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STEFAN JAGDHUBER

Sharing Sovereignty in the EU's Area of Freedom, Security and Justice

The Integration Trajectories of Judicial Cooperation
and Migration Policies in the European Union

OLMS

Vertical Differentiation in the European Union

Explaining varying integration levels in the
EU's Area of Freedom, Security and Justice

Inaugural-Dissertation
zur Erlangung des Doktorgrades an der
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Stefan Jagdhuber

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and Justice

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Sharing Sovereignty in the EU's Area of Freedom, Security and Justice

The Integration Trajectories of Judicial Cooperation and Migration Policies in the European Union

by
Stefan Jagdhuber

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I believe that it happens quite often that political science students are asked about their professional career after graduation. Too often interviewers answer this question themselves without awaiting any response: politician, journalist, taxi driver. Jokes that I was not tired of branding as bad jokes and for which I combined a smile with a gesture that hopefully signaled indifference. But, to be fair, there were certainly times during my university career in which I probably had given the same answers, to the best of my knowledge and without any sarcasm. I honestly did not know what kind of profession “awaits” a political scientist. I only learned that political science is a profession in its own right when I started to work for my supervisor, Berthold Rittberger, the Chair of International Relations at the LMU Munich. It was strange to learn that I did not study political science to become something and someone but that I could do political science and be myself. Berthold accepted me as a PhD student and I could not be luckier. Always addressable and supportive in professional as well as personal matters, competent and fair, Berthold is certainly one of the supervisors who features only in positive “PhD Comic” strips. I owe you a lot, Berthold, more than I can say here. I remember very well when you handed me over a *Rettungsschirm*. I was certainly no “easy case” in the universe of PhD students. Should you ever find yourself once again in a supervision situation like this, take this dissertation, have a glass of whiskey and remember the Sinatra strategy: Since I made it there, I can make it anywhere.

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Lastly, whoever reads this, this is for you. I am literally done. Some might say that I could have written more. Others might say, he could have cut the story shorter. Without any sarcasm involved: *Prost y'all!*

Munich, February 2021

Stefan Jagdhuber

Summary

European integration has turned the EU neither into a state, in which authority is fully centralized in Brussels, nor is the EU a classic international organization, in which member states remain fully sovereign. Instead, European integration is patchy. For some policies, decision-making authority still rests with the member states whereas, for others, policy-making authority was transferred to the EU. Once integrated in the EU, we nevertheless see that policies fall under different decision-making procedures involving supranational actors to different extents and hence leaving decision-making authority with the member states to different extents. Why does the EU's authority vary across policies?

An obvious answer to this question could be that policies are just different. Beyond the EU's daily business, some policies belong to the core powers of nation states, making it unlikely that governments will relinquish (too much) authority to the EU. Similarly, one could argue that some problems call for local or national policies or speedy decisions in the Council instead of the Commission's expertise, the European Parliament's consent or legal interpretation by the European Court of Justice. In a nutshell, policies are different by their very nature and this may explain the patchwork of different decision-making procedures in the EU and sovereignty-sharing arrangements between Brussels and the EU's member states.

Ultimately, we might agree with these idiosyncratic accounts to explain why the EU's authority varies across policies, so why we have different integration trajectories and hence vertical differentiation in the EU. And yet, the EU's Area of Freedom, Security and Justice (AFSJ) provides us with interesting variation nevertheless. Comprising migration, judicial cooperation and internal security policies, the AFSJ was integrated into the EU with the Treaty of Maastricht as a policy area in its own right. All of the AFSJ policies are related to the core of national sovereignty and all these policies share functional traits or are even functionally interrelated. Nevertheless, integration trajectories of these policies vary, demanding an explanation beyond policy idiosyncrasies.

Taking policies belonging to the EU's AFSJ as a sample, this dissertation controls for policy idiosyncrasies and focuses on a political explanation. It theorizes and empirically analyzes why integration proceeded and the EU's authority has become stronger on illegal immigration policy and judicial cooperation on civil law matters, whereas it lags behind for legal immigration policy and judicial cooperation on criminal law matters. Integration levels were uniform when this policy area ("Justice and Home Affairs") provided for intergovernmental decision-making with the Treaty of Maastricht. With further treaty reforms, however, integration trajectories diverged. Decision-making authority for EU institutions varies and vertical differentiation characterizes the EU's AFSJ to date.

This dissertation contributes by mapping and theorizing this unobserved variation. Previous studies analyzed AFSJ policies and their integration trajectories individually and hence independently of each other. Although we know why states might demand integration and EU authority, we do not know why demand and supply of integration varies in the EU's AFSJ. Drawing on this literature, this study tests diverse factors to explain vertical differentiation. The findings show that uneven integration trajectories are likely when policy interdependence, supranational activism and domestic constraints differ across policies. Governments are willing to consider European integration, whenever unilateral policies or non-European policy-making produce costs beyond national borders. Whether governments are able to integrate policies is increasingly dependent upon domestic opposition to EU integration. Whenever demand and/or supply of integration varies across policies, vertical differentiation is likely.

1 Introduction

The analysis of authority in the European Union (EU) lies at the center of European integration research. More than sixty years of scholarship has asked where actually the center of authority is in the EU, and why. Regarding the former question, there is a debate between International Relations scholars and comparative political scientists on whether the EU is an extreme case of an international organization or whether the EU rather harbors characteristics of a federal state (Risse-Kappen, 1996). Does authority still primarily rest with the member states (Hoffmann, 1966; Moravcsik, 1998), as is the case in international organizations, or is the EU and its institutions the central authority in a federal state-like setting with the member states being subunits of this political system (Hix and Høyland, 2011; Hooghe and Marks, 2001)? Both sides of the debate have a point exactly because the EU comes close to either side of the authority continuum depending on which policy we are looking at. External security and defense matters are still member state driven and authority rests with national capitals. On this policy, member states take decisions by consensus and intergovernmental negotiations largely exclude supranational actors. In contrast, monetary policy as well as external trade policies are primarily pursued by supranational actors who may force member states into compliance if member states fail to implement provisions. The EU's authority varies across its different tasks, a phenomenon that is defined by the term "vertical differentiation" (Leuffen et al., 2013). European integration, so the pooling and delegation of authority on the EU level, has proceeded in some sectors while it still lags behind in other policies. Some policies fall under the "ordinary legislative procedure" granting supranational rule-making powers whereas others remain an intergovernmental affair. Why do integration levels vary across policies in the EU? How can we explain vertical differentiation in the EU?

There are two easy answers that obscure why a young scholar should devote his thesis and many years of his life to this question. First, there is the "form follows function" approach. Accordingly, policies deal with different problems and therefore require different decision-making

procedures in the EU (Mitrany, 1965). According to this argument, policies are ultimately functionally independent. External security crises necessitate speedy reactions leaving decision-making to one EU actor, the Council, in order to avoid delays in the EU's crisis response (Wagner, 2003b). In contrast, some policy problems would less require speedy solutions by the executive, but rather the European Commission's expertise or legitimacy through the European Parliament's co-decision or the European Court of Justice's jurisprudence. EU policies on product regulation and policies related to the free movement of workers may serve as examples. The second approach puts member states' sovereignty concerns center stage and holds that, by their very nature, some policies are less likely to be candidates for European integration (Hoffmann, 1966). External security policies go to the heart of national sovereignty as defending one's citizens and territory has always been a core function of sovereign nation states. Regulatory policies related to the economy instead could be likely candidates for integration as these do not fundamentally intervene in a nation state's domestic social contract and hence do not raise legitimacy concerns (Majone, 1994). According to these approaches, it is no wonder that we observe vertical differentiation in the EU and it is easily explained by referring to policy idiosyncrasies with respect to distinct functional problem-solving necessities on the ground and varying sovereignty costs.

I ultimately agree with these standard explanations of vertical differentiation. They may answer the broader question of why vertical differentiation is indeed a fundamental characteristic of the EU that distinguishes it from states or international organizations in which authority is generally either highly centralized or decentralized. Yet, explanations resting on apolitical policy idiosyncrasies provide us with little guidance on why even very similar policies are vertically differentiated. The level of integration also varies across policies, which deal with the same policy problem and equally raise sovereignty concerns. Moreover, policy idiosyncrasies may hardly explain variation over time regarding vertical differentiation. If policies are considered to be naturally different, we should observe the permanent vertical differentiation of policies that are functionally independent and differ in their political sensitivity. By the same token, we should observe uniform integra-

tion levels for policies that are functionally similar and equally prone to raising sovereignty concerns. The vertical differentiation of kindred policies at certain points in time demands a more nuanced explanation of varying integration levels – an approach that offers a theoretically informed answer as to why we observe vertical differentiation beyond policy idiosyncrasies.

To move beyond policy idiosyncrasies in explaining vertical differentiation, we need a case selection strategy that allows us to control for this standard approach. I hereby chose policies as cases that are kindred and yet have experienced different and uniform integration levels over time. Both conditions are given for policies belonging to the very same policy area – the Area of Freedom, Security and Justice (AFSJ). AFSJ comprises policies related to migration matters, judicial cooperation and police affairs. All these policies were grouped together under the heading “Justice and Home Affairs” and integrated into the EU with the Treaty of Maastricht. Based on intergovernmental decision-making procedures, integration levels were uniform for these policies. Yet, with the Treaties of Amsterdam and Nice, integration trajectories diverged considerably, and vertical differentiation characterized this policy area. Following the Treaty of Lisbon, integration levels converged again, although vertical differentiation persists in the EU’s AFSJ. In order to analyze this pattern and the vertical differentiation of AFSJ policies through the Amsterdam and Nice Treaties in particular, I chose two policy dyads as cases of vertical differentiation: regular and irregular migration policy and, secondly, judicial cooperation in civil law and criminal law matters.

Regarding the former, regular and irregular migration policies deal with the same policy problem, namely the regulation of people’s movement across borders. Together, these migration policies circumscribe the entry, stay and leave conditions for third country nationals (TCNs) (Bjerre et al., 2015). The EU has ever since distinguished between different migrant categories and respective migration policies: visa policies, asylum matters, legal and illegal immigration policies. For the purpose of this study, I focus on the latter two, calling them regular and irregular migration policies for normative reasons while excluding visa and asylum policies from the analysis. Regular migration policies

hereby comprise measures on labor migration and family reunification of TCNs. Irregular migration policies deal with border controls and the expulsion of persons who lack valid residence permits.

As more and more EU member states started to abolish internal border controls in the Schengen area in the 1990s, both regular and irregular migration developed a European dimension as it became easier for not only EU citizens to move freely within Union territory. Lacking the instrument of border controls, EU member states saw the need to find common rules on who should be allowed to enter and stay in Union territory. At the same time, member states experienced rising domestic opposition towards immigration, making migration policies a very sensitive political issue. Right-wing parties gained ground in national elections by fueling anti-immigrant sentiments in light of comparatively high unemployment rates in Europe, open borders and increasing migratory pressures from Eastern Europe in particular. Governments promised then to reduce and control migration flows by strengthening controls at external borders, deterring illegal entry by expulsion regimes and limiting TCNs' chances to successfully apply for family reunification and labor immigration. European integration of these policies was a rational strategy in light of open internal borders and the potential for secondary movements. Varying irregular and regular migration policy standards across member states could induce forum-shopping with TCNs regularly or irregularly entering Union territory in one state and then moving on towards another member state. Pooling authority by introducing majority voting in the Council could allow member states to at least approximate national rules on entry and stay conditions while delegating authority to supranational actors could allow more effective implementation of these rules across member states. In sum, there was a functional demand to consider both migration policies and a joint endeavor by EU member states to reduce and control migration given the domestic sensitivity of these policies. But why did governments then opt for vertical differentiation of these policies with the Treaties of Amsterdam and Nice? Why was irregular migration policy integrated further while regular migration policies remained an intergovernmental affair until the Treaty of Lisbon?

Vertical differentiation of law cooperation policies took the form that judicial cooperation on civil law matters was further integrated with the Treaty of Nice while judicial cooperation on criminal law matters remained an intergovernmental affair until the Treaty of Lisbon came into force. Both civil law and criminal law relate to questions of justice in society. Civil law regulates the rights and obligations among private actors and ensures that interactions are undertaken in legal certainty. Subfields of civil law, or of private international law as it is known, beyond the EU context involves matters of company law, contract law, insolvency proceedings and family law. The state hereby takes the role as facilitator by offering a legal framework and a judicial infrastructure for private actors to settle disputes and to seek compensation. Criminal law is different, especially in two respects: first, the state does not act as a facilitator in dispute resolution but is a party in the legal case. Criminal law also determines rights and obligations in society, yet among private actors and the state. Secondly, criminal court sentences involve punishment which could eventually mean that offenders' personal freedoms are physically curtailed by prison sentences. Despite these noticeable differences between both law sectors, they share the common objective of ensuring justice and legal certainty in society. Member states' criminal and civil law systems and legal certainty, however, were critically challenged when internal border controls were abolished. Free movement of persons meant easier access to neighboring societies that could boost transnational private interactions as well as transnational crime. Legal scholars and political decision-takers alike identified the need to consider harmonizing or approximating substantive and procedural criminal and civil law rules in the EU to ensure an area of justice and legal certainty in Europe. Functional pressures in both law sectors were offset by political sensitivities of both sectors given civil law and criminal law traditions that vary strongly across member states. Why did governments then consider civil law cooperation to be a more suitable candidate for integration than criminal law matters at the Intergovernmental Conferences leading to the Amsterdam and Nice Treaties? Why does vertical differentiation of civil law and criminal law matters persist until today?

A theory resting on policy idiosyncrasies would lead us to expect permanent uniform integration levels for both policy dyads given the similarities in their respective functions and political sensitivity. To explain vertical differentiation in the EU, and in the EU's AFSJ in particular, we therefore need a more nuanced theory and an in-depth analysis of varying integration trajectories of AFSJ policies. The aim of this dissertation is therefore to explain vertical differentiation in the EU's AFSJ by analyzing why regular and irregular migration policies and civil and criminal law cooperation policies reached different integration levels with the Treaties of Amsterdam and Nice. Although vertical differentiation is the explanandum, this study will also shed light on the reasons why the integration levels of these AFSJ policies converged again with the Treaty of Lisbon.

1.1 Contribution to the state of the art

This dissertation taps into a double research gap. Literature on differentiated integration (DI) in the EU offers elaborate concepts and measurements to map both horizontal as well as vertical differentiation in the EU over time (Börzel, 2005; Leuffen et al., 2013; Holzinger and Schimmelfennig, 2012). Although this literature presents diverse explanations as to why member and non-member states join or abstain from EU initiatives (horizontal differentiation) (Kölliker, 2001; Winzen and Schimmelfennig, 2016), there is no study that has exclusively focused on analyzing vertical differentiation in the EU. In consequence, we lack knowledge on the causes of vertical differentiation. On the other hand, the literature on AFSJ policies offers multiple explanations on the integration of these policies (Niemann, 2008; Boswell and Geddes, 2011; Wagner, 2011; den Boer, 2014; Storskrubb, 2008; Guiraudon, 2000) and of the AFSJ as such (Kaunert, 2010; Monar, 2012b). Relying on single case studies of integration only, however, this literature so far misses an account that firstly maps varying integration levels in the EU's AFSJ and secondly explains vertical differentiation. Moreover, comparing integration trajectories and pursuing a comparative approach allows us to also compare the causal strength of previous explanations on integration dynamics in the AFSJ. There is room for a contribution to both

literatures by bringing DI concepts to the study of the EU's AFSJ to map and analyze previously unobserved variation while using the integration trajectories of AFSJ policies as in-depth case studies to learn more about the causes of vertical differentiation.

Differentiation in its vertical or horizontal manifestation began as a debate among policy-makers. Concepts such as “flexible integration”, a “Europe of concentric circles”, “hard core Europe” or “multi-speed Europe” were presented by policy-makers in the 1980s and 1990s. Scholarship attempted to make sense of these catch phrases and tried to anticipate the nature and implications of the various scenarios they represented (Stubb, 1996). Even in 2012, scholars complained that, in matters of differentiated integration, the field was still confronted with “many concepts, sparse theory, few data” (Holzinger and Schimmelfennig, 2012).

With a very few exceptions (Börzel, 2005; Leuffen et al., 2013; Schimmelfennig et al., 2015), the literature on DI in the EU has focused exclusively on explaining horizontal differentiation, i.e. why the validity of EU rules varies across member states (Kölliker, 2001; Andersen and Sitter, 2006; Schneider, 2009; Adler-Nissen, 2014; Schimmelfennig, 2014a; Winzen and Schimmelfennig, 2016; Gstöhl, 2015; Leruth, 2015). In consequence, we know a lot about why and when EU member states and non-member states join EU initiatives such as the Eurozone and the Schengen area, or opt out of concrete policy measures (Schimmelfennig, 2016; Gehring, 1998; Adler-Nissen, 2011). However, we know comparatively little about the causes of vertical differentiation. This is surprising in light of Leuffen et al.'s figure that depicts vertical differentiation in the EU since its inception with the Treaty of Rome 1957 (2013: 22). Vertical differentiation has ever been a characteristic of the EU that was even accentuated with the Treaty of Maastricht. Moreover, in light of the Commission's 2017 White Paper on the future of Europe that presents different scenarios for the future integration process, vertical differentiation is likely to remain or even to intensify in the EU (European Commission, 2017). As differentiation is likely to stay, the study of vertical differentiation is not only a valuable end in itself but it also “can contribute to generating a more refined theoretical and empirical understanding of European integration more generally” (Schimmelfennig et al., 2015: 780).

Previous studies on vertical differentiation offer valuable conceptualizations of vertical differentiation but could either not find an explanation (Börzel, 2005: 231) or came to the conclusion that no single established integration theory alone may explain varying integration levels across policies (Leuffen et al., 2013: 259). Börzel focused on the comparison of external and internal security policies and found no explanation for varying integration levels. Instead, she concluded that the

puzzle as to why member states voluntarily give up power to a new political centre has been solved. Now, we need to explain why member states seek to contain the loss of sovereignty rights in some areas but not in others (Börzel, 2005: 231).

Leuffen et al. (2013) answered this call and tested three integration theories, i.e. supranationalism, intergovernmentalism and constructivism, for their respective explanatory power in accounting for vertical differentiation. The authors concluded that, taken in isolation, no integration theory can explain varying integration levels (Leuffen et al., 2013: 259). Consequently, there is still a need for an explanation of vertical differentiation and, based on Leuffen et al.'s findings, the way forward is not to test integration theories against each other. Instead, I deduct several explanatory factors from the integration and AFSJ literature that, in conjunction, might account for vertical differentiation. The overall aim of this study therefore is to analyze the diverse causes of vertical differentiation and only in a second step to ask which causes seem to be the main drivers for vertical differentiation to occur. In the theory section, I draw on integration theories, and previous integration studies in the EU's AFSJ literature in particular, to derive a set of explanatory factors that explain the varying demand for and supply of integration per policy. In the conclusions of each empirical chapter that summarize the main findings of the two case studies on vertical differentiation in (1) migration and (2) law cooperation, I will discuss which factors were the main drivers towards vertical differentiation. But why has the AFSJ literature so far neglected to compare the varying integration trajectories of AFSJ policies and hence vertical differentiation?

Comparing the historical-political trajectory of AFSJ integration with the scholarly attention given to this domain, helps us to understand why vertical differentiation has so far been neglected by the scholarly debate. With increasing communitarization of specific AFSJ policies, the empirical domains as well as the theoretical approaches have changed. European coordination on AFSJ policies started on a loose intergovernmental basis in the 1970s, with interior ministers of the European Communities meeting informally and behind closed doors in the framework of the so-called TREVI group (Cruz, 1990). National justice and home affairs ministers coordinated measures against terrorism, organized crime and irregular migration (as of 1985). The TREVI group operated outside of the treaty framework and did not produce any legally binding texts. As such, meagre political output within the TREVI group was mirrored by meagre academic output on European cooperation in justice and home affairs policies. Politically, things changed with the Treaty of Maastricht that established the Justice and Home Affairs (JHA) domain as the third pillar of the EU. JHA policy-making was integrated into the EU treaty framework but remained an intergovernmental affair, therefore clearly lagging behind the communitarization of first pillar policies on the internal market. Equally, the academic debate “appeared focused on the first pillar and its unique institutional setting” whereas JHA cooperation was less covered in the “grand debates among theorists of European integration” (Wagner, 2003a: 1034). Literature on Justice and Home Affairs in the 1990s predominantly described the historical development of this domain (Bieber and Monar, 1995; den Boer, 1996).

The Treaty of Amsterdam moved asylum and immigration policy into the first pillar, whereas criminal law and police cooperation remained in the intergovernmental third pillar. Again, policies that experienced rising levels of integration were awarded with higher academic attention. Consequently, research on the communitarization of asylum and immigration policy took place whereas police and criminal law cooperation “continued an existence outside the European as well as the EU studies community” (Wagner, 2003a: 1034). The grand debate between intergovernmentalists and supranationalists encroached on the analysis of asylum and immigration policy in the first place. The Amsterdam Treaty provided for the communitarization of immigration

and asylum policy and scholars presented competing explanations for this development (Monar, 2001; Givens and Luedtke, 2004; Niemann, 2006; Geddes, 2008; Boswell and Geddes, 2011). Research on the integration of criminal law and police cooperation only proliferated when these two policies were also communitarized with the Treaty of Lisbon (Wagner, 2011; den Boer, 2014; Sperling, 2013).

As soon as policies lose the label of “intergovernmental” in favor of “supranational”, decision-making integration theories are dug out. There is a clear selection bias in the research on AFSJ integration. Integration research on AFSJ has so far focused on cases (specific AFSJ policies) where further vertical integration was clearly observable following treaty revisions. Scholars on AFSJ integration clearly preferred migration and asylum policies as empirical cases since for both of the dependent variable “vertical integration” had extreme positive values. When criminal law and police cooperation were communitarized in the Lisbon era scholars re-focused on JHA policy domain as an empirical case since the dependent variable “vertical integration” showed extreme positive values for it (so for all AFSJ policies) (Kaunert, 2010; Monar, 2012b). This case selection strategy had two consequences. Firstly, integration research on AFSJ has so far used “no variance” designs. That is, by focusing on extreme cases for vertical integration in JHA, the negative cases of “no/less integration” have been unnecessarily neglected. This situation is empirically and theoretically deplorable. Empirically, studying vertical differentiation in the EU’s AFSJ allows us to learn more about one of the most dynamic policy areas in the EU. Although only integrated with the Maastricht Treaty, AFSJ “has developed into one of the fastest-growing fields of EU action, with well over a hundred new texts having been adopted every year by the EU “Justice and Home Affairs Council” during the decade 2000–2010” (Monar, 2012a: 613).

The most recent migration crisis and the fight against terrorism have highlighted the importance of this policy area. Studying the drivers and obstacles to integration of AFSJ policies since the Maastricht Treaty helps us to understand why also today we observe both progress and stagnation in responding to crisis phenomena in law cooperation and migration policies. Theoretically, studying vertical differentiation in the EU’s AFSJ allows us to systematize the landscape of the various explana-

tory factors mentioned in the literature. Do explanations only hold for their respective single case studies, i.e. for the integration of a single policy? Or can these explanations travel and help us to explain integration dynamics and hence both progress and stagnation of cooperation in several policies? Studying the vertical differentiation of regular and irregular migration policies and judicial cooperation of civil and criminal law matters allows us to produce both: more reliable causal inferences as to why further integration succeeded in irregular migration and civil law cooperation, and secondly, why these policies were more integrated than their counterparts, regular migration and criminal law matters.

Vertical differentiation mandates the analysis of both drivers and obstacles to integration and the exploration of why similarly sensitive AFSJ policies are nevertheless vertically differentiated. Comparing different integration trajectories and levels allows us to learn more about which factors in particular advanced or slowed progression towards communitarization and the ordinary legislative procedure in this policy area. In conclusion, while we have a broad range of explanatory factors for vertical integration of AFSJ policies, we are so far lacking a comparative research design that may account for vertical differentiation of the AFSJ policy domain.

In summary, this study contributes to two strands of literature. On the one hand, it introduces vertical differentiation and hence a comparative perspective to the research on integration in the EU'S AFSJ. Variation that so far remained obscure becomes visible, namely, that the integration trajectories of policies in this policy area varied and only became rather uniform with the Treaty of Lisbon. Previous integration case studies on single AFSJ policies are acknowledged in that explanations are integrated into the theoretical framework, yet tested in their generalizability by comparing the integration trajectories of different AFSJ policies.

On the other hand, this study adds to previous literature on differentiated integration by putting the analysis of vertical instead of horizontal differentiation center stage. Choosing the integration trajectories of EU AFSJ policies as a sample allows us to study vertical differentiation in depth and to ask where the variation of demand and supply of integra-

tion across policies comes from. The research interest and contribution hereby lie in offering a rich analysis of vertical differentiation by taking into account various integration logics starting from different levels of analysis grouped under a limited number of explanatory categories.

The next section will conceptualize and measure vertical differentiation in the EU's AFSJ in order to map previously unobserved variation. After that, I will present my theoretical argument.

1.2 Key concepts and operationalization

Integration is defined as the pooling of decision-making authority in the Council and as the delegation of limited authority to supranational actors (Hooghe et al., 2017). Pooling and delegation of authority find their practical expression in different decision-making procedures within the EU (Wallace and Reh, 2015). The Council may take decisions unanimously, or by a qualified or simple majority. The EU's organizations are involved to different extents in these decision-making procedures. The European Parliament might only be informed, consulted before legislation or may co-decide on policy initiatives. The European Commission might have the exclusive right of initiative, share this right with member states or even lack any competence to initiate legislation. The jurisdiction of the European Court of Justice provides for different legal procedures and yet the Court may not have the authority to apply all of these procedures for every policy matter. In extreme cases of integration, supranational actors like the European Central Bank may make autonomous decisions beyond the control of national governments.

Integration and hence the pooling and delegation of authority may exist in different institutional designs and decision-making configurations. Jupille (2004) differentiates between nine different decision-making procedures while other scholars identify five different types of decision-making power arrangements (Börzel, 2005). The mere existence of various decision-making procedures highlights the necessity of asking why integration levels vary across policies. Following previous studies, I define a situation that includes different integration levels for policies as vertical differentiation (Leuffen et al., 2013).

Drawing on Tanja Börzel's article (2005), in which she argues for the consideration of the gap between varying integration levels in the study of European cooperation, Leuffen et al. (2013) presented a comprehensive operationalization of vertical differentiation. Based on an ordinal scale of five different decision-making categories ranging from "no EU level policy coordination" to "supranational centralization", the authors mapped the extent of vertical differentiation throughout the history of European integration. The EU's consecutive treaties were used as a source of data, as they typically assign a decision-making procedure for each policy pursued within Community structures. Leuffen et al. find that the degree of vertical differentiation in the EU has increased over time. Moreover, they demonstrate that certain policy areas in particular were and are characterized by vertical differentiation. Based on Leuffen et al.'s findings, I have selected the EU's Area of Freedom, Security and Justice as a sample to study the reasons for vertical differentiation. Policies belonging to the EU's AFSJ focus on immigration matters, judicial cooperation and internal security policies. Integrated as part of the Treaty of Maastricht, these policies fell under intergovernmental decision-making procedures and shared rather uniform levels of integration. Under the Treaties of Amsterdam and Nice, these policies were vertically differentiated before integration levels converged again with the Treaty of Lisbon. Based on this variation, the policies of the EU's AFSJ are prime candidates for studying vertical differentiation while also taking into account that vertical differentiation decreased over time.

Applying Leuffen et al.'s operationalization and mapping tools to this policy area and its different policies, I found that the decision-making procedures assigned to AFSJ policies by various treaties since Maastricht do not fit neatly into the authors' typology of decision-making categories. In light of this empirical variation, which could not be fully explained by previous studies, I decided to construct an additive index for measurement that is complementary to Leuffen et al.'s approach. As outlined in more detail in Chapter 2, this index suits the depiction of the integration trajectories of AFSJ policies very well. However, the question remained as to which policies exactly should be selected as case studies and how far this selection would be representative of all cases of vertical differentiation.

1.3 Case selection

The EU's AFSJ was formerly known as "Justice and Home Affairs" and entered the EU's *acquis* as the so-called third pillar in the Treaty of Maastricht. The AFSJ includes policies on asylum, regular immigration, irregular immigration, civil law matters, criminal law matters and police cooperation. I tracked the integration trajectories of these policies by using my own additive index to code the decision-making procedures for each policy in each treaty following Maastricht.

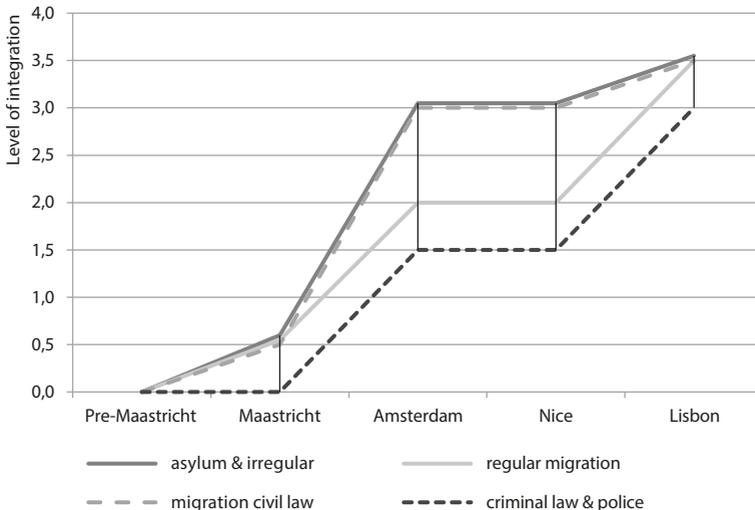


Figure 1: Vertical differentiation in the EU's AFSJ

I found that asylum and irregular immigration policies as well as criminal law and police cooperation always shared the same level of integration and therefore were not suitable case studies to study vertical differentiation. This meant that 13 policy dyads remained that would support the study of vertical differentiation in the EU's AFSJ. I chose regular and irregular immigration as well as civil law and criminal law cooperation as the policy dyads for my case studies based on theoretical and methodological considerations. In a nutshell, I chose these cases of vertical differentiation to maximize variation on the dependent variable while controlling for policy idiosyncrasies as an explanation of differentiation as most similar policies were selected as cases.

First, these policy dyads are characterized by stark variation in integration levels. Since the primary aim of this study is to explain vertical differentiation, making a choice based on the dependent variable is highly justifiable. However, it could be argued that selecting cases on the dependent variable could bias the findings by over- or underdetermining the strength of explanatory factors (King et al., 1994: 139). In consequence, researchers should avoid no-variance designs. Others contend that qualitative research necessarily selects on the dependent variable in order to analyze the phenomenon they are interested in (Goertz and Mahoney, 2012). Moreover, methodologists argued that by substantiating one's case study analysis with causal process observations, one could boost our confidence in causal inference even if cases are selected on the dependent variable (Collier et al., 2004). This dissertation will not settle this methodological debate in favor of one of the aforementioned arguments. In order to avoid the selection bias trap, I decided to heed the advice. Following Goertz and Mahoney, I selected my cases on the dependent variable in order to make sure that I am indeed able to analyze the causes of vertical differentiation. For this, however, it would have been enough to solely analyze the Amsterdam and Nice Intergovernmental Conferences at which EU member states decided to devise different decision-making procedures for migration policies and judicial cooperation on criminal law and civil law matters. Instead of only analyzing these instances of varying policy integration and hence vertical differentiation, I chose to analyze the integration trajectories of these policies over several Intergovernmental Conferences (IGCs). The integration trajectory of these policies by itself lowers potential bias. The policy dyads displayed not only vertical differentiation (Amsterdam and Nice) but also instances of uniform integration levels (Maastricht and Lisbon), which are taken into account in the analysis and allow controlling for overstating the explanatory power of certain factors. Comparing instances of vertical differentiation and uniform integration therefore allows inferences to be made about the causal strength of the explanatory factors. Lastly, I side with Collier et al. and others who argue that causal process observations strengthen our confidence in causal inference (Blatter and Haverland, 2012; George and Bennett, 2005).

Second, I pursue a most similar case study design (Hönnige, 2007). In light of policy idiosyncrasies, it is not surprising that policies, which deal with different policy problems and invoke sovereignty concerns to different extents, experience vertical differentiation. In order to control for explanations resting on idiosyncrasies, I selected policies that are most similar in terms of functionality and sovereignty costs. Having policy dyads as cases that are on the one hand most similar and nevertheless display high values for vertical differentiation, this study may shift the focus onto explanatory factors that are less policy-specific and hence allow generalization beyond the cases at hand. What are potential alternative causes of vertical differentiation? Why were regular and irregular migration policies as well as civil law and criminal law matters differentiated?

1.4 Theoretical framework, method and data

In order to answer these questions in light of the few studies on vertical differentiation (Börzel, 2005; Leuffen et al., 2013) and an abundant literature on European integration and integration of AFSJ policies, I opted for a broad theoretical framework and a covariation analysis. First, the theoretical framework distinguishes between demand and supply factors of integration (Mattli, 1999; Leuffen et al., 2013). Vertical differentiation is hence likely when demand conditions or supply conditions for integration vary across policies or, most likely, when both vary across policies. To delineate demand and supply factors, respectively, I drew on supranationalist and liberal intergovernmentalist theory generally and the literature on the integration of AFSJ policies more specifically. I derived three demand factors and three supply factors from this literature.

The demand for governments to consider (further) policy integration increases: (1) the more the benefits of unilateral policy-making decline in light of policy failure, hence decreasing the home benefits of unilateral policy instruments demanding more cooperative solutions (Milner, 1997: 47–48); (2) the more unilateral decisions produce negative externalities for other EU member states in light of heightened

interdependence (Moravcsik, 1998; Stone Sweet and Sandholtz, 1997); (3) the more supranational actors are able to push integration forward beyond member states' control in everyday EU policy-making (Pollack, 1994; Farrell and Héritier, 2007b; Stacey and Rittberger, 2003).

The supply of (further) integration increases: (1) the more governments are able to negotiate at IGCs without domestic constraints in the form of veto players or politicized publics (Tsebelis, 2000; Hug and König, 2002; De Wilde and Zürn, 2012); (2) the more the preference intensities of recalcitrant member states can be accommodated by side payments and concessions (Moravcsik, 1998; Slapin, 2008); and (3) the more supranational actors enjoy information advantages that they can use during IGCs to channel negotiations closer to integrative outcomes and act as supranational entrepreneurs (Falkner, 2002; Moravcsik, 1999; Beach, 2007).

I refrained from putting these factors into a logical temporal order and hence I did not formulate a theoretical mechanism ripe for a process tracing analysis (Beach and Pedersen, 2013; Bennett and Checkel, 2014). I also rejected theory synthesis in the form of a "domain of application approach" or "sequencing" that a priori defines which explanatory factors are supposed to be prevalent at distinctive stages in a model and in reality (Jupille et al., 2003; Rittberger, 2012; Andreatta and Koenig-Archibugi, 2010). We know little about vertical differentiation. Therefore, instead of analyzing how exactly conditions make up for an outcome (mechanism-based research) or when certain factors kick in and take turns in explaining vertical differentiation, a covariation analysis allows us in the first place to determine "whether [a factor] makes a difference" (Blatter and Haverland, 2012: 33). The objective of this dissertation is to explain vertical differentiation beyond policy idiosyncrasies and only then to ask which factors are more important than others to account for differentiation. A Y-centered covariation analysis incorporating causal process observations serves exactly this purpose (Blatter and Haverland, 2012: 216–217).

I rely on an analytical framework that takes into account the demand for integration and the supply of integration (Mattli, 1999; Leuffen et al., 2013). Demand for integration means that at least some governments of EU member states show a preference for integrative outcomes. Drawing

on extant literature on European integration and on integration studies dedicated to the AFSJ, I delineate three factors that help formulate expectations about why and when governments seek increased cooperation: home country benefits, interdependence and supranational activism. Declining home benefits of unilateral policy-making materialize in policy failures as governments are overburdened by globalization pressures in light of scarce resources or due to domestic blockade of policy reforms by critical veto players (Wolf, 1999). Regarding the integration of migration policies in the EU, scholars emphasized that governments opted for integration because European cooperation promised economies of scale by sharing resources on border controls and by artificially extending national labor markets that could attract high skilled labor (Fellmer, 2013: 118–119) or because EU level policy-making circumvents domestic opposition to policy reform (venue-shopping) (Guiraudon, 2000). Note that sinking home country benefits are analytically separate from negative externalities and interdependence. Interdependence triggers governments to consider integration when unilateral policy-making leads to negative externalities beyond borders and hence costs for foreign societies (Keohane and Nye, 2011; Moravcsik, 1998). The abolition of border controls has hereby made national AFSJ policies more interdependent (Turnbull and Sandholtz, 2001). The states most affected have an incentive to demand integration in order to control migration policy-making and crime prevention in other member states and to moderate interdependence in a mutually beneficial way. Moreover, governmental demand for integration might be created by supranational activism. Supranational actors have an incentive to push integration forward, granting them more competence and authority in the policy-making process (Pollack, 1994). When supranational actors are successful in extending their authority before treaty conferences due to ambiguities in the treaties or judicial politics, governments might need to acknowledge reversed power distributions at subsequent treaty conferences (Stacey and Rittberger, 2003). Vertical differentiation is likely when the demand for integration varies across policies due to varying home country benefits, interdependence and supranational activism.

The second step in the analytical framework is to consider treaty negotiations, i.e. the supply of integration. Ultimately, governments

decide on the institutional design of EU cooperation at Intergovernmental Conferences and therefore on the level of integration regarding the policy areas at hand. Successful treaty revisions require the unanimous consent of governments and domestic ratification. To explain the supply of integration at IGCs, I rely on three factors: preference intensities, domestic opposition and supranational leadership. Preference intensities are a function of governmental demand for integration. The more some governments prefer integration over the status quo, the likelier these governments are to offer concessions to recalcitrant states in order to prevail with integration as the bargaining outcome (Moravcsik, 1998). Governments of both positions, integration frontrunners and integration laggards, are thus constrained in their room for maneuver in trading votes and exchanging concessions for an integrative outcome. Domestic opposition in the shape of Eurosceptic publics or reluctant domestic veto players might threaten treaty revisions if their concerns are not recognized by governments and the bargaining outcome (Hug and König, 2002; Schünemann, 2017). Finally, the supply of integration can depend on whether supranational actors are successful in shaping the agenda of IGCs and manipulating the intergovernmental bargaining process in line with their interests (Falkner, 2002). Vertical differentiation and the unequal supply of integration for policies is likely when preference intensities, domestic opposition and supranational leadership varies across policies.

The primary aim of this study is to explain vertical differentiation and therefore this analysis relies on factors that are relevant for this phenomenon. However, this study also investigates which factors might be more or less important for explaining vertical differentiation. The policy dyads of regular and irregular immigration policy as well as judicial cooperation on civil law and criminal law matters are cases of vertical differentiation in which the Treaties of Amsterdam and Nice involved different decision-making procedures. Within these cases, however, variation in the dependent variable also exists, allowing comparisons to be drawn. Variation within the cases of vertical differentiation, i.e. varying and uniform integration levels at different points in time, allows exploration of which factors might be necessary or sufficient for vertical differentiation. Variation on the dependent variable, i.e. vertical differ-

entiation and uniform integration, helps to check for covariation and to build confidence that some factors are more relevant than others for the occurrence (or not) of vertical differentiation. The analysis is backed by causal process observations (Seawright and Collier, 2004; Blatter and Haverland, 2012: 23). Causal process observations go beyond the measurement of indicators and how independent and dependent variables co-vary. They include information on how explanatory factors are temporally linked and how factors influence an outcome. To observe covariation backed by causal process observations I rely on several data sources that were triangulated. Therefore, the number of observations per case study was increased in order to counter selection bias concerns and to allow for a deeper look at how explanatory factors and the dependent variable might be linked. I hereby distinguished between hard and soft primary sources as well as secondary literature (Rittberger, 2005: 11–12). “Hard” primary sources were collected by requesting the documents of the several IGCs as well as Council minutes and Commission documents. The former enable us to take a deeper look at bargaining dynamics at IGCs whereas the latter include rich information on everyday policymaking on AFSJ matters and hence detail whether member states or supranational actors were driving integration in policies and thus vertical differentiation. EU level based documentation was supplemented by sources that reported on EU and AFSJ matters, in particular at the national level. A very valuable source in this regard were the reports by representatives of the German Länder to EU committees dealing with migration and law cooperation issues. To cross-check for pure political rhetoric, I conducted 19 semi-structured interviews with persons who were involved in IGCs and in everyday AFSJ policy-making during the last decades consisting of representatives of member states’ diplomats and employees of EU based organizations such as the Council, the Commission and the European Parliament and their respective Secretariats in particular. Lastly, having interpreted these sources, I compared the information to findings in the secondary literature, so studies that have already analyzed the integration of AFSJ policies and intergovernmental negotiations towards treaty reform.

1.5 Overview of the dissertation

This dissertation is the first study that puts the phenomenon of vertical differentiation center stage in the DI as well as the AFSJ literature. Vertical differentiation is conceptually embedded in the definition of European integration, namely that the pooling and delegation of authority might vary across policies. The easy explanation is that policies are just different and require different rule-making procedures. To control for this default explanation, I chose policies that belong to the same policy area, the EU's AFSJ, addressing similar policy problems and invoking similar sovereignty concerns. I developed a theoretical framework resting on demand and supply factors derived from established integration theories and the literature on the integration of AFSJ policies. I find that the more interdependence varies across policies, the likelier it is that governments demand different integration levels for these policies. Moreover, the more domestic resistance to integration varies across policies, the likelier that the supply of integration varies across policies. Two policy dyads are selected as case studies of vertical differentiation: varying integration trajectories of regular and irregular migration policies and of civil law and criminal law matters.

With regard to the former policy dyad, I find that vertical differentiation of regular and irregular migration policies was due to varying demand and supply conditions in the run up and during the Amsterdam Intergovernmental Conference. The abolition of border controls triggered governments to consider European migration policies in the first place in order to compensate for the loss of border checks as an instrument to control state entry and irregular residence. Open borders heightened the interdependence between member states' irregular migration policy in particular. Member states in the geographical core of the EU demanded European integration of this policy since EU level decisions would allow them to commit states at the EU's external border to strict border controls. Moreover, geographical core states in Europe such as Germany were skeptical of Southern states' use of naturalizations, the granting of "amnesty" to and the distribution of residence permits to irregular migrants. Again, EU level decision-making allowed Germany to influence Southern states' irregular

migration policy towards a tougher expulsion regime intended to deter irregular migrants instead of (arguably) creating a pull factor for irregular migrants in the form of regular naturalizations. Open borders had less of an impact on regular migration policies since, despite open borders, regular third country nationals in the EU were not allowed to move freely within the EU but were bound stay in the EU member state for which they had a residence permit. Interdependence effects varied across regular and irregular migration policies, resulting in an unequal demand for integration.

This unequal demand was matched by an unequal supply of integration at the Amsterdam Intergovernmental Conference. Governments who rejected the further integration of both policies could be bought in by concessions in the form of opt out (Denmark) and opt-in arrangements (United Kingdom). These states eventually did not veto integration as a bargaining outcome for irregular migration policy as they were not bound to participate in future policy initiatives. Uneven supply and hence vertical differentiation are attributable to uneven domestic resistance against the integration of these policies. There was no domestic resistance against further EU measures on irregular migration. Regarding the integration of regular migration, however, the German *Länder* protested any proposal that implied further integration. Threatening to not ratify the Treaty of Amsterdam in the Bundesrat if regular immigration matters are further integrated, the German *Länder* forced the federal government into compliance and Chancellor Kohl canceled an integrative outcome in the last days of the IGC. Vertical differentiation of regular and irregular migration policy was therefore due to varying interdependence effects and varying domestic resistance towards policy integration.

Civil law and criminal law matters have ever since been characterized by vertical differentiation. In this case, varying demand stemmed from supranational activism. Policy-makers associated the abolishment of borders with increased interdependence in both law sectors. It was expected that business in particular would increasingly transact across borders and hence would need harmonized civil laws that ensure legal certainty for intra-European trade. Likewise, member states perceived open borders as a potential security deficit, especially in light of

enlargement. The demand for integration varied across these policies because of varying supranational activism by the European Commission in particular. Compared to its efforts on civil law matters, the Commission accepted a bystander role in criminal law matters, leaving it to the Council Secretariat to prepare initiatives for the Council. On civil law matters, however, the Commission early on drew on scientific input by civil law scholars to convince member states of the potential benefits foregone if intra-European trade were hampered due to varying civil law rules across states. Moreover, supranational actors became information hubs on civil law matters due to close contacts to the legal scholarship that lobbied for a “European Civil Code”. This network brought an information advantage for supranational actors vis-à-vis the member states. Civil law matters were the only AFSJ policy that was further integrated with the Treaty of Nice and this had mostly to do with the Commission’s activism.

In summary, this work offers an explanation of vertical differentiation, which is not based on the peculiarities of policy areas. A covariance analysis has shown that interdependence is a key driver of integration and vertical differentiation when interdependence varies across policy areas. In itself, interdependence is a necessary but not sufficient condition to explain vertical differentiation. Domestic resistance and supranational activism before and during negotiations can either counter or reinforce the varying demand for integration.

This dissertation will proceed by conceptualizing vertical differentiation. Drawing on previous conceptualizations of integration and vertical differentiation, I construct an additive index that is more suitable for mapping varying integration trajectories in the EU’s AFSJ. I discuss the research design of this study that is based on two cases of vertical differentiation. Comparing the integration trajectories of regular and irregular migration policies as well as civil law and criminal law matters corresponds to a most similar case design. This case design allows focusing on the explanatory factors of interest only while controlling for confounding factors such as “policy idiosyncrasies”. After that, I theorize the causes for vertical differentiation based on established integration theories and the previous literature on the integration of single AFSJ policies. Chapter 4 entails the case study of vertical differentiation

of regular and irregular migration policies in the EU, whereas Chapter 5 focuses on vertical differentiation of civil law and criminal law matters. Chapter 6 concludes this dissertation by summarizing the main findings and discussing these findings in light of the state of the art in the current literature on European integration and vertical differentiation.

2 Conceptualizing vertical differentiation

This chapter serves the purpose of conceptualizing vertical differentiation by offering a definition and an additive index to measure varying integration levels over time. Consequently, this index is used to map vertical differentiation in the EU's AFSJ.

Research on “differentiated integration” has grasped this phenomenon as “vertical differentiation” (Leuffen et al., 2013: 22–23). Vertical differentiation is hereby conceptualized as a “radial category” (Collier and Mahon, 1993: 848–852), a sub-phenomenon of political integration. Both concepts share definitional attributes whereas vertical differentiation describes a particular manifestation of political integration and therefore does not encompass all attributes of the latter. Both concepts ask for the organization of political authority in the EU. But whereas integration may be associated with questions of EU membership and enlargement or why EU member states have increasingly institutionalized cooperation in the EU, vertical differentiation explicitly asks why cooperation on different policies is institutionalized differently. Thus, vertical differentiation does not primarily ask why EU member states transfer authority to the EU but why they transfer more authority to the EU for some policies and less for others.

2.1 “Integration” as conceptual core

The EU has been characterized as a “regulatory state” (Majone, 1994; Caporaso, 1996), a “confederation” or “condominio” (Schmitter, 1996), a system of “multi-level governance” (Hooghe and Marks, 2001), and as a “system of differentiated integration” (Leuffen et al., 2013). Multiple concepts have been used to explore “the nature of the beast” (Risse-Kappen, 1996). This debate has contrasted the EU with notions of traditional statehood and classic international organizations in order to describe the European polity. Consensus has been reached that the EU features neither the core attributes of a modern sovereign state nor of an inter-governmental organization but rather entails attributes of both depend-

ing on which policy area where are looking at (Leuffen et al., 2013). Sovereignty and political authority in the EU are essentially dispersed across levels of decision-making, across territories and across policy areas. The DI literature consequently grasped this phenomenon by distinguishing political integration across three dimensions: vertical, horizontal and sectoral integration (Stubb, 1996; Dyson and Sepos, 2010; Leuffen et al., 2013). Theorists on European integration have accordingly analyzed the increasing institutionalization of authority on the EU level (vertical integration), the expansion of EU authority due to enlargement rounds or conditional EU foreign policy (horizontal integration), and for which policies the EU is mandated to take authoritative decisions (sectoral integration). It is reasonable to assume that the EU has reached an immense functional scope covering nearly the entire range of policies since the Treaty of Maastricht. That is, we can observe less sectoral integration than varying degrees of vertical and horizontal integration of EU policies and rules. Leuffen et al. (2013) have introduced the notions of horizontal differentiation and vertical differentiation in order to describe that EU authority is horizontally and vertically dispersed. Far from integrating policies uniformly, EU member states have delegated authority to the EU discriminately along the EU treaty revisions. The selective delegation of authority on the vertical dimension of political integration will be called vertical differentiation.

The conceptual core of vertical differentiation is similar to vertical integration. States decide to transfer sovereign rights to the EU by delegating authority to the EU. Although “delegation” is often used to describe both, it is analytically beneficial to distinguish between member states delegating authority to supranational agents and the pooling of authority among member states (Lake, 2007: 220; Hooghe and Marks, 2015). The EU member states delegate conditional authority to supranational agents in order to render European cooperation more effective and efficient, thereby increasing individual utilities (Hawkins et al., 2006: 12–20). Giving supranational agents a conditional grant of authority helps member states to overcome problems of credible commitments and reduces the transaction costs of policy-making with agents providing critical information or ensuring the implementation of common policies (Tallberg, 2002; Pollack, 2003). By pooling author-

ity, "states transfer the authority to make binding decisions from themselves to a collective body of states within which they may exercise more or less influence" (Lake, 2007: 220). Pooling thus enables states to overcome decisional blockage owing to the unanimity principle by introducing majority decision rules. Both pooling and delegation reduce individual member states' decision-making autonomy. Principal-agent theorists have pointed out that the delegation of policy-making tasks to supranational agents may enable policy drift or shirking (Kassim and Menon, 2003). Supranational actors hereby make use of their delegated powers in order to drag policy outcomes closer to their ideal point at the expense of member states' preferred policy option. Policy drift presupposes that supranational agents' policy-making discretion is accompanied by inefficient control mechanisms of member states. Pollack (2003) used the principal-agent approach in order to explain how supranational agents such as the Commission could function as "engines of integration" by pushing European integration beyond the levels foreseen by EU primary law and member states' will. Similarly, scholars pointed at the integrationist role of the ECJ whose jurisdiction established substantive and procedural revisions of EU law thereby granting EU agents ever more authority over policy outcomes (Alter, 1998; Stone Sweet, 2004). Pooling implies that single EU governments are formally more dependent on the interests and votes of their foreign counterparts. Majority decisions critically entail the possibility that single member states are outvoted by the majority of their peers. Through pooling and delegation, member states institutionalize policy-making authority on the supranational level. Vertical integration is therefore understood as the increasing pooling and delegation of authority in the EU (Moravcsik, 1993: 509; Rittberger, 2003: 204).

The pooling and delegation of authority concerning different policies does hereby not follow a uniform script. Decision-making procedures and thus the discretion of supranational agents and the decision rule in the Council have essentially varied over the history of the EU. Moreover, these decision-making procedures have varied across policies. Deepening or vertical integration implies that the decision rule in the Council provides for majority voting instead of unanimity, and that supranational actors are increasingly involved in the policy-

making process. Vertical integration is then conceptualized as a continuum, with intergovernmental decision-making on one end and supranational decision-making on the other (Stone Sweet and Sandholtz, 1997). Accordingly, when a decision-making procedure for a policy moves from the intergovernmental pole towards the supranational end of the continuum, we may observe vertical integration. EU member states have established different modes of decision-making that are distinguished by scholars by having reached different positions on the continuum (Buonanno and Nugent, 2013: 119–141; Wallace and Reh, 2015). As an example, introduced with the Treaty of Maastricht, irregular and regular migration policies used to fall under intergovernmental decision-making as stated in Title VI of the former Treaty on the European Union (TEU). Following the treaty revisions at Amsterdam and Lisbon, the EU member states agreed on QMV as the decision rule in the Council, co-deciding with the European Parliament on legislative proposals by the Commission under full review of the ECJ. Both migration policies therefore were essentially integrated with the formal legal basis in the current primary law, allowing for supranational decision-making. EU authority on immigration policy has increased by pooling sovereignty in the Council and by delegating policy-making powers to supranational agents. Yet, whereas irregular migration policy was already communitarized, at Amsterdam regular migration policies still remained a rather intergovernmental affair until the Treaty of Lisbon. EU member states obviously delegated and pooled authority selectively by providing for different decision-making procedures for these policies. Accordingly, the EU member states did not integrate these two AFSJ policies uniformly but opted for vertical differentiated before the Lisbon Treaty came into force.

2.2 Vertical differentiation as selective integration

Vertical differentiation builds upon the conceptual attributes of vertical integration but introduces a comparative dimension to the analysis of deepened cooperation within the EU. We observe vertical differen-

tiation when vertical integration varies across policies. Vertical differentiation will thus describe the status when different policies provide for different decision rules in the Council and varying involvement of supranational actors in the policy-making process. Similar to previous scholarship, we can refer to a decision-making continuum ranging from an intergovernmental mode to a supranational mode of decision-making. Scholars interested in vertical integration focused on whether a decision-making procedure for a policy moved from one end to the other along treaty revisions. Accordingly, previous research has looked for policies for which the decision-making procedure moved up the ladder towards supranational decision-making. For vertical differentiation, however, we need to observe that the decision-making procedures for different policies reached different rungs of the ladder. That is, the status of vertical integration for different policies needs to have different positions on the decision-making continuum. The non-concept of vertical differentiation is therefore not “stagnation” or “no integration”, as in previous accounts that focused on vertical integration. But the opposite of vertical differentiation is uniform integration levels of different policies.

Vertical differentiation therefore is conceptualized in light of different decision-making procedures for at least two policies that vary with regard to the decision rule in the Council as well as regarding the involvement of supranational agents in the policy-making process. The previous sentence already contained a decision that has to be qualified. Depending on the theoretical school, vertical integration may be perceived as a self-reinforcing process or as a constitutional status. Whereas intergovernmentalists analyze treaty conferences and their outcomes as instances of vertical integration (Moravcsik, 1998), supranationalists and institutionalists preferably analyze the interstitial phases in between treaty revisions as integration process (Stone Sweet and Sandholtz, 1997; Jupille, 2007). To measure integration levels and hence vertical differentiation I chose to screen the EU's treaties and to determine which AFSJ policies fall under which decision-making rules in the EU over time. In order to explain vertical differentiation, I will analyze both intergovernmental negotiations at treaty conferences and potential integrative pressures in-between treaty conferences. The unit

of analysis for vertical differentiation is then the constitutional status of policies that provides for more supranational decision-making for one policy than for another. EU primary law in the form of the EU treaties records the decision-making procedures for different policies. Therefore, in order to trace and assess vertical differentiation I will focus on the EU treaties that came up following the Treaty of Maastricht, which introduced all AFSJ policies into the EU framework. I proceed by operationalizing vertical differentiation by referring to previous accounts (Börzel, 2005; Leuffen et al., 2013).

2.3 Measuring integration levels and vertical differentiation

Vertical differentiation then implies that vertical integration varies across policies by providing more supranational decision-making for some policies and less for others. The decision-making procedures are outlined in the respective EU treaty under consideration. In order to measure vertical integration and, as a second step, vertical differentiation, several scholars have operationalized both along decision-making procedures. Different decision-making procedures allow for different decision rules in the Council as well as different levels of involvement of the different supranational agents. Leuffen et al. (2013) and Börzel (2005) operationalize vertical integration along two dimensions: The (non-)delegation of decision-making authority to supranational institutions; and the (non-)pooling of authority in the Council, thus whether the Council votes by unanimity or QMV. Börzel therefore introduced five categories of European cooperation that vary with regard to the decision rule in the Council and the participation of supranational institutions in the decision-making process. Leuffen et al. follow Börzel's operationalization by formulating five categories or types of EU decision-making (Table 1). Category 0 involves no policy coordination at the EU level, but policies are only decided at the state level. Category 1 implies that governments coordinate a policy within the Council that decides by unanimity. Supranational institutions, however, are completely excluded from the decision-making process (Leuffen et al., 2013: 13). Category 2 transcends intergovernmental coordination by allowing

some involvement of supranational institutions (Leuffen et al., 2013: 14). Thus, the Commission may share the right of initiative with the Council or the EP has to be consulted in the decision-making process. Categories 3 and 4 share the inter-institutional decision-making game whereas the EP and the Council negotiate outcomes that are under the judicial review of the ECJ. However, the difference is that the Council decides unanimously under joint decision-making I whereas decision-making II resembles the features of the ordinary-legislative procedure in which the Council decides by QMV. Category 5 presents the most radical form of vertical integration. Here supranational, non-majoritarian institutions such as the Commission, the ECB and the ECJ may act unilaterally, on an equal footing with the member states (Leuffen et al., 2013: 15). Given this operationalization, we can assess the integrative progress or stagnation of policies over time. Moreover, we can observe whether and how vertical differentiation increases between two policies.

Coordination	Vertical integration		
	Delegation	Pooling	Examples
0 No EU-level policy coordination	None	None	Taxation
1 Intergovernmental coordination	None	None	Social security
2 Intergovernmental cooperation	Minimal	None	Foreign Security
3 Joint decision-making I	Community method	Limited pooling	Environment
4 Joint decision-making II	Community method	Pooling	Most of JHA
5 Supranational centralization	Full delegation to supranational bodies		Monetary Policy

Table 1: Five categories of EU decision-making according to Leuffen et al. (2013: 13)

Börzel (2005) as well as Leuffen et al. (2013) rely on these five categories, a typology of different cooperation schemes, in order to assign different values for varying integration levels per policy area. Values range from 0 to 5 and the more decision-making shows supranational features the higher the value assigned to it is. Having assigned the respective policy area values, these scholars are able to map vertical integration processes of policy areas over time. Both approaches use primary law, the EU's treaties, to identify decision-making procedures and to assign values for the integration level of policies. The graphs therefore show varying

vertical integration along the different IGCs and treaty outcomes. Exemplarily, I will use Leuffen et al.'s coding scheme for mapping the vertical integration process of the JHA policies over time. Figure 2 shows the resulting graphs for the institutional development of asylum and immigration policy, civil law and criminal law cooperation, and police cooperation from Maastricht until the Constitutional Treaty.

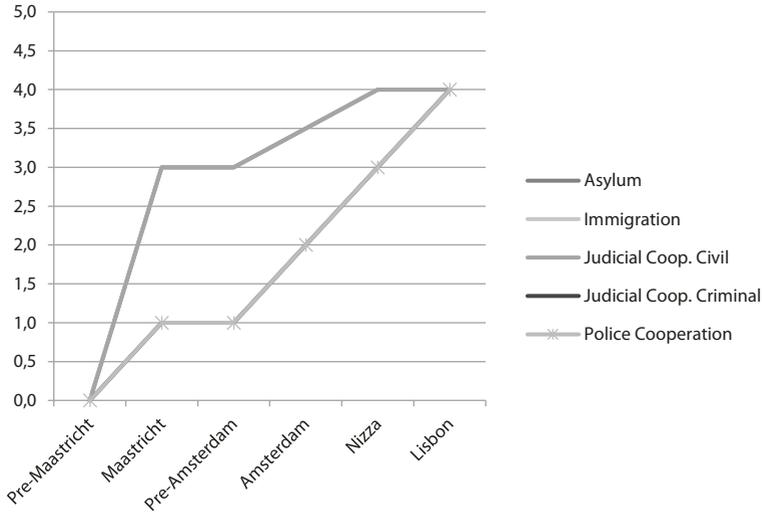


Figure 2: Vertical integration of AFSJ policies according to Leuffen et al.'s operationalization and coding

Börzel's and Leuffen et al.'s typology of five different cooperation schemes certainly has helped to map vertical differentiation in the EU. We can therefore observe that the vertical integration of different AFSJ policies has followed different integration trajectories, as demonstrated by Figure 2. The authors' ordinal scale based upon decision-making categories is a parsimonious way to map vertical integration across all EU policy sectors. Parsimoniousness, however, comes at a price when looking at individual policies. Each cooperation category provides for a fixed combination of the respective Council decision rule and participation of supranational institutions in the decision-making process (the involvement of the European Parliament, the Commission and the ECJ). Empirically, however, we observe decision-making schemes that

do not fit neatly into these categories. The design of decision-making procedures for the AFSJ policies have varied over time and comprised arrangements that cannot be assigned clearly to one of the categories.

To give an example, decision-making on criminal law matters in the EU today involves a peculiar arrangement that exceeds the above-mentioned categories and ordinal scale. The European Parliament and the Council decide jointly on criminal law measures whereby the Council takes decisions by QMV. Taking the categories into account, we would probably code this arrangement as “joint decision-making II”. However, as the Commission still has to share its right of initiative with a quarter of member states in the Council and hence lacks the right of initiative which is standard practice in joint decision-making II, we face the situation that it is unclear which value we should assign to this arrangement. Is it joint decision-making II because the Parliament and the Council co-decide on legislation (value = 4) or is it “intergovernmental cooperation” because the Commission and the Council still share the right of initiative (value = 2)?

The typology or category-approach potentially forces the researcher to take an ambivalent coding decision. Therefore, I elaborated a refinement of Börzel’s and Leuffen et al.’s operationalization by building an additive index and a more fine-grained aggregation rule for assigning values. Consequently, we are able to assign values along indicators rather than categories, which helps us to measure decision-making constellations with less ambiguity.

Instead of creating categories comprising a fixed combination of these factors, I will base my aggregation of values for vertical integration on the specific manifestations of these factors (Table 2). These five factors are: the decision rule within the Council; the right of initiative for policy proposals; the inter-institutional decision rule among the Council and the European Parliament; the scope of ECJ jurisdiction; and lastly, the degree to which non-majoritarian EU agents may act unilaterally. The respective manifestation of these factors may point towards more or less supranational decision-making and hence towards vertical differentiation or uniform integration. The values hereby range from 0 over 0.5 to 1 respectively. When a policy is on the Council’s agenda the Council may take decisions either by unanimity, by QMV or

by simple majority. Since unanimity keeps every member state a veto power and therefore autonomous control of the decision-making process within the Council this status is valued with 0. In contrast, QMV is assigned the value of 0.5 following the pooling of decision-making authority within the Council and hence the possibility that some states are outvoted but nevertheless are bound by EU measures. This possibility is even higher if decisions are taken by simple majority, which is assigned the highest value of 1. Similarly, the proposed index suggests a difference regarding the degree to which the Commission is involved in drafting of policy decisions or not. In light of previous research (Pollack, 2003; Kaunert, 2010) the ability of the Commission to shape EU politics increases when given the power to initiate legislative proposals partly (value=0.5) or solely (value=1). When the European Parliament is only to be informed about the progress of policy-making (consulted *after* measures have been taken) we may expect very little chance for the EP to influence EU politics (value=0). The influence of the EP and therefore its possibility to shape outcomes more towards supranational ideal points changes when it is at least consulted prior to Council action (value=0.5) and ultimately when it has the right to co-decide upon Union legislation (value=1) (Scully, 1997; Hix and Høyland, 2013). The jurisdiction of the ECJ has varied with regard to different policy areas. In the backdrop of previous research on the role of the ECJ, it is reasonable to argue that EU politics becomes more supranational when the involvement of the ECJ in the policy-making process increases. Therefore, ECJ exclusion is coded as 0 concerning the status of vertical integration. The difference between restricted (value=0.5) or full ECJ jurisdiction (value=1) is whether and how the ECJ is allowed to process preliminary rulings or not, which are said to be the motor for the ECJ to expand Union authority vis-à-vis member states (Alter, 1998). For some JHA policies, member states only allowed preliminary rulings to be issued by the highest national courts, thereby forestalling the integrative dynamic of various national courts asking for ECJ interpretation (Stone Sweet, 2000). When coding and mapping the development of AFSJ policies along formal treaty revisions according to this index we find quite another picture of vertical differentiation of AFSJ policies.

Decision-rule in Council	Unanimity	= 0
	QMV*	= 0.5
	Simple majority	= 1
Right of initiative	MS	= 0
	COM+MS (=shared)	= 0.5
	COM	= 1
Inter-institutional decision-rule (EP involvement)	Information procedure	= 0
	Consultation procedure	= 0.5
	Co-decision procedure	= 1
ECJ jurisdiction and legal effect of instrumentsw	No jurisdiction	= 0
	restricted jurisdiction	= 0.5
	full jurisdiction	= 1

Table 2: Additive index to measure vertical differentiation

* QMV = qualified majority voting; MS = Member State; COM = Commission. Information procedure involves that the Commission is mandated to brief the European Parliament on Council action. The EP is hereby not taking part in the decision-making process.

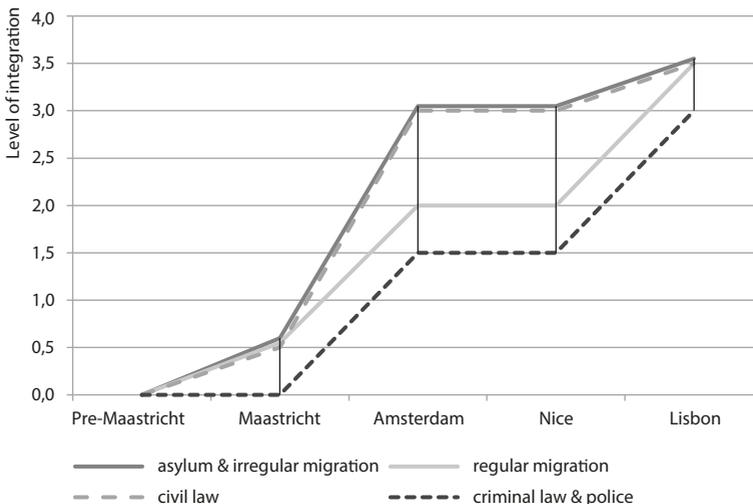


Figure 3: Vertical differentiation in the EU's AFSJ over time

Interpreting Figure 3 we can discern four patterns. First, all policies experience rising vertical integration levels from Maastricht to Lisbon and there is no AFSJ policy that remains stuck in intergovernmental decision-making procedures. Second, we can observe that all AFSJ policies start their integration trajectory fairly on the same integration level with the Treaty of Maastricht and almost reach uniform integration

levels with the Treaty of Lisbon. Third, some policies experienced the same integration trajectory and thus permanent uniform integration levels. Asylum and irregular migration policy as well as criminal law and police cooperation respectively shared a common integration destiny and hence do not qualify for case studies on vertical differentiation. This means that 13 policy dyads remained that would support the study of vertical differentiation in the EU's AFSJ. Fourth, there are two pairs of policies, i.e. policy dyads, that display stark values of vertical differentiation. Regular and irregular migration policies shared uniform integration levels with the Treaty of Maastricht and again with the Treaty of Lisbon. In the time period in between these two treaties, this policy dyad shows high values of vertical differentiation. Although civil law and criminal law matters have since reached different integration levels, vertical differentiation was most pronounced with the Treaty of Nice, again after Maastricht and before the Treaty of Lisbon. I chose regular and irregular immigration as well as civil law and criminal law cooperation as the policy dyads for my case studies based on theoretical and methodological considerations.

2.4 Case selection and research design

The case selection strategy applied here aims to fulfil three goals. First, I select two policy dyads for case studies of vertical differentiation which indeed display high values of vertical differentiation. As this study is interested in identifying the causes of vertical differentiation, selecting on the dependent variable is warranted (Goertz and Mahoney, 2012). King, Keohane and Verba most forcefully criticized qualitative research designs that select cases on the dependent variable (King et al., 1994). Selecting cases this way could induce bias into studies whereby the causal strength of explanatory factors is under- or overdetermined lacking variation of the dependent variable. To alleviate the potential for bias, I decided to not only analyze the vertical differentiation of the selected policies at Amsterdam and Nice but to also take into account why integration levels of these policies converged again with the Treaty of Lisbon. I therefore avoid a “no variance design” by analyzing variation over time, including diverging as well as converging integration trajectories of pol-

icies. Besides maximizing variation on the dependent variable, choosing migration and law cooperation policies as case studies has the advantage that I may control for causal effects of policy idiosyncrasies and go beyond policy-specific factors in explaining vertical differentiation.

Functionalism is one theoretical school that implicitly draws on policy idiosyncrasies to explain institutional choice and depth of cooperation (Mitranyi, 1976; Keohane, 2005). Cooperation would take the form that fits specific policy problems. As policy problems differ, it is likely that the institutional design of organization will differ as states would only bestow an organization with functions and resources that are needed to address a certain problem. For functionalists it is therefore no wonder that institutional designs and the competence distribution also varies within in the EU across policies. In a nutshell, form follows function and as policies address different issues and contexts it is clear that policy integration will diverge.

Another theoretical approach that uses policy idiosyncrasies to explain varying cooperation formats and integration levels puts sovereignty arguments center stage (Hoffmann, 1966; Milward, 2010). Policies vary not only with regard to their functions but also concerning their political sensitivity. Some policies constitute political entities as sovereign states in the first place. Taxing authority, the monopoly of force in defense and police matters belong to state's "core state powers" and although we may observe integration of these policies (Genschel and Jachtenfuchs, 2014), it is nevertheless likely that integration proceeds differently compared to rather regulatory policies.

I agree. Ultimately, policies are different and I think there is hardly anyone who would bitterly object to this statement. But observing that even very similar policies such as regular and irregular migration policies as well as criminal law and civil law cooperation nevertheless experience vertical differentiation points to a theoretical world beyond policy idiosyncrasies. As this world has hardly been explored, this dissertation offers pioneering work on finding causes for vertical differentiation while controlling for policy idiosyncrasies.

Moreover, it is safe to assume that the majority of cases are to be found after the entry into force of the Maastricht Treaty since the "pre-1992 European Community approximated a single institutional order

more closely than the post-1992 European Union” (Leruth and Lord, 2015: 754). Although we may find instances of vertical differentiation before 1992, Leuffen et al.’s (2013) map on vertical integration trajectories of multiple EU policies over time suggests Maastricht to be a caesura. More recent accounts even identify the post-Maastricht European politics and integration therein to be critically distinct from its past (Bickerton et al., 2015). European integration is supposed to be context bound and scholars interested in instances of vertical differentiation therefore need to consider changes of contexts over time when choosing policy pairs as a sample. Hypothetically, we may analyze why policy A was deeper integrated with the Single European Act (1987) than policy B with the Lisbon Treaty (2009). This case selection, however, strains the depth of the analysis by rather multiplying than reducing the number of independent variables (context factors) that need to be controlled for. Bearing in mind the EU’s enlargement rounds, the construction of a monetary and political union after Maastricht, the failed national referenda on the Constitutional Treaty, we might feel uncomfortable to pursue this research design further. In order to control for context factors such as the few listed above, I chose to define cases as instances of vertical differentiation at one certain point in time, so at certain IGCs. ASFJ policies and their different integration trajectories prove to be advantageous sample in this regard. These policies were jointly integrated with the Maastricht Treaty and their integration level was jointly re-negotiated at the consecutive IGCs. Comparing then the integration trajectory of these policies per IGC allows for the control of context factors and therefore focuses on a few causal propositions.

Lastly, this dissertation is interested in generalization. To assess in how far findings can be generalized from studying two cases of vertical differentiation, we need to locate these cases in the broader universe of cases. But how do these cases of vertical differentiation relate to the broader universe of cases? Delineating the population of cases for vertical differentiation would require the budget of a full research project.¹

¹ Compare the research project “Differentiated Integration in Europe” co-directed by Katharina Holzinger and Frank Schimmelfennig that indeed compiled two datasets. Unfortunately, these datasets coded instances of horizontal differentiation in EU primary (EUDIFF 1) and secondary law (EUDIFF 2) and not instances of vertical differentiation.

Since data on the integration levels of all policies at every point in time of the EU's history is missing, it is impossible to empirically define the cases at hand as extreme cases (maximal variance of integration levels) or as typical cases (average range between integration levels) (Gerring, 2008). In order to nevertheless classify the selected cases and to systematically relate these to the broader universe of cases, I use traditional integration theories to discuss whether these cases are common or uncommon cases of vertical differentiation.

I proceed by justifying my case selection in light of the research objectives of this dissertation. First, I will describe in more detail the vertical differentiation of (1) regular and irregular migration policies and (2) civil law and criminal law matters over time. After that, I discuss these cases in light of a broader universe of cases. In both parts, I will substantiate the claim that each of these two policy pairs resemble a most similar case design in terms of policy integration which makes vertical differentiation a puzzling outcome.

2.4.1 Policy Pair 1 – vertical differentiation of migration policies

The European Union differentiates between four categories of migrants where the latter two are used for a comparative case study: third country nationals with a visa, asylum seekers, regular migrants and irregular migrants.² Regular migration deals with issues of labor migration, family reunification, anti-discrimination, the rights of long-term residents as well as the admission of scientists and students. Irregular migration instead is focused on expulsions and the control of external borders. Both policies share the same functional purpose, namely, to regulate the entry, stay and leave conditions for third country nationals (Bjerre et al., 2015). Politically and analytically, these categories are predominantly treated as mutually exclusive. Nevertheless, this distinction obscures the fact that irregular and regular migration policies are functionally interrelated. First, third country nationals may fall under several cat-

² The EU actually differentiates between legal and illegal migrants. For normative reasons, I prefer to use the terms regular and irregular migrants instead.

egories over time. Migrants may enter territories as regular migrants but stay illegally in the country when residence permits run out and are not renewed. Restrictive standards for migrants to regularly enter or stay in a country may actually trigger irregularity. Tough regular migration regimes may hence end in increased irregular entry or stay (Geddes, 2008). Irregular migration is then generally rated as “government failures” being unable to control the entry of people as well as to implement stay conditions for immigrants. The reason for this lies in the political sensitivity of regular and irregular migration policies. To be considered a truly sovereign state, governments need to be able to demonstrate that the monopoly of force is used for both controlling borders and for distributing public goods only to persons who are seen by citizens as part of society. In order to avoid the impression of governance failure, governments have an incentive to regulate migration in line with societal expectations by legally lowering or reducing the costs of entry and stay for the different categories of migrants (Kolb, 2007). Mainly depending on the category, control instruments are hereby border controls, the introduction of language tests or charges and the accessibility of public services and goods. Regular and irregular immigration policies are functionally linked and both go to the heart of sovereign statehood. Nevertheless, we observe vertical differentiation of these policies over time.

Screening the EU’s treaties on their institutional provisions for both policies from the Single European Act until the Treaty of Lisbon and aggregating values in accordance with the index mentioned above, we may map the integration trajectory of both policies over time. Before I go into more detail in describing the integration trajectories, I will briefly justify the data points resulting from assignment of values. Cooperation on migration issues started on an intergovernmental basis in the form of the Ad Hoc Immigration Group as well as the Schengen Agreement in mid-1980s (Cruz, 1990). Since these initiatives were pursued outside of the EU’s treaty framework, the integration levels of both policies were coded as 0. The Maastricht Treaty (1993) formally introduced migration matters into the EU’s realm. According to Title VI of the Treaty on the European Union (TEU) member states provided for an intergovernmental arrangement, sticking to unanimous decision-mak-

ing in the Council and basically excluding supranational agents from the policy process. Member states shared the right of initiative with the Commission for both policies whereas the European Parliament was only to be informed after decisions had been taken and without granting the European Court of justice a treaty-based right to adjudicate on migration legislation.

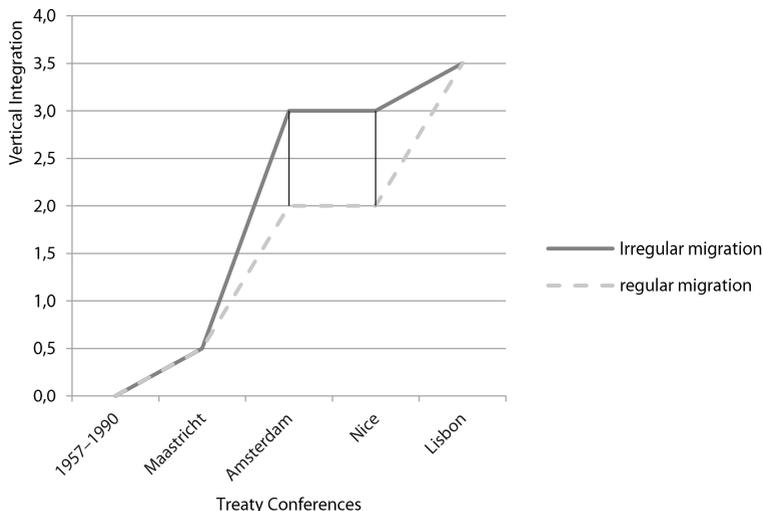


Figure 4: Vertical differentiation of migration policies

The Amsterdam Treaty provided for different institutional arrangements with regard to regular and irregular migration policies. At least after a period of five years the Council was supposed to adopt irregular migration measures by QMV instead of unanimity whereas the European Parliament co-decided on the final legislative act. The Commission was automatically granted the sole right of initiative after this period. Regular migration was explicitly exempted from this institutional reform and the five-year deadline. Regular migration remained the only immigration policy still subject to unanimity and consultation with the European Parliament.

Since 1975, national justice interior ministers had been cooperating mainly on security issues within the TREVI Group. Cooperation on migration policy among all EC states was firstly institutionalized

in form of the Ad Hoc Immigration Group in October 1986 under the British Presidency. Consequently, national interior ministers met relatively regularly and the Commission was allowed to attend these meetings. The number of intergovernmental working groups has proliferated extensively since the 1970s whose work overlapped inevitably. Given this and increasing concerns that compensatory measures for the realization of a frontier-free area are underdeveloped, the European Council of Rhodes established the *Group of Co-ordinators on the Free Movement of Persons* (Cruz, 1990). The so-called Rhodes group was supposed to coordinate the undertakings of the numerous intergovernmental working groups and counter any delays in the member states. The implementation of Article 8a in line with the self-determined deadline proved to be difficult given member states' disagreement on the scope of this provision. Member states were divided on the question whether the term "persons" included TCNs as well when abolishing internal frontier controls. Whereas a group mainly led by the UK rejected this interpretation, referring to security concerns, the vast majority of member states and the Commission embraced this idea if accompanied by conditions that guarantee internal security.

This paramount lack of consensus within the EC on the scope of the free movement objective and the means for attaining it triggered a group of member states to consider closer cooperation outside of the treaty framework. France and Germany decided to abolish frontier controls by signing the *Saarbrücken Agreement* in 1984 in light of "long queues at their common border" (Papagianni, 2006: 13). The Benelux countries immediately signaled their interest in joining the initiative and the five states signed a common agreement in on 14 June 1985 in Schengen. The Schengen agreement outlined general principles for cooperation and included a list of measures that should be adopted in the short and in the longer term. A more detailed action plan was adopted by the Schengen Implementing Convention on 19 June 1990. The Schengen Convention included provisions that were to ensure the compatibility between Schengen and Community law and the Commission was granted observer status in 1988. So, whereas the Schengen states early on clarified that Schengen was to be a laboratory which should be later integrated into the EU, the Schengen institutional sys-

tem was different and exclusively based on international law, which is why it was coded as 0 concerning the additive index.

The Maastricht revision brought migration policies into the realm of the EU. Title VI TEU enlists the primary law provisions in the fields of Justice and Home Affairs. Article K.1 lists the policies that are “matters of common interest” for member states. Migration policies hereby comprise “asylum policy” (K.1(1)), “rules governing the crossing by persons of external borders of the Member States and the exercise of controls thereon” (K.1(2)) and “immigration policy and policy regarding nationals of third countries” (K.1(3)). The latter is subdivided into three specific issues: conditions of entry and movement by TCNs; conditions of residence by TCNs including family reunion and access to employment; and combatting unauthorized immigration, residence and work by TCNs. Preserving sovereignty on substance member states maintained that policy-making within these fields should “not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. Moreover, these policies were issued as “matters of common interest” only in order to fulfil the objectives of the Union, and the free movement of persons in particular.

Article K.3 outlines the decision-making procedure for this Title, establishing a strict intergovernmental mode for negotiating migration policies with regard to TCNs. The Council is the single decision-making body adopting instruments by unanimity. The Commission may initiate legislation. Yet it shares its right of initiative with every member state, giving governments the opportunity to pre-empt or to side-line Commission proposals. The European Parliament is essentially excluded from intervening in the decision-making process and rather fulfils the function of an observer and impotent advisory board. The Presidency and the Commission inform the EP of the discussion on these policies and the Presidency consults the EP “on the principal aspects of activities [...] and ensure that the views of the European Parliament are duly taken into consideration”. Additionally, the EP may ask questions of the Council and issue recommendations to it. The EP’s influence therefore is confined to soft political instruments of control lacking institutional

levers to block or to co-fashion migration policies. Equally, the ECJ's jurisdiction is heavily restricted.

There is no automatic and mandatory ECJ competence on migration policies and EU instruments. Article κ.3(c) reserves it to the member states to endow the ECJ with the competence to interpret provisions of Conventions or legal disputes thereon on a case-by-case basis. Governments therefore decide for each Convention individually whether the ECJ and its functions will be available or not. Policy-making on migration issues tightly remains in the hands of EU member states and it is largely up to their discretion whether to involve supranational agents or not, and when or with whom to intensify cooperation in the EU. Both policies were coded with an integration level of 0.5 since the Council adopted decision unanimously (o) and the member states shared the right of initiative with the Commission (0.5). The EP was only to be informed (o) and the ECJ had not even a restricted automatic jurisprudence (o).

The deadline for the Amsterdam IGC to start was already set in the Maastricht Treaty. After controversial negotiations on the status of the third pillar, EU member states agreed to split it, transferring migration-related measures and judicial cooperation on civil matters into the EC Treaty while maintaining police and criminal law cooperation in the EU Treaty (Title VI). The new Title IV TEC reads "Visas, Asylum, Immigration and other policies related to free movement of persons" codifying the link between internal free movement of persons and so called "flanking measures with respect to border controls, asylum and immigration". Moreover, the member states answered the call for more accountable and communitarized policy-making, however, with qualifications. Article 67 laid out the decision-making procedure for Title IV policies.

During a transitional period of five years after entry into force of the Amsterdam Treaty, the Council shall act unanimously on a proposal from the Commission or a member state and after consulting the European Parliament. The decision-making procedure for the transitional period is basically the same as provided for by the Maastricht Treaty. The role of the European Parliament was weakly upgraded, which has to be consulted now before adopting measures in the Council, compared to the Maastricht era, when the Council often did not even inform the

Parliament on time. After the transitional period, the Commission was to enjoy the right of initiative, however, taking into account any request by a member state for a Commission proposal. The switch to community decision-making and jurisdiction procedures was not automatic and did not necessarily involve all policies listed in Title IV. After the five years, the Council should take a unanimous decision after consulting the EP on whether all or parts of the policies of Title IV should be governed by the co-decision procedure and how to adapt the powers of the ECJ accordingly.

Article 68 laid out the powers of the ECJ with regard to the policies of Title IV. The preliminary ruling procedure (Art. 234 TEC) shall apply when “in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling”. The Council, the Commission or any member state may request an ECJ ruling for interpreting Title IV and acts based on this Title. According to Article 68(2) the ECJ, however, should not have any jurisdiction on measures that relate to the “maintenance of law and order and the safeguarding of internal security” (=Art. 62(1)) hereby curtailing the ECJ’s jurisdiction at least according to the Commission. Given the Amsterdam Protocols (national Protocols and the Schengen Protocol) the ECJ therefore had extreme limits for establishing legal conformity with respect to Title IV measures and initiatives that were based on the Schengen acquis. The preliminary ruling procedure was heavily circumscribed in that only higher national courts could request preliminary rulings. According to Article 67(2) TEC the ECJ’s jurisdiction and competences should be reconsidered by the Council after the five-year transitional period had lapsed. But neither the Commission nor the Council examined this question. By integrating migration policies into Title IV (TEC) the Council used community instruments such as Regulations and Directives, though adopting these at least for five years under different decision-making procedures than co-decision. In 2004, the Council indeed introduced co-decision for most of the Title IV policies except regular migration issues that continued to be exempted from EP influence. Article 63 TEC furthermore permits

member states to maintain or introduce national provisions regarding immigration as long as they are compatible with the Treaty. Germany in particular interpreted this provision as not infringing on its right to maintain national immigration policies and denying TCNs a right of residence, as outlined in a letter sent to the British Presidency (Hailbronner, 1998: 1047–1067).

The integration level of irregular migration policies reached 3 with the Amsterdam Treaty due to the fact that the Council introduced by way of a transition period QWV (0,5) and co-decision with the European Parliament (1), delegating the right of initiative to the Commission (1) and allowing restricted jurisdiction by the ECJ (0.5). The integration level of regular migration in contrast only increased to 2. Although regular migration matters also could have been shifted to communitarian decision-making procedures after the transition period, the Council did not do so as it did for irregular migration matters. Given that the Council still decided unanimously (0) while only consulting the European Parliament (0.5) with member states acting on a proposal of the Commission after a transition period of five years (1) and facing only restricted jurisdiction by the ECJ (0.5), regular migration matters remained on a lower integration level until the Treaty of Lisbon. The Lisbon Treaty harmonized the integration levels of both policies by introducing the ordinary legislative procedure and giving full jurisdiction to the ECJ (value = 3.5).

2.4.2 Policy Pair 2 – Justice: the vertical differentiation of law cooperation policies

Civil law and criminal law are different especially in regard to the role of the state in these law sectors and in terms of legal redress. Civil law shall regulate interactions among private actors whereas the state is only facilitating private interactions by adopting a legal framework and offering a judicial infrastructure. In this respect, company law, insolvency law, contract law and family law are subfields of civil law, or private international law as it is called outside of the EU context. Disputes are settled in the form of compensation. Criminal law matters involve

the state not as a facilitator but as a party to a legal conflict. Offenders face public prosecutors before court and may need to fear punishment instead of compensatory claims that may even involve prison sentences. Despite these noticeable differences, both law sectors share a common function: the preservation of justice in order to ensure that society lives in peace. In both law sectors it is paramount that governments ensure legal certainty. Legal certainty in civil law matters is required for private actors in order to enter into contractual relationships, be it in the economy as business representative, client or consumer or in family affairs (Kennett, 2000). Criminal justice systems also need to be based on legal certainty as citizens will only obey the rules if crimes are clearly defined and prosecuted. Both policies share functional similarities. Moreover, both policies are considered to be politically sensitive when integration is considered. States have distinct civil law and criminal law traditions and European harmonization might be seen as a threat to legal cultures (Cotterrell, 2006).

European cooperation on civil law and criminal law matters firstly took place outside of the EU's treaty framework. The Council of Europe was the preferred venue to cooperate on criminal law matters with the *Convention on Extradition* (1957) being the centerpiece. Civil law cooperation proceeded in *The Hague Conference on Private International Law* that as well rested on international conventions as policy instruments. These policies were integrated into the EU with the Treaty of Maastricht.

The Treaty of Maastricht already provided for vertical differentiation of these policies. Cooperation on both policies was intergovernmental in the sense that the Council decided by unanimity whereas the European Parliament was only to be informed. The European Court of Justice had no right to give judgements. Instead, member states could allow for ECJ jurisdiction in individual EU conventions. Vertical differentiation of these policies was due to the fact that the Commission was involved differently in the decision-making process. The Council had the sole right of initiative for criminal law measures whereas it shared this right with the Commission on civil law matters.

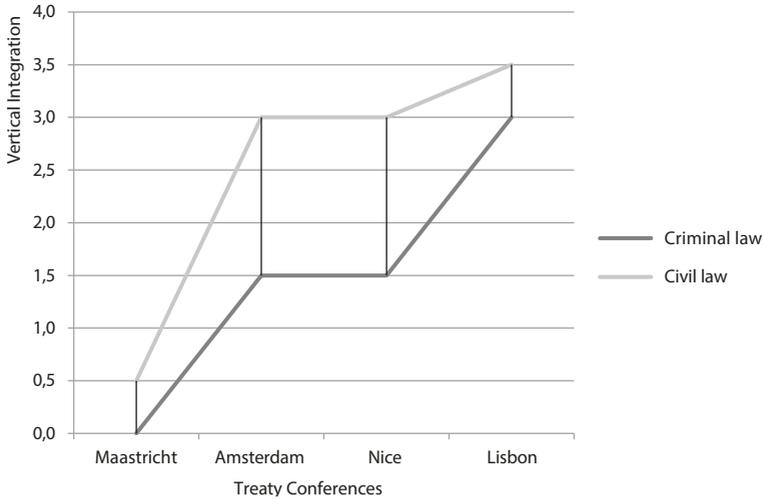


Figure 5: Vertical differentiation of judicial cooperation policies

Although both policies were further integrated with the Treaty of Amsterdam, vertical differentiation remained in place. The European Court of Justice was granted restricted jurisdiction on both policies, although due to different arrangements. On civil law matters, the Court was allowed to accept preliminary rulings only by the highest national courts. On criminal law matters, member states could decide after treaty ratification whether they want to opt into Court jurisdiction and if so whether all or only the highest national courts may ask for preliminary rulings. Again, vertical differentiation was due to the status of the Commission in the decision-making process. Now the Council shared its right of initiative with the Commission on criminal law matters whereas the Commission was to receive the sole right of initiative for civil law measures automatically after a transition period of five years. Moreover, after the transition period, civil law measures could fall under the co-decision procedure if, in line with Article 67 TEU, the Council unanimously and after consulting the European Parliament decided so. Given this transition clause and the prospect of shifting civil law measures into the co-decision procedure including QMV in the Council, it was coded accordingly.

Vertical differentiation accentuated with the Treaty of Nice. Member states did no further integrate criminal law matters but decided to communitarize civil law matters *immediately*, so well before the transition period ran out. Civil law matters thus provided for qualified majority voting in the Council and co-decision rights for the European Parliament. The Commission was granted the sole right of initiative immediately, so before the transition period foreseen by the Amsterdam Treaty elapsed. The Court's power to give preliminary ruling, however, remained restricted.

The Lisbon Treaty indeed established full jurisprudence by the Court of Justice for both policies, although for criminal law matters this only came into effect after a transition period of five years (2014). Both policies now fall under the so-called ordinary legislative procedure, with QMV in the Council and co-decision rights for the European Parliament. Vertical differentiation of these policies is due to the status of the Commission. The Commission enjoys the sole right of initiative on civil law measures but has to share this right with a quarter of member states in the Council on criminal law matters.

In sum, both cases of vertical differentiation, regular/irregular migration and civil/criminal law matters, offer the empirical variation that is needed to study varying integration levels. Regular and irregular migration policies started out with uniform integration in the Treaty of Maastricht and today again share the same level of integration. Vertical differentiation of these policies, however, was the intermediate result with the Treaties of Amsterdam and Nice. In contrast, vertical differentiation of civil law and criminal law matters has always been the case.

2.4.3 Both cases in light of the broader universe of cases

The universe of cases comprises all policy pairs that were or are characterized by vertical differentiation in the EU. Seventy years of European integration, whereby the EU's scope of activities comprises nearly every policy, make it hard to empirically map a universe of cases. Leuffen et al.'s study (2013) comes closest to this ideal. However, the authors compare policy *areas* whereas this study treats *policies* and their integration

trajectories as units to analyze vertical differentiation. In the absence of a full picture of every policy dyad of vertical differentiation in the EU's history, it is impossible to brand policy pairs as typical. Lacking an empirical picture, I decided to classify my cases based on theoretical expectations. In light of the larger population of cases, I theorized which policy pairs should rather be most or least likely cases of vertical differentiation.

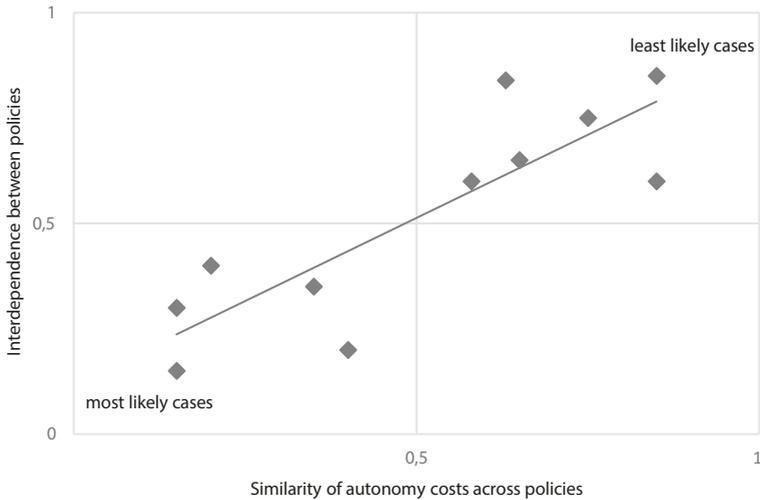


Figure 6: Most and least likely cases of vertical differentiation

The core variables of established integration theories help us classify these cases against the broader universe of cases. Interdependence between policies is the central core variable of supranationalist thinking and the spill-over logic (Haas, 1958; Schmitter, 1969). The more two policies are interrelated and the more policy-making shows reciprocal effects between these policies, the higher the incentive for governments to consider the integration of both policies in order to avoid utility losses. Thus, policies that are interrelated are hard cases of vertical differentiation and easy cases of uniform integration. The core variable of intergovernmentalist theory is the autonomy costs of integration from the perspective of member states. The more European integration would threaten the autonomy of member states, the lower the incentive

for governments to consider integration (Hoffmann, 1966; Milward, 2010). Policies that vary with regard to autonomy costs can thus be defined easy cases or most likely cases of vertical differentiation and hard cases or most unlikely cases of uniform integration.

Based on these considerations, the most likely cases for vertical differentiation should be policies that are independent of each other and entail varying autonomy costs for governments (lower left quadrant). The least likely cases are policies that are highly interdependent and raise similar sovereignty concerns when governments consider integration (upper right quadrant). Typical cases in this regard should be “on-liner cases” that exhibit a combination of policy interdependence and autonomy costs with the outcome of varying degrees of vertical differentiation. Based on this conceptualization, the assignment of case status and the relationship between core variables of integration and uniform integration are inverse: high similarity of autonomy costs coupled with high policy interdependence are most likely cases of uniform integration (upper right quadrant), while when autonomy costs diverge and policies are independent of each other it is unlikely that uniform integration will occur (lower left quadrant).

This depiction of most likely and least likely candidates for vertical differentiation corresponds with findings from previous studies. Börzel compared the integration levels of internal and external security policies (2005). Both policies raised the same reservations about integration on the part of the member states and both policies, although not reciprocal, were linked to economic policies, making them a puzzling case for vertical differentiation (Börzel, 2005: 231). Börzel’s astonishment at these findings stems from the basic expectation that policy interdependencies and similar autonomy costs should result in uniform integration levels, i.e. least likely cases for vertical differentiation.

Based on this, I argue that the vertical differentiation of regular and irregular migration policies resembles a least likely or hard case whereas differentiation of civil law and criminal is classified as a rather likely and rather easy case of vertical differentiation. Migration policies are highly interdependent and governments are skeptical to trade autonomy for a European wide migration policy. Irregular and regular migration policies are interrelated as decisions in one of these

policies has consequences for the other. Two examples may illustrate this point: being too soft in regular migration matters by granting residence permits may increase the number of irregular migrants on the state territory should persons overstay their permits. Being tough and restrictive in granting residence permits to enter state territory regularly might not deter migrants but lead them to enter the territory nevertheless, but through irregular channels. Irregular migration is often referred to as the dark side of restrictive regular migration rules (Geddes, 2008). Moreover, governments are rather hesitant to give up control on migration matters facing right-wing parties who campaign on migration issues and in light of unemployment, which too often forges a sentiment that jobs should be primarily reserved for national citizens. High interdependence among these policies and equal autonomy costs associated with delegation make regular and irregular migration an unlikely case of vertical differentiation and a hard case for established integration theories.

From a functional viewpoint, the vertical differentiation of civil law and criminal law matters in the EU remains puzzling. Despite differences, both policies share the core function of ensuring justice in societies and to allow for legal certainty. However, these policies are not interdependent. Reforming civil law articles has no consequences on the criminal law system and vice versa. Moreover, autonomy costs vary as well, although only to some extent. Both law sectors are characterized by distinct legal traditions in the member states and governments will certainly have an incentive to risk no overhaul of national legal cultures through European cooperation. Yet, governments are certainly eager to protect autonomy in criminal law matters as defining actions as crimes essentially needs local societal support and resonance with the national culture.

Both cases of vertical differentiation can be regarded as crucial cases (Gerring, 2008). Theories resting on policy idiosyncrasies and classic integration theories would lead us to predict uniform integration levels for regular and irregular migration policies, which is not the case, which makes this policy dyad a least likely case. This case is crucial in order to confirm that there are critical explanatory factors beyond policy idiosyncrasies that may account for vertical differentiation. In

contrast, explanatory factors of my framework that do not hold in the civil law/criminal law case lose out as important factors to explain vertical differentiation.

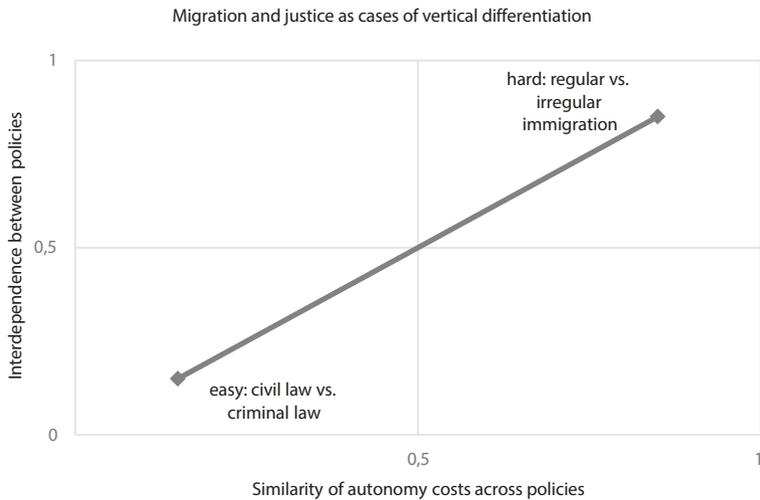


Figure 7: Classifying the cases

Against the backdrop of my previous methodological remarks, two policy pairs were selected as cases for reasons of both empirical variation and theoretical relevance. In order to most clearly observe the effects of the explanatory factors and to minimize the risk of confounding factors having an unnoticed impact, it is recommendable to select cases with extreme values on the dependent variable (van Evera, 1997; Goertz and Mahoney, 2012). Choosing a most similar case design for selecting policies to be compared and maximizing variation on the dependent variable should allow us to observe the impact of third variables and therefore to control for their effects. Therefore, I select policy pairs as cases with policies whose integration levels converged and diverged over time, so similar policies that were uniformly integrated and vertically differentiated at certain points in time.

3 Theory

The literature review on differentiated integration and integration in the EU's AFSJ in particular demonstrated that we are in dire need of an explanation for vertical differentiation. However, these literatures offer multiple explanatory factors accounting for integration that could also help to explain varying integration levels of policies. There is no point to test integration competitively again when others just found out that no integration theory alone can do the job. Apparently, there is “not a single ‘winner’” (Leuffen, et al., 2013: 259). If it is unlikely that there will be a winner in the end, then why send them into yet another battle?

I therefore do not conclude that integration theories are irrelevant in explaining vertical differentiation. I only doubt that, based on Leuffen et al.'s findings, it is now the time to ask who is getting it right. Rather, it seems that we should ask what could be right, i.e. what factors are helpful to understand why governments relinquish sovereignty for some policies but spare some policies from (further) European integration. Therefore, I sought categories that might subsume different mechanisms while sharing similar basic assumptions. The primary aim of this study is to explain vertical differentiation by drawing on these multiple factors. Only in a second step do I ask which integration factors might be most helpful in explaining outcomes at certain points in time.

The theories I use are all rooted in rationalist micro foundations. Actors pursue interests and weigh the consequences of each course of action when making decisions. The theories, however, disagree on who the most important actors are in the integration process and whether actors form preferences endogenously or exogenously to the integration process. Moreover, these theories conceptualize bargaining dynamics differently and therefore offer distinct (although not necessarily conflicting) predictions about who is able to influence negotiation outcomes. To structure this analysis, Leuffen et al. (2013: 34–39) proposed an analytical framework that distinguished between the “demand for” and “supply of” integration. The demand side focuses on explaining actors' preferences for integration while the supply side illuminates reasons for why and when actors are able to accommodate demands

for integration with integrative bargaining outcomes at treaty negotiations. Theories on international cooperation and European integration attribute causal relevance to different political arenas, and hence actors, when theorizing the demand for and supply of integration. To further structure the analysis of both the demand and supply side of integration I distinguished between explanatory factors that put the domestic, transnational or supranational arena center stage. Integration and cooperation theories not only begin at different levels of analysis, they also allow varying integration logics and theoretical mechanisms to operate at these levels. I will outline the different mechanisms per explanatory factor but refrain from testing them. Instead, this study delineates explanatory factors and tests them in a covariation analysis. This decision was taken in light of the state of the art on vertical differentiation. This dissertation is the first study that exclusively focuses on vertical differentiation. As a pioneer study it cannot draw on a debate in the literature that already offers information on which explanatory factors might be dominant in explaining vertical differentiation and whether varying demand and supply of integration per policy results from dynamics at the domestic, transnational or supranational arena. Testing theoretical mechanisms allows us to analyze how exactly one or several factors is linked to an outcome of interest. Yet, before we analyze how exactly factors affect the outcome, it is necessary to know which factors actually should feature in any explanation of vertical differentiation. This study will analyze whether demand and supply factors co-vary with the outcome, vertical differentiation. I will therefore not test theoretical mechanisms. However, I will outline the different mechanisms per explanatory factor and refer to these as theoretical underpinnings or rationales in order to avoid the impression that mechanisms are tested. I summarize the explanatory factors of this study in and attribute them respectively to the demand or supply side of integration and the three political arenas.

In the following I will present independent variables that help in explaining varying demand and supply of policy integration. I furthermore clarify the theoretical underpinnings of these factors which I will call “rationales”. The purpose is not to test these different rationales in the empirical chapters, which is why I refrained from calling these

underpinnings “mechanisms”. I will pursue a covariation analysis that also relies on process causal observations in order to increase confidence in the causal relationship between independent and dependent variables (Blatter and Haverland, 2012: 216–217). Knowing about the theoretical underpinnings of these independent variables may prevent me from falling into the trap of spurious correlations and hence may rather bolster the plausibility of my findings in the case studies. Moreover, this chapter rolls out a theoretical framework that may generally be used to analyze vertical differentiation of policy dyads. I will specify the theoretical framework towards explaining the concrete cases at hand in the respective empirical chapters.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses</i>
Domestic	Home benefits	Vertical differentiation likely when home benefits of unilateral policy-making varies across policies.
Transnational	Interdependence	Vertical differentiation likely when interdependence varies across policies.
Supranational/European	Supranational activism	Vertical differentiation likely when supranational activism varies across policies.
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses</i>
Domestic	Domestic opposition	Vertical differentiation likely when domestic opposition to integration varies across policies.
Transnational	Preference intensities	Vertical differentiation likely when governments' preference intensities vary across policies.
Supranational/European	Supranational activism	Vertical differentiation likely when supranational activism during negotiations varies across policies.

Table 3: Theoretical framework to explain vertical differentiation

Integration theories and theories on international cooperation more generally diverge in two dimensions. First, theories prescribe different levels of analysis for explaining the demand for cooperation and focus

on different actors in this regard. Liberal theories of international cooperation as well as liberal intergovernmentalism in particular highlight the domestic arena in which interest groups and governments form preferences on cooperation in light of ineffective unilateral policy-making (Moravcsik, 1993, 1998; Milner, 1997). Theories that attribute the demand for cooperation to interdependence identify the exchange of negative externalities and hence the wish to moderate mutual costs of unilateral policy-making on the transnational level (Stone Sweet and Sandholtz, 1997; Moravcsik, 1998; Mattli, 1999). Lastly, supranationalist and institutionalist approaches focus on the European level and supranational actors' activism when explaining demand for integration (Pollack, 1994; Hug, 2003; König and Bräuninger, 1997).

The demand for integration is dependent on actors' preferences for more or less centralized decision-making in a policy area. Governments, domestic interest groups, the transnational community and supranational agents form preferences about integration based on their general interests in a given policy field. Integration may be seen as a solution to functional policy problems and a means for these actors to maximize their individual power. While the "analysis of integration preferences is the first step of any explanation" of integration, the second step involves the analysis of supply conditions (Leuffen et al., 2013: 34). The supply of integration is mediated by the constellation of actor preferences and the distribution of power among bargainers. Integration is dependent on either the convergence of preferences or integration-willing actors' power to prevail in negotiations. Integration negotiations can be characterized through two aspects. All integration theories are aware that governments are the masters of any treaty who ultimately need to agree on further integration. The theories, however, diverge when it comes to the level of discretion member states enjoy when negotiating treaty revisions (Moravcsik, 1999; Falkner, 2002; Hug and König, 2002). Liberal intergovernmentalists assume purely intergovernmental negotiations in which outcomes match the preferences of the most powerful member states and credible commitment problems (Moravcsik, 1998). Bargaining power and outcomes are a function of transnational interdependence and states that are least dependent on a cooperation should dominate negotiations. Other studies pointed to domestic actors who

may constrain governments' room of maneuver in negotiations and hence influence intergovernmental bargaining outcomes (Hug and König, 2002). In order to ensure treaty ratification, governments need to take into account the preferences of domestic veto players and politicized publics already during the negotiations, which affects their bargaining positions and win-sets at the bargaining table (Slapin, 2011; De Wilde and Zürn, 2012). Supranationalists emphasize the role of the supranational level and actors such as the Commission and the European Parliament in influencing governmental negotiations by setting agendas or highlighting the costs of different institutional designs (Falkner, 2002; Hix, 2002). Here, an integration outcome occurs when demand corresponds with supply. As outlined in the previous chapter, integration outcomes can result in the uniform integration of policies or in vertical differentiation. We should observe vertical differentiation when demand and supply conditions vary across policies.

The aim of this chapter is to delineate explanatory factors for the demand and supply side of integration generally. The following explanatory factors and the underlying integration logics are suitable for any study interested in explaining vertical differentiation. At the beginning of each case study and respective chapters I adapt these overarching factors to the cases at hand and formulate expectations explicitly geared towards explaining differentiation in the migration and judicial cooperation cases.

3.1 The demand side: Explaining governmental preferences for integration

I measure integration levels and vertical differentiation by evaluating the EU's treaties to determine whether they provide the same or different decision-making procedures for policies. Based on this methodological decision, it follows that we must explain why member states adopted the respective decision-making procedures at IGCs that led to revised treaties. More specifically, in order to explain the demand for integration, we need to explain why governments displayed prefer-

ences for integration in the first place. Ultimately, governments are the masters of treaties and their preferences therefore require explanation.

Integration theories and theories on international cooperation more generally highlight different levels of analysis in explaining demand. Liberal international relations theories and liberal intergovernmentalism in particular argue that these preferences have domestic causes. Both liberal intergovernmentalism and supranationalism emphasize interdependence as a main driver for integration, with governments willing to moderate the negative effects of transnational interdependence. Lastly, governments may have to accept integration as an outcome at treaty conferences when supranational actors could change the institutional status quo during the time preceding treaty revision.

Established integration theories and institutionalist approaches focus on different political arenas for explaining the demand for integration. Varying demand for integrating certain policies may originate from three distinct political arenas: the domestic, the transnational and European arenas. This is supported by studies that offer explanations for the integration of AFSJ policies. Pointing to domestic constraints in reforming national immigration policies, Guiraudon (2000) assumes that governments integrated immigration policies into the EU in order to stymie domestic veto players by shopping the European venue in the search of stricter rules on asylum and immigration. Other scholars focus on the transnational arena and emphasize interdependence as a central driver for integrating immigration policies in the EU (Turnbull and Sandholtz, 2001). Open borders within Schengen coupled with increasing East-West movements due to the fall of the Iron Curtain caused governments to consider European immigration rules. Lastly, scholars highlighted developments in the European arena that led of the integration of AFSJ policies. Accordingly, supranational actors such as the Commission and the European Parliament pressured governments to further integrate immigration policies (Niemann, 2006; Kaunert, 2010).

3.1.1 The domestic arena: Benefits of unilateral policy-making

Multiple theories emphasize the domestic arena for analyzing governmental preference formation regarding European integration (Moravcsik, 1998; Finke, 2010). These theories can be grouped into two different rationales for why governments demand integrative outcomes. The first group includes functionalist rationales, which may lead governments to search for “economies of scale” when unilateral policy-making is found to be insufficient to address policy problems (Milward, 2010). Second, governments may have an interest in deepening European cooperation and adopting European rules when the domestic context does not allow for policy reform due to domestic opposition (Wolf, 1999; Moravcsik, 1994; Koenig-Archibugi, 2004). In this case, governments may consider shopping the European venue for policy reform because domestic routes are blocked (Guiraudon and Lahav, 2000). I subsume these different rationales under the heading of sinking “home benefits” of unilateral policy-making that may trigger governments to demand European integration (Milner, 1997: 47–50).

Helen Milner proposed the independent variable of home benefits as explaining why governments’ interest in cooperation might vary across policies (1997: 47–49). Home benefits are the effectiveness of unilateral policy instruments and policy-making in addressing societal problems. Cooperation implies costs for governments as national representatives lose the authority and ability to use policy instruments independently. However, when unilateral policy instruments are ineffective in addressing societal needs, governments may consider cooperation in order to remain in control of the situation.

There are two different rationales for why home benefits of unilateral policy-making may decrease and governments’ motivation to seek integration may increase depending on the policy area. The first rationale follows functionalist reasoning and suggests that governments pursued European integration to rescue the nation-state from collapse in the face of overwhelming challenges (Milward, 2010). According to this line of argument, European states surrender formal sovereignty to the EU in order to remain sovereign in taking effective actions and to “restore

order and control in the face of challenges posed by globalization” (Jacoby and Meunier, 2010: 304; Leibfried and Zürn, 2005). In order to better manage risks and resources, European states decide to pool their capacities in favor of joint political response. European integration becomes more likely the more joint policies promise economies of scale, resulting in policy outputs that address problems more effectively and are more resource preserving than unilateral measures. Resource scarcity and administrative capacities may vary across policy areas, which is reflected in the home benefits of unilateral policy-making. This explains the varying demand for policy integration within the EU.

The second rationale follows a power-based reasoning. Beyond functional pressures that question a state’s ability to act, domestic opposition may complicate government policy-making and hence reduce the home benefits of unilateral policies. Governments that increasingly lose the ability to shape policies in line with their own preferences in the domestic context may favor European integration “to manipulate the domestic context by enhancing the internal autonomy of the executive” (Wolf, 1999: 341). By pooling and delegating authority on the EU level, governmental actors free themselves from domestic political constraints as domestic political actors have restricted access to European decisions and resources (Moravcsik, 1994). The incentives for governments to defer to Europe for policy reform may vary across policy areas. In policy areas where a government faces fairly strong domestic constraints and hence experiences lower home benefits of unilateral policy-making, executives should have a strong incentive to demand further European integration (Koenig-Archibugi, 2004).

It is hard to quantify home benefits of unilateral policy-making. In order to nevertheless determine declining home benefits and hence demand for policy integration, I assess whether governments face either problem in policy reform due to domestic opposition by veto players or face policy failure, i.e. a gap between political rhetoric and policy effectiveness on the ground. Challenges and governmental instruments may therefore vary across issue areas, leading to the following expectation:

Demand Hypothesis 1: Policies are vertically differentiated when the home benefits of unilateral policy-making vary across policies.

3.1.2 The transnational arena: Interdependence and preferences for integration

Interdependence is well established as an explanatory factor for international cooperation (Keohane and Nye, 2011). Policy problems increasingly span across borders and call into question the sovereignty of states that are supposed to effectively address challenges within their borders (Zürn, 1998). Transnational exchanges and reciprocal costs of unilateral policy-making beyond national borders are said to drive governments to consider cooperation. Two established integration theories draw on interdependence to explain demand for integration with different underlying rationales. First, liberal intergovernmentalism contends that international interdependence drives domestic demand for integration (Moravcsik, 1998). When states' unilateral policies induce mutual adjustment costs and result in negative externalities, these states have an interest in demanding policy integration. Interdependence thus results from changes to the external environment and is exogenous to previous cooperative measures. In contrast, supranationalism argues that endogenous factors drive interdependence and governmental demand for integration. Previous integration is said to boost transnational exchanges across borders whereby transnational actors can only fully reap the benefits of cooperation if further policies are integrated into supranational rule making (Stone Sweet and Sandholtz, 1997).

A central, basic assumption of liberal intergovernmentalism is that governments are eager to preserve their autonomy and only seek international cooperation when domestic demands can no longer be met unilaterally (Moravcsik, 1998: 38). On the one hand, rising interdependence between states impacts interest groups' welfare gains and therefore their preferences for pressuring governments to alleviate the effects of negative externalities arising from interdependence (Mattli, 1999). On the other hand, the more interdependent states become, the more governments lack the ability to realize domestic interests unilaterally, and states therefore become more interested in relinquishing autonomy in favor of international cooperation arrangements. Interdependence is the driving force that pushes domestic constituencies and national governments to seek more or less integration in certain issue areas at

certain times. Preferences regarding integration are likely to diverge across issues when the effects of interdependence are stronger in one issue area than another, causing governments to relinquish authority unevenly across policies.

Supranationalists do not dispute the fact that governments ultimately need to approve treaty revisions and that these governments may pursue their own interests, such as retaining control of their resources and decision-making autonomy. However, they argue that rejecting or slowing integration in policy areas that are characterized by increasing transnational exchanges becomes costly and the pressure on governments to adjust to the process is heightened (Stone Sweet and Sandholtz, 1997: 306). Individuals and groups that engage in transactions across borders are the drivers of change, demanding supranational rules in order to alleviate the costs of transnational exchanges within arenas that have different national regulations (Stone Sweet et al., 2001). Once transnational and supranational actors establish European rules for a certain policy, these rules “generate a self-sustaining dynamic that leads to the gradual deepening of integration in that sector and, not uncommonly, to spillovers into other sectors” (Stone Sweet and Sandholtz, 1997: 299). Supranationalists assume that governments are increasingly unable to maintain disparate national rules when they increase the costs of transnational exchanges. In turn, when policy sectors experience uneven levels of transnational exchanges it becomes likely that the demand for integration and European rules varies across policies. Both supranationalism and liberal intergovernmentalism agree that interdependence may vary across policies, leading to the following proposition:

Demand Hypothesis 2: Policies are vertically differentiated when interdependence varies across policies.

3.1.3 The European arena: Supranational activism and preferences for integration

Member states decide on the rules concerning each policy area at IGCs. In doing this, they create institutional settings that structure policy-making in the interstitial phase, i.e. the time in between treaty confer-

ences. Some scholars suggest that the bargaining outcomes of treaty conferences perfectly correspond to the drafters' intentions (Moravcsik, 1998; Tsebelis and Garrett, 2001). According to this line of reasoning, the member states in the Council as well as supranational actors such as the Commission and the European Parliament adhere to the rules agreed at IGCs, that is, they behave according to governments' preferences. More recent literature suggests the opposite to be the case (Stacey and Rittberger, 2003; Farrell and Héritier, 2007b).

Member states decide on treaty articles in situations of uncertainty under considerable temporal pressure. The effects of formal institutions on day-to-day policy-making cannot be foreseen entirely, which means that institutional designs produce unintended consequences (Pierson, 2000). Moreover, governments tie up hasty package deals that inject legal ambiguity into treaties (Jupille, 2007: 303), which runs counter to the argument of a perfect match between the drafters' intentions and relevant treaty articles. The interstitial phase creates windows of opportunity for supranational actors to intercede and push integration forward in between treaty conferences and even beyond some member states' will. There are two different rationales for theorizing supranational activism. The first argues that institutional rules are inefficient or even contested, allowing supranational actors to demand further integration. The second contends that treaty ambiguities and previous delegation may give supranational actors levers to empower themselves further.

The first rationale for this hypothesis stems from deficiencies in institutional rules and instruments that may mandate further integration. Beyond functional spillovers across policies, Niemann theorized functional "pressures from within" policy areas (Niemann, 2006: 31). Institutional rules and instruments that were established by member states at treaty conferences may be inefficient or ineffective in everyday policy-making. Intergovernmental decision-making rules may safeguard member states' control over the policy-making process but fail to produce effective policy outputs, failing to solve coordination and implementation problems. Supranational actors then have an incentive to demand deeper integration and hence further empower themselves by pointing to institutional fallacies.

Moreover, institutional rules on EU decision-making may be too vague and allow for “procedural politics” (Jupille, 2004). Legislative actors in the EU may disagree over the correct procedural rules for adopting legislative instruments if a policy measure falls under different institutional rules than those that govern different decision-making power arrangements. Fighting over rules, however, takes time and shifts resources towards power struggles instead of adopting effective policies (Jupille, 2004: 112). Supranational actors may demand further integration and precision of treaty principles through the argument that procedural politics diverts time and resources from effective policy-making. Institutional fallacies and procedural disputes following vague treaty bases may vary across policies and therefore supranational activism in favor of integration may also differ.

The second rationale is based on the assumption that supranational actors not only highlight treaty ambiguities and institutional gaps but exploit these for their own purposes. Here, treaties are conceived as “incomplete contracts” that cannot fully clarify the meaning and usage of their articles (Cooley and Spruyt, 2009; Mahoney and Thelen, 2010; Farrell and Héritier, 2007b). Treaty provisions are therefore inevitably open to interpretation and contestation. Supranational actors are said to have a self-interest in interpreting procedures in the most integrative way possible as further integration implies increased power for them (Pollack, 1994). Supranational actors draw on institutional gaps and their existing power resources to effect policy-making outcomes and procedures that are closer to their preference for further integration and European decision-making. For example, the Commission may use its agenda-setting powers (Pollack, 1997) and the European Parliament its co-decision and budgetary powers to alter legislative outcomes (Farrell and Héritier, 2007a), while the European Court of Justice may exploit treaty ambiguities to establish legal principles and procedural rules that further integration even against the will of member states’ (Alter, 1998; Stone Sweet, 2004). Institutional gaps and supranational actors’ existing power resources may vary for different policies, affecting supranational activism as well as the demand for integration.

Once member states have decided in favor of an integrative step, governments face comparatively high costs for abandoning this plan

(Pierson, 1996, 2000). Social actors and decision-makers alike have already invested in previous institutional arrangements and adjusted their behavior accordingly. The higher these incremental investments are the more these actors associate exiting agreements with sunk costs and seek to keep these arrangements alive, especially since it may be uncertain how displacing or substituting previous arrangements enables more advantageous solutions. Supranational agents use their delegated functions to pursue their own agendas, which may run counter to the initial interests of the governmental principals. Once delegated, supranational agents use their power to defend their status and work towards rules that are consistent with their idea of how the European project should proceed. Governments interested in stopping this process face high hurdles and efficiency trade-offs that impede the re-regulation of supranational authority. As a result, member states are likely to codify integrative steps at treaty conferences that were actually taken in the interstitial phase (Stacey and Rittberger, 2003). Institutional deficiencies, treaty ambiguities and hence supranational activism may vary across policy areas, leading to the following proposition:

Demand Hypothesis 3: Policies are vertically differentiated when supranational activism varies across policies.

3.2 The supply of integration: Explaining bargaining outcomes

Studies that analyze negotiations at the IGCs of Maastricht, Amsterdam, Nice and the European Convention have focused on three political arenas to explain the supply of integration. The increasing politicization of European affairs (Hooghe and Marks, 2009; De Wilde and Zürn, 2012) as well as domestic veto players (Hug and König, 2002) are said to mediate the supply of integration at treaty conferences. Here, the domestic political arena intervenes in governmental negotiations on treaty outcomes and may hinder member state representatives from agreeing to increased integration. Liberal intergovernmentalists emphasize the role of governmental preference constellations. They argue that the

transnational arena is a function of international interdependence and determines whether states are more or less interested in further European integration and therefore if they are willing to agree on integrative outcomes in negotiations (Moravcsik, 1998; Moravcsik and Nicolaidis, 1999). Lastly, some authors note the influence of supranational actors and the European venue in explaining bargaining outcomes. Depending on the policy area and the structure of intergovernmental negotiations, supranational actors might be able to “pre-cook” negotiation outcomes and hence push integration forward (Reh, 2007; Falkner, 2002).

3.2.1 The domestic arena: Veto players and politicization

Robert Putnam (1988) most prominently highlighted the role of domestic politics when analyzing international negotiations. According to Putnam, governments not only negotiate bargaining outcomes with each other but also with domestic constituencies. Two strands of literature have focused on two different domestic constituencies when analyzing European bargains: domestic veto players and the national public sphere (Hug and König, 2002; Slapin, 2011; Schünemann, 2014). As EU treaties not only require signature by government actors but also demand national ratification to enter into force, domestic actors involved in national ratification have bargaining leverage. Domestic actors can be critical veto players, such as national parliaments or national courts that might strike down EU treaties after intergovernmental negotiations, or can be the national public sphere and electorate, who may threaten to reject European bargains in referendums or punish the parties in government in subsequent elections if they are dissatisfied with European agreements.

The first argument places domestic veto players, whose consent is needed to change the status quo, at the forefront (Tsebelis, 2000: 442). In the context of EU treaty conferences, the supply of integration is not only dependent on intergovernmental agreement but also on approval by national actors involved in ratification. Most of the time, national parliaments are key actors in the ratification process and indeed may constrain governments interested in European bargains (König and Sla-

pin, 2004). Governments have an interest in avoiding ratification failure and the ensuing reputation costs, and hence have an interest in taking national veto players' preferences into account. The latter's preferences can be issue-specific (Hug and König, 2002). Governmental opportunities for supplying integration may vary across policies depending on the domestic opposition to policy integration.

Another pivotal actor in national ratification is the public. Especially since the Treaty of Maastricht and the increase of national referendums as a ratification mechanism, governments have been constrained in negotiations by their national electorates (Hooghe and Marks, 2009; Bickerton et al., 2015). As governments extended and bolstered the EU's authority through consecutive treaty conferences, European publics became increasingly aware of European politics (De Wilde and Zürn, 2012). European policy-making therefore became increasingly politicized and contested, leading to situations in which intergovernmental negotiations are conducted in light of domestic opposition (Schünemann, 2014). The salience of issues and policies regulated by the EU varies (Beyers et al., 2018). Depending on the policy area, governments find themselves more or less constrained by domestic opposition, meaning the supply of integration may vary across policies. Domestic opposition can vary across policies and can affect governments' willingness to supply integration. This leads to the following proposition:

Supply Hypothesis 1: Policies are vertically differentiated when domestic opposition to integration varies across policies.

3.2.2 The transnational arena: Preference intensities

Finding agreement on further integration within borders is equally important as reaching consensus on integration across borders during treaty conferences. Liberal intergovernmentalist and institutionalist bargaining theories make different predictions about the bargaining power of governments. Whereas the former highlights material power resources in terms of economic weight, population size and geographical size, the latter expects that governments favoring the institutional status quo are privileged in moving bargaining outcomes closer to their

preferences because their consent is required independent of material resources (Moravcsik, 1998; Garrett and Tsebelis, 1996; Slapin, 2008). This dissertation, however, is not interested in which players strike the best deals in negotiations but rather in why policies are vertically differentiated, i.e. when do governments compromise (or not) on integration as a bargaining outcome. Here, both theories agree that integration is only likely if integration-willing governments are able to compel integration laggards into agreement using credible threats or by offering concessions. As integration laggards need to be accommodated, rewards for agreement are based on the preference intensities of integration-willing states and their readiness to offer these concessions.

I follow Moravcsik's assumption that governmental preferences are exogenous to bargaining dynamics. The more a government experiences negative externalities due to international interdependence in a policy area, the more this government will prefer integration and cooperative arrangements to alleviate the adverse costs of unilateral policy-making (Moravcsik, 1998). Integration of a policy is only the bargaining outcome if there is at least one government that is intensely in favor of integration. Thus, integration as a bargaining outcome is dependent on the pattern of preference intensity that "dictates the relative value each state places on an agreement, which in turn dictates its respective willingness to make concessions" (Moravcsik, 1998: 60). Integration laggards that lean towards the institutional status quo and are less affected by interdependence structures need to be bought into agreement.

Although governmental preferences remain unaltered during negotiations, bargaining positions may change. As theorized above, governments may be forced to change bargaining positions due to domestic opposition and refrain from integrative outcomes if ratification failure looms. Moreover, governments may change bargaining positions and support integrative outcomes if integration-willing governments offer concessions. I assume that one government's willingness to offer concessions in exchange for another government's consent for integrative outcomes is a function of preference intensities (Moravcsik, 1998: 62–65). Preference intensities for integration may vary across policies depending on interdependence patterns, which leads to the following proposition:

Supply Hypothesis 2: Policies are vertically differentiated when preference intensities for integration vary across policies.

3.2.3 The European arena: Supranational activism

Supranationalist bargaining theories have hypothesized the conditions under which supranational actors may intervene in intergovernmental negotiations and shift bargaining results towards more integrative outcomes (Sandholtz and Zysman, 1989). Intergovernmental conferences are complex, involving different issue areas, questions on policy and procedural reform, clarification of each state's bargaining position, drafting and revising of text and finding overall compromise formulae that meet legal requirements. Therefore, governments are under pressure to gather and process a lot of information while equally trying to influence negotiations in their favor. It is likely that, with regard to some issues, governments face coordination failure during negotiations. When information is scarce, supranational actors have a window of opportunity to make their voices heard and manipulate negotiations according to their interests (Moravcsik, 1999). Presenting critical information and new ideas in situations of coordination failure allows supranational actors to initiate treaty reform proposals and mediate compromises between governments that mirror supranational preferences for integration (Kassim and Dimitrakopoulos, 2007). Highly technical and complex policy areas that seem to be less salient for governments may prove to be fields for supranational activism during negotiations (Adler and Haas, 1992).

In formal terms, supranational actors are ill-equipped to influence intergovernmental negotiations. Classic IGCs offer neither formal agenda-setting powers for supranational actors nor participation and decision-making rights during negotiations. Supranational activism and influence are dependent on the distribution of information among conference participants (Moravcsik, 1999). Supranational actors enjoy two power resources. First, supranational actors have privileged access to information regarding everyday policy-making in the EU. When governments discuss treaty revision and institutional reforms, supranational actors may offer first-hand information about how previous

institutional rules performed in respective policy areas. As the Commission has for the most part enjoyed the right of initiative in the EU's legislative process, it has accumulated substantial expertise on policies, underlying procedural rules and implementation problems (Falkner, 2002). Second, supranational actors may present themselves as neutral brokers during negotiations who share information about delegations' bargaining positions and mediate compromise formulae (Moravcsik, 1999: 278–279). Delegations have an incentive to hide their true preferences during negotiations or may be incapable of formulating a clear bargaining position. In these circumstances, supranational actors may intercede, collect information on delegations' bargaining positions and disseminate proposals as “majority opinions” that convince delegations with uncertain preferences. Information advantages of supranational actors may vary across policies. The Commission, for example, only has substantial expertise on policies for which it already enjoyed some policy-making competence before treaty conferences that discuss institutional change. Policies that were previously under member states' control are not candidates for supranational activism as these actors have not been able to accumulate substantial knowledge regarding these policies. Moreover, supranational actors may only function as brokers during negotiations over policies for which governments have unclear bargaining positions. More salient policies are not candidates for supranational activism compared to policies that are rather technical in nature. Supranational activism during negotiations can thus vary across policies, which leads to the following proposition:

Supply Hypothesis 3: Policies are vertically differentiated when supranational activism during negotiations varies across policies.

Table 4 summarizes explanatory factors that may account for increasing demand for and supply of integration per policy. For both the demand and supply side of integration, I referred to the literature that situated explanatory factors in different political arenas, i.e. the domestic, transnational and European arenas.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses</i>
Domestic	Home benefits	Vertical differentiation likely when home benefits of unilateral policymaking varies across policies.
Transnational	Interdependence	Vertical differentiation likely when interdependence varies across policies.
Supranational/European	Supranational activism	Vertical differentiation likely when supranational activism varies across policies.
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses</i>
Domestic	Domestic opposition	Vertical differentiation likely when domestic opposition to integration varies across policies.
Transnational	Preference intensities	Vertical differentiation likely when governments' preference intensities vary across policies.
Supranational/European	Supranational activism	Vertical differentiation likely when supranational activism during negotiations varies across policies.

Table 4: Summary of explanatory factors and hypotheses on vertical differentiation

3.3 Method for analyzing vertical differentiation

I drew on theories on international cooperation and European integration to formulate testable hypotheses on why policies are integrated differently. To test the theoretical conjectures, we might draw on two different approaches on qualitative research: cross-case and within-case analysis. Whereas comparative case analyses in form of controlled comparisons largely emulate correlational analyses, which are predominant in quantitative and statistical methods, within-case analyses such as the co-variation analysis, congruence method and process-tracing rather aim to fully account for why and how factors produce an outcome (George and Bennett, 2005; Blatter and Haverland, 2012).

Regular/irregular migration policies and civil/criminal law matters are two cases of vertical differentiation. Selecting vertical differentia-

tion as a basic unit of analysis necessarily implies that we select policy pairs or policy dyads as cases. Consequently, a single case study of vertical differentiation is by nature a comparative case study of integration with regard to at least two policies. This dissertation therefore on the one hand analyses two single cases of vertical differentiation that are made up of two comparative case studies of policy integration. Within each case of vertical differentiation, I base my analysis on the selection of most similar cases, namely policies that are fairly similar and nevertheless integrated to different extents at certain points in time. I draw on two methods to draw causal inferences in the framework of this research design that comes close to what Blatter and Haverland call a “Y-centered combination of cross-case comparisons and CPT [Causal Process-Tracing]” (2012: 216–217). I primarily pursue a covariation analysis which is backed by causal process observations.

First, I intentionally selected positive cases of vertical differentiation showing high values for the outcome of interest (Y-centered). Both cases of vertical differentiation, so both policy pairs, show these values over time. The second rationale was to select cases of vertical differentiation that pair cases of integration of very similar policies. This most similar case design of policy integration that adds up to cases of vertical differentiation allows for the control of some alternative explanatory factors. This, in turn, allows us to focus on the explanatory factors of interest and I therefore formulated testable hypotheses and delineated explanatory factors that may account for the outcome. I pursue a covariation analysis and I will determine whether the causal factors indeed co-vary with the outcome per treaty conference (Blatter and Haverland, 2012: 33–78). It is tested whether indeed varying values on demand and supply factors of integration led to vertical differentiation. As such, this study tries to reduce the number of possible factors to explain vertical differentiation and may hence prepare the ground for a more focused process-tracing analysis by future studies (Blatter and Haverland, 2012: 216)

I combine this covariation analysis with causal process observations (Blatter and Haverland, 2012: 216–217). This study certainly does not live up to the standards of a fully-fledged process-tracing analysis. Neither did I formulate theoretical mechanisms nor did I cut the empirical anal-

ysis in temporal sequence per step in a theoretical mechanism. Yet, this study draws on process observations, and therefore information that allows me to not only assign values for independent variables but also to have a look at how far variables interact and are temporally ordered (Blatter and Haverland, 2012: 23; Seawright and Collier, 2004: 283).

I basically consulted three sources of data. First, I reviewed secondary literature on the integration of AFSJ and AFSJ policies in particular to learn more about my cases. Screening secondary literature was accompanied by the analysis of primary sources on both the demand and supply stage of integration. Statistics on transnational mobility (immigration statistics; crime rates; opinion polls), newspaper articles of national and European news outlets, national parliamentary debates, governmental position papers, reports by EU organizations, European Council Conclusions, European Parliament minutes as well as Council minutes were analyzed to learn more on why demand for integration varied across policies. Conference documents, newspaper articles and semi-structured interviews were used to learn more about the varying supply of integration. Seventeen semi-structured interviews turned out to be a major source to, on the one hand, validate information given by the secondary literature, newspaper articles or the interpretation of conference documents. On the other hand, these interviews increased process observations beyond the current state of the art. These interviews were primarily conducted with two groups of persons: first, officials who have worked in the EU's organizations for more than ten years; second, with persons who were directly involved in the respective Intergovernmental Conferences. The first group aided in clarifying the demand for integration and how supranational actors were involved in the negotiations. The second group gave first-hand information on bargaining dynamics, preference settings and resistance points in the negotiations. I triangulated my data by combining information of very different resources, which allows cross-data validation of information and by collecting new data to even add further information on why policies were integrated and the selected policy pairs were characterized by vertical differentiation.

I presented a theoretical framework that distinguishes among demand and supply factors to account for vertical differentiation. The

demand for integration is hereby dependent on governmental preferences on integration. Preferences on integration are likely to diverge across policies when home benefits of unilateral policy-making, interdependence and supranational activism in everyday policy-making in the EU varies across policies. The supply side of integration focuses on negotiations at IGCs and vertical differentiation is likely when domestic opposition to integration, preference intensities of governments and supranational entrepreneurship during negotiations varies across policies. This dissertation uses a covariation analysis that includes causal process observations. Given that we barely know anything about why pressures for integration vary across policies, a covariation analysis on vertical differentiation is a logical first step in light of the current state of the art. As a pioneer study that exclusively focuses on vertical differentiation, it will reduce the number of possible explanatory factors by determining which factors co-vary with the outcome of interest. It offers a first theory-informed account of an underexplored phenomenon and sets the scene for more in-depth case studies that test theoretical mechanisms which analyze the process of how exactly explanatory factors are linked to the outcome. In the following two chapters, I will adapt the theoretical factors and hypotheses to concrete cases at hand and analyze the reasons for why we observed vertical differentiation of regular and irregular migration policies (Chapter 4) and of civil law and criminal law matters in the EU (Chapter 5).

4 Vertical differentiation of regular and irregular immigration policy

When comparing the integration trajectory of regular and irregular immigration policies in the EU, a peculiar development can be observed. Both policies had uniform integration levels when they first entered the EU's arena through the Treaty of Maastricht and both policies share the same level of integration today with the Treaty of Lisbon. Upon closer inspection, however, we observe an intermediate period when these policies were vertically differentiated under the Treaty of Amsterdam. This intermediate stage is of particular interest for the purposes of this study.

I start by defining migration policies and then briefly review the history of migration in Europe. Afterwards, I summarize the integration trajectories of these policies and formulate theoretical expectations regarding this case. Lastly, I will analyze the varying integration trajectories of both policies along the Amsterdam and Nice Intergovernmental Conference as well as the European Convention.

4.1 Immigration policy

Migration policies, i.e. policies concerning asylum, regular and irregular migration, have for a long time been associated with issues related to the traditional nation state (Hollifield, 2004). The concept of national sovereignty as it emerged over time, by its very definition, begets migration and locates authority for regulating migratory flows in national governments. Physical borders demarcate state territory in which state authorities govern a citizenry according to the respective legal order and by holding a monopoly on the legitimate use of force. This makes states, as subjects of international law, externally as well as internally sovereign and independent of orders by other states when pursuing national affairs. Sovereignty includes the legitimate claim by state authorities to control law and order internally. Limited territoriality due to borders in combination with the clear distribution of power has empowered states, in comparison to other traditional forms of social organization such as

city states or historical federations, to assert property rights, common currencies and standardized metrics (Spruyt, 1996). Borders are essential for state authorities to enforce internal sovereignty as well as for constructing national identities by geographically and culturally separating communities (Delanty, 2006). State authorities make decisions related to public good provision and who is to be included or excluded from consumption of public services. A government is assisted in this by a hierarchical and dense organizational structure, i.e. public administration, in the form of a civil service whose powers have increasingly been extended. Governmental orders reach the citizenry more directly in order to provide or withhold public services.

National governments are first and foremost accountable to their citizenry. Social contract theorists have persistently argued that the power of state authorities requires legitimization. Governments must therefore provide core state functions, such as internal security and a welfare system, in order to guarantee their right to exist (Genschel and Jachtenfuchs, 2014). The corresponding side of this contract is the general exclusion of foreigners from the state or the conscious selection and admission of immigrants if governments expect migration to negatively affect the consumption of public services by its national citizenry (Fellmer, 2013: 91). Migration policy, then, is not an end in itself but something that allows governments to manage the provision of services by regulating the inclusion and exclusion of migrants in the interests of the citizenry. Governments have two means by which to regulate migratory pressures: physical exclusion via material borders and administrative power to refuse migrants' access to public services. The difficulty facing governments deciding on a more generous or restrictive migration policy is that they must contend both with a citizenry that has heterogeneous preferences regarding immigration and a heterogeneous group of migrants who differ in their attributes. Ideally, state authorities would make migration decisions on a case-by-case basis, but this is technically impossible. Therefore, a common strategy employed by governments is to categorize migrants in order to manage the abundance of immigration requests while simultaneously building societal consensus around questions of exclusion and inclusion.

Depending on public consensus, every society establishes a right to immigrate for migrants with certain attributes according to fixed categories. How the persons that are to be admitted are defined under a certain category varies between states (Freeman, 1995). European Union treaties and their respective provisions on migration issues distinguish four categories of migrants: visa holders, asylum seekers, regular migrants and irregular migrants. The last two categories are used for a comparative case study here. Regular migration relates to issues of labor migration, family reunification, anti-discrimination, the rights of long-term residents and the admission of scientists and students. Irregular migration instead is focused on expulsions and control over external borders.

Politically and analytically, these two categories are mostly treated as mutually exclusive. Nevertheless, this distinction obscures the fact that individuals may fall under several categories over time. Migrants may enter territories as asylum seekers or with temporary residence permits but stay illegally in a country after their asylum application has been dismissed or their residence permit expires and is not renewed. Irregular migration is generally considered to be a “government failure”, as state authority is seen as being unable to control the entry of people or enforce residence conditions for immigrants (Boswell and Geddes, 2011: 39–41). In order to avoid this impression, governments have an incentive to regulate migration in line with societal expectations by legally lowering or reducing the costs of entry and residence for different categories of migrants (Kolb, 2007). Mainly depending on the category, control instruments include border controls, the introduction of language tests or charges and accessibility to public services and goods. Strict rules regarding family reunification might also be used, for example, to minimize the incentive for migrants to seek work abroad.

The interdependence of migration policies makes it plausible to streamline policy-making on migration matters in order to avoid efficiency losses due to incoherence. In the European context, EU member states could benefit from delegating policy formulation competences to the Commission, which would ensure a coherent approach to migration matters in the EU. By exclusively initiating legislation on migration matters and monitoring member states’ compliance, gov-

ernments could avoid incoherent policy-making resulting in negative feedback loops. Otherwise, restrictive entry provisions for regular migrants and asylum seekers might not deter migrants from moving but rather incentivize illegal immigration to other states. Nevertheless, EU member states were reluctant to delegate migration competences to supranational actors and until the Treaty of Lisbon, established different rule-making procedures for interdependent regular and irregular migration policies.

4.2 Immigration policy in Europe

European Union member states have very different immigration experiences. Previous studies have generally distinguished between countries of emigration and countries of immigration in Europe (Baldwin-Edwards, 1997; Geddes, 2008). Northern EU member states, and Germany in particular, were characterized by increasing immigration in the 1950s and 1960s. Economic recovery and development after the Second World War increased the demand in northern European states for foreign labor. Southern European states, in contrast, did not experience the same economic success and their citizens were incentivized to move to northern Europe. Northern states, therefore, have experienced immigration for decades whereas southern European states only recently became countries of immigration in the 1990s (Baldwin-Edwards, 1997).

With the oil crisis and economic recession of the 1970s, northern European states (followed by southern states in the 1980s and 1990s) adopted a policy of “zero immigration” (Joppke, 1998: 271). The economic downturn accompanied by high unemployment rates triggered strict government constraints on legal or regular immigration routes to “reserve” scarce labor for the domestic population. However, restricting foreign labor by constricting labor migration channels did not stop immigration towards and within Europe. Instead, migrants continued to immigrate into European states as asylum seekers and for the purposes of family reunification (Boswell and Geddes, 2011). Asylum seeking and family reunification are within the jurisdiction of international law, and European states are bound to accept immigration under cer-

tain conditions, regardless of the fact that member states pursued a zero-immigration policy. Several European states strengthened their rules on immigration and asylum in the 1980s but refrained from European cooperation on these matters. Cooperation on migration issues within the EU formally began only with the Treaty of Maastricht. Since then, migration policy has become one of the most important issues in the EU and integration has proceeded rapidly. However, depending on the particular migration policy, integration has proceeded differently.

4.3 Mapping vertical differentiation of immigration policies

The Treaty of Maastricht integrated migration policies into the EU. Regular and irregular immigration policies were established in the so-called third pillar of the EU's treaties, the Justice and Home Affairs pillar. European cooperation here was based on intergovernmental working methods. Only the Council had the authority to make decisions and the European Parliament was merely informed about legislative measures. The European Court of Justice could not rule on any legislative measures or EU migration policies, except for the case that member states explicitly included ECJ jurisprudence in individual conventions. Only the Commission was involved to some extent by sharing the right of initiative with the member states. These decision-making provisions of the Maastricht Treaty applied to both regular and irregular migration policies, which is why uniform integration instead of vertical differentiation occurred at that time.

The Amsterdam Treaty shifted migration policies towards vertical differentiation. Both regular and irregular migration policies were further integrated, but to different extents. The Commission was given the sole right of initiative for both policies after a transition period of five years. The European Court of Justice was restricted in giving judgments in that it was only allowed to accept preliminary rulings by the highest national courts. Unanimity prevailed in the Council and it was decided that the European Parliament should be consulted before any legislation was passed. In this study, the integration level of irregular

immigration was coded as higher since the Treaty of Amsterdam, and the post-Amsterdam process in particular, resulted in further integration than for regular migration matters.

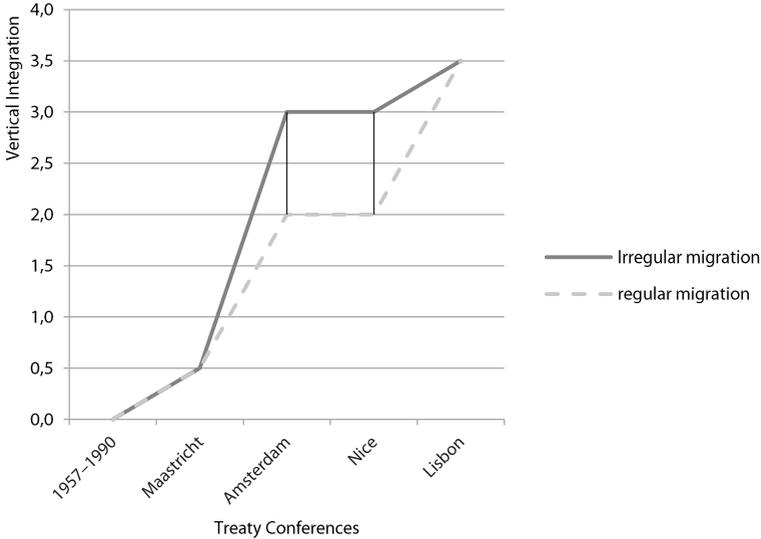


Figure 8: Vertical differentiation of migration policies

Irregular immigration matters were considered candidates for communitarization, i.e. the introduction of majority voting and co-decision rights for the European Parliament, under the Treaty of Amsterdam. With a Council Decision in 2004, member states communitarized irregular immigration policy while regular immigration matters were explicitly excluded from communitarization (Council, 2004). This situation was peculiar in the sense that the Draft Constitutional Treaty, which was ready for ratification in parallel to this Council Decision, provided for the communitarization of regular migration matters as well. However, only the Treaty of Lisbon that came into force in 2009 unified integration levels again. As both policies were uniformly integrated and today share the same level of integration, the question arises as to why these policies were vertically differentiated in the interim.

4.4 Theorizing vertical differentiation of immigration policies

Chapter 3 presented the analytical framework used in this dissertation, which distinguishes between factors explaining the demand for integration and the supply of integration. Varying home country benefits, negative externalities and supranational activism accounts for the unequal demand for integration across policies. Varying preference intensities, national opposition levels and supranational leadership in intergovernmental agreements result in an unequal supply of integration across policies. In this section, this overarching theoretical framework is adapted to the vertical differentiation of regular and irregular immigration policy.

4.4.1 Home country benefits

As outlined in Chapter 4, home country benefits are the domestic benefits for a government if it employs policy instruments unilaterally. Home benefits are low if a policy is ineffective in addressing a certain problem due to insufficient capacities of an administration or because implementation is undermined by domestic opposition (Milward, 2010; Wolf, 1999). The lower the home benefits, the more a government expects utilities from integration. On the one hand, cooperation may result in a more effective solution to a policy problem through exploiting economies of scale. On the other hand, integration enables governments to circumvent domestic veto points by using the European venue for legislation and enforced policy implementation (Moravcsik, 1994). Governments' demand for integration is a function of the home benefits of unilateral policy-making in relation to ceding policy-making autonomy to the European level.

4.4.1.1 Home benefits and costs of irregular immigration

The 1990s witnessed an intensive scholarly debate about whether migration is an example of states losing control in times of globalization (Sassen, 1996). Increasing migratory movements and the evolution of

international human rights law would hollow out a states' capacity and autonomy in controlling the entry and exit of third country nationals (Soysal, 1994; Jacobson, 1997). States that pursued restrictive immigration policies on the one hand faced migratory pressures, and on the other were constrained in rejecting and deporting asylum seekers due to rights-protecting judgements by national or international courts (Hollifield, 1992; Guiraudon, 2000). Others contended that states were still capable of restricting unwanted immigration through domestic reforms (Joppke, 1997; Lahav, 1997) or by regaining capabilities through cooperation (Guiraudon and Lahav, 2000). This dissertation does not aim to give a definite answer to this question but uses this debate as a point of departure to develop theoretical conjectures about variations in states' ability to control different categories of migrants entering and remaining on national territory and their respective unequal demand for cooperation. Losing control necessarily implies that home benefits of unilateral policy-making regarding migration are low.

I assume the home benefits to be lower and hence the demand for integration to be higher for irregular migration policies. By definition, irregular or "illegal" immigration denotes policy failure. Border controls and migration policies are set in place precisely to select specific immigrants and prevent the entry or residence of people who are not eligible for asylum, visas or other regular national immigration schemes. Therefore, irregular immigration in general is politically costly for governments as it reveals the limits of government actions in securing borders and preventing perceived negative welfare effects of irregular stay and employment (Gilligan, 2015).

Policy failure on irregular immigration becomes visible especially when states introduce regularization programs. In broad terms, regularization refers to "the granting, on the part of the State, of a residence permit to a person of foreign nationality residing illegally within its territory" (Apap et al., 2000: 263). A residence permit given to an irregular immigrant can provide for a temporary or permanent stay. Regularizations signify policy failure in two respects. Governments have to acknowledge that, despite border controls, migrants were still able to enter the country and that their administration must admit publicly to their inability to deport people that according to law have no legal right

of residence (Levinson, 2005: 5). Moreover, regularization might further attract irregular migratory movements. Given that governments often face hostile attitudes towards irregular immigrants, deportation and border control are preferred options (Baker, 1997). While states devise border controls and expulsion policies to deter irregular immigrants, regularizations imply the policy failure of this strategy. In such situations, unilateral policies are found to be ineffective and home benefits are low.

The causes for policy failure may be twofold, which is reflected in governments' motivations for considering integration. First, the sheer number of irregular immigrants overburdens border patrol agencies and the administrative apparatus. Borders are permeable, and the geographical position of a country might make it prone to migratory movements. Administrative capacities are limited and although administrations may even have a list of illegal persons in a database, resource constraints in processing deportations may constrain the state's ability to enforce migration policies. In such cases, member states might expect economies of scale resulting from European-wide measures and pursue integration. Pooling resources for addressing irregular immigration offers a level of effectiveness that cannot be achieved by unilateral means alone. Joint border patrols can increase the scope of territorial coverage and make enforcement more effective, joint expulsion measures in the form of sharing airplanes and negotiating transit arrangements at respective airports can lower the cost of conducting removals and, finally, states can pool their material power resources and bargaining leverage in order to negotiate common readmission agreements with third countries more effectively. Reluctant third states can be put under increased pressure to accept readmission of migrants.

Second, states might have the necessary administrative capacities to expel irregular immigrants but are hindered from doing so by national courts. Based on arguments of humanitarian law, courts may suspend wholesale deportations of irregular immigrants or specify restrictive criteria that constrains an administration's room for maneuver in conducting removals. Guiraudon refers to several European states in which governments were restricted from enforcing restrictive migration policies due to the "juridicization of migration policy through the jurisprudence of higher courts such as administrative and constitutional courts"

(Guiraudon, 2000: 259). Policy failure and low home benefits, so governments' inability to pursue self-interested immigration policy, do not result from a lack of resources or administrative capacities but rather from a lack of governmental discretion. Less for functional than political reasons, governments might demand integration that allows states to adopt more restrictive policies on a higher level of authority that allows them to circumvent domestic veto points (Guiraudon, 2000).

In sum, states' demand for integration of irregular immigration policy depends on the effectiveness of unilateral policy instruments with regard to border controls and expulsion. The more unilateral measures are perceived by governments and their publics as policy failures, the more governments will consider integration desirable. Taken by itself, the phenomenon of irregular immigration indicates governance failure. Policy failure becomes visible if governments introduce regularization programs, which signify a failure of the deterrence strategy that most states employ via border controls and deportation measures. Policy failure and hence low home benefits become more likely the more governments experience an influx of migrants, lack administrative resources or see enforcement constrained by domestic courts. As demonstrated in the next section, home benefits vary across policies and in this case make irregular immigration policy a likely candidate for integration. Regular immigration policy is less prone to fail given governments' higher ability and discretion in controlling the entry and residence of regular migrants. Moreover, whereas policy failure of irregular migration policy mobilizes broad based criticism by the public, failing labor migration policies, for example, disadvantage only certain societal actors. The demand for integration therefore varies and hence the likelihood for vertical differentiation differs.

4.4.1.2 Home benefits and costs of regular immigration

States enjoy far more control capabilities and policy-making discretion on regular migration matters. Regular migrants have to fulfil legal standards set by the destination state autonomously before they can even enter the country. In order to be considered a regular migrant, foreigners must apply for residence permits. States are free to determine the possibility and conditions for foreigners to qualify as legal residents,

be it family members that want to follow previously migrated loved ones or workers seeking employment abroad. Strictly speaking, states can simply deprive regular migrants of access based on self-interested needs calculations by reforming their foreigner or alien laws (Roos, 2013: 34–35). Isolated from political considerations, governments are in full control of both total regular migrant stocks and flows, which presents a significant difference from irregular immigration matters. Policy failure and increased home benefits are rather unlikely without taking into consideration political factors.

The domestic veto points, however, vary with regard to regular migration categories. In matters of family reunification, governments have faced opposition from courts. The implementation of restrictive family migration policies was curtailed by courts that protected migrants' rights to family life (Hollifield, 1992). However, despite this, there is no positive right to family reunification (Lahav, 1997), and although states are constrained in implementing these policies they nevertheless enjoy discretion in imposing restrictive conditions for family reunification such as long waiting periods, age requirements and integration guides (Boswell and Geddes, 2011: 105). Governments face less judicial opposition with regard to labor migration matters. States are free to define and select categories of migrants for admission based on utilitarian considerations and market needs. Compared to asylum and family migration, labor migration policy allows states the most discretion in pursuing self-interested policies without judicial constraints (Fellmer, 2013: 93–94). Sub-national governments, however, are critical domestic veto players. These local authorities administer social welfare provisions, education, housing and potential integrative conflicts and therefore demand "increased autonomy in shaping labor migration policies" (Boswell and Geddes, 2011: 100). Both considerable governmental discretion in selecting labor migrants and the demand by sub-national governments to be involved in policy-making make regular migration policy an unlikely candidate for European integration.

In sum, the likelihood that governments will demand integration regarding regular migration matters is lower compared to integration regarding irregular migration policy. Both incentives for integration, i.e. venue-shopping at the European level for more restrictive policies

or the advantage of economies of scale, are less salient for questions of family reunification and labor migration. A positive right to family migration does not exist and cannot be asserted by the courts, leaving it mostly to governments to decide on admission. Whereas irregular migrants can refer to an ever denser web of human rights law and refugee protection provisions, families lack a comparable lever to contest restrictive immigration laws. Governments' incentive to venue-shop the European decision-making level might be present vis-à-vis the national judiciary, but it is certainly less pronounced in family migration matters than in matters of irregular migration and asylum. Moreover, governments are less likely to expect advantages from economies of scale through integrating regular migration policies. Family migration is, by definition, bound to one destination country, namely, the one in which the migrated family member already resides. A European function in this regard, i.e. the possibility that cooperation will result in more effective control or regulation, is non-existent (Fellmer, 2013: 121). Integrating labor migration might generate economies of scale. Through integration and common rules on cross-border mobility, states may expand their individual labor markets. Foreign workers face comparatively lower chances of becoming unemployed and have more job offers at their disposal. States can therefore more successfully attract labor migrants to their countries. This incentive is, however, less powerful than those for irregular migration matters, and here states are also confronted with the opposition of sub-national governments who, as policy enforcement actors, are skeptical of sharing autonomy with yet another decision-making entity.

Demand hypothesis 1: Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in irregular migration matters.

4.4.2 Interdependence

Interdependence is a key driver of European integration. Several studies have found interdependence to be a critical factor in explaining the integration of AFSJ policies and migration policies in particular (Turn-

bull and Sandholtz, 2001; Niemann, 2008). The standard account is that, following the decision to lift internal border control between Schengen states and later between EU member states (with notable exceptions), governments were triggered to also consider the integration of migration policies. Losing the ability to control borders unilaterally, states agreed to jointly devise rules on how to control the common external border and to coordinate migration policies in order to keep track of who is entering the EU. This narrative of endogenous pressures for integrating migration policies is often supplemented by accounts focused on exogenous interdependence effects (Geddes, 2008: 36–37). This line of reasoning refers to changes in the external environment to explain why governments chose to integrate migration policies. Accordingly, the fall of the Iron Curtain and the secession wars in the former Yugoslavia prompted migratory movements from Europe's east to west. Facing increasing transnational movements towards Schengen and EU territory, governments were motivated to consider common rules for border controls, asylum standards and immigration. Drawing on this literature, I do not aim to test these accounts competitively but rather to theorize about why irregular immigration policy is a likelier candidate for integration in light of endogenous and exogenous interdependence effects.

4.4.2.1 Interdependence and irregular immigration

Interdependence in irregular migration matters is closely connected to the phenomenon of secondary movements. Restrictive immigration policies and border control measures by state A to prevent irregular immigration are undermined if state B grants easier access to migrants legally or illegally and allows further migration towards state A (Fellmer, 2013: 116). State B's more relaxed migration regime produces negative externalities and costs for state A in cases of onward migration. Facing secondary movements and migratory pressures that cannot be addressed unilaterally, state A is incentivized to consider integration. Joint decision-making and implementation control allow state A to codify common standards for immigration and hence to force state B to enact stricter border controls and more restrictive immigration policies. Integration allows states who object to secondary movements to resolve differences in migration control and, depending on the institutional

arrangement, compel states into compliance. Interdependence effects, and hence the desire for integration, become stronger the closer these states are to each other geographically, as this reflects higher mobility between these countries.

4.4.2.2 Interdependence and regular immigration

Interdependence effects in regular migration matters are considerably lower than in irregular migration matters. Secondary movements here necessarily imply long time horizons and uncertainty for regular migrants, thereby reducing the incentive for onward regular migration. Fellmer (2013: 124–127) hereby offers an illustrative example. Regular migrants might choose state A as a destination. Although not eligible for immigration according to state A's laws at the outset, migrants might decide to apply for regular migration status in state B first and, if granted, to use this new immigration status to enter state A under more favorable conditions. In this case, state B's comparatively generous immigration policy creates negative externalities for state A and the latter might consider integration and joint decision-making as a means to control state B's approach to migration.

However, secondary movements require long time horizons and resilience from regular migrants. Ultimately, aiming to immigrate to state A, regular migrants must first wait for legal resident status in state B. Applications for work permits and legal residence status for families have to be filed twice in two different states with different bureaucratic procedures and hurdles. Beyond this time-consuming process, regular migrants have no guarantee that their efforts in state B will result in their desired outcome in state A. As previously mentioned, governments enjoy wide discretion and flexibility in formulating entry and stay conditions for family and labor migrants alike. There is no guarantee that regular migrants will see the same entry requirements in state A that existed before they began to move towards state B. Depending on migrants' determination to live in state A, irregular migration or applying for asylum might even be a more promising strategy to at least enter the country of destination.

In sum, although we can expect interdependence effects for both cases, negative externalities and hence the demand for integration is

likely to be higher for irregular immigration policy. Diverse immigration policies in terms of restrictiveness across states can invite secondary movements and produce negative externalities for states. Integration offers the possibility of alleviating these costs. The demand for integration is supposed to be higher for irregular immigration policies since regular onward migration is unlikely to be the preferred option for migrants. In the latter case, immigration to the destination state is tedious and without certainty.

Demand hypothesis 2: Interdependence and hence demand for integration are likely to vary as negative externalities in terms of secondary movements should be higher in irregular matters.

4.4.3 Supranational activism

As described in Chapter 3, supranational activism is expected to be greatest when supranational actors enjoy an information advantage regarding policies vis-à-vis governments and when they can exploit jurisdictional ambiguity in treaties to reinterpret authority grants in their favor. In line with this reasoning, *de facto* integration predominantly takes place in between treaty conferences. Supranational actors use this interstitial phase to contest the distribution of competences (Farrell and Héritier, 2007b). Treaty rules are ambiguous, allowing supranational actors to negotiate with member states on both the substance of legislative decisions as well as the choice of particular legislative procedure. The more successful supranational actors are in winning interstitial bargains (especially if confirmed by ECJ judgements), the more likely governments become to delegate further competences to these supranational actors. Moreover, supranational actors may increase their competences by using their formal and informal agenda-setting powers (Pollack, 1997). Governments are also more willing to delegate competences to supranational actors the more they alleviate information shortages with regard to certain policies. Vertical differentiation is likely when jurisdictional ambiguity and information asymmetries between governments and supranational actors vary across policies.

4.4.3.1 Supranational activism in irregular immigration matters

According to Pollack “the influence of a supranational agent should be greatest where information is imperfect, uncertainty about future developments is high, and/or asymmetrical distribution of information between the agent and the member states favors the former” (Pollack, 1997: 126). On all of these points, irregular migration matters appear to be a plausible candidate for supranational activism and influence.

By definition, irregular immigration matters contain an element of covertness and hence imperfect information. Irregular immigrants enter or stay in host countries clandestinely, facing expulsion if detected. Consequently, both administrations and scholars experience difficulties in presenting reliable data on the stock and flow of irregular migrants (Kraler and Reichel, 2011). Adding to this, irregular migratory movements are often the result of deteriorating circumstances abroad. Besides the element of clandestine movements, forecasting irregular migration flows is complicated because predicting political and socio-economic grievances that, at a certain level, will push irregular immigrants to leave their home country, is based on speculation and probability calculation.

Indicators that have been used include apprehensions at the border or the number of individuals who applied for amnesty in the context of regularization programs (Kraler and Reichel, 2011; Baldwin-Edwards and Kraler, 2009). These data sources remain imperfect. First, statistics based on detentions at the border cannot capture either migrants who succeeded in entering the country despite the presence of border guards or migrants who entered the country legally but overstayed their visas or residence permits. Second, although regularization programs are offered to irregular migrants within a country, this does not necessarily imply that all irregular migrants are eligible for these programs or that all eligible candidates accept this offer. Some states and migration scholars extrapolate the stock of irregular migrants from the size of the officially recorded foreign population and legal inflows into a country. As measurement practices are by nature imperfect and likely to vary across countries, supranational actors can provide added value by informing states about each other’s statistics and policies as well as by creating

a more detailed picture of irregular cross-border flows towards and within Europe (Boswell, 2008). Integration may, therefore, lower the transaction costs for states in identifying best practices regarding policy-making and provide European states with an early-warning mechanism that alerts them to the development of irregular migration flows.

Supranational actors may not only exploit information scarcity in order to gain influence and push for increased power delegation, they may also exploit the ambiguity of treaty-based rules for their own purposes. Yet, it is difficult to make an argument *a priori* for why this should be the case for irregular immigration policy. In fact, the opposite appears true, and irregular immigration is seen by many societies as a security issue. Besides treaty provisions that directly address policy making on irregular immigration issues, concrete legislative measures could be based on treaty articles that relate to security policies. It is unlikely, however, that the latter treaty provisions would endow supranational actors with more leverage in the legislative process. Hence, procedural politics and interstitial integration in this manner is assumed to be rather unlikely.

4.4.3.2 Supranational activism in regular immigration matters

Compared to irregular immigration, statistics and information on regular immigration flows are considered to be more reliable. First, foreign workers or family members must formally apply for residence and work permits. Besides residence applications and official population registers, public authorities may draw on many different sources to measure the stock and flow of regular migrants more accurately, namely formal requests made by regular migrants in the health, education and transportation sectors, for example (Global Migration Group, 2017). There are not only established data sources and methods for counting regular immigrants in each country, but economic indicators such as GDP per capita, unemployment rates and labor shortages are believed to be good indicators for explaining immigration patterns and designing well-informed policies (Boswell et al., 2004). Lastly, with regard to labor immigration, governments already have agents in the domestic arena interested in informing authorities about labor shortages. Employers

lose productivity and hence profits if they cannot maintain production levels due to labor shortages. Besides quantitative statistics, legislators and administrations can rely on sector-specific demands and information to design labor migration policies. Compared to irregular immigration policy, supranational actors therefore have few chances to exploit information scarcity and thereby to set agendas in their favor.

However, procedural politics might be an avenue for supranational actors to push for integration. Regular immigration policy might be linked to provisions on the free movement of workers and aspects of social policy, two policy areas that have been part of the EU *acquis* and supranational decision-making for a longer period. Basing regular immigration measures on procedural rules related to these policies would allow supranational actors more influence in shaping regular migration policies and enable competence creep.

In sum, supranational activism might lead to integrative steps in both policy areas. Information scarcity on irregular immigration advantages supranational actors and may demonstrate their added value and hence the benefits of further delegation in the form of a European perspective. The role of information transmitter is already occupied by domestic actors in the realm of regular immigration policy, and employers especially have an incentive to inform governments about labor shortages and demand policy adaptation. In contrast, supranational actors have a better chance at exploiting jurisdictional ambiguity on regular immigration matters. However, while supranational actors can make a straightforward, functional argument for delegation on irregular immigration matters, they need to contest procedures on regular immigration matters in order to push for more integration in between IGCs.

Demand hypothesis 3: Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward on irregular migration matters.

4.4.4 Domestic opposition

Domestic opposition may intervene in the supply of integration at IGCs. National veto players involved in treaty ratification, such as second

parliamentary chambers or a politicized public, may constrain governments when entering into integrative agreements (Hug and König, 2002; Slapin, 2011; Schünemann, 2014). I expect domestic opposition to be higher to integrating regular compared irregular immigration policy.

4.4.4.1 Domestic opposition to integrating irregular immigration policy

Irregular immigration critically challenges state representatives. Securing national borders and distributing public goods to recognized members of society only are key demands of the citizenry. Preventing irregular entry and stay in society is a critical function of the state as such. Consequently, all state representatives have an incentive to be firm on irregular immigration in order to signal to citizens that the state is capable of maintaining order (Morales et al., 2015). This implies that any representative of the state, independent of whether the person represents the federal or state government, is willing to control immigration and refuse irregular entry into state territory. The suggestion here is that every state level of authority has the same preference, namely, to prevent irregular immigration, and that it is unlikely that we will observe varying preferences regarding irregular entry.

Moreover, I expect that all domestic levels of authority, as well as the citizenry, will accept further integration of irregular immigration as long as integration promises more control. Questions of irregular immigration are often referred to as security issues as the state cannot inspect identities and criminal records when persons enter territory irregularly (Huysmans, 2000). Without prior identity checks before entry, migrants are often considered potential security threats, as the intentions and “suitability” of irregular migrants is unknown. This rationale can, of course, be criticized from many normative angles. Empirically speaking, we observe that governments have indeed successfully securitized irregular immigration and therefore presented irregular migrants as security threats to society as part of calls for increased executive power (Huysmans, 2000). Compared to regular migration matters, integration of irregular immigration policy is more likely given that, framed as a security issue, the government enjoys more room of maneuver and may seek integration without strong domestic opposition.

4.4.4.2 Domestic opposition to regular immigration

I expect domestic opposition to integration to be higher for regular migration matters for two reasons. First, preferences at the federal and state level may well diverge on regular migration issues. Second, regular migration is considered less of a security threat and this constrains the executive from acting with full discretion.

As federal states include states that are more or less economically competitive, it is likely that states will have different opinions about whether regular migration, and labor migration in particular, is desirable (Cornelius and Rosenblum, 2005; Freeman, 2006). Compared to irregular immigration matters, we see no preference convergence between federal and state governments in reducing regular migration. Instead, we observe that federal and state governments, especially if different political parties are involved, have different opinions about whether regular migration should be reduced or increased. Moreover, regular migration matters are not a security issue and do not lend themselves to securitization. Governments have less freedom to integrate regular migration matters because regular migration is often related to economic needs and not security politics. I therefore expect it to be likelier that domestic opposition will intervene in negotiations on integrating regular migration compared to those focusing on irregular migration.

Supply hypothesis 1: Domestic opposition and hence supply of integration are likely to vary as governments face more discretion in pursuing irregular migration matters than regular migration matters.

4.4.5 Preference intensities

In addition to domestic support for integration, integration-friendly governments require the approval of other EU member states regarding integrative outcomes at IGCs. I expect governmental resistance to integrating regular migration policies to be higher than resistance to integrating irregular immigration policies.

Based on the previous sections, which lead us to expect a higher demand for integrating irregular immigration policy compared to regular immigration policies, I expect preference intensities in favor

of integrating irregular migration policies to be higher than those for integrating regular immigration policies. Member states' capabilities for controlling irregular immigration, and hence (unwanted) irregular transnational mobility, should be lower compared to regular migration. Preference for halting irregular immigration while lacking capabilities to fully control irregular migration should therefore lead to high preference intensities for cooperating on irregular immigration. Regular immigration, however, can only take place if the government gives its consent. Thus, the preference for controlling regular immigration can more easily be met by the government's capability of controlling regular immigration. The necessity of cooperating in order to manage transnational flows of people should be lower and hence the preference intensity to integrate regular immigration policy should be less strong.

Supply hypothesis 2: Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on irregular migration matters.

4.4.6 Supranational leadership

Supranational actors have an interest in promoting integration independent of the respective policy area. Yet, their ability to do this varies across policies as information asymmetries between supranational actors and governments differ. Supranational actors may only manipulate intergovernmental negotiations if they have more access to information and can present this information purposefully (Moravcsik, 1999; Pollack, 1997).

When supranational actors work on policies and are in contact with experts on certain policies, they may have an information advantage that they can exploit during IGCs. I expect supranational actors' knowledge base to be stronger on irregular migration matters. Schengen cooperation started already in 1985 and focused mostly on asylum and irregular migration matters. Supranational actors followed this cooperation closely and should therefore have gained more knowledge on member states' irregular migration policies and goals than for regular migration matters. The Commission in particular, as it was present in meetings of

Schengen Executive Committee, should have an information advantage vis-à-vis at least some states. since some states joined Schengen and meetings of the Executive Committee only later. At least these states should be potential candidates whose agenda could be influenced by supranational actors.

Supply hypothesis 3: Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on cooperation irregular migration matters due to Schengen process.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses on varying demand for integration of migration policies</i>
Domestic	Home benefits	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in irregular migration matters.
Transnational	Interdependence	Interdependence and hence demand for integration are likely to vary as negative externalities in terms of secondary movements should be higher in irregular matters.
Supranational/ European	Supranational activism	Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward on irregular migration matters.
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses on varying supply of integration for migration policies</i>
Domestic	Domestic opposition	Domestic opposition and hence supply of integration are likely to vary as governments face more discretion in pursuing irregular migration matters than regular migration matters.
Transnational	Preference intensities	Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on irregular migration matters.
Supranational/ European	Supranational activism	Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on cooperation irregular migration matters due to Schengen process.

Table 5: Summary of theoretical expectations on migration case

4.5 The demand for integration at Amsterdam

The Treaty of Maastricht defined irregular and regular immigration as policies of “common interest” for EU member states. This wording indicates a European dimension to both immigration matters, yet implies that member states were still capable of addressing illegal border crossings, deportation measures and labor migration autonomously. Sinking home benefits of unilateral deportation measures and border controls during the 1990s, however, heightened interdependence following the abolishment of border controls turned member states’ common interest into a common effort to curb irregular immigration in the EU. The demand for integration of regular migration policies was lower as member states could deal with regular migration matters unilaterally and felt less interdependence effects despite open internal borders. In order to make it easier for the reader to follow the analysis I will include figures in the following empirical sections that mark the value of the dependent variable and the respective period of time.

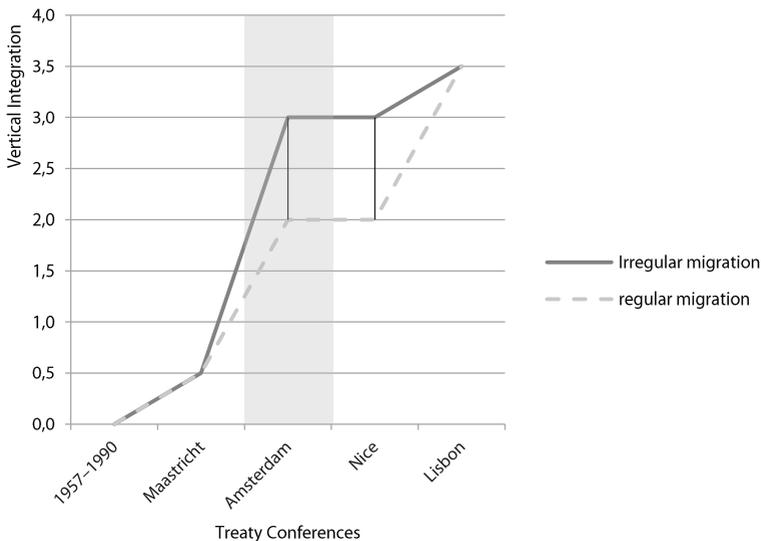


Figure 9: Vertical differentiation with the Amsterdam IGC

4.5.1 Sinking home benefits of unilateral policies on irregular immigration

The Treaty of Maastricht was negotiated against the backdrop of the fall of the Iron Curtain. The effects of this new European order on migration patterns, however, were only observed after the Treaty had already been signed and ratified. The fall of the Iron Curtain challenged national immigration regimes of EU member states in two ways. First, the purpose of the Iron Curtain was to prevent people from the Soviet-controlled Eastern Bloc from crossing the border and fleeing to Western European states (Bade, 2003: 282). Eager to avoid losing face and its workforce, the Soviet Union and its satellite states in Central and Eastern Europe deterred their citizens from emigrating through strict border controls and an emigration regime based on restrictive conditions. With the collapse of Soviet rule in Eastern Europe and the fall of the Iron Curtain, East-West migration accelerated considerably (Fassmann and Münz, 1994). Second, migratory pressure on EU member states intensified further with the outbreak of the secession wars in the former Yugoslavia, which resulted in refugee flows. Member states' irregular immigration regimes had to adapt to these circumstances. The sheer number of people moving towards EU member states required strengthened migration policies aimed at controlling the inflow and regulating the status of migrants, and the disintegration of the Soviet bloc dismantled previous border regimes and called for new arrangements to control new borders and ensure the exchange of peoples. These new arrangements had to be negotiated with new states in Central and Eastern Europe, who were in a transformation process. Critical push factors for migration were present in these countries, such as high unemployment rates, which triggered East-West migration (Pytlíkova, 2006). European Union member states needed to reach an agreement with these countries on the readmission of CEE citizens and third country nationals whose stay in EU member states was determined to be illegal and hence subject to removal orders.

4.5.1.1 The rising “deportation gap” and regularizations

The mass influx of migrants at the beginning of the 1990s challenged national immigration systems of EU member states and revealed a double implementation gap and hence the policy failure of irregular immigration policies (Czaika and Haas, 2013). All EU member states considered irregular immigration unacceptable and promised to fight illegal immigration. Increased migration towards Europe from Eastern Europe and Northern Africa in the 1990s, however, critically challenged member states’ ability to both refuse entry at their borders and to expel irregular immigrants or asylum seekers whose asylum applications were rejected.

By adopting more restrictive asylum laws, EU member states were partly able to alleviate the number of successful asylum applications, and hence the number of people allowed to remain in their countries. However, increased restrictiveness on paper was difficult to implement in practice. Expulsion orders by public administrations do not necessarily result in actual deportations. Rejected asylum seekers and irregular immigrants may refuse to cooperate with national administrations and delay or even impede deportations by preventing administrations from identifying their nationality (e.g. by destroying one’s passport or giving incorrect personal data) or by simply disappearing into underground networks. Willing but unable to effectively implement a tough stance on irregular immigration through voluntary or forced deportations, EU member states attempted to alleviate policy failure by regularizing the status of irregular immigrants (Baldwin-Edwards and Kraler, 2009; Apap et al., 2000).

Regularization programs can take different forms (e.g. one-off or permanent programs) and involve different motivations (e.g. for humanitarian reasons or to normalize the status of illegal foreign workers). All EU member states introduced regularization measures in the 1990s, signaling a deportation gap and the failure to implement irregular immigration policies through expulsion orders (Baldwin-Edwards and Kraler, 2009). The deportation gap and the extent to which immigration systems were overburdened varied across EU member states. Northern EU member states introduced regularization programs for humanitarian reasons, complementary to their asylum systems. Even ideological

opponents to regularization, such as Austria and Germany, awarded rejected asylum seekers with “tolerated status” under certain conditions. Southern EU member states clearly dominate the list and introduced several regularization measures in the late 1990s, particularly in order to normalize the residence status of illegal workers and satisfy labor demand, especially in low-skilled labor sectors (Baldwin-Edwards and Kraler, 2009: 30–36).

4.5.1.2 The rising “deportation gap” and readmission agreements

Expulsion orders remained ineffectual not only because irregular migrants themselves prevented deportation, but also because countries of origin refused to cooperate with European host states (Roig and Huddleston, 2007). Countries of origin in the EU’s neighborhood have an interest in their citizens emigrating to the EU in order to take pressure off their labor markets and gain access to foreign capital and currencies via remittances. Although states are generally obliged to readmit their nationals (Hailbronner, 1997), countries of origin employed strategies to delay or reject readmission applications by EU member states. Readmission applications could even be outright rejected or delayed, impeding EU member states from implementing expulsion orders, regardless of the fact that removal procedures had been finalized in the domestic context. In order to alleviate implementation failure in expelling irregular immigrants, EU member states began to negotiate bilateral readmission agreements with various countries of origin (Roig and Huddleston, 2007; Cassarino, 2010b).

Readmission agreements legally regulate forced returns. From the perspective of host states, readmission agreements bring the advantage of speedier removal procedures by clarifying competent authorities, setting time limits by which readmission requests must be answered and clarifying what type of documents must be in the possession of the person expelled. Countries of origin use readmission demands as a bargaining tool to secure benefits from the host country (Trauner and Kruse, 2008). The wording and substance of readmission agreements “vary with the type of flows affecting their national territories, geographical proximity, the nature and intensity of their interaction (in terms of

power relations) and, finally, with the third country's responsiveness to the need for enhanced cooperation on readmission" (Cassarino, 2010a: 12). In consequence, while readmission agreements differ, they all essentially require the consent of origin countries (Giuffr , 2015).

Until the year 2000, EU member states negotiated more than 100 bilateral readmission agreements with third countries (Cassarino, 2018). At the beginning of cooperation on immigration matters within the EU, only Interior Ministers and the Council recommended concluding bilateral readmission agreements with countries of origin (Belgian Presidency, 1987; Council Press Release 10550/93). However, EU member states soon learned that, by themselves, they were often unable to persuade third countries to cooperate and identified a joint EU position as more favorable for incentivizing cooperation. Hence, member states in the Council acknowledged the value of member states combining their efforts to negotiate readmission agreements with countries of origin early on. The Council adopted a standard readmission clause text to be included in Community agreements (Council doc. 12509/95) with third countries and in mixed agreements (Council doc. 4272/96). This allowed EU member states to exploit their extensive Community resources in terms of trade affairs and development policies as a tool to aid readmission affairs (Coleman, 2009: 55).

European Union member states learned that working together would increase the bargaining leverage of each state vis- -vis countries of origin. Pooling resources and bargaining power at the EU level promised each member state a stricter and speedier formalization of readmission arrangements with neighboring states. In this spirit, the Council's October 1996 resolution, which outlined priorities for cooperation in the field of justice and home affairs, called on member states to improve "cooperation with countries of origin" and "cooperation regarding the expulsion of illegal immigrants" given "problems of readmission" (Council, 1996a).

The demand for integration due to sinking home benefits of unilateral expulsion and readmission policies became most obvious directly after the IGC that led to the Amsterdam Treaty. Bilateral readmission agreements were negotiated with countries of origin who could not be persuaded into agreement through member states' own resources.

However, member states in the Council agreed to find common solutions “to the phenomenon whereby increasing numbers of countries of origin refuse to take back their own nationals” (Council, 1998). In order to convince these “problem States” as well as powerful states such as China, India, Russia and Turkey (Council, 1999b) to support readmission agreements, the preferred strategy was that “the European Union as an entity manages to use its international political and economic muscle to persuade such States to adopt such an agreement” (Council, 1998).

Sinking home benefits of unilateral policy-making on irregular migration came in two forms. On the one hand, EU member states were unable to implement strict expulsion policies despite their rhetorical commitment to fighting illegal immigration. Instead, nearly all member states introduced regularization measures in different formats. On the other hand, member states faced increasing problems in persuading countries of origin to accept readmission agreements that allowed a speedier removal procedure of irregular migrants. For both issues, member states identified the value added in using the EU venue, which resulted in policy outcomes and the provision of utilities that were well beyond what could be achieved unilaterally. Common standards and common actions on expulsion measures promised to make deportations more efficient, and transit arrangements eased the removal process while joint charter flights made deportation less costly. In addition, facing reluctant countries of origin and powerful counterparts in negotiations of readmission agreements, member states recognized the value of using the political and economic clout of the EU to negotiate collective readmission agreements more effectively. For this, however, the EU needed a mandate and a legal basis for such treaties. In this regard, at the Amsterdam IGC, EU member states showed an increased preference for further integrating irregular migration policy.

4.5.2 Stable home benefits of unilateral, regular immigration policies

As theorized above, member states would have demanded further integration of regular immigration policies if European measures had promised desired policy reform impossible to achieve independently

due to domestic opposition or if European cooperation promised economies of scale in attracting foreign labor. Both incentives were absent in the 1990s and therefore governments did not demand further integration of regular migration policies at the Amsterdam IGC.

Initially, it appears that EU member states indeed had an incentive to venue-shop the EU level to toughen their stance on family reunification in the domestic context. Besides asylum, family reunification was mostly used to enter and stay in EU member states and was assisted by court rulings (Joppke, 1998). Although internal legal instruments curtailed member states' ability to reject family reunification in principle, governments enjoyed wide discretion in regulating this channel of legal immigration by adopting restrictive eligibility criteria (Lahav, 1997). Although Interior Ministers' resolution on family reunification was one of the first instruments to address legal migration matters (EC Ministers, 1993), this resolution was not meant to establish harsher standards at the European level while circumventing domestic veto players. The resolution was not binding and could hardly challenge domestic veto players. Moreover, the resolution did not establish new or stricter standards for family reunification but rather was comprised of provisions that were already part of national systems. The intention here was to record common minimum standards on family reunification that should not be subverted by member states. Otherwise, third country nationals could enter EU territory in one state under relatively generous conditions and move on towards other EU member states. The motivation for this resolution was less to venue shop than to control secondary movements of migrants through increased interdependence of national immigration policies. Home benefits of unilateral policies on family reunification have remained the same and hence governments had less of an incentive to demand further integration.

Similarly, governments did not expect to benefit enough from European cooperation on regular immigration matters to justify sovereignty losses. European cooperation could have added value if it assisted member states in attracting foreign labor and allocating residence and work permits more effectively in line with labor market needs. The 1990s marked a transition process for EU member states, however, that made a genuine EU-wide regular immigration policy an unattractive scenario.

The unpredictable effects of a borderless internal market on national labor markets, high unemployment rates and rising anti-immigrant sentiments in domestic arenas as well as the diversity of labor needs across member states kept governments from embracing a comprehensive European immigration policy (Messina, 2007).

Drawing on Eurobarometer data from the period between 1991 and 1997, Williams finds that, generally, anti-immigrant sentiment was on the rise (Williams, 2006: 63–65). Neither unemployment rates nor the percentage of foreign populations by country account directly for this pattern, but the presence of right-wing parties that mobilized anti-immigrant sentiments (Messina, 2007: 76–88; Williams, 2006). Faced with increasing popular resistance to immigration, EU member states declared with their first resolution on admission of third country nationals for employment purposes that “no Member State is pursuing an active immigration policy” and that admission for work for third country nationals would “of necessity be restrictive” (Council, 1994a). Job vacancies were to be filled “as far as possible by nationals of other Member States or of Member States or of EFTA countries” (Council, 1994a).

Moreover, despite variation across states, EU member states generally experienced high levels of unemployment in the 1990s. Combined with increasing anti-immigrant sentiments, high unemployment discouraged governments from considering an active national, let alone EU-wide regular immigration policy. Instead, governments attempted to reduce immigration and manage the inflow of labor migrants. Southern EU member states did not actively attract foreign labor but regularized the residence and work status of foreign workers who were already residing there illegally (Apap et al., 2000). Northern EU member states negotiated bilateral temporary and seasonal worker agreements with Central and Eastern European countries. With these individual agreements, member states such as Germany could ensure that job vacancies in specific sectors, such as agriculture, were filled while the stay of foreign workers was limited and impermanent.

In sum, European cooperation could have allowed EU member states to extend national labor markets in order to attract foreign labor. Moreover, the EU could have functioned as a venue for the adoption of policy reforms on regular immigration policies that would have been

with met opposition by domestic veto players. Both potential benefits of further integrating regular immigration policies in the EU were neglected by member states. Member states had scarcely any need for recruiting third country nationals as workers given high unemployment rates in most countries. In addition, most EU member states experienced popular resistance to immigration and governments adhered to a zero-immigration doctrine. The demand for integration before the IGC of Amsterdam was therefore low.

4.5.3 The borderless Schengen area and high interdependence of irregular immigration policies

As outlined in the previous section on declining home benefits of unilateral irregular immigration policies, EU member states faced increasing migratory pressure in the early 1990s. The fall of the Iron Curtain and the secession wars in former Yugoslavia led to an influx of migrants moving towards EU member states (Fassmann and Münz, 1994). National irregular immigration policies on expulsion were ineffective and governments increasingly recognized the benefits of European cooperation. Joint expulsion measures and combined bargaining leverage for negotiating readmission agreements promised the benefits of economies of scale and more effective outcomes than what could be achieved unilaterally. Beyond sinking home benefits, however, migratory pressure exogenously increased interdependence between governments' unilateral irregular immigration policies.

Unilateral policy-making towards ever stricter national migration regimes resulted in a race to the bottom between member states. Once a member state adopted harsher rules on asylum procedures, and hence deterred asylum seekers from immigration, other member states (especially those with arguably more generous asylum rules) experienced negative externalities in the form of more asylum applications and a potential increase in pressure to enforce expulsion measures or increased irregular immigration to avoid expulsion a priori (Geddes, 2003: 133–134). Between 1985 and 1994, refugees from the same country of origin often changed their preferred destination country following pol-

icy reforms, signaling asylum-shopping behavior that implied adaption costs for new destination countries (Böcker and Havinga, 1998). Migratory pressures triggered unilateral policy reforms that produced negative externalities for neighboring states, with EU member states realizing that managing migration flows and irregular immigration unilaterally necessarily impacted immigration regimes in other states (Baldwin-Edwards and Schain, 1994: 11). These exogenous pressures were, however, exacerbated by endogenous dynamics predominantly pitting northern EU member states against southern members of the Community.

The north-south divide on immigration was not only the result of northern member states having already experienced decades of immigration compared to southern member states, which had only recently developed from emigration countries to destination states. Europe was also divided into different sub-regional immigration regimes whereby southern EU member states were forced into the role of petitioners and addresses of northern demands for more restrictive irregular immigration policies.

4.5.3.1 The north-south divide on irregular immigration: High interdependence and common demand for integration, for different reasons

The Common Travel Area between the United Kingdom and Ireland as well as the Nordic Passport Union between Denmark, Finland, Norway and Sweden have existed for several decades as exclusive and complacent arrangements that allow citizens to reciprocally travel and reside in neighboring states. The Schengen Agreement between Germany, France and the Benelux states was quite different from these self-serving initiatives in both purpose and strategy. The Schengen initiatives were formed outside of the EU's treaty framework because of the United Kingdom's opposition to the abolishment of internal border controls (Interview Member State Representative #3). However, as the Schengen states made clear from the beginning, measures should be compatible with EU initiatives and the Schengen *acquis* should ultimately be incorporated into the EU (Gehring, 1998). In contrast to the Common Travel Area and the Nordic Passport Union, Schengen was conceived of as an expansive project that invited all EU member states to participate.

As the Schengen agreement was established between Germany, France and the Benelux states, it excluded southern EU member states. Other EU member states were disinterested (United Kingdom) or politically hindered from joining due to their membership in sub-regional free movement areas (Scandinavian countries and Ireland). Since the prospects of a borderless regime in the EU were dim due to the United Kingdom's continuing resistance, southern member states welcomed the Schengen process early on and signaled interest in becoming members. The Schengen states held converging views on immigration: a zero-immigration policy based on deterring immigration through restrictive admission criteria for asylum seekers and regular migrants alike and an emphasis on resolutely expelling irregular immigrants. The immigration policies of southern EU member states did not fit this pattern, as they had periodic regularizations granting "amnesties" to irregular migrants and experienced rising push factors for emigration (increased labor supply, poverty, etc.) in neighboring countries (Di Pascale, 2002; Gortázar, 2002; Skordas, 2002). In addition, these countries have sea borders that are difficult to patrol and thus vulnerable to clandestine immigration.

These factors neither increased nor decreased substantially in the 1990s before the Amsterdam IGC. For northern states, interdependence increased with the admission of southern EU member states into the Schengen area. All southern EU member states officially applied for Schengen membership between 1990 and 1992. All of them accepted and implemented the conditions that were imposed on them by the founding Schengen members and the *Schengen Convention* of 1990. These conditions included strengthened controls at the common external border (Chapter 2 of the Schengen Convention) and a commitment to expelling third country nationals who lacked valid residence permits (Article 23 of the Schengen Convention).

Although southern member states formally committed to these objectives by accepting the Schengen acquis and introducing national legislation, northern member states and the Schengen regime lacked any third party or agent that would ensure the implementation of these commitments. Lacking any insurance for sound implementation, northern EU states and the Schengen states in particular feared secondary

movements towards their countries due to relaxed border controls and expulsion regimes in Europe's south (Interview Secretariat of European Commission #2). Following the southern enlargement of the Schengen area, irregular immigrants could enter the common area in the south and move towards northern states under privileged conditions.

Irregular east-west migration flows were to be reduced and managed by the instruments and conditions set for Central and Eastern European states in preparing for the EU's Eastern enlargement (Lavenex, 2001). All association agreements between the EU and CEE states entailed clauses that committed these enlargement candidates to the EU's immigration and border control standards. The EU member states could rationally expect CEE states to implement these commitments given the desired prospect of becoming members of the EU and relying on the European Commission to monitor and demand implementation (Schimmelfennig and Sedelmeier, 2004). This enforcement and incentive mechanism, however, was not in place in the south where the EU rejected membership applications by Northern African countries. Hence, migratory pressure was expected to continue to originate from southern regions, and northern Schengen and EU members alike had to rely on southern Schengen states to secure the external border and deter irregular immigration through strict expulsion measures without any third-party monitoring or enforcement. These issues became particularly urgent shortly before the Amsterdam IGC.

On 22 December 1994, the Schengen Executive Committee decided to implement the Schengen Convention and lift internal border controls by 26 March 1995. The lifting of border controls included Spain and Portugal, while implementation in Italy and Greece was postponed due to difficulties in operating the Schengen Information System. Interdependence and negative externalities due to lenient border controls and immigration regimes in southern Schengen states therefore increased immediately before the IGC began. Facing high uncertainty regarding to what degree southern member states were able and willing to implement Schengen standards for border controls and fighting irregular immigration, northern Schengen states had a two-pronged preference: to incorporate Schengen into the EU's treaty framework and hence open the possibility of using the EU's decision-making and implementation

potentials and actors, and to integrate irregular immigration policies beyond the intergovernmental Maastricht set-up and delegate monitoring and enforcement powers to the Commission and the Court of Justice (Interview Member State Representative #1).

Southern member states shared a preference for both the incorporation of the Schengen acquis into the EU's treaty framework and the further integration of irregular immigration policies. However, these member states had different motivations. Having been excluded from the Schengen area at the beginning, southern newcomers had to accept standards and obligations regarding border control and expulsion measures set by northern Schengen states. The Schengen arrangements resulted in costs for southern states, who were obliged to patrol the external Schengen border on behalf of the entire community and realign immigration policies that often tolerated irregular work and stay with northern policies that were based on deterrence and strict expulsion measures (Baldwin-Edwards, 1997). The incorporation of Schengen and the further integration of irregular immigration policies with the Treaty of Amsterdam promised southern member states more influence over how increased interdependence and the burden of controlling external borders would be managed within the Schengen community. Delegating agenda-setting to the European Commission and investing the European Parliament with co-decision powers would introduce agents in the decision-making process who were mandated to take a European perspective when considering legislation. The previous dominance of northern states' positions and interests in the Schengen area, as well as in the EU at large, could hence be balanced by the increased influence of supranational agents who would also consider the position of southern states. Moreover, majority voting in the Council would allow southern member states to have more say over how migration control was to be designed.

In sum, interdependence and the likely negative externalities of uncoordinated policy-making on irregular immigration rose immediately before the IGC started. Northern member states considered further integration beneficial for gaining better control and influence over how southern member states implemented border control and irregular immigration policies through supranational agents' implementation

powers. Southern member states had the same preference for integration, but were interested in the benefit of further pooling and delegating powers at the EU level, ensuring that EU and Schengen-related measures increasingly also mirrored the positions of Southern Europe. As more and more states joined the Schengen area in the 1990s, interdependence expanded in Europe. However, it is necessary to consider previous developments in European policy-making before the Amsterdam Treaty to explain why, despite increasing interdependence, some member states either opposed further integration (United Kingdom and Denmark) or were indifferent (Sweden and Finland).

4.5.3.2 Divisions on further integrating irregular immigration policy in light of increased interdependence

The Schengen area was born both out of the idea of having a common market without border controls and opposition to this idea. The German Chancellor Helmut Kohl as well as the French President Francois Mitterrand saw economic benefits in a borderless common market as well as a way to escape the impasse on further European integration that occurred after *Eurosclerosis* in the 1970s. Far from sharing these views, the British Prime Minister Margaret Thatcher wrote in her private memoirs on the Fontainebleau summit of 1984:

in the meantime [we] talked about the future of Europe some of the things in our (U.K.) memorandum and others known by the curious title of 'Citizens Europe!' (Thatcher, 1984).

Kohl emphasized the achievements of the Fontainebleau summit and that the mood in the European Council had changed since the disappointing talks and unsuccessful initiatives of previous summits. Nevertheless, he noted that these achievements could only be a beginning for the further development of the EC and political union. For Kohl, this implied the immediate completion of the internal market, enabled by the increasing use of majority voting in the Council. Connected to this, Kohl presented one of his priorities for further EC development:

which I would like to call the 'Europe of the citizens', which I think is the reduction and reduction of controls on passenger traffic, which will be achieved first between Germany and France. Corresponding agreements with the Benelux countries will soon follow (Kohl, 1984; *author's own translation*).

The Schengen agreement was therefore a response to the United Kingdom's opposition to a borderless Europe and common migration policies in the EU. Article 8a of the Single European Act (SEA) indeed maintained that the internal market "shall comprise an area without internal frontiers [with] the free movement of goods, persons, services and capital". However, a Declaration annexed to the SEA explicitly prohibited member states and EC organizations from considering migration policies in the Community. Given the costs associated with further blockade of the EC, the Schengen initiative therefore seemed to be an attractive avenue for success on both the domestic and European level. The Schengen governments could meet demands by domestic constituencies that profit from unrestricted movement across borders, ranging from industries over service providers to travelers. Citizens critical of open borders could be assured that the loss of physical borders would be compensated by strengthened cooperation on migration issues and crime prevention. With regard to the European level, Schengen states could credibly threaten integration laggards with exclusion (Gehring, 1998). The United Kingdom, for example, had a difficult time renegotiating agricultural issues that were established in the EC before it joined the Community. The establishment of Schengen to a similar extent threatened the United Kingdom with seeing policies enacted that it, lacking institutional access, could not block or shape in terms favorable to itself. Instead, the Schengen states could set agendas on issues such as border control and migration policies with the expectation that the rules adopted among a fraction of states would later be integrated into the EC and therefore become valid for all member states. By determining that Schengen policies would be aligned with EC provisions, from the very beginning these states formulated the objective of bringing Schengen rules into the Community sphere. The transaction costs for installing the Schengen regime were therefore moderate and sover-

eignty costs were kept to a minimum given that domestic audiences welcomed the benefits of open borders and that the harmonization of rules was bound to the requirement of intergovernmental consensus.

As interdependence increased throughout the 1990s following the implementation of the borderless Schengen area and the lifting of internal order controls within the EU, the Schengen states became interested in both incorporating the Schengen acquis into the EU and credibly backing formal commitments to irregular immigration policies with supranational implementation insurances (Interview Member State Representative #1). Moreover, the Schengen EU member states were frustrated with insufficient progress and cumbersome decision-making processes on irregular immigration policies. Although after the Maastricht IGC there was widespread agreement that migration policies in the EU should be geared towards controlling if not limiting access to member states, Council members continued to disagree on whether the free movement of persons already enshrined in the SEA also extended to third country nationals. Whereas the Schengen initiative could gradually increase its membership and therefore support of open borders, the United Kingdom still objected to the idea of lifting border controls entirely (Interview Member State Representative #2). This dispute on basic principles had an immense effect on cooperation on migration-related matters. The unanimity rule gave an advantage to the United Kingdom, which could, by threatening a veto delay, constrain or even block draft proposals that were too ambitious from the British point of view. Moreover, given the legally unclear status of the new policy instruments outlined in the Maastricht Treaty, member states mostly adopted non-binding resolutions and recommendations. Effective harmonization of irregular immigration rules was therefore unlikely given that neither the Commission nor the European Court of Justice could monitor domestic transposition activities. States that were vulnerable to the costs of disparate irregular immigration rules as a result of increased interdependence demanded communitarization.

The United Kingdom opposed communitarization, despite the fact that the country also experienced increased migratory pressure in the 1990s (International Organization for Migration, 2000). On the one hand, integration and the integration of immigration policies in par-

ticular were very unpopular within both leading parties in Britain. On the other hand, the veto possibility in the intergovernmental setting ensured that the United Kingdom would not need to implement immigration policies against its will and was therefore uninterested in considering communitarization. Ireland did not directly oppose integration but stood with the United Kingdom as both states were part of the Common Travel Area (Adler-Nissen, 2014: 10). Denmark, Finland and Sweden joined the Schengen area in the mid-1990s when it was clear that the Schengen arrangements were compatible with the Nordic Passport Union. All these states experienced increased migratory pressures in the 1990s as well, and hence had to contend with heightened interdependence following Schengen membership. However, all these states were reluctant to demand further integration of irregular immigration policies. Denmark opposed communitarization due to domestic constraints and opposition (Adler-Nissen, 2009: 73–74). Sweden and Finland did not oppose communitarization, but were both rather hesitant in pushing integration forward (European Parliament, 1996c). Due to British opposition, cumbersome decision-making procedures and lack of supranational control of implementation, the founding Schengen states anticipated that increased interdependence would require communitarization. Sweden and Finland, however, joined the EU only in 1995 and Schengen in 1996. Consequently, for both states the implications of joining Schengen and living in a borderless Schengen area were yet to be felt (implementation of Schengen began in 2001) and neither state had experienced continuing British opposition to legislating irregular immigration policies. Therefore, while neither state rejected communitarization, they were both rather indifferent to further integration and were open to following the pro-integrationist agenda of the founding Schengen states.

In sum, changes to the external environment, including the fall of the Iron Curtain, civil wars in the immediate European neighborhood and the implementation of open borders in Europe, increased interdependence between EU member states' irregular immigration policies. Northern and southern EU member states alike sought further integration to manage and control irregular migration flows. Southern member states saw an opportunity to shape the Schengen agenda

with respect to their concerns in alliance with supranational agents and to escape their status as rule addressees. Northern, Schengen-founding member states saw further delegation of powers to supranational agents as a forceful tool to ensure implementation of common border and expulsion standards in the southern states. Although all member states experienced and had to anticipate further migratory pressure and heightened interdependence through the lifting of internal border controls, some northern EU member states opposed or were indifferent to communitarization. The United Kingdom benefitted from the intergovernmental decision-making system with the veto possibility as insurance against a stronger European imprint on the British border control system. Ireland, although not completely opposed to communitarization, followed the United Kingdom's lead because of its inclusion in the Common Travel Area. Denmark rejected communitarization for domestic reasons given previous opposition to European integration, while Finland and Sweden were rather indifferent. While also experiencing migratory pressure, both states were newcomers to the Schengen area and the EU and had not experienced cumbersome intergovernmental policy-making as a result of heightened interdependence.

4.5.4 Slightly increased interdependence of national regular immigration policies following the implementation of Schengen

It is reasonable to assume interdependence as a motivating factor for considering integration on regular immigration policies if one or both scenarios were present in the 1990s. First, states' admission policies might diverge across a restrictiveness-generosity continuum and migrants might enter EU territory in one member state, acquire that member state's nationality or another mobility right and move onwards to other member states whose national laws would have previously refused their admission. The latter member state then has an incentive to seek European harmonization on admission criteria that prevent immigrants from secondary movements that exploit diverging national immigration rules (Fellmer, 2013: 124). Second, member states might compete for regular immigrants, especially labor migrants, and enter

into a race to the top alternately making entry and stay criteria more and more generous to attract foreign labor. Member states then have an incentive to consider European maximum standards on admission criteria in order to prevent legislative race dynamics (Fellmer, 2013: 125).

Member states were not in competition for foreign labor in the 1990s. On the contrary, the regular immigration policies of member states converged in their general aim to restrict immigration by third country nationals, although the instruments for limiting this access differed (Freeman, 1995). Thus, there was no preference divergence regarding admission that could induce competition for foreign labor and no shortage of foreign labor supply that could trigger competition between member states.

The EU's neighborhood had developed strong push factors for work-related emigration. High unemployment rates and prevailing poverty created demand for third country nationals to consider working in the EU (Pytlikova, 2006). And indeed, all member states allowed temporary labor migration and entered into temporary work agreements with third states based on immigration quotas and return arrangements (Boswell and Geddes, 2011: 98). However, in entering these bilateral agreements, EU member states did not compete as there was an overwhelming labor supply from abroad for the economic sectors of interest.

The first scenario implies that comparatively generous admission rules and mobility rights in some states could have detrimental effects for others in the form of secondary movements of migrants. With the aim of lifting internal border controls to allow free movement of people within EU territory, as stated in the SEA and the Schengen agreement in particular, this scenario was anticipated by EU member states early on. While it was considered essential "to ensure the protection of the entire territory of the five [Schengen] States against illegal immigration" in the short term, measures on regular migration and laws on aliens were held as long-term measures to be harmonized only "insofar as is necessary" (Schengen Agreement, Articles 7 and 20 respectively). Similarly, the "Palma Document" of 1989, written by the Coordinators Group on the Free Movement of Persons for the European Council, links both the open internal market to increased cooperation on migration matters and distinguishes between joint irregular migration policies as "essen-

tial” measures and regular migration policies as “desirable” measures (Coordinators’ Group on the Free Movement of Persons, 1989). The ministers responsible for immigration acknowledged that “immigration has little concern for borders and will have even less once checks are relaxed and/or abolished” (Ministers responsible for immigration, 1991). In consequence, the ministers responsible for immigration were given a mandate to submit proposals for the harmonization of regular migration policies.

However, legislative progress and interest in harmonizing regular immigration policies was minimal because interdependence remained at a low level in the 1990s. Different admission rules for regular third country nationals could indeed provoke secondary movements, especially when Schengen began to be implemented and border controls were abolished. Regularizations by southern member states could develop a pull effect for migrants who saw regularizations as an opportunity to obtain legal residence permits in EU territory. However, regularizations permitting immigration by other means did not involve mobility rights for third country nationals and therefore prohibited regular movements across the borders of Schengen and EU member states alike (Boswell and Geddes, 2011: 215–216). Residence and work permits for third country immigrants were country specific and prohibited regular secondary movements in the Schengen area and the EU. Granting mobility rights would have increased interdependence of national regular immigration policies (Roos, 2013: 25). However, there was disagreement between member states on whether third country nationals should be able to move freely in the EU.

In 1995, the French president tabled a Draft Joint Action on single residence and work permits for long-term regular residents of EU member states, which, if adopted, would have given such third country nationals the possibility of moving freely throughout the EU in search of employment. Yet, the proposal failed to find approval in the Council and was eventually dropped. The demand for integration from an externality perspective was therefore rather low, which corresponds with the observation that no government present at the Amsterdam IGC lobbied too fiercely for communitarizing regular migration policies. The preparatory report by the Reflection Group to the IGC mentions regular

migration matters in only one instance. Some member states wanted to “introduce a common status for legally resident third-country nationals, whilst others point out that this would require the precondition of an overall common immigration policy” (Reflection Group, 1995). These statements and previous legislative measures do not support the conclusion that governments experienced negative externalities due to unilateral regular immigration policies and were therefore less eager to influence or control the decisions made by other member states through increased European decision-making and implementation control.

4.5.5 Supranational activism: No supranational alliances and self-restraint

Beyond declining home benefits and increased interdependence of unilateral immigration policies, member states might demand further integration when supranational agents are able to push delegation forward during the interstitial phase (Farrell and Héritier, 2007b). Indications of supranational activism inducing demand for further integration include supranational agents forming coalitions for integration, increased agenda setting by supranational agents and instances of judicial politics changing the power distribution between the Council and agents in favor of the latter (Jupille, 2004; Pollack, 1997). Indications of weak supranational influence are supranational organizations generally demonstrating self-restraint, implementing member states’ will without shirking behavior and being sensitive to majorities in the Council when considering agenda setting actions or giving legal judgements. By analyzing supranational agents’ policy output and interaction vis-à-vis member states in the Council and comparing Council decisions with resolutions and communications of supranational actors, we can see that the latter were unable to push integration forward.

4.5.5.1 The European Commission’s perverse exploitation of treaty ambiguity

As early as the 1970s, member states began to thematize the situation of third country nationals in the Community and ask the Commission to foster cooperation among member states. The Commission answered

this call and undertook initiatives based on voluntary collaboration, but only if the Council agreed to these initiatives beforehand (Mancini, 1987: 3223–3225). Ultimately, voluntary collaboration did not produce satisfactory results in the eyes of the Commission. When Germany and France signed the *Saarbrücken Agreement* in July 1984 and promoted the idea of establishing a “citizen’s Europe” without internal border controls, the Commission saw both an opportunity and potential allies for strengthening Community initiatives on immigration policies. In this spirit, the Commission issued the Communication “Guidelines for a Community policy on migration” (European Commission, 1985b). Lacking any treaty basis for considering immigration matters at the Community level, the Commission justified its activism by referring to the concept of “A people’s Europe” and previous Council resolutions that had bearing on migration matters. At first, the Commission’s Communication was endorsed by the Council, which adopted a resolution in July 1985. The resolution invited the Commission to “promote cooperation and consultation between the Member States and the Commission as regards migration policy” while equally declaring that “matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member States” (Council, 1985). The Council knew of the Commission’s intention to introduce a consultation mechanism to improve coordination of member states’ migration policies and was informed on this intention beforehand. The resulting initiative by the Commission in the form of a unilateral decision nevertheless provoked resistance by several member states. The dispute came before the European Court of Justice, solidified member states’ preferences for intergovernmental instruments on migration policies and led the Commission to a strategy of self-restraint in the following years.

The Commission’s Decision created a consultation mechanism that required member states to inform the Commission and each other of draft measures on entry, residence and employment as well as of illegal entry, residence and employment of third country workers and related draft agreements with third countries. Both member states and the Commission itself could then initiate a consultation process whereby the latter should ensure that unilateral policies were in conformity with

Community actions in those fields and could even propose measures “aimed at achieving progress towards a harmonization of national legislation on foreigners” (European Commission, 1985a). The decision was legally based on Article 118 EEC, which dealt with social policy.

With its activism, the Commission clearly tried to gain competences beyond the powers delegated to it via treaties through what Jupille (2004) describes as “procedural politics”. Lacking a clear legal basis to pursue immigration policies, the Commission rhetorically linked its Decision to social and employment matters and based its consultation mechanism on Article 118. This article mandates that the Commission promote “close co-operation between Member States in the social field” including in employment matters. To this end, the Commission therefore “shall act in close contact with Member States by making studies, delivering opinions and arranging consultations”. There is no reference here to migration and third country nationals and no clear statement regarding what powers and instruments the Commission might employ to foster closer cooperation. The Commission exploited this ambiguity in the treaties, linked immigration to social policy and interpreted for itself the right to request member states’ draft measures for a “conformity check” with Community measures and even to propose harmonization of foreigner laws. With its resolution, the Council invited the Commission to introduce a consultation mechanism but one based on voluntary collaboration and cognizant of the fact that immigration policies still fall under the jurisdiction of national governments. The Commission’s Decision attempted to establish the opposite by both increasing Commission involvement when drafting national legislation as well as its competence to propose harmonization measures.

Germany, France, the Netherlands, Denmark and the United Kingdom brought an action before the Court of Justice to declare the decision void (European Court of Justice, 1987). These states rejected the Commission interpretation that Article 118 EEC allowed the adoption of measures that were binding on member states and also held that migration policy was an exclusive national competence outside the scope of this article. The European Court of Justice gave an ambivalent judgement. On the one hand, the Court confirmed the Commission’s interpretation that migration is related to social policy matters and hence

falls under the ambit of Article 118. The Community therefore had a mandate to consider migration policies, although this was narrowly defined and was only in conjunction with social matters. On the other hand, the Court agreed with the member states that Article 118 EEC did not entail the competence for the Commission to verify and enforce that national immigration policies conform with Community actions. As a result, the Commission presented a revised version of its Decision in 1987, but member states were unwilling to cooperate in this consultation procedure (Papagianni, 2006: 8).

The Commission's attempt to expand its competences on immigration policies by exploiting treaty ambiguities had perverse effects. Activism on the part of the Commission backfired in the sense that this endeavor was useful for governments that were hostile or hesitant to the idea of creating a Community competence for immigration matters. While the case was still pending before the Court of Justice, member states finalized negotiations on the Single European Act. Arguably, in light of the case (Mancini, 1987: 3229; Papagianni, 2006: 9), member states refused to create a legal basis for migration policy-making in the Single European Act and instead attached General Declaration Number 6 to it. Designed as a safeguard clause against supranational activism, the Declaration states that the articles on abolishing internal frontiers in order to allow the free movement of persons shall not affect "the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries". While allowing the Commission a seat in different fora, the member states preferred intergovernmental settings for cooperation on migration-related matters. The Ad Hoc Immigration Group was founded in October 1986 with Interior Ministers having regular meetings to meet this need. It was the British presidency that launched this initiative and ensured that cooperation remained intergovernmental and based on unanimity (De Lobkowicz, 2002: 29). Having established multiple intergovernmental fora that addressed issues of free movement in an uncoordinated fashion, member states established the Free Movement Coordinators Group at the Rhodes European Council in December 1988 to enhance coherence.

The Commission's early activism alone cannot explain some member states' resistance to the communitarization of immigration policies. The reasons for their resistance can be found in the respective domestic contexts examined later in this chapter. However, integration laggards such as the United Kingdom, Denmark and to a lesser extent Ireland, could now convincingly warn other member states about communitarization given this precedent. The joint letter of December 1990, written by the German chancellor Helmut Kohl and the French president Francois Mitterrand, only proposed that immigration matters that had already been addressed on an intergovernmental basis outside of treaties could be inserted into the EU's treaty framework. Helmut Kohl proposed an intergovernmental decision-making system based on unanimity in the Council and a shared right of initiative for the Commission and each individual member state in the Council at the Luxembourg European Council in June 1991 (European Commission, 1991b).

Germany, as well as the Benelux states, had supported communitarization but were unable to persuade integration laggards. As Kohl noted during a plenary debate in the German Bundestag, it was impossible to convince the British prime minister John Major in favor of communitarization. Instead, Kohl argued that an intergovernmental setting is "at least the second-best solution – better than outright failure" (Kohl, 1991; *author's own translation*). The Treaty of Maastricht provided this intergovernmental context based on unanimity, a shared right of initiative and no automatic authority for the Court of Justice to give judgments. However, Kohl stood firm on including the "passerelle clause" in Article K.9 that allowed the transfer of third pillar policies to the Community if agreed on by the Council and ratified by each member state. Among supranational actors, only the Commission was granted some authority in the decision-making process and communitarization of migration policies was left open with the *passerelle* clause. Both, however, are not attributable to the Commission's activism. Quite the opposite—the Commission's early activism had the perverse effect of rhetorically empowering integration laggards and deterring hesitant states from considering communitarization.

4.5.5.2 Lacking supranational agenda-setting: The Commission's self-restraint is the European Parliament's frustration

Member states rebuked the European Commission for its early activism by suing the Commission for one of its first initiatives on immigration and in the following stuck to intergovernmental settings. Instead of drawing on the Commission in collecting information on member states' immigration policies, member states primarily relied on information and resources from the Council Secretariat (Stetter 2004: 180). Accordingly, the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) was managed by the Secretariat and not located within the Commission (Council, 1994b). While member states did not accept the Commission as an agenda setter on immigration policies, the Commission also restrained itself from actively striving for this position.

On the first point, several authors have noted that the Council barely acted upon Commission proposals (Stetter, 2004: 157; Niemann, 2006: 216). The Commission's 1991 Communication on immigration policy was not even discussed in the Council (Stetter 2004: 213). Its 1994 Communication proposed a comprehensive approach to immigration (European Commission, 1994), aiming to harmonize national policies instead of approximation, but this Communication also remained ineffectual. Member states drew on the Commission to monitor national implementation through reports, yet "showed reluctance to allow the Commission to have a more political or agenda setting role in this area" (Stetter, 2004: 162).

On the second point, we can observe that the Commission itself adopted a "gradualist" (Niemann, 2006: 215) or "realistic" (Stetter, 2004: 213) approach and opted for self-restraint instead of doctrinal agitation when proposing measures. The Commission did not use the opportunity to lobby for a communitarized immigration policy during the Maastricht IGC. Instead, it accepted that an intergovernmental setting was necessary for promoting "the necessary climate of trust between Member States [...] on the basis of dialogue between the competent channels (General Affairs Council and Conference of Immigration Ministers)" (European Commission, 1991a: 27). The Commission again

had the opportunity to propose communitarization in 1995 when it was mandated to consider the application of the *passerelle* clause (Article K.9 TEU), which was a legal possibility for member states to communitarize AFSJ policies. Although the Commission made very clear that it favored communitarization of immigration policies, it refrained from advising the application of the *passerelle* clause and instead recommended awaiting the outcomes of the IGC that was slated to begin in 1996 (European Commission, 1995a). The Commission therefore opted for a strategy of self-restraint and limited agenda-setting in order to win trust among member states. Loyal agency instead of shirking behavior should persuade governments to further delegate powers to the Commission.

The Commission's gradualist approach provoked criticism by the European Parliament, which instead opted for maximalist positions. In its resolutions of 15 July 1993, the European Parliament was highly outspoken in its criticism towards both the member states and the Commission (European Parliament, 1993a, 1993b). The European Parliament condemned the intergovernmental setting for third pillar policies and attributed "this omission partly to the attitude of the Commission which, as long ago as the second half of the eighties, gave in too readily to pressure from a number of Member States" (European Parliament, 1993a). The Parliament expressed regret that, due to the intergovernmental setting, judicial and parliamentary oversight was kept to a minimum and that immigration matters were tackled "solely from the point of view of public order and internal security" (European Parliament, 1993b). In this regard, the European Parliament urged the Council and the Commission to use the *passerelle* clause and to transfer third pillar policies into the Community framework early on (European Parliament, 1993a, 1995). As the Commission discarded this possibility (European Commission, 1995a), the European Parliament had to accept "the Commission's opinion that a wait-and-see attitude should be adopted until the end of the IGC as far as application of Article K.9 is concerned" (Committee of Civil Liberties and Internal Affairs 1996). The European Parliament deplored the fact that the Commission flirted with the Council rather than forging an alliance with the Parliament, stating that it "regrets once more that the Commission has not long ago

taken an initiative to this effect under Article K.9, as called for on many occasions by the European Parliament” (European Parliament, 1997).

Moreover, in contrast to the Commission, the European Parliament did not welcome the Schengen process in either procedure or substance. With regard to the latter, the European Parliament presented a more liberal opinion on immigration policies leaning towards a “human rights” perspective compared to the “security perspective” held by EU member states and adopted by the Commission. Second, the European Parliament was skeptical of the intergovernmental setting and decision-making process of Schengen and the effect that due to Schengen there was little ambition and progress within the EU to abolish internal border controls (European Parliament, 1996a). The European Parliament was eager to emphasize that the Community itself would have competence to establish free movement within the Community and enact compensatory measures on immigration by third country nationals (European Parliament, 1993a). At this point in time, it was not clear that the Schengen regime would be incorporated into the EU treaty framework at the following IGC. The European Parliament feared that the existence of Schengen would make both free movement within the EU and immigration policies at the Community level unlikely. Schengen therefore also prevented the European Parliament from influencing intra-EU mobility and immigration. In light of these considerations, the European Parliament wanted to discipline the Commission and force it into a more confrontational stance against member states. Only when the European Parliament brought an action before the European Court of Justice claiming that the Commission failed to act on abolishing border controls (European Court of Justice, 1996, July 1996) did the Commission present three directives on border controls (later abandoned due to opposition by the United Kingdom) (Peers, 2011: 141).

Progress on lifting internal border controls within the Community would indeed have heightened interdependence and increased pressure on EU member states to also consider immigration policies at the EU level. This process was seen among Schengen members with the consequence that internal border controls were abolished and common immigration policies adopted without any involvement of supranational actors. The Commission in this case acted with self-restraint and the expectation that its cautious behavior would grant it better standing

with member states in the future, to the frustration of the European Parliament. The establishment of the internal market could have been a lever for supranational actors by linking previous Community competences on social policy and free movement of workers to the fate of third country nationals and immigration. The Commission abandoned this opportunity, however, after member states rebuked its activism in the late 1980s. The European Court of Justice instead cautiously intervened by granting at least certain categories of third country nationals mobility rights within the EU. In *Rush Portuguesa* the Court ruled that companies of an EU member state may provide services in another member state with a workforce that may also include third country workers (European Court of Justice, 1990). Foreign workers therefore enjoy a restricted mobility right in that they were able to work in member states other than their country of residence as long as they did not seek access to the labor market and returned to their country of residence after the service had been provided (Barnard, 2007: 368–370). This mobility right for third country workers was affirmed in *Vander Elst* (European Court of Justice, 1994), but member states largely circumvented these principles (Roos, 2013: 112).

In sum, by strengthening the mobility rights for third country nationals, supranational actors could have increased interdependence among member states. The inability to prohibit cross-border movements by third country nationals that are legal residents in one member state could have forced member states' unilateral admission policies to become more interdependent and therefore candidates for cooperation (Roos, 2013: 113). The Court's rulings in this regard constituted the first steps in this direction. The European Parliament saw this opportunity and called on the Commission to be more active in realizing a borderless internal market within in the EU, and the Commission did call for more social and mobility rights for third country nationals. Ultimately, however, the Commission did not pursue an active pro-integration agenda regarding immigration policies but rather took a cautious stance in order to avoid repelling member states. Supranational actors did not push integration forward before the Amsterdam IGC on either irregular immigration matters or regular immigration policies. The unequal demand for integration of regular and irregular immigration policies can therefore not be attributed to supranational activism.

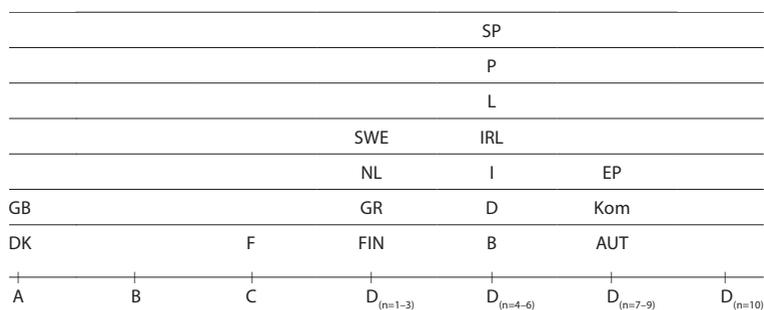
4.6 The supply of integration on immigration policies

The Treaty of Maastricht named the year 1996 as a date for when another IGC should take place to revise the treaties (Article N 2). Moreover, the treaty also invited EU organizations to present proposals to amend the treaties, which the Council, the European Parliament, the Commission and the Court did in the first half of 1995. The European Council invested the “Reflection Group” with the task of elaborating priorities and guidelines until December 1995 on the basis of the reports by EU organizations. The Reflection Group consisted of a representative from each member state, two members of the European Parliament and one representative from the Commission. The Reflection Group’s report was presented to the European Council on 6 December 1995 and outlined the basic internal and external challenges the EU faced and analyzed the functioning of the EU’s structures (Reflection Group, 1995). The third pillar on Justice and Home Affairs policies was defined as one policy area that required reform, despite the fact that it had been operating for only a few years. In presenting its analysis and its reform proposals on Justice and Home Affairs, the report recorded the different opinions among member states. With regard to communitarizing certain JHA policies, “many members agree” that “everything to do with the crossing of external frontiers: arrangements for aliens, immigration policy, asylum (ruling out asylum among citizens of the Union) and common rules for external border controls” should be brought under Community competence. In contrast, “[o]thers believe that the current separation of ‘pillars’ is essential in order to respect intergovernmental management of these matters that are so closely linked with national sovereignty” (Reflection Group, 1995).

Before the IGC and negotiations began, the dividing line among member states pitted integration-willing states against integration laggards who preferred to maintain an intergovernmental policy-making setting. Following the report by the Reflection Group, each member state drafted position papers that were distributed to each delegation by the President of the Council and the Council Secretariat. Initially, it appears easy to assess member states’ preferences on integrating immi-

gration policies based on these position papers. However, there are three obstacles to this endeavor. First, not every member state clarified its position on this question unambiguously. The European Parliament listed member states' positions in its 1996 White Paper and could not document a clear preference for each member state (European Parliament, 1996c). Consecutive studies on the bargaining dynamics present during the Amsterdam IGC also had difficulties in filling these gaps (Griller et al., 1996; Hug and König, 2002; Slapin, 2008), whereas others were more successful by relying on questionnaires and extensive interview material (Turner et al., 2002). Second, these accounts did not differentiate between different immigration policies but collected data on governments' preferences on integrating Justice and Home Affairs or on immigration as such. Finally, this study is also interested in how intense these preferences were, as this might explain why member states ultimately compromised and communitarized irregular immigration after a transition period while providing an intergovernmental setting for regular immigration policy.

In the following I use Turner et al.'s measurement of member states' preferences as a baseline to deduce preference intensity as a function of member states' sinking home benefits and interdependence. In my second step, I compare this input to my own account based on member states' position papers and conference notes during the IGC. Figure 10 is taken from Turner et al.'s (2002: 203) assessment of member states preferences on integrating the different JHA policies.



- A Status quo: intergouvernemental
- B Use a crossover procedure between intergouvernemental and cooperation and EC sphere (Art. K.9)
- C Increase the cooperation on the basis of the EC method
- D Bringing certain subjects under the Community
- Visa policy in general
 - Asylum policy
 - External border control
 - Immigration policy
 - Freedom of movement for third-country nationals legally resident in one MS
 - Combating drug addiction
 - Combating fraud
 - Customs cooperation
 - Judicial cooperation civil matters
 - Judicial cooperation criminal matters

Figure 10: Governmental preferences on integrating JHA policies at Amsterdam IGC according to Thurner et al. (2002: 203)

The further to the right a member state is located on the spectrum presented above, the more it welcomes integration of an increasing number of JHA policies. The caveat in this table is that fighting illegal immigration is not its own category but likely included under D4 “immigration policy”. This lack in differentiation makes it difficult to interpret this table and the separate preferences on integrating irregular and regular immigration policy definitively. However, it becomes evident that there is a clear majority of member states that prefer bringing one aspect of irregular immigration policy, namely external border control, under Community competence. When it comes to D4-5, which can arguably be considered regular immigration policy, the picture is less clear, with eight states supporting integration and seven states not voicing support for this option. Three countries stand out as holding a minority position. We can observe that two states, the United Kingdom and Denmark, generally prefer the status quo and reject integration of both regular and irregular immigration policies represented as D3 and D4-5 respectively. France, however, seems to be undecided on whether it prefers the status quo or Community competence given its position in between the majority of integration frontrunners and the two integration laggards.

Turner et al. clarify in their study that this table depicts preference setting at the beginning of the Conference. The table thus provides a first indication of the preference setting that characterized the negotiations at the Conference. It remains unclear, however, to what extent this bargaining setting was characterized by varying preference intensities. Three member states were hostile or at least hesitant about the idea of communitarizing both immigration policies. Why then was this resistance to integration resolved for irregular immigration policies and not for regular immigration policies? Based on my previous analysis on the demand for integration, I deduce preference intensities for both policies and groups of member states. After this, I compare the assumed preference intensities with the bargaining dynamics and outcome. Preferences should have been stronger for integrating irregular immigration policies given sinking home benefits of unilateral measures and increased interdependence. Moreover, governments that held strong preferences should have offered concessions to integration laggards in exchange for their support.

4.6.1 Preference intensities for integrating immigration policies: The threat of exclusion and British isolation

The founding Schengen states had strong preferences for integrating immigration policies and were aware of the British resistance to relinquishing the intergovernmental setting in the third pillar. Already in the preparation phase of the IGC, Germany and France anticipated continued resistance to further integration and proposed an institutional alternative. The joint letter by Helmut Kohl and Jacques Chirac of 6 December 1995 demanded further integration of immigration policies and also promoted the consideration of flexibility clauses that would allow closer cooperation between member states in situations where some states have “temporary difficulties in keeping up with the pace of progress in the Union” (Hix and Niessen, 1996: 49). Even before the IGC began, Germany and France signaled their strong preference for further integration combined with a threat of exclusion towards hesitant member states. As an alternative to an agreement on further integration, closer cooperation could imply that some member states might be excluded from cooperation and hence would not be able to influence European policy-making on immigration policies. This proposal was interpreted as a credible threat in the United Kingdom (Karacs, 1995), which nevertheless continued to resist further integration. However, member states who were unsure of whether they were candidates for closer cooperation preferred to maintain the single institutional framework, even if it implied further integration and proposed conditions for closer cooperation that would ensure inclusiveness.

Although both France and Germany desired progress on immigration policies and a revised decision-making system, there was disagreement on the exact design. Germany and the Benelux states in particular showed an interest in communitarization to make full use of supranational organization and qualified majority voting in the Council (European Parliament, 1996c; CONF/3909/96). France, in contrast, favored the so-called “EC method”, i.e. bringing immigration policies into the first pillar although distinctive institutional arrangements. Framed as “Pillar Ia”, this arrangement did not offer full communitarization but

was based on a shared right of initiative with the Commission and increased the involvement of national parliaments in the decision-making process (CONF/3908/96; CONF/3824/97). On the latter point, the French position was consistent with the Danish and British proposals for strengthening the influence of national parliaments (CONF/3915/97). Strong advocates of communitarization, such as Germany and the Benelux states, therefore needed to sway a hesitant France as well as resistant Danish and British delegations if further integration was to be the outcome of the IGC.

The first notes during the Italian presidency in March 1996 list all the different proposals for reforming the policy-making system on immigration policies (CONF/3803/96; CONF/3804/96). Based on this preference setting, with advocates of communitarization, status quo-minded states and the French proposal that fell somewhere in between, member states began to explore compromise formulae and adapted their strategies. Consecutive documents from the Italian and later the Irish presidency mention that there was widespread support for communitarizing immigration policies (CONF/3848/96; CONF/3866/96). These summaries of the state of negotiations highlighted the option for communitarization to be facilitated by a “progressive approach” (CONF/3866/96), i.e. by “by retaining certain particular procedures and by a phased implementation timetable” (CONF/3848/96). This compromise formula addressed the French hesitance to consider outright communitarization of immigration policies.

The transition period for introducing communitarization became the compromise formula between France and integration-willing member states. The Benelux states became the leaders in pushing the negotiations towards an integrative outcome. On behalf of the Benelux states, Belgium again argued for full communitarization but for the first time presented a deadline in their note from 13 November 1996 (CONF/3909/96). From 1 January 2003 onwards, decision-making was required to follow the co-decision procedure with majority voting in the Council whereas, before that date, unanimity in the Council and only a consultative role for the Parliament was the rule. France and Italy proposed phasing in communitarization over five years or three years, respectively, after the Treaty of Amsterdam came into force

(CONF/3824/97; CONF/3840/97). Communitarization of immigration policies was the consensus among the Schengen states (with exception of Denmark) whereas the United Kingdom was still resistant. In order to explain why the United Kingdom finally accepted communitarization and why the final deal in Amsterdam laid the groundwork for differentiated integration levels between regular and irregular immigration policies, it is necessary to consider domestic opposition.

4.6.2 Domestic opposition and integration: Accommodating the German Länder and British concerns

The presidency note from 18 September 1996 summarized the status of negotiations with regard to communitarizing third pillar policies. The note was delivered in answer to a call by “Representatives [who] found it difficult to consider meaningfully the question of what topics might be transferred to the First Pillar without more precise details as to the matters covered in each area concerned” (CONF/3908/96). Therefore, the presidency suggested definitions of what matters might be subsumed under the headings of “asylum”, “border controls” and “immigration”.

As a consequence, some delegations used this opportunity to lobby for their preferences with regard to communitarization. Whereas the United Kingdom again made clear that it considered communitarization unnecessary and introduced the principle of subsidiarity with regard to third pillar policies (CONF/3918/96), the Benelux states issued a common proposal that emphasized that the functional unity of migration policies are pursued most effectively in a communitarized setting (CONF/3909/96). The presidency note from 19 February 1997 indeed provided for the communitarization of all migration policies after a certain time period that at that point was yet to be determined (CONF/3823/97). The presidency note from 26 February 1997 maintained that this arrangement was widely accepted among delegations and would be a baseline for elaborating a draft treaty text (CONF/3828/97). However, two caveats were included in the note. One delegation, presumably the United Kingdom, voiced strong reservations to the approach of “simply changed procedures, thereby creating political difficulties”. The

second caveat was that a “number of delegations highlighted the need for particular attention to be given to the content of, and the procedures for adopting, provisions on third country nationals”.

The first caveat implied the United Kingdom’s general rejection of communitarizing any third pillar policy. This preference stood in stark contrast to what the Schengen states especially wanted to achieve with the Amsterdam IGC. The Schengen states drafted a list of “flanking measures” that they “deemed essential [...] for the removal of controls at internal borders”. Measures on irregular migration and border control were prominently placed whereas common action on regular matters was only mentioned with regard to governing the movement of third country nationals within the territory of the EU (CONF/3823/97). Schengen members made it clear that “action by the Union in the various areas covered must, at a very minimum, be equivalent to that already accomplished by Schengen” (CONF/3828/97). The communitarization of irregular migration policies was seen as beneficial in this regard and the desire on the part of these governments to achieve communitarization was high. In order to win the United Kingdom’s consent, member states pursued a double strategy. First, the Dutch presidency waited for the election of Tony Blair in May 1997 to bring critical negotiation issues back into discussion (Interview Member State Representative #3). Although it was clear that Blair could not, as his first official act as Prime Minister, surrender British prerogatives on border controls, the presidency hoped that Blair would adhere to his campaign rhetoric on the EU and be more receptive to the European cause. A member of the Dutch Presidency during the IGC remembered: “Under Major there was nothing possible. So we waited deliberately until Blair was there. And in the run-up already, when he was preparing himself, so before the elections, we already had contact with his shadow administration” (Interview Member State Representative #2). Having just won the election by bringing the Labour party into his campaign, Blair felt less pressure by backbenchers compared to John Major before him. However, Blair made clear that the United Kingdom would not abdicate its right to control its borders (Tony Blair, 1997), which would have been neither acceptable to his party nor the euro-sceptic public. Second, member states won the British government’s consent by granting the United

Kingdom concessions in the form of an opt-in mechanism and declarations that secured the country's right to maintain border controls (CONF/3806/97).

With regard to the second caveat, the call of some communitarization supporters to re-consider the procedures used for pursuing common regular migration policies were less successful. The presidency note from February 1997 provided for the communitarization of both regular and irregular migration policies after a fixed time period. Whereas the German government, along with the Benelux states, had previously supported the communitarization of migration matters, Chancellor Kohl had to revise the country's bargaining position due to domestic opposition (Niemann, 2006: 231; Moravcsik and Nicolaidis, 1999: 68). "He said 'yes' and later on the came back on and said 'no'. We had quite some nasty discussions, but in the end he said, that he would love to say 'yes', but I cannot, because he could not come home with it. It was not in his power, it is not in the German constitution to give this away, majority voting on something instead of consensus on things that were not federal, but *Länder* competence" (Interview Member State Representative #3). *Länder* leaders of Kohl's own government threatened to block ratification of the Amsterdam Treaty in the German Bundesrat if the treaty text provided for an automatic switch to QMV after three years for matters that were to be transferred to the first pillar (Süddeutsche Zeitung, 1997). Second, the Bavarian leader, Edmund Stoiber, rejected the transferal of regular migration matters to the first pillar out of the fear of "(uncontrolled) migration" towards the "regional labor markets" (Niemann, 2006: 231).

The final agreement in Amsterdam accommodated these concerns. Communitarization of regular and irregular immigration policies after the five-year time period was not automatic but dependent upon a unanimous decision by the Council. In addition, the Amsterdam Treaty highlighted member states' reluctance to address regular immigration matters in the same manner as irregular immigration matters. Only regular immigration matters (Articles 63, 3(a) and 4) are exempted from the five-year deadline after which the Council was legally required to adopt policy measures on irregular immigration policies. Regular and irregular immigration policies were not yet differentiated in institu-

tional terms, but the treaty in Amsterdam created the conditions for this differentiation, which eventually came into effect on 1 January 2005 pursuant to the Council's decision.

4.6.3 Supranational activism: Presidencies as agenda-setters and gate keepers

Supranational actors were involved very early on in the IGC. As described in the Maastricht Treaty, the European Parliament, the Commission and the Court of Justice were mandated to present a report on the functioning of the treaties. The Court of Justice did not present any concrete proposals for how to reform policy-making on migration matters and hence did not in any way set the agenda for the Conference (European Court of Justice, 1995). The Parliament and the Commission proposed the full communitarization of immigration policies and also took part in the Reflection Group (European Commission, 1995b; European Parliament, 1996b). The Reflection Group's report itself did not present a consensual reform proposal, but rather recorded member states' disagreement over whether to communitarize immigration policies. It is therefore questionable to what degree supranational actors set the agenda for the IGC regarding a certain reform proposal. Instead, the Italian presidency used its first notes to list the different reform proposals that were submitted by the member states.

The presidency notes during the Conference made certain that every delegation was well informed about the status of the negotiations and member states' preferences. In preparing its notes, the presidencies mostly drew on the work of the Council Secretariat instead of the Commission (Beach, 2004). The Commission therefore could neither exploit information shortages nor shape the agenda in its favor since presidencies remained gate keepers and chose the Council Secretariat as the information hub. The only exception was the Dutch presidency, which heavily lobbied for the incorporation of Schengen into the EU's treaties and relied on the Commission for preparing related proposals. One of the Commission's rare contributions to the IGC in February 1997 (CONF/3817/97) was in direct reaction to proposals for Schengen incorporation by the Dutch presidency (CONF/3806/97; CONF/3811/97).

However, it was the Dutch Presidency and not the Commission that set the agenda on incorporating Schengen into the EU:

Well, what fascinated me in the process of Amsterdam, was that we got Schengen back in the European compact, which was not the given thing. If Foreign Minister [Michiel] Patijn did not make this his personal goal, that would not have happened. [...] But Patijn made it his personal aim. He wanted to bring this whole area of competences of Schengen within the EU, so that gradually it would grow into normal EU policy (Interview Member State Representative #3).

In sum, the fundament for vertical differentiation of regular and irregular migration policies was already set with the Amsterdam Treaty. Based on the additive index to measure vertical differentiation of policies, both policies still shared the same level of integration. For both policies the European Commission should receive the right of initiative and the Council should decide on communitarization of both policies after a five-year transition period. Beyond institutional question, however, vertical differentiation loomed large as the Council was required to ensure legislative progress only on irregular migration matters. Regular migration matters were purposively exempted from this deadline given the domestic opposition by the German *Länder* that forced the federal government to obstruct further integration. Uneven supply conditions for integration across migration policies was matched by uneven demand for integration in the first place. The abolishment of internal borders drew member states' attention primarily towards irregular migration matters fearing that disparate rules on border controls and regularizations could boost secondary movements and hence negative externalities and costs. Interdependence and domestic opposition during the Amsterdam IGC explain why the Amsterdam negotiation already laid the foundations for vertical differentiation afterwards. The consecutive IGC, the Nice Treaty conference, took place only one year after the Amsterdam Treaty came into force and manifested vertical differentiation also in institutional terms. Again, interdependence was driving the uneven demand for integration and domestic opposition the unequal supply of integration leading to vertical differentiation.

<i>Independent variable</i>	<i>Hypotheses on varying demand for integration of migration policies</i>	<i>Finding</i>
Home benefits	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in irregular migration matters.	Home benefits/policy failure varied across policies; yet, unclear why delegation and pooling needed
Interdependence	Interdependence and hence demand for integration are likely to vary as negative externalities in terms of secondary movements should be higher in irregular matters.	Interdependence varied; regular migrants had no mobility rights despite open borders; irregular migrants had it 'easier'
Supranational activism	Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward on irregular migration matters.	Supranational activism did not vary and was toothless
<i>Independent variable</i>	<i>Hypotheses on varying supply of integration for migration policies</i>	<i>Indication</i>
Domestic opposition	Domestic opposition and hence supply of integration are likely to vary as governments face more discretion in pursuing irregular migration matters than regular migration matters.	Threats by national veto players varied; strong opposition by German Länder against integrating regular migration
Preference intensities	Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on irregular migration matters.	Opposition did not vary across policies; opposition by UK and DK was bought off by opt in/out arrangements
Supranational activism	Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on cooperation irregular migration matters due to Schengen process.	Supranational interventions during IGC did not vary and for negotiations on both policies Presidency remained in control

Table 6: Summary of expectations and findings (Amsterdam IGC)

4.7 Towards the IGC leading to the Treaty of Nice

The Treaty of Amsterdam led to vertical differentiation of immigration policies in substantive terms. Progress was legally required on irregular immigration policies within a five-year period and previous Schengen measures were incorporated into the EU's acquis. Regular immigration matters were purposefully exempted from this schedule, indicating that matters of admission and legal stay conditions ranked lower in terms of member states' priorities. In legal terms, EU member states were to clearly prioritize irregular immigration matters. The differentiation and reluctance towards regular immigration matters relativized until the Treaty of Nice was signed. Member states did begin to debate policy reform for regular immigration policies, however, this did not occur on the European level but in domestic contexts, given labor market needs and influential studies that highlighted ageing populations in Europe (UNDESA, 2000). Instead of giving impetus to increased European policy-making on regular immigration policy, pending national reforms prevented governments from considering European measures. Although both regular and irregular immigration matters became more and more relevant in Europe, European cooperation before and after the Treaty of Nice clearly privileged irregular immigration policies in substantive terms, as well as procedurally via deadlines for policy measures. The Treaty of Nice, Declaration number 5 on Article 67 in particular, implied that irregular immigration policies should be communitarized automatically on 1 May 2004 without another decision by the Council as planned in the Treaty of Amsterdam whereas regular immigration policies were explicitly exempted from the deadline.

Vertical differentiation of immigration policies before the Treaty of Nice are attributable to mainly two developments. On the one hand, the implementation of Schengen also in southern member states and the impending enlargement of the EU towards Central and Eastern Europe heightened interdependence between member states' irregular immigration policies. Southern member states and Italy in particular faced increased migratory pressure due to the Schengen and Dublin conventions and hence an increased desire for EU response measures especially

on irregular migration. Communitarization assured both northern and southern states that their situation and interests would be taken into account. The uneven supply of integration for both immigration policies was the result of domestic opposition that was particularly high for regular immigration matters, especially within the German context. Similar to the Amsterdam process, supranational influence was minimal for both the demand and supply of integration.

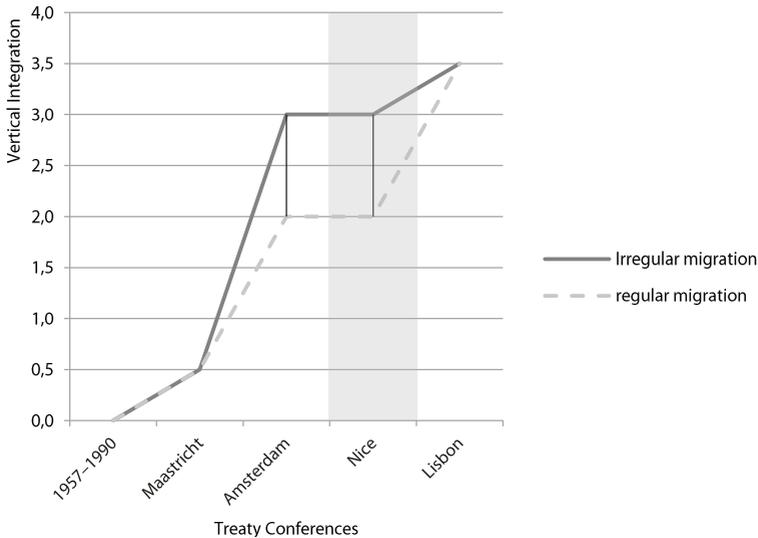


Figure 11: Vertical differentiation with the Nice IGC

4.7.1 Sinking home benefits of national irregular immigration policies

Even in the period before the Treaty of Amsterdam, the member states of the EU experienced declining home benefits of national irregular immigration policies, and the deportation gap widened. Until the mid-1990s, northern states saw increasing numbers of asylum applications and hence third country nationals that might remain in their countries irregularly (Köppe, 2003; Klusmeyer and Papademetriou, 2009). Southern EU member states experienced unauthorized migration into their labor sectors, based less on asylum procedures (Baldwin-Edwards, 1997;

Finotelli, 2007). Unable to deport large numbers of irregular immigrants, some northern and all southern member states adopted regularization programs or similar measures to accommodate irregular immigration (Baldwin-Edwards and Kraler, 2009). In addition, member states negotiated readmission agreements with countries of origin to ease the deportation of third country nationals that lacked valid residence permits. For both expulsion measures and readmission agreements, member states identified value added in developing a European approach. European cooperation promised economies of scale with joint expulsion measures, easing transit and lowering the costs of organizing deportation measures. Working in unison allowed member states to negotiate readmission agreements with “problem states” (Council, 1998) that might reject or dominate agreements if facing individual EU member states alone. Finally, collective bargaining meant pooling not only of bargaining leverage but also of the basket of side payments EU member states could offer to recalcitrant countries of origin.

The incentive to negotiate collective readmission agreements increased throughout the 1990s. Generally, immigration and thus also unauthorized immigration into EU member states became “increasingly cosmopolitan or ‘globalized’, involving flows of migrants from every continent and almost every country” (International Organization for Migration, 2000: 190). Hypothetically, every EU member state could negotiate readmission agreements with all countries of origin individually. However, this option was costly and thus made European cooperation attractive. It takes a great deal of both time and resources to negotiate readmission agreements with every country of origin. European Union readmission agreements pooled member states’ resources and costs, and enabled EU member states to not only enter into readmission agreements with single countries but also to consider inter-regional agreements on migration and hence the enforcement of common rules in multiple states through a single agreement (Cassarino, 2010b).

Besides the globalization of clandestine immigration flows, irregular immigration became increasingly privatized and beyond governmental control (International Organization for Migration, 2000: 201; Lahav, 1998). Schengen measures had unified members’ irregular immigration policies on strengthening control of external borders, the introduction

of visa obligations and expulsion measures. Closed legal immigration channels and a reinforced emphasis on combatting irregular immigration triggered migrants to employ the services of human smugglers to enter EU territory regardless (Pastore et al., 2006; Neske, 2006). As member states increased efforts to deter immigration and to forge the image of a fortress, human smuggling increasingly became a business model that challenged national irregular immigration policies in a new way. Given that internal borders within the EU were mostly lifted, unilateral policy responses were doomed to be ineffective in countering this new phenomenon and member states instead developed an EU-level response. The demand for increased European cooperation on irregular immigration policies remained high. However, declining home benefits of unilateral policy-making increasingly became a function of interdependence within the EU. Southern member states lacked resources and increasingly faced domestic unrest on irregular migration matters which points to declining home benefits of unilateral irregular migration policies. Yet, migratory pressure and following (perceived) burdens to society increased due to the obligations for southern EU member states under the Schengen and Dublin conventions to control the external border and to process asylum applications as state of first entry for asylum-seekers, which taken together created the myth of a north-south disparity in handling migration (Finotelli, 2007).

The globalization and privatization of irregular immigration affected every EU member state, although to different extents, and the demand for cooperation on irregular immigration was widespread (Neske and Doomernik, 2006). The effectiveness of unilateral irregular immigration policies and so home benefits, however, was most questionable for southern EU member states. As Schengen members, these states had to implement a tough stance on irregular immigration and yet faced consistently high and, with the end of the 1990s, ever increasing numbers of irregular immigrants in their territories (González-Enríquez and Triandafyllidou, 2009). The reasons for this development included a mixture of constant labor demand, especially in the construction and agriculture sector, that could not be met and managed by regular immigration policies. Italy and Spain, for example, relied on a quota system allowing a number of third country nationals to enter and work legally in the country based on yearly estimates. This quota

system did not work efficiently since it is difficult to project concrete labor demand per year and to process applications for work at a pace that meets employers' expectations. Consequently, southern states were characterized by informal job markets that attracted undocumented foreign labor (Finotelli and Arango, 2011). In addition, previous regularization measures for irregular immigrants developed a pull effect for third country workers that bet on the implementation of future regularization programs (Baldwin-Edwards, 1997: 508). Immediately before the IGC leading to the Nice Treaty, all southern EU member states introduced a large-scale regularization program for third country nationals, and workers in particular (this was the first regularization program for Greece). In light of the Schengen dogma and the states' own rhetoric around at least managing irregular immigration, these countries' irregular immigration policies signaled policy failure, a mismatch between control rhetoric and abilities, and demonstrated low home benefits for unilateral policies.

In sum, throughout the 1990s a deportation gap developed between official rhetoric on strict expulsion and the continuing and even increasing numbers of irregular immigrants in the EU (especially in southern member states). Unilateral policy measures proved to be ineffective in closing the deportation gap. European integration and further European initiatives on collective readmission agreements on emerging phenomena, such as human smuggling, and reinforcing a joint stance on deportation promised utilities that outweighed the costs of relinquishing autonomous policy-making. The demand to consider further integration of irregular immigration was therefore high in light of decreasing home benefits for unilateral policy-making on irregular immigration. But it this finding has to be set in context of increased interdependence following the Dublin and Schengen conventions. Based on these documents, member states effectively closed regular migration channels towards the EU and, moreover, shifted the burden primarily on states at the external border. Home benefits of unilateral policy-making decreased but this was increasingly a function of previous integrative steps and interdependence effects, which calls into question the independent causal influence of declining and varying home benefits at this stage.

4.7.2 Sinking home benefits of national regular immigration policies

Although most EU member states publicly stated and implemented a policy of zero immigration, all of these states experienced ongoing regular immigration in the 1990s. Northern states and Germany in particular opted for temporary working arrangements for third country nationals from Eastern Europe. Southern member states' regular immigration policies proved to be ineffective in matching labor demand with foreign supply. Instead of an arguably active and coordinated labor migration policy, southern member states relied on regularization to stabilize working relations and the labor market in low-skilled sectors (González-Enríquez and Triandafyllidou, 2009: 113–116). For both northern and southern states, unilateral policy-making paid off, and home benefits of national regular immigration policies were comparatively high. European integration could have implied costs that were out of proportion compared to the ensuing sovereignty losses. All member states needed foreign workers in the low-skilled labor sector and recruited workers in this regard without hindrance given that labor demand could easily be met through foreign labor supply in these sectors via national programs, whether these were temporary working agreements or regularization measures. Member states were neither in competition between themselves nor between third states in attracting low-skilled workers given the sheer number of third country nationals who were willing to take these jobs. Under these conditions, it seemed only disadvantageous to cede policy discretion and autonomy to the EU level from a governmental perspective that promises home-made migration control.

This situation changed in the time preceding the Nice IGC. On the one hand, EU member states were increasingly in competition with other industrialized states in recruiting high-skilled labor in the globally ascendant information and technology sector (International Organization for Migration, 2003: 248–249). On the other hand, especially Western European societies had to acknowledge demographic trends that projected both declining and ageing populations and hence raised the question of how to uphold existing welfare state structures (UNDESA, 2000).

The United Nations Population Division issued a widely recognized report, titled “Replacement Migration”, in 2000 that projected demographic trends for 10 countries and regions until 2050 (UNDESA, 2000). The EU as a whole, as well as four EU member states individually, were analyzed. The report found that the EU’s population, and working population in particular, was set to decline. With regard to the latter point, the report emphasized the adverse effects of ageing populations on social welfare systems. In order to maintain current support ratios (number of workers per older adult), member states needed to strike a balance and either increase the maximum working age and/or consider opening immigration and increasing the number of foreign workers to provide this support. In order to keep support ratios fairly consistent with 1995 levels through 2050, member states could either raise the maximum working age to 76 years (in the absence of immigration) or raise the number of immigrants to “15 times greater than the net migration level in the 1990s” (UNDESA, 2000: 91). In light of these demographic trends and the consequences on social welfare policies, member states clearly had to question if “zero immigration” policies were still pertinent. Demographics entered domestic debates and governments came under pressure to take action. Instead of maintaining the zero-immigration dogma, governments began to shift towards an approach that rested on the key term “migration management”. The German government, for example, reacted to the UN report by investing a special commission with the task of elaborating a vision on future immigration. The resulting report recommended a proactive immigration policy (Unabhängige Kommission Zuwanderung, 2001).

Besides echoing the demographic trends and conclusions that were presented by the UNDESA report, the commission also highlighted increased global competition for highly skilled labor. In order to secure its social welfare system, Germany needed to acknowledge and take part in the “competition for the brightest minds” (Unabhängige Kommission Zuwanderung, 2001: 26; *author’s own translation*). Occupational mobility was said to be on the rise, and Germany and other EU member states lacked skilled labor in one of the fastest growing economic sectors—information and communication technology (European Commission, 2000b; European Council, 2000). Facing this “skills

gap” (European Council, 2000), as well as worldwide competition for skilled labor given increased readiness to move from the side of immigrants, EU member states had a further incentive to revise immigration policies in favor of migration management.

Previous regular immigration policies by EU member states came under pressure. Although labor market needs differed across member states, all member states had an incentive to attract third country nationals and foreign labor in particular. From the perspectives of individual governments, a situation that would allow retaining control over who entered their countries in light of labor market needs was preferable. However, while they maintained ultimate authority over who qualified for admission, national governments had incentives to consider EU measures that might make EU states more attractive for highly skilled labor in the IT market compared to competitor states such as the US, Canada or Australia.

In order to attract highly skilled labor from abroad, EU member states considered the possibility of increasing mobility rights for third country nationals within the EU. Further cooperation on labor immigration in this regard added the value of creating a European job market that was comparable to national labor markets but also promised highly skilled workers increased flexibility in finding new jobs and re-employment in 15 job markets instead of one (Fellmer, 2013: 126–127). Although home benefits of unilateral labor immigration policies began to decrease and the benefits of a European approach increased, member states were nevertheless skeptical of relinquishing more authority to the EU level. This was partially due to ongoing domestic resistance to integration during the Nice IGC. However, reluctance also resulted from the fact that many member states were in the process of reforming their regular immigration policies before and during the Conference. Southern member states, such as Italy and Spain, as well as northern member states like Germany were working on revised national legislation (Unabhängige Kommission Zuwanderung, 2001; Di Pascale, 2002; Gortázar, 2002). For these states it was paramount to codify new regular immigration regimes first before European cooperation and potential interference in national immigration policies could be considered. In sum, although European cooperation on regular immigration increas-

ingly promised economies of scale in attracting required highly skilled labor, the home benefit of national immigration policies remained strong given reform processes in the member states during the Nice IGC.

Member states increasingly had to acknowledge that home benefits of unilateral policy-making on both regular and irregular immigration policy declined and that European cooperation offered a way to prevent human smuggling as well as to attract foreign, high-skilled labor. However, human smuggling and problems of southern member states to pursue tough irregular immigration policies were increasingly an effect of heightened interdependence resulting from the Dublin and Schengen conventions. On regular migration matters, member states increasingly saw the benefit of having a European instead of closed national labor markets. Nevertheless, unilateral policy-making on regular migration matters was preferred at this stage. In sum, home benefits for both policies were declining but based on a closer look and process observations we can conclude that declining home benefits for both policies did not have an effect on governments' demand for (varying) integration and therefore vertical differentiation.

4.7.3 Increased interdependence of irregular immigration policies

The conflict between northern and southern EU member states on irregular immigration, however, deepened at the turn of the millennium. With the Schengen Convention being implemented in Italy and Austria beginning in 1997, northern EU member states had to give up border controls on Schengen's southern flank, which faced increasing migratory pressure at maritime borders (Finotelli and Sciortino, 2009; González-Enríquez, 2009). Northern member states had to rely on the border control capacities and strict enforcement measures of southern states. The demand to make use of the EU's monitoring and implementation apparatus and consider further integration therefore remained high for northern member states before the Nice IGC.

Southern member states had an even greater incentive to support further integration of irregular immigration policies within the EU. First, southern states experienced irregular immigrants entering EU

territory with short-term or fake visas in other member states and then immigrating into the informal labor market in their states (González-Enríquez and Triandafyllidou, 2009: 111). For southern member states, it became relevant to intensify European cooperation on uniform visas and information exchange systems that kept track of who traveled with a visa in the EU. Second, integration and supranational policy-making allowed these states to inject their perspective into EU legislation. Based on the Schengen acquis, especially Italy, Spain and Greece had to patrol the EU's external southern border relying solely on national capacities and funds. Patrolling maritime borders was resource intensive and disadvantageous compared to the land borders that were secured by northern states to the East. While Germany could rely on EU candidate states such as Poland and the Czech Republic for help with patrolling borders who also had an incentive to assist as candidate states for EU membership, Germany could also simply refuse entry at its border check points. Italy, Spain and Greece in contrast had no neighbors to the south. Hence, these states had to convince third countries to prevent migrants for departing for Europe and did not have the incentive of potential EU membership. Southern member states could not simply refuse entry at the southern border and had to account for the fact that maritime borders placed a higher burden and responsibility on them (Baldwin-Edwards, 2004; Gil-Bazo, 2006). Refusing entry would imply allowing people to potentially die in the Mediterranean Sea instead of placing these people in the custody of authorities in neighboring states. The principle of non-refoulement as guaranteed by international law and generally valid for all border controls therefore placed a higher burden on southern EU member states in patrolling the EU's external border (Fischer-Lescano et al., 2009).

Further integration of irregular immigration policy in the EU promised southern EU member states the possibility to commit northern member states to burden-sharing arrangements for controlling the external border. In this regard, the Italian and Spanish prime ministers, Giuliano Amato and José María Aznar, wrote to Jacques Chirac calling on the French Council presidency that coordinated the IGC at that time to consider common initiatives on irregular immigration (Agence France Presse, 2000). The demand for integration was highest for southern

EU member states whereas northern EU member states were interested in increased policy-making given the enlargement process and the preference for committing soon-to-be EU members in Eastern Europe (already in the pre-accession phase) to irregular immigration policies.

4.7.4 Increased interdependence of regular immigration policies

Northern EU member states observed with concern that southern member states had once again introduced regularization programs that within a borderless Europe could attract further irregular immigration and secondary movements towards every EU member state. Northern member states were well aware of these externalities. When asked whether the German Federal Government might also consider a regularization program in light of the Spanish experience, the government responded to an opposition party in parliament by saying:

Comprehensive legalization measures are fundamentally questionable in terms of migration policy because they can trigger additional undesirable migration movements from third countries into the EU and from third country nationals already residing in the EU within the EU (Deutscher Bundestag, 1999; *author's own translation*).

Instead, Germany and other member states continued to promote expulsions as a dominant measure regarding irregular immigrants. Fearing secondary movements, northern member states used the EU level to commit southern member states to an irregular and regular immigration policy that prioritized expulsions and strengthened border controls instead of regularizations.

Compared to irregular migration matters, interdependence in regular migration matters was comparatively lower. Regularization in southern EU member states implied that, previously, irregular migrants were awarded with a residence and, depending on the exact program, a work permit. These residence permits, however, were only valid for the state that issued the documents. Therefore, third country nationals whose status was legalized nevertheless had no mobility right to move

onwards regularly to other Schengen members and EU member states (Niessen, 2001: 420). If migrants decided to move onwards, these secondary movements thus still fell under the category of irregular migration. With the conclusions of the European Council at Tampere in 1999 member states indeed decided that the status of regular TCNs should be approximated to that of EU nationals (European Council, 1999c). Granting TCNs equal mobility rights and hence increasing the probability of regular secondary movements, however, did not take place before or during the Nice IGC and hence interdependence in regular migration matters remained comparatively low to heightened interdependence in irregular migration matters.

4.7.5 Supranational activism: The Commission's subversive activism pays off

Similar to the period leading up to the Amsterdam IGC, the post-Amsterdam period was also characterized by supranational action only within the limits set by the member states. The European Commission was involved and active if and when the European Council called for it. The European Parliament was consulted only if member states, and the Council presidency in particular, were interested in doing this, and the jurisprudence of the European Court of Justice was limited according to the Treaty of Amsterdam in that only national courts of last instance could request preliminary rulings. The curtailed powers and limited involvement of supranational actors did not vary across immigration policies and hence can barely account for why the Nice Treaty differentiated between these policies in terms of decision-making arrangements.

The Treaty of Amsterdam came into force in May 1999. Given the five-year transition period during which the Council might decide on communitarization, this date barely evinced a positive effect on supranational actors' involvement before the Treaty of Nice. In terms of formal power distribution between supranational actors and member states in the Council, the former had not received sufficient new competences or, more specifically, the possibility in practice to exploit their competences, to change the status quo during the interstitial phase.

The European Court of Justice had received no preliminary rulings or actions for annulment before the IGC that could have embedded governments' negotiations during the Conference in a revised policy-making setting. Shortly before the Amsterdam Treaty entered into force and the Council would be required to consult the European Parliament before adopting legislation, the European Parliament complained that it was insufficiently informed. It urged the Council "to take into account the opinions of the European Parliament when it takes decisions on legislation on the basis of Title IV of the new version of the EC Treaty" (European Parliament, 1999). The Council had clearly held the Parliament at arm's length and the European Parliament had no chance to expand its competences.

The Commission still shared the right of initiative with member states in the Council. The Commission rarely used this shared right in the 1990s and instead presented Communications that were aimed at influencing decision-making in the Council. When the Commission was active in its own right and presented a draft convention on the admission of third country nationals, this initiative was not taken up by the member states and was eventually abandoned (European Commission, 1997b). Subsequently, the Commission adhered to its previous strategy of self-restraint in that it offered and provided especially the European Council with information and input upon request. The European Council mandated both the Commission and the Council to present an Action Plan on how to implement an AFSJ policy in line with the new provisions of the Amsterdam Treaty. The ensuing Action Plan was presented in 1998, and listed priority measures to be taken in either two or five years, therefore paving the way for the European Council meeting at Tampere in 1999 that would further concretize a strategy for realizing the AFSJ (Council and European Commission, 1999). Tellingly, regular immigration matters and questions of admission for third country nationals that had been emphasized in the Commission's draft convention just one year before did not qualify as urgent matters and were given five years, rather than two, for resolution.

To be fair, this indicated a slight step forward given that the Treaty of Amsterdam exempted regular immigration matters from the five-year deadline by which the EU should make legislative progress on immigra-

tion matters (Article 63 TEC). One explanation could be that the Commission indeed had difficulty influencing the Interior Ministers on the Council of its proposals who were critical gatekeepers on AFSJ matters (Interview Member State Representative #2). The Commission instead found more resonance for its proposals with the European Council. The Commission knew that justice and home affairs policies were high on domestic agendas and election campaigns. Governments were determined to make progress in these fields in light of increased interdependence and the impending enlargement that might imply further transboundary movements. These circumstances put the Commission in a central position. Not only was the Commission able to monitor the implementation of the pre-accession obligations in candidate countries and therefore the transposition of the EU's *acquis* on justice and home affairs in the new member states, but member states also committed each other to legislative progress in this field with the Treaty of Amsterdam and were increasingly dependent on the Commission's resources to push legislation forward and enforce implementation of common rules on external borders and migration management.

The Commission presented itself as a benevolent agenda setter. Its communication "Towards an Area of Freedom, Security and Justice" added value for governments to define for the first time what this area could mean and what it might look like in practice (European Commission, 1998). Whereas Interior Ministers defended national interests in the Council and failed to present a common vision for a European area of free movement and security, the Commission presented governments with a unique selling point in favor of increased European integration as the Nice Treaty and eastern enlargement approached.

Enlargement was increasingly becoming a reality and member states were rhetorically "entrapped" to fulfil their promises to candidate states (Schimmelfennig, 2001). Precisely for this reason, member states convened another IGC, namely to prepare the EU for enlargement with the Treaty of Nice. Simultaneously, many member states faced increasing Eurosceptic and anti-immigrant tendencies among their domestic populations (Messina, 2007: 54–96). It was not without reason that, with the Treaties of Maastricht and Amsterdam, member states had continually enshrined the principle of subsidiarity in the EU's *acquis*.

Strictly speaking, governments had to deliver and satisfy both to ensure that candidate countries would fulfil immigration standards and that domestic audiences would support enlargement and further European integration. Under these circumstances, the Commission struck the correct balance. On one hand, it provided governments with a vision of the AFSJ that could ensure both progress on legislation that would be transferred to candidate states and could equally resonate with EU citizens by offering an area that promised mobility while ensuring security. On the other hand, the Commission was eager to present itself as non-intrusive by stating that it considered “the design and implementation of this plan of action as [a] joint effort with the Council” (European Commission, 1998: 10).

The Commission’s strategy of subversive supranationalism paid off. The European Council at Tampere agreed upon a full working program of AFSJ policies and hence on immigration policies, and awarded the Commission with an informal right of initiative. Not foreseen in the Amsterdam Treaty, the European Council mandated the Commission to draft all legislative proposals on both regular and irregular immigration matters (European Council, 1999c). The Commission was mandated to prepare a “scoreboard” that would annually evaluate legislative progress with respect to the 1999 Tampere goals, which granted the Commission informal monitoring and implementation competences. Having received informal agenda setter and implementation competences, the Commission became increasingly active and presented both a Communication on immigration policy as well as the first scoreboard in 2000 (European Commission, 2000b, 2000c). Both documents are evidence of the Commission’s changed behavior in not only pandering to national governments but also pushing legislation forward.

In sum, whereas the European Court of Justice and the European Parliament were sidelined, the Commission succeeded in inserting itself into the immigration policy debate. Governments were under pressure to present enlargement candidates and domestic audiences alike with concrete immigration policies that struck a balance between mobility rights and public security. The Commission acted with self-restraint and avoided alienating member states with excessive activism before the Treaty of Amsterdam, but at this point the Commission’s

activism and strategy were welcomed by the European Council. Facing enlargement and another IGC that would likely include integrative steps, governments were very amenable to the Commission's vision and concrete plan to make an AFSJ a reality. Showing respect for the Council and the Council's competences, the Commission presented itself as a knowledgeable and ambitious team player. Due to this strategy and the extant political circumstances, the European Council awarded the Commission with informal agenda-setting and implementation powers beyond the provisions in the Amsterdam Treaty before the Nice Conference began. Governments did not, however, formalize these competences with the Treaty of Nice. Although in practice the Commission already enjoyed the function of agenda setter, domestic opposition to integration explains why governments refrained from integration and formalizing these competences in the treaty.

4.8 The supply of integration and the Nice IGC

The foundations for yet another IGC were already laid with the Treaty of Amsterdam. The attached protocol on institutions called for another IGC aimed at preparing the EU for enlargement. The European Council of Cologne in June 1999 called for the Conference to begin in early 2000 and to address the so-called "Amsterdam leftovers" (European Council, 1999a). The European Council of Helsinki in December 1999 reaffirmed this decision and set three priority matters on the agenda for the upcoming IGC: the re-weighting of votes in the Council, the size and composition of the Commission and lastly the possible extension of qualified majority voting in the Council (European Council, 1999b). It was decided that the Conference should commence in February and end in December 2000 under the French presidency.

The Conference officially began on 14 February 2000 after the European Parliament and the Commission expressed their support as required under Article 48 TEU. A group of representatives from each government met roughly twice and the Foreign Ministers approximately once per month over the course of the IGC (Laursen, 2006: 4).

The heads of state and government met three times during the Conference, in Santa Maria da Feira (19 and 20 June), in Biarritz (13 and 14 October) and finally in Nice (7 until 11 December). The European Parliament was to be informed via exchanges of views with the president of the parliament before foreign ministers or the heads of state and government met. The European Commission was allowed to take part in the meetings of the group of representatives as well as in higher-ranked meetings whereby the Council Secretariat functioned as secretariat of the conference (Laursen, 2006: 3).

As mentioned above, the Nice IGC dealt primarily with three issues. For the purposes of this study, negotiations on extending qualified majority voting to further policy areas was the most important aspect of the negotiations. There were 73 policy areas in which decisions were still made unanimously in the Council before the Treaty of Nice (Laursen, 2006: 5). The Portuguese presidency did not propose extending QMV to all of these policy areas but instead suggested 39 areas as candidates for extension (CONFER 4750/00). Early on, immigration policies were one such candidate, indicating that at least some governments had a strong preference even after the Amsterdam IGC to consider further integration of these policies. However, the preference setting on integrating these policies changed in comparison to the negotiations at the Amsterdam IGC. Resistance came less from integration-sceptic governments. Previous integration laggards such as the United Kingdom and Denmark had received opt in/out arrangements and were thus not bound by further integrative steps anyway. Intergovernmental negotiations on regular migration matters in particular were subject to domestic contestation by the German *Länder*. The demand to integrate both migration policies varied in light of interdependence effects and so did the supply of integration as subnational actors hijacked the negotiations on regular migration matters.

4.8.1 Preference intensities for integrating regular and irregular immigration policies

Of the 39 policy areas considered for qualified majority voting, immigration policies were included, with the Portuguese presidency devising

a special note on this matter on 22 February 2000 (CONFER 4710/00). The presidency suggested several options for the further integration of these matters, which were meant to serve as a basis for the negotiations. This note indicated that preference intensities on integrating immigration policies varied. Member states were asked whether it was possible during the Conference to already identify “certain areas” that fell under the co-decision procedure or QMV in the Council with consultation rights for the Parliament, either immediately when the treaty entered into force or after a transition arrangement (CONFER 4710/00). The presidency apparently did not consider it a viable option to propose the communitarization of all immigration-related matters. The introductory note indicates that preference intensities varied across immigration policies without stating, however, which immigration policy would be the likeliest candidate for further integration.

Following the introductory notes by the Portuguese presidency, member states distributed position papers that outlined their overall preference setting on the three main issues of the Conference agenda. All member states accepted that qualified majority voting should be extended to further policy areas in light of the upcoming enlargement round. Most governments were of the opinion that qualified majority voting, in combination with the co-decision procedure, should become the rule for Community decision-making, but each delegation also indicated either exemption criteria or even concrete policy areas that should deviate from this rule. No governmental position paper mentioned any immigration policy as an area that should remain intergovernmental and it is therefore not possible to unambiguously observe and determine varying preference intensities for regular and irregular immigration policies.

However, the observation that both regular and irregular immigration policies were candidates for further integration corresponds with the previous analysis that, in the run up to the Nice IGC, demand for integration of both policies increased in parallel, for different reasons. Interdependence of irregular heightened with southern member states facing increased irregular immigration that could lead to secondary movements within the EU. Furthermore, southern member states had to control maritime borders on behalf of the Community, which

involved disproportionate costs due to the peculiarity of maritime borders. Northern member states were skeptical towards southerners' regularization programs, which they believed could attract increased irregular immigration that, as a result of open borders, could result in immigration flows into their territories. For both northerners and southerners alike, integration and supranational policy-making could ensure control over unilateral policy decisions that implied negative externalities. As far as regular immigration matters were concerned, governments increasingly saw benefits in cooperation given ageing populations and increased demand for highly skilled labor in the IT sector, for which the EU was competing with other international players. European measures hereby promised economies of scale in attracting foreign labor. Thus, for both policies demand for further integration from the government side can be deduced and validated by every government at least not objecting to further integration. The final outcome of the Conference, namely that irregular immigration policies were further integrated while regular immigration policies were not, is not attributable to opposition resulting from different governmental preferences but to varying domestic opposition towards the integration of these policies.

Compared to the Amsterdam IGC, preferences regarding integration of immigration policies conflicted less. Previous status quo supporters, such as the United Kingdom and Denmark, had received opt-in and opt-out arrangements regarding immigration policies that shielded these states from being forced into Community policies and rules. Therefore, these states were less threatened by integrative outcomes with regard to immigration policies at the Nice IGC. Neither state showed the same level of resistance during the Conference as was seen at the Amsterdam IGC. Other governments demanded further integration of both regular and irregular immigration policies. Consecutive notes by the Portuguese presidency list both immigration policies as candidates for an integrative arrangement (CONFER 4734/00; CONFER 4737/00). The presidency's report to the European Council at Santa Maria da Feira (19 and 20 June) even explicitly refers to the respective treaty articles and to both policies as provisions for which qualified majority voting should be considered (CONFER 4750/00).

The further integration of both policies remained in consensus among conference participants over the following months, although the presidency notes increasingly differentiated between concrete treaty articles and policies when presenting policies as candidates for integration (CONFER 4753/00; CONFER 4767/00). On 14 September, the French presidency for the first time presented a revised treaty article on the decision-making procedure for immigration policies (CONFER 4770/00 ADD. 1). The presidency states that there was consensus among delegations in favor of introducing QMV for both policies, yet it remained to be discussed whether QMV should be the rule when the treaty entered into force or after a transition period without a further Council decision as provided for originally in the Amsterdam Treaty (CONFER 4770/00). The proposal for the revised treaty article went so far as to suggest the right of initiative for the Commission and QMV in the Council immediately when the treaty entered into force. The provision on the powers of the Court of Justice were to be adapted by a Council decision after consulting the Parliament. The European Parliament's powers remained undecided, and the co-decision as well as the consultation procedure remained on the bargaining table.

It is intriguing to compare the draft article of 14 September (CONFER 4770/00 ADD. 1) with the final treaty article as entailed in the provisional text of the treaty of 22 December 2000 (SN 533/1/00). Most importantly, while the draft article offered the same decision-making arrangement, the final agreement devised different decision-making arrangements for regular and irregular immigration policies after a transitional period. Irregular immigration policies came under the co-decision procedure automatically from 1 May 2004 (Protocol on Article 67 of the TEC). Regular immigration policies were not part of this automatic transition to co-decision, and it remained optional for the Council to transfer these matters to co-decision after the five-year transition period that was introduced by the Amsterdam Treaty. The provisions on the European Court of Justice remained unchanged and hence were the same as in the Treaty of Amsterdam.

The question is, what happened in the time between 14 September and December 2000 that can explain why member states ultimately decided to institutionally differentiate between regular and irregular

immigration policies? Although there was agreement to integrate both immigration policies from February until September 2000, consecutive presidency notes recorded a process of differentiation between immigration articles and phasing out the effect of integration. The fact that governments generally accepted the integration of both policies initially and maintained this ambition until nearly the end of the Conference is indicative of both an original governmental demand for the integration of both policies tempered by increasing domestic opposition to this potential bargaining outcome.

4.8.2 Rising domestic constraints and differentiation

Germany and France became more reluctant to support integration and hardened the negotiations towards integrating immigration policies further (Taylor, 2000b). The French government showed itself to be an integration laggard already at the Amsterdam IGC and was reluctant to grant further competences to the EU level with regard to immigration policies. It was on French insistence that a safeguard clause was included in the Amsterdam Treaty that stated that common immigration policy-making in the EU should not affect member states' responsibilities to ensure law and order and internal security (Article 64 TEC). France was anxious to relinquish authority on border control measures to supranational agents in particular as these could enforce open borders within the EU against the will of national governments. France was suspicious of the liberal drug policy in the Netherlands and had for years blocked full implementation of open borders and the Schengen acquis at its borders with Belgium and Luxembourg (Interview Member State Representative #3). Granting supranational actors enforcement powers could undermine the government's discretion in controlling its borders, especially in a time when anti-immigrant sentiment was on the rise in the domestic context.

French resistance can hardly explain vertical differentiation as an outcome of the negotiations or the timing of when consensus shifted towards a differentiated outcome. France was apparently against further integration with regard to "QMV to rules on issues ranging from

visa and asylum rules to border controls” (Taylor, 2000a). France was not a clear opponent of integrating regular immigration matters, which ultimately was the policy area exempted from immediate or automatic communitarization. Moreover, the French presidency itself presented an integration-minded draft article on immigration policies on 14 September. As France held the EU presidency and thus acted as a broker, the country was hindered from shaping negotiations too egoistically in line with its own preferences. It seems more likely that France revealed itself as integration laggard only when the German position changed in favor of status quo arrangements, especially for regular immigration matters. According to this interpretation, France subsequently held reservationist positions and joined German objections later on, making resistance less expensive in terms of reputation costs vis-à-vis other delegations.

Increasing domestic opposition in Germany towards integrating regular immigration matters is the primary causal effect explaining differentiation. As previously outlined, demand for integration of both regular and irregular immigration policies increased before and during the IGC of Nice. Ageing populations and projected demand for foreign labor in the IT sector combined with international competition for highly skilled labor pressured governments to reconsider their regular immigration schemes. The German government reacted to these developments by starting a domestic debate and policy reform process. One of the first measures taken was the German government’s “Green Card” of August 2000, meant to attract foreign labor to the German information and communication sector (Schmid-Drüner, 2006). The second initiative was to invest in the previously mentioned special commission on immigration in September 2000, which could facilitate the implementation of a comprehensive immigration law based on its findings and recommendations (Unabhängige Kommission Zuwanderung, 2001). The government’s actions were proof of the sinking home benefits of the zero-immigration policy and interest in the option of further European cooperation. However, despite the pressure was on governments, domestic opposition was politicizing these measures.

The German *Länder* and Bavaria in particular had already influenced the Amsterdam IGC towards an outcome that bracketed further cooperation on regular immigration matters. Although the German

chancellor at that time, Helmut Kohl, managed to push Bavarian concerns through the intergovernmental negotiations, the Bavarian minister President Edmund Stoiber remained dissatisfied with the outcome and expressed his frustration publicly (Süddeutsche Zeitung, 1998c). Stoiber explicitly criticized the treaty Article that addressed regular entry and stay conditions for third country nationals (Süddeutsche Zeitung, 1998b). In his opinion, member states should always be autonomous in deciding how many third country nationals could enter their countries and on the conditions for admission. Stoiber forced the German Federal Government to send a letter to the British presidency in 1998 in order to clarify that the new treaty did not hinder Germany from restricting admission into the national labor markets (Süddeutsche Zeitung, 1998c; Hailbronner, 1998: 1052).

The *Länder* governments kept their opposition to Community policy on labor migration alive and again constrained the federal government with respect to its bargaining position. The *Länder* governments did this at a rather late juncture during the IGC, which corresponds to the timing of when presidency notes devised different decision-making arrangements for regular and irregular immigration policies. At the beginning, the *Länder* governments were undecided on which policies should be sequestered from integration and called upon the government to promote a delimitation of competences (“*Kompetenzabgrenzung*”) in February 2000 (Bundesrat, 2000b). This vague mandate gave the federal government some room for maneuver to list policies suitable for increased QMV decision-making. While the German government held a rather constructive position on extending QMV and co-decision to further policies in the first months of the Conference, this changed when the *Länder* governments voiced their opposition via the Bundesrat at the end of October 2000 (Engel, 2006: 101). Minister Presidents of the *Länder* governments met from 25 to 27 October and on 10 November adopted a resolution in the Bundesrat (Bundesrat, 2000a). The resolution listed seven policy areas for which the Council should continue to make unanimous decisions. Asylum, regular and irregular immigration matters were part of this group of policies.

The final agreement at Nice reconciled the preferences of most EU member states in favor of integration. Given the borderless Schengen

area that was now also implemented in Italy, all EU member states saw the need for further cooperation. The upcoming enlargement made this topic even more urgent and decision-making gridlock an anticipated scenario. Given French resistance, the delegations agreed to adhere to a transitional period, although, in light of enlargement, this included an automatic transition to communitarization instead of an optional decision by the Council after five years. This arrangement committed current EU member states to progress on irregular immigration legislation through increased interdependence and forced candidate states to implement these policies as part of the pre-accession strategy without allowing them to have any input. The German *Länder*, which intervened most prominently in the intergovernmental bargaining protest, did not object to intensified cooperation on external border management as EU integration allowed for more influence over how southern states controlled borders (Süddeutsche Zeitung, 1998c, 1998a).

Demand for integration and supply regarding irregular immigration policy to some extent corresponded to outcomes at the IGC. This was not the case concerning regular immigration policy. Demand for integration was increasing given exogenous developments such as changing demographics and new economic sectors demanding highly skilled labor. This demand was well recognized by governments that, for the majority of the Conference, considered the integration of regular immigration policies a desired option. Failure of supply was due to the strong domestic opposition in Germany, with state governments forcing the federal government into making a special arrangement for regular immigration policies. Ultimately, regular and irregular immigration policies were vertically differentiated—a decision that was reaffirmed by the Council decision after the transition period, yet repealed by the parallel treaty revision process during the European Convention towards the Treaty of Lisbon.

4.8.3 The absence of supranational influence in the bargaining process and the result

In line with Article 48 TEU, the European Commission and the European Parliament had to be heard before the IGC could be officially con-

vened. Both organizations used this opportunity to present their opinion on treaty revision, whereas the European Court of Justice delivered no input on the negotiations. The European Parliament's resolution did not mention immigration policies and generally did not include any specific proposals on integrating policies further (European Parliament, 2000). The resolution instead expressed the Parliament's frustration that the agenda for the conference was too narrow and fell short of comprehensive revision before enlargement. The European Commission's first contribution to the conference equally failed to present concrete reform proposals. With regard to justice and home affairs policies, and hence also immigration matters, the Commission simply referred to the ambitious agenda set by the European Council and Tampere without showing preference for further communitarized decision-making (European Commission, 1999: 7).

The European Parliament's role during the IGC was negligible. With its second contribution, it indeed tried to influence the negotiations, this time presenting concrete reform proposals and demanding co-decision and QMV for all policies belonging to the AFSJ (CONFER 4736/00). However, this contribution on 13 April 2000 came at a point in time when the agenda had already been set and hence did not alter bargaining dynamics (Niemann, 2006: 242). Many MEPs were heavily disappointed with the final treaty and threatened to block the ratification of the Nice Treaty (Ulrich, 2000). Formally, treaty ratification was independent of the European Parliament welcoming or rejecting the treaty text, however, the European Parliament linked its agreement to its role in the enlargement process (Ulrich, 2000; European Parliament, 2000). Parliamentary consent was required for making enlargement a formal reality. Member states, however, were unimpressed by this threat, which lacked credibility. The European Council as well as the European Parliament had voiced their support for the enlargement process several times and the Commission, on behalf of the Community, was in the process of implementing the pre-accession strategy in the candidate states. From the perspective of the EU member states it was unlikely that the Parliament would sabotage the enlargement process. Although minimal in the eyes of some MEPs, the Treaty of Nice nevertheless implied further integrative steps and extended the co-decision proce-

dure and QMV in the Council to several policies. Moreover, the Nice Treaty included member states' commitment to another treaty revision before enlargement, and hence another opportunity for the Parliament to advocate for increased integration. Lastly, reputation costs were too high for the European Parliament to block enlargement and disappoint electorates in the old and new member states after EU member states and candidate states had already reached an enlargement agreement.

The European Commission did not even suggest member states to consider the communitarization of immigration policies with its second communication just before the conference started (European Commission, 2000a). Instead of trying to set the agenda in favor of co-decision and QMV in the Council, the Commission highlighted the institutional peculiarity of Article 67 but was "at this stage [...] not proposing that the five-year period be shortened" (European Commission, 2000a). This reluctance to cultivate support for an integrative outcome is surprising given that the Commission had previously issued scoreboards that recorded insufficient legislative progress on immigration policies and the Tampere timetable and linked these poor results to the current decision-making system. Moreover, the French presidency was a laggard leader and as such created an opportunity for the Commission to provide leadership in framing and anchoring reform proposals. The failure to do so and the Commission's restrained activism were attributed to the overall context of the negotiations (Niemann, 2006: 240–241). One important aspect that drove the Commission to take on a passive role during the conference was that the Commission itself was the object of negotiations and was recovering from a legitimacy crisis after the Santer Commission had resigned only the year before.

Ultimately, both supranational actors failed to influence the negotiations with regard to the integration of immigration policies. The European Parliament missed its opportunity to influence the agenda-setting process and later lacked a credible threat for shaping the bargaining outcome. The European Commission could have played a more important role but failed to do so. Most importantly, supranational activism cannot explain the vertical differentiation of immigration policies. This outcome does not correspond with their preferences and cannot be attributed to varying activism across the two migration policies.

<i>Independent variable</i>	<i>Hypotheses on varying demand for integration of migration policies</i>	<i>Finding</i>
Home benefits	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in irregular migration matters.	Home benefits/policy failure varied across policies; yet, increasingly a function of interdependence
Interdependence	Interdependence and hence demand for integration are likely to vary as negative externalities in terms of secondary movements should be higher in irregular matters.	Interdependence varied; regular migrants had no mobility rights despite open borders; irregular migration increasingly to/via southern EU states
Supranational activism	Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward on irregular migration matters.	Supranational activism did not vary but convinced member states to delegate informal agenda-setting to Commission
<i>Independent variable</i>	<i>Hypotheses on varying supply of integration for migration policies</i>	<i>Indication</i>
Domestic opposition	Domestic opposition and hence supply of integration are likely to vary as governments face more discretion in pursuing irregular migration matters than regular migration matters.	Threats by national veto players varied; strong opposition by German Länder against integrating regular migration
Preference intensities	Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on irregular migration matters.	Opposition did not vary across policies
Supranational activism	Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on cooperation irregular migration matters due to Schengen process.	Supranational interventions during IGC did not vary and did not have impact on negotiations on both policies

Table 7: Summary of expectations and findings (Nice IGC)

4.9 Demand for uniform integration with the Treaty of Lisbon

The Treaty of Nice provided for the vertical differentiation of regular and irregular immigration policies. The former remained largely in an intergovernmental setting with a shared right of initiative, unanimity in the Council and consultation with the European Parliament. Although irregular immigration was governed by the same procedures, the Protocol on Article 67 determined that irregular immigration policies would be subject to co-decision procedures from 1 May 2004. For both policies, the jurisdiction of the European Court of Justice remained limited in that only the highest national courts were allowed to make preliminary rulings.

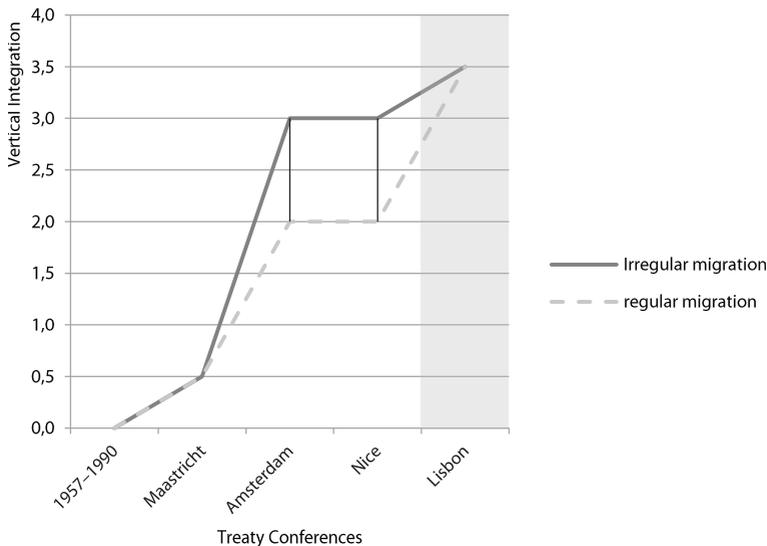


Figure 12: Uniform integration levels with the Lisbon Treaty

The year 2004 led to an institutional paradox. Vertical differentiation was reaffirmed when the Council adopted a decision on 22 December 2004 that brought irregular immigration policies under the co-decision procedure and explicitly excluded regular immigration matters (Council, 2004). However, at the same time, the European Council finally approved the Constitutional Treaty in June 2004 and cleared the way

for national ratification. Successful ratification would have implied that both regular and irregular immigration policies would be subject to the co-decision procedure accompanied by full jurisdiction of the Court of Justice. It is interesting to ask why the year 2004 brought two different institutional settings for immigration policies to light, one providing for vertical differentiation and one providing for uniform integration of both policies.

One explanation for this puzzle is that interdependence and hence the demand for integration was stronger regarding irregular immigration matters. Migratory pressure towards southern Europe combined with human tragedies in the Mediterranean Sea (Nowak, 2001), the assumed link between terrorism and irregular immigration after 9/11 (Huysmans, 2000) and the anticipated effects of Eastern enlargement eventually created the momentum for governments to commit each other to integration and a joint effort regarding irregular immigration (Niemann, 2006: 246). Declining home benefits, in contrast, had brought regular immigration matters to the European agenda with the potential promise of attracting highly skilled labor more effectively by turning national labor markets into a joint labor market characterized by mobility rights. This argument was taken up by supranational actors and the Commission in particular, which tried to force member states into cooperation. Yet, interdependence between regular immigration policies was low and therefore governments' incentive to control each other's legislation via integrated decision-making structures was not very high. Based on this, the demand for integration was already unevenly distributed between immigration policies.

Why the Constitutional Treaty nevertheless provided for uniform integration levels while the Council decision of 2004 maintained vertical differentiation is less linked to demand factors. This parallelism and uniform integration as the end result of the Treaty of Lisbon was dependent on whether domestic opposition could affect a government's bargaining position and hence influence negotiations. More specifically, the German government was able to exclude regular immigration matters from communitarization with the 2004 Council Decision. Facing persistent domestic opposition towards a European regular immigration policy, the German government could bracket regular immigra-

tion matters in the Council Decision, which was based on unanimity. Although this was attempted, this exclusion strategy was not successful in the European Convention leading to the Constitutional Treaty. The Convention was not an IGC granting each delegation a right to veto final agreements. Participation by diverse actors and argumentation as the standard method for agreement made it difficult for the German representatives to dominate the negotiations via traditional means. The following IGCs in 2003/2004 and 2007 could hardly reverse provisions that were adopted by the Convention, as the Convention and its results locked in previous agreement and enjoyed great legitimacy.

4.9.1 Sunk home benefits of irregular immigration

Schengen cooperation and soft parallel measures in the EU in the 1990s had led to a restrictive stance on immigration in the Community. Schengen member or not, all EU member states subscribed to or were forced to subscribe to a restrictive stance on immigration. The tightening of regular immigration channels did not prevent migrants from heading towards the Community, but rather resulted in migrants using immigration channels supported by international law, such as asylum seeking and family reunification, or opting for irregular immigration. Irregular immigration was recognized as a problem, particularly by southern EU member states and governments, who adopted laws and invested in increased capacities to address irregular immigration (Finotelli and Sciortino, 2009; González-Enríquez, 2009). Indeed, restrictive immigration laws, reinforced border control measures and surveillance systems made it difficult for migrants to enter EU territory on their own. Instead, migrants progressively had to rely on third parties to increase their chances of entering the EU. Human smuggling networks developed that challenged member states' capacity to effectively prevent third country nationals from entering their countries (Pastore et al., 2006; Neske and Doomernik, 2006). Trafficking and smuggling routes went across EU territory and were therefore problematic for all states. In response to this, the Council adopted *Directive 2002/90/EC* to establish a common definition of human smuggling as a legal offense.

Moreover, EU member states still had difficulty imposing their austere stance on irregular immigration and implementing expulsion orders. As previously noted, European cooperation from the mid-1990s onward promised economies of scale in this regard. This rationale gained increased traction at the beginning of the 2000s. The Seville European Council urged the Council to consider an expulsion and repatriation program. Based upon the Commission's Green Paper and consultation process on return policies, the Council adopted the *Return Action Programme* (Council, 2002). The mutual recognition of return decisions and dialogue between return officials was designed to enable member states to expel irregular immigrants more effectively in line with their rhetoric at the expense of protecting migrants' rights (Cholewinski, 2006: 925).

Lastly, several southern states (Italy, Portugal and Spain) once again introduced regularization programs, indicating decreased effectiveness of their national irregular immigration policies in terms of the expulsion dogma. The Italian regularization program was the largest of its kind in the EU and naturalized the status of over 700,000 people in 2002 (Baldwin-Edwards and Kraler, 2009: 31). Spain experienced a heated domestic debate on how to manage irregular immigration (Nowak, 2001). In 1999, Spanish opposition parties adopted a rather generous law against the votes of the minority government of Partido Popular. When the latter won the national election in March 2000, it immediately introduced and adopted a legislation that once again threatened every irregular immigrant with expulsion if apprehended without a valid residence permit. Despite restrictive laws and rhetoric, Spain nevertheless enacted two further regularization programs in 2001 and 2005, granting 700,000 residence permits in total (Baldwin-Edwards and Kraler, 2009: 32).

In sum, previous efforts to reduce immigration and to bolster border control capacities did not disincentivize migrants from immigration. Instead, migrants became increasingly reliant on human smuggling networks that organized irregular movement across land and increasingly sea borders. Especially southern EU member states experienced increasing levels of irregular immigration and despite expulsion policies had to resort to regularization programs to close deportation gaps. Redress was hoped for through further European cooperation

on border controls and human smuggling networks to stop migrants from entering EU member states in the first place. These challenges and declining home benefits were at least partly an effect of previous EU measures that heightened interdependence besides unilateral problems such as informal economic sectors (Baldwin-Edwards, 1997). Southern member states faced an over proportionate migratory pressures due to their obligations to control the EU's external borders to the Mediterranean Sea and to also process asylum applications on the community's behalf. As the EU stepped up its border control measures and jointly worked on managing migration via common asylum and immigration rules, migrants that were not eligible for asylum or regular migration relied on human traffickers to nevertheless enter EU territory. Human smuggling that increasingly challenged member states' irregular migration policies was therefore linked to previous EU measures. Declining home benefits are therefore at least partly a result of heightened interdependence. The more integration proceeds, the more unilateral policies and potential policy failure have to be interpreted in light of increasing interdependence of member states' policies.

4.9.2 Sinking home benefits of regular immigration policies

Already during the Nice IGC governments had begun to recognize that regular immigration was a necessity due to ageing populations and entrepreneurial demands for highly skilled labor. The European states were in competition with other industrialized nations, such as Canada, Australia and the US, which had already adopted regular immigration schemes (International Organization for Migration, 2003: 239). In this situation, European cooperation seemed to be a promising avenue for making European labor markets more attractive. Consequently, EU member states began to consider common policies that granted certain categories of third country nationals in the EU increased mobility rights within the Community. Labor shortages could then be filled by nationals, EU nationals and lastly by third country nationals, and highly skilled workers would have a higher incentive to consider emigration

towards an EU member state instead of other labor markets given the opportunity to find re-employment throughout the EU under privileged terms (Fellmer, 2013: 126–127).

In parallel, however, several governments faced increasing domestic opposition to relinquishing the zero-immigration paradigm as right-wing parties in several states saw success in national elections. National reforms on foreigner laws and regular immigration schemes were highly politicized in some states and in Germany in particular (Schmid-Drüner, 2006). As national reforms proved to be contentious, the incentive to lobby for an EU-wide regular immigration schemes was rather low. Trapped between increasing demand for regular labor and domestic opposition to immigration, governments did consider European cooperation, but negotiations were cumbersome and centered on lowest common denominator outcomes. Although European policies on regular immigration promised to add value in attracting foreign labor, member states still resisted making EU-wide regular immigration policies a priority.

4.9.3 Interdependence of irregular immigration policies

Previous European cooperation was focused on preventing immigration. Uniform visa policies towards third countries and the decision to make carriers liable in cases where immigrants entered EU territory without valid documents led to asylum seekers and irregular immigrants entering EU member states illegally (Baird, 2017). The EU's external border with Eastern Europe was patrolled by the respective EU member states and EU candidate states alike. The consequence was that migrants increasingly took routes that were difficult to control and more and more made their journey to Europe via dangerous routes including across the Mediterranean Sea (Vries and Guild, 2018). The strict posture on immigration therefore placed a higher burden on southern European states, who had to fulfil both the processing of asylum applications as states of first entry according to the Dublin framework as well as patrol the EU's sea borders, which increasingly saw the

phenomenon of “boat people”. The overall Dublin and Schengen regime hence produced dis-proportionate costs for southern member states.

Southerners were increasingly unwilling to shoulder these costs alone. Italy and Spain joined forces and were eager to shift EU policies towards a system of burden-sharing. The Spanish and Italian governments met twice in 2000 to develop a common strategy and proposals that could alleviate their situations. Already at this stage both governments began to lobby for a “multinational European border police force to fight illegal immigration” (Agence France Presse, 2000), arguing that the costs of heightened interdependence should be shared among EU member states equally. The Spanish government then used its presidency term to make irregular immigration a top priority for the EU. The Seville European Council in June 2002 placed irregular immigration as the first item on the agenda.

The southern member states were the strongest advocates of further cooperation but were supported by several EU member states who saw domestic opposition parties politicizing irregular immigration as a top priority during national elections (Lauber, 2002). Increased awareness of and consensus on the urgency of finding a common approach to irregular immigration did not result in legislative progress, as noted by governments themselves (European Council, 2001). The demand for further cooperation and for decision-making structures that allowed the swift adoption of common measures was therefore high. This demand became even more salient as governments anticipated the effects of the upcoming Eastern enlargement when legislation would need to find consensus among 25 states. Governments’ acceptance of extending majority voting and endowing supranational actors with implementation functions therefore grew until 2004 when treaty revision was negotiated and enlargement was scheduled.

4.9.4 Interdependence of regular immigration policies

Although governments abandoned the zero-immigration paradigm and were increasingly willing to attract foreign labor in the high-skilled sector, they did not enter into a legislative race to the top in which more

and more generous immigration schemes were implemented. Interdependence of national regular immigration rules was therefore low and did not place any pressure on governments to consider further European integration in order to control each other's legislation on regular third country nationals.

It was also rather unlikely that states would at some point in the future enter into competition for foreign labor and thus trigger a legislative race to the top. Instead, governments identified unemployment in Europe to be a major issue that was supposed to be addressed by the Agenda 2000 and the European Employment Strategy adopted at the Lisbon European Council 2000 (European Council, 2000).

4.9.5 Supranational activism with regard to irregular immigration policies

The Nice Treaty maintained the Amsterdam policy-making rules for irregular immigration matters until 1 May 2004. In line with this institutional arrangement, the European Parliament and the European Court of Justice continued to play only a minor role in shaping irregular immigration policies. The European Commission instead made use of its shared right of initiative and presented several communications that attempted to actively push legislation forward. In doing so, however, the Commission acted in the service of the European Council that in Laeken, 2001, and Seville, 2002, had asked the Commission to propose or accelerate legislation according to the lists of measures entailed in the respective conclusions. Only when the transition period for the decision-making rules approached in 2004 did the European Parliament and the Commission remind member states of their commitment to introducing co-decision and majority voting in the Council (European Parliament, 2004; European Commission, 2004a). The European Parliament even called upon the member states to end limited jurisdiction for the Court of Justice and to extend its powers.

The European Council officially took note of these recommendations and mandated the Council to take a decision based on Article 67 TEC to introduce co-decision and QMV in the Council for all immigration policies except legal migration (European Council, 2004: 17). The

Council did this just one month later on 22 December 2004 where legal immigration matters remained excluded and the powers of the Court remained unchanged. Initially, this decision appears superfluous given that the IGC in 2004 had just agreed on the Constitutional Treaty that provided for the communitarization of all immigration policies and was now ready for ratification. Besides the mandate by the European Council, the Council was forced to make this decision as otherwise the Commission threatened to sue the Council before the European Court of Justice in order to ensure that Article 67 (2) TEC and the new decision-making procedure would indeed be implemented (Bayerisches Staatsministerium des Innern, 2005a: 5). The European Commission therefore actively pressured governments towards communitarization.

4.9.6 Supranational activism with regard to regular migration

The German *Länder* restricted the federal government's bargaining positions at the Amsterdam and Nice IGCs and hence forced regular immigration policies to be sequestered from supranational interference. The Amsterdam Treaty exempted regular immigration policies from the five-year deadline (by which time legislative progress on asylum and irregular immigration matters had to be achieved), and the Treaty of Nice exempted regular immigration matters from the transition period after which irregular immigration policies were to fall under co-decision and majority voting in the Council. The clear signal towards supranational actors was that Germany consider regular immigration matters to be a national prerogative.

The European Commission rejected this interpretation and instead showed strong activism in tabling legislative proposals and communications on family reunification, the status of long-term resident third country nationals and labor migration (Interview European Commission Secretariat #2). The main point of contention was to what extent the Commission and the EU as such had the authority to legislate regarding labor migration matters. Where the Commission interpreted the treaties in a way that included foreign labor as part of regular immigration policy,

the German *Länder* in particular rejected any Community competence on dealing with the admission of migrants in national labor markets.

With its Communication on a Community Immigration Policy (European Commission, 2000b), legal and illegal migration (European Commission, 2004b) and economic migration (European Commission, 2004c) the Commission was keen to set the agenda on regular immigration matters. The Commission's rationale was "the so-called salami technique, which we then applied. That you say okay, it doesn't all go in one go. Let's try it sliced-wise and do it with the relatively uncontroversial subject areas first" (Interview European Commission Secretariat #2; author's own translation). On the one hand, the Commission supported the general notion that ageing populations and increased competition for highly skilled labor required states to abandon a zero-immigration policy (European Commission, 2000b). Although it did not consider regular immigration to be a panacea for ageing populations, it nevertheless recognized member states' ongoing migratory pressure and need of foreign labor. Moreover, the Commission presented the opening of legal immigration channels as one lever to reduce uncontrolled irregular immigration flows and combat human smuggling networks. In order to win the support of governments for Community policies on regular immigration, the Commission emphasized that common efforts should continue to strengthen external border controls and return measures based on expulsions and readmission agreements with third countries. In order to intensify cooperation among member states on the EU level, the Commission introduced an open method of coordination.

The German *Länder* in contrast pushed their federal government to eliminate or dilute provisions in Council acts that related to questions of access to labor markets for any category of migrants. The first instance of *Länder* resistance in this regard was seen in the negotiations on the *Directive 2003/9/EC* of January 2003, which outlined the minimum standards for the reception of asylum seekers. The respective Commission proposal also included a passage to regulate asylum seekers' access to national labor markets when awaiting a final decision on their asylum application. In response, the German *Länder* made it unambiguously clear that from their perspective the EU lacked any authority to regulate migrants' access to labor markets (Innenministerium Baden-Würt-

temberg and Bayerisches Staatsministerium des Innern, 2002; Federal Republic of Germany, 2005). Although the German government was isolated in its opinion, the *Länder* and the German government were successful in ensuring member states' discretion in determining labor market access. While the *Länder* governments registered this outcome as a success, they also tried to ensure that the federal government would adhere to this line of reasoning in future Council negotiations:

In a letter to the BMI [Interior Ministry] in January 2003, I took up this topic again because of its fundamental importance. It will continue to play a role in many of the forthcoming legislative acts. I have therefore reaffirmed that the *Länder* still do not consider a regulatory competence for access to the labor market to be given (Senator für Inneres, Kultur und Sport der Freien Hansestadt Bremen 2003; *author's own translation*).

In the end, the *Länder* governments were successful in committing the federal government to shielding regular immigration matters from communitarization. In November 2004, the European Council in the Hague decided to exclude regular immigration matters from communitarization upon request by Germany and others (Bayerisches Staatsministerium des Innern, 2005b: 9). This took effect with the Council decision of 22 December 2004. Although regular immigration matters were barred from communitarization with the Council decision, the Draft Constitutional Treaty that was formally endorsed by the EU governments provided for exactly the opposite. This paradox was due to both supranational activism outside of and during the European Convention and to the *Länders'* varying institutional levers for controlling bargaining outcomes.

As previously mentioned, governments acknowledged that European cooperation on regular immigration matters could be of benefit in attracting highly skilled labor. Apart from this, however, governments clearly prioritized cooperation on irregular immigration matters and anti-terrorism measures after the 2001 terrorist attacks in the US and those in Spain in 2004. While regular immigration matters were on the European Council's agenda, regular immigration showed weak interdependence effects that could create governmental advocates for

intensified European cooperation in order to moderate the exchange of externalities. Instead, the Commission intervened and kept regular immigration matters on the agenda by tracking legislative progress with its biannual scoreboards, presenting a vision for a comprehensive Community immigration policy and tabling proposals on family reunification, long-term residency and admission. Ultimately, the Commission pressured governments to consider the communitarization of immigration policies in line with Article 67 TEC, although it could not force states to include regular immigration in this decision.

As demonstrated in the following sections, the institutional set-up of the Convention and supranational actors led to regular immigration matters being fully integrated with the Draft Constitutional Treaty. This institutional design also was the reason why the German *Länder*, although generally able to control governmental position taking, were unable to prevent the communitarization of regular immigration policies while ensuring that the Council decision of 2004 excluded regular immigration. Supranational activism created demand for EU-wide regular immigration policies and a respective decision-making system. Germany could prevent the supply of integration with the Council decision in 2004, but the government was unable to block communitarization of regular immigration policies in the Draft Constitutional Treaty.

4.10 The supply of uniform integration

The conclusions of the Nice European Council mandated governments to initiate another treaty revision before the accession of 10 new member states. The European Council in Laeken of December 2001 answered this call by determining that a European Convention would take place under the presidency of Giscard d'Estaing and the vice presidency of Giuliano Amato and Jean-Luc Dehaene (European Council, 2001). The European Convention held its inaugural session in February 2002 and comprised national parliamentarians of member and candidate states, the European Parliament, the Commission and representatives of governments.

The Laeken European Council held that the Convention should lay the groundwork for another treaty revision that would eventually be

negotiated by another IGC. The Convention was to allow a broad discussion on the future of the EU and the relationship between the EU and its member states. The Convention's Praesidium and majority of members not only deliberated on the future of the EU but simultaneously drafted the Constitutional Treaty that pre-determined treaty articles that became the basis for negotiations in the IGC in 2004 and the Lisbon Treaty in 2007. The Convention's membership as well as its mandate had far-reaching consequences for integration laggards. Governmental representatives had no privileged access to the bargaining process in the form of veto rights. This does not imply that the Convention rested on Habermas-like deliberation and persuasion process instead of bargaining dynamics. Previous studies rather observe the opposite (Panke, 2006; Magnette and Nicolaidis, 2004). But governments individual bargaining power resources were reduced by the Convention's design. The Praesidium was at the center of negotiations and could manipulate negotiations by reducing the time to hand in amendments to change negotiated texts, and secondly by deciding to have no binding vote in the end (Tsebelis and Proksch, 2007). Open membership combined with the fact that no Convention member had a formal veto right meant that integration laggards needed to convince a majority of members of their position.

The European Convention can be separated into three phases: a deliberation phase with plenary discussions, a treaty text drafting phase and a phase of finalizing the draft treaty and negotiating amendments to text. With regard to immigration, the deliberation phase saw a special debate on AFSJ policies on 6 and 7 June. The presidency noted that there was high interest in these policies from governments and citizens, which is why the Praesidium decided to establish a special working group, Working Group X, on the area of freedom, security and justice. The group started its work in September 2002 and presented its final report on 2 December 2002. After this, their report was discussed in plenary meetings and Convention members were invited to propose amendments to the draft text. The presidency submitted the draft treaty establishing a constitution for Europe to the European Council in July 2003 and declared the Convention closed (CONV 851/03).

The European Convention decided in favor of full communitarization of all immigration policies, namely co-decision rights for the European Parliament, the exclusive right of initiative for the Commission and full jurisdiction by the Court of Justice. Communitarization of irregular immigration policies was less controversial than full integration of regular immigration policies. Although the German *Länder*, supported by the German government, voiced opposition to the communitarization of regular immigration policies, this resistance was only partly successful. In order to secure uniform integration of regular and irregular immigration policy, the draft Constitutional Treaty included a compromise formula that held that, despite communitarization, member states nevertheless had discretion in determining the number of people to be admitted into national labor markets. On the one hand, Germany had secured the safeguard clause that member states alone could determine the volume of third country nationals legally entering their labor markets. On the other hand, communitarization was secured with the draft Constitutional Treaty. The two consecutive IGCs in 2004 and 2007 did not reverse this agreement.

4.10.1 Preference intensities for integrating immigration policies

It is difficult to map the preference setting for the European Convention across states. Convention membership and mandates mostly cut across national affiliation. Governmental representatives sat next to European as well as national parliamentarians and the European Commission and were subordinated to the leadership of the presidency and independent personalities in the Praesidium. Some states indeed presented national bargaining positions but these proved to be the exception rather than the rule. Moreover, since the Convention was rather based on deliberation in working groups and the plenary instead of bargaining behind closed doors, even collective actors such as the European Parliament or delegations of national parliaments lacked an incentive to adopt a common bargaining strategy. As the conference did not allow for any blackmailing techniques or institutional levers to exert influence as a single entity, coalition building focused on finding like-minded part-

ners in substantial terms who shared the same perspectives on concrete policies and what the EU should contribute to these policies. Therefore, it is almost impossible to map preference intensities across states or even by organizational entity such as national parliamentarians or European parliamentarians.

Although it is difficult to directly observe preference setting and preference intensities for the European Convention, the previous section on the demand for integration of immigration policies following the Treaty of Nice can serve as an approximation. Preference intensities were supposed to vary with regard to irregular and regular immigration policies, with the former showing greater demand for integration in light of southern member states' externalities in controlling the EU's border. This demand was visible in the plenary and working group debates during the Convention, which supported communitarization, increased burden-sharing in controlling the external border and the establishment of a European border guard. Overall communitarization of all immigration policies was supported by a majority of Convention members, although some members emphasized that the EU should have no authority to link immigration matters with access to labor markets (CONV 97/02; CONV 449/02).

4.10.2 Domestic opposition to communitarizing regular immigration matters

British Convention members were integration sceptics. This position was in line with the United Kingdom's overall Euroscepticism but should be qualified in light of the state's previous use of its opt-in arrangement for immigration matters. The United Kingdom had opted into most irregular immigration policies set by the EU except for Community measures on regular immigration and border control (Adler-Nissen, 2014: 127). Officially, the United Kingdom was still resistant to communitarizing immigration matters, although this resistance was less intense given the British opt-in arrangement. As long as the European Convention did not question this mechanism, communitarization was at least acceptable to the British Convention members. As former Prime Minister Tony Blair noted in 2004, "unless we opt in we are not

affected by it. And what this actually gives us is the best of both worlds” (Adler-Nissen, 2014: 69).

Resistance was mainly presented by the representative of the German *Länder*, Erwin Teufel, who was later supported by the German Foreign Minister Joschka Fischer who joined the European Convention at the end of 2002. The German Conference of Interior Ministers, which meets regularly and includes the interior ministers of the German *Länder*, had written a position paper and submitted it to Erwin Teufel in November 2002 (Senator für Inneres, Kultur und Sport der Freien Hansestadt Bremen, 2003). Moreover, the *Länder* contacted Erwin Teufel twice in March 2003 when the Praesidium of the Convention had tabled the draft Constitutional Treaty text and asked for amendments (Senator für Inneres, Kultur und Sport der Freien Hansestadt Bremen, 2003). The interior ministers reminded Erwin Teufel that there should be no extension of majority voting for immigration matters.

The timing of these interventions by the *Länder* corresponded with respective interventions in the Convention’s plenary debates nicely. Already in the first debate on the AFSJ in June 2002 the Secretariat of the Convention had to record that some delegations rejected the link between immigration and EU authority to regulate access to employment markets (CONV 97/02). In the second major plenary debate on AFSJ on 13 December 2002 there remained “one member of the Convention [who] emphasized that Union competence in the area of immigration should not extend to access to the labor market” (CONV 449/02). Erwin Teufel was present in this debate and reacted to the report of Working Group X (CONV 426/02) that proposed extending co-decision and qualified majority voting to “as many sectors as possible” (CONV 449/02). Erwin Teufel was not a member of this working group and could not steer the negotiations and drafting efforts on the treaty parts on AFSJ policies. Instead, he had to use plenary debates to voice opposition and ultimately tried to reverse the working group’s consensus on full communitarization of all immigration policies by tabling amendments and reaffirming the position of the German *Länder*. In a joint contribution with the German MEP Wolfgang Senff, Erwin Teufel intervened in the amendment phase of the Convention negotiations

in March 2003, which again corresponds with the timing of when he received instructions by the German *Länder*:

With regard to asylum, refugee and immigration regulations, the Treaty should specify that at the European level, there is no competence to regulate the right of access to the labor market of the Member States. In addition, the German *Länder* do not see the need to amend Article 63 of the Treaty establishing the European Communities [...] If, however, amendments to Article 63 of the EC Treaty are envisaged, the field of 'immigration' is either to be excluded from the majority procedure, or to be immediately limited in its scope vis-à-vis the current state (CONV 597/03; *author's own translation*).

Only one month later the *Länder* position was formulated in an even more reactionary tone with contribution by the German Christian Democrat parties (CONV 616/03). Not only did this contribution state that the EU had no formal powers to regulate the access of any third country national to national labor markets, it also called for retransferring EU competence on regular immigration matters included in Article 63 (3) (a) TEC to ensure that member states alone decided on the "number and nature of immigrants" (CONV 616/03). Pressured by domestic opposition, both *Länder* representative Erwin Teufel as well as the German Foreign Minister Joschka Fischer attempted to prevent the communitarization of regular immigration policies. Fischer tabled an amendment that provided for retaining the articles on regular immigration matters as they appeared in the Treaty of Nice (CONV 644/03: 23). With his amendment, Teufel wanted to make certain that access to the labor market remained solely within the jurisdiction of member states (CONV 644/03: 24).

Given the Convention's design based on deliberation and the mandate to submit a draft treaty to the IGC only, Germany was not in a position to threaten a veto if its concerns were not taken into account. However, based on continuing German opposition (CONV 783/03), the Praesidium decided to include a safeguard clause in the article on regular immigration that reserved the right of member states to determine the volume of third country nationals to be admitted for work pur-

poses (CONV 847/03). Regular immigration policies as well as irregular immigration policies were nevertheless communitarized, with the exclusive right of initiative reserved for the Commission, co-decision powers for the European Parliament and full jurisdiction for the European Court of Justice.

The safeguard clause had settled the debate and the IGCs of 2003 and 2004 did not address regular immigration issues again. The Italian presidency accepted the Convention's draft Constitutional Treaty as a basis text for the negotiations at the next IGC. This meant that the German government had to accept the text as it stood before it could try to reframe the respective treaty article a posteriori. Furthermore, the German government was under less pressure to reopen the debate on regular immigration. The *Länders'* concerns had been accommodated with the safeguard clause and they had to acknowledge that they were isolated at the Convention in terms of their position of retaining the institutional status quo on. Uniform integration of both immigration policies was therefore decided and came into effect when the Treaty of Lisbon entered into force in 2009.

4.10.3 Supranational activism

Compared to IGCs, the European Convention clearly established a situation that allowed for stronger supranational activism. Although many scholars reject the notion that the Convention was purely based on deliberation beyond the control of governments (Magnette and Nicolaïdis, 2004; Panke, 2006; Kleine, 2007), the open membership of the Convention nevertheless allowed supranational actors to have at least some say in the debate and on the treaty text (Beach, 2007; Tsebelis and Proksch, 2007). It was the Praesidium and members of the Convention Secretariat that steered debate, summarized alleged consensus provisions and presented draft texts as independent actors in the negotiations. The Praesidium's decision to draft a treaty text and to not vote on this text but to adopt it by "consensus" increased supranational actors' leverage in the negotiations since governmental representatives could not threaten to veto the final document. Moreover, one of the main tenets of the Convention was the outspoken aim of simplifying

the treaties in terms of both structure and decision-making procedures. This gave supranational actors a strong rhetorical lever for proposing that policies should fall under the same decision-making procedure and that, in this regard, co-decision in combination with majority voting in the Council had become the rule.

These advantages were noticeable in Working Group X. One main opponent to overall communitarization, the German *Länder* and the German government, was not represented in this working group and could resist Commissioner Vitorino's and MEPS' calls for communitarization. The British contributions to the working group by David Heathcoat-Amory and Timothy Kirkhope were isolated in their opinion that cooperation should remain as intergovernmental as possible. Representatives of southern member states, candidate states and the representatives of the European Parliament that presented their contributions together were in the majority, and since consensus was not necessarily required, the Convention Secretariat presented the majority opinion in favor of communitarization to the plenary.

Uniform integration of immigration policies and hence the future empowerment of supranational actors became the consensus and the German representatives could only use the amendment phase to change, not remove, pre-existing articles. Re-drafting articles was impeded by the Praesidium's decision to limit the time for amendments and by juxtaposing amendments while presenting its proposals as a middle ground (Tsebelis and Proksch, 2007).

4.11 Conclusion

The policy dyad of regular and irregular immigration policies was classified as a hard case for vertical differentiation. Core supranationalist and intergovernmentalist assumptions would expect uniform integration levels for these policies. Both immigration policies are highly interdependent. Overall, restrictive regular immigration policies on admission and stay conditions for third country nationals make irregular entry and overstaying residence permits a likely outcome. Scholars and political actors alike have made the case for more open legal migration channels to reduce the incentive for third country nationals to immigrate irregu-

larly. Generosity or restrictiveness in one immigration policy produces costs in regulating the flow of other migrant categories. Supranationalists would therefore expect uniform integration levels for both policies.

One baseline assumption of intergovernmentalist reasoning is that governments weigh the benefits and costs of pooling and delegating authority to achieve utilities with supranational policy output. Varying autonomy costs for each policy might thus explain vertical differentiation. However, both immigration policies can be considered to directly affect national sovereignty, with high autonomy costs following integration. Irregular immigration policies as defined in this study include border controls measures. Controlling the national border and protecting citizens from external threats is a primary function of governments and is a core characteristic of statehood. Similarly, governments are expected to control the inflow of foreigners and the distribution of scarce public goods to the citizenry. Governments therefore are hesitant to relinquish autonomy in this policy area, since failing to distribute public goods in line with citizens' preferences leads to protest and threatens the survival of governments. Therefore, from an intergovernmentalist viewpoint as well, we might expect uniform integration.

Despite this, we observe that, with the IGCs of Amsterdam and Nice, immigration policies were gradually vertically differentiated. Irregular immigration matters fell under communitarized decision-making procedures whereas regular immigration policies, until the Treaty of Lisbon, remained an intergovernmental affair. Vertical differentiation was due to a combination of demand and supply factors that varied across these policies. Both policies were characterized by decreasing home benefits of unilateral policy-making over the course of the 1990s. However, the decisive push factor for integration of irregular immigration policies in particular was heightened interdependence of national policies on expulsion/regularization and border controls. The Schengen and Dublin regimes, combined with large informal economies, led southern EU member states in particular to seek redress at the EU level. Northern member states also showed interest in further integration given the potential costs of lenient irregular immigration policies in the south that could manifest in the form of secondary movements within a borderless EU. Regular immigration policies showed interdependen-

dence effects as long as third country nationals did not enjoy large-scale mobility rights within the Community. Secondary movements and their negative externalities resulting from disparate rules on admission and work permits were therefore a minor problem, making integration an acceptable outcome but not a priority.

Strong demand for integrating irregular immigration matters could more easily meet with supply at IGCs. Opt-in and opt-out arrangements as well as transition periods that phased in the effects of integration over time were an acceptable compromise formula for integration proponents and laggards alike. However, these compromise formulae could not alleviate opposition to the integration of regular immigration matters. First, given low demand for integration, few states held strong preferences and were ready to offer concessions to integration laggards for the final approval of an integrative outcome. Major opposition did not come from governments but was based particularly in the German domestic context. The German *Länder* fiercely opposed the integration of regular immigration policy, and especially the potential effect of integration on regulating third country nationals' access to labor markets. The *Länder* were successful so long as negotiations were intergovernmental and the *Länder* could threaten the federal government with non-ratification of treaties or with other retaliatory measures. This led to the paradox that in 2004 immigration policies were formally differentiated in the Council decision of 22 December 2004 while, informally, the Constitutional Treaty provided for the full communitarization of both regular and irregular immigration policies. The European Convention disadvantaged sub-state actors who forced their governments into compliance with their preferences. Instead, the domestic opposition in Germany was mollified with a safeguard clause that preserved the right of member states to determine the volume of foreign workers who could enter their labor markets. Since the Constitutional Treaty remained unchanged on immigration provisions in the IGCs 2003/4 and 2007, uniform integration of regular and irregular immigration policies is in effect today.

Explaining vertical differentiation of regular and irregular migration policies in the EU
Which factors co-varied with the outcome?

<i>Conference</i>	<i>Dependent variable</i>	<i>Home Benefits</i>	<i>Interde- pendence</i>	<i>Supran. activism</i>	<i>Preference intensities</i>	<i>Domestic resistance</i>	<i>Supran. manipu- lation</i>
Amster- dam	Vertical differen- tiation	+	+	-	-	+	-
Nice	Vertical differen- tiation	+	+	-	-	+	-

Declining home benefits were increasingly a function of heightened interdependence.

Interdependence was driving the uneven demand for integration.

Domestic resistance at IGCs was conditioning the uneven supply of integration.

European Convention/ Lisbon	Uniform integration	Regular migration matters were integrated to the same level as irregular migration matters as home benefits of unilateral policy-making alone declined in light of worldwide competition for skilled labour and because the German Länder could not hijack the negotiations at the European Convention.
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Table 8: Summary of the covariation analysis of the migration case

5 Vertical differentiation of judicial cooperation policies

In the chapter on case selection, the policy dyad of civil and criminal law cooperation was presented as an easy case for vertical differentiation. Core explanatory factors of established integration theories would suggest that both policies should be characterized by different rather than equal integration levels. From a supranationalist perspective, we find that these policies are not interrelated and interdependent and therefore should not develop spill-over dynamics. Civil law measures have no repercussions on criminal matters and vice versa. Since policy-making on civil law has no adverse consequences for criminal judicial cooperation policies, it is likely that governments will devise different decision-making procedures for each individual policy and each policy area.

From an intergovernmentalist perspective, it is imperative to compare the autonomy costs associated with integrating these policies. Civil law and criminal law matters vary with regard to autonomy costs of integration. Civil law matters regulate the private interactions between citizens and companies and civil law proceedings mediate conflicts between private persons (Storskrubb, 2008). The state's function in this regard is passive, providing private actors with a legal framework and judicial redress infrastructure. Criminal law conflicts, however, involve state authorities as parties to the legal conflict and judgements may mean that citizens' freedom will be limited for the duration of a prison sentence. With the criminal law system, governments need to ensure that crime is deterred and citizens are protected from violence and fraud (Ashworth, 2010). In contrast to civil law matters, criminal law is a fundamental state power in that it falls under the state's monopoly of force to ensure security and safety within its territory. Relinquishing this autonomy implies high costs for governments and makes equivalent integration levels with civil law matters unlikely and vertical differentiation a plausibility.

5.1 Civil law and criminal law matters

Civil law and criminal law are two separate branches of law that can be distinguished by their underlying purpose, the laws' subjects and the outcomes of respective law proceedings. Civil law mediates legal disputes between private actors; individuals or organizations that see their rights violated by another private actor may sue wrongdoers. The outcome of civil proceedings is compensation in the form of awards for damages or an injunction if a person or organization is found to be liable.

The purpose of criminal law is to maintain public order and social stability by deterring and prosecuting criminal offences (Ashworth, 2010: 71–103). Criminal cases are not filed by private plaintiffs and it is the state that initiates proceedings against persons that are alleged to have committed acts in violation of national laws. The outcome of criminal law proceedings is not compensation for the aggrieved parties but punishment in cases where a person or organization is found to be guilty.

Both civil and criminal law are comprised of substantive and procedural laws (Peers, 2011). Substantive laws define the rights and obligations of legal persons and hence define the legal relationship between multiple private actors or private actors and the state. Procedural laws define the means by which substantive law, in the form of compensation or punishment, is enforced. They clarify how civil or criminal lawsuits are initiated and processed in court, including rules that stipulate the terms for presenting a case, collecting and presenting evidence, giving a judgement and how to appeal judgements.

Civil law and criminal law matters differ with regard to substantive and procedural rules. In terms of substance, criminal substantive laws are more repressive and intrusive than civil substantive laws. With regard to the former, defendants in court may face imprisonment and are compelled to accept curtailment of their freedom. Conversely, the state and the judiciary in this case have the obligation to ensure utmost care in gathering and presenting sound evidence for punishment. Criminal procedural laws are hence designed to guarantee criminal justice, carefully balancing the goals of preventing crime and preventing abuse of a state's penal power (Gröning, 2010). As a person's basic freedoms are weighed against public order concerns, judgements must be pro-

portional and based on compelling evidence and criminal proceedings are therefore exercised with utmost care to avoid errors.

Justice and proportionality are principles that also characterize civil procedural laws and civil proceedings should be aimed at establishing truth via the examination of sound evidence. Here, courts are also mandated to take care in correctly applying laws. One important difference from criminal procedures, however, is that civil law proceedings have a stronger time and cost dimension with regard to justice (Zuckerman, 1999a). Beyond the accuracy of a judgement, litigants expect a timely decision since delayed compensation might aggravate their situation. For example, a supply firm that sues a contractor for failing to fulfil an invoice has an interest in being financially compensated as quickly as possible. Depending on the revenues of the business relationship, the supply firm might face financial turmoil or even insolvency in the absence of a timely judgement. Moreover, while states have the financial means to initiate criminal proceedings, private actors might not be able to afford legal redress in civil law matters. In most civil law systems, litigants must pay court fees themselves and justice in civil law thus requires that every citizen and organization be able to afford access to justice (Zuckerman, 1999a). In addition to legal accuracy, civil law judgements need to be timely and affordable.

In sum, the most significant difference between civil and criminal law for the purposes of this study is the role of the state in both branches of law. In criminal law matters, the state is always a party to the legal conflict. The state not only defines criminal offences but is also involved in the enforcement of criminal justice and has a monopoly of force in intruding on the personal liberties of persons found guilty. In civil law matters, the state is not a party to the dispute but acts as a facilitator for private interactions. By offering a judicial infrastructure and defining laws, the state allows private actors to enter into relationships with legal certainty and seek compensation in cases where one actor fails to fulfil its obligations.

The definition of criminal behavior and the use of force in the form of imprisonment makes criminal law a very sensitive matter for states and societies compared to civil law matters (Interview Council Secretariat #2). In criminal law matters, the state has a monopoly of force

and is mandated to ensure criminal justice as part of the societal contract. In civil law matters, however, the state has no repressive authority and not even the monopoly of legal redress. Private actors might favor alternative dispute resolution or out-of-court settlements if they dislike the state-offered judicial process (European Commission, 2002). Thus, with regard to criminal law, the state has a strong obligation to enforce justice whereas in civil law matters states have an obligation to allow private actors to enforce justice themselves (Basedow, 2008). The state is the enforcer in criminal law matters and a facilitator in civil law matters. Thus, we can expect that states may tolerate other facilitators in civil law disputes as long as private actors have access to justice, whereas states should be reluctant to give up their role as the enforcer in criminal justice.

5.2 Cooperation on civil law and criminal law matters in Europe

The special intrusiveness of criminal law makes it an unlikelier candidate for integration compared to civil law matters. As seen later in this chapter, vertical differentiation and uneven integration trajectories indeed characterize these two law branches. However, before these policies were integrated into the EU *acquis* states pursued international cooperation on both civil and criminal law matters alike.

European states either co-founded or joined the Hague Conference on Private International Law (HCCH) that was established as an international organization in 1955. The aim of this organization is to find common rules regarding which state's courts should have jurisdiction over a dispute, which laws should apply in these disputes and how to recognize and enforce private law judgements. The Hague Conference on Private International Law member states have adopted several conventions on commercial law, family law and civil procedural law. All EC and later EU member states joined the HCCH and had cooperated on civil law matters even before the Treaty of Maastricht placed civil law matters on the EU's agenda.

Similarly, European states began to cooperate on criminal law matters outside of the EU's treaty framework. The principal organization for this endeavor was the Council of Europe. The most prominent Council of Europe Conventions are the Convention on Mutual Assistance in Criminal Matters, the European Convention on Extradition and the European Convention on the Suppression of Terrorism. As terrorism in particular became an increasingly salient issue in several states in the 1970s, EC member states established the informal TREVI group in 1975 to cooperate on criminal law and police matters (Cruz, 1990). This group was located outside of the EC treaty framework and no EC organization was invited to join group meetings. Interior ministers met every six months to discuss questions of internal security. On a working group level, national representatives exchanged information not only about terrorist networks but also increasingly about drug trafficking, money laundering and organized crime (Occhipinti, 2003: 32). The next cooperative initiative on criminal law matters outside of the EC treaty framework was the Schengen Agreement and the Schengen Convention. The abolishment of internal border controls in the Schengen area led parties to the Convention to devise "compensatory measures" with regard to criminal law and internal security. Here, the European Commission was invited to join meetings of the Schengen Executive Committee. However, cooperation remained intergovernmental in that only states could adopt decisions (unanimously).

5.3 Mapping vertical differentiation of judicial cooperation policies

The Treaty of Maastricht introduced both civil and criminal law matters in the EU, linked these policies to the internal market and grouped them into the third pillar (Title VI) as "matters of common interest" for member states. The decision rule in the Council for both policies was unanimity and the Council was only to be informed about Council decisions without any opportunity for the EP to offer input. The European Court of Justice had no automatic jurisdiction over either policy, but member states could decide ad hoc and for each convention individu-

ally whether they wanted to allow European Court of Justice jurisdiction or not. Member states therefore devised a very intergovernmental decision-making system for both law matters. Vertical differentiation was the result of different arrangements with regard to the legislative right of initiative. Whereas the Commission shared the right of initiative with the member states on civil law matters, legislative measures on criminal law matters could only be initiated by a member state.

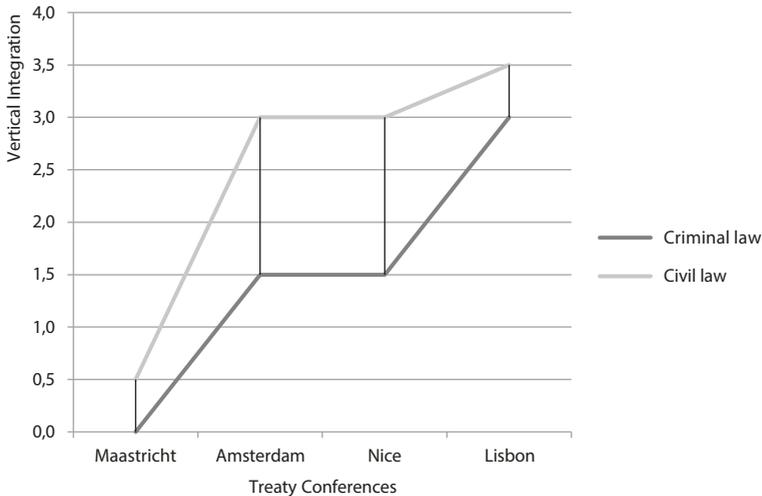


Figure 13: Vertical differentiation of judicial cooperation policies over time

Both judicial cooperation policies were further integrated with the Treaty of Amsterdam, although the level of integration continued to vary across civil law and criminal law matters. The decision rule in the Council remained unanimity for both law matters, and for both the European Parliament was to be consulted before legislative measures were adopted. Similarly, the European Court of Justice had limited jurisdiction for both policies in that the preliminary ruling procedure was curtailed, although through different formal arrangements. For civil law matters only national courts of last instance were allowed to transfer cases to the ECJ for preliminary rulings. With regard to criminal law matters, member states had the choice to opt into ECJ jurisdiction and could state whether all national courts or only the courts of last instance

should be allowed to ask for preliminary rulings. Again, the difference in integration levels across civil and criminal law matters related to the right of initiative. With the Treaty of Amsterdam, the Commission at least shared the right of initiative with the member states on criminal law matters. For civil law matters, the Commission was to be given the sole right of initiative automatically after a transition period of five years. Moreover, civil law matters were part of a group of policies that based upon a Council decision could fall under the co-decision procedure including QMV in the Council after the transition period whereas criminal law matters were explicitly not mentioned in this regard.

The Treaty of Nice accentuated vertical differentiation by leaving the integration level of criminal law matters untouched while introducing qualified majority voting and co-decision rights for the European Parliament on civil law matters. The Treaty of Lisbon reduced the degree of vertical differentiation but did not lead to equal integration levels for these policies. Both criminal law and civil law matters fell under the ordinary legislative procedure, with qualified majority voting in the Council and co-decision rights for the European Parliament. The European Court of Justice had full jurisdiction for both policy fields, although the ECJ was given full jurisdiction for criminal law matters only after a transitional period of five years after the Lisbon Treaty entered into force. Vertical differentiation of these policies after the Lisbon Treaty was due to varying involvement of the Commission in the legislative process. For civil law matters, the Commission had the sole right of initiative whereas in criminal law matters the Commission shares this right with the member states. Besides the Commission, a quarter of member states in the Council have the right to introduce legislative proposals.

In sum, civil law and criminal law matters have always been vertically differentiated in the EU. Already with the Treaty of Maastricht these policies fell under different decision-making rules and, although both policies were further integrated with consecutive treaty revision, vertical differentiation prevailed. The degree of vertical differentiation was most accentuated with the Treaty of Nice, and the following analysis therefore focuses especially on developments before and during the Nice IGC and theorizes why vertical differentiation of civil law and criminal law matters was a likely outcome.

5.4 Theorizing differentiation of judicial cooperation policies

Chapter 3 presented the analytical framework of this dissertation, which distinguishes between factors explaining the demand for integration and the supply of integration. The explanatory factors were drawn from the two most prominent integration theories, liberal intergovernmentalism and supranationalism as well as theories liberal IR theories and bargaining theories. Varying home country benefits, negative externalities and supranational activism accounts for the unequal demand for integration across policies. Varying preference intensities, national opposition levels and supranational leadership in intergovernmental bargains result in unequal supply of integration across policies. In this section, the overarching theoretical framework is adapted to the vertical differentiation of civil law and criminal law matters.

5.4.1 Home country benefits of civil law procedures

The primary function of civil law and private international law is to ensure legal certainty for private interactions (Rühl, 2011). The state and its civil law in particular must ensure that interactions are performed and that one actor is compensated if the other party to an interaction fails to meet its commitments. In the commercial area, for example, trading partners or parties in a vendor-client relationship need to trust each other's commitments in order for the transaction to take place. Commercial law in this regard guarantees a party's commitment and clarifies the rights and duties of each party. In case of breach of contract, parties may seek compensation either through private dispute settlement or by filing a case in a civil court. This example resonates with multiple accounts that emphasize the positive effect of law and contracts in solving prisoner's dilemma situations in favor of transaction and cooperation (Rühl, 2010; Muir Watt, 2003; Whincop, 1999).

States experience sinking home benefits of national civil laws and procedures if legal certainty decreases for private actors (Rühl, 2010). Decreasing home benefits and policy failure materialize when private

actors face high entry costs for transactions or for seeking compensation. The more national civil law systems prevent speedy conflict resolution between private actors and include high financial costs, the more these civil law systems privilege private actors who can afford these costs at the expense of private actors who lack access to compensation and potentially the security of their rights.

In light of policy failure and decreasing effectiveness of national civil law procedures, governments might expect increasing economies of scale from cooperation. The exchange of best practices and the opportunity for joint training programs would allow states to learn more about and improve civil procedures. Cooperation can then allow access to knowledge and joint capacities that assist states in alleviating national deficits in providing private actors with timely dispute resolution at reasonable costs.

5.4.2 Home country benefits of criminal law procedures

Initially, the same rationale could be applied for criminal law procedures. All states are interested in criminal law systems that allow legal certainty and quick legal redress to reduce the costs and increase compliance with national rules. Access to international legal training for national lawyers and judges as well as international funds that allow additional investments to be made in the justice sector are certainly benefits that governments expect from cooperation. In terms of economies of scale and decreasing home benefits, cooperation might be an attractive avenue for states to pursue more efficient criminal law systems.

However, this economic rationale is less prevalent in the criminal law sector. The overall aims of the state in considering criminal law are to ensure justice and deter citizens from criminal acts. Both the question of what justice entails and what actions should be deterred are inherently dependent on the national culture and societal consensus (Cotterrell, 2006). Timely judgements cannot be an official mission statement since criminal court proceedings put an individual's freedom at stake. The state's primary function is to ensure the security and freedom of its citizens (Jung, 1998). As state representatives, deci-

sion-makers as well as criminal courts and public prosecutors therefore have a responsibility to ensure that evidence conclusively dictates constraining the freedom of an individual to ensure the security of fellow citizens. Timely decisions are of a lower priority in this regard. Moreover, in contrast to civil proceedings, criminal court cases are less dependent on financial resources since even when a suspect cannot afford to hire a lawyer he or she is nevertheless provided with a public defender. Ultimately, European cooperation might add value if access to legal training and funds allow improved judicial structures. However, I expect this added value to be lower for criminal law matters given that criminal law systems are primarily in need of legitimacy rather than material resources that allow for speedy and economical dispute resolution. Based on these considerations, I expect demand for integration of civil law cooperation to be higher than for criminal law cooperation.

Demand hypothesis 1: Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in civil law matters.

5.4.3 Interdependence of civil law systems and procedures

Transboundary transactions and legal plurality beyond borders create an extra challenge for governments in establishing legal certainty for private actors (Smits, 2012). The territoriality principle maintains that every state is sovereign in adopting its own legal order and laws. The consequence is that transnational private actors face different legal regimes and hence legal uncertainty as to their rights (Muir Watt, 2003). Property rights and civil law procedures vary, and private actors face legal uncertainty that does not occur in domestic transactions (Rühl, 2010). Governments need to resolve this legal uncertainty, and cooperation in this regard promises relief. Disparate civil law systems in substance and procedure produce mutual costs for states, specifically for private actors that may choose not to enter into transactions. Costs are also incurred for governments that, due to legal uncertainty, see private actors prevented from engaging in transactions that promise

welfare benefits for societies at large. The more mobile private actors are across borders, the more states experience potentially problematic interdependent civil law systems and the higher the incentive for states to consider cooperation (Rühl, 2011).

The scenario described above presents a situation of symmetric interdependence where two different states and societies have an incentive to consider the approximation of civil law rules and procedures in order to allow for cross-border transactions. Another incentive to consider cooperation arises when states face asymmetrical interdependence of their civil law systems. In particular, powerful private actors, such as multinational companies, might identify advantages in disparate civil law rules across states. These actors can select civil law systems that promise them the most beneficial legal framework to conduct their business in terms of property rights and civil law procedures, which disadvantages weaker economic actors (Koch, 2006). As far as powerful actors are concerned, disparate commercial laws and civil law procedures allow for forum-shopping at the expense of business partners and clients who cannot afford to exploit legal plurality. In attracting foreign business, competitive civil law systems might find themselves in a legislative race to the bottom, lowering the standards of protection. Since governments are responsible for ensuring legal protection for every private actor, this race to the bottom is not in the interest of governments—at least those that have difficulty keeping pace with ever lower civil law standards on equality and justice.

5.4.4 Interdependence of criminal law systems and procedures

Disparate criminal law systems across borders may also produce highly interdependent settings. First, persons found to be engaged in criminal activity in one state may try to evade legal prosecution and punishment by fleeing across the border into the legal system of another state. The prosecuting state then faces an obstacle in directly arresting criminal persons and bringing them before a court (Panayides, 2006). In this situation, public prosecutors must ask the host state of the criminal persons to extradite the individuals concerned. Extradition is dependent

on the host state's acceptance of the legal charges against the persons within their territory (Warbrick et al., 1997). Transnational prosecution and extradition occur more smoothly the more states share a common understanding of what acts should be considered criminal and the more legal authorities trust each other across borders and exchange information. The more states experience criminal evasion movements through the exploitation of legal plurality, the higher the incentive for states to demand cooperation.

Moreover, legal plurality in criminal law may lead to the exchange of negative externalities between states if criminals enjoy safe haven in one state while extending their criminal activity beyond borders. What constitutes a crime in one state might not be considered a criminal act or be a minor offence in a neighboring state. In such cases, criminals have an incentive to settle in comparatively "generous" criminal law systems while nevertheless organizing their criminal activities transnationally. Organized criminal networks can span different states, with host states, as a result of relaxed criminal law procedures and/or insufficient law enforcement capacities produce negative externalities for neighboring states (Fijnaut and Paoli, 2006). The more organized crime operates across borders, the more neighboring states will demand cooperation and the approximation of criminal law standards.

The demand for integration is expected to be higher with regard to civil law matters given a stronger likelihood of increasing symmetrical and asymmetrical interdependence, and even more so when private actors enjoy increased mobility.

Demand hypothesis 2: Interdependence and hence demand for integration are likely to vary as negative externalities in terms of disparate rule and forum-shopping should be higher in civil law matters.

5.4.5 Supranational activism

Supranational activism is mediated by supranational actors having an information advantage vis-à-vis member states, the possibility to exploit treaty ambiguities or the ability to use their competences beyond the governments' control (Farrell and Héritier, 2007b; Pollack,

1994). I expect the conditions for supranational activism to be more favorable in the sphere of civil law matters than in criminal law matters.

The dominant actors in civil law systems are private actors who seek legal certainty for their transactions. Citizens and economic actors demand rules, and governments react by adapting the legal framework. The more private actors transact across borders, the likelier it is that legal uncertainty will hinder their undertakings (Rühl, 2010). Instead of lobbying respective governments for policy reform, private actors in the European context may appeal directly to supranational organizations for legal remedies (Low, 2012). The benefit of EU-level legislation for private actors is that rules are binding for all EU member states and one does not need to wait for multiple, independent bilateral agreements. In this case, supranational actors face a demand for supranational rules that creates information advantages vis-à-vis the member states over time and enables them to extend their competences in civil law matters. Moreover, since the Treaty of Rome established the common goal of ensuring the four freedoms in the EU, supranational actors might link the implementation of these mobility rights to a functioning transnational civil law framework. European Union nationals and businesses might hesitate from transactions and enjoying mobility without proper certainty that their rights are equally protected in every EU member state.

In criminal law matters, governments demand or do not demand common rules. Criminal law procedures and law enforcement are embedded in the different legal cultures of member states (Colson and Field, 2016a). It is rather unlikely that supranational actors enjoy information advantages with regard to criminal law making. Moreover, criminal law matters can hardly be linked to the EU's four freedoms and the promise of fostering mobility within the Community. I therefore expect civil law matters to be characterized by more supranational activism than criminal law matters.

Demand hypothesis 3: Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward together with private actors on irregular civil law matters.

5.4.6 Preference intensities

Based on the previous discussion, I expect preference intensities for integration at IGCs to be higher for civil law matters. The more private actors enjoy mobility across borders, the more states experience symmetrical and asymmetrical interdependence. In cases of symmetrical interdependence in particular, it should be comparatively easy for governments to supply integration. In their call for supranational rules, private actors may not only pressure governments but may also rely on supranational actors to drive cooperation (Basedow, 2008). When a situation is characterized by high asymmetrical interdependence, supply of integration is dependent on the exchange of concessions in order to win approval from recalcitrant member states in negotiations.

Criminal law systems may also be interdependent and create demand for integration. Legal plurality facilitates organized crime and the evasion of prosecution. Symmetrical interdependence and hence converging preferences for integration is likely when fugitives and organized criminal networks enjoy increased mobility (Fijnaut and Paoli, 2006). Increased mobility, however, does not necessarily lead to a situation of symmetrical interdependence. Mobility of respective criminals leads to a situation of symmetrical interdependence only for actions that are considered by all member states to be criminal. When states differ in their definitions of criminal acts, increased mobility leads to asymmetrical interdependence. Different legal interpretations pit prosecuting states against more lenient states. Preference intensities for integration will then vary, and lenient states might be eager to defend their legal culture (Colson and Field, 2016a).

Supply hypothesis 1: Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on civil law matters.

5.4.7 Domestic resistance to integration

I expect domestic resistance to integration to be higher for criminal law matters than for civil law matters. The level of resistance to integration

of a certain law sector is dependent on the extent to which a law sector relates to the personal liberties of citizens and national identities.

Many scholars have used the example of varying legal cultures across states to explain why criminal law matters are an unlikely candidate for integration (Colson and Field, 2016b). According to this reasoning, states have developed a legal culture and criminal law system in specific historical and social contexts. Therefore, states have different law systems and prefer to uphold their respective legal culture, which has characterized their society for decades. Yet, variation in legal cultures as such can hardly explain vertical differentiation of civil and criminal law matters, since legal cultures vary across states for both law branches. For example, not only does the British common law system differ from continental European civil law systems, but there is also considerable variation within continental European civil law systems themselves (Zuckerman, 1999b). Legal cultures as such do not explain varying domestic resistance to integration. The difference derives from governmental and societal incentives to retain a close bond between a law sector and national culture. Criminal law culture is closely linked to questions of national identity and fundamental values of a society, and this link motivates domestic resistance to integration more intensely than for civil law matters.

Criminal law is the most extreme form of exerting social control in a legal community as it establishes a code of social behavior and guarantees its inviolability by penalizing certain actions and setting boundaries on the personal liberties of citizens. As such, criminal law strikes a balance between social order and freedom from state repression. Historically, European societies democratically legitimized state authorities to define and enforce this balance in accordance with national values and traditions (Jung, 1998). This establishes a double burden for governments with respect to European integration of criminal law matters. On the one hand, criminal law making and enforcement has become a state prerogative and defining characteristic of sovereign states. On the other hand, integration-willing governments need to ensure that EU legislation on criminal law matters still upholds the critical link between criminal law and respective national identities and fundamental values. It is therefore likely that governments will be hesitant to

integrate in this dimension and that Eurosceptic or integration-sceptic actors will find it easy to mobilize opposition to integration in order to “protect national sovereignty and culture”. Governments hence need to make certain that they always remain gate keepers regarding criminal law matters (Weigend, 1993).

This differs for civil law matters. Civil law systems have also developed within specific national, historical and social contexts and hence legal cultures vary across states. Yet, for most branches of civil law the link between law and distinct national identities and the role of the state in ensuring this connection is less straightforward. Commercial law has for a long time developed beyond states’ discrete control as so-called *lex mercatoria*, or merchant law in the medieval period (Tóth, 2017). Private transactors shaped this field based on the desire to facilitate trade. Today, states are expected to offer a legal framework that allows private actors to interact with legal certainty. Beyond this, however, states give discretion to private actors in enforcing and further shaping commercial law through arbitration (Basedow, 2008). The state’s rationale and mandate in this policy area is not as focused on safeguarding national identity and actively enforcing a social code of conduct as is the case for criminal law matters. Rather, in civil law matters states are passive actors in the sense that they only guarantee legal certainty while private actors enforce and shape laws according to their needs. The only exception to this is family law, which, similar to criminal law, resonates with a society’s definition of how it defines and protects the family as an institution in society. Here, (some) states have even adopted a constitutional provision that cites the family as a critical institution to national identity. With the exception of family law matters (Krause, 2006), domestic veto players or Eurosceptic forces find it more difficult to mobilize resistance to integration given that civil law matters are less embedded in questions of national identity and sovereignty. In sum, I expect domestic resistance to integration to be higher for criminal law matters compared to civil law matters.

Supply hypothesis 2: Domestic opposition and hence supply of integration are likely to vary as the role of the state varies across law sectors.

5.4.8 Supranational activism

The different role conceptions of the state for criminal law and civil matters also helps theorize supranational actors' likelihood of influencing bargaining outcomes. I expect supranational actors to have more influence in negotiations on civil law matters than on criminal law matters, which may account for vertical differentiation as a bargaining outcome at IGCs.

The state is the enforcer of criminal law whereas private actors are the predominant enforcers of civil law matters. As criminal law is interwoven with questions of national identity and value systems, it is therefore likely that governments and national actors have an information advantage vis-à-vis supranational actors regarding why certain actions are penalized and how criminal proceedings function in respective societies. Supranational actors may therefore have little opportunity to capitalize on information asymmetries in order to make an argument in favor of more powers for the EU.

It is likelier that supranational actors will have an information advantage vis-à-vis member states with regard to civil law matters. The EU is founded on the four freedoms and supranational actors' prime mandate has always been to ensure that goods, capital, services and persons. Having been involved in the legislation and implementation of these freedoms, supranational actors have first-hand access to information about obstacles that impede private transactions within the EU's territory. As private actors largely enforce civil law themselves, beyond greater interference from state authorities and increasingly transact across European borders, it is likely that supranational actors will capitalize on insufficient member state control and information disadvantages. Using member states' passivity, supranational actors may argue in favor of integrating civil law matters, while member states might lack information about why integration could be counterproductive. In sum, I expect supranational actors to have an influence on bargaining outcomes and hence integration to be more likely with regard to civil law matters compared to criminal law matters.

Supply hypothesis 3: Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on what private transactors need in the single market.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Hypotheses on varying demand for integration of judicial cooperation policies</i>	<i>Indication</i>
Domestic	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in civil law matters.	Policy failure varies across policies
Transnational	Interdependence Interdependence and hence demand for integration are likely to vary as negative externalities in terms of disparate rule and forum-shopping should be higher in civil law matters.	Costs of disparate rules vary across policies
Supranational/ European	Supranational activism Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward together with private actors on civil law matters.	Ambiguity on legal base of procedures vary across policies
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Hypotheses on varying supply of integration for judicial cooperation policies</i>	<i>Indication</i>
Domestic	Domestic opposition Domestic opposition and hence supply of integration are likely to vary as the role of the state varies across law sectors.	Threats by national veto players/publics vary across policies
Transnational	Preference intensities Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on civil law matters.	Degree of preference convergence varies across policies
Supranational/ European	Supranational activism Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on what private transactors need in the single market.	Supranational interventions during IGC vary across policies

Table 9: Summary of theoretical expectations on the differentiation of judicial cooperation policies

5.5 Varying demand for integration

The overall purpose of this chapter is to explain vertical differentiation of civil and criminal judicial cooperation policies. In order to make it easier for the reader to follow each step in the analysis, I will include figures that mark value of dependent variable and the respective time period.

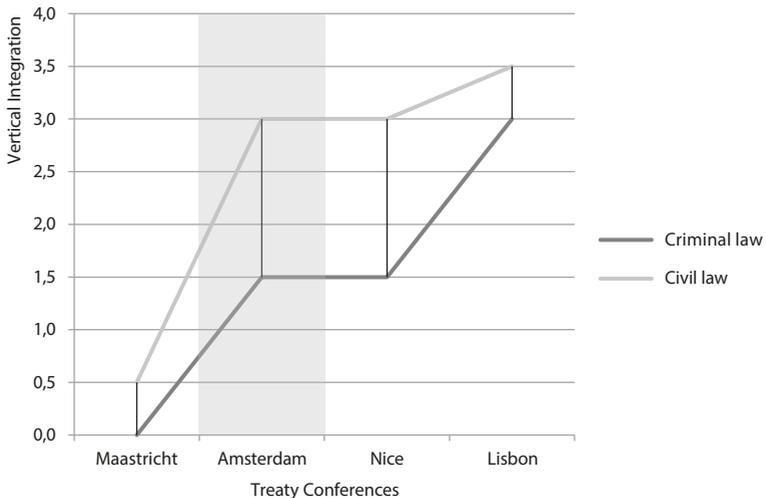


Figure 14: Vertical differentiation of judicial cooperation policies with the Amsterdam IGC

5.5.1 Declining home benefits for both national criminal law and civil judicial cooperation policies

For both branches of law, European states have recognized the benefit of international cooperation since the 1950s. Criminal law cooperation primarily occurred in the Council of Europe, whereas the Hague Conference on Private International Law was the dominant venue for cooperation on civil law matters. For both law matters, the 1990s brought developments that led governments to intensify cooperation. The end of the Cold War refocused member states' attention on internal security

matters and crime prevention (Wright and Bryett, 1994). The communication revolution and globalized trade incentivized EU member states to opt for fewer unilateral measures in favor of European action on civil law matters (Fox, 2001; Mattli, 2001; Michaels and Jansen, 2006). Home benefits of unilateral policy-making declined for both law branches. In consequence, member states integrated both criminal and civil legal policies into the EU. However, declining home benefits for both fields of law does not account for vertical differentiation with the Amsterdam and Nice IGCS.

5.5.1.1 Sinking home benefits of civil judicial cooperation policies

European civil law systems were in crisis in the 1990s (Zuckerman, 1999b). Although the reasons for crisis differed, all EU member states had difficulties meeting the demand for civil law dispute settlement. Crisis in this policy area implied costs associated with seeking legal redress. These costs included high expenditures for trying to go before a court as a private litigant or delays due to caseloads that were too great for civil law courts to manage (Zuckerman, 1999a). To alleviate pressures on court-based civil law systems, member states increasingly reflected on ways to make civil law more affordable and relieve courts of an excessive numbers of cases. One avenue that was pursued was to increase the number of out of court settlements and rely on private dispute settlement bodies (Mattli, 2001). Offering legal redress before litigants went before a court reduced pressure on national civil law systems.

Another strategy for managing increased civil law pressures was learning from other countries' crisis responses. Learning from other societies' experiences and policy reforms could offer a fast track for addressing the overburdening number of civil law cases that were only likely to increase in light of globalization and the European single market (Kennett, 2000). European cooperation therefore offered economies of scale as long as European measures promised more effective policy responses without hampering states in adapting them to national contexts.

Member states realized these potential benefits when they established the Grotius program by a Council Decision in 1996. Member

states decided to fund a project that allowed legal practitioners to exchange information and experiences and to learn more from each other. According to the Council, legal certainty in the EU could “be more effectively realized at European Union level than at the level of each Member State, because of the expected economies of scale and the cumulative effects of the projects envisaged” (Council, 1996c). The incentive for the Grotius program came from decreasing home benefits of pure unilateral policy-making on civil law matters, which led to an increased demand for cooperation.

5.5.1.2 Sinking home benefits of unilateral criminal judicial cooperation policies

The criminal justice systems of EU member states came under stress in the 1990s (Garland, 1996). The end of the Cold War eliminated the external security threat that had largely dominated societal debates on safety and dangers to society. As external threats diminished, European societies increasingly looked inwards and problems of internal security gained prominence in the 1990s (Garland, 2002). This development had a two-pronged consequence. First, citizens increasingly focused on security threats stemming from within national borders and the fight against crime became a highly politicized issue, and second, governments now had the task of defining these new, or at least previously neglected, threats to social order and simultaneously finding solutions. Therefore, governments had an incentive in the 1990s to seek EU-level cooperation that might assist in defining and addressing these new threats by offering states the opportunity to learn from each other and present their politicized publics with a response. Ideally, this response would demonstrate that, not only one state, but all states were struggling with these new threats as well as present convincing (because of their joint nature) counter-measures. Legal scholars and criminologists have diverging opinions, however, on the actual severity of criminal problems encountered by the member states during that time period.

The “cautious” strand of literature in this field emphasizes member states’ need to address “new offences” that increasingly characterized European societies (Wright and Bryett, 1994). These offences were not new in the sense that citizens and states were experiencing more or

novel violence. Certain actions were increasingly qualified as criminal only now due to overarching social transformations that changed conceptions of legitimate behavior in society (Killias, 2006). European societies began to discuss gender equality, immigration and environmental protection in the 1960s and 1970s, with the result that states increasingly recognized certain behaviors as sexist, racist or an environmental crime. States not only faced the challenge of re-defining adequate social behavior but also needed a practical response. As an overarching theme in revision of criminal law and policing, member states also took into account the extent to which criminal activities were systematic and coordinated under the new heading of “organized crime”. Drug trafficking, human trafficking and sexual exploitation as forms of organized crime with transnational reach due to previous migration movements were seen as new challenges that were to become more prevalent with the dissolution of the Eastern Bloc (Fijnaut and Paoli, 2006). Germany adopted a first definition of organized crime in May 1990 (Bundeskriminalamt, 1997: 133).

The more “resolute” strand of literature sees unilateral crime prevention as being in crisis in the 1990s (Wright and Bryett, 1994; Garland, 1996). According to this argument, criminal law has increasingly focused on preventing criminal events rather than preventing criminal careers since the 1970s (Garland, 2002). The focus on events rather than individuals, however, places a higher burden on criminal law systems. Crime prevention not only has the function of disincentivizing criminal activity through legal deterrence and threat of punishment, in cultures of control member states and criminal law systems are required to prevent criminal events by increasing information and surveillance. This is the result of politicized publics that raised criminal law matters as an issue that could decide national elections.

Independent of whether the cautious or the resolute strand of literature is correct in describing the true circumstances in the 1990s, it is clear that governments faced a situation of potential policy failure on criminal law matters, exacerbated by but not exclusively due to increased interdependence. Whether the result of new offences or a new culture of control, member states had an incentive to seek European cooperation (Cadoppi, 1996). The exchange of best practices and

information in light of developments that affected all EU member states offered economies of scale (Grijpink, 2006). Exchanging experiences and information on criminal activities promised an expedited way to address the new focus on internal security after the Cold War and accommodate the public's new concern about crime prevention.

In sum, both law matters put governments under pressure and questioned the resoluteness of unilateral policy measures. Due to declining home benefits, European cooperation was a desirable option for both civil law and criminal law matters. In terms of home benefits, vertical differentiation at Amsterdam and Nice was not a logical or compelling outcome.

5.5.2 Interdependence

The same can be said about interdependence. Both policy fields were characterized by increased interdependence, in its endogenous and exogenous variants. Member states associated the lifting of internal border controls with a potential security deficit and therefore planned adopted "compensatory measures" in the criminal law field. Open borders were anticipated to result not only in citizens moving freely within the community but also in transnational crime extending its activities more easily beyond borders (Turnbull and Sandholtz, 2001). These security concerns were further fueled by the dissolution of the Soviet Union and the assumption that criminal activities in Central and Eastern Europe would spill over to the west (Joutsen, 1997). With regard to civil law matters, member states also experienced increased endogenous pressures for further integration. Citizens and companies made use of their right to transact freely across internal borders. To run smoothly, the free movement of goods, capital, services and persons had to be based on legal certainty as otherwise private actors could refrain from transactions and hence undermine the rationale for the single market (Freyhold et al., 1995). Thus, for both law matters, heightened interdependence in the time period leading to the Amsterdam and Nice Treaties can be observed. Interdependence therefore helps explain the demand for integration for both policies but cannot account for vertical differentiation of civil law and criminal law matters.

5.5.2.1 Interdependence in civil law matters

The demand for further integration of civil law matters at the Amsterdam and Nice IGCs had endogenous sources. The completion of the single market gained momentum with the Commission's White Paper (European Commission, 1985c), the conclusions of the Single European Act in 1986 and the Schengen Convention in 1990. All three initiatives echoed most member states' desire to establish a borderless single market that allowed the free movement of goods, capital, services and persons. These initiatives were aimed primarily at free trade, and labor mobility threatened to remain suboptimal if cooperation on civil law matters was not considered. Increased mobility rights combined with the principle of non-discrimination towards EU nationals and products heightened interdependence of civil law systems as long as member states wanted to reap maximum benefits of a borderless single market. European Union nationals increasingly used their mobility rights and transacted across borders in the EU (Eurostat, 2008). Diverging civil law rules across states could prevent or impede EU nationals from transacting across borders, which decreased the benefits of the single market.

The further development of the single market program and the lifting of internal border controls in the mid-1990s boosted intra-EU trade relative to GDP in general and also "led to a strong increase in overall bilateral trade intensities [within the EU], as measured by bilateral trade flows relative to GDP" (Stehrer et al., 2016; Eurostat, 2008). The increase in bilateral trade was especially noticeable with regard to the free movement of goods, whereas the free movement of services lagged behind until the year 2000 and the services directive of 2006. Although trade increased as a result of the single market, the market was not fully effective and obstacles to free movement remained. Beyond member states' failure to transpose legislation to the single market, one central obstacle that made the market suboptimal was the lack of legal redress as "absence of effective remedies may hinder the correct enforcement of Community legislation" (European Commission, 1996a). Enforcement in this regard heavily relied on private parties as "[r]edress [could] be sought by private parties through the courts but here, too, there [were] barriers" (European Commission, 1996a).

Diverging substantive and procedural civil law rules meant legal uncertainty for private actors. Tourists, consumers or companies could refrain from transacting and engaging in economic activities within the single market if they had no knowledge of which EU state's law applied for a transaction or seeking legal redress. These transaction costs for private actors resulted in costs for European economies when private actors refrained from transacting due to legal uncertainty, which could imply that the utility of the single market and the Schengen area remained unexhausted. The more private actors in the EU had the right to transact and move freely within the Community, the more these actors raised the question of which substantive and procedural law would apply to their transactions. The single market program and the lifting of (non-) physical borders to trade and travel made civil law systems in the EU increasingly interdependent (Storskrubb, 2008: 21–23). In light of this interdependence, the demand for further integrating civil law matters in the EU was objectively high, although supranational activism was required to push integration further.

Besides economic rationales for considering further integration on civil law matters, citizens, who used new mobility rights to reside in foreign EU member states, demanded converging civil law rules. The Treaty of Rome envisaged the free movement of workers, and the European Court of Justice held that EU workers should not be discriminated against within the EU because of their nationality. This mobility right was extended from workers to all EU citizens when the Treaty of Maastricht introduced the notion of EU citizenship and the promise that EU citizens could move and reside freely within EU territory (Storskrubb, 2008: 37–38). Over the course of the 1990s, EU nationals indeed migrated towards other EU member states (Eurostat, 2008). As a consequence, increasing transnational property and family relationships led to demand for legal certainty for private actors as well as increased judicial cooperation across borders in cases that were brought before courts. Legal documents and evidence needed to travel across borders as well. Moreover, private actors could become trapped in legal limbo in cases where a judgement in one member state was not recognized by authorities in another member state.

Both economic actors and citizens needed legal certainty in order to fully enjoy the right to free movement in the EU without fearing deficits in legal protection. Closer cooperation on civil law matters to ensure legal certainty was imperative economically in order to make sure that private actors indeed engaged in transaction and therefore supported intra-EU trade. With regard to questions of justice, demand for integration and converging civil law rules stemmed from the possibility that some private actors could abuse diverging civil laws and procedures in EU member states to the detriment of less powerful actors. Powerful commercial actors could engage in forum-shopping and choose civil law systems that promised them the most beneficial outcomes in legal disputes. The more free movement within the EU became a reality, the higher the incentive for member states to intensify cooperation on civil law matters in order to avoid negative consequences for the single market and free trade, as well as to prevent injustice. However, as demonstrated below, this heightened interdependence was not realized by the member states. Instead, supranational actors placed civil law matters high on the agenda and promoted integration of civil law matters.

5.5.2.2 Interdependence in criminal law matters

Interdependence of member states' criminal systems rose during the 1990s as criminal activities increasingly spanned across borders following the loss of border controls within the EU and increased east-west mobility in Europe after the fall of the Iron Curtain (Aebi, 2004). In order to demonstrate that interdependence in criminal law matters increased, this dissertation first demonstrates that criminal activity gained a transnational dimension, second that member states indeed identified a European dimension to crime and criminal prosecution and third that intergovernmental cooperation was not enough to cope with interdependence effects.

Lifting internal border controls had the consequence of also allowing criminal actors to enjoy increased freedom in moving across borders. The security implications for EU member states were further exacerbated by exogenous developments, primarily the dissolution of the Soviet Union. Open borders within the EU combined with the fall of the Iron Curtain created fundamentally new crime opportunities and

transportation routes for illegal goods, drugs, arms and people (Aebi, 2004). This new opportunity structure combined with the wealth gap between western and Eastern Europe incentivized the opening of new markets for stolen goods and drugs (Killias and Aebi, 2000). Increasingly permeable borders fostered the trans-nationalization of criminal activity as well as professionalization in the form of organized crime and criminal networks.

On an aggregate level, Western Europe had experienced stagnating levels of recorded crime until 1994 (Joutsen, 1997). Comparing the statistics for individual offences, it can be observed that drug-related and violent offences, such as homicide and robbery, increased from 1990 until 2000, whereas property-related crimes peaked in 1993 and decreased afterwards (Aebi, 2004). These patterns correspond with the new crime opportunity structure. Directly after the Iron Curtain fell, police recorded property offences increased as a market for stolen products such as cars and jewelry developed in central and Eastern Europe. That the number of property offences decreased after 1993 is attributable to the saturation of the eastern black market and strengthened police measures by Eastern European countries that applied for EU membership (Aebi, 2004). Drug offences in contrast increased steadily over the 1990s in each member state of the EU. Drugs produced in the Middle East could not only enter Europe and the EU more easily, but drug trafficking also went more smoothly within the EU given the lack of border controls and a reliance on controls on state territory. Increased violent offences were at least partially due to criminal organizations struggling over new lines of transportation in Europe as well as the greater drug consumption related to violent crimes such as robbery (Killias and Aebi, 2000). Criminal activity hence increasingly spanned beyond borders in the 1990s and allowed organized crime to make use of new lines of supply for illegal goods, drugs and human beings.

In contrast to the civil law case, member states took note of the heightened interdependence of European criminal law systems that resulted from open internal borders. The common response came in two forms: first, member states tried to intensify practical cooperation in the form of increased information sharing and the establishment of Europol—matters that fell under the label of police cooperation

(Occhipinti, 2003). Second, member states sought ways to streamline judicial cooperation in criminal law matters. Increasing transnational activities and mobility across borders implied that criminal law systems would increasingly face legal cases against foreigners or organized crime that operates across borders.

Interdependence in criminal law matters had two aspects. Member states had an incentive to approximate substantive criminal law in the form of joint definitions of offences, as diverging definitions of offences could result in criminals seeking safe haven in states in which they were unlikely to face prosecution. Varying definitions of criminal behavior could also allow criminals to exploit rule divergence to some extent and play off diverse criminal law systems. In that regard, the Council agreed with recommendations from the High Level Group on Organized Crime that member states should find a common definition for organized crime. In order to combat organized crime in the EU and to allow for comprehensive prosecution, member states would “need to ‘know your enemy’ and to agree on the characteristics which make it both dangerous and, it is hoped, vulnerable” (Council, 1997). The second face of interdependence in criminal law matters was procedural. The likeliness of increased criminal proceedings involving foreign persons meant that member states were more and more dependent on mutual assistance in obtaining evidence and extraditing suspects that could flee prosecution by crossing open borders. Immediately when the Treaty of Maastricht came into force member states looked for ways to ease and speed extradition between themselves. This topic remained on the EU agenda and the Council adopted a joint action in 1996 that drafted the Convention related to extradition between member states.

Member states recognized increased interdependence of their criminal law systems and intensified cooperation in this regard on substantive and procedural criminal law matters. However, the measures based on the intergovernmental setting of the Maastricht Treaty were ultimately flawed. In the midst of the Amsterdam IGC the High Level Working Group on Organized Crime lamented that “judicial cooperation needs to be brought up to a comparable level to police cooperation” (Council, 1997). The reason the High Level Group and many member states were upset with previous cooperation was that legislative mea-

tures had previously relied on conventions. These conventions were difficult to draft given the unanimity requirement, as exemplified by protracted negotiations in the Convention on Mutual Legal Assistance on Criminal Matters (2000), which could only be adopted after five years of negotiations. Even if consensus on a draft could be found within the Council, ratification of each member state was required. These requirements resulted in no criminal law convention coming into force before the Amsterdam and Nice Treaty conferences.

In sum, the interdependence of criminal law systems of EU member states increased in the period before the Amsterdam and Nice IGCs. Mobility rights and opportunities expanded both within and towards the EU, which gave rise to increased transnational crime. Although well informed about this development, member states had difficulties countering organized crime and the third pillar instruments were found to be deficient in addressing transnational criminal activity. Member states did integrate criminal law cooperation further with the Treaty of Amsterdam, although not to the same level as seen for civil law matters. This outcome was mainly due to supranational activism, which pushed integration forward on civil law matters even while member states shielded criminal law matters from supranational interference.

5.5.3 Supranational activism before the Amsterdam and Nice IGCs

Supranational actors and the Commission in particular were aware of the heightened interdependence in both judicial cooperation policies fields. Increased mobility within the EU had consequences for both law branches, and supranational actors were not hesitant to outline the benefits of intensified European cooperation for both fields. Although the intention to drive integration was the same for both branches, supranational actors were only successful with regard to civil judicial cooperation policies. In this policy field, member states had a comparative information disadvantage compared to criminal law matters. With regard to the latter, states held strong authority in shaping and enforcing criminal judicial cooperation policies. Combatting crime is a state prerogative and specifically a prerogative of executive branches. Member

states therefore sequestered criminal law cooperation from supranational involvement and instead preferred to rely on Council structures and working party reports to fill information gaps. By contrast, states held a more passive position with regard to civil law cooperation in the EU. The implementation of Schengen and the single market made civil law systems more interdependent. Here, governments allowed private actors, and legal scholars in particular, as well as supranational actors to address heightened interdependence of civil law systems.

5.5.3.1 Supranational activism on civil law matters

Supranational actors realized the consequences of the single market for the further development of European integration early on. The European Parliament forwarded a motion for a resolution on approximating EU member states' private law to its Committee on Legal Affairs and Citizens' Rights in 1985. The ensuing resolution in 1989, well before the single market was supposed to be completed in 1992, called for increased harmonization of civil laws within the EU in order to make the single market a true success (European Parliament, 1989). In order to prepare the EU for the single market, the European Parliament urged member states to set up a committee of legal experts mandated to draft a "European Code of Private Law". The European Parliament echoed these intentions in 1994 (European Parliament, 1994). It is no coincidence that the Commission on European Contract Law, the so-called "Lando Commission", comprising legal experts from every member state had simultaneously already taken up its work in 1982. It envisioned unified civil law rules in Europe and presented its Principles of European Contract Law in 1994. Supranational actors and legal professionals in civil law were in constant contact in the 1990s, which gave supranational actors an information advantage over member state representatives. This interaction did not lead to integrative steps before the Amsterdam and Nice conferences but did allow the Commission in particular to consolidate its status as a civil law expert and to influence EU policy-making and treaty conferences in this regard in favor of more European integration.

Legal scholars envisioned increased transactions in the single market that at some point would call for harmonized civil law rules. Besides

the *Lando Commission*, which exclusively worked with European contract law, legal scholars established working groups on European Tort Law, Trust Law, Insolvency Law and Family Law (Zimmermann, 2006). The “Storme group”, established in the mid-1980s and named after the chairman Marcel Storme, went a step further to set a goal of compiling a “European Judicial Code”. The *Storme group* contacted multiple European actors including the European Parliament, the Council and the Commission. In their first report, they made clear that “thanks to the encouragement given by some senior European officials, our voice would ultimately be heard by the Commission” (Storme, 1994). The Commission originally scheduled the report for release in 1992, when the single market was supposed to become operational, but allowed a delay of two years. The Commission became the information hub on civil law rules and the costs associated with a single market not accompanied by harmonized civil law rules. Consequently, the Commission argued that access to civil justice was a precondition for the effectiveness of the single market (European Commission, 1993). Based on a variety of input from legal scholars, the Commission focused on consumer protection and the costs of judicial barriers in the single market (European Commission, 1993; Freyhold et al., 1995). The conclusion presented to the member states was that “legal barriers create an atmosphere of uncertainty whose macroeconomic costs partly explain the ‘foregone profits’ of the internal market” (European Commission, 1996a).

Transnational legal scholarship in the 1990s explored the advantages of and avenues towards a European civil law system, first by comparatively analyzing the differences between civil law systems in the member states and second by relating these differences to transactions costs in the single market without European harmonization. Supranational actors referred to these legal studies on European private law, emphasized the costs of diverging civil law rules and procedures in the EU and made a political argument for increased integration. Supranational actors used legal scholarship and hence expert knowledge as an argumentative device to legitimate their calls for more supranational rules and integration (European Parliament, 1994). The Commission opened up a consultation process with its Green Paper on “Access of Consumers to justice and the settlement of consumer disputes in the Single Market” (European Commission, 1993). It also mandated an in-depth

case study on the costs of judicial barriers for consumers in the single market. These initiatives rhetorically created a close link between the effectiveness of the single market and the necessity of harmonizing civil law rules in the EU. This call was not answered by the governments before the Amsterdam IGC due to member states' "resistance to harmonization both in the legislature and in the courts" (Storskrubb, 2008: 21; Caruso, 1997). However, supranational actors gained an information advantage on civil law matters and the benefits of European civil law rules and procedures. The Commission in particular used this information advantage during the Amsterdam IGC with the result that civil law matters, together with migration policies, were associated with effectiveness of the single market and hence further integrated with the Amsterdam Treaty.

5.5.3.2 Supranational activism on criminal law matters

Similar to civil law matters, the demand for integration was high on criminal law issues in light of declining home benefits and interdependence of national criminal law systems in the EU. Despite this, while supranational actors could indeed make an argument for integrating civil matters further in the EU due to the single market and open borders, they were unsuccessful in convincing member states of the same argument for criminal law issues before and during the Amsterdam and Nice Treaty negotiations. Supranational actors were active on both civil law and criminal law matters but member states' resistance to supranational activism was higher with regard to a European dimension on criminal law.

In parallel to the efforts by legal scholars to establish a European Civil Code, criminal law comparatists discussed the benefits of and worked on a European Criminal Code (Cadoppi, 1996; Sieber, 1997). The argumentation in favor of such a code was the same. Although both law-abiding persons and criminals enjoyed increased mobility within the EU, criminal law enforcement stopped at national borders. While the state is obliged to protect its citizens and state authorities may rely on the monopoly of force to fulfil this promise within national borders, states were in increasing need of legitimation when borders no longer presented obstacles for criminal activities but only constrained criminal law

enforcement (Sieber, 1997). Previous European integration had not only made new forms of crime possible, such as crimes against the financial interests of the EU, it had also made it more difficult to prosecute crimes because of the free movement of persons within a borderless European territory. Legal authors therefore called for a European judicial area that complemented the single market, as otherwise transnational crime prevention and prosecution would remain suboptimal and ineffective. As Sieber stated, “The only solution to the problems induced by (incomplete) European integration is further integration” (Sieber, 1997: 370).

Governments of the EU member states followed this reasoning and shared the opinion that open borders could lead to security deficits. The Schengen accords and Council documents in the 1990s reflect this argumentation. Drug and human trafficking, terrorism and European financial crimes were recognized as threats to a borderless Europe that called for flanking measures in the European market. When considering European initiatives, however, member states mandated reports and relied on information that was not provided by supranational actors but by Council working groups. In debating legislation on organized crime and simplified extradition procedures the Council consulted reports and scientific studies that were commissioned by the Council of Europe (Council, 1994c). In contrast to developments in European civil matters, supranational actors did not become the information hub on criminal law cooperation and therefore could not rely on information advantages during treaty conferences to steer negotiations towards more integration.

Instead, supranational actors (the Commission and the European Court of Justice in particular) introduced a criminal law dimension into regular Community policies. Member states cooperated on criminal law matters in the 1990s via intergovernmental methods. They drafted two conventions on extradition procedures, although neither convention entered into force due to lack of ratification. The Commission and the European Court of Justice remained inactive on any legislative proposal that was based on third pillar treaty articles. Instead, both organizations worked together in establishing the Community competence to penalize economic activity in the EU and as a result drew criminal law matters closer to Community competence and legislation (Sieber, 1994; Harding, 2015).

The rationale of the Commission, partly followed by the European Court of Justice, was that penal law and sanctions should be a means to ensure that Community legislation and European rules were respected. The European Council and EU member states have rejected this idea when the European Commission or the European Parliament called for criminal provisions on insider-trading and money laundering (Sieber, 1994: 92). Against member states' resistance, the European Court of Justice created a precedent for criminal judicial cooperation policies-making in the first pillar by clarifying that the Community may impose penalties in agricultural policy (Case C-240/90 and Case 68/88).

Thus, there were indications of supranational activism attempting to Europeanize criminal judicial cooperation policies-making. Supranational actors were successful to some extent by linking first pillar policies to criminal law aspects. However, supranational actors could not find a way to access criminal judicial cooperation policies that were adopted under third pillar treaty articles. Member states shielded criminal law matters from supranational influence by mandating Council bodies prepare legislation and information and using intergovernmental conventions instead of more legislative policy instruments, such as Joint Actions. Member states' eagerness to shield criminal law matters from supranational involvement was further demonstrated during the IGC of Amsterdam, as discussed below.

5.6 The unequal supply of integration at the Amsterdam IGC

The Treaty of Maastricht provided for the convention of another IGC. Negotiations in this IGC proceeded in essentially three stages. First, member states requested that the so-called Reflection Group, consisting of national representatives as well as the supranational organizations, write reports on the functioning of the Maastricht Treaty. Based on these reports and suggestions for reform, member states began to exchange bargaining positions and draft text under the Irish presidency in the second half of 1996. Negotiations and the treaty text were finalized under leadership of the Dutch presidency in 1997.

As the previous section has demonstrated, demand for integration was high for civil law and criminal law matters. Both policies increasingly developed a transnational dimension in light of the borderless single market. Interdependence of national civil law and criminal law systems grew over the 1990s. However, demand for integration was uneven across these policies given that supranational activism was more pronounced on civil law matters compared to criminal law matters. With regard to the former, supranational actors and the Commission in particular developed into an information hub for member states, whereas regarding criminal law matters member states rejected supranational assistance. This uneven demand for integration was translated into unequal supply of integration.

The Treaty of Amsterdam maintained the vertical differentiation of civil law and criminal law matters. This outcome was influenced highly by the European Commission in two respects. First, the difference of integration levels of these policies in the Amsterdam Treaty was the result of the Commission being granted the sole right of initiative on civil law matters (after a five-year transition period), whereas the Commission had to share its right of initiative on criminal law matters with the member states. Second, it was the Commission that pushed the integration of civil law matters further during the negotiations and therefore was responsible for the further supply of integration on civil law matters with the Treaty of Amsterdam. Member states were reluctant to consider civil law matters as a candidate for further integration at the beginning of the conference. The Commission's intervention during the negotiations changed this by linking civil law matters to the success of the single market. By manipulating the negotiations this way, the Commission's activism led to the peculiar outcome that civil law matters were grouped with immigration matters under the first pillar, whereas criminal law cooperation remained part of the third pillar. The liaison between migration and civil judicial cooperation policies is "anomalous" from a conceptual viewpoint given that subjects of these policies are essentially different (Storskrubb, 2008: 39). Migration policies relate to third country nationals and their access and stay conditions, while civil judicial cooperation policies address EU citizens and independently of the immigration of third country nationals.

That member states did not originally consider civil law matters a candidate for integration and that civil law matters were grouped with migration policies indicate that negotiations were manipulated successfully by the European Commission. Varying supranational activism during the IGC of Amsterdam explains the varying supply of integration for both policies and hence vertical differentiation.

5.6.1 Domestic opposition to integration

When determining why regular and irregular immigration policies were vertically differentiated, we saw that the supply of integration varied because the German Länder consistently opposed the integration of regular immigration matters. The German government changed its bargaining position when the Länder intervened during the negotiations of the Amsterdam and Nice Treaties. In order to conclude that domestic opposition accounts for vertical differentiation at Amsterdam, it would be necessary to determine that either national veto players involved in ratification, such as second parliamentary chambers, or the public resisted the further integration of criminal law matters in particular. Moreover, we would need to find that governmental positions changed during the conference due to the intervention of national oppositional forces.

With regard to civil law and criminal law cooperation, we do not observe domestic opposition to integration of both policies. The European Ministers of the German Länder and the German Bundesrat supported the integration of criminal law and civil law matters with the Treaty of Amsterdam (Europaministerkonferenz, 1996, 1997). Other federal governments that could have faced domestic opposition by their sub-state veto players did not change their bargaining positions during the conference. All of these federal states (except Ireland) were strong supporters of integrating both policies further. Belgium, the Netherlands, Italy and especially Spain wished to integrate criminal law cooperation further by moving not only parts of the third pillar but all JHA policy into the first pillar of the EU's treaties (Interview Member State Representatives #2 and #4).

Similarly, we see that national publics were largely in favor of strengthening European cooperation on criminal law matters. Taking the fight against drug trafficking as a proxy, we can see that a majority in very member state was in favor of intensifying European cooperation (European Commission, 1997a). The fight against drugs and organized crime were even considered to be top priorities for the EU to address (European Commission, 1996b). Yet, three states faced domestic constraints in accepting the integration of criminal judicial cooperation policies. Ireland and Denmark were the only states that had to ratify the Amsterdam Treaty by a referendum. Equally, both states were rather hesitant to support the communitarization of criminal law matters. The United Kingdom did not require a referendum but was characterized by highly Eurosceptic attitudes.

During the IGC, the Danish public's approval of European integration was slightly below the EU average (European Commission, 1996b). Moreover, approval ratings in favor of European integration had been decreasing since the failed referendum on the Maastricht Treaty. Denmark was not the only EU member state characterized by this trend, but Denmark was the first EU member state that rejected a European treaty by referendum. This action had two consequences: first, the government pre-emptively lowered its ambitions for the Amsterdam IGC. The Danish delegation was mainly eager to control instead of shape bargaining outcomes on policies relating to the third pillar. The Danish position papers defend the status quo rather than call for more European authority on policies. Second, having had a referendum that already politicized the public with regard to European affairs, the Danish government could not accept the same concessions for approval as other states. Compared to the rest of the EU, the Danish public was not only (comparatively) very well informed about European policy-making but also about the IGC (European Commission, 1996b). The Danish government's ability to swiftly accept integration or to accept side payments relating to other issue areas was relatively low and the preference to avoid ratification failure rather high. The Danish government therefore had a binary choice: either criminal law matters remained intergovernmental or Denmark would opt out of the treaty completely. As criminal law matters remained intergovernmental, the

Danish government was able to approve the treaty text in this regard. For migration and civil law matters, which were communitarized with the Amsterdam Treaty, Denmark was allowed to opt out completely.

The Irish position was more peculiar. Ireland had the highest approval rating for EU membership in 1997 (European Commission, 1997a). A clear majority of Irish citizens even supported the idea of having a European government, although Ireland was also very much in favor of strengthening the principle of subsidiarity in the EU. The Irish government therefore found it difficult to formulate a clear bargaining position for three reasons. First, the demand to strengthen European integration on criminal law matters was high. Fighting drug trafficking in particular was a top priority for the Irish government and society alike, and the Irish government even used its EU presidency to put crime high on the EU's agenda (Council, 1996b; CONF/3854/96). Second, the Irish government had a clear incentive to present itself as a pro-European state. Not only did it hold the EU presidency in the second half of 1996, but the EU was quite popular among the Irish citizenry (European Commission, 1997a). With these considerations in mind, why did the Irish government not speak clearly in favor of integrating criminal judicial cooperation policies further?

Because Ireland held the EU presidency, it failed to clearly delineate its bargaining positions in 1996 in order to avoid the suspicion that it was trying to influence negotiations in line with its preferences. Moreover, although Ireland largely supported EU membership there was a slight majority of Irish citizens that rejected majority voting on policies (Smyth, 1996). Moreover, it is plausible that the Irish citizenry not only consulted national media but British media outlets as well. As the United Kingdom and hence the British media were characterized by Eurosceptic voices, the Irish government could not be certain that its public would approve the integration of criminal judicial cooperation policies in a national referendum, as these functions belong to core state powers. The Irish government therefore pursued a "toe-on-the-edge" bargaining approach of supporting and distancing itself from the British government: "The Brits always were hesitant, the Danish were hesitant, the Irish were hesitant, because the Brits were hesitant. The Irish were much more open" (Interview Member State Representative #1).

Ireland did not advocate the integration of any third pillar policy and often pointed to the Common Travel Area with the United Kingdom. Ireland was, however, eager to signal to other EU member states that it was interested in further cooperation and felt threatened by developments towards enhanced cooperation and excluding member states from certain policy initiatives (CONF/3862/97). Having an intergovernmental arrangement on criminal law matters allowed Ireland to convey to its domestic constituency that it had sided with the British government while simultaneously being active in shaping European solutions to crime. With regard to civil law matters, the final opt-in mechanism allowed Ireland to both declare its solidarity with the United Kingdom's position and join EU measures on demand. Equally, it could convince its domestic audience that while it was not formally bound to EU measures it was still able to integrate them if this seemed to be of benefit.

The United Kingdom formally had low domestic ratification constraints. The British government neither needed the approval of a second legislative chamber nor the consent of the public in a referendum. Informally, domestic opposition to integration was high. The British public was the most Eurosceptic society in the EU with an approval rating of EU authority that was well below the EU average (European Commission, 1996b). More importantly, opposition to any form of integration of third pillar policies stemmed from the leading party itself. In 1996, John Major inherited strong Eurosceptic sentiments in the Conservative party from Margaret Thatcher's time as party leader (Major, 1999). Sovereignty concerns were high and relinquishing control over immigration or judicial policies seemed unacceptable, especially given the difference between British common law and continental law systems. When Tony Blair and the Labour Party won the national elections in 1997, the UK did not revise its bargaining position on third pillar policies. Margaret Thatcher not only left an impact on the Conservative Party, but on Britain as a whole. However, compared to Major, Blair could abandon a position of complete opposition at the Amsterdam IGC. With an election campaign that included a more conciliatory approach towards the EU, Blair was able to retreat from a blockade mentality while still signaling to the British public that he would preserve sovereignty in the British parliament: intergovernmental or no cooper-

ation when British sovereignty is threatened, namely for both criminal law and civil law matters. Criminal law matters remained intergovernmental and Britain was given the option to opt into civil law legislation whenever it saw fit to do so.

As illustrated above, domestic opposition played a role in explaining the supply of integration. However, this explanatory factor was not the deciding factor in explaining why civil law matters were more highly integrated than criminal law matters. Integration-friendly states did not face domestic opposition to integrating both policies, while integration laggards faced opposition integration on both counts. There is no variation in this independent variable that can account for the variation in outcomes.

5.6.2 Preference intensities regarding integration

Preference intensities on integrating civil law and criminal law matters varied diametrically compared to the bargaining outcome. Criminal law matters and the fight against organized crime and drug trafficking were high on member states' agendas. Many delegations complained about limited progress on criminal matters in their respective position papers. Although member states drafted several conventions, no convention could enter force without uniform ratification. Member states perceived transnational crime to be increasing, and during the IGC they mandated the High Level Group on Organized Crime to prepare a report and recommendation for improving cooperation (Council, 1997). In contrast, civil law matters remained fully overlooked by member states during the IGC. No member state clearly advocated for or rejected further cooperation on civil law matters at the conference. If this was the case, why did civil law matters become more highly integrated than criminal law matters at the Amsterdam IGC?

Preference intensities on the integration of civil law and criminal law matters need to be analyzed in the context of the overall debate on whether integration should proceed in the third pillar. By screening each delegation's position paper (European Parliament, 1996c), we can observe that some states were in favor of moving all parts (the Benelux states, Germany, Greece, Italy and Spain) or some parts (Austria, France,

Finland, Portugal and Sweden) of the third pillar under Community competence, whereas three states rejected any further integration of third pillar policies (Denmark, Ireland and the United Kingdom). Preference intensities varied less between civil law and criminal law matters but between immigration policies and the “rest” of third pillar policies. Except for the three integration laggards, every member state showed a strong preference for integrating immigration policies further. These preferences resulted in integration advocates focusing their bargaining resources primarily on finding approval for integrating immigration policies at the expense of other third pillar policies. Therefore, integration advocates offered a compromise to integration laggards that immigration policies would be integrated further whereas law and police cooperation should remain in the intergovernmental third pillar.

Thus, partial communitarization of the third pillar was the original compromise formula in the Amsterdam negotiations. The report by the Reflection Group (1995) had included this scenario as a possible bargaining outcome. Accordingly, immigration policies were to be communitarized, whereas both civil law and criminal law cooperation would remain intergovernmental. Taken in isolation, preference intensities varied across civil law and criminal law matters, although member states were eager to improve cooperation on crime-related policies in particular. However, in the context of the overall negotiations on the third pillar, integration-friendly member states decided to abandon the idea of a complete transfer of the third pillar into the Community pillar. In light of resistance by Denmark, and the United Kingdom in particular, insisting on total communitarization of the third pillar could have led to bargaining gridlock and eventually the failure of integrating immigration policies further, which was the most important preference for the majority of member states. This preference setting helps explain why integration-friendly states did not offer concessions for integrating criminal judicial cooperation policies as well, since leaving criminal law cooperation intergovernmental was already a concession in itself.

Preference intensities on integrating civil law matters were comparatively low and no state clearly advocated or rejected the integration of civil law matters. Given this, it is interesting to investigate why civil law matters were further integrated even though the original proposal by

the Reflection Group recommended intergovernmental arrangements for both civil law and criminal law matters.

5.6.3 Supranational activism

The uneven supply of integration is attributable to varying supranational entrepreneurship. In contrast to migration and criminal judicial cooperation policies, member states had no clear ideas or preference on civil law cooperation: “Well because it was not a very hot topic, it was not a very hot potato. The hot potatoes were certainly police cooperation and law cooperation on the one hand and the other ones, the dimension more clearly connected to the internal market to put it that way” (Interview Member State Representative #1). Governments did not link civil judicial cooperation policies to migration issues or the freedom of movement, nor did they clearly align it with security issues or questions of national sovereignty. Strictly speaking, civil law cooperation was unknown territory for the member state delegations. The European Commission used this information deficit and took ownership of this topic. The Commission was the first actor to explicitly mention civil law matters as a distinct policy matter in its own right, and thus questioned the conflation of criminal law and civil law matters as policy areas that were to remain jointly in the intergovernmental third pillar. The Commission manipulated negotiations in favor of integrating civil law matters further by presenting this policy area as closely linked to the single market and freedom of movement in the EU (Interview Council Secretariat #1). The Commission framed some policies as freedom of movement-related areas that should be integrated in juxtaposition to security matters, such as police cooperation and criminal judicial cooperation policies, which should remain intergovernmental. This framing of civil law matters as market-making policy put states on the defensive that rather pointed to sovereignty concerns. Ultimately, it became accepted that civil law matters should be integrated further with immigration policies, all of which were rhetorically linked to the freedom of movement within the EU.

The Reflection Group’s report held that a majority of member states were willing to integrate immigration policies further while civil law,

criminal law matters and police cooperation should remain an intergovernmental affair (1995). This compromise formula was largely upheld during the negotiations under the Irish presidency in the second half of 1996. The negotiations on the third pillar were dominated by two questions. The first was to what extent immigration policies should be integrated and whether a transitional period was necessary in this regard, and the second was how member states could make certain that cooperation on crime-related matters became more effective. In answer to these questions, member states produced multiple position papers. The Irish presidency devoted two notes explicitly to the fight against international crime and organized crime in particular (CONF/3977/96; CONF/3989/96). The consequence was that member states increasingly found consensus for dividing these third pillar policies into different treaty parts with different decision-making rules. Immigration-related policies were to be in Part B and should fall under Community competences to some extent, although ultimate compromise was still missing. Crime-related matters were to be put into Part C and were to remain an intergovernmental affair. The outline for a Draft Treaty, which was tabled by the Irish presidency on 5 December 1996, maintained this division, and civil law matters were grouped with criminal law matters in the intergovernmental Part C (CONF/2500/96).

In 1997, the Netherlands took over the EU presidency. The first two presidency notes on 21 January and 3 February 1997 left the Dublin Draft outline unaltered with regard to third pillar policies and their separation into two different treaty parts (CONF/3803/97; CONF/3811/97). Only 16 days after the last presidency note on the AFSJ, the presidency distributed yet another note on the “progressive establishment of an area of freedom, security and justice” on 19 February 1997 (CONF/3823/97). This time, however, civil law matters were not found in Part C, but in Part B, as a candidate for further integration together with immigration policies. What happened in these 16 days that triggered the Dutch presidency to change the treaty basis for civil law matters in favor of an integrative outcome?

The timing and direction of this rearrangement indicate an instance of supranational activism. The European Commission issued its “outline approach” on AFSJ on 10 February (CONF/3817/97), i.e. directly

between the inconsistent notes by the Dutch presidency. The Commission's intervention was the only note on AFSJ during this time period and allowed the presidency to also include civil law matters under the new Community arrangement. As no member states had so far addressed civil law matters and considering that the Commission was the information hub on these matters before the conference, the Commission clearly had an information advantage vis-à-vis member states. The Commission framed the AFSJ as a two-sided policy area. On the one hand, the AFSJ would entail the ultimate objective of ensuring the free movement of persons, including directly related flanking measures, while on the other hand some AFSJ policies had to address new security challenges. The Commission thus did not distinguish between policies that did or did not relate to national sovereignty, which could indicate which policies should be candidates for integration. Instead, the Commission framed the division for integration as existing between policies that were related either to the free movement of persons or belonged to the security realm. Accepting this framing meant that every AFSJ policy, independent of its intrusiveness on national sovereignty, should be considered as candidate for integration so long as it did not relate to security aspects.

The Commission successfully manipulated the negotiations. The Dutch presidency followed the Commission's argumentation and transferred civil law matters into the first pillar with the consecutive presidency note (CONF/3823/97). While some delegations objected this development (CONF/3828/97), given the "either free movement or security policy" framing they were put on the defensive. Ultimately, civil law matters remained in the first pillar and, as such, were integrated to a higher degree than criminal law matters. Integration laggards received the concession that civil law legislation would only be considered for integration if it implied cross-border implications and was related to the proper functioning of the internal market.

Supranational activism on part of the Commission therefore explains the uneven supply of integration for civil law and criminal law matters. The Commission manipulated the bargaining setting by establishing an artificial criterion for policy integration, namely whether policies were related to the single market or whether they belonged to the security

realm. As this framing was accepted, sovereignty arguments for grouping policies as integration candidates or intergovernmental leftovers lost value. Instead, every AFSJ policy that had no security implications could be considered as an integration candidate, leading to the “anomalous” outcome that civil law matters were grouped with immigration policies under the first pillar and criminal law matters remained in the intergovernmental third pillar. Vertical differentiation was therefore the result of varying supranational activism across both policies. The Commission conceded on criminal law matters but through clever framing was able to gain support for the integration of civil law matters. Integration of civil law matters, and hence vertical differentiation, was the perverse effect of securitization arguments by the Commission.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses on varying demand for integration of judicial cooperation policies</i>
		<i>Finding</i>
Domestic	Home benefits	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in civil law matters.
Transnational	Interdependence	Interdependence and hence demand for integration are likely to vary as negative externalities in terms of disparate rule and forum-shopping should be higher in civil law matters.
Supranational/ European	Supranational activism	Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward together with private actors on irregular civil law matters.
		Commission pushes agenda on civil law matters
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Independent variable</i>	<i>Hypotheses on varying supply of integration for judicial cooperation policies</i>
		<i>Finding</i>
Domestic	Domestic opposition	Domestic opposition and hence supply of integration are likely to vary as the role of the state varies across law sectors.
Transnational	Preference intensities	Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on civil law matters.
		Strong reservation on criminal law matters, indifference on civil law
Supranational/ European	Supranational activism	Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on what private transactors need in the single market.
		Supranational interventions during IGC vary across policies

Table 10: Summary of expectations and findings (Amsterdam IGC)

5.7 The varying demand for integration at the Nice IGC

The Treaty of Amsterdam led to criminal law and civil law matters falling under different treaty bases and hence under different decision-making rules. However, it must be emphasized that civil law matters were only communitarized fully after a transition period of five years. Both policies remained an intergovernmental affair until the transition period ended. The Council still made decisions by unanimity and the European Parliament was consulted before legislative decisions. The European Court of Justice was restricted from giving jurisprudence for both policy realms, although under different arrangements. Civil law matters were further integrated in the sense that the European Commission was granted the sole right of initiative automatically when the transition period elapsed. This differed for criminal law matters, for which both the Council and any member state could table legislative proposals. This situation changed with the Treaty of Nice. Civil law matters were the only AFSJ policy fully communitarized with the treaty revision in 2000, so immediately and before the transition period mentioned in the Amsterdam Treaty elapsed. Migration policies were still governed by the transition period and criminal law matters remained an intergovernmental affair, but with the Treaty of Nice entering into force the Council decided by QMV and in co-decision with the European Parliament on civil law proposals for which the Commission held the right of initiative.

Vertical differentiation of civil law and criminal law matters thus increased with the Treaty of Nice. As demonstrated in later sections, this outcome was due to supranational activism on both the demand and supply sides of integration preceding and during the IGC of Nice. Home benefits were low and interdependence was high for both policies, but the Commission's legislative activism in particular led to member states' increasing demand for integration of civil law matters.

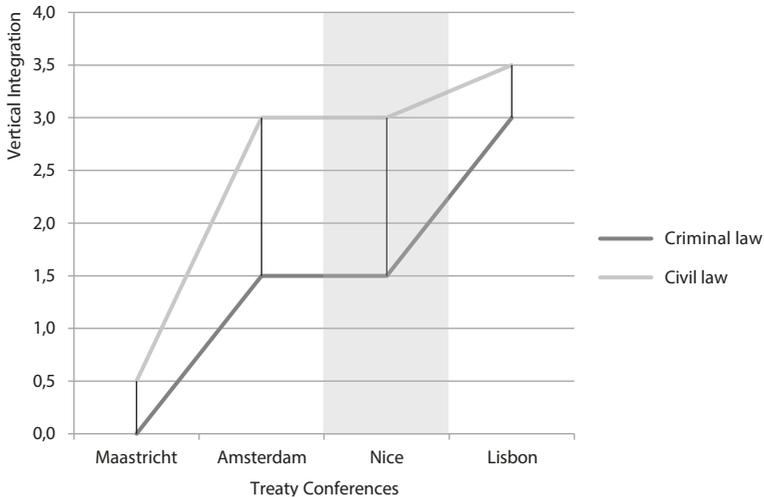


Figure 15: Vertical differentiation of judicial cooperation policies with the Nice IGC

5.7.1 Sinking home benefits of unilateral policy-making

Even before the Amsterdam IGC national criminal law as well as civil law systems were under strain. With regard to the former, governments increasingly had to contend with “new crimes”, such as organized crime, and hence needed to reform criminal prosecution (Fijnaut and Paoli, 2006). Moreover, member states increasingly experienced calls from their citizens to not only prosecute criminal behavior but to strengthen crime prevention capacities (Garland, 2002). With citizens shifting expectations to crime prevention, governments needed to extend and strengthen the instruments of criminal law systems. Similarly, civil law systems in member states were increasingly overburdened by massive caseloads, triggering governments to consider the introduction of non-judicial dispute settlement mechanisms.

European cooperation could contribute economies of scale in addressing these challenges. Exchanging information and experiences on new forms of crime and out-of-court settlements of civil law disputes offered an accelerated solution for addressing these develop-

ments. As previously mentioned, the Council established the Grotius Program in 1996, which provided for the exchange of national civil law and criminal law magistrates and common training projects. Member states expected effective judicial responses to be “more effectively realized at [the] EU level than at the level of each Member State, because of the expected economies of scale and the cumulative effects of the projects” (Council, 1996c).

Member states’ interest in sharing information and reaping common gains also prevailed after the Amsterdam IGC. The Council therefore decided to extend the Grotius program for both civil law and criminal law officials in 2000 (European Commission, 2000d, 2000e). It appears, however, that the decreasing home benefits of unilateral criminal law and civil judicial cooperation policies-making were increasingly a function of heightened interdependence. The growing public perception of criminal threats and the high case load of civil law disputes are attributable to progressive transnational exchanges. With regard to criminal law matters, citizens and governments alike increasingly observed a transnational dimension to crime that needed to be addressed without the aid of the previous dominant crime control instrument, namely border controls. Moreover, as more and more citizens made use of their right to move freely within the EU, civil law systems increasingly had to rely on foreign systems and cooperate with foreign judiciaries in the service of documents.

5.7.2 Interdependence of law systems

The perception that the home benefits of unilateral policy-making on civil law and criminal law matters were decreasing was high among publics and governments alike. States were hampered in addressing challenges effectively given that civil law disputes as well as criminal law cases increasingly had a transnational dimension. National law systems became more and more interdependent due to both endogenous as well as exogenous developments of European integration.

In its exogenous variant, interdependence heightened due to a paramount external development. The invention of the internet and the development of the mainstream web browser in the 1990s brought

new communication structures and opportunities for transnational exchange (Lehmann, 2000). Private use of the internet rose significantly from 1996 onwards and critical platforms, such as eBay, Amazon, Yahoo and Google, were developed for online use. The easing of private transactions had consequences for both criminal and civil policy areas. Political actors realized that private and commercial transactions would increasingly occur over the internet. E-commerce was said to boost trade in the internal market, leading to more civil law contracts and hence civil law disputes that required better transmission of judicial documents in civil law matters (Economic and Social Committee of the European Union, 1999).

Similarly, it was expected that criminal actors would make increasing use of the internet for their own purposes (Council, 1997). The internet not only allowed easier access to and distribution of criminal goods, but also created safe havens if European member states' rules and activities with regard to internet-based crime differed. By connecting people more closely in the virtual arena, member states' criminal systems became increasingly interdependent, as the deterrence effect of criminal law and effective prosecution became more and more dependent on cooperation. German Interior Minister Otto Schily used a special meeting of the Federal Criminal Police Office to emphasize this development in 1998:

The range of criminal activities occurring on the Internet is now alarming. This ranges from gambling and copyright infringement to the offering of stolen goods, drugs and weapons, to instructions for building explosive devices and the dissemination of extremist ideas, violence-glorifying writings and child pornography. However, national measures alone are by no means sufficient in view of the international character of the Internet; they must be flanked by international measures. Above all, the harmonization of national penalties are necessary to prevent the perpetrators from living in 'safe havens' (Bundeskriminalamt, 1999; *author's own translation*).

While e-commerce offered benefits to the single market, the existence of these benefits also implied that governments needed to accelerate

judicial cooperation in civil matters in order to capitalize on this opportunity. With regard to criminal matters, interdependence heightened due to the internet allowing criminal activities to flourish in impunity if member states did not increase cooperation.

In its endogenous variant, interdependence was due to central integration projects whose benefits could only be fully realized if states intensified cooperation on criminal law and civil law matters. Plans to finally implement the common currency area and a “social Europe” implied increasing transnational private and commercial transactions that needed to be matched by legal certainty on which laws applied and how legal documents could be exchanged in transnational civil law cases (Storskrubb, 2008: 67; European Council, 1999c). Having a common currency lowered transactions costs for commercial and private actors alike for entering into transnational relationships. Intra-European trade as well as tourism were expected to become more attractive as private actors would not need to adapt to foreign exchange rates when calculating transactions. However, transactions and the resulting benefits were dependent on legal certainty. Commercial actors and citizens would only make full use of these new opportunities if they were confident that their rights would be protected during transactions. Moreover, as the idea of EU citizenship and a “social Europe” gained traction, member states could anticipate increasing civil law cases involving EU nationals, not only national citizens. In order to make the single currency area and the freedom of movement a success, governments were forced to consider further integration of civil law matters in the EU.

Endogenous pressures to further cooperate on criminal law matters were the result of the upcoming EU enlargement round and member states’ fear of both transnational crime and decision blockage in a union of 25 instead of 15 member states. European Council conclusions before the Nice IGC had distinct chapters on enlargement and fighting international crime but also implied that cooperation on criminal law matters was a pre-requisite for making enlargement a success (European Council, 1999c, 1998). Cooperation on justice and home affairs and hence also on criminal law matters was encouraged by the Tampere European Council in particular (1999). Governments set clear targets

for improving cooperation on both civil law and criminal law matters. The approximation of laws was to occur under the principle of mutual recognition and the conclusions listed in clear policy proposals to be implemented by the Council and the Commission. As German Foreign Minister Joschka Fischer noted,

The Tampere decisions are more closely interrelated than they might seem at first glance. [...] Before we enlarge the EU, we must make as much progress as possible in deepening the EU, in terms of justice and home affairs [as well as] foreign and security policy (Fischer, 1999; *author's own translation*).

Equally, British Prime Minister Tony Blair noted that cooperation on cross-border crime was a priority and that this “task will become even more important as enlargement takes place” (Blair, 1999).

Generally, interdependence in both civil law and criminal law matters heightened before the IGC of Nice. E-commerce and cyber-crime exogenously compelled governments to consider further integration of both policies in light of these transnational opportunities and threats. The development of the single currency area as well as the upcoming enlargement round prompted governments to put both civil and criminal law matters high on the EU's agenda, as indicated by the Tampere European Council, which is well known as a watershed moment for intensifying cooperation on justice and home affairs. However, although interdependence was high for both policies the Nice Treaty provided for the integration of civil law matters only. The Nice IGC indeed generally discussed to what extent integration was desirable for all AFSJ policies in light of upcoming events and enlargement in particular. The following sections of this dissertation demonstrate that vertical differentiation with the Treaty of Nice was due to three factors. First, supranational activism created the perception among member states, and hence the demand, that civil law matters should be integrated further. Supranational actors also pointed to deficiencies in criminal judicial cooperation policies-making, but this was not successful in influencing outcomes. Second, the Amsterdam Treaty had already split third pillar policies into those that were candidates for further integration

and those that were not, which narrowed the options at the IGC of Nice. In terms of integration, even if there had been widespread support for integrating criminal law matters further this previous delineation disadvantaged criminal law matters as an integration candidate. Finally, similar to the Amsterdam IGC no state had a clear preference against integrating civil law matters further, whereas criminal law matters continued to be seen as too sensitive to give over European institution control.

5.7.3 Supranational activism

Interdependence in both policy areas was high before and after the Amsterdam IGC. Member states saw a demand for further cooperation and therefore negotiated and adopted several conventions on civil law and criminal law matters. Criminal law conventions on extradition and mutual legal assistance were never ratified (Peers, 2011: 657). Similarly, member states formally adopted three civil law conventions, one on the service of judicial and non-judicial documents, one on the enforcement and jurisdiction of judgements in family matters and one on insolvency proceedings. None of these conventions were ratified by all EU member states (Freudenthal, 2003). Until the Amsterdam Treaty came into effect, legal cooperation generally stagnated, although member states apparently had an interest in intensifying cooperation in light of increased interdependence.

Supranational actors drew on legal scholarship to heighten pressure on governments to consider further cooperation. The European Parliament and the Commission pointed to the *Corpus Juris*, a research project that advocated increased European cooperation on criminal matters and transnational financial crime in particular. Similarly, both actors highlighted the “Geneva Appeal”, a manifesto written by seven European and Swiss judges (MEDEL, 2015). The expansion of the internet had allowed criminals to exploit varying criminal systems and internet regulations in Europe to work in impunity, especially those who specialized in financial crimes. According to the authors (an opinion shared by European organizations), only a real European area of criminal justice could solve this problem by allowing judicial actors (not

only political actors) to be able to exchange information and cooperate on prosecution. Similarly, civil law scholars called for more European cooperation on civil law matters as e-commerce was hampered by disparate commercial rules and consumers remained unprotected without an EU-wide approximation of civil and commercial law (Lehmann, 2000). The legal scholars' proposal of a European Civil Code that would harmonize European civil law systems could provide resolution in this regard (Economic and Social Committee of the European Union, 2000).

Supranational actors were eager to relate the demand for cooperation with meagre output on civil and criminal law matters to the institutional status quo and cumbersome intergovernmental decision-making arrangements. Both the European Commission and the European Parliament blamed intergovernmental decision-making structures for insufficient policy output on both policies and reminded member states in the run-up to the Nice IGC that the Tampere European Council clearly demanded further progress on AFSJ legislation (European Commission, 1999, 2000a; European Parliament, 2000). Rhetorically, supranational actors were active with regard to both policy areas and eager to press member states into further integration. However, supranational actors were more successful in this regard in civil law matters because of the Commission's intention to make immediate use of its new powers as soon as the Treaty of Amsterdam entered into force.

The Treaty of Amsterdam entered into force on 1 May 1999. Only three days later, the Commission tabled proposals for a directive and a regulation that should turn the above mentioned "service convention" and the "convention on the enforcement and jurisdiction in family matters" (Brussels II) into Community instruments. Moreover, the Commission lost no time and proposed further Community legislation on insolvency proceedings as well as on the jurisdiction and enforcement of civil law and commercial matters (Brussels I) until July 1999. All of these proposals were swiftly adopted by the Council and came into effect. The European Council of Tampere called for legislative progress on these matters. Some initiatives were already drafted in the form of conventions, although these failed to come into force because they could not pass the ratification requirement. The European Commission, however, was the actor that ultimately pressured governments

into complying with their commitments and here could rely on legal experts that similarly emphasized the benefits of European rules on civil law matters. The demand for integration was not only seen to be high for member states in light of interdependence and calls for more cooperation, the Commission by its activism also demonstrated that Community rules and instruments were more effective in producing legislative output on civil law matters.

The Commission was also active in criminal law matters, although it had to acknowledge that it was not the center of EU policy-making on this subject. Therefore, it did not propose any legislation on criminal law matters, despite the fact that there were draft conventions readily available on criminal matters that could have been tabled as framework for decisions by the Commission, as it enjoyed a shared right of initiative. Moreover, the Commission held a secondary place in preparing information for criminal judicial cooperation policies-making. It was the information hub on civil law matters, but on criminal law matters it shared its position with the Council, as the joint Action Plan on the AFSJ indicated (Council and European Commission, 1999). The Commission was active on criminal law matters, and mandated studies on the increasing threat of cyber-crime and proposed legislation on money laundering (Carrapico and Farrand, 2018). The European Council answered this call by mandating the Commission to work on further proposals and to steer legislation via the scoreboard. Yet, it did so by always pointing to the Council as a co-worker. On criminal law matters, the Commission was active and invited to intensify its work, but only in cooperation with the Council. In contrast to civil law matters then, the Commission did not propose any legislation by itself. Instead, it acted as an agent of the European Council.

The demand for integration thus varied before the IGC of Nice, as supranational activism differed across policies. The Commission accepted a bystander role on criminal law matters. It highlighted criminal law challenges but failed to deliver its own proposals for legislation. On civil law matters, however, the Commission immediately proposed legislation as soon as the Amsterdam Treaty was concluded and its co-right of initiative took effect. The Commission was thus success-

ful in demonstrating that there was a clear demand for EU action that could only be met if Community organizations and rules were utilized.

5.8 The supply of integration at the Nice IGC

Similar to the Amsterdam negotiations, domestic opposition to integration of both policy areas was rather low during the Nice IGC. Critical national veto players were the secondary legislative chambers involved in national ratification as well as politicized publics, who may have pressured governments into taking a defensive posture. I find that domestic veto actors in federal states played less of a role in constraining governments' bargaining positions on civil law and criminal law matters. Although publics were still in favor of stronger cooperation on criminal law matters, governments generally pointed to domestic politicization and contestation as a reason to limit the extension of qualified majority voting to additional policy areas. Although domestic opposition in the form of heightened levels of politicization seemed to constrain intergovernmental negotiations, the bargaining outcome of vertical differentiation was due to varying preference intensities and the negotiating setting.

5.8.1 Domestic opposition to integration

All federal states (Belgium, Netherlands, Italy, Spain and Germany) continued to support the integration of civil law and criminal judicial cooperation policies. Citing the costs of enlargement, namely increased membership and hence the threat of decision-making gridlock in the future, these states called for maximum extension of qualified majority voting in the Council accompanied by co-decision rights for the European Parliament (CONFER 4717/00; CONFER 4720/00; CONFER 4721/00; CONFER 4731/00). Germany faced domestic hostility to this position with the opposition parties calling for a clear "delimitation of competences" (*Kompetenzabgrenzung*) between the EU and domestic levels of authority that would be a condition for their consent for treaty ratification (Heims, 2000). However, the German opposition parties,

i.e. the Christian Democratic Union and the Christian Social Union, clearly supported the extension of qualified majority voting in light of enlargement. The German Länder clearly indicated which policies they believed should not be candidates for further integration and thereby set limits on the German bargaining position. This list of policies did not mention civil law or criminal law matters, as the Länder considered matters to be a policy area that should fall under QMV instead of unanimity (Bundesrat, 2000a). Thus, national veto players seemed to play less of a role in constraining governments and hence supplying integration for civil law matters only and not for criminal law matters.

Governments often referred to national publics and increasing politicization when arguing in favor of narrowing the list of policies that might be considered for further integration in light of enlargement (Council, 1999a; European Council, 2000; CONFER 4720/00). There was a considerable rift between governments. Some governments argued that the IGC of Nice should focus on Amsterdam “left-overs” only—a position favored by the British (CONFER 4718/00). In line with this reasoning, the IGC should exclusively focus on the three central questions that were not resolved at the Amsterdam IGC, namely the composition of the Commission, the size of the European Parliament and the weighting of votes in the Council. As enlargement required the speedy conclusion of the Nice IGC and as national publics arguably were increasingly skeptical of relinquishing more sovereignty to the EU, negotiations should thus focus less on the question of extending qualified majority voting to further policies. This argumentation was not shared by other delegations, and the Benelux states, Italy and Germany in particular saw the need to communitarize more policies and thus make decision-making more effective. According to this reasoning, public support for the EU and EU enlargement could only be maintained if the EU was able to make decisions and effectively improve the livelihoods of its people.

It is difficult to determine whether publics were skeptical of integration regarding specific policies. Eurobarometer data for the year 2000 indicates that EU citizens were largely in favor of intensifying European cooperation on criminal law matters and the fight against crime (European Commission, 2000f). Unfortunately, there is no indicator for civil

law matters in this report, and thus it is unclear whether politicization constrained governments from integrating specific policies further. It is clear that politicization arguments and the framing of focusing on “Amsterdam leftovers” only limited the conference agenda and the list of policies considered as integration candidates. The reason that civil law matters and criminal law matters were vertically differentiated, however, was mostly related to preference intensities and bargaining setting after the Amsterdam IGC.

5.8.2 Preference intensities

Preference intensities for and against integration varied across bargaining areas as well as across policies. Member states were divided on the question of whether to exclusively focus on institutional reforms only (vote weighting, composition and size of the Commission and Parliament) or to also consider the communitarization of further policies. The United Kingdom and Denmark held defensive preferences in particular (CONFER 4718/00; CONFER 4722/00). Both states argued that the Amsterdam Treaty already provided for considerable integrative outcomes. Instead of debating the extension of qualified majority voting and hence potential co-decision rights for the European Parliament, these states wanted to shift focus to the three institutional questions. The Benelux states, Italy, Germany and Austria, however, were clearly in favor of extending the conference agenda beyond the Amsterdam leftovers. According to their bargaining positions, communitarization of further policies were a prerequisite for enlargement and for an effective EU after enlargement took place. The compromise reached was that the so-called “extension of qualified majority voting” was placed on the conference agenda. However, integration laggards managed to reduce the number of policies considered for further integration. At the beginning of the conference, there were 73 policies that fell under the unanimity requirement. At the European Council at Santa Maria da Feira in June 2000, the Portuguese presidency proposed shifting 39 policies to QMV. The French presidency proposed QMV for 47 policies in November (CONFER 4790/00). Ultimately, however, only 30 policies were moved to QMV (Laursen, 2006: 5). Civil law matters came under

QMV and the co-decision procedure with the Treaty of Nice while criminal law matters did not. The reason for the uneven supply of integration for both policies was strong preference intensities against integration by the British and Danish governments, although they could only legitimately obstruct integration with regard to criminal law matters due to the bargaining conditions.

Denmark and the United Kingdom held defensive preferences on integration. Denmark emphasized that it considered its bargaining position at the Amsterdam IGC to remain valid (CONFER 4722/00). Denmark was therefore only ready to cooperate on AFSJ policies as long as these policies would not be subject to supranational decision-making rules. By opting out, Denmark was not affected by EU legislation on Title IV matters (asylum, immigration and civil law matters), although Denmark continued to cooperate on criminal law matters as long as these were governed by intergovernmental decision-making procedures. The United Kingdom was in a similar position since it had an opt-in arrangement on Title IV policies but took part in legislation on Title VI policies and hence criminal law matters.

With these opt-in and -out arrangements, as well as with the transitional period for communitarizing Title IV policies, the further integration of migration policies and civil law matters came at a high price at the Amsterdam IGC. Partial communitarization was already difficult to achieve in Amsterdam and the idea of integrating criminal law matters was ultimately abandoned. Criminal law matters did not find their way into the list of policies that were considered as integration candidates. The presidency report of 7 December 1999 set the agenda and did not mention criminal law matters at all. Consecutive lists naming policies with the potential for integration also did not mention criminal law matters (CONFER 4750/00; CONFER 4790/00). This indicates that even integration-willing member states saw no possibility for criminal law matters to be moved to QMV. As there was a general skepticism about the extension of qualified majority voting, member states instead focused on policies that had real possibilities of being communitarized. The British government under Tony Blair tried to abandon the strict Eurosceptic stance of previous Conservative governments and early on signaled their approval for further integrating certain policies (CONFER

4718/00). However, integrating criminal law matters was not an option. Hypothetically, member states could have once again offered the United Kingdom and Denmark the concession of an opt-in or opt-out arrangement in order to integrate criminal judicial cooperation policies further. This scenario was rather unattractive given that Denmark made clear that any change to the status of its opt-out arrangement would require another referendum (CONFER 4722/00), and thus implied the threat that the Treaty of Nice would fail to be ratified despite the fact that enlargement required institutional reforms.

Instead of investing time in negotiating on policies that were unlikely candidates for integration and risking ratification failure, member states focused on issues where potential integration seemed possible. Civil law matters were one such case. On the one hand, the Amsterdam Treaty already provided for integration after a transition period of five years. Integration-willing states therefore did not need to find consensus on whether to integrate this policy area but rather had to agree only on at what point in time integration would occur, i.e. after the transition period or automatically with the entry into force of the Nice Treaty. The latter option prevailed given that previous integration laggards could no longer legitimately argue against integration. The opt-in and opt-out arrangements already addressed British and Danish concerns about deepened cooperation on civil law issues and they had received these concessions in return for not obstructing integration further. Therefore, *de facto*, their consent was no longer needed and member states could move forward and communitarize civil law matters with the Treaty of Nice. The presidency report set the agenda in this regard (1999) and no member state raised objections during the conference.

In sum, member states refrained from putting criminal law matters on the agenda in light of firm resistance to this idea by the United Kingdom and Denmark and member states' overall preference for concluding the IGC successfully with an eye towards the upcoming EU enlargement round. Communitarizing civil law matters, however, was an uncontroversial affair as highlighted by the French presidency before the European Parliament in October 2000 after the informal Council of Biarritz (European Parliament, 2000). Some states voiced clear support for communitarizing civil law matters immediately with the Treaty of Nice

(CONFER 4717/00), whereas previous integration laggards could not legitimately obstruct this outcome given that they were not affected by this decision. Bargaining power in terms of the bargaining conditions varied across both policies and hence affected the supply of integration.

5.8.3 Supranational activism

Supranational activism on part of the Commission before the IGC created demand for integrating both civil and criminal policy fields further. Previous decision-making structures and policy instruments had resulted in meagre progress in the sense that no civil law or criminal law convention was ratified. This demand was echoed by the European Council that, by devising an extra summit on the AFSJ, clearly shared the Commission's concerns over slow progress in this field (European Council, 1999c). The Tampere "milestones" envisaged legislative progress on both criminal law and civil law matters and mandated the Commission as well as the Council to increase its efforts to deliver practical results and legislation on both policies.

Supranational actors seized on the Tampere milestones and the European Council's call for legislative progress and urged member states to consider further integration of both policies at the Nice IGC. The European Parliament pushed for the full integration of all AFSJ policies (CONFER 4736/00). Civil law as well as criminal law matters were to be fully communitarized with QMV in the Council, co-decision rights for the Parliament and full jurisdiction of the Court of Justice. Although member states took note of parliamentary resolutions (Council, 1999a), these proposals had no influence whatsoever on the negotiations. As previously stated, criminal law matters were not even placed on the conference agenda.

The European Commission was more reserved in advocating integrative outcomes. Its contribution at the beginning of the conference referred to the Tampere milestones and the need to deliver progress on AFSJ policies (European Commission, 1999; CONFER 4701/00). This framing clearly tried to relate previous policy-making deficits to the institutional status quo, yet it did not recommend clear revisions or

suggest specific policies for integration. Commission President Prodi sharpened his tone at the end of the conference, stating:

Mark my words: if the Member States' veto on justice and home affairs is maintained, we shall be severely delayed in implementing the programme agreed at Tampere or even unable to do so. And I shall say so loud and clear to the Heads of States and Government at Nice. They must be under no illusions about this (Prodi, 2000).

Whether Prodi was similarly outspoken at the intergovernmental bargaining table is unknown, but it is clear that the bargaining outcome did not match his rhetoric. Only civil law matters were further integrated whereas the rest of AFSJ policies were vetoed in the Council for a transitional period (immigration policies) or for an indefinite time period (criminal law matters). Supranational activism was thus not influential during the Nice IGC and the bargaining outcome is attributable to preference intensities and the bargaining setting.

The Treaty of Nice accentuated the vertical differentiation of civil law and criminal judicial cooperation policies. Whereas the former now fell under "ordinary legislative procedure", criminal law matters remained an intergovernmental affair. The European Convention process that ultimately ended in the Treaty of Lisbon provided for further integration of criminal law matters, although vertical differentiation of civil law and criminal law matters prevailed. Criminal law matters today fall under the ordinary legislative procedure as well. As of 2014, both policies are under full jurisdiction of the European Court of Justice. However, whereas the Commission enjoys the sole right of initiative for civil law matters, it shares this right with a quarter of member states for legislation on criminal law matters.

The following sections analyze both the further integration of criminal law matters and why vertical differentiation of these policies persists until today. With regard to the former, the analysis shows that the demand for integrating criminal judicial cooperation policies increased when international terrorism and hence the question of criminal prosecution became central in European debates. Moreover, integration could be supplied as the European Convention disadvantaged gov-

ernments in controlling negotiation outcomes. Instead, with the help of criminal law experts, supranational actors prevailed in the negotiations and could sustain integration as a bargaining outcome as governmental representatives had no veto possibility in the Convention. Integration of criminal law matters was written into the Constitutional Treaty and member states subsequently had less chance to re-open the debate. Criminal law integration was locked in and hence was difficult to reverse. Based on this, the question of why vertical differentiation nevertheless persisted arises. Why is it that today, the Commission has to share its right of initiative with the member states on criminal law matters while being able to initiate legislation independently on civil law matters? Supranational activism may have propelled integration forward—it certainly did so with regard to civil law matters. With regard to criminal law matters, the Commission's activism, however, was less successful. This activism motivated governments to maintain a shared right of initiative as a safeguard clause and an institutional island that may be used by member states to propose legislation. Thus, the Commission is incentivized to only propose legislation that has governmental support, since otherwise member states may table their own proposal. However, the threshold for a proposal to be submitted is the support of one quarter of member states, which ensures that the Council does not have to manage a new proposal for each member state but only has to address measures that have already found reasonable support. Thus, both competence creep by the Commission as well as legislative overload are prevented.

Demand for integration: Explaining preferences		
<i>Arena</i>	<i>Hypotheses on varying demand for integration of judicial cooperation policies</i>	<i>Finding</i>
Domestic	Home benefits of unilateral policy-making and hence demand for integration are likely to vary, as governments are likelier to face policy failure in civil law matters.	States are in need to reform both law sectors given e-commerce and new forms of crime
Transnational	Interdependence and hence demand for integration are likely to vary as negative externalities in terms of disparate rule and forum-shopping should be higher in civil law matters.	Both law sectors experience increasing trans-border transactions
Supranational/ European	Supranational activism and hence demand for integration are likely to vary as supranational actors are likelier to push integration forward together with private actors on irregular civil law matters.	Commission pushes agenda on civil law matters by tabling legislation
Supply of integration: Explaining negotiation outcomes		
<i>Arena</i>	<i>Hypotheses on varying supply of integration for judicial cooperation policies</i>	<i>Finding</i>
Domestic	Domestic opposition and hence supply of integration are likely to vary as the role of the state varies across law sectors.	No variation and no strong resistance observable
Transnational	Preference intensities and hence supply of integration are likely to vary and governments should be more willing to exchange concessions on civil law matters.	Strong reservation on criminal law matters, rather indifference on civil law
Supranational/ European	Supranational activism during IGCs and hence supply of integration are likely to vary as supranational actors have more information on what private transactors need in the single market.	No variation in supranational activism and no input to IGC

Table 11: Summary of expectations and findings (Nice IGC)

5.9 The demand for integration at the European Convention

Member states were apparently not fully satisfied with the results of the Nice IGC. Instead, they called for a wider and deeper debate on the future of European integration. With the European Council of Laeken, member states made clear that this debate should take place in the form of a European Convention consisting of representatives of governments, supranational organizations and national parliaments (European Council, 2001). In the same declaration, member states cited an event that should also trigger further cooperation on criminal law matters.

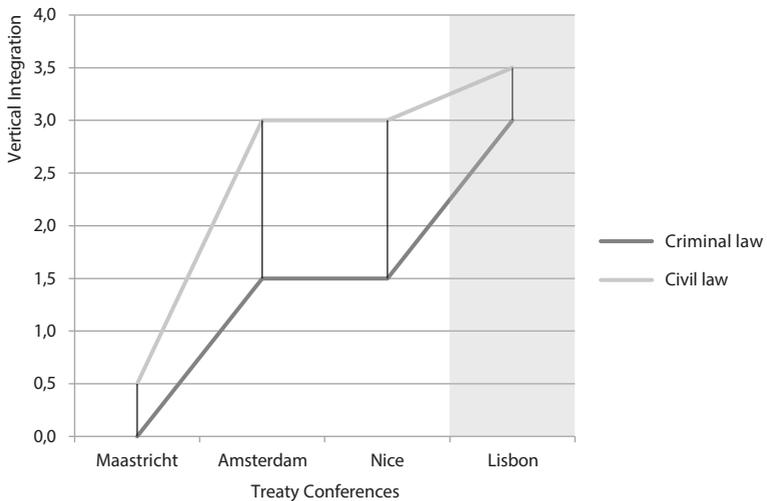


Figure 16: Vertical differentiation of judicial cooperation policies with the European Convention/ Lisbon IGC

5.9.1 Interdependence

The terrorist attacks on the World Trade Center in September 2001 reverberated worldwide. The United States responded to this attack by not only using military means to fight terrorism in the Middle East but also pressuring governments to consider legislative instruments. International terrorism and its perception in Europe had two conse-

quences: first, European publics and governments alike saw a need to intensify counter-terrorism measures and in addition to unilateral measures opted for increased cooperation and, second, the unconvincing record for European cooperation on criminal matters was considered unacceptable.

There is no specific section on home benefits of unilateral policy-making anymore. To be fair, international terrorism indeed induced a public sentiment that the home benefits of unilateral policy-making were shrinking, but this was related to the idea that transnational crime could no longer be addressed adequately through unilateral policy-making due to international interdependence. Although European states adopted unilateral counter-terrorism measures, it became accepted that these measures needed to be accompanied by further European cooperation (Jimeno-Bulnes, 2004).

Before the terrorist attacks on the World Trade Center, European cooperation on criminal matters was characterized by a capabilities-expectations gap. Bolstering the fight against crime had always ranked high among citizens' expectations for further European cooperation, but compared to this desire policy output on criminal law matters in the EU was disappointing. While the Council negotiated and signed two conventions on extradition, neither entered into force due to lack of ratification. In consequence, criminal law cooperation between the EU member states was still based on the Council of Europe Convention on Extradition (1957) and on the Council of Europe Convention on the Suppression of Terrorism (1977). Member states attributed this poor policy output to the legislative instrument of conventions and hence introduced new policy instruments for criminal judicial cooperation policies-making with the Treaty of Amsterdam. The first use of these new policy instruments and the rapid increase in criminal judicial cooperation policies-making, however, was directly related to the rise of international terrorism.

Just 10 days after the terrorist attacks in New York, the Council had a special meeting and adopted a strategy that listed 68 measures (Wouters and Naert, 2004). Member states moved quickly, and within half a year adopted two paramount legislative measures on 13 June 2002. The first was the Framework Decision on Combating Terrorism,

which defined terrorist offences and even proposed detailed penalties for these offences. The second was the Framework Decision establishing the European Arrest Warrant that essentially replaced previous texts on extradition and for the first time created the principle of mutual recognition effect in the EU. The European Arrest Warrant abolished the principle of double criminality when the warrant was issued for 1 of 32 offences listed in the Framework Decision (Peers 2011: 697). Double criminality meant that an act must be acknowledged as an offence by both the requesting and the requested state (Mackarel, 2007: 44). For 32 offences, this double criminality rule was abandoned and member states instead decided to mutually recognize judgements and prosecutions and to base judicial cooperation on a higher level of mutual trust. Although the Framework Decision still mentions grounds for member states to legitimately reject executing a European Arrest Warrant, the latter certainly reduces member states' discretion in doing so compared to the previous conditions for extradition.

The cumbersome policy-making process that previously rested on conventions and their (non-) ratification created pressures from within for member states to revise policy instruments for criminal law matters. The Amsterdam Treaty therefore introduced framework decision as a new policy instrument. That criminal judicial cooperation policies-making gained traction and substantially changed previous criminal law cooperation is certainly attributable to the rise of international terrorism and ensuing member states' demand for further integration. The European Arrest Warrant in particular is a milestone in the sense that it essentially eases the transfer of persons who face trial or are to be taken into custody and reduces political discretion in deciding upon execution (Plachta, 2003). The current system rests on mutual recognition and cooperation by judicial actors (Nilsson, 2006). Directly before and during the European Convention, member states formulated the clear objective of intensifying cooperation on criminal law matters in light of heightened interdependence. Members of the European Convention who were in the majority in calling for abandoning intergovernmental decision-making rules to make legislative progress pursued this demand for further integration. Some authors also attribute the adoption of the European Arrest Warrant to supranational entrepre-

neurship by the European Commission (Kaunert, 2007). However, as I argue in the next section, whereas heightened interdependence created governmental demand for further integration, supranational activism by the Commission backfired and instead triggered governments to remain in control of policy-making process despite the fact that integration should have proceeded.

5.9.2 Supranational activism

Already in the 1990s the European Commission obscured the boundaries between the first and the third pillar. It proposed legislation on first pillar policies, such as agricultural policy and market regulation, but included criminal penalties in the proposals, which normally fell under third pillar matters (Harding, 2015). Member states did not follow the Commission's reasoning and the European Court of Justice had to provide interpretations (Case C-240/90 and Case 68/88). The Commission engaged in cross-pillar politics and with the help of the Court of Justice could use cross-pillar skirmishes as an entry point for considering criminal law when devising mechanisms to ensure policy implementation.

After the Nice IGC, this dispute between the member states and the Commission escalated and was resolved by a judgment of the European Court of Justice that ran counter to member states' interests. Broadly speaking, the institutional conflict was over the distribution of power between the supranational actors and the member states and how criminal law elements could be used for first pillar legislation. Specifically, the legal dispute was on environmental criminal law and the question of whether environmental criminal law matters should be based on the first or third pillar.

Denmark presented a Framework Decision on Environmental Crime in February 2000 which, as a Framework Decision, was based on the third pillar. The European Commission followed by presenting its own proposal as a Directive on the Protection of the Environment through Criminal Law (European Commission, 2001). In substance, these two different proposals were rather similar, threatening individuals who violated standards of environmental protection with crimi-

nal fines and even custodial sentences. As the Council did not take the Commission's proposal for a Directive into account but instead adopted the Danish proposal for a Framework Decision, the Commission went before the European Court of Justice in April 2003. According to the Commission, the Council based its instrument on the wrong treaty base. The European Commission was supported by the European Parliament whereas the Council was supported by 11 member states during Court proceedings. The Court's judgement was clearly a victory for the European Commission in that it annulled the Framework Decision and codified supranational actors' right to propose Community legislation on matters of environmental criminal law (Zeitler, 2006). Consequently, environmental criminal law matters came to fall under the ordinary legislative procedure and not third pillar decision-making rules, which essentially redistributed legislative power to the Commission and the European Parliament. Environmental criminal law therefore is a clear case of integration and supranational entrepreneurship occurring in between treaty conferences.

Initially, this outcome looks like a success story for the Commission. However, creeping competences had consequences for member states' readiness to give up control on criminal law legislation and to fully devise Community decision-making procedures for this policy area. Criminal law matters were communitarized with the Constitutional Treaty and the Lisbon Treaty. The European Parliament gained co-decision rights and the European Court of Justice received full jurisdiction (by 2014). Yet, in contrast to civil law matters for which the Commission enjoys the sole right of initiative, criminal judicial cooperation policies may be initiated by either the Commission or a quarter of member states in the Council. Supranational activism hence had perverse effects in the sense that it reinforced member states' resolve to not fully relinquish control over this policy area.

5.10 The supply of integration at the European Convention

With the Nice Declaration of 2001, member states expressed their will to engage in a deeper and wider debate on the future of the EU. The European Council of Laeken the same year proposed a European Convention to be attended by representatives of Community organizations, governments and national parliaments. In contrast to normal IGCs, the European Convention was chaired by an independent Praesidium and structured into 11 different working groups that prepared reports that were ultimately to be adopted by the plenary. This working structure had two significant consequences: first, member states lost control over the bargaining process and outcomes. An independent presidium made decisions on the workflow and the process of negotiations—not the EU's presidency (Tsebelis and Proksch, 2007). Supranational actors and national actors participated in the negotiations on equal terms. No participant had a formal veto right and negotiations were therefore based on deliberation and bargaining at the same time (Panke, 2006). The final text did not need formal governmental approval but was considered a draft text for the following IGC. Second, structuring the work into working groups fostered deliberation on single issue areas and did not allow for issue linkages or horse trading. Instead, participants in the working groups were to propose arguments. Here, Convention attendees could rely on expert information as many national and supranational experts were invited to give reports.

5.10.1 Domestic opposition and preference intensities

This bargaining setting diminished the role of domestic oppositional forces. First, only four national parliamentarians and two governmental representatives per state were invited to the Convention. Against the backdrop of 11 different working groups and plenary sessions, national actors found it difficult to process all information and be involved in every matter. They could not be everywhere and the chance that they

would fail to sufficiently steer the bargaining process in line with their interests was high. As the Convention's outcome did not require any formal approval or ratification, domestic veto players were essentially disempowered. Instead, they needed to ensure that their voice and arguments were heard during negotiations. Integration laggards and status quo defenders could not rely on a veto threat to move bargaining outcomes closer to their preferences. Instead, they had to find argumentative support in the negotiations as outcomes mirrored majority opinions and not individual "red lines". Although there was an IGC scheduled after the Convention, it was clear that it would be difficult or unlikely for the Convention's draft treaty text to be fundamentally altered after the fact.

Another circumstance that diminished the influence of domestic opposition and strong preference intensities against integration was that the dominant objective for the Convention (in line with member states' Nice Declaration) was to simplify the treaties. Previously, recalcitrant governments could be persuaded in favor of integrative outcomes by offering concessions in the form of differentiation: status quo defenders could be offered special arrangements such as opt-in/opt-out arrangements (horizontal differentiation), institutional peculiarities such as pairing co-decision rights for the Parliament with unanimity in the Council on certain policies, or transition periods during which previous decision-making rules should persist, allowing Community competence to be only gradually transferred (temporal differentiation). The exchange of these concessions and the existence of very different decision-making rules made the treaties overly complex. The Convention therefore had the mandate to simplify the treaties, which in practice meant both reducing the number of decision-making rules and establishing a uniform system for making decisions (Interview European Parliament #1). In light of the simplification dogma, status quo defenders and integration laggards had less chance to argue in favor of accommodating national sensitivities by writing more exceptions into the treaties.

Drafting the report on the AFSJ took place in Working Group X. In this group, defenders of the status quo were clearly in the minority. International terrorism and insufficient previous policy output on criminal law matters in particular led to converging preferences among gov-

ernmental as well as parliamentary representatives (Interview Commission Secretariat #1). Only two members of the working group voiced objection to the full communitarization of criminal law matters. The British MEP Timothy Kirkhope rejected communitarization or any form of integration in its entirety and heavily defended intergovernmental working methods on AFSJ matters (Kirkhope, 2002). The French Parliamentarian Hubert Haenel did not object to further integration but argued in favor of maintaining governmental control of criminal law matters by strengthening the European Council in its authority to set guidelines (Haenel, 2002).

These two voices, however, were in a clear minority, with the rest of the working group clearly favoring the communitarization of criminal law matters. The argument was that only the abolition of the pillar structure and the convergence of decision-making rules for each AFSJ policy could truly lead to a simplification of the treaties and make policy-making more effective at producing output. Consequently, in its final report to the plenary in November 2002 the working group referred to a majority of its members who were convinced that communitarization should be the outcome on criminal law matters (Working Group X of the European Convention, 2002). However, the group suggested that for criminal law matters the Commission should share its right of initiative with a quarter of member states. This arrangement would allow member states to retain control of the legislative process to some extent while the quarter threshold would ensure that only a reasonable number of different proposals were tabled.

In sum, there was a clear majority of Convention members in favor of communitarizing criminal law matters. International terrorism led to the convergence of preferences in favor of further integration, and the aim of simplifying the treaties meant that communitarization was the best way forward. There were defensive voices but the composition and working structure of the European Convention clearly disempowered governments and domestic actors in influencing bargaining outcomes compared to previous IGCs. Multiple working groups, few representatives and a working structure based on deliberation instead of hard bargaining was especially detrimental for actors who were in favor of defending the status quo. Conversely, this implied an advantage for

supranational actors and national representatives who were in favor of simplifying treaties by devising general Community decision-making procedures for policies.

5.10.2 Supranational activism

The report by Working Group X on the EU's AFSJ called for communitarization. Although there was a general preference for integration and hardly any opposition, both the bargaining setting of the Convention and supranational activism ensured that communitarization indeed occurred. Participants were sure that communitarization would not necessarily have been the outcome if negotiations had taken place in an IGC setting compared to the Convention method (Interview Commission Secretariat #1). The Convention method gave supranational actors the opportunity to promote integration, especially on AFSJ policies.

One of the most important members of Working Group X was Antonio Vitorino, Commissioner for Justice and Home Affairs since 1998. Compared to other members of the working group, Vitorino had a clear information advantage that he could use to manipulate the debate in his favor. He had worked on this portfolio for years and could offer first-hand insights into the cumbersome legislative process on criminal law matters. Vitorino was one of the working group's most active members, tabling three working documents on reforming the AFSJ. Expert presentations further supported Vitorino's argument in favor of communitarizing criminal judicial cooperation policies in light of institutional deficiencies and increased criminal law challenges. One important contribution in this regard was made by Mr Gilles De Kerchove, who worked in the Council Secretariat on AFSJ policies and clearly supported Vitorino's call for communitarization (Interview Commission Secretariat #1). Both individuals had been involved in AFSJ matters for years, and were hence considered trustworthy experts. Many Convention participants held that if these individuals called for communitarization as a solution for both policy problems ahead and simplifying treaties, communitarization was indeed the only option.

Beneath these high-level figures supranational actors were directly involved in drafting the final draft treaty text. One representative from

the Commission and one representative from the European Parliament were responsible for drafting the treaty text in the Convention's Secretariat (Interview Commission Secretariat #1). These two individuals were in contact with Antonio Vitorino and Gilles De Kerchove, the chair of the working group John Bruton and the Convention Presidium. Whereas Vitorino and experts such as De Kerchove delivered the arguments for communitarization, John Bruton and the Presidium were aware of potential resistance points. The Secretariat officials used this information to carefully craft a treaty text on AFSJ policies that verbally balanced intergovernmental and supranational elements in communitarization. As a result, criminal law matters came under the ordinary legislative procedure, but the role of the European Council in formulating guidelines was mentioned. Most importantly, the member states were ensured the co-right of initiative on criminal law matters.

Vertical differentiation of civil and criminal law matters persists because of varying rights of initiative for the Commission on both policies. The demand for integrating criminal judicial cooperation policies increased due to international terrorism and rather slow progress on criminal judicial cooperation policies-making, leading a majority of representatives at the European Convention to favor further integration. That this demand resulted in communitarization had to do with the aim of simplifying treaties and the objectives of supranational actors, who manipulated the negotiations in favor of this outcome. That the Commission has to share its right of initiative on criminal law matters was a perverse effect of supranational activism in combination with the events of the Convention. Cross-pillar political action by the Commission with regard to environmental criminal law was a case of successful integration in everyday policy-making, however, this outcome meant that member states became interested in not completely relinquishing authority on criminal law matters.

5.11 Conclusion

Civil law and criminal law matters have always been differentiated in the EU and have never shared uniform integration levels. To explain this trajectory, one might easily point to policy idiosyncrasies and claim

that these policies are just naturally different and hence require different institutional settings. Functionalists may argue that civil law and criminal law address different policy problems, and this is certainly true. The role of the state in both law sectors as well as their respective interference into the personal freedoms of citizens varies. We should therefore expect different EU procedures for dealing with these issue areas. This chapter showed, however, that despite noticeable differences both law sectors share functional similarities and it was not clear that these policies naturally fall under different decision-making procedures. Both policies were grouped together under the same heading with the Treaty of Maastricht, in both policies member states experienced heightened level of interdependence following increased mobility in an area without internal border controls, for both policies member states established the “mutual recognition” as overall cooperation principle and today’s decision-making procedures for both policies are pretty similar, whereby the difference lies in the involvement of the Commission. A policy idiosyncratic explanation stressing sovereignty concerns only might similarly be puzzled by this trajectory. Both policies are deeply rooted in national legal cultures and European integration might threaten the integrity of both national law systems. Moreover, why should we observe constant integration of both policies although with different endpoints?

Drawing on integration theories and on theories of international cooperation more broadly, I presented conjectures why these policies should experience vertical differentiation beyond pure idiosyncrasies. Varying home benefits of unilateral policy-making, interdependence and supranational activism in interstitial phases were presented as factors that could explain why the demand for integration varied across these policies. Varying domestic opposition, preference intensities and supranational activism during IGCs were theorized as factors that could help in explaining the uneven supply of integration for these policies. Based on a covariation analysis that considered both developments in interstitial phases and bargaining dynamics at the Amsterdam, Nice and Convention negotiations, this chapter offered the fullest picture possible of why and how vertical differentiation characterized law cooperation in the EU. Moreover, involving causal process observations based on

comparisons of official documents and multiple interviews we can draw conclusions on which factors turned out to be more or less influential in explaining differentiation and how these factors relate to each other.

Demand for integration was present for both policies in the run-up of the Amsterdam IGC. Home benefits of unilateral policy-making were declining as national criminal and civil justice systems were confronted with new criminal networks and offences as well as higher demand for civil litigation, respectively. This raised the possibility that European cooperation in the form of exchanging experiences and knowledge on national policies could offer a fast track for EU member states to address these challenges. Moreover, interdependence between national civil law and criminal law systems increased as the abolishment of internal borders boosted mobility in the EU. Increasing intra-EU trade as well as organized crime spanning across borders triggered governments to consider joint responses and harmonized rules to ensure legal certainty in both law sectors. Both variables, home benefits and interdependence, help in explaining why there was a demand to integrate these policies further. However, as there was even demand for integration and yet uneven integration outcomes at the Amsterdam IGC, both factors cannot account for vertical differentiation as outcome. Instead, differentiation is attributable to supranational activism before and during the Amsterdam IGC.

Early on supranational actors were in contact with legal scholarship on civil law matters exchanging views how consumers could be protected in the internal market. Calls by legal scholars for a European Civil Code were echoed by supranational actors written output, with European Parliament resolutions and communications by the Commission pointing to the adverse effects of disparate civil law rules in a fully integrated internal market that should boost cross-border transactions. There were similar calls by the criminal law scholarship, but this was not taken up by supranational actors as especially the Commission had to share its role as legislative facilitator with the Council Secretariat on criminal law matters.

Likewise, it was the Commission who rhetorically linked civil law matters to the completion of the single market during the Amsterdam IGC and through that convinced governments of further policy integra-

tion. Member states discussed integration of AFSJ policies on a sovereignty-matters-axis, distinguishing between policies that go to the heart of national sovereignty or are rather unrelated to political sensitivities. Following this discussion, civil law matters remained in draft treaty parts next to criminal law matters and hence on the sensitive end of the sovereignty continuum. This changed within 14 days when a consecutive Presidency note provided for civil law matters to be placed under the first pillar, next to migration policies and hence out of the intergovernmental third pillar in which criminal law matters remained. The Commission intervened exactly in-between these different presidency notes. The Commission hereby successfully proposed another framing of the debate: are policies related to the free movement of persons or are they security matters? The Commission prevailed in its argument that civil law matters belonged to the first category and civil law matters were hence further integrated in the peculiar spot in the treaties, namely next to migration matters.

Vertical differentiation heightened with the Treaty of Nice when civil law matters were communitarized (as only AFSJ policy) whereas criminal law matters remained on the same integration level as with the Amsterdam Treaty. Varying demand for integration is attributable to varying supranational activism although varying supply this time was rather related to varying preference intensities. Only a few days after the Amsterdam Treaty came into force in 1999 and hence new policy instruments on AFSJ matters in the EU, the Commission became active on civil law matters. Previous initiatives were stuck in intergovernmental negotiations on conventions that would have required unanimity and uniform ratification. The Commission then proposed the same measures as community instruments that do not allow for individual ratification. Pointing to scarce legal output and dire need for harmonized civil law rules in the EU, the Commission made a point that was echoed by the European Council at Tampere immediately before the Nice IGC. On criminal law matters the Commission had to share its agenda-setting role with the Council Secretariat and hence was less able to create demand for further integration.

The Nice IGC remained an intergovernmental affair, however, and supranational actors were on the sidelines. Civil law matters were fur-

ther integrated as previous integration laggards had not lever to stop other governments from communitarization. The United Kingdom and Denmark were granted opt in/out arrangements with the Amsterdam Treaty on civil law (and migration) matters whereas they were still part of criminal law cooperation as this policy remained in the intergovernmental third pillar. Member states lobbied for integrating civil law matters further and integration laggards could hardly obstruct given their privileged or special arrangements. This was different on criminal law matters for in which states took part. Vertical differentiation was most pronounced with the Treaty of Nice but why did integration levels converge again with the Lisbon Treaty (although differentiation persists)?

Civil law matters were already communitarized and the remaining question was why criminal law matters were further integrated leading to uneven, but similar decision-making arrangements in the treaty. Further integration of criminal law matters was mainly due to external shocks in the form of international terrorist attacks, which triggered governments to demand further integration. After the terrorist attacks on the World Trade Center, it took the Council almost no time to establish the European Arrest Warrant compared to previous years of cumbersome negotiations on extradition conventions. Terrorism had the effect that governments perceived their national criminal law systems and prosecution to be interdependent and, in order to ensure effective and fast responses to new internal security threats, government demanded further criminal law integration.

The European Convention mirrored this preference convergence on more criminal law cooperation. There are two reasons why criminal law matters still do not share uniform integration levels with civil law matters: I argued that the reason for this is a perverse consequence of supranational activism in parallel to the European Convention. The European Commission's endeavor to legislate on environmental crimes while basing legislation on procedures beneficial to it, aroused a reaction by member states that saw their prerogative to legislate on criminal law matters threatened. The European Court of Justice followed the Commission's choice of legal basis and together these supranational organizations pushed the agenda forward, but member states learned their lesson. The Constitutional Treaty and consequently the Lisbon

Treaty ensures that the Commission still shares its right of initiative for criminal law legislation with a quarter of member states in the Council. Member states could thus ensure both, speedier and more efficient decision-making while keeping the Commission under control.

**Explaining vertical differentiation of civil law and criminal law matters in the EU
Which factors co-varied with the outcome?**

<i>Conference</i>	<i>Dependent variable</i>	<i>Home Benefits</i>	<i>Interdependence</i>	<i>Supran. activism</i>	<i>Preference intensities</i>	<i>Domestic resistance</i>	<i>Supran. manipulation</i>
Amsterdam	Vertical differentiation	-	-	+	+	-	+
Nice	Vertical differentiation	-	-	+	+	-	-

Interdependence is the factor that explains why both policies were further integrated.

**Supranational activism was driving the uneven demand for integration.
Supranational activism (at Amsterdam) and preference intensities were conditioning the uneven supply of integration.**

European Convention/ Lisbon	Vertical differentiation	Criminal law matters were integrated nearly to the same level as civil law matters as interdependence increased in light of international terrorism and because supranational actors could lead the negotiations towards an integrative outcome.
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Table 12: Summary of the covariation analysis of the law case

6 Conclusion

This work began with the observation of a debate. The European Union was used as both a case of international cooperation, but also as something special, unprecedented. A political order that presided over nation states. Admittedly, there is no clear contradiction between the two sides of the argument. Precisely because the EU is both an international organization and a supranational guardian, depending on which policy area you look at.

This fact has already been described as differentiated integration. Depending on the policy area, the power of the EU varies, be it in territorial validity or depending on the policy area. The former is described as horizontal differentiation, the latter as vertical differentiation. This dissertation is dedicated to the latter. Why EU member states or even external states join EU initiatives has already been widely discussed and analyzed. But why the EU receives more or less competences depending on the policy was still a mystery.

The dominant explanation for this phenomenon in the literature as well as in numerous conversations was that policies are simply different. Problems vary, necessities require tailor-made solutions and therefore require different institutional decision-making mechanisms. Different levels of integration are simply necessary and not surprising. Similarly, sovereignty arguments are put forward. Some policies are far in the range of national sovereignty and states therefore refuse to accept any demands for integration. Functional and sovereignty arguments alike would lead one to expect vertical differentiation.

Ultimately, policies are different and these policy-specific explanations must be worked through. To do justice to this, this Dissertation focused on AFSJ policies that are very similar. Policy-specific explanations are void as soon as very similar policies experience different levels of integration. The selection of this sample thus allows policy idiosyncrasies to control in the explanation of vertical differentiation. Moreover, that this case selection brings methodological advantages, it is simply exciting to learn more about how a policy area with similar policies experiences different institutional designs without anyone noticing.

The literature simply did not perceive vertical differentiation in the AFSJ. Either individual case studies were undertaken or the AFSJ was analyzed as such. It was overlooked that integration levels and integration paths across policy areas varied and still vary today. This circumstance had two consequences: firstly, variance was overlooked and thus a part of reality that needs to be explained. Secondly, previous research in this area was based on individual case studies on integration paths, although it remained unclear to what extent explanations of a policy could make statements about integration in other AFSJ policies.

With regard to the DI and AFSJ literature, this dissertation argues that dialogue would be mutually beneficial. The DI literature lacks studies that focus on vertical rather than horizontal differentiation. Vertical differentiation as a phenomenon is well known and based on previous research, we know that vertical differentiation has always been and will remain a characteristic feature of the EU. An explanation is finally needed. Conversely, many of the explanations of integration paths in the AFSJ literature have no comparative analysis yet, which is why differentiation was and is observable here. Through this dissertation we learn more about the causes of vertical differentiation, precisely because we put both research areas into dialogue.

The concrete case selection followed two conditions: First, vertical differentiation should be observable and thus explainable. In order to reduce the disadvantages of a *y*-based case selection, the following steps were taken: in order to have variance on the dependent variable, no further policy pairs were selected, but moments of institutional approximation were included within the case pairs. In addition, process observation was collected in addition to covariance analysis, both of which increase the probability of falsification of the independent variables. An over- or under-determination of the causal influence of the factors is thus countered. Second, policy pairs that are very similar were selected to control for policy-specific explanations. Regular and irregular migration as well as civil and criminal law are precisely such policy pairs.

Regular and irregular migration are two sides of the same coin. For functional reasons, it makes sense to treat these two policies equally. Moreover, both policies go to the heart of national sovereignty. Legal cooperation is very similar. Both civil and criminal law share the same

goals and both are linked to very different national cultures. Nevertheless, we observe differentiation in both policy pairs. Why?

In order to analyze vertical differentiation and vertical differentiation in AFSJ in particular, I distinguished between supply and demand for integration. Against the background of the DI and AFSJ literature, I deducted three demand and three supply factors each. In the respective empirical chapters, the theoretical expectations were tailored to the concrete empirical case. The demand for vertical differentiation increases when home benefits, interdependence and supranational activism vary across policies. The more domestic resistance, preference intensities and supranational activism during conferences vary across policies. What was the result in the concrete cases?

As far as demand is concerned, i.e. why governments consider vertical differentiation, interdependence is the key driver. Regular and irregular migration have been further integrated step by step. Irregular migration has been communitarized more quickly than regular migration issues. Interdependence was decisive for this dual movement.

The abolition of internal border controls combined with increased migration movements made unilateral migration policies more interdependent. However, the effect of the Schengen process was stronger for irregular migration issues. Secondary movements by third country nationals were more likely, mutual costs of too lax border controls and regularizations (from the governments' point of view) were higher in the irregular migration area. Both northern and southern states saw European integration as a way out. Communitarization allowed both parties to exercise mutual control by allowing joint decisions in the Council as well as the involvement of supranational actors to influence national policies. European integration of irregular migration issues was a matter of mutual control. Regular migration, on the other hand, was less characterized by interdependence effects. Secondary movements simply obstructed the way. For a long time (until the Charter of Fundamental Rights in the Lisbon Treaty), regular third-country nationals had hardly any mobility rights. Moreover, it was not particularly attractive to enter the EU in an EU state, which implies an enormous bureaucratic effort, only to migrate on irregularly.

The different demand for integration was met by a different offer of integration. The differences with other governments were bypassed by side-payments and concessions. The United Kingdom and Denmark received opt in/out arrangements in this respect. Resistance came primarily from domestic political actors and this resistance was directed exclusively against the possibility of communitarizing questions of regular migration. The German *Länder* were the driving force and forced the government to avoid regular migration issues from integration projects. This resistance did not break off and stretched from the Amsterdam negotiations to the European Convention. Why were regular migration issues finally communitarized?

Member States recognized that a common regular migration policy brings international advantages. In the fight for the brightest minds, the EU could be an advantage for all member states in competition with the USA, Canada, Australia, etc. European policy measures have artificially expanded the labor market and thus reduced the likelihood of unemployment for skilled immigrants. However, this theoretical possibility was not enough. It was supranational activism that finally brought Member States to this idea. The European Commission had communicated this to its communications. And it was these actors who transferred regular migration into community competence during the European Convention.

In summary, varying interdependencies led to different demands for integration. Within political resistance to the integration of regular migration issues explains the different supply of integration. Vertical differentiation between civil law and criminal law partly followed a similar pattern. Home benefits did not vary across the two policy fields and is therefore not a convincing explanation for different demand for integration. National civil and criminal law was in crisis in the 1990s. Globalization reached both law sectors. Increasing trade, e-commerce, organized crime and new offences equally challenged the areas of law in the states. The abolition of internal border controls generally made national legal systems more interdependent. Private transactions as well as criminal projects were now able to cross borders in equal measure. For both areas of law, legal scholars recommended deeper cooperation in the form of uniform codes of law. The differ-

ence in demand was supranational activism. It was only in the civil sector that the Commission was able to push the demand for integration. Building on knowledge from jurisprudence, the Commission put forward convincing arguments as to why civil law should be communitarized. The single market would remain loss-making if market participants failed to invest due to legal uncertainty. The Commission could not play a comparable role in criminal law because it shared the agenda-setting function with the Council.

As regards the different needs for integration, however, it is important to stress that the Commission could only act in this way because the interdependence between states on civil law issues had increased. Interdependence was necessary for supranational activism and for creating demand for integration.

The fact that different demand was met by different supply had much to do with the Commission. In the Amsterdam negotiations, it was the Commission that brought a communitarization of civil law into play. Other states simply did not have this policy field on their screens and domestic political actors were also indifferent.

The Commission shifted the negotiations from sovereignty issues to the question of which policies are attached to the internal market and which policies are more likely to address security problems. Civil law thus came into the first category and was communitarized with the Amsterdam Treaty with a transitional phase. The Treaty of Nice confirmed this, with criminal law issues remaining in the intergovernmental domain. But why was criminal law further integrated with the Treaty of Nice, on the one hand, but still less than civil law?

An increased perception of interdependence in the wake of terrorist attacks created an increased demand for European criminal law measures. This demand was met because the European Convention did not allow a veto on integration. States were skeptical and some received special concessions after the Convention, such as the United Kingdom. However, these states could not block during the convention and instead had to watch how criminal law was communitarized by the convention. Here, too, supranational actors were the driving force, pushing for communitarization in the working groups as well as through written contributions. Nevertheless, criminal law remains

below the level of integration of civil law (except family law), why? Supranational activism backfired exactly during the conference, when the Commission wanted to combine environmental policy with criminal law. After Member States protested, the Court of Justice tended to interpret the Commission. However, Member States learned the lesson that they should secure control over criminal law issues.

Against the background of the case studies listed here, it can be summarized: Interdependence is the necessary condition to explain different demands for integration per policy area. In itself, however, interdependence is not sufficient to explain vertical differentiation. To adequately explain vertical differentiation, either varying domestic political resistance or varying supranational activity before or during intergovernmental negotiations are required. As vertical differentiation of regular and irregular migration policies was a hard case, I expect this explanation to also hold for other policy dyads that experienced or still experience vertical differentiation. How does this result compare with previous research and where do we go from here?

Domestic explanations for AFSJ integration seem less convincing in explaining integration. Member states did not venue-shop the EU level for more restrictive immigration policies as previous accounts assumed (Guiraudon, 2000; Lahav and Guiraudon, 2006). This hypothesis might hold for asylum policies for which governments indeed faced powerful national veto positions in the policy-making process, such as those held by national courts or parliamentary opposition to policy reforms. However, this analysis has already been met with skepticism (Kaunert and Léonard, 2012). My findings rather indicate a middle ground. Declining home benefits of unilateral policy-making may create demand for further cooperation. Yet, this has less to do with increasing domestic opposition as EU legislation in the 1990s on AFSJ matters was always only recommendatory and hence not legally binding for national veto players anyway. Rather, migration and law systems were overburdened and the EU offered a way to address these challenges in a better-informed way through governments exchanging data and information and supranational agencies being involved in delivering more European-wide data instead of national-level only. Declining home benefits may mandate delegating authority to European agencies and programs that promise

better information and financial means to address a policy problem and offer the benefits of economies of scale. However, this incentive does not convincingly explain why governments should therefore opt for communitarized decision-making that brings in new, namely EU level-based veto points. If governments integrate to venue shop the EU level and to circumvent national veto players, why they empower veto players on the EU level instead of remaining in full control?

Declining home benefits tell us why governments may demand European cooperation but not why governments opt for (further) integration and specific decision-making rules. Interdependence is key in explaining governments demand in this regard. When unilateral policies produce negative externalities, governments strive for influence on each other's decisions. The European venue and joint decision-making in the EU allow exactly that. Germany wanted to integrate irregular migration policy further in order to have a say on how Italy, Spain and other states control the EU's external border as internal border controls were lifted. In reverse, these southern states were willing to integrate irregular migration policy further because this allowed them to finally have a say on policy substance, as before these states had to accept fait accompli decisions and rules adopted by the original Schengen member states. Involving the European Parliament, the European Commission and the European Court of Justice in policy-making ensured that policy-making increasingly included a European dimension taking into account the interests of all member states and not only the national interests of powerful EU member states such as Germany and France. In reverse, Germany had a credible guarantee that southern states will implement joint commitments as supranational actors monitor implementation and sanction defection. Governments opt for the EU venue to control each other and to manage interdependence in mutually beneficial ways and not to circumvent national veto players.

Another strand of the AFSJ literature has indeed put interdependence center stage in explaining the integration of this policy area (Turnbull and Sandholtz, 2001; Niemann, 2006). According to these accounts, the abolition of internal border controls heightened interdependence and mandated integration of these policies. I agree. However, these accounts fall short of explaining the stop-and-go rhythm of this process.

It remained unobserved that AFSJ policies developed varying integration trajectories. Moreover, by bracketing intergovernmental negotiations and solely focusing on spill-over pressures in their explanations it remained unclear why integration was no smooth process towards full communitarization but involved diverse differentiation arrangements. These accounts explain why there was demand for integration but not why the supply of integration was uneven across policies and involved transition periods before new decision-making rules came into effect as well as why not all states remained on board but opted out of AFSJ policies. Niemann (2006: 12–52) presents five spill-over mechanisms to explain demand for integration of migration policies and rather bluntly refers to “countervailing forces” such as “sovereignty consciousness” of governments to account for obstacles to integration. This dissertation does not only side three demand factors with three supply factors of integration but through the analysis shows why and when governments have a strong sovereignty consciousness. Governmental sovereignty consciousness then is no constant countervailing pressure but a variable that is a function of domestic resistance to integration. The United Kingdom has ever been a Eurosceptic society at least since Margaret Thatcher was in office. Consecutive governments countered demands for further integration in light of strong Eurosceptic publics and backbenchers in parliament. Yet, we see that British sovereignty consciousness varied when Tony Blair came into office during the Amsterdam IGC. Having won the election with a pro-European campaign, Blair was less constrained in accepting European compromises than John Major before. Similarly, the German government was not sovereignty conscious when it blocked the integration of regular migration matters. It was forced to do so given the resistance by the Länder which threatened to block treaty ratification in the Bundesrat in case the German government gave away national competences on regulating regular migration.

This dissertation therefore did not only map previously unobserved variation in the EU’s AFSJ but it also offered an explanation of the stop-and-go rhythm of policy integration in this area. The literature on European integration and differentiated integration is enriched by offering in-depth case studies on vertical differentiation instead of horizontal differentiation. As Leuffen et al. (2013) have stated, there is no single the-

ory accounting for vertical differentiation. This study used this insight to study different political arenas and their respective pressures and constraints regarding integration. One critical conclusion to be drawn from this analysis is that demand for integration is generally on the rise. It is open to debate whether the demand for integration has exogenous or endogenous (or both) sources, or whether liberal intergovernmentalism or supranationalism more adequately explain the demand for integration. However, against the backdrop of 60 years of European integration and ongoing globalization, it is difficult to determine whether interdependence increases as a result of endogenous or exogenous developments. Rather, it seems that external shocks generate demand for cooperation exactly because European states have become so interdependent already. Lines are blurred and interdependence and demand for integration has heightened. It appears to be particularly important to consider supply conditions for integration to explain policy integration and vertical differentiation.

Literature on politicization as an obstacle to integration (Hooghe and Marks, 2009), blame-shifting (Rittberger et al., 2017) and the limits of postfunctionalism (Schimmelfennig, 2014b) led to the placing of focus on bargaining conditions and governments' room for discretion in supplying integration in light of increased interdependence. The domestic political arena is less of interest in analyzing the demand for integration, but has gained considerable importance in explaining the supply of integration. Whether governments can transform integration preferences into outcomes or whether supranational actors may manipulate bargaining contexts increasingly relates to domestic opposition. Conversely, given public salience of European affairs, supranational actors are increasingly active in influencing the demand for integration in the interstitial phase, removed from international bargains, although this is less true with regard to the supply of integration at increasingly politicized European Council meetings. Studying integration will continue to imply the analysis of demand and supply factors. Further integration and vertical differentiation will have to do with how general demand for integration (heightened interdependence) can be accelerated by supranational actors in the demand stage and how governments can circumvent domestic opposition to integrating poli-

cies further in the supply stage. As this setting prevails, vertical differentiation will be a likely outcome of further European integration as Commission President Juncker's White Paper on future scenarios for EU integration indicates.

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- CONF/3915/97: The role of national parliaments in relation to cooperation on JHA.
- CONF/3918/96: Third pillar objectives and scope of application.
- CONF/3977/96: Fight against international crime.
- CONF/3989/96: Fight against international organized crime.

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- CONFER 4710/00: IGC 2000: Possible extension of qualified majority voting – JHA field.

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European integration has turned the EU neither into a state, in which authority is fully centralized in Brussels, nor is the EU a classic international organization, in which member states remain fully sovereign. Instead, European integration is patchy. For some policies, decision-making authority still rests with the member states whereas, for others, policy-making authority was transferred to the EU. Why does the EU's authority vary across policies?

Taking policies belonging to the EU's Area of Freedom, Security and Justice as a sample, Stefan Jagdhuber theorizes and empirically analyzes why integration proceeded on illegal immigration policy and judicial cooperation on civil law matters whereas it stagnated for legal immigration policy and judicial cooperation on criminal law matters.

The findings show that uneven integration trajectories in the EU are likely when policy interdependence, supranational activism and domestic constraints differ across policies.

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