

# **When kindred policies were separated at Amsterdam: Explaining the different integration trajectories of regular and irregular migration policies in the EU**

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## **Abstract**

The objective of this contribution is to explain why irregular migration policies were communitarized with the Treaty of Amsterdam whereas regular migration matters remained in an intergovernmental setting. Though both policies are functionally interrelated, Member States nevertheless decided to devise different institutional arrangements to adopt common measures. I draw on an intergovernmentalist framework and show that differences in Member States' preferences on integrating these policies can be explained by different exposures to negative externalities and Member States discretion vis-à-vis domestic opposition. Moreover, by analyzing the bargaining dynamics at the Amsterdam Intergovernmental Conference we can attribute the different integrative outcomes to varying preference intensities across migration policies and therefore Member States willingness to offer concessions in return for integration. The Schengen states offset British opposition to communitarizing irregular migration policies through an opt-in mechanism and declarations attached to the Treaty. The potential communitarization of regular migration policies was eventually off the table when the German *Länder* pressured the government to revise its bargaining position.

## Introduction

Though it has become regulatory practice to differentiate between different categories of migrants, policies with regard to asylum-seekers, regular and irregular migrants are inherently interrelated. In this regard, the nexus between regular and irregular migration is not only stressed by academic contributions (Walters 2008: 48-49; Venturini 2004), but also by political decision-makers (European Commission 2004). Most irregular migrants in the European Union (EU) do enter regularly but overstay their residence permits making irregular migration the ‘dark side of admission policies’ (Boswell and Geddes 2011: 123). Though certainly not a panacea against irregular migration it has been acknowledged that opening up legal channels of migration would reduce the incentive for TCNs to enter, stay and work in a destination country without valid documents. Policies on irregular and regular migration are therefore kindred policies with an inherent functional unity and lend themselves to be pursued in conjunction.

With the ‘Tampere Milestones’ the Member States of the European Union (EU) called for a ‘comprehensive approach to migration’ and the ‘need for more efficient management of migration flows’ (European Council 1999). Notwithstanding the recognised functional *unity* of migration matters, EU Member States decided to provide *different* institutional arrangements for conducting regular and irregular migration policies with the Treaty of Amsterdam. Coming into force only five months before the Tampere European Council, the Amsterdam Treaty envisioned the communitarization of irregular migration policies granting the Commission the right of initiative, the European Court of Justice jurisprudence and the European Parliament a co-decision right and allowing for qualified majority (QMV) decisions in the Council. Regular migration matters, however, remained in the hands of EU Member States and excluded the involvement of EU organizations and the use of majority decisions in the Council.

The main objective of this contribution is to explain why regular and irregular migration policies, despite their inherent interrelation, have been institutionally separated at the Amsterdam Intergovernmental Conference though the Maastricht and nowadays the Lisbon provisions provide for equal integration levels. Regular migration policies comprise policies on the admission and stay conditions of third country nationals (TCNs), most prominently for the purpose of work or family reunification. Irregular migration policies deal with questions of border control and the expulsion of migrants without a valid residence status. While there are many accounts explaining the integration trajectory of an ‘EU immigration policy’ or the

Area of Freedom, Security and Justice (AFSJ) as policy area (see, for example, Guiraudon 2000; Geddes 2008; Monar 2001; Kaunert 2010), we lack an explanation for the different integration outcomes of migration policies. This paper is the first to address this puzzle in a systematic, theory-informed fashion. Drawing on an intergovernmentalist framework that factors in spill-over dynamics and approaches focusing on domestic influences, I basically attribute the different integration outcomes to preference constellations among Member States and bargaining dynamics (Moravcsik 1998). Governmental preferences are formed in light of international interdependence and largely reflect positional characteristics such as the geopolitical and economic situation of EU Member States. In contexts of high interdependence, unilateral decisions produce negative externalities for affected governments that hence are eager to influence and control the rules of other Member States via European legislation and EU agents. I argue that the abolition of internal border controls and increased migratory pressures triggered governments to consider the communitarization of both policies, but that the preference intensity for integration varied across policies because expected negative externalities associated with the institutional status quo were higher with regard to irregular migration matters. Member States in the geographical core of the EU feared increasing levels of onward migration from the periphery if they could not influence border control policies and expulsion measures of Member States at the common external border. In contrast, since all Member States had the preference to limit immigration and were not in competition for labour migrants, the pressure on governments to seek joint actions and monitoring by EU organizations was low.

Bargaining dynamics are traced in order to analyse in how far the demand for integration could be supplied with the Amsterdam Treaty. The varying preference intensity on communitarization with regard to regular and irregular migration matters combined with the level of domestic opposition explains the different integrative outcomes. The British government eventually accepted the communitarization of irregular migration policies in return for an opt-in mechanism and declarations that enshrined the UK's right to keep its system of border controls. Having just won the election shortly before the end of the Conference, Blair could comparatively confident sell this deal to his own party and the electorate. Regular migration policies, though indeed considered, were not communitarized following the threat by the German *Länder* to not ratify the treaty if regular migration matters were further integrated. The German Chancellor and other integration-willing states gave in since the overall preference intensity on communitarizing regular migration matters was low

anyway. To risk ratification crisis because of a communitarized regular migration policy was simply not considered worthy. The paper is organized as follows. I first present my conceptualization and measurement of the different integration levels and apply these for case of regular and irregular migration policies. Second, I present an intergovernmentalist framework to account for different integration trajectories of policies. Third, I apply this framework to the integration trajectory of regular and irregular migration policies. The paper concludes by discussing the implications of the analysis.

### **The dependent variable: disparate integration levels at Amsterdam**

Political integration is defined by Member States delegating authority to supranational agents and pooling 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 the individual utility (Hawkins et al. 2006: 12-20; Tallberg 2002). By pooling authority “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. Supranational agents 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.

#### *Measuring disparate levels of integration*

In order to measure integration and as a second step diverging integration levels between policies 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 involvement of supranational agents (Börzel 2005; Leuffen et al. 2013). The (non-) delegation of decision-making authority to supranational institutions; and the (non-) pooling of authority in the Council. I created an additive index that is based on four factors (cp. Table 1). These four factors are: the decision-rule within in the Council; the right of

initiative for policy proposals; the inter-institutional decision-rule among the Council and the European Parliament (EP); and the scope of jurisdiction for the European Court of Justice (ECJ). The respective manifestation of these factors may point towards more or less supranational decision-making and hence towards disparate or uniform integration. The values hereby range from 0 over 0,5 to 1 respectively.

When a policy is on the Council's agenda it may take decisions either by unanimity, by QMV or 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 0,5 and simple majority voting the maximum value of 1 following the pooling of decision-making authority within the Council. Similarly, the proposed index suggests a difference regarding the degree to which the Commission is

**Table 1:** additive index to measure integration levels for policies as denoted in EU treaties:

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 instruments	No jurisdiction	= 0
	restricted jurisdiction	= 0, 5
	full jurisdiction	= 1

involved in the 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 EP is only to be informed about the progress of policy-making (consulted after measures have been taken) we may expect very little chances for the EP to influence EU politics (value=0,5). 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; Crombez 2000).

In the backdrop of previous research on the role of the ECJ it is reasonable to argue that policy 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 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 which are said to be the motor for the ECJ to expand Union authority vis-à-vis Member States (Stone Sweet 2000). For some Justice and Home Affairs 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.

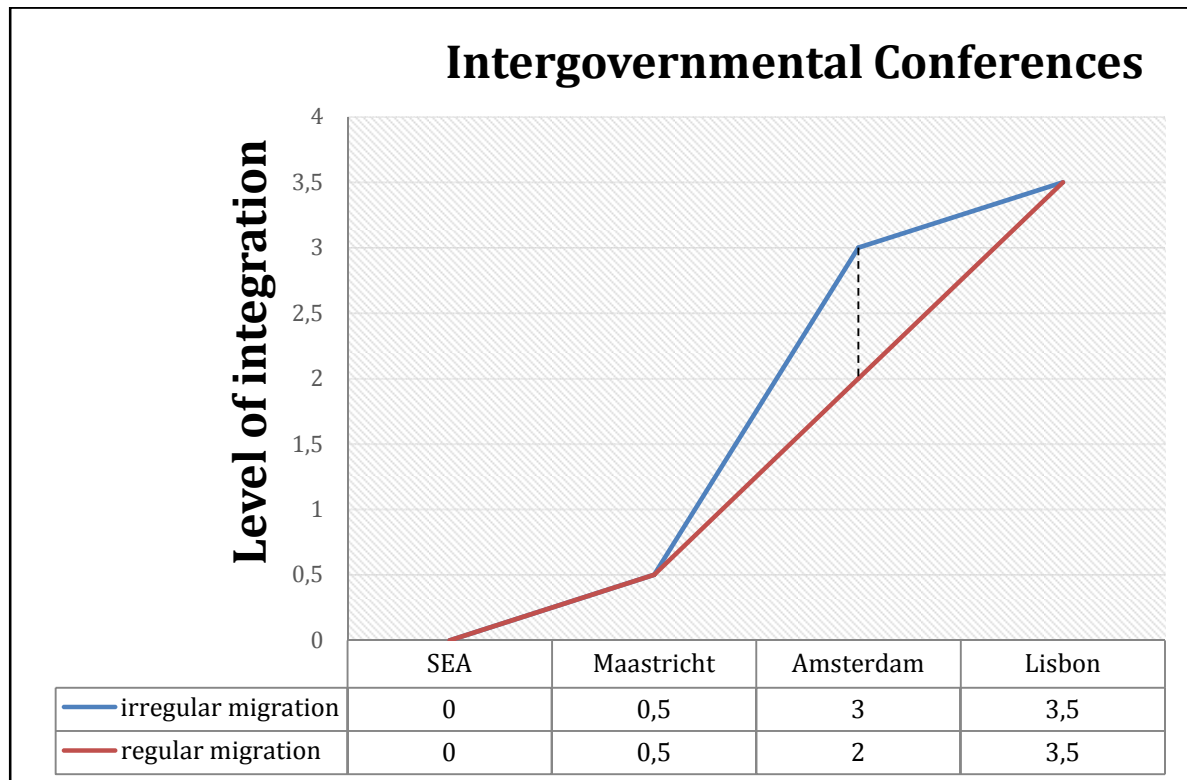
### *Mapping the integration trajectories of the EU's regular and irregular migration policies*

Screening the EU's treaties on their institutional provisions for regular and irregular migration policies from the Single European Act until the Treaty of Lisbon and aggregating values in accordance with the additive index, we may map the integration trajectory of these policies over time (cp. Diagram 1). European coordination on migration policies intensified in the mid-1980s in the context of the single market programme, yet the intergovernmental cooperation remained outside of the EU treaties. The paramount lack of consensus within the EU 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. 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 with regard to migration policies. Ministers of every Schengen state met in the Executive Committee, the highest body, which took decisions by unanimity. Cooperation was highly pragmatic given that there were no other provisions on the rules of procedure, the types of legal instruments to be adopted, confidentiality rules or possibility for judicial control.

The Single European Act (SEA) does not provide for a legal basis for migration policies. Instead, governments attached political Declarations to the treaty that codify the “right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries” (Declaration No. 6). There seemed to be common ground among the Member States that migration was and should remain a national competence as further exemplified by several intergovernmental coordination groups

established outside of the EU treaty framework. Cooperation on migration policy among all EU Member States was firstly institutionalized in form of the Ad Hoc Immigration Group in October 1986 established under the British Presidency. Consequently, national interior ministers met regularly whereas 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.<sup>1</sup> Before the Treaty of Maastricht, EU Member States indeed started to coordinate migration policies. However, cooperation remained outside the EU's treaty framework, followed intergovernmental coordination arrangements without delegating tasks to EU organizations or allowing for majority decisions among Member States. The integration levels of migration policies before Maastricht are therefore coded as 0.

**Figure 1: Integration trajectories of migration policies in the European Union following:**



<sup>1</sup>It coordinated especially the activities of the Ad Hoc Immigration Group, the TREVI Groups, the Mutual Assistance group, the European Committee to Combat Drugs, the European Political Cooperation Group and the horizontal Group (Cruz 1990).

Institutionally things changed with the Treaty of Maastricht that established the Justice and Home Affairs (nowadays called AFSJ) domain as the third pillar of the European Union. Policy-making on migration policies was integrated into the EU treaty framework but remained an intergovernmental affair. According to Title VI of the Treaty on the European Union (TEU) Member States provided for an intergovernmental arrangement sticking to unanimous decision-making in the Council and basically excluding supranational agents from the policy process. The European Parliament was only to be informed *after* decisions have been taken and the ECJ had no automatic right to adjudicate on migration matters. The Commission only shared the right of initiative with Member States which is why the integration levels of both regular and irregular migration policies were coded with 0,5.

In contrast to the Maastricht provisions, the Amsterdam Treaty provided for considerable differentiation among migration policies (cp. dashed line in diagram 1). At least after a period of five years, the Council was supposed to adopt asylum and irregular migration measures by QMV instead of unanimity whereas the European Parliament co-decided on the final legislative act. The Commission was granted the sole right of initiative after this period. Instead, regular migration was explicitly exempted from this institutional reform and the five-year deadline. With the Treaty of Lisbon all migration policies uniformly fall under 'ordinary legislative procedure'. The Council and the EP hereby co-decide on legislative instruments that are exclusively tabled by the Commission. The European Court of Justice has full jurisprudence on migration matters.

Based on the additive index, we are able to observe different integration trajectories of policies. With regard to regular and irregular migration policies, we see uniform integration levels with the Treaties of Maastricht and Lisbon, but disparate institutional arrangements with the treaty of Amsterdam. How can we explain the puzzle posed by the different integration trajectories of two policies that form a functional unity and entered the European agenda in the same historical context?

### **Explaining vertical differentiation**

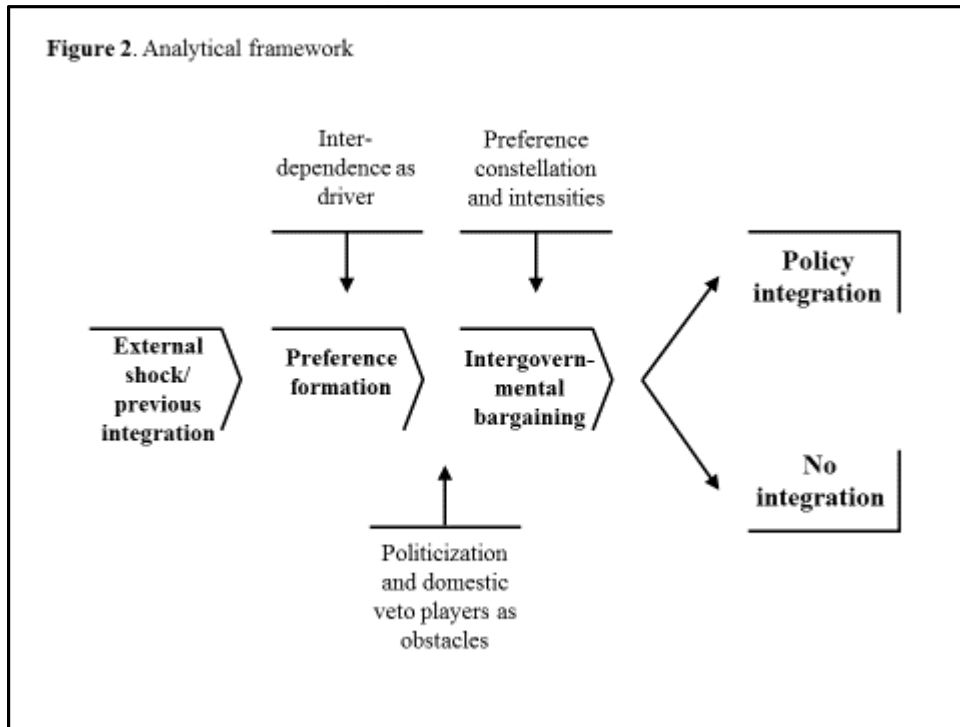
I base my explanation on a basic intergovernmentalist framework (Moravcsik 1998), which considers governments of EU Member States to be rational actors who form preferences on integration outcomes based on utility calculations. Integration outcomes are the result of the



constellation of Member States' preferences and their ability to force each other into agreement at Intergovernmental Conferences. Relying on an intergovernmentalist framework, I opt for a state-centered explanation given that governments sign treaty agreements at the EU's conferences that have to be ratified by all Member States in order to come into force. The framework thus puts national preferences as shaped by interdependence structures center stage in explaining the demand for integration. It attributes the supply of integration in the form of integration outcomes to Member States' preference constellation and hard bargaining dynamics.

I model the intergovernmentalist framework as an integration sequence (cp. Figure 2). The sequence starts with a trigger that motivates Member States to consider political integration of policies. The classic integration theories hereby offer two conditions that trigger governments to propose political integration. Both supranationalism and intergovernmentalism stress the role of political costs of non-integration for governments as drivers of integration. States opt for political integration in response to negative externalities promising that the benefits of joint actions outweigh the gains of keeping the status quo alive. The theories, however, differ in their respective assumptions on whether externalities are side-effects of previous integrative steps and therefore endogenous to the integration process or whether externalities result from external shocks and changes to the political environment exogenous to previous integration. With regard to the former, supranationalists emphasize the interdependence between policies and the costs that governments have to bear when only one of the functionally related policies is integrated but cooperation remains suboptimal without the integration of the other policy (Haas 1958; Niemann 2008). Willing to reap the maximum benefits of cooperation, EU Member States have then an incentive to consider further political integration with the cooperation with regard to one policy spilling-over to related policy areas. Intergovernmentalists on the other hand argue that changes in the external political environment heighten the interdependence between states whereby unilateral actions by states produce political adaptation costs for one or several states. Especially those states that experience adaptation costs as negative externalities from unilateral decisions by another state are motivated to seek integration in order to control and influence another state's actions.

**Figure 2.** Analytical framework



Interdependence is therefore the central driver of integration producing negative externalities for EU Member States. Governments are motivated to opt for integration if they can either expect that an integrative outcome promises every state problem-solving capacities and gains that could not be achieved by unilateral actions (economies of scale); or when an integrative outcome presents the prospect for governments to control and influence decisions of other Member States whose rules and unilateral actions produce negative externalities for others (Fellmer 2013). Interdependence and hence externality effects vary across states and policies. In consequence, states are likely to have different preferences on integrating certain policies depending on the exposure to negative externalities due to foreign decisions. Similarly, those policies and issues that most clearly challenge Member States capacity to absorb changes in the external political environment or side effects of previous integration by unilateral actions, are the most likely candidates to be integrated (further). The absorption capacity of a state is hereby a function of its positional characteristic, for example its geographical location or its economic situation (Schimmelfennig 2003; 2015). In sum, policy issues achieve disparate integration levels when interdependence and hence the effects of negative externalities on Member States vary across policies.

Governments form their preferences against the background of interdependence structures. Yet, governments may be constrained to pursue their preferences during international negotiations due to domestic resistance. The more governments enjoy discretion with regard to a policy area, the more governments are able to transform their preferences into bargaining positions and to opt for integration in order to 'lock-in' preferred options on the European level (Moravcsik 1998: 73). Governments may find obstacles to integration, however, if they face strong domestic veto players whose consent is ultimately required (König and Hug 2002) or a euro-sceptic public that rejects authority transfers to the European Union (Hooghe and Marks 2009). The interdependence based governmental demand for integration may be curtailed due to resistance by domestic players that expect to lose influence following political integration. In federal systems, for example, state authorities may protest federal governments endeavour to transfer and pool authority on the European level for policies that constitutionally fall into the competence area of the states. Moreover, Hooghe and Marks (2009) identified increasing politicization of EU affairs in domestic publics with masses linking their EU scepticism to cultural and identity concerns. Constitutional veto positions (Tsebelis 2002) as well as politicization vary across states and policy issues (de Wilde et al. 2016). Governments that face comparatively high number of domestic veto points and a politicized electorate are less able to advance integrative outcomes. The prospect of policies being integrated depends on in how far these policies are associated with core functions and the identity of nation states. Policy issues then are integrated differently when the sovereignty concerns of domestic veto players and euro-scepticism varies across policies.

In order to explain whether and how the demand for integration of policies can be supplied through integration outcomes, it is necessary to analyse bargaining dynamics at Intergovernmental Conferences. Following the intergovernmentalist bargaining theory integration is dependent on the preference constellation of Member States. Interdependence is hereby said to not only affect governments' demand for integration but also their respective preference intensity to push for an integrative outcome (Moravcsik 1998: 60-67). A basic condition in the bargaining dynamics is that for treaty change and therefore integration the consent of all Member States is required. The more a Member State suffers political costs from the status quo, the more permissive this Member State will be in offering concessions to reluctant Member States in return for its consent to an integrative outcome. On the other hand, the more the gains to be expected from integration tend to be minimal, the less prepared a government to offset reservations of integration-unwilling states. Policies are then

likely to reach different integration levels when preference intensities of governments vary across policies motivating governments to different degrees to exchange concessions for integration outcomes

In my comparative analysis of the integration trajectories of regular and irregular migration policies, I will apply this intergovernmentalist framework that also factors in a supranationalist trigger condition and likely obstacles to integration as theorized by post-functionalism and domestic veto player theories. The likelihood that governments agree on disparate integration levels for policies at Intergovernmental Conferences increases, the more the effects of negative externalities on Member States, governments' discretion and preference intensities vary across policies. In the following paragraphs, I apply the framework in order to explain the different integration trajectories of regular and irregular migration policies in the EU. One central element in analysing integration dynamics is to ask for the reasons of decision-takers to pool or delegate more or less authority to the European Union. However, it is impossible to directly observe governments' reasons for actions since we cannot simply look into the heads of decision-takers. Yet as one is still interested in reasons for actions, one convincing way to overcome this dilemma is to analyse what decision-takers said and what they did instead of simply assuming reasons for behavior or to avoid reason attribution a priori (Mahoney 2015). In order to empirically support a reason attribution, Mahoney suggests taking into account three types of evidence: statements of motivations; evaluating actions in light of existing alternatives; and strategic contexts that render an action more or less plausible with a stated motivation (2015: 248). Therefore, I draw on texts that may indicate reasons for behaviour, which is mostly governmental and supranational output on the policies of interest backed by several background interviews with participants to the Amsterdam Intergovernmental Conference. I hereby consider documents from two levels: reports, decisions and conclusions produced by supranational agents and governments within the European Council and the Council. On the national level, I draw on parliamentary debates in the two parliamentary chambers of Germany and of the UK. The analysis may not only indicate the reasons of governmental actors for pursuing policies in a certain way but also what alternative routes of action were on the table, mainly highlighted by oppositional actors in the domestic and supranational context. The timeframe that was analysed is from the Single European Act until the adoption of the Treaty of Amsterdam.

## **Explaining the different integration levels of regular and irregular migration matters in the Treaty of Amsterdam**

Against the backdrop of Eurosclerosis in the 1970s, the French President Mitterand and the German Chancellor were eager to revive the European project. The finalization of the Single Market Programme stagnated and both heads of government envisioned bringing the Union closer to their citizens. Chancellor Kohl seemingly disappointed by previous unsuccessful attempts to revive the European project and to complete the internal market used a governmental statement in the Bundestag on 4 May 1983 to express his view: ‘Our expectation of European unification is not measured by months or years. I say this into the sentiment of resignation that is to be found in many European countries, including ours’ (Kohl 1983; author’s translation). One cornerstone of this initiative to strengthen the visibility and acceptance of the European Community and move the EC towards a ‘Political Union’ was the idea of creating a ‘Citizens Europe’. Far from sharing the views of other governments, the British Prime Minister Thatcher wrote down in her private memoirs on the Fontainebleau summit that ‘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). The UK fiercely rejected the Franco-German call for another Intergovernmental Conference towards a Political Union accompanied by procedural reforms that substituted the Luxembourg Compromise and threatened sovereign prerogatives (Hansard HC [69/352-59]; Thatcher 1985). Moreover, the notion to link the completion of the internal market with the abolishment of border controls was rejected with reference to the geographical position of the United Kingdom as an island state and its previous effective practice of border controls (Hansard HC [76/1061-70]). In consequence, Kohl and Mitterand changed their strategy towards the UK and consecutive speeches dropped the notion of “going-it-alone” and proceeding reforms to the current institutional status quo. Reactive to the Draft Treaty on the European Union presented by the European Parliament, Mitterand addressed the Plenary on 23 May 1984 to present his vision of the EC’s future:

‘Some people have talked about a Europe of different speeds or variable geometry. Such a step, which reflects a real situation, is one we must take. Care will be taken to ensure that it complements, rather than competes with, the central structure, the Community.’ (Mitterand 1984).

In this regard, 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). The Saarbrücken Agreement was signed between France and Germany on 13 July 1984 and codified the abolition of border controls between both states. Conceding the ability to conduct systematic border checks, both states agreed to intensify cooperation on police and irregular migration issues as well as to harmonize legal and administrative provisions with regard to foreigner law. With the Benelux countries sharing the Europe of the Citizens vision, this initiative was extended in the Schengen Agreement on 14 June 1985 and finally the Schengen Convention of 1990.

*The triggers: abolition of internal border controls and the fall of the Iron Curtain*

The conflict between the German-French axis for reform and British opposition culminated at the Milan European Council of 28 and 29 June 1985, where Thatcher emphasized once again that the current treaties do not need to be changed in order to finalize the internal market. Together with Greece and Ireland, the UK was outvoted at the Milan summit and the European Council decided by a majority of seven Member States to convene an intergovernmental conference leading to the Single European Act (SEA). The negotiations on the SEA ended in a minimalist compromise (Moravcsik 1991). Article 8a indeed maintained that the internal market 'shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital'. Moreover, migration policies did not find their way into the SEA with Declaration on Articles 13 and 19 attached to the SEA safeguarding national immigration policies from Community influence.

Given the UK's resistance within the EC, the advocates of creating a border-free Europe used the Schengen venue to advance the abolishment of internal border controls, which from the very beginning was designed to be incorporated later into the EC's treaties (Gehring 1998). In contrast to the SEA that via Declaration explicitly prohibits Member States or EC institutions to consider migration policies in the EC's context, the Schengen maintained already in the Schengen Agreement of 1985 that the abolishment of internal border controls requires intensified cooperation on the entry and stay conditions for TCNs. The Schengen

states feared that without cooperating on migration policies the easing of internal border checks leads to ‘adverse consequences in the field of immigration and security’ (Article 7). The statement reveals the assumed interdependence among the policy goals of an internal market without border checks and governments’ persistence to control borders as well as the commonly shared notion to keep immigration at a minimum. The lifting of internal border controls was perceived to produce political costs in the security realm and with regard to governments’ ability to control the inflow of migrants if not followed by a common approach to external border controls, irregular migration and common standards on entry and stay conditions for TCNs. Yet, already in the Schengen Agreement it is observable that governments differentiated between migration policies and prioritised joint actions with regard to counter irregular migration. Whereas it was considered essential ‘to ensure the protection of the entire territory of the five States against illegal immigration’ in the short term, measures on regular migration and law 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 does both linking the open internal market to increased cooperation on migration matters and hereby distinguishing between joint irregular migration policies as ‘essential’ measures and regular migration policies as ‘desirable’ measures (Group of Coordinators 1989).

Besides Member States’ functional linkage of the internal market to common migration policies, governments consistently voiced increasing migratory pressures and the detrimental effects of unilateral policies in this regard as motivational force to cooperate on migration policies (Ministers Responsible for Immigration 1991). The deadline for abolishing internal border controls in the EC was set on 31 December 1992 and hereby coincided with fundamental changes to the political external environment. With the fall of the Iron Curtain, the outbreak of secession wars in Former Yugoslavia and migratory movements from Asia and Africa Member States of the EC increasingly questioned their capacity to unilaterally manage migration flows (Papademetriou 1996: 12-13). The patterns of migration to Europe have changed. Whereas the majority of Member States opted for a zero immigration policy following economic recession in the 1970s and devised restrictive legal and administrative procedures in this regard, European societies nevertheless experienced ongoing immigration, especially through the asylum system, family reunification and irregular migration. The ministers responsible for immigration had to acknowledge that ‘immigration has little

concern for borders and will have even less once checks are relaxed and/ or abolished' (Ministers Responsible for Immigration 1991). Moreover, migration movements did not only affect industrialized northern European countries, but also southern European states that previously were countries of emigration became destination countries for international migrants (European Commission 1991). The converging situation among Member States developed a European dimension for which it 'became accepted that unilateral action was no longer possible' since '[t]he international interdependence of national situations, taken together with the permeability of borders' had the Member States to 'recognise the need for a common approach' (European Commission 1991). In consequence, the ministers responsible for Immigration were given the mandate to submit proposals for the harmonization of migration policies. The ministers' report found that harmonization of migration policies was not an end in itself and recommended harmonization on a needs-basis, so for those migration policies that, unilaterally pursued, turned out to be ineffective in managing migration flows between Member States.

In sum, the goal of abolishing internal border controls put a common approach on migration policies onto the European agenda. Following British opposition the Single European Act indeed envisioned a deadline for lifting internal border controls but excluded the migration policies from cooperation within the EC. Instead, Germany, France and the Benelux states pushed the agenda forward and logically linked the abolishment of border controls to joint action with regard to migration policies in order to minimize negative effects of open borders on states' capacity to regulate migration flows and to ensure internal security. Already at this stage, it was observable that irregular migration matters were higher on the agenda as regular migration policies. Notwithstanding that cooperation on migration matters started out within the Schengen group, the regulation of migration flows increasingly developed a European dimension. Changes to the external environment in the form of new immigration patterns and external political crises increasingly challenged national migration system of northern and southern states alike in their capacity to handle and absorb migratory pressures. Interdependence between open border and migration policies timely coincided with an increasing perception of interdependence between Member State migration policies that rendered their harmonization desirable in light of permeable borders. In the next section, it will be shown that Member States' preferences on integrating migration matters (further) varied across states and type of migration policy matching due to variegating effects of



negative externalities that largely matched the geopolitical and economic positions of Member States.

*Preference Constellation in favour of integrating irregular migration policies*

In the theory section it was hypothesized that governments opt for integration if they can either expect economies of scale through increased cooperation, so beneficial policy outcomes through joint action that could not be achieved by unilateral actions; or when an integrative solutions promise governments to influence and control decisions of other Member States whose unilateral actions produce negative externalities. With regard to economies of scale, governments soon saw the advantage of sharing capacities in order to reap common gains. First, information-sharing mechanisms were developed over the 1990s in order to control unwanted migration more effectively. Examples for common initiatives in this regard were the Schengen Information System and the establishment of a clearing house (the Center for Information, Discussion and Exchange on the Crossing of Borders and Immigration, CIREFI) within the EU. Second, governments could pool their resources and common power to deter unwanted migration more effectively through Europe-wide standards on sanctioning irregular entry, stay and work. In this regard, the Council adopted three recommendations on detecting irregular immigration and illegal employment. Articles 26 and 27 of the Schengen Convention provided for common sanctions on persons and carriers that facilitate the irregular entry of migrants. Third, Member States could pool their bargaining power vis-à-vis third states in the negotiation of readmission agreements. The Council adopted three recommendations and hence produced a common blueprint for readmission agreements, common principles to be included in the protocols of those agreements, and a standard travel document to be used for individual expulsions.

Promising a common benefit without disadvantaging any Member State, these initiatives can be seen as an example of why Member States generally saw a benefit in intensifying cooperation on irregular migration policies.<sup>ii</sup> Yet, Member States diverged on the institutional

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<sup>ii</sup> Already during the Maastricht IGC, Germany proposed the communitarization of irregular migration and asylum but found liminal support among other governments. Though there was principled resistance by the British government, France supported Kohl's substantive preferences on coordinating asylum and immigration policies but was rather skeptical to the supranational design (Moravcsik 1998: 452). The Maastricht Intergovernmental Conference in the end resulted in the pillar-approach uniting all migration policies in the intergovernmental third pillar.

arrangement for pursuing common irregular migration policies. Preferences varied along interdependence patterns and largely matches Member States' geopolitical position. Germany and the Benelux states demanded the communitarization of irregular migration matters whereas the UK, Ireland and Denmark instead considered the existing intergovernmental setting sufficient to coordinate migration matters (European Parliament 1996; Thurner et al. 2002).

By lifting internal borders, Germany and the Benelux countries were most vulnerable to the decisions taken by Member States that controlled the external border of the EU. The communitarization of irregular migration policy was seen as imperative to influence and, by way of involving the EU's organizations, to control the actions taken at the EU's common external border. Common rules on border checks and administrative processing of entry requests were supposed to prevent onward-migration. Otherwise, it was feared that migrants might use less restrictive migration systems of states in the periphery to enter Union territory and then to move onwards to Member States in the centre of the European Union. Moreover, Member States had different traditions in handling unwanted migrants. Whereas Germany sought maximum deterrence by comparatively very restrictive immigration rules and expulsion of irregular migrants, southern Member States have occasionally regularized and therefore granted amnesty to migrants without official residence permits. From the German perspective, regularization decisions of other Member States could produce negative externalities when migrants speculate on amnesties and choose this path for eventually migrating towards Germany. For Germany, the integration of irregular migration policies promised the possibility of being able to influence the generosity and restrictiveness and therefore the deterrence capability of foreign migration systems. The Council in the 1990s indeed adopted several recommendations on setting standards on expulsions and to facilitate joint deportation measures among Member States.

The German government promoted the communitarization of irregular migration policies at Amsterdam to increase its potential to not only influence decisions of foreign governments via adopted EU measures but to also ensure the implementation of these measures. The Maastricht provisions combined with the cumbersome 'Schengen-approach' turned out to be ineffective in this regard (Reflection Group 1995; Council 1995; Letter by Kohl and Chirac 1996). The unanimity requirement in the Council led to decision that favoured the least common denominator. Member States were unsure about the legal bindingness of the

legislative instruments that were available in the third pillar and the Council therefore predominantly made use of non-binding 'recommendations'. Given these soft-law instruments and lacking the Commission's and the Court's enforcement powers, the Council adopted a decision on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third country nationals and cooperation in the implementation of expulsion orders' (Council 1996). Instead, Member States relied on Conventions to push the agenda on irregular migration forward. The External Frontiers Convention, however, that enlisted a series of measures on harmonizing external border control and migration standards and that Member States therefore regarded as elementary for finally abolishing internal border controls never came into force lacking ratification by all Member States. The German Delegation to the Amsterdam Intergovernmental Conference supported by the Benelux states therefore saw an urgent need to communitarize irregular migration policies.

The UK most prominently voiced opposition to the communitarization of irregular migration policies (European Parliament 1996). As an island state, the UK did not rely on identity checks within its borders, but on controls at its external borders. Both at Maastricht and at the Amsterdam intergovernmental Conference the British government stressed that given its geographical position the UK may best control irregular migration flows at its border by apprehending persons who try to enter the country (European Commission 1992; Hansard HC [287/428-507]). The UK saw no need in gaining influence on other Member States expulsion decisions or border control measures given that the UK did not have to expect negative externalities in the form of clandestine onward migration that finds its way on the British isle. Therefore the British government associated the communitarization of irregular migration policies as unproportional and overly costly and rejected further integration.

#### *Preference Constellation against communitarizing regular migration policies*

Based on the circumstance that most EU Member States pursued a policy of 'zero immigration' in the times before the Amsterdam Intergovernmental Conference, cooperation on regular migration policies was rather unable to produce economies of scale. Hypothetically, governments could establish common rules for a European labour market and grant migrants the right to move freely on Union territory. Regular migration to Europe

would then become even more attractive for migrants making it easier to find employment and lowering the chances to become unemployed and bound to one single national labour market (Fellmer 2013: 126-127). The French Presidency in 1995 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 these TCNs the possibility to move freely in the Union in the search for employment. Yet, the proposal failed to find approval in the Council and was eventually dropped. With regard to family reunification economies of scale are also less observable since by definition this type of migration is bound to one certain state, namely the one to which the first family member immigrated having therefore less potential to induce a European dimension.

Externalities could trigger integration of regular migration policies in two regards: First, if rules on admission of TCNs diverge between Member States with regard to their restrictiveness and ‘generosity’. States that have comparatively restrictive provisions in place could fear that migrants enter another Member State regularly and after some time is granted the permission to move freely on Union territory (Fellmer 2013: 124). In the second, scenario externalities could trigger integration if Member States competed for external workforce starting a race to the top for most ‘generous’ admission and family reunification standards. With every state trying to be more attractive for regular migrants Member States could at some point be interested in determining common standards on restrictiveness to end the race (Fellmer 2013: 125).

Both scenarios did not materialize before the Amsterdam Intergovernmental Conference. Instead, Member States adopted several resolutions on regular migration matters that were not aimed at harmonizing national standards but to safeguard national discretion and flexibility in regulating entry and stay conditions for TCNs sensitive to national labour market needs and cultural concerns. The Council’s 1992 resolution on family reunification delivered a common definition of what constitutes a family but left to the Member States to set the criteria for allowing families to reunite. The resolution on limiting the admission of TCNs for employment recorded Member States’ shared goal of to restrict admission of TCNs for employment reasons given that no Member State pursued an ‘active immigration policy’ (Council 1994). Instead, Member States should draw on EU, EFTA or long-term TCN resident workers to fill labour shortages. Exempted from this provision were the several bilateral employment and worker agreements that Member States had negotiated with third

states. Generally, Member States retained discretion and flexibility to hire foreign regular labour whenever required and under conditions set by national standards (Papademetriou 1996: 88). These measures do not lend to the conclusion that governments experienced negative externalities and were therefore eager to influence or control the decisions by other Member States.

The demand for integration from an externality perspective was therefore rather low matching the observation that no government present at the Amsterdam Intergovernmental Conference fiercely lobbied for communitarizing regular migration policies. The preparatory report by the Reflection Group to the Intergovernmental Conference mentions regular migration matters only at one point. Some Member States would like 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’ (1995, cp. clause 55). The preferences of Germany and the Benelux states have been recorded as broadly supporting the full communitarization of asylum, border and immigration policies whereas Denmark, the UK and Ireland rejected further moves down the integration ladder (European Parliament 1996; Thurner et al. 2002). Though this assessment matches the initial position papers that Member States released before the Conference (European Parliament 1996), the documents and letters produced during the Conference reveal that governments increasingly differentiated between migration policies and accordingly fine-tuned their preferences.

#### *Domestic obstacles to integration and the bargaining game over integrative outcomes*

The Presidency notes and proposals by delegations that were issued during the Amsterdam Intergovernmental Conference reveal that for a long time governments negotiated on the communitarization of regular and irregular migration policies as a package. The report by the Reflection Group already hinted at the tendency that:

‘many members agree in identifying, as an area which ought to be brought under Community competence, 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.’ (1996, cp. clause 49).

Member States' position papers that followed in 1995 until 1996 built upon this notion and voiced their preferences on communitarizing this package of migration policies or not (European Parliament 1996). The Presidency introductory note on Justice and Home Affairs in July 1996 again identifies the question of communitarizing migration policies as a central one and records a 'widespread view' in favour of communitarization (CONF/3866/96). Member States' preferences cannot be fully grasped by this simple dichotomy as it already mentions suggestions in favor of a 'progressive approach [...] in order to help communitarisation' (Ibid.). Some delegations pointed to the given implications by moving these policies to the Community pillar and it seems that the progressive approach might already be a first concession to Member States that are rather hesitant in supporting communitarization. The Presidency note of 18 September 1996 then summarized the status of negotiations with regard to communitarizing third pillar policies. The note was delivered answering 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'.

In consequence, some delegations used the opportunity to bring lobby for their preferences with regard to communitarization. Whereas the UK made again clear that is considering communitarization unnecessary and introduces the principle of subsidiarity with regard to third pillar policies (CONF. 3918/96), the Benelux states issued a common proposal that emphasizes the functional unity of migration policies that are pursued most effectively in a communitarized setting (CONF. 3909/96). The Presidency note of 19 February 1997 indeed provided for the communitarization of all migration policies after a certain time period that still needed to be determined (CONF. 3823/96). After that time period, the Council should decide by QMV on proposal by the Commission whereas the roles of the European Parliament and provisions with regard to the European Court of Justice were still undecided. The Presidency note of 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). Yet, two caveats were included in the note: One Delegation, presumably the UK, voiced strong reservations with the approach of 'simply changed procedures, thereby creating political difficulties'. The other 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 UK’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 Intergovernmental Conference. The Schengen states drew up 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 solely mentioned with regard to governing the movement of TCNs in the territory of the Union (CONF. 3823/97). Schengen members made it explicit 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 beneficial in this regard and the intensity by these governments to achieve communitarization was high. In order to win the UK’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 on the table (Interview #1). Though it was clear that Blair could not in his first official act as Prime Minister surrender British prerogatives on border controls, the Presidency hoped that Blair lived up to his rhetoric on the EU and be more receptive to the European cause. Having just won the election by bringing the Labour party behind his campaign, Blair felt less pressure by backbenchers compared to John Major before at Maastricht. Yet, he made clear that the UK would not give up on its right to control its borders (Hansard HC [296/ 313-330]), which would have not been acceptable for his party and the euro-sceptic public alike. Second, Member States won the British governments consent by granting the UK concessions in the form of an opt-in mechanism and declarations that secured the UK’s right to maintain border controls.

With regard to the second caveat, namely some delegations’ call to re-consider the procedures used for pursuing common regular migration policies, communitarization supporters were less successful. The Presidency note of February 1997 provided for the communitarization of both regular and irregular migration policies after a fixed time period. Whereas the German government along the Benelux states previously supported the communitarization of migration matters, Chancellor Kohl had to revise its bargaining position due to domestic opposition (Nicolaidis and Moravcsik 1999; Niemann 2008: 231).

*Länder* leaders of his own government threatened to block the ratification of the Amsterdam Treaty in the German *Bundesrat* if the treaty text provides for an automatic switch to QMV after three years for matters that were to be transferred to the first pillar, and so for irregular migration matters. And secondly, the Bavarian leader, Edmund Stoiber, rejected the transferral of regular migration matters to the first pillar in the fear of '(uncontrolled) migration' towards the 'regional labor markets' (Niemann 2008: 231).

The integrative outcome ultimately varied across regular and irregular migration policies and reflected the preference intensities of Member States. Irregular migration policies were communitarized whereas the conditions for integration had account for the German government's domestically constrained bargaining position. The final switch to QMV, co-decision for the European Parliament and the greater involvement of the European Court of Justice remained to be decided by a unanimous Council decision five years after the entry into force of the Amsterdam Treaty. The UK's opposition could be offset by the concession in the form of an opt-in arrangement and declarations safeguarding the British right to keep border controls. The coalition lobbying for the communitarization of regular migration policies was rather small consisting mainly of the Benelux states. The chances of regular migration matters being communitarized reached their minimum when the German government had to withdraw its support given the opposition by *Länder* leaders who feared to lose control over migration matters and therefore threatened to veto further integration.

## **Conclusion**

The aim of this paper was to explain why the kindred policies of regular and irregular migration were institutionally separated with the Treaty of Amsterdam. I argued that different patterns of interdependence resulted in diverging governmental preference constellations that led to different integration levels for these policies. The integration trajectories of both policies were triggered by the abolition of internal border controls and changes to the external environment that led to increased migratory pressures on EU Member States. Yet, while these circumstances increased led to negative externalities between national decisions and rules with regard to irregular migration, the intensity of interdependence and hence governmental preferences on further integrating regular migration matters was comparatively low. Consequently, especially Germany and most Schengen states were eager to communitarize



irregular migration matters and won the UK's consent by conceding to the British government the right to keep border controls in place and to opt into EU legislative measures whenever considered desirable. The communitarization of regular migration policies was off the table as soon as the German government was pressured domestically to change its bargaining position against further integration. Both the German government as well as potentially integration-willing Member States saw no need in further negotiations to balance out differences in this regard. With the German *Länder* threatening to block ratification otherwise, EU governments did not want to risk treaty failure because of a tough stand on the communitarization of regular migration policies.

The contribution of this paper is two-fold: First, the paper addressed an interesting empirical puzzle, which has so far been disregarded and the paper therefore adds another jig saw to the overall puzzle of the EU's immigration polity and politics. Second, the paper can be read in light of the research on differentiated integration in the European Union. Not long time ago, authors complained that research on differentiated integration has produced 'many concepts, sparse theory and few data (Holzinger and Schimmelfennig 2012). This paper offers a theoretical model that could easily be tested for other cases in which integration levels diverged between policies.

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