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Costs and Benefits of Differentiated Integration: Lessons From the Schengen and Pruem Laboratories

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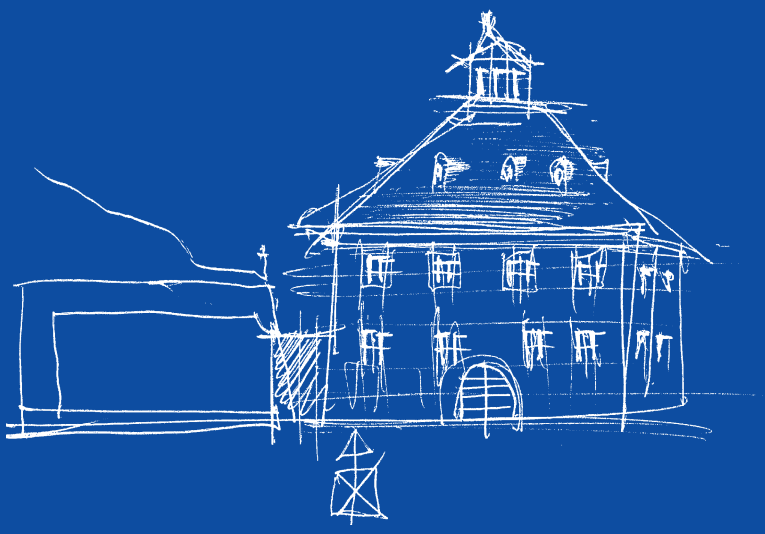

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COSTS AND BENEFITS OF DIFFERENTIATED INTEGRATION: LESSONS FROM THE SCHENGEN AND PRUEM LABORATORIES

HELMUT P. GAISBAUER

ABSTRACT

This article discusses the politics of differentiated integration in European Justice and Home Affairs from a theory of clubs and transaction-cost perspective. By way of comparative analysis of two cases – the Schengen regime and the Pruem Treaty – I outline the main stages of a differentiation club's career. Analyzing the costs and benefits at stake for club members and non-members allows me to get a tight grasp of the politics of differentiated integration at the different stages. The club's trajectories reveal, however, that contingencies and *ad hoc* solutions interfere with strategic calculations to a high degree.
The article concludes that incorporation efforts necessarily lead to pick-and-choose situations that preclude full uniformity; consequently, outside treaty clubs always lead to *á la carte* fragmentation. Moreover, time pressure and bargaining dynamics in incorporation efforts preclude effective search for efficient policy solutions; hence, smaller club agendas generate less incorporation problems.

INTRODUCTION

Differentiated integration – or flexibility – is a key aspect of European integration. Despite considerable scholarly effort over decades to decipher and theorize the general phenomenon (Gstoehl 2000; Warleigh 2002, Koelliker 2001; 2003; 2006), we still know little about the politics of differentiated integration. However, new attempts are beginning to systematize this research field (Dyson and Sepos 2010). When do member states choose forms of differentiated integration to pursue their policy goals? Are decisions for club formation purely tactical and strategic in nature or do they reveal a significant degree of experimentation and contingency? What are the cost benefit calculations that drive the politics of differentiated integration? Finally, how effective are such laboratories in the end?

In this article, I approach these questions by a comparative analysis of two differentiated integration arrangements in EU Justice and Home Affairs: the Schengen regime and the Pruem Treaty "on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration" (10900/05 CRIMORG 65 ENFOPOL 85, Brussels). Both were initiated outside the European Union by a core group of member states,

but eventually both were partly incorporated into the EU's treaty framework. Hence, their trajectory stretches over all possible stages of a club's career.

My theoretical framework combines transaction-cost theory (Dixit 1996) and the theory of clubs (Buchanan 1965) perspective with insights from the venue-shopping theory (Baumgartner and Jones 1993; Pralle 2003). The concepts from neo-institutionalist economics allow for the conceptualization of differentiation arrangements as clubs, and thus the analysis of cost-benefit calculations; in turn, the insights from venue-shopping allow for a further refinement of the analysis of strategic action in differentiated integration. The comparative analysis undertaken with the help of these conceptual tools is structured by a distinction of main stages of the politics of differentiated integration. This structuring is in line with recent propositions that underline the importance of *temporality* for both the study of the European Union in general, and differentiated integration in particular (Meyer-Sahling and Goetz 2009; Goetz and Meyer-Sahling 2009; Goetz 2009).

Interpreting the Schengen regime and the Pruem Treaty as instances of club formation with the strategic goal of final incorporation, namely, uniformity, I discern the following main stages of politics of differentiated integration: (I) *blocking of policy change* by influential veto players that motivate the initiative to club formation; (II) *club formation* that allows for exclusion of these veto players; (III) *club definition* involving bargaining and negotiations, legitimisation and identity building efforts; (IV) *club activity*, or in other words, implementation of the contract and provision of the club good; and (V) the *incorporation endgame* that begins with the proposal to incorporate or transpose the club and includes the final negotiations. I expect the latter, in particular, to deepen our insights regarding the main costs and benefits, therefore, the effectiveness, of bypassing reluctant member states by way of strategic club formation.

It seems that incorporation efforts under unanimity rules necessarily lead to a situation where non-members pick and choose club goods that are attractive to them and remain reluctant to incorporate the rest. Network club goods – such as transnational databases in the Schengen (SIS) and the Pruem case (DNA, fingerprints and vehicle data exchange) – are obviously most attractive to non-members. Given their stable reluctance to accept all parts of the club, *ad hoc* decisions of last resort, like opt-out regulations, may then be inevitable in order to reach an agreement. Thus, the goal of uniformity is not available by way of strategic club formation outside the treaties. Moreover, time pressure and bargaining dynamics seem to preclude the

necessary thorough preparation of incorporation methods. As a result, experimentation, contingencies and *ad hoc* solutions endanger the effectiveness of incorporation methods, as well as the efficiency of the incorporated policy instruments. The article concludes that a theory of clubs perspective is a suitable tool to guide further reasoning.

FRAMEWORK

Giandomenico Majone (2009, 217-219; 2005, 20-21) proposes the theorization of differentiated integration by drawing on key concepts of the theory of clubs, originally developed by James Buchanan (1965). I follow this proposition by starting with a conceptualization of the European Union as a club *in toto*.[1] According to Buchanan, a club is an association of members put up to provide a *club good*. In public good theory, a club good is a special kind of public good. Pure public goods are open for consumption by the general public, for example, unpolluted air or peace. On the other hand, club goods are public goods with consumption restricted to club members. The primary difference between pure public goods and club goods is that free-riding is not possible with club goods. A club involves benefits (the club good) and (transaction-) costs.

We can conceive the EU as a club providing multiple integration club goods and involving multiple costs. By drawing on key concepts of the theory of clubs, we can identify the discern members and goods, and we can calculate the benefits and costs, as well as optimal club size (Wohlgemuth and Brandi 2006, pp. 7-9). The more integration club goods are involved, the more complicated the calculus will be.

If we accept the premise that distinct integration areas can be conceptually conceived as distinguishable clubs (Wohlgemuth and Brandi 2006, p. 8), but understand the Union as heading purely for (legal) uniformity, then the EU is and continues to be a *single* European club providing multiple integration goods much like the Internal market, the Common Agricultural Policy, the Lisbon strategy or the European Neighbourhood Policy. Apparently, this conceptualization of the EU as a club needs further refinement. The Communities have never been totally harmonized; this is true even in supranational policy fields. Flexibility in time, matter, or space accompanied their development from the beginning (De Witte, Hanf and Vos 2001). The fact of flexibility gained special visibility at the integration watershed of the Maastricht Treaty – this is demonstrated by differentiation arrangements for the Economic

[1] Critical about such a conceptualization is: Schimmelfenning (2003). See also the critical discussion of Schimmelfennigs arguments in: Pluember (2003).

and Monetary Union (EMU) and the pillar structure. One could not fail to notice that the club's memberships began to differ substantially across different policy fields. In order to conceptually take the Economic and Monetary Union, Schengen, or WEU into account, we have to conceptualize the EU as a club-of-clubs instead. This allows grasping varying membership in EU sub clubs, even of non-EU-members, as in the case of Schengen. Such membership of non-EU-members alters the way of calculating the cost-benefit balance, but the calculus is still possible.

Generally, we can determine at least two possible conceptions of differentiated integration: *integration à la carte* as proposed by Ralph Dahrendorf in the 1970's, and *multiple speed* arrangements (Majone 2009, 215f). The first would accept the club-of-clubs as a permanent solution to flexibility problems, the second, only for a distinct period of time. The first would accept differentiation as an end (amongst others) of integration, the second, only as a means. All conceptual propositions in the vast literature on differentiated integration can be subsumed to one of these two conceptions (e.g. Stubb 2002). By way of normative reasoning, this conceptual dichotomy leads to the question of whether uniformity accompanied by harmonization as standard technique is feasible, as well as whether it is the best solution in EU governance in terms of costs and benefits (cf. Ahrens and Meurers 2004).

Efficiency problems in institutional design are not germane to the present discussion, however. What concerns us here is a novel conceptualization of differentiated integration in order to shed light on costs and benefits of distinct patterns of (differentiated) integration in EU Justice and Home Affairs. In a nutshell, in this policy field we are confronted with subsets of member states that undertake various policy coordination or projects in which other member states are unable to make a positive contribution, are not interested in, or are even opposed to. Thus, the interested member states form a club with the strategic goal to develop their optimal solution to a common problem and propose it to, or impose it on, the rest of the fellow member states by way of communitarization. In order to better shed light on these conflicting interests, I also propose to further refine the concepts of costs involved. According to Coarse (1998; cited in Majone 2010, 153), transaction-costs can be subdivided as: (1) *costs of preparing* contracts (*clubs*); (2) costs of concluding contracts (that establish clubs), that is, *costs of bargaining and decision making*; and (3) costs of monitoring and enforcing contractual obligations (i.e. *costs of operating a club and providing the club good*. I should add: (4) *costs* arising due to the *difference* between individual preferences and the club good;

(5) political costs of exclusion of EU players (i.e. *legitimacy costs*); and (6) *costs of communitarization of the club*. Complementarily, I should add to the benefit side the *benefits from communitarization*, namely, to achieve a European policy solution.

As we can derive from this taxonomy, transaction-costs are conceptually inherently dynamic (Dixit 1996, pp. 43-44). The last component of our framework adds to these dynamic aspects and the strategic dimension of club formation. I borrow from insights of the venue-shopping theory as outlined by Baumgartner and Jones (1993) that theorizes similar strategic actions, but rests on basic assumptions which are not sufficiently convincing under the present discussion of differentiated integration.[2] A recent perspective on venue shopping that focuses less on the issues at stake and more systematically on the key actors' political strategies is helpful to convincingly apply this framework to the challenging issue of differentiated integration as club formation (Pralle 2003). Firstly, Pralle argues that venue shopping (read here instead: sub club formation) can be more experimental and less deliberate or calculated than commonly perceived; secondly, actors choose venues not only to advance substantive policy goals, but also to reinforce organizational identities; and finally, venue choice is shaped by policy learning processes (Pralle 2003, 234). In general, these findings fit very well with the empirical case studies of this article and can be transposed to club theory reasoning. Club formation opens the leverage to forward and decide on policy proposals that have been blocked in the Council before. *Tactical* reasoning of adversaries' exclusion seems to be purely calculated, whereas the "long term" circumvention *strategy* is far more experimental and challenged by contingent dynamics. I presume that the strategic goal of the sub club members is to eventually communitarize their club good by having all member states take part in the policy by way of altering the cost-benefit balance. I, however, argue that experimentation and contingency play a major role in the process of defining how this strategic goal can be reached. Furthermore, Pralle's emphasis of policy learning touches my case studies in two ways. First, in several aspects the Pruem initiative was rooted in the Schengen experience and partly driven by the same actors. Hence, it accounts *per se* for an instance of policy learning. Second, empirical evidence from both cases shows a strong reframing of the initiative as a

[2] The main difference between differentiation in EU integration and the realm of national or international forum or venue shopping is the lack of competing or overlapping jurisdictions that theoretically drives the shopping for more favourable conditions of policy making. Moreover, venue shopping accounts for strategic action of advocacy groups mainly understood as societal actors. I understand – and conceptualize – "venue-shopping" by governmental actors in the case of differentiated integration in EU's JHA instead as club formation for strategic reasons.

laboratory for the production of a club good that eventually should be open to all fellow member states, and therefore serve all member states and *mutatis mutandis* the whole Union. In this way, outside treaty club formations are accompanied by strong legitimating efforts that can be interpreted as club identity building.

CASE STUDIES

The choice of the Schengen Regime and the Pruem Treaty for my empirical study seems nearly ideal since both initiatives come from the same policy domain. Furthermore, both cases started outside the treaty framework in the realm of pure inter-governmentalism and, far more importantly, both clubs were transformed by incorporation efforts. Schengen started with an agreement of five member states in 1985 (Gehring 1998); the Pruem Treaty was signed in May 2005 by seven member states (Guild and Geyer 2007). Schengen was incorporated into the TEU at the Amsterdam treaty reform round, but still represented a club in the EU since three member states did not accept full participation. Some ten years later, Pruem was implemented outside the EU`s treaty framework and in major parts incorporated into the EU treaty framework in the course of 2007 under the German presidency. In that case, all member states accepted this incorporation without major resistance, whereas not all operational instruments of the Pruem Treaty have been incorporated, too. However, there are also major caveats to this choice of cases. Most importantly, my cases are nonsynchronic. I am, therefore, confronted with two different relative institutional settings: on the one hand, the Community/Union before and shortly after the implementation of the Maastricht Treaty with a third pillar that in the first years very slowly lived up to its potential (Turnbull-Henson 1997); on the other hand, the Union after Nice with a consolidated JHA-*acquis* (Monar 2006), with a growing role for the European parliament and with multi-lateral EU policy programmes. Even more importantly, the two cases are situated in strongly diverging political contexts. The Schengen regime represents an effort to promote or strengthen core principles of the Internal Market: freedom of movement and free circulation of goods and services. The Pruem Treaty is motivated, instead, by an effort to develop an Area of Freedom, Security and Justice after the terrorist attacks on New York and Washington in 2001, as well as Madrid (2004) and London (2005).

Adopting a transaction-cost perspective, it is possible to integrate different political and institutional contexts into the analysis: the political context after 9/11 apparently provides more support for security measures – transaction costs, thus, sink. Conversely, the fact that

more institutional actors are excluded from decision making, as the Pruem case compared to Schengen shows, raises political costs of exclusion. Apparently, the two factors are balancing each other to a certain degree.

Main Stages: the club career

The case studies reveal that the club career consists in five main stages: (I) the situation that motivated the club formation initiative, in other words, the *blocking of policy change* by influential veto players; (II) *club formation*, which allows for the exclusion of reluctant veto players; (III) *club definition* involving bargaining and negotiations, legitimisation and identity building efforts; (IV) *club activity*, namely implementation of the contract and provision of the club good; and (V) the *incorporation endgame* that begins with the proposal to communitarize the club in a window of opportunity and the final negotiations. In particular, this endgame allows for a general assessment of the costs and benefits – and therefore, the effectiveness – of the club formation strategy.

(I) Policy blocking within the EU institutional setup

Antecedent to Schengen, some member states tried to set up an EC policy regime that provided the club good of free movement of people and the associated welfare gains for all EC citizens. As early as 1972, the European Council envisaged approaching a European Union including a "Citizens' Europe" that would bring about a European citizenship practically supported by a passport Union (Bull EG 12/1974, 8f) (Gehring 1998, 47). Contrary to these Council "lyrics" the new member states of the United Kingdom, Ireland and Denmark were not convinced by this vision. Denmark had already been in a passport Union with the other Nordic non-EC-members for decades. Lifting border checks at the German border was expected to generate serious political costs. Similarly, the UK and Ireland had already lifted the checks at their common land border between Ireland and Northern Ireland – and so had already consumed a considerable part of the newly envisaged club good. In contrast, their island geography meant that lifting identity checks at entrance points would have made no big difference in terms of freedom of movement since other, mostly physical, obstacles remained. The expected benefits from the club good were considerably lower than for the continent. The cost-benefit balance was obviously negative in all three countries. Interested in maintaining the *status quo*, they even succeeded in eliminating related issues of the Commissions' Europe

'92 programme, as well as from the SEA negotiations (Moravcsik 1991, 41f; cited after Gehring 1998, 48).

Similarly, prior to the Pruem initiative, the German minister of interior, Otto Schily, proposed different instruments of law enforcement on different occasions, however, all these initiatives failed. A first proposal aired by minister Schily and his Italian colleague Claudio Scajola concerned a European anti-riot constabulary in the aftermath of the Gothenburg Council meeting in June, and the G8 meeting held in Genoa in July 2001. The proposal was promoted by Austrian minister Ernst Strasser, but met abrasive comments in the JHA Council in September, as well as from the German opposition (Dicke 2001; Weissensteiner 2001).

A next proposal of Schily met similar reluctance in the Council. In July 2001, he put forward a plan to set up a European database for "rowdyish" and (politically) radical participators of demonstrations aiming at "preventing individuals who have a record of law and order offences from leaving the Member State". The Council decided, instead, to use existing possibilities on data exchange on this matter (Spiegel online 2001).

Moreover, on several occasions between 2001 and 2004, Schily proposed preventive *Rasterfahndung* at the EU level, that is to say computer-aided profile-searching in all available data-bases, to filter out so called "sleepers".[3] This instrument became famous in Germany's struggle with the RAF terror in the 1970's, but less notable for its functionality than for producing high costs with little effect: for this reason it was criticised regularly at the national level. Critics assumed that Schily tried to "Europeanise" this tool to respond to this pressure (Papayannis 2008). The issue meandered through the Council machinery meeting considerable opposition by some member states.[4] Some of the Council members doubted the expected benefits, others expected high democratic costs (pressure on civil rights) and/or costs concerning the set-up of novel systems of data exchange. In the end, a final discussion in the working group on terrorism made clear that the proposal would not meet sufficient support in the near future.[5]

Both cases reveal that the veto players wanted and managed to maintain a *status quo* that was closer to their interests than the proposed policies. In both cases, they could do so because decisions required unanimity. Substantially differing policy preferences made the conclusion

[3] Schily tabled a proposition of EU wide computer aided profile-searching in a Council meeting in October 2001: 13176/01 JAI 120, 24.10.2001. Welt online (2004). Schily setzt auf Rasterfahndung, 27.03.2004.
[4] Cf. 6403/02 ENFOPOL 27, 8.03.2002; 11858/02 ENFOPOL 117, 13.09.2002; 11858/1/02 ENFOPOL, 14.10.2002; 13626/02 ENFOPOL 130, 31.10.2002.
[5] Cf. 5865/03 ENFOPOL 9, 31.10.2002.

of an agreement impossible. From the perspective of the initiators, search and information costs for the proposals, as well as costs associated with the development of alternative solutions tended to rise together with the anticipated bargaining and decision-making costs (e.g. package deals or side payments). By the same token, they expected costs to rise as a direct result of the differences between the individual preferences of the member states interested in a policy solution, and the considerably less attractive alternative solution that would reach agreement by all member states. Beyond that, if the status quo was not negotiable at all – as the policy proponents had to learn from the SEA negotiations and the different debates in the Council in the Pruem case, respectively – then a cost-benefit calculation was meaningless. Whatever reasoning may apply, two exit strategies were feasible: either wait for a change in preferences, or bypass the reluctant veto players.

(II) Club formation

In reaction to the blocking of policy change by veto players at the European level, the original Schengen, as well as the Pruem, signatories excluded the reluctant member states and promoted the Community policy on free movement of persons (Schengen) and some operational instruments in police co-operation, migration and asylum (Pruem) by way of an international treaty outside the Community framework. This way, they established new clubs that allowed them to change their common policy without the reluctant member states. The above stipulated costs concerning alternative policy solutions, bargaining, etc., sank to a minimum. In both cases, the expected benefits of the club good also decreased since a smaller number of club members would also mean restrictions in the geographical scope of the club good and, therefore, smaller efficiency gains. However, since the geographical area continued to be significant and the expectation was to include new members into the club, the expected benefits remained were still high. The two instances show different costs of exclusion a fact already taken into consideration above. I will return to that point later.

In line with arguments brought forward by Pralle (2003, 234), the Schengen case shows, nonetheless, that club formation can be more experimental and less deliberate or calculated than commonly perceived in the case of venue shopping or club formation. The main actors in club formation could not rely on any precedent, but instead experimentally choose to cooperate on a bilateral basis. Obviously, the Schengen convention was not accompanied by a well-prepared strategy on the state levels. Some even hold that the Saarbruecken accord between France and Germany, which preceded the Schengen convention and at the time

included the Benelux countries, was a rather spontaneous or erratic idea of the newly elected German chancellor, Helmut Kohl. In this view, his primary motivation was to present himself as a truly European-minded leader to the constituency (Baumann 2008, 18). The fact that the German ministry of interior had not been consulted, or even informed, before the public declaration of the Saarbruecken convention is then interpreted as revealing a high "level of spontaneity" (Baumann 2006, 58). This course of action, however, also feeds perfectly into the argument of a tactical exclusion of adversaries – this time in the domestic realm. The further trajectory leading to the Schengen Implementation Convention (SIC) shows a more experimental and evolutionary character than a pure club formation or venue shopping approach would stipulate and does not verify a sort of grand strategic design idea.

Other than the Schengen initiative, the Pruem case did not start from a *tabula rasa*, but rather revealed a certain kind of strategic policy learning. As a reaction to failure of his policy proposal of a preventive European *Rasterfahndung*, German minister Otto Schily proposed some weeks later, in March 2003, a further Schengen club to his fellow ministers from the Schengen founding states. Evidently, the minister consulted his high officials to sound out alternative ways of forwarding his policy ideas.[6] We can corroborate this assumption by the fact that according to Lavenex and Wallace (2005, 466) the G5 (now G6) cooperation was a direct outcome of a failed attempt by the German bureaucracy to replay Schengen in 2002. If our assumption is valid, then this instance of club formation reveals far more strategic calculation than the Schengen initiative did. The Pruemians could capitalize tactically and strategically from the Schengen club experience. However, again, it also showed a considerable degree of experimentation, at least at the political level, as I will show later by analyzing the definition phase and the surprising shifts in the agenda in this respect.

The exclusion of policy adversaries is similar in both initiatives, but has to be complemented by the exclusion of the European Commission and the European Parliament, which played strongly different roles in JHA policy making after the Amsterdam treaty reform than before (Maurer and Kietz 2007). The cost of exclusion of EU players rose significantly between the two cases. Contrary to the Schengen process, there is strong evidence that the European Commission was not satisfied with the Pruem club initiative. In several meetings, high-ranking German and Austrian officials tried to convince Jonathan Faull, European

[6] Interview with an official from the Department for bilateral relations at the Austrian Ministry of Interior, 8 September 2008.

Commission Director General of Justice and Home Affairs, of the initiative.[7] It is not surprising that he remained sceptical since the Commission worked on different proposals to implement the Hague programme: for example, on a proposal for a framework decision on exchange of information under the principle of availability, and on a Council decision on the improvement of Police cooperation that were severely challenged by the Pruem initiative.[8] In the course of the incorporation endgame, Commissioner Franco Frattini, then praised the instrument of DNA data exchange and the Commission supported the German presidency with its effort to incorporate most of the Pruem regulations into the EU's legal body. In the European Parliament, too, there were strongly critical opinions concerning the club formation, as well as the subsequent reluctance to grant the EP a relevant say in the process of transposition (Bellanova 2008, 207).

(III) Club Definition

Defining the Schengen club comprised two main steps and lasted five (!) years: the Saarbruecken accord, the BENELUX memorandum and the subsequent Schengen accord were about negative integration measures; the successive negotiations of the Schengen implementation convention (SIC) set up compensatory measures (of positive integration). The first part concerned the establishment of the club good free movement by abolishing checks at the common borders; the second was about the reduction of external costs caused by this measure. It is revealing that the first accords were essentially agreed upon by ministries of transport and governmental leaders, respectively, whereas SIC was nearly exclusively negotiated by staff of the ministries of interior. Baumann (2006; 2008), for example, interprets the SIC negotiations as a fight by the German law and order officials to re-conquer the agenda once the German chancellery decided to lift the border controls. This explains the heavily security biased nature of SIC and the extraordinarily strong role of officials from the German ministry of interior in defining the SIC agenda and the subsequent outcome of the negotiations. These dynamics also feed into our understanding of the experimentation of the club formation. Obviously, the German chancellor and the French president and their staff could not predict where the process of lifting the border controls would end if one thinks of the Schengen information system (SIS), the Schengen ministers committee, etc.

[7] Ibd.
[8] COM (2005) 490 final; COM (2005) 317 final: Proposal for a Council decision on the improvement of police cooperation between the Member States of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement.

In terms of costs and benefits, we note considerable bargaining and decision making costs caused by the – probably necessary – exclusion of the ministries of interior from the initial decision making, and of course by the highly sensitive issue of internal security. Once part of the bargaining game, the officials from the ministries of interior apparently sought to maximize their benefits from the contract in terms of extensive compensatory measures.

The identity factor specified by Pralle (2003, 234) further supports the experimentation thesis and reveals some further costs involved. The *fait accompli* manner of the Schengen initiative did not raise high political costs of exclusion at the beginning. However, a five-year club definition in an increasingly "Europeanized" policy field meant steady increase of such legitimacy costs. Beyond that, the club definition also necessitated some club identity building for the members within in order to interpret the club's relation to the Union and the ongoing process (and interpretation) of European integration. In the view of Zaiotti (2008, 100f), to emphasize the complementarity of Schengen with the "objective of the internal market comprising an area without internal frontiers" (SIS, preamble) was not sufficient to dispel the sense of illegitimacy surrounding the Schengen initiative. Its proponents had to find a valid reason for explaining the exclusion of fellow member states and eventually put forward the notion of Schengen as a 'laboratory of the EC'. "The laboratory metaphor […] surfaced in internal and public documents and speeches about the Schengen regime soon after the initiative was launched in the mid-1980s" (Zaiotti 2008, 101). We can stipulate that this discursive strategy resulted in reduced political costs of exclusion. The Commission replicated the laboratory notion extensively.

Compared to the Schengen case, the Pruem initiative was a much narrower one. It is not surprising then, that bargaining and decision-making resulted in fewer costs than in the preceding case. Until March 2004, the officials of five member states negotiated in nine meetings the general content of the treaty, which was finalized in detailed negotiations by May 2005. Their preferences were similar; hence, the bargaining and decision-making costs were considerably low. However, given the original club goal of establishing a multinational system for computer-aided profile search to fight terrorism and to approach a kind of anti-riot constabulary, it is enlightening that the Pruem Treaty ended with a substantially different club good at its core — an automatic DNA, fingerprint and vehicle data exchange system. This data exchange idea was on the agenda of an informal meeting of JHA ministers in March 2004, shortly after the bombings of Madrid. They had been informally discussed and agreed

upon at a G5 summit immediately before the Council meeting (BMI 2004). Minister Schily presented the idea to the Council, however, several Council members raised concerns, such as constitutional problems with intensive DNA- and fingerprinting data exchange (BMI 2004b; FAZ 2004). Consequently, Minister Schily implemented what he had announced in the Council. He had stressed "that, if all Member States did not agree to this [centralisation and comparison of biometric databases, databases on DNA and on illegal immigrants] *immediately*, then those that did should be able to decide to do so together" (Agence Europe 2004; emphasis added.) In line with this position, he consequently put this issue on the Pruem agenda. The German initiators did not reach their initial goals of *Rasterfahndung* and a European anti-riot police by way of club formation; rather, they introduced a new one to the agenda. This revealing flexibility substantiates the experimentation assumption and shows that the Pruem club represented a special short-term bypass forum to trade law enforcement policy ideas that did not reach sufficient response in the Council.

In identity terms, it is revealing that the club members decided to abstain from the public use of the club's internal emblem *Schengen III* in order "not to further stress the relation to the other member states and the Commission".[9] Aware of the far-reaching symbolical weight of repeating a Schengen style club initiative, the group tried to keep the political costs of exclusion as low as possible. In their first official statement presenting the scope and content of the initiative, the ministers underlined to form an *avant-garde*, a group of pioneers to enhance practical and operational conditions for internal security. The goal would be to initiate a dynamic process for closer and more intensive cooperation within the European Union (BMI 2003). The declaration ends with some short notes on its European context: The partners would take into account all developments at the Union's level in the relevant fields, all member states, as well as the European Commission would be informed regularly on the negotiations and their outcome and, finally, the initiative would be open for all member states (Gemeinsame Erklärung, 28 March 2004). This suggests that they did everything to capitalize from the Schengen experience by framing the initiative as a laboratory that is, providing a club good to all member states, except for denominating it a Schengen-III-initiative until the conclusion of negotiations.

(IV) Club activity: implementation and provision of the club good

[9] Interview, endnote 6.

Schengen did not become operational until the end of March 1995, and its activity phase outside the treaties lasted until the entry into force of the Amsterdam treaty on 1 May, 1999; the negotiations on the incorporation began at the end of 1996. Being a policy-making club and constituting an independent authoritative space, Schengen produced multiple club goods such as operational instruments like the Schengen Information System (SIS) generally on stolen property and wanted or missing persons, the SIRENE network that provides for supplementary information on SIS alerts and measures concerning migration, asylum and the Schengen border. In line with our general theoretical approach, den Boer (2001, 298ff.) reminds us that Schengen was established as a club of experimentation, with the original meta-objective to integrate it into the TEU as rapidly as possible (Picarra 1998; cited after den Boer 2001, 299).

It is a truism that the duration of an outside club with policy making capacity increases the issues at stake for the club members and the non-members alike. At the end, the legal output of the Schengen regime consisted of a total of 175 adopted decisions and 57 declarations (den Boer 2001, 306f). Furthermore, frequent accedence to the club further altered the asymmetry between the club and the non-members. The first new members were Italy (11/1990), Portugal and Spain (06/1991), followed by Austria (04/1995). The Nordic passport countries entered at the time the incorporation effort started (12/1996).

Schengen set up a fully independent bureaucracy, including institutions like the *Executive Committee* consisting of the representatives of the 13 signatories, Norway and Iceland, as well as, the observers from the European Commission and the Secretariat General of the Council, a *Schengen Secretariat* with about 60 employees managing about 200 meetings annually, a *Central Group* with a comparable function of the old K.4-Committee in the Council and of COREPER and a *Joint Control Authority* to control SIS data exchange (den Boer 2001, 300-302). Therefore, costs of operating the club and producing the club goods (3) were considerably high. Since the initiative was generally well received by European institutions, especially by the European Commission, political costs of exclusion (5) were certainly lower than in the Pruem case.

Learning from the Schengen case that led to a structure of "Byzantine complexity" (Philippart 2003, 4), the Pruem initiators kept the agenda narrow, did decide against new institutional arrangements, such as like new central databases, and aimed to transpose the club into the framework as quickly as possible. In fact, the treaty entered into force in Germany, Austria

and Spain in November 2006, after ratification in their national parliaments. Starting in September 2006, Wolfgang Schäuble, the new German minister of interior, campaigned for its incorporation into the TEU within the time frame of the German presidency in 2007. Literally in the last minute, Germany and Austria could demonstrate the legal and technical operability of the automatic DNA exchange system. First tests started in November. After having signed a final implementation agreement in December, they started to use the system just in time to present first results under the German presidency (Heise online 2006). Consequently, minister Schäuble was able to underpin his arguments for a quick incorporation into the TEU at the informal meeting of JHA ministers in Dresden in January 2007 with impressive numbers: "[A]fter only one month of its operation between Germany and Austria, more than 1500 DNA traces had been collected, which helped to confirm evidence in some 30 criminal cases and in nine sex cases" (Agence Europe 2007a). Apparently, these numbers were bound to create distorted impressions of the benefits from data exchange since they were based on a single effect of first connection of existing databases.

Costs of operating the club and producing the club goods (3) were significantly lower than in the Schengen case. Beyond that, they would not be reduced by transposition of the legal basis into the EU treaty. The political costs of exclusion (5) were certainly relatively higher. On the other hand, it has been shown in the club definition section that Schäuble's predecessor Schily held strong arguments for the club effort to put up a working system. However, since the club delivered the club good and declarations of membership increased (Finland and Italy were the first to declare interest to join the treaty in May and June 2006, followed by Slovenia and Portugal, Bulgaria, Romania, Sweden and Estonia), time was ripe for aiming to bring the club into the treaty framework. In both cases, the club members had already invested the costs of preparing (1) and concluding (2) the contract as well as the costs of not exactly meeting the individual preferences (4).

More importantly, both clubs comprised of a special club good at its core that had centripetal effects on non-members and, by the same effect, drove the club members to maximize membership, as Koelliker (2001; 2003; 2006) has shown for the Schengen (and Dublin) case. Standard club goods involve costs that balance themselves: costs of contracting the club and costs of not precisely meeting the preferences of the individual members. The standard example is a private pool: the more individuals who enter the club of pool users and share the costs of building and operating the pool, the less of such costs the individual has to bear. Then

again, the more crowded the club gets, the less the individual club member can enjoy his club good. The optimal balance of these costs represents the optimal size of the club. Schengen and Pruem comprise a club good that entails a different costs-benefits relationship: so called network club goods. Network club goods do not follow a rival consumption logic as the pool example shows: every new club member increases the value of the network club good. This holds true for databases, as well. The more data available the better, as data consumption is non rival. Schengen (with SIS) and Pruem consisted at the core of databases for law enforcement and preventive action. The optimal size of such clubs is the maximum possible. In both cases, the club members had an interest to incorporate or transpose the club into the treaty framework in order to increase the benefits from the databases' usage. In the Pruem case, minister Schäuble, mentioned that "if all 27 Member States are in favour, the EU will then have an "enormous body of data" which can be used to bring criminals to justice, but which can also be used preventatively" (Agence Europe 2007b).

(V) The incorporation endgame

The incorporation endgame starts with the proposition to incorporate or transpose the outside treaty club. In line with the arguments presented above, we can stipulate that the club members tried to finally meliorate the cost-benefit calculation in their favour. In order to reach this goal, the communitarization effort must in turn also improve the situation for the non-members. The network club good incentive is certainly one important stimulus. Incorporation, on the other hand, would end a club situation of splendid isolation in decision-making in the realm of public international law. This loss of independence would balance the benefits of incorporation to a certain degree. In addition, club members had to anticipate further bargaining costs since non-members held veto power. Accordingly, not all Schengen states were initially in favour of incorporation.

The comparative analysis of the cases reveals that incorporation endgames involve different necessary and beneficial conditions, and involve further factors (presented in table 1): the network character of a club good at the core of the club (1) as well as, increase in membership (2) have already been mentioned. Apparently the operability (3) of the policy arrangement at stake (producing the club good) is a further necessary condition. Beyond basic operability a certain (in-)maturity of club good production (4) seems to be a relevant factor influencing the outcome. Finally, incorporation endgames are directly related to the agenda setting power (5) of a Council presidency that acts as a policy entrepreneur within a macro-political window of

opportunity (6). In both cases, the presidencies pushing for incorporation were founding members of the club.

Schengen eventually became operational by the end of March 1995. Just three months later, the Amsterdam treaty reform process started with the convening of the reflection group that prepared the Intergovernmental Conference (IGC). The IGC eventually started in March 1996, and lasted until June 1997. The first two presidencies leading the IGC were Italy (first semester 1996), a new member to the Schengen regime, and Ireland (second semester), a non-member. In fact, only the subsequent Dutch presidency showed an inclination to the incorporation effort. "The proposal [...] was submitted at the end of 1996 by the then Dutch Minister of European Affairs, Michel Patijn" (den Boer 2001, 296). Yet, as commentators noted, one of the main problems in the incorporation process stems from the fact that the Schengen arrangement had not yet ripened to its full extent (den Boer and Corrado 1999, 399).

Table 1. Incorporation politics: Schengen and Pruem compared

	Schengen Regime	*Pruem Treaty*
Character of club good	network club good at the core of the arrangement: SIS	network club good at the core of the arrangement: automatic exchange of DNA and other data
Club growth	From 5 to 13 (15)	from 7 to 11
Operability of the club	March 1995	December 2006
Maturity of the club	Questionable	Questionable
Policy entrepreneur	Dutch minister Patjin and subsequent Council presidencies	German minister Schäuble and preceding presidencies
Macro situation in politics	Treaty reform aiming at reforming the 3rd pillar	No treaty reform
Positions	All members inclined to incorporation Initial adversaries do not change their core position	All members inclined to incorporation Original adversaries do not oppose Treaty (scope changed considerably)
Incorporation method	Technical implementation process	Political agreement decides on

	decides on which parts are to be incorporated and which not	parts to be incorporated
	Decision under time pressure, i. e. uncertainty	Decision under time pressure
	Political agreement: opt-out/opt-in solution of last resort	
	Unresolved problems, e. g. Treaty location of SIS	
Rest	Parts of arrangement remain outside	Parts of arrangement remain outside

In the Pruem case, no IGC was available for a transposition effort. However, since the Pruem regulations were far less complicated and complex, an incorporation scenario beneath the level of Treaty reform was available. According to several interviews done by Bellanova, three possible solutions were debated: (1) enhanced cooperation; (2) the *acquis* via the ratification of all member states; and (3) the adoption of one or more framework decisions or Council decisions. Finally, the parties agreed on the form of a Council decision (Bellanova 2008, 206). The policy entrepreneur in this transposition effort was the club initiator's minister of interior, Wolfgang Schäuble, Council president in JHA, in the first semester of 2007. As already mentioned above, Austria and Germany could demonstrate the technical operability of the automatic DNA exchange system, literally in the last minute.

Incorporation politics in the Schengen case show that the initial veto-players had not changed their policy stance, as can be seen at the IGC 1996/97. At first, the proposition to incorporate Schengen into the TEU was not well received by the IGC. In particular, the United Kingdom and Ireland took an extremely reluctant view regarding the proposal (den Boer 2001, 296). Their cost-benefit calculation had not changed significantly in the meantime. Moreover, during the Irish EU Presidency, still only seven Member States endorsed a possible integration scenario: the BENELUX countries, Austria, Germany, Italy and Spain. Apparently, other club members feared that incorporation costs (e. g., in terms of decreased leeway in policy making by bringing in member states with starkly deviant preferences) would be too high compared to the expected increase in benefits. Only the persuasive force of the Dutch Presidency, which devoted a considerable amount of time to informal discussion on the Schengen issue during April 1997, convinced also the initially sceptical Schengen members to incorporate all existing Schengen legislation (Stubb 2002, 95). How did the club

members approach the originally bypassed blocking veto players? In stark contrast to the Maastricht negotiations, where the opt-outs for Britain from EMU and the Social Agreement were subject to fierce debate in the IGC 1996/97, in this case, no one talked about special arrangements for the United Kingdom, Ireland and Denmark (Stubb 2002, 94). In line with this, the Schengen debate took centre stage just in the last two months of the IGC negotiations with the United Kingdom and Ireland being the key players. These delegations sought to make sure that their specific concerns would be reflected in the Schengen Agreement draft texts (Stubb 2002, 98). Comparably to Maastricht, instruments of flexibility were introduced *ad hoc* as bargaining tools in order to secure unanimity on the whole treaty reform.

In the end, the price for unanimous approval at Amsterdam had been a thoroughly compromised and complex incorporation process that is full of opt-ins and safety valves (den Boer 2001, 302). Denmark can choose whether or not to apply any new measures taken under Title IV of the EC Treaty within the EU framework, even those that constitute a development of the Schengen *acquis*. However, Denmark is bound by certain measures under the common visa policy. Ireland and the United Kingdom can take part in some or all of the Schengen arrangements, if the Schengen Member States and the government representative of the country in question vote unanimously in favour within the Council. Astonishingly, both Ireland and UK did not take part in SIS as our theoretical considerations have suggested. However, Denmark, in line with our reasoning, did. This is a puzzle related more to the politics of the endgame than to the theory since, finally, both countries decided to pick this network good on the basis of the rights granted by the Amsterdam protocols: the UK asked to collaborate in police and judicial cooperation in criminal matters, the fight against drugs and the SIS in March 1999, and Ireland did the same in June 2000, broadly speaking, regarding the same aspects.

On the other hand, the club members succeeded at least in bringing much of their arrangement into the TEU. The process in which the Schengen *acquis* has been defined and allocated (establishment of the legal base) was heavily submerged in politics. To illustrate: it took the 13 Schengen states more than one and a half years to reach unanimous agreement on what should be included in the Schengen *acquis* for the purpose of its incorporation (den Boer 2001, 304f.). Finally, the Council Decision determining the legal basis for each of the provisions or decisions which constitute this *acquis* was only adopted three weeks after the entry into force of the new Treaty, on 20 May, 1999 (OJ L 176 of 10.7.1999, pp. 17-30; cited

after den Boer 2001, 310). Some major conflicts, like the allocation of the C-SIS bureau, remained unresolved even much longer. In sum, we can hold that the Schengen incorporation process did not reach the goal of re-establishing uniformity of all EU member states, but instead transformed a club outside the treaty framework into a club within the Union at considerable cost. These costs resulted from a highly contingent process triggered by political decisions made under a high degree of uncertainty under enormous time pressure. Besides that, some of the Schengen regulations remained untouched outside the treaties and have gone unnoticed since then.

Compared to the Schengen case, the inclination of Germany and the fellow club members to transpose the Pruem instruments and regulations into the TEU framework is apparent, as is their costs-benefits calculus. Most of the costs invested would remain stable; even the political costs of exclusion of EU players – given the candid inclination to "Europeanize" a well working and useful law enforcement toolbox. Transposition raises some incorporation costs, but increases benefits from additional available data. If incorporation failed, then the related costs and benefits would both fall; the club continued to exist and to provide the club good in a slightly smaller version. The non-members calculus would entail the costs of establishment or adaptation of their DNA databases since they had to accept the system set up by the Pruem members. Furthermore, the Pruem Treaty contained regulations on air marshals, document advisors and repatriation measures that would alter existing Schengen practices and, therefore, raise considerable "sovereignty" costs for non-Schengen members. The benefits of a working system of data exchange connecting a great number of national databases are obvious. Part of the calculation of benefits by non-Pruem governments might be the political-legal obligation to set up DNA databases stemming from the transposition and possibility to avoid complex discussions at the national level, as some interviews conducted by Bellanova (2003, 212) suggest.

In fact, the bargaining under the auspices of the German presidency revealed that both sides agreed to transpose the regulations on data exchange into the TEU framework. In order to reach this agreement in an extraordinarily short timeframe, the German presidency kept the dossier at the Article 36 Committee (CATS) level by not involving the working party on Police Cooperation that would normally be involved.[10] Furthermore, it set the time limit for the European Parliament's obligatory consultation as short as possible. It transmitted the

[10] Interview with an official representing Austria in the Art.-36-committee, Austrian Ministry of Interior, 13 November 2009.

proposal for a Council resolution on 13 March, 2007. Under the consultation procedure the EP has three months to give its opinion; it, therefore, voted on 7 June, 2007. Within this timeframe, it was nearly impossible to scrutinize the proposal in depth. However, the LIBE committee even managed to organize a public hearing on the Pruem decision in May 2007.[11]
A last point underlines the presidencies' decisive role as a policy entrepreneur in the endgame: The previous presidencies held by Austria and Finland did a lot to block "rival" or overlapping policy proposals from the Commission to pave the way for the Pruem transposition initiative (Kietz 2007, 65).
Beyond this substantial pushing of the dossier, the Presidency showed considerable flexibility by removing pillar 1 provisions from the initial text, as the United Kingdom and Ireland demanded (Agence Europe 2007a; Bellanova 2006, 209-210). Reservations concerning the high costs of putting compatible databases into place were raised by some of the non members, notably the United Kingdom, Ireland, Poland and the Czech Republic. These bargaining positions were answered by promises of financial help by Commission funds (Agence Europe 2007a). Still, during the German presidency, the Council unanimously decided on an implementation agreement that was formally adopted after the EP's consultation and the consultation of the Data Protection Supervisor on 26 June, 2008.
In sum, this second transposition process went far more smoothly than the one of Schengen. All member states reached a unanimous agreement on the transposition of distinct parts of the treaty including the network club good. Of course, this process also shows that successful incorporation comes at the price of some parts of the club remaining outside the treaty framework in the twilight of pure inter-governmentalism.

CONCLUSION AND FURTHER RESEARCH AVENUES

This article presents two cases of tactical club formation in the domain of EU Justice and Home Affairs. Both the Schengen regime, as well as the Pruem Treaty, started as outside EU initiatives after policy proposals had been blocked in the Council or the European Council. Reluctant veto players were bypassed in the club based on public international law. Both differentiation arrangements have been partly incorporated into the TEU as soon as the laboratories went operational and began to produce output. As they ended by policy change, both cases represent successful differentiation arrangements from the point of view of

[11] The Pruem decision: Striking a balance between data protection and effective police cooperation? Public Hearing, 7 May 2007, Brussels, OJ/664063EN.

strategic reasoning. However, the club's trajectories reveal that contingencies and *ad hoc* solutions interfere with strategic calculations to a significant degree. The laboratories' success, hence, comes at considerable costs of fragmentation and inefficiencies.

From a theoretical point of view, these insights stimulate questions concerning the costs and benefits of these politics of differentiated integration, as well as the conditions that led to the final outcome. A closer comparative inquiry of the club's main stages reveals, firstly, that club formation is far less deliberate and calculated and far more experimental than normally assumed (main stages (II) and (III)). Secondly, by taking into account the motivations and goals of the club promoters, my investigation reveals that both cases showed strong efforts to legitimize the differentiation attempt. The discursive nodal point in this effort is the notion of "laboratory". This *topos* allows the club initiators to legitimize this move by objectives that serve the whole Union and to generate a distinct club identity. I conclude that the officials reassured themselves of a Schengen replay, but had been sensitive to the impact this replay would have on other member states and the European Commission. Consequently, the definition stage in the Pruem process reveals considerable signs of strategic policy learning (III). Thirdly, the investigation of the main stages (IV) activity phase and (V) incorporation endgame shows that in both cases, club promoters tried to bring the arrangement into the TEU as soon as possible after it became operable. From the investigation we also learn that the laboratory function was restricted to aspects of legitimacy (reducing the costs of exclusion) and decision-making, but not in establishing well functioning policy instruments. Concerning the conditions for incorporation, I conclude from my investigation that success depends on the inclination of a strong Council presidency and the members of the differentiation arrangement, as well as the interest of the outsiders. Furthermore, I hold that incorporation depends on the character of the public good represented by the differentiation's policy arrangement. From my analysis, I conclude that incorporation under the condition of unanimity leads to a pick-and-choose approach that resembles differentiated integration á la carte on a micro level. As a result, outside treaty clubs lead to fragmentation. In addition, time pressure and bargaining dynamics preclude the effective search for efficient policy solutions and create considerable political, legal and bureaucratic problems, representing the costs of the politics of differentiated integration. These costs increase with the clubs' range of club goods. The smaller a club, the less it generates incorporation problems.

By way of conclusion, this article demonstrates the potential of a theory of clubs perspective to theorize politics of differentiated integration. I suggest expanding the comparison to further differentiation efforts, both successful and unsuccessful ones. Additionally, it would be of major importance to carry out further research on the development of positions of the club member and the non-members with special emphasis on the incorporation endgame.

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