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The European Security Vanguard? Prüm, Heiligendamm and Flexible Integration Theory

Abstract:

The main purpose of this paper is to better understand the political importance of the so-called G6 group that unites the Interior ministers of the six biggest EU member states. Furthermore, some of the implications of the Prüm Convention will be discussed, as the group of Prüm signatories has been compared elsewhere to the G6. However, this paper also hopes to contribute to the wider discussion of the phenomenon of ‘flexible integration’ in area of Justice and Home Affairs. Thus, after a brief historical overview of this issue, a relatively unknown theory of flexible integration will be presented, and briefly applied to the case of the Prüm Convention. This will serve as a springboard to engage in a wider theoretical and normative discussion of different kinds of groups that cooperate on Justice and Home Affairs, while focusing in particular on the G6. In conclusion, I will agree with other commentators on these issues that the G6 and the Prüm Convention should be subjected to stringent normative criticism. However, I will also argue that the G6 rather than the Prüm Convention should generate more critical attention, and, above all, political opposition, even if the G6’s existence may have to be accepted as an expression of the power-political realities in an enlarged EU.

1. The G6 controversy

Before its last meeting in Heiligendamm in March 2006, this informal group of Justice and Interior ministers from the biggest member states numbered only five (Germany, France, Spain, Italy, UK), and thus was known as the G5. The G5 has existed since 2003, and was founded on the initiative of France. However, only since its “enlargement” in 2006 to include Poland did the G6 attract wider critical attention. Most significantly, the House of Lords European Union Committee looked into the matter and recently published an extensive report entitled “Behind Closed Doors: the meeting of the G6 Interior Ministers at Heiligendamm” (House of Lords 19/07/2006).

The title already gives away the critical edge, which was surprisingly sharp. The report primarily criticised the lack of transparency and publicity around the meeting in Heiligendamm and similar ones in the past, because they may be of considerable importance for the direction of EU as well as national Justice and Home Affairs policies¹: for instance, in its last meeting the G6 promoted and adopted measures related to the fight against terrorism and transnational crime, essential aspects of immigration policy as well as to the construction and elaboration of European criminal databases (Bundesministerium des Innern 23/06/06). The peers regarded the fact that the conclusions to the meetings were only published on a website in the country holding the meeting (in this latest instance on the website of the German ministry of interior) as insufficient. On top of demanding translations and a much more active dissemination of conclusions, some peers also expressed their interest in seeing advance agendas of these meetings. The peers did not accept the argument brought forward by

¹ In this paper I will continue to use “Justice and Home Affairs” as a general term, as the discussion goes beyond the activities of EU institutions that officially use the expressions of “Justice, Liberty and Security” or the “Area of Freedom Justice and Security”.

junior UK government representatives that these meetings are merely informal, and therefore, relatively unimportant, and that this very informality required increased confidentiality.

Apart from such procedural aspects of the meetings, the report also reproduced hearings in which the very *raison d'être* of the G6 was critically discussed. The peers basically accepted the right of the UK government to meet some of its European partners outside the formal context of the EU, but said that due to their decisive weight, the big six should not try “to ride roughshod” over the 19 smaller member states (p.8). In this context, they drew the parallel to the Prüm Convention which is also central to this paper. The report deserves to be quoted at some length here for its very candid language:

The G6 should recognise that they are not the *Europe des Six*.

Inter-governmental groupings of this type, which lack the basic democratic requirements of accountability and transparency, have in the past led to the Schengen agreement and the Schengen Convention. Neither EU citizens, nor their representatives, nor indeed those Member States that were not originally part of the Schengen group, had any say on these policies of fundamental importance. They were presented with a *fait accompli*.

A more recent example is the Prüm group...This to our mind is a perfect illustration of the dangers of a small group of Member States taking steps which pre-empt negotiations already taking place within the EU institutions. Article 1(2) of the Prüm Convention provides that any Member State may accede to it, and Article 1(4) sets out the aim “of incorporating the provisions of the Convention into the legal framework of the European Union”. But those provisions are now set in stone, and are being treated as if they were already part of EU policy...If the Convention does become part of the legal framework of the EU, that framework will for practical purposes have been imposed by seven Member States on the other eighteen.

(House of Lords 19/07/2006: 8-9)

2. The wider controversy over 'flexible' European integration in Justice and Home Affairs

Generally speaking, European cooperation on Home and Justice Affairs outside the EU Treaties has increasingly come under fire, even if – or precisely because – the policies are mostly known to specialist circles. The Prüm Convention referred to by the peers in the above citation is perhaps only the most important recent example of such rather secretive policy initiatives and has been harshly criticized as such (Balzacq, Bigo et al. 01/2006). More fundamentally, Balzacq et al. (*ibid.*) have also argued that the Prüm Convention weakens the EU as an effective actor in Justice and Home Affairs, as it undermines the trust in, as well as the coherence and transparency of, EU security policies.

This current debate on cooperation in Justice and Home Affairs outside the formal EU framework draws on an older more general debate on the merits and dangers of 'flexible' or 'differentiated' integration inside the EU. Therefore, I will very briefly present some historical context on the issue of flexible integration² before turning to a particular theory of flexible integration that can help to clarify some long-term policy developments. I will then summarize what this theory leads one to expect in the case of the Prüm Convention. Next, I will also highlight how this theory may be insufficient to understand the dynamics G6. Consequently, I will argue that one needs to distinguish more carefully between different groups of states that promote initiatives of flexible integration. That is, blanket critiques of flexible integration that lump the Prüm Convention and the G6 together may be somewhat imprecise. Finally, I will make the case that the G6 is potentially more problematic than the Prüm Convention, as the former plays a more direct role in the EU decision-making process than the latter.

² However, it is far beyond the scope of this article to give an fully adequate historical discussion of the issue. There extensive literature on this issue best summarized in Stubb (2002).

Throughout the paper, the term ‘flexible integration’ will be used very loosely. This is somewhat imprecise, as there are important variations of the phenomenon such as ‘opt-outs’ or ‘enhanced cooperation’, which have implication from the standpoint of EU Treaty law. There is also a variety of terms used in political debates, such as ‘core Europe’, Europe ‘*à la carte*’, Europe of ‘variable geometry’ or of ‘*deux vitesses*’. I can only refer to other academic works that have admirably disentangled the various legal, political and historical implications of each of these and several other terms (e.g. Wallace and Wallace 1995; Stubb 1996; Shaw 2002; Stubb 2002; Dehousse, Coussens et al. 2004; Er 2004). Yet these terminological distinctions are not important to my argument, as should become clear over the course of this paper. Therefore, as well as for simple reasons of space, this paper will content itself with a very open-ended understanding of ‘flexible integration’³ as any form of systematic cooperation on substantial policy issues⁴ between a group of - in contrast to all - European Union member states, be this cooperation institutionalized or not, or legally inside or outside the Treaties⁵.

³ The term ‘differentiated integration’ is also very frequently used, but here I will stick to ‘flexibility’ as the wider concept. ‘Flexibility’ seems to have been the most general buzz-word in policy-making circles, see Wallace, H. (2000).

⁴ This implies that ‘opt-outs’ from existing EU arrangements are not covered by this understanding of flexible integration, as it focuses on instances of cooperation, rather than the absence of such cooperation. However, opt-outs come indirectly into the picture, in so far as they are the response to an extension of such flexible integration initiatives to the whole Union.

⁵ As will be mentioned further on, all existing instances of such flexible integration do actually take place outside the Treaties, even if there are legal provisions for enhanced cooperation under the Amsterdam and Nice Treaty.

3. The historical controversy over flexible integration

Already during 1990s the traditional ‘Community method’, based on common, formal deliberation in the EU institutions leading to legally binding decisions, was on the retreat (Wallace and Wallace 1995). The Amsterdam Treaty that aimed to regulate the use of flexible integration, just as it made arrangements for the inclusion of the Schengen accord into the *acquis*, formalized this ongoing trend (Walker 1998; Stubb 1999). One reason for the growing popularity of flexibility over the course of 1990s were ‘new’ European integration projects in areas of ‘high politics’, such as Defense and Justice and Home Affairs, so that national sovereignty came to be defended more strongly. Furthermore, opposition to the Community method or any binding EU decision was strengthened by an increasing politicization of the issue European integration as such and by changing power balances among the growing and increasingly diverse number of member states (Wallace 2000). Yet also precisely because of these and several other obstacles to communal decision-making, flexible forms of European cooperation became increasingly attractive to a number of member states that liked to press ahead with integration⁶.

However, proposals for the formation of a “hard core” around the Franco-German alliance and the “Founding Six”, which had kicked off the discussion over flexible or differentiated integration around 1994 (Stubb 2002: ch.3), never took concrete shape. Therefore, fears of a permanent and formal division of Europe, with a clear hierarchy between an inner circle and the marginalized rest, have mostly been put to rest by now (*ibid*: 119-21). Already the larger than originally expected number of EMU participants spoke against the formation of such a small hard core (Wallace 2000: 181). And even if the idea was still discussed during the

⁶ For a nice discussion of these convergent pressures for more flexible integration from the opposite directions of the ‘autonomist’ and ‘integrationist’ states, see Leslie, P. (2000).

European Convention (Dehousse, Coussens et al. 2004), the negative French referendum on draft constitutional treaty could be regarded as the final nail on the coffin, as no core EU could form without the leadership or at the least the inclusion of France. Therefore, policy-specific and cross-cutting trends of divergence and convergence across various political levels in the EU, rather than cores or concentric circles, have increasingly attracted academic and political attention (e.g. Dimitrova and Steunenberg 2000).⁷ Any area of EU integration has by now been analysed in light of the inevitably “differentiated” responses or adaptations of national and sub-national governments (Thym 2004; Andersen and Sitter 2006). Still, this rediscovered ubiquity of differentiation and flexibility across European member states does not imply that instances of flexible integration between EU member states have become uncontroversial.

Rather, the controversy over flexible integration is alive and well, but perhaps in a slightly different form than during the 1990s.⁸ This is underlined by the fact that the legal provisions for “enhanced cooperation”, which were the object of intense discussion at Amsterdam and Nice (Stubbs 2002: ch.4 & 5) and were meant to regulate the use of flexibility within the EU, so far have not been used in the new millennium (Guske 2004). That is, instead of discussing the relation between flexibility and the formal constitutional structure of the EU, the debate is now more on particular policy issues and the *informal* exercise of power in the EU. For instance, the alleged formation of an informal ‘*directoire*’ in the second pillar, consisting of the “big three” UK, France and Germany, provoked much controversy in recent years (Dehousse, Coussens et al. 2004: 45): most notoriously, it led to the diplomatic scandal of the so-called “bring your own bottle dinner” in November 2001. On this occasion Blair had invited Chirac and Schröder for an informal meeting to discuss the situation in Afghanistan

⁷ For the most sweeping recent analysis of the EU in this light, see Zielonka, J. (2006).

⁸ For an excellent summary of the key points of the political debate during that period, see Hall, B. (2000).

and the wider direction of European foreign policy after September 11. Yet Verhofstadt, Berlusconi, Solana, Aznar and Wim Kok stirred up political opposition against the informal approach of big three and forced their entry into this exclusive meeting. However, there is also widespread recognition that key European foreign policy issues need the leadership the ‘big three’, so that such open opposition to the *directoire* seems to alternate with calls for giving it more substance (Missiroli 1999; Pernice and Thym 2002; Dinan 2005: 600-1). In sum, the political debate over the merits and threats of flexible integration continues unabated; but just as the current debate goes beyond the legal arrangements for flexible or, properly speaking, ‘enhanced’ cooperation, it has moved on from grand schemes for a core EU to more informal groupings of EU member states that cooperate flexibly in specific policy areas.

4. A theory of flexible integration

There is a large number of academic works and theoretical discussions of flexible integration, which I cannot discuss in this paper. Here I would only like to focus on one theory of flexible integration that has mainly been developed by Alkuin Kölliker (Kölliker and Milner 2000; Kölliker 2001; Kölliker 2006). Kölliker’s theory parsimoniously conceptualizes the likely long-term consequences of flexible integration and generates interesting predictions, even if this is purchased at the cost of considerable abstraction and is based on perhaps questionable rationalist assumptions.⁹ Although I cannot fully expound his theory that has been widely discussed so far, I will endeavour to summarize it intelligibly for readers who may also be unfamiliar with the more general theory of public goods that forms the basis of his approach.

⁹ The theory is based on assumptions that states can be treated as unitary rational actors that act on the basis of a logic of expected consequences and rationally calculated costs and benefits of different courses of action

Köllicker essentially argues that the long-term consequences of any instance of flexible integration depend on the nature of the “good” that it aims to generate. Some goods have “centrifugal” and other “centripetal” effects: i.e. they can either induce initially unwilling outsiders to sign up to the initial group of cooperating states, or they can drive them further away from cooperation (or leave them indifferent). Whether such centrifugal or centripetal effects ensue, is mainly determined by two qualities that are central to the study of public goods: a) the degree of excludability b) the rivalry of consumption. The degree of excludability determines in how far benefits of the good can be limited to its producers. The category ‘rivalry of consumption’ denotes whether a good is diminished by an increasing number of consumers or not. Based on these criteria of excludability, which takes on the expressions of either ‘excludable’ or ‘non-excludable’, and of rivalry of consumption, which is either ‘positive’, ‘neutral’ or ‘negative’, there are six types: private goods, club goods, excludable network goods, common pool resources, public goods, and non-excludable network goods.

Private goods are goods that are exclusive to insiders, but whose consumption is rival. This means that an increase in the number of insiders/consumers diminishes the collective benefit. An example would be private hunting grounds. Club goods are also exclusive, but their consumption is neutral. That is, membership can increase without decreasing benefits, while the production costs for the club good may even go down. Examples for club goods are obvious by the name of it, e.g. sport clubs. Excludable network goods are goods that are also exclusive to insiders, but whose rivalry in consumption is negative. This means that the more consumers there are, the better, while the benefits are still exclusive to insiders. For instance, every user of a computer operating system benefits from an increase of the overall number of users (negative rivalry), while it is protected so that all users have pay for it (excludability), which ensures the continued development (upgrading) of the product. Public goods are goods

whose benefits are not exclusive to insiders or producers, but whose consumption is non-rival. Street-lighting would be a classic example: it is paid for by the tax-payer, but benefits everybody, tax-payer or not, and its use does not diminish with an increasing number of beneficiaries. Non-excludable network goods again benefit from an increase in numbers, but there is an incentive not to contribute to their creation, i.e. to ‘free-ride’, as the benefits are not limited to insiders. Software piracy of operating systems furnishes one example: it is still generally advantageous for every users if there are more users that use the same operating system, as they jointly have a bigger market share and can share more data, even if some software pirates are ‘free-riding’ on the payments of others who have legally bought the operating system. Finally, common pool resources are both rivalry in consumption and hard to limit to an in-group of consumers. Natural resources, such as fish stock or oil, are the classic examples. As there is rivalry of consumption, i.e. every consumer diminishes the amount of available goods, there is a strong systemic incentive to regulate consumption so as to avoid over-exploitation. Yet as it is hard to exclude from outsiders, there is very little individual willingness to accept limitations, as it may just help outsiders that do not take part in the regulation to exploit more of the resource for themselves.

There is no need to go into further details of public goods theory, nor can I claim any particular expertise in this field. The essential point is that different kinds of goods generate different incentives: Excludable network goods provide the strongest incentive to join, whereas common pool resources give the strongest incentive to free-ride. This, in turn, translates into ‘centripetal’ or ‘centrifugal’ policy-dynamics. In short, excludable network goods are most attractive to outsiders, as there are increasing and exclusive benefits for every new insider compared to the falling costs of joining – centripetal effects ensue. This means that states that did not initially form part of a cooperation agreement are likely to accede later on. By contrast, the regulation of common pool resources is costly to insiders, whereas

outsiders can happily exploit the resource and even take advantage of the self-constraint of insiders by consuming more of the latter's share – centrifugal effects ensue. This means that it is not only unlikely that new states join a cooperation agreement, but there is also a need for strong enforcement mechanisms to constrain insiders. The other four kinds of goods fall between the poles of centripetal and centrifugal forces.

Furthermore, one needs to calculate the potential costs of staying outside an agreement for international cooperation, which off-set some of the incentives to free-ride. For instance, in the case of a free-trade area, which is generally speaking an excludable “club good” of neutral consumption, non-participating countries may also profit from the general rise of prosperity in their neighbourhood, which favours free-riding. However, their national economies may also suffer if their companies cannot compete with enterprises from the free-trade zone that operate on different economies of scale inside the zone. So outsiders may bear a cost, or a ‘negative externality’, of the free-trade zone, with the result that they may be induced to join, even if participation would cost them in tariff revenues and they would rather prefer that the free-trade zone did not exist at all. Finally, - and here Kölliker's theory may need to be slightly modified as he does not consider this aspect – an increase in the number of insiders may sometimes increase rather than decrease the production costs of the public good (Ahrens, Hoen et al. 2005), regardless of whether consumption is rival or not: i.e. do new members make the running of the club more or less expensive for every existing member? If one assumes relatively fixed costs, these may be split – yet if the “club rules” are stringent or based on informal trust, then an increase in membership may make enforcement more difficult or require the elaboration of more formal rules, both of which makes membership more onerous for all. So although outsiders may want to join, they may be barred from doing so by insiders, which counteracts the centripetal policy dynamics of public goods.

5. A brief theoretical analysis of Schengen and the Prüm Convention

This is only a rough summary of the theory of flexible integration. Nevertheless, it is still rather easy to see how one may theoretically deduce whether certain forms of flexible integration may develop centripetal dynamics and thus come to be extended to the whole of the EU, or whether the opposite is likely to happen. To turn to European JHA policies, the general argument is that this policy area mostly consists of excludable club goods or of even excludable network goods. Therefore, there are strong incentives for outsiders to join any pioneering initiatives of flexible integration in this field. Kölliker spells out this argument in relation to the original Schengen agreement (2006: ch. 4). The Schengen Treaty primarily generated excludable network goods, as an increasing number of states increased the power of the data-sharing arrangements and the benefits of free mobility relative to its set-up and running costs. Furthermore, with an increasing size of the Schengen area, there have also arguably been rising negative externalities to outsiders, such as displacement effects of criminality and asylum applications, providing more incentives for signing up. Thus, it is not surprising that the Schengen Treaty was not only extended to most of the EU, but even beyond its borders. Furthermore, although a few states secured an ‘opt-out’ from the Treaty, the UK, for instance, sought, and eventually managed, to take part in the most clearly identifiable “network goods” of the Schengen Treaty, i.e. the Schengen Information System.

Thus, Kölliker’s theory gives a much more convincing explanation for the ‘success’ of Schengen than the rather vague arguments that it served as a “laboratory” for cooperation (Monar 2001). The “laboratory” function may have supported the overall centripetal policy dynamics, as transaction costs could be decreased by exploring possible forms of cooperation. Yet it seems hard to see why, for instance, Switzerland may be interested in taking part in an EU ‘laboratory’ for deeper international cooperation, were it not for the concrete benefits and

negative externalities that Schengen gradually created. Public goods theory can also make more sense of the demanding and fairly rigid nature of the Schengen *acquis*, whereas the metaphor of a laboratory evokes openness, experimentation and flexibility, which nowadays would be associated with the Open Method of Coordination. As has been discussed in the previous section, any common good, such as the sharing of sensitive security data, can become more costly to produce with an increase in the number of participants. Therefore, insiders may not easily allow new outsiders to participate, even if the latter are keen to join, and are likely to impose strict convergence conditions that will keep the production costs of the common good as low as possible. This is clearly what has happened with the extension of Schengen agreement to new members, even before it became part of the *acquis*.¹⁰ Although this aspect of trade-offs between the number of participants and production costs of the public good would merit a more extensive discussion (see e.g. Majone 2005: 106), this unfortunately cannot be undertaken here.

The key point for now is that there are good theoretical -and not merely historical or metaphorical¹¹ - reasons to expect a continuation of Schengen-style extension and ratification dynamics in the case of the Prüm Convention. Its core provisions clearly deal with increased and improved data exchanges¹² and with standards of operational cooperation between national security agencies.¹³ Confidential data exchange arrangements can easily be classified as exclusive network goods, whereas standards of operational cooperation are exclusive club goods, i.e. they serve as the basis for more effective security cooperation within the 'Prüm Club'. As has just been argued, exclusive club goods and particularly exclusive network

¹⁰ The current exclusion of the new member states from Schengen may be more to do with the concerns over labour mobility. But even in this case the issue of common standards and interoperability, i.e. lower common production costs, are very salient: The new member states will now have to wait for yet two years before being allowed to join Schengen due to such technical problems (Financial Times Deutschland 11/09/2006)

¹¹ This refers back to the persistent metaphor of a laboratory for cooperation that Prüm inherited from Schengen.

¹² See the preamble and Art.1.1 of the Convention of Prüm, on top of Art.2-22 that specify concrete measures

¹³ See, for instance, Art.7 & 22-32. Moreover, every measure in the Convention should be supported by the establishment of national contact points (summary Art. 42.1).

goods are most likely to lead to centripetal dynamics, creating increasing incentives for outsiders to sign up. That is, we can expect that the Prüm Convention will fare similar to the Schengen Agreement, and will eventually come to be part of the *acquis*, just as the preamble to the Prüm Convention foresees. Recent developments are in line with this prediction: Italy has already expressed the intent to join the Prüm group, and Finland allegedly is posed to sign on soon (Bundesministerium des Innern 04/07/2006), which, in turn, will probably lead to the extension of the Convention to the Nordic States over time. This more or less only leaves the UK as the only significant outlier, just as with Schengen, while it would be highly surprising if Greece and the new member states would opt out, if they are given the choice to opt in. And even while there may be formal problems for the UK to join Prüm, in the context of the G6 the UK has already expressed interest in arrangements for increased data sharing and police cooperation that the Prüm Convention developed.¹⁴

Thus, I would not agree with Balzaq et al. (2006) on at least one of the three criticisms they raise in relation to the Prüm Convention. As already mentioned, they have argued that the Convention has three serious deleterious effects, namely on trust, coherence and transparency in the Third Pillar. I fully concur that trust and transparency are very likely to be undermined: the Convention was elaborated by a small group of member states and marginalises more democratic decision-making bodies in JHA affairs, such as the European Parliament. The House of Lords report cited in the beginning similarly bemoaned the lack of wider participation in the elaboration of the Convention. Yet there is one difference in relation to the issue of coherence. The Lords rightly criticized a lack of participation, because policies that have been agreed in Prüm are likely to become binding within the EU, not because they threaten to fragment the Union. This is in line with theoretical argument developed so far: Prüm is not likely to lead to undermine the ‘coherence’ of EU JHA policies, at least not over

¹⁴ This point will be briefly taken up towards the end of this paper.

the long-term when centripetal policy dynamics have had time to unfold. Initial outsiders to the Convention will eventually feel compelled to join, which eventually will lead up to the formal adoption of the Convention into *acquis*.

Thus, it may be perhaps too strong to state that “Prüm weakens the EU more than it strengthens it, and ... it simply cannot provide the way forward to the establishment of a manageable area of freedom, security and justice” (Balzacq, Bigo et al. 01/2006: 1). This is not to say that some of the provisions of Prüm Convention may not create new difficult transition and ratification periods. Yet, in my view, this is a lesser technical problem in comparison to the question of deeper and long-term coherence of the Area of Freedom, Security and Justice. To be clear, persistent differentiation and flexibility in European JHA cooperation is more than likely, as there are already a number of important opt-outs and transition periods in the Third Pillar. But it seems that the EU has managed this degree of complexity reasonably well so far, and has come already quite some way in constructing the envisaged Area of Freedom Security and Justice.¹⁵ Therefore, as much as one may and should criticise the current Prüm Convention and the entire Schengen regime from a normative point of view (e.g. Bigo and Guild 2005), it is likely that the technical capabilities of the EU as an internal security actor will rather be strengthened over the long-term by such initiatives.

¹⁵ Thus, it has been repeatedly remarked that the formation of the ASFJ is perhaps the next biggest success story of the EU after the Single Market. See, for instance, Kaunert, C. (2005).

6. The limitations of functional theorizing and the political dimensions of the G6

So far I have presented the Prüm Convention as an example of a possible ‘attractor’ to outsiders based on functional policy-dynamics. This casts the ‘Prüm Group’ in the role of a *vanguard*, which is meant to create momentum for change and to overcome collective action problems. Ideally speaking, such a vanguard role is meant to be based on direct political pressure, but rather on leadership ‘by example’. That is, centripetal policy dynamics may push initially unwilling outsiders to cooperate so that their ‘free choice’ is diminished; but formally there is no coercion involved. Accordingly, outsiders with very intense preferences against the extension of cooperation to the entire EU so far have managed to obtain opt-outs, be it from Schengen, EMU or European Defence initiatives.¹⁶

However, this kind of functional reasoning about centripetal policy dynamics may not easily be transferred to the G6. The very fact that the Prüm agreement is a Convention, and therefore, a single package that can be more-or-less assessed as a whole in terms of its incentives and policy dynamics facilitates the theoretical argument. That is, even if there are perhaps several unattractive features to the Convention, the package as a whole may be attractive enough for outsiders to want to sign up. The G6 group, by contrast, so far has only agreed on measures and initiatives in a rather loose and informal manner, so that a pick-and-mix approach and loose national implementation of the agreements are much more likely. Rather than being able to assert theoretically that the initiatives agreed on by the G6 may have centrifugal or centripetal effects on outsiders, it would, thus, be necessary to look at each measure in isolation. However, such a detailed analysis will not be undertaken here. This is not primarily because of empirical constraints. Rather, this lack of clear policy incentives points to the somewhat different nature and rationale of the G6 in contrast to the Prüm Group.

¹⁶ For an interesting discussion of the dynamics of political choice behind various opt-outs, see Sion, M. (2003).

As will be more extensively discussed in the last section of this paper, there are different political implications to the cooperation among a strong bloc of member states, such as the G6. Rather than having to wait for unfolding centripetal policy-dynamics to induce initially unwilling outsiders to sign up, a group like the G6 can weigh directly on the EU institutions to promote their agenda at the collective level, which more-or-less excludes the possibility of opt-outs.¹⁷ Partly this can also be inferred on the basis of the previous theoretical argument: Initiatives of flexible integration, which are usually costly to participants, are only likely to be engaged in if outsiders cannot free-ride, or are likely to be compelled to join over the longer term. By contrast, policies that are not likely to generate such incentives may more effectively be regulated by binding policies in common institutions. Thus, one should not only expect the formation of avant-gardes that lead by example, but also of lobby groups that try to exert direct political power. The political manoeuvrings over restrictive immigration and border control policies, which may be ‘in the interest’ of receiving countries, but may be costly to border countries are an example, (e.g. Charlemagne 14/09/2006; Phuong 2003). Accordingly, the G5/6 have been very concerned to tighten immigration policies among themselves (e.g. République Française 05/07/2005: 3), just as they supported restrictive EU policies, such as on the development of a system of liaisons officers (Amnesty International 12/2005: 8).

Although not illegitimate by definition, lobby groups may distort democratic or constitutional decision-making procedures. Lobbies may, furthermore, be particularly undemocratic in so far as they are often small exclusive clubs that aim for maximum political coherence and clout. This stands in contrast with vanguards that have to be somewhat more accommodating to new members as their effectiveness rests on the creation of a broader following. Correspondingly, it is not too surprising that the Prüm Convention is and needs to be open to all signatories,

¹⁷ It would lead too far here to discuss the so-called ‘emergency-brake’ provisions in the Third Pillar, which open the way for flexible integration, and thus opt-outs, if no agreement can be reached neither within the Council of Ministers nor the European Council.

whereas the unsigned G5 has so far only incorporated one more member state – and unsurprisingly, it has incorporated the next biggest member state Poland, maximising the trade-off between political clout and smallness that sustains coherence. In short, there are two possibilities how extending policies that emerge from ‘flexible integration’ could be extended to the EU:

1. An avant-garde may create centrifugal dynamics that lead a gradual extension of the policy to EU and even beyond. The advantage is that tightly defined policies may be effectively ‘uploaded’ to the entire EU, and ‘voluntarily’ acceded to by outsiders, which tends to boost implementation records. The disadvantage is that this ‘free choice’ of outsiders can also lead to opt-outs and persistent levels of differentiation if centripetal pressures are not strong enough. Thus, the effectiveness of the method is based on the kinds of policies pursued, and, thus, inherently limited in its usefulness.
2. A sufficiently powerful group of member states could push the EU institutions to incorporate a given policy into the *acquis*. This may obviously be the method of choice when it comes to securing collectively binding agreements, and within a comparatively short period of time. The disadvantage of this approach is that it rests on formal decision-making processes in the EU, which – particularly under conditions of unanimous decision-making – may frustrate progress, not least as the exercise of overt pressure can give rise to the mobilization of opposing coalitions. That is, it may be almost impossible to forge a winning coalition, or a winning coalition that includes more than an unsatisfactory lowest common denominator. Consequently, flexible integration below the level of all member states may become more attractive again, even if it is not likely to lead to common policies over the long-term in this case.

7. The normative controversy

States that do not want an increase in European cooperation may rather be worried by two corresponding normative problems¹⁸, which partly have been touched on already. The first is that the policy-dynamics set off by the actions of an avant-garde can unduly constrain the choice of outsiders over time. The second is the formation of power-blocs within the Union that skew collective decision-making. This roughly corresponds to the distinction made by Leslie (2000) in terms of ‘functional’ and ‘political’ asymmetry that may result from flexible integration (Leslie 2000). These two sets of normative concerns, then, can be linked to different approaches to political legitimacy to clarify some dimensions of the complex debate about flexible integration.

Output legitimacy is linked to the issues of policy coherence and deepening European integration. Input legitimacy, by contrast, focuses on the democratic quality of the decision-making process. But the debate on the merits and dangers of flexible integration revolves not only around different assessments of the likely long-term outcomes of initiatives of flexible integration (output) and around the issue of undemocratic agenda-setting and decision-making power (input). What makes the debate complex is the unclear connection between input and output legitimacy. If there is a general consensus on desirable outcomes, such as a deeper level of integration in a given issue area, input legitimacy becomes less essential. Thus, an undemocratic avant-garde can justify its action in light of the “higher” common good, as arguably has been the case with Schengen: tThe initial signatories could point to objective of

¹⁸ Even if I will also refer to input legitimacy, I am aware that the following discussion mostly leaves out the crucial perspective of citizens or parliaments that may be much more interested in issues of transparency and accountability. The focus of this article is rather on the fairness or legality of decision-making and balance of power between European member states, which is more central to their executives. I can only refer to the wide and extensive literature – much boosted by the Challenge project - which has normatively criticised European security policy and policy-making. For instance, in relation to the Prüm Convention this critique is very well made by the paper by Balzaq et. al. (2006).

the EU to realize the free movement of persons to justify their actions.¹⁹ However, if there are opt-outs, this “incoherent” outcome is often regarded as deficient. Consequently, if it was possible to arrive at common EU legislation rather than engaging in flexible integration, this may be preferable even from a perspective that accentuates outputs. If, however, the outcome is not widely welcomed or agreed on in advance, then the issue of input legitimacy becomes much more salient. That is, if a vanguard is ‘successful’ in promoting new policies in the EU, this may then not only be criticized an undemocratic approach to agenda-setting, but also as inefficient or overly costly for those who were compelled to join later on. Thus output legitimacy may not be drawn on either, and formal decision-making and preference-aggregation structures in the EU become indispensable both for input and output legitimacy. However, from a perspective of input legitimacy it may also be justifiable to engage in flexible integration initiated on the basis of national sovereignty, which again have negative implications for outsiders or the coherence of the EU. The simple upshot of these cross-cutting arguments is that any initiative of flexible integration may be presented in various lights, be it from the ‘inside’ and the ‘outside’ of the participating states.

Yet even if flexible integration may, therefore, be ‘essentially contested’, I would still hope to clarify the current debate by shifting the focus to the actors of flexible integration. I would argue that there are different rationales for forming different kinds of cooperating groups of states. This is mainly related to the kind of public good they seek to secure. To get a handle on this I would offer rough typology of four kinds of groups, which draws on several points raised in this paper so far:

¹⁹ Now the ‘principle of availability’ of information seems to serve as a legitimizing ideal for initiatives.

1. Groups for the exchange of “best-practices” and policy-learning in areas of common concern. These concerns are usually specific to the regional focus of the group, or to any other peculiar characteristic of the members of the group (such as their status as destination countries for immigrants).
2. Groups that cooperate in specific areas of common concern. It may be asked whether bi- or multilateral forms of cooperation outside the common EU framework are not undermining the spirit of EU law. But in principle, there are no grounds to object to initiatives of transnational cooperation based on the national sovereignty of participant states, as long as they do not have harmful consequences for outsiders.
3. *Vanguards* that regard their projects of cooperation as a signal and of wider importance. In the context of the EU, a vanguard typically would aim to generate political momentum that would lead to the creation of common EU legislation. But the creation of common EU laws may also only be the last step in a different and wider process of step-wise inclusion of outsiders that could also include non-EU member states. However, a vanguard does not resort to open political pressure, even if it is undemocratic from the point of agenda-setting.
4. Finally, there are ambitious lobby groups that actively push their political agenda in a wider context, such as the EU. At its extreme, a small and highly effective lobby group could be also called a *directoire*. In both cases, informal political power is exercised to bring about binding collective decisions. A key difference to the ideal-typical avant-garde lies in the fact that lobby groups cannot count on the inherent pull- and push-factors of their preferred policies, but need to intervene more directly to make other countries comply. On top of ‘raw’ political power measured in votes or by the ability to impose costs on non-cooperative countries, there are a wide variety of more subtle strategies that such groups may use to exercise political influence, such as making policy-linkages, side-payments, manipulating issue-dimensions, etc.

8. Matching public good theory with the normative debate

It should be noted that any existing group of cooperating states can serve one or several of these logics at the *same* time, i.e. it can act as a different kind of group in different contexts.

This often adds to confusion. Yet the following table should help to at least conceptually clarify the complex reality of flexible integration, drawing together many earlier points.

Table 1

Type of group	Public good	Output legitimacy	Input legitimacy
Information forum	Network goods, both exclusive or non-exclusive	Moderately high, in so far as open information is used to increase efficiency	High, in so far as there is an open process of deliberation
Club	Exclusive club goods, without significant negative externalities for outsiders	High, in so far as it effectively realizes important preferences of subset of member states, but there are potential negative consequences for the policy coherence of the entire EU	Fairly high, in so far as initiatives are limited to participants with common interests, and do not unduly affect outsiders who have no voice or vote. But there are costs in terms of transparency and democratic accountability, both at the domestic and international level
Vanguard	Exclusive network goods, or exclusive club goods, often with negative externalities on outsiders that enhance centripetal effects	High, as a vanguard can lead to new efficient pan-European cooperation, as long as optimal club size is not violated, i.e. production costs of the public good do not rise exponentially as membership expands above a certain threshold	Low, as there is an undemocratic process of agenda-setting for outsiders who may be compelled to join by negative externalities. But formally democratic choice remains intact and 'opt-out' are possible. Transparency and accountability concerns persist.
Lobby (potentially turning into a <i>directoire</i> if lobby group is stable and highly effective)	Most likely to occur for public goods, and common pool resources, which allow free-riding. But possible for all goods if binding decisions in common institutions are pending.	Moderate, as lobby efforts may fail or impose collectively inefficient policies when policies are overly skewed to the interests of the lobby. But lobbying may also help to overcome inertia when regulation would be beneficial and free-riding needs to be controlled.	Low, if common political goals are not agreed on and undemocratic, extra-institutional power is exercised to either set the agenda and/or skew the collective decision-making outcome. May be more acceptable lobbying is based on arguing rather than bargaining and respects intense preference of others.

9. The G6 – a *Directoire* of the Third Pillar?

Clearly, just as the Prüm group, the six biggest member states of the EU may easily act as a vanguard by agreeing on policies or standards and conventions with centripetal dynamics, so that other member states would feel compelled to join later. For instance, the G6 in Heiligendamm made reference to the ‘standards of Prüm’ in relation to transnational police cooperation (Bundesministerium des Innern 23/06/06: par.5), thus strengthening the *vanguard* role of the Convention, even if some G6 states are not, and will not soon become signatories to Prüm.²⁰ However, this example could also be interpreted as evidence of a common political agenda of the G6 above and beyond various institutional or legal frameworks, whereas the Prüm Group is defined by the signatories of a particular Convention. Arguably, there is more to the G6 than the direct comparison to the Prüm Group²¹ can tell us.

First, it is very illuminating to turn to Nicolas Sarkozy who stood behind the foundation of the original G5 in 2003. The speech he gave in Berlin in February 2006 needs to be quoted extensively here, as it most straightforwardly expresses the objectives of the G5, which, however, does not automatically mean that the now G6 actually achieve these objectives, as will be picked up on later. The speech is also noteworthy, as it directly addresses the problematic status of the G6, which of central interest to this paper:

I have made the experience that logically it has become difficult with 25 members to quickly reach a clear decision. As I have experienced this inability to decide, I have taken the initiative to found the G5 of interior ministers. This G5, which I wanted to expand to Poland and which has been accepted by my friend Wolfgang Schäuble (...) has proven to be a informal and pragmatic solution for the inaction of Europe. I

²⁰ This, of course, relates to the UK, as it already opted-out from Schengen, and to Poland that still awaits accession to Schengen. By contrast, it has already been noted that Italy is posed to join Prüm soon.

²¹ As, for instance, has been made in the House of Lords Report.

have acquired the following habit: What works, I keep, and do not push it aside with the argument that it would break taboos. But I want to be very clear here: It is not an institution, it is not the aim to marginalize the “small states”. The aim is to prepare informally initiatives for the Council of the European Union and possibly to invite other big or small states, that are interested in one or the other topic, to the deliberations. For in light of their historical role, everybody knows what the small states can contribute to the creation of Europe. And as everybody knows, all common decisions are taken by a vote in the Council and require a majority. Nobody has to fear a Directory of the Great. Nevertheless I affirm that Europe with 25 members needs a new motor. That the six great European countries take responsibility and take care at the same time that all those are participating in their actions that want to go ahead. I am thinking here of Belgium and Luxemburg that have joined Germany, Spain and France to form the Eurocorps. And I am also thinking of Portugal and the Netherlands that have joined Spain, Italy and France to found the European Gendarmerie Force. And the G6 is not the only smaller group inside Europe and is not necessarily qualified to cover all themes. Thus I have strongly supported to modernize the functioning of the Eurogroup that does neither include the UK nor Poland....I do not think back nostalgically to the Europe of Six.

(Sarkozy 16/02/2006), own translation from German)

It may be commented on in passing that it does not lack a certain irony that Sarkozy does not see any contradiction between his quite regal approach to European leadership, whereby he does not care about ‘taboos’ and simply decides who is fit to be invited to the G6, and his reassurances that nobody “has to fear a Directory of the Great”. It is perhaps of also of interest that one Sarkozy’s key partners in the G6 is the German Wolfgang Schäuble who was the first important politician to openly promote the idea of a ‘core Europe’ in the early 1990s (Schäuble and Lamers 01/09/1994). Yet here I would more like to draw attention to the fact that Sarkozy states the G6 is meant to “prepare informally initiatives for the Council”. This is a more upfront description of the political intent of the G6, as it refers to the formal EU

decision-making process in the Council, than the preamble to conclusions of the meeting in Heiligendamm that states:

Similar to a “laboratory” this small circle will draw up concrete proposals to intensify cooperation in European home affairs. Other EU Member States will be fully informed about proposals made by the G6 countries and can participate in their implementation.

(Bundesministerium des Innern 23/06/06; translation by Statewatch)

I have already criticized the common metaphor of a “laboratory” to explain instances of flexible integration like Schengen. Furthermore, in this particular quotation it appears as if the results of the meeting in Heiligendamm are only some proposals outside the EU framework that other states may choose to participate in. Thus, the G6 seems to play the role of a vanguard, which may be problematic enough, as discussed previously. Yet it should be clear by now that there are important differences between the G6 and a ‘regular’ *vanguard*.

One difference is that other countries may “participate” in the implementation of new proposals, but cannot form part of G6 themselves, in contrast to other *vanguard* initiatives like Schengen or EMU. I have already briefly argued earlier that judging from its composition and size the G6 seems to be a lobby group: so far it included Poland into their midst, which maximizes the trade-off between political clout and cohesion, even though reportedly several states, such as Austria, Belgium, Luxemburg, Netherlands and Portugal, are already ‘knocking on the door’ of the G6 (Agence 22/03/2006).

The second, crucial difference is that, according to Sarkozy, the G6’s purpose is to prepare proposals for EU council decisions. That is, the G6 does not merely engage in open experimentation and leadership by example, but in direct agenda-setting for the Third Pillar.

In short, G6 is meant to play an important lobbying and power-political role in EU JHA policy-making.

It is surely no accident that even the name G6 throws up some confusion with the G8 that perhaps symbolize the continued importance of power-politics like no other contemporary international institution.²² In fact, the last meeting place of the G6 in Heiligendamm will actually host the ‘real’ G8 in a year’s time, while, for instance, the 2005 G5 meeting in Evian was equally preceded by a G8 meeting in the same location in 2003. Of course, it may not be more than a small dose of diplomatic symbolism, but it certainly underlines the status difference to other groups of EU member states that Sarkozy mentioned²³ in order to play down the role of the G6. It may be true that the ‘Europe de six’ is truly an idea of the past, at least if it is meant to denote a ‘hard core’ of member states across all three pillars. But in the area of European cooperation on JHA, some groups are clearly more equal than others.

An illustrative example was the meeting of the so-called Salzburg group with the then G5 in April 2004. The Salzburg group, in my view, is a classic case of a cooperating club with limited reach and interests - i.e. it is a more ‘unproblematic’ kind of flexible integration outside the Treaty framework. This was also implicitly assumed by the UK Home secretary when he defended the G6 by equating its importance with the Salzburg group (House of Lords 19/07/2006:23). The Salzburg group was founded in 2001 on an Austrian initiative and united the interior ministers of Austria, Slovakia, Hungary, the Czech Republic, Slovenia and Poland, in order to discuss the Schengen accession of the new member states and to cooperate more closely on issues of crime and migration. By now it has also come to incorporate Romania, Bulgaria and Croatia, which exemplifies the more inclusive membership dynamics of other groups than the G6. Yet although the Salzburg group is composed of a fairly large

²² At least in the eyes of NGO and anti-globalization activists.

²³ See his reference to the Eurogroup, or the founders of the European Gendarmerie Force.

number of states, its political weight and range of cooperation has no significant implications for the entire EU, even if there seems to be some ambitions to that effect. For instance, the new member states have repeatedly used the platform to ask for an accelerated accession to Schengen, but clearly have got nowhere.²⁴ More interestingly, the Austrian Interior Minister Ernst Strassner got the G5 to meet the Salzburg group in 2004, with the intention to unveil a new plan to combat terrorism and play a pioneering role in matters of European security cooperation (Der Standard 15/04/2004). However, French officials stated in advance that no concrete results were expected (Agence 15/04/2004). In the end, some general agreement on increased data sharing was reached, particularly on bi-lateral data sharing (eGovernment news 19/4/2004), but this was far from an ambitious new direction for EU JHA policy the Austrian plan had envisaged. This demonstrates the power imbalance to the G5 who rather seemed to prefer to set the direction for EU policies among themselves. This impression was underlined by the fact that Austria was not invited to the last G6 meeting in Heiligendamm even though it held the EU presidency at the time (Die Presse 21/07/2006).

However, it is also only fair to point out that the G6 is anything but a like-minded group that controls the EU institutions. Most prominently, it even failed to bridge political differences to find a new director of Europol (Burns 06/07/04) only a few month after the Madrid bombings should have facilitated more European cooperation. And although the conclusions of the G5/6 meetings have covered large ground, as the House of Lords report extensively discusses, their rather general nature indicate that the group is probably not often in a position to dictate details of particular policy proposals to the EU.

Yet to give an empirically well-founded assessment of its effective influence in EU policy-making so far would require another paper and access to inside sources, which I do not have

²⁴ See footnote 11

at this point in time. So far one has to make general inferences on the basis of the conclusions of the G5/6 meetings: For instance, the G5 meeting in Evian (République Française 05/07/2005) discussed the introduction of biometric passports as well as the Passenger Name Record arrangements with the US, both of which have been highly controversial issues on the EU agenda for the last two years. Yet conclusions to the G5/6 meetings are fairly short and of a general nature, and are, therefore, not very informative about the level of detail of the jointly deliberated policy-proposals, just as they tell us almost nothing about the degree of cooperation at the level of national experts from the G6. Consequently, it is hard to assess the input of these national experts in the working groups of the Council of Ministers that are a crucial, but equally very secretive element in EU decision-making in the Third Pillar. For the time being the effective influence of the G6 on the EU can only be speculated on from the outside, which, however, is precisely a significant problem from perspective of accountability.²⁵

Therefore, this paper has content itself with more general, theoretically derived conclusions. As has been extensively discussed by the House of Lords Report, just as the Prüm Group, the G6 deals with important European JHA policies, such as on counterterrorism and data sharing, and, therefore, may indirectly set the agenda for other member states and EU institutions over the long term. But further than that, the G6 explicitly aims to prepare and lobby for particular proposals in formal EU Council decision-making. Therefore, it will remain limited in membership to a select group of political heavy-weights, notwithstanding possible ‘coalitions of the willing’, so to speak, of G6 members with other small member

²⁵ Generally speaking, Tony Bunyan from Statewatch argued in his testimony to the House of Lords that the G6 engaged in ‘policy-laundering’, which means that “policies are discussed in small groups like the G6, Prüm, G8 and the principles are sorted out and then those broad strategic decisions are presented in different fora and pushed to the top of the agenda because they would have been sorted out amongst key Member States.” (House of Lords 19/07/2006: 44). In this paper I have argued for making more careful distinctions between different mechanisms of policy-diffusion and agenda-setting that groups like Prüm and the G6 generate. But I agree with Bunyan on the fundamental critique about secretive and inaccessible political groupings that push controversial proposals on the official agenda of the EU.

states on particular policies, as Sarkozy pointed out. Thus, even if internal political disagreements may frequently hamper the G6, the shadow of a highly exclusive *directoire* in EU JHA policy-making is on the wall. Extrapolating from their general attitude towards European integration, the UK and Poland may have counted on acting as a braking element on groups like the G6. Yet ever since the threat of terrorism has risen on the agenda, such expectations have been upset. There is a real threat of unbridled transnational activism of national interior ministers, including from the UK, as they can distance themselves both from domestic and from EU constraints in their informal gatherings.

The formation of lobbies and the exercise of informal power may be an inevitable phenomenon if formal institutions do not correspond to the preferences of powerful member states. Yet only if things are called by their name, so to speak, is it possible to create the necessary political opposition to such power-political approaches. This is arguably what has happened in the context of the second pillar, where the leadership of the 'big three' may frequently be seen as a necessary evil, but where equally the more open manifestations of a *directoire* are harshly criticized by other member states. As inconsistent as it may be, this attitude of occasionally welcoming the initiative of the big member states, but consistently challenging any form of permanent alliances and hierarchy may be precisely what is called for when dealing with the G6. The controversy over Heiligendamm is a step in the right direction and will hopefully lead to a much more critical engagement with the G6 in the future.

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