

A Political Sociology of Sovereignty: Treaty Opt-Outs and the Doxa of an Ever Closer Union

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Abstract

This paper explores the relationship between sovereignty and European integration through the prism of national opt-outs. When the Maastricht Treaty granted substantial treaty opt-outs to the United Kingdom and Denmark in 1993, legal scholars described this development as a 'hijacking' of the *acquis communautaire* and political scientists predicted a destructive disintegration of the European Union. Yet the details of what happens when member state opts out have remarkably remained uncharted territory over the years. This paper poses the question of what kind of sovereignty – if any – is safeguarded through formal opt-outs.

On the one side of the fence, stand the scholars who see opt-outs as a threat to the uniform application of EU law and thus to the coherence of the legal order of the Union. On the other side stand the researchers who celebrate differentiation and opt-outs as a means to strengthen democracy accommodate national differences. The two camps disagree not only in their assessments of the treaty protocols, but also in their conceptualisation of sovereignty. Yet neither approach appears to fully grasp the ways in which claims to sovereignty are interpreted and managed in the EU.

This paper proposes a political sociological approach to sovereignty, which may help unravel how opt-out protocols are handled on an everyday basis. It focuses on the British and Danish opt-outs from Justice and Home Affairs and Schengen and draws on in-depth interviews and archival material. Three cases of re-interpretations are analysed: First, the extensive use of the British opt-in possibility, second the struggle to limit the scope of the British Schengen protocol and third the Danish negotiation of parallel agreements. The paper demonstrates that opt-outs are managed in ways that go against their original meanings. Thus, rather than seeing opt-outs as classical instruments of international law, accentuating the unchanged sovereign status of the member states, or saluting the protocols as late sovereign instruments, which strengthen the respect for national differences, the paper argues that management of the British and Danish opt-outs, quite ironically, express the strength of the doxa of European integration, i.e. the notion of 'an ever closer union'.

Introduction

'In actual fact, opt-outs constitute a de facto negation of the idea of European cooperation' (Verhofstadt 2006: 214). Former Belgian Prime Minister Guy Verhofstadt does not mince his words in his latest book, *The United States of Europe*, but the convinced European does not stand alone with this view. In both political and academic debates, national opt-outs from EU and EC treaties are generally perceived as leading to dangerous fragmentation of the Union.

When the Maastricht Treaty granted substantial opt-outs to the United Kingdom and Denmark in 1993, legal scholars described this development as a 'hijacking' of the *acquis communautaire*, and political scientists predicted a destructive disintegration of the European Union. From Deirdre Curtin's alarming annunciation that the British and Danish opt-outs would lead to a 'Europe in bits and pieces' (Curtin 1993: 88) to the claim that opt-outs are increasingly marginalising the UK and Denmark (Louis 2001), researchers have argued that opt-outs serve to destabilise the Union and freeze out member states. Nevertheless, the details of what kind of sovereignty – if any – which is safeguarded when a member state opt out have remarkably remained uncharted territory over the years.

The various motivations behind the self-imposed exclusion have been explored to some degree (Watts and Pilkington 2005; Hansen 2002; Buller 2006; Haahr 2003; Petersen 2004: 499ff; Risse 2002; Marcussen and Zolner 2001; Risse 2003; Wiener 1999). Opt-outs have been interpreted as being driven by the motivation to safeguard national sovereignty (e.g. Routh and Burgoyne 1998), avoid Europeanization (e.g. Geddes 2005) or as a means to maintain intra- and inter party unity on controversial EU policy (e.g. Aspinwall 2003; Nielsen 2009). However, the consequences of opting out for the sovereign status of member states remain an understudied subject.

Yet opt-outs should be of interest to the students of European integration as well as practitioners, since national opt-outs and other instruments of differentiation are likely to be used much more as the Union expands geographically, continues to introduce new policies, and struggles with eurosceptic populations (Friis and Murphy 2000: 237; Walker 2003). The rejection of the Constitutional Treaty in the French and Dutch referendums in 2005 and the negative Irish vote on the Lisbon Treaty in 2008 have only strengthened the interest in a differentiated Europe.

Opt-outs are far from technical questions; they postulate that it is possible to (re-)constitute the boundary of the state in face of European integration. They draw a symbolic, legal and political line in the sand, as it were, and establish an area where the state is to remain sovereign. To the degree that sovereign statehood is fundamentally changing due to integration, national opt-outs serve as a good indicator of how far this process has proceeded. As Helen Wallace puts it, an opt-out is installed to guarantee '[...] immunity from disliked European legislation' (Wallace 1997: 682).

Two member states, the UK and Denmark, appear to have acquired status as pariah states due to their respective opt-outs and reluctant positions in areas such as the EMU (EMU) and Justice and Home Affairs (JHA) (see Watts and Pilkington 2005: 35). However, little is known of how opt-outs are managed in the rapidly growing policy areas in which both countries have –

apparently – chosen to surrender influence in order to safeguard national sovereignty. The question is therefore whether Guy Verhofstadt is correct. Are opt-outs really a negation of European cooperation? Or are opt-outs an expression of a pragmatic way of integrating states, a testimony to the *sui generis* nature of the Union or even a foretaste of what will be an inevitable element in future forms of regional and global governance bound to avoid the homogenising aspects of the state model? One must go ‘off piste’ to answer these questions, as little research has been carried out regarding the effects of opt-outs on the sovereignty of the member states in question.

The paper is divided in five sections. First, I briefly introduce the British and Danish opt-outs and the ideas of national autonomy, which motivated them. The second section provides a succinct overview of the existing literature on the interlinkages between differentiated integration and sovereignty. On the one hand are those that see sovereignty as a question of *either/or*. Either the state is sovereign or it is not. On the other hand are those that argue that Europe has left the sovereign state system for good and that an opt-out represents an integral aspect of this late sovereign order with overlapping and competing claims to authority. Here sovereignty is a question of *both-and*.

The third section of the paper proposes a political sociological approach to sovereignty and European integration, which builds on a distinction between the *doctrine* (constitutive dimension) and *practice* (regulative dimension) of sovereignty. It argues that the practice of sovereignty can be seen as an ongoing process of claims about the superiority and autonomy of the authority of the claim makers within a particular diplomatic field.

The fourth section examines this practice dimension of sovereignty in more detail by looking at the actual management of the British and Danish opt-outs from JHA and Schengen. It demonstrates that while an opt-out protocol formally safeguards autonomy, in practice it does not lead to legal immunity and the possibility for conducting a different policy than the other member states is seldom used, partly because British and Danish decision-makers work against the original intention with the opt-outs. The fifth and final section discusses how these insights require a rethinking of some of the established assumptions on differentiated integration. While opt-outs may be workable solutions to problems pertaining to the ratification of treaties, they have not led to a safeguarding of sovereignty, as many scholars have otherwise expected, feared or hoped for.

I. The Maastricht Legacy

With the Maastricht Treaty, negotiated in the beginning of the 1990s, the EU advanced ambitious aspirations of creating a common currency, eliminating national border control, and introducing common asylum and immigration policies as well as Union citizenship and a common foreign policy. Two states, the UK and Denmark, were particularly reluctant to surrender authority in these areas and came close to killing the Treaty and derailing the whole process of political integration. In the UK, ‘Maastricht’ became synonymous with the creation of a federal super state and generated ‘the longest lasting and arguably the deepest’ division over Britain’s relationship

with Europe since WWII (Baker and Seawright 1998: 2). To prevent the UK from blocking the entire project, it was accorded opt-out clauses, meaning that it would not be required to participate in the third stage of the Economic and Monetary Union (EMU) and the Social Chapter.¹ Even then, parliamentary ratification was opposed by the opposition Labour and Liberal Democrat MPs and crucially by the ‘Maastricht Rebels’ within the governing Conservative Party. The John Major government came close to losing a vote of confidence in the House before the Parliament ultimately ratified the Treaty (Ludlam 1998: 33ff). The long and agitated debates on the Maastricht Treaty in Westminster revealed a bitterly divided political landscape, fighting over a treaty, which concerned not just the British position in the world political economy but arguably ‘the very sovereignty of the British nation’ appeared to be at stake (Baker et al. 1995: 53).

Maastricht also signalled political drama in Denmark. The Danish government was a reluctant negotiator in Maastricht; however, having been granted a protocol on the EMU, the pro-European government had accepted the treaty when it was unexpectedly rejected in a dramatic referendum held in June 1992. 50.7 per cent voted ‘no’, while 49.3 per cent voted ‘yes’. Following the referendum, the Danish Parliament drafted a common negotiation position for the government. It focused on the most dominant issue in the Danish referendum debate: the transfer of national sovereignty to the EU (Hansen 2002).² The Danish ‘no’ led to four key opt-outs attached to the treaties, which imply that Denmark does not participate in the third stage of the EMU and thus has not adopted the euro; will not accept – if this scenario should arise – to replace national citizenship with EU citizenship³; does not participate in the development of a common European defence; and does not participate in supranational cooperation in the field of JHA. On 18 May 1993, 56.7 per cent of the Danes voted ‘yes’ against 43.3 per cent that voted ‘no’ to the Edinburgh Decision on the four Danish opt-outs and made it possible for Denmark to ratify the Maastricht Treaty.⁴

¹ The ‘Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland’, annexed to the Maastricht Treaty, spells out the details of the British opt-out. In 1997, the UK decided to participate in the Social Union and the provisions of the Protocol were inserted into the Treaty of Amsterdam.

² The document refers to itself as a national compromise, which can ‘unite [sic] the population on Denmark’s participation in the continued EC’. In the document, the ‘no’ is carefully interpreted as a rejection of ‘United States of Europe’, but not as a rejection of EC membership or European cooperation as such. Adopted by all parties in Parliament with the exception of the Progress Party, 27 October 1992, author’s translation).

³ In fact, this opt-out is probably the most misunderstood. The Maastricht Treaty did not seek to replace national citizenship with EU citizenship, but embedded existing rights and created new rights. As Wiener demonstrates, the Maastricht Treaty can be seen as part of a longer historical development of European citizen practice beginning in the early 1970s (Wiener 1998a: 213-279). While EU citizenship was not intended as a form of state citizenship, there were fears in Denmark and the UK regarding its development (see also Koslowski 1999: 166). Thus, the Edinburgh Decision stresses that European citizenship in no way replaces the national citizenship and that EU citizenship is an entirely different concept than Danish citizenship as defined in the Danish Constitution (Guild 2004: 36). Since the Amsterdam Treaty, this provision is established for all member states, as the treaty basically copies Danish wording stressing that the EU citizenship is meant to ‘complement, not replace national citizenship’ cf. Art. 17 (I) in the Amsterdam Treaty (Krunke 2005: 351; Magnette 1998: 57).

⁴ The ‘yes’ vote in the referendum on the four opt-outs triggered riots in Copenhagen, which are considered to be the worst in Denmark’s peacetime history (Carvel 1993). The night following the second Danish referendum, Danish police shot into a crowd of demonstrators, which had created what they called an ‘EU-Free Zone’ in Nørrebro, an inner-Copenhagen district. At least 11 persons were injured in the shooting. Still today, the ‘Nørrebro night’ is a matter of heated public debate in Denmark and has developed into the Vietnam syndrome of Danish police (Scharling 2003). See the over 500-page official report on 18 May 1993 entitled *Beretning i henhold til lov nr. 389 af 22. maj 1996 om*

The importance of the Maastricht ratification crisis can hardly be overstated. The Danish ‘nej’ to the Maastricht Treaty in the June 1992 referendum and the narrow French ‘oui’ came as a shock to the leaders of the EU and contributed to a dramatic ratification crisis that had already begun in London. Joseph Weiler has argued that the popular resistance that almost led to the fall of the Maastricht Treaty represents the most important ‘constitutional moment’ in the history of the EU (Weiler 1999a: 4). With ‘constitutional moment’ he understands an important symbolic moment where the constitutional order (broadly understood as the political and civil culture of a society) is changed formally or informally. The rejection of the Maastricht Treaty was a turning point as it became clear that the European populations no longer just accepted or ignored the integration; they debated and protested. In Weiler’s words, it was:

[...] the beginning or end of a deeper process of mutation in public ethos or societal self-understanding (Weiler 1999a: 3).

Whether or not one accepts the rejection and ratification crisis of the Maastricht Treaty as a constitutional moment, it became clear in 1992 that the so-called permissive consensus was a thing of the past (Hix 1998).

This may also explain why the British and Danish opt-outs are seen as the most controversial and highly profiled protocols in the EU. By highly profiled, I mean that a continuum of opt-outs exists ranging from the more substantial and debated opt-outs from major policy areas such as the EMU, Schengen or the common security and defence policy to the relatively uncontroversial protocols on reindeer husbandry, the acquisition of second homes or Swedish chewing tobacco (*snus*).⁵ Specific derogations at the primary law level in favour of some member states are hardly a new phenomenon; at least six of the ten protocols annexed to the original Treaty of Rome dealt with derogations, as did many protocols annexed to the various acts of accession (Hanf 2001: 7). However, these protocols have a limited effect outside the two countries and do not threaten the cohesion of the Union.⁶ The same goes for a *temporary* exception to, or exemption from, a regulation, directive or treaty provision, e.g. as part of a transitional arrangement when a new state joins the EU. Conversely, the British and Danish opt-outs are perceived as emblematic of the two countries’ reluctant approaches to intensified European integration (Gstöhl 2002).⁷

The domestic political debate in both the UK and Denmark in the beginning of the 1990s was centred on the perception of a threat of loss of control of daily lives and national identity to

undersøgelse af Nørrebro sagen [Report pursuant to act no. 389 of 22 May 1996 on the investigation of the Nørrebro case] and the special issue on 18 May 1993 of the magazine *Dansk Polit* [Danish Police] (2003, no. 5).

⁵ The snus derogation was originally introduced in 1994 into the EEA Agreement as a subject of a decision in the EEA Joint Committee incorporating Council Directive 92/41/EEC.87. The Joint Committee Decision stipulated that the Community prohibition on oral tobacco should not apply to marketing in Iceland, Norway and Sweden. In the drafting of the Treaty of Accession, the Joint Committee Decision was transposed into Chapter X of Annex XV of the Treaty of Accession. Ireland has an attached a declaration ensuring that Ireland only participates in EU military operations if there is a UN mandate and the majority of the Irish Parliament backs the decision (see Hummer 2006). Compared to the Danish defence opt-out, however, which assures that Denmark does not participate in the military dimensions of the European Defence and Security Policy, the Irish declaration is much less restrictive.

⁶ Protocol 3 attached to the 1994 Accession Treaty between Finland, Sweden and the European Union

⁷ For an interesting account of how Ireland has been forced to follow the UK in the area of JHA in order to save the Common Travel Area, see Meehan (2000a; 2000b; Meehan 2000a).

foreign bureaucrats. Under the sovereignty heading a range of specific issues were grouped, such as the fear of federal armed forces, federal police including foreign police officers on Danish or British territory, common social policy, EU law applying on areas such as justice and police matters, a common currency, the extension of qualified majority voting, the legalization of politics, the perception of a self-amending treaty and the notion of European citizenship (see also Hansen 2002). These fears tend to present sovereignty as a fixed capital, given and known, and all it takes to re-establish it is to annul the decisions that have led to its careless dissipation (Rosanvallon 2000: 437-438; Morefield 2005). In the public debate in the UK and Denmark, the opt-outs are seen to constitute bulwarks against European integration; underpinning an image of the state with full political and legal authority over people, territory and money. This gives them an almost sacred character.

II. Disintegrating Europe?

This section examines how treaty opt-outs have been evaluated in the existing literature on differentiated integration. The introduction of the British and Danish opt-outs seemed to strengthen the liberal intergovernmentalist argument that – after all – the EU was still driven by the member states interests (Gstöhl 2000: 46). Legal commentators, however, were more cautious in their assessments of the ability of member states to take back sovereignty. There were questions as to whether these opt-outs had a permanent character, as Curtin put it ‘[...] for how long after the second Danish referendum will the Danes be able to retain their “special position?”’ (Curtin and Van Ooik 1994: 351). They also questioned the legal status of the Edinburgh European Council decision, which outlined the Danish opt-outs.⁸ Yet most legal scholars saw opt-outs as more than a temporary breach of the normal state of affairs and were deeply worried about the destructive and disintegrating effects of the opt-outs.

A hijacking of the EU’s legal order

Legal scholars hold the dominant position in the literature on national exemptions in the EU and generally regard opt-outs as problematic (Curtin 1993; Shaw 2003b; De Witte, Hanf and Vos 2001). Indeed, an opt-out can be seen as an anomaly in treaty law. It is drafted for unique circumstances, namely in order to overcome the political or legislative difficulties encountered by the contracting parties. In legal thinking, an opt-out represents the drawing of a line between the national and EU legal orders and this inevitably leads to tricky questions of demarcation (Philippart and Edwards 1999; Karsten and Sinai 2003). When does the opt-out apply and when does it not? How general and how restrictive can an opt-out be presumed to be? What happens if an opt-out clause is at odds with other provisions in either the EU or national legal order? Such

⁸ Although the opt-outs took the character of a legally binding decision, the statements of the European Council, ‘[...] are not adopted with the procedural rules of the EEC Treaty, no binding legal nature can *stricto sensu* be ascribed to such acts within the Community legal order’ (Curtin and Van Ooik 1994: 355).

questions arise naturally whenever a state is granted an exemption from an international treaty. However, opt-outs from the EU appear to pose more fundamental problems.

To lawyers who maintain a vision of the EU as a classical international organisation and who stress that the powers of the Union are delegated, an opt-out from an EU or EC treaty corresponds to a national exemption from any other international treaty. In this view, the fact that states are allowed to opt in and opt out of treaties represent another piece of evidence that the EU remains a classical treaty-based organisation where states remain ‘Herren der Verträge’ (see also Weiler 1999b: 292; Allain 1999: 269).⁹ This follows an understanding that sovereignty is thought to be an absolute principle and reflects an *either/or* perspective on sovereignty.¹⁰

In contrast, many EU lawyers perceive the EU legal order as a constitutional legal system in accordance with the doctrine of the European Court of Justice (ECJ). Major national opt-outs are seen as undermining the unified EU legal order and the solidarity between the member states. Opt-outs become more problematic in this light, because they represent a threat to the uniform application of EU law and thus the coherence of the legal order of the Union (Búrca and Scott 2000; Curtin 1993; Hine 2001). Deirdre Curtin described the introduction of the British and Danish opt-outs as a ‘hijacking’ of the *acquis communautaire* (Curtin 1993: 88). As she writes, ‘[o]ne can indeed claim that the opt-outs do in fact contribute to the undermining of the Community legal order’ (Curtin 1995: 245).

The most enduring manifestation of this view has been the image of the constitutionalised treaties, i.e. the notion that the treaties form a constitutional setup. It has been argued that the interpretative role of the ECJ, which attributed direct effectiveness to the ‘negative’ integration rules of the treaty – free movement of goods, persons and services, in particular – and posited their primacy over any conflicting national rules and policies, has helped transform the intergovernmental agreements into the core of an economic constitution.¹¹ In this light, national opt-outs and other forms of differentiated integration represent a threat to the unified legal order – the treaties and the *acquis communautaire* – the body of common rights and obligations binding the member states together.¹² To understand why opt-outs from the EU are seen as problematic, one must also consider the self-understanding of many EU lawyers. As Walker notes:

[...] there is a significant strain of EU scholarship which for reasons of intellectual training, professional socialisation and associated normative commitments is minded to embrace the official constitutional perspective and object-language of the EU as its own, and to develop the best sense and best defence of those of the ECJ’s various doctrines of constitutional self-assertion – not just supremacy but also direct effect, implied powers etc., – which seem to embrace and confirm a sovereigntist self-understanding (Walker 2003: 12-13).

⁹ For an argument in favour of an international law approach to EU law, which encompasses the dynamic development of EU law as well as its teleological features, see Spiermann (1999).

¹⁰ For a discussion see e.g. Lake (2003: 305-306)

¹¹ The twin concepts of direct effectiveness and supremacy are the legal instruments by which the Court of Justice is said to have constitutionalised the EC Treaty (Búrca 2003).

¹² It should also be noted that opt-outs are not the sole enemy of a unified legal order; the ‘pillarization’ and limits on the jurisdiction of the ECJ also serve to give the EU legal system an ambivalent character (Búrca 1996: 262-266).

This ‘sovereignist self-understanding’ is linked to the view that the Community legal order is supreme and independent from national constitutions. Accordingly, opt-outs represent less a national claim to sovereignty and more a threat to the EU’s own claims to sovereignty, i.e. ‘[...] its own claim to sovereign authority within a limited sphere’ (Walker 1999: 18). Interestingly, also from this perspective, where the unity of the EU’s legal order is to be respected, sovereignty is seen as an *either/or* question. Either the EU’s legal order is respected – as having a sovereign character – or the national legal order is sovereign. You can’t have both.

It appears as though the scholar who defends the EU’s legal order against opt-outs is guided not just by analytical considerations but also by this particular (self-)understanding or normative concern for the *telos* of the integrative process. It may help explain Deirdre Curtin’s argument that member states must pay a price for infracting on the legal order of the EU:

Those who nevertheless ‘opt-out’ should be obliged to accept the majority’s *droit de regard* including in the final analysis the right of the partners to define their behaviour as ‘destabilising or unacceptable’ (Curtin 1995: 251).

Curtin’s position is characteristic for the bulk of legal research on opt-outs.¹³ The question is whether this position is also characteristic for the officials involved with the management of opt-outs.

Differentiation as a Constructive Ideal for the EU

On the other side of the fence stand those believing that one should not readily buy into the traditional assumptions or analytical conclusions of the claims concerning the problems of opting out for the unity of the EU’s legal order. Instead, these scholars celebrate differentiated integration and opt-outs as a means to develop new modes of governance or strengthen democracy in the EU. This section will argue that the key differences and points of disagreements between opponents and defenders of opt-outs are conceptual rather than empirical. Indeed, to the pro-differentiation camp, sovereignty is not a question of *either/or*, but a question of *both-and*.

While most EU lawyers are critical of opt-outs, some may accept a ‘positive synergy between the principles of flexibility and constitutionalism’, viewing differentiation as a normative principle of governance (Shaw 2003a; Denza 1999). They promote a different understanding of opt-outs in the post-Maastricht era and call for a contextual and pragmatic approach to EC law admitting room both for the dynamics of integration and disintegration *within* the EU legal order (e.g. Dehousse 2003; Shaw 1996, 2005). As Shaw remarks:

The task of the lawyers is to develop a conception of the legal order, which can adequately reflect the sophistication of new models and go beyond the old simplicities of the united legal order (Shaw 1996: 242).

Interestingly, this does not necessitate abandoning the idea of a constitutionalised treaty or the understanding that the EU claims sovereignty. Rather, differentiation is taken as an indication of the evolving and subtle project of the constitutionalisation of the EU (Shaw 2000b). This involves

¹³ In later work, Curtin focuses on the overall tendencies of differentiation in the EU and has also written extensively on the question of the supremacy of EU law (e.g. Curtin 2006).

a break with the notion that a constitutional framework can only apply to states and not to contexts beyond the state (Wiener 2007a: 2-5).¹⁴ These scholars assume that neither the state nor the EU possesses the ultimate supreme authority. In this light, opt-outs represent an integral aspect of the ‘post-sovereign’ (MacCormick 2002) or ‘late sovereign’ perspective where sovereignty is shared, dispersed and disaggregated (Walker 2003).¹⁵ Because of its *de facto* lack of a single legal order, the EU can be characterised as a ‘polycentric’ entity; a set of interlocking legal orders with none being privileged.¹⁶ Polycentrism refers to a setting where the law cannot be seen as a hierarchically unified system originating from an authoritative centre; instead, the law increasingly derives from multiple sources due to e.g. decentralisation and Europeanisation.¹⁷

This camp of legal scholarship celebrates differentiation and is joined by a diverse group of political and social scientists who – for different reasons and with very different theoretical baggage – are enthusiastic about the perspective of differentiated integration (Saccomando 1994; e.g. Dewatripont, Sapir and Rosenthal 1995).¹⁸ A normative position emerging from such ideas builds upon a positive interpretation of the partly unsuccessful attempts to create a harmonious and unified legal and political order in the EU (Dehousse 2003). Consequently, opt-outs do not constitute a threat, but rather an inevitable or even promising avenue for the future of the EU.¹⁹ The pro-differentiation camp provides an important counter-argument to the dominant and sceptical interpretation of opt-outs.

A critique of the camp would argue, however, as Walker has done, that differentiated integrated challenges both the technical capacity of law to address problems of inter-systemic coordination as well as its symbolic capacity as an independent source of power and as a means of constructing an authoritative image and discourse of the political order and cultural community it seeks to represent (Walker 1999: 6-7). Yet the argument that opt-outs challenge the (symbolic) authority of the EU legal order has yet to demonstrate its value to a more detailed understanding of the practice of opting out. Indeed, the subsequent pages will argue that contrary to the claims

¹⁴ See also Walker (2008); for a review, see Adler-Nissen and Knudsen (2005: 343-246).

¹⁵ For a useful overview of different approaches to sovereignty in legal EU research, see Walker (2003: 11-14).

¹⁶ Neil McCormick believes that the ‘suigenericity’ of the Union ought to be upheld, i.e. that the EU is neither an ordinary international organisation nor a state (MacCormick 2004: 14-15). For a powerful critique of polycentrism as a normative project, especially its potential neoliberal tendencies and hostility towards collective action, see Houtzager (2005).

¹⁷ Polycentrism entails an order of numerous overlapping centres of legal authority and political control. It implies that there are ‘[...] no fixed hierarchical relations, and the relations of internal deviation that can be proved in a conflict do not exist in a stable form’ (Wind 2003: 122). Polycentrism leads to a demand for new rights and new forms of political control and influence (Skelcher 2005). Along the same lines, it has been argued that the conduct of politics among EU members resembles the medieval form of rule with its ‘overlapping forms of authority’ and ‘non-exclusive forms of territoriality’ (Ruggie 1993: 148-74).

¹⁸ Political theorists and politicians frequently refer to differentiation in the so-called finality debate on possible or legitimate endpoints of the European integration process (Ferry 2000; Parker 2002: 4; Habermas 2003; e.g. Castiglione 2008; Schmitter 2001). They have argued that differentiation and the accommodation of national particularities are keys to enhancing the legitimacy of the EU (Delanty and Rumford 2006; Warleigh 2002).

¹⁹ Kalypso Nicolaïdis argues that the EU gains legitimacy if it becomes more flexible, because it will become more responsive to the interests and plural identities of the citizens (Nicolaïdis 2001). But is it really easier for citizens to influence or identify with a political system that is deconcentrated, divided, fragmented or even fused? Yes, Zielonka argues: Since there is no clearly identified hierarchical centre in the EU, ‘the abuse of power is also less likely’ (Zielonka 2007: 204). Critics would argue that it is this very lack of clear hierarchies that makes it more difficult to hold political leaders accountable.

of both the anti- and pro-differentiation camp, the unity vision of the EU remains fundamentally unchallenged by the British and Danish opt-outs.

III. A Political Sociology of Sovereignty

The majority of the efforts made by scholars to understand cooperation in the EU reflect top-down applications of analytic frameworks to existing case material and suggest that an opt-out is a relatively stable legal arrangement or collective identity position in the EU. In the following, I propose an alternative, political sociological approach to sovereignty in the EU, which is more closely related to the social reality in which the opt-outs are managed. It acknowledges that sovereignty is a concept which gains its meaning in everyday negotiations between national elites in Brussels. Thus, apart from seeing sovereignty as a doctrine, we also need to see it as a set of activities. Sovereignty can accordingly be understood as the ongoing process of claims about the superiority and autonomy of the authority of the claim makers (see also Sheehan 2006: 3).

Sovereignty as doctrine and practice

A political sociological approach does not imply doing away with understanding sovereignty as a fundamental institution or ignoring its epistemic function as a way knowing and ordering the world.²⁰ Rather, what I suggest is that the abstract notions need to be supplemented by a view of how sovereignty plays out in practice. This distinction between doctrine and practice may become clearer by considering the double character of sovereignty, which involves tackling both its *constitutive* and *regulative* dimensions. Sovereignty constitutes the states system as the ‘meta-political authority in world politics’ (Thomson 1995: 214). But once this constitution has taken place, or rather is taken for granted, it also functions as a framework of action; it regulates international relations and law, and it becomes part of daily political struggles. This is the double character of sovereignty. Sovereignty is already instituted, but once it is instituted, it is also maintained through political, legal and social practices.

From this perspective, one may think of the opt-outs in two phases. First, the initial negotiation of the opt-outs in Maastricht, Edinburgh and Amsterdam where the UK and Denmark exercise their sovereignty as treaty-makers. Here, the opt-out is a classical move referring to the constitutive dimension of sovereignty as the UK and Denmark exercise their right as international sovereigns. Related to this understanding is the notion that delegation of authority has a conditional nature and that the member states are only controlled by the decisions of the international or supranational body so long as they agree to be.

In a second phase, however, the exercise of sovereignty through the opt-out protocol relates not the norm-creating, but to the norm-interpretation function. There remain potential conflicts in relation to the interpretation and handling of opt-outs. These points of tension can best be

²⁰ Even though new actors and moves prompt controversy, change at the epistemic level of sovereignty itself it is much harder to imagine (Adler-Nissen and Gammeltoft-Hansen 2008: 199-207).

explored by considering how the understanding of national interests is modified by diplomats and officials in Brussels. In the following, I focus merely on this practice dimension of sovereignty.

In political sociology – and arguably all research – one of the fundamental phases in the research process is that of ‘constructing the object’.²¹ Take the most basic question: ‘What kind of phenomenon is an opt-out?’ At first glance, a national opt-out is quite simply a legal protocol, attached to a treaty, which usually implies that a member state will not formally participate in the decision-making process and will not adopt or implement EU legislation in the area covered by the opt-out. A given EU proposal, e.g. a regulation proposed under Title IV TEC, simply states in the preamble:

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on EU and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

A number of analyses examine how such paragraphs should be understood from a legal perspective (e.g. Curtin 1993; Thym 2004). Most research ends here, however, implicitly or explicitly assuming that when an opt-out applies, the member states will not participate in the policy-making process. To be sure, if cooperation is highly formalised and an opt-out protocol clearly applies, the given state cannot adopt EU legislation. But not all of EU cooperation is legally codified, and there are informal rules and power structures in any social system. These underlying power structures may affect how national representatives (with or without opt-outs) perform in the decision-making processes. Moreover, the exact meaning of an opt-out may be contested from both legal and political perspectives. When e.g. the UK is excluded from participating in Frontex (the external border agency of the EU) due to a particular legal interpretation of its Schengen protocol, UK lawyers may contest the decision of the ECJ. The point to be stressed here is therefore that opt-outs cannot be understood on the basis of formal rules alone, and not even on the basis of the various legal interpretations of these rules; identities and social contexts modify the political implications of rules (Searing 1991: 1240-1242). Rather than assuming any automaticity to these protocols, I propose to look at how British and Danish diplomats manage them.

The conception of sovereignty as an on-going practice corresponds to a political sociological understanding of European integration, which I propose to see as a social process driven by politico-administrative elites working within a specific and relatively narrow understanding of possible political positions and ideas.²² This can be seen as a ‘bottom-up’ approach to integration because it begins by looking at the face-to-face interactions between individuals and groups negotiating on behalf of their states or the EU institutions. From this starting point, it develops an account of how these interactions contribute to making the EU what it is. Accordingly, focus is not on the state as such – and not even on ‘foreign policy decision

²¹ For a comprehensive discussion of the importance of constructing the object, see (Bourdieu, Chamboredon and Passeron 1991).

²² As Niilo Kauppi argues, particular groups of people ‘present themselves as holders or caretakers of a type of European collective, symbolic capital that undermines state sovereignty’ (Kauppi 2003: 782).

makers' (understood as heads of states and ministers) – but instead on their representatives (the national officials). As a consequence of this choice, the presence of the state in the EU and its national interests become more fluid. In practice, sovereignty and the way it has been translated into particular legal and political agreements with other states within international organisations is continuously constructed and reconstructed by those that represent the state.

Field, habitus and doxa

The primary sources for the analysis of the management of the British and Danish opt-outs are 123 in-depth interviews with representatives from the UK, Denmark and other member states as well as representatives from the Council of Ministers, the European Commission, national parliaments and experts. Moreover, the paper draws on an extensive use of archival material from the Danish Foreign Ministry. Together, these sources provide the basis for an exposure the actual workings of national opt-outs in the EU. This empirical material was gathered as part of my Ph.D. project and the thesis describe the sources in more detail.²³ Analytically, I focus on three concepts, *field, habitus and doxa*, which are crucial to sovereignty management in the EU.

Opt-outs are managed within a particular *field* of struggles where participation is valued more than autonomy. The field can be defined as a relatively autonomous social system consisting of a patterned set of practices and beliefs, which suggests competent action in conformity with rules and roles. A field is a historically derived system of shared meanings which define agency and make action intelligible (Moi 1991: 1021). The agents in a field develop a sense of the social game, and the concept of a field is thus an analytical concept that can help us systematise the study of social practices (Lamaison and Bourdieu 1989). According to this view, the national representatives' understanding of the goal of the negotiations is pieced together not only by their ministries and parliament back home, but also by the field that makes some actions possible and other actions not only impossible, but unthinkable.²⁴

To grasp the specificity of the diplomatic field in the EU, it may be useful to recall that the areas covered by opt-outs such as JHA are still recent newcomers in the EU and cooperation has an experimental character. One British representative explained that, for him, the next stage in the European asylum system was 'an open question'; he had little idea of what he and his colleagues would agree to in this fast-moving area.²⁵ This means that the struggles in the field have a pioneering feel to it for the participants, and the agents in the field function as a brother- and sisterhood of lawyers, an *avant-garde* in European cooperation.

In any field, promoting, reinforcing, repairing and restoring the social order requires constant effort, as does creating, recreating and rearranging it. The social order of the EU is not a finished system, which is acknowledged by obeying its rules; rather, it is a *modus vivendi*, which

²³ The thesis is entitled *The Diplomacy of Opting Out: British and Danish Stigma Management in the European Union* and will be defended at the Department of Political Science, University of Copenhagen on 19 June 2009.

²⁴ Bourdieu argued that the supply of political options does not develop in direct response to popular demand 'but to the constraints peculiar to a political space that has a history of its own' (see also Wacquant 2004).

²⁵ Interview, Home Office (London), April 2007.

operates in so far as – and only in so far as – the bureaucrats take the time and trouble to keep it going.

Second, the *habitus* can be defined as the unconscious overtaking of rules, values and dispositions gained from an individual and collective history. The habitus functions like the materialisation of collective memory and is a disposition to act, perceive and think in a particular way in conformity with the field throughout time (Bourdieu 1994: 163). While national representatives identify with their home states, they are also placed in a socially structured situation in which their interests and identities are defined.²⁶ Interestingly, this does not mean that concepts of national interest become irrelevant, but rather that they are interpreted and reinterpreted in the diplomatic field. There is an emerging sense of solidarity among the national representatives in the area of JHA and EMU, which are covered by the British and Danish opt-outs.²⁷ According to a young British diplomat in the UK Permanent Representation:

Brussels does something to you. I think of the officials from the other member states as my colleagues; they are not opponents, although of course sometimes we have to defend different interests.²⁸

However, the ‘Brussels effect’ is not limited to those positioned permanently in Brussels. British and Danish representatives, just as representatives from the other member states, like some migrants, feel a loyalty both to their own state and its opt-outs and to the EU in which they are attempting to achieve influence. This is partly due to their diplomatic habitus, which is orientated towards having international impact and influence.

Third, national representatives work within a particular understanding of the aim of European integration. Apart from the everyday internalisation of rules and values in the habitus, there are the foundational rules that the national representatives of the member states do not even reflect upon. These informal and unspoken structures constitute the prevailing *doxa*: the silent experience of the world (Jackson 2008: 167). Agents in a field work within the *doxa*, which ‘operates as if it were the objective truth across social space in its entirety’ (Bourdieu 1990). The *doxa* is the undisputed and taken-for-granted premise or ‘truth’. In order to identify the *doxa* of the Council, one must thus uncover the tacit assumptions that are fundamental to the European project. One of the dominant ideas is that opt-outs are problematic because they breach the solidarity between the member states and threaten the *acquis communautaire*. Indeed, the *acquis communautaire* has been interpreted as more than the legal provisions, procedures and rules of the Treaty of European Union, namely as ‘an embedded *acquis*’, which is ‘an institution which forms

²⁶ They are socialised when they engage in negotiations together with other member state representatives in Brussels.²⁶ Socialisation can be understood as a ‘process of inducting agents into the norms and rules of a given community’ (Checkel 2005: 804) which lead them to follow a logic of appropriateness, i.e. norm-guided behaviour. Checkel has argued that social interaction between nation state representatives is much more intensive in the EU than anywhere else in the world, and this increases the possibility of the transfer of loyalties.

²⁷ Accordingly, national actors develop into stakeholders with shared responsibility for the collective output of the Council (Lewis 2009: 168). A number of studies of the Council support the understanding that national representatives overtake supranational allegiances during participation in Council working groups and COREPER meetings, which possibly leads to an adherence to participation in itself; officials develop ‘dual loyalties’ (Trondal 2004: 22; see also Kassim and Peters 2001: 298; Bátorá 2005)

²⁸ Interview, UK Permanent Representation (Brussels), May 2006.

part of an ongoing process of constructing meaning and applying knowledge'. The *acquis* thus represents a certain 'world view' (Wiener 1998b: 302).

With some variations, the *doxa* of European integration is captured in the preamble of the Treaty of Rome, which states that the gathering nations of Europe are 'determined to lay the foundations of an ever closer union among the peoples of Europe'. When the states became EU members, 'they also implicitly signed up for more integration, because – in EC rhetoric – law (and obedience to law) has traditionally meant integration' (Shaw 1996: 237). Indeed, the idea that Europe must continue to move forward is a shared assumption, which is very rarely questioned by any national representative. One of the most important ways in which the EU moves forward is through law. The *doxa* of 'an ever closer union' serves to legitimise the EU's actions to its own civil servants in the Commission as well as to the national representatives when they negotiate in Brussels. In the system of the Council of Ministers diplomats translate the abstract notions of 'an ever closer union' into negotiations on secondary legislation in the form of regulations and directives. In the following, I will look at how *doxa* may help explain the reinterpretation and creative management of the opt-outs.

IV. Managing the Claim to Sovereignty

In every one of my 123 interviews, I asked who was the most critical of the British and Danish opt-outs. The answer was always the Commission. According to one British diplomat, the Commission has a negative view of the British protocol, because: '[...] the opt-in possibility is basically against the idea of a common legal order for everyone so the Commission is not very happy.'²⁹ The diplomat identifies the Commission as the protector of what Bourdieu would call the orthodoxy of European integration. Orthodoxy aims 'without ever succeeding in restoring the primal state of innocence of *doxa*' (Bourdieu 1977). Indeed, the supranational institutions of the EU have often expressed concern about 'outside closer co-operation' and defend the idea that the EU should affirm itself as a united and coherent legal order (De Witte 2001: 236). In this quest for European unity, differentiated integration is seen as an unwanted obstacle. Accordingly, opt-outs represent a threat of legal disintegration, but do they also pull the rug out from under the tacit assumptions of 'an ever closer union' which give meaning in the first place to the diplomatic interaction in Brussels?

My interviews reveal that this is not the case. Despite the opt-outs, also the British and Danish officials work in a particular direction, more or less consciously sharing the common goal of fulfilling the aims of the treaties. As one Home Office representative states:

We want what is best not only for UK but also for Europe, and I believe the EU needs our perspective in Justice and Home Affairs.³⁰

British and Danish representatives negotiate on a daily basis in Brussels not with the aim to safeguard sovereignty but to promote a particular national interest; this means furthering

²⁹ Interview, UK Permanent Representation (Brussels), 22 August 2007.

³⁰ Interview, Cabinet Office (London), April 2007.

particular ideas for the integration process. From new legislation on counter-terrorism to decisions on the Growth and Stability Pact, British and Danish representatives struggle to leave ‘British’ and ‘Danish’ fingerprints on the European edifice; opt-outs or no opt-outs. This management of the protocols challenges the view that integration and opt-outs are unnaturally and uncomfortable European bedfellows. In the following, I will provide three examples of how this reconfiguration of the opt-out serves to reinforce rather than threaten the doxa of European integration.

Reinterpreting the claim to sovereignty: opting in

A first example of how the opt-outs change meaning from a hesitant position to active participation relates to the extensive use of the so-called opt-in possibility. When the JHA pillar of the Maastricht Treaty was incorporated into the Community pillar in Title IV on ‘freedom, security and justice’, the UK acquired an opt-in possibility for measures under Title IV, meaning that it can choose from case to case whether to participate or not. Title IV covers the free movement of persons, checks at external borders, asylum, immigration and protection of the rights of the nationals of non-member countries and judicial cooperation in criminal matters. Legal scholars have wondered just how the UK managed to obtain such a favourable *à la carte* protocol (Juss 2005; Tuytschaever 1999), but what matters here is how the UK has exercised this flexible opportunity.³¹ The opt-in mechanism, which took effect on 1 May 1999, has now been in operation for several years.

In the first years after the Amsterdam Treaty entered into force, the Blair government was reluctant to exercise the opt-in possibility. However, as there was an increase in the number of asylum seekers entering the UK via other EU states, the British government found it advantageous if issues of asylum and immigration could be addressed through the Europeanization of policy-making in order to ensure that other member states took on a greater share of the burden (Fella 2006: 9). This conception is reflected in the UK’s use of its opt-in possibility: To date, the UK has opted into most civil law measures, all asylum measures and most measures concerning illegal migration, but it has remained outside of the few protective measures concerning legal migration, visas and border controls (Peers 2007b).³²

In *asylum and immigration cooperation*, British officials have been active in the development of a European asylum policy since the beginning of the 1990s, working in parallel with the EU on domestic initiatives such as the Asylum and Immigration Appeals Act (1993) (Joppke 1999). Former Prime Minister Tony Blair has claimed that the opt-in means that ‘[...] unless we opt in we are not affected by it. And what this actually gives us is the best of both worlds’ (BBC 2004). This is not entirely correct, as the UK is affected by the EU in the area of JHA in ways other than through its opt-in. Few of these changes have been detectable for the public at large; however, from the idea of ‘safe countries’ to mutual recognition, the UK is trying to both influence and

³¹ The opt-in possibility grants UK and Ireland a higher degree of flexibility than any previous forms of treaty based differentiation (Monar 2000: 10).

³² For a complete record of the UK decisions to opt in or out, see Peers (2007a).

imitate EU measures (Geddes 2005: 734).³³ Apart from staying out of the few protective measures on legal immigration, ‘the UK does not act like an opt-out state in this field’, a Commission official explains.³⁴

In *police and judicial cooperation* under the third intergovernmental pillar, British officials support a further intensification of collective EU measures to fight transnational crime and terrorism. This support has become even stronger after 9/11. The UK officials have been pressing hard for mutual recognition in both civil and criminal judgments, but they remain sceptical of harmonisation. Thus, the Labour Government accepted QMV on areas such as police matters and crime during the negotiations on the Constitutional and Lisbon Treaties, the officials declaring, ‘Whatever makes decision-making easier, we are for’.³⁵

In order to understand how exactly the opt-in decision is made, I asked a Cabinet Office official to explain the process:

First, we go for the ideal, which is to opt in right from the beginning, because then we are full members and have full influence. The second best option is to make clear that we would like to opt-in eventually and negotiate the condition for that to be possible. The worst case is when we do not opt-in.³⁶

Opting in is risky, because the UK may ultimately be bound by legislation that it does not like. For the British officials, however, it is frustrating *not* to opt in, because they want to be regarded as frontrunners. Today, the general approach of the UK is that it seeks to opt in to as much as possible; only the right to maintain border controls remains a non-negotiable element of the national position. A desk officer in the Cabinet Office explains that when the UK has announced that it does not opt in ‘[...] we still speak, and since our general position is to opt in wherever possible, we will try to influence the negotiations so that we can later opt in’.³⁷

While the British diplomats identify with the opt-in possibility and find it politically sound, they are also socialised into a diplomatic field, which values active and constructive participation and punishes staunch obsession and ‘un-European’ behaviour. The use of the opt-in possibility reflects that the UK officials work within the doxa of European integration. Conceived initially as a safeguard of legal immunity, it now merely protects the government from participating in the most generous regimes vis-à-vis immigrants.

Reducing the scope of the claim to sovereignty: the legal struggle

The second example relates to the struggle over the *scope* of opt-out, i.e. the interpretation of the legal range of the claim to sovereignty. While one could perhaps think that British and Danish representatives would seek to broaden the scope of the opt-outs as a means to ensure legal immunity, paradoxically, it is the opposite move which is most frequent. British and Danish officials attempt to diminish the scope of the national protocols to avoid exclusion from legal

³³ Interview, DG JLS European Commission (Brussels), January 2007.

³⁴ Interview, DG JLS European Commission (Brussels), October 2007.

³⁵ Interviews, Foreign and Commonwealth Office (London), December 2007.

³⁶ Interview, Cabinet Office (London), 17 April 2007.

³⁷ Interview, Cabinet Office (London), 17 April 2007.

measures that they would like to their states to be part of. British officials do so by challenging the interpretation of the British opt-outs in order to allow for increased British participation.

The UK is not party to Schengen but it has a pre-determined exemption. The Schengen protocol limits the British room for manoeuvre because it cannot simply opt into whatever it wants. Only with the unanimous agreement of all of the Schengen states may the UK 'request to take part in some or all of the provisions of this *acquis*' (Art. 4 of the Schengen Protocol). The member states that are parties decide unanimously on such requests. Hence, any Schengen state can in principle veto the participation of the UK, and the British position concerning Schengen-related measures is less flexible than concerning the rest of JHA.

In April 2000, the UK joined the part of the Schengen *acquis* dealing with police and judicial cooperation as well as partial participation in the Schengen Information System, but remained outside the core of Schengen: the common border policy. A significant majority on the domestic scene, led by Conservatives and other eurosceptics, have 'securitised' the British Schengen protocol to the extent that it appears to constitute a guarantee of the survival of the British nation (Wiener 1999).

For the UK, it is extremely important whether a new proposal builds on the border-related Schengen *acquis* or not. However, the correct legal basis for new initiatives is not always evident, and the UK has recently argued that two proposals were not related to the Schengen border policy so that it could participate in the adoption of the regulations. The two regulations are critical in the sense that they represent legal instruments from which the UK was excluded and domestic scepticism regarding participation was high; British officials were nonetheless able to participate in the decision-making process. In 2002-2004, the UK supported two new EU measures: regulations on security features and biometrics in passports (Council Regulation 2252/2004) and the Regulation on a European Border Agency (Frontex) (Council Regulation 2007/2004). The British government was in favour of the Regulation on Biometrics in Passports and was domestically engaged in the politically sensitive project of introducing biometric identifiers in national passports and identification cards. Due to the widespread domestic scepticism towards registration and control of personal freedom in the UK, the government has had an interest in promoting these issues on the EU level. The Labour government participated in the discussions about what to include in the regulation, arguing as a 'normal' member state. Also in relation to Frontex, the UK participates 'without question' in all the meetings and operational work of the European Border Agency on an ad hoc basis (House of Lords 2007). Indeed, the British officials are staunch supporters of increased control with the external EU borders.

When ultimately proposed, however, both regulations were classified as building on Schengen border measures in which the UK does not formally participate, and it was not allowed to adopt the two measures. British legal experts did not accept being 'unfairly' excluded from the Schengen club and argued that the two regulations were erroneously proposed as measures developing the border provisions of the Schengen *acquis* and lodged applications with the ECJ challenging UK exclusion. By choosing this dramatic route, the UK tested the informal norms of good behaviour in the field, as pointed out by a high-level Commission official:

I think it is a complete shot in the dark. I must say that I was also personally surprised that the UK government, which has excellent lawyers, chose to go to court with such a bad case.³⁸

On 18 December 2007, the ECJ ruled against the British challenge on Frontex and passports regulations (ECJ 138/79, United Kingdom v Council). The ECJ thus backed the position of the Council and stressed that the UK and Ireland can be allowed to participate only in the adoption of provisions building on an area of the *acquis* in which they already take part.

Despite the Schengen protocol, the UK has adapted its national legislation regarding for instance biometrics in passports to conform to EU standards. Furthermore, it has contributed in quite significant ways to the development of the EU security paradigm and sought to influence the development of the operational cooperation at the external borders. From the idea of ‘safe countries’ to mutual recognition and the strengthening of its own border control system, the UK is trying to both influence and imitate EU measures (Geddes 2005: 734). While the UK has lost the Frontex and biometrics cases at the ECJ, the Schengen protocol does not prevent the UK from adopting national legislation on biometrics in passports conforming to the EU standards, and UK officials continue to participate informally in the discussions concerning biometrics and Frontex. Even the UK’s reluctance to participate in a common border regime is ambiguous and there appears to be no automatic link between the original claim to sovereignty and the way it plays out in practice.

Circumventing the claim to sovereignty: negotiating parallel agreements

Apart from the attempts to influence the drafting of new legislation and diminishing the scope of the protocols, British and Danish representatives also seek formal adaptation to the EU. The most remarkable form of mimicking within JHA is the Danish negotiations of parallel agreements. The Danish politico-administrative elite attach great importance to keep the national legislation meticulously consistent with EU legislation in the field of immigration and asylum. However, as Denmark does not have an opt-in possibility, the Danish government has applied to the European Commission for intergovernmental parallel agreements associating Denmark with legislative measures under Title IV TEC (asylum, immigration, and civil law) where the Danish opt-out applies.³⁹ Concretely, Denmark adjusts its domestic legislation via parallel agreements ‘[...] which are considered as being a vital interest to the country’ (Vedsted-Hansen 2004: 67). If Denmark is granted a parallel agreement, the government copies the EU measure in the form of Danish law which is then subsequently agreed on by Parliament.⁴⁰

³⁸ Interview, DGJLS, European Commission (Brussels), 24 January 2007.

³⁹ This strategy is unknown to most of the public and while it is a legally defensible practice, one could argue that it represents a political bypassing of the protocol (Adler-Nissen 2008: 95).

⁴⁰ This gives the parliamentarians a veto possibility, which has however never been used as the majority of Parliament has supported the parallel agreements. In order to ensure the Parliament’s approval, the Foreign Minister has held meetings with the European Affairs Committee to get a mandate prior to the negotiations of the parallel agreements. Furthermore, the Ministry has made a great deal of energy to hold them continuously informed, Interview, 28 February, 2006, Danish Ministry of Foreign Affairs.

By practicing its right as an international sovereign to enter into parallel agreements with other entities, Denmark accepts to implement the same rules as the other member states, but it has formally declined the opportunity to influence the design of the rules in the first place.⁴¹ On the one hand, the ability to negotiate parallel agreements suggests that the state exercises its treaty-making role, but on the other hand by doing so it undermines the legal immunity, which was presumably the idea with the opt-out in the first place. Moreover, parallel agreements are regarded as deeply problematic by the Legal Services of Council of Ministers and the European Commission.

Parallel agreements are extremely artificial; the EC has to do an external agreement with one of its own members. This cannot stand as a precedent for any future arrangement with any member state.⁴²

Interviews and archival studies also demonstrate that these negotiations are extremely time-consuming and difficult. As a Legal Service official argues, 'First they ask to be exempted, then they ask to be associated. This is illogical. Why do they not just drop the opt-out?'.⁴³ This also explains why they have taken around six years to negotiate. So far, Denmark has applied for six parallel agreements, but the Commission has only granted three.⁴⁴

Dublin II: Council regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; and

Eurodac: Council regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

Brussels I: Council regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Service of documents in cross-border cases: Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

According to the Commission, the following conditions apply if Denmark is to be granted a parallel agreement:

- Parallel agreements could only be of an exceptional and transitional nature.
- Such an interim solution should also only be accepted if the participation of Denmark is fully in the interest of the community and its citizens.
- The solution on a longer term is that Denmark gives up its protocol on JHA.

⁴¹ In practice, the Commission authorizes the Council to negotiate the parallel agreements with Denmark.

⁴² Group interview, Legal Service, European Council, 26 February 2008.

⁴³ Interview, Legal Service, European Commission, 12 December 2006.

⁴⁴ The Commission refused to grant Denmark parallel agreements with respect to the Regulation on insolvency proceedings and the Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters (Bruxelles II).

Whether or not Denmark is granted such parallel agreements depends on the Commission. If it is not in the interests of the EU – which are defined by the Commission – Denmark cannot formally adopt EU legislation within an area where it has opted out. Therefore Danish diplomats use a considerable amount of energy and time to convince the Commission that it is in the interest of the Union that Denmark gets parallel agreements.⁴⁵

Moreover, the conditionality built into the parallel agreements functions as a disciplining mechanism where Denmark promises one day to get rid of its disputed exemptions. To be granted parallel agreements, Danish officials must behave as representatives from applicant countries who argue that their country is making progress, that it is Europeanizing and moving closer to the European core (Wæver 2000: 262-263).⁴⁶ By signing the parallel agreements, Denmark agrees to the temporality of the exemptions and accept that it eventually will have to give up authority on the areas where it has opted out.⁴⁷ In this sense, the opt-out no longer guarantees autonomy, because it is transformed into a sort of delay-action device. Danish political and administrative elites promise to work actively toward lifting the opt-outs ‘in a few years’ and continuously assert that they are just waiting for the right moment to call a referendum.⁴⁸ In this sense, Curtin’s argument that opt-outs would only be temporary instruments appear well-founded.

V. Alternative models?

If opt-out protocols are hollowed in order to allow the UK and Denmark to participate as much as possible despite the opt-outs, they are perhaps not the best way answer to safeguard what Helen Wallen calls legal immunity. If we, for the sake of argument, accept the idea that opt-outs have been installed to increase national autonomy from EU policies and legislation (and not e.g. to secure the signing and subsequent ratification of a treaty or respond to eurosceptism), the question is whether one can think of alternative ways or models to safeguard autonomy. There are at least three reflections which merit consideration: *radical differentiation*, *diplomatic self-restraint* and *processual everyday control*.

A first approach to securing national autonomy is to radicalise the idea of a differentiated Europe. Instead of extending national opt-outs, not-so-willing states could become associated members of the EU, not participating in all policies. At first glance, association represents an alternative and more resolute way of choosing to opt-out. Judging from experience, however, this may not be so simple. In fact, one could argue that the Norwegian model merely represents an exaggeration of the position of a member state with opt-outs. Through the EEA agreement, Norway and the other EEA states have taken on the obligation to implement all EU legislation

⁴⁵ Interviews, February 28, 2006, Danish Ministry of Foreign Affairs

⁴⁶ If Denmark is granted a parallel agreement, the government copies the EU measure in the form of Danish law which is then subsequently agreed on by Parliament. A majority of the Danish Parliament has supported the application for parallel agreements and openly or tacitly backed the pace-setting strategy within Justice and Home Affairs (Larsen 2006: 96).

⁴⁷ Interviews, August 22, 2006, Danish Ministry of Refugees, Immigration and Integration Affairs.

⁴⁸ Interviews, February 28, 2006, Danish Ministry of Foreign Affairs.

relevant to the functioning of the internal market (Egeberg and Trondal 1999; see also Neumann 1999: 273).⁴⁹ The EEA agreement allows the EFTA countries to participate in committees under the Commission, but not in committees or working groups under the Council.⁵⁰ Norway only participates actively in Schengen, where it is considered to be a full member without the right to vote. As a rule, however, Norway is not even part of struggles in the diplomatic field for new legislation, which it is later bound to follow (Eliassen and Sitter 2003).⁵¹ The difference between being a Norwegian official and being an official from the UK or Denmark is that while the British and Danish representatives may not be allowed to vote or are sometimes not even invited to the meetings, they are not complete outsiders; they are still part of the struggle for influence. In contrast, the possibility of leaving Norwegian fingerprints on the European edifice are minimal, although the country is in many respects just as bound by the decisions and rules made in Brussels.

A second approach is to return to a vision of a more traditional diplomacy. In a general critique of current polity-building oriented diplomacy, Sharp advocates more prudence and self-restraint among national representatives in international organisations. To avoid becoming a source of international tension:

[d]iplomats should remind themselves and others that they are first and foremost the representatives of sovereign states, that this is their *raison d'être* and a precondition for anything else they may aspire to be or do (Sharp 2004: 76).

In the current European order, however, the *raison d'être* of national diplomacy has changed, perhaps for good. Indeed, European integration would not have been possible had this not been the case. Thus, while Sharp's comment is valuable, more radical reforms are required to pass on this 'reminder' to diplomats given the shared diplomatic habitus, the current overlapping authority structures in the EU and the supranational decision-making process.

A third – and perhaps more realistic – option is to focus on the daily workings of the EU. If the management of opt-outs can only be understood in its particular social milieu – as it is a socially mediated and constructed phenomenon – institutional engineering aimed at safeguarding national autonomy from EU legislation should address this social context. There have been calls for an increasing politicisation of the national representation in Brussels as a way to increase its legitimacy and transparency (Follesdal and Hix 2006). According to this view, the challenge is how to introduce new checks that will supposedly increase its accountability. We are likely to see greater parliamentary control, both on the national and European scenes. The stronger involvement of the national parliaments in the decision-making process will possibly link national

⁴⁹ The EEA (European Economic Area) agreement is an international agreement between EU and EFTA, which came into force on 1 January 1994. The agreement allows the EFTA countries into the Single European Market on equal terms as the member countries. Some policy areas are nevertheless excluded from the agreement (e.g. fisheries and agriculture). Since Sweden, Finland and Austria joined the EU in 1995, the only EFTA countries left in the EEA are Norway, Iceland and Liechtenstein (the last EFTA country, Switzerland, said 'no' to the EEA agreement in a referendum in 1993).

⁵⁰ Interview, Norwegian Embassy in Denmark (Copenhagen), 12 March 2008.

⁵¹ Norway is represented in the Mixed Committees but has no formal representation in the Council system. The EEA agreement contributes to the conclusion of the Norwegian Power and Democracy Study that parliamentary representation appears to erode without being re-compensated on the European level (Selle and Østerud 2006).

representative practices more directly to the debates in the national capitals and give rise to demands that the bargains in Brussels reflect particular national problems. Moreover, the enduring importance of national parliaments is emphasised in providing representative legitimacy as a basis for the developing EU institutions, despite the fact that they have receded in their capacity to exercise control over their own national governments (cf. Sousa 2008).⁵² Nonetheless, it is doubtful whether initiatives such as giving national parliaments the power to block new legislation through the use of ‘red cards’ will change how integration functions. Rather, they may have the opposite effect in terms of increased frustration, both for diplomats and the populations they are supposed to represent (see also Búrca 1996).

Another way of addressing this could be to make the national parliaments elect the the EU ambassadors in Brussels. This could create a direct link between the most powerful national representative in Brussels who represent the state in COREPER and the domestic representative institution. Nevertheless, it also risks politicising the negotiations to the degree that the doxa of problem-solving and cooperative culture is threatened; a culture which has been decisive for the integration process. The challenge related to introducing more checks and balances in order to reduce the autonomy of the diplomatic field is that it may make it more difficult for state representatives to engage in sincere dialogues in the Council.

Whether or not reproducing national systems of accountability and representation in a system in which national representation is serving both national and European agendas in a quasi-autonomous diplomatic field will have the desired effects ought to be explored further in empirical analyses. But creating fundamental changes in the EU would require radical reforms; not only to the institutional setup, but also to the diplomatic identities, social hierarchies and the sense of purpose of the integration process.

Conclusions

In a short-term perspective, the British and Danish governmental strategies of opting out were possibly a smart move to convince reluctant domestic populations and backbenchers that important elements of national sovereignty would go untouched by future European integration. In a more long-term perspective, opt-outs complicate the European policies of the UK and Denmark; and lead to strategies of reinterpretation.

The paradoxical – and perhaps most perplexing – finding is that the ways opt-outs are managed contribute to the upholding of the doxa of ‘an ever closer union’. Theoretically, this has implications for how we understand opt-outs as well as for the European integration process more broadly – understood as a social integration of politico-administrative elites. Indeed, national opt-outs should not be narrowly interpreted as exemptions to the general rule of integration, but also as rules that confirm the objective of continued European integration.

⁵² With the increasing use of institutional brakes, an increasingly powerful European Parliament, a Charter of Fundamental Rights and the role of ordinary citizens have been sought promoted and representative democracy has been advanced (see e.g. Bellamy and Castiglione 1997; Bellamy and Castiglione 1997; Bellamy and Castiglione 2003).

To understand the character of the sovereignty exercised through opt-out protocols, this paper proposed a distinction between the *constitutive* dimension of sovereignty, expressed in the initial granting of the opt-out and the *regulative* dimension, illustrated by subsequent interpretation and management of the protocols. In the first instance, the state appears to act as a sovereign in an international law sense, but in the second instance, the opt-out state accepts the EU's own claim to a sovereign legal order. I provided three examples of this translation of the claims to sovereignty within JHA and Schengen where both the UK and Denmark have controversial opt-outs. First, the extensive use of the opt-in possibility by the UK, which means that the UK generally participates fully as any other member state, second the UK's legal struggle with the ECJ to diminish the scope of the opt-out and third, the Danish negotiation of parallel agreements. On the one, hand opt-outs may help preserve the symbolic figure of an autonomous state; on the other hand, opt-outs may be seen as part of its transformation.

Where does that leave the current debate on a differentiated Europe? Opt-outs and other forms of differentiated integration has recently come to be seen not only as a pragmatic instrument to solve stalemates, but also as a solution to problems of legitimacy and governance beyond the state (e.g. Scharpf 2006). Without directly addressing these issues, the paper has provided insight into the potential challenges to this line of thinking. Opt-outs have hitherto enabled a deepening of the integration process through increasingly demanding treaties, even though not all governments (or populations) were fully on board. Hence, instead of fragmenting the Union, opt-outs become an important instrument to assure continued integration.

For almost a decade, the EU has sought to ratify a successor to the Nice Treaty from 2001. For numerous reasons, the member states have struggled to reach agreement on a new treaty, while popular scepticism toward the EU appears to be on the rise. In exchange for receiving concessions from the other EU countries, the Irish government has committed itself to holding a second referendum on the Lisbon Treaty by November 2009. Genuine opt-outs – on defence, taxation, abortion and family law – will be attached to the treaty, which the Irish will then have to accept in a second attempt. In this sense, history repeats itself: when the Irish rejected the Nice Treaty in 2001, they were granted opt-outs resembling those of Denmark back in 1992, which were created to avoid blocking the Maastricht Treaty.

Drawing from the empirical analysis of the management of the British and Danish opt-outs, however, I would suggest that any institutional mechanism created to install external controls with the quasi-autonomous diplomatic fields which constitute the engine room of European integration will be reinterpreted and socially managed to secure the positions of the agents in the field. Thus, institutional entrepreneurs should consider the social site in which they seek to construct new governance architecture. As 'accountable' (Scharpf 2006: 860), 'neo-medieval' (Zielonka 2006: 9) or 'post-modern' (Plattner 2003: 54) as they may be, measures of differentiation such as opt-outs are not applied in a room empty of meaning or power. Indeed, there are no social fields exempt from struggles to position or classify other groups of people, and instruments of differentiation will be part of – and take their meaning in – these struggles. As long as the doxa in the EU policy fields are not addressed, the effects of institutional reforms will be limited.

Nevertheless, while the current treaties and institutional reforms with more use of national protocols and enhanced cooperation are not likely to lead to a radically different (iated) Europe, the doxa of ‘an ever closer union’ may still be fragile because it is only fully shared by a small European elite. New generations of heads of state and government and their national representatives may enter the European scene with a different understanding of the purpose of integration, thereby strengthening differentiation vis-à-vis the orthodox integration mode. Future enlargement rounds may also question the existing doxa, although it has been demonstrated that the national representatives from the new member states adapt quickly to the informal norms of the Council system (Lempp and Altenschmidt 2008).

External shocks (be they negative referendums or an economic slowdown) may impact the overall development of the EU, yet this paper suggest that these shocks are transformed in the engine room of integration. Below the level of ministers, national representatives work within a common language of polity-building and problem-solving, which has made them the caretakers not just of a national interest but also a particular version of a European interest as they struggle for symbolic power in self-referring fields. Without these social mechanisms building on trust and a common understanding of the game, it would be difficult to see how the EU could have evolved in the first place; just as hard as it would be to understand how states in the 21st century have surrendered their competences over monetary affairs criminal law, which touch the core of the state functions.

It is in this light that we can return to the statement made by Guy Verhofstadt presented at the beginning of this paper; namely, that opt-outs constitute a negation of the idea of European cooperation. This must now be revised: In practice, the management of the British and Danish opt-outs indicates the strength of the idea of European cooperation.

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