

Straitjacket or Sovereignty Shield? The Danish Opt-Out on Justice and Home Affairs and Prospects after the Treaty of Lisbon¹

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INTRODUCTION: BEYOND THE INTEGRATION DILEMMA

How are we to understand the perplexing and sometimes even counter-intuitive position of Denmark in relation to Justice and Home Affairs (JHA)? In this article, we attempt to go behind the many myths and misunderstandings involved and analyse the consequences of the Danish opt-out from EU cooperation in Justice and Home Affairs. Symbolically, the opt-out plays a major role for large parts of the Danish population as a sort of sovereignty guarantee in the face of European integration. While shifting Danish governments may point out the detrimental effects of opt-outs on Denmark's position in the EU, they still have to guarantee to the Danish public that they respect the protocols. In Denmark, the opt-outs are seen to constitute a bulwark 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

- 1 This article builds on research conducted in connection with an investigation into the four Danish EU opt-outs commissioned by the Danish Parliament (DIIS, 2008) as well as research for a Ph.D. thesis (Adler-Nissen 2009a).
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sacred character. In addition to their dramatic origins, the extremely controversial nature of the opt-outs is displayed in how they are debated. The opt-outs from the basic treaties of the EU are highly politicised.⁴ Most recently, politicians have exaggerated or downplayed the importance of opt-outs. Eurosceptic politicians and media claim that protocols protect national sovereignty and may serve as an example to other member states, whereas British and Danish pro-European ministers argue that they lose political influence when they 'are sent outside'.⁵

The treaty exemption is indeed of crucial importance not only to Denmark's policy on Justice and Home Affairs, but also its position in the EU more generally. Yet, the actual implications of the opt-out remain largely under-researched. As a response to this unsatisfying situation, we provide an overview of the inbuilt tensions within the legal construction of the opt-out and discuss some of the major political questions and challenges raised by the particular Danish position and how these are likely to affect Denmark following the Treaty of Lisbon.

The Danish opt-out on Justice and Home Affairs is often seen as inherently complex and difficult to understand. Two factors in particular contribute to this image. First, EU cooperation in this area appears as a patchwork of policies, covering seemingly disparate policy areas such as asylum, police cooperation and international divorce law. The main commonality between these policy areas is that, since their introduction with the Maastricht Treaty in 1992, they have become some of the fastest growing policy areas in the EU. Border control, international crime, terrorism and immigration policy have all moved to the top of the political agenda in both the individual member states and the EU at large. A recent analysis suggests that on average ten new legislative proposals on Justice and Home Affairs are tabled every month.⁶

Secondly, the very design of the opt-out is somewhat tricky. When Denmark voted 'no' to the Maastricht Treaty in 1992, the 'no' was carefully interpreted as a rejection of 'the United States of Europe' idea, not as a rejection

4 Mullen and Buller, 2003.

5 Søren Gade, 'Forsvarsforbeholdet spænder ben', *Berlingske Tidende*, 3 December 2004 & Udenrigsministeriet, 2001.

6 Monar, 2007.

of EC membership or of European cooperation in these matters as such.⁷ The JHA opt-out was thus designed as an exemption to *supranational* cooperation, leaving Denmark free to participate as long as cooperation remained *intergovernmental*.⁸ In other words, the JHA opt-out is 'activated' by the particular *mode* of cooperation rather than the political *content*. The basic logic of the opt-out is that Denmark is 'out' where cooperation is supranational, but 'in' where it is intergovernmental.

In 1992, Denmark was certainly not alone in its concern about supranational cooperation in the newly established JHA policy area. Several member states were reluctant to surrender sovereignty on issues connected to politically sensitive areas such as border control, asylum policy and police cooperation. For many years, the political-administrative leaders in the respective member states were cautious not to allow EU institutions to influence their policies on asylum, immigration, border control, civil law or police and criminal law, which they regarded as closely interwoven with the security and sovereignty of the nation state.⁹ During the Maastricht negotiations in 1991-1992, the British and Danish governments, together with the governments of Ireland and Greece, were able to block German plans for the full communitarisation of immigration and asylum policy. This resulted in a messy compromise and led to the creation of the pillar structure.¹⁰ The third pillar of the Maastricht Treaty was strictly intergovernmental and dealt with Justice and Home Affairs. It was juxtaposed to the supranational first pillar covering the existing policies on agriculture, trade and the internal market (EC), while the second pillar covered security and foreign policy (CFSP). When the Danish JHA opt-out was introduced after a second referendum in 1993, it therefore did not have any practical significance. At the outset, Denmark participated fully in all aspects of

7 For details regarding the debate leading up to the Maastricht referendum, see Adler-Nissen (2008), Møller (2003), Petersen (2003).

8 Supranational cooperation implies among other things that EU legislation has a direct effect in member states and thus also a direct effect for EU citizens. The member states also engage in intergovernmental cooperation, which is the traditional form of treaty-based international cooperation between states. Basically, intergovernmental cooperation means that only states are bound by the treaties and that – to be effective – treaty law has to be transposed into national law via national parliaments.

9 Papagianni, 2001: 111.

10 Geddes, 2000: 89 & Givens, 2003: 305.

Justice and Home Affairs cooperation. The general interpretation in the early 1990s was that Danish sovereignty was safeguarded with the protocols and the ambitions to move this area forward would be limited.

Hence, the Danish JHA opt-out should perhaps mainly be understood as a signal to the rest of the Union that Denmark wished to maintain intergovernmentalism in cooperation over Justice and Home Affairs. However, if Denmark did indeed try to send such a signal in 1992, it is clear today that it was not received nor observed by the other member states. In 1997, member states took a drastic choice towards the integration of their asylum, immigration, border control and civil law policies upon agreeing to speed up the process with the Amsterdam Treaty. Substantial parts of the JHA portfolio were transferred to ordinary EC cooperation with the entry into force of the Amsterdam Treaty in 1999. The UK, Denmark and other reluctant member states attempted to resist the communitarisation of asylum, immigration and border control up until the last weeks before the Amsterdam summit, but they failed.¹¹

The supranational move 'triggered' the Danish opt-out for all matters concerning border control, civil law, and asylum and immigration policy (Title IV, TEC). Only criminal law and police cooperation remained intergovernmental, which is why Denmark could continue to participate in these policy areas on an equal footing with all other member states. From being completely outside EC competence, Justice and Home Affairs has become fully integrated in the EC and EU treaties and is among the top official political priorities of the European Commission.¹² While national control and authority may still be important concerns, cooperation in Justice and Home Affairs has shifted from taboo to totem in less than two decades.

In all the areas currently covered by the opt-out, Denmark appears to have exchanged influence for freedom. As Helen Wallace puts it, an opt-out may guarantee 'immunity from disliked European legislation',¹³ but the price for autonomy is a loss of influence in the policy-making process. On the one hand, Denmark is prevented from participating in new measures covered by the opt-out. Danish ministers and civil servants still sit around the negotiation table in

11 Moravcsik & Nicolaidis, 1998: 29.

12 Guiraudon & Jileva, 2006: 280.

13 Wallace, 1997: 682.

Brussels and may take the floor, but Denmark obviously has no voting right in the Council of Ministers, and Danish interests are seldom 'heard' in the negotiations.¹⁴ On the other hand, Denmark maintains national autonomy within these areas since no formal sovereignty has been handed over to the EU. As such, Denmark is not obliged to implement, for example, common legislation on civil law, asylum and immigration. Or, rather, this is how the situation looks at first sight!

In reality, a much more complex picture emerges once we examine the actual working of the protocols. In this sense, the opt-out becomes a prism for understanding how Denmark deals with a range of conflicting interests when it comes to its EU policy. As we will attempt to show in the following, managing the Danish opt-out from Justice and Home Affairs has increasingly become a question of dealing with unintended and largely unforeseen consequences of the peculiar legal position that Denmark assumed in 1992. We will demonstrate that, in this endeavour to manage the protocols, the posited trade-off between freedom and influence – the so-called integration dilemma – is far from being a zero-sum game.

This article is organised as follows. The next section starts by tracing the current anatomy of the JHA opt-out, including how it was legally designed and constituted and how it has come to operate in political terms. Building on this, future scenarios for Danish (non-)participation in EU cooperation on Justice and Home Affairs are sketched out, including some historical and comparative reflections for understanding the policy dilemmas that Danish decision-makers are likely to face in the years to come. With the entry into force of the Treaty of Lisbon in December 2009, the task of managing the JHA opt-out is set to change further. On the one hand, the Treaty triggers Denmark's exemption for the remaining parts of the JHA portfolio. On the other hand, it presents Denmark with a fresh opportunity to convert its current opt-out into a seemingly 'pick and choose' model. Due to the immense legal and political complexity of the policy area of Justice and Home Affairs, however, providing a systematic overview of the byzantine Danish protocols is no mean task. Hence, this article will not cover the entire development of Justice and Home Affairs, nor all its policies or legislation, but instead attempt to unravel the different implications of Danish opt-out more analytically.

14 DIIS, 2008.

AN EXEMPTION WITH EXEMPTIONS

As soon as one looks more closely at the Danish position on Justice and Home Affairs cooperation, things start to get complicated. The devil is in the detail. The first complicating aspect is that, despite its opt-out, Denmark remains bound by EU law due to special forms of association in several areas. These various agreements of association include first and foremost the common border policy – also known as the Schengen *acquis* – which was incorporated into the EU treaty system with the Amsterdam Treaty. Denmark was initially reluctant to share authority in this area with the other member states; the domestic debate centered around such notions as German police officers entering Danish territory and the EU influencing Danish criminal law. Yet Denmark accepted the surrender of its national border controls by signing the Schengen agreement in 1996. When the Schengen agreement was integrated in the Amsterdam Treaty in 1997, part of it was inserted into Title IV. A protocol was drafted to assure ensure that Denmark could accede to any future supranational EU rules that might be introduced on the basis of the original Schengen cooperation while continuing to respect the opt-out from ‘supranationality’ in the field of Justice and Home Affairs. The protocol states:

Denmark shall decide within a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen *acquis* under the provisions of Title IV of the Treaty establishing the European Community, whether it will implement this decision in its national law.¹⁵

At first glance, it appears as though Danish autonomy has been formally secured. However, the protocol also states that, if Denmark decides *not* to implement such a Council initiative, the other member states will consider what ‘appropriate measures’ should be taken. While the meaning of this has never been made explicit, it is commonly understood that Denmark would thereby risk being excluded from the entire Schengen *acquis*.¹⁶ The Council has never had to consider such measures because Denmark has so far transposed all such

15 Art. 4 of the Schengen Protocol. This special procedure is criticised by legal scholars for being ‘complex [and] illogical’ (Tuytschaever, 1999: 101).

16 Vedsted-Hansen, 2008: 117.

initiatives into national law. Today, all EU policies on border control and large parts of illegal immigration are categorized as developments of the Schengen framework. A substantial part of police cooperation is equally considered a development of Schengen cooperation. But because this area has hitherto remained intergovernmental, this has not had any consequences for Danish participation so far.

The other set of special exceptions to the JHA opt-out concerns the so-called parallel agreements. As supranational cooperation on Justice and Home Affairs has developed, Denmark has increasingly experienced being left out of cooperation on matters it considers to be of vital interest to it and where it could not simply copy EU measures introducing similar Danish legislation. The Danish government has therefore applied to the European Commission for intergovernmental parallel agreements associating Denmark with legislative measures under Title IV TEC (asylum and civil law) where the Danish opt-out applies. Concretely, Denmark adjusts its domestic legislation via parallel agreements 'which are considered as being a vital interest to the country'.¹⁷ If Denmark is granted a parallel agreement, the government copies the EU measure in the form of Danish law, which is then subsequently passed by the Danish Parliament.¹⁸ Denmark agrees to implement the same rules as the other member states by practising its right as an international sovereign to enter into parallel agreements with other entities, but it has formally declined the opportunity to influence the design of the rules in the first place.¹⁹

So far, Denmark has applied for six parallel agreements, but the Commission has only granted three, two on civil law and one on asylum.²⁰ The most important of these is probably the latter, which concerns the Dublin system,

17 Vedsted-Hansen, 2004: 67.

18 This gives Parliament the possibility of a veto, which has, however, never been used, as a majority MPs have supported the parallel agreements. In order to ensure Parliament's approval, the Foreign Minister has held meetings with the European Affairs Committee to obtain a mandate prior to the negotiations of the parallel agreements. Furthermore, the Ministry has expended a great deal of energy in keeping them continuously informed (Interview, 28 February, 2006, Danish Ministry of Foreign Affairs).

19 In practice, the Commission authorizes the Council to negotiate the parallel agreements with Denmark, making the Commission the gatekeeper.

20 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).

normally considered the cornerstone of EU cooperation on asylum. The Dublin Regulation lays down the principle that asylum-seekers can only launch an application in one member state and thereby prevents 'asylum shopping'. Denmark used to participate in this system when it was still an intergovernmental measure. The parallel agreement ensures that Denmark can continue to apply the Dublin rules as a matter of international treaty law, despite the new regulation being a supranational measure for all other member states. While this legal technicality is crucial in regard to the Danish opt-out, in practice little difference exists between the obligations that Denmark has to observe and those observed by other member states with respect to the Dublin system.

Both the Schengen *acquis* and the parallel agreements effectively constitute 'exemptions to exemptions' allowing Denmark to participate in certain measures despite its general opt-out. The parallel agreements have been created because Denmark itself has asked to participate. These agreements are essentially stopgap measures. Similarly, changing Danish governments have found that Denmark has a fundamental interest in remaining within Schengen. Danish participation in these areas does not, however, come with the same influence and decision-making rights, which normally follows from being bound by EU regulation. Denmark has no right to vote on new Schengen measures. In practice, Denmark is thus *de facto* forced to accede to all new Schengen measures, but formally retains no power to influence their content. Thus, when the Return Directive was adopted in 2008, Denmark was forced to accept a new eighteen-month detention limit for any foreigners in a return position.²¹

With regard to the parallel agreements, Denmark is similarly bound to accept any changes to the EU rules or else give up the agreement entirely. The consequence of this became clear when proposals to amend the Dublin Regulation were tabled in December 2008, including, among other things, a suspension clause temporarily halting asylum-seekers from being returned to member states experiencing a particularly high influx of asylum-seekers. The Danish government has so far been opposed to this clause, arguing that it might undermine the system itself. Denmark can obviously voice such concerns during negotiations, but it has no voting powers in the Council, which, all other

21 Directive 2008/115/EC, 16 December 2008.

things being equal, leave member states freer to ignore the Danish position.²² For the civil law measures covered by the parallel agreements, it is also the case that Denmark has ceded its right to negotiate on these matters in other international fora, such as the Council of Europe. The price for association – getting an exception to the exception – is thus considerable.

OPTING OUT VS. STANDING OUT

Contrary to the above situations, the JHA opt-out also forces Denmark to remain outside EU cooperation in a number of areas where the Danish government otherwise considers participation to be in Denmark's interest. As long as EU measures are simply concerned with establishing common rules and legislation, Denmark may of course unilaterally choose to introduce similar rules as a matter of Danish law. Thus, when it comes to different forms of legal harmonization – or common rules – the opt-out leaves Denmark with a freedom of choice that no other member states have – the Danish government and parliament (Folketinget) can copy the EU rules they wish to and simply ignore the rest.

Yet, as soon as EU measures involve the establishment of EU agencies, supranational funding structures or reciprocity mechanisms, simply copying the rules into Danish law will not do. The Dublin system, for instance, is based on a reciprocity principle that commits all member states to receive asylum-seekers referred under the Dublin criteria from another member state. Here, Denmark may copy parts of the regulation into Danish law and itself decide to receive asylum-seekers from other member states, but it would have no way of ensuring that, for example, Greece accepted asylum-seekers referred from Denmark. These more advanced forms of cooperation have substantially increased within the areas of Justice and Home Affairs over the last ten years. Today, reciprocity mechanisms are applied to everything ranging from divorces to court rulings regarding terrorism.²³

In such situations, if Denmark wants to participate, it needs a parallel agreement. Yet, the Commission and other member states have been highly reluctant

22 DIIS, 2008: 333.

23 Peers, 2006: 76.

to extend such agreements. The idea that the EU should enter into what is essentially an external treaty with one of its own member states has been met with great resistance on grounds of both practice and principle. Negotiations on the existing three agreements took several years. According to the Commission, the following conditions apply when Denmark is 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 interests of the Community and its citizens.
- The solution in the longer term is that Denmark gives up its protocol on Justice and Home Affairs.

On this basis, few commentators expect that Denmark will be granted additional parallel agreements over the next couple of years. The position of the Commission further underlines the fact that, while Denmark chooses when and on what to apply for parallel agreements, it is the rest of the EU that decides whether such agreements are granted or not.²⁴

THE FREEDOM OF OPTING OUT

Even though the Schengen *acquis* today constitutes a considerable part of Justice and Home Affairs cooperation, both this and the parallel agreements remain 'exceptions' from an opt-out perspective. For the remaining policy areas under JHA, the rule is that the opt-out leaves Denmark out of all supranational EU legislation. One of the paradoxes of the JHA protocol is the striking discrepancy between the original motivation behind the Danish reluctance toward community competence within the area of asylum and immigration policy and its current motivation to maintain its opt-outs. In the beginning of the 1990s, Denmark, together with the Netherlands, was among the most liberal countries and feared that community competence within asylum and immigration policy would threaten the high level of protection given to asylum seekers in Denmark.²⁵ As

24 Europaudvalget, alm. del, bilag 551. 31 January 2003.

25 Manners, 2000: 98.

of the late 1990s, however, and in particular since the election of the Liberal-Conservative government in 2001, Danish asylum and refugee policy has on some issues been more restrictive than that of the rest of the EU, in particular the rules on family reunification. Indeed, to the politicians currently in power and the parts of the Danish public supporting them, the strict Danish rules on asylum and immigration constitute important barriers to the perceived inflow of immigrants and asylum seekers. If the opt-outs are surrendered, these barriers will be removed. The opt-out arguably presents Denmark with the freedom to pursue different policies in these areas from that of all the other member states.

So far, Denmark has mainly exploited this freedom with regard to asylum and legal immigration. Until the entry into force of the Treaty of Lisbon, police and criminal law cooperation has remained intergovernmental, so here Denmark fully participates. EU cooperation on border control and large parts of illegal immigration is covered by Schengen, all of which Denmark has acceded to. For civil law cooperation, Denmark *can* choose to stand outside, but in practice it has done much to align its national legislation generally with EU measures and, as described above, in a number of areas it has applied for parallel agreements. Thus, it is mainly with regard to the harmonization of asylum legislation and legal immigration, in particular family reunification, that Denmark has gradually taken a different political course than the rest of the EU.

If Denmark were to abolish its opt-out tomorrow, this would imply substantial changes to the Danish asylum and immigration legislation (*Udlændingeloven*). The EU's directive on family reunification does not permit member states to maintain provisions like the Danish 24-year rule, the association requirement, the housing requirement and other special Danish requirements for obtaining family reunification. Under the EU directive, member states may – if special needs demand it – impose a 21-year rule, but the ordinary requirement under the directive for the family reunification of couples is 18 years. Incorporating the EU's current rules into Danish law would also imply that foreigners with permanent residence would be able to demand family reunification and a range of other rights on a par with Danish citizens earlier than is the case at present.²⁶

With regard to asylum, thus far member states have only been able to agree

26 Kjær, 2004.

on a set of directives setting out minimum standards on who qualifies for protection, asylum procedures and reception conditions. A number of commentators have criticized the rules for containing so many interpretative gaps and potential national exceptions that in practice they have not succeeded in bringing about a substantial harmonization.²⁷ Against this background, it is difficult to assess whether Danish asylum law is substantially more restrictive than asylum policies in other EU member states. Exactly because EU measures so far represent minimum standards, nothing prevents individual member states from applying more liberal standards. The many national exceptions and interpretative uncertainties in the current EU rules imply that Denmark hardly stands out, even though it might fall below the minimum standards in certain areas. The fact that the EU minimum standards do not go much beyond what is required by, for example, the 1951 Refugee Convention and the European Convention on Human Rights further reduces the significance of the Danish opt-out at present. Denmark remains bound by these instruments as a matter of international law. As such, Danish ministers and civil servants have long claimed that Denmark's asylum policy is fully in line with EU rules.

Today, however, this claim is debatable. In particular within refugee policy, it already now appears quite evident that Denmark applies a more restrictive approach than demanded by the EU's minimum standards. Under EU law a more comprehensive personal scope is maintained in terms of who qualifies for protection compared to the wordings of international law. The EU's Qualification Directive thus not only covers political refugees as defined by the 1951 Refugee Convention and persons fleeing torture, inhumane or degrading treatment as protected by Art. 3 of the European Convention on Human Rights, it also entitles persons fleeing 'random violence as a result of international or internal armed conflict' to subsidiary protection (Art. 15c). That this latter category, popularly termed 'conflict refugees', is wider than required by international conventions was made clear by the European Court of Justice in the *Elgafaji* case.²⁸ This group is not recognized as a separate category under Dan-

27 Refugee lawyers and NGOs have further pointed out that these minimum standards in many ways represent a black letter reading of international refugee and human rights instruments that in practice may easily result in member states falling below this threshold (Gammeltoft-Hansen, 2007 & Peers, 2006: 352).

28 *Elgafaji v. Staatssecretaris van Justitie*. European Court of Justice, C-465/07, 17 February 2009.

ish asylum law, so today many within it are likely to find themselves rejected if they apply for asylum in Denmark even though EU law requires that they be granted protection in all other member states.

Moreover, the current EU legislation on asylum is, as the term ‘minimum standards’ suggests, only the first phase of harmonization. Proposals for amendments to all the current directives have already been tabled. For the second phase of harmonization, the idea is that the EU will establish a ‘common European asylum system’, thus ensuring uniform rights and procedures across all member states based on high standards and an inclusive reading of international refugee and human rights commitments. While several member states are likely to work against an overly liberal approach and generally oppose harmonization in this sensitive area, the mandate to see this through was nonetheless confirmed in the recently adopted Stockholm Programme, which set the political course for JHA cooperation for the years 2010-14. The pressure to work towards a common asylum system is further related to the Dublin system, which demands a rather high degree of harmonization.²⁹ If or when the EU succeeds in adopting the new directives on asylum, the chances are thus that the current Danish asylum policy will appear more restrictive than that of the rest of the EU. Under such a scenario, the implication of the Danish opt-out will obviously increase for those wishing to maintain or further restrict the current Danish legislation on asylum.

THE BLURRED DISTINCTION BETWEEN AUTONOMY AND PARTICIPATION

Even though the JHA opt-out has become a guarantee for Denmark’s current and possibly future restrictive asylum and immigration policy, it is remarkable that it is exactly in these areas that Denmark occasionally finds it difficult to pursue a policy independent of and different from the EU. This paradoxical situation concerns first asylum policy, where Denmark falls between two stools. Although the material EU asylum legislation does not bind Denmark, it

29 This is hardly achieved with the current minimum standards, which many commentators have described as an ‘asylum lottery’ that leaves the same groups of asylum-seekers with a more than 80 per cent chance of receiving protection in some member states and nearly zero in others.

nonetheless maintains a parallel agreement in regard to the Dublin system. The possibility to return asylum-seekers to another member state so that each application is only processed in one member state is, as noted above, the cornerstone of the European asylum policy. In order to work, this system conversely demands a high degree of harmonization and a mutual trust that all participating member states apply fairly similar procedures and criteria for granting protection.

This is problematic for Denmark as the only member state to lead a significantly more restrictive asylum policy. Over the last couple of years, there have been a number of examples where national authorities and courts have stopped referrals of asylum cases to other member states under the Dublin rules because the member state in question did not live up to EU's minimum standards or international obligations. In the current situation there is not much chance that this would happen in Denmark: The minimum standards are not very demanding, and wide discrepancies persist in terms of their implementation. Yet, if the second phase of EU legislation is adopted or it becomes clear under the current rules that Denmark does not offer protection to certain categories of, for example, 'conflict refugees', Denmark may find itself in a position where other member states eventually find that they cannot return certain types of asylum-seekers to Denmark under the Dublin rules.³⁰

If such a situation arises, Denmark is likely to find itself under significant political pressure either to adjust in accordance with EU requirements or, ultimately, to leave the Dublin system. The latter could become costly for Denmark, which so far has been able to return more asylum-seekers back to other member states every year than Denmark itself has had to receive. Leaving the Dublin system would also require Denmark to negotiate individual readmissions agreements with all other member states or face a situation in which asylum-seekers rejected in all other EU member states could potentially launch a new application in Denmark.

A second limitation on Denmark's freedom to pursue an independent asylum and immigration policy concerns the much-debated right to family reunification that flows from the EU's general rules on the free movement of EU cit-

30 DIIS, 2008: 312-13.

izens.³¹ The European Court of Justice has established that, if free movement within the Union is to be effective, this must include the right for EU citizens to take their family and spouses along with them. It is important to stress that these rules do not pertain to EU cooperation on Justice and Home Affairs, even though in reality they also concern family reunification. The Danish opt-out thus does not cover the rules regarding free movement, and Denmark is obliged to process all family reunification cases for EU citizens exercising their right to free movement under the special EU procedure inscribed in the Danish Immigration Act.

Contrary to the normal Danish rules for family reunification, the special procedure for EU citizens provides a range of extended rights and contains none of the ordinary restrictions with regard to age, common association to Denmark etc. The more liberal rules have induced a number of Danes to exercise their right to free movement, and take up work in, for example, Sweden for a period, and then subsequently return to Denmark and claim family reunification under the EU procedure. Denmark has conversely sought to restrict access to the EU procedure by introducing a range of additional requirements about employment during and after the stay abroad and about prior legal stay for the person that EU citizens wish to be united with. However, the Danish requirements have come under increasing pressure, and the Danish authorities have had to revise repeatedly their administration as the European Court of Justice has ruled against similar requirements in cases involving other member states. The *Eind* case in December 2007 thus meant that it is no longer necessary to be employed following one's return from abroad, while the *Metock* case in July 2008 made it clear that Denmark had to abandon the requirement of prior legal stay.

The combination of Danes exercising their right to free movement and the series of judgments from the European Court of Justice means that more and more Danes are likely to claim the special right to family reunification under the EU procedure. The opt-out means that as a matter of EU law Denmark has every right to uphold the 24-year rule and other Danish restrictions with regard to the ordinary family reunification procedure. However, the question is whether so many will end up making use of the special EU procedure that it

31 Directive 2004/38/EC, 29 April 2004.

eventually becomes unsustainable to maintain a more liberal regime for those who take the route via Sweden and a substantially more restrictive regime for those who, for one reason or another, are barred from doing just that.³²

THE STRANGE AUTONOMY OF THE JHA OPT-OUT

More generally, we might ask to what extent Denmark has lost strategic control over its participation in the areas of Justice and Home Affairs? This question relates to the unique legal design and anatomy of the opt-out protocol. As more and more policy areas have moved from intergovernmental to supranational cooperation, the Danish opt-out now covers all parts of EU cooperation on Justice and Home Affairs. Denmark is thereby excluded from participating in a still growing part of EU cooperation. An important dynamic in this process, however, is that it has been the other member states, not Denmark, that have been setting the pace for this development. Denmark has had little control over the treaty amendments that have moved policy areas from the (now historical) third to the first pillar. During these treaty negotiations, Denmark has also paid a political price for its opt-out. Interviews indicate that Denmark has had to spend a lot of negotiation time ensuring that the opt-outs would be secured in a suitable manner under the new treaty, which has conversely reduced Denmark's ability to influence other questions under the treaties.³³ Furthermore, the opt-out entails a political commitment by Denmark not to hinder or oppose the rest of the EU in moving cooperation forward. This was inserted in the Danish opt-out protocol in 1993 by the other member states to ensure that Denmark would not attempt to block or sabotage political developments. When a new policy has gone over to supranational first pillar cooperation, Denmark has therefore been prevented from voicing opposition or go against it in other ways.

When the Amsterdam Treaty entered into force in 1999, Denmark suddenly experienced being excluded from all EU cooperation on civil law, an area in which Denmark had been an active participant and driving force for inter-

32 Gammeltoft-Hansen, 2009.

33 DIIS, 2008: 371-376.

national cooperation since the 1960s. With the Treaty of Lisbon now effective, this case of abrupt exclusion is set to repeat itself. The treaty abolishes the last remaining parts of the old third pillar, thus 'normalizing' police and criminal law cooperation within the supranational EU framework. As new measures are now being adopted, Denmark is prevented from participating. Moreover, Denmark's participation in the current range of intergovernmental measures will gradually be abolished as new supranational legislation is set to replace the existing third pillar instruments over the next five years. Denmark will then be barred from participating in EU cooperation on issues such as human trafficking, international crime and the fight against terrorism, issues where Denmark has so far been a full and active participant.

This will have important effects on Denmark's cooperation in the areas police cooperation and criminal law. Hitherto Denmark has been able to participate in Europol, the European Law Enforcement Agency which aims at improving the effectiveness and cooperation of the competent authorities in the member states in preventing and combating terrorism, unlawful drug trafficking and other serious forms of organised crime. Moreover, Denmark participates actively in building up Eurojust, a special unit composed of national prosecutors, magistrates and police officers that help the member states coordinate difficult cases and prosecutions across borders. Both institutions, located in the Hague, are vital tools in the fight against international crime. Europol and Eurojust are playing an increasingly important role in facilitating interaction between the respective national law enforcement and judicial authorities. Joint Investigation Teams set up by Europol are used to reduce obstacles to cross-border operational cooperation through non-legislative measures such as training, identifying best practice, and operational and technical support. Mutual recognition of judicial decisions, the European Arrest Warrant, the execution of orders freezing property or evidence and rules on the confiscation of crime-related proceeds has fundamentally changed the way police officers cooperate in the EU today, in effect extending the 'reach' of national internal security measures to the territories of other EU member states. If the opt-out is not changed, Denmark will be forced to leave both Europol and Eurojust when these are eventually amended or replaced by new supranational legislation.

It is uncertain whether Denmark will manage to secure some sort of special association agreement in regard to some of the more important police and

criminal law measures. Unless the opt-out is abandoned or changed before new legislation is adopted, this would be a likely strategy to pursue with regard to, for example, the EU's police agency, Europol, where maintaining a Danish presence would no doubt be considered of the utmost importance. On the one hand, the other member states may well be interested in securing Denmark's continued participation in order to 'avoid a white spot on the map' when it comes to coordinating measures to combat international crime. On the other hand, there is a continued reluctance to extend any further special association agreements among both the Commission and those member states that wish to see Denmark eventually abandoning its opt-out. Furthermore, hoping for special parallel agreements is not going to be an effective strategy to secure continued Danish participation in police and criminal law cooperation more generally. Even if Denmark is granted such arrangements on par with Norway, an agreement of this sort does not amount to full participation when it comes to ensuring influence on the legislative proposals and management of Europol or other EU agencies.

Moreover, from a Danish perspective, parallel agreements are not necessarily attractive if we look at the experience of managing them over the past years. As we have shown, it is immensely difficult to predict the long-term impact of an EU opt-out. When a new policy area is established or made supranational, it is tricky to foresee what content it will be given and how fast new measures will be adopted. Until recently, few had probably imagined that the EU would have a common border agency that coordinates border operations in the Mediterranean. It is characteristic of large parts of Justice and Home Affairs cooperation that, despite widespread concerns and political sensitivities, policies have tended to develop a lot faster than most people had expected. As Justice and Home Affairs cooperation has been growing, so has the Danish opt-out. Precisely because the legal anatomy of the opt-out relates to the mode and not the content of the cooperation, Denmark has had few possibilities to influence this process. To the extent that new measures are believed to go against Danish interests, the opt-out is obviously a guarantee that Denmark is not bound against its will. But the opt-out also works the other way around: Denmark cannot accede to new measures even though there is a Danish political majority in Parliament that wishes to do so. In these cases, the Danish government can only watch as Denmark is gradually excluded from parts of EU cooperation that it hitherto participated in.

If the introduction of the Danish opt-out on Justice and Home Affairs in 1993 was meant as a signal to other member states that they should support Denmark in keeping this policy area intergovernmental, the opt-out today seems instead to prevent Denmark from following the course that the rest of Europe has set for this area of cooperation.

Today the opt-out on Justice and Home Affairs plays a completely different and opposite role than when it was formulated back in 1992. Undeniably, the opt-out provides Denmark with the freedom to pursue a different policy on certain issues. This freedom has been used above all in the area of asylum and immigration, where in principle the opt-out guarantees the relatively strict Danish policies regarding asylum and family reunification. As this article has tried to demonstrate, however, this freedom has its price. This is mainly because the opt-out in Justice and Home Affairs has turned out to be highly inflexible when it comes to securing Denmark's interests in other areas of cooperation. The consequence of the opt-out's particular legal design is that at least four areas have arisen where the opt-out actually limits Denmark's room for manoeuvre rather than increasing it, as shown in Table 1.

Table 1: **The Current Danish JHA Opt-out Position: Limited Room for Manoeuvre**

<i>Limited room for manoeuvre:</i>	If Denmark wishes to participate in parts of EU cooperation in an area covered by the opt-out, it is not always possible --- difficult to get parallel agreements.
<i>Limited control of scope and content of exclusion:</i>	Denmark has only limited control over the scope and content of its opt-out from Justice and Home Affairs because the opt-out relates to the cooperation <i>mode</i> (supranational vs. intergovernmental) and not the <i>content</i> of the policy (e.g. police cooperation) --- participation depends on general treaty changes related to Justice and Home Affairs.
<i>Lack of legal immunity:</i>	In those policy areas where Denmark wishes to conduct a different policy than the rest of the EU, in some areas it remains legally constrained regardless of the opt-out --- Denmark is bound by parallel agreements and EU legislation in other areas, which spills into opt-out related areas.
<i>Loss of rights and influence:</i>	In the policy areas where Denmark is inevitably bound by the EU rules, because of its special association agreements it does not have the same influence and rights as the other member states do --- loss of voting right under association model.

CONCLUSION AND THE FUTURE: OPTING IN TO JUSTICE AND HOME AFFAIRS?

It is hard to predict how the Danish opt-out in Justice and Home Affairs will be handled in the future. It largely depends on political developments in both Denmark and the EU. What is more certain is that cooperation in Justice and Home Affairs is likely to continue to evolve, resulting in ever more important implications of opting out. Denmark can, of course, choose to abolish the opt-out with a referendum if it is no longer considered to be in Denmark's interests to maintain it. But the Treaty of Lisbon also gives Denmark the possibility to transform the opt-out into a so-called opt-in. Conscious of the perspective of complete exclusion from JHA, including cooperation on police matters and criminal law, the Danish government used much of its goodwill during the negotiations on the Constitutional Treaty to secure this opt-in possibility similar to the supposedly more advantageous British and Irish protocols. Importantly, this opt-in possibility can only enter into force following a Danish referendum. Winning a referendum will be difficult for any Danish government. Not only is the opt-in possibility complicated to explain. Broader trends in European politics visible in the last few years also provide a difficult backdrop for holding a referendum. In light of the French and Dutch rejections of the Constitutional Treaty in 2005 and the subsequent negative Irish vote on the Treaty of Lisbon in 2008, domestic objections to the EU are likely to become more prominent in the years to come. Moreover, the political reaction and guarantees to the Greek government following the global economic crisis in Spring 2010 proved to many Danes, right or wrong, that the opt-outs (in this case the euro opt-out) protect Danish interests. The growth of euroscepticism in many European states, apparent during the last European Parliament elections in June 2009, appear indirectly to legitimize the Danish opt-out position, regardless or not of whether it actually protects Danish independence.

Meanwhile, the rest of Europe anticipates that Denmark *will* make use of the opt-in possibility. Attached to the modified Danish protocol is a declaration of particular importance. It states that Denmark *will* make use of the opt-in possibility, that opting out should not be permanent, and that the Commission expects Denmark to participate fully in all parts of JHA cooperation with

time. The preamble to the protocol on the Danish opt-in position attached to the Treaty of Lisbon reads as follows:

Conscious of the fact that a continuation under the Treaties of the legal regime originating in the Edinburgh decision *will significantly limit Denmark's* participation in important areas of cooperation of the Union, and that it would be in the best interest of the Union to ensure the integrity of the *acquis* in the area of freedom, security and justice;

Wishing therefore to establish a legal framework that will provide an option for Denmark to participate in the adoption of measures proposed on the basis of Title IV of Part Three of the Treaty on the Functioning of the European Union and welcoming the intention of Denmark to avail itself of this option when possible in accordance with its constitutional requirements;

Noting that Denmark will not prevent the other member states from further *developing their cooperation* with respect to measures not binding on Denmark.³⁴

As should be clear from the above, two purposes are invoked for granting Denmark the possibility to adopt the opt-in possibility: Denmark's participation is significantly limited, and it is in 'the best interests of the Union'.

Contrary to the situation today, an opt-in will provide Denmark with the ability to choose on a case-by-case basis whether it wishes to participate in new EU proposals or not. The opt-in possibility guarantees Denmark three months to decide whether or not to participate in discussions once a proposal for legislation is formally presented to the Council; if Denmark decides to participate, negotiations will continue with its full participation. As another option, Denmark can choose to await the results of the negotiations and only opt in to adopted legislation later on if it changes its mind, provided this meets with the approval of the European Commission.

On paper, the opt-in possibility should thus provide Denmark with much more flexibility, giving it the power to decide when to participate and when to remain outside new EU legislation. Moreover, if Denmark chooses to opt in early in the process (before the three-month deadline), it will have the same in-

34 Protocol on the Position of Denmark, preamble [authors' emphasis].

fluence as the other member states and will be able to leave Danish fingerprints on new EU legislation. Last but not least, Denmark will regain control of the scope and content of the opt-out, as it can choose on a case-by-case basis, irrespective of whether measures are supranational or intergovernmental. Hence, Denmark arguably gets the best of both worlds: Freedom to remain outside, as well as freedom to participate.

Notwithstanding these possibilities, if we examine the British and Irish experiences in closer detail, it becomes evident that the opt-in possibility is not without its challenges. Thus, a number of potential issues might make the otherwise attractive model somewhat difficult to handle.³⁵ Firstly, the national decision-making procedures in the Danish government, parliament and administration will be put under pressure to construct a national position more rapidly. Under the opt-in system, Denmark must consider whether to opt in or out each time a new proposal is put on the table. There is here a question of time constraint. When asked about the most difficult part of managing the opt-in possibility, British representatives answered unanimously that the time constraint of three months is stressful.³⁶

Secondly, Danish decision-makers will have to calculate risk. Under the qualified majority voting system, a member state needs to form a blocking minority in order to prevent the legislation from being adopted. This is now the normal practice in nearly all fields of European cooperation. With an opt-in possibility, this means that if Denmark opts in to discussions in which qualified majority voting applies and all of a sudden does not approve of the proposal, it might not be able to construct a blocking minority. In short, this means that exploiting the opt-in possibility is risky. Just as in 'normal' areas of European cooperation, Danish government may not be able to influence the proposal 'enough', will have to accept being outvoted and will, in principle, be forced to accept legislation they dislike.³⁷ In addition, an important part of the opt-in possibility is that, once Denmark's opts in, it will be obliged to opt into

35 For a more detailed comparison of the UK and Denmark in this respect see Adler-Nissen 2009b.

36 Adler-Nissen, 2009a: 199.

37 Steve Peers notes that the UK has already been outvoted twice in relation to the Refugee Fund and the Return Fund. However, the UK only voted against the legislation because the House of Commons had a scrutiny reserve, not because of any objections to the two measures as such (Peers, 2007: 5).

all future changes of the given piece of legislation, as well as related proposals which are directly affected by it.

Last but not least, the decision to opt in or not is not merely a question about the concrete proposal, but also about how Denmark will use the opt-in possibility in Justice and Home Affairs in practice. Where will Denmark position itself? If Denmark chooses to opt in to the great majority of all new measures, it will most likely be perceived to be more or less an 'ordinary' member state within Justice and Home Affairs despite its special position. In contrast, Denmark may well be met with disapproval by the rest of the Union if it chooses to remain outside large parts of Justice and Home Affairs. If Denmark systematically pulls out when it comes to cooperation that involves a large degree of political and/or financial concessions, this will also be seen as a sign of lack of solidarity. Several member states already have difficulties understanding the need for a special Danish position in the area of asylum and immigration. Whereas the current opt-out simply prevents Denmark from participating today, it may be more difficult to explain to the other member states why Denmark should still wish to remain outside specific areas of cooperation with an opt-in possibility.

The current opt-out situation appears deeply perplexing as Denmark is set to be excluded from most JHA cooperation, from immigration to cooperation on police matters and criminal law with the entry into force of the Treaty of Lisbon. This situation explains the invention of the opt-in possibility. The opt-in possibility, however, is unlikely to solve all problems. For those politicians who would like Denmark to influence the European agenda within Justice and Home Affairs, the option of completely abolishing the opt-out remains a more attractive, albeit domestically unrealistic alternative. Opt-outs such as Denmark's have hitherto enabled a deepening of the integration process through increasingly demanding treaties, even though not all governments (or populations) were fully on board. For the member state in question, however, the consequences of an opt-out are often hard to foresee and politically challenging to manage. Myths continue to dominate the political debate, while the unintended consequences of the opt-out lead to a murky picture with very few clear winners. Originally constructed as a quick-fix solution, the Danish opt-out has today become just as much a straitjacket as a guarantee of national sovereignty.

REFERENCES

- Adler-Nissen, Rebecca (2008), 'Organized Duplicity? When States Opt Out of the European Union', in Rebecca Adler-Nissen & Thomas Gammeltoft-Hansen (eds.), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and beyond*, New York: Macmillan: 81-103.
- Adler-Nissen, Rebecca (2009a), *The Diplomacy of Opting Out: British and Danish Stigma Management in the EU*, Ph.D. Dissertation, Department of Political Science, University of Copenhagen.
- Adler-Nissen, Rebecca (2009b), 'Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs', *Journal of European Public Policy*, vol. 16, no. 1: 62-80.
- Danish Institute for International Studies (2008), *De danske forbehold overfor den Europæiske Union: Udviklingen siden 2000*, Copenhagen: Danish Institute for International Studies
- Gammeltoft-Hansen, Thomas (2007), 'The Extraterritorialisation of Asylum and the Advent of Protection Lite', *DIIS Working Paper 2007/2*.
- Gammeltoft-Hansen, Thomas and Rebecca Adler-Nissen (2008), 'Retsforbeholdet: Et forbehold ude af kontrol?' *Økonomi & Politik*, vol. 81, no. 3: 35-43.
- Gammeltoft-Hansen, Thomas (2009), 'Familiesammenføring: Vejledning fra Kommissionen', *Ugebrevet Europa*, 2 July 2009.
- Geddes, Andrew (2000), *Immigration and European Integration: Towards Fortress Europe?* Manchester: Manchester University Press.
- Givens, Terri & Adam Luedtke (2003), 'EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonization', in Tanja A. Börzel & Rachel A. Cichowski (eds.), *The State of the European Union: Law, Politics and Society*, Oxford: Oxford University Press.
- Kjær, Kim U. (2004), 'EU's familiesammenføringsdirektiv og dansk ret' in *Ægtefællesammenføring i Danmark*, Udredning nr. 1, Copenhagen: The Danish Institute for Human Rights: 126-130.
- Lassen, Nina (2007), 'Centrale EU-direktiver vedrørende asyl- og ophold: På hvilke områder er der ringere standarder i Danmark?', København: Dansk Flygtningehjælp.
- Manners, Ian (2000) *Substance and Symbolism: An Anatomy of Cooperation in the New Europe*. Adershot: Ashgate.

- Ministry of Foreign Affairs of Denmark, The (2001) *Danmark Og Europa: Udvidelse, Globalisering Og Folkelig Forankring. Regeringens Hvidbog*. Copenhagen: Ministry of Foreign Affairs of Denmark.
- Monar, Jörg (2007), 'Justice and Home Affairs', *Journal of Common Market Studies*, vol. 45, no. 1: 107-227.
- Moravcsik, Andrew & Kalypso Nicolaidis (1998), 'Keynote Article: Federal Ideals and Constitutional Realities in the Treaty of Amsterdam', *Journal of Common Market Studies*: 13-38.
- Mullen, Andrew & Brian Burkitt (2003) 'European Integration and the Battle for British Hearts and Minds: New Labour and the Euro', *Political Quarterly*, vol. 74, no. 3: 322-336.
- Møller, Jørgen Ørstrøm (2003), 'Maastricht-traktaten og Edinburgh-afgørelsen', *Danmark 30 år i EU – et festskrift*, Copenhagen: Gyldendal.
- Papagianni, Georgia (2001), 'Flexibility in Justice and Home Affairs: an Old Phenomenon Taking New Forms', in Bruno De Witte, Dominik Hanf, & Ellen Vos (eds.), *The Many Faces of Differentiation in the EU*, Antwerp: Intersentia.
- Peers, Steve (2006), *Justice and Home Affairs Law*, Oxford: Oxford University Press.
- Petersen, Niels Helveg (2003), 'Formuleringen af forbeholdene', *Danmark 30 år i EU – et festskrift*, Copenhagen: Gyldendal.
- Starup, Peter (2008), 'Europæiseringen af dansk familiesammenføringsret', in Birgitte Egelund Olsen & Karsten Engsig Sørensen (eds.), *Europæiseringen af dansk ret*, Copenhagen: DJØFs Forlag: 577-603.
- Tuytschaever, Filip (1999), *Differentiation in European Union Law*. Oxford: Hart Publishing.
- Vedsted-Hansen, Jens (2008), 'Det retlige forbehold og personers mobilitet', in Birgitte Egelund Olsen & Karsten Engsig Sørensen (eds.), *Europæiseringen af dansk ret*, Copenhagen: DJØFs Forlag: 101-120.
- Vedsted-Hansen, Jens (2004), 'Denmark', in Imelda Higgins (ed.), *Migration and Asylum Law and Policy in the European Union: FIDE 2004 National Reports*, Cambridge: Cambridge University Press.
- Wallace, Helen (1997), 'At Odds With Europe', *Political Studies*, vol. 45, no. 4: 677-688.