Opt-Outs in the Lisbon Treaty: What Direction for Europe *à la Carte*?

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A. Europe *à la Carte* in the Area of Freedom Security and Justice – State of Affairs

The debate on the merits of flexibility in the European Union (EU) has been going on intensely since the Amsterdam Treaty introduced the Enhance Cooperation mechanism in 1997. Opt-outs – exemptions from policy fields – are considered one of the most harmful forms of flexibility in the EU, as they breach the unity and coherence of a main principle in the EU – preserving the *acquis communautaire* as common community law.[1] Indeed, opt-outs harm the EU's unity and sense of community. But opt-outs also allow the integration process to advance and deepen, as they prevent the Member State receiving an opt-out from vetoing new EU treaties. Despite the fact that opt-outs were already introduced in the Maastricht Treaty, 1991, they did not capture much academic attention. So far eight opt-outs have been obtained in the European integration process by four Member States from four policy areas.[2] Among the least researched opt-outs are the ones from Justice and Home Affairs (JHA)/Area of Freedom, Security and Justice (AFSJ).[3] The first JHA opt-out was granted to Denmark in the Maastricht Treaty. Soon

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1 *See* A. Stubb, Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond 52 (2002). Stubb classified the various flexibility mechanisms in the EU into three categories: multi speed, variable geometry and Europe *à la carte*. In the first category the *acquis* is preserved, in the second category the *acquis* is not harmed as flexibility takes place outside the legal and institutional structure of the EU, whereas in the third category the *acquis* is undermined. The EU's flexibility mechanisms in this latter category are opt-outs and constructive abstention (introduced in the Amsterdam Treaty in the field of Common Foreign and Security Policy). *Id*., 32-33.

2 The UK obtained opt-outs from the Economic and Monetary Union (EMU), social policy and the removal of border control. Denmark obtained an opt-out from the EMU, EU citizenship (merely declaratory opt-out, hence not part of the eight opt-outs considered), defence, and supranational JHA. Ireland, due to the Common Travel Area with the UK, had to join its opt-out of removal of border controls, and Sweden has a *de-facto* opt-out from EMU third phase.

3 The terms JHA and AFSJ are used interchangeably. The term JHA was created in the Maastricht Treaty for the third pillar. The term AFSJ was coined in the Amsterdam Treaty, which transferred

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after, the UK and Ireland obtained opt-outs (presented as opt-ins, see below) from the AFSJ in the Amsterdam Treaty. Despite much criticism they receive, opt-outs have not been terminated. On the contrary, the Lisbon Treaty will, for the first time, bring to the expansion of those opt-outs/opt-ins to additional AFSJ policy fields.

This article will analyze the trends in the Lisbon Treaty regarding Europe *à la carte* as reflected in the JHA/AFSJ opt-out/opt-in. Several questions arise: Is the flexible opt-in which allows Member States to 'pick & choose', and hence to enjoy 'the best of both worlds',[4] becoming the preferable form of Europe *à la carte*? What was the response of other EU Member States to this expansion of opt-ins? How did they succeed to narrow the ability of the three opt-out Member States to 'pick & choose'? At first glance the UK, Ireland and Denmark got 'more of the same' – the UK and Ireland obtained an extension of their flexible opt-in, while Denmark faces an extension of its rigid opt-out. But on closer inspection the Lisbon Treaty will change the opt-outs 'rules of the game'. The UK and Ireland will face the threat of being shoved out of measures they already adopted under the opt-in, whereas Denmark has the opportunity to remove its rigid opt-out and adopt the more flexible opt-in model. Such a move is expected to considerably shrink its opt-out. On the one hand, the flexible opt-in which allows Member States to 'pick & choose', and therefore to enjoy 'the best of both worlds', becomes the preferable form of Europe *à la carte*. On the other hand, the response of the other EU Member States to this extension of the opt-ins was to narrow the ability of those three Member States to 'pick & choose'. The novelty in the Lisbon Treaty is the introduction of the EU as a veto-player in the opt-in management 'game', which change its rules.

The AFSJ is one of the main policy areas in which the EU has most developed the integration process in the last years, intruding deeper and deeper into the sovereignty of Member States. Once the Single Market and the Economic and Monetary Union projects have been nearly completed, the next fundamental objective of the EU is to offer its citizens "an AFSJ without internal borders." One of the means to achieve this aim in the Lisbon Treaty is to cancel the pillars structure of the EU, moving the remaining third pillar from intergovernmental cooperation to the supranational Community method (legally speaking, Title VI Treaty on European Union [TEU], containing the third pillar, would become part of Title IV Treaty establishing the European Community [TEC], comprising first pillar AFSJ. The latter would be renumbered as Title V in the Lisbon Treaty). Such a move is part of the EU's long identified desire to strengthen and advance cooperation in the fight against illegal immigration, cross-border crime and terrorism. As the pillars structure of the EU is about to be abolished, this bears consequences on the opt-outs from AFSJ, since the JHA policy fields in the third pillar (police and judicial cooperation in criminal matters) will be added to the

asylum, immigration and judicial cooperation in civil matters from the third to the first pillar. With the due cancellation of the third pillar the term AFSJ would prevail.

4 The phrase "the best of both worlds" is taken from Geddes, quoting Prime Minister Tony Blair. A. Geddes, *Getting the Best of Both Worlds? Britain, the EU, and Migration Policy*, 81 International Affairs 723 (2005).

AFSJ opt-out/opt-in regimes of Denmark, the UK and Ireland, expanding them. This move for more Europe *à la carte* is partially balanced by changing the opt-outs provisions and restricting their use so that the 'in' Member States will have a 'weapon' against too much 'pick & choose' by an opt-out Member State.

Denmark, the UK and Ireland are under two very different opt-out regimes. They have dissimilar roots and paths and have been managed in different ways. The UK and Ireland's opt-outs stem from the Schengen Agreement, which brought about the removal of borders control, while Denmark is part of the Schengen Agreement. The Danish opt-out is very rigid and self-constraining, whereas the British one is much more flexible and pragmatic, leaving room to manoeuvre. The UK and Ireland's arrangement allows them to 'pick & choose' which legislation in Title IV TEC they will enter and which they will stay out of, while Denmark's opt-out leaves no choice but to stay out of all measures in that Title. The British call their opt-out an 'opt-in', which best articulates the difference between their opt-out and the Danish one (see Table 1 below for summary of the comparison between the JHA/AFSJ opt-outs/ins). It comes as no surprise that for the last few years there is a wish by the Danish government to move to the British opt-in model. If the Lisbon Treaty is ratified, and Denmark will vote 'Yes' in a referendum to change its AFSJ opt-out to an opt-in, both brands of opt-out are likely to become more similar.

To analyze the trends in the Lisbon Treaty regarding Europe *à la carte* as reflected in the JHA opt-out/opt-in, we first need to understand the opt-outs roots and their path. Such an understanding is vital to the analysis of opt-outs in the Lisbon Treaty and especially to analyze the expected trend. Due to the academic lacuna in this field, the first part of this article will depict how the opt-outs were obtained and managed since the Maastricht and Amsterdam Treaties and will examine their path. It will then analyze the changes introduced in the Lisbon Treaty in the opt-outs regimes, and will conclude by inquiring what direction the EU is taking – more Europe *à la carte* which allows 'the best of both worlds', or Europe *à la carte* that is a double edge sword to the opt-in Member State.

The article is based on 90 interviews with politicians in government and in parliament, senior government officials and legal specialists and with some non-governmental organisations from each of the four opt-out countries and Brussels (EU institutions and Permanent Representatives) dealing with the eight opt-outs (see footnote 2). Twenty four interviews dealt specifically with the JHA/AFSJ opt-outs. Additional twenty interviews had general relevance to all opt-outs, including JHA/AFSJ. The interviewees were selected based on their close involvement in handling the opt-outs and the period of time they have been dealing with them, so as to cover the whole time-span of each opt-out. Most interviews were conducted during September-October 2007 and February 2008. Those were open interviews structured according to both similar questions and case-relevant questions, lasting an hour on average. All of the interviews were conducted under the promise of confidentiality, and are therefore not attributable.

I. Denmark – Losing Both Ways

The Danish opt-out from Title IV TEC is a result of the 'No' in the June 1992 referendum on the Maastricht Treaty. The centre-right minority government in Denmark supported the Maastricht Treaty, but was unable to resolve this crisis by itself. The solution came from three opposition parties: the Social Democrats and the Radical Left Party, which also supported the ratification of the treaty, and the Socialist People's Party (SPP) which moved from a 'no' to a 'yes' position on condition of obtaining opt-outs for Denmark. The resolution of this domestic and European crisis was brought to an end by the Edinburgh Summit of the European Council, December 1992, in which four opt-outs were granted to Denmark (see footnote 2). Regarding JHA, the opt-out protocol text actually seemed to be a full opt-in, as JHA was intergovernmental while the opt-out was only from supranational policy. Annex no. 1 in the Edinburgh Presidency conclusion stated that "Denmark will participate *fully* in cooperation on Justice and Home Affairs on the basis of provisions of Title VI of the Treaty on European Union" (emphasis added). The opt-out obtained was forward-looking. It dealt with the possible future application of Article K9 TEU, known as the *passarelle* article. This article provided the possibility to transfer six policy fields from the third intergovernmental pillar to the first community pillar. Annex no. 3 stressed and clarified that in Denmark such transfer of sovereignty will require either majority of 5/6 of Members of the Folketing or both majority of the Members of the Folketing and majority of voters in a referendum.[5] Until the Amsterdam Treaty the JHA opt-out was merely declaratory. As the *passarelle* article was not employed, Denmark did not have to face the above procedure. The 1996-1997 Intergovernmental Conference (IGC) agreed on the transfer of visa, asylum and immigration, together with judicial cooperation in civil matters, to the first supranational pillar under Title IV TEC. This made Denmark activate its opt-out. When the Amsterdam Treaty took effect in May 1999, Denmark got out of all first pillar measures in asylum, immigration and judicial cooperation in civil matters, but continued to fully participate in what was left in the intergovernmental third pillar – police cooperation and judicial cooperation in civil matters.[6] To conclude, Denmark is fully included in intergovernmental JHA (under Title VI TEU), but is fully excluded from supranational JHA (under Title IV TEC).

This opt-out, stemming from the electorate's veto and imposed by opposition parties, was designed and construed very rigidly. The Danes have excluded themselves entirely from the JHA first pillar policies. In legal terms, whatever legislation based on Title IV TEC falls under the opt-out terms, therefore the measure will not be binding on Denmark. Denmark does not have a voice around the Council's table and does not vote. Thus, the only argument it can raise is whether the legal basis is indeed the right one.[7] The interpretation and management

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5 Ann. 3, Unilateral Declarations of Denmark on Cooperation in the Fields of Justice and Home Affairs, Conclusion of the Presidency, European Council of 11-12 December 1992, OJ 1992 C 348.

6 Denmark also has to adopt all measures regarding visa policy, as those pertain to the Schengen Agreement. *See below.*

7 The measure against smuggling illegal immigrants is one example where the legal basis was

of this opt-out is very strict. It does not matter what legislation and new measures are being introduced by the EU, Denmark cannot be bound by them as such. Even if it is in the 'national interest' to cooperate with the rest of the Member States in measures coping with illegal immigration and multiple asylum seekers, the Danish government has no independent judgment whether to exercise its opt-out or not. It is automatically out.

The only way Denmark can be bound by those measures in a manner that would legally fit the opt-out is under international law. Therefore, the Danish government asked for six 'parallel agreements', which are meant to introduce EU community measures to Danish law under international law. Two of the parallel agreements were in the field of asylum[8] and four in the field of judicial cooperation in civil matters. At first the European Commission did not favour Denmark's request. It was not enthusiastic to allow Denmark to minimize the opt-out indirectly, reducing its costs of non-participation in EU cooperation and decision-making, which would, in turn, decrease the political inclination in Denmark to terminate it. Hence, Denmark is at the mercy of the Commission when asking for parallel agreements.[9] In terms of content, these parallel agreements bypass the opt-out, but legally speaking they respect the terms of the opt-out, since those parallel agreements are not EU law, but are covered by international law. Unlike EU law, they can be unilaterally terminated by Denmark.[10] However, as long as those parallel agreements are in place, Denmark agrees to be under the European Court of Justice (ECJ) ruling. Thus, this Danish opt-out is a question of form and method, and not of content. The form is Title IV TEC and the method is supranational.

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divided between first and third pillar into two complementing measures. Denmark was able to vote and participate only in the measure which was under the third pillar, but not in the measure under the first pillar. *See* Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorized entry, movement and residence, 4 September 2000, OJ 2000 C 253/1; Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry and residence, 4 September 2000, OJ 2000 C 253/6.

8 Denmark signed the 1990 Dublin Convention on Asylum. When the EU inserted that convention into its *acquis*, Denmark was left in an awkward position. It was obliged by the convention but not by the measures the EU adopted to advance and change that convention.

9 It took the Prime Minister himself, Anders Fogh Rasmussen, to persuade Romano Prodi, the President of the Commission, to agree to open negotiations on four such agreements. Still, it took about six years to conclude them. The Commission consented to negotiate those agreements due to the rationale that Denmark was already party to former agreements between EU Member States before they became EU law (*e.g.*, the 1990 Dublin Convention on Asylum and the 1968 Brussels Convention). *See* footnote 8. Moreover, the Commission has stressed the parallel agreement solution is "exceptional and transitional" in nature. *See* Commission Press Release of 30 April 2002, IP/02/643, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/643.

10 *See for example* Art. 3-7(c) in Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, 8 March 2006, OJ 2006 L 66 at 38-43.

Joining the Schengen Agreement at a time of negotiations over introducing it into the EU *acquis*, and in parallel of negotiating a renewed opt-out protocol from Title IV TEC, can be seen as another bypass of the opt-out content, while keeping its form intact. In December 1996, Denmark joined the Schengen Agreement together with the other Scandinavian countries while the Amsterdam IGC was being held. Among other things, the IGC was negotiating the incorporation of the Schengen Agreement into the EU legal and institutional system. This resulted in a special kind of opt-out, as Denmark is in Schengen but out of Title IV TEC (to which the major part of the Schengen *acquis* was about to enter). Thus, Denmark is not only in Schengen; it is also in EU 'Schengen building measures', but here as well it is under international law and not under EU law. When it comes to 'Schengen building measures' concluded by the Council under Title IV TEC, Denmark does not vote but has a (rather weak) voice around the Council's table, as the new measure will affect it. Once a measure has been adopted, Denmark has six months to notify the Council if it accepts the new measure under international law or not. If it does not, the Schengen Member States can take steps against it. Until now (August 2008), Denmark fully adopted all the Schengen building measures, and is expected to continue this docile, compliant path. On some issues Denmark even wants to go further than the majority of the Member States would.[11] Thus, the Danish agreement to join Schengen is a kind of parallel agreement with an updating mechanism.

In other AFSJ policies, where the opt-out is full both in content and form, Denmark's voice is the weakest – if heard at all – as the EU measures will not affect it. Therefore, its rhetoric is different.[12] In the field of immigration the Danish centre-right government can actually benefit from the opt-out and the ability to have a more strict policy than the EU (see below). In contrast, in the field of asylum there is hardly any difference between Denmark and the EU's policies. The Danish government actually wants to be fully in the EU regime, and the opt-out is conceived as a cost. This cost was lowered by the parallel agreement Denmark signed in March 2005 with the EU Council, agreeing to participate in the Dublin II Regulation and Eurodac.[13] It seems that despite its rigid opt-out, Denmark had some room to manoeuvre and narrow its content, though not its form. The next section will reveal the extent to which, unlike Denmark, the UK has much more choice whether to be in or out.

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[11] For example, on harmonizing the kind of information inserted into the Schengen Information System (SIS).

[12] *See also* R. Adler-Nissen, *The Diplomacy of Opting Out: A Bourdieudian Approach to National Integration Strategies*, 46 JCMS 663 (2008).

[13] Dublin II Regulation determines asylum application procedures. It is designed to prevent 'asylum shopping' and to ensure that each asylum applicant's case is processed by only one Member State. Eurodac is a system for the comparison of asylum seekers and illegal immigrants' fingerprints for the effective application of the 1990 Dublin Convention.

II. The UK – Enjoying the 'Best of Both Worlds'

Removing border controls between the EU Member States and creating common EU external border control has been a contentious issue between the UK – wanting to maintain its natural geographical advantage as an island – and the Continental Member States since the Single European Act in mid 1980s. The UK refused to relinquish its border control *vis-à-vis* the other Member States and allow freedom of movement of third country nationals. This was one of the reasons why the Schengen system evolved outside the legal and institutional framework of the EU. Unlike the political situation in Denmark, where the veto stemmed from the electorate and the opt-outs were imposed by opposition parties, in the UK both big political parties – the Conservative and Labour – were united against this EU policy, and were in line with the voters. But unlike Denmark, the UK did not negotiate an opt-out from JHA in the Maastricht Treaty. Despite the sensitivity of the issue, as long as JHA was intergovernmental (meaning the UK maintained its veto-power), the government did not feel the political need to secure such a formal – though merely declaratory – opt-out. However, when parts of the JHA were to be transferred to the supranational first pillar, and the Schengen Member States wanted to bring in the Schengen Agreement as part of the *acquis communautaire* in the Amsterdam Treaty, it was an opportunity for the UK to secure its non-participation. The government could use its veto power over the new treaty as a bargaining chip and obtain an opt-out as the price for its consent. This 'blackmail' was used to obtain a flexible opt-out/in. The protocol the UK negotiated in AFSJ is very different from the Danish one, and is different from the former two opt-outs it obtained in the Maastricht Treaty (see footnote 2). The fact that the government and administration chose to call it an opt-*in* rather than opt-out, is an indication of this difference.

There are three protocols pertaining this opt-out/opt-in. One relates to Schengen and the others to Title IV TEC. The first is the Schengen Protocol, which introduced the Schengen Agreement and implementing measures into the EU's *acquis*. This Protocol allows the UK to participate in part or all of the Schengen *acquis*, subject to the unanimous approval of the Schengen Member States in the council. A second protocol sets the UK's opt-out of common EU border control, allowing it to keep her border checks for persons coming from EU Member States. This protocol sets the opt-out, and does not give an opt-in option. A third 'Title IV' protocol entitles the UK to adopt the opt-in option, this time for first pillar JHA measures (under Title IV TEC) – asylum, immigration and judicial cooperation in civil matters. This opt-in protocol gives the UK three months from the time a legislative proposal is laid on the Council's table to announce if it would like to opt in. If the UK announces that it wishes to opt in, it can participate in the decision-making, i.e., have a voice and a vote on the new measure. However, if it participates in the vote, and is the deciding factor in blocking the measure from being adopted, the other Member States can proceed without her. Hence, ostensibly, the UK cannot veto a proposal once it opted in.[14]

[14] There has been no case where after the UK or Ireland opted in to a proposal, they blocked

If the UK does not opt in at the decision-making phase, it can still join after the measure has been concluded and adopted. Obviously, this latter track does not give the UK a voice nor a vote. Until now (August 2008), the UK has not made use of this option.

While the Title IV protocol allows for 'cherry picking' on a case-by-case basis, it is understood that if the UK wants to opt in to Schengen measures, it has to join clusters of the *acquis* which are internally coherent. In March 1999 the UK made a partial application to Schengen. Jack Straw, the Home Secretary, made a statement to parliament in which he said the government is "keen to engage in co-operation in all areas of present and future JHA co-operation which do not conflict with our frontiers control."[15] That has broadly remained the UK's approach, though there are some exceptions.[16] The UK is out of most measures relating to abolishing EU internal borders control, including the common visa policy. So far, the UK participates in all asylum measures, and most illegal immigration measures, but has remained out of legal immigration instruments. In judicial cooperation in civil matters it exercises its opt-in on a case-by-case basis, picking and choosing which measures to opt in to and from which to opt out. Since the ratification of the Treaty of Amsterdam in mid 1999 until mid 2004, the UK opted into 18 out of 39 measures in Title IV TEC.[17] As mentioned, Tony Blair has called this opt-out/opt-in 'the best of both worlds'.[18] The UK has the option to 'pick & choose' in which fields or measures it would like to participate and have influence on the decision-making, and in which measures it prefers to stay out, preserve its sovereignty, and not be bound. Still, this flexible opt-in has limits. First, the UK needs unanimity in the Council for joining parts of Schengen. Second, the right of the UK to opt in can be denied in 'Schengen building measures' if the UK did not adopt the measures upon which the new legislation builds on. This was the ECJ judgment in the *Frontex* case (see below). The Irish opt-out is identical to the British one in form, but is completely different in its reasons.

III. Ireland – Out of Strong Came Forth Some Sweetness

Ireland is a party to the same AFSJ opt-out protocols as the UK, and is under exactly the same flexible opt-in arrangement. But behind the similar legal terms lies a different story, which makes Ireland's opt-out quite extraordinary. The Irish

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agreement on that proposal, resulting in the other Member States going ahead without them. It is understood that the UK Home Office is particularly keen to avoid this ever happening, and so far it has succeeded. S. Peers, *Statewatch Analysis EU Reform Treaty Analysis No. 4: British and Irish Opt-outs from EU Justice and Home Affairs (JHA) Law*, 4 (2007), http://www.statewatch.org/news/2007/aug/eu-reform-treaty-uk-ireland-opt-outs.pdf.

15 House of Commons Hansard, *Written Answers*, 12 March 1999, Column: 382, http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo990312/text/90312w02.htm.

16 For example, the UK has not participated in family reunion, long-term residence, and extension of long term residence to those with international protection status.

17 21 out of the 39 measures were on border control and visas, to which the UK joined 6. So in fact, the UK opted in to most other measures on legal and illegal immigration and asylum, *See* Geddes, *supra* note 4, at 734.

18 *See supra* note 4.

government did not want this opt-out. On the contrary, in the Amsterdam summit it explicitly stated its desire to be a full participant in those policy fields. Ireland declared that "it intends to exercise its right … to take part in the adoption of [Title IV TEC] measures … to the maximum extent compatible with the maintenance of its Common Travel Area with the United Kingdom."[19] This is still the formal position of the government.[20] The decision to obtain an opt-out from Title IV TEC and Schengen did not stem from the government as in the UK, nor from opposition parties or the median voter as in Denmark. The Irish opt-out stems from the British one. Ireland had to agree to the opt-out because of its Common Travel Area (CTA) with the UK. Keeping the CTA is far more important to Ireland than joining Schengen, both for practical and political reasons.[21] To preserve it, Ireland had to have the same external border control, visa, immigration and asylum policy as the UK. In other words, to keep the uniformity and consistency of the CTA, it had to adopt the UK's opt-out/opt-in arrangement in measures pertaining to border control. This is a unique case where the 'veto-player' making the opt-out call is not located domestically, but in another country – the UK.

Ireland normally follows the UK in the management of the opt-out/opt-in. It does so completely in the field of border control, but is not obliged to do so in judicial cooperation in civil matters. Here Ireland has an opportunity to use the opt-in as it sees fit. Out of strong came forth some sweetness. Despite its declared intention to opt in and take part in non CTA related measures 'to the maximum extent', Ireland takes advantage of the opt-out in the field of judicial cooperation in civil matters, especially regarding family law. For example, it has taken advantage of the opt-in arrangement to get out of Rome III on matrimonial matters, as it pertains to the sensitive issue of divorce.[22] Why judicial cooperation in civil matters was put in Title IV TEC together with visa, asylum and immigration is not quite clear. However, the flexile opt-in arrangement serves both Ireland and the UK, as their common law systems are different than the Continental ones.

Each of the three opt-outs has different roots and a different path. Revealing the specific veto-players who caused the obtainment of each opt-out also explains the manner they have been managed later on (see Table 1 below). In Denmark, the opt-out came from voters and was 'translated' by opposition parties, who have been 'guarding' ever since the way in which the government manages the opt-out. This results in quite a strict and rigid interpretation of the opt-out, leaving

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[19] *Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland*, Declaration No. 4, 1999 Treaty of Amsterdam, at 143 (OJ 1999 C340).

[20] The different governments repeated this declaration ever since. *See, for example, Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice*, Declaration No. 56, The Lisbon Treaty, at 450.

[21] The CTA is comprised of the two islands of Great Britain and Ireland, giving their citizens the same rights of free movement, the right to work and even vote. It solves the delicate political sensitivity of carrying passports when crossing from Ireland to Northern Ireland.

[22] Rome III is proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. This is a regulation proposed by the Commission to create a set of harmonized choice of law rules applicable in matrimonial matters, and thus improve legal certainty in cross-border divorce proceedings.

the government with hardly any room to manoeuvre. In the UK's case the opt-out stems from the government, which took advantage of a window of opportunity that allowed it to 'blackmail' the other Member States to grant it a flexible opt-in/opt-out. This allows her to 'pick & choose' to a large extent to which measures it will opt in and from which it would stay out. Ireland did not even want this opt-out. On the contrary, it wanted to be in, but was forced to follow the UK. In terms of Europe *à la carte* the three opt-outs are under two very different regimes, and are not managed in a similar manner. Moreover, Ireland does not always manage its opt-in in an identical manner to that in which the British do, which makes the Europe *à la carte* state of affairs even more complex and complicated. What has the Lisbon Treaty changed in that regard?

Table 1: Comparing the Three JHA/AFSJ Opt-Outs/Opt-Ins Roots and Paths

	Opt-out	*Opt-in*	
Who	Denmark	UK	Ireland
Veto-player	Median voter, opposition parties	Government	UK
When – obtained	Edinburgh European Council 1992	Amsterdam IGC 1997	
When – activated	Amsterdam Treaty ratification	Amsterdam Treaty ratification	
Out of what	All JHA measures moving to 1st pillar (Title IV TEC) – no voice, no vote	Measures in 1st pillar (Title IV TEC) on a case-by-case basis – voice and vote if opting in, but no blocking ability	
	Schengen Member under international law – have some voice, no vote	Not Schengen member – no voice, no vote	
Result	Rigid	Flexible	Rigid in CTA; otherwise quite flexible
Interpretation and management	Self-constraining	Pragmatic	
Bypass mechanism	Parallel agreements under international law	Opt-in protocol allows 'pick & choose'	
Room to manoeuvre	Little	Considerable	None in CTA; some in other fields
State of affairs	Opt-out as question of form, not content	Opt-out as question of content, not form	

B. Negotiating More Europe *à la Carte*: From the Constitutional Treaty to the Lisbon Treaty

The development of the JHA/AFSJ field is a story of stops and starts. The Maastricht Treaty first established JHA in the EU intergovernmental sphere. The Amsterdam Treaty transferred the policy fields of visa, asylum, immigration and judicial

cooperation in civil matters from the third to the first pillar, but this supranational step forward was postponed as it was agreed its commencement will be only five years after the treaty ratification. The Nice Treaty, coming so shortly after the Amsterdam Treaty ratification, did not deepen or widen the AFSJ. But soon after the Constitutional Treaty agreed to abolish the third pillar altogether and transfer it to the first one.[23] This is a fundamental change, as the communitarisation of the third pillar is much more than just changing the legal basis. EU competences and decision-making procedures will be revised. Moving from unanimity to QMV in the fields of legal migration, police cooperation and most areas of judicial cooperation in criminal law, accompanied by co-decision with the European Parliament (EP), along with increased powers of the Commission in those areas, and the ECJ jurisdiction, will increase the EU's powers *vis-à-vis* the Member States. For Denmark the move to a one pillar structure means expanding its rigid opt-out, while for the UK and Ireland it meant expanding their flexible opt-in. This explains their different responses.

Since each Member State has veto-power over new EU Treaties, it can use its veto to either obtain new opt-outs or expand existing ones if a reform in the EU is to be unanimously approved. On the one hand, as mentioned, opt-outs breach the unity, uniformity and coherence of the EU *acquis*. On the other hand, they allow new treaties and new measures to be adopted, and hence allow the integration process to advance. In the Constitutional Treaty Denmark expanded its opt-out to the widened Title IV TEC (to become Title V in the Constitutional/Lisbon Treaty). The UK and Ireland expanded their opt-ins only in the Lisbon Treaty.[24] On the one hand, opt-outs were expanded in the Lisbon Treaty. On the other hand, this move to more Europe *à la carte* was matched by the rest of the Member States and the EU institutions, who have become less patient with opt-outs, and especially with opt-ins. Thus, they have made a counter-move to reduce the opt-outs/ins harm to the integrity of the integration process by transforming the opt-out/in mechanism into a 'double edge sword', so that they can fight back some of the 'pick & choose' trend. The following sections will analyze those trends.

I. Denmark – Getting Some of the Best of Both Worlds?

In the Edinburgh Council, 1992, Denmark has undertaken the obligation not to stand in the EU's way to deepening the integration.[25] Therefore, it could not (nor did it want to) veto the abolishment of the pillar structure, and consequently

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[23] *See* J. Monar, *Justice and Home Affairs*, 43 JCMS 131 (2005); A. Niemann, *Dynamics and Countervailing Pressures of Visa, Asylum and Immigration Policy Treaty Revision: Explaining Change and Stagnation from the Amsterdam IGC to the IGC of 2003–04*, 46 JCMS, 559 (2008).

[24] S. Peers, Statewatch Analysis: Transferring the Third Pillar 10 (2006). *See also* S. Peers, Statewatch Analysis: EU Reform Treaty Analysis No. 3.2: Revised text of Part Two of the Treaty establishing the European Community (TEC), 23 October 2007.

[25] "… Denmark does not intend to make use of the following [opt-out] provisions in such a way as to prevent closer cooperation and action among Member States compatible with the Treaty and within the framework of the Union and its objectives." *Ann. 1: Decision of the Heads of State and Government, Meeting Within the European Council, Concerning Certain Problems Raised by*

was about to see its rigid opt-out expand also to policy areas where it has been actively participating in. For example, Denmark might have to leave third pillar agencies like EUROPOL and EUROJUST and anti-terror activities once they become supranational.[26] As the political and policy costs of this expanded opt-out are expected to be high, the government wanted to negotiate a solution. By the end of 2003 the new Danish opt-out protocol was agreed upon domestically and intergovernmentally. Denmark was granted the right to adopt the same opt-in conditions as the UK and Ireland. This was a second-best solution to cancelling the opt-out altogether. Unlike the former opt-out protocols, which came into force when the treaties were ratified, here Denmark did not ask to move immediately to an opt-in position, but first to ratify the new treaty with the expanded AFSJ opt-out, and only later to hold a referendum on changing this opt-out to an opt-in. Therefore, Denmark is expected to have a two-step process, separating the ratification of the Lisbon Treaty from the referendum on cancelling the AFSJ opt-out. This way a Danish 'no' to cancelling the opt-out would not have a negative impact on the rest of the EU, but on Denmark alone.

The main policy field presenting a domestic political problem for cancelling the Danish opt-out in JHA is immigration. The centre-right government, and particularly the Danish People's Party (DPP) supporting it from outside, want to maintain a relatively strict national immigration policy and for that purpose they would like to keep the opt-out.[27] The dilemma is that if Denmark does not change its rigid opt-out into a flexible opt-in, it will also find itself excluded from EU cooperation on the fight against terrorism, in which the government (and the DPP) very much wishes to continue its participation and cooperation. This desire was strengthened after the cartoon episode, in October 2005, which amplified Denmark as a target for terrorists. The change from opt-out to an opt-in will solve this dilemma and grant Denmark the ability to enjoy 'the best of both worlds'. Denmark would be able to opt in to most AFSJ cooperation, but stay out of legal immigration policy. The difficulty is to ratify this change in a referendum. It is unclear whether even this lower threshold (moving to opt-in instead of cancelling the opt-out altogether) will be crossed. Some in Denmark have expressed fears that in fact the government will adopt most of the EU's measures.

A way to reduce those fears would be to reach an agreement among a wide majority of the political parties and to formulate policy guidelines for managing the opt-in, clarifying in which fields Denmark would seek to opt in and in which it would maintain its opt-out. Such policy guidelines were formulated by the British Government in 1999 and by Ireland in its opt-out protocol. It is probable that the Danish government would have to make concessions to some opposition parties regarding the management of the opt-out, so as to enhance its chance to win the referendum. The left-wing Socialist People's Party, that once opposed

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Denmark on the Treaty on European Union, Conclusion of the Presidency, European Council of 11-12 December 1992, OJ 1992 C 348.

[26] F. Laursen, *Denmark and the Intergovernmental Conference: a Two-Level Game*, Danish Foreign Policy Yearbook 91, at 109 (2004).

[27] The most known example is family reunification. Denmark passed a rule such unification can take place only after a person is 24 years old, where in the rest of the EU the age barrier is 21 at most.

the Maastricht Treaty and asked for the JHA opt-out, has changed its position in recent years and supports its cancellation. The right-wing DPP, supporting the government from outside, is against such move. However, on EU matters the government usually does not seek its support, but rather reaches to the left-wing parties. Once Denmark will move to the opt-in position, the parliament would be the veto-player determining where the government can opt in or not. This is very different than the situation in the UK.

II. The UK – Is the 'Best of Both Worlds' Coming to an End?

As mentioned, the Constitutional Treaty did not expand the UK's opt-in to the widened AFSJ, whereas the Lisbon Treaty did. The political price of blocking the EU from moving the third pillar to the Community method would have been high for the UK. Furthermore, it has actually been in the UK's interest to move at least some fields in the third pillar to QMV, so as to allow the EU to act more quickly, dynamically and resolutely on relevant issues such as the fight against terrorism and cross-border crime. But in other areas, such as criminal procedural law, the UK had objected to moving to QMV. When the Constitutional Treaty was opened for renegotiation, the UK took this opportunity to expand its opt-in to those fields, and was no longer satisfied with the reassurance of the Emergency Brake.[28] The UK's widened opt-in protocol was concluded in the last weeks before the conclusion of the new treaty in Lisbon, October 2007. Some movement to opt in has already begun in parallel to expanding the opt-out. At the Lisbon summit, the UK announced it will exercise its opt-in in Article 75 of the Lisbon Treaty, which added the grounds of "preventing and combating terrorism and related activities" to the current provisions on sanctions against a third state.[29]

The Lisbon Treaty has clarified the UK's rules of the opt-in. The question in dispute was whether the UK has to opt in to future amendments of measures it has formerly opted in to. The new opt-in protocol in the Lisbon Treaty concluded it should. If not, the UK can be excluded from the measure it already takes part in. The new procedure in Article 4a (which applies also to Ireland and Denmark under opt-in regime) is that:

> [I]n cases where the Council, acting on a proposal from the Commission, determines [by QMV] that the non-participation of the United Kingdom or Ireland [or Denmark] in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to [opt in to the decision-making phase]… or… [opt in after a measure was adopted]. *If… [after] two months… the United Kingdom or Ireland [or Denmark] has not [notified of opting in], the existing measure shall no longer be binding upon or applicable to it.*[30]

[28] According to the Emergency Brake procedure if a Member State considers a draft directive would affect its fundamental aspects, it may request that the draft be referred to the European Council, which would have to make a unanimous decision.

[29] The new article 75 specify "the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities."

[30] Art. 4a Protocol No. 21 in regards to the UK and Ireland; Art. 5 Protocol No. 22 in regards to Denmark in the Lisbon Treaty.

Moreover, if the UK (or Ireland and Denmark) will not adapt its opt-in, it "shall bear the direct financial consequences."[31] This is the major change in the opt-in protocol. Some have called it 'the bullying tactic' which aims to pressurise the UK into opting in to the adapting measures.[32] This procedure puts some limit on Europe *à la carte* and the ability of an opt-out Member State to 'pick & choose'.

Another limitation on the opt-in was the ECJ's judgment in the *Frontex* case given two months after the conclusion of the Lisbon Treaty. Frontex is the European Agency established in 2005 to manage cooperation between the Member States at the external borders, and is considered a 'Schengen building measure' integral to the Schengen *acquis* on borders. The UK notified the Council it would like to opt in within the three months period set by the opt-in protocol, but was denied the right to take part in the adoption of the Regulation establishing Frontex. As the UK is out of the common borders policy, the Council decided it could not join a legislation building on it. It was all or nothing; to join Frontex, the UK had to join the whole cluster of border checks and control *acquis*. This was the first limit the Council set on the UK's ability to use its Schengen opt-in to 'pick & choose'. The UK has challenged the Council in the ECJ and lost.[33] The ECJ ruled that if an EU measure is deemed a 'Schengen building measure', but the UK does not participate in the underlined *acquis*, it will not be granted the right to participate in the *acquis* building on this measure. While the UK thought there could be a 'win-win' solution, in which it could have its cake and eat it, the Council Legal Service considered it a zero sum game of 'either – or'. Is the 'best of both worlds' coming to an end for the UK? Perhaps to some extent, but as many Member States want the UK to be in, so that they will be able to enjoy the UK's data, experience and cooperation in the AFSJ, the UK is still likely to be able to play its cards and push some opt-in limits, especially in its areas of interest: cross-border crime, terrorism and illegal immigration.

These two developments – Article 4a procedure and the *Frontex* case – have put some limit on the 'pick & choose' by the UK and increase the opt-out cost. Due to the opt-out, the UK finds itself outside of an expanding area of legislation, where the Schengen Member States act under Enhanced Cooperation in an exclusive manner, expanding it to gradually include more policy fields, like migration. This can gradually squeeze the UK out. Fears were expressed that the changes in the opt-in regime weaken the UK's position by making decisions not to opt in to a measure the subject of unpredictable consequences and risk.[34] The way the

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[31] Art. 4a(3) Protocol No. 21 in regards to the UK and Ireland.

[32] Open Europe, Guide to the Constitutional Treaty 15 (2008), quoting the Labour Chairman of the European Scrutiny Committee, Michael Connarty, European Scrutiny Committee Hearing, 16 October 2007.

[33] The UK also lost the biometric passport case on similar grounds. Judgement of 18 December 2007 in *Case C-77/05, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* (*Frontex)*, [2007] and *Case C-137/05, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, [2007] 45 CMLR 835 (not yet published in ECR).

[34] House of Commons, European Scrutiny Committee 3rd Report 2006-07, European Union Intergovernmental Conference: Follow-Up Report, 14 November 2007, Para. 56.

British will exploit the expansion of their opt-out depends mostly on the party in government and the ministers in place. It is yet to be seen how the Commission and Council will employ Article 4a.

III. The Irish 'No' to the Reform Treaty

The first Irish 'no' in 2002 to the Treaty of Nice was resolved by the EU making the Seville Declaration on Ireland's policy of military neutrality. This was not another opt-out, but clarification. Following the defeat of the Lisbon Treaty in the Irish referendum on 12 June 2008, EU officials have said that the country will probably be offered additional guarantees of its sovereignty, most likely in areas such as taxation, military policy and family law.[35] The latter is relevant to the opt-in arrangement. As in the Treaty of Amsterdam, the extension of the UK's opt-in protocol in the Lisbon Treaty had to be matched by Ireland, so as to preserve the CTA. As indicated, the time that has passed since the Amsterdam Treaty was ratified proved to Ireland there are also benefits to this forced opt-out, such as in family law and judicial cooperation in civil matters. Here Ireland can have a different opt-in picture than the UK, allowing it to preserve its different legal/religious tradition and values. Although it shares the common law system with the UK, it has different family law, such as strict divorce law, therefore its decisions where to opt in and where not to in those fields do not necessarily resemble those of the UK. Even though the Irish opt-out started due to the British one, Ireland may have become accustomed and even fond of the opt-in possibility. Nevertheless, Ireland has inserted to the Lisbon Treaty a (non-binding) declaration in which it states:

> Ireland declares its firm intention to exercise its right … to take part in the adoption of measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union [current Title IV TEC and Title VI TEU] to the maximum extent it deems possible.
>
> Ireland will, in particular, participate to the maximum possible extent in measures in the field of police cooperation.
>
> Furthermore, Ireland recalls that … it may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. Ireland intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon.[36]

Due to the failure of ratification of the Lisbon Treaty in Ireland, the optimistic note of the government is somewhat less promising, and may be either lip service given by Ireland to the EU and/or an expression of an internal split on the matter. If at all, Ireland may be given more opt-outs/opt-ins and special declarations to resolve the EU ratification block of the Lisbon Treaty.

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[35] L. Phillips, *Irish No Side Rejects Additional Protocols as 'Trinkets'*, EUobserver, 17 June 2008, at http://euobserver.com/18/26343?print=1. *See also* P. Runner, *Ireland to Work With EU Lawyers on Lisbon Opt-outs*, EUObserver, 17 October 2008, at http://euobserver.com/18/26953.

[36] *Supra* note 20, at 450-451.

C. The Lisbon Treaty – What Direction for Europe *à la Carte*?

Each of the three JHA/AFSJ opt-outs has different roots and a different path. Revealing the specific veto-players who caused the obtainment of each opt-out also explains the manner they have been managed later on and is the key factor for predicting their future management. In Denmark the veto stemmed from the electorate and the opt-out was imposed on the minority government by opposition parties. Thus, the parliament is the guardian of the opt-out. In the UK there has been consensus among both big political parties and the 'median voter'. Therefore, the UK government had much more room to manoeuvre both in the opt-out obtainment and in the management phase of its opt-out. The Irish opt-out is a unique case where the veto-player making the opt-out call is not located domestically, but in another country – the UK. Still, the Irish government has learned to make the most of it. The novelty in the Lisbon Treaty is the introduction of the EU as a veto-player in the opt-in management 'game', which change its rules.

Analysing the trend of Europe *à la carte* as manifested through opt-outs in the Lisbon Treaty demonstrates that the direction the EU is proceeding in is both more Europe *à la carte* which allows 'the best of both worlds', and at the same time Europe *à la carte* that is a 'double edge sword' to the opt-out Member State. Despite the EU's general desire to terminate the opt-outs or at least narrow them, the direction in the treaty is to expand their scope to additional policy fields. On the one hand, the flexible opt-in, which allows a Member State to 'pick & choose', and hence to enjoy 'the best of both worlds', becomes the preferable form of Europe *à la carte* in one of the most dynamic and expanding policy fields of the integration process – the AFSJ. On the other hand, the 'in' Member States have inserted themselves as a veto-player in the opt-in 'pick & choose' 'game'. Thus, *vis-à-vis* the expansion of the opt-ins, the EU has taken a defensive/offensive move to restrict the 'pick & choose' trend. An opt-out state that opts in to a measure will need also to opt in to its amendments. The Lisbon Treaty does not change the veto-players in each of the opt-out Member States. What it does do is adding the 'in' Member States as a veto-player regarding the ability of the above three to exercise their opt-out once they have opted in. This new Article 4a procedure can limit to a certain extent the trend of Europe *à la carte* and resist its becoming a complete 'pick & choose' state of affairs.

Will this expansion of the JHA/AFSJ opt-outs on paper necessarily bring about more Europe *à la carte* on the ground? Once a referendum in Denmark results in 'yes' to the opt-in, it will have the ability to 'pick & choose' from new JHA/AFSJ measures. The expected trend by Denmark is less opt-out and more opt-in, meaning that despite the right to stay out, once Denmark moves to the opt-in position, it will opt in to almost all EU measures in this field, narrowing the opt-out to the minimum (probably except family unification). However, the extent to which Denmark will use its opt-in depends not only on the government (usually a minority government), but on the parliament. It is somewhat paradoxical that

the expansion of the Danish opt-out is expected to narrow it substantially if it changes into an opt-in. What on paper looks like more differentiation would probably bring about less. The UK's direction once the Lisbon Treaty is ratified is not clear, as its opt-in management is pragmatic and is done on a case-by-case basis. Among other things, it depends on the road the EU will choose to follow in those fields under the Community method. Since many Member States want the UK to opt in, so they will be able to enjoy its data, experience and cooperation, the UK may still be able to play its cards and push some of the new opt-in limits in its areas of interest: crime, terrorism and illegal immigration. Once the UK expands the opt-in limits, Ireland and Denmark should be able to enjoy the same benefits (at lower political cost).

With the integration process intruding deeper into the heart of Member State's sovereignty, opt-outs on the one hand serve to preserve national sovereignty of reluctant Member States, while on the other hand remove their veto on new EU treaties and later on new measures. Hence, despite their negative image, opt-outs have a positive side, as they allow for the integration process to advance. As such, they have policy, political, institutional and normative implications, which should be closely examined if opt-outs are to be terminated or managed in a way that would disturb the *acquis communautaire* less.