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Defection in the European Union

An Explanation for EU Treaty Opt-Outs

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Abstract

This paper develops a theoretical approach towards understanding treaty opt-outs from EU common policies by drawing on Putnam's Two-Level Games theory. In doing so, the paper first presents treaty opt-outs as defections from negotiations by looking at previous research regarding opt-outs. Then, the paper goes on to concentrate on different European integration theories in order to explain their shortcomings in explaining defection from negotiations. Drawing from this discussion, the thesis presents Putnam's two-level games approach as the theoretical basis chosen in order to study opt-outs as defections from negotiations. Focusing on Putnam's theoretical insights regarding defection, a theoretical framework based on three analytical dimensions is built in order to explain opt-outs. Finally, four cases of opt-outs from EU common policies are analysed empirically, by comparing them along the three analytical dimensions. The purpose of this comparative analysis is to assess whether there are any patterns of similarities that might account for the defection that occurred in all of the opt-out cases examined. The results from this analysis indicate that the main factors triggering defection are the ones imposed by the domestic constraints. Following the comparative analysis of the four opt-outs along the three analytical dimensions, a further explanation of defection is explored. Thus, based on the findings, the final part frames a theory about opt-outs by revisiting Putnam's assumptions. The developed theory builds on Putnam's concept of "win-set" and argues that domestic constraints represent the key explanatory factor triggering defection and thus, the formulation of treaty opt-outs.

Key words: treaty opt-out, European Union, Two-Level Games Theory, Putnam, defection, domestic constraints, comparative method

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1 Introduction

In the last decade, doubts over the benefits of EU membership have given rise to controversial national opt-outs, which indicate that sometimes selected “exclusion” may be preferred to full involvement. In general, the law of the European Union (EU) is valid and applicable to all the 27 member states. However, sometimes member states negotiate certain opt-outs from legislation or treaties of the EU, meaning that they do not participate in certain policy areas. The practice of special protocols annexed to the EU treaties in order to secure derogations for individual member states has come to the attention of academic scholars only starting with the mid-1990s. Studying opt-outs is an interesting topic mainly because of their rather controversial nature; opt-outs are seen either as breaking the unity among member states, or as a positive thing allowing the European integration process to move forward.

Opt-outs should be of interest not only to practitioners, but also to students of European integration, since exemptions and other instruments of flexibility are likely to be used much more as the Union expands geographically and continues to introduce new policies. While the motivations and consequences of these opt-outs have been intensively discussed, explaining the “birth” of these EU derogations has been quite neglected by the academic research. Therefore, the following paper will be an “explorative study” that seeks to identify a theoretical approach in order to explain why member states decide to formulate treaty opt-outs. This thesis will try to address the following research question:

How can one explain EU treaty opt-outs?

In light of the research question posed, the aim of this thesis will be to find an explanation for treaty opt-outs by seeking to develop a theoretical approach towards understanding their formulation. The purpose is to shed new light on the conditions underpinning treaty opt-outs and in order to answer the research question the thesis was structured in the following way. First, an overview of the literature dealing in one way or another with EU opt-outs identifies opt-outs as defections from negotiations. Secondly, a theoretical discussion points out the

shortcomings posed by main European integration theories in explaining defection. Putnam's two-level game approach regarding international negotiations is chosen to serve as a theoretical basis for answering the research question and in the next section Putnam's main assumptions regarding international negotiations are presented. Then, Chapter 4 discusses the research method chosen for this study and explains the reasons for choosing to conduct a comparative study of different EU opt-outs in order to answer the research question.

Next, in Chapter 5, a theoretical framework based on Putnam's assumptions is brought forward in order to explain defection from negotiations. This section might seem awkwardly unfit to come at this stage. However, the method chosen to answer the research question, namely the comparative method, requires a rather organized comparison of the cases based on specific variables or aspects. The third chapter presenting all of Putnam's assumptions regarding international negotiations is too general and descriptive in order to be used as a framework for conducting comparison across the chosen cases. That is why, taking into consideration the rigors implied by the comparative method, Chapter 5 will focus on Putnam's assumptions regarding defection in order to build a clearly structured theoretical framework that will serve as a basis for the comparison in all of the chosen cases for the empirical analysis. Three analytical dimensions are identified based on Putnam's approach and information is given regarding data collection for analyzing empirically each of the three dimensions.

In Chapter 6 the three dimensions that stand as explanatory factors for the defection, are empirically analysed in the four opt-out cases chosen. Following the empirical analysis, in Chapter 7 cross- case analysis is conducted among cases in order to interpret the findings and see if they fit with the initial theoretical propositions. Then, the findings are compared across cases in order to reveal similarities or differences that might explain the phenomenon of treaty opt-outs. Finally, a conclusion is drawn to answer the research question and disclose a theory about opt-outs based on the findings. The thesis will therefore be able to make a scientific contribution to the debate regarding EU opt-outs through the development of a theoretical two-level game inspired approach explaining defections from international negotiations.

2 Literature overview

As mentioned above, the focus on opt-outs in the EU context is relatively recent and thus, research on this topic is rather scarce. Positioning one's research in the context of the literature is key to identifying the contribution the new research makes (George & Bennett 2005: 70). Thus, in the following part I will try to give a brief overview of the literature that deals in one way or another with this issue.

In the field of European integration studies, there is an increasingly growing body of literature building on the concepts of differentiated or flexible integration in order to explain the possibility of member states to have different rights and obligations with respect to certain common policy areas (Kölliker 2006; Closa 2010; Král 2008; Faber & Wessels 2005; Stubb 1996; de Neve 2007; Richardson 2005; Nugent 1999). Flexible integration is understood in the literature as a means by which to deepen the integration process (Closa 2010: 3; Fiala 2006; Stubb 2002: 537). Some of the scholars mention that an EU opt-out is a specific type of differentiated integration (Closa 2010; Fiala 2006; Stubb 1996), while others consider that only enhanced cooperation can be regarded as flexible integration because opt-outs are actually a way of avoiding further integration (Closa 2010). However, none of these studies focus explicitly on analysing the opt-outs, but merely on developing a theoretical approach in order to explore flexible integration. Although the research concerning the issue of flexible/differentiated integration is rather vast, opt-outs have been only marginally discussed. Thus, the purpose of my thesis will be to explain the "birth" of these opt-outs by looking at the process behind their formulation.

2.1 Opt-outs as defection from EU negotiations

A relevant contribution brought by the literature is the forging of a definition regarding opt-outs. According to Maya Sion, a treaty opt-out "occurs when most of the member states in the EU agree to advance the integration

process, and therefore negotiate in an Intergovernmental Conference (IGC) to change the common EU treaties, but encounter a refusal within a member state to relinquish its sovereignty in a specific policy field. The political, institutional and legal solution is treaty opt-out: a protocol attached to the new treaty, giving an exemption from the common policy-field to that Member State at the end of the intergovernmental negotiations. The opt-out protocol enters into force together with the treaty, and is valid for an indeterminate period of time.”(Sion 2004: 2). An opt-out is an exemption from a treaty provision or a directive granted to a member state that does not wish to join the other member states in a particular area of community co-operation (Adler-Nissen 2008: 665). Closa goes even further and argues that the opt-out represents a “voluntary exclusion” which is characterized by the following features: it is defined under primary law (normally through protocols) and is not a generic option that is open to each and every state at all times, it is applied to issues and areas that are clearly defined in the sense that it is not available for any EU policy (2010: 3).

In her article, Maya Sion conceptualizes treaty opt-outs as the only form of defection in the EU. She based her argument on the assumption that neither a failure of the negotiations altogether, nor a conclusion of a new agreement without the defecting country, can represent possible outcomes of defections from international negotiations (Sion 2004: 2). However, time proved her wrong since the failure of the Constitutional Treaty in 2005 confirmed that a failure of the negotiations altogether is also possible in the EU context. As George & Bennett acknowledge, new historical data may become available at a later date and may lead to a successful challenge of earlier explanations (2005: 91). The Treaty establishing a Constitution for Europe, commonly referred to as the Constitutional Treaty, was signed on 29 October 2004 by representatives of the then 25 EU member states. After that it was submitted for ratification in all the EU countries. French and Dutch voters rejected the EU’s Constitutional Treaty in May and June 2005. Since the Treaty must be ratified by all EU members, these negative votes were a huge blow to the Constitutional Treaty. EU leaders reacted by suspending the formal ratification timetable, namely, the deadline by which all EU members were supposed to have ratified the Treaty (November 2006), and allowed individual member states to decide how to proceed. Some states went on with their ratification plans while other decided to wait and see. As of early 2006

neither the French nor the Dutch governments had a plan for reversing the fatal “no”. Therefore, the negotiations were not reopened and led to the collapse of the Constitutional Treaty.

The Constitutional Treaty’s critical failure that led to the abandon of the negotiations altogether, is a proof that treaty opt-outs are not the only form of defection in the EU. Therefore, a reassessment of Sion’s assumptions is necessary since new historical data led to a successful challenge of her earlier statement. It appears that Sion’s assumptions need to be sharpened in order to fit the present context. Hence, it seems that in the EU context today, defections from international negotiations can generate two possible outcomes: an abandon of the negotiations altogether or treaty opt-outs. In the following paper, we will focus our attention on the second type of defection, namely, treaty opt-outs.

Opt-outs represent defections from the international negotiations because when a member state is granted an opt-out, it automatically implies that the member state is exempted from a certain common policy and is not obliged by the community decisions and legislation in this field for an indeterminate period of time. Thus, one can say that the EU member state defects from that common policy and it fails to embrace all the aspects negotiated and accepted by the other member states. In her paper, Iida also argues that the rejection of international agreements can be termed “defection” in Putnam’s term. Moreover, focusing on the defections caused by the failure of a country to ratify a treaty, she also states that such a defection can be reasonably called “involuntary defection” according to Putnam’s assumption (Iida 1996: 283); in order to support this argument she defines the ratification failure of the Maastricht Treaty in Denmark as an example of an involuntary defection in which the leader is forced to defect from a certain policy.

Opt-outs from the EU and EC treaties are highly politicized and differently explained in the literature. On the one hand, they are seen as breaking the unity of the integration process among the member states and creating a so-called *Europe à la carte*, in which member states can “pick and choose” the integration policies in which they want to participate (Sion 2004: 3). Moreover, opt-outs are often perceived as “hijacking” the *acquis communautaire* (Curtin 1993: 49) and the EU’s declared ambition of speaking with a common voice. Curtin further on argues that such a polity tool stands in contrast to the “acquis

communautaire”- the entire body of EU law- which obliges all member states and binds them together within the EU (1993: 46). The perspective adopted is that the “acquis communautaire” is the most sacred principle of the European integration process and that uniformity of the application of Community law is critical for the continued existence of the European Community (Curtin 1993: 46).

On the other hand, opt-outs are seen as enabling the rest of the member states to advance in the integration process and allowing integration to be applied to a sector without depending on the will of those who exclude themselves (Closa 2010: 3). Therefore, an opt-out is not a failure of the negotiations altogether that obstructs the conclusion of a new treaty (like in the case of the Constitutional Treaty), but rather it is given in order to allow for the ratification of the new treaty (Sion 2004: 2). Most of the time the opt-out decision is described as a form of heterogeneous EU integration, that is a differentiated and flexible integration encountered practically since the integration of Europe started (Fiala 2006: 57).

The various motivations behind the opt-outs have also been explored to some degree (Buller 2006; Watts and Pilkington 2005; Hansen 2002; Risse 2002; Marcussen & Zølner 2001). Some scholars have recently argued that factors such as self-perception and state-identity are inherently linked to decisions to opt-out (Marcussen & Zølner 2001). Thus, the EU derogations are explained by the differences in collective understandings and identification patterns with the nation-state and Europe (Risse 2002). Moreover, scholars have also tried to explain the consequences of opting-out for the diplomatic activities of member states (Adler-Nissen, 2008; Adler-Nissen & Gammeltoft-Hansen 2010). In her study, Adler-Nissen concludes that member states with opt-outs do not necessarily lose influence, but rather that the social context and norm-sensitive relations in the diplomatic field of the Council impact on the diplomats’ power of maneuver (2008: 680).

While the motivations behind the opt-outs and their consequences have been explored to some degree, there is no research looking at factors that could account for the instances in which treaty opt-outs are negotiated. That is why the following thesis will try to find a reasonable explanation for the formulation of the EU treaty opt-outs. The next part of the thesis will thus focus on identifying a reasonable theoretical approach that can explain treaty opt-outs.

3 Theory

3.1 Theoretical discussion

In order to be able to explain the negotiation process that takes place in the intergovernmental setup, the paper will present a review of the current approaches to “grand” EU bargains and “everyday” EU politics and their shortcomings in explaining treaty opt-outs. In the following section, opt-outs will be examined through the lens of European integration theories and the goal will be to present a theoretical understanding of the opt-outs.

Opt-outs or derogations leading to some sort of a differentiated integration among member states have not been a topic in the classical integration theories. Nevertheless, according to Gstöhl, (neo) federalism could interpret a “multi-speed Europe”, as a temporary situation in which the laggards are to catch up with full integration (Gstöhl 2000: 46). However, according to the same author, even in such a gradual federalizing process, permanent exemptions like treaty opt-outs are hard to imagine (*ibid.*). Hence, one could argue that the Danish or British exemptions from the EMU (Economic and Monetary Union) are an anomaly from a federalist perspective.

According to neo-functionalism, European integration was built upon successive steps that opened new windows for increased integration (Stone Sweet & Sandholtz 1998: 5-6). Neo-functionalists argue that according to the spillover effect, European integration has its own rationale, which is autonomous from member states’ willingness: once a step is taken to deepen European integration, future steps that support the process will be independent from member states (Pollack, 1998). Neo-functionalist theory would expect the expansive logic of sector integration to ensure uniform integration (Wiener & Diez 2009: 52). However, instead of a smooth transition from the internal market to monetary union and “high politics”, instances in which states have chosen to opt-out have increased during time. Neo-functionalist explanations could be adjusted to

account for the cases where all member states are willing but not yet able to implement those policies. However, they fail to explain the opt-out protocols clearly formulated in the treaties, namely the derogations formulated by able but unwilling member states. (e.g. the Danish or British opt-outs from the Economic and Monetary Union). Thus, spillover cannot be expected to take place in the absence of a will to proceed on the part of the member states (Lindberg 1963: 11). Neo-functionalism does not provide explicit explanations to political bargains that lead to exemptions formulated by member states and finds it difficult to accommodate unevenness in the integration process (Gstöhl 2000: 47). Moreover, neo-functionalism underestimates the continued impact of sovereignty consciousness and nationalism as barriers to the integration process (ibid). Examples such as the Danish population's rejection of the Maastricht Treaty illustrate the significance of these conceptions. As Gstöhl points out, "the nation-state might have been transformed, but is not withering away." (Gstöhl 2000: 45).

Therefore, this conventional integration theories leave us puzzled when it comes to opt-outs. Of the existing integration theories, only the intergovernmental school offers an explanation to why countries might be unwilling to integrate in certain policy areas. A reaction to neo-functionalism and inspired by neo-realism, intergovernmentalism views nation-states as dominant actors pursuing their national interests, which may consist in opt-outs from integration. According to intergovernmentalism, member states remain the key actors in Europe while supranational institutions are controlled by member states. Thus, national identities are likely to remain salient and the European Community is regarded as preserving, rather than weakening the nation-state. As Hoffmann (1966: 867) argued, the integration process is shaped by national interests and proceeds most swiftly when it does not involve matters of essential national interests. Neofunctionalism and federalism focus on integration, while intergovernmentalism focuses on non-integration. However, intergovernmentalism remains too static if it does not take into consideration the roots of national preferences (Gstöhl 2000: 46). This is where liberal intergovernmentalism comes in.

Liberal intergovernmentalism is a "grand theory" which argues that one cannot explain integration with just one factor, but instead seeks to link together multiple theories and factors into a single, coherent approach appropriate to

explaining integration (Wiener & Diez 2009: 68). The latest protagonist of intergovernmentalism, Andrew Moravcsik, argues that states are actors which achieve their goals through intergovernmental negotiation and bargaining, rather than through a centralized authority making and enforcing political decisions (Moravcsik & Schimmelfennig 2009: 68-69). Thus, liberal intergovernmentalism provides a good starting-point for the topic of this thesis since EU treaty opt-outs are typically agreed upon in intergovernmental negotiations preceding the drafting of a new EU treaty. Liberal intergovernmentalism acknowledges that in the EU context, member states are “masters of the treaty” and continue to enjoy decision-making power and political legitimacy (Moravcsik 1993). In order to restate the states-as-actors and rationality assumptions, decisions to cooperate internationally can be explained in a three-stage framework: economic interests, relative power and credible commitments (Moravcsik 1998: 4 ; Moravcsik & Nikolaidis, 1999: 60). The decision-making process is thus divided into national preference formation and international negotiations.

Therefore, the key element that explains European integration is member states’ preferences and powers. As a result, only member states shape the European integration process. Although member states accept a dynamic supranational polity, they are the “owners” of European integration developments. Supranational institutions are not granted the autonomy suggested by neo-functionalism, because they are directly or indirectly commanded by the member states’ political willingness, and they exist only to serve the member states’ interests (Moravcsik 1993). However, liberal intergovernmentalism’s view of preference formation does not capture the “Euro-sceptic” cases and opt-outs. Moravcsik (1998: 35-50) assumes that, in pluralist democracies, governments aggregate the demands articulated by interest groups on the basis of their expected gains and losses as well as future uncertainty, and argues that economic interests dominate, except for issues of “high” politics. He also argues that geopolitical interests, even more than ideology, also have an important impact on European integration (Wiener & Diez 2009: 70). However, geopolitics is not always the potential cause for a reluctant policy, and the analysis of political factors is not only important where economic interests are weak (Gstöhl 2000: 46). In the case of the opt-outs secured by Denmark, Great Britain or Sweden, the anticipated large economic benefits of integration have been outweighed by deeply rooted

political impediments to it (ibid). In such cases, Moravcsik's explanation of the preference formation process with its emphasis on (commercial) interests stemming from economic interdependence may not capture all relevant motivations.

Moreover, Moravcsik further states that governments have actively sought to maximize their room for manoeuvre and he relies on Putnam's game theory in order to argue that national governments have used EU institutions as part of a two-level game to increase the policy autonomy of national governments in relation to domestic interests (Moravcsik 1994: 46). Thus, according to him, the supranational elites are not tying the member states into a process to which they are resistant, but rather the European Union may in fact strengthen the state by allowing, for example, "chief executives to manipulate their own domestic constituents into accepting common policies" (Moravcsik 1994: 47). However, if one looks closer to specific opt-outs held by member states it might be possible to point out towards situations when the EU does not always strengthen the executive as Moravcsik points out.

3.2 Choice of theoretical approach

Drawing on the shortcomings posed by various EU integration theories in explaining defection, I will now try to motivate the choice of theoretical approach. Failures of the negotiations are prevalent in the EU context, but due to the assumption of unitary actors in international relations theory, theoretical analysis has been underdeveloped. In order to explore the EU negotiations and their outcome, I decided that Putnam's two-level games approach regarding international negotiations is the most appropriate to serve as a theoretical support.

Robert Putnam's two-level games approach moves away from the state-centric approach by acknowledging that the state is a fragmented unit consisting of different groups or units. According to this approach, states are no longer the actors since central decision-makers, legislatures and domestic groups become the agents. A state's policy preferences are often expressions of coalitions of interests of these units and agents (Dash 2008: 26). Focusing on this, Putnam argues that "Unlike state-centric theories, the two-level approach recognizes the inevitability

of domestic conflict about what the national interest requires” (1988: 460). Therefore, the definition of national interest and how it is constructed and pursued gains a central focus of analysis in this approach.

Another appealing aspect of the two-level game framework for exploring opt-outs is the fact that Putnam’s approach offers several theoretical assumptions regarding defections from negotiations. Since in the previous chapter this study conceptualizes opt-outs as defections from negotiations, Putnam’s theoretical propositions regarding defection prove to be essential for the understanding of treaty opt-outs. Also, the two-level games approach offers a better conceptual framework in which negotiations are no longer viewed as binary game, based on cooperation or defection, but as a continuous situation where many tactics and bargaining tools are used (Dash 2008: 27).

3.3 Putnam’s Two-Level Games analysis

In order to explain the factors that lead to defection in EU negotiations, viewed in terms of treaty opt-outs, we first have to begin constructing a preliminary theory related to the topic of study. This role of theory-building, prior to the conduct of any data collection is essential because no empirical investigation can be successful without theory to guide its choice of questions (Yin 1989: 35; King, Keohane & Verba 1994: 40). Thus, before venturing into the empirical analysis of the EU opt-outs, it is necessary to explore some theoretical considerations concerning decision-makers that negotiate international agreements. A useful model for analyzing defection from EU negotiations is Robert Putnam’s “Two-Level Games” approach about international negotiations and the relations between the national and the international. In 1988 political scientist Robert Putnam wrote “Diplomacy and domestic politics: the logic of two-level games”, where he exemplifies how diplomacy (negotiation) and domestic politics can become entangled in international negotiations.

Putnam’s basic assumption is that domestic and international politics are fundamentally intertwined. To ease analysis, Putnam portrayed this “two-level games” metaphor as an interactive bargaining process with Level I comprising negotiations on an international level and Level II discussion on the national or

domestic level. Chief negotiators or national leaders and the ratification process fulfill a key role in this bargaining process. In negotiating an international agreement, chief negotiators are typically engaged in two simultaneous games, one at the domestic level and the other at the international level:

“At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies [...] At the international level, governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments” (Putnam 1988: 434).

The basic model presented by Putnam argues that international relations should be modeled on both levels, and what happens on one of the “game boards” can have a major impact on the outcome on the other one (Putnam 1988). In this context almost everything is endogenous in the sense that changes on one board change the situation on the other board. It is important to note that the two-level game is complex in the sense that moves that are rational for a player at one game board may be not so acceptable for the same player at the other board (Putnam 1988: 434). Actually, what Putnam is doing is relaxing the “unitary actor” assumption by allowing “internal bargaining” namely, everything that is happening at Level II.

In order to simplify the game Putnam breaks it into two levels. At Level I, the international level, bargaining between negotiators leads to a tentative agreement. At this level of negotiations the leader or the chief negotiator is the main negotiating force and the link between the two levels (Putnam 1988: 456). At Level II the domestic audience discusses whether to ratify the agreement. Level II refers to a parliament, a ratification vote or other instances that require acceptance of the Level I agreement (Putnam, 1988: 436). The basic outline of the game is that negotiators make a deal at Level I which will then have to be submitted for ratification (either formal or informal) at Level II. The important relationship between these two levels is the fact that any Level I agreement must be ratified by the constituents at Level II (*ibid*). Moreover, any amendment of the agreement at Level II represents a rejection at Level I and will require a reopening of the negotiations at Level I; final ratification must be again decided by Level II (Putnam 1988: 437). The ratification process represents the theoretical link between Level I and Level II and highlights the principal role of the chief negotiator and of the domestic constituents. From the basic model, Putnam then identifies a series of tendencies in international negotiations.

Although all the above identified elements will be explored, it is not possible to clearly de-link them from each other. While the ratification process and the role of the chief negotiator are the main explanatory factors, a number of other strategies and processes, such as win-sets and “synergistic issue linkage” also form an intrinsic part of the comprehensive two-stage interactive bargaining process across the two levels.

3.3.1 The ratification process

The ratification process primarily takes place at the domestic level (Level II) and represents the theoretical link between Level I and Level II. This is because it influences negotiation positions on both “game boards” and during the Level I negotiations and is a requirement for international agreements (Putnam 1988: 436). The ratification process represents an important part of the chief negotiator’s activities, but will be discussed separately, as much as possible, in order to explore and identify certain constraints. The somehow “symbiotic” relationship between ratification and national leader lies in the fact that the chief negotiator consults and coordinates the different domestic positions at Level II in order to forge a unified domestic opinion that can serve as term of reference in the international negotiations (Level I). As the discussions proceed and new issues appear at the Level I negotiation process, the leaders need to take into consideration the opinion of their domestic constituents if they want to be sure that the negotiated agreement will be ratified at the end of the Level II process. Thus, the “expectation of rejection” at Level II should be constantly considered by the leader since it will negatively affect the negotiations at Level I (Putnam 1988: 436). It is important to make note that, in formulating the above hypotheses, Putnam initially assumes that negotiators in Level I have no interests of their own, although later he will relax his assumption.

Putnam uses the term “ratification” generically “to refer to any decision-process at Level II that is required to endorse or implement a level 1 agreement, whether formally or informally” (Putnam 1988: 437). According to Putnam, the only formal constraint on the ratification process is that it must be ratified by both sides. A preliminary Level I agreement cannot be amended at Level II without a reopening of the negotiations at Level I. Negotiations can simply be voted up or

down since any amendment is viewed as a rejection unless it is approved by both parties to the agreement.

Win-set

Putnam uses the term “win-set” to explain the success or failure of international negotiations. Given the circumstances evoked in the basic model, Putnam defines a “win-set” for a particular Level II constituency as the set of all possible Level I agreements that would “win” – or gain the necessary majority among the constituents- when voted up or down (Putnam 1988: 437). Since domestic ratification is required at Level II, a win-set is actually also a domestic constraint. A key element of Putnam’s theory is his application of the win-set as a strategy of negotiation. In this regard, it is mainly the size of the win-set that is emphasized since it can determine the relative negotiating power (Putnam 1988: 442-443). Putnam (1988) and Iida (1993: 405) have advanced a two-fold hypothesis concerning the win-set as a strategy of negotiations:

Hypothesis 1: Larger win-sets make Level I agreements more likely.

Hypothesis 2: The smaller the win-set, the greater the risk of failure in negotiations.

Assuming that the national leader is devoid of personal preferences, Putnam states that Level I negotiators only bargain for outcomes that will be acceptable to the constituents at Level II. Being aware that successful agreement must fall within the Level II win-sets of the constituents, agreement is only possible if those win-sets overlap. A general precondition for an international agreement is that there has to be an overlap between the win-sets of the opposing chief negotiators. A larger win-set at Level II implies that constituents are able to accept a broader range of options for actions (Putnam 1988: 437). Basically, the more a country is willing to agree to, the more likely the agreement. Therefore, negotiations at Level I are more likely to be successful when larger win-sets are present at Level II, because more outcomes are able to be ratified, thereby increasing the likelihood of finding an outcome acceptable to all parties. Conversely, the smaller the win-sets at Level II, the less likely is that they will overlap and as a result, defections or failure of the negotiations will occur (Putnam 1988: 437-438).

According to Putnam, the negotiator is able to use his autonomy to change the size of the domestic win-set. In doing so he would make use of a tactic called

“synergistic issue linkage” in Putnam’s terms. Basically, the chief negotiator achieves ratification by linking “unpopular” provisions, previously outside the win-set, to more popular provisions, therefore, creating new policy options that were previously beyond domestic control (Putnam 1988: 447).

The determinants of the win-set

According to Putnam, the size of the win-set will determine if an international agreement will be concluded or not. The size of the win-set is influenced by three factors.

The first factor refers to the Level II preferences and possible coalitions. When discussing this factor, Putnam mostly refers to the “cost of no-agreement”. For example, if the cost of “no agreement” to domestic constituencies is low, the win set becomes much smaller. No-agreement often represents the status quo. Constituents that face low costs from no-agreement will be more skeptical of Level I agreements than the ones who face higher costs from no-agreement (Putnam 1988: 442). Therefore, the size of the win-set (and thus the negotiating room of the level I negotiator) will depend on the relative size of the “forces” that oppose the agreement.

Putnam makes an important distinction between two kinds of issues. The first type of issue is “homogenous” (or “boundary”) conflict, in which all domestic constituencies basically want the same thing, but differ only in what minimum amount they find acceptable. The second is “heterogeneous” (or “factional”) conflict, in which domestic constituencies may have completely opposing preferences. While in the first case domestic division raises the risk of involuntary defection to impede agreement at Level I, in the latter case, domestic division “may actually improve the prospects for international cooperation” (Putnam 1988: 444) in the sense that it expands the possible win-set by creating transnational alignments. In this category, Putnam also points out that in multi-issue negotiations, tradeoffs may be possible across issues when subject to international negotiation but not in strictly domestic bargaining (Putnam 1988: 446-448).

The second factor influencing the size of the win-set refers to the political institutions at home. Political institutions might refer to ratification procedures, the political culture in the country or whether, for example, the treaty needs to be ratified by a referendum (Putnam 1988: 449). Putnam argues that ratification

procedures affect the size of the win-set in the sense that higher ratification requirements make the win-set smaller (ibid: 448-449). The type of institution in a country also impacts directly on the size of the win-set and might impose a tighter constraint (ibid). This last situation enhances the possibility of involuntary defection which, according to Putnam, occurs when a domestic group vetoes an agreement that is supported by the national leader or chief negotiator (1988: 448). Involuntary defection is mainly the result of failed ratification. Putnam also considers the possibility of voluntary defection, namely, a situation where a state led by a chief negotiator rejects ratification of an agreement on account of the egoistical behavior of the leader. Both types of defection constitute part of the ratification process (Putnam 1988:438).

Thirdly, the size of the win-set depends on the strategies of the leading negotiator towards the national level. Those include linkage and side-payments that allow the leader to enlarge the domestic win-set and to advance policies that without the international level would not have been possible (Putnam, 1988: 450-451). Sometimes, national leaders are able to use their international deal making not only to achieve international cooperation but to change their domestic political outcomes – to achieve domestic goals which would otherwise be blocked. We already mentioned the tactic of “synergistic linkages” above, when discussing the win-set.

3.3.2 The role of the negotiator

The chief negotiator is the second element of Putnam’s two-level game metaphor and is viewed as the formal link between the two levels because he is situated on both of the “game-boards”. According to Putnam, the negotiator’s main task is to forge an agreement at Level I that is acceptable to the Level II. The influence of domestic constituents on negotiators and their bargaining positions on both sides remains a key element during the Level I negotiation process since there is always the vital requirement of ratification at Level II. Thus, the chief negotiator also plays a key role in terms of the ratification process (Putnam 1988: 434-437).

In his paper, Putnam notes several limits and especially opportunities that international negotiations can offer to the chief negotiator or the leader of a state.

He shows that sometimes leaders led their governments to adopt a different policy than if there would not have been international negotiations. He argues that sometimes agreement was possible only because of a powerful minority in the government that actually favoured on domestic grounds the policy being demanded internationally (Putnam 1988: 428-430). Putnam also concludes that the international level can strengthen the leader at the expense of other political players in that state. In this sense, Putnam argues that the leader might play a two-folded game: to his national public he presents himself as fighting for the best agreement for his country, while in fact the chief negotiator is using the negotiation process on the international level to justify policies that are unpopular to the public or to the majority of his government (Putnam 1988: 434).

As mentioned above, for constructing the basic two-level games framework for negotiations, Putnam assumes that the leader has no independent policy views and that he acts as an honest broker or as “an agent on behalf of his constituents” (Putnam 1988: 456). However, he then relaxes his assumption and admits that sometimes the preferences of the chief negotiator may diverge from those of his constituents. The leader does not necessarily negotiate in the name of his constituents and also maybe not on behalf of the majority in his government or party (Putnam 1988: 457). A chief negotiator will employ certain strategies only if they further his own aims; that is why the set of agreements preferred by the statesman to the status quo may be termed the statesman’s “acceptability set” (Moravcsik 1993: 30). Putnam claims that the leader’s preferences may reflect three things: (1) the statesman’s interest in enhancing his domestic position by increasing his political resources; (2) an effort to shift the balance of power in his state in favour of domestic policies that he prefers; or (3) the pursuit of his own conception of the national interest in the international context (Putnam 1988: 457). Despite his preferences or strategies, Putnam emphasizes that the leader will only agree at the international level to what he can ratify at home. In this sense, Putnam argues that concerns about what he calls “deliver-ability” are a prominent element in the statesman’s strategy and that the leader will be careful not to promise to the other leaders more than he can deliver (Putnam 1988: 439).

3.3.3 Two types of defection: implications

Putnam acknowledges the possibility of failed negotiations during the ratification process and argues that the key determinant of defections is the size of the win-set. He then distinguishes between two types of defection that might occur during the ratification process.

1. One is voluntary defection (e.g. as in the prisoner's dilemma), in which the negotiator deliberately violates an agreement by rejecting its ratification due to egoistical reasons and in order to get a better deal (Putnam 1988: 438). In this case, drawing on Putnam's assumption, voluntary defection means that the size of the leader's win-set was smaller than the one of the other political players in her state and the other negotiating parties.

2. On the other hand, involuntary defection refers to situations in which the leader cannot deliver on a promise because of failed ratification at Level II (Putnam 1988: 438). In fact, Putnam first introduced the argument that defection from commitments could be the results of domestic constraints. He suggests that when national and international win-sets fail to overlap, an executive may find his internationally negotiated agreement unable to be ratified by his national legislature. Putnam suggests this case represents one of involuntary defection since the leader violated his promise, not of his own volition, but because internal constraints at home prevented him from following through with the commitment. As a result, Putnam argues that democratic executives should take the preferences of veto actors into consideration during the negotiation phase and only conclude agreements that they know will be ratifiable at home (1988: 458). Failure to secure ratification may be a result of the leader overestimating the potential for negotiating a policy package capable of creating sufficient support to obtain ratification. Thus, in the case of involuntary defection, miscalculation is the source of the defection not dishonesty (Iida 1996: 284).

Moreover, Putnam states that the smaller the win-set, the greater is the risk of involuntary defection. He implicitly assumes uncertainty about the contours of the win-set on the part of the Level I negotiator. Uncertainty about the contours of the win-set on the part of the Level I negotiator is responsible for the involuntary defection since if the negotiator knew the win-set with certainty, he would never propose for ratification an agreement that would be rejected (Putnam 1988: 458-

459). Iida also argues that involuntary defection is determined by the uncertainty of the negotiator about his own domestic constraints (Iida 1996: 284).

Again, drawing on Putnam's hypotheses, it can be assumed that involuntary defection implies that the domestic win-set did not overlap with the personal win-set (preference) of the chief negotiator (which did overlap the win-sets of the other negotiating states) or that there was high uncertainty concerning the domestic win-set. This means that despite the last factor (the strategies of the leader to widen his win-set), the first two explanatory factors (the preferences of political actors and the institutional setting at home) maintained the win-set small or too uncertain to conclude an agreement that could be ratified at home.

Putnam further argues that sometimes it might be difficult to distinguish voluntary and involuntary defection, particularly since a strategic negotiator might seek to present his voluntary defection as involuntary in order to keep his international reputation as a credible negotiator (Putnam 1988: 439). The difficulty to distinguish between these two types of defection might be caused by the secrecy in both levels of the game, namely, in the domestic executive, where decisions about the national negotiation strategy and policy positions are made, and in the international negotiations, where the details of the treaty are concluded. This lack of transparency on both game boards enables the leader to hide the real nature of the negotiations and whose fault was their failure (Sion 2004: 5).

Adjusting Putnam's approach from the anarchic international sphere to the EU institutionalized intergovernmental regime

First of all, the unique regime of the European Union characterized by a continuous process of creating an "ever closer union among the peoples of Europe" (Treaty on the European Union, Preamble), is very different from the anarchic international sphere. The member states are not complete sovereigns in the sense that they relinquish part of their sovereignty to the EU by accepting common policies and the authority of the EU's supranational institutions.

Second, Putnam assumes that unlike in an anarchic, "self-help" world where prospects for international cooperation are often said to be poor because of the fact that policy makers generally have an incentive to cheat, the temptation to defect can be dramatically reduced among players who expect to meet again (Putnam 1988: 438). At the EU level, leaders of the EU member states are

meeting in the European Council twice a year or more and it is obvious that each leader will meet his counterparts every several months to discuss the future of the integration process. Therefore, the interest to protect their reputation and credibility at the EU negotiation table will definitely reduce the leader's interest to voluntarily defect from the EU negotiation table.

4 Methodology

4.1 Choice of method: The comparative method

This paper conceptualizes opt-outs as a form of treaty defection in the European Union and intends to be an explanatory study of the factors that trigger these opt-outs. In the following paper several opt-out cases will be analysed and put to comparison according to the comparative method in order to reveal the factors generating defection from EU negotiations. Comparative research examines patterns of similarities and differences across a moderate number of cases (King, Keohane & Verba 1994: 212). The following comparative study will include four cases of opt-outs, the number of cases being limited because one of the concerns of comparative research is to establish familiarity with each case included in a study (George & Bennett 2005: 288). The comparative research will consider how the different parts of each case - those aspects that are relevant to the investigation – fit together and will try to make sense of each case (Ragin 1994: 108-109). Thus, the knowledge of cases is considered an important goal of comparative research.

The comparative method in this paper will be used with an explanatory purpose since it aims to uncover the conditions leading to the formulation of treaty opt-outs. The goal will be to develop a theory of opt-outs drawing on Putnam's assumptions and so the comparative study will also serve as a strategy for advancing theory. In comparative research, investigators usually initiate research with a specific analytic frame in mind, but these initial frames are open to revision. In the next section of this paper, an analytical framework will be introduced for studying opt-outs as defections, by drawing on Putnam's general assumptions presented in Chapter 3. First, the analytic frame developed will be used in order to guide the analysis of each of the opt-out cases chosen. Then, by comparing the findings across the cases, emerging results will be analysed through pattern-matching, within the case and across cases, thus testing the

framework developed from Putnam's assumptions regarding defection. Patterns of similarity will be identified among the cases and as a result, I will hopefully be able to develop an explanation regarding opt-outs and shed some light on the factors determining treaty opt-outs. The findings may also lead to the development of a typological theory of defections in EU negotiations, that is, a theory on how different combinations of independent variables interact to produce different levels or types of dependent variables (Yin 1989: 81). In this sense, the findings of the study may confirm Putnam's classification of defections as voluntary and involuntary if evidence will be found to support Putnam's typology.

Thus, the present thesis will be a comparative study with a theory-developing purpose of explaining treaty opt-outs. The objective of the study is to identify under what conditions the outcome, namely the defection or the treaty opt-out, occurs. The study uses a most different system research design (or Mill's method of agreement) which consists of comparing different cases, all of which however have in common the same dependent variable, so that any other circumstance which is present in all the cases can be regarded as the independent variable (George & Bennett 2005: 82; 121). The cases chosen for analysis are different in the sense that they study opt-outs from different EU policies and opt-outs that were formulated in different contexts and by various member states. Simply stated, the method of agreement argues that if two or more instances of a phenomenon under investigation have only one of several possible causal circumstances in common, then the circumstance in which all the instances agree is the cause of the phenomenon of interest (George & Bennett 2005: 82). However, the study will not be a quest for identifying "the key, master variable" explaining the defection, but rather its goal will be to describe all the instances that might influence, in one way or another, the formulation of treaty opt-outs.

The main problem with this method is considered to be its inability to establish any necessary link between cause and effect. In order to establish this link, the analytic tactic of pattern-matching will be used. Such a logic compares an empirically based pattern with a predicted one. If the patterns coincide, the results can help to strengthen internal validity of the findings (Yin 1989: 109). Since this study is an explanatory one, the patterns will be related to the dependent and independent variables of study (or both).

One important characteristic for the explanation-building process that will be the focus of this study is that, for explanatory case studies, the final explanation is a result of a series of iterations. In order to come up with an explanation for treaty opt-outs, an initial theoretical proposition about the main determinant of opt-outs has been made, namely that the size of the win-set determines the defection. Then evidence will be sought in each of the cases in order to support this theoretical statement. The theoretical assumptions lead to a predicted course of events when defection occurred. The existence of this course of events is investigated in the individual cases, with a pattern-matching analysis comparing the hypothesized with the actual course of events. The findings across the case studies will then be compared with the theoretical assumptions and as a last step, the theoretical propositions will be revised and the appropriate adjustments will be made to the model. In this sense, the final explanation may not have been fully stipulated at the beginning of the study and therefore will differ in this respect from the pattern-matching approach previously discussed (Yin 1989: 114-115).

4.2 Case selection

George and Bennett state the following:

”[A] well defined research objective and an appropriate research strategy to achieve that objective should guide the selection and the analysis of a single case or several cases within the class or subclass of investigation. Cases should not be chosen simply because they are ‘interesting’ or because ample data exists for studying them.” (2005:69).

The comparative approach can be applied to many different kinds of cases, not just countries. It is important, however, for the cases selected to be comparable and to share membership in a meaningful, empirically defined category (George & Bennett 2005: 69). Cases allow a researcher to achieve high levels of conceptual validity or to identify and measure the indicators that best represent the theoretical concepts the researcher intends to measure (George & Bennett 2005:19). In qualitative research, “selection must be done in an intentional fashion, consistent with research objectives and strategy.” (King, Keohane & Verba 1994: 139). Thus, the first criterion for the choice of cases to be studied consisted of identifying representative cases for the research question, namely, their membership of the class of problems that are of interest. The cases

in a given study must all be instances of only one phenomenon (George & Bennett 2005: 69), in our case of defection. In order to satisfy this criterion, the choice was rather simple and did not require any strategic selection. That is because the choice of cases to be studied was limited to the countries holding treaty opt-outs in the EU. Thus, the class of cases is the nation-states, and the main reason for the choice is that EU member states are the entities that have the political power to formulate and propose opt-outs from common EU policies.

In order to identify the cases, I started “soaking and poaking” (George & Bennett 2005: 89) in the latest EU treaty- the Lisbon Treaty, and the secondary literature on the subject. Existing literature deals in one way or another with opt-outs. As emphasized earlier in the literature review, there is a growing body of literature building on the concepts of differentiated or flexible integration and opt-outs are usually portrayed as granting the member states the opportunity to have different rights and obligations with respect to several common policy areas (Kölliker 2006; Closa 2010; Král 2008; Faber & Wessels 2005; Stubb 1996; de Neve 2007; Richardson 2005; Nugent 1999). Upon scrutinizing the Lisbon Treaty one can notice that there are several protocols attached to the treaty, which allow member states to derogate from certain EU policies. According to the Lisbon Treaty, currently, five states have such opt-outs: Denmark (four opt-outs), Ireland (two opt-outs), Poland (one opt-out) Sweden (one opt-out, but only *de facto*) and the United Kingdom (four opt-outs). The Czech Republic will gain their first opt-out under the next treaty to be ratified (likely an accession treaty)

Upon realizing that there is a large number of treaty opt-outs stipulated in the treaty, I decided to narrow down the selection of cases. The need to delimit this study due to the hard work and time necessary for the collection of data, as well as due to the restricted length of the thesis, has resulted in the choice to make a selection of only four EU treaty opt-outs. The fact that only some cases will be examined already points towards a weakness of the analysis. Naturally, it would have been better to analyse all the cases in which member states decided to opt-out, with the aim of making a more robust research design and thereby strengthening the validity of the findings in order to control for potential variations. In selecting the cases, I chose to look at those cases that were highly debated and received the most attention in the media when being negotiated.

The first case that I chose to look at is Denmark. In Edinburgh in December 1992, the European Council adopted a declaration granting Denmark special status in relation to European co-operation, which in concrete terms gave Denmark opt-outs in four areas: Economic and Monetary Union (EMU), common defence, justice and home affairs and Union citizenship. The opt-out regarding citizenship is no longer valid today since the subsequent Amsterdam treaty reflected the wording of the derogation. That leaves me with only three Danish opt-outs out of which I chose to look at the EMU opt-out and the one from the common defence policy since these were the ones receiving the most attention in the media. The second case that I chose for my analysis is the United Kingdom. The UK holds several opt-outs: from the Schengen agreement, the EMU, the Charter of Fundamental Rights, as well as from the Police and Judicial Cooperation in Criminal Matters. Due to the fact that collection of data takes a lot of work and time I am only going to pick the EMU opt-out for the empirical analysis. Last but not least, I chose to also have a look at the Czech opt-out from the Charter of Fundamental Rights in the context of the Lisbon Treaty, because of its rather controversial nature. The protocol securing the opt-out was included in the Presidency Conclusions of the European Council on 29-30 October 2009 and will be attached to the next accession treaty.

5 Analytical framework

5.1 Building the framework

Variables are those concepts whose values change over a given set of units. Observations are the values of the variables for each unit, and for the present study the values of the variables will be assessed in a qualitative way, identifying either their presence or their absence. Variables can either be dependent or independent. (Landman 2008: 18) Dependent variables (alternatively referred to as outcome variables, endogenous variables) are those political outcomes that the research is trying to explain. An independent variable, on the other hand, is that which explains the dependent variable (and is alternatively labeled as causal variable or an explanatory variable) (ibid:19). In the research model designed to explore the conditions triggering treaty opt-outs, the dependent variable (the phenomenon that is affected by other variables) would be the defection per se, namely, the formulation of an opt-out; the independent variable (the phenomena that may have some effect on the dependent variable) would be the size of the win-set. The relationship between the independent and dependent variables will be assessed in each case study by collecting data on the size of the win-sets and then comparing the information obtained with the dependent variable (which is considered to be defection from negotiations). If evidence is found that the win-set was small in every instance, namely in each of the opt-outs cases analyzed, then the hypothesis of this study will have support.

Drawing on the conjunctures derived from Putnam's theoretical approach described in the "Theory" chapter, the general hypothesis of this thesis will be that *the smaller the win-set, the greater the risk of defection from EU negotiations*. It is safe to say that the concept of win-set constitutes a cornerstone of the two-level framework since it maps the room for maneuver of the leader on the international level and his ability to broaden or widen his domestic leeway in the decision-making process. Since the win-set delineates the array of policy choices at the

disposal of each negotiator, an international agreement is possible only if domestic win-sets of all parties overlap. Due to the centrality of win-sets for the two-level framework as a whole, determining the boundaries of the leader's win-sets becomes a necessary precondition for the applicability of this framework to the empirical analysis of defection. Since Putnam's main assumption (which is also the general hypothesis of this study) mentions that the size of the win-set is vital for understanding defection, the next step will be to identify the factors that shape the size of the win-set.

Drawing on Putnam's assumptions, we identify three factors that have the capacity to influence the size of the win-set: a) domestic tolerance for the status quo; b) hurdles imposed by ratification or institutions and political culture at the domestic level; and c) the role of the leading negotiator. Therefore, the research will start out with a frame that specifies three factors that trigger defection but it might conclude that only one or two explain the defection, namely the formulation of treaty opt-outs. The next section will formulate theoretical propositions regarding each of the three dimensions and will discuss data collection. The theoretical propositions formulated will constitute the basis for the pattern-matching analysis that will be conducted after the empirical analysis of each of the three analytical dimensions.

To sum up, drawing on Putnam's assumptions, the analysis of this study will be divided into three analytical dimensions that constitute explanatory factors of the phenomenon under investigation. For each of these dimensions evidence will be sought in order to support the presence or absence of each of these three explanatory factors in the four opt-out cases examined. In this study multiple sources of evidence will be utilized and triangulated in order to analyse the identified dimensions in each of the cases; these sources include both primary and secondary sources.

5.2 Three analytical dimensions and data collection

Domestic tolerance for the status quo

Domestic tolerance for the status quo implies that the cost of "no agreement" to domestic constituencies is low. As a result, domestic tolerance for

the status quo will imply a smaller win-set. No-agreement often represents the status quo. Constituents that face low costs from no-agreement will be more skeptical of Level I agreements than the ones who face higher costs from no-agreement (Putnam 1988: 442). Therefore, the size of the win-set (and thus the negotiating room of the Level I negotiator) will depend on the relative size of the “forces” that oppose the agreement.

Preference formation at the domestic level is important in determining the room for manoeuvre in Level I negotiations, as well as the potential outcome. But whose preferences are we talking about? As Putnam states, the actors at Level II may represent parties, social classes, interest groups, legislators and even public opinion and elections (Putnam 1988: 432). In this paper, I will discuss domestic preferences in terms of party preferences. I chose to focus on political parties since in all of the cases that I will be examining, parliamentary ratification was needed and thus, the position of the political parties with respect to the draft treaty being negotiated is essential. Unfortunately, the choice to look only at the political parties’ preferences further limits the study and points to another weakness: the fact that it will not be able to assess all the other actors that might influence the domestic win-set in one way or another.

Thus, the first variable that might contribute to reduce the win-set refers to the preferences of the political actors at Level II and their tolerance for the status quo. In this sense, domestic tolerance of the status quo, namely, the political parties’ tolerance of the status quo will reduce the win-set. No-agreement often represents the status quo. If a “no-agreement” outcome bears little or no cost for a political party, the latter is likely to be less compromising or more easily opposed to the agreement. On the other hand, if the status quo represents a worsening situation or a great cost, that political party will likely show general support for the draft treaty. Therefore, as a general rule, a lower cost to maintaining the status quo will determine a small win-set (Putnam 1988: 442).

This indicator will be used to identify positions of the political parties at domestic levels in order to assess if there was a strong support for the negotiated agreement. In the literature on political preference formation, a series of instruments are used to determine the policy positions of political parties. Three of these instruments are often used in the literature on political parties and appear also in the research on parties in European integration. First, some authors rely on

analyses of the policy programs of political parties. The Party Manifesto research project (Budge et al. 1987) has collected for most European countries and political parties data on the political parties' position on various issues. Among them is one item measuring the number of positive and negative statements with respect to European integration. Second, some authors use expert interviews to measure the stances of political parties with respect to European integration (Ray 1997). Thirdly, some other authors (Hix & Lord 1997; König & Hug 2000) employ information from surveys (e.g. Eurobarometers) on party identifiers to infer the position of political parties.

All these instruments have both advantages and disadvantages. Both Party Manifesto and expert interview data only give a general assessment of a party's policy position with respect to European integration. The Party Manifesto project counts the number of positive and negative statements with respect to European integration appearing in electoral programmes of political parties. Both Party Manifesto and expert interviews collect rather crude information on the parties' general policy positions and fail to give indications on policy positions for specific issues. That is why I chose to counterbalance this limitation. Unlike these two instruments, Eurobarometer surveys contain specific questions on several issues of the Maastricht and Lisbon Treaties (the two moments when the opt-outs studied were formulated). This allows the researcher to infer more specific policy positions. Moreover, the coverage, both of countries and parties, speaks in favour of Eurobarometer data. Ray's (1997) data and the Party Manifesto Project do not cover all member countries. However, the Czech Republic Eurobarometer survey regarding the Lisbon Treaty does not offer us the possibility to assess party preference for the proposed agreement since the survey does not contain specific questions regarding EU policies. There is also a limitation with Eurobarometer surveys in general, namely, the fact that some parties present in domestic parliaments fail to appear in these datasets; however, the problem is not that acute as in the other two instruments.

Since according to Putnam, a lower cost to maintaining the status quo will determine a small win-set (1988: 442), the analysis will need to look at party preference for the status quo in order to predict the size of the win-set. Thus, for the purpose of this paper, I decided to use König and Hug's study of the Maastricht Treaty that illustrates with empirical data how "big" the domestic win-

set was in the parliamentary ratification. König and Hug represent the win-sets of the status quo for each of the 12 member states negotiating Maastricht. The win-sets are determined by the location of the status quo and the ideal point of the pivotal parties. They assess whether the pivotal parties' distance to the status quo is larger than their distance to the Maastricht draft treaty (König & Hug, 2000: 107). It is, however, important to note that, when assessing the political parties' preference for the status quo, König and Hug took into consideration the ratification requirements in each of these countries in order to assess the level of support needed in order to be able to secure ratification of the proposed agreement.

In order to determine party preference for the status quo, König and Hug use the third instrument mentioned above, namely the Eurobarometer survey. The survey that they employ is Eurobarometer 37, which contains a series of questions relating to issues of the Maastricht Treaty. They use five questions which cover the domains of EMU, EU foreign policy and the role of the European Parliament. They only employ these five questions since no other aspects of the Maastricht Treaty were addressed in the same question format in this survey. Each question asked the respondent to state whether or not he/she was in favour of a particular disposition in the Treaty. Based on the answers of party identifiers to these five questions, the two authors managed to identify the size of the domestic win-sets in each of the 12 countries ratifying the Maastricht Treaty. Apart from König and Hug's study, the present thesis will also use other secondary literature in order to assess the political parties' tolerance for the status quo.

A limitation of the present thesis might be the fact that the above study of König and Hug addresses only the context of the Maastricht Treaty and thus, the study can only be used to assess party preferences in only three of the opt-out cases chosen for analysis. The Czech opt-out, however, was formulated in the context of the Lisbon Treaty and thus, other instrument must be used in order to indicate Czech party preference. In this sense, not using the same instrument in order to measure the domestic party preference for the negotiated agreement might constitute a strong criticism of the validity of the cross-case comparison and conclusions referring to the formulation of the opt-outs. In order to assess party preference regarding the negotiated agreement in the case of the Czech opt-out, three working papers will be used: one of the German Institute for International

and Security Affairs written by Tomislav Marsic, one of the European Policy Institutes Network written by Mats Braun and one of the Centre for Russian and Eastern Studies at the University of Birmingham. A study provided by the UK's Library of the House of Commons regarding the ratification of the Lisbon Treaty in the Czech Republic will also be used. In addition, I will also use a PhD dissertation written by Mats Braun regarding the Czech discourse on European Unity.

Hurdles imposed by ratification requirements and/or political institutions/culture at the domestic level

Putnam argues that higher ratification requirements, as well as the institutions and political culture back home may impact directly on the size of the win-set and might impose a tight constraint. In this sense, higher ratification requirements make the win-set smaller. The type of institution in a country also impacts directly on the size of the win-set and might impose a tighter constraint. This last situation enhances the possibility of involuntary defection which, according to Putnam, occurs when a domestic group vetoes an agreement that is supported by the national leader or chief negotiator. Ratification procedures affect the size of the win-set in the sense that for example, due to high ratification requirements, the leader is forced to defect from the negotiations when acknowledging that he will not be able to secure ratification of the treaty (Putnam 1988: 448). Putnam also notes that the propensity for seeking the broadest possible domestic consensus before acting will also constrict the size of the win-set, as contrasted with majoritarian political cultures (ibid: 449). Moreover, a weakening of party discipline will also reduce the scope for international cooperation (ibid).

Thus, according to the literature on two-level games, ratification hurdles constitute the crucial domestic constraint. Finding evidence that, for example, the ratification requirements were high might be a good explanation for the defection. One can differentiate between the following high ratification requirements: Supermajorities Required, Referendum Probable. The political culture might be for example, consensus oriented or majoritarian. Primary sources will be examined in order to find information about the political culture and the institutional requirements in each of the countries subject to the empirical analysis. In order to collect the data regarding the ratification requirements I will

look at the constitutional provisions regarding ratification procedures in each of the countries studied for their opt-outs. An exception is the UK, which has no formal written constitution, and thus, for this case we looked at the British Parliament's official website; a factsheet from August 2010, issued by the House of Commons Information Office will be used in order to identify the ratification procedure of international treaties.

The role of the negotiator

Putnam assumes that the strategies of the negotiator are able to shape the size of the win-set. In this sense he argues that the leader can use side-payments in order to maximize his own win-set at Level I. Thus, evidence will also be sought in order to see if the leader used any of the strategies or tactics mentioned by Putnam in order to influence the size of the win-set. For example, as stipulated by Putnam, linkage and side-payments will allow the leader to enlarge the domestic win-set and to advance policies that without the international level would not have been possible (Putnam 1988: 450-451). Sometimes, national leaders are able to use their international deal making not only to achieve international cooperation but to change their domestic political outcomes – to achieve domestic goals which would otherwise be blocked. We already mentioned the tactic of “synergistic linkages” above, when discussing the win-set.

Putnam also discusses the preferences of the negotiator when referring to defection. The chief negotiator is often described by Putnam as a key role in terms of the ratification process. As mentioned in the previous chapter, for constructing the basic two-level framework for negotiations, Putnam assumes that the leader has no independent policy views and that he acts as an honest broker or as “an agent on behalf of his constituents” (Putnam 1988: 456). However, he then relaxes his assumption and admits that sometimes the preferences of the chief negotiator may diverge from those of his constituents. The leader does not necessarily negotiate in the name of his constituents and also maybe not on behalf of the majority in his government or party (Putnam 1988: 457). A chief negotiator will employ certain strategies only if they further his own aims; that is why the set of agreements preferred by the statesman to the status quo may be termed the statesman's “acceptability set” (Moravcsik 1993: 30). Putnam claims that the leader's preferences may reflect three things: (1) the statesman's interest in enhancing his domestic position by increasing his political resources; (2) an effort

to shift the balance of power in his state in favour of domestic policies that he prefers; or (3) the pursuit of his own conception of the national interest in the international context (Putnam 1988: 457). The three motives of a negotiator discussed above imply that the leader has a veto over possible agreements and therefore, holds the possibility of shaping the size of the win-set. Thus, even if Level II groups would approve of an agreement, it is unlikely to be concluded if the negotiator objects.

Depending on the preferences of the leader, Putnam argues that there are two types of defection from international negotiations: involuntary and voluntary. Linked to these two types of defection, there are two instances in which defection can occur: in the ratification phase, after a failed ratification (involuntary) and during the negotiations (voluntary). Thus, “involuntary defection reflects the behavior of an agent who is unable to deliver on a promise because of a failed ratification” (Putnam 1988: 438), while voluntary defection refers to a rational egoist leader who rejects the agreement (*ibid*).

Therefore, the main goal will be to determine two things: whether the leader acted as an honest broker, having no independent policy views and if he used any strategies or tactics in order to enhance his win-set. In order to identify the preferences and strategies employed by the negotiator in each of the cases chosen for the analysis, secondary sources describing the negotiations of the Maastricht Treaty and the Lisbon Treaty will be examined. For example, evidence will be sought in order to determine whether the negotiator acted as an honest broker or based on egoistical reasons. If evidence will be found that the negotiator acted on behalf of his constituents, then an implication might be that he involuntarily defected from the policy he was negotiating because of constraints at the domestic level.

Despite the preferences and strategies of the leader, Putnam also emphasizes that the chief negotiator will only agree at the international level to what he can ratify at home. In this sense, Putnam argues that concerns about what he calls “deliverability” are a prominent element in the statesman’s strategy and that the leader will be careful not to promise to the other leaders more than he can deliver (Putnam 1988: 439).

6 Empirical analysis of the three dimensions

6.1 Domestic tolerance for the status quo

The first case to be studied in order to assess domestic tolerance for the status quo is the Danish EMU opt-out. In October 1990 agreement was reached between the government parties (Conservatives, Liberals and Radicals) and the Social Democrats on a so-called government memorandum which represented an inter-party agreement on Denmark's position at the coming Intergovernmental Conferences in Maastricht regarding the adoption of a new EU treaty (Laursen 1992: 76). The paper proposed by the Social Democrats was also accepted by the Centre Democrats and the Christian People's Party. On the other hand, the People's Socialists remained opposed to a deepening of the European Community and to the notion of a European Union, as well as the populist Progress Party which also strengthened its critique against the European Community (Petersen 1996: 97-98). Despite the initial agreement reached in October 1990 between six out of eight parties in the Danish parliament, the biggest opposition party, the Social Democratic party, and a majority in the parliament demanded in November 1991 that Denmark should not commit itself to join the common currency (Pedersen 1996: 96; Petersen 1996: 98). According to König & Hug, all the political parties were heavily split concerning additional economic integration and in the case of the EMU opt-out it appears that the majority of the political actors preferred the status quo to the Maastricht draft proposal (2000: 107).

The second case chosen is the Danish defence opt-out. During the IGC negotiations, the Social Democrats, once again, firmly objected to the inclusion of the defence policy in the treaty (Petersen 1996: 97-98). In May 1991, during the IGC negotiations, the left-wing opposition parties led by the Social Democrats, initiated a vote in the parliament that was concluded with a resolution stating that a defence dimension should not be included in the treaty since it should not be in

the remit of the Community. Once again, the political convention of negative parliamentarism forced the Foreign Minister Uffe Ellemann-Jensen, to object to the common defence policy during the negotiations. However, three days before the Maastricht summit, the minority government managed to obtain the informal agreement of the Social Democrats to join the EU defence policy, but only after the Danish demands to enhance NATO's¹ stance were agreed upon by the other EU member states, and the Prime Minister was then able to sign the treaty (Sion 2004: 10; Laursen 1992: 73-76). Thus, in this case, the defection did not occur during the negotiation stage, but at a later time, after the Danish Parliament did not manage to obtain the five-sixths majority to ratify the treaty and the Danish people rejected the proposed agreement in a national referendum.

According to König and Hug, in Denmark, all of the political parties (except one, the Progress Party) moderately favoured further political integration and the inclusion of an EU defence policy (König & Hug 2000: 110). Even though agreement was secured to join the common defence policy, in May 1992, that is before the referendum, the Socialist People's Party had published its demands for renegotiation in the case of a "no" vote, one of them being that Denmark should stay out of the EU defence policy (Petersen 1996:101). Then, in September the Social Democratic Party congress adopted a resolution which mirrored the opponents' demands regarding a rejection of participation in the defence dimension (ibid). Later in the month the Radical Party adopted similar demands at their annual convention (ibid). Thus, it is safe to say that in this case there was also a strong support for the status quo, that being the non-participation in the defence policy.

The third case chosen is the controversial Czech opt-out. Euroscepticism in the Czech Republic is largely a phenomenon confined to the Civic Democratic Party (ODS), as well as to the opposition Communist Party, which has also provided the country with a eurosceptic left, and was the only one that encouraged its voters to reject EU membership in the referendum of 2003 (Braun 2008: 51). The leaders of the two major parties - Prime Minister Mirek Topolánek (Civic Democrats, ODS) and Jiri Paroubek (Social Democrats, CSSD) - supported the

¹ NATO stands for *North Atlantic Treaty Organisation*.

Lisbon treaty. Topolanek repeatedly said he had a number of reservations about the document but that it is his head, not heart that decides in support of the treaty. However, most ODS politicians were against the treaty. President Vaclav Klaus, ODS founder and former long-standing leader, was one of its strongest critics. Along with the Social Democrats, the junior coalition Greens (SZ) and Christian Democrats (KDU-CSL) wanted the treaty to be ratified as soon as possible.

The peculiar thing in studying this opt-out is that the Lisbon Treaty was approved in both chambers of the Czech Parliament during spring 2009 and therefore, there was a strong support for the already negotiated agreement. Only a very small part of the political elite, led by President Klaus and a few senators loyal to him, continued in their attempts to delay the completion of the Czech ratification process (Braun 2009: 4). They, however, claimed to respect the original ODS position on the Treaty, which since the Convention on the Future of Europe consisted of a resistance to revise the Treaty. During the Convention, the Civic Democrats criticized the inclusion of the Charter of Fundamental Rights in the Treaty and the increased powers of the European Parliament and favoured what they called a “Europe of Democracies” – basically a more intergovernmental form of cooperation (Braun 2009: 4-5).

In October 2009 President Klaus insisted on obtaining what he called “footnote”, to be added to the Lisbon Treaty to guarantee that the Charter of Fundamental Rights, to which the Treaty gives legal status, could not be used to counter the Beneš decrees and allow potential property claims by Germans expelled from Czechoslovakia after World War Two (Miller 2009 : 9-10). By mid-October 2009 Klaus’s demand had changed from a footnote to an “opt-out” from the Charter, along the lines of the UK/Polish Protocol 30 attached to the Lisbon Treaty (Miller 2009: 10-11). The European Council on 29-30 October 2009 discussed the Czech demands and agreed on the text of a new protocol which would apply the provisions of Protocol 30 of the Lisbon Treaty to the Czech Republic. However, the Czech President only agreed to sign the Treaty on 3 November 2009, when the Czech Court ruled for the second time that the Lisbon Treaty was not in breach of the Czech Constitution (ibid: 13).

As König and Hug point out, in the British case the win-set was completely determined by the government party, which preferred the status quo to the Maastricht Treaty (2000:107). This meant that the economic dimension

appeared as a stumbling block for the British parliamentary ratification process. The British parties appeared to moderately favour further political integration, but they were heavily split concerning additional economic integration (ibid). Especially the Conservatives appeared to oppose further integrative moves in the economic arena. This party's policy position determined completely the parliamentary win-set of the status quo (König & Hug 2000: 108). In the context of the Maastricht Treaty, there was a section of the Parliamentary party who were committed anti-Europeans or Eurosceptics, some of whom were relatively elderly, no longer constrained by career considerations (Bradbury 1996 : 79). According to Bradbury, this majority was sufficient to block the ratification of the Treaty (ibid: 78).

6.2 Hurdles imposed by ratification requirements and political institutions/culture at the domestic level

Denmark

The Danish constitution envisions two basic ratification procedures for international treaties. Either a treaty is ratified by five-sixths majority in the parliament, or a referendum decides on the final fate of a treaty approved by less than the required supermajority in parliament (Danish Constitution, Article 20). Therefore, at the parliamentary level this supermajority is the highest hurdle for ratification in the Danish case. Moreover, the “negative parliamentarism convention” sets the political culture at the domestic level by requiring the Danish government to ensure that there is not a majority against its negotiation position (Pedersen 1996: 208).

Analysing the case of the Danish EMU opt-out, the political culture at home was responsible for reducing the size of the win-set. According to the “negative parliamentarism convention”, the Danish Prime Minister had to defect from the negotiations and formulate an opt-out from the common currency when, just before the Maastricht summit, the Social Democrats and a majority in the parliament demanded the government not to join the third phase of the EMU (Laursen 1992: 76-77).

Unlike the EMU opt-out, the Danish defence opt-out was not formulated during the IGC negotiations, but in the ratification phase, after the Maastricht Treaty was rejected by the Danish people in a referendum in June 1992. The six Danish pro-EC parties judged the Maastricht Treaty to be an acceptable framework for Denmark's position in Europe regarding the defence dimension and voted unanimously for it at the final parliamentary reading on 12 May (Petersen 1996 : 98). However, two political parties did not support Denmark ratifying the Treaty (with its common defence policy dimension) and parliamentary opposition was confined to the Socialist People's Party on the left and the Progress Party on the right (Krunke 2005: 340). Thus, the government could not gather the five-sixths majority required for enacting the Bill (Petersen 1996: 99), but it did have the support of the majority of parliament, which made it possible to hold the referendum in which the Treaty was rejected by the population. Thus, in this case, the win-set size was reduced by the high ratification requirement in the parliament which did not allow a simple majority to ratify the Treaty. In the referendum, the Danish people voted against the Maastricht Treaty and the result further reduced the size of the leader's win-set. The leader was then forced to reopen the negotiations at the EU level, having an even smaller win-set at its disposal.

The Czech Republic

In the Czech Republic, the ratification of an international treaty without a transfer of sovereignty is achieved by a simple majority under Article 49 of the Constitution. A treaty which transfers sovereignty, but without amending the Constitution, is achieved by a three-fifths "constitutional majority" under Article 10a. A treaty which transfers sovereignty and amends the Constitution requires a constitutional amendment under Article 89 of the Constitution.

In the context of the Lisbon Treaty, the then Czech Prime Minister, Mirek Topolánek, and the Minister of Foreign Affairs, Karel Schwarzenberg, signed the Lisbon Treaty on 13 December 2007. The Government chose to use Article 10a of the Constitution (see above) as the basis for ratification, rather than a constitutional amendment with a referendum. The Lower House voted in favour of the Treaty on 18 February 2009 by 125 deputies to 61 out of 197 present. A constitutional majority of three-fifths was required, or at least 120 votes out of the 200-seat Lower House (Czech Constitution, Article 39(4)). On 6 May 2009 the

Treaty was also ratified in the Senate (i.e. by 54 votes to 20 senators), where a three-fifths constitutional majority was also required to approve the Lisbon Treaty (Czech Constitution, Article 39(4)). Thus, parliamentary ratification of the Lisbon Treaty was secured in the Czech case. However, a group of eurosceptic ODS Senators led by Vaclav Klaus, used the constitutional provision to take questions to the Constitutional Court in order to suspend the ratification process and push towards the negotiation of a “footnote” that, they considered, defended the Czech Republic against certain provisions in the Charter of Fundamental Rights.

The United Kingdom

In the United Kingdom, in order to become effective, international treaties have to be translated into British laws. Consequently, the British parliament has to approve all dispositions of an international treaty by simple majority (König & Hug 2000: 101). All EU treaties require legislation for their implementation in the UK and are therefore subject to parliamentary scrutiny (House of Commons Factsheet, 2010). The British Parliament is not just an arena where debates take place and in this respect, one crucial thing is that the government needs to secure a majority in the House of Commons if it is to enact legislation or ratify treaty changes (ibid). The British political system is characterized by a bi-partisan, adversarial, and party-government system (Armstrong, Bulmer 1996: 261). In the UK, the opposition usually does not play an influential role, and it is rather the discipline within the governing party that matters. In this case, the majoritarian culture should not assume a high ratification hurdle after all.

6.3 The role of the negotiator

The Danish EMU opt-out

Even though a memorandum regarding Denmark’s position at the coming IGC was signed between six out of eight parties in the Danish parliament, the biggest opposition party, the Social Democratic party, demanded in November 1991 that Denmark should not be part of the common currency (Pedersen 1996: 96; Petersen : 98). This demand took the minority center-right government by surprise and emptied its win-set. On December 5, just before the Maastricht summit, the Social Democrats and a majority in the Folketing demanded the

government not to join the third phase of EMU. Pedersen (1996: 208) points out that the Danish government has to ensure that there is not a majority against its negotiation position (negative parliamentarism). Thus, according to the negative parliamentarism convention, the Danish prime minister, heading a minority government, was forced to negotiate an opt-out from the EMU, even though it was against his wish to do so (Laursen 1992: 76-77).

In the case of the Danish EMU opt-out, the Prime Minister was forced to negotiate the opt-out due to the consensus oriented political culture at home. The common currency problem was then solved at the Maastricht summit where Denmark got a special protocol on EMU, which noted the possibility of a Danish referendum on the third phase, and which allowed Denmark not to commit itself to it until after the conclusion of the second phase (Petersen 1996: 98). While signing an opt-out protocol at Maastricht, Danish Prime Minister Schlüter stressed his desire that Denmark participate fully in the EMU (Laursen 1992: 77). Thus, in this case, the negative parliamentarism convention and the majority in the parliament forced the leader to involuntarily defect from the negotiations. Despite the two-level game, Prime Minister Schlüter was unable to widen the domestic win-set and was constrained by his domestic level to defect.

The Danish defence opt-out

When the proposed treaty, which represented the Maastricht compromise between the Danish political establishment and the Community, had failed to win the support of the population in the referendum, the leader was unable to deliver the ratification it had promised when signing the treaty (Petersen 1996: 99). After the Danish people rejected the Maastricht Treaty in the referendum imposed by the constitutional requirements, the leader and the government were forced to find a new settlement with Denmark's EC partners which could be presented to the people with some certainty of success in a future referendum (Petersen 1996: 99). After the negative result of the referendum, the government found itself in the position of finding a new and more stable balance between public opinion and the European mainstream.

The way out of the impasse was a paper known as the "National Compromise", which was produced by the leader of the People's Socialists and then accepted by the Social Democrats and the Radicals in October 1992. The memorandum was then presented to the Conservative-Liberal Government on a

take-or-leave-it basis. The paper was also accepted by the Centre Democrats and the Christian's People's Party. Basically, the memorandum requested among other things, that Denmark should keep out of the defence policy cooperation (Petersen 1996: 101) and represented Denmark's official position in the anticipated negotiations with the other EC member states. The memorandum was also accepted by the government on 30 October 1992. The government, and especially the Liberal Party of Foreign Minister Uffe Ellemann-Jensen, disliked the memorandum, but chose to support it as the lesser evil (Petersen 1996: 99-100). Thus, in this case, the leader involuntarily defected from the negotiated treaty due to two major events: the failed referendum and the new domestic constraints that took the shape of the opposition parties' memorandum.

The Czech opt-out

In the context of the Lisbon Treaty, the then Czech Prime Minister, Mirek Topolánek, and the Minister of Foreign Affairs, signed the Lisbon Treaty on 13 December 2007. Even though parliamentary approval was secured, the Czech President Vaclav Klaus refused to sign the Treaty until Poland, Germany and Ireland had completed their ratification as well. This event completely emptied the government's win-set. After the Czech Prime Minister Mirek Topolánek and his minority centre-right government lost a vote of confidence in the Parliament on 24 March 2009, he stepped down, handing over the premiership to Jan Fischer, who oversaw the rest of the Czech EU Presidency and the Lisbon ratification process. Prime Minister Fischer remained confident that ratification would be completed by the end of the year and his government assured the EU that it was committed to ratifying (Miller 2009: 8).

However, President Klaus continued to ignore that multiple governments have supported the treaty, both chambers of parliament have approved it, and that the constitutional court has accepted it once (after a group of ODS senators submitted questions to the Constitutional Court regarding the compatibility of Treaty elements with the Czech constitution). Thus, the Czech government was forced to negotiate an opt-out from the Charter of Fundamental Rights, along the lines of the UK/Polish Protocol 30 attached to the Lisbon Treaty, in order to satisfy the demands of the Czech President who stated that otherwise, he will continue vetoing the ratification of the Treaty (Miller 2009 : 10). In this case, the chief negotiator had to involuntarily defect from the negotiated agreement because

of the refusal of an additional veto player, the Czech President, who was supposed to sign the Treaty in order for the ratification to be complete.

The UK EMU opt-out

The 1990 leadership election led to the installation of John Major as Conservative Party leader and Prime Minister. Looking at the literature regarding Britain's negotiation of the Maastricht Treaty, it is still unclear what were the British Prime Minister's personal preferences regarding the Economic and Monetary Union. However, it was clear to John Major that it was impossible for him to bring his party to join the common policy referring to the EMU (Pilkington 1995: 49-50). John Major's government had a ruling majority of twenty-one. A vocal group of Eurosceptics within the government party was in a position to put that majority in jeopardy. Moreover, the Labour Party, namely Her Majesty's Opposition, acted out its institutional role of trying to defeat the government, despite its support for the Maastricht Treaty (Armstrong, Bulmer 1996: 261). Therefore, Major could not negotiate a treaty that committed the UK to a single currency since such a treaty had almost no chance of being ratified.

At first, Major tried to use the EU-level in order to manage the Eurosceptic positions at home. That is why Major and his government first tried to introduce a general option clause to the treaty, allowing each member state to choose whether and when to enter the common currency (Sion 2004: 12). However, this proposal was dismissed by the other member states and the only solution left was an opt-out protocol that removes the need for Britain to move towards economic and monetary union, while keeping the door opened for a change of mind through the possibility to opt-in (Pilkington 1995: 48). Major was trying to use the EU level in order to change the proposed agreement so that he could obtain the domestic support he needed at home. In this case the leader's preferences regarding the issue of the EMU are not clearly noticeable but according to Bradbury (1996: 81-82), the leader chose to voluntarily defect from the common currency in order to preserve his party unity before the next upcoming elections, an act that he expected to strengthen him domestically. However, since there was also a strong opposition against the common currency, coming from both the government party and the opposition, Major also had reasons to be concerned about his ability to ratify a treaty that implied British participation in the EMU (Armstrong, Bulmer 1996: 261).

7 Cross-case analysis and interpretation of the findings

In qualitative research data collection and analysis, interpretation and reporting are often carried on in parallel. In this chapter, we analyze data across all of the cases in order to identify similarities and differences in the way in which the three factors triggered the defection in the cases chosen for analysis. By identifying similarities and differences, I will seek to provide further insight into issues concerning the formulation of treaty opt-outs by analytically generalizing the case study results. In order to be able to make meaningful sense of data generated by empirical research, a theoretical framework is necessary. The theoretical framework of this study builds on Putnam's two-level game approach and is based on one of his main assumptions, namely, that the smaller the size of the win-set, the higher the risk of failure in negotiations. This is followed by an operationalization of Putnam's assumptions by defining three analytical dimensions that might account for defection. This framework was used as a template for comparing and generalizing the empirical results of the cases. Studying multiple cases makes it possible to build a logical chain of evidence (George & Bennett 2005: 137-138). In other words, the cross-case search for patterns will be used to seek a chain of evidence for the relationships studied on the basis of the framework and in order to produce analytic conclusions answering the original "how" research question. The next step will be to conduct further analysis of consistencies identified across the cases in the various relationships. The relevant issues concerning the size of the win-set relate to the research question, as formulated in Chapter 1: "How can one explain treaty opt-outs?"

Interpretation of the findings in terms of the analytical framework

As predicted by Putnam's approach, in all of the cases analysed above, the size of the win-set was considerably small. Putnam defines a "win-set" for a particular Level II constituency as the set of all possible Level I agreements that would "win" – or gain the necessary majority among the constituents- when voted

up or down (Putnam 1988: 437). In all of the cases examined, the small win-set represented a domestic constraint, just as Putnam predicted arguing that the win-set can determine the relative negotiating power (Putnam 1988: 442-443). The findings also confirm the main hypothesis formulated, namely, that the smaller the win-set is, the greater the risk of defection from negotiations. Most of the cases examined proved to be instances in which the leader involuntarily defected from the negotiations because of different domestic constraints. It is usually other political actors or institutional and ratification requirements in the state that force the leader to defect.

The analysis revealed that the essential factor influencing the size of the win-set, and thus, triggering the defection is represented by the domestic constraints. As argued in the “Theory” chapter, domestic constraints refer to the preferences of the main political actors, as well as to the ratification requirements or the political culture at Level II. The above empirical analysis reveals that in the cases examined, the win-set of the status quo did not comprise the location of the Maastricht draft Treaty. First of all, in all of the above cases, the preferences of the political actors at the domestic level constricted the size of the win-set. In the Danish EMU opt-out case it was the opposition’s lack of support for the agreement that triggered the opt-out. In the case of the defence opt-out, the opposition again played a significant role in proposing the opt-out as a solution for the ratification failure in the referendum. In the Czech case, the refusal of a veto player (President Klaus) to sign the ratification and his demand for an opt-out triggered the defection. Thus, a small faction of the Czech political elite, led by Václav Klaus, the Czech President who refused to sign the ratification treaty until he was granted an opt-out, were responsible for the chief negotiator’s defection. In the case of the UK EMU opt-out it was the opposition within the government party that influenced Major to defect from the common policy.

Secondly, ratification requirements and the political culture at Level II might constitute hurdles both in the ratification process, as well as in the negotiation phase. In the case of the Danish EMU opt-out, it was the consensus oriented political culture at home that forced the leader to negotiate the opt-out. Due to the negative parliamentarism convention, the leader had to follow the request of the biggest opposition party, The Social Democratic party, and of a majority in the parliament who demanded that Denmark should not commit itself

to join the common currency. In the case of the Danish defence opt-out it was both the high ratification requirement in the parliament, as well as the failure of the subsequent referendum that triggered the formulation of the opt-out. However, neither in the Czech case, nor in the case of the British EMU opt-out, the political institutions at home or the ratification requirements did not impose severe hurdles for the leader's negotiating room and did not generate the defection. In the Czech case, the constitutional Court authorization needed in order to ratify the treaty did not trigger the opt-out since the Court always ruled in favour of the Treaty; this additional ratification requirement only prolonged the ratification process and was used by President Klaus to push for his demands to be met. In the case of the British opt-out, it was the Euro-sceptic part of the governing party that reduced the size of the win-set; as Putnam already predicted, a weakening of party discipline can reduce the scope for international cooperation (Putnam 1988: 449).

Thirdly, when assessing the role of the negotiator as the last factor responsible for defection, the analysis proved that it can be extremely difficult to assess the preferences of the leader regarding a certain issue. As Putnam also points out, it is often difficult to disentangle voluntary from involuntary defection in terms of the leader acting either as an "honest broker" or as a "rational egoist". The UK case is a good example of this. Instead of assuming that Major egoistically defected from the negotiations in order to maintain his image back home and keep the unity of his party who was split between Euro-sceptics and pro-Europeans (Sion 2004: 12), it is also a possibility to assume that concerns about "deliverability" (in Putnam's terms) might have determined Major to negotiate the EMU opt-out already in the IGC. According to Putnam, despite his preferences, the leader will only agree at the international level to what he can ratify at home and therefore, concerns about "deliverability" are a prominent element in the statesman's strategy (Putnam 1988: 439). Concerns about deliverability at Level II might affect the negotiations at Level I in the sense that, when the leader acknowledges that there is a high "expectation of rejection of the agreement", he might voluntarily defect from the negotiations. Putnam further argues that democratic executives should take the preferences of veto actors into consideration during the negotiation phase and only conclude agreements that they know will be ratifiable at home.

Moreover, also regarding the third factor, the strategies employed by the negotiator in order to expand the size of the domestic win-set were visible only in one of the cases. In the case of the Danish defence opt-out the leader used the tactic of “synergistic issue linkage” (in Putnam’s terms) and managed to avoid the defection. The Danish Prime Minister negotiated with the other EU member states an enhancement of NATO’s stance in order to obtain the support of the Social Democrats for joining the defence policy. By using this strategy, the leader was able to expand the size of the win-set and avoid the defection.

To sum up, in all of the examined cases the win-set was small and determined by the domestic constraints at Level II. Domestic constraints include the domestic tolerance for the status quo and the ratification hurdles imposed by the high ratification requirements or the political culture at home.

8 A conclusive way forward: revisiting Putnam's assumptions

Looking at the cases examined, several conclusions and answers to the research question can be formulated by revisiting Putnam's assumptions. The following part will reveal the implications of the empirical findings for theory development. Based on the discussion regarding the findings drawn from the empirical analysis, a theory about opt-outs will be sketched. However, the research design used in this thesis does not permit a definitive disentangling of causal mechanisms; its goals are primarily descriptive. The focus is therefore more on explaining the process than describing the relationship. Nonetheless, this discussion serves to highlight some of the potential factors reducing the win-set, as well as the expected direction of the effects generated by the small-win set, namely defection from negotiations in the form of treaty opt-outs.

Expanding on previous studies, I have described opt-outs as defections from EU negotiations in the sense that they grant a member state that does not want to relinquish its sovereignty in a specific policy field, an exemption from that common policy. The formulation of treaty opt-outs is the result of a two-level game or bargaining process with Level I comprising negotiations on an international level and Level II discussion on the national or domestic level. At level I, the international level, bargaining between negotiators leads to a tentative agreement. At this level of negotiations the leader or the chief negotiator is the main negotiating force and the link between the two levels (Putnam 1988: 456). At level II the domestic audience discusses whether to ratify the agreement. Level II refers to a parliament, a ratification vote or other instances that require acceptance of the Level I agreement (Putnam 1988: 436). The basic outline of the game is that negotiators make a deal at Level I which will then have to be submitted for ratification (either formal or informal) at Level II. The important relationship between these two levels is the fact that any Level I agreement must be ratified by the constituents at Level II (*ibid*). Moreover, any amendment of the

agreement at Level II represents a rejection at Level I and will require a reopening of the negotiations at Level I; final ratification must be again decided by Level II (Putnam 1988: 437).

To begin with, in order to postulate a theory about opt-outs, one needs to first define the instances in which treaty opt-outs might occur. The interpretation of the findings of the empirical analysis reveals that, unlike Putnam predicted, there are more than two instances in which opt-outs might occur. There are actually three moments in which defection can occur: during the negotiations (the Danish EMU opt-out, the UK EMU opt-out), during the ratification phase (the Czech opt-out) or after a failed ratification (the Danish defence opt-out).

The second major finding of this analysis is that the size of the “win-set” for a particular Level II constituency (namely, the set of all possible Level I agreements that would “win” – or gain the necessary majority among the constituents- when voted up or down) is responsible for the defection (Putnam 1988: 437). In this sense, the smaller the win-set, the greater the risk of defection, which in the present case means the formulation of a treaty opt-out. Since domestic ratification is required at Level II, a win-set is actually also a domestic constraint. Domestic constraints are the ones responsible for reducing the size of the win-set. By domestic constraints the following study refers to the domestic tolerance for “no-agreement” and the hurdles imposed by high ratification requirements or the political culture at home.

The most relevant factor that defines the boundaries of the leader’s win-set in the negotiations appears to be the preferences of the political actors at the domestic level. Putnam identified several factors that shape the size of the win-set and trigger defection but did not, however, predict the fundamental importance of the preferences of political actors at the domestic level in reducing the size of the win-set. As revealed by the empirical analysis, domestic tolerance for the status quo (or differently put, for no-agreement) is fatal to the acceptance of the proposed agreement. It seems that as a rule of thumb, the lower the cost of “no-agreement” to constituents, the smaller is the win-set. Here it is important to note that ratification implies the acceptance of a proposed agreement only against “no-agreement”, not against an array of other, possibly attractive, alternatives. As Mill’s method of agreement argues, if two or more instances of a phenomenon under investigation have only one of several possible causal circumstances in

common, then the circumstance in which all the instances agree is the cause of the phenomenon of interest (George & Bennett 2005: 155). Thus, based on the findings, the preference of the political actors at Level II seems to be the decisive element that reduces the size of the win-set.

However, it would be wrong to dismiss the other two explanatory factors since they can obviously further shrink the size of the win-set and enhance the possibility of defection. In this sense, the ratification requirements characteristic for each member state determine the “amount” of domestic political support needed in order to ratify the agreement. Just as the Danish defence case points out, even though there was enough political support for the common defence policy and parliamentary majority was secured, the defection was triggered by the fact that the ratification requirement for ratifying the Treaty was not simple majority, but a five-sixths majority. Thus, when defining domestic support for the proposed agreement, one needs to take into consideration the ratification requirements and the political culture in that specific member state.

Thirdly, the chief negotiator or the leader is the one that represents the link between the two levels of the bargaining game. However, distinction should not be made, as Putnam frames it, in terms of the leader’s personal preferences acting either as an “honest broker” or as a “rational egoist”. As Putnam also acknowledges, it is often difficult to disentangle voluntary from involuntary defection in terms of the leader’s personal preferences (Putnam 1988: 438). Therefore, the leader will be forced to defect from the EU negotiations and formulate an opt-out because of:

- failed ratification at Level II (the Danish defence case);
- lack of support from opposition parties (the Danish EMU opt-out);
- a veto player that blocks the ratification (the Czech opt-out);
- concerns about his ability to ratify the agreement (the UK EMU opt-out).

All in all, the present thesis manages to build a theoretical approach for understanding EU treaty opt-outs based on Putnam’s assumptions regarding defection from negotiations. However, as I already pointed out in the thesis, the present study also poses several limitations. First of all, the fact that the empirical analysis considers only four opt-out cases and not all of the existing opt-outs constitutes a limitation since the analysis of other cases might reveal other factors

responsible for the defection. Therefore, more research is needed to empirically investigate the rest of the opt-outs in order to see if the theory about opt-outs developed in this study holds for other cases as well. Secondly, when arguing that the preferences of domestic actors are able to reduce the size of the win-set, I chose to only look at the preferences of some of the actors (the political parties' tolerance for the "no-agreement"), while excluding others due to the space limit of this study. Thus, several additional questions are outside the scope of this study but might dismiss the explanation that this paper provides for the formulation of treaty opt-outs, for example: Do the preferences of public opinion or interest groups at the domestic level impact on the size of the win-set and are they also able to trigger defection?

Nevertheless, this research's major contribution lies in providing an explanation for treaty opt-outs by describing the factors leading to their formulation. As already outlined above, opt-outs are discussed in terms of defection from EU negotiations and the results of the analysis reveal several instances in which opt-outs can be negotiated. In this sense, the analysis shows that opt-outs can be formulated both during the intergovernmental conferences, as well as during the ratification phase, which was outside Putnam's assumptions. Another significant contribution of this study is the finding that domestic constraints are the key explanatory factor for treaty opt-outs. Providing an analytical framework describing opt-outs is extremely useful for identifying such future opt-outs when an EU treaty is discussed in an intergovernmental conference.

9 Executive Summary

EU treaty opt-outs seem to be quite a popular “habit” nowadays, but while the motivations and consequences of treaty derogations have been explored to some degree, the factors explaining treaty opt-outs have received almost no attention in the academic research. Some argue that treaty opt-outs break the unity among member states while others state that they actually allow the European integration process to move forward. Either way, the scientific research does not offer too much insight regarding the explanatory factors connected with the formulation of treaty opt-outs. However, the present thesis addresses this problem by answering the following research question: how can one explain EU treaty opt-outs? Therefore, the purpose of this study is of an explanatory nature since it seeks to provide an explanation for the “birth” of treaty opt-outs by exploring Putnam’s theoretical assumptions regarding bargaining and defection in international negotiations.

In order to place the study in its scientific context, the thesis contains a literature overview. The review considers the literature dealing in one way or another with treaty opt-outs. Building on the previous research regarding opt-outs from EU policies, the thesis presents opt-outs as defections from negotiations. This is because when a member state secures an opt-out from an EU policy, it automatically defects from that common policy by failing to embrace all the aspects negotiated and accepted by the other member states. By acknowledging that treaty opt-outs represent defections from negotiations, the choice of a theory explaining opt-outs became much focused in the sense that the purpose was now to identify a theory able to explain defection. Following the chapter focusing on the research overview, comes a theoretical discussion pointing out the shortcomings posed by various EU integration theories in explaining defection. Then, a choice is made regarding the theory to be used in order to answer the research question, stressing the appropriateness of using Putnam’s two-level games approach in order to explain opt-outs. Putnam’s two-level games approach towards international negotiations was chosen because first of all, it offers a solid

theoretical basis specifically explaining defection from international agreements. Moreover, unlike state-centric theories, the two-level games approach recognizes the importance of domestic conflict and the role of the domestic agents in shaping the negotiations.

Putnam's theory stresses the importance of the two-level games, namely of the games played both at the national and international level, for shaping the final outcome of the negotiations. Basically, Putnam is relaxing the "unitary actor" assumption by allowing the "domestic bargaining", which comprises Level II. The most important element in Putnam's theoretical approach is the fact that he acknowledges the possibility of failed negotiations during the ratification process and argues that the key determinant of defection is the size of the win-set. By win-set he means the set of all possible Level I agreements that could obtain ratification at Level II. Putnam also argues that the chief negotiator (which in most cases is the Prime Minister) represents the key link between the two levels, namely the international level and the domestic one. Based on the preferences of the leader, Putnam argues that there are two types of defections, namely voluntary and involuntary.

Regarding the methodology used, the comparative method was deemed appropriate for the purpose of this thesis. Since the study is of "explorative" nature, a comparison of several EU opt-outs offers the perfect opportunity to analyse patterns of similarities across the cases in order to reveal the conditions that can be held accountable for the same final result (defection) in all of the cases analysed. Since the comparative method requires a clear identification of the aspects that are going to be noted and recorder for each of the cases chosen, the next chapter, Chapter 5, structures the analysis by building a theoretical framework consisting of three analytical dimensions. Since the main hypothesis of the study relies on Putnam's assumption that "the smaller the size of the win-set, the greater the risk of defection from the negotiations" (Putnam 1988: 439), the three dimensions represent three factors able to impact on the size of the win-set. The first factor that might reduce the win-set refers to the preferences of the political actors at Level II and their tolerance for the status quo, that is their support for "no-agreement". The second dimension considers that the hurdles imposed by high ratification requirements as well as by the political culture in a country also impact directly on the size of the win-set and enhance the possibility

of defection. Last but not least, the third analytical dimension refers to the role of the negotiator. In order to investigate this last dimension in the empirical analysis, the main goal was to determine whether the leader acted as an honest broker, having no independent policy views and if he used any strategies or tactics in order to enhance his win-set.

Based on the empirical analysis and the interpretation of the findings, a theory about opt-outs is developed by revisiting Putnam's assumptions. To begin with, treaty opt-outs are seen as the result of a two-level game or bargaining process with Level I comprising negotiations at the EU level and Level II discussions on the national or domestic level. The explanation of treaty opt-outs seen as defections from negotiations, builds on Putnam's concept of "win-set". The size of the win-set for a particular Level II constituency is responsible for the defection in the sense that a small win-set will raise the risk of defection. Since domestic ratification is required at Level II, a win-set is actually also a domestic constraint. To summarize the findings, the analysis reveals that domestic constraints are the ones responsible for reducing the size of the win-set and thus, triggering the defection. Domestic constraints refer to the preferences of the main political actors, as well as to the ratification requirements or the political culture at Level II.

In the negotiations for an EU treaty, defection occurs when there is not enough support for the proposed agreement from the political parties. The analysis reveals that defection is imminent if the cost of "no agreement" is low among the political parties. Secondly, higher ratification requirements and the political culture at the domestic level also need to be considered when assessing domestic tolerance for the status quo. A high ratification requirement (like a five-sixths majority requirement instead of a simple majority) will make it really hard to obtain domestic support for the proposed agreement. Moreover, the consensus oriented political culture of a country can also trigger the defection in the sense that the government is required to ensure that there is not a majority against its negotiation position; if such a majority exists, the government will be forced to defect from the negotiations. Thus, the hurdles imposed by these last two factors might determine the leader to defect from the negotiations when he realizes that he will not be able to gather the domestic support necessary to ratify the

agreement. In other cases, the leader will be forced to defect from the negotiations during the ratification phase, because of a veto player that refuses ratification.

All in all, this study's major contribution lies in providing an explanation for treaty opt-outs by describing the factors leading to their formulation. As already outlined above, opt-outs are discussed in terms of defection from EU negotiations and the results of the analysis reveal several instances in which opt-outs can be negotiated. In this sense, the analysis shows that opt-outs can be formulated both during the intergovernmental conferences, as well as during the ratification phase, which was outside Putnam's assumptions. The second significant finding of this study is that domestic constraints represent the key explanatory factor triggering the defection, namely, treaty opt-outs.

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