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CONSTITUTIONAL  
SUPREMACY  
AND THE  
MAASTRICHT  
TREATY

CASES AND MATERIALS  
1998

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**THE CONSTITUTIONAL APPLICATION OF  
EUROPEAN COMMUNITY LAW**

5 October 1998

Lecture at Tilburg University on 8 October 1998  
Peter Gjørtler, advocate at Dragsted & Helmer Nielsen  
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## 1. Provisions of the Danish constitution 1953

### Section 19:

- (1) The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing, the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation which for fulfillment requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, terminate any international treaty entered into with the consent of the Folketing.
- (2) Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall forthwith be submitted to the Folketing. If the Folketing is not in session it shall be convened immediately.
- (3) The Folketing shall appoint from among its members a Foreign Affairs Committee, which the government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by statute.

### Section 20:

- (1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such specified extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.
- (2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in section 42.

### Section 42:

- (1) Where a Bill has been passed by the Folketing, one-third of the members of the Folketing may, within three weekdays from the final passing of the Bill, request of the President that the Bill be submitted to a referendum. Such request shall be made in writing and signed by the members making the request.
- (2) Except in the instance mentioned in sub-section 7, no Bill which may be submitted to a referendum (see sub-section (6)), shall receive the Royal Assent before the expiration of the time limit stated in sub-section (1), or before a referendum requested as aforesaid has taken place.

- (3) Where a referendum on a Bill has been requested the Folketing may, within a period of five weekdays from the final passing of the Bill, resolve that the Bill shall be withdrawn.
- (4) Where the Folketing has made no resolution in accordance with sub-section (3), notice that the Bill is to be submitted to a referendum shall be given without delay to the Prime Minister, who shall then cause the Bill to be published together with a statement that a referendum is to be held. The referendum shall be held, in accordance with the decision of the Prime Minister, not less than twelve and not more than eighteen weekdays after the publication of the Bill.
- (5) At the referendum votes shall be cast for or against the Bill. For the Bill to be rejected, a majority of the electors who vote and not less than thirty per cent of all persons who are entitled to vote, shall have voted against the Bill.
- (6) Finance Bills, Supplementary Appropriation Bills, Provisional Appropriation Bills, Government Loan Bills, Civil Servants (Amendment) Bills, Salaries and Pensions Bills, Naturalization Bills, Expropriation Bills, Taxation (Direct and Indirect) Bills, as well as Bills introduced for the purpose of discharging existing treaty obligations shall not be submitted to decision by referendum. This provision shall also apply to the Bills referred to in sections 9, 8, 10, and 11, and to such resolutions as are provided for in section 19, if existing in the form of a law, unless it has been prescribed by a special Act that such resolutions shall be submitted to referendum. Amendments to the Constitutional Act shall be governed by the rules laid down in section 88.
- (7) In an emergency a Bill which may be submitted to a referendum may receive the Royal Assent immediately after it has been passed, provided that the Bill contains a provision to this effect. Where, under the rules of sub-section (1), one-third of the members of the Folketing request a referendum on the Bill or on the Act to which the Royal Assent has been given, such referendum shall be held in accordance with the above rules. Where the Act is rejected by the referendum an announcement to that effect shall be made by the Prime Minister without undue delay, and not later than fourteen days after the referendum was held. From the date of such announcement the Act shall become ineffective. (8) Rules for referenda, including the extent to which referenda shall be held in the Faroe Islands and in Greenland, shall be laid down by statute.

Section 63:

- (1) The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, avoid temporary compliance with orders given by the executive authority.
- (2) Questions relating to the scope of the executive's authority may by statute be referred for decision to one or more administrative courts, except that an appeal against the decision of the administrative courts shall be referred to the highest court of the Realm. Rules governing this procedure shall be laid down by statute.

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Section 64:

In the performance of their duties the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in such cases where a rearrangement of the courts of justice is made. A judge who has completed his sixty-fifth year may, however, be retired, but without loss of income up to the time when he is due for retirement on account of age.

Section 88:

Should the Folketing pass a Bill for the purposes of a new constitutional provision, and the Government wish to proceed with the matter, writs shall be issued for the election of members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall, within six months after its final passage, be submitted to the electors for approval or rejection by direct voting. Rules for this voting shall be laid down by statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.

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**2. Act on the Accession of the Kingdom of Denmark to the European Communities, No 446, 11 October 1972**

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, do hereby make known: The Danish Parliament has passed and We have provided the following Act with our Royal Assent:

§ 1. (1) The Treaty of 22 January 1972 concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community may be ratified on behalf of Denmark.

(2) The Decision of the Council of the European Communities of 22 January 1972 concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Coal and Steel Community may be adopted on behalf of Denmark.

§ 2. (1) The powers accorded to the authorities of the Kingdom of Denmark pursuant to the Danish Constitution may to the extent prescribed by the treaties etc. specified in section 4 hereof be exercised by the institutions of the European Communities.

§ 3. (1) The provisions of the treaties etc. specified in section 4 hereof shall come into force in Denmark to the extent that they are directly applicable in Denmark pursuant to Community law.

(2) The same applies to the acts adopted by the institutions of the European Communities prior to the accession of the Kingdom of Denmark to the European Communities and published in the Official Journal of the European Communities.

§ 4. (1) The provisions of sections 2 and 3 concern the following treaties etc.:

(i) The Treaty of 18 April 1951 establishing the European Coal and Steel Community, as amended by the Treaty of 27 October 1956, Decision of the Special Council of the European Community and the High Authority of 16 May 1960 and Council Decision of 6 December 1962;

(ii) The Treaty of 25 March 1957 establishing the European Economic Community;

(iii) The Treaty of 25 March 1957 establishing the European Atomic Energy Community;

(iv) The Convention of 25 March 1957 concerning institutions common to the European Communities;

(v) The Convention of 13 November 1962 amending the Treaty establishing the European Economic Community for the purpose of implementing in the Dutch Antilles the special association scheme described in the Fourth Part of the said Treaty;

(vi) The Treaty of 8 April 1965 establishing a common Council and a common Commission of the European Communities;

(vii) The Treaty of 22 April 1970 amending certain budgetary provisions of the Treaties establishing the European Communities and the Treaty establishing a common Council and a common Commission of the European Communities;

(viii) The Treaty of 22 January 1972 concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community;

(ix) Council Decision of the European Communities of 22 January 1972 concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland of the European Coal and Steel Community and its annexes, protocols, etc.

§ 5. (1) The Minister concerned may provide for exemptions to the statutory requirements to citizenship, address and domicile in Denmark to the extent required in consequence of the obligations of Denmark pursuant to the rules of the European Communities on the right of establishment, freedom to provide services and the free movement of labour.

§ 6. (1) The Danish Government shall give notice to the Danish Parliament (Folketinget) of any developments in the European Communities.

(2) The Danish Government shall notify a committee appointed by the Danish Parliament (Folketinget) of any proposals for council decisions which are to be directly applicable in the Kingdom of Denmark or whose fulfilment requires the participation of the Danish Parliament (Folketinget).

§ 7. (1) This Act shall come into force at the same time as the Treaty mentioned in section 1(1) above. But the provisions of section 1 shall come into force upon notice in the Danish Law Gazette.

§ 8. (1) This Act shall not apply to the Faroe Islands.

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### 3. Provisions of the European Union Treaty 1992

#### Preamble:

Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

Recalling the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

Desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

Desiring to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

Resolved to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

Determined to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

Resolved to establish a citizenship common to nationals of their countries,

Resolved to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

Reaffirming their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty,

Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

In view of further steps to be taken in order to advance European integration,

Have decided to establish a European Union.

Article F:

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Article N:

1. The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

2. A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B.

#### 4. Provisions of the European Community Treaty 1992

##### Preamble:

Determined to lay the foundations of an ever closer union among the peoples of Europe,

##### Article 2:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

##### Article 3:

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) measures concerning the entry and movement of persons in the internal market as provided for in Article 100c;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the internal market is not distorted;
- (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
- (i) a policy in the social sphere comprising a European Social Fund;

- (j) the strengthening of economic and social cohesion;
- (k) a policy in the sphere of the environment;
- (l) the strengthening of the competitiveness of Community industry;
- (m) the promotion of research and technological development;
- (n) encouragement for the establishment and development of trans-European networks;
- (o) a contribution to the attainment of a high level of health protection;
- (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- (q) a policy in the sphere of development cooperation;
- (r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- (s) a contribution to the strengthening of consumer protection;
- (t) measures in the spheres of energy, civil protection and tourism.

Article 3b:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 4:

1. The tasks entrusted to the Community shall be carried out by the following institutions:

- a European Parliament,

- a Council,
- a Commission,
- a Court of Justice,
- a Court of Auditors.

Each institution shall act within the limits of the powers conferred upon it by this Treaty.

2. The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 5:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

The shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Article 164:

The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

Article 228:

1. Where this Treaty provides for the conclusion of agreements between the Community and or more States or international organizations, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

In exercising the powers conferred upon it by this paragraph, the Council shall act by a qualified majority, except in the cases provided for in the second sentence of paragraph 2, for which it shall act unanimously.

2. Subject to the powers vested in the Commission in this field, the agreements shall be concluded by the Council, acting by a qualified majority on a proposal from the Commission. The Council

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shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules, and for the agreements referred to in Article 238.

3. The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 113(3), including cases where the agreement covers a field for which the procedure referred to in Article 189b or that referred to in Article 189c is required for the adoption of internal rules. The European Parliament shall deliver its opinion within a time limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time limit, the Council may act.

By way of derogation from the previous subparagraph, agreements referred to in Article 238, other agreements establishing a specific institutional framework by organizing cooperation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 189b shall be concluded after the assent of the European Parliament has been obtained.

The Council and the European Parliament may, in an urgent situation, agree upon a time limit for the assent.

4. When concluding an agreement, the Council may, by way of derogation from paragraph 2, authorize the Commission to approve modifications on behalf of the Community where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement; it may attach specific conditions to such authorization.
5. When the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in Article N of the Treaty of the European Union.
6. The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union.
7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.

#### Article 235:

If action by the Community should prove necessary to attain, in the

course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 238:

The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

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## **5. Judgment of 6 April 1998 from the Danish Supreme Court on the Maastricht Treaty**

Transcript of the Record of Judgments for the Danish Supreme Court (unofficial translation)

Judgment delivered by the Danish Supreme Court on Monday, 6th April 1998,  
in case No. 1361/1997

- 1) Hanne Norup Carlsen
- 2) Ingeborg Fangel
- 3) Nicolas Fischer
- 4) Jørgen Erik Hansen
- 5) Marianne Henriksen
- 6) Ole Donbæk Jensen
- 7) Yvonne Petersen
- 8) Iver Reedtz-Thott
- 9) Lars Ringholm
- 10) Arne Würgler

(represented by Attorneys-at-Law Ms. Karen Dyekjær-Hansen and Mr. Christian Harlang)

versus

Prime Minister Poul Nyrup Rasmussen

(Attorney to the Danish Government, Mr. Gregers Larsen, attorney-at-law, and Mr. Karsten Hagel-Sørensen, attorney-at-law),

Interveners:

- 1) Professor Ole Krarup, Doctor of Laws (in person)
- 2) The Association Constitution Committee 93 (Foreningen Grundlovskomiteé 93) acting for Allan S. Aabech et al. (Mr. Christian Harlang, attorney-at-law)

In the lower instance, judgment was delivered by the 3rd Court of the Eastern Division of the Danish High Court on 27th June 1997.

Eleven Supreme Court Judges have participated in the adjudication: Hornslet Hermann, Marie-Louise Andreasen, Wendler Pedersen, Poul Sørensen, Melchior, Blok, Jørgen Nørsgaard, Lorenzen, Børge Dahl, and Lene Pagter Kristensen.

The Appellants, Hanne Norup Carlsen et al., have made a claim that the Respondent Prime Minister Poul Nyrup Rasmussen be ordered to recognise that the transfer of the powers of Danish authorities which is a consequence of Section 2, cf. Section 4, of Danish Act no. 447 of 11th October 1972 on Denmark's Accession to the European Communities, with the overall contents of the Act after the entry into force of Act no. 281 of 28th April 1993, is in contravention of the Danish Constitutional Act of 5th June 1953. The Appellants have withdrawn claims 2 and 3 made before the High Court.

The Prime Minister has moved for dismissal of the Appellants' claim.



The interveners Professor Ole Krarup, Doctor of Laws, and the Association Constitution Committee 93 (Foreningen Grundlovskomité 93) acting for Allan S. Aabech et al., have made statements in support of the Appellants' claim.

For the purpose of the Supreme Court additional information has been provided, La. as a consequence of an Order of 3rd November 1997 made by the Supreme Court according to which the Respondent was ordered to produce a substantial number of documents.

Furthermore, in accordance with the Supreme Court's Order of 13th January 1998, evidence has been given by the Minister for Foreign Affairs, Mr. Niels Helveg Petersen, former Minister Mr. Ivar Nørgaard and former Ambassador and Secretary General Mr. Niels Ersbøll.

The full text of the Supreme Court's ratio decidendi is:

**"9.1.** What the Supreme Court is considering in this case is whether the implementation in Denmark of the Treaty Establishing the European Community ("the EC Treaty") as framed in the Treaty Establishing the European Union ("the Union Treaty") was lawfully made in pursuance of sect. 20 of the Danish Constitution or, alternatively, such implementation required an amendment of the Constitution pursuant to sect. 88 thereof.

Primarily, the appellants have pleaded that sect. 20 (1) of the Danish Constitution grants authority for the transfer of sovereignty only "to such specified extent as shall be provided by statute", and that this condition has not been met. In this connection they have referred, in particular, to the powers vested in the Council under Article 235 of the EC Treaty, and to the law-making activities of the EC Court of Justice. Secondly, the appellants have pleaded that the delegation of sovereignty is on such a scale and of such a nature that it is inconsistent with the Constitution's premise of a democratic form of government.

The appellants' representations concern the EC Treaty and, in other words, neither involve pillar 2 of the Union Treaty on the common foreign & security policy, nor pillar 3 concerning cooperation regarding justice and home affairs. The representations about the EC Treaty have no bearing on the third phase of the Economic and Monetary Union, in that Denmark is not participating therein, cf. sect. 4, 12., item a., of the Act of Accession.

**9.2.** Sect. 20 of the Danish Constitution is framed as follows:

"20 (1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such specified extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

(2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing (Parliament) shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval, or rejection in accordance with the rules for referenda laid down in sect. 42."

Sect. 20 was included in the 1953 Constitutional Act to enable Denmark to participate - without amending the Constitution by virtue of its sect. 88 - in international cooperation implying that the exercise of legislative, administrative or judicial authority is entrusted to an international organisation with direct effect in this Kingdom. Because it was impossible to predict with any degree of certainty what forms the international cooperation would assume in the future, no detailed specification was made as to what powers the provision covers. Thus, the aim was to grant wide limits for the access to transfer sovereignty. However, it was emphasised in the provision that the delegation of powers can occur only "to such extent as shall be provided by statute". Furthermore, it was considered important that the more stringent demands for the adoption of bills under the provision offer a far-reaching guarantee.

The application of the qualified procedure in sect. 20 of the Constitution is required to the extent that an international organisation is entrusted with the exercise of legislative, administrative or judicial authority with direct effect in this Kingdom, or the exercise of other powers which, according to the Constitution, are vested in the authorities of the Realm, including the power to enter into treaties with other states.

Sect. 20 does not permit that an international organisation is entrusted with the issuance of acts of law or the making of decisions that are contrary to provisions in the Constitution, including its rights of freedom. Indeed, the authorities of the Realm have themselves no such power.

The term "to such extent as shall be provided by statute" must be interpreted to the effect that a positive delimitation must be made, of the powers delegated, partly as regards the fields of responsibility and partly as regards the nature of the powers. The delimitation must enable an assessment to be made of the extent of the delegation of sovereignty. The fields of responsibility may be described in broad categories, and there is no requirement for the extent of the delegation of sovereignty to be stated so precisely that there is no room left for discretion or interpretation. The powers delegated may be indicated by means of reference to a treaty.

The demand for specification in sect. 20 (1) precludes that it can be left to the international organisation to make its own specification of its powers.

The term "to such extent as shall be provided by statute" cannot be interpreted to the effect that powers which are vested in the authorities of the Realm can be entrusted to an international organisation only to a limited - i.e., minor extent.

**9.3.** The Act of Accession delegates powers to the EC to the extent laid down in the EC Treaty. The compatibility of the Act of Accession with sect. 20 of the Constitution therefore presupposes that the Treaty meets the requirement that powers have been delegated only "to such extent as shall be provided by statute".

The EC Treaty is based on a principle of conferred powers, cf. Article 3b (1) and Article 4 (1) of the Treaty. The institutions of the Community may act only within such limits for the operation of the Community as appear from the provisions of the Treaty, and within these limits the institutions may only exercise such powers as have been conferred upon them by or pursuant to the Treaty.

The principle of conferred powers thus implies a restriction on the powers of the institutions which is in keeping with the demand for specification in sect. 20 of the Constitution. The Supreme Court finds that the specific rules of authority in the, EC Treaty meet this demand.

**9.4.** However, as stated above, the appellants specifically claimed that the general provision of authority in Article 235 of the EC Treaty enables the incorporation of new areas of responsibility under the powers of the EC to an extent which implies that the demand for specification in sect. 20 of the Danish Constitution has not been observed. They have stated that this appears from the way in which Article 235 has been applied prior to the implementation of the Union Treaty. In this connection they have referred, inter alia, to the material which was produced in accordance with the order by the Supreme Court of 3rd November 1997 (excerpts of which are included in paragraph 5 above). Furthermore, they have stated that the amendments to the EC Treaty which were made by the Union Treaty imply an expansion of the scope of Article 235.

In this connection it should be noted that, as already mentioned, the case concerns the question whether the adoption of the Act on Denmark's Accession to the EC Treaty with the content given to that Treaty through the Union Treaty was constitutional. The issue, therefore, is not whether any transgression of the limits to the powers conferred may have taken place during the time prior to the amendment of the Treaty through certain legislative acts, etc., adopted in pursuance of Article 235.

At the amendment of the Treaty the fields of cooperation stated in Article 3 have been expanded and new articles have been added in Part Three of the Treaty on "Policy of the Community". A number of the fields where Article 235 was previously referred to as authority for drawing up legislative acts, etc., has now been adjusted or is even mentioned in the Treaty. Pillars 2 and 3 of the 'Union Treaty also comprise regulations on international cooperation in a number of other fields. The field of application of Article 235 must be evaluated on this background.

The wording of Article 235 of the EC Treaty is as follows:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

It appears from the wording of Article 235 that the fact that action by the Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient background for applying the provision. It is a further condition that the intended action is "in the course of the operation of the common market". This - compared with Article 2 under which the tasks of the Community shall be promoted "by establishing a common market and an economic and monetary union and through implementation of common policies or action as stated in articles 3 and V' - is to be understood so that the intended action shall lie within the scope of the operation of the common market that appears from the other provisions of the Treaty, including in particular Part Three on the policy of the Community and the listing in Articles 3 and 3a of the individual fields of operation. This interpretation is in accordance with the Government's memo of 21st January 1997, to the Parliament's European Committee (mentioned above in paragraph 4) and is confirmed by

opinion 2/94 of 28th March 1996 of the EC Court of Justice in plenary session, (mentioned above in the same paragraph) where it is stated in paragraphs 29 and 30 (E.C.R. 1996-I, page 1788):

"29. Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the, objectives laid down by the Treaty.

30. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."

The stated interpretation of Article 235 must be taken as the basis even though, prior to the amendment of the Treaty, the provision may have been applied on the basis of a wider interpretation.

A legislative act which does not go any further than to confer powers to issue legislative acts or decide upon other measures in accordance with the interpretation of Article 235 stated above, does not constitute a violation of the demand for specification in sect. 20 of the Constitution.

Any adoption pursuant to Article 235 must be unanimous. Therefore the Government may prevent the provision from being applied to any adoption which is beyond the stated scope for Denmark's delegation of powers to the EC. The Government cannot assist in the adoption of bills which fall outside this scope and therefore presuppose additional transfer of sovereignty. On the background of the objective which Article 235 is intended to support it is unavoidable that the precise delimitation of the scope of application of the provision may give rise to doubts. In view thereof it is considered that the Act of Accession grants the Government a not insignificant margin.

**9.5.** In pursuance of Article 164 of the Treaty, the European Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed, and under Article 173 of the Treaty the Court of Justice shall review the legality of acts of the institutions of the Community. Under Article 177 the Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community.

Any question on the validity of an act of law or another action passed in pursuance of Article 235 may therefore be brought before the EC Court of Justice, and in that event the Court of Justice shall ensure that the scope of the operation of the Community is observed.

The fact that the detailed determination of the powers vested in the institutions of the Community may give rise to doubts, and that the jurisdiction to give rulings concerning the interpretation of such questions is transferred to the EC Court of Justice cannot in itself be regarded as incompatible with the requirement for specification in sect. 20 of the Constitution.

The fact that the EC Court of Justice in its interpretation of the Treaty also attaches importance to factors of interpretation other than the wording of the provisions, including the objectives of the Treaty, is not in violation of the assumptions on which the Act of Accession was based, nor is it in itself incompatible with the demand for specification in sect. 20 (1) of the Constitution. The same applies to the law-making activities of the EC Court of Justice within the scope of the Treaty.

**9.6.** The appellants have pleaded that the jurisdiction of the EC Court of Justice under the Treaty, held against the principle of precedence for EC law, implies that Danish courts of law are prevented from enforcing the limits for the transfer of sovereignty which has taken place by the Act of Accession and that this must be taken into consideration, when assessing if the demand for specification in sect. 20 (1) of the Constitution has been observed.

By adopting the Act of Accession it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold that an EC act is inapplicable in Denmark without the question of its compatibility with the Treaty having been tried by the EC Court of Justice, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the transfer of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in sect. 20 (1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession. Similar, interpretations apply with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.

**9.7.** On the background mentioned, the Supreme Court finds that neither the additional powers that have been delegated to the Council in pursuance of Article 235 of the EC Treaty, nor the law-making activities the Court of Justice can be regarded as incompatible with the demand for specification in sect. 20 (1) of the Constitution.

**9.8.** Under sect. 20 of the Constitution any delegation of powers can take place only to "international, authorities" established by "mutual agreement" with "other states" for the promotion of "international rules of law and cooperation". It must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state. The determination of the limits to this must rely almost exclusively on considerations of a political nature. The Supreme Court finds it beyond any doubt that by the Act of Accession no sovereignty has been transferred to the Community to such an extent that it is in violation of the said assumption in the Constitution.

**9.9.** With regard to the question whether transfer of sovereignty in accordance with the Act of Accession is of such a nature that it is in violation of the assumption of the Constitution of a democratic system of government, it is noted that any delegation of part of the Parliament's legislative powers to an international organisation will involve a certain

encroachment on the Danish democratic system of government. This has been taken into consideration when drawing up the rigorous requirements for adoption under sect. 20 (2). In so far as concerns the EC Treaty, legislative powers have been transferred primarily to the Council, in which the Danish Government answering to the Parliament can exercise its influence. It is reasonable to assume that the Parliament has been entrusted to consider whether participation by the Government in the EC cooperation should be conditional upon any additional democratic control. Nor does the Supreme Court in this respect find any basis for holding the Act of Accession unconstitutional.

**9.10.** In view of the above and in view of the fact that the appellants have made no further statements that 'may lead to a different outcome the Supreme Court hereby affirms the judgment and dismisses the appeal."

HELD:

The judgment of the High Court of Justice shall be affirmed.  
Neither of the parties shall pay costs of the case before the Supreme Court to any other party or to the Treasury.

IN WITNESS of the correctness of the Transcript,  
In the Supreme Court of Justice, this 6th day of April,  
(signature) Annika Niebling, Senior Clerk

## **6. Opinion of 14 December 1991 from the European Court of Justice on Community accession to the European Economic Area Treaty**

Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.

Opinion 1/91.

Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty

### **SUMMARY**

1. The fact that the provisions of the agreement relating to the creation of the European Economic Area and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically. An international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives.

With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement. Indeed, the EEC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union and the objective of all the Community treaties is to contribute together to making concrete progress towards European unity.

The context in which the objective of the agreement is situated also differs from that in which the Community aims are pursued. The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.

It follows that homogeneity of the rules of law throughout the European Economic Area is not secured by the fact that the provisions of Community law and those of the corresponding provisions of the agreement are identical in their content or wording.

Neither will the interpretation mechanism provided for in the provisions of the agreement, which stipulate that the rules of the agreement must be interpreted in conformity with the case-law of the Court of Justice on the corresponding provisions of Community law, enable the desired legal homogeneity to be achieved. On the one hand, that mechanism is concerned only with rulings of the Court of Justice given prior to the date of signature of the agreement, which will give rise to difficulties in view of the evolving nature of the Court's case-law. On the other hand, although the agreement does not clearly specify whether it refers to the Court's case-law as a whole, and in particular the case-law on the direct effect and primacy of

Community law, it appears from a protocol to the agreement that the Contracting Parties undertake merely to introduce into their respective legal orders a statutory provision to the effect that the rules of the agreement are to prevail over contrary legislative provisions with the result that compliance with the case-law of the Court of Justice does not extend to essential elements of that case-law which are irreconcilable with the characteristics of the agreement.

2. As the Court of the European Economic Area has jurisdiction in relation to the interpretation and application of the agreement, it may be called upon to interpret the expression "Contracting Parties". As far as the Community is concerned, that expression covers the Community and the Member States, or the Community, or the Member States. Consequently, that court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.

3. Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, inter alia where the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions.

As far as the Agreement creating the European Economic Area is concerned, the question arises in a particular light. Since it takes over an essential part of the rules which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order, the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules. Furthermore, in so far as it is intended to secure uniform application and equality of conditions of competition, it necessarily covers the interpretation both of the provisions of the agreement and of the corresponding provisions of the Community legal order.

Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the



interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. As a result, it is incompatible with Community law.

4. Although it is true that there is no provision of the EEC Treaty which prevents an international agreement from conferring on the Court of Justice jurisdiction to interpret the provisions of such an agreement for the purposes of its application in non-member countries and that no objection on a point of principle can be made to the freedom which the States of the European Free Trade Association are given under the agreement to authorize or not to authorize their courts and tribunals to ask the Court of Justice questions or to the fact that there is no obligation on the part of certain of those courts and tribunals to make a reference to the Court of Justice, it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the States of the European Free Trade Association are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the Treaty, namely that of a court whose judgments are binding.

5. Since the right to intervene in cases pending before the Court of Justice is governed by Articles 20 and 37 of the Protocol on the Statute of the Court of Justice of the EEC, which may be amended by the Community institutions under the procedure provided for in the second paragraph of Article 188 of the EEC Treaty, it is not necessary to amend the EEC Treaty, pursuant to Article 236 thereof, in order to give the countries of the European Free Trade Association the right to intervene.

6. Article 238 of the EEC Treaty does not provide any basis for setting up under an international agreement a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community. For the same reasons, an amendment of Article 238 could not cure the incompatibility with Community law of the system of courts to be set up by the agreement.

In conclusion,

gives the following opinion:

The system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community.

Luxembourg, 14 December 1991.

**7. Opinion of 28 March 1996 from the European Court of Justice on Community accession to the European Convention on Human Rights Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms**

Opinion 2/94.

**SOMMAIRE**

1. La procédure exceptionnelle permettant de recueillir l'avis de la Cour de justice sur la compatibilité d'un accord envisagé avec les dispositions du traité, que prévoit l'article 228, paragraphe 6, du traité, constitue une procédure particulière de collaboration entre la Cour de justice, d'une part, les institutions communautaires et les Etats membres, d'autre part, par laquelle la Cour est appelée à assurer, conformément à l'article 164 du traité, le respect du droit dans l'interprétation et l'application du traité dans une phase antérieure à la conclusion d'un accord susceptible de donner lieu à une contestation concernant la légalité d'un acte communautaire de conclusion, d'exécution ou d'application. Elle a pour but de prévenir les complications pouvant découler, tant sur le plan communautaire que sur celui des relations internationales, d'une décision judiciaire constatant éventuellement qu'un accord international engageant la Communauté est, au vu soit de son contenu, soit de la procédure adoptée pour sa conclusion, incompatible avec les dispositions du traité.

2. Pour apprécier dans quelle mesure l'absence de précisions sur le contenu d'un accord envisagé affecte l'admissibilité d'une demande d'avis adressée à la Cour de justice au titre de l'article 228, paragraphe 6, du traité, il convient de distinguer selon l'objet de cette demande.

Lorsqu'il s'agit de trancher une question de compétence de la Communauté pour conclure un accord, il est de l'intérêt des institutions communautaires et des Etats intéressés, y compris les pays tiers, de tirer cette question au clair dès l'ouverture des négociations et avant même que les éléments essentiels de l'accord ne soient négociés, la seule condition étant que l'objet de l'accord soit connu avant que la négociation ne soit engagée.

En revanche, lorsqu'il s'agit pour la Cour de se prononcer sur la compatibilité des dispositions d'un accord envisagé avec les règles du traité, il est nécessaire que celle-ci dispose d'éléments suffisants sur le contenu même dudit accord.

C'est pourquoi, saisie de la question de savoir si l'adhésion de la Communauté à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales serait compatible avec le traité, la Cour peut, alors même que l'ouverture de négociations n'a pas encore été décidée, rendre un avis sur la compétence de la Communauté pour procéder à cette adhésion, car l'objet général de la convention, la matière qu'elle régit et la portée institutionnelle pour la Communauté d'une adhésion sont parfaitement connus, mais ne peut, faute de disposer de précisions sur les modalités de l'adhésion et notamment sur les solutions envisagées en ce qui concerne l'aménagement concret de la soumission de la Communauté aux mécanismes actuels et futurs de contrôle juridictionnel institués par la convention, rendre un avis sur la compatibilité de l'adhésion à ladite convention avec les règles du traité.

3. Il résulte de l'article 3 B du traité, aux termes duquel la Communauté agit dans les limites des compétences qui lui sont conférées et des objectifs qui lui sont assignés par le traité, qu'elle ne dispose que de compétences d'attribution. Le respect de ce principe des compétences d'attribution s'impose tant pour l'action interne que pour l'action internationale de la Communauté. La Communauté agit normalement sur la base de compétences spécifiques qui ne doivent pas nécessairement résulter expressément de dispositions spécifiques du traité, mais peuvent également se déduire, de façon implicite, de ces dispositions. Ainsi, la compétence de la Communauté pour prendre des engagements internationaux peut non seulement résulter de dispositions explicites du traité, mais également découler de manière implicite de ces dispositions. Chaque fois que le droit communautaire a été établi, dans le chef des institutions de la Communauté, des compétences sur le plan interne en vue de réaliser un objectif déterminé, la Communauté est investie de la compétence pour prendre les engagements internationaux nécessaires à la réalisation de cet objectif, même en l'absence d'une disposition expresse à cet égard.

4. L'article 235 du traité vise à suppléer l'absence de pouvoirs d'action conférés expressément ou de façon implicite aux institutions communautaires par des dispositions spécifiques du traité, dans la mesure où de tels pouvoirs apparaissent néanmoins nécessaires pour que la Communauté puisse exercer ses fonctions en vue d'atteindre l'un des objets fixés par le traité.

Faisant partie intégrante d'un ordre institutionnel basé sur le principe des compétences d'attribution, cette disposition ne saurait constituer un fondement pour élargir le domaine des compétences de la Communauté au-delà du cadre général résultant de l'ensemble des dispositions du traité, et en particulier de celles qui définissent les missions et les actions de la Communauté. Elle ne saurait en tout cas servir de fondement à l'adoption de dispositions qui aboutiraient en substance, dans leurs conséquences, à une modification du traité échappant à la procédure que celui-ci prévoit à cet effet.

5. Les droits fondamentaux font partie intégrante des principes généraux du droit dont le juge communautaire assure le respect. A cet égard, le juge communautaire s'inspire des traditions constitutionnelles communes aux Etats membres ainsi que des indications fournies par les instruments internationaux concernant la protection des droits de l'homme auxquels les Etats membres ont coopéré ou adhéré. Dans ce cadre, la convention européenne des droits de l'homme, à laquelle il est, notamment, fait référence dans l'article F, paragraphe 2, du traité sur l'Union européenne, revêt une signification particulière.

6. En l'état actuel du droit communautaire, la Communauté n'a pas compétence pour adhérer à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, car, d'une part, aucune disposition du traité ne confère aux institutions communautaires, de manière générale, le pouvoir d'édicter des règles en matière de droits de l'homme ou de conclure des conventions internationales dans ce domaine et, d'autre part, une telle adhésion ne saurait s'opérer par le recours à l'article 235 du traité.

En effet, si le respect des droits de l'homme constitue une condition de la légalité des actes communautaires, l'adhésion de la Communauté à la convention européenne des droits de l'homme entraînerait un changement substantiel du régime actuel de la protection des droits de l'homme, en ce qu'elle comporterait l'insertion de la Communauté dans un système institutionnel international distinct ainsi que l'intégration de l'ensemble des dispositions de la convention dans l'ordre juridique communautaire. Une telle modification du régime de la protection des droits de l'homme dans la Communauté, dont les implications institutionnelles

seraient également fondamentales tant pour la Communauté que pour les Etats membres, revêtirait une envergure constitutionnelle et dépasserait donc par sa nature les limites de l'article 235. Elle ne saurait être réalisée que par la voie d'une modification du traité.

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