

Peoples' Vengeances

From Maastricht to Edinburgh: The Danish Solution

Helle Krunke*

The Danish 'no' after Maastricht. Key role of negotiations between political parties towards 'national compromise' with main 'no'-party-exceptions to be negotiated at Edinburgh. The Edinburgh Agreement as closing off alternative developments or options for Denmark. The legal status debated, but most probably an international agreement. Intensified parliamentary scrutiny as result. Particular circumstances made acceptance in a second referendum possible.

INTRODUCTION – THE FIRST REFERENDUM ON THE MAASTRICHT TREATY

The Maastricht Treaty was rejected by the Danes at a referendum on the 2nd of June 1992, by 50.7 against 49.3%. All political parties in the Danish parliament, except two, had recommended a 'yes' vote, but the Treaty was narrowly defeated. The result was clear though – it was not possible for Denmark to ratify the Maastricht Treaty. Less clear, however, was how the Danish government and parliament should react to the referendum – how was the result of the referendum to be interpreted? And what would be the consequences for Denmark's membership in the European Community and the European Union? Also, the referendum gave rise to some soul-searching among the political parties in parliament, because it was obvious that many voters had not followed the recommendation of the political party for which they normally voted. One could therefore argue that the composition of parliament did not reflect the stance of the Danish people, at

* Assistant Professor, Faculty of law, University of Copenhagen, Denmark. Author of a doctoral thesis on foreign affairs and separation of powers, in a number of European countries, at the dawn of the 21st century.

European Constitutional Law Review, 1: 339–356, 2005

© 2005 T.M.C. ASSER PRESS and Contributors

DOI: 10.1017/S1574019605003391

least not in the matter of Community policy.¹ Denmark – and to some extent Europe² – was facing a political crisis.

This article discusses how the crisis was solved during the period from the first referendum on the Maastricht Treaty to the second referendum a year later, which led to Denmark ratifying the Maastricht Treaty. A central question is whether the Danes gained something from it, both at the national and the international level. The answer seems to be ‘yes’ on both counts.

THE INTERPRETATION OF THE DANISH ‘NO’ AND THE NATIONAL COMPROMISE

The reason for the first referendum, on the 2nd of June 1992, is found in Article 20(2) of the Danish Constitution:

(1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such 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 cooperation.

(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.

In the opinion of the Danish government, Denmark would be ceding sovereignty by ratifying the Maastricht Treaty.³ As mentioned earlier, two political parties did not support Denmark ratifying the Treaty. The government could therefore not gather the five-sixths majority required for enacting the Bill, but it did have the support of the majority of parliament, which made it possible to hold the fateful referendum.

The ‘no’ left the politicians with the question as to why the Danes had voted ‘no’ to the Maastricht Treaty, when a large majority of the members of parliament

¹ This had happened before – just the other way around. In 1985/1986 a majority of the Danish parliament did not vote in favour of Denmark acceding to the Single European Act. The government – which supported ratifying the Treaty – managed to convince a majority of parliament to have a referendum and let the Danish population decide whether Denmark should ratify the Treaty. 56.2% of Danes voted in favour of the Treaty and parliament then respected the wish of the Danish voters. As ratifying the Treaty did not mean giving up sovereignty it was not necessary to follow the special procedure in Art. 20 in the Danish Constitution.

² See Jørgen Ørstrøm, ‘Maastricht-Traktaten og Edinburgh-afgørelsen’ [The Maastricht Treaty and the Edinburgh Agreement], in *Danmark 30 år i EU. Et festsskrift* (Copenhagen, Nordisk Forlag 2003) p. 50-59.

³ *Hvidbog om Danmark og Maastrichttraktaten* [Whitebook on Denmark and the Maastricht Treaty] (Udenrigsministeriet 1992) p. 48-49.

supported ratifying the Treaty. Before taking further action, the Danish government and parliament had to 'interpret' the outcome of the referendum. A large majority of parliament still supported Denmark ratifying the Treaty. What would it take to convince the voters to accept the Treaty? And how could government and parliament justify another referendum on the Treaty without looking disrespectful to the voice of the voters?

The solution to the problem was the so-called 'national compromise'. Two political parties in parliament – *Socialdemokratiet* and *Det Radikale Venstre* – supporting the ratification of the Treaty, succeeded in entering into a dialogue with the largest of the political parties against the Treaty, the leftist *Socialistisk Folkeparti*. These three parties negotiated a draft 'national compromise' in September/October 1992. On the 27th of October 1992, the national compromise was – after the involvement of the Danish government – accepted by seven of the eight political parties in parliament.⁴

From a strictly formal point of view, the Danish population had said 'no' to the Maastricht Treaty, because that was the issue they were asked to vote on. But the matter is not that simple. As we have seen recently in the referenda in France and the Netherlands on the EU Constitution, there might be other reasons for voting against. The Danish government and parliament interpreted the Danish 'no' in the 1992 referendum the following manner:

The Danish 'no' to European Union on 2 June 1992 reflected the fact that the majority of the Danes do not wish a United States of Europe. It was not, however, a 'no' to the EC membership or European co-operation.⁵

To some extent, this interpretation was probably correct. The problem is that the goal of European co-operation from the beginning has been to work towards a closer engagement of the member states in a political union, but in 1972, when Denmark joined the European Community, the political debate primarily focused on the Community as a trade co-operation. Thus it was primarily economic reasons, which led a majority of the Danish population (63%) to vote in favour of a membership of the Community (90.1% turn out). In 1992, however, it became obvious to the Danish population that the co-operation was turning into a political Union, which dealt with subjects that were very far removed from trade, for instance defence policy.⁶ Many voters were concerned about ceding sovereignty and creating 'The United States of Europe' and about specific political areas, about

⁴ Karen Siune, Palle Svensson and Ole Tonsgaard, *Fra et nej til et ja* [From a no to a yes] (Aarhus, Forlaget Politica 1994) p. 21-22.

⁵ *Denmark in Europe*, The Foreign Affairs Office, the 30th of Oct. 1992, Introductory remarks, Memorandum given to the parliamentary European Affairs Committee.

⁶ See Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 14-15 and p. 78-96; and *Information material from the Danish parliament to the voters*, 1972.

European Citizenship, the common defence policy, a European currency and the social dimension.⁷

According to the government and parliament the solution was to be the following:

With a result of 50.7% votes against and 49.3% in favour, the political parties must formulate a national compromise which can unite the population on Denmark's participation in further EC cooperation.⁸

Had the outcome been less close, such a further solution might not have been feasible. From a political point of view, the close outcome of the referendum meant that it was only necessary to 'move' a limited number of voters. If *Socialistisk Folkeparti* would advise its voters to vote in favour of the Maastricht Treaty in a new slightly adjusted referendum, then a majority of the voters might vote in favour of the Treaty. At the same time, this solved the problem of analysing the exact reasons that had led many Danes to vote against the Treaty.

The problem was now reduced to agreeing upon certain exceptions to the Treaty, which could satisfy the *Socialistisk Folkeparti* and at the same time, hopefully, both the voters of that party (or at least some of them) and other negative voters.⁹ When the national negotiations on the exceptions were finished, the Danish government would then have to convince the other member states that Denmark should have a special agreement in relation to the Maastricht Treaty, and if successful, Denmark could hold a new referendum.

This way the *Socialistisk Folkeparti* played a very important role in formulating the Danish exceptions to the Treaty. Actually, if one compares the written material from the *Socialistisk Folkeparti*'s referendum campaign in the first referendum on the Maastricht Treaty in 1992 with the outcome of the national compromise, they are almost¹⁰ concordant (the national compromise is just formulated in more technical terms).¹¹

⁷ See the results of an opinion poll carried out in May and June 1992 in Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 74 and 93.

⁸ Denmark in Europe, The Foreign Affairs Office, the 30th of Oct. 1992, Introductory remarks, Memorandum given to the parliamentary European Affairs Committee.

⁹ This actually proved to be the case to some point. Many voters were sceptical about ceding sovereignty and creating 'The United States of Europe', and when asked about specific political areas: European citizenship, the common defence policy, a European currency and the social dimension, these political areas were also areas which concerned the *Socialistisk Folkeparti*. See the results of an opinion poll carried out in May and June 1992 in Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 74 and 93.

¹⁰ *Socialistisk folkeparti* does not refer to Union Citizenship and Justice and Home affairs in direct terms in their written referendum campaign.

¹¹ See *Information material from the Danish parliament to the voters*, 1992, p. 7, and *Information material from the Danish parliament to the voters*, 1993, p. 2, and *Denmark in Europe*, The

This observation is actually quite important, because the Edinburgh Agreement, which was based on the 'national compromise', was interpreted by some foreign newspapers and academics as an intelligent illusion, a trick created by the Danish and European politicians to get the Danes to vote in favour of the Maastricht Treaty, without making any real changes. The argument was that Denmark did not gain anything that was not already found in the Maastricht Treaty. According to this argument, the Danes voted on exactly the same texts in the two referenda.¹² The fact that the Edinburgh Agreement is very much based on the wishes of the *Socialistisk Folkeparti*, i.e., on elements in the Treaty this political party opposed (from the beginning), at least to a certain extent withdraws from the 'illusion/trick-thesis'. We shall return to this later.

Of course the reasons for taking over the objections from the *Socialistisk Folkeparti* were of a pragmatic, political, nature. Most of the members of parliament wanted Denmark to ratify the Treaty and the exceptions agreed to were the political 'price' for getting that party to support Denmark ratifying the Treaty and advising their voters to vote 'yes' to the Treaty.¹³ But formally, the exceptions agreed upon must be seen as reflecting the Danish government's and the Danish parliament's interpretation of the Danish 'no' to the Treaty. The exceptions have played and still play an important role in Denmark's European policy and therefore their origin is quite interesting.

THE CONTENT OF THE 'NATIONAL COMPROMISE'¹⁴

First of all, the 'national compromise' contains quite a few declarations of intent concerning democracy, openness and transparency in the Community, an effective application of the principle of subsidiarity, involvement of the EFTA countries and the countries of Central and Eastern Europe in the European Community, preserving the environment, preventing unemployment, preserving the Danish welfare system and preserving the system of Danish labour market agreements (section B.1 of the 'national compromise').

Foreign Affairs Office, the 30th of Oct. 1992, Introductory remarks, Paper given to the parliamentary European Affairs Committee.

¹² See Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 24-26; Deidre Curtin and Ronald van Ooik, 'Denmark and the Edinburgh Summit: Maastricht without Tears', in David O'Keeffe and Patrick M. Twomey, *Legal issues of the Maastricht Treaty* (London, Wiley Chancery Law 1994) p. 349.

¹³ It worked, because at the next referendum on the Maastricht Treaty in 1993, 56.7% voted in favour of the Treaty and 43.3% against. 86.5% of the entire population voted in the referendum.

¹⁴ An English (German and French) version of the memorandum on the 'national compromise' can be viewed at <www.eu-oplysningen.dk/dokumenter/raadet/DER/der_111292> (consulted in July 2005).

The content of an agreement for Denmark is then outlined (section B.2 of the 'national compromise'). Denmark must make it clear in relation to the objectives of the Union that Community co-operation involves independent states, which in accordance with the founding Treaties, have freely decided to exercise some of their powers in common. Next the four exceptions are outlined:

Along with this clearer definition of the aims of Denmark's participation in the co-operation, any agreement must contain the following points:

- Denmark does not participate in the so-called defence policy dimension which involves membership of the Western European Union and a common defence policy or a common defence.
- Denmark does not participate in the single currency and the economic policy obligations linked to the third stage of Economic and Monetary Union. However, Denmark attaches great importance to participation in exchange-rate co-operation as formulated within the EMS and in the form which is to be carried forward in the second stage. Denmark must remain involved in close exchange-rate co-operation within the EC, even if and when other EC countries move into the third stage. Denmark will thus retain its national powers over financial and monetary policy, including legislation on the National Bank of Denmark.
- Denmark will have no obligations in connection with citizenship of the Union. However, for EC citizens living in Denmark it will retain the right to vote and to stand as a candidate at municipal elections and introduce both aspects for elections to the European Parliament.
- Denmark cannot agree to transfer sovereignty in the area of justice and police affairs, but can take part in the intergovernmental co-operation which has existed to-date. This means that Denmark cannot agree to parts of the third pillar being transferred to the area of supranational co-operation in the first pillar.

As a result of this, the objectives of the Union set out in the common provisions of the Maastricht Treaty will not apply to Denmark on the above points.

The 'national compromise' emphasises that the Danish agreement must be legally binding on all the twelve member states for an unlimited period. However, Denmark will not stand in the way of the other member states taking the co-operation further in one or more of the mentioned areas. The precise legal form of the agreement will be laid down in the forthcoming negotiations. A further referendum will be held when a result, which the Danish parliament can recommend, has been achieved.

Finally (section C), the Danish position in discussions at European Council meetings on enlargement, are outlined. Denmark must actively support membership of Poland, Czechoslovakia and Hungary. The balance between the influence of large and small countries must be maintained. The different cultures, histories and traditions of the applicant countries must be respected. Denmark must promote the further development of Nordic cooperation in a wider European framework.

Attention should be drawn to the fact that a new referendum is part of the national compromise. Formally, a new referendum was not necessary (and might legally even be not possible)¹⁵ according to Article 20 of the Danish Constitution now that the *Socialistisk Folkeparti* supported approving the Maastricht Treaty. Of course, one could argue, that it would have been political suicide to ratify the Treaty without asking the Danish population first, when they had already rejected the Treaty.

THE MEETING OF THE EUROPEAN COUNCIL IN EDINBURGH

After the 'national compromise' was struck, it was up to the Danish government to reach an agreement with the other member states at the meeting of the European Council in Edinburgh on 11 and 12 December 1992.

The results of the negotiations in the European Council concerning Denmark are to be found in Part B of the conclusions entitled 'Denmark and the Treaty on European Union'.¹⁶ Part B consists of three parts. In the first part, the Council *notes* that Denmark has submitted the memorandum *Denmark in Europe* to the other member states. Against this background the Heads of State and Government in the second part in a 'Decision' *agree* on four 'exceptions' in the field of citizenship (section A), the Economic and Monetary Union (Section B), defence policy (Section C) and Justice and Home Affairs (Section D). In Section E the 'Decision' emphasizes that Denmark has the right to abolish these exceptions at any time. The third part of the conclusions consists of some *declarations* from the Council on social policy, consumer protection, the environment and distribution of income (Annex A), and of some *unilateral declarations* from Denmark, mainly on statements regarding existing Community law and provisions in the Maastricht Treaty in the field of European Citizenship and Justice and Home Affairs (Annex B).¹⁷

¹⁵ I shall return to this in the paragraph on the second referendum on the Maastricht Treaty.

¹⁶ The conclusions of the European Council in Edinburgh can be found at <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=DOC/92/8&format=HTML&aged=1&language=EN&guiLanguage=en>>.

¹⁷ The agreement states that the European Council takes cognisance of the unilateral declarations from Denmark.

The four exceptions are as follows:¹⁸

1. The provisions of Part two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the member states additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a member state will be settled solely by reference to the national law of the member state concerned.¹⁹
2. Denmark will not participate in the third stage of the Economic and Monetary Union.
3. Denmark is only an observer to the Western European Union and does not take part in the elaboration and implementation of decisions and actions which have defence implications.
4. Denmark will participate fully in the cooperation on Justice and Home Affairs on the basis of the provisions of Title VI of the Treaty on the European Union.

The 'national compromise' had ambitions regarding many other – more general – issues like democracy, openness and transparency in the European Community, etc. (see *supra* after note 14). Even though many of these subjects were discussed at the Edinburgh meeting (and at the Birmingham meeting on 16 October 1992), and action was taken in some of the areas, the conclusions from the Edinburgh meeting reflect that the Danish population voting 'no' to the Treaty was primarily seen as an isolated Danish problem.

This follows, first of all, from the fact, that the Treaty was not *changed*. Secondly, it follows from the fact that Part B of the conclusions makes it clear that the Danish Agreement applies exclusively to *Denmark* and not to other existing or acceding member states. Denmark wanted the acceding member states to be able to have exceptions to the Maastricht Treaty as Denmark. Thus the 'national compromise' had stated in part C:

Variations in the twelve member states' bases for ratification are a demonstration of the flexibility which must naturally be the benefit of the applicant countries in their effort to have national wishes taken into account in the accession negotiations.

¹⁸ Only exception 1 and 4 are quoted in their entire, original wording.

¹⁹ The element of citizenship was to a certain extent dealt with differently in the national compromise and in the Edinburgh agreement. The national compromise did not express that the Union Citizenship should not take the place of national citizenship and that only Denmark decides if a person can become a Danish citizen. See also Curtin and Van Ooik, *supra* n. 12, at p. 359, where the authors compare the national compromise and the Edinburgh agreement.

However, the conclusions from the Edinburgh meeting state:

The conditions of admission will be based on the acceptance in full of the Treaty on European Union and the 'acquis', subject to possible transitional measures to be agreed in the negotiations.

Thirdly, that the Danish 'no' was seen as an exclusively Danish problem also follows from the final declaration in part B of the conclusions from the Edinburgh meeting, which states that:

As far as *Denmark* is concerned, the objectives of the Treaty in the four areas mentioned in sections A to D of the Decision are to be seen in the light of these documents, which are compatible with the Treaty and do not call its objectives into question. (emphasis added, HK)

This also illustrates another interesting aspect of the Danish Agreement. It is underlined that the four exceptions are *compatible with the Treaty* and do not call its objectives into question. A similar formulation is to be found in the beginning of Part B of the conclusions:

Against this background, the European Council has agreed on the following set of arrangements, which are *fully compatible with the Treaty*, are designed to meet the Danish concerns... (emphasis added, HK)

The two above-mentioned quotations can be understood in at least two ways, which at the same time reflect two important issues concerning the Edinburgh Agreement: did Denmark actually gain anything in the Edinburgh negotiations? And what was the legal status of the Agreement?

THE GAINS OF EDINBURGH

One could argue that the Danes did not actually succeed in obtaining 'real' exceptions from the Treaty at the meeting in Edinburgh. Curtin and Van Ooik have argued that the four exceptions were actually not exceptions because Denmark, according to them, did not gain anything that was not already to be found in the Treaty and thus the Treaty did not need to be adapted.²⁰ According to the two authors, the Danes voted on exactly the same texts in the two referendums.²¹

²⁰ Curtin and Van Ooik, *supra* n. 12, at p. 349-365.

²¹ *Ibid.*, at p. 364.

This, however, underestimates the Agreement's importance at a national level of the Maastricht Treaty's content. This is true as regards the early closure of options and for certain interpretations contained in the Edinburgh Agreement.

An example of the first point is the issue of the Economic and Monetary Union (EMU). The Edinburgh Agreement stated that Denmark would not participate in the third stage of the EMU. One could argue that because the possibility of not taking part in the third stage already exists in the twelfth Protocol of the Maastricht Treaty, Denmark did not get an 'exception' from the Treaty in Edinburgh. Denmark merely activated the Protocol at an early stage, namely the date of the Maastricht Treaty's entry into force on 1 November 1993.²²

However, even though Denmark 'only' used a possibility, which already was provided for in the Treaty, it did actually have an effect at the national level. The decision was taken immediately as a (national) condition for accepting the Treaty. Even though the decision can be changed later on according to the Edinburgh Agreement, it is stated in the explanatory memorandum to the Bill on Denmark approving the Edinburgh Agreement and ratifying the Maastricht Treaty, that the Danes will have a referendum before any of the four exceptions can be given up.²³ This means that parliament will not use its right under Article 20 of the Constitution to enact a bill with a majority of five-sixths of the members of the parliament. Denmark did in fact have a referendum on joining the third stage of the EMU in 2001, which was rejected with 53.2%.

²² Ibid., at p. 360-361.

²³ Explanatory memorandum attached to the bill on Denmark accepting the Edinburgh Decision and the Maastricht Treaty, Lovtidende, Tillæg A, 1992/93, column, 6703 and 6736. In Denmark the explanatory memorandum attached to the bill is legally considered an important source when interpreting the law. According to the explanatory memorandum attached to the original Bill on *Lov om ændring af lov om Danmarks tiltrædelse af de Europæiske Fællesskaber* [Statute on amendment of the statute on Denmark's accession to the EC], proposed by the Minister of Foreign Affairs on the 10th of March 1992 and passed by parliament on the 12th of May 1992 (in a slightly different version), the decision whether Denmark should enter the third stage of the EMU should be taken later. It is emphasized that a referendum is *possible* (Lovtidende, Tillæg A, 1992, column 5899). The bill or its accompanying notes do not promise the Danish voters the right to a referendum before entering the third stage of the EMU. Art. 20 of the Danish Constitution allows the parliament to give up sovereignty if five-sixths of parliament supports it. Entering the third stage of the EMU would mean giving up sovereignty. One could then argue, that the Danes would have had a referendum anyway at some point, because the Maastricht referendum in 1992 had not dealt with the third stage of the EMU. But in this case it is important to remember that five-sixths of parliament can decide to give up sovereignty. Only if these five-sixths cannot be gathered, a referendum is needed. It is also interesting, that (parts of) the EMU exception and (parts of) the Justice and Home Affairs exception were the only two of the four exceptions which would actually mean ceding sovereignty, according to Art. 20. See Hvidbog om Danmark og Maastrichttraktaten, Udenrigsministeriet, 1992, p. 48-50. Therefore the procedure in Art. 20 would not even have been necessary, if the Danish Parliament later on decided to abolish the other exceptions. Nevertheless the Danish population was promised a referendum if *any* of the exceptions – including the exceptions which did not fall under Art. 20 – were to be abolished later on.

So the exception on the EMU did have an effect at the national level. The Danish population was given the power to decide whether Denmark should join the third stage of the EMU and so far it decided not to do so. Nevertheless, it is true that Denmark did not gain much from the other member states. The Agreement on the EMU is much more important in the relationship between the Danish voters and the Danish government, though this does not make the exceptions less 'real'. Also logically the exceptions are 'real'. Making use of possibilities which already exist in the Treaty does not make them less of an exception to the Treaty rules, as has been said of the Danish position on citizenship and on the EMU,²⁴ because it 'closes' off the possibilities with regard to Denmark which the Treaty offers.

Furthermore, it is claimed that the Danish exception on defence policy merely clarifies or interprets the Maastricht Treaty.²⁵ But the power of clarification and interpretation should not be underestimated. Clarifying how specific articles must (and must not) be interpreted can prove to be of great importance later on, and it must be seen as a way of controlling the extent of the co-operation. Curtin and van Ooik themselves express doubts on how the Treaty should be interpreted regarding the question of whether all member states should be members of the Western European Union (WEU).²⁶ This is a question of great importance and is a very good example of the 'open space' left for interpretation. Once again some may not call this an 'exception' from the Treaty. However, also here the interpretation at Edinburgh eliminates other possible interpretations and thereby changes the position of Denmark under it. On this ground, I find that the clarifications of the interpretation of the Treaty must be considered as gaining something from the other member states at the Edinburgh meeting.

The clarifications of the interpretation of the Treaty and the closing of future possibilities in the Treaty in areas which demand unanimity have an effect on all member states, and thus the gains in these areas are of importance at Union level as well as at a national level.

More than ten years after the ratification of the Maastricht Treaty, it is clear that the Danish exceptions did actually have an effect on Danish European Union policy. Denmark has not participated in European co-operation in a number of

²⁴ Curtin and van Ooik claim that the Danish unilateral Declaration on Citizenship, where it states that nothing in the Maastricht Treaty implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state, could possibly be included in a future Council decision under Art. 8b (currently Art. 19 of the Treaty establishing the European Community; ECT) or perhaps Art. 8a (currently Art. 18 ECT). In that case, the unanimity requirement in Art. 8e (currently Art. 22) provides the guarantee that such a Council decision can only be adopted with Denmark's consent. The Danish exception on citizenship determines the Danish position in such a vote. See Curtin and Van Ooik, *supra* n. 12, at p. 359-360.

²⁵ *Ibid.*, at p. 363.

²⁶ *Ibid.*, at p. 361-362.

cases, e.g., in the field of peace keeping forces, but also in many other cases concerning the areas of the other exceptions. It is often the subject of political discussion whether Denmark should abolish the four exceptions. At this moment – June 2005 – opinion polls show that a majority of the Danish population supports abolishing them.

THE LEGAL STATUS OF THE EDINBURGH AGREEMENT

One can argue that the provisions quoted above reflect the legal status of the Edinburgh Agreement as an approved ratification reservation (conditions for ratification). The fact that it is emphasized several times that the exceptions only concern Denmark seems to confirm this thesis.²⁷ This complies with the Vienna Convention as the Maastricht Treaty holds no prohibition against ratification reservations.

However, Hjalte Rasmussen argues that, although some facts point in the direction of a ratification reservation, the Edinburgh Agreement must probably be regarded as an international agreement. The Edinburgh Agreement was not deposited together with the Maastricht Treaty with the Italian government. The Agreement was registered by the United Nations instead.²⁸ In the same line, Trevor C. Hartley makes a distinction between the different parts of Part B of the conclusions from the meeting of the European Council in Edinburgh.²⁹ The Decision, from Section A to E, is a 'decision of the Heads of State and Government, meeting within the European Council'.³⁰ The Decision is thus an act of the member states, not of the European Council. Hartley argues that the member states intended the Decision to be legally binding and that it is probably an international agreement in a simplified form.³¹ This agrees with the position of the Danish government which regarded the Decision as binding under international law.³²

According to Hartley, the Court of Justice would probably take the Decision into account in interpreting the Maastricht Treaty, but that is not to say that the Court would regard itself as bound by the Decision. According to the Danish government, the International Court of Justice would have jurisdiction to inter-

²⁷ Hjalte Rasmussen, *EU-ret i kontekst* [EU Law in Context], 2nd edn. (Copenhagen, Gad Jura 1995) p. 109.

²⁸ *Ibid.*, at p. 11.

²⁹ Trevor C. Hartley, 'Constitutional and institutional aspects of the Maastricht Treaty Agreement', *International and Comparative Law Quarterly* (1993) p. 234-237.

³⁰ See the conclusions from the meeting of the European Council in Edinburgh on the 11-12 Dec. 1992, Part B, Annex 1.

³¹ Hartley, *supra* n. 29, p. 234.

³² This is clear when reading the remarks following the Danish Bill on Denmark accepting the Edinburgh Agreement and ratifying the Maastricht Treaty, *Lovtidende*, Tillæg A, columns 6705 and 6706.

pret the Decision.³³ This however, according to Hartley, is not possible to the extent that the Decision affects the interpretation or application of the Maastricht Treaty, according to Article 219 in the Treaty.³⁴

When it comes to the Declarations by the European Council, these are acts of the European Council. According to Hartley it is uncertain what legal effect they have, because it is doubtful whether Community law gives the Council power to adopt binding acts in circumstances such as these. Nevertheless, the Court of Justice would probably take them into account when interpreting Community law, without being bound by them.³⁵

So the legal status of the Edinburgh Agreement has been the matter of discussion because of its, from a legal point of view, 'strange' character. It is difficult to place the Agreement within the system of European and international law, though in the end the Decision must probably be considered as an international agreement.³⁶ The question of the status of the Edinburgh Agreement has been eclipsed, however, because the Danish exceptions (except the EMU-exception) are now integrated in the fifth Protocol to the Amsterdam Treaty. Also, the provision on Union citizenship not taking the place of national citizenship has taken a firm and lasting place within the Community Treaty itself since the Amsterdam amendments.

THE SECOND REFERENDUM ON THE MAASTRICHT TREATY

On the 18th of May 1993, Denmark had a referendum on the Edinburgh Agreement and the Maastricht Treaty. This time five-sixths of the parliament supported Denmark ratifying the Maastricht Treaty, because the *Socialistisk Folkeparti* could support it after the Edinburgh Agreement. As mentioned earlier, a referendum is only needed when a majority of less than five-sixths of the parliament supports a bill on ceding sovereignty. Actually, it must probably be considered a violation of the Danish constitution to have a referendum in this case.³⁷ However Henning Koch argues that a constitutional convention has taken form, according to which referendums on transferring sovereignty to the European Community or European Union can take place even though five-sixths of parliament support it. This constitutional convention is considered to amend the constitution and can therefore now, according to him, be considered part of Danish constitutional law.³⁸

³³ *Ibid.*, column 6705.

³⁴ Hartley, *supra* n. 29, at p. 235.

³⁵ *Ibid.*, at p. 236.

³⁶ Besides Rasmussen and Hartley, for instance Curtin and Van Ooik, *supra* n. 12, p. 353-358.

³⁷ Henning Koch, 'Grundlovsstridige EU-folkeafstemninger' [Unconstitutional EU Referenda], in *Politik og jura. Festskrift til Ole Espersen* (Copenhagen, Forlaget Thomson 2004) p. 520.

³⁸ *Ibid.*, at p. 519-521.

Technically, parliament passed three bills (on the 30th of March 1993): A Bill on Denmark approving the Edinburgh Agreement and the Maastricht Treaty, a Bill on arranging a referendum on the Bill on Denmark approving the Edinburgh Agreement and the Maastricht Treaty and finally a Bill on amending the Act on Denmark's accession to the European Community.³⁹

The result of the referendum was 56.7% in favour of the Edinburgh Agreement and the Maastricht Treaty, while 43.4% rejected it. In this referendum, 86.5% of the Danish population voted. It is quite interesting to note that 19.6% of the voters who had voted 'no' in the first referendum in 1992 and voted 'yes' in the second referendum in 1993, were under the impression that there was nothing new in the Edinburgh Agreement.⁴⁰ As mentioned earlier, government and parliament had interpreted the outcome of the first referendum as requiring 'a national compromise which can *unite the population* on Denmark's participation in further EC co-operation' (emphasis added, HK). Viewed in this light, the politicians did not succeed in *uniting the population*, but they did succeed in convincing *a majority of the population* in voting in favour of the Treaty. Maybe apart from the first referendum in 1972 on Denmark's accession to the European Community, the Danes have never been united when it comes to Denmark's Community and Union policy. The outcome of the referendums on Community and Union treaties are always 50/50 – just as is the case in many other member states.

STRENGTHENING PARLIAMENTARY SUPERVISION OF COMMUNITY AND UNION POLICY

Parliamentary scrutiny of European policy was strengthened as a result of Denmark ratifying the Maastricht Treaty. In the explanatory memorandum to the Bill of the *Lov om ændring af lov om Danmarks tiltrædelse af de Europæiske Fællesskaber m.v.* [Statute to amend the Statute on Denmark's accession to the European Communities], proposed by the government on the 9 February 1993, it is emphasized that if Denmark ratifies the Maastricht Treaty and the Edinburgh Agreement, it shall have consequences for the way parliament works, in order to ensure more openness.⁴¹

³⁹ This special 'three-law-procedure' is used when, notwithstanding that five-sixths of the parliament are willing to approve a treaty which cedes sovereignty according to Art. 20, parliament still wants to hold a referendum. Henning Koch discusses the procedure in detail, *supra* n. 37.

⁴⁰ Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 142.

⁴¹ *Lov om ændring af lov om Danmarks tiltrædelse af de Europæiske Fællesskaber m.v.* [Statute to amend the Statute on Denmark's accession to the EC], proposed on the 9 Feb. 1993, column 6704.

On 19 March 1993, it was decided to strengthen the ordinary Select Committees role in the scrutiny of European business, the beginning of an on-going process of strengthening parliamentary control. Instead of primarily involving the Select Committee on European Affairs, all the Select Committees were since then involved. Of course, this fits very well with the character of Union-policy, which often has more in common with domestic policy than with traditional foreign affairs policy. At the same time the aim was to strengthen the public debate on European affairs, which was also the rationale for extending public access to governmental documents in the same year. Also several steps were taken to secure the Select Committee on European Affairs more information and more documents at an earlier stage. Since 1993, the involvement of the Select Committees in the scrutiny of European business has been strengthened further several times.⁴² (In 1996, the Select Committee on European Affairs managed to take even further steps in this direction).⁴³

On the date of the Maastricht Treaty's entry into force, the European Second Pillar co-operation (common foreign and security policy) and Third Pillar co-operation (Justice and Home affairs) were made the subject of parliamentary scrutiny in the Select Committee on European Affairs as well as in the Special Committee on Foreign Affairs, *Det Udenrigspolitiske Nævn* (which is not an ordinary Select Committee), and in the Select Committee on Justice.⁴⁴ In the Select Committee on European Affairs, there is a long-standing practice (more than 30 years) according to which the Danish ministers only vote for proposals in the European Council in matters falling under the supranational co-operation of the First Pillar if the majority of the Committee is not against it. Thus, the Danish government acts on the basis of a mandate from the Select Committee on European Affairs. Parts of Danish legal theory claim that these mandates must be considered legally binding for the Danish government.⁴⁵ When it comes to the

⁴² See Beretning om Folketingets behandling af EU-sager [Report on parliament's reading of EU-business], 27th of Sept. 1996, Beretning om Europaudvalgets fremtidige arbejde [Report on the future work of the Select Committee on European Affairs], 10th of May 2001, and Beretning om reform af Folketingets behandling af EU-sager [Report on reforming parliament's reading of EU-business], 10 Dec. 2004.

⁴³ Beretning om Folketingets behandling af EU-sager [Report on parliament's reading of EU-business], Select Committee on European Affairs, 27 Sept. 1996.

⁴⁴ Beretning om regeringens orientering af Folketinget om EU-sager [Report on government informing parliament on EU-business], Select Committee on European Affairs, 20 May 2004, p. 1.

⁴⁵ Henrik Zahle, *Dansk forfatningsret 1* (Copenhagen, Christian Ejler's Forlag 2001), p. 333-334; Helle Krunke, 'Folketingets kontrol med den europæiske udenrigs- og sikkerhedspolitik', in *Ugeskrift for Retsvæsen* [Weekly Journal on the administration of Justice] (2001), p. 401-409, and Helle Krunke, 'Den Udenrigspolitiske Kompetence', in *Udenrigspolitik og magtfordeling ved overgangen til det 21. århundrede* (Copenhagen, Jurist- og Oekonomforbundets Forlag 2003) p. 212. For a different opinion, see Jørgen Albæk Jensen, *Parlamentarismens statsreligie betydning* (Copenhagen, Jurist- og Oekonomforbundets Forlag, 1997) p. 136.

intergovernmental co-operation in the Second and Third Pillar, the government formally only notifies the Select Committee on European Affairs.⁴⁶ Nevertheless over the past five to six years the government has in a number of cases obtained a mandate from the Select Committee of European Affairs in Second Pillar policies.⁴⁷ The legal character of these mandates under the Second and Third Pillar is not clear.⁴⁸

According to Article 19 of the Danish Constitution, foreign affairs is traditionally a governmental prerogative in Denmark, parliament must only consent to far reaching decisions. Thus, the government does not need mandates from the Special Committee on Foreign Affairs. However, because it concerns 'European Affairs', the Select Committee on European Affairs is now involved in scrutinizing foreign affairs policy under the Second Pillar. Via the practice of giving mandates under the First Pillar policy – and maybe because there often is a close connection between the three Pillars in the European Policy – the Select Committee on European Affairs has managed to gain an influence on foreign policy which would not have been possible in the Special Committee on Foreign Affairs. This way, the Maastricht Treaty has had an effect on the separation of powers between government and parliament in the field of foreign affairs at a national level.⁴⁹

CONCLUDING REMARKS

This article is entitled *A long journey from Maastricht to Edinburgh*. Maybe the title should have been followed by a question mark. No doubt, geographically there is a long way from Maastricht to Edinburgh, but how about legally? And politically?

We have shown that a certain part of the legal doctrine was under the impression that the Edinburgh Agreement did not lead to any legal changes in the Maastricht Treaty, and thus it was a very short way from Maastricht to Edinburgh, at least legally. I do not entirely agree with this view, because the Agreement did result in some clarifications of the interpretation of the Treaty. These must be considered of legal importance. Also, some possibilities offered by the Treaty were closed off. Thus some elements of uncertainty about how far the Community and Union co-operation would evolve in the future were, with regard to Denmark,

⁴⁶ *Beretning om regeringens orientering af Folketinget om EU-sager* [Report on government informing parliament on EU-business], Select Committee on European Affairs, 20 May 2004, p. 4.

⁴⁷ *Beretning om Det Udenrigspolitiske Nævn's inddragelse i sager vedrørende EU's fælles udenrigs- og sikkerhedspolitik (FUSP)* [Report on the involvement of the special foreign affairs committee in the European foreign and security policy], 16 May 2001, p. 8 and p. 13.

⁴⁸ Helle Krunke, *supra* n. 45 (2001), at p. 401-409 and Helle Krunke, *supra* n. 45 (2003), at p. 213-218.

⁴⁹ *Ibid.* (2003), at p. 200-221.

eliminated. As argued, this can be considered as creating an 'exception' for Denmark. The Agreement – or at least the Decision which includes the four exceptions – must probably be considered as legally binding under international law, and at least since the Amsterdam Treaty's entry into force, also under Union law.

Furthermore, as explained above, there was also a legal effect at the national level, because the Danish population was promised a referendum before any of the four exceptions could be abolished. This promise was laid down in the explanatory memorandum to the Bill on approving the Edinburgh Agreement and the Maastricht Treaty and therefore it has considerable legal force. Even though one can argue that the Bill cannot alter Article 19 and 20 of the Danish Constitution, the promise (and the Edinburgh Agreement) can be considered as preconditions for ratifying the Maastricht Treaty. Furthermore, one could argue that by now a constitutional convention has taken shape, according to which the Danish people must always have a referendum when approving a new Community or Union Treaties, or when Denmark cedes sovereignty to the Community or the Union. This would mean taking Henning Koch's argument about the existence of a constitutional convention amending the Danish constitution – referenda on transferring sovereignty to the Community or Union can take place even though five-sixths of parliament support its – one step further.⁵⁰ Such a constitutional convention did not exist at the time of the referenda on the Maastricht Treaty.

From a political point of view, it was a long journey from Maastricht to Edinburgh. It required extensive negotiations, both among the political parties at the national level, as well as at the European level.⁵¹ On top of that – and perhaps this was the most difficult – the voters had to be convinced. The Danish parliament spent almost 25 million Danish kroner on distributing information to the voters.⁵² Finally, ratification of the Maastricht Treaty was only possible for the following five reasons:

1. There was a sufficiently large opposition party in the first Maastricht Treaty referendum (*Socialistisk Folkeparti*) which could attract a sufficiently large number of votes if the party changed its mind towards supporting the ratification of the Treaty.

⁵⁰ See also Henning Koch, *Kommentar til Grundlovens § 42*, in Henrik Zahle (ed.), *Danmarks Riges Grundlov med kommentarer* (Copenhagen, Jurist og Oekonomforbundets Forlag 1999), p. 220.

⁵¹ The negotiations at the European level are described in Jørgen Ørstrøm, *supra* n. 2, at p. 50-59. According to Jørgen Ørstrøm the Edinburgh negotiations were very difficult from a technical point of view. From a political point of view, the exception on defence was the most difficult of the four exceptions to negotiate. *See ibid.*, at p. 57.

⁵² Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 27. The sum of 25 million Danish kroner is equivalent to approximately 3-3,5 million Euro.

2. The outcome of the first Maastricht Treaty referendum was very close: 49.7 % against 50.7%.
3. Denmark managed to get a special agreement in Edinburgh. This is one of the two main reasons for the 'no' turning into a 'yes'.⁵³ A little – but sufficiently significant – group of voters changed their minds.⁵⁴
4. Many voters felt insecure about the future position of Denmark in Europe if the outcome of the referendum had once more been a 'no'. This was the second main reason for the 'no' turning into a 'yes'.⁵⁵
5. The reasons for the Danes voting 'no' in the first referendum were mainly related to the European Community/European Union (not to dissatisfaction with their leaders or for other ulterior motives). Therefore it was possible to satisfy the dissatisfaction – at least with regard to a sufficient number of the voters – by way of an agreement in the European Council and some promises made by the Danish Government to the Danish population on Denmark's future EC and EU policy.

Perhaps something can be learned from the Danish experience with the Maastricht Treaty now that the Treaty establishing a Constitution for Europe has been rejected in referenda in France and the Netherlands.



⁵³ Ibid., at p. 160.

⁵⁴ Whether the Agreement actually brought legal changes to the Maastricht Treaty or not, was not important to one fifth of the 'no'-voters from the first Maastricht referendum, who voted 'yes' in the second Maastricht-referendum, even though they were under the impression that there was nothing new in the Edinburgh agreement.

⁵⁵ Siune, Svensson and Tonsgaard, *supra* n. 4, at p. 160.