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THE DRAFT TREATY ESTABLISHING THE EUROPEAN UNION
CONSTITUTIONAL AND POLITICAL IMPLICATIONS
IN DENMARK

by

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The European Policy Unit

The European Policy Unit, at the European University Institute, was created to further three main goals. First, to continue the development of the European University Institute as a forum for critical discussion of key items on the Community agenda. Second, to enhance the documentation available to scholars of European affairs. Third, to sponsor individual research projects on topics of current interest to the European Communities. Both as in-depth background studies and as policy analyses in their own right, these projects should prove valuable to Community policy-making.

In October 1984, the EPU, in collaboration with the University of Strasbourg and TEPSA, organised a conference to examine in detail the Draft Treaty Establishing the European Union. This Working Paper, presented at the conference and revised in light of the discussion, will appear in book form later in 1985 along with other studies of the Draft Treaty.

Further information about the work of the European Policy Unit can be obtained from the Director, at the European University Institute in Florence.

PART ONE: The Draft Treaty establishing the European Union and the Danish Constitution.

I. The Draft Treaty establishing of the European Union.

1. The purpose of this section is not to give legal evaluation - let alone a political one - on the merits of the Draft Treaty establishing the European Union. It is rather to provide some preliminary information as to the constitutional process required in Denmark should this draft be submitted for approval in Denmark.

2. A few general remarks may, however, be called for. From the point of view of a lawyer who has to check into the compatibility of the Draft with the national Constitution it is striking that although the Draft is based on clear principles and ideas it contains quite some measure of ambiguity. No doubt part of this is due to the inability of the present reporter to fully comprehend all the intentions behind the various articles and paragraphs in the Draft. Part of the ambiguity is on the other hand unquestionably contained in the basic approach chosen by the European Parliament.

a. While the Draft is based on the "acquis communitaire", the future legal position of the basic Community Treaties is only defined in the broadest terms. The Community Treaty provisions relating to the objectives and scope of the Treaties are part of the law of the Union, but only in so far as they are not explicitly or implicitly amended by the new Treaty. Though not formally a part of the new Treaty they may be amended only by the procedure governing treaty amendmends.

All other provisions of the Community Treaties which are not incompatible with the new Treaty are also law of the Union, but subject to amendmends through the procedure for organic laws.

We would suggest that the determinations as to which provisions of the Community Treaties concerns their objectives and scope opens up an area of great legal uncertainty. Likewise it is impossible to have an exact idea as to which of those provisions that have been implicitly or explicitly amended by the new Treaty.

Finally the determination of any incompatibility of the "other" Treaty provisions with the new Treaty is marked by the same kind of legal uncertainty.

A few examples may illustrate some of the difficulties:

- Does article 235 of the Rome-Treaty concern the "Scope" of that Treaty? In the affirmative should it be considered that the objectives in Article 9 of the Draft have explicitly or implicitly replaced Art. 2 of the Rome-Treaty with respect to the objectives which may be pursued under Article 235?

If Article 235 is applicable under the Draft it is conceivable that not only the legislature may apply it, but also the European Council with respect to cooperation matters, and if so will the requirement of unanimity be maintained?

- Do Article 30-36 and Article 48 paragraph 4 (which makes an exception for the free movement of workers with respect to the public administration) of the Rome- Treaty concern the "objectives

and scope" of the Rome-Treaty, and in the affirmative have these provisions been implicitly or explicitly amended through Article 47 of the Draft relating to free movements?

These are only a few of many questions which we feel unable to answer with any reasonable degree of certainty.

b. It seems certain that the new Draft does involve fundamental amendmends of the basic Treaties without however respecting the procedures laid down in Article 236 of the Rome-Treaty and the equivalent provisions of the other basic Treaties. This of course raises delicate problems which are dealt withbelow under chapter VII.

c. The distinction - conceptually clear - between common action and cooperation also seems in the legal sphere to raise a number of questions. In particular: through what legal instruments is the cooperation exercised and executed. The European Council - the primary centre for cooperation - may pursuant to Article 32 undertake commitments in the fields of cooperation. Are such commitments part of the law of the Union which is directly applicable in the Member States pursuing to Art. 42? And to what extent is the Court competent to interprete and ajudicate with respect to such commitments!

Art. 10 paragraph 2 defines common action as all the internal and external acts of the Union including among other things recommendations from the Union institutions. According to Art. 46 the Commission and the Parliament may adopt recommendations with a respect to cooperation undertakings regarding "espace judiciaire" and other enumerated matters. The Euro-

pean Council may adopt recommendation regarding all matters of cooperation pursuant to Article 32. It would logically seem to follow that such recommendations -unintentionally - would bring a cooperation action under the area of common action.

For the purpose of this paper we will assume that cooperation matters are dealt with as intergovernmental cooperation. To the extent that this assumption may be erroneous the subsequent evaluation of the constitutional implications in Denmark has to be reconsidered.

II. The Danish Constitution.

1. The Danish Constitution in its present form was adopted in 1953. Compared to other constitutions it is singularly difficult to amend. Consequently, amendments to the Constitution are the extreme exception in Danish constitutional life. In this century, the Constitution has only been amended in 1915 and in 1953. The requirements for amending the Constitution are contained in section 88 of the Constitution. According to this section a bill to amend the Constitution which has been passed by the Parliament - "Folketing" - under the procedure for ordinary laws must be presented once more to a newly elected "Folketing". The new "Folketing" must then adopt the same constitutional text without any further amendments. Following the second adoption the proposal shall be submitted for a referendum for approval with a simple majority. However, the votes in favour of the amendment must in any case amount to at least 40% of the total electorate.

This very cumbersome procedure (which was even more stringent prior to 1953) has in fact led to a kind of a politico-constitutional common wisdom that only amendments passed in unanimity by all major political parties and likely to be of such popular interest that a major turnout to the polls can be secured can be considered in Denmark.

2. It was exactly this very cumbersome procedure for amending the Constitution which led professor Max Sørensen to suggest to the Parliament in 1952 that provisions might be inserted allowing for transfer of constitutional powers to international authorities without amending the Constitution. The Danish Constitution, originally drafted in 1849 under strong influence from the Belgium Constitution of 1831 was inspired by the Dutch Constitutional provision with regard to transfer of sovereignty to international authorities. The text proposed by Max Sørensen suggested that such transfer of sovereignty could be decided by an ordinary bill. However, a certain minority in the "Folketing" would have the right to request that such a bill be ratified by the next elected "Folketing" prior to its entry into force. In the political process necessary to achieve unanimity among all major political parties on the constitutional amendments in 1953 the procedure for adoption of such bill was however dramatically amended. A majority of 5/6 of the total "Folketing" (i.e. 150 members out of the 179 members must vote in favour) is required. If this majority is not obtained, though simple majority is secured, the bill can only be promulgated if it has been submitted to a referendum in accordance with section 42 of the Constitution. Pursuant to this section a bill adopted by Parliament can be rejected by the electorate if a majority votes against and this majority constitutes at least 30% of

the total electorate. The provisions of section 20 have only been used twice since 1953. The first time was Denmarks accession to the European Communities. The bill for accession did not obtain the required 5/6 and was consequently submitted for a referendum where it received the consent of almost 2/3 of those voting amounting to more than 50% of the total electorate.

The second time of application of section 20 was the conventions for the European patent and for a Community patent. The bill for Danish accession to these conventions did not receive the 5/6 majority. The bill has been considered unfit for a referendum and is therefore still on the government's table.

The procedural aspects of the Danish provision regarding transfer of sovereignty to international authorities differ considerably from those of other Member States if not qualitatively then at least quantitavely. Also the substantive provisions regarding transfer of sovereignty seem somewhat more strict in Denmark than in other Member States. The text of section 20 paragraph 1 reads as follows:

> "Powers vested in the authorities of the Realm under this Constitution Act may to such extent as shall be provided by statute be delegated to international authorities set up by mutual agree ment with other States for the promotion of international rules of law and cooperation."

The theoretical background for the provision is explained by Max Sørensen in the following manner in his textbook on constitutional law:

"It is a fundamental principle in Danish constitutional law that legal authority vis-a-vis citizens is exercised by organs directly established pursuant to the Constitution or which, in any case, are a part of the Danish constitutional system. The legislative power lies primarily in the elected assembly. The executive power lies with the ministers responsible towards the "Folketing" with the elected municipal councils or with independent executive agencies which, however, are subject to the Danish legal system as regards the regulation of their responsibility. The judicial power rests with the independent courts instituted by the Constitution. It is true that the legislative power may within certain limits delegate its competence to other organs and it may to a certain extent change the distribution of competence between the courts and the administration, but this does not authorize it to transfer powers to organs which are outside the Danish constitutional system. Such a transfer of competence would not be possible without amending the Constitution as it would violate the said fundamental principle that authority over citizens are exercised by Danish organs".

"Any power which pursuant to the Constitution is exercised by the authorities of the Kingdom may be transferred pursuant to Section 20. When this provision speaks of powers vested in the authorities of the realm under this Constitution Act, it is not only the specified competences in the Constitution, such as the King's right to cause money to be coined in section 26, but also the broad categories of constitutional competences spelled out in section 3 of the Constitution" (which institutes the legislative power, the

executive power and the judicial power respectively).

"The powers vested in the authorities of the Realm to which section 20 refers do not include the power to amend the Constitution. Pursuant to section 88 only the legislative power and the electorate in combination can exercise this power, and it is therefore not exercised by an authority in the sense of section 20. It is therefore not possible to transfer to an international authority the power to amend the Constitution, for instance to determine that the form of government should be republican, that foreigners be given voting rights, that a person who is taken into custody is not required to be brought before a judge within 24 hours or that expropriation is possible without due compensation. It is however obvious that the very transfer of powers provided for in section 20 may to a certain extent amend the Constitution in the sense that the powers will no longer be exercised by Danish authorities as presumed in the Constitution, but by the international authority to whom the powers have been transferred. In other words, section 20 allows for the amendment of the system of competence established by the Constitution, whereas the material conditions for or limitations in the exercise of these powers may not be changed."

III. Section 20 and the substantive provisions of the Draft.

1. It is possible to read Art. 45 in such a way that this article which refers to Art. 9 concerning the objectives of the Union gives the general delimitation of the powers of the Union"ratione materiae". According to such an interpretation the Union would be able to legislate, take executive action and actions with respect to third countries covering all subject matters referred to in Art. 9. The competence of the Court would obviously cover the same fields.

   Given the fact that the aims of the Union in Art. 9 are described in the broadest possible terms such interpretation would in fact imply that the Union had unlimited competence. Under Section 20 of the Constitution , however, competence may only be transferred to an extent to be provided by statute. In his text book on constitutional law Max Sørensen states that:

   > "this condition imply that there must be a certain level of precision with respect to the powers to be transferred.
   >
   > Negatively, it may be said that it is excluded to transfer all legislative competence or judicial competence in general etc. Even less it would be possible to transfer all powers belonging to Danish authorities and thus abolish Denmark as an independent State.
   >
   > The required level of precision implies that the powers are clarified with respect to their kind - legislation, administration, judicial decisions etc. - as well as with respect to their subject matter. The comparable provision in the Norwegian

Constitution section 93 uses the words "within a materially limited field". The Danish provision must be understood in this sense. It is consequently required that all decisions which may be taken by the international organ are defined with respect to their subject matter or object.

On the other hand it cannot be demanded that this delimitation should be formulated in a narrow way. There is no quantitative criteria in the wording of the Constitution. There is no basis for implying any demand that the transfer can only be made within a limited scope meaning within few subject matters or within areas of lesser importance.

Consequently, nothing prevents powers to be transferred with respect to subject matters defined in broad categories such as the provisions in the Treaty of Rome concerning the European Economic Community, in particular Art. 3."

It is obvious that under the above given interpretation of Art. 45 Section 20 would be inapplicable. Only a full- scale constitutional amendment could be used in such a case.

On the other hand it would seem from the general scheme of the Draft that the intention has been that the Union may only exercise competences pursuant to the individual articles of chapter 1 - 3 of part 4 and part 5 regarding the finances of the Union. If this assumption is correct and Art. 45 therefore could be clarified in this respect without any change in its meaning one will have to look at the

delimitations given in the various chapters in part 4 and part 5 of the Draft.

2. Compared to the competence of the present Communities the Union's competence seems to be enlargened in different ways:

- new areas of activities such as education, culture and health are added.

- The union competence in areas where the Community has only a very limited competence such as taxation and social affairs is greatly increased. The competence to impose taxes and collect the revenue as "own income" is even without limits in the Draft.

- limitations inherent in the Community Treaties with respect to the exercise of the competence are either set aside by the Union Treaty, or may possibly be set aside by decisions of the Union institutions. As said above in chapter I it is very unclear to the present reporter to what extent this may happen.

- the objectives of the Union provided for in Art. 9 of the Draft is considerably wider than the objectives in Art. 2 and 3 of the Rome-treaty. Given the impact which these objectives have for the interpretation of the various substantive provisions this will also be a factor in enlarging the competence of the Union compared to the competence of the Communities.

Nevertheless, nothing would in principle exclude the transfer of powers to this wider extent pursuant to

section 20 of the Constitution. As is quoted above from Max Sørensen there is no requirement in the Constitution with respect to the quantities of the powers transferred.

It is not possible without a very detailed study to see if the powers intended to be transferred by means of the various provisions are spelled out sufficiently clear to meet the requirement of section 20. This, however, would rather be a matter of drafting and clarity than of quantity.

The clarity required does of course not imply that there can be no room for future interpretations. Many important questions with respect to the present text should, however, be solved prior to a possible signature of the Draft. Such questions would include:

- A clarification of Article 7 as discusssed under chapter I.

- Does Article 55, which gives the Union concurrent competence in the field of social, consumer protection, regional environmental education and research, cultural and information policies give the Union a general competence with respect to these matters subject only to the individual limitations in the following Articles?

- In Articles 57-59 and 62 the Union is given power to encourage the attainment of various objectives. Does such power limit the Union to making programmes which the Member States may or may not chose to comply with?

- Pursuant to Article 56 the Union may take action with respect to social an health matters "in

particular in matters relating to" a number of specified objects. Does such wording imply that in fact any other action in the field of social and health policy which conforms to the broad objectives in Article 9 would also be possible?

- Article 4 paragraph 1 may be read to imply, that the Union will have as one of its tasks to ensure the compliance of Member States with the fundamental rights of the Union. It is obvious that the Union will be under an obligation not no violate the fundamental rights and not to legislate in a way which compels Member States to act contrary to the fundamental rights of the Union. However, if Article 4 paragraph 1 is also intended to grant authority to the Union to protect the citizens against other violations of their fundamental rights, one would have to inquire what remedies the Union would have at its disposal. It appears from paragraph 4 of Art. 4 and from Art. 44 that if Member States in their own rights violate the Human rights of their citizens, the only legal remedy for the Union is a partial suspension of the participation in the activities of the Union If this interpretation is correct it would seem that no powers would be transferred from Danish authorities in this respect.

3. It must be kept in mind that the Union may not pursuant to Article 20 be authorized to act contrary to the substantive provisions of the constitution.

If the freedom of movement with respect to persons would include a right to all jobs in the public administration, i.e. if Article 48 paragraph 4 of the Rome-treaty is considered contrary to Article 47 or if it may be amended through the adoption of an

organic law, then this part of the Draft would require a constitutional amendment.

4. Article 11 of the Draft Treaty authorises the European Council to transfer matters of "cooperation" to the area of "common action". Such transfer will inevitably imply a corresponding transfer of competence to the Union pursuant to Section 2o.

However Section 2o of the Constitution does not allow the transfer of the powers contained in that section. In other words, the institutions of the Union may not be authorized via section 20 to decide to transfer matters from national competence to Union competence. The powers which are to be transferred must be determined in the statute which transfer the powers to the Union.

Theoretically it would be possible for the "Folketing" to transfer powers so to speak in advance in all cases cowered by Article 11. Such a construction was applied at the time of Denmarks accession to the EC with respect to Article 235 of the Rome-Treaty. Where others may consider Article 235 an instrument of gradual transfer of competence to the Community the approach taken in Denmark was to transfer in the bill of accession all powers to the Community with respect to Article 235. In this as in all other cases, the transfer of power is subject to the understanding that the powers may still be exercised by Danish authorities until such time as they are used by the Community.

However one may doubt whether it would be realistic to transfer in advance all powers which could be the subject of a decision pursuant to Article 11.

If decisions pursuant to Article 11 will be taken by unanimity it would on the other hand be possible to pass the necessary bills pursuant to section 20 each time a subject matter would be transferred from "cooperation" to "common action". The Danish Prime Minister would then have to make sure prior to his formal acceptance of any decision pursuant to Article 11 that the necessary bill under Section 20 of the constitution had been passed.

IV. Section 20 and the supremacy of Union law over the fundamental rights guarantied by the Constitution.

The transfer of competence pursuant to Section 20 of the constitution does not imply that the recipient institutions may act in contravention of the fundamental rights guaranteed in the Danish Constitution.

The principle of the supremacy of the law of the Union even vis-a-vis national constitutions therefore raises a problem. The problem is however not new. It already exists in the Community as it stands.

In certain other Member States having extensive cataloques of fundamental rights a certain national case law already exists in this respect. In Denmark it has been considered most unlikely that a conflict would ever arise due to the fairly limited scope of the fundamental rights guaranteed in the Danish constitution and the limitation of the competence of the Community.

The practise developed by the ECJ with respect to fundamental rights has further eliminated the likelihood of any prospective conflict.

Article 4 of the Draft codifies the Court's jurisprudence with respect to fundamental rights and it would - even with the expanded Union competence - be most unlikely that a conflict would arise. A further analysis of the fundamental rights guaranteed in the constitutions of the Member States might even show, that all relevant fundamental rights found in the Danish Constitution would be fully covered by the common principles of the constitutions of the Member States, which must be protected by the Court pursuant to Article 4 of the Draft.

It would therefore seem that no new problems of principle would arise due to the fact that under section 20 of the Constitution no powers to act contrary to the fundamental rights of the Constitution may be transferred.

V. Section 20 and the Institutional set up of the Union.

1. Under Section 20 powers may be transferred to international authorities set up by mutual agreement.

Max Sørensen writes that the most important element in this respect is that:

> "the authority shall be international. The transfer may thus not be made to the authorities of a foreign State. It is immaterial how the international organ is constituted and what legal position it has. It may be an organ composed of representatives of the Governments or Parliaments of the Member States. It may be a parliamentary organ elected through direct elections in the Member States in total, or it may be an independent organ the members of which are not bound by

instructions from any side, such as for instance the Commission of the European Communities or an international court."

"The international authority shall be created by mutual agreement. ... When the term "mutual" is used with respect to the agreement the aim undoubtedly is not only formal in the sense that the agreement is made by mutual obligations on all the participating states. The aim is also and in particular that the agreement must be based on a certain principle of equality in the sense that the international authority must have the same powers with respect to all participating States and that there is no discretionary discrimination between the participating States with respect to their influence in the organization. This does not exclude, however, that the size of the population or other similar quantitative factors are taken into account in the determination of the composition of the individual organs or in the voting rules or with respect to definition of rights and duties at large.

2. In general the Draft raises no problems with respect to the institutional set up of the Union.

It is however remarkable that the existing balance within the institutions between the larger and the smaller Member States has been dramatically changed by the Draft in favour of the larger Member States. The fact that this change has not been explained in the various papers of the European Parliament might signify that this aspect has not been given much attention by Parliament.

The transfer of power from the Council to the Parliament gives the larger Member States far more influence. This is due to the fact that the composition of the Parliament gives greater weight to the relative size of the population of each Member State than the voting rules of the Council.

In a pre-federal system like the Union it seems of course perfectly resonable, that the "Peoples Chamber" is composed with due regard for the relative size of the populations of the Member States.

However, The same logic must ofcourse imply that in the "State Chamber" the States are represented with equally due respect for the principle of "one state one vote". It is therefore surprising, that the Draft does not involve any steps in that direction. If the existing balance in the instittutions between larger and smaller Member States should be preserved the vo ting rules of the Council should have been changed in the direction of "one State one vote".

In fact the existing voting rules for the Council are also changed in favour of the large States. Thus simple majority in the Council is not necessarily a majority of governments represented, as is now the case, but may in fact be a minority consisting of no more than three governments of larger States out of the ten governments represented in the Council.

Qualified majority similarly means in fact only a simple majority of the governments represented in the Council if this simple majority includes most of the larger States.

It is clear that the influence of the smaller Member States is thus reduced both by the transfer of competance from the Council to the Parliament and by the proposed voting rules of the Council.

The result is that the smaller States will have a representation which is less than what would follow from f.i. the US constitution.

On top of this the over-representation of the larger States in the Council may only be changed by amending the Treaty, i.e. by unanimity, whereas the - smaller - over-representation of the smaller States in the Parliament may be changed by an organic law, i.e. almost by the larger States alone.

On basis of these facts one might expect a discussion in Denmark as to the requirement of a "fair representation".

The composition of the Court and the Commission may also be changed by an organic law. In our view it would be unthinkable that the smaller Member States lost their seats in these two institutions. A discussion with respect to these institutions would therefore focus on the lack of any legal guarantees in this respect.

3. The legal instruments available to the Union are mostly clear and represent a continuation of the Community's legal instruments.

The commitments and recommendation of the European Council with respect to matters of cooperation may however give rise to doubts as mentioned in chapter I. The term "commitment" is thus in the Danish text called "forpligtelse" which means obligation. We have

nevertheless assumed that such commitments are either political in nature or at any rate not part of the law of the Union which pursuant to Article 42 is directly applicable in the Member States. Under that assumption no powers would be transferred from Danish authorities to the European Council.

VI. Section 20 and the European Union as a quasi federation.

We have in the preceding chapters looked into some of the main elements in determining whether section 20 of the Danish Constitution is of application with respect to the Draft presented by the European Parliament.

It may be expected, however, that in the event the Draft would be submitted to the "Folketing", an argument would be advanced to the effect that the Draft involves more loss of sovereignty than is permissible under section 20 of the constitution. The combination of the very vide Union Competence "ratione materiae", the limited Danish influence in the decision-making process, the unlimited right of the Union to impose taxes and the strong position of the Union as a subject of international law might taken together be considered beyond what may be acomplished by virtue of section 20 of the constitution. In favor of this view it may be argued that the Union in fact is a federal State and that section 20 only covers transfer of powers to international authorities, and not to a federal state.

Against this argument it could be pointed out that the basic meaning of the term "international authority"in section 20 is no doubt to exclude transfer of

competence to foreign States. The federal State would - in our case - not be a foreign State since Denmark would be a Member State. It could further be said that section 2o does not use the term "international Organization" but international authority thus clearly accepting that also entities which are so sovereign, that they would not be classified as international organizations may be adhered to pursuant to Article 20.

We - for our part - would,however, not find it unreasonable if adherence to a full-fledged federal State would be considered as being beyond what may be accomplished pursuant to section 20 of the Constitution. However the Union is clearly not a full-fledged federal State.

To go beyond this, and assume that adherence to a highly integrated Union which is not a full-fledged federal State could in principle not be accomplished via section 20 of the constitution would in our view not follow from the text or legislative history of section 20. It would, however, clearly be within the legitimate rights of the "Folketing" to make such a qualitative interpretation of Section 20. Under such an interpretation the application of section 20 could be restricted to transfer of powers of a politico-constitutional importance, which is consonant with the requirements for adopting a bill pursuant to Section 20. An interpretation of this kind would in our view imply an evaluation of the combined impact of all the changes proposed compared with the present situation under the Community Treaties.

It should be noted that the "Folketing" did not rely on a qualitative interpretation with respect to the European Patent Conventions. A qualitative approach

would clearly have resulted in an adoption of the patent Conventions pursuant to section 19 of the Constitution (i.e. simple majority), without application of section 20 as these Conventions are void of any politico - constitutional importance.

VII. Procedures for adoption in Denmark.

1. The Danish constitution and legal tradition with respect to international law is the so called dualism. Pursuant to section 19 of the constitution the King (Government) negociates and ratifies international treaties. The consent of the "Folketing" - given as a folketing resolution or in form of a bill - is required in all important cases.

   The implementation of treaties is generally subject to specific legislation in casu first of all a bill pursuant to section 20 of the constitution.

   A bill containing the "Folketing" consent to ratification pursuant to section 19 of the Constitution and provisions for transfer of powers pursuant to section 2o would be introduced by the Government.

2. The Draft Treaty on the European Union is obviously amending to basic EC - Treaties and the Danish authorities are therefore obliged - on top of their own constitutional procedures - to follow the rules laid down in Article 236 of the Rome - Treaty (and the equivalent Articles in the other Treaties). Only after completion of such procedures a bill could properly be introduced nationally.

3. A private member of the "Folketing" could introduce the Draft by a "forespørgselsdebat" (questions to the Government with a formal debate). At the end of this debate a formal motion may be adopted which could express the opinion of the "Folketing" with respect to the Draft and request the Government to submit a bill as described above.

VIII. Summary and Conclusions

1. An approval by Denmark of the Draft Treaty establishing a European Union would have to be made either through an amendment to the Constitution or by a bill adopted in accordance with the special procedure in Section 20 of the constitution governing transfer of powers from Danish to international authorities.

   The procedure for a Constitutional amendment being very difficult and time- consuming the focus of interest lies in examining the possibility of adhering to the Draft Treaty by way of a bill pursuant to section 20 of the Constitution. This procedure requires either a 5/6 majority in the "Folketing" or a simple majority coupled with a referendum.

2. The Draft Treaty uses a sometimes very broad language open to differing interpretations. The findings of this report is therefore subject to a number of reservations regarding the interpretations of the Draft.

3. The power of the European Council to transfer matters of cooperation to matters of common action is difficult to comply with under the terms of section 20 of the Constitution and will probably require an amend-

ment to the Constitution unless decisions by the European Council to transfer matters of cooperation to matters of common action is taken by unanimity.

4. The enlargened competence of the Union "ratione materiae" is in principle compatible with Section 2o of the Constitution. However, a number of clarifications in the text as to the extent of the new competences should be made prior to any Danish accession in order to comply with the requirement of section 20 that powers may only be transferred to such extent as shall be provided by statute pursuant to Section 20.

5. Pending clarifications it might be that at least one substantive provision of the Constitution which reserves certain jobs in the public administration for Danish nationals would have to be amended by the procedure for constitutional amendmends.

6. The explicit provisions regarding the supremacy of Union law would most likely not give rise to new constitutional problems in Denmark because it is unlikely that a conflict between the fundamental rights of the Danish Constitution and the fundamental rights protected by the Union would occur.

6. The composition and voting rules for the Parliament and the Union Council gives the Smaller Member States a representation which is less than in a full-fledged federal State, and which could become even smaller if an organic law redistributed the seats in Parliament. A discussion in Denmark with respect to "fair" representation as required by section 20 of the Constitution, may be expected.

The legal instruments available to the European Council in matters of cooperation are not clearly

defined. A clarification may be necessary to comply with section 20 of the Constitution.

7. The combined effect of all the changes contained in the Draft Treaty might be considered to be of such politico- constitutional importance that a Constitutional amendmend rather than a bill pursuant to section 20 would be considered the most correct solution, but such an interpretation is probably not necessary from a legal point of view.

Part TWO: The Draft Treaty establishing a European Union and the political parties

I. The Danish political parties.

The following parties are represented in the "folketing" using the traditional yet sometimes erroneus left/right order:

Venstresocialisterne (Leftist Socialists)	5
Socialistisk Folkeparti (Peoples Socialists Party)	21
Socialdemokratiet (Social-democratic Party)	57
(S) Det radikale Venstre (the Radical Party)	10
(G) Kristeligt Folkeparti (Christian Peoples Party)	5
(G) Centrumsdemokraterne (the Center-democrats)	8
(G) Venstre (the Liberal Party)	23
(G) Det konservative Folkeparti (the Conservative Peoples Party)	42
(S) De frie Demokrater (the Free Democrats)	1
Fremskridtspartiet (the Progress Party)	5
Outside the parties (the Faroe Islands and Green land)	2
Total	179

The four parties with a (G) added are forming the government. The two parties with an (S) added are in general supporting the Government in domestic issues. This block har a practical majority as the two members outside the parties will not both vote against the government on a critical issue.

The list shows that Denmark is blessed with numerous parties. We shall in the following concentrate on the four most important parties which for our purpose are

the Social-democratic Party, the Radical Party, the Conservative Party and the Liberal Party.

II. The "Folketing" debate on EC-questions in May 1984

1. In May 1984 the two left wing socialist parties in the "Folketing" requested a debate on the following questions to the Government:

> "Will the Foreign Minister inform the "Folketing" of the Government's position on the EC-policy for the next five years including the future financing of the EC, the plans for a union, plans for incorporating new areas, such as security and culture under the EC-cooperation, the relation between the institutions and the safeguarding of the right of veto."

The question was paret of the campaign prior to the elections to the European Parliament, and its formulation gives an indication of the issues which the anti EC parties wanted to become central in the campaign.

The answer of the Foreign Minister was centered on the budgetary problems and the need to devolop new common policies for industry, tecnology, research and development and energy. To the Minister common actions in this fields:

> "should be the center of gravity in discussions on the future of the EC rather than long term plans for a European union, like the draft treaty establishing a European Union proposed by the

> European Parliament" "Obviously, there is always room for improvements and one may always find some grounds for criticism , but the crux of the matter is that by and large EC cooperation is functioning in a way which is satisfactory and which is beneficial to Denmark".

This approach similarly indicates how the four governmental parties wished to focus the debate prior to the European elections.

In the debate the two left wing socialist parties proposed a motion which was clearly designed to appeal to the anti EC part of the social-democratic and radical electorate. However, these two parties proposed their own motion with the following text:

> "The Folketing decides, that the conservation of the right of veto and the maintenance of the distribution of powers between the Council of Ministers, the Commission and the European Parliament is the basis for Denmarks membership of the EC.
>
> The Folketing consequently rejects the draft treaty establishing a European Union as proposed by the European Parliament."
>
> (The motion included another paragraph on the substantive EC cooperation)

The adoption of this motion would in all likelyhood have been secured by the two left wing socialist parties once their own motion had been defeated. In this situation the four parties in Government chose to vote in favour of the motion.

The formal Danish position on the Draft Treaty is thus quite clear. The Draft is unequivocally rejected by both the opposition and the Government.

2. The most fundamental issue related to the European Union is no doubt the question of the approach. With the possible exception of the Center-democrats all pro EC Danish parties are clearly functionalists. In their view the best and in fact only possible way towards a Union is to make new common policies and strenthening the the existing ones. Such endeavours are supported by all major parties. We would suggest that in this respect Danish political parties are as integrationists as parties in most other Member States. Increases in the "own resources" of the Community to this end is also favoured by the major parties. ' This is not to suggest that proposals to this end would always be favoured blindly. Special national interests as well as party interests may of course call for special positions. The fundamental point, however , remains,that there is a general concensus among the major political parties in Denmark that new policies in the central areas of EC cooperation are both desirable a and necessary, and that Denmark as a small state is vitally dependant on the succesfull outcome of such policies.

As regards the institutional set up a broad concensus likewise exists among Danish political parties that the existing Treaties must remain the center and basis for a Union to come.

It is a very widespread feeling among Danish politicians that progress in the essential fields of tecnology and industrial policy, energy policy and economic cooperation has in fact been prevented to a large

extent by some of the same Governments to whom this lack of progress is taken as a proof of the need for a major institutional reform. In this Danish view organs like those proposed by the Draft will meet the same resistance as the existing institutions have met and will consequently be unable to adopt - or even worse - to ensure enforcement by the Member States of programmes which these Member States have so far persistently been determined to oppose.

Major institutional reforms would therefore be a greater danger to the political authority of the institutions than the present too slow decision making process.

It is obvious that the Draft Treaty presented by the European Parliament with its strong emphasis on revising the institutions, and the fundamental absence of any attempt to define the future common policies must be felt as problematic and counterproductive by the major Danish political parties.

The interventions by the Foreign Minister and the various spokesmen of the political parties in the "Folketing" debate referred to above confirms this. With the exception of the Center-democrats the Government parties were clearly embarrassed by the Draft which "is a matter for our children to decide upon once they grow up" as the spokesman for the Liberal Party put it. Any identification with the Draft was clearly seen as unhelpful in the general contest for seats in the European Parliament. To the Social-democrats and Radicals a firm rejection of the union was undoubtedly a way to appeal to that part of their electorates to whom the EC membership is disagreable.

The "Folketing" motion af may 1984 certainly is a true reflection of the fundamental and contemporary Danish position with respect to the Draft Treaty. We would, however, suggest that the motion does not give a nuanced picture of the position of the political parties voting in favour of the motion. Certain features of the Danish political scene which we shall examine below may explain why.

III. The fundamentals of Danish politics in EC matters.

It is the rule and not the exception that Danish Goverments are minority Governments. Danish domestic politics are therefore based on short-term political alliances. In foreign policy - including EC policy - the major parties have, however, traditionally maintained a more or less permanent alliance. Danish foreign policy has in this way largely been unaffected by any domestic instability.

This alliance implies that even in opposition the alliance parties excercise influence on Danish foreign policy. It also means that while in opposition the parties cannot - as in most other countries - exploit their lack of responsibility to recapture votes lost due to foreign policy decisions.

Over the last years serious rifts have shown in the alliance on external policy between the Social-democratic Party and the government.This is not the place to analyse these rifts. Below we shall provide some information on the reasons for the rifts with respect to EC matters. Here we would only stress that the parties of the present Government for want of any real alternatives have accepted a number of foreign

policy motions by the "Folketing" which were clearly not to their liking. In other words the nuances of opinion among the major political parties may not al ways be deduced from the "Folketing" motions under the circumstances prevailing in the Danish political life. This is in particular so with respect to the Liberal and Conservative parties to whom no viable alternative to the big foreign policy alliance has existed so far. Thus the two non-socialist Governments which have been in existence since 1973 have both had to accept "Folketing" motions stating that they did in fact continue the very same policy that their Social-democratic predecessors pursued.

2. The vulnerable position of the Social-democratic and Radical Parties

The problems facing these two parties with repsect to the EC may be clearly seen from the following comparison of the results of the most recent elections to the "Folketing" and to the European Parliament:

	Folketing elections Jan. 1984	EP elections June 1984
Leftist Socialists	2.7%	1.3%
Peoples Socialist Party	11.5%	9.2%
Other small anti-EC Parties	2.0%	not running
Popular movement against the EC	not running	20.8%
Total anti-EC votes	16.2%	31.3%
Social-democratic Party	31.6%	19.5%
Radical Party	5.5%	3.1%
The four parties in Government	43.1%	42.6%
Free Democrats and Progress Party	3.6%	3.5%
Total pro EC votes	83.8%	68.7%

The Table shows that the pro EC parties continue to dominate in the "Folketing" having 83.8% of the votes. However, the anti EC share of the electorate is roughly on third of the total electorate, which -incidentally - is almost the same as in the 1972 referendum on Danish membership of the EC.

The discrepancy between the electorate and the "Folketing"in EC matters is,however, not evenly distributed among the parties. On the contrary it is concentrated in the two parties that moved the motion adopted in the "Folketing" in May 1984, i.e. the Social-democratic and the Radical parties.These two parties are obviously in a vulnerable position on EC issues, having an important fraction of their electorate disagreeing with the policy of the party. They are therefore - particularly while in opposition - focusing their concern on how to maintain and (re)establish the appeal to their electorate.

IV. The differences among the major political parties

While "Folketing debates tend to focus on points of agreements in order to continue the big foreign policy alliance the elections to the European Parliament necessarily involves a certain focusing on party differences. The various election manifestos adopted prior to the European elections bear witness to this.

1. The liberal party

The Liberal Party manifesto to the European elections adheres to the general Danish concensus by stressing that the Party is basing its policy on the Treaty of Rome.However, it goes on to say that the Liberals accept treaty amendmends which strengthen the ability

of the EC to act with respect to problems where common action yields the best results. According to the manifesto the national conflicts in the Council of Ministers are increasingly blocking for the Community interests. The manifesto suggests to strengthen the role of the Commission to counteract this development. The right of veto is in this vay maintained though the manifesto explicitly proposes to abolish the widespreadmisuse of this right.

The Liberals favours an increased influence to the European Parliament. This should be achieved on the basis of the existing Treaties by way of inter institutional agreements. It is suggested that the European Parliament in this way should be given the right of veto against proposals from the Commission.

The Liberals are also in favour of closer coordination between the EPC and the Treaty cooperation. In particular the Parliament should be more actively integrated with the EPC.Such closer coordination between the Treaty cooperation and the EPC should give the Community a possibility to speak and act on behalf of the Member States in order to increase the EC influence on the international peace and security.

While defence matters should be left to the NATO, European security arrangements should be dealt with in the EPC.

The Liberal manifesto also speaks out in favour of a generally stronger involvement of the EC in education and culture , and calls for special Community initia-

tives in the field of education, in particular with respect to vocational training.

It should be stressed, however, that the major part of the Liberal manifesto is devoted to the policies to be pursued by the EC. The institutional sections of the manifesto is, however, important and are - in contrast to those of other parties - put in the beginning of the manifesto.It may easily be seen that the Liberal manifesto in form and to a certain extent al-

so in substance differs in tone and content from the "Folketing" motion of May 1984, though it remains with in its broad concensus as far as the Union is concer ned.

2. The Conservative Party.

The Conservative approach to the institutional quest ions is more prudent than the Liberal. The Draft Treaty is diplomatically but firmly rejected by a repudi ation of "artificial new modes of cooperation which do not enjoy any popular support and which is there fore endangering the steady but slow progress of the Community".In the Conservative view the existing Treaties are a sufficient basis for the cooperation, though it is emphazised that they should be used in a more complete way.

Also the Conservative favours a strengthening of the role of the Parliament, but they do in fact only envisage a larger controlling function for the Parliament.

While the Conservatives also favours increased cooperation with respect to education, they note that the subject falls outside the Treaty, and they do not

call explicitly for the cooperation to take place with in the Community institutions.

The Conservatives differs from the Liberals as to the security policy, which in the Conservative view should be dealt with in the NATO.

3. The Radical Party.

Compared to the two foregoing manifestos the Radical manifesto is quite defensive in its approach. All institutional developments and increases in the com petence are rejected and the importance of separating the Treaty cooperation from cooperation outside the Treaty is strongly emphazised. A political or military union is specifically rejected as is an economic and monetary union. The right of veto is strongly stressed.

The Radicals do not foresee any increased role for the European Parliament, and the democratic controle of the Community must lie with the nationnal Parlia ments according to this party.

4. The Social-democratic Party

The Social-democratic manifesto outlines the policies which the Party will support in the EC. In a second paragraph the manifesto undertakes to oppose inter alia:

- changes in the competence of the institutions,
- any erosion in the right of veto,
- any granting of rights to the European Parliament in matters of security and defence,
- the inclusion of education and culture under the Treaty cooperation.

It is obvious that the Social-democratic manifesto - like the Radical - is designed to appease the important fraction of the Party electorate which is critical of the EC. The rather poor showing of the Social-democratic Party in the European elections is, however, sometimes explaines exactly as a consequence of the lack of a clear profile in an election where a number of other parties both to the left and to the right could be either for or against further integration. In an attempt to try to clarify the Party's policy the Social-democrats have recently established a committee to study the role of Denmark in Europe and of Europe in the world. It will no doubt be of vital importance to the Party as well as to the Danish policy vis-a-vis the EC what this committee may achieve.

V. Summary and conclusions.

1. All leading Danish Parties have in a "folketing" motion rejected the Draft Treaty proposed by the European Parliament.

2. This rejection is an expression of a broad concensus on the approach to the Europeaan Union. The steady but slow progress of the Community is prefereed to great leaps forward which cannot be implemented for want of popular support.

3. The center of gravity in discussions on the future development of the Community towards a European Union should in the wiev of all Danish Parties be new policies in the fields of industry, tecnology, research and development, energy, etc..General institutional reforms are rejected by all parties and the right of veto is considered a necessity also in the future.

4. Within this general concensus there is a clear diffe rence between the parties with respect to smaller institutional amandmends. This difference is often not clearly expressed due to the necessary alliance among the major parties regarding foreign policy including EC policy. The Liberals and - to a lesser degree - the Conservatives are more open to such smaller reforms, while the Social-democrats and the Radicals are taking a more defensive attitude in this respect. The So cial-democrats have after their poor results in the latest European elections set up a committte to study their position with respect to the Europe. The outcome of this committee is difficult to forecast, yet important for the Party and thereby for Denmark.

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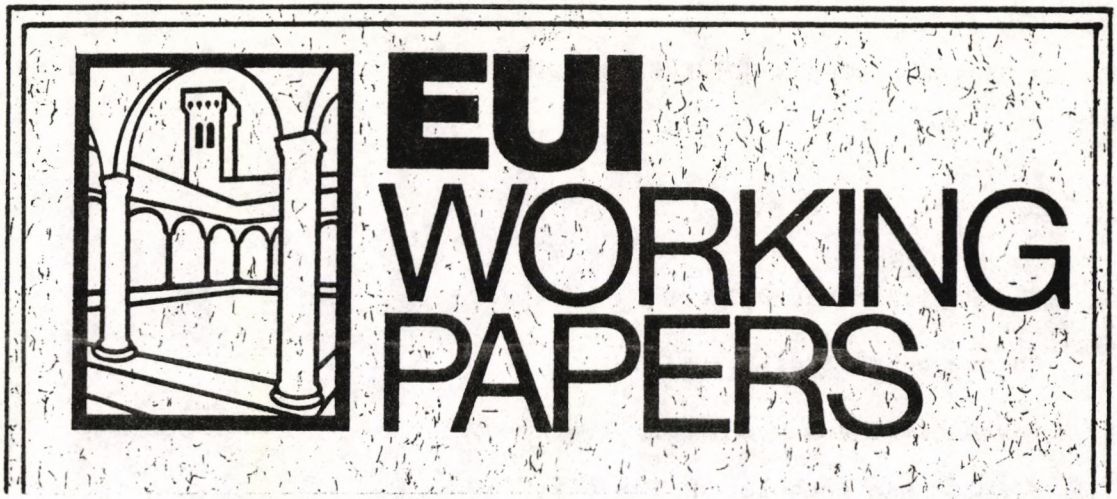

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