Denmark and the Ratification of the Lisbon Treaty: How a Referendum was avoided.

By

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Abstract

Given the fact that the Lisbon Treaty is rather similar to the Constitutional Treaty in content, it looks surprising that Denmark could avoid a referendum on the former when it had previously been decided that a referendum would have been necessary to ratify the latter. This paper will give some background on the Danish Constitution and transfer of sovereignty to supranational organisations and give a brief overview of how these rules have been applied in connection with the Accession Treaty in 1972 and subsequent treaty reforms. Denmark ratified the Treaty of Nice without a referendum. The decision whether to have a referendum is officially a legal one, but one can ask whether political considerations enter too. Given the negative referendum votes on the Maastricht Treaty in 1992 and on joining the euro in 2000 the government is eager to avoid the use of referendums. The reason for this is partly that the Danish public is sceptical about European integration. This affects parliamentary politics and it makes treaty reform a difficult two-level game in Denmark.

Introduction[1]

The use of referendums is an important part of the history of Denmark's relations with the European Communities (EC) and European Union (EU). The Danish political elite has also learned that referendums are fairly unpredictable. So we should expect this elite by now to try to avoid the use of referendums if legally and politically possible.

Popular attitudes to European integration in Denmark are very complex. A majority of the Danish people support economic integration in Europe as long as it does not affect Danish autonomy too much. Denmark joined the EEC in 1973 after a referendum in October 1972 where 63.4 percent of the Danish people supported membership. The Single European Act (SEA) was ratified after being supported by 56.2 percent of the Danish voters it in a referendum on 27 February 1986. The SEA referendum however, was a consultative referendum, not obligatory, as I shall explain later.

The Maastricht Treaty was first voted down by a narrow majority of 50.7 percent on 2 June 1992. When it was accepted in a second referendum on 18 May 1993 by 56.7 percent of the electorate Denmark had secured four exemptions, or opt-outs, at the Edinburgh summit in December 1992 (Laursen, 1994). One of these dealt with Economic and Monetary Union (EMU), where Denmark decided not to take part in the third phase. The three other exemptions dealt with Citizenship of the Union, Justice and Home Affairs (JHA) co-operation and defence policy. Denmark would not join the Western European Union (WEU) which was to be the vehicle for developing a European defence policy, and only take part in intergovernmental JHA co-operation. The four areas of exemptions were those where a deepening of integration was taking the process closer to the traditional

[1] Slightly revised version of a paper prepared for delivery at 21st World Congress of Political Science, International Political Science Association (IPSA) Congress, Santiago de Chile, 12-16 July 2009. Research support from the Education, Audiovisual and Culture Executive Agency (EACEA) through the author's *ad personam* Jean Monnet Chair is gratefully acknowledged.

symbols of the nation state: citizenship, money and defence.

The hesitancy of the Danish public should be contrasted with economic and political elites that are much more pro-integration. 141 members of the Danish parliament, the *Folketing*, voted in favour of membership in 1972, against 34 'no' votes. In 1992 and 1993 there were quite large majorities in the Parliament, too. The only exception from the rule was January 1986, when the opposition denied the Liberal-Conservative government a majority in favour of the SEA. But after a consultative referendum, where a majority of the people supported the SEA, a substantial majority of MPs did vote for the treaty.

After the four Edinburgh exemptions had been accepted by Denmark's partners, prior to the second referendum in 1993, 154 members of the *Folketing* voted for ratification of the Maastricht Treaty as supplemented with the four exemptions. An important difference in comparison with 1992 was the support from the Socialist People's Party, which had been actively involved in finding the so-called national compromise, which became the basis for the Edinburgh exemptions. The so-called Progress Party remained opposed, but the total number of 'No' votes was only 16.

The Amsterdam Treaty was accepted by 92 votes after the third reading on 7 May 1998 in the Parliament (Social Democrats, Liberals, Conservatives, Centre-Democrats, Social Liberals and Christian People's Party) against 22 votes (Socialist People's Party, Danish People's Party, the Unity List, the Progress Party and one Conservative MP). Four members of the Socialist People's Party indicated afterwards that they would have voted for the Treaty, had they been present, saying that it was a mistake that they had not been present (*Folketingets Forhandlinger*, no.6, 1997-98 (2. samling), p. 1275).

The last referendum was about Danish participation in the euro. It took place on September 2000, i.e. during the Intergovernmental Conference (IGC) negotiating the Treaty of Nice. It gave a shocking 'no' of 53.1% (Jakobsen, Reinert and Risbjerg Thomsen, 2001; Buch and Hansen, 2002; Laursen, 2003).

In relation to the Treaty of Nice, coming so soon after the 'no' to the euro, the central questions was, could a referendum be avoided? The government had tried actively to avoid changes that would fall under the Constitution's section 20 and require a referendum. It succeeded, so the Treaty of Nice was ratified without a referendum (Laursen, 2006)

Table 1: Danish referendums on EC/EU questions

Date	Topic	Participation In %	Yes in %	No in %
2 October 1972	Danish membership	90.1	**63.3**	36.7
17 February 1986	Single European Act	75.8	**56.2**	43.8
2 June 1992	The Maastricht Treaty	83.1	49.3	**50.7**
18 May 1993	The Maastricht Treaty and the Edinburgh Agreement	86.5	**56.7**	43.3
28 May 1998	The Amsterdam Treaty	74.8	**55.1**	44.9
28 September 2000	Adherence to the Euro	87.5	46.9	**53.1**

Source: Branner and Kelstrup, 2000, p. 17, and *Morgenavisen Jyllands-Posten*, 30 September 2000, 2. section, p. 5

In order to understand the significance of referendums in Danish politics in respect to the European integration process we need to take a look at the Danish Constitution.

The Constitution and the Transfer of Sovereignty

The most central stipulation in respect to transfer of powers to supranational organisations is found in Section 20 of the Danish Constitution. This section was introduced in connection with the last amendment of the Danish Constitution in 1953. We quote the section in full:

> (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.[2]

So there are two possibilities. If there is a five-sixths majority in the *Folketing* the government is authorized to ratify the treaty involving the transfer of powers to a supranational organization like the EC. Alternatively, if there is only a simple majority in the *Folketing*, ratification can take place if the Bill is confirmed in a referendum. Section 42 of the Danish Constitution is a long article on referendums as such. The part relevant for our considerations here is the following:

> (5) At the referendum votes shall be cast for or against the Bill. For the Bill to be rejected, a majority of the electors who vote and not less than thirty per cent of all persons who are entitled to vote, shall have voted against the Bill.

Section 20 - in combination with section 42 - was first used in Denmark in 1972 in the referendum which confirmed Danish membership in the EC. At the time of the third reading of the accession bill on 8 September 1972 there were 141 members voting for and 34 members voting against Denmark's membership in the European Communities. Thus there was not a five-sixth majority in the *Folketing* and the referendum was decisive. But it had actually been decided beforehand that there would in any case be a referendum (Lehmann Sørensen, 1978, 77). Similarly in 1992 there was not a five-sixth majority in the *Folketing*, so the referendum was decisive. Whereas there was a Yes vote of 63.4% in the referendum in 1972 there was a No vote of 50.7% in 1992. The referendum in 1986 about the SEA was different since there

[2] An English translation of the Danish Constitution is available in *Denmark: An Official Handbook* (Copenhagen: Press and Cultural Relations Department, Royal Danish Ministry of Foreign Affairs, 1974), pp. 124-135. It is also available online at: http://www.folketinget.dk/pdf/constitution.pdf

was no majority for the SEA in the *Folketing*. The referendum was consultative because it had been determined that the SEA did not constitute a transfer of sovereignty; The decision was not based on section 20, but section 19 of the Constitution, which deals with international treaties not transferring sovereignty. Since the members of the *Folketing* had promised to respect the outcome of the referendum a majority was available in the *Folketing* afterwards for ratification. In the referendum there was a 56.2% Yes vote.

The basic idea in section 20 is to create a possibility of transferring powers to supranational bodies with procedures that are less demanding than a constitutional amendment (which, according to section 88 of the Danish Constitution, must be passed by two successive parliaments with intervening elections and then confirmed by at least 40% of the electorate in a referendum). On the other hand it is obviously more difficult to pass an act that transfers powers to supranational bodies than a normal act. The five-sixths majority, which means at least 150 members out of 179, is a very high threshold. It was meant as a minority guarantee (Sørensen, 1969, 303-314).

The First Maastricht Referendum (1992)

To understand the current debates in Denmark about the use of referendums we must briefly mention the Maastricht Treaty experience. The outcome of that experience, the opt-outs, also affected the Lisbon Treaty.

On 10 March 1992 the government put forward a bill which would authorize the government to ratify the Maastricht Treaty, technically by changing the Danish accession law of 11 October 1972. There was support from the main parties: Social Democrats, the Conservative Party, the Liberal Party, the Social-Liberal Party and the Centre-Democrats. The Socialist People's Party on the left and the Progress Party on the right were against. The Christian People's Party was split (Laursen, 1992)

During the referendum campaign opinion polls showed that it was a close race. During the first part of May there was a majority of No votes in the Gallup polls, but the last 10 days before the referendum there was an increasing Yes majority. The prognosis the day before the referendum had 45.7 percent Yes and 40.8 percent No, with 13.5 percent undecided.[3] In the referendum on 2 June 1992 there were 1,606,442 Yes votes (49.3 percent) and 1,653,289 No votes (50.7 percent). 30,879 votes were invalid, most of them blank. The turnout was 83.1 percent of the 3.9 million Danes who could vote (*Dansk Udenrigspolitisk Årbog 1992*, p.351). It was thus a very narrow No majority. Although it was known from opinion polls that it would be a narrow vote the result was nevertheless a shock for the political establishment.

The Second Maastricht Referendum (1993)

Despite the Danish No to Maastricht the Eleven EU Member States decided to go on with the ratification process. So the Danish problem was indeed a Danish problem. After some

[3] Gallup Polls are published in *Berlingske Tidende* and by the Danish Radio. The figures given here are from Nielsen, 1993, p. 44.

reflection among leading politicians Denmark's domestic politics took an interesting turn. The leaders of three opposition parties, the Social Democrats, the Social-Liberals and the People's Socialists, started working out what became known as 'the national compromise'.[4] After dramatic negotiations a text was presented to the government, which in turn accepted the opposition's proposals with only minor changes. The text which was forwarded to Denmark's 11 partners on 30 October 1992 was also supported by the smaller Centre-Democrats and Christian People's Party, leaving only the Progress Party not to support it.

The 'national compromise' suggested an agreement including the following points:

1. 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.

2. Denmark does not participate in the single currency and the economic policy obligations linked to the third stage of Economic and Monetary Union.

3. Denmark will have no obligations in connection with citizenship of the Union.

4. 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.[5]

The text also said that 'the Danish agreement must be legally binding on all twelve EC Member States and for an unlimited period'.

After intense diplomatic activities the Edinburgh summit in December 1992 adopted a 'Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union'. (*Agence Europe*, 13 December 1992).[6] This 'decision' basically satisfied the Danish requests.[7] The 'decision' noted that Denmark did not intend to take part in certain provisions of the Treaty of Maastricht. The text in respect of citizenship emphasized that the provisions relating to Citizenship of the Union 'give nationals of the Member States additional rights and protection'. 'They do not in any way take the place of national citizenship'. At most this was a clarification. With respect to EMU the text said that 'Denmark has given notification that it will not participate in the third stage'. This Denmark could do on the basis on the protocol that

[4] For an account by one of the participants in the negotiations, see Iversen, 1993.

[5] The Danish text can be found in *Dansk Udenrigspolitisk Årbog 1992*, pp. 362-365.

[6] Danish translations of the Edinburgh texts in Biering and Holm, 1993, pp. 198-202.

[7] What exactly the implication of calling it a 'decision' was remained somewhat unclear, and its legal nature became part of the discussion in Denmark. Most lawyers argued that it was binding under international law, not Community law.

it had already secured at the time of the Maastricht summit in December 2001. With respect to defence policy the Edinburgh 'decision' said that 'nothing in the Treaty on European Union commits Denmark to become a member of the WEU'. Finally, with respect to Justice and Home Affairs the Edinburgh 'decision' simply stated that 'Denmark will participate fully in cooperation on Justice and Home Affairs on the basis of the provisions of title VI of the Treaty on European Union' (*Agence Europe*, 13 December 1992, appendix). These provisions are intergovernmental in nature.

At first sight the Edinburgh 'decision' may not look radical. The Maastricht Treaty itself did not change. But Denmark excluded itself from some potential future developments. The 'decision' included clarifications and the acceptance by the Eleven of the Danish positions in respect to the third phase of EMU, the defence dimension and supranational Justice and Home Affairs (JHA) cooperation. Denmark exploited possibilities already in the Treaty to the utmost. By this Denmark confirmed its minimalism in respect to further integration. It was a No to things which did not exist at the time, but which most of Denmark's partners wanted to be able to realize in the future, including a single currency, a common defence and supranational cooperation in Justice and Home Affairs.

The Maastricht Treaty as supplemented by the Edinburgh 'decision' and declarations was sent to a second referendum on 18 May 1993. The new government coalition of Social Democrats, Social-Liberals, Centre-Democrats and the Christian People's Party introduced three bills on 9 February 1993.[8] The three bills would allow Denmark to ratify the Maastricht Treaty (Bill L. 176), accede to the Edinburgh agreement (Bill L. 177) and hold a new binding referendum (Bill L. 178). This construct was not based on section 20, but a combination of sections 19 and 42 of the Constitution.[9] Section 19 deals with foreign affairs in general, saying *inter alia* that the government cannot "enter into any obligation which for fulfilment requires the concurrence of the Folketing" without the consent of the Folketing. Treaties that affect the legal situation obviously fall into this category, even if the Constitution does not say so explicitly (See also Sørensen, 1969, 269-83). Article 42(6) as a general rule exempts article 19 bills from referendum 'unless it has been prescribed by a special Act that such resolutions shall be submitted to referendum.' The purpose of L 178 was thus to get such an act adopted.

The third and final reading of the bills took place on 30 March 1993. Separate votes took place on the three bills. First L. 176 (ratification of Maastricht) was adopted by 154 votes (Social Democrats, Conservatives, Liberals, People's Socialists, Centre Democrats, Social-Liberals and Christian People's Party) against 16. The two other bills were adopted by similar majorities. It is interesting to note that there was indeed a five-sixths majority in favour of these European integration bills. According to section 20 of the Constitution Denmark

[8] For reasons unrelated to the Maastricht ratification problem in Denmark the Schlüter government resigned in mid-January 1993, at a time where Denmark also had the presidency of the EC. See for instance 'Denmark's PM quits over Tamil refugees scandal,' *Financial Times*, January 15, 1993; and 'Denmark: Magic moment,' *The Economist*, January 23, 1993. Getting a Social-Democratic-led government in January 1993 may have contributed to secure the Yes a few months later in the second referendum.

[9] These bills and comments to the bills have been reproduced in Petersen (1993), annexes 2 and 3.

could thus formally have ratified the Maastricht Treaty without a referendum. However, L. 178 had specified that there would be a binding referendum.

On 18 May 1993 56.7 percent of the Danish electorate gave their Yes to the Maastricht Treaty plus the Edinburgh agreement. 43.3 percent voted No. The turnout this time increased to 86.5 percent, up from 83.1 percent in 1992 (Laursen, 1994).

The Amsterdam Treaty Referendum (1998)

To the extent that the Amsterdam Treaty meant a transfer of new powers to the EU, the Danish Constitution's section 20 would apply. But did such a transfer actually take place? After examining the Treaty, the Ministry of Justice concluded that such a transfer of new powers to the EU took place in three areas, viz. articles 6A, 129A and 236. These concerned "appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (new Article 6A), which was found to go beyond already existing stipulations concerning non-discrimination. In respect to consumer policy, it was the extension of contributions to protect the interests of consumers to include the words "to organise themselves in order to safeguard their interests" (from amended Article 129A). Finally, it was concluded that the new possibility of suspending the voting rights of a Member State (Article 236) breaching the principles of democracy, respect of human rights and fundamental freedoms, and the rule of law, would require the application of Article 20 of the Danish Constitution (Denmark, Ministry of Justice 1998).

Given the fact that there was no five-sixths majority in the Parliament, the referendum was necessary for Danish ratification.

Interestingly enough the three areas singled out by the Ministry of Justice were in no way central issues during the referendum debate.

The referendum result on 28 May 1998 was a "yes" vote of 55.1 percent. The turnout was 74.8 percent, lower than earlier EU referenda.[10] Maybe the Treaty did not spark the imagination of the Danes? Or maybe they were a little weary after the two Maastricht referenda.

The strategy adopted by the government in 1996-97 had been to try to influence the treaty in such a way that it would be easy to sell it to the Danish public (Laursen, 2002). The strategy in connection with the next treaty reform was to try to avoid a referendum (Laursen, 2006).

The Treaty of Nice: Avoiding a Referendum

After the many referendums about EU questions in Denmark, and given the unpredictability of these, the government was happy to conclude after the Nice summit in December 2000 that it looked as if a referendum could be avoided this time.

The Ministry of Justice was asked to evaluate the Treaty from a legal point of view. Did it involve a transfer of sovereignty according to section 20 of the Danish Constitution? The answer given in a report on 27 February was 'no' (Denmark, Ministry of Justice, 2001). The Parliament could therefore authorize ratification as for any other international

[10] As reported in the Danish press, e.g. *Jyllands-Posten*, 30 May, 1998.

treaty according to section 19 of the Constitution. This meant a simple majority in the Parliament and no referendum.

How did the Ministry of Justice reach such conclusion? The interpretation given by the Ministry of Justice is that a transfer of sovereignty takes place when EU competence is extended to new policy areas, allowing for new legislation that reaches Danish citizens directly in those areas. This did not happen in the Nice Treaty. The institutional changes that took place were not interpreted as a transfer of sovereignty. Nor was the extended use of QMV seen as a transfer of sovereignty. This interpretation was later criticised by the Danish People's Party and the Unity List. They called for an interpretation by independent legal experts. But the government decided to trust its own lawyers in the Ministry of Justice.

The Ministry of Justice did mention one possible problem in the Treaty, viz. the new article 229A, which deals with a possible future transfer of competence to the ECJ for industrial property rights. If such a transfer does take place Denmark will at that point in time have to apply section 20 of the Constitution.

On 2 March 2001 the government proposed the bill authorising Danish ratification of Nice. The bill excluded Denmark from art. 67 and the Protocol attached to it. Denmark was kept outside supranational JHA co-operation by this procedure. It was in accordance with the Danish exemption. Further, Denmark did not adhere to the new article 229A through its ratification of Nice.

In the remarks to the bill the government called the Treaty of Nice an enlargement treaty and argued that enlargement will be good for Europe and Denmark. Enlargement will increase European stability and help secure the security-political gains that followed the end of the Cold War. Enlargement would also be economically beneficial for Denmark. Especially small and medium-sized companies would get new markets. The participation of the CEECs in the internal market would be good for investors and exporters.

Looking at Nice from a broader political perspective the political establishment could be relieved that Nice did not question the Danish exemptions. But the developments in the JHA area and the parallel developments in the area of defence policy were now putting pressure on the Danish exemptions.

The Constitutional Treaty: Why a Referendum was foreseen

That the Constitutional Treaty would fall under Section 20 of the Danish Constitution was confirmed in a report from the Ministry of Justice on 22 November 2004 (Ministry of Justice 2004). The report had been worked out in cooperation with the lawyers in the Prime Minister's Office and in the Ministry of Foreign Affairs.

The Constitutional Treaty was compared with the existing treaties. Increasing the use of qualified majority voting (QMV) in the Council or introducing more co-decision for the European Parliament or changing the composition of the Commission were not considered to fall under section 20. However, there were some articles in the treaty that would fall under section 20. The following were in that category:

1. Article I-9(2): EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2. Article I-18: The flexibility clause

3. Article I-51: Protection of personal data

4. Article III-125 (2): Measures concerning passports, identity cards, residence permits and other such documents

5. Article III-127: diplomatic and consular protection

6. Article III-160: administrative measures with regard to capital movements and payments (fight against terror)

7. Article III-364: ECJ jurisdiction, intellectual property rights

8. Article III-278: public health

9. Probably also Article III-254 concerning space policy.

Later on in connection with the Danish debate about the Lisbon Treaty these points became known as the Nine Points.

Given Denmark's opt-out from supranational Justice and Home Affairs cooperation (Protocol 20) the communitarisation of the Area of Freedom, Security and Justice (AFSJ) taking place through the Constitutional Treaty would not require the application of Section 20 of the Danish Constitution. Nor would the changes in the Common Foreign and Security Policy (CFSP) included in the treaty require the application of Section 20 because. CFSP stayed intergovernmental. So there was no transfer of sovereignty.

The solidarity provision in Article I-43 was discussed. To the extent it involves military means it would be covered by the Danish Defence opt-out as made explicit in Declaration 39, attached to Protocol 20. So Section 20 of the Danish Constitution would not apply.

For the following policy areas it was concluded that Section 20 did not apply:

Article III-136, social security
Article III-176, intellectual property rights
Article III-321, humanitarian aid
Article III-256, energy policy
Article III-281, tourism
Article III-282, sport
Article III-284, civil protection,

The explicit reference to the primacy of Union Law (article I-6) was no problem in relation to the Danish Constitution since this principle already existed in Community law when Denmark joined in 1973.

The incorporation of the Charter on Fundamental Rights would not require application of Section 20. According to the Constitutional Treaty the Charter did not extend

the competences of the EU.

The so-called *passerelle* – article IV-444 – was deemed to not require the application of Section 20.

In conclusion then, the lawyers in the Ministry of Justice found nine provisions in the Constitutional Treaty that would (or might) require the application of Section 20 of the Danish Constitutions. Anyway, by this time the political decision to have a referendum had already been made by the government. So the lawyers 'confirmed' a political decision.

Seen from a political perspective it is interesting that the big political innovations of the treaty, including important institutional changes, did not require a referendum, but some – arguably - relatively minor extensions of the functional scope of the Union did.

The Lisbon Treaty

The Lisbon Treaty which replaced the Constitutional Treaty in 2007 retained most of the institutional changes of the Constitutional Treaty. It also retained the Danish opt-outs with minor technical changes in the protocols (European Union, 2007). The Foreign Ministry's account of the treaty to the *Folketing* emphasized that the Danish exemptions remained intact and that only Denmark can decide to abolish one or more of these. The Lisbon Treaty also included the possibility of Denmark opting-in on JHA measures, as the Constitutional Treaty had done previously (Denmark, Foreign Ministry, 2007, 109).

Denmark was the first Nordic country to ratify the Lisbon Treaty. The *Folketing* approved the treaty on 24 April 2008 with 90 votes in favour and 25 against (Casey, 2008). The Ministry of Justice had concluded that the treaty did not constitute a transfer of sovereignty in the sense of section 20 of the Danish Constitution (Denmark, Ministry of Justice, 2007). So no referendum was required.

The votes in favour of the Lisbon Treaty in the *Folketing* came from the government parties as well as the Social Democrats and Social Liberals. With three exceptions the Socialist People's Party members also voted for the treaty. The Danish People's Party and the Unity List voted against.[11]

So why was no referendum needed? Presumably something happened to the Nine Points in the Constitutional Treaty that would have required application of section 20 of the Danish Constitution. Let's compare the two treaties on these points.

In the following I will compare the respective articles in the Constitutional Treaty and the Lisbon Treaty and see what the differences were (See also detailed tables with treaty texts in the Annex to this paper).[12]

[11] For the parliamentary proceedings, see (http://www.folketinget.dk/doc.aspx?/Samling/20072/lovforslag/L53/index.htm

[12] In the following the 2004 Report refers to Denmark, Ministry of Justice, 2004, and 2007 Report refers to Denmark, Ministry of Justice, 2007.

Issue 1: EU Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Ministry of Justice argued in 2004 that accession to the European Human Rights Convention foreseen by the Constitutional Treaty article I-9(2) would give the rules in respect to EU law direct effect in Denmark. Section 20 of the Danish Constitution thus had to be applied (2004 Report, 83-85).

The new article 188 N(8) in the Lisbon Treaty allows for a separate Danish decision on the EU's accession to the European Human Rights Convention. So application of section 20 at the time of ratification of the Lisbon Treaty was not necessary. (It was also argued that it might not be necessary later) (2007 Report, 97-101).

Issue 2: Flexibility clause

Because of the abolition of the pillar structure by the Constitutional treaty the flexibility clause (Article 16(2)) would apply to all the Union's policies in part III, not just pillar one policies as is the case currently (Art. 308 TEC). The Ministry of Justice therefore said that Danish ratification of the Constitutional Treaty should be based on section 20 in the Danish Constitution (2004 Report, 90-94).

The Lisbon Treaty circumscribes the application of the flexibility clause by explicitly excluding CFSP from its application. For the Area of Justice, Security and Justice (AFSJ) the Danish opt-out would apply. So the Ministry of Justice concluded in 2007 that this part of the Lisbon Treaty did not require the application of section 20 of the Danish Constitution (2007 Report, 106-113).

Issue 3: Protection of Personal Data

The Ministry of Justice concluded in 2004 that the new article I-51 in the Constitutional Treaty would lead to a transfer of sovereignty, so section 20 of the Danish Constitution had to be applied. The article extended measures from the EC to the whole EU, thus also Criminal Justice and Police cooperation. The Danish Protocol 20 to the Constitutional Treaty (opt-out) did not explicitly refer to this article (2004 Report, 40-41).

The new Article 16 B of the Lisbon Treaty is mentioned in the Protocol on the Position of Denmark. It means that measures adopted under Art 16 B applying to criminal justice and police cooperation will not apply to Denmark (2007 Report, 46-49).

Issue 4: Measures concerning passports, identity cards, etc.(right to free movement)

Article III-125 in the Constitutional Treaty implied transfer of sovereignty. It was not covered by the Danish JHA opt-out. Its aim was to facilitate free movement (2004 Report, 41-44).

Article 62(2) in the Lisbon Treaty also implies transfer of sovereignty, but it is covered by the Danish opt-out from supranational JHA cooperation because it is placed in AFSJ section of the treaty (2007 Report, 41-44).

Issue 5: Diplomatic and consular protection

It was concluded in 2004 that article III-127 in the Constitutional Treaty implied a transfer of sovereignty. It talks about measures and a European law (2004 Report, 44-45).

Article 20 in the Lisbon Treaty talks about 'directives establishing the coordination and cooperation measures'. The latter were deemed to be of such a nature that they would not reach the individual citizens directly, thus no transfer of sovereignty and no application of section 20 of the Danish constitution (2007 Report, 44-46).

Issue 6: Administrative measures with regard to capital movements and payments (combating terrorism)

Article III-160 in the Constitutional Treaty was placed in section on Capital and Payments which was not covered by the Danish opt-out. So the introduction of the so-called smart sanctions against individual instead of states to combat terrorism would require the application of section 20 of the Danish Constitution (2004 Report, 45-47).

Article 61 H in the Lisbon Treaty is placed under the Area of Freedom, Security and Justice (AFSJ) covered by the Danish opt-out. So the application of section 20 of the Constitution is avoided (2007 Report, 51-53).

Issue 7: ECJ jurisdiction, intellectual property rights

Article 229A TEC (of the Nice Treaty) allows a future transfer of sovereignty, giving ECJ jurisdiction in respect to intellectual property. At such future moment Denmark would have to follow section 20 in the Danish Constitution, as decided in connection with the ratification of the treaty of Nice.

Article III-364 in the Constitutional Treaty does not mention unanimity or application of national constitutional rules. So section 20 of the Danish Constitution should be applied in connection with ratification of the Constitutional Treaty (2004 Report, 47-49).

The Lisbon Treaty, in article 229A, again includes the reference to "approval by Member States in accordance with their respective constitutional requirements." It only includes minor linguistic changes compared with the existing treaty. So section 20 of the Danish Constitution can be used later when/if it becomes necessary (2007 Report, 53-54).

Issue 8: Space policy

The Ministry of Justice concluded vaguely in 2004 that the new article III-254 in the Constitutional Treaty might imply an extension of the Union's competences and the Ministry was most inclined to be of the opinion that it would require application of section 20 of the Constitution (2004 Report, 49-51).

The fact that the article 172a in the Lisbon Treaty excludes "any harmonisation of the laws and regulations of the Member States" made it possible for the Ministry of Justice to assert in 2007 that section 20 in the Danish Constitution would not apply to the Lisbon Treaty (2007 Report, 58-60).

Issue 9: Public health

The Ministry of Justice concluded in 2004 that the measures concerning cross-border threats to public health in article III-278(4) would fall under the Danish Constitution section 20 (2004 Report, 51-52).

In the Lisbon Treaty, article 152, these are reduced to incentive measures, and they cannot include harmonisation of national laws. The Ministry of Justice therefore concluded in 2007 that section 20 of the Constitution was not affected (2007 Report, 56-58).

Box 1: Summary Nine Changes that Made a Difference

- Accession to the European Convention on Human Rights – New art. 188(8) allows for separate Danish Decision, applying section 20 when accession happens
- Flexibility clause – Lisbon excludes CFSP; Danish opt-out applies for AFSJ
- Protection of Personal Data – New art. 16B mentioned explicitly in Danish Protocol, so does not apply for Criminal Justice and Police cooperation in Denmark
- Passports, identity cards, etc – Lisbon moves article from Free Movement to AFSJ, so covered by Danish opt-out
- Diplomatic protection – language weakened to 'coordination and cooperation measures' instead of European law
- Administrative measures, capital movements (smart sanctions) – Article moved from Capital and Payments to AFSJ so covered by Danish opt-out
- ECJ jurisdiction, intellectual property rights – New language allows Denmark to wait applying Section 20 till such transfer takes place
- Space policy – New article excludes harmonisation of national laws
- Public health – New article includes only incentive measures, no harmonisation

In conclusion, a variety of basically four techniques were used to move the Nine Points from falling under section 20 of the Danish Constitution to not falling under section 20. One technique was to limit the application of some measure to what is already the case under existing law. Another technique was to move the provision to a section of the Treaty where Denmark has an opt-out.

Box 2: Summary of the Four Techniques Used

- Moved to AFSJ covered by Danish opt-out: Identity cards and smart sanctions
- Mentioned specifically in Danish Protocol (opt outs): Personal data
- Language changed, so separate national decision later: Human Rights Convention and ECJ jurisdiction for intellectual property
- Limitation of measures that can be adopted: Flexibility, diplomatic protection, space policy and public health

These changes were so subtle that the international press did not seem to have discovered the details. They were mentioned in the Danish debate, but the technical details did not become part of the debate. The debate was political. Those who supported the Lisbon Treaty were usually very happy to learn that it had been concluded that a referendum could be avoided. Those who were against further integration called for a referendum and claimed that the government was cheating the people. In the *Folketing* these voices came from the Danish People's Party on the Right and the Unity List on the left. There were calls for independent legal analyses of the treaty and some argued that the institutional changes included in the Lisbon Treaty, for instance the increased use of QMV, were sufficiently important to warrant a referendum.

Danish-German Cooperation

To understand the emergence of a new treaty that did not require referendums in any Member State except Ireland we also need to look at EU-level developments, especially during the German Presidency in the first part of 2007. We have to focus on the decision by the European Council in June 2007 to abandon the Constitutional Treaty and go for a new treaty, initially referred to as a Reform Treaty. It was in the run-up to this decision, which included a detailed mandate for a new Intergovernmental Conference (IGC) that we saw the German Presidency, Chancellor Angela Merkel in particular, playing a role of leadership. The coming to power of Nicolas Sarkozy in France in May 2007 was also an important factor in the process.

The June 2006 meeting of the European Council decided that "the Presidency will present a report to the European Council during the first semester of 2007, based on extensive consultations with the Member States. This report shall contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments." This was a mandate to the future German Presidency to start consultations. It was also specified that the reform process should be completed "during the second semester of 2008 at the latest." It was not mentioned explicitly at the time, but the idea was to finish the process before the elections to the European Parliament in June 2009. The

Presidency Conclusions from the June 2006 meeting also mentioned that a political declaration should be adopted in Berlin on 25 March 2007, commemorating 50 years of the Treaties of Rome (Council of the European Union, 2006).

Finding a solution to the constitutional impasse produced by the negative referenda in France and the Netherlands was the most important point on the agenda of the German Presidency in the first half of 2007. 17 of the now 27 member states had ratified the Constitutional Treaty and in Germany the parliamentary part of the ratification had been completed. The treaty had been rejected by referenda in France and the Netherlands. The remaining states had put the ratification process on hold.

Those who had ratified the Constitutional Treaty wanted something as close as possible to that treaty. Presidential hopeful Sarkozy in France had suggested a mini-treaty which would only include the essential elements of the Constitutional Treaty. The Netherlands and the UK also wanted some kind of minimal reform that would allow them to avoid a referendum. Denmark obviously had sympathy for such an approach (Kurpas and Riecke, 2007).

In April Chancellor Merkel sent a letter to the member governments with 12 questions which indicated a pragmatic approach. While wanting only to do what was absolutely necessary to satisfy the sceptical governments, especially the UK, Poland and the Czech Republic, but also France and the Netherlands, the questions suggested the possibility of reverting to the classical method of amending the existing treaties, doing away with the Foreign Minister title and various symbols of a constitution (flag, hymn and logo) (Mahony, 2007a). This was the point where the Danish government produced a letter to the German Presidency listing the Nine Points. Since the Germans wanted to avoid referendums as much as possible they were very cooperative (Nielsen, 2007).[13]

In the end the summit adopted a 16-page mandate for an IGC, which then started early in the Portuguese Presidency on 23 July 2007. Final agreement on the Reform Treaty was reached at a meeting of the European Council in Lisbon, 18-19 October 2007. It was signed in Lisbon on 13 December 2007 (Hans, 2007).

The mandate for the IGC was rather detailed. This made it possible to conclude the IGC rather quickly during the Portuguese Presidency. The German Presidency deserves credit for its handling of the negotiations that reached the agreement on the mandate. After the June summit the *Financial Times* (June 24, 2007b) wrote:

> Angela Merkel, the German chancellor, emerged with her reputation enhanced, as a clear-sighted leader and a persuasive negotiator. She looked after the interests of big and small alike, essential in an enlarged EU. Against the odds, she produced a detailed road map for a "reform treaty" that manages to preserve most of the substance, but water it down enough to satisfy the "minimalists" in France, the Netherlands and the UK. Those governments were desperate to have a deal that would not require them to call referendums, and risk another No vote. Ms Merkel persuaded the

[13] The details of this Danish-German cooperation needs further research, including interviews in Copenhagen, Berlin and Brussels, which the author hopes to be able to conduct at a later stage.

"maximalists" to shelve their ambitions and accept a second best deal.

The job during the Portuguese Presidency was mostly technical, putting the political agreements into treaty language. The text that emerged from the group of experts on 10 October 2007 had removed the nine obstacles singled out by Denmark to avoid a referendum (Lauritzen, 2007).

Concluding remarks

At this stage of research on this topic I limit my conclusions to three points:

- Denmark provided the German Presidency with list of 9 articles in the Constitutional Treaty that required a referendum, assuming that there would not be a 5/6th majority in the *Folketing.*
- Thanks to good cooperation with the Presidency Denmark got the changes that allowed the country to avoid a referendum.
- The Presidency and other member states shared an interest in avoiding a Danish referendum.

On 11 December 2007, a week after the lawyers in the Ministry of Justice had decided that there was no transfer of sovereignty in the Lisbon Treaty, the government of Anders Fogh Rasmussen decided that there would be no referendum in Denmark (Kongstad, 2007b). The announcement came two days before the signature of the Treaty in Lisbon. The other member states were relieved when the Prime Minister announced that Denmark would not have a referendum (Nielsen, 2007).

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Annex

Comparative Treaty Texts

Table A1: EU Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Constitutional Treaty	Lisbon Treaty	Difference?
Art I-9(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.	Art. 6(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. Art. 188 N(8) (…) The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.	The Ministry of Justice argued that accession to the Constitutional Treaty would give the rules in the European Human Rights Convention in respect to EU law direct effect in Denmark. Section 20 of the Danish Constitution thus had to be applied. The new article 188 N(8) in the Lisbon Treaty allows for a separate Danish decision on the EU's accession to the European Human Rights Convention. So application of section 20 at the time of ratification of the Lisbon Treaty was not necessary (it was also argued that it might not be necessary later)

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A2: Flexibility clause

Constitutional Treaty	Lisbon Treaty	Difference?
Art. I-18 1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. 2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article. 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.	Art. 308 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 3b(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article. 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation. 4. This Article cannot serve as a basis for attaining objectives pertaining the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 25b, second paragraph of the Treaty on European Union.	Because of the abolition of the pillar structure the flexibility clause would apply to all the Union's policies in part III, not just pillar one as is the case of the existing flexibility clause Art. 308 TEC. The Union's objectives are further described more broadly in Art. I-3 than in Art. 2 TEC. The Ministry of Justice therefore said that Danish ratification of the Constitutional Treaty should be based on section 20 in the Danish Constitution. The Lisbon Treaty explicitly excludes CFSP from application of the flexibility clause. For the Areas of Justice, Security and Justice the Danish opt-out would apply.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A3: Protection of Personal Data

Constitutional Treaty	Lisbon Treaty	Difference?
Art. I-51 1. Everyone has the right to the protection of personal data concerning him or her. 2. European laws or framework laws shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.	Art 16 B (Art. 16 TFEU in Consolidated version) 1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regards to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 25a of the Treaty on European Union. Article 2a of Protocol no 21 on the Position of Denmark (no 22 in Consolidated Treaty): Article 2 of this Protocol shall also apply in respect of those rules laid down on the basis of Article 16 of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or 5 of Title V of Part Three of that Treaty.	The Ministry of Justice concluded in 2004 that the new article in the CT would lead to a transfer of sovereignty, so Art 20 of the Danish Constitution had to be applied. The article extended measures from the EC to the whole EU, thus also Criminal Justice and Police cooperation. The Danish Protocol to the CT (opt-out) did not explicitly refer to this article. Art. 16 B of the Lisbon Treaty is mentioned in the Danish Protocol. It means that measures adopted under Art 16 B applying to criminal justice and police cooperation will not apply to Denmark.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A4: Measures concerning passports, identity cards, etc.

Constitutional Treaty	Lisbon Treaty	Difference?
Art. III-125 1. If action by the Union should prove necessary to facilitate the exercise of the right, referred to in Article I-10(2)(a), of every citizen of the Union to move and reside freely and the Constitution has not provided the necessary powers, European laws or framework laws may establish measures for that purpose. 2. For the same purposes as those referred to in paragraph 1 and if the Constitution has not provided the necessary powers, a European law or framework law of the Council may establish measures concerning passports, identity cards, residence permits or any other such document and measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.	Art. 62(2) (Art. 77(3) in Consolidated Treaty) If the action by the Union shall prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament	The article in the CT implies transfer of sovereignty. It was not covered by the Danish JHA opt-out because it was placed under free movement. The article in the Lisbon Treaty also implies transfer of sovereignty, but it is covered by the Danish opt-out from supranational JHA cooperation because it is placed under AFSJ.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A5: Diplomatic and consular protection

Constitutional Treaty	Lisbon Treaty	Difference?
Art. III-127 Member States shall adopt the necessary provisions to secure diplomatic and consular protection of citizens of the Union in third countries, as referred to in Article I-10(2)(c). Member States shall commence the international negotiations required to secure this protection. A European law of the Council may establish the measures necessary to facilitate such protection. The Council shall act after consulting the European Parliament.	Art. 20 (Art. 23 in Consolidated) Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection. The Council acting with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.	It was concluded that the article in the Constitutional treaty implied a transfer of sovereignty. It talks about measures and a European law. The article in the Lisbon Treaty talks about 'directives establishing the coordination and cooperation measures'. The latter were deemed to be of such a nature that they would not reach the individual citizens directly, thus no transfer of sovereignty.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A6: Administrative measures with regards to capital movements and payments (combating terrorism)

Constitutional Treaty	Lisbon Treaty	Difference?
Art. III-160 Where necessary to achieve the objectives set out in Article III-257, as regards preventing and combating terrorism and related activities, European laws shall define a framework for administrative measures with regard to capital movements and payments, such as freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.. The Council, on a proposal from the Commission, shall adopt European regulations or European decisions in order to implement the European laws referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards.	Art. 61 H Where necessary to achieve the objectives set out in Article 61, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards.	The article in the Constitutional Treaty was placed in section on Capital and Payments not covered by Danish opt-out. The article in the Lisbon Treaty is placed under the Area of Freedom, Security and Justice (AFSJ) covered by the Danish opt-out.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A7: ECJ jurisdiction, intellectual property rights

Treaty of Nice	Constitutional Treaty	Lisbon Treaty	
Art. 229 A TEC	Art III-364 Without prejudice to the other provisions of the Constitution, a European law may confer on the Court of Justice of the European Union, to the extent that it shall determine, jurisdiction in disputes relating to the application of acts adopted on the basis of the Constitution which create European intellectual property rights.	Art 229 A Art 262 Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.	The article in Nice would allow a future transfer of sovereignty. At such future moment Denmark would have to follow Art. 20 in the Danish Constitution. The article in the CT does not mention unanimity or application of national constitutional rules. So art. 20 should be applied in connection with ratification of the CT. The Lisbon treaty again includes the reference to "approval by Member States in accordance with their respective constitutional requirements." It only includes minor linguistic changes compared with the existing treaty. So Art. 20 can be used later when/if it becomes necessary.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A8: Space policy

Constitutional Treaty	Lisbon treaty	Difference?
Art III-254 1. To promote scientific and technical progress, industrial competitiveness and implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space. 2. To contribute to attaining the objectives referred to in paragraph 1, European laws or framework laws shall establish the necessary measures, which may take the form of a European space programme. 3. The Union shall establish any appropriate relations with the European Space Agency.	Art. 172a Art 189 1. To promote scientific and technological progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European space policy. To this end, it may promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space. 2. To contribute to attaining the objectives referred to in paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the necessary measures, which may take the form of a European space programme, excluding any harmonisation of the laws and regulations of the Member States. 3. The Union shall establish any appropriate relations with the European Space Agency. 4. This Article shall be without prejudice to the other provisions of this Title. –(i.e Research and Technological Development and Space)	The Ministry of Justice concluded vaguely that the new article in the CT might imply an extension of the Union's competences and it was most inclined to be of the opinion that it would require application of Art 20 in the Constitution. The fact that the article in the Lisbon Treaty excludes "any harminisation of the laws and regulations of the Member States" made it possible for the Ministry of Justice to avoid art. 20 in the Danish Constitution.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.

Table A9: Public health

Nice	Constitutional Treaty	Lisbon Treaty	Difference?
Art 152	Art. III-278(4) …. … European laws or framework laws shall contribute to the achievement of the objectives referred to in this Article by establishing the following measures in order to meet common safety concerns: …. (c) measures setting high standards of quality and safety for medicinal products and devices for medical use; (d) measures concerning monitoring, early warning of and combating serious cross-border threats to health.	Art 152 Art 168 Art III-278(4)(c) is renumbered paragraph 5 and replaced with the following: The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.	The Ministry of Justice concluded that the measures concerning cross-border threats would fall under the Danish Constitution Art. 20. In the Lisbon Treaty these are reduced to incentive measures, and they cannot include harmonisation of national laws.

Source: European Union 2004, 2007 and 2008; Denmark, Ministry of Justice 2004 and 2007.