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EDITORIAL COMMENTS

The Danish Referendum

What happened in Denmark on the 2nd June 1992? Was the negative outcome of the referendum the result of poor information? Was it the effect of the Government's policy to attribute unpopular measures to obligations under Community law rather than to economic necessities or to their own political needs? Was it the fact that the full text of the Maastricht Treaty was distributed to the Danish people, who found it too complicated? Or was it really an anti-Community feeling? Did the no-vote express the wish to leave the Community? Or did it mean that the majority of the Danes want to freeze the Community at its present state of development and, if so, would it be possible to freeze a development such as the one that has dominated Western Europe since the Second World War? Or do the Danes prefer a further development in a direction other than the one expressed in the Maastricht Treaty and, if so, is there a direction other than the Maastricht-compromise between the Member States?

Perhaps even more important than the Danish intention is the response elsewhere in the Community. In all Member States understanding and sympathy for the no-vote was expressed. It was explained as demonstrating the democratic deficit of the Community or the bureaucratic surplus. It was alleged that Community law went too far into details, that the right of self-determination of the European peoples was unnecessarily curtailed. The examples of the Soviet Union and Yugoslavia were used to demonstrate that too much centralization finally leads to conflicts and fights for independence.

Should our conclusion be that Europe is on the wrong path, that a totally different approach should be looked for? A well known Dutch beer-brewer proposed redividing Europe into a large number of States, each having about 10 million inhabitants. Mutual equality of the States would exclude power politics and dominant positions; smaller size of States would diminish the distance between the government and the people; more equality of the Community's Member States would facilitate European co-operation. No doubt other good solutions for a better Europe can be thought up. But what possibilities really exist? Vested loyalties and vested interests are strong. People do not like drastic changes and popular support is necessary for any important project. Are there realistic alternatives other than going more slowly or going faster along the path we are following? In our opinion there are no fundamental alternatives. The choices we have to make are choices of detail, however important these details may be.

Where does the path lead us? Increasing communication and increasing mobility of people will ultimately diminish the differences between the European peoples. Ultimately – in the very long term – there may be one European people, and, ultimately – in the very long term – we may accept a central European government. But that is not for the near future. We accept that mobility and technology make uniform rules in industry and trade unavoidable, but for a long time to come we want cultural rules to be made at a level closer to the people. We all want "to remain ourselves", which means that we do not want to rush the inevitable development to cultural harmonization.

We want and we need a Community with a limited number of restricted powers but we cannot define what these powers should be, as the need for common European rules is continuously changing, and in most fields continuously increasing. That is why the Community's new powers were always limited to what was necessary to attain the objectives of the Community (the wording of Article 235 EEC) or by the principle of subsidiarity (which comes down to the same, but has the charm of new wording). The principle of subsidiarity, stressed in and after Maastricht, does not contain any fundamental change of policy. At the most it may lead to the Commission and the Governments being more reticent in accepting that particular Community rules are necessary, but more likely necessity will continue to

be accepted whenever the Governments agree that particular Community rules are desirable. The promise that European integration will be limited by the rule of subsidiarity should rather be seen as an effort to meet a popular demand for a diminution of European rules, in the same way as promises of deregulation were given to meet a popoular demand for a diminution of regulation in general. As in the case of deregulation, the actual effect of such promises remains to be seen.

The question before us after the Danish referendum is the question of available options. Negotiations between twelve different nations are difficult. The Maastricht agreement was preceded by long and cumbersome negotiations and finally based on complicated compromises. Understandably, all Governments are reluctant to reopen negotiations and even if they were to do so, the outcome would not be fundamentally different from the Maastricht agreement, and there would be no certainty that any compromise would be supported by a second Danish referendum. Government by referendum may be fair and democratic for purely national issues, it is too inflexible for issues of international co-operation. One cannot negotiate with the entire population in order to find an acceptable compromise, nor can a Government find out what solutions would be acceptable. When parliamentary approval is required, different political parties can be consulted during negotiations but one cannot consult the people in advance. This means that renegotiation of the Maastricht agreement would not only be difficult, it would also lead to a most uncertain result. But what is the alternative?

European integration is a streaming river. To a minor degree its course can be changed but it cannot be stopped. In the early years, when in 1954 France had blocked the European Defence Community, some years of stagnation were still possible, but today the European markets have been integrated to such an extent that further harmonization of laws will be inevitable in many fields, more European rules will be required and the need for institutional improvements will grow. If all other Member States accept the Treaty on European Union, a small Danish majority should not be permitted to block it. Are there alternatives? Can we go on without Denmark?

Under the general rules of international law a majority of two thirds of

the participating States may adopt amendments to a multilateral treaty.[1] Such amendments will enter into force between the States expressing their consent to be bound. Such consent may be demonstrated by ratification or otherwise.[2] The amending agreement does not bind any State party to the treaty which does not express its consent to be bound. The rights and obligations of such States remain governed by the unamended treaty.[3] These rules have the effect that no small minority of States can block amendments to treaties desired by a majority of at least two-thirds of the parties. The general rules of the Vienna Convention of the Law of Treaties apply, however, only in so far as the treaty concerned does not otherwise provide.[4]

The amendments to the Community treaties were adopted by common agreement of the representatives of the Governments of all Member States of the Community. They shall enter into force when ratified by all Member States.[5] With respect to voting in the field of the common foreign and security policy, the Maastricht conference adopted a declaration (which does not need ratification) with regard to Council decisions requiring unanimity. The Conference agreed that to the extent possible Member States will not block unanimity once a qualified majority exists in favour of a decision. This means that a blocking minority will be under strong pressure to give in, or at least to try to find an acceptable compromise. Article 5 of the EEC Treaty contains the same principle. Under that article Member States shall facilitate the achievement of the Community's tasks. If all other Member States accept the Treaty on European Union and thus indicate their opinion that this Treaty is necessary for the achievement of the Community's tasks, then Denmark should not block it.

Most likely, the Danish Government is willing to take account of the wishes of the other Member States, in particular if they are unanimous. Because of the referendum they cannot, however, accept any solution on behalf of Denmark. Unlike the Vienna Convention on the Law of Treaties,

1. Vienna Convention on the Law of Treaties, Art. 39, juncto Art. 9, para 2.
2. *Idem*, Art. 39, juncto Art. 11.
3. *Idem*, Art. 40, para 4.
4. *Idem*, Arts. 39, 40.
5. Treaty on European Union, Art. 4.

Community law does not offer a way out if all Members but one want to amend the text of the existing treaty. The most appropriate solution seems to be to revise Article R of the Treaty of the Union by making it possible that the Treaty enters into force when ratified by eleven Member States. This solution would be on strained terms with EEC Article 236, ECSC Article 96 and Euratom Article 204 which require unanimity for amendment, but under international law the eleven States are free to make a separate, new treaty which enters into force after eleven ratifications. The effect would be, however, that the present Community treaties would remain in force with respect to Denmark, which would lead to almost unsurmountable practical problems. One must try therefore to find a solution acceptable to Denmark. If it is possible to identify the main objections of the Danish people, one could perhaps adopt a protocol comparable to the protocol on social policy in order to meet those objections. One should be extremely careful, however, in excluding particular Member States from parts of Community law. In its opinion on the laying-up fund, the Court of Justice used the word "incompatible" with respect to special prerogatives reserved to certain States. The Court found its critical attitude confirmed by the possibility that the draft agreement on the laying-up fund might constitute the model for future arrangements in other fields. According to the Court: "the repetition of such procedures is in fact likely progressively to undo the work of the Community irreversibly".[6] The same must be true for any repetition of the social policy exception in order to enable the Danish Government to present in a second referendum a proposal different from the one of the first referendum. Possible exceptions for Denmark should be carefully chosen and should be of a temporary nature. Then the Danish people should be faced with a clear alternative: either to accept, or to leave the Community. The latter possibility would be catastrophic for Denmark especially when Sweden is to be admitted as a new Member State. One may trust that the Danes will be wise enough to accept the only solution possible both for the Community and for Denmark, that is to accept the Treaty of the Union with only minor changes or exceptions. This Treaty should be renegotiated only if one or more other Member States also refuse ratification.

6. Opinion 1/76 of the Court of Justice of 26 April 1977, [1977] ECR 741, at 759.