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SUPREME COURT JUDGMENT
delivered on Wednesday 20 February 2013

Case no. 199/2012

Niels Hausgaard,
Hans Henningsen,
Annelise Ebbe,
Andreas Åbling Petersen,
Sven Skovmand,
Hedvig Vestergaard,
Helge Rørtoft-Madsen,
Hanne Jakobsen,
Erik Bach,
Knud Bjerre Engsnap,
Anette Nilsson,
Jens Frederik Dahl Schelde,
Drude Dahlerup,
Jørgen Raffnsøe,
Uffe Geertsen,
Christian B. Karstoft,
Poul Erik Andreasen,
Elisabeth Bergsøe,
Bo Jeppesen,
Karen Margrethe Hansen,
Thorkil Sohn,
Ole Krarup,
Christian Juhl,
John Holten-Andersen,
Hanne Reintoft,
Villy Klit-Johansen,

Finn Sørensen,
Klaus Lorenzen,
Karen Horsens
and
Finn Hermann
(all represented by court-assigned counsel, Karen Dyekjær, attorney-at-law)
vs.
The Prime Minister
and
The Minister for Foreign Affairs
(both represented by the Legal Advisor to the Danish Government, Peter Biering, attorney-at-law)

Intervener for the Appellants:
Folkeafstemningskomité 2010 represented by Ole Krarup
(in person)

Judgment was previously delivered in the case by the 7th Division of the Eastern High Court on 15 June 2012.

Eleven justices participated in the adjudication: Børge Dahl, Lene Pagter Kristensen, Poul Søgaard, Niels Grubbe, Thomas Rørdam, Jon Stokholm, Vibeke Rønne, Michael Rekling, Hanne Schmidt, Jan Schans Christensen and Kurt Rasmussen.

Claims

The Appellants, Niels Hausgaard and others, made the following claims:

1) The Respondents, the Prime Minister and the Minister for Foreign Affairs, be ordered to recognise that Act no. 321 of 30 April 2008 amending the Act on Denmark's Accession to the European Communities and the European Union, under which Denmark accedes to the Lisbon Treaty of 13 December 2007, was adopted in contravention of s. 20 of the Danish Constitutional Act (the Constitution), as accession to the Treaty was adopted without following the procedure stipulated in s. 20 of the Constitution.

2) The Prime Minister and the Minister for Foreign Affairs be ordered to recognise that accession to the Lisbon Treaty of 13 December 2007 under Act no. 321 of 30 April 2008 amending the Act on Denmark's Accession to the European Communities and the European Union is invalid.

The Prime Minister and the Minister for Foreign Affairs have principally moved for affirmation, and alternatively for deferment of the legal effect of the Supreme Court's judgment until the Danish Parliament (the Folketing) and the Government have had the opportunity to comply with the procedure stipulated in s. 20(2) of the Constitution.

Niels Hausgaard and others have acknowledged and admitted the Prime Minister and the Minister for Foreign Affairs' alternative claim.

The Supreme Court's grounds and findings

1. Background to the case and main issues

a. Implementation of treaties

Under Danish law, accession to and implementation of a treaty or a treaty amendment, including concerning the relationship with the EU, may, as a general rule, be adopted following the general procedure for accession to treaties and legislation in the Constitution, i.e. by a simple majority in the Folketing, cf. s. 19(1) of the Constitution. However, if powers are delegated as described in s. 20 of the Constitution, the special procedure stipulated therein must be followed, i.e. adoption by a qualified majority in the Folketing or by a referendum. Amendment of the Constitution is required to delegate powers to the EU or another international organisation to a wider extent than that stipulated in s. 20 of the Constitution.

By judgment of 6 April 1998, the Supreme Court considered the issue of whether the Maastricht Treaty was rightly implemented in conformity with s. 20 of the Constitution or whether such implementation required an amendment of the Constitution (the Maastricht judgment, Danish Weekly Law Reports, UfR 1998, p. 800).

The present case concerns the implementation of the Lisbon Treaty (pursuant to Act no. 321 of 30 April 2008 amending the Act on Denmark's Accession to the European Communities

and the European Union). The Act was adopted under the general procedure for accession to treaties and legislation.

The Maastricht case concerned the upper limit of s. 20: Were the changes resulting from the Maastricht Treaty in the relationship between Denmark and the EU within the scope permitted by s. 20? The present case on the Lisbon Treaty concerns the lower limit of s. 20: Does the Lisbon Treaty result in such changes in Denmark's relationship with the EU that the procedure in s. 20 should have been followed?

b. The Appellants' legal interest in a judicial review

By judgment of 11 January 2011 (UfR 2011, p. 984), the Supreme Court ruled that the Appellants – 30 ordinary citizens – have a legal interest in a judicial review of whether the procedural rules in s. 20 of the Constitution should have been complied with when Denmark acceded to the Lisbon Treaty. In that judgment, the Supreme Court stated, among other things, that:

> "In support of the claim that the procedure stipulated in s. 20 of the Constitution should have been followed, the Appellants stated, among other things, that the Lisbon Treaty introduces fundamental changes in terms of the competence and voting rules applicable to the EU institutions. In particular, they stated that the legislative competence within several areas has been shared between the Council and the European Parliament, and that the Council now renders decisions by a qualified majority instead of by unanimous resolution to a far wider extent than before. In the Appellants' opinion, these amendments to the EU institutions' competence and voting rules are in themselves – i.e. regardless of whether new powers were delegated to the EU – so far-reaching that the provisions in s. 20 of the Constitution should have been followed.
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> The Parties, thus, disagree on the significance relative to s. 20 of the Constitution of the amendments made to the competence and voting rules of the EU institutions in the Lisbon Treaty. This disagreement concerns the legislative competence within a number of general and important spheres of life and, thus, matters which are of far-reaching importance to the general Danish population. Due to the general and far-reaching importance of the dispute, the Appellants have a significant interest in having their claim heard. To make access to judicial review conditional on new acts being adopted under the new treaty provisions which have a specific and real impact on the Appellants would not provide a better basis for review of the dispute.
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> Consequently, the Supreme Court finds that the Appellants have the requisite legal interest in having their claim heard. With regard to the issue of the capacity to sue, it is accordingly unnecessary to consider the significance of the other grounds cited by the Appellants to support their claim that the procedural rules in s. 20 should have been followed."

It is, thus, clear that this case must consider the importance in relation to s. 20 of the Constitution of the changes made to the EU institutions' distribution of responsibilities and voting rules in the Lisbon Treaty, while the question of whether other issues may be subjected to judicial review during this case has been kept open, including whether a s. 20 review of other issues should be deferred until acts having a real and existing impact on citizens are adopted.

c. The Appellants' principal views

In this case, the Appellants claim that the Lisbon Treaty has caused such fundamental and significant changes to the administration of powers previously delegated, and that this fact alone implies that the s. 20 procedure should have been applied. The Appellants also claim that it is not possible to rule out that new powers are conferred to EU institutions under the Lisbon Treaty, in which connection they have particularly referred to the so-called flexibility clause in Article 352 TFEU, the explicit adoption of the principle of primacy of EU law and sanctioning of the case law of the Court of Justice, sanctioning of the Charter of Fundamental Rights in the Treaty and the provision stipulating that the EU accedes to the European Human Rights Convention as well as the addition of new policy areas and extension of the EU's competence to conclude treaties.

2. S. 20 of the Constitution and change of the EU's administration of delegated powers

a. S. 20 of the Constitution

S. 20 of the Constitution is worded as follows:

> "20. Powers vested in the authorities of the Realm under this Constitutional Act may, by statute to a certain specified extent, 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."

This provision was included in the 1953 Constitutional Act in accordance with a proposal from the Constitutional Commission of 1946. In its report, the Constitutional Commission states that the provision will enable Denmark to participate in international cooperation, although it implies delegation of sovereignty, but that it must be made a condition "that the

majority of the population supports surrendering powers which have been conferred on the authorities of the Realm under the Constitution" (Report of Danish Parliamentary Proceedings Rigsdagstidende 1952-53, supplement A, column 3546).

In the Maastricht judgment, the Supreme Court stated, among other things (paragraph 9.2):

> "S. 20 was included in the 1953 Constitutional Act to enable Denmark to participate – without amending the Constitution by virtue of its s. 88 – in international cooperation implying that the exercise of legislative, administrative or judicial authority is entrusted to an international organisation with direct effect in this country. Because it was impossible to predict with any degree of certainty what forms the international cooperation would assume in the future, no detailed specification was made as to what powers the provision covers. Thus, the aim was to grant wide limits for the access to transfer sovereignty. However, it was emphasised in the provision that the delegation of powers can occur only "to a certain specified extent". Furthermore, it was considered important that the more stringent demands for the adoption of bills under the provision offer a far-reaching guarantee.
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> The application of the qualified procedure in s. 20 of the Constitution is required to the extent that an international organisation is entrusted with the exercise of legislative, administrative or judicial authority with direct effect in this country, or the exercise of other powers which, according to the Constitution, are vested in the authorities of the Realm, including the power to enter into treaties with other states."

Pursuant to s. 20(1) of the Constitution, the decisive condition is, thus, whether "powers" have been delegated as mentioned.

Furthermore, the following is stated in the Maastricht judgment (paragraph 9.2) on delegation of powers "to a certain specified extent":

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

When amending a treaty by which Denmark has delegated powers to an international authority, such treaty must be implemented in Denmark according to the qualified procedure in s. 20 of the Constitution if the international authority is entrusted with the exercise of further legis-

lative, administrative or judicial authority with direct effect in Denmark, regardless of whether the extension concerns the fields of responsibility or the nature of the powers. The s. 20 procedure must also be followed in case of extension of the international organisation's authority to exercise other powers which are conferred on the authorities of the Realm by the Constitution. However, it is not necessary to use the procedure in s. 20 if the amended treaty only clarifies the powers which were already delegated to the international authority pursuant to an act adopted in accordance with the procedure in s. 20 of the Constitution.

According to s. 20 of the Constitution, powers may be delegated to "international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation".

According to the wording of s. 20 of the Constitution, it is not a requirement that the delegation of powers must be accompanied by particulars on the internal organisation and working method of the international organisation, on the composition of and distribution of responsibilities between its institutions, on voting rules or on other rules governing the administration of the delegated powers. In addition, the legislative history behind the Act does not indicate that such requirement exists. In the Supreme Court's opinion, the wording of s. 20 of the Constitution, the legislative history behind the provision and the purpose of the provision do not imply that it is a requirement that Denmark's delegation of powers to an international organisation must be made subject to a new procedure under s. 20 of the Constitution in the event of changes in the organisation, working method, voting rules or general administration of such international authority. This is also how the provision has consistently been interpreted and applied by successive governments and the Folketing.

However, a new s. 20 procedure must be undertaken in the event of treaty amendments resulting in such fundamental changes to the organisation etc. of the international authority that the organisation effectively assumes a new identity. This would be comparable to delegating powers to another international authority. A new s. 20 procedure may also be required in case of changes in the administration of previously delegated powers in contravention of what might have been determined in the provisions of the act adopted under s. 20 under which such delegation was authorised.

However, it cannot – as the Appellants assert – be demanded that a new s. 20 procedure be undertaken in case of treaty amendments resulting in fundamental changes in an international organisation's administration of delegated powers, based on a notion that the effect of delegating a power depends on the extent to which Denmark will retain parliamentary control over the exercise of the delegated power. Pursuant to s. 20, the decisive factor is the specification of what has been delegated to whom, and according to this provision, there is nothing to prevent delegating powers to an international organisation as such without specifying the structure and design of such organisation.

b. Change of the EU's administration of delegated powers resulting from the Lisbon Treaty

Since Denmark joined the EC in 1972, a number of fundamental changes have been made to the EC's – later the EU's – organisation, working method, voting rules and general administration. Such changes were introduced in connection with, among other things, the accession to the Maastricht Treaty in 1993 and the Amsterdam Treaty in 1998. Both the changes brought on by these Treaties and the changes resulting from the Nice Treaty from 2001, enabling a number of Eastern European countries to join the EU as new members, have gradually weakened the individual Member State's scope for influencing the legislative process in the EU.

When determining whether the Lisbon Treaty resulted in such fundamental changes to the institutional setup that it in effect implied that the international organisation, to which powers had previously been delegated, assumed a new identity, a comparison with the institutional setup existing before the Lisbon Treaty will have to be made.

Among other things, the Lisbon Treaty led to the EC and the EU being merged into one unit called "the EU" in what was a merger of two organisations that already existed under the Treaties in force at the time.

The so-called ordinary legislative procedure, according to which the Council and the European Parliament must agree on a proposal in order for it to be passed, was introduced by the Maastricht Treaty in 1993 (then termed the "co-decision procedure"). This meant that the European Parliament became co-legislator in a number of policy areas. The application of this procedure was extended and adapted in 1998 when the Amsterdam Treaty was implemented.

Following the Lisbon Treaty, the number of areas where the Council and the Parliament must agree was increased further, and this legislative procedure is currently the most commonly used procedure.

In addition, in respect of a number of provisions governing authority in the Treaties, the Lisbon Treaty amended the requirement for unanimity to a requirement for a qualified majority among the member states in the Council. Adoption of legislation by a qualified majority is now the principal rule in the Council. The definition of qualified majority has also been amended with the Lisbon Treaty.

In addition to the new legislative procedures, the Lisbon Treaty also introduced new procedures for adoption of non-legislative acts, including for the so-called delegated acts and implementing acts. This means that it is possible for both the Council and the Commission to adopt different types of non-legislative acts in connection with the implementation of legislative acts adopted by the European Parliament and the Council.

In addition to the widening of the application of the ordinary legislative procedure, the Lisbon Treaty significantly strengthened the role of the European Parliament in several other respects, including strengthening of the Parliament's powers in relation to the EU budget as well as its control of the Commission, e.g. when electing the President of the Commission, just as the Parliament's democratic control functions were enhanced in a number of other areas. With the Lisbon Treaty, the Parliament was also given a much stronger role in relation to the EU's conclusion of international agreements.

The role of the national parliaments in the EU's decision-making process has also been strengthened, in particular in the control of compliance with the subsidiarity principle and the scope for changing the decision-making procedures in the Union's institutions without amending the Treaties.

The Lisbon Treaty also introduced a number of changes in the European Council, which has now become an independent EU institution with tasks and functions that are established and specified in the Treaty. Furthermore, the European Council now has a permanent President, just as the new post of High Representative of the Union for Foreign Affairs and Security Policy was created. This post replaces the High Representative for the EU introduced by the

Amsterdam Treaty. This change strengthens and extends the office, as the High Representative is the permanent Chairman of the Foreign Affairs Council and one of the Vice-Presidents of the Commission in addition to being in charge of the Union's common foreign and security policy.

Also, after the Lisbon Treaty, the Commission will have fewer commissioners than the number of Member States, as the members will be elected pursuant to a rotating system from 2014.

c. The changed EU administration after the Lisbon Treaty and s. 20 of the Constitution

Regardless of the treaty amendments mentioned above, the EU is still an organisation consisting of independent, mutually obliged states functioning based on powers delegated by each Member State, and the Supreme Court finds that the changes made to the EU's organisation, working method, voting rules and general administration are not so fundamental in nature that the EU has in effect assumed a new identity.

The Appellants have stated that s. 2 of the 1972 Accession Act must be assumed not only to refer to the determination of the scope of the powers, but also to the institutional provisions of the Treaties as stipulated in the Treaties mentioned in s. 4 of the Act. In the Appellants' opinion, this implies that subsequent institutional changes must be regarded as changes in the conditions of the surrender of sovereignty, with the effect that the changes require a new procedure under s. 20 of the Constitution. In addition, the Appellants have stated that it appears from s. 6 of the Act that, when Denmark joined the EC, it was found to be important that the Treaty contained special rules on veto power and voting.

According to s. 2 of the 1972 Accession Act, "powers may be exercised by the institutions of the European Communities to the extent stipulated in the Treaties etc. mentioned in s. 4". The Supreme Court finds that this provision must be interpreted to the effect that the powers have been delegated to the Community institutions without this being conditional on the organisation of the Communities remaining as provided in the Treaties listed in s. 4 of the Accession Act. According to s. 2, powers are delegated to the Community institutions, and the provision does not in any way specify that the powers are delegated to certain institutions with a certain organisation, and the reference to s. 4 strictly concerns the scope of the powers and not the regulation of the Communities' institutional setup in the Treaties.

According to s. 6 of the Accession Act, the Government must report to the Folketing on developments in the EU and notify the Folketing's European Committee (originally the Folketing's Market Committee) on proposals for Council decisions which will have direct applicability in Denmark or for the compliance with which the Folketing's involvement is required. According to the explanatory notes to the Accession Bill regarding this provision (Report of Danish Parliamentary Proceedings Folketingstidende 1971-72, supplement A, column 4544), it must "ensure that the Folketing will be kept informed of the work in the EC and may exercise parliamentary control". The Supreme Court does not find basis therein for making delegation of powers to the Community under the Act conditional on a certain institutional setup of the Community.

The Appellants have also stated that the changes resulting from the Lisbon Treaty are in contravention of the clear and expressed assumptions on which the adoption of the 1972 Accession Act was based, and that this too implies that a legislative procedure according to s. 20 of the Constitution must be undertaken. In this regard, the Appellants have specifically referred to the comments by the then Minister for European Market Affairs in his speech when introducing the Bill (Report of Danish Parliamentary Proceedings *Folketingstidende 1971-72*, column 3631), including the following statement:

> "At the time when we possibly accede to the Rome Treaty and the other Treaties, we know exactly which matters are delegated to supranational decision-making power, and which conditions govern the exercise of such power".

However, the preparatory work for the 1972 Accession Act also contains statements showing that it was known that the EC's organisation etc. could and would change over time. The majority of the Folketing's Market Committee stated the following in its report on the Bill (Folketingstidende 1971-72, supplement B, column 2810 et seq.):

> "The institutional setup of the EC is to some extent in the making. Following the addition of new Member States, the number of members in the present institutions will increase. Also, the issue of a strengthening of the institutions is on the agenda for the planned European summit...".

Against this background, the Supreme Court does not find that the Appellants' statements provide a basis for assuming that the surrender of sovereignty is based on legal assumptions

on the administration of the delegated power, or for assuming that the Act was based on conditions to this effect. The overall legislative basis does not provide any grounds for establishing that such assumptions or conditions have existed.

Accordingly, the views concerning the change of the EU's administration brought forward by the Appellants do not justify upholding their claims.

3. Indirect widening of the scope of the powers?

The Appellants have asserted that it is not possible to rule out that new powers have indirectly been delegated to EU institutions due to the changed structure and the explicit addition of new policy areas. In this connection, the Appellants have particularly stated that with the Lisbon Treaty, the principle of primacy of EU law was explicitly adopted, and the very expansive interpretation of the Treaty which has been applied in certain areas was sanctioned, that it has been laid down in the Treaty that the Charter on Fundamental Rights has the same legal value as the Treaties, and that the new treaty basis enables a much wider application of the flexibility clause than the previous treaty basis.

In the Maastricht judgment, the Supreme Court found, among other things, that it is for the Danish courts to decide whether EU acts exceed the limits for the surrender of sovereignty which has taken place by the Accession Act. Paragraph 9.6 of the judgment thus reads:

> *"9.6.* The Appellants have pleaded that the jurisdiction of the EC Court of Justice under the Treaty, held against the principle of primacy of EC law, implies that Danish courts of law are prevented from enforcing the limits for the surrender of sovereignty which has taken place by the Accession Act and that this must be taken into consideration when assessing if the demand for specification in s. 20(1) of the Constitution has been observed.
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> By adopting the Accession Act, it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold than an EC act is inapplicable in Denmark without the question of its compatibility with the Treaty having been tried by the EC Court of Justice, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the surrender of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in s. 20(1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for surrender of sovereignty determined by the Accession Act. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the re-

> quired certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Accession Act. Similarly, this applies with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice."

The fact that it was stated in Declaration 17 to the Lisbon Treaty that the Conference recalls the case law of the Court of Justice of the European Union regarding the primacy of EU law, and the fact that an Opinion from the Council Legal Service was attached to this Declaration, do not change the Supreme Court's conclusion on the Danish courts testing of the constitutionality of acts and EU acts.

In paragraphs 9.4 and 9.5 of the Maastricht judgment, the Supreme Court stated the following on the interpretation of the flexibility clause in Article 235 of the EC Treaty in force at the time:

> *"9.4. ...*
> It appears from the wording of Article 235 that the fact that action by the Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient basis for applying the provision. It is a further condition that the intended action is 'in the course of the operation of the common market'. This – compared with Article 2 under which the tasks of the Community shall be promoted 'through establishment of a common market and an economic and monetary union and through implementation of common policies or action as stated in Articles 3 and 3a' – is to be understood so that the intended action shall lie within the scope of the operation of the Community that appears from the other provisions of the Treaty, including in particular Part Three on the policies of the Community and the listing in Articles 3 and 3a of the individual fields of operation. This interpretation is in accordance with the Government's note of 21 January 1997, to the Folketing's European Committee ... and is confirmed by Opinion 2/94 of 28 March 1996 of the European Court of Justice in plenary session, where it is stated in Paragraphs 29 and 30 (ECR 1996-I, page 1788):
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> > '29. Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.
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> > 30. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.'

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

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

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

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

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

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

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

The flexibility clause, as now laid down in Article 352 TFEU, clarifies that it still only authorises adoption of acts without specific authority in areas that lie within the framework created by the other provisions of the Treaty, to attain one of the objectives therein, see also Declaration no. 42 appended to the Lisbon Treaty. As held by the Supreme Court in the

Maastricht judgment (paragraph 9.4), the Government is obliged to prevent that the provision is used to adopt proposals which fall outside this framework and therefore presuppose additional transfer of sovereignty. A similar obligation applies in respect of the Charter of Fundamental Rights, where Article 6(1) TEU expressly provides that it shall not extend the Union's competences.

In the Act implementing the Lisbon Treaty, it has, from a constitutional point of view, been presupposed that no additional powers are delegated when Denmark accedes to the Lisbon Treaty. The constitutional assessment has been based on the proviso that the Lisbon Treaty should be interpreted in accordance with the Protocols and Declarations appended to the Treaty.

The Court of Justice of the European Union is charged with settling any disputes on the interpretation of EU law, but this must not result in widening of the scope of Union powers. As mentioned above, Denmark's implementation of the Lisbon Treaty was based on a constitutional assessment that it will not imply delegation of powers requiring application of the s. 20 procedure, and the Danish authorities are obliged to ensure that this is observed.

The Supreme Court finds that the Appellants' statements on primacy of EU law, interpretation, the Charter of Fundamental Rights and the flexibility clause do not in themselves justify setting aside the Government's and the Folketing's mentioned constitutional assessment.

If an act or a judicial decision which has a specific and real impact on Danish citizens etc. raises doubts as to whether it is based on an application of the Treaties which lies beyond the surrender of sovereignty according to the Accession Act, as amended, this may be made subject to a judicial review, as stated in paragraph 9.6 of the Maastricht judgment. The same applies if EU acts are adopted – or if the Court of Justice delivers judgments – based on such application of the Treaties with reference to the Charter of Fundamental Rights.

Against this background, the Supreme Court finds that the Appellants' claim that the scope of the powers has indirectly been widened does not justify upholding their claims.

4. Direct widening of the scope of powers?

As mentioned above, in its judgment of 11 January 2011 (UfR 2011, p. 984), the Supreme Court held that the Appellants are entitled to a judicial review of the significance relative to s. 20 of the Constitution of the changes made to the EU institutions' distribution of responsibilities and voting rules with the Lisbon Treaty, while the question of whether other issues may be subjected to judicial review during this case has been kept open, cf. paragraph 1.b. above.

The Appellants have stated that the Lisbon Treaty resulted in a direct widening of the scope of the powers in a number of policy areas. In this regard, the Appellants have specifically referred to provisions in the Treaty, including its Protocols and Declarations, on the free movement and right of residence of Union citizens, personal data, social security, restrictive measures, energy policy and international agreements and the common foreign and security policy, but have withdrawn their allegations in the areas of diplomatic protection, third countries and humanitarian assistance, the solidarity clause and the jurisdiction of the Court of Justice of the European Union in disputes relating to intellectual property rights.

The Respondents have dismissed the allegation that the powers to adopt acts having a direct impact on Danish citizens etc. have been extended, and have particularly submitted that the provisions only clarify powers that have already been delegated in the mentioned areas, except for personal data and the joint foreign and security policy, and that the provisions in these two areas do not authorise acts having a direct impact on Danish citizens. In addition, the Respondents have submitted that the provisions are covered by Danish opt-outs in respect of the free movement and right of residence of Union citizens, personal data and restrictive measures.

The Supreme Court finds that there is no basis in this case for concluding that the Act on the Lisbon Treaty delegated additional powers to adopt acts having a direct impact on Danish citizens etc. in a number of policy areas implying that the procedure in s. 20 of the Constitution should have been followed. Furthermore, the Supreme Court finds that this case is not suited to settle the Parties' disagreements concerning these issues. However, a case involving an act or a judicial decision adopted or delivered pursuant to the relevant Treaty provisions and having a specific and real impact on citizens etc. would provide a better basis for hearing the dispute.

Against this background, the Supreme Court finds that the Appellants' claim that the scope of the powers has directly been widened in the mentioned policy areas does not justify upholding their claims.

5. *The European Human Rights Convention*

Pursuant to the Lisbon Treaty, the EU Treaty stipulates in Article 6(2), first sentence, that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

The Appellants have asserted that the EU's competence to accede to this Convention is new, see the Opinion of the Court of Justice of 28 March 1996 (Opinion 2/94), in which it is concluded that "as Community law now stands, the Community has no competence to accede to the Convention". The EU's accession to the Convention is not an option for the Member States, but a duty which they assume when acceding to the Lisbon Treaty, and it will provide the Court of Justice with further competence and increase the potential for having a direct impact on relations among individuals.

The Respondents have submitted that Denmark's accession to the Lisbon Treaty in this regard is based on the constitutional assessment that Denmark does not delegate powers to the EU requiring application of the s. 20 procedure by acceding to Article 6(2) TEU. The EU's right to accede to the Human Rights Convention is not a power covered by s. 20 of the Constitution, and the EU's accession does not affect the EU's competences, which has expressly been stipulated in Article 6(2), second sentence, of the EU Treaty. In addition, Protocol No. 8, Article 2, provides that the agreement relating to the accession of the EU to the Convention must ensure that accession of the Union does not affect the competences of the Union or the powers of its institutions, and that nothing in the agreement affects the situation of the Member States in relation to the Convention. Also, Article 218(8) TFEU states that a decision on accession to the Convention must be made by the Council, but that it will only enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements. Consequently, a separate Danish decision must be made before the provisions laid down in the Human Rights Convention within the scope of EU law will have any direct impact in Denmark.

The Supreme Court does not find any basis for setting aside the Government's and the Folketing's constitutional assessment that the Lisbon Treaty does not delegate powers to the EU in this regard which requires a s. 20 procedure – an assessment which is binding on the Danish authorities. If EU acts are adopted or if the Court of Justice delivers judgments, with reference to the European Human Rights Convention, based on an interpretation of the Treaties that contravenes this constitutional assessment, it will be possible to submit this to a judicial review as stated in the Maastricht judgment (paragraph 9.6), see paragraphs 3 and 4 above.

Against this background, the Appellants' objection that a new power was delegated to the EU with the provision in the Treaty on the EU's accession to the European Human Rights Convention does not justify upholding their claims.

6. Conclusion and costs

Based on these grounds, the judgment is affirmed.

According to the nature of the case, neither Party shall pay costs before the Supreme Court to any other Party.

It is held that:

The High Court's judgment is affirmed.

Neither Party shall pay costs before the Supreme Court to any other Party.