

# EMU CHOICES

THE CHOICE FOR EUROPE SINCE MAASTRICHT  
SALZBURG CENTRE OF EUROPEAN UNION STUDIES

## Fact sheet on legal foundations for fiscal, economic, and monetary integration

### DENMARK

by Ulla Neergaard



## **Introduction**

This country fact sheet provides concise information on the main characteristics of the national constitutional systems, including the system and role of national jurisprudence, parliaments and governments. Further, it briefs on the constitutional foundations and limits in the field of Economic and Monetary Union. It outlines on the existence of specific constitutional provisions on EMU membership, accession, treaty amendments, or limits to the (further) transfer of powers through Treaty amendments.

Among others, the overview informs about the principal actors in the field of fiscal and economic policies, the relevant findings of the judicial and parliamentary branches on EMU related actions, implementation measures of supranational and international rules, and respective constitutional amendments.

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## **DENMARK (Ulla Neergaard)**

### **1) Main characteristics of the national constitutional system**

The Danish constitutional system is mainly based on the Danish Constitutional Act, “Grundloven” (which could be translated into “the fundamental law”). It has its origin all the way back to 5 June 1849, where it was adopted. The adoption had its ideological background in the abolition of absolute monarchy and the introduction of a parliamentary political system. It was most recently amended in 1953 (and previously in principle in 1866, 1915 and 1920). It now consists of 89 provisions; in contrast to the original 100. The majority of these are still largely identical with how they were formulated back in 1849. Especially due to the lack of changes of the original provisions and the extremely old-fashioned formulations, nowadays the Danish Constitutional Act is viewed by many as quite out-dated and insufficient. One further reason behind the prevailing criticism is that it does not contain a comprehensive catalogue of all those fundamental rights, which have now become common to be included in more modern constitutions including leading international treaties, etc. It mainly contains civil and political rights, and thus not truly e.g. social rights to the extent to which such may be found in for instance the CFREU. Despite the problems, the Constitution has nevertheless been able to provide a solid framework of democracy.

The main reason for the Danish Constitution not having matured as constitutions in comparative countries is that it is quite difficult to amend it. In brief, according to Section 88 it first requires adoption in Parliament of the amendments in question, then a calling of a general election, followed by re-adoption of the same proposal in the newly elected Parliament, and finally confirmation by referendum with a majority of at least 40 per cent of all possible voters.

Regarding the constitutional “culture”, it may be seen as characterised by a positivistic approach to interpretation, implying that no other content is derived from a given provision than its wording undoubtedly can be seen as containing. Court-made law is generally viewed as problematic and a high degree of judicial self-restraint dominates. Ultimately, this tradition implies that the courts are reluctant in setting aside legislation as in conflict with the Constitution. Even though a slight influence might take place, these factors all imply that the Danish constitutional culture is quite different – and weaker – when compared with the more international one. So in Denmark, the protection of the individual’s fundamental rights mainly derives from international sources of law.

### **2) Constitutional foundations of EMU membership**

The Danish Constitution does not contain any provisions referring explicitly to the European Union. However, two provisions are nevertheless of importance, namely Sections 19 and 20. The former concerns treaty making powers. Despite its complexity, for the purposes here it suffices to state that the provision implies that a dualist system in principle rules.

Section 20, which is of at least an equal degree of complexity, concerns the delegation of powers to international organisations. The provision was inserted in the Constitution in 1953 to prepare for future international arrangements. Accordingly, it constituted the legal basis for the Danish membership of the European Communities by 1 January 1973. It implies that

powers vested in the Danish authorities under the Constitution may only “to a certain specified extent” be delegated to international authorities set up by mutual agreement for the promotion of international rules of law and cooperation. The conditions prescribed for the procedure to be followed are quite strict, but after all not as strict as those prescribed for amending the Constitution.

The most important judgments of the Supreme Court on these matters are the ones regarding the Maastricht Treaty and the Lisbon Treaty respectively (U1998 p. 800 and U 2013 p. 1451). In both instances, the core is that the Danish courts cannot be deprived their right to adjudicate questions as to whether EU law instruments overstep the boundaries for the transfer of sovereignty that has been accepted.

Since the Constitution does not contain any explicit references to the EU, it is no surprise that it neither contains any to the EMU. Under all circumstances, the country is not a member thereof. Rather, as a consequence of the initial so-called Danish “No” in 1992 to the Maastricht Treaty, Denmark’s situation in this regard has become one of the more peculiar ones. According to the Edinburgh Agreement of 1992, the purpose of which was to assist in approval in a second referendum, four exemptions/derogations/reservations were allowed for. Accordingly, not until a new referendum which took place in 1993, the Danes accepted the Maastricht Treaty. The four opt-outs, which are still in force even today, concern Union Citizenship, EMU, Defence Policy, and Justice and Home Affairs. The special Danish opt-out with regard to the euro gives Denmark the right to decide if and when it would join the euro.

Any change with regard to this opt-out is due to Section 20 of the Constitution assessed to require a referendum. In fact, back in 2000 the Danish electorate voted against joining the euro in a referendum. Thus, it is not the least likely that a new referendum will be planned in the near future, which is further supported by the negative result (rejection by 53% of voters) on the most recent referendum on another of the opt-outs, namely whether to convert Denmark's current full opt-out on home and justice matters into an opt-out with case-by-case opt-in, which took place on 3 December 2015

### **3) Constitutional limits for EMU membership**

Regarding constitutional limits for EMU Membership, reference may be made to the previous section. In addition, although not in a strict sense constituting a Eurozone regulation, the Treaty on Stability, Coordination and Governance (also known as the Fiscal Compact or TSCG) shall be - for the sake of completeness - included here. The reason why it is not in a strict sense a Eurozone regulation is that it besides the Eurozone Member States themselves also is signed by the Member States outside it. It introduced a so-called “golden rule” which obliges government budgets to be balanced. Concerning Denmark, the country has signed it and Article 14(5) is of importance.

The Treaty has not been viewed as constitutionally problematic by the important actors in Denmark. The Ministry of Justice has thus assessed that Denmark can ratify the Treaty on the basis of Section 19 of the Constitution and that accession hence does not require an application of the procedure in Section 20 of the Constitution or a change as such of the latter.

Another element briefly to be touched upon is the Banking Union. In that regard, the Ministry of Justice has concluded in a memorandum that Denmark can participate in the enhanced cooperation on the basis of Section 19 of the Constitution, and that thereby the procedure in Section 20 is not required. In other words, the assessment is that a referendum is not legally required. It must be emphasised that this might eventually become contested from different angles.

#### **4) Crisis Management Measures**

Crisis management measures are here understood to be directed to members of the Eurozone. Thus, being a non-Eurozone-country, these will normally not be of direct impact to Denmark. Nevertheless, Denmark will indirectly be influenced by any larger crisis in the Eurozone, in particular because its monetary policy is conducted under the objective of keeping the krone stable vis-à-vis the euro.

Pursuant to Section 2(3) of “Bekendtgørelse af lov om valutaforhold m.v.”, i.e. Consolidated Act on Foreign Exchange, etc. no. 279 of 11 April 1988, “Guidelines for the foreign-exchange policy to be conducted while the Act is in force shall be laid down after negotiation between Danmarks Nationalbank and the Royal Bank Commissioner”. This means that although the bank is responsible for the monetary policy – independently from the Danish government – the exchange-rate policy rather has to be laid down by the Danish government, however in consultation with the bank.

The fixed-exchange-rate policy vis-à-vis the euro was agreed upon nearly twenty years ago. More precisely, it was concluded at an informal meeting of the Ecofin Council on 25-27 September 1998 in Vienna between the ministers for economy and finance and the central bank governors of the EU Member States. A narrow fluctuation band of +/- 2.25 per cent around the central rate in ERM II was the decision at that time. In practice, since the fixed-exchange-rate policy ensures that fluctuations in the krone rate against the euro are kept at a very modest level, the krone will match the euro's fluctuations vis-à-vis other currencies.

#### **5) Constitutional law scrutiny of EMU reform scenarios**

Besides what has already been stated above, as a non-Eurozone-country, this aspect is estimated as not being of relevance for the time being.

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