

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

GERMANY

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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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1) Main characteristics of the national constitutional system

The German constitution (“*Grundgesetz*”, Basic Law, GG) characterises Germany as a democratic, social and federal state (Art. 20.1 GG). Along with of the rule of law, the separation of powers (Art. 20.3 GG), and the protection of the basic rights (Art. 1 GG) these characterisations form the main principles of the constitution. Art. 79.3 GG states that these principles may not be amended or altered under the rule of the *Grundgesetz*.

People use their democratic power solely in elections to the federal parliament (“*Bundestag*”), state parliaments and local representatives. There are no plebiscites on federal level, although the constitution does not explicitly prohibit them. The Government is formed by the Chancellor and his cabinet. The Chancellor is elected by the *Bundestag* and chooses the cabinet for his administration. As the principle of federalism implies, Germany is built up of the federation (“*Bund*”) and 16 States (“*Länder*”). The states take part in the federal legislation via the federal council (“*Bundesrat*”) consisting of representatives of the state governments.

A judicial review of constitutional matters is provided by the Federal Constitutional Court (“*Bundesverfassungsgericht*”). Among other duties, the Court has the authority to decide over controversies between the high state organs, to abrogate unconstitutional laws and to defend the citizens against violations of their constitutional rights.

For the modification of rules of the constitution a majority of two thirds of each the *Bundestag* and the *Bundesrat* is required (Art. 79.1 and 2 GG).

2) Constitutional Culture

The German constitution is considered to have large influence on the entire German legal system. It provides the guidelines for the interpretation of law in general and marks the cornerstones for politics in Germany. The main interpreter of the constitution is the Federal Constitutional Court equipping it with a great amount of authority in the legal system.

3) Constitutional foundations of EU and EMU membership

The participation in the process of the European integration is demanded by Art. 23 GG. Consequently, Germany aims to actively take part in the EU and the EMU. However, in order to trigger this state objective of integration, the EU has to meet certain criteria. Specifically, the EU has to value democratic, social and federal principles as well the principle of subsidiarity and the rule of law. Art. 23 GG also requires a protection of fundamental rights by the EU.

Art. 23 GG also provides a gradual system for involvement of the *Bundestag* and the *Bundesrat* in matters of the European Union. The participation consists in the right to obtain sufficient information about EU projects and the right to make statements about these projects, which the representative of Germany in the European Council has to respect. The more the responsibility of the states is concerned the more influence the *Bundesrat* gains on

matters of the European Union. Secondary European law is being implemented by federal and state law. For parliamentary involvement there is no difference between EU law and EMU related measures outside of the European Union.

The modification of primary law and the implementation of secondary law that changes the *Grundgesetz* have to meet the same requirements as the alteration of the constitution. “The minimum standard protected by Article 79.3 GG must not fail to be achieved even by Germany’s integration into supranational structures.”¹

4) National fiscal and economic politics

Federal and state parliaments hold the competences of national and economic politics. However, most matters in that area, such as taxation and basic economic principles, belong to the federal competences.

Budgetary laws regarding the *Bund* belong to federal competences, while state budgetary laws are autonomously enacted by the states. Art. 109.2 GG binds the federal state and the states to budgetary discipline imposed by EU law. In 2009, Art. 109.3 GG was changed to implement a new “debt break” for the federal state and the states replacing an already existing regulation. The budgets have to be balanced without public borrowing. However, these rules do not bind municipalities and the public social insurance agencies. The norm is considered to fulfill the demands of the TSCG.

Democratic legitimacy is ensured over the direct election of the members of the parliaments.

5) Constitutional limits for EU and EMU membership

“The *Grundgesetz* calls for European integration and an international peaceful order. Therefore, not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*) applies.”² Hence, Germany respects the main principles of the EU such as the primacy of EU law. The courts (and in recent history even the Federal Constitutional Court for the first time) use the preliminary reference procedure under Art. 267 TFEU. The Constitutional Court’s scope of review does not include EU law or EMU related measures, though it controls the consenting decisions of the *Bundestag* towards these measures.

In order to do so, the Federal Constitutional Court established two different scrutinies that limit EU and EMU integration. The first is the ultra-vires control for EU law. The European Union is founded on the principle of conferral meaning that all powers and responsibilities of the Union are granted specifically by the member states. That being said, an act of the European Union is regarded as ultra-vires if that the act exceeds these granted powers or the European Union is given the capacity to determine its own competences. If an exceeding act is identified, it must not be applied in Germany.

¹ BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), 230 http://www.bverfg.de/e/es20090630_2bve000208en.html.

² BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), 225.

The second scrutiny is called “control of identity” (“*Identitätskontrolle*”). The court underlines that the EU is not a sovereign state and not democratic to the full extent. Endowed with a higher standard of democratic legitimation, the federal parliament has a “permanent responsibility for integration”³ (“*Integrationsverantwortung*”). That means, it has to ensure that while transferring powers to the EU the Bundestag leaves “sufficient space to the Member States for the political formation of the economic, cultural and social living conditions”⁴. Hence, it recognises certain areas of legislation which have to be kept in the responsibility of the *Bundestag*. The Federal Constitutional Court lists following topics:

“Decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)”⁵.

Especially the third point on the list, in later decisions referred to as “budgetary responsibility” of the *Bundestag*, limits further integration into the EMU.

Both scrutinies can be triggered by every citizen with the claim that the *Bundestag* undermines his or her right to vote by approving to an act of the EU or failing to fulfill its responsibility for integration.

6) Crisis Management Measures

All crisis management measures (bilateral loans, EFSF, EFSM, ESM, Fiscal compact, TSCG, OMT by ECB) have been challenged before the Federal Constitutional Court. Though all of the complaints were rejected, the Federal Constitutional Court set up certain requirements for those measures. First of all, the *Bundestag* has been granted the same amount of involvement in those areas as it has got towards matters of the EU. The members of the *Bundestag* have to be informed sufficiently about those measures. Secondly, if the budgetary responsibility of the *Bundestag* is concerned, the *Bundestag* as a whole has to agree with such measures. Third, Germany “may not submit itself to financially significant mechanisms which – whether through their overall conception or an overall evaluation of the individual measures – can result in incalculable burdens on the budget, be they expenses or losses of revenue, without first having given its constitutive consent”.⁶ Therefore, the *Bundestag* may not agree to measures that are “tantamount to accepting liability for decisions of other states [or the EU], above all if they entail consequences which are hard to calculate by other states”⁷. This binds the German representative at the ESM to the will of the parliament.

³ BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), 245.

⁴ BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), 249.

⁵ BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 - paras. (1-421), 252.

⁶ BVerfG, Judgment of the Second Senate of 18 March 2014 - 2 BvR 1390/12 - paras. (1-245), 163, http://www.bverfg.de/e/rs20140318_2bvr139012en.html.

⁷ BVerfG, Judgment of the Second Senate of 18 March 2014 - 2 BvR 1390/12 - paras. (1-245), 165.

7) Constitutional law scrutiny of EMU reform scenarios

Although the limits imposed by these decisions may sound strict, the Federal Constitutional Court pointed out that even in those areas that exclusively belong to the parliament further integration is possible as long as it preserves the competences of the *Bundestag*. Every decision about expenses made by the German state needs the consent of the *Bundestag* or one of its committees. As history shows, every act that leads to further integration into the EU will be challenged before the Federal Constitutional Court. Until now the Court considered every step of the integration to be constitutional.

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