

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

NETHERLANDS

by Monica Claes



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.

The legal fact sheets were compiled for all 28 EU member states of the Horizon 2020 funded project ‘The Choice for Europe since Maastricht: Member States’ Preferences for Economic and Financial Integration’.

NETHERLANDS (Monica Claes)

1) Main characteristics of the national constitutional system

The Netherlands constitutional system is based mainly on the Constitution, which dates back to 1814, but was revised many times. The latest major revision was in 1983, when the catalogue of fundamental rights was inserted. The Netherlands is a decentralized unitary state. Parliament (the Estates General – ‘Staten Generaal’) consists of two houses: the Lower House (‘Tweede Kamer’) and the Upper House (‘Eerste Kamer’). An amendment of the Constitution requires two readings in both Houses (with general elections in between) and a qualified two-thirds majority in both Houses in the second reading. The Netherlands has no constitutional court and article 120 of the Constitution bans constitutional review of primary legislation and of treaties by courts. Constitutional review is considered to be the prerequisite of the Parliament itself, with the Upper House acting as a ‘chambre de réflexion’. In addition, the Council of State (Advisory Division) advises government and Parliament on Bills introduced in Parliament. Its advice is not binding, but is authoritative. The courts can and must however review the compatibility of statutes with directly effective provisions of international treaty law (art. 94 Constitution). They also serve as yardstick for Parliament and the Council of State.

The highest court for civil and criminal matters is the Supreme Court (‘Hoge Raad’), while the Council of State (Administrative Jurisdiction Division – ‘Afdeling Bestuursrechtspraak van de Raad van State’) is the highest general administrative court of the land. In addition, the ‘Centrale Raad van Beroep’ (Central Appeals Court for the public service and for social security matters) hears appeals in cases involving public servants and social security cases, while the Administrative Court for Trade and Industry (‘College van Beroep voor het bedrijfsleven’) is the highest court for cases relating to socio-economic administrative law.

2) Constitutional Culture

The Netherlands does not have a strong constitutional culture, and the Constitution does not play an important role in public life. The absence of constitutional review reduces the legal and political authority of the Constitution, which is overshadowed by European and international (human rights) law (mainly ECHR and EU law). In fact, the ECHR, international human rights law and EU law are often considered as ‘substitute constitution’. During the legislative process and in the public debate, European and international law are more often indicated as guiding and limiting the action of public authorities, rather than the Constitution.

Thus for instance, in assessing Bills and other requests for advice, the Advisory Division of the Council of State reviews whether the Bill is compatible with ‘higher law’, which includes the Constitution, treaties (such as the human rights conventions) and European law. Treaty law generally and European law specifically are considered part of the higher law against which Bills are reviewed. In fact, directly effective provisions of treaties and of European law are considered even to take precedence over the Constitution under articles 94 and 120 of the Constitution.

EU law is considered to be part of the law of the land, and is awarded absolute and unconditional primacy over national law, including also constitutional law. In practice, no

conflict or collision has ever been found between EU law and the Constitution. The Constitution has never been amended in order to adapt it to the realities of membership.

3) Constitutional foundations of EMU-membership and closely related instruments

a) Constitutional provisions for economic and fiscal integration

The Netherlands was one of the founding members of the then European Communities. The Constitution allowed for the transfer of legislative, executive and judicial powers to international organizations under public international law by or pursuant to a treaty (art. 92 Constitution). Where such a treaty would conflict with the Constitution or lead to such conflicts, approval with such treaties would require a two thirds majority of the votes cast in both Houses of Parliament (art. 92 jo. 91(3) Constitution). However, none of the European Treaties has ever been considered as requiring such special majority. All EU Treaties have been approved by simple majority in Parliament. The Constitution has never been amended in light of EU membership, which is considered to be fully in line with the Constitution. No special provision has been made for EMU membership, which was and still is considered to be fully in line with the Constitution and with the ‘budgetary power’ (budget recht) of the Netherlands Parliament.

b) Role of the jurisprudence of supreme and/or constitutional courts

The courts have played no role in the matter.

4) Constitutional rules and/or practice of implementing EU law and EMU-related instruments, including the role of parliamentary bodies

There are no special rules with respect to the implementation of EU law, which normally takes the form of primary legislation. The same applies in the field of EMU.

The annual budget is in accordance with article 105(1) of the Constitution to be determined by law (government and parliament acting together). Parliament has the ‘budgetary power’ (‘budget recht’, i.e. the prerogative to approve or reject the budget and control the expenses of the government).

No special rules have been adopted for the involvement of Parliament in the context of EMU-related mechanisms. The usual rules relating to budget continue to apply.

5) Resulting relationship between EU law and national law

The absolute and unconditional primacy of EU law goes unchallenged in the Netherlands. The same applies to EMU law. There is no theory of ultra-vires or identity review. There is no control of EMU-related measures by means of referenda. Dutch courts do not consider themselves competent to review European secondary law, and are furthermore very active in the context of preliminary reference procedures.

6) Constitutional limits to EMU related measures

In Netherlands constitutional law and legal thinking, there are no legal limits to EU integration. This is not to say that there would never be any obstacles to further integration: certain forms of further integration would be considered too far reaching, to infringe the sovereignty of the

Netherlands, or would be considered to be an infringement of the identity of the Netherlands or its people. Especially in the context of the economic crisis, there is a strong narrative against further transfers of sovereignty and against a political union. However, these arguments are not framed in legal terms, are not related to the Constitution or identified as legal principles that restrict European integration. There is no legal concept of ‘core constitutional principles’, or of ‘core competences’, or of a constitutional identity. The rules on fiscal discipline are considered necessary for the operation of the EMU, more particularly to bind other states. There is broad support for this in parliament.

7) Crisis Management Measures

There have been no constitutional adjustments in the context of crisis management measures. The legislative package has been implemented by aligning the existing legal framework. The only legislative amendment that has been made is the Wet HOF (the Sustainable Public Finances Act – ‘Wet Houdbare Overheidsfinanciën’), which implements the Fiscal Compact. This Wet HOF is an ordinary Act of Parliament (there are no ‘organic laws’ in the Netherlands which would rank between Acts of Parliament and the Constitution).

The ESM Treaty and the Fiscal Compact have been approved as normal Treaties with ordinary Acts of Parliament, and with a strong support in Parliament. Geert Wilders, leader of the euro-sceptic and populist PVV did bring interlocutory proceedings in the civil court, asking for an injunction to prevent the State from approving and ratifying the ESM Treaty. At the time, the government did not have full powers: the government had resigned and elections were impending. The judge denied the action, holding that the claim asked him to intervene in the legislative process, which the Constitution endows to the government and the parliament acting together (Article 81 Constitution). The decision is fully in line with the very restricted role of the courts in European integration policy and the participation in the EU (Rb Den Haag, decision of 1 June 2012; ECLI:NL:RBSGR:2012:BW7242)

In the context of ESM, the powers of parliament are aligned with its ordinary powers and competences.

8) Constitutional law scrutiny of EMU reform scenarios

The Constitution has never really played a role in the context of the debate on European integration. It is considered to allow for far reaching integration, and there is no concept of constitutional limits to integration. Opposition against further integration into a fiscal or political union is couched in terms of ‘sovereignty’ and against further transfers, but there is no reference to the constitution in this respect.

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 649532

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