

# 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

### BELGIUM

by Philippe Gérard



## **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’.

## **BELGIUM (Philippe Gérard)**

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

Article 1 of the Belgian Constitution lays down the basic principle of the Belgian State's organization: **"Belgium is a federal State composed of Communities and Regions."**<sup>1</sup> Belgium is a **parliamentary constitutional monarchy** in which the **executive is politically accountable towards Parliament** (on all levels of government, i.e. this principle governs the Federal State as well as the Federated Entities).

**The judiciary can be divided into the "ordinary" judiciary and the administrative courts.** The former is headed by the **Court of Cassation**, whereas the latter is headed by the **Administrative Litigation Section of the Council of State**. Both the Court of Cassation and the Administrative Litigation Section of the Council of State fulfil the role of Supreme Court for the respective judiciaries, and are endowed with the competence to hear appeals on points of law.

**The Council of State is composed not only of an Administrative Litigation section, but also of Legislative Section** which renders non-binding *a priori* opinions on the conformity of draft legislative and executive acts with the Constitution. The review of such acts will encompass a review of an EU Treaty amendment itself if the legislative act is aimed at assenting to a Treaty amendment.

The **Constitutional Court**, installed in 1984, is the judicial body which is endowed with the task of *a posteriori* reviewing (federal and federated) legislation in light of the Constitution. The body of norms of reference is, however, limited to the provisions which govern the division of competences between the Federal State and the Federated Entities (Regions and Communities), and the provisions of Title II of the Constitution (fundamental rights provisions, articles 8-32), as well as articles 170 (principle of legality in fiscal matters), 172 (principle of equal treatment in fiscal matters) and 191 (rights of aliens) of the Constitution. The Constitutional Court can rule on the conformity of legislative acts with these norms of reference by way of **actions for annulment and preliminary rulings**.

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

There is **no specific provision which plays the role of a constitutional anchor for EU or EMU membership**. In this respect, however, regard must be had to **article 34 of the Constitution**: "The exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law." This provision was inserted in the Constitution in 1970.

In the framework of EU integration (within and outside the EU legal order, e.g. the Lisbon Treaty, the Fiscal Compact and the ESM Treaty), the **Legislative Section of the Council of State developed a number of yardsticks against which to judge the constitutionality of supranational law**. These yardsticks comprise the temporal limits on the "outsourcing" of

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<sup>1</sup> [http://www.const-court.be/en/basic\\_text/belgian\\_constitution.pdf](http://www.const-court.be/en/basic_text/belgian_constitution.pdf).

specific powers. Sovereignty cannot be transferred fully and indefinitely, i.e. article 34 only allows for the temporary exercise of sovereignty by international organizations. The meaning of the temporal limitation of the assignment of the exercise of sovereignty needs to be put into perspective in the context of EU Treaty law, however, as the Treaties' validity is not subject to temporal limits. Furthermore, as the text of article 34 says, assignment can only concern "specific" powers, clearly defined as to their material scope. It goes without saying that the Legislative branch has to consent to a treaty, c.q. an EU Treaty amendment. Article 34 only covers transfer of the exercise of constitutional powers to bodies of public international law and cannot exceed the scope of the exercise of these powers (i.e. cannot adversely affect the enjoyment of fundamental rights; this would render the Constitution's amendment necessary). In this context see e.g. the Legislative Section's opinion on the ESM Treaty.<sup>2</sup>

Besides the general provision of article 34, reference must be made to **article 167 of the Constitution** relating to the approval of international treaty law. Primary Treaty law amendments thus have to pass through sub-federal state parliaments insofar as their content falls within the latter's sphere of competence. This was for instance the case of the article 136 TFEU amendment, deemed to be an international norm of a mixed nature, due to the possible implications for the Federated Entities' economic and budgetary policy. Federal and Federated entities also conclude **cooperation agreements** as to the execution of international obligations (e.g. with regard to the TSCG), agreements which are subject to each level's parliamentary approval and which are amenable to constitutional review by the Constitutional Court.

### 3) Constitutional limits for EMU membership

**The Belgian constitutional order does not provide for any specific written limits as to EMU membership.** The case law of the Constitutional Court and the interpretation by the Legislative Section of the Council of State of article 34 of the Constitution apply. On the whole, one must say that the **Belgian constitutional culture entails little limits on EU and EMU membership.** This might be due to the traditional stance of openness of the Belgian political culture towards European integration. Belgium's position as one of the smaller founding member states of the European Union might be the main reason for this. Political debate on EMU membership has therefore been limited, and so have been the legal and constitutional "resistance" towards further steps in integration. Article 34 therefore does not have the same legal significance as article 23 of the German Basic Law for instance has for the German legal order. German constitutional history is characterized by a peculiar need to protect the German constitution from outside influences due to the specific circumstances of German history. Belgium's history has not framed its Constitution in the same way. **Focus has always been laid on one hand on being a loyal partner in deepening European integration, which was and is in the country's interest. On the other hand, Belgium's internal ongoing process of state reform, in order to reconcile the various cultural and**

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<sup>2</sup> Council of State, opinion of 3 April 2012, *Parl.Doc.*, Senate, 2011-2012, n° 5-1598/1, 41 <https://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=83888587> (as to the need for legislative consent by the Federal State and the Federated Entities regarding mixed treaties).

**linguistic communities' interests, demands major political and constitutional energy.** The combination of this political fact with the absence of established case law of the Constitutional Court on the matter might explain the limited scope of constitutional limits on EU and EMU membership.

For the same reason, **no constitutional amendments in order to legalize EU integration have been passed.** In this respect, it needs to be stressed that article 34 serves as a kind of passe-partout provision.

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

Thus, the installation of the **EFSM, EFSF, the ESM and the conclusion of the TSCG did not give rise to any legal difficulty worthy of that name.** Furthermore, parliamentary debates have been quite limited in scope and intensity. The Legislative Section of the Council of State did have some remarks as to the scope of delegation to the Executive, which was deemed to be too wide in some instances (e.g. as to the adjustment of Belgium's participation in EFSF capital).<sup>3</sup>

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

**Cases have been lodged** with respect to a variety of Euro Crisis related institutional changes (e.g. the EFSF agreement, the article 136 TFEU amendment or the TSCG). Up until now, however, **none of these cases have led to a substantive judgment of the Constitutional Court on the merits.** In the judgements n° 111/2011 and n° 33/2012 the Constitutional Court dismissed the actions for annulment brought against national legislation assenting to and implementing the EFSF Framework Decision.<sup>4</sup> The Court found that the actions were to have no effect as the arguments e.g. drew from reference norms which do not fall within the competence of the Court.

**Three cases have been filed against the legislative acts assenting to the TSCG.** These three proceedings have been joined and might lead to the first interesting judgment by the Constitutional Court on the constitutional consequences of Euro Crisis law in the Belgian Constitutional order. The arguments relate to the conformity of Belgium's assent to the TSCG with article 34 of the Constitution. This reasoning could be amenable to bring the Constitutional Court to render a first judgment laying out a coherent doctrine on the relation between EU (and EMU) law on the one hand and the Belgian legal order on the other hand. A judgment on these cases is expected to be rendered in the coming months.<sup>5</sup>

For now, one has to bear in mind that **article 34 is not a direct reference norm,** the conformity of which the Constitutional Court would be able to review. It can only indirectly review the conformity of legislation (assenting to a treaty, c.q. EU Treaty amendment) with article 34 (or article 167) of the Constitution in the context of a review of the conformity of legislation with the principle of equality or another direct norm of reference.

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<sup>3</sup>See the Council of State's opinion on article 6 of the EFSF Participation Act. <http://www.dekamer.be/FLWB/PDF/53/0024/53K0024001.pdf>, at 14.

<sup>4</sup><http://www.const-court.be/public/f/2011/2011-111f.pdf>; <http://www.const-court.be/public/f/2012/2012-033f.pdf>.

<sup>5</sup>The cases have been joined under the numbers 6127, 5917, 5920 and 5930.

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