

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

PORTUGAL

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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.

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’.

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1) Main characteristics of the national constitutional system

The current Constitution of the Portuguese Republic (“CPR”) of 1976 was mainly conceived in the first two years after the Revolution (25 April 1974). The political system created by CPR is based on a separation of effective – positive and negative – powers between president, parliament and government, each possessing identical democratic legitimacy. It does not match well with any classical system – parliamentary or presidential. As a result, the majority of the Portuguese doctrine classifies it as a semi-presidential system. The structure of the State is unitary with autonomous regions (Article 6 (2)) and shall respect the autonomous island system of self-government, and the principles of subsidiarity, the autonomy of local authorities, and the democratic decentralization of the Public Administration (Article 6 (1)).

From 1976 until now the Constitution has been amended seven times, but the most important revisions concerned on the theme of this paper was the third one, occurred in 1992, which purpose was to adapt the constitutional text to the principles of the Maastricht Treaty, as well as the sixth one, approved in 2004, which amended the rules on the applicability within Portugal’s domestic legal system of EU law. In the last 10 years, the Constitution has not been amended, which can be assessed as a factor of maturity of the Constitution.

As the Portuguese Constitution is, on the one hand, the outcome of several commitments and, on the other hand, it stimulates future commitments between the sovereignty organs and within member of collegial organs by referring its implementation, this is not a definitive, closed or static document, but a living instrument, opened to new and better solutions attained, for instance, by constitutional revision and by reception of either international law or European law. In addition, the living character of the Constitution comes also from the interpretation of the constitutional rules and principles by the judiciary and from the implementation of the constitutional rules by the lawmaker, which enjoys in many cases a large margin of discretion. The Constitutional Court has an enormous influential and active role in the national legal system, which even increased, in the last five years, due to the so-called “case law of the crisis”.

2) Constitutional foundations of EMU membership

Portugal acceded to the European Communities in 1986, few years before the negotiation and signature of the Treaty of Maastricht, that is to say that Portugal participated in the negotiations of the EMU and, later on, the participation in the monetary union and in the single currency has been mostly envisaged as a national goal.

The specific field of the EMU led to an amendment of the constitutional provision on the Bank of Portugal (BoP), in the revision of 1992). The BoP lost its monopoly on currency issuance and still did not have competence to define and to run the monetary and financial policies. The BoP had only competence to collaborate in the definition and executions of these policies, which fall on the government competence. Article 105 CPR read: “*Bank of Portugal* [Banco de Portugal], *as a national central bank, assists in defining and*

implementing monetary and financial policies and issues money, under the law". After the 1997 revision, Article 102 CPR proclaims that the BoP "*shall function under the law and international standards to which the Portuguese state is linked.*"

None of the constitutional rules on financial and fiscal system (Articles 101 to 107) refers either to the European Stability Mechanism (ESM) or to the Stability and Growth Pact (SGP), including the Fiscal Compact (FC).

A proposal for including the "golden rule" in the Constitution was supported by the XIX Constitutional Government, but a consensus in that direction was not achieved. As a consequence, the reference to the ESM and to the SGP, including the FC, is inserted in the Budget Framework Law (Law No 151/2015 of 11 September 2015), which has an enhanced value, as it "prevails over all rules establishing particular budgetary regimes not compatible with" (Article 4).

This Law is fully inspired not only by EU law, but also by the Treaties approved by Member States outside EU legal order. The Constitution plays in these issues a rather insignificant role.

3) Constitutional limits for EMU membership

The current Constitution contains specific provisions on EU-Membership: Articles 7 (5) and (6), which contains the so-called "European clause", and Articles 8 (2), (3) and (4) that relates to the reception of the primary EU law into the Portuguese legal order, the reception of the secondary European Union law in the Portuguese legal order and the relationship between European Union law and Portuguese domestic law, including the constitutional law, respectively.

In fact, the Portuguese Constitution recognizes the essential characteristics of EU law: direct effect and primacy of EU law, including over constitutional law. EU measures are not subjected to the judicial control of the Constitutional Court, and if it has doubts on the conformity of EU secondary law with EU primary law it could have made use of the preliminary reference procedure under Article 267 TFEU, but, for the time being, it has never been used.

The constitutional limits to further transfer of powers to the EU through treaty amendments derive from a combined reading of Article 7 (6) CPR – the 'European Union clause' – and Article 288 CPR – the «material limits of constitutional revision clause». The principle of reciprocity, the fundamental principles of a democratic state based on the rule of law, the principle of subsidiarity and the national independence and the unity of the Portuguese state, the republican form of government, the autonomy of local authorities, and the political and administrative autonomy of the Azores and Madeira archipelagos should be envisaged as limits to further transfer of powers to the EU.

Portuguese Constitution admits referenda with restrictions, such as defined by Article 115 (3): "[o]nly important issues concerning the national interest which the Assembly of the Republic or the Government must decide by approving an international convention or passing a

legislative act may be the object of a referendum.” Article 295 CPR, introduced by the revision of 2005, expressly states that “[t]he provisions of Article 115(3) do not prejudice **the possibility of calling and holding referenda on the approval of treaties concerning the construction and deepening of the European Union.**” That means the further developments of EU may be subjected to referendum. However, in Portugal the exercise of political power by referendum does not have any tradition.

4) Crisis Management Measures

In 2011 the *Council of Public Finances* was created, a new and independent entity to enhance control on the implementation of crisis management measures, whose task is to rule on the proposed objectives with regard to macroeconomic and fiscal scenarios, the long-term sustainability of public finances and compliance with the rules on the budget balance, the expense of administration central part of the multi-annual budgetary planning and the debt of the autonomous regions and local authorities.

The rules laid down in the *Treaty on Stability, Coordination and Governance* (“*Fiscal Compact*”) were transposed into national law by incorporating them in the above-mentioned Budgetary Framework Law, through a designated article “*Rule of the structural budget balance*” (Article 12, C which implements the balanced budget rule of Article 3(2) of the Fiscal Compact) and a chapter which identifies the method for calculating the so-called significant deviations and respective mechanisms correction.

Concerning the adoption of austerity measures, a multiannual framework plan is established, with tight control mechanisms for expenditure; this plan was presented for the first time to the Parliament in April 2012, simultaneously with the Plan for Stability and Growth.

According to article 107 of CPR, “[t]he Budget’s execution shall be scrutinised by the Court of Auditors and the Assembly of the Republic. Following receipt of an opinion issued by the Court of Auditors, the Assembly of the Republic shall consider the General State Accounts, including the social security accounts, and shall put them to the vote”.

The parliament’s *Budgetary Technical Support Unit*, created in 2006 and powered enforced in 2014 to monitor and control projects involving public investment, is competent to monitor budgetary execution, and to analyse revisions to the stability and growth programme.

In the specific field of Early Emergency Funding – EFSM and EFSF, Law No. 8-A/2010 was approved to enable Portugal’s participation in the programme of financial assistance to Greece.

In the last five years (2010-2015) during the public debt crisis and the Financial Assistance Programme for Portugal, the Constitutional Court had to control some austerity measures, such as cuts in staff, in wages and other benefits, and cuts in pensions that were sometimes imposed by either EU law or international law.

5) Constitutional law scrutiny of EMU reform scenarios

Portuguese constitutional law does not seem to contain major obstacles to further EMU integration due to a Treaty change. However, provided the Treaty amendments imply a

constitutional revision, this would probably be difficult to achieve the majority to revise the Constitution (two thirds of the members of Parliament), due to the current political twitching.

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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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