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The Netherlands

JAN-HERMAN REESTMAN, MONICA CLAES

I. Main Characteristics of the National Constitutional System and Constitutional Culture

A. The Constitutional System of the Netherlands, Including the Judiciary

The Netherlands' constitutional system is based mainly on the Constitution (*Grondwet*), which dates back to 1814, but was revised many times.¹ The latest major revision was in 1983 when the entire text and structure of the document were modernised, and a catalogue of fundamental rights was inserted as Chapter I. The Netherlands is a constitutional monarchy, in which the King plays a merely ceremonial role, with a parliamentary form of government.² The parliament (the States-General – *Staten Generaal*) consists of two houses, the Lower House (*Tweede Kamer*) and the Upper House (*Eerste Kamer*), the government of King and ministers. Governmental stability is rather high, but there are considerable fluctuations between periods. The Lower House is politically the most important of the two Houses. The Upper House is indirectly elected, via the provinces, but is not regarded as a provincial representation at the national level and functions instead as a *chambre de réflexion*. It has no right of initiative, and no right of amendment.

The Netherlands is a decentralised unitary state, where the provinces and municipalities have a certain degree of autonomy, but always have to act in accordance with the law set by higher authorities.³ The central government is devolving more tasks to the local governments, eg, in

¹ A distinction is often made between the Constitution (*Grondwet*)– ie, the document that contains many of the basic rules of the constitutional system, and the Constitution (*constitutie*)– the wider collection of constitutional rules, norms and principles that govern the polity. This broader constitution contains, in addition to the Constitution, also certain rules contained in international treaties (such as human rights treaties or certain rules of EU law), unwritten rules, constitutional principles and conventions, as well as a number of acts of parliament. See eg, Luc Verhey, *De constitutionele conventie: een blinde vlek in ons staatsrecht* (Alphen aan den Rijn, Kluwer, 2014).

² The rule that ministers, individually or collectively, should resign if the Lower House adopts a motion of no confidence is unwritten; opinions differ on whether the Upper is entitled to adopt a motion of no confidence.

³ To be more precise, the Netherlands forms part of the Kingdom of Netherlands, a union with federal characteristics comprising several countries: the Netherlands (country in Europe), Aruba, Curaçao and St Maarten. In the context of this project, however, the focus will be on the Netherlands (the country in Europe), rather than on the Kingdom of the Netherlands. The relationship between the four countries and their respective competences are regulated in the Charter of the Kingdom of 1954.

the social policy domain. Financially, municipalities and provinces are heavily dependent on the central government.⁴

The highest court for civil and criminal matters is the Supreme Court (*Hoge Raad*), and the CoS (Administrative Jurisdiction Division – *Afdeling Bestuursrechtspraak van de Raad van State*) is the highest general administrative court of the land. The Central Appeals Court for the public service and social security matters (*Centrale Raad van Beroep*) hears appeals in the final instance 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 matters relating to socioeconomic administrative law.

There is no constitutional court in The Netherlands, and Article 120 of the Constitution explicitly bans judicial constitutional reviews of acts of parliament and treaties. The Supreme Court interprets the provision extensively: it not only prohibits courts to review acts of parliament against the Constitution but also against (unwritten) general principles of law and the Charter of the Kingdom, the Netherlands' quasi-federal constitution.⁵ Constitutional reviews of parliamentary legislation are thus considered to be the prerogative of the legislature, consisting of the government and the States-General, with the Upper House acting as a *chambre de réflexion*. In addition, the CoS (Advisory Division-*Afdeling advisering van de Raad van State*) advises government and parliament on the compatibility of bills introduced in parliament with the Constitution and international law. Its advice is not binding, but it is authoritative.

While the courts cannot review acts of parliament against the Constitution, they may and do review the constitutionality of lower regulations (Royal Decree, ministerial orders, municipal by-laws). Moreover, they can and must review the compatibility of acts of parliament with the directly effective provisions of written international law (Article 94 Constitution, see hereunder).

In general, the judiciary has a rather modest place in the Dutch constitutional order. Courts do not generally scrutinise economic issues.

As regards the relationship between national law and international law, the Netherlands adheres to a monistic view. All international law binding on the Netherlands, including unwritten international law, is considered to be part of the law of the land on the basis of unwritten constitutional law.⁶ The Constitution regulates the status of provisions of directly effective written international law. Article 93 of the Constitution provides that provisions of treaties and of decisions of international organisations 'which can bind everyone', ie, which are directly effective,⁷ are binding upon publication. Article 94 of the Constitution adds that national regulations in the Netherlands, including the Constitution itself, shall not be applicable if they conflict with the directly effective provisions of treaties or decisions of international organisations. Courts, therefore, may and must review all national regulations, including acts of parliament and even the Constitution, against directly effective provisions of written international law. However, courts are not allowed to disapply national regulations if they are in conflict with unwritten international law.⁸

⁴ See generally on local government in the Netherlands: Frank Hendriks and Linze Schaap, 'The Netherlands: Subnational democracy and the reinvention of tradition' in J Loughlin, Frank Hendriks and A Lidstrom (eds), *The Oxford Handbook of local and regional democracy in Europe* (Oxford, Oxford University Press, 2011) 96–119.

⁵ HR 14 April 1989, ECLI:NL:HR:1989:AD5725 (Harmonisatiewet).

⁶ HR 28 November 1919, NJ 1920, p 1210 (Grenstractaat Aken).

⁷ The Supreme Court interprets the concept 'binding on everyone' in a similar way as the CJEU interprets the concept 'direct effect'; HR 10 October 2014, ECLI:NL:HR:2014:2928 (Rookverbod).

⁸ HR 18 September 2001, ECLI:NL:HR:2001:AB1471.

When it comes to EU law, the courts follow a similar approach – as we will examine below – in that the direct effect and primacy of EU law tend to be grounded on the nature of EU law as adopted in the case law of the European Court of Justice (ECJ), rather than on constitutional provisions.

As mentioned, international law also serves as a benchmark for the States-General and CoS in the evaluation of bills. As a rule, the legislature, the CoS and the courts interpret the Constitution consistently with international and European law. In 1980, the Lower House adopted a (non-binding) resolution that in case of doubt the provisions of the Constitution should be interpreted so that the European integration process is not hindered by it.⁹ However, this resolution was explicitly repealed by the Lower House in 2013, with a resolution stating ‘that the provisions of the Dutch Constitution are to be interpreted in a normal manner in accordance with the objectives and considerations of the Dutch legislature.’¹⁰ Nevertheless, in general, consistent interpretation may be still said to be the prevailing method of interpretation of the Constitution.

B. Significance of the Dutch Constitution in the Legal System and Importance for the Polity

The Netherlands does not have a strong constitutional culture in the sense that the Constitution does not play a significant role in public life. Pragmatism is the dominant constitutional philosophy. The Constitution does not contain a preamble, and if we leave aside the first Chapter containing fundamental rights, it is a very sober text of mainly institutional and procedural relevance lacking high-minded ideals and principles. However, a proposal for a constitutional amendment to insert an unnumbered, general article in the Constitution dedicated to democracy and the rule of law (‘The Constitution guarantees democracy, the rule of law and fundamental rights’) has been accepted by both the Lower House and Upper House.¹¹

The Constitution is very rigid. A constitutional amendment requires two readings in both houses, general elections in between the readings, and a two-thirds majority of the votes cast in both houses in the second reading (Art 137 Constitution). The rigidity of the Constitution is often considered one of the causes for its limited legal, political and public authority, among other things because it precludes the adaptation of the Constitution to political and constitutional realities. The absence of constitutional review further reduces the authority of the Constitution, which is overshadowed by European and international (human rights) law (mainly the European Convention on Human Rights (ECHR) and EU law). The ECHR, international human rights law and EU law are often considered as a ‘substitute Constitution’.

During the legislative process and public debate, European and international law are more often indicated as guiding and limiting the action of public authorities, than the Constitution. Thus for instance, in assessing bills and other requests for advice, the Advisory Division of the CoS reviews whether a bill is compatible with ‘higher law’, which includes the Constitution,

⁹ Kamerstukken (Parliamentary Papers) 15049, 16 (motie Brinkhorst).

¹⁰ Kamerstukken (Parliamentary Papers) 21501-20, 732 (motie van der Staaij en Slob).

¹¹ Kamerstukken (Parliamentary Papers) 34516. Wet van 9 maart 2018, houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering van de Grondwet, strekkende tot het opnemen van een algemene bepaling [Declaration that there is a reason to consider a proposal to amend the Constitution to include a general provision]. The adoption of the Act ends the first stage of constitutional amendment. The proposed amendment will be adopted if approved with two-third majority of both houses of a future parliament. The provision would read: ‘De Grondwet waarborgt de grondrechten en de democratische rechtsstaat’.

treaties (such as the human rights conventions) and EU law. Treaty law generally and EU law specifically are considered part of the higher law against which bills are reviewed. In fact, directly effective provisions of treaties and decisions of international organisations, including the EU, are considered taking precedence over the Constitution under Article 94 of the Constitution (see above, under I.A).

C. Critical Developments

Two parties in the States-General are considered to be populist: Geert Wilders' *Partij voor de Vrijheid* (PVV) and Thierry Baudet's *Forum voor Democratie*. Both parties are anti-Islam, anti-immigration and anti-Europe. Their influence is rising. Nevertheless, there does not seem to be a serious risk of the rule of law backsliding or democratic decline.

As regards the EU, Dutch politics is certainly more Eurosceptic than it used to be, but overall there is still a strong commitment to European integration.¹² The country has been described as a 'constructive EU partner', despite its sometimes critical stances on EU integration and EU policies. For example, Netherlands has opposed the accession of Bulgaria and Romania to Schengen until they fully complied with the requirements, delayed the ratification of the agreement with Ukraine after a negative referendum, and took a long time before joining the EPPO. The Dutch approach is rule-based and requires compliance with agreements laid down in the treaties and EU legislation. Nevertheless, overall, support for Dutch membership is high according to the Eurobarometer, and the official stance, expounded by Prime Minister Rutte, is pro-EU integration. When it comes to the EMU, the Dutch preference has always been for a euro based on the strong Member States, a strict no bail-out rule and an independent ECB. The Netherlands had strong reservations about the creation of the European Financial Stability Facility (EFSF) and the EMF. It lobbied hard for independent monitoring of the SGP and reinforcement of the European Semester.¹³ In 2012, the prime minister won the elections on a 'no more money to Greece' ticket (but the government agreed to the third support package to Greece in 2015, be it reluctantly). Nevertheless, the EMU is considered to be of fundamental importance for the Netherlands. Also, the idea that further strengthening of the EMU is necessary is broadly supported. At the same time, there is a strong narrative, both in politics and scholarship, against additional transfers of sovereignty and against a political union. The dominant view is that strengthening of the EMU must take place along the traditional lines of reinforcing and better enforcing the individual fiscal discipline of the eurozone states.¹⁴

¹² See Hans Vollaard and Jan van der Harst and Gerrit Voerman, *Van aanvallen! naar verdedigen? De opstelling van Nederland ten aanzien van Europese integratie, 1945–2015* (Den Haag, Boom, 2015); see also Standard Eurobarometer, 2018.

¹³ See eg, Adriaan Schout, 'The Netherlands as constructive EU partner searching for an EU narrative', in J Erikson (ed), *The Future of the Economic and Monetary Union. Reform perspectives in France, Germany, Italy and the Netherlands*, SIEPS (2018) 60, 62–64.

¹⁴ See the memos of the government on the proposals of the EC, COM(2017)822, Communication on new budgetary instruments for a stable eurozone within the Union framework and EC, COM(2017) 823 Communication on a European Minister of Economy and Finance in Kamerstukken (Parliamentary Paper) 22112, 2471 and 2470; see also the report of a roundtable discussion with members of the Lower and Upper House on EU proposal: EC, COM(2017) 2025, White Paper on the Future of Europe; considerations and scenarios for the EU27 by 2025, Kamerstukken 22112, 2465; the report of an expert meeting in the Upper House on the future of EMU, Kamerstukken (Parliamentary Papers) 34844, C. Further the report of the Adviesraad Internationale Vraagstukken of July 2017, *Is de Eurozone stormbestendig? Over verdieping en versterking van de EMU*, Advies no 105 (available, also in German, French and English, at www.aiv-advices.nl/9fx/publicaties/adviezen/is-de-eurozone-stormbestendig-over-verdieping-en-versterking-van-de-emu); see also the government's reaction to study by the AIV in a letter to the Lower House, Kamerstukken (Parliamentary Papers),

II. Constitutional Foundations of EMU Membership and Closely Related Instruments

A. Specific Provisions on EMU Membership, Accession, Treaty Amendments, Judicial Control on EMU Matters

The Constitution still makes no mention of membership in the EU or the EMU. The Netherlands was one of the founding members of the then European Communities. In 1953 and 1956, between the establishment of the European Coal and Steel Community (ECSC, 1952) and the establishment of the European Economic Community (EEC) and European Atomic and Energy Community (Euratom, 1958), Articles 92–94 (then numbered 65–67) were inserted in the Constitution, with the specific aim of facilitating European integration.¹⁵ Articles 93 and 94 of the Constitution, as we have already seen, provide for direct effect and primacy of directly effective treaty provisions and provision of decisions of international organisations. Article 92 of the Constitution holds that legislative, executive and judicial powers may be transferred to international organisations under public international law or pursuant to a treaty. Since 1956, the Constitution has not been amended in light of EU or EMU membership, which is considered to be fully in line with the Constitution. Article 92 of the Constitution is, therefore, still the constitutional basis of EU and EMU membership of the Netherlands.

There is no special procedure for the approval of an EU (amendment) Treaty. Like any other treaty, it has to be approved by both houses of the States-General.¹⁶ For approval, a simple majority of the votes cast in both houses suffices, also when a treaty transfers legislative, executive and judicial powers to an international organisation,¹⁷ unless the treaty conflicts with the Constitution or would lead to such conflict. In that case, approval of the treaty requires a two-thirds majority of the votes cast in both houses (Arts 92 in combination with Article 91(3) Constitution).¹⁸ There was some discussion at the time of Maastricht, as to whether the introduction of the common currency deviated from Article 106 of the Constitution ('The monetary system shall be regulated by Act of Parliament').¹⁹ Yet, deviation from the Constitution is only deemed to take place when treaty provisions are incompatible with (the contents of) specific constitutional provisions, 'also in view of the latter's underlying basic assumptions and intentions.'²⁰ However, so far, none of the EU Treaties has been considered as requiring such special majority. All EU Treaties have been

21501-20, 1262; Report of November 2017 the Advisory Division of Raad van State (CoS), *The State of the Euro*, available at www.raadvanstate.nl/publicaties/publicaties.html.

¹⁵ It should be noted that the transfer of powers provision was inserted merely to dispel all doubts about the possibility of such transfers, but there was a general agreement that even without such provision, powers could be transferred.

¹⁶ Unless they fall under a category in Art 7 of the Act of the Kingdom on the approval and publication of treaties which do not require parliamentary approval. The categories – such as treaties merely implementing approved treaties – are of no relevance here.

¹⁷ Treaties may also be tacitly approved by parliament (Art 91, paras 2, Constitution in conjunction with Art 4 of the Act of the Kingdom on the approval and publication of treaties). However, politically, it is highly unlikely that a treaty furthering EMU integration be approved in such a way (Art 91, para 3, of the Constitution).

¹⁸ It may be noted that the adoption of a treaty that deviates from the Constitution – thus substantively amending the Constitution – is easier than a proper constitutional amendment, which requires two readings by the States-General, with elections for the Lower House in between and a two-thirds majority in both Houses in the second reading (Art 137 Constitution). This is a sure sign of the openness of the Dutch constitutional order towards international law.

¹⁹ AW Heringa, 'De Verdragen van Maastricht in strijd met de Grondwet' [The Maastricht Treaty infringes the Constitution], *NJB* 1992, 749–52.

²⁰ Opinions of the Raad van State of 23 December 1983 (cruise missiles), *Kamerstukken (Parliamentary Papers)* 17980, A-B, p 1–3; and of 19 November 1999 (foreign jurisdictions), *Kamerstukken (Parliamentary Papers)* 26800 VI, A, p 3.

approved by a simple majority in the States-General (see also under III.B). The same goes for the ESM Treaty and the TSCG in the EMU (Fiscal Compact). None of these treaties has ever required an adaptation of the Constitution.

B. EMU Membership Covered by the ‘General Membership Clause’?

There is no specific constitutional provision dedicated to EU or EMU membership in the Netherlands. EU and EMU membership are covered by Article 92 of the Constitution, which allows for the transfer of legislative, executive and judicial powers to be conferred on international institutions by or pursuant to a treaty.

C. (Continued) Relevance of (General) Provisions on International Law and/or Treaties

Articles 93 and 94 of the Constitution already provide for the direct effect and primacy of directly effective treaty provisions and thus seem perfectly designed as a constitutional foundation for the direct effect and primacy of EU law. The Supreme Court, both in its criminal and civil law capacities, has accepted that these provisions are irrelevant for the effect and status of directly effective EU law in the Netherlands’ legal order. It has endorsed the position of the ECJ in *Costa v ENEL*,²¹ according to which EU law may have direct effect and primacy in the national legal orders on the basis of the EU legal order’s autonomy.²²

In its case law, the CoS used to take the same position. It has even gone further than the ECJ by positing that not only directly effective EU law but also non-directly effective EU law has primacy over Dutch national law and can set aside conflicting national legislation.²³ However, in a more recent decision, it criticised a minister for failing to investigate whether provisions of an act of parliament conflicted with an EU directive and would thus have to be disapplied under Article 94 of the Constitution. In that way, it suggested that the primacy of EU law is based on the Constitution.²⁴ It is too early to tell whether this decision is just an incident or the starting point of a new line of case law holding that the effect and status of EU law in the legal order of the Netherlands are determined by Articles 93 and 94 of the Constitution. Similarly, the positions of the Central Appeals Court for public service and social security matters and the Administrative Court for Trade and Industry are not entirely clear. The latter Court has always refrained from taking a stance on the issue, but recently disapplied a ministerial order which conflicted with EU law on the basis of Articles 93 and 94 of the Constitution, without giving any further explanation.²⁵ In practical effect, however, it does not matter whether EU law is considered to take precedence on the basis of the Constitution or its nature since the courts have never alluded to constitutional limits to primacy.

²¹ Case 6/64 *Costa v ENEL*, 15 July 1964, ECLI:EU:C:1964:66.

²² HR (criminal chamber) 2 November 2004, ECLI:NL:HR:2004:AR1797 (rusttijden); HR (civil chamber) 18 September 2015, ECLI:NL:HR:2015:2722 (Staat/Habing). The government has endorsed the view, see Kamerstukken (Parliamentary Papers) 29 861, 19, 4. See on this and the following case law, Michiel Duchateau ‘Doorwerking van Europees recht en de plaats van de Nederlandse Grondwet’ in S Hardt, AW Heringa and A Waltermann (eds), *Bevrijdende en begrenzenende soevereiniteit* (Den Haag, Bju, 2018), 125–45, 134–35.

²³ ABRvS 7 juli 1995, AB 1977, 117; See also ABRvS 12 juli 2011, ECLI:NL:RVS:2011:BR2048.

²⁴ ABRvS 11 januari 2017, ECLI:NL:RVS:2017:35.

²⁵ CBB 28 March 2017, ECLI:NL:CBB:2017:107.

D. Rules Governing Closely Related Instruments Outside the EU Legal Order, Especially the ESM and the Fiscal Compact

There are no specific constitutional rules governing EU and EMU related instruments that are formally placed outside the EU legal order.

E. Practice and Doctrinal Debate on these Provisions

i. The Fiscal Compact

There has been no debate about whether the Fiscal Compact conflicts with the Dutch Constitution and in particular, with Article 105(1), which stipulates that an act of parliament shall establish the budget of the Kingdom. During the examination of the act of parliament approving the Fiscal Compact, the government and parliament tacitly assumed that this was not the case. The act could, therefore, be accepted by both chambers by a simple majority.

This position is in the majority shared by scholarship on the basis of the traditional literalist and restrictive interpretation of Article 91(3) of the Constitution, which stipulates that a treaty has to be approved with a two-thirds majority of the votes cast by both chambers if it deviates from the Constitution or leads to such deviation.²⁶ According to this interpretation, a treaty is only unconstitutional if its provisions are incompatible with (the contents of) particular constitutional provisions, because of the underlying fundamental assumptions and intentions (see further III B). The intention of Article 105(1) of the Constitution is twofold. It seeks to make government expenditure subject to prior authorisation by parliament (authorisation function) and, secondly, to give parliament a decisive say on the allocation of the Kingdom's revenues (allocation function). Neither the text of Article 105(1) of the Constitution nor its underlying assumptions or intentions give the budget legislature the right to adopt an unbalanced budget. However, the contrary position has also been defended on the basis of a 'substantive reading' of the provision.²⁷

Another issue is whether the Treaty should have been adopted with the qualified majority referred to in Article 91(3) of the Constitution if it would have required the budget to be included in the Constitution (*quod non*). That position is indeed defended in scholarship;²⁸ see also under III 2.a.

There has been some debate in the Netherlands whether the provisions of the Fiscal Compact should have been laid down in secondary EU law instead of a treaty that is formally placed outside the EU legal order. Originally the Dutch government was not of that opinion. In the version of memorandum of explanation to the bill approving the Fiscal Compact that was submitted to CoS for advice, the government wrote that the approval of the treaty by the parliaments of participating countries provided for 'a more direct and more substantial share of national parliaments in the realisation and implementation' of the treaty than parliamentary involvement in the drafting

²⁶ Jan-Hermann Reestman, 'Constitutioneel minimalisme. Het Stabiliteitsverdrag in de Nederlandse rechtsorde' (2013) *TvCR*, 6–27, 24–25; HG Han Warmelink, 'Over afwijken en afwijkingen van de Grondwet' (2013) *TvCR*, 44–8; Michael Diamant and Michiel van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief' (2013) *TvCR*, 94–129, 109–11.

²⁷ Jan Willem Van Rossem, 'Pleidooi voor een materiele soevereiniteitsopvatting' (2013) *TvCR*, 49–54.

²⁸ Jan-Herman Reestman, 'Constitutioneel minimalisme. Het Stabiliteitsverdrag in de Nederlandse rechtsorde' (2013) *TvCR*, 6–27, 25.

of EU directives or regulation would have provided. This accordingly would lead to an ‘enhanced national commitment to the objectives of the treaty and a stronger democratic legitimacy.’ The government also wrote that because the greater role of ‘Europe’ envisioned by the Compact could potentially have far-reaching consequences, it considered it desirable for democratic legitimacy to have the measures approved by the national parliaments.²⁹ A similar position was defended in scholarship, which doubted whether secondary EU law has sufficient constitutional and democratic stature to impose the kind of duties as contained in the Fiscal Compact, which directly relates to national parliaments’ budget authority, without the explicit consent of the national parliaments.³⁰

However, the Advisory Division of the CoS in its opinion on the bill did not agree with the above analysis and advised the government to delete the relevant lines, which it did. The CoS argued that with the adoption of the EU Treaties, the Member States have agreed that economic policy is a matter of common interest and the EU can adopt secondary legislation on this subject. Moreover, had EU secondary legislation been adopted, the European Parliament would have had an important role in decision-making as well as a monitoring function in the decisions on EMU related matters. Additionally, the national parliaments could have exercised influence via their government’s input into the EU decision-making process, and via their right to issue reasoned opinions under the subsidiarity protocol. As a result, national parliaments could have directly influenced the European decision-making process, while when approving treaties, they can only say yes or no.³¹

ii. The ESM Treaty

a) Involvement of the Lower House in Decision-Making on Aid Dispensing

Since the Schengen Treaties and the Maastricht Treaty, the Lower House when approving treaties transferring powers to the EU or related international organisations requires involvement in the decision-making process of the relevant international institutions, to compensate for the lack of co-legislative powers of parliament at the international level. Something similar happened with regard to the powers of the Board of Governors of the ESM to provide for financial aid to eurozone states in financial distress, although this time the arrangement only concerns the Lower House and is not embodied in an act of parliament. Moreover, this time the rationale does not only lie in a lack of involvement of the European Parliament, but also in the States-General’s budgetary power.

In its advice on the bill approving the ESM Treaty, the CoS observed that by approving the bill and the corresponding financial obligations, the States-General had, strictly speaking, democratically legitimised the financial claim on the Netherlands that can amount to 40 billion euro. However, in view of the enormous financial obligations entered into, the Council decided that the States-General should also be involved in the decision-making by the ESM institutions. The Council suggested, in the light of Article 105 of the Constitution and the lack of democratic control on the EU level, at national level an arrangement be made to do justice to the need for democratic control over the actions of the competent minister in the context of the ESM, but at the same time, not undermine the effectiveness of the ESM.³²

²⁹ Kamerstukken (Parliamentary Papers) 33319, 4, 7–8.

³⁰ Jan-Herman Reestman, ‘Constitutioneel minimalisme. Het Stabiliteitsverdrag in de Nederlandse rechtsorde’ [Constitutional Minimalism. The Stability Treaty in the Dutch legal order] (2013) *TvCR*, 6, 10.

³¹ Kamerstukken (Parliamentary Papers) 33319, 4, 7.

³² Opinion of the CoS of 1 March 2012, Kamerstukken (Parliamentary Papers) 33221, 4, 5.

As a follow-up, the government proposed making the results of the pending negotiations between the government and parliament³³ on parliamentary involvement in the EFSF decision-making also applicable to the ESM.³⁴ These negotiations resulted in a so-called Information Protocol (*Informatieprotocol*), which is contained in a letter of the Minister of Finance to the Lower House.³⁵

The Protocol, in short, stipulates that the Dutch minister in the Board of Governors of the ESM will not consent to a decision to provide for aid before s/he has discussed the matter with the Lower House. The Lower House is immediately informed, if necessary confidentially, of any request for financial support by a eurozone state. Also, the documents that the Board of Governors uses in its decision-making processes, such as the Commission's assessment of the financial-economic situation of the state seeking assistance, the draft Memorandum of Understanding, and the Financial Assistance Facility Agreement, are submitted to the house. Within seven days of the submission of these documents, and in principle before the Board of Governors takes its decision, the government will announce its position on the said application and discuss it with the house.

If the anticipated moment of decision-making in the Board of Governors' time is too short for a genuine exchange of views between government and house, the government will make a parliamentary reservation in the Board. This entails the obligation not to take irreversible decisions before consultation with the house has taken place. Also, in case the emergency procedure ex Article 4(4) of the ESM Treaty is followed, the government will, if possible, enter into a debate with the house before a decision is taken, but if this is not possible, it will not make a parliamentary reservation in the Board. According to the government, that would not be reasonable because in that case, in the opinion of both the European Commission and the ECB, it is necessary to make a decision without delay to ensure the economic and financial stability of the eurozone.³⁶ We add that in that case, a parliamentary reservation would also be useless, as the consent of the Dutch government is not required under the emergency procedure.

The arrangement in the Information Protocol is formally merely of political nature. However, a working group of a Standing Committee of the Lower House considers that it effectively gives the Lower House a veto power.³⁷ Also, the scope of the Information Protocol is limited. It only extends to applications for aid in the strict sense, but not to the conditions under which the aid is granted. Also, the Protocol is not applicable to decisions to amend the aid instruments provided for in the Treaty and to decisions calling in authorised unpaid capital (Article 9 ESM Treaty).³⁸ However, the latter decisions are arguably covered by the budgetary legislature's decision to insert a warranty obligation in the budget acts for the Ministry of Finance of 2012 and later years (above III.A. 2.b).³⁹

³³ See Kamerstukken (Parliamentary Papers) 21 501–07, 877.

³⁴ Kamerstukken (Parliamentary Papers) 33221, 3, 13.

³⁵ Brief van de Minister van Financiën aan de Voorzitter van de Tweede Kamer der Staten-Generaal (Letter of the Minister of Finance to the chairman of the Upper House) of 15 December 2014, Kamerstukken (Parliamentary Papers) 21501-07, nr 1217.

³⁶ *Idem*, 4.

³⁷ Rapport van een werkgroep uit de commissie voor Rijksuitgaven van de Tweede Kamer der Staten-Generaal, 'Aandacht voor het parlementair budgetrecht in Europees perspectief', annex to Kamerstukken (Parliamentary Papers) 31597, 7, 29.

³⁸ Suzanne Poppelaars, 'Een Europees Monetair Fonds en de positie van het Nederlandse parlement' (2018) *TvCR*, 342–55, 347.

³⁹ Act of 5 July 2012 amending the budget of Ministry of Finance (IXB) for the year 2012 (Incidental supplementary budget act ESM) [Wet van 5 juli 2012 tot wijziging van de begrotingsstaat van het Ministerie van Financiën (IXB) voor het jaar 2012 (Incidentele supplettoire begroting ESM)], Staatsblad 2012, 369.

b) An Intergovernmental ESM Terminus or Intermediate Station?

In its advice on the bill approving the ESM Treaty, the CoS remarked that due to the intergovernmental character of the Treaty, democratic control under the Treaty only exists to the extent that ministers are held accountable by their national parliaments for their share in the functioning of the ESM. However, these ministers cannot be held individually accountable for the ESM as such or its institutions. Only democratic control from the side of the EU could close that democratic gap. Nevertheless, despite these objections to the purely intergovernmental design of the ESM, the Council recommended that the Treaty be approved, in the interest of combatting the financial and economic crisis. However, an intergovernmental ESM should according to the Council not be a terminal, but only an intermediate station.⁴⁰ The government did not agree. It replied that the ESM treaty has a specific task that does not necessarily have to be performed in an integrated EU context and good public and democratic control was guaranteed by the involvement of the national and European Courts of Auditors.⁴¹ But it did not exclude 'further' integration of the ESM into the EU legal framework in the future.⁴²

The adherence of the government to intergovernmental character of the ESM was at the time and still is, almost generally shared, not only in politics but also in scholarship. For instance, the Advisory Council on International Issues (*Adviesraad Internationale Vraagstukken (AIV)*) advocates a strong involvement of national parliaments in the control of support operations for countries that face acute financial problems because, after all, it concerns the transfer of national funds.⁴³

III. Constitutional Obstacles to EMU Integration

A. Revealed Obstacles by the Implementation of the Crisis Management Measures Within and Outside the EU

In the Netherlands, the implementation of the crisis management measures has not encountered any serious constitutional obstacles, but did raise several domestic constitutional questions.⁴⁴

i. Implementation of the Six Pack and the Two Pack

To the extent that it needed implementation, the Six Pack⁴⁵ and Two Pack legislation was implemented by aligning the existing budgetary, legal framework in the Government Accounts Act

⁴⁰ Kamerstukken 33221, 4, 4.

⁴¹ See Art. 24 of the ESM By-Laws.

⁴² Kamerstukken (Parliamentary Papers) 33221, 3, p 8–9;

⁴³ AIV, 'Is de Eurozone stormbestendig? Over verdieping en versterking van de EMU', Advies no. 105, July 2017, 37 (available, also in German, French and English, at <aiv-advice.nl/9fx/publicaties/adviezen/is-de-eurozone-stormbestendig-over-verdieping-en-versterking-van-de-emu>; see also the government's reaction to study by the AIV in a letter to the Lower House, Kamerstukken (Parliamentary Papers), 21501-20, 1262, 3–4.

⁴⁴ See also Suzanne Poppelaars, *Het nationale budgetrecht en Europese integratie* (Alphen aan den Rijn, Wolters Kluwer, 2018).

⁴⁵ Regulation 1175/2011 amending Regulation 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure; Regulation 1173/2011: On the effective enforcement of budgetary surveillance in the euro area Regulation 1176/2011: On the prevention and correction of macroeconomic imbalances; Regulation 1174/2011: On enforcement action to correct excessive macroeconomic imbalances in the euro area; Directive 2011/85/EU: On requirements for budgetary frameworks of the Member States.

(*Comptabiliteitswet*) and by a new act of parliament, the Act on Sustainable Public Finances, the HOF Act (*Wet Houdbare Overheidsfinanciën*).⁴⁶ This HOF Act also implements the various obligations of the Fiscal Compact, such as the insertion of the balanced budget rule in national law and the establishment of an independent authority monitoring compliance with EU fiscal rules.

In the Netherlands, '(t)he estimates of the State's revenues and expenditures shall be laid down by Act of Parliament' (Article 105(1) Constitution). In fact, the state's budget is laid down in several acts of parliament, one for every government department. It is the Government Accounts Act that prescribes how budget bills should be presented to the States-General. In 2016, when the act was entirely revised, two provisions were inserted that relate to the Six Pack and the Two Pack.

The first provision is inspired by the duty of the national government to submit its stability plan, or if need be its recovery plan, for the following fiscal year to the Commission before 1 May.⁴⁷ Article 2.22 of the Government Account Act prescribes that those plans also have to be submitted to the two houses of the States-General.

The second provision inserted in the Government Accounts Act relates to the duty contained in Article 4(3) of Regulation 473/2013, which requires the budget for the central government for the following year in principle to be adopted and made public not later than 31 December. This principle was, and is, problematic in the Netherlands. Like other bills, budget bills are always first discussed in the Lower House, and then by the Upper House. Although the Government Accounts Act already implied that the budget acts had to be adopted before 1 January of the fiscal year to which they apply, the Upper House in practice almost always adopts budget bills after that date. This practice is a consequence of the right of each house to determine its own agenda. The government first considered the possibility of bringing budgetary practice in line with the Regulation by explicitly providing in the Government Accounts Act that budget acts had to be adopted before the new fiscal year, force majeure excepted.⁴⁸ That would have restricted the procedural autonomy of both houses, and especially the Upper House, which have the dilemma of either breaking the law or rushing its discussion of the budget to meet the deadline.

In the end, a practical solution was found that respects both the right of each house to determine its agenda and does not put a time limit on budgetary discussions. According to Article 2.24 of the Government Accounts Act, budget bills have to provide for a provision regulating the entry into force of budget acts on 1 January of the year to which they relate. So even if the parliamentary budget procedure is not completed on that date, the entry into force will take place with retroactive effect from 1 January.⁴⁹

The HOF Act has implemented the various obligations in Directive 2011/85/EU.⁵⁰ The Directive, amongst other things, prescribes that the Member States have to cover all sub-sectors of the national government when they put in place the required country-specific numerical fiscal rules and various forms of fiscal planning (Arts 5 and 13 of the Directive). These demands are

⁴⁶ Wet of 11 December 2013, Staatsblad 2013, 531.

⁴⁷ Arts 3 and 4 of Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; See also Art 4 f Regulation 473/2013, according to which the member states before the same date to send in their medium-term fiscal plans at the same.

⁴⁸ Kamerstukken (Parliamentary Papers) 33181, A, 8.

⁴⁹ The standard formulation is as follows: 'This act shall enter into force on 1 January of the current financial year. If the Bulletin of Acts and Decrees in which this law is placed is issued on or after this date of 1 January, it shall enter into force on the day following the date of issue of that Bulletin of Acts and shall be retroactive to 1 January.'

⁵⁰ For the details, see the memorandum of explanation of the Act, Kamerstukken (Parliamentary Papers) 33416, 3, 11.

the consequence of the fact that the EU fiscal rules are addressed to the Member States and concern not only the central government and the social funds but also, amongst others, local governments, in the Netherlands inter alia the municipalities and provinces. The Directive also demands that the country-specific numerical fiscal rules shall contain specifications about the consequences in the event of non-compliance (Art 6(c) of the Directive).

To meet all these demands, the HOF Act prescribes that the local governments are obliged to make an effort equivalent to those of the central government and the social funds, to ensure compliance with EU fiscal rules. The Minister of Finance, in agreement with the other relevant ministers and after consultation with representative organisations of municipal and provincial authorities, determines what is regarded as an 'equivalent effort' for the local governments jointly. This effort is itemised in a share for the municipalities jointly and the provinces jointly (Art 3 of the HOF Act). In the bill for the HOF Act, the government proposed two penalty mechanisms, one for the situation in which the municipalities jointly or the provinces jointly would exceed their collective share in the EMU balance, but the Netherlands were not fined by Brussels (Art 6 of the HOF Act), the other for a similar situation in which the Netherlands were fined by Brussels (Art 7 of the HOF Act).

Representatives of local authorities claimed that the arrangement in the bill, and more specifically the possibility to fine municipalities or provinces even if Brussels did not fine the Netherlands, does not fit the constitutional relations between the central and local governments, and is at odds with the lower governments' autonomy. From a strictly formal constitutional perspective, the national legislature could do what the government proposed. It is entitled to determine the lower governments' competences, supervision over their institutions and financial relationships with the central government on the condition that a certain amount of autonomy remains.⁵¹

Nevertheless, the States-General has been sensitive to the complaints. The Lower House adopted several amendments to soften the arrangement and especially the penalty mechanisms. For instance, it adopted the rule that if the ministers want to sanction local governments, they have to inform the Lower House of their intention first and the ministers may only implement the sanction after four weeks have elapsed unless the house has pronounced itself against it (Art 9 of the HOF Act).⁵² Under pressure from the Upper House,⁵³ the mechanism which made it possible to fine the lower governments even when the Netherlands were not fined by Brussels, was replaced by a so-called 'correction mechanism'. As the Upper House does not have the right of amendment, the insertion of a correction mechanism in the HOF Act required a new act of parliament.⁵⁴ The correction mechanism still makes it possible to fine local governments, but only as a last resort, if all other means to make the lower governments return to the required fiscal parameters (consultations between the central government and lower governments; measures laid down in an Order of Council) fail.⁵⁵

ii. The Fiscal Compact and the ESM Treaty

The Fiscal Compact and the ESM Treaty have been approved as ordinary treaties with ordinary acts of parliament, and with strong support in the States-General. Geert Wilders, leader of the

⁵¹ Art 132 in combination with Art 124(1) Constitution.

⁵² Wytze van der Woude, 'Houdbare overheidsfinanciën en gemeentelijke autonomie. Hoe Europese begrotingsnormen interbestuurlijke verhoudingen raken' (2013) *Ars Aequi*, 916.

⁵³ Kamerstukken (Parliamentary Papers), 33416 and 33540, G, 4.

⁵⁴ Wet of 4 June 2015, Staatsblad 2015, 305.

⁵⁵ Memorandum of explanation of the bill amending the HOF Act, Kamerstukken (Parliamentary Papers), 33961, 3, 2.

Eurosceptic 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 pending. 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 (Art 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.⁵⁶

a) Implementation of the Fiscal Compact

The most important constitutional issue raised by the Fiscal Compact was whether the Netherlands was capable of implementing the balanced budget rule in national law ‘through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes,’ as required by Article 3(2) of the Fiscal Compact. That provision seems to imply that the rule has to be laid down in an act that binds the budget authority. If that were the correct interpretation, the rule in the Netherlands should have been laid down in the above-legislative national provision, because the budget authority in the Netherlands is the legislature (Art 105(1) Constitution).

However, implementation in an above-legislative act was impossible in the Netherlands, for two reasons. First, Dutch constitutional law does not provide for (organic) laws with a status in between that of the Constitution and those of acts of parliament, ie, above-legislative and infra-constitutional. There is thus no ‘fast-track’ solution that would avoid constitutional amendment and at the same time formally puts the rules beyond the reach of the ordinary legislature. Second, the Fiscal Compact entered into force on 1 January 2013 and already a year later, on 1 January 2014, its budgetary arrangement had to be implemented by the Contracting Parties. Inserting the budget rule in the Constitution would have required two readings in parliament and between general elections. Even if the government had wanted to insert the rule in the Constitution, there was practically no time to do so.

The only possibility for a swift implementation of the budget rule was, therefore, the implementation by an ordinary act of parliament, ie, by the HOF Act.⁵⁷ Legally speaking, the HOF Act does not bind the Dutch government when introducing (budget) bills or the Dutch legislature when adopting a budget act. It is an unwritten principle of Dutch constitutional law that the legislature cannot bind itself (or its successor). For that reason, the question has been raised whether the Netherlands has correctly implemented the Fiscal Compact’s balanced budget rule.

On the other hand, it has been argued that perhaps the Netherlands’ adherence to the monistic vision on the relationship between national and international law could come to the rescue. Upon ratification, the Fiscal Compact has become part of the Netherlands’ legal order with (at least) above-legislative ranking. Therefore, if the budget legislature disregards the balanced budget rule in the HOF Act, it would at the same time disregard the Fiscal Compact which is

⁵⁶ Rb Den Haag, decision of 1 June 2012; ECLI:NL:RBSGR:2012:BW7242.

⁵⁷ Since 1994 the Dutch budget is based on a policy according to which the (authorised) expenditures for the various ministerial departments are maximised for a number of years, and neither a financial setback nor a financial windfall allows for an increase of the expenditures. Art 2, para 3, (a) (i) of the HOF Act makes it a legal obligation for the Dutch supra of finance to conduct that policy in accordance with, among other things, ‘the [medium-term budgetary objective] for the structural EMU-balance in force. It is by this provision that the Compact’s balanced budget rule is deemed to be implemented. As is evident, this provision in the HOF Act does not quantify the balanced budget rule and does not even refer to it directly: the implementation is based on the assumption that the Netherlands has a medium-term budgetary objective which conforms to the rule in the Fiscal Compact.

not only binding on the Netherlands in the international realm but also part of the domestic legal order, and hence binds the legislature domestically. In such reading, any implementation of the balanced budget rule in domestic law would, in fact, be redundant to make the golden rule binding on the legislature. In other words, it could be argued that the Netherlands has complied with the implementation duty in Article 3(2) Fiscal Compact simply by ratifying the Compact.⁵⁸

The European Commission, in its report under Article 8 of the Fiscal Compact of 22 February 2017, was not entirely convinced by that reasoning. It nevertheless found that the Netherlands complied with the implementation requirement. It did so by taking into account two issues. The first is the ‘formal public commitment’ of Dutch authorities that the national legal framework requires that the budget bills are adopted in compliance with the Compact’s budget rule. According to the Commission, ‘such public commitments reinforce the binding status of the national rules.’ The second redeeming issue taken into account by the Commission is the ‘robustness of the monitoring mechanism’ set up in accordance with the Fiscal Compact, by which, according to the Commission, enforcement of the budget rule ‘appears also to be guaranteed.’⁵⁹

Both the Fiscal Compact (Art 3(2)) and Regulation (EU) 473/2013 (Art 5) require the establishment of an independent institution monitoring compliance with the European fiscal rules. This function is, inter alia, exercised by the Advisory Division of the CoS, which of old advises on legislative proposals. On the basis of the HOF Act (Art 2(6)), the Council now advises on a potential ‘recovery plan’ (*herstelplannen*; see below) and on the so-called *Miljoenennota* (the annual Budget Memorandum). This Budget Memorandum accompanies the introduction of the various draft budget acts submitted to the Lower House on the third Tuesday of September (known as Prince’s day – *Prinsjesdag*). It contains a description of the most important policy choices of the government for the coming year and their costs, and the economic and financial situation of the Netherlands as such. The Council also advises, in April, on the draft Stability plan for the following fiscal year, which the government has to submit to the Commission before 1 May. If considered necessary, this may be done on other occasions.⁶⁰ The ordinary members (councillors) of the CoS are nominated by Royal Decree for life (Art 74(2) of the Constitution), while ‘councillors in extraordinary service’ can be appointed for three years on the grounds of their specific expertise in the areas of legislation, jurisdiction and administration.⁶¹ The Council seems to have interpreted its supervisory role extensively, aligning it to the text of the Fiscal Compact.⁶²

The fact that the Netherlands have outsourced the activation of the required corrective mechanism to the Union institutions has also contributed to the Commission’s positive evaluation of the implementation of the Fiscal Compact. Accordingly, a correction mechanism has to be triggered automatically in case of ‘significant observed deviations’ from the required

⁵⁸ Jan-Herman Reestman, ‘The Fiscal Compact: Europe’s Not Always Able to Speak German’ (2013) 9 *EuConst*, 480–500.

⁵⁹ Country annex nr 17 (on the Netherlands) to the Report from the Commission presented under Art 8 of the TSCG in the EMU, COM(2017) 1201 final, 2–3.

⁶⁰ See the interim assessment of 3 November 2017 of the planned budget policy or the newly appointment government Rutte III, available at www.raadvanstate.nl/begrotingstoezicht/rapportages-begrotingstoezicht.html. This advice is not provided for by the HOF Act, but based on the Wet op de Raad van State ([Act on the CoS], which gives the CoS the competence to advise whenever it deems this necessary (Art 21).

⁶¹ Art 8 of the Wet op de Raad van State [Act on the CoS].

⁶² Poppelaars, *Het nationale budgetrecht en Europese integratie. De juridische consequenties van Europese integratie voor het Nederlandse en het Duitse budgetrecht*, 347; Michael. Diamant, *Het budgetrecht van het Nederlandse parlement in het licht van Europees economisch bestuur* (Leiden, Wolters Kluwer, 2017) 265–75.

budgetary situation,⁶³ and include the obligation to implement measures to correct the deviations over a defined period.⁶⁴ According to the HOF Act, the ministers, in accordance with the opinion of the (Dutch) council of ministers, have to take ‘adequate expenditure-reducing and/or revenue-generating measures’ if an EU Council recommendation establishes that the Dutch budgetary policy does not sufficiently respect the budgetary requirements.⁶⁵ The measures that ministers have to be in accordance with the EU Council’s recommendation regarding ‘budgetary size and time’⁶⁶ and must be assembled in a corrective plan (*herstelplan*), on which the advice of the CoS has to be obtained. It has to be presented to parliament in the form of a ‘budgetary memorandum.’⁶⁷ This is fully in line with the general principles that the Commission published in the Annex to its Communication of 26 June 2012 on the basis of Article 3(2) of the Fiscal Compact. The general tendency of these principles is that the ‘(n)ational correction mechanisms shall rely closely on the concepts and rules of the European fiscal framework.’⁶⁸

The Netherlands have done so by letting the EU institutions rather than an independent national supervisor decide on the triggering of the correction mechanism. In its report under Article 8 of the Fiscal Compact of 22 February 2017, the Commission noted that the HOF Act ‘does not contain specific national corrective rules.’ Moreover, we would add, a ‘budgetary memorandum’ does not bind the (budget or any other) legislature. Nevertheless, the Commission also noted with satisfaction that the Dutch framework correction mechanism ‘stresses consistency with the Union budgetary surveillance framework, whereby the activation and substance of the correction are linked to recommendations made by the Union institutions.’⁶⁹

b) Implementation of the ESM Treaty

The budgetary consequences of the participation of the Netherlands to the ESM have been incorporated into the budget of the Ministry of Finance – since 2012 – via an incidental, supplementary budget act. The amount of paid-in shares (4,6 billion euro) is in the budget for 2012 registered as a ‘payment obligation’ (*betalingsverplichting*; starting in 2012 with a payment of 1,8 billion and running until 2015), and the amount of the authorised unpaid capital (35,4 billion euro) as a ‘warranty obligation’ (*garantieverplichting*).⁷⁰

At the instigation of the CoS, the government clarified that a decision of the Board of Governors of the ESM to increase ESM’s authorised capital stock in accordance with Article 10(1) of the ESM Treaty would amend the ESM Treaty. Therefore, it would require approval, as a new treaty, by the States-General ex Article 91 of the Constitution.⁷¹ The parliament will lose this right to approve decisions increasing the authorised capital stock if the ESM is turned into an EMF, as proposed by the Commission.⁷² According to the Commission’s proposal, the Board of

⁶³ Art 3(1)(e) Fiscal Compact.

⁶⁴ Art 3(1)(e) Fiscal Compact.

⁶⁵ Art 2(4) jo. Art. Wet 2(5) Wet HOF.

⁶⁶ Art 2(5) Wet HOF.

⁶⁷ Resp Arts 2(6) and 2(8) Wet HOF.

⁶⁸ EC, COM(2012) 342, Communication on Common principles on national fiscal correction mechanisms.

⁶⁹ EC, Country annex no 17 (on the Netherlands) to the Report from the Commission presented under Art 8 of the TSCG in the EMU, COM(2017) 1201, 4.

⁷⁰ Act of 5 July 2012 amending the budget of Ministry of Finance (IXB) for the year 2012 (Incidental supplementary budget act ESM) [Wet van 5 juli 2012 tot wijziging van de begrotingsstaat van het Ministerie van Financiën (IXB) voor het jaar 2012 (Incidentele suppletore begroting ESM)], Staatsblad 2012, 369.

⁷¹ Explanatory memorandum to the legislative proposal for the approval of the ESM Treaty, Kamerstukken (Parliamentary Papers) 33221, nr 4, p 6.

⁷² Kamerstukken (Parliamentary Papers) 33221, nr 3, p 11; Kamerstukken 33221, nr 4, p 6.

Governors, subject to approval by the Council of Ministers, may decide to increase the capital stock of that fund autonomously, without the consent of any parliament, European or national. From a Dutch constitutional perspective, this is not unproblematic, because under Article 105 of the Constitution, the government may only enter into new financial obligations after approval by the States-General in a budget act. We will come back to this issue under III.E.2.b.

B. Obstacles to the (Further) Transfer of Powers in the Field of EMU Through Treaty Amendments

In Dutch constitutional law and legal thinking, there are no clear limits to EU integration, including in the field of the EMU. There is no legal concept of an immutable core, of ‘core competences’ or of a ‘constitutional identity’ that is protected against transfers of powers to the EU. Nevertheless, some developments may point in the direction of very rudimentary thinking in terms of a stable core. The pending proposal for a new general provision in the Constitution can be seen as an attempt to make the unwritten and implicit core constitutional principles explicit.⁷³

Moreover, as we have seen, Article 91(3) of the Constitution allows for treaties which deviate from the Constitution to be approved with a two-thirds majority of the votes cast by both houses of the States-General.⁷⁴ However, according to the CoS in an advisory opinion of 1999, that provision does not allow for the approval of just any treaty with such majority.⁷⁵ For instance, the legislature would not be allowed to approve a treaty which not only deviates from the Constitution but also applicable international obligations of the Netherlands. The Council by way of example referred to the treaties establishing the EU and to the ECHR. According to the Council, the same may apply to treaties which deviate from provisions of the Constitution which contain substantial safeguards, in particular the fundamental rights in Chapter 1 of the Constitution. In the Council’s view, the infringement of fundamental rights under these circumstances can be so fundamental that even approval of it in accordance with the procedure of Article 91(3) of the Constitution would not be acceptable.

It may be clear that the abovementioned limits to further EU and EMU integration are primarily hypothetical. At the same time, there are genuine political and constitutional obstacles to further EU integration, which to a large extent run parallel and can be overcome if the government can muster sufficient political support in the States-General.

Politically, certain forms of further integration are often considered too far-reaching to affect the sovereignty of the Netherlands or be an infringement of the ‘identity’ of the Netherlands or its people. As said before (above I.B), especially in the context of the economic crisis, there is a

⁷³ Kamerstukken (Parliamentary Papers) 34516. Wet van 9 maart 2018, houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering van de Grondwet, strekkende tot het opnemen van een algemene bepaling [Declaration that there is a reason to consider a proposal to amend the Constitution to include a general provision]. The preparatory works do, however, emphasise that the provision is not intended as an eternity clause and does not have a higher rank than other provisions of the Constitution. On the provision, see eg, Maarten Stremler, ‘De voorgestelde algemene bepaling als fundamentele constitutionele norm’ (2018) *TvCR*, 204–20.

⁷⁴ Note that the Charter of the Kingdom (see note 1), which ranks above the Netherlands’ Constitution, does not contain a comparable provision. This implies that a treaty that deviates from the Charter can only be ratified after the Charter has been amended, which would require the consent of the States-General, and the parliaments of the other three countries making up the Kingdom of the Netherlands (Art 55 Charter; see on this Leonard F Besselink et al, *De Nederlandse Grondwet en de Europese Unie* (Groningen, Europa Law Publishing, 2002), 45, and the literature referred to there). However, the Charter plays no role whatsoever in the discussions on the future of EU integration.

⁷⁵ Advice of the Raad van State of 19 November 1999, Kamerstukken (Parliamentary Papers) 26800 VI, A, 6.

rather strong narrative against further transfers of sovereignty and against a political union.⁷⁶ However, these arguments are not framed in legal terms, not related to the Constitution⁷⁷ or identified as legal principles that restrict European integration. More specifically, the rules on fiscal discipline are considered necessary for the operation of the EMU, more particularly to bind other states.⁷⁸ There is generally broad support for this position in parliament, although the fate of the Fiscal Compact hung in the balance for a long time. Constitutionally, treaties that further EU and EMU integration have to be approved by both houses of the States-General. For approval, generally ordinary majorities in both houses suffice, but a two-thirds majority of the votes cast is necessary where the treaty deviates from the Constitution or leads to such deviation (Art 91(3) Constitution). The application and interpretation of Article 91(3) of the Constitution have, however, traditionally been very EU integration friendly.

First, the decision on the compatibility of a treaty with the Constitution is exclusively in the hands of government and parliament, because Article 120 of the Constitution forbids courts to review the constitutionality of treaties. This means that ordinary majorities in both houses of the States-General decide whether or not a treaty deviates from the Constitution.⁷⁹

Secondly, the interpretation of the concept 'deviating from the Constitution' has always been literalist and restrictive.⁸⁰ For instance, a treaty that causes a loss of sovereignty, or infringes the spirit, intention or system of the Constitution, is not considered as deviating from the Constitution. Also, the dominant opinion is that constitutional provisions, which reserve the regulation of certain subject matters for the legislature, only have an internal effect, ie, in constitutional relations within the Netherlands, but not in external relations. The transfer of the relevant competences to an international organisation is not considered as deviating from the Constitution (see also above under Sec II.A).

For example, the claim⁸¹ that the introduction of the common currency by the Maastricht Treaty deviated from Article 106 of the Constitution ('The monetary system shall be regulated by Act of Parliament') was rejected on the basis of this argumentation. Deviation from the Constitution is only deemed to take place where treaty provisions are incompatible with (the contents of) specific constitutional provisions, 'also in view of the latter's underlying basic assumptions and intentions.'⁸² Examples are treaty obligations which derogate from fundamental

⁷⁶ On the official Dutch position on EMU reform, see Schout, 'The Netherlands as constructive EU partner searching for an EU narrative', 60. Among the political parties, Wilders' PVV and Baudet's Forum voor Democratie are most critical of further integration, which they see as threatening the identity of the Netherlands.

⁷⁷ This is also due to the literalist and restrictive interpretation of the term 'deviating from the Constitution' in Art 91, para 3, Constitution.

⁷⁸ See the government's position of 27 November 2017 on the future of the EMU, Kamerstukken (Parliamentary Papers), 21501-20, 1263.

⁷⁹ The institutions that are involved in the making of an act of parliament may have different opinions on the constitutionality of a treaty, as is shown by the procedure of approval of the treaty on the basis of which the suspects of a bomb attack on a PanAm aircraft above the Scottish town of Lockerbie were detained, and tried, in the Netherlands, by a Scottish tribunal. According to the government and the Lower House, this treaty did not deviate from the Constitution, while according to the CoS and the Upper House the treaty deviated from Art 15(2) of the Constitution ('Anyone who has been deprived of his liberty other than by order of a court may request a court to order his release. In such a case he shall be heard by the court within a period to be laid down by Act of Parliament ...'). See on the consequences of diverging views of government and the houses of the States-General on the question whether or not a treaty deviates from the Constitution, Leonard F Besselink et al, *De constitutionele bepalingen over verdragen die van de Grondwet afwijken en de opdracht van bevoegdheid aan internationale organisaties*, Kamerstukken I, 2002/03, 27 484 (R 1669), nr 298.

⁸⁰ *Ibid.*, 26.

⁸¹ AW Heringa, *De Verdragen van Maastricht in strijd met de Grondwet*, NJB 1992, 749–52.

⁸² Opinions of the Raad van State of 23 December 1983 (cruise missiles), Kamerstukken (Parliamentary Papers) 17980, A-B, p 1–3; and of 19 November 1999 (foreign jurisdictions), Kamerstukken (Parliamentary Papers) 26800 VI, A, 3.

rights provisions that have no derogation clause,⁸³ or lead to very profound infringements of fundamental rights or infringements of applicable international obligations.⁸⁴

In view of the specific subject matter of this report, it should be added that a treaty amendment, or an EU act, that would give the EU Commission, or other EU institution (eg, a future European Minister of Economy and Finance), the competence to impose 'budgetary and economic decisions' on the Member States under certain circumstances,⁸⁵ would arguably deviate from Article 105(1) of the Constitution, which stipulates that the budget shall be laid down by an act of parliament. As we have already seen, that provision intends to make government expenditure subject to prior authorisation by parliament (authorisation function) and consequently give parliament a decisive say on the allocation of the Kingdom's revenues (allocation function). If the Commission acquires the power to issue binding instructions on the level of specific expenditures, such as social benefits and pensions, parliament will lose its decisive say.⁸⁶ Arguably, also a veto power for the Commission in case the general level of expenditure in the budget was too high would deviate from Article 105(1) of the Constitution.

Here a parallel may be drawn with proposals for the introduction of a binding corrective referendum in the Netherlands. According to these proposals, a legislative proposal adopted by the States-General could be subjected to a national referendum on the request of a certain number of voters. If the electorate in the referendum voted against the proposal, the proposal would lapse by operation of law.⁸⁷ It goes (almost) uncontested in the Netherlands that for the introduction of such a referendum Article 81 of Constitution, which provides that acts of parliament shall be enacted by the government and the States-General, would have to be amended. The amendment would have to provide for the interference of the electorate in the process of enactment of acts of parliament.⁸⁸ In the same vein, it may be argued that Article 105(1) of the Constitution would have to be amended to provide for the interference of the Commission in the process of the enactment of budget acts.

Following the judgment of the German *Bundesverfassungsgericht* on the ESM Treaty,⁸⁹ it has further been argued that if the Netherlands entered into a financial obligation with unlimited financial consequences, this would be contrary to the parliament's budget authority.⁹⁰

In the meantime, two additional potential legal obstacles for further EU/EMU integration have been removed from the legal order of the Netherlands. Since 1 July 2015, the Advisory

⁸³ Cp. Opinion of the *Raad van State* of 15 June 2000 (Statute of Rome regarding the International Criminal Court), Kamerstukken (Parliamentary Papers) 27484 (R 1669) A, 4–5.

⁸⁴ Opinion of the *Raad van State* of 19 November 1999 (foreign jurisdictions), Kamerstukken (Parliamentary Papers) 26800 VI, A, 5–6. In practice, until now three treaties have been considered to deviate from the Constitution: the Treaty of establishment of the European Defence Community in 1954 (inter alia because it deviated from the provision which declares that there shall be armed forces of Kingdom over which the Government shall have supreme authority); the Treaty with Indonesia on the transfer of sovereignty of New Guinea in 1962 (which inter alia deviated from a provision in which New Guinea was mentioned as part of the Netherlands); and the Statute of the International Criminal Court (which deviated from the provisions which declare that the King, for all his acts, and MP's and ministers, and anything they say in parliament, are inviolable).

⁸⁵ As proposed by the EC, COM(2012) 777/2, A blueprint for a deep and genuine economic and monetary union Launching a European Debate, 31['a means of imposing budgetary and economic decisions on its members, under specific and well-defined circumstances'].

⁸⁶ See also Diamant, van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', 121.

⁸⁷ See the proposed Art 89d of the Constitution in the Act of 30 September 2014, Staatsblad 314, 355.

This act was rejected in the second reading of the constitutional amendment procedure by the Lower House.

⁸⁸ See the proposed amendment of Art 81 of the Constitution, *ibidem*.

⁸⁹ ECLI:DE:BVerfG:2012:rs20120912.2bvr139012.

⁹⁰ M Diamant, *Het budgetrecht van het Nederlandse parlement in het licht van Europees economisch bestuur* (Leiden 2017), 68–69.

Referendum Act⁹¹ made it possible for 300,000 Dutch citizens to request an advisory referendum on acts of parliament that had been adopted but not yet entered into force. Among the acts that could be subject to a referendum were also those approving EU treaties. On this basis, a referendum on the mixed Association Agreement with Ukraine took place on 6 April 2016, with a majority 61 per cent of the votes cast rejecting the Approval Act.⁹² However, considering that the Advisory Referendum Act ‘had not met expectations’,⁹³ the governing majority repealed it.⁹⁴ The second potential obstacle that has been removed concerns a binding referendum on EU treaties. The Lower House rejected a constitutional amendment to that effect in September 2017.⁹⁵ Although the State Commission on the functioning of the Dutch parliamentary system in its interim-report of 21 June 2018 referred to the introduction of a binding corrective referendum as a possible means for improving the system of democracy,⁹⁶ it will, due to the very rigid constitutional amendment procedure of the Netherlands, take years before such binding referendum can be introduced – if it ever will.

C. Scrutiny of Secondary EU Law, Especially Ultra Vires Doctrine

In the Netherlands, courts do not review whether secondary EU law is compatible with the Constitution or is ultra vires. Nevertheless, review of draft secondary EU law by political institutions is neither entirely impossible nor absent, as we will now see.

In October 2001, the Minister of Justice asked the CoS for advice on the compatibility of the draft Framework Decision on the European Arrest Warrant with both the Treaty on the EU and the Constitution of the Netherlands. The Council opined that the draft fell within the EU competences under the said Treaty. It also thought that the draft was not incompatible with the Constitution. More specifically, the Council concluded that surrender on the basis of the Framework Decision did not deviate from Article 2(3) of the Constitution, according to which ‘(e)xtradition may take place only pursuant to a treaty’. A ‘reasonable’ interpretation of the term ‘pursuant to a treaty’ in that provision allowed, according to the Council, for the conclusion that a treaty basis suffices for extradition. Moreover, the Council reasoned that the grounds for

⁹¹ Wet of 30 September 2014, houdende regels inzake het raadgevend referendum (Act of 30 September 2014, containing rules concerning the advisory referendum), Staatsblad 2015, 122.

⁹² With a turnout of 32.28 per cent, the threshold for a valid referendum was met. In accordance with the Referendum Act, the outcome was non-binding, but the government had to ‘at the earliest convenience’ propose a new act to either gain parliamentary approval for either retraction of the approval act or for its entry into force. The government secured an additional agreement between the 28 Member States. On the Ukraine referendum, see the various contributions in Kristof Jacobs (ed), ‘Special issue: Referendums in times of discontent’ (2018) 5 *Acta Politica*; on the EU ‘solution’ to the referendum, see Ramses Wessels, ‘The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement’ (2016) *European Papers*, 1305–09.

⁹³ 34845, 3, p 1–2. The government inter alia argued that although the Advisory Referendum Act only obliges the legislature to reconsider a law or treaty rejected in a referendum, many voters believed that such rejection entailed the material obligation for the legislature not to enter into force the law or to approve the treaty. Therefore, if the legislature nevertheless would decide to let the law enter into force or approve the treaty, this would not be accepted by many voters. The instrument of the national advisory referendum would therefore only widen ‘the gap’ between voters and national political institutions, which it was intended to narrow.

⁹⁴ Wet van 10 juli 2018 tot intrekking van de Wet raadgevend referendum (Act van 10 juli 2018 repealing the Advisory Referendum Act), Staatsblad 2018, 214. The coalition was of the opinion that support for referendums had decreased and that the Act was insufficiently clear.

⁹⁵ For the proposal, see the Wet of 30 September 2014, Staatsblad 2014, 355.

⁹⁶ Interim report of the Staatscommissie Parlementair Stelsel, Tussenstand, 53–56, available at www.staatscommissieparlementairstelsel.nl/actueel/nieuws/2018/06/21/tussenstand-staatscommissie-mogelijke-oplossingen-om-democratie-rechtsstaat-en-parlement-te-versterken.

the treaty requirement in Article 2 of the Constitution is that entering into a treaty reflects a certain amount of confidence in the administration of justice in the other state-party. There was, according to the Council, ‘no reason to doubt that this guarantee has been complied with of the embedding of the draft in the EU Treaty.’⁹⁷

However, this does not amount to the scrutiny of secondary legislation *ex post*, which is highly unlikely in the Dutch context. Moreover, the *ultra vires* test of the draft Framework Decision can be explained because it concerns a decision taken in the former Third Pillar of the EU, in which the supervision of the ECJ was restricted.

D. Limits to ‘European Integration Outside the EU Legal Order’

In the Netherlands, there are no other limits to EU integration outside the EU legal order than to EU integration proper. Any limits that apply to the latter, also apply to the former.

E. Constitutional Feasibility Study of EMU Reform Proposals

Usually, the government of the Netherlands submits a memo (‘fiche’) on proposals or communications to the Lower House, which the Commission has submitted to the Council and/or the European Parliament. In those memos, the government sketches the content of the proposal, discusses the EU’s competence to take the proposed decision, and gives its first opinion on the subsidiarity, the proportionality and the political desirability of the proposal.

The memos on the proposals for reform of the eurozone presented by the EC in December 2017 show that the government has mixed views about their political and sometimes constitutional desirability and feasibility. In both respects, the reception of the Commission’s communications concerning the introduction of a European automatic macroeconomic stabilisation function and a European Minister of Economy and Finance was even downright negative.

We will briefly discuss the receipt of the proposals in the Netherlands on the basis of these memos. As regards possible constitutional obstacles to the adoption of the proposals, we can be very short: there are none, at least no specific ones. The proposed decisions do not belong to those decisions to which the States-General under national law must consent before the Dutch minister can agree in the Council of Ministers (see under IV.A). In short, the government is constitutionally entirely free to assent to the proposals in the Council. Of course, there may be political pressure from the States-General, under the ever-present shadow of the possibility of a motion of no-confidence, to not do so, or to do so only under specific conditions.

i. Integration of the Fiscal Compact

The Commission’s Proposal for a Council Directive ‘laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States’ aims among other things to incorporate the fiscal rules of the Fiscal Compact in the EU legal order.⁹⁸ The obligations in the proposal to set up a national framework of binding and permanent

⁹⁷ Opinion of the *Raad van State* of 19 October 2001, Advies WO3.01.0523/I/A; see also the letter of the Minister of Justice to the Lower House of 25 October 2001, Kamerstukken (Parliamentary Papers) 23490, 209.

⁹⁸ EC, COM(2017)824, Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States.

country-specific numerical fiscal rules, including a medium-term budgetary objective and fiscal planning and correction mechanism, were already included in the Fiscal Compact, do not conflict with national constitutional principles or rules, and have been met by the HOF act (see above III.A. 2.a). However, the proposed Directive also contains some new obligations which raise the following political and constitutional issues.

a) Political Issues

Politically, the government is ‘partly positive and partly negative’ about it. It is positive about the integration of the rules in the EU legal framework as such, but negative about the implicitly proposed weakening of the Compact’s fiscal rules. The Commission’s proposal does not copy the quantified medium-term objective of the Fiscal Compact: a maximum structural medium-term objective of 0,5 per cent GDP, or 1 per cent if the national debt is below 60 per cent GDP.⁹⁹ Instead, Article 3(1)(a) of the proposal ‘merely’ requires that the Member States have a structural medium-term fiscal objective which ensures

that the ratio of government debt to gross domestic product at market prices does not exceed the reference value set out in Article 1 of Protocol No 12 on the excessive deficit procedure or approaches it at a satisfactory pace.

That reference value is 60 per cent. In other words, the Member States would need a medium-term budgetary objective that helps to bring down government debt to 60 per cent GDP at a ‘satisfactory pace’.

Whether this proposal indeed leads to a relaxation of the Fiscal Compact’s balanced budget rule, as the government fears, seems to depend on the interpretation of terms ‘satisfactory pace’. However, it should not be forgotten that the Compact’s budget rule is only marginally stricter than a similar budget rule in Article 2a of the amended Regulation 1466/97, which requires that the Member States have a maximum medium-term budgetary objective of 1 per cent GDP. This requirement remains in place. Hence, the room for manoeuvre for the Member States remains small.

b) Constitutional Issues

A possible constitutional sting in the proposal is that the Member States must adopt a medium-term growth path of government expenditure, which has to be set as soon as a new government takes office and then respected by the annual budgets throughout ‘the term of the legislature as established by the constitutional legal order of the relevant member state’ (Art 3(1)(b) of the proposal). The term of office of the Lower House in the Netherlands is four years (Art 54 Constitution). However, before those years have lapsed, a new government may have taken office due to a government crisis.

Two scenarios can be distinguished in that case. The first is that a new government takes office after dissolution of the Lower House and general elections have taken place (Art 64 Constitution). The second is that a new government is formed without elections, ie, simply based on a change in the coalition of factions in the Lower House which supports the government.¹⁰⁰ It is possible

⁹⁹ Kamerstukken (Parliamentary Papers) 34856, 2, 4.

¹⁰⁰ Paul P Bovend’Eert and Henk Kummeling, *Het Nederlandse parlement*, (Alphen aan den Rijn, Wolters Kluwer, 2017), 501–02.

to interpret Art 3(1)(b) of the proposal in such a way that their predecessors' growth path binds the new governments in both situations. However, we may assume that this is not the intention of the Commission and that any new government within the parameters of EU may establish a new growth pact.

Another constitutional issue raised by the proposed Directive is related to the role of the required independent institution monitoring compliance with the European fiscal rules. The establishment of such an institution as such is already required by the Fiscal Compact. Article 3(5) of the proposal holds the new requirement that the Member States ensure that the independent institution – in the Netherlands, the CoS – shall call upon the budgetary authorities to activate the correction mechanism in the event of a significant observed deviation from the medium-term objective or the adjustment path towards it. This obligation is not constitutionally problematic, but its introduction probably requires an amendment of the HOF.¹⁰¹

However, the 'comply or explain' obligation contained in Article 3(6) of the proposal is constitutionally problematic. The provision demands that if the CoS finds that the medium-term objective or the expenditure path towards it set by budget authorities is inadequate or that the set objective or path significantly deviates from the budgetary authorities have to comply with relevant recommendations of the CoS or 'publicly justify the decision not to comply with those recommendations'. If adopted, this 'comply or explain' obligation will probably be incorporated in the HOF act.

However, as we have already noted (above III.A.2.a), it is an unwritten principle of Dutch constitutional law that the legislature cannot bind itself (or its successor). Therefore, the obligation to comply with the recommendations of the CoS or to otherwise justify non-compliance in the Act HOF itself cannot bind the Dutch budget authority, ie, the Dutch legislature. To establish the binding force of the obligation, one would, therefore, have to have recourse to the Directive, as part of the Dutch legal order. It remains to be seen whether this reasoning will convince the Commission. It was after all not entirely convinced by the employment of similar reasoning with respect to the duty in the Fiscal Compact to bind the national budget authority in national law to respect balanced budget rule (above, III.A.2.a). However, it probably will accept it, because it would be hard to expect that the Netherlands amend its Constitution to comply with the Directive.

ii. European Funds

The proposal for a Regulation amending Regulation (EU) No 1303/2013 laying down common provisions on the European Funds¹⁰² seems to raise no constitutional objections in the Netherlands. The proposal, received favourably by the Dutch government,¹⁰³ intends to offer the Member States the possibility of getting financial support from the European Structural and Investment Funds in return for structural reforms in the wake of what are called 'European Semester priorities' (among them the Country Specific Recommendations addressed to the

¹⁰¹ Although one may argue that Art 21 of the Wet op de Raad van State ([Act on the CoS], which gives the CoS the competence to advise whenever it deems this necessary, already provided sufficient basis for it.

¹⁰² EC, COM (2017)826 Proposal for a Regulation amending (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

¹⁰³ Kamerstukken 22112, nr 2471, 4–5.

Member States in the course of that semester). In order to obtain the financial support, the Member States have to propose to the Commission a detailed set of measures, including milestones, targets and a timetable of no longer than three years, for the implementation of the reforms, which may include product and labour markets reforms, tax reforms, development of capital markets, reforms to improve the business environment as well as investment in human capital and public administration reforms. If the Commission positively assesses the proposal, it takes a decision setting out the reform commitments and the amount of financial support for the relevant Member State. That decision shall stipulate that the support is paid in full once the Member State has fully implemented the reform commitment (proposed Art 23a(5)).

How to qualify this arrangement? Does it lead to binding contractual relations? We do not think so. The decision of the Commission is a unilateral one which, strictly legally speaking, only binds the Commission, not the Member State in question. The Commission obliges itself to pay the stipulated amount of support on the condition that the relevant Member State has implemented the promised reforms. If that analysis is correct, the arrangement does not pose any constitutional, and, more precisely democratic, problems in the Netherlands, as the commitments undertaken by the government do not bind a new government, which may refuse to carry out the promised reforms. However, in the alternative interpretation, that the promised structural reforms bind the state in question, this can be problematic democratically. This would be especially the case if the reforms were the subject of the electoral battle and the parties or parties opposing it have won the majority. Even in that case, the arrangement seems to have an in-built escape route for the relevant Member State. The consequence of not implementing the reforms is simply that the Commission does not have to fulfil its part of the contract.

iii. European Monetary Fund

The government of the Netherlands in principle supports the Commission's proposal¹⁰⁴ for a Council regulation on the establishment of the EMF, as the successor of the ESM, and the accompanying Annex with the proposed Statute of the EMF. But it disagrees in many respects with how the Commission has shaped that intention in its proposals.

a) Aid Dispensing

The Dutch government wants to stick to the decision-making procedures and the intergovernmental character of the ESM and believes that the development of the ESM into the EMF should not be at the expense of the Member States' control on the Fund. Under the terms of the ESM Treaty, decisions to grant aid to states in financial distress are made by the Board of Governors (ie, the ministers of finance of the participating states) unanimously, except in the case of an emergency situation, in which case decisions can be taken with a qualified majority (85 per cent of the votes). The Commission wants to turn the exception into a general rule and introduce qualified majority voting for all aid dispensing: the relevant decisions will be taken by the Board of Governors (ministers of finance) with a qualified majority of 85 per cent of the votes cast, subject to approval by the Council of Ministers (also with a qualified majority, but now in accordance with Article 238(3) TFEU).¹⁰⁵ This means that the Netherlands, like all participants in the Fund, except France, Germany and Italy, would lose their right of veto.

¹⁰⁴ EC, COM (2017)827 Proposal for a Council Regulation on the establishment of the EMF.

¹⁰⁵ Art 5, para 7, of the proposed Statute of the EMF in combination with Art 3 of the proposed Regulation.

The Dutch government considers this an undesirable development because it jeopardises the control that the national parliaments of the smaller Member States can exert on the functioning of the Fund through their ministers of finance. Indeed, in the proposed forms of reinforced qualified majority voting in respectively the Board of Governors and the Council, the Information Protocol, which provides for consultation between the Dutch government and the Lower House on aid applications,¹⁰⁶ loses all (decision-making in the Board of Governors) or much (decision-making in the Council) of its possible impact. Of course, draft decisions can still be discussed between the government and the Lower House, but the emphasis is removed. Although the Lower House can still try to force the minister to oppose draft decisions, ultimately under the shadow of a motion of no-confidence, such a threat is of no avail if there is a majority for it in the Board and Council. Therefore, although the proposed methods of decision-making strictly speaking do not infringe the budgetary prerogatives of the Dutch parliament, it will be clear that it is at odds with it.

In this context, it is striking that the Commission's proposal, does not provide for direct involvement of the European Parliament in the decision-making of the EMF as compensation for the loss of influence of most national parliaments. The proposal does, however, specify that the EMF shall be accountable to a limited extent to the European Parliament for the execution of its tasks. Every year it has to submit a report and a statement to the European Parliament and its Managing Director that may be heard by the competent committees of the parliament. Moreover, the EMF shall reply orally or in writing to questions put to it by the European Parliament.¹⁰⁷ The government of the Netherlands believes that such a 'supervising' role for the European Parliament is 'not necessary' and 'less obvious' because the capital for the Fund is provided for by the Member States, and not by the EU.¹⁰⁸

b) Increase of the Authorised Capital

Not discussed in the government's memo is the issue of the increase of the authorised capital of the proposed EMF. As is the case with the ESM, the authorised capital stock of the EMF will be made up of contributions from the individual participating states. Under Dutch constitutional law, a decision to increase the capital stock of the ESM is considered to be an (amendment) treaty in the sense of Article 91(1) of the Constitution. Thus, it requires the consent of both houses of parliament (see also under II.A). According to the proposal of the Commission, the Board of Governors, unanimously and subject to the approval of the Council of Ministers, will decide on an increase of the capital stock of the EMF.¹⁰⁹ If this proposal becomes law, the houses of the States-General would, therefore, lose their rights of veto. This may encounter principled resistance in both houses.

The Commission's proposal is on this point also at odds with the States-General's budgetary power under the Constitution. The main function of budget acts is the authorisation function, according to which government expenditures have to be authorised by parliament in a budget act

¹⁰⁶ Brief van de Minister van Financiën aan de Voorzitter van de Tweede Kamer der Staten-Generaal (Letter of the Minister of Finance to the chairman of the Upper House) of 15 December 2014, Kamerstukken (Parliamentary Papers) 21501-07, nr 1217; see further, above II.E.2.b.

¹⁰⁷ Art 5 of the proposed Regulation; a similar accountability arrangement is foreseen vis-à-vis the national parliaments.

¹⁰⁸ Kamerstukken (Parliamentary Papers) 34856, 3, 7–8.

¹⁰⁹ Art 10 of the proposed Statute of the EFM in combination with Art 6 of that Statute and Art 3 of the proposed Regulation.

beforehand. However, budget acts only have an internal effect, ie, in the relationship between the government and the States-General. That entails, among other things that agreements with third parties entered into by the government or individual ministers have to be complied with by the Dutch state, even if a budget act does not cover their financial consequences.

Similarly, if the Dutch finance minister on the Board of Governors would agree to increase the authorised capital stock of the EMF, the Netherlands would have to pay their share, even if the States-General has not authorised the expenditure. In that case, the government would have done what it is allowed to do according to EU law, but at the same time violates the Constitution.¹¹⁰ At first sight, the Commission's proposal seems to lead to a deviation of the Constitution in the sense of Article 91(3) of the Constitution. However, the tension between the proposed competence of the EMF Board of Governors and the States-General's budgetary power may be easily solved.

First, the government may, in practice, decide to only agree to an increase of the subscribed capital after the States-General have agreed to it in an ordinary or supplementary budget law. This is exactly how in practice the tension is solved between, on the one hand, the competence of the Board of Governors of the European Investment Bank (EIB) to increase that Bank's subscribed capital stock, which is also made up of the Member States' contributions,¹¹¹ and on the other, the States-General's budgetary power. The minister only agrees to an increase of the capital stock of the EIB after the adoption of a budget act, if necessary as a supplementary one.¹¹²

Secondly, if in an emergency, there is a shortage of time in which to issue a budget act, the government could have recourse to the so-called 'budgetary power in a material sense' (or informal budgetary power), which has emerged in Dutch constitutional practice.¹¹³ If the running budget does not cover an intended expenditure and there is no time to adopt a supplementary budget act, or the expenditure is confidential, the government will usually inform the States-General (in practice, the Lower Houses), most times in a letter, of its intention and the budgetary consequences thereof. The Lower House may then (tacitly) agree to the expenditure or reject it. In the latter case, the government has to refrain from entering the financial obligation. If the parliament (tacitly) agrees to the expenditure, it is considered to have exercised its informal budgetary power, and the government may proceed as intended. However, this informal budgetary power cannot replace formal budgetary power. Parliament subsequently still has to formalise its substantive consent by the adoption of a supplementary budget act.

¹¹⁰In such a situation, all the States-General, and more specifically the Lower House, could do to sanction the violation of the Constitution is to hold the relevant minister, or the government as a whole, accountable and, as a last resort, send him, or it, home, by a motion of no-confidence.

¹¹¹See Art 4 of the Statute of the EIB.

¹¹²See the Act of 8 November 2012 amending the budget act of the Ministry of Finance for the year 2012 (Incidental supplementary budget EIB), *Staatsblad* 2012, 573. In the memorandum of explanation of the bill for the act, the Minister of Finance wrote that '(t)he present bill aims to amend the departmental budget of the Ministry of Finance for the year 2012, so that the obligation to enter into a capital injection for the EIB is incorporated in the budget in time. The proposal to the Board of Governors of the EIB requires a decision by 31 December 2012. That is why it was decided to include this change in a separate supplementary budget and thus not to wait for the regular supplementary budget act'; *Kamerstukken* (Parliamentary Papers) 33409, 2, p 1.

¹¹³There are various definitions of the 'budgetary power in a material sense' in circulation, see Poppelaars, 'Het nationale budgetrecht en Europese integratie', Ch 5. The definition used here is the one used by the Parliamentary Inquiry Committee on the Financial System (Parlementaire enquetecommissie parlementair stelsel) in its final report of 2012, *Kamerstukken* (Parliamentary Papers) 31980, 61, 478–79, and by the Raad van State in its opinion on the modernisation of the Government Accounts Act in 2014, *Kamerstukken* (Parliamentary Papers) 33837, 4, 4.

c) The Legal Basis

The Commission proposes to use Article 352 TFEU as a legal basis for the incorporation of the ESM as the EMF into the EU legal order. The Dutch government is not yet convinced that this is legally feasible, as one of the conditions for the provision does not seem to be fulfilled. This concerns the condition that the proposed measure must be necessary in order to achieve an objective laid down in the Treaties, in this case, the safeguarding of financial stability. According to the government, that objective is already achieved with the ESM. It, therefore, queries if a Treaty amendment is not required.¹¹⁴ If the Commission persists in its view that the EMF can be established on the basis of Article 352 TFEU, it will have to convince the Dutch government. If it cannot, one may expect the Dutch government, probably also under pressure from the Dutch parliament, to vote against the proposal, with the result that it cannot be accepted, because Article 352 TFEU requires unanimity in the Council.

iv. European Automatic Macroeconomic Stabilisation Function

As regards the Commission's Communication on new budgetary instruments for a stable eurozone with the Union framework, the government of the Netherlands is non-committal. For a definitive position, the Dutch government awaits the further explanation and financial substantiation of the proposals by the Commission. However, the government in advance warns 'it wants to prevent the Netherlands from having to pay for the withdrawal of the UK'.¹¹⁵

Nevertheless, the government is slightly positive about the Commission's proposal to make financial support available within the EU budget for the Member States implementing structural reforms, if certain conditions are met, and a satisfactory cover can be secured within the upcoming Multiannual Financial Framework.

As regards a budgetary convergence facility for the Member States on their way to joining the euro, the government is rather sceptical. It not only requires further substantiation of the Commission's assertion that the number of applications under the current Structural Reform Support Program, which serves the same purpose, significantly exceeds the available resources but also states that it cannot yet assess the added value of the proposed instrument on the basis of the Communication.¹¹⁶

The government is not in favour of the proposed stabilisation function at European level to provide for the possibility of dealing with asymmetric economic shocks that cannot be managed at the national level alone, as specifically proposed in a draft regulation on the establishment of a European Investment Stabilisation Function.¹¹⁷ In its opinion, the Member States must and can absorb such shocks by using their budgetary buffers and the automatic stabilisers in their budgets. The SGP offers enough room for this.¹¹⁸ For that reason, it also assesses the proportionality of the proposal negatively.¹¹⁹

¹¹⁴ Kamerstukken (Parliamentary Papers) 34856, 3, 9.

¹¹⁵ Kamerstukken (Parliamentary Papers) 22112, 2471, p 4.

¹¹⁶ Kamerstukken (Parliamentary Papers) 22112, 2471, p 6.

¹¹⁷ European Commission, COM(2018)387 Proposal for a regulation on the establishment of a European Investment Stabilisation Function. The government does not discuss at all the very rudimentary Commission proposal of, to establish an European Unemployment Reinsurance Fund or a Rainy Day Fund, in EC, COM (2017)822 Communication on new budgetary instruments for a stable eurozone within the Union framework, 14 and 15, it only mentions them in passing; Kamerstukken (Parliamentary Papers) 22112, 2471, 4, fn 2.

¹¹⁸ Kamerstukken (Parliamentary Papers) 22112, 2471, 6–7; 22112, 2632, 5.

¹¹⁹ Kamerstukken (Parliamentary Papers) 22112, 2632, 6.

To fund the financing of the interest rate subsidy which may accompany the loans that a Member State receives to deal with an asymmetric shock, the Commission proposes to establish a Stabilisation Support Fund funded with a percentage of the so-called *seignorage*, ie, the income that the national central banks generate by issuing money. The set up of the Fund requires an intergovernmental agreement between the Member States, and, therefore, the approval of both Houses of Parliament (Article 91(3) Constitution). The government is opposed to the proposed method of financing of the Fund¹²⁰ and the Lower House even adopted a resolution calling upon 'the government to clearly indicate to the European Commission that a red line is exceeded in a claim on the ECB *seignorage* income'.¹²¹ The prospects for the Fund, therefore, do not seem to be promising. However, the proposal for the establishment of a European Investment Stabilisation Function does not raise other constitutional or legal issues in the Netherlands.

v. European Minister of Economy and Finance

It is hard to find a positive word in the Dutch government's memo to the Lower House on the Commission's Communication about a European Minister of Economy and Finance.¹²²

The government is opposed to the merger of the functions of vice-president of the Commission and president of the Eurogroup because an element of 'checks and balances' will then be lost. The president of the Eurogroup must often find a compromise between different positions of the governments of the eurozone states. That function can be at odds with the task of a European Commissioner, who, as an independent arbiter, must ensure compliance with the budget rules.

The government is also not in favour of combining the vice-presidency of the Commission with the presidency of the Council of Governors of the EMF. If the EMF has to intervene, the Commission has failed in its preventive monitoring of compliance with the SGP and Macro-economic Imbalances Procedure. That is, according to the government, why it is not 'obvious' to give a Commissioner a role in the EMF.

Since the government is opposed to the establishment of a stabilisation fund, it is also opposed to a role for the European Minister in the management of that fund. A European Minister of Economy and Finance with a discretionary power over a common eurozone treasury to allocate funding for investments or labour market policies would raise no constitutional objections in the Netherlands. However, the competence of such a Minister to veto Member States' budgets in case of non-compliance with relevant rules or policy recommendations would arguably violate Article 105(1) of the Constitution (see above II B).

Finally, the government is of the opinion that a European Minister of Economy and Finance is not necessary to increase the democratic legitimacy of the EU and EMU. Democratic legitimacy can better be enhanced by involving national parliaments more in EMU.¹²³

Also significant is that a motion from the member of the Lower House Leijten, which called on the government 'to actively oppose, now and in the future, the arrival of a European Minister of Finance',¹²⁴ was rejected. However, it should not be inferred from that fact that a majority of the Lower House would be in favour of a European Minister of Economy and Finance. Nevertheless, it would seem that the opposition to the idea would be mainly political, rather than legal or constitutional.

¹²⁰ Kamerstukken (Parliamentary Papers), 21501-20, 1349, 9.

¹²¹ Kamerstukken (Parliamentary Papers) 21501-07, 1510.

¹²² EC COM (2017) 823 Communication on a European Minister of Economy and Finance.

¹²³ Kamerstukken (Parliamentary Papers) 22112, 2470, 4-5.

¹²⁴ Kamerstukken (Parliamentary Papers) 21501-20, 1241.

vi. Banking Union Insurance Mechanisms – COM(2015) 586 and COM(2017) 827

a) European Deposit Insurance Scheme

The government is in principle positive about the proposal to establish a European Deposit Insurance Scheme (EDIS),¹²⁵ because such a system is the logical consequence of the establishment of the Banking Union and the SRF. At the same time, the government observes that the conditions for further risk sharing, which such a scheme implies, have not yet been met, despite all progress made in the last years.¹²⁶ The Lower House is of the same opinion. In December 2015, it adopted a resolution in which it asked the government to reject the Commission's proposal 'for now', because 'many steps have still be taken in the field of risk reduction'.¹²⁷ In addition, the Lower House placed a scrutiny reserve (*behandelvoorbehoud*)¹²⁸ on the Commission proposal. This reserve ended on 12 February 2016 with the agreement that the House will be informed of every step in the negotiations, and the Minister of Finance will not take 'decisive standpoints' in the Council without first consulting the House.¹²⁹ The Upper House wants to be informed in the same way.¹³⁰

The government doubts whether Article 114 TFEU (internal market) is the correct legal basis for the Scheme, as is proposed by the Commission. It points out that the Commission proposed the same legal basis for the establishment and funding of the SRF.¹³¹ However, the Council finally decided to regulate the funding in an intergovernmental agreement,¹³² because it considered that the TFEU did not provide a sufficient legal basis for the relevant financial transfers by the Member States.¹³³

b) EMF as Backstop for the SRF

(i) Political Issues

Although the Dutch government is convinced that a financial backstop for the European Banking Union to enhance the capacity of the SRF for executing banking resolutions of the Single Resolution Board (SRB) is necessary, it is not yet convinced that the EMF should function as such. It is also of the opinion that the backstop can only be introduced after sufficient risk mitigation measures have been taken, and not in 2019, as the Commission proposes. The government is also opposed to the Commission proposal to let the executive director decide on the drawdown

¹²⁵ Formally EC, COM(2015) 586, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme.

¹²⁶ Kamerstukken 21 501-07, 1334, p 10–11; 34385, A, see also Kamerstukken (Parliamentary Papers) 34844, nr F, 2.x.

¹²⁷ Kamerstukken (Parliamentary Papers) 21 501–07, 1333 (Motie Aukje de Vries en Merkies).

¹²⁸ See below IV.A.

¹²⁹ Kamerstukken (Parliamentary Papers) 34385, 2.

¹³⁰ Brief van de voorzitter van de vaste commissie voor financiën van de Eerste Kamer aan de minister van financiën van 9 maart 2016 (Letter from the chairman of the permanent Finance Committee of the Upper House to the Minister of Finance of 9 March 2016), not published (yet) in Kamerstukken (Parliamentary Papers) 34385.

¹³¹ EC, COM(2013) 520, Proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and the Council.

¹³² Agreement on the Transfer and Mutualisation of Contributions to the SRF, recital 7: 'The obligation to transfer the contributions raised at national level towards the Fund does not derive from the law of the Union.'

¹³³ Kamerstukken (Parliamentary Papers) 21 501–07, 1334, 8/9.

of credit lines or the provision of guarantees on liabilities of the SRB.¹³⁴ Such a decision should, in its view, be taken by the Board of Directors (the government probably means: the Board of Governors) with unanimity.¹³⁵

(ii) Constitutional Issues

The proposal to let the EMF, through credit lines or guarantees, function as a common backstop to the Single Resolution Board/Fund if the latter Fund's resources prove to be insufficient, and as such do not create specific constitutional issues in the Netherlands. The amount available for the backstop is initially limited to 60,000 million euro and comes from the funds of the EMF. The ceiling of 60,000 million may be raised by the Board of Governors, with unanimity, and is then subject to the approval of the Council, with a qualified majority.¹³⁶ The requirement of unanimity in the Board entails that the Dutch Minister of Finance can be held fully responsible for his behaviour on that Board. Furthermore, although the Information Protocol formally does not extend to decisions to increase the ceiling, it is easily conceivable that also here the rule will apply that the minister consults the Lower House before he decides to consent to the relevant draft. It may be added that as long as the increase does not lead to a raising of the subscribed capital of the EMF, the proposal is not at odds with the budget authority of the Dutch parliament as in Article 105(1) of the Constitution. If this increase would require a raising of the subscribed capital, the observations made above, in III.E.3.b are applicable.

The Dutch government's opposition to the proposal to let the Managing Director decide on the drawdown of credit lines to the SRB, however, also seems to have a constitutional significance.¹³⁷ This Managing Director is appointed by the Council for five years and can only be dismissed by the ECJ, if he or she 'no longer fulfils the conditions required for the performance of his or her duties, or in case of serious misconduct'.¹³⁸ Although the financial terms and conditions for the support to the SRB will be established by the Board of Governors with unanimity,¹³⁹ the Managing Director will most probably have some political leeway in deciding whether or not to provide support.

At present, the Dutch government wants the Board of Directors to decide to provide support, instead of the Managing Director. In contrast to the Managing Director, the members of this Board are not independent, or at least they do not have the same level of protection of their function as the Managing Director. Each governor, ie, each minister of finance, appoints a Director and this appointment is revocable at any time. This seems to indicate that Directors may be subjected to political instructions by the relevant minister. Therefore, if the Board of Directors were to decide on support, the ministers would effectively control the decision to support the SRB, which in turn would give the national parliaments the possibility to influence the ministers. However, support decisions usually have to be made very fast – according to the Commission's proposal, even within 12 hours after the receipt of a support request of the SRB¹⁴⁰ – and it is highly unlikely that the parliaments can be consulted in such a short time frame. Nevertheless, the ministers would, thus, control the support dispensing decision-making and can be held fully accountable for their voting behaviour by the national parliaments.

¹³⁴ Art 23 of the proposed Statute of the EMF.

¹³⁵ Kamerstukken (Parliamentary Papers) 34856, 3, 6 and 8.

¹³⁶ Respectively Art 22, para 6, sub f and g, of the proposed Statute of the EFM, and Art 3, para 1, of the proposed Regulation.

¹³⁷ Art 23, para 2, sub b, proposed Statute.

¹³⁸ Art 7, paras 1 and 2, proposed Statute.

¹³⁹ Art 22, para 4, sub a, in conjunction with Art 5, para 6, sub f and g, of the proposed Statute.

¹⁴⁰ Art 22, para 7, of the proposed Statute.

IV. Constitutional Rules and/or Practice on Implementing EMU Related Law

A. Country-Specific Modes of Participation of the National Parliament and Governments in EMU Decision-Making

In the period between the entry into force of the Maastricht Treaty and the entry into force of the Lisbon Treaty, both houses of parliament had to approve drafts of binding decisions under the so-called Third Pillar (Justice and Home Affairs) of the EU before the government representative in the Council of Ministers was allowed to agree to them.¹⁴¹ The rationale of this parliamentary right of consent was to compensate for the absence of co-legislative competences of the European Parliament as regards the relevant subject matters. Proportional to the extension of the European Parliament's legislative powers by the Treaty of Lisbon, the consent powers of the Dutch parliament have diminished. Under that Treaty, the Dutch parliament's right of consent is limited to decisions under the Articles 77(3), 87(3), and 89 TFEU. Under these provisions, a special legislative procedure applies, which gives the European Parliament merely consultative powers. The consent requirement is also applicable to decisions under Article 81(3)(1) TFEU, as long as the ordinary legislative procedure is not made applicable there. The relevant draft decisions have to be approved by both houses of parliament before the Dutch representative in the Council may consent to it. Tacit approval is given unless within 15 days of the submission of the draft to the States-General one of the houses expresses the wish that the draft requires explicit approval.¹⁴²

On the occasion of the parliamentary approval of the Lisbon Treaty, the States-General, by way of amendment of the Lower House, also obtained a so-called scrutiny reserve (*behandelvoorbehoud*) relating to proposals for legislative acts referred to in Article 2 of the Protocol on the role of national parliaments in the EU (except those submitted to parliamentary consent). Each House may, within two months of receiving it, decide that it considers a proposal to be of such political importance that it wishes to be informed about it in a particular manner. In that case, the government makes a parliamentary reservation in the Council and within four weeks enters into an agreement with the House(s) about how it informs the House(s) about the course of the negotiations, the legislative procedure and any follow-up consultation. As a rule, the parliamentary reservation lapses after this agreement is reached, although according to the Upper House, it may last longer if it deems this necessary for an adequate treatment of the proposal.¹⁴³

As will be clear, the Dutch parliamentary scrutiny reserve should be distinguished from the British parliamentary scrutiny reserve, which in general requires that a government representative does not vote in favour of a draft in the Council until the houses have finished their scrutiny of the proposal. The Dutch reserve is, in principle, limited in time, to four weeks.¹⁴⁴ In another

¹⁴¹ Art 3 of the Rijkswet of 17 December 1992 (approval Treaty of Maastricht), *Staatsblad* 1992, 692. At the occasion of the approval of the Treaty of Amsterdam, the right of consent was also declared applicable to decisions about subjects which were transferred by that Treaty to the EC-Treaty as long as the EP was not co-legislature; Art 4 of Rijkswet of 24 December 1998, *Staatsblad* 1998 (approval Treaty of Amsterdam), 737.

¹⁴² Art 3 of the Rijkswet of 10 Juli 2008 (approval Treaty of Lisbon), *Staatsblad* 2008, 301.

¹⁴³ Brecht van Mourik, *Parlementaire controle op Europese besluitvorming* (Nijmegen, Wolf Legal Publishers, 2012) 58.

¹⁴⁴ Interestingly, the Raad van State has tentatively suggested in an opinion on national democratic control on powers transferred to the EU to convert the Dutch version of the scrutiny reserve into the British version; Kamerstukken (Parliamentary Papers) 33848, nr 15, 13–14.

sense, however, it does resemble the British scrutiny reserve in that both arrangements concern not-legally binding, political agreements that are not enforceable in the courts. The only sanctions possible are of a political nature: holding the minister accountable and, as *ultimum remedium*, the adoption of a motion of no confidence.

The scrutiny reserve is regularly invoked by the Lower House,¹⁴⁵ and among the proposals concerned include, as we have seen, the Commission proposals for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States (COM(2017) 824), for establishing EDIS (EDIS; COM(2017) 827) and for the EMF (COM(2017) 827).¹⁴⁶ The House formally ended the latter scrutiny reserved on the basis of the following agreement:

1. The minister sends the House a summary comparing the EMF proposal of the EC with the existing possibilities under the ESM, and the position of the cabinet. The economic advantages and disadvantages of the various options will also be discussed.
2. The minister will inform the House prior to the EMU debate whether the Netherlands will ask the Legal Service of the Council for advice on the legal basis of the EMF proposal.
3. The House receives an annual overview of stress tests carried out at financial institutions in the eurozone.
4. If so desired, the minister will inform the Chamber confidentially about the position of other Member States in the negotiation of these proposals.
5. The minister will inform the House in a timely manner if the Netherlands chooses a position during the negotiations on these proposals that deviate from the positions previously shared with the House, in particular the specific objections of the government against the EMF proposal.¹⁴⁷

B. Country-Specific Techniques of Implementing Secondary Legislation, Especially of Directives: Laws, Administrative Regulations, Others

The (unwritten) constitutional rule in the Netherlands is that the implementation of EU law requires at least a basis in the act of parliament. In practice, however, a large majority of EU Directives is implemented by way of delegated legislation (orders in Council, ministerial orders, etc).¹⁴⁸ In some cases, the implementation by an act of parliament is required, for instance if the subject matter of the Directive is reserved for the legislature by the Constitution or leaves room for important policy choices. EU law in the field of the EMU has been implemented by acts of parliament, more particularly, the Government Accounts Act and the HOF Act (see under III.A.1).

¹⁴⁵For instance, 16 times by the Lower House in 2017.

¹⁴⁶Kamerstukken (Parliamentary Papers) 34 856, nr 1 (beëindigen behandel voorbehoud inzake EU-voorstellen inzake de Economische en Monetaire Unie COM (2017) 824 en 827).

¹⁴⁷Kamerstukken (Parliamentary Papers) 34 856, 4, p 1.

¹⁴⁸Bernard Steunenberg, Wim Voermans, *De omzetting van Europese richtlijnen: Instrumenten, technieken en processen in zes lidstaten vergeleken*, (Leiden: Universiteit Leiden, 2005) 31. The Crown issuing Orders in Council is the first to qualify for delegation; delegation to a minister is only considered to be acceptable if it concerns the implementation of EU law that leaves the Dutch legislature no policy choices, except on subordinate points; Art 26(2) of the government instructions for drafting legislation ('aanwijzingen voor de wetgevingstechniek'). Henri VIII clauses, ie, provisions in acts of parliament which empower delegated legislation to amend acts of parliament, were incidentally used in the past, but were very contested and are now considered anathema in Dutch constitutional law, see Art 34 of the Government instructions for drafting legislation ('aanwijzingen voor de wetgevingstechniek'); Kamerstukken (Parliamentary Papers), 29 200 VI, F, tweede herdruk.

C. Enforcement Through the Courts

Doctrinally, the direct effect and primacy of EU law and the European mandate of Dutch courts pose no real problems. Dutch judges are well aware that domestic law must be in accordance with directly effective EU law, and they may set aside conflicting legislation or even the Constitution. Similarly, Dutch courts are among the leading group of national courts sending preliminary questions to the ECJ, even if recently the flow of requests has somewhat diminished.¹⁴⁹ Moreover, the enactment and enforcement of a regulation contrary to higher regulations constitute a tort under Dutch Law.¹⁵⁰ Since the state has the duty under Article 4(3) TEU and Article 288, third sentence, TFEU to correctly implement European directives, failure to do so is considered a tort.¹⁵¹

Nevertheless, in practice, courts tend to prefer to take recourse to less invasive tools and techniques, such as conform interpretation.¹⁵² Moreover, the separation of powers between the various state organs in the Netherlands is such that the question of whether, when and how an act of parliament will be enacted must be answered by the political institutions involved, ie, the government and the States-General, and not by the courts. Accordingly, the courts cannot order the legislature to adopt a specific act of parliament or correctly implement a given Directive. This is the same if the result to be achieved by the legislature and the period within which the result must be achieved are fixed on the basis of an EU Directive and the legislature has failed to adopt the required legislation within the implementation period of a Directive.¹⁵³

V. Resulting Relationship between EMU Related Law and National Law

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

Overall, the Constitution and constitutional law do not create problems in the implementation and application of EU and EMU law. Similarly, they do not impose serious obstacles to participation in further integration. Any further steps in EU and EMU integration will be a matter of political debate, rather than legal or constitutional feasibility.

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¹⁵⁰ HR 9 May 1986, ECLI:NL:HR:1986:AC0867, NJ 1987/252 (Staat/Van Gelder).

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