



CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW: THE NETHERLANDS

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I POLITICAL CONTEXT

POLITICAL CHANGE

I.1

WHAT IS THE POLITICAL CONTEXT OF THE EUROZONE CRISIS PERIOD IN THE NETHERLANDS?
HAVE THERE BEEN CHANGES IN GOVERNMENT, ELECTIONS, REFERENDA OR OTHER MAJOR
POLITICAL EVENTS DURING THE PERIOD OF 2008-PRESENT?

The political situation in The Netherlands in this period was quite turbulent. Some major EU crisis measures were negotiated in situations when there was not a full functioning government or where government had to rely strongly on the support from the House of Representatives. Please see the answers to questions IV.1, V.3, VI.1 and VII.1 for the specific political context surrounding specific EU measures that have been negotiated during these periods. Since a clear majority of the political parties within Dutch the House of Representatives is pro-EU and government, early on, adopted a close working relationship with the House of Representatives, in terms of a information protocol, there were no real obstacles encountered in the negation or ratification of the EU debt crisis related measures. For ease of reference please find here a schematic overview of political events and their relevance to the EU crisis measures:

Political event NL	Effect	EU measures implemented
February 2010: government falls over military participation in Afghanistan. New (minority) government formed in October 2010.	Interim period during which government can only deal with current affairs and is not allowed to decide on any 'controversial' affairs.	Negotiation and implementation of the EFSF and EFSM
October 2010 – April 2012 Minority government (Liberal and Christian democrats) in place that relies on support on anti-EU Party for Freedom of Geert Wilders	For EU related policy matters government had to rely on pro EU opposition parties and was consequently very careful with informing the House of Representatives and agreed on a working document	Government had to rely on the pro-EU opposition parties to get a mandate for the negotiation of the Euro-Plus-Pact. A clear majority within parliament (that includes the Social Democrats, Centre Right Liberals and Greens) is pro-EU and, eventually, government received a broadly supported mandate to negotiate the Euro-Plus-Pact. Parliament did request government to ensure in all its negotiations on the combined economic governance measures, coined as

		the Europact in The Netherlands, to ensure not to move towards a political union. Concretely this meant that there could be no transfer of powers on the level of <i>policy measures</i> to be undertaken on a national level.
The (minority) government fell in April 2012 because the main right wing Party for Freedom (<i>the PVV of Geert Wilders</i>) withdrew support for the Liberal and Christian Democrats led (VVD and CDA) government after failed negotiations on government cuts. New government was formed in November 2012.	Interim period during which government can only deal with current affairs and is not allowed to decide on any 'controversial' affairs.	Both the ratification of Art 136 TFEU amendment and the ESM Treaty took place within this period. Both were adopted with broad parliamentary support from the centre left and right that traditionally strongly support the European Union project.
The government in place since November 2012 has a majority in the House of Representatives but not in the Senate	Government depends on opposition parties to support legislative initiatives in Senate (a number of - non EU related - legislative proposals have already been blocked in the Senate)	Government depends on support from opposition parties to pass current Wet Hof and other implementing measures related to directive 2011/85/eu

II CHANGES TO THE BUDGETARY PROCESS

BUDGETARY PROCESS

II.1

DESCRIBE THE MAIN CHARACTERISTICS OF THE BUDGETARY PROCESS (CYCLE, ACTORS, INSTRUMENTS, ETC.) IN THE NETHERLANDS.

The main characteristics of the budgetary process are as follows. Article 105 (1) Dutch Constitution determines that the budget is to be determined by law (government and parliament combined). The parliamentary budgetary rights have internal effect with the exception that only (budgetary) laws can authorize government spending. That is to say that they are mostly relevant for the relationship between parliament and government. As such a disregard of the budget rules can only have political effects. The yearly budget proposals are submitted on - traditionally called – *Prinsjesdag* (third Tuesday of September). Government submits its budget plans. Every ministerial department submits one budget plan that is to be approved by parliament. Thereby parliament – as most parliaments – has a so-called budget-right. That is to say the right to reject the proposed budget of the government. Parliament exercises this right through financially limiting the amounts that government can spend within specific policy areas. This is a form of external control on government spending. Thereby parliament exercises the political control of spending. Technical control is based on the justifiability of spending and its effectiveness and exercised by the general auditing chamber (*Algemene Rekenkamer*). In this way the general auditing chamber assists parliament in controlling the spending of the budget. The budget-right is anchored in the CW that was mentioned before. As such the parliamentary involvement with the budget is twofold. It has political control through its rights of approval and technical control through the checks on the justifiability of government spending.

An important part of these rights is the parliamentary right on information on the basis of article 68 of the Dutch Constitution. Effective parliamentary control of the budget is only present if parliament is in the possession of sufficient information – the material budget right (see further below) is relevant here.

Approved budgets have the status of law and authorises government to spend money. It is considered to be a rule rather than exception that authorised government budgets are considered insufficient or that authorised policy-objectives change. In these cases the *Compabiliteitswet* (CW) prescribes that new authorisation has to be provided by parliament through ad hoc supplementary budget measures (*suppletoire begrotingsmaatregel*), which are passed through parliament.

Next, there exists a separation between the formal and material budget-right of parliament. The formal budget-right prescribes that parliament always has to be informed prior to any spending that is not in accordance with the approved budget. The material budget-right applies for those situations where the exercise of policy is urgent and cannot await the outcome of the formal procedure. In these instances parliament is *informed* of on-going

changes in policy and the accompanying budgetary impact to avoid a situation where parliament is confronted with accomplished facts. This information is shared through separate policy letters or through budgetary notes. Parliament either (silently) accepts or rejects this and thereby exercises its material budget-right.¹

Since a number of years the government policy proposals are accepted by parliament on the last day before the Christmas recess. Formally the senate also has approval rights of the budget. In practice senate has since 1907 not used its power to reject the budget proposal. Since 1971 there exists a rule that budgets that have not yet been approved in May of the relevant budget year are treated as formalities provided that the government comes to the Senate to discuss its policy plans substantively. This is how the senate has mainly used its budget rights.²

GENERAL CHANGE

II.2

HOW HAS THE BUDGETARY PROCESS CHANGED SINCE THE BEGINNING OF THE FINANCIAL/EUROZONE CRISIS?

This question has been answered specifically with respect to the crisis measures in previous answers. As a general observation it is relevant to note that the basic budgetary process has not been changed. Instead all the specific measures have been implemented by aligning the measures within the existing budgetary framework. As noted in previous answers, government has made specific procedural agreements with parliament on how to inform them of measures and as far as possible guarantee the functioning of its existing budget rights in the application of, for example, the ESM Treaty.³ These arrangements have, so far, been made on an informal basis. The exact legal status of these information arrangements between government and parliament is therefore a bit unclear. Parliament has expressed a preference to make the arrangements official and legally sound information protocols on the basis of article 100 of the Dutch Constitution, but this has been refused by government. Instead there will probably be made a slight amendment to the existing CW in order to implement the informal information arrangements and thereby provide them with a stronger legal grounding.⁴

These agreements guarantee the involvement of parliament every time that aid is provided. In principle this happens before the aid is granted (confidential if necessary) by a policy note and debate with the minister. In cases where the urgency of the situation does not allow for the prior communication with parliament the minister will make a parliamentary reservation, meaning that there is no final commitment for the aid measure until parliament has been informed. Parliament can then decide whether it wants to utilise this reservation or not. In cases of urgent voting procedures (art. 4 ESM Treaty) there is no possibility nor use in

¹ 05 ESM Treaty - Diamant/Van Emmerink 'Het Nederlandse budgetrecht in Europees perspectief'

² Ibid.

³ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

⁴ 05 ESM Treaty - 100812 discussion on budget right parliament.

making the parliamentary reservation since there are no veto rights. In these cases the minister will as soon as possible defend its position within parliament. With respect to the actual payments the minister periodically informs parliament.

Wet HOF

Overview of Wet van 11 december 2013 inzake houdbare financiën van de collectieve sector (Wet houdbare overheidsfinanciën, Staatsblad 2013, 531)

Summary: The Law on Sustainable Government Finances of the collective sector (hereafter “HoF”) implements legal instruments to reach and maintain sustainable Government spending for current and future governments in the Netherlands. It is the main legislative instrument introduced in the Netherlands to implement the requirements that follow from the Fiscal Compact Treaty.

Key instruments and aims of HoF: The main aim of HoF is to implement instruments to establish a so-called trend-based budgetary policy on the central and local levels of government. The essence of the Dutch trend-based budget policy is that the budget balance is allowed to fluctuate within certain limits. Those limits are determined by what deficit is allowed for the medium-term (trend-based). It is characterised by the use of realistic economic premises, a strict separation of revenues and expenditures, a fixed multi-annual expenditure framework and one principle moment of decision-making on next years’ budget.

Article 2 sections 1-3 is a key part of HoF and determines that the Minister of Finances has to run a trend-based budgetary policy taking into account the norms that have been established by *the institutions of the European Union* for: i. The MTO for the *structural* EMU-balance; ii. The *yearly* EMU-balance; and iii. The *yearly* EMU-debt. Section 4-11 provide the operational procedural means through which recommendations from the EU institutions are implemented on a national level.

Articles 3-8 decentralise the obligations by imposing on local governments and specified legal entities with public spending capacities an *equivalent effort obligation* to reach the norms that have been established by the institutions of the European Union. These articles also determine the sanction mechanism that can be applied in case the equivalent effort obligation is breached.

Comments: A legal commentator highlights that the *norms* that article 2 Hof refers to are unclear.⁵ This un-clarity is caused by the phrase ‘*the norms that have been established by the institutions of the European Union*’. If Article 2 is intended to implement the obligations arising from the Fiscal Compact Treaty then the article erroneously refers to the institutions of the European Union since the norms in that Treaty have not been made by the institutions of the European Union but, jointly, by all the Member States together. As such it can be debated whether, due to this un-clarity, the Netherlands has actually sufficiently implemented the Fiscal-Compact Treaty. Another main issue that has come up in the comments on the Wet

⁵ 06 Fiscal Compact - Reestman 2013 De ondoorgrondelijke systematiek van het wetsvoorstel HOF NJB 2013, p. 299-302

HoF is that the requirements of a trend-based budgetary policy conflicts with the conventional budgetary processes of local governments that tend to spread out budget spending over multiple years. This is no longer possible under the Wet HoF.

INSTITUTIONAL CHANGE

II.3

WHAT INSTITUTIONAL CHANGES ARE BROUGHT ABOUT BY THE CHANGES IN THE BUDGETARY PROCESS, E.G. RELATING TO COMPETENCES OF PARLIAMENT, GOVERNMENT, THE JUDICIARY AND INDEPENDENT ADVISORY BODIES?

The relevant changes have been described in questions II.1 and II.2.

CHANGE OF TIME-LINE

II.4

HOW HAS THE TIME-LINE OF THE BUDGETARY CYCLE CHANGED AS A RESULT OF THE IMPLEMENTATION OF EURO-CRISIS LAW?

So far no changes have been made to the time-line of the budgetary cycle. On the basis of the CW national budget has to be approved before the 1st of January – as such it is in alignment with the EU framework. In practice the budget is always approved later and this could therefore affect the time-line of the budgetary cycle and necessitate some changes in the established practices of parliament in the approval of the budget.⁶

MISCELLANEOUS

II.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND CHANGES TO THE BUDGETARY PROCESS?

Not applicable.

⁶ Government intends to adopt these changes in the CW. 05 ESM Treaty - Diamant/Van Emmerink 'Het Nederlandse budgetrecht in Europees perspectief'

III CHANGES TO NATIONAL (CONSTITUTIONAL) LAW

NATURE NATIONAL INSTRUMENTS

III.1

WHAT IS THE CHARACTER OF THE LEGAL INSTRUMENTS ADOPTED AT NATIONAL LEVEL TO IMPLEMENT EURO-CRISIS LAW (CONSTITUTIONAL AMENDMENT, ORGANIC LAWS, ORDINARY LEGISLATION, ETC)?

The instruments that have been adopted have either been aligned with the existing legal frameworks or on the basis of ordinary legislation.

CONSTITUTIONAL AMENDMENT

III.2

HAVE THERE BEEN ANY CONSTITUTIONAL AMENDMENTS IN RESPONSE TO THE EURO-CRISIS OR RELATED TO EURO-CRISIS LAW? OR HAVE ANY AMENDMENTS BEEN PROPOSED?

No.

CONSTITUTIONAL CONTEXT

III.3

IF NATIONAL CONSTITUTIONAL LAW ALREADY CONTAINED RELEVANT ELEMENTS, SUCH AS A BALANCED BUDGET RULE OR INDEPENDENT BUDGETARY COUNCILS, BEFORE THE CRISIS THAT ARE NOW PART OF EURO-CRISIS LAW, WHAT IS THE BACKGROUND OF THESE RULES?

The budget rights of parliament are vested in constitutional law. This has been described in the answer to question II.1.

PURPOSE CONSTITUTIONAL AMENDMENT

III.4

WHAT IS THE PURPOSE OF THE CONSTITUTIONAL AMENDMENT AND WHAT IS ITS POSITION IN THE CONSTITUTION?

Not applicable.

RELATIONSHIP WITH EU LAW

III.5

IS THE CONSTITUTIONAL AMENDMENT SEEN AS CHANGING THE RELATIONSHIP BETWEEN NATIONAL AND EUROPEAN CONSTITUTIONAL LAW?

Not applicable.

ORGANIC LAW

III.6

HAVE THERE BEEN CHANGES TO ORGANIC LAWS OR OTHER TYPES OF LEGISLATION THAT ARE OF

A DIFFERENT NATURE OR LEVEL THAN ORDINARY LEGISLATION, IN RELATION TO EURO-CRISIS LAW OR THE BUDGETARY PROCESS?

Not applicable.

CONSTITUTIONAL AMENDMENT AND ORDINARY LAW

III.7

IF ORDINARY LEGISLATION WAS ADOPTED IN CONJUNCTION WITH A CONSTITUTIONAL AMENDMENT, WHAT IS THE RELATIONSHIP BETWEEN THE TWO?

Not applicable.

PERCEPTION SOURCE OF LEGAL CHANGE

III.8

IN THE PUBLIC AND POLITICAL DISCUSSIONS ON THE ADOPTION OF ORDINARY LEGISLATION, WHAT WAS THE PERCEPTION ON THE APPROPRIATE LEGAL FRAMEWORK? WAS THE ORDINARY LEGISLATION SEEN AS IMPLEMENTING NATIONAL CONSTITUTIONAL LAW, OR EURO-CRISIS LAW?

The Wet HOF is the only real new law that has been introduced to implement EU crisis measures. The perception of this law within The Netherlands is not dominantly perceived as a measure that implements Euro-crisis law. The political debates do mention this dimension but somehow this is absent in the public debates. The public debates mainly frame it as a battle between central government and local governments.⁷

MISCELLANEOUS

III.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND TO CHANGES TO NATIONAL (CONSTITUTIONAL) LAW?

The Parliamentary motion Brinkhorst that was adopted in 1980 stipulated that the interpretation of the Dutch Constitution should always be made in a way that the EU integration process is not frustrated.⁸ This motion has recently been repealed by Parliamentary motion Van der Staaij that stipulates that interpretation of the Dutch Constitution should exclusively be made on the basis of the intentions of the Dutch legislator.⁹ The government response to this repeal is that neither the motion Brinkhorst nor the recent repeal of that motion change any of the EU relevant legal obligations for The Netherlands that came into existence autonomously as a direct consequence of the accession to the European Union.¹⁰

⁷ For example, <http://www.binnenlandsbestuur.nl/financien/nieuws/dijsselbloem-noemt-kritiek-op-wet-hof-achterhaald.9014113.lynx>

⁸ 02 Treaty 136 - Parliamentary motion Brinkhorst 1980

⁹ 02 TFEU 136 - Parliamentary repeal motion Brinkhorst

¹⁰ 02 Treaty 136 - Government response to Parliamentary repeal of motion Brinkhorst

IV EARLY EMERGENCY FUNDING

Prior to 2010, loan assistance to States was made primarily via bilateral agreements (to Latvia, Hungary, Romania, 1st round of Greek loan assistance).

The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) are two temporary emergency funds, both resulting from the turbulent political weekend of 7-9 May 2010. On May 9, a Decision of the Representatives of the Governments of the Euro Area Member States was adopted expressing agreement on both funds.

The EFSM is based on a 'Council regulation establishing a European financial stabilisation mechanism' of May 11, 2010 adopted on the basis of article 122(2) TFEU and therefore binding on all 27 member states of the EU.

([http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:118:0001:0001:EN:PDF))

The EFSF is a special purpose vehicle created under Luxembourgish private law by the 17 member states of the Eurozone. The EFSF Framework Agreement was signed on June 7, 2010. On June 24, 2011, the Heads of State or Government of the Eurozone agreed to increase the EFSF's scope of activity and increase its guarantee commitments.

(http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf and http://www.efsf.europa.eu/attachments/faq_en.pdf)

NEGOTIATION

IV.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE NEGOTIATION OF THE EFSF AND THE EFSM, IN PARTICULAR IN RELATION TO (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

It is relevant to note that the political situation in The Netherlands during the negotiation of the EFSF and the EFSM was particular. The government fell in February 2010 because of a conflict over military participation in Afghanistan. The social democrats (*PvdA*) pulled out of the coalition that formed the government, leaving the Christian democrats (*CDA*) to manage on-going affairs until after the elections and the formation of a new government in October 2010. According to customary Dutch constitutional law, within such an interim period, government can only deal with current affairs and is not allowed to decide on any 'controversial' affairs. The negotiation of the EFSF and EFSM therefore took place against this background and there was a strong political need for broad support by parliament of the implementation of these measures.

The parliamentary debates in The Netherlands on EFSF and EFSM were preceded by the aid package for Greece and partly debated together. The Minister of Finance asked for express consent from parliament for the participation in the Greek aid package.¹¹ Parliament endorsed

¹¹ 01 EFSM&EFSF – 070510 parliamentary debate and approval of Greek aid.

the aid package for Greece on 7 May 2010.¹² There existed broad support for the creation of the EFSF within parliament, which was approved by a majority of parliament on the 11th of May (Social Democrats and the Party for Freedom voting against).¹³ Thereby parliament supported implicitly all rescue operations of EFSF aid including the aid that was later provided to Ireland and Portugal.¹⁴

The main issues that were debated in parliament centred around two issues. The first was the involvement of the IMF in order to supervise the implementation of economic restructuring in Greece. The involvement of the IMF was broadly supported within parliament and demanded by most political parties. The second issue was that the new measures should not lead to the creation of more powers for the EU to the detriment of the (budgetary) sovereignty of Member States that have a ‘sound’ budgetary position within the EU. This was discussed also with reference to more general statements by most political parties that a ‘political union’ or ‘economic government’ should be prevented. The extent to which these measures would impact the (budgetary) sovereignty of Greece was not considered important.¹⁵

Regarding the budgetary process it is furthermore relevant to note that the Dutch Minister of Economic Affairs did not follow the correct procedure as prescribed by Dutch State budgetary law (on the specifics of the budgetary process see further under question II.1) with the establishment of the EFSF. The rules of procedure were breached but this was considered to be legitimate in view of the broad parliamentary support for participation in the EFSF.¹⁶

ENTRY INTO FORCE

IV.2

ARTICLE 1(1) EFSF FRAMEWORK AGREEMENT PROVIDES THAT IT WILL ENTER INTO FORCE IF SUFFICIENT EUROZONE MEMBER STATES HAVE CONCLUDED ALL PROCEDURES NECESSARY UNDER THEIR RESPECTIVE NATIONAL LAWS TO ENSURE THAT THEIR OBLIGATIONS SHALL COME INTO IMMEDIATE FORCE AND EFFECT AND PROVIDED WRITTEN CONFIRMATION OF THIS. WHAT DOES THIS PROCEDURE LOOK LIKE IN THE NETHERLANDS AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

The Dutch government asked for support of parliament for the participation in EFSF on the basis of Dutch budgetary law (Compabiliteitswet ‘CW’) that requires notification to parliament for participation of the Dutch State in private undertakings (article 34 CW). Normally this procedure requires the government to submit a notification to parliament that sets out the plans to participate in a private undertaking. Government is then to respect a waiting period of 30 days during which parliament can object or ask for further information regarding the plans of government to participate in the private undertaking. In this case the normal procedure was not followed in view of the urgency and the broad parliamentary support that was given to government during the parliamentary debate on the Greek aid

¹² Ibid.

¹³ 01 EFSM&EFSF – 110510 parliamentary debate on EFSF.

¹⁴ 01 EFSM&EFSF – 180511 policy letter on EFSF aid to Portugal and Greece, p 3.

¹⁵ 01 EFSM&EFSF – 110510 parliamentary debate on EFSF.

¹⁶ 01 EFSM&EFSF – 080610 Policy letter on EFSF establishment.

measures and the establishment of the EFSF. Although broad parliamentary support was sought and given, the normal procedural framework that would apply to these governmental actions was ignored.

GUARANTEES

IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN THE NETHERLANDS? WHAT DEBATES HAVE ARISEN DURING THIS PROCEDURE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE GUARANTEES FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

See for an explanation of the Dutch budgetary process the answer to question II.1.

The establishment of the EFSF and the resulting obligation to issue guarantees touches on the budget-rights of parliament. Parliament was informed with a policy letter (d.d. 10 may 2010) about the establishment of the EFSF and the consequent obligation for the Dutch government to issue EUR 26 billion on guarantees.¹⁷ In the subsequent debates of 10 and 11 may parliament explicitly approved Dutch participation in all support programmes that EFSF would engage in, beyond the immediate support to Greece.¹⁸ Parliamentary involvement in these acts is ensured on the basis of the procedural agreements that were established between government and parliament - see further under question II.1.¹⁹

ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER DURING THE NATIONAL PROCEDURES RELATED TO THE ENTRY INTO FORCE OF THE EFSF FRAMEWORK AGREEMENT AND/OR THE ISSUANCE AND INCREASE OF GUARANTEES?

The initial broad parliamentary support for the EFSF measures implicitly included the future support actions for Portugal and Ireland.²⁰ The increased guarantee commitments did need express parliamentary support. Other than the budgetary impact, the parliamentary debate regarding the increased guarantee commitments focussed on the question of parliamentary control on the functioning of the EFSF - which will be discussed further in the answer to question 6. Eventually there was broad support for the EFSF and the increase of guarantees commitments. The big opposition parties (Party for Freedom (*PVV*), the Socialist Party (SP)) voted against but this did not affect the clear majority (including some of the smaller opposition parties) that was in favour of the measures.²¹

¹⁷ 01 EFSM&EFSF 1 - 100510 policy letter government on EFSF.

¹⁸ Such as the Portugal and Ireland EFSF aid. 01 EFSM&EFSF 1 - 180511 policy letter on EFSF aid to Portugal and Greece.

¹⁹ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

²⁰ 01 EFSM&EFSF 1 - 180511 policy letter on EFSF aid to Portugal and Greece

²¹ <http://www.parlementairemonitor.nl/9353000/1/j9vvijs5epmjl5y0/vj0gkm5nlez8>

CASE LAW

IV.5

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ABOUT THE EFSM OR EFSF IN THE NETHERLANDS?

No.

IMPLEMENTATION

IV.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE EFSF, FOR EXAMPLE WITH REGARD TO DECISIONS ON AID PACKAGES (LOAN FACILITY AGREEMENT AND MEMORANDUM OF UNDERSTANDING) AND THE DISBURSEMENT OF TRANCHES, BOTH OF WHICH NEED UNANIMOUS APPROVAL BY THE SO-CALLED GUARANTORS, I.E. THE EUROZONE MEMBER STATES?

The relationship between government and parliament is regulated under the auspices of the parliamentary budget-rights. Parliament and government agreed on a 'working basis' with respect to parliamentary involvement in the application of the EFSF²² – see the answer to questions II.1-II.2.

The parliament-government relationship in Germany and the judgment of the *Bundesverfassungsgericht* functioned as a focal point for the parliamentary debate on government-parliament relationship in The Netherlands.²³ The standpoint of the Dutch government is that the functioning of the formal and material budget-right of parliament provide control rights that, *de facto*, go further than or are in any case similar to the powers of parliament in Germany.²⁴ This *de facto* right is considered to exist because of the power of parliament to 'fire' the minister if he is insufficiently informing parliament or acts not in accordance with the information that was provided to parliament – during a lot of EFSF negotiations this was a real power in view of the minority government in place at the time of these negotiations.²⁵

In practice, the Dutch ministers have demonstrated to be sensitive towards the information rights of parliament and continuously updated parliament about EU developments. It is considered that this is why parliament has shown continuous broad support for both the Greek aid measures and subsequent participation in EFSF.²⁶

Of relevance is furthermore a parliamentary survey (*Commissie de Wit*) that evaluated the measures that have been undertaken by the government in response to the crisis. This survey concluded with a few recommendations on the relationship between government and parliament, primarily from the perspective of ensuring a form of parliamentary control with

²² 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

²³ 01 EFSM&EFSF - parliamentary debate EFSF changes, p. 11.

²⁴ <http://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vj0gkm5nlez8>

²⁵ Ibid.

²⁶ 01 EFSM&EFSF - M. Diamant en M.L. van Emmerik, 'Parlementair budgetrecht onder vuur?', NJB 2011, p. 1942-1950

respect to the measures adopted by government in crisis context.²⁷ These recommendations all addressed a need to ensure a proper and effective role for parliament in cases where government needs to act quickly. The survey concluded that, where possible, parliament should be informed before measures are undertaken and according to the normal rules of parliaments' budget-rights. In cases where this is not possible parliament should be informed as soon as possible afterwards with an explanatory memorandum of government that justifies and explains the reasons for the infringement of parliament's budget-rights.²⁸ As a whole these recommendations are all more or less reflected in the working relationship that has been established between parliament and government as explained in the answer to question II.1.

The government has in the application of the EFSF also informed parliament of developments on a confidential basis. The Dutch Minister of Financial Affairs (*De Jager*) informed parliament on a confidential basis about the consequences of the request of Ireland for financial aid.²⁹ When Greece turned out not to be able to fulfil the bail-out conditions in 2011 the Minister in a similar vein called the members of parliament back from recess to have a confidential parliamentary meeting in order to discuss freely the potential measures to be taken and the position of the Dutch government during the Ecofin council of 16 and 17 May 2011. During these meetings the minister was not looking for a political mandate but rather to inform parliament of the developments and debate freely about possible actions.³⁰ In these cases the Dutch minister made a clear distinction between situations where parliament was informed of measures on a confidential basis and situations where parliament was to provide a budgetary mandate. The latter mandate was always asked during public parliamentary debates. The former was installed because of the need to be able to freely discuss urgent situations without alarming the financial markets.

These instances show that government was working hard to keep parliamentary support for its actions in the EU crisis context. The minister was trying to get sufficient parliamentary support for all actions where it was possible and when it was not possible tried to make a parliamentary reservation for its support to EU measures. These efforts can perhaps be explained on the basis of the political context as further described in the answer to question IV.1.³¹

IMPLEMENTING PROBLEMS

IV.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE APPLICATION OF THE EFSF?

No significant difficulties. The general line of a clear majority within parliament is to support EFSF measures provided that strict measures are enforced on the countries that receive money. In the case of Greece the support of parliament was conditional on the involvement of

²⁷ 01 EFSM&EFSF – 180912 response government to survey de wit.

²⁸ Ibid.

²⁹ 01 EFSM&EFSF - 021210 report on parliamentary debate Irish aid, page 30.

³⁰ 'Beleggers verwachten bankroet Griekenland' NRC handelsblad 13 May 2011. <http://www.nrc.nl/nieuws/2011/05/13/de-jager-nog-geen-extra-geld-naar-griekenland/>.

³¹ 01 EFSM&EFSF - 160211 policy letter government, page 2.

the private sector and a significant contribution of the IMF to that aid package.³²

In the application of the EFSF the government informed parliament on the basis of the working agreement as previously highlighted, thereby ensuring that the conditions for participation of parliament were respected.³³

BILATERAL SUPPORT

IV.8

IN CASE THE NETHERLANDS PARTICIPATED IN PROVIDING FUNDING ON A BILATERAL BASIS TO OTHER EU MEMBER STATES DURING THE CRISIS, WHAT RELEVANT PARLIAMENTARY DEBATES OR LEGAL ISSUES HAVE ARISEN?

The Netherlands contributed to the bilateral aid provided to Greece in May 2010. It is relevant to note that the measures were approved in a period when there was, arguably, no effective government in place (see answer to question IV.1). Furthermore, under the previous government a parliamentary motion was adopted (initiated by the Liberal Democrats (VVD)) on the 11th of February 2010 that explicitly stated that no Dutch taxpayer money whatsoever would be spend on a bilateral solution for Greece and to ensure a solution through the IMF.³⁴ However, the Liberal Democrats supported and advocated for the aid package for Greece in May 2010, arguing that this Greek aid package was the exact reflection of what they meant with the February 2010 motion that demanded a solution for Greece through the IMF.³⁵ Despite this apparent contradiction, no legal issues surfaced and there existed a broad parliamentary support for the aid which was subsequently approved on the 7th of May 2010.³⁶ Of the main parties only the Party for Freedom (*PVV*) voted against the aid, arguing that The Netherlands should instead leave the Eurozone as soon as possible.³⁷

The parliamentary debate focused mainly on the existence of the risks of a default of Greece and the negative effects on the Dutch economy. Other than that the main parties in parliament considered it important to ensure a role for the IMF in the supervision of the aid and the implementation for the restructuring conditions.³⁸

MISCELLANEOUS

IV.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE EFSM/EFSF?

Not applicable.

³² 01 EFSM&EFSF - 070510 parliamentary debate and approval of Greek aid and 01 EFSM&EFSF - 110510 parliamentary debate on EFSF

³³ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

³⁴ 01 EFSM&EFSF - 110210 motie Weekers on bilateral support to Greece

³⁵ 01 EFSM&EFSF - 070510 parliamentary debate and approval of Greek aid, page1.

³⁶ 01 EFSM&EFSF - 070510 parliamentary debate and approval of Greek aid

³⁷ Ibid.

³⁸ Ibid.

V TREATY AMENDMENT ARTICLE 136(3) TFEU

At the 16/17 December 2010 European Council a political decision was taken to amend the Treaties through the simplified revision procedure of article 48(6) TFEU. On March 25, 2011 the European Council adopted the legal decision to amend article 136 TFEU by adding a new third paragraph: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

The process of approval of this decision by the member states in accordance with their respective constitutional requirements as prescribed by article 48(6) has been completed and the amendment has entered into force on 1 May 2013.

NEGOTIATION

V.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

There were no difficulties encountered in the negotiation of the amendment of article 136 TFEU. The position of the government is that the amendment embodies no changes of significance and, in fact, is not necessary but was proposed solely because some other countries feared that a structural stability mechanism could be perceived as problematic when compared with the old formulation of article 136 TFEU.³⁹ The EU level negotiations on the Treaty amendment in themselves were not debated in parliament. Parliament got involved seriously only in the ratification process.

APPROVAL

V.2

HOW HAS THE 136 TFEU TREATY AMENDMENT BEEN APPROVED IN THE NETHERLANDS AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The amendment of the Treaty article was ratified in The Netherlands on the basis of art. 91 (1) of the Dutch Constitution. Article 91 states that the Kingdom shall not be bound by treaty without prior approval of parliament, except for those cases where the law determines no such approval is necessary. Such approval may be tacit (Subarticle 2). Despite this, if no reservations of approval are made on conclusion of the treaty, or the treaty contains a ratification clause, treaties are according to international law binding upon conclusion. Subarticle 3 determines that if a treaty conflicts with the Constitution, it has to be approved by a two-thirds majority of both the House of Representatives and the Senate. Whether such conflict exists is decided by both the House of Representatives and the Senate. It is furthermore relevant to note the Parliamentary motion Brinkhorst of 1980 on the relationship between the Dutch Constitution and European law. This Parliamentary motion stipulated that

³⁹ 02 Treaty 136 - explanatory memorandum government, page 3.

the interpretation of the Dutch Constitution should always be made in a way that the EU integration process is not frustrated.⁴⁰ This motion has recently been repealed by Parliamentary motion Van der Staaij that stipulates that interpretation of the Dutch Constitution should exclusively be made on the basis of the intentions of the Dutch legislator.⁴¹ The government response to this repeal is neither the motion Brinkhorst nor the recent repeal of that motion change any of the EU relevant legal obligations for The Netherlands that came into existence autonomously as a direct consequence of the accession to the European Union.⁴²

By referring to art. 91 (1) of the Dutch Constitution, the implementation act, implicitly, qualified the amendment as a Treaty. The amendment of the Treaty was passed through parliament as a law and it followed the ordinary legislative procedure.

The general legislative procedure in The Netherlands is – in a nutshell – as follows: 1. Draft legislation is submitted to an organ of the State called Raad van State (“Council of State”) that provides a critical assessment of the law and reports on it. This can then lead to changes in the proposed law or a so-called ‘further report’ that responds to the comments. 2. The proposed law is then submitted to the House of Representatives (*Tweede Kamer*) where it is first directed to a relevant Committee by the chair of the house and debated there. Members of the House of Representatives can table amendments. 3. After the committee has concluded its scrutiny with a report the bill is debated in the plenary. 4. When the House adopts the bill, it is sent to the Senate (*Eerste Kamer*). The senate discusses the bill in its committees as well and – not always – in the plenary afterward. Senators in the Netherlands cannot amend a bill. The Senate can only adopt or reject the bill. After a bill passes the senate the bill needs to be ratified by the government (article 87 Dutch Constitution) and after an extra contraseign it is promulgated by the Minister of Justice.

There is no judicial control over the ratification of treaties, nor are referenda provided for by the Constitution (the 2005 referendum on the Constitutional Treaty was organized on the basis of a law, adopted solely for the ratification of that treaty).

RATIFICATION DIFFICULTIES

V.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER DURING THE RATIFICATION OF THE 136 TFEU TREATY AMENDMENT?

The Treaty was ratified in July 2012.⁴³ Political and legal difficulties over the ratification of 136 TFEU in The Netherlands could have been expected in view of the political situation in The Netherlands at that time. The political situation in The Netherlands during the ratification

⁴⁰ 02 Treaty 136 - Parliamentary motion Brinkhorst 1980

⁴¹ 02 TFEU 136 - Parliamentary repeal motion Brinkhorst

⁴² 02 Treaty 136 - Government response to Parliamentary repeal of motion Brinkhorst

⁴³ Wet van 5 juli 2012 houdende goedkeuring van het Besluit van de Europese Raad van 25 maart 2011 tot wijziging van artikel 136 van het Verdrag betreffende de werking van de Europese Unie met betrekking tot een stabiliteitsmechanisme voor de lidstaten die de euro als munt hebben (Trb. 2011, 143). See 02 Treaty 136 - The Law.

shared an important characteristic with the period in which the EFSF and EFSM were negotiated (see answer to question IV.1): the absence of a full functioning government. The (minority) government fell in April 2012 because the main right wing Party for Freedom (*the PVV of Geert Wilders*) withdrew support for the Liberal and Christian Democrats led (VVD and CDA) government after failed negotiations on government cuts. New government was formed in November 2012. According to customary Dutch constitutional law, within this interim period April-November, government can only deal with current affairs and is not allowed to decide on any ‘controversial’ affairs. Nevertheless, both the ratification of Art 136 TFEU amendment and the ESM Treaty took place within this period. Both were adopted with broad parliamentary support from the centre left and right that traditionally strongly support the European Union project. The main political parties that were against consisted of the SP – socialist party – and the Party for Freedom (PVV – the populist Geert Wilders party).⁴⁴

The parliamentary debates on the topic of the 136 TFEU amendment were held simultaneously with the ESM Treaty discussions. As a result these parliamentary debates somehow focussed mainly on the ESM Treaty and marginally on the Art 136 TFEU amendment. Below I provide the relevant debates with respect to the Treaty Amendment. The ESM Treaty is discussed further in the designated section of this questionnaire.

The Council of State report was overall positive but advised to explain more clearly in the so called *Memorie van Toelichting* (a legislative document accompanying draft laws that explains the purpose and background of the law in more detail) why there has been made a choice to provide for a Treaty amendment that allows a permanent stability fund outside of the EU legal and institutional order.⁴⁵ This advice has been implemented in the *Memorie* that now explains that the preference for an intergovernmental set up was mainly fuelled by concerns that a EU based solution would not have been possible on the basis of the simplified revision procedure. In addition the Council advised to explain more clearly why Member States do not infringe the TFEU rules by setting up a permanent stability mechanism.⁴⁶ The reply to this concern – that was also raised in the Parliamentary commission and debates – from the government was that the creation of a permanent stability mechanism was a necessary mechanism to ensure stability of the Eurozone and the non implementation could have potentially led to enormous financial and economic consequences. A collective that exists between the Member States on the basis of the ESM and the strict conditionality’s attached to it therefore does not infringe the no bail-out clause.⁴⁷

The comments of the Parliamentary committee focussed on (i) the relationship between 136 TFEU and the no bail out clause, (ii) the relationship between 136 TFEU and the ESM Treaty and (iii) the potential transfer of sovereignty through the amended article.⁴⁸ The government response on these points was that the Treaty amendment was in fact from a legal point of

⁴⁴ 02 TFEU 136 - voting overview Treaty amendment

⁴⁵ 02 Treaty 136 - Advice Council of State, page 2.

⁴⁶ Ibid., page 3.

⁴⁷ Ibid.

⁴⁸ 02 Treaty 136 - preparatory parliamentary report.

view unnecessary and merely confirming, enforcing or clarifying a legal situation that was already possible on the basis of the existing TFEU. The reason for the amendment according to the Dutch government was that certain Member States felt that there would be more legal certainty if there would be an amendment of the Treaty.

CASE LAW

V.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT IN THE NETHERLANDS ON THE 136 TFEU TREATY AMENDMENT?

No.

MISCELLANEOUS

V.5

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE 136 TFEU TREATY AMENDMENT?

Not applicable.

VI EURO-PLUS-PACT

On March 11, 2011 the Heads of State or Government of the Eurozone endorsed the Pact for the Euro. At the 24/25 March 2011 European Council, the same Heads of State or Government agreed on the Euro Plus Pact and were joined – hence the ‘Plus’ - by six others: Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania (leaving only the UK, Czech Republic, Sweden and Hungary out).

The objective of the pact is to foster competitiveness, foster employment, contribute to the sustainability of public finances and reinforce financial stability. In the Euro-Plus-Pact the Heads of State or Government have entered into commitments on a number of policy areas, in which member states are competent.

(http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf)

NEGOTIATION

VI.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE NEGOTIATION OF THE EURO-PLUS-PACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE PACT FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

The political reality in The Netherlands at the time of negotiation of the Euro-Plus-Pact was delicate. At the time there was a minority government in power, led by the Liberals and Christian Democrats that relied on support from the Party for Freedom for a majority in the House of Representatives. However, the Party for Freedom is outspoken anti-EU and government had to rely on the pro-EU opposition parties to get a mandate for the negotiation of the Euro-Plus-Pact. A clear majority within House of Representatives (that includes the Social Democrats, Centre Right Liberals and Greens) is pro-EU and, eventually, government received a broadly supported mandate to negotiate the Euro-Plus-Pact.⁴⁹ The House of Representatives did request the government to ensure in all its negotiations on the combined economic governance measures, coined as the Europact in The Netherlands, to ensure not to move towards a political union. Concretely this meant that there could be no transfer of powers on the level of *policy measures* to be undertaken on a national level (e.g. changing pension age).⁵⁰ The government now consequently refers to this motion of House of Representatives – that is to say that they respect the boundaries set by the House of Representatives – in the policy updates it sends to the House of Representatives regarding EU negotiations.⁵¹

During parliamentary debates the government strongly maintained its position that the Euro-Plus-Pact would not involve any transfer of sovereignty. In so far as there was any transfer of sovereignty this could only be said to be the case with respect to the enforced stability and growth pact that would include stronger sanctioning mechanisms. It has been suggested by

⁴⁹ 03 Euro-Plus-Pact 230311 parliamentary debate 1/2, 03 Euro-Plus-Pact 230311 parliamentary debate 2/2.

⁵⁰ 03 Euro-Plus-Pact 230311 Parliamentary condition no transfer of powers on the level of policy measures.

⁵¹ For an example, 03 Euro-Plus-Pact 110311 policy update, page 6.

some parties in the discussion that the Pact did involve a transfer of sovereignty because of the process whereby reports have to be provided to the Commission that would then be graded on a benchmarking basis, which could then subsequently induce to changes in policy. The government maintained that this does not at all affect the capacity to set goals and the means to pursue them (it could only inspire to do better), therefore no transfer of sovereignty would take place.⁵² As such the commitments made in the pact are considered to be a reflection of the determination to increase competitiveness without real mechanisms to force Member States to changes anything (in this sense they were considered to be more political than legal commitments).

MISCELLANEOUS

VI.2

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE EURO-PLUS-PACT?

As to national measures on economic/social issues adopted in reaction to the Euro-Plus-Pact, the following can be said on the basis of the national reform programmes of The Netherlands that were submitted to the Commission.⁵³ The national reform programmes of 2011 and 2012 made explicit reference to links between the Euro-Plus-Pact and national reform measures. The 2013 reform programme no longer contains any references to the Euro-Plus-Pact.⁵⁴ It appears that the Euro-Plus-Pact objectives have been integrated in the more general reporting mechanisms of the European Semester and the country specific recommendations that are made in that context.

It is relevant to note that on a national level no references whatsoever are made that link the Euro-Plus-Pact objectives and the national measures. In fact, most of the measures that are presented in the context of national reform programmes as responses to the EU objectives already existed prior to the objectives of the Euro-Plus-Pact. From this perspective, the actual impact of the Euro-Plus-Pact is questionable. However, the below points have been communicated to the European Commission as being the implementing measures for the Euro-Plus-Pact.

1. Competitiveness: the introduction of a new business policy, consisting of a sectoral approach with more demand-side management by industry, fewer special-purpose grants, more generic reductions in taxation and administrative burden and more freedom for entrepreneurs.
2. Employment: measures to ensure increased activating of social security and reduced dependency on unemployment benefits through the introduction of a scheme to reform existing schemes for the lower end of the labour market.

⁵² 03 Euro-Plus-Pact 230311 parliamentary debate 2/2.

⁵³ 03 Euro-Plus-Pact nrp2012 and 03 Euro-Plus-Pact nrp2013 in addition also 03 070411 Euro-Plus-Pact policy letter government on EuroPlusPact measures.

⁵⁴ 03 Euro-Plus-Pact nrp2013.

3. Sustainability of public finances: introduction of a new Act to embed the Stability and Growth Pact agreements in national legislation see further on this act below in the section of Fiscal Compact.

4. Financial stability: the introduction of a new Act that will provide more power to intervene in financial institutions than the statutory instruments of the Financial Supervision Act and the Bankruptcy Act.

VII SIX-PACK

The ‘Six-Pack’ is a package of six legislative measures (five regulations and one directive) improving the Economic governance in the EU. The Commission made the original proposals in September 2010. After negotiations between the Council and the European Parliament, the package was adopted in November 2011 and entered into force on December 13, 2011. Part of the ‘Six-Pack’ measures applies only to the Eurozone member states (see the individual titles below).

The ‘Six-Pack’ measures reinforce the Stability and Growth Pact (SGP), among others by introducing a new Macroeconomic Imbalances Procedure, new sanctions (for Eurozone member states) and reversed qualified majority voting. Also, there is more attention for the debt-criterion.

(http://ec.europa.eu/economy_finance/economic_governance/index_en.htm)

NEGOTIATION

VII.1

WHAT POSITIONS DID THE NETHERLANDS ADOPT IN THE NEGOTIATION OF THE ‘SIX-PACK’, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE ‘SIX-PACK’ FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

At the time of the negotiations the political situation in The Netherlands was delicate. There was a minority government in power, led by the Liberals and Christian Democrats, that relied on support from the Party for Freedom (anti-EU) for a majority in the House of Representatives – see further under question VI.1. However, there were no particular political/legal difficulties encountered in the negotiation of the Six-Pack. The position of government, that is broadly supported by the main parties in the House of Representatives, was that the measures introduced with the Six Pack are necessary means to ensure – previous lacking – fiscal discipline of all Member States.⁵⁵ The position of government and main opposition parties in the House of Representatives is that the main cause for the crisis is the fact that some Member States did not follow the rules on fiscal discipline (‘the sick countries’). Therefore, the automatic sanctioning mechanism is considered very important. Government insisted also on increasing the power of the European Commission to supervise Member States that were not fulfilling their fiscal obligations (through the creation of a special Commissioner for this purpose). This is broadly supported by the House of Representatives.⁵⁶

At the same time, both the position of government and that of the main parties in the House of Representatives is that the measures should not lead to a transfer of sovereignty to the European Commission with respect to the Netherlands. The implicit assumption in the parliamentary debates was that the Netherlands would never get into a situation where they

⁵⁵ Clearly stated in 04 Six-Pack 070911 Government vision on future of EMU first letter and 04 Six-Pack 231112 Government vision on future of EMU second letter.

⁵⁶ 04 Six-Pack 231011 parliament debate on EU Council agenda, page 26 and further.

would be forced to install measures on the basis of the new legal infrastructure.⁵⁷ Therefore, even though the new legal framework would lead to an increase of powers of the European Union vis-à-vis Member States, this was only perceived as a matter of transfer of sovereignty for the ‘problematic’ Member States and, in practice, would never be relevant for the Netherlands.⁵⁸ The Netherlands is, today, however increasingly being confronted with the effects of the new mechanisms that do in fact put increasing pressure on implementing specific measures considered necessary from the European Commission’s perspective.

DIRECTIVE 2011/85/EU

[Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States](#)

IMPLEMENTATION

VII.2

WHAT MEASURES ARE BEING TAKEN TO IMPLEMENT DIRECTIVE 2011/85/EU ON REQUIREMENTS FOR BUDGETARY FRAMEWORKS (REQUIRED BEFORE 31 DECEMBER 2013, ARTICLE 15 DIRECTIVE 2011/85/EU)?

On 24 September 2012 the Dutch government tabled the bill Sustainable Public Finances Act (Wet Houdbare Overheidsfinanciën ‘HOF’) to, amongst others, implement Directive 2011/85/EU (see the overview of this Act at question II.2). The overview in the Commission report on the implementation of directive 2011/85 provides the measures that have been taken in The Netherlands.⁵⁹ For ease of reference below follow the main aspects of the implementation measures that have been directly copied from the report. The overview specifically highlights the instances where there is new information, additional to the Commission report:⁶⁰

Measures to implement the accounting and statistical requirements

“For local governments, the Dutch statistical office receives but does not publish quarterly data. A reform is under consideration. The draft law on the sustainability of public finances specifies that local governments should provide data of sufficient quality to the Dutch statistical office at a faster pace (within a maximum of 10 working days, instead of the current 30 days).”⁶¹

Measures to implement the transparency requirements

“A list of all general government units will be published by the Dutch Statistical Office in 2014-2015. Information on tax expenditures is already published every year in a separate

⁵⁷ See also <http://www.denederlandsegrondwet.nl/9353000/1/j9vviHf299q0sr/vitki5uuds91>.

⁵⁸ As reflected in the parliamentary Europe debates of 03 Euro-Plus-Pact 230311 parliamentary debate 1/2, 03 Euro-Plus-Pact 230311 parliamentary debate 2/2.

⁵⁹ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 66.

⁶⁰ Other source are the 04 Six Pack Wet HOF MvT, 04 Six-Pack CPB policy document.

⁶¹ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 66.

annex to the Budget Memorandum. Relevant information on contingent liabilities with a potentially large impact on public finances, in particular guarantees, is already published for central government in the yearly Budget Memorandum and Financial Report. Information on central government participation in public corporations is already published in the balance sheet of the state and separately in an overview of the public corporations of central government. As regards local governments, contingent liabilities are usually part of their annual reports, but there is not yet an aggregation at national level.”⁶²

Measures to implement the forecasts requirements

“Before the start of each government term, the CPB (Bureau for Economic Policy Analysis) publishes a medium-term macro-economic outlook for the Dutch economy. The CPB provides macro-economic forecasts within the annual budget cycle. There is currently no legal obligation for the government to do so, but the new law on the sustainability of public finances is to make this practice mandatory. Any significant differences between the CPB macro-economic forecasts and the forecasts of the European Commission will be explained in future in the annual Budget Memorandum.”⁶³

Measures to implement the requirements on the fiscal rules

“The central feature of the rules regulating Dutch budgetary policy is the implementation of a medium-term expenditure framework (MTEF) along with other de facto fiscal rules for the budget process (acting as a revenue rule). The MTEF itself is established as a set of principles covering the term of the government implementing it. This is not subject to legally anchored fiscal rules, but is the product of a longstanding political tradition. A new framework is under consideration to enshrine this process more formally in law, while combining it with the European fiscal framework, i.e. numerical obligations under the SGP.

The draft law on the sustainability of public finances will anchor in law the basic principles of the Dutch trend-based budgetary policy. The law will also stipulate that trend-based budgetary policy needs to conform to the Treaty reference values and procedures on debt and deficit, and the MTO. If trend-based budgetary policy does not lead to outcomes in line with the Treaty reference values or the MTO, additional measures will be taken to increase revenues and/or cut expenditures.”⁶⁴

Measures to implement the requirements of the medium-Term Budgetary Framework

“The current budgetary process of the Netherlands is already based on a four-year cycle with minimal annual revisions allowed to initial projections. ... The government adheres to an expenditure framework that fixes the overall level of expenditure during the government’s term. The framework is usually drawn up in the new government’s first Budget Memorandum. It is based on multi-annual expenditure estimates, which are derived from the

⁶² 04 Six-Pack report on the implementation of directive 2011/85/eu, page 66.

⁶³ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 67.

⁶⁴ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 67.

economic development scenario presented by the CPB.”⁶⁵

In addition to the above information that comes directly from the Commission report it is relevant to note that the Netherlands tabled a law that obligates local government to centralise their financial household on State level (*Verplicht schatkistbankieren voor decentrale overheden Obligated Treasury banking for local governments*). Although not directly related to the Directive this law is intended to stabilise and cut back the EMU debt. The main point of the law is that local governments will be obligated to keep all their excess cash and investments at the Ministry of Finance. As an effect the external financing needs of the Dutch government will be reduced.⁶⁶

IMPLEMENTATION DIFFICULTIES

VII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE IMPLEMENTATION PROCESS, IN PARTICULAR IN RELATION TO IMPLICATIONS OF THE DIRECTIVE FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

There were hardly any political/legal difficulties encountered in the implementation process of Wet Hof in the House of Representatives. There are, however, increasing protests from five local governments (Overijssel, Noord-Brabant, Friesland, Gelderland and Limburg) against the implementation of the Law. They argue that the law leads to damaging limitations of local governments to be sufficiently autonomous and invest in economic sectors that they deem necessary.⁶⁷ Furthermore, because of supposedly different accounting mechanisms on a central and local level of government, the effects of budget norms would be much bigger on a local level. The protesting local governments produced an economic report to support their claims and started intensive lobbying against the implementation plans of the Wet Hof.⁶⁸ The report has been submitted to the Senate, where the law is currently on the table (plenary debate scheduled for 26 November 2013). The minister of financial affairs has responded to the report, claiming it to be incorrect and flawed in its economic effects analysis.⁶⁹

There were some question raised in the House of Representatives as to the impact on sovereignty and the budgetary process but the position of government was that there were no real changes since most of the rules that were being implemented already existed on the basis of the Stability and Growth Pact.⁷⁰ The draft law was accepted by all major parties (Christian Democrats, Liberals, and Social Democrats) in the House of Representatives except for the Party for Freedom (PVV) and the Socialist Party.⁷¹

⁶⁵ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 67.

⁶⁶ 04 Six-Pack Obligated Treasury banking for local governments

⁶⁷ <http://www.binnenlandsbestuur.nl/bestuur-en-organisatie/nieuws/groeiend-verzet-tegen-financiele-afspraken.8802935.lynkx> and <http://www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/3375408/2013/01/11/Ook-werkgevers-leveren-kritiek-op-de-Wet-Hof.dhtml>

⁶⁸ 04 Six-Pack Ecorys effects wet HOF on Provincial investment programs

⁶⁹ 04 Six-Pack - Letter minister on Ecorys report Provincial investments

⁷⁰ 04 Six -Pack note on parliamentary committee Wet Hof.

⁷¹ 04 Six-Pack voting overview.

MACROECONOMIC AND BUDGETARY FORECASTS

VII.4

WHAT INSTITUTION WILL BE RESPONSIBLE FOR PRODUCING MACROECONOMIC AND BUDGETARY FORECASTS (ARTICLE 4(5) DIRECTIVE 2011/85/EU)? WHAT INSTITUTION WILL CONDUCT AN UNBIASED AND COMPREHENSIVE EVALUATION OF THESE FORECASTS (ARTICLE 4(6) DIRECTIVE 2011/85/EU)?

The Netherlands implements these obligations through making use of the existing institutional framework. The Bureau For Economic Policy Analysis (het Centraal Planbureau 'CPB') will be responsible for producing macroeconomic and budgetary forecasts on the basis of Article 2 Wet Hof. Currently the CPB already provides similar forecasts of the effects of intended government policy.

In cycles of five years, the policy relevance and scientific quality of the CPB is assessed by s 'visitation commissions'.⁷² Although these commissions are supposed to be independent (<http://www.cpb.nl/kwaliteitscontrole>) these are ad hoc commissions without any legal basis in the Wet Hof to ensure unbiased reporting.

FISCAL COUNCIL

VII.5

DOES THE NETHERLANDS HAVE IN PLACE AN INDEPENDENT FISCAL COUNCIL (ARTICLE 6(1) DIRECTIVE 2011/85/EU: 'INDEPENDENT BODIES OR BODIES ENDOWED WITH FUNCTIONAL AUTONOMY VIS-À-VIS THE FISCAL AUTHORITIES OF THE MEMBER STATES')? WHAT ARE ITS MAIN CHARACTERISTICS? DOES THE NETHERLANDS HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

This is the CPB. Research at CPB is carried out on CPB's own initiative, or at the request of the government, the House of Representatives, individual members of the House of Representatives, national trade unions or employers' federations. CPB is a part of the ministry of Economic Affairs. Its director is appointed by the Minister, in consultation with other members of the government. CPB is considered as fully independent as far as the contents of its work is concerned. It has its own legal mandate and an independent executive and advisory committee.

REGULATION NO 1176/2011 ON THE PREVENTION AND CORRECTION OF MACROECONOMIC IMBALANCES

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1176:EN:NOT>

MEIP DIFFICULTIES

VII.6

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY)

⁷² 04 Six-Pack report on the implementation of directive 2011/85/eu, page 67.

SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS?

Until now, any changes necessitated on the basis of EU measures on the national budget have been made through ad hoc supplementary budget measures (*suppletoire begrotingsmaatregel*), which are passed through the House of Representatives as ordinary laws. There is increasing critique on the implementation of the crisis measures, in particular as to the role of the House of Representatives. The Council of State (*Raad van State*) has provided an assessment of this situation in the beginning of 2013– on the request of the Senate – and concluded critically that the EU measures have potential significant effects on the national budgetary process that are currently not addressed. For example, the Council of State identified that the European Semester does not align with the current national budgetary process and considers this to be a potential problem in terms of the parliamentary involvement in its possibilities to influence policy through the use of its budget rights.⁷³ See further the answer to question II.1.

REGULATION No 1175/2011 ON STRENGTHENING BUDGETARY SURVEILLANCE POSITIONS

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF>

MTO PROCEDURE

VII.7

WHAT CHANGES TO THE RULES ON THE BUDGETARY PROCESS ARE MADE TO ACCOMMODATE THE AMENDED MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) PROCEDURE?

The correction mechanisms introduced with the MTO procedure have been implemented in the draft law on the sustainability of public finances (Wet Hof) – as discussed in questions VII.3 and VII.16. The law provides for legal obligation for central and local government to produce economic recovery plans in cases of breach of the MTO. The procedure to produce such plans has been constructed in the draft law. This process, as far as possible, is integrated in the existing budgetary process. In case ad hoc changes have to be produced that do not fit within the normal budgetary cycle, ad hoc measure will be presented in the form of supplementary budget measures (*suppletoire begrotingsmaatregel*), which pass through the House of Representatives as ordinary legislation.

Also see the overview of the Wet Hof at question II.2.

EUROPEAN SEMESTER

VII.8

WHAT CHANGES HAVE TO BE MADE TO THE RULES AND PRACTICES ON THE NATIONAL BUDGETARY TIMELINE TO IMPLEMENT THE NEW RULES ON A EUROPEAN SEMESTER FOR

⁷³ 04 Six-Pack 180113 Report RvS on Democratic Legitimacy crisis measures. For English summary see <http://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=180>

ECONOMIC POLICY COORDINATION (SECTION 1-A, ARTICLE 2-A CONSOLIDATED REGULATION 1466/97)?

The reporting mechanism that has been established with the Commission in which the Dutch government reports on its policy objectives in response to the economic challenges (the National Reform and Stability Programs) will be further institutionalised in order to ensure sufficient parliamentary involvement. For this purpose the House of Representatives has also appointed a special parliamentary rapporteur on the European semester that will provide the House of Representatives with information on the process of the European Semester.⁷⁴

See further the answer to question VII.6.

MTO DIFFICULTIES

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See answer to question VII.8.

RESPECT MTO

VII.10

HOW IS RESPECT OF THE MEDIUM-TERM BUDGETARY OBJECTIVE INCLUDED IN THE NATIONAL BUDGETARY FRAMEWORK (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)?

See answer to question VII.7.

CURRENT MTO

VII.11

WHAT IS THE NETHERLANDS' CURRENT MEDIUM-TERM BUDGETARY OBJECTIVE (SECTION 1A, ARTICLE 2A CONSOLIDATED REGULATION 1466/97)? WHEN WILL IT BE REVISED?

Between -0,5 % and 0,5% GDP for the period 2009-2012.⁷⁵ Thereby the Netherlands went further than was required and committed itself to a MTO of max 0,5% GDP. This information cannot be found in the Dutch Stability program. Apparently there exists no autonomous document that anchors the Dutch MTO.⁷⁶

ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS THE NETHERLANDS' MEDIUM-TERM

⁷⁴ Last year, the Dutch government last year sent the Netherlands' reform programme to Brussels without it first being debated in parliament. <http://euobserver.com/economic/120275>. See 04 Six-Pack 070313 debate on state of EU, page 17.

⁷⁵ 04 Six Pack Wet HOF MvT, page 6

⁷⁶ 04 Six-Pack Reestman 'de ondoorgroendelijke systematiek van het wetsvoorstel Hof footnote 6

BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

The stability program is drafted by government and then discussed in the House of Representatives. The normal procedure with respect to Dutch budgetary policy is the implementation of the so called medium-term expenditure framework (MTEF). The MTEF itself is not subject to legally anchored fiscal rules, but is rather the product of a longstanding political tradition. The Commission report on the implementation of directive 2011/85 indicates that that a new framework is under consideration to institutionalise this process “more formally in law, while combining it with the European fiscal framework, i.e. numerical obligations under the SGP. The draft new law on the sustainability of public finances will anchor in law the basic principles of the Dutch trend-based budgetary policy.”⁷⁷

The correction mechanisms introduced with the MTO procedure have been implemented in the draft law on the sustainability of public finances (Wet Hof). The law provides for legal obligation for central and local government to produce economic recovery plans in cases of breach of the MTO. The procedure to produce such plans has been constructed in the draft law. This process, as far as possible, is integrated in the existing budgetary process. In case ad hoc changes have to be produced that do not fit within the normal budgetary cycle, ad hoc measure will be presented in the form of supplementary budget measures (*suppletoire begrotingsmaatregel*), which pass through the House of Representatives as ordinary legislation. As explained above, the forecasts of the CPB are the main basis for economic recovery plans in cases of breach of the MTO.

REGULATION NO 1177/2011 ON THE EXCESSIVE DEFICIT PROCEDURE

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF>

EDP DIFFICULTIES

VII.13

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Not applicable.

REGULATION NO 1173/2011 ON EFFECTIVE ENFORCEMENT OF BUDGETARY SURVEILLANCE

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011R1173:EN:NOT>

SANCTIONS

VII.14

⁷⁷ 04 Six-Pack report on the implementation of directive 2011/85/eu, page 67.

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

See the answer to question VII.16.

GENERAL CHANGES

VII.15

WHAT FURTHER CHANGES HAVE TO BE MADE TO THE RULES ON THE BUDGETARY PROCESS IN ORDER TO COMPLY WITH THE SIX-PACK RULES?

No further changes.

MISCELLANEOUS

VII.16

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE SIX-PACK?

It is perhaps relevant to note, in view of the importance of the CPB within the new framework introduced with the six-pack, that there has been some controversy recently about the appointment of the new CPB director. Some professors in The Netherlands have questioned her independence since she was formerly working within the Ministry of Finance.⁷⁸

Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area

There were no changes made to the budgetary process in reaction to this regulation. The only change that is directly related to the possibility of sanctions is that local governments can be made co-responsible for payment of these sanctions in case the cause for non-compliance can be related to the fiscal behaviour of local government.⁷⁹

The draft law on the sustainability of public finances will legally anchor the obligation for local governments to contribute their fair share (*'gelijkwaardige inspanning'*) to achieving the Medium-Term Objective. The central government and local governments would need to conclude a multi-annual agreement on the budget balance for local governments. To this end, the Minister of Finance, in agreement with the Minister of the Interior and the Minister for Infrastructure after consulting the local governments, would determine the 'fair share'. Two sanction mechanisms will apply if local governments do not adequately contribute to reaching the MTO. As a first step, they would be required to place a deposit with the central government. As a second step, they would be required to contribute to any EU financial sanction if the Netherlands as a whole does not comply with SGP requirements.⁸⁰

⁷⁸ <http://www.nu.nl/economie/3408109/politici-verdedigen-keuze-nieuwe-cpb-directeur.html>

⁷⁹ 04 Six Pack Wet HOF MvT

⁸⁰ 04 Six -Pack note on parliamentary committee Wet Hof.

VIII ESM TREATY

The European Stability Mechanism (ESM) Treaty was signed on July 11 2011. It was later renegotiated and a new ESM Treaty was signed on February 2, 2012. The Treaty provides a permanent emergency fund that is intended to succeed the temporary emergency funds. It entered into force on September 27, 2012 for 16 contracting parties (Estonia completed ratification on October 3). The 17 contracting parties are the member states of the Eurozone, but the ESM Treaty is concluded outside EU law.

(<http://www.european-council.europa.eu/eurozone-governance/esm-treaty-signature?lang=it> and <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf>)

NEGOTIATION

VIII.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE NEGOTIATION OF THE ESM TREATY, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

The ESM Treaty was discussed within the House of Representatives at the same time as the 136 Treaty change. The answers in this part of the questionnaire therefore occasionally refer back to the sources mentioned in the answers of that section in the questionnaire.

Please see the answer to question V.3 for the relevant political context at the time of the negotiations. There were no major difficulties in the negotiation of the ESM Treaty.

The position of government and that of the major parties in the House of Representatives is that a cause for the crisis was the lacking of fiscal discipline of Member States. Government therefore pushed for a stricter legal framework with more possibilities to supervise and sanction Member States that did not comply with the balanced budget rules. The position of government was and is therefore strongly grounded in the idea that, to prevent future crises, it is necessary to install a strict(er) legal framework. Against this background government pushed for a stronger position of the European Commission in its supervising capacity of the fiscal discipline of Member States and also pushed for the instalment of reverse qualified majority voting mechanisms.⁸¹

RATIFICATION

VIII.2

HOW HAS THE ESM TREATY BEEN RATIFIED IN THE NETHERLANDS AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The ESM Treaty has been ratified on the basis of the legal framework that applies to

⁸¹ 05 ESM Treaty MvT, p 5. See also 04 Six-Pack 070911 Government vision on future of EMU first letter and 04 Six-Pack 231112 Government vision on future of EMU second letter.

international Treaties. On the basis of Dutch Constitutional Law (*art. 91 Grondwet*) the House of Representatives has to be informed and approve such legal measures. The ‘ordinary’ legislative process as explained in the answer to question V.2 applies. The Treaty was ratified in July 2012.⁸²

RATIFICATION DIFFICULTIES

VIII.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER DURING THE RATIFICATION OF THE ESM TREATY?

The main substantive points discussed in the House of Representatives concerned: the issue of parliamentary control on the ESM, the relationship with the EU legal framework, internal and external control on the functioning of the ESM and the budgetary consequences.⁸³

Issues discussed with respect to parliamentary control on the ESM concerned the impact of the ESM on the budget rights of the House of Representatives. Most political parties took note of the fact that, since the ESM was concluded outside of the EU legal framework, the control of national parliaments on the functioning of the ESM was important to ensure a form of democratic control on the functioning of the ESM.⁸⁴ The government and the House of Representatives agreed to apply the same working basis as was installed with respect to the functioning of the EFSF – see further the answer to question II.1 on the specifics of this working arrangement.⁸⁵ The issue that was discussed regarding the parliamentary budget rights was to what extent the House of Representatives would be involved in financial-aid decisions when they would be required on short notice.

Government argued that in these cases the House of Representatives only has a right to be *informed* as soon as possible and ideally before the granting of specific aid measures. Only in cases where the total capital guaranteed by The Netherlands would change, the House of Representatives has a ‘strong’ budget right and will be asked for prior approval.⁸⁶ As said, there are currently no hard laws on these information rights but government and the House of Representatives agreed to apply the same working basis as was installed with respect to the EFSF – see further the answer to question 86 of the questionnaire on the specifics of this working arrangement.⁸⁷ Some political parties focussed on the issue to what extent the functioning of the ESM could be conflicting with the EU legal framework. The position of

⁸² Wet van 5 juli 2012 houdende goedkeuring van het op 2 februari 2012 te Brussel tot stand gekomen Verdrag tot instelling van het Europees Stabieliteitsmechanisme tussen het Koninkrijk België, de Bondsrepubliek Duitsland, de Republiek Estland, Ierland, de Helleense Republiek, het Koninkrijk Spanje, de Franse Republiek, de Italiaanse Republiek, de Republiek Cyprus, het Groothertogdom Luxemburg, Malta, het Koninkrijk der Nederlanden, de Republiek Oostenrijk, de Portugese Republiek, de Republiek Slovenië, de Slowaakse Republiek en de Republiek Finland (Trb. 2012, 28). See 05 ESM Treaty - the implementing Law.

⁸³ 05 ESM Treaty - Parliamentary debate (2e kamer 1 of 2), 05 ESM Treaty - Parliamentary debate (2e kamer 2 of 2).

⁸⁴ 05 ESM Treaty - Report of parliamentary commission

⁸⁵ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

⁸⁶ 05 ESM Treaty - Parliamentary debate (2e kamer 2 of 2), page 4, 9, 12.

⁸⁷ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

the government has been consistently that there is no nor was there at any point in time a conflicting with the existing EU legal framework.⁸⁸

It was agreed in the parliamentary debate that it could be useful to investigate whether further integration within the EU legal framework of the ESM could be deemed desirable at a certain point in the future.⁸⁹ Until that time the position of the government is that there exist no problems due to an absence of the checks and balances that are normally provided by the EU legal framework since, government argues, the primary rules of the EU framework will still apply as a matter of priority and in addition a number of checks and balances have been installed that should ensure the internal and external control on the functioning of the ESM.⁹⁰ Emphasis was put on the importance of ‘by laws’ that would ensure the proper functioning of the ESM.⁹¹ The internal and external control on the ESM was discussed and the existence of by laws and control of auditing committees demanded.⁹²

CASE LAW

VIII.4

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE ESM TREATY?

Geert Wilders, political leader of the Party for Freedom (*PVV*) started legal injunction proceedings against the State for its participation in the ESM. He argued that this participation was illegal in view of the fact that – at that time – government was in a transfer period towards the new elections. According to customary Dutch constitutional law, within this interim period April-November, government can only deal with current affairs and is not allowed to decide on any ‘controversial’ affairs. Wilders considered therefore that government lacked the democratic legitimacy to start participating in the ESM and that this decision should have been postponed until after the elections. The summary judge denied this claim on the basis of the argument that this would interfere too much with the legislative process.⁹³

CAPITAL PAYMENT

VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

This payment had to be approved by the House of Representatives on the basis of its budget right. The discussion was part of the debates on the ESM Treaty and the 136 Treaty-amendment. The discussion focussed mainly on the extent to which the House of

⁸⁸ 05 ESM Treaty - Parliamentary debate (2e kamer 2 of 2), page 17, 18.

⁸⁹ 05 ESM Treaty - Report on the basis of parliamentary commission discussion, page 10.

⁹⁰ 05 ESM Treaty - Report on the basis of parliamentary commission discussion, page 8.

⁹¹ 05 ESM Treaty - Parliamentary debate (2e kamer 2 of 2), page 16.

⁹² Ibid.

⁹³ <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2012:BW7242>

Representatives would be involved in future aid decisions and how that could work – see the answers to previous questions on this regard. By approving the ESM Treaty the House of Representatives has agreed with both the first payment and the remaining pledged amount.

APPLICATION & PARLIAMENT

VIII.6

WHAT IS THE ROLE OF PARLIAMENT IN THE APPLICATION OF THE ESM TREATY, FOR EXAMPLE WITH REGARD TO DECISIONS TO GRANT FINANCIAL ASSISTANCE AND THE DISBURSEMENT OF TRANCHES, WHICH BOTH REQUIRE UNANIMOUS ADOPTION BY THE BOARD OF GOVERNORS COMPOSED OF THE NATIONAL FINANCE MINISTERS?

The House of Representatives ensured through a parliamentary motion (*Harbers*) that every decision to grant financial assistance outside of the pledged amount of capital will be tabled in the House of Representatives because the transfer of these funds directly impacts the budget-right of the House of Representatives.⁹⁴ Government promised to respect this motion of the House of Representatives by describing in a policy note how it will involve parliament in these decisions.⁹⁵ Any application outside of the pledged amount of capital will be accompanied with the tabling of a *suppletoire begroting* within the House of Representatives.⁹⁶ With respect to individual applications that fall within the pledged amount the government has indicated that it shall closely inform the House of Representatives. Legal commentators have described this ‘working agreement’ as a hollow shell, arguing that in practice, the government will be bound by the obligation to pay the money, regardless of the circumstance that the House of Representatives might decide to veto the tabled budget act. As such this working agreement can only have political effects.⁹⁷ See further the answer to questions II.2.

APPLICATION DIFFICULTIES

VIII.7

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE APPLICATION OF THE ESM TREATY?

There were no significant difficulties encountered in the application of the ESM Treaty. That is to say that all ESM applications have been approved by clear majorities within the House of Representatives. Government has meticulously informed the House of Representatives of all measure and asked for approval of each measure – on the basis of the previously agreed working basis.

That is not to say that all parties in the House of Representatives happily agreed with the aid measures. Most political parties approved the measures only because they couldn’t perceive

⁹⁴ 05 ESM Treaty - parliamentary motion Harbers.

⁹⁵ 01 EFSM&EFSF - 180112 first policy letter on parliamentary involvement efsf measures and 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first.

⁹⁶ 01 EFSM&EFSF - 130912 second policy letter on parliamentary involvement efsf measures replacing the first, page 3.

⁹⁷ 05 ESM Treaty - Diamant/Van Emmerink 'Het Nederlandse budgetrecht in Europees perspectief'

any alternative options.⁹⁸ Relevant debates that arose in the House of Representatives focussed, for example in the case of Cyprus, on the specifics of the measures including their social effects.⁹⁹ This applies to most political parties with the exception of the Party for Freedom (*PVV*) (and to a lesser degree) the Socialist Party (*SP*) who adopted a political rhetoric capitalising on the line that taxpayers savings were no longer safe in the European Union and that government cared more about Greek, Spanish and Cypriot taxpayers than their own.¹⁰⁰

IMPLEMENTATION

VIII.8

HAVE THERE BEEN ANY RELEVANT CHANGES IN NATIONAL LEGISLATION IN ORDER TO IMPLEMENT OR TO COMPLY WITH REQUIREMENTS SET BY THE ESM-TREATY?

No. The implementation of the ESM requirements has been done by aligning them with the existing legal framework.

MISCELLANEOUS

VIII.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE ESM TREATY?

Not applicable.

⁹⁸ 05 ESM Treaty - Parliamentary debate Cyprus aid.

⁹⁹ 05 ESM Treaty - Parliamentary debate Cyprus aid, page 7.

¹⁰⁰ For example, 05 ESM Treaty - Parliamentary debate Cyprus aid, page 2, 10.

IX FISCAL COMPACT

The Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed on March 2, 2012. Negotiations on this Treaty began between 26 member states of the EU (all but the UK) after the 8/9 December 2011 European Council. 25 contracting parties eventually decided to sign the Treaty (not the Czech Republic).

After ratification by the twelfth Eurozone member state (Finland) in December 2012, the Fiscal Compact entered into force on 1 January 2013. For several contracting parties the ratification is still on-going.

(<http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=it>)

NEGOTIATION

IX.1

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER IN THE NEGOTIATION OF THE FISCAL COMPACT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

There were no political/legal difficulties with respect to the negotiation of the Fiscal Compact. The position of government has consistently been that a tightening of the fiscal discipline rules is a necessary answer to address the debt crisis and this position is broadly supported within the House of Representatives.¹⁰¹

The main issue with respect to the phase of the negotiation of the Fiscal Compact debated in the House of Representatives concerned the insurance that the Fiscal compact would be subjected to the ordinary legislative procedure and submitted to the council of state for advice during the ratification process.¹⁰²

RATIFICATION

IX.2

HOW HAS THE FISCAL COMPACT BEEN RATIFIED IN THE NETHERLANDS AND ON WHAT LEGAL BASIS/ARGUMENTATION?

The Fiscal Compact has been ratified in the Netherlands in July 2013.¹⁰³ The ratification process has taken place on the basis of Article 91(i) of the Dutch Constitution, which means that the legislative process is comparable to that of an ordinary law (as described above in the answer to question V.2). Article 91 states that the Kingdom shall not be bound by treaty without prior approval of the States-General, except for those cases where law determines no such approval is necessary. The choice of legal basis for this ratification in The Netherlands

¹⁰¹ See 04 Six-Pack 070911 Government vision on future of EMU first letter and 04 Six-Pack 231112 Government vision on future of EMU second letter.

¹⁰² 06 Fiscal Compact - Parliament Debate on negotiation of Fiscal Compact, page 5.

¹⁰³ 06 Fiscal Compact - Fiscal compact implemented law

has not been provided with any argumentation but is a standard legislative procedure followed for international Treaties.¹⁰⁴

RATIFICATION DIFFICULTIES

IX.3

WHAT POLITICAL/LEGAL DIFFICULTIES DID THE NETHERLANDS ENCOUNTER DURING THE RATIFICATION OF THE FISCAL COMPACT?

The ratification process so far has not brought any real political/legal difficulties in The Netherlands. The Council of State raised the point that the creation of the Fiscal Compact outside of the EU legal order could undermine the existing EU based obligations and weaken their authority.¹⁰⁵ Furthermore, the Council of State noted that the reversed qualified majority voting procedure constituted a change of the Treaty as compared with the existing situation in article 126 TFEU and raised the point whether this was legal in view of the fact that such a Treaty amendment would normally require another procedure within the EU legal order.¹⁰⁶ Government disagreed and considered that the reversed qualified majority voting mechanisms left the existing structure intact and only added a moment of ‘informal’ decision making within the Council for specific situations where the Commission wants to take further measures within the SGP. This decision making moment will then determine then whether during the ‘formal’ decision making process these countries will vote for or against the Commission proposal, leaving the original decision making moment on the basis of article 126 TFEU intact.¹⁰⁷

Eventually, the Fiscal Compact was supported by a clear majority within the House of Representatives – all major political parties (with the exception of the main opposition parties - Party for Freedom (*PVV*) and Socialist Party (SP)) supported the Fiscal Compact.¹⁰⁸ Surprisingly, the Greens (*GroenLinks*), clearly and consistently a pro-Europe party, voted against this Treaty. The main reason for this was that the Fiscal Compact is negotiated outside of the EU legal order and the government refused to commit itself to take a proactive stand in the integration of the Fiscal Compact within the EU legal order.¹⁰⁹

The main issues that were debated during the ratification process concerned how the balanced budget rules and the Medium Term Objective would work in practice. I have included further specifics on these debates in the answers to the following questions. A main point of discourse that has become a focal point for parliamentary approval on new EU measures is that the House of Representatives insists on the pledge of government to make sure that no

¹⁰⁴ See 06 Fiscal Compact - Van Rossem 2013 TvCR 2013, p. 49-54 for a discussion on the conditions under which the Fiscal compact could be perceived as a constitution amending Treaty and hence requiring a 2/3 majority – see also the answer to question 57.

¹⁰⁵ 06 Fiscal Compact - Advice council of state fiscal compact, page 3.

¹⁰⁶ Ibid., page 4.

¹⁰⁷ Ibid., page 6.

¹⁰⁸ 06 Fiscal Compact - Votes on Fiscal Compact

¹⁰⁹ <http://tweedekamer.groenlinks.nl/node/95910>

control is lost over the determination of specific socio-economic policy measures.¹¹⁰ Government at the same time consequently promises not to allow the transfer of sovereignty at the level of implementation of specific policy measures.

There have been some debates in the literature on the question to what extent these measures deprive the parliamentary budget right from any real meaning. Legal commentators agree that there is a big impact when taking the perspective of the budget right as being a substantive tool to influence policy. That is to say that the House of Representatives could use its budget rights to influence policy in a certain direction. The position taken by one legal commentator is that Fiscal Compact significantly limits this potential and thereby infringes article 105 of the Dutch Constitution.¹¹¹ However, article 105 merely provides the House of Representatives with a right to control the expenses of government and the interpretation of parliamentary budget rights as a constitutional right to influence the policy through these rights is unconventional. Other legal commentators identify similarly that the Fiscal Compact has a big influence on the potential of the House of Representatives to influence specific policy measures but do not consider this to infringe 105 of the Constitution.¹¹²

BALANCED BUDGET RULE

IX.4

ARTICLE 3(2) FISCAL COMPACT PRESCRIBES THAT THE BALANCED BUDGET RULES SHALL TAKE EFFECT 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.” HOW IS THE BALANCED BUDGET RULE (INTENDED TO BE) IMPLEMENTED IN THE NETHERLANDS? WILL THERE BE AN AMENDMENT OF THE CONSTITUTION? IF NOT, DESCRIBE THE RELATION BETWEEN THE LAW IMPLEMENTING THE BALANCED BUDGET RULE AND THE CONSTITUTION. IF THE CONSTITUTION ALREADY CONTAINED A BALANCED BUDGET RULE, DESCRIBE THE POSSIBLE CHANGES MADE/REQUIRED, IF ANY.

On 24 September 2012 the Dutch government tabled the bill Sustainable Public Finances Act (Wet Houdbare Overheidsfinanciën) to implement this.¹¹³ This is a regular Act of Parliament.

DEBATE BALANCED BUDGET RULE

IX.5

DESCRIBE THE NATIONAL DEBATE ON THE IMPLEMENTATION OF THE FISCAL COMPACT/BALANCED BUDGET RULE, IN PARTICULAR IN RELATION TO THE IMPLICATIONS OF THE TREATY FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS.

¹¹⁰ 06 Fiscal Compact - 190313 Parliament demand to keep authority over the design of measures

¹¹¹ 06 Fiscal Compact - Van Rossem 2013 TvCR 2013, p. 49-54

¹¹² 06 Fiscal Compact - Warmelink 2013 Over afwijken en afwijkingen van de Grondwet TvCR 2013, p. 44-48, 05 ESM Treaty - Diamant/Van Emmerink 'Het Nederlandse budgetrecht in Europees perspectief' and 06 Fiscal Compact - Reestman 2013 Constitutioneel minimalisme 012013 TvCR, page 24.

¹¹³ Kamerstukken II 2012/13, 33 416, nr. 2. See 06 Fiscal Compact - Draft law on sustainable public finances

There were hardly any political/legal difficulties encountered in the implementation process of Wet Hof in the House of Representatives. It is currently on the table at the senate but there are no difficulties to be expected there. There were some question raised in the House of Representatives as to the impact on sovereignty and the budgetary process but the position of government was that there were no real changes since most of the rules that were being implemented already existed on the basis of the Stability and Growth Pact.¹¹⁴ The draft law was accepted by all major parties (Christian Democrats, Liberals, and Social Democrats) in the House of Representatives except for the Party for Freedom (PVV) and the Socialist Party.¹¹⁵

As said, the impact on the budgetary process is considered to be significant. I refer to the answers to question II.1 and II.2.

Update: the bill has been passed by the Senate and entered into force on 11 December 2013.

RELATIONSHIP BBR AND MTO

IX.6

WHAT POSITIONS, IF ANY, ARE TAKEN IN THE NATIONAL DEBATE ABOUT THE RELATIONSHIP BETWEEN THE BALANCED BUDGET RULE OF ARTICLE 3(1)(B) FISCAL COMPACT AND THE MEDIUM-TERM BUDGETARY OBJECTIVE (MTO) RULE IN THE SIX-PACK (SECTION 1A, ARTICLE 2A REGULATION 1466/97, ON WHICH SEE ABOVE QUESTION VII.10)?

A part of the parliamentary debate on 19 March 2013 concerned the question of how the balanced budget rule would work in practice, combined with the MTO. The question was raised how the Commission would measure and judge the relationship between policy restructuring and the Balanced Budget Rule combined with the MTO. There remained some unclarity on this but the government expected that this would be evaluated on the basis of the yearly Stability Programs that are submitted to the Commission.¹¹⁶

As a whole the position of government is that these measures did not embody significant changes as to the situation as it was before on the basis of SGP. Also the government maintains that the new framework does not mean that The Netherlands lost any sovereignty on what specific measures are being taken to ensure a more balanced budget.¹¹⁷

CASE LAW

IX.7

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON THE FISCAL COMPACT/IMPLEMENTATION OF THE BALANCED BUDGET RULE?

No.

¹¹⁴ 06 Fiscal Compact - Policy nota on the basis of parliamentary questions, pages 6-7.

¹¹⁵ 6 Fiscal Compact - Votes on Wet Hof

¹¹⁶ 06 Fiscal Compact - 190313 parliamentary debate Fiscal Compact and 06 Fiscal Compact - Letter of government on relationship MTO and balanced budget rules. See also 04 Six-Pack Reestman 'de ondoorgroedelijke systematiek van het wetsvoorstel Hof footnote 6.

¹¹⁷ 06 Fiscal Compact - 190313 parliamentary debate Fiscal Compact, page 17.

NON-EUROZONE AND BINDING FORCE

IX.8

HAS THE NETHERLANDS DECIDED TO BE BOUND BY PARTS OF THE FISCAL COMPACT ON THE BASIS OF ARTICLE 14(5) FISCAL COMPACT ALREADY BEFORE JOINING THE EURO AREA, OR HAS THIS OPTION BEEN DEBATED?

Not applicable, since The Netherlands is part of the euro area.

MISCELLANEOUS

IX.9

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO THE NETHERLANDS AND THE FISCAL COMPACT?

Not applicable.

X QUESTIONS ABOUT MEMBER STATES RECEIVING FINANCIAL SUPPORT

A number of member states have received direct financial assistance through balance of payments support (Hungary, Rumania, Latvia), bilateral agreements/IMF (Greece), the temporary emergency funds/IMF (Ireland, Portugal, Greece), and the permanent emergency fund (Spain and Cyprus).

(http://ec.europa.eu/economy_finance/assistance_eu_ms/index_en.htm)

Several member states have (also) indirectly benefited through the Securities Markets Programme (SMP) created in May 2010, a bond-buying programme of the European Central Bank that was replaced in September 2012 by the Outright Monetary Transactions (OMT) programme (Greece, Ireland, Portugal, Italy, Spain).

(<http://www.ecb.int/mopo/liq/html/index.en.html#portfolios>)

CONTEXT

X.1

IF RELEVANT, DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT OF THE FORMAL REQUEST OF DIRECT FINANCIAL ASSISTANCE.

The Netherlands has not received financial assistance.