



***CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW:
BELGIUM***

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I POLITICAL CONTEXT

POLITICAL CHANGE

I.1

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

The general election of 2007 sparked the beginning of a prolonged period of political instability due to tensions between the two major linguistic groups, Dutch and French speaking. Although *de facto* a bipolar federal system, Belgium has two different kinds of substate entities with their own sets of competences: regions (three: Flanders, Wallonia and Brussels) and communities (three: Flemish Community, the Francophone Community and the Germanophone Community). Regions are territorially defined, and the communities generally follow these lines, with the main exceptions for Brussels (governed by the Flemish and Francophone community). The main thrust of the division of competences is to allocate subject matters with regards to defined socio-economic issues to the Regions, and cultural and linguistic matters to the Communities.¹ The federal level holds the competences with regards to macro-economic policy, social security, labour law, criminal law, and taxation. Additionally, the federal level has the residual competence.

Inherently unstable due to this bipolarity and the absence of national political parties, multiple reforms of state have occurred with regularity since the 1960's. The recent cycle 2007-2011 culminated in the Sixth Reform of State, with a wide scope: 47 articles of the Constitution (out of 197) were altered, 15 Special Acts and 18 statutes set out in detail the reform. These acts amount to 1130 pages in the Official Gazette.²

Three federal elections have occurred: June 10, 2007, June 13, 2010, and May 25, 2014. In 2007 the formation period during which political parties negotiated to form a government, took 194 days, in 2010-11, an astonishing 541 days. Elections occurred at the substate level in 2009. New governments were rapidly formed.

During these long periods of political upheaval, the federal government was often the outgoing coalition, competent according to custom with regards to the current affairs. This constitutional doctrine prescribes a certain restraint because of the absence of meaningful parliamentary control.

¹ For a general introduction: P. Popelier & K. Lemmens, *The Constitution of Belgium* (Oxford, Hart 2015) 228 p., forthcoming in the series *Constitutional Systems of the World*.

² See in Dutch: J. Velaers, J. Vanpraet, Y. Peeters and W. Vandenbruwaene (eds.), *De Zesde Staatshervorming: instellingen, bevoegdheden en middelen* (Intersentia 2014) 1026 p.; in French: J. Sautois & M. Uyttendaele (eds.), *La sixième réforme de l'Etat (2012-2013). Tournant historique ou soubresaut ordinaire?* (Limal, Anthemis, 2013) 610 p.

Election	Caretaker government (named after PM)	Political composition ³	Formation period	Date of new government (named after PM)	Political Composition
10/06/2007	Verhofstadt II until 21/12/2007	Vld, MR, Sp.a, PS	194 days		
	Temporary government ⁴ : Verhofstadt III until 20/03/2008	CD&V, cdh, MR, Vld, PS			
				20/03/2008 Leterme I until 30/12/2008	CD&V, cdh, MR, Vld, PS
				Van Rompuy I until 25/11/2009	CD&V, cdh, MR, Vld, PS
			Leterme II until elections June 2010	CD&V, cdh, MR, Vld, PS	
13/06/2010	Leterme II until 6/12/2011	CD&V, cdh, MR, Vld, PS	541 days		
				6/12/2011 Di Rupo I until elections May 2014	PS, Sp.a, CD&V, cdh, MR, Vld
25/05/2014	Di Rupo I	PS, Sp.a, CD&V, cdh, MR, Vld	139 days	11/10/2014 (Michel I)	CD&V, Vld, MR and NVA

From this background, it results that during important phases of the financial crisis (financial turmoil starting in 2007 and the EU debt crisis 2010 onwards), the most important actor, the federal government, was often an outgoing government, under the constitutional duty to limit itself to the current affairs.

Moreover, public opinion and political efforts were distracted from the external financial crisis because of the internal on-going state reform and formation process.

³ The traditional political parties are divided along linguistic and ideological lines: christen democrats: CD&V and cdh; socialists: Sp.a and PS; liberals: Open Vld and MR; greens: Groen and Ecolo. From 2007 onwards, the Flemish Nationalist Party (NVA) rose to dominance (27 seats out of 150 in the Federal House of Representatives and around 30 % of the votes in Flanders polled continuously since 2010).

⁴ This temporary government Verhofstadt III was constitutionally required to limit itself to the current affairs. Mainly because the formation discussions did not seem to lead to a new government fast, and because an annual budget had to be drawn up, this temporary government was sworn in with a limited program of 10 points (see Parliamentary Documents, House of Representatives, report of the debates 21 December 2007, *complete report nr 13*). The same problem of a drafting an annual budget under current affairs arose again in 2010-11, but was deemed permissible under the doctrine because parliamentary control was guaranteed: it could refuse to adopt the budget.

II CHANGES TO THE BUDGETARY PROCESS

BUDGETARY PROCESS

II.1

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

The main legal source is the Law of May 22nd, 2003 governing the budget of the federal state.

The four principles governing the governmental budget are the requirement of legislative basis, annual approval, universality of revenue and expenses, and specificity of all revenue and expenses.

The budgetary cycle consists of three steps: preparation, execution and closure. The three phases correspond roughly to three years: n-1, n and n+1. The Minister of Finance and Budget prepares the federal budget. The budgets of the regions and communities have a similar to near identical process.

The process consists of the following steps:⁵

April: general instruction to the administration to compile a budget for their department

May: each federal department composes a draft budget

June-September: political negotiation

October: definitive agreement in the plenary session of the executive

November-December: draft budget is submitted to parliament.

After the approval of the budget by the Parliament, the Government, assisted by the Inspectorate of the Finance department, supervises the execution of the budget.

The Court of Auditors is constitutionally charged with the jurisdiction over the accounts and the responsible administrative functionary.⁶ Next to this jurisdictional oversight, the Court of Auditors submits an annual report to the House on the administrative compliance with the budget as put forward.

GENERAL CHANGE

II.2

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

The main changes applied to the budgetary process consist of the timing. November used to be the final month for political discussion within the executive, but following Regulation 473/2013, October 15th has been marked as the new deadline.

Independent fiscal councils, macro-economic forecasts and the possibility to consolidate (i.e. put together) the budgets of the several governments in the federation were already in place.⁷

⁵ See H. Matthijs, F. Naert, W. Marneffe & L. Vereeck, *Handboek Openbare Financiën* (Intersentia 2013) 147 ff.

⁶ “rekenplichtige” in Dutch, the persons in the administration charged with the implementation of an account.

⁷ H. Matthijs, F. Naert, W. Marneffe & L. Vereeck, *Handboek Openbare Financiën* (Intersentia 2013) 94.

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?

No real shifts in institutional balance occurred.

The thorny issue of deciding on the responsibility of each government in ascertaining an overall balanced budget is relegated by Cooperation Agreement to the High Council for Finance, which is a semi-independent body under executive authority. See *infra*, IX.45.

The second point relevant in this discussion is the loss of real power of the parliaments, since the budget is drafted based on the national reform programs and mid-term objectives.⁸ However, the power of parliaments, defined in juxtaposition to the executive, was in the past not much greater in political terms.

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?

See question II.2.

MISCELLANEOUS

II.5

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

No other relevant information.

⁸ See for instance the remark by MP Vienne in the House: Report, *Economic governance and the european semester: implications for the Belgian budgetary process*, Parl. Doc., House, 53-1343/1 (March 31, 2011). <http://www.dekamer.be/FLWB/PDF/53/1343/53K1343001.pdf>

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)?

Ordinary law governs changes to the budgetary process.

The transposition of Directive 85/2011 is done through ordinary law (see under VII.2 below).

The execution of the fiscal compact is laid down in a cooperation agreement, which ranks above ordinary law and decree, but lacks jurisdictional protection (see also under IX.4 below).⁹

Following articles 39, 127, 128 and 130 of the Constitution¹⁰, the Special Act on Institutional Reform contains a provision on optional and obligatory cooperation agreements (art. 92*bis*). Some cooperation, for instance those with financial obligations, require parliamentary approval for each participating level of government. The cooperation agreement implementing the TSCG has obtained parliamentary approval, and takes rank above law and decree, but below special acts, the constitution, and international law with direct effect.¹¹

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?

The Euro-crisis coincided with a major reform of the institutional structure of Belgian federalism. Amongst the numerous proposals for constitutional amendments, not one relates to the euro-crisis directly. The amendment to ensure an easier process of ratification of international treaties is a returning issue, but is not inspired by the euro crisis.

The phased process of constitutional change requires a declaration for revision indicating which articles are up for revision and a subsequent election, after which a two-thirds majority may revise those articles. This explains how, though some parties have come out in favour of a constitutional balanced budget requirement (e.g. Open Vld), no real amendment has been proposed.

⁹ See for an account in English on cooperation agreements and joint decrees: P. Popelier & W. Vandenbruwaene, "Joint decrees" Report for the *Osservatorio sulle Fonti*, January 2014, http://www.osservatoriosullefonti.it/component/docman/doc_download/660-joint-decrees-between-the-regions-and-communities

¹⁰ Article 39 refers to the Regions, articles 127 and 128 to the Communities, and 130 to the German-speaking Community.

¹¹ Y. Peeters, *De plaats van samenwerkingsakkoorden in het constitutioneel kader* [The place of cooperation agreements in the constitutional framework] University of Antwerp, doctoral thesis, to be defended 2015, p. 316-320.

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 jurisdiction of the Court of Auditors, reviewing the execution of the budget as approved by Parliament is laid down in article 180.

No other relevant provisions.

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?

See with respect to the cooperation agreement used for implementation of the Fiscal Compact's Balanced Budget Rule, section IX.4 on the Fiscal Compact.

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?

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Not applicable.

MISCELLANEOUS

III.9

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

No other relevant information.

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 BELGIUM 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?

No legal difficulties; see the parliamentary discussion mention below in IV.2.

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 BELGIUM AND IN WHAT WAY DOES IT INVOLVE PARLIAMENT?

The federal government submitted the draft law authorizing financial participation in the EFSF on August 19th, 2010. Following the optional bicameral procedure of article 78 Const., the Senate decided *proprio motu* to evoke the draft legislation and confirmed the text as voted by the House. The resulting law entered into force on the day of publication, i.e. November 23rd, 2010.¹²

¹² Law of 2 November 2010 concerning the participation of the Belgian State in the ‘European Financial Stability Facility’ and the issuance of State guarantee for the financial instruments emitted by this Corporation, *Official Gazette* 2010, 23 November 2010. http://www.ejustice.just.fgov.be/mopdf/2010/11/23_3.pdf

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Article 3 of this law granted the caretaker government the right to participate in the capital of the EFSF, following the distribution key as set out in the EFSF. Additionally, the original draft set out a wide delegation to adjust this key, which was criticised by the Council of State in its Advice.¹³ The draft article 6 was thus amended to refer to the EFSF as the objective and framework of the delegation and stipulated that these governmental decrees have to be approved by the House within 12 months.

The Minister of Finance received his authorization to buy shares of the EFSF the same day.¹⁴

The higher key following the financial support to Ireland and Portugal was approved the next year by the law of September 26, 2011.¹⁵ The Belgian part of the State guarantee was increased from 15.3 billion euro to 34.5, which amounts to approximately 10 % of the Belgian GDP.

The initial parliamentary debates were limited, given the urgency requested by the government. Most questions inquired into the general approach of the EU to the financial crises. The most poignant question as regards the EFSF raised the issue of the Excessive Deficit Procedure. The Minister of Finance responded that any expenditure following the EFSF would be marked as government debt, but would be calculated separately.¹⁶

The debates on the amendment of the law approving participation in the EFSF following the extension of the Framework Agreement in 2011 extended into the general approach to the financial crisis, with little detailed remarks concerning the EFSF in particular.¹⁷

Parliamentary involvement is thus limited to the authorizing act, and the stipulation that the delegation to the government to acquire capital in the EFSF, or undertake other measures in that respect, has to be approved within twelve months by formal law.

GUARANTEES

IV.3

MEMBER STATES ARE OBLIGED TO ISSUE GUARANTEES UNDER THE EFSF. WHAT PROCEDURE WAS USED FOR THIS IN BELGIUM? 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?

According to article 4 of the Law of November 2nd, 2010, the Belgian State guarantees the EFSF issued loans for 165 % (initially 120%)¹⁸ of the Belgian share in the distribution key. The maximum amount for the total of guarantees is 34 500 000 000 euro.

¹³ Parl. Doc. *House*, 2010-11, nr. 53K24/1, p. 14. The draft article 6 was amended to refer to the EFSF and stipulated that these governmental decrees have to be approved by the House within 12 months.

<http://www.dekamer.be/FLWB/PDF/53/0024/53K0024001.pdf>

¹⁴ Royal Decree of November 23, 2010, *Official Gazette* November 25, 2011.

¹⁵ Law of September 26, 2011, *Official Gazette* September 30, 2011.

http://www.ejustice.just.fgov.be/mopdf/2011/09/30_2.pdf

¹⁶ Parl. Doc. *House*, 2010-11, nr. 53K24/2, p. 5. <http://www.dekamer.be/FLWB/PDF/53/0024/53K0024002.pdf>

¹⁷ See Parl. Doc. *House*, 2011-12, nr. 53K1715/3.

<http://www.dekamer.be/FLWB/PDF/53/1715/53K1715003.pdf>

¹⁸ Amended by law of September 26, 2011.

The debates were not of a technical nature, and focused more on the general approach to the crisis, see above, IV.2.

ACTIVATION PROBLEMS

IV.4

WHAT POLITICAL/LEGAL DIFFICULTIES DID BELGIUM 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 political situation was rather unstable at the time, and the caretaking government could not command a majority in Parliament. The main opposition party, the NVA, did support the legislative acts related to the EFSF, yielding a large majority in total despite the lack of formal majority.

From a legal angle, three questions arose: first, can a caretaking government submit draft legislative acts to parliament? Second, should the EFSF framework treaty be approved by parliament? And third, what are the conditions for the delegation to the government authorizing expenditure as regarding the EFSF?

With regards to the first question, the issue is whether the executive's competence, limited to the 'current affairs' in a period of dismissal, includes limitations on the drafts put before parliament. The Council of State denied to opine on this question¹⁹, but legal scholarship generally approves of this practice²⁰, since it does not detract any decision from the power of parliament. Even if one adheres to the limitation to the current affairs doctrine, classifying the proposal as urgent would be valid under the current affairs doctrine. The EFSF execution would certainly qualify.

Second, although article 167, paragraph 2 of the Constitution obliges Parliament to approve of all Treaties²¹, the EFSF framework treaty has not been formally approved by the federal Parliament because it is "an intergovernmental agreement governed by English law and incorporating the EFSF under Luxemburg law".²² Again, the Council of State denied to opine on this classification.²³ Where parliamentary assent is lacking, the consequence would be the inability to derive rights and obligations from the Treaty before a Belgian judge, which is arguably not the intention of the EFSF treaty.

The delegation to the government to adjust the amounts that Belgium invests in the EFSF was criticised by the Council of State as being too wide, and was amended to be functionally limited to the operation of the EFSF. Additionally, the Royal decrees²⁴ authorized have to be approved by Parliament within twelve months.

¹⁹ See the advice of the Council of State, Parl. Doc. *House*, 2010-11, nr. 53K24/1, p. 13.

<http://www.dekamer.be/FLWB/PDF/53/0024/53K0024001.pdf>

²⁰ A. Alen & K. Muylle, *Handboek Belgisch Staatsrecht* (Kluwer 2011) p. 151, and references in note 556.

²¹ With the minor exception of the "executive agreements that aim to execute and update existing treaties".

²² Parl. Doc. *House*, 2010-11, nr. 53K24/1, p. 4. <http://www.dekamer.be/FLWB/PDF/53/53K0024001.pdf>

²³ Parl. Doc. *House*, 2010-11, nr. 53K24/1, p. 14. <http://www.dekamer.be/FLWB/PDF/53/53K0024001.pdf>

²⁴ As often the case, these Royal Decrees require the assent of the ministers of the government, hence ensuring parity between the two linguistic groups (see article 99 Const.).

CASE LAW

IV.5

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

As the EFSF Framework Treaty has not been formally approved by Parliament, no ordinary proceedings can invoke this agreement. However, the law of November 2nd, 2010 was twice challenged before the Constitutional Court.

a. Const. Court, Case 111/2011

In the first case, nr. 111/2011, private citizens argued that the execution of the EFSF framework treaty as laid down by the Act of November 2, 2010 violated article 48(7) TEU²⁵ and a number of constitutional provisions related to the parliamentary procedure. Both norms are not within the competence of the constitutional court.²⁶ The appeal was rejected for lack of merits.

1. Name of the court: Constitutional Court
2. Parties: Four private citizens
3. Type of action/procedure: appeal for invalidation
4. Admissibility issues: inadmissible due to reference to constitutional norms upon which the Court cannot adjudicate. The competence of the Constitutional Court is formally limited to federal division of competences, Title II of the Constitution (fundamental rights), and articles 170,172 and 191 (tax provisions and alien status). Through the equality provision and prohibition of discrimination (articles 10 and 11), the Court casts a wider net. However, in this case, no violation of the equality clause was invoked by the applicants.
5. Legally relevant factual situation: /
6. Legal questions: /
7. Arguments of the parties: violation of articles 74 (competences of the House), 77 (bicameral competences) and 96 (general provision on the executive) of the Constitution, violation of articles 48(7) and 222 TFEU, and violation of article 1 of the Special Act on Institutional Reform.
8. Answer by the Court: Court is not competent to adjudicate upon these norms, unclear appeal as to the precise violation.
9. Legal effects of the decision/judgment: none.
10. Main outcome and broader political implications: none.

b. Const. Court, Case 33/2013

The second case, nr. 33/2012, fared equally bad from the point of view of the petitioners. They construed an argument based on democracy, and lamented the severe budgetary operations that would result from the operation of the EFSF. The Constitutional Court again rejected the plea for lack of merits.²⁷

1. Name of the court: Constitutional Court
2. Parties: Two private citizens

²⁵ European Council initiative installing QMV instead of unanimity has to be submitted to the national parliaments who enjoy a veto right.

²⁶ Constitutional Court, Case 111/2011 of June 23 2011. <http://www.const-court.be/public/n/2011/2011-111n.pdf>

²⁷ Constitutional Court, Case 33/2012 of March 1st, 2012. <http://www.const-court.be/public/n/2012/2012-033n.pdf>

3. Type of action/procedure: appeal for invalidation
4. Admissibility issues: inadmissible due to lack of *locus standi*. Applicants relied on their status as citizens and voters, and lamented the impact of budgetary constraints.
5. Legally relevant factual situation: /
6. Legal questions: /
7. Arguments of the parties: /
8. Answer by the Court: Court did not find a direct and individual concern and declared the appeal inadmissible.
9. Legal effects of the decision/judgment: none.
10. Main outcome and broader political implications: none.

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 entire operation of the EFSF was delegated to the government. In case a Royal Decree would be necessary, for instance to acquire shares of the EFSF on top of the amount indicated in the law of 2010, or to increase the guarantee, these decrees have to be approved by Parliament within twelve months.

Normally, such delegation to the executive would be unproblematic, but since Parliament lacks any effective sanctioning mechanism vis-à-vis a government that is already demissionary, little accountability was installed.

IMPLEMENTING PROBLEMS

IV.7

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

None.

BILATERAL SUPPORT

IV.8

IN CASE BELGIUM 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 Law of May 12, 2010 authorized the Belgian demissionary government to partake in the Commission-led Greek Loan Facility for an amount of 1 billion euro.²⁸ This amount was later increased (Law of December 29, 2010) to almost 2.9 billion for the full term of three years.

²⁸ Law of May 12, 2010, *Official Gazette* May 25, 2010.
http://www.ejustice.just.fgov.be/mopdf/2010/05/25_2.pdf

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Political support was heavily in favour, though the extreme-right Vlaams Blok Party urged modesty of the EU in issuing financial support, and proposed to grant national parliaments more voice in this process.²⁹

MISCELLANEOUS

IV.9

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

None.

²⁹ Parl. Doc. *House*, 2009-10, nr. 52K2576/2, p. 11.
<http://www.dekamer.be/FLWB/PDF/52/2576/52K2576002.pdf>

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 BELGIUM ENCOUNTER IN THE NEGOTIATION OF THE AMENDMENT OF ARTICLE 136 TFEU?

None. Conversely, Belgium was an active proponent of the amendment at the European level. Belgium chaired the Council in the fall of 2010 and submitted the formal request to amend article 136 TFEU. The explanation offered by the Minister of Foreign affairs refers to the constitutional objections of the *Bundesverfassungsgericht* that necessitated an amendment of the TFEU.³⁰

APPROVAL

V.2

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

The first legal issue that arose is the classification of the amendment in the internal distribution of powers related to foreign affairs. Belgian federated entities, Regions and Communities enjoy large powers in the external sphere, following the adage ‘*in foro interno, in foro externo*’.³¹ In other words, when Regions and Communities are competent within the national sphere to – predominantly exclusively – regulate a matter, this competence is extended to foreign affairs. Whereas monetary affairs is an exclusive federal matter, the stringent conditions mentioned in the proposed article 136(3) TFEU could have repercussions on economic and budgetary policy of the Regions and Communities. Hence, the intergovernmental negotiating committee, the *Committee Mixed Agreements of the Intergovernmental Conference for Foreign Policy*³², decided to qualify the amendment as a mixed

³⁰ Parl. Doc. *House*, 2011-12, nr. 53K1536/2, p. 2.

<http://www.dekamer.be/FLWB/PDF/53/1536/53K1536002.pdf>

³¹ Article 167 Const.: “§ 2. The King concludes treaties, with the exception of those regarding matters described in § 3. These treaties take effect only after they have received the approval of the Houses.

§ 3. The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament.” http://www.const-court.be/en/basic_text/belgian_constitution.pdf

³² In Dutch: “werkgroep gemengde verdragen, adviesorgaan van de Interministeriële Conferentie Buitenlands Beleid”.

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treaty, hence requiring approval of all parliamentary assemblies of Regions, Communities and the federal state.³³

The table below indicates the formal approval per parliament:

Level	Assembly	Date of approval (formal act)	Document nr.
Federal	House	Law of July 9, 2012 ³⁴	53K2189
	Senate		5S1536
Regions	Parliament of the Flemish Region	Decree of July 6, 2012 ³⁵	1520
	Parliament of the Brussels Region	Ordinance of April 26, 2012 ³⁶	A228
	Parliament of the Walloon Region	Decree of January 12, 2012 ³⁷	501
Communities	Parliament of the Flemish Community	<i>Idem Flemish Region</i>	
	Parliament of the French Community	Decree of December 20, 2011 ³⁸	277
	Parliament of the German Community	Decree of March 19, 2012 ³⁹	95
	United Assembly of the Community Commissions (Brussels)	Ordinance of April 26, 2012 ⁴⁰	B46

RATIFICATION DIFFICULTIES

V.3

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

The Council of State had no objections.⁴¹

CASE LAW

V.4

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

No substantive challenges were brought before the Constitutional Court.⁴²

³³ See Parl. Doc. *Flemish Parl.*, 2011-12, nr. 1520/1, p. 9; <https://docs.vlaamsparl.be/docs/stukken/2011-2012/g1520-1.pdf>; see also Parl. Doc. *Parl. Brussels Region*, 2011-12, nr. A228/2, p. 5 where the Minister pointed out that budgetary consequences, and possible sanctions, would implicate all governments.

³⁴ http://www.ejustice.just.fgov.be/mopdf/2012/10/02_1.pdf

³⁵ http://www.ejustice.just.fgov.be/mopdf/2012/08/17_1.pdf

³⁶ http://www.ejustice.just.fgov.be/mopdf/2012/05/07_1.pdf

³⁷ http://www.ejustice.just.fgov.be/mopdf/2012/01/26_1.pdf

³⁸ http://www.ejustice.just.fgov.be/mopdf/2012/01/24_1.pdf

³⁹ http://www.ejustice.just.fgov.be/mopdf/2012/04/18_1.pdf

⁴⁰ http://www.ejustice.just.fgov.be/mopdf/2012/05/07_1.pdf

⁴¹ Parl. Doc. *House*, 2011-12, nr. 53K1536/1, p. 14.

<http://www.dekamer.be/FLWB/PDF/53/1536/53K1536001.pdf>

⁴² Direct constitutional challenges to an Act assenting to a Treaty can only be brought within 60 days of publication: see article 3(2) of the Special Act on the Constitutional Court. Indirect challenges (prejudicial

MISCELLANEOUS

V.5

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

None.

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 BELGIUM 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.

Prior to the March 24/25 European Council meeting, a parliamentary debate was scheduled, led by the Parliamentary Committee for Advice on European Affairs, joined by the Committee for Social Affairs and the Committee for Financial and Budgetary Affairs.⁴³ Severe criticisms arose, concerning the lack of transparency of the ECOFIN meetings, positions adopted by the government without a specific mandate from parliament, and the concern for the budgetary prerogative of the national parliament.⁴⁴ After the European Council meeting, a debriefing was held before the same committees, on April 5th, 2011. One of the main concerns with respect to the Euro Plus Pact related to the budget of regional and local governments, and the instruments to control deficits at the subnational level.⁴⁵ The lack of social protection and measures was also lamented.⁴⁶ At that same meeting, the national reform programme of 2010 and regional memoranda were put forward.⁴⁷

⁴³ The Parliamentary Committee for Advice on European Affairs is composed of 10 Members of the House, 10 Members of the Senate, and all Belgian Members of the European Parliament. The other two standing committees were in joined session, i.e. members of both House and Senate were present.

⁴⁴ Parl. Doc. *House*, 2010-11, nr. 53K1365/1, p. 7: « plusieurs membres ont fait part de leur vive inquiétude de voir les instances européennes intervenir d’une manière de plus en plus prégnante dans les compétences dévolues aux parlement nationaux, en particulier dans le domaine de leurs prérogatives budgétaires. La rapidité des processus décisionnels, leur manque de transparence, notamment au sein du Conseil ECOFIN, ont été critiqués, de même qu’un manque de concertation préalable suffisante. Ils ont également exprimé certaines critiques au regard des engagements que le gouvernement était en train de prendre vis-à-vis des autorités européennes au nom de la Belgique, sans que le Parlement se soit encore prononcé en pleine connaissance de cause sur la base d’un mandat explicite précis. »
<http://www.dekamer.be/FLWB/PDF/53/1536/53K1536001.pdf>

⁴⁵ Parl. Doc. *House*, 2010-11, nr. 53K1365/1, p. 27.

<http://www.dekamer.be/FLWB/PDF/53/1365/53K1365001.pdf>

⁴⁶ Parl. Doc. *House*, 2010-11, nr. 53K1365/1, p. 23.

<http://www.dekamer.be/FLWB/PDF/53/1365/53K1365001.pdf>

⁴⁷ Parl. Doc. *House*, 2010-11, nr. 53K1365/1, p. 69-121.

<http://www.dekamer.be/FLWB/PDF/53/1365/53K1365001.pdf>

MISCELLANEOUS

VI.2

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

None.

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 BELGIUM 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?

In a general sense, both public opinion and political decisions have been in favour of a strengthening of European economic governance, with an emphasis from the left side of the political spectre on the need for accompanying social policy.

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)?

Directive 85/2011 has been implement by two separate Acts of the same date: the Laws of April 10, 2014.⁴⁸ One law deals exclusively with the federal budgetary process and hence has been adopted by the House only.⁴⁹ The other law translates the obligations of the directive for the control of regional budgets and the Court of Auditors, and hence followed the bicameral legislative procedure.⁵⁰

⁴⁸ *Official Gazette* April 25th, 2014. http://www.ejustice.just.fgov.be/mopdf/2014/04/25_1.pdf

⁴⁹ Article 78 Const. – optional involvement of the Senate (see the debate Parl. Doc. *Senate*, 2013-14, nr. 5S2811/2, without resulting amendments).

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=2811&VOLGNR=2&LANG=fr>

⁵⁰ Article 77 Const. http://www.const-court.be/en/basic_text/belgian_constitution.pdf

Those same Acts also address article 4(2) of Regulation 473/2013 ensuring the observance of the time-frame (October 15th). Before, the draft budget was to be put before the House before October 31st.

As to the content, the Law on the Federal Budgetary Procedure implements articles 3(1), 3(2), 4(4), 4(6), 9, 10, 11, 14(1) and 14(3) of Directive 85/2011. Additionally, the scope of implementation is extended to include federal social security.

The other Law envisages an identical implementation, but applied to the budgets of the regions and the communities. The implementing Acts amend the Law of May 22nd, 2003 on the budgetary procedure.

Summarizing, the amendments to the Law of 2003 ensure that:⁵¹

- (article 3-3) The provisions derived from Directive 85/2011 are applied to the social security departments of the federal government.⁵²
- (article 4-45) The draft budget will be presented on October 15 at the latest, following article 4(2) of Regulation 473/2013
- (article 5-46) In the general memorandum that accompanies the draft budget, a sensitivity-analysis is presented that gives a prediction of the evolution of most variables under different scenarios, following article 4(4) and 14(1) of Directive 85/2011.
- (article 5-46) Also included in the general memorandum is an overview of institutions and funds that are not part of the federal budget in strict sense, but are consolidated.
- (article 6-111) Starting in 2020, the Court of Auditors will certify the draft budgets, following article 3(1) of Directive 85/2011.⁵³
- (article 8-124/1) Budgetary proceedings of all governments are published through monthly publications (on a website), following article 3(2) of Directive 85/2011.
- (article 9-124/2) Differences between the national forecasts employed and the (more recent) prognoses of the European Commission are to be explained in the accompanying Memorandum.
- (article 10-124/3) The medium-term budgetary framework is annually updated and included in the Memorandum of the draft budget, following articles 9, 10 and 11 of the Directive.
- (article 11-124/4) The Section "Public sector borrowing requirements" of the High Council of Finance will review each three years the methodology of budgetary prognoses, following article 4(6) of the Directive.
- (article 12-124/5) Obligation to publish all conditional budgetary obligations following article 14(3) of Directive 85/2011.

The second law of April 10, 2014 essentially installs the same requirements for the Communities and the Regions: additional information to accompany the annual draft budget, an evaluation by the High Fiscal Council of the methodology, conformity with the medium-term budgetary framework.

⁵¹ The first article numbers refer to the Law of April 10, 2014, the second number to the final version of the Law of May 22, 2003.

⁵² Those falling within the institutional sector S1314 as defined by Regulation 549/2013.

⁵³ Certification is no strict requirement of the Directive. As set out by the government, it aims to ensure the truthfulness and reliability of the draft budget and will help to strengthen internal and external audits. See Parl. Doc. *House*, 2013-14, nr. 53K3408/1, p. 9. <http://www.dekamer.be/FLWB/PDF/53/3408/53K3408001.pdf> The Council of State raised the issue of compliance by December 31st, 2013 (as opposed to 2020 as envisaged) – see Parl. Doc. *House*, 2013-14, nr. 53K3408/1, p. 27. <http://www.dekamer.be/FLWB/PDF/53/3048/53K3048001.pdf>

IMPLEMENTATION DIFFICULTIES

VII.3

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

The time-gap between 2011 and the implementation in 2014 can be explained by the intergovernmental process governing these changes: an important additional element in the negotiation on the budgetary procedure is the Cooperation Agreement of December 13, 2013, which executes the Fiscal Compact.⁵⁴ Political negotiations were quite conflictual due to the different budgetary circumstances and objectives.⁵⁵

Belgium failed to implement Directive 2011/85 before December 31, 2013, but when the Commission gave notice under article 258 TFEU, Belgium replied that draft legislation was introduced by that date.⁵⁶

Parliamentary debates were very limited, and contained actually only technical questions by one Member of the Committee on Budgetary and Financial Affairs.⁵⁷

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)?

According to article 9 of the Law of April 10, 2014, the macroeconomic and budgetary forecasts are produced by the Institute for National Accounts (INA). *De facto*, the Central Bank of Belgium, as an associated institution of the Institute for National Accounts, carries this responsibility.⁵⁸

Article 4(6) of Directive 85/2011 is implemented through article 11 of the Law of April 10, 2014. It designates the Section "Public sector borrowing requirements" of the High Council of Finance to review each three years the methodology of budgetary prognoses.

⁵⁴ See below, section IX on the Fiscal Compact for a detailed discussion of the cooperation agreement.

⁵⁵ See for instance the discussion on "European economic governance and the 'six-pack' in the Flemish Parliament: Parl. Doc. *Flemish Parl.*, 2011-2012, nr. 1410/1, p. 12.

<https://docs.vlaamsparlament.be/docs/stukken/2011-2012/g1410-1.pdf>

⁵⁶ L. Buffel & E. Vanalme, "De omzetting van de nieuwe Europese budgettaire regelgeving in België" Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 1^{er} trimestre 2014, p. 97. – see the Commission's webpage and the decision to send a formal notice on March 28, 2014:

http://ec.europa.eu/eu_law/eulaw/decisions/dec_20140328_1.htm ; and the closing of the case on July 23, 2014:

http://ec.europa.eu/eu_law/eulaw/decisions/dec_20140723.htm

⁵⁷ See Report, Parl. Doc. House 2013-14, nr. 3408/4. <http://www.dekamer.be/FLWB/53/3408/53K3408004.pdf>

⁵⁸ The Central Bank is also charged with providing the statistics for the excessive deficit procedure – see the Law of February 28, 2014, *Official Gazette* April 4, 2014.

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2014022816&table_name=loi

FISCAL COUNCIL

VII.5

DOES BELGIUM 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 BELGIUM HAVE TO CREATE (OR ADAPT) A FISCAL COUNCIL IN ORDER TO IMPLEMENT DIRECTIVE 2011/85/EU?

The Court of Auditors (enshrined in article 180 Const.) was erected in 1831. It will review (‘certify’) the draft budgets of the Federation and the Regions and Communities.⁵⁹

An evaluation of the methodology used to draft the budget and to base the statistical data will be carried out each three years by the Section “Public sector borrowing requirements” of the High Council of Finance. This section was erected following article 49 (6) of the Special Act on Finance of 1989. This section is charged with providing annual advice on the budgetary status of the respective governments.⁶⁰ It is composed of 12 members, half of them appointed by the federal level, and half by the various Regions and Communities. It will additionally be charged with this review following article 9 of the Law of April 10, 2014.

The independence of the Court of Auditors is constitutionally assured: it is an institution of Parliament, and thus independent from executive authority.

Whether the High Council of Finance qualifies as independent in the classification of Directive 85/2011 is doubtful.⁶¹ The High Council of Finance is erected by Royal Decree⁶², and chaired by the Minister of Finance. Functional autonomy of the Section Public sector borrowing requirements is guaranteed by article 49(6) of the Special Act on Finance.

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 BELGIUM ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY)

⁵⁹ Art. 3 of the Law of April 10, 2014. See also higher, on “certification” in footnote 39 in section VII.2. See also L. Buffel & E. Vanalme, “De omzetting van de nieuwe Europese budgettaire regelgeving in België” Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 2014, p. 132-133.

⁶⁰ See also the cooperation agreement of 22 May 2014, which organizes the monthly publication of budgetary statistics and charges the Section Public Borrowing Requirements with the evaluation: published in the Official Gazette, 18 august 2014. http://www.ejustice.just.fgov.be/mopdf/2014/08/18_1.pdf

This cooperation agreement adds to the implementation of Directive 85/2011, both stipulations of the agreement needed the explicit approval of the substate levels, see the Advice of the Council of State, Parl. Doc. *House*, 2013-14, nr. 53K3408/1, p. 28-29. <http://www.dekamer.be/FLWB/PDF/53/3048/53K3048001.pdf>

⁶¹ See also K. Brams & T. Corthaut, ‘De financiering van de gemeenschappen en de gewesten na de Zesde Staatshervorming – responsabilisering in de schaduw van Europa’ in A. Alen et al. (eds.), *Het federale België na de zesde staatshervorming* (die Keure 2014) 615.

⁶² Royal Decree of April 3, 2006, *Official Gazette* April 13, 2006.

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006040331&table_name=loi

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

Because of the direct applicability of EU law and the general favourable political position on EU economic governance, no real debate in constitutional terms has been argued. In the general report to the House, the European Advisory Committee (consisting of members of the House, Senate, and Belgian MEPs) raised no real constitutional objections, though some members of parliament lamented the lack of social objectives and the lack of EU wide convergence in taxation.⁶³

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 annual stability program includes the obligation to attain the MTO.

Article 124/3 of the Law on the Budgetary Procedure (implemented by the Law of April 10, 2014) obliges the budget to adhere to the MTO (§1), and points out that the forecasts are based on the economic assessments of the Institute for National Accounts (§2), and that each deviation from the budgetary framework should be justified (again §2).⁶⁴

A nearly identical obligation pertains to the Regions and Communities (including the Local Governments).⁶⁵

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

See above, section II.2.

MTO DIFFICULTIES

VII.9

WHAT POLITICAL/LEGAL DIFFICULTIES DID BELGIUM ENCOUNTER AND WHAT DEBATES HAVE

⁶³ Report, *Economic governance and the European semester: implications for the Belgian budgetary process*, Parl. Doc., House, 53-1343/1 (March 31, 2011). Some of the objections were voiced at p. 12-13 for instance. See also higher, II.2. <http://www.dekamer.be/FLWB/PDF/53/1343/53K1343001.pdf>

⁶⁴ See also L. Buffel & E. Vanalme, “De omzetting van de nieuwe Europese budgettaire regelgeving in België” Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 2014, p. 105-106.

⁶⁵ Article 16/12 of the Law on the Budgetary Procedure for Regions and Communities of 22 May 2003.

ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No specific debate on this point.

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)?

The annual stability program includes the obligation to attain the MTO.

Article 124/3 of the Law on the Budgetary Procedure as implemented by the Law of April 10, 2014, obliges the budget to adhere to the MTO (§1), and requires each deviation from the budgetary framework to be justified (§2).⁶⁶ The section public borrowing requirements of the High Council of Finance will monitor the budgetary developments of each level of government, and, in case of a significant deviation in the Fall assessment, starts a bilateral procedure between the Section and that level of government.⁶⁷

CURRENT MTO

VII.11

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

Currently, Belgium's MTO is a surplus of 0,75 % of the GDP.⁶⁸

ADOPTION MTO

VII.12

BY WHAT INSTITUTION AND THROUGH WHAT PROCEDURE IS BELGIUM'S MEDIUM-TERM BUDGETARY OBJECTIVE ADOPTED AND INCORPORATED IN THE STABILITY PROGRAMME (EUROZONE, ARTICLE 3(2)(A) CONSOLIDATED REGULATION 1466/97)?

1. Macro-economic forecasts by the Institute for National Accounts
2. Advice by the High Council for Finance
3. Draft budget by the government – which needs to comply with the MTO as laid down in the Law on Budgetary Procedure
4. Adoption of the budget by Parliament
5. Monitoring by the section Public Borrowing Requirements of the High Council for Finance

⁶⁶ See also L. Buffel & E. Vanalme, “De omzetting van de nieuwe Europese budgettaire regelgeving in België” Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 2014, p. 105-106; 137-138.

⁶⁷ See Advice of the High Council of Finance, March 2014, p. 23-24: (in French)

http://www.docu.fin.fgov.be/intersalgfr/hrfcsf/adviezen/PDF/csf_fin_avis_2014_03.pdf

⁶⁸ See point 14 of Council Decision of 21 June 2013 giving notice to Belgium to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit – OJ 190/87 of July 11, 2013.

See also the 2014-2017 Stability Program: http://ec.europa.eu/europe2020/pdf/csr2014/sp2014_belgium_en.pdf

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 BELGIUM ENCOUNTER AND WHAT DEBATES HAVE ARISEN, IN PARTICULAR ABOUT IMPLICATIONS OF THE REGULATION FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

No specific debate on this point.

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

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

No specific debate on this point.

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?

None.

MISCELLANEOUS

VII.16

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

Not applicable.

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 BELGIUM 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 question was debated⁶⁹ – referring to the amendment of art. 136 TFEU – whether the ESM was a mixed treaty that would need approval of the regions too. According to the Minister of Finance, the ESM Treaty concerned only the Federal level, for three reasons:

First, the immunity of the ESM and its operational framework does not involve Belgium as such. Second, the obligation to attach a collective action-clause to all governmental debt (art. 12 ESM Treaty) only applies to federal, national, debt, and not to regional debt.⁷⁰ Third, the regions do not contribute to the financial costs of the ESM.⁷¹

Although the issue of budgetary sovereignty and “additional transfers of competences to the EU” was criticised, this opinion remained outside of the mainstream political consensus.⁷²

RATIFICATION

VIII.2

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

For the internal distribution of competences, see above VIII.1.

⁶⁹ The Council of State merely posed the question but did not give an opinion: Parl. Doc. Senate, 2011-12, nr. 1598/1, p. 39 <http://www.dekamer.be/FLWB/PDF/53/1598/53K1598001.pdf> – see also K. Brams & T. Corthaut, ‘De financiering van de gemeenschappen en de gewesten na de Zesde Staatshervorming – responsabilisering in de schaduw van Europa’ in A. Alen et al. (eds.), *Het federale België na de zesde staatshervorming* (die Keure 2014) 608-609.

⁷⁰ Questionable though – art. 49bis of the Special Act on the Finances of the Regions and Communities explicitly confirms the competence for regions to emit debt instruments.

⁷¹ Parl. Doc. Senate, 2011-12, nr. 1598/2, p. 17.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1598&VOLGNR=2&LANG=fr>

⁷² Parl. Doc. Senate, 2011-12, nr. 1598/2, p. 5.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1598&VOLGNR=2&LANG=fr>

BELGIUM

Ratification of the ESM Treaty took place by a bicameral Act, the Law of June 20th, 2012.⁷³ Apparently, the Flemish Government has composed a draft decree approving the ESM Treaty in the beginning of 2014.⁷⁴ The current status of that Flemish draft is unclear; we can assume the intervening elections in May 2014 precluded further development of this draft decree. S explained under VIII.1, the argument rejecting regional approval of the ESM Treaty might be shaky, but it has not been challenged. The Flemish draft thus only had political value. At any rate, the proposal has not been taken up after the elections.

RATIFICATION DIFFICULTIES

VIII.3

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

None. It was noted by the Minister of Finance that “Belgium has proportionally more to gain by the ESM than to lose”.⁷⁵ Given the spreads on Belgian debt during the euro crisis, this European initiative was seen as an opportunity.

The fraction of both green parties (Groen and Ecolo) proposed two additional ideas: a binding referendum approving the ESM, and a law instructing the Belgian representative in the Board of Governors to inform Parliament of his actions.⁷⁶ None of these was given effect.

A minor issue of federal division of competences arose, see VIII.1 and VIII.2.

CASE LAW

VIII.4

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

Yes, in the sole case 156/2012, the law ratifying the ESM Treaty was challenged before the Constitutional Court, but the appeal was lodged after expiry of the deadline.⁷⁷

CAPITAL PAYMENT

VIII.5

WHAT IS THE ROLE OF PARLIAMENT IN THE PAYMENT OF THE (FIRST INSTALMENT OF) PAID-IN

⁷³ Published in the Official Gazette July 9th, 2012.

⁷⁴ See the advice of the SERV of March 24th 2014, online at http://www.sariv.be/web/images/uploads/public/8639675005_20140324_Advies_SARiV_SERV_ESM-Verdrag_web.pdf

⁷⁵ Parl. Doc. Senate, 2011-12, nr. 1598/2, p. 15.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1598&VOLGNR=2&LANG=fr>

⁷⁶ See proposals nrs. 1612 and 1613, submitted to the Senate.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1612&VOLGNR=1&LANG=fr>

⁷⁷ Which is limited to 60 days after publication. Direct constitutional challenges to an Act assenting to a Treaty can only be brought within 60 days of publication: see article 3(2) of the Special Act on the Constitutional Court. Indirect challenges (prejudicial questions posed by ordinary judges) to assenting Acts concerning the TEU, TFEU and ECHR are not allowed (article 26, §1*bis* of the Special Act on the Constitutional Court)..

CAPITAL REQUIRED BY THE ESM TREATY (ARTICLE 36 ESM TREATY)? WHAT RELEVANT DEBATES HAVE ARISEN IN RELATION TO THIS PAYMENT?

No specific role. The Belgian financial participation in euro crisis mechanisms has been executed through quarterly adjustments of the formal budgetary law.

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.

In the ratification debates, the issue of transparency and control was raised. The government's position, supported by the majority was to exclude any instruction before the meeting of the Board of Governors, but to allow Parliament to ask for a debriefing afterwards.⁷⁸

APPLICATION DIFFICULTIES

VIII.7

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

The issue was raised, but not decided, what were to happen if Belgium would apply for emergency assistance by the ESM. In that case, the federal government would conclude the memorandum, but the regions would also be bound by the objectives. As the Minister stated: "The issue how to involve the regions and communities does not pertain to this Treaty".⁷⁹

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.

MISCELLANEOUS

VIII.9

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

No other relevant information.

⁷⁸ Parl. Doc. Senate, 2011-12, nr. 1598/2, p. 16.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1598&VOLGNR=2&LANG=fr>

⁷⁹ Parl. Doc. Senate, 2011-12, nr. 1598/1, p. 10.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1598&VOLGNR=1&LANG=fr>

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 BELGIUM 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.

At the drafting stage, Belgium indicated it would be unable to implement the article 3(2) obligation of constitutional anchorage because it lacked the necessary two-thirds majority and because of the electoral phase in the constitutional amendment procedure.⁸⁰

As the Council of State noted in its advisory opinion, the TSCG is intimately connected to the T(F)EU and can borrow from the latter normative status vis-à-vis the Belgian Constitution. Article 34 of the Constitution allows the delegation of powers to ‘supra or international’ organisations. Hence, the Council opined that no issues of compatibility between the TSCG and the Belgian Constitution arose.⁸¹

RATIFICATION

IX.2

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

At the federal level, the TSCG was approved on the basis of article 77, 6° of the Constitution, following a bicameral procedure.⁸²

There were several difficulties, which can be grouped in three clusters: one on the division of competences in federal Belgium (art. 167 Const.) , one on the role and autonomy of parliament, and one on the implementation of the TSCG. For this latter problem, see infra question IX.4.

⁸⁰ See implicitly Parl. Doc. Senate, 2012-13, nr. 1939/1, p.10.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁸¹ Advice of the Council of State nr. 51.725/VR of 18 September 2012, Parl. Doc. Senate, 2012-13, nr. 1939/1, p. 47, point 6.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁸² Article 77, 6° reads: “The House and the Senate are equally competent for the laws approving international treaties.”

The first cluster indicates the question which governments in Belgium have to assent to the TSCG. The table below indicates the formal approval per parliament:

Level	Assembly	Date of approval (formal act)	Document nr.
Federal	House	Law of 18 July 2013	53K2830
	Senate		5S1939
Regions	Parliament of the Flemish Region	Decree of 21 December 2012	1815
	Parliament of the Brussels Region	Ordinance of 20 December 2013	A476
	Parliament of the Walloon Region	Decree of 23 December 2013	906 ⁸³
Communities	Parliament of the Frenchspeaking Community Commissions (Brussels)	Decree of 23 December 2013	108
	Parliament of the Flemish Community	<i>Idem Flemish Region</i>	
	Parliament of the Frenchspeaking Community	Decree of 23 December 2013	576
	Parliament of the Germanspeaking Community	Decree of 14 October 2013	143
	United Assembly of the Community Commissions (Brussels)	Ordinance of 20 December 2013	B84

On the role of parliament, one notable legal obstacle is the constitutional stipulation that “Each year, the House of Representatives approves the final accounts and the budget.” (Article 174 Constitution). As the Council of State observed, the House will have to abide by the TSCG, adhering to a balanced budget, with the automatic correction mechanism.⁸⁴ Because the Treaty in article 3(2) *in fine* explicitly refers to the prerogatives of the national parliaments, the Council of State found the Treaty in compliance with the Constitution.⁸⁵

RATIFICATION DIFFICULTIES

IX.3

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

Inspired by Declaration 51 to the Treaty of Lisbon, Belgium has issued a separate declaration to the TSCG⁸⁶, concerning the national parliaments.

⁸³ Because of the asymmetrical nature of the division of competences between the Frenchspeaking Community and the Walloon Region, two decrees contain the assent to the TSCG: nr. 906 (principal assent by Walloon Region), 907 (assent for matters transferred by Frenchspeaking community to the Walloon Region) – see their joint approval on 20 December 2013, Parl. Debates, Walloon Parliament, 20 December 2013, p. 19 ff.

⁸⁴ Advice of the Council of State nr. 51.725/VR of 18 September 2012, Parl. Doc. Senate, 2012-13, nr. 1939/1, p. 53-54.
<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁸⁵ Id at p. 54.

⁸⁶ See on the meaning and significance of Declaration 51 with respect to the Early Warning mechanism on subsidiarity as laid down in Protocol 2 to the TEU: P. Popelier & W. Vandenbruwaene, “The subsidiary mechanism as a tool for inter-level dialogue in Belgium : on 'regional blindness' and cooperative flaws” in 7 European constitutional law review (2011), 204-228.

*“Déclaration du Royaume de Belgique relative aux Parlements nationaux
La Belgique précise que, en vertu de son droit constitutionnel, tant la Chambre des représentants que le Sénat du Parlement fédéral que les assemblées parlementaires des communautés et des régions agissent, dans le cadre de leurs compétences, comme composantes du Parlement national au sens du Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire.”⁸⁷*

This means that the automatic correction mechanism as it stems from article 3 TSCG is applicable to all governmental budgets approved by parliamentary bodies in Belgium. All regions and communities have assented to this Treaty by formal act.

However, some regional acts attached certain conditions to the functioning of the automatic correction mechanism: for instance, the Brussels Parliament imposed a social and environmental evaluation of possible budgetary corrections.⁸⁸ Moreover, a possible adjustment plan for a deficitary budget should “in no case impinge upon the competence to provide services of general interest of a non-economic nature”. This article will fail in the hypothetical case to protect those services of general interest of a non-economic nature.⁸⁹

The opposition parties Groen and Ecolo submitted a proposal to call for a referendum on the ratification of the TSCG, but this was rejected.⁹⁰

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 BELGIUM? 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.

The Council of State disapproved of a Treaty imposing constitutional amendment. Treaties are assented to by simple parliamentary majority, while constitutional change can only be sanctioned by a two-thirds majority in a two-step process with intervening elections. Thus, the Council of State observed that because article 3(2) TSCG only “proposes” constitutional enshrinement of the balanced budget rule without strictly requiring it, the lawmaker does not impose any obligation on the constitution maker.⁹¹

⁸⁷ See Parl. Doc. Senate, 2012-13, nr. 1939/1, p.40.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁸⁸ See Articles 4 and 5 of the Ordinance of 20 December 2013 approving the Cooperation Agreement of 13 December 2013.

⁸⁹ K. Brams & T. Corthaut, ‘De financiering van de gemeenschappen en de gewesten na de Zesde Staatshervorming – responsabilisering in de schaduw van Europa’ in A. Alen et al. (eds.), *Het federale België na de zesde staatshervorming* (die Keure 2014) 616.

⁹⁰ Parl. Doc. House, 2011-12, nr. 53K2105. <http://www.dekamer.be/FLWB/PDF/53/2105/53K2105001.pdf>

⁹¹ Advice of the Council of State nr. 51.725/VR of 18 September 2012, Parl. Doc. Senate, 2012-13, nr. 1939/1, p. 51, point 8.3.1.

The main problem was to ensure that all governments would abide by this rule, even more so because the overall budget of Belgium in the European semester is composed of “entity I” (federal state) and “entity II” (regions and communities) with political coordination, but no formal legal mechanism to resolve disputes. One solution, advocated by the Council of State, is to implement the TSCG obligations through a cooperation agreement between all governmental levels. This solution, which has in fact been chosen, has two advantages: because it is ranked above ordinary law, a cooperation agreement is binding on all parliaments of the levels of government in federal Belgium⁹², and involving the regions through a cooperation agreement ensures the compliance with budgetary rules by local governments.⁹³

Moreover, the adoption of a constitutional balanced budget rule would be overly rigid, posited the Council of State.⁹⁴ The Council deemed the common principles of the Commission to be subject to economic fluctuations.⁹⁵ This argument though, fails in my opinion. None of the seven principles put forward by the Commission lack flexibility.⁹⁶ Cooperation agreements are usually a matter for the executives. The instrument of cooperation agreements proves a valuable tool for cooperation and coordination in a federal setting. Based in the constitutionally guaranteed autonomy of each level of government, a cooperation agreement may “jointly set up and direct joint services and institutions”, or allow “the joint exercise of competences”, or “the joint development of initiatives” (article 92*bis* § 1, first paragraph of the Special Act Institutional Reform). Cooperation agreements are to be understood as a form of intrastate treaties, and their legal operation is often analogous to treaty law. The great bulk of cooperation agreements are agreements between the governments of some or all of the levels of government in the Federation. In a few exceptional cases, a purely parliamentary cooperation agreement has been set up.⁹⁷ When cooperation agreements touch upon issues reserved for parliaments under the principle of legality, or if they “encumber the Region or Community” or if they impose obligations on citizens, such cooperation agreements need parliamentary approval (article 92*bis* § 1, second paragraph of the Special Act Institutional Reform). In this case, because the cooperation agreement touches upon budgetary affairs, parliamentary assent was necessary.

The concertation committee is composed of the heads of the executives of the several levels of government and charged with intergovernmental relations.⁹⁸ In budgetary affairs, the committee will

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁹² If a cooperation agreement is approved by Parliamentary Act, one can draw an analogy to international treaties and their binding nature based on the adage of *pacta sunt servanda*. Similarly, the obligation to abide by cooperation agreements follows from federal loyalty (article 143 Constitution).

⁹³ Regions have the administrative capacity to sanction local governments, or even adopt acts devolving their responsibilities – see article 6 § 1 VIII and article 7 of the Special Act on Institutional Reform. See with more detail the Advice, Parl. Doc. Senate, 2012-13, nr. 1939/1, p. 52.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=fr>

⁹⁴ Advice, Parl. Doc. Senate, 2012-13, nr. 1939/1, p. 53.

<http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=1939&VOLGNR=1&LANG=nl>

⁹⁵ COM(2012)342.

⁹⁶ The Advice of the Council of State mentions the ‘future principles to be developed by the Commission’, although COM(2012)342 predates the advice by almost four months.

⁹⁷ For instance, on subsidiarity or a parliamentary ombudsman. These matters clearly pertain to the prerogatives of parliaments.

⁹⁸ See article 31 of the Ordinary Act on Institutional Reform.

formally approve and adopt⁹⁹ the advice of the High Council for Finance pertaining to the budgetary objectives of the different levels of government.¹⁰⁰ The Secretary for Budgetary Affairs declared in the House committee on financial affairs that:

“The Belgian institutional structure precludes any form of hierarchy between the federal and the substate level. Hence, no level of government can command another level to abide by certain obligations. There is no other solution than cooperation. The cooperation agreement envisages coordination of the budgetary objective of the joint government in the Concertation Committee. The partition of this budgetary objective will be done through a formal decision of this Committee. [...] This decision is based on objective evidence, by basing the decision on the advice of the High Council for Finance.”¹⁰¹

The cooperation agreement itself¹⁰² essentially repeats the TSCG:

Article 2

§ 1er. Les budgets des parties contractantes doivent s’inscrire dans l’objectif d’équilibre des comptes des administrations publiques inscrit à l’article 3 du Traité.

§ 2. Cette règle est considérée comme respectée pour la Belgique si le solde structurel annuel de l’ensemble des pouvoirs publics atteint l’objectif à moyen terme, ou respecte la trajectoire de convergence vers celui-ci telle que définie dans le Programme de stabilité, la limite inférieure étant un déficit structurel de 0,5 % du PIB.

Cette limite peut cependant être portée à un déficit structurel de maximum 1 % lorsque le rapport entre la dette publique générale et le PIB est sensiblement inférieur à 60 % et que les risques à long terme pour la soutenabilité des finances publiques sont faibles.

§ 3. Un écart temporaire par rapport à l’objectif à moyen terme ou à la trajectoire d’ajustement est uniquement autorisé en cas de circonstances exceptionnelles.

§ 4. Dans le cadre de la mise à jour du Programme de stabilité, les objectifs budgétaires annuels de l’ensemble des pouvoirs publics définis en termes structurels conformément aux méthodes de la Commission de l’Union européenne sont répartis en termes nominaux et structurels entre les différents niveaux de pouvoir de l’ensemble des pouvoirs publics, en s’appuyant sur un avis de la Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances. La Section Besoins de financement des pouvoirs publics du Conseil Supérieur des Finances examinera, à cette occasion, le comportement des pouvoirs locaux en matière d’investissements et tiendra compte de la mise à jour éventuelle de l’objectif à moyen terme.

L’objectif budgétaire global des pouvoirs publics fait l’objet d’une concertation préalable en Comité de concertation. Les parties contractantes s’engagent à faire un effort maximal pour aboutir à un consensus. La fixation en termes nominaux et structurels des objectifs budgétaires individuels des parties contractantes et des pouvoirs locaux devra être approuvée par une décision de Comité de concertation.

Article 3

⁹⁹ The formal decision of the Concertation Committee is not a legal act. The Council of State in its opinions has always denied the possibility to endow joint institutions with statutory powers through a cooperation agreement. See on this point Y. Peeters, *De plaats van samenwerkingsakkoorden in het constitutioneel kader* [The place of cooperation agreements in the constitutional framework] University of Antwerp, doctoral thesis, to be defended 2015, p. 396-401.

¹⁰⁰ See on this L. Buffel & E. Vanalme, “De omzetting van de nieuwe Europese budgettaire regelgeving in België” Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 1^{er} trimestre 2014, p. 133-135.

¹⁰¹ Secretary Chastel responding to question n° 21596 on an internal stability pact: Parl. Doc. , Proceedings, Committee on Financial and Budgetary Affairs, 22 January 2014, p. 5.

<http://www.dekamer.be/doc/CCRI/pdf/53/ic906.pdf>

¹⁰² The French and Dutch version can be found at (link to the Official Journal) <http://goo.gl/jzNzAV>

Chaque partie contractante s'engage à prendre, dans l'exercice de ses compétences et/ou de sa tutelle à leur égard, toutes les mesures nécessaires pour que les pouvoirs locaux respectent les objectifs budgétaires tels qu'établis par l'article 2.

In article 4, the cooperation agreement puts the burden of verification of compliance with this rule with the Section "Public sector borrowing requirements" of the High Council of Finance (see *supra* VII.5 on the requirement of independence).

Article 4

§ 1er. Chaque année, la Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances est chargée d'évaluer le respect des engagements pris par les parties contractantes dans le cadre du présent accord de coopération et des décisions du Comité de concertation visées à l'article 2, § 4.

A cette occasion, elle identifie, en cas d'écart constaté dans le résultat des pouvoirs locaux, la part de cet écart découlant de l'impact nouveau des mesures prises par l'Etat fédéral et dont la responsabilité n'incombe dès lors pas aux Régions et Communautés. Elle formule également un avis relatif notamment à l'existence de circonstances exceptionnelles visées à l'article 2, § 3.

§ 2. Si la Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances constate un écart important d'une partie contractante par rapport à ses engagements dans le cadre de l'évaluation visée au § 1er, la partie contractante concernée est tenue de justifier cet écart et de prendre des mesures immédiates de correction. Les mesures de correction doivent permettre de remédier à l'écart dans un délai de 18 mois, sauf si la réalité économique ou institutionnelle justifie une période plus longue selon l'avis de la Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances. Dans tous les cas, le délai précité ne peut être en contradiction avec un éventuel délai fixé par l'Union européenne à l'égard de la Belgique.

La Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances est chargée d'émettre un avis sur l'ampleur des mesures de correction à prendre.

§ 3. La Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances est chargée de vérifier la mise en œuvre des mesures de corrections, visées au § 2, et d'émettre un avis annuel à ce sujet. A cette fin, toutes les données nécessaires à l'exercice de cette mission par le Conseil supérieur des Finances lui seront fournies par les Gouvernements concernés.

§ 4. La Section Besoins de financement des pouvoirs publics du Conseil supérieur des Finances est chargée de procéder à une évaluation globale de l'application du Traité et de l'accord de coopération par les différents niveaux de pouvoir de l'ensemble des pouvoirs publics belges au plus tard le 31 décembre 2017.

The section public borrowing requirements of the High Council of Finance will monitor the budgetary developments of each level of government, and, should a significant deviation be detected, will start a bilateral procedure between the Section and that level of government.¹⁰³

Article 5 gives the High Council of Finance an additional competence. In the case of a financial sanction taken by the Council in the framework of the excessive debt procedure, the Section "Public sector borrowing requirements" will determine the pro rata defaults of the various governments concerned. Note that article 5 does not apply to possible sanctions imposed by the Court of Justice for non-compliance with article 3 TSCG following the jurisdiction conferred in article 8 TSCG – it only applies to the sanctions ex Regulation 1173/2011.¹⁰⁴ Moreover, no predefined distribution key has

¹⁰³ See Advice of the High Council of Finance, March 2014, p. 23-24: (in French)

http://www.docufin.fgov.be/intersalgr/hrfcsf/adviezen/PDF/csf_fin_avis_2014_03.pdf

¹⁰⁴ See K. Brams & T. Corthaut, 'De financiering van de gemeenschappen en de gewesten na de Zesde Staatshervorming – responsabilisering in de schaduw van Europa' in A. Alen et al. (eds.), *Het federale België na de zesde staatshervorming* (die Keure 2014) 616.

been developed. Analogous to the enforcement of transposition of EU directives and the sanctions under article 260 TFEU¹⁰⁵, this may prove a severe future problem, albeit hypothetical for the moment.

Another problem with cooperation agreements is their lack of enforceability.¹⁰⁶ Legal disputes are theoretically reserved for a specific arbitrage-like court, but such court has never been installed. A solution might be to perceive loyal execution of the cooperation agreement as a part of the principle of federal loyalty, guaranteed in article 143 of the Constitution. In such interpretation, local or regional budgets that violate the cooperation agreement, can be challenged before the Constitutional Court. However, this hypothetical example seems very impractical, consider for instance the effects of a nullification of a governmental budget.

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.

Several members of parliament noted the unclear definition of ‘exceptional circumstances’.¹⁰⁷

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)?

No observations made in the parliamentary debates on this particular issue.

CASE LAW

IX.7

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

Not yet. Three cases are pending before the Constitutional Court: two appeals challenging the constitutionality of the Federal act approving the TSCG¹⁰⁸, and one appeal specifically challenging the

¹⁰⁵ See ECJ, C-533/11, *Commission v. Belgium* [2013] ECLI:EU:C:2013:659, for a case where the failed transposition was a regional competence. A commentary (in dutch) is P. Popelier, C. Janssens Christine, W. Vandenbruwaene, “De interne verdeling van financiële sancties op grond van artikel 260 VWEU” in *Chroniques de droit publique - Publiekrechtelijke kronieken* (2014) p. 59-78. In that case, the political decision on the partition of the fine remains to be taken.

¹⁰⁶ Politically, the cooperation agreement and the concertation committee function: in 2013, the subnational levels of government formally denied to approve the stability program, which they on the contrary did approve in 2014 – see L. Buffel & E. Vanalme, “De omzetting van de nieuwe Europese budgettaire regelgeving in België” Service Public Fédéral Finances – Belgique, *Bulletin de Documentation*, 74^{ème} année, n° 1, 1^{er} trimestre 2014, p. 134.

¹⁰⁷ Parl. Doc. House, 2012-13, nr. 2830/2, p. 22.

¹⁰⁸ Pending cases nr. 5920 and 5917.

cooperation agreement that implements article 3(2) TSCG.¹⁰⁹ These three appeals are merged, but to date no hearing has been scheduled.¹¹⁰

NON-EUROZONE AND BINDING FORCE

IX.8

HAS BELGIUM 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 – Belgium is part of the Euro area.

MISCELLANEOUS

IX.9

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

The delayed ratification and implementation, only by the end of 2013, was due to political disagreement. The main pressure to ensure implementation was Council decision 2013/370/EU¹¹¹ of 21 June 2013, by which the Council gave notice to Belgium to take measures for deficit reduction under article 126(9) TFEU.

On the cooperation agreement implementing the TSCG, the Commission noted that: “While the agreement represents substantial progress, much will depend on implementation and on the High Council of Finance’s ability to reach a consensus on both medium-term fiscal targets for general government and the distribution of these targets. Additional arrangements might be needed to make targets beyond 2014 binding and coordinate strategies to minimise the negative impact of remaining consolidation efforts.”¹¹²

¹⁰⁹ Pending case nr. 5930.

¹¹⁰ See <http://www.const-court.be/cgi/hzap.php?recour=yes&question=yes&lang=nl&start=0&nb=-1#5930>

¹¹¹ See also the Commission’s recommendation COM((2013)381: point 9 “no significant progress has been made to adjust the fiscal framework in order to ensure that the budgetary targets are binding at the federal and subfederal levels, and increase transparency and accountability across government layers”.

¹¹² SWD(2014)402, p. 11.

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.

Not relevant for Belgium, since Belgium has not received financial assistance.

NEGOTIATION

X.2

DESCRIBE THE PUBLIC AND POLITICAL DEBATE DURING THE NEGOTIATIONS ON THE FINANCIAL ASSISTANCE INSTRUMENTS, NOTABLY THE MEMORANDUM OF UNDERSTANDING (MOU) AND FINANCIAL ASSISTANCE FACILITY AGREEMENT, IN PARTICULAR IN RELATION TO THE IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW, SOCIO-ECONOMIC FUNDAMENTAL RIGHTS, AND THE BUDGETARY PROCESS.

Not relevant for Belgium.

STATUS INSTRUMENTS

X.3

WHAT IS THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS IN THE NATIONAL LEGAL ORDER (POLITICAL AGREEMENT, INTERNATIONAL TREATY, ETC.)?

Not relevant for Belgium.

TRANSPOSITION NATIONAL LEGAL ORDER

X.4

CONSIDERING THE STATUS OF THE FINANCIAL ASSISTANCE INSTRUMENTS, WHAT PROCEDURE DOES THE CONSTITUTION PRESCRIBE FOR THEIR ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER?

Not applicable.

ROLE PARLIAMENT

X.5

WHAT IS THE ACTUAL ROLE OF PARLIAMENT WITH REGARD TO THE ADOPTION/TRANSPOSITION INTO THE NATIONAL LEGAL ORDER OF THE FINANCIAL ASSISTANCE INSTRUMENTS?

Not relevant for Belgium.

ADJUSTMENT REQUIREMENTS

X.6

DESCRIBE THE RELEVANT CONTENT OF THE FINANCIAL ASSISTANCE INSTRUMENTS.

Not relevant for Belgium.

MISSIONS

X.7

WHAT LEGAL CHANGES, IF ANY, HAD TO BE MADE TO ACCOMMODATE 'TROIKA' REVIEW MISSIONS, POST-PROGRAMME SURVEILLANCE MISSIONS, ETC?

Not relevant for Belgium.

CASE LAW INTERNATIONAL INSTRUMENTS

X.8

HAVE THERE BEEN DIRECT OR INDIRECT LEGAL CHALLENGES AGAINST THE FINANCIAL ASSISTANCE INSTRUMENTS BEFORE A NATIONAL (CONSTITUTIONAL) COURT?

Not relevant for Belgium.

CASE LAW IMPLEMENTING MEASURES

X.9

IS THERE A (CONSTITUTIONAL) COURT JUDGMENT ON NATIONAL POLICY MEASURES ADOPTED IN RELATION TO THE MEMORANDA OF UNDERSTANDING?

Not relevant for Belgium.

BOND PURCHASES ECB

X.10

DESCRIBE THE POLITICAL, ECONOMIC AND LEGAL SITUATION LEADING UP TO THE MOMENT WHERE THE EUROPEAN CENTRAL BANKS STARTED BUYING GOVERNMENT BONDS ON THE SECONDARY MARKET (THROUGH THE SECURITIES MARKETS PROGRAMME, SMP).

Not relevant for Belgium.

CONDITIONALITY BOND PURCHASES ECB

X.11

BELGIUM

WHAT NATIONAL POLICY MEASURES HAVE BEEN REQUESTED BY THE ECB IN EXCHANGE FOR THE ACQUISITION OF GOVERNMENT BONDS ON THE SECONDARY MARKET? HOW HAVE THESE REQUESTS BEEN SUBJECT TO DEBATE IN LIGHT OF THEIR IMPLICATIONS FOR (BUDGETARY) SOVEREIGNTY, CONSTITUTIONAL LAW AND THE BUDGETARY PROCESS?

Not relevant for Belgium.

MISCELLANEOUS

X.12

WHAT OTHER INFORMATION IS RELEVANT WITH REGARD TO BELGIUM AND FINANCIAL SUPPORT?

Not relevant for Belgium.