

Legal and Institutional Design of EMU October 2015 EUI

Thomas Beukers
Claire Kilpatrick
Päivi Leino-Sandberg
Giorgio Monti

Session 1: Thursday 22 October

EMU and national constitutional conditions to change

The Eurozone is undergoing a metamorphosis as a consequence of the Eurozone crisis. Central to this development are new crisis management instruments like the (external) ESM, a Balanced Budget Rule imposed by an international treaty (Fiscal Compact), substantively and institutionally strengthened economic governance (6- and 2-pack), a fundamental change in the role played by the ECB (e.g. OMT), and an important single supervisory and resolution mechanism in the new European banking union (SSM and SRM). These instruments are the subjects of sessions 2-4 of this workshop.

These developments have taken place with relatively few changes to national constitutions (an exception being the balanced budget rule introduced in some national constitutions; these constitutional amendments have taken place not for the ratification of the Fiscal Compact, but for its (anticipated) implementation). But many constitutional courts *have* dealt with these instruments, in very different ways, sometimes imposing conditions for compatibility of the new instruments with the national constitution (most notably the *Bundesverfassungsgericht* with regard to the involvement of the German *Bundestag*), sometimes referring questions of EU law to the European Court of Justice.

The end of Eurozone integration may however very well not be in sight, although the political will to take significant steps further is lacking in most if not all member states at the moment. Political reports prepared by European institutions (most recently the 5-Presidents' report of June 2015), as well as academic research, are proposing further integration steps in reaction to (lessons learned from) the Eurozone crisis. These mostly relate to: the creation of a fiscal capacity capable of absorbing macroeconomic shocks or with an insurance type function; further risk-sharing through some sort of mutualisation of debt; and the creation of a European Treasury.

A significant amount of relevant research is being carried out by legal scholarship about the Eurozone crisis,¹ including about the limits to further change posed by EU law at the moment (a recent example is Closa).² Less attention is given in academic literature to conditions posed to change at EU level by national constitutions (with the exception probably of the conditions posed by the German constitution due to the rich *Bundesverfassungsgericht* case law). An important exception is a recent study carried out by Besselink e.a.,³ which looks in-depth at the constitutional conditions posed by 12 EU member states and gives a bird's eye view of all 28 EU member states. The study however does not look in great detail at possible further development of EMU, instead taking a much broader view of European integration. An important empirical study providing relevant data in this context are the country reports prepared in the framework of the 'Constitutional Change through Euro Crisis Law' project.⁴ The issue of national constitutional limits to further integration of the EMU is explicitly raised by Hinarejos, but not worked out further in detail.⁵ This first session of our workshop tries to take research on this topic one step further, by linking explicitly future integration options in EMU to the conditions posed by national constitutions in the Union.⁶ The conditions posed at EU level are subject of sessions 2-4.

The main objective of session 1 will be to identify and discuss relevant questions, including:

¹ For an overview and analysis of this literature see e.g. Beukers, *Legal Writing(s) on the Eurozone Crisis* (EUI Law Working Paper, 2015) and Martinico, *The Constitutional Implications of the European Union Crisis. A Review Article* (forthcoming, 2015).

² Closa, *Looking ahead: pathways of future constitutional evolution of the EU* (Study prepared for the European Parliament (2015), available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510005/IPOL_IDA%282015%29510005_EN.pdf).

³ Besselink e.a., *National Constitutional Avenues for Further EU Integration* (Study prepared for the European Parliament, 2014), available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf.

⁴ See in great details these Country Reports from the 'Constitutional Change through Euro Crisis Law' project of the EUI Law Department at <http://eurocrisislaw.eui.eu/>.

⁵ Hinarejos, 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration', in: Barnard and Gehring (eds), *Cambridge Yearbook of European Legal Studies 2011-2012* (Oxford, Hart Publishing 2012) p. 243-268.

⁶ See for a presentation of the ADEMU research project: <http://apps.eui.eu/Personal/rmarimon/projects/ADEMU/ADEMU%20presentation%20201503.pdf>.

- What are the relevant national constitutional constraints to further EMU integration, what is the nature of these constraints (constitutional text, case law, politics), what is their rationale?⁷
- What role does national constitutional identity play in limiting further EMU integration?⁸
- To what extent can national constitutional constraints be avoided or overcome,⁹ and how?¹⁰
- What different approaches do national constitutions/constitutional courts take to the impact of European integration on the national constitutional order? This includes strategies to enforce development at EU level (Bundesverfassungsgericht and fundamental rights), development at national level (Bundesverfassungsgericht and the involvement of the Bundestag), and attempts to accommodate European integration and to establish limits.
- What role do fundamental rights play in limiting EMU integration? Compare the limits posed by various national constitutional courts, including for example the Portuguese¹¹ and Italian court.¹²

⁷ See extensively Besselink e.a., supra. See also Wendel, 'Lisbon before the Courts. Comparative Perspectives', *EuConst* (2011) p. 96-137, in particular the section 'Constitutional limits and judicial reservations'.

⁸ See e.g. Claes and Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case', *German Law Journal* (2015) http://static1.squarespace.com/static/56032653e4b0dc68f619c310/t/56057301e4b07571cdc75570/1443197697818/09.04.16_Claes+%26+Reestman_CJEU+OMT+FINAL.pdf.

⁹ See Besselink e.a., supra, p. 34: "As indicated before, things may become even more complicated when the wish to further EU integration might collide with obstacles deriving from provisions that are unamendable. These are provisions which are considered to be so essential that they are protected even against the highest authority in the land, the Constitution-amending power or the *pouvoir constitué*. The best-known example of such an unamendable core is laid down in Article 79(3) of the German Basic law. Also the Constitution of the Czech Republic (Article 9(2)), the French Constitution (Article 89(5)), the Greek Constitution (Article 110), the Italian Constitution (Article 139) and the Romanian Constitution (Article 152) contain such a 'Ewigkeitsklausel' or 'eternity clause'. In other Member States, these are not made explicit in the text of the Constitution, or in constitutional case law, but they are often implied or presumed: no State will lightly give up the principles of democracy, rule of law, the protection of fundamental rights, or statehood itself."

¹⁰ For this last distinction see also Besselink ea., supra, p. 35.

¹¹ Cisotta and Gallo, *The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal*, available at <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>.

¹² See e.g. Fasone, *Taking budgetary powers away from national parliaments? On parliamentary prerogatives in the Eurozone crisis*, EUI working paper 2015/37, in particular the section 'Parliaments and Constitutional Courts', available at http://cadmus.eui.eu/bitstream/handle/1814/36658/LAW_2015_37.pdf; see again also the Country Reports from the 'Constitutional Change through Euro Crisis Law' project of the EUI Law Department at <http://eurocrisislaw.eui.eu/>; Kilpatrick and De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone*:

- Do national constitutional constraints differ depending on the instrument of integration chosen, e.g. an international agreement, primary or secondary EU law?¹³
- What insights does a comparative perspective provide? What are e.g. the conditions present in the Estonian case that make it possible for the Estonian Supreme Court to take its accommodating approach so much different from the Bundesverfassungsgericht (see below for a short introduction to both cases)? And to what extent would it be possible for the German Constitutional Court to adopt a similar approach?¹⁴
- What is the impact of a different balance between member states when it comes to the space for constitutional law/case law versus constitutional/normal politics on the constraints on European integration? What relevant insights does a comparative perspective on the protection of national democracy as challenged by European integration provide?
- What is the role for national constitutions and political systems as sources of legitimacy of (further) EMU integration?

Reading:

- Study the 5-Presidents' report, available at http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf¹⁵
- Have a look at (at least) two member states (and if applicable include your own) in the following report and reflect on the constitutional conditions to EMU integration: Besselink e.a., *National Constitutional Avenues for Further EU Integration* (Study prepared for the European Parliament, 2014), available at

The Role of Fundamental Rights' Challenges, available at <http://cadmus.eui.eu/bitstream/handle/1814/31247/LAW%20WP%202014%2005%20Social%20Rights%20final%202242014.pdf?sequence=1>; Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiries*, in particular the section 'Constitutional challenges in euro-crisis', available at http://cadmus.eui.eu/bitstream/handle/1814/36097/LAW_2015_34.pdf?sequence=1.

¹³ See among others the various Country Reports from the 'Constitutional Change through Euro Crisis Law' project of the EUI Law Department at <http://eurocrisislaw.eui.eu/>.

¹⁴ See e.g. Besselink e.a., supra, about specific BvG approach of not accepting democratic solution at EU level.

¹⁵ You may find the following chart useful as well for all 4 sessions:

http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/542642/IPOL_BRI%282015%29542642_EN.pdf.

http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf

- Have a look at the country report of the same two member states, in particular the questions highlighted in red, available at <http://eurocrisislaw.eui.eu/>.
- Read the rest of the introduction to this session below (for further reading see the references in the various footnotes).

In the following some of the basic changes to EMU that are often considered necessary in scholarly works and political reports will be illustrated. Moreover, a first analysis of some national constitutional conditions will be given in Germany, France, UK, and Estonia (including two main Eurozone countries, one important member state external to the Eurozone, and one small recent Eurozone country). The objective of this session is to further build a framework for the assessment of legal options for and restraints to policy proposals that will result from the ADEMU economic research.

What further developments of EMU are currently on the table?

Among the many proposals for further reform of EMU, three central elements can be detected. All three of them raise questions of EU law and of national constitutional law. A first central element is the creation of a fiscal capacity for the absorption of macroeconomic shocks.¹⁶ Such a fiscal capacity raises many institutional design questions relating to the way the resources are raised (part of the EU budget or not; based on direct EU taxation or not), what function it will have (insurance type of function, shock absorption), whether its activation should in any way be linked to contractual arrangements with the member states involved, and who should decide on its activation (automaticity on the basis of specified criteria or a European treasury). Depending on the choices made there will be different challenges at EU level relating to the possibility to introduce (direct) taxation, the unity of the Union budget, and the

¹⁶ H. Van Rompuy, Towards a Genuine Economic and Monetary Union, 5 December 2012, p. 11, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

institutional balance of powers.¹⁷ Equally at national level different choices will lead to the encountering of more or less constraints at member state constitutional level.

A second central element of further reform proposal is the introduction of further risk-sharing through some sort of common debt issuance.¹⁸ The exact modalities of the 'Eurobond' proposals differ between blue bonds,¹⁹ red bonds, or a jointly and severally guaranteed Eurobond issued by a European debt agency.²⁰ At the level of the EU Treaties these options will have to be confronted with the no-bail out clause of article 125 TFEU. At national constitutional level they will have to be confronted with limits posed by the budgetary autonomy enshrined in the constitution.²¹

A third element is the introduction of a European treasury, for example with the power of veto over national budgetary plans or with powers regarding the activation of a European fiscal capacity (in fact this third element is related to the first element above).²² At European level these proposals run into limits in the current EU treaties as to the competences of the EU to decide in the area of economic policy. At national level they are again at tension with the budgetary autonomy central to member state sovereignty enshrined in national constitutions.

¹⁷ See on this e.g. Repasi, Legal options for an additional EMU fiscal capacity (Study for the EP, 2013) available at http://www.europarl.europa.eu/RegData/etudes/note/join/2013/474397/IPOL-AFCO_NT%282013%29474397_EN.pdf.

¹⁸ See the comparative overview of the various proposals made by Shahin Vallee at http://www.bruegel.org/fileadmin/bruegel_files/Blog_pictures/eurobonds_EP_snv.pdf.

¹⁹ Delpla and Von Weizsacker, 'Eurobonds: the Blue Bond Concept and its Implications', (Study for the EP, 2010),

<http://www.europarl.europa.eu/document/activities/cont/201103/20110321ATT15948/20110321ATT15948EN.pdf>.

²⁰ Jacques Delors institute, Report of the Tommaso Padoa-Schioppa Group, *Completing the Euro: A road map towards fiscal union in Europe*, June 2012,

<http://www.institutdelors.eu/media/completingtheeuroreportpadoa-schioppagroupneune2012.pdf?pdf=ok>. Possibly with a limit of 40% of GDP, see Juncker C and Tremonti G, "E-bonds would end the crisis", *Financial Times* (5 December 2010).

²¹ IMF Working Paper, Paths to Eurobonds,

<https://www.imf.org/external/pubs/ft/wp/2012/wp12172.pdf>, p. 19-20: "Some scholars, and the legal services of the Council, now seem to interpret the Article as compatible with joint and several guarantees as long as member states enter voluntarily into such agreements. (...) Each member state is likely to have important and idiosyncratic legal challenges and the possibility that constitutional amendments are necessary in a number of countries is more than distinct. This is particularly, but not only, the case for Germany, key to any decision on common debt issuance. For Germany, and likely for other countries, the issue is whether the proposals comply with the provision of its constitution with respect to prerogatives of parliament and budgetary processes. Two important rulings by the Karlsruhe Constitutional Court helped to frame the court's interpretation of these issues: one on the Lisbon Treaty in 2009 (Schorkopf, 2009) and one on the EFSF in 2011 (Mayer, 2012). Both rulings limit the scope for intergovernmental guarantees to specific designs and limited amounts. Some proposals, by being more limited in scope and time of fiscal commitments, such as the Eurobills and the Redemption Pact, expect to be able to pass this German constitutional test. Others are explicit that they may have to confront these legal challenges."

²² An even further reaching possibility that could involve a European Treasury, but which however is not often advocated by policy makers, is that of a single European economic policy.

What relevant limits are posed by national constitutions and what is their nature?

Germany

In Germany three different moments or periods can be distinguished in the development of national constitutional constraints relevant for the development of the EMU. One category of constraints results from the Maastricht decision of the German Constitutional Court,²³ which has established conditions linked to the observation of directives for monetary stability.²⁴ A second category has developed later on, in particular in the Lisbon Judgment,²⁵ and relates to the constitutional identity review by the German Constitutional Court, including the elements of democracy and budgetary autonomy of the Bundestag. In a third development the German Constitutional Court has established more detailed requirements in its examination of crisis instruments such as the first rescue package for Greece, the Fiscal Compact, the ESM and the OMT programme of the ECB (see below).

In Germany the constraints can therefore in unique detail be found in the case law of the Constitutional Court. In particular in the German case they relate to elements of the German constitutional that are considered unamendable, because enshrined in the eternity clause. The German constitution explicitly makes the establishment and further development of the European Union conditional on respect of the eternity clause (cfr. Art. 23 and 79 Grundgesetz). Any change to EMU that would violate the eternity clause would require nothing less than a new constitutional moment in Germany.²⁶ A

²³ See Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union" and Document "Extracts from: *Brunner v. The European Union Treaty (Bundesverfassungsgericht)*" (1994) 31 *Common Market Law Review*, Issue 2, pp. 235–262. PM: 1998 EMU decision BvG.

²⁴ Note in this context also the OMT ruling by the BvG about what is not acceptable; violation of constitutional identity; ultra vires act such as act of financial assistance amounting moreover to monetary financing.

²⁵ https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

²⁶ For an accessible discussion of the question whether the eternity clause can be amended and how see Besselink e.a., supra, p. 39: "Moreover, at least in some Member States the provisions which claim to be unamendable under the present national constitutional arrangement can themselves be amended. And even were this is not the case, as in Germany, the obstacle is not constitutionally insurmountable. At least certain infringements of German constitutional identity can be overcome if the German people as the 'original' constituent power adopt a new Constitution." See also p. 122: "Apart from the strictly procedural limit of Art. 79(2) GG, there is the more difficult hurdle of the eternity clause contained in Article 79(3) GG. As we shall see presently, the matter is conceptualized under German constitutional law in the terms coined around the French revolution concerning the distinction of *pouvoir constituant* and *pouvoir*

detailed study is therefore warranted about which of the above presented reforms to EMU would likely be acceptable in light of these constraints, what can be considered compatible with the German eternity clause, and what the German Constitutional Court could learn from other constitutional courts when it comes to the relationship between European integration and national democracy.

On the relevance of the Lisbon Judgment, and constitutional identity review in particular, for reform of EMU, Besselink e.a. note that:

“The case law of the Bundesverfassungsgericht has been strongly premised on the idea that the Grundgesetz expresses the constitutional identity of the German state, and in particular the values described in Article 23(1) GG in combination with those of the ‘eternity clause’. The Lisbon judgment formulated a number of further specifications of the meaning of the principle of democracy. Thus, it demanded that there should be a significant scope for the national parliament in terms of its autonomous decision-making power with regard to a number of fields of state activity. These (...) fundamental decisions on public revenue and expenditure, (...) At the moment, the issue of control over public expenditure is of importance as regards the mechanisms designed in the course of the public debt crisis at EU level, notably the ESM Treaty (and to a lesser extent the Fiscal Compact). As this risks undermining the role of the budgetary powers of parliament, the Bundesverfassungsgericht has insisted on a significant role of the Bundestag in this field.”²⁷

With regard to the more detailed requirements developed by the Bundesverfassungsgericht during the Eurozone crisis, relevant elements relate to the impact of crisis measures on budgetary autonomy of incalculable risks for Member

constitué. As the Bundesverfassungsgericht specified in the Lisbon judgment, the respect due to the Ewigkeitsklausel is binding on ‘the constitution-amending power’ (‘der verfassungsändernde Gesetzgeber’, sometimes referred to as verfassungsgesetzgebende Gewalt) as constituted power under Article 79 of the Grundgesetz and as such, the principles and rights protected by that clause cannot be amended. The power to amend the Grundgesetz under Article 79 GG cannot give an amendment a specific content that would infringe the principles and rights protected by the eternity clause (as they are elaborated in the case law of the BVerfG). The BVerfG explicitly left it an open question whether the values protected by the clause also bind the original constitutional power under Article 146, the Verfassungsgebende Gewalt, pouvoir constituant originaire, “i.e. for the case that the German people, in free self-determination, but in a continuity of legality to the Basic Law’s system of rule, gives itself a new constitution”. See also p. 124.

²⁷ Besselink ea, supra, p. 116.

States paying financial assistance. The German Federal Constitutional Court considers it problematic from a legal point of view and has attempted to put limits to this impact.²⁸ In its decision of 7 September 2011 on the two German laws on granting guarantees for the Greek Loan Facility Agreement and for the EFSF, the *Bundesverfassungsgericht* on the one hand upheld German participation in both. On the other hand it set two fundamental standards, both relating to the right to vote of article 38(1) German Basic Law: the *Bundestag* must remain the forum where decisions on revenue and expenditure are taken independently, and the *Bundestag* cannot transfer its responsibilities away, through incalculable burdens without prior consent.²⁹ In its decision of 12 September 2012 on temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact, it put no insurmountable hurdle to any of the two international treaties. But in light of the budgetary responsibility of the German Parliament, it did demand that the German liability under the ESM Treaty could not be increased beyond its share in the authorized capital stock of the ESM without the approval of the *Bundestag*.³⁰ It also demanded that the functioning of the ESM would not stand in the way of comprehensive information of both Houses of Parliament.

In its order of 18 March 2014 on the ESM Treaty and Fiscal Compact the *Bundesverfassungsgericht* confirmed its provisional green light to both international treaties, since, despite the liabilities assumed, the budgetary autonomy of the *Bundestag* is sufficiently safeguarded. This time it did put the condition that arrangements be made under budgetary law that would reliably exclude the possibility of a suspension of Germany's voting rights in the ESM bodies (by ensuring that capital calls under the ESM Treaty be met fully and in time within the agreed limits).³¹ In the words of the *Bundesverfassungsgericht*:

The principle of democracy requires that the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities. (...) it

²⁸ See for similar concerns of the Finnish Constitutional Law Committee, Tuori and Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP, 2014), p. 204.

²⁹ *Bundesverfassungsgericht* judgement of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10.

³⁰ *Bundesverfassungsgericht* judgement of 12 September 2012, 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 (ESM and Fiscal Treaty, interim measures).

³¹ Art 4(8) ESM Treaty.

follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag* 's control and influence.³²

From the above it is clear that the case law of the *Bundesverfassungsgericht* gives clear indication that the possibility of EMU reform is not unlimited when it comes to the interference of the EU with national budgetary decision making (e.g. through a European treasury).

With regard to the specific issue of mutualisation of debt, it is relevant to note that the case law of the *Bundesverfassungsgericht* is often interpreted as not allowing Eurobonds under the current German constitution. Economist Münchau for example notes that:

A eurobond is, of course, a permanent mechanism. It also involves a permanent loss of control. Its size is very likely to be substantial. There would not be any point in issuing a small eurobond – it would not resolve the crisis. And unless member states were to transfer some of their sovereignty to Brussels, all the inherent risks in the structure would come from non-compliance by national governments or parliaments. In other words, a eurobond perfectly matches the conditions set by the constitutional court for an arrangement that violates the German constitution.³³

Similarly, EU lawyer Lindseth notes that

The BVerfG has made clear that control over the national debt is a core democratic prerogative of the *Bundestag*, which it cannot transfer in an open-ended and indeterminate fashion without violating the Demokratieprinzip and the “eternity clause” (Greek Bailout Decision, paras.

³² *Bundesverfassungsgericht* judgement of 18 March 2015, 2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12, para 162 and 164.

³³ This comment is from Münchau on the *Bundesverfassungsgericht* decision of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10. See Wolfgang Münchau, ‘Stop rejoicing. This was no victory for the eurozone’, *The Financial Times*, 11 September 2011.

124-7-25) More specifically, the joint-and-several liability dimension of Eurobonds would violate the Court's prohibition against unbestimmte haushaltspolitische Ermächtigungen ("indeterminate budgetary empowerments"), because they would enable other national parliaments and/or the European Parliament to add to the German national debt without specific prior authorization of the Bundestag for each debt issuance. Thus, to adopt debt-mutualization, the BVerfG would likely require a constitutional referendum under Article 146 of the Basic Law."³⁴

And again Lindseth:

"The conventional wisdom is that, for debt-Mutualization to have any chance to avoid triggering a referendum, it must be limited in time and scale, thus avoiding the BVerfG's prohibition against unbestimmte haushaltspolitische Ermächtigungen ("indeterminate budgetary empowerments."³⁵

In general, Besselink e.a. argue that:

"In Germany, the sheer size of committing its public finance to rescue operations could become an obstacle to further integration. Further integration in the field of economic, monetary and fiscal governance, as well as in the field of the own means of the Union, might transgress national constitutional limits. Nevertheless, to a certain extent national substantive constitutional sensitivities regarding new transfers of competences can be accommodated, be it only at a certain cost. (...) with respect to German constitutional identity: German constitutional identity requires that the Bundestag retains 'a formative influence on the political development in Germany'. However, that does not exclude that the relevant competences are transferred to the EU. This is possible as long as the Bundestag

³⁴ Lindseth,
http://www.mauldineconomics.com/images/uploads/overmyshoulder/Lindseth_PowerPoint_Slides.pdf,
p. 13.

³⁵ Lindseth,
http://www.mauldineconomics.com/images/uploads/overmyshoulder/Lindseth_PowerPoint_Slides.pdf,
p. 14.

'is in a position to exert a decisive influence on European decision-making procedures.' (Lisbon judgment, para. 246)"³⁶

France

In the case of France the limits to EMU reform at national constitutional level have been developed in much less detail. This does not mean they do not exist though. Constitutional amendment is required for transfers of competences that are fundamental for the exercise of national sovereignty. Besselink e.a. for example argue that:

"Moreover, in a comparative law perspective the areas covered by the referendum requirement partially cover the same ground as the 'essential conditions for the exercise of national sovereignty' in the case law of the French Constitutional Council (justice and home affairs, the currency, taxation, foreign affairs and security policy). In addition, the areas overlap to a certain extent with the areas which according to the German Constitutional Court are very sensitive for the ability of a constitutional state to democratically shape itself and which, consequently, are easily prone to infringements of German constitutional identity."³⁷

Similarly, even though the case law of the French Constitutional Council gives less detailed indications about what further reform of the euro area would be unconstitutional, that case law is nonetheless instructive:

"According to the Conseil constitutionnel, an EU (amendment) treaty is unconstitutional in case it contains a clause which (1) runs counter to the Constitution, (2) calls into question constitutionally guaranteed rights and freedoms or (3) adversely affects the fundamental conditions for the exercise of

³⁶ Besselink ea., supra, p. 38.

³⁷ Besselink e.a., supra, p. 193.

national sovereignty. (Conseil constitutionnel decision 2007-560 DC of 20 December 2007, par. 9)”³⁸

More in detail, it follows from the Constitutional Council’s decision on the Fiscal Compact that a treaty obligation to insert a balanced budget rule into the Constitution would be contrary to Articles 34 and 47 Constitution.³⁹ And it is argued that “the same would be true for a treaty giving EU institutions the competence to prescribe which measures would have to be taken by France to correct a potential deviation from the balanced budget rules in EU law.”⁴⁰

United Kingdom

Although not a member of the Eurozone, the UK is still a relevant factor in a study of conditions to reform of the Eurozone as most clearly evidenced by the combination of events leading to the adoption of the Fiscal Compact by then 25 member states of the EU outside the framework of the EU Treaties. Since UK Prime Minister Cameron at the December 2011 European Council blocked treaty reform on EMU, most of the other member states decided to resort to development outside the EU Treaties.

The UK constitution presents a number of relevant characteristics. Among them are the sovereignty of parliament, the fact that from a comparative perspective a constitutional identity review is not well developed, the existence of the recent European Union Act prescribing referendum for certain Treaty amendments,⁴¹ and the

³⁸ Besselink e.a., supra, p. 104. On the latter criterion, see Besselink e.a., p. 104-105: “(3) The third criterion regarding the scrutiny of the constitutionality of EU (amendment) treaties concerns the fundamental conditions for the exercise of national sovereignty. This is quantitatively the most important criterion. (...) In short, the transfer of competences which are fundamental for the exercise of national sovereignty is unconstitutional only if France loses grip on the exercise of the competence. The duality of the test also explains why the abandonment of competences inherent in the exercise of national sovereignty, i.e. their transfer to an independent European institution such as the European System of Central Banks (ESCB, for monetary policy) or, potentially, the European Public Prosecutor’s Office (prosecution of offences against the Union’s financial interests) is a fortiori unconstitutional.”

³⁹ Conseil constitutionnel decision 2012-653 DC of 9 August, par. 21.

⁴⁰ Besselink e.a., supra, p. 104

⁴¹ Cfr. Besselink e.a., supra, p. 193: “Moreover, in a comparative law perspective the areas covered by the referendum requirement partially cover the same ground as the ‘essential conditions for the exercise of national sovereignty’ in the case law of the French Constitutional Council (justice and home affairs, the currency, taxation, foreign affairs and security policy). In addition, the areas overlap to a certain extent with the areas which according to the German Constitutional Court are very sensitive for the ability of a constitutional state to democratically shape itself and which, consequently, are easily prone to infringements of German constitutional identity (substantive and procedural criminal law; monopoly on

most recent legislative proposal on the UK's EU referendum promised by Cameron before the end of 2017. But it is also clear in any event that the UK does not intend to participate in monetary union in the years to come, or in further integration of the euro area. Potential national constitutional hurdles could thus in theory relatively easily be overcome by not rendering euro area reform applicable to the UK.

However, even if a referendum were not required by the European Union Act because of the substance of an EU Treaty amendment carrying further euro area reform of whatever nature, the referendum promised by Cameron on EU membership will condition any further reform of the EU in the coming years. This constitutional event, consequence of a political choice by the UK Conservative Party, will condition the development of the EU, especially within the framework of the EU, as the UK is likely to link any development of the euro area to its own political demands concerning its relation to the EU. The coming referendum could present an occasion for Treaty change, a delicate issue after the debacle of the Constitutional Treaty of 2005, since PM Cameron has made it explicit that he strives for an amendment of the EU treaties to accommodate the British concerns. Clearly such treaty amendment would be necessary for an ambitious reform of EMU. But the referendum could also provide Cameron with a good reason to block reform of EMU if it were not part of a UK favourable package, e.g. concerning the relationship of the euro area with the broader internal market and the interests of the City (compare the Fiscal Compact episode).

Estonia

Estonia provides an interesting case, being very different from the above discussed member states of the Union, as it is a new member, a small one, and one that has moreover a very short history in the Eurozone. It also provides for an interesting case from a comparative perspective, as the Estonian Supreme Court has taken a very flexible approach to the ESM Treaty in light of national sovereignty.

On 12 March 2012 the Chancellor of Justice had recourse to the Supreme Court, relying on § 6(1)4) of the Constitutional Review Court Procedure Act (CRCPA), with a request to

the use of force by the police within the state and by the military towards the exterior; fundamental fiscal decisions on public revenue and public expenditure; living conditions in a social state; and decisions of particular cultural importance, such as those regarding family law and the education system."

declare Article 4(4) of the signed Treaty to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution.

In its analysis of the impact of the ESM treaty on budgetary autonomy the Estonian Court found that:

Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu*, as well as the state's financial sovereignty related thereto and the principle of a democratic state subject to the rule of law due to the possibility that at the request of the ESM the callable capital must be paid in the future (up to 1 153.2 million euros).⁴²

Nonetheless, the Estonian Supreme Court found that the emergency voting procedure of article 4(4) ESM is not in violation of the Estonian Constitution:

The purpose of Article 4(4) of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. The financial instability and closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is a part of the euro area. Economic and financial stability is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4(4) of the Treaty is justified by substantial constitutional values – the need arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.⁴³

The different approach of the German constitutional court and of the Estonian Supreme Court towards the compatibility of the possibility of being outvoted under the ESM

⁴² Estonian Supreme Court Judgment of 12.07.2012 No. 3-4-1-6-12, para 206. For more information about this Judgment see the Country Report on Estonia by Marja-Liisa Laatsit part of the 'Constitutional Change through Euro Crisis Law' project of the EUI Law Department, available at <eurocrisislaw.eui.eu>. For an analysis see Carri Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty' (2013) EuConst 335.

⁴³ Estonian Supreme Court Judgment of 12.07.2012 No. 3-4-1-6-12, para 208.

Treaty with the national constitution is striking. What can we learn from this case in comparative perspective?