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**THE INVOLVEMENT OF NATIONAL
PARLIAMENTS IN THE CURRENT ESM AND THE
POSSIBLE FUTURE EMF**

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ABSTRACT

This working paper goes into the involvement of two national parliaments, the Dutch and the German, in the European Stability Mechanism (ESM), which was created during the Euro crisis to grant financial assistance to member states of the Eurozone that have financial difficulties. Based on a different interpretation of the so-called power of the purse, both parliaments have a very different position with regard to the ESM. The role of both parliaments is set out in this working paper, and the question is answered what the recent plans of the European Commission to transform the ESM to an European Monetary Fund (EMF) change about this. This working paper concludes that, although the European Commission emphasizes the importance of democratic accountability of the EMF, the involvement of national parliaments in the EMF gets weaker compared to their current role in the ESM, which is also not compensated by a stronger position of the European Parliament.

Keywords: *ESM, EMF, National Parliaments, Power of the purse, Parliamentary oversight*

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TABLE OF CONTENTS

1. INTRODUCTION	1
2. RESEARCH SO FAR	1
3. THE INSTITUTIONAL SHAPING OF THE ESM	3
4. THE DUTCH PARLIAMENT AND THE ESM	4
5. THE GERMAN PARLIAMENT AND THE ESM	7
5.1 The content of the ESMFinG	7
5.2 The German constitution and European integration	8
5.3 Democracy and the German Constitutional Court	9
6. COMPARISON	11
7. THE EUROPEAN MONETARY FUND	13
8. CONCLUSION	16
BIBLIOGRAPHY	17

1. INTRODUCTION

At the end of 2017, the European Commission proposed several initiatives for deepening the economic and monetary union (EMU). One of these plans was aimed at the introduction of a so-called European Monetary Fund (EMF). An EMF would come in the place of the European Stability Mechanism (ESM), which was established in 2012 during the heat of the Euro crisis, after some temporary forerunners. The aim of the ESM and of the possible future EMF is to grant financial support to member states of the Eurozone that no longer have sufficient access to the financial markets.

The financial resources that are available for the current ESM and the possible future EMF come from the national member states. They are collected through national taxes. Normally, national parliaments themselves decide about the expenses that are made possible by those taxes. The so-called power of the purse gives national parliaments the right to decide on revenues and expenses. It is therefore interesting to see what the role of national parliaments is with regard to the ESM, and what the introduction of a possible EMF would change about this involvement of national parliaments.

The ESM was part of a wider European response to the Euro crisis, which further mainly consisted of the so-called “six-pack”, “two-pack” and the Treaty on Stability, Coordination and Governance in the EMU. Although there has been quite some attention for the consequences of these different measures for the role of national parliaments, for the role of the European Parliament, and for the relationship between national parliaments and the European Parliament, some elements are still underexposed. This working paper first looks into the research that has been done about the involvement of national parliaments and European crisis measures (par. 2). This paragraph shows that the involvement of national parliaments in the ESM has not received the attention it deserves. The institutional framework of the ESM is then discussed (par. 3), which forms the foundation for looking into the involvement of two national parliaments, the Dutch (par. 4) and the German (par. 5), in the ESM. Both parliaments have a very different position when it comes to the financial aid that can be given from the ESM to a Eurozone member state. This different position is based on a different interpretation of the so-called power of the purse of both parliaments, as will be explained in the following (par. 6). This working paper then turns to the initiative of the European Commission for establishing an EMF and shows what the consequences of the introduction of an EMF according to these plans would be for the position of national parliaments (par. 7).

2. RESEARCH SO FAR

The relationship between European crisis measures and national parliaments has received quite some attention from scholars in recent years. Among other things, studies have been conducted about the diversity of domestic parliamentary procedures related to the European Semester. This European calendar for the drafting and adoption of the yearly budget in the different member states is based on the six-pack and aims at coordinating national economic policies. Part of the European Semester are the Annual Growth Survey (AGS), the Stability and

Convergence Programmes (SCP), the National Reform Programmes (NRP) and the Country-Specific Recommendations (CSR). Both programmes (the SCP and the NRP) are sent from the member states to the European Commission and the Council, which issue the recommendations (CSR) on the basis of the AGS.

The idea of the European Semester is that via this method of coordination European institutions try to adjust budgets of member states that do not conduct sound economic policy. At the same time, however, one of the most important rights of national parliaments is its before-mentioned power of the purse. This right to control the national budget gives parliaments a say in the distribution of public finances. The power of the purse lies at the heart of the idea of democracy, because politicians can carry out their ideas through affecting yearly budgets. With these budgetary powers of national parliaments in mind, one can question the effect of the European Semester on the position of parliaments to shape economic policies. Because within the European Semester, not so much the national parliaments, but especially the European institutions try to influence the national budgets.

Therefore it is interesting to see what the position of national parliaments is in relation to the European Semester. Research has shown that national parliaments can deal with the European Semester in a very different way. In about a third of the European national parliaments, procedures have changed, to adopt to the European Semester or to incorporate the Semester into the annual national budget cycle.¹ In other national parliaments, the European Semester is integrated into existing structures. Furthermore, a distinction can be made between firstly solely informing parliament about the AGS, the SCP, the NRP and the CSR, secondly organizing a debate about (some of) these key points of the European Semester, which can be done either in committees or in a plenary debate, and thirdly voting about (some of) these main steps of the European Semester.² For example, some parliaments have enforced the right to agree with the SCP and the NRP. Moreover, informing parliament about the course of the European Semester and discussing some of the elements of the Semester can take place before information is sent to European institutions (*ex ante*) or after (*ex post*).³ Also, the amount of information that is given to national parliaments by governments about the functioning of the European Semester can differ.

What is also important for the budgetary powers of national parliaments, next to the before-mentioned differences between the role of these parliaments in relation to the European Semester, is the extent to which the CSR are executed. If the effectiveness of these recommendations is low, which has been the case in practice, then apparently there is a lot of room for national parliaments to make their own budgetary decisions.⁴ The European recommendations, although they are meant to coordinate economic policies of the member states, turn out to not have a large effect on the national budgets.

An element that is also of interest for the position of national parliaments with regard to the European crisis measures that have been taken, is the role that these parliaments play when it comes to the ESM. Where the aspects mentioned above have been the topic of ongoing research,

¹ Rittberger and Winzen (2015), p. 437; COSAC (2013), p. 19.

² Raimla (2017).

³ Kreilinger (2016), p. 33.

⁴ Maatsch (2017), p. 193-195; Deroos and Griesse (2014); Darvas and Leandro (2015), p. 10-15; Hagelstam et al. (2016); Kreilinger (2016), p. 44-46; Zoppè and Copeland (2017), p. 9.

the relationship between national parliaments and the ESM has received only little attention.⁵ Because the activities of the ESM have significant financial consequences, this mechanism is (also) of great importance for the budgetary powers of national parliaments. It is therefore interesting to see how the relationship between some of these parliaments and the ESM has been constructed.

In the following I make a comparison between the involvement of the Dutch and the German parliament in the ESM. Both the Netherlands and Germany have a parliamentary system. According to previous research, the Dutch and German parliament score similarly on the general strength of parliamentary budgetary powers.⁶ They are therefore, despite important differences between the two legal systems, in that sense, comparable. At the same time, however, there are important differences between the Dutch and the German parliament with regard to the use of the ESM, as will be explained hereafter.⁷ The next section first looks into the background and institutional shaping of the ESM, before delving into the involvement of both parliaments in the ESM.

3. THE INSTITUTIONAL SHAPING OF THE ESM

The current text of the ESM Treaty was established in 2012.⁸ The purpose of the ESM is to grant financial assistance to Eurozone countries in difficulties, subject to stringent conditions. This has to be necessary for the financial stability of the Eurozone and its member states.⁹ To be able to do so, the ESM holds a so-called authorised capital stock of around 700 billion euro.¹⁰ This authorised capital stock is divided into paid-in shares and callable shares.¹¹ At the start of the ESM the members of the Eurozone have deposited 80 billion euro, the rest can be requested from these member states.¹² The distribution of contributions to the ESM, for both the paid-in shares as the callable shares, from the Euro area members, is laid down in the so-called contribution key. This contribution key is based on the capital invested in the European Central Bank (ECB).¹³

The governance of the ESM takes place within the Board of Governors.¹⁴ Each member of the ESM appoints a governor, who is part of the government of that member state and who is responsible for finance.¹⁵ So in practice the Board of Governors consists of the Ministers of Finance of the countries that are part of the ESM.

The Board of Governors decides, among other things, on granting financial assistance from the ESM to a Eurozone member and on capital calls.¹⁶ Decisions within the Board of Governors can be taken in three different ways: by mutual agreement (unanimity), by qualified majority or by

⁵ See mainly: Höing (2015); Höing (2012).

⁶ Wehner (2006), p. 777.

⁷ Höing (2015) comes to a somewhat different conclusion when it comes to the Netherlands, see p. 52, 58.

⁸ See for the text of the ESM Treaty: <https://www.esm.europa.eu/legal-documents/esm-treaty>.

⁹ Article 3 ESM Treaty.

¹⁰ Article 8 ESM Treaty.

¹¹ Article 8, par. 2, ESM Treaty.

¹² Article 8, par. 2 and 4, and article 9 ESM Treaty.

¹³ Article 11, par. 1, ESM Treaty. The contribution key is shown in Annex I and II of the ESM Treaty.

¹⁴ Article 4, par. 1, ESM Treaty.

¹⁵ Article 5, par. 1, ESM Treaty.

¹⁶ Article 5, par. 6, c and f, ESM Treaty.

simple majority.¹⁷ When a qualified majority is provided, eighty percent of the votes needs to be in favour of that decision.¹⁸ A quorum of two-thirds of the voting members representing at least two-thirds of the voting rights must be present for all decisions.¹⁹ The voting rights of the member states are based on their inlay in the ESM and therefore on the capital invested in the ECB.²⁰ The Netherlands has a percentage of 5,6781 of the votes, and Germany 26,9616.²¹

The ESM Treaty decides which decision-making procedure has to be followed when.²² Deciding by unanimity is normally prescribed for giving financial support or requesting callable shares from the member states.²³ The ESM Treaty however also makes an emergency voting procedure possible, in case that a failure to urgently adopt a decision to grant financial assistance would threaten the economic and financial sustainability of the euro area.²⁴ Whether or not this is the case, is decided by the European Commission and the ECB. When the emergency voting procedure is followed, financial assistance can be given when 85 percent of the total votes is in favour.²⁵ Most countries then do no longer have a veto, because their voting rights are less than 15 percent. Only Germany, France and Italy can individually uphold a decision to grant financial assistance in the emergency voting procedure.

When the Board of Governors has decided to grant financial assistance, the European Commission, the ECB and the International Monetary Fund (IMF) are going to negotiate with the member state in question about a so-called memorandum of understanding.²⁶ This entails the conditions for the support, which can be given in different forms.²⁷ According to the ESM Treaty, the Board of Governors may review the list of financial assistance instruments and can decide to make changes to it.²⁸ This decision has to be made unanimously.²⁹

The ESM Treaty has been the subject of fierce debate among legal scholars, mainly about its compatibility with EU law.³⁰ It has also led to several legal disputes before the European Court of Justice.³¹ The Court, however, so far approved the basic structure of the ESM and its functioning.

4. THE DUTCH PARLIAMENT AND THE ESM

Because the ESM Treaty is an intergovernmental agreement, parliamentary approval was necessary in the Netherlands as well as in Germany. During the parliamentary debate in the

¹⁷ Article 4, par. 2, ESM Treaty.

¹⁸ Article 4, par. 5, ESM Treaty.

¹⁹ Article 4, par. 2, ESM Treaty.

²⁰ Article 4, par. 7, and article 11, par. 1, ESM Treaty.

²¹ See Annex I of the ESM Treaty.

²² Article 5, par. 6 and 7, and article 6, par. 5, ESM Treaty.

²³ Article 5, par. 6, c en f, ESM Treaty.

²⁴ Article 4, par. 4, ESM Treaty.

²⁵ Article 4, par. 4, ESM Treaty.

²⁶ Article 13, par. 3, ESM Treaty.

²⁷ Article 14 - 18 ESM Treaty.

²⁸ Article 19 ESM Treaty.

²⁹ Article 5, par. 6, i, ESM Treaty.

³⁰ See: Hinarejos (2015), p. 121-136.

³¹ Case C-370/12, Pringle v Ireland, ECLI:EU:C:2012:756; Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising Ltd and Others v European Commission and ECB, ECLI:EU:C:2016:701.

Netherlands, the involvement of parliament in the ESM was an important topic of discussion. This involvement is rather ambiguous and mainly laid down in a so-called information protocol. Although the Minister of Finance of that time had already suggested to establish such a protocol in reaction to the temporary forerunners of the ESM, this did not happen until after parliament had approved the ESM Treaty.

The information protocol about the parliamentary involvement in the ESM was set out in a letter of the Minister of Finance to the Lower House.³² The protocol has a weak judicial status, because it is a policy paper and therefore judicially not binding. At every moment, the government or parliament could decide to not follow the protocol. Also, future Finance Ministers and governments are not bound to act according to the protocol.

The most recent version of the information protocol was discussed in a joint debate of the committees of Finance and European Affairs that took place in January 2015.³³ Eight members of the Lower House were actually present and implicitly agreed with the protocol.

Different aspects of the parliamentary involvement in the ESM can be distinguished in the information protocol. Firstly, there is the position of parliament when financial assistance is granted to one of the members of the ESM. The protocol calls it ‘desirable’ that the Dutch government and the Lower House have a debate about this, looking at the amount of aid that usually is involved.³⁴ The protocol does not state that parliament should agree with the aid that is being discussed nor with the conditions for that aid that are laid down in the memorandum of understanding. Therefore, the protocol does not give parliament a right of assent for granting financial support from the ESM.

At the same time, government is, because of the parliamentary system in the Netherlands, based on a majority in parliament and the Lower House can decide to issue a vote of no-confidence against a minister. It is therefore difficult to image a Minister of Finance agreeing with financial assistance in the Board of Governors, if he does not have the support of (the majority of) parliament. The position of parliament in this sense is, as said, ambiguous. At the same time, a formal right to assent is clearly not given to parliament, because the information protocol only calls it desirable that a debate should take place about the intention to grant financial assistance.

The information protocol also discusses the emergency voting procedure.³⁵ In that case, the Dutch representative in the Board of Governors cannot stop the granting of financial assistance because the Netherlands have less than 15 percent of the voting rights and a decision in the emergency voting procedure is taken with 85 percent of the votes. Therefore, also in that case the Dutch parliament does not have the possibility to prevent financial support from happening.

Next to granting support, via the regular or the emergency voting procedure, and negotiating the conditions for that financial aid, there are at least two other ways in which parliament can play a role when it comes to the ESM. The most recent version of the information protocol does not say anything about both options. First of all, the protocol does not mention the request of callable shares. This decision, which is taken by unanimity by the Board of Governors as explained above, is not discussed in the protocol. It apparently assumes that, because parliament

³² *Kamerstukken II* 2014/15, 21501-07, 1217.

³³ *Kamerstukken II* 2014/15, 21501-07, 1242.

³⁴ *Kamerstukken II* 2014/15, 21501-07, 1217, p. 3-4.

³⁵ *Kamerstukken II* 2014/15, 21501-07, 1217, p. 4.

agreed with the ESM Treaty and therefore with the total contributions to the ESM, it does not have a direct say in the way the Dutch Minister of Finance votes in the Board of Governors.

On the other hand, a request of callable shares does have an impact on the yearly national budget. Therefore, an adjustment of the national budget in the form of a law is necessary, which parliament has to agree. But, even if parliament would vote against this adjustment, it then would still have to comply with the ESM Treaty, according to which shares have to be delivered whenever they are correctly asked for by the Board of Governors. The absence of a budget item has in that sense no external effect. So, even in this case, there is a treaty obligation to make the deposit and to deliver the requested callable shares. Therefore, the adjustment of the national budget that is necessary in case of a request for callable shares, also does not give parliament a right of assent.

Secondly, the information protocol does not regulate anything about the role of parliament when it comes to changing the instruments of the ESM. The ESM Treaty now sums up different ways in which financial assistance can be given. The Board of Governors may review this list of financial assistance instruments and can unanimously decide to make changes to it, as discussed above. Apparently, the Dutch national parliament does not play a role when it comes to changing these ESM-instruments.

The position of the Dutch parliament regarding the ESM is, based on the above, rather weak and ambiguous.³⁶ In none of the different aspects of parliamentary involvement in the ESM does parliament have a right of assent, whether it comes to granting financial assistance (in the regular or in the emergency voting procedure), to negotiating the conditions for that support, to requesting callable shares or to changing the instruments of the ESM. The information protocol that has been set up after parliament approved the ESM Treaty states that it is 'desirable' that the Dutch government and the Lower House have a debate about the granting of assistance, but parliament does not have to approve this support. Because of the parliamentary system in the Netherlands, the Dutch Minister of Finance will try to get a majority of parliament behind his vote, but he can agree with granting support in the Board of Governors, without parliamentary approval, although this could result in a vote of no-confidence.

This somewhat unclear position of parliament with regard to the ESM was illustrated during debates about a third round of financial assistance for Greece in July and August of 2015. After a political agreement to grant assistance, the Dutch Prime Minister Mark Rutte and the Minister of Finance Jeroen Dijsselbloem held a consultation with the committees for Finance and European Affairs about the events. In response to questions about the position of parliament in approving the financial support, the Prime Minister claimed that the government did not ask for parliamentary approval, because the information protocol did not provide for that.³⁷ Both the Prime Minister as the Minister of Finance did – wrongfully – state, however, that the government should ask for approval when the matching memorandum of understanding would be signed, which had not happened at that moment.³⁸ Strangely enough, none of the attending members of parliament pointed out to the Prime Minister and the Minister of Finance that parliament does not have a right of assent according to the information protocol when it comes to decisions regarding

³⁶ See for a different conclusion: Höing (2015), p. 52, 58.

³⁷ *Kamerstukken II 2014/15, 21501-07, 1291, p. 25.*

³⁸ *Kamerstukken II 2014/15, 21501-07, 1291, p. 25, 36, 49, 61.*

the granting of financial assistance, whether or not an agreement is reached over the memorandum of understanding. The familiarity with the information protocol therefore seems to be limited.

During a subsequent debate, the Prime Minister – although not explicitly – correctly recalled his previous statements. When a resolution was brought forward by a political party in which the Lower House was asked to pronounce its support for the third round of assistance to Greece, the Prime Minister called this motion redundant, because parliament does not have a right of assent when it comes to the decision of the Board of Governors of the ESM to grant financial assistance.³⁹ Parliament therefore is only informed about this decision. It can of course discuss this decision with representatives of government, and it can issue a vote of no-confidence when a decision is taken that does not have the support of parliament, but it cannot prevent this decision from being taken.

5. THE GERMAN PARLIAMENT AND THE ESM

The German parliament has a very different position than the Dutch when it comes to the ESM.⁴⁰ This is based on a different interpretation of the power of the purse of both parliaments, as will be explained hereafter. The involvement of the German parliament in the ESM is laid down in German law, in the so-called *Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus* (ESMFinG).⁴¹ In the following, I will firstly discuss the content of this law. This law builds upon the famous case law of the German Constitutional Court (*Bundesverfassungsgericht*) about European integration, which is based on specific characteristics of the German constitution. Both aspects will be discussed as far as needed in the following.

5.1 The content of the ESMFinG

The first article of the ESMFinG regulates the financial consequences of the ESM for Germany. The ESM Treaty obligates Germany to deposit over 21,7 billion to the ESM and to have approximately 168,3 billion available as authorised unpaid capital. Article 4 is one of the main provisions of the ESMFinG. It states in the first paragraph that the German *Bundestag* needs to discuss in the plenary ESM-matters that concern “the overall budgetary responsibility” of that chamber. If this is the case, then the *Bundestag* has to agree with that decision.

The overall budgetary responsibility can be affected in at least three different ways. Firstly, a decision to grant financial assistance is part of the overall budgetary responsibility of the *Bundestag*. Secondly, this is the case when the conditions for that support are laid down in a memorandum of understanding. Lastly, also changing the authorised capital and the maximum lending volume are seen as impacting the overall budgetary responsibility of the *Bundestag*. The *Bundestag* therefore needs to approve all of these decisions beforehand.

Next to this provision regarding the position of the *Bundestag* as a whole, the ESMFinG also contains clauses about the participation of the Budget Committee of the *Bundestag*, and of the so-called Special Panel within this Committee. The Budget Committee has a right of assent when

³⁹ *Kamerstukken II* 2014/15, 21501-07, 1299; *Handelingen II* 2014/15, 105, 5, p. 41.

⁴⁰ See differently: Höing (2015), p. 58.

⁴¹ BGBl. I 2012, no. 43, p. 1918 (13 September 2012).

it comes to for example capital calls.⁴² Also, the Federal Government needs to ask for the opinion of the Budget Committee and give consideration to it when a decision is taken about the payment of individual tranches of already agreed stability support.⁴³ The Special Panel of the Budget Committee may exercise the rights described above in the case of particular confidentiality.⁴⁴ The ESMFinG also contains an extensive provision about the information rights of the *Bundestag* and the *Bundesrat*.⁴⁵

With the ESMFinG, the *Bundestag* realized a strong position with regard to its involvement in the ESM. Every use of the ESM needs approval of the *Bundestag*. It has therefore agreed with support from the ESM to Spain, Cyprus and Greece.⁴⁶ And not only the granting of support, but also the conditions for that support need permission from the *Bundestag*. In this way, the *Bundestag* made sure that the Federal Government did not get too much freedom in the use of the ESM.

5.2 The German constitution and European integration

Important in this context is the case law of the *Bundesverfassungsgericht* about European integration. The German Constitutional Court has outlined in different judgements that there are legal boundaries to the process of European integration. This case law is based on different articles in the German constitution (*Grundgesetz*, GG). Article 20 GG is central for this and contains the so-called democracy principle, which states that Germany is a democratic and social federal state. The democratic and federal form of government are constitutional principles which do not only decide the way in which the German legal system is established, but also form a framework for the interpretation of other provisions of the constitution.⁴⁷ These constitutional principles therefore comprise the core of the German constitution (the so-called *Verfassungsidentität*).⁴⁸

The second paragraph of article 20 protects the idea of popular sovereignty, that is closely related to the democracy principle.⁴⁹ According to this provision, all state authority is derived from the people. This does not mean that the people actually exercise state authority. This is done through elections in which they choose representatives of their liking. This shows the link between article 20 and article 38 GG, which contains the right to vote.⁵⁰ So, through elections the idea of popular sovereignty gets meaning.

A third important provision for the case law of the German Constitutional Court about European integration is article 79 GG. The third paragraph of this clause gives a special protection to the democracy principle. It states that amendments to the constitution that affect, among other things, the core constitutional principles of article 20 GG are inadmissible. Therefore, parliament and the Federal Government are not allowed to make any changes to the democracy principle of

⁴² Article 5, par. 2, 2, ESMFinG.

⁴³ Article 5, par. 3, ESMFinG.

⁴⁴ Article 6 ESMFinG.

⁴⁵ Article 7 ESMFinG.

⁴⁶ BT Drs. 17/10320, 17/10321 (Spain); BT Drs. 17/13060 (Cyprus); BT Drs. 18/5590 (Greece).

⁴⁷ Katz (2010), p. 68.

⁴⁸ Von Münch and Mager (2016), p. 34

⁴⁹ Sachs (2014), p. 806.

⁵⁰ Von Münch and Mager (2016), p. 38.

article 20 GG. So, the German constitution does not only contain this principle, but also offers special guarantees for its preservation.⁵¹

A last provision of the German constitution that should be mentioned here is article 23 GG. This provision was introduced in the *Grundgesetz* after the signing of the Treaty of Maastricht in 1992.⁵² With this article, the European Union (EU) was given a prominent place in the German constitution. It states in the first paragraph, inter alia, that Germany shall participate in the development of the EU “that is committed to democratic [...] principles”. This obligation to contribute to the development of the EU is also called the *Integrationsverantwortung*.⁵³ This responsibility, however, has its boundaries, because parliament and the Federal Government are not allowed to provide for an EU that breaches the principle of democracy. As part of the *Integrationsverantwortung* the *Bundestag* needs to protect these boundaries to European integration.⁵⁴

The above shows that the democracy principle holds a special place in the German constitution. Together with other fundamental constitutional principles, it is laid down in article 20 GG and forms a framework for interpreting other articles of the *Grundgesetz*. Moreover, it cannot be changed by the Federal Government and parliament according to article 79, third paragraph, GG. Finally, on the basis of article 23, first paragraph, it forms one of the limits for the development of the EU. The principle of popular sovereignty and the right to vote are closely related to the principle of democracy. The German response to various steps of European integration must be placed against the background of this constitutional framework.

5.3 Democracy and the German Constitutional Court

In various judgments related to European integration, the German Constitutional Court had to give an interpretation to the democracy principle as laid down in the *Grundgesetz*. In the case about the Maastricht Treaty,⁵⁵ one of the complainants argued that the right to vote of article 38 GG was violated.⁵⁶ According to the complainant, this provision did not only protect the right to cast a vote during elections, but also the right to participate in the legitimation of state authority and to influence the way it is exercised. The act of voting would lose its meaning if the *Bundestag* did not have sufficient responsibilities and competences. This would violate article 38 (the right to vote), 20 (the democracy principle) and 79, third paragraph, GG (eternity clause). Although the German Constitutional Court decided in its Maastricht-decision that those articles are not violated because the *Bundestag* still has enough responsibilities, also after the Treaty of Maastricht, it turned out to be convinced by the core of this reasoning that the right to vote involves that people should be able to influence the exercise of state authority.⁵⁷ As such, there is a limit to the transfer of competences from the national level to the European level. There has to be a *lebendige*

⁵¹ Sodan (2015), p. 517; Degenhart (2016), p. 7; Sachs (2014), p. 1632.

⁵² Sachs (2014), p. 937.

⁵³ Von Münch and Mager (2016), p. 43; Jarass and Pieroth (2016), p. 610; Pechstein (2012); Nettessheim (2010).

⁵⁴ Pernice (2017), p. 120.

⁵⁵ BVerfGE 89, 155 (12 October 1993).

⁵⁶ BVerfGE 89, 165.

⁵⁷ BVerfGE 89, 182, 171-172. This explanation of article 38 GG came as a surprise to some, see for example: Bieber (1993). See for a critical response to this interpretation of article 38 GG: Gassner (1995). See also: Cremer (1995); Murswiek (2010a); Schönberger (2010); Murswiek (2010b).

Demokratie (living democracy) at the national level.⁵⁸ Therefore, with every new step of European integration the question was raised what would be the effect of that on the responsibilities of the *Bundestag*.

In its *Lissabon*-decision,⁵⁹ the German Constitutional Court went a little further by appointing different areas that had to remain the responsibility of the *Bundestag*. Although the Court emphasized that the democracy principle does not require “a pre-determined number or certain types of sovereign rights [... to] remain in the hands of the state”, it did enumerate, a few paragraphs further, areas that were, in the view of the Court, essential for the political formation of citizens’ living conditions.⁶⁰ One of these areas were the fundamental fiscal decisions about public revenues and public expenditures. Those should be made at the national level, according to the German Constitutional Court because they require a general policy debate that citizens should be able to influence. In the *Lisbon*-judgement, the Court already stated that not every European or international obligation that has an effect on the budget endangers the democracy principle.⁶¹ Decisive, however, is that “the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German *Bundestag*”.⁶²

The *Lisbon*-judgement dates from 2009. At that moment, the Euro crisis was about to fully break out. In the period that followed, the German Constitutional Court had to decide in several judgements whether the measures that were taken by the member states did not infringe its previous statement that the so-called power of the purse should remain with the *Bundestag*. The Court therefore had to elaborate on the constitutional boundaries of European cooperation in the field of budgetary affairs.

In this context, the Court repeated that the democracy principle would be violated if the *Bundestag* would give up the responsibility for the budget.⁶³ It is therefore not possible, because of the German constitution, to hand over the power of the purse to the European level. This also means that the *Bundestag* cannot transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations.⁶⁴ The financial effects of any mechanism or measure that is agreed on, must be clear in advance. In reaction to the funds that were set up during the Euro crisis to grant financial support to Eurozone member states, the Court emphasized that every large-scale measure of aid must be specifically approved by the *Bundestag*.⁶⁵ Also, there had to be sufficient parliamentary influence on the manner in which the funds made available are dealt with.⁶⁶ It would be a violation of the principle of democracy if the budget autonomy of the *Bundestag* were, at least for an appreciable period of time, to be not merely restricted but effectively fail.⁶⁷

The ESMFinG was introduced against this background. The German Constitutional Court had, at the moment of introducing the law, given its judgment about the first aid measures that were taken during the crisis, such as the financial assistance to Greece and the so-called European

⁵⁸ BVerfGE 89, 186.

⁵⁹ BVerfGE 123, 267 (30 June 2009).

⁶⁰ BVerfGE 123, 357-359.

⁶¹ BVerfGE 123, 361.

⁶² BVerfGE 123, 362.

⁶³ For example: BVerfGE 129, 124 (7 September 2011), 177.

⁶⁴ BVerfGE 129, 179.

⁶⁵ BVerfGE 129, 180; BVerfGE 130, 318 (28 February 2012), 345.

⁶⁶ BVerfGE 129, 180-181.

⁶⁷ BVerfGE 129, 183.

Facility Stability Fund (EFSF).⁶⁸ With that, the contours of the framework that the Court used to review these measures, were therefore becoming clear. Based on the democracy principle as laid down in the German constitution, the power of the purse of the German *Bundestag* is protected in sufficient manner with the ESMFinG because it states that the *Bundestag* needs to approve every use of the ESM. Also, the *Bundestag* maintains influence on the way the fund is used, because it needs to approve the conditions for granting financial support as laid down in a memorandum of understanding. Because of the way the ESMFinG is shaped, the power of the purse of the *Bundestag* is not handed over to another actor. The *Bundestag* therefore remains the place where important budgetary and policy decisions are taken. For that reason, the German Constitutional Court largely upheld the ESMFinG in its ESM-decisions.⁶⁹

6. COMPARISON

The previous shows that the Dutch parliament and the German *Bundestag* have a very different position when it comes to the ESM. This is based on a different interpretation of the power of the purse in both countries. The Dutch Constitution states in article 105 that the annual national budget must be adopted by Act of Parliament. This provision therefore does not literally protect the fact that parliament has to have a say in the distribution of public finances. It does not offer a norm for the involvement of parliament in the ESM. Whether parliament simply has to approve the total amount that is transferred from the national level to the ESM, which can be decided over by the Board of Governors without further support from both Chambers, or whether parliament should agree with every use of the ESM, does not follow from the Dutch Constitution or any other national budgetary legislation.

The German Constitution and the interpretation thereof of both the German Constitutional Court and the *Bundestag* itself offer a more substantive elaboration of the power of the purse. Although article 110 of the German *Grundgesetz* is very similar to article 105 of the Dutch Constitution in that it states, in the second paragraph, that the budget shall be set forth in a law enacted before the beginning of the first year, it is also filled in by the other provisions of the German Constitution that are discussed above. According to this view, the power of the purse would be violated if the *Bundestag* would not have an actual say in the use of ESM. The democracy principle and the special protection thereof in the German Constitution make it impossible for the *Bundestag* to transfer its budgetary powers to another actor, such as European institutions. The *Bundestag* needs to be responsible for important budgetary decisions because otherwise the idea of democracy would be violated.

The discussion of the involvement of the Dutch and German parliament in the ESM shows that this different interpretation of the power of the purse actually leads to different position of national parliaments. Although the ESM Treaty, which is signed by the Netherlands and Germany, is the same for both countries, the consequences thereof for both national parliaments are not.

⁶⁸ BVerfGE 129, 124 (7 September 2011).

⁶⁹ BVerfGE 132, 195 (12 September 2012); BVerfGE 135, 317 (18 March 2014). The Court did, however, among other things, demand a declaration from the member states in which they state that the payment obligations for Germany are limited to over 190 billion euro (BVerfGE 132, 256-257). This way, the Court underlined the idea that budgetary authorisations should be precise and limited.

These differences in the interpretation of the power of the purse can be explained by the characteristics of each Constitution and its resulting contrasts in constitutional law and organisation of the state. The German Constitutional Court, which does not have a counterpart in the Netherlands, plays an important role in the more substantive interpretation of the power of the purse in Germany. This does not mean, however, that these differences are compelling. The Dutch parliament could have initiated a law just like the German ESMFinG, and enforced a right of consent for the use of the ESM. It decided, however, that it wanted to accept this limit to the power of the purse and leave room for a more efficient European collaboration.

This shows the advantages and disadvantages of both ways of looking at the power of the purse. A more substantive interpretation clearly does more justice to the place of a national parliament in a democratic state. The reasoning of the German Constitutional Court, that certain significant rights, such as the power of the purse, should remain in the hands of the *Bundestag*, because people should be able to influence essential decisions for elections to have effect, makes sense. The Dutch interpretation of the power of the purse makes it possible to fully transfer this right to European institutions, with or without a role for the European Parliament, as long as the Dutch parliament keeps on adopting the budget. The power of the purse can then easily lose its meaning.

Still, a more substantive interpretation of the power of the purse also has some important disadvantages. Firstly, the stronger position of a national parliament as a result of a more substantive interpretation of its budgetary powers can hinder European cooperation. If every member state would interpret its power of the purse in the way the *Bundestag* has, then it is questionable whether the same European arrangements would have been possible. Would the ESM then be viable? This fund can now be used very quickly, which is necessary for achieving its goal: offering financial support for member states in difficulties, when the financial stability of the Eurozone and its member states asks for that. The situations in which the ESM is used, by definition require fast decision-making. This seems difficult to unite with a right of consent for every national parliament of the member states of the Eurozone. At the same time, looking at the financial obligations that are at stake, it is important to pay attention to the due diligence and care of those decisions.

A second disadvantage of this more substantive interpretation of the power of the purse is that it is difficult to limit this meaning. With this interpretation, it is not possible to hand over the budgetary powers of parliament to another actor. But at what moment would that (practically) be the case? For example, during proceedings for the German Constitutional Court about some of the crisis measures that were taken, complainants argued that the *Bundestag* had practically abandoned its power of the purse by agreeing with guarantees that were worth more than half of the federal budget.⁷⁰ With this more substantive interpretation, the question rises whether it is possible to limit the power of the purse in such a numerical way. The German Constitutional Court refused to do so, and stated that this does not mean that the budgetary powers of the *Bundestag* are handed over.⁷¹ A violation of the principle of democracy would only arise if the budget autonomy of the *Bundestag* were, at least for an appreciable period of time, to be not merely restricted but effectively fail. When this is exactly the case is, however, still not fully clear.

⁷⁰ BVerfGE 129, 184.

⁷¹ BVerfGE 129, 184.

7. THE EUROPEAN MONETARY FUND

There is a good chance that the ESM will be replaced by a European Monetary Fund in the near future. Based on, among other things, the Five Presidents' Report of June 2015, the European Commission proposed a regulation to do so at the beginning of December 2017.⁷² This proposal is part of a wider package of initiatives to strengthen the EMU.⁷³ This also includes, for example, proposals for a European Minister of Economy and Finance, new budgetary instruments for the euro area and the integration of the Treaty on Stability, Coordination and Governance in the EMU into the Union legal framework.

The European Commission stresses that the current financial and institutional structures of the ESM are essentially preserved in its proposal for the transformation of this mechanism to an EMF. The aim of both institutions is the same, namely providing financial stability support to member states in need.

The proposal for an EMF does, however, in the words of the European Commission “add a limited number of new features”.⁷⁴ One of these features are the rules about voting rights. The explanatory memorandum states that “[i]t is proposed to keep unanimity voting for all major decisions with financial impact (e.g. capital calls)”.⁷⁵

This is followed, however, by the remark that “reinforced qualified majority, in which 85% of the votes are required, is proposed for specific decisions on stability support [...]”.⁷⁶ That means that a decision to grant financial support, that within the ESM is now taken by unanimity in the regular proceeding, will in the future EMF be taken with a qualified majority of 85 percent of the votes. Countries like the Netherlands will then no longer have a veto. Within the ESM, this is only the case when the emergency voting procedure is applied, which can be the case if a failure to urgently adopt a decision to grant financial assistance would threaten the economic and financial sustainability of the euro area. So, although the European Commission emphasizes that the institutional structure of the ESM is largely preserved and the proposal only adds limited features, in my view, it changes a crucial aspect of the decision-making process.

In the proposal for the transformation of the ESM to an EMF, the European Commission stresses that a simplification of decision-making procedures is necessary. The explanatory memorandum states in this regard:

“Experience has shown that it is difficult and cumbersome to articulate a collective action of the Member States with the competences of economic policy coordination conferred on the Union. More generally, the coexistence of the Union institutions and of a permanent intergovernmental mechanism such as the ESM generates a complex landscape where judicial protection, respect of fundamental rights and democratic accountability are fragmented and unevenly implemented. Furthermore, the decision-making process under

⁷² COM(2017) 827 final.

⁷³ COM(2017) 821 final.

⁷⁴ COM(2017) 827 final, p. 6.

⁷⁵ COM(2017) 827 final, p. 6.

⁷⁶ COM(2017) 827 final, p. 6.

an intergovernmental method usually requires cumbersome national procedures and is therefore often difficult to reconcile with the speed needed for ensuring an effective crisis management [...]. This also extends to the adaptation of actions to new circumstances. Since even minor modifications rely on the signature of all contracting parties at the highest political level, the approval of the national Parliaments may be necessary to modify them. Those procedures are time consuming and may prevent taking action at the time when it is needed. The EU legal framework, on the other hand, offers a potential range of methods for modifications of existing acts, with their complexity corresponding to the seriousness of the issue in question and the form of the measure to be adapted. Application of EU decision-making framework would therefore make the process of adjustments of relevant provisions faster, if needed. Greater synergies and a more streamlined decision-making would strengthen governance and procedures.”⁷⁷

Although the balance between an effective support mechanism on the one hand and democratic control over the use of such a fund on the other is clearly difficult, it is noteworthy that the European Commission in this proposal is quite critical of the role of national parliaments in the ESM. Procedures are called “cumbersome” and “time consuming”, as cited above. Therefore, it is even more conspicuous that the European Commission, immediately after the above-mentioned paragraph, goes into the importance of democratic accountability. Democratic accountability is called a key aspect of the debate on the future of Europe. For the EMF, this means, according to the European Commission, that “the role for National Parliaments remains fully preserved, in view of the large contributions of the Member States to the EMF”.⁷⁸

This is in my view however not really the case, since the proposed changes to the decision-making process result in countries that do no longer have a veto in the decision to grant financial support to a member state. This also changes the position of national parliaments, since they can make arrangements with the Minister of Finance if he or she needs to agree with granting support. In the proposal of the European Commission, this is no longer the case for most Ministers of Finance. This puts the relevant national parliaments, whose involvement in the ESM already differs as shown above, also at a greater distance. In the proposal of the European Commission, although the aid that is given is made possible by contributions collected at a national level, both the government and the national parliament then no longer can decide over the actual use of this funding.

The proposal of the European Commission does pay attention to the role of national parliaments (and also of the European Parliament). The proposed regulation contains two accountability provisions, one pointed at the European Parliament and one at national parliaments.⁷⁹ The regulation therefore, in the eyes of the European Commission, “provides for a

⁷⁷ COM(2017) 827 final, p. 3.

⁷⁸ COM(2017) 827 final, p. 3.

⁷⁹ Article 5 and 6 of the proposed regulation on the establishment of the European Monetary Fund. These provisions show similarities to the position of national parliaments when it comes to the banking union, see: article 21 of Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and article 46 of Regulation (EU) No 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010. See on this: Fromage and Ibrido (2016).

more explicit scrutiny role of national Parliaments in comparison to the current state of play in the ESM Treaty”.⁸⁰ Such a role is also warranted, “in view of the impact of the EMF's decisions on the political constituencies of its Members”.⁸¹

According to the provision about the accountability towards national parliaments, the EMF shall submit on an annual basis a report on the execution of its tasks, together with its annual accounts and its financial statement, to the national parliaments of the EMF members.⁸² They may also address their reasoned observations on that report to the EMF. National parliaments may further request the EMF to reply in writing to any observations or questions submitted by them to the EMF in respect of the tasks of the EMF.⁸³ Also, they can invite the Managing Director of the EMF to participate in an exchange of views in relation to the progress made regarding the implementation of the financial stability support.⁸⁴ For the European Parliament, similar provisions apply.⁸⁵

It is open to question whether these provisions really imply democratic accountability. Not only do national parliaments no longer have a say in the use of the emergency funding in the proposal of the European Commission, but also most of the governments then no longer do. National parliaments receive a report about the functioning of the EMF and can start discussions about its activities. They, however, have always been able to invite guests or ask questions. So, it is difficult to see how the emphasis of the European Commission on the importance of democratic accountability is translated into the design of the possible future EMF. As said, there are of course good reasons for simplifying decision-making procedures, and it is difficult to find the right balance between an effective mechanism and truly democratic accountability, but the proposal of the European Commission for a future EMF does not make the scrutiny role of national parliaments any stronger.

One could think of the Interparliamentary Conference on Stability, Economic Coordination and Governance as a solution for this tension between effective decision-making and parliamentary legitimacy.⁸⁶ This conference, based upon article 13 of the Treaty on Stability, Coordination and Governance in the EMU, brings together representatives from national parliaments and the European Parliament and could be given a role to ensure involvement of national parliaments in the oversight of the current ESM or future EMF decisions. This does raise the question, however, what kind of form this involvement should take. Up till now, this interparliamentary conference is mainly a platform for networking and exchanging information, and not so much for taken any real decisions.⁸⁷ It has proven to be a forum for discussion, and not a decision-making body. A right of consent for the interparliamentary conference therefore seems like a quite far-reaching idea. Also, such a right for the interparliamentary conference as a whole makes it possible that representatives of national parliaments are outvoted. Whether this is desirable and whether this actually leads to a greater involvement of parliaments, can be the topic of discussion. It at least seems difficult to harmonize with the German interpretation of the power

⁸⁰ COM(2017) 827 final, p. 14.

⁸¹ COM(2017) 827 final, p. 14.

⁸² Article 6, par. 1, of the proposed regulation on the establishment of the European Monetary Fund.

⁸³ Article 6, par. 2, of the proposed regulation on the establishment of the European Monetary Fund.

⁸⁴ Article 6, par. 3, of the proposed regulation on the establishment of the European Monetary Fund.

⁸⁵ Article 5 of the proposed regulation on the establishment of the European Monetary Fund.

⁸⁶ See about this and other interparliamentary conferences: Lupo and Fasone (2016).

⁸⁷ Crum (2017), p. 830; Fromage and Ibrido (2016), p. 17.

of the purse. It is therefore questionable whether the Interparliamentary Conference on Stability, Economic Coordination and Governance could really bring any answers to the involvement of national parliaments in the ESM or EMF.

8. CONCLUSION

This working paper has looked at the involvement of two national parliaments, the Dutch and the German, in the ESM. Both parliaments have a very different position in this regard, because of a different interpretation of its power of the purse. The German *Bundestag* gives, based on the democracy principle in the German Constitution and the elaboration given to this provision by the German Constitutional Court, a more substantive interpretation to its power of the purse than the Dutch parliament does. This means that, where the Dutch parliament is focused on adopting the budget by law, the German *Bundestag* needs to keep the overall responsibility for the budget, with sufficient political discretion regarding revenues and expenditures.

This approach puts a number of limits to European cooperation in budgetary affairs. According to this view, the power of the purse cannot be transferred (legally or in practice) to the European level. Also, the *Bundestag* cannot agree with imprecise budgetary authorisations because this shifts the responsibility for the budget to other actors. So, the financial effects of agreements must be clear in advance. Lastly, the *Bundestag* needs to have sufficient parliamentary influence on the use of the emergency funds that were set up during the Euro crisis, such as the ESM.

It is clear that, if more national parliaments would give this more substantive approach to the power of the purse, European cooperation would become much more difficult. At the same time, however, one could question the true worth of (national) elections, when (national) parliaments can no longer decide over budgetary affairs. After all, the core of elections is that representatives can point out what kind of policies they advocate, which asks for certain costs and investments. Also, when it comes to the ESM, one must keep in mind that the contributions that make financial support possible come from the national level.

The proposal of the European Commission for the transformation of the ESM to an EMF makes the position of most national parliaments weaker. Although the Commission suggests not to make important changes to the institutional structure of the ESM, it does propose simplifying the decision-making process. A decision to grant financial support can then be taken with 85 percent of the votes, which means that most countries (except Germany, France and Italy) then no longer have a veto. This makes the room for national parliaments to influence this decision smaller. Also the European Parliament does not get a right of consent in this decision. It is therefore questionable whether this proposal really does justice to the proclaimed aim of the European Commission to increase the democratic accountability in this regard.

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