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European Union Law and National Constitutions The Netherlands

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I. Introduction: foundations of European constitutionalism

1. Concept of constitution in the Netherlands

a. Theoretical concepts and basic notions

The Netherlands possesses a written, rigid Constitution (Grondwet), originally dating from 1814. It has been amended several times. In 1983, a general revision took place, but its main features still date from 1848. The underlying principles are: constitutional monarchy, representative democracy, separation of powers and checks and balances, decentralisation and, finally, the rule of law (rechtsstaat, Etat de Droit, Rechtsstaat). The Constitution is not preceded by 'ideological' or 'philosophical' principles or declarations, like popular or people's sovereignty,¹ nor does one find any reference to such principles in the text of the Constitution itself. It has a pragmatic character, comparable to the Danish Grundlov, for example.

According to the dominant doctrine, constitutional law of the Netherlands does not only comprise the Constitution in its formal sense. The following are also deemed to be part of constitutional law: the Charter for the Kingdom (a sort of super-constitution governing the federation-like relationship between the European Netherlands, the Dutch Antilles and Aruba), so-called organic regulations, such as the Provinces Act and the Municipalities Act, judge-made law, constitutional conventions, and parts of international and supranational law, especially Community law and the European Convention on Human Rights.²

b. The EU/EC architecture and national constitutional traditions

For a long time, the Netherlands constitutional tradition has been one of openness towards international law.³ Since a revision of the Constitution in 1953, its text explicitly permits transfers of national competences to international organisations. If such a transfer would deviate from the Constitution, it requires no more than an authorisation by Act of Parliament, approved by a two-thirds majority in both Houses of Parliament. Thus, a prior amendment of the Constitution, although possible, is not required. There have been only three such deviations since 1953. Treaties such as the EEC-Treaty and its later amendments have never required the qualified majority of two-thirds of the votes cast.

Concerning the relationship between international law and domestic law, the Netherlands adheres to a monistic system: international law is 'automatically' part of the national legal system. Moreover, according to article 94 of the Constitution, directly applicable international law prevails over all domestic law, including the Constitution.

With respect to EC law, it is commonly accepted that it prevails over domestic law. Even without the Articles 93 and 94, governing the relationship between international law and national law, EC law would still be national law and prevail over that law. The famous Van Gend and Loos and Costa ENEL rulings of the Court of Justice of the European Communities have been accepted without significant resistance. So, it can be said that the EC/EU architecture did not and does not meet any serious constitutional obstacle.

2. National conditions for the adoption of a 'Constitution' of the European Union

a. Constitutional conditions for and limits to further integration (substance)

The Netherlands Constitution neither mentions nor protects concepts such as national sovereignty, parliamentary sovereignty or, in German terminology, 'Staatlichkeit'. Therefore, any treaty could limit or even abrogate national competences and structures. However, depending on the content of the relevant treaty dispositions, it could deviate from (Articles of) the Constitution, such as those protecting fundamental rights. In these cases the above mentioned authorisation by a two-thirds majority, or a revision of the Constitution, would be required.

According to several opinions of the Council of State (the principal Government advisory body), and in the opinion of the Dutch Government and Parliament, deviation from the Constitution means deviation from specific Articles of the written Constitution. So, arguments based on the history, the nature or the character of the Constitution or of the constitutional order to defend the thesis of deviation from the Constitution are constitutionally neither convincing nor decisive.

1. See C.W. van der Pot, A.M. Donner, L. Prakke e.a., *Handboek van het Nederlandse staatsrecht*, Deventer: 2001, p. 600.

2. See C.A.J.M. Kortmann, *Constitutioneel recht*, Deventer: 2001, p. 27 ff.

3. See L.F.M. Besselink, 'An Open Constitution and European Integration', 17 FIDE Congress, Berlin: 1996, p. 361 ff., *SEW* 1996, p. 192 ff.

b. Procedural requirements under national constitutional provisions

Articles 90 ff. of the Dutch Constitution regulate the treaty-making process from a national perspective. Treaty-making power belongs to the Government (i.e. the King and one or more responsible ministers). In principle, treaties must be approved by Parliament. The approval may be tacit or by Act of Parliament. In the latter case the bill is approved or rejected by an ordinary majority of the votes cast. As said before, a two-thirds majority is required in the case of deviation from the Constitution by the treaty. Nevertheless, the question of whether a treaty contains a deviation from the Constitution is decided by an ordinary majority. So, in practice an ordinary majority in Parliament decides whether the Government is entitled to ratify a treaty, notwithstanding its possible deviation from the Constitution.

c. The role of the citizens: international treaty or European social contract?

Here, the author of this report encounters some difficulty in the questionnaire submitted to him. He supposes that 'European social contract' has a meaning similar to that of Rousseau's 'contrat social', but Dutch constitutional law is not based – either in positive law, or in the doctrine – on the idea of popular sovereignty. Dutch democracy is basically a representative democracy, although an abrogating consultative referendum is possible since 1 January 2002. This could be used for an Act of Parliament which authorises the ratification of a treaty, whether or not concerning the EC or EU. Outside of this possibility for the exercise of direct democracy, the creation of a 'European Constitution' would be based on an international treaty.

3. The constitution-making process: preparing the IGC 2004 in practice

a. How is the international debate on the future of the European Union organised?

The Dutch debate on the future of the European Union is to a great extent purely a governmental and parliamentary one. The Treaties of Maastricht and Amsterdam, although negotiated in the Netherlands, have hardly been discussed in Dutch society. The same is true for the Treaty of Nice. The Council of State in its advice on the Treaty of Nice remarks that the public and political debate on Europe is meagre.⁴ One may find Articles written by lawyers and (other) experts in reviews on European politics and European law, but they rarely result in fundamental discussions about the EC or EU and their future.⁵ So we can concentrate on observations on the activities of the Dutch Government and Parliament and describe how they have proceeded during the last two decades. Except for the conclusion of treaties as such, no constitutional or legal provision prescribes any co-operation between Government and Parliament concerning the preparation of treaties or intergovernmental conferences. All depends on the free will of both.⁶

During the intergovernmental conferences to prepare the Maastricht Treaty, the Government informed Parliament regularly about the difficulties met and the progress made. Several standing committees of the Tweede Kamer (Dutch House of Commons) held discussions with ministers involved in the conferences, but the draft-treaty was not submitted to Parliament. In the end, the Chambers discussed only the Bill authorising the ratification of the Treaty.

During the preparations of the Treaty of Amsterdam, the Government literally buried Parliament in information, consisting of 'verkennde'⁷ and other governmental notes and papers. Some of these were debated on the floor, others in (standing) committees. Parliament could not and did not complain of a lack of information or debate. Later on, during the review of the Bill authorising the ratification of the Amsterdam Treaty, the Second Chamber asked the Government more than 400 questions, which were answered within a few months. The conclusion may be that the information and debates concerning both Treaties have been ample and intense. The same is globally true for the Treaty of Nice.

In addition to these procedures, the regular parliamentary activities were and are frequently focused on developments⁸ within the EC/EU. The annual debate on the budget provides information about future government policy. Annually, within the framework of the budget, the cabinet delivers a document entitled 'De staat van de Europese Unie', which 'provides a survey of the financial and policy implications of European decision-making, and an overview of future government policy and the financial consequences for the forthcoming years'. Recently, the cabinet added a notice on 'De toekomst van de Europese Unie',⁹ in which it develops several ideas on the future of the EU.

b. Key issues and proposals of the leading political groups

In May 2002, general elections for the Second Chamber will be called. This enables the author to describe the recent standpoints in the respective (draft) electoral programmes of the main political groups in the Netherlands. These groups are the Socialists (Partij van de Arbeid), the Liberal-Conservatives (Volkspartij voor Vrijheid en Democratie), and the Christian-Democrats (Christen-Democratisch Appel).

The 'Partij van de Arbeid' emphasises the need for a clearer distribution of competences between the EU and the Member States based on the subsidiarity principle, more democracy within the EU, and more effective decision-making by decreasing unanimity rules. They call for direct election of the President of the Commission and the introduction of a so-called corrective referendum. It should be possible for the European Parliament to dismiss individual members of the Commission, which in its turn should be enabled to dissolve the European Parliament. All this should finally lead to a European Constitution.

The 'Volkspartij voor Vrijheid en Democratie' also emphasises the subsidiarity principle, but is opposed to fixing a distribution of competences between the EU and the Member

4. See *Kamerstukken II 2000/01*, 27 818 (R 1692), A, p. 4.

5. There are exceptions, such as the Asser Institute Colloquium on European Law. Session XXX – September 2000. See A.E. Kellerman, J.W. de Zwaan, J. Czuczai (eds.), *EU Enlargement. The Constitutional Impact at EU and National Level*, The Hague: T.M.C. Asser Press 2001.

6. See N.Y. Del Grasso, *Parlement en Europese Integratie*, Nederlands Parlementsrecht, Monografie 10, Deventer: 2000.

7. Literally: exploring, or surveying.

8. In this field, the 'General Commission for European Affairs' of the Second Chamber plays an important role. See Van der Pot/Donner/Prakke, o.c., p. 613 ff, with further details. It should be noted that Netherlands legislation does not exclude a double mandate for the European Parliament and the Netherlands States General. Nevertheless, the political parties de facto exclude this.

9. Literally: The future of the European Union, *Kamerstukken II 2000/01*, 27 407, no. 9.

States. However, with the Socialists, they plead for more effective decision-making by qualified majority voting and a stronger role for the European Parliament. There is no mention of a future European Constitution.

The Christian Democrats consider the EU as a federal Union of states based on such values as democracy, solidarity, justice, equality and durability. The EU must strictly observe the subsidiarity principle, and a clear distinction of competences has to be established. The members of the Commission should be individually responsible and the European Parliament should be competent to dismiss any individual member of the Commission. Decision-making should take place by qualified majority voting in a co-decision procedure with the European Parliament. The electoral programme of the Christian Democrats does not mention a future European Constitution.

This overview of the standpoints of the main political parties would not be complete without referring to the opinion of the actual government.¹⁰ Government opts for a 'European Constitution for an effective and democratic Union'. Its main elements should be: fundamental rights; a clear distribution of powers based on the subsidiarity principle; simplification of the European treaties and splitting them up into a basic constitutional treaty and a 'policy treaty'; further integration; strengthening of the Commission and the European Parliament; individual responsibility of the members of the Commission; direct election of the President of the Commission; more decision-making in the Council by a qualified majority; strengthening of the role of national parliaments within the European architecture.

II. Relationship and interaction of EC/EU law and the Netherlands Constitution today

1. Member States' constitutional autonomy under European constraints

a. National identity of the Netherlands (article 6.3 TEU) as a limit to the extension of EC/EU competences

Article 6.3 TEU is formulated as a barrier against the destruction of the national identity of the Member States by the European Union. It is not an obstacle to the Member States' transferring (many of) their competences to the EC/EU. The significance of this barrier, however, is not at all clear. One of the possible interpretations is that the Member States of the EU must remain 'states' and that they may not be transformed into component parts of a federation.¹¹ The opinion of different Dutch governments on the future of the EC/EU seems to attach little value to such an article. Since the beginning of the EC, the majority of the Dutch politicians have always emphasised the final goal of a European Federation. In a 'real' federation, the component parts lose their 'state-hood', being subject to a federal Constitution. Whatever the meaning of article 6.3 TEU may be, the Luxembourg Court is not competent to condemn the EU institutions because of a breach of article 6.3 TEU. And under Dutch constitutional law, no judge could forbid the political institutions to give up the identity of the Kingdom by means of a treaty.

b. Articles 6.1 and 7 TEU as limits to the constitutional autonomy of the Netherlands

Theoretically article 6.1 TEU could be considered as a limit to the constitutional autonomy of the Netherlands. But in reality it is not. The Dutch Constitution contains several Articles that guarantee freedom (i.e. fundamental rights, independent

and impartial administration of justice, free and secret elections), democracy (i.e. direct elections for the Lower House), the respect of fundamental rights (i.e. Chapter 1 of the Constitution). Under the national constitutional and legal system it seems very improbable that the Dutch public authorities should seriously and persistently breach one of the principles mentioned in article 6.1 TEU. One should also take into consideration that the Kingdom of the Netherlands ratified the European Convention on Human Rights which, according to the monistic system concerning international treaties, is automatically part of the Dutch legal system.

2. Common values: the Charter of Fundamental Rights of the European Union

a. Does the Charter reflect the basic human rights standards of the Dutch Constitution and international law?

In the Dutch legal system, human rights are guaranteed by different means. Chapter 1 of the Constitution contains a large number of 'classical' and social fundamental rights. Moreover, the European Convention on Human Rights, the European Social Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights have long been part of the Dutch legal system. Therefore, it can be concluded that there is a significant correlation between the Charter of Fundamental Rights of the European Union and the Dutch protection of human rights.

b. The Charter as a reference for fundamental rights protection in Dutch courts

The Charter is not a treaty in the sense of the Dutch Constitution. So, it does not directly create rights for citizens to be upheld by Dutch courts. Articles 93 and 94 of the Dutch Constitution do not apply to the Charter. Nevertheless, Dutch courts sometimes 'create' unwritten fundamental principles which may function as a human right. It is not wholly excluded that Dutch courts could make use of the Charter to 'create' or 'invent' such unwritten fundamental rights.

c. The impact of the Charter on the standards referred to in article 6.1 TEU

It is difficult to predict if the Charter will have any impact on the standards referred to in article 6.1 TEU. In the opinion of this author the Charter could (and will) be used as a help for the interpretation of article 6.1 TEU.¹²

3. The question of the supremacy of EC/EU law and its constitutional effects

a. Supremacy I: Community primary law and Dutch constitutional law. Position of national constitutional courts

The Netherlands does not possess a constitutional court. Article 120 of the Dutch Constitution forbids any judge to test the constitutionality of Acts of Parliament. On the other hand, article 94 of the Constitution orders every judge (and other public authority) not to apply any rule of national law if the

10. See 'De toekomst van de Europese Unie', *Kamerstukken II* 2000/01, 27 407, no. 9.

11. See R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Deventer: 1999, p. 29, 583.

12. See E.M.H. Hirsch Ballin, 'Een wezenlijke maatstaf voor alle actoren in de Gemeenschap', *SEW* 2001, p. 330 ff.

application would contravene a self-executing or directly applicable provision of an international treaty or of a binding resolution of an international organisation. So, international law prevails in many cases over all national law, including the Constitution. Concerning primary EC law, the Dutch legal system follows the famous Costa ENEL ruling of the Court of Justice of the European Communities. This implies that all primary EC law is superior to national (constitutional) law. This superiority is generally admitted and has to be guaranteed by all Dutch courts, in compliance with the ECJ Simmenthal ruling.

*b. Supremacy II: Community secondary legislation and Dutch constitutional law*¹³

According to the Dutch legal system there is no difference between primary and secondary EC law as to its effects on domestic law. So, all Community law is superior to national (constitutional) law.¹⁴

c. Implicit modification of the Dutch Constitution by the revision and application of the TEU

According to article 93.3 of the Dutch Constitution, any provision of a treaty that deviates from the Constitution, or which leads to conflicts with it, can be approved by the Chambers of Parliament only if at least two-thirds of the votes cast are in favour. So, in theory, all primary and secondary community law which conflicts or could ultimately conflict with the Constitution, could only be binding on the basis of a qualified majority vote of the Dutch Parliament. But the question if there is any conflict with the Constitution is decided by an ordinary majority in both Chambers. Neither the EEC Treaty and its later revisions, nor the TEU have been submitted to the aforementioned special procedure. This means that until today EC law and EU law have been considered to be consistent with Dutch constitutional law. However, Dutch constitutional law has surely been modified by community law in an implicit way. The best example of such a modification is the general acceptance of the Costa ENEL ruling of the Luxembourg Court. Its effect goes further than the rule contained in the aforementioned article 94 of the Dutch Constitution, which only gives priority over Dutch law to self-executing (or directly applicable) provisions of international law. According to the Costa ENEL ruling all EC law prevails over Dutch law, which is undoubtedly an important extension of the rule laid down in article 94. A second good example of an implicit modification of the Constitution is the introduction of the euro. Article 106 of the Constitution states that the monetary system shall be regulated by Act of Parliament. Since the creation of the European Monetary Union this article has lost much of its meaning. A third example is the position of the Prime Minister. Under Netherlands constitutional law, he is only the 'first among equals'. In fact, he plays a primary role in EU policy and often dominates the position of the minister for foreign affairs.

4. Institutional interdependence: European functions of Dutch institutions

a. The Dutch Parliament in the European legislative process: indirect source of legitimacy and responsibilities for implementation

The Dutch Parliament is involved – directly or indirectly – in the European legislative process in four ways. First, the Dutch Parliament has to approve treaties by an ordinary or qualified

majority vote (article 91 of the Constitution), be it explicitly or tacitly. Second, some draft decisions of the Council of the European Union have to be approved by the Houses of Parliament before the representative of the Kingdom may give his consent to the decision.¹⁵ Third, the Chambers can exercise their normal competences vis-à-vis a Dutch minister acting in the Council, such as asking written and oral questions and using the right of interpellation (their right to demand an explanation). They can only exercise political pressure on the minister. In this way they may try to legitimise the minister's actions in the Council of the European Union. Fourth, the implementation of EC directives must be mentioned. The form of implementation of directives depends partly on constitutional requirements. In several fields of national policy the Constitution attributes competences only to the legislature, i.e. government and parliament in co-operation. In these cases implementation has to take place wholly by Act of Parliament (*wet in formele zin*). In other fields the Constitution allows the legislator to delegate its rule-making power to the government (the Crown) or a minister. For reasons of speed and flexibility, many Acts of Parliament have delegated powers to the executive to implement EC directives. Depending on the delegating Act, Parliament preserves special control powers, such as the right to ask for a bill replacing the implementation decree of the Crown or a minister. In the other cases parliament preserves its common powers, such as interpellation, questions and ultimately the budget or the application of the confidence rule, which may lead to the dismissal of the minister concerned.

b. European functions of the Dutch administration: a double mandate for the executive

It is obvious that the Dutch government and especially the ministers act as Dutch and as EU officers. In both capacities they are responsible to the House of Parliament. It is clear that their decision-making in the EU weakens the powers of the Dutch Parliament when the unanimity rule does not apply.¹⁶ Nevertheless, as already said, most political groups in Parliament are favourable to an extension of decision-making by a qualified majority in the Council of the European Union.

*c. Judicial protection in the European Union through national judges: conflicts of loyalties; questions of procedural autonomy*¹⁷

Dutch judges have to apply the law, be it Dutch law or EC law. Because of the aforementioned Costa ENEL ruling, they (must) apply EC law as national law and even give it priority over Dutch (constitutional) law. In most cases the Dutch judges faithfully apply primary and secondary Community law, including rulings of the EC Court, such as the famous Francovich case. Moreover, Dutch judges regularly ask the Court of Justice prejudicial questions, but a general complaint is that many judges are insufficiently proficient in EC law.

13. See C.A.J.M. Kortmann, 'Secundair gemeenschapsrecht en de nationale constitutie' (Secondary community law and the national constitution), *SEW* 1999, p. 82-88.

14. See C.W. van der Pot, A.M. Donner, L. Prakke e.a., *Handboek van het Nederlandse staatsrecht*, Deventer: 2001, p. 600-603.

15. See for example Articles 3 and 4 of the (draft) Act of approval of the Treaty of Nice, *Kamerstukken II* 2000/01, 27 818 (R 1692), no. 1-2; Van der Pot/Donner/Prakke, o.c., p. 611, 612.

16. See Van der Pot/Donner/Prakke, o.c., p. 6-11.

17. See A-M. Van den Bossche, *Europees recht in de kring: over winterbedding, potpolder en schorre*, Antwerpen: Kluwer 2001.

Measures to improve this situation have recently been taken in the form of judge-tailored courses in Community law. The question of procedural autonomy becomes more and more pressing. Although the Netherlands has had only a few problems in this field, the harmonisation of the different procedural systems of the Member States seems ineluctable. The doctrine in *Comet* and *Rewe* appears to be less and less sufficient to guarantee equal protection for the citizens of the European Union.¹⁸ Unfortunately this problem seems to be given no priority at all by most Dutch lawyers and politicians.

III. The role of regions and local authorities in EU law

1. Effects of EU law on the constitutional framework in relation to regions and local authorities¹⁹

The Netherlands is a so-called decentralised unitary state. The Constitution guarantees the existence of provinces and municipalities (territorially decentralised bodies) and permits the creation of other (territorially or functionally) decentralised entities such as the Water Boards, commodity boards and industry boards.²⁰ Decentralised bodies may be and are charged with the implementation and execution of Community law, although the responsibility for it vis-à-vis the EC stays with the Kingdom itself. This may cause problems where decentralised bodies do not fulfil their obligations. The core of the problem is that the central government is not empowered to give orders to the decentralised bodies, nor to substitute itself for them.²¹ This situation stems from the constitutional arrangements according to which there is no general hierarchy between the central government and the decentralised authorities. The only way to solve the problem is to adopt an Act of Parliament which obliges the decentralised bodies to fulfil the requirements of Community law or which centralises the originally decentralised competences.

Special attention should be given to the supremacy of EC law in relation to the obligation of decentralised authorities to implement or execute Community law. Within the Netherlands (national) legal order, decentralised authorities are subject to the Constitution and other 'higher' rules like Acts of Parliament. In implementing or executing EC law, however, the decentralised authorities can be compelled to disapply the aforementioned national legal provisions if their application would contravene EC law. It seems a rather theoretical problem, but it arises in practice.²²

A different question is the representation of decentralised bodies in the EC decision-making process. No Act of Parliament or other statutory instrument guarantees their presence in 'Brussels'. Nevertheless, the provinces and municipalities take part in the Committee of the Regions. Of the twelve Netherlands members of the Committee, six represent the provincial executives, another six are representatives of the municipal authorities.²³

2. Possible consequences for EU law of Dutch-style regionalisation and decentralisation of the kind that goes on in the Netherlands

Here, the author of this report can be very brief. In the Netherlands there are no plans to fundamentally change the actual form of state. The subdivision of the state in provinces, municipalities and other decentralised bodies will probably survive for many years.

IV. Conclusions and recommendations for 2004

1. A new architecture: What should an EU Constitution or EU basic treaty look like?²⁴

Under the present circumstances it seems rather improbable that the Member States of the EU will decide to establish a real supranational European Constitution. European federalism of the American or German kind meets strong opposition, so it makes little sense to develop such a structure, but a basic European treaty seems feasible. Partly in line with the ideas of the Netherlands government, the author of this report supports the drafting of a basic treaty²⁵ which, in a systematic manner and following the structure of many recent European constitutions, would contain:

- a clear, though flexible, distribution of powers between the EU and the Member States;
- a basic regulation of the main EU institutions and their respective general competences such as those relating to legislation, execution and administration of justice;
- a clear hierarchy of statutory instruments;²⁶
- a bicameral parliament,²⁷ based on a parliamentary system as is – broadly speaking – present in the Member States;
- fundamental rights.

The tasks or policy of the institutions of the EU should not be covered by the basic treaty, but laid down in one or more substantive treaties.²⁸

2. A Constitution for the European Union: conditions of adoption and amendment; its relationship with the Netherlands Constitution

As said before, under the present conditions, an EU Constitution is probably a bridge too far. The EU will continue to find its basis in a (basic) treaty. Nevertheless, the conditions of adoption and amendment as laid down in article 48 TEU could be slightly modified. It should not always be necessary that

18. See A.-M. Van den Bossche, o.c.; Van der Pot/Donner/Prakke, o.c., p. 620.

19. See B. Hessel, K.J.M. Mortelmans, *Het recht van de Europese Gemeenschappen en de decentrale overheden in Nederland*, Deventer: 1997.

20. See C.A.J.M. Kortmann, P.P.T. Bovend'Eert, *Dutch Constitutional law*, The Hague-London-Boston: 2000, p. 43-57.

21. The government is competent to annul every decision of a decentralised institution, but this does not imply the power to take the decision itself. See further J. Gerards, 'Naleving van het Europese recht door decentrale overheden: naar een herzien stelsel van toezicht', *SEW* 2000, p. 208 ff.

22. See ECJ, Case 103/88, *Fratelli v. Comune di Milano* [1989] *ECR* 1839; K. Lenaerts & P. van Nuffel, *Constitutional Law of the European Union*, London: 1999, p. 397.

23. See L.F.M. Besselink, o.c., *SEW* 1996, p. 199.

24. See *Ars Aequi-special*, *De toekomst van de Europese integratie*, May 2001.

25. See for more details *Ars Aequi-special*, o.c., p. 310.

26. See C.A.J.M. Kortmann, 'Het normenstelsel in het gemeenschapsrecht', *SEW* 1996, p. 116 ff.; C.A.J.M. Kortmann, 'Sources and categories of legal acts – Netherlands', in: G. Winter (ed.), *Sources and Categories of European Union Law*, Baden-Baden: 1996, p. 127 ff.

27. The Netherlands government does not support a bicameral system.

28. See W. van Gerven, 'Het voor en tegen van een Europese grondwet', in: A.K. Koekoek (red.), *Bijdragen aan een Europese grondwet*, Deventer: 2000, p. 27 ff.

all Member States agree before an amendment of the Treaty enters into force, as article 48 TEU requires. It is imaginable – for example – that the chapter on fundamental rights be amended by a referendum of the citizens of the EU, on a joint proposal of the Council of the European Union and the European Parliament. Such a system would correspond to a certain degree with the actual constitutional provisions of several Member States, where various amendment procedures exist for the national Constitution,

It would not be necessary to alter the relationship of a basic treaty with the Netherlands Constitution. As is the case now, the basic treaty would be superior to the Netherlands Constitution. The author realises, however, that many Member States of the EU disagree on this issue and continue to consider the national Constitution as the basis of all other law in force on the national territory.

3. Merging the constitutional process and enlargement: how to involve the candidates?

This last question of the questionnaire is a little obscure for the author of this report. If it means to ask if the (12) candidates for the EU should be formally involved in the ICT of 2004, the (my) answer would be negative. The actual – constitutional – problems of the EU seem to be already sufficiently complicated for the existing institutions of the EU and

its Member States. Moreover, the lack of a long (democratic) constitutional tradition on the part of several candidates would probably hamper the progress of constitutional and institutional reforms. On the other hand, it is clear that the existing institutional framework of the EU is insufficiently tailored to a number of 25 or more Member States. The Nice Treaty appears to be insufficient on this point.²⁹

Some defects may be mentioned: the composition of the European Commission (too many members), the complicated voting system of the Council of the European Union, the overload of the judicial institutions, the complicated three-pillar-structure.

To avoid further complications concerning the institutions of the EU, it seems wise and practical to involve representatives of the candidate Member States in the discussions on the future of the EU. Therefore, the 'Declaration of Laken' of 25 December 2001 rightly states that the candidate Member States will wholly and under the same conditions as the Member States, participate in the discussions of the Convention on the future of the Union, presided over by Valérie Giscard d'Estaing. But they are – also rightly – not entitled to obstruct an apparent consensus between the existing Member States.

29. See *Ars Aequi*-special, o.c., p. 312 ff.

Cross-Border Mergers in Company Law and Competition Law: Removing the Final Barriers

*R. Snelders and M. Dolmans**

This article is a contribution to the XX Congress of the Fédération Internationale pour le Droit Européen ('FIDE') that will be held in London from October 30, 2002, through November 2, 2002. It takes the form of responses to a series of questions from the Congress' General Rapporteurs. These questions aim to explore remaining barriers to takeovers in the various Member States of the European Union. The article is organized as follows. Section A examines possible obstacles to cross-border M&A activity from the perspective of Dutch merger control law. Section B examines any such obstacles inherent in Dutch company and/or capital markets (or other) laws. Finally, Section C offers a brief conclusion.

A. The Competition Regime

1. What is the view of your country on the functioning of the threshold levels in Article 1(2) as well as the 2/3 rule in the Merger Regulation, and the proposal in the Commission's Green Paper for amendment of Article 1(3) to deal with the problems of multiple filings?

There are few legal commentators who address the functioning of the thresholds levels of Council Regulation 4064/89/EEC (the 'EC Merger Regulation'), other than to support the principle of one-stop-shopping and the apparent failure of Article 1(3) to achieve its objective of subjecting multiple national filings to EC jurisdiction.¹ The European Commission's recent proposals to reform Article 1 of the EC Merger Regulation, however, have been subject to criticism. Jurisdictional thresholds based on objective, clear-cut turnover tests are the most capable of providing the clear legal certainty that the business community requires. The frustrations sometimes associated with multi-country filings should not be addressed by creating a more complex and less objective system for case allocation. The revised thresholds proposed by the Commission may create more problems than they would

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