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ANNEX 2

ANNEX

Country annex

BELGIUM

to the

REPORT FROM THE COMMISSION

**presented under Article 8 of the Treaty on Stability, Coordination and Governance in
the Economic and Monetary Union**

BELGIUM

Belgium deposited its instruments of ratification of the Treaty on Stability, Coordination and Governance in Economic and Monetary Union (TSCG) with the General Secretariat of the Council of the European Union on 28 March 2014.

National provisions considered in this assessment are essentially those provided for by:

- The Cooperation agreement of 13 December 2013 concluded by the federal government and the eight federated entities (communities, regions and community commissions), as approved by the respective parliaments for an indefinite period of time (the 2013 Cooperation Agreement),
- The Royal Decree of 3 April 2006 on the High Council of Finance,
- The Special Law of 16 January 1989 related to the financing of the communities and the regions,
- The Special Law of 8 August 1980 on institutional reforms.

1. Legal status of the provisions

In Belgium, as there is no hierarchy between the federal level and the federated entities, a cooperation agreement may be concluded to set out the joint exercise of own competences (Article 92a of the Special Law of 8 August 1980 on institutional reforms). The position of cooperation agreements in the hierarchy of Belgian legal norms is not defined as such. According to its recitals the 2013 Cooperation Agreement is binding on each signatory party (the federal State and the federated entities) and of a permanent character.

Its judgment 62/2016 of 28 April 2016 the Belgian Constitutional Court ruled that the cooperation agreement could not be modified by a later legislative provision without violating the principle of federal loyalty and that the parties to that agreement were bound to respect the engagements contained within it when approving their annual budgets¹.

Against that background, the Belgian provisions comply with the criterion of provisions of "binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".

2. Balanced budget rule

Formulation: The balanced budget rule is implemented in Article 2 of the 2013 Cooperation Agreement.

The formulation of the balanced budget rule follows closely the formulation enshrined in the TSCG. Specifically, Article 2(1) provides that the budgets of the participating parties must comply with the balanced budget rule of the general government, as set out in Article 3 of the TSCG. Article 2(2) states that the balanced budget rule is met if the annual structural balance of the general government is at its medium-term objective (MTO) or on the adjustment path towards it, as set out in the Stability Programme to be transmitted to the European Commission (as per Regulation (EC) No 1466/97). The MTO is defined by reference to Regulation 1466/97 and complemented by the TSCG-specific lower limits.

Reflecting the federal nature of the general government sector in Belgium, Article 2(4) creates a coordination mechanism among various levels of general government, which takes place in

¹ Arrêt n° 62/2016 du 28 avril 2016, sections B.3.4, B.6.6 and B.8.6.

the context of the preparation of the Stability Programme. According to Article 2(4), annual budgetary targets for the general government are distributed among the different levels of governments, both in nominal and structural terms, on the basis of a recommendation of the High Council of Finance (HCF). Furthermore, the HCF must take into account the investment cycle at local government level and a possible revision of the MTO. The structural targets must be calculated in line with the "Commission's methods", possibly with national parameters including for the distribution across sub-sectors. Ultimately, the Concertation Committee² decides on the targets of each government, based on the recommendation of the HCF.

Convergence towards the MTO: As noted, according to Article 2(2), the balanced budget rule is deemed to be fulfilled when the annual structural balance of the general government is on the convergence path towards the MTO, as set out in the Stability Programme. In addition, Article 2(4) provides that the annual budgetary targets are set in the context of the preparation of the Stability Programme, based on the advice of the HCF. While the 2013 Cooperation Agreement is not explicit in that regard, the interpretation of the provisions submitted by the Belgian authorities to the Commission emphasised that if the Stability Programme was to be assessed as being at odds with Union law by the Commission, the Stability Programme in question would have to be amended in order to secure compliance. Hence, there is an understanding that the annual targets set in the Stability Programme are compliant with the rules of the Stability and Growth Pact (SGP).

Escape clauses: Article 2(3) of the 2013 Cooperation Agreement provides that a temporary deviation from the MTO or the adjustment path towards it is authorised only in exceptional circumstances. The latter are defined in Article 1(2) in line with the TSCG. The HCF is obliged to review the existence of exceptional circumstances.

Overall, the balanced budget rule complies with the TSCG requirements. The formulations of the MTO and the escape clause are in line with the TSCG. Moreover, following the interpretation provided by the Belgian authorities, there are sufficient safeguards in national provisions to ensure that the convergence path towards the MTO is consistent with SGP rules.

3. The correction mechanism

The provisions relating to the correction mechanism are mostly found in Article 4 of the 2013 Cooperation Agreement.

Activation: Every year the "Public sector borrowing requirement" section of the High Council of Finance (HCF-PB) must assess the respect of the commitments taken by the contracting entities in the 2013 Cooperation Agreement and agreed in the Concertation Committee (Article 4(1)). The correction mechanism is automatically activated once the HCF-PB detects ex post a significant deviation from those commitments by one of the contracting entities (Article 4(2)).

While the 2013 Cooperation Agreement itself does not further develop the notion of significant deviation, the Belgian authorities have made clear that the latter is to be derived from the EU criteria, and the HCF-PB confirmed that the notion is understood in reference to the criterion defined by the preventive arm of the SGP. The Belgian authorities also indicated that a significant deviation at the level of general government can only arise if there is a significant deviation at the level of a contracting party to the 2013 Cooperation Agreement.

² That body (Comité de concertation/Overlegcomité), in which all Belgian governments are represented, was set up in 1980 to prevent conflicts of competences and solve conflicts of interests between different governments.

In terms of timeline of activation, while the 2013 Cooperation Agreement itself does not give details on that issue, since 2015 the HCF-PB has brought forward its ex post report from October to July, allowing for a more timely response. With that timeline the HCF-PB can also take into account the guidance issues in the spring and early summer by the Commission and the Council, including in the event that a significant deviation is identified by Union institutions.

Substance of the correction: Article 4(2) of the 2013 Cooperation Agreement requires the contracting entity (or entities) where a significant deviation is observed to immediately adopt corrective measures. The main corrective rule is that the measures must ensure a correction of the deviation from the budgetary target within an 18-month deadline. Given that the correction mechanism would be activated around the middle of the year following the occurrence of the significant deviation, that principle implies a return to the originally projected structural targets two years after the occurrence of the significant deviation. The HCF must produce a report on the amount of corrective measures to be taken, and monitor the subsequent implementation on annual basis (Article 4(3)).

The requirement for corrective measures to produce their effect within 18 months is in line with the TSCG requirement of implementing corrections "over a defined period of time" and with the common principles (principle n°4). Further, the Belgian authorities have clarified that the language of the 2013 Cooperation Agreement laying out that principle ('remedy to the gap') should be interpreted as full correction, in the sense of returning to the original structural targets.

The 2013 Cooperation Agreement also incorporates a possibility to depart from that main corrective rule. Moreover, based on the provisions of the 2013 Cooperation Agreement, such flexibility could be used when "the economic or institutional reality justifies a longer period based on the advice of the HCF-PB". While such a clause could be invoked in many circumstances, opening up a risk of abuse, the Belgian authorities have noted that it remains subject to an advice from the HCF-PB, which is likely to take into consideration in particular the recommendations from Union institutions when producing such advice. In addition, the Cooperation Agreement specifies that any extension of the 18-months delay can in any event not be in contradiction with a deadline set at the level of the Union.

Finally, in the event of a sanction imposed by the Council of the EU, the sanction is allocated to the different entities in proportion to their share in the shortfall, as identified by the HCF.

Overall: The correction mechanism is compliant with the TSCG requirements and the common principles in light of the clarifications provided by the Belgian authorities. The activation is triggered by the HCF-PB based on a notion of significant observed deviation that is interpreted consistently with those requirements. The main corrective rule is in line with those requirements. The possibility to depart from it is restricted by the obligation to respect deadlines set at Union-level. The credibility of the mechanism relies significantly on the role of the HCF-PB.

4. The monitoring institution

The Belgian monitoring institution is the HCF-PB.

Statutory regime and set-up: The HCF was first established in 1936 and significantly reformed in 1989 and 2006. It is currently grounded in the Royal Decree of 3 April 2006 (2006 Royal Decree), abrogating earlier decrees. The HCF is an advisory committee of the federal Minister of Budget and Minister of Finance on budgetary, financial and tax issues

established alongside the Federal Ministry of Finance. The HCF includes two permanent sections: the HCF-PB and a section advising on tax and other revenues. The HCF-PB was already established by the Special Law of 16 January 1989 related to the financing of the Communities and the Regions (Article 49). The specific mandate of the HCF-PB in relation to the Fiscal Compact is assigned by Article 4 of the 2013 Cooperation Agreement.

Mandate: Based on the 2013 Cooperation Agreement and in addition to its pre-existing advisory role³, the HCF-PB is responsible for monitoring the compliance of budgetary positions of the federal state and federated entities against the structural balanced-budget rule and against the breakdown of the federal budgetary target into individual targets for each level of government. In particular, the HCF-PB must assess the following:

- the existence of exceptional circumstances,
- the existence of a significant deviation in the budgetary position of the federal government or a federated government against its target assigned via the breakdown complying with the structural balanced-budget rule,
- in case such deviation is identified at the level of the federated entities, the share of deviation generated by measures decided at federal level whose responsibility does not belong to the federated level,
- the magnitude of the required correction,
- the progress of the implementation of the correction plan (an annual opinion has to be delivered).

In addition, the HCF-PB must deliver an evaluation of the implementation of the Fiscal Compact and the 2013 Cooperation Agreement across all government levels by 31 December 2017.

Comply-or-explain principle: Article 4(2) of the 2013 Cooperation Agreement calls for the HCF-PB to assess whether a significant deviation occurs on the part of one entity (i.e. federal or sub-central government), and for that entity to explain the deviation and adopt corrective measures with effect within 18 months. No legal provisions establish a 'comply-or-explain' principle in relation to the assessments of the HCF-PB on the occurrence of exceptional circumstances and the progress of the correction as regards the balanced-budget rule for the general government. However, the Belgian authorities have formally expressed their intention to explore opportunities to make amendments to the 2013 Cooperation Agreement in order to extend accordingly the scope of the comply-or-explain principle⁴.

Freedom from interference and nomination procedure: The HCF appears to be tightly attached to the Ministry of Finance, which provides logistical resources, budget and staff. Furthermore, the Royal Decree establishes that the HCF is chaired by the Minister of Finance (who leads the debates but has no voting power), with two vice-chairmen designated by the Minister of Finances and the Minister of Budget.

As regards the HCF-PB, according to the 2006 Royal Decree and the Special Law of 16 January 1989, its 12 members (including the Chair) have to be appointed, based on experience and competence in economic and financial matters, on suggestion by the Minister of Finance, the Minister of Budget, or the different regional and community governments (8 members)

³ With regard to the Stability Programme, in particular the medium term fiscal targets for the general government and the internal breakdown of those targets across governments. The respective opinions are not binding.

⁴ Letter from the Belgian authorities of 17 October 2016.

and by the central bank (3 members). Notably, in past reports issued by the HCF-PB in relation to the TSCG-related mandate, its members were explicitly identified as "representing" the different national, regional and community governments that proposed them as members. Conditions for dismissal are not specified in the Royal Decree. Members cannot hold political mandates (except in small local entities) or be members of Ministers' personal staff. Moreover, the HCF-PB is supported by the HCF secretariat which includes the Chair (the Minister of Finance), the two vice-chairmen, the Chair of each permanent section and other members (usually seconded from the Ministry of Finance). While the nomination procedure for the HCF-PB members is based on competence and experience, the current legal and institutional framework establishes close interdependencies with the Ministry of Finance and other institutions and governments who nominate the HCF-PB members, thereby weakening the HCF-PB's ability to act as an autonomous entity providing independent, unbiased monitoring.

However, the Belgian authorities have formally committed to use their best efforts to adopt a series of amendments to the 2006 Royal Decree⁵. The envisaged amendments in question aim *inter alia* to explicitly state the autonomy of the HCF-PB within the HCF, the independence of its members in their function and the ban on accepting interference, including from the nominating entity. Furthermore, the draft amendments envisage a dedicated secretariat for the HCF-PB, which would only follow the instructions of the HCF-PB Chair.

Capacity to communicate: According to the 2006 Royal Decree, the HCF sends its assessments to the Minister of Finance or the Minister of Budget, depending on the issue concerned. There is no provision on specific communication by the HCF-PB or its public nature. Nevertheless, the Belgian authorities have committed to use their best efforts to adopt the draft amendments to the 2006 Royal Decree which include a provision according to which the HCF-PB would be able to communicate independently and publicly without any impediment or censoring, including through the publication of its reports and advice. With a view to operationalising its communication, the HCF has recently launched its own website, which hosts a dedicated section for the HCF-PB⁶.

Resources and access to information: There is no reference in legal acts to an earmarked budget for the HCF or the HCF-PB in particular. However, the above-mentioned draft amendments to the 2006 Royal Decree also envisage a provision entitling the HCF-PB to receive adequate resources necessary to fulfil its tasks. Starting with the 2017 budget, the Belgian authorities envisage including a budget line dedicated to the HCF-PB in the Ministry of Finance's budget. The staff (5 FTE) and operational expenses of the HCF-PB secretariat are estimated at EUR 400 000 for 2017.

In terms of access to information, Article 4(3) of the 2013 Cooperation Agreement states that, if the correction mechanism is activated, the government concerned has to provide the HCF with the information it needs to assess the progress of the correction measures taken. That provision is not mirrored for other assessments to be delivered by the HCF-PB in relation to its TSCG-related mandate. However, the Belgian authorities have committed to investigate how the HCF-PB could take part in the exchange of information set out by an existing protocol (for the purposes of national government accounts and the excessive deficit procedure), signed in April 2014 between the Institute of National Accounts, the Federal State and the federated entities.

⁵ Letter from the Belgian authorities of 20 July 2016.

⁶ <http://www.highcounciloffinance.be/en/high-council-finance/section-borrowing-requirement>

Overall, the set-up of the Belgian monitoring institution is compliant with the requirements set in Article 3(2) of the TSCG and in the common principles subject to the adoption of appropriate amendments to the 2006 Royal Decree, on the one hand, and to the 2013 Cooperation Agreement or another legally binding document which could complete the scope of the comply-or-explain principle for the general government, on the other hand, as well as subject to identifying ways to ensure broader access to information for the monitoring institution. The HCF-PB is grounded in law and its mandate includes the tasks prescribed by the Fiscal Compact and the common principles. Whereas the legal framework includes insufficient safeguards for functional autonomy, the Belgian authorities have formally committed to amend the 2006 Royal Decree with a view to strengthening the independence of the HCF-PB and its members. The 'comply-or-explain' principle is only partially provided for in law, i.e. with respect to the identification of a significant deviation. However, the Belgian authorities have formally confirmed their intention to explore opportunities to amend the 2013 Cooperation Agreement to address the gaps related to the scope of the 'comply-or-explain' principle. While provisions concerning the appropriate resourcing of the HCF-PB and its capacity to communicate are lacking, the Belgian authorities have also formally committed to address those issues by amending the 2006 Royal Decree. Finally, access to information is grounded in provisions only with reference to the information HCF-PB needs to assess the progress of the correction; nevertheless, the Belgian authorities have formally committed to explore ways to ensure a broader access to information by means of an existing protocol.

5. Conclusion

The national provisions adopted by Belgium are compliant with the requirements set in Article 3(2) of the TSCG and in the common principles in light of the clarifications provided by the national authorities on the activation and substance of the correction mechanism and subject to the adoption of the amendments announced by the national authorities on the functional autonomy of the monitoring institution and applying the comply-or-explain principle.