



Brussels, 22.2.2017  
C(2017) 1201 final

ANNEX 22

**ANNEX**

**Country annex**

**SPAIN**

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**REPORT FROM THE COMMISSION**

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

## SPAIN

Spain 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 27 September 2012.

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

- the Constitution, in particular its Article 135 (as amended in September 2011),
- the Organic Law on Budgetary Stability and Financial Sustainability 2/2012, adopted on 27 April 2012 and amended on 21 December 2013 (BSOL),
- the Organic Law 6/2013 on the creation of the Independent Authority for Fiscal Responsibility, adopted on 14 November 2013 (AIReF-OL),
- the Royal Decree 215/2014 approving the Organic Statute of the Independent Authority for Fiscal Responsibility, adopted on 28 March 2014,
- the Ministerial decision HAP/1287/2015 of 23 June 2015.

### 1. Legal status of provisions

The balanced-budget rule is enshrined in Article 135 of the Spanish Constitution (as amended on 27 September 2011), which prohibits structural deficits for both the State and the self-governing Autonomous Communities (*Comunidades Autónomas*), and also requires local authorities to submit a balanced budget. The content of Article 135 of the Constitution is specified in more detail in the BSOL, as laid down in Article 135(5) of the Constitution. The Constitution and the Organic Law have a supra-legislative nature and are binding on and not amendable by the annual budget, which is adopted pursuant to the ordinary legislative procedure.

Against that background, Spain's provisions comply with the criterion of being 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 via the Constitution and an organic law.

Article 135(1) of the Constitution requires all public administrations to respect the principle of fiscal stability. The fiscal stability principle is developed in the Constitution itself and in the BSOL into a set of rules for specific sub-sectors of the public sector. Specifically, Article 135(2) of the Constitution provides that the State and the Autonomous Communities may not incur a structural deficit higher than the limits established by the European Union for the Member States, while local governments must submit a balanced budget in nominal terms. Those rules are extended to the general government sector in Articles 3(2) and 11(1) of the BSOL. Article 3(2) states that: "Fiscal Stability of Public Administrations means a situation of equilibrium or structural surplus" and Article 11(1) states that: "The preparation, approval and implementation of the Budget and other actions affecting the expenditure or revenues of Public Administrations and other entities forming part of the public sector shall be subject to the principle of fiscal stability". Additionally, Article 11(5) of the BSOL sets a specific rule for Social Security Administrations which should have at least a balanced budget, but may exceptionally incur a structural deficit (subject to the purposes and conditions laid down in the

Social Security Reserve Fund regulations). In such a case, the central administration is required to offset the Social Security's structural deficit.

That formulation of the balanced budget rule thus sets a floor for the balances of individual units of public sector and, by implication, the general government as a whole. The law does not refer to the medium-term objective (MTO) *per se*. However, the formulation of the rule is consistent with the current MTO for Spain, which is a balanced budget in structural terms. At the same time, that limit is more demanding than the lower limits for the structural balance set in the TSCG (-0.5% and -1% of GDP) and consequently, complies with the latter. The current level of the MTO for Spain is also more stringent than the minimum level fulfilling the requirements of Regulation (EC) No 1466/97. If the MTO were to be revised above the current level, the BSOL would have to be amended. However, in view of the interpretation provided by the Spanish authorities, Article 135 of the Constitution binds the State and the Autonomous Communities to comply with the targets for the structural deficit under Union law, including if the required MTO is a structural surplus. In addition, Article 3(1) of the BSOL mentions that the principle of fiscal stability should be in line with "European law". Moreover, the preamble is explicit that the BSOL aims, among other things, to ensure compliance with the TSCG.

In addition, Article 11(2) of the BSOL, referring directly to "European regulations", allows the general government sector to incur a structural deficit to accommodate the cost of structural reforms which improve long-term fiscal sustainability. In such cases, the general government sector may incur a structural deficit of 0.4% of GDP, a level lower than envisaged in the framework of the implementation of the SGP (0.5% of GDP). Moreover, Article 11(2) envisages explicitly aligning the maximum allowance for structural reforms if a more stringent limit were to be introduced in the Union budgetary surveillance legislation.

**Convergence towards the MTO:** According to the *First transitional provision* included in the BSOL, the budget balance rule of Article 11 comes into force in 2020. On the path towards the target, the structural deficit should be reduced by at least 0.8% of GDP annually. That convergence rules applies already before 2020. During the period covered by an excessive deficit procedure ('EDP'), the pace of adjustment should, however, be aligned with the required structural adjustment set in the EDP recommendation.

**Escape clauses:** Article 135(4) of the Constitution and Article 11(3) of the BSOL provide that the public sector may incur a structural deficit in cases of natural disasters, severe economic recessions or extraordinary emergencies. The latter term include also events that seriously impair "economic or social sustainability". That provision may lend itself in practice to a wide range of interpretations, some of which could go beyond the definition of exceptional circumstances included in the SGP. The authorities submitted to the Commission further elements regarding the interpretation of that provision. The reference to "economic or social sustainability" is limited to exceptional costs related to "the subsistence of the State and a minimum provision of services to citizens". Moreover, if it is to be invoked as an escape clause, the event has to be exceptional, outside the control of the authorities, create an emergency and approved by the Congress of Deputies by an absolute majority. Those conditions create reasonable safeguards against an open-ended interpretation of the escape clause provisions.

If a deficit is incurred due to exceptional circumstances, a rebalancing plan, which sets the correction path, must be approved, following a report by the Independent Authority for Fiscal Responsibility (AIReF), which is Spain's monitoring institution. The plan is subject to regular monitoring and a failure to implement it can lead to sanctions imposed on the relevant public administration.

**Overall**, the balanced budget rule complies with the TSCG requirements. While the formulation of the rule does not refer explicitly to the MTO, in practice it establishes limits that are more demanding than those required by the TSCG and are also more stringent than those currently implied for the MTO by Regulation (EC) No 1466/97. The adjustment path towards the MTO foreseen in the BSOL is consistent with the SGP and hence with the TSCG. Article 11(2) of the BSOL, envisaging an allowance for structural reforms, is consistent with Regulation 1466/97. Moreover, the floor for the allowed deviation and the requirement of compliance with Union rules included in Articles 11(3) and 3(1) of the BSOL means that the interpretation of those provisions should remain compatible with the application of Union law and with the TSCG.

### **3. The correction mechanism**

The provisions relating to the correction mechanism are mostly found in Articles 17 to 26 of the BSOL.

**Activation:** By 1 April AIREF has to issue a public report examining in particular the compliance in the preceding year with the budget rules, including the structural balanced budget rule, referred to as the 'fiscal stability target', as well as with the expenditure rule and the debt rule (Article 17(2)). By 15 April, the Ministry of Finance also has to issue a public report examining in particular the compliance in the preceding year with the same budget rules (Article 17(3)).

While the provisions of the BSOL do not refer to the notion of a "significant observed deviation", they imply that any observed non-fulfilment of the fiscal stability targets, as well as of the expenditure or public debt rule, would lead to triggering the corrective measures set out in Articles 20 to 24 of the BSOL, irrespective of the size of deviations. That interpretation has been provided by the Spanish authorities.

As a complementary feature, AIREF and the Ministry of Finance are also required to assess whether the fiscal rules were respected in the preceding year, by issuing public reports by 1 October and 15 October respectively. In addition, the Ministry of Finance may have recourse to preventive mechanisms aimed at avoiding the materialisation of a budgetary deviation in the first place (Articles 18 and 19 of the BSOL in particular).

**Substance of the correction:** The steps to be followed in the corrective procedure are specified in detail in Articles 20 to 24 of the BSOL. The procedure requests the formulation of binding corrective plans ("economic and financial plans") within one month of identification of non-compliance, and their approval within a further two months (Article 23). The administrations liable for deviations are responsible for adopting those plans.

The main corrective principle, set out in Article 21(1) of the BSOL, is the achievement of compliance with the fiscal targets in the current and the subsequent years. Should the deviation be identified in the year following its occurrence, this implies that the deviation be corrected as soon as the year following its occurrence. By construction this captures the notions of proportionality and MTO adherence encapsulated in the common principles (principle n°4). That corrective rule applies irrespective of the size of possible deviations. In particular, there is no basis in the provisions for spreading out the corrections over time. There may however be room for flexibility in the allocation of structural balance targets at the sub-levels of general government.

The corrective procedure is backed by further preventive and coercive safeguards. When deviations stem from Autonomous Communities, the concerned entities cannot further borrow without prior central authorisation and grants from the central budget are subject to a

favourable report from the Ministry of Finance (Article 20). The Ministry of Finance has a core role in monitoring implementation on a regular (quarterly) basis. In case the corrective plans are inappropriate or incorrectly implemented, coercive steps can be taken vis-à-vis the non-complying Autonomous Communities or local corporations (Articles 25 and 26). Those steps include credit freezes, the lodging of interest-bearing deposits, and further enforcement measures. AIReF is requested to report on the economic and financial plans before their approval. It may also (but is not obliged to) report on the implementation of those plans.

**Overall:** The correction mechanism is compliant with the TSCG requirements and the common principles. The provisions imply that the corrective procedure is triggered in the event of any deviation from the targets and requires restoration of the targets within one year, based on binding corrective plans, with no flexibility even in the event of large deviations. The provisions are geared towards ensuring tight monitoring by the Ministry of Finance of the sub-sectors of general government, including Autonomous Communities.

#### **4. The monitoring institution**

The Spanish monitoring institution is the AIReF.

**Statutory regime and set-up:** The AIReF was founded by the AIReF-OL as a public law body with its own legal personality and full public and private capacity to act. The Royal Decree 215/2014 of 29 March 2014 on the organic statute of the AIReF and the ministerial decision HAP/1287/2015 adopted on 23 June 2015 complement the statutory regime of the monitoring institution. For organisational and budgetary purposes and without prejudice to its independence, AIReF is placed under the Ministry for Finance and Public Administration. The AIReF is headed by a President, whose activity is supported by dedicated staff.

**Mandate:** The AIReF's mandate provides the necessary basis for carrying out the tasks foreseen by the Fiscal Compact and the common principles. The mission of the AIReF is to ensure effective compliance by the general government sector with the principle of budgetary stability set out in Article 135 of the Spanish Constitution, by continuously evaluating the fiscal cycle and public debt and by analysing economic forecasts. The mandate is detailed in chapters I-II of the AIReF-OL and the BSOL. In particular, the mandate includes the publication of reports on the fiscal stability target, which is interpreted as being the numerical target for the budget balance set for budgetary planning and execution in accordance with the balanced-budget rule presented in section 2.

The following reports, as part of the AIReF's mandate, are particularly relevant vis-à-vis Fiscal Compact requirements:

- a) Report on the ex-ante compliance of the draft budget and the draft Stability Programme with the fiscal stability target (Article 17(1) and (2) of the BSOL and Articles 16 and 20 of the AIReF-OL), respectively by 15 October and 1 April every year.
- b) Report on the compliance of budget being implemented that year with the fiscal stability target, taking into account budget execution of the preceding year and measures proposed during the current year (Article 17 of the AIReF-OL).

The reports a) and b) do not explicitly refer to the identification of a significant deviation. However, they can conclude to non-compliance with the rule, which appears to be a sufficient proxy.

In addition, the AIReF has to propose a breakdown of the fiscal stability targets for Autonomous Communities (Article 16 of the BSOL and Article 18 of the AIReF-OL).

- c) Report on the economic and financial plans and the rebalancing plans elaborated by the Central Administration and the Autonomous Communities before their adoption (Article 19 of the AIREF-OL), i.e. an assessment of the appropriateness of the correction mechanisms proposed at central and sub-central levels.
- d) Report on the appropriateness of activating the correction mechanisms foreseen in the BSOL (as well as the preventive and enforcement measures), as well as on the progress of their implementation (Article 21 of the AIREF-OL).
- e) Report on the occurrence of exceptional circumstances that might allow a deviation from the fiscal stability target (Article 22 of the AIREF-OL).

The reports listed under a), b), c) and e) *have to be* drafted by the AIREF while for reports listed under d) the AIREF *may* draft them.

**Comply-or-explain principle:** The general government or the body concerned by a report from the AIREF must, in case it disagrees, state its reasons in a report to be included "in the corresponding file" (Article 5 of the AIREF-OL), which in turn will be communicated to the AIREF (Article 5 of the ministerial decision HAP/1287/2015). The AIREF reports concerned include the ones listed under a) to e) above. The law does not explicitly state that those explanations have to be public. However, the Spanish authorities have formally committed to applying the 'comply-or-explain' principle in accordance with the TSCG<sup>1</sup>. That commitment consists in publishing the explanations on the web page of the Ministry of Finance's bureau for general government economic and financial information<sup>2</sup>.

**Freedom from interference and capacity to communicate:** The institutional and operational independence of the AIREF is explicitly established by the AIREF-OL (Articles 1 and 7). Neither the President nor the staff of AIREF may seek or take instructions from any public or private entity. As to its capacity to communicate, the AIREF has a power to publish its mandatory reports within specified deadlines as well as to publish its opinions at its discretion as long as they concern the areas listed in the AIREF-OL (Article 5 of the AIREF-OL). The reports and opinions are published on its website<sup>3</sup>.

**Nomination procedure:** All staff, including the President and directors of divisions, must be recruited on the basis of merit, competence and equality (chapter III of the AIREF-OL and chapter IV of AIREF's organic statute). The President is appointed by the government upon proposal from the Ministry of Finance and the government following Parliamentary consultation, for a non-renewable term of six years. He/she must have at least ten years of experience in matters of budgetary, economic and financial analysis of the public sector (Article 24 of the AIREF-OL). While the President is the ultimate decision-maker, the AIREF is managed through an executive committee gathering the President and the Directors of AIREF's divisions. The latter are appointed by the government upon proposal by the President of AIREF and must have at least ten years of experience in the field of the division (Article 26 of the AIREF-OL). The President can be dismissed only under defined circumstances, including a serious breach of duties left to the appreciation of the Minister of Finance after hearings at the Parliament.

**Resources and access to information:** The AIREF-OL (Article 11) grants to the AIREF "*sufficient economic and staff resources* [in order to fulfil its objectives]". The AIREF is funded through a specific levy on the rest of the public administration, as well as through fees

<sup>1</sup> Letter from the Spanish authorities of 20 July 2016.

<sup>2</sup> <http://www.minhap.gob.es/es-ES/CDI/SeguimientoLeyEstabilidad/Paginas/peticionesAiref.aspx>

<sup>3</sup> <http://www.airef.es>

if a specific administration requests a study from the AIREF. In 2014, the AIREF's revenues amounted to EUR 4.1 million<sup>4</sup>.

Article 4(2) of the AIREF-OL aims at securing an appropriate access to information for the AIREF. It states *inter alia* that the relevant authorities have to provide the economic and financial information required by the AIREF which are necessary to carry out its tasks. However, the Organic Statute of AIREF approved by the Royal Decree 215/2014 and the ministerial decision HAP/1287/2015 qualify that access to information by introducing a number of exceptions, some of which being potentially significant. Thus, according to Article 6(1) of AIREF's organic statute, access shall not be granted to auxiliary or supporting information such as the one contained in notes, drafts, opinions, summaries, communications and internal reports or reports exchanged between administrative bodies and entities. Articles 1 and 5(4) of the ministerial decision reiterate those exceptions and add others. With respect to the latter, access shall not be granted *inter alia* to i) information whose generation is not motivated by a legal or regulatory provision, and ii) information whose generation is motivated by a legal or regulatory provision but is requested by the AIREF before the deadline set out in applicable legislation for its production. Having reviewed the above-mentioned set of legal provisions governing the AIREF's access to information, it can be concluded that some of the exceptions introduced by legislation subsequent to the AIREF-OL leave the possibility to unduly narrow down the scope of information (i.e. documents and data) to which the AIREF can have access, thereby potentially affecting the latter's capacity to properly discharge its specific tasks.

In terms of the procedure for access to information, the Ministry of Finance's bureau for general government economic and financial information has been assigned to provide the information requested by the AIREF (including on the scope of regional and local governments), with the exceptions enshrined in the above-mentioned Royal Decree and ministerial decision. Article 5(5) of the ministerial decision allows the AIREF to request information directly from other ministerial departments or regional/local governments, provided that the information has been previously requested to the Ministry of Finance and it has not been provided by the Ministry of Finance based on the established exceptions.

**Overall**, in light of the formal commitment provided by the national authorities to apply the comply-or-explain principle in line with the common principles, the set-up of the AIREF will be compliant with the requirements set in Article 3(2) of the TSCG and in the common principles if and when the set of provisions regulating access to information for the AIREF are brought fully in line with the common principles. The AIREF is grounded in law and its mandate provides the necessary basis for carrying out the tasks prescribed by the TSCG and the common principles. The legal framework includes appropriate safeguards for functional autonomy. The comply-or-explain principle is explicitly provided for in the law, without the obligation to make public the concerned administrations' replies to the AIREF's recommendation. However, the Spanish authorities have formally committed to apply the comply-or-explain principle in accordance with the TSCG. While the AIREF-OL states that the relevant authorities have to provide the AIREF with the economic and financial information necessary to carry out its tasks, exceptions are specified by secondary legislation. These provisions have to be brought fully in line with the common principles. Adequate provisions on the AIREF's endowment with resources are in place.

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<sup>4</sup> 2014 activity report of the AIREF.

## **5. Conclusion**

In light of the formal commitment provided by the national authorities to apply the comply-or-explain principle in line with the common principles, the national provisions adopted by Spain will be compliant with the requirements set in Article 3(2) of the TSCG and in the common principles if and when the set of provisions regulating access to information for the monitoring institution are brought fully in line with the common principles.