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THE CHOICE FOR EUROPE SINCE MAASTRICHT
SALZBURG CENTRE OF EUROPEAN UNION STUDIES

Fact sheet on legal foundations for fiscal, economic, and monetary integration

SPAIN

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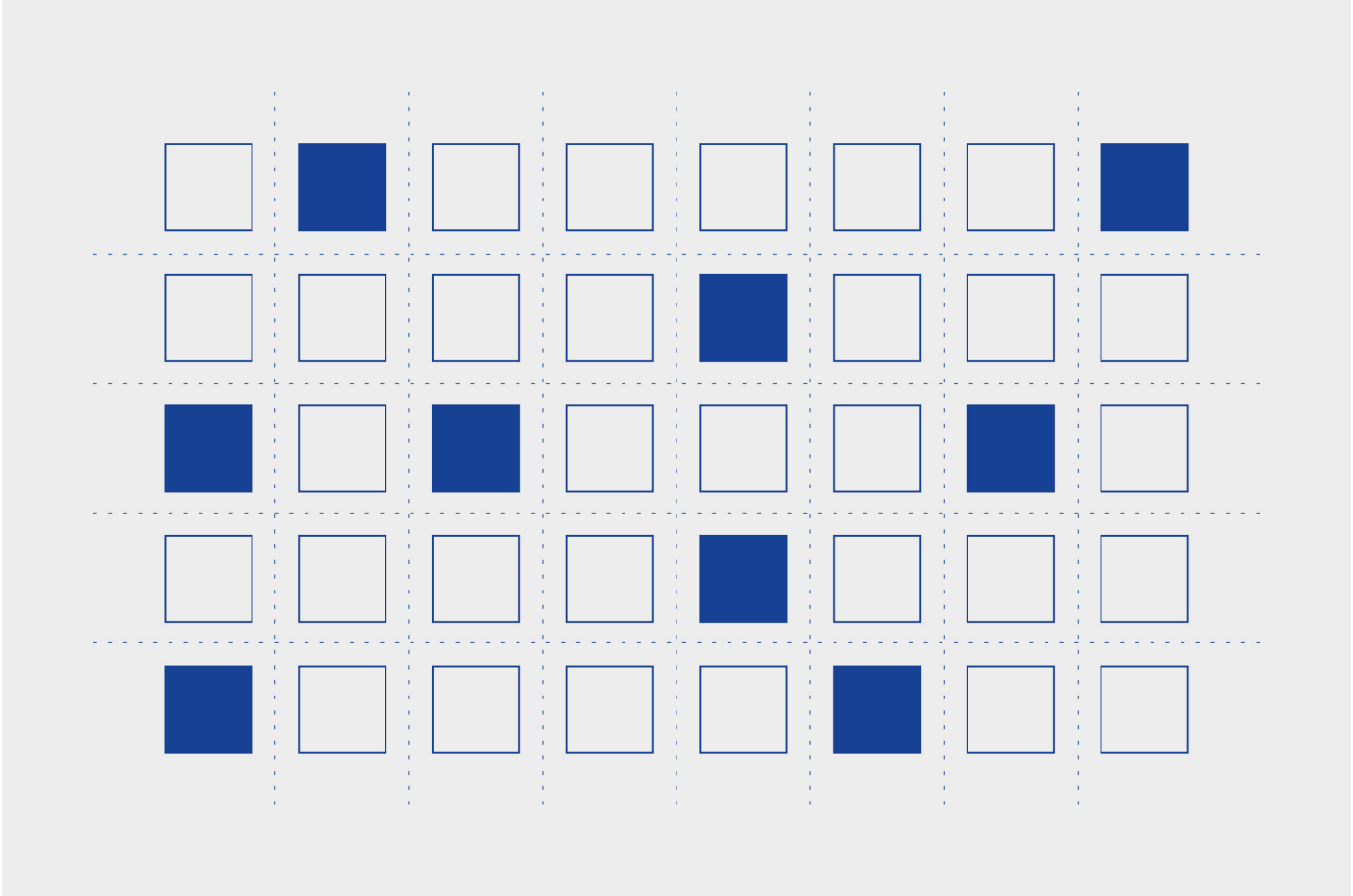

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Introduction

This country fact sheet provides concise information on the main characteristics of the national constitutional systems, including the system and role of national jurisprudence, parliaments and governments. Further, it briefs on the constitutional foundations and limits in the field of Economic and Monetary Union. It outlines on the existence of specific constitutional provisions on EMU membership, accession, treaty amendments, or limits to the (further) transfer of powers through Treaty amendments.
Among others, the overview informs about the principal actors in the field of fiscal and economic policies, the relevant findings of the judicial and parliamentary branches on EMU related actions, implementation measures of supranational and international rules, and respective constitutional amendments.

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SPAIN (Maribel González Pascual/ Joan Solanes Mullor/Aida Torres Pérez)

1) Main characteristics of the national constitutional system

The Spanish Constitution of 1978 was drafted in the transitional period to democracy in the aftermath of Franco's dictatorship. The Constitution was the outcome of a consensus among the main political parties represented in parliament after the 1977 elections. For a long time, the amendment of the Constitution was regarded as a 'taboo' since the priority was to secure the stability of the democratic system. The fear was that any attempts to modify the Constitution would put the achievements of the democratic regime at risk, and the shadow of the dictatorship still loomed large. Nonetheless, after almost forty years since its enactment, there are more and more voices calling for an overall constitutional amendment regarding issues such as the territorial decentralisation of power, the Senate and the Crown.

In terms of the process for constitutional amendment, the Spanish Constitution is rigid. There are two amendment procedures: the general procedure (Art. 167) requires a qualified majority of three-fifths of both parliamentary chambers (Congress and Senate), and a referendum is not compulsory. Nonetheless, a referendum shall be convoked if at least one-tenth of the representatives in Congress or in the Senate request it. The Constitution provides for a more demanding procedure (Art. 168) in order to amend certain parts: the Preliminary Title – which includes provisions on the main principles of the constitutional order – basic fundamental rights, the Crown, and for the total revision of the Constitution. According to Art. 168, a qualified majority of two-thirds is required to support the initiative, a general election has to take place and, after the election, the support of a two-thirds majority of both chambers for the final text must be secured. Ratification by referendum is compulsory.

The key elements of the rationale of the Constitution include a) a system of representative democracy, separation of powers and the rule of law, b) protection of constitutional rights and liberties and c) the territorial decentralisation of political power in Spain. A parliamentary system was established, consisting of a national parliament with two chambers (Congress and Senate) and a president nominated by the parliament. The model of territorial organisation was particularly contested and eventually a sort of quasi-federal state was established, i.e., the *Estado de las autonomías* (17 autonomous communities and 2 autonomous cities). The autonomous communities have political autonomy (legislative and administrative powers, including a parliament). The allocation of powers between the central state and the autonomous communities has been a permanent source of conflicts, and today this model is under the pressure by the secessionist movement in Catalonia.

The Constitutional Court is in charge of reviewing the constitutionality of legislation and solving the constitutional conflicts between the national government, the autonomous communities and local governments. EU law is not a parameter for the Constitutional Court in deciding the compatibility between ordinary laws and the Constitution. The Constitutional Court has lodged only one preliminary reference to the CJEU (*Melloni* case). The Treaty on Stability, Coordination and Governance (TSCG) and the Treaty Establishing the European Stability Mechanism (TESM) are part of the national legal system as international treaties -not

EU law. They are in a supralegal position, i.e., they may not be amended by ordinary laws and ought to comply with the Constitution.

2) Constitutional foundations of EMU membership

International treaties that transfer constitutional powers to international organisations are subject to the consent of parliament through an organic law, which requires an absolute majority in Congress (Art. 93 of the Constitution). Despite the fact that the European Union is not expressly mentioned, this provision was drafted with the future accession of Spain to the European Union in mind. In fact, Spain's accession was carried out through Art. 93. In addition, legislative consent by simple majority is required in the case of international treaties on specific matters, such as treaties that involve fundamental rights or financial obligations for Spain (Art. 94(1) of the Constitution). Finally, in all other instances, the government shall simply inform parliament of the conclusion of international treaties and agreements (Art. 94(2) of the Constitution).

The TSCG was qualified as an Art. 93 type of treaty and obtained the legislative consent by an organic law (absolute majority). The TESM was qualified as an Art. 94(1) type of treaty, and its ratification was authorized by simple majority of the parliament.

Art. 135 of the Spanish Constitution, which introduces the budget stability principle and the limit of public deficit for all public administrations (State, Federal and Local), was amended under the context of the Euro-Plus-Pact, a package of measures adopted by the European Council in March 2011 to respond to the crisis and preserve financial stability, and, more particularly, by the French-German summit held on 16 August 2011. The amendment incorporated the so-called "balanced budget" rule and limitations to the public debt and deficit. Several months after the constitutional amendment, the TSCG incorporated the “golden rule”, i.e., the requirement that “the budget position of the general government must be balanced or in surplus” (Art. 3(1)(a)). Moreover, according to Art. 3(2), there was an obligation to give effect to the financial provisions of Art. 3(1) in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes”.

Art. 135 of the Constitution was amended in a record time of thirteen days by the end of the summer in 2011. Apparently, the President of the Government at the time, José Luis Rodríguez Zapatero, and the leader of the main opposition party, Mariano Rajoy (who is the incumbent President), agreed on the constitutional amendment during a phone conversation. The amendment took place by means of the general procedure and without a referendum. The proposal for the constitutional amendment, submitted jointly by the PSOE and PP parliamentary groups, followed an urgent and special procedure according to which the proposed amendment was only discussed and voted by the full chamber of the Congress and Senate (without being discussed in the respective parliamentary commissions), and the timelines were reduced. Twenty-nine deputies and seven senators asked for a referendum, but they did not reach the minimum of one-tenth of all members as required by Art. 167 – which would have meant at least thirty-five deputies or twenty-seven senators.

3) Constitutional rules and/or practice of implementing EU law and EMU-related instruments, including the role of parliamentary bodies

The Constitution does not give a decisive role to parliament in the ratification and oversight of international treaties. The government is in charge of the negotiations at the international level, while parliament shall consent prior to the ratification by means of a simple or qualified majority depending on the type and content of the treaty (Art. 93 or 94(1) of the Constitution). In certain cases, the role of parliament is reduced to a minimum and it must only be informed of the ratification of the treaty (Art. 94(2) of the Constitution).

In line with the limited oversight of parliament, referendum is scarcely used in Spain in the ratification process or subsequent oversight of an international treaty. There is neither a specific provision establishing the obligation to hold a referendum nor the ban of this instrument for this purpose. Art. 92 of the Constitution allows the government to call a consultative referendum, i.e., not binding, on "political decisions of special importance". This kind of referendum has been used only twice, precisely regarding international treaties (NATO and the Treaty Establishing a Constitution for Europe). For the EMU instruments a referendum has not been called.

Under the Spanish legal system, fiscal and economic policies are driven and led by the executive branch (central and regional governments). However, central institutions have a predominant role in economic and fiscal policies. The central and regional parliaments exercise a supervisory role of governmental action and their most significant prerogative on this field is the approval of the budget (Art. 134 of the Constitution). Despite parliamentary powers regarding the approval and amendment of the budget, the government has a strong position (prepares the budget and shall consent to increases in public expenditure).

The EMU has had a significant impact on the balance of powers between the central government and the autonomous communities. EMU has attributed an even more predominant role to the central institutions in economic and fiscal policies. The reform of Art. 135 of the Spanish Constitution, and particularly Law 2/2012, of 27 April, on budgetary stability and financial sustainability (Law 2/2012), have implied the curtailing of economic and financial autonomy of the autonomous communities and local governments. Law 2/2012 includes the principles of budgetary stability and financial sustainability that apply to all public administrations (central institutions, autonomous communities and local governments). Law 2/2012 also incorporates mechanisms for the prevention of violations of these principles, and budgetary supervision and intervention instruments. These changes have strengthened the powers of central institutions over the economic, financial and budgetary powers of autonomous communities and local governments.

4) Resulting relationship between EU law and national law and constitutional limits to EMU related measures

Art. 93 of the Spanish Constitution merely sets the procedure in order to authorise the transfer of sovereign powers, but it does not include any substantive limits or requirements regarding the values, principles or objectives that should be respected by international organisations. Nonetheless, the Constitutional Court has interpreted this provision to contain implicit substantive limits to integration: the respect for state sovereignty, basic constitutional

structures, and the system of values and fundamental principles enshrined in the Constitution, in particular fundamental rights (Declaration nº 1/2004, of 13 December). In this decision, the Constitutional Court established its counter-limits doctrine, following the lead of the German and the Italian Constitutional Courts. The limits to integration were formulated rather broadly, since the Court did not spell out what "basic constitutional structures" were considered to be or how to understand "respect for state sovereignty" at a time in which this concept is constantly being revised and reshaped.

Despite the counter-limits doctrine, the primacy of EU law is recognized in the Spanish legal system. In particular, the Constitutional Court acknowledged the primacy of EU law on the basis of Art. 93 of the Constitution. In Declaration nº 1/2004 the Constitutional Court crafted a distinction between the primacy of EU law and the supremacy of the Constitution. The Constitutional Court found that the primacy of EU law did not impinge upon the supremacy of the Constitution, since the former referred to the applicability of domestic legislation clashing with EU law, whereas the latter referred to the validity of domestic legislation in light of the Constitution.

The Constitutional Court is in charge of reviewing the constitutionality of international treaties. According to Art. 95(2) of the Constitution, the CC can be consulted on whether an international treaty is compatible with the Constitution prior to its ratification (*ex ante* judicial review). In the case of no prior consultation, a ratified treaty can also be declared unconstitutional according to Art. 27(2) of Law 2/1979 of 3 October (*ex post* judicial review). However, neither the TSCG nor the TESM have been challenged before the Constitutional Court and have not been subject to the scrutiny of the counter-limits doctrine.

There have been only two indirect constitutional challenges related to EMU measures. First, national parliamentary minorities challenged the accelerated constitutional reform of Art. 135 of the Spanish Constitution. The Constitutional Court dismissed the individual constitutional complaint without examining the substance of the controversy (Order nº 9/2012, of 13 January). Second, the Canarias Government has argued before the Constitutional Court the unconstitutionality of several measures included in Law 2/2012, on the grounds of an infringement of its financial and budgetary autonomy. The Constitutional Court declared these measures constitutional (Judgment nº 215/2014, of 18 December).

5) Crisis management measures

At the constitutional level, the amendment of Art. 135 of the Spanish Constitution should be highlighted (see section 3 *supra*). At the legislative level, there have been two relevant legislative changes: (1) Law 2/2012 (see section 4 *supra*); and (2) austerity measures programme under a context of close surveillance by the European and Troika institutions.

In April 2009, the European Commission initiated an excessive deficit procedure against Spain. Moreover, Spain has been signaled as a country with macroeconomic imbalances by the Alert Mechanism Report (AMR). Finally, the banking rescue programme for Spanish financial institutions in 2012 has implied, in practice, a surveillance of the Spanish financial institutions along with deep reforms of the financial system. In this context, Spain has launched a massive austerity programme that has impacted all areas of the welfare state. This

has implied, *inter alia*, a reduction of health, social assistance to dependents and education expenditures, a reform of the social security scheme, a reform of the labour market, and cost-cuttings in the public administrative structure and staff. All these measures have been launched at the legislative level and most of them have been challenged before courts most of whose decisions are still pending.

6) Constitutional law scrutiny of EMU reform scenarios

Spanish constitutional law does not constitute an impediment for further EMU integration.

Art. 93 of the Spanish Constitution allows for the ratification of subsequent treaty amendments subject to the absolute majority of parliament without a compulsory referendum (this was the case of the ratification of the TSCG). This threshold is even lower –simple majority of the parliament or a duty to inform the parliament- in case that EMU measures are not considered a transfer of "powers derived by the Constitution" (this was the case of the ratification of the TESM).

The activation of the counter-limits doctrine by the Constitutional Court in the context of future developments of EMU treaties and related measures is not foreseeable (this doctrine has only been declared but never applied in practice).

Finally, EMU process has not been understood as a change in nature of the constitutional order requiring mandatory constitutional amendments. Up to now, EMU related measures have implied one “voluntary” constitutional reform (Art. 135), which was carried out by the less demanding constitutional amendment procedure and in a time record of thirteen days.

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