



Press and Information

Court of Justice of the European Union

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Judgment in Case C-64/11
Commission v Spain

Spanish legislation which taxes unrealised capital gains on the transfer of the place of residence or of the assets of a company established in Spain to another Member State is contrary to EU law

The freedom of establishment does not preclude such taxation, but does preclude immediate payment thereof

Under Spanish corporate taxation law, unrealised capital gains form part of the basis of assessment for the tax year, where the place of residence or the assets of a company established in Spain are transferred to another Member State, or where a permanent establishment ceases to operate in Spain. For the Commission, since those capital gains do not have any immediate consequences in terms of taxation if those operations are carried out within Spanish territory, such legislation constitutes a discriminatory measure and an obstacle to the freedom of establishment in that it puts the companies which have exercised that freedom at a cash-flow disadvantage. Consequently, the Commission brought an action for failure to fulfill obligations against Spain before the Court of Justice¹.

In today's judgment, the Court states, first, that **the taxation of unrealised capital gains on assets assigned to a permanent establishment which ceases to operate in Spain does not amount to a restriction on the freedom of establishment**. That taxation does not result from a transfer of the place of residence or of the assets of a company resident in Spanish territory to another Member State, but merely from a termination of its activities. Consequently, it is a purely domestic situation and not one of unequal treatment which falls within the freedom of establishment.

By contrast, **the immediate taxation of unrealised capital gains on the transfer of the place of residence or of the assets of a company established in Spain to another Member State amounts to a restriction on the freedom of establishment**. The Court considers that, in such cases, a company is penalised financially as compared with a similar company which carries out such transfers in Spanish territory, in respect of which capital gains generated as a result of such transactions do not form part of the basis of assessment for corporate taxation until the transactions are actually carried out. That difference in treatment is likely to deter a company from transferring its activities from Spanish territory to another Member State. Moreover, that difference in treatment cannot be explained by an objective difference in situation as compared with companies which carry out such transactions in national territory.

In that regard, the Court considers that the Spanish legislation seeks to obtain the legitimate objective of safeguarding Spain's powers in fiscal matters. Thus, EU law does not, in principle, preclude the tax due on unrealised capital gains, arising in Spain, from being determined at the point at which Spain's taxation powers in relation to the company concerned cease to exist, in this instance, at the point at which the company's seat or assets are transferred to another Member State.

¹ Germany, Finland, France, Italy, the Netherlands, Portugal, the United Kingdom and Sweden intervened in support of Spain.

However, the Court takes that view that the measures adopted to achieve that objective are disproportionate and go beyond what is necessary. Spain could preserve its powers in taxation matters by means of measures which are less harmful to the freedom of establishment. It is possible, for example, to request payment of the tax debt following the transfer, at the point at which the capital gains would have been taxed if the company had not made that transfer outside of Spanish territory. Moreover, the mechanisms of mutual assistance which exist between the authorities of the Member States are sufficient to enable the Member State of origin to assess the veracity of declarations made by companies which opt to defer payment of the tax. Thus, **the right to the freedom of establishment does not preclude capital gains generated in a territory from being taxed, even if they have not yet been realised. By contrast, it does preclude a requirement that that tax be paid immediately.**

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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