



## **National legislation requiring Spanish tax residents to declare their overseas assets or rights is contrary to EU law**

*The restrictions on the free movement of capital imposed by that legislation are disproportionate*

On the 15 February 2017, the Commission issued a reasoned opinion in which it found that certain aspects of the requirement for Spanish tax residents to declare overseas assets or rights<sup>1</sup> by means of a form entitled 'Form 720' were incompatible with EU law. According to the Commission, the consequences of failure to comply with that obligation are disproportionate in the light of the objectives pursued by the Spanish legislation, namely to guarantee the effectiveness of fiscal supervision and to prevent tax evasion and avoidance.

Under the national legislation at issue, Spanish residents who fail to declare or who make a partial or late declaration of assets and rights that they hold abroad are liable for additional assessment of the tax due on the amounts corresponding to the value of those assets or of those rights, including where they have been acquired during a period that is already time-barred, and to the imposition of a proportional fine and specific flat-rate fines.

In today's judgment, **the Court declares that Spain has failed to fulfil its obligations under the principle of free movement of capital.** The obligation to submit 'Form 720' and the penalties for failure to comply with or for partial or late compliance with that obligation, which do not have an equivalent in respect of assets or rights located in Spain, establish a difference in treatment between Spanish residents according to the location of their assets. As that obligation is likely to deter, prevent or restrict the opportunities for residents of that Member State to invest in other Member States, it constitutes a restriction on the free movement of capital.

The Court notes that **the legislation at issue appears appropriate for ensuring the attainment of the objectives referred to** above because, despite the existence of mechanisms for the exchange of information or administrative assistance between the Member States, the level of information available to them concerning assets held by their tax residents abroad is, overall, lower than that available to them concerning assets located on their territory. However, **in the Court's assessment that legislation goes beyond what is necessary to achieve those objectives in three respects:**

**In the first place, the Court considers that Spain has failed to fulfil its obligations under the free movement of capital by providing that the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets and rights located abroad entails the taxation of undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility, in practice, of benefiting from limitation.**

According to the Court, the presumption of acquisition of 'unjustified capital gains' established by the Spanish legislature does not appear disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision and the prevention of tax evasion and avoidance, since, in particular, that presumption can be rebutted by the tax payer. By contrast, **the**

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<sup>1</sup> Including immovable property, bank accounts, securities, assets or rights representing the share capital, own funds or assets of any type of entity or life and disability insurance which they hold outside Spanish territory.

**choices made with regard to limitation are disproportionate in the light of those objectives, in so far as they allow the tax authorities to make an additional assessment of the tax due without that assessment being subject to any time limit** in respect of amounts corresponding to the value of assets or rights situated abroad and not declared, or declared partially or late, using 'Form 720'.

Thus, the Court notes that **the measure adopted by the Spanish legislature, in addition to including an effect of non-applicability of any limitation period, also allows the tax authorities to call into question a limitation period which had already expired vis-à-vis the taxpayer, which undermines the fundamental requirement of legal certainty. By attaching such serious consequences to the failure to comply with a declaratory obligation, the Spanish legislature went beyond what is necessary to guarantee the effectiveness of fiscal supervision and to prevent tax evasion and avoidance.**

**In the second place, the Court considers that Spain also failed to fulfil its obligations under the free movement of capital by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights held overseas. That fine may be applied concurrently with the flat-rate fines which apply to each missing, incomplete, incorrect or false data item or set of data which should appear on 'Form 720'.**

The Court notes that **the imposition of that fine is directly linked to the failure to comply with reporting obligations**, since only taxpayers who have not complied with the obligation to provide information are penalised. That non-compliance is sufficient to lead to a finding of the existence of a **tax offence, which is regarded as very serious** and punishable by the imposition of a fine of 150% of the amount of the tax avoided, that rate not being expressed as a ceiling rate. The Court also notes that the very high rate of that fine gives it a **highly punitive nature** and that the **concurrent application** of that fine with the flat-rate fines provided for elsewhere **may lead**, in a number of cases, **to an increase of the total amount of the sums payable by the taxpayer to more than 100% of that taxpayer's overseas assets or rights.** That constitutes a **disproportionate interference with the free movement of capital.**

**In the third place, the Court finds that the Spanish legislature also failed to fulfil its obligations under the free movement of capital by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to flat-rate fines the amount of which is disproportionate to the penalties imposed in respect of similar infringements in a purely national context and the total amount of which is not capped.** The amount of those fines is EUR 5 000 per data item or set of data which is missing, incomplete, incorrect or false, with a minimum of EUR 10 000, and an amount of EUR 100 per data item or set of data declared late or not declared digitally where so required, with a minimum of EUR 1 500.

The Court notes in that regard that **Spanish law penalises failure to comply with mere obligations to declare or purely formal obligations by the imposition of very high flat-rate fines, since they apply to each data item or set of data concerned together with, as appropriate, a minimum amount of EUR 1 500 or EUR 10 000 and the total amount is not capped.** The Court also takes account of the fact that **those flat-rate fines are applied concurrently with the proportional fine of 150%** and notes that **their amount is disproportionate to the amount of the fines which penalise failure to comply with similar obligations in a purely domestic context in Spain.** Consequently, **those flat-rate fines introduce a disproportionate restriction on the free movement of capital.**

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**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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