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Opinion Statement ECJ-TF 2/2022 on the Decision of 27 January 2022 in *European Commission v. Kingdom of Spain (Form 720)* (Case C-788/19)

In this CFE Opinion Statement, the CFE ECJ Task Force comments on the decision of 27 January 2022 in *European Commission v. Kingdom of Spain (Form 720)* (Case C-788/19) on the lack of proportionality of the consequences derived from the failure to provide information concerning assets or rights held in other Member States of the European Union or the European Economic Area.

1. Introduction

This is an Opinion Statement, submitted to the EU institutions in May 2022, of the CFE ECJ Task Force on *Commission v. Spain* (Case C-788/19) (also cited as the Form 720 case), in which the First Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 27 January 2022.[1] The Court, in its decision, ruled in favour of the action brought by the Commission and did not fully follow the reasoning of Advocate General Saugmandsgaard Øe in his Opinion of 15 July 2021, who proposed only partially accepting the action brought by the Commission.[2]

The Court held that the Kingdom of Spain had failed to fulfil its obligations under article 63 of the Treaty on the Functioning of the European Union (TFEU) (2007)[3] and article 40 of the EEA Agreement (1992)[4] by imposing disproportionate measures on the failure to duly comply with the obligation to provide information concerning assets and rights located abroad. The Spanish legislation provided for very serious economic consequences, such as the taxation of the value of not duly declared assets and rights as unjustified capital gains with no limitation period. The legislation also provided for a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which could be applied concurrently with flat-rate fines. At the same time, such flat-rate fines were much higher than the penalties imposed in respect of similar infringements in a purely national context, which were not capped. *Commission v. Spain* is an important case, as it addresses a number of relevant issues regarding the limits that the Member States must respect when implementing measures to counteract international tax avoidance and evasion.

2. Background and Issues

In 2012, Spain implemented certain rules with the aim of combating tax evasion and avoidance with respect to assets located outside Spanish territory.[5] The regulation included an obligation for tax residents, either subject to corporate income tax (CIT) or to personal income tax (PIT) in Spain, to declare specific assets and rights located abroad (the "Form 720"). Specifically, assets to be declared include:

– accounts by the holder, the beneficial owner, the representative, or any authorized or beneficiary person

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1. ES: ECJ, 27 Jan. 2022, Case C-788/19, *European Commission v. Kingdom of Spain*, Case Law IBFD.
2. ES: Opinion of Advocate General Saugmandsgaard Øe, 15 July 2021, Case C-788/19, *European Commission v. Kingdom of Spain*, Case Law IBFD.
3. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD [hereinafter TFEU].
4. Agreement on the European Economic Area, 2 May 1992, Primary Sources IBFD.
5. ES: Law 7/2012 of 29 Oct. 2012.

with a right of disposal at 31 December of each year unless the sum of balances does not exceed EUR 50,000; further obligations to report only arise when there is a yearly variation higher than EUR 20,000;

– any other assets, securities, stocks or rights representing the capital, equity or assets of any type of entity, including trusts, or the transfer to third parties of equity capital (investment funds, structural funds) of which the person is the holder or beneficial owner and that are deposited or situated abroad as of 31 December of each year; life insurance or invalidity insurance policies by the policy holder; temporary or life annuities, by the beneficiary following a transfer of cash capital; and
– real estate and rights in respect of real estate located abroad by the holder or beneficial owner.

Law 7/2012 of 29 October also introduced certain amendments to the General Tax Law,[6] to the Corporate Income Tax Act[7] and to the Personal Income Tax Act (hereinafter PITA),[8] establishing certain tax consequences related to different situations of improper fulfilment of this obligation (hereinafter Form 720 regime), namely:

– very serious offences for (i) failure to comply with the obligation to declare or incomplete, inaccurate or false declaration, or (ii) late declaration or declaration by other than electronic, computer and telematic means, with a fixed penalty of EUR 5,000 per data or set of data subject to a minimum amount of EUR 10,000 in respect of case (i), or EUR 150 per data or set of data subject to a minimum amount of EUR 1,500 in respect of case (ii), and with no cap or maximum amount for such a fine (hereinafter fixed amount or flat-rate penalties);
– qualification and taxation as "unjustified capital gain" of the amount corresponding to the value of the assets and rights in respect of which the reporting obligation has not been complied with within the period established for this purpose. The unjustified capital gain is attributed to the last period not covered by the statute of limitation of the taxpayer, irrespective of the date of acquisition of the assets concerned. This qualification automatically applies unless the taxpayer proves that the ownership of the assets or rights corresponds to (i) declared income or to (ii) income obtained in tax periods in respect of which they were not considered a taxpayer under CIT/PIT; and
– serious penalty consisting of a monetary sanction of 150% of the tax corresponding to the undeclared assets/rights considered as unjustified capital gains ("150% penalty"). This penalty can apply together with the fixed amount penalties for improper reporting.

After a series of complaints, the Commission sent a letter to Spain on 20 November 2015 regarding the potential incompatibility of the consequences linked to the obligation to declare the assets and rights located abroad (Form 720) due to a lack of proportionality as regards the objectives of the Spanish regulations.[9] The Commission considered that all three consequences and their modalities of application lead to disproportionate restrictions on several freedoms of movement (articles 21, 45, 49, 56 and 63 of the TFEU and articles 28, 31, 36 and 40 of the EEA Agreement) and especially against the free movement of capital. After the answer of Spain on 29 February 2016, the Commission issued a reasoned opinion on 15 February 2017, maintaining its initial position. The Spanish authorities reacted on 12 April 2017 and 31 May 2019, and the Commission finally brought an action for failure to comply with EU law under article 258 of the TFEU on 23 October 2019.

The European Commission requested that the Court declare that:

> – by providing that failure to comply with the obligation to provide information in respect of assets and rights located outside of Spain or the late submission of 'Form 720' results in the classification of those assets as 'unjustified capital gains' without the possibility of pleading expiry of the limitation period;
> – by automatically imposing a proportional fine of 150% in the event of failure to fulfil the obligation to provide information in respect of overseas assets and rights or late submission of 'Form 720'; and
> – by imposing, in the event of failure to comply with the obligation to provide information concerning overseas assets and rights or of late submission of 'Form 720', flat-rate fines which are more severe than the penalties laid down by the general rules on penalties for similar infringements,
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> the Kingdom of Spain has failed to fulfil its obligations under Articles 21, 45, 49, 56 and 63 TFEU and Articles 28, 31, 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

The action was based on the following arguments:

– the consequences attached to the failure to comply with the partial or the late compliance are incompatible with the obligations under articles 21, 45, 49, 56 and 63 of the TFEU and articles 28, 31, 36 and 40 of the EEA Agreement. The main fundamental freedom involved is the free movement of capital because such legislation generally relates to the ownership of assets or rights held abroad by Spanish residents.[10] All other freedoms, where applicable, appear to be secondary as regards the objective of the legislation in issue;
– the difference in tax treatment regarding not duly declared assets or rights held abroad and assets or rights held domestically by resident taxpayers creates a prohibited restriction on the free movement of capital that deters Spanish residents from transferring their assets abroad;[11]
– despite the fact that the legislation at issue can be justified by the need to guarantee the effectiveness of fiscal supervision and by the objective of prevent-

6. ES: Law 58/2003 of 17 Dec. 2003, General Tax Law.
7. ES: Law 27/2014 of 27 Nov. 2014, Corporate Income Tax Act.
8. ES: Law 35/2006, 28 Nov. 2006, Personal Income Tax Act.
9. *Commission v. Spain* (C-788/19), para. 6.
10. Id., para. 13.
11. Citing NL: ECJ (Fourth Chamber), 11 June 2009, Joined Cases C-155/08 and C-157/08, *X and Passenheim-van Schoot v. Staatssecretaris van Financiën*, paras. 36-40, Case Law IBFD.

ing tax evasion and avoidance, the legislation goes beyond what is necessary to attain those objectives;[12]
- the classification of the value of assets and rights held abroad as "unjustified capital gains" without the benefit of a limitation period is disproportionate;[13]
- the penalty of a proportional fine of 150% of the tax due calculated on the amounts corresponding to the value of the rights or assets situated abroad, imposed on those that fail to comply or those who comply too late, is a disproportionate restriction on the free movement of capital, since it is automatic, cannot be varied and is much higher than the rates of the fine incurred in a late declaration of taxable income in a purely national situation;[14] and
- the application of flat-rate fines in the event of failure to comply with the reporting obligation, or for partial or late compliance with that obligation, at a higher rate than that imposed in respect of similar infringements in a purely national context and without taking into account the information available to the tax authorities concerning those assets, is a disproportionate restriction on the free movement of capital.[15]

3. The Decision of the Court of Justice

In the "Form 720" case, the Court had to clarify whether the consequences established by the Spanish legislation for not duly reporting (i.e., a failure to comply; incomplete, inaccurate, false or late compliance; or compliance by different means) constituted a disproportionate restriction of different fundamental freedoms under the TFEU and the EEA Agreement, mainly of the free movement of capital.

The ECJ, in its decision, fully supported the Commission's application, dismissed the arguments brought by Spain and departed from some of the conclusions reached by the Advocate General in the Opinion in the case. In doing so, the ECJ relied on the analysis of the principle of proportionality as a limit on the need to guarantee the effectiveness of fiscal supervision and the prevention of tax evasion and avoidance, considering that the consequences foreseen in the Spanish legislation were disproportionate.

The Court concluded that the compatibility analysis had to be made under the free movement of capital requirements, which were the most adequate considering the objective of the legislation. The ECJ concluded that the legislation at issue – the obligation to declare foreign assets or rights and the consequences associated with improper compliance – was likely to deter, prevent or restrict the opportunities for residents of Spain to invest in the other Member States. The aim of the legislation, to prevent taxpayers from concealing their assets abroad for tax reasons, cannot act as an exception to that fundamental freedom, despite the fact that the effectiveness of fiscal supervision and the prevention of tax evasion may constitute an overriding reason capable of justifying the imposition of such a restriction.[16] The Court accepted that the legislation establishing the obligation to report assets and rights abroad may appear appropriate to ensuring such goals.[17] It further analysed, however, the proportionality of the different consequences foreseen in the Spanish legislation for improper fulfilment of the obligation to declare.

The Court reaffirmed that the holding of assets or rights outside the territory of a Member State could not give rise to a general presumption of tax evasion and avoidance. The Court also recognized that the Spanish legislation allowed a taxpayer to provide evidence in order to prevent the inclusion of the value of the improperly declared assets and rights as unjustified capital gains, which was not solely based on the holding of assets or rights abroad but was also linked to the taxpayer's failure to comply with, or late compliance with, their specific declaration obligations.[18] Therefore, the presumption did not appear disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision.[19]

The Court, however, went on to elaborate on the possibility of a taxpayer relying on the statute of limitations legislation. The Court did not question the presumption of tax evasion or avoidance by reference to statutes of limitation.[20] It held, however, that the power given to the tax authorities to raise an additional assessment of the tax due without being subject to any time limit goes beyond what was necessary to guarantee the effectiveness of fiscal supervision and to combat tax evasion and avoidance.[21] This is especially true regarding assets or rights acquired during a year already covered by the statute of limitations when the taxpayer was requested to comply with the obligation to provide information. This leads to the de facto non-applicability of any limitation period and allows the tax authorities to disregard a limitation period that had already expired in respect of the taxpayer.[22] Indefinitely extending the period during which taxation may take place or reversing a limitation period that has already expired goes beyond what is necessary to ensure the effectiveness of fiscal supervision and to combat tax evasion and avoidance. This is precluded by the "fundamental requirement" of legal certainty.[23]

In that regard, the ECJ departed from the Opinion of the Advocate General. The Advocate General had considered that the proportionality of the measure had to be seen from the point of view of the effectiveness of fiscal supervision, having regard to the scope of the exchange of information mechanisms available to verify the comparability of situations. The Advocate General had concluded that the measure was disproportionate only in respect of improper information on new bank accounts abroad and, therefore, contrary to the free movement of capital.[24] The

12. *Commission v. Spain* (C-788/19), para. 21.
13. Id., para. 25.
14. Id., paras. 42-43.
15. Id., para. 55.
16. Id., paras. 19-20.
17. Id., para. 24.
18. Id., paras. 27-31.
19. Id., para. 32.
20. Id., para. 33.
21. Id., paras. 35-40 and, in particular, para. 41.
22. Id., para. 37.
23. Id., paras. 38-39.
24. AG Opinion in *Commission v. Spain* (C-788/19), paras. 35-112 and 165.1.

ECJ, in contrast, held that the de facto lack of temporal limitation of the tax administration's powers of adjustment was disproportionate; consequently, it was not necessary to consider the mechanisms for exchange of information or administrative assistance between the Member States under the proportionality analysis.[25]

The ECJ also held that the 150% penalty was clearly disproportionate, following the Commission's argumentation.[26] In so concluding, the ECJ took into account (i) the highly punitive nature of the penalty, which led, in some instances, to a total payment higher than the total value of the assets or rights not duly reported; (ii) the fact that flat-rate penalties were also imposed; (iii) the direct link between the penalty and the failure to comply with reporting obligations, rather than with the substantive obligation to pay tax; and (iv) the lack of a graduated penalty assessed on a case-by-case basis.[27] The Court also confirmed its holding that an administrative act allowing for graduation of the penalty, but issued after the reasoned opinion sent by the Commission, could not be taken into account in the infringement procedure.[28]

Finally, the ECJ concluded that the flat-rate penalties applicable to the Form 720 also constituted a disproportionate restriction on the free movement of capital[29] based on a comparison with the general penalty regime applicable to taxpayers who do not comply with other obligations to declare or who do so partially, late or not in the prescribed form and that do not cause direct economic harm to the tax authorities. The specific penalty regime applicable to the Form 720 led to penalties of between 15, 50 and 66 times that of the comparable general penalty regime.[30] Other characteristics that led to the outcome were the lack of a cap and a potential overlap with the proportional 150% penalty.[31]

4. Comments

Several issues that stem from this interesting decision deserve specific comment:

- the evolution of the justification of restrictions based on the effectiveness of fiscal supervision and prevention of tax evasion;
- the relevance of the proportionality analysis in verifying the compatibility of certain restrictions generated by tax measures aimed at counteracting potential cases of tax evasion and avoidance; and
- the need to exercise the power to impose penalties in accordance with the requirements of proportionality.

The need to ensure the effectiveness of fiscal supervision,[32] on the one hand, and the need to prevent tax evasion and avoidance,[33] on the other, have been accepted by the ECJ as legitimate aims in the public interest. From the very beginning, acceptance of such restrictive measures has been made dependent on the condition that the restriction not go beyond what is necessary for that purpose.[34] The fact that article 63 of the TFEU recognizes the *right* of Member States to prevent infringements of national law and regulations, in particular in the field of taxation, should not be seen as a reformulation of the ECJ case law on the acceptance of such valid public interests and their proportionality, but as a confirmation of settled case law.

Having this in mind, the Commission did not challenge the reporting obligation as such, but the Court implicitly had to address it in its analysis.[35] It would be reasonable to assume that reporting obligations without disproportionate consequences would be acceptable under EU law, irrespective of the existence of exchange of information under the Directive. For this reason, the obligation to present Form 720 was retained after the Spanish tax provisions were adapted to the ECJ decision.[36]

Unlike the Advocate General, the Court did not put much emphasis on the automatic exchange of information under the DAC. It merely concluded that, based on the different levels of information available regarding domestic and foreign assets, the Spanish legislation was justified (though not necessarily proportionate), "even taking into account an overall analysis of the level of information available from the mechanisms for the exchange of information or for administrative assistance between the Member States".[37] One can only wonder whether the outcome might have been different had the Commission focused on a specific, item-by-item challenge regarding the different assets and the corresponding exchange of information. It remains to be seen whether exchange of information will play a role under the new tax Form 720 regime following Law 5/2022 of 9 March.

Another issue is the characterization of the value of the assets and rights held abroad that were not duly declared as unjustified capital gains. The ECJ accepts that characterization.[38] As regards the presumption of tax evasion and avoidance, the ECJ notes the following:[39]

25. *Commission v. Spain* (Case C-788/19), para. 41.
26. The AG had restricted, by contrast, the lack of proportionality of the 150% penalty as applied to new bank accounts, considering the lack of proportionality of the penalty as a corollary to the lack of proportionality of the imputation of the unjustified capital gain. AG Opinion in *Commission v. Spain* (C-788/19), para. 141.
27. *Commission v. Spain* (Case C-788/19), paras. 48-54.
28. Id., para. 52.
29. Id., para. 62.
30. AG Opinion in *Commission v. Spain* (C-788/19), paras. 149, 151, 152 and 160.
31. *Commission v. Spain* (Case C-788/19), para. 60.
32. After BE: ECJ, 28 Jan. 1992, Case C-204/90, *Hanns-Martin Bachmann v. Belgian State*, Case Law IBFD.
33. The ECJ has already recognized that the aims of both reasons of public interest may overlap (SE: ECJ, 21 Nov. 2002, Case C-436/00, *X and Y v. Riksskatteverket*, para. 60, Case Law IBFD). In some other cases, the justification analysis has been brought together, such as in the Form 720 case (FI: ECJ, 3 Oct. 2002, Case C-136/00, *Rolf Dieter Danner*, para. 44 et seq., Case Law IBFD).
34. LU: ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, para. 26, Case Law IBFD.
35. *Commission v. Spain* (Case C-788/19), paras. 19 and 24.
36. Fourth and Fifth Final Provisions of ES: Law 5/2022, of 9 March, amending Law 27/2014, of 27 November, on Corporate Income Tax, and the revised text of the Law on Non-Resident Income Tax, approved by Royal Legislative Decree 5/2004, of 5 March, in relation to hybrid asymmetries.
37. *Commission v. Spain* (Case C-788/19), para. 24.
38. Id., para. 31.
39. FR: ECJ, 11 Mar. 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, para. 51, Case Law

- the holding of assets and rights outside the territory of a Member State cannot give rise to a general presumption of tax evasion and avoidance; and
- when there is a presumption of fraudulent behaviour, the taxpayer must have an opportunity to rebut that presumption.[40]

The ECJ confirmed that both conditions have been met by the Spanish legislation. Therefore, article 39(2) of the PITA passes the proportionality test as regards the characterization of the value of assets and rights not duly declared as unjustified capital gains without taking into consideration the extended temporal power given to the tax administration to raise such a reassessment.[41] This provision is not disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision and the prevention of tax evasion and avoidance because (i) the qualification is not solely linked to the holding of assets abroad but also to the failure to comply with the obligation to provide information; and (ii) the legislation allows a taxpayer to provide some evidence to counter this qualification, namely that those assets or rights were acquired through declared income or income obtained during tax years in respect of which the taxpayer was not subject to tax.

The EU analysis, however, could have been different had the comparison been made with the general tax regime applicable to other unjustified capital gains. Despite the fact that there is no such presumption regarding assets and rights located in Spanish territory, the discovery of concealed assets and rights may also give rise to such a characterization. In that situation, however, a more favourable regime may apply that differs in several respects. The first difference refers to the evidence available to the taxpayer. The qualification can be rebutted by showing evidence of the origin and nature of the income that generated the undeclared assets and rights and not necessarily by demonstrating that the income generating them was (effectively) subject to tax as in the case of the Form 720 regime. The second difference relates to tax treatment. With regard to individual taxpayers, the Form 720 regime provides (i) that the "unjustified income" is attributable to the last not-time-barred tax period, regardless of the year of generation and or incorporation of the asset and right that was undeclared as wealth of the taxpayer, as well as the corresponding interest; and (ii) the unjustified income is taxed under the general tax base, regardless of the origin, even if it is demonstrated that a higher tax burden arises under the general tax base. Since, under the general regime, the taxpayer may provide evidence of the origin and nature of the income that generated the undeclared assets and rights, the tax due would still be applied accordingly. Third, the range of taxpayers affected by the Form 720 regime is much broader than the general one; not only may the holder or the owner of the asset be subject to the recharacterization rule but also any taxpayers subject to the special regime. If these considerations had been taken into account together, the conclusion of the ECJ could have been different since a presumption of fraudulent behaviour leads to a worse tax treatment and can be rebutted through more limited mechanisms than in situations in which the presumption is applied as regards assets and rights concealed but located in Spain.

The reference to the effects of the de facto lack of temporal limitation needs specific attention. The Court confirmed that citizens and entities protected by EU law cannot rely on a statute of limitations by itself to call into question a presumption of tax evasion or avoidance.[42] Moreover, the ECJ has already accepted the application of different limitation periods regarding assets or rights in respect of which the obligation to provide information has not been duly fulfilled.[43] Any legislative choice must, however, be assessed under the proportionality principle to determine whether the choice is adequate and necessary in light of the objectives pursued.[44]

In this regard, it is important to stress the substantive approach taken by the ECJ and the foundations for such a delimitation. Whatever the legal mechanism used to justify the powers of the tax administration to make an additional assessment,[45] the crucial element in verifying the lack of proportionality is whether this power is not subject to a time limit, which involves de facto (i) the non-applicability of any limitation period and, also (ii) the possibility to call into question a limitation period that had already expired for the taxpayer. The ECJ, referring to settled case law,[46] recognized the competence of Member States to introduce extended limitation periods in certain justified cases with the aim of ensuring the effectiveness of fiscal supervision and combating tax evasion and avoidance connected with the concealment of overseas assets, but found it disproportionate when the mechanisms amount, in practice, to an indefinite extension of the period during which the tax administration may reassess the tax associated with the income corresponding to undeclared assets or at the same time may reverse a limitation period which had already expired.[47] When amending the rules, the Spanish legislature did not opt for such an alternative and decided instead to apply the general subsidiary limitation regime that would have applied had Law

IBFD and FI: ECJ, 7 Nov. 2013, Case C-322/11, *K*, para. 60, Case Law IBFD.

40. PT: ECJ, 3 Oct. 2013, Case C-282/12, *Fazenda Pública v. Itelcar - Automóveis de Aluguer, Lda*, para. 37, Case Law IBFD and DE: ECJ, 26 Feb. 2019, Case C-135/17, *X-GmbH v. Finanzamt Stuttgart – Körperschaften*, para. 88, Case Law IBFD.
41. *Commission v. Spain* (Case C-788/19), paras. 28-32.
42. Id., para. 33.
43. *X and E.H.A. Passenheim-van Schoot* (C-155/08), paras. 56, 58, 66 and 76.
44. *Commission v. Spain* (Case C-788/19), para. 34.
45. Either the *action nata* rule, which is justified by the Spanish government on a discriminatory basis, or an expanded and undefined statute of limitations rule.
46. *X and E.H.A. Passenheim-van Schoot* (C-155/08), paras. 66, 72 and 73.
47. *Commission v. Spain* (Case C-788/19), para. 38. Surprisingly, the Association of Tax Inspectors of Spain (IHE) regrets that the ECJ considers the rule regarding a de facto lack of temporal limitation of the taxation of the value of assets and rights unduly undeclared as unjustified capital gains as disproportionate, as it was considered an effective instrument against tax evasion. They deplore the fact that the decision supports those who use tax havens for their own fraudulent purposes. *See* https://www.inspectoresdehacienda.org/doc/20220127_Comunicado%20IHE%20a%20sentencia%20TJUE%20modelo%20720%20-1.pdf.

7/2012 not been approved, despite the fact that it retains the obligation to file Form 720.

The rationale for this approach is based on the principle of legal certainty,[48] noted as a fundamental requirement in the present decision, which precludes the indefinite use of public powers even in order to put an end to an unlawful situation.[49]

The obviously excessive power granted to the tax administration to ensure the effectiveness of fiscal controls and the fight against evasion and abuse has prevented the ECJ from further elaborating on the impact of such powers on the effectiveness of the mechanisms for the exchange of information, in particular with reference to the formulation of the proportionality requirements under EU law.[50] Regardless of their limitations and (in)effectiveness, the ECJ was not able to justify a different outcome based on a total lack of disproportionality generated by the recognition of such a tax power. It is important, however, to determine whether or not the ECJ will change course from their initial consideration of the relevance of the administrative assistance mechanisms under ECJ case law following the Advocate General's analysis.[51] Initially, the mere application of an administrative assistance mechanism, such as the Mutual Assistance Directive (77/799),[52] was considered sufficient to guarantee the effectiveness of fiscal supervision.[53] However, it remains to be seen whether a more detailed analysis of the content and extent of the exchange mechanisms, possibilities and powers conferred will be developed.

The relevance of the elaboration of the proportionality analysis, as regards concrete penalties imposed under the Form 720 regime, must also be stressed. Despite the competence of Member States in respect of their design of a penalty system to counteract avoidance and evasion, this competence has to be exercised in line with the principles of equivalence and proportionality. This statement is true even in situations in which the penalty regime is enabled by secondary EU law[54] and may lead to a reconsideration of some of these regimes. For instance, the new article 25a of the DAC[55] recognizes the competence of Member States to develop a system of penalties for infringements of the obligations enshrined in the Directive.[56] However, it clearly states that "[t]he penalties provided for shall be effective, *proportionate*, and dissuasive" [emphasis added].

The ECJ recognized that the 150% penalty was not proportional but was excessive, causing a disproportionate interference with the free movement of capital based on several factors.[57] It also stressed the cumulative nature of the penalty, which included the flat-rate penalty and the "unjustified capital gains" qualification that, as discussed herein, may lead, in some instances, to an indirect sanction. A tax (penalty) regime with potential confiscatory effects due to the accumulation of various legal consequences – unjustified capital gains, proportional penalty, flat-rate penalty – linked to a failure to fulfil a broad and formal obligation to declare certain assets and rights is unlikely to pass the proportionality analysis. Moreover, as the Advocate General pointed out, the severity and practical automatic nature of the penalty provided under the Spanish law could not be properly mitigated by an administrative act – *Consulta Tributaria Vinculante* – by the tax administration that does not have the force of law and was issued only after the reasoned opinion of the Commission.

In assessing the proportionality of the penalty regime, the ECJ recognized, as a valid tool, the comparison between the specific penalty regime and the subsidiary regime that would otherwise be applicable and was excluded by Law 7/2012 in order to prevent the application of the *ne bis in idem* principle. This element provides a sufficient basis for making both penalty regimes comparable[58] and for concluding that the flat-rate penalty system was restrictive and discriminatory. Although initially justified by the need to guarantee the effectiveness of fiscal control, it was disproportionate.

5. The Statement

Proportionality plays an important role in ensuring the compatibility of measures designed by the Member States to counteract tax evasion and abuse and, in particular, their scope, extent, consequences and intensity.[59] However, a more precise analysis of the proportionality principle requires that a distinction be made between situations that can be considered tax evasion and those that only imply an abuse of rights or tax avoidance.[60]

This is an important case with regard to the recognition of rights derived from the EU fundamental freedoms limiting the discretionary and broad exercise of taxing

48. The ECJ has recognized the principle of legal certainty as a corollary of the rule of law recognized in article 2 of the TFEU. *See* PL: ECJ (Full Court), 16 Feb. 2022, Case C-157/21, *Poland v. European Parliament and Council of the European Union*, paras 319-321, Case Law IBFD.
49. ECJ, 14 July 1972, Case 52/69, *J. R. Geigy AG v. Commission of the European Communities*, para. 21.
50. The legal regime regarding administrative assistance at the EU level varied significantly but, nevertheless, the Form 720 legal regime was not amended or adapted at all.
51. AG Opinion in *Commission v. Spain* (C-788/19), paras. 91-104.
52. Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, Primary Sources IBFD.
53. BE: ECJ, 6 June 2013, Case C-383/10, *European Commission v. Kingdom of Belgium*, paras. 52-53, Case Law IBFD.
54. The penalty systems established by Member States in order to implement DAC6 (Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139 (2018), Primary Sources IBFD) vary significantly and some such legislation of the Member States could be scrutinized on the same basis as the present decision.
55. Council Directive (EU) 2018/822.
56. "Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented".
57. *Commission v. Spain* (C-788/19), para. 52.
58. *Commission v. Spain* (Case C-788/19), para. 56.
59. As the recent case law indicates. *See*, inter alia, BE: ECJ, 24 Feb. 2022, Case C-52/21, *Pharmacie populaire – La Sauvegarde SCRL v. État belge*, Case Law IBFD.
60. A proper application of the proportionality requirements should result in a different outcome when analysing the consequences of a failure to comply with a reporting obligation and when analysing late – and full – compliance of the reporting obligation.

powers by the Member States to counteract potential tax evasion and abuse. The CFE stresses the need to ensure the effectiveness of the rights enshrined by the TFEU and the EEA Agreement by promoting decisions within a shorter period of time and reinforcing access to domestic remedies available to restore the primacy of EU law where it has been infringed by the Member States. Limitation periods, restrictions and legal constraints under domestic legislation that impact the use of available remedies may hamper the aphorism *ubi ius ibi remedium.*[61]

It is justified to guarantee the effectiveness of tax controls and to provide tax administrations with the necessary legal mechanisms to combat tax evasion and abuse, but this must be done with full respect for the fundamental rights and freedoms of taxpayers.

61. Advocate General Szpunar, in his Opinion in ES: Opinion of Advocate General Szpunar, 9 Dec. 2021, Case C-278/20, *European Commission v. Kingdom of Spain*, considers that the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness, which limits the procedural autonomy enjoyed by Member States when laying down the conditions governing their liability for a loss or damage caused to individuals in breach of EU law.

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