Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 15 July 2021 [1]

Case C-788/19

European Commission
v
Kingdom of Spain

(Failure of a Member State to fulfil obligations – Declaration of assets held in other EU or European Economic Area (EEA) Member States – Omission – Disproportionate penalties – Form 720 – Articles 63 and 65 TFEU – Article 40 of the EEA Agreement – Proportionality – Limitation period – Directive 2011/16/EU – Directive 2014/107/EU – Mutual assistance – Automatic exchange)

I. Introduction

1. This action for failure to fulfil obligations concerns tax legislation introduced in 2012 by the Kingdom of Spain with the aim of combating tax evasion and avoidance in respect of assets situated outside Spanish territory. That legislation includes, first, an obligation for tax residents in Spain to declare certain assets and rights situated abroad (an obligation that is fulfilled in Spain by means of the 'Form 720') and, secondly, a series of consequences linked to the failure to comply with that obligation. Those consequences include, first, the classification of assets as unjustified capital gains and their inclusion in the general taxable amount irrespective of the date of acquisition of the assets concerned, secondly, the imposition of a proportional fine of 150% and, thirdly, the imposition of flat-rate fines.

2. The European Commission considers that those three consequences and the rules for their application constitute disproportionate restrictions which infringe several freedoms of movement provided for by the TFEU and the Agreement on the European Economic Area (EEA), in particular the free movement of capital (Article 63 TFEU and Article 40 of the EEA Agreement). According to the Commission, the disproportionate nature of the three consequences is due inter alia to the fact that they lay down very severe penalties for the failure of the taxpayer to fulfil the obligation to provide information without taking into account the fact that the Spanish tax authorities already have the information concerned, or could have it at their disposal, under the system for the exchange of information in the field of taxation provided for by

[1] Original language: French.

Directive 2011/16/EU,[2] as amended by Directive 2014/107/EU[3] ('Directive 2011/16'). By the present action for failure to fulfil obligations, it is therefore requesting that the Court declare that, by establishing those three consequences, the Kingdom of Spain has failed to fulfil its obligations under, inter alia, Article 63 TFEU and Article 40 of the EEA Agreement.

3. At the end of my analysis, I will propose that the Court should uphold the action in part.

II. Spanish law

4. The main law at issue is Ley 7/2012 de Modificación de la Normativa Tributaria y Presupuestaria y de Adecuación de la Normativa Financiera para la Intensificación de las Actuaciones en la Prevención y Lucha contra el Fraude (Law No 7/2012 amending tax and budgetary rules and aligning financial rules to strengthen actions for preventing and combating fraud) of 29 October 2012 (BOE No 261 of 30 October 2012) ('Law No 7/2012'). That law introduced the Form 720 scheme, inter alia, by amending several laws in the field of taxation. More specifically, the various elements of the Form 720 scheme are provided for in the laws cited in the following sections: the obligation to provide information as such (Section 1) and, with regard to the three consequences at issue which are mentioned in the introduction to this Opinion, first, the classification of assets as unjustified capital gains and their incorporation into the general taxable amount irrespective of the date of acquisition of the assets concerned (Sections 2 and 3),[4] secondly, the imposition of a proportional fine of 150% (Section 4)[5] and, thirdly, the imposition of flat-rate fines (Section 1).[6]

A. Ley 58/2003 General Tributaria (General Tax Law No 58/2003) of 17 December 2003 as amended by Law No 7/2012 ('the GTL')

5. The eighteenth additional provision, entitled 'Obligation to provide information on overseas assets and rights' of the GTL provides:

'1. In accordance with Articles 29 and 93 of the present law, taxable persons are required to provide the tax authorities, under the conditions laid down by regulation, with the following information:

(a) Information relating to accounts situated abroad, opened with institutions which carry out banking or credit activities, of which the persons concerned are holders or beneficiaries, or in respect of which they hold, in any form, an authorisation or a right of disposal.

(b) Information relating to all securities, assets, stocks or rights representing the share capital, equity or assets of any type of entity, or concerning the transfer of equity to third parties, of which the persons concerned are holders and which are deposited or situated abroad, as well as information relating to life or disability insurance policies of which they are the holders and

[2] Council Directive of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

[3] Council Directive of 9 December 2014 amending Directive 2011/16 as regards mandatory automatic exchange of information in the field of taxation (OJ 2014 L 359, p. 1).

[4] That consequence is the subject of the Commission's first complaint.

[5] That penalty is the subject of the Commission's second complaint.

[6] That penalty is the subject of the Commission's third complaint.

life or temporary annuities of which they are beneficiaries following a transfer of cash capital, or even information on movable or immovable property acquired from entities established abroad.

(c) Information relating to immovable property and rights in immovable property situated abroad which they own.

…

2. Rules on offences and penalties

It is a tax offence not to submit within the prescribed period the informative declarations provided for in this additional provision or to include incomplete, incorrect or false information.

It is also a tax offence to submit such declarations by means other than electronically, by computer and telematically where it is stipulated that such methods be used.

The above offences are very serious and shall be penalised in accordance with the following rules:

(a) Failure to comply with the obligation to declare accounts held with credit institutions located abroad shall be liable to a flat-rate fine of EUR 5 000 for each data item or set of data relating to the same account which should have been included in the declaration, or for each data item which is incomplete, incorrect or false, the minimum fine shall be set at EUR 10 000.

The fine is EUR 100 for each data item or set of data relating to the same account, with a minimum fine of EUR 1 500, where the declaration has been submitted out of time, without prior request from the tax authorities. The same penalty shall apply where the declaration is submitted by means other than electronically, by computer and telematically where it is stipulated that such methods be used.

(b) Failure to comply with the obligation to declare securities, assets, stocks, rights, insurance and annuities deposited, managed or obtained abroad shall be liable to a flat-rate fine of EUR 5 000 for each data item or set of data relating to each individual asset, depending on the category in question, which should have been included in the declaration, or for each data item which is incomplete, incorrect or false, the minimum fine shall be EUR 10 000.

The fine is EUR 100 for each data item or set of data relating to each individual asset, depending on the category in question, with a minimum fine of EUR 1 500, where the declaration has been submitted out of time, without prior request from the tax authorities. The same penalty shall apply where the declaration is submitted by means other than electronically, by computer and telematically where it is stipulated that such methods be used.

(c) Failure to comply with the obligation to declare immovable property and rights in immovable property situated abroad shall be liable to a flat-rate fine of EUR 5 000 for each data item or set of data relating the same immovable property or the same right in immovable property which should have been included in the declaration, or for each data item which is incomplete, incorrect or false, the minimum fine shall be set at EUR 10 000.

> The fine is EUR 100 for each data item or set of data relating to the same immovable property or the same right in immovable property, with a minimum fine of EUR 1 500, where the declaration has been submitted out of time, without prior request from the tax authorities. The same penalty shall apply where the declaration is submitted by means other than electronically, by computer and telematically where it is stipulated that such methods be used.
>
> Offences and penalties governed by this additional provision shall not be in addition to those provided for in Articles 198 and 199 of this law.

3. The laws governing each tax may provide for specific consequences in the event of failure to comply with the obligation to provide information laid down in this additional provision.'

B. Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de Modificación Parcial de las Leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio (Law No 35/2006 on personal income tax and amending in part the laws on the taxation of corporations, the income of non-residents and wealth) of 28 November 2006, as amended by Law No 7/2012 ('the Law on personal income tax')

6. Article 39 of the Law on personal income tax, entitled 'Unjustified capital gains', provides:

'1. Assets or rights the possession, declaration or acquisition of which does not correspond to income or capital declared by the taxpayer, and the entry of non-existent debts in a declaration in respect of this tax or wealth tax, or their entry in official books or registers shall be regarded as unjustified capital gains.

Unjustified capital gains shall be included in the general taxable amount for the tax period in which they were discovered, unless the taxpayer demonstrates that he or she acquired ownership of the rights or assets in question during a prescribed period.

2. In any event, the possession, declaration or acquisition of assets or rights for which the obligation to provide information referred to in the eighteenth additional provision of [the GTL] has not been complied with within the prescribed period shall be treated as unjustified capital gains and included in the general taxable amount for earliest tax year which has not yet become time-barred and may still be regularised.

However, the provisions of this paragraph shall not apply if the taxpayer provides proof that the assets or rights held by him or her were acquired by means of declared income or income obtained in tax years for which he or she was not liable to that tax.'

C. Ley 27/2014 del Impuesto sobre Sociedades (Law No 27/2014 on corporate tax) of 27 November 2014, as amended by Law No 7/2012 ('the Law on corporate tax')

7. Article 121 of that law, entitled 'Unaccounted for or undeclared assets and rights: presumed income', provides, in paragraphs 1 to 6 therein:

'1. Assets held by the taxpayer which are not entered in his or her accounts are presumed to have been acquired by means of undeclared income.

That presumption also exists in the case of a partial concealment of the acquisition value.

2. Assets not entered in the accounts are presumed to belong to the taxpayer where he or she is in possession of them.

3. The amount of undeclared income is presumed to be equal to the acquisition value of the assets or rights not entered in the accounts, minus the amount of actual debts incurred to finance that acquisition, which are also not entered in the accounts. The net amount may not be negative under any circumstances.

The amount of the acquisition value shall be checked against the relevant supporting documents or, if this is not possible, against the valuation rules laid down in the [GTL].

4. There is a presumption of undeclared income where non-existent debts are entered in the taxpayer's accounts.

5. The amount of income established on the basis of the abovementioned presumptions shall be attached to the earliest tax year which has not yet become time-barred, unless the taxpayer demonstrates that it corresponds to one or more other tax years.

6. In any event, assets or rights in respect of which the obligation to provide information referred to in the eighteenth additional provision of the [GTL] has not been complied with within the prescribed period shall be regarded as having been obtained by means of undeclared income attached to the earliest tax year which has not yet become time-barred and may still be regularised.

However, the provisions of this paragraph shall not apply if the taxpayer provides proof that the assets or rights held by him or her were acquired by means of declared income or income obtained in tax years for which he or she was not liable to that tax.'

D. Law No 7/2012

8. The first additional provision of that law, entitled 'System of penalties in the event of unjustified capital gains and presumed income', provides:

'The application of Article 39(2) of Law No 35/2006 of 28 November 2006 on personal income tax and amending in part the laws on the taxation of corporations, the income of non-residents and wealth and Article 134(6) of the consolidated text of the Law on corporate tax, approved by Royal Legislative Decree No 4/2004 of 5 March 2004, shall determine the tax offence, which shall be regarded as very serious and shall be punished by a fine of 150% of the amount of the penalty.

The penalty shall be based on the value of the total amount resulting from the application of the articles referred to in the preceding paragraph. …'

III. Pre-litigation procedure and the proceedings before the Court

9. By letter of formal notice dated 20 November 2015, the Commission drew the attention of the Spanish authorities to the possible incompatibility with EU law of certain aspects relating to the obligation to declare assets and rights situated abroad by means of the Form 720. According to

the Commission's analysis, the consequences of the failure to comply with that obligation and the associated system of penalties appeared disproportionate in the light of the objectives pursued by the Spanish legislation.

10. Following the Spanish authorities' reply dated 29 February 2016 disputing the existence of any incompatibility of that law with EU law, on 15 February 2017, the Commission issued a reasoned opinion maintaining, in essence, the position it had taken in its letter of 20 November 2015.

11. By letters of 12 April 2017 and 31 May 2019, the Spanish authorities replied to that reasoned opinion.

12. Since the Commission was not convinced by those replies, on 23 October 2019 it brought the present action for failure to fulfil obligations on the basis of Article 258 TFEU and claims that the Court should:

– declare that 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 EEA Agreement by:

  – establishing that the failure to fulfil the obligation to provide information in respect of overseas assets and rights or the late submission of the Form 720 results in those assets being classified as unjustified capital gains without being able to rely on the statute of limitation;

  – 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 the late submission of the Form 720;

  – applying flat-rate fines in respect of the failure to fulfil the obligation to provide information in respect of overseas assets and rights or the late submission of the Form 720 which are more severe than the penalties laid down by the general rules on penalties for similar infringements, and

– order the Kingdom of Spain to pay the costs.

13. The Kingdom of Spain contends that the Court should:

– dismiss the action and

– order the Commission to pay the costs.

14. No hearing was held but both parties replied to the written questions put to them by the Court on 8 December 2020.

IV. Analysis

A. Preliminary observations on the Form 720

15. As I stated in the introduction to this Opinion, the legislation at issue was introduced with the aim of establishing stricter fiscal supervision in a situation involving a significant risk of tax evasion and avoidance. In that regard, the Commission has stated that it in no way disputes that the Kingdom of Spain is entitled to impose an obligation to provide information on assets and rights held abroad, as provided for by the Form 720. It also accepts that the obligation imposed by the Form 720 may be justified by the need to prevent tax evasion and avoidance and abusive practices, as well as by the need to guarantee the effectiveness of fiscal supervision. The Commission therefore disputes only the consequences laid down in the event of failure to comply with that obligation, consequences which it considers disproportionate.

16. Even though it is not the obligation to provide information laid down by the Form 720 as such which is disputed by the Commission, but the consequences which derive from it in the event of the failure to fulfil or late compliance with that obligation, I consider it useful to explain the scope of that obligation to provide information.

17. That obligation covers three categories of assets and rights situated abroad: accounts opened with financial entities, securities representing share capital and other assets considered as such under the legislation, as well as immovable property.[7] According to the information provided by the Commission, the assets and rights in question must be declared if, at the end of the financial year (or during that financial year), the estimated value of each category exceeds EUR 50 000. The declaration is renewed for subsequent years if the value of the assets and rights in a given category increases by more than EUR 20 000. The obligation to provide information includes the obligation to provide a set of data for each category of assets and rights[8] and the declaration must be submitted using the Form 720 within the period from 1 January to 31 March following the reference tax period. Apart from the exceptions provided for by the legislation,[9] persons liable for payment are natural or legal persons who are domiciled for tax purposes in Spain, irrespective of their nationality, entitled to act as the holder, agent or beneficiary of the assets and rights, or even as an authorised person in respect of bank accounts.

[7] See paragraph 1 of the eighteenth additional provision of the GTL.

[8] According to the information provided by the Commission, in the case of *bank accounts*, the taxpayer must provide five data items or groups of data: name of the financial institution or bank; identification of the bank account; opening or closing dates, or date on which a licence to operate the bank account was granted or revoked; account balance on 31 December and average balance in the last quarter of the year. In the case of *assets or rights*, the taxpayer must declare in essence the following data items or groups of data: name of the institution issuing the securities or the borrower of the debt or identification of the legal relationship; the balance of securities (shares or bonds) or rights as at 31 December, with an indication of the number and category of shares or securities and their nominal value. In the case of *life insurance* and *temporary or life annuities*, the taxpayer must declare in essence the following data items or groups of data: identification and address of the insurance company, identification of the insurance contract or temporary or life annuities in force on 31 December; the redemption value in the case of insurance contracts or the capitalisation value in the case of annuities. In the case of *immovable property*, the taxpayer must communicate in essence the following data items or groups of data: identification of the immovable property, by specifying its type; location of the State, country or territory in which it is situated, town, street and number; date of acquisition; acquisition value and, in the case of the cancellation or transfer of assets, information is requested on the date of cancellation or transfer.

[9] According to the Commission, the obligation to provide information does not apply to natural and legal persons holding overseas assets and rights where these are recorded in the accounts in an individualised and identified manner.

B. The freedoms in question

18. By its action, the Commission submits that the Kingdom of Spain has infringed the freedoms enshrined in Articles 21 (citizens), 45 (workers), 49 (establishment), 56 (services) and 63 TFEU (capital) and the corresponding freedoms under the EEA Agreement. In that regard, the Commission observed that, although the Form 720 set of rules may affect all of those freedoms, the legislation at issue primarily affects the free movement of capital and therefore the Spanish legislation must be examined solely in the light of that freedom.

19. I partially share that view. It is settled case-law that when a national measure concerns both the freedom to provide services and the free movement of capital, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it.[10] The same applies to a national measure which concerns both the free movement of capital and freedom of establishment.[11]

20. In that regard, I consider that the free movement of capital is the principal freedom to which the national measure at issue relates. The national legislation at issue refers generally to the holding of overseas assets or rights by residents of Spain, without this necessarily taking the form of holdings in the share capital of entities established abroad or being principally motivated by the desire to benefit from financial services there. Although the freedom to provide services and freedom of establishment may well be affected, those freedoms appear to be secondary however in relation to the free movement of capital, to which they can be linked. I consider that the same conclusion should be drawn with regard to the free movement of workers, which appears to be even more marginal in the present case than the freedom to provide services and freedom of establishment. As regards the right of European citizens to move, enshrined in Article 21 TFEU, I consider that the Commission has not put forward any arguments as to why this freedom would also be affected by the legislation at issue.

21. It follows that the present case must be assessed from the point of view of the free movement of capital, provided for in Article 63 TFEU and Article 40 of the EEA Agreement. In the interests of clarity, and since Article 40 of the EEA Agreement has the same legal scope as Article 63 TFEU,[12] I shall refer in the following analysis only to Article 63 TFEU.

C. Is Article 63 TFEU restricted?

1. Arguments of the parties

22. The Commission considers that the legislation relating to the Form 720 constitutes a restriction on the principle of the free movement of capital due to the fact that the legislation at issue imposes specific rules on the holding of overseas assets and rights which do not exist in respect of the same assets situated in Spain. The application of those rules is said to have the effect inter alia of making the transfer of assets abroad less attractive for the taxpayers.

[10] See, to that effect, judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 39).

[11] See, to that effect, judgments of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraphs 89 to 93), and of 28 February 2013, *Beker and Beker* (C-168/11, EU:C:2013:117, paragraphs 25 to 31).

[12] See, to that effect, judgments of 11 June 2009, *Commission* v *Netherlands* (C-521/07, EU:C:2009:360, paragraph 33), and of 5 May 2011, *Commission* v *Portugal* (C-267/09, EU:C:2011:273, paragraph 51).

23. According to the Spanish Government, the penalties for deficiencies in relation to the Form 720 constitute a restriction, since the imposition of penalties is essential in order to make the obligation to provide information effective. Moreover, persons who conceal their assets for tax reasons would not be entitled to protection on the basis of freedom of movement.

2. Assessment

24. In my view, the legislation at issue undoubtedly constitutes a restriction.

25. According to the settled case-law of the Court, measures taken by a Member State which are liable to dissuade, prevent or limit the opportunities for investors from that State from investing in other States constitute, inter alia, restrictions on the movement of capital, within the meaning of Article 63(1) TFEU.[13] As the Commission submits, without having been challenged by the Spanish Government, the Form 720 scheme lays down an obligation to provide information and penalties in the event of failure to comply with that obligation which apply to residents for tax purposes who have assets abroad which do not exist in respect of the same assets situated in Spain. Such legislation is therefore liable to dissuade, prevent or limit the opportunities for residents of that State to invest in other States.

26. In that regard, the Spanish Government's argument that persons who conceal their assets for tax reasons would not be entitled to any protection on the basis of freedom of movement cannot lead to the opposite result. It must be noted that it follows from the very wording of Article 65(1)(b) TFEU that a restriction on the free movement of capital may be justified if it prevents infringements of the laws and regulations of the Member States in the field of taxation. That measure presupposes, in other words, that a national measure, such as the one at issue, does not fall outside the definition of restrictions within the meaning of Article 63 TFEU merely because its objective is fiscal supervision or the prevention of tax evasion.[14]

D. The existence of a possible justification for the restriction on the free movement of capital

1. Arguments of the parties

27. According to the Commission, the difference in treatment applied by the Kingdom of Spain according to the place where the assets concerned are situated does not correspond to objectively different situations for the purposes of Article 65(1)(a) TFEU. In order to determine whether there is a difference in the situation of taxpayers who hold assets and rights on national territory and abroad, the purpose of the legislation at issue must be taken into consideration.[15] In the light of the objective pursued by that legislation, namely to prevent and counter tax evasion and avoidance there is no objective difference in the situation of taxpayers residing in Spain

[13] See to that effect, in particular, judgments of 26 September 2000, *Commission* v *Belgium* (C-478/98, EU:C:2000:497, paragraph 18); of 23 October 2007, *Commission* v *Germany* (C-112/05, EU:C:2007:623, paragraph 19); and of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 44).

[14] The same applies to objectives recognised by the Court's case-law, outside the TFEU, such as the prevention of tax evasion and avoidance, abusive practices and the need to guarantee the effectiveness of fiscal supervision. See, by way of example, judgment of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 27).

[15] See judgments of 1 July 2010, *Dijkman and Dijkman-Lavaleije* (C-233/09, EU:C:2010:397, paragraphs 45 to 48), and of 13 March 2014, *Bouanich* (C-375/12, EU:C:2014:138, paragraphs 46 to 48).

depending on whether their assets are located on Spanish territory or outside that territory. In both cases, it cannot be ruled out that a resident who has fraudulent intentions can evade his or her tax obligations in respect of income from concealed activities or transactions.[16]

28. In particular, contrary to the Spanish Government's claims, the fact that the tax authorities do not have the same information with regard to assets situated abroad and those situated on national territory has no bearing. The Court has already rejected such an argument.[17] By contrast, in the Commission's view, the restriction may be justified by the need to prevent tax evasion and avoidance and abusive practices, as well as by the need to guarantee the effectiveness of fiscal supervision.[18]

29. The Spanish Government considers, in the alternative, that if the Court were to find that a restriction does exist, that restriction could be justified.

30. In the first place, it states that the legislation at issue distinguishes, in accordance with Article 65(1)(a) TFEU, between taxpayers who are not in the same situation with regard to the place where their capital is invested, in the light of the possibilities of fiscal supervision. In particular, the information available to the national authorities with regard to assets and rights held by their residents abroad is fragmentary since the international exchange of tax information is limited, including within the European Union, in view of the prohibition on 'fishing expeditions' (random requests). As far as an obligation to declare information is concerned, the level of information available to the authorities is the relevant criterion in order to determine whether residents whose assets are situated on or outside national territory are in comparable situations.

31. In the second place, that government considers that the restriction is also justified on grounds of public interest addressing the need to prevent tax evasion and avoidance and abusive practices or the need to guarantee the effectiveness of fiscal supervision.[19]

2. Assessment

32. Like the Commission, I take the view that the difference in treatment resulting from the legislation at issue does not correspond to objectively different situations for the purposes of Article 65(1)(a) TFEU. This has already been established in the case-law of the Court[20] and rightly so, since the contrary view would have the effect of denying the existence of any restriction on the free movement of capital on the sole ground that the information available on assets abroad is not sufficient in comparison with information relating to assets situated on national territory.

33. That said, as the Commission and the Spanish Government observe, the objectives pursued by the legislation at issue, namely the fight against tax evasion and avoidance, may justify a restriction, which is apparent both from Article 65(1)(b) TFEU and from the case-law.[21]

[16] See, to that effect, judgment of 11 June 2009, *X and Passenheim-van Schoot* (C-155/08 and C-157/08, EU:C:2009:368, paragraphs 36 to 40, 'the judgment in *X and Passenheim-van Schoot*').

[17] See the judgment in *X and Passenheim-van Schoot*, paragraphs 36 to 40. According to the Commission, the question as to the extent of the information to which the tax authorities have access depending on where the assets in question are situated may, however, be examined in the context of the justification for the legislation at issue and its proportionality.

[18] See judgment of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 27).

[19] Judgment of 20 February 1979, *Rewe-Zentral* (120/78, EU:C:1979:42).

[20] See, to that effect, the judgment in *X and Passenheim-van Schoot*, paragraphs 36 to 40 and the judgment of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraphs 30 to 33).

[21] See, by way of example, judgment of 4 March 2004, *Commission* v *France* (C-334/02, EU:C:2004:129, paragraph 27).

34. The central issue in the present case is therefore whether the legislation at issue is proportional.

E. The proportionality of the legislation at issue

1. The classification of assets as unjustified capital gains without being able to rely on the statute of limitation (first complaint)

35. By its first complaint, the Commission submits that the fact 'that the failure to fulfil the obligation to provide information or the late submission of the Form 720 results in those assets being classified as unjustified capital gains without being able to rely on the statute of limitation' constitutes a disproportionate restriction.

(a) The legislation at issue

36. The first complaint concerns the rules contained in Article 39 of the Law on personal income tax and Article 121 of the Law on corporate tax. Those provisions, essentially identical, concern unjustified capital gains and contain a general rule and a specific rule.

37. Under the *general* rule, assets or rights the possession, declaration or acquisition of which does not correspond to income or capital declared by the taxpayer are regarded as unjustified capital gains and included in the general taxable amount for the tax period in which the tax authorities discovered them. However, those gains will not be included in the taxable amount if the taxpayer demonstrates that he or she acquired ownership of the rights or assets in question during a 'prescribed period'.[22] According to my research, the right of authorities to adjust tax liability is in fact subject to a limitation period of four years, which starts to run from the day following the day on which the statutory period for submitting the declaration concerned ends.[23] In practice, as I understand it, a taxpayer may therefore avoid those assets being included in the taxable amount for four years after those assets should have been declared.

38. As to the *specific* rule, this concerns the possession, declaration or acquisition of assets or rights for which the obligation to provide information under the Form 720 has not been complied with within the prescribed period. Such assets or rights are treated as unjustified capital gains and included in the general taxable amount. The abovementioned rule on limitation is not laid down for that category of assets. Thus, under that rule, in order to avoid capital gains being included in the taxable amount, the taxpayer must provide proof that 'those assets or rights were acquired by means of declared income or income obtained in tax years for which he or she was not liable to that tax'.[24]

[22] See Article 39(1) of the Law on personal income tax and Article 121(1) to (5) of the Law on corporate tax.

[23] That limitation period and the detailed rules for its application are laid down in Article 66(a) and Article 67(1)(a) of the GTL.

[24] See Article 39(2) of the Law on personal income tax and Article 121(6) of the Law on corporate tax.

(b) Arguments of the parties

(1) Arguments put forward by the Commission

39. The Commission observes that failure to fulfil the obligation to submit the Form 720 within the prescribed period gives rise to a presumption that income corresponding to the value of the assets and rights in question has been obtained, which is regarded as an unjustified capital gain, and this gives rise to an obligation to pay personal income tax or corporate tax on the income presumed to correspond to the total value of the assets and rights concerned by the declaration requirement.

40. It does not regard that presumption as constituting, in itself, a disproportionate measure, as long as it results from the failure by the taxpayer to fulfil a material tax obligation to pay taxes.[25] The disproportionate nature of the legislation resides in the fact that the taxpayer cannot rely on the statute of limitation in order to escape that presumption. Where the holder of overseas assets and rights has not submitted the Form 720 within the prescribed period, he or she cannot rely on the rule on limitation which determines the period within which the tax authorities may take action for the purposes of rectifying the tax bases.

41. Those arguments put forward by the Commission, which seek to demonstrate the disproportionate nature of that aspect of the rule, are, as I understand them, essentially twofold.

42. The first argument concerns the situation in which the taxpayer *has paid* the income tax. In particular, this concerns the specific situation in which the acquisition of assets or rights abroad occurred more than four years before the beginning of the period for submitting the Form 720 for the first time,[26] in which the income with which those assets or rights were acquired would also have been taxed more than four years ago and in which the taxpayer was liable to that tax at that time, but has no evidence that he or she declared that income to the tax authorities.[27] According to the Commission, in such a situation, where the asset or right holder is unable to prove that he or she has paid tax on the income in question, he or she is also unable to rely on the statute of limitation to avoid regularisation by the tax authorities. Therefore, the inability to prove that income tax corresponding to assets situated abroad has been paid results in an irrebuttable presumption of tax evasion. The Commission recalls that, according to settled case-law, the presumption of tax evasion and avoidance cannot be based on facts such as the holding, by a resident taxpayer, of assets situated abroad.[28]

43. In that regard, the Commission refutes the Spanish Government's assertion that the burden of proof lies with the tax authorities, and therefore it is for those authorities to conduct the appropriate investigations in order to verify the taxpayer's actual situation and to act accordingly. In its view, that practice is not described in the legislation at issue and there is no document capable of proving that it has actually been applied by the Spanish authorities. The legislation requires the taxpayer, expressly and restrictively, to bear the burden of proof in respect of the

[25] It thus states that from the moment when the classification of capital gains results from the failure by the taxpayer to fulfil a material tax obligation to pay taxes, the classification operates as a recovery of the tax debt initiated by the tax authorities in order to correct the situation of the taxpayer who, in the first instance, was not subject to the tax rules in force.

[26] With regard to that four-year period, see point 37 of this Opinion.

[27] According to the Commission, where the overseas asset has been acquired during a tax year in respect of which the right of the tax authorities to determine the tax debt or to demand payment thereof was time-barred, it is entirely possible that the taxpayer may not have kept the documents proving the completion of tax declarations for the income with which that asset was acquired.

[28] See judgments of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 60), and by analogy, of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 51).

declaration of income or the absence of tax liability. Moreover, the examples of the specific application of the legislation relating to the Form 720 show that the burden of proof lies with the holder of assets and rights who has not complied with the obligation to provide information within the prescribed period.

44. The second argument concerns the ‘complete absence of a limitation period’. The Commission therefore considers that there is an ‘effect of non-applicability’ in the event of a failure or delay in fulfilling the obligation to provide information laid down by the Form 720.

45. In that regard, it considers, in essence, *in the first place*, that the absence of a limitation period is not appropriate for the purpose of attaining the objective pursued, since merely submitting the Form 720 within the prescribed period allows the taxpayer to retain the benefit of the limitation period already acquired at that time, even though it is clearly a case of tax avoidance.

46. *In the second place*, the complete absence of a limitation period is also not necessary in order to attain the objectives pursued by the legislation at issue in the light of existing instruments for the exchange of tax information at EU level.

47. More specifically, the Commission states that it does not dispute the fact that, at the time when the Form 720 scheme was adopted in 2012, none of the instruments that existed for the exchange of tax information enabled appropriate information on overseas assets and rights to be obtained. The system for the exchange of information at EU level evolved considerably between 2012 and 2017 and on the date on which the reasoned opinion was issued, namely 15 February 2017 – the date which would need to be taken into account in the Court’s assessment of the legal framework of the present action – the instruments for the exchange of information that existed at EU level enabled Member States to obtain the necessary information on assets and rights held abroad in order to carry out appropriate fiscal supervision.

48. *First*, the information which had to be declared using the Form 720 was largely covered by Directive 2011/16.

49. In support of that finding, the Commission refers to specific provisions which relate to the three categories of assets covered by the Form 720.

50. With regard to *bank account* information, it refers to Article 8(3a) of Directive 2011/16 and the annexes which include the automatic exchange of information on bank accounts, including deposit accounts and custodial accounts. That exchange of information concerns ‘reportable persons’. These are natural persons and entities other than: (i) corporations the stock of which is regularly traded on one or more established securities markets; (ii) corporations related to a corporation described in clause (i); (iii) governmental entities; (iv) international organisations; (v) central banks or (vi) financial institutions.[29]

51. In accordance with Article 8(3a) of Directive 2011/16, the information to be transmitted by automatic exchange is said to include all the information needed to identify the account holder, the financial institution that maintains the account and the account itself. The information also concerns the account balance or value. In the case of custodial accounts, the information relates to the total gross amount of interest, the total gross amount of dividends, and the total gross amount of income generated with respect to the assets held in the account and the total gross

[29] Annex I, Section VIII, point D.2 to Directive 2011/16.

proceeds from the sale or redemption of financial assets. In the case of a deposit account, the information to be exchanged covers the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period. In the case of any other account, the information must include the total gross amount paid or credited to the account holder.

52. In accordance with that Article 8(3a)(a), the information which is automatically exchanged is sufficient for the purposes of determining the amount of income tax deriving from the possession of bank accounts abroad.

53. Next, the Commission notes that the automatic exchange of information introduced by Directive 2011/16 requires that persons who have to make a declaration must include in that declaration information relating to *assets* held in another Member State. With regard to assets held by means of depository or custodial accounts, in the vast majority of cases, the information exchanged is the same as that relating to bank accounts, which in the present case also allows the amount of the corresponding income tax to be determined.

54. As regards *life insurance rights or contracts* not covered by other EU legal instruments, they may also be subject, under Article 8(1)(c) of Directive 2011/16, to the automatic exchange of information regarding any taxable period. In that case, the information concerns residents of a Member State, whether natural persons or entities, and enables the tax authorities of the Member States to determine the amount of tax applicable to that income.

55. Finally, the information on *immovable property* which may be subject to automatic exchange under Article 8(1)(e) of that directive concerns both the ownership of and income from such property, whether owned by natural persons or entities residing in a Member State. That information makes it possible to assess the income tax corresponding to those assets and rights.

56. *Secondly*, although the system for the *automatic* exchange of information does not cover all the information subject to the obligation to file a declaration using the Form 720,[30] the tax authorities of the Member States may nevertheless have recourse, in those cases, to the (non-automatic) exchange of information on request, as provided for in Articles 5 to 7 of Directive 2011/16.

57. *Thirdly*, the Commission highlights the fact that the alleged gaps in the existing system for the exchange of information at EU level relied on by the Spanish Government cannot affect that reality. According to the Commission, it is clear from the settled case-law of the Court, and in particular its judgment in *Commission* v *Belgium*,[31] that the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable a Member State to check the truthfulness of the returns made by taxpayers relating to their income earned in another Member State. The Court also held that, consequently, although the instruments for cooperation may not always function in an efficient and satisfactory manner in practice, the Member States should not be able to rely on the possible difficulties in obtaining the information required or on the shortcomings of cooperation between their tax authorities in order to justify a restriction of the fundamental freedoms secured by the Treaty.

[30] According to the Commission, this is the case for bank accounts and securities where they are held by listed companies and their related undertakings or financial institutions. The system for the automatic exchange of information also does not cover information on authorised persons (who do not hold the assets) in respect of certain financial accounts referred to in the Form 720. Nor does it cover information relating to securities which are not held through accounts in financial institutions.

[31] Judgment of 6 June 2013 (C-383/10, EU:C:2013:364, paragraphs 52 and 53).

58. *In the third place* and in any event, the Commission takes the view that if the inadequacy of the information available to a Member State concerning assets or rights held by its residents abroad may be such as to justify a *longer* recovery period, in so far as it is intended to permit the tax authorities to have effective recourse to mechanisms of mutual assistance,[32] it cannot justify the *complete absence* of a rule on limitation, which is generally reserved for the most serious cases of human rights violations.

(2) Arguments put forward by the Spanish Government

59. With regard to the first aspect of the Commission's arguments, the Spanish Government denies the existence of an irrebuttable presumption of tax evasion. In that regard, it states that Article 39(2) of the Law on personal income tax[33] is an anti-fraud provision, but does not provide for any presumption of evasion. For the purposes of applying that provision, two elements must be proved by the tax authorities: first, the fact that the taxpayer did not declare the assets required by the Form 720 even though he or she was obliged to do so and, second, the fact that the taxpayer did not pay income tax in respect of the acquisition of those assets.

60. The fact that a taxpayer does not keep the declaration for the financial year in which he or she claims to have been taxed does not mean that the authorities automatically consider that he or she is in possession of unjustified capital gains. In such cases, the tax authorities must examine what the taxpayer has claimed, and if they do not do so, the fact underlying the presumption is not established (namely that the taxpayer was not taxed in respect of the income in question) and there is no reason to consider that unjustified capital gains exist. In case of doubt, there is no need for regularisation since one of the facts underlying the presumption has not been proven. Conversely, if the taxpayer wished to avoid the application of Article 39(2) of the Law on personal income tax on the ground that he or she had previously declared, by means of the Form 720, the income with which the undeclared assets or rights were acquired, it is sufficient for him or her to indicate in which earlier tax returns he or she declared that income. The tax authorities are then required to verify this.

[32] See judgment in *X and Passenheim-van Schoot*, paragraphs 62 to 75 and judgment of 15 September 2011, *Halley* (C-132/10, EU:C:2011:586, paragraph 35).

[33] I note that, in its application, the Commission did not specify which provisions of Spanish law its first complaint concerned. However, in the legal framework part of the application, it cited both Article 39 of the Law on personal income tax and Article 121 of the Law on corporate tax. I therefore understand the Commission's first complaint as relating to both provisions. In that regard, I note that, in its defence, the Spanish Government, when referring to the Commission's first complaint, refers only to Article 39(2) of the Law on personal income tax. That said, since the Spanish Government is proposing that the Court should dismiss the action in its entirety, I understand the arguments put forward by the Spanish Government with regard to Article 39(2) of the Law on personal income tax as extending to Article 121(6) of the Law on corporate tax.

61. In support of those findings, the Spanish Government refers to several provisions relating to the burden of proof.[34] It states that that burden of proof therefore lies with the tax authorities, which is clearly stated in the legislation cited in footnote 34 to the present Opinion. It also refers, by way of example, to a judgment concerning regularisation under Article 39(2) of the Law on personal income tax, which annulled the assessment at issue, the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain) having found that the taxpayer had claimed to have been taxed and had produced the documents in his possession and that the authorities had not made any effort to adduce the relevant evidence to the contrary.[35]

62. With regard to the second aspect of the Commission's arguments, the Spanish Government observes, first of all, that the Commission starts from an incorrect premiss in so far as it considers that the Form 720 scheme does not include a limitation period. It is in fact a specific application of the principle '*actio nata*', in accordance with which the limitation period of a right or action can start to run only from the moment when the holder is aware of the existence of that right or action.[36] The application of that principle therefore means that a limitation period of four years[37] starts to run from the moment when the tax authority is aware of elements relating to the taxable event which enable it to open an investigation, whether with information provided by another State through an automatic or spontaneous system for exchanging information, or through the taxpayer or third parties. Therefore, there was no absence of a limitation period.

63. That said, the Spanish Government asserts, in essence, that the principle '*actio nata*' does not apply where assets are situated in Spain. However, there is an objective reason for that difference in treatment relating to the limitation period between assets situated in Spain and those situated abroad.

64. *First*, on Spanish territory, the Spanish tax authorities may exercise their powers without restriction in respect of any assets and rights, in particular in the form of 'fishing expeditions' (random requests), but not when those assets and rights are situated abroad. In that regard, the Spanish Government notes that unjustified gains correspond to assets and rights of which the tax authorities have no knowledge and which, to be discovered, require the authorities to carry out an investigation which they would not be able to carry out in full as their officials, for example, are

[34] First, in the context of the verification procedure for the purposes of applying Article 39(2) of the Law on personal income tax, Article 105(1) of the GTL, entitled 'Burden of proof', states that 'in taxation procedures, the person asserting the right must prove the facts constituting that right'. Secondly, Article 102 of the GTL, entitled 'Notification of assessments' cites, in paragraph 2(c), as an element that must be included in such assessments, 'the reasons for those assessments where they do not correspond to the information given by the taxpayer or to the application or interpretation of the legislation by the taxpayer, stating the facts and the essential elements that gave rise to them, as well as the legal bases'. Thirdly, the Spanish Government refers to the 'theory of the proximity of the subject matter of the evidence' contained in Article 217 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Law No 1/2000 of 7 January 2000 on Civil Procedure) (BOE No 7, 8 January 2000), in accordance with which account must be taken of the possibility and ease for each party to the dispute of producing evidence. Although, in principle, each party should prove the facts alleged in its favour under Article 106(1) of the GTL, the application of the 'theory of the proximity of the subject matter of the evidence' means that, if the taxpayer declares that he or she has not kept the documents relating to his or her taxes in order to prove that he or she has been taxed, the tax authorities must search for that information in their archives in order to verify whether he or she has indeed been taxed. Fourthly, the Spanish Government submits that those rules and principles are also contained in Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas (Law No 39/2015 of 1 October 2015 on the Common administrative procedure for public bodies) (BOE No 236, 2 October 2015). Fifthly and lastly, Articles 141 and 145 of the GTL stipulate that it is for the tax authorities to 'investigate the factual elements of tax obligations in order to ascertain which/those that would be ignored by the authorities' and to 'establish the veracity and accuracy of the declarations submitted by taxpayers'.

[35] Decision of the Tribunal Económico-Administrativo Central (Central Tax Tribunal) of 16 January 2019 (R. G. 4253/2016).

[36] According to the Spanish Government, that '*actio nata*' rule is provided for in general terms in Article 1969 of the Spanish Civil Code (*Gaceta de Madrid* – now the 'BOE' – No 206, of 25 July 1889). The Spanish Government states that not only is the application of the '*actio nata*' rule not contrary to the literal wording of Article 39(2) of the Law on personal income tax, which does not mention any 'non-applicability of limitation periods', but this also follows from the spirit of the rule and from a systematic interpretation which is consistent with the purpose of the legal concept of time-barring.

[37] See, with regard to the four-year period, point 37 and footnote 23 to the present Opinion.

unable to act outside the Spanish territory. In the light of those difficulties, it is fully justified for the limitation period to start to run from the moment when the existence of those assets and rights situated abroad, which have generated undeclared income and could not be investigated using the means which would have been used if the income had been generated on Spanish territory, becomes known.

65. In that regard, the Court has recognised the existence of specific rules on limitation where a Member State must exercise its powers in respect of assets and rights situated abroad.[38] The Court has also stated that the different limitation periods for individuals to exercise rights as compared with those for the tax authorities are justified by the fact that the tax authorities do not have the information necessary and can take action only after they receive the tax return,[39] which applies in particular in cases where the property and/or assets have been concealed and where it is practically impossible to obtain information about them with the current instruments.

66. *Secondly*, the Spanish Government disputes the Commission's assertion that the existing instruments for collaboration within the European Union are sufficient. It puts forward a number of arguments in support of this, which may be summarised as follows.

67. It states at the outset that, since the Commission's action does not seek to have certain aspects of the legislation on the Form 720 declared invalid as from the date of the reasoned opinion, namely 15 February 2017, it is necessary to examine the situation regarding international mutual assistance in 2012, the year in which the Form 720 was introduced, and not in February 2017. That said, it considers in any event that, to date, the instruments that exist for the international exchange of information remain insufficient for the purposes of determining the possible existence in the assets of Spanish taxpayers of assets and rights with economic and tax implications situated abroad.

68. In that regard, the Spanish Government points out, first of all, that the Commission has acknowledged that the information obtained using the Form 720 does not fully coincide with that which may be obtained under Directive 2011/16.[40]

69. Next, it points out that automatic exchange within the meaning of Article 3(9)(a) of Directive 2011/16 is subject to the principle 'available information', that being understood as the 'information in the tax files of the Member State communicating [it], which is retrievable in accordance with the procedures for gathering and processing information in that Member State'. Consequently, the source State of the income concerned may not have the information which is subject to automatic exchange, either because its national legislation does not tax certain income or certain assets and does not require information in that regard, or because the person required to provide the information, whether the taxpayer or a third party, has not declared the income or asset which is the subject of the information. It takes the view that, in its judgment in *X and Passenheim-van Schoot*,[41] the Court held that the fiscal supervision imposed by a Member State cannot be dependent on the conduct of another Member State or a third State, in this case the information available for the specific case. Moreover, with regard to bank account information for the purposes of Article 8(3a) of Directive 2011/16, the tax authority cannot be certain that it

[38] See judgment in *X and Passenheim-van Schoot*, paragraph 86.

[39] See judgment of 8 May 2008, *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 50 et seq.).

[40] In particular, according to the Spanish Government, the directive does not cover information relating to securities (shares, holdings), to rights and income deposited, managed or obtained in another Member State, which are subject to the declaration of information, or information relating to rights in immovable property other than property owned by the person concerned (timeshare rights, use and enjoyment, bare ownership), which are also subject to declaration.

[41] See paragraph 61 of that judgment.

will receive the information it needs with regard to pre-existing accounts within the meaning of that directive, namely accounts maintained as of 31 December 2015,[42] since, for those accounts, the residence of the taxpayer is determined in accordance with domestic legislation, which may therefore differ from one Member State to another.

70. Finally, according to the Spanish Government, although the situation regarding the exchange of information has changed considerably in recent years, it should nevertheless be pointed out that the current situation is far from being comparable to the national situation and that its practical and effective implementation will probably take time in order to be properly adapted, given its complexity, the many States involved and the different national regulations and practices.

(c) Assessment

71. I would point out that, according to settled case-law, in proceedings for failure to fulfil obligations, it falls to the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled and in so doing the Commission may not rely on presumptions.[43] As I shall explain, I take the view that, in the present case, the Commission, largely, has not provided the Court with the information needed to enable it to prove the allegation that the obligation has not been fulfilled.

72. That is apparent, in my view, from the fact that the Commission's application is very brief. Moreover, in its defence, the Spanish Government has responded to the Commission's claims in great detail by putting forward a number of arguments the merits of a large number of which cannot, in my opinion, be ruled out prima facie. In its reply, the Commission merely responds to those arguments to a very limited extent and, in my opinion, it therefore did not respond effectively to the Spanish Government's line of argument. Accordingly, I consider that, to a large extent, the Court does not have the necessary information in order to determine whether there has been a failure to fulfil obligations as alleged by the Commission.

(1) 'The complete absence' of a limitation period (second aspect)

73. With regard to the question as to whether the failure to submit the Form 720 or the late submission of that form would entail an 'effect of non-applicability of any limitation period', which, in itself, would be disproportionate,[44] I consider it necessary, *in the first place*, to clarify the scope of the rule at issue.

74. Specifically, in the event of the failure to submit the Form 720 within the prescribed period, Article 39(2) of the Law on personal income tax and Article 121(6) of the Law on corporate tax allow the tax authorities to adjust income corresponding to assets situated abroad which are part of taxpayers' assets even if those assets were acquired during a period that was already time-barred at the time when the tax authorities discover them. This follows from the very wording of those provisions and is not, moreover, disputed by the Spanish Government. In other words, the

[42] See the concept of 'pre-existing accounts' in Annex I, Section VIII, point C, No 9 to Directive 2011/16.

[43] See, inter alia, judgment of 29 October 2009, *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 52 and the case-law cited).

[44] I point out that, after the present action for failure to fulfil obligations was brought before the Court, a request for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain) was received at the Court (Case C-330/20). In that request for a preliminary ruling, the referring court asks, in essence, the same question as that at issue in the present case, namely about the proportionality of the rule on limitation provided for in Article 39(2) of the Law on personal income tax and the impact, in that regard, of the system for the exchange of information.

limitation period of four years, which allows a taxpayer with assets situated in Spain to avoid taxation solely because the assets concerned were acquired prior to the period of four years from the time when those assets should have been declared, does not apply in the case of assets covered by the Form 720.

75. In practice, in respect of such assets, the abovementioned provisions allow the tax authorities to make an adjustment, irrespective of the date of acquisition of the assets concerned and therefore without any time limit. They therefore have an effect of 'non-applicability', as the Commission rightly claims. I note in that regard that the information provided by the Spanish Government on the principle '*actio nata*' cannot lead to the opposite finding. That principle merely implies that, where they have evidence of a taxable item, the tax authorities must adjust any tax liability within a period of four years. Therefore, even if that principle is applied, which the Commission, moreover, does not appear to challenge,[45] the effect of non-applicability remains in that, as long as the tax authorities comply with the four-year period, they may proceed with the adjustment, irrespective of the date of acquisition of the assets concerned.[46]

76. As regards, in the second place, the proportionality of such a rule with an 'effect of non-applicability', it must be determined whether it is *appropriate* for attaining the objective it pursues and whether it does not go beyond what is *necessary* in order to attain it.

77. Regarding that first point, the Court has already held that the application by a Member State of an extended recovery period in the case of taxable items which are held or have arisen in another Member State contributes to the effectiveness of fiscal supervision and to the prevention of tax evasion in so far as such legislation may dissuade taxpayers holding such assets from concealing them, or their income from them, from the tax authorities, so as not to run the risk later of an additional assessment.[47] In the present case, it should be noted, however, that the limitation period at issue applies only where the Form 720 has not been completed within the prescribed period. It does not therefore apply generally, where the assets are situated abroad. That said, I am not convinced that that rule is not appropriate for attaining the objective it pursues, as the Commission alleges. It is true that taxpayers who comply with the obligation to provide information within the prescribed period retain the benefit of the limitation period in respect of any income concealed in order to acquire the assets or rights held abroad.[48] However, if a taxpayer wishes to conceal income, it seems unlikely to me that he or she would want to comply with the disclosure obligation in the first place in order to benefit from the limitation period.

78. As regards, next, whether the limitation period at issue is necessary, I consider that the Commission has proved that it goes beyond what is necessary in order to attain the objective pursued, but only in relation to some of the assets covered by the Form 720, namely new bank accounts in accordance with Directive 2011/16 ('the new bank accounts').[49]

79. More specifically, as I shall explain in Section (i), I consider that it follows from the case-law of the Court that where a Member State has, or may have, under the system for mandatory automatic exchange, sufficient information on assets held abroad by its taxpayers in order to

[45] The Commission merely claims that this is 'a case of a complete absence of a limitation period'.

[46] By way of example, there is nothing to prevent the adjustment being made several decades after the assets in question became part of taxpayers' assets if that is when the tax authorities became aware of their existence.

[47] Judgments in *X and Passenheim-van Schoot* (paragraphs 51 and 52), and of 15 September 2011, *Halley* (C-132/10, EU:C:2011:586, paragraph 32).

[48] That point, which the Commission emphasised, was confirmed by the Spanish Government.

[49] The concept of 'new accounts' is defined in Annex I, Section VIII, point C, No 10 to Directive 2011/16 as financial accounts opened on or after 1 January 2016.

determine the appropriate taxes, the application of an extended limitation period goes beyond what is necessary in order to attain the objective it pursues. In that regard, as I shall explain in Section (ii), I consider that the Commission has established to the requisite legal standard that, on the date of the period laid down in the reasoned opinion in 2017, the date which must be taken into account for the purposes of assessing the action,[50] the Spanish tax authorities had, or could have had, under Directive 2011/16, sufficient information on new bank accounts held abroad by their taxpayers in order to determine the appropriate taxes.

(i) Principles deriving from the case-law

80. In my opinion, the Court has issued two rulings which are complementary and relevant to the present case.

81. *First*, the Court has ruled on the need for a Member State to apply an extended recovery period where there is a suspicion that taxable assets held in another Member State are being concealed and on the impact, in that regard, of instruments for the exchange of information at EU level.[51] It should be noted, however, that, as I shall explain, that case-law was, first, delivered in the specific context of the former Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation,[52] which preceded the directive at issue in the present case. In particular, as I shall explain, that former directive differs from the one at issue in the present case in so far as it did not enable the tax authorities of the Member States *automatically* and *mandatorily* to obtain information relating to their taxpayers. Secondly, the Court has ruled only on the application of a specific *extended* limitation period of 12 years, which it considered proportionate, but it has not taken a position on a limitation period with an 'effect of non-applicability' as in the present case.

82. In the case-law concerned, the Court made a distinction between two situations by determining whether an extended limitation period goes beyond what is necessary to achieve those objectives: the first is where taxable items have been concealed and the tax authorities have no evidence which would enable an investigation to be initiated, and the second is where the tax authorities have information concerning those taxable items.[53]

83. The Court merely recognised, in general, the need for an extended recovery period in the first situation. It therefore took the view, in essence, that, in such a situation, the first Member State was unable, in the light of Directive 77/799, to request the competent authorities of the other Member State to communicate to it the information necessary to establish correctly the amount of tax due.[54] As the Court noted, in essence, that former directive did not allow the tax authorities of the Member States to obtain, automatically and mandatorily, banking data concerning its taxpayers.[55] Accordingly, unless the Member State concerned already possessed

[50] According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. See judgment of 28 January 2020, *Commission* v *Italy (Directive combating late payment)* (C-122/18, EU:C:2020:41, paragraph 58 and the case-law cited). The deadline set out in the reasoned opinion of 15 February 2017 was two months from the date of receipt by the Spanish Government of that opinion.

[51] Those are the judgments in *X and Passenheim-van Schoot*, and of 15 September 2011, *Halley* (C-132/10, EU:C:2011:586), which were also relied on by the parties.

[52] Council Directive of 19 December 1977 (OJ 1977 L 336, p. 15).

[53] See judgments in *X and Passenheim-van Schoot*, paragraphs 62, 63 and 74, and of 15 September 2011, *Halley* (C-132/10, EU:C:2011:586, paragraph 33).

[54] See judgment in *X and Passenheim-van Schoot*, paragraphs 64 and 65.

[55] See, to that effect, judgment in *X and Passenheim-van Schoot*, paragraphs 64 and 65).

information enabling it to contact the competent authorities of other Member States by way of mutual assistance, it was unable to obtain the necessary information to determine the correct amount of tax due.

84. In such a situation, the Court recognised the need for an extended recovery period on the ground that the risk for a taxpayer that assets and income which have been concealed from the tax authorities of his or her Member State of residence will be discovered is less in the case of assets and income in another Member State than in the case of domestic assets and income.[56]

85. As to the second situation, the Court held that where the tax authorities of a Member State have evidence enabling them to request the competent authorities of other Member States by way of the mutual assistance provided for in Directive 77/799 to communicate to them the information necessary to establish the correct amount of tax due, the application by the first Member State of an extended recovery period which is not specifically intended to permit the tax authorities of that Member State to have effective recourse to mechanisms of mutual assistance between Member States and which commences once the taxable items concerned are located in another Member State cannot be justified.[57]

86. In that regard, it is apparent, *secondly*, from the other case-law that, where the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable a Member State to carry out the necessary checks, the Member States should not be able to rely on the possible difficulties in obtaining the information required or on the shortcomings of cooperation between their tax authorities in order to justify a restriction of the fundamental freedoms secured by the Treaty, even if it cannot be ruled out that the instrument for cooperation referred to above may not always function in an efficient and satisfactory manner in practice.[58] In other words, where the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable a Member State to carry out the necessary checks, that Member State must expect it to be more difficult to carry out the checks in another Member State than on its own territory.[59]

87. In my view, it also follows that if the instrument for cooperation does not function in a satisfactory manner, with the result that a Member State does not receive the information due, it must contact the Member State in order to resolve the problem and, where appropriate, communicate with the Commission.[60] By contrast, a Member State cannot apply an extended limitation period in order to remedy the fact that it has not been provided with the information due.

88. It follows from the case-law cited above that if the Spanish tax authorities are able to obtain the necessary information under mandatory automatic exchange in order to determine the correct amount of tax, those authorities cannot rely on the possible difficulties in obtaining the

[56] See judgment in *X and Passenheim-van Schoot*, paragraphs 72 and 73.

[57] See judgments in *X and Passenheim-van Schoot*, paragraphs 74 and 75, and of 15 September 2011, *Halley* (C-132/10, EU:C:2011:586, paragraphs 35 and 36).

[58] See, in particular, judgments of 28 January 1992, *Bachmann* (C-204/90, EU:C:1992:35, paragraph 18); of 14 September 2006, *Centro di Musicologia Walter Stauffer* (C-386/04, EU:C:2006:568, paragraph 50); and of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 43).

[59] See, to that effect, also, Opinion of Advocate General Kokott in *Q* (C-133/13, EU:C:2014:2255, points 54 and 55).

[60] As a last resort, it has the option of bringing infringement proceedings under Article 259 TFEU. See, to that effect, judgments of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309, paragraph 46), and of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 45).

information required or on the shortcomings of cooperation between the tax authorities in order to justify a restriction of the fundamental freedoms secured by the Treaty and, in that regard, establish an extended limitation period.

89. In my opinion, the distinction drawn by the Court is well founded. Where the tax authorities' only source of information on taxable assets is the taxpayer himself or herself, it is more difficult for the Member State concerned to discover concealed assets than in a situation where the tax authorities have that information at their disposal under the system for the exchange of information, which justifies the application of an extended limitation period.

90. It follows from the foregoing that the necessity of the limitation period at issue in the present case depends, in the first place, on whether the mandatory automatic exchange of information under Directive 2011/16 is sufficient to enable the Spanish tax authorities to carry out the necessary checks to establish the correct amount of tax due. If that is the case, the Spanish tax authorities cannot, contrary to their claims, rely on possible difficulties in order to apply an extended limitation period.

(ii) Is the mandatory automatic exchange of information under Directive 2011/16, sufficient to enable the Spanish tax authorities to carry out the necessary checks?

91. The parties have differing opinions as to the answer to this question. The Commission takes the view that Directive 2011/16, enables the Spanish tax authorities to obtain the necessary information in order to carry out the appropriate tax checks in relation to assets covered by the Form 720, whereas this is disputed by the Spanish Government.

92. In my opinion, three specific cases must be distinguished.

93. *First*, the bank account information covered by the Form 720. On that point, Article 8(3a)(a) of Directive 2011/16, read in conjunction with Annexes I and II to which that provision refers, requires Member States, as the Commission rightly points out, to exchange financial account information automatically[61] so that they can carry out the necessary checks and establish the correct amount of tax due in cross-border situations.[62] That information must be declared by the financial institutions of each Member State to the competent authority so that the latter can communicate that information to the other Member States.

94. The Spanish Government has put forward two arguments to demonstrate why that provision does not, however, allow the tax authorities to have the information concerned.

95. In that regard, the argument based on the principle 'available information' must be rejected. The fact remains that financial account information is not subject to the condition of availability of the information requested.[63] As regards, next, the argument concerning pre-existing accounts, I have serious doubts as to the fact that that would mean in practice that the Member States would

[61] For specific information, see point 51 of this Opinion.

[62] See, to that effect, recitals 1, 2 and 10 of Directive 2011/16.

[63] See recital 10 of Directive 2011/16. For the Spanish Government's two arguments, see point 69 of the present Opinion.

not receive the information concerned. The Commission has not put forward any counter-argument on this point and I therefore consider that it has not provided the elements required by the case-law[64] that could verify the existence of any failure in that regard.[65]

96. It is therefore only in relation to new bank accounts that I consider that the Commission has established to the requisite legal standard that the Spanish tax authorities have the necessary information at their disposal. It follows that the application of the limitation period at issue goes beyond what is necessary in respect of that category of assets.[66]

97. Next, as regards pre-existing accounts, the duration of the limitation period at issue applicable to those assets does not appear to me to be disproportionate.

98. I would point out that, to date, the Court has ruled only, in the judgment in *X and Passenheim-van Schoot*, on the proportionality specifically of an extended limitation period of 12 years, which was at issue in that case, and which it found to be proportionate.[67]

99. In the present case, the Court is called upon to give a ruling on whether, in the case of assets concealed abroad of which it has no knowledge, a Member State may also proceed with the adjustment irrespective of the date of acquisition of the assets concerned and therefore without any time limit in that regard. I think that it may. I note, first, that the reasons given by the Court in the judgment in *X and Passenheim-van Schoot* recognising the need for Member States to apply an extended limitation period[68] also apply in the present case. Secondly, in view of the existing level of harmonisation in the field of taxation, which is very limited, and in view of the need of the Member States to prevent tax evasion, which the Court has therefore acknowledged, I consider that the Member States enjoy broad discretion in that field, including the discretion to apply the rule in the present case.[69]

100. *Secondly*, there is the category of assets covered by the Form 720 which are subject to automatic exchanges under Article 8(1) of Directive 2011/16.[70] In respect of that category of assets, the Spanish Government is right to assert that automatic exchange is subject to the

[64] See point 71 of this Opinion.

[65] I point out that the argument put forward by the Spanish Government with regard to pre-existing accounts is presented in its rejoinder in the form of a reference to the Spanish Government's reply to the Commission's reasoned opinion. Even though the Commission did not have the opportunity to reply to the rejoinder, since it puts an end to the written procedure before the Court, it was nevertheless aware of that argument raised by the Spanish Government and it therefore had the opportunity to respond to it.

[66] Specifically, the disproportionate nature of the limitation period at issue arises when the Spanish tax authorities *do not obtain* information from other Member States regarding new financial accounts held by their taxpayers under the abovementioned provisions, even though such information should have been provided. Thus, in such situations, the application of the principle '*actio nata*' means that the adjustment period of four years does not start to run, whereas the tax authorities cannot, in accordance with the abovementioned case-law, rely on difficulties in obtaining the information required or shortcomings of cooperation between the tax authorities of the Member States in order to justify a restriction of the fundamental freedoms secured by the Treaty. However, if the information is *actually provided*, for example before the end of the designated period for making a declaration using the Form 720, the effect of the '*actio nata*' rule will not, in such a situation, lead to any real extension to the limitation period compared to the period applicable in domestic situations.

[67] Specifically, it found that period to be proportionate on the ground that the choice by a Member State to limit that period temporally and to determine the limit on the basis of the time limit applicable to prosecutions for tax evasion does not seem disproportionate (judgment in *X and Passenheim-van Schoot*, paragraph 69).

[68] See, in that respect, points 83, 84 and 89 of the present Opinion.

[69] I note that, in the light of the principle '*actio nata*', where the tax authorities have evidence of a taxable item, they must adjust any tax liability within a period of four years. Since that period is the same as that which applies in domestic situations, it is not an extended recovery period which is not specifically intended to permit the tax authorities of that Member State to have effective recourse to mechanisms of mutual assistance between Member States and which commences once the taxable items concerned are located in another Member State, as mentioned by the Court in the judgment in *X and Passenheim-van Schoot*.

[70] Those are life insurance rights or contracts, covered by Article 8(1)(c) of that directive, and immovable property, covered by Article 8(1)(e).

principle of 'available information'.[71] In essence, that principle implies that the Member States are required only to share the information available on their national tax databases. There is no requirement for data to be collected other than by the tax authorities for internal tax purposes.

101. While I recognise that automatic exchange in respect of that category of assets may therefore, in principle, be limited, I have serious doubts as to whether that is the case in practice for all the assets concerned, as the Spanish Government alleges. Article 8(1) of Directive 2011/16 contains five categories of assets, and at least so far as immovable property is concerned, it seems to me unlikely that the Member States would not have the information necessary to enable the Member State concerned to establish the correct amount of tax due.[72]

102. That said, the Commission has not responded to those claims made by the Spanish Government and, in my opinion, it has therefore not provided arguments that would allow the Court to reject them with certainty.[73] It follows that the Commission has not adduced the necessary proof that the Spanish tax authorities are capable of carrying out the necessary checks in respect of that category of assets. Furthermore, for the reasons set out in paragraphs 97 to 99 above, I consider that, as regards that category of assets, the limitation period at issue does not go beyond what is necessary.

103. *Thirdly*, with regard to information which is not covered by the directive,[74] the Spanish tax authorities do not obtain knowledge of information for this category of assets systematically and automatically under Directive 2011/16. For the reasons set out above in paragraphs 97 to 99, I consider that, for that category of assets, the limitation period at issue does not go beyond what is necessary.

104. To conclude, I consider that it is only with regard to the category of information relating to new bank accounts that the Commission has adduced proof that that limitation period is disproportionate. I therefore propose that the Court uphold the first complaint in so far as the Spanish Government has provided for the limitation period at issue in respect of that category of assets.

(2) The existence of an irrebuttable presumption of tax evasion (first aspect)

105. As regards the existence of an irrebuttable presumption of tax evasion, I consider that the arguments put forward by the Commission should be rejected.

[71] Accordingly, under Article 8(1) of Directive 2011/16, the competent authority of each Member State must, by automatic exchange, communicate to the competent authority of any other Member State, 'information … that is available'. In that regard, Article 3(9) of that directive states that available information for the purposes of Article 8(1) of that directive means information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State.

[72] With regard to immovable property, the Member States usually have registers with all the relevant information.

[73] See, by analogy, judgment of 12 July 2012, *Commission* v *Germany* (C-562/10, EU:C:2012:442, paragraphs 53 and 61).

[74] For that information, see footnotes 30 and 40 to this Opinion.

106. It is true that the establishment of a presumption of tax evasion cannot be based solely on the fact that the taxpayer's situation includes a foreign element.[75] Moreover, a measure which presumes the existence of fraudulent behaviour on the sole ground that the conditions laid down therein are satisfied, without giving the taxpayer any opportunity to rebut that presumption, goes, in principle, beyond what is necessary in order to attain the objectives pursued.[76]

107. That said, the Commission has not adduced proof, however, that there is an irrebuttable presumption of tax evasion in the present case.

108. First, it must be noted that the fact that it is not possible to rely on a limitation period is irrelevant in respect of the opportunity to rebut a presumption of fraud.[77] Secondly, and beyond the question of limitation, it remains to be determined whether the taxpayer may nevertheless avoid the application of Article 39(2) of the Law on personal income tax and Article 121(6) of the Law on corporate tax and therefore prevent the inclusion in the tax base of sums corresponding to the value of assets or rights situated abroad where those sums have indeed been subject to tax but the taxpayer is not or is no longer able to prove that they have been declared. In that regard, the points in dispute between the parties relate, in essence, to the scope of the legislation at issue, both at regulatory level and in respect of its implementation.[78]

109. In that regard I would point out that, with regard in particular to the implementation of a national provision, proof of a Member State's failure to fulfil its obligations requires production of evidence different from that usually taken into account in an action for failure to fulfil obligations concerning solely the terms of a national provision. In those circumstances, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable.[79]

110. As regards the scope of the legislation at issue, I consider that the Spanish Government has explained convincingly, by referring to several provisions relating to the burden of proof and to a judgment on that subject, that the burden of proof lies with the tax authorities, and therefore if the taxpayer does not keep the documents proving the completion of tax declarations for the income with which his or her assets were acquired, it does not automatically follow that he or she is in possession of unjustified capital gains within the meaning of Article 39(3) of the Law on personal income tax.[80] The Commission has not adduced any evidence to refute that explanation. In particular, the wording of that provision does not in itself preclude the interpretation adopted by the Spanish Government. Next, as far as the practice of the tax authorities is concerned, it must be

[75] See, to that effect, for example, judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 51); of 5 May 2011, *Commission* v *Portugal* (C-267/09, EU:C:2011:273, paragraphs 33 to 49); and of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 60).

[76] See, to that effect, judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 82); of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 50); of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 37); and of 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, EU:C:2019:136, paragraph 88).

[77] By its very nature, the benefit of a limitation period merely makes it possible to prevent the consequences which the application of the presumption should entail, which is different in so far as the finding of fraud still remains. The fact that the provisions in question do not automatically allow the presumption of tax evasion to be avoided solely on the ground that they concern assets acquired during a prescribed period does not therefore, in itself, amount to an irrebuttable presumption of fraud.

[78] Thus, the Commission refers, in that regard, both to the wording of Article 39(2) of the Law on personal income tax and to examples of the specific application of that legislation. See point 43 of this Opinion.

[79] See judgment of 12 May 2005, *Commission* v *Belgium* (C-287/03, EU:C:2005:282, paragraph 28).

[80] I note that the Spanish Government's arguments cite only Article 39(2) of the Law on personal income tax. Since these are general principles, I understand this to mean, however, that those arguments also concern Article 121(6) of the Law on corporate tax.

noted that the Commission's reference to 'examples of … specific application', without further clarification, does not satisfy the criterion of sufficiently documented and detailed proof of the alleged practice.

111. It follows that the Commission has not adduced the necessary evidence to prove the existence of an irrebuttable presumption of fraud.

112. To conclude, I propose that the Court should uphold the first complaint in part in that, in so far as, in the event of the failure to fulfil or late compliance with the obligation to provide information in respect of new bank accounts, the tax authorities may adjust the resulting tax liability irrespective of the date of acquisition of the assets concerned, the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement.

2. The proportional fine of 150% (second complaint)

113. By its second complaint, the Commission submits that the act of '[imposing] automatically a proportional fine of 150% applicable in the event of the failure to fulfil the obligation to provide information in respect of overseas assets and rights or the late submission of the Form 720' constitutes a disproportionate restriction.

(a) The legislation at issue

114. This complaint concerns the rule contained in the two additional provisions of Law No 7/2012. Those provisions penalise the tax offence resulting from the application of Article 39(2) of the Law on personal income tax and the similar rule contained in Article 121(6) of the Law on corporate tax. In that regard, the first additional provision of Law No 7/2012 states that the application of those provisions 'shall determine the tax offence' which will regarded as 'very serious' and will be punished by a fine of 150%. The fine will be calculated on the basis of the amount of tax applicable to the value of the assets and rights concerned.

(b) Arguments of the parties

(1) The arguments put forward by the Commission

115. According to the Commission, the proportional fine of 150% is disproportionate both because of its severity and because it is automatic and cannot be varied.

116. With regard to the severity of the fine, the rate of 150% is said to be significantly higher than the rates of progressive penalties that apply in the event of a late tax return, since the level of those penalties is 5%, 10%, 15% and 20%, depending on whether the delay was, respectively, 3, 6 or 12 months or more.[81] Those lower rates should be compared to the proportional fine of 150% since both are responses to the submission out of time of a declaration concerning taxable income. That said, the lowest additional charges are associated with a tax declaration, which is directly linked to the *obligation to pay*, whereas the highest penalty of 150% is associated with the declaration of information in the Form 720, which is merely a *formal obligation* to disclose information which, as a general rule, does not entail taxation.

[81] Article 27 of the GTL.

117. With regard to the fact that the fine is automatic and cannot be varied, the Commission points out, *in the first place*, that the 150% fine is not subject to any possible variation since that rate applies irrespective of the level of information available to the national tax authorities,[82] irrespective of the date of acquisition of the assets at issue (before or during a prescribed period) and irrespective of the conduct of the taxpayer who, far from having failed to comply with the obligation to provide information in every case, may have just done so belatedly.

118. As regards the possibility of regularisation provided by the rescript of 6 June 2017 invoked by the Spanish Government, the Commission observes that, in accordance with that rescript, a taxpayer who has not complied with the obligation to declare information has the opportunity to regularise his or her situation in the context of a self-assessment filed out of time in respect of personal income tax and accompanied by payment of the corresponding tax. In that case, instead of the 150% fine, a surcharge of 20% would be applied. According to the Commission, that rescript cannot be taken into account because, first, it has no legal force and there is nothing in Law No 7/2012, which constitutes the legal framework for the obligation relating to the Form 720, that supports the conclusion that that possibility exists. Secondly, the date of publication of the rescript is after the Commission's reasoned opinion, which precludes it from being taken into account. As to the practice of the tax authorities prior to the publication of that rescript, the option of replacing the 150% fine with a 20% surcharge does not appear to have been applied by the tax authorities in a uniform manner, but rather on a case-by-case basis. It appears from the information available to the Commission that before the publication of the rescript, it was possible, in certain cases where the Form 720 was submitted out of time, for the 150% fine to be applied to the holder of overseas assets and rights solely on the ground that he or she was unable to prove that he or she had duly paid the tax on the corresponding income in good time.

119. *In the second place*, as with the classification of assets situated abroad as unjustified capital gains, the tax authorities do not carry out any specific investigation in the event of the failure to fulfil the obligation to declare information where the holder of the assets cannot prove that they correspond to declared and taxable income, which results in an irrebuttable presumption of tax evasion.

120. *In the third place*, the Commission considers that it would also be disproportionate for the 150% fine, the taxation of the income in question and the flat-rate fines to be applied at the same time, without taking into account the overall tax debt that would result. Situations may arise inter alia where the overall tax liability exceeds the value of the taxable assets and rights. The Commission refers to 'cases brought to [its] notice' and mentions two examples of the simultaneous application of penalties.

(2) The Spanish Government's arguments

121. The Spanish Government, for its part, observes at the outset that the proportionality of penalties, whether the proportional fine of 150% or flat-rate fines, is a matter for the national courts alone to determine since they have not been harmonised at European level.

122. That said, it takes the view that, as regards, *in the first place*, the severity of the fine, the 150% fine and the lower additional charges invoked by the Commission are, first, not comparable. Only the former has the character of a penalty, which is intended to punish the conduct of a taxpayer

[82] As explained in points 47 to 57 of this Opinion, under the first complaint, the Commission takes the view that the Member States have sufficient means to obtain information on assets and rights held abroad in order to carry out the appropriate tax checks under Directive 2011/16.

who merely complies with the obligation to provide information *without* regularising the corresponding tax, whereas the sole purpose of the latter is to encourage taxpayers to comply with the prescribed time limits and to compensate the State for the damage suffered as a result of the late payment of tax.

123. Next, the fact that the rescript of 6 June 2017 is subsequent to the reasoned opinion should not preclude the interpretation contained therein from being taken into account. First, rescripts are limited to interpreting provisions and it is not possible for a rescript to amend or rectify a provision. Consequently, no new applicable provision results from the tax rescript and the effects in the taxpayer's favour are retroactive to the entry into force of the provision. Moreover, the Spanish Government states that it is incorrect to take the view that the possibility of regularisation is not provided for in the law. That possibility and its effects are generally recognised in Article 27 and Article 179(3) of the GTL. It is clear from that legislation, which is what is considered in the rescript, that it is possible to submit voluntary late adjustments without a penalty for non-payment, without prejudice to any surcharges. That legislation applies to all tax declarations, including the regularisation of assets situated abroad, and it was already in force when Law No 7/2012 was adopted. The possibility of regularisation therefore existed before the rescript was published. As regards, secondly, the Commission's allegations concerning the practice before the rescript was published, these merely state that the possibility of regularisation cannot be applied uniformly without providing any specific evidence in that regard.

124. Moreover, the requirements stemming from the principle of proportionality as provided for in Spanish law[83] also allow the authorities to adjust the penalties in order to ensure that they correspond to the tax offences to which they are applied.

125. Furthermore, the proportional fine of 150% does not penalise the failure to comply with a mere obligation to declare information, but the concealment of income and the repeated failure to pay the tax due, in other words acts of tax avoidance. Since that fine is intended to penalise the taxpayer's conduct, it is impossible to vary the rate of the fine according to the level of information which may be provided by third parties to the tax authorities.

126. *In the second place*, the Spanish Government disputes that the fine is automatic in nature. First, it recalls that, in order for it to be imposed, the constituent elements of the offence it penalises must be present, and the burden of proof in that regard rests with the authorities.[84] Secondly, in its view, the tax authorities must also prove the taxpayer's guilt, as is evident inter alia from Articles 178, 179 and Article 183(1) of the GTL. In its view, in the Spanish tax and administrative system, penalties cannot be imposed automatically and, in particular, penalties can be imposed only if guilt has been sufficiently justified and substantiated, the burden of proof of the facts and of guilt being borne entirely and exclusively by the authorities in accordance with the principle of the presumption of innocence. Since the creation of the Form 720, of the cases in which a declaration has been submitted out of time, only 7.6% have resulted in the imposition of a tax penalty.

[83] The Spanish Government observes that, in general, in administrative law on penalties, the principle of proportionality is governed by Article 29 of Ley 40/2015 de Régimen Jurídico del Sector Público (Law No 40/2015 on the legal rules governing the public sector) paragraph 4 of which provides that, 'where the required alignment of the penalty to be imposed and the seriousness of the act constituting the offence and the circumstances of the case so justify, the competent adjudicatory body may impose a lower penalty'. In the field of taxation, the principle of proportionality is referred to more specifically in the following provisions: (a) Article 3 of the GTL, entitled 'Principles governing the organisation and application of the tax system', paragraph 2 of which provides that: 'the application of the tax system is based on the principles of proportionality …', and (b) Article 178 of the GTL, entitled 'Principles of the power to impose penalties in tax matters', the second paragraph of which provides that: 'the principles of legality, incrimination, accountability, proportionality and non-competition shall apply in particular …'.

[84] See, in that regard, points 59 to 61 of this Opinion.

127. It is therefore said to be essential that the guilt is the subject of a specific statement of reasons and that it is proved using sufficiently clear and detailed factual evidence incorporating the reasoning which led to the conclusion that it exists. By way of illustration, the Spanish Government refers to a judicial decision [85] which annuls the penalty imposed in so far as it is considered that the statement of reasons establishing guilt contained in the decision to impose a penalty is insufficient. It also refers to figures which essentially show that the imposition of that fine would still be open to assessment: out of 781 monitoring procedures, only 296 resulted in penalty procedures and, of those, 108 [86] gave rise to the application of the proportional fine of 150% by the tax authorities. In the Spanish Government's view, the legislation therefore contains no presumption of tax evasion.

128. *In the third place*, in order to justify the proportionality of the fine, the Spanish Government submits, first, that it can be compared only with other fines penalising the repeated and systematic concealment of assets, which provide for penalties of between 100% and 150%. [87] The 150% penalty is therefore within the limits generally provided for in the GTL for aggravated cases of non-payment of tax debt. Moreover, in general, in more serious cases such as offences against the tax authorities, the penalty may even reach 600% of the amount which has not been paid. [88] Secondly, the rate of 150% can be reduced in the event of consent (30%) or prompt payment (25%) and the penalty may therefore be reduced to 78.75%.

129. Moreover, the Commission's claim regarding the (alleged) 'simultaneous application' of the formal infringement in respect of the failure to submit the Form 720 and the material infringement in respect of the regularisation of an unjustified capital gain is said to be erroneous. If the tax authorities prove that there has been wrongful conduct on the part of the taxpayer, the material penalty would have to be imposed since the formal infringement is absorbed by it under Article 180(1) of the GTL. [89] According to the Spanish Government, the very close link between the regularisation of the unjustified capital gain and the failure to submit the Form 720 means that they cannot be considered separately and must be regarded as a whole for the purposes of the offence, as a result of the combination of instruments.

(c) Assessment

130. At the outset, I would point out that, contrary to the Spanish Government's claim, it must be stated that the Court has jurisdiction to assess the Commission's complaints relating to the proportionality of penalties. [90]

[85] Decision of the Tribunal Económico-Administrativo Central (Central Tax Tribunal), First Chamber, of 14 February 2019 (R. G. 529/2016).

[86] I note that there is some doubt as to the number of cases in which the 150% penalty was applied. The Spanish Government referred once to 108 cases, once to 129 cases in its observations.

[87] Article 191(4) of the GTL.

[88] The Spanish Government refers to Article 305 of Ley Orgánica 10/1995 del Código Penal (Organic Law No 10/1995 on the Criminal Code), of 23 November 1995 (BOE No 281, 24 November 1995).

[89] That provision states that 'the same action or omission that is to be applied as a criterion to grade an offence or as a circumstance determining the classification of an offence as serious or very serious cannot be penalised as an independent offence'.

[90] While, in the absence of harmonisation of EU legislation in the field of penalties, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with, inter alia, the principle of proportionality. See, to that effect, judgment of 12 July 2001, *Louloudakis* (C-262/99, EU:C:2001:407, paragraph 67 and the case-law cited).

131. In support of its second complaint, the Commission put forward a number of different arguments each seeking to demonstrate the disproportionate nature of the 150% fine. While I am of the opinion that most of those arguments should be rejected (Section 1), I consider that, in view of my proposed response to the Commission's first complaint, the argument alleging that the limitation period is disproportionate must be upheld (Section 2).

(1) The arguments put forward by the Commission other than that alleging that the limitation period is disproportionate

132. The arguments put forward by the Commission in this regard are, to a large extent, related to the nature and scope of the fine, which are, however, disputed by the Spanish Government. In order to assess those arguments (Section (ii)) it is necessary, in the first place, to define those two points (Section (i)).

(i) The nature and scope of the fine

133. First of all, contrary to the Commission's submissions, it seems clear to me that the 150% fine does not penalise the failure to fulfil a mere *formal* obligation, but the failure to fulfil a *material* obligation. As the Spanish Government points out, which, moreover, the Commission does not dispute, the imposition of that fine presupposes the application of Article 39(2) of the Law on personal income tax and the rule contained in Article 121(6) of the Law on corporate tax, which means that the taxpayer has assets abroad in respect of which he or she has not paid the tax he or she should have paid. In that regard, I would point out that, as provided for by the very wording of the first additional provision of Law No 7/2012, the 150% fine is calculated on the basis of the amount of tax due, and it is therefore directly linked to the material obligation to pay the tax. Moreover, the failure to fulfil the formal obligation of the Form 720 is penalised by other means, namely the flat-rate fines which form the subject matter of the Commission's third complaint.[91]

134. Furthermore, I am of the view that the arguments put forward by the Commission are not capable of ruling out the Spanish Government's explanation that the tax authorities must also prove that the taxpayer is guilty in order to apply the fine. In particular, the fact that the two additional provisions of Law No 7/2012 do not contain an express rule of guilt themselves in no way means that such a rule is not applicable, since it is clearly laid down in the legislation, as the Spanish Government has demonstrated. The Commission has therefore not adduced the required proof that the fine would be imposed automatically in the event of a failure to fulfil the obligations associated with the Form 720. It also follows that the Commission has not adduced proof that the taxpayer's conduct would not be taken into account for the purposes of applying the fine, or that there would be an irrebuttable presumption of tax evasion.

135. Finally, with regard to the allegation that the fine cannot be varied, the points in dispute between the parties concern, in the first place, the possibility of regularising the debt, as described in the rescript of 6 June 2017 and, in the second place, the question of the cumulation of penalties.[92]

136. With regard to the first point, I note that, according to its wording, the first additional provision of Law No 7/2012 provides for a fixed fine of 150%. The Spanish Government has explained that, notwithstanding that wording, the possibility of self-assessment is provided for,

[91] See, in that regard, points 144 and 145 of this Opinion.

[92] However, it is not disputed that the information available to the tax authorities will not be taken into account.

generally, in Article 27 and Article 179(3) of the GTL, which would also apply to the Form 720 upon its entry into force. In the light of those provisions, which have force of law, I do not think it is relevant that the rescript entered into force after the period laid down in the reasoned opinion.[93] In my mind, the Commission has not adduced any other evidence to refute that explanation. In particular, the fact that, according to the information provided by the Commission, 'it was possible, in certain cases' for the 150% fine to be applied to the holder of overseas assets and rights solely on the ground that he or she was unable to prove that he or she had duly paid the corresponding income tax in good time, is not sufficient to provide the proof required by the case-law cited above.[94]

137. As to the question of the cumulation of penalties, I consider, in the same vein, that the Commission has not adduced any evidence capable of refuting the explanations provided by the Spanish Government, in accordance with which it is clear from Article 108 of the GTL that the formal infringement is absorbed by the material infringement.

(ii) The proportionate nature of the fine

138. Since the scope and nature of the fine have been clarified, it follows that the Commission has not adduced proof that a fine of 150% would be imposed automatically and could not be varied. That said, there are still situations in which a fine of 150% will be imposed on the ground that the taxpayer is guilty of the concealment of assets. However, a fine of that magnitude does not appear to me to be disproportionate.

139. First, where the fine of 150% is imposed in order to penalise the systematic concealment of assets, it cannot be compared with the lower additional charges invoked by the Commission, which are applied in the event of late payment. By contrast, and like the Spanish Government, I take the view that it is more appropriate to compare the 150% fine with those provided for by the provisions of Spanish law which penalise the repeated and systematic concealment of assets in domestic situations, which, according to the Spanish Government, provide for fines of up to 150%. Since the Commission has not put forward any argument enabling that comparison to be rejected, it has not adduced proof that the penalty imposed in cases of concealed overseas assets is more severe than those applied in domestic cases.

140. Secondly, I am not convinced by the other arguments put forward by the Commission. In particular, the fact that, when applying the 150% fine, the information available to the tax authorities is not taken into account does not, in itself, seem to me to be disproportionate. The fine penalises the taxpayer's conduct, namely the systematic concealment of assets and, in that regard, it is, as explained above, calculated solely on the basis of the amount of tax due. Similarly, the fact that the fine is imposed at the same time as the recovery of the tax does not seem to me to be disproportionate since the two amounts are of a different nature. Only the fine is a penalty, which will be calculated on the basis of the amount of tax due.

93 As explained in footnote 50 to this Opinion, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. I would point out that, as I understand it, this is not a matter for the discretion of the authorities.

94 See the case-law cited in points 71 and 109 of this Opinion.

(2) The argument alleging a complete absence of a limitation period

141. One of the Commission's arguments seeking to demonstrate that the fine is automatic in nature alleges that the fine applies without distinction to all undeclared assets and rights, with no consideration as to the date of acquisition of the assets. I understand this argument to be a corollary of the argument put forward by the Commission under its first complaint in that, in so far as it considers that the recovery of taxes would be disproportionate on the ground of a complete absence of a limitation period, the fine imposed in order to penalise non-payment of tax would also be disproportionate.

142. On this particular point, I agree with the Commission's reasoning. Thus, in so far as I consider it disproportionate that, in the event of the failure to fulfil the obligation to provide information in respect of new bank accounts, the tax authorities may adjust the resulting tax liability irrespective of the date of acquisition of the assets concerned, I also consider, consequently, that the application of the fine in that situation is disproportionate.

143. In the light of all the foregoing, I propose that the Court should uphold the second complaint in part in that, in so far as, by imposing a proportional fine of 150% in the event of the failure to fulfil the obligation to provide information in respect of new bank accounts irrespective of the date of acquisition of the assets concerned, the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement.

3. The flat-rate fines (third complaint)

144. By its third complaint, the Commission submits that to '[apply] fixed penalty payments in respect of the failure to fulfil the obligation to provide information in respect of overseas assets and rights or the late submission of the Form 720 the level of which is higher than that of the penalties laid down by the general rules on penalties for similar infringements' constitutes a disproportionate restriction.

(a) The legislation at issue

145. This complaint relates to the flat-rate fines provided for in paragraph 2 of the eighteenth additional provision of the GTL. That article lays down rules on offences and penalties relating to the failure to fulfil the obligations associated with the Form 720. Under that provision, the declaration out of time of the information stipulated in the Form 720 and the inclusion of incomplete, incorrect or false information are regarded as 'very serious' tax offences. The penalties provided for are more severe, first, in the case of incomplete, incorrect or false information and, second, where information has not been declared at all than, third, in the case of a declaration out of time. Thus, for the first two categories, a flat-rate fine of EUR 5 000 applies for each data item or set of data relating the same account/asset, immovable property, etc., with a minimum fine of EUR 10 000. Where a declaration is submitted out of time without prior request from the tax authorities, a fine of EUR 100 is provided for each data item or set of data relating to the same account/asset, immovable property, etc., with a minimum fine of EUR 1 500.

(b) Arguments of the parties

(1) The arguments put forward by the Commission

146. According to the Commission, although it is accepted that the holding of assets outside the national territory may require the imposition of specific fines for failure to comply with the obligation to provide the corresponding information, at the very least the information on assets held abroad that is available to the tax authorities must be taken into consideration. The only criteria used to determine the amount of the flat-rate fines are the number of data items or groups of data relating to the assets in question.

147. In any event, a comparison between domestic situations and situations in which flat-rate fines were applied under the provisions relating to the Form 720 is said to show that the fines concerned are disproportionate. It is clear from that comparison that the flat-rate fines specific to the Form 720 are 15, 50 or 66 times higher than those applied in domestic situations.

148. More specifically, the Commission observes that the tax obligation to submit the Form 720 is an information obligation and must be classified as a formal obligation since the submission of that form does not enable any tax liability to be determined or settled, which leads to the conclusion that the failure to submit that form does not cause the tax authorities direct economic damage. That obligation also takes the form of a general obligation (not arising from an individual request) which is addressed to the taxpayer required to submit the form (and not to a third party). In order to determine the parallel regime of penalties which are applied in domestic situations,[95] the following four situations must be taken into account.

(i) Failure to submit the declaration

149. In order to compare the penalties imposed in the event of failure to comply with that obligation with those which would be imposed in respect of a similar offence at domestic level, account must be taken of the conduct referred to in the first to third subparagraphs of Article 198(1) of the GTL. That provision, which classifies the failure to submit a tax declaration within the prescribed period as a minor offence, is punishable by a flat-rate fine of EUR 200. In that situation, the Form 720 (paragraph 2 of the eighteenth additional provision of the GTL) provides for a fine of EUR 5 000 per data item, the minimum fine being set at EUR 10 000, and that minimum amount is 50 times higher than that laid down in respect of the offence referred to in Article 198(1) of the GTL.

(ii) Late submission of the declaration, without prior request from the tax authorities

150. If the Form 720 is submitted after the expiry of the statutory time limit, but before the tax authorities ask the taxpayer to do so, this would be a spontaneous submission of the declaration, but out of time. Again, the tax authorities would not suffer any direct economic damage. The similar offence at domestic level is defined in Article 198(2) of the GTL. In accordance with that provision, if the declaration is submitted out of time without prior request from the tax authorities, the penalty and the minimum and maximum limits would be equal to half of those

[95] According to the Commission, since Spanish law does not provide for the declaration of information in respect of assets and rights situated in Spain, it is not possible to assess whether the measure is disproportionate solely by determining what penalty would have been imposed if, pursuant to the legislation relating to the declaration using the Form 720, a specific parallel regime of penalties had not been put in place.

provided for in Article 198(1) of the GTL, namely a flat-rate fine of EUR 100. As paragraph 2 of the eighteenth additional provision of the GTL provides for a penalty consisting of a fine of EUR 100 per data item, with a minimum amount of EUR 1 500, the minimum amount is 15 times higher than that of the penalty provided for in Article 198(2) of the GTL.

(iii) Submission of the declaration containing information which is incomplete, incorrect or false, but is spontaneously corrected out of time, without prior request from the tax authorities

151. This situation concerns the submission of the declaration within the prescribed period but the declaration is incomplete, incorrect or contains erroneous information. However, in this case, the taxpayer corrects that information before he or she is requested to do so by the tax authorities (spontaneous correction but out of time). Article 198(2) of the GTL is also said to apply by analogy to this situation since it can be treated in the same way as the submission out of time of an accurate declaration. The fine in that case would therefore be a fixed amount of EUR 100. Similarly, in respect of the submission of the Form 720, paragraph 2 of the eighteenth additional provision of the GTL provides for a fine of EUR 100 per data item, with a minimum fine of EUR 1 500, and this is therefore a penalty which is 15 times higher than the amount of the penalty provided for in Article 198(2) of the GTL.

(iv) Submission of the Form 720 containing incomplete, incorrect or erroneous information

152. In respect of the submission of the declaration within the prescribed period but with incomplete, incorrect or erroneous information, without the taxpayer correcting it, the similar offence at domestic level is that laid down in Article 199(1) of the GTL. That provision classifies the submission of a declaration with incomplete, incorrect or erroneous information as an offence and the fine provided for in that article is a fixed sum of EUR 150. Under the rules governing the Form 720, the fine is EUR 5 000 per data item, with a minimum fine of EUR 10 000, and the amount of that penalty is therefore at least 66.66 times higher than that of the penalty imposed under Article 199(2) of the GTL.

(2) The arguments put forward by the Spanish Government

153. The Spanish Government, for its part, submits that the penalties used by the Commission for its comparison are inappropriate, as they do not concern comparable situations. In that regard, it highlights three main characteristics of the offence resulting from the failure to comply with the obligations relating to the Form 720. First of all, the Form 720 is, according to the Spanish Government, a tax declaration for information purposes. Next, it corresponds to a declaration of monetary data. Finally, it concerns a declaration submitted by the taxpayer who is concerned by the information in question.

154. The most appropriate comparison would be the reporting of related transactions, since the three preceding characteristics would be met for both fines: they concern obligations to provide information, they relate to monetary values and they are declarations submitted by the taxpayer himself or herself and not by a third party.

155. With regard to related transactions, the Spanish Government points out that the taxpayer must record and retain certain information relating to transactions with related persons and entities. In the event of failure to comply with that obligation, Article 18(13) of the Law on corporate tax stipulates that a tax offence exists in the case of failure to provide that information

or where the information provided is incomplete, incorrect or contains errors regarding those related transactions. Article 18(13) of the Law on corporate tax provides, in subparagraph 1, for the application of that penalty in the event that there is no need to make any corrections to the assessment, that is to say where no economic damage is caused to the tax authorities since the amount of tax is not affected, and Article 18(13)(2) thereof governs the penalty to be applied where corrections must be made to the assessment. Consequently, like the legislation on the Form 720, Article 18(13)(1) of the Law on corporate tax establishes an offence relating to an obligation to provide information – which does not cause economic damage – which is of a monetary nature and does not fall to the taxpayer who is concerned by the information in question. For such offences, the penalties consist of a flat-rate fine of EUR 1 000 for each data item and EUR 10 000 per set of data which is omitted, incorrect or false.

156. Finally, according to the Spanish Government, the level of information from third parties which is available to the authorities should not be taken into account since flat-rate fines penalise only the taxpayer's conduct.

(c) Assessment

157. As regards the nature of the flat-rate fines, I note that the parties agree that the obligation to submit the Form 720 is a formal obligation, the non-fulfilment of which does not cause the tax authorities any direct economic damage, and which takes the form of a general obligation which is targeted directly at the taxpayer.

158. That said, the flat-rate fines seem to me to be disproportionate for the reasons put forward by the Commission.

159. With regard to the question whether the flat-rate fines imposed in the event of a failure to fulfil the obligations associated with the Form 720 must be compared with those provided for in Articles 198 and 199 of the GTL or those for related transactions, I share the Commission's view. Related transactions are specific transactions and are therefore not general in nature. Moreover, I note that paragraph 2 of the eighteenth additional provision of the GTL makes direct reference to Articles 198 and 199 of the GTL in that it stipulates that the flat-rate fines are not in addition to those provided for by those provisions. That reference leads me to believe that, in the absence of specific penalties laid down in paragraph 2 of the eighteenth additional provision of the GTL, the penalties provided for in Articles 198 and 199 of the GTL would apply.

160. In that regard, I note that, as the Commission observes in points 147 to 152 of this Opinion, which is not disputed by the Spanish Government, the fines imposed in the event of a failure to fulfil the obligations associated with the Form 720 are 15, 50 or 66 times higher than those applied in domestic situations. Although the Member States have a margin of discretion to determine appropriate penalties,[96] I consider, however, that the fines at issue are so high that they appear disproportionate, without it being necessary to distinguish here between the different categories of assets. Accordingly, while it is clear to me that the fines imposed in respect of the category of new bank accounts are disproportionate since the Spanish tax authorities

[96] See, to that effect, judgment of 12 July 2001, *Louloudakis* (C-262/99, EU:C:2001:407, paragraph 67 and the case-law cited).

already have that information,[97] I take the view that, in view of the very high fines and the fact that the fines penalise only non-compliance with a formal obligation, the same conclusion must be drawn in respect of the other categories of assets.

161. Finally, I point out that the fact that those fines may, according to the information provided by the Spanish Government, be reduced by virtue of the principle of proportionality, cannot produce a contrary result. The fact remains that an option which is a matter for the discretion of the authorities is not sufficient to remedy the failure to fulfil obligations arising from paragraph 2 of the eighteenth additional provision of the GTL.[98]

162. It follows from the foregoing that the third complaint should be upheld in its entirety.

F. Costs

163. Under Article 138(3) of the Rules of Procedure of the Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

164. In the present case, the Commission has applied for the Kingdom of Spain to be ordered to pay the costs. Since the Kingdom of Spain has been unsuccessful in the third complaint and partially unsuccessful in the first and second complaints put forward by the Commission, I consider that the Kingdom of Spain should be ordered to pay half of the costs incurred by the Commission.

V. Conclusion

165. In the light of the foregoing considerations, I propose that the Court should:

(1) Declare that the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area by:

- establishing that the failure to fulfil the obligation to provide information in respect of new overseas banks accounts or the late submission of the Form 720 results in those assets being classified as unjustified capital gains irrespective of the date of acquisition of the assets concerned;

- imposing a proportional fine of 150% in the event of the failure to fulfil the obligation to provide information in respect of new overseas bank accounts or for the late submission of the Form 720 irrespective of the date of acquisition of those assets;

- applying flat-rate fines in the event of the failure to fulfil the obligation to provide information in respect of overseas assets and rights or the late submission of the Form 720 which are more severe than the penalties laid down by the general rules on penalties for similar offences.

[97] See my conclusion in respect of the first complaint. I would point out that, unlike the proportional fine of 150%, the flat-rate fines directly penalise the fact that the information required by the Form 720 has not been provided. The fact that that information is not taken into account is therefore, in my opinion, disproportionate in that respect.

[98] Judgment of 2 August 1993, *Commission* v *France* (C-276/91, EU:C:1993:336, paragraph 25 and the case-law cited).

(2) Dismiss the action as to the remainder.

(3) Order the Kingdom of Spain to pay half of the costs incurred by the European Commission.