Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

27 January 2022*

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Free movement of capital – Obligation to provide information concerning assets or rights held in other Member States of the European Union or the European Economic Area (EEA) – Failure to comply with that obligation – Limitation – Penalties)

In Case C-788/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 23 October 2019,

European Commission, represented initially by C. Perrin, N. Gossement and M. Jáuregui Gómez, acting as Agents, and subsequently by C. Perrin and N. Gossement, acting as Agents,

applicant,

v

Kingdom of Spain, represented by L. Aguilera Ruiz and S. Jiménez García, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of L. Bay Larsen, Vice-President of the Court, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur) and M. Safjan, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2021,

gives the following

* Language of the case: Spanish.

Judgment

1 By its application, the European Commission requests the Court to declare that:

– by providing that failure to comply with the obligation to provide information in respect of overseas assets and rights or the late submission of 'Form 720' results in the classification of those assets as 'unjustified capital gains' without the possibility of pleading expiry of the limitation period;

– by automatically imposing a proportional fine of 150% in the event of failure to fulfil the obligation to provide information in respect of overseas assets and rights or late submission of 'Form 720'; and

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

the Kingdom of Spain has failed to fulfil its obligations under Articles 21, 45, 49, 56 and 63 TFEU and Articles 28, 31, 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

Legal context

2 The eighteenth additional provision of Ley 58/2003 General Tributaria (General Tax Law 58/2003), of 17 December 2003, as amended by Law 7/2012 ('the General Tax Law'), 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 the life or invalidity insurance policies of which they are the holders and to 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 to the same immovable property or to 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.’

3 Article 39 of 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 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 7/2012 ('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 [General Tax Law] has not been complied with within the prescribed period shall be treated as unjustified capital gains and included in the general taxable amount for 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.'

4 Article 121 of Ley 27/2014 del Impuesto sobre Sociedades (Law 27/2014 on corporate tax), of 27 November 2014 ('the Law on corporate tax'), entitled 'Unaccounted for or undeclared assets and rights: presumed income', provides:

'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 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 [General Tax Law].

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 [General Tax Law] 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.

…'

5 The first additional provision of Law 7/2012, entitled 'System of penalties in the event of unjustified capital gains and presumed income', is worded as follows:

'The application of Article 39(2) of the [Law on personal income tax] and Article 134(6) of the consolidated text of the Law on corporate tax, approved by Royal Legislative Decree 4/2004 of 5 March 2004 [, the provisions of which were subsequently reproduced in Article 121(6) of the Law on corporate tax] 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. …'

Pre-litigation procedure

6 By letter of formal notice of 20 November 2015, the Commission drew the attention of the Spanish authorities to the incompatibility with EU law of certain aspects of the obligation to declare overseas assets or rights by means of 'Form 720'. In its view, the consequences of failure to comply with that obligation were disproportionate in the light of the objective pursued by the Spanish legislation.

7 Following the reply sent by the Kingdom of Spain on 29 February 2016, in which that Member State disputed the existence of any incompatibility with EU law, the Commission sent a reasoned opinion on 15 February 2017 in which it maintained the position it had taken in its letter of formal notice.

8 By letters of 12 April 2017 and 31 May 2019, the Kingdom of Spain replied to that reasoned opinion. It argued, in essence, relying on certain practical examples, that the legislation at issue was compatible with EU law.

9 As it was not convinced by the Kingdom of Spain's arguments, on 23 October 2019 the Commission brought the present action on the basis of Article 258 TFEU.

The action

The freedoms at issue

10 By its action, the Commission submits 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 on account of the consequences attached by its legislation to the failure to comply with, or the partial or late compliance with, the obligation to declare overseas assets or rights by means of 'Form 720'.

11 It should be recalled that when a national measure concerns several of the freedoms of movement guaranteed by the Treaties, the Court will in principle examine the measure in dispute in relation to only one of those freedoms if it appears, in the light of the subject matter of that measure, that the other freedoms are entirely secondary in relation to that freedom and may be considered together with it (see, to that effect, concerning a measure relating to both free movement of capital and freedom of establishment, 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 and, concerning a measure relating to both the free movement of capital and the freedom to provide services, judgment of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2015:356, paragraph 39).

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

13 Such legislation, which relates generally to the ownership of assets or rights abroad by Spanish residents, without that ownership necessarily taking the form of acquisitions of shareholdings in the capital of entities established abroad or being principally motivated by the wish to receive financial services abroad, falls within the scope of the free movement of capital. Although that legislation may also affect the freedom to provide services and the freedom of establishment, those freedoms appear, however, to be secondary in relation to the free movement of capital, to which they may be linked. The same is true, in any event, of the freedom of movement of workers.

14 It should also be noted that the Commission has not adduced sufficient evidence to enable the Court to assess how the national legislation at issue affects the freedom of movement of Union citizens or the free movement of workers guaranteed in Articles 21 and 45 TFEU.

15 It follows from the foregoing that the complaints raised by the Commission must be considered in terms of the free movement of capital guaranteed in Article 63 TFEU and in Article 40 of the EEA Agreement, the legal scope of which is essentially the same (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).

The existence of a restriction on the movement of capital

Arguments of the parties

16 According to the Commission, the legislation at issue, which has no equivalent in respect of assets or rights held by taxpayers on the national territory, establishes a restriction on the free movement of capital in that it has the effect of deterring Spanish residents from transferring their assets abroad. It submits that, as the Court has already acknowledged in its 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), there is no objective difference between taxpayers resident in Spain depending on whether their assets are located on or outside Spanish territory.

17 The Kingdom of Spain, for its part, considers that persons who conceal their assets for tax reasons cannot rely on the free movement of capital. It also submits that the penalties for failure to comply with the obligation to provide information cannot be regarded as imposing restrictions on that freedom, since they are necessary in order to ensure the effectiveness of that obligation. In any event, in its view, in the light of the possibility of fiscal supervision, taxpayers whose assets are located on Spanish territory are not in the same situation as taxpayers whose assets are located outside Spanish territory.

Findings of the Court

18 According to the settled case-law of the Court, measures imposed by a Member State which are such as to discourage, prevent or limit the opportunities of investors from that State to invest in other States constitute, inter alia, restrictions on the movement of capital within the meaning of Article 63(1) TFEU (see, to that effect, 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).

19 In the present case, the obligation to declare overseas assets or rights by means of 'Form 720' and the penalties for failure to comply with or for partial or late compliance with that obligation, which do not have an equivalent in respect of assets or rights located in Spain, establish a difference in treatment between Spanish residents according to the location of their assets. That obligation is likely to deter, prevent or restrict the opportunities for residents of that Member State to invest in other Member States and therefore constitutes, as the Court has already held with regard to legislation the objectives of which are to guarantee the effectiveness of fiscal supervision and to combat tax evasion linked to the concealment of assets abroad, a restriction on the free movement of capital, within the meaning of Article 63(1) TFEU and Article 40 of the EEA Agreement (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).

20 The fact that that legislation is aimed at taxpayers who conceal their assets for tax reasons is not such as to call that conclusion into question. The fact that legislation aims to guarantee the effectiveness of fiscal supervision and to prevent tax evasion cannot preclude a finding that there is a restriction on the movement of capital. Those objectives are only among the overriding reasons in the public interest capable of justifying the imposition of such a restriction (see, to that

effect, judgments of 11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, EU:C:2009:368, paragraphs 45 and 46, and of 15 September 2011, *Halley*, C-132/10, EU:C:2011:586, paragraph 30).

Justification for the restriction on the free movement of capital

Arguments of the parties

21 If the contested legislation were to be regarded as a restriction on the movement of capital, the Commission and the Kingdom of Spain agree that such a restriction could be justified by the need to guarantee the effectiveness of fiscal supervision and by the objective of preventing tax evasion and avoidance. The Commission submits, however, that that legislation goes beyond what is necessary to attain those objectives.

Findings of the Court

22 As stated in paragraph 20 of this judgment, the need to guarantee the effectiveness of fiscal supervision and the objective of preventing tax evasion and avoidance are among the overriding reasons in the public interest capable of justifying the imposition of a restriction on the freedoms of movement (see, to that effect, judgments of 11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, EU:C:2009:368, paragraphs 45 and 46, and of 15 September 2011, *Halley*, C-132/10, EU:C:2011:586, paragraph 30).

23 With regard to capital movements, Article 65(1)(b) TFEU provides moreover that Article 63 TFEU is to be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation.

24 In the present case, since the level of information available to the national authorities concerning assets held by their tax residents abroad is, overall, lower than that available to them concerning assets located on their territory, even taking into account the existence of mechanisms for the exchange of information or for administrative assistance between the Member States, the legislation at issue appears appropriate for ensuring the attainment of the objectives pursued. It must, however, be ascertained whether it goes beyond what is necessary to achieve those objectives.

The proportionality of the classification of assets held abroad as 'unjustified capital gains', without the benefit of a limitation period

Arguments of the parties

25 According to the Commission, failure to fulfil the obligation to provide information or the partial or late presentation of 'Form 720' has consequences which are disproportionate in the light of the objectives pursued by the Spanish legislature, in that they give rise to an irrebuttable presumption that undeclared income has been obtained, equal to the value of the assets or rights at issue, resulting in the taxation of the corresponding sums in respect of the taxpayer, without the latter being able to rely on the rules on limitation periods or to avoid taxation by arguing that he or she has, in the past, paid the tax due in respect of those assets or rights.

26 The Kingdom of Spain disputes that there is an irrebuttable presumption of tax evasion. It submits that the concealment of the assets or rights in question and the failure by the taxpayer to pay the corresponding tax must be established in order for the failure to declare or the late declaration of those assets or rights by means of 'Form 720' to give rise to a presumption that the taxpayer has received undeclared income. The Kingdom of Spain also disputes that there is no limitation rule. In its view, Spanish law merely contains a specific feature as regards the starting point of the limitation period, which, according to the *actio nata* rule, does not begin to run until the date on which the tax authority becomes aware of the existence of the assets or rights in respect of which the obligation to provide information has not been complied with, or has been complied with partially or late.

Findings of the Court

27 In accordance with settled case-law, the mere fact that a resident taxpayer has assets or rights outside the territory of a Member State cannot give rise to a general presumption of tax evasion and avoidance (see, to that effect, judgments of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraph 51, and of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 60).

28 Moreover, a provision 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 achieve the objective of combating tax evasion and avoidance (see, to that effect, judgments of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 37 and the case-law cited, and of 26 February 2019, *X* (Controlled companies established in third countries), C-135/17, EU:C:2019:136, paragraph 88).

29 It is apparent from Article 39(2) of the Law on personal income tax and Article 121(6) of the Law on corporate tax that a taxpayer who has not complied with the obligation to provide information or who has done so partially or late may avoid the inclusion in the basis of assessment of the tax due in the earliest tax year which is not time-barred, as unjustified capital gains, of amounts corresponding to the value of that tax payer's assets or rights not declared by means of the 'Form 720' by providing evidence that those assets or rights were acquired through declared income or income obtained during tax years in respect of which the tax payer was not subject to tax.

30 The Kingdom of Spain also contends, without being effectively contradicted by the Commission, that the fact that the taxpayer has not retained proof of the tax paid in the past in respect of sums used to acquire undeclared assets or rights by means of 'Form 720' does not automatically lead to the inclusion of those sums in the basis of assessment of the tax payable by that tax payer as unjustified capital gains. That Member State notes that, under the general rules on the shifting of the burden of proof, it is, in all cases, for the tax authorities to prove that the taxpayer has not fulfilled his or her obligation to pay tax.

31 It follows from the foregoing, first, that the presumption of acquisition of unjustified capital gains established by the Spanish legislature is not based solely on the holding of assets or rights abroad by the taxpayer, since its triggering is linked to the taxpayer's failure to comply with, or late compliance with their specific declaration obligations in respect of those assets or rights. Secondly, according to the information provided to the Court, the taxpayer may rebut that presumption not only by proving that the assets or rights at issue were acquired by means of

declared income or income obtained during tax years in respect of which he or she was not liable to tax, but also, where the taxpayer is unable to provide such proof, by arguing that he or she has complied with his or her obligation to pay the tax in respect of the income used to acquire those assets or rights, which it is for the tax authorities to determine.

32 In those circumstances, the presumption introduced by the Spanish legislature does not appear disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision and the prevention of tax evasion and avoidance.

33 The fact that it is impossible for the taxpayer to rebut that presumption by arguing that the assets or rights in respect of which he or she has not complied with the obligation to provide information, or has done so partially or late, were acquired during a prescribed period cannot invalidate that conclusion. Reliance on a rule on limitation is not such as to call into question a presumption of tax evasion or avoidance, but merely serves to prevent the consequences that the application of that presumption should entail.

34 It must, however, be ascertained whether the choices made by the Spanish legislature with regard to limitation do not, in themselves, appear disproportionate in the light of the objectives pursued.

35 In that regard, it should be noted that Article 39(2) of the Law on personal income tax and Article 121(6) of the Law on corporate tax in fact allow the tax authorities to make an additional assessment of the tax due in respect of amounts corresponding to the value of assets or rights situated abroad and not declared, or declared partially or late, using 'Form 720', without that power to make an additional assessment being subject to any time limit. This is true even if the view is taken that the Spanish legislature merely intended, pursuant to the *actio nata* rule, to defer the starting point of the limitation period and to set it at the date on which the tax authorities first became aware of the existence of assets or rights held abroad, since that choice has the effect, in practice, of allowing the authorities to tax income corresponding to the value of those assets for an indefinite period, without taking account of the tax year or year in respect of which the taxation of the corresponding amounts was normally due.

36 It is apparent, moreover, from Article 39(2) of the Law on personal income tax and from Article 121(6) of the Law on corporate tax that failure to comply with or late compliance with the obligation to provide information results in the inclusion in the basis of assessment of the tax payable by the tax payer of amounts corresponding to the value of undeclared assets or rights which are located abroad, including where those assets or those rights became part of the taxpayer's assets in a year or tax year already time-barred on the date on which he or she was required to comply with the obligation to provide information. By contrast, a taxpayer who has complied with that obligation within the prescribed period retains the benefit of the limitation period in respect of any concealed income used to acquire the assets or rights which he or she holds abroad.

37 It follows from the foregoing not only that the measure adopted by the Spanish legislature entails an effect of non-applicability of any limitation period, but also that it allows the tax authorities to call into question a limitation period which had already expired vis-à-vis the taxpayer.

38 Whilst the national legislature may introduce an extended limitation period with the aim of ensuring the effectiveness of fiscal supervision and combating tax evasion and avoidance connected with the concealment of overseas assets, provided that that period does not go beyond what is necessary to attain those objectives, having regard, inter alia, to the mechanisms for the

exchange of information and administrative assistance between Member States (see judgment of 11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, EU:C:2009:368, paragraphs 66, 72 and 73), the same is not true concerning the introduction of mechanisms amounting, in practice, to extending indefinitely the period during which taxation may take place or reversing a limitation period which has already expired.

39 The fundamental requirement of legal certainty precludes, in principle, public authorities from being able to make indefinite use of their powers to put an end to an unlawful situation (see, by analogy, judgment of 14 July 1972, *Geigy* v *Commission*, 52/69, EU:C:1972:73, paragraph 21).

40 In the present case, as has been stated, in paragraphs 35 and 36 of this judgment, the possibility for the tax authorities to act without any temporal limitation, or even to call into question a limitation period which has already expired, results solely from the failure by the taxpayer to comply, within the prescribed periods, with the obligation to provide information relating to the assets or rights which that taxpayer holds abroad.

41 By attaching such serious consequences to the failure to comply with a declaratory obligation, the choice made by the Spanish legislature goes beyond what is necessary to guarantee the effectiveness of fiscal supervision and to combat tax evasion and avoidance, without there being any need to consider the conclusions to be drawn from the existence of mechanisms for the exchange of information or for administrative assistance between Member States.

The proportionality of the fine of 150%

Arguments of the parties

42 The Commission submits that, by penalising the failure to comply with, or late compliance with, the obligation to provide information with a proportional fine of 150% of the tax calculated on the amounts corresponding to the value of the rights or assets situated abroad, which is automatic and cannot be varied, the Spanish legislature introduced a disproportionate restriction on the free movement of capital.

43 The Commission submits, in particular, that the rate of that fine is much higher than the progressive rates of the fine incurred in the event of a late declaration of taxable income in a purely national situation, which amount, according to the delay that is found to exist, to 5, 10, 15 or 20% of the duties payable by the taxpayer, even though, unlike the fine in a purely national situation, which is linked to the failure to comply with an obligation to pay tax, the fine of 150% penalises the mere non-compliance with a formal obligation to provide information, which does not generally involve the payment of additional tax.

44 The Commission also states that, in its view, account cannot be taken of the possibility of variation provided for by a rescript of 6 June 2017, since that rescript does not have the force of law and is subsequent to the date of the reasoned opinion. It points out that, in the absence of an investigation by the tax authorities, taxpayers who are unable to prove that their assets or rights abroad were acquired by means of declared and taxable income would automatically face a fine of 150%, which would be tantamount, once again, to introducing an irrebuttable presumption of tax evasion, and not taking any account of the overall tax liability borne by the taxpayer as a result of the concurrent application of the proportional fine of 150% with the flat-rate penalties provided for by the eighteenth additional provision to the General Tax Law.

45 The Kingdom of Spain, for its part, considers that the proportionality of penalties is a matter for the national authorities alone to determine, since that issue has not been the subject of harmonisation at EU level. However, it submits that the purpose of the fine of 150% is to penalise failure to comply with an obligation to declare where there has been no adjustment of the corresponding tax, that is to say, acts of tax avoidance, and cannot, on that basis, be compared with the increases imposed in the event of a delay in making a declaration, which are intended solely to encourage taxpayers to comply with the time limits set.

46 The Kingdom of Spain also considers that account should be taken of the possibility for variation afforded by the rescript of 6 June 2017, the content of which is incorporated into the law retroactively, and of the general power of variation granted to the administrative authorities under national law, in accordance with the principle of proportionality.

47 Finally, that Member State disputes the automatic nature of the fine of 150%, arguing that the fine can be imposed only where the constituent elements of the offence which it penalises are present, that the burden of proving the taxpayer's guilt is always borne by the authorities and that that fine is not, in practice, imposed systematically. Moreover, in view of the characteristics of the fine of 150%, its proportionality should be assessed by taking into account the penalties incurred in the most serious cases of non-payment of a tax debt, which, in the event of an offence against the tax authorities, could go as far as the imposition of a fine of 600% of the amount of the tax payable by the taxpayer.

Findings of the Court

48 As a preliminary point, it must be borne in mind that, although it is for the Member States, in the absence of harmonisation in EU law, to choose the penalties which appear to them to be appropriate for failure to comply with the obligations laid down by their national legislation in the field of direct taxation, they are, however, required to exercise that power in accordance with EU law and its general principles, and, consequently, in accordance with 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).

49 As regards the proportionality of the fine of 150%, it is apparent from the first additional provision of Law 7/2012 that the application of Article 39(2) of the Law on personal income tax or Article l34(6) of the consolidated text of the Law on corporate tax approved by Royal Legislative Decree 4/2004 of 5 March 2004, the provisions of which were subsequently reproduced in Article 121(6) of the Law on corporate tax, gives rise to the imposition of a fine of 150% of the total amount of tax due on the sums corresponding to the value of the assets or rights held abroad. That fine is applied concurrently with the flat-rate fines provided for in the eighteenth additional provision to the General Tax Law, which apply to each missing, incomplete, incorrect or false data item or set of data which should appear on 'Form 720'.

50 Although the Kingdom of Spain maintains that that proportional fine penalises failure to comply with a substantive obligation to pay tax, it is clear that its imposition is directly linked to the failure to comply with reporting obligations. Only taxpayers whose situation is covered by Article 39(2) of the Law on personal income tax or Article 121(6) of the Law on corporate tax are penalised, that is to say, taxpayers who have not complied with the obligation to provide information relating to their assets or rights abroad, or have done so partially or belatedly, to the exclusion of those who, while having acquired such assets or rights by means of undeclared income, have, on the contrary, complied with that obligation.

51 Furthermore, although the Kingdom of Spain submits that, in practice, the imposition of the proportional fine of 150% is the result of a case-by-case assessment and that its rate may be varied, the wording of the first additional provision to Law 7/2012 suggests that the mere application of Article 39(2) of the Law on personal income tax or Article 121(6) of the Law on corporate tax is sufficient to lead to a finding of the existence of a tax offence, which is regarded as very serious and punishable by the imposition of a fine of 150% of the amount of the tax avoided, that rate not being expressed as a ceiling rate.

52 In that regard, it should be made clear that the possibility for variation offered by a rescript of 6 June 2017, subsequent to the reasoned opinion sent by the Commission to the Kingdom of Spain on 15 February 2017, cannot be taken into account in the present action since, in accordance with 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, to that effect, judgment of 22 January 2020, *Commission* v *Italy (Directive on late payment)*, C-122/18, EU:C:2020:41, paragraph 58). The fact that the interpretation contained in that rescript is applied retroactively to the law has no bearing on that point.

53 Finally, as the Commission points out, the very high rate of the proportional fine incurred should be noted, which gives it a highly punitive nature and may lead, in a number of cases, taking account of the concurrent application with the flat-rate fines provided for elsewhere by the eighteenth additional provision to the General Tax Law, to an increase of the total amount of the sums payable by the taxpayer for failure to comply with the obligation to provide information relating to that taxpayer's assets or rights overseas to more than 100% of the value of those assets or rights.

54 In those circumstances, the Commission has established that, by imposing on the taxpayer in respect of failure to comply with his or her obligations to declare relating to the taxpayer's assets or rights situated abroad a fine proportional to 150% of the amount of tax calculated on amounts corresponding to the value of those assets or those rights, which could be applied concurrently with flat-rate fines, the Spanish legislature caused disproportionate interference with the free movement of capital.

The proportionality of the flat-rate fines

Arguments of the parties

55 Finally, in the Commission's submission, it is a disproportionate restriction on the free movement of capital to impose, in the event of failure to comply with the obligation to provide information relating to assets or rights held abroad, or for partial or late compliance with that obligation, flat-rate fines at a higher rate than that imposed for similar infringements in a purely national context, without taking into account the information available to the tax authorities concerning those assets.

56 In any event, the Commission submits that the fact that the failure to comply with or the partial or late compliance with the obligation to provide information, which is a purely formal obligation failure to comply with which does not cause any direct economic loss to the tax authorities, leads to the imposition of fines which are, as the case may be, 15, 50 or 66 times higher than those

imposed on similar infringements in a purely national situation, provided for in Articles 198 and 199 of the General Tax Law, is sufficient to establish that the amount of those fines is disproportionate.

57 While agreeing that the flat-rate fines provided for by the eighteenth additional provision to the General Tax Law penalise failure to comply with a formal obligation, failure to comply with which does not cause the tax authorities direct economic loss, the Kingdom of Spain takes the view that the comparators identified by the Commission are not relevant. In its view, it is more appropriate to compare the flat-rate fines incurred in the event of failure to comply with or late compliance with the obligation to provide information with the fines incurred in the event of failure to comply with the 'declaration of related transactions', provided for by Spanish law, since that declaration also takes the form of an obligation to provide information relating to monetary data, which must be made by the taxpayer concerned by the information in question. That Member State is also of the opinion that the level of information available to the tax authorities regarding the assets held by a taxpayer abroad should not be taken into account in assessing the proportionality of the flat-rate fines incurred, which should be examined solely on the basis of the taxpayer's conduct.

Findings of the Court

58 According to the eighteenth additional provision to the General Tax Law, taxpayers are required to provide the tax authorities with a set of information relating to their assets or rights abroad, including immovable property, bank accounts, securities, assets or rights representing the share capital, own funds or assets of any type of entity or life and disability insurance which they hold outside Spanish territory. The fact that a taxpayer has declared incomplete, incorrect or false information to the tax authorities, has failed to provide them with the required information or has not done so within the time limits or in accordance with the prescribed forms is classified as a 'tax offence' and entails the imposition of flat-rate fines of EUR 5 000 per data item or set of data which is missing, incomplete, incorrect or false, with a minimum of EUR 10 000, and an amount of EUR 100 per data item or set of data declared late or not declared digitally where so required, with a minimum of EUR 1 500.

59 The eighteenth additional provision to the General Tax Law also provides that those fines may not be applied concurrently with the fines provided for in Articles 198 and 199 of that law, which determine generally the penalties applicable to taxpayers who do not comply with their obligations to declare or who do so partially, late or not in the prescribed form. Under those provisions, in the absence of direct economic harm to the tax authorities, failure to submit a declaration within the prescribed period is, except in special cases, to be penalised by a flat-rate fine of EUR 200, the amount of which is reduced by half in the event of late submission by the taxpayer, without a prior request from the tax authority. The submission of an incomplete, incorrect or false declaration is punishable by a flat-rate fine of EUR 150 and the submission of a declaration that is not in the prescribed form by a flat-rate fine of EUR 250.

60 It follows from the foregoing that the eighteenth additional provision to the General Tax Law penalises failure to comply with mere obligations to declare or purely formal obligations connected with the possession, by the taxpayer, of assets or rights abroad by the imposition of very high flat-rate fines, since they apply to each data item or set of data concerned together with, as appropriate, a minimum amount of EUR 1 500 or EUR 10 000 and the total amount is not capped. Those flat-rate fines are also applied concurrently with the proportional fine of 150% provided for by the first additional provision to Law 7/2012.

61 It also follows from the foregoing that the amount of those flat-rate fines is disproportionate to the amount of the fines incurred by taxpayers on the basis of Articles 198 and 199 of the General Tax Law, which appear to be comparable in so far as they penalise failure to comply with obligations similar to those laid down by the eighteenth additional provision to the General Tax Law.

62 Those characteristics are sufficient to establish that the flat-rate fines imposed by that provision introduce a disproportionate restriction on the free movement of capital.

63 Having regard to all the foregoing considerations it must be held that:

– by providing that the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets and rights located abroad entails the taxation of undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility, in practice, of benefiting from limitation;

– by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which may be applied concurrently with flat-rate fines, and

– by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to flat-rate fines the amount of which is disproportionate to the penalties imposed in respect of similar infringements in a purely national context and the total amount of which is not capped,

the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement.

Costs

64 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and as it has been held that the Kingdom of Spain has failed to fulfil its obligations, that Member State must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Declares that, by providing that the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets and rights located abroad entails the taxation of undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility, in practice, of benefiting from limitation;

by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which may be applied concurrently with flat-rate fines, and

by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to flat-rate fines the amount of which is disproportionate to the penalties imposed in respect of similar infringements in a purely national context and the total amount of which is not capped,

the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area.

2. Orders the Kingdom of Spain to pay the costs.

[Signatures]