

THE ECJ DECLARES THE CONSEQUENCES OF NOT COMPLYING WITH THE OBLIGATION TO REPORT ASSETS ABROAD CONTRARY TO EUROPEAN UNION LAW

The Court of Justice of the European Union found that a significant part of the consequences associated with the failure to comply with the obligation to declare assets and rights of Spanish residents abroad (Form 720) is incompatible with European Union law because it constitutes an unjustified restriction on the free movement of capital.

1. THE OBLIGATION TO DECLARE ASSETS HELD ABROAD

Since 2012 Spanish tax residents are required to declare their overseas assets and rights. The obligation covers three groups of assets, which value must exceed EUR 50,000: (i) accounts and deposits; (ii) shares, bonds, insurance or pensions; and (iii) real estate. From 2021 virtual currency must also be declared.

The infringement procedure and the subsequent judicial action brought by the European Commission focuses on the consequences of non-compliance with this obligation.

The first of such consequences is that undeclared assets, if detected, would be taxed as unjustified capital gains in the last tax period with no possibility of benefiting from limitation. The only objection the taxpayer could make is that *“the ownership of the assets or rights is declared income, or income obtained in tax periods in which the taxpayer was not a taxpayer for the purposes of this tax.”* The taxpayer could not argue, however, that such assets were time-barred, as it could do with assets that were not within the scope of Form 720.

Sanctions were established by means of two types of penalties: (i) a penalty of 150% of the tax liability that would result from considering the asset an unjustified capital gain; and (ii) fixed penalties for late or incorrect filing of Form 720, of up to EUR 5,000 per information item, with a minimum fine of EUR 10,000.

2. THE RULING OF THE COURT OF JUSTICE

The Court of Justice reasons in its [judgment](#) that the obligation to declare assets held abroad through Form 720 and the penalties for failure to comply with it establish a difference in treatment between Spanish residents according to the location of their assets and can deter their investment in other Member States.

As such, it constitutes a restriction on the free movement of capital. Furthermore, this restriction is not justified and is contrary to European Union law to the extent the measures under review go beyond what is necessary to achieve the objective of preventing tax evasion and avoidance.

The Court of Justice declared that the Kingdom of Spain had failed to fulfil its obligations under the provisions regarding freedom of movement of capitals

- (A) By providing that the failure to comply with or the partial or late compliance with this obligation 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;**

Such measure, the Court points out, not only produces the effect of non-limitation, it also allows the tax authorities to challenge a statute of limitations that has expired. and is. The Court concludes that "*such serious consequences*" are contrary to the fundamental requirement of legal certainty. Contrary to the Advocate General's opinion, the Court held that it is not appropriate to distinguish between different types of assets on the basis of the scope of exchange of information or administrative assistance within the European Union.

- (B) By subjecting the failure to comply with or the partial or late compliance with this obligation 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.

The Court takes into account, firstly, that this penalty is associated with a reporting obligation (and not with a material obligation to pay the tax). Secondly, it considers that the amount of the penalty "*gives it a highly punitive nature*".

- (C) 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**.

According to the Court, these penalties are out of proportion compared to the penalties provided for similar infringements in a purely domestic context and their total amount is not capped.

These measures, therefore, are contrary to European Union law.

3. IMPLICATIONS OF THE JUDGMENT

This long awaited judgment implies, firstly, that from now on, the penalties described cannot be imposed and the legal effect of having no limitation period will no longer apply. The Court's judgment does not affect the obligation itself, which must continue to be complied with.

The effect the judgment has on past situations will have to be analysed case-by-case. It will apply in pending administrative and judicial proceedings. It will also allow requests for correction of the income tax returns submitted and refunds of amounts paid. In certain cases it can open the possibility of the State being held liable (such a liability regime is also being challenged before the Court¹).

¹ The [opinion](#) of the Advocate General in this case was favourable to declaring the liability regime contrary to EU Law. We are expecting the judgment to be published in the upcoming months.

Finally, in view of the impact of the judgment, we can expect legislative amendments to adapt Form 720 to the decision.

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