# Opinion Statement ECJ-TF 2/2022 on the CJEU decision of 27 January 2022 in Case C-788/19, *European Commission v Kingdom of Spain (Form 720)*, on the lack of proportionality of the consequences derived from the failure to provide information concerning assets or rights held in other Member States of the European Union or the EEA

**Prepared by the CFE ECJ Task Force**
**Submitted to the EU Institutions in May 2022**

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on the *Commission v Spain* case (also cited as the 'Form 720' case), in which the First Chamber of the Court of Justice of the EU (ECJ) delivered its decision on 27 January 2022[2]. The Court, in its decision, ruled in favour of the action brought by the Commission and did not fully follow the reasoning of AG Saugmandsgaard Øe in his Opinion of 15 July 2021, who proposed only to partially accept the action brought by the Commission[3].

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

# I. Background and Issues

1. In 2012, Spain implemented certain rules with the aim of combating tax evasion and avoidance with respect to assets located outside Spanish territory (Law 7/2012 of 29 October). The regulation included an obligation for tax residents, either subject to Corporate Income Tax (hereinafter "CIT") or to Personal Income Tax (hereinafter "PIT") in Spain, to declare specific assets and rights located abroad (the so-called "Form 720"). Specifically, assets to be declared include:
    a. Accounts, by the holder, the beneficial owner, the representative, or any authorised or beneficiary person with a right of disposal at December 31 of each year, unless the sum of balances does not exceed € 50.000; further obligations to report only arise when there is a yearly variation higher than € 20.000.
    b. Any other assets, securities, stocks or rights representing the capital, equity or assets of any type of entity, including trusts, or the transfer to third parties of equity capital (investment funds, structural funds) of which the person is the

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[2] ES: ECJ, 27 Jan. 2022, Case C-788/19, European Commission v. Kingdom of Spain, Case Law IBFD (accessed 29 Apr. 2022).

[3] Opinion of AG Saugmandsgaard Øe, 15 July 2021 in , Case C-788/19, European Commission v. Kingdom of Spain, Case Law IBFD (accessed 29 Apr. 2022).

holder or beneficial owner and which are deposited or situated abroad as of December 31 each year; life insurance or invalidity insurance policies by the policy holder; temporary or life annuities, by the beneficiary following a transfer of cash capital; and

c. Real estate and rights on real estate located abroad by the holder or beneficial owner.

2. Law 7/2012 of 29 October also introduced certain amendments to the General Tax Law (hereinafter GTL), to the Law of the Corporate Income Tax, and to the Law of the Personal Income Tax, establishing certain tax consequences related to different situations of improper fulfilment of this obligation (hereinafter Form 720 regime), namely:
   a. Very serious offences for (1) failure to comply with the obligation to declare or incomplete, inaccurate or false declaration, or (2) late declaration or declaration by other than electronic, computer and telematic means, with a fixed penalty of € 5.000 per data or set of data with a minimum amount of 10.000 euro in case (1), or 150 EUR per data or set of data with a minimum amount of 1.500 EUR in case (2), and with no cap or maximum amount for such a fine (hereinafter fixed amount or flat-rate penalties).
   b. Qualification and taxation as 'unjustified capital gain' of the amount corresponding to the value of the assets and rights in respect of which the reporting obligation has not been complied with within the period established for this purpose. The unjustified capital gain is attributed to the last period not covered by the statute of limitations of the taxpayer, irrespective of the date of acquisition of the assets concerned. This qualification automatically applies unless the taxpayer proves that the ownership of the assets or rights corresponds to (a) declared income or to (b) income obtained in tax periods in respect of which they were not considered a taxpayer under CIT/PIT.
   c. Serious penalty consisting of a monetary sanction of 150% of the tax corresponding to the undeclared assets/rights considered as unjustified capital gains (hereinafter "150% penalty"). This penalty can apply together with the fixed amount penalties for improper reporting.

3. After a series of complaints, the Commission sent a letter to Spain on 20 November 2015 regarding the potential incompatibility of the consequences linked to the obligation to declare the assets and rights located abroad (Form 720) due to its lack of proportionality as regards the objectives of the Spanish regulations.[4] The Commission considered that all three consequences and their modalities of applications lead to disproportionate restrictions on several freedoms of movement (Articles 21, 45, 49, 56 and 63 TFEU and Articles 28, 31, 36 and 40 EEA Agreement) and especially against the free movement of capital. After the answer of Spain on 29 February 2016, the Commission issued a reasoned opinion on 15 February 2017, maintaining its initial position. The Spanish authorities reacted on 12 April 2017 and 31 May 2019, and the Commission finally brought an action for failure to comply with EU law under article 258 TFEU on 23 October 2019.

4. The European Commission requested the Court to declare that:

[4] Commission v Spain (Case C-788/19), supra n. 2, para. 6.

"– by providing that failure to comply with the obligation to provide information in respect of assets and rights located outside of Spain or the late submission of 'Form 720' results in the classification of those assets as 'unjustified capital gains' without the possibility of pleading expiry of the statute of limitations 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 had 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').

5. The action was based on the following arguments:
   a. The consequences attached to the failure to comply with the partial or the late compliance are incompatible with the obligations under Articles 21, 45, 49, 56 and 63 TFEU and Articles 28, 31, 36 and 40 EEA Agreement. The main fundamental freedom involved is the free movement of capital because such legislation generally relates to the ownership of assets or rights held abroad by Spanish residents.[5] All other freedoms, where applicable, appear to be secondary as regards the objective of the legislation in issue.
   b. The difference in tax treatment regarding not duly declared assets or rights held abroad and assets or rights held domestically by resident taxpayers creates a prohibited restriction on the free movement of capital that may deter Spanish residents from transferring their assets abroad.[6]
   c. Despite the fact that the legislation at issue can be justified by the need to guarantee the effectiveness of fiscal supervision and by the objective of preventing tax evasion and avoidance, the legislation goes beyond what is necessary to attain those objectives.[7]
   d. The classification of the value of assets and rights held abroad as 'unjustified capital gains' without the benefit of a statute of limitations period is disproportionate [8].
   e. The penalty of a proportional fine of 150% of the tax due calculated on the amounts corresponding to the value of the rights or assets situated abroad, imposed on those that fail to comply or those who comply too late, is a disproportionate restriction on the free movement of capital, since it is automatic, cannot be varied, and is much higher than the rates of the fine payable onia late declaration of taxable income in a purely national situation.[9]
   f. The application of flat-rate fines in the event of failure to comply with the reporting obligation, or for partial or late compliance with that obligation, at a higher rate than those imposed for similar infringements in a purely national context and without taking into account the information available to the tax

[5] Commission v Spain (Case C-788/19), supra n. 2, para. 13.

[6] Citing ECJ (Fourth Chamber), 11 June 2009, Cases C-155/08 and C-157/08, X and Passenheim-van Schoot, EU:C:2009:368, para. 36-40.

[7] Commission v Spain (Case C-788/19), supra n. 2, para. 21.

[8] Commission v Spain (Case C-788/19), supra n. 2, para. 25.

[9] Commission v Spain (Case C-788/19), supra n. 2, paras. 42-43.

authorities concerning those assets, is a disproportionate restriction on the free movement of capital.[10]

## II. The Judgment of the Court of Justice

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

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

8. The Court concluded that the compatibility analysis had to be made under the free movement of capital requirements, which was the most adequate considering the objective of the legislation. The ECJ concluded that the legislation in issue - the obligation to declare foreign assets or rights and the consequences attached for improper compliance - was likely to deter, prevent or restrict the opportunities for residents of Spain to invest in the other Member States. The aim of the legislation to prevent taxpayers from concealing their assets abroad for tax reasons cannot make an exception to that fundamental freedom, despite the fact that the effectiveness of fiscal supervision and the prevention of tax evasion may constitute an overriding reason capable of justifying the imposition of such a restriction.[11] The Court accepted that the legislation establishing the obligation to report assets and rights abroad may appear appropriate for ensuring such goals.[12] However, it further analysed the proportionality of the different consequences foreseen in the Spanish legislation for improper fulfilment of the obligation to declare.

9. The Court reaffirmed that the holding of assets or rights outside the territory of a Member State could not give rise to a general presumption of tax evasion and avoidance. The Court also recognised that the Spanish legislation allowed a taxpayer to provide evidence in order to prevent the inclusion of the value of the improperly declared assets and rights as unjustified capital gains, which was not solely based on the holding of assets or rights abroad but was also linked to the taxpayer's failure to comply with, or late compliance of their specific declaration obligations.[13] Therefore, the presumption did not appear disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision.[14]

10. However, the Court went on to elaborate on the possibility of a taxpayer relying on the statute of limitations legislation. The Court did not question the presumption of tax

[10] Commission v Spain (Case C-788/19), supra n. 2, para. 55.
[11] Commission v Spain (Case C-788/19), supra n. 2, para. 19-20.
[12] Commission v Spain (Case C-788/19), supra n. 2, para. 24.
[13] Commission v Spain (Case C-788/19), supra n. 2, para. 27-31.
[14] Commission v Spain (Case C-788/19), supra n. 2, para. 32.

evasion or avoidance by the need to rely on a rule of limitation[15] . However, it held that the power given to the tax authorities to make an additional assessment of the tax due without being subject to any time limit goes beyond what was necessary to guarantee the effectiveness of fiscal supervision and to combat tax evasion and avoidance.[16] This is especially true regarding assets or rights acquired during a year already covered by the statute of limitations when the taxpayer was requested to comply with the obligation to provide information. This leads to the *de facto* non-applicability of any limitation period and allows the tax authorities to disregard a limitation period which had already expired for the taxpayer.[17] Indefinitely extending the period during which taxation may take place or reversing a limitation period which has already expired goes beyond what is necessary to ensure the effectiveness of fiscal supervision and to combat tax evasion and avoidance. This is precluded by the 'fundamental requirement' of legal certainty.[18]

11. In that regard, the ECJ departed from the Opinion of the AG. The AG had considered that the proportionality of the measure had to be seen from the point of view of the effectiveness of fiscal supervision, having regard to the scope of the exchange of information mechanisms available to verify the comparability of situations. The AG had concluded that the measure was disproportionate only regarding the improper information of new bank accounts abroad and, therefore, contrary to the free movement of capital.[19] The ECJ, on the contrary, held the *de facto* lack of temporal limitation of the tax administration's powers of adjustment to be disproportionate; consequently, it was not necessary to consider the mechanisms for exchange of information or administrative assistance between the Member States on the proportionality analysis.[20]

12. The ECJ also held that the 150% penalty was clearly disproportionate, following the Commission's argumentation.[21] In concluding so, the ECJ took into account (a) the highly punitive nature, which led in some cases to a total payment higher than the total value of the assets or rights not duly reported; (b) the concurrence with flat-rate penalties; (c) the direct link of the penalty to the failure to comply with reporting obligations and not with the substantive obligation to pay tax; and (d) the lack of a graduation of the penalty on a case by case basis.[22] The Court also confirmed its jurisprudence that a rescript allowing for a graduation of the penalty but issued after the reasoned opinion sent by the Commission could not be taken into account in the infringement procedure.[23]

13. Finally, the ECJ concluded that the flat-rate penalties applicable to the Form 720 were also a disproportionate restriction on the free movement of capital,[24] based on a comparison to the general penalty regime applicable to taxpayers who, in a purely domestic situation, do not comply with other obligations to declare or who do so

[15] Commission v Spain (Case C-788/19), supra n. 2, para. 33.
[16] Commission v Spain (Case C-788/19), supra n. 2, para. 35-40 and especially para. 41.
[17] Commission v Spain (Case C-788/19), supra n. 2, para. 37.
[18] Commission v Spain (Case C-788/19), supra n. 2, para. 38-39.
[19] Opinion of AG Saugmandsgaard Øe, 15 July 2021, supra n. 3,para. 35-112 and 165.1.
[20] Commission v Spain (Case C-788/19), supra n. 2, para. 41.
[21] The AG had restricted, by contrast, the lack of proportionality of the 150% penalty as applied to new bank accounts, considering the lack of proportionality of the penalty as a corollary of the lack of proportionality of the imputation of the unjustified capital gain. Opinion of AG Saugmandsgaard Øe, 15 July 2021, Case C-788/19, Commission v Spain, ECLI:EU:C:2021:621. Para 141.
[22] Commission v Spain (Case C-788/19), supra n. 2, para. 48-54.
[23] Commission v Spain (Case C-788/19), supra n. 2, para. 52.
[24] Commission v Spain (Case C-788/19), supra n. 2, para. 62.

partially, late or not in the prescribed form and which do not cause direct economic harm to the tax authorities. The specific penalty regime applicable to the Form 720 led to penalties between 15, 50 and 66 times higher than the comparable general penalty regime.[25] Other characteristics that led to the outcome were the lack of a maximum cap amount and the potential concurrence with the proportional penalty of 150%.[26]

## III. Comments

14. Several issues from this interesting decision deserve a specific comment:
    a. The evolution of the justification of restrictions based on the effectiveness of fiscal supervision and prevention of tax evasion;
    b. The relevance of the proportionality analysis in the verification of the compatibility of certain restrictions generated by tax measures aimed at counteracting potential cases of tax evasion and avoidance;
    c. The need to exercise the power to impose penalties in accordance with the requirements of proportionality.

15. The **need to ensure the effectiveness of fiscal supervision**,[27] on the one hand, and the need to prevent tax evasion and avoidance,[28] on the other, have been accepted by the ECJ as legitimate aims of public interest. From the very beginning, the acceptance of such restrictive measures is made dependent on the condition that the restriction does not go beyond what is necessary for that purpose.[29] The fact that Article 63 TFEU recognises the *right* of Member States to prevent infringements of national law and regulations, in particular in the field of taxation, should not be seen as a reformulation of the ECJ case law on the acceptance of such valid public interests and their proportionality, but as a confirmation of the settled case law.

16. Having this in mind, the Commission did not challenge the reporting obligation as such, but the Court implicitly had to address it in its analysis.[30] It would be reasonable to assume that reporting obligations without disproportionate consequences would be acceptable under EU law, irrespective of the existence of the exchange of information under the Directive. For this reason, the obligation to present Form 720 is maintained after the adaptation of the Spanish tax provisions to the ECJ decision.[31]

17. Unlike the AG, the Court did not put much emphasis on the automatic exchange of information under the DAC. It merely concluded that, based on the different levels of information available regarding domestic and foreign assets, the Spanish legislation was justified (though not necessarily proportionate), "even taking into account an overall analysis of the level of information available from the mechanisms for the exchange of

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[25] Opinion of AG Saugmandsgaard Øe, 15 July 2021, supra n. 3, para. 149, 151, 152, and 160.
[26] Commission v Spain (Case C-788/19), supra n. 2, para. 60.
[27] After ECJ 28 January 1992, date of the decision of case BE: ECJ, 28 Jan. 1992, Case C-204/90, Hanns-Martin Bachmann v. Belgian State, Case Law IBFD (accessed 29 Apr. 2022).
[28] The ECJ has already recognized that the aims of both reasons of public interest may overlap (SE: ECJ, 21 Nov. 2002, Case C-436/00, X and Y v. Riksskatteverket, Case Law IBFD (accessed 29 Apr. 2022), para 60). In some other cases, the justification analysis has been brought together, such as in the Form 720 case (FI: ECJ, 3 Oct. 2002, Case C-136/00, Rolf Dieter Danner, Case Law IBFD (accessed 29 Apr. 2022), para . 44 and ff.)
[29] LU: ECJ, 15 May 1997, Case C-250/95, Futura Participations SA and Singer v. Administration des contributions, Case Law IBFD (accessed 29 Apr. 2022), para. 26.
[30] Commission v Spain (Case C-788/19), supra n. 2, para.19, 24.
[31] Fourth and Fifth Final Provisions of Law 5/2022, of 9 March, amending Law 27/2014, of 27 November, on Corporate Income Tax, and the revised text of the Law on Non-Resident Income Tax, approved by Royal Legislative Decree 5/2004, of 5 March, in relation to hybrid asymmetries.

information or for administrative assistance between the Member States ".[32] One can only wonder if the outcome could have been any different had the Commission focused on a specific, item-by-item challenge regarding the different assets and the corresponding exchange of information. It remains to be seen whether exchange of information will play a role under the new tax regime of Form 720 after Law 5/2022 of 9 March.

18. Another issue is the characterisation as unjustified capital gains of the value of the assets and rights held abroad not duly declared. The ECJ accepts that characterisation.[33] As regards the presumption of tax evasion and avoidance, the ECJ notes the following:[34]
    a. The holding of assets and rights outside the territory of a Member State cannot give rise to a general presumption of tax evasion and avoidance;
    b. When there is a presumption of fraudulent behaviour, the taxpayer must have an opportunity to rebut that presumption [35].

19. The ECJ confirms that both conditions are met by the Spanish legislation. Therefore, article 39(2) of the PIT passes the proportionality test as regards the characterisation of the value of assets and rights not duly declared as unjustified capital gains without taking into consideration the extended temporal power given to the tax administration to apply such reassessment.[36] This provision is not disproportionate in relation to the objectives of guaranteeing the effectiveness of fiscal supervision and the prevention of tax evasion and avoidance because (a) the qualification is not solely linked to the holding of assets abroad but also to the failure to comply with the obligation to provide information; and (b) the legislation allows a taxpayer to provide some evidence against this qualification, namely that those assets or rights were acquired through declared income or income obtained during tax years in respect of which the taxpayer was not subject to tax.

20. However, the EU analysis could have been different if the comparison was made with the general tax regime applicable to other unjustified capital gains. Despite the fact that there is no such presumption regarding assets and rights located in Spanish territory, the discovery of concealed assets and rights may also give rise to such a characterisation. However, in that situation, a more favourable regime may apply that differs in several respects. The first difference refers to the evidence available for the taxpayer. The qualification can be rebutted by showing evidence of the origin and nature of the income that generated the undeclared assets and rights; and not necessarily by demonstrating that the income-generating them was (effectively) subject to tax as in the case of the Form 720 regime. The second difference is a difference in tax treatment. In the case of individual taxpayers, the Form 720 regime determines (a) that the 'unjustified income' would be attributable to the last not-time-barred tax period, regardless of the year of generation and or incorporation of the asset and right undeclared to the wealth of the taxpayer, with the corresponding interest; and (b) the unjustified income is taxed under the general tax base, regardless the origin, even if

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[32] Commission v Spain (Case C-788/19), supra n. 2, para. 24.
[33] Commission v Spain (Case C-788/19), supra n. 2, para.31.
[34] FR: ECJ, 11 Mar. 2004, Case C-9/02, Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie, Case Law IBFD (accessed 29 Apr. 2022), para. 51 and FI: ECJ, 7 Nov. 2013, Case C-322/11, K, Case Law IBFD (accessed 29 Apr. 2022), para 60.
[35] PT: ECJ, 3 Oct. 2013, Case C-282/12, Fazenda Pública v. Itelcar - Automóveis de Aluguer, Lda, Case Law IBFD (accessed 29 Apr. 2022), para. 37 and DE: ECJ, 26 Feb. 2019, Case C-135/17, X-GmbH v. Finanzamt Stuttgart – Körperschaften, Case Law IBFD (accessed 29 Apr. 2022), para. 88.
[36] Commission v Spain (Case C-788/19), supra n. 2, para. 28-32.

demonstrated, and not under the savings income tax base, which gives rise to a higher tax burden. Since, under the general regime, the taxpayer may provide evidence of the origin and nature of the income that generated the undeclared assets and rights, the tax would be applied correspondingly. Third, the range of taxpayers affected by the Form 720 regime is much broader than the general one; not only the holder or the owner of the asset may be subject to the recharacterisation rule but any of the taxpayers subject to the special regime. If these considerations had been taken into account altogether, the conclusion of the ECJ could have been different since the presumption of fraudulent behavior leads to worse tax treatment and can be rebutted with more limited mechanisms than the situations where the presumption is applied as regards assets and rights concealed but located in Spain.

21. The reference to the effects of the *de facto* lack of temporal limitation needs specific attention. The Court confirms that citizens and entities protected by EU law cannot rely on a statute of limitations by itself to call into question a presumption of tax evasion or avoidance.[37] Moreover, the ECJ has already accepted the application of different periods of limitation regarding assets or rights in respect of which the obligation to provide information has not been duly fulfilled.[38] However, any legislative choice must be assessed under the proportionality principle to see whether the choice is adequate and necessary in light of the objectives pursued.[39]

22. In that regard, it is important to stress the substantial approach taken by the ECJ and the foundations for such delimitation. Whatever the legal mechanism used to justify the powers of the tax administration to make an additional assessment,[40] the crucial element to verify the lack of proportionality is whether this power is not subject to any time limit, which involves *de facto* (a) the non-applicability of any limitation and, also (b) the possibility to call into question a limitation period which had already expired for the taxpayer. The ECJ, referring to settled case-law,[41] recognised the competence of Member States to introduce extended limitation periods in certain justified cases with the aim of ensuring the effectiveness of fiscal supervision and combating tax evasion and avoidance connected with the concealment of overseas assets, but found it disproportionate when the mechanisms amount in practice to an indefinite extension of the period during which the tax administration may reassess the tax associated with the income corresponding to undeclared assets or at the same time may reverse a limitation period which had already expired.[42] When amending the rules after the judgment was delivered, the Spanish legislature did not opt for such an alternative and decided instead to apply the general subsidiary regime of statute of limitations that would have applied otherwise had Law 7/2012 not been approved, despite the fact that it maintains the obligation to present the Form 720.

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[37] Commission v Spain (Case C-788/19), supra n. 2, para.33.

[38] X and E.H.A. Passenheim-van Schoot v. Staatssecretaris van Financiën, (Case C-155/08), supra n. 35, paras. 56, 58, 66 and 76.

[39] Commission v Spain (Case C-788/19), supra n. 2, para.34.

[40] Either the *action nata* rule, which is justified by the Spanish government on a discriminatory basis; or an expanded and undefined statute of limitations rule.

[41] X and E.H.A. Passenheim-van Schoot v. Staatssecretaris van Financiën, (Case C-155/08), para. 66, 72 and 73.

[42] Commission v Spain (Case C-788/19), supra n. 2, para. 38. Surprisingly, the Association of Tax Inspectors of Spain (IHE) has regretted that the ECJ considers disproportionate the rule of the de facto lack of temporal limitation of the taxation as unjustified capital gains of the value of the assets and rights unduly undeclared, as it was considered an effective instrument against tax evasion, deploring that the decision backs the defaulters who use tax haven jurisdictions for their own fraudulent purposes. https://www.inspectoresdehacienda.org/doc/20220127_Comunicado%20IHE%20a%20sentencia%20TJUE%20modelo%20720%20-1.pdf,

23. The rationale of this approach lies in the principle of legal certainty,[43] named as a fundamental requirement in the present decision, which precludes the indefinite use of public powers even with the aim to put to an end an unlawful situation.[44]

24. The obviously excessive power granted to the tax administration to ensure the effectiveness of fiscal controls and the fight against evasion and abuse has prevented the ECJ from further elaborating on the impact on the effectiveness of the mechanisms for the exchange of information in the formulation of the proportionality requirements.[45] No matter what their limitations and (in)effectiveness were, the ECJ was not able to justify a different outcome derived from the total lack of disproportionality generated by such a tax power recognition. However, it is important to verify whether the ECJ is going to make a certain move from an initial consideration of the relevance of the administrative assistance mechanisms in the case-law of the ECJ following AG Opinion analysis.[46] Initially, the mere application of an administrative assistance mechanism, such as the Directive 77/799, was considered sufficient to guarantee the effectiveness of fiscal supervision.[47] However, it remains to be seen whether a more detailed analysis of the content and extent of the exchange mechanisms, possibilities and powers conferred will be developed.

25. The relevance of the elaboration of the proportionality analysis as regards the concrete penalties imposed by the Form 720 regime must also be stressed. Despite the competence of Member States in the design of the system of penalties appropriate to counteract, this competence has to be exercised in line with the principles of equivalence and proportionality. This statement is true even in cases where the penalty regime is enabled by secondary EU Law[48] and may lead to a reconsideration of some of these regimes. For instance, the new Article 25a of the Directive on Administrative Cooperation (DAC)[49] recognises the competence of Member States to develop a system of penalties for infringements of the obligations enshrined in the Directive.[50] However, it clearly states that "[t]he penalties provided for shall be effective, *proportionate*, and dissuasive" (italics added).

26. The ECJ recognised that the 150% penalty was not proportional but excessive, causing disproportionate interference with the free movement of capital based on several factors,[51] stressed the cumulative nature of the penalty, both with the flat-rate penalty and with the "unjustified capital gains" qualification which, as shown earlier,[52] may lead

[43] The ECJ has recognized the principle of legal certainty as a corollary of the rule of law recognized in article 2 of the TEU. See ECJ (Full Court), 16 February 2022, case C-157/21, Poland vs European Parliament and Council of theEuropean Union, ECLI:EU:C:2022:98, para 319-321.

[44] ECJ 14 July 1972, Case 52/69, Geigy v Commission, ECLI:EU:C:1972:73, para.21

[45] The legal regime of the administrative assistance at the EU level varied significantly but, despite that fact, the Form Form 720 legal regime was not amended or adapted at all.

[46] Opinion of AG Saugmandsgaard Øe, 15 July 2021, supra n. 3, para 91-104.

[47] BE: ECJ, 6 June 2013, Case C-383/10, European Commission v. Kingdom of Belgium, Case Law IBFD (accessed 29 Apr. 2022), para. 52-53.

[48] The penalty systems established by Member States in order to implement the so-called DAC6 vary significantly and some legislation of Member States should be scrutinised under the criteria setup in the present decision.

[49] Council Directive 2011/16/EU of 25 May 2018, as amended by Council Directive 2018/822/EU of 25 May 2018.

[50] "Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented".

[51] See para 12 of the present Statement.

[52] See para 20 of the present Statement.

in some cases to an indirect sanction. A tax (penalty) regime with potential confiscatory effects derived from the accumulation of different legal consequences -unjustified capital gains, proportional penalty, flat-rate penalty- linked to the improper fulfilment of a broad and formal obligation to declare certain assets and rights is unlikely to overcome the proportionality analysis. Moreover, as the AG pointed out, the severity and practical automatism of the penalty provided in the Spanish law could not be properly eliminated by a "rescript" – *Consulta Tributaria Vinculante* – by the tax administration that does not have the force of law and was issued only after the reasoned opinion of the Commission.

27. In order to assess the proportionality of the penalty regime, the ECJ recognised as a valid tool the comparison between the specific penalty regime and the subsidiary regime that would otherwise be applicable and was excluded by Law 7/2012 in order to prevent the application of the *ne bis in idem* principle. This element provides a sufficient basis for making both penalty regimes comparable[53] and for concluding that the flat-rate penalty system established a restrictive and discriminatory regime that, even if initially justified by the need to guarantee the effectiveness of fiscal control, becomes disproportionate.

## IV. The Statement

28. Proportionality plays an important role in ensuring the compatibility of the measures designed by the Member States to counteract tax evasion and abuse, and in particular, its scope, extent, consequences and intensity.[54] However, a more precise analysis of the proportionality principle would require one to distinguish the reaction against those situations that can be considered tax evasion from those that can only imply abuse of rights or tax avoidance instead of taking an overall approach and analysis.[55]

29. This is an important case for the recognition of rights derived from the EU fundamental freedoms limiting the discretionary and broad exercise of taxing powers by the Member States to counteract potential tax evasion and abuse. The CFE stresses the need to ensure the effectiveness of the rights enshrined by the TFEU and the EEA Agreements, by promoting decisions within a shorter period of time and by reinforcing the access to domestic remedies available to restore the primacy of EU Law in infringements by the Member States. Limitation periods, restrictions, and legal constraints under domestic legislation to use available remedies may hamper the aphorism *ubi ius ibi remedium*.[56]

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

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[53] Commission v Spain (Case C-788/19), supra n. 2, para. 56.

[54] As the recent case law shows. See inter alia BE: ECJ, 24 Feb. 2022, Case C-52/21, Pharmacie populaire – La Sauvegarde SCRL v. État belge, Case Law IBFD (accessed 29 Apr. 2022).

[55] A proper application of the proportionality requirements should derive in a different outcome when analyzing the consequences of a failure to comply with a reporting obligation and when analyzing a late -and full- compliance of the reporting obligation.

[56] AG Szpunar, 9 December 2021, gave his Opinion on Case C-278/20, European Commission v Kingdom of Spain, ECLI:EU:C:2021:996, considering that the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness, which limits the procedural autonomy enjoyed by Member States when laying down the conditions governing their liability for the loss or damage caused to individuals in breach of EU law.