



12.9.2023

NOTICE TO MEMBERS

Subject: Petition 0393/2013 by F.T. (British), bearing 750 signatures on new Spanish legislation which mandates the reporting of assets and rights held abroad

Petition 0478/2013 by Patrick Le Cam (French), on Spanish tax legislation

Petition 0566/2013 by Anthony Valcke (Belgian), on behalf of EU Rights Clinic and Abusos Urbanísticos NO, on new Spanish legislation which mandates the reporting of assets and rights held abroad

Petition No 0204/2021 by F.O. (German) on Spanish tax requirements allegedly non complaint with European case law

1. Summary of petition 0393/2013

The petitioner questions whether Law 7/2012 and Royal Decree 1558/2012, recently adopted in Spain, are in line with EU Treaties and legislation. These regulations establish new reporting obligations for assets and rights held outside of Spain, aiming to prevent and fight tax fraud but which impact very heavily on the very large expatriate community which is very ill-equipped to comply with the excessively strict reporting measures. The petitioner expresses concern that the reporting format established is flawed. Firstly, the petitioner states that it violates the principle of non-discrimination as it does not recognise different kinds of 'wealth'. Secondly, the petitioner worries that the financial service companies in charge of receiving the information returns may not be able to properly protect the data from internet fraudsters. In addition, the petitioner denounces that penalties for minor errors are disproportionate. More broadly, the petitioner also denounces that this new legislation violates the rights to privacy and to free movement of persons and capital. The petitioner underlines that efforts to prevent and identify fiscal abuses are necessary and welcome, but argues that, in order to do so, Spain should build on the EU Savings Directive and other international tools for the exchange of information. Lastly, the petitioner notes the urgency of this situation as the asset reporting deadline is 30 April 2013.

Summary of petition 0478/2013

The petitioner, a French national residing in Spain, is protesting against Spanish Law 7/2012 of 29 October 2012, which, adopted as part of a set of fiscal measures, requires people to declare any assets they hold abroad and to pay a special tax. He complains that this legislation introduces unlawful double taxation and is also hampering the mobility of citizens within the European Union.

Summary of petition 0566/2013

The petitioner questions three new legislative instruments adopted in Spain which require all residents to declare assets worth in excess of €50,000. According to the petitioner and the association it represents, these new rules discriminate against non-Spanish EU citizens residing in Spain and also unjustifiably restrict the free movement of capital in the internal market. In addition, the petitioner alerts that the reporting obligations are far too extensive and intrusive, as well as difficult to comply with, and that penalties for incorrect or incomplete information are therefore disproportionate. The petitioner further points out that efforts to prevent and identify fiscal abuses are better served through other measures.

Summary of petition 0393/2013

The petitioner complains that Spanish tax authorities require submission of information about any assets and real estate above 150 million Euro and located abroad. He claims that is contrary to the jurisprudence of the European Court of Justice.

2. Admissibility

Petition 0393/2013 declared admissible on 11 November 2013.
Petition 0478/2013 declared admissible on 15 November 2013.
Petition 0566/2013 declared admissible on 19 November 2013.
Petition 0204/2021 declared admissible on 16 June 2021.

Information requested from Commission under Rule 227(6).

3. Commission reply, received on 31 January 2014

The Commission has received a large number of complaints concerning the obligation, imposed by the Spanish authorities on persons liable for tax in Spain, to declare overseas assets of more than EUR 50 000, in an effort to fight tax evasion.

Similar to the petitions addressed to the European Parliament, the complaints questioned the compatibility of the Spanish measures with EU law. In particular, as regards the administrative difficulties faced by those submitting the foreign-assets' declarations and the size of the fines in case of delay, which vary from those relating to domestic investments. Certain data protection concerns were also raised.

It should be noted that the Commission's concerns do not relate only to other EU nationals residing in Spain, but also to any Spanish resident who invests in another EU Member State.

As further information is required from the Spanish authorities before the Commission can

reach a final position, the Commission has contacted Spain on the matter in the framework of the EU Pilot project. Spain has provided extensive information, which is currently being analysed by the Commission. Further clarification of some of the issues will probably be needed before a definitive conclusion on the compatibility of the rules can be reached.

Conclusion

Further to other complaints received on the matter, the Commission is currently analysing the EU law compatibility of the manner in which the obligation to declare overseas assets has been imposed on Spanish tax residents. If it is concluded that the rules (or some of them) are incompatible with EU Law, the Commission will request Spain to modify the regulation (or some aspects of it). In so far as the Commission is taking action as a result of the complaints received, no separate investigation will be undertaken stemming from the petitions in subject.

4. Commission reply (REV.), received on 29 August 2014

The Commission previously informed about its pending analysis and the contacts it undertook with the Spanish authorities to clarify some aspects of the Spanish regulations imposing an obligation on persons liable for tax in Spain to declare certain overseas assets. The Commission anticipated that further contacts were most likely still to be made before a definitive conclusion on the compatibility of the rules could be reached.

In the meantime, the Commission has requested Spain to provide further clarification on some of the issues and the Spanish authorities responded with a second extended reply. Subsequently, a meeting was held between the services of the Commission and representatives from Spanish Ministry of Finance, which addressed this topic. Though some of the aspects of the relevant Spanish regulation seem to have been fully covered and clarified, the investigation and analysis is still ongoing in respect of some aspects. A definitive conclusion on the compatibility of the rules is therefore still pending and may require further information and/or clarification on the application of the rules to be requested from the Spanish authorities.

5. Commission reply (REV II), received on 30 January 2015

Petitions 393/2013, 478/2013 and 566/2013

The Commission informed the Parliament both in its communications to date and at the Petitions committee meeting of 11 November 2014 about its preliminary contacts with the Spanish authorities under the EU Pilot procedure on the recent Spanish rules which impose an obligation on persons liable for tax in Spain to declare certain assets they own located abroad¹.

In the light of the extended information received from the Spanish authorities, the services of the Commission can already conclude that the obligation imposed on residents² in Spain to

¹ 2013 was the first year in which such declaration had to be submitted.

² Both companies and natural persons (e.g. Spanish citizens tax resident in Spain or any other EU citizens tax resident in Spain).

declare some of the assets located abroad¹ seems to be justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. The Court of Justice of the EU (CJEU) has recognized the latter as legitimate grounds for restricting the EU fundamental freedoms.

However, national measures restricting the fundamental freedoms must be proportionate². In the light of the case-law of the CJEU, the Commission services have doubts whether that test is met by the penalty regime and some of the consequences drawn by the Spanish rules from the failure to properly comply with the declarative obligation.

If the Spanish authorities do not adequately address the concerns communicated to them, the Commission services could envisage proposing the opening of a formal infringement procedure. However, any formal decision of the Commission cannot be anticipated at this stage.

On 16 December 2014 the petitioners, who are also complainants, have been informed of the above preliminary findings of the Commission services and of the intended further steps. They were given the opportunity to submit their views and were requested to inform the Commission services on their experiences in respect of the practical application of the Spanish penalty regime at stake.

6. Commission reply (REV III), received on 18 December 2015

Petitions 393/2013, 478/2013 and 566/2013

The Commission has already reported to the Parliament³ its preliminary contacts with the Spanish authorities⁴ concerning the Spanish rules which impose an obligation on persons liable for tax in Spain to declare certain assets they own located abroad. Following such contacts, the Commission services concluded that the aforementioned declarative obligation seemed not to be in violation of the EU law, as measure justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. However, the Commission services raised doubts on the proportionality⁵ of some specific features and the accompanying penalty regime as applicable towards assets held in another Member State of the EU or EEA State and covered by a certain degree of exchange of information.

As the Spanish reply to this preliminary investigation was not considered satisfactory, the Commission decided to formally open an infringement procedure on 19 November 2015, by sending a letter of formal notice⁶. The Spanish authorities have two months to submit their observations.

On 23 November 2015 in accordance with its rules on handling of complaints⁷, the

¹ The list of assets to be declared is limited, including three categories of assets (bank accounts, securities and life insurance contracts/rights, and immovable property)

² See, inter alia, C-383/10 *Commission v Belgium*, paragraph 49

³ Communications to date and at the Petitions committee meeting of 11 November 2014

⁴ In the framework of the EU Pilot procedure reference 5652/13/TAXU

⁵ See, inter alia, C-383/10 *Commission v Belgium*, paragraph 49

⁶ reference 2014/4330

⁷ COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Updating the handling of relations with the complainant in respect of the application of Union law; COM/2012/0154 final

Commission services duly informed the petitioners, who are also complainants, about the aforementioned Commission's decision.

7. Commission reply (REV IV), received on 3 August 2016

Petitions 393/2013, 478/2013 and 566/2013

In its communications to date and at the Petitions committee meeting of 11 November 2014 the Commission had already reported to the Parliament its preliminary contacts with the Spanish authorities¹ concerning the Spanish rules which impose an obligation on persons liable for tax in Spain to declare certain assets they own abroad. Following these contacts, the Commission services concluded that the aforementioned declarative obligation seemed not to be in violation of EU law, as this measure is justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. However, the Commission services raised doubts regarding the proportionality² of some specific features and the accompanying penalty regime as applicable towards assets held in another Member State of the EU or EEA, and covered by a certain degree of exchange of information.

As the Spanish reply to this preliminary investigation was not considered satisfactory, the Commission decided to formally open an infringement procedure (ref. 2014/4330) on 19 November 2015, by sending a letter of formal notice. The Commission has recently received the reply from the Spanish authorities and is currently assessing it before taking a decision on the next step forward. In case the response is considered unsatisfactory, the Commission may address a reasoned opinion to the Member State.

On 23 November 2015 and in accordance with its rules on the handling of complaints³, the Commission services duly informed the petitioners, who are also complainants, about the steps taken so far in this matter.

8. Commission reply (REV V), received on 31 January 2017

Petitions 0393/2013, 0478/2013 and 0566/2013

In its communications to date and at the meeting of the Committee on Petitions of 11 November 2014, the Commission has already reported to Parliament on its preliminary contacts with the Spanish authorities concerning the Spanish rules which impose an obligation on persons liable for tax in Spain to declare certain assets held abroad. Following such contacts, the Commission services concluded that the aforementioned declarative obligation appeared not to be in violation of EU law, as the measure can be justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. Concerning the technical difficulties to properly fulfil this obligation deriving from the various and differing types of property which exist beyond Spanish borders, these may be reported to the Spanish Ministry of Finance through their system of tax queries (Article 88 of the Spanish General Tax Act, *Ley General Tributaria*). Concerning data protection, the Spanish authorities should

¹ In the framework of the EU Pilot procedure

² See, inter alia, C-383/10 *Commission v Belgium*, paragraph 49

³ COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Updating the handling of relations with the complainant in respect of the application of Union law, COM/2012/0154 final

guarantee the corresponding rights through the Ley Orgánica 15/1999, de 13 de diciembre de Protección de Datos de carácter personal.

However, the Commission services raised doubts on the proportionality¹ of some specific features and the accompanying penalty regime as applicable towards assets held in another Member State of the EU or EEA State and covered by a certain degree of exchange of information.

As the Spanish reply to this preliminary investigation was not considered satisfactory, the Commission decided to formally open an infringement procedure on date of 19 November 2015, by sending a letter of formal notice². The Spanish authorities replied on 29 February 2016. The Commission services are currently analysing the Spanish arguments. In case the response is considered unsatisfactory, the Commission may address a reasoned opinion to the Member State.

On 23 November 2015 and in accordance with its rules on handling of complaints³, the Commission services duly informed the petitioners, who are also complainants, about the aforementioned Commission decision.

9. Commission reply (REV VI), received on 31 July 2017

Petitions 0393/2013, 0478/2013 and 0566/2013

The Commission refers to its previous communication to Parliament on the pending infringement procedure concerning the Spanish legislation on declarative obligations (Modelo 720) of certain assets held abroad and the consequences in the case of failure to report properly and timely⁴. On 18 April 2017, the Spanish authorities replied to the Reasoned Opinion sent by the Commission on 16 February 2017, maintaining that the current legislation does not infringe the EU law. The Commission services are currently analysing the arguments put forward by Spain and considering the next steps to take.

10. Commission reply (REV VII), received on 30 July 2019

Petitions 0393/2013, 0478/2013 and 0566/2013

On 6 June 2019, the Commission decided to refer the case to the Court of Justice of the European Union, given the lack of reaction of the Spanish authorities to the grievances raised in the Commission's reasoned opinion.

11. Commission reply (REV. VIII), received on 8 October 2021

Petition 0204/2021

¹ See, inter alia, C-383/10 *Commission v Belgium*, paragraph 49

² reference 2014/4330

³ Communication from the Commission to the Council and the European Parliament: Updating the handling of relations with the complainant in respect of the application of Union law; COM/2012/0154 final.

⁴ Communication to the Petitions committee of 31 January 2017

Spanish legislation obliges resident taxpayers to report on real estate, bank accounts and some financial assets held abroad where their value exceeds €50 000 through the form 720. No similar obligation exists concerning assets located in Spain.

Failure to comply with that obligation has the following consequences: (i) the classification of the assets as unjustified property gains and their inclusion in the general taxable amount irrespective of the date of acquisition of the assets concerned, (ii) the imposition of a proportional fine of 150 % and (iii) the imposition of flat-rate fines.

The Commission considers that these three consequences and their detailed rules of application constitute disproportionate restrictions, which affect, *inter alia*, the free movement of capital that makes it less attractive for Spanish resident taxpayers to invest abroad.

The Commission fully acknowledges the right of Spain to require taxpayers to provide the Spanish tax authorities with information on certain assets held abroad. This obligation is justified by the need to guarantee effective fiscal supervision, a justification considered by the Court of Justice of the European Union (CJEU) as a legitimate justification for restricting the EU fundamental freedoms under specific conditions, in particular compliance with the principle of proportionality.

However, those three consequences penalise the failure to comply with the obligation to provide information in a very strict manner, without taking into account the fact that the Spanish tax authorities already have, or could have, the information in question under the system of exchange of information in the field of taxation provided for by EU law.

Consequently, the Commission opened an infringement procedure (NIF 2014/4330) and sent a reasoned opinion to Spain on 16 February 2017 inviting Spain to eliminate the above breaches of EU law.

Since Spain did not put its legislation in conformity with EU law, the Commission decided to refer the case to the CJEU on 22 October 2019. The case was registered under number C-788/19, Commission versus Spain¹.

On 15 July 2021, the Advocate General issued their opinion in the case C-788/19 and the judgment is now pending.

Conclusion

It is for the CJEU to decide if the above features of the Spanish legislation on declarative obligations violate EU law. If that were the case, the Commission would take the necessary steps to ensure that the Spanish authorities comply with the judgment.

¹ <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-788/19>

12. Commission reply (REV. IX), received on 12 July 2022

Petitions 0393/2013, 0478/2013, 0566/2013 and 0204/2021

On 22 January 2022, the Court of Justice of the European Union (CJEU) ruled in case C-788/19, Commission vs Spain¹ concerning the compatibility with EU law of the Spanish obligation imposed on resident taxpayers to report assets held abroad ('Modelo 720'). The Court concluded that Spain had violated the free movement of capital (Articles 63 TFEU and 40 of the European Economic Area Agreement) when:

- it presumed that the taxpayer had capital gains corresponding to the value of the assets not properly declared in the Modelo 720 without the right to allege that the assets were acquired with income obtained in a tax year barred by the statute of limitation;
- it imposed a sanction of 150% of the value of the assets which were not properly declared in the Modelo 710, and
- it imposed disproportionate flat-rate fines for not properly reporting assets held abroad in the Modelo 720, much higher than the sanctions imposed in respect of similar infringements in a purely domestic context.

Following this judgment, the Spanish Parliament has adopted the Law 5/2022, of 9 of March 2022, which modifies the Law 27/2014, of November 27, on Corporation Tax, and the recast of the Non-Resident Income Tax Law, approved by Royal Legislative Decree 5/2004, of March 5, in relation to hybrid asymmetries². In practice, the new legislation has abolished the special regime of penalties for failure to meet properly the information obligations on assets held abroad by Spanish tax residents. Accordingly, the general regime on tax sanctions is now applicable.

Conclusion

The Commission recalls that the obligation to report assets abroad as such can be justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. However, it addressed with an infringement procedure the excessive penalty regime associated with this reporting obligation. Thus the CJEU has assessed that the penalty regime associated with this reporting obligation was not in line with EU law. The Commission is in the process of assessing the Spanish legislation adopted following the CJEU's ruling.

¹ <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-788/19>

² Spanish Official Journal of 10 March 2022

In addition, the Commission notes that in the absence of EU rules, it is for each Member State to designate the competent courts and to determine the procedural conditions governing legal actions that taxpayers can take to protect the rights they infer from the EU law.

13. Commission reply (REV X), received on 12 September 2023

Petition 0566/2013

(this petition has the same subject matter as petitions 0393/2013, 0478/2013 and 0204/2021)

The Commission's observations

The Commission would like to recall that it has already provided a factual description, on occasion of a response to the European Parliament on 12 July 2022, of the evolution in the case before the Court of Justice of the European Union (CJEU) that dealt with the matter at hand under this petition. As to the substance, the Commission would recall that: On 22 January 2022, the Court of Justice of the European Union (CJEU) ruled in case C-788/19, *Commission vs Spain*¹ concerning the compatibility with EU law of the Spanish obligation imposed on resident taxpayers to report assets held abroad ('Modelo 720'). The Court concluded that Spain had violated the free movement of capital (Articles 63 TFEU and 40 of the European Economic Area Agreement) when:

- *it presumed that the taxpayer had capital gains corresponding to the value of the assets and rights located abroad not properly declared in the Modelo 720 without the right to allege that the assets were acquired with income obtained in a tax year barred by the statute of limitation*
- *it imposed a sanction of 150% of the value of the assets and rights located abroad which were not properly declared in the Modelo 710, and*
- *it imposed disproportionate flat-rate fines for not properly reporting assets and rights held abroad in the Modelo 720, much higher than the sanctions imposed in respect of similar infringements in a purely domestic context and the total amount of which is not capped*

Following this judgment, the Spanish Parliament adopted Law 5/2022, on 9 March 2022, which modifies Law 27/2014, of 27 November 2014, on Corporation Tax, and the recast of the Non-Resident Income Tax Law, approved by Royal Legislative Decree 5/2004, of 5 March 2004, in relation to hybrid asymmetries². In practice, the new legislation abolishes the special regime of penalties for failure to meet properly the information obligations on assets held abroad by Spanish tax residents that had been in place and was the subject of the Commission's infringement work and CJEU case. As a consequence, the general regime on tax sanctions applicable to infringements for the failure to meet information obligations is now applicable, which is non-discriminatory.

Conclusion

The Commission recalls that the obligation to report assets abroad, as such, is justified by the need to ensure tax collection, proper fiscal supervision or prevent tax avoidance. However,

¹ <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-788/19>

² Spanish Official Journal of 10 March 2022

the Commission addressed – with an infringement procedure – the excessive penalty regime associated with this reporting obligation. In its ruling, the CJEU assessed the penalty regime associated with this reporting obligation (the so-called Modelo 720) and concluded that it was not in line with EU law.

By subsequently abolishing the special penalty regime associated with the Modelo 720, in response to the ruling of the CJEU described above, Spain solved the grievances against EU law. Consequently, the Commission closed the infringement procedure as part of its next regularly scheduled adoption cycle on 29 September 2022.