

# State Council Nullifies Decree on Progressive DAC6 Penalties

19 July 2023

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On 10 May 2023, the State Council decided in *Orde Van Vlaamse balies v. Belgian State* (Case no. 256.480) (recently published) on the application of a decree of 20 May 2020 on progressive DAC6 penalties (see [Decree on DAC 6 Penalties Gazetted \(5 June 2020\)](#)). the Court held that the DAC6 penalties decree violates both the non-discrimination provisions of articles 10 and 11 of the Belgian constitution and article 6 of the [European Convention on Human Rights](#).

The Court observed per articles 10 and 11 of the Belgian Constitution that, when the same offence can be punished by prosecution or by imposing an administrative fine, there should in principle be a parallelism between the measures to tailor the punishment.

Such parallelism between the measures to individualize the penalty is only not required if different acts in the same legislation give rise to different specific sanctions. In that situation, it is only necessary to verify the fulfilment of the right to effective judicial supervision.

Separate DAC6 penalties apply to violations committed with fraudulent intent or the intent to harm. There are therefore alternative sanctioning mechanisms.

Under the jurisprudence of the Constitutional Court on alternative sanctioning mechanisms, the criminal court has the option to lower a fine below the legal minimum by assuming mitigating circumstances. The court deciding on the appeal on the administrative fine, imposed because of the same infringement, must also have the same possibilities to tailor the punishment.

However, this possibility does not apply to the DAC6 penalties. A judge ruling on a claim against an administrative sanction imposed by the tax authorities, in implementation of the scale established by contested royal decree, can do a proportionality check of the amount of the fine and, if necessary, consider the reasons for the justification and the mitigating circumstances.

However, a proportionality test by the court in a claim against an administrative fine imposed cannot be equated with the possibility of imposing a fine that is less than the legal minimum if mitigating circumstances exist.

In addition, the council observed in line with the case law of the Court of Cassation it follows that it is not for a court itself to determine the appropriate sanction based on a subjective assessment or based on mitigating circumstances.

This means that no proper option exists to individualize the penalty.

Therefore, the Court held that the DAC6 penalties decree violates both the non-discrimination provisions of articles 10 and 11 of the Belgian constitution and article 6 of the [European Convention on Human Rights](#).

The full text of the decision is available [here](#) (in Dutch, French and German).

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