

Spain sends MDR bill to Parliament for approval

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Executive Summary

The Spanish Government published draft legislation in June 2019 accompanied by detailed guidance implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).¹ Under DAC6, taxpayers and intermediaries are required to file information on reportable cross-border arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.²

On 22 May 2020, after a public consultation, the Spanish Government published a revised Bill which has been sent to the Congress and Senate (the Parliament) to be voted upon. If implemented as currently proposed, the Spanish legislation will be broadly aligned to the requirements of the Directive.

It is expected that further regulations will be published by the Spanish Government to address the practical application of the Hallmarks and the Main Benefit Test, however it is not yet known whether the regulations will be available before 1 July 2020.

Detailed discussion

Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (the Directive or DAC6), entered into force on 25 June 2018.³

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.⁴ Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions. For more background, see EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018.

EU Member States were required to adopt and publish national laws to comply with the Directive by 31 December 2019.

The initial draft legislation and accompanying detailed guidance implementing the Directive were discussed in detail in the EY Global Tax Alert, [Spain publishes draft proposal on Mandatory Disclosure Rules](#), dated 28 June 2019.

The key differences between the Spanish Bill (which has been submitted for Parliament approval) and the Directive are summarized below. A revised version of the accompanying guidance has not been issued to date.

Legal professional privilege

In accordance with the option provided under the Directive, the draft Spanish Mandatory Disclosure Rules (MDR) legislation exempts intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries that can report, the obligation will shift to the relevant taxpayers.

In the draft Bill (pre-consultation), the objective scope was very limited as the LPP only protected private non-wealth data and data threatening personal and family honor or privacy, as well as confidential data that the intermediary had been made privy to due to the rendering of professional advisory or defense services.

This scope of LPP in the context of DAC6 is redefined in the Bill to Intermediaries, as defined in the Directive irrespective of their business activities, that have provided advice with respect to the design, marketing, organization or making available for implementation, or management of the implementation, of a cross-border arrangement, with the sole purpose of assessing the compliance of that mechanism with the applicable rules and without seeking or facilitating its implementation.

It is possible for the relevant taxpayer to authorize the waiver of LPP so that the intermediary can make the report.

If an intermediary is exempt from reporting based on LPP, it must notify other intermediaries and the relevant taxpayer, to whom the obligation to report will be shifted. Failure to make this notification results in penalties (€600), which will be increased in the event that the cross-border arrangement should have been reported by another intermediary or the relevant taxpayer but it has not been reported. In this scenario, the standard penalty regime, described below, applies.

Penalties

Failure to submit information within the deadline or submitting incomplete, inaccurate or false information is considered a severe tax infringement.

The penalties initially set in the draft bill of June 2019 have been increased. Penalties now amount to €2,000 per data or set of data, with a minimum of €4,000 and a maximum of the amount of the fees received by the intermediary or the tax value of the arrangement in the case of the taxpayer (instead of the amount initially set in the draft bill, €1,000 and €3,000, respectively).

An additional €1,500 penalty would be imposed if the reporting obligation is not done by electronic means (instead of the €1,000 initially set in the draft bill).

Next steps

Now the Bill moves to the Parliament for approval. If approved, it will come into force as of 1 July 2020 after it is published in the Spanish *Official Gazette*.

If an extension to the DAC6 reporting deadlines is approved at the EU level, an extension could be introduced during the Parliamentary negotiation as an amendment to the Bill.

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the DAC6, taxpayers and intermediaries who have operations in Spain should review their policies (internal, with clients, with advisors) and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations and specific deadlines.

Endnotes

1. See EY Global Tax Alert, [Spain publishes draft proposal on Mandatory Disclosure Rules](#), dated 28 June 2019.
2. On 8 May 2020, in a Proposal for a Council Directive amending Directive 2011/16/EU, the Commission proposed a time extension for filing and exchanging information under Directive 2011/16 concerning reportable arrangements as provided by DAC6. See EY Global Tax Alert, [European Commission proposes deferral for certain filing deadlines under the Mandatory Disclosure Rules](#), dated 8 May 2020.
3. For background on MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
4. DAC6 sets out a minimum standard. Member States can take further measures; for example, (i) introduce reporting obligations for purely domestic arrangements; (ii) extend the scope of taxes covered; (iii) bring forward the start date for reporting.

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