

Spain publishes draft proposal on Mandatory Disclosure Rules

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Executive summary

The Spanish Government has published draft legislation 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).

The draft legislation was issued on 20 June 2019 with a public consultation launched and comments on the proposals requested by 12 July 2019.

The Spanish draft legislation is subject to the formal legislative process and is likely to be amended before final enactment. If implemented as currently proposed, the Spanish Mandatory Disclosure Rules (MDR) legislation will be broadly aligned to the requirements of the Directive. The draft legislation and draft guidance contain some useful interpretations which clarify the concepts and terms used in the Directive.

The draft legislation is expected to be finalized by the end of the year.

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 (referred to as DAC6 or the Directive), entered into force on 25 June 2018.¹

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.² 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 are to adopt and publish national laws required to comply with the Directive by 31 December 2019. Spain is expected to finalize its legislation by this date, which will take effect from 1 July 2020.

The key differences between the draft Spanish legislation and the Directive are as summarized below.

Scope of taxes covered

The scope of the taxes covered under the Spanish draft legislation is fully aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

Reportable arrangements

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. The hallmarks can be

distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

The Spanish draft legislation defines a cross-border arrangement as any agreement, legal arrangement, scheme or operation. An arrangement shall also include a series of arrangements, and an arrangement may comprise more than one step or part. However, payments made to formalize a reportable cross-border arrangement wherein the amount of the payment is not material, shall not be treated as separate reportable arrangements.

The Spanish draft legislation does not cover domestic arrangements and does not include any hallmarks in addition to Hallmarks A-E of DAC6.

Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Spanish draft legislation provides certain clarifications as outlined below.

In relation to each hallmark, the following are the clarifications that the Spanish draft legislation provides to the concepts included in the Directive:

Hallmark A

For hallmark A. 2, an arrangement might be reportable irrespective of whether the success fee is wholly or partly linked to the tax advantage.

For the purposes of this hallmark, a “marketable arrangement,” as defined in Article 3.24 of the Directive, is deemed to be a “standardized mechanism.”

Hallmark C

The Spanish draft legislation clarifies that “cross-border payments” shall include cross-border charges, irrespective of whether the payment was made.

Payment shall also be deemed to be made between two associated enterprises when the payment is made indirectly through one or more interposed persons or entities.

The indirect recipient of payments shall be deemed to be the recipient of the cross-border payment if the payments have been imputed to the recipient based on the tax regimes of tax transparency, imputation of income or equivalent.

The Spanish draft legislation includes some clarifications on when hallmark C. 1 is complied with:

- ▶ Any tax similar to the Spain corporate tax shall be considered as corporate tax for these purposes, and a tax rate below 1% is considered to be “zero or almost zero.”
- ▶ “Non-cooperating third country jurisdictions” means those countries, territories and regimes referred to as “non-cooperating jurisdictions” in the First Additional Provision of Spanish Law 36/2006, of 29 November, on measures for the prevention of tax fraud.
- ▶ We would like to emphasize that the Spanish draft legislation expressly states that those regimes that have been authorized by the European Union should not be considered as preferential regimes for the purposes of this hallmark.

Regarding cross-border arrangements that include transfers of assets, the Spanish draft legislation clarifies the following:

- ▶ Material differences arising due to the difference in values for accounting and non-tax purposes shall not be included in this hallmark.
- ▶ A material difference for these purposes means a difference of more than 25% between the tax values in both jurisdictions.

Hallmark D

The Spanish draft legislation lists the cases in which this hallmark is deemed to be met, including arrangements which prevent compliance with domestic obligations to provide information on financial accounts or with obligations established by international agreements on the automatic exchange of information on “financial accounts” between EU Member States or with third countries.

The Common Reporting Standard and the Organisation for Economic Co-operation and Development (OECD) Commentaries are expressly mentioned as guidance for interpreting this hallmark.

Hallmark E

None of the transfer pricing hallmarks will be deemed to have been met when the value of the cross-border arrangement has been determined through an Advance Pricing Agreement.

For hallmark E.3, related to “intragroup cross-border transfer or functions, and/or risks and/or assets, individuals of the same group shall be deemed to be those who are referred to as “person” in Article 3. 11) of this Directive, who were treated as an associated enterprise within the meaning of Article 3. 23) of the same Directive.

Main benefit test

In accordance with DAC6, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

The Spanish draft legislation clarifies that “tax advantage” means a reduction in the taxable base or tax due, including a deferral of the tax due, as well as generating net operating losses, or tax credits. When the companies involved in the arrangement are associated enterprises within the meaning of Article 3. 23) of the Directive, the tax advantages of all the associated enterprises will be taken into consideration.

Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries which can report, the obligation will shift to the taxpayers.

Under the Spanish draft legislation, the subjective scope of LPP is broadened to include not only tax lawyers but also other intermediaries. However, the objective scope is very limited as the LPP only protects private non-wealth data and data which threatens personal and family honor or privacy, as well as confidential data that the intermediary has been made privy to due to the rendering of professional advisory or defense services.

The objective scope of LPP is a controversial point and it is expected to be debated during the public consultation.

Similar to the Directive, the draft legislation provides that the disclosure of commercial, industrial, professional secrets, commercial processes and information contrary to public policy are also protected, regardless of the LPP exemption.

Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting under the Directive (from 1 July 2020) are when the reportable arrangement is “made available for implementation”; or when the reportable arrangement is “ready for implementation” or when “the first step of implementation has been made.”

Under the Directive, reporting starts from 1 July 2020 and exchanges between jurisdictions from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

According to the Spanish draft legislation, for hallmark A. 3 (arrangement with substantially standardized documentation and/or structure) the obligation to report arises on the day following the date on which the client has accepted the provision of services, when the services to be provided are standard or the relevant cross-border arrangement is described in the letter of provision of services.

In the case of arrangements which, even having substantially standardized documentation and/or the structure requires substantial customization, the obligation to report arises on the day following the day on which such cross-border arrangements will be executable.

For other arrangements, the obligation arises when the cross-border arrangement is implemented with some legal effect.

The Ministry of Tax will issue an Order approving the tax form for complying with this reporting, and where the filing deadline will be established.

Other obligations

The Spanish draft legislation includes the obligation to quarterly update the information on the marketable arrangements which have been reported.

The Spanish draft legislation also includes the obligation for the taxpayer to file annual reports detailing the use of reportable cross-border arrangements that have already been reported before any tax authority. The draft legislation includes a list of cases in which this obligation arises in Spain, which include those where: (i) the taxpayer benefitting from the cross-border arrangement is a Spanish tax resident; (ii) the taxpayer benefitting from the cross-border arrangement has a permanent establishment in the Spanish territory; (iii) the taxpayer derives income in Spain which is related to the referred arrangement; or (iv) the taxpayer performs an activity in Spain which is included in the cross-border arrangement.

Intermediaries covered by the LPP must inform the other intermediaries and the taxpayer of this circumstance within five days from the day on which the arrangement becomes reportable, as per the above. Also, intermediaries

or taxpayers whose obligation to file the report determines the exemption from the reporting obligation for other intermediaries or taxpayers, must inform the latter of the filing within five days from the day of the filing.

Additionally, the draft legislation provides that the Spanish Tax Administration will publish, for information purposes only, the most relevant reportable cross-border arrangements on its website. The draft legislation does not clarify when and how regularly this information will be published.

Penalties

Not submitting information within the deadline or submitting incomplete, inaccurate or false information is considered a severe tax infringement.

Penalties amount to €1,000 per data or set of data, with a minimum of €3,000 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.

The Spanish draft legislation also imposes a penalty when an intermediary fails to communicate to other intermediaries and/or the taxpayer the application of the LPP or when an intermediary or a taxpayer fails to communicate the filing of the report to other intermediaries or taxpayers as discussed above. In these cases, the penalty would be €600.

An additional €1000 penalty would be imposed if the reporting obligation is not done by electronic means.

Next steps

After the public consultation, the Spanish Government will present the formal draft legislation, with possible amendments, which will then be debated by the Spanish Parliament. It is anticipated that the subsequent legislative process will provide more clarification.

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 regulations included in the draft legislation, taxpayers and intermediaries who have operations in Spain should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations and specific deadlines.

Endnotes

1. 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.
2. 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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EYG no. 003166-19GbI

1508-1600216 NY
ED None

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