DAC 6: Regulations completing transposition of the directive in Spain have been published

Law 10/2020 of December 29, 2020 published on December 30, 2020 (see our alert on this law), transposed into Spanish law Council Directive (EU) No 822/2018 of 25 May 2018, on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6), through two additional provisions in the General Taxation Law (LGT).

The April 7, 2020 edition of the Official State Gazette (BOE) published the regulations completing that transposition, apart from approval of the relevant reporting forms. These were published in Royal Decree 243/2021, of April 6, 2021 which amends the general regulations on tax management and audit work and procedures and implementing the common rules on procedures to manage, collect and audit taxes (Royal Decree 1065/2007 of July 27, 2007).

This royal decree implements, among other elements, (i) the requirements to be fulfilled by cross-border arrangements, (ii) the role of intermediaries with whom the main reporting obligation lies, and (iii) the information making up the mandatory content of that report. It also contains the rules determining when the reporting obligation arises and the time period for communicating the information.

Below is a summary of the key elements of the transposition of DAC6 in Spain, looking at the law and regulations mentioned:

1. Obligation holders

The transposing legislation states, in line with the directive, that the reporting obligation falls first on the so-called "intermediaries" and secondly on the relevant taxpayers.

1.1 Intermediaries

The definition of this role is implemented in the regulations in line with the provisions in the directive. The following individuals or entities will have (not necessarily or only "tax") intermediary status:

i. Those known as "main intermediaries", that is, any individuals or entities who design, market, organize or make available for implementation or manage the implementation of a reportable cross-border arrangement.

ii. Those known as "secondary intermediaries", meaning any individual or entity that knows or could reasonably be expected to know that it has undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

These intermediaries, however, may be made exempt from their reporting obligations in three scenarios:

i. Where they are bound by professional privilege.

   Royal Decree 243/2021 states that intermediaries will not be required to file the report where the disclosure of information is in breach of legal professional privilege under paragraph 2 of additional provision twenty three of the General Taxation Law (i.e. "neutral advice").

   To be exempt, the intermediary claiming professional privilege must inform the other intermediaries involved in the arrangement and the relevant taxpayer, within five days running from when the reporting obligation arises and in a communication with the format of the form approved for this purpose by the Spanish Tax Agency (AEAT).

ii. Where there is more than one intermediary and verifiable proof that the information has been filed by one of them. The intermediary who has reported the information must communicate this to the others in five days running from the day following its filing, and this communication must be also made with the format approved by AEAT.

iii. Where the intermediary has filed the report in another state and has verifiable proof of this.

1.2 Relevant taxpayers

Under article 45 of the regulations, relevant taxpayers are the individuals or entities to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement provided no intermediary is required to file the report.

Where the duty to file the report is held by more than one taxpayer, it must be done by the individual or entity that features first on the following list:

a. The relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary.

b. The relevant taxpayer that manages the implementation of the arrangement.

As a general rule, the reporting obligation will fall only on the relevant taxpayer in the absence of an intermediary, either because (i) the intermediary is outside the EU; (ii) there is no intermediary because the arrangement was designed and implemented internally by the relevant taxpayer; or (iii) the intermediary is exempt by reason of professional privilege.

The relevant taxpayer also may be made exempt from its reporting obligation where they have filed a report in another state and they have verifiable proof that this has been done.

Any relevant taxpayer that files a report must notify the other relevant taxpayers within five days running from the day following the filing date.

2. Subject-matter: reportable arrangements

The reportable transactions have three main characteristics:

i. They fall within the definition of **arrangement**.

Arrangement means "any agreement, legal dealing, scheme or transaction" (article 45.2 of the regulations).

An arrangement may include a number of arrangements and may consist of more than one step or part. Royal Decree 243/2021 clarifies for these purposes that payments derived from the creation of arrangements that do not amount to reportable arrangements in their own right which require separate treatment are not considered separate arrangements although they may be reported as part of the content of reportable arrangements in their own right.

ii. It must be a **cross-border** arrangement,

Unlike a few other EU member states, Spain has not implemented (at least for the time being) the option allowed in the directive of extending the obligation to purely internal arrangements, that is, to mechanisms that do not have a cross-border nature.

For these purposes, the new article 45 of the regulations defines cross-border arrangements as those involving more than one member state or a member state and a third country where at least one of the following conditions is met:

a. not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

b. one or more of the participants in the arrangement are simultaneously resident for tax purposes in more than one jurisdiction;

c. one or more of the participants in the arrangement carry on an economic activity in another jurisdiction through a permanent establishment (PE) situated in that jurisdiction and the arrangement forms part or the whole of the economic activity of that permanent establishment;

d. one or more of the participants in the arrangement carry on an activity in another jurisdiction without being resident for tax purposes or without creating a permanent establishment situated in that jurisdiction and the arrangement accounts for part or the whole of that economic activity;

e. the arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership;

iii. The cross-border arrangement has at least one of the hallmarks listed in the annex to the directive (the regulations refer directly to the annex), with the particular provisions set forth in article 47 of the regulations.

These hallmarks are defined as characteristics or features of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, and fall into two categories: **(i) generic**; and **(ii) specific**.

Some of the hallmarks also require **the main benefit test** to be fulfilled. This test is satisfied if the main effect or one of the main effects that a person may reasonably expect to achieve from the arrangement is the obtaining of a **tax saving** (defined as a reduction to the tax base or tax liability, in terms of tax debt, including deferral of the date for payment or full or partial avoidance of the taxable event, caused by implementing the arrangement; together with the generation of bases, tax payable, tax credits or other tax assets).

2.1 Hallmarks requiring satisfaction of the main benefit test

a. Generic hallmarks:

- The existence of a condition of confidentiality between the intermediary and the relevant taxpayers, which requires them not to disclose how the arrangement could secure a tax advantage for them;
- An arrangement where the intermediary is entitled to receive a fee determined by reference to the amount of the advantage derived from the arrangement or which depends (fully or partly) on whether or not an advantage is actually obtained from the arrangement;
- An arrangement that has substantially standardized documentation or structures available to more than one relevant taxpayer without needing to be substantially customized for implementation.

b. Specific hallmarks:

- Contrived acquisition of a loss-making company, discontinuing the main activity of any such company and using the losses to reduce its tax liability, including by transferring the losses to another jurisdiction or by the acceleration of the use of those losses;
- Conversion of income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax;
- Circular transactions resulting in the "round-tripping" of funds, namely through involving interposed entities without any other primary commercial function;
- An arrangement that involves deductible cross-border payments[1] made between associated companies where the recipient is not levied any corporate income tax, or

[1] The term "cross-border payments" includes cross-border expenses regardless of whether or not they have been paid.

Also the payment is made between two associated companies for the purposes of the hallmark where all the other requirements laid down by the legislation are fulfilled and the payment is made between those companies indirectly through one or more interposed individuals or entities.

is levied corporate income tax at a rate of zero or almost zero, or the payment benefits from a full exemption, or lastly if the payment benefits from a preferential tax regime in the recipient's jurisdiction[2].

2.2 Hallmarks not requiring satisfaction of the main benefit test

- An arrangement that involves deductible cross-border payments made between associated companies where the recipient is not resident for tax purposes in any jurisdiction, or is resident for tax purposes in a third country assessed by member states collectively or within the framework of the OECD as non-cooperative[3].

- Claiming deductions for the same depreciation on the asset in more than one jurisdiction.

- Claiming double taxation relief in respect of the same item of income or capital in more than one jurisdiction.

- There are transfers of assets and there is a material difference in the amount being treated as payable for those assets in the jurisdictions involved[4].

- The hallmarks concerning transfer pricing contain: (i) the use of unilateral safe harbor rules; or (ii) the transfer between associated companies of hard-to-value intangibles or rights in intangibles; or (iii) an intragroup cross-border transfer of functions, risks or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer are less than 50% of the projected annual EBIT if the transfer had not been made.

  It is clarified that the hallmarks concerning transfer pricing do not exist: (i) where any of the pricing agreements under chapter X of title I of the corporate income tax regulations exists; or (ii) where there are other advance pricing agreements in relation to transfer prices falling within an automatic exchange of information.

  It is also clarified (in the initial recitals of the regulations) that, for interpreting the specific hallmarks concerning transfer pricing, interpretation methods may be taken from the OECD Transfer Pricing Guidelines and the recommendations of the EU's Joint Transfer Pricing Forum.

The recipient of the cross-border payment will be the indirect recipient of the payments if these payments have been attributed for tax purposes to the recipient under regimes for fiscal transparency, the attribution of income or their equivalents.

[2] The regulations state in this respect that (i) corporate income tax means any tax identical or similar to the Spanish *impuesto sobre sociedades*; (ii) a rate of zero or almost zero is deemed to be levied where the country or territory of residence of the recipient determines a **nominal tax rate** below 1%, and (iii) no regime authorized under EU law will be treated as a preferential tax regime.

[3] The regulations did not finally include the definition of "non-cooperative jurisdiction" by reference to additional provision number 1 of Law 36/2006, of November 29, 2006, which was originally included.

[4] The regulations specify that any significant differences that have occurred as a result of a difference in values for accounting purposes only not for tax purposes will not be included; and that significant difference will mean a difference higher than 25% between the values for tax purposes in both jurisdictions.

- Lastly, there is a category of specific hallmarks concerning arrangements or structures that hinder or impede compliance with reporting obligations on the financial accounts or investments held by private parties:

    - Arrangements that have the effect of undermining the obligation concerning the automatic exchange of financial account information.

    - The existence of a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures.

3. Content of reportable information

The regulations set out the eight particulars or sets of particulars that must be reported by individuals or entities with reporting obligations.

In particular, the information on reportable cross-border arrangements that must be submitted to the Spanish tax authorities is as follows.

a. Identification and full particulars of the intermediaries and of the relevant taxpayers.

b. Details of the hallmarks that make the cross-border arrangement reportable, and the reference number, if any, given to the arrangement by the tax authority to which it was reported for the first time.

c. A summary of the content of the reportable arrangement, without disclosing any information that is a technological, scientific, industrial, commercial, professional, organizational or financial secret, or information the disclosure of which would be contrary to public policy.

d. Date on which the first step in implementing the cross-border arrangement was or will be made, as well as the date the reporting obligation arose.

e. Details of the national and foreign provisions that form the basis of the reportable cross-border arrangement.

f. Value of the tax effect of the reportable cross-border arrangement (meaning the outcome it has had in terms of the tax debt, and including any tax saving).

g. Identification of the member state of the relevant taxpayer and of the intermediaries involved, and any other member state which are likely to be concerned by the reportable cross-border arrangement.

h. Identification of any other person or member state likely to be affected by the reportable arrangement.

The information must be provided on the relevant report forms, on which the regulations issued by ministerial order have yet to be published.

There has been deleted from the approved wording of Royal Decree 243/2021 the express reference in the original bill to private non financial data the disclosure of which is an attack on reputation and privacy, as an element that must be excluded in all cases from the report.

4. Reporting obligation to the Spanish tax authorities

For an individual or entity to be required to file the report with the Spanish tax authorities they must have any of the connection points defined in article 45 of the regulations.

For intermediaries, any of the following connection points must exist:

a. The intermediary is tax resident in Spain.

b. The intermediary has a permanent establishment in Spain, through which intermediary services in relation to the arrangement are provided.

c. The intermediary is established in Spain or is governed by Spanish law.

d. The intermediary is registered at a Spanish professional association related to legal, tax or advisory services.

For relevant taxpayers, the requirement to file a report with the Spanish tax authorities is determined by any of the following connection points:

a. The taxpayer is tax resident in Spain.

b. The taxpayer has a permanent establishment in Spain that benefits from the arrangement.

c. The taxpayer receives or generates in Spain income or gains related to the arrangement.

d. The taxpayer carries on an activity in Spain and the arrangement is part of that activity.

Lastly, unlike the draft royal decree, the finally approved wording turned away from making it an obligation for the AEAT to publish the most significant arrangements on its website, and this has been left as an option for the tax authorities.

5. Other reporting obligations in Spain

In addition to the reporting obligation described above, article 48 of the regulations requires intermediaries to file a **quarterly update report** on the information relating to any **marketable cross-border arrangements** that had been reported earlier as a cross-border arrangement.

Moreover, article 49 states that, regardless of the tax authority to which the arrangements were reported according to the connection points described above, the relevant taxpayer must always file with the Spanish tax authorities **an annual report on their use of any**

previously reportable cross-border arrangements. This report must be filed in the last quarter of the calendar year following the year in which the use in Spain of the previously reportable cross-border arrangements occurred.

6. Reporting timeframes

Generally, a **30 calendar day** time period is specified for filing the report (whichever occurs sooner):

a. The day after the date the arrangement is made available for implementation. The arrangement is considered to be made available when the intermediary transfers and the relevant taxpayer acquires on a final basis the service that determined intermediary status for the individual or entity concerned.

b. The day after the date the arrangement is implementable. The mechanism is considered to be implementable when it is ready to be implemented by the relevant taxpayer.

c. When the first step in the implementation of the arrangement has been made. It is considered that the first step in the implementation has been made when it is put into practice and gives rise to any legal or economic effect.

In relation to secondary intermediaries, however, that 30-day time period is computed from the day following the date they provided, directly or by means of other persons, aid, assistance or advice.

In line with the directive, the single transitional provision of Law 10/2020 and transitional provision one of Royal Decree 243/2021 contain a transitional regime covering arrangements in which the first step was implemented between June 25, 2018 and June 30, 2020 (known as the **"first transitional period"**). This regime also covers cross-border arrangements for which the reporting obligation arose on or after July 1, 2020 (the **"second transitional period"**), the date from which the provisions in the directive are applicable.

Namely, these arrangements must be reported within **30 calendar days** from the entry into force of the ministerial orders approving the report forms (these have not yet been published as we mentioned above).

7. Entry into force

The regulations entered into force the day after their publication in the Official State Gazette (BOE), namely, on April 8, 2021, although they have the retroactive effects set out in transitional provision one in relation to arrangements in the first and second transitional period.

The entry into force of Law 10/2020 took place on December 31, 2020.