
Spain publishes the Act transposing Council Directive (EU) 2018/822 of May 25, 2018 (“DAC 6”), into national law

Legal Flash | Tax

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Act 10/2020, of December 29, modifies the Spanish General Tax Act, transposing the new obligation to report potentially aggressive tax planning arrangements provided under Council Directive (EU) 2018/822 of May 25, 2018 (“DAC 6”)



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- > New obligations to report potentially aggressive crossborder tax planning arrangements fall on intermediaries and other relevant taxpayers.
 - > Arrangements subject to reporting must meet certain hallmarks specified in the Directive.
 - > New reporting obligation to update information on marketable crossborder arrangements.
 - > New obligation for taxpayers to file reports on the use in Spain of crossborder arrangements that should have been previously reported.
 - > Transitional regime to report crossborder arrangements where the first step of which was implemented between June 25, 2018, and June 30, 2020, and arrangements where the reporting requirement is triggered from July 1, 2020.
 - > Specific penalty regime.



On December 30, 2020, the Spanish Official Gazette published [Act 10/2020, of December 29, modifying Spanish Act 58/2003, of December 17, the General Tax Act, transposing Council Directive \(EU\) 2018/822 of May 25, 2018, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable crossborder arrangements](#) (“**Act 10/2020**”).

The approved Act transposes into Spanish law Council Directive (EU) 2018/822 of May 25, 2018, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable crossborder arrangements, known as the “Intermediaries Directive” or “DAC 6” (the “**Directive**”).

Act 10/2020 only regulates aspects of the Directive that require a rule having the force of a law: new reporting obligations applicable to crossborder tax planning arrangements, taxpayers required to disclose information, exemptions from the reporting obligation due to legal professional privilege, certain reporting obligations between individuals and the penalty regime applicable if the reporting obligations are not fulfilled. Also, transitional rules are established regarding the requirement to disclose information on reportable crossborder arrangements, the first step of which was implemented between June 25, 2018, and June 30, 2020, and arrangements where the reporting requirement is triggered from July 1, 2020.

The process involving the transposition of the Directive is expected to be completed shortly with the approval of the implementing regulations of these new reporting requirements, and the new tax forms that will have to be submitted to fulfill them.

New reporting requirements for crossborder tax planning arrangements

New Additional Provision 23 of Spanish Act 58/2003, of December 17, the General Tax Act, lays down three new reporting obligations applicable to taxes:

- (i) Obligation to report crossborder tax planning arrangements containing certain hallmarks specified in the Directive.
- (ii) Obligation to update information on marketable crossborder arrangements. “Marketable arrangements” means arrangements that do not need substantial modification to be implemented by the taxpayer.
- (iii) Obligation to report on the use in Spain of previous crossborder tax planning arrangements.



Taxpayers subject to reporting obligations and exemptions based on legal professional privilege

Reporting obligations fall on intermediaries or, in some circumstances, on relevant taxpayers.

Under the Directive, as referred to in Additional Provision 23 of the General Tax Act, there are two types of intermediaries:

- > **Primary intermediaries:** persons or entities that design, market, organize or make available for implementation, or manage the implementation of a reportable crossborder arrangement.
- > **Secondary intermediaries:** persons or entities that know or could be reasonably expected to know that they have agreed to provide, directly or through other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable crossborder arrangement.

Relevant taxpayers: persons or entities to whom either a reportable crossborder arrangement is made available for implementation, or are ready to implement a reportable crossborder arrangement, or have implemented the first step of such an arrangement.

If the reporting obligation is incumbent on the intermediary, it is established that information provided to the tax authorities would not breach the restrictions on disclosure of information provided under an agreement or by law, and no liability would be triggered with regard to the relevant taxpayer that owns the disclosed information.

Exceptionally, **intermediaries with legal professional privilege will not be obliged to file the reporting.** This exemption is applicable when the intermediary provides “neutral” advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable crossborder arrangement, i.e., **when the sole purpose of the intermediary’s advice is to assess the adjustment of that arrangement to applicable regulations, without securing or facilitating its implementation.**

The exemption from the reporting obligation due to legal professional privilege is applicable to all intermediaries, regardless of the economic activity they may carry out. As well as lawyers, this includes tax advisors, economists and consultants. Intermediaries exempt from the reporting obligation due to legal professional privilege



can waive this exemption if the relevant taxpayer gives them certified authorization to do so.

Purpose of the information. Potentially aggressive tax planning arrangements that meet certain hallmarks

The reporting obligation is limited to the crossborder arrangements specified in article 3.18 of the Directive that contain the hallmarks set out in Annex IV of the Directive, i.e., arrangements that have a crossborder dimension and contain certain hallmarks making them reportable to the tax authorities.

For these purposes, a **crossborder arrangement** means:

- an arrangement concerning more than one Member State, or
- an arrangement concerning one Member State and a third country where at least one of the following conditions is met: (i) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction; (ii) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction; (iii) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment; (iv) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of that activity; or (v) that arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

Not all crossborder arrangements are reportable. To be reportable, a crossborder arrangement must meet the hallmarks provided in Annex IV of the Directive. Thus, reporting obligations only apply to crossborder arrangements that present a hallmark, characteristic or feature indicating a possible risk of tax avoidance. The hallmarks in Annex IV fall into two categories:

- **Hallmarks linked to the “main benefit” test.** The presence of these hallmarks is not enough for the arrangement to be reportable. Obtaining a tax advantage must also be the main benefit or one of the main benefits that a person can reasonably expect from the arrangement.



- **A.1.** A condition of confidentiality requiring the intermediary or relevant taxpayer not to disclose to other intermediaries or to the tax authorities how the arrangement could secure a tax advantage.
 - **A.2.** The intermediary is entitled to receive variable fees or fees fixed by reference to the tax advantage.
 - **A.3.** Standardized arrangements. The arrangement referred to in the report has substantially standardized documentation or structure and is available to more than one relevant taxpayer without a need to be substantially customized for implementation.
 - **B.1.** Acquisition of a loss-making company. An arrangement involving contrived steps consisting in acquiring a loss-making company, discontinuing the main activity of that company and using its losses to reduce its tax liability through a transfer of those losses to another jurisdiction or by the acceleration of the use of those losses.
 - **B.2.** Converting income into capital, gifts or other categories of revenue that are taxed at a lower rate or are exempt from tax.
 - **B.3.** Circular transactions resulting in the round-tripping of funds through interposed entities without other primary commercial function, or transactions that offset or cancel each other or that have other similar features.
 - **C.1.b) (i), C.1.c) and C.1.d).** Crossborder payments between two or more associated enterprises where the enterprise making the payment can deduct it and the recipient is resident for tax purposes in a jurisdiction that (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; (ii) benefits from a full exemption from corporate tax; or (iii) benefits from a preferential tax regime.
- **Hallmarks not linked to the “main benefit” test.** The presence of these hallmarks is sufficient for the arrangement to be reportable. They do not need to meet the criterion concerning the tax advantage that may be obtained by the taxpayer.
- **C.1.a) and C.1.b) (ii).** Crossborder payments between two or more associated enterprises where the enterprise making the payment can deduct it for tax purposes and the recipient (i) is not resident for tax purposes in any tax jurisdiction; or (ii) is a resident for tax purposes in a jurisdiction classified as a tax haven.



- **C.2.** Double relief for the same depreciation on the asset. Relief from taxation in respect of the same asset is claimed in more than one jurisdiction.
- **C.3.** Double relief from double taxation. Relief from double taxation in respect of the same item of income or capital is claimed or applied in more than one jurisdiction.
- **C.4.** Transfers of assets with a different tax assessment. The arrangement includes transfers of assets and there is a material difference in the amount being treated as payable in consideration for the assets in different jurisdictions.
- **D.1.** An arrangement that may undermine the automatic exchange of information on financial accounts (equivalent products not subject to reporting, transfer to jurisdictions not subject to reporting, interposed structures, among others).
- **D.2.** An arrangement that may undermine the identification of the real ownership. This involves a non-transparent legal or beneficial ownership chain with the use of persons or active interposed structures, the beneficial owners of which cannot be identified.
- **E.1, E.2 and E.3.** Arrangements concerning transfer pricing: (i) use of unilateral safe harbor rules; (ii) transfer of hard-to-value intangibles; and (iii) an intragroup crossborder transfer of functions, risks or assets, if the projected annual earnings before interest and taxes ("EBIT"), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

Reporting obligations between individuals resulting from the obligation to file information on crossborder tax planning arrangements

New Additional Provision 24 of the General Tax Act lays down certain reporting obligations between parties involved in a reportable crossborder tax planning arrangement in the following cases:

- If intermediaries are exempt from reporting due to legal professional privilege, they must provide certified notification of this circumstance to the other intermediaries and relevant taxpayers participating in the arrangement, who will then become subject to the reporting obligation.



- If the obligation to submit a statement falls on several intermediaries or relevant taxpayers, the intermediary or taxpayer that submitted the statement must provide certified notification of this statement to the other intermediaries and, if applicable, relevant taxpayers, who, by virtue of that notification, will be exempt from the obligation to submit a statement.

In both cases, a regulatory referral is established setting out the terms in which these notifications must be provided.

Reporting obligations of arrangements in the transition period

Act 10/2020 includes a single transitory provision extending the obligation to file a statement to the following crossborder tax planning arrangements that meet the hallmarks specified in the Directive:

1. Crossborder arrangements, the first step of which was implemented between June 25, 2018 (the date on which the Directive came into force) and June 30, 2020 (the day before the date the Directive was effectively applied).
2. Crossborder arrangements where the reporting requirement is triggered from July 1, 2020, the date on which the Directive was effectively applied.

The terms to file the statements corresponding to both types of arrangements will be established in implementing regulations, yet to be established.

Infringement and penalty regime

New Additional Provisions 23 and 24 of the General Tax Act include a specific penalty regime applicable to default on statement and reporting obligations between individuals.

**Penalties for breach of the reporting obligation concerning crossborder tax planning arrangements**

Infringement	Classification	Penalty
Failure to file on time	Serious	<p>€2,000 for each piece of data or data set that has not been declared (or piece of data or data set that is incomplete, inaccurate or false), regarding the same arrangement that should have been included in the statement, with the following thresholds:</p> <ul style="list-style-type: none">• Minimum threshold: €4,000• Maximum threshold:<ul style="list-style-type: none">a) If the infringing party is an intermediary: the fees received or to be received for each arrangement.b) If the infringing party is a relevant taxpayer: an amount equivalent to the value of the tax impact resulting from each arrangement. If there is no value of the tax impact, the fees received or to be received by the intermediary for each arrangement. <p>.If there are no fees, the maximum threshold will be based on the market value of the activity, the concurrence of which will determine the condition of intermediary, calculated according to article 18.1 of the Spanish Corporate Income Tax Act.</p> <p>The maximum threshold will not be applied if the amount is lower than €4,000.</p> <p>If a return is filed after the deadline without prior notice and it supplements or substitutes a previous return that was filed on time, but providing incomplete, inaccurate or false information, the penalty will only be applied to the return filed after the deadline.</p>
Submitting data that is incomplete, inaccurate or false		
Filing after the deadline without prior notice	Serious	The above penalties and thresholds are reduced by half.
Filing by means other than electronic, computer or web-based means.	Serious	<p>€250 for each piece of data or data set regarding the same arrangement with the following thresholds:</p> <ul style="list-style-type: none">• Minimum threshold: €750• Maximum threshold: €1,500

Previous penalties are incompatible with those generally provided for infringements involving filing after the deadline (or incorrectly) any tax returns and self-assessments



that do not cause a financial loss to the tax authorities established under articles 198 and 199 of the General Tax Act.

Penalties for breach of reporting obligations between individuals resulting from the obligation to file information on crossborder tax planning arrangements

Infringement	Classification	Penalty
Failure to communicate the reporting exemption due to professional privilege to another intermediary or taxpayer on time, or informing of the exemption on time, yet omitting data or including false, incomplete or inaccurate information	Minor (1)	€600
Failure to inform other obligated parties of the exemption from the reporting obligation as it has already been filed	Minor	

(1) The infringement will be considered serious if it coincides with the failure to report the corresponding crossborder tax planning arrangement by another intermediary or by the relevant taxpayer that should have reported the arrangement if they had received notification of the exemption from the reporting obligation due to legal professional privilege. In these cases, the applicable penalty will be the same as failing to report the arrangement.

For additional information, please contact Cuatrecasas.

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