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Spain publishes draft legislation transposing Council Directive (EU) 2018/822 of 25 May ("Intermediaries Directive")

Legal Flash Tax

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Spain's Ministry of Finance has opened a public information process for a draft Bill and a draft Royal Decree to transpose Council Directive (EU) 2018/822 of May 25, 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of tax information in relation to reportable crossborder arrangements.

Main features:

- New information obligations for tax intermediaries on crossborder tax planning arrangements and, where appropriate, for relevant taxpayers.
- Reportable arrangements must fulfil certain hallmarks provided in the Directive and that are specified in the draft legislation.
- Quarterly reporting obligations on marketable arrangements, and relevant taxpayers' obligation to report yearly the arrangements implemented and that may have been previously reported.
- Specific penalty regime.

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On June 20, Spain's Ministry of Finance published the draft bill to implement the provisions of 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"**).

Two drafts were published: (i) a **draft Bill** modifying Act 58/2003, of December 17, the General Tax Act, and (ii) a **draft Royal Decree** modifying current Royal Decree 1065/2017, of July 27, on the actions and procedures related to tax management and auditing and developing common regulations on the application of taxes.

The draft Bill would create new reporting obligations related to crossborder tax planning arrangements, exemptions to such obligations based on the professional secrecy duty of intermediaries, and the infringements and penalty regime. The draft Royal Decree would develop these obligations and implement the remaining regulations of the Directive.

The draft Bill and the draft Royal Decree are subject to public information until July 12, so their wording is likely to be modified.

This Legal Flash summarizes the main features of the published draft legislation.

1. New reporting obligations for "tax intermediaries" and "relevant taxpayers"

The draft legislation establishes **new reporting obligations** in the field of taxation:

(i) Reporting obligation for tax intermediaries or, where appropriate, for relevant taxpayers, on crossborder tax planning arrangements that meet certain hallmarks.

(ii) Reporting obligation for tax intermediaries or, where appropriate, for relevant taxpayers, on quarterly updating information related to crossborder "standardized arrangements" that had been previously reported. "Standardized arrangements" means arrangements that do not need substantial modification to be implemented by the taxpayer.

(iii) Obligation for relevant taxpayers to report annually on the crossborder arrangements they have implemented and that may have been previously

reported, regardless of the tax authorities to which they were previously reported. This third obligation goes beyond the provisions of the Directive.

To the effects above, **intermediaries** are defined as persons or entities that design, market, organize , make available for implementation or manage implementation of a reportable crossborder arrangement (the **"principal intermediary"**). An intermediary is also any person who knows or could be reasonably expected to know that has agreed to provide, directly or through others, help, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable crossborder arrangement (the **"secondary intermediary"**).

Relevant taxpayers are individuals or entities to whom a reportable crossborder arrangement is made available for implementation, or who is ready to implement or has implemented the first stage of such an arrangement, provided there is no intermediary obliged to report.

As an **exception**, intermediaries will be exempt from reporting if the information to be reported may infringe the **duty of professional secrecy under article 93.5 of the General Tax Act**. This means that intermediaries are exempt from reporting (i) non-patrimonial private data whose disclosure may harm personal or family reputation and privacy, and (ii) the taxpayer's confidential data that may be known by the intermediary in the exercise of its advisory activity related to the reportable crossborder arrangement. However, it is possible to report this data if the taxpayer concerned authorizes the intermediary to do so.

The draft bill also regulates additional specific reporting obligations in the following cases:

(i) When intermediaries are exempt from reporting due to the professional secrecy duty must communicate such circumstance to the other intermediaries and relevant taxpayers participating in the arrangement within five days from the date of accrual of the reporting obligation; and

(ii) When there are several intermediaries or relevant taxpayers subject to the reporting obligation, the intermediary or the relevant taxpayer that has reported the information, thus releasing the other intermediaries and relevant taxpayers, must communicate such circumstance to the others within five days from the date the information was reported.

2. What must be reported?

The reporting obligations refer to the **"crossborder tax planning arrangements."** Internal arrangements (non-crossborder) are outside their scope. Taxes affected by the reporting obligations will be those levied by Spain, except value added tax, customs duties, excise duties and social security contributions.

To this extent, an **arrangement** is widely defined as a crossborder agreement, legal contract, scheme or transaction.

An arrangement will qualify as **"crossborder"** when it affects to more than one Member State or a Member State and a third tax jurisdiction, provided any of the following circumstances are met : (i) not all of the participants in the arrangement are tax residents in the same jurisdiction; (ii) one or more of the participants in the arrangement is simultaneously a resident in more than one jurisdiction; (iii) one or more of the participants in the arrangement carries out a business activity in another jurisdiction through a permanent establishment in that jurisdiction, and the arrangement is part or the entire business of that permanent establishment; (iv) one or several of the participants in the arrangement carries out an activity in another jurisdiction without being a tax resident or having a permanent establishment in that jurisdiction, and the arrangement is part or the entire economic activity; (v) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

Finally, not all crossborder arrangements must be reported. For a crossborder arrangement to be reported, it must meet the hallmarks provided in Annex IV of the Directive, together with the draft specialties provided in these hallmarks. Thus, reporting obligations only apply to those crossborder arrangements with a characteristic or feature indicating a possible risk of tax avoidance. To this extent, the draft legislation expressly refers to Annex IV of the Directive, although, since the wording of the hallmarks is complex, some of the hallmarks would be subject to clarification or qualification to ensure greater legal security in their application.

The hallmarks are divided in two groups:

Hallmarks linked to the "main benefit" test. Concurrence of these hallmarks is not enough for the arrangement to be reportable. Obtaining a tax benefit must also be the main benefit or one of the main benefits that a person can reasonably expect from the arrangement. For these purposes, the draft legislation defines **tax benefit** as obtaining tax savings, i.e., any reduction of the taxable base or the tax quota, in terms of final tax due, including a tax

deferral in the absence of the reportable arrangement or when the taxable event is totally or partially avoided by implementing the arrangement. A tax saving will also be deemed to exist if taxable bases, tax debts, allowances or any other tax credit that may be compensated or deducted in the future is generated. A tax benefit in the case of arrangements where related entities are involved will be determined on the aggregated tax savings in all the associated entities, regardless of their tax jurisdiction.

Hallmarks not linked to the "main benefit" test. The remaining hallmarks, not linked to the main benefit, may be reported only if the arrangement fulfils the characteristics or features of the hallmark, regardless of the fiscal benefit that may be obtained by the taxpayer.

The main **hallmark clarifications** provided in Annex IV of the Directive included in the draft legislation are as follows:

- Arrangements where the intermediary is entitled to receive a **variable fee** according to the tax benefit (hallmark A.2). It is specified that this hallmark will exist regardless of whether the fees are totally or partially linked to the fiscal benefit.

- Arrangements with substantially standardized documentation and structure that are available to more than one relevant taxpayer without a need to be substantially customized for implementation (hallmark A.3). It is specified that this hallmark refers to the "**marketable arrangements**" as defined in article 3.24) of the Directive.

- Specific hallmarks related to crossborder transactions (group C hallmarks). It is specified that the hallmarks in this group that involve the **tax deduction of crossborder payments between associated entities** will be deemed to exist whether or not the payment is made, and will include indirect payments through one or more intermediary persons or entities. The indirect beneficiary of such payments will also qualify as beneficiary if crossborder payments are fiscally attributed to the beneficiary by virtue of fiscal transparency or imputed income regimes or similar.

    - Arrangements that involve deductible crossborder payments between two or more associated enterprises where the recipient is a tax resident in a jurisdiction that imposes corporate tax at the **rate of zero or almost zero** (hallmark C.1.b).i). A corporate tax will be any tax that is identical or

analogous to the Spanish corporate income tax and a rate of zero or almost zero will be an effective taxation below 1%.

- Arrangements that involve deductible crossborder payments between two or more associated enterprises where the recipient is a tax resident in a **non-cooperative jurisdiction** (hallmark C.1.b).ii). Non-cooperative jurisdictions will include those listed in additional provision 1 of Law 36/2006, of November 29, on legal measures aimed at the prevention of tax fraud.

- Arrangements that involve deductible crossborder payments between two or more associated enterprises where the payment benefits from a **preferential tax regime** in the tax jurisdiction where the recipient is a tax resident (hallmark C.1.d)). The regimes authorized by the EU will not qualify as preferential tax regimes.

- Arrangements that include **transfers of assets** and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved (hallmark C.1.d)). The draft legislation provides two rules: (i) the significant differences that have occurred as a result of the difference in values exclusively for accounting and non-tax purposes will not be included; (ii) the difference of more than 25% between the fiscal values in both jurisdictions will be considered a significant difference.

- **Specific hallmarks concerning automatic exchange of information and beneficial ownership** (group D hallmarks): these hallmarks will be interpreted under the provisions on the reporting obligations to prevent avoidance of the common reporting standard for financial account information and foreign opaque structures and its official OECD commentary. Specifically, arrangements that undermine the automatic exchange of financial account information (hallmark D.1) are those that infringe additional provision 22 of the General Tax Act, Royal Decree 1021/2015, of November 13, on the obligation to identify the tax residence of the persons holding the ownership or control of certain financial accounts and report them in the field of mutual assistance or any similar agreement on the automatic exchange of information on financial accounts between EU Member States or with third countries or that takes advantage of the absence of such legislation or agreements.

- **Specific hallmarks concerning transfer pricing** (group E hallmarks). This group of hallmarks will not apply when the values of the arrangement have been determined by an Advanced Pricing Agreement (APA) of those regulated in Chapter X of Title I of the Corporate Tax regulations. Likewise, for arrangements that involve intra-group transfers of functions, risks or assets that imply a decrease in the operating result (hallmark E.3), they refer to the concept of associated companies in the terms defined by the Directive.

3. Information to be reported

The information to be reported to the tax authorities is the following:

Regarding the reporting obligation on crossborder tax planning arrangements for tax intermediaries and, where appropriate, relevant taxpayers:

a) Identity of intermediaries and relevant taxpayers and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;

b) Detailed information on the hallmarks that make the crossborder arrangement reportable set out in Annex IV of the Directive and, if applicable, the reference number assigned to the arrangement by the tax authorities when it was first filed.

c) A summary of the content of the reportable crossborder arrangement, which will include the arrangement's relevant tax information.

d) Reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements.

e) Under no circumstance should non-property private data be disclosed when the disclosure threatens the reputation and personal and family privacy, as well as commercial, industrial or professional secret or of a commercial process, or information that would be contrary to public policy.

f) The date on which the first phase in implementing the reportable crossborder arrangement was or will be made, as well as the date of accrual of the reporting obligation.

g) Details of the national and foreign provisions that are the basis of the reportable crossborder arrangement.

h) The value of the reportable crossborder arrangement, understood as the outcome obtained in terms of tax debt, of the reported arrangement that must include, where appropriate, tax savings.

i) The Member State of the relevant taxpayer(s) and the intermediaries involved in the arrangement, and any other Member States that are likely to be affected by the reportable crossborder arrangement.

j) The identity of any other person in a Member State likely to be affected by the reportable crossborder arrangement, indicating the Member States to which that person is linked.

In relation to the **quarterly information obligation of intermediaries and taxpayers**, regarding the **standardized arrangements** that have been previously reported:

a) The identification of the crossborder arrangement originally reported by means of the reference number assigned to it in the first report.

b) The identity of intermediaries and relevant taxpayers.

c) The date on which the first phase in implementing the reportable crossborder arrangement was or will be made, as well as the date in which the standardized arrangement was made available.

d) The Member State of the relevant taxpayer(s) and the intermediaries involved in the arrangement and any other Member States that are likely to be affected by the reportable crossborder arrangement.

e) The identity of any other person in a Member State likely to be affected by the reportable crossborder arrangement, indicating the Member States to which that person is linked.

Regarding the **obligation of relevant taxpayers to submit an annual report on the arrangements they have implemented and that may have been previously reported**:

a) The identity of intermediaries and relevant taxpayers.

b) The identification of the originally reported crossborder arrangement by means of the reference number assigned to the arrangement in the first filing.

c) The date in which the reportable crossborder arrangement was implemented.

d) Any information that may have been modified in using the arrangement with respect to the original filing.

e) The value of the reportable crossborder arrangement, understood as the outcome obtained in terms of tax debt, of the reported arrangement that must include, where appropriate, tax savings.

4. Date of accrual of the reporting obligation. Method, deadline and place of filing

The date of accrual of the reporting obligation is different at different stages depending on the type of arrangement subject to disclosure. Hence,

(i) Regarding the **standardized arrangements without a need of substantial modifications to be implemented** ("marketable arrangement", under the terms of the Directive), on the day after the reportable crossborder arrangement **is made available for implementation**, i.e., when the relevant taxpayer definitely accepts the services provided by the intermediary.

(ii) Regarding the **standardized arrangements that need substantial modifications to be implemented**, the obligation to file the information begins on the day after the reportable crossborder arrangement is ready for implementation, i.e., once the relevant amendment has been made, the arrangement is made available to the taxpayer.

(iii) Regarding any **other arrangements** ("customized" arrangements), the obligation to file the information begins when the first phase in the implementation of the reportable crossborder arrangement has been made, i.e., **when the arrangement is implemented generating any legal or economic effect.**

Regarding **"secondary intermediaries,"** i.e., those that know that they have undertaken to provide help, assistance or advice with respect to designing, marketing, organizing, making

available or managing the implementation of a reportable crossborder arrangement, the reporting obligation begins **at the time they provided such help, assistance or advice.**
As a specialty, when the intermediary is exempt from reporting by application of the duty of professional secrecy, the reporting obligation transferred to another intermediary or to the taxpayer will arise at the moment in which it receives notice that the exempted intermediary is obliged to report.

The **deadline for reporting the information** is relegated to what the Order that approves the corresponding tax form establishes. The form must be submitted **electronically.**

Regarding **the place where the information must be filed**, different criteria are established depending on whether the obligation falls on an intermediary or on the taxpayer:

If the reporting obligation falls on an intermediary, the information must be filed with the Spanish tax authorities when the following connection criteria are met in this order:

1. When the intermediary is a tax resident in Spain;
2. When the intermediary has a permanent establishment in Spain through which the services with respect to the arrangement are provided;
3. When the intermediary is incorporated in, or governed by the laws of, a Member State; and
4. When the intermediary is registered with a professional association related to legal, taxation or consultancy services in Spain.

However, **if the reporting obligation falls on a relevant taxpayer**, the information must be filed with the Spanish tax authorities when the following connection criteria are met in this order:

1. When the relevant taxpayer is a tax resident in Spain;
2. When the relevant taxpayer has a permanent establishment in Spain that benefits from the arrangement;
3. When the relevant taxpayer receives income or obtains profits in Spain when the arrangements are related to such income or profits; and
4. When the relevant taxpayer carries out an activity in Spain, with the arrangement included in that activity.

5. Transitional regime

Although the entry into force of the reporting obligations will take place on July 1, 2020, the proposed legislation, in line with the provisions of the Directive, establishes the obligation to report those crossborder arrangements for which the **obligation to report has accrued between June 25, 2018 and June 30, 2020**. These arrangements of the "transitory period" must be reported in July and August 2020.

However, unlike the Directive, which refers exclusively to arrangements whose "first phase of implementation" was carried out between June 25, 2018, and June 30, 2020, the proposed transitional rule seems to refer to all the arrangements, not only those whose first phase of implementation took place between June 25, 2018, and June 30, 2020, but also the arrangements that in that period have been made available for implementation or have been enforceable, because in all of them, according to the draft legislation, the " accrual date of the reporting obligation" will arise.

6. Publication of arrangements

It is expected that the Spanish tax authorities will publish on its website, only for information purposes, the most relevant arrangements reported and, where appropriate, the information regarding the regime, classification or tax characterization for each case.

7. Infringement and penalty regime

The draft Bill introducing changes in the current General Tax Act includes a specific infringements and penalties regime, summarized in the following table:

Infringements	Grade	Penalty
Failure to file on time	Very serious	EUR 1,000 for each incomplete, inaccurate or false data or group of data regarding the same statement with the following limits: Minimum amount: EUR 3.000 Maximum: a) Intermediaries: Fees received or to be received. b) Relevant taxpayer: Value of the tax impact derived from the arrangement. In the absence of value of the tax impact, the amount of the fees received or to be received by the intermediary. In the absence of fees, market value of the activity whose concurrency determines the condition of intermediary, calculated according to article 18.1 of the CIT Act. The maximum limit does not apply if its amount is less than EUR 3.000.
Filing incomplete, inaccurate or false information		
Filing after the deadline without prior notice		The above penalties and limits are reduced by half.
Filing by means other than electronic, computer and telematic when this is mandatory	Very serious	EUR 250 per data or group of data regarding the same statement with the following limits: Minimum: EUR 750 Maximum: EUR 1,000
Failure to communicate the reporting exemption to another intermediary or taxpayer on time or omitting data or including false, incomplete or inaccurate information	Minor	EUR 600
Failure to inform other obligated parties of the exemption from the reporting obligation as it has already been filed		

For the above purposes, the different information to be submitted in relation to each reporting obligation will constitute different groups of data.