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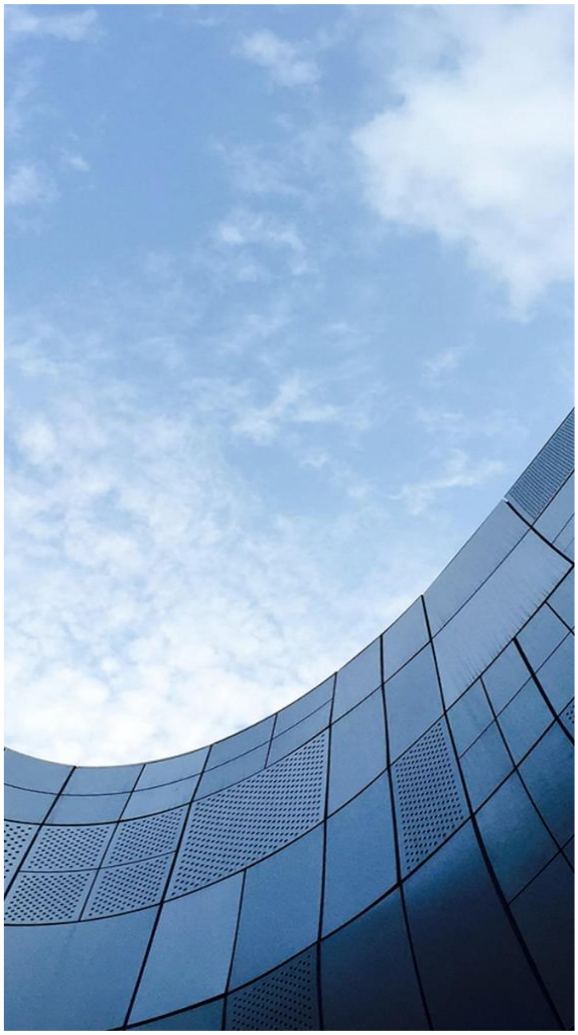
Spain concludes the transposition into national law of Council Directive (EU) 2018/822 of May 25 ("DAC 6")

Legal Flash
April 19, 2021

The obligation to report potentially aggressive crossborder tax planning arrangements is established under Royal Decree 243/2021, of April 6; Order HAC/342/2021, of April 12, approving Forms 234, 235 and 236; and the Resolution of April 8, 2021, on communications between the different parties involved.



- The law sets out the obligation to report potentially aggressive crossborder tax planning arrangements, which falls on intermediaries and other relevant taxpayers.
- It clarifies some issues concerning the application in Spain of the Directive's hallmarks.
- It regulates the date on which the reporting obligation is triggered and the term of 30 calendar days to file the information on reportable crossborder arrangements, including those made during the transitional period.
- Term of five business days for notices in the case of exemptions based on legal professional privilege or if the information has been filed.
- Approval of the reporting forms corresponding to the different obligations, and the format and minimum content to be included in the communications between the intermediaries and parties involved in crossborder arrangements.

Contents

On April 13, 2021, the Official Gazette of the Spanish State published three regulations that conclude the transposition into national law 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"):

- Royal Decree 243/2021, of April 6, amending the General Regulation on the steps and procedures for tax management and inspection, and implementing the common rules on tax application procedures, approved by Royal Decree1065/2007, of July 27, transposing Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable crossborder arrangement (the "**Regulation**").

- Order HAC/342/2021, of April 12, approving Form 234 for "reporting information on certain tax planning arrangements," Form 235 for "reporting updated information on marketable crossborder arrangements" and Form 236 for "reporting information on the use of certain crossborder tax planning arrangements" (the "**Order**").

- Resolution of April 8, 2021, of the tax management department of the Spanish tax authorities, approving the forms for communications between parties involved in a reportable crossborder tax planning arrangement subject to reporting (the "**Resolution**").

These provisions contain the implementing regulations set out in *Act 10/ 2020, of December 29*, which introduced new Additional Provisions 23 and 24 of the General Tax Act to transpose aspects of the Directive requiring a rule having the force of a law and that were laid down by establishing the obligation to disclose information on reportable crossborder arrangements, reporting obligations between the parties involved and the penalty regime. It also regulated the obligation to file information on reportable arrangements made during the transitional period. For further details, see our Legal Flash on Act 10/2020 by clicking this *link*.

The Regulation implements many aspects of the following three reporting obligations established in Additional Provision 23 of the General Tax Act:

(i) The obligation to report crossborder arrangements meeting any of the hallmarks set out in Annex IV of the Directive.

(ii) The obligation to report updated information on marketable crossborder arrangements referred to in article 3.24 of the Directive.

(iii) The obligation to report the use in Spain of previous crossborder tax planning arrangements.

The Order approves new Forms 234, 235 and 236 for filing, respectively, the above information, and the Resolution approves the format and minimum content to be included in the communications between the intermediaries and relevant taxpayers.

This Legal Flash explains the aspects subject to implementing regulations, the main features of the new tax forms that must be filed to fulfill the reporting obligations and the deadlines set for the different reporting obligations related to information and communications between the parties involved.

Reporting obligations related to certain tax planning arrangements

Article 45 of the Regulation states, as established in the General Tax Act, that reporting obligations only apply to tax planning arrangements meeting any of the hallmarks set out in Annex IV of the Directive. To define the scope of this first reporting obligation, the Regulation covers a number of additional matters, as described below.

Definition of arrangement

To transpose into the legal system the concept of **arrangement**, a term having no legal basis under Spanish law, the Regulation defines arrangement as *"(...) any agreement, legal business, scheme or transaction (...)"*. It also specifies that an arrangement may include a series of arrangements, and that it may be made up of more than one stage or part.

Moreover, it states that payments resulting from reportable arrangements that have no sufficient relevance to qualify themselves as an arrangement will not be considered as such, although they may need to be reported as part of a reportable arrangement.

Crossborder nature of an arrangement

An arrangement will be considered **crossborder** where it involves more than one Member State, or one EU Member State and a third state, as long as any 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 is simultaneously resident for tax purposes in more than one jurisdiction

c) 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.

d) 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 the economic activity of that permanent establishment.

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

Also, it specifies that arrangements not considered crossborder (internal arrangements) are not subject to reporting obligations. The same applies to crossborder arrangements affecting taxes not covered by the Directive, namely those involving value added tax, custom duties, excise duties and special social security contributions.

Clarification of certain aspects of the hallmarks

To ensure greater legal certainty when applying Annex IV of the Directive in Spain, article 47 of the Regulation includes a series of rules that qualify and clarify the concept of "main benefit," as well as the hallmarks set out in the Directive.

In regard of hallmarks requiring the fulfillment of the **main benefit test**, the latter is considered satisfied if the main effect or one of the main effects deriving from the arrangement is a tax advantage. The Regulation defines **tax advantage** as any reduction to the tax base or tax liability, in terms of tax debt, including tax deferral,

which would have been imposed if the crossborder arrangement subject to reporting obligations had not been carried out, or when there is full or partial avoidance of the taxable event as a result of implementing the arrangement. A tax advantage also occurs when taxpayer generates tax bases, liabilities, deductions and any other kind of tax credit that may be offset or deducted in the future. It specifies that when it comes to arrangements involving individuals or entities considered associated in the terms provided under article 3.23) of the Directive, the tax benefit will be ascertained considering the tax advantage made by the group of associated entities as a whole, regardless of the tax jurisdiction.

The main **clarifications of the hallmarks** set out in Annex IV are described below:

- **Hallmark A.2** (arrangements where the intermediary is entitled to receive a variable fee based on the tax advantage). This hallmark will be fulfilled regardless of whether the connection between the fees and the tax advantage is total or partial.

- **Hallmark A.3** (arrangements that have substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation). It specifies that this hallmark refers the marketable arrangements defined in article 3.24) of the Directive.

- **Hallmarks of category C** (hallmarks related to certain crossborder transactions). It specifies that in the case of hallmarks in this category involving deductible crossborder payments between associated enterprises, these payments will include the crossborder expenses regardless of whether the payment has been made, as well as payments made indirectly through one or several individuals or interposed entities. Also, it indicates that the recipient of the crossborder payment will be the indirect recipient of the payments if they have been attributed for tax purposes to the recipient under regimes for tax transparency, the attribution of income or their equivalents.

  Specifically, it provides the following clarifications regarding the hallmarks of category C:

  - **Hallmark C.1.b) (i)** (crossborder payments made between associated companies where the recipient of the payment is resident for tax purposes in a jurisdiction that imposes corporate income tax at the rate of zero or almost zero). It specifies that a corporate tax is any tax identical or similar to Spanish corporate income tax, and that a zero or almost zero tax rate is considered to be levied in cases where a nominal tax rate is below 1%.

- **Hallmark C.1.d)** (crossborder payments made between associated companies where the payment benefits from a partial or full exemption from tax in the jurisdiction where the recipient is resident for tax purposes). It specifies that no regime authorized under EU law will be treated as a preferential tax regime.

- **Hallmark C.4** (transfers of assets to another jurisdiction where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved). Two rules are established: (i) any significant differences resulting from a difference in values for accounting purposes only and not for tax purposes will not be included; and (ii) "significant difference" means a difference of over 25% between the values for tax purposes in both jurisdictions.

> **Hallmarks of category D** (arrangements affecting the automatic exchange of information on financial accounts and beneficial ownership). It establishes that the interpretation of these hallmarks will be made based on the Standard Rules on mandatory reporting to address arrangements that impede compliance with the OECD's Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures and its Commentary.

  Specifically, it provides the following clarifications regarding the hallmarks of category D:

  - **Hallmark D.1** (arrangements undermining the reporting obligation in the framework of the automatic exchange of information on financial accounts). It specifies that these must be arrangements that infringe the provisions of (i) Additional Provision 22 of the General Tax Act; (ii) Royal Decree 1021/2015, of November 13, establishing the obligation to identify the tax residence of individuals that own or control certain financial accounts and to provide information concerning them in the field of mutual assistance; or (iii) any other equivalent agreement on the automatic exchange of information on "financial accounts" between EU Member States or third countries, or that takes advantage of the absence of rules or agreements of this kind. Moreover, it establishes that letter e) of this hallmark must be understood to refer to the use of legal entities, instruments or structures that remove or aim to remove information on one or several account holders or individuals that exercise control in accordance with the automatic exchange of information on financial accounts.

- **Hallmark D.2** (arrangements involving non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures). It clarifies that the arrangement will be only reportable if each of the conditions in letters a), b) and c) of this hallmark are fulfilled.

- **Hallmarks of category E** (arrangements with hallmarks concerning transfer pricing). It clarifies that the hallmarks concerning transfer pricing do not exist where the values of the arrangement have been determined by an advance pricing agreement regulated under Chapter X of Part I of the Corporate Income Tax Regulations, or under other advance pricing agreements concerning transfer prices subject to an automatic exchange of information. Specifically, with regard to **hallmark E.3** (arrangements involving transfers between different members of the same corporate group of functions, liabilities of assets that involve a decrease in the EBIT), reference is made to the concept of associated companies in the terms defined by the Directive (a relationship in which, among others, a person holds at least 25% of the voting rights).

Parties required to report information and exceptions to the reporting obligation

In terms of the subjective scope of the reporting obligation, article 45.4 of the Regulation reiterates the content of Additional Provision 23 of the General Tax Act and the Directive **as regards who is obliged to report**: intermediaries and relevant taxpayers.

It also reiterates that an intermediary is considered to be (i) the person or entity that designs, markets, organizes, or makes available for implementation a reportable crossborder arrangement, or that manages its implementation ("**primary intermediary**"); and (ii) the person or entity that knows or could be reasonably expected to know that it has 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 ("**secondary intermediary**"). It is also established that a relevant taxpayer is a person or entity to whom either a reportable crossborder arrangement is made available for implementation, or is ready to implement a reportable crossborder arrangement, or has implemented the first step of such an arrangement, when there is no intermediary subject to reporting obligations.

The Regulation resolves situations involving several relevant taxpayers, indicating that the report must be submitted by the party appearing first on the following list:

1. The relevant taxpayer that reached an agreement with the intermediary regarding the reportable crossborder arrangement.
2. The relevant taxpayer managing the implementation of such an arrangement.

The Regulation provides the same **exceptions to the reporting obligation** as those established under Additional Provision 24 of the General Tax Act, which provides an exemption from the reporting obligation for intermediaries that must comply with a professional secrecy privilege.

The Regulation also stipulates that no obligation arises for an intermediary to file a report when one has been already filed by another in cases involving several intermediaries. In those cases, the intermediary exempted from the obligation to report must have certified proof that the report has been filed by other intermediaries. Certified proof is understood to be the communications between intermediaries specified under Additional Provision 24 of the General Tax Act. In cases involving several relevant taxpayers where one of them files the report, the exemption from the reporting obligation is regulated under the same terms as for intermediaries.

Competence of the Spanish tax authorities and rules governing situations involving the tax authorities of other Member States

Article 45.6 of the Regulation establishes the connection criteria determining the obligation to make a report to the Spanish tax authorities, making a distinction depending on whether the obligation falls on the intermediaries or on the taxpayers involved.

When the reporting obligation falls on the intermediary, the report must be filed with the Spanish tax authorities when any of the following connection criteria exists, applied in the following order:

1. When the intermediary is a resident for tax purposes in Spain.
2. When the intermediary provides services from a permanent establishment located in Spain.
3. When the intermediary has been incorporated in Spain or is governed by Spanish law.
4. When the intermediary is registered with an official professional organization or association in Spain relating to legal, tax or advisory services.

If the same arrangement involves several Member States to which reports must be made, the intermediary will be exempted from filing a report with the Spanish tax authorities if it has certified proof that it has been filed in another Member State.

When the reporting obligation falls on the relevant taxpayer, the report must be filed with the Spanish tax authorities when any of the following connection criteria exists, applied in the following order:

1. When the taxpayer is a resident for tax purposes in Spain.
2. When the taxpayer has a permanent establishment in Spain that benefits from the arrangement.
3. When income is received or profits are generated in Spain when the arrangement is related to the income or profits.
4. When an activity is carried out in Spain and the arrangement is included within that activity.

If the same arrangement involves several Member States to which reports must be made, the relevant taxpayer will be exempted from filing a report with the Spanish tax authorities if it has certified proof that it has been filed in another Member State.

Deadline and content of the communications between the parties involved in reportable crossborder tax planning arrangements

Article 45.4 of the Regulation sets a **five-day deadline** for individuals to send the communications established by Additional Provision 24 of the General Tax Act. The communication obligations between individuals affected by this five-day deadline are as follows:

(i) Communications that intermediaries exempted from reporting due to legal professional secrecy must send to other intermediaries involved in the arrangement and to the relevant taxpayer. The five-day deadline is calculated from the day following the date on which the reporting obligation is triggered.

(ii) Communication that the intermediaries that have filed the report must send to the other intermediaries involved in the arrangement. The five-day deadline is calculated from the day following the date on which the report is filed.

(iii) Communication that the relevant taxpayers that have filed the report must send to the other relevant taxpayers involved in the arrangement. The five-day deadline is calculated from the day following the date on which the report is filed.

Since the Regulation does not specify whether the deadline should be calculated as five calendar or business days, the term should be calculated as business days in accordance with article 30.2 of Act 39/2015, of October 1, on the Common

Administrative Procedures of Public Administrations regarding the calculation of deadlines.

The Resolution establishes the format and minimum content of those communications. As this involves the notification obligations between individuals, the Resolution indicates that the approved format is not mandatory and communications using another format are acceptable, as long as the minimum content of such communications meets the requirements of the Resolution.

Date on which the reporting obligation is triggered

Article 46.3 of the Regulation sets the dates on which the reporting obligation is triggered. Contrary to the provisions of the Draft Regulation, it is no longer necessary to establish the origin of the obligation based on the different types of arrangements (standardized arrangements, standardized arrangements requiring substantial adaptation or other arrangements). This means that the reporting obligation will be triggered in the terms below.

When the party required to report is the **primary intermediary**, the reporting obligation is triggered when any the following circumstances first arises:

(i) The day following the date on which **the arrangement is made available** to the taxpayer for implementation, i.e., when the taxpayer definitively acquires the services provided from the intermediary. Certified proof that the arrangement has been available includes documents such as acceptance sheets, reports or invoices.

(ii) The day following the date on which **the arrangement can be implemented**, i.e., when it is ready to be implemented by the taxpayer.

(iii) The moment at which the **first step of implementation** of the arrangement has taken place, i.e., when the arrangement is implemented and generates a legal or financial effect.

When the reporting obligation falls on a **secondary intermediary**, the date on which the reporting obligation is triggered is the day following the date on which that intermediary **provided the aid, assistance or advice**.

As a particularity, when the **intermediary is exempted from reporting** due to a professional secrecy privilege, the reporting obligation transferred to another intermediary or the relevant taxpayer arises **on the reception of the communication**

that must be sent by the intermediary exempted from reporting due to the professional secrecy privilege.

Information that must be included in the report on certain tax planning arrangements

Article 46.1 of the Regulation establishes the information to be included in the report on **crossborder tax planning arrangements** to be filed by intermediaries and relevant taxpayers, as appropriate:

a) The identity of the intermediaries and the relevant taxpayers and, if appropriate, the persons or entities that are companies associated with the relevant taxpayer.

b) Detailed information on the hallmarks listed in Annex IV of the Directive and, if appropriate, the arrangement ID number assigned by the tax authorities with which it was first reported.

c) A summary of the crossborder arrangement, including information that is relevant for tax purposes, making reference to the name with which it is commonly known, if applicable, and a broad description of the economic activities or pertinent arrangements in terms that will not result in the disclosure of technological, scientific, industrial, commercial, professional, organizational or financial secrets, or any information that would harm the public interest.

d) The date on which the first stage of the arrangement was or will be implemented, and the date on which the reporting obligation is triggered.

e) Detailed information regarding the national and foreign legislation that serves as a basis for the arrangement.

f) The value of the tax effect deriving from the arrangement, which is understood to be the effective result, in terms of tax liabilities, of the reported arrangement, which must include, if appropriate, the tax advantage.

g) The name of the state in which the relevant taxpayer, or relevant taxpayers and intermediaries involved in the arrangement reside, and any other Member States affected by the arrangement.

h) The name of any other person in a Member State that could be affected by the arrangement, indicating the Member States with which that person is associated.

Obligation to report updated information on marketable crossborder arrangements referred to in article 3.24 of the Directive

Article 48 of the Regulation covers several aspects of the obligation to report updated information on marketable crossborder arrangements referred to in article 3.24 of the Directive, and which the Regulation itself identifies as arrangements pertaining to hallmark category A.3, i.e., arrangements that have substantially standardised documentation and/or structure and are available to more than one relevant taxpayer without a need to be substantially customised for implementation.

Parties required to report information and reporting frequency

The reporting obligation becomes effective if the arrangement to which it refers has been previously reported. The parties required to report information are the intermediaries, who must file reports on a quarterly basis.

Information to be included in the report

The report must include the following information:

a) The identification of the crossborder arrangement originally reported using the reference number assigned to the first reported arrangement.

b) The identity of the intermediaries and relevant taxpayers.

c) The date on which the first stage of the reportable crossborder arrangement was or will be implemented, and the date on which marketable arrangement is made available.

d) The name of the state in which the relevant taxpayer, or relevant taxpayers and intermediaries involved in the reportable arrangement reside, and any other Member States affected by the reportable crossborder arrangement.

e) The name of any other person in a Member State that could be affected by the reportable crossborder arrangement, indicating the Member States with which that person is associated.

Obligation to report on the use in Spain of crossborder tax planning arrangements

Article 49 of the Regulation sets out the terms of the obligation to report the use in Spain of crossborder tax planning arrangements.

Objective scope of the obligation

Notification must be provided of the use of the crossborder arrangements that must be previously reported, regardless of the tax authority with which the report was filed in accordance with the general reporting obligation referred to in article 8 bis ter.1 of Directive 2011/16/EU when any of the following connection criteria exists, applied in the following order:

1. When the relevant taxpayer is a resident for tax purposes in Spain.
2. When the relevant taxpayer has a permanent establishment in Spain that benefits from the arrangement.
3. When the relevant taxpayer received income or generates profits in Spain in cases where the arrangement is related to the income or profits.
4. When the relevant taxpayer carries out an activity in Spain and the arrangement is included within that activity.

Parties required to report information and reporting frequency

This reporting obligation falls exclusively on the relevant taxpayers, who must file reports on an annual basis.

Information to be included in the report

The report must include the following information:

a) The identity of the intermediaries and relevant taxpayers.

b) The identification of the crossborder arrangement originally reported using the reference number assigned to the first reported arrangement.

c) The date on which the crossborder arrangement was used.

d) Any information that was changed on using the arrangement with regard to the information provided in the original report on the arrangement.
e) Value of the tax effect deriving from the arrangement during the year to which the report refers, understood to be the result caused by the arrangement in Spain, in terms of tax liabilities, including the tax advantage.

Reporting deadlines and forms

Reporting deadlines

Both the Regulation and the Order set the following deadlines for filing the reports based on the type of obligation to which they refer.

Reporting obligations related to certain tax planning arrangements (Form 234)

As a **general rule**, information on crossborder tax planning arrangements must be reported within **30 calendar days** following the date on which the obligation to report the arrangement is triggered. That means 30 calendar days after the date on which the arrangement is made available, the date on which the arrangement can be implemented or the date of the first step of implementation of the arrangement, whichever occurs first.

When the report must be filed by secondary intermediaries, the 30-calendar-day period will be calculated from the day following the date on which those intermediaries directly, or indirectly through other parties, provided aid, assistance or advice.

When this report must be filed by a relevant taxpayer as a result of receiving notification from another intermediary within the deadline that the latter is exempted from the reporting obligation as a result of professional secrecy privilege, the 30-calendar-day period will be calculated from the day following the date on which that notification is received.

A common 30-calendar-day period starting on April 14, 2021, has been established as **a special rule for arrangements originating before April 14, 2021**, although a distinction must be made between the following arrangements:

(i) Arrangements where the first step f implementation occurred between June 25, 2018, and June 30, 2020 (arrangements of the "first transitional period"), will be reported within 30 calendar days after April 14, 2021. Deadline on May 14, 2021.

(ii) Arrangements where the reporting obligation was triggered between July 1, 2020, and April 14, 2021 (arrangements of the "second transitional period") must also be reported within 30 calendar days after April 14, 2021. Deadline on May 14, 2021.

Obligation to report updated information on marketable crossborder arrangements (Form 235)

As a **general rule**, this report will be filed within the calendar month following the end of the calendar quarter in which marketable crossborder arrangements have been made available after the originally reported arrangement.

The filing must take place within the 30-calendar-day deadline after the date on which the Order enters into force (April 14, 2021), **as a special rule for marketable crossborder arrangements made available after the originally reported arrangement, between July 1, 2020 and March 31, 2021**.

Obligation to report information on the use of certain crossborder tax planning arrangements (Form 236)

This report must be filed during the final quarter of the calendar year following the year in which the crossborder arrangements that had to be previously reported have been used in Spain.

Channels for reporting information

The reports must be filed online by sending an electronic message subject to the conditions and procedures established under articles 16 and 17 of Order HAP/2194/2013, of November 22, and in line with the content established by the annexes to the Order. Individuals required to report information may use the Cl@ve system.

Publication of arrangements reported through the tax authority's electronic office

The tax authorities may publish on their website, for informational purposes only, the most relevant crossborder tax planning arrangements that have been reported including, if appropriate, information regarding the system and the tax classification or qualification relating to each one.

For additional information, please contact Cuatrecasas.