
Spain publishes Draft Bill transposing Council Directive (EU) 2018/822, of May 25 (DAC 6)

Legal flash

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The Spanish Congress of Deputies has begun the parliamentary process of the draft bill transposing directive “DAC 6” to national law (“the Draft Bill”). Its content varies substantially from the Preliminary Draft Bill released for public consultation.



Council Directive (EU) 2018/822, of May 25 (known as “DAC 6”), establishes obligations to report certain potentially aggressive crossborder tax planning arrangements designed by tax intermediaries and companies.

This Legal Flash analyzes the developments introduced by the Draft Bill transposing DAC 6 with regard to the Preliminary Draft Bill published in June 2019 that was released for public consultation.

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On May 22, 2020, the Official Gazette of the Spanish Parliament published the text of the [Draft Bill modifying Act 58/2003, of December 17, the General Tax Act, 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 arrangements](#).

Having closed the public consultation process of the Preliminary Draft Bill and completed the formalities for the Report of the General Council of the Spanish Judiciary and the Opinion of the Council of State, the Draft Bill was approved by the Spanish Council of Ministers on May 12, 2020 and submitted to the Spanish Parliament for parliamentary processing.

This Legal Flash gives an overview of the most significant amendments included in the Draft Bill compared to the text of the Preliminary Draft Bill, the most noteworthy of which is the obligation to report potentially aggressive tax planning arrangements not being enforceable under the duty of professional secrecy of intermediaries. For more details on the Preliminary Draft Bill, see our [Legal Flash of July 8, 2019](#).

It should be noted that the observations below are based on the text of the Draft Bill, which may be amended during the parliamentary process.

Reporting obligations involving potentially aggressive crossborder tax planning arrangements

- 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 arrangements (known as “DAC 6”), establishes new reporting obligations for “tax intermediaries” and “relevant taxpayers” to inform of certain crossborder arrangements that could potentially be used for aggressive tax planning.
- Tax intermediaries are defined as persons or entities that design, market, organize or make available for implementation or manage the implementation of a reportable crossborder arrangement (the “main intermediary”). An intermediary is also any person who 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 (the “secondary intermediary”).



- The obligation lies mainly with tax intermediaries, or, only if there is no such intermediary, with the relevant taxpayers.
- As well as the obligation to file information on reportable crossborder tax planning arrangements, it regulates (i) the obligation to update on a quarterly basis the information on certain crossborder arrangements, known as “standardized arrangements” (those without a need to be substantially customized for implementation by the taxpayer and that have been previously notified); and (ii) the obligation for relevant taxpayers to report annually on the crossborder arrangements subject to prior reporting they may have implemented, regardless of the tax authorities to which they were reported.
- The Draft Bill submitted for parliamentary processing may introduce amendments related to the concept of crossborder tax planning arrangement. Also, it may modify the regulation of cases where the reporting obligation would not be enforceable on intermediaries under the duty of professional secrecy, shifting that reporting obligation to intermediaries that are not bound by that duty or, if there are no such intermediaries, on relevant taxpayers and companies.

Exemptions from the concept of crossborder tax planning arrangements subject to information disclosure

- The Draft Bill includes a specific provision under which agreements, legal transactions, schemes or crossborder transactions based on **tax regimes that have been notified to and expressly authorized by a European Commission decision** are not considered arrangements subject to the reporting obligation.

Exemptions from the reporting obligation under the duty of professional secrecy

- The Draft Bill provides an independent definition of the scope of the duty of professional secrecy for the purposes of the Directive, unlike the Preliminary Draft Bill, which proposed regulating the non-enforceability of the reporting obligation



under the duty of professional secrecy in accordance with article 93.5 of the General Tax Act.

- Thus, it would allow non-compliance with the reporting obligations of relevant intermediaries, regardless of the economic activity they may carry out, that have given advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable crossborder arrangement among those specified in the Directive for the sole purpose of assessing the adjustment of that arrangement to applicable regulations, without facilitating its implementation.
- Therefore, the recommendations put forward in the Report of the General Council of the Spanish Judiciary dated October 4, 2019, and the essential observations of the Opinion of the Council of State dated March 5, 2020, have been taken into account as regards lawyers' duty of professional secrecy. These recommendations and observations considered that lawyers' duty of professional secrecy can be enforced when their actions fall within the scope of the duties specific to the legal profession, i.e., defense and legal advice, although in this latter case it is necessary to distinguish between "participative advice" (when the lawyer is at the same level as the taxpayer and has designed the tax planning arrangement) and "neutral advice" (when the lawyer analyses how the arrangement fits into applicable law and the legal consequences that may derive from implementing it). Only in the case of neutral advice can lawyers invoke the right of professional secrecy and not report a crossborder tax planning arrangement.
- Note that the exemption from the reporting obligation set out in the Draft Bill applies not only to lawyers but **also to other intermediaries that are not lawyers**, in line with the observations of the Council of State.
- Intermediaries exempted from the reporting obligation under the duty of professional secrecy must give certified notification of this exemption to all other relevant intermediaries and taxpayers involved in these arrangements, who will become obliged to submit the declaration as provided under applicable regulations.



Penalties

- The Draft Bill now classifies as **serious** infringements those involving **information not being provided within the deadline, and the filing incomplete, inaccurate or false information**. The Preliminary Draft Bill classified them as very serious. Based on this amendment, offenders will no longer be liable for the collateral effects linked to very serious infringements, such as suspension from the practice of their activities or from participating in public tenders.
- Moreover, the Draft Bill **increases the penalties** imposed on these infringements to €2,000 for each piece of data or data set (instead of €1,000) set at a minimum of €4,000 (instead of €3,000) and a maximum equivalent to the fees or tax value resulting from the arrangement. However, it clarifies that the maximum amount will not apply if it is lower than €4,000 to ensure the minimum amount takes precedence.
- The Draft Bill also indicates that these minimum and maximum amounts will be halved when the information is filed after the deadline without prior notice from the tax authorities.
- The Draft Bill also provides clarification regarding **returns that supplement or substitute** a previous return that are filed without prior notice: if the previous return was filed on time, but providing incomplete, inaccurate or false information, the penalty applicable to the first return filed will be substituted for the penalty associated with the infringement of filing the return after the deadline.
- Moreover, amendments have been made to the penalty system applicable to infringements committed by intermediaries exempt from reporting obligations under the duty of professional secrecy. In these cases, exempt intermediaries must give certified notification of this exemption to all other relevant intermediaries and taxpayers. Not fulfilling this obligation is considered a minor infringement, punishable with a fine of €600. The Draft Bill states that this infringement will be classified as **serious if, as a result of the lack of notification, the arrangement was not reported by whoever was obliged to do so** (namely, other intermediaries or the relevant taxpayer), resulting in an associated penalty of €2,000, carrying a minimum of €4,000.



Information on mechanisms of the transition period

- The single transitory provision of the Draft Bill amends the provision set out in the Preliminary Draft Bill, and now **only includes arrangements the first phase of implementation of which was carried out between June 25, 2018, and June 30, 2020**. In this regard, the Preliminary Draft Bill laid down the obligation to report all arrangements in respect of which the reporting obligation was triggered between these two dates. As to the triggering of this obligation, this included not only “customized” arrangements the first phase of which had been implemented, but also marketable arrangements made available, and also standardized arrangements ready for implementation during this period.
- The Draft Bill has maintained the period to report these arrangements, namely between July 1 and August 30, 2020. However, the deadline is likely to be extended to November 30, 2020, in the framework of the [Proposal for a Council Directive](#) published by the European Commission on May 8, 2020, on deferring certain time limits for the filing and exchange of information due to the COVID-19 pandemic.

The Basque Country and Navarre (chartered communities)

- The Draft Bill has removed the mention made in the Preliminary Draft Bill, according to which the regulation would also be applicable to tax authorities in the chartered communities of the Basque Country and Navarre.
- It is worth noting that the transposition of DAC 6 has already been carried out in Navarre, and in the provinces of Álava and Gipuzkoa, and is yet to be approved in the province of Biscay.



For additional information, please contact Cuatrecasas.

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