G A _ P

Gómez-Acebo & Pombo

Publication of legislative proposals to transpose the DAC6 Directive

Diego Martín-Abril y Calvo
Of counsel, Gómez-Acebo & Pombo

Marta Algaba Dueñas
Associate Tax Lawyer, Gómez-Acebo & Pombo

On 20 June 2019, the Ministry of Finance published legislative proposals[1] to transpose the Directive[2] concerning the reporting of potentially aggressive cross-border tax-planning arrangements.

The purpose of Directive (EU) 2018/822, one of the latest European Union initiatives in the field of tax transparency, is to lay down the obligations of intermediaries (in general, tax advisors) or, where appropriate, of the taxpayers themselves, in reporting to the tax administration those cross-border tax-planning arrangements that, containing at least one of the hallmarks listed therein, are characterised as potentially aggressive. It should be pointed out that these rules will apply to all tax administrations, including those pertaining to "foral"[3] territories.

[1] Draft bill amending the General Tax Act 58/2003 of 17 December and Draft Royal Decree amending the general regulations on actions and procedures for tax management and inspection and implementing common rules on procedures for the application of taxes, approved by Royal Decree 1065/2007 of 27 July. The foregoing are available for public consultation and objection until 19 July.

[2] 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 cross-border arrangements.

[3] Generic name used in Spain for all the institutions of the autonomous administration and legal systems of the former Kingdom of Navarre and the former seigniories of Araba-Alava, Gipuzkoa and Biscay, constituting Navarre and the Basque Country, respectively, which, for various historical vicissitudes, have been maintained.

The Spanish tax administration must exchange the information received on cross-border arrangements that are potentially linked to aggressive tax planning with the tax administrations of the other 27 Member States of the European Union.

Those cross-border arrangements in respect of which reporting obligations have arisen during the transitional period between 25 June 2018 (date of entry into force of the Directive) and 30 June 2020 (date of application of the Directive) must be reported in July and August 2020.

Prior to analysing the above pieces of legislation, and in accordance with their preambles, the following should be noted:

— On the one hand, the obligation to report a cross-border arrangement does not mean, per se, that such arrangement is fraudulent or elusive, but only that certain indicative tax-planning circumstances apply that make reporting thereof warranted.

— On the other hand, the fact that a tax administration does not react to a reportable cross-border arrangement shall not imply any acceptance of the validity or tax treatment of that arrangement.

Generally speaking, these proposals follow the same line as the Directive being transposed. In short, the most important issues are set out below.

- **Persons liable to report and professional secrecy**

  The definition of intermediary[4] , in line with the Directive, is maintained in broad terms, with the reporting obligations primarily lying with the intermediary and, failing that, with the relevant taxpayer himself.

  The personal scope of the duty of professional secrecy is regulated for the purposes of the aforementioned reporting obligations, this being one of the most relevant issues of the draft bill.

  Thus, the duty of professional secrecy is expressly recognised for all those who are regarded as intermediaries under the terms laid down in the Directive, irrespective of the business activity carried out (therefore, lawyers and non-lawyers). Professional secrecy extends to private non-financial data and confidential data referred to in Art. 95 of the General Tax Act that become known as a result of the provision of professional advice or litigation services.

[4] Any person involved in designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement. Likewise, any person who provides, directly or by means of other persons, assistance with respect to the performance of the above activities.

It is also expressly provided that those intermediaries who have reported the cross-border arrangements referred to in the Directive will not incur any liability to the taxpayer, as such reporting will not constitute a breach of contractual or statutory restrictions on information disclosures.

In addition, a possibility is provided for the intermediary to be released from the duty of professional secrecy by way of a reliable authorisation from the relevant taxpayer and, in this case, the reporting obligations remain with the former. On the other hand, there is no option of the reporting obligations being shifted "voluntarily" from the intermediary to the relevant taxpayer.

- **Cross-border arrangements subject to reporting obligations**

  Under the proposals and on the same lines as the Directive, the obligation to report arrangements (concept defined in broad terms) "only" applies to those arrangements that are of a cross-border type, leaving transactions in Spain (national arrangements) outside the scope of application.

  Similarly, with the exception of indirect taxes, in particular the value-added tax, excise duties and tariffs, reporting obligations apply in respect of all taxes.

  Reportable are those cross-border tax-planning arrangements that, containing at least one of the hallmarks listed therein, are characterised as potentially aggressive, in certain cases additionally requiring a "main benefit".

  In this respect, it should be noted that (i) no additional hallmarks are added to those set out in the Directive, but certain aspects of them are developed or the interpretative criteria are expressly indicated in respect of certain specific hallmarks (i.e., automatic exchange of information, beneficial ownership or transfer pricing); (ii) when the "main benefit" test is understood to be fulfilled is clarified, such being the case where "*the main effect or one of the main effects that can reasonably be expected, taking into account all relevant factors and circumstances, is the realisation of tax savings*"; (iii) any reduction in the tax base or tax liability in terms of tax due, as well as the generation of tax bases, rates, rebates or any other relief that may be offset or deducted in the future, expressly and additionally including deferments as an advantage, are regarded as tax savings; and (iv) the existence of tax savings in an arrangement is determined taking into consideration all associate companies, regardless of the tax jurisdiction.

- **Birth of reporting obligations**

  In order to determine the moment at which reporting obligations arise, the characteristics of the arrangement will have to be taken into account, distinguishing several cases: (i) standardised arrangements, which must be reported on the day after they are made available for

implementation; (ii) arrangements that have substantially standardised documentation and/or structures but need to be substantially customised for implementation, which must be reported on the day after they are made available for implementation, and, lastly; (iii) remaining arrangements, which must be reported when the first step in their implementation has been taken, that is, when implemented in such a way as to generate some legal or economic effect.

- **Content of reportable arrangements**

  The proposals clarify that detailed information should be provided not only as regards national provisions, but also as regards foreign provisions, that form the basis of the cross-border arrangement. Likewise, in relation to the value of the arrangement, it is specified that it is the value of the "*tax effect*" (i.e. result produced in Spain, in terms of tax due, of the reported arrangement, which should include, where appropriate, tax savings), but not the value of the transaction.

  In any case, the data reportable by the taxpayers will be developed and specified by the appropriate Ministerial Order regulating the information return form. In summary, this will involve the economic and legal data of the cross-border arrangement with tax implications.

- **Penalties**

  Bearing in mind that the Directive gave Member States a free hand to lay down the rules on penalties, provided that they be "effective, proportionate and dissuasive", the draft bill provides specific rules on penalties linked to non-compliance with the aforementioned obligations.

  In general terms, both the late filing of information returns and the filing of incomplete, inaccurate or false information returns are classed as very serious tax infringements, the penalty consisting of a fixed pecuniary fine of 1,000 euros for each item or set of data with a minimum of 3,000 euros and a maximum equivalent to the fees earned or to be earned or equivalent to the value of the tax effect derived from the cross-border arrangement in question, depending on whether the reporting obligations lie with the intermediary or the taxpayer, respectively. In the absence of fees, the limit shall refer to the market value of the activity that would have given rise to the consideration of an intermediary.

  The amount of the penalty may be reduced by half if the information has been filed outside the legally prescribed period without a prior requisition from the tax administration.

  Finally, it should be noted that the Spanish Tax Agency will publish on its website, for information purposes only, the most important cross-border arrangements to have been reported and, where appropriate, information on the tax scheme, characterisation or classification applicable in each case.

Without prejudice to the foregoing, attention must be paid to the possible modifications that the aforementioned legislative proposals may undergo until they are definitively adopted, with the practical consequences that may derive therefrom, both for the intermediaries and for the relevant taxpayers themselves.