



Law 10/2020 amending General Taxation Law as regards transposition and enforce of DAC 6 in Spain

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Law 10/2020 of December 29: the first step of DAC 6 implementation in Spain

On December 30, 2020, Law 10/2020, of December 29, was published, modifying Law 58/2003, of December 17, General Taxation, in transposition of Council Directive (EU) 2018/822 of 25 May 25 2018, amending Directive 2011/16/EU as regards the automatic and mandatory exchange of information in the field of taxation in relation to cross-border arrangements subject to communication of information.

A future Regulation is required, and an Order that approves the return models. Interpretative guides could also be released by the Tax Agency. Therefore, the full scope of the DAC6 obligations is not known at this time, and we will update this information as soon as we have this complementary regulation.

This Law constitutes the long-awaited transposition into Spanish law of Council Directive (EU) 2018/822, of 25 May 2018, known as “DAC 6” or the “Intermediaries Directive” (hereinafter, the Directive), which establishes the obligation on so-called “intermediaries” to report cross-border arrangements that could be deemed to constitute aggressive cross-border tax planning, to the tax authorities.

The principal objectives sought through DAC 6 are: (i) to obtain information on potentially aggressive tax-planning arrangements affecting two member states or one member state and a third country, placing the principal obligation not on the taxpayer but on the “intermediaries”, while also providing for an automatic exchange of such information between EU tax administrations; and (ii) to dissuade tax avoidance and evasion practices, in other words, to implement measures that effectively contribute to preventing and combatting tax fraud.

The Directive entered into force on 25 June 2018, with member states given until 31 December 2019 to transpose it and pass implementing regulations, with a view to its entry into force as of 1 July 2020. However, in light of the pandemic, [Council Directive \(EU\) 2020/876](#), of 24 June 2020 granted member states the option to defer the deadline for its practical enforcement until 1 January 2021. Spain exceeded the deadline for completing the transposition process, doing so with just a few days to go until it is to take effect.

The majority, albeit not all, of the member states have taken advantage of the above deferral, according to which the new time limits for commencing enforcement of the DAC6 obligations are as follows (**at this time the dates for the first communications in Spain are not yet known**, subject to be determined by regulations):

- The ordinary 30-day period for filing information on cross-border arrangements will begin on 1 January 2021.
- In the case of arrangements for which the 30-day reporting period began between 1 July 2020 and 31 December 2020, the relevant start date is deferred to 1 January 2021 – which will mark the beginning of the 30-day period for reporting all such arrangements *en bloc*.
- The deadline for filing information on reportable cross-border arrangements from the transitional period (those in respect of which the first step in implementation was made between 25 June 2018 and 30 June 2020), is deferred to 28 February 2021.
- The first exchange of information between EU Member States will take place on 30 April 2021.

Transposition process in Spain

On 12 May 2020, the Council of Ministers approved the Draft Law for the transposition of DAC6, triggering commencement of the ordinary legislative process that has ultimately led to the publication of Law 10/2020.

DAC6 is to be incorporated into Spanish domestic law by means of the pertinent amendment done to General Taxation Law 58/2003 of 17 December 2003, in the case of aspects that may only be regulated through primary legislation, and to the General Regulations on Tax Management and Inspection Proceedings, approved by Royal Decree 1065/2007 of 27 July 2007, in the case of all other matters.

The latter regulations will be key to defining the obligations arising from DAC6 in Spain as they must clearly set out the essential definitions of cross-border tax-planning arrangements, hallmarks and intermediaries. They must also define other essential aspects of the new tax obligation to supply information, such as the scope, deadlines for filing and content of the relevant information.

Model tax returns must also be approved by the State Tax Agency (foreseeably forms 234, 235 and 236) and, as administrations in other countries have done, the Spanish tax authorities are expected to issue guidelines on interpretation, to facilitate understanding and define the scope of DAC6.

Content of the regulations included in Law 10/2020

Law 10/2020 introduces two new additional provisions (twenty-three and twenty-four) to the General Taxation Law. These new provisions set out the obligations arising for intermediaries and relevant taxpayers from cross-border tax-planning arrangements and establish the infringements and penalties regime, while giving the Government powers to define the regulations that are to implement such obligations.

We examine the content of the Law in greater detail below.

1. Reporting obligations of intermediaries and relevant taxpayers

In line with the Directive, the Law provides for **five scenarios** in which there is a reporting

obligation on intermediaries or the relevant taxpayers, and refers to the future Government's regulations to develop these specific obligations. The reporting obligations are the following:

- a. Intermediaries and, in the absence thereof, the relevant taxpayers, must file information on cross-border arrangements presenting any of the hallmarks listed in Annex IV to the Directive. In this regard, the Spanish legislation does not extend the scope of the closed list of hallmarks contained in the Directive.
- b. Intermediaries must file information on updates to cross-border arrangements classed as "marketable".
- c. The relevant taxpayers must file information on the use of the cross-border arrangements referred to in the two preceding sections.
- d. Intermediaries that are exempt from the reporting obligation due to professional privilege must duly notify the other intermediaries and relevant taxpayers participating in the arrangements of such exemption, as the relevant reporting obligation will fall to them as a result.
- e. Persons or entities that are subject to the reporting obligation and have filed the cross-border arrangements return must notify the other intermediaries or relevant taxpayers, as the case may be, of such filing, on the terms to be set forth in the regulations, and such other intermediaries or relevant taxpayers will be exonerated from their reporting obligation as a result of such filing. This obligation applies to both intermediaries and relevant taxpayers.

Arrangements that are based on **tax regimes that have been reported and expressly authorised by a European Commission Decision** are **expressly excluded** from classification as a reportable cross-border tax-planning arrangement.

2. Professional privilege

The Spanish Law includes the waiver from the obligation to file information due to professional privilege set out in section 5 of article 8ab of Directive 2011/16/EU, stating that, irrespective of

the activity in which they are engaged, intermediaries who have advised on the design, marketing, organisation, making available for implementation or management of implementation of a cross-border arrangement **“solely for the purposes of assessing the alignment of such arrangement with the applicable legislation and without seeking or facilitating implementation thereof”** shall be exempt from the reporting obligation.

It also expressly provides that the intermediary may be released from its duty of professional privilege by means of an authorisation communicated by duly authenticated means by the relevant taxpayer.

Lastly, the Law provides that the filing by intermediaries of information on cross-border tax-planning arrangements, under the applicable legal regime, shall not constitute a violation of any contractual or legislative restrictions on the disclosure of information, nor shall it entail any liability whatsoever for them with respect to the relevant taxpayers.

3. Penalty regime

Failure to file information returns on time, or the filing of incomplete, inaccurate or false returns, shall be classed as serious (‘grave’) infringements and shall be subject to the penalty consisting of a fine of **Euros 2,000 for each item or set of data** in relation to a single arrangement, subject to a minimum of Euros 4,000 and a maximum equal to the amount of the fees received or to be received for each arrangement (in the case of intermediaries) or to the value of the tax effect of each arrangement (in the case of relevant taxpayers). The above maximum limit shall not apply where it is lower than Euros 4,000.

Where the arrangement has no value and the infringing party is the relevant taxpayer, the above maximum limit will be equal to the fees received or to be received by an intermediary, or, where no fee is to be received, the limit will refer to the *“market value of the activity giving rise to intermediary status, calculated according to the provisions of article 18.1 of Corporate Income Tax Law 27/2014, of 27 December 2014.”*

The above amounts will be **reduced by half** where the information was filed late but without a prior request from the tax authorities, and where

incomplete or inaccurate returns or returns containing false information that were filed on time are rectified after the filing deadline but without a prior request.

Two minor (‘leve’) penalties are also envisaged for infringements concerning communication, not to the tax authorities but between intermediaries and relevant taxpayers, both consisting of a **fine of Euros 600**:

- The first, where an intermediary that is exempt from the reporting obligation owing to a duty of professional privilege fails to notify the other intermediaries and relevant taxpayers participating in the arrangement of such exemption by the regulatory deadline or where it does so omitting data, or including false, incomplete or inaccurate data.

These infringements will be classed as serious (‘grave’) where the failure to notify on time by an intermediary leads to a failure to report the relevant arrangement in the initial phase by the other intermediary or relevant taxpayer, as the case may be, who would have been obliged to file the relevant return had they been duly notified. In such cases, the penalty for the intermediary infringing its obligation to inform of its professional privilege will be the general penalty that would have corresponded to the infringement of failure to file the relevant return.

- The second, where persons or entities that are obliged to file information have filed the return but do not notify the other intermediaries or, as the case may be, other relevant taxpayers who are exonerated from the reporting obligation by virtue of such filing, that they have filed the return or where they do so omitting data or including false, incomplete or inaccurate data.

Lastly, another penalty is envisaged for filing information returns via means other than electronic and telematic means, in cases where the filer was obliged to do so via such means, which will be classed as a serious (‘grave’) infringement punishable with a fine of Euros 250 per item or set of data, subject to a minimum of Euros 750 and a maximum of Euros 1,500.

4. Transitional regime

The sole transitional provision of Law 10/2020, entitled “Transitional regime for the obligations to file information in respect of reportable cross-border arrangements performed prior to the entry into force of this Law” provides that cross-border mechanisms “*in which the first step in implementation*” has been made, on the terms set out in regulations, **between 25 June 2018 and 30 June 2020**, must be reported by the regulatory deadlines.

The content of this provision merely reproduces the relevant provision of the Directive.

- In **Vizcaya**, [Provincial Law 6/2020 of 15 July 2020](#) amended Vizcaya Provincial Taxation Law 2/2005 of 10 April 2005, to include additional provisions 33 and 34 and transitional provision 1.

In some cases, the above provisions are based on those of the Central Government’s Draft Bill and, as regards certain relevant matters such as the framework of the professional privilege of intermediaries and the amounts of penalties, they thus differ from the definitive provisions of the State Law. Where this is the case, they will presumably be amended to bring them into line with the State regulations.

DAC 6 in some provincial territories

Lastly, it is worth noting that the provincial tax authorities in both Navarre and the Basque Country transposed the DAC 6 before the Central Government of Spain.

These territories have a recognized historical regime that gives them their own normative competence:

- With a view to transposing DAC6 on time in **Navarre**, [Provincial Law 29/2019 of 23 December 2019, on the amendment of various taxes and other tax measures](#), amended Provincial General Taxation Law 13/2000 of 14 December 2000, by introducing two new additional provisions (nos. 34 and 35) and one transitional provision (no. 6, which was subsequently amended by [Provincial Royal Decree Law 4/2020, of 29 April 2020](#)).
- In **Álava**, the Directive was transposed by the original deadline by means of [Provincial Law 22/2019, of 13 December 2019, on tax measures](#), subsequently amended by [Tax Emergency Regulatory Decree 9/2020, of 14 July 2020](#). The above pieces of legislation amended General Alava Provincial Tax Law 6/2005 of 28 February 2005 to include additional provisions 24 and 25.
- In **Guipúzcoa**, [Provincial Law 1/2020 of 24 April 2020, introducing tax modifications relating to the transposition of European Directives and other technical modifications](#) transposes DAC6 by amending the Historic Territory of Guipúzcoa General Taxation Law 2/2005 of 8 March 2005, to include additional provisions 17 and 18 and transitional provision 5, subsequently amended by [Provincial Decree-Law 6/2020 of 21 July 2020](#).

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