Chapter 33: Mandatory Disclosure Rules in Spain

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33.1. Objective of mandatory disclosure rules

In Spain, the implementation of DAC6[1] has been carried out through Law 10/2020 of 29 December 2020 (the Law).[2] Specifically, this Law introduces two additional provisions to General Taxation Law 58/2003 of 17 December 2003[3] that deal with mandatory disclosure rules (MDR) in a broad way. The first provision regulates the disclosure obligation on cross-border tax planning arrangements, whereas the second elaborates on the specific obligations between individuals derived from the former. In addition, such implementation has been completed with certain complementary measures and clarifications included in General Taxation Regulation 1065/2007 of 27 July 2007[4] by Regulation 243/2021 of 6 April 2021 (the Regulation)[5] and three tax disclosure models included in Ministerial Order HAC/342/2021 of 12 April 2021 (the Order).[6]

In this sense, it should be noted that – even with the deferral due to the COVID-19 situation provided in Directive 2020/876/EU[7] – the Law is almost a year late passed the implementation deadline established by the Directive. Similarly, both the Regulation and the Order were approved months later and on different dates. In addition, it should be pointed out that – unlike other Member States – Spain has not approved interpretive guidelines to shed some light on many of the questions raised by these new obligations. The only clarification given by the administration is a series of FAQs related to the tax disclosure models that add nothing new of substance.[8] In general lines – and as will be shown in this chapter – the MDR have been implemented in identical terms to DAC6, making constant references to its wording and deviating from it on rare occasions.

As a starting point, it shall be noted that, before BEPS Action 12,[9] the adoption of MDR had not been considered in Spain. The first initiative in this regard has been the implementation of DAC6 and – in line with the Preamble to the Law – it meets the same objectives described in DAC6.

Thus, it is noted that these new reporting obligations arise from the need for Member States to protect their national tax bases from erosion since tax planning structures have evolved to become particularly complex and often take advantage of increased mobility of people and capital within the European internal market. Typically, these structures consist of mechanisms that operate in several jurisdictions and transfer taxable profits to more favourable tax regimes or that have the effect of reducing the taxpayer's overall tax bill. It is therefore crucial that tax authorities obtain complete and relevant information on potentially aggressive tax arrangements.

Specifically, the reporting obligation pursues two fundamental objectives. On the one hand is that of obtaining information in order to fight against tax avoidance and evasion. Thus, early information will allow tax authorities to react quickly to harmful tax practices and close existing loopholes by enacting legislation or conducting appropriate risk analyses and tax audits. On the other hand is the deterrent effect regarding the implementation of aggressive tax planning mechanisms. In the authors' view – and although not specifically mentioned in the regulations – there is a third objective, which is to detect aggressive tax planning structures more quickly and thus be able to counteract them in time through appropriate legislative changes.

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1. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (2018), Primary Sources IBFD.
2. ES: *Ley 10/2020, de 29 de diciembre, por la que se modifica la Ley 58/2003, de 17 de diciembre, General Tributaria, en transposición de la Directiva (UE) 2018/822 del Consejo, de 25 de mayo de 2018* (29 Dec. 2020).
3. ES: *Ley 58/2003, de 17 de diciembre, General Tributaria* (17 Dec. 2003).
4. ES: *Real Decreto 1065/2007, de 27 de julio, por el que se aprueba el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria* (27 July 2007).
5. ES: *Real Decreto 243/2021, de 6 de abril, por el que se modifica el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria y de desarrollo de las normas comunes de los procedimientos de aplicación de los tributos, aprobado por el Real Decreto 1065/2007, de 27 de julio, en transposición de la Directiva (UE) 2018/822 del Consejo, de 25 de mayo de 2018* (6 Apr. 2021) [hereinafter the Regulation].
6. ES: *Orden HAC/342/2021, de 12 de abril, por la que se aprueba el modelo 234 de "Declaración de información de determinados mecanismos transfronterizos de planificación fiscal", el modelo 235 de "Declaración de información de actualización de determinados mecanismos transfronterizos comercializables" y el modelo 236 de "Declaración de información de la utilización de determinados mecanismos transfronterizos de planificación fiscal"* (12 Apr. 2021).
7. Council Directive (EU) 2020/876 of 24 June 2020 amending Directive 2011/16/EU to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic, OJ L 204 (2020).
8. Agencia Tributaria, *Preguntas Frecuentes Sobre La Obligación De Información De Mecanismos Transfronterizos De Planificación Fiscal* (26 Apr. 2021), available at https://www.agenciatributaria.es/static_files/Sede/Procedimiento_ayuda/GI46-GI47-GI48/FAQ_234_235_236.pdf (accessed 26 Oct. 2022).
9. OECD, *Mandatory Disclosure Rules – Action 12: 2015 Final Report* (OECD 2015), Primary Sources IBFD.

As can be observed, the Law refers indistinctly to the concepts of "tax avoidance", "tax evasion" and "aggressive tax planning", thus creating confusion regarding the objectives pursued. This confusion already arises from DAC6 (for which the preamble also refers interchangeably to these concepts), and it is relevant since it causes problems when defining hallmarks or in relation to the right to not incriminate oneself. This is also evidenced if the origins (BEPS Action 12) are compared to the current situation. In the BEPS Action 12 Final Report, it is established that MDR should be clear and easy to understand while also being effective in achieving their objectives; however, the final result of DAC6 and its implementation in Spain goes one step beyond these guidelines.

Finally, note that, given that the regime has just been implemented in Spain and – as indicated above – the first reporting should have been carried out before 13 May 2021, to date, there is still no information on the types of arrangements that have been reported nor on possible breaches of the obligation. For the same reason, there have not yet been any substantive or formal regulatory changes as a consequence of DAC6 and, accordingly, it is not possible to assess any effect of implementing MDR in Spain.

33.2. What has to be reported (reportable arrangements)?

33.2.1. Temporal scope

In relation to the temporal element, in general, Spanish regulations accord with what is provided by DAC6. This way, it is established that the disclosure shall be made within 30 days following the triggering of certain situations. All of these rules will apply to reportable cross-border arrangements that have arisen as of 1 July 2020. In addition, reportable arrangements for which the first phase of execution was carried out between 25 June 2018 and 30 June 2020 shall be declared within 30 calendar days. For further information, *see* section 33.4.

33.2.2. Substantive scope

33.2.2.1. Taxes covered

Spanish regulations cover the same taxes as DAC6 by establishing that "[t]he disclosure obligation will only be applicable with respect to the taxes referred to in article 2 of Council Directive 2011/16 / EU" [authors' translation].[10] Thus, the scope of DAC6 covers all taxes of any kind with the exception of the VAT, customs duties, excise duties and compulsory social contributions because these are already covered by other EU legislation on administrative cooperation.

33.2.2.2. Persons covered

Regarding the subjective element, in general, Spanish regulations comply with what is provided by DAC6. That is, in relation to reportable persons, the Law establishes that the disclosure obligation falls on the persons or entities that are considered intermediaries or relevant taxpayers by virtue of the provisions of DAC6. For further information, *see* section 33.3.

33.2.2.3. Arrangements covered

It shall be remarked that the disclosure obligation is only placed on international arrangements and, for that purpose, the same cross-border requirements as DAC6 are considered. Specifically, not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction; one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction, etc.

In relation to the arrangements covered – unlike DAC6 – Spanish regulations do intend to define the concept of "arrangement" by establishing that any agreement, legal business, scheme or cross-border operation in which certain requirements are met (namely, fulfilment of a hallmark and cross-border nature) will be considered as a tax planning arrangement subject to disclosure. For these purposes, an arrangement may include, when appropriate, a series of arrangements and may even consist of more than one phase or part. Now, as a novelty, it is confusingly established that payments derived from the formalization of reportable arrangements that do not have their own substantivity to require individualized treatment will not be considered as a reportable arrangement (without prejudice to their disclosure as part of the content of the arrangement). Despite the confusion of this wording, in the authors' view, its aim is to avoid overreporting in the assumptions of complex arrangements composed of several steps.

Finally, note that there has not been a "de minimis filter" established that is understood as a minimum amount below which the arrangement shall not be reported.

10. *See* the Regulation.

33.2.2.4. Main benefit test (threshold requirement)

In exactly the same way as DAC6, Spanish regulations establish that "[t]hat test will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage" [authors' translation].[11]

In addition, some examples of situations in which this benefit is obtained are listed. Thus, it is understood that, for these purposes, a tax saving is any reduction in the tax base or tax rate in terms of tax debt, including the deferral in the accrual of the same. This saving would have corresponded if the cross-border arrangement subject to declaration had not been carried out or when the realization of the taxable event is totally or partially avoided through the completion of such arrangement. Likewise, the generation of tax bases, fees, deductions or any other tax credit that may be offset or deducted in the future will be considered as tax savings. Also, it is pointed out that, when associated persons or entities participate in the arrangement (in the sense established by DAC6), the existence of tax savings will be verified considering the effects referred to in the previous paragraph in the group of the associated entities, regardless of the tax jurisdiction.

In this regard, it shall be noted that the tax saving requirement is reminiscent of the Spanish national general anti-avoidance rule (GAAR) that is established in article 15 of the General Taxation Law, as follows:

> It will be understood that there is a conflict in the application of tax regulations when the realization of the taxable event is totally or partially avoided or the tax base or debt is reduced through acts or businesses in which the following circumstances occur:
>
> a) That, individually or as a whole, are notoriously artificial or inappropriate for the achievement of the result obtained.
>
> b) That their use does not result in relevant legal or economic effects other than tax savings.
>
> [...]
>
> In those tax operations that are carried out as a result of the provisions of this article, the tax will be levied by applying the provision that would have corresponded to the usual acts or businesses, eliminating the tax advantages obtained and adding default interest. [authors' translation.]

Thus, it can be observed that both provisions are of a wide-ranging nature in the sense that, in practically all cases (even if there are valid economic reasons), the main benefit criterion will be met due to the fact that the tax impact is considered in any significant transaction.[12] However, Spanish anti-abuse regulations are stricter or narrower in their scope than DAC6 as – in addition to the tax saving condition – a component of artificiality is explicitly required. In this way, there would be situations that might not fall within the scope of the GAAR but that should be reported under the DAC6 regime.

33.2.2.5. Hallmarks

As a starting point, it is necessary to highlight that the DAC6 hallmark system has been strongly criticized by the Spanish doctrine. To the extent that Spanish regulations are copying DAC6, these critics should be applicable. Thus, Calderón Carrero points out that – from the perspective of legal certainty and legality – DAC6 deserves criticism. This is due to the fact that taxpayers and tax intermediaries face the risk of sanctions for non-compliance with a regulation that is based on very broad concepts of unclear limits (e.g. the hallmarks used to identify potentially aggressive arrangements have a wide scope to the extent that, in many cases, intermediaries or taxpayers may lack sufficient information to determine their existence).[13] In the same vein, Sanchez López notes that DAC6 does not comply with the principle of proportionality, fundamentally given the lack of definition of the objective element (that is, due to the reportable information delimited by the so-called hallmarks). Hallmarks are, in many cases, objective and unrelated to the existence (or lack of existence) of tax risk in the cross-border arrangements and – even in some cases – independent of the existence of any tax advantage, especially if the potential aggressive nature of such information is considered.[14]

That said, general hallmarks refer to what is established in Annex IV of DAC6, although certain clarifications are provided in the Regulation as follows (note that only those hallmarks that add more information are listed as follows):

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11. *See* id.
12. A. Báez Moreno, *La cláusula del propósito principal (Principal Purpose Test): Un análisis crítico de la acción 6 del proyecto BEPS*, Revista de Contabilidad y Tributación 404 (2016).
13. J.M. Calderón Carrero, *El nuevo marco europeo de transparencia sobre esquemas transfronterizos sujetos a declaración por intermediarios fiscales y contribuyentes: las "EU tax disclosure rules" y sus implicaciones*, Quincena Fiscal 10, sec. IV (2018).
14. M.E. Sánchez López, *La obligación de declaración obligatoria y el Compliance: La figura del intermediario y la protección de los derechos de los obligados tributarios*, Quincena Fiscal 22, sec. 1 (2019).

33.2.2.5.1. A.1: Confidentiality

It will be understood that hallmark A.1 concurs independent of whether the link of the fees with the tax saving is total or partial.

33.2.2.5.2. C.1: Payments between associated enterprises

In relation to the term “cross-border payments”, it includes cross-border expenses regardless of whether or not the payment was made. It will also be considered that the payment is made between two associated companies for the purposes of the hallmark when, fulfilling the rest of the requirements demanded by the regulations, the payment is made between them indirectly through one or more persons or interposed entities. The recipient of the cross-border payment shall be deemed to be the indirect recipient of the payments if they had been fiscally attributed to the recipient by virtue of tax systems of tax transparency, imputation of income or the equivalent.

Regarding the requirement that the recipient does not apply any corporate tax or applies corporate tax at the zero or near zero rate, it will be determined in accordance with the following rules:

- Any identical or analogous tax to the corporate tax required in Spain will be considered corporate tax.
- It will be understood that a rate of 0 or almost 0 is applied when the country or territory of residence of the recipient establishes a nominal tax rate of less than 1%.

Finally, it is clarified that those tax regimes that had been authorized by EU law will not be considered as preferential tax regimes.

33.2.2.5.3. C.4: Transfer of assets when there is a material difference in the amount treated as payable

For these purposes, the “material difference” in value between the jurisdictions involved will be determined in accordance with the following rules:

- Significant differences that have occurred as a result of the difference in values for exclusively accounting and non-tax purposes will not be included.
- The difference greater than 25% between the tax values in both jurisdictions will be considered a material difference.

In this way, Spanish regulations try to objectify a concept that is certainly ambiguous (“material difference”) and to provide the hallmark with greater legal certainty.

33.2.2.5.4. D.1: Arrangements aiming at the circumvention of financial account transparency rules

In the first place, it is established that the hallmark will be interpreted in accordance with the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures from the OECD.[15]

Having said this, hallmark D.1 will be present when a mechanism meets any of the following conditions (in addition to the ones listed by DAC6):

- that may have the effect of undermining the obligation to provide information on financial accounts established in the General Taxation Law (twenty-second additional provision). This article (which implements Directive 2014/107/EU of the council of 9 December 2014) establishes the obligation to identify the tax residence of the persons who hold the ownership or control of certain financial accounts and to report on them in the field of mutual assistance. It also covers any equivalent agreement on the automatic exchange of information on “financial accounts”, including the FATCA, between EU Member States or with third countries; or
- that takes advantage of the non-existence of the legislation or the agreements provided for in the previous point.

In addition, in relation to the characteristic referred to in hallmark D, it will be understood as referring to the use of entities, instruments or legal structures that eliminate (or intend to eliminate) information about one or more account holders or persons who exercise control on the basis of the automatic exchange of information on financial accounts.

33.2.2.5.5. D.2: Arrangements aiming at the circumvention of transparency rules by hiding the beneficial ownership

Hallmark D.2 shall be deemed to be present if all of the conditions referred to in letters a), b) and c) of the aforementioned section exit cumulatively. In the authors’ view, this clarification was not necessary as the cumulative requirement was already demanded by DAC6.

15. OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* (OECD 2018).

33.2.2.5.6. E: Transfer pricing

It will be understood that none of the hallmarks related to transfer pricing provided for in category E concur when the value of the arrangement has been determined by advance pricing agreements (APAs). To this aim, APAs are those regulated in chapter X of title I of the Corporate Taxation Regulation (Royal Decree 634/2015 of 10 July 2015[16]) or any other prior APAs on transfer pricing that are subject to automatic exchange in accordance with DAC6.

In addition to all of these clarifications, a general exclusion criterion is established as follows: "For the purposes of the reporting obligation, those agreements, legal businesses, schemes or cross-border operations based on tax regimes communicated and expressly authorized by a decision of the European Commission will not be considered as a reportable cross-border tax planning arrangement" [authors' translation]. Such exclusion criterion works as a whitelist in the sense that the addressed arrangements will not have to be reported.

33.3. Who has to report (reportable persons)?

33.3.1. Persons addressed

In relation to reportable persons, the Law establishes that the disclosure obligation falls on the persons or entities that are considered intermediaries or relevant taxpayers by virtue of the provisions of DAC6 (that is, once again, there are no deviations).

Note that the persons or entities that had the legal condition of reportable persons and that had disclosed the arrangement must reliably communicate such submission to the rest of the intermediaries or, when appropriate, to the rest of the relevant taxpayers who – by virtue of that – will be exempted from the obligation to disclose.

33.3.2. Intermediary/promoter

Taking into account the broad definition of a "tax intermediary", such a role might be adopted by both tax advisers/consultants and attorneys. Nonetheless, it shall be noted that, in Spain, there is a material difference between tax advisers and attorneys.

A tax adviser is a professional who manages compliance with the tax obligations of companies and individuals; it is essential to have a solid knowledge of taxes and procedures for the proper exercise of the profession. However, to be a tax adviser, it is not necessary to have a degree; nor it is a regulated profession. On the contrary, attorneys have to obtain a professional degree and comply with the requirements of the Bar Association. Accordingly, attorneys are endowed with greater protection as, for instance, they are protected by legal professional privilege. In this regard, Spanish regulations do not differentiate between in-house and external lawyers, as both of them are considered intermediaries for the purposes of the MDR.

Thus, it can be seen how one of the most conflictive aspects of this element is the breadth in the definition of the subjective dimension of the reporting obligation, which implies – at least at first glance – that everyone involved in the arrangement will be forced to report. As a result, it might affect professionals that do not even have a clear idea of the dimension of the scheme, especially in the case of secondary intermediaries who advise in relation to a part of the arrangement. In this regard, the Spanish tax administration in the FAQ has established that the intermediary with partial knowledge does not have the obligation to disclose since it is not considered an intermediary. If there is no intermediary with full knowledge of the arrangement, the subjects obligated to present the tax disclosure model will be the interested taxpayer.

In the case of multiple tax intermediaries, the same tiebreaker rules as DAC6 apply for determining which one is obligated to report.

Finally, as a novelty, Spanish regulations establish an additional obligation to update information on reportable arrangements for those qualified as intermediaries. Thus, intermediaries shall submit a quarterly tax return updating the information related to those cross-border arrangements already reported. In a nutshell, such a return shall identify those Member States and people that may be affected by the reported arrangement.

33.3.3. Legal professional privilege and other similar sorts of privileges

As inferred from the wording of DAC6, each Member State has the option to grant a waiver of professional secrecy.

Spain has decided to regulate this privilege in two ways, namely (i) it establishes who is protected by the waiver of professional secrecy and when; and (ii) it indicates the conditions for such waiver to be effective.

Thus, all of those who are considered intermediaries for the purposes of the MDR will be exempted from the disclosure obligation due to the privilege of professional secrecy, regardless of the activity they carry out (that is, regardless of whether they are

16. ES: *Real Decreto 634/2015, de 10 de julio, por el que se aprueba el Reglamento del Impuesto sobre Sociedades* (10 July 2015).

consultants, advisers or attorneys). However, this privilege will only apply when the intermediaries have advised with respect to the design, commercialization, organization or management of the execution of a cross-border arrangement of those listed by DAC6. However, such advice must be provided with the sole purpose of evaluating the adequacy of such an arrangement to the applicable regulations and without attempting or facilitating its implementation (the so-called "neutral advice"). In the authors' view, this distinction will give rise to conflictive situations when it comes to clarifying when one is facing one type of advice or another.[17] In any case, the intermediary may be relieved from the duty of professional secrecy if the relevant taxpayer authorizes it by reliable communication.

Additionally, Spanish regulations establish that compliance by intermediaries with the disclosure obligation will not constitute a violation of the restrictions on the disclosure of information imposed by contractual or regulatory means between individuals (e.g. intermediaries and taxpayers). Consequently, disclosure does not imply any type of responsibility for such an intermediary.

Finally, in those cases in which the communication of the information violates the duty of professional secrecy, the exempted intermediary shall communicate such a circumstance within a period of 5 days to the other intermediaries involved in the mechanism and the relevant taxpayer on whom the obligation to disclose will fall. This period will begin the day after the reporting obligation arises.

In this regard, article 93.5 of the Spanish General Taxation Law, which regulates professional secrecy at an internal level, shall be mentioned:[18]

> The obligation of other professionals to provide information foreseeable relevant to the Tax Administration shall not apply to private, non-monetary data that they become aware of by reason of the exercise of their activity, if their disclosure threatens personal and family honor or privacy. Nor shall it reach those confidential data of their clients of which they become aware as a consequence of the provision of professional advisory or defense services.

It is important to highlight that the professional secrecy protected by article 93.5 of the General Taxation Law not only affects professional defence services but also any other professional advisory service. This is, in accordance with Spanish regulation, any data that may be obtained by a professional as a result of the provision of professional advisory or defence services and may be protected by professional secrecy. Henceforth, the tax administration's claim to obtain this information may be denied. Thus, it is stated that the obligation to provide information of tax significance to the tax administration does not apply to taxpayers' confidential data.[19] For these purposes, those who – in accordance with the law – carry out a recognized professional activity, for which the purpose is legal, economic or financial assistance, will be considered as tax advisers.

In this regard, note that the Spanish Lawyers' Bar Association requested in June 2021 that the Spanish Supreme Court grant a precautionary suspension of the Regulation, which implements DAC6. The main claim was that the Regulation severely violated the principle of professional secrecy of legal professionals who work on tax advice. Specifically, it was argued that the transposition carried out by the Spanish government exceeded the principle of professional secrecy contained in Spanish legislation and left the client, who is covered under such principle, defenseless and without the right to a fair trial.[20] The position of the Spanish Supreme Court in this regard is still uncertain, although the authors believe that the appeal will be dismissed because, otherwise, the reporting obligation would be void of content.

33.3.4. Taxpayer (user of the arrangement)

As advanced in section 33.3.1., Spain considers as "relevant taxpayers" the same persons as DAC6 and, in the case of multiple relevant taxpayers, the same tiebreaker rules apply for determining which one is obligated to report.

In addition, a new obligation is imposed on those qualified as relevant taxpayers. Thus, the relevant taxpayer shall submit to the Spanish tax administration an annual declaration on the use of those cross-border arrangements that have been previously disclosed (additional obligation on the use of reportable arrangements). This declaration shall identify the already reported arrangement and indicate any data that has been modified with respect to its first declaration (including any fluctuation in the tax value of the arrangement).

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17. For further information, *see* the Agreement adopted by the Plenary of the Spanish General Council of the Judiciary at its meeting on 26 Sept. 2019, approving its Report on the Draft Law for the transposition of Directive (EU) 2018/822, of May 25 2018, available at: https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Informes/Informe-sobre-el-Anteproyecto-de-Ley-de-transposicion-de-Directiva--UE--2018-822-del-Consejo--de-25-05-2018--que-modifica-Directiva-2011-16-UE-por-lo-que-se-refiere-al-intercambio-automatico-y-obligatorio-de-informacion-en-el-ambito-de-la-fiscalidad-en-relacion-con-mecanismos-transfronterizos-sujetos-a-comunicacion-de-informacion-y-del-Proyecto-de-RD-que-modifica-el-Rgto--Gral--de-las-actuaciones-y-los-procedimientos-de-gestion-e-inspeccion-tributaria-y-de-desarrollo-de-las-normas-comunes-de-los-procedimientos-de-aplicacion-de-los-tributos--aprobado-por-el-RD-1065-2007--de-27-de-julio (accessed 26 Oct. 2022).
18. Note that this right is granted with constitutional protection (art. 24.2 of ES: *Constitución Española* [Spanish Constitution] (29 Dec. 1978), in connection with art. 18).
19. For further analysis, *see* F.A. García Prats, *La transposición en España de la Directiva sobre Intermediarios Tributarios (DAC6)*, AEDAF 14, sec. 3.3.2. (2019).
20. *See*, in this regard, https://www.eleconomista.es/legislacion/noticias/11257409/06/21/La-Abogacia-reclama-al-Tribunal-Supremo-la-suspension-cautelar-del-nuevo-reglamento-de-inspeccion-tributaria-que-les-obliga-a-denunciar-a-sus-clientes.html (accessed 5 Oct. 2021).

33.4. When to report, which information to report and use of reported data

33.4.1. Reporting event and time limits

Deadlines for disclosing the information also comply with what is required by DAC6; however, Spanish regulations provide further clarifications as explained below. In general terms, the disclosure obligation will arise when any of the following circumstances occur:

- The day after the reportable cross-border arrangement is made available for implementation: it will be considered that the "making available" occurs when the intermediary provides the service that has determined its consideration as an intermediary, and the interested taxpayer acquires it definitively. For the purposes of proving the availability, any of the legally admissible means of proof (in particular, documents such as acceptance sheets, reports or invoices, among others) may be submitted in accordance with the provisions of the General Taxation Law (article 106).
- The day after the reportable cross-border arrangement is ready for implementation: it will be considered that the arrangement is ready for implementation when it is in a condition to be executed by the relevant taxpayer.
- When the first step in the implementation of the reportable cross-border arrangement has been made: the first phase of implementation of an arrangement will be considered to have been carried out when it is put into practice, generating some legal or economic effect.

In the case of secondary intermediaries, the obligation will arise the day after the day they provide – directly or through other people – help, assistance or advice in relation to the reportable arrangement. In the event that the persons were obligated to submit the information due to the existence of the prerogative of professional secrecy, it will be understood that the triggering of the obligation occurs when the communication of the existence of such waiver is received.

Finally, it is established that the disclosure shall be made within 30 days following the triggering of the obligation as defined above. All of these rules will apply to reportable cross-border arrangements that have arisen as of 1 July 2020. Reportable arrangements, for which the first phase of execution was carried out between 25 June 2018 and 30 June 2020, shall be declared within 30 calendar days following the entry into force of the ministerial order that completes the implementation of the obligation (13 April 2021). The same situation occurs regarding those reportable arrangements carried out between 1 July 2020 and 31 March 2021 (the day DAC6 should have been implemented/the day it was finally implemented).

At this point, the authors believe it is important to recall that, based on the principle of legal certainty, rules must adjust to a criterion of reasonable predictability. Thus, the Spanish Constitutional Court has stated that this principle protects the confidence of citizens, who adjust their economic behaviour to the current legislation, against regulatory changes that are not reasonably foreseeable. Thus, the retroactivity of the tax regulations could negatively affect the aforementioned principle guaranteed by article 9.3 of the Spanish Constitution.[21]

In this regard, it is necessary to mention what was argued by Soler Roch, who makes a distinction between the concepts of retroactivity and retrospectivity.[22] These two concepts are projected onto two different types of situations referring to the effects of regulatory changes on the position of taxpayers, in relation to consequences arising at a time prior to such changes. Thus, it is understood that there is "retroactivity" in those cases when the new regulations apply to events that occurred prior to its publication. On the contrary, there is "retrospectivity" in those situations when the new regulations have immediate effect without grandfathering in existing situations, as they are applicable to the future consequences of transactions or events that had already occurred previously. Taking into account the circumstances of the case and the type of regulation in question – for the authors – both the retroactive and retrospective effects may violate the requirements of legal certainty, especially if the regulatory change does not meet the requirement of foreseeability and it damages the legitimate confidence of taxpayers without sufficient justification.

In these cases, the Spanish Constitutional Court has established that the balance between the principle of legal certainty and the general interest must be weighed. Thus, the rights and legitimate expectations of taxpayers should not be violated with insufficient or arbitrary justification, but also these rights and expectations cannot imply – above any other consideration – the immutability of the tax legislation. To do this, the principle of proportionality must be taken into account on a case-by-case basis.[23]

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21. ES: *Tribunal Constitucional* [Constitutional Court], 16 July 1987, 126/1987; ES: Constitutional Court, 4 Oct. 1990, 150/1990; and ES: Constitutional Court, 28 Oct. 1997, 182/1997. The same approach has been taken by the Court of Justice of the European Union (ECJ) in IT: ECJ, 29 June 1999, C-60/98, *Butterfly Music Srl v. Carosello Edizioni Musicali e Discografiche Srl*.
22. M.T. Soler Roch, *Reflexiones sobre el efecto retrospectivo en el ámbito tributario*, Nueva Fiscalidad 2, sec. II (2017).
23. ES: Constitutional Court, 31 Oct. 1996, 173/1996; ES: Constitutional Court, 13 Dec. 2001, 234/2001; ES: Constitutional Court, 20 Apr. 2009, 89/2009; and ES: Constitutional Court, 18 May 2009, 116/2009.

In this vein, the Spanish Association of Tax Advisors (AEDAF) appealed in May 2021 to the Spanish Supreme Court regarding the regulations implementing DAC6, on the grounds of their retroactive nature and technical shortcomings. In addition, the Supreme Court was also asked to adopt precautionary measures in order to avoid that the obligation was implemented in such a short period of time.

In the authors' view, the requirement that those arrangements carried out from 25 June 2018 are reported is an assumption of retrospectivity in the terms mentioned above. Given that their reporting deadline is only 1 month and taking into account the doctrine of the Spanish Constitutional Court, it could be understood that this obligation is disproportionate. However, the "announcement effect" of the measure should be considered in the sense that such an implementation had already been announced for months (namely, BEPS Action 12, the DAC6 regulations and the Law) until its effective application in May 2021. Again, the tax community will have to wait to see the position of the Spanish Supreme Court in this regard. For the moment, on 2 June 2021, the Supreme Court already rejected the adoption of the precautionary measures.[24]

33.4.2. Content and form of reporting

Spanish regulations establish that information shall be reported in relation to three different obligations as follows:

- information on cross-border arrangements when any of the hallmarks listed in Annex IV concur (Model 234): this model shall be submitted by the intermediaries or, when appropriate, the relevant taxpayers;
- updated information on reportable cross-border arrangements (Model 235): this model shall be submitted only by tax intermediaries; and
- information on the use in Spain of reportable cross-border tax planning arrangements (Model 236): this model shall only be submitted by the relevant taxpayers.

The submission of all of these models will be carried out electronically as established by Ministerial Order HAP/2194/2013.[25]

Specifically, the obligation to declare certain cross-border planning arrangements shall include, when appropriate, the same information as established by article 1(2), section 14 of DAC6 (e.g. personal data of the tax intermediaries and taxpayers; information on the existing hallmarks; detailed information on the national and foreign provisions that constitute the basis of the reportable cross-border arrangement; value of the arrangement; reference number, etc.). The only clarification made for these purposes is that, in order to calculate the value of the reportable arrangement, the result that is obtained – in terms of tax debt – of such an arrangement will be considered (which should include the tax savings determined in accordance with the main benefit test).

33.4.3. Use of and access to the reported data

The confidential nature of data with tax significance is regulated in article 95 of the General Taxation Law. This provision establishes that the data, reports or any other information obtained by the tax administration in the performance of its functions are confidential and may only be used for the effective application of taxes and, when appropriate, for the imposition of sanctions, but such information can never be communicated to third parties.

However, this general rule has certain exceptions, and the data may be transferred in extraordinary situations of general interest listed in the same provision, such as (i) collaboration with courts and the public prosecutor's office in the investigation or prosecution of crimes; (ii) collaboration with other tax administrations for the purposes of compliance with tax obligations; (iii) collaboration with the labour and social security authorities in the fight against fraud in contributions; (iv) collaboration with public administrations to fight tax crime and fraud in obtaining or receiving aid or subsidies; and (v) the protection of the rights and interests of minors and disabled persons by the courts or the public prosecutor's office, among others.

In any case, the tax administration will adopt the necessary measures to guarantee the confidentiality of the tax information and its proper use. All authorities or officials having knowledge of these data will be bound by the strictest and most complete secrecy regarding such data. In addition, it is remarked that, regardless of the criminal or civil responsibilities that may arise, the violation of this particular duty of secrecy will always be considered a serious disciplinary offense.

In a very brief way, it should be noted that, in the event that any reported information has to be exchanged in the field of mutual assistance, it will be necessary to comply with the provisions of article 177 of the General Taxation Law.

24. *See* ES: *Tribunal Supremo* [Supreme Court], 2 June 2021, 7095/2021.
25. ES: Ministerial Order HAP/2194/2013 (22 Nov. 2013).

In this sense, it should be noted that the draft royal decree[26] established the publication in the electronic headquarters of the tax administration of the most relevant cross-border tax planning arrangements that had been declared and – when appropriate – of the tax regime, qualification or classification. However, the final regulations did not include this obligation. As far as the authors are concerned, they believe that such an obligation would have been extremely useful. While hiding the sensitive data, publishing the most relevant arrangements would have been quite positive to achieve greater transparency, to have real information about the usefulness and impact of the MDR and to control the effective reaction to the operations that are reported.

33.5. Consequences of (non-)reporting

33.5.1. Response/reaction by tax authorities

In line with DAC6, Spanish regulations clarify that the obligation to declare a cross-border arrangement does not imply, per se, that such a mechanism is fraudulent or elusive but only that it involves certain circumstances of potential aggressive tax planning. It is also necessary to point out that the lack of reaction from the tax administration to the declaration of information does not entail acceptance of the legality of the declared cross-border arrangement.

33.5.2. Penalties and fines

As advanced, Spanish regulations establish two different obligations, namely on the one hand, the disclosure obligation on cross-border tax planning arrangements and, on the other hand, a provision that specifies the obligations between individuals derived from the former. The penalties will be different depending on the obligation that is breached.

33.5.2.1. Obligation to disclose cross-border tax planning arrangements

33.5.2.1.1. Failure to submit the informative tax returns on reportable arrangements on time

The sanction will consist of a fixed pecuniary fine of EUR 2,000 for each data or set of data referring to the same arrangement that should have been included in the tax return. The minimum penalty will be EUR 4,000 and the maximum amount equivalent to the fees received or to be received by the intermediary or, in the case of taxpayers, the value of the tax benefit to be obtained. The maximum limit will not apply when it is less than EUR 4,000.

Notwithstanding the foregoing, when a cross-border arrangement lacks value and the offender is the relevant taxpayer, the maximum limit will be equivalent to the fees received or to be received by the intermediary. In the absence of fees, the limit will refer to the market value of the activity carried out by the intermediary.

The penalty and the minimum and maximum limits will be reduced by half when the information has been submitted after the deadline without a prior requirement from the tax administration.

33.5.2.1.2. The submission of incomplete, inaccurate or false information regarding the informative tax returns on reportable arrangements

The sanction will consist of a fixed pecuniary fine of EUR 2,000 for each omitted, inaccurate or false data or set of data referring to the same arrangement that should have been included in the tax return. Again, the minimum penalty will be EUR 4,000 and the maximum amount equivalent to the fees received or to be received by the intermediary or, in the case of taxpayers, the value of the tax benefit to be obtained. The maximum limit will not apply when it is less than EUR 4,000.

In the same vein, when a cross-border arrangement lacks value and the offender is the relevant taxpayer, the maximum limit will be equivalent to the fees received or to be received by the intermediary. In the absence of fees, the limit will refer to the market value of the activity carried out by the intermediary.

In the case that incomplete, inaccurate or false tax returns are submitted and a substitute tax return is later submitted after the reporting deadline without prior requirement of the tax administration, this penalty situation will not occur. Rather, the infringement of the previous section will be committed (failure to submit tax returns on time).

33.5.2.1.3. The submission of the informative tax returns by means other than electronic, computerized and telematic in those cases in which there is a legal obligation to do so by such means

The sanction will consist of a fixed pecuniary fine of EUR 250 per data or set of data referring to the same arrangement that should have been included in the tax return, with a minimum of EUR 750 and a maximum of EUR 1,500.

26. ES: *Proyecto de Real Decreto de 20 de Junio de 2019 por el que se modifica el Reglamento General de las actuaciones y los Procedimientos de Gestión e Inspección Tributaria y de Desarrollo de las Normas Comunes de los Procedimientos de Aplicación de los Tributos, Aprobado por el Real Decreto 1065/2017, de 27 de Julio* (20 June 2019).

33.5.2.2. Obligations between individuals derived from the disclosure obligation of cross-border tax planning mechanisms

33.5.2.2.1. Failure to communicate the existence of the waiver of professional secrecy within the established period or its communication omitting data or including false, incomplete or inaccurate data

The intermediaries exempted from the declaration of cross-border tax planning arrangements due to the duty of professional secrecy must reliably communicate said exemption to the other intermediaries and relevant taxpayers who participate in the aforementioned arrangements (on whom the obligation to disclose the information will fall).

In case such communication does not take place, the intermediary will have committed a minor offense that will be sanctioned with a fixed pecuniary fine of EUR 600.

This infringement will be considered serious when the lack of timely communication coincides with the lack of declaration of the corresponding cross-border tax planning arrangement by another intermediary or, when appropriate, by the relevant taxpayer who should have submitted the tax return. In these cases, the sanction will be the one that would have corresponded to the infraction due to the failure to submit the tax return.

33.5.2.2.2. Failure to communicate that the tax return has already been submitted within the established period or communication omitting data or including false, incomplete or inaccurate data

The persons or entities that were obligated to disclose and that had presented the tax return must reliably communicate their submission to the rest of intermediaries or, when appropriate, to the rest of the relevant taxpayers who, by virtue of that, will be exempted from the obligation to declare.

If this communication is not made, a minor infraction will have been committed that will be sanctioned with a fixed pecuniary fine of EUR 600.

As a final note, the authors point out what is established by Sánchez Huete and Pérez Tena, who affirm that – when doing a comparative analysis of proportionality of the penalty regime – the lack of nuances of the Spanish system stands out. This is due to the fact that the regime does not consider the length of the delay; the kind of behavior; the type of arrangement; or the intentionality of the subject obligated to report when quantifying sanctions. Additionally, the comparison with other tax sanctions in the domestic sphere is not comforting; the penalty regime under DAC6 establishes sanctions much higher than the internal ones for similar behaviours.[27]

33.6. Interaction with other domestic procedural rules

As mentioned in section 33.2.2.5., Spanish regulations clarify that, when the value of the arrangement has been determined by the APAs, it will be understood that none of the hallmarks related to transfer pricing provided for in category E concur. To this aim, APAs are of those regulated in chapter X of Title I of the Corporate Taxation Regulation[28] or any other prior APAs on transfer pricing that are subject to automatic exchange in accordance with DAC6.

It is also necessary to highlight that, in Spain, there is no specific regime for tax rulings and, therefore, it does not interact with DAC6.

Regarding cooperative compliance programs in Spain, the Spanish Association for Standardization (UNE) Standard 1902, prepared by the Spanish Association for Standardization standardizes the requirements and facilitates the guidelines to adopt, implement, maintain and continuously improve tax compliance policies. Obtaining the certificate of conformity UNE 1902 constitutes an element of proof that attests before the tax administration or the courts a diligence and willingness of a company to comply with its tax obligations for the eventual exemption from criminal liability, sanctioning and derivation of tax liability. Although, at the moment, there are no guidelines in this regard, it could be convenient to incorporate DAC6 in some way into the practice of tax compliance.

Finally, it should be noted that, in Spain, Law 10/2010 of April 28[29] on the prevention of money laundering and the financing of terrorism imposes information obligations on certain operations. This law establishes that certain subjects (e.g. credit institutions, insurers, lawyers, auditors, etc.) will notify the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offenses (Sepblac) of any fact or operation, even the mere attempt, for which there is an indication or certainty that it is related to money laundering or the financing of terrorism. Some of the operations that must be reported by lawyers and auditors

27. M.A. Sánchez Huete & J.R. Pérez Tena, *Las nuevas infracciones y sanciones en la planificación fiscal internacional: Críticas de culpabilidad y proporcionalidad*, Quincena Fiscal 1, sec. IV (2021).
28. ES: Royal Decree 634/2015, of 10 July 2015.
29. ES: *Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo* (28 Apr. 2010).

are (among others) (i) operations with prices significantly lower or higher than those of the market; (ii) operations that use unusual or unnecessarily complex legal figures that apparently lack economic logic; and (iii) operations for which the payment is made through funds from tax havens, countries or territories not cooperating in the fight against money laundering and terrorist financing. In these cases, although there is no explicit relationship between DAC6 and Law 10/2010 of April 28, the situation could arise that the operation is doubly reported under the two regimes.

33.7. Fundamental rights

In the first place, as advanced in section 33.1., there is certain confusion about the objective pursued by the regulations (the concepts of "tax avoidance", "tax evasion" and "aggressive tax planning" are referred to interchangeably). As a consequence, there are reasonable doubts as to whether DAC6 requires the communication of arrangements that constitute a tax offense.

In this regard, Spanish scholars are divided. On the one hand, García Prats points out that the wording of DAC6 ("potential risk of tax avoidance") suggests that behaviours punishable as a tax offense are excluded from the reporting obligation.[30] Partly, the justification for such an exclusion is to be found in the need to respect the right of non-self-incrimination since the disclosure of punishable behaviour through the threat of the imposition of a sanction may be contrary to the European Court of Human Rights doctrine.[31]

On the other hand, Rodríguez Márquez also understands that the reporting obligation does not violate the right not to incriminate oneself but for a different reason. In this sense, the author understands that it is coercion prior to the commission of the tax offence and, therefore, is legitimate. He argues that, in order to consider the right not to incriminate oneself applicable, the coercion of the public power aimed at obtaining evidence must be subsequent to the commission of the punishable offense. Therefore, coercion would not be relevant if it is predetermined prior to the commission of the offense so that the subject knows his subsequent obligation to submit a tax return.[32]

Despite all of this, the authors consider that, in any case, the disclosure of the arrangement evidences a diligent – and not fraudulent – behaviour of the taxpayer, as well as the belief that he is acting correctly. This is due to the absence of concealment in the behaviour of the subject, understood as the total or partial omission of any data that affects the determination of the tax debt[33] (a requirement that will not exist, as the taxpayer himself is the one who places the information in the hands of the tax administration). All of this determines the taxpayer's absence of guilt and will prevent those behaviours that have previously been reported from being sanctioned. This interpretation is also consistent with the new cooperative compliance programmes that are intended to govern the tax administration/taxpayer relationships.

33.8. Overall evaluation and future outlook

As mentioned in section 33.1., the implementation of DAC6 in Spain was almost a year late. Furthermore, such implementation has been of a minimal nature (in the sense that the wording of DAC6 has practically been copied), and there have been very few clarifications regarding ambiguous aspects. From the authors' point of view, all of this demonstrates the total lack of interest of the Spanish state in the MDR regime that has been forced to implement it due to the European binding nature of the measure.

This lack of interest may have resulted in the Spanish regulations suffering from the same shortcomings as DAC6, and this has been evidenced by Spanish doctrine that has been quite critical with the domestic implementation process. Thus, Soler Roch points out that DAC6 has displaced the principle of legal certainty in favour of "a standard of transparency". Furthermore, the author argues that the new mechanism tries to solve in the area of the tax relationship what the field of tax policy has not wanted to solve.[34] This opinion coincides with that of Sánchez López, who understands that the main problem with DAC6 also revolves around the lack of legal certainty that has a "drag" effect with respect to the principle of proportionality and the guarantee of taxpayers' rights.[35] The uncertainty is manifested, in essence, in the lack of definition of many aspects of the disclosure obligation, generating doubts as to its requirements and consequences. Additionally, the author considers that Member States have been granted too much scope for action from which "significant asymmetries" can arise, which generate distortions in the functioning of the tax advisory market at the EU level while, at the same time, causing the ineffectiveness of DAC6.

In addition, in the authors' opinion, the way in which the measure has been developed (from BEPS to the implementation of DAC6 in each Member State) seems to have led to a regression in the sense that, from the current global standard of cooperative

30. García Prats, *supra* n. 19, at sec. 3.1.3.
31. *See* ECtHR: 17 Dec. 1996, 43/1994/490/672, *Saunders v. United Kingdom*, para. 69; and ECtHR: 3 May 2001, [2001] ECHR 324, *JB v. Switzerland*, para. 68.
32. J. Rodríguez Márquez, *Medidas preventivas del fraude fiscal: la obligación de revelación de esquemas de planificación fiscal agresiva*, in *El fraude fiscal en España* sec. 2 (E. Giménez-Reyna Rodríguez, S. Ruiz Gallud & I. Arráez Bertolín eds., Aranzadi 2018).
33. H. López López, *El Principio de Culpabilidad en Materia de Infracciones Tributarias* sec. 3.1.2.1. (Aranzadi 2009).
34. M.T. Soler Roch, *La declaración obligatoria de mecanismos de planificación fiscal agresiva* foreword (Y. Martínez Muñoz ed., Tirant lo Blanch 2019).
35. Sánchez López, *supra* n. 14, at sec. II.

compliance, the MDR are returning to the traditional confrontational model (taxpayers vs. tax administration). This is also the approach taken by Calderón Carrero,[36] who firstly concludes that – although DAC6 presents a clear connection with BEPS Action 12 – it goes beyond the OECD/G20 recommendations. Against this background, it can be argued that the European Union is adopting measures "beyond BEPS" that go one step ahead of the essential consensus agreed by the different countries. This has a negative impact in terms of raising the costs of tax compliance in the European Union, which can reduce the attractiveness of investment conditions and the very international competitiveness of European economies and markets. Secondly, Calderón Carrero highlights the erosion of taxpayers' rights in relation to the confidentiality and economic privacy of their businesses and operations so that, in some cases, such an erosion is not clearly justified and can also put business, industrial, professional or commercial secrets at risk. Additionally, from the perspective of legal certainty and legality, it is understood that taxpayers and tax intermediaries face the risk of sanctions for non-compliance with a regulation that revolves around very broad concepts with unclear limits (e.g. hallmarks). Finally, it is pointed out how the MDR mechanism – although not generating a stigmatization of tax intermediaries – does contribute to a climate of mistrust towards them, when, in reality, intermediaries are one of the key pieces on which the modern tax systems rest. This is a view also shared by García Prats, who remarks that the implementation of the European MDR will significantly affect the professional relationship between tax advisers and their clients.[37]

Thus, the question that arises is whether, as a result of all of these uncertainties, the implementation of DAC6 complies with the principle of proportionality. The answer is clearly negative for Quintas Bermúdez, who understands that the way in which DAC6 has been drafted is disproportionate both in relation to subjective and objective aspects.[38]

It is still too early to venture anything, but it can be questioned if all of the effort underway to create the MDR and the problems that their implementation process entails will be outweighed by the benefits intended to be obtained. In this regard, it should be borne in mind that tax transparency is not the only remedy against tax evasion, tax avoidance or unintended tax planning. Over and above, Member States could undertake substantive regulatory changes to counteract such practices.

36. Calderón Carrero, *supra* n. 13, at sec. IV.
37. García Prats, *supra* n. 19, at sec. 5.1.
38. J. Quintas Bermúdez, *Planificación fiscal: obligaciones de comunicación de intermediarios fiscales y contribuyentes: Directiva (UE)2018/822 del Consejo, de 25 de mayo de 2018 ("DAC6"): síntesis y crítica*, Quincena Fiscal 22, sec. VII (2018). This author also argues that DAC6 is redundant with what is established in other provisions, such as Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 (2016), Primary Sources IBFD.