

Subsidiary Legislation made under ss.3D and 30A.

## **International Agreements on Taxation Matters (Spain) Regulations 2021**

**LN.2021/156**

*Commencement*                      **26.2.2021**

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**REPORTABLE CROSS-BORDER ARRANGEMENTS: HALLMARKS**

*In exercise of the powers conferred upon him by section 3D and 30A of the Income Tax Act 2010, the Minister has made the following Regulations-*

**PART 1****PRELIMINARY****Title.**

1. These Regulations may be cited as the International Agreements on Taxation Matters (Spain) Regulations 2021.

**Commencement.**

2. These Regulations come into operation on the day of publication.

**Interpretation.**

3. In these Regulations-

“Act” means the Income Tax Act 2010;

“competent authority of Spain” means the liaison body designated by Spain under Article 4 of the International Agreement;

“International Agreement” means the International Tax Agreement with Spain specified in the Income Tax Act 2010 International Agreement (Spain) Notice 2021;

“person” means any corporation either aggregate or sole and any club, society or other body, or any one or more persons of any age, and either of the male or female sex and includes any company, body of persons, foundation as defined in section 74 of the Act, trust as defined in section 12(4) of the Act, and any other entities as defined in regulations made under section 18A of the Act;

“Relevant Information” means information which the International Agreement requires to be provided to the Spanish tax authorities, including but not limited to the information referred to in Article 2(2)(d) of the International Agreement and in particular, shall satisfy the conditions of paragraphs (2)(a)(iii) or (2)(a)(iv) of that Article at 31 December 2018 and also meet the conditions in paragraphs (2)(b)(i) to (2)(b)(v) of that Article at 31 December 2018 in relation to entities, other legal structures or arrangements incorporated in Gibraltar before 16 November 2018;

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“Return” means the return of Relevant Information required by the Commissioner under section 30A or section 6C(1)(a).

**Scope.**

4.(1) These Regulations have effect for and in connection with the implementation of the International Agreement and, in particular, to enable the Commissioner to provide the Spanish tax authorities with the Relevant Information.

(2) For the purposes of subregulation (1) above, the Commissioner shall issue a Return to any person in respect of Relevant Information.

(3) These Regulations give effect to Article 3(2) of the International Agreement by making provision equivalent to-

- (a) Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation; and
- (b) 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.

**PART 2**

**RETURNS AND OTHER INFORMATION**

**Requirement to complete and submit Return.**

5.(1) Every person who falls within the scope of regulation 4 shall make a full and complete Return as at 31 December 2018.

(2) The Return shall be delivered to the Commissioner as required by the Commissioner in the form specified by the Minister in the Gazette and be accompanied by such information or documentation as is specified in the Return or any notes accompanying the Return published by the Minister in the Gazette.

(3) The declaration in the Return shall be made to the Commissioner-

- (a) in the case of a trust, by the trustees of a trust specified in section 28(3)(a) of the Act;

(b) in the case of a foundation, by the councillors specified in section 28(8)(a) of the Act.

(4) For the purposes of these Regulations, a branch of a company situated in Gibraltar shall make a Return in respect of that branch.

### **PART 3**

#### **ADVANCE CROSS-BORDER RULINGS AND PRICING ARRANGEMENTS**

##### **Interpretation.**

6.(1) In this Part-

“advance cross-border ruling” means an agreement, communication or other instrument or action with similar effect including one issued, amended or renewed in the context of a tax audit which-

(a) is issued, amended or renewed by, or on behalf of-

(i) the Government or the Commissioner; or

(ii) in the case of a communication made by the Government or tax authority of Spain or its territorial or administrative subdivisions including local authorities,

irrespective of whether it is effectively used;

(b) is issued, amended or renewed to a particular person or a group of persons, and upon which that person or group of persons is entitled to rely;

(c) concerns the interpretation or application of a legal or administrative provision concerning the administration or enforcement of-

(i) Gibraltar laws relating to Gibraltar taxes; or

(ii) in the case of a communication made by the Government or tax authority of Spain, its national law relating to taxes or the taxes of its territorial or administrative subdivisions, including local authorities;

- (d) relates to a cross-border transaction or to the question of whether or not activities carried on by a person in Spain (or in the case of a communication by Spain, a person in Gibraltar) create a permanent establishment; and
- (e) is made in advance of the transactions or of the activities in Spain (or in the case of a communication by Spain, activities in Gibraltar) potentially creating a permanent establishment or in advance of the filing of a tax return covering the period in which the transaction or series of transactions or activities took place,

and for the purposes of this definition, a cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling;

“advance pricing arrangement” means any agreement, communication or any other instrument or action with similar effects, including one issued, amended or renewed in the context of a tax audit, and which-

- (a) is issued, amended or renewed by, or on behalf of-
  - (i) the Government or the Commissioner alone or with the Government or tax authority of Spain including any territory or administrative subdivision thereof, including local authorities, or
  - (ii) in the case of a communication made by Spain, its government or tax authority, including any territory or administrative subdivision thereof, including local authorities,

irrespective of whether it is effectively used;

- (b) is issued, amended or renewed to a particular person or a group of persons, and upon which that person or group of persons is entitled to rely; and
- (c) determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment;

“cross-border transaction” has the meaning given by regulation 7;

“enterprise” means any form of conducting business;

“transfer prices” means the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises, and “transfer pricing” is to be construed accordingly;

“working day” means a day other than-

- (a) Saturdays and Sundays;
- (b) any day that is a bank holiday or public holiday in Gibraltar under the Banking and Financial Dealings Act or the Interpretation and General Clauses Act;
- (c) any day appointed in Gibraltar as a day of public thanksgiving or mourning.

(2) An enterprise is an associated enterprise when-

- (a) it participates directly or indirectly in the management, control or capital or another enterprise; or
- (b) the same persons participate directly or indirectly in the management, control or capital of two or more enterprises.

#### **Meaning of cross-border transaction.**

7. In this Part, “cross-border transaction” means-

- (a) in relation to an advance cross-border ruling, a transaction or series of transactions where-
  - (i) not all of the parties to the transaction or series of transactions are resident for tax purposes in Gibraltar, or where a communication is made because Spain is issuing, amending or renewing the advance cross border ruling, in Spain;
  - (ii) any of the parties to the transaction or series of transactions is simultaneously resident for tax purposes in Gibraltar and Spain;
  - (iii) one of the parties to the transaction or series of transactions carries on business in Spain, (or where a communication is made by Spain, one of the parties to the transaction or series of transactions carries on business in Gibraltar) through a permanent establishment and the transaction or series of transactions forms part or the whole of the business of the permanent establishment;

- (iv) the transaction or series of transactions include arrangements made by a person in respect of business activities in Spain, (or where a communication is made by Spain, the transaction or series of transactions include arrangements made by a person in respect of business activities in Gibraltar), which that person carries on through a permanent establishment; or
- (v) the transaction or transactions have a cross border impact;
- (b) in relation to an advance pricing arrangement, a transaction or series of transactions-
  - (i) involving associated enterprises which are resident in both Gibraltar and Spain; or
  - (ii) a transaction or series of transactions which have a cross border impact.

**Obligation to exchange information.**

8.(1) The Commissioner shall ensure that the information set out in regulation 9 in respect of relevant advance cross-border rulings and relevant advance pricing arrangements is provided to the competent authority of Spain in accordance with regulation 15 and the practical arrangements adopted between the Commissioner and competent authority of Spain for the purposes of the International Agreement.

(2) An advance cross-border ruling or advance pricing arrangement is relevant if it was issued, amended or renewed-

- (a) after 31 December 2013; or
- (b) between 1 January 2012 and 31 December 2013 and were valid on 1 January 2014.

(3) An advance cross-border ruling is not relevant if it exclusively concerns and involves the tax affairs of one or more natural persons.

(4) An advance cross-border ruling and advance pricing arrangement is not relevant if it was issued, amended or renewed-

- (a) before 1 April 2016; and



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- (b) to a person or group of persons-
  - (i) not conducting mainly financial or investment activity; and
  - (ii) with group-wide annual net turnover (as defined in Schedule 9 of the Companies Act 2014) of less than €40,000,000 or its Sterling equivalent in the fiscal year preceding the date of issuance, amendment or renewal of those advance cross-border rulings or advance pricing arrangement.
- (5) The Commissioner shall ensure information is provided under this regulation-
  - (a) where an advance cross-border ruling or advance pricing arrangement was issued, amended or renewed between 1 January 2021 and the date of entry into force of the International Agreement, within 3 months following the entry into force of the International Agreement;
  - (b) where an advance cross-border ruling or advance pricing arrangement was issued, amended or renewed after the date of entry into force of the International Agreement, within 3 months following the end of the calendar year during which that issuance, amendment or renewal took place.

**Information to be exchanged.**

9.(1) For the purposes of regulation 8, and subject to subregulation (2), the information to be provided to the competent authority of Spain is-

- (a) the dates of issuance, amendment or renewal of the advance cross-border ruling or advance pricing arrangement;
- (b) the start date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- (c) the end date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if specified;
- (d) the type of the advance cross-border ruling or advance pricing arrangement;
- (e) the amount of the transaction or series of transactions of the advance cross-border ruling or advance pricing arrangement if such amount is referred to in the advance cross-border ruling or advance pricing arrangement;

- (f) the identification of the method used for determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement; and
- (g) the indication whether the information communicated is based upon the advance cross-border ruling or advance pricing arrangement itself or upon the request referred to in regulation 10(2).

(2) In addition to the information set out in subregulation (1), the competent authority of Spain shall be provided with-

- (a) the identification of the person, other than a natural person, and where appropriate the group of persons to which the advance cross-border ruling or advance pricing arrangement belongs;
- (b) a summary of the content of the advance cross-border ruling or advance pricing arrangement including a description of the relevant business activities or transactions or series of transactions provided in abstract terms without leading to the disclosure of-
  - (i) a commercial, industrial or professional secret;
  - (ii) a commercial process; or
  - (iii) information whose disclosure would be contrary to public policy;
- (c) a description of the set of criteria used for the determination of the transfer pricing or the transfer price itself in the case of an advance pricing arrangement.

**Exclusion.**

10.(1) Subject to subregulation (2), information on bilateral or multilateral advance pricing arrangements with a jurisdiction or territory other than Spain may not be provided under this Part where they were negotiated under an international tax agreement that does not permit disclosure to third parties.

(2) Where information on advance pricing arrangements is excluded under subregulation (1), the Commissioner shall ensure that information is provided in respect of those arrangements where-

- (a) it would otherwise be provided under regulations 8 and 9; and

- (b) that information is contained in the request that lead to the issuance of the excluded bilateral or multilateral advance pricing arrangement.

**Confirmation of Receipt.**

11. Where Gibraltar is identified by Spain as likely to be concerned by an advance cross-border ruling or advance pricing arrangement in a communication, the Commissioner shall ensure that receipt of the information is confirmed to the competent authority of Spain within 7 working days of receipt.

**Additional Information.**

12. The Commissioner may make a request in writing for additional information on an advance cross-border ruling or advance pricing arrangement communicated by a competent authority of Spain, including the full text of such ruling or arrangement.

**Feedback.**

13. The Commissioner shall provide feedback to the competent authority of Spain on the receipt or provision of information under this Part or the International Agreement, in accordance with arrangements agreed between the Commissioner and the competent authority of Spain.

**Use of Information.**

14.(1) Information received by the Commissioner under this Part-

- (a) may be used for any of the purposes set out in subregulation (2);
- (b) may not be used for any other purpose unless the competent authority of Spain gives its permission;
- (c) subject to subregulation (2), is to be treated for the purposes of the law of Gibraltar relating to admissibility, authentication, confidentiality or other protection in the same way as other information received by the Commissioner, including the relevant Gibraltar law on data protection.

(2) Subject to subregulation (1), information received under this Part may be used-

- (a) for the administration and enforcement of tax;

- (b) for the administration, enforcement and collection concerning taxes of all kind and description imposed by Gibraltar or Spain within the scope of the International Agreement and covered by mutual assistance agreed and within the scope of the International Agreement;
- (c) for the assessment and enforcement of compulsory social security contributions;
- (d) in connection with judicial and administrative proceedings that may involve penalties, initiated as a result of infringements of tax law (subject to any general rule or provision governing the rights of defendants and witnesses in such proceedings).

(3) This Part does not require or permit the Commissioner to provide information where in the Commissioner's opinion it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy, and where the Commissioner relies on this subregulation in declining to take action he shall inform the competent authority of Spain of his reasons.

**Method of exchange.**

15.(1) In complying with this Part, the Commissioner must exchange information in the manner and under the transmission method agreed with the competent authority of Spain for the purposes of the International Agreement.

(2) In addition to the information listed in regulation 9, the information exchanged under this Part must include-

- (a) the legal basis under which the information is being exchanged;
- (b) a reference number for the communication; and
- (c) the date of the communication.

(3) Information exchanged under this Part must, in addition to any other agreed language, be provided in English.

**PART 4****REPORTABLE CROSS-BORDER ARRANGEMENTS****Interpretation.**

15.(1) In this Part-

“associated enterprise” has the meaning given by regulation 17;

“bespoke arrangement” means any cross-border arrangement that is not a marketable arrangement;

“cross-border arrangement” has the meaning given by regulation 18;

“hallmark” means a characteristic or feature of a cross-border arrangement that presents an indication of a potential risk of tax avoidance, as listed in the Schedule;

“intermediary” has the meaning given in regulation 19;

“marketable arrangement” means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customised;

“relevant taxpayer” means any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement; and

“reportable cross-border arrangement” means any cross-border arrangement that contains at least one of the hallmarks set out in the Schedule.

(2) Other expressions have the same meaning in this Part as in Part 1B of the Act.

**Associated enterprise.**

16.(1) In this Part “associated enterprise” means a person who is related to another person in at least one of the following ways-

- (a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;
- (b) a person participates in the control of another person through a holding that exceeds 25% of the voting rights;
- (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25% of the capital;
- (d) a person is entitled to 25% or more of the profits of another person.

(2) If more than one person participates, as referred to in subregulation (1)(a) to (d), in the management, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

(3) If the same persons participate, as referred to in subregulation (1)(a) to (d), in the management, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

(4) A person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

(5) In indirect participations-

(a) the fulfilment of requirements under subregulation (1)(c) shall be determined by multiplying the rates of holding through the successive tiers, and

(c) a person holding more than 50% of the voting rights shall be deemed to hold 100%.

(6) An individual, his or her spouse and his or her lineal ascendants or descendants shall be treated as a single person.

**Cross-border arrangement.**

17.(1) In this Part “cross-border arrangement” means an arrangement concerning Gibraltar and Spain where at least one of conditions in subregulation (2) is met.

(2) Those conditions are that-

(a) not all of the participants in the arrangement are resident for tax purposes in the same jurisdiction;

(b) one or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;

(c) one or more of the participants in the arrangement carries on a business in another jurisdiction through a permanent establishment situated in that jurisdiction and the arrangement forms part or the whole of the business of that permanent establishment;

- (d) one or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a permanent establishment situated in that jurisdiction;
  - (e) such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.
- (3) In this regulation, “jurisdiction” means Gibraltar or Spain.
- (4) For the purposes of this Part, an arrangement also includes a series of arrangements.
- (5) An arrangement may comprise more than one step or part.

**Intermediary.**

18.(1) In this Part “intermediary”-

- (a) means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement; and
  - (b) also means any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.
- (2) For the purpose of subregulation (1)(b)-
- (a) any person has the right to provide evidence that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement; and
  - (b) for that purpose, that person may refer to all relevant facts and circumstances as well as available information and their relevant expertise and understanding.
- (3) In order to be an intermediary, a person shall meet at least one of the following additional conditions (and subregulations (1) and (2) are subject to this subregulation): the intermediary must-

- (a) be resident for tax purposes in Gibraltar or Spain;
- (b) have a permanent establishment in Gibraltar or Spain through which the services with respect to the arrangement are provided;
- (c) be incorporated in, or governed by the laws of, Gibraltar or Spain; and
- (d) be registered with a professional association related to legal, taxation or consultancy services in Gibraltar or Spain.

**Reportable cross-border arrangements: exchange of information by intermediaries.**

19.(1) Intermediaries must, subject to subregulation (2), file information that is within their knowledge, possession or control on reportable cross-border arrangements with the Commissioner within the period of 30 days beginning-

- (a) on the day after the reportable cross-border arrangement is made available for implementation; or
- (b) on the day after the reportable cross-border arrangement is ready for implementation; or
- (c) when the first step in the implementation of the reportable cross-border arrangement has been made,

whichever occurs first.

(2) The period of 30 days for filing information referred to in subregulation (1) begins on the date on which the International Agreement enters into force, where-

- (a) a reportable cross-border arrangement is made available for implementation or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and the date of entry into force of the International Agreement; or
- (b) intermediaries within the meaning of regulation 18(1)(b) provide, directly or by means of another person, aid, assistance or advice between 1 July 2020 and the date of entry into force of the International Agreement.

(3) Notwithstanding subregulation (1), intermediaries referred to in regulation 18(1)(b) must also file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.



(4) In the case of marketable arrangements, a periodic report must, subject to subregulation (5), be made by the intermediary every 3 months providing an update which contains new reportable information as referred to in regulation 21(2)(a), (d), and (g) that has become available since the last report was filed.

(5) The first periodic report under subregulation (4) must be made by intermediaries by whichever of the following dates first occurs at least 30 days after the entry into force of the International Agreement-

- (a) 31 January;
- (b) 30 April;
- (c) 31 July; or
- (d) 31 October.

(6) Where the intermediary is liable to file information on reportable cross-border arrangements with the Commissioner and competent authority of Spain, such information is to be filed in Gibraltar only if Gibraltar features first in the list below-

- (a) the jurisdiction where the intermediary is resident for tax purposes;
- (b) the jurisdiction where the intermediary has a permanent establishment through which the services with respect to the arrangement are provided;
- (c) the jurisdiction which the intermediary is incorporated in or governed by the laws of;
- (d) the jurisdiction where the intermediary is registered with a professional association related to legal, taxation or consultancy services.

(7) Where, pursuant to subregulation (6), there is a multiple reporting obligation, the intermediary is exempt from filing the information in Gibraltar if it has proof, in accordance with any relevant national law, that the same information has been filed in Spain.

(8) Intermediaries have the right to a waiver from filing information on a reportable cross-border arrangement where the reporting obligation would breach the legal professional privilege under the law of Gibraltar; and-

- (a) where this subregulation applies, intermediaries must notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under regulation 20; and
- (b) intermediaries are only entitled to a waiver to the extent that they operate within the limits of the relevant law of Gibraltar in respect of their professions.

(9) Where there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lies with all intermediaries involved in the same reportable cross-border arrangement.

(10) An intermediary is exempt from filing the information only to the extent that it has proof, in accordance with any relevant national law, that the same information referred to in regulation 21(2) has already been filed by another intermediary.

(11) Intermediaries-

- (a) must file information on reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 1 July 2020, and
- (b) must file information on those reportable cross-border arrangements within 58 days after the filing date referred to in subregulation (2).

**Reportable cross-border arrangements: exchange of information by relevant taxpayers.**

20.(1) Where there is no intermediary or the intermediary notifies the relevant taxpayer or another intermediary of the application of a waiver under regulation 19(8), the obligation to file information on a reportable cross-border arrangement lies with-

- (a) the other notified intermediary; or
- (b) if there is no such intermediary, the relevant taxpayer.

(2) The relevant taxpayer with whom the reporting obligation lies must, subject to subregulation (3), file the information within 30 days, beginning-

- (a) on the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or is ready for implementation by the relevant taxpayer, or
- (b) when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

(3) The period of 30 days for filing information referred to in subregulation (2) begins by the first day of the month following the month in which the International Agreement enters into force where-

- (a) a reportable cross-border arrangement is made available for implementation or is ready for implementation, or where the first step in its implementation has been made between 1 July 2020 and the date of entry into force of the International Agreement; or
- (b) intermediaries within the meaning of regulation 18(1)(b) provide, directly or by means of another person, aid, assistance or advice between 1 July 2020 the date of entry into force of the International Agreement.

(4) Where the relevant taxpayer has an obligation to file information on the reportable cross-border arrangement with the Commissioner and the competent authority of Spain, such information is to be filed in Gibraltar only if Gibraltar features first in the list below-

- (a) the jurisdiction where the relevant taxpayer is resident for tax purposes;
- (b) the jurisdiction where the relevant taxpayer has a permanent establishment benefiting from the arrangement;
- (c) the jurisdiction where the relevant taxpayer receives income or generates profits, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in Gibraltar or Spain;
- (d) the jurisdiction where the relevant taxpayer carries on an activity, although the relevant taxpayer is not resident for tax purposes and has no permanent establishment in Gibraltar or Spain.

(5) Where, pursuant to subregulation (4), there is a multiple reporting obligation, the relevant taxpayer is exempt from filing the information if it has proof, in accordance with any relevant national law, that the same information has been filed in Spain.

(6) Where the reporting obligation lies with the relevant taxpayer and where there is more than one relevant taxpayer, the relevant taxpayer that is to file information in accordance with subregulation (1) is the one that features first in the list below-

- (a) the relevant taxpayer that agreed the reportable cross-border arrangement with the intermediary;
- (b) the relevant taxpayer that manages the implementation of the arrangement.

(7) Any relevant taxpayer shall only be exempt from filing the information to the extent that it has proof, in accordance with any relevant national law, that the same information referred to in regulation 21(2) has already been filed by another relevant taxpayer.

(8) Relevant taxpayers-

- (a) must file information on reportable cross-border arrangements the first step of which was implemented between 25 June 2018 and 1 July 2020, and
- (b) must file information on those reportable cross-border arrangements by the first day of the second month following the month on which the International Agreement enters into force.

**Communication of information by Commissioner.**

21.(1) The Commissioner where the information was filed pursuant to this Part shall communicate the information specified in subregulation (2) to the competent authority of Spain, in accordance with the practical arrangements adopted between the Commissioner and competent authority of Spain for the purposes of the International Agreement.

(2) The information to be communicated by the Commissioner under subregulation (1) must contain the following, as applicable-

- (a) the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;
- (b) details of the hallmarks that make the cross-border arrangement reportable;
- (c) a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information the disclosure of which would be contrary to public policy;
- (d) the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;

- (e) details of the national provisions that form the basis of the reportable cross-border arrangement;
- (f) the value of the reportable cross-border arrangement; and
- (g) the identification of any other person likely to be affected by the reportable cross-border arrangement.

(3) 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.

(4) The automatic exchange of information must take place within one month of the end of the quarter in which the information was filed.

(5) In complying with provisions of this Part the Commissioner must exchange information in the manner and under the transmission method agreed with the competent authority of Spain for the purposes of the International Agreement.

#### **Penalties.**

22. The provisions of sections 10U to 10ZA of the Act apply in relation to a failure to comply with a provision of this Part, and in relation to the provision of inaccurate information when purporting to comply with a provision of this Part, as they apply in relation to failing to comply with a provision of Part 1B of the Act or providing inaccurate information when purporting to comply with a provision of Part 1B of the Act.

## SCHEDULE

**REPORTABLE CROSS-BORDER ARRANGEMENTS: HALLMARKS**

Regulation 15(1)

**Part I. Main benefit test.**

Generic hallmarks under category A and specific hallmarks under category B and under points (b)(i), (c) and (d) of paragraph 1 of category C may only be taken into account where they fulfil the “main benefit test”.

That 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.

In the context of hallmark under paragraph 1 of category C, the presence of conditions set out in points (b)(i), (c) or (d) of paragraph 1 of category C cannot alone be a reason for concluding that an arrangement satisfies the main benefit test.

**Part II. Categories of hallmarks.****A. Generic hallmarks linked to the main benefit test.**

1. An arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.

2. An arrangement where the intermediary is entitled to receive a fee (or interest, remuneration for finance costs and other charges) for the arrangement and that fee is fixed by reference to-

- (a) the amount of the tax advantage derived from the arrangement; or
- (b) whether or not a tax advantage is actually derived from the arrangement. This would include an obligation on the intermediary to partially or fully refund the fees where the intended tax advantage derived from the arrangement was not partially or fully achieved.

3. An arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation.

**B. Specific hallmarks linked to the main benefit test.**

1. An arrangement whereby a participant in the arrangement takes contrived steps which consist in acquiring a loss-making company, discontinuing the main activity of such company and using its losses in order to reduce its tax liability, including through a transfer of those losses between Spain and Gibraltar, as the case may be, or by the acceleration of the use of those losses.

2. An arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

3. An arrangement which includes circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without other primary commercial function or transactions that offset or cancel each other or that have other similar features.

**C. Specific hallmarks related to cross-border transactions.**

1. An arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs-

- (a) the recipient is not resident for tax purposes in any tax jurisdiction;
- (b) although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either-
  - (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
  - (ii) is included in a list of third-country jurisdictions which have been assessed by either Gibraltar or Spain collectively or within the framework of the OECD as being non-cooperative;
- (c) the payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes (being either Spain or Gibraltar);
- (d) the payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes;

2. Deductions for the same depreciation on the asset are claimed in more than one jurisdiction.
3. Relief from double taxation in respect of the same item of income or capital is claimed in more than one jurisdiction.
4. There is an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

**E. Specific hallmarks concerning transfer pricing.**

1. An arrangement which involves the use of unilateral safe harbour rules.
2. An arrangement involving the transfer of hard-to-value intangibles. The term “hard-to-value intangibles” covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises-
  - (a) no reliable comparables exist; and
  - (b) at the time the transaction was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.
3. An arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50 % of the projected annual EBIT of such transferor or transferors if the transfer had not been made.