INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Commission(s) in charge of the Session/Workshop:
Private Clients Commission
Tax Law Commission

Munich, 2016

National Report of Spain

Gustavo Yanes

Monereo Meyer Marinel- Lo Abogados /MMMM, Calle de Alfonso XII, 30, 28014 Madrid, Spain,

913 19 96 86

General Reporters:

Cosima von Rechteren Bär & Karrer AG Brandschenkestrasse 90 CH – Zurich 8027 Phone: +41 58 261 56 01 E-mail: cosima.vonrechteren@baerkarrer.ch	Roos Jongeneel Taxand Netherlands Piet Heinkade 133 Amsterdam, The Netherlands Phone: +31 20 435 64 09 E-mail: Roos.Jongeneel@taxand.nl

31 January 2016

INTRODUCTION

1. Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this section, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

2. Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing

transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

Now, how are these issues dealt with in your country? In this section, we would like to find out in what way your country is introducing the transparency requirements proposed by the OECD and the European Commission besides the requirements that already exist and how these developments may affect the future tax strategy of your clients.

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- If you need to display a list, you may use bullet points or letters in lowercase.
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BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection.

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Trusts are not regulated under Spanish law. Spain has not ratified the Hague Convention on the Law of Trusts (1985). In addition, Spanish legislation does not recognize, in general terms, a difference between formal (legal owner ship*)* and beneficiary (equitable ownership*)* ownership reason why is not recognized. That unfolding is not possible in countries under continental law as Spain. Under Spanish law, trusts are generally considered as a group of assets without legal personality. Spanish tax legislation does not contain any provisions on the taxation of trusts or settlors, beneficiaries or trustees. This has caused legal uncertainty when dealing with trusts for Spanish tax purposes.

On the other hand, the only existing guidelines on the tax treatment of foreign trusts under Spanish law can be found in the legal doctrine and a few tax rulings issued by the Spanish tax authorities. In some of the Spanish tax authorities' recent rulings, the government has disregarded the existence of trusts, considering transactions carried out through trusts to be transactions made directly between the settlors and beneficiaries, even in cases where the trustees had discretionary powers to allocate or distribute the trust's assets to the beneficiaries.

Particularly talking about family trusts, Spanish courts have had occasion to voice their opinion on their recognition under Spanish regulation. In its judgment of 30 April 2008, the Spanish Supreme Court stated its opinion on the recognition of a US trust in Spain in the case of a mortis causa trust established by two US nationals under US laws of which their daughter – the plaintiff – was to become the beneficiary when one of the parents died, acquiring under the trust deed real estate located in Spain, which was held by the trust, and which was the object of the judgment.

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

The Spanish legal system does not contemplate private foundations that are suitable for asset protection purposes. The Spanish Foundation State Act

49/2002 establishes a special tax regime applicable only to registered Spanish non-profit entities. So, foundations must pursue general interest objectives, such as social assistance, education, culture, science or health; therefore, their main purpose cannot be to devote their services to their founders, or to the founder's relatives or to the members of the board of trustees. At least 70 per cent of their net income should be used for carrying out activities related to their main non-profit objective within five years (including the year that the income is used) of the receipt of the income.

The foundation's object may include carrying out commercial activities that do not qualify for the tax exemption, but the income obtained through commercial activities cannot exceed 40 per cent of the foundation's total income. In any case, the foundation's assets must not revert to being the founder's property. The foundation's governing body must comprise at least three members or trustees, who cannot be remunerated. However, they can be remunerated for any other professional services they provide the foundation, when the founder has not expressly forbidden this, and it has been expressly authorized by the Protectorate (a public body that monitors foundations by controlling and reviewing them). The foundation submits its annual accounts to the Protectorate. These accounts are reviewed, approved, and deposited in the Register of Foundations once the Protectorate has examined and verified their content, and that the annual action p lans have been fulfilled.

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

An appealing alternative for certain wealthy individuals moving to Spain is the investment in the financial markets through collective investment vehicles, such as, among others, the Spanish SICAV. These investment vehicles require a minimum investment, a certain number of investors (100) and are subject to regulatory supervision and requirements. They are subject to very low taxation (ie SICAVs are subject to 1% corporate tax in Spain), and, therefore, they can be suitable for a tax deferral estate planning scheme. During the last year there were 220 new SICAVS opened in Spain, so these are vehicles that are really increasing their number in Spain.

In Spain, SICAVS have to fulfill several requirements:

- Number of stockholders no less than 100.
- Restrictions on investments.
- Capital may vary between the minimum and maximum established by the articles of association.
- Minimum capital of €2,400,000.

- Oversight and supervision is carried out by the Comisión Nacional del Mercado de Valores and the Dirección General del Tesoro y Política Financiera.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

The doctrine of *piercing the corporate veil or lifting the veil* is a doctrine that is being highly discussed lately in Spain, as it confronts the general rule about the right of limitation of liability of the partners, with respect the debts of the society, which they are participants (usually limited to participation or amount invested) and full patrimonial autonomy of legal persons.

This doctrine takes place when directors/administrators of a corporation have an improper behavior by fraudulently implementation of corporate patrimonial autonomy. For the suppression of these situations the right punishes members of society by applying the English technique, disregarding the separate legal personality of the company ("disregard of legal entity") and deduce the consequences of acts extend legal administrators; it is also known as “to lift the mask”, but mainly known as “to lift the veil “of the legal entity, is a phrase that if it is enshrined in the Spanish judicial practice.

Judgment 271/2011, the Provincial Court of Barcelona built a consolidated line to indicate when it is convenient to go to the lifting of the veil *"in certain cases and circumstances it is permissible to enter personal substratum of the entities or companies to which the Act confers legal personality, in order to prevent the lee of the fiction or legally, as they can be damaging private or public interests, or be used as a vehicle for fraud.*”

The prerequisites for a court to apply this principle had been stablished by the Supreme Court in its Judgment 83/2011, which would be:

a) Control of several companies by the same person

b) Related party transactions between these companies

c) Lack of economic and legal justification of such operations.

When such situations are seen in intra-group transactions that do not obey any other purpose than to defraud, for example diverting funds the company has debts to another that does not, with obvious prejudice to creditors at first, the courts apply the doctrine of piercing the veil, thus leaving no apparent effect to those businesses that have constituted abuse.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-

)recognition of foreign judgments) and have there been any changes to these principles recently?

In the case of Spain nowadays seems to be complicated to say that there's a political stability (we just had elections and still we aint got a stablish government), recently an important Spanish bank as Bankia had to be rescued by the government so we may say Bank institutions in general had lost lots of social reputation and confidence, becoming much more controlled entities.

For example, as SICAVS raised their number in the past few years in Spain, other alternative investment funds as Hedge funds (-private companies with a small number of participants in which the manager has a significant personal stake in the share capital it is free to operate in a wide variety of markets and market-neutral strategies used by different degrees of leverage) had been limited lately by the restrictive line took by CNMV (National market committee securities). For a hedge fund to be validate in Spain (most of them are normally foreign), the origin state of the fund will have to sign a memorandum of Understanding (MoU according acronym) with Spanish CNMV, so those estates which may not find a way to agree on those certain terms shall not be marketed in our country. So, as a direct effect of this raised requirements in Spain has become the fourth most restrictive country in Europe with these investment institution, only followed by Germany, Italy and Austria. Great Britain remains being the most open country accepting this investment funds.

There's a similar followed line in Spain when it comes to talk about money laundering.

So we may say this example pictures the general situation in Spain.

1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

Regarding with Sicavs, in 2014, there was a relevant European case (regarding European Union) that affected 39 Spanish eurodiputies (MEPs) members that reopened the discussion about the Sicavs and its social consideration. This process even ended with the resignation of some of the affected MEPs.

A total of 39 Spanish MEPs who have been part of previous legislatures of the European Parliament (since 1994-2009) participate in the pension fund of the MEPs also known as "Additional Program Voluntary Pension" - created in 1994 by a large group of parliamentarians and two-thirds funded with Community public funds.

This collective investment instrument was created in 1994 and allowed the MEPs adhere voluntarily to ensure a pension after 60 years. Contributions are made monthly at 1,194 euros per month while the European Parliament brought twice that amount in 2388 euros a form of co-financing.

The choice of this system was because until 2009 the European Parliament did not have a harmonized remuneration for MEPs and both wages and pensions depended on each Member State. This created significant disparities between Members based on their nationality: while some, such as the German or British, had enjoyed high salaries and retirement benefits at the end of their careers, others had more modest payroll and had no pension retirement.

The situation changed in July 2009 when the Statute for MEPs, which establishes **equal remuneration** for all members of Parliament, regardless of nationality took effect.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

Spanish tax legislation does not contain any provision on the taxation of trusts, the settlor, trustees or beneficiaries; and this has generated certain legal uncertainty when dealing with trusts for Spanish tax purposes.
From a tax point of view, tax consequences deriving from a trust must be addressed through the interpretation of the general principles established by each specific tax being applicable, which implies a **case-by-case** analysis in order to raise individual conclusions.

The Spanish tax authorities have disregarded trusts and the provisions of each trust deed must be analyzed to ascertain its tax treatment. Corporations and partnerships that are resident in Spain are subject to corporate income tax (CIT- Impuesto sobre sociedades) on their worldwide income. According to the CIT Act, taxable income is the profit and loss account corrected by certain adjustments and will be applied at a general **tax rate of 30 per cent.**

The CIT Act provides a special regime for holding companies defined as resident companies whose corporate purpose is to manage (under human and physical organization in Spain) shares in companies that are non-resident in Spain.

The Spanish tax authorities' position on trusts is to disregard their existence, transactions carried out through trusts as transactions made directly between the settlors and beneficiaries, even where the trustees had discretionary powers to allocate or distribute the trust's assets to the beneficiaries. As mention above Spanish tax authorities have issued their opinion mainly on mortis causa transfers. Based on existing tax rulings,

(1) Distributions made by trusts to beneficiaries on the settlor's death will be considered mortis causa transfers between the settlor and the beneficiaries, and

(2) Spanish-resident beneficiaries would be subject to IGT on the value of the assets received, and the tax liability would be calculated under the rules

established by the ACs or the state default legislation, depending on where the settlor was resident when he died. According to the Spanish tax authorities, the relationship between the settlor and beneficiaries (relevant in applying lower IGT rates) should be considered. Non-resident beneficiaries in Spain would be subject to IGT on the Spanish assets acquired or rights that can be exercised in Spain. In the above rulings, the Spanish tax authorities established that Spanish residents would be liable to pay IGT 'when they receive the assets, that is, on the death of the decedent, disregarding the incorporation of the trust for Spanish tax purposes'.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

Spain has implemented the OECD-CRS, together with other forty-four countries known as *Early adopters* giving a common statement on March the 19th 2014. The OECD-CRS came into force in Spain on January the 1st 2016 and entity accounts are considered *new* for information treatment since this date. Financial accounts opened on December 31st 2015 or before are considered pre-existent. Pre-existent entity accounts can be analyzed until December the 31st of 2006 or 2007 depending on the case. The period to communicate the information of 2016 starts in 2017.

The CRS communication system for information must be introduced by Spanish financial institutions. The financial institutions have to communicate any information about their clients with tax residency in a foreign country to the Tax Agency who exchanges the information with each country depending on if there is a signed or not a bilateral CRS agreement.

OECD-CRS is based on bilateral agreements which have to be signed with each country separately.

Considered as financial institutions are, including branches in Spain of foreign institutions: deposit institutions, custodians, investment entities and insurance companies.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

Spain entered into a bilateral FATCA agreement on May the 14th of 2013 signing an Intergovernmental Agreement (IGA) between the Spanish Minister of Finance and the US ambassador to Spain. The Agreement entered in force on December 9th of 2013.

The Spain-US IGA provides a system for the automatic exchange of information on financial accounts for tax purposes within the scope of mutual assistance between the two countries and sets out the obligation for financial institutions in each country for identifying the accounts held or controlled by U.S. persons and providing annual information on such financial accounts pursuant to article 27 of the US-Spain Double Taxation Treaty dated on February 22, 1990.

The FATCA rules apply to a wide variety of non-U.S. financial institutions such as banks, broker-dealers, custodians, certain insurance companies, hedge funds, mutual funds, and private equity investments. In general, FATCA defines a financial institution as an entity which is in the banking business (accepts deposits) or holds financial assets for the account of others, or which engages primarily in the business of investing, reinvesting, or trading in securities, commodities, partnerships, or any interests in such assets.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

At the end of 2014 FATF published the Mutual Evaluation of Spain. The results were that Spain has created a strong system to combat money laundering and terrorist financing, but improvements are needed in certain key areas. The FATF found Spain has up-to-date laws and regulations and sound institutions for combatting money laundering, crime and drug trafficking, as well as ongoing threats from terrorism and terrorist financing. In particular Spain has a strong financial intelligence unit. There have been significant successes in investigating and prosecuting money laundering but the terms of imprisonment imposed are low, the report said. The anti-money laundering measures applied by banks and notaries are strong, particularly Spain's system for preventing the misuse of companies. However, implementation in other sectors is variable.

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Yes, Spain will be subject of the 4AMLD and has to transpose the Directive before June 26th of 2017.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

It does not apply.

1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

The Law 10/2010 against money laundering and terrorism financing established an obligation to always discover the real owner behind a company or corporation. This obligation affects banks, casinos, notaries and registers, electronic payment companies, lawyers and other professionals, jewelry and art traders, lotteries, etc. This includes specially persons who own or control more than 25% shares of a company.

2. Tax

2.1. Transparency requirements under national law

2.1.1. Does the national law currently include transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied)?

When a taxpayer is tax resident in Spain, and he owns property the following tax obligation must be met.

1. The first obligation is to present an annual basis, the informative Tax Return 720, which is used to declare all rights and assets located abroad.

Besides Spain has modified recently the transfer pricing obligations of documentation, in order to relieve the paperwork for medium size companies. On the contrary, the obligation for big group of companies has increased.

2.1.2. Does the national law in your country currently include regulations to report the world wide transfer pricing policy of the group?

Yes. Entities or group of companies, whose turnover is over €45 Million are oblige to give information regarding their organization and structure, its activities, Information in relation with intangible assets, etc.

If the turnover of the entity or group of companies exceeds €750 Million the information must be given country by country.

In General , Spain´s documentation requirements established by Royal decree 634/2015, are closely aligned with the EU transfer Pricing Forum´s Code of Conduct concepts. The OECD transfer pricing guidelines also apply.

The corporate tax law 27/2014 (Corporate tax rules), includes a general reference to proportionally and sufficiency principles in relation to the obligation to maintain transfer pricing documentation has been introduced.

2.1.3. Does the national law currently include obligations to report tax schemes?

Apart from the obligation regarding the Transfer Pricing, the Spanish Tax Law doesn't include any obligation for taxpayers regarding to report tax schemes.

In any case the tax payer can ask for a *"Tax Ruling"* in connection with the Tax Schme

2.2. Exchange of information under national law

2.2.1. What are the current regulations regarding international tax assistance and exchange of information on the tax position of companies in your country?

In Spain exists a General Tax Law that regulates all the matters in connection with the tax formal obligations, including of course the exchange of information, without the prejudice the multilateral and bilateral agreement of exchange of information, as well as the implementation of the Foreign Account Tax Compliance Act in agreement with the United States of America. There is also the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information signed by Spain the 29th of October 2014.

2.2.2. For EU countries, please describe the current implementation in our country of the Directive 2011/16/EU of 15 February 2011 and any developments regarding the automatic exchange of information on tax rulings? Please also describe the current status and any legislative proposals.

Spain has transposed the Directive through the Royal Decree 1558/2012 adapting the Implementing Rules of the General Tax Law (*Ley General Tributaria*). In first place it changes the articles about the concept of tax levy and about calculation of interests regarding tax assistance. In second place the royal decree changes the General Regulation for proceedings of tax management and inspection. These changes introduce for example new articles regarding the duty to inform about accounts in foreign countries or about shares, rights, insurances and incomes that are deposited, managed or gained abroad. It also introduces a new chapter in this General Regulation about proceedings regarding mutual tax assistance.

2.2.3. What are the current developments in your country regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans)?

Spain signed the 29th of October 2014 the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. It is a result of a project started by Germany, Spain, France, Italy and United Kingdom, and follows the FATCA model. The exchangeable information contains bank deposits, securities, investment fund shares, insurances and rents and includes data on wages, charges levied on rents or transfers, and the identification of the person or entity holder and who effectively controls the account. The information will be exchanged annually and automatically.

2.3. BEPS Action Plan

2.3.1. Please describe in what way the BEPS Action Plan no. 5, 12 and 13 will be introduced in the national tax law of your country (e.g. via legislative proposals, inclusion in the policy of the tax authorities or solely used as guidelines) and the current status thereof.

Action definitions:

- Action 5: *Countering* ***Harmful Tax Practices*** *More Effectively, Taking into Account Transparency and Substance*
- Action 12: *Mandatory* ***Disclosure Rules***
- Action 13: *Guidance on* ***Transfer Pricing Documentation*** *and Country-by-Country (CbyC) Reporting*

As an OECD member, Spain played an active role in all of the debates on BEPS Action Plan items. The Spanish government aims to implement most of the BEPS recommendations in domestic law, and representatives of the Spanish tax authorities have taken opportunities to explain the potential impact of the BEPS Action Plan on domestic legislation at many public events in Spain.

Spanish tax administration has not yet produced a public reaction on how changes derived from the BEPS report will be addressed at a local level. However, it is worth noting that in April 2013, the Spanish Government established the National Office for International Taxation (Oficina Nacional de Fiscalidad International (ONFI)) an élite force that will focus on the control and coordination of matters relevant to international tax, including

transfer pricing (Action 13) and the APA program, and the coordination of tax audits of cross-border structures.

With the creation of this highly specialized unit, the Spanish Government follows the global trend to tackle aggressive tax planning (**increasingly aggressive audit practices)** and, in particular, what is perceived as an increase in the level of sophistication in the structuring of cross-border transactions. This is evidence that the Spanish tax authorities, following the general trend, intend to increase the focus on crossborder payments and transfer pricing. While the ONFI provides the Spanish tax authorities with a highly specialized team to coordinate and concentrate the effort to control these areas, it also provides MNCs and other taxpayers the opportunity to interact with specialized tax officials. it is therefore expected that the APA program will run more efficiently going forward and be a frequently sought after alternative.

Spain is one of the first countries to modify its domestic law to introduce mandatory country by country reporting for transfer pricing documentation, and Spanish companies will need to issue their **first CbyC reports in 2016.** The Spanish law meets all of the requirements imposed by OECD in terms of deadlines, implementation and sanctions for non-compliance.

Modifications to Spanish tax law have already been enacted, either as part of Spain's new Corporate Income Tax Law, which took effect on 1 January 2015, or through measures introduced earlier. Some of these new rules may be amended in line with the OECD's final package of recommendations.