2.15.
Spain

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2.15.1. Overview: taxation of interest income[1]

Since January 1, 2007, Spain has a dual taxation system[2]. Interest income obtained by resident individuals is taxed, as "income from savings" at a rate of 19 percent for the first 6.000 euros and 21 percent onwards (as of October 2014, the percentage may vary depending on the region of residence within Spain), together with other types of capital income and capital gains. Labour income, income from business activities, certain types of capital income (mainly from a ius in re on real estate) and other sources of income are taxed at progressive rates (the top rate being 52 percent as of October 2014; the percentage may vary depending on the region of residence in Spain).

The concept of interest income in the PIT will be discussed below, since Spanish regulations transposing the Directive 2003/48/EC refer to the internal concept of interest income.

As for non-residents, it is interesting to note that most income subject to information requirements under the Savings Directive is exempt in Spain. In general, residents in other EU countries without a permanent establishment that obtain interest income in Spain are exempt from taxation[3]. Non-residents, whether resident in other EU Member States or not, are exempt in relation to interests from public debt. Income derived from securities issued in Spain by non-residents without a permanent establishment and income derived from non-residents' accounts paid by the Bank of Spain or other entities registered for purposes of the legislation on foreign transactions, except when paid to a permanent establishment located in Spain, are also exempt. Finally, income derived from the sale of an interest in an investment fund traded on an official exchange is also exempt provided that the non-resident does not have a permanent establishment in Spain and is resident in a state that has a

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1. List of abbreviations frequently used in this contribution : BOE, Spanish Official Journal (Boletin Oficial del Estado); LGT, Spanish General law of Taxation (Ley General Tributaria); RD, Royal Decree; PIT, Personal Income Tax; TRLIRNR, Consolidated Text of the Non-residents Income Tax Law (Texto Refundido de la Ley del Impuesto sobre la Renta de No-Residentes); LIRPF, Personal Income Tax Law (Ley 35/2006, del Impuesto sobre la Renta de las Personas Fisicas).
2. Act 35/2006 (BOE November 29, 2006; the electronic version of BOE is available at www.boe.es).
3. Art. 14.1.c) TRLIRNR, (Consolidated Text of the Non-Residents Income Tax Law) that establishes the exemption and defines the scope by reference to the rules of the LIRPF (Personal Income Tax law) on the concept of interest income.

double taxation convention (DTC) with exchange of information clause. None of the exemptions mentioned apply in relation to residents in tax havens[4].

Spain has DTCs with all EU Member States (the DTC with Denmark has been denounced though). Also relevant for this discussion is the DTC with Switzerland. The maximum withholding tax stipulated is in most cases 10% (Belgium, Denmark, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, the Netherlands and Switzerland), but other rates are also provided for in some DTCs (5% for Austria and Slovenia; 8% for Greece; 12% for Italy; 15% for Portugal and Sweden). In the case of the DTCs with Bulgaria, the Czech Republic, Germany, Hungary, Ireland, Malta, Poland, the Slovak Republic, Switzerland and the United Kingdom, only the state of residence can tax this income[5].

Regarding the concept of interest income, most DTCs signed by Spain include a reference to the concept of interest income applicable at the source state. Among the DTCs relevant for this discussion (EU Member States plus Switzerland) only those with the Bulgaria, Czech Republic, Hungary, Luxembourg, Poland, Romania, the Slovak Republic, Slovenia, Sweden and Switzerland do not include this reference.

As for the territories especially relevant to Spain, both Gibraltar and Andorra, among other countries, are regarded by Spain as tax havens, although the application of an agreement providing exchange of information has the effect of taking them out of the list of tax havens. Most tax benefits cannot be applied by residents in tax havens. In particular, residents in these territories are subject to tax on the interest income they obtain in Spain (see above).

While Andorra has signed an agreement with the European Union, Gibraltar has not. In the case of Gibraltar, the provisions of the EC treaties apply to this British Dependent territory, and therefore EC law is in force except for the rules on: 1) Common Customs Tariff; 2) Common Agricultural Policy; 3) Harmonization of Turnover Taxes[6]. This fact has allowed the EC Commission, for example, to examine Gibraltar's tax law under the State aid rules[7]. We must conclude, then, that the provisions of the Savings Directive are fully in force in respect to Gibraltar[8].

2.15.2. Implementation issues

2.15.2.1. Full or partial implementation

In order to comply with the requirements set in the Savings Directive, Spain has enacted:

4. Art. 14.2 TRLIRNR. In the Spanish tax system, tax havens are listed by Royal Decree 1080/1991 (BOE 13 July 1991, with amendments).
5. Regarding Switzerland, the amended DTC (2006, BOE 27 March, 2007) provides that excessive interest due to the special relationship between parties or with a third arty is excluded from this rule and can be taxed by applying internal provisons.
6. See Art. 299.4 EC Treaty (consolidated version) and Art. 28 of the Act of Accession of the United Kingdom (OJ L 73, 27.03.1972) See also Gibraltar's Ordinance 18 of 1972 ("European Communities Ordinance") as amended by Ordinance 21 of 2004 (First Supplement to the Gibraltar Gazette No. 3423 of 19 August 2004).
7. See procedures on the Gibraltar Corporation Tax Reform; Gibraltar Qualifying Companies; Gibraltar Exempt Companies.
8. The same conclusion is reached by Tello Belosillo, J.M., *Aspectos prácticos en los procesos de captación de datos y declaraciones de información derivados de la Directiva del Ahorro*, Noticias de la UE, n. 254 (March 2006), p. 121.

- Royal Decree 1065/2007[9], which introduces in the Spanish tax system the information requirements established by the Directive (Arts. 45 to 49; Art. 76; Additional Provisions 10 and 13; Transitory Provision 2);
- Ministerial Order EHA/2339/2005[10], which regulates the form to declare the information required from paying agents by the above-mentioned Royal Decree 1778/2004; and
- Arts. 79.e) and 99.11 of the Personal Income Tax Law (LIRPF), which establish a deduction in the personal income tax for the amounts paid in another state by virtue of the withholding tax paid in compliance with the rules of the Savings Directive[11].

Spain has reached agreements with the following dependent territories of the EU Member States: Anguilla, Aruba, the British Virgin Islands, the Cayman Islands, the Isle of Guernsey, the Isle of Man, Jersey, Montserrat, the Netherlands Antilles, and the Turks and Caicos Islands. The table below provides the date of official publication in Spain of each agreement and the regime established in it. An examination of these agreements shows that only Anguilla, Aruba, the Cayman Islands and Montserrat will provide information from the moment the agreement enters into force, and two of those territories, Anguilla and Aruba, have limited the information that paying agents in those territories are obliged to provide (only that available by virtue of the legislation in force in those territories, without further compromise on the content of such legislation). The rest of the territories have preferred to levy a withholding tax during the transitional period, with the Netherlands Antilles limiting the information that paying agents in that territory are obliged to provide afterwards in the same fashion as Anguilla and Aruba.

Territory (source of the income)	*Instrument – Date of Official Publication (in BOE – Spanish Official Journal –Boletín Oficial del Estado)*	*Regime*
Anguilla	30.06.2005	Information exchange*
Aruba	28.06.2005	Information exchange*
British Virgin Islands	29.06.2005	Withholding tax; information exchange after transitional period
Cayman Islands	28.06.2005	Information exchange
Isle of Guernsey	30.06.2005	Withholding tax; information exchange after transitional period
Isle of Man	29.06.2005	Withholding tax; information exchange after transitional period

9. Royal Decree 1065/2007 (BOE September 5, 2007). These provisions were originally introduced by Royal Decree 1778/2004, of 30 July (BOE August 7, 2004) by means of an amendment to Royal Decree 2281/1998. In turn Royal Decree 1122/2005 amended the date of entry into force of certain aspects of RD 1778/2004 for interest payments made after July 1, 2005 (in its original version, RD 1778/2004 ordered that any interest payment made after July 1, 2005 should be reported). Therefore payments of interest accrued prior to that date but paid subsequently were excluded from information requirements in this regard, in line with the ECOFIN agreement in its session of April 12, 2005.
10. Ministerial Order EHA/2339/2005, (BOE 19 July 2005).
11. Originally these provisions were introduced in Spanish law by Act 62/2003 (BOE 31 December 2004). Later they were incorporated on Act 35/2006, LIRPF.

Territory (source of the income)	*Instrument – Date of Official Publication (in BOE – Spanish Official Journal –Boletín Oficial del Estado)*	*Regime*
Jersey	30.06.2005	Withholding tax; information exchange after transitional period
Montserrat	28.06.2005	Information exchange
Netherlands Antilles	30.06.2005	Withholding tax; information exchange after transitional period*
Turks and Caicos Islands	29.06.2005	Withholding tax; information exchange after transitional period

* On the basis of the information available to the paying agent by virtue of the legislation in force in that territory (money laundering legislation in the case of Anguilla).

Spain has not concluded agreements with Andorra, Liechtenstein, Monaco, San Marino and Switzerland. The regime applicable in respect to those countries is that derived from their respective agreements with the European Union.

2.15.2.2. Beneficial ownership

The Spanish authorities have to date not provided guidelines on the scope of the term “beneficial owner” (*beneficiario efectivo*). The Spanish regulations that implement the Savings Directive simply reproduce the term “*beneficiario efectivo*”. This term is unknown in the internal law, and this could cause difficulties for the correct application in Spain of the rules we are examining. Further, Spanish authors have unanimously criticized the exclusion of legal persons from the concept of “beneficial owner”[12] for the purposes of the Savings Directive.

The Spanish Corporate Income Tax Law applies mainly to legal persons. Nevertheless, certain specific types of entity that lack legal personality are subject to corporate income tax[13], such as: *Sociedades Agrícolas de Transformación or SAT* – Agricultural Partnerships; *Uniones Temporales de Empresas or UTE* –Temporary Associations of Undertakings; Investment Funds; Capital-Risk Funds; Pension Funds; Regulators of the Mortgage Market Funds; *Fondos de Titulización Hipotecaria* – Mortgage Funds; *Fondos de Titulización de Activos* –Securities Funds; Investments Warranty Funds; *Comunidades Titulares de Montes Vecinales* – Community Owners of Neighbourhood Forests.

On the other hand, although “*sociedades civiles*”, “civil societies”, (we think that partnerships would fall in this category) might acquire legal personality, they are not subject to corporate income tax.

12. García Prats points out that the mere interposition by the taxpayer of a legal person makes the whole Directive hollow (*La propuesta de Directiva de imposición sobre el ahorro: algunos apuntes*, Crónica Tributaria, No. 96, 2000, pp. 31-62, at p. 35). See also Pérez Royo, F., L*a propuesta de Directiva europea sobre fiscalidad de los intereses*, Noticias de la UE, n. 214, 2002, p. 130; García Moncó, A., *Libre circulación de capitales en la Unión Europea: problemas tributarios*, Civitas, Madrid, pp. 292-293; Sanz Gadea, E., *Aspectos internacionales de la política fiscal (III)*, Impuestos, n. 15-16, 2001, pp. 46-47; Cordero González, E.M., *El intercambio de información sobre las rentas del capital mobiliario en la Unión Europea*, Crónica Tributaria, n. 113, 2004, pp. 29-64, at pp. 47-48.
13. See Arts. 6 and 7 RDLeg. 4/2004 (BOE 11 March 2004).

The Spanish General Taxation Law, in Art. 35.4 refers to "*entes sin personalidad jurídica*": entities lacking legal personality. With regard to these entities (and also with regard to "*sociedades civiles*"), the Personal Income Tax Law (TRLIRPF) establishes that they are not taxpayers themselves (they are included in the "*régimen de atribución de rentas*", Art. 8.3 LIRPF). Their income is allocated to their members instead[14]. The regime covering this income is dependent on the activity of each member in the context of the entity, i.e. it is regarded as income from an economic activity for those members who undertake such an economic activity, while it is income from capital for those who do not perform an economic activity within the entity ("passive income"). The amount of income is first determined at the level of the entity and later apportioned to each of its members, who will be taxed according to their status: residents, who in turn might be: a) natural persons, subject to personal income tax; b) legal persons, subject to corporate income tax; and c) non-residents, subject to non-residents income tax. At the entity level, income is determined applying personal income tax rules, with some specific elements designed to avoid that certain benefits might be enjoyed by members of the entity who are not resident natural persons[15]. From the perspective of the Savings Directive, this regime seems very adequate since, as we have explained, income of the entity is allocated to its members (the "beneficial owners"), who will be the taxpayers. Besides, there is an information requirement in force by means of which the Tax Administration[16] already has information regarding the identities of the members of these entities and their share in it, among other details[17]. Nevertheless, as we will comment below, the Spanish authorities have created a specific form (Form 299) to comply with the information requirements of the Directive.

In the context of DTCs, Vega Borrego suggests that the use of the term "beneficial owner" results in quite the same thing as the application of the internal "fraus legis" rule[18] (*fraude de ley; Umgehung des Gesetzes, Art. 42 Abgabenordnung; fraus legis*) would do, except for the fact that the procedural constraints of the abuse of law do not need to be observed with regard to determining who the "beneficial owner" is[19]. We feel that this conclusion is not fully predicable in the context of the Savings Directive, since it is irrelevant that the correct allocation of income to the "beneficial owner" results in a higher taxation than it would have been if allocated to a different person. What is relevant is that the state of residence of the beneficial owner is entitled to tax, and the information provided by virtue of the Savings Directive will make it feasible. Therefore, at least in principle, allocating the income to the beneficial owner does not have to do with the amount of taxation, it is rather a matter

14. See Arts. 8.3, 86-90 LIRPF and art. 70 Royal Decree 439/2007 (General regulations of the personal income tax).
15. Mostly they deal with ways to avoid the burden of a progressive tax such as the personal income tax, in relation to income generated over several years but which arises in one given year, since neither the corporate income tax, nor the taxation of non-residents are affected by this provision, as the application of such structures in relation to income allocated to members of the entity subject to these tax rates would result in an improper benefit.
16. The Spanish authority in charge of enforcing the Directive is the AEAT, *Agencia Estatal de la Administración Tributaria* (Agency of the State Tax Administration), and its website is at www.aeat.es.
17. See Art. 90 LIRPF. The implementing regulations (Ministerial Order HAC/171/2004, BOE 2 February 2004) further detail the information requirements for these entities which lack legal personality and establish Form 184 to comply with this obligation.
18. We refer to the kind of tax avoidance that the "economic substance doctrine" tries to fight.
19. Vega Borrego, F.A., *El concepto de beneficiario efectivo en los convenios para evitar la doble imposición*, Documentos de Trabajo del IEF, doc. No. 8/05, pp. 16-17.

of which country is the residence state and, accordingly, has taxing power on that income; and it is also a matter of who, in principle, should be taxed for that income (as we will illustrate with an example below, the latter is not always the case).

The fact that the concept of "beneficial owner" is alien to the Spanish legal culture can result in unintended consequences. In this regard, it is interesting to highlight that, according to Spanish civil law, when two persons get married all income they obtain afterwards will be deemed common, i.e. belonging to both of them 50/50 ("*ganancial*"), irrespective of who earned it (this regime is called "*régimen económico matrimonial de gananciales*"), unless they otherwise formally agree to a different regime. Since most people in Spain do not formally agree differently, the "*gananciales*" regime applies to most married people in Spain. As a result, the income earned by one spouse is only his/hers by half; the beneficial owner of the other half is the other spouse. Nevertheless, for personal income tax purposes, the income is fully allocated to the spouse that earned it. We can expect that this will probably constitute a source of difficulties in the context of the Savings Directive, since:

– persons married according to Spanish law should give foreign paying agents notice that they are married under the above-mentioned marital regime – if that is the case – in order to have the income correctly attributed to the beneficial owner;
– the Spanish tax authorities should find out which spouse has earned the income, since taxation is not based on the condition of being the beneficial owner but on the condition of being the person who earned the income.

It seems quite obvious that allocating the income to the spouse that has earned it would make things easier; nevertheless, this would collide with the Savings Directive rules, since this spouse is beneficial owner only with regard to half of that income. As we have anticipated, the beneficial owner will not necessarily be the taxpayer in the residence state.

The Spanish implementing regulations do not direct the paying agent to identify the "individual for whom an interest payment is secured" (Art. 2.1 Directive) although the Tenth Additional Disposition of RD 1065/2007 establishes that the rules governing the determination of the applicability of the tax exemption for interest income obtained by residents in other EU Member States will apply.

In relation to the possibility that a Spanish resident be a "beneficial owner" in another EU Member State, it is interesting to note that Spanish Identity Cards show an identification number formed by eight figures and a matching letter (the letter being a control element). This combination is the tax identification number, which is also included in passports and driving licences. Regarding tax residence certificates, the Spanish Tax Administration issues them at the request of the taxpayer (there is a form, "Form 01", to request the issue of certificates from the Tax Administration).

2.15.2.3. Paying agent

Art. 45 RD 1065/2007 establishes that legal persons and any other entity, including entities "*en régimen de atribución de rentas*"[20], and individuals acting in the course of a business or profession, when paying or intermediating in the payment of interest income to individuals resident in other EU Member States, are subject to the information requirements established in this RD.

Four ideas are noteworthy. First, payment of interest by an individual who is not acting in the course of a business or profession is not subject to information

20. We have referred to "*entidades en régimen de atribución de rentas*" in section 2.15.2.2., on "beneficial owner"; both entities lacking legal personality and "*sociedades civiles*" are included in this regime.

requirements; individuals are only obliged to provide information when acting in the course of a business or profession. Second, every kind of entity, including entities that lack legal personality, is subject to information requirements. Third, the domestic rules avoid referring to the activity of "securing the payment of interest" (Art. 4.1 Directive) and refer instead to "intermediating" in the payment of interest (the verb is "*mediar*" in Spanish). And fourth, the Spanish regulation ignores that Spain has committed itself to providing information to dependent or associated territories (see section 2.15.2.1., "Implemenation issues") and therefore, not only payments to individuals resident in other EU Member States are relevant, but also payments to residents in such dependent or associated territories.

Art. 47 RD 1065/2007 further elaborates on the concept of paying agent, and establishes that, in particular, the following entities are subject to information requirements: a) financial entities, for the interest, or any other compensation, paid in accounts held by them; b) the issuer of securities, for interest paid, or for the payment made in the case of refund, redemption, exchange or conversion of securities, except when such payments are made through a financial institution, in which case the financial institution is the paying agent; c) the financial institution acting on behalf of the individual who transfers a security; d) the entity that manages the Spanish Public Debt Market, in relation to the securities it trades; e) the entity that manages an investment fund, for the income distributed by the fund; when such entity is not domiciled in Spain, the entity that markets the fund in Spain or its intermediary; f) the managing or marketing entity, the investment society or the financial intermediary, for the income derived from the transfer or refund of shares or units in UCITS (*instituciones de inversión colectiva*); when the UCITS is not domiciled in Spain, the entity that markets it in Spain or its intermediary.

The contents of Arts. 4.2 and 4.3 Directive 2003/48/EC have been subject to some transformation in order to adapt them to the Spanish legal system (and, in our view, to avoid legal uncertainties that would otherwise have arisen). In the Spanish regulation (Art. 47.2 RD 1065/2007), when the interests are paid to an entity "*en régimen de atribución de rentas*" and, at least, part of such interest accrues to an individual resident in another EU Member State, the entity "*en régimen de atribución de rentas*" itself will be regarded as a paying agent and, thus, subject to information requirements. The entity can opt to provide information, not at the time of receiving the payment, but at the time of paying it to the non-resident. The Tax Administration must be given proper notice of this option.

Nevertheless, when interest is paid to a non-resident entity which is in any of the circumstances referred to in Art. 4.2 Directive 2003/48/EC (letters a), b) or c)), the payer – or who mediates in the payment – is subject to information requirements (i.e. is a paying agent for the purposes of the Directive), and must report the name and address of the receiving entity and the amount of income paid as well (Art. 45.2 RD 1065/2007).

This distinction between resident entities "*en régimen de atribución de rentas*"" and their non-resident counterparts is fully justified if we take into account that resident entities "*en régimen de atribución de rentas* " are subject to reporting requirements[21] that allow the Tax Administration to exercise proper control over their activities, while non-resident entities might avoid such controls and reporting.

The contents of paragraphs a), b) and c) of Art. 2.1 Directive 2003/48/EC (circumstances that exclude the receiver of interest payments from the condition of beneficial owner) have been transposed to Spanish regulations (nearly verbatim)

21. See note 18 above.

as exceptions to the information requirements, and thus, when a paying agent pays to such individuals he is not obliged to report it. The contents of Art. 2.2 Directive 2003/48/EC have not been transposed to domestic regulations, and so paying agents in Spain do not need to check (or guess) whether the individual who receives the payment might not be the beneficial owner and if so "take reasonable steps to establish the identity of the beneficial owner".

2.15.2.4. Interest

In order to determine when it is deemed that the income is subject to information requirements, Art. 46.1.a) RD 1065/2007 refers to Art. 25.2 of the Personal Income Tax Law (LIRPF). Accordingly, the income subject to information requirements is that derived from any type of lending (in an economic sense; assignment of capital in exchange for a compensation), no matter the name or the nature of the compensation, no matter whether the compensation is in money or in kind; and also the income derived from the transfer, refund, redemption, exchange or conversion of any kind of securities representing obtaining and using other people's capital[22].

To illustrate the relevance of the wording "no matter the name or the nature of the compensation", it is interesting to note that, for example, if someone lends money and, instead of agreeing on an interest rate, the compensation is set as a percentage of the profits of the economic activity of the borrower (or, for that purpose, the variation in the price of gold), the income obtained by the lender will be deemed "interest income" according to Art. 23.2 TRLIRPF[23].

Further, the above-mentioned Art. 25.2 LIRPF provides that this category comprises in particular:

- income derived from any bill of exchange or similar instruments, even when originating in the course of a business activity, from the moment they are endorsed or transferred, except when the endorsement or transfer is made to pay a debt with providers or suppliers;
- the compensation, no matter what its name or nature, derived from accounts in any kind of financial institution, including accounts based on securities;
- income derived from the temporary assignment of securities with a buy-back agreement (repo's);
- income paid by a financial institution as a result of the transfer or assignment, whether complete or partial, of a credit of the financial institution itself. Art. 46.1.a) RD 1065/2007 excludes penalty charges from late payments from information requirements (in compliance with Art. 6.1.a) of the Savings Directive).

22. Art. 25.2 LIRPF, to which Art. 46.1.a) RD 1065/2007 refers, deals with the determination of the gross amount of income. Therefore, implicitly, the amount of "interest" subject to information requirements is the gross amount. Note, however, that in the case of the transfer, refund, redemption, exchange or conversion of any kind of securities, buying and selling expenses are not included in the concept of gross income (see Art. 25.2 LIRPF). In any case, in the Spanish Personal Income Tax there are no deductible expenses for most of the income covered by the Savings Directive, only expenses dealing with the administration and deposit of securities (see Art. 26 LIRPF).
23. For example, the contract known as "*cuentas en participación*", by which a person lends capital in exchange for the right to obtain a percentage of the profits realized in the economic activity of the borrower, is deemed "interest income" for purposes of Art. 25.2 LIRPF. It is important to stress, however, that in this contract the lender does not become a shareholder of the borrower (it is not equity).

Cordero González points out that the Directive is not explicit about the inclusion in the concept of "interest" of the income obtained with the transfer of a security before its maturity[24]. In the Spanish regulations, this income is included in the concept of interest for purposes of the Directive (by reference to Art. 25.2 LIRPF). The author thinks that this approach is correct, within the objectives of the Directive because otherwise taxpayers could easily avoid the applicability of the Directive by selling the securities before maturity.

It is also important to draw the limits of "interest income" according to Art. 25.2 LIRPF. In this regard, it must be noted that income derived from the following sources is not "interest income":

- income derived from equity (Art. 25.1 LIRPF);
- income derived from insurance operations (Art. 25.3 LIRPF). It should be borne in mind that the concept of "insurance" has become wider over time. Especially relevant for this discussion is the fact that "unit linked" products are deemed as insurance (Art. 14.2.h) LIRPF)[25];
- income derived from investment funds (Art. 33 LIRPF). Nevertheless, although for internal tax purposes this is not deemed "interest income", for purposes of the Savings Directive it is so deemed under certain circumstances, as discussed later. Therefore, as we will explain, RD 1065/2007, which transposes the Directive, provides that, in such cases, this income must be reported;
- income derived from annuities, either life annuities or temporary annuities (Art. 25.3.b) LIRPF). This exclusion could prove especially troublesome in connection with the purposes of the Savings Directive, since interest income could easily be transformed into a temporary annuity and then be excluded from reporting requirements;
- income derived from the deferment of payment of the price in operations undertaken in the context of an economic activity (Art. 25.5 LIRPF).

Besides the reference to Art. 25.2 LIRPF, Art. 46.1.b) RD 1065/2007 reproduces (nearly verbatim) Art. 6.1.c) Savings Directive, regarding interests paid by UCITSs, paying agents upon receipt and Collective Investment Undertakings established outside the territory of application of the Directive [26]. Art. 46.1.c) incorporates the contents of Art. 6.1.d) Savings Directive, regarding the income realized upon the sale, refund or redemption of shares of units in those same entities. The main peculiarities found in these rules are:

- in order to establish the 40% threshold[27] (proportion of assets in debt claims), the internal law determines that the relevant indicator must be the investment

24. Cordero González, E.M., *El intercambio de información sobre las rentas del capital mobiliario en la Unión Europea*, Crónica Tributaria, No. 113, 2004, pp. 29-64, at pp. 41-42.
25. In a "unit linked" operation it is the insured, not the insurer, who assumes the risk. That is because the insured decides where the premiums should be invested: in shares or groups of shares – i.e. the Nasdaq index – or in investment funds. The insured can, at any time, decide to change where the premiums should be invested. Therefore, "unit linked" products somehow resemble "umbrella funds".
26. Note, however, that in Spain, for tax reasons, it is exceptional that investment funds pay interest (which would be taxed at progressive rates) and instead the income is obtained through the sale of units (which are taxed at a flat rate of 15% if the unit is owned for more than one year). Since January 1, 2007, both interest and capital gains are taxed similarly, so this practice might change.
27. The threshold will be set at 25% from 2011 onwards, Thirteenth Additional Provision, RD 1065/2007 (Art. 6.7 Directive 2003/48/EC).

policy of the fund as established in its deed of incorporation or, in the absence of such, the effective composition of its investments in the year before the payment of interests or the sale, refund or redemption of shares or units;

- in relation to the option established in the final paragraph of Art. 6.1.d) Savings Directive, Spain has opted to subject to information requirements all income realized upon the sale, refund or redemption of shares or units referred to in Art. 6.1.d) Directive, and not only that deriving from interest payments;
- Spain has also established that paying agents might simply provide information about the total amount distributed (Art. 6.1.c) Savings Directive) or the total amount realized upon the sale, refund or redemption (Art. 6.1.d) Savings Directive), instead of determining which part of such amounts is income;
- Spain has not made use of the option provided in Art. 6.6 Savings Directive, to exclude from the definition of interest payment any income derived from entities whose investment in debt claims does not exceed 15% of their assets, and thus income derived from these entities will be subject to information requirements;
- Spain has not made use, either, of the option provided in Art. 6.5 Savings Directive, to request paying agents in Spain to annualize the interest referred to in paragraphs 6.1.a) and 6.1.d) of the Directive, and treat such interest as an interest payment even if no sale, redemption or refund occurs during that period.

It should be taken into account that not all income derived from a UCITS will be subject to information requirements, since there are CIUs that are not covered by the provisions of Directive 85/611/EEC. The Spanish legislation on the matter distinguishes between “financial” and “non-financial” UCITS[28]. Among the latter, Act 35/2003 refers expressly to Real State UCITS (Arts. 35-38). According to domestic tax legislation, the income obtained from the sale of units in these “non-financial” UCITS, which are not covered by the provisions of Directive 85/611/EEC, is a capital gain (therefore, it is not covered by Art. 25.2 LIRPF either, and so it is not “interest income” for purposes of the information requirements we are examining).

The “Second Transitional Provision” of RD 1065/2007 transposes to Spanish law the content of Art. 15 of the Savings Directive, which establishes a transitional regime (in force until 2010) in relation with negotiable debt securities issued before 1 March 2001 (which will not be regarded as “debt claims” for the purposes of the concept of interest in the framework of the Directive).

As a final comment on the concept of interest income, we think the Directive will have serious difficulties with the underlying differences among Member States in their respective private law, commercial law and tax law. Especially in the case of insurance products, if it is easy to transform a lending operation into an insurance product the usefulness of the Directive will be seriously limited[29]. As for the incidence of the Directive on the taxation of interest income in the Member States it should be noted that, although the Directive does not compel the residence state to tax interest income, it encourages it, at least to compensate for the tax credit that the taxpayer will be able to deduct for the withholding tax applied in another Member State.

28. Act 35/2003, of Collective Investment Undertakings (BOE 5 November 2003); Royal Decree 1309/2005, implementing regulations (BOE 8 November 2005).
29. The same opinion is expressed by Chico de la Cámara, P.: *Los agujeros negros de la Directiva sobre fiscalidad del ahorr*o, Noticias de la UE, No. 254 (March 2006), at p. 5-6.

2.15.2.5. Transfer of Information

2.15.2.5.a. Transfer of information to the national tax authority

Dating back to 1985, Spain has well-established information requirements which are quite wide in scope[30]. Art. 93 of the General Law of Taxation[31] (LGT) establishes that all persons, whether natural or legal, public or private, as well as entities lacking legal personality, are obliged to provide the Tax Administration with every kind of data, report, record or supporting document relevant for taxation, related to their own tax liabilities or to a third person's tax liabilities. The duty of compliance with the tax system (established in Art. 31 of the Spanish Constitution) has been deemed a higher good than the right to privacy, and thus only minor exceptions are made (mail secrecy; secrecy of data provided for statistical purposes, in order to protect its accuracy; and certain deeds relating to private personal matters). In particular, bank secrecy is not one of those exceptions (as Art. 93.3 LGT expressly provides).

Information requirements can be particular or general. The first are those which the Tax Administration directs to an individual taxpayer in order to ascertain the tax due relating to a specific taxable event (i.e. those which typically arise in the context of a tax audit). The latter are those whose particular content is established by law with the aim to collect information, mostly on a periodical and regular basis, from a certain group of persons (such as financial institutions, employers and the like) in order to provide the Tax Administration with third-party knowledge that enables it to check if the compliance by taxpayers is correct[32]. These information requirements are standardized by law, which establishes the form to be used in each case to provide the information, the time to provide it, etc. The use of electronic means to comply with these requirements is widespread.

There are several general information requirements imposed on financial institutions, which provide the Tax Authorities with a comprehensive source of knowledge to carry out tax audits and also, in a wider sense, to ensure that taxpayers comply with their tax duties. Investment funds are also subject to information requirements regarding the cost of acquisition and sale price of each of their units by investors. Other relevant general information requirement for the purposes of the Savings Directive is the one imposed on entities "*en régimen de atribución de rentas*", as we have already mentioned. Third-party sources of information are so extensive that for a number of years now the Tax Administration offers taxpayers a draft of their Personal Income Tax Form, so that, if every relevant fact is already known to the Administration, the taxpayer only needs to sign it[33]. This "Draft" seems quite effective in boosting compliance, once taxpayers realize that the Tax Administration has them under close scrutiny. Also, the software provided by the Tax Administration in order to facilitate the filling in of the Personal Income Tax form is prepared so as to

30. Act 10/1985, that amended the General Law of Taxation, introduced Art. 111 (Art. 93 in the General Law of Taxation enacted in 2003, Act 58/2003), which is the frontline in the information requirements system. See Sesma Sánchez, B.: *La obtención de información tributaria*, Aranzadi, 2001.
31. Act 58/2003, of 17 December 2003 (BOE 18.December.2003).
32. The general regulations for these information requirements are now incorporated in RD 1065/2007 that sets the general regulations on tax procedures and the detailed implementation regulations on assessment procedures.
33. Art. 98 LIRPF. Third-party sources of information are very developed with respect to labour and capital income. They are less so with respect to capital gains (although capital gains deriving from investment funds, among others, are subject to information requirements) and in respect to income from business and professional activities. Needless to say, the latter are the sources of income where tax fraud thrives.

download from the Tax Administration website all the facts it already knows about the taxpayer.

In this context, Art. 49 RD 1065/2007 transposes to Spanish law the contents of Arts. 3.2 and 3.3 of the Savings Directive – which deal with the obligation on the paying agent to establish the identity and residence of the beneficial owner– nearly verbatim. The references made in the Directive to the Council Directive 91/308/EEC are made in the Spanish regulation to Act 19/1993, which transposes to Spanish law the contents of that Council Directive. There is only one minor, and sensible, element introduced by the Spanish transposition of Art. 3.3 Savings Directive – regarding the establishment, by the paying agent, of the residence of the beneficial owner – when Art. 49.b).2nd RD 1065/2007 establishes that the certificate of residence for tax purposes has a limited validity, of one year.

In Spain anyone who opens a bank account must provide his tax identification number (failure to comply is an offence; Art. 202 LGT). The mandatory use of the tax identification number is widespread in economic transactions. Therefore, paying agents should not have difficulties identifying the receiver of interest income and its residence.

Besides the identity and residence of the beneficial owner, paying agents must report (Art. 48.1 RD 1065/2007 the amount of the income paid, the account number of the beneficial owner and the identification of the debt claim giving rise to the interest (both items, and not just one of them as the Directive demands in Art. 8.1). They are not required to provide their name and address, since the Tax Administration already has this data.

When establishing the information to be provided there is no mention regarding deductible tax expenses incurred, which are also relevant to assess the tax. Nevertheless, the taxpayer can provide this information. What is more problematic is the lack of similarity among states regarding the magnitude about which information is provided (net income, gross income, gross amount realized upon the sale…). In our view this may mean that the figures provided by other states must be regarded as unreliable.

Paying agents must provide the required information in Form 299, to be produced in the month of March each year, in relation to the relevant information of the previous year. Form 299 must be produced through the Internet. But when there are more than 10.000.000 records, Form 299 can be produced in DVD-R format[34]. Ministerial Order EHA/2339/2005 regulates the details on compliance in each case (requisites to produce the declaration through the Internet and procedure, referral to the procedures of Ministerial Order of 21 December 2000 – BOE 28 December 2000 – in relation to teleprocessing, etc.).

Ministerial Order EHA/2339/2005 makes a somewhat baffling assertion when it states that “in general, that same income is already subject to information requirements, by the same persons, in other tax forms”, an assertion that is followed by a list of some forms (296, 291, 187, 192 and 198) that should contain the same data as the new Form 299. Nevertheless, the Ministerial Order states that the new regulations request certain special data (such as the address, date and place of birth, among others) that is not included in other forms and also sets new rules to identify the persons receiving the income (a clear reference to the concept of beneficial owner).

34. Art. 1 Ministerial Order EHA/3062/2010, Art. 3.2. provides that, if for technical reasons it were impossible to produce Form 299 through the Internet on time, it can still be made in the following three days. The place of presentation of Form 299 in CD-R format is specified in Art. 6.1 Ministerial Order EHA/2339/2005.

Therefore, it seems to conclude, the creation of a new Form would appear to be justified[35].

It is also interesting to note that Ministerial Order EHA/2339/2005 refers to beneficial owners resident in associated territories and dependencies, to extend information requirements in relation to them[36]. This extending provision is omitted in RD 1065/2007 (as it was the case in RD 2261/1998 previously in force and as amended by RD 1778/2004). This omission might prove to be unfortunate, since Ministerial Order EHA/2339/2005 has not been given authority to extend the information requirements established by Royal Decree, as it intends to do here. The authority of Ministerial Order EHA/2339/2005 derived from Art. 18 and from the last paragraph of the "Final Provision" of RD 2281/1998 as amended by RD 1778/2004. Ministerial Order EHA/2339/2005 was issued before the entry into force of RD 1065/2007[37] Art. 18 deals with "Terms, place and means to provide information", and directs the Minister to establish implementing regulations on these matters. The Final Provision directs the Minister to modify the date of entry into force of the information requirements in case a decision is made pursuant to Art. 17.3 of Directive 91/308/EEC. Therefore, we think that the Minister had no authority to request paying agents to report interest paid to residents in associated territories and dependencies. If that conclusion is correct, then paying agents are not bound to report interest paid to those residents. And it cannot be argued that the agreements between Spain and these associated territories and dependencies are the basis for this obligation to report on the part of paying agents, because these agreements do not intend to create obligations for the paying agents; they just create obligations for the parties.

RD 1065/2007 does not regulate the consequences of failure to comply with the reporting requirements it establishes. Therefore, we must refer to the general rules established in the LGT and in RD 2063/2004, on the implementing regulations on tax offences and penalties[38]. Art. 198 LGT provides that the failure to produce a declaration imposed by virtue of general information requirements will be sanctioned with a fine of EUR 20 per record or per pack of records referring to the same third person, with a minimum of EUR 300 and a maximum of EUR 20,000. The amounts will be cut by half if the person obliged to produce the declaration spontaneously complies at a later time (i.e. without a previous request by the Tax Administration). On the other

35. One cannot avoid the impression that the author of the Ministerial Order is sceptical about the need to create a new form to comply with Directive 91/308/EEC. After the Ministerial Order has exposed the arguments in favour of the creation of a new form, the paragraph ends by a revealing "although this might mean the duplication of some information"; then it seems to recover some strength to offer a laughable argument: "Besides, it should be borne in mind which is the term to produce this new form. Art. 18 of Royal Decree 2281/1998 has established that it is the month of March, which does not coincide with the term for the rest of the forms, which must be produced in the month of January." Sounds like the Ministerial Order intends to make it clear that it was not its choice to create Form 299.
In fact, it seems it would make more sense to establish certain modifications to existing information requirements in order to avoid unreasonable duplication.
A comprehensive outline of the contents and data to be provided in Forms 198, 296 and 299 can be seen at Tello Belosillo, J.M., *Aspectos prácticos en los procesos de captación de datos y declaraciones de información derivados de la Directiva del Ahorro*, Noticias de la UE, n. 254 (March 2006), pp. 132-133.
36. First Additional Provision of Ministerial Order EHA/2339/2005. The Ministerial Order fails to refer to residents in Anguilla and the Cayman Islands, since the agreements with these territories do not require Spain to provide information to them (in the case of Anguilla in so far as there is no direct tax in that territory, Art. 7.2 of the Agreement).
37. RD 1065/2007 confers a wider power to the Minister, since the Final Provision authorizes him/her to "establish any necessary provision for the development and implementation of these regulations.
38. RD 2063/2004, 15 October 2004 (BOE 28 October 2004).

hand, if the omission of information results, or could have resulted, in damage to the Treasury, then this “lenient penalty” would not apply and the conduct should be included in the other – more serious – type of offence.

Taking into account that most of the information requested in Form 299 should already have been provided on other forms (i.e. it is redundant in most cases), as the Ministerial Order itself expressly recognizes, it is hard to imagine a court deciding that the omitted records “result or could have resulted” in damage to the Treasury, since the Treasury should have known the underlying facts through the information provided on other forms. Hence, the duplication of information requests could result in a lower protection against failures to comply with Form 299.

Regarding the period during which paying agents should keep the records available for the Tax Administration, Art. 70.2 LGT establishes that taxpayers must preserve and provide the relevant data during the same period as the commercial law requires them to keep it, or during the prescription period of their tax duties, whichever is longer. The commercial legislation establishes that records should be kept for five years (Art. 45 Code of Commerce). The prescription period is four years, but it is interrupted (and, in such case, the period restarts from zero) whenever the taxpayer is notified of and subject to a tax control (see Arts. 66-68 LGT; the term “tax control” is wider than “tax audit”, tax audits being one of the forms of tax control; for example, the requirement to produce a supporting document at the Tax Office is another form of tax control). Besides, Art. 70.3 LGT provides that the taxpayer must keep any data relevant for tax liabilities which are not prescribed. This provision can increase considerably the number of years during which records must be kept. To illustrate this idea, suppose that a taxpayer buys a 50-year bond and keeps it until it reaches maturity. According to this rule, since the price of acquisition is a relevant data for the tax liability at the moment in which the bond reaches maturity, the taxpayer should keep the record that justifies his acquisition until the tax period in which the bond has matured (i.e. for at least 54 years).

2.15.2.5.b. Transfer of information between Member States

The Tax Administration will supply the information obtained to the tax administrations of the other EU Member States. Although tax information is confidential and there are strict rules on the use of that information for purposes different from the application of the – internal – tax system, Art. 95.1.b) LGT provides that one of the cases in which tax information can be revealed is “to collaborate with other tax administrations for the purposes of the compliance in relation to their tax competencies”[39]. This provision adequately covers the supply of the information required by the Savings Directive, and thus no legal change has been necessary in this respect.

39. Note that Spain is politically organized in “*Comunidades Autónomas*” (autonomous regions), which have important authority in tax matters, including the power to regulate certain aspects of some taxes (each *Comunidad Autónoma* has its own elected Parliament). In relation to the Personal Income Tax, for example, the *Comunidades Autónomas* can regulate the Autonomous Tax Rates (which represent a third of all revenue) and tax deductions. They also administer some taxes, such as the Gifts and Inheritance Tax, or the Transfer Tax (which taxes transfers of property not taxed by VAT). In the Basque Country and Navarra, the regional authorities have full taxing powers, both to regulate every aspect of most taxes, including Personal Income Tax and Corporate Income Tax, and to administer them. This explains the provision in Art. 95.1.b) LGT we are referring to.

2.15.2.5.c. Information received for a taxpayer resident in another Member State

If a taxpayer turned out to be resident in another Member State than the state indicated by the paying agent, we think that the information should be automatically forwarded to the "authentic" residence country. Note that Art. 9 of the Directive establishes that "the competent authority of the Member State of the paying agent shall communicate the information referred to in Art. 8 to the competent authority of the *Member State of residence of the beneficial owner*". The Directive does not provide that the information should be transmitted to the state designated by the paying agent as the residence country; instead it must be transmitted to the state of residence, which is a legal concept. Therefore, we think that under Art. 9 the transmission of the information to the "authentic" residence state is mandatory.

2.15.3. Withholding tax

Spain will apply automatic exchange of information from the moment of the entry into force of the Savings Directive, and thus it will not apply the withholding tax provided for in Art. 11 of the Directive.

As a general rule, Spain does apply a withholding tax of 15% on interest income. Nevertheless, this withholding tax does not apply in relation to exempt income (Art. 31.4.a) TRLIRNR and, as we have explained above (section 2.15.2.4., "interest income"), most interest income obtained by residents in other EU Member States without a permanent establishment in Spain is exempt. The Spanish withholding tax will be relevant with respect to the territories that have made compromises pursuant to the Savings Directive, since in this case the interest income obtained by residents in those territories will not benefit from the exemption. Art. 15.3 of RD 1776/2004, establishing implementing provisions for the Non-Residents Income Tax, establishes that the person obliged to withhold must provide the taxpayer with a certificate of the withholding tax (this same obligation is provided for in Art. 108.3 RD 1775/2004, Personal Income Tax). Therefore, the taxpayer will be informed by the person obliged to withhold of any withholding tax applied in Spain, if any.

In relation to the withholding tax provided for in the Savings Directive, applied by Austria, Belgium and Luxembourg – among the EU countries –, Art. 76 RD 1065/2007 establishes that the Tax Administration will issue, at the request of the taxpayer of the Spanish Personal Income Tax (which applies to residents), the certificate referred to in Art. 13.1.b) Savings Directive, i.e. the certificate that ensures that the withholding tax is not levied in the source state. The certificate will state the details mentioned in Art. 13.2 Savings Directive (name, address and tax identification number of the beneficial owner; name and address of the paying agent; account number of the beneficial owner or, where there is none, the identification of the credit). This certificate will have a validity of three years (the maximum period allowed by the Directive) and will be issued in a maximum of ten working days (*dies juridici*) following the request (in this case the Directive allows for a maximum period of two months).

Regarding the possibility that a taxpayer who has been identified as an EU resident under the Directive but nevertheless proves that he is not a resident of a Member State under the rules on international tax law, in our view, this taxpayer should be allowed to ask for a refund of the withholding tax from the source state (in case a withholding tax has been applied). It should be noted, however, that according to the Spanish PIT, an absence by an individual is deemed "sporadic" and thus irrelevant for tax purposes unless he proves that he is a resident in another state which is not a tax haven (the Tax Administration considers this burden of proof met only when the taxpayer provides a certificate of tax residence in another state). It is also relevant to take into account that the change in the address for tax purposes must be communicated to the Tax Administration, and the failure to provide this information is a tax offence (Arts. 48 and 198 LGT). These provisions should make it less likely that a conflict might arise.

As far as the identification of the beneficial owner in withholding countries is concerned, the state of residence should be the one which takes measures against the beneficial owner who failed to provide relevant and accurate data to his paying agent. In the case of Spain, failure to provide full and correct data that results in a withholding tax not being applied or being applied in an amount below what it should have been is an offence (Art. 205 LGT), and the penalty depends on whether or not there is an obligation to include that income in the tax assessment, the penalty being more severe if there is no obligation to declare (omission of income in the tax assessment is also an offence). We think that the language of this provision allows for its application when a Spanish taxpayer fails to provide the foreign paying agent with full and correct data to apply the withholding tax, since it refers to "withholding tax" in general, and the withholding tax provided for in the Directive could be included in its scope and taking into account that 75% of that withholding tax accrues to the Spanish Treasury.

The withholding tax "effectively" levied in another jurisdiction by virtue of the rules of the Savings Directive is deductible from the tax due in Spain in the Personal Income Tax, as is expressly established in Arts. 79.e) and 99.11 LIRPF. The deduction can be applied in respect to the taxable year in which the withholding tax was applied.

A Directive of the Tax Administration dated July 21, 2006[40] establishes the procedure for the reception by Spain of the withholding tax collected in other member states in respects to residents in Spain.

40. Published in the BOE, August 2, 2005.