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Global Tax Alert

Spain sends 2020 bill on Digital Services Tax to Parliament for approval

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Executive summary

On 28 February 2020, the Spanish Council of Ministers sent a bill (the Bill) on Digital Services Tax (DST) to the Parliament (Congress and Senate) for a vote.

The Spanish Government resumed its initiative to enact a unilateral DST after its failure to pass the bill drafted in 2019 (See EY Global Tax Alert, *Spain sends bill on Digital Services Tax to Parliament for approval*, dated 29 January 2019). Since then, two general elections were held in Spain since the ruling party did not have sufficient parliamentary support. In the last election, which took place in November 2019, the same party was elected as the ruling party in Parliament, and it entered into an agreement with another allied party to pass, among other tax measures, a unilateral Spanish DST.

The current Bill is fully aligned with the previous version (2019 Spanish DST bill). Its main features are similar to the DST initially proposed by the European Union (EU) Commission on 21 March 2018, with a rate of 3% imposed on gross income derived from certain digital services for which user participation is essential for creating value; namely, targeted online advertising, online intermediation services and the sale of user data. Only companies with worldwide revenues of at least €750 million annually, with a total amount of taxable revenues obtained in Spain exceeding €3 million annually, would be subject to the DST.

Building a better working world

Apart from the exclusions contained in the original EU DST proposal, the following transactions are excluded from Spanish DST pursuant to the Bill:

- Transactions involving only entities with 100% direct or indirect ownership or common ownership
- Regulated financial services rendered by regulated financial entities
- Income derived from the transfer of data by regulated financial entities

It remains uncertain whether the Spanish Government has the support needed to progress the Bill. EY will provide updates on the approval status in Parliament as the Bill moves forward.

If approved, the filing and payment of the DST corresponding to the second quarter (2Q) and third quarter (3Q) of 2020 will not be due until 20 December 2020.

Detailed discussion

Spanish DST within the European and international framework

In accordance with the Bill's explanatory statement, the DST would be a first interim response to the challenges arising from the new global economy development.

The Spanish Government has acknowledged that the ideal approach to address these tax challenges would be to find a multilateral, international solution within the Organisation for Economic Co-operation and Development (OECD).

Nevertheless, the Spanish Government also notes that, since the adoption and implementation of practical measures at the international level is taking a long time, the adoption of a unilateral interim measure is needed to address this problem.

As per the above, the Bill's preamble states that the Spanish DST is conceived as a temporary transitional measure which will apply until the rules implementing the internationally-agreed solutions enter into force.

The Government's view is that since the DST is focused on the services rendered, irrespective of the providers' features (among others, their economic capacity), it should not be considered as a tax on income or wealth and, therefore, falls outside the scope of the double tax treaties entered into by Spain.

The above is the key reason why the tax would be implemented as an indirect tax, in accordance with Article 1 of the Bill, as in the original European Commission's proposal.[1] Additionally, the Government considers that the DST would be compatible with the Value Added Tax (VAT), harmonized throughout the EU.

Spanish DST's main features

The proposed Spanish DST, if approved, will apply to services where the participation of a user in a digital activity constitutes input for the business and that enables that business to obtain revenues therefrom.

In particular, the tax is imposed on the provision of the following **digital services**:

(i) The placing on a digital interface[2] of advertising targeted at users of that interface (*online advertising services*).

The Bill expressly defines the notion of "targeted advertising" as any form of digital commercial communication, the purpose of which is to promote a product, service or brand, which is directed to users of a digital interface based on the data collected from them.

The Bill also includes a presumption that all advertising will be considered as "targeted advertising," unless proved otherwise.

(ii) Services consisting in making available multi-sided digital interfaces to users which allow them to find other users and to interact with, and which may also facilitate the provision of underlying supplies of goods or services directly among users (*online intermediation services*).

(iii) The transmission of data collected about users which has been generated from such users' activities on digital interfaces (*data transfer services*).

Activities that are not subject to taxation generally match the ones outlined in the European Commission's proposal and include:

- Online sales of goods or services through the website of their supplier, in which the supplier does not act as an intermediary (e-commerce related to retail activities), are excluded. In such cases, the value creation for the retailer lies with the goods or services provided and the digital interface is simply used as a means of communication.
- The Bill expressly excludes from its scope the sale of goods or services between end users within an online intermediation service (i.e., the underlying transaction, for example, a rental service price).

- Online intermediation services are also excluded when the main objective is to provide digital content to users or provide them with communication or payment services.
- Transactions when there is a direct or indirect participation of 100% of the group entities involved.
- Regulated financial services rendered by regulated financial entities.

  Regulated financial services are defined as financial services for which a regulated financial entity is authorized.

  Regulated financial entity is defined as a financial services supplier that is subject to authorization, or registry, and supervision due to any domestic law or EU-harmonized measure to regulate financial services, including those financial services suppliers subject to supervision according to any non-EU rule that, according to a legal act by the EU is considered as equivalent to EU measures.
- The provision of data transmission services by regulated financial entities.

  The DST **tax base** will be the gross income, excluding the VAT or other equivalent taxes (if any), obtained by the taxpayer upon the provision of the digital services covered by the DST and which are rendered within the Spanish territory. For such purposes, the Bill establishes certain allocation keys to allow the determination of the portion over total revenues that must be taxed depending on, basically, their relation to Internet Protocol (IP) addresses located in Spain.

  Certain **thresholds** are established in order to ensure that the DST is only applied to companies of a certain scale with a significant Spanish digital footprint in Spain. This is intended to protect the initial phases of highly-digitalized economic activity development, where it is usually necessary to make a substantial investment and the period to reach a profit-making position may be long.

Hence, the companies subject to this tax will be those with a total amount of worldwide revenues for the previous calendar year exceeding €750 million (a reference is now made to the EU Directive on Country-by-Country Reporting[3]) and with a total amount of taxable revenues obtained in Spain in the same period exceeding €3 million in Spain.

Special rules are established for entities belonging to a group. The thresholds above must be assessed at a group level in order to determine if a company exceeds the thresholds and, therefore, should be considered a taxpayer.

In line with the initial European Commission's proposal, the **nexus** with the Spanish territory that allows taxation in Spain is based on the location of the users (i.e., users located in Spain), regardless of whether the user has paid any consideration that contributes to the generation of revenue for the company.

For these purposes, a specific set of location rules are established for each of the digital services listed above, based on the place where the devices of these users have been used, generally located by their IP addresses.

However, proof to the contrary (in particular, other geo-location methods) is accepted. This is a protection mechanism for the tax administration and the taxpayer against potential errors, concealment or falsification of the IP address of the devices used, aimed at locating services in or out of Spanish territory.

The Bill also sets forth that the data that can be compiled from users for the purpose of applying the provisions of the Spanish DST Law is limited to those which allow the localization of the users' devices located in Spanish territory.

The DST **tax rate** is set at 3% on the gross income derived from the referred services.

The **accrual** of the tax is immediate, taking place for each taxable digital service (or at the time of the total or partial collection of the price for the amounts actually received, whichever event takes place first). The tax is settled on a quarterly basis. Details on filing and payment deadlines and methods are still to be determined. However, for 2Q and 3Q 2020, it is expressly foreseen that the filing and payment of the DST will not be due until 20 December 2020.

Next steps

The Bill now moves to the Parliament for approval. If approved, it will come into force three months after it is published in the Spanish *Official Gazette*. It is expressly foreseen that, if approved, the filing and payment of the DST corresponding to 2Q and 3Q 2020 will not be due until 20 December 2020.

Highly digitalized groups should conduct a detailed analysis of the terms of the Bill, as well as the legal and economic substance of their transactions, to consider the potential impact of this measure.

EY will monitor the development of the Bill's approval procedure and, at the same time, the development of negotiations at OECD level.

Endnotes

1. The Directive proposal is based on Article 113 of the EU treaty that refers to "other forms of indirect taxation."
2. The Bill defines "digital interface" as any program, including websites or parts thereof, or application, including mobile applications, or any other means, accessible to users, that enables digital communication.
3. Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

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