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New financial transaction tax

Legal flash

October 16, 2020

The Spanish Official Gazette has published Law 5/2020, of October 15, on the Financial Transaction Tax. The legislation will become effective from January 16, 2021, three months after publication in the Official Gazette.

- The new tax will fall on the acquisition for value **of listed shares** of Spanish companies on a regulated market with a **market capitalization value of over €1,000 million**, irrespective of where the acquisition is made and the place of residence of the parties to the transaction.

- There are many **exemptions from the financial transaction tax,** including (i) acquisitions on the primary market; (ii) transactions viewed as necessary for the proper functioning of the market (e.g., price stabilization, central securities depositories, liquidity providers, market makers); (iii) transactions between entities of the same corporate group; (iv) acquisitions arising from business restructuring transactions; and (v) acquisitions of own shares within a buyback program.

- **Tax rate: 0.2%**

- **Taxpayer**: the acquirer of the shares.

- **Taxable person:** mostly financial intermediaries that convey or fulfill the order, on their own account (as a taxpayer), or on account of another (as a "substitute of the taxpayer"). Tax returns will be filed through a central securities depository located in Spain.

On October 16, 2020, the Spanish Official Gazette has published *Law 5/2020, of October 15, on the Financial Transaction Tax*. (hereinafter, "Law on the FTT").

The financial transaction tax ("FTT") is an indirect tax that will be imposed from January 16, 2021, three months after the publication of the Law on the FTT in the Official Gazette.

Following the line taken unilaterally by France in 2012 and Italy in 2013, the new tax approved in Spain will affect the negotiation of Spanish listed shares with a market capitalization exceeding €1,000 million, deviating in some aspects from the Proposal for a Council Directive put forward by the European Commission on February 14, 2013, on implementing enhanced cooperation in the area of financial transaction tax.

Characteristics, scope of application and taxable event

The FTT is an indirect tax that will be applied based on the **issuance principle**, meaning that it is levied on the acquisition of Spanish shares, regardless of where the acquisition is made and of the residence of the individuals or entities involved in the transaction.

The taxable event is the **acquisition for valuable consideration** of shares that:

(i) **are admitted to trading on a regulated market** (i.e., on the Spanish Stock Exchanges, on another regulated EU market, or on an equivalent third-country market), and

(ii) have been issued by a **Spanish company with a market capitalization exceeding €1,000 million** at December 1 of the year before the acquisition. In the case of transactions carried out between January 16, 2021 -the date the regulation comes into effect- and December 31, 2021, the market capitalization will be the value determined in the month preceding the entry into force of the law (i.e., in December 16, 2020). The Spanish tax authorities will publish the list of companies in this situation on their website before the law enters into force.

Acquisitions for valuable consideration of **depositary receipts** (e.g., ADRs and GDRs) representing the shares specified above are also subject to FTT, regardless of where the entity issuing them is established. Exceptionally, the tax will not be levied on (i) acquisitions made exclusively for the issuance of depositary receipts, (ii) acquisitions of depositary receipts in exchange for the shares they represent, and (iii) transactions canceling depositary receipts through delivery to the holders of the shares they represent.

Also, the tax will be levied on acquisitions of shares and depositary receipts arising from the implementation or settlement of securities or convertible or exchangeable bonds, derivative financial instruments or any other type of financial instruments, or atypical financial contracts.

In all of these cases, these acquisitions will be subject to FTT irrespective of whether they are made on a trading venue (regulated market, multilateral negotiation system or organized trading system). Therefore, this will also affect any over-the-counter ("OTC") transactions made outside a trading venue (e.g., bilateral agreements between the contracting parties or systematic internalizer operations).

Exemptions

a) Acquisitions arising from the issuance of shares and depositary receipts (**primary market**).

b) Acquisitions arising from the initial placement of shares in the context of a public offering of sale ("**IPO**").

c) In the context of an issuance or IPO, acquisitions made by **underwriters and placement entities** to distribute the shares or to fulfill their obligations as underwriters or placement entities of these transactions.

d) **Price stabilization transactions** carried out in the context of the safe harbor envisaged under the market abuse regulation in the context of the admission to trading of the shares on the stock exchange.

e) Transactions performed by **central counterparties or central securities depositories** in the exercise of their compensation, liquidation and registry functions.

f) Acquisitions made by **liquidity providers**.

g) Acquisitions made in the framework of **market making** activities.

h) Transactions between **entities of the same corporate group**.

i) Acquisitions arising from transactions eligible for application of the **special regime for mergers, spin-offs, asset contributions and share exchanges** regulated in Chapter VII, Title VII of the Spanish Corporate Income Tax Act, and those arising from **mergers or spin-offs of collective investment undertakings** or of compartments or subfunds of collective investment undertakings carried out under the corresponding regulations.

j) Securities financing transactions and title transfer collateral transactions resulting from of a **financial collateral arrangement**.

k) Acquisitions arising from the application of resolution measures of credit institutions and investment services firms.

l) Acquisition of **own shares or shares of the parent company** made by another entity in the same corporate group within a buyback program of shares intended for (i) capital reduction, (ii) the conversion of debentures into shares, or (iii) the delivery of shares arising from stock options or other shares assigned to employees or members of governing or supervisory bodies of the issuing entity or an entity in its corporate group.

For these exemptions to be effective, the acquirer must notify the taxable person acting on behalf of a third party that the grounds giving rise to application of the exemptions have been met, also providing certain additional information depending on the exemption being applied.

Accrual

The tax accrues when the securities in the acquirer's favor are **entered on a securities account or register**.

Taxable base

Generally speaking, the tax base will consist of the **amount of the consideration** for the transactions subject to FTT, not including the transaction costs arising from market infrastructure prices, intermediation fees or any other cost associated with the transaction. If the amount of the consideration is not stated, the tax base will be the value at the closing of the most significant market by liquidity of the security in question on the last day of trading before the transaction date.

However, there are also other special rules for calculating the taxable base depending on the type of transaction resulting in the acquisition of the shares:

Transaction	Taxable base
Securities or bonds convertible into or exchangeable for shares	The value established in the related issue document
Execution or settlement of options over shares or other derivative financial instruments	Exercise price of the derivative instrument
Acquisitions arising from derivative instruments that constitute forward transactions	The agreed price, or the delivery price at the expiration date if the derivative is traded on a regulated market
Acquisitions arising from the settlement of atypical financial contracts	Value at the closing of the most significant market by liquidity of the security in question on the last day of trading before the transaction date

For taxable persons acting on behalf of third parties to be able to apply these special rules, the acquirer must inform them of the circumstances enabling the application of the rules, and of the factors determining the quantification of the taxable base.

In the case of **acquisition transactions and intra-day trading** of the same security ordered or fulfilled by the same taxable person with respect to the same acquirer, the taxable base is:

$$\mathbf{TB = (No.\ shares\ acquired - No.\ shares\ sold) \times \frac{\Sigma\ considerations\ for\ the\ acquisitions}{No.\ shares\ acquired}}$$

In other words, the result of multiplying the positive difference resulting from subtracting the number of securities transferred on the same day by the quotient resulting from dividing the sum of the considerations for these acquisitions by the number of securities acquired. Exempt acquisitions are excluded from this calculation.

Taxpayers, taxable persons and liable parties

The **TAXPAYER** is the **acquirer of the shares**.

However, the **TAXABLE PERSON** is the following, irrespective of the place where that person is established:

(i) **In the case of acquisitions made on account of the acquirer,** as a **taxpayer**, the investment services firm or credit institution making the acquisition.

(ii) **In the case of acquisitions made on account of third parties**, as a **substitute of the taxpayer**, the following entities, depending on the type of transaction:

Transactions made on a trading venue (regulated market, multilateral negotiation system or organized trading system)
The member of the market fulfilling the transaction. When one or more financial intermediaries acting on behalf of the client are involved, this will be the financial intermediary that receives the order directly from the client.

OTC transactions	
Systematic internalization (*)	The systematic internalizer fulfilling the transaction. When one or more financial intermediaries acting on behalf of the client are involved, this will be the financial intermediary that receives the order directly from the client.
Processed by another financial intermediary.	The intermediary that receives the order from the acquirer of the securities or delivers the securities by virtue of the fulfillment or settlement of a financial instrument or contract.
Other OTC transactions	The entity providing the depositary services for the securities on behalf of the client. In these cases, the acquirer must inform the depositary of the payment obligation and the quantification.

(*) Direct fulfillment of orders by an investment services firm without going through a market.

The law sets out three situations of **JOINT AND SEVERAL LIABILITY** that **acquirers of the securities** must assume:

(i) They have provided the taxable person with incorrect or inaccurate information for determining the application of the exemptions.

(ii) They have provided the taxable person with incorrect or inaccurate information leading to a lower tax base applicable in cases where this base must be calculated based on the special rules.

(iii) They have not notified the depositary of the securities in cases where the acquisition was made outside a trading venue, or where this information is incorrect or inaccurate.

Tax rate

The tax rate is 0.2%.

Tax management

As a rule, taxable persons must calculate and pay the tax debt in the place, form and within the time limits established by the tax authorities.

Under the regulation, taxable persons must submit a self-assessment and pay the tax debt through a central securities depository located in Spain. The central securities depository will file the return for and on behalf of the taxable person, without assuming any tax liability for the returns submitted or their content.

In these cases, the taxable person must give the central securities depository all of the information that must appear in the return, and also pay the depository the corresponding tax debt amount.

This procedure also applies to other central securities depositories in other European Union Member States, or in third states authorized to provide services in the European Union, by means of collaboration agreements entered into with a central securities depository located in Spain.

Tax returns must be filed on a **monthly basis** and the tax debt cannot be postponed or paid in installments.

To facilitate the control and management of the tax, taxable persons and central securities depositories located in Spain, as well as their participating entities, must make the documentation or files regarding the taxable transactions available to the tax authorities.

Infringements and penalties

Tax infringements provided in the regulation regulating FTT and its implementing regulations will be classified and penalized under the General Taxation Act.

For additional information, please contact Cuatrecasas.