
Spain approves digital services tax

Legal flash | Finance and Tax

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- **Act approving digital services tax (“DST”) is published in Official Gazette of the Spanish State**
- **Tax is levied on three service types: online advertising, online intermediary services and data transmission**
- **Taxable base is gross income earned**
- **Tax rate is 3%**
- **Companies subject to this tax are those with turnover of over €750 million and revenue, subject to that tax, of over €3 million in the previous year. Thresholds to be calculated at group level**
- **Tax to be levied for first time in first quarter of 2021**



Approval of new digital tax

The DST was finally approved by Act 4/2020, of October 15. Following a parliamentary process that started two parliamentary terms ago, which sparked an intense political debate regarding how appropriate the measure is in the current international tax arena, the Official Gazette of the Spanish State today published the wording of the act on this tax.

This international context includes both the European Union (EU) and the Organisation for Economic Co-operation and Development (OECD). The European Commission (EC) issued two proposals for directives (one in *March 2018* that included three types of digital services to be subject to DST, and another one in *March 2019* that only referred to digital advertising) which, however, do not seem to have the unanimity currently required for approval. In fact, although the first draft regulation limited the validity of DST until the new EU regulation enters into force, the later wording, and the wording that was finally approved, do not include this referral.

Meanwhile, the OECD has spent many years reviewing the taxation of the digital economy. In particular, on October 12, it has released its public consultation document on *Pillar One* (its multilateral proposal for a new distribution of taxing rights in this field), although the finalizing of the political agreement has been postponed until mid 2021. As these measures overlap (DST's services are included in the list of Automated Digital Services in Amount A of the OECD's proposal), the preamble to the act approving DST mentions that the tax is of a provisional nature "until the entry into force of the new legislation aimed at incorporating the solution that is adopted internationally."

In any case, despite these developments, the mentioned preamble justifies the inclusion of Spain on the list of countries that have adopted unilateral measures for taxing digital services due to (i) the prolonged duration of the negotiations, and (ii) "reasons of social pressure, tax justice and the sustainability of the tax system."

The preamble of Act 4/2020 also indicates that DST does not conflict with the double tax treaties signed by Spain given that, as it focuses on services provided and does not consider the supplier's characteristics, it is not a tax on income or wealth covered by those agreements. In the case of the double tax treaty between Spain and the US (paradigmatic regulation on which this compatibility must be confirmed), we highlight that Spanish taxes covered are personal income tax, company income tax and all taxes that are "identical or similar" to these taxes.



Main features of DST

DST is defined as an indirect state tax that is levied on certain digital services when the users involved are located in Spain, on the basis that these users contribute to the value creation process of the company providing the service and through which the company obtains revenue.

Unlike the most recent EU proposal, DST will be levied on three service types:

- Online advertising, understood as the inclusion in a digital interface, own or of a third party, of advertising aimed at the users of that interface.
- Online intermediary services, consisting of making a digital interface available to the users (which enables interaction with different users) that (i) facilitates delivery of goods or the provision of services between users, and (ii) enables users to locate other users and to interact with them.
- Data transmission with consideration, including the sale or assignment of data gathered on the users generated by their activities on digital interfaces.

The act includes a detailed regulation of the connection points, i.e., of the rules determining the place of supply of the digital services; when this place of supply is in Spain (in the case of the Basque Country and Navarre, agreement would be required), the provision would be subject to DST.

Cases not included in the scope of the DST are: (i) sales of goods or services bought on the supplier's website (i.e., when the supplier is not acting as an intermediary); (ii) delivery of goods and provision of underlying services between users; (iii) online intermediary services when the only or main purpose of the provision of services is to make available an interface for supplying digital content or providing communication or payment services; (iv) the provision of financial services and data transmission carried out by regulated financial institutions; and (v) provisions of digital services between institutions forming part of a group that wholly owns them, whether directly or indirectly.

DST taxpayers are exclusively those legal entities and other entities exceeding two thresholds: (a) net turnover of over €750 million in the previous calendar year; and (b) total revenue from the provision of digital services subject to the tax, corresponding to the previous calendar year, of over €3 million. In the case of entities forming part of a group, the amounts considered for these thresholds will be the global figures.

The tax base is made up of the amount of revenue earned by the taxpayer, excluding VAT and similar taxes, for each provision of taxable digital services subject to DST. There are particular



rules in relation to each one of the services covered in the scope of the act, and it is clarified that provisions of services carried out between entities of the same group must be assessed based on their market value.

The tax rate is 3% and the tax return must be filed quarterly. Considering that Act 4/2020 will come into force three months after its publication in Official Gazette of the Spanish State, the first tax period affected will be the first quarter of 2021, in which the provisions of services carried out since January 16 must be included. Under the general system for compliance with quarterly obligations, we expect that the first DST self-assessment would take place between April 1 and 20, 2021, although the implementing regulation of the tax (yet to be passed) should clarify this.

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