

# Digital Services Tax: Spain joins the list of countries with domestic regulations

The Digital Services Tax ("DST") Law has been approved in the Spanish Senate.

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## Get in touch with PwC Tax and Legal Services

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In a scenario of no modification of the text sent by the Congress of Deputies, the approval by the Senate, on October 7, 2020, was the last procedure that the DST Draft Bill had to go through, leaving only its publication in the Official State Gazette pending (with respect to the detailed content of the DST Law, we refer to what was stated in [previous Tax Alerts](#)).

Spain has therefore not wanted to wait for the materialization of an international solution (around the so-called Pillar I, whose progress has stalled - the EU is threatening to open its own way-), and has regulated this matter domestically in a unilateral and in principle, transitory manner, following in the footsteps of other countries such as France and the United Kingdom.

The DST is a tax defined normatively as indirect, which must be liquidated quarterly and which taxes at 3% the following qualified operations ("digital services"):

- **Online advertising services**, considered as inclusion services in a digital advertising interface directed to the users of that interface.
- **Online intermediation services**, understood as the provision of platforms that allow different users to contact each other, either to facilitate the delivery of underlying goods or services, or to interact with each other.
- **Data transmission services**, i.e. the sale or transfer of user data collected on digital interfaces by the activity of users.

## Taxpayers

Only those entities that exceed the following thresholds will be considered as DST taxpayers whether they are residents or not:

- That the total **income of the previous year exceeds 750 million Euros** (for all concepts of activity, i.e. beyond the qualified operations).
- That the total income derived from the provision of "**digital services**" carried out in Spanish **territory exceeds 3 million Euros** in the previous fiscal year.

However, for entities belonging to a group within the meaning of Article 42 of the Commercial Code, the thresholds are determined at group level.

## Unapproved amendments evidencing points of conflict

In its parliamentary process in the Senate, the different groups have presented a total of 91 partial amendments to the Bill (many of which had already been raised in Congress), rejected in their entirety, which show evidence of its controversial points. By way of example, we mention the following:

- The inclusion of the **transitory nature** of the DST Law (once an international, global or European solution has been adopted) in the articles of the regulation (and not in the Preamble).
- The **"cascade effect"** of the Tax as a generator of taxation in chains of digital services that incorporate others, all of which are subject to the DST.



The practical difficulty in determining the quantitative elements of the DST (certainty and proof of information, especially in relation to the criteria for locating taxable operations) probably requires companies to rely on external assistance for their assurance.

- The need to eliminate **double taxation** with respect to taxes such as corporate income tax and non-resident income tax (NRIT).
- The convenience of referring the **"worldwide" income threshold** to qualified activities.
- The determination of the **intra-group transactions** that are not subject to the DST to the cases of group of companies of Article 42 of the Code of Commerce and not to the cases of participation between entities at 100 %.
- The improvement in the definition of certain **taxable cases** (digital content, targeted online advertising, marketplaces) and the **explicit reference to certain non-subject cases** (electronic communications and audiovisual content, cloud computing, etc.).
- The clarification of the **location criteria** in the subject operations (especially in online advertising).
- Simplification, through the use of **aggregation criteria**, in the determination of the **tax base**.
- The modulation of certain **formal obligations**, in particular that of *"establishing systems, mechanisms or agreements that allow for the determination of the location of user devices in the territory of application"* of the DST Law.
- The **sanctioning regime** of the regulation does not take into account that there may be situations in which users hide their IP address for legal reasons and without any tax motivation, so that the taxpayer providing the digital service will not know the location of its users according to IP.
- It has been proposed that the DST **liquidation period** be annual given the administrative and technical complexity that may arise in order to determine the income derived from certain sources.
- Without denying its contribution to agility and flexibility, disagreement with the reference to the **General State Budget Law** for the modification of relevant elements of the DST (Third Final Provision).

#### Other elements to consider, linked to the approved rule

- Despite being qualified in the Law as an indirect tax, it could be argued that it is in fact a **direct tax** (remember for example its "connection" with the international solution of "Pillar I") with

the debate on the potential application of the Conventions for the Avoidance of Double Taxation signed by Spain.

- The practical complexity in **determining with certainty the quantitative elements of the DST** (taxable base, with particular attention to the application of the criteria for the location of digital services in Spain), means that taxpayers could need assurance solutions in this area, potentially provided by third parties.
- Implications for the purposes of the **Organic Law on the Protection of Personal Data** and the guarantee of digital rights in the determination of the place where the users' devices have been used, located from their IP addresses.

#### Other challenges in the economy

- The unilateral implementation of this measure could potentially reduce the **interest of foreign investment in Spain in the field of digital services** (or in the consolidation or increase of its presence), even to the point of being planned by digital multinationals to reduce their profile in our country, if their business share does not compensate the increase in tax burden.
- Potential **repercussion, at least partial, of the DST** to individual users, and above all, to small and medium-sized companies (the basic business fabric of the country), with the consequent impact on profits and competitiveness in our market in comparison to others where a similar tax has not been implemented.

#### Regulatory development

The **development and execution** of this Law through a Regulation remains pending (Second Final Provision) and in particular, in application of the provisions of Articles 13 and 14 of the DST Law, the different **formal obligations** that taxpayers of this tax will have to comply with. A period of **public consultation has been set up on this point until October 13, 2020**.

#### Entry into force

This Law will come into force **three months after its publication in the Official State Gazette**, so the first self-assessment of this tax by the taxpayers affected by it will take place by reference to the period between the date of entry into force (within 2021) and March 31, 2021.