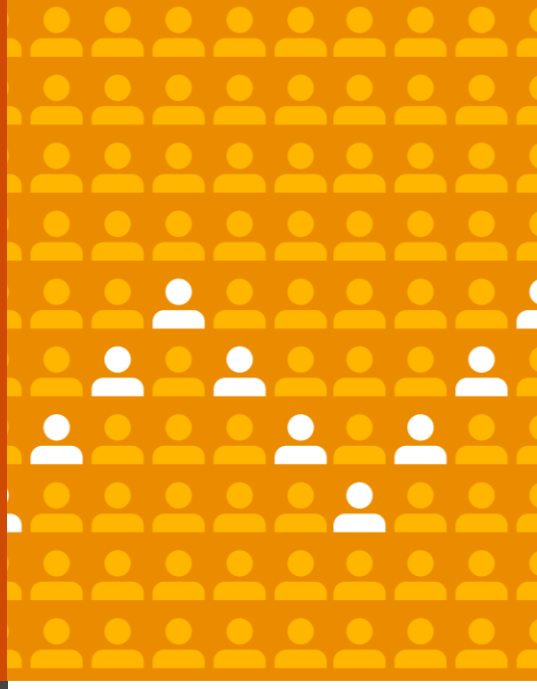
Digital Services Tax in Spain: The regulatory circle is beginning to close



Analysis of the Draft Royal Decree, which approves the Regulation of the Tax on Certain Digital Services

December 2020

Get in touch with PwC Tax and Legal Services

Álvaro Sánchez-Herrero
Responsible Partner of Legal and Tax Services for the Technology, Media & Telecoms sectors (TMT)
alvaro.sanchez-herrero@pwc.com

Cristina Foyedo Lahoz
Lawyer specialized in TMT
cristina.foyedo.lahoz@pwc.com

Pablo Fernández Hernández
Tax advisor specialized in TMT
pablo.fernandez.hernandez@pwc.com

On 3 December 2020 the draft Royal Decree was published on the website of the Ministry of Finance, which mainly approves the Digital Services Tax (DST) Regulations, a document which has been submitted for public hearing until 16 December.

With regard to the content of the Regulation (with only two articles in the current text), the draft rule is limited to establishing certain regulations in relation to formal obligations that were expressly entrusted to regulatory development under Article 13 of Law 4/2020 of DST, specifically those contained in paragraphs a), c) and d) of that article.

Insufficient regulation

The limitation of the regulatory development to these paragraphs of Article 13 in the draft draws particular attention to the absence (at least apparent) of such regulation for paragraph h) of that article, which contains the only formal obligation under the DST Law whose noncompliance is qualified as a serious tax breach and which carries with it a penalty of up to 400,000 euros for each calendar year in which such noncompliance has occurred (Article 15.2 of Law 4/2020). We refer to the formal obligation consisting of "*(...) establishing the systems, mechanisms or agreements that allow the location of the users' devices in the territory of application of the tax to be determined (...)*".

And we say "*apparent*", since someone could claim that this regulation of Article 13.h) of the Law would be indirectly included in Article 1 of the draft Regulation, which details the means of geolocation for the location of user devices alternative to that based on the IP address of such devices (Article 7.4 of Law 4/2020), in those cases where it can be concluded that the location is different from that which, incorrectly, determines the IP address. Such alternative systems, the draft states, would consist of geolocation based on the MAC address or network identification, or physical geolocation by satellite, or by terrestrial antennas or beacons. However, for entities belonging to a group within the meaning of Article 42 of the Commercial Code, the thresholds are determined at group level.

This regulation does not seem to be sufficient as a development of Article 13.h), but rather a mere specification of the rule contained in the aforementioned Article 7.4 of the Law on the location of user devices (this is mentioned in the text of Article 1 of the draft itself), protected by the general authorization to the "*Government to issue any provisions that may be necessary for the development and execution of this Law*" of the second final provision of Law 4/2020.

Obligation to keep records

On a different note, it is in Article 2 of the draft Regulation that, in our opinion, Article 13 c) and d) of the DST Act are developed. There it is indicated, in relation to paragraph c) (which regulates the obligation to "keep the records established by regulation"), that for each quarterly settlement period, DST taxpayers "*shall be obliged to keep, conserve and make available to the Tax Administration records for each operation (...)*". The current text does not clarify whether these records will only be delivered at the express request of the Administration, or whether they must automatically accompany each DST quarterly self-assessment.

The regulation, in its current draft, configures the descriptive report, by regulatory mandate, into a true "defense file" of the position of the DST taxpayer in relation to its tax settlement, in which business, tax-technical and process aspects are combined, both in terms of information extraction and technology, which makes it an extremely relevant document.

The draft specifies, for each type of taxable event (online advertising, online intermediation -with or without the facilitation of supplies of goods or services to users - and data transmission), which figures must be contained in the above-mentioned registers, the most relevant being perhaps that, in relation to *"total revenue*", the identification of customers is requested (remember that global), including "*name and surname, company name or full name and, if available, VAT identification number or national tax number*".

On the other hand, Article 2 of the draft DST Regulation also states that the transactions subject to registration "*must be recorded at the time of settlement and payment of the tax relating to such transactions or, in any event, before the end of the legal period for settlement and payment in the voluntary period*", without it being very clear how the two moments in time differ (the Ministerial Order which will regulate self-assessments by DST -Article 14 of the Law- has not yet been approved).

Descriptive report

But perhaps the most novel aspect of the draft is that, in development of section d) of article 13 of Law 4/2020 (which includes the formal obligation to "*present periodically or at the request of the Administration, information relating to its digital services"),* it is also for each quarterly settlement period, DST taxpayers *"shall be obliged to keep, conserve and make available to the Tax Administration (...) a* ***descriptive report*** *(...)*" (emphasis added), it being again uncertain whether their contribution should be made together with each self-assessment.

According to Article 2.3 of the current draft, *"the descriptive memory shall contain the processes, methods, algorithms and technologies used to*

a) Analyse the tax liability of the digital services referred to in Article 4.5 of the Tax Law, as well as the non-tax liability of the services referred to in Article 6 of that Law.

b) To locate the provision of each type of service and its attribution to the territory of application of the tax (...)

c) Calculate the income corresponding to each service provision subject to the tax.

d) Identify the files, programs and applications used in the previous processes for each settlement period".

In our opinion, the regulation, in its current draft, configures the descriptive report, by regulatory mandate, into a true "*defense file*" of the position of the DST taxpayer in relation to its tax settlement, in which business, tax-technical and process aspects are combined, both in terms of information extraction and technology, which makes it an extremely relevant document.

Compulsory census declaration

Furthermore, the draft Royal Decree contains, in addition to the draft DST Regulation, a first additional provision which proposes the amendment of the General Tax Procedures Regulations, approved by Royal Decree 1065/2007, of 27 July.

Its purpose, according to the Explanatory Report of the draft, is to meet the "*formal obligation of Article 13.1.a) of Law 4/2020, [which] must be complied with through the declarations of registration, modification and cessation of the Census of Entrepreneurs, Professionals and Withholders, to which the taxpayer would be obliged in all cases due to its condition as an employer. Furthermore, it is considered necessary that the Census identifies the taxpayers of this tax, and therefore that it expressly includes, within the data to be communicated, the condition of taxpayer of the Tax on Certain Digital Services or the changes that occur in the tax situation related to the tax*".

This means that, even for business people or professionals who are already part of the tax census in Spain, there must be formal communication of their status as DST taxpayers.

Next steps

In conclusion, nothing is expressly stated in this version of the Royal Decree implementing the Law on DST in relation to the regulatory detail (which may be necessary) of the other formal obligations contained in Article 13, specifically in paragraphs b), e), f), g) and (the one already cited) h).

Nor, under the aforementioned generic qualification of the second final provision of Law 4/2020, is there a guide, in a format similar to that of the French or British "DSTs", which provides greater detail and clarity in the application of the DST to specific business cases, which is currently a widespread complaint by companies.

In both cases (although more likely in the first case), all this could be incorporated into the new version of the draft Royal Decree once the Administration evaluates the proposals of the different stakeholders after the end of the public hearing period. However, with the entry into force of the DST on 16 January, time is running out...