

## THE DIGITAL SERVICES TAX IN SPAIN

### 1. BACKGROUND

Spain has implemented the Digital Services Tax ("**DST**") by means of the DST Act. The DST Act was published in the Spanish Official State Gazette on 16 October 2020 and will enter into force on 16 January 2021, with Q1 2021 being the first reportable period.

### 2. SCOPE OF APPLICATION

The main purpose of the DST Act is to regulate certain digital services (as defined below) rendered by legal entities considered as taxpayers (as defined below) for which the contributions of users located in Spain ("Spanish-located users", as defined below) is essential to the value-creation procedure of the entity providing the services in such a way that the entity monetizes such user contributions.

#### ***Digital services taxed under the DST***

Only the provision of certain types of digital services, which are considered to be linked to Spanish territory, are subject to the DST.

The types of digital services falling within the scope of the DST are as follows:

- **Online advertising services:** Advertising included in a digital interface addressed to the users of such interface. If the entity inserting the advertising is not the owner of the digital interface, the service provider for DST purposes would not be the owner of the interface but the entity inserting the advertising.
- **Online intermediation services:** Services designed to provide a multifaceted digital interface allowing users (i) to interact amongst themselves, (ii) to find other users, and/or (iii) facilitating the supply of goods or the provision of services amongst them.
- **Online data transmission:** Transmission of users' data which have been generated by activities performed by users in digital interfaces.

#### ***Digital services not subject to the DST***

For the sake of clarity, the Spanish DST Act states that the following services fall outside of the scope of the DST:

- i. the supply of goods or provision of services contracted online where the supplier/provider is not acting as an intermediary (retail trade),
- ii. the supply of goods or provision of services carried out amongst users of online intermediation services (transactions between private individuals),

#### **Key issues**

- The new tax will enter into force on 16 January 2021
- Online advertising services, online intermediation services and online data transmission will be the services subject to DST if rendered to users located in Spain
- The tax rate is 3% on income earned from these services
- Companies with a turnover higher than EUR 750 M and income subject to DST higher than EUR 3 M, regardless of their place of residence in the world, will be required to pay this tax
- DST will also have a relevant impact on GDPR and IP policies

- iii. regulated financial services or data transmission services rendered (in both cases) by regulated financial institutions, and
- iv. digital services rendered between entities belonging to the same group (100% direct or indirect participation).

### **3. TAXPAYERS**

The parties required to pay the DST are those legal entities or economic units which, despite being based in Spain, an EU jurisdiction or a non-EU jurisdiction, meet the following two requirements:

- Their turnover for the prior calendar year exceeded EUR 750 million;
- Their income subject to DST for the prior calendar year exceeded EUR 3 million.

For DST purposes, both thresholds are calculated on a mercantile group level, regardless of the tax residence of the entities belonging to such group. If a group exceeds such thresholds, each of the entities belonging to such group will be considered as DST taxpayers, regardless of their individual income for DST purposes.

In addition, the application of the DST requires that the recipients of the above-mentioned services be Spanish-located users, which are those users whose IP (internet protocol) address is located in Spain (unless otherwise proved by a geolocation instrument of the relevant device).

Given the definition of DST taxpayers, this is not just a tax on digital service companies, as is commonly thought, but potentially a tax on companies or economic units that also provide digital services, even if digital services are not their main economic activity but the above thresholds are met.

### **4. TAX BASE AND APPLICABLE RATE**

In terms of effective taxation, the DST will accrue when the services subject to DST are rendered.

The tax quota will amount to 3% of the income (VAT excluded, if applicable) earned from each of the services subject to the DST and attributable to Spanish-located users.

In particular, the allocation of income for DST purposes will be as follows:

- Online advertising services: The global income (on a worldwide basis) earned by the relevant entity will be multiplied by the proportion of the number of times such advertising pops up on Spanish-located devices over the total number of times (on a worldwide basis) such advertising pops up.
- Online intermediation services: The global income (on a worldwide basis) earned by the relevant entity will be multiplied by the proportion of the number of Spanish-located users over the total number of users (on a worldwide basis).
- Online data transmission: The global income (on a worldwide basis) earned by the relevant entity will be multiplied by the proportion of the number of Spanish-located users generating such data over the total number of users (on a worldwide basis) generating such data.

The taxable base must be initially estimated by the taxpayer based on justified criteria. The taxpayer must also regularize the amount of DST initially paid within four years of the DST accrual date, when the definitive income data would be available.

## 5. TAX MANAGEMENT

Taxpayers must pay the tax every three months. New regulations will be approved regarding DST compliance obligations.

## 6. FORMAL REQUIREMENTS AND PENALTY REGIME

From a formal tax perspective, taxpayers must:

- i. obtain a Spanish Tax ID number ("NIF"),
- ii. register with the Spanish Tax Authorities for DST purposes,
- iii. declare the start, any modification of, and the end of activities for DST purposes, and
- iv. in the case of non-EU taxpayers, appoint a representative in Spain for DST purposes.

As regards the penalty regime, in addition to the general one applying to any tax under the Spanish General Tax Act, a specific penalty is established for those cases in which the users' IP address and/or geolocation are distorted or hidden. In such cases, penalties would amount to 0.5% of the entity's global turnover for the previous year, with a minimum penalty of EUR 15,000 and a maximum penalty of EUR 400,000.

## 7. MISCELLANEOUS

### 7.1 Compatibility with data protection regulations

The effective application of the DST requires that taxpayers be capable of determining which digital services are subject to the tax, i.e. when there are users of the service located in Spain. The DST Act states that this will be achieved by processing users' IP (internet protocol) addresses and other user device geolocation mechanisms, where necessary.

Insofar as IP addresses (both static and dynamic) and geolocation data are personal data, their processing must be carried out in accordance with the EU's General Data Protection Regulation ("GDPR") and Spanish Act 3/2018, of 5 December, on Personal Data Protection and the safeguard of digital rights.

In practice, this will require that taxpayers, in addition to collecting the necessary IP addresses and/or geolocation data (with the practical problems that this can bring, especially in the case of dynamic IP addresses), will have to protect the data being processed under one of the legal bases envisaged in the GDPR (the most appropriate one, in this case, being compliance with a legal obligation, i.e. the obligations imposed by the DST). Taxpayers will also have to notify users of this new data processing, in most cases by updating the relevant privacy policy.

Beyond that, the processing of IP addresses and other geolocation data by taxpayers must be limited to the purpose for which the data has been collected (i.e. paying the tax) and the data kept only for the mandatory period established by Spanish General Tax Act 58/2003, of 17 December (i.e. four years, as from the deadline for filing the quarterly tax return).

## **7.2 Potential effects of the DST in Spain**

According to the Spanish Government, the annual revenue from DST taxation in Spain is expected to amount to EUR 968 million. A year ago, that figure was forecast to be EUR 1.2 billion. Now, according to the Spanish Finance Minister, that forecast has been lowered in view of the economic slowdown – mainly caused by the Covid-19 situation – and the experience of other countries which, like France and Italy, have already implemented a similar tax.

The Spanish technology industry, meanwhile, represented by AMETIC (the Association of Electronics, Information and Communications Technologies, Telecommunications and Digital Content Companies) has warned that the "Google Tax" will jeopardise the development of technology companies by creating barriers to entry for small enterprises and start-ups, for whom it will be more costly to access the digital services affected by the DST. In this vein, the document "[Who will bear the Burden of DSTs?](#)" prepared by the Global Digital Foundation (available on the internet since September 2020) has pointed out the economic effects of the "Google Tax" on certain digital services in Europe and its consequences for consumers and small enterprises.

In any case, we will have to wait until 16 January 2021 to see the practical effects of the DST in Spain, when the law governing the Digital Services Tax will enter into force.

## **7.3 Debatable indirect nature of the DST**

The DST is defined as an indirect tax (compatible with VAT). We consider this to be quite debatable, considering that:

- although the DST is theoretically levied on the added value it gives end consumers for these services, the tax base of the DST consists of the total income earned from these services, and not only the estimated added value for end consumers, and
- the DST considers the economic capacity of the taxpayers (and even of their groups), insofar as only digital service providers with high turnover (in general, and specifically, related to digital services) are obliged to pay this tax.

This becomes a relevant debate because the DST, defined as an indirect tax, theoretically does not fall under the scope of Double Tax Treaties entered into by Spain and therefore allows the DST to be imposed when the digital service provider does not reside in Spain or does not have a Permanent Establishment in Spain. This would not be the case if the DST were considered an income tax or a direct tax (and a Double Tax Treaty with Spain is in place).

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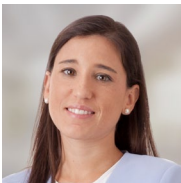
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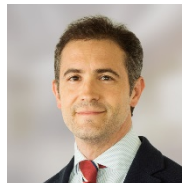
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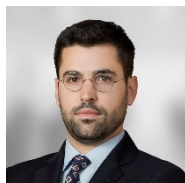
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