



WTS Tax Update for the Digital Economy

Spanish Digital Service Tax (II)

SPAIN'S DIGITAL SERVICE TAX

Following our previous updates on the Spanish Digital Services Tax (click [here](#), [here](#) and [here](#)), the Spanish Digital Service Tax ("DST") Act was finally published in the Spanish Official State Gazette (*Boletín Oficial del Estado*) on 16 October 2020 and will come into force on **16 January 2021**.

The Spanish DST rate is 3% and the first taxable period will be the first quarter of 2021. Exceptionally for 2021, the payment and submission period of the first quarter returns is postponed to July 2021.

1. SCOPE

The Spanish DST applies to certain digital services in which participating users are located in Spain and their participating activity constitutes a contribution to the value creation process for the company providing these services, and through which the company monetises those users' contributions. Therefore, the digital services concerned are those that could not exist in their form without their users' involvement. In particular:

- a) **Online advertising services**, which refer to advertisements included on a digital interface that are addressed to the users of such a digital interface;
- b) **Online intermediation services**, which refer to the provision of a multifaceted digital interface that allows users to get in contact and interact with each other, or even facilitate the delivery of goods or the provision of services directly between them, and
- c) **Data transmission services**, which refer to sales or transfers of data about users, which have been generated as a result of activities carried out in digital interfaces.

The Spanish DST applies to companies that, on the first day of the taxable period (i.e. the first day of the quarter) exceed both of the following thresholds:

- Worldwide revenues over €750 million in the previous calendar year; and
- €3 million Spanish-sourced revenues from "digital services" in the previous calendar year. This threshold must be calculated by adding up all three types of "digital services": online advertising, online intermediation and data transmission services.

The reference period for the above thresholds is the previous calendar year. If the company has started its

activity in the previous year, then the threshold will be calculated proportionally to the period of company activity during that year.

The thresholds must be calculated, where appropriate, at the group level. If the group exceeds these thresholds, then all the entities of the group could be subject to the DST, regardless of the amount of income that is attributable to each of them.

In addition, as set out in our [previous updates](#), certain "digital services" are excluded from the scope of the Spanish DST, which are: (i) e-commerce through the seller's own webpage, (ii) the transactions, underlying the intermediation services, between the users of the online marketplace, (iii) the mere supply of digital content or the provision of online communications and payment services, (iv) digital services provided by authorised financial institutions, and (v) digital services carried out between entities belonging to the same group of companies where the group has 100% direct or indirect ownership of the entities.

2. KEY DEFINITIONS

For the Spanish DST Act's purposes, the following definitions are used:

- **Digital services**: these are considered as exclusively online advertising services, online intermediation and data transmission.
- **Digital content**: this is data supplied in a digital format, such as computer software, applications, music, videos, texts, games and any other computer programs, other than any data representative of the digital interface itself.
- **Digital interface**: this is any program, including websites or parts of such websites, or any application, including mobile applications, or any other means, accessible to users, that enable digital communication.
- **Group**: this is a group of entities in which an entity holds or may hold control of another or others according to the criteria established under Article 42 of the Spanish Code of Commerce (related entities), regardless of their residence and the obligation to file consolidated accounts annual.
- **User**: this is any person or entity that uses a digital interface. Such a user will be deemed as being located in Spanish territory even when such a user has not made any payment contributing to the income derived from the service.

3. SAAS

The Spanish DST Act clearly states that the DST only applies to the supply of *online advertising and intermediation* and *data transmission*. We therefore expect that SaaS-based business lines will be beyond the scope of the Spanish DST's purpose. Nevertheless, we strongly recommend SaaS-based companies or companies with SaaS-based business lines, to review their position to determine whether they are in any way within the Spanish DST's scope.

4. FINANCIAL SERVICES

Similar to other recently introduced DSTs, so-called "Financial Services" are outside the scope of the Spanish DST.

We note that the definition of "Financial Services" for the Spanish DST's purposes is, to a certain extent, still unclear. Granting loans and/or taking care of third party payments for online purchases clearly is not within the DST's scope. However, like other DST proposals, the Spanish DST lacks a clear definition of "Financial Services" and a further explanation of the so-called "Composite Supplies".

As a result, it cannot be fully excluded that certain products of Banks and Payment Services Providers ("PSPs") could very well come (partially) within the Spanish DST's scope. We therefore recommend Financial Institutions and PSPs to carefully review their business lines to identify potential Spanish DST liabilities.

5. M&A REORGANISATION IMPACT

The impact of any DST, in this case the Spanish DST, is not only limited to the day-to-day business of digital MNEs. We expect that the DSTs will have a lasting impact on International M&A and Reorganisation activities as well. Furthermore, we strongly recommend that MNEs that (partially) offer, or intend to offer, online business lines should incorporate a full DST review into their M&A approach.

It is important to point out that the thresholds could be exceeded as a consequence of the acquisition of a company, a group of companies, another organisation's IP, or the creation of new online products or business lines.

Furthermore, as pointed out, the transfer of user data could be within the Spanish DST's scope. If such data is

part of the sale or acquisition of a company or IP, then this could trigger a DST liability on its own.

Given the fact that the DST triggers a substantial compliance obligation and more importantly that the DST is very likely to affect pricing and/or margins of the products or business lines falling within its scope, we strongly recommend reviewing any possible DST impact before entering into an M&A transaction.

6. RELEVANT COMPLIANCE OBLIGATIONS

Besides the DST Act, Spain published the Draft Royal Decree on Digital Services Tax Regulations ("**Draft DST Regulations**") on 3 December 2020, and the Draft Order on Tax Form 420 (for self-assessment) ("**Form 420**") on 15 December 2020.

The Draft DST Regulations focus on the following aspects:

- Location of taxable digital services;
- Reporting;
- Registration.

a) Location of taxable digital services

Under the DST Act, only the revenues arising from the provision of the digital services (set out above) to users located in Spain will be taxable. Specific rules, depending on the type of digital service, determine when users will be considered as being located in Spain for the Spanish DST's purposes.

To this effect, the Draft DST Regulations provide a list of some of the means of proof that may be used by taxpayers to demonstrate that the user's location is different from that indicated by the IP address, including, among others, the geolocation based on the media access control ("**MAC**") address or network identification (such as WiFi or Ethernet). Physical geolocation can be carried out by (i) satellite (with systems such as GPS-Global Positioning System, GLONASS, Galileo or Beidou); (ii) terrestrial antennas (such as those of the GSM-Global Mobile Communications System or LP-WAN); (iii) beacons (WiFi or Bluetooth), or any combination of existing or future technologies.

b) Reporting obligations

The Draft DST Regulations provide further clarifications of some of the formal obligations included in the DST Act, determining that taxpayers will be required to

prepare, keep and make available to the Spanish tax authorities a record of all their transactions that are subject to the DST, as well as a descriptive report.

In addition, for each quarterly assessment period, taxpayers are obliged to keep and provide records of each transaction to the tax administration.

According to the Draft DST Regulations' current wording, it is not clear if such documents should be provided to the tax authorities following a specific request or given together with each self-assessment.

These files must include all the required information for each category of service:

a) Online advertising services:

- The total revenue arising from the provision of online advertising services, regardless of where it was obtained, with the client's identification.
- The times advertising appears on devices located in Spain.
- The total times such advertising appears on any device, regardless of where it is located.

b) Online intermediation services:

- The total revenue obtained from online intermediation services, wherever they are obtained, with the client's identification.
- The number of users located in Spain.
- The total number of users involved in that service, regardless of where they are located.

c) Other online intermediation services:

- The total revenue obtained directly from users whose access accounts to the digital interface used were opened using a device located in Spain, with the identification of the user, at the time of its opening.
- The number of accounts opened during the settlement period by users whose devices were located in Spain at the time of such opening.

d) Data transmission services:

- The total revenue obtained from the data transmission services, regardless of where they were obtained, with the user's identification.
- The number of users who were located in the territory of the tax's application at the time the data

was collected.

- The total number of users who have generated such data, regardless of where they were located at the time of the collection of such data.

Descriptive report:

The descriptive report will contain the processes, methods, algorithms and technologies used to:

- Analyse whether the digital services are subject to or outside the Spanish DST.
- Locate the provision of each type of service and its attribution to Spain.
- Calculate the revenue corresponding to each supply of digital service subject to tax.
- Identify the files, programs and applications used in the previous processes for each assessment period.

c) Registration

Entities subject to the Spanish DST, regardless of their nationality and tax residence, are obliged to be registered and identified with the Spanish "census of companies" using the standard registration process. Changes in their details and other information will have to be reported within the legal deadlines (usually of one month).

d) Fiscal Representative

Non-EU entities will have to appoint a Spanish tax representative.

e) Payment collection

The Spanish DST will be self-assessed by taxpayers using Form 420, of which a draft version was published on 15 December 2020.

Form 420 must be filed and the resulting due tax must be paid within the month following the corresponding assessment period (which matches with the calendar quarters). The filing obligation must be fulfilled even if the assessment results in a zero return.

Payments to the Spanish tax authorities must be executed from an authorised bank entity, which are all Spanish financial entities. In that regard, those taxpayers that do not have a bank account open in a Spanish financial institution can settle the Spanish DST through a bank transfer to the tax office after a registration process for this special method of payment.

7. TAKEAWAY / NEXT STEPS

To the extent that there are only a few months left to the first filing period that will take place in July 2021, we encourage companies to take action now.

Since the DST is a new and unprecedented tax, which involves difficult allocation rules, you may require your IT department's assistance with managing the high data volume and assessing the DST. Hence, we highly recommend that companies performing services within the DST's scope seek professional advice and analyse their potential liabilities as soon as possible. In that sense, we suggest a three-step process:

- 1.) Check whether the entity or group of entities fulfills the thresholds established by the law;
- 2.) If the thresholds are exceeded, then determine the exposure to the Spanish DST through a forecast of the estimated tax due, based on past information;
- 3.) Finally, depending on the exposure to the Spanish DST, set up the teams and necessary processes to manage the DST.

Furthermore, we highly recommend digital companies that operate within the Spanish DST's scope, or that expect to operate within its scope within a short period, to anticipate its likely impact on their P/L account and on their company margins, through a customised analysis of the Spanish DST.

Also, we strongly recommend reviewing and verifying customer onboarding procedures to determine whether the required information complies with the Spanish DST liabilities and for calculating what will be available when the Spanish DST is collected.

In addition, we recommend reviewing the underlying contracts and Terms & Conditions to ensure that they cover any potential Spanish DST liabilities.

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