

Draft Digital Services Tax Bill

Ángela Atienza Pérez

Lawyer, GA_P

Last Friday, 19 October, the Spanish Cabinet presented and reported on the Draft Digital Services Tax Bill, the main objective of which is to meet the challenges currently posed by the taxation of the 'digital economy'.

On Friday 19 October, the Spanish Cabinet presented and reported on the Draft Digital Services Tax Bill together with the Draft Financial Transaction Tax Bill and the Draft Tax Fraud Bill, which are part of the Spanish Government Budget that is pending approval by Parliament.

According to the explanatory notes to the draft bill under review, current national and international tax rules were not designed to cope with business models driven primarily by “intangible assets, data and knowledge”, and we are currently facing the problems generated by the digital economy.

In order to solve the problems caused especially by the disconnect between where the value is created, and where taxes are paid, at an international level a regulatory review process has been carried out which concluded on 21 March 2018 with the presentation by the European Commission of the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services. Its aim is to tax revenues from the provision of certain digital services in order to achieve a fair and efficient taxation of the digital economy.

In this context, at a national level and in the face of social pressure and the need for tax justice and the sustainability of the tax system, the draft bill anticipates the future conclusions of the European Union by clarifying in its explanatory notes that at all times the regulation adapts to the content of the proposed directive, as well as being “provisional” until a definitive solution is finally adopted at a European level.

The draft bill, warning of the inadequacy of the rules governing corporate income tax (direct taxation) for the taxation of the digital economy, creates a tax on certain indirect digital services compatible with value added tax (VAT) with the intention of taxing the provision of digital services involving ‘users’ located in Spain.

The tax will only be levied on digital services matching the following three categories:

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- (1) *Online advertising services*: the placing on a digital interface of advertising targeted at users of that interface.
- (2) *Online intermediation services*: the making available of multi-sided digital interfaces to users, which allow users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users.
- (3) *Data transmission services*: the transmission of data collected about users which has been generated from such users’ activities on digital interfaces.

In line with the rationale of this new tax, exclusions are also regulated, including the following: the underlying supply of goods or services directly between users in the context of online intermediation services, the sale of goods or services which are contracted online via the website of the supplier of such goods or services where the supplier does not act as an intermediary, and the provision of data transmission services, when carried out by trading venues, systematic internalisers or regulated crowdfunding service providers.

The taxpayers of this tax will be companies with a net turnover of more than 750 million euros worldwide and whose revenues from digital services affected by the tax exceed 3 million euros in Spain (to be applied to the group, if any). These thresholds limit the application of the tax to ‘large-scaled’ companies and to those cases where there is a significant digital footprint at the national level.

The tax base for the tax will consist of the revenue (excluding value added tax or other equivalent taxes where appropriate) obtained by the taxpayer in each of the provisions of digital services subject to tax carried out in Spanish territory (in the case of entities in the same group, the tax base will be the market value), with special rules being established according to the type of digital service.

With regard to the place where digital services are provided, the draft bill considers such provision to have been carried out in Spanish territory when a user is located therein, regardless of whether or not the user has paid any consideration. For example, in the case of online advertising services, it will be understood that the user is located in the territory of application of the tax when, at the time the advertising appears on his device, the latter is in that territorial area.

As regards the tax rate that will be applied to the taxable base, this will be 3%; the tax will be due when the taxed transactions are concluded, executed or carried out, and the advance payment of the tax will be established in the event that payments have been made prior to the taxable event.

With regard to sanctioning rules, in addition to referring to general rules under the Taxation Act 58/2003 of 17 December, the draft bill establishes a special rules, classifying as serious infringements that translate into a distortion or concealment of the decisive place in the provision of digital services.

Finally, in addition to pointing out that this will be a State tax with a quarterly settlement, it is important to note that the draft bill establishes that once passed as an Act, it will enter into force three months after its publication in the Official Journal of Spain and will be provisional until the future European Union directive is incorporated into the Spanish legal system.