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Global Tax Alert

Spanish Parliament approves Law on Financial Transaction Tax

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Executive summary

The Spanish Council of Ministers approved the text of the bill (the Bill) on the Financial Transactions Tax (FTT) on 28 February 2020. The Bill was subsequently published and sent to the Parliament (Congress and Senate) to go through the corresponding parliamentary procedure (See EY Global Tax Alert, *Spain sends bill on Financial Transaction Tax to Parliament*, dated 4 March 2020).

The parliamentary procedure has been completed and Law 5/2020, of 15 October, on the Spanish Financial Transactions Tax (FTT Law) was published on 16 October in the Spanish *Official Gazette*, with certain changes in relation with the initial Bill.

The tax will be in force from 16 January onwards, with the first reporting due by February 2021.

Detailed discussion

Background and purpose

Since 2013, Spain is one of the European Union (EU) Member States – together with Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia and Slovenia (following Estonia's formal withdrawal in 2016) – involved in the

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enhanced cooperation procedure regarding the adoption of a Directive for the implementation of an FTT. On 14 February 2013, the European Commission made a proposal for a Council Directive on enhanced cooperation in the area of a financial transaction tax.

The issue is currently at a standstill in the Council, though the status of this matter has been regularly discussed at the Economic and Financial Affairs Council (ECOFIN). The June 2018 report reiterates that further work at the Council is still required, before a final agreement can be reached.

Under this context, the Spanish Government resumed its initiative of a domestic FTT and has passed the FTT Law but without abandoning the enhanced cooperation procedure for the establishment of a harmonized tax.

Main characteristics of the Spanish FTT

According to the FTT Law, the main characteristics of the Spanish FTT are:

Nature

The FTT is an indirect tax.

Taxable event

The taxable event is the acquisition of shares of Spanish companies with market capitalization over €1,000 million, admitted to trading on the Spanish market, or on a regulated market of another EU Member State, or on an equivalent third-country market.

The Spanish tax authorities will publish before 31 December of each year the list of Spanish companies with market capitalization exceeding €1,000 million as of 1 December of that year.

Furthermore, acquisitions for valuable consideration of depositary receipts representing the shares referred to in the first paragraph (e.g., ADRs, ADS) fall within the scope of the FTT, regardless of the place of establishment of the issuer of such securities.

However, the FTT Law sets forth that the following are out of the scope of the FTT: (i) the acquisition of shares exclusively aimed at the issuance of depositary receipts; (ii) the acquisition of depositary receipts in exchange for the supply of the Spanish shares that will be represented by the depositary receipts; and (iii) transactions to cancel depositary receipts via supply of the Spanish shares represented by them.

Finally, acquisitions of securities referred to in the previous paragraphs which result from the execution or settlement of obligations or of convertible/exchangeable bonds or obligations, or from derivative financial instruments, as well as from any other instrument or financial agreement will also be subject to the FTT.

In principle, the scope is therefore very similar to that defined by the French FTT, where differences may arise, for instance, in relation with the inclusion of certain instruments regarding voting rights (i.e., not included in the Spanish FTT).

Exemptions

The FTT Law provides several exemptions, which include, among others, acquisitions:

(i) Derived from the issuance of shares and public offerings of sale (Initial Public Offerings (IPOs), as well as the instrumental acquisitions prior to said operations made by placers and insurers.

(ii) Carried out by financial intermediaries in the framework of a price stabilization in IPO/IP assignments, acting as liquidity suppliers or conducting market-making activities (the FTT Law contains an express definition rather than the Draft's reference to EU Regulation on short selling) as well as those made by the by clearing houses and central depositories.

(iii) Made among entities that are part of the same group.

(iv) Made of securities during restructuring transactions that are entitled to apply the Spanish roll-over regime.

(v) Made in the scope of securities financing transactions.

(vi) Derived from the application of resolution measures adopted by the Single Resolution Board or by the competent national resolution authorities.

(vii) Of own shares and shares in parent companies made by any entity of the same mercantile group, carried out under a buyback program for the purposes of (a) the reduction of the issuer's capital; (b) the fulfilment of the obligations inherent to convertible financial instruments; or (c) the fulfilment of obligations arising from a share option programs or other allocation of shares to employees or members of the administrative or supervisory bodies of the issuer or a group entity.

(viii) Within the context of market making activities.

It should be noted that, while most of the exemptions are common to the French FTT (e.g., market-making), differences between the interpretation of them are expected to arise.

The acquirer of the Spanish shares must provide the taxable person (see relevant section below) evidence of the eligibility for the exemption in all cases. The FTT Law sets forth the obligation, both for the acquirer of the Spanish shares and the taxpayer, to keep certain documentation readily available in case the Spanish tax authorities request it.

Accrual

The Spanish FTT will accrue at the time when the registration of the securities is made in favor of the acquirer in a securities account or register, either before the institution providing custody services or within the system of a central securities depository, resulting from the settlement of the transaction or the financial instrument giving rise to the acquisition of the securities.

Tax base

The tax base is determined by the consideration in return for the transaction, without transaction fees derived from the prices of the market infrastructures, nor the intermediation commissions, nor any other expense linked to the transaction.

Where the consideration amount is not expressed, the tax base is the closing value that the security had in the most relevant market in terms of liquidity of the relevant security on the day preceding the transaction.

However, certain special rules are established in those cases in which the acquisition of the securities derives from the execution or settlement of convertible/exchangeable bonds or obligations, of derivative financial instruments, or of any instrument or financial agreement, where the conditions that are set forth in said instruments or agreements in relation to the delivery of the securities should be considered. Finally, a specific calculation method is established for intraday transactions with respect to the same acquirer of Spanish shares.

Taxpayer – Taxable person – Joint liability rules

The Spanish FTT will be assessed, irrespective of its residence, by the investment services company or credit institution acquiring the Spanish shares on its own behalf, as FTT taxpayers.

If the Spanish shares are not acquired by an investment services company or credit institution on its own behalf, the tax will be assessed (i.e., taxpayer) by the following persons, depending on the features of the transaction, as *substitutes of the* acquirer (i.e., taxable person):

- If the transaction is performed in a trading venue, Spanish FTT will be assessed by the market member *executing* the purchase order.

  If one or more financial intermediaries are involved in executing a security purchase order, the tax shall be assessed and paid by the firm that *received* the purchase order directly from the end buyer.
- If the acquisition takes place outside a trading venue:
  - If carried out within the activity of a systematic internalizer (SI), Spanish FTT will be assessed by the SI. However, if one or more financial intermediaries are involved in executing the purchase order, the tax will be assessed and paid by the intermediary that receive the purchase order directly from the end buyer.
  - If not carried out within the activity of an SI, the Spanish FTT will be assessed by the financial intermediary that *receives* the purchase order from the acquirer or *delivers* the Spanish shares to the acquirer upon the execution or settlement of a financial instrument or agreement.
  - If carried out without the intervention of any of the above-mentioned persons or entities, the Spanish FTT will be assessed by the *custodian* of the Spanish shares for the acquirer.

In these cases, the taxpayer is entitled to claim back/charge from/to the taxable person (i.e., the actual acquirer of the Spanish shares) the amount of Spanish FTT due.

Tax rate

The tax rate is set at 0.2%.

Collection procedure and other formal obligations

No specific tax form has been proposed yet – this will be regulated later on.

The Spanish FTT will be assessed monthly and tax due may not be deferred or paid by installments.

Pending further development through the FTT Regulations, Spanish FTT returns and payment will be done in certain circumstances through a central securities depositary (CSD) established in Spain or through a foreign CSD established within the EU or third countries who has entered into a collaboration agreement with a Spanish CSD.

To this extent, taxpayers will need to communicate to the CSD all the relevant information to be included in the form, and transfer the FTT amount due, either directly or via its participant entities.

Penalties

No specific penalty regime has been included. Rather, a reference is made to the general penalty regime of the Spanish General Tax Law.

Entry into force

The entry into force is foreseen as three months following the publication of the Law in the Spanish *Official Gazette*, so the Spanish FTT will be applicable as of 16 January 2021.

Considering that the Spanish FTT will be settled on a monthly basis, it is reasonable to expect that the first return will be filed during February 2021, with respect to the taxable transactions taking place in January.

Next steps

No official FTT Regulations have been released, so there are still certain practicalities that need to be addressed, and some of the provisions of the FTT Law should be further developed.

In order to assess the effects that this new tax could have on the different financial intermediaries, the impact on both their business and operational model should be analyzed, identifying the areas or business lines, processes, systems and applications that might be affected and how they should be adapted to the new FTT.

Endnote

1. In accordance with the provisions of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on markets in financial instruments.

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