28 October 2020

# Global Tax Alert

# Spain sends anti-tax evasion Bill to Parliament for approval

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## Executive summary

The Spanish Government announced on 13 October 2020 that the anti-tax evasion Bill would be presented to the Parliament for its approval. This Bill includes, among other measures, certain amendments to Spanish exit tax and the controlled foreign companies (CFC) rules with the aim of entirely aligning them with the European Union (EU) Anti-Tax Avoidance Directive (ATAD).

A draft of this Bill was first published for public consultation on 23 October 2018 (see EY Global Tax Alert, *Spanish Council of Ministers releases draft anti-tax evasion Bill for public consultation*, dated 26 October 2018), but the Government did not present it to the Spanish Parliament until now.

## Detailed discussion

The following is a detailed description of the measures included in the Bill which would be relevant for multinational structures and cross-border transactions with Spain. The current text, which already differs from the draft originally published in 2018 after the public consultation, may undergo changes as a result of the negotiation and approval process by the Spanish Congress and Senate.

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## ATAD implementation

The ATAD requires that Member States implement in their respective domestic legislation a number of tax measures aiming at preventing tax evasion and erosion of taxable base, including CFC rules, limitations on interest expense deductibility, exit tax and general anti-abuse rules (GAAR).

While the Spanish domestic rules already included most of the measures required by the ATAD, some adjustments in terms of the CFC regime and exit tax were required to entirely align the Spanish provisions with the Directive.

In terms of interest tax deductibility, the Spanish rules allow dividend income to be taken into consideration as earnings before interest, taxes, depreciation and amortization (EBITDA) for the calculation of the earning-stripping limitation, but Spain has been allowed to maintain this exception until 2024.

### Amendments to the CFC regime

The Bill includes the following amendments to the Spanish CFC regime as included in the Corporate Income Tax (CIT) Law:

- Under the Bill, the Spanish CFC rules are extended to income obtained by a foreign permanent establishment which is below the minimum taxation threshold (75% of the tax which would have been paid in Spain) which applies to foreign companies. The Bill clarifies that, where an inclusion is required under the CFC regime, the Spanish participation exemption would not apply.
- The Bill abolishes the currently applicable safe-harbor clause for holding companies as per which, companies owning more than 5% in foreign subsidiaries, during more than one year, were not subject to CFC rules if: (i) they had human and material resources to manage the participation; and (ii) did not qualify as "companies merely holding assets" under the Spanish CIT rules.

  Since income from subsidiaries (i.e., dividends and capital gains arising from the transfer of shares) is among the list of CFC income, foreign holding companies could fall under the scope of the new CFC rules if all the other relevant requirements are met.

  This could potentially raise an issue if combined with an amendment to the Spanish participation exemption regime which limited the amount of the exempt income and resulted in a positive effective tax higher than 0% (this measure has been announced as being included in the Budget Law for 2020, not yet released; a Global Tax Alert will be prepared when the draft Law is available. See EY Global Tax Alert, *Spain releases 2019 State Budget Bill*, dated 17 January 2019 on the proposal which was originally considered in 2019).
- The Bill includes new sources of CFC income including: (i) sales and services where the foreign entity add little or no economic value; and (ii) insurance and leasing financial activities, regardless of whether the recipient is a Spanish tax resident or not, if the same do not constitute a business activity.
- The scope of the safe-harbor clause for EU tax resident subsidiaries is broadened to include companies which are resident in the European Economic Area.

  Further, the safe-harbor is amended to require "the existence of an economic activity" instead of "business reasons for its incorporation and operative," as per the current wording.

  Finally, the safe harbor, under the Bill, would also apply to EU-regulated Collective Investment Vehicles.

### Exit taxation

The Bill amends the current wording of the Spanish provisions on exit tax to align it with the ATAD.

While the current Spanish exit tax rules allow for an indefinite deferral when the migration takes place to another EU Member State (taxation being triggered when the relevant assets and/or the company is sold), the Bill introduces a maximum five-year deferral with equal annual installments.

The Bill also details the circumstances which terminate the deferral before the five-year period elapses (namely, the transfer of the relevant assets to a third-party, transfer of the tax residence or of the assets to a non-EU Member State, liquidation or bankruptcy proceeding of the entity, or failure to meet payment of the deferral installments).

In addition to this, the Bill includes the transfer of the activity of a permanent establishment in the Spanish territory to another State as a new exit tax scenario for Nonresident Income Tax (NRIT) purposes, in line with ATAD.

The Bill also establishes that, in cases of move/transfer of assets or activity into the Spanish territory, the fair market value applied under the other EU jurisdiction's exit tax will be accepted as the asset's basis for Spanish tax purposes.

## Amendments to the Spanish tax haven list

The Bill introduces very significant changes to the Spanish list of tax haven jurisdictions (the List).

First, the rules are amended to refer to "non-cooperative jurisdiction," in line with the concept now prevailing in the international tax environment.

The criteria to determine which States, territories or regimes shall be regarded as "non-cooperative jurisdictions" are established as follows: (i) tax opacity and lack of transparency, taking into account the absence of mutual assistance regulations and/or their application in practice; (ii) the incorporation or utilization of companies or instruments aimed at shifting profits to territories with no actual economic activity is allowed; and (iii) a nil or low level of taxation. In this regard, and although the Bill includes a definition of what "nil or low taxation" means, no clear threshold is established to determine which territories/tax regimes would fall under that scope (the wording refers to "low taxation" as "taxation significantly lower, including a 0% tax rate, that the one applicable in Spain").

Under the Bill, the Ministry of Tax shall issue a new list (with the rank of Ministry Order and not a Regulation, as provided in the draft Bill published in 2018) prepared considering the criteria above and where the territories deemed as "non-cooperative jurisdictions" will be included.

The concept can include, as per the wording of the Bill, not only States and territories but also preferential tax regimes, in line with Action 5 on harmful tax practices of the Base Erosion and Profit Shifting (BEPS) Action Plan released by the Organisation for Economic Co-operation and Development (OECD). It is also expressly foreseen that territories currently having a tax treaty with Spain can potentially be included in the new list (the Bill establishes that the Spanish domestic provisions against "non-cooperative jurisdictions" will be applicable to the extent they do not contravene such Treaty).

Currently, the Spanish tax haven list deviates from the OECD/EU list; the Bill includes the possibility (but not a formal requirement) that the list is aligned with the result of the works at the EU and OECD levels but some differences may not be discarded.

There is currently no procedure to publish updated official lists (without the jurisdictions that are no longer tax havens). Once the list of non-cooperative jurisdictions is published by the Ministry of Tax there will be more certainty on whether a given jurisdiction is listed. This is relevant for a large number of tax rules, among others, the Mandatory Disclosure Regime reporting.

Finally, the transitory regime provided in the Bill until the Ministry Order with the new list of "non-cooperative jurisdictions" is published raises some significant uncertainties. In particular, the reference to the original Spanish tax haven list (issued in 1991) does not seem to take into consideration that a significant number of territories have exited the list since its approval. There is also no guidance on whether jurisdictions which currently have a tax treaty and/or an exchange of information agreement in place with Spain are "grandfathered" for these purposes and will be excluded from the list of "non-cooperative jurisdictions."

## Other measures

The Bill proposes a number of amendments to other Spanish tax rules generally aimed at targeting situations for potential tax evasion or base erosion.

The General Tax Law is amended to introduce several measures. It proposes certain technical adjustments to the calculation of surcharges and delay interest. Namely, surcharges for late payments (currently amounting to 5%, 10%, 15% or 20% plus interest in the case of delays up to 3, 6, 12 and more than 12 months) will amount to 1% per month during the first year, and a flat 15% surcharge plus interest when the delay is over 12 months. Also, the reductions applicable to penalties are increased in the case of assessment in agreement (from 50% to 65%) and prompt payment (from 25% to 40%). The General Tax Law is also amended to ban future tax amnesties, to introduce changes to penalty regime, including a new infringement for the manufacturing and commercialization of "dual use software," among others.

In addition to the above, amendments to the Personal Income Tax, Value Added Tax (VAT) and Excise Duties, Net Wealth Tax rules, cadastral regulations, and rules governing gambling activities have been introduced by way of this Bill. Also, the Bill proposes, in line with the 2018 Bill, to prevent Spanish tax resident individuals from benefiting from the Spanish deferral regime (the so-called *traspasos* regime) on gains/losses triggered upon the transfer to or from EU-exchange traded funds (ETFs) (See EY Global Tax Alert, *Spanish Government proposes to exclude EU ETFs from traspasos (deferral) regime*, dated 26 October 2018).

Finally, a significant difference with the draft Bill published in 2018 is that the Spanish Mutual Agreement Procedure is not reviewed by virtue of this Bill.

### Entry into force

As per the wording of the Bill, it will enter into force the day after it is published in the Spanish *Official Gazette*.

This being said, amendments to CIT and NRIT will apply to fiscal years beginning on, or after, 1 January 2020 and which have not concluded on the day on which the Bill enters into force.

## Implications

The measures included in this Bill may have a significant impact in multinational groups with Spanish presence, in particular if the new CFC provisions were combined with an eventual amendment to the Spanish participation exemption regime (as considered by the Spanish Government in the past).

International groups should review their structures to anticipate the impact that these provisions could have. In particular, multinational structures with Spanish holding companies should be carefully revisited in light of the potential amendments to the CFC regime and new list of "non-cooperative jurisdictions."

EY will closely follow the Parliamentary procedure so as to anticipate any changes in the wording of the Bill which may be relevant as well as to understand the expected timing for its approval and entry into force.

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