

Spain sends bill on Financial Transaction Tax to Parliament

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Executive summary

On 18 January 2019, the Spanish Council of Ministers approved the bill on the Financial Transaction Tax (the Bill). This Bill has been sent to the Spanish Congress and Senate to be voted on.

The main features of the Financial Transaction Tax (FTT) (e.g., taxable base, tax rate) remain almost unchanged from the original draft released on 23 October 2018, but the Bill includes many of the changes identified by the Banking Associations and lobbies during the public consultation. For instance, it is clarified that the FTT taxpayer is the acquirer of the Spanish shares and that the financial entity is only acting as a substitute when acting on behalf of the acquirer of shares (the financial entity would be the taxable person), meaning that the tax could be charged back to the clients.

Also, the proposed Spanish FTT is now similar to the French FTT model. For instance, there is an express definition of market-making activities instead of the reference contained in the Draft to European Union (EU) Regulation¹ on short selling and certain aspects of credit default swaps.

Detailed discussion

Background and purpose

Since 2013, Spain is one of the Member States of the EU - together with Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia and Slovenia (following Estonia's formal withdrawal in 2016) - involved in the 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 financial transaction tax.²

The issue is currently at a standstill in Council, though the state of this matter has been regularly discussed at the 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 decided to unilaterally promote the approval of a domestic FTT, without waiting for the outcome of the enhanced cooperation procedure. Notwithstanding this approach, the Spanish tax will have to be adapted, where appropriate, to the FTT when it is finally approved under the Directive.

As reported in EY Global Tax Alert, [Spain issues draft bill on Financial Transaction Tax](#), dated 25 October 2018, the Draft establishing the FTT was published. Stakeholders were allowed to provide comments during a public consultation phase, which ended 15 November 2018.

After receiving several comments from different associations and lobbies, the Spanish Council of Ministers approved the final Bill, which was submitted to the Spanish Parliament for discussion and approval.

Main characteristics of the Spanish FTT

According to the Bill, the main characteristics of the Spanish FTT are the following:

Nature

The FTT is an indirect tax.

Taxable event

The taxable event is the acquisition of Spanish companies with market capitalization over €1,000 million, the shares of which are admitted to trading on the Spanish market, or on the regulated market of another EU Member State, or on an equivalent third-country market.³

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 Bill now 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.

Exemptions

The Bill provides a number of exemptions, which include, among others, acquisitions:

- (i) Derived from the issuance of shares and public offerings of sale (IPOs and IPs), 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 Bill 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) Among entities that are part of the same group.
- (iv) 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.

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 Bill 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 accrual of the proposed Spanish FTT depends on the place where the acquisition takes place:

- ▶ When acquisitions are executed in a trading venue, the accrual occurs upon the trade date, unless the trade is not finally settled.

It will be assumed, until proof to the contrary, that executed purchase orders have been settled.
- ▶ When acquisitions are made outside a trading venue, the accrual occurs at the time when the securities are registered in favor of the acquirer.

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 taken into account. Finally, a specific calculation method is established for intraday transactions with respect to the same acquirer of Spanish shares (the original rule has been simplified).

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 by the following persons, depending on where the transaction is carried out, also as FTT taxable persons but in this case as *substitutes of the taxpayers*:

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

If several 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 internaliser (SI), Spanish FTT will be assessed by the SI.
 - 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 taxable person is entitled to claim back/ charge from/to the taxpayer (i.e., the actual acquirer of the Spanish shares) the amount of Spanish FTT due.

The new wording of the Bill also includes the obligation of the taxpayer to inform the custodian of all the details of the transaction as well as of the amount of Spanish FTT due. If the taxpayer does not provide this information (or the information provided is not accurate), it will be jointly and severally liable for the Spanish FTT due derived from the inaccurate information provided (or lack thereof).

Tax rate

The rate of the tax 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.

Taxpayers will also have to submit an annual statement of the tax, which will have to include the exempt transactions carried out. If the taxpayer has opted to pay the tax through a central securities depository (CSD), the CSD will be in charge of filing this annual statement, subject to certain conditions.

In addition, the taxpayer is required to obtain a Spanish tax ID.

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

If finally approved, the entry into force is foreseen as three months following the publication of the Law in the *Spanish Official Gazette*.

Next steps

The Bill must now follow the appropriate parliamentary procedure for its approval, thus, it may eventually be subject to modifications during the process or might even be discarded (i.e., not approved).

The current Government will have to analyze the international acceptance of this Bill and estimate the impact that this legislation could have on the level of international investment in the listed companies that fall under the scope of the tax.

The three-month entry into force deadline may be clearly insufficient to allow the financial intermediaries to modify and adapt their IT systems to the FTT. The different Banking Associations claimed an extension of the “go live” period (for instance, of six months) during the public consultation but this has not been accepted. An amendment to the entry into force period could be introduced during the parliamentary discussion.

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.

Endnotes

1. Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.
2. See EY Global Tax Alert, [European Commission issues new Financial Transaction Tax proposal](#), dated 8 March 2013.
3. 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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EYG no. 000198-19Gbl

1508-1600216 NY
ED None

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