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*Section 301 Investigation*  
**Report on Spain's Digital Services Tax**

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## Report on Spain's Digital Services Tax Prepared in the Investigation Under Section 301 of the Trade Act of 1974

### EXECUTIVE SUMMARY

In 2013, the Organisation for Economic Co-operation and Development (OECD) and G20 countries began negotiations to address taxation matters related to the digitalization of the economy. Despite ongoing OECD discussions, the European Commission (EC) introduced a digital services tax (DST) proposal on March 21, 2018. After it became clear that the Commission's proposal was not going to receive unanimous support, the Spanish government adopted its own unilateral DST. However, OECD reports have made it clear that "[t]here is no consensus on either the merit or need for interim measures," while discussions continue.

Spain introduced a legislative proposal to establish a DST on February 28, 2020 and adopted the DST on October 7, 2020. The DST applies a three percent tax on the certain digital services revenues related to online advertising services, online intermediary services, and data transmission services. Companies with worldwide revenues of €750 million or more and €3 million in certain digital services revenues are subject to the tax. The tax is expected to take effect on January 15, 2021.

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Spain's DST under section 302(b)(1)(A) of the Trade Act of 1974, as amended (the Trade Act). Section 301 of the Trade Act sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce. If the Trade Representative determines that an act, policy, or practice of a foreign country falls within any of the categories of actionable conduct, the Trade Representative determines what action, if any, to take.

As discussed in this report, the investigation identified unreasonable, discriminatory, and burdensome attributes of Spain's DST.

Spain's DST discriminates against U.S. companies. In the course of this investigation, 39 companies, or company groups, were identified as likely to be subject to Spain's DST, meeting both threshold and covered services requirements. Of those companies, 25 were U.S. companies, two were Spanish companies, and the remaining 12 were from other countries. Alternatively stated, of those companies identified in the investigation, over 64% of covered companies were U.S. companies, while Spanish companies comprised only 5.1% of companies covered by Spain's DST. In comparison, there are an estimated 249 companies that would be subject to the DST if revenue thresholds included all companies operating in the covered services, excluding small and medium enterprises (as defined by turnover). Both of the Spanish companies that may be covered by Spain's DST fall under online intermediary services. One of those Spanish companies also may be covered under the data transmission provisions. The investigation did not identify any Spanish company that would meet the Spanish DST's online advertising provisions.

The revenue thresholds in Spain's DST have a discriminatory impact against U.S. companies. An analysis conducted in this investigation identified that both the percentage and absolute number of U.S. companies affected by Spain's DST increases when compared with lower revenue thresholds. Applying a threshold of €50 million, the analysis identified 249 companies, of which 20 (8%) had an ultimate parent in Spain and 80 (32.1%) had an ultimate parent in the United States. Increasing the threshold to €100 million identified 170 companies, of which 8 (4.7%) had an ultimate parent in Spain and 70 (41.2%) had an ultimate parent in the United States. In comparison, applying the actual threshold of Spain's DST, €750 million, the analysis identified 60 companies, of which 2 (3%) had an ultimate parent in Spain and 34 (56.7%) had an ultimate parent in the United States.

Spain's DST also pertains to a narrow range of covered services: online advertising services, online intermediary services, and data transmission services. The selection of covered services under Spain's DST targets services where U.S. companies are market leaders. Accordingly, Spain's DST discriminates against U.S. companies.

Spain's DST is unreasonable because it is inconsistent with prevailing international tax principles. This investigation assesses that Spain's DST is inconsistent with prevailing international tax principles, including that Spain's DST applies to revenue rather than income and that Spain's DST is extraterritorial as it applies to revenues unconnected to a physical presence in Spain.

Spain's DST imposes a wide range of burdens. Spanish DST liability constitutes a burden on covered U.S. companies. Spain's DST will impose a significant tax liability on covered companies, generating as much as €68 million in tax revenue in calendar year 2021. The Spanish DST's reliance on user location is a burden to covered U.S. companies. In order to establish a link between taxable revenues and Spain's taxable jurisdiction, Spain's DST's relies on complicated user location rules (instead of the location of the company providing the service). Covered businesses' systems may not be engineered to capture or retain this type of data. Re-engineering these systems and storing the relevant data in a legally sufficient manner is costly. These rules are different for each type of digital service covered under the law. Additionally, Spain's DST incurs administrative and compliance burdens on covered U.S. companies.

### Conclusions

The results of this investigation indicate that:

- (1) Spain's DST, by its structure and operation, discriminates against U.S. digital companies, including due to the selection of covered services and the revenue thresholds;
- (2) Spain's DST is unreasonable because it is inconsistent with principles of international taxation; and,
- (3) Spain's DST burdens or restricts U.S. commerce.

## I. BACKGROUND

### A. SPAIN'S ADOPTION OF THE DIGITAL SERVICES TAX AMIDST ONGOING ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT DISCUSSIONS

In 2013, the Organisation for Economic Co-operation and Development (OECD) and G20 countries began negotiations to address taxation matters related to the digitalization of the economy.<sup>1</sup> Despite ongoing OECD negotiations, the European Commission (EC) introduced a digital services tax proposal on March 21, 2018. European Union (EU) members debated the proposal at length but certain EU members, including Ireland, Sweden, and Denmark, opposed the DST.<sup>2</sup> Under EU law, tax-related legislation at the EU level requires unanimous member state support.<sup>3</sup> After it became clear that the Commission's proposal was not going to receive unanimous support, the Spanish government introduced its own unilateral DST.<sup>4</sup>

OECD reports have made clear that “[t]here is no consensus on either the merit or need for interim measures,” referring to unilateral digital services taxes, while discussions continue.<sup>5</sup> Notwithstanding, Spain introduced a DST proposal on February 28, 2020.<sup>6</sup> Spain's Senate passed the legislation on October 7, 2020.<sup>7</sup> The tax is expected to enter into force on January 15, 2021. The DST applies a three percent tax on the certain digital services revenues related to online advertising services, online intermediary services, and data transmission services.<sup>8</sup>

In the preamble to the DST, Spain justifies its DST on the premise that a “long period of time . . . has passed since the international debates on this issue began without reaching . . . possible solutions.”<sup>9</sup> However, OECD and G20 countries have already decided on some specific actions that countries should implement to improve the operation of the international tax system.<sup>10</sup> Against this backdrop, OECD reports have cautioned against unilateral DSTs, noting

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<sup>1</sup> See OECD, Action Plan on Base Erosion and Profit Shifting, July 19, 2013.

<sup>2</sup> Jorge Valero, *The EU's digital tax is dead, long live the OECD's plans*, EURACTIV (Mar. 11, 2019), <https://www.euractiv.com/section/economy-jobs/news/the-eus-digital-tax-is-dead-long-live-the-oecd-plans/>.

<sup>3</sup> See European Commission, *Decision making on EU Tax Policy*, EUROPA.EU, [https://ec.europa.eu/taxation\\_customs/taxation/decision-making-eu-tax-policy\\_en](https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en) (last visited Dec. 5, 2020).

<sup>4</sup> See Tax on Certain Digital Services, preamble art. II (B.O.E. 2020, 4); see also Proyecto de Ley del Impuesto sobre Determinados Servicios Digitales (B.O.E. 2020, 1-1), [https://www.congreso.es/public\\_oficiales/L14/CONG/BOCG/A/BOCG-14-A-1-1.PDF](https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-1-1.PDF).

<sup>5</sup> Org. for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 178 (OECD Publishing 2018), [https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report\\_9789264293083-en#page180](https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en#page180).

<sup>6</sup> Proyecto de Ley del Impuesto sobre Determinados Servicios Digitales (B.O.E. 2020, 1-1), [https://www.congreso.es/public\\_oficiales/L14/CONG/BOCG/A/BOCG-14-A-1-1.PDF](https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-1-1.PDF).

<sup>7</sup> See, e.g., El Senado aprueba las tasas ‘Google’ y ‘Tobin’, que entrarán en vigor a inicio de 2021, EL PAÍS (Oct. 7, 2020), <https://elpais.com/economia/2020-10-07/el-senado-vota-hoy-la-aprobacion-definitiva-de-las-tasas-google-y-tobin.html>.

<sup>8</sup> Tax on Certain Digital Services, preamble art. IV (B.O.E. 2020, 4).

<sup>9</sup> *Id.* at art. II.

<sup>10</sup> See OECD, OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers' meeting, (Oct. 5, 2015), <https://www.oecd.org/tax/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion->

that “it is expected that any consensus-based agreement must include a commitment by members . . . to withdraw relevant unilateral actions, and not adopt such unilateral actions in the future.”<sup>11</sup>

The adoption of Spain’s DST in the absence of an international consensus reinforces concerns that Spain has chosen a measure that unfairly targets large, U.S.-based technology companies and that Spain’s DST is inconsistent with current principles of international taxation.<sup>12</sup> Furthermore, unilateral laws like Spain’s DST undermine progress in the OECD by making an agreement on a multilateral approach to digital taxation less likely.<sup>13</sup> If unilateral measures proliferate while negotiations are ongoing, countries lose the incentive to engage seriously in the negotiations.<sup>14</sup> For this reason, among others, the United States has discouraged governments from adopting country-specific DSTs. Nonetheless, Spain has chosen to create and implement its own unilateral tax on digital services.

## **B. BACKGROUND OF THE INVESTIGATION**

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Spain’s DST under section 302(b)(1)(A) of the Trade Act.<sup>15</sup> On the same date, the Trade Representative requested consultations with the Government of Spain.<sup>16</sup> Minister María Reyes Maroto Illera replied on July 31, 2020.<sup>17</sup> Consultations regarding Spain’s DST were held on December 17, 2020.

As set out in the Notice of Initiation, the investigation involves determinations of whether the act, policy, or practice at issue—i.e., Spain’s DST—is actionable under Section 301 of the Trade Act, and if so, what action, if any, to take under Section 301. This report provides analysis relevant to a determination of actionability under Section 301.

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at-g20-finance-ministers-meeting htm; OECD, *BEPS 2015 Final Reports* (Oct. 5, 2015), <https://www.oecd.org/ctp/beps-2015-final-reports htm>.

<sup>11</sup> Org. for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*, 211 (OECD Publishing 2018), [https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint\\_beba0634-en#page213](https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint_beba0634-en#page213); Legge 27 dicembre 2019, n. 160, art. 1, para. 49 *bis* (It.).

<sup>12</sup> See generally Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34,709 (Jun. 5, 2020).

<sup>13</sup> See, e.g., OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, 9, OECD PUBLISHING (Oct. 14, 2020).

<sup>14</sup> See Tax on Certain Digital Services, preamble art. II (B.O.E. 2020, 4) (“The long period of time that has passed . . . make[s] it necessary to adopt, following the path initiated by other countries, a unilateral solution that allows Spain to immediate exercise taxation rights . . .”).

<sup>15</sup> *Initiation of Section 301 Investigations of Digital Services Taxes*, 85 Fed. Reg. 34,709, 34,710 (Jun. 5, 2020).

<sup>16</sup> See Letter from Ambassador Robert Lighthizer to Minister María Reyes Maroto Illera, June 2, 2020 (on file with USTR).

<sup>17</sup> See Letter from Minister María Reyes Maroto Illera, to Ambassador Robert Lighthizer, U.S. Trade Representative, Jul. 31, 2020 (on file with USTR).

## 1. Relevant Elements of Section 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce.<sup>18</sup> Section 301 defines “discriminatory” to “include . . . any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment.”<sup>19</sup> “[U]nreasonable” refers to an act, policy, or practice that “while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable.”<sup>20</sup> The statute further provides that, in determining if a foreign country’s practices are unreasonable, reciprocal opportunities to those denied U.S. firms “shall be taken into account, to the extent appropriate.”<sup>21</sup>

If the Trade Representative determines that the Section 301 investigation “involves a trade agreement,” and if that trade agreement includes formal dispute settlement procedures, USTR may pursue the investigation through consultations and dispute settlement under the trade agreement. Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the USTR must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce:

[T]he Trade Representative shall take all appropriate and feasible action authorized under [section 301(c)], subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.<sup>22</sup>

Actions authorized under Section 301(c) include: (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.<sup>23</sup>

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<sup>18</sup> 19 U.S.C. § 2411(a)-(b).

<sup>19</sup> 19 U.S.C. § 2411(d)(5).

<sup>20</sup> 19 U.S.C. § 2411(d)(3)(A).

<sup>21</sup> 19 U.S.C. § 2411(d)(3)(D).

<sup>22</sup> 19 U.S.C. § 2411(b).

<sup>23</sup> In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. §§ 2411(c).

## 2. Focus of the Investigation

The focus of this investigation is: “[d]iscrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy. With respect to tax policy, the DSTs may diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These departures may include: [e]xtraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.”<sup>24</sup>

Additionally, USTR invited comments as to the extent to which the DST burdens or restricts U.S. commerce as well as other aspects that may warrant a finding that Spain’s DST is actionable under Section 301.<sup>25</sup>

## 3. Input from the Public

USTR provided interested persons with opportunities to present their views and perspectives on Spain’s DST. The Initiation Notice invited written comments by July 15, 2020.<sup>26</sup> More than 380 public comments were filed in response to the Initiation Notice.<sup>27</sup> USTR received comments by businesses, industry associations, and other groups that supported the Section 301 investigation and provided information and arguments in support of the bases identified in the Initiation Notice.<sup>28</sup>

## II. SPAIN’S DIGITAL SERVICES TAX

This section describes the structure and expected operation of Spain’s DST. Subsection A describes the content of Spain’s DST. Subsection B discusses the companies likely covered by the DST. Subsection C discusses the proposal on which Spain’s DST is based.

### A. FEATURES OF SPAIN’S DIGITAL SERVICES TAX

Spain’s DST applies a three percent tax on the revenue obtained from the provision of covered digital services.<sup>29</sup>

#### Covered Services

Spain’s DST applies to the following digital services:

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<sup>24</sup> *Initiation of Section 301 Investigations of Digital Services Taxes*, 85 Fed. Reg. 34,709, 34,710 (June 5, 2020).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 34,709.

<sup>27</sup> *See Initiation of Section 301 Investigations of Digital Services Taxes*, Docket USTR-2020-0022, REGULATIONS.GOV.

<sup>28</sup> *See, e.g.*, Silicon Valley Tax Directors Group, Comment Letter Re: Written Submission in Response to Initiation of Section 301 Investigations of Digital Services Taxes (USTR-2020-0022), 14-25 (Jul. 15, 2020).

<sup>29</sup> Tax on Certain Digital Services, art. 11 (B.O.E. 2020, 4) (“The tax will be levied at a rate of 3 percent.”).



- (1) “the inclusion, in a digital interface, of advertising targeted at users of said interface (‘online advertising services’);”<sup>30</sup>
- (2) “the provision of multi-sided digital interfaces that allow users to locate and interact with other users, or even facilitate the underlying supply of goods or services directly between those users (‘online intermediary services’);”<sup>31</sup> and
- (3) “data transmission services, including the sale or transfer of user data that has been collected and generated by the activities of the user on digital interfaces (‘data transmission services’).”<sup>32</sup>

Spain’s DST exempts the following activities:

- “The sale of goods or services contracted online, through the website of the provider of those goods or services, in which the provider is not acting as an intermediary;”<sup>33</sup> *i.e.*, “the retail activities of ‘electronic commerce’”;<sup>34</sup>
- “The facilitation of underlying supply of goods or services directly between users, within the framework of an online intermediary service;”<sup>35</sup>
- “The provision of online intermediary services, when the sole or main purpose of said services provided by the entity that makes a digital interface available is to provide digital content to users or provide communication or payment services;”<sup>36</sup>
- “The provision of financial services regulated by regulated financial entities;”<sup>37</sup>
- The provision of data transmission services, when they are carried out by regulated financial entities;”<sup>38</sup> and
- “The provision of digital services when they are carried out between entities that are part of a group with a, direct or indirect, 100 percent ownership.”<sup>39</sup>

Regarding the retail activities of electronic commerce, the preamble to the law provides that “[i]n order to determine whether a provider sells goods or services online on its own account or

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<sup>30</sup> Tax on Certain Digital Services, preamble art. IV (B.O.E. 2020, 4).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Tax on Certain Digital Services, art. 6 (B.O.E. 2020, 4).

<sup>34</sup> Tax on Certain Digital Services, preamble art. IV (B.O.E. 2020, 4).

<sup>35</sup> Tax on Certain Digital Services, art. 6 (B.O.E. 2020, 4).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

provides intermediary services, the legal and economic substance of the transaction must be taken into account.”<sup>40</sup>

The Preamble also clarifies that “[i]n no case is the conveyance of communication signals referred to in Law 9/2014, of May 9, General Telecommunications included.”<sup>41</sup>

### Revenue Thresholds

Companies become liable for Spain’s DST when their revenues exceed two thresholds: (1) “the net amount of their revenue in the preceding calendar year is higher than 750 million euros; [and] [(2)]. . . the total amount of their revenue derived from the provision of digital services subject to tax . . . corresponding to the preceding calendar year, exceeds 3 million euros.”<sup>42</sup>

### Taxable Revenues & Relationship to Other Taxes

Under Spain’s DST, “[t]he tax base of this tax will be established by the revenue, excluding, where appropriate, the Value Added Tax or any other equivalent taxes, obtained by the taxpayer for each of the digital services it provides subject to the tax, and carried out in the territory of its application.”<sup>43</sup>

### Location Provisions

Spain’s DST contains several provisions addressing the location of subject services or users. Spain’s DST provides that “digital services shall be understood as carried out in the territory where this tax is applicable whenever a user is located in that territorial area, regardless of whether the user has paid any compensation that contributes to the generation of revenue derived from the service.”<sup>44</sup> Spain’s DST also provides that a “user is located in the territory where the tax applies”:<sup>45</sup>

- “[i]n the case of online advertising services, when at the time the advertising appears on the device of the user, the device is in that territory”;<sup>46</sup>
- “[i]n the case of online intermediary services in which there is facilitation of underlying supply of goods or services directly between users, when the conclusion of the underlying

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<sup>40</sup> Tax on Certain Digital Services, preamble art. IV (B.O.E. 2020, 4).

<sup>41</sup> *Id.*

<sup>42</sup> Tax on Certain Digital Services, art. 8.1 (B.O.E. 2020, 4); *see also id.* at preamble, art. V; the Spanish DST contains a special rule for the first year of its implementation: “During the period between the day this Law becomes effective and the following December 31, for the purpose determining compliance with the threshold referred to in Article 8.1. b), of this Law, the total amount of the annual income received from the provision of digital services subject to tax will be taken into account, from the day this Law becomes effective until the end of the settlement period.” Tax on Certain Digital Services, Sole Temporary Regulation, *determination of thresholds* (B.O.E. 2020, 4).

<sup>43</sup> Tax on Certain Digital Services, preamble art. VII (B.O.E. 2020, 4).

<sup>44</sup> Tax on Certain Digital Services, art. 7 (B.O.E. 2020, 4).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

transaction by a user is carried out through the digital interface of a device that at the time of conclusion is in that territorial area”,<sup>47</sup>

- “[i]n any other online intermediary services, when the account allowing the user to access the digital interface has been opened using a device that, at the time it was opened, was in that territory”;<sup>48</sup> and,
- [i]n the case of data transmission services, when the transmitted data is generated by a user through a digital interface that has been accessed through a device that, at the time of data generation, is present in that territorial area.”<sup>49</sup>

However, for the purpose of determining the location where the digital services have been rendered, Spain’s DST does not take into consideration either: “[t]he place where the underlying supply of goods or services takes place, in the case of online intermediary services where this takes place”<sup>50</sup> or “[t]he place from which any payment related to a digital service is made.”<sup>51</sup>

Additionally, under Spain’s DST, it is “assumed that the device of a user is in the place that is identified by the IP address of the same, unless it can be concluded that said place is a different one through the use of other means of admissible evidence by law, in particular, the use of other geolocation tools.”<sup>52</sup>

#### Calculation of the DST’s Taxable Base

The DST applies a different rule to determine the tax base for each type of covered service:

- “In the case of online advertising services, the proportion that represents the number of times said advertising appears on devices that are located in the tax territory will be applied to the total revenue obtained with respect to the total number of times said advertising appears on any device, regardless of where they are located.”<sup>53</sup>
- “In the case of online intermediary services in which there is a facilitation of underlying supply of goods or services directly between users, the proportion representing the number of users located in the tax territory will be applied to the total revenue obtained with respect to the total number of users that participate in that service, notwithstanding where they are located.”<sup>54</sup> In all other cases, “[t]he tax base for other intermediary

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at art. 7.3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at art. 7.4; *see also id.* at art. 7.5 (providing that “[t]he data that can be collected from users in order to apply this Law is limited to those that allow the location of users’ devices in the territory where this tax is applied.”).

<sup>53</sup> *Id.* at art. 10.2(a).

<sup>54</sup> *Id.* at art. 10.2(b).

services will be determined by the total amount of revenue that results directly from users when the accounts that allow access to the digital interface used had been opened using a device that, at the time it was opened, was located in the territory where the tax applies.”<sup>55</sup>

- “In the case of data transmission services, the proportion that represents the number of users who have generated said data, and are located in the tax territory, will be applied to the total revenue obtained with respect to the total number of users who have generated such data, notwithstanding where they are located.”<sup>56</sup>

### Accrual & Payment of DST

Spain’s DST will become effective three months after its publication in the *Boletín Oficial del Estado*, i.e., the DST will take effect on January 15, 2021.<sup>57</sup> Once Spain’s DST enters into effect, the “tax will accrue at the time any taxed operations are rendered, executed or carried out.”<sup>58</sup> The law also provides that the settlement period coincides with the calendar quarter.<sup>59</sup> The first payments are expected to occur on April 15, 2021. Accordingly, the DST does not appear to be retroactive.

### Estimated Revenue

Spain’s 2021 budget estimated that the DST may generate as much €68 million in calendar year 2021.<sup>60</sup>

### Sunset Clause

Spain’s DST does not contain a sunset clause.

## **B. COVERED COMPANIES**

As described above, the DST applies to companies that, during the previous calendar year, generated €750 million or more in worldwide revenues and €3 million or more in subject digital services revenues attributed to Spain under the law. While there are some ambiguities in the text of Spain’s DST, it is possible to estimate which companies will be covered based on a

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at art. 10.2(c).

<sup>57</sup> *Id.* at Sixth Final Regulation, *Effectiveness* (“This Law shall come into effect three months after its publication in the ‘Official State Gazette’.”); see also B.O.E. n. 274, Oct. 16, 2020, <https://www.boe.es/boe/dias/2020/10/16/pdfs/BOE-A-2020-12355.pdf>.

<sup>58</sup> Tax on Certain Digital Services, art. 9 (B.O.E. 2020, 4).

<sup>59</sup> *Id.* at art. 14.

<sup>60</sup> Ministerio de Hacienda, Presentación del Proyecto de Presupuestos Generales del Estado 2021, HACIENDA.GOB.ES (Oct. 28, 2020), <https://www.sepg.pap.hacienda.gob.es/sitios/sepg/es-ES/Presupuestos/PGE/ProyectoPGE2021/Documents/LIBROAMARILLO2021.pdf>; see also Report on the Analysis of the Regulatory Impact, SECRETARIAT OF STATE FOR FINANCE, 19 (Oct. 23, 2018) (Economic and budgetary impact).

review of publicly available information, including: regulatory filings, corporate annual reports, corporate websites, press articles, and other sources.<sup>61</sup>

In the course of this investigation, 39 companies, or company groups, were identified as likely to be subject to Spain's DST, meeting both threshold and covered services requirements. Of those companies, 25 were U.S. companies, two were Spanish companies,<sup>62</sup> and the remaining 12 were from other countries. Alternatively stated, of those companies identified in the investigation, over 64% of covered companies were U.S. companies, while Spanish companies comprised only 5.1% of companies covered by Spain's DST.

In comparison, an estimated 249 companies would be subject to the DST if revenue thresholds included all companies operating in the covered services,<sup>63</sup> excluding small and medium enterprises (as defined by turnover).<sup>64</sup>

By category of covered services, 13 U.S. companies may be covered under online advertising provisions, 13 U.S. companies may be covered under online intermediary services provisions, and four U.S. companies may be covered by data transmission provisions. Approximately four U.S. companies may fall under more than one category of covered service.

Both Spanish companies that may be covered by Spain's DST fall under online intermediary services. One Spanish company also may be covered under the DST's data transmission provisions. The investigation did not identify any Spanish company that would meet the Spanish DST's covered services and revenue threshold provisions that would fall under the DST's online advertising provisions.

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<sup>61</sup> USTR's analysis of companies likely covered under Spain's DST was based on a review of publicly available information, including regulatory filings, corporate annual reports, corporate websites, press articles, and other sources. Using these sources, USTR identified which companies would likely meet the DST's criteria, such as revenue thresholds and provision of services meeting the DST's definition of covered services. Where possible, USTR isolated revenue attributable to covered services in Spain. Previously, companies have not been required to publish (or even to collect) data relevant to whether they meet Spain's DST criteria or what tax liability they may incur, and complete information was not available for all companies. Where specific information was not publicly available, USTR used available data to assess whether a company likely met Spain's DST criteria.

<sup>62</sup> One of these two companies may have an ultimate parent entity in a European nation other than Spain. However, this company is included in the Spanish company listing as the primary business is listed as a Spanish company. While this investigation was only able to identify two subject companies, a comment submitted to this investigation indicated Spain's Finance Minister suggested that at least three Spanish companies would be subject to the DST. See Silicon Valley Tax Directors Group, Comment Letter Re: Written Submission in Response to Initiation of Section 301 Investigations of Digital Services Taxes (USTR-2020-0022), Comment No. USTR-2020-0022-0383, 63 (Jul. 15, 2020).

<sup>63</sup> An academic paper identified the following European Classification of Economic Activities (NACE) Revision 2 codes 6201, 6209, 6311, 6312, 4791 and 5811 to 5819, as codes that identify industries likely to fall in the scope of the European Commission's DST proposal. Due to the similarities between the Commission DST proposal and Spain's DST, these codes were applied to a database to identify possibly affected companies. See Daniel Klein, Christopher Ludwig, & Christoph Spengel, *Ring-fencing Digital Corporations: Investor Reaction to the European Commission's Digital Tax Proposals*, ZEW DISCUSSION PAPER NO. 19-050, 11 (Nov. 2019), <http://ftp.zew.de/pub/zew-docs/dp/dp19050.pdf>.

<sup>64</sup> See *SME definition*, EUROPEAN COMMISSION (Mar. 28, 2014), [https://ec.europa.eu/growth/smes/sme-definition\\_en](https://ec.europa.eu/growth/smes/sme-definition_en).

As discussed below, this investigation's analysis of companies likely covered by Spain's DST indicates that the DST is likely to disproportionately impact U.S. companies.

### C. EUROPEAN COMMISSION'S DIGITAL SERVICES TAX PROPOSAL

Spain's DST draws from and is similar a failed proposal for an EU-wide DST. Accordingly, discussion of the European Commission proposal provides context to the analysis of Spain's DST. This discussion addresses the structure of the Commission proposal, as Spain's DST contains a highly similar structure. Likewise, discussion of criticisms of the Commission proposal provides context for the analysis of the Spanish DST, as the Spanish DST adopts many of the same discriminatory, unfair, and burdensome aspects that have been identified in the Commission proposal.

Public sources indicate that Spain's DST is based on a Commission proposal that would have taxed gross revenues earned by certain companies from supplying certain digital services deemed to be provided in the EU.<sup>65</sup> The Commission introduced the proposal on March 21, 2018.<sup>66</sup> EU members states debated the proposal at length, including consideration of various amendments. Under EU law, tax-related legislation at the EU level requires unanimous member state approval.<sup>67</sup> Certain EU members, including Ireland, Sweden, and Denmark, opposed the EU-wide DST.<sup>68</sup> After it became clear that the Commission proposal was not going to receive unanimous approval, the Spanish government adopted its own DST.<sup>69</sup>

The Commission proposal called for a three percent tax on revenues generated by covered companies from providing three categories of services provided in the EU. The taxable services were: (i) internet advertising "targeted at users," (ii) digital "intermediation services" enabling users to "find other users and interact with them," and (iii) the "transmission of data collected about users and generated from such users' activities on digital interfaces."<sup>70</sup> Like the Commission proposal, the Spanish proposal also contains a three percent tax rate on revenues arising from online advertising services, online intermediary services, and data transmission services.<sup>71</sup>

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<sup>65</sup> Patricia Lampreave, *Spain Has Approved the Digital Service Tax: The Controversy Is Served*, Kluwer Int'l Tax Blog (Feb. 24, 2020), [http://kluwertaxblog.com/2020/02/24/spain-has-approved-the-digital-service-tax-the-controversy-is-served/#:~:text=The%20tax%20rate%20applied%20will,any%20expenses%20from%20digital%20services;see%20also%20Report%20on%20the%20Analysis%20of%20the%20Regulatory%20Impact,SECRETARIAT%20OF%20STATE%20FOR%20FINANCE%20\(Oct.%2023,%202018\),%20%24.%202.2,%20\(\[I\]t%20should%20be%20noted%20that%20within%20the%20Council%20the%20European%20Union%20is%20holding%20discussions%20regarding%20the%20possible%20establishment%20of%20a%20tax%20with%20similar%20characteristics%20to%20that%20which%20is%20the%20subject%20of%20this%20law,%20based%20on%20a%20regulatory%20proposal%20made%20by%20the%20European%20Commission%20on%20March%2021,%202018.%20.%20.%20\[T\]he%20Tax%20on%20Certain%20Digital%20Services%20is%20based,%20to%20a%20large%20extent,%20on%20that%20provided%20for%20in%20the%20European%20Commission's%20proposal\[.\]](http://kluwertaxblog.com/2020/02/24/spain-has-approved-the-digital-service-tax-the-controversy-is-served/#:~:text=The%20tax%20rate%20applied%20will,any%20expenses%20from%20digital%20services;see%20also%20Report%20on%20the%20Analysis%20of%20the%20Regulatory%20Impact,SECRETARIAT%20OF%20STATE%20FOR%20FINANCE%20(Oct.%2023,%202018),%20%24.%202.2,%20([I]t%20should%20be%20noted%20that%20within%20the%20Council%20the%20European%20Union%20is%20holding%20discussions%20regarding%20the%20possible%20establishment%20of%20a%20tax%20with%20similar%20characteristics%20to%20that%20which%20is%20the%20subject%20of%20this%20law,%20based%20on%20a%20regulatory%20proposal%20made%20by%20the%20European%20Commission%20on%20March%2021,%202018.%20.%20.%20[T]he%20Tax%20on%20Certain%20Digital%20Services%20is%20based,%20to%20a%20large%20extent,%20on%20that%20provided%20for%20in%20the%20European%20Commission's%20proposal[.])).  
<sup>66</sup> *Id.*

<sup>67</sup> See European Commission, *Decision making on EU Tax Policy*, EUROPA.EU, [https://ec.europa.eu/taxation\\_customs/taxation/decision-making-eu-tax-policy\\_en](https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en) (last visited Dec. 5, 2020).

<sup>68</sup> Jorge Valero, *The EU's digital tax is dead, long live the OECD's plans*, EURACTIV (Mar. 11, 2019), <https://www.euractiv.com/section/economy-jobs/news/the-eus-digital-tax-is-dead-long-live-the-oecd-plans/>.

<sup>69</sup> Tax on Certain Digital Services, preamble art. II (B.O.E. 2020, 4).

<sup>70</sup> *Commission Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, 7, 13, 17, 24, COM (2018) 148 final (Mar. 21, 2018).

<sup>71</sup> Tax on Certain Digital Services, preamble arts. 10-11 (B.O.E. 2020, 4).

The Commission proposal also would have applied revenue thresholds. The Commission proposal provided that a company was covered by the tax only if, during the relevant tax year: (i) the total amount of its global annual revenues exceeded €750 million, and (ii) the total amount of taxable revenues earned by the company “within the Union” exceeded €50 million.<sup>72</sup> Spain’s DST applies the same worldwide threshold as the Commission proposal, noting that:

The first threshold allows limiting the application of the tax to large companies, which are those capable of providing these digital services based on data and user contributions, and which rely largely on the existence of extensive networks of users, high data traffic and the exploitation of a solid position in the market. This threshold, which is the same as the one contained in Council Directive (EU) 2016/881, of May 25, 2016, and which amends Directive 2011/16 / EU. . . which establishes the declaration on the Country-by-Country Report, in the equivalent international standards adopted in application of Action 13 of the OECD and G-20 Project on the Based Erosion and Profit Shifting (BEPS) . . . will provide legal certainty, since it will allow companies and the Tax Administration to determine more easily whether an entity is subject to tax.<sup>73</sup>

Additionally, Spain’s in-country revenue thresholds appear to bear an approximate proportional relationship to the Commission proposal thresholds, relative to gross domestic product statistics available in Eurostat.<sup>74</sup>

Commentators at the time opined that the EU proposal was aimed at, and would be borne primarily by, a few U.S. digital companies. For example:

- Two U.S. commentators noted that “thresholds for applying the DST are very high and would largely embrace [U.S.] firms.”<sup>75</sup> They estimated that Spotify (a Swedish company) would be one of the very few EU companies that would meet the revenue thresholds but that the content carve-out excluded Spotify from the definition of digital intermediation services.<sup>76</sup> This assessment remains concerning as Spain’s DST contains highly similar content carve-outs.
- Two European commentators stated that, due to the revenue thresholds, “[t]he tax falls mainly upon [U.S.] multinational firms.”<sup>77</sup> The commentators noted that an earlier draft

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<sup>72</sup> *Commission Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, 10, COM (2018) 148 final (Mar. 21, 2018).

<sup>73</sup> Tax on Certain Digital Services, art. V (B.O.E. 2020, 4).

<sup>74</sup> Comparing “GDP and main components (output, expenditure and income)” data for Spain and the European Union as available in Eurostat. See *GDP and main components (output, expenditure and income)*, EUROSTAT DATA BROWSER (last updated Jan. 5, 2021, 17:00), [https://ec.europa.eu/eurostat/databrowser/view/namq\\_10\\_gdp/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/namq_10_gdp/default/table?lang=en).

<sup>75</sup> Gary Clyde Hufbauer & Zhiyao Lu, *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, Peterson Institute for International Economics, 5 PIIE (Jun. 2018).

<sup>76</sup> *Id.* at 5-6, 8.

<sup>77</sup> Johannes Becker & Joachim Englisch, *EU Digital Services Tax: A Populist and Flawed Proposal*, KLUWER INT’L TAX BLOG (Mar. 16, 2018), <http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/>.

of the measure suggested that the Commission had considered higher thresholds that would have carved out all European firms but decided that these would have “rendered [the tax’s] discriminatory effects all too obvious.”<sup>78</sup> Even under the final thresholds, however “[o]nly a few European players are affected by the tax.”<sup>79</sup> As described in this report, this assessment remains concerning due to the discriminatory impact of Spain’s DST thresholds.

- Another commentator stated that there was “no legal or economic rationale for [the revenue] thresholds” and that they ensured that “the vast majority of the digital advertising and intermediary businesses within the definition and above the threshold are almost exclusively from” the United States or from China.<sup>80</sup> As described in this report, this assessment remains concerning as it is consistent with this investigation’s analysis of companies likely covered by Spain’s DST.

According to a draft European Commission paper obtained by the media, the EC identified seven companies that would be affected by the tax—all but one of which were U.S.-based.<sup>81</sup> Further, the one non-U.S. company that the paper mentioned, Spotify, would be covered only as an advertiser—i.e., for the revenues associated with its ad-supported free service—and not with respect to its subscription service, which provides the vast majority of its total revenue.<sup>82</sup> This assessment remains concerning as this investigation identified 25 U.S. companies that may be covered by Spain’s DST, but only two Spanish companies that may be covered by the DST’s full parameters. In comparison, there could be approximately 249 companies that would be subject to the DST if just the revenue parameters were removed.<sup>83</sup>

Commentators also criticized the structure and rationale of the EU proposal. For example:

- A commentator explained that the proposal was discriminatory because, “[t]ax policy designed to target a single sector or activity is likely to be unfair and have complex

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Hosuk Lee-Makiyama, *The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST)*, 7, EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY (May 2018), <https://ecipe.org/wp-content/uploads/2018/11/The-Cost-of-fiscal-unilateralism-Potential-retaliation-against-the-EU-Digital-Services-Tax-DST-1.pdf>.

<sup>81</sup> European Commission, *Taxation of Digital Activities in the Single Market (Draft)*, 7 (Feb. 26, 2018), <https://images.politico.eu/wp-content/uploads/2018/02/taxation-of-digital-economy-2.pdf> (citing “Facebook, Google AdWords, Twitter, Instagram, ‘free’ Spotify, . . . Airbnb, [and] Uber” as companies that would be covered by the tax).

<sup>82</sup> Spotify, *Spotify Technology S.A. Announces Financial Results for First Quarter 2019*, SPOTIFY.COM (Apr. 29, 2019), <https://investors.spotify.com/financials/press-release-details/2019/Spotify-Technology-SA-Announces-FinancialResults-for-First-Quarter-2019/default.aspx> (showing that, in 2018 and 2019, ad-supported “free” Spotify generated less than 10% of Spotify’s total revenues).

<sup>83</sup> Excluding small and medium enterprises (as defined by turnover). See *SME definition*, EUROPEAN COMMISSION (Mar. 28, 2014), [https://ec.europa.eu/growth/smes/sme-definition\\_en](https://ec.europa.eu/growth/smes/sme-definition_en).



consequences. The digital economy is not something that can easily be separated out from the rest of the global economy.”<sup>84</sup>

- Another commentator also argued that the EU proposal “squarely conflicts with the permanent establishment concept affirmed in EU member state bilateral tax treaties with the United States.”<sup>85</sup>

Because the Spanish DST has a similar structure and expected operation, these criticisms remain relevant to Spain’s DST. Additionally, adoption of highly similar DST, without accommodation for these fundamental criticisms, suggests that Spain’s DST was intended to target covered U.S. companies.

### **III. USTR’S FINDINGS REGARDING SPAIN’S DST**

This section sets out USTR’s findings on the question of actionability, *i.e.*, whether Spain’s DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As explained below, the investigation identified discriminatory, unreasonable, and burdensome aspects of Spain’s DST.

#### **A. SPAIN’S DST DISCRIMINATES AGAINST U.S. COMPANIES**

This section addresses how Spain’s DST, by its structure and operation, discriminates against U.S. digital companies.

##### **1. Revenue Threshold Discrimination Against U.S. Companies**

As described in Section II, the DST applies to companies that generate €750 million or more in worldwide revenues and €3 million or more in covered digital services revenues, as defined by the DST.

An analysis conducted in this investigation identified that both the percentage and absolute number of U.S. companies affected by Spain’s DST increases when compared with lower revenue thresholds. If a threshold of €50 million was to be applied, the analysis identified 249 companies, of which 20 (8%) had an ultimate parent in Spain and 80 (32.1%) had an ultimate parent in the United States. Increasing the threshold to €100 million identified 170 companies, of which 8 (4.7%) had an ultimate parent in Spain and 70 (41.2%) had an ultimate parent in the United States. In comparison, applying the actual threshold of Spain’s DST, €750 million, the analysis identified 60 companies, of which 2 (3%) had an ultimate parent in Spain and 34 (56.7%) had an ultimate parent in the United States.

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<sup>84</sup> Daniel Bunn, *A Summary of Criticisms of the EU Digital Tax*, 7, TAX FOUNDATION (Oct. 2018), <https://files.taxfoundation.org/20181022090015/Tax-Foundation-FF618.pdf>.

<sup>85</sup> Gary Clyde Hufbauer & Zhiyao Lu, *The European Union’s Proposed Digital Services Tax: A De Facto Tariff*, *Peterson Institute for International Economics*, 2 (Jun. 2018).

<b>Revenue Threshold (or Comparative Alternative Thresholds)</b>	<b>Total Subject Companies<sup>86</sup></b>	<b>Spanish Companies<sup>87</sup></b>	<b>U.S. Companies<sup>88</sup></b>
€750m	60	2 (3%)	34 (56.7%)
€100m	170	8 (4.7%)	70 (41.2%)
€50m	249	20 (8%)	80 (32.1%)

Accordingly, Spain’s DST revenue thresholds appear to serve as a proxy for nationality, with a discriminatory effect against covered U.S. companies.

Spain contends that the worldwide revenue threshold is intended, in part, to “make it possible to exclude from this new tax, small and medium-sized companies and startups, for which the compliance costs associated with it could have a disproportionate effect.”<sup>89</sup> As identified above, the investigation analyzed the potential number of companies covered by the DST at different revenue threshold levels to assess this statement. The European Commission definition defines a small and medium-sized enterprise based on factors including staff headcount and either turnover or balance sheet total.<sup>90</sup> For a medium-sized enterprise, the turnover threshold identified is €50 million.<sup>91</sup> The Spanish DST threshold level, however, is fifteen times the highest revenue threshold of a medium-sized enterprise. Accordingly, this justification does not support the threshold applied in the DST.

Thus, by applying such a high worldwide revenue threshold, Spain’s DST discriminates against U.S. companies.

## **2. The Selection of Covered Services Under Spain’s DST Discriminates Against U.S. Companies**

Spain’s DST, like the Commission’s proposal, targets categories of services where U.S. companies are dominant—namely, online advertising services, online intermediary services and data transmission services.

### Online Advertising

As described by a comment to the investigation: “[m]any of the world’s most popular digital advertising-supported services are provided by companies located in the United States. These companies grew to be world industry leaders due to their innovative offerings, competitive pricing, and early adoption of new technologies and services. As a result of their success in the U.S. and globally, many U.S. companies meet or exceed the revenue thresholds[.]”<sup>92</sup> This

<sup>86</sup> With revenues at or above the threshold amount.

<sup>87</sup> Defined as companies with an ultimate parent entity in Spain.

<sup>88</sup> Defined as companies with an ultimate parent entity in the United States.

<sup>89</sup> Tax on Certain Digital Services, preamble art. V (B.O.E. 2020, 4).

<sup>90</sup> See *SME definition*, EUROPEAN COMMISSION (Mar. 28, 2014), [https://ec.europa.eu/growth/smes/sme-definition\\_en](https://ec.europa.eu/growth/smes/sme-definition_en).

<sup>91</sup> *Id.*

<sup>92</sup> Interactive Advertising Bureau, Re: Docket No. USTR-2020-0022, 3, Comment No. USTR-2020-0022-0374 (Jul. 15, 2020).

description is confirmed by this investigation’s assessment of covered companies. As discussed in Section II.B, 13 U.S. companies may be subject to the Spanish DST as providers of online advertising services.<sup>93</sup> In contrast, the covered companies identified in this investigation’s analysis included no Spanish companies that were likely subject to the Spanish DST as providers of online advertising services.<sup>94</sup> However, there are reportedly 17 Spanish companies (excluding small- and medium-size enterprises), that are engaged in advertising business activities.<sup>95</sup> This indicates that Spain’s DST has a discriminatory impact.

Additionally, because Spain’s DST applies “selectively to digital advertising and do[es] not apply to other traditional forms of media and advertising, such as print, television, radio, or out-of-home, these taxes increase the competitiveness of those forms of advertising relative to digital advertising.”<sup>96</sup> As a result, one commenter stated that DSTs, such as Spain’s DST:

. . . will have a discriminatory impact on U.S. companies vis-à-vis local competitors. For example, some U.S. companies in each DST market will have no choice but to increase their advertising rates to compensate for the costs of complying with the DST. Accordingly, when advertisers or others procuring digital services in each market make decisions as to how best to manage and allocate their budgets, they are likely to redirect significant portions of their spending to local providers that are not subject to the same cost pressures because they are outside the scope of the DST. In-scope U.S. companies will lose out on business to local rivals that do not meet the revenue thresholds or the strict business model definitions in the tax.”<sup>97</sup>

Thus, the selection of online advertising as one of the three narrow services covered by Spain’s DST indicates that Spain’s DST discriminates against U.S. companies and targets market-leading U.S. companies for special, unfavorable tax treatment.

### Online Intermediary Services

As described in Section II.B of this report, 13 U.S. companies may be covered under online intermediary services, while only two Spanish companies are likely covered under these provisions.<sup>98</sup> The low number of Spanish companies covered by online intermediary services may be attributable to the manner in which Spain’s DST defines online intermediary services: the definition applies only when the company operating the online intermediary service does not

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<sup>93</sup> See Section II.B.

<sup>94</sup> *Id.*

<sup>95</sup> Analysis based on companies in Spain under NACE code 73.1, Advertising, with reported revenues of greater than €50 million.

<sup>96</sup> Interactive Advertising Bureau, Re: Docket No. USTR-2020-0022, 3, Comment No. USTR-2020-0022-0374 (Jul. 15, 2020).

<sup>97</sup> Information Technology Industry Council, Docket No. USTR-2020-0022: Initiation of Section 301 Investigations of Digital Services Taxes, 13, Comment No. USTR-2020-0022-0345 (Jul. 15, 2020).

<sup>98</sup> For illustrative purposes, this investigation assessed companies that might otherwise be covered by this category of services by reference to NACE codes 781, 782, 7911, and 799. This creates a comparison between a subset of potentially covered services within this category. This assessment identified 130 companies, of which 47 had a ultimate parent entity in Spain and 16 had an ultimate parent entity in the United States. This suggests that Spanish companies operate similar business activities, but by operation of the law, are not covered by the DST.

itself own or provide the good or service.<sup>99</sup> This distinction has the effect of excluding Spanish companies from the scope of the DST while covering their U.S.-based competitors. Thus, the selection of online intermediary services as one of the three narrow services covered by Spain's DST indicates that Spain's DST discriminates against U.S. companies and targets market-leading U.S. companies for special, unfavorable tax treatment.

### Data Transmission Services

As described in Section II.B of this report, approximately four U.S. companies may be covered under data transmission services, whereas this investigation identified only one Spanish company that would be covered under the data transmission service provisions, applying the statutes' criteria as well as applicable exceptions and exclusions. In contrast, an analysis of businesses with operations under NACE code 631 (Data processing, hosting and related activities; web portals) identified possibly as many as eight Spanish companies that may provide services within in this category. This indicates that Spain's DST functions in a manner so as to exempt or exclude Spanish companies while including U.S. companies. Thus, the selection of data transmission services as one of the three narrow services covered by Spain's DST indicates that Spain's DST discriminates against U.S. companies and targets market-leading U.S. companies for special, unfavorable tax treatment.

### Targeting a Small Number of Digital Companies for Special, Unfavorable Tax Treatment

The DST targets a select group of digital service providers (most of which are U.S. companies), but does not tax companies that provide the same or very similar services in non-digital format. In doing so, Spain's DST is inconsistent with admonishments against targeting the digital economy for different tax treatment. The result is that Spain's DST targets a small number of (mostly U.S.-based) digital companies for special, unfavorable tax treatment.

The OECD has several times cautioned against this discriminatory 'ring-fencing' approach, meaning that digital companies are taxed, but non-digital companies that provide the same or similar services are excluded. A 2015 OECD report stated:

As digital technology is adopted across the economy, segmenting the digital economy is increasingly difficult. In other words, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy. Attempting to isolate the digital economy as a separate sector would inevitably require *arbitrary lines to be drawn* between what is digital and what is not. As a result, the tax challenges and base erosion and profit shifting (BEPS) concerns raised by the digital economy are better identified and addressed by analysing existing structures adopted by MNEs together with new business models and by focusing on the key features of the digital economy and determining which of those

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<sup>99</sup> Commission Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services, 17-18, COM (2018) 148 final (Mar. 21, 2018).

features raise or exacerbate tax challenges or BEPS concerns, and developing approaches to address those challenges or concerns.<sup>100</sup>

A March 2019 OECD public consultation document agreed that “it would be difficult, if not impossible, to ‘ring-fence’ the digital economy from the rest of the economy for tax purposes because of the increasingly pervasive nature of digitalization.”<sup>101</sup> Consequently, it recommended changes to international tax rules that do not distinguish between digital and non-digital activities.<sup>102</sup> Another OECD document published subsequently also recognized “that it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes” and therefore focused on a “systematic solution” applicable to all business models.<sup>103</sup>

Other entities have agreed that it is not possible or advisable to “ring-fence” the digital economy. The International Chamber of Commerce endorsed the OECD’s statement that it would be “impossible” to “ring-fence the digital economy” in a non-arbitrary way and encouraged a “long-term global solution” to the challenges posed by the digital economy.<sup>104</sup> Even an expert group of the European Commission acknowledged that “there should not be a special tax regime for digital companies. Rather the general rules should be applied or adapted so that ‘digital’ companies are treated the same way as others.”<sup>105</sup>

As described in this report, Spain’s DST attempts to “ring-fence” the digital economy through revenue thresholds and a narrow definition of covered taxable services. Spain asserts that these criteria limit “the application of the tax to large companies, which are those capable of providing these digital services based on data and user contributions, and which rely largely on the existence of extensive networks of users, high data traffic and the exploitation of a solid position in the market.”<sup>106</sup> Such justifications are without merit. Not only has the theory of “user created value” been thoroughly refuted, but as described by one analysis, “[i]t is not clear why users suddenly create more value when a company gets beyond this size.”<sup>107</sup> Accordingly,

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<sup>100</sup> OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report*, 54, OECD PUBLISHING (2015) (emphasis added).

<sup>101</sup> OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy*, 5 OECD PUBLISHING (Feb. 13, 2019), <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf>.

<sup>102</sup> *Id.* at 24-25.

<sup>103</sup> OECD, *Programme of Work to Develop and Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, 25, OECD PUBLISHING (May 2019), <https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf>.

<sup>104</sup> International Chamber of Commerce (ICC), *Digital Tax Rules Should Be Global and Long-Term in Scope*, ICCWBO.ORG (Mar. 22, 2018), <https://iccwbo.org/media-wall/news-speeches/icc-digital-tax-rules-global-long-termscope/>.

<sup>105</sup> Expert Group, *Report of the Commission Expert Group on Taxation of the Digital Economy*, 44, EUROPA.EU (May 28, 2014), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/gen\\_info/good\\_governance\\_matters/digital/report\\_digital\\_economy.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/report_digital_economy.pdf).

<sup>106</sup> Tax on Certain Digital Services, preamble art. V (B.O.E. 2020, 4).

<sup>107</sup> Joe Kennedy, *Digital Services Taxes: A Bad Idea Whose Time Should Never Come*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION (May 13, 2019).

aside from separating large U.S. companies from others, there is nothing substantively meaningful about the DST threshold levels employed by Spain’s DST.<sup>108</sup>

In sum, the analysis of the Spanish DST revenue thresholds and selection of covered services shows that the narrowly defined digital services covered by Spain’s DST are likely to affect U.S. companies, but are unlikely to affect many, if any, Spanish companies. This analysis also indicates that covered U.S. companies may be subject to special, unfavorable tax treatment when compared to Spanish competitors, particularly in the provision of advertising services. One comment remarked that, due to the limited scope of covered services under Spain’s DST, “there is no non-nationality-based explanation for the selection of covered services and revenue thresholds[.]”<sup>109</sup> Thus, Spain’s DST discriminates against covered U.S. companies and targets those market-leading U.S. companies for special, unfavorable tax treatment.

**B. SPAIN’S DST IS UNREASONABLE BECAUSE THE DST’S APPLICATION TO REVENUE RATHER THAN INCOME IS INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES**

The architecture of the international tax system reflects that corporate income (as defined by domestic law), and not corporate gross revenue, is an appropriate basis for taxation. There are over 3,000 bilateral tax treaties in effect, the majority of which are based on the OECD Model Tax Convention on Income and on Capital and on the UN Model Double Taxation Convention between Developed and Developing Countries.<sup>110</sup> The OECD model treaty provides disciplines on the taxation of “business profits” and other types of income streams, such as dividends, interest, royalties, and capital gains. However, the OECD model treaty makes no provision for taxes on gross revenues.<sup>111</sup> The UN model treaty likewise has disciplines on business profits and numerous other types of income, but has no provision for taxes on gross revenues.<sup>112</sup> The U.S. model tax treaty, as well as scores of bilateral tax treaties to which the United States is a party, including the U.S.–Spain Tax Treaty, have the same scope in this regard.<sup>113</sup> Other sources confirm that prevailing tax policy principles support the taxation of

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<sup>108</sup> See also United States Council for International Business (USCIB) Comments on Initiation of Section 301 Investigations of Digital Services Taxes, Comment No. USTR-2020-0022-0364 (Jul. 15, 2020) (“[T]here is evidence that the [Spanish] DST . . . is designed to reach U.S. companies.”); Spain also notes that the worldwide revenue threshold pertains to Council Directive (EU) 2016/881, of May 25, 2016, and which amends Directive 2011/16 / EU, which establishes the Country-by-Country Report. However, this rationale is not substantive linked to user value creation (contribution) theory also posited as the substantive basis for the DST’s criteria. See Tax on Certain Digital Services, preamble art. V (B.O.E. 2020, 4).

<sup>109</sup> Information Technology Industry Council, Docket No. USTR-2020-0022: Initiation of Section 301 Investigations of Digital Services Taxes, 11, Comment No. USTR-2020-0022-0345 (Jul. 15, 2020).

<sup>110</sup> BRIAN J. ARNOLD, AN INTRODUCTION TO TAX TREATIES 1 (2015).

<sup>111</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD PUBLISHING, art. 7, Dec. 18, 2017 (on business profits); see *id.* arts. 6, 8-21.

<sup>112</sup> See United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017 (setting out disciplines on taxes of business profits); *id.* arts. 6, 8-21 (covering other types of income).

<sup>113</sup> See Dep’t Treasury, United States Model Income Tax Convention, art. 2, 2016 (setting out disciplines on “total income, or on elements of income”); *id.* art. 7 (establishing disciplines on taxes of “business profits”); Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with protocol, U.S.-Spain, 1591 UNTS 41, Feb. 22, 1990 (entered into force Nov. 21, 1990) (hereinafter U.S.-Spain Tax Treaty).

corporate income but not of gross revenue. For example, one comment to the investigation reported that most European countries rejected turnover taxes, i.e., revenue-based taxation, in the 1960s.<sup>114</sup>

Chapter 2 of the OECD publication *Addressing the Tax Challenges of the Digital Economy*, entitled “Fundamental Principles of Taxation,” recognizes two bases for corporate taxation—income and consumption.<sup>115</sup> As described by the OECD, income taxes are “imposed on net profits, that is receipts minus expenses”<sup>116</sup> and that “[i]ncome taxes are levied at the place of source of income.”<sup>117</sup> Consumption taxes, on the other hand, “find their taxable event in a transaction, the exchange of goods and services for consideration either at the last point of sale to the final end user (retail sales tax and VAT), or on intermediate transactions between businesses (VAT)[,]”<sup>118</sup> and “are levied at the place of destination (i.e.[,] the importing country).”<sup>119</sup>

Spain’s DST is neither an income tax nor a consumption tax. It is not an income tax because the DST is a tax on gross revenues.<sup>120</sup> It is not a consumption tax because it does not find its taxable event in a transaction or in the exchange of services for consideration at the last point of sale to the final end user.<sup>121</sup> For example, Spain’s DST provides that “[t]he provision of digital services shall be understood as carried out in the territory where this tax is applicable whenever a user is located in that territorial area, *regardless of whether the user has paid any compensation that contributes to the generation of revenue derived from the service.*”<sup>122</sup>

Thus, analysis of Spain’s DST reveals that the DST’s application to revenue rather than income is inconsistent with prevailing principles of corporate taxation.

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<sup>114</sup> Daniel Bunn & Elke Asen, Tax Foundation Comments on the Initiation of Section 301 Investigations of Digital Services Taxes, Docket No. USTR\_2020-0022, 2, Comment No. USTR-2020-0022-0295 (Jul. 9, 2020); *see also* Daniel Bunn, *A Summary of Criticism of the EU Digital Tax*, TAX FOUNDATION (Oct. 22 2018), <https://taxfoundation.org/eu-digital-tax-criticisms/>.

<sup>115</sup> OECD, *Fundamental Principles of Taxation*, in ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, 32-47 (OECD PUBLISHING, 2014).

<sup>116</sup> *Id.* at 33.

<sup>117</sup> *Id.* at 32.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Tax on Certain Digital Services, preamble art. III (B.O.E. 2020, 4) (“By focusing on the services provided, without taking into account the characteristics of the provider, including their economic capacity, the Tax on Certain Digital Services is not a tax on income or wealth, and therefore is not included in the double taxation agreements[.]”); *see also* Ernst & Young, *Spanish DST is enacted, effective 2021*, EY TAX NEWS UPDATE (Oct. 16, 2020), <https://taxnews.ey.com/news/2020-2495-spanish-dst-is-enacted-effective-2021?uAlertID=Sd%2FG8rua1oj6%2FI58E22AiA%3D%3D>; *see also* Patricia Lampreave, *Spain Has Approved the Digital Service Tax: The Controversy Is Served*, Kluwer Int’l Tax Blog (Feb. 24, 2020), [http://kluwertaxblog.com/2020/02/24/spain-has-approved-the-digital-service-tax-the-controversy-is-served/#:~:text=The%20tax%20rate%20applied%20will,any%20expenses\)%20from%20digital%20services.](http://kluwertaxblog.com/2020/02/24/spain-has-approved-the-digital-service-tax-the-controversy-is-served/#:~:text=The%20tax%20rate%20applied%20will,any%20expenses)%20from%20digital%20services.)

<sup>121</sup> Tax on Certain Digital Services, preamble art. V (B.O.E. 2020, 4).

<sup>122</sup> *Id.* at art. 7.



## Double Taxation

Spain's DST is also inconsistent with the tax policy principle of avoiding double taxation. Avoiding double taxation, i.e., preventing the same income being taxed twice, is a foundational principle of the international tax system.<sup>123</sup> According to the OECD, the “*harmful effects* on the exchange of goods and services and movements of capital, technology and persons” of double taxation “*are so well known* that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents[.]”<sup>124</sup> Both tax treaties and model tax treaties alike make clear that one of their primary objectives is the elimination of double taxation between countries.<sup>125</sup>

Because Spain's DST applies to revenue rather than income, the DST will lead to double taxation of the same revenue stream. For example, a company's revenues would be subject to domestic corporate income taxes in addition to Spain's DST. Furthermore, Spain affirmatively states that the DST will not fall within the ambit of double taxation agreements: “[b]y focusing on the services provided, without taking into account the characteristics of the provider, including their economic capacity, the Tax on Certain Digital Services is not a tax on income or wealth, and therefore is not included in the double taxation agreements.”<sup>126</sup> Alternatively stated, the structure of Spain's DST makes it possible that Spain's DST will not be within scope of the over 3,000 bilateral tax treaties in effect, the majority of which are based on the OECD Model Tax Convention on Income and on Capital and on the UN Model Double Taxation Convention between Developed and Developing Countries.<sup>127</sup>

Thus, by adding a dimension of taxation that is not aligned with the principles of international corporate taxation, Spain's DST results in double taxation, which is unreasonable.

### **C. SPAIN'S DST IS UNREASONABLE BECAUSE IT IS EXTRATERRITORIAL IN A MANNER THAT IS INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES**

The international tax system reflects the principle that companies are not subject to a country's corporate tax regime in the absence of a territorial nexus to that country. This is reflected in international tax treaties, which typically establish that a company need not pay a country's corporate income tax unless it has a “permanent establishment” in that country. For instance:

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<sup>123</sup> See, e.g., OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD PUBLISHING, introduction (Dec. 18, 2017) (“International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more). States on the same taxpayer in respect of the same subject matter and for identical periods.”).

<sup>124</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD PUBLISHING, introduction (Dec. 18, 2017).

<sup>125</sup> See, e.g., OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD PUBLISHING, preamble (Dec. 18, 2017); United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, preamble, 2017; United States Model Income Tax Convention, preamble, 2016.

<sup>126</sup> Tax on Certain Digital Services, preamble art. III (B.O.E. 2020, 4).

<sup>127</sup> BRIAN J. ARNOLD, *AN INTRODUCTION TO TAX TREATIES* 1 (2015).



- The OECD model tax treaty provides that the profits of an enterprise “shall be taxable” only in the country of which the enterprise is a national “unless the enterprise carries on business in [another country] through a permanent establishment situated therein.”<sup>128</sup>
- The UN Model Treaty similarly provides that the profits of an enterprise are taxable in a country only if “the enterprise carries on business in [that country] through a permanent establishment situated therein.”<sup>129</sup>
- The U.S. Model Tax Treaty and the U.S.–Spain Tax Treaty both contain similar provisions barring taxation absent a permanent establishment.<sup>130</sup>

Consistent with model treaties, the U.S.–Spain Tax Treaty defines “permanent establishment” as “a fixed place of business in which the business of the enterprise is wholly or partly carried on.”<sup>131</sup> The U.S.–Spain Tax Treaty also provides that the term includes, *inter alia*: a place of management, a branch, an office, a factory, a workshop; or a “place of extraction of natural resources.”<sup>132</sup>

Under the U.S.–Spain Tax Treaty, a “permanent establishment” does not include, *inter alia*, the maintenance of a fixed place of business solely for the purpose of “purchasing goods or merchandise, or for collecting information, for the enterprise” or of “the maintenance of a fixed place of business solely for the purpose of *advertising, for the supply of information . . .* or for similar activities which have a preparatory or auxiliary character, for the enterprise.”<sup>133</sup> Other sources confirm that this is the general rule in international tax policy.<sup>134</sup> Thus, contrary to Spain’s contention that current international tax rules “were not designed to deal with business models based primarily on intangible assets, data, and knowledge,”<sup>135</sup> the existing international

<sup>128</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

<sup>129</sup> UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1).

<sup>130</sup> *Compare United States Model Income Tax Convention*, art. 7 (“Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.”) with U.S.–Spain Tax Treaty, art. 7 (“The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on or has carried on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on or has carried on business as aforesaid, the business profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”).

<sup>131</sup> U.S.–Spain Tax Treaty, art. 5; *see also* OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(1); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(1); United States Model Income Tax Convention, art. 5(1).

<sup>132</sup> U.S.–Spain Tax Treaty, art. 5; OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(2); United States Model Income Tax Convention, art. 5(2). Note that the treaty in paragraph 5 of Article 5 may also deem a permanent establishment to exist notwithstanding the general rule in paragraphs 1 and 2 of Article 5 if there is a dependent agent conducting certain activities on behalf of the foreign enterprise.

<sup>133</sup> U.S.–Spain Tax Treaty, art. 5 (emphasis added); OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(4); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(4); United States Model Income Tax Convention, art. 5(4).

<sup>134</sup> *See, e.g.*, OECD, *Inclusive Framework on Base Erosion and Profit Shifting, Action 7: Permanent establishment status*, OECD (2019), <https://www.oecd.org/tax/beps/beps-actions/action7/>.

<sup>135</sup> Tax on Certain Digital Services, preamble art. II (B.O.E. 2020, 4).

framework directly accounts for the types of business activities that Spain ascribes were not anticipated.

The international tax system also reflects the principle that, if a foreign company has a permanent establishment in a country, it is subject to that country's tax regime only to a circumscribed extent. The OECD model tax treaty provides that a country may tax a foreign company only on "the profits that are attributable to the permanent establishment" in that country.<sup>136</sup> The profits attributable to the permanent establishment "are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions."<sup>137</sup> The U.S. model tax treaty and the U.S.–Spain Tax Treaty both contain substantially the same provisions.<sup>138</sup> The UN model treaty is substantially similar: it provides that a country may tax only so much profit as is attributable to the permanent establishment in that country or to other business activities (including sales of goods) carried out in the country that are of "the same or similar kind" as those carried out by the permanent establishment.<sup>139</sup>

While the preamble of Spain's DST confirms that "current international tax rules are still largely based on physical presence,"<sup>140</sup> Spain's DST is not consistent with this principle. This is evident in the DST's provisions for determining the taxable base. For example:

- "In the case of online advertising services, the *proportion* that represents the number of times said advertising appears on devices that are located in the tax territory *will be applied to the total revenue* obtained with respect to the total number of times said advertising appears on any device, *regardless of where they are located.*"<sup>141</sup>
- "In the case of online intermediary services in which there is a facilitation of underlying supply of goods or services directly between users, the *proportion* representing the number of users located in the tax territory *will be applied to the total revenue obtained* with respect to the total number of users that participate in that service, *notwithstanding where they are located. . .*"<sup>142</sup>
- "In the case of data transmission services, the *proportion* that represents the number of users who have generated said data, and are located in the tax territory,

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<sup>136</sup> OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

<sup>137</sup> *Id.* at art. 7(2).

<sup>138</sup> United States Model Income Tax Convention, art. 7; U.S.–Spain Tax Treaty, art. 7 ("[W]here an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar activities under the same or similar conditions.").

<sup>139</sup> UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1)-(3).

<sup>140</sup> Tax on Certain Digital Services, preamble art. I (B.O.E. 2020, 4).

<sup>141</sup> *Id.* at art. 10 (emphasis added).

<sup>142</sup> *Id.* (emphasis added).

*will be applied to the total revenue obtained with respect to the total number of users who have generated such data, notwithstanding where they are located.”*<sup>143</sup>

By applying these proportions, Spain’s DST creates circumstances where revenues arising out of users or economic activity not in Spain is taxed by Spain, particularly if the value of the revenues are not equal across all jurisdictions.

The user location provisions also create the likelihood that Spain’s DST will tax transactions with no territorial relationship to Spain. For example, under the DST and “[i]n the case of online intermediary services in which there is facilitation of underlying supply of goods or services directly between users,” user location is determined “when the conclusion of the underlying transaction by a user is carried out through the digital interface of a device that at the time of conclusion is in that territorial area.”<sup>144</sup> Yet, “[f]or the purpose of determining the location where the digital services have been rendered, the following will not be taken into account: [t]he place where the underlying supply of goods or services takes place, in the case of online intermediary services where this takes place; [or] [t]he place from which any payment related to a digital service is made.”<sup>145</sup> These provisions create a likely scenario where the DST could be applied extraterritorially. For example, a U.S. business could incur liability under the Spanish DST if a U.S. citizen ordered a good, located in the United States, to be delivered to the person’s U.S. residence, while that person was traveling through Spain. Existing principles of international taxation, as represented by the use of permanent establishments, would prevent taxation under these types of circumstances. Such situations illustrate why the deviation from this principle is unreasonable.

Thus, the DST provisions addressed in this section show that Spain’s DST is not consistent with a key principle of international taxation, as identified by taxation based on permanent establishments.<sup>146</sup>

#### **D. SPAIN’S DST BURDENS OR RESTRICTS U.S. COMMERCE**

This section of the report describes the manners in which Spain’s DST burdens or restricts U.S. commerce.

##### **1. DST Liability Is a Burden on U.S. Companies**

Spain’s DST burdens affected U.S. companies. As described in Section II.B of this report, a significant number of U.S. companies are expected to be affected by Spain’s DST. Likewise, as described in this report, Spain’s DST will impose a significant tax liability on

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<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> Tax on Certain Digital Services, art. 7 (B.O.E. 2020, 4).

<sup>145</sup> *Id.*

<sup>146</sup> Proponents may note that Spain’s DST contains several statements that appear to be intended to limited its extraterritorial application, such as Article 2, Tax Territory, which states that “[t]his tax applies throughout the Spanish territory.” *See, e.g.,* Tax on Certain Digital Services, preamble art. 2 (B.O.E. 2020, 4). However, as described in this section, by taxing a proportion of revenues, the tax does not account for unequal revenue values arising from different jurisdictions. Thus, the DST is likely to create a tax obligation arising out of a revenue generated in a jurisdiction other than Spain.

covered U.S. companies, generating – according to Spain – as much as €68 million in tax revenue in calendar year 2021.<sup>147</sup> Thus, Spain’s DST burdens or restricts U.S. commerce.

## 2. The DST’s User Location Provisions Burden Covered U.S. Companies

The Spanish DST’s reliance on user location is a burden to covered U.S. companies. In order to establish a link between taxable revenues and Spain’s taxable jurisdiction, Spain’s DST’s relies on complicated user location rules (instead of the location of the company providing the service).<sup>148</sup> These rules are different for each type of digital service covered under the law.

Under the DST and “[i]n the case of online advertising services,” user location is determined “when at the time the advertising appears on the device of the user, the device is in that territory.”<sup>149</sup> The DST further provides that “it will be assumed that the device of a user is in the place that is identified by the [internet protocol] IP address of the same, unless it can be concluded that said place is a different one through the use of other means of admissible evidence by law, in particular, the use of other geolocation tools.”<sup>150</sup>

Determining the location of a particular device, even by reference to an IP address, is challenging. A comment in this investigation also identified this problem, adding that “legislation imposing DSTs often cites IP addresses as a tool to identify location of the provision of service” but that “[t]his analysis is difficult when users use virtual private networks (VPNs) to mask location[.]”<sup>151</sup>

Under the DST and “[i]n the case of online intermediary services in which there is facilitation of underlying supply of goods or services directly between users,” user location is determined “when the conclusion of the underlying transaction by a user is carried out through the digital interface of a device that at the time of conclusion is in that territorial area.”<sup>152</sup> “In any other online intermediary services,” user location is determined “when the account allowing the user to access the digital interface has been opened using a device that, at the time it was opened, was in that territory.”<sup>153</sup>

First, it is not necessary to track user IP addresses in order to create a business model involving the supply of goods or services between users. Accordingly, covered businesses’ systems may not be engineered to capture or retain this type of data. Re-engineering these systems and storing the relevant data in a legally sufficient manner is costly. Second, Spain’s DST affirmatively rejects the type of information that online intermediary services may capture

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<sup>147</sup> Ministerio de Hacienda, Presentación del Proyecto de Presupuestos Generales del Estado 2021, HACIENDA.GOB.ES (Oct. 28, 2020).

<sup>148</sup> Tax on Certain Digital Services, art. 7 (B.O.E. 2020, 4).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Comments of Computer & Communications Industry Association (CCIA), 3-4, USTR-2020-0022-0329 (Jul. 14, 2020).

<sup>152</sup> Tax on Certain Digital Services, art. 7 (B.O.E. 2020, 4).

<sup>153</sup> *Id.*

as part of the normal business transaction, namely: “[t]he place where the underlying supply of goods or services takes place, in the case of online intermediary services where this takes place [or] [t]he place from which any payment related to a digital service is made.”<sup>154</sup> This represents a burden to covered U.S. companies.

Under the DST and “[i]n the case of data transmission services,” user location is determined “when the transmitted data is generated by a user through a digital interface that has been accessed through a device that, at the time of data generation, is present in that territorial area.”<sup>155</sup> Again, due to the wide range of services that may involve some form of covered data transmission, it should not be assumed that the subject business model would include collection of user location data, either by IP address or other geolocation tools. As with other covered digital services, re-engineering the services or the underlying information technology infrastructure is costly.

Thus, Spain’s user location provisions impose a burden on covered U.S. companies.

### **3. Spain’s DST Imposes Administrative Burdens and Costs**

Spain’s DST imposes administrative and compliance burdens on covered U.S. companies. One such burden is the re-engineering systems to comply with Spain’s DST. Companies were not previously required to—and did not—categorize users as being in Spain or not in Spain for the purposes of determining taxable revenue. These issues were addressed in comments submitted to the investigation. One commenter stated that:

Companies will need to engage in significant re-engineering of their internal business and financial reporting systems to ensure that they can accurately capture required information and comply with the DSTs. Companies will also need to include new filing and audit components on accounts in these jurisdictions, which creates legal and financial risks.<sup>156</sup>

Another commenter added that “[w]hile firms have access to limited data provided by users, firms do not collect and/or retain this data for the purpose of tax compliance and the current data held is likely insufficient to make accurate calculations under the law.”<sup>157</sup> Accordingly, covered U.S. companies must re-engineer their systems in order to comply with Spanish DST calculation requirements. In addition to these direct “re-engineering” costs, companies also incur substantial opportunity costs whenever they divert valuable (and often scarce) engineering resources away from their core products. Thus, Spain’s DST imposes administrative and compliance burdens on covered U.S. companies.

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Information Technology Industry Council, Docket No. USTR-2020-0022: Initiation of Section 301 Investigations of Digital Services Taxes, 17, Comment No. USTR-2020-0022-0345 (Jul. 15, 2020).

<sup>157</sup> Comments of Computer & Communications Industry Association (CCIA), 3-4, USTR-2020-0022-0329 (Jul. 14, 2020).

#### **IV. CONCLUSIONS**

The results of this investigation indicate that:

- (1) Spain's DST, by its structure and operation, discriminates against U.S. digital companies, including due to the selection of covered services and the revenue thresholds;
- (2) Spain's DST is unreasonable because it is inconsistent with principles of international taxation; and,
- (3) Spain's DST burdens or restricts U.S. commerce.

**ANNEX 1: SPAIN'S DIGITAL SERVICES TAX**

UNOFFICIAL TRANSLATION

**Official State Bulletin**

*October 16, 2020*

<https://www.boe.es/boe/dias/2020/10/16/pdfs/BOE-A-2020-12355.pdf>

**I. GENERAL REGULATIONS**

HEAD OF STATE

**12355** Law 4/2020 on Tax on Certain Digital Services, of October 15.

FELIPE VI

KING OF SPAIN

To all those that read and understand this act.

Please know: That the Spanish Parliament has approved and I am hereby passing the following law:

PREAMBLE

I

The current global economy is rapidly becoming digital and, as a result, we have seen the emergence of new ways of doing business. Digital business models are largely based on their ability to carry out activities remotely, even cross-border, with little or no physical presence, as well as on the importance of intangible assets, and the value of data and the contributions from end users to create such value.

However, current international tax rules are still largely based on physical presence, and were not designed to deal with business models based primarily on intangible assets, data, and knowledge. Therefore, they do not take into account the business models in which companies can provide digital services in a country without being physically present in it. They face complications when trying to prevent the relocation of intangible assets to jurisdictions with little or no taxation, and they do not recognize the role that users play in generating value for the most digitized companies through the provision of data or content generation or as components of the networks on which many digital business models are based. All of this results in a disconnection between the place where value is generated and the place where companies pay taxes.

This come to show that current corporate tax regulations are no longer appropriate to tax the benefits generated by the digitization of the economy, when these are closely linked to the value created by data and users, and need to be reviewed.

## II

The process for the review of these standards has been taking place for years at the international level. Hence, within the Organization for Economic Cooperation and Development (OECD) and the G20, the project on Based Erosion and Profit Shifting (BEPS) has been especially relevant in recent times, particularly its Report on Action 1 on Tax Challenges with Digital Economy, of October 5, 2015, as well as the Interim Report on Tax Challenges Arising from Digitization, dated March 16, 2018. In the scope of the European Union, the Communication of the European Commission “A fair and efficient tax system in the European Union for the Digital Single Market”, adopted on September 21, 2017, and the package of proposals for Directives and Recommendations for achieve a fair and effective imposition of the digital economy presented on March 21, 2018. All this is a perfect example of the worldwide concern on this issue.

Given the global dimension of the tax issue regarding certain digital business models, there is an international consensus stating that the best strategy to address this issue would be to find a solution to it also at the global level, that is, within the OECD. This solution could involve a revision of the concept of permanent establishment (digital) that would allow identifying the portion of the profit obtained by the company that corresponds to the value derived from user data and contributions to the country from which they emanate or in which these data and users are located. However, since the adoption and implementation of these consensual measures at the international and multilateral level could take a long time, various countries have begun to adopt unilateral measures in an effort to address this issue. Both, the global agreement and the adoption of unilateral measures, are legitimate solutions foreseen in the aforementioned Interim Report of the G20/OECD on the Tax Challenges Arising from Digitization.

The European Union Member States have not been exempt from this trend of adoption of unilateral measures. In fact, many of them have already adopted, or are in the process of adopting, some measures in this regard. In addition, on March 21, 2018, the European Commission itself presented, upon the request of the Council, a proposal for a Directive in regard with the common taxing system on digital services that taxes revenue from the provision of certain digital services. One of the main purposes for this is to correct the inadequate allocation of tax rights that results from the failure of the current international tax regulations to recognize the contribution of users to the creation of value for companies in the countries where they carry out their activity. The European Commission proposal, which consisted of an indirect tax on the provision of certain digital services, was finally rejected, considering the unanimous vote required for it to be approved could not be reached. Consequently, it was agreed that, since the challenges of the digitization of the economy are global and affect all countries, the debate should take place within the OECD and the Inclusive Framework due to its greater representation.



However, the Tax on Certain Digital Services regulated by this Law comes in anticipation to the conclusion of discussions on this issue in international forums. The long period of time that has passed since the international debates on this issue began without reaching a possible solutions in this regard, along with social pressure, tax justice and sustainability of the tax system, make it necessary to adopt, following the path initiated by other countries, a unilateral solution that allows Spain to immediately exercise taxation rights that legitimately correspond to it in its territory, as this is where the data and user contributions that generate value for the company come from.

Recently, the OECD has also resumed working on a way to adjust the International Tax System to the economy's digitization, through the reallocation of tax rights to countries or market territories where economic activity happens without the need of physical presence, creating a new link to the effect. Therefore, as already indicated in the OECD reports on digital economy, the establishment of unilateral measures is temporary. Thus, this provisional nature is established on the new taxes, until a new legislation that aims to incorporate the solution adopted internationally comes into force.

### III

The purpose of Taxing Certain Digital Services is being able to provide certain digital services. Specifically, these are digital services in relation to which there is user participation that constitutes a contribution to the value creation process of the company providing the services, and through which the company monetizes those user contributions. In other words, the services contemplated by this tax are those that could not exist in their current form without the participation of users. The role that users of these digital services play is unique and more complex than the one traditionally adopted by a customer of an offline service.

By focusing on the services provided, without taking into account the characteristics of the provider, including their economic capacity, the Tax on Certain Digital Services is not a tax on revenue or wealth, and therefore is not included in the double taxation agreements, as established in the repeated Interim Report of the G20 / OECD on Tax Challenges Arising from Digitization. The tax is, therefore, configured as an indirect tax, which is otherwise compatible with the Value Added Tax.

### IV

The tax is limited exclusively to the following services, which for the purposes of this Law are identified as "digital services": the inclusion, in a digital interface, of advertising targeted at users of said interface ("online advertising services"); the provision of multi-sided digital interfaces that allow users to locate and interact with other users, or even facilitate the underlying supply of goods or services directly between those users ("online intermediary services"); and the data transmission services, including the sale or transfer of user data that has been collected and generated by the activities of the user on digital interfaces ("data transmission services"). In no case is the conveyance of communication signals referred to in Law 9/2014, of May 9, General Telecommunications included.

As a consequence of the justification of the tax, within the exempt cases, the tax is not levied in the following scenarios (among other cases): the underlying supply of goods or services directly between users within the framework of an online intermediary service; and the sale of goods or services contracted online via the website of the supplier of such goods or services (the retail activities of “electronic commerce”) in which the supplier does not act as an intermediary, since, for the retailer, the creation of value resides in the goods and services provided, and the digital interface is used only as a means of communication. In order to determine whether a provider sells goods or services online on its own account or provides intermediary services, the legal and economic substance of the transaction must be taken into account.

## V

Taxpayers required to pay this tax are the legal persons and entities described in Article 35.4 of the General Tax Law, whether they are established in Spain, in another member state of the European Union or in any other state or jurisdiction that is not part of the European Union, and that, at the beginning of the settlement period, exceed the following two thresholds: the net amount of their revenue in the preceding calendar year is higher than 750 million euros; and the total amount of their revenue derived from the provision of digital services subject to tax, once the rules established for the determination of the taxable base have been applied (in order to determine the part of said revenue that corresponds to users located in Spanish territory), corresponding to the preceding calendar year, exceeds 3 million euros.

The first threshold allows limiting the application of the tax to large companies, which are those capable of providing these digital services based on data and user contributions, and which rely largely on the existence of extensive networks of users, high data traffic and the exploitation of a solid position in the market. This threshold, which is the same as the one contained in Council Directive (EU) 2016/881, of May 25, 2016, and which amends Directive 2011/16 / EU with regard to the mandatory automatic exchange of information in the field of taxation, which establishes the declaration on the Country-by-Country Report, in the equivalent international standards adopted in application of Action 13 of the OECD and G-20 Project on the Based Erosion and Profit Shifting (BEPS), regarding the documentation on transfer pricing and country-by-country reporting, and in other European regulatory projects, will provide legal certainty, since it will allow companies and the Tax Administration to determine more easily whether an entity is subject to tax. In addition, it will make it possible to exclude from this new tax, small and medium-sized companies and startups, for which the compliance costs associated with it could have a disproportionate effect.

The second threshold allows limiting the application of this tax to cases in which there is a significant digital footprint in the territorial scope of application of the tax, in relation to the types of digital services being taxed.

Nevertheless, there are special rules that apply for entities that belong to a group. Thus, in order to determine whether an entity exceeds the thresholds and should, therefore, be considered a taxpayer, thresholds must be applied in relation to the amounts applicable to the entire group.

## VI

Only those digital service benefits that can be considered as associated, in some way, with the territory where the tax is applied will be subject to said tax. This will be understood to happen when users of said services are located in that territory, which is precisely what constitutes the association justifying the existence of the levy. For users to be considered as located in the territory of application of the tax, a series of specific rules are instituted for each of the digital services, which are based on the place where the devices of those users have been used, in general located, in turn, by the Internet protocol (IP) addresses of the same, unless other means of proof are used, in particular, other geolocation instruments in the devices.

Any processing of personal data carried out in the context of the Tax on Certain Digital Services must be done in accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of individuals for the processing of personal data and the free circulation of these data, and in Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights.

## VII

The tax base of this tax will be established by the revenue, excluding, where appropriate, the Value Added Tax or any other equivalent taxes, obtained by the taxpayer for each of the digital services it provides subject to the tax, and carried out in the territory of its application. For the purposes of calculating the tax base, there are rules that must be followed to be able to tax exclusively the part of the revenue that corresponds to users located in the territory applying the tax in relation to the total users.

The tax will be levied at a rate of 3 percent, the accrual will occur for each provision of taxable services, and it will be assessed on a quarterly basis.

## VIII

This Law includes sixteen Articles and six final Regulations.

The first final regulation incorporates the competence title under which the rule is approved, which is none other than that established in the Constitution, according to which exclusive competence in matters of general Finance is attributed to the State.

## IX

In accordance with the provisions of Law 39/2015, dated October 1, on the Common Administrative Procedure of Public Administrations, the preparation of this Law has been carried out in accordance with the principles of necessity, effectiveness, proportionality, legal certainty, transparency, and efficiency.

Thus, the principles of necessity and effectiveness are met. Especially, since what the new norm regulates is the adoption of a unilateral measure that consists of the ex novo creation of a tax, its adoption by means of a norm with the force of law is necessary, without considering other normative alternatives of lower rank. The new Law is considered the ideal instrument from the point of view of effectiveness to achieve the general economic policy objectives set forth therein, which are: facing the challenges that, from a fiscal point of view, the digitization of the economy represents, such as, in particular, correcting the inappropriate allocation of tax rights that occurs as a result of the lack of recognition by current international tax regulations of the contribution of users to the creation of value for companies in the countries where they carry out their activities.

The principle of proportionality has also been duly met, given that the intention has been to strictly achieve the objectives pursued.

On the subject of the principle of legal certainty, it has been guaranteed that the legislative project will be consistent with the rest of the national legislation. Similarly, the greatest efforts have been made in the drafting of the legislative project in order to guarantee the same legal certainty in the interpretation and application of the tax regulated therein, despite the challenge posed by the novel nature of the concepts that are handled in itself, not only in the field of our domestic law, but also worldwide.

The principle of transparency has been guaranteed, without prejudice to its official publication in the “Official State Gazette”, through the hearing and public information process on the bill.

Regarding the principle of efficiency, the norm has been created in a way that generates the least possible administrative burdens and indirect costs, promoting the rational use of public resources. In this sense, the information and documentation requirements that are required of taxpayers are strictly essential to guarantee a minimum control of their activity by the Tax Administration.

Finally, the European Commission has been informed, about the objectives of Article 5.1 in relation to Article 7.4 of Directive (EU) 2015/1535 of the European Parliament and of the Council, of September 9, 2015, which lays down a procedure for the provision of information in the field of technical regulations and of rules on Information Society Services.

#### Article 1. *Purpose and Scope.*

The Tax on Certain Digital Services is an indirect tax that levies, in the manner and conditions provided in this Law, the provision of certain digital services in which users that participate are located in the territory where this tax applies.

#### Article 2. *Tax Territory.*

1. This tax applies throughout the Spanish territory.
2. The provisions of the preceding section shall be understood without prejudice to the regional tax systems of Concert and Economic Agreement in force, respectively, in the Historical Territories of the Basque Country and in the Autonomous Community of Navarra.

Article 3. *Treaties and agreements.*

The provisions of this Law shall be understood notwithstanding the provisions of international treaties and conventions that have become part of the national legislation, in accordance with Article 96 of the Spanish Constitution.

Article 4. *Terms and definitions.*

For the purposes of this Law, the terms below will be understood as follows:

1. Digital Content: Data supplied in digital format, such as computer programs, applications, music, videos, texts, games, and any other computer program, other than the representative data of the digital interface itself.
2. Internet Protocol (IP) address: Code assigned to interconnected devices to enable them to communicate over the Internet.
3. Group: Group of entities in which one entity holds or may hold control of another or others according to the provisions of Article 42 of the Commercial Code, notwithstanding their place of residence and their obligation to prepare consolidated annual accounts.
4. Digital Interface: Any program, including websites or parts of them, or application, including mobile applications, or any other means, accessible to users, that enables digital communication.
5. Digital services: All exclusively online advertising, online intermediation, and data transmission services will be considered as such.
6. Online Advertising Services: Those that include a digital interface, either their own or a third party's, with targeted advertising for the users of said interface. In the event that the entity that includes the advertising does not own the digital interface, said entity will be the one considered as the provider of such advertising service, and not the entity that owns the interface.
7. Online Intermediary Services: services made available to users of a multi-sided digital interface (which allows interaction with different users simultaneously) facilitating the underlying supply of goods or services directly between those users or allowing them to locate other users and interact with them.
8. Data Transmission Services: services for the transmission, including the sale or transfer, of user data that has been collected and generated by the activities of the user on digital interfaces.
9. User: Any person or entity that uses a digital interface.
10. Targeted Advertising: any form of commercial digital communication for the purpose of promoting a product, service or brand, targeted at users of a digital interface based on the data collected from them. All advertising will be considered "targeted advertising", unless proven otherwise.
11. Regulated Financial Services: Any financial service a regulated financial entity is authorized to provide.

12. Regulated Financial Entity: Financial service provider subject to authorization, or registry, and supervision in accordance with any national standard or harmonization measure for the regulation of financial services adopted by the European Union, including those providers of financial services subject to supervision in accordance with regulations not issued by the European Union which, by virtue of a legal act of the European Union, is considered equivalent to the measures of the European Union.

Article 5. *Taxable Event.*

All Digital Services carried out in the territory where this tax applies, by the taxpayers responsible to pay this tax, will be subject to the same.

Article 6. *Tax Exemption.*

The following activities will not be subject to the tax:

- a) The sale of goods or services contracted online, through the website of the provider of those goods or services, in which the provider is not acting as an intermediary;
- b) The facilitation of underlying supply of goods or services directly between users, within the framework of an online intermediary service;
- c) The provision of online intermediary services, when the sole or main purpose of said services provided by the entity that makes a digital interface available is to provide digital content to users or provide communication or payment services;
- d) The provision of financial services regulated by regulated financial entities;
- e) The provision of data transmission services, when they are carried out by regulated financial entities;
- f) The provision of digital services when they are carried out between entities that are part of a group with a, direct or indirect, 100 percent ownership.

Article 7. *Location where Digital Services are provided.*

1. The provision of digital services shall be understood as carried out in the territory where this tax is applicable whenever a user is located in that territorial area, regardless of whether the user has paid any compensation that contributes to the generation of revenue derived from the service.
2. It will be understood that a user is located in the territory where the tax applies:
  - a) In the case of online advertising services, when at the time the advertising appears on the device of the user, the device is in that territory.
  - b) In the case of online intermediary services in which there is facilitation of underlying supply of goods or services directly between users, when the conclusion of the underlying transaction by a user is carried out through the digital interface of a device that at the time of conclusion is in that territorial area.

- In any other online intermediary services, when the account allowing the user to access the digital interface has been opened using a device that, at the time it was opened, was in that territory.
- c) In the case of data transmission services, when the transmitted data is generated by a user through a digital interface that has been accessed through a device that, at the time of data generation, is present in that territorial area.
3. For the purpose of determining the location where the digital services have been rendered, the following will not be taken into account:
    - a) The place where the underlying supply of goods or services takes place, in the case of online intermediary services where this takes place;
    - b) The place from which any payment related to a digital service is made.
  4. For the purposes of this Article, it will be assumed that the device of a user is in the place that is identified by the IP address of the same, unless it can be concluded that said place is a different one through the use of other means of admissible evidence by law, in particular, the use of other geolocation tools.
  5. The data that can be collected from users in order to apply this Law is limited to those that allow the location of users' devices in the territory where this tax is applied.

#### Article 8. *Taxpayers.*

1. Taxpayers required to pay this tax are the legal persons and entities described in Article 35.4 of Law 58/2003, of December 17, General Tax Law, that on the first day of the settlement period exceed the following two thresholds:
  - a) the net amount of their revenue in the preceding calendar year is higher than 750 million euros; AND
  - b) and the total amount of their revenue derived from the provision of digital services subject to tax, once the regulations described in Article 10 have been applied, corresponding to the preceding calendar year, exceeds 3 million euros.

In the event that the activity started in the immediately preceding year, the above amounts will be increased per year.
2. When the amounts referred to in paragraph 1 are available in a currency other than the euro, they will be converted into euros by applying the exchange rate published in the latest Official Journal of the European Union available in the calendar year in question.
3. In the case of entities that are part of a group, the amounts regarding the thresholds referred to in Section 1 that shall be taken into account will be those of the group as a whole. To these effects:
  - a) The threshold described in paragraph a), Section 1 will be the same as that contained in Council Directive (EU) 2016/881, of May 25, 2016, which amends Directive 2011/16 / EU with regard to the mandatory automatic exchange of information in the field of taxation, which establishes the declaration on the Country-by-Country Report, in the equivalent international standards adopted in application of Action 13 of the OECD and G-20 Project

on the Based Erosion and Profit Shifting (BEPS), regarding the documentation on transfer pricing and country-by-country reporting;

- b) The threshold described in paragraph b), Section 1 shall be determined without eliminating the provision of digital services subject to this tax and made between the entities of a group.

Should the group exceed these thresholds, each and every one of the entities that are part of the same will be considered as Taxpayers, insofar as they carry out the taxable event, regardless of the amount of revenue referred to in paragraph b) of said section that correspond to them.

#### Article 9. *Accrual.*

This tax will accrue at the time any taxed operations are rendered, executed or carried out.

Notwithstanding the provisions of the preceding section, in operations subject to tax that originate advance payments prior to the completion of the taxable event, the tax will accrue at the time of total or partial collection of the price, for the amounts actually received.

#### Article 10. *Tax Base.*

1. The taxable base of the levy will be constituted by the amount of revenue, excluding, where appropriate, the Value Added Tax or any other equivalent taxes, obtained by the taxpayer for each of the digital services subject to the tax, carried out in the territory where it applies. Regarding the provision of digital services between entities of the same group, the tax base will be its normal market value.
2. For the purposes of determining the tax base of the levy, the following rules shall apply:
  - a) In the case of online advertising services, the proportion that represents the number of times said advertising appears on devices that are located in the tax territory will be applied to the total revenue obtained with respect to the total number of times said advertising appears on any device, regardless of where they are located.
  - b) In the case of online intermediary services in which there is a facilitation of underlying supply of goods or services directly between users, the proportion representing the number of users located in the tax territory will be applied to the total revenue obtained with respect to the total number of users that participate in that service, notwithstanding where they are located.

The tax base for other intermediary services will be determined by the total amount of revenue that results directly from users when the accounts that allow access to the digital interface used had been opened using a device that, at the time it was opened, was located in the territory where the tax applies.

For the purposes of the provisions of the preceding paragraph, the time in which the account used was opened will be irrelevant.

- c) In the case of data transmission services, the proportion that represents the number of users who have generated said data, and are located in the tax territory, will be applied to the total revenue obtained with respect to the total number of users who have generated such data, notwithstanding where they are located.



For the purposes of the provisions of the preceding paragraph, the time in which the transmitted data was collected will be irrelevant.

3. If the amount of the tax base is not known in the settlement period, the taxpayer must provisionally estimate it by applying well-founded criteria that take into account the total timeline in which revenue derived from these digital services will be generated, without prejudice to its regularization when said amount becomes known. The taxpayer will do this through a self-assessment of said settlement period.

The regularization must be carried out within a period of up to 4 years, following the accrual date of the tax related to the operation.

4. In the event that a Tax Base is incorrectly determined, the Taxpayer must rectify it in accordance with the provisions of General Tax Law 58/2003, of December 17, and its regulations.
5. The Tax Base will be determined by the direct estimation method, with no exceptions other than those established in the regulations governing the tax base indirect estimation method.

#### Article 11. *Tax Rate.*

The tax will be levied at a rate of 3 percent.

#### Article 12. *Full Fee.*

The full fee will be the amount resulting from applying the Tax Rate to the Tax Base.

#### Article 13. *Formal Obligations.*

1. Taxpayers will be subject, with the requirements, limits, and conditions to be determined by regulations, to the following:
  - a) Reporting all information regarding the start, modification and cessation of activities that determine their tax obligation.
  - b) Requesting from the Administration the tax identification number, and communicate and certify it when necessary.
  - c) Keeping records in accordance to regulations.
  - d) Reporting, periodically or at the request of the authorities, of the information concerning their digital services.
  - e) Appointing a representative for the purposes of compliance with the obligations that are relevant to this Law in the case of taxpayers from a Non- European Union country. The taxpayer, or his/her representative, will be required to inform the Taxpayer Administration about this appointment, which must be duly accredited, before the period to submit the report about of the operations subject to the tax ends.
  - f) Keeping, during the statute of limitations mentioned in Law 58/2003, of December 17, General Tax, the justifications and supporting documents of the operations subject to the tax. In particular, they must keep those means of proof that allow the identification of the place where the taxed digital service is provided.

- g) Translating into Spanish, or any other official language, when required by the Tax Administration Office, for the purposes of controlling the taxpayer's tax situation, all invoices, contracts or supporting documents corresponding to the provision of digital services that are understood to be carried out in the territory where this tax applies.
  - h) Set in place systems, mechanisms or arrangements enabling the location of user devices in the territory where this tax applies.
2. In addition, taxpayers will be required to comply with any other formal obligations established by tax regulations.

Article 14. *Tax Management.*

The settlement period will coincide with the calendar quarter.

Taxpayers must file the corresponding self-assessments and pay all tax fees in the place, form and deadlines established by order of the head of the Treasury Department.

Article 15. *Infringements and Penalties.*

1. Notwithstanding the special provisions described in this Article, tax offenses related to this tax will be assessed and sanctioned in accordance with the provisions of Law 58/2003, of December 17, General Tax, and other generally applicable regulations.
2. A serious tax offense, for the purposes of this tax, constitutes a breach of the obligation referred to in Article 13.1.h) of this Law.

The penalty will consist of a pecuniary fine of 0.5 percent of the net revenues in the previous calendar year, as established in Article 8 of this Law, with a minimum of 15,000 euros and a maximum of 400,000 euros, for each calendar year in which the breach referred to in the preceding paragraph takes place.

3. The amount of the penalty that must be paid for the infringement established in this Article may be reduced in accordance with the provisions of Article 188.3 of Law 58/2003, of December 17, General Tax.

Article 16. *Jurisdiction.*

The contentious-administrative jurisdiction, once the economic-administrative route has been exhausted, will be the only competent authority to settle disputes of fact and law that may arise between the Tax Administration Office and Taxpayers, regarding any of the issues defined in this law.

Sole Temporary Regulation. *Determination of thresholds.*

During the period between the day this Law becomes effective and the following December 31, for the purpose determining compliance with the threshold referred to in Article 8.1. b), of this Law, the total amount of the annual revenue received from the provision of digital services subject to tax will be taken into account, from the day this Law becomes effective until the end of the settlement period.

First Final Regulation. *Competence.*

This Law is issued under the exclusive jurisdiction of the State in matters of the Treasury Department provided for in Article 149.1.14 of the Spanish Constitution.

Second Final Regulation. *Regulatory Implementation and Enforcement.*

The Government is empowered to dictate how many provisions are necessary for the implementation and execution of this Law.

Third Final Regulation. *Amendment by the Law of General State Budgets.*

The General State Budget Law may:

- a) Modify the quantitative thresholds that determine the Taxpayer status.
- b) Modify the tax rate.
- c) Introduce and modify the exact regulations to fulfill the obligations derived from Community Law.
- d) Modify the assumptions of non-subjection.

Fourth Final Regulation. *Self-assessments and revenue corresponding to the second and third quarters of 2020.*

In year 2020, the filing of the self-assessments regarding the settlement periods of the second and third quarters, as well as the collection of the respective tax debt, will not be required, in any case, before December 20.

Fifth Final Regulation. *Adaptation of the Economic Agreement with the Autonomous Community of the Basque Country and the Economic Agreement between the State and the Autonomous Community of Navarra.*

Within a term of three months of its publication in the “Official State Gazette”, the Mixed Commission of the Economic Agreement with the Basque Country and the Commission of the Economic Agreement with Navarra will meet to agree on the corresponding adaptation of the Economic Agreement with the Autonomous Community of Basque Country, approved by Law 12/2002, of May 23, in accordance with the provisions of its second additional provision, and of the Economic Agreement between the State and the Autonomous Community of Navarra, approved by Law 28/1990, of 26 December, in accordance with the provisions of Article 6 of the same.

Sixth Final Regulation. *Effectiveness.*

This Law shall come into effect three months after its publication in the “Official State Gazette”.

Therefore,

I order all Spaniards, whether individuals or authorities, to abide by this law and ensure it is enforced.

Madrid, October 15, 2020.

FELIPE R.

The President of the Government,  
PEDRO SÁNCHEZ PÉREZ-CASTEJÓN

**ANNEX 2: LETTER FROM AMBASSADOR ROBERT LIGHTHIZER TO THE GOVERNMENT OF SPAIN**



THE UNITED STATES TRADE REPRESENTATIVE  
EXECUTIVE OFFICE OF THE PRESIDENT  
WASHINGTON

June 2, 2020

Minister María Reyes Maroto Illera  
Ministry of Industry, Commerce, and Tourism  
Madrid, Spain

Dear Minister Reyes Maroto:

I am writing to inform you that, in accordance with Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation of the digital services tax (DST) under consideration by Spain. In particular, the investigation addresses a proposed 3% tax on revenues from targeted advertising and digital interface services.

The investigation will initially consider several problematic aspects of DSTs: (1) whether the tax would amount to *de facto* discrimination against U.S. companies; (2) whether the tax would have retroactive elements; and (3) whether the tax diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.*, possible extraterritorial application, or a purpose of penalizing certain technology companies for their commercial success. Depending on the course of the investigation, other aspects and features of the measure might also be included.

In accordance with Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of Spain regarding this matter. These issues are of great concern to the Government of the United States. I look forward to working with you or another appropriate official in a cooperative manner to resolve this matter.

Sincerely yours,

Robert E. Lighthizer

cc: María Jesús Montero Cuadrado, Minister for the Treasury and Government Spokesperson