Financial Transactions Tax Law

Tax Alert

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On October 16 2020, the Law regulating the establishment of a Financial Transactions (FTT) in Spain was published in the **Official Gazette**, without amendments to the text remitted by Congress to the Senate back in August (**Official Gazette of the Spanish Parliament of August 25**). The definitive text has been approved after more than seven months of legislative procedure, which initiated with the approval of the Draft Law in February – for the second time, and after several filters of amendments and vetoes in both chambers of the Spanish parliament. The entry into force of the FTT will occur in January 16, 2021, 3 months after the publication of the Law in the Official Gazette.

The tax is **structured** along the same lines as those introduced in neighbouring countries, particularly France and Italy, where it was introduced in 2012 and 2013, thereby effectively contributing to the *de facto* coordination of these taxes at European level. Even so, the new Spanish tax cannot be said to be identical to the French or Italian models, which themselves present differences with respect to each other.

The **tax model** is a tax on financial transactions (FTT, commonly known as the Tobin Tax), and specifically on transfers of shares in large listed Spanish companies. It is thus neither a "bank levy" on banking business and bank deposits, nor a tax levied on the gross margins, profits or remuneration of banking activity (FAT).

In brief, this is a new indirect tax of **0.2% levied on transactions for the acquisition for consideration of shares in Spanish companies, irrespective of the place of residence of the parties to the transactions, provided that the companies in question are listed on regulated markets and have a market capitalisation value of over Euros 1,000 million.**

The government sets expected revenues from the new levy at some Euro 850 million per year in accrual terms.

Nature and scope of application

The FTT is an **indirect tax** on **certain acquisitions for consideration of the shares of large listed Spanish companies**, irrespective of the place of residence or establishment of the persons or entities participating in the transaction or where the acquisition takes place.

The **principle for taxation** is therefore the **place of issue** and not that of residence, as this is considered to minimise the risk of offshoring of financial intermediaries, since certain dealings in the shares of Spanish companies are taxed regardless of the place of residence of the financial intermediary (i.e. established in Spain or otherwise) or where the transactions take place.

Taxable event

The tax will not be levied on all share acquisitions but only **acquisitions for consideration**, i.e. transactions implying the existence of reciprocal obligations between the parties, of **shares** (as defined in art. 92 of the Revised Spanish Companies Act) representing the share capital of certain **Spanish** companies.

The concept of acquisition for consideration has been used in the broad sense, so that the taxable event includes not only sale and purchase, but also acquisitions via other types of contracts for consideration, such as swaps, or those deriving from the settlement of other securities or the execution of instruments and finance contracts that may give rise to their acquisition (convertible bonds, atypical finance contracts or full settlement of derivative instruments). The following will therefore be taxed:

- Acquisitions for consideration of marketable securities consisting of **certificates of deposit** representing the above shares, irrespective of the place of establishment of the issuing entity, as such securities (for example ADRs listed in the US) constitute the means of trading the shares of Spanish companies in certain countries and afford the acquirer the same legal position of shareholder as those offered by the underlying shares that they represent.

Nonetheless, the FTT Law goes on to add that the following will **not be taxable**: (i) acquisitions of shares solely for the purpose of issuing certificates of deposit; (ii) acquisitions of certificates of deposit in exchange for the delivery by the acquirer of the shares they represent; and (iii) transactions performed to cancel such certificates of deposit by means of the delivery to their holders of the shares they represent.

- Acquisitions arising from the execution or settlement of fixed-income securities that may be **converted into or exchanged** for such shares.

- Acquisitions arising as a result of the exercise or settlement of **financial derivatives**, such as options or futures on shares, where they lead to the acquisition of the underlying securities by the contracting party (the tax does not therefore apply to derivatives for which the underlying securities are subject to the tax where they are settled by offset).

- Acquisitions arising as a result of the exercise or settlement of any financial instruments other than those referred to in the two preceding sections.

- Acquisitions taking place as a result of the execution of the finance contracts defined in art. 2.1 of Order EHA3537/2005 of 10 November 2005, implementing art. 27.4 of the Securities Market Law 24/1988 of 28 July 1988, i.e. **structured contracts not traded** on official secondary markets for which a credit institution receives money or securities or both from its customers, assuming a repayment obligation consisting of the delivery of certain listed securities, depending on the trend in the listing of one or several securities or the evolution of a stock exchange index, with no commitment to repay the principal received in full.

For the tax to be applicable, two further conditions must be met:

- The shares in question **must have been admitted to trading on a regulated market** (as defined in Directive 2014/65/EU), which may be a Spanish market, a market of another European Union Member State, or an equivalent market in a third country.

  However, the share transfers may be carried out via a trading venue (regulated market, an MTF or an organised trading system), on any other market or trading system, by a systematic internaliser (art. 331 of the Securities Market Law), or even by means of direct arrangements between traders.

- The company's **market capitalisation value** at a specific date - set at 1 December of the year preceding the year in which the acquisition takes place - **must exceed Euros 1,000 million**. This quantitative threshold is designed to reduce the impact of the tax on market liquidity, as it excludes companies with lower market capitalisation values, while the purpose of setting 1 December of the year prior to the acquisition as the reference date for determining capitalisation, is to afford a degree of legal certainty regarding the taxation of the transaction before it is performed.

  To this same end, the State Tax Agency is expected to publish on its website a list of the Spanish companies with a market capitalisation value exceeding the Euros 1,000 million threshold at 1 December by 31 December each year.

  The FTT Law includes a special provision for companies whose shares are taxed in the first year in which the tax applies, whereby, between the date of entry into force of the Law (January 16 2021) and 31 December 2021, the scoping requirement of the respective listed company exceeding the threshold of Euros 1,000 million capitalisation value will be reviewed one month prior to the entry into force of the Law (in other words, in December 2020). Likewise, the list of companies meeting this requirement will be published on the State Tax Agency website before the Law's entry into force.

Exemptions

Article 3 regulates a considerable number of exemptions, of a highly technical nature, with a view to avoiding disruption to the workings of the securities markets and certain corporate transactions.

While the above exemptions may be amended each year by the General State Budget Law, those listed in the Law can be summarised as follows:

❖ **Related to primary markets and issues:**

a) Acquisitions deriving from the **issue of shares**; The FTT Law clarifies that acquisitions deriving from the issue of certificates of deposit representing shares issued solely to create such securities are exempt.

b) Acquisitions deriving from a **public offering of shares** on initial placement to investors.

c) Instrumental acquisitions carried out prior to both of the above by **placement agents and insurers** hired by the issuers or offerors with a view to the ultimate distribution of the shares to final investors and acquisitions in compliance with their obligations as placement agents and, in particular, as insurers, as the case may be, of such transactions.

d) Acquisitions carried out by financial intermediaries tasked with stabilising prices as part of a **stabilisation engagement** in the context of **admission of shares to the stock market.**

❖ **Related to the appropriate functioning of secondary markets:**

a) Acquisitions deriving from purchase or loan transactions and other transactions carried out by a central counterparty entity or central securities depositary in the exercise of their respective functions in the areas of **securities clearing, settlement or registration**. This exemption is thus understood to include the novation transactions of the central counterparty entity itself and those performed in the context of a repurchasing transaction due to a settlement failure. As we can see, transactions necessary for entities that manage post-trading infrastructures to perform their functions are exempt from the tax.

b) Acquisitions performed by financial intermediaries on account of the issuer in the exercise of **liquidity provider functions** under a regulated liquidity contract. It should be noted that other treasury stock acquisitions not derived from a liquidity provider contract are not exempt.

c) Acquisitions performed in the context of **market-making** activities.

Acquisitions carried out in the context of market-making activities are exempt, such activities being deemed for these purposes to include the activities of investment services companies, credit institutions or like entities in a third country which are members of a trading venue or market of a third country the legal and regulatory framework of which the European Commission has declared to be equivalent, where any of the above entities acts as an intermediary for its own account in relation to a financial instrument traded inside or outside a trading venue, in any of the following ways:

1° Simultaneously announcing firm bid and offer quotes, of comparable size and in competitive conditions, thereby providing liquidity on a regular and ongoing basis to the market.

2° As part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade.

3° By hedging positions arising out of the conduct of the activities referred to in points 1 and 2 above.

The exemption is structured along the lines of its French counterpart and is essentially based on the nature of the above activities, without being limited to financial intermediaries that have signed market-making agreements. It should be noted, in any event, that the exemption must be applied to the market-making activity but not to proprietary trading.

The exemption covers acquisitions performed by financial intermediaries to hedge positions arising as a result of their market-making functions in respect of derivative instruments,

including over-the-counter instruments, where the underlying assets comprise shares subject to this tax. Acquisitions performed by these financial intermediaries corresponding to the exercise or settlement of derivative positions with respect to which they are market makers and whose positions derive from their activities as such are also exempt.

❖ **Other exemptions:**

a) Acquisitions of shares among entities forming part of the **same group** on the terms of article 42 of the Commercial Code. The FTT Law includes here, specifically, the acquisition of own shares or shares of the head office of the group, made in the context of a repurchase program implemented with the sole purpose[1] of reducing the share capital of the issuer, fulfilling obligations deemed inherent to convertible financial instruments or fulfilling of obligations derived from stock options or share plans of employees or directors of the group. The exemption is therefore applicable to this kind of equity instrument-based compensation schemes.

b) To avoid creating an obstacle to business restructuring transactions, the following are exempt: (i) acquisitions that "may qualify for" the **special tax regime** provided for in Corporate Income Tax Law 27/2014 for mergers, spinoffs, contributions of assets, exchanges of securities and change of registered office and (ii) those arising as a result of merger or spin-off transactions involving **collective investment institutions** or compartments or sub-funds of collective investment institutions carried out under the provisions of the relevant regulating legislation.

c) A series of transactions relating to the financing of securities referred to in art. 3.11 of Regulation (EU) 2015/2365, such as **securities lending** and loan transactions involving top-up of guarantees, as well as **repos, buy-sell backs and repurchase transactions** and **collateral transactions involving change of title as a result of a financial guarantee agreement**, necessary for financial entities and central counterparty entities to cover their risks.

d) Lastly, acquisitions deriving from the **application of resolution measures** approved by the competent authorities in relation to credit institutions and certain investment services companies.

No provision is made for exemptions for acquisitions relating to employee remuneration schemes such as stock option or share plans.

For a taxpayer to apply these exemptions in transactions in which it acts on account of third parties rather than on its own account, the acquirer must report the existence of the scenarios entitling it to exemption. Also, depending on the exemption in question, it must provide additional information, inter alia, on the relevant issue or public offering for sale of shares, the announcement to the market of the liquidity contract, the reference of the publication of market maker status (market list or market maker contract) or, inter alia, the details of the group of companies or the entities involved in the financing transaction or in the collateral transactions involving change of title. The entities involved must also be identified.

Lastly, the Law provides that the taxpayer and the acquirer must keep available to the tax authorities the receipts evidencing the issue and content of the above communication.

Chargeability

For purposes of preserving the neutrality of the tax chargeability is determined irrespectively of the market in which the acquisitions take place. Hence, the FTT is chargeable in the moment in which an entry is made for purposes of assigning the respective security to the acquirer in a securities account or registry.

Tax base

The general rule is that the tax base comprises **the amount of the consideration** for the taxable transactions, not including transaction costs deriving from market infrastructure prices, or commission for intermediation, or any other expense associated with the transaction. Where the amount of the

[1] This is one of the objectives foreseen in section 2 of Article 5 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation).

consideration is not stated, the tax base will be the value of the security in question at close of the most relevant regulated market in terms of liquidity on the last day of trading prior to the transaction.

Moreover, special rules are established for determining the tax base in certain transactions, for example where the acquisition of the securities derives from the trading of derivative financial instruments, the settlement of certain finance contracts or the conversion or exchange of other securities. In setting these special rules, regard is had to the specific conditions in which these acquisitions take place and provision is made for a tax base other than the trading value, subject to the condition that, where a taxpayer is acting on behalf of a third party, it must be informed by the acquirer of the facts entitling it to application of such rules and of the factors that determine the amount of the tax base.

Lastly, there is a **special system for calculating the tax base for so-called intra-day transactions on a net basis** - i.e. where an acquirer performs acquisition and transfer transactions involving the same securities, which are executed on the same day by the same taxpayer, with settlement on the same date, so that the ownership position with respect to the securities at the end of the day only varies by the net number of securities purchased and sold in the same stock exchange or relevant market session - whereby the tax only applies to **net purchases of securities** at the end of the trading day[2] (the so-called "*net long position*"), based on the positive difference between the number of securities purchased and sold, and applying the average acquisition price.

Taxpayers, taxable persons and parties liable for the tax

The **taxpayer** for FTT will be the **acquirer** of the securities. It is therefore the acquirer that performs the taxable event for FTT purposes and who will bear the financial burden of the tax passed on to it by the taxable person, even though it will not fall to it to settle and pay it to the tax authorities.

It should be noted that there are no subjective exemptions based on the characteristics of the acquirer, except in cases of transfers between groups of companies. The new tax thus applies to pension funds, collective investment undertakings, associations, foundations and legal and natural persons alike, whether resident in Spain or otherwise.

The second section deals with the **taxable persons** for the tax, which, in the first instance are investment services companies or credit institutions performing acquisitions for their own account. It goes on to define various scenarios for cases where the acquisition is not performed by an investment services company or credit institution acting on its own account, specifying which party will hold **taxable person status as substitute taxpayer**:

- Where the acquisition is carried out on a **trading venue**, the taxable person will be the **member of the market executing it**.

  Where the acquirer's order is processed via a **chain of financial intermediaries**, the taxable person will be the **financial intermediary receiving the purchase order directly from the acquirer**. This is because this intermediary is best placed to determine the tax base of the transactions or to apply the relevant exemption, as the case may be.

- Where the acquisition is performed within the scope of the ordinary activities of a systematic internaliser, the taxable person will be the systematic internaliser itself, irrespective of its position as counterparty in the transactions performed with its clients. Nevertheless, if the acquisition is made through one or more financial intermediaries on behalf of the acquirer, the taxpayer shall be the financial intermediary receiving the order from the purchaser.

- Where the acquisition is performed **independently of a trading venue and the activity of a systematic internaliser,** the taxable person will be the **financial intermediary** receiving the order from the purchaser of the securities or delivering them to it by virtue of the execution or settlement of an instrument or finance contract. The Law therefore excludes investment services companies and credit

[2] A previous version of the Draft Law stated that the net long position could only be determined based on the acquisitions made in the same market, through the same market member and associated to the same securities account. These requirements have been eliminated by the Law approved by the Spanish Parliament, as it is not uncommon to acquire shares in different markets and in different securities accounts held at the level of the same custodian.

institutions performing the transaction for their own account.

- Lastly as a **final rule**, where the acquisition is carried out i**ndependently of a trading venue and without the intervention of any of the persons or entities referred to above**, the taxable person will be the entity rendering the securities **deposit** service on account of the acquirer. In this case, the acquirer must notify the entity rendering the deposit service of the circumstances giving rise to tax payable, as well as the amount thereof. Under this rule, the taxable person in the last instance is the entity that has the acquired securities listed on the securities register or account kept in the acquirer's name.

Elsewhere, according to the Law, purchasers of securities who have provided the taxable person with **incorrect or inaccurate information** leading to the undue application of exemptions or a lower tax base due to the incorrect application of the special rules for determining the tax base will be **jointly and severally liable** for the tax. Likewise, this Law includes a scenario for liability whereby, where the taxable person is the entity rendering the securities deposit service on behalf of the purchaser, the purchaser of the securities will be jointly and severally liable where it failed to issue the appropriate communication or did so incorrectly or inaccurately.

Tax rate

The tax will be charged at a tax rate of **0.2 percent.**

This rate may be amended each year by the General State Budget Law.

This is lower that the current rate being applied on France (0,3 percent) and higher than the Italian (0,1 percent) and even the High Frequency Tax in France.

Filing, payment and documentation obligations

The new FTT would be self-assessed by taxable persons on a monthly basis, in the place and form and as per the deadline established by the Ministry of Taxation.

As regards transactions carried out in foreign markets and with a view to facilitating management of the tax in national markets, regulations are expected to establish, on a general basis, that each taxable person files and pays the tax via a central securities depositary located in Spanish territory or in other states (including non-EU states) subject to cooperation agreements executed with Spain.

The Law includes certain provisions aimed at developing and improving the regulation of the procedure for payment of the tax debt via the central securities depositary, which will facilitate management of the tax and permit increased automation. Namely: (i) the filing of returns and payment of the tax debt by the central securities depositary will not make it specifically liable for it for payment of the tax or for the content of returns; and (ii) the taxpayer is required to provide the central securities depositary, in due time and form, of all the necessary information to make the appropriate filing and to transfer the amount corresponding to the tax debt.

To this respect, it is relevant to note that on September 15 2020, the Government initiated a public comments procedure on the preparation of a Draft Royal Decree regulating filing and payment obligations regarding the FTT. Contributions were accepted until September 30 2020. This Draft Royal Decree would regulate, in principle, the most operational aspects of the tax.

It is expected that the Draft Royal Decree will propose that the filing and payment procedure is done through the central securities depositary, on behalf of each taxpayer, as the default compliance procedure of the tax. This compliance standard would be more in line with what the industry has been dealing with in the context of the French tax.

Lastly, the Law includes the tax debt in respect of FTT may not be deferred or paid in instalments.

Infringements and penalties (art. 9)

No special penalty regime is provided for and tax infringements will be classified and penalised according to the provisions of General Taxation Law 58/2003 of 17 December 2003.

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