

Draft bill on Spain's new Financial Transactions Tax

23 October saw the publication on the Ministry of Finance website of the [Draft Bill on the Financial Transactions Tax](#)

The rationale for this draft bill lies in the work already underway in ten EU countries since 2013, under the enhanced cooperation procedure, to introduce this union-wide tax, which has yet to be approved at the date hereof. The Spanish government has therefore considered it appropriate to **introduce this tax at national level**, on a unilateral basis, notwithstanding the ultimate objective of establishing a harmonised tax at European level.

The tax is structured along the same lines as those introduced in neighbouring countries (in particular France and Italy), thereby effectively contributing to the relative coordination of these taxes at European level. However, the new Spanish tax cannot be said to be identical to its French or Italian counterparts, due to variations in treatment.

The tax model is a tax on financial transactions (FTT, commonly known as the Tobin Tax), and specifically for 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, the new tax will be levied on the majority of transactions for the purchase or acquisition of shares in large listed Spanish companies, anywhere in the world, at a rate of 0.2% of the acquisition price. It will be paid by the entities participating in the markets and not the purchasers of securities.

Needless to say, this new tax will have a negative economic impact on transactions for the acquisition of shares in large listed Spanish groups, placing them at a disadvantage when compared for like transactions involving shares of foreign entities.

According to Ministry of Finance, this new tax is expected to raise around **Euro 850 million per year**.

The Draft Bill is to be processed as a Draft Law and the necessary parliamentary majority must be obtained for its approval, so that its viability will depend on the minority Spanish Government's capacity to reach a cross-party consensus.

We have set out below a detailed analysis of the core elements of the new tax.

1. Nature (art. 1)

The Financial Transactions Tax (FTT) is an **indirect tax on acquisitions for consideration on shares** of large listed Spanish companies.

The principle condition of taxation is the **place of issuance** and not that of residence, as this is considered to minimise the risk of offshoring financial intermediaries, since **certain dealings in the shares of Spanish companies are taxed regardless of the place of residence of the financial intermediary or the place the transactions take place**.

2. Taxable event (art. 2)

The tax will be levied on **acquisitions for consideration**, i.e. transactions implying the existence of reciprocal obligations between the parties, of **shares** representing the share capital of certain Spanish companies.

The concept of acquisition for consideration has been used in a **broad sense**, so that the taxable event not only includes 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 execution of instruments, and finance contracts that may give rise to their acquisition (convertible bonds, atypical finance contracts, reverse convertibles or full settlement of derivatives). 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. Such securities (for example ADRs listed in the US) constitute the means for trading shares of Spanish companies in certain countries, and provide the acquirer the same legal shareholder status with respect to the company, as those offered by the underlying shares that they represent.
- Share 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 execution or settlement of **financial derivatives**, such as share options or futures that give rise to the acquisition of the underlying securities by the contracting party (the tax does not therefore apply to derivatives whose underlying assets comprise securities when subject to cash settlement).
- 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 article 27.4 of the Securities Market Law 24/1988 of 28 July 1988, i.e. 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. The repayment obligation should consist of either the delivery of certain listed securities or the payment of a sum of money (or both), depending on variations in the market price 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**, which may be a Spanish market, a market of another European Union Member State, or an equivalent market in a third country.
- The company's **market capitalisation value must exceed Euros 1,000 million** as at 1 December of the year preceding the year that the acquisition takes place.

This quantitative threshold is designed to ensure that the tax affects market liquidity as little as possible, as it excludes companies with lower market capitalisation values. The purpose of setting the reference date for determining capitalisation as 1 December in the year prior to the acquisition is to provide a degree of legal certainty regarding the taxation of a transaction before it is performed.

Each year, the Ministry of Finance will publish a list of the Spanish companies with a market capitalisation value exceeding the Euro 1,000 million threshold at 1 December, by 31 December of the same year.

3. Exemptions (art. 3)

Article 3 regulates the exemption of a series of share acquisitions with a view to avoiding disruption to the workings of the securities markets and certain corporate transactions.

From an initial analysis of the exemptions, particularly noteworthy is the fact that such exemptions do not extend to acquisitions by pension funds or collective investment institutions or to transfers relating to inheritances or gifts.

The list of exemptions can be summarised as follows:

- Related to primary markets and issues:
 - a) Acquisitions deriving from the **issue of shares**;
 - b) Investor's acquisitions deriving from an **initial public offerings of shares**;
 - 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 in charge of price stabilization, as part of a **stabilisation engagement** in the context of the admission of shares onto the stock market.
- Related to the appropriate functioning of secondary markets:
 - a) Acquisitions deriving from purchase or stock loan transactions and other transactions carried out by a **central counterparty or central securities depository** in the exercise of their respective functions in the areas of securities clearing, settlement or registration. This exemption is thus understood to include novation transactions of the central counterparty entity itself and those performed in the context of a repurchasing transaction due to a settlement failure.
 - b) Acquisitions performed by financial intermediaries on account of the issuer in the exercise of **liquidity provider functions** under a regulated liquidity contract.
 - c) Acquisitions performed by financial intermediaries in the context of their **market making activities**, and those

aimed at **hedging transactions** carried out by market makers in derivative contracts on shares subject to the tax, as well as potential purchases derived from the execution or maturity of such contracts. Also included are acquisitions performed by these financial intermediaries corresponding to the **execution or settlement of derivative positions** with respect to which they are market makers and whose positions derive from their activities.

- d) A series of transactions relating to the financing of securities and temporary assignments, such as **securities lending and loan transactions involving top-up of guarantees**, as well as **repos, buy-sell backs and repurchase transactions** and, **transactions based on collateral and a change of title as a result of a financial guarantee agreement**, necessary for financial entities and central counterparties to hedge their risks.

- **Acquisitions of shares among entities forming part of the same group** on the terms of article 42 of the Commercial Code.
- Given that the taxation of these acquisitions could prove an obstacle for 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-OEIC-** (SICAV) or compartments or sub funds of collective investment institutions carried out under the provisions of the relevant regulating legislation.
- Lastly, acquisitions deriving from the **application of resolution measures** approved by the competent authorities in relation to credit institutions and certain investment services companies.

For a taxpayer to apply these exemptions in transactions in which it acts for third parties rather than on its own account, the person or entity from

which it receives the acquisition order or, as the case may be, the acquiring person or entity, 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 issue or public offering for sale of shares, the notice of stabilization measures, the notice to the market of the liquidity contract, the reference of the publication of market maker status (market list or market maker contract), or the details of the decision in which the resolution measures are adopted. The entities involved must also be identified.

4. Accrual (art.4)

To determine chargeability, one must take note of the scope of the regulated secondary market in which the security acquisitions take place:

- Where **the acquisition takes place in a trading centre or in the context of the activity of a systematic internaliser**, the tax becomes payable on the date of **settlement of the transaction**, which is when absolute certainty as to the effectiveness of the acquisition is obtained.
- Where the **acquisitions are carried out independently of a trading centre or a systematic internaliser**, for example, sales and purchases performed directly between the parties or acquisitions deriving from settlements of derivatives or the exchange of debentures or bonds (where it is not essential to observe a post-contract procedure), the tax shall become chargeable on the date on which the acquired securities are entered in the **relevant register or securities account of the acquirer**.

5. Tax base (art.5)

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 commissions for intermediation, or any other expense associated with the transaction.

Where the amount of the consideration is not stated, the tax base shall be the value of the security in question on the last day of trading prior to the

transaction at close of the most relevant regulated market in terms of liquidity.

Moreover, special rules are established for determining the tax base in certain transactions, for example where the acquisition of the securities derive from the contracting of derivative financial instruments, the settlement of certain finance contracts, or the conversion or exchange of other securities.

Lastly, there is a **special system for calculating the tax base for so-called intra-day transactions** - i.e. cases in which the same securities are purchased and traded, ordered and executed by the same taxpayer and, as the case may be, via the same market operator, in relation to the same securities register or account of the same acquirer, 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, after the offset of securities purchased and sold.

6. Taxpayers and parties liable (art.6)

The taxpayers for FTT are essentially **investment service companies and credit institutions** engaged in proprietary trading or rendering investment services to third parties.

As such, the tax is not payable by the individual or company acquiring the securities, except in the case of investment services companies or credit institutions engaged in proprietary trading. Rather, it is levied on market intermediaries or agents or alternatively, depositary entities, irrespective of their place of residence and the place that the markets carry out transactions.

Thus, a range of scenarios have been envisaged in order to identify the taxpayer depending on the way in which taxable securities are acquired and the way in which the relevant entities participate in the taxable acquisition:

- Where the acquisition is carried out in a **trading centre**, the taxpayer will be the **member of the market executing it**, be it for its own account or on account of third parties. Where the acquirer's order is processed via a

chain of financial intermediaries, the taxpayer will be the **closest intermediary** to the acquirer that transferred the acquirer's order in its own name.

- Where the acquisition is executed within the scope of the activities of a **systematic internaliser**, the taxpayer will be the systematic internaliser itself
- Where the acquisition is performed independently of a trading centre and the activity of a systematic internaliser, in the first instance the taxpayer will be the **investment services company or credit institution performing the transaction directly for its own account** and, if the acquirer is a third party, the taxpayer 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.
- Lastly as a **final rule**, when the acquisition is carried out independently of a trading centre and without the intervention of any of the persons or entities referred to above, the taxpayer will be the **entity rendering the securities deposit service on account of the acquirer**.

According to the law, persons who have provided the taxpayer with **incorrect or inaccurate information** leading to the undue application of exemption 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.

7. Tax rate (art.7)

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

8. Filing and payment obligation (art. 8)

As a general rule, taxpayers will determine and pay the tax by means of a **self-assessment**, by the deadlines provided for in the regulations. They must also file an **annual tax return** which will include exempt transactions.

With regards to transactions carried out in foreign markets and with a view to facilitating management of the tax in domestic markets, regulations are expected to provide for the possibility of taxpayers paying the tax via a central securities depository located in Spanish territory or in other states (including non-EU states) subject to cooperation agreements.

9. Infringements and penalties (art. 9)

No special penalty regime is provided for and tax infringements resulting from a breach of the provisions of this law and the implementing regulations will be classified and penalised according to the provisions of the General Taxation Law.

