



Royal Decree 400/2021, of 8 June, implementing the rules for locating user devices and the formal obligations of the Tax on Certain Digital Services, and amending the General Regulation on tax management and inspection actions and procedures and implementing common rules for tax application procedures, approved by Royal Decree 1065/2007, of 27 July

Law 4/2020, of 15 October, on the Tax on Certain Digital Services has addressed the need to review taxation on the new ways of doing business resulting from the digitalisation of the economy, largely based on the ability to carry out activities remotely, even cross-border, with little or no physical presence, on the importance of intangible assets, and on the value of data and the contributions of end users to creating value. All of this causes a disconnect between the place where value is generated and where companies pay tax.

The Tax on Certain Digital Services Law approves a new tax whose target is the benefit from certain digital services. Specifically, these are the digital services where there is user participation that constitutes a contribution to the value creation process of the company providing the services, and through which the company monetises those user contributions.

The rules contained in this Royal Decree are enabled both by the specific references in the law itself and the general enabling contained in final provision two of Law 4/2020, and they are issued pursuant to Article 149.1.14 of the Spanish Constitution, which assigns the State competence over general finances.

This Royal Decree contains five articles and three final provisions.

Article 1 develops Article 7 of the Law, relating to the place where the taxable event occurs, which provides that the provision of digital services is understood to be carried out in the territory where the tax is applied when the user is also there, establishing a series of specific rules for each digital service, based on the place where the devices were used; that place being their location. Section 4 of Article 7 states that it will be presumed that a certain user device is in the place as determined by its IP address, unless it can be concluded that this place is different through the use of other means of proof admissible in law, in particular, the use of other geolocation instruments. To specify the place, Article 1 of the Royal Decree establishes that the location of the device will be given by all the details of the address used by the geolocation technology employed. Some means of proof that may be used to demonstrate that the localised location differs from that indicated by the IP address are also listed.

Articles 2 to 4 of the Royal Decree implement the formal obligations provided for in Law 4/2020, by virtue of which taxpayers of the Tax on Certain Digital Services will be obliged to carry out, keep and make available to the Tax Administration, for each settlement period, a record of operations subject to the tax, as well as a descriptive report.

The report must describe the processes, methods, algorithms and technologies used to analyse the tax liability of the digital services provided, locate the provision of each service and its attribution to the territory where the tax is applied, calculate income from the operations subject to tax and identify the files, applications and programs used in such processes.



Article 5 details the scope of the formal obligation to establish systems, mechanisms or agreements to determine the location of user devices in the territory where the tax is applied, provided for in Article 13.1.h) of Law 4/2020. The purpose is to provide guidance to taxpayers, but at the same time allow them to use the systems, mechanisms or agreements at their disposal or those that technology allows them to use in the future.

Final provision one of the Royal Decree makes the pertinent amendments to the General Regulation on tax management and inspection actions and procedures and implementing common rules for tax application procedures, approved by Royal Decree 1065/2007, of 27 July. Thus, various precepts of the aforementioned General Regulation are amended, since the formal obligation of Article 13.1.a) of Law 4/2020 must be met by filing the registration, modification and termination declarations of the Register of Business Persons, Professionals and Withholders, to which the taxpayer would be obliged in any case due to their condition as a business person. The Tax Register must also identify the taxpayers of this tax, and, therefore, the status of taxpayer for the Tax on Certain Digital Services or changes in the tax situation related to the tax must expressly be included in the data to be communicated.

Final provision two of the Royal Decree makes reference to the competence by virtue of which it is issued.

Final provision three of the Royal Decree establishes its entry into force on the day following its publication in the Official State Gazette.

This Royal Decree, in accordance with the provisions of Article 129 of Law 39/2015, of 1 October, on the Common Administrative Procedure for Public Administrations, has been drawn up in accordance with the principles of necessity, effectiveness, proportionality, legal certainty, transparency and efficiency.

It therefore complies with the principles of necessity and effectiveness as the implementing regulation of the Tax on Certain Digital Services Law contained in the Royal Decree is indispensable and requires its inclusion in legal regulations through legislation with regulatory status.

It also meets the principle of proportionality as it contains the necessary regulations to achieve the intended objectives of the Royal Decree.

Regarding the principle of legal certainty, consistency of the draft legislation with other Spanish legal regulations and specifically with the Tax Law itself is guaranteed, creating an integrated and certain regulatory framework that facilitates information and understanding and, therefore, action and decision-making for the different taxpayers affected without introducing unnecessary administrative burdens. Fundamentally, approval of the Royal Decree intends to ensure correct application of the Law by obliged taxpayers, increasing legal certainty.

Regarding the amendment to the General Regulation on tax management and inspection actions and procedures and implementing common rules for tax application procedures, the principles of necessity and effectiveness are also met in terms of the aforementioned legislation, as it has regulatory status, requires legislation of equal status to amend it, as well as the principle of proportionality, as it contains the necessary and limited regulation to achieve the intended goals. In regard to the principle of legal certainty, it guarantees a clear, certain and consistent regulatory framework for the taxpayers affected in all cases.



Notwithstanding official publication in the Official State Gazette, the principle of transparency has been guaranteed by publishing the draft order as well as its Regulatory Impact and Analysis Report on the Treasury e-Office for the purpose of disclosing the texts to citizens during the public hearing and information procedure.

Finally, in relation to the principle of efficiency, an attempt has been made for the regulation to generate the fewest possible administrative burdens and indirect costs, promoting the rational use of public resources. In this sense, the formal obligations required of taxpayers are strictly essential to ensure a minimum control of their activity by the tax administration.

The Draft Royal Decree has been notified to the European Commission for the purposes of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

Accordingly, at the proposal of the Treasury Minister, in accordance with the Council of State and after deliberation by the Council of Ministers at its meeting on XX XXX 2021,

I HEREBY RULE:

Article 1. Location of user devices.

1. For the purposes of Article 7 of Law 4/2020, of 15 October, on the Tax on Certain Digital Services, the location of the device is given by all the details of the address provided by the geolocation technology used, including longitude and latitude where applicable.

The location will be obtained through geolocation technologies that analyse information obtained from the device, from the internet connection network where the device is located, or a combination of both.

2. Pursuant to the provisions of Article 7.4 of the aforementioned Law, it will be presumed that the device is in the location determined according to the geolocation based on its IP address or the equipment through which the user's device accesses the service when it is on a certain network, unless it can be concluded that this location differs using other proof.

For this purpose, geolocation based on the identification of networks (Wi-Fi, Ethernet or others), physical geolocation by satellite (with systems such as GPS-Global Positioning System, GLONASS, Galileo or Beidou) or through information provided by terrestrial wireless communications systems (such as those of the GSM-Global System for Mobile Communications- or LPWAN), or by beacons (Wi-Fi or Bluetooth), or any other combination of existing or future technologies.

Article 2. Records and descriptive report of the Tax on Certain Digital Services.

1. For each quarterly settlement period, taxpayers of the Tax on Certain Digital Services will be obliged to keep, preserve and make various records for each type of service and a descriptive report available to the Tax Administration. Records and the descriptive report are not subject to specific formats.

2. Taxpayers must provide the Tax Administration with the records and report when required.



Article 3. Content of the records of the Tax on Certain Digital Services.

1. In the records referred to in Article 2, the following parameters shall be recorded for each operation subject to tax:

a) In the case of online advertising services:

1) Total income derived from online advertising services, irrespective of the location where they were obtained, with client identification.

2) Number of times the advertising appears on devices that are in the territory where the tax applies.

3) Total number of times the advertising appears on any device, irrespective of their location.

b) In the case of online intermediation services where goods are delivered or underlying services provided directly between users:

1) Total income derived from online intermediation services, irrespective of the location where they were obtained, with client identification.

2) Number of users whose devices are located in the territory where the tax applies at the time the underlying operation concludes.

3) Total number of users involved in this service, wherever they are located.

c) In the case of other online intermediation services:

1) Total income derived directly from users whose access accounts on the digital interface used had been opened using a device that, at the time the account was opened, was in the territory where the tax is applied, with client identification.

2) Number of accounts opened during the settlement period by users whose devices were located in the territory where the tax applies at the time the account was opened.

d) In the case of data transfer services:

1) Total income derived from data transfer services, irrespective of the location where they were obtained, with client identification.

2) Number of users who have generated the data whose devices were located in the territory where the tax applies at the time the data was generated.

3) Total number of users who have generated data, irrespective of where they were located at the time of collecting the data.

2. Customers will be identified by name and surname, company name or full name and, if available, the identification number for VAT purposes or the national tax identification number.

3. The operations that must be recorded pursuant to section 1 of this Article must be recorded at the time the settlement and payment of the tax related to these operations is carried out or, in any case, before the legal deadline to carry out the settlement and payment in voluntary period.

4. The books or records that, in compliance with other tax or accounting obligations, must be kept by taxpayers of the Tax on Certain Digital Services may be used to comply with the records obligation referred to in this Article, provided that they comply with the requirements established in this Royal Decree.



Article 4. Content of the descriptive report of the Tax on Certain Digital Services.

The descriptive report will contain the processes, methods, algorithms and technologies used to:

- a) Analyse liability to the tax of digital services subject to the provisions of Article 4.5 of the Tax Law, as well as non-liability of the services included in Article 6 of that Law.
- b) Locate where each type of service is carried out and its attribution to the territory where the tax is applied, taking into account that the location for each service will be the location of the device in which:
 - 1) The advertising appears when the online advertising service is provided.
 - 2) The underlying operation is concluded when online intermediation services are provided with goods delivered or services provided.
 - 3) The account with which the digital interface is accessed on other online intermediation services has been opened.
 - 4) The transferred data has been generated, in the case of data transfer services.
- c) Calculate income corresponding to each provision of service subject to the tax.
- d) Identify the files, programs and applications used in the above processes for each settlement period.

Article 5. Systems, mechanisms or agreements for the location of user devices in the territory where the tax applies.

1. Taxpayers must have internal systems or mechanisms that allow them to locate user devices within Spanish territory.
2. Likewise, taxpayers may have an agreement with third parties to provide the location of user devices service within Spanish territory, in which case these third parties will have location systems or mechanisms.
3. The location systems and mechanisms must record the IP address of the devices. However, where the user is not located using the device's IP address or where this data is used in conjunction with others, the systems or mechanisms must record all location data.
4. Information obtained by the location systems and mechanisms must be kept for the statute of limitations of the Tax.

Final provision one. Amendment of the General Regulation on tax management and inspection actions and procedures and implementing common rules for tax application procedures, approved by Royal Decree 1065/2007, of 27 July.

General Regulations for tax management and inspection procedures and development of standard regulations for tax application procedures, approved by RD 1065/2007 of 27 July is amended as follows:

One. Section 2 of article 3 is amended, with the following wording:

"2. The Register of Business Persons, Professionals and Withholders will be made up of the people or entities that have implemented or will implement any of the activities or operations mentioned below within Spanish territory:



a) Business or professional activities. These shall be understood as those activities which, when carried out, confer the status of employer or professional on the party that carries them out, and shall include agriculture, forestry, livestock and fishing activities.

The Register of Business Persons, Professionals and Withholders shall not include those parties that engage exclusively in the lease of properties exempt from Value Added Tax under the stipulations of Article 20.One.23 of Law 37/1992 dated 28 December concerning Value Added Tax, provided that this lease does not constitute engaging in a business activity under the provisions of the law that governs Income Tax. Neither will the tax register include parties that deliver, on an occasional basis, new means of transport exempt from Value Added Tax by virtue of the provisions of Article 25(1) and 25(2) of the law governing said tax, or intra-Community acquisitions of goods exempt under the provisions of Article 26(3) of this law.

b) Payment of income subject to withholding or payment on account.

c) Intra-Community acquisitions of goods subject to Value Added Tax made by parties that do not act as employers or professionals.

The tax register shall also include people or organisations that are not resident in Spain according to the provisions of Article 6 of the consolidated text of the Non-Resident Income Tax Act, approved by Royal Decree-Law 5/2004 dated 5 March, who carry out their activity in Spain through a permanent establishment or who receive income in Spain that is subject to withholding or payment on account, as well as the organisations stipulated in Paragraph c) of Article 5 of this Law.

Similarly, persons or entities not established within Spanish territory when they are taxpayers of the Tax on Certain Digital Services will be included in this tax register, as well as persons or entities not established in the territory where Value Added Tax applies when they are subject to this tax.

Likewise, people or organisations that do not meet any of the aforementioned requirements set out in this section but which are partners in, heirs to, community members or shareholders of entities in the income allocation system which engage in business or professional activities and are subject to taxation requirements arising from their status as members of these organisations shall also be included in the census.

The Register of Business Persons, Professionals and Withholders will form part of the Tax Register of Parties Liable for Taxation."

Two. Letter k) is amended and a new letter u) is introduced in section 3 of Article 9, with the following wording:

"k) Choose to determine payment by instalments of Corporation Tax, in accordance with the modality provided for in Article 40.3 of Law 27/2014, of 27 November, on Corporation Tax."

"u) Communicate the status of taxpayer for the Tax on Certain Digital Services referred to in Article 8 of Law 4/2020, of 15 October, on the Tax on Certain Digital Services."

Three. A new letter i) has been introduced and letters m) and s) of section 2 of Article 10 are amended, with the following wording:

"i) Communicate the acquisition or loss of status of taxpayer for the Tax on Certain Digital Services referred to in Article 8 of Law 4/2020, of 15 October, on the Tax on Certain Digital Services."



"m) Choose or waive the option to determine payment by instalments of Corporation Tax, in accordance with the modality provided for in Article 40.3 of Law 27/2014, of 27 November, on Corporation Tax."

"s) Notify other events and circumstances related to the tax register provided for in the tax regulations or ascertained by the head of the Treasury."

Four. Section 1 of article 14 is amended, with the following wording:

"1. The filing of returns referred to in this subsection will have the effects of the filing of returns relating to the beginning, amendment or termination of economic activities subject to Value Added Tax and the Tax on Certain Digital Services."

Final provision two. Competence.

This Royal Decree is approved pursuant to the terms of Article 149.1.14 of the Spanish Constitution which assigns the State the competence over general finances.

Final provision three. Entry into force.

This Royal Decree will come into force on the day following its publication in the "Official State Gazette".