



DAC7. Draft order approving registration and reporting forms (040 and 238)

Tax Alert



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The Draft order approving form 040 and reporting return 238, to be used by platform operators to fulfil their registration and reporting obligations in respect of certain activities has now been published.

These registration and reporting requirements have arisen in the wake of Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC7), which Spain has transposed into domestic law by amending the General Tax Law.

As noted in our November [Tax Alert](#) entitled *DAC7 “Digital platforms-new reporting obligation”*, despite the mandate established by the DAC7 Directive whereby Member States were required to have transposed its contents by no later than 31 December 2022 (with a view to its implementation as of 1 January 2023), the following have yet to be approved in Spain:

- (i) **the implementing Regulations for the new reporting obligation** introduced by the new Additional Provision 25^a of the General Tax Law. Following the publication of an initial version of the Draft Royal Decree for public consultation in February 2022, a second public consultation period commenced in June 2023 in respect of the updated wording of the [Draft Royal Decree](#). Once this period ends, the Draft Royal Decree must be submitted to the Council of State and ultimately approved by the Spanish Cabinet, following which it will be published in the Official State Gazette.
- (ii) **the registration and reporting forms**. A first draft order for the approval of census return 040 was published on 27 December 2022. Under that order the filing obligation appeared to apply to non-resident reporting platform operators only, in line with the Directive.

Against this backdrop, **23 November 2023** saw the publication of the [Draft Order](#) -together with an abridged [report](#) on the regulatory impact assessment- approving census return **form 040** for “*registration or amendment of data on, or deregistration from, the register of non-qualifying foreign platform operators and the register of other reporting platform operators*”, and reporting return **form 238** “*for the reporting of information by platform operators*”, and establishing the relevant filing conditions and procedure.

This triggered the public consultation phase, with the period for submitting contributions running from 24 November until this coming 4 December. The Draft

Order is expected to be approved and published in the Official State Gazette imminently once this period ends. Theoretically, this ought to be preceded by the approval of the Regulations.

Given the deadline envisaged for filing the first return (January 2024), **it would be reasonable to expect that both the Regulations and the Order will be approved in the coming weeks.**

The contents of the new census return and informative return relating to the various registration and reporting obligations, in accordance with the wording of the published Draft, are analysed below. We cannot, however, rule out further amendments prior to their definitive approval.

Form 040

Per the provisions of article 2 of the Draft Order, the **new census return form 040** must be filed electronically by:

- (a) The *Reporting Platform Operators* listed in amended article 54 ter.3.b), paragraph one of the General Regulations on Tax Management and Inspection Procedures and Proceedings and Implementing the Common Rules for Taxation Procedures approved by Royal Decree 1065/2007 of 27 July 2007 (the “GRTM”), who choose Spain as the Member State of single registration.

i.e., operators which, **while they are not tax resident in Spain and do not meet the relevant conditions linking them to Spain** per the provisions of article 54 ter.3.a) of the GRTM, facilitate the carrying out of a *Relevant Activity* by *Reportable Sellers* resident in a Member State, or one which involves the rental or temporary leasing of immoveable property located in a Member State, and are not Qualified Non-Union Platform Operators, provided the operator in question is registered in Spain.

(b) The *Reporting Platform Operators* listed in article 54 ter.a)¹ of the GRTM, i.e. operators with **tax residence in Spain** or which, **while not tax resident in Spain, meet any of the following conditions linking them to Spain**:

- i) they were incorporated in accordance with Spanish law;
- ii) they have their place of management (including effective management) in Spain; or
- iii) they have a permanent establishment in Spain and are not classed as a *Qualified Non-Union Platform Operator*.

The filing deadlines for the various events to be reported under form 040 are as follows:

- **Registration**: upon commencement of the activity as *Platform Operator*.
- **Amendments**: within one month of the date on which the events calling for the amendment arise.
- **Deregistration**: one month as of the date on which *Platform Operators* cease engaging in the Relevant Activities or breach the requirements provided for in article 54 ter.3 sections a) and b) of the GRTM.

Form 238

Meanwhile, **form 238** must be filed by:

- (a) The Platform Operators listed in article 54 ter.2.b) of the GRTM, i.e. **those considered Qualified Non-Union Platform Operators** based on the definitions set out in the Draft Order, per the provisions of DAC7 (i.e. operators resident in non-Union states that have agreements with Union states or meet certain requirements).

(b) *Reporting Platform Operators* meeting the requirements set out in article 54 ter.3.a) of the GRTM (i.e. operators with tax residence in Spain, or which, while not resident in Spain meet one of the relevant conditions linking them to Spain).

(c) *Reporting Platform Operators* meeting the requirements set out in article 54 ter.3.b) of the GRTM (non-residents choosing Spain as the Member State of single registration).

(d) Finally, article 8 of the Draft Order provides that form 238 must also be used by the *Excluded Platform Operators* referred to in “the final paragraph of section two of article 54 ter” (we understand that this refers to article 54 ter.2.a) of the GRTM) including only the platform data.

As regards the filing deadlines, as expected, article 9 of the Draft Order provides that form 238 must be filed annually, in January of the calendar year following the year to which the information to be reported refers.

Final provision two of the Order also provides that form 238 must be filed for the first time in January 2024, in respect of 2023.

¹ We understand that this refers to article 54 ter.3.a of the GRTM.

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