



Exchange of information on digital platforms. Approval of the Regulations and the Order completing the transposition of DAC7 in Spain

Tax Alert



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Following publication of the Regulations and the relevant registration and return forms in the Official State Gazette, Digital Platform Operators in Spain now have until 8 April 2024 to file their first informative return under DAC7.

Royal Decree 117/2024 of 30 January 2024 (the “Regulations” or the “RD”), implementing the due diligence procedures and rules in relation to the mandatory automatic exchange of information to be reported by Digital Platform Operators in line with the DAC7 Directive (Council Directive 2021/514 of 22 March 2021) was published in the Official State Gazette on 31 January 2024.

First off, it is worth recalling that the DAC7 Directive introduced an immediate report of information obligation for Digital Platform Operators and set out rules for the effective exchange of information between European Union Member States.

In doing so, it seeks to set in place the framework for the reporting of tax-relevant information on certain activities (*Relevant Activities*) that is now to be provided by Digital Platform Operators (*Reporting Platform Operators*).

The aims of the recently published Regulations are two-fold:

- On the one hand, to **set out the due diligence procedures and rules** to be observed by digital platforms when reporting information on sellers operating on them in accordance with the DAC 7 Directive; and
- On the other, to **complete the regulation of the new registration and reporting obligations** incumbent upon digital platforms.

Just a few days later (on 5 February 2024), [Order HAC/72/2024](#) of 1 February 2024 (Order HAC/72/2024, or the Order) was published in the Official State Gazette, approving the following registration and return forms:

- **Form 040**, "*Census return*) for the 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".
- **Form 238**, "*Informative return for the reporting of information by platform operators*".

Transposition of the DAC7 Directive in Spain

The DAC7 Directive established a mandate whereby Member States were required to have transposed its contents by 31 December 2022 at the latest, with a view to its implementation as of 1 January 2023.

In Spain’s case, the process to transpose the Directive into domestic law was carried out after the above deadline. It commenced with the approval of [Law 13/2023 of 24 May 2023](#), which included within the General Taxation Law (“GTL”) the provisions of DAC7 that were to be regulated in primary legislation.

Specifically, Additional Provision 25 of the GTL sets out the general rules governing the reporting and due diligence obligations applicable to “Digital Platform Operators” and a specific penalty regime for non-compliance.

The relevant implementing regulations have now been published by means of Royal Decree 117/2024, and the process completed by means of Order HAC/72/2024 approving the DAC7 registration and reporting forms.

The new informative return form 238 is already available for online completion on the Spanish Tax Agency (“STA”) website, where several frequently asked questions (FAQs) can also be found. Nonetheless, given the complexity of this new reporting obligation, we cannot rule out the possibility of further guides being published, as we have seen in other countries.

Form 040 is also available for completion on the STA's website.

It should be noted that the above refers only to the regulations generally applicable in the Spanish common territory, as the regional territories of the Basque Country and Navarre have independent legislative jurisdiction in this regard.

With this in mind, we analyse below the main aspects of both the new registration and reporting obligation and the penalty regime for non-compliance.

1.- REPORTING OBLIGATION

The RD implements the new reporting obligation whereby the Digital Platform Operators to which it applies per Additional Provision 25 of the GTL must supply the tax authorities with certain information relating to the activities of sellers operating on their platforms. Fiscal year 2023 is the first period in respect of which the relevant information must be reported (the *Reportable Period*).

In order for Platform Operators to be able to fulfil this obligation, the *Sellers* must provide them with the necessary information.

Or, as the regulations very technically put it, *Reporting Platform Operators* must supply the tax authorities with certain information regarding the *Relevant Activities* carried out by *Reportable Sellers* during the *Reportable Period*.

Reporting Platform Operators

This new reporting obligation applies to all *Platform Operators*, except *Excluded Platform Operators*, which:

- a) are resident for tax purposes in Spain or which, although not having a residence for tax purposes in Spain or any other Member State, meet any of the following requirements linking them to Spain:
 - i) They are incorporated under the Spanish law;
 - ii) They have their place of management in Spain; or
 - iii) They have a permanent establishment in Spain and are not classed as a *Qualified Non-Union Platform Operator*. The above criteria will not apply in certain cases.

Where a *Reporting Platform Operator* meets the above criteria in more than one Member State or "Partner Jurisdiction", it may elect the Member State or Partner Jurisdiction in which to fulfil the reporting obligation. In such case, it must notify the competent authorities of the other Member States or Partner Jurisdictions involved of its choice.

The FAQs recently published on the STA website clarify that operators choosing to file the return with the Spanish tax authorities must be previously registered in Spain and must, where appropriate, notify the other Member State or Partner Jurisdiction of their choice.

Where the *Reporting Platform Operator* opts to file its return in another Member State or Partner Jurisdiction, it must notify the Spanish tax authorities of this decision by filing form 238, including only the details of the declaring platform together with its name, Taxpayer Identification Number (TIN) and address in the filing jurisdiction, selecting under "Filing type" the option "No sellers because I am notifying filing in another jurisdiction".

- b) do not meet the above requirements linking them to Spain but 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 immovable property located in a Member State, and are not Non-Union Platform Operators, provided they are registered in Spain.

The above operators will not be required to report reportable *Relevant Activities* subject to an *Effective Qualifying Competent Authority Agreement* that provides for the equivalent automatic exchange with a Member State of information on *Reportable Sellers* resident in such Member State.

Platform Operators not subject to the reporting obligation

Certain operators are not subject to this obligation:

- c) "**Qualified Non-Union Platform Operators**", or operators on whose platforms all *Relevant Activities* are subject to an automatic exchange of information requirement by virtue of an *Effective Qualifying Competent Authority Agreement* and are also tax resident in a *Qualified Non-Union Jurisdiction* or, where this is not the case, they have been incorporated under the laws of a *Qualified Non-Union Jurisdiction* or have their place of management (including effective management) in such jurisdiction.
- d) "**Excluded Platform Operators**", i.e. those which have demonstrated to the Spanish tax authorities each year that their platform's business model does not involve *Reportable Sellers*.

Excluded Platform Operators must file a **negative return** each year informing the Spanish tax authorities of their *Excluded Platform Operator* status.

This return must be filed in January of the calendar year following that in which they held *Excluded Platform Operator* status.

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Reportable Activities

Reportable activities are grouped under the heading *Relevant Activities* and refer to activities carried out for consideration and included within the following operation types:

- the **rental or temporary leasing of immovable property**, including both residential and commercial property, as well as any other immovable property and parking spaces;
- **a Personal Service**;
- the **sale of Goods** (according to the Annex to RD 117/2024, "goods" shall mean any tangible property, with no further requirements); and
- the **rental of any mode of transport**.

Regard should be had to the following in relation to reportable activities:

- They do not include activities carried out by a seller acting as an employee of the Platform Operator or a related entity of the Platform Operator.
- "Consideration", which is a requirement for an activity to be treated as a *Relevant Activity*, means compensation in any form, net of any fees, commissions or taxes withheld or charged by *Reporting Platform Operators*, that is paid to a seller in connection with a *Relevant Activity*. The amount paid must be known or reasonably knowable by the *Reporting Platform Operator*.

Information to be reported

- (i) Information relating to the Platform Operator itself.
- (ii) Detailed information on *Reportable Sellers* (that provided by the sellers themselves, along with the particulars of the relevant bank accounts and their holders, the amounts of payments and consideration, fees, commissions, taxes withheld or charged, etc.).
- (iii) Additional information with respect to each *Reportable Seller* that carried out a Relevant Activity involving the rental or temporary leasing of immovable property.

Reporting form and deadlines

The relevant information is to be included in **form 238 "Informative return for the reporting of information by platform operators"** via electronic messaging on the STA website.

Form 238 must be **filed annually** in January of the **calendar year following** that with respect to which the information is being provided.

Nonetheless, the first return to be filed in 2024 - which will contain the data relating to 2023 - may be filed **within two months of 6 February 2024** - the date of entry into force of the Order approving the form.

The filing deadline for the first form 238, relating to 2023, is thus 8 April 2024 (as 6 April 2024 is a Saturday).

2.- REGISTRATION OBLIGATION

Effective from 1 January 2023, Law 13/2023 of 24 May 2023 introduced, inter alia, an **obligation** for Platform Operators **to register** with the competent authority. This has been implemented via the incorporation of new provisions into the General Regulations on Tax Management and Inspection Procedures ("GRTM") by means of RD 117/2024.

Reporting Platform Operators are thus required to register on either:

- **The register of Non-Qualifying Foreign Platform Operators**, in the case of *Reporting Platform Operators* which, **while they are not resident for tax purposes 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 immovable property located in a Member State, and are not *Qualified Non-Union Platform Operators*, provided the operator in question is registered in Spain; or
- **The register of Other Reporting Platform Operators**, in the case of Platform Operators with residence for tax purposes in Spain or which, while not tax resident in Spain, meet any of the following conditions linking them to Spain: (i) they are incorporated under the Spanish law; (ii) they have their place of management in Spain; or (iii) they have a permanent establishment in Spain and are not classed as "*Qualified Non-Union Platform Operators*."

Certain **registration-related aspects** are also regulated, including:

- The data necessary for registration.
- Potential precautionary deregistration in the event that the operator fails to fulfil its reporting obligation.
- Revocation of the TIN of the operator concerned in such cases, or the reporting to the Commission of the commencement of activities without prior registration

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in the case of operators that are not established in the European Union.

The registration obligation is to be fulfilled via a **census return in respect of registration**. This will enable the Spanish tax authorities to identify the date of commencement of activities by *Reporting Platform Operators*. **Form 040** "Census return for the 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" will be used.

Form 040 must also be used for the amendment of data or deregistration of Platform Operator activities.

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

- **Registration:** upon commencement of the *Reporting Platform Operator* activities.
- **Amendments:** within one month of the date on which the events calling for the amendment arise.
- **Deregistration:** within one month of the date on which the *Reporting Platform Operators* cease to engage in the *Relevant Activities* or to hold "Non-Qualifying Foreign Platform Operator" status.

Form 040 must be filed online (for which purpose the operator must be in possession of the relevant electronic certificate).

3.- OBLIGATION TO COMPLY WITH THE DUE DILIGENCE PROCEDURES AND RULES

RD 117/2024 sets out the **due diligence procedures and rules** to be observed by *Reporting Platform Operators* as of 1 January 2023.

Timing and validity of these procedures

The due diligence procedures are generally required to be completed by 31 December of the *Reportable Period*, defined in the Annex to RD 117/2024 as the calendar year in respect of which information is reported.

Article 7 of the Regulation nevertheless provides for two specific circumstances to be borne in mind, namely:

- (i) The deadline in the case of initial application: the deadline is extended until 31 December of the second *Reportable Period*. Thus, for Platform Operators that were already registered on the platform as of 1 January 2023 or as of the date on which an entity becomes a Platform Operator, the due diligence procedures must be completed by no later than 31 December of the second *Reportable Period* for the Platform Operator.

- (ii) Observance in subsequent years: the operator may rely on the due diligence procedures carried out in the previous three years if it considers that no changes have been made to the information obtained.

Persons subject to the due diligence procedures and rules

The due diligence procedures and rules must be observed by **Reporting Platform Operators** -understood as entities that contract with Sellers to make available all or part of a platform to such Sellers- in respect of certain information relating to the Sellers. Sellers are also required to report this information to the digital platforms.

To this end, *Reporting Platform Operators* may rely on a **third party** to comply with the due diligence procedures and rules. Under no circumstances, however, will their doing so exempt the operator from fulfilling its due diligence obligations.

Description of the due diligence procedures and rules

Due diligence procedures and rules are the steps to be taken by platforms in order to obtain, verify and determine **information relating to Reportable Sellers** (referred to in the Directive as *Reportable Sellers* "identification"). These steps are as follows:

- **Identification of the Sellers not subject to review.** The Platform Operator will determine whether a seller qualifies as an *Excluded Seller* by relying on publicly available information, a confirmation from the Seller in question or its own internal records, as the case may be.
- **Collection of information.** The Platform Operator is required to obtain and collect certain particulars of Non-Excluded Sellers -according to the Annex to RD 117/2024, Sellers (individuals or entities) which are registered on the platform that they operate and on which they carry out *Relevant activities* during the *Reportable Period*-.

The Regulations state that if the Platform Operator can directly confirm the identity and residence of the Seller by means of an identification service made available by a Partner Jurisdiction that has signed the Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms within the OECD, it will not be necessary to obtain such information.

Moreover, where a **Seller** carries out a **Relevant Activity** relating to the **rental or temporary assignment of use of immovable property**, the *Reporting Platform Operator* is required to collect certain information from the Seller regarding such property.

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- **Verification that the information obtained from the Sellers is correct.** Such verification is generally based on the information contained in the operator's records.
- **Determination of the State of residence of the Seller.** The Seller will be considered resident in any of the following EU Member States:
 - (i) That of their primary address;
 - (ii) The State in which their taxpayer identification number was issued, if different from that of their primary address; and
 - (iii) The State in which the seller's permanent establishment is located, where information has been provided on the location of such permanent establishment.

4.- INFRINGEMENTS AND PENALTIES. INSPECTION POWERS OF THE TAX AUTHORITIES.

Although this matter had already been introduced in the GTL, it is worth bearing in mind the penalty regime envisaged in the event of breach of these new obligations.

In this connection, Additional Provision 25 of the GTL provides for application of:

- the general penalty regime under Title IV of this Law, along with
- a specific penalty regime in certain cases.

The specific penalty regime envisaged for certain scenarios consists of:

- a penalty regime for Platform Operators; and
- a penalty regime for Sellers required to report to Platform Operators.

4.1.- Penalty regime for the Digital Platform Operators affected by this new obligation

Additional Provision 25 of the GTL provides for (i) application of the general penalty regime under Title IV of this Law, along with (ii) a specific penalty regime envisaged primarily for non-resident infringements and operators whose infringement would not be covered by the GTL. This specific penalty regime will apply in cases of:

- Breach of the **due diligence obligation.**

Breach, or incorrect or late fulfilment, of the obligations arising from due diligence procedures will be treated as a **serious infringement**, punishable with a fixed monetary fine of Euros 200 for each Seller with respect to which the obligations deriving

from the due diligence procedures and rules have been breached.

- Breach of the **registration obligation** by *Reporting Platform Operators* not resident in the EU.

Reporting Platform Operators not resident in the EU which breach the registration obligation may face a fine equal to three times the fine that would have applied due to failure to supply this information under the general rules established in Title IV of the GTL. This breach may be treated as a **very serious infringement.**
- Breach of the **reporting obligation** by *Reporting Platform Operators* not resident in the EU.

In the event of breach of the reporting obligation by *Reporting Platform Operators* not resident in the EU, the tax authorities may, following two requests, order precautionary deregistration of the operator from the relevant census.

Once its deregistration is ordered, the operator may only re-register if it provides the tax authorities with sufficient assurance that it will comply with the reporting obligation, including the communication of the outstanding information to be reported.

4.2.- Specific penalty regime for “reportable sellers”

The following specific infringements and penalties are envisaged for breaches that may be incurred by Sellers required to report to Platform Operators:

- Failure to report mandatory information to *Reporting Platform Operators* by the deadline, or the reporting of false, incomplete or inaccurate information, constitutes a serious tax infringement, punishable with a fixed monetary fine of Euros 300.
- Provision is also made for closure of the “Seller’s” account on the platform (following two reminders and once 60 calendar days have elapsed since the initial request), and a prohibition on their re-registration or withholding of payment of the *Consideration* until such time as the necessary information is provided.

4.3.- Inspection powers of the STA

The tax authorities are expressly granted **powers of inspection**, as follows:

“Notwithstanding the powers to inspect and investigate the registration and reporting obligations referred to in this additional provision in accordance with the general rules under this Law, the tax authorities may inspect and investigate compliance with the due diligence procedures and rules to be applied by “reporting platform operators”.

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