GARRIGUES ICEX INVEST IN SPAIN

This work is for information only and its content can not be invoked in support of any claim in progress.

ICEX does not assume responsibility for the information, opinion or action based on said content, regardless of whether it has made every effort to ensure the accuracy of the information contained in its pages.

This guide was researched and written by Garrigues, on behalf of ICEX, on February 2023.

This guide is correct to the best of our knowledge. It is, however, written as a general guide so it is necessary that specific professional advice be sought before any action is taken.

Madrid, June 2023

Pº de la Castellana, 278
28046 Madrid
Tel: 902 34 90 00
Fax: 914 31 61 28

icex@icex.es
desarrollo@investinspain.org

www.icex.es
www.investinspain.org

Administración General del Estado (AGE)
http://administracion.gob.es

Catálogo de publicaciones de la AGE
http://cpage.mpr.gob.es

NIPO (PDF): 114230304

Design & Layout
Intelligenia, S.A.

7.

Legal framework and tax implications of e-commerce in Spain

The main legal and tax issues to take into consideration regarding e-commerce, digital economy and privacy are discussed in this Chapter.

In Spain, as in neighboring countries, e-commerce-related activities are currently the object of specific regulation. In transactions involving e-commerce, regard should be had to the legislation on distance sales, advertising, standard contract terms, data protection, intellectual and industrial property, and e-commerce and information society services, among others. Apart from these specific laws, it is also necessary to examine the general legislation on civil and commercial contracts and, when in case of e-commerce addressed to consumers (B2C), the specific regulation on consumers' protection should also be considered. Additionally, matters such as cybersecurity or electronic identification (electronic signature) have an increasing importance.

From the tax perspective, e-commerce raises issues, which would require a consensus to be reached on measures to be adopted at regional and even global level. Fair progress has been made in reaching a consensus on the VAT treatment of "online e-commerce". As regards the Tax on Certain Digital Services, although Spain has created this tax, we will have to wait for a coordinated, uniform interpretation of the various criteria determining the tax treatment of e-commerce at international level.

7.

Legal framework and tax implications of e-commerce in Spain

1

Introduction

E-commerce-related activities are regulated by diverse rules contained in Spanish legislation. Moreover, a fundamental point to bear in mind when undertaking any initiative in the area of electronic transactions is that the applicable legislation varies depending on the potential recipient of the related offer. Consequently, there is greater leeway for the parties to agree if the transaction takes place between companies (business to business, B2B) than if the commercial dealings are between a company and a private consumer as the final recipient (business to consumer, B2C), since, among others, consumer protection legislation or data protection legislation will apply in the latter case.

In the tax sphere, e-commerce raises issues that are difficult to address from a purely Spanish perspective. Perhaps for that reason, the Spanish tax authorities have not seen fit to adopt unilateral measures, preferring to wait until a consensus is reached on the measures to be adopted regionally and even worldwide.

7.

Legal framework and tax implications of e-commerce in Spain

2

Defining regulatory principles

2.1 CIVIL AND COMMERCIAL LEGISLATION

2.1.1 CIVIL AND COMMERCIAL CODES

Electronic contracts are fully subject to the rules established by the Spanish Civil Code on obligations and contracts and by the Commercial Code.

Electronic contracts are also subject to EC Regulation 593/2008, of June 17, 2008, on the law applicable to contractual obligations (Rome I) which will apply to contractual obligations in the civil and commercial area in situations involving a conflict of laws.

2.1.2 DISTANCE SALES

1. Equally applicable to electronic sales are the rules related to distance sales and other related relevant rules: Regarding commercial operations in which the buyer is an undertaking or a business man, the Act 7/1996 ordering the Retail Trade should be taken into consideration, in particular the Chapter regarding Distance Sales, which makes a specific referral to Title III of Book II of the Legislative Royal Decree 1/2007, of 16th of November, approved the Revised General Consumer and User Protection Law and other supplementary laws ("**TRLGDCU**").

2. Whenever e-commerce activities are targeted at consumers, it is necessary to comply with consumer protection legislation, regulated in the aforementioned TRLGDCU.

   This Law defines "distance sales" as sales concluded without the simultaneous physical presence of the buyer and the seller, where the seller's offer and the buyer's acceptance are conveyed exclusively by a means of distance communication of any nature and within a distance contract system organized by the seller.

   This Law establishes that distance sale offers (either to consumers or to undertakings) must contain at least the following:

   - The seller's identity, including its trade name.
   - The main features of the product, the price, and the shipping expenses and, if applicable, the cost of using the distance communication technique if it is calculated on a basis other than the basic rate basis.
   - The full address of the trader's establishment, telephone number and e-mail address, and details of any other medium made available to consumers or users by the trader.
   - Where applicable, the fact that the price has been customized on the basis of automated decision-making.
   - The payment method, and form of delivery or types of fulfillment of orders.
   - The period for which the offer remains valid and, if applicable, the minimum term of the contract.
   - The existence of a right to withdraw or terminate the contract and, if applicable, the circumstances and conditions in which the seller could supply a product of equivalent price and quality.

- The out-of-court dispute resolution procedure, if applicable, in which the seller participates.
- Remainder of the existence of a legal guarantee depending on the type of goods or services.
- Information of the cases in which the Seller shall take the costs of returning the goods.

This Royal Decree sets out, among other matters affecting the consumers, the rules governing unfair conditions of contracts concluded with consumers, and the right to withdraw that consumers have in distance sales (fourteen calendar days).

3. It should also be noted that Law 22/2007, of July 11, 2007, on the distance marketing of consumer financial services, shall also be taken into consideration when dealing with consumers in the financial sector. The Law specifically regulates the protection granted by the general law to the users of remote financial services by establishing, among others, the generic requirement to provide the consumer with precise and exhaustive information on the financial contract prior to its signature and by granting the consumer a specific right to withdraw from the distance contract previously concluded.

4. In making the contract, there is an intention to incorporate predisposed clauses into a plurality of contracts, regard must be had to Standard Contract Terms Law 7/1998.

5. If the activity carried out is related to the sale of consumer goods, the aforementioned TRLGDCU must be taken into consideration regarding the warranties on consumer goods, because it establishes the measures aimed at ensuring a minimum uniform standard of consumer protection. Such rules require the trader to provide a free 3-year warranty for consumers on all consumer goods (acquired for the first time) and a 2-year warranty in the case of digital contents or services[1], and to offer consumers a range of possible remedies when the goods acquired do not conform to the terms of the contract, to make them conform, enabling consumers to choose between demanding their repair or substitution.

2.1.3 OTHER APPLICABLE REGULATIONS

1. In accordance with Law 56/2007 of December 28, 2007 on Measures to Promote the Information Society, enterprises that provide services of special economic significance to the general public and that are of a certain size are required to provide their users with an electronic means of communication which, through the use of qualified electronic signature certificates, enables them to perform at least the following steps: (a) conclude contracts electronically and amend and terminate them; (b) consult their customer data (including the record of billings covering at least the past 3 years) and the concluded contract, with its general conditions; (c) submit complaints, incidents, suggestions and claims (while guaranteeing a record of their submission and direct personal assistance); and (d) exercise the rights provided for in data protection legislation.

   This requirement applies to enterprises providing services of special economic significance to the general public provided that they employ more than 100 workers or have an annual turnover (according to the VAT legislation) of more than €6,010,121.04. The enterprises that Law 56/2007 includes in this category are those operating in the following industries: (i) electronic communications services to consumers; (ii) financial services aimed at consumers (banking, credit or payment, investment services, private insurance, pension plans and insurance brokerage); (iii) supplying water to consumers; (iv) supplying retail gas; (v) supplying electricity to final consumers; (vi) travel agencies; (vii) carriage of travelers by road, railway, by sea, or by air; and (viii) retail trade (although for these last-mentioned ones, the electronic means of communication need only enable what is set out in letters (c) and (d) above).

2. Due to their particular importance in electronic commerce, it is worth noting some legal provisions concerning payment services:

   a. Royal Decree-Law 19/2018, of November 23, on payment services and other urgent measures on financial matters is the law transposing in Spain the Directive (UE) 2015/2366, of November 25, on payment services in the internal market (known as PSD2 Directive). This Royal Decree-Law has repealed the Payment Services Law 16/2009, of November 13, 2009. The new payment services legislation mainly affects the payment transactions that are most commonly used in an electronic commerce environment: transfers, direct debiting and cards, establishing, as a general rule, that the payer and the payee of the transaction must each bear the charges levied by their respective payment services providers. In any event, in the case of transactions with consumers, the specific legislation (Legislative Royal Decree 1/2007) prohibits the trader from charging the consumer fees for the use of payment methods that exceed the cost borne by the trader for the use of such payment methods.

      Due to the volume and importance of the data that may be exchanged in connection with economic transactions executed in an e-commerce environment, the protection of the personal data that they may contain is particularly important. In this regard, it is important to consider Guidelines 06/2020 on the interplay of the Second Payment Services Directive and the General Data Protection Regulation, adopted by the European Data Protection Board ("EDPB") on December 15, 2020.

1 In accordance with art. 16.7 of Royal Decree-Law 7/2021 of April 27, 2021, which amends, among others, art. 120 of the TRLGDCU, the period for declaring a lack of conformity in the case of contracts for the sale and purchase of goods is changed from two to three years, effective for goods purchased after January 1, 2022.

7.

Legal framework and tax implications of e-commerce in Spain

Lastly, both the Royal Decree-Law 29/2018 and the consumer protection legislation envisage for distance contracts that, where the amount of the purchase or of a service has been charged fraudulently or incorrectly using the number of a payment card, the consumer may request the immediate cancellation of the charge.

As one of the main news of the Royal Decree-Law 19/2018, it regulates the payment initiation services and the account information services.

b. The legislation on interchange fees has been introduced by Royal Decree-Law 8/2014, of July 4 and Law 18/2014, of October,15. This legislation establishes a system of caps on interchange fees in transactions with credit or debit cards in Spain (applying them to POS terminals located in Spain), regardless of the trade channel used (that is, including physical and virtual POS terminals), provided that they requirethe involvement of payment services providers established in Spain.

   The caps applicable on or after September 1, 2014 are as follows:

   i. Debit cards: The interchange fee per transaction may not exceed 0.2% of the value of the transaction, subject to a cap of 7 euro cents. But if the amount does not exceed €20, the interchange fee may not exceed 0.1% of the value of the transaction.

   ii. Credit cards: The interchange fee per transaction may not exceed 0.3% of the value of the transaction. But if the amount does not exceed €20, the interchange fee may not exceed 0.2% of the value of the transaction.

   These caps do not affect transactions performed with company cards or withdrawals of cash from automatic teller machines. In addition, three-party payment card systems are excluded from the application of these caps, except for certain cases identified by the legislation.

3. Also worthy of note is Law 29/2009, of December 30, 2009, modifying the legal regime governing unfair competition and advertising in order to enhance consumer and user protection. Special mention should be made of the unfair practice status to be granted to the making of unwanted and reiterated proposals by telephone, fax, e-mail and other means of long-distance communication, unless such proposals are legally justified for the purpose of complying with a contractual obligation. Moreover, when issuing such communications, traders and professionals must use systems that enable consumers to place on record their opposition to continuing to receive commercial proposals from such traders or professionals. Thus, when making such proposals by telephone, calls must be made from an identifiable number.

4. It is convenient to take into account the legislation deriving from the Directive (EU) 2016/1148, concerning measures for a high common level of security of network and information systems across the Union. In Spain, this Directive has been transposed by means of the Royal Decree-law 12/2018, of 7 September, concerning security of the networks and information systems, which has itself been developed by Royal Decree 43/2021, of 26th January. This legislation applies to essential services operators and digital services providers, as they are defined , as they are defined therein (digital services being the cloud computing services, online search engines and online marketplaces). In particular, these marketplaces are a more and more common way of developing e-commerce activities.

   It should be noted that the aforementioned Directive (EU) 2016/1148 has recently been repealed by Directive (EU) 2022/2555 of 14 December 2022 on measures for a high common level of cybersecurity across the Union (NIS 2 Directive).

The main objectives of this new Directive are: to eliminate the divergences that have arisen between Member States' national cybersecurity regulations and the implementation thereof, namely by defining minimum standards for the functioning of a coordinated regulatory framework, establishing mechanisms to ensure that the competent authorities of each Member State cooperate effectively, updating the list of sectors and activities subject to cybersecurity obligations, and making available effective remedies and enforcement measures to guarantee actual compliance with such obligations. However, although this Directive came into force on January 16, 2023, the deadline for its transposition is October 17, 2024, and until its transposition into Spanish law has been approved, the provisions of Royal Decree-Law 12/2018 will continue to apply.

We simply mention this legislation because, although it only applies to certain types of service providers, compliance with it is particularly important, especially in the case of the obligated parties under Royal Decree-Law 12/2018, and those others referred to in the provisions transposing the NIS 2 Directive, based on the new activities and criteria for determining whether an entity is an obligated party included in the scope of application of the Directive.

All obligated entities must take into account this legislation, which, among others, imposes an obligation to notify the competent authorities beforehand, and requires compliance with other data security obligations (such as, for example: governance measures, internal organizational policies and greater control over subcontractors). Non-compliance may lead to high penalties (up to 10 million euros or a maximum of at least 2% of the total annual worldwide turnover of the organization to which the essential entity belonged during the previous financial year, whichever is higher).

7.

Legal framework and tax implications of e-commerce in Spain

5. Finally, it is important to draw attention to Regulation (EU) 2022/2554 of 14 December 2022 on digital operational resilience for the financial sector ("DORA"), which came into force on January 16, 2023 and whose mandatory date of application in all Member States will be January 17, 2025.

   Digital operational resilience is defined as the ability of a financial entity to build, assure and review its operational integrity and reliability by ensuring, either directly or indirectly through the use of services provided by ICT third-party service providers, the full range of ICT-related capabilities needed to address the security of the network and information systems which a financial entity uses[2], and which support the continued provision of financial services and their quality, including throughout disruptions.

   In this regard, the purpose of the DORA Regulation is to establish, for the security of networks and information systems, a series of uniform requirements: (i) that are applicable to financial institutions (e.g. on ICT risk management, the notification of serious ICT and payment incidents, digital operational resilience testing); (ii) requirements regarding contractual arrangements with ICT providers; (iii) rules on the supervisory framework for critical ICT third-party providers; and (iv) rules on cooperation between authorities.

   As a result, this Regulation contains important organizational, analytical and technical requirements for the entities which are obliged to comply with its provisions. It establishes that the organization's most senior managing body shall be responsible for defining, approving and supervising a management and governance framework for the organization to ensure compliance with ICT risk management requirements and the obligations envisaged in its provisions.

2.2 ELECTRONIC INVOICING

Article 88.2 of Value Added Tax Law 37/1992 states that VAT shall be charged through the invoice, on the conditions and with the requirements determined by regulations. A clear indication that the new invoicing regulations approved by Royal Decree 1619/2012, of November 30, 2012, aim to promote electronic invoicing is that they establish the same treatment for electronic invoices as for paper invoices. A new definition is provided for electronic invoice, i.e., an invoice that meets the requirements established in the Royal Decree but which has been issued and received on electronic format.

Therefore, this equal treatment for paper and electronic invoices broadens the possibilities for the supplier to be able to issue invoices electronically without needing to use specific technology to do so.

Moreover, Order EHA/962/2007[3] issued by the former Ministry of Finance establishes and further develops particular obligations regarding telematic invoicing. That Order clarifies that any Advanced Electronic Signature based on a certain certificate and generated through safe signing procedures will be valid in order to guarantee the authenticity and origin of the bill. The Order also clarifies the legal requirements that electronic invoices issued abroad must meet in order to be validly accepted in Spain.

Since January 15, 2015, there has been an obligation in Spain (by application of Law 25/2013, of December 27, 2013, on the promotion of electronic billing and the creation of a public sector accounting register of invoices) to issue invoices in electronic format that affects enterprises operating in certain industries (according to a list included in the law) and providing services "of special economic significance" to the general public.

This obligation to issue electronic invoices applies regardless of the contracting channel used (face-to-face or distance, electronic or non-electronic), provided that the customer agrees to receive them or has expressly requested them. However, travel agencies, carriage services and retail trade businesses are only required to issue electronic invoices where the contracting has taken place by electronic means.

In any event, it is the recipient of the invoices who has the power to give his or consent to the issuance and sending of invoices in electronic format and to revoke such consent in order to receive them on paper again. In the absence of consent, the trader should issue and send the invoices on paper.

2.3 ELECTRONIC SIGNATURE

On the 28th of August 2014, the Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC was published in the Official Journal of the European Union. This Regulation came into force on the 17th of September of the same year and it is obligatory since the 1st of July 2016 (known as e-IDAS Regulation). At a national level, Law 6/2020, of 11th of November, on several aspects of the electronic trust services, introduces specific regulations complementing the contents of e-IDAS Regulation in Spain.

2 The scope of application of the DORA Regulation includes a broad list of entities, such as credit institutions, payment institutions, account information service providers, e-money institutions, investment firms and third-party providers of ICT services.

3 Order EHA/92/2007, of April 10, 2007, implementing certain provisions concerning telematic billing and electronic invoice storage, contained in Royal Decree 1496/2003, of November 28, 2003, approving the regulations governing billing obligations.

7.

Legal framework and tax implications of e-commerce in Spain

Regulation 910/2014 defines the following concepts:

- Electronic signature, data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.
- Advanced electronic signature means an electronic signature which meets the requirements set out in article 26.
- Qualified electronic signature means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.
- Certificate for electronic signature means an electronic attestation which links electronic signature validation data to a natural person and confirms at least the name or the pseudonym of that person.
- Qualified certificate for electronic signature means a certificate for electronic signatures, that is issued by a qualified trust service provider and meets the requirements laid down in Annex I of the e-IDAS Regulation.
- Electronic seal means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity.
- Advanced electronic seal means an electronic seal, which meets the requirements set out in article 36 of the e-IDAS Regulation.
- Certificate for electronic seal means an electronic attestation that links electronic seal validation data to a legal person and confirms the name of that person.
- Qualified certificate for electronic seal means a certificate for an electronic seal, that is issued by a qualified trust service provider and meets the requirements laid down in Annex III .of the e-IDAS Regulation.

In the structure of the e-IDAS Regulation, *"an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures"*, and therefore any electronic signature, whatever the type, has legal effect and must be admitted as evidence, although, as the e-IDAS Regulation states, only "a qualified electronic signature shall have the equivalent legal effect of a handwritten signature".

2.4 PERSONAL DATA PROTECTION

Another aspect that may have e-commerce implications is the possible processing of any personal data in transactions of this nature.

At present, the applicable legislation on these matters in Spain, as in the rest of the European Union, is the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), known as GDPR.

In the framework of the GDPR, which is directly applicable in Spain since 25th May 2018, the Constitutional Law on the Protection of Personal Data and guarantee of digital rights (*LOPD-gdd*) has been passed, repealing the previous Constitutional Law 15/1999, of 13 December, on Personal Data Protection. The *LOPD-gdd* regulates some aspects of the processing of an individual's personal data within the margins that the GDPR allows to the EU Member States.

The GDPR applies to "personal data," meaning any information concerning identified or unidentified individuals. Accordingly, it does not apply to data concerning legal entities; however, as opposed to the previous legislation in Spain, it applies to data concerning individual entrepreneurs or individuals being the contact person of a legal entity where the personal data is used.

Personal data protection legislation revolves around the following principles:

- The data controller has to rely on one of the legal bases envisaged in article 6 of the GDPR in order to be able to process personal data.
- The processing of specially protected data (i.e., data referring to ideology, labor union membership, religion, beliefs, ethnicity, health, and sex life) is prohibited other than in certain circumstances set out in article 9.2 of the GDPR.
- The data subject must be informed of a number of matters in relation to the envisaged processing of his or her personal data.
- Personal data may only be processed where they are adequate, relevant and not excessive in relation to the purpose for which they have been obtained.
- Personal data may only be disclosed if a legal basis applies.
- When the communication is addressed to a third party classified by the Law as a data processor, which provides a service entailing access to such data, prior consent by the data subject is not required, but the relationship must be regulated in a contract for services that includes a number of provisions established in article 28 of the GDPR (data processing agreement).
- There is recognition of data subjects' rights of access, rectification, erasure, restriction of processing, portability, and objection and the right not to be subject to a decision based solely on automated processing, including profiling, which has legal consequences for them.
- Sanctions for infringement of GDPR may consist of fines of up to €20,000,000 or 4% of the global annual turnover of the group during the previous fiscal year.

7.

Legal framework and tax implications of e-commerce in Spain

It should also be noted that international transfers of personal data are subject to limitations and the obligation to ensure an equivalent level of security as that inside the EU, and therefore it is necessary to use one of the methods listed in the GDPR including, in some cases, the prior authorization of the Director of the Spanish Data Protection Agency.

In relation to penalties, worthy of note is the power of the Spanish Data Protection Agency not to commence, in certain exceptional cases, disciplinary proceedings and, instead, require the party responsible for the offense to evidence that it has taken the corrective measures applicable in each case.

The GDPR bases its regulatory structure on the "accountability", which implies the obligation for the data controller to assess the processing that it carries out and the risks attached thereto, adopting the security measures that are more accurate for each case. This principle is closely related to the concept "Privacy by Design and by Default", which places data controllers under the obligation to assess such processing risks and to implement appropriate technical and organizational measures, not only during processing, but also from the design stage of the processing, and to ensure that by default, only the data necessary for the specific purposes of the processing are processed.

2.5 INTELLECTUAL AND INDUSTRIAL PROPERTY AND DOMAIN NAMES

2.5.1 COPYRIGHT

The legal protection of copyright is crucial when engaging in e-commerce in the "information society", since digital content protected by intellectual property (authorship, trademarks, image rights, etc.) constitute the real value added of the internet.

The Copyright Law[4] establishes in article 10 that all original literary, artistic or scientific creations expressed by any means or on any medium, whether tangible or intangible, currently known or invented in the future, are copyrightable. Accordingly, all original creations are subject to protection, including graphic designs and source codes of, and information contained on, websites.

Website content will be afforded such protection as pertains to the specific category of the content (graphics, music, literary works, audiovisual, databases, etc.) and, therefore, the person in charge of the website must hold the related rights, either as the original owner (of the collective work under his management or developed by employees) or as a licensee.

In protecting intellectual property, the owner may seek both civil and criminal remedies. The Copyright Law affords the holder of the rights of exploitation the possibility of applying for the cessation of unlawful activities (e.g., a website unlawfully disseminating a protected work could be closed down) and of seeking damages. From a criminal law standpoint, the protection of intellectual property on the Internet is based on article 270 of the Criminal Code, which imposes prison sentences or fines for crimes against intellectual property.

Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, was implemented in Spain through Law 23/2006, which amends the Copyright Law in order to harmonize the economic rights of reproduction, distribution and public communication (including new forms of interactive on-demand making available of works), with the rest of EU Member States and to adapt the rules governing these rights to the new operating procedures existing in the Information Society. Recently, Spain has placed itself at the forefront of the fight to strengthen copyright protection on the Internet in Europe. The Law 21/2014, of November 4, broadens the powers of the administrative body within the Ministry of Culture and Sport (the "Second Section of the Copyright Commission"), strengthening an expedited hybrid procedure of administrative and judicial nature to fast-track action for copyright infringement on the Internet. The purpose of this amendment is to force Internet Service Providers (ISPs) to take down unlawful content and, in some cases, to shut down websites which openly violate copyright legislation (including websites which actively provide lists of links to unlawful content). However, the amendment is not focused on individuals who share unlawful content through "peer to peer" networks.

Lastly, we must underline the elimination of the private copying levy, applied in Spain until January 1, which required collaboration from manufacturers, distributors and retailers of products "suitable for reproducing copyrighted works". The former system was replaced in 2012 with a new form of compensation which shall be satisfied directly by the State to the copyright owners. The law 21/2014 consolidates the State-funded system.

2.5.2 INTELLECTUAL PROPERTY

When engaging in e-commerce, regard should also be had to intellectual property matters. Article 4.4.c of the Patents Law 24/2015, in force since 1st of April 2017, provides that plans, rules, and methods for conducting a business, as well as software, cannot be patented.

2.5.3 DOMAIN NAMES

Another essential issue to take into account is the registration and use of domain names. In this respect, Order ITC/1542/2005 approved the National Plan for Internet Domain Names under the country code for Spain (".es"). The function of assigning domain names under the ".es" code is performed by the public for-profit entity Red.es.

4 Legislative Royal Decree 1/1996, of April 12, 1996, approving the Revised Intellectual Property Law, regulating, clarifying and harmonizing the legal provisions in force in this area.

7.

Legal framework and tax implications of e-commerce in Spain

Order ITC/1542/2005, following international trends, simplified the system for assigning ".es" domain names, which can be requested directly from the granting authority or through an agent.

Thus, second-level domain names under the code ".es" are assigned on a "first come, first serve" basis. This assignment can be requested by individuals or legal entities and entities without legal personality that have interests in or ties with Spain. However, those which coincide with a first-level domain name or with generally known names of Internet terms will not be assigned.

It is also established that domain names under the codes ".com.es," ".nom.es," ".org.es," ".gob.es" and ".edu.es" may be assigned in the third level. The persons or entities that can apply for the domain names will vary according to the codes. Thus, for example, the Spanish Public Authorities and the public law entities can request domain names under the ". gov.es" code.

Furthermore, the National Plan establishes that the right to use a domain name under the ".es" code is transferable provided that the acquiror meets the requirements necessary to own the domain name and that the transfer is notified to the assigning authority.

Also, one of the main features of Order ITC/1542/2005 is the establishment of an extrajudicial body of mediation and arbitration for the resolution of disputes concerning the assignment of ".es" domain names.

2.6 LAW 34/2002 ON E-COMMERCE AND INFORMATION SOCIETY SERVICES

Law 34/2002 on E-Commerce and Information Society Services (ECISSA) defines as "information society services" any service provided for a valuable consideration, long-distance, through electronic channels and upon individual request by the recipient, also including those not paid for by the recipient, to the extent that they constitute an economic activity for the provider. Specifically, the following are deemed to be information society services:

- Contracting for goods and services through electronic means.
- Organization and management of auctions using electronic means or of virtual shopping centers or markets.
- Management of purchases on the network by groups of persons.
- Sending of commercial communications.
- Supply of information through telematic channels.
- Video upon demand, as a service that the user may select through the network and, in general, the distribution of contents upon individual request.

The ECISSA applies to information society service providers established in Spain. In this respect, the provider is considered to be established in Spain when its place of residence or registered office is located in Spanish territory, provided that it coincides with the place where its administrative management and business administration are actually centralized. Otherwise, the place where such management or direction is performed will be considered.

Likewise, the ECISSA will apply to services rendered by providers who are resident or have a registered office in any other State when the services are offered through a permanent establishment located in Spain. Therefore, the mere use of technological means located in Spain to provide or access the service will not of itself determine that the provider has an establishment in Spain.

The above notwithstanding, the requirements of the ECISSA will apply to service providers established in another State of the European Union or the European Economic Area when the recipient of the services is located in Spain and the services affect:

- Intellectual or industrial property rights.
- Advertising issued by collective investment institutions.
- Direct insurance activities.
- Obligations arising from contracts with consumers.
- The lawfulness of unsolicited commercial communications by e-mail.

The ECISSA establishes the basic legal regime for information society service providers and e-mail activities, including:

- The principle of freedom to provide services not subject to prior authorization applies to information society services, except in certain cases. In the case of service providers established in States that do not belong to the European Economic Area, this principle will apply in accordance with the applicable international agreement.
- The following obligations are imposed on information society service providers:
  - To put in place the means to permit the recipients of the services and the responsible bodies to access easily, directly and free of charge, the information on the provider (corporate name, registered office, registration particulars, tax identification number, etc.), on the price of the product (stating if it includes applicable expenses and shipping costs) and on the codes of conduct to which it has adhered.
  - For providers of intermediation services, to cooperate with the responsible authorities in interrupting the provision of information society services or in withdrawing contents.

7.

Legal framework and tax implications of e-commerce in Spain

Please note that depending on the specific services that these intermediation service providers carry out (access to the internet, e-mail services), they are obliged to furnish certain information such as, for example, the security measures in place, the filters for certain persons to access the site or the responsibility of the users.

- A specific system of liabilities is established for information society service providers, without prejudice to the provisions of civil, criminal and administrative legislation.

- A specific system is established for commercial communications through electronic channels, without prejudice to the legislation in force on commercial, publicity and personal data protection matters. In this regard, commercial communications through electronic channels must be clearly identifiable, stating the individual or corporation for whom they are made, and spelling out the conditions for access and participation, in the case of discounts, prizes, gifts, competitions or promotional games.

  Additionally, advertising or promotional communications sent by e-mail or similar form of communication that have not been previously requested or expressly authorized by the recipients are prohibited. Express consent will not be necessary when there is a pre-existing contractual relationship, provided that the supplier had lawfully obtained the recipient's contact data and that the commercial communications refer to goods or services of the provider's own company which are similar to those for which the recipient initially made a contract. In any case, the provider must offer the recipient the possibility to object to the processing of his data for promotional purposes, through a procedure that is simple and free of charge, both at the time the data is collected and in each of the commercial communications sent to him. Where the communications have been sent by e-mail, that medium shall necessarily include a valid e-mail address where the recipient can exercise this right, it being prohibited to send communications that do not include such address.

- Service providers may use devices for storage and recovery of data on computer terminals of the recipients (commonly known as "cookies"), on the condition that the recipients have given their consent after having received clear and complete information on their use.

  Where technically possible and efficient, the recipient may give his consent to the processing of his data through the use of the appropriate parameters of the browser or of other applications, provided that the recipient must configure it during installation or updating through express action for that purpose.

  The foregoing will not prevent the possible technical storage or access for the sole purpose of transmitting a communication through an electronic communications network or, to the extent that it is strictly necessary, providing an information society service expressly requested by the recipient.

  The Spanish Data Protection Agency is the body with the authority to impose monetary penalties to the information society providers for the use of cookies without the proper informed consent from users of an information society service. The fines can reach the amount of €30.000.

- Contracts through electronic channels are regulated, recognizing the effectiveness of the agreements made through electronic channels when consent has been granted and other requirements necessary for their validity are met. Additionally, the following provisions are established for contracts made through electronic channels:

  - The requirement that a document should be placed on record in writing is considered to be met when it is contained on electronic medium.

  - The admission of documents on electronic medium as documentary evidence in lawsuits.

  - Determination of the legislation applicable to the contract made through electronic channels will be governed by the provisions of international private law.

  - Establishment of a series of obligations to be met prior to commencement of the contracting procedures, relating to the information that must be furnished on the formalities for the making of the contract, the validity of offers or proposals of contracts and the availability, if any, of general contracting conditions.

  - Obligation on the offeror to confirm receipt of the acceptance within 24 hours after its receipt, by an acknowledgement sent by e-mail or equivalent means to that used in the contracting procedure which enables the recipient to give such confirmation.

  - Assumption that agreements made through electronic channels in which the consumer participates have been made in the place where the consumer has his customary place of residence. When these contracts are made between entrepreneurs or professionals, they will be assumed to have been made, in the absence of a provision on the matter, in the place where the service provider is established.

    When dealing with agreements entered into with customers, the Revised General Consumer and User Protection Law should be taken into account, in particular in connection with distance sales.

- Recognition of a ground to claim cessation against conduct that contravenes the ECISSA which is detrimental to collective or general consumers' interests, and promotion of out-of-court settlement of disputes.

- Establishment of minor, serious and gross infringements due to failure to comply with the obligations imposed by the ECISSA, with penalties of up to €600,000.

7.

Legal framework and tax implications of e-commerce in Spain

2.7 PLATFORMS REGULATION

As an important European law it is also worh mentioning the Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 "on promoting fairness and transparency for business users of online intermediation services", known as P2B. This regulation applies to online intermediation services (commonly known as "Marketplace") and the search engine services.

The Regulation imposes certain obligations to the online intermediation services providers, such as the inclusion in the terms and conditions of information on the ranking parameters, clear and transparent description of the terms and conditions and of the ancillary goods and services, limitations regarding termination of the contracts or inclusion of internal complaint-handling systems.

2.8 DIGITAL SERVICE ACT AND DIGITAL MARKETS ACT

As a consequence of the most recent legislative campaign promoted by the European Commission, in relation to the regulation of the digital environment for the creation of a safer digital space, a package of measures has recently been approved for this purpose. These measures include most notably the following:

- Regulation (EU) 2022/2065 of 19 October 2022 on a single market for digital services ("Digital Service Act" or "DSA").

  This Regulation, which was approved on October 4, 2022 and will not come into force until February 17, 2024 (with the exception of certain obligations that apply as from its publication), imposes obligations on digital service providers to prevent unlawful content on the Internet, while seeking to ensure that the rights of their users are safeguarded. Although the DSA partially amends Directive 2000/31/EC, it maintains the exclusion of liability for intermediary service providers, but imposes more obligations on them in terms of transparency, information, design of their services and the implementation of procedures, with the aim of making them more diligent in the removal of the content they host.

  The parties obliged to comply with this regulation include: online intermediation services, data hosting services, online platforms (including social networks and marketplaces) and search engines. In this regard, it should be noted that platforms and search engines with a number of users exceeding 10% of the EU population will be required to comply with additional obligations.

- Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector ("Digital Markets Act" or "DMA").

  This Regulation, applicable as from May 2, 2023, aims to ensure that large digital platforms do not engage in anti-competitive conduct and avoid unfair practices, such as: favoring the services offered by the platforms themselves, preventing professionals using their services from impacting consumers, or preventing the installation of applications from sources other than the service provider itself.

  In order to be considered subject to this rule, a series of conditions must be met. Of these, the following in particular require analysis: the platform's annual turnover in the European Economic Area, whether its services are used for intermediation between a certain volume of end users and professionals, and whether the platform maintains this position over a certain period of time.

  The penalties that the Commission may impose on obligated entities for breaches of the DMA may be up to 10% of a company's worldwide turnover, and up to 20% in the event of repeated breaches.

7.

Legal framework and tax implications of e-commerce in Spain

3

Tax implications of e-commerce in Spain

3.1. INITIATIVES TAKEN IN RELATION TO TAXATION, PROBLEMS AND GENERAL PRINCIPLES

In relation to e-commerce, Law 4/2020 of October 15, 2020 on the Tax on Certain Digital Services ("TCDS") came into force on January 16, 2021, such tax being levied on the provision of certain digital services involving users located in Spanish territory. As shall be explained in greater detail in the section on direct taxation, this is a measure adopted by Spain unilaterally, on a transitional basis, through provisional legislation which shall remain in force until a solution adopted internationally can be implemented.

On the other hand, in relation to VAT, Spain has assumed commitments at European Union ("EU") level.

Below is a list of the basic pieces of VAT legislation emanating from the EU:

- Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. Council Directive 2008/8/EC of 12 February 2008 has amended Directive 2006/112/EC as regards the place of supply of services, introducing, in particular, rules applicable to telecommunications, broadcasting and electronically supplied services, with effect from January 1, 2015. On the other hand, Directive 2017/2455 of 5 December 2017 also introduced certain amendments in relation to on-line trading in goods and services. Part of these amendments came into force on January 1, 2019 (those affecting trade in services) and the pertinent changes have therefore already been made to internal legislation. Other measures, however, will not come into force until January 1, 2021 (those relating primarily to distance sales of goods) and are pending transposition into Spanish legislation.

  Finally, other measures came into force on July 1, 2021 (those relating primarily to distance sales of goods) and have been transposed into Spanish legislation by means of Royal Decree-law 7/2021 of April 27, 2021.

  Additionally, Council Directive 2019/1995 of 21 November 2019 introduced amendments which came into force on July 1, 2021, related to distance sales of goods and certain domestic supplies of goods.

- Council Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax. This Regulation has been amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 as regards the place of supply of services. Similarly, Implementing Regulation 282/2011 was amended by means of Implementing Regulation 2017/2459 of 5 December 2017 for the purpose of introducing certain simplification rules in respect of on-line trading in services for small and medium-sized companies. These changes came into force on January 1, 2019.

  Additionally, Council Implementing Regulation 2019/2026 of 21 November 2019 has also introduced amendments to Implementing Regulation 282/2011 that came into force on July 1, 2021. Those amendments are related to supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods.

- Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, which recast Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative

cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT), in respect of additional measures regarding electronic commerce. On the other hand, this Regulation has been amended by Regulation (EU) 2017/2454, in order to introduce certain changes concerning the transmission of information and transfer of money between Member States, as a result of the new provisions introduced in relation to on-line trading, with effect as from January 1, 2021.

- Council Regulation (EU) No 967/2012 of 9 October 2012 amending Council Implementing Regulation (EU) No 282/2011, as regards the special schemes for non-established taxable persons supplying telecommunications services, broadcasting services or electronic services to non-taxable persons. Among other matters, this Regulation regulates the existence, starting January 1, 2015, of a single point of electronic contact for suppliers of EU electronic, telecommunications, and broadcasting services which will enable enterprises to declare and pay over the VAT in the Member State where they are established rather than doing so in the customer's country.

The content of these EU provisions and their transposition into Spanish law are examined in the section on the indirect taxation of e-commerce.

Work is currently being undertaken by the OECD and the European Union to adapt the international tax system to the digitalization of the economy through the re-allocation of taxing rights to market countries or territories when participating in the economic activity, without the need for a physical presence, and the establishment of certain minimum taxation thresholds, among other questions.

The EU has also been concerned about the growing digital economy of our day. In this sense, it has long promoted the European Strategy eEurope002 (now eEurope2020) which encouraged e-commerce. The consultation period in respect of an initiative to implement a harmonized digital levy was recently initiated.

Finally, it should be noted that on December 30, 2022 the Council of Ministers approved the Draft Law amending the Spanish General Tax Law in order to give effect to the transposition of EU Directive 2021/514 - known as DAC 7 - on cooperation in the field of taxation, the main new feature of which is the obligation to exchange information obtained through the operators of digital platforms with other EU countries.

This transposition improves administrative cooperation in the European Union and extends such cooperation to new areas, with the aim of addressing the challenges posed by the digitalization of the economy and helping tax administrations to collect taxes in a better and more efficient way. In this regard, a new reporting obligation is established with regard to digital platform operators.

In this way, the future regulation will not only transpose the so-called DAC 7, as foreseen in the initial text, but will also implement, in a context of strengthening international cooperation between tax authorities, the Multilateral Agreement between Competent Authorities for the automatic exchange of information on income obtained through digital platforms within the scope of the OECD, which was already signed by Spain.

3.2. DIRECT TAXATION

The following chart shows the main potential issues of this nature.

MAIN CONTENTIOUS ISSUES IN RELATION TO DIRECT TAXATION
a) The permanent establishment problem.
b) Legal characterization of the income generated from the sale of goods and services on the Internet.
c) Determination of taxable income and transfer pricing problems.
d) Application of the place-of-effective-management rule to determine the tax residence of taxable persons engaging in e-commerce activities.

The most relevant considerations and the progress made in analyzing those issues are summarized below:

3.2.1 THE PERMANENT ESTABLISHMENT PROBLEM

The issue concerns whether the paradigmatic elements of e-commerce, such as a server, a website, etc., can be deemed a permanent establishment ("PE") in the country where a company supplying a good or service on the Internet is located:

In the Commentary published in December 2017 on the OECD Model Tax Convention, the comments regarding article 5 (concerning the definition of PE) remain unchanged from those published in 2003, in which the elements defining the new forms of commerce were already foreshadowed. Based on the observations made in the Commentary, the following chart shows the scenarios in which, as a general rule, a PE can be deemed to exist and those in which it cannot:

CAN CONSTITUTE A PE	CANNOT CONSTITUTE A PE
Server	Software.
	Website.
	ISP (Internet Service Provider).
	Hosting.

The reasons justifying the characterization of a PE in each case are as follows:

- A computer or server can constitute a PE whereas the software used by that computer cannot. This distinction is important because the entity that operates the server hosting the website is normally different from the entity that engages in the online business (hosting agreements).

  In order to characterize a server as a PE, regard must be had to the following considerations:

  - A server will constitute a fixed place of business only if it is permanent and located in a certain place for a sufficient length of time. What is relevant here is

whether it is actually moved from one place to another, rather than whether it can be moved. A server used for e-commerce can be a PE regardless of whether or not there is personnel operating that server, since no personnel is required to perform the operations assigned to the server.

- In determining whether or not the server installed by a given enterprise in a country constitutes a PE, it is particularly important to analyze whether the enterprise engages in business activities specific to its corporate purpose through that server, or whether, on the contrary, it only engages in activities of a preparatory or auxiliary character (such as advertising, market research, data gathering, providing a communications link between suppliers and customers, or making backup copies).

- A website does not, in itself, constitute tangible property and, therefore, cannot be deemed a "place of business," defined as facilities, equipment, or machinery capable of constituting a PE. ISPs do not generally constitute a PE of enterprises that engage in e-commerce through websites since ISPs are not generally dependent agents of those nonresident enterprises.

3.2.2 LEGAL CHARACTERIZATION OF INCOME

The second relevant issue is the characterization of income and, in particular, the possibility that certain goods supplied online may, merely by virtue of the fact that they are protected by intellectual or industrial property laws (such as music, books and, particularly, software), be characterized as generators of royalties and, therefore, be taxable in the country of source.

The Commentaries on the OECD Model Tax Convention characterize as business profits (instead of royalties) almost all payments made for all intangible goods delivered electronically, on the ground that the subject-matter of those transactions are copies of images, sounds or text, rather than the right to exploit them commercially.

Initially, Spain included an observation on the relevant Commentary on the 2003 Model Tax Convention qualifying the treatment of the acquisition of rights to software by arguing that payment for those rights could constitute a royalty. Specifically, Spain considered that payments relating to software were royalties where less than the full rights to it were transferred, either if the payments were in consideration for the use of a copyright on software for commercial exploitation or if they related to software acquired for business or professional use when, in this latter case, the software was not absolutely standardized but somehow adapted to the purchaser.

However, the relevant Commentary on the OECD Model Tax Convention published in July 2008 took the novel line that payments made under arrangements between a software copyright holder and a distribution intermediary do not constitute a royalty if the rights acquired by the distributor are limited to those necessary for the commercial intermediary to distribute copies of the software. Thus, if it is considered that distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights (without the right to reproduce the software), payments in these types of arrangements would be characterized as business profits. The Commentary published in December 2017 maintains this position.

In light of this change in the Commentary on royalties in the OECD Model Tax Convention, Spain introduced a qualification in the observations published in July 2008 (which was kept in the Commentary on the OECD Model Tax Convention published in December 2017), indicating that payments in consideration for the right to use a copyright on software for commercial exploitation constitute a royalty, except payments for the right to distribute standardized software copies, not comprising the right to customize or to reproduce them.

Therefore, as acknowledged by the Directorate-General of Taxes ("DGT") in its binding ruling of November 10, 2008 and other subsequent rulings, Spain considers that payments made for the right to distribute standardized software copies are business profits, although it continues to treat as royalties any payments made for the right to distribute software where the software has been adapted. This issue is also addressed, in relation to a "cloud base software distribution agreement", in ruling V2039-15 of July 1 2015, in which the DGT resolves, on the basis of agreements of this type, on the distinction between business profits and royalties. In any case, as was clarified in a binding ruling of November 23, 2010, the transfer, together with the distribution right, of other rights, such as a license to adapt the software being distributed, will mean that the payments are treated as royalties.

It should also be noted that article 13 of the Revised Non-resident Income Tax Law, approved by Legislative Royal Decree 5/2004, of March 5, 2004, treats as royalties amounts such as those paid for the use of, or the right to use, rights in software.

Also, in some tax treaties signed by Spain, income derived from the licensing of software is expressly characterized as a royalty. In this regard, one should note the Supreme Court judgment of March 25, 2010, which defined the licensing of software as a license of the rights to exploit a literary work, although the Court's definition addressed a situation pre-dating the entry into force of the Spanish legislation specifically listing the items deemed to be royalties. However, in a judgment dated March 22, 2012, the National Appellate Court held that such a definition was no longer possible after the entry into force of the above-mentioned legislation. The Supreme Court confirmed this view in a judgment handed down on March 19, 2013, in which it held that characterization as a literary work is no longer correct after the change in the legislation, reflecting a criterion which has continued to gain strength in judgements delivered by this High Court (the most recent of which include judgement STS 2189/2016 of October 11, 2016).

Finally, it is relevant to mention the judgment issued by the National Appellate Court on June 18, 2021 in which it established that payments made for the transfer of the use of rights over computer programs in which the client is allowed to modify the software transferred (with access to the source code) cannot qualify as business profits, but constitute royalties. The Court reached this conclusion by stating that there are not only two types of software: standardized and custom-made. There is also a type of software which is called "customizable" and which, by its definition, can be considered as "non-standard" software.

3.2.3 DETERMINATION OF TAXABLE INCOME AND TRANSFER PRICING PROBLEMS

The widespread use of intranets among different companies belonging to multinational groups, and the enormous mobility of transactions over computer networks, create highly complex problems when applying the traditional arm's-length principle to pricing transactions within groups. This has been accentuated by the increase in transactions between group companies and the downloading of digital content or of free services.

Accordingly, the tax authorities of OECD countries (including Spain) are advocating the development of bilateral or multilateral systems for advance pricing agreements, applying the OECD transfer pricing guidelines to e-commerce. Noteworthy in this regard is the creation of an EU Joint Transfer Pricing Forum in which, among other matters, non-legislative measures are being proposed to enable a uniform application of the OECD guidelines across the EU.

Following the initial proposal in relation to Actions 8 to 10 of the BEPS Action Plan, which are ultimately aimed at ensuring that the results of transfer pricing are in line with the creation of value, the implementation of these measures was initially addressed in July 2017 by the OECD Guidelines on transfer pricing for multinational enterprises and tax administrations, which have recently (in January 2022) been updated.

The update reflected in this new version focuses on three main areas:

- Revised guidance in relation to the method for allocating results.
- Guidance for tax administrations regarding the application of the approach towards hard-to-value intangibles.
- Transfer pricing guidance on financial transactions.

In what concerns the second point, which reflects the work carried out by the OECD since the report published in June 2018 on this matter, it is now included in Appendix II of Chapter VI of the 2022 Guidelines. A particular aspect of this new publication regards the guidance reflected on the ex ante criterion, related to pricing, and the ex post criterion, which attends the reliability of evidence on financial results, related to transactions based on the arm's length principle. Some examples are provided to illustrate the adjustments that can be made, in practice, in respect of intangible property of this type.

3.2.4 APPLICATION OF THE PLACE-OF-EFFECTIVE-MANAGEMENT RULE

Due to the special characteristics of e-commerce (which include easy detachability from location, relative anonymity, and the mobility of the parties involved), the traditional rules on taxation of worldwide income, based on the principles of residence, registered office or place of effective management, are more difficult to apply to taxpayers engaging in e-commerce.

Indeed, the parameters established in the tax treaties for apportioning the revenue powers among States in the event of a conflict (most of them based on the "place-of-effective-management" principle) are exceeded in the context of e-commerce, since the various managing bodies of the same enterprise can be located in different jurisdictions and be totally mobile during the same year. It can therefore be extremely difficult to determine where the enterprise's place of effective management is situated, and this can lead to double taxation or to no taxation at all[5].

3.3. INDIRECT TAXATION

It is in the area of VAT where the most relevant coordinated legislative measures have been adopted.

The indirect taxation implications for e-commerce have so far mainly concerned "online e-commerce," a term that refers to products supplied on the Internet in digitized format (books, software, photographs, movies, music, and so on) and downloaded by a user in real time onto his or her computer, having clicked on to the supplier's website and paid for the products in question (in contrast to offline supplies where products sold on the Internet are subsequently delivered by using conventional means of transportation).

However, the EU provisions regarding offline intra-Community trade in goods (distance sales), which are also referred to in this chapter, are to came into force with effect as from July 1, 2021.

There are other relevant VAT issues also to be considered in relation to e-commerce (especially in the area of online e-commerce). These are basically the following:

5 From a general perspective, mention should be made of the State Tax Agency Directorate General's Ruling of January 26, 2022 approving the general guidelines of the 2022 Annual Tax and Customs Control Plan.

Point A4 of this Ruling, on the "control of economic activities", in section two entitled "control of internal taxes", under heading III on "investigation and verification proceedings in respect of tax and customs fraud", expands upon the various provisions planned to be carried out in 2022. These relate to (i) e-commerce, (ii) the ban on dual-use software, (iii) virtual currencies, and (iv) other virtual work, on which further information will be further provided in the section on indirect taxation.

7.

Legal framework and tax implications of e-commerce in Spain

- The determination of the VAT rates applicable to the different types of e-commerce.
- The adaptation of the formal obligations and management of VAT to the realities of e-commerce and, particularly, the invoicing obligations.
- The problems already raised in relation to direct taxation, regarding the determination of the existence of a fixed establishment and of the effective place of business, are also applicable in the area of indirect taxation. Council Implementing Regulation (EU) No 282/2011 has clarified these concepts, defining them as follows:
    - Place of establishment of a business: The place where the functions of the business's central administration are carried out, i.e., the place where essential decisions concerning the general management of the business are made, the place where the registered office is located or the place where management meets. The Regulation clarifies that if, having regard to the above criteria, the place of establishment of a business cannot be determined with certainty, the place where essential management decisions are made will take precedence. It also clarifies that a postal address cannot be taken to be the place of establishment of a business.
    - Fixed establishment: Any establishment, other than the place of establishment of a business, with a degree of permanence and a suitable structure in terms of human and technical resources to enable the services supplied it to be received and used for its own needs.

Each of these issues is briefly examined below.

3.3.1 SERVICES PROVIDED ELECTRONICALLY

3.3.1.1 Definition of "taxable event" as a supply of goods or services for the purpose of determining the place of supply

Directive 2002/38/EC was based on the premise that transactions performed electronically are deemed supplies of services:

- Services will be deemed to be electronically supplied services where their transmission is sent initially and received at destination by electronic data processing equipment. The fact that the supplier of a service and his customer communicate by e-mail does not of itself mean that the service performed is an electronically supplied service.

  In relation to the concept of "electronically supplied service", article 7 of Council Implementing Regulation (EU) No 282/2011 further defined it by including a list of services that must be regarded as electronically supplied services and others that are not. In this regard, article 7 established that electronically supplied services are those "delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology".

7.

Legal framework and tax implications of e-commerce in Spain

Implementing Regulation 1042/2013, to which we shall refer subsequently because it regulated the changes which came into force on January 1, 2015, revised the list of electronically supplied services as set out in the following table:

ELECTRONICALLY SUPPLIED SERVICES	SERVICES NOT SUPPLIED ELECTRONICALLY
a. The supply of digitized products generally, including software and changes to or upgrades of software.	a. Radio and television broadcasting services.
b. Services providing or supporting a business or personal presence on an electronic network such as a website or a webpage.	b. Telecommunications services.
c. Services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient.	c. Goods, where the order and processing are done electronically.
d. The transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by e-mail automatically generated from a computer.	d. CD-ROMs, floppy disks and similar tangible media.
e. Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e., packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.).	e. Printed matter, such as books, newsletters, newspapers or journals.
f. The services listed in Annex I.	f. CDs and audio cassettes.
	g. Video cassettes and DVDs.
	h. Games on a CD-ROM.
	i. Services of professionals such as lawyers and financial consultants, who advise clients by e-mail.
	j. Teaching services, where the course content is delivered by a teacher over the Internet or an electronic network (namely via a remote link).
	k. Offline physical repair services of computer equipment.
	l. Offline data warehousing services.
	m. Advertising services, in particular as in newspapers, on posters and on television.
	n. Telephone helpdesk services.
	o. Teaching services purely involving correspondence courses, such as postal courses.
	p. Conventional auctioneers' services reliant on direct human intervention, irrespective of how bids are made.
	q. Tickets to cultural, artistic, sporting, scientific, educational, entertainment or similar events, booked online.
	r. Accommodation, car-hire, restaurant services, passenger transport or similar services booked online.

7.

Legal framework and tax implications of e-commerce in Spain

3.3.1.2 Place of supply of services provided electronically

Directive 2006/112/EC provides that starting on January 1, 2015, the electronically supplied services will be taxed in the Member State where the recipient is established, regardless of where the taxable person supplying them is established. Thus, effective that date, where the recipient is established in Spain, the services will be deemed supplied in Spanish VAT territory. This general rule is applicable for both recipients classed as traders or professionals and those not classed as such.

The above notwithstanding, Directive 2017/2455, effective as from January 1, 2019, established a threshold for the determining the place of provision of these services, the rule being that when the total amount of services of this kind rendered by the services provider does not exceed, in the current year or the preceding year, €10,000, services provided to final consumers shall be considered subject to VAT in the place where the supplier is established. It should be borne in mind that, effective since July 1, 2021, intra-Community distance sales have also been taken into account for the purposes of calculating this €10,000 threshold.

Spanish legislation stipulates that businesses and professionals may opt voluntarily for taxation at destination even when the €10,000 threshold is not exceeded, this option being valid for a minimum of two calendar years. The option must be exercised through the pertinent census communication, using form 036. In addition, since the approval of Royal Decree 1512/2018 of December 28, 2018, which amends – inter alia - the VAT Regulations, the rule has been that taxable persons who take up this option must demonstrate to the tax administration that the services rendered have been declared in another Member State. Similarly, taxable persons wishing to extend the option exercised must reaffirm it once two calendar years have elapsed, with failure to do so resulting in automatic revocation.

In order to implement the above provisions, Implementing Regulation 1042/2013 introduced the relevant amendments. Accordingly, the Regulation contains provisions:

- To define and update the list of services that are affected by the rules discussed here and to clarify who the supplier is where several traders are involved (e.g. sale of applications).
- To define the place of establishment of the customer (legal person not acting as a trader).
- To clarify – since certain rules already exist in this respect in the Regulation – how to evidence the trader's status as a recipient.
- To specify the place of actual consumption of the services through presumptions on the customer's permanent address or residence and the evidence that can be required, if applicable, to rebut them.
- To establish transitional provisions.

The Regulation also address the supply of services through a portal or telecommunications network such as a marketplace for applications, in order to clarify who will be deemed the supplier in these cases.

The Regulation contains a number of provisions aimed at defining the place of business, establishment, permanent address or habitual residence according to the type of customer in order to clarify the application of the place-of-supply rules for supplies of services that depend on these circumstances.

These definitions are kept intact, although a specific rule is added for legal persons who do not act as traders whose place of establishment will be where the functions of their central administration are carried out (place of business) or where they have a PE that is suitable for receiving or using the services.

As regards determining the location of the recipient, the place-of-supply rules that apply from 2015 are those for supplies to parties acting as final consumers, that is, natural or legal persons not acting as traders.

For these purposes, the supplier may regard the recipient as the final consumer as long as the recipient has not communicated his individual VAT identification number to the supplier but, unlike other supplies of services, the supplier may consider the recipient as the final consumer regardless of whether he has information to the contrary.

In the case of legal persons that have several establishments or of natural persons who have a permanent address other than their habitual residence, the Regulation establishes that:

- For non-trader legal persons the "place of business" prevails on the terms defined in the preceding section.
- For natural persons, priority will be given to their habitual residence (a concept which is already defined in the Regulation in its current wording) unless there is evidence that the service is used at the person's permanent address.

However, these rules are not sufficient to determine the place of supply of services where the same recipient can access them from several places or by various means. To try to cover the most frequent cases, the Regulation includes specific rules such as the following:

- If the services are supplied requiring the physical presence of the customer (e.g. an internet café, a wi-fi hot spot or a telephone booth), the services will be taxed at that location. This rule also applies to services supplied by hospitality establishments where they are supplied in connection with accommodation services.
- If the service is supplied on board a ship, aircraft or train, at the place of departure of the transport operation.

- A service supplied through a fixed land line, at the permanent address of the customer where it is installed.
- If it is supplied through mobile networks, at the country identified by the mobile country code of the SIM card.
- If the service requires a viewing card or decoder or similar device (without being supplied through a fixed land line), where the decoder or similar device is located, or if that place is not known, at the place to which the viewing card is sent.

In any other case, at the place identified as such by the supplier on the basis of two items of evidence: billing address, IP address, bank details (e.g. place of demand deposit account), the mobile country code stored on the SIM card, location of the land line, other commercially relevant information.

Since January 1, 2019, the rule has been that only one item of evidence is required when the amount of these services rendered by the services provider does not exceed €100,000, either for the current year or the preceding year.

The presumptions on the place of supply of the service described can be rebutted by the supplier if three of the items of evidence listed in the preceding point determine a different place of supply.

The tax authorities may, in turn, rebut any of the presumptions described where there are indications of misuse or abuse by the supplier.

Lastly, there is a use and enjoyment rule set out in article 70.2 of the VAT Law that applied to electronic services provided both to private individuals and traders or professionals. This closing rule meant that electronic services would be subject to Spanish VAT when, under the general place-of-supply rules, they were not deemed made in the EU, the Canary Islands, Ceuta or Melilla, but they were effectively used or utilized in such territory.

Since January 1, 2023, that rule has been modified by Law 31/2022, of December 23, 2022, on General State Budgets for 2023, eliminating its application to the services provided electronically.

3.3.1.3 Special schemes applicable to electronic services

Directive 2002/38 created a special regime applicable to electronic services provided by traders or professionals not established in the EU to final consumers in the EU (the Non-Union Scheme). The scope of this special scheme was extended, as from January 1, 2015, to cover services provided to private individuals by operators established in the EU but not in the Member State of consumption (the Union Scheme).

The schemes in question, which are optional for the traders by whom such services are provided, are aimed at simplifying their obligations, so that traders only have to register (electronically) in one Member State, although they will have to charge the VAT relating to each of the jurisdictions where their customers are located and pay it over (also by telematic means) to the tax authorities of the Member State in which they are registered. Subsequently, that Member State will reapportion the VAT collected among the other Member States.

The "mini one stop shop" system was created for this purpose, to allow the taxable person to file in the Member State of identification a single return which includes transactions addressed to final consumers of different Member States.

Similarly, Regulation 282/2011 establishes certain special VAT management rules in the case of exclusion from the scheme, rectification of VAT returns, impossibility of rounding off the VAT payable, etc.

Summarized below are the main characteristics of each of these schemes:

- The Non-Union scheme:

  This scheme may be applied by traders or professionals who are not established in the EU and provide electronic services to final consumers in the EU.

  The trader is required for these purposes to register in a Member State (the "MS of identification"), in which it must comply with the obligations deriving from the scheme. If the Member State of identification is Spain, the corresponding returns declaring the commencement, change or cessation of operations covered by the scheme — form 035 — must be presented, VAT returns must be filed electronically, the corresponding amount of VAT must be paid in, a register of operations included under the scheme must be kept, etc.

  Non-established traders or professionals that apply this special regime in Spain will be entitled to a refund of input VAT in accordance with the refund procedure for non-established traders, without being subject to the reciprocal treatment requirement generally established in the legislation.

- Union Scheme:

  This scheme is available to traders who provide electronic services and are established in the EU but not in the Member State of consumption.

  In this case, the Member State of identification is the place where the trader's main place of business is located or, if this is outside the EU, the place where it has a fixed establishment. If the trader has more than one fixed establishment, it can chose the Member State of identification.

  If the Member State of identification is Spain, the corresponding returns declaring the commencement, change or cessation of operations covered by the special scheme — form 035 — must be presented, VAT returns

must be filed in respect of these services, the VAT must be paid in, a register of operations included under the scheme must be kept, etc.

It should be noted that traders established in a Member State cannot apply these special schemes in respect of technological services provided in the Member State in which they themselves are established.

VAT charges borne for the provision of technological services can be deducted either through the general procedure or via the procedure envisaged for traders established in another EU Member State.

For these purposes, where Spain is the Member State of identification, VAT borne in Spanish territory must be deducted in the returns filed under the general VAT regime.

If Spain is the Member State of consumption, the deduction procedure is that envisaged for non-established persons in article 119 of the VAT Law.

3.3.2 THE NEW TREATMENT APPLICABLE TO DISTANCE SALES OF GOODS AND CERTAIN DOMESTIC SUPPLIES OF GOODS AND NEW ONE STOP SHOP SCHEMES

As mentioned above, a package of EU measures — established in Directives 2017/2455 and 2019/1995 — is set to come into force with effect as from July 1, 2021. These will be applicable primarily to distance sales of goods and certain imports and will make it possible to pay VAT in in the Member State of identification through the "one stop shop".

These EU measures were transposed into Spanish legislation[6] during 2021. We describe below the main changes introduced within the offline e-commerce framework:

- As a general rule, **distance sales** made from one Member State to another, to recipients who are not acting as traders or professionals are deemed subject to VAT in the Member State of destination.

  Taxation will nevertheless take place in the Member State of origin where the following requirements are met:

  - The seller is established in a single Member State.
  - Total distance sales for the year do not exceed €10,000, with provisions of telecommunications services, broadcasting and television services and services provided electronically also being taken into account for these purposes.

In any event, the rule will envisage the possibility of opting voluntarily for taxation in the Member State of destination.

- A special one stop shop scheme – "Union Scheme" — was introduced to simplify the self-assessment and paying-in of VAT, and this is similar to that already in place for digital services, as referred to above. The filing of a single quarterly return in the Member State of identification has been envisaged for these purposes, including all intra-EU distance sales of goods.
- A new **special scheme was introduced for distance sales of goods imported from third countries** – the "Import scheme" — which are not subject to special taxes and whose intrinsic value does not exceed €150. Over and above this value, a full customs declaration is required at the time of importing the goods.

  The general rule under this scheme is that the place of supply will be the Member State of destination of the goods and that the import of the goods will be exempt in order to avoid double taxation. A one stop shop system with a monthly return in the Member State of Identification is also envisaged.

Lastly, VAT relief (exemptions) on imports of goods of negligible value — which had been set at €22 — was eliminated. As a result, since July 1, 2021, imports have been subject to and not exempt from VAT whatever their value.

- In certain cases, **the operators of the electronic interface are responsible for payment of the VAT** (on the understanding that they act as intermediaries in the sale in their own name).

  In particular, it is established that a trader who facilitates certain sales through the use of electronic interfaces (online marketplace, platform, portal or similar) has itself received and supplied the goods in the following situations:

  a. Distance sales of imported goods in consignments with an intrinsic value not exceeding €150.

  b. Supply of goods made within the EU by traders not established in the EU to private individuals.

     In this way, when the interface is understood to have facilitated the sale, two supplies of goods take place: (i) that made by the supplier of the goods to the trader who facilitates the sale via the electronic interface and (ii) the supply made by such trader to the private individual.

6 We refer, specifically, to Royal Decree-law 7/2021, of April 27, 2021 on the transposition of European Union directives on competition, anti-money laundering, credit institutions, telecommunications, tax measures, environmental damage prevention and remediation, posting of workers in the framework of the transnational provision of services and consumer protection; to Royal Decree 424/2021 of June 15, 2021 amending, inter alia, the VAT Regulations (Royal Decree 1624/1992), and the Billing Regulations (Royal Decree 1619/2012).

7.

Legal framework and tax implications of e-commerce in Spain

3.3.3 NEW REGIMES APPLICABLE TO SERVICES PROVIDED BY TAXABLE PERSONS NOT ESTABLISHED IN THE MEMBER STATE OF CONSUMPTION

In addition to the one stop shop schemes referred to in previous sections, "Directive 2017/2455, since July 1, 2021, has envisaged the possibility of including in the Union Scheme services provided by traders or professionals established in the EU but not in the Member State of consumption, to recipients who are not classed as traders or professionals acting in their capacity as such, following identification for this purpose in the Member State of their choice.

Similarly, services provided by taxable persons not established in the EU who provide services to recipients who are not classed as EU traders or professionals would come under the Non-Union Scheme.

3.3.4 DETERMINATION OF THE VAT RATES APPLICABLE TO THE VARIOUS TYPES OF E-COMMERCE

In keeping with the view held by the Spanish tax authorities, the standard VAT rate of 21% will apply in all cases, since it is a kind of service for which the VAT Law makes no special provision.

In the case of electronic books, newspapers and magazines, however, the legislation envisages, as from April 23, 2020, the application of the super reduced VAT rate (of 4%) when such publications are not made up solely or primarily of advertising and do not consist entirely or mainly of audible video or music contents, and supplementary items supplied along with them for a single price.

3.3.5 FORMAL OBLIGATIONS AND MANAGEMENT OF TAXES

Both the EU and the Spanish tax authorities ascribe to the principle that this form of commerce should not be hindered by the imposition of formal obligations that reduce the speed with which transactions should be performed.

Of particular relevance in this regard are the rules already contained in Council Regulation (EEC) No 1798/2003 on administrative cooperation in the field of Value Added Tax, which, among other matters, provides that individuals and legal entities involved in intra-Community transactions can access the databases kept by the tax authorities of each Member State. This possibility of identifying reliably the status under which the recipient is acting (trader, professional or final consumer) is absolutely decisive for the proper tax treatment of each transaction.

Royal Decree 1619/2012, approving the Regulations on Invoicing Obligations, establishes the legal regime applicable to electronic invoices, which are defined as invoices that have been issued and received in electronic format without the use of a certain technology being required. This Royal Decree supersedes its predecessor, Royal Decree 1496/2003, and stipulates that paper and electronic invoices are treated similarly. In addition, it permits invoices to be kept in an electronic format provided that the conservation method ensures the legibility of the invoices in the original format in which they were received, and the data and mechanisms that guarantee the authenticity of their origin and the integrity of their contents.

The requirements that must be met by electronic invoices are as follows:

- The recipient must have given his consent.
- The invoice must reflect the reality of the transactions documented in it and guarantee this certainty throughout its period of validity.
- The authenticity, integrity and legibility of the invoice must be ensured.

These aspects must be guaranteed by any legally admissible proof and, in particular, through the "usual management controls over the business or professional activity of the taxable person" which must enable the creation of a reliable audit trail establishing the necessary connection between the invoice and the supply of goods or services documented in it.

The authenticity of the origin and integrity of the contents will, in all cases, be guaranteed by:

- The use of an advanced electronic signature based either on a qualified certificate and created using a secure-signature-creation device, or on a qualified certificate.
- An EDI that envisages the use of procedures that guarantee the authenticity of the origin and integrity of the data.
- Other means that have been communicated prior to their use and validated by the authorities.

In relation to the issue of invoices, Royal Decree 1512/2018 of December 28, 2018 which amends – inter alia - the VAT Regulations, stipulates that the legislation applicable to invoices issued by taxable persons who have elected to apply the special single one-stop shop regimes for telecommunications, radio and television broadcasting services and services provided electronically - which had previously been the legislation of the Member State of consumption - shall now be that of the Member State of identification. This avoids the taxable person being subject to different legislative regimes in relation to billing.

Accordingly, the aforementioned Royal Decree 1512/2018 of December 28, 2018 amends the Billing Regulations and clarifies that Spanish billing rules shall be applicable when Spain is the Member State of Identification of the provider of electronic services.

Moreover, the entry into force on July 1, 2021 of the provisions of Directive 2017/2455 will result in the elimination of the obligation to issue an invoice in distance sales for which this was previously required in accordance with the billing obligations applicable in the Member State of destination of the goods.

On the other hand, regarding to formal obligations, it must be noted that since 1 July 2017, taxable persons who have to file monthly VAT returns (generally, those whose turnover in the previous year exceeded €6,010,121.04; any taxable

person registered in the monthly refund scheme, and any taxable person applying the VAT grouping regime) have also been required to keep their business records on the website of the Spanish tax agency (AEAT) by electronically providing the information requested therein, together with some additional data of the invoices (but not the invoices themselves).

Under this system (generally known as "SII"), taxable persons will have to submit the information related to invoices issued within 4 calendar days from the date of issuance. If they are invoices issued by the recipient or by a third party, a longer time period of 8 calendar days is allowed. In both cases, subject to a limit ending on the 16th day of the month following that in which VAT on the transaction became chargeable.

Invoices received must also be reported within 4 calendar days, in this case from the date when they are recorded in the accounts. A limit is laid down, also ending on the 16th day of the month following the assessment period in which the transactions are included. A similar rule applies to import transactions.

Saturdays, Sundays and public holidays are excluded from the calculation of the time periods.

The above notwithstanding, in the case of taxable persons who apply the special regime for telecommunications, radio and television broadcasting services and services provided electronically, it is not necessary to record the operations performed under this special regime in VAT registers. Instead, a specific register must be kept, containing a series of special fields:

a. *The Member State of consumption in which the service is provided;*

b. *the type of service provided;*

c. *the date of provision of the service;*

d. *the taxable amount, indicating the currency used;*

e. *any subsequent increase or reduction of the taxable amount;*

f. *the tax rate applied;*

g. *the amount of tax owed, indicating the currency used;*

h. *the date and amount of payments received;*

i. *any advance received prior to the provision of the service;*

j. *the information contained in the invoice, if this has been issued;*

k. *the name of the customer, where available;*

l. *the information used to determine the place where the customer is established, or its domicile or habitual place of residence."*

3.3.6 TAX ON CERTAIN DIGITAL SERVICES

The preamble to the Law approving the TCDS reminds us that the creation of this tax is temporary until the OECD completes its works to adapt the international tax system to the digitalization of the economic, through the "re-allocation of taxing rights to market countries or territories when participating in the economic activity, without the need for a physical presence, creating a new nexus for that purpose", in clear reference to pillars 1 and 2 of the OECD.

The TCDS charges taxes to companies whose global net revenues in the preceding calendar year are above 750 million euros and that obtain revenues in Spain (also in the preceding calendar year) of at least 3 million euros derived from the provision of online advertising services, online intermediation services or the sale of data generated on the basis of information provided by the user of digital interfaces.

The tax rate at 3%, and the scope of the tax excludes sales of goods or services between users in the context of an online intermediation service, and sales of goods or services contracted online on the website of the supplier of those goods or services in which the supplier does not act as intermediary. The tax will be assessed every three months as indicated in the Ministerial Order of June 9, 2021 approving the self-assessment tax form (i.e., Form 490) for payment of the aforementioned tax.

It is stipulated in the sole transitional provision that for 2021, the revenue taken into account shall be the total amount deriving from digital services subject to the tax from January 16, 2021 through to the end of the settlement period, on an annualized basis.

The DGT, in its Ruling of June 25, 2021, has sought to provide clarification and greater legal certainty in the interpretation of the elements and criteria relating to this tax, focusing on the following concepts:

- Online advertising services.
- Online intermediation services.
- General instances of non-subjetion.
- Accrual and taxable amount.

The Spanish tax authorities have also made available to taxpayers a bank of frequently asked questions updated to March 24, 2022.

GUIDE TO BUSINESS IN SPAIN /2023

June 2023 / **NIPO (PDF)**: NIPO: 114230304

GOBIERNO DE ESPAÑA · MINISTERIO DE INDUSTRIA, COMERCIO Y TURISMO · ICEX · INVEST IN SPAIN · GARRIGUES