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USTR investigates digital services taxes in nine more countries and the European Union, as multilateral efforts falter

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On 2 June the Office of the United States Trade Representative (USTR) announced that it is launching investigations under Section 301 of the Trade Act of 1974 into digital services taxes (DSTs) adopted or under consideration in Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.

The USTR seeks to determine whether the taxes are discriminatory or unreasonable and burden or restrict U.S. commerce. A finding in the affirmative, which is a virtual certainty, would allow the United States to take unilateral actions against imports of goods and services from the imposing country or jurisdiction, most likely in the form of increased tariffs on imports of their goods. These investigations have taken on a new impetus in light of the administration's 17 June announcement that it is stepping away for now from efforts at a multilateral solution to taxation of the digital economy being conducted at the Organization for Economic Co-operation and Development (OECD).

The USTR will investigate a number of DST policies currently in place.

- Austria: Austria's 5 percent DST that applies to revenues from online advertising sources went into effect on 1 January 2020. The DST applies only to companies with at least €750 million in annual global revenues for all services and €25 million in in-country revenues for covered digital services.

- India: On 1 April 2020 India imposed a 2 percent tax on nonresident companies' online sales of goods and services to, or aimed at, persons in India. The tax only applies to companies with annual revenues greater than Rs20 million.

- Indonesia: Indonesia has adopted an electronic transaction tax that will apply to cross-border, digital transactions. The tax has not yet gone into effect.

- Italy: Italy imposed a 3 percent tax on revenues from advertising and digital interface services on 1 January 2020. The DST only applies to companies generating at least €750 million in global revenues for all services and €5.5 million in in-country revenues for covered digital services.

- Turkey: Turkey's DST currently imposes a 7.5 percent tax on revenues from targeted advertising, social medial, and digital interface services, but the Turkish president has the authority to increase the tax up to 15 percent. The DST went into effect on 1 March 2020 and only applies to companies generating at least €750 million in global revenues from covered digital services and TL20 million in in-country revenues for covered digital services.

The USTR will also investigate DST policies under consideration by certain countries:

- Brazil: The legislature has proposed the "Contribution for Intervention in the Economic Domain" which would impose a tax on gross revenues derived from digital services provided by large technology companies.

- Czech Republic: Parliament is considering a 7 percent DST on revenues from targeted advertising and digital interface services. The DST would only apply to companies with at least €750 million in annual global revenues for all services and CZK50 million in in-country revenues in covered digital services.

- European Union: The European Commission is considering a 3 percent tax on revenues from targeted advertising and digital interface services as a part of its proposed COVID-19 recovery plan. The DST would only apply to companies with at least €750 million in annual global revenues from covered digital services and €50 million in EU-wide revenues in covered digital services.

- Spain: The proposed measure would apply 3 percent tax to revenues from advertising and digital interface services. The DST would only apply to companies generating at least €750 million in revenue for all services and €3 million in in-country revenue for covered digital services.

- United Kingdom: Parliament is considering a 2 percent tax on UK revenues above £25 million from internet search engines, social media services, and online marketplaces. The tax would only apply to companies generating at least £500 million in global revenues from covered digital services and (of course) £25 million in in-country revenues from covered digital services.

The investigations will initially focus on the following concerns with respect to the DST: discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy, including "extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success," according to the Federal Register notice. USTR Robert Lighthizer stated that "President Trump is concerned that many of [the United States'] trading partners are adopting tax schemes designed to unfairly target [U.S.] companies," and that the USTR is "prepared to take all appropriate action to defend [U.S.] businesses and workers against any such discrimination."

The USTR has previously investigated France's digital services tax and found it in violation of Section 301. France's DST went into effect in July 2019 and imposed a 3 percent tax on revenues derived from certain digital advertising services and digital interface services. Only companies with at least €750 million in global gross revenues and at least €25 million in gross revenues from the covered services in France are subject to the tax. The United States planned to impose tariffs of up to US$2.4 billion on politically sensitive French products (e.g., wine) and leading French brands (e.g., cosmetics).

The United States previously suspended imposing tariffs on imports from France pending the outcome of multilateral negotiations at the OECD. The administration's involvement in those talks appears to have been put on "pause," however, after several countries, including the United Kingdom, France, Italy, and Spain, pushed to move forward immediately with an initial agreement targeting digital services and particularly U.S. technology leaders (including Apple, Facebook, and Google, among others). Treasury Secretary Munchin instead has pressed for a broader OECD arrangement that would impact all consumer-facing businesses. USTR Lighthizer confirmed to the House Ways and Means Committee, on 17 June, that the United States is temporarily withdrawing away from those negotiations.

The current European proposal being debated by the OECD is similar to many of the imposed or considered DSTs detailed above, in that it would allocate additional taxing rights to market jurisdictions – where the actual consumers or online users are located – based on a percentage of the multinational company's global sales. Such a system would permit countries to impose this tax irrespective of whether a company is physically present in the jurisdiction. The OECD discussions are broader than DSTs and also cover much wider questions of where tax should be paid and on what basis, and thus have much broader implications for many global businesses. The United States has consistently urged countries to work through the OECD process, but remains opposed to the current proposal. The United States instead has sought an alternative solution that would be consistent with parameters set out in Secretary Mnuchin's letter last year, but without success. The apparent breakdown could lead various countries – those backing the current proposal including France, Italy, Spain, and the United Kingdom – to keep pushing forward unilaterally although any such move would create a high risk of U.S. Section 301 tariffs. Mnuchin's letter emphasized that the United States "remains opposed to digital service taxes and similar unilateral measures." USTR Lighthizer testified that he believes "there's clearly room for a negotiated settlement," and the administration has said it hopes to resume talks later this year.

In a time when the global economy is trying to recover from the effects of the COVID-19 pandemic, tensions will likely continue to increase between DST proponents and the United States until a deal is met. However, earlier this week, French Finance Minister Bruno Le Maire and his German counterpart Olaf Scholz said they were still committed to reaching an international deal at the OECD and they will not push ahead with an EU-only digital tax until after the U.S. election in November.

If France does move forward with its DST, it's very likely the suspended U.S. tariffs on French imports will follow immediately. In response to Mnuchin's letter, the United Kingdom said it will move forward with its DST and the European Commission announced it will support any EU member state that moves to impose a DST.

Interested parties may submit written comments to the USTR until 15 July with respect to any of the above-mentioned policies and whether the USTR should act. We recommend that companies assess the possible impact of the above-mentioned DSTs on their businesses and possible action(s) to be taken by the USTR. Companies should urgently consider whether they should participate in the public comment and hearing process that has been announced and should closely monitor whether one of the company's products appears on a preliminary USTR retaliation list, as such products could be subject to duties up to 100 percent ad valorem. We would be pleased to assist you with both the initial assessment and/or participation in the Section 301 investigation.

We are closely monitoring the Section 301 investigation and the DST tax measures under consideration.

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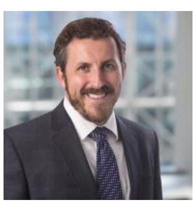

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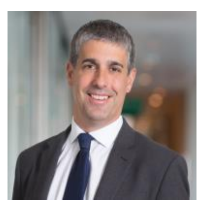

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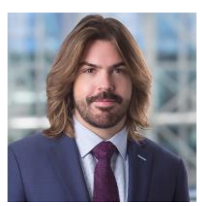

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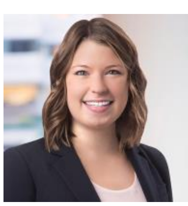

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