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ALERT

USTR Initiates Additional Section 301 Investigations into Digital Services Taxes (DSTs) Adopted or Under Consideration by European Union, United Kingdom, and Eight Other Trading Partners

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On June 2, 2020, the Office of the United States Trade Representative (USTR) announced that it was initiating Section 301 investigations into digital service taxes (DSTs) that have been adopted or are being considered by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. USTR is soliciting public comments on the investigations through July 15, 2020, at the docket at regulations.gov.

The Federal Register notice echoed previous statements by U.S. Trade Representative Robert Lighthizer that DSTs, which generally apply only to companies that generate specified amounts of revenue, are targeted at large U.S. tech companies. In the press release announcing the action, Lighthizer stated that USTR was "prepared to take all appropriate action to defend our businesses and workers against any such discrimination."

A broad range of U.S. companies and industries may be harmed by these new DST measures and proposals, and should strongly consider engaging with USTR and submitting comments in this proceeding. These DSTs are costly, burdensome, and likely to spread, impacting numerous companies who engage in a wide range of digital services. As we have seen firsthand with the General Data Protection Regulation (GDPR) and other technology initiatives, U.S. and global businesses will have to spend heavily to assess

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applicability and comply. Moreover, these DST measures could quickly erode global commitments not to place customs duties or taxes on digital transactions.

Proponents of DSTs argue that globally, corporate taxation needs an overhaul to reflect how—and where—revenue is generated in 2020. Led by the G-20, 137 countries have been negotiating international tax rules since 2015 through the Organization for Economic Co-operation and Development's (OECD's) "BEPS Project," and have committed to reach an agreement by the end of 2020.[1] It is uncertain whether BEPS negotiations will be delayed because of coronavirus (COVID-19) effects and countermeasures.

Most of the largest technology or digital services companies in the world are located in the United States, and DSTs have been nicknamed "GAFA" taxes for their propensity to affect leading tech companies such as Google, Apple, Facebook, and Amazon.

USTR previously investigated France's Digital Services Tax (DST), finding in December 2019 that the French DST "discriminates against U.S. companies, is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies." In January 2020, before the United States proceeded with threatened retaliatory tariffs, it reached a temporary truce with France, with the French government suspending tax collection until the end of the year and the United States agreeing to continue participation in the OECD BEPS negotiations.[2]

The new Section 301 investigations will examine DSTs in force in Austria, India, Italy and Turkey, and those proposed or awaiting formal adoption in Brazil, the Czech Republic, the European Union, Czech Republic, and the United Kingdom. The majority of the European DSTs apply (or would apply) only to companies that earn at least €750 million (approximately $847 million USD)[3] in global revenue, and the DSTs have separate requirements for minimum revenue earned through targeted digital services in the respective country. Notably, the European Union and Indonesian DSTs are included in COVID-19 economic relief packages. Out of those DST taxes already in force, India's has the lowest minimum local revenue requirement, and consequently will capture much smaller companies that the other DSTs do not.

Because many of these DSTs are proposals, some questions, such as concerning the scope of the measures, are unanswered.

See the below Annex for the DSTs to be examined by the new Section 301 investigations.

The United States' Section 301 investigations will focus on "{d}iscrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy" and the Federal Register notice indicated that some of the DSTs may be extraterritorial in scope. In particular, USTR has asked for comments on the following:

- "Concerns with one or more of the DSTs adopted or under consideration by the jurisdictions covered in these investigations.
- Whether one or more of the covered DSTs is unreasonable or discriminatory.

- The extent to which one or more of the covered DSTs burdens or restricts U.S. commerce.
- Whether one or more of the covered DSTs is inconsistent with obligations under the WTO Agreement or any other international agreement.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken."

USTR initiated the new DST investigations under Section 301 of the Trade Act of 1974, which gives the President and USTR broad authority to investigate, and obtain the removal of, any act, policy, or practice of a foreign government that (1) violates an international trade agreement, (2) is "unjustifiable" and "burdens or restricts" U.S. commerce, or (3) is "unreasonable or "discriminatory" and "burdens or restricts" U.S. commerce.

As required by 303(a) of the Trade Act, USTR has requested consultations with the respective governments of the DST measures. It is unclear whether the United States will be open to an agreement similar to that struck with France, with the United States agreeing to postpone retaliatory action if the trading partner agrees to suspend any DST collection, and both of the countries agreeing to participating in the multilateral BEPS negotiations at the OECD. If, after the public comment period ends on July 5, 2020, consultations with the respective governments are not successful, USTR will solicit public comment on its proposed action (likely in the form of retaliatory duties on imports). USTR allows for business confidential versions of public comments as well.

U.S. companies and industries should strongly consider filing comments at USTR, detailing their concerns with these various DSTs and proposals. Similarly, companies should engage with their Congressional allies on these measures, and should be participating in or closely monitoring ongoing negotiations affecting trade in digital services, including not only the OECD BEPS negotiations, but also the World Trade Organization negotiations on digital trade, as well as U.S. free trade agreement negotiations with the United Kingdom, Brazil, and others.

Many of the DSTs are still proposals, and consequently may change substantively or ultimately fail to be enacted. Wiley will update its guidance as information becomes available, both about the DSTs and these Section 301 investigations.

Should you have questions on digital service taxes, commenting on these Section 301 investigations, or navigating Section 301 investigations in general, Wiley's International Trade, Telecom, Media & Technology (TMT), Cyber, and Tax practices would be happy to assist. Please contact one of the authors listed on the alert.

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Annex:

Specifically, the new Section 301 investigations will examine these DSTs:

DSTs in Force **Austria** On January 1, 2020, Austria began to collect a 5% tax on online advertising revenue from companies with at least €750 million in annual global revenues for all services and €25 million (approximately $28 million USD) in in-country revenues for covered digital services. **India** On April 1, 2020, India began to collect a 2% DST on online sales of goods and services to, or aimed at, persons in India. The DST applies to non-resident companies with annual revenues in excess of approximately Rs. 20 million (approximately $265,000 USD). **Italy** Since January 1, 2020, Italy has been collecting a 3% DST on revenue from targeted advertising and digital interface services from companies that generate at least €750 million in global revenues for all services and €5.5 million (approximately $6.2 million USD) in in-country revenues for covered digital services. **Turkey** Since March 1, 2020, Turkey has been collecting a 7.5% DST on revenues from targeted advertising, social media, and digital interface services. The tax applies to companies that generate at least €750 million in global revenues from covered digital services and Turkish Lira 20 million (approximately $2.95 million USD) in in-country revenues from covered digital services.

Proposed DST Measures **Brazil** Brazil is considering adopting a "Contribution for Intervention over the Economic Domain" on the revenues of digital services and advertising provided by large technology companies (called "CIDE-Digital "). The tiered tax would apply to companies with global revenues of at least Brazilian Real (R) $3 billion ($616 million USD) and local revenue of $100 million (approximately $20.5 million USD), as such:

- 1% on annual gross revenue up to R$ 150 million ($30.8 million USD)
- 3% on the portion of the annual gross revenue exceeding R$ 150 million and up to R$ 300 million (approximately $61.62 million USD)
- 5% on the portion of the annual gross revenue exceeding R$ 300 million

The bill will need to be adopted by both Brazil's House of Representatives and Federal Senate, and must be sanctioned by the President, before going into effect. **Czech Republic** The Parliament of the Czech Republic is considering legislation that would apply a 7% DST to revenues from targeted advertising and digital interface services. The DST would apply to revenue generated in the Czech Republic by companies generating €750 million in annual global revenues for all services and €4 million in in-country revenues. **European Union** The European Union has revived a 2018 DST proposal and included it in the financing package for its proposed COVID–19 recovery plan. The 3% DST on revenue from targeted advertising and digital interface services will apply to companies that generate at least €750 million in global revenues from covered digital services and €50 million in revenues within the European Union for covered digital services. **Indonesia** As a part of COVID-19 tax relief measures, Indonesia announced that it will charge companies its value-added tax (VAT) on taxable intangible goods and/or services sold through electronic platforms, as well as an electronic transaction tax on e-commerce transactions of foreign individuals or digital companies that have a "significant economic presence," starting on July 1, 2020. Indonesia collects a 10% VAT tax. **Spain** Spain is considering a 3% DST on revenues from targeted advertising and digital interface services from companies that generate at least €750 million in global revenues for all services and €3 million ($3.39 million USD) in in-country revenues for covered digital services. **United Kingdom** The United Kingdom is expected to implement a 2% DST on revenues above £25 million to internet search engines, social media, and online marketplaces as part of its Finance Bill 2020. The tax will apply to companies generating at least £500 million in global revenues from covered digital services and £25 million in in-country revenues from covered digital services. Though the Finance Bill has yet to receive Royal Assent from the Queen as required by U.K. parliamentary procedure, this is considered a formality, and once it receives Royal Assent, the tax will be applicable retroactively to revenue from April 1, 2020.

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[1] 94 of the countries previously signed the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* that went into effect in July 2018. The United States is not a signatory to the July 2018 convention, but has agreed to participate in the BEPS negotiations.

[2] Tax liability will continue to accrue in 2020.

[3] All conversions to United States dollars reflect currency conversion rates as of June 8, 2020 and are susceptible to change.