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Indirect Tax Alert

USTR initiates investigations into digital services taxes either adopted, or under consideration, by certain jurisdictions

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Executive summary

On 2 June 2020, the United States (US) Trade Representative (USTR) announced investigations will be conducted into certain jurisdictions relating to the adoption or contemplated adoption of a digital services tax (DST).[1] As outlined in a corresponding Federal Register Notice (FRN), jurisdictions included within the scope of this announcement include: Austria, Brazil, the Czech Republic, the European Union[2] (EU), India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.[3]

Investigations will be conducted pursuant to Section 301 of the *Trade Act of 1974* (Section 301), with the goal of determining whether the adopted or contemplated DST of the relevant jurisdiction is unreasonable or discriminatory as well as whether it burdens or restricts US commerce.

In the event the USTR concludes that a particular DST policy falls within the scope of Section 301, the USTR will then decide how the DST policy is to be addressed. For example, the USTR could choose to impose punitive tariffs on goods from these jurisdictions, as seen with other Section 301 investigations. Companies with transactions involving the investigated jurisdictions, and therefore, potentially subject to actions on DST, should closely monitor the investigation process, consider submitting comments per the FRN (due 15 July 2020), and assess impacts if action is taken.

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Detailed discussion

Background

Certain jurisdictions have recently imposed or contemplated imposing a tax on the revenue of specific companies offering digital services to users within the jurisdiction. This tax, or DST, stands to impact certain US companies operating abroad.

The table below outlines DST metrics for the jurisdictions included within the scope of the USTR's recent announcement.[4]

Jurisdiction	In effect	Percentage of taxation	Revenue threshold
Austria	*1 January 2020*	5% tax on revenue from online advertising services.	Companies with at least €750 million in annual global revenue for all services and €25 million in in-country revenue for covered digital services.
Brazil	*Under consideration*	Applicable to the gross revenue derived from digital services provided by large technology companies.	N/A
Czech Republic	*Under consideration*	7% tax on revenue from targeted advertising and digital interface services.	Companies generating €750 million in annual global revenues for all services and CZK50 million in in-country revenue for covered digital services.
European Union	*Under consideration*	3% tax on revenue from targeted advertising and digital interface services.	Companies generating at least €750 million in global revenue from covered digital services and at least €50 million in EU-wide revenue for covered digital services.
India	*1 April 2020*	2% DST.	The tax applies to nonresident companies, and covers online sales of goods and services to, or aimed at, persons in India. The tax applies only to companies with annual revenue in excess of approximately Rs. 20 million (approximately US $267,000).
Indonesia	*Further measures required*	An electronic transaction tax that targets cross-border, digital transactions was adopted.	N/A
Italy	*1 January 2020*	3% tax on revenue from targeted advertising and digital interface services.	Companies generating at least €750 million in global revenue for all services and €5.5 million in country revenue for covered digital services.
Spain	*Under consideration*	3% tax on revenue from targeted advertising and digital interface services.	Companies generating at least €750 million in global revenue for all services and €3 million in in-country revenue for covered digital services.

Jurisdiction	In effect	Percentage of taxation	Revenue threshold
Turkey	*1 March 2020*	The measure applies a 7.5% tax on revenue from targeted advertising, social media and digital interface services. The Turkish President has the authority to increase the tax rate up to 15%.	Companies generating €750 million in global revenue from covered digital services and TL20 million in in-country revenue from covered digital services.
United Kingdom	*Under consideration*	The measure would apply a 2% tax on revenue above £25 million to internet search engines, social media, and online marketplaces.	Companies generating at least £500 million in global revenue from covered digital services and £25 million in in-country revenue from covered digital services.

This USTR investigatory announcement aligns with the USTR's previous findings relating to France's DST.[5] The French DST imposed a 3% tax on global revenue generated by "digital interface" services provided to French users. The tax was to be retroactive to 1 January 2019 and applied to companies that have global, annual revenues in excess of €750 million, or US$845 million at the current exchange rate, and that have €25 million, or US$28.15 million, of digital sales that are generated in France.[6] The USTR found that France's DST created an unreasonable or discriminatory burden to US commerce.

As a result of the USTR's finding, the US threatened to impose tariffs on approximately US$2.4 billion of goods of French-origin. France decided to suspend the DST, and the US did not impose the proposed tariffs, pending the Organisation for Economic Co-operation and Development (OECD) negotiations of a DST agreement incorporating multiple jurisdictions.[7] As of now, a final resolution has not been achieved by the OECD.

In response to the adoption or contemplated adoption of a DST within the identified jurisdictions, and pursuant to Section 301, the USTR announced it will begin investigations with the goal of determining whether the adopted or contemplated DST are unreasonable or discriminatory and whether they burden or restrict US commerce. Initially, the DST investigations will aim to assess if there is discrimination against US companies, retroactivity, and potentially unreasonable tax policy. Specifically relating to tax policy, the USTR will seek to determine whether the tax policy differs from the standards embodied within the US and international tax systems.[8] As in the investigation into France's DST, if these DST are found to be discriminatory, the USTR will then determine actions to address the policies.

The USTR is currently accepting comments relating to these investigations and those comments must be submitted by 15 July 2020.

Actions for businesses

US companies that import goods from any of the aforementioned jurisdictions subject to USTR investigations should closely monitor the USTR investigations, results, and subsequent actions. Companies should also consider submitting comments by the 15 July deadline.

Past USTR actions have included targeting specific categories of goods in certain industry subsectors. If the respective DST are found to be discriminatory, similar actions may be taken with respect to each implicated jurisdiction. Consequently, as the investigations progress, companies should be sure to fully understand the extent of products, particularly, the Harmonized Tariff Schedule of the US (HTSUS) classifications and country of origin for trade flows between the impacted jurisdictions and the US.

Endnotes

1. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/ustr-initiates-section-301-investigations-digital-services-taxes.
2. EU member countries are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.
3. https://ustr.gov/sites/default/files/assets/frn/FRN.pdf.
4. Ibid.
5. See EY Global Tax Alert, *US issues findings of Section 301 investigation regarding France's Digital Services Tax; proposes imposition of tariffs*, dated 4 December 2019.
6. Ibid.
7. https://www.wsj.com/articles/france-yields-on-its-unilateral-internet-tax-11579635427.
8. https://ustr.gov/sites/default/files/assets/frn/FRN.pdf.

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