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CLIENT ALERT

USTR Launches 301 Investigations into Digital Services Taxes

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Opens Door for Potential Retaliatory Tariffs by United States

On June 2, the Office of the U.S. Trade Representative (USTR) launched a series of Section 301 trade investigations into digital services taxes (DST) adopted or under consideration by a number of United States (U.S.) trading partners – including Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom. The investigations will initially focus on whether these taxes discriminate against U.S. companies, including concerns about "retroactivity and possibly unreasonable tax policy". The Federal Register Notice provides a complete overview of the investigations.

As proposed and in practice, the DST regimes under investigation apply primarily or exclusively to companies with global annual revenues above £500 million for the U.K. proposal, to above €750 million for most of the others. The Indian DST threshold impacts non-resident companies with global revenues of approximately $250,000 USD per year and who provide goods and services to or aimed at persons in India.

Estimates of the amount of revenue generated or likely to be generated from the DST regimes vary. Since most or all of these regimes will have a disproportionate impact on U.S. companies, with the potential to generate $USD billions in annual revenue for the taxing authorities, the scope of the investigations and potential consequences of any U.S. retaliatory action are high.

USTR is seeking comments in response to the Notice until July 15, 2020.

Section 301

Section 301 of the 1974 Trade Act gives *broad authority to investigate and respond to a foreign country's action that may be unfair or discriminatory and negatively affect U.S. commerce*. In December 2019, USTR concluded that France's digital services tax unfairly discriminated against the U.S. and proposed additional duties of up to 100% on certain products of France. However, the U.S. and France reached an agreement under which France paused the tax and the U.S. held off on imposing tariffs while the Organization of Economic Cooperation and Development (OECD) continues to negotiate a multinational DST agreement.

OECD Digital Services Tax Negotiations

Under its *Inclusive Framework on Base Erosion and Profit Shifting* (BEPS), the OECD has initiated multilateral efforts to ensure large multinational companies, including digital companies, "pay tax wherever they have significant consumer-facing activities and generate their profits." While multilateral efforts have stalled due to COVID-19, the OECD continues to push ahead on developing a multilateral consensus this year.

While some countries, including Austria, Hungary, Italy, Turkey and the U.K. are proceeding with digital services taxes, the European Union (EU) and several countries have indicated they may push for ones if the OECD talks fail. The EU Commission has estimated such digital services tax could bring in €5 billion ($6.1 billion) in revenue for the bloc's budget. The OECD released a statement in March 2020 stating it aims of reaching a "political decision on the key components of a multilateral consensus-based solution" by the time of the G20/OECD Inclusive Framework on BEPS plenary meeting in July 2020.

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