New Section 301 investigations into digital services taxes involving multiple countries

International Trade Alert

29 June 2020

By: Richard Newcomb | Martin Schaefermeier | Amadi Anene

On June 2, 2020, the Office of the Unites States Trade Representative (USTR) announced the initiation of Section 301 investigations of digital services taxes either adopted or under consideration by nine countries and the European Union. Based on the results of these investigations, the United States may impose tariffs or other restrictions on imports from the affected countries.

The Trump Administration has been in multilateral discussions seeking a resolution to the issue of taxation of the digital economy currently conducted through the Organization for Economic Co-operation and Development (OECD). However, a June 12 letter from the Administration signaling that the US would pause its involvement in the discussions further suggests that an affirmative finding in the Section 301 investigations would result in the US imposing Section 301 remedies.

Digital services taxes

A digital services tax (DST) is a tax on revenues that certain companies generate from the provision of digital services to, or digital services aimed at, end users within the subject jurisdiction. Through the Section 301 investigations, the USTR will investigate whether DSTs discriminate against or place an unreasonable burden upon or restrict US commerce. According to the USTR, evidence suggests these DSTs target large, US-based technology companies. The USTR will investigate both DST policies under consideration by certain countries, and DST policies currently in place.

As stated by the USTR, the following DST policies are currently in effect:

- "Austria: In October 2019, Austria adopted a DST that applies a 5% tax to revenues from online advertising services. The law went into force on January 1, 2020. The tax 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: In March 2020, India adopted a 2% DST. The tax only applies only 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 revenues in excess of approximately Rs. 20 million (approximately US$ $267,000). The tax went into effect on April 1, 2020."
- "Indonesia: Earlier this year, Indonesia adopted an electronic transaction tax that targets cross-border, digital transactions. Further implementing measures are required for the new tax to go into effect."
- "Italy: Italy has adopted a DST. The measure includes a 3% tax on revenues from targeted advertising and digital interface services. This tax applies only 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. The tax applies as of January 1, 2020."
- "Turkey: Turkey has adopted a DST. The measure applies a 7.5% tax to revenues from targeted advertising, social media and digital interface services. The tax applies only to companies generating €750 million in global revenues from covered digital services and TL20 million in in-country revenues from covered digital services. The Turkish President has authority to increase the tax rate up to 15%. The law went into effect on March 1, 2020."

According to the USTR, the following DST policies are currently under consideration and will also be a focus of the Section 301 investigations:

- "Brazil: Brazil is considering a legislative proposal entitled the "Contribution for Intervention in the Economic Domain" or CIDE. If adopted, CIDE would apply to the gross revenue derived from digital services provided by large technology companies."
- "The Czech Republic: The Parliament of the Czech Republic is considering a draft law that would apply a 7% DST to revenues from targeted advertising and digital interface services. The tax would apply only to companies generating €750 million in annual global revenues for all services and CZK 50 million in in-country revenues for covered digital services."
- "The European Union: The European Commission is considering a DST as part of the financing package for its proposed COVID-19 recovery plan. The EU DST is based on a 2018 DST proposal that was not adopted. The 2018 EU proposal included a 3% tax on revenues from targeted advertising and digital interface services, and would have applied only to companies generating at least €750 million in global revenues from covered digital services and at least €50 million in EU-wide revenues for covered digital services."
- "Spain: Spain is considering a draft DST. The measure would apply a 3% tax to revenues from targeted advertising and digital interface services. This tax would apply only to companies generating at least €750 million in global revenues for all services and €3 million in in-country revenues for covered digital services."
- "The United Kingdom: The United Kingdom is considering a DST proposal as part of its Finance Bill 2020. The measure would apply a 2% tax on revenues above £25 million to internet search engines, social media, and online marketplaces. The tax applies only 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. The bill is in the final stages of adoption by Parliament, and if passed, payments would be due from affected companies in 2021."

Pursuant to Section 304 of the Trade Act of 1974, USTR must determine whether the policies under investigation are actionable under Section 301. Section 301 provides a statutory basis for the US to impose trade sanctions on foreign countries that violate US trade agreements or engage in acts that are "unjustifiable" or "unreasonable or discriminatory" and burden or restrict US commerce. To remedy a foreign trade practice, Section 301 authorizes the USTR to (1) impose duties or other import restrictions; (2) withdraw or suspend trade agreement concessions; or (3) enter into a binding agreement with the foreign government to either eliminate the conduct in question (or the burden to US commerce) or compensate the United States with satisfactory trade benefits.

USTR will initially focus its investigations into DSTs on "discrimination against US companies; retroactivity; and possibly unreasonable tax policy" that may "diverge from norms reflected in the US tax system and the international tax system in several respects." Divergences from these norms may include "extraterritoriality; taxing revenue not income; and penalizing particular technology companies for their commercial success."

Ongoing developments

Interested parties have the opportunity to submit public comments on the proposed duties by July 15, 2020. USTR has not scheduled a hearing at this time, but may do so at a later date via a separate announcement.

USTR has invited written comments with respect to any issue covered by the investigations. In particular, the USTR seeks comments with respect to:

- 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 US commerce.
- Whether one or more of the covered DSTs is inconsistent with obligations under the WTO Agreement or any other international agreement.
- Which determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

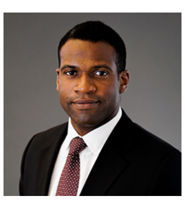
DLA Piper attorneys have extensive experience in representing clients before Federal trade agencies and courts, and can advise clients on strategies with respect to Section 301 investigations and the trade remedies that can result from such investigations.

If you have any questions or would like to discuss your company's situation, please contact any of the authors or your DLA Piper relationship attorney.

AUTHORS

Richard Newcomb
Partner
Washington, DC | T: +1 202 799 4000
richard.newcomb@dlapiper.com

Martin Schaefermeier
Of Counsel
Washington, DC | T: +1 202 799 4000
martin.schaefermeier@dlapiper.com



Amadi Anene
Associate
Washington, DC | T: +1 202 799 4000
amadi.anene@dlapiper.com