Statement of the U.S. Chamber of Commerce

ON: "Section 301 Investigations of Digital Services Taxes"

TO: Office of the U.S. Trade Representative

BY: U.S. Chamber of Commerce

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The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to present the following comments to the Office of the U.S. Trade Representative (USTR) on the "Initiation of Section 301 Investigations of Digital Services Taxes" pursuant to Federal Register Notice (FRN) 2020-12216/Docket No. USTR-2020-0022.

USTR has initiated investigations with respect to Digital Services Taxes (DSTs) adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union (EU), India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. As the FRN notes, "Actionable matters under section 301 include, inter alia, acts, policies, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce."

In recent years, the U.S. and international economies have benefitted from the emergence of digital technologies that today serve as a powerful engine of economic growth and job creation — as underscored by the 150-fold increase in cross-border data flows since 2005. In fact, the digital economy is growing four times faster than the non-digital economy, though this transformation makes it increasingly difficult to differentiate between the two as firms of every size and sector participate. Today, more than 60% of all services exports can be delivered to customers overseas digitally.

In this context, new DSTs that are unilateral, discriminatory, and burdensome to the economy present serious risks. The Chamber has repeatedly urged foreign governments not to impose DSTs, which often target U.S. companies that have invested billions of dollars in their markets and engage in mutually beneficial commercial relationships with citizens and businesses in those countries. At the same time, the Chamber has expressed support for negotiations taking place under the aegis of the Organization for Economic Cooperation and Development (OECD) to forge a consensus-based approach to the taxation of digital services and continues to urge all parties to focus their efforts on devising a multilateral approach.

The proposed and imposed DSTs in question amount to de facto discrimination against U.S. companies. In certain cases (e.g., India and Indonesia), the measure is discriminatory on its face, applying only to non-residents. These DSTs appear to violate obligations the nine countries and the EU have undertaken as parties to the WTO's General Agreement on Trade in Services (GATS). Specifically, the DSTs violate the national treatment principle, which enjoins WTO Members to "accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers" (GATS Article XVII). The GATS explicitly prohibits Members from implementing measures that afford de facto discrimination even when the measure provides "formally identical" treatment.

The DSTs violate the national treatment principle and discriminate against U.S. companies in two ways. First, thresholds in the DSTs are often set at a level that has been chosen specifically to apply to large U.S. technology companies while sparing domestic industry almost entirely. In many cases these DSTs are modeled on the French DST. In the French example, the DST will apply only to companies with worldwide "qualifying" gross revenues of at least €750 million and French "qualifying" revenues of at least €25 million. Published reports, including a comment by the French finance minister, indicate an expectation that the French DST will impact just one French firm. This pattern appears to hold in the jurisdictions in the present Section 301 investigation.

Jurisdictions	Global Revenue Threshold	Local Revenue Threshold
Austria	€750 million (US$847 million)	€25 million
Brazil	BRL 3 billion (US$560 million)	BRL 100 million (US$18.6 million).
Czech Republic	€750 million (US$847 million)	CZK 50 million (US$2.1 million)
European Union	€750 million (US$847 million)	€50 million
India	INR 20 million (US$267,000)	NA
Indonesia	Details regarding thresholds and rates will be issued through implementing measures	
Italy	€750 million (US$847 million)	€5.5 million
Spain	€750 million (US$847 million)	€3 million
Turkey	€750 million (US$847 million)	TL 20 million ()
United Kingdom	£500 million (US$628 million)	£25 million

Second, the proposed and imposed DSTs appear to target a selection of digital services in which U.S. firms are market leaders but exclude digital services where local firms are significant actors. The subsectors targeted include online advertising services (e.g., Google and Facebook), digital platforms and marketplaces for goods and services (e.g., Airbnb, Amazon, and Uber), and online intermediation services that depend on the transmission of users' data to other users (e.g., social media). The DSTs do not apply to other digital services where local firms are significant actors (e.g., financial services, communications services).

Jurisdictions	Subsectors Subject to DSTs
Austria	Digital advertising services
Brazil	Data transmission, advertising on digital platforms, and marketplaces
Czech Republic	Targeted advertising and digital interface activities
European Union	Targeted advertising and digital interface services
India	Online sales of goods and services; applies only to non-resident companies
Indonesia	Electronic transactions applicable to foreign merchants, foreign service providers, and foreign digital platforms
Italy	Targeted advertising and digital interface services
Spain	Targeted advertising and digital interface services
Turkey	Targeted advertising, social media, and digital interface services
United Kingdom	Internet search engines, social media, and online marketplaces

The DSTs also appear to violate existing tax treaties, which uphold many of these same nondiscrimination principles. The United States has income tax treaties with all of these jurisdictions with the exceptions of Brazil and the EU (though it has tax treaties with most EU member states). Those treaties include nondiscrimination obligations that the DSTs in question violate. For instance, parties to these treaties commit not to subject nationals of the other party to any taxation or requirement more burdensome than their own nationals face.

The FRN requests input on whether the DSTs represent "unreasonable tax policy," including through such departures from international norms as extraterritoriality; taxing revenue rather than income; and penalizing particular technology companies for their commercial success.

The fact that the DSTs are unreasonable is evident in the multiple ways they conflict with principles developed as part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting process, through which more than 135 governments are developing a global approach to the challenges posed by digitalization of the economy. Specifically, the DSTs conflict with the following principles:

- No ring fencing of the digital economy;
- The principles of international taxation, including taxation of net income;
- Avoidance of multiple taxation of the same income;
- Providing certainty for taxpayers and minimizing tax disputes;
- Minimizing the compliance burden on tax administrations and taxpayers;
- New taxing regimes should be implemented on a prospective basis;
- Consistency with the principles of proportionality and sustainability; and
- Deviation from the arms-length standard.

As noted above, many of the DSTs under investigation have explicit extraterritorial provisions (i.e., those of India and Indonesia, while the others deploy revenue thresholds and a focus on specific kinds of digital services to discriminate in a de facto manner against foreign-headquartered enterprises). The DSTs are constructed around revenue thresholds, violating the principle that taxes should be levied on net income rather than revenue.

The FRN also asks for views on the extent to which the DSTs burden or restrict U.S. commerce. In addition to the problems described above, these DSTs are likely to impose heavy burdens on specific U.S. companies without significantly ameliorating the fiscal challenges facing governments today: The sums involved are large for the companies affected, but small in the context of a national tax base.

The DSTs will also impose significant compliance costs and administrative burdens on U.S. firms. For example, companies will need to revise their accounting systems to ensure that they can accurately assess DST liability that — in a break from normal practice — targets revenue rather than net income. Some of the DSTs rely on sourcing rules that are out of step with current tax norms, lack consistent standards for application (thus creating uncertainty), require tracking of information that may violate privacy laws, and require taxpayers to allocate and assess tax where available data is not precise and cannot produce clear, certain, and auditable results. Firms will also need to include new filing and audit components on domestic accounts. Estimated costs to U.S. firms are in the millions.

Conclusion

The Chamber urges the U.S. administration and the governments of the countries at the focus of the present investigation to redouble their efforts to secure a multilateral path forward. Contrary to some press accounts, the Chamber understands real progress has been achieved in some aspects of the negotiations under way under the aegis of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting process. All parties have interests in these negotiations that should provide motivation to press forward to a successful conclusion.

Finally, the Chamber cautions that the application of Section 301 tariffs to goods from these countries presents risks for the economy. Unilateral taxes and tariffs put economic growth and job creation at risk.

The Chamber greatly appreciates the hard work of Treasury officials and staff seeking to advance the negotiations at the OECD to a favorable outcome. Given that this process has the potential to impact a wide range of U.S. companies, the Chamber appreciates the opportunity to offer these comments and is ready to provide additional input as appropriate.

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