The Bottom Line

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DIGITAL TRADE WAR IS ONE STEP CLOSER

Summary

On March 31, 2021, the U.S. Trade Representative (USTR) announced that it will proceed with the Section 301 investigations into the Digital Services Taxes (DST) adopted by Austria, India, Italy, Spain, Turkey, and the United Kingdom. Each of these six countries were determined to have taken discriminatory action against U.S. digital companies.

Background

Under current international tax rules, multinationals generally pay corporate income tax where production occurs rather than where consumers or users are located. Through the digital economy, businesses derive income from users abroad but, without a physical presence, are not subject to corporate income tax in that foreign country. Multinationals content that taxing profits based on where users reside would effectively tax their income more than once. The Organization for Economic Cooperation and Development (OECD) has been in negotiations with over 130 countries to adapt international tax law as it applies to these digital service providers. Their current proposal would require multinational businesses to pay some of their income taxes where their consumers or users are located, a project referred to as Base Erosion and Profit Shifting (BEPS). However, despite these ongoing multilateral negotiations, several countries have decided to move ahead with unilateral measures to tax the digital economy. These measures target specific multinationals in a narrow range of business models meant to reflect the claimed sources of user value.

Current Status

The international community has been trying to address legitimate international tax concerns. There are clear cases wherein companies have used the international rules to reduce their taxes in ways which, though legal, were not intended by policymakers. The countries that have decided to proceed with the Digital Services Taxes have proposals that would only cover profits from three business models: (1) those placing ads targeting users of a digital interface based on their data profiles; (2) those providing a multisided digital platform that allows users on one side of a transaction to interact with users on other sides, including the purchase of goods and services; and (3) those selling users' data.

The United States strenuously objects to these taxes because the only targets would be American companies (Amazon, Google, Facebook, and Apple). Although these DSTs are generally considered to be interim measures until an agreement is reached at the OECD level, it is unclear whether all will be repealed at that point.

The notices concerning the six (6) countries still under a Section 301 investigation outline proposed Section 301 tariffs of up to 25% that may be imposed on certain products. The proposed Section 301 duties are based on the aggregate level of trade in the products and the DST expected to be collected from U.S. companies. The proposed product lists include products with significant U.S. markets, such as:

- Austria: Leather articles, ceramics, glassware, printed circuit assemblies, radar apparatus, telescopes, and pianos
- India: Shrimp, bamboo articles, silk brassieres, precious and semi-precious stones, and furniture
- Italy: Perfume, gloves, handbags, suits, jackets, blazers, ties, leather footwear, and lenses
- Spain: Footwear, hats, glassware, and handbags
- Turkey: Certain textiles, carpets, bed linens, ceramic tiles, and jewelry
- UK: Perfumes, overcoats, dresses, footwear, makeup, tiles, ceramic fixtures, brushes, industrial robots, jewelry, and furniture

Impact

The United States, under the Biden administration, is working with the OECD to advance their negotiations. According to Treasury Secretary Janet Yellen "The pandemic has moved much of work and life online. We must invest in efforts to help people adapt to this increasingly digital world...As we know, the changing global economy presents new challenges for corporate taxation. The United States is committed to the multi-lateral discussions on both pillars within the OECD/G20 Inclusive Framework, overcoming existing disagreements, and finding workable solutions in a fair and judicious manner." Until that day, however, duties on products originating in those countries that have already enacted digital services taxes are forthcoming.

REFERENCES

What European OECD Countries Are Doing about Digital Services Taxes (Tax Foundation)

Biden Removes Trump's MAGA Roadblock to a Global Digital Services Tax (Diginomica)

Digital Services Tax (DST) Investigations (Miller & Co. P.C.)