Trade Compliance Flash: USTR Accepting Comments on Proposed Section 301 Tariffs in Response to Digital Services Taxes

Goods from Six Countries Potentially Impacted

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In response to Digital Services Taxes (DSTs) implemented in 2020 and 2021 by Austria, Spain, the United Kingdom, India, Italy, and Turkey, the Office of the United States Trade Representative (USTR) is seeking comments and testimony on a the possible imposition of tariffs on a proposed list of goods from those countries. The additional tariffs could be as high as 25 percent of the value of the goods.

While the DSTs themselves primarily impact large multinational tech companies, retaliatory tariffs used to discourage them could impact U.S. companies of all sizes by increasing the cost of the specified imported goods by up to 25 percent. A partial list of goods the USTR has identified as potential targets for Section 301 tariffs is below. Click on the country name and scroll down to the Annex to see a full list of the goods for which the tariffs are being considered from each country.

- Certain glassware, stemware, clothing accessories, printed circuit assemblies, leather, binoculars, and optical and telecommunications equipment from Austria
- Certain seafood, handbags, belts, footwear, hats, and glassware from Spain
- Certain apparel, footwear, toiletries, cosmetics, jewelry and precious metals, ceramic tile, furniture, refrigerators, air conditioners, and game machines from the United Kingdom
- Certain furniture, seafood, bamboo products, cigarette papers, metals, and jewelry from India
- Certain perfumes, handbags, apparel, and lenses from Italy
- Certain carpets, bed linens, porcelain goods, monument/building stone, precious metals, and jewelry from Turkey

If your company imports goods covered by any of these lists, we can help you draft comments and/or testimony. The USTR is seeking comments and testimony focused on:

- Whether particular products should stay on the list
- The rate of additional tariff (up to 25 percent)
- Whether additional tariffs on a particular product would cause disproportionate economic harm to U.S. interests, including small- or medium-sized businesses and consumers
- The level of the burden or restriction on the U.S. economy resulting from the DST
- The appropriate aggregate level of trade to be covered by the additional tariffs

We anticipate that comments and testimony relating to tariffs on products that will disproportionately impact individual businesses, especially small- or medium-sized businesses, will be the most persuasive. The deadline to submit a request to appear at a hearing (and a summary of the testimony) is **Wednesday, April 21, 2021**. The deadline to submit written comments is **Friday, April 30, 2021**. It is also not too early to start thinking about tariff mitigation strategies, including sourcing from other countries, duty drawback, and using the first sale rule (*i.e.*, legally lowering customs duties by using the price paid by the middleman, rather than the price paid by the importer, as the base price for the duties).

Background

DSTs were first instituted in response to the perception that certain large, primarily U.S.-based multinational companies were relying on long-established international tax rules to generate large profits in market jurisdictions without paying a commensurate amount of tax on those profits based on a lack of physical presence. An early example is the DST instituted by France in 2019. Commonly referred to as the "GAFA" tax (so named because of the companies the law was intended to hit – Google, Apple, Facebook, and Amazon), France's flat three percent DST is imposed on the revenue generated from digital interface services and targeted advertising services.[1]

In response to France and other countries' efforts to institute local DSTs – or "unilateral measures," the Organization for Economic Cooperation and Development (OECD) ramped up its work addressing the tax challenges of the digitalization of the economy, work that stemmed from the OECD's original Base Erosion and Profit Shifting (BEPS) project that began in 2015. Often dubbed "BEPS 2.0," the OECD's current project brings together more than 135 countries and jurisdictions (the Inclusive Framework) with the goal of creating a uniform set of international tax rules to address evolving concepts of jurisdictional nexus and profit allocation, as well as to institute a global minimum tax regime. The OECD's goal is to set forth a comprehensive set of rules on which the members of the Inclusive Framework can all agree, in an effort to circumvent the unilateral measures many countries have taken – and continue to take – to address the issues. However, the BEPS 2.0 process has been progressing slowly. While the OECD had hoped to have an agreement by the end of 2020, it now hopes to reach an agreement by mid-2021. Because DSTs impact some large U.S. companies, the USTR has considered retaliatory action – *i.e.*, additional Section 301 tariffs – on certain goods imported into the U.S. from countries that impose DSTs. For example, in July 2020, the U.S. announced it would impose additional 25 percent tariffs on certain imports from France after concluding a Section 301 investigation into France's DST. However, the tariffs have been suspended.

On June 2, 2020, USTR initiated investigations into proposed and final DSTs in 10 jurisdictions: Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. In January 2021, at the very end of the Trump administration, USTR issued reports on the DSTs adopted by Austria, India, Italy, Spain, Turkey, and the United Kingdom. The reports found that the DSTs imposed by those countries were unreasonable, discriminatory, and burdensome, and therefore actionable under Section 301.[2] Also in January, USTR terminated the investigations into the DSTs that were under consideration – but not finalized or implemented – by Brazil, the Czech Republic, the European Union, and Indonesia. The USTR can open new Section 301 investigations if these jurisdictions implement DSTs in the future.

USTR, now under the Biden administration, says it is "committed to reaching an international consensus through the OECD process on international tax issues." However, until consensus is reached, USTR is "maintain[ing] our options under the Section 301 process, including, if necessary, the imposition of tariffs."

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[1] *See*, Conclusion of USTR's Investigation Under Section 301 into France's Digital Services Tax ; United States Trade Representative, Section 301 Investigation: Report on France's Digital Services Tax.

[2] "Section 301" is Section 301(b) of the Trade Act (19 U.S.C. § 2411(b)).