ITI Promoting Innovation Worldwide

July 15, 2020

Ambassador Robert E. Lighthizer
U.S. Trade Representative
600 17th St. NW
Washington, DC 20508

Re: Docket No. USTR-2020-0022: Initiation of Section 301 Investigations of Digital Services Taxes

Dear Ambassador Lighthizer:

The Information Technology Industry Council (ITI) welcomes the U.S. Administration's recognition that digital services taxes (DSTs) that have been adopted or are under consideration in ten jurisdictions – Austria, Brazil, the Czech Republic, the European Union (EU), India, Indonesia, Italy, Spain, Turkey, and the United Kingdom (UK) – raise concerns under Section 301 of the Trade Act of 1974. These unilateral measures advance a troubling precedent, unnecessarily depart from progress toward stable and sustainable international tax policies, and will disproportionately impact U.S.-headquartered companies. In accordance with the notice and request for comments published by the Office of the United States Trade Representative (USTR) on June 5, 2020, ITI respectfully submits the following written comments on the Administration's initiation of Section 301 investigations of these ten measures.[1]

In our comments, we provide USTR with evidence to support a determination that these new DSTs – like the French DST – are unfair trade practices under Section 301 because they are discriminatory, unreasonable, inconsistent with prevailing international tax principles, and unusually burdensome for affected U.S. companies. Notably, many of the DSTs are structured similarly to the French DST and share the same problematic features that USTR identified in its Report on France's Digital Services Tax (French DST Report),[2] including scope limitations and revenue thresholds that are meant to target U.S. companies and shield domestic companies. Other DSTs explicitly target an increasingly broad range of foreign companies, including U.S. companies.

We have confidence that USTR's current investigations, together with USTR's investigation of the French DST, will provide impetus for all countries concerned to continue their commitment to negotiations to eliminate unilateral DSTs and achieve a sustainable, multilateral consensus on the rules governing international corporate taxation. Global tax policy challenges – like those arising from the digitalization of the global economy – require

[1] Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34709 (June 5, 2020), https://ustr.gov/sites/default/files/enforcement/301Investigations/DST_Initiation_Notice_June_2020.pdf.

[2] Office of the U.S. Trade Representative, Report on France's Digital Services Tax (December 2, 2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

consensus global tax policy solutions, such as those under development in ongoing multilateral negotiations at the Organisation for Economic Co-operation and Development (OECD).

We would also call your attention to our concerns with DSTs that USTR did not include within the scope of these investigations, including measures that have been adopted or are under consideration in Belgium, Kenya, and other countries. The Belgian proposal, for example, closely tracks the other European DSTs under investigation. We urge USTR to conduct its investigations with a view to dissuading these and other states considering the introduction of unilateral DSTs from moving forward with such measures, which will hurt U.S. companies and undermine the rules-based international tax and trade regimes.

Given the evolving nature of some of the measures under investigation, we recognize that governments may amend their respective measures in coming weeks and months. We would welcome the opportunity to provide additional or updated input as warranted following the conclusion of the public comment period.

I. BACKGROUND

A. ITI

ITI represents the world's leading information and communications technology (ICT) companies. We are the global voice of the tech sector and the premier advocate and thought leader around the world for the ICT industry. ITI's membership includes companies from all corners of the technology sector, including hardware, software, digital services, payments, semiconductor, network equipment, and internet, as well as "technology-enabled" companies that rely on ICT to innovate, make informed investment decisions, and grow their businesses. The new DSTs will directly or indirectly impact many of our members. More broadly, all of our companies rely on clear and established international tax rules to innovate and grow their operations.

A primary objective for ITI is therefore to ensure a functioning and dependable international tax system. For this reason, ITI has been engaged on the issue of DSTs since governments first started discussing these types of measures. Beginning in Brussels, where a DST was first debated by the EU, and subsequently extending to numerous other countries contemplating similar measures, ITI has consistently raised concerns about the tax, trade, and other policy implications of unilateral DSTs. In support of USTR's investigation of the French DST, ITI provided USTR with extensive oral[3] and written[4] comments.

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[3] Information Technology Industry Council Testimony, "France's Digital Service Tax," Docket No. USTR 2019-000 (August 19, 2019), https://www.itic.org/dotAsset/0a32fa86-c707-49d5-bd91-8c844f14b9bd.pdf; Information Technology Industry Council Testimony, "France's Digital Services Tax," Docket No. USTR 2019-0009 (January 7, 2020), https://www.itic.org/policy/2020.1.7ITIUSTRSection301Testimony.pdf.

[4] Letter from the Information Technology Industry Council to Ambassador Robert E. Lighthizer, Docket No. USTR 2019-000: Initiation of a Section 301 Investigation of France's Digital Services Tax (August 22, 2019), https://www.regulations.gov/document?D=USTR-2019-0009-0032.

Finally, we acknowledge the rationale for multilateral bodies such as the OECD to update existing tax frameworks in light of widespread digitalization of the global economy, and we have supported ongoing negotiations at the OECD from their inception. However, we remain firm in our assertion that the DSTs under investigation are discriminatory, unreasonable, inconsistent with prevailing international tax principles, and unusually burdensome for affected U.S. companies.

B. The DSTs

This section summarizes the key features of the 10 DSTs that are the subject of USTR's present investigations.

Eight measures – the Austria, Brazil, Czech Republic, EU, Italy, Spain, Turkey, and UK measures – share the same basic features as the French DST that USTR concluded is an unfair trade practice under Section 301. The French DST is a retroactive 3% tax on gross revenue generated by the supply of digital platform services and digital advertising services, excluding certain services, like the supply of digital content, which would have entangled domestic companies. By comparison, the eight measures are between 2% (UK) and 7.5% (Turkey) taxes on revenue generated by a similar scope of services, except: the Austrian measure only covers digital advertising services; the Turkish measure adds digital content and streaming services; and just two of the measures (Italy and the UK) apply retroactively. The French DST also excludes domestic companies by means of revenue thresholds requiring at least €750 million in global gross revenues from the covered activities and at least €25 million in gross revenues from covered activities in France. Similarly, the eight measures each have global and domestic revenue thresholds that result in targeting U.S. companies. Finally, these DSTs, like their French counterpart, are expected to be deductible from domestic corporate income taxes.

The other two measures under investigation – the India and Indonesia measures – impose taxes that are expressly limited to foreign digital companies that sell, or facilitate the sale of, goods and services, thereby carving out all Indian and Indonesian companies, respectively. Given their substantively different design features, we differentiate between these two sets of DSTs in portions of our analysis in this section and throughout this submission.

1. Austria

The Austrian DST took effect on January 1, 2020, after having been approved by the Austrian National Council (the lower legislative chamber) on September 19, 2019, and the Austrian Federal Council (the upper legislative chamber) on October 10, 2019. The first tax payments were due on March 15, 2020. The Austrian DST is a 5% tax on revenue generated by digital advertising services supplied in Austria. Digital advertising services are deemed to be supplied in Austria if the advertisement is (a) displayed on a user's device with an Austrian IP address; and (b) the content of the advertisement is directed toward Austrian users. Only digital advertisers that meet the following thresholds, either individually or as part of a group, need pay the tax: global revenue exceeding €750 million (approximately $844 million); and revenue from supplying digital advertising services in Austria exceeding

€25 million (approximately $28 million). Austria will use €15 million (approximately $17 million) of this revenue to subsidize Austrian media companies by way of a digitalization fund.

2. Brazil

Brazil is considering a DST entitled the "Contribution for Intervention in the Economic Domain – Digital" (CIDE-Digital), an addition to the existing CIDE regime (in Portuguese, Contribuição de Intervenção no Domínio Econômico), which applies a 10% tax on payments for the importation of certain services into Brazil. The proposed measure is a progressive tax of 1-5% on gross revenue generated by the following activities: (a) supplying digital advertising to users located in Brazil, which is generally determined by the IP address; (b) providing a digital platform that connects users with the objective of selling goods or providing services, provided that one of the users is located in Brazil; and (c) transmitting data from users located in Brazil that is collected while using a digital platform or generated by these users. The measure would impose a 1% tax on gross revenue from these activities of up to BRL 150 million (approximately $26.2 million), followed by 3% on gross revenue of BRL 150 million to BRL 300 million (approximately $56.2 million), and 5% on gross revenue exceeding BRL 300 million. The tax would only apply to companies that meet the following thresholds: global revenue exceeding BRL 3 billion (approximately $525 million); and revenue from supplying covered services in Brazil exceeding BRL 100 million (approximately $17.5 million). The proceeds from the tax will be fully allocated to the "National Scientific and Technological Development Fund" to promote domestic innovation and technological development.

In addition to the CIDE-Digital, ITI understands that there is a proposal (PLP 131/2020) pending in the Federal Senate that would raise taxes paid by digital companies and advertisers on the basis of turnover. If implemented, digital companies and advertisers would have to pay a unique Cofins (Contribution for the Financing of Social Security) tax rate of 10.6%, instead of the current 7.6%. ITI also acknowledges that at least three amendments presented as part of broader tax reform efforts (PEC 45/2019 and PEC 110/2019) underway at the Joint Special Committee in Congress may exacerbate U.S. companies' concerns related to a Brazilian DST. ITI encourages USTR to monitor these and any other legislative proposals or amendments that may share characteristics with other DSTs under investigation and may be unfair trade practices under Section 301.

3. Czech Republic

The Czech Republic is considering a 7%[5] DST on revenue generated by the following activities: (a) supplying targeted advertising on a digital interface to Czech users (minimum threshold CZK 5 million in revenue); (b) making available to Czech users a multisided digital interface that facilitates the provision of goods and services among users (only if the number of user accounts on the interface exceeds 200,000, and excluding an interface where the sole or main purpose is providing digital content, computer gaming, communications

[5] Based on recent discussions this rate is expected to fall to 5%; however, the rate remains 7% in the latest public draft proposal.

services, or payments to users, as well as excluding an interface supplying gambling or certain financial services); and (c) transmitting data about Czech users derived from their activities on digital interfaces (minimum threshold CZK 5 million in revenue). The measure will deem a service to be supplied in the Czech Republic if, as a general matter, a user accesses the digital interface using a device with a Czech IP address. A company will be liable to pay the tax if it meets the following thresholds, either individually or as part of a group: global revenue exceeding €750 million (approximately $844 million); revenue from supplying covered services in the Czech Republic exceeding CZK 100 million (approximately $4 million), and revenue from supplying covered services in the EU amounts to at least 10% of total revenue in the EU. ITI understands that the EU revenue threshold was introduced in the final stages of the legislative process at the behest of domestic automotive and energy companies. Overall, the Minister of Finance has estimated that the tax will raise CZK 1-2 billion (approximately $42-85 million) in revenue annually.[6] The Czech Republic based this tax on the 2018 EU proposal discussed below, and it is expected to become effective by January 1, 2021.

4. EU

In its proposals for Europe's economic recovery in the wake of COVID-19, the European Commission has expressed its intention to revisit a continent-wide 3% DST, which the Commission had explored but ultimately shelved in 2018 due to a lack of required unanimity amongst the EU Member States. The 2018 proposed tax would have applied to revenue generated by the following activities: (a) supplying targeted advertising on a digital interface to European users; (b) making available to European users a multisided digital interface that facilitates the provision of goods and services among users (excluding an interface where the sole or main purpose is providing digital content, communications services, or payment services to users, as well as excluding an interface supplying certain financial services); and (c) transmitting data about European users derived from their activities on digital interfaces. Per the EC's 2018 proposal, a company would be liable to pay the tax if it meets the following thresholds, either individually or as part of a group: global revenue exceeding €750 million (approximately $844 million); and revenue from supplying covered services in the EU exceeding €50 million (approximately $56 million). The European Commission estimates that the DST could generate up to €1.3 billion (approximately $1.5 billion) per year for the EU budget.[7]

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[6] Tomáš Belica (Czech Ministry of Finance), Interview of Alena Schillerová , (June 17, 2020), https://www.mfcr.cz/cs/aktualne/v-mediich/2020/rozhovor-aleny-schillerove-pro-blesk-38715 (translation). This estimate is made on the basis of a 5% rate.

[7] European Commission, *The EU budget powering the recovery plan for Europe* at 15 (May 27, 2020), https://eur-lex.europa.eu/resource.html?uri=cellar:4524c01c-a0e6-11ea-9d2d-01aa75ed71a1.0003.02/DOC_1&format=PDF.

5. India

India enacted its expanded Equalization Levy (herein referred to as "EL" or "DST") on March 27, 2020 through its Finance Act, 2020. The EL was incorporated into the Finance Act at a late stage, without any Parliamentary discussion or public consultation, and became effective just four days later, on April 1, 2020. The levy is a 2% tax on the sale of goods and services to a person resident in India or a person using an Indian IP address where such sales are facilitated by an "e-commerce operator," which is defined as an electronic facility or platform that is owned, operated, or managed by a non-resident. The EL also applies to the following transactions between e-commerce operators and non-residents: (1) the sale of an advertisement which targets a customer who is resident in India or a customer who accesses the advertisement through an Indian IP address, and (2) the sale of data collected from a person who is resident in India or from a person who uses an Indian IP address. This new proposed measure builds upon an existing 6% levy on gross revenues earned by non-resident companies from digital advertising.

Both the existing 6% levy and the new 2% levy were considered in a 2016 report prepared by the Indian government on the taxation of e-commerce.[8] While the rate for the expanded levy is set at 2% for now, the report's recommendations indicate that the government may increase the rate to 6-8% over the next year.

The non-resident e-commerce operator must pay the tax whether or not it owns the goods or services sold on the facility or platform. Unlike other DSTs, India's new tax applies with respect to the online sale of both goods and services and it solely targets non-Indian e-commerce companies. In addition, its exemption threshold applies to companies with revenues of ₹20 million (approximately $267,000), which is substantially lower than the thresholds included in the other DSTs and may have the effect of capturing U.S. small businesses exporting to India.

6. Indonesia

Indonesia issued its DST on March 31, 2020, by means of Government Regulation in Lieu of Law No. 1 Year 2020, an emergency administrative decree. The decree (which was subsequently passed as Law No. 2 Year 2020 on May 18, 2020) sets out new digital tax measures:[9] (a) a corporate income tax to be applied to foreign digital services companies that the Minister of Finance deems to have a "significant economic presence" (SEP) in Indonesia based on an assessment of gross revenue, sales in Indonesia, and number of users; and (b) an "electronic transaction tax" (ETT). The ETT, which is Indonesia's version of a DST, applies to the sale of goods and services over the internet by foreign digital services companies in situations where it would be inconsistent with Indonesia's income tax treaty arrangements to deem a permanent establishment based on the application of the new SEP

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[8] *See* Indian Ministry of Finance, *Proposal for Equalization Levy on Specified Transactions* at 108 (February 2016), https://incometaxindia.gov.in/News/Report-of-Committee-on-Taxation-of-e-Commerce-Feb-2016.pdf.

[9] The decree also included a value-added tax on digital goods and services sold from abroad to domestic consumers, effective July 1, 2020.

rules. For example, the ETT rules would subject U.S. companies to a gross revenue tax if the SEP rules were otherwise inapplicable due to the income tax agreement between the United States and Indonesia.

As an emergency administrative decree, this measure was not subject to Parliamentary consideration until after it had already entered into force. Many important details, including the rate and the calculation method, will be determined by subsequent regulations which have not yet been issued by the Indonesian government and the timing of which remains unclear. Furthermore, the government has not addressed whether the ETT is still applicable in the event that a foreign service operator is already withholding income tax on income derived from services delivered through electronic systems when it sells to B2B customers. This could potentially subject companies to unnecessary double taxation, which contravenes international norms. While USTR does not reference the SEP provision in the Federal Register Notice, this measure could also establish income tax liability for certain foreign digital services companies that meet yet-to-be determined standards, which would be discriminatory, unreasonable, inconsistent with prevailing international tax principles, and unusually burdensome for U.S. companies that provide digital services in Indonesia.

7. Italy

Italy issued its DST in December 2019, and it will apply retroactively to January 1, 2020, although further technical details, including details regarding which services will be covered, have yet to be published. Like the Czech DST, the Italian measure is based on the 2018 EU proposal, but it is closer to the EU proposal in that the tax rate is an identical 3%. The tax applies to revenue generated by the following activities: (a) supplying targeted advertising on a digital interface to Italian users; (b) making available to Italian users a multisided digital interface that facilitates the provision of goods and services among users (excluding an interface where the sole or main purpose is providing digital content, communications services, or payment services to users, as well as excluding an interface supplying certain financial services or managing the exchange of electricity, gas, environmental certificates, and fuels); and (c) transmitting data about Italian users derived from their activities on digital interfaces. A company will be liable to pay the tax if it meets the following thresholds, either individually or as part of a group: global revenue exceeding €750 million (approximately $844 million); and revenue from supplying covered services in Italy exceeding €5.5 million (approximately $6.2 million).

8. Spain

Spain is considering a DST that closely follows the EU proposal and also parallels the Czech and Italian DSTs. The Spanish Parliament passed the DST on June 4, 2020, and it is now under consideration by the Lower House Budget commission. The proposed 3% tax would apply to revenue generated by the following activities: (a) supplying targeted advertising on a digital interface to Spanish users; (b) making available to Spanish users a multisided digital interface that facilitates the provision of goods and services among users (excluding an interface where the sole or main purpose is providing digital content, communications services, or payment services to users, as well as excluding an interface suppling certain financial services); and (c) transmitting data about Spanish users derived from their activities on digital interfaces. The proposed tax includes an additional carve-out for digital services that are performed between entities that are part of a corporate group, which parallels the EU proposal, except the exemption in the Spanish proposal applies only to a group with a stake, direct or indirect, of 100%. A company will be liable to pay the tax if it meets the following thresholds, either individually or as part of a group: global revenue exceeding €750 million (approximately $844 million); and revenue from supplying covered services in Spain exceeding €3 million (approximately $3.4 million). Spain's Treasury estimates that the tax will generate €968 million (approximately $1.1 billion) per year for the government.[10]

9. Turkey

Turkey issued its DST on December 7, 2019 by means of Act No. 7194, and the DST took effect on March 1, 2020. The DST is a 7.5% tax on revenue generated by the following activities: (a) all types of advertising services provided through digital platforms; (b) the sale of any audio, visual, or digital content on digital platforms, and services provided on digital platforms for listening, watching, or playing the content, downloading the content, and using the content on electronic devices; and (c) the provision and operation of digital platforms where users can interact with each other (including services related to the sale or facilitation of the sale of goods or services among users). Significantly, the President of Turkey is empowered to reduce the tax rate to 1% or increase the rate up to 15% (either separately for each service type or collectively). A company will be liable to pay the tax if it meets the following thresholds, either individually or as part of a group: global revenue exceeding €750 million (approximately $844 million); and revenue from supplying covered services in Turkey exceeding TL 20 million (approximately $3.14 million).

10. UK

The UK plans to implement a DST proposal that was included in Finance Bill 2020, which was published on March 19, 2020. The DST would be a 2% tax, retroactive to April 1, 2020 after the tax receives royal consent, on revenue generated by the following "digital services activities" that are attributable to a UK user: (a) a social media service (an online service that promotes interaction between users as one of its main purposes and a significant feature of the service is making content generated by users available to other users); (b) an internet search engine; and (c) an online marketplace (an online service, excluding defined online financial marketplaces, that facilitates the sale of goods or services by users as one of its main purposes and enables the selling or advertising of goods or services to other users). Each of these three categories of digital services include associated online advertising services. Further, a UK user is a user that it is reasonable to assume is an individual normally in the UK or an entity established in the UK. A company will be liable to pay the tax if it meets the following threshold, either individually or as part of a group: global revenue from supplying the covered services exceeding £500 million (approximately $624

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10 Laura Delle Femmine, El Pais, *The 'Google rate' will represent 0.45% of the total tax revenue of Spain* (February 18, 2020), https://elpais.com/economia/2020/02/18/actualidad/1582013171_371351.html (translation).

million) where at least £25 million (approximately $31 million) is attributable to UK sales. Finally, the tax includes two additional features: an alternative calculation method for low-margin companies; and a reduction of the tax by 50% should the same revenue be subject to a DST in another jurisdiction.

II. THE TAX MEASURES DISCRIMINATE AGAINST U.S. COMPANIES

In the French DST Report, USTR concluded that the French DST is discriminatory on the basis of extensive evidence that the DST is intended to, and does, target U.S. companies.[11] USTR catalogued dozens of statements by Minister of Economy and Finance Bruno Le Maire and other senior French officials showing the measure's discriminatory intent, including statements describing the measure as the "GAFA tax," denoting Google, Amazon, Facebook, and Apple. With respect to the design of the measure, USTR explained that the services covered by the measure, the revenue thresholds, and the relationship of the measure to other French taxes discriminate against U.S. companies. USTR concluded that while the French DST is not expressly limited to U.S. companies, it is discriminatory on a *de facto* basis.

Eight of the ten measures that are the subject of USTR's present investigations – the Austria, Brazil, Czech Republic, EU, Italy, Spain, Turkey, and UK measures – are similarly *de facto* discriminatory. As discussed below, the EU established the template for each of these measures in 2018, and the EU's description of its proposed measure left no doubt that it would discriminate against U.S. companies. The measures subsequently adopted or considered by Austria, Brazil, the Czech Republic, Italy, Spain, Turkey, and the UK are thus similarly designed to target a specific subset of U.S.-headquartered companies, and are discriminatory at their core. In addition, officials from these jurisdictions have made statements voicing discriminatory intent – despite intensified international scrutiny of DSTs and USTR's high-profile investigation of the French measure. Beyond such statements of discriminatory intent, the central design features of the measures are also clearly discriminatory. As set out below, there is no non-nationality-based explanation for the selection of covered services and revenue thresholds in these measures. This is because the narrow scope of covered services and revenue thresholds operate together to functionally select a subset of large, foreign companies for taxation, while leaving domestic companies and would-be competitors untaxed.

The other two measures under investigation – the India and Indonesia measures – are distinct because they are facially discriminatory. These taxes apply only to "non-residents" (India) or "foreign" companies (Indonesia). The discriminatory nature of these measures is indisputable.

[11] French DST Report at 31-49.

A. Statements of senior government officials show that all the tax measures are intended to target U.S. companies

The 2018 EU measure established the template for the Austria, Brazil, Czech Republic, Italy, Spain, Turkey, and UK measures that followed, including a narrow selection of covered services and revenue thresholds that were each intended to target U.S. companies and shield domestic companies. Because of that fact, and because the EU is now revisiting its proposal and the proposal itself is under investigation, it is important to recall the EU's descriptions of its proposal that reveal discriminatory intent.[12]

In a European Commission (EC) working group paper cited by USTR in the French DST Report,[13] the EU named seven companies whose revenues would be subject to the tax, six of which are American (Facebook, Google, Twitter, Instagram, Airbnb, and Uber).[14] The working group paper also repeatedly used examples of U.S. companies to demonstrate the scope and application of the measure.[15] Based on this paper, one EU scholar concluded that "the taxes proposed by the European Commission would almost exclusively affect the revenues of companies that are currently headquartered in the US."[16]

Further, the same EC working group paper also documents the EU's internal discussions about potential approaches to disguising the discrimination. "In order for the tax not to be seen as discriminatory, it is necessary that it is not designed in such way that domestic companies are systematically excluded," the EC wrote.[17] To preempt accusations of discrimination, the EC floated a €10 million threshold for EU revenue, since "preliminary data suggests that it would capture both non-EU and EU companies."[18] Tellingly, however, the EC ultimately proposed a €50 million threshold for EU revenue that would exclude most

[12] For the purposes of this submission, we have focused our analysis on the 2018 proposal based on the framing of the EU's position in USTR's notice and request for comments.

[13] French DST Report at 29, 37.

[14] European Commission, *Taxation of Digital Activities in a Single Market* at 3.3 (February 26, 2018), https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/Taxation-of-digital-activities-in-the-single-market.pdf.

[15] *See, e.g.*, *id* at 3.5 ("[P]lease note that in some cases the tax will be due in a Member State while the cash-flow of the transaction remains in a third country. For instance, the scenario concerning a cash-flow between a US advertising company (e.g. Coca-Cola) and a US company offering advertisement space (e.g. Facebook), where the advertisements target EU users (tax due in the EU).").

[16] Dr. Matthias Bauer, Senior Economist at ECIPE, *Five Questions about the Digital Services Tax to Pierre Moscovici*, ECIPE Occasional Paper, at 2 (Apr. 2018) (adding that Google, Amazon, Facebook, Uber, AirBnb "have been explicitly outlined in the European Commission's 'Draft Justification for EU Action' from 26 February 2018. Based on the design, architecture and revealing structure of the Commission's proposal, the US government is likely to come to the conclusion that the measures constitute a disguised restriction on international trade. . . .").

[17] European Commission, *Taxation of Digital Activities in a Single Market* at 3.4.

[18] *Id*.

(if not all) European companies. The EC described this threshold as necessary to protect European start-ups that provide the same services as the targeted U.S. companies.[19]

The EC's descriptions of the EU proposal not only reveal the EC's discriminatory intent; they also implicate later measures that the EU proposal inspired, including measures under investigation in Austria, Brazil, the Czech Republic, Italy, Spain, Turkey, and the UK. Senior officials from some of these countries have conceded that their measures were based on the EU proposal,[20] which is also apparent from the similarities among the measures. In certain instances, senior officials from these countries have also explicitly named U.S. companies as targets. For instance, Austrian Chancellor Sebastian Kurz stated: "The goal is clear: taxation of corporations that earn large profits online but barely pay any taxes – such as Facebook or Amazon."[21] Brazilian Congressman João Maia said that a DST is necessary because technology companies "simply take everything they collect from Brazilian consumers to the United States, or tax havens."[22]

Other senior officials have framed the target as global "giants," a thinly veiled description of leading U.S. technology companies. In a joint letter to U.S. Treasury Secretary Steven Mnuchin, four minister-level officials from France, Italy, Spain, and the UK said that "[d]igital giants" need to "pay their fair share of tax within countries where they create value and profit."[23] Czech Finance Minister Alena Schillerova contended that a DST is necessary "[b]ecause we can no longer wait and see the unequal competition of global giants with other entrepreneurs."[24] Likewise, former UK Chancellor of the Exchequer Philip Hammond said the UK measure would be "designed to ensure it is the established tech giants rather

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19 European Commission, *Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services*, at para. 24, (November 23, 2018), https://data.consilium.europa.eu/doc/document/ST-14476-2018- INIT/en/pdf ("In particular, it is important for the EU to provide a favourable environment for R&D activities and innovation, in particular for start-ups in the fast-growing digital sector. Thus additional taxes for such companies should be avoided.").

20 *See*, *e.g.*, Reuters, *Czech government approves digital tax aimed at internet giants* (November 18, 2019), https://www.reuters.com/article/us-czech-taxation-digital/czech-government-approves-digital-tax-aimed-at-internet-giants-idUSKBN1XS1XU (reporting that the Czech finance ministry "said the Czech proposal was based on the earlier ideas for pan-European legislation"); Spain's 2019 Budget Plan, at 22 (October 15, 2018), https://www.hacienda.gob.es/CDI/estrategiapoliticafiscal/2019/plan_presupuestario_2019.pdf ([T]he Government of Spain is committed to coordinated fiscal measures within the European Union in sectors related to financial transactions, the digital economy and green taxation. The measures to be adopted cannot wait and will place us at the forefront of taxation, in line with the demands of international organizations.") (translation).

21 Troler Tageszeitung, *Chancellor Briefly in the TT Interview: "We will introduce the digital tax"* (December 31, 2018), https://www.tt.com/artikel/15167384/kanzler-kurz-im-tt-interview-wir-werden-die-%20digitalsteuer-einfuehren (translation).

22 Agoraran, *RN deputy bill makes Trump question Brazil about digital service tax* (June 6, 2020), https://agorarn.com.br/politica/projeto-de-deputado-do-rn-faz-trump-questionar-brasil-sobre-taxacao-de-servico-digital/ (translation).

23 Letter to Secretary Mnuchin from Bruno Le Maire, María Jesús Montero Cuadrado, Roberto Gualtieri, and Rishi Sunak (June 17, 2020), https://www.politico.eu/wp-content/uploads/2020/06/Letter-Mnuchin-IT-FR-UK-SP-FINAL-SIGNED%E2%80%94CLEANED.pdf?source=email.

24 Kafkadesk, *Czech Republic approves 'GAFA' tax on digital giants* (November 19, 2019), https://kafkadesk.org/2019/11/19/czech-republic-approves-gafa-tax-on-digital-giants/.

than the technology startups which shoulder the burden."[25] EU officials have made similar statements when discussing a Europe-wide DST. Othmar Karas, the Vice President of the European Parliament, said that Europe "need[s] a digital establishment so that the Internet giants pay their taxes where they make the profits."[26] He added that a digital giant-focused EU DST "would also be a good opportunity to expand the EU's own resources and thus reduce the national contributions to the EU budget from the budgets of the member states."[27] This logic is also reflected in the DST's inclusion in proposals for Europe's economic recovery in the wake of COVID-19 published by the Commission, which would ultimately bear legislative responsibility for the reintroduction of the EU DST proposal.

Outside of the EU measure and other measures under investigation that closely follow the EU approach, senior officials from India and Indonesia have also broadcast their discriminatory intent, which is apparent on the face of their measures. Indian Ministry of Finance Joint Secretary Kamlesh Varshney described the purpose of the Indian measure thusly: "I think my personal view is that the tax should be taxed on the actual MNE, who is providing those services. All parts of the digital taxation incident should be on the foreign player, because if the incidence is passed on to the Indian player, then it doesn't really serve the purpose."[28] Another Indian government official commented that U.S. withdrawal from the OECD discussions will "only encourage more countries to act unilaterally as far as digital taxes are concerned," suggesting that U.S. companies are the target.[29] In the case of Indonesia, Finance Minister Sri Mulyani Indrawati named Zoom and Netflix as targets of the Indonesian measure, stating that these companies "are not present in Indonesia . . . [b]ut their economic activities are huge."[30]

B. The design of the Austria, Brazil, Czech Republic, EU, Italy, Spain, Turkey, and UK tax measures discriminates against U.S. companies

There are numerous companies that supply digital services and like services through traditional means (*e.g.*, print or television advertising) in Austria, Brazil, the Czech Republic, the EU, Italy, Spain, Turkey, and the UK that compete with one another.

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25 Hannah Boland and Matthew Field, The Telegraph, *Hammond unveils digital services tax to raise £400 million a year* (October 29, 2018), https://www.telegraph.co.uk/technology/2018/10/29/hammond-unveils-digital-services-tax-make-tech-giants-pay-fair/.

26 Die neue Volkspartei press release, *Karas: "Digital corporation tax online corporations"* (December 18, 2009), https://www.ots.at/presseaussendung/OTS_20191218_OTS0042/karas-online-konzerne-mit-digitalsteuer-belegen (translation).

27 *Id*.

28 Anjana Haines, International Tax Review, *Discussion: Kamlesh Varshney talks about India's tax policy agenda* (March 30, 2020), https://www.internationaltaxreview.com/article/b1kxs1b3pvv2x1/discussion-kamlesh-varshney-talks-about-indias-tax-policy-agenda.

29 Dilasha Seth, Business Standard, *India, European nations may soon tax digital firms as US upends global plan* (June 20, 2020), https://www.business-standard.com/article/economy-policy/india-european-nations-may-soon-tax-digital-firms-as-us-upends-global-plan-120062000076_1.html.

30 Taxlinked.net, *Indonesia Joins Digital Tax Bandwagon as a Result of Covid-19* (April 22, 2020), https://taxlinked.net/blog/april-2020/indonesia-joins-digital-tax-bandwagon-result-covid-19.

However, analysis of the likely application of the DSTs suggests that nearly all of the companies that will be subject to the DST measures in these jurisdictions are foreign companies, as some DST proponents have conceded;[31] in fact, most affected companies will be U.S. companies. As noted above, this is because of the narrow scope of covered services and revenue thresholds which operate together to single out a subset of large, foreign companies for taxation.

For example, take the advertising sector in five jurisdictions: Austria, Brazil, the Czech Republic, Turkey, and Italy. Nearly all of the top domestic advertisers in Austria (*e.g.*, Mediaprint, ProSiebenSat1Puls4, Red Bull Media House, Styria Media Group), Brazil (*e.g.*, Grupo Bandeirantes, Grupo Folha São Paulo, Grupo Globo, Grupo Record), the Czech Republic (*e.g.*, Agrofert, Mafra, Parlamentnilisty.cz, Seznam.cz), and Turkey (*e.g.*, Hepsiburada, N11, Modanisa, Trendyol) appear to be outside the scope of the DSTs in those jurisdictions. As for Italy, subject to implementing measures, numerous major advertisers (*e.g.*, Gruppo24 Ore, IGP Decaux, Italiaonline, Publiemme) will likely be outside the scope of the DST, and those that may be inside the scope (*e.g.*, Discovery Media, Publitalia, Rai, Cairo Communication) will have minimal tax burdens because digital advertising is a relatively minor part of their businesses.

The exclusion of nearly all domestic companies appears to be the result of conscious efforts by the governments in the eight jurisdictions to structure their measures in a way that would limit the impact of the taxes on domestic companies. For example, these DSTs – like the French DST – effectively carve-out companies that are successful only or primarily in the domestic market, as such companies will not meet the global revenue threshold. These are likely to be domestic companies. There is no non-nationality-based explanation for this approach, as these untaxed domestic companies may be identical in nearly all respects to their taxed foreign companies in terms of their domestic footprint (*e.g.*, numbers of customers, amount of revenue).

As a result, these DSTs will have a discriminatory impact on U.S. companies vis-à-vis local competitors. For example, some U.S. companies in each DST market will have no choice but to increase their advertising rates to compensate for the costs of complying with the DST. Accordingly, when advertisers or others procuring digital services in each market make decisions as to how best to manage and allocate their budgets, they are likely to redirect significant portions of their spending to local providers that are not subject to the same cost pressures because they are outside the scope of the DST. In-scope U.S. companies will lose out on business to local rivals that do not meet the revenue thresholds or the strict business model definitions in the tax.

In addition, the negative impact of the DSTs on U.S. companies will be exacerbated by the absence of any exemption from the tax for any portion of local in-scope revenue (excluding in the case of the UK DST). This results in a cliff effect whereby a domestic company with

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[31] *See, e.g.*, Ruth Mason and Leopoldo Parada, Tax Notes International, *Digital Battlefront in the Tax Wars* at 1186 (December 17, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3279639&download=yes (translating a Spanish government analysis as stating that the Spanish measure would "mainly . . . affect multinational companies").

taxable revenue just underneath the local threshold is fully exempt, but a U.S. company with revenue just over the local threshold has 100% of such revenue subject to tax. Some of the DSTs also include features not found in the French DST that amplify the discrimination. For example, as noted above, the Austrian DST states that €15 million in annual proceeds from the tax will be channeled directly to foreign companies' domestic competitors, and all of the proceeds from the Brazilian DST will promote domestic innovation and technological development.

In the limited instances in which a domestic company may be required to pay one of the DSTs, the disproportionate impact of the measures on U.S. and other foreign companies still provides compelling evidence to support a determination that the measures are discriminatory, particularly coupled with the evidence of discriminatory intent discussed above. An individual example of a domestic company being treated the same as a foreign one does not erase the many examples in which domestic and foreign companies that supply the same services and compete against each other are treated differently. In addition, a domestic company that pays a DST will generally be able to deduct the payment against its domestic corporate income taxes. This will increase the cost advantage for domestic firms, as foreign companies will not be able to offset their tax payments: they will not have a domestic income tax bill from which to deduct DST payments, and they will not be able to deduct the DST payments from their home country income taxes.

In sum, the design of the measures appears to focus on the particular business models of foreign, mainly U.S., companies that these governments have previously and repeatedly identified in connection with their respective measures.

C. The design of the India and Indonesia tax measures discriminates against U.S. companies

The India and Indonesia measures discriminate against U.S. companies in two respects. First, the measures only apply to foreign digital companies that supply goods or services to domestic purchasers (whether individuals or businesses), not to domestic digital companies.[32] For example, Indian digital companies that are outside the scope of the taxes that compete with ITI member companies that are within the scope include Snapdeal, Pepperfry, and Quikr. Second, the tax only applies to sales made through digital companies, and thus excludes Indian and Indonesian brick-and-mortar establishments that supply the same goods and services as the foreign digital businesses. There is an endless variety of Indian and Indonesian physical marketplaces that compete with ITI member companies. The Indian and Indonesian companies would be excluded from the tax, while the ITI member companies would be within the tax's scope. There is no legitimate justification for this differential treatment.

[32] Under section 301(d)(5) of the Trade Act, measures that deny national treatment to U.S. services or investment – as the Indian and Indonesian measures plainly do – are discriminatory by definition.

III. THE TAX MEASURES ARE INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES AND UNUSUALLY BURDENSOME FOR AFFECTED U.S. COMPANIES

In the French DST Report, USTR concluded that the French DST is inconsistent with international tax principles and unusually burdensome for affected U.S. companies on three grounds.[33] First, taxing corporate revenue, rather than income, is inconsistent with international tax principles – as reflected, for example, in the OECD Model Tax Convention on Income and on Capital, the UN Model Double Taxation Convention, and over 3,000 bilateral tax treaties.[34] This approach appears to penalize low-margin and loss-making companies and subjects affected companies to potential multiple taxation and significant compliance costs. Second, subjecting companies to domestic corporate taxes without regard to whether and to what extent they have a permanent establishment in-country is inconsistent with the international tax laws vis-à-vis bilateral tax treaties as well as international tax principles reflected in the OECD model tax treaty and other instruments, and it will, like taxing revenue, create the risk of multiple taxation and significant compliance costs. Third, a retroactive tax undermines the principle of tax certainty and exacerbates the already significant compliance burdens posed by an unusual extraterritorial tax on revenue. USTR added that the French DST is also inconsistent with international tax principles to the extent the measure seeks to target digital companies and ring-fence the digital economy. ITI has long agreed that it is both unrealistic and poor policy to try to ring-fence the digital economy – a position that the OECD has also expressed as a key underpinning of its work to address the tax challenges presented by the digitalization of the economy.[35]

All of the measures under investigation single out digital companies and ring-fence the digital economy in a manner that is inconsistent with international tax principles. In addition, eight measures – the Austria, Brazil, Czech, EU,[36] Italy, Spain, Turkey, and UK measures – share the French DST's approach of taxing revenue without regard to the existence of a permanent establishment. As discussed in more detail below, the measures will also burden affected U.S. companies by subjecting them to the risk of multiple taxation and extraordinary compliance costs, in addition to creating an exceptional burden for low-margin or loss-making companies by potentially taxing them into, or further into, the red. Two of these measures also apply retroactively: the Italian measure will apply retroactively

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33 French DST Report at 49-70.

34 To illustrate how DSTs as gross receipts taxes compare to corporate income taxes, a DST of 3% applied to a company with a 10% profit rate equates to a 30% effective corporate income tax rate, with no availability of deductions or credits. This is applied on top of corporate income taxes paid by the company. The double taxation and subsequent effective corporate income tax rate are especially impactful to companies with lower profit margins and companies with losses.

35 OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report at 54 (October 5, 2015), https://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm ("[B]ecause the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy.").

36 The EU does not have a tax treaty with the United States as the EU does not have competency over direct taxation, only over indirect taxation.

to January 1, 2020, once technical details are released; and the UK measure will apply retroactively to April 1, 2020, should the legislative package receive royal assent.

The other two measures – the India and Indonesia measures – are broader measures focused on a wider scope of digital goods and services, and they are no less inconsistent with international tax principles and burdensome for affected U.S. companies than the other measures. Concerns related to the risks of multiple taxation and compliance burden extend to these measures as they also do not require the existence of a permanent establishment for the tax to apply. The even broader scope of these measures may actually make them more burdensome for an expanded group of U.S. companies in these markets. Furthermore, the Indonesian SEP measure deviates from the internationally accepted definition of permanent establishment, which, in tandem with the arm's length principle, has anchored liability in the global tax system for generations.

A. The Austria, Brazil, Czech, EU, Italy, Spain, Turkey, and UK measures are inconsistent with international tax principles and unusually burdensome for affected U.S. companies

As discussed above, the Austria, Brazil, Czech, EU, Italy, Spain, Turkey, and UK measures are broadly inconsistent with international tax principles on the same grounds as the French DST, with the exception of the fact that just two of these measures will apply retroactively. USTR's determinations regarding the French DST should thus hold and apply here. Notably, since USTR issued its French DST Report, the OECD has made and continues to make progress in developing rules that may ultimately permit a jurisdiction under certain defined circumstances to apply its corporate taxes to companies without a permanent establishment or nexus in accordance with current international tax rules, but unless and until the governments participating in multilateral discussions reach agreement regarding how to achieve a deviation from permanent establishment norms – which countries have defined and agreed to in bilateral tax treaties – imposing taxes without regard to the existence of a permanent establishment will continue to breach international tax principles.

Taxes on revenues generated from in-scope digital services supplied in these eight jurisdictions will burden U.S. commerce by imposing a severe financial burden on U.S. companies that supply such services, including ITI member companies. The burden is particularly notable with respect to the Austria, Czech, Turkey, and Brazil measures, which are 2% to 5.5% higher than the French DST. In Turkey, the President can also double the already hefty 7.5% tax – a unilateral prerogative which is both burdensome and highly atypical in international tax practice. In addition, the Turkish DST applies to a broader scope of services than the seven other DSTs discussed in this section, including the sale of any audio, visual, or digital content.

Given the design of these eight measures, there is also a high likelihood that costs will be passed down the supply chain, and in that respect hurt other U.S. companies, including small- and medium-sized companies.

Some of the most vocal DST advocates acknowledge the risks of multiple taxation intrinsic to an extraterritorial tax on revenue.[37] Notably, the UK's attempted solution is insufficient; it actually highlights the extent of the problem. The proposed UK measure reduces the tax obligation by 50% in certain circumstances where the same revenue is subject to a DST in another jurisdiction. However, a 50% discount is arbitrary and is unlikely to eliminate the risk of multiple taxation where the two DSTs have basic differences, such as inconsistent tax rates, scope, and calculation methods. Also, the UK fix does not address multiple taxation as a result of home country corporate income taxes or other taxes. The only way to coherently and effectively address the issue of multiple taxation is through a multilateral process that results in a sustainable and consensus-based solution.

In addition to added tax costs, there are also substantial administrative burdens in terms of compliance costs and greater uncertainty. Companies will need to engage in significant re-engineering of their internal business and financial reporting systems to ensure that they can accurately capture required information and comply with the DSTs. Companies will also need to include new filing and audit components on accounts in these jurisdictions, which creates legal and financial risks. For example, the data retention mechanisms necessary to support the calculations of ads shown in each country and taxable under their DSTs may not comply with the EU's General Data Protection Regulation (GDPR). To the extent that these taxes differ in scope and thresholds, those compliance costs increase. We estimate associated costs to be in the millions in each jurisdiction for those companies that are in scope. Further, there will be very high audit uncertainty, which will lead to additional disputes and subsequent costs.

All of these burdens will be amplified in the case of the Italy and UK DSTs, due to their retroactive application. For example, the Italian DST that was published on January 1, 2020 leaves numerous questions unanswered regarding how the DST will be calculated that could put U.S. companies in legal and financial jeopardy, including how to determine if a service is provided in Italy and is therefore subject to the tax. These questions remain unanswered more than six months later. When regulations are finally issued, U.S. companies covered by the tax may need to calculate their tax liability for several months during which they were not collecting the right information and did not have other necessary systems in place. This could be extremely burdensome for affected companies in terms of costs and audit risks.

B. The India and Indonesia measures are inconsistent with international tax principles and unusually burdensome for affected U.S. companies

While the India and Indonesia measures are different than the DSTs discussed above, they too are inconsistent with international tax principles because they similarly focus on tax

[37] Samuel Stolton, Euractiv, *Gentiloni: Virus crisis highlights importance of digital tax* (April 14, 2020), https://www.euractiv.com/section/digital/news/gentiloni-virus-crisis-highlights-importance-of-digital-tax/ (quoting EU Commissioner Paolo Gentiloni: "What is clear from the European Union point of view is that we need a digital taxation and we are now working to have it at the global level, which should be the best way to avoid double taxation and other very complicated issues.").

revenue earned by firms that lack a permanent establishment.[38] These measures also facially target U.S. and other foreign companies, and as such, they breach a second international tax principle: non-discrimination. This principle is a pillar of the international tax regime as reflected in the OECD Model Tax Convention on Income and on Capital and many other international tax instruments. Finally, these measures are unusually burdensome for U.S. companies.

The Indian measure is perhaps the broadest of the DSTs, as it applies to the sale of all goods or services by digital businesses to persons using an Indian IP address. The measure also applies to sales to Indian residents, potentially irrespective of their location.[39] Further, the Indian government set the revenue threshold significantly lower than the other DSTs (presumably because domestic companies were already carved out on the face of the measure) – requiring revenue of ₹20 million (approximately $267,000) – meaning that an unusually large swath of foreign companies will fall within the scope. This will result in substantial tax, compliance, and audit costs for many U.S. companies, including smaller businesses and low-margin businesses. Since the EL was enacted unilaterally and without regard for a multilateral framework, it does not take into account a fair apportionment of income between various tax jurisdictions involved in the same e-commerce transaction. In low-margin companies, it may be possible that a business's entire income is subject to tax in India alone.

Administrative burdens are also cause for concern with the Indian measure. For example, the formal mechanism to facilitate payment of the tax directly to the tax authorities – the payment *challan* – mandates that non-residents seek a Tax Registration Number in India; however, the government has not made any legal amendment in the rules or issued a notification for doing so. As such, small- and medium-sized U.S. companies that exceed the low threshold are having difficulty setting up the remittance process through an intermediary bank, in part because they generally lack a physical presence or employees in India. In addition, there is no procedure for taxpayers to claim refunds for overpayments of the tax due to any subsequent cancellation of the transaction that was subject to the tax. There is also little guidance on how taxpayers can substantiate their tracking of the IP addresses of their customers for audit purposes. All of these issues are amplified by the rushed nature of the Indian measure: the first tax payments were due on July 7, barely three months after the measure was unveiled, and just two days after the *challan* was amended on July 5 to enable companies to pay the tax.

The Indonesian measure has been similarly rushed: it was rendered effective through an emergency decree before parliamentary consideration. While the ultimate scope of the

[38] The Indian measure accomplishes this by explicitly applying this tax to non-resident companies, which by definition do not have a permanent establishment. In contrast, the Indonesian measure does this by artificially expanding the concept of permanent establishment to similarly capture companies without a physical presence.

[39] For example, a non-resident advertiser based in Country X books a digital advertisement from Country X e-commerce operator. The advertisement targets Indian tourists (*i.e.*, Indian residents) present in Country X using an IP address of Country X. Based on the language in the EL, such advertisement may be taxable. The tax would be in addition to the tax implications under the DST of Country X if applicable, in addition to the corporate income tax payable by the operator in the country of resident.

Indonesian measure will be determined by regulations, based on the statutory language, the law parallels the Indian measure's focus on online, remote sales of goods and services by foreign e-commerce companies. Also similar to the Indian measure's construct, the mutually exclusive applicability of income tax (based on permanent establishment, or the vaguely defined SEP) to the ETT, introduces ambiguity and potential administrative burdens for non-resident firms with an uncertain permanent establishment status. This approach will impose substantial tax, compliance, and audit costs on U.S. companies in the market.

IV. PUBLIC RATIONALES FOR THE TAX MEASURES ARE UNPERSUASIVE

In the French DST Report, USTR conclusively demonstrated that two common rationales for DSTs – that covered digital companies have lower tax rates than non-covered companies, and that these covered digital companies' users generate value in a different manner than traditional companies – are baseless.[40] Further, USTR made the critical point that even if these rationales were well-supported, they would not justify numerous elements of the DSTs that make them unfair trade practices under Section 301.[41] For example, in the case of the Austria, Brazil, Czech Republic, EU, Italy, Spain, Turkey, and UK measures, these rationales would not justify illegitimate elements including the discriminatory revenue thresholds and the burdensome application of the taxes to revenue rather than income.

Since USTR published the French DST Report, countries have had to confront the new and unprecedented public health and economic challenges posed by COVID-19. ITI supports efforts by all governments to mount the strongest possible response to these challenges in a manner consistent with free, fair, and rules-based international trade. Unfortunately, some governments have invoked the COVID-19 crisis in support of their DST initiatives. The EU and Indonesia, for example, have each framed their DSTs as part of reform packages to address the economic fallout caused by COVID-19. French Minister of Economy and Finance Le Maire said that "[t]he digital giants are going to be the main beneficiaries of this crisis, so taxing them has never been more necessary."[42] Similarly, Indonesian Finance Minister Sri Mulyani stated that "[w]e decided to tax digital companies with an electronic transaction tax because their sales have soared amid the Covid-19 outbreak," highlighting Zoom and Netflix as examples.[43]

We urge USTR to strongly oppose the use of discriminatory tax policies, such as DSTs, as a response to the current crisis. For all economies, the challenges posed by COVID-19 are extraordinary. Responding to this crisis demands enhanced multilateral cooperation across all fronts – not unilateral tax policies that pit countries that face similar challenges against one another. Significant changes to global tax laws should adhere to clear and consistently applied tax policy principles and should be designed to be sustainable and prospective.

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40 French DST Report at 71-76.

41 *Id.*

42 *See* Bryce Baschuk and William Horobin, Bloomberg, *Cash-Strapped Governments See Revenue in $26 Trillion Online Industry*, https://www.bloomberg.com/news/articles/2020-05-03/a-26-trillion-pot-of-digital-gold-eyed-by-cash-hungry-nations.

43 *Id*.

IV. CONCLUSION

In the written comments that ITI submitted to USTR in support of the investigation of the French DST, we argued that the investigation and subsequent negotiation of a multilateral solution that would result in the rollback of that measure were important to prevent the widespread adoption of unilateral taxes. The same is even more true now. We believe that a firm finding that the ten DSTs under investigation are discriminatory, unreasonable, inconsistent with prevailing international tax principles, and unusually burdensome for affected U.S. companies, will be an important step in pushing back against all DSTs and other unilateral efforts that some governments are undertaking to draw arbitrary distinctions based on the digitalization of business models that are not grounded in either data or tax policy principles.

The proliferation of unilateral DSTs is apparent based on the scope of this investigation, but the India and Indonesia measures point to a more pernicious trend of increasingly protectionist measures. ITI has long warned of this outcome. Whereas the majority of measures introduced or under consideration have largely aligned with the French template in terms of design, the most recently introduced measures feature explicit discrimination, broader scope of application, and comparably minute exemption thresholds. This development increases the imperative of a robust investigation, as economies contemplating DSTs now have multiple, expanding models to which they can look.

We continue to strongly support the OECD discussions to develop a stable, multilateral, consensus-based solution that addresses the tax challenges of the digitalization of the economy. A successful agreement will respect the fact that the entire economy is becoming digitalized; it will not seek to ring-fence the digital economy. Further, a successful agreement will be based on long-standing and well-founded international taxation principles and objectives.[44] Countries should continue to constructively engage with each other to ensure that ongoing multilateral discussions result in an agreement that achieves these objectives.

Sincerely,

Sam Rizzo
Senior Director of Policy, Trade and Tax

[44] In May 2020, ITI published Principles for a Solution in the OECD's Project for Addressing the Tax Challenges of the Digitalization of the Economy: https://www.itic.org/news-events/news-releases/global-tech-trade-association-outlines-principles-for-oecd-efforts-to-address-tax-and-the-digitalization-of-the-economy