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Section 301 Investigation
Report on Austria's Digital Services Tax

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REPORT ON AUSTRIA'S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974

I. EXECUTIVE SUMMARY

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Austria's Digital Tax Act of 2020 (DST) under Section 301 of the Trade Act of 1974, as amended (the Trade Act). Austria's DST imposes a 5% tax on gross revenues from digital advertising services provided in Austria. The DST applies only to companies with annual global revenues of €750 million or more, and annual revenues from digital advertising services in Austria of €25 million or more.

In this report, the Office of the United States Trade Representative (USTR) presents its findings on actionability. The applicable standard for actionability under Section 301 is whether Austria's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As described in this report, our investigation suggests that Austria's DST satisfies this standard. If the U.S. Trade Representative determines that the DST is actionable, Section 301 would authorize "all appropriate and feasible action ... to obtain the elimination of" the DST.¹

As explained in the Federal Register notice launching the investigation (the Notice of Initiation),² USTR focused on various aspects of the DST over the course of the investigation, including whether the DST discriminates against U.S. companies, if the DST is unreasonable as tax policy, and whether the DST burdens or restricts U.S. commerce. The Notice of Initiation requested public comments on these points, and 383 comments from interested persons, including companies, organizations, and governments, are available in the public docket. USTR also participated in direct, government-to-government consultations with Austria regarding the DST on December 21, 2020. These and other investigatory steps indicate that Austria's DST discriminates against U.S. companies, unreasonably contravenes international tax principles, and burdens or restricts U.S. commerce.

First, our investigation indicates that Austria's DST discriminates against U.S. digital services companies. The primary mechanism of this discrimination is the DST's revenue thresholds, which shield smaller firms from taxation (including many Austrian firms), while creating tax liability for an inordinate number of large, U.S.-based companies. Statements from the highest levels of the Austrian Government—including Chancellor Sebastian Kurz—indicate that this targeting of U.S. companies was deliberate. In December 2018, Chancellor Kurz was unambiguous, explaining that: "We will introduce a digital tax in Austria... The aim is clear: taxation of companies that make large profits online but barely pay taxes—such as Facebook and

¹ 19 U.S.C. § 2411(b).

² USTR, "Initiation of Section 301 Investigations of Digital Services Taxes" 85 FED. REG. 34709, June 5, 2020 ("Notice of Initiation").

Amazon.”³ Four months later, the Chancellor reiterated his intentions, characterizing the DST as “a national tax on digital giants like #Google or #Facebook ...”⁴

For these and other reasons explained further in Section IV(A) below, our investigation would support a finding that Austria’s DST discriminates against U.S. companies.

Second, our investigation indicates that Austria’s DST unreasonably contravenes international tax principles. At least two aspects of the DST appear to be inconsistent with principles of international taxation:

- The DST taxes companies with no permanent establishment in Austria, contravening the international tax principle that companies should not be subject to a country’s corporate tax regime absent a territorial connection to that country.
- The DST taxes companies’ revenue rather than their income. This is inconsistent with the international tax principle that income—not revenue—is the appropriate basis for corporate taxation.

For these and other reasons explained further in Section IV(B) below, our investigation would support a finding that Austria’s DST unreasonably contravenes international tax principles.

Third, our investigation indicates that Austria’s DST burdens or restricts U.S. commerce. The DST is burdensome or restrictive in at least three ways:

- The DST creates an additional tax burden for U.S. companies. USTR estimates that the aggregate DST tax bill for U.S. companies could amount to tens of millions of dollars each year. Aspects of the DST that exacerbate this tax burden include the DST’s extraterritorial application and its taxation of revenue rather than income.
- The DST forces U.S. companies to undertake costly measures to comply with the tax’s new payment and reporting requirements. This includes the reengineering of existing systems to collect and organize new and different types of information. USTR’s analysis indicates that compliance costs could run into the millions of dollars for each affected company.
- The DST burdens U.S. companies by subjecting them to double taxation.

For these reasons, which we discuss further in Section IV(C) below, our investigation suggests that Austria’s DST burdens or restricts U.S. commerce.

* * *

³ *Reuters*, “Austria plans digital tax while EU keeps working on its own levy,” December 29, 2018, available at: <https://de.reuters.com/article/eu-tax-digital-austria/austria-plans-digital-tax-while-eu-keeps-working-on-its-own-levy-idUKL8N1YY086>

⁴ Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), April 3, 2019, available at: <https://twitter.com/sebastiankurz/status/1113361541938778112>.

In summary, as set out in detail in this report, USTR's investigation indicates that Austria's DST is discriminatory, unreasonable, and burdens or restricts U.S. commerce, and thus, actionable under Section 301.

II. BACKGROUND

This section provides background on the adoption of Austria’s DST and on USTR’s investigation. Subsection A summarizes the historical context of the DST, with a focus on the multilateral tax negotiations that were ongoing when Austria adopted its DST and the legislative and procedural history of the DST. Subsection B describes the relevant elements of Section 301 of the Trade Act, the focus of this investigation, and the investigatory process USTR followed.

A. AUSTRIA’S ADOPTION OF THE DST IN THE MIDST OF ONGOING, MULTILATERAL NEGOTIATIONS REGARDING DIGITAL SERVICES TAXES

In 2013, the Secretary-General of the Organisation for Economic Co-operation and Development (OECD) released an action plan on base erosion and profit sharing (BEPS).⁵ The BEPS action plan discussed the “spread of the digital economy” and noted that this “poses challenges for international taxation.”⁶ That plan led to the establishment of the OECD/G20 Inclusive Framework, a group of countries and jurisdictions working to address issues raised in the BEPS action plan. The inaugural meeting of the OECD/G20 Inclusive Framework was held in Kyoto, Japan in June, 2016.⁷

The work of the OECD/G20 Inclusive Framework continues today. As of July 2020, the OECD/G20 Inclusive Framework negotiations involved over 135 countries and jurisdictions—including Austria and the United States—along with 14 observer organizations.⁸ The United States remains actively engaged in the OECD Inclusive Framework process, and supports bringing those negotiations to a successful conclusion. As of now, the official position of the OECD is that, “[t]here is no consensus on either the merit or need for interim measures,” such as country-specific digital services taxes like Austria’s DST.⁹

Despite these long-running and ongoing negotiations, Austria has chosen to move forward with its own tax on digital advertising services. Austria’s DST is related to a 5% tax on revenues from advertising on “TV, radio, print media, or posters,” which Austria implemented in

⁵ Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 2, 11 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

⁶ Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 12 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

⁷ Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 2 (OECD 2020), available at: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf>.

⁸ Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 7, 35 (OECD 2020), available at: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf>.

⁹ Org. for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 178 (OECD Publishing 2018), available at: https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en.

2000.¹⁰ Austria introduced a new, separate tax focused only on digital advertising on April 4, 2019. The lower chamber of the Austrian Parliament passed this digital tax proposal on September 19, 2019, and the upper chamber passed the measure on October 10, 2019. Austrian President Van der Bellen signed the DST into law shortly thereafter. The tax went into effect on January 1, 2020, and the first DST payments were due on March 15, 2020.

Unilateral laws like Austria’s DST undermine progress in the OECD by making an agreement on a multilateral approach to digital taxation less likely. If unilateral measures proliferate while negotiations are ongoing, countries lose the incentive to engage seriously in the negotiations. For this reason, among others, the United States has discouraged governments from adopting country-specific DSTs. Nonetheless, Austria has chosen to create and implement its own unilateral tax on digital advertising services.

B. USTR’S INVESTIGATION OF THE DST PURSUANT TO SECTION 301 OF THE TRADE ACT

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Austria’s DST under section 301 of the Trade Act.¹¹ Below, we describe: (i) the legal basis for this Section 301 investigation; (ii) the substantive focus of the investigation; and (iii) the process that USTR has followed in carrying out the investigation.

1. Relevant elements of Section 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. Commerce.¹² Section 301 defines “discriminatory” to “include . . . any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment.”¹³ “[U]nreasonable” refers to an act, policy, or practice that “while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable.”¹⁴ The statute further provides that, in determining if a foreign country’s practices are unreasonable, reciprocal opportunities to those denied U.S. firms “shall be taken into account, to the extent appropriate.”¹⁵

If the Trade Representative determines that the Section 301 investigation “involves a trade agreement,” and if that trade agreement includes formal dispute settlement procedures,

¹⁰ Austrian Advertising Tax Law 2000 at para. 1(2); Austrian Finance Ministry, “Digital Tax Act 2020,” available at: <https://www.bmf.gv.at/en/topics/taxation/digital-tax-act.html>.

¹¹ See Notice of Initiation.

¹² 19 U.S.C. § 2411(a)-(b).

¹³ 19 U.S.C. § 2411(d)(5).

¹⁴ 19 U.S.C. § 2411(d)(3)(A).

¹⁵ 19 U.S.C. § 2411(d)(3)(D).

USTR may pursue the investigation through consultations and dispute settlement under the trade agreement.¹⁶ Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the Trade Representative must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce:

“The Trade Representative shall take all appropriate and feasible action authorized under [section 301(c)], subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under the subsection, to obtain the elimination of that act, policy, or practice.”¹⁷

Actions authorized under Section 301(c) include: (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.¹⁸

2. The focus of USTR’s investigation

As set out in the Notice of Initiation, the investigation involves determinations of whether the act, policy, or practice at issue—namely Austria’s DST—is actionable under section 301 of the Trade Act, and if so, what action, if any, to take under Section 301. More specifically, this investigation focuses on discrimination against U.S. companies and unreasonable tax policy. With respect to unreasonableness, USTR investigated whether the DST diverges from principles reflected in the U.S. tax system and the international tax system, such as extraterritorial reach and taxing revenue rather than income.¹⁹

3. USTR’s investigatory process

Throughout the investigation, USTR followed the process provided for under Section 301. That included, for instance, requesting consultations with the Austrian Government. The

¹⁶ 19 U.S.C. § 2413(a)(2).

¹⁷ 19 U.S.C. § 2411(b).

¹⁸ In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. § 2411(c).

¹⁹ See Notice of Initiation, at 34710 (setting out a list of the types of issues that the USTR might address through the ten investigations discussed in the notice). The Notice of Initiation also invited interested parties to submit comments on other aspects of the DST that may warrant a finding of actionability under Section 301. Notice of Initiation, at 34710.

U.S. Trade Representative requested consultations on the same date that he initiated the investigation.²⁰ Austria's Minister of Digital and Economic Affairs accepted the request for consultations in a letter dated July 17, 2020.²¹ The consultations took place on December 21, 2020.

USTR also provided interested persons with an opportunity to present their views and perspectives on the Austrian DST. The Notice of Initiation invited written comments on this investigation (as well as the investigations of nine other jurisdictions' DSTs) by July 15, 2020.²² Interested persons filed 383 written submissions, the majority of which related (either implicitly or explicitly) to Austria's DST.²³ Several of these public comments were lengthy and detailed, and analyzed Austria's DST specifically.²⁴

Of the comments that addressed whether Austria's DST is actionable under Section 301, the vast majority supported a positive finding on actionability.²⁵ Commenters provided evidence and argumentation supporting actionability based on several of the areas of concern outlined in the Notice of Initiation. As explained in more detail later in this report, commenters provided argumentation and evidence that, *inter alia*, Austria's DST discriminates against U.S. companies, that it is unreasonable, and that it burdens or restricts U.S. commerce.

III. DESCRIPTION OF AUSTRIA'S DIGITAL SERVICES TAX

This section, which describes Austria's DST in detail, is based on USTR's review of public comments and a detailed analysis of the DST text itself. In general terms, Austria's DST is a 5% tax on digital advertising services targeting the Austrian market. In the subsections below, we address: the companies that are subject to the DST (Section A); the scope of the taxable services under the DST (Section B); and the DST's payment and reporting requirements, as well as the use of DST revenue (Section C).

A. COMPANIES SUBJECT TO THE DST

Austria's DST only applies to digital services companies that meet or exceed two revenue thresholds.²⁶ If, "within a financial year," a company did not: (i) generate at least €25 million in

²⁰ See Annex 2.

²¹ See Letter from Minister Margarete Schramböck to Ambassador Robert Lighthizer, July 17, 2020 (on file with USTR).

²² Notice of Initiation, at 34709.

²³ The submissions can be viewed on the Federal eRulemaking Portal, <https://www.regulations.gov>.

²⁴ See, e.g., Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020.

²⁵ See, e.g., Public comment submitted by Americans for Tax Reform, July 11, 2020; Public comment submitted by the National Retail Federation, July 15, 2020; Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020.

²⁶ DST at Section 2(2).

revenue in Austria for covered digital advertising services; and (ii) generate at least €750 million globally for all services, then the tax does not apply.²⁷ These thresholds are much higher than the single revenue threshold in Austria’s 2000 tax on television, radio, and print advertising, which stands at €10,000 in taxable revenue.²⁸ One public commenter noted that the DST’s “local threshold of €25 million is very high for the relative population size of Austria.”²⁹

The DST’s revenue thresholds contain one important carve-out: “[r]evenues based on financial liabilities established by law are not included” when determining whether a company meets the revenue thresholds.³⁰ This provision operates to exempt Austrian state-owned broadcaster Österreichischer Rundfunk (ORF) from DST liability. We understand that ORF would meet the €750 million global revenue threshold, except that approximately half of its annual revenue (*i.e.*, its revenue from compulsory subscription fees) is excluded pursuant to the above-referenced provision.³¹

USTR’s analysis indicates that many—if not all—of the companies likely to meet the DST’s revenue thresholds are U.S. companies.³² USTR was unable to identify any Austrian company with revenues sufficient to meet the DST’s thresholds.

B. SERVICES SUBJECT TO THE DST

Austria’s DST covers “online advertising services,” a term it defines as “[a]dvertising insertions on a digital interface, particularly in the form of banner ads, search engine advertising and comparable advertising services.”³³ With respect to determining what services qualify as “comparable advertising services,” the DST states that “[t]he Federal Minister of Finance is authorized to establish online advertising services as comparable by regulation, particularly to ensure equal treatment of comparable services or to take technical developments into account.”³⁴

²⁷ DST at Section 2(2).

²⁸ Austrian Advertising Tax Law 2000 at para. 4(1).

²⁹ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 27.

³⁰ DST at Section 2(1).

³¹ See *Dun & Bradstreet*, “Corporate Profile of Österreichischer Rundfunk,” available at: https://www.dnb.com/business-directory/company-profiles.%C3%B6sterreichischer_rundfunk.a10ef3b8b9522dd6734962820927ff58.html (stating that ORF’s annual revenue is US\$1.17 billion); *ORF Website* “ORF – The Austrian Broadcasting Corporation,” available at: https://zukunft.orf.at/show_content.php?hid=37&language=en (explaining that “half of [ORF’s revenue] comes from radio and TV licence fees”).

³² USTR’s analysis of companies likely covered under Austria’s DST was based on a review of publicly available regulatory filings, corporate annual reports, press articles, and other sources. Using these sources, USTR identified which firms would likely meet the DST’s revenue thresholds. Where possible, USTR isolated revenue attributable to covered services in Austria, but this information was not available for many firms. Where that specific information was not accessible, USTR used the data available to assess the likely revenue derived from digital advertising services provided in Austria.

³³ DST at Sections 1(1) and 1(2).

³⁴ DST at Section 1(3).

The DST only applies to advertising services provided “domestically” in Austria. Per the DST, “[o]nline advertising services are considered provided domestically if they are received on a device belonging to a user with a domestic IP address and, based on their content and design, are aimed at domestic users (as well).”³⁵ It follows that not all digital advertising that appears on devices in Austria is taxable under the DST. If, for instance, a standard, English-language advertisement in a digital version of *The New York Times* appears on a device in Austria, the revenue for that ad would not be taxable, because the ad was not “aimed at” Austrian users.

Aside from the text of the law itself, the Austrian Government has released no regulations or any other guidance to clarify the precise scope of the services covered under the DST.

C. PAYMENT AND REPORTING REQUIREMENTS, AND USE OF DST REVENUE

Companies must pay the DST by the 15th day of the second month after they provide taxable digital advertising services.³⁶ Each year, companies are also required to prepare and submit an annual tax return setting out “the types of online advertising services provided and the compensation due for them as well as worldwide revenues.”³⁷ In addition, the DST mandates that companies create and maintain specific types of records, including logs of IP addresses or other geolocation-related information, as well as copies of all online advertising service contracts. Companies must provide these records to the Austrian Government on request.

Lastly, we note that the DST reserves €15 million in tax revenue for a fund “to finance the digital transformation process of Austrian media companies.”³⁸ The DST does not specify who will administer this fund, how companies will be selected to receive funding, or how much funding those companies might receive.

IV. USTR’S FINDINGS REGARDING AUSTRIA’S DST

This section set outs USTR’s findings on the question of actionability, *i.e.*, whether Austria’s DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As explained below, our investigation would support a finding that: the DST discriminates against U.S. companies (Section A); the DST is inconsistent with international tax principles and therefore unreasonable (Section B); and the DST burdens or restricts U.S. commerce (Section C). It follows that our investigation would support a positive actionability finding under Section 301.

A. AUSTRIA’S DST DISCRIMINATES AGAINST U.S. DIGITAL SERVICES COMPANIES

Our investigation indicates that the DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies. The principal mechanism of this discrimination is the DST’s revenue thresholds. Below, we explain how the DST’s revenue

³⁵ DST at Section 1(1).

³⁶ DST at Section 5(1).

³⁷ DST at Section 5(3).

³⁸ DST at Section 8(4).

thresholds function to target U.S. digital services companies, while shielding many—if not all—Austrian companies from tax liability.

As noted above, under the DST’s revenue thresholds, a company only pays the tax if, within a year, that company generated at least: (1) €750 million in global revenues; and (2) €25 million in in-country revenues from covered digital services.³⁹ Revenue from “financial liabilities established by law” is excluded for the purposes of determining whether a company meets the revenue thresholds.⁴⁰ This exclusion effectively exempts the Austrian Broadcasting Corporation (ORF), a major Austrian State-owned company, from liability under the DST. As explained in Section II(A) above, we understand that ORF would meet the €750 million global revenue threshold, except that approximately half of its annual revenue is excluded under the above-quoted provision.⁴¹ We are not aware of any other company that benefits from the carve-out for “financial liabilities established by law” in this way.

USTR’s analysis indicates that the effect of the revenue thresholds (and the carve-out discussed above) is to focus the DST’s tax burden on non-Austrian companies, and in particular, on U.S. firms.⁴² In fact, we have been unable to identify a single Austrian company that likely meets the DST’s revenue thresholds, and therefore is subject to the tax. This result is consistent with a January 2019 article from *Reuters*, which reported that Austrian Chancellor Sebastian Kurz had confirmed that “no Austrian firms would be hit by the tax.”⁴³

Numerous stakeholders submitted public comments regarding the discriminatory nature of the revenue thresholds, noting that:

- “[T]he revenue thresholds support a discrimination argument given that local Austrian firms selling digital advertising, which are smaller, will likely be excluded from the scope of the [DST].”⁴⁴

³⁹ DST at Section 2(2).

⁴⁰ DST at Section 2(2).

⁴¹ See *Dun & Bradstreet*, “Corporate Profile of Österreichischer Rundfunk,” available at: https://www.dnb.com/business-directory/company-profiles.%C3%B6sterreichischer_rundfunk.a10ef3b8b9522dd6734962820927ff58.html (stating that ORF’s annual revenue is US\$1.17 billion); *ORF Website* “ORF – The Austrian Broadcasting Corporation,” available at: https://zukunft.orf.at/show_content.php?hid=37&language=en (explaining that “half of [ORF’s revenue] comes from radio and TV licence fees”).

⁴² As noted above, USTR’s analysis of companies likely covered under Austria’s DST was based on a review of publicly available regulatory filings, corporate annual reports, press articles, and other sources. Using these sources, USTR identified which firms would likely meet the DST’s revenue thresholds. Where possible, USTR isolated revenue attributable to covered services in Austria, but this information was not available for many firms. Where that specific information was not accessible, USTR used the data available to assess the likely revenue derived from digital advertising services provided in Austria.

⁴³ *Reuters*, “Austria says will tax internet giants 3 percent of ad revenue,” January 10, 2019, available at: <https://fr.reuters.com/article/uk-austria-economy-digital-tax-idUKKCN1P41MG>

⁴⁴ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 27.

- The DST “impose[s] high thresholds intended to exclude domestic enterprises.”⁴⁵
- “[T]he Austrian [DST] discriminates through the application of the turnover thresholds that result in the taxes being concentrated on the globally successful American firms”⁴⁶
- “[T]he Austrian [DST] revenue thresholds are discriminatory in their effect, as they are designed to capture large global digital advertising service providers while excluding smaller local competitors, even if such competitors have a significant local market presence.”⁴⁷

Our investigation also indicates that the DST’s discriminatory targeting of U.S. companies was intentional. Public statements from government officials demonstrate that focusing the tax burden on specific U.S. firms was Austria’s goal. For instance, in December 2018, Austrian Chancellor Sebastian Kurz was explicit about his intentions: “[w]e will introduce a digital tax in Austria... The aim is clear: taxation of companies that make large profits online but barely pay taxes—such as Facebook and Amazon.”⁴⁸ Chancellor Kurz also stated that:

Austria will introduce its own digital tax on Internet giants in addition to the European plans. Because it cannot be that corporations like #Facebook or #Amazon make big profits in Austria, but pay almost no taxes here.⁴⁹

Later, upon introduction of the DST in April 2019, Chancellor Kurz reiterated that U.S. companies were the specific target of the tax, characterizing the DST as “a national tax on digital giants like #Google or #Facebook”⁵⁰

Other Austrian Government officials have made similar statements:

- On October 10, 2019, Member of the upper house of the Austrian Parliament Elisabeth Mattersberger explained that under the DST: “internet giants such as Facebook, Google or Amazon will in the future be charged a 5 percent tax on online advertising sales. Presumably nobody can have anything against that.”⁵¹

⁴⁵ Public comment submitted by the United States Council for International Business, July 15, 2020 at 3.

⁴⁶ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 22.

⁴⁷ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 27.

⁴⁸ *Reuters*, “Austria plans digital tax while EU keeps working on its own levy,” December 29, 2018, available at: <https://de.reuters.com/article/eu-tax-digital-austria/austria-plans-digital-tax-while-eu-keeps-working-on-its-own-levy-idUKL8N1YY086>.

⁴⁹ Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), December 29, 2018, available at: <https://twitter.com/sebastiankurz/status/1078995659414556672>.

⁵⁰ Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), April 3, 2019, available at: <https://twitter.com/sebastiankurz/status/1113361541938778112>.

⁵¹ Statement by Federal Councilor Elisabeth Mattersberger, 897th meeting of the Federal Council of the Republic of Austria, October 10, 2019.

- On October 10, 2019, Member of the upper house of the Austrian Parliament Dr. Doris Berger-Grabner made a statement in support of the DST, noting that the tax should target “digital giants ... from Silicon Valley” such as “Google, Apple, Facebook and Co....”⁵²
- A public statement from the Austrian Parliament regarding the passage of the DST referred specifically and exclusively to U.S. companies as those that would face a tax burden, explaining that: “[i]nternet giants like Facebook, Google or Amazon must now pay a five percent tax on online advertising sales from 2020.”⁵³

The prescribed use of funds collected by the DST also indicates that the tax is intended to favor Austrian companies. Specifically, the DST provides that “[t]he sum of EUR 15 million from income from digital tax must be allocated to finance the digital transformation process of Austrian media companies.”⁵⁴ In April 2019, Austrian Finance Minister Hartwig Loeger explained the purpose of this “digital transformation” fund as follows:

In order to strengthen Austria as a media location and to secure the country’s identity for the future, a digitalisation fund will be set up. We will use this to support the digital transformation process of Austrian media companies.⁵⁵

If, as Minister Loeger states, a goal of the tax is to “support” Austrian companies, this suggests that those same Austrian companies are not the intended taxpayers. Indeed, it would have been illogical for Austria to design the DST to tax its domestic media companies, only to then distribute that same tax revenue to those very same Austrian companies.

⁵² Statement by Federal Councilor Doris Berger-Grabner, 897th meeting of the Federal Council of the Republic of Austria, October 10, 2019.

⁵³ Parliamentary Correspondence No. 914, National Council: digital tax on online advertising sales decided, August 20, 2019, available at: https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0914/.

⁵⁴ DST at Section 8(4).

⁵⁵ *Orbitax*, “Austria Announces Digital Tax Package Including 5% Digital Tax on Advertising for Large Corporations and VAT Obligations for Digital Retail Platforms,” April 5, 2019, available at: <https://www.orbitax.com/news/archive.php/Austria-Announces-Digital-Tax--37200>.

Numerous commenters took issue with the DST’s “digital transformation” fund for Austrian companies.⁵⁶ One commenter explained that this fund is “direct[] evidence” of the “protectionist intent” of the DST.⁵⁷

In sum, as described above, the DST’s discriminatory nature is apparent from the structure of the tax itself, the tax’s inordinate impact on U.S. companies, and the above-quoted statements from Austrian Government officials. For these reasons, our investigation suggests that Austria’s DST discriminates against U.S. companies.

B. AUSTRIA’S DST IS UNREASONABLE, BECAUSE IT IS INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES

The statute defines an “unreasonable” measure as one that “while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable.”⁵⁸ USTR’s analysis indicates that two aspects of Austria’s DST are inconsistent with international tax principles, and thus, unreasonable under Section 301: the DST’s extraterritorial application (Section 1); and the DST’s application to revenue rather than income (Section 2).

1. The DST’s extraterritorial reach contravenes international tax principles

Our investigation indicates that the DST’s extraterritorial application—*i.e.*, its targeting of revenues unconnected to a physical presence in Austria—contravenes prevailing international tax principles. As described in section III(B) above, the DST applies to digital advertising with a nexus to Austria, *i.e.*, advertising that: (i) is received on a device belonging to a user with a domestic IP address; and (ii) is aimed at domestic, Austrian users.⁵⁹ However, no physical presence in Austria is required for the DST to apply. Our investigation shows that this taxation of revenue absent a physical presence in Austria is inconsistent with principles of international tax policy.

The international tax system reflects the principle that companies are not subject to a country’s corporate tax regime in the absence of a territorial nexus to that country. This is reflected in international tax treaties, which typically establish that a company need not pay a

⁵⁶ Public comment submitted by Engine Advocacy, July 15, 2020, at 4 (“[T]he Austrian DST—while similar in nature to that of France—goes one step further in favoring domestic companies by funneling 15 million Euros generated by the tax to Austrian media companies—effectively the competitors of taxed companies.”); Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 22 (explaining that the fund “channels revenues from [the DST] to subsidize domestic print advertising platforms.”); Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 6 (noting that “it is poor policy to subsidize local firms by taxing foreign companies.”).

⁵⁷ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 27. *See also* Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 5 (stating that “[t]he discriminatory motivations underlying [the DST] are clear.”)

⁵⁸ 19 U.S.C. § 2411(d)(3)(A).

⁵⁹ DST at Section 1(1).

country’s corporate income tax unless it has a “permanent establishment” in that country. For instance:

- The OECD model tax treaty provides that the profits of an enterprise “shall be taxable” only in the country of which the enterprise is a national “unless the enterprise carries on business in [another country] through a permanent establishment situated therein.”⁶⁰
- The UN Model Treaty similarly provides that the profits of an enterprise are taxable in a country only if “the enterprise carries on business in [that country] through a permanent establishment situated therein.”⁶¹
- The U.S. Model Tax Treaty and the U.S.-Austria Tax Treaty both contain similar provisions barring taxation absent a permanent establishment.⁶²

Each of these treaties defines “permanent establishment” as “a fixed place of business through which the business of an enterprise is wholly or partly carried on.”⁶³ These treaties also provide that the term includes a place of management, branch, office, factory, workshop, and “place of extraction of natural resources.”⁶⁴ A “permanent establishment” does not include, *inter alia*, the maintenance of a fixed place of business solely for the purpose of “purchasing goods or merchandise or of collecting information for the enterprise” or of “carrying on, for the enterprise, any other activity” “provided that ... the overall activity of the fixed place of business, is of a preparatory or auxiliary character.”⁶⁵ Other sources confirm that the requirement of a permanent establishment is the general rule in international tax policy.⁶⁶ Austria’s DST—which taxes companies irrespective of whether they maintain a permanent establishment in Austria—contravenes this principle of international taxation.

⁶⁰ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

⁶¹ UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1).

⁶² *United States Model Income Tax Convention*, art. 7 (“Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.”); U.S.-Austria Tax Treaty, art. 7(1) (“The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.”).

⁶³ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(1); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(1); *United States Model Income Tax Convention*, art. 5(1); U.S.-Austria Tax Treaty, art. 5(1). Note that the treaty in paragraph 5 of Article 5 may also deem a permanent establishment to exist notwithstanding the general rule in paragraphs 1 and 2 of Article 5 if there is a dependent agent conducting certain activities on behalf of the foreign enterprise.

⁶⁴ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(2); *United States Model Income Tax Convention*, art. 5(2); U.S.-Austria Tax Treaty, art. 5(2).

⁶⁵ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(4); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(4); *United States Model Income Tax Convention*, art. 5(4); *see also* U.S.-Austria Tax Treaty, art. 5(4).

⁶⁶ *See, e.g.*, OECD, Inclusive Framework on Base Erosion and Profit Sharing, Action 7: Permanent establishment status, <https://www.oecd.org/tax/beps/beps-actions/action7/>.

Public comments received in this investigation noted that the DST’s extraterritorial reach is inconsistent with international taxation principles.⁶⁷ One commenter explained that the “[DST]’s extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies.”⁶⁸ A second commenter similarly observed that the DST “impos[es] taxes without regard to the existence of a permanent establishment [which] continue[s] to breach international tax principles.”⁶⁹

In summary, our investigation suggests that the DST’s extraterritorial application to revenues not connected to a company’s physical presence in Austria contravenes international taxation principles.

2. The DST’s application to revenue rather than income contravenes international tax principles

As described in Section III above, the DST applies to gross revenues generated from covered digital advertising services.⁷⁰ Thus, it differs from taxes on income (also called net profit), which tax a company’s gross revenues minus its business expenses.⁷¹ Our investigation indicates that the DST’s application to revenue rather than income is inconsistent with prevailing principles of international taxation, which recognize income—not gross revenue—as an appropriate basis for taxation.

A variety of international tax treaties reflect the principle that corporate income, and not corporate gross revenue, is a proper basis for taxation. For instance, the OECD Model Treaty provides for the taxation of “business profits” and other types of income streams (dividends, interest, royalties, capital gains, etc.), but makes no provision for taxes on gross revenues.⁷² The UN Model Treaty likewise has disciplines on taxing business profits and numerous other types of income, but has no such disciplines for taxes on gross revenues.⁷³ Moreover, the U.S. Model Tax Treaty, and scores of bilateral tax treaties—including the U.S.-Austria Tax Treaty—make no

⁶⁷ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 28; Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 15-16.

⁶⁸ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 28.

⁶⁹ Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16.

⁷⁰ DST at Section 3(1).

⁷¹ See, e.g. United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017.

⁷² OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7, December 18, 2017 (on business profits); see *id.* arts. 6, 8-21.

⁷³ United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017 (setting out disciplines on taxes of business profits); *id.* arts. 6, 8-21 (covering other types of income).

reference to taxes on gross revenues.⁷⁴ Thus, the system of international tax treaties reflects the international principle that income, not revenue, is the appropriate basis for corporate taxation.

Other sources confirm that the taxation of corporate income comports with international tax principles, but that the taxation of gross revenue does not. For example, Chapter 2 of the OECD publication *Addressing the Tax Challenges of the Digital Economy*, which is entitled “Fundamental Principles of Taxation,” lists two bases for corporate taxation: income and consumption.⁷⁵ Taxation of gross revenue is not recognized. In practice, taxes on revenue are rare. One tax policy organization noted that “there are few recent empirical studies on gross [revenue] taxes because of their near-universal abandonment in developed countries.”⁷⁶

Public comments received in this investigation highlighted the inconsistency between the DST’s taxation of revenue and international tax principles. One commenter noted that the “[DST]’s application to gross revenue rather than net income is inconsistent with international tax principles and unusually burdensome for U.S. affected companies.”⁷⁷ Another commenter observed that digital services taxes: “abandon the long-held standard of taxing profits by taxing revenues of the targeted technology companies. This contravenes the principle that companies should only be taxed on their actual gains from doing business, and leaves open the possibility to being taxed on a loss.”⁷⁸

In sum, our investigation suggests that the DST’s application to revenue instead of income is inconsistent with principles of international taxation.

3. Conclusion

As explained above, our investigation indicates that the DST’s extraterritorial application and application to revenue rather than income are inconsistent with international tax principles. It follows that these same aspects of Austria’s DST are unreasonable under Section 301.

C. AUSTRIA’S DST BURDENS OR RESTRICTS U.S. COMMERCE

USTR’s investigation also addressed the question of whether Austria’s DST burdens or restricts U.S. commerce. Our investigation suggests that it does. More specifically, the DST burdens U.S. commerce by, *inter alia*: obligating U.S. companies to pay tens of millions of

⁷⁴ See *United States Model Income Tax Convention*, art. 2, 2016 (setting out disciplines on “total income, or on elements of income”); *id.* art. 7 (establishing disciplines on taxes of “business profits”); U.S.-Austria Tax Treaty, arts. 2, 7.

⁷⁵ OECD, *Addressing the Tax Challenges of the Digital Economy*, ch. 2: “Fundamental Principles of Taxation,” at 32-47 (2014). There are, of course, other appropriate bases for taxation besides income. Consumption is one generally accepted basis for taxation. Value-added taxes and sales taxes are examples of consumption taxes. However, the Austrian DST is not structured as a tax on consumption.

⁷⁶ See Justin Roxx, “Gross Receipts Taxes: Theory and Recent Evidence,” *Tax Foundation*, available at: <https://taxfoundation.org/gross-receipts-taxes-theory-and-recent-evidence/>.

⁷⁷ Public comment submitted by the Silicon Valley Tax Directors’ Group, July 15, 2020, at 28.

⁷⁸ Public comment submitted by Americans for Tax Reform, July 11, 2020, at 2.

dollars in new taxes (Section 1); forcing U.S. companies to undertake costly compliance measures (Section 2); and subjecting U.S. companies to double taxation (Section 3).

1. U.S. companies face an additional tax burden under the DST

Our investigation indicates that the DST burdens or restricts U.S. commerce by subjecting U.S. companies to additional tax burdens. USTR’s analysis indicates that U.S. companies, in the aggregate, may face tens of millions of dollars in new tax payments each year under the DST.

Aspects of the DST discussed in this report exacerbate this financial burden on U.S. companies. For example, at a basic level, and as described in Section IV(A), the DST creates this tax burden by discriminatorily targeting non-Austrian companies. Furthermore, Austria’s decision to disregard international tax principles by taxing revenue rather than profit exacerbates the burden on U.S. companies further still. This is most apparent in the case of low margin businesses. For example, if Company A generates US\$100 million in revenue in Austria, it must pay US\$5 million under the DST (a 5% tax on Company A’s revenue). But if we assume that Company A incurred US\$90 million in costs, and thus received just US\$10 million in profit, it would still pay US\$5 million under the DST—a sum equal to 50% of Company A’s profits.

In sum, and as explained above, additional tax liability under the DST represents a burden for U.S. companies.

2. U.S. companies face considerable compliance costs in connection with the DST

U.S. companies also face significant costs to comply with the DST’s payment and reporting requirements. As one commenter explained, DSTs create “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.”⁷⁹ One reason this sort of “reengineering” is necessary, is because Austria’s DST only applies to revenue for digital advertising services provided “domestically” in Austria.⁸⁰ This requires companies to revamp their systems to capture and track the information needed to determine whether specific instances of service provision meet the definition of “domestically” under the DST. Companies were not previously required to categorize their work in this way. In addition to these direct “re-engineering” costs, companies also incur substantial opportunity costs whenever they divert valuable (and often scarce) engineering resources away from their core products.

All told, commenters estimate that compliance costs for Austria’s DST will be “in the millions” for each company,⁸¹ and note that “[t]he administrative burden associated with

⁷⁹ Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

⁸⁰ DST at Section 1(1).

⁸¹ Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

compliance is significant, even if firms can pay the tax.”⁸² In sum, the compliance challenges posed by the DST represent a significant burden for U.S. companies.

3. U.S. companies face double taxation under the DST

The DST also burdens U.S. companies by subjecting them to double taxation. U.S. companies that pay the DST in Austria will still be subject to U.S. corporate income tax, creating two layers of taxation. Take, for example, hypothetical Company A discussed above. To recall, Company A earned US\$100 million from Austria-connected services, and incurred US\$90 million in Austria-related costs. Company A must pay US\$5 million (5% of Austrian revenue) to Austria pursuant to the DST, leaving it with just US\$5 million in remaining profit. Company A must then also pay U.S. corporate income tax on its residual US\$5 million. Avoiding double taxation of this sort is the focus of prominent model tax treaties as well as the U.S.-Austria Tax Treaty.⁸³

The risk of double taxation was a concern noted in several public comments. For instance, commenters explained that there exist “risks of multiple taxation intrinsic to an extraterritorial tax on revenue,”⁸⁴ and that “DSTs cause companies to be taxed twice, hindering innovation and economic growth.”⁸⁵

Furthermore, in some circumstances, companies subject to the DST could face triple taxation. Consider, for example, a French digital advertising company that directs advertising to Austrian users. That company may be liable to pay the French digital services tax, the Austrian DST, and French income tax on the revenue from a single advertising placement. Although the United States has no digital services tax, U.S. companies could nonetheless face triple taxation risk if they own subsidiaries in countries with national digital services taxes.

In sum, the DST exposes firms to multiple layers of taxation, which represents a clear burden on U.S. digital services companies.

4. Conclusion

As explained above, USTR’s investigation would support a finding that the DST burdens or restricts U.S. commerce by negatively impacting U.S. companies’ operations in Austria. More specifically, our investigation suggests that the DST creates a significant new tax burden for U.S. companies, forces U.S. companies to undertake costly compliance measures, and subjects U.S. companies to multiple layers of taxation.

⁸² Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 14.

⁸³ See, e.g., OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, preamble, December 18, 2017; United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, preamble, 2017; *United States Model Income Tax Convention*, preamble, 2016; U.S.-Austria Tax Treaty, preamble.

⁸⁴ Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

⁸⁵ Public comment submitted by CompTIA, July 15, 2020, at 2.

V. CONCLUSIONS

USTR's investigation indicates that:

1. Austria's DST is discriminatory against U.S. companies;
2. Austria's DST contravenes prevailing international tax principles, and is therefore unreasonable; and
3. Austria's DST burdens or restricts U.S. commerce.

It follows that USTR's investigation would support a finding that Austria's DST is actionable under Section 301.

ANNEX 1: AUSTRIA'S DIGITAL TAX ACT OF 2020

(Provisional Translation)

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Long title

Digital Tax Act of 2020 (DiStG 2020)

First publication version: BGBl. I Nr. 91/2019 (NR: GP XXVI IA 983/A AB 686 S. 88. BR: AB 10251 S. 897.) [CELEX-Nr.: 32011L0016, 32018L0822]

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Text

Items subject to the tax

§ 1. (1) Online advertising services are subject to digital tax if these services are provided by online advertising providers domestically for pay. Online advertising services are considered provided domestically if they are received on a device belonging to a user with a domestic IP address and, based on their content and design, are aimed at domestic users (as well).

(2) Advertising insertions on a digital interface, particularly in the form of banner ads, search engine advertising and comparable advertising services, are considered online advertising services. Advertising services that are subject to advertising tax under the Advertising Tax Act of 2000, BGBl. I Nr. 29, are not considered online advertising services.

(3) The Federal Minister of Finance is authorized to establish online advertising services as comparable by regulation, particularly to ensure equal treatment of comparable services or to take technical developments into account.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Definitions

§ 2. (1) Online advertising providers are companies,

1. that provide online advertising services for pay or contribute to doing so and
2. within a financial year attain

a) worldwide revenues of at least EUR 750 million and

b) revenues of at least EUR 25 million domestically from conducting online advertising services

Expenditures for preliminary services under the second sentence of § 3(1) are not to be included in the revenue under b). If a company is part of a multinational group within the meaning of § 2 of the Transfer Price Documentation Act, BGBl. I Nr. 77/2016, the revenues of the group must be applied. The authoritative measure is the most recent annual financial statements/consolidated financial statements. Revenues based on financial liabilities established by law are not included in this revenue.

(2) User means any individual or legal entity that uses a device to access a digital interface.

(3) Digital interface means any type of software (including web sites or parts thereof as well as mobile apps) that users can access.

(4) IP address (Internet Protocol address) is a series of alphanumeric symbols assigned to a network device to allow it to communicate through the internet. Determination of the location for providing online advertising services based on the IP address is equivalent to using other technologies to geolocate the devices.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Assessment base and tax amount

§ 3. (1) The assessment base for digital tax is the compensation that the online advertising provider receives from a client. This base is reduced by expenditures for preliminary services by other online advertising providers that are not part of its multinational group.

(2) The tax is 5% of the assessment base.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Taxpayer, onset of the tax entitlement

§ 4. (1) The taxpayer is the online advertising provider that has an entitlement to compensation for conducting an online advertising service within the meaning of § 1. This applies even if the online advertising provider is not the owner of the digital interface.

(2) The tax entitlement arises at the end of the month in which the taxable service is provided.

(3) If the compensation for performing the tax is changed later, an adjustment must be made during the taxation period in which the change occurred.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Collection of the tax

§ 5. (1) The taxpayer must compute the tax himself and pay it no later than the 15th of the second month after the tax liability arose.

(2) A tax established under § 201 of the Federal Tax Rules, BGBl. Nr. 194/1961, has the due date indicated in Paragraph 1.

(3) The taxpayer must provide an annual tax return for the previous year three months after the end of the financial year. It must list the types of online advertising services provided and the compensation due for them as well as worldwide revenues under § 2(1)(2)(a).

(4) Collection of digital tax is up to the Finance Office responsible for collecting sales tax for the taxpayer.

(5) The Federal Minister of Finance is empowered to establish more specific rules through regulations to simplify procedures or to take the special features of online advertising services into account. That applies in particular to cases in which taxpayers are companies that do not have a headquarters, senior management or an operating location domestically.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Recording and reporting obligations

§ 6. (1) The taxpayer is obligated to record online advertising services taken over, additional companies it has contracted with in this regard, the client and the basis for computation of the digital tax.

(2) Records of IP addresses or other information on geolocation of devices must be kept, for the purposes of this Act, in a form that is limited to permitting a conclusion as to whether an online advertisement was provided domestically. If the tax authorities so request, these data must be provided. Other records and the vouchers and other documents for the books and records, particularly contracts to provide online advertising services, must be maintained as indicated in the Federal Tax Rules and provided if the tax authority so requests.

Effective date and transitional provisions

§ 7. (1) This Act must be applied to online advertising services that are provided after December 31, 2019. As an exception to § 5(3), the annual tax return for financial years ending before July 1, 2020 must be provided by September 30, 2020.

(2) Regulations based on this Act may be issued starting on the day following its publication. However, they may not be applied until January 1, 2020.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Final provisions

§ 8. (1) The Federal Minister of Finance is entrusted with implementing this Act.

(2) At regular intervals, with the first time being December 31, 2021, the Federal Minister of Finance must evaluate taxation of online advertising services within the meaning of this Act in regard to its application, equality of taxation, and implementation as well as its effects on companies in light of any more comprehensive steps to tax the digital economy at the EU or OECD level.

(3) If this act refers to provisions of other federal acts and does not indicate otherwise, those provisions must be applied in their respective versions.

(4) The sum of EUR 15 million from income from digital tax must be allocated to finance the digital transformation process of Austrian media companies.

**ANNEX 2: LETTER FROM AMBASSADOR ROBERT LIGHTIZER TO THE AUSTRIAN
GOVERNMENT DATED JUNE 2, 2020**



THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

June 2, 2020

Margarete Schramböck
Ministry for Digital and Economic Affairs
Vienna, Austria

Dear Minister Schramböck:

I am writing to inform you that, in accordance with Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation of the digital services tax (DST) adopted by Austria in October 2019. In particular, the investigation addresses Austria's 5% tax on revenues from online advertising services.

The investigation will initially consider several problematic aspects of DSTs: (1) whether the tax amounts to *de facto* discrimination against U.S. companies; (2) whether the tax has retroactive elements; and (3) whether the tax diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.*, possible extraterritorial application, or a purpose of penalizing certain technology companies for their commercial success. Depending on the course of the investigation, other aspects and features of the measure might also be included.

In accordance with Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of Austria regarding this matter. These issues are of great concern to the Government of the United States. I look forward to working with you or another appropriate official in a cooperative manner to resolve this matter.

Sincerely yours,

A handwritten signature in blue ink that reads "Robert E. Lighthizer".

Robert E. Lighthizer

cc: Minister Gernot Blümel, Minister of Finance