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Hearings on Competition and Consumer Protection in the 21st Century

Topic 1
The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings

Comment

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Introduction

In response to the Federal Trade Commission's request for comments in its Competition and Consumer Protection in the 21st Century hearing series, we would like to offer comment on Topic One with a focus on (d) the benefits and costs associated with the growth of international competition and consumer protection enforcement regimes.

As the Federal Trade Commission considers international competition and the various arrays of international consumer protection regimes, we would like to call your attention to the European Union's increasingly protectionist attitude as a whole.

Its attacks on American companies are not limited to the General Data Protection Regulation or European Court decisions. The EU is requesting that the Organisation for Economic Co-operation and Development designate the U.S. as a tax haven; may challenge the US tax law at the World Trade Organization; and is promoting proposals known as the Digital Services Tax.

By threatening U.S. sovereignty, the EU is working aggressively to set international regulatory norms targeting American companies and undermining the 2017 tax reform at an enormous cost to American business, jobs, and innovation.

This is all to say that we should not take policies that the EU is advancing as part of our own policy or accept those approaches as international norms. It is important that free market polices are advanced by U.S. government officials both within the United States and abroad.

2017 Tax Reform

The tax reform bill passed by the House and Senate, and signed into law by President Donald J. Trump, has made America competitive again. The bill, known as the Tax Cuts and Jobs Act, lowered the federal corporate tax to a globally competitive 21 percent rate and updated the international tax system so that businesses can now compete and reinvest trillions of dollars in foreign earnings into America.[1]

In fact, since passage of tax reform, the U.S. has been named the most competitive economy in the world, according to the IMD World Competitiveness Center.[2]

Tax reform included two new international provisions, which implement a "carrot and stick" approach with the aim of incentivizing the location of capital and profits within America and clamping down on erosion of the U.S. tax base.[3]

The stick, known as "global intangible low-taxed income," or GILTI – imposes a 10.5 percent minimum tax on intellectual property derived income. The carrot, known as "foreign-derived intangible income," or FDII provides a deduction of 37.5 percent off the 21 percent corporate rate (for an effective rate of 13.125 percent) for income derived from IP held in the U.S.[4]

In combination with the low U.S. corporate rate, these provisions create a strong incentive for companies to invest and do business in America.

It is also why high-tax, big government European nations hate the tax law and have demanded the OECD review GILTI and FDII [5]in its Forum on Harmful Tax Practices. Even before the Tax Cuts and Jobs Act had been enacted, European countries expressed concern over the law.[6]

Some countries have even gone as far as to suggest that the OECD designate the U.S. a tax haven,[7] and it is expected that the EU will launch a legal challenge[8] to the tax law in the World Trade Organization.

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[1]Organisation for Economic Co-operation and Development, "Statutory corporate income tax rate," Health Insurance Historical Tables, 2018, table II.1., accessed August 20, 2018. https://stats.oecd.org/index.aspx?DataSetCode=Table_II1.

[2] Michelle Jamrisko "U.S. Leapfrogs Singapore, Hong Kong to Win World's Most Competitive Economy," *Bloomberg BNA,* May 23, 2018, https://www.bloomberg.com/news/articles/2018-05-23/u-s-beats-hong-kong-to-reclaim-global-competitiveness-crown.

[3] Robert Verzi, "Lower FDII Tax rate Lures Foreign IP and Services Back to US," *Aprio,* https://www.aprio.com/whatsnext/lower-fdii-tax-rate-lures-foreign-ip-and-services-back-to-u-s/.

[4] Alexander Hendrie, "To defend tax reform, Trump must nominate an OECD ambassador," *Washington Examiner,* August 2, 2018, https://www.washingtonexaminer.com/opinion/to-defend-tax-reform-trump-must-nominate-an-oecd-ambassador.

[5] Joe Kirwin, "EU Requests OECD Review of U.S. Tax Law's Harmful Provisions," *Bloomberg BNA,* March 7, 2018, https://www.bna.com/eu-requests-oecd-n57982089605/.

[6] Anne Sylvaine Chassany and Chris Giles, "Europeans issue warning to Trump on tax overhaul," *Financial Times,* December 11, 2017, https://www.ft.com/content/eeb17eaa-de91-11e7-a8a4-0a1e63a52f9c.

[7] Colleen Murphy and Penny Sukhraj, " EU May Blacklist U.S. As a Tax Haven After OECD Review," *Bloomberg BNA,* March 23, 2018, https://www.bna.com/eu-may-blacklist-n57982090327/.

[8] Tom Bergin, "U.S. Tax bill provision likely to spark EU trade dispute: legal experts," Reuters, December 21, 2017, https://www.reuters.com/article/us-usa-tax-trade-analysis/u-s-tax-bill-provision-likely-to-spark-eu-trade-dispute-legal-experts-idUSKBN1EF24X.

Digital Services Tax

EU leaders have called for a discriminatory tax[9] predominately aimed at iconic American companies out of Silicon Valley. The tax, generally called the EU Digital Tax, it is a two-part proposal composed of an interim and permanent proposal that would predominately impact American companies, whether they are physically located in the EU or not.[10]

The permanent proposal, the Digital Permanent Establishment Directive, would establish a so-called virtual nexus for companies with, what the EU deems, a significant EU and worldwide presence. The proposal would tax profits generated in a Member State's territory.

The Digital Services Tax, one element of the EU Digital tax, is an "interim" proposal that would effectively create a 3 percent global minimum tax on company revenue — not profits — based off of user location, advertising that facilitates sales, and data collection and processing. The interim framework would apply to companies[11] with, what the EU deems, have a virtual nexus, and would rake in roughly five billion euros (5.8 billion dollars) for Member States from companies that have chosen not to physically locate in there. Once a proposal is in place it is hard to change or repeal, which makes the interim proposal, the Digital Services Tax, arguably the more nefarious of the two proposals because of its broad scope of taxation powers.

The DST will limit tax competition between the US and EU countries by effectively shifting from an origin-based tax system—with businesses taxed where they produce— to a destination-based tax system—with businesses taxed where their customers are located.[12] This completely breaks from long recognized international tax policy.

The proposals are not only surprising because of the tax's design, but also because the DST proposal lacks supporting evidence that it is even in the EU Member States' economic and fiscal interest to deviate from traditional international policy and begin taxing digital business models differently.[13]

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[9] Ali Breland, "Tech lobby speaks out against EU digital tax proposal," *The Hill*, June 25, 2018, http://thehill.com/policy/technology/394040-big-tech-lobby-pressures-eu-to-not-pursue-digital-tax-increases.

[10] Editorial Board, "Europe's Digital Tax is a Bad Idea," *Bloomberg BNA,* April 11, 2018, https://www.bloomberg.com/view/articles/2018-04-11/europe-s-digital-tax-is-a-bad-idea.

[11]European Commission. 2018. "Digital Taxation: Commission Proposes New Measures To Ensure That All Companies Pay Fair Tax In The EU". http://europa.eu/rapid/press-release_IP-18-2041_en.htm.

[12] Stan Veuger, "The future of corporate taxation in a digital world," *American Enterprise Institute*, April 11, 2018, http://www.aei.org/publication/the-future-of-corporate-taxation-in-a-digital-world/.

[13] Dr. Matthias Bauer, "Five Questions about the Digital Services Tax to Pierre Moscovici," *European Centre for International Political Economy,* April 2018, http://ecipe.org/app/uploads/2018/06/Five-Questions-about-the-Digital-Services-Tax-to-Pierre-Moscovici.pdf.

This is a full-blown assault on American companies. The EU alleges that Member States are not getting their "fair" share of American tax revenues — which aren't even theirs in the first place — since many companies are not physically located in the EU and, therefore, fall outside of the EU's tax powers.[14]

The proposals are overwhelmingly unpopular within Member States and in industry. Norway, Denmark, Finland[15] and Ireland[16] rightly came out against the proposals, while Silicon Valley[17] and the OECD[18] have cautioned against the tax. Despite clear calls from the international and business community, the EU has no plans to pump the breaks on the tax hikes.

While the proposals are not law throughout the EU, Member States can implement their own versions of the burdensome tax. Spain recently announced their version of the tax despite strong opposition to the proposal. While France looks forward to "taxing the digital giants."[19]

However, the assumption promoted by France that shareholders of digital services companies will bear the burden of the tax without downstream consequences or other economic harm is incorrect.[20]

It is hard to believe that the DST proposal evolved from purely deductive conceptual reasoning from the Commission. Rather, the economic activities at issue, particularly those activities and companies affected by the interim proposal, are ones where the European Union is a net importer, not a net exporter.[21]

This is not the first time the EU has targeted American businesses and will not be the last. The European Commission has previously ruled that low tax rates of EU member countries constituted "illegal state aid."

Conclusion

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[14] European Commission. 2018. "Fair Taxation Of The Digital Economy". https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en.

[15] Reuters Staff, "Nordic countries oppose EU plans for digital tax on firms takeover," *Reuters,* May 31, 2018, https://www.reuters.com/article/us-eu-digital-tax/nordic-countries-oppose-eu-plans-for-digital-tax-on-firms-turnover-idUSKCN1IW337.

[16]Padraic Halpin, "Ireland's concerns over EU digital tax gaining wider support: finance minister," February 5, 2018, https://www.reuters.com/article/us-ireland-economy/irelands-concerns-over-eu-digital-tax-gaining-wider-support-finance-minister-idUSKBN1FP2DU.

[17] Information Technology Industry Council. 2018. "EU Digital Tax Proposal Misses the Mark". https://www.itic.org/news-events/news-releases/eu-digital-tax-proposal-misses-the-mark.

[18] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264293083-en.

[19] Stan Veuger, "Spain's Misguided Digital Tax," *American Enterprise Institute,* July 26, 2018, https://www.aei.org/publication/spains-misguided-digital-tax/.

[20] "Five Questions about the Digital Services Tax to Pierre Moscvici."

[21] Stan Veuger, "How reasonable are the EU's digital taxation plans?" *American Enterprise Institute,* May 9, 2018, http://www.aei.org/publication/how-reasonable-are-the-eus-digital-taxation-plans/.

The EU's increasingly protectionist attitude as a whole threatens free market competition abroad and in the US. The laws infringe on US policy individually and as a whole. The attacks at the OECD and through the DST are part of a string of actions, including GDPR, that the EU has taken to undermine competition and American businesses.