

July 17, 2018

Comments of Digital Liberty Before
The National Telecommunications and Information Administration
U.S. Department of Commerce

In the Matter of)
)
International Internet) Docket No. 180124068-8068-01
Policy Priorities)
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RE: THE FREE FLOW OF INFORMATION AND JURISDICTION

On June 5, 2018 the National Telecommunications and Information Administration issued Docket No. 180124068-8068-01 seeking comments and recommendations on its international internet policy priorities.

As the National Telecommunications and Information Administration considers its international internet policy priorities, we would like to call your attention to the European Union’s increasingly protectionist attitude to the 2017 Tax Reform and American technology companies. The EU is requesting that the OECD designate the US a tax haven, may challenge the US tax law at the World Trade Organization, and has been working on proposals known as the Digital Users Tax.

Just as it is important that the United States have a representative at the International Telecommunications Union, our interests must be represented at the OECD (Organisation of Economic Co-operation and Development). It has been over 500 days since the U.S. had an Ambassador to the OECD and this vacuum of American leadership is allowing the EU to set international norms and take aim at U.S. sovereignty in an effort to undermine tax reform at a cost of American business, jobs, and innovation.

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

¹ OECD Tax Database. “Table II.1 – Statutory corporate income tax rate.” *Organisation for Economic Co-Operation*

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

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.

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 in its Forum on Harmful Tax Practices.⁴

Even before the Tax Cuts and Jobs Act had been enacted, European countries expressed concern over the law.⁵

Some countries have even gone as far as to suggest that the OECD designate the U.S. a tax haven.⁶ It is expected that the EU will launch a legal challenge to the tax law in the World Trade Organization.⁷

This is not the only threat to US sovereignty and competitiveness. EU leaders have called for a discriminatory tax known as the Digital Services Tax (DST) that is predominately aimed at iconic American companies out of Silicon Valley.⁸ The tax would be imposed in the form of a 3 percent tax on the digital revenue of tech companies, based on the concern from Europe that companies are paying too little.⁹

The DST comes in two forms: (1) companies will be taxed after either exceeding 7 million euros in annual revenue in an EU member country, having at least 100,000 members in a member country over the course of a year, or 3,000 business contracts for digital services in a year. (2) an interim tax would be placed on revenue from online advertising, facilitating the sale of goods between platforms and the sale

³ Robert Verzi and Jason Knott, “Lower FDII Tax Rate Lures Foreign IP and Services Back to U.S.,” *Aprio, LLP*, <https://www.aprio.com/whatsnext/lower-fdii-tax-rate-lures-foreign-ip-and-services-back-to-u-s/>.

⁴ 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/>.

⁵ 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>.

⁶ Joe Kirwin, “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/>.

⁷ 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>.

⁸ 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-p pressures-eu-to-not-pursue-digital-tax-increases>.

⁹ Reuters Staff, “EU leaders to urge progress on digital tax despite concerns, draft says” *Reuters*, June 19, 2018, <https://www.reuters.com/article/us-eu-tax-digital/eu-leaders-to-urge-progress-on-digital-tax-despite-concerns-draft-says-idUSKBN1JF1LC>.

of user-generated data. The commission said it would want these taxes in place until it could develop larger “comprehensive reform.”

These conditions would be imposed regardless of whether or not a business has a physical presence in an EU country. 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).¹⁰ This completely breaks from long recognized international tax policy.

The proposal is 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.¹¹

While countries like Ireland, Germany, Sweden, Denmark, and Finland ask the EU to slow down on its rushed interim DST proposal, Spain and France are plowing ahead. France looks forward to “taxing the digital giants,” through its own efforts to provide “a basis for co-ordinated EU action to effectively align the taxation of highly digitalised business profits with the place where value is created.”¹² 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.¹³

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.¹⁴

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” and ordered US tech companies such as Amazon and Apple to pay these governments.

The attacks at the OECD and the DST are part of a string of actions, including the General Data Protection Regulation (GDPR) that the EU has taken to undermine tax competition and American businesses.

As NTIA considers its Internet Policy Priorities, it will be helpful to maintain awareness of all of the various actions that foreign nations are taking that affect the free flow of information.

¹⁰ 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/>.

¹¹ Dr. Matthias Bauer, “Five Questions about the Digital Services Tax to Pierre Moscovici,” *European Centre for International Political Economy*, February 2018, <http://ecipe.org/app/uploads/2018/06/Five-Questions-about-the-Digital-Services-Tax-to-Pierre-Moscovici.pdf>.

¹² Mehreen Khan and Rochelle Toplensky, “Berlin gets cold feet over EU tech tax promoted by Macron,” *Financial Times*, March 21, 2018, <https://www.ft.com/content/6d5f5ea8-2d29-11e8-9b4b-bc4b9f08f381>.

¹³ Bauer, “Five Questions about the Digital Services Tax to Pierre Moscovici.”

¹⁴ 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/>.

Thank you for the opportunity to provide comments in this matter.

Respectfully,

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Digital Liberty