United States Council for International Business (USCIB) Comments on Section 301 Investigation of France's Digital Services Tax

Docket No. USTR-2019-0009

August 19, 2019

The United States Council for International Business (USCIB) welcomes the opportunity to provide comments on this investigation into France's Digital Services Tax ("DST"). USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. As the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers and the Business and Industry Advisory Committee to the OECD, USCIB has a unique global network through which it provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

This submission addresses the questions set forth in the request for public comments in connection with this investigation, 84 FR 34042.

The French Digital Services Tax is unreasonable and discriminatory and, therefore, actionable under section 301

USCIB believes that France's DST is actionable under section 301 because it discriminates against U.S. companies. While the DST is neutral on its face, it is not neutral in its application. The design of the tax, including the thresholds and the scope of the services covered disproportionately affects U.S. companies. This is confirmed by remarks that have been made by the French Finance Minister.[1] While a few companies from other countries[2] are reportedly affected, U.S. technology companies are the targets of this tax and it appears as though the tax will only apply to one French company.

USCIB believes that the DST is also actionable because its application to low-margin businesses is unreasonable. The 3% tax on revenues may exceed entire taxable profits. The French DST has been justified by assertions that the digital sector is undertaxed.[3] The analysis purporting to support

[1] https://www.worldwideerc.org/news/france-will-impose-digital-services-tax-in-2019; https://siliconangle.com/2018/12/17/france-implement-digital-tax-focused-u-s-tech-giants/ I am giving myself until March to reach a deal on a European tax on the digital giants," France's Le Maire told France 2. "If the European states do not take their responsibilities on taxing the GAFA [Google, Amazon, Facebook Inc. and Apple Inc.], we will do it at a national level in 2019."

[2] https://www.ft.com/content/8b8d1010-a3f1-11e9-974c-ad1c6ab5efd1 It should affect approximately 30 companies including companies from the US, other European states, China and one French company (Criteo).

[3] The European Commission's Impact Assessment of the EC digital services tax claimed that the traditional business model has an average tax rate of 23.2%, while the average tax rate for a digital company is only 9.5%. These figures were based on a study conducted by the Zentrum fur Europaische Wirtschaftsforschung Gmbh ("ZEW").

under taxation has been rebutted.[4] Even if the sector were under taxed, a gross basis tax on revenue would be an unreasonable response. A gross basis tax restricts commerce because companies will be forced to choose among unacceptable options: raise prices to cover the additional cost of the tax or cease to do business because the business is uneconomical. Amazon recently announced that they are not in a position to absorb an additional tax based on revenue rather than profit and that they have no other option than to pass it on.[5]

Section 301 permits action after a finding that a foreign government has adopted an act, policy, or practice that is unreasonable and burdens or restricts U.S. commerce. USCIB believes that the DST is, therefore, actionable because retroactive application of the tax is unreasonable. Taxpayer financial and tax systems will not be configured to track the revenues subject to the French DST and therefore taxpayers will likely be unable to comply without significant additional expense to modify systems. The retroactive effective date means that inability to comply is built into the DST.

USCIB believes that the application of the tax is also discriminatory. In the exceptional case that the tax applies to a French company, the tax is deductible for purposes of determining its French income tax liability, thus reducing the impact of the tax on a French entity.[6] The DST would also discriminate against similar businesses using different models and means of delivery. For example, advertising in a French newspaper would not be subject to the DST, while advertising through an online publisher would be.

The French DST is inconsistent with France's obligations under the WTO, the U.S.-France Income Tax Treaty, and the Convention of Establishment between the U.S.-France

Because the DST is discriminatory, as discussed above, USCIB believes that the DST violates the national treatment obligation of the General Agreement on Trade in Services (GATS).[7] The national treatment principle requires WTO Members to treat foreign services and services suppliers no less favorable than its own like services and services suppliers. Accordingly, a discriminatory tax is in violation of this obligation under the GATS.

USCIB believes that the French DST is a covered tax under Article 2, paragraph 1(b) of the U.S. – France treaty and therefore may only be imposed consistent with Article 5 (Permanent Establishments) and Article 7 (Business Profits).

The relevant language of the U.S. – France treaty reads as follows:

> (b) in the case of France, all taxes imposed on behalf of the State, irrespective of the manner in which they are levied, on total income, on total capital, or on elements of

[4] The ZEW study's author later clarified that the EC's reliance was misplaced as it misinterpreted the findings. Jack Schickler, EU Study's Author Doubts Digital Transactions Undertaxed, Law360 (Mar. 6, 2018). "Understanding the ZEW-PwC Report," https://www.pwc.com/us/en/press-releases/2018/understanding-the-zew-pwc-report.html(publicly rejecting the assertion that digital companies are undertaxed).
[5] https://finance.yahoo.com/news/amazon-says-french-digital-tax-163930385.html.
[6] Non-French companies may be able to deduct the French DST in their country of residence depending on local law; however, even in that case, the cost of such deduction would be borne by non-French governments.
[7] GATS Article XVII.

income or of capital, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation, in particular:

(i) the income tax (1' impôt sur le revenu);

(ii) the company tax (l'impôt sur les sociétés):

(iii) the tax on salaries (la taxe sur les salaires) governed by the provisions of the Convention applicable, as the case may be, to business profits or to income from independent personal services; and

(iv) the wealth tax (l'impôt de solidarité sur la fortune) (hereinafter referred to as "French tax").

The Technical Explanation of the treaty does not provide any guidance concerning the interpretation of this language. A reasonable reading, however, would include the DST as a covered French tax. The DST is not one of the enumerated taxes, but that list is not exclusive. The proper question is whether the DST is imposed on total income, total capital or elements of income or capital. The DST is imposed on gross revenues. Revenues are clearly an element of income – i.e., gross revenues are a starting point for determining total income. As explained above, the French government is concerned that digital companies are under taxed. Thus, the intent of the DST is to find another way to reach the income of the affected companies. Given the broad language of the definition of "French tax" and the clearly expressed intent to reach undertaxed income of digital companies, the DST should be considered a covered tax. As a covered tax, the DST would have to comply with the rules of Article 5 and Article 7, which it clearly does not. Therefore, USCIB believes that the DST would violate the U.S.-France Income Tax Treaty in cases in which it is applied in the absence of a permanent establishment. USCIB believes that in all cases, the application of the DST violates the Business Profits Article.

The Convention of Establishment between the United States of America and France[8] imposes a number of obligations on the contracting parties with respect to nationals and companies of the other contracting party including to:

1. Provide equitable treatment to nationals and companies of the other state;[9] and
2. Avoid extraterritorial taxation.[10]

Paragraph 4 of Article IX of the Convention provides:

The nationals, companies and associations of either High Contracting Party referred to in paragraph 1 (b), (c), and (d) of the present Article shall not be subject, within the territories of the other High Contracting Party, to any form of taxation upon capital, income, profits

[8] France – United States Convention of Establishment (1959) https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005341.asp , hereinafter Convention of Establishment.
[9] Convention of Establishment, Article I.
[10] Convention of Establishment, Article IX paragraphs 4 and 5.

> or any other basis, except by reason of the property which they possess within those territories, the income and profits derived from sources therein, the business in which they are there engaged, the transactions which they accomplish there, or any other bases of taxation directly related to their activities within those territories.

USCIB believes that this paragraph requires that any French tax on U.S. companies be directly related to their activities within France. Paragraph 5 of Article IX of the Convention makes clear that this obligation applies to "all taxes of whatever nature or denomination." The DST was adopted precisely because the affected companies are not engaging in activities within France that permit income taxation. USCIB believes, therefore, that the DST violates the Convention of Establishment.

Both the U.S.-France Income Tax Treaty and the Convention of Establishment are consistent with longstanding international norms that companies resident in and nationals of one jurisdiction are not subject to tax in another jurisdiction on income that is not from sources within that country or relating to activities of the company conducted in that country.

USTR should engage with France toward a negotiated outcome

The ultimate goal of any U.S. action with respect to the French DST should be the removal of the DST and France's commitment to resolve their concerns through the OECD's inclusive framework process. USCIB urges that full efforts to achieve a negotiated solution be pursued before consideration is given to any retaliatory measures.

<u>Engage through multilateral channels</u>

To that end we urge the Administration to engage in a dialogue with France to negotiate an acceptable outcome which includes the elimination of the DST including through multilateral negotiations that are taking place at the OECD concerning the taxation of the digitalizing economy. USCIB supports this multilateral process and supports U.S. leadership in this process. USCIB believes that any changes to the international tax system should be achieved through a broad-based consensus on taxing income where value is created. This process should move forward quickly; countries should not resort to unilateral measures while that process is ongoing. The United States should also insist on the retroactive revocation of any unilateral measures as part of an OECD solution, including the DST. The DST is just one of many unilateral measures that the countries have recently adopted to address the tax challenges of the digitalizing economy. Any OECD solution should include an agreement to remove all of these unilateral measures.

Among other options, USCIB believes that the U.S. government should also consider pursuing discussions under the auspices of the WTO.

Conclusion

USCIB believes that the French DST is actionable under section 301. We encourage the U.S. government to pursue a negotiated solution including through multilateral channels such as the

OECD and the WTO. We urge caution in pursuing retaliatory measures, including tariffs, that could harm some U.S. companies without accomplishing the goal of eliminating the DST.

USCIB appreciates the opportunity to provide these comments and would be pleased to discuss them further.

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