Before the
Office of the United States Trade Representative
Washington, D.C.

In re Initiation of a Section 301 Investigation of France's Digital Services Tax	Docket No. USTR-2019-0009

POST-HEARING COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Further to CCIA's written submission responding to the Office of the United States Trade Representative's initial Federal Register notice at 83 Fed. Reg. 67,468 (July 12, 2019), the Computer & Communications Industry Association (CCIA) submits the following post-hearing comments regarding the Section 301 Investigation of France's Digital Services Tax (DST).[1]

I. The French DST potentially conflicts with state aid rules under European Union law.

At the public hearing on August 19, CCIA's representative was asked to expand upon comments in pre-hearing testimony regarding the French DST's potential conflicts with EU law. CCIA appreciates the opportunity to expand on previous submissions on this issue.[2]

The French DST is subject to EU state aid laws. Under Article 107(1) of the Treaty on the Functioning of the European Union, impermissible state aid is any aid granted by a Member State or through State resources which "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods."[3] "Favouring certain undertakings" has been construed by EU courts to mean that imposing a specific tax to certain undertakings may imply a selective advantage to other companies not subject to the tax. As explained further in CCIA's written comments, the French DST was designed to predominantly affect foreign firms, while carving out French competitors from the scope of the tax that offer the same services to French users. The French DST may then be unlawful under these EU state aid rules. CCIA has

[1] A list of CCIA members is available at https://www.ccianet.org/members.

[2] CCIA briefly discusses these concerns in its written submission in Section V. Comments of CCIA, In Re Initiation of a Section 301 Investigation of France's Digital Services Tax, Docket No. USTR 2019-0009 (filed Aug. 16, 2019), *available at* https://www.regulations.gov/document?D=USTR-2019-0009-0022.

[3] Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2008 O.J. C 115/47.

commissioned a legal analysis regarding the state aid claim as it applies to various digital services taxes around Europe (an executive summary of this analysis is attached to these comments).[4]

It is concerning that French policy makers decided to forgo a review by the French Constitutional Council of the bill implementing the DST prior to publication to review the constitutionality of the legislation. Under the French legislative process, members of Parliament may ask for review of legislation prior to its enactment to determine consistency with the French Constitution as well as with France's obligations under existing treaties. French Finance Minister Bruno Le Maire had encouraged the performance of such a review in order to strengthen the legal validity of the new tax and to respond to concerns of the DST's critics.[5] However, this review was ultimately not performed.[6] A report is expected detailing why this review was neglected within the next three months.[7]

II. The United States should consider all remedies under the Trade Act as a result of the Section 301 Investigation regarding the French DST.

As some press reporting does not reflect the entirety of written submissions from industry regarding recommendation action as a result of the Section 301 investigation, CCIA takes this opportunity to stress its position that USTR should consider all options and remedies available

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[4] *See* also Alfonso Lamadrid, *Unilateral Digital Services Taxes and EU State Aid Rules: The Elephant in the Room*, DISRUPTIVE COMPETITION PROJECT (March 22, 2019), http://www.project-disco.org/european-union/032219-unilateral-digital-service-taxes-eu-state-aid-rules-the-elephant-in-the-room/#.XVru-JNKhmM; Christian Borggreen, *Legal Experts: National Digital Taxes Constitute State Aid That Must Be Pre-Cleared by the EU*, DISRUPTIVE COMPETITION PROJECT (Mar. 25, 2019), http://www.project-disco.org/european-union/032519-legal-experts-national-digital-taxes-constitute-state-aid-pre-cleared-by-eu/#.XWRRL5NKhTY (summarizing findings of law firm analysis).

[5] Remarks of Minister Bruno Le Maire, Assemblée nationale XV^{e} législature, session extraordinaire de 2018-2019, Compte Rendu (July 4, 2019), http://www.assemblee-nationale.fr/15/cri/2018-2019-extra/20191005.asp (" Certains, je le sais, jugent ces garanties juridiques encore insuffisantes. Je vous en propose donc une nouvelle: je souhaite qu'une fois voté, le texte soit soumis et validé par le Conseil constitutionnel. Cela renforcera notre dispositif, cela renforcera notre taxe nationale sur les géants du numérique et cela renforcera notre position politique dans les instances du G7, du G20 et de l'OCDE pour mener ce combat sur la taxation des activités numériques." [*Some consider that these legal certainties are therefore insufficient. I will give you this new one: I hope that following the vote, the text is submitted to and validated by the Constitutional Council. This will strengthen our position, it will strengthen our national tax on the tech giants and it will strengthen our political position in the bodies at the G7, G20, and at the OECD to lead this fight on the taxation of digital activities*.]).

[6] Marc Rees, *La taxe « Gafa » publiée au Journal officiel, sans contrôle constitutionnel préalable,* NEXTINPACT (July 25, 2019), https://www.nextinpact.com/news/108079-la-taxe-gafa-publiee-au-journal-officiel-sans-controle-constitutionnel-prealable.htm; Tweet of l'Association des Services Internet Communautaires (ASIC), July 25, 2019, https://twitter.com/L_ASIC/status/1154271326166749185?s=20 (raising censorship concerns on the lack of review following Minister Le Maire's remarks).

[7] Rees*, La taxe « Gafa » publiée au Journal officiel, sans contrôle constitutionnel préalable.*

under the Trade Act to respond to France's DST.[8] Without a strong response from the United States, other countries are likely to move forward with similar taxes against U.S. digital firms. This will further undermine the ongoing, multilateral process at the OECD to achieve a global, consensus-based solution that does not ring-fence the digital economy. The consideration of all tools is necessary to address this threat in a timely manner, recognizing the timeline for the OECD process and the imminent risk of other unilateral action by other countries.

Reports suggest that the U.S. and France had productive bilateral discussions towards a resolution at the G7 Leaders' Summit.[9] Once further details are released, CCIA will evaluate the terms to determine whether it addresses the discrimination aspect of the DST and whether the resolution will lead to a lasting, multilateral agreement at the OECD.

August 26, 2019

Sincerely,

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[8] 19 U.S.C. § 2411.

[9] *Macron Says France and U.S. Reached Digital Tax Deal*, REUTERS (Aug. 26, 2019) https://www.reuters.com/article/us-g7-summit-tax-macron-idUSKCN1VG1N7?.

EXECUTIVE SUMMARY

State aid analysis of the digital services tax proposals in EU countries

*Some EU Member States like France, Italy and Spain are currently considering adopting in the near future a digital services tax ("**DST**"). These are largely inspired by a Proposal for an EU Directive aimed at establishing a harmonized DST. However, the EU Council of Ministers has not reached an agreement on the said Proposal. As of today, therefore, there is no EU harmonized DST. In the current scenario the DSTs, as currently planned by some Member States, would therefore constitute unilateral measures subject to EU State aid law.*

*According to Article 107(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), State aid is defined as a measure decided by a Member State and financed with public funds that confer a selective advantage upon certain undertakings, thereby creating distortions of competition within the Internal Market. The form of the measure is irrelevant and may include fiscal measures like those under examination. The EU Courts' case law makes clear that a specific tax addressed to certain undertakings may imply a selective advantage to other companies not subject to the tax.*

The following elements strongly indicate that the different DSTs, as currently designed, would involve the granting of State aid.

First, the key question is whether the Member State has set out the scope of the tax in such a way as to be coherent with its declared objectives or – on the contrary – whether it has exempted certain companies or sectors that should have normally been subject to the tax. It is clear that not all digital services nor all the services in which the participation of users create value – as per the DST's declared objective – are equally subject to the DSTs, therefore suggesting the presence of a selective advantage favouring certain undertakings or sectors that are exempted from the tax.

Second, the high revenue thresholds set to delineate the scope of the tax appear to have been set at an arbitrary level, thereby constituting a selective advantage to domestic *companies which do not exceed the worldwide thresholds, equally active in the same or similar sectors, but not subject to the tax.*

Third, the selective character of the tax is reinforced by the fact that a revenue-based tax, such as that at issue, has no apparent link with the declared objective of taxing the provision of digital services where users contribute significantly to the process of value creation, simply because significant value can be created by users regardless of the turnover of a company.

Fourth, these elements are indicative of de iure and de facto selectivity, since they would clearly produce a discriminatory effect against foreign companies. Statements made by different politicians at the national level suggest that the DSTs may have been designed so as to exclusively apply to very specific multinationals. Similarly, since the DST would be a revenue-based tax, it would produce a discriminatory effect on companies with a high turnover but a low profit margin and on loss-making companies.

It follows that unilateral DSTs, such as the Spanish, Italian or French DST, can be considered to be "selective" measures, as they clearly treat differently companies that are in comparable situations.

Finally, the DSTs would distort competition since they would be releasing non-taxed companies from the normal fiscal burden that they would have to bear under usual conditions, thereby distorting the level playing field.

*The above findings are not contradicted by a recent opinion issued by the French Conseil d'Etat. On the contrary, the said opinion implicitly recognizes the significant impact that State aid rules have in the analysis of the DST measures. Even though it succinctly expresses some unsubstantiated doubts as to the selective character of the DST, it also acknowledges that the European Commission ("**Commission**") itself has recently adopted Decisions declaring that taxes with striking similarities with the DSTs (advertising tax in Hungary and tax on the retail sector in Poland) constitute unlawful State aid. Although these Decisions are currently under appeal before the Court of Justice of the EU ("**CJEU**"), they clearly represent the point of view of the Commission* *on this kind of tax. The opinion therefore implicitly recognizes that there is a serious risk that the DST is considered by the Commission to be State aid.*

Pursuant to Article 108(3) TFEU, a Member State that is planning to grant State aid is obliged to notify it in advance to the Commission and to wait for its formal authorization before granting it. A notification under this provision is different from other communications made for other purposes (budgetary controls, technical norms, etc.). Thus, if a tax such as the DST constitutes State aid, it must be notified by the Member State before its adoption, and be subject to examination and, if compatible, subsequent approval by the Commission.

If a Member State does not fulfil this obligation and does not notify the Commission then any aid granted would automatically be considered as "unlawful aid" and the (DST) measure could be suspended and revoked. Indeed, any affected party would be able to allege the unlawful character of any aid before the national courts of the Member State which adopted the measure, and those courts would be obliged to take the necessary interim measures in order to preserve the effectiveness of Article 108 TFEU. This may include the suspension of the measure. So, if the Member State does not notify the draft DST to the Commission, the measure would be considered as unlawful aid, which means that national judges may suspend it and refer the matter to the CJEU. Alternatively, any affected party may directly address a complaint to the Commission and, in this case, this institution would be legally obliged to adopt a formal Decision on the State aid character of the measure and on its compatibility with the TFEU.

To sum up, a unilateral DST, such as the Spanish, Italian or French DST, can be considered State aid, since it clearly treats differently companies that are in comparable situations. Its implementation would therefore clearly be in breach of the EU State aid rules unless it is previously notified to and approved by the Commission.

Brussels, March 22, 2019