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

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 83 Fed. Reg. 67,468 (July 12, 2019), the Computer & Communications Industry Association (CCIA)[1] submits the following comments regarding the Section 301 Investigation of France's Digital Services Tax.

I. Introduction

CCIA welcomes the Administration's scrutiny on France regarding its targeting of U.S. technology firms and supports USTR's decision to pursue a Section 301 investigation of French Law No. 2019-759, dated July 24, 2019, commonly referred to as the French Digital Services Tax (DST). In the United States, officials and lawmakers across the spectrum have made clear their disapproval of the French DST and other similar unilateral digital tax proposals.[2] The DST

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

[2] *See, e.g.*, Rep. Darin LaHood, Rep. Suzan DelBene Letter to White House, June 19, 2019, *available at* https://lahood.house.gov/sites/lahood.house.gov/files/6.19.19_Digital%20Tax%20Letter_Signed.pdf; Press Release, Portman Questions Treasury Nominees About France Digital Services Tax, https://www.portman.senate.gov/newsroom/press-releases/hearing-portman-questions-treasury-nominees-about-frances-digital-services; *Pompeo Urges France Not to Approve Digital Services Tax*, REUTERS (Apr. 4, 2019), https://www.reuters.com/article/us-usa-france-tax/pompeo-urges-france-not-to-approve-digital-services-tax-idUSKCN1RG1TZ; OFFICE OF THE U.S. TRADE REP., Digital Trade Fact Sheet 2019, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/march/fact-sheet-2019-national-trade-estimate; U.S. DEP'T OF TREASURY, Secretary Mnuchin Statement on Digital Economy Taxation Efforts, Oct. 25, 2018, https://home.treasury.gov/news/press-releases/sm534; Press Release, House Ways & Means, Senate Finance Leaders' Statement on Unilateral Digital Services Taxes, OECD Negotiations to Address the Tax Challenges of the Digitalization of the Economy (Apr. 10, 2019), https://gop-waysandmeans.house.gov/house-ways-and-means-senate-finance-leaders-statement-on-unilateral-digital-services-taxes-oecd-negotiations-to-address-the-tax-challenges-of-the-digitalization-of-the-economy/; House Ways & Means Committee Republicans Letter to White House, Apr. 3, 2019, https://lahood.house.gov/sites/lahood.house.gov/files/LaHood%20DST%20Letter%20-%20Final.pdf; Press Release, Brady Laments France Digital Tax Proposal (Mar. 6, 2019), https://gop-waysandmeans.house.gov/brady-laments-france-digital-tax-proposal/; Senators Grassley, Wyden Letter to U.S. Treasury Secretary Mnuchin (Jan. 29, 2019), *available at* https://www.finance.senate.gov/imo/media/doc/2019-01-29%20CEG,%20Wyden%20to%20Treasury%20(Foreign%20Digital%20Services%20Taxes-OECD).pdf.

warrants a substantial, proportionate response from the United States as the tax represents a significant departure from international taxation norms, violates various international commitments of France, and undermines the ongoing process to reach an international solution to the taxation challenges associated with the digitalization of the global economy.

Since USTR's announcement of the initiation of a Section 301 investigation in early July, France has unfortunately moved forward with the bill and President Macron signed the Digital Services Tax into law on July 24. The law imposing the new tax was published in the official gazette the next day.[3]

Based on the final text of the law, a three percent tax will be placed on revenue generated in France derived from digital intermediary services[4] and digital advertising services that utilize user data.[5] Calculating the tax base depends on the services in question. For intermediary services, the base is determined by the number of transactions involving at least one French user divided by the total number of transactions; or the number of French accounts divided by the total number of accounts.[6] For advertising services, the base is determined by: the number of advertisements placed online targeting users located in France divided by the total number of advertisements; or the number of French users on which data was generated or collected divided by the total number of users on which data was generated or collected.[7] The tax only applies to firms that meet a certain revenue threshold. The two thresholds for taxable revenue are (1) revenue in excess of 750 million euro worldwide; and (2) revenue in excess of 25 million euro in France. These thresholds effectively ensure that foreign firms will be paying the vast majority share of the revenue collected through the tax. *See infra* Section II, III.

In moving forward with the DST, France departs from the lead of the European Union. Last fall, the EU considered a similar tax on digital services[8] but ultimately decided not to pursue

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[3] LOI n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [Fr.] [hereinafter "*Law on the Creation of a Tax on Digital Services*"].

[4] *Law on the Creation of a Tax on Digital Services* art. 299 1º.

[5] *Law on the Creation of a Tax on Digital Services* art. 299 2º.

[6] KPMG, *France: Digital Services Tax (3%) is Enacted* (July 25, 2019), https://home.kpmg/us/en/home/insights/2019/07/tnf-france-digital-services-tax-enacted.html.

[7] *Id.*

[8] European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence 2018/0072 (Mar. 21, 2018), https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf.

at the objection of various EU Member States,[9] and based on concerns regarding U.S. retaliation if the EU pursued the tax.[10] Others have argued that the EU's proposed tax would have negatively impacted multilateral negotiations on international taxation and conflicted with EU law.[11] Despite the EU's decision not to pursue such a tax, France nonetheless chose to proceed with unilateral action disregarding the concerns raised.

Changes to international taxation may be warranted in the increasingly digitized global economy.[12] Traditional conceptions of physical presence that taxation frameworks are based on are being challenged in light of companies across industries adopting a predominantly digital presence. To this end, CCIA supports the efforts of the Organisation for Economic Cooperation and Development (OECD) and the Group of 20 (G20) to negotiate a consensus-based solution to the tax challenges arising from the digitalization of the economy.[13] These changes should not be carried out by disproportionately focusing on a single sector of the global economy, or by singling out U.S. digital services for unique treatment. An international collaborative approach that considers all aspects of the changing global economy should be championed rather than a country-by-country approach. As the OECD noted in its 2018 interim report to the G20, "it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy" and there is "no consensus on either the merit or need for interim measures" such as the one pursued by France through the French DST.[14] The OECD reaffirm this position in 2019.[15] Studies document that digital firms targeted by unilateral digital services taxation

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[9] BAKER INSTITUTE, *Recent Development on the EU's Digital Tax Proposal* (Jan. 9, 2019), https://www.bakerinstitute.org/media/files/files/2a38fa65/bi-report-010919-cpf-digitaltax.pdf at 5 (listing the "foes" as the Czech Republic, Denmark, Finland, Ireland, Luxembourg, Malta, and Sweden).

[10] *EU Ditches Digital Tax Plan for Global Reform*, REUTERS (Mar. 12, 2019), https://www.reuters.com/article/us-eu-tax-digital/eu-ditches-digital-tax-plan-to-work-for-global-reform-idUSKBN1QT1HC.

[11] *See* BAKER INSTITUTE, *Recent Development on the EU's Digital Tax Proposal*, *supra* note 9.

[12] *See* Vijay Govindarajan, Anup Srivastava, Hussein Warsame, Luminita Enache, *The Problem With France's Plan to Tax Digital Companies*, HARVARD BUSINESS REVIEW (July 17, 2019), https://hbr.org/2019/07/the-problem-with-frances-plan-to-tax-digital-companies.

[13] OECD, International Collaboration to End Tax Avoidance, https://www.oecd.org/tax/beps/ (last visited Aug. 16, 2019).

[14] OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018, *available at* http://www.oecd.org/tax/taxchallenges-arising-from-digitalisation-interim-report-9789264293083-en.htm [hereinafter "*OECD Tax Interim Report 2018*"].

[15] OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, at 5, 26, *available at* https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

proposals pay as much tax as traditional firms.[16] The calls for the need for immediate interim measures, then, are not justified.

CCIA's submission responds to USTR's request for comments regarding the following: concerns with the French DST (focusing on "discrimination", "retroactivity", and "unreasonable tax policy" as listed in the Federal Register notice); the unreasonable and discriminatory nature of the French DST under Section 301 of the Trade Act of 1974; the conflicts of the French DST with international commitments; the threat the tax poses to the progress made at the international level on a long-term solution; and recommendations on the outcome of the Section 301 investigation.

II. Concerns with the French DST

This section responds to USTR's request to comment on concerns related to the three major problematic features of the French DST listed in the Federal Register notice: "discrimination", "retroactivity", and "unreasonable tax policy". CCIA notes that other sections of this submission may also speak to these three specific concerns.

A. *"Discrimination"*

As illustrated further in Section III of this submission, the French legislation targets predominantly U.S. firms, and French policymakers have frequently referred to the tax as a 'GAFA' tax (a European moniker to describe Google, Amazon, Facebook, and Apple) and other American 'tech giants'. Only one French firm is expected to fall in the scope of the tax, out of an estimated thirty firms in total.[17] While non-U.S. (and non-French) companies are expected to also fall into the scope of the new tax, the majority of payments derived from the tax are expected to be paid by U.S. firms.[18] The focus on U.S. firms is motivated by flawed

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[16] European Center for International Political Economy, Digital Companies and their Fair Share of Taxes: Myths and Misconceptions (Feb. 2018), *available at* http://ecipe.org/publications/digital-companies-and-their-fair-share-of-taxes [hereinafter "*ECIPE Digital Companies Tax Share Study*"]; Copenhagen Economics, The Proposed EU Digital Services Tax (Sept. 2018), *available at* https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/7/457/1537162175/copenhagen-economics-study-on-the-eu-dst-proposal-13-september.pdf; Daniel Bunn, *France's Digital Services Tax: Facts and Analysis*, Tax Foundation (Mar. 11, 2019), https://taxfoundation.org/france-digital-services-tax/.

[17] Boris Cassel and Séverine Cazes, *«Taxer les géants du numérique, une question de justice fiscale», affirme Bruno Le Maire*, Le Parisien (Mar. 2, 2019), http://www.leparisien.fr/economie/taxer-les-geants-du-numerique-une-question-de-justice-fiscale-affirme-bruno-le-maire-02-03-2019-8023578.php.

[18] *See* Deloitte, Taj, *The French Digital Services Tax: An Economic Impact Assessment* (2019), *available at* https://taj-strategie.fr/content/uploads/2020/03/dst-impact-assessment-march-2019.pdf [hereinafter "*Taj French DST Impact Study*"].

understandings of the current tax payments of digital firms and inaccurate characterizations of effective tax rates.[19]

B. *"Retroactivity"*

The French DST was signed into law in July, but will apply on a retroactive basis to include revenue earned beginning in January 2019. The retroactive nature of the French DST will make compliance extremely difficult for companies affected, as well as for tax authorities in France. To calculate the tax base, firms will have to calculate the portion of revenue that was generated in France which means they will have to determine user location and location of certain user activities to know whether there was a taxable event that occurred at that time. While firms have access to limited data provided by users, firms do not collect and/or retain this data for the purpose of tax compliance and the current data held is likely insufficient to make accurate calculations under the law. Further complicating this analysis is when French users use virtual private networks (VPNs) to mask location (the bill states that a users' IP address can be used to determine whether the user is located in France[20]). These concerns are exacerbated by the timeline established under the final text. Under the bill, the first payment installments are due in November, giving firms just over four months to make these calculations based on a tax calculation method that is virtually untested.

C. *"Unreasonable tax policy"*

The French DST represents an unreasonable tax policy for a number of reasons. First, the thresholds that were created were set at arbitrary levels,[21] with the apparent goal of ensuring that foreign companies shouldered the vast majority of the tax burden. French companies that provide identical intermediary and ad-supported services will not be taxed. The upper threshold for worldwide revenue, set at 750 million euro, is so high that only the largest technology firms will be impacted and effectively penalized for commercial success.

Second, the taxation of revenue rather than profits departs from international norms. Historically, corporate taxes have been levied where value is created, not where it is consumed. If this were to change, governments should seek consensus on the methodology and degree to

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[19] *See ECIPE Digital Companies Tax Share Study*, *supra* note 16.

[20] *Law on the Creation of a Tax on Digital Services* art. 299bis 2º.

[21] In negotiations, amendments to change this threshold to remedy stated concerns regarding disparate treatment were rejected on claims that France wanted to keep the French DST closely aligned to the European failed proposal. *See* Sénat, Compte Rendu Intégral, Séance du mardi 21 mai 2019, *available at* http://www.senat.fr/seances/s201905/s20190521/s20190521.pdf at 6807, 6808, 6809.

which taxation rights should shift. With narrow definitions and targeted policy instruments, the risk is that every country could seek to impose new taxes on whatever products and services they import, while maintaining direct taxes on those that they export. Targeting revenue also does not align with France's goal to target "value creation" for the purposes of ensuring "fair" taxation. The users of a service can generate significant "value" for a service, without this relationship leading to significant revenues for the service. This discriminates against companies with high global turnover, but with low profit margins.

Third, the administrative burdens associated with compliance and auditing will likely offset any relative gains to be made by French collection authorities.[22] Firms are required to make complex determinations on whether covered digital activities were "supplied in France" based on unclear guidelines in the law.[23] The lack of clarity could lead to different interpretations of the law among firms in the scope of the tax and the French tax authorities.[24]

III. The French DST Is Unreasonable and Discriminatory Under the Trade Act of 1974

By unduly targeting leading U.S. Internet firms for specialized taxation based on flawed metrics for measuring current taxation rates, the French DST meets the standard for unreasonable and discriminatory (in addition to the concerns raised in the preceding section).[25]

A. *The 'GAFA' Tax*

The impetus behind the French DST is an intent to tax leading U.S technology firms operating in France, while carving out most French firms that offer the same services. This is

[22] The *Taj French DST Impact Study* also makes the observation that the total additional tax burden on consumers and companies will be roughly 570 million euro, almost 50 percent more than the tax revenue raised by the French DST.

[23] For intermediary services, services are supplied in France either "when a transaction is concluded during the calendar year by one of the users located in France", or "concerning a digital interface does not enable the supply of goods or services, when one of the users possesses during that year an account having been opened from France that allows such user to access all or part of the services available on that interface". For advertising services, services are supplied in France "when an advertising message is placed during the year on a digital interface consulted by a user located in France" or, for sales of data generated or collected upon the consultation by users of digital interfaces, "when data sold during that year is derived from the consultation of one of those interfaces by a user located in France." KPMG, *France: Digital Services Tax (3%) is Enacted* (July 25, 2019), https://home.kpmg/us/en/home/insights/2019/07/tnf-france-digital-services-tax-enacted.html.

[24] *See Taj French DST Impact Study*, *supra* note 18 at § 5.1 (specifically identifying three points of difficulty in administering the tax: the difficulties to identify all taxpayers, the difficulties to calculate the taxable base, and the risks of multiple taxation).

[25] "Discriminatory" is defined under Section 301 of the Trade Act of 1974 to include "any act, policy, and practice which denies national or most-favored nation treatment to United States goods, services, or investment." 19 U.S.C. § 2411(d)(5). An "unreasonable" measure that is actionable under Section 301 is one that is "unfair and inequitable", even if not necessarily in violation of or inconsistent with the legal rights of the United States. 19 U.S.C. § 2411(d)(3)(A).

supported by unambiguous, repeated statements by French officials, who have regularly referred to the tax as a GAFA tax and have stated their goal is to target "tech giants" for special taxation. Bruno Le Maire, French Minister of the Economy and Finance, has stated:

- "[N]ous allons taxer les géants du numérique dès 2019 . . . il y aura une taxe nationale qui nous permettra de remédier à cette injustice qui fait qu'aujourd'hui, nos PME et nos TPE paient 14 points de plus que les géants du numérique – Google, Amazon ou Facebook."[26] [*We are going to tax the American tech giants in 2019. There will be a national tax which will remedy the injustice we face today, where our SMEs and very small enterprises pay 14 points more than the tech giants - Google, Amazon, or Facebook.*]

- "La taxation des géants américains du numérique est un enjeu majeur du XXIe siècle et une question de justice et d'efficacité […] Comment financer nos crèches, nos écoles et plus largement nos services publics si nous ne taxons pas la valeur là où elle se trouve?"[27] [*The taxation of American tech giants is a challenge of the 21st century and a question of justice and efficiency . . . How will we finance our nurseries, schools, and public services if we do not tax the value where it is.*]

- "La taxe sur les géants du numérique est une mesure forte, attendue par les Français, qui vise à rétablir de la justice fiscale et à construire la fiscalité du 21ème siècle."[28] [*The tax on the tech giants is a strong action, which will restore fiscal justice and build the tax system for the 21st century.*]

- "La taxation des #GAFA est un enjeu majeur du 21ème siècle et une question de justice et d'efficacité. Nous proposerons un projet de loi spécifique en Conseil des ministres d'ici à fin février."[29] [*The taxation of #GAFA is a major issue of the 21st century and a question of justice and efficiency. We will propose a specific bill in the Council of Ministers at the end of February.*]

Mounir Mahjoubi, former French Secretary of State for Digital Affairs, has stated:

- "[L]a taxe GAFA est très bonne, très juste et on en a besoin".[30] [*The GAFA tax is very good, very just, and needed.*]

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[26] Discours de Bruno Le Maire, ministre de l'Economie et des Finances, Assemblée Nationale (Dec. 17, 2018), https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=D3EB6041-BA80-44F5-A4F1-21C82C73768C&filename=926%20-%20Discours%202eme%20lecture%20PLF.pdf.

[27] Gouvernement.fr, *Taxe GAFA: que prévoit le futur projet de loi?* (Jan. 23, 2019), https://www.gouvernement.fr/taxe-gafa-que-prevoit-le-futur-projet-de-loi.

[28] Tweet of Bruno Le Maire, Mar. 6, 2019, https://twitter.com/BrunoLeMaire/status/1103198053966716928.

[29] Tweet of Bruno Le Maire, Jan. 20, 2019, https://twitter.com/BrunoLeMaire/status/1086918944743669760. *See also* Bruna Basini, *Bruno Le Maire: "Comment nous allons taxer les Gafa"*, LE JOURNAL DU DIMANCHE (Jan. 19, 2019), https://www.lejdd.fr/Politique/bruno-le-maire-comment-nous-allons-taxer-les-gafa-3841754.

[30] Tweet of BFMTV, Mar. 25, 2019, https://twitter.com/BFMTV/status/1110087964925874176 (quoting video interview of Mounir Mahjoubi). *See also* Tweet of Mounir Mahjoubi, Feb. 26, 2019, https://twitter.com/mounir/status/1100302862855360512 (using the hashtag #GAFA).

Representatives of the French National Assembly and Senate have called for a 'GAFA' tax.[31] French Government sites refer to the French DST as the 'GAFA' tax.[32] Legislative reports predominantly cite American companies in background documents for the tax.[33] During negotiations, an amendment was even proposed to exclude the one French company that meets the revenue thresholds (the advertising firm Criteo) from the tax.[34]

The intent to tax American firms is clear, and France understands that it has structured the French DST in a way that will predominantly affect U.S. firms. When explaining who will be affected by the tax, Minister Bruno Le Maire stated:

> Une trentaine de groupes seront touchés. *Ils sont majoritairement américains*, mais aussi chinois, allemands, espagnols ou encore britanniques. Il y aura également *une entreprise française* et plusieurs autres sociétés d'origine française, mais rachetées par des grands groupes étrangers."[35] [*There will be 30 holdings affected. The majority of them are American, but also Chinese, German, Spanish, and British. There will be one French company and others whose origins are French, but owned by foreign entities*.]

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[31] *See, e.g.*, Assemblée nationale, Projet de loi de finances pour 2019, http://www.assemblee-nationale.fr/15/cri/2018-2019/20190108.asp (representatives making multiple reference on the intent of France to introduce a tax on GAFA and "ces géants du numérique souvent américains"); Remarks of M. Benoit Potterie, Assemblée nationale Commission des finances, de l'économie générale et du contrôle budgétaire, Apr. 2, 2019, http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (citing the need to tax the digital giants ("des géants du numérique") and identifying the "GAFA (Google, Amazon, Facebook, Apple)"); "); Remarks of Mme Sabine Rubin, Assemblée nationale Commission des finances, de l'économie générale et du contrôle budgétaire, Apr. 2, 2019, http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (stating that "Sur le fond, taxer davantage les grandes multinationales, en particulier les GAFA, est un souhait louable et partagé sur tous les bancs de cette commission et, je le suppose, de notre Assemblée." [*Taxing more large multinationals, in particular the GAFA, is a laudable and shared wish by this commission and our Assembly*.]).

[32] *Supra* note 27; Gouvernement.fr, *Fiscalité : les contours de la taxe GAFA dévoilés* (Mar. 5, 2019), https://www.gouvernement.fr/fiscalite-les-contours-de-la-taxe-gafa-devoiles.

[33] Au nom de la commission des affaires étrangères sur le projet de loi portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, Par M. Denis Masseglia *available at* http://www.assemblee-nationale.fr/15/pdf/rapports/r1819.pdf; Impact Assessment (2019), http://www.assemblee-nationale.fr/15/pdf/projets/pl1737-ei.pdf.

[34] *See France's National Assembly Approves Tax on Tech Giants*, BLOOMBERG TAX (Apr. 9, 2019), https://news.bloombergtax.com/daily-tax-report-international/frances-national-assembly-approves-tax-on-tech-giants-2 (linking to a draft text approved by the National Assembly which included an amendment to include a domestic double taxation clause, which "could prove controversial since it may exclude the only French digital giant, Criteo SA, that would be netted by the new digital tax").

[35] Boris Cassel and Séverine Cazes, *«Taxer les géants du numérique, une question de justice fiscale», affirme Bruno Le Maire*, LE PARISIEN (Mar. 2, 2019), http://www.leparisien.fr/economie/taxer-les-geants-du-numerique-une-question-de-justice-fiscale-affirme-bruno-le-maire-02-03-2019-8023578.php.

France's assurances in response to the launch of the Section 301 investigation claiming that they are not targeting U.S. companies, then, ring hollow.[36]

B. *Based on inaccurate characterizations of current tax payments of U.S. digital firms*

The underlying assumption of France's pursuit of a DST is that the prominent U.S. technology and Internet firms do not pay an effective tax rate under the current framework. French policymakers argue that these firms pay less tax than their domestic counterparts and are more prone to tax evasion.[37] However, the French government appears to err in the same manner as the EU in its pursuit of its own DST and relies on an inaccurate interpretation of recent studies on digital taxation.[38] Studies show that digital firms are not undertaxed and that digital firms' effective tax rates are at par with traditional companies in the EU.[39] Again, if changes are warranted to the international taxation framework, changes should be pursued on a multilateral basis and consistent with existing international obligations, and should not single out digital firms when the data does not show that different treatment is needed.

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[36] Tweet of Bruno Le Maire, July 27, 2019, https://twitter.com/BrunoLeMaire/status/1155165429096165377?s=20 (linking to video interview of Minister Le Maire stating "I want to be very clear . . . We are not targeting specifically the American companies.").

[37] Assemblée nationale Commission des finances, de l'économie générale et du contrôle budgétaire, Apr. 2, 2019, http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp ("Sur le fond, taxer davantage les grandes multinationales, en particulier les GAFA, est un souhait louable et partagé sur tous les bancs de cette commission et, je le suppose, de notre Assemblée. *La justice fiscale ne consiste pas à se résigner à voir nos PME être imposées à hauteur de 23 %, quand les GAFA, armés de leurs bataillons de fiscalistes, ne paient que 9 %, à croire une étude de Bercy*. La justice fiscale en revanche commande de refuser qu'un géant tel que Google puisse ne déclarer au fisc français que 14 millions d'euros au titre de ses bénéfices, alors que cette entreprise engrange près de 94 milliards d'euros dans le monde – on a des éléments sur le bénéfice ainsi réalisé.") (emphasis added).

[38] Christian Borggreen, *An EU Inconvenient Truth: Digital Companies Pay More Tax Than Traditional Companies*, PROJECT DISCO (Mar. 7, 2018), http://www.project-disco.org/innovation/030718-an-eu-inconvenient-truth-digital-companies-pay-more-tax-than-traditional-companies/#.XVW_RpNKhTY; Daniel Bunn, *France's Digital Services Tax: Facts and Analysis*, TAX FOUNDATION (Mar. 11, 2019), https://taxfoundation.org/france-digital-services-tax/; European Center for International Political Economy, Digital Companies and their Fair Share of Taxes: Myths and Misconceptions (Feb. 2018), *available at* http://ecipe.org/publications/digital-companies-and-their-fair-share-of-taxes. *See also* Nicolas Marques, *Taxe sur les GAFA : soyons factuels, ne nous pénalisons pas*, MOLINARI ECONOMIC INSTITUTE (Aug. 2, 2019), https://www.contrepoints.org/2019/08/02/336695-taxe-sur-les-gafa-soyons-factuels-ne-nous-penalisons-pas ("Il n'a pas été calculé en partant du vécu des entreprises du numérique, mais en modélisant des cas types d'entreprises fictives « stylisées ». L'analyse factuelle des documents fiscaux montre que le taux d'imposition des quatre principaux acteurs du numérique est en moyenne de 24 % depuis 2009. La réalité est quasiment trois fois plus élevée que l'ordre de grandeur, théorique, mis en avant. Dans le détail, le taux d'imposition réel depuis 2009 varie entre 23 % pour Facebook et 36 % pour Amazon, une entreprise fonctionnant avec des immobilisations et une main d'œuvre significative."[).

[39] COPENHAGEN ECONOMICS, *The Proposed EU Digital Services Tax*, *supra* note 16.

IV. The Burden and Restrictions on U.S. Commerce

The French DST serves as a market access barrier for U.S. Internet service exporters in a market where information and communications technology (ICT) service exports continue to grow. For instance in 2015, ICT service exports from the United States to France were valued at $1,348,000,000, and in 2017 these same exports were valued at $1,541,000,000.[40] While not all ICT services exports will be affected by the French DST, there is a risk of deterrence. Growing U.S. firms are unlikely offer services in a market that will essentially penalize success. The administrative burden associated with compliance is significant, even if firms can pay the three percent tax. If the French DST is left unchecked and other countries follow France's lead to impose similar taxes, U.S. Internet exports will be discouraged from serving markets around the world.[41]

USTR has cited various EU Member States' Digital Services Taxes, including the French DST, as a key digital trade barrier. USTR was correct to emphasize the nature of the French DST, and other unilateral digital taxes, as a trade barrier in its 2019 National Trade Estimate (NTE) Report.[42] As USTR recently stated in the context of the 2019 NTE Report:

> "[B]arriers to digital trade threaten the ability of all firms – including small businesses – to benefit from the advantages of the digital economy. When governments impose unnecessary barriers to cross-border data flows or discriminate against foreign digital services, local firms are often hurt the most, as they cannot take advantage of cross-border digital services that facilitate global competitiveness."[43]

As was the case with the EU's proposed digital tax in 2018,[44] the French tax also serves as a *de facto* tariff. As with any tariffs, costs will likely be passed on to the consumers of the

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[40] U.S. DEP'T OF COMMERCE, Bureau of Economic Analysis, International Transactions, International Services, and International Investment Position Tables, https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4 (released Oct. 19, 2018).

[41] At the time of this filing, the following countries have either introduced or announced they are considering imposing a digital services tax: Austria, Australia, Czech Republic, Italy, Poland, Spain, and the United Kingdom.

[42] OFFICE OF THE U.S. TRADE REP., 2019 National Trade Estimate Report at 211-12, *available at* https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf ("The United States opposes proposals by any country to single out digital companies. Such proposals are based on an unprincipled and unsupported distinction between digital companies and non-digital companies.").

[43] OFFICE OF THE U.S. TRADE REP., Digital Trade Fact Sheet 2019, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/march/fact-sheet-2019-national-trade-estimate.

[44] PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, *The European Union's Proposed Digital Services Tax: A De Facto Tariff* (2018), *available at* https://www.piie.com/publications/policy-briefs/european-unions-proposed-digital-services-tax-de-facto-tariff.

services affected by the tax.[45] This may also make it harder for local small firms in France to compete.[46]

The French DST could also lead to double taxation.[47] It is likely that the same tax base will be taxed several times. For example, in digital advertising the advertising value chain includes several intermediaries between the ads and the publishers. The French DST risks taxing a number of these relationships.[48] There are also domestic competition concerns against foreign competitors that will restrict U.S. commerce. In a 2019 report, GAFA taxation is cited by French policymakers as a means to strengthen French startups.[49] Section V of these comments discusses allegations of illegal state aid.

In its 2018 report, the OECD has listed a number of other risks associated with unilateral measures that rely on intangible assets or user contribution as a basis for taxation (as the French DST does). These include: impacts on investment, innovation and growth; impacts on welfare; economic incidence of taxation on consumers and businesses; possibility of over-taxation; possible difficulties in implementing the tax as an interim measure; and compliance and administration costs.[50]

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[45] The *Taj French DST Impact Study* examined the impact of the DST on both categories of taxpayers under the law (referred to as "marketplaces" and "digital advertising platforms" in the study) and the resulting incidence. Their analysis determined that consumers are likely to pay the majority of the taxes, calculating an "upstream" pass-on rate of 100 percent for goods marketplaces, services marketplaces, and digital advertising. The "downstream" pass-on rate was 70 percent for goods marketplaces, 76 percent for services marketplaces, and 100 percent for digital advertising. *Taj French DST Impact Study*, *supra* note 18 at § 3.3-3.4.

[46] *Amazon Says French Digital Tax Will Hit Consumers, Small Firms*, REUTERS (Aug. 2, 2019), https://www.reuters.com/article/us-amazon-com-france-digitaltax/amazon-says-french-digital-tax-will-hit-consumers-small-firms-idUSKCN1US241.

[47] *OECD Tax Interim Report 2018*, *supra* note 14 at 187 ("[E]conomic double taxation may arise due to the fact that the excise tax is applied to both residents and non-residents with no ability to credit the tax against corporate income tax levied on the same payment. . . . Another type of double taxation can arise in those cases where a supply of e- services is made to a person that incorporates those services into an onward supply that is subject to the excise tax under domestic or foreign law.").

[48] *Taj French DST Impact Study*, *supra* note 18 at § 5.1.3.

[49] Projet de Loi de Finances Pour 2019, Rapport Économique, Social et Financer, *available at* https://www.economie.gouv.fr/files/files/Actus2018/RESF_2019_web.pdf at 154 (Stating under the heading of "Le Gouvernement met en œuvre une politique favorable aux startups du numérique" the following: "Les efforts se poursuivent pour pousser la vision française des sujets systémiques majeurs traités au niveau international tels que l'intelligence artificielle, la neutralité du net, la fiscalité des GAFA, etc.") *[The Government will create a policy environment that is favorable to tech startups. The efforts continue to promote the French vision on issues at the international level on items such as artificial intelligence, net neutrality, the taxation of the GAFA, etc.]*.

[50] *OECD Tax Interim Report 2018*, *supra* note 14 at 178-79.

V. Potential Conflict with International Commitments

The French DST is inconsistent with France's existing obligations under various international agreements with the United States and the EU. According to the OECD and other stakeholders, the French DST, as well as other proposed digital taxes, may conflict with commitments under tax treaties, World Trade Organization (WTO) obligations, and laws for members of the EU.[51] Many have commented that the French DST risks increased trade conflict.[52] As was the case with the EU's proposed digital tax in 2018, the French tax also serves as a *de facto* tariff.[53]

A. *Potential Conflicts with WTO Commitments and Commitments Under U.S.-France Tax Treaties*

The French DST may violate commitments made to the U.S. under various tax treaties by departing from the principle of "permanent establishment" when determining relevant tax jurisdiction.[54] The French DST may also be in conflict with non-discrimination clauses in the relevant tax treaties.[55]

The discriminatory nature of the DST conflicts with France's commitments under the World Trade Organization's General Agreement on Trade in Services (GATS), notably the non-discrimination principles under Article II and Article XVII. Article II mandates that members offer "treatment no less favourable than it accords to like services and suppliers of any other

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[51] *Id.* at 183.

[52] Editorial Board, *The Digital Services Tax Could Set Off Another Trade War, Countries Must Work Together for a Way Out*, WASH. POST (July 20, 2019), https://www.washingtonpost.com/opinions/the-digital-services-tax-could-set-off-another-trade-war-countries-must-work-together-for-a-way-out/2019/07/20/b69e9fe8-a988-11e9-a3a6-ab670962db05_story.html.

[53] PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, *The European Union's Proposed Digital Services Tax: A De Facto Tariff* (2018), *available at* https://www.piie.com/publications/policy-briefs/european-unions-proposed-digital-services-tax-de-facto-tariff.

[54] Gary Clyde Hufbauer, *France Threatens a Digital Tax: Will the US Retaliate?*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Apr. 19, 2019), https://www.piie.com/blogs/trade-investment-policy-watch/france-threatens-digital-tax-will-us-retaliate ("The French digital tax is ill-considered firstly because it contravenes the 'permanent establishment' principle for dividing the profits of a multinational company between two or more taxing jurisdictions. Under current tax treaties, the existence of a permanent establishment—some sort of physical presence—is the threshold for including a portion of corporate profits in the domestic tax base. Digital firms, including US tech giants, purvey their websites globally with no physical presence in most countries. The claim is often made that the internet calls for a new threshold for dividing the corporate tax base. But until a new threshold is agreed between countries, national self-help measures, like the proposed French tax, will result in double taxation and discourage the spread of digital commerce, one of the strongest forces now lifting the global economy.").

[55] Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, at Art. 25, Signed Aug. 31, 1994, as amended Dec. 8, 2004, Jan. 13, 2009.

country." French firms that offer the same targeted services in the French DST — intermediary and ad-supported services — as their U.S. competitors will not be taxed, save a single French firm.

B. *State Aid Under European Union law*

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."[56] "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. Some have argued that the French DST may then be unlawful under these EU state aid rules.[57]

VI. Threat to the Progress Made at the International Level

The OECD is the optimal forum to review the current international tax framework and to seek global consensus-based solutions. The French DST undermines the ongoing process at the OECD, and invites others countries to act unilaterally to impose similar national taxes that will further disrupt this critical work at the multilateral level.

CCIA strongly supports the efforts under the OECD/G20 Inclusive Framework on BEPS (base erosion and profit shifting), which seeks to develop a consensus solution to the tax challenges arising from the digitization of the global economy.[58] CCIA has participated in the consultation process.[59] The OECD is making significant strides in its work to address the tax challenges arising from the digitalization of economies through an inclusive and consensus-driven process.[60] CCIA has encouraged the OECD, and participating governments, to reach

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

[57] CCIA also commissioned an analysis regarding the state aid claim. 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/ (summarizing findings of law firm analysis).

[58] OECD, International Collaboration to End Tax Avoidance, https://www.oecd.org/tax/beps/ (last visited Aug. 16, 2019).

[59] Comments of CCIA to OECD Consultation on the possible solutions to the tax challenges of digitalisation, filed Mar. 6, 2019, *available at* http://www.ccianet.org/wp-content/uploads/2019/07/CCIA-Response-To-OECD-Tax-Consultation.pdf.

[60] OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, at 35, 40, *available at* https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf (delivering a

consensus on a truly ambitious, comprehensive and long-term solution by 2020. This solution should prevent double taxation and ring fencing of the so-called "digital economy" and it should seek simplicity for authorities and firms that will need to implement it. The international tech industry is committed to this important process and CCIA remains optimistic that the end result can solve taxation challenges worldwide and provide certainty needed to enhance investments, trade and growth globally. The G7 and the G20 continue to endorse the OECD work, and the need for a truly consensus-based solution.[61]

Interim measures should not be pursued as countries continue this work at the OECD and international level. Finance Minister, Bruno Le Maire, stated that the DST "is based on the diagnosis that there are new business models based on data…The tax is temporary. As soon as the OECD adopts a credible solution, France will withdraw its national tax." He further emphasized that "France is a sovereign state that makes its own fiscal decisions, and will continue to do so[.]" The promise to remove the DST once the OECD reaches a solution is disingenuous on the part of France for a number of reasons. First, the final text of the law imposing the French DST does not include a sunset provision or makes clear references that this tax is intended as an interim or temporary solution. Others have commented on the difficulty in rolling back interim taxes once put in place and once companies have structure compliance mechanisms.[62] Second, these remarks leave open the option for France to only remove the

status update of OECD work to the Group of 20 in June 2019 and confirmed delivery of a long-term solution by 2020).

[61] G20 Leaders' Declaration (2019), https://g20.org/en/documents/final_g20_osaka_leaders_declaration.html at ¶ 16 ("We will continue our cooperation for a globally fair, sustainable, and modern international tax system, and welcome international cooperation to advance pro-growth tax policies. We reaffirm the importance of the worldwide implementation of the G20/OECD Base Erosion and Profit Shifting (BEPS) package and enhanced tax certainty. We welcome the recent progress on addressing the tax challenges arising from digitalization and endorse the ambitious work program that consists of a two-pillar approach, developed by the Inclusive Framework on BEPS. We will redouble our efforts for a consensus-based solution with a final report by 2020."); G7 Leaders' Declaration (2018), https://www.consilium.europa.eu/en/press/press-releases/2018/06/09/the-charlevoix-g7-summit-communique/ at ¶ 3 ("In order to ensure that everyone pays their fair share, we will exchange approaches and support international efforts to deliver fair, progressive, effective and efficient tax systems. We will continue to fight tax evasion and avoidance by promoting the global implementation of international standards and addressing base erosion and profit shifting. The impacts of the digitalization of the economy on the international tax system remain key outstanding issues. We welcome the OECD interim report analyzing the impact of digitalization of the economy on the international tax system. We are committed to work together to seek a consensus-based solution by 2020.").

[62] AICPA, *Taxation of the Digitized Economy* (2018), *available at* https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/201810-taxation-of-the-digitalized-economy.pdf ("Temporary tax measures tend not to expire as planned, if they expire at all. Taxpayers have well-founded concerns that any implementation of an "interim" or "temporary" measure may become permanent. The reasons for this outcome are numerous but are generally linked to governmental tendencies to rely on the new revenue sources for spending. Once these sources are established, abolishing a temporary tax often appears as a

French DST if the solution reached at the OECD is to its preference. Based on the statements made by numerous French officials, it is yet to be determined that a global solution that does not single out the U.S. technology firms will meet France's standard for an appropriate solution. Minister Bruno Le Maire said that a compromise solution would still look at digital taxation at the OECD level, which could only focus on singling out digital firms once again rather than address comprehensive tax challenges to the digitization taking place across all global enterprises.[63]

VII. Recommended Action as a Result of the Section 301 Investigation

An investigation under Section 301 is a welcomed course of action for the Administration and will signal to trading partners the gravity of moving forward with a unilateral tax. CCIA recognizes that there are a number of tools at USTR's disposal as a result of the Section 301 investigation.[64] It appears that the Administration is considering the use of tariffs against French imports as retaliation for the French DST.[65]

CCIA takes seriously the impact that tariffs can have and, as a general policy view, believes that they should only be used in limited circumstances, in a targeted manner, and where there is a clear strategy in place designed to change the behavior of a trading partner. CCIA does not take a position here on whether the use of tariffs is appropriate in this circumstance, but would note that it appears that there are limited options left to address this dispute in a timely manner recognizing the timeline for the OECD process and the imminent risk of other unilateral action by other countries.

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spending cut that is politically untenable to the constituency benefitting from the spending. Also, when temporary measures are enacted, tax authorities and other government agencies often are forced to establish systems to ensure the fair and accurate collection of those taxes. Those systems (and jobs) become obsolete if the underlying tax is abolished. Therefore, it becomes difficult to justify eliminating a tax after the government has invested in resources designed to aid in its collection.").

[63] *We Need Digital Taxation at OECD Level, French Finance Minister Says*, CNBC (July 17, 2019), https://www.cnbc.com/2019/07/17/france-fin-min-comments-on-libra-digital-tax-us-probe-ahead-of-g7.html; Tweet of Bruno Le Maire, July 27, 2019, https://twitter.com/BrunoLeMaire/status/1155164877029302272.

[64] 19 U.S.C. § 2411.

[65] *Trump Says U.S. Could Tax French Wine in Retaliation for Digital Tax*, REUTERS (July 26, 2019), https://www.reuters.com/article/us-usa-trade-france/trump-says-us-could-tax-french-wine-in-retaliation-for-digital-tax-idUSKCN1UL291.

VIII. Conclusion

The French DST unduly targets U.S. Internet companies and CCIA applauds USTR's strong and immediate response. If France's action is left unchecked by trading partners, France could be the first of a number of countries looking to enact similar unilateral policies targeting American companies, fragmenting the digital economy, and undermining any chance to achieve a consensus-based, fair framework for international taxation in the 21st century.

August 16, 2019

Sincerely,

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