Computer & Communications Industry Association
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SUBMISSION OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA):
CONSULTATION ON THE DRAFT GUIDELINES ADDRESSING THE SCOPE AND THE CALCULATION OF THE FRENCH DIGITAL SERVICES TAX (BOI-TCA-DST)

The Computer & Communications Industry Association (CCIA) is an international, nonprofit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 40 years, to promoting innovation and preserving full, fair and open competition throughout our industry.[1]

On 24 July 2019, the French Parliament enacted a law imposing a 3% tax on gross revenue derived from certain services provided by major digital sector companies with retroactive effect as from 1 January 2019 (hereafter, "Digital Services Tax" or "DST").
On 30 March 2020, the French Tax authorities published draft guidelines addressing the scope and calculation of the Digital Services Tax (hereafter "the draft guidelines").

CCIA welcomes the opportunity to provide comments on the proposed guidelines on the implementation of the French digital services tax.

CCIA raises three main concerns with the draft guidelines: (1) the guidelines considerably extend the scope of application of the French DST beyond what was provided for by the DST Law; (2) the draft guidelines contradict the DST Law by restricting the scope of certain exemptions and exceptions; and (3) the lack of clarity of certain concepts in the draft guidelines makes the effective implementation more difficult.

These general comments are followed by comments and proposed edits on specific text within the draft guidelines.

Kind regards,

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1. **The guidelines considerably extend the scope of application of the French DST beyond what was provided for by the DST Law.**

An illustration of this problem is the case of independent economic operations (see appendix 5 for details).

Under the DST Law, payments made by users of a digital interface in consideration of a service that constitutes, from an economic standpoint, a service independent of access to and use of the digital interface as such, are not subject to DST. In this respect, CCIA recalls that "using" the digital interface, within the meaning of the DST Law, corresponds to a user "*coming into contact with other users and interacting with them*"[2].

However, the draft guidelines describe as being subject to DST a number of activities like shipping and logistical services, though these services are clearly independent from the access to and use of the digital marketplace. Indeed these services are neither essential nor decisive for accessing or using the digital interface. Moreover, they are not even ancillary to the digital marketplace. Even if these services are likely to facilitate or improve the conditions of access to or use of the marketplace, they constitute an end in itself for the clientele (not a mere means to benefit from the digital interface under the best conditions).

The draft guidelines also extend the scope of the DST far beyond its objective when it provides that when an operation is made of several components, one of them not involving access to and use of the digital interface, the entire operation should be subject to DST (see appendix 6).

2. **The draft guidelines contradict the DST Law by restricting the scope of certain exemptions and exceptions.**

The DST law provides for a number of exceptions where the French DST is not applicable. However, the draft guidelines restrict the scope of some of these exceptions by adding conditions to benefit from them, which are not mentioned in the DST Law itself.

An illustration is the exclusion applicable to **services provided between members of a group.**

Consistently with the logic used for the proposed EU directive concerning the digital services tax[3], which brought about the exclusion provided for intra-group services, the DST Law excludes from taxable services the provision of a digital interface intended for a company

[2] Article 299 II 1°CGI.

[3] European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM (2018), 148 final.

belonging to the same group as the operator, even when such intermediation service would classify as a taxable service if it were provided to independent companies.

In contradiction with the spirit of the DST Law, the Draft guidelines adds **a condition that is not provided for by DST Law** in order to benefit from this exclusion (see Appendix 2 for more details).

Likewise, in contradiction with the DST Law, the Draft guidelines restrict the **scope** of the exception applicable to payment services and digital content (see Appendices 3 and 4).

3. **The lack of clarity of certain concepts in the draft guidelines makes the effective implementation more difficult.**

An illustration of this lack of clarity is the concept of "operator" of a digital interface (see appendix 1) in particular in the context of a group of entities where the **operation of the digital interface** (e.g. website operation) and the **provision of a digital service as referred to in DST Law** are operated by **two distinct entities** of the same group.

APPENDIX 1 - Concept of the "operator" of a digital interface

Reference: BOI-TCA-TSN-10-10-10-20200323, No. 60

> *"The digital interface is provided by a person, hereinafter referred to as "the operator", for the benefit of users, who are natural persons. The user may act on his own behalf or on behalf of a third party, in particular a legal entity. He may act in a private capacity or as a part of an economic activity. The operator is never a user of the digital interface, which means that the interactions it has with users do not characterize a taxable digital intermediation service."*

CCIA Comments:

The concept of "operator" as defined in Draft guidelines Reference n° 60, needs to be **clarified**, particularly in cases where the **operation of the digital interface** (e.g. website operation, managing the capacity of data centres, verification and provision of information regarding orders, etc.) and the **provision of a digital service as referred to in DST Law** are operated by **two distinct entities** of the same group. Thus, it could be specified that the "operator" is the entity that provides the taxable digital service, regardless of whether the operation of the digital interface as such is carried out by another entity.Such a clarification would have the advantage of also clarifying the statements contained in other chapters of the Draft guidelines referring to the concepts of "operator" or "interface operator".

APPENDIX 2 - The exclusion of services provided between members of a group

Reference: BOI-TCA-TSN-10-10-10-20200323, No. 80

"Since the same service cannot be artificially broken down (§ 10), the exclusion condition is assessed globally and cannot apply to only a fraction of the clientele. This means in particular that when a taxable service is supplied to a group of undertakings, it does not benefit from the exclusion, even if some of them turn out to be connected with the supplier."

CCIA Comments:

Draft guidelines Reference n° 80 should be **deleted** since **it restricts the exclusion applicable to services provided between members of a group**, in contradiction with the DST Law. Indeed, pursuant to DST law, the provision, through electronic communications, of a digital interface intended for a company belonging to the same group as the operator is excluded from taxable services, even when such intermediation service would classify as a taxable service if it were provided to independent companies. On the one hand, Draft guidelines Reference n° 80 adds **a condition that is not provided for by law** in order to benefit from this exclusion, this condition being that **the services must be provided "exclusively" between companies belonging to the same group.**

Furthermore, since it prescribes, in certain cases, for certain intra-group services to be subject to the DST, Draft guidelines Reference n° 80 is also **contrary to the spirit of the law**. Indeed, both the bill's impact assessment and the National Assembly's Finance Committee's report on the Bill clearly exclude all intra-group services from the scope of the DST[4].

Lastly, Draft guidelines Reference n° 80 appears contrary to the logic used for the proposed EU directive concerning the digital services tax[5], which brought about the exclusion provided for intra-group services.

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[4] Please see:

- Impact assessment, Bill for the creation of a tax on digital services and modifying the downward trajectory of the corporate income tax, p. 10.
- J. Giraud, Report on the bill for the creation of a tax on digital services and modifying the downward trajectory of the corporate income tax, National Assembly, XVth legislature, No. 1838, 3 April 2019, p. 136. Our emphasis.

[5] European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM (2018), 148 final.

APPENDIX 3 - Exception regarding the provision of a digital interface mainly to provide payment services

Reference: BOI-TCA-TSN-10-10-20-20200330, No. 210

"Payment services are listed in section II of Article L. 314-1 of the Monetary and Financial Code (CoMoFi), subject to the exclusions provided for in section III of the same article."

CCIA Comments:

Draft guidelines Reference n° 210 needs to be **amended** since it restricts the **scope** of the exclusion applicable to payment services in contradiction with the law.

Under the DST law, the services concerned by the exception applicable to payment services are payment services **"*within the meaning*" of Article L. 314-1 of the Monetary and Financial Code**, while the commented statements refer to the payment services "***listed***" in Article L. 314-1 of the Monetary and Financial Code. The wording of the law thus makes it possible to include in the scope of the exception **services of the same type** as those mentioned in Article L.314-1 II of the Monetary and Financial Code, but which originate from an **equivalent foreign regulation**[6]. Yet, Draft guidelines Reference n° 210 arbitrarily limits the scope of the payment services exception that **originates exclusively in French regulations** on the subject.

Therefore, it should be specified that the payment services are payment services "within the meaning of" Article L. 314-1 II of the Monetary and Financial Code, i.e., the payment services referred to in Article L. 314-1 II of the Monetary and Financial Code, but also the payment services within the meaning of Annex 2 of the Second Payment Services Directive, as well as **any payment service of an equivalent nature subject to foreign law, whether rendered from France or abroad.**

[6] This is particularly the case for payment services provided from a State in the European Union that has transposed the Second Payment Services Directive of which Annex I (which Article L. 314-1 II of the Monetary and Financial Code codifies) specifies the payment services.

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

APPENDIX 4 - Exception regarding the provision of a digital interface mainly to provide digital content

Reference: Draft guidelines BOI-TCA-TSN-10-10-20, No. 150

"The provision of digital content means the provision, using the digital interface, of any data in digital form, which the operator owns or for which it has the distribution rights. "

CCIA Comments:

The DST Law provides for an exception for digital content: the provision of a digital interface is not a taxable service when the person who provides the digital interface uses the digital interface mainly to provide users with digital content.

Draft guidelines Reference n° 150 provides for a condition in order to benefit from this exception whereby distribution rights must be owned or held in respect of the digital content provided using an interface by the operator. Such a condition is **not contained in the DST Law** and **therefore should be deleted.**

Furthermore, such a condition seems overly excessive to the extent that companies selling digital content for which they hold the rights do not even fall under the scope of DST. Indeed, when a digital interface is used by the operator to sell the property that it owns (purchase/sale) or its own services, the operator does not provide a taxable digital intermediation service. This is very clear in the parliamentary work:

> *"Online sales on one's own behalf are excluded, as well as the provision of digital content. In other words, Amazon, for its direct sales activities, and Netflix would not be subject to the tax, for example."* [7]

[7] Report No. 496 (2018-2019) by Mr Albéric de MONTGOLFIER, made in the name of the Finance Committee, filed on 15 May 2019

APPENDIX 5 - Exception concerning independent economic operations

1. Shipping fees

Reference: BOI-TCA-TSN-20-20200330, No. 140

"Example 2: *The operator of a marketplace enabling deliveries of goods between merchants and individuals offers buyers various shipping options for the goods delivered (standard delivery, express delivery, premium delivery, etc.). To this end, it bills buyers for shipping fees in their name, with the amount varying depending on the solution chosen. Buyers who wish for their goods to be delivered can only use those solutions. Such shipping options do not involve access to or use of the digital interface*."

CCIA Comments:

The Draft guidelines Reference n° 140 Example 2 should be **deleted** since **it extends the scope of application of the DST in contradiction with the law**.

As a reminder, under the DST Law, payments made in exchange for the provision of a taxable service through a digital interface are all amounts paid by users of that interface, with the exception of those paid in consideration of supplies of goods or services which constitute, from an economic standpoint, transactions independent of access to and use of the taxable service[8].

Thus, with regard to a marketplace, for the application of these provisions, a shipping service should be considered **not to involve access to and use of the digital interface as such**, and for at least two series of reasons.

First, such a service is theoretically neither essential nor decisive for accessing the digital interface or "using" it.

In this respect, we recall that "using" the digital interface, within the meaning of the aforementioned provisions, corresponds to a user "*coming into contact with other users and interacting with them*"[9]. Even if such interaction makes it possible, particularly in the context of a marketplace, to conduct deliveries of goods, interaction and delivery should still be regarded as distinct concepts and activities.

[8] Emphasis added.

[9] Article 299 II 1°CGI.

Second, the shipping service is the ancillary component of a global service that it forms with the delivery of the good[10], which itself does not involve access to and use of the digital interface.

As transactions "underlying" the intermediation service, it is indeed established that deliveries of goods and services enabled by the digital interface constitute operations not involving access to and use of the taxable service, regardless of whether or not the payments are formally received by the operator of the intermediation service[11].

2. Subscriptions

References: BOI-TCA-TSN-20-20200330, No. 140 and 150

> **"Example 3:** *A user purchases an offer from the operator of a marketplace making it possible, in particular, to benefit from exclusive rights on the marketplace over certain periods. That offer is not, in economic terms, disconnected from access to or use of the marketplace*."
>
> **"Example:** *The operator of a marketplace sells, for a flat-rate price, an offer, for a given period, giving access to a service providing digital content as well as privileged access to the marketplace. The offer cannot be broken down artificially and the flat-rate price is taxed in full."*

CCIA Comments:

It appears that the above examples should be **deleted** since **they extend the scope of application of the DST in contradiction with the law**. In fact, **the offer described in those examples** should, in light of the circumstances provided, be regarded as **not involving access to and use of the taxable service**, within the meaning of the DST Law. In this respect, CCIA recalls that, under case **law associated with complex VAT operations**, which directly inspired these provisions, multiple separate services can be considered not to be independent:

- When they are so closely linked that [they] form, objectively, a single, indissociable economic service, whose breakdown would be artificial. In order to be considered

[10] In this sense, VAT developments: Mémento fiscal Lefebvre, No. 35850.

[11] Furthermore, this interpretation is taken up by the example published under Reference No. BOI-TCA-TSN-20-20200330, No. 100, in which "*the operator of a marketplace enables the transaction to be paid through its intermediary and collects, in the name of and on behalf of the seller, the consideration for the delivery of a good or the performance of a service paid by the buyer: this consideration is not taxable.* "

indissociable, the services must each be considered, "an essential or decisive component of the global service[12].

- When one may be considered as constituting the principal service and the others as one or more ancillary services undergoing the same tax treatment as the principal service. A service must be considered ancillary to a principal service when it provides for the clientele not an end in itself, but the means to enjoy the service provider's principal service under the best conditions[13].

In this case, an offer, as described in the aforementioned examples, must be regarded as **not involving access to and use of the taxable service** because (i) it is neither essential nor decisive for accessing or using the digital interface and (ii) giving access to a digital content provision service, could not be regarded as an ancillary service to the main service that would be created by accessing and using the marketplace.

3. Logistical services

References: BOI-TCA-TSN-20-20200330, No. 140

"***Example 2:*** *The operator of a marketplace enabling deliveries of items between users sells to sellers logistical services dedicated to routing to buyers those goods acquired through the marketplace. Sellers cannot use those logistical services or call upon other service providers and the use of such services does not result in changes to the conditions, particularly pricing conditions, for accessing the marketplace. The income derived from such logistical services is not taxable."*

"Example 4: *Repeat of example 1 above. However, sellers can use other logistical providers. The acquisition of logistical services from the taxpayer enables them, however, to benefit from more advantageous pricing terms in the use of the marketplace (discount on access fees, fees for posting ads or the commission applied, priority posting of ads compared to other sellers, etc.). The logistical services are not, in economic terms, disconnected from access to or use of the marketplace*".

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[12] ECJ, 27 October 2005, *Levob Verzekeringen BV, OV Bank NV*, C-41/04, point 22 ; CJEU, 19 November 2009, *Don Bosco Onroerend Goed BV*, C-461/08 ; CJEU, 19 November 2009, *Don Bosco Onroerend Goed BV*, C-461/08 ; CJEU, 11 June 2009, *RLRE Tellmer Property*, C-572/07 ; V. B. Bohnert, conclusions on EC, 24 June 2015, *Société Center Parc Resorts France*, No. 365849.

[13] See CJEU, 18 January 2018, *Stadion Amsterdam CV*, C-463/16, point 21 ; V. CJEU, 10 March 2011, *Bog e.a.*, C-497/08, C-499/09, C-501/09 and C-502/09, point 54 ; CJEU, 17 January 2013, *BGZ Leasing sp. zoo*, C-224/11.

CCIA Comments:

The above examples should be **deleted** or, at the very least, **modified**, since **they extend the scope of application of the DST in contradiction with the law**. In fact, in accordance with case law associated with complex VAT operations, as recalled above, the **optional logistical services** should, in any case, be regarded as **operations not involving** access to and use of the taxable service.

In any case, the comments related to logistical services should be clarified by specifying that only the logistical services having a direct impact on pricing terms are not independent from the access to and use of the digital interface.

APPENDIX 6 -Taxation method for non-independent operations

References: BOI-TCA-TSN-20-20200330, No. 150

"Where a delivery of goods or services does not qualify for the exclusion commented on in the following subparagraph, the entire consideration paid by the user of the digital interface shall be taxed.

It is not possible to break it down into a first component which would be closely linked, in economic terms, to access to or use of the digital interface and a second component which would not.

[...]

It is also not possible to benefit from the exclusion on the ground that, within the delivery of goods or provision of services, the elements that are closely associated, in economic terms, with access to or use of the digital interface would be of a non-paramount nature."

CCIA Comments:

Draft guidelines Reference N° 150 should be **deleted** since **it adds to the law and extends the scope of the DST far beyond its object**.

Indeed, it would result from Draft guidelines Reference N° 150 that any composite operation of which one of the components may be regarded as not involving access to and use of the digital interface would, automatically and without examining the case, be regarded as a unique operation, of which all components should receive the same tax treatment (namely being subject to the DST).