



Computer & Communications Industry Association (CCIA) Comments to Department of Finance Canada on “Digital Services Tax Act” February 2022

I. Introduction

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.¹ CCIA appreciates the opportunity to provide its views² on Canada’s draft legislative proposals for the Digital Services Tax Act.³ Rather than adopting a digital services tax (DST) that invites trade conflicts, CCIA encourages Canada to work with its international partners on implementing the OECD/G20 Inclusive Framework Two-Pillar Solution reached in October 2021.⁴

CCIA strongly opposes the imposition of DSTs and similarly discriminatory digital taxation measures that depart from long-standing taxation norms and target a specific set of U.S. firms. DSTs and other unilateral measures threaten to undermine the solution reached at the global level on international tax reform. A long-term, multilateral solution that does not discriminate against U.S. services remains the only path forward to provide certainty, and reduce trade tensions caused by countries’ decisions to enact unilateral measures.

The U.S. and Canada have a vibrant digital trading relationship, representing two strong digital economies.⁵ According to Stats Canada, “up to \$11.2 billion of the maximum \$16.4 billion of digitally delivered services exports were generated from demand in the United States” and “in-scope exports to the United States, a maximum share of 82% of these services were digitally delivered”.⁶ In 2020, the United States exported \$39.4 billion (USD) in digitally-enabled

¹ For more, visit www.cciagnet.org.

² These comments reiterate many concerns included in CCIA’s submission in the previous consultation. See Comments of CCIA, Canada Digital Services Tax 2021, available at <https://www.cciagnet.org/wp-content/uploads/2021/06/Comments-of-CCIA-Canada-Digital-Services-Tax-2021.pdf>.

³ Dep’t of Finance Canada, Digital Services Tax Act, <https://www.canada.ca/en/department-finance/news/2021/12/digital-services-tax-act.html>.

⁴ OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy (Oct. 8, 2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> [hereinafter “OECD Agreement”].

⁵ Statistics Canada, *Canada’s Services Exports Through the Lens of Digital Trade* (Dec. 15, 2020), <https://www150.statcan.gc.ca/n1/pub/13-605-x/2020001/article/00005-eng.htm>. See also Council on Foreign Relations, *The Coming North American Digital Trade Zone* (Oct. 9, 2018) <https://www.cfr.org/blog/coming-north-american-digital-trade-zone>.

⁶ *Id.*

services to Canada.⁷ This trade relationship is threatened by discriminatory measures such as a DST that targets a handful of U.S. companies.

II. Conflicts with the OECD/G20 Inclusive Framework

The Organization for Economic Cooperation and Development (OECD) and the Group of 20 (G20) carefully negotiated a consensus-based solution to the tax challenges arising from the digitalization of the economy. The Statement on a Two-Pillar Solution was released on October 8, 2021 and agreed to by 137 countries. The agreement was subsequently endorsed by G20 Leaders.⁸ CCIA welcomed this historical global tax reform agreement.⁹ Industry remains committed to this important process as focus turns to implementations and is optimistic that the result will provide certainty needed to enhance investments, trade, and growth globally.

The pursuit of a unilateral tax under the Digital Services Tax Act is inconsistent with Canada's participation in the OECD/G20 Two-Pillar Solution. As part of the agreement announced on October 8, 2021, parties made a commitment not to enact new discriminatory digital services taxes and instead focus on implementation of the global agreement.

On unilateral measures, the agreement states:

The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC.¹⁰

It is discouraging that Canada immediately welcomed the global agreement with an announcement that the Canada DST would move forward nonetheless, albeit with a delayed timeline.¹¹ Further, the retroactive component where companies are still obligated to pay the tax accrued since January 1, 2022 is an extremely concerning framework for other countries to follow and adds to the uncertainty faced by covered firms.

⁷ U.S. Dep't of Commerce, Bureau of Economic Analysis, <https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=9&isuri=1&6210=4> (updated July 2021).

⁸ *G20 Leaders Endorse Global Minimum Tax Deal for 2023 Start*, Reuters (Oct. 30, 2021), <https://www.reuters.com/business/g20-leaders-endorse-global-minimum-corporate-tax-deal-2023-start-2021-10-30/>.

⁹ Press Release, CCIA Welcomes Historical Global Tax Reform, Oct. 8, 2021, *available at* <https://www.cciainet.org/2021/10/ccia-welcomes-historic-global-tax-reform-agreement/>.

¹⁰ OECD Agreement at 3.

¹¹ Statement by the Deputy Prime Minister on new international tax reform agreement, Oct. 8, 2021, *available at* <https://www.canada.ca/en/department-finance/news/2021/10/statement-by-the-deputy-prime-minister-on-new-international-tax-reform-agreement.html>.

III. Potential Conflicts with International Commitments

DSTs may conflict with international commitments, and international agreements these countries are party to. The consistency of DSTs with commitments under tax treaties and WTO obligations has been questioned by the OECD and other stakeholders.¹²

The Canada DST is based on the French DST, which the U.S. Trade Representative concluded to be actionable under Section 301 of the Trade Act of 1974 as discriminatory and burdensome for U.S. multinationals.¹³ USTR has made clear its concerns regarding Canada’s decision to pursue a DST, noting that USTR would “examine all options, including under our trade agreements and domestic statutes” if Canada adopted a DST.¹⁴ Congressional trade leaders have also raised concerns, noting that a Canada DST would risk “setting a troubling precedent that could undermine years of work by negotiators at the OECD.”¹⁵

(a) Tax Treaties

The Canada U.S. Tax Treaty contains provisions that may conflict with the imposition of a DST.¹⁶ Article VII details parties’ rights to tax corporate entities operating in the country that extend to entities with a physical presence. Further, the Treaty contains a non-discrimination commitment in Art. XXV. As it is likely that only a handful of predominantly U.S. companies will be in scope of the DST, the DST may be considered to discriminate based on nationality.

(b) Potential conflicts with WTO and USMCA Commitments

The DSTs predominately apply to U.S. firms. The covered activities (online marketplace, digital advertising, and social media), combined with the revenue thresholds make clear that the target of the DST is a handful of U.S. companies. Their local competitors are likely out of scope. To this end, the United States has found on multiple occasions that DSTs similar to what Canada is proposing are clearly discriminatory against U.S. firms,¹⁷ and has made clear that any unilateral digital services tax measures will be met with scrutiny by the Office of the U.S. Trade Representative.¹⁸

¹² 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> at 183.

¹³ Office of the U.S. Trade Rep., Section 301 Investigation Report on France’s Digital Services Tax, *available at* https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

¹⁴ Press Release, Statement by USTR Spokesperson Adam Hodge on Canada’s Digital Services Tax, Dec. 15, 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/december/statement-ustr-spokesperson-adam-hodge-canadas-digital-services-tax-described-canadas-notice-ways>.

¹⁵ *U.S. Trade Official Raises Concerns About Canada’s Proposed Digital Services Tax*, Reuters (Jan. 12, 2022), <https://www.reuters.com/business/us-trade-official-raises-concerns-about-canadas-proposed-digital-services-tax-2022-01-12/>.

¹⁶ *Available at* <https://freemanlaw.com/wp-content/uploads/2020/07/canada.pdf>.

¹⁷ *See* Section 301 Report France Digital Services Tax (Dec. 2019), *available at* https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf; Section 301 Report, Various Digital Services Taxes, *available at* <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes>.

¹⁸ *See* Readout of Ambassador Katherine Tai’s Virtual Meeting with Canada’s Minister of Small Business, Export Promotion, and International Trade Mary Ng (May 17, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/readout-ambassador-katherine-tais-virtual-meeting-canadas-minister-small-business->

Policymakers make clear their target of these new taxes, singling out other American “tech giants”. Some follow French policymakers and refer to the tax as a ‘GAFA’ tax (a moniker to describe Google, Amazon, Facebook, and Apple), or cite only U.S. companies as the basis for introducing the tax. As noted above, the discriminatory nature of DSTs is motivated at least in part by inaccurate characterizations of current tax payments of digital firms.

The discriminatory nature of the DST conflicts with 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 favorable than it accords to like services and suppliers of any other country.” Domestic firms that offer the same targeted services in DSTs as their U.S. competitors — such as intermediary and ad-supported services — are unlikely to be taxed.

Further, these commitments are outlined in the recently negotiated U.S.-Mexico-Canada Agreement (USMCA). The USMCA represented the gold standard for a 21st century trade agreement that sets strong rules across digital services trade, reflecting shared priorities among North American trading partners. Discriminatory taxes, especially ones that the United States have made clear will be met with trade scrutiny, conflict with the spirit of this renewed partnership.

IV. Flawed Justifications for Unilateral Digital Services Taxes

Studies demonstrate that the firms that would fall into the scope of the Canada DST “pay taxes at rates equal or higher than the average large Canadian company.”¹⁹ The notion that digital firms are undertaxed compared to physical counterparts has also been challenged in the European context.²⁰ Additionally, the costs of the Canada DST are likely to be passed onto Canadian consumers and businesses.²¹ The Canada DST would result in higher costs to users of these services, including SMEs who rely on these services for business operations.

If changes are warranted to corporate tax rules to reflect the nature of global business, these changes should be pursued at the multilateral level and pursued on a non-discriminatory basis relative to specific business models. To this end, CCIA supports the timely implementation of the OECD/G20 Inclusive Framework Two-Pillar solution to provide a future-proof framework and speed economic recovery around the world.

export-promotion; *Canada Could Face U.S. Tariff Retaliation Over Proposed Tax on Digital Services*, National Post (Apr. 5, 2021), <https://nationalpost.com/news/politics/canada-could-face-u-s-tariff-retaliation-over-proposed-tax-on-digital-services>.

¹⁹ Montreal Economic Institute, *Taxing the Tech Giants Why Canada Should Not Follow the French Example* (2020), available at https://www.iedm.org/wp-content/uploads/2020/01/cahier012020_en.pdf [hereinafter “MEI, *Taxing the Tech Giants*”].

²⁰ Understanding the ZEW-PwC Report, *Digital Tax Index, 2017*, <https://www.pwc.com/us/en/press-releases/2018/understanding-the-zew-pwc-report.html>.

²¹ MEI, *Taxing the Tech Giants*.

V. Digital Services Taxes are Unreasonable Tax Policy

DSTs are unreasonable tax policy for a number of reasons.

First, thresholds that were created were set at arbitrary levels, with the apparent goal of ensuring that foreign companies shouldered the vast majority of the tax burden. The global thresholds closely follow the once-abandoned EU proposal, while in-country thresholds either follow the EU approach or are crafted in a manner to exclude leading domestic companies that would be within scope. Domestic companies that provide identical intermediary and ad-supported services will not be taxed.

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 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.

Third, the administrative burdens associated with compliance and auditing will likely offset any relative gains to be made by foreign tax collection authorities. Firms are required to make complex determinations on whether covered digital activities were “supplied in country”, a determination that varies across different DST legislation and implementing guidelines. The lack of clarity could lead to different interpretations of the law between firms in the scope of the tax and foreign tax authorities.

VI. Conclusion

Rather than adopting a DST that invites trade conflicts, CCIA encourages Canada to work with its international partners on implementing the OECD/G20 Inclusive Framework Two-Pillar Solution reached in October 2021.