

Section 301 Investigation

Report on France's Digital Services Tax

UNITED STATES TRADE REPRESENTATIVE

Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974

Office of the United States Trade Representative
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I. EXECUTIVE SUMMARY

On March 6, 2019, the French government released a proposal for a 3 percent tax on revenues generated by some companies from certain digital services (the DST). The two houses of the French parliament passed DST bills on April 9 and May 21, 2019 and agreed on a final bill on July 4. President Emmanuel Macron signed the bill into law on July 24. The DST imposes a 3 percent levy on gross revenues generated from providing "in France," within the meaning of the law, two categories of digital services— "digital interface" services and "targeted advertising" services. The DST applies only to companies that generate, from providing the taxable services, €750 million globally and €25 million "in France." The DST requires that covered companies calculate revenues attributable to France (and, therefore, covered by the DST) using formulas specified in the law. The DST applies beginning January 1, 2019.

U.S. officials repeatedly urged France to refrain from adopting such a law, including for the reasons discussed in this report. On July 10, 2019, the U.S. Trade Representative initiated an investigation of the French DST pursuant to section 302(b)(1)(A) of the Trade Act of 1974, as amended (the Trade Act). Section 301 of the Trade Act sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce. If the Trade Representative determines that an act, policy, or practice of a foreign country falls within any of the categories of actionable conduct, he must determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and burdens or restricts U.S. commerce, authorized actions include "imposing duties, fees, or other import restrictions on the goods or services of the foreign country."

A *Federal Register Notice* published on July 16, 2019 announced the initiation of the investigation. The *Federal Register Notice* stated that, initially, the investigation would focus on whether the DST discriminated against U.S. companies or was unreasonable as tax policy, including due to its retroactivity, its application to revenue rather than income, its extraterritoriality, and a purpose of penalizing particular technology companies. The *Federal Register Notice* requested the public and other interested persons to provide comments in connection with the investigation by noon on August 19, 2019, and USTR held a public hearing on that date. At the hearing, ten witnesses testified and responded to questions from the interagency section 301 committee. Interested persons filed 36 written submissions in the public docket for this investigation.

The evidence on the record in this investigation, including the witness testimony provided at the August 19 hearing and in the written comments, indicates that France's DST discriminates against U.S. companies and is inconsistent with prevailing principles of tax policy and unusually burdensome for affected U.S. companies for the reasons identified in the July 16 *Federal Register Notice*.

First, the evidence collected in this investigation indicates that the French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies.

Statements by French officials responsible for proposing and enacting the French DST show that the law deliberately targets U.S. companies. Minister of Economy and Finance Bruno Le Maire, as well as other officials and members of the French parliament, repeatedly referred to the French DST as the "GAFA tax," which stands for Google, Apple, Facebook, and Amazon. The French government website announcing the DST proposal even contained a graphic with the logos of Google, Apple, Facebook, and Amazon. One French lawmaker seemed to speak for much of the government when she stated: "[T]axing more large multinationals, especially the GAFA, is a laudable and shared wish on all the benches of this committee and, I suppose, of our Assembly."[1] French officials also have explained that the DST is intended to apply to the U.S. "digital giants" *and not* French and European companies. For example, Minister Le Maire stated that the tax is "targeted because it will only affect the largest digital companies with 2 cumulative thresholds. . . . The goal of these thresholds is very clear: we do not want to slow down the innovation of our start-ups or curb the digitization of our SMEs."[2]

Further, the French DST targets U.S. companies by covering only services where U.S. companies are dominant and excluding services where French companies are more successful. Eight of the nine company groups expected to be subject to the DST for providing digital advertising services are U.S.-based. This is not surprising because U.S. companies are highly successful in the Internet advertising sector in France. French companies are quite successful in, for example, traditional advertising, but the DST does not apply to these services. Similarly, twelve of the twenty-one company groups expected to be subject to the DST under the digital interface prong are U.S.-based, and *none* is France-based. This reflects the fact that U.S. companies have been, and continue to be, successful in the global e-commerce market. However, U.S. companies do not dominate the French e-commerce market. Indeed, French companies are highly successful in e-commerce but tend to own their own inventory. Thus, the fact that the DST excludes this business model—combined with the DST's global revenue threshold—focuses the tax on U.S. companies and excludes successful French company groups.

The revenue thresholds likewise focus the DST on U.S.-based company groups and exclude many non-U.S.-based companies that supply covered services in France. That U.S. companies account for nearly all of the company groups covered for providing "targeted advertising" services is largely due to the DST's revenue thresholds. Non-U.S. based companies, including scores of French companies, supply targeted advertising services in France. However, with only one exception, the company groups based outside the United States are not sufficiently successful at supplying targeted advertising services to meet both revenue thresholds. Some of these companies are too small, while others are large and highly successful but supply the covered services as only part of their business. Similarly, many non-U.S.-based companies, including French companies, supply digital interface services in France. However, the French DST's revenue thresholds exclude these French companies from any liability under the DST, either because they are too small (even though they may be very successful in France) or because the covered services account for only part of their business. Notably, many French companies likely would have faced DST liability under the EU DST proposal, on which the French law was based, because the EU proposal's global revenue threshold applied to all company revenues.

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[1] National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64, Apr. 2, 2019, http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (statement of Mme. Sabine Rubin).

[2] Bruno Le Maire, Press Conference, Mar. 6, 2019, *available here*.

France has not given any public explanation of the change from the EU threshold or any justification for either revenue threshold.

The DST's relationship to national income taxes also discriminates against U.S. companies. Under French law, DST payments will be deductible expenses against the French corporate income tax. This relationship to the French income tax can lessen a company's DST liability by up to about a third. French companies are more likely than U.S.-based company groups to pay significant income taxes in France. Therefore, the DST's relationship to the French income tax is much more likely to benefit any French companies covered by the tax than the many U.S.-based company groups expected to be covered.

Second, the evidence collected in this investigation indicates that the French DST's retroactive application is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies, which will also affect their customers, including U.S. small businesses and consumers.

Tax certainty is an important principle of international taxation. The OECD, the G20, and the United Nations (UN) have all endorsed providing legal and fiscal certainty to taxpayers so that they understand their tax obligations in advance of incurring them. The DST is a substantively new tax that will require new reporting and accounting systems to implement. It significantly alters companies' tax reporting and recordkeeping responsibilities, as well as their overall tax liability. The DST affects these changes effective *immediately* upon the law's publication and even for the seven months preceding its announcement. This contravenes the principle of tax certainty, as well as specific OECD guidance concerning substantively new taxes (specifically extraterritorial value-added taxes). Comments and witness testimony affirmed that the DST's retroactivity is extraordinary and even unprecedented for a tax of its significance and magnitude.

The DST's retroactivity greatly burdens covered U.S. companies, which will also affect the companies and individuals that purchase their services. The DST requires companies to implement complex new business and financial reporting systems to capture new transactional data. Under the DST, these systems must be effective *immediately* on the DST's publication. This increases the burdens and costs of setting up such systems and adds to already high audit uncertainty, which will lead to additional costs. Further, the DST's retroactivity means that, by the time the DST was enacted, companies had already been incurring DST liability for seven months without having any ability to budget for this additional tax burden. The DST's burdens will affect U.S. small businesses and consumers as covered companies raise their prices to adjust to the new tax.

Third, the evidence collected in this investigation indicates that the French DST's application to gross revenue rather than income contravenes prevailing tax principles and imposes significant additional burdens on covered U.S. companies.

The architecture of the international tax system reflects that corporate income (as defined by domestic law), and not corporate gross revenue, is an appropriate basis for taxation. The OECD Model Tax Convention on Income and on Capital, the UN Model Double Taxation

Convention between Developed and Developing Countries, the U.S. model tax treaty, the U.S.-France tax treaty, and more than 3,000 other bilateral tax treaties in effect all reflect the principle that taxation generally should be income-based, rather than based on gross revenues for companies that earn revenues from operations in a country. This is also evident from the near abandonment of gross revenue taxes by developed countries, including European countries. Revenue-based taxes like the DST have been widely criticized for being inefficient, unfair, and creating barriers to economic growth. The DST contravenes the principle that corporate taxes be imposed on income not revenue.

The DST's application to revenue rather than income significantly increases the burden it puts on covered U.S. companies. First, the DST will impose a far greater burden than an income tax on unprofitable companies or companies with a low profit margin. These companies would pay little or no income tax, while the DST may render them unprofitable or entirely eliminate their profit margin. Second, the DST's application to revenue rather than income means that it is unusually burdensome even for profitable companies both because it will lead to double taxation of the same revenue stream and because a gross revenue tax is equivalent to a much higher rate income tax. Third, the DST's novel scope of application means that it imposes on covered companies significant administrative burdens. For example, companies were not previously required to—and did not—categorize transactions or ads as being "in France" or not "in France." Again, the DST's burdens will extend, indirectly, to customers of the covered U.S. companies, including small businesses and consumers.

Fourth, the evidence collected in this investigation indicates that the French DST's application to revenues unconnected to a presence in France contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies.

The international tax system reflects the principle that companies should not become subject to a country's corporate tax regime without a territorial connection to the country. For example, tax treaties establish that companies do not become subject to a country's corporate income tax system unless they have a "permanent establishment" in that country. Further, the international tax system also reflects the principle that, if a foreign company has a permanent establishment in a country, it is subject to that country's tax regime only to a circumscribed extent, namely only on profits attributable to the permanent establishment. The French DST contravenes this tax principle because it is not limited to companies with a permanent establishment in France or to revenues associated with a permanent establishment in France. Rather, the location of an individual viewing a website determines whether the DST applies—the location of the company providing the service is irrelevant. Further, the service generating the revenue that is subject to the DST also need not be performed in France.

The DST's application to revenue streams unconnected to a permanent establishment in France is unusually burdensome for covered U.S. companies. First, comments and witness testimony suggest that the DST's application to revenues unconnected from a permanent establishment in France renders the DST unusually burdensome to administer. Second, the DST will be imposed in addition to the existing income and consumption taxes imposed within the architecture of the international tax system. The DST applies to revenue streams unconnected to a permanent establishment in France, meaning that these revenue streams are part of the income

that is taxed by other countries where the covered company operates or is resident. Indeed, for some companies, the DST represents a third layer of taxation on top of existing income taxes and value-added taxes.

Fifth, the evidence collected in this investigation indicates that the French DST's application to a small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment.

International tax principles condemn singling out the digital economy for less favorable tax treatment than traditional business models. The OECD has several times cautioned against creating new tax rules for the digital economy, including in the 2015 report on the BEPS work program, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015* and a March 2019 public consultation document issued by the OECD pursuant to the Inclusive Framework on BEPS. The International Chamber of Commerce, the U.S. government, and even an expert group of the European Commission (EC) have agreed that there should not be a special tax regime for digital companies. A fundamental reason for this principle is that digitalization is occurring across the economy, so it is impossible to draw a principled line around any defined group of "digital companies." The DST, of course, contravenes this paragraph by applying exclusively to particular services delivered digitally.

France has advanced two rationales for the DST, but both of these explanations rely on incorrect or unproven facts.

First, French officials have suggested that the companies covered by the DST are not paying their fair share of taxes because their overall tax rates are much lower than those of other companies. The assertions by the French government appear to be based entirely on the EC's impact assessment report regarding its proposed DST, which had stated that digital business models had average effective tax rates that were 14 percentage points lower than traditional businesses. However, shortly after the EC published its impact assessment report, the company that published the report cited for the 14 percentage point gap explicitly repudiated the Commission's analysis, stating that its report could not be used to support the statement the Commission made. Moreover, other studies show that digital companies pay an average effective tax rate that is comparable or even higher than the average tax rate for other companies.

Second, French officials have argued that the digital services companies targeted by its DST uniquely benefit from the value they obtain from data provided by or concerning their users in France, which creates a basis for imposing a tax on these companies. These assertions by the French government are generally unsupported. Further, they appear to contradict directly the findings of the OECD in its report on the digital economy. In contrast to French officials' claims, the OECD has found that digitalization is revolutionizing the entire economy and that, therefore, it is "difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes."[3] Indeed, the business practices that supposedly lead to user value creation increasingly characterize many traditional industries including the healthcare industry and the manufacture of cars and smart devices.

[3] OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 142.

II. BACKGROUND

This section of the report provides background on the French digital services tax (DST) and on the investigation, under section 302(b)(1)(A) of the Trade Act of 1974, as amended (Trade Act), concerning it. Subsection A briefly summarizes the factual background of the French DST, including its procedural history and origin. Subsection B describes the background of the section 301 investigation, including the relevant elements of section 301 of the Trade Act, the focus of this investigation, and the process of public input into the investigation.

A. Multilateral Negotiations and France's Adoption of the DST

Beginning in 2013, the OECD and G20 countries conducted negotiations aimed at addressing issues arising from domestic tax base erosion and profit shifting (BEPS), by which multinational enterprises exploited mismatches between countries' tax systems to minimize their taxes.[4] These negotiations reached a successful outcome: the OECD and G20 countries decided on 15 actions countries should implement to tackle this problem and improve the operation of the international tax system.[5] However, some countries, including France, determined that these actions were insufficient to address the taxation of digital companies. Responding to these countries, in March 2017, the G20 directed the OECD to continue its work on the tax challenges of digitalization of the economy.[6] Negotiations in the OECD are ongoing; the G20 called for a final report to be issued in 2020.[7]

While these negotiations are ongoing, French officials have enacted a unilateral DST, justifying it, *inter alia*, on the grounds that it addresses the alleged under-taxation of digital companies until the negotiations in the OECD can produce a multilateral agreement on the international tax system. On March 6, 2019, the French Ministry of Economy and Finance released its proposal for a 3 percent levy on revenues generated by some companies from certain digital services deemed to have been provided in France.[8] The Ministry submitted a draft bill to the French parliament on the same day. The National Assembly, the lower house of France's legislature, passed the DST bill, with some amendments, 88-7 on April 9.[9] The Senate passed an

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[4] *See* OECD, *Action Plan on Base Erosion and Profit Shifting*, July 19, 2013.

[5] *See* OECD, *OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers' meeting*, Oct. 5, 2015; OECD, *BEPS 2015 Final Reports*, Oct. 5, 2015, https://www.oecd.org/tax/beps-2015-final-reports.htm.

[6] OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 19, Mar. 6, 2018, *available at* http://dx.doi.org/10.1787/9789264293083-en.

[7] OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 19.

[8] *See* Ministere de L'Economie et des Finances, *Project de loi Relative a la Taxation des Grandes Entreprises du Numerique*, Mar. 6, 2019, https://src.bna.com/F9D.

[9] "France Takes a Step Closer to Making 3 Percent Digital Tax Law," *Bloomberg*, Apr. 10, 2019, https://news.bloombergtax.com/daily-tax-report-international/france-takes-a-step-closer-to-making-3-percent-digital-tax-law.

amended version of the bill 181-4 on May 21.[10] Thereafter, a joint committee of the Senate and National Assembly negotiated a final bill, which the National Assembly passed on July 4. The Senate passed the final bill on July 16, and it was signed into law on July 24.[11] The basic structure and content of the final law is largely the same as that of the original bill the government submitted.

The French government's DST bill was based on a proposal that the EC introduced on March 21, 2018.[12] Like the French bill, the EC's proposal would have taxed gross revenues earned by certain companies from certain digital services deemed to have been provided in the European Union (EU). France was a strong supporter of the EU-wide proposal.[13] When it became clear that the EU proposal was not going to receive sufficient support, the French government proposed their unilateral DST, drawing from the EU proposal.[14] (As noted in Sections III and IV below, the final French DST departs from the EU proposal in significant respects.)

Rather than working toward developing fair and appropriate rules concerning the challenges related to digitalization of the economy, unilateral laws like France's DST undermine progress towards a multilateral approach. U.S. officials repeatedly urged French officials not to enact the DST and to work with the United States to develop a multilateral tax solution that would be fair and appropriate to taxpayers and jurisdictions. For example:

- The Deputy Chief of Mission at the U.S. Embassy in Paris raised these issues in a meeting with a French official on November 14, 2018.

- Staff at the U.S. Embassy in Paris made these points in meetings with French officials on April 5, December 20, and December 21.

- On March 12, 2019, a Treasury Deputy Assistant Secretary made these points in meetings with members of the National Assembly and officials of the French government.

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[10] "French Senate Passes Amended Digital Tax Despite Le Maire Warning," *Bloomberg*, May 22, 2019, https://news.bloombergtax.com/daily-tax-report-international/french-senate-passes-amended-digital-tax-despite-le-maire-warning;

[11] LOI n. 2019-759 (Fr.) (July 24, 2019); *see* Law No. 2019-759 (July 24, 2019) Concerning Creation of a Tax on Digital Services and Modification of the Downward Correction of the Corporation Tax (translation) ("Translation of French DST Law") (Appendix I).

[12] *See* 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," Mar. 21, 2018.

[13] Samuel Stolton, "Le Maire renews push for EU-wide digital services tax," *Euractiv*, Jan. 21, 2019, https://www.euractiv.com/section/digital/news/le-maire-renews-push-for-eu-wide-digital-services-tax/.

[14] *See* Bruno Le Maire, Press Conference, Mar. 6, 2019, *available at* https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=C76CC5F4-CDA8-4F66-86A7-1A9462D1462E&filename=1073%20-%20Discours%20Bruno%20LE%20MAIRE%20-%20Conf%C3%A9rence%20de%20presse%20taxation%20des%20grandes%20entreprises%20du%20num%C3%A9rique.pdf.

- On April 4 and 5, the Secretary of State and Deputy Secretary of State, respectively, made these points in calls with French officials and in G7 meetings.

- On May 5, staff at the U.S. Embassy in Paris raised these issues in a meeting with French officials.

- On May 24, an Assistant USTR made these points in meetings with officials from the French Ministry of Economy and Finance and the president's office.

- On June 16, a State Department official raised these issues in a meeting with French officials from the Ministry of Economy and Finance.

- On July 5, the Secretary of State again raised these issues in a phone call with a French official.

- On July 19, 2019, the U.S. Ambassador to France raised the issue in a meeting with a French official.

French officials ignored these requests. French officials insist that France will repeal the DST once the OECD reaches a solution.[15] However, despite multiple amendments to the DST bill throughout the French legislative process, France has declined to add a provision that would terminate the DST once the OECD negotiations yield a multilateral approach.

B. Background of the Investigation

On July 10, 2019, the U.S. Trade Representative initiated an investigation of the French DST under section 302(b)(1)(A) of the Trade Act.[16] One the same date, the Trade Representative requested consultations with the government of France.[17] France's Minister of Economy accepted the request for consultations in a letter dated August 9.[18] Consultations were held in Washington, D.C. on November 14, 2019. The purpose of the investigation is to determine whether the act, policy, or practice at issue, namely France's DST, is actionable under section 301 of the Trade Act, and if so, what action, if any, to take under Section 301.This report provides findings relevant to a determination of actionability under Section 301.

1. Relevant Elements of Section 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable

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[15] *See, e.g.*, Bruno Le Maire (@BrunoLeMaire), Twitter, Apr. 12, 2019 ("Once we have a global consensus, France will withdraw its national tax").

[16] *See* USTR, "Initiation of a Section 301 Investigation of France's Digital Services Tax," 84 Fed. Reg. 34042, July 16, 2019 ("Initiation Notice").

[17] *See* Appendix II.

[18] *See* Letter from Minister of Economy and Finance Bruno Le Maire to Ambassador Robert Lighthizer, Aug. 9, 2019 (on file with author).

(defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce.[19] Section 301 defines "discriminatory" to "include . . . any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment."[20] "[U]nreasonable" refers to an act, policy, or practice that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[21] The statute further provides that, in determining if a foreign country's practices are unreasonable, reciprocal opportunities to those denied U.S. firms "shall be taken into account, to the extent appropriate."[22]

If the Trade Representative determines that the Section 301 investigation "involves a trade agreement," and if that trade agreement includes formal dispute settlement procedures, USTR may pursue the investigation through consultations and dispute settlement under the trade agreement. Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the USTR must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce:

> The Trade Representative shall take all appropriate and feasible action authorized under [section 301(c)], subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under the subsection, to obtain the elimination of that act, policy, or practice.[23]

Actions authorized under Section 301(c) include: (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.[24]

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[19] 19 U.S.C. § 2411(a)-(b).

[20] 19 U.S.C. § 2411(d)(5).

[21] 19 U.S.C. § 2411(d)(3)(A).

[22] 19 U.S.C. § 2411(d)(3)(D).

[23] 19 U.S.C. § 2411(b).

[24] In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. §§ 2411(c).

2. Focus of the Investigation

The Initiation Notice describes the initial focus of the investigation:

> (1) Discrimination: Available evidence, including statements by French officials, indicates that the DST will amount to de facto discrimination against U.S. companies. For example, the revenue thresholds have the effect of subjecting to the DST larger companies—which, in the covered sectors, tend to be U.S. companies— while exempting smaller companies, particularly those that operate only in France.
>
> (2) Retroactivity: The DST would be a substantively new tax that applies retroactively to January 1, 2019. This feature calls into question the fairness of the DST. Further, since the tax is retroactive, companies covered by the DST may not track the data necessary to calculate their potential liability back to the beginning of 2019.
>
> (3) Unreasonable tax policy: The DST appears to diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These apparent departures include: Extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.[25]

Additionally, the Initiation Notice invited interested parties "to raise other aspects that may warrant a finding that the French DST is actionable under Section 301."[26] The Initiation Notice also asked for public comments on the "extent to which the French DST burdens or restricts U.S. commerce."[27]

3. Input from the Public

USTR provided the public and other interested persons with opportunities to present their views and perspectives on the French DST. The Initiation Notice invited written comments by August 19, 2019.[28] Written post-hearing comments were requested by August 26, 2019. Interested persons filed 36 written submissions in the public docket for this investigation.[29]

USTR and the interagency Section 301 committee held a public hearing on August 19, 2019. Ten witnesses appeared at the hearing. Witnesses provided oral testimony and responded to questions from the interagency section 301 committee. These witnesses included

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[25] Initiation Notice, at 34043.

[26] Initiation Notice, at 34043.

[27] Initiation Notice, at 34043.

[28] Initiation Notice, at 34042.

[29] The submissions can be viewed on the Federal eRulemaking Portal, https://www.regulations.gov.

representatives of U.S. companies, trade associations, and think tanks.[30] A transcript of the hearing has been placed on the public docket.[31]

The vast majority of the written comments and all the hearing testimony supported the section 301 investigation and provided evidence and argumentation supporting one or more of the three bases of the investigation outlined in the Initiation Notice. Comments and hearing testimony argued that the DST discriminates against U.S. companies[32] and that it is unreasonable as tax policy due to, *inter alia*, its retroactivity,[33] its application to gross revenue not income,[34] its

[30] The following individuals participated in the public hearing: Nicholas Bramble, Google; Daniel Bunn, Tax Foundation; Peter Hiltz, Amazon; Stefanie Holland, Computing Technology Industry Association (CompTIA); Joe Kennedy, Information Technology and Innovation Foundation; Alan Lee, Facebook; Jennifer McCloskey, Information Technology Industry Council; Matthew Schruers, Computer & Communications Industry Association (CCIA); Gary Sprague, Baker & McKenzie LLP; Rufus Yerxa, National Foreign Trade Council.

[31] The transcript is available on the Federal eRulemaking Portal, https://www.regulations.gov and on USTR's website, https://ustr.gov.

[32] *See, e.g.*, Matthias Bauer, European Centre for International Political Economy, Comment, at 3, Aug. 12, 2019; Caroline Harris, U.S. Chamber of Commerce, Comment, at 2, Aug. 14, 2019; Peter Hiltz, Amazon, Written Testimony, at 3-4, Aug. 12, 2019; Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 5-8, Aug. 18, 2019; Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 19, Aug. 5, 2019; Jennifer McCloskey, Information Technology Industry Council, Written Testimony, at 2, Aug. 19, 2019; Jennifer McCloskey, Information Technology Industry Council, Comment, at 6, Aug. 22, 2019; Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019; Marianne Rowden, American Association of Exporters and Importers, Comment, at 2, Aug. 19, 2019; Matthew Schruers & Rachel Stelly, Computer & Communications Industry Association (CCIA), Comment, at 4, 6-9, 11, Aug. 16, 2019; Gary Sprague, Baker & McKenzie, Written Testimony, Aug. 9, 2019; Gary Sprague, Baker & McKenzie, Comment, at 7-8, Aug. 26, 2019; U.S. Council for International Business, Comment, at 2, Aug. 19, 2019; Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 4, Aug. 12, 2019.

[33] *See, e.g.*, Daniel Bunn, Tax Foundation, Written Testimony, at 2, Aug. 12, 2019; Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019; Caroline Harris, U.S. Chamber of Commerce, Comment, at 2-3, Aug. 14, 2019; Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019; Alan Lee, Facebook, Written Testimony, at 3-4, Aug. 12, 2019; Jennifer McCloskey, Information Technology Industry Council, Comment, at 11-12, Aug. 22, 2019; Bryan Riley, Free Trade Initiative, National Taxpayers Union Foundation, Comment, at 3, Aug. 26, 2019; Marianne Rowden, American Association of Exporters and Importers, Comment, at 2, Aug. 19, 2019; Matthew Schruers & Rachel Stelly, Computer & Communications Industry Association (CCIA), Comment, at 5, Aug. 16, 2019; Gary Sprague, Baker & McKenzie, Written Testimony, Aug. 9, 2019; Gary Sprague, Bakery & McKenzie, Comment, at 17, Aug. 26, 2019; U.S. Council for International Business, Comment, at 2, Aug. 19, 2019; Rufus Yerxa, National Foreign Trade Council, Written Testimony, Aug. 12, 2019.

[34] Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019 Peter Hiltz, Amazon, Written Testimony, at 3, Aug. 12, 2019; Stefanie Holland, Computing Technology Industry Association (CompTIA), Written Testimony, at 2-3, Aug. 12, 2019; Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019; Joe Kennedy, Information Technology and Innovation Foundation, Written Testimony, at 2, Aug. 5, 2019; Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019; Gary Sprague, Baker & McKenzie, Written Testimony, Aug. 9, 2019; Gary Sprague, Bakery & McKenzie, Comment, at 18, Aug. 26, 2019; U.S. Council for International Business, Comment, at 3, Aug. 19, 2019; Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 2, Aug. 12, 2019.

extraterritoriality,[35] and its targeting of a small group of digital companies.[36] Of the seven comments that did not express support for the investigation, five did not opine at all on the French DST or the actionability phase of the investigation.[37] The other two expressed mixed opinions.[38]

III. FRANCE'S DIGITAL SERVICES TAX

This section describes the structure and expected operation of France's DST and provides background on the EU DST proposal on which it was based. Subsection A describes the content of France's digital services tax, focusing on several major elements: the definition of taxable services, the scope of revenues covered, the revenue thresholds for covered companies, how the tax is paid, and its relationship to other taxes. Subsection B discusses the companies that independent commentators and French politicians have suggested will be covered by the DST. Subsection C provides further background on the EU DST proposal, on which the French DST was based, and identifies differences between the French DST and the EU proposal.

A. Features of France's Digital Services Tax

The French DST imposes a 3 percent levy on revenues generated from two categories of "taxable services": (1) "digital interface" services and (2) "targeted advertising" services. The DST applies only to revenues deemed to have been generated from providing such services "in France," and the law provides guidance on how companies must calculate the share of their global revenues attributable to France. The DST applies only to companies that meet global and French revenue thresholds for the covered services. It applies beginning January 1, 2019. The

[35] Nicholas Bramble, Google, Written Testimony, at 1-2, Aug. 12, 2019; Gary Hufbauer, Peterson Institute for International Economics, Comment, Aug. 1, 2019; Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019; Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 2, 5, Aug. 5, 2019; Jennifer McCloskey, Information Technology Industry Council, Comment, at 7, Aug. 22, 2019; Grover Norquist, Americans for Tax Reform, Comment, at 1-2, Aug. 8, 2019; Matthew Schruers, Computer & Communications Industry Association (CCIA), Written Testimony, at 2, Aug. 9, 2019; Gary Sprague, Baker & McKenzie, Written Testimony, at 1, Aug. 9, 2019; Gary Sprague et al., Bakery & McKenzie, Comment, at 3, Aug. 26, 2019.

[36] Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019; Caroline Harris, U.S. Chamber of Commerce, Comment, at 3, Aug. 14, 2019; Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 17, Aug. 5, 2019; Alan Lee, Facebook, Written Testimony, at 4, Aug. 12, 2019; Jennifer McCloskey, Information Technology Industry Council, Comment, at 5, 7, Aug. 22, 2019; Bryan Riley, Free Trade Initiative, National Taxpayers Union Foundation, Comment, at 3, Aug. 26, 2019; Matthew Schruers & Rachel Stelly, Computer & Communications Industry Association (CCIA), Comment, at 7 Aug. 16, 2019; Gary Sprague, Baker & McKenzie, Written Testimony, Aug. 9, 2019; Gary Sprague et al., Bakery & McKenzie, Comment, at 4 Aug. 26, 2019.

[37] *See* Erik Autor, National Association of Foreign-Trade Zones (NAFTZ), Comment, Aug. 19, 2019; Marc Poulan, Association of Large French Companies (Afep), Comment, July 31, 2019; Christopher Padilla, International Business Machines Corporation (IBM), Comment, Aug. 19, 2019; Vinous Ali, techUK, Comment, Aug. 19, 2019; Linda Dempsey, National Association of Manufacturers (NAM), Aug. 26, 2019.

[38] *See* JM Lofficier, Comment, Aug. 12, 2019; Paul Verhaeghe, Comment, Aug. 18, 2019.

Minister of Economy, Bruno Le Maire, stated that the tax would "quickly" generate €500 million per year for the year 2019.[39]

Taxable Services

The DST applies to gross revenues generated from providing "digital interface" services and "targeted advertising" services, as each is defined in the law.[40]

The DST law defines "digital interface" services as follows:

> The provision, by electronic communication, of a digital interface allowing users to be in contact with other users and to interact with them, especially for the purpose of delivering goods or providing services directly between these users. However, the provision of a digital interface is not a taxable service:
>
> (a) When the person providing this service uses the digital interface primarily to provide users with:
>
> - digital content;
>
> - communications services;
>
> - payment services, under the meaning of Article L. 314-1 of the monetary and financial code;
>
> (b) When the digital interface is used to manage the following systems and services:
>
> - interbank settlement systems or financial instrument settlement and delivery systems, under the meaning of Article L. 330-1 of the same code;
>
> - negotiation platforms defined in Article L. 420-1 of the aforesaid code or negotiating systems of systematic internalizers defined in Article L. 533-32 in the same code;
>
> - advisory activities for equity investments, under the meaning of Article L. 547-1 of the same code, and, if they facilitate lending, intermediary services for crowdfunding, under the meaning of Article L. 548-1 of the same code;

[39] Boris Cassell & Severine Cazes, "'Taxing the digital giants, a question of tax justice,' says 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.

[40] Translation of French DST Law, art. 299.

- other linking systems listed in an order of the Minister of the Economy, whose activities are subject to authorization and whose service provision is subject to monitoring by a regulatory authority to ensure the security, quality and transparency of transactions related to financial instruments, savings products or other financial assets; [or]

(c) When the purpose of the digital interface is the purchase or sale of services for the purpose of placing advertising under the conditions set forth in [provisions concerning the second taxable service].[41]

Thus, "digital interface" services are the provision of an electronic interface that users use to connect with other users, especially to buy and sell goods or services between themselves. Notably, this definition excludes where a "digital interface" provider (*i.e.*, a company operating a website) sells to a user goods or services that it owns. Additionally, the law excludes from its scope certain types of digital interfaces, namely those used "primarily" to provide "digital content," "communications," "payment services," various banking and financial services, or the placement of targeted ads. The law gives little guidance on the scope of these carve-outs. However, it is generally thought that the "digital content" carve-out excludes interfaces primarily for the delivery of music or movies, that the "communications" carve-out excludes telecommunications providers, and that other carve-outs exclude essentially all financial service, including payment interfaces.

The chart below provides a few examples of covered and non-covered services:

Covered Service	**Non-Covered Service / Explanation**
- Small enterprise sells shoes to user through Amazon marketplace	- Amazon sells shoes to user from its own inventory (not "between the users")
- Individual sells purse to another individual on eBay	- Louis Vuitton sells purse to user through its website (not "between the users")
- Small enterprise sells DVDs or CDs to user through Amazon marketplace	- Spotify delivers music to subscriber (content carve-out)
- Driver uses Uber app to connect with passenger and provides ride	- Taxi driver uses taxi company app to connect with passenger and delivers ride
- Tourist uses Airbnb to book a furnished apartment	- Tourist uses hotel's website to book a room in that hotel
- Person pays a subscription fee to a dating service for membership	- Person takes out a classified ad in a newspaper or attends a speed dating event (not digital)

[41] Translation of French DST Law, Art. 299, II.1.

Thus, some of the services not covered by the DST are indistinguishable, from the perspective of a consumer, from those covered by the DST.

The DST law defines the second category of taxable services, "targeted advertising" services, as follows:

> Services marketed to advertisers, or their agents, for the purposes of placing on a digital interface advertising that is targeted based on user data collected or generated when such interfaces are visited, including when they are produced via interfaces whose provision is not taxable based on c. of 1. of this II. These services may specifically include purchasing, storage, and placement of advertisements, advertising and performance monitoring, and user data management and transmission services.[42]

Thus, the following activities related to Internet advertising are covered by the DST: (1) the placement of an ad targeted based on data concerning the individual who views the ad, (2) the monitoring of an ad placed based on data concerning the individual who views the ad, and (3) the sale of user data in connection with Internet advertising.

Targeted Internet advertising produces a simple result: an individual user sees an ad on a website she visits for a product or service that she is likely to want to buy (or for a company is seeking to reach consumers to communicate a message). Generally, online advertising is done programmatically, that is, using software to sell and purchase the advertising impressions.[43] However, how an Internet ad reaches a viewer can be relatively simple or quite complicated.

The simplest version of Internet advertising involves only two companies—an advertiser (a company seeking to advertise itself or its products) and a publisher (a website or mobile app with an ad impression that will be seen by a viewer). In the simplest possible transaction, an advertiser pays the company that operates a website or mobile app to put the advertiser's ads on the company's website or app to be seen by users that, based on information the website or app company has, are valuable to the advertiser.[44] For example, Facebook, Instagram, Amazon, and Google, all operate this way (at least in part), providing directly to advertisers Internet advertising services with respect to their own websites or mobile apps.

In other situations, the placing of an ad on a website in front of a particular user involves one or more intermediary companies. The graphic below illustrates one potential example of how programmatic Internet advertising can operate where there are intermediaries (*i.e.*, where

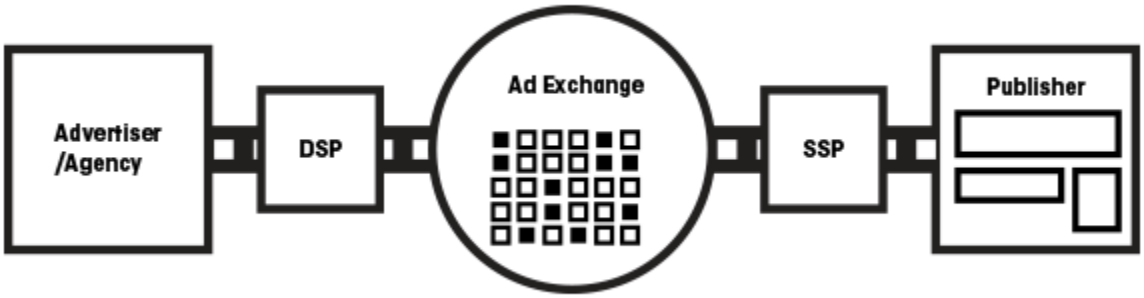
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[42] Translation of French DST Law, Art. 299, II.2.

[43] Jack Marshall, "WTF Is Programmatic Advertising?," at 3, *Digiday*, Feb. 20, 2014, https://digiday.com/media/what-is-programmatic-advertising/.

[44] *See* Clifford Chi, "Online Advertising: Everything You Need to Know in 2019," https://blog.hubspot.com/marketing/online-advertising (discussing paid social advertising and pre- and mid-roll advertising, *inter alia*).

the advertising is not contracting directly with the company that owns the website or mobile app that displays the ad):[45]



In this example, an advertiser or its agent works with a DSP (demand side platform), which is software used to purchase a digital advertising impression in an automated fashion.[46] The DSP purchases the ad impression through an ad exchange, which is a digital marketplace that allows advertisers (or DSPs) and publishers (or their agents) to buy and sell digital advertising impressions.[47] These impression auctions often occur in real time. The DSP purchases the ad impression (through the ad exchange) from an SSP (supply side platform), which is essentially the mirror image of a DSP for the publisher instead of the advertiser, *i.e.*, it is a piece of software that *sells* digital advertising impressions in an automated fashion.[48] The SSP, in turn, is working with a publisher website. Ads are placed based on anonymized data that the digital companies have concerning the individual visiting the publisher website.

Overall, in Internet advertising, payments flow from the advertiser to the publisher. Where a digital company runs advertising for its own website or mobile app, there may be only one advertising contract, *i.e.*, between the advertiser and the company that owns the publisher website or mobile app.[49] Where there are intermediaries, as in the example above, each intermediary will receive payment, depending on the terms of their contracts. The example above depicts a separate DSP, ad exchange, and SSP. However, there may be only one intermediary, if a company operates all stages of connecting an advertiser to a publisher site.[50] Alternatively, there may be even more intermediaries. For example, some companies specialize in "retargeting," *i.e.*, keeping track of people who visit a site and displaying retargeting ads for

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[45] Maciej Zawadzinski, "How Does Real-Time Bidding (RTB) Work?", *Clearcode*, Jan. 23, 2015, https://clearcode.cc/blog/real-time-bidding/.

[46] Jack Marshall, "WTF Is Programmatic Advertising?," at 18, *Digiday*, Feb. 20, 2014, https://digiday.com/media/what-is-programmatic-advertising/.

[47] Jack Marshall, "WTF Is Programmatic Advertising?," at 9, *Digiday*, Feb. 20, 2014, https://digiday.com/media/what-is-programmatic-advertising/.

[48] Jack Marshall, "WTF Is Programmatic Advertising?," at 15, *Digiday*, Feb. 20, 2014, https://digiday.com/media/what-is-programmatic-advertising/.

[49] *See* Clifford Chi, "Online Advertising: Everything You Need to Know in 2019," https://blog.hubspot.com/marketing/online-advertising

[50] *See* Clifford Chi, "Online Advertising: Everything You Need to Know in 2019," https://blog.hubspot.com/marketing/online-advertising.

that site as they visit other sites.[51] Retargeting companies may act as a DSP or may work with a DSP (or another type of intermediary) to place ads.[52]

The French DST applies to a subset of programmatic Internet advertising services. The law's definition of "taxable service" covers companies operating targeted advertising on their own websites or mobile apps. It also applies to other Internet advertising services that are marketed to advertisers (or their agents) that have the purpose of placing targeted ads. This encompasses DSPs and ad exchanges, to the extent they provide the covered services and market their services to advertisers or their agents (*i.e.*, to the extent they are also operating as DSPs).

However, the DST excludes various types of advertising services, including some programmatic advertising services. Most obviously, the DST excludes all non-Internet advertising. It also excludes Internet advertising that is not targeted based on individual user data, which includes ads that are embedded into a web page and appear to any visitor to the page. Finally, it excludes providers of targeted advertising services that market their services to website publishers rather than to advertisers. This includes SSPs and pure ad exchange services. Commentators have noted that ad exchanges are generally excluded from the scope of "targeted advertising" services, based on how the definition is phrased.[53] A report by Joel Giraud, reporter general of the National Assembly Committee on Finance explains that supply-side platforms are also not covered.[54] Notably, SSPs' services operate in the same way, and rely on individual data to the same extent as, DSPs, which the DST covers. Further, although ad exchanges are both "digital interfaces" and participants in the targeted advertising sector, they are generally excluded from the scope of the DST.

Scope of Revenues Covered

The DST applies to gross revenues collected in return for providing the taxable services "over the course of a calendar year *in France*."[55] The law prescribes when taxable services are deemed to be provided "in France" and how companies must calculate the share of their revenues deemed to be generated from providing services "in France."

Revenues collected in return for providing the taxable services

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[51] *See* Luma, "Display LUMAscape," https://lumapartners.com/content/lumascapes/display-ad-tech-lumascape/ (accessed Sept. 19, 2019).

[52] "What is Retargeting?" *adrool.com*, https://www.adroll.com/learn-more/retargeting (accessed Sept. 19, 2019).

[53] *See* Matthias Bauer, European Centre for International Political Economy, Comment, at 4, Aug. 12, 2019; Isabel Gottlieb et al. "French Digital Tax Bill May Offer Reprieve for Ad Exchanges," *Bloomberg*, Apr. 8, 2019, https://news.bloombergtax.com/daily-tax-report-international/french-digital-tax-bill-may-offer-reprieve-for-ad-exchanges-1; Stefanie Holland, Computing Technology Industry Association (CompTIA), Comment, at 2, Aug. 19, 2019; Gary Hufbauer, Peterson Institute for International Economics, Comment, at 2 Aug. 1, 2019; Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 3-4, Aug. 12, 2019.

[54] Joel Giraud (Reporter General), Report of the Committee on Finance, the General Economy and Budgetary Control, at 137, Apr. 3, 2019.

[55] Translation of French DST Law, Art. 299 (emphasis added).

The DST law provides that revenue in return for providing digital interface services refers to "all amounts paid by users of that interface, except those paid for the delivery of goods or the provision of services that constitute, in economic terms, operations independent of the access and use of the taxable service."[56] Generally, a digital interface receives from the purchaser of a good or service the entire value of the transaction and then remits to the third party seller of the good or service a portion of that payment. The DST law provides that covered digital interface companies can exclude from the revenues on which they pay the DST amounts passed on to the seller of the good or service at issue. However, they must pay tax on all other revenue they receive, including revenue for providing services other than the provision of the digital interface. For example, payments to the "digital interface" for the packing and shipping of a product would be covered by the DST.

The DST law provides that revenues received for provision of covered "targeted advertising" services are "all amounts paid by advertisers or their agents in return for the placement of advertisements or any other operation that is closely related in economic terms."[57] Where a company is operating targeted advertising for its own website, this would encompass all payments made to the company for placing a targeted Internet ad. Where a digital advertising company is placing advertising on a third party website, the advertising company receives revenue from the advertiser but then remits part of it to the publisher website where the ad is placed (or to the next intermediary in the transaction, as described above). As discussed above, the DST law is clear that, for digital interface services, payments remitted to third party sellers for good or service sold can be deducted from revenues covered by the tax. However, companies supplying targeted advertising services cannot exclude from taxed revenues amounts paid to the publisher website in exchange for the ad impression.

Thus, with respect to both categories of taxable services, the revenues covered by the DST go beyond the revenues for providing the covered service itself. For "digital interface" services, covered revenues include revenues for warehousing and shipping services. For "targeted advertising" services, covered revenues include payment for the ad space itself, not just the placement of the ad.

When services are provided "in France"

The DST law provides that taxable "digital interface" services are provided "in France" during a calendar year if:

> 1. When the digital interface allows the delivery of goods or the provision of services between interface users, such a transaction is concluded during this year by a user located in France;
>
> 2. When the digital interface does not allow for the delivery of goods or the provision of services, one of its users has, over the course of this year, an account

[56] Translation of French DST Law, Art. 299 bis I.3.

[57] Translation of French DST Law, Art. 299 bis, I.4.

> opened from France and that allows him/her to access all or part of the services available on this interface.[58]

Under this definition, taxable services are provided in France when a French person purchases goods or services through a digital interface (French or foreign) from another user of the interface (French or foreign). They are also provided when a French company sells a good or service through a French or foreign digital interface other than their own to a French or foreign buyer. These transactions can have several connections to France—for example, when a French company sells to a French user through an interface. On the other hand, they may have very little connection to France—for example, when the seller of the good or service and the provider of the interface are foreign and only the consumer is in France; the consumer need not even be a French resident—location in France is enough. Similarly, for digital interfaces other than for the delivery of goods and services, a consumer physically in France is all that is necessary to bring a transaction within the scope of the tax. For example, a non-French person purchasing, while in France, a subscription to a non-French dating website would be covered.

The DST law provides that taxable "targeted advertising" services are provided "in France" during a calendar year if:

> For the sale of data that were generated or collected during the use of digital interfaces by users, data sold over the course of this year are a result of the use of one of these interfaces by a user located in France[; and]
>
> For [other] services . . . , an advertisement is placed over the course of this year on a digital interface based on data regarding a user who visits this interface while located in France.[59]

Thus, for the sale of Internet advertising data, the service is deemed to be provided "in France" if the data sold concerns a user located in France. It could be that none of the companies involved—neither the seller nor the purchaser of the data—is French. Indeed, even the individual data subject could be a non-French person who just happened to be in France when she interacted with the Internet ad and generated the data that was subsequently sold. Other Internet advertising services are deemed provided in France when an individual in France views the ad placed as a result of those services. Again, none of the companies involved—the advertiser, the publisher, or any of the intermediaries—need be French. All the Internet advertising services related to the placement of an ad are deemed provided "in France" if the person that views the ad is in France when she does so.

Revenues attributed to France for purposes of the DST

The DST law also defines how companies covered by the tax must calculate the portion of their revenues from the taxable services that are deemed to come from services provided "in France." The law provides that, for all covered companies, the amount "is defined as the

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[58] Translation of French DST Law, Art. 299 bis. II.

[59] Translation of French DST Law, Art. 299 bis. III.

proceeds of the total amounts paid over the course of this year in return for this service multiplied by the percentage representing the portion of these services connected with France for this same year."[60] The percentages are as follows:

(a) For "digital interfaces" for the sale of goods and services, "the proportion of transactions for the delivery of goods or the provision of services for which one of the users of the digital interface is located in France";

(b) For "digital interfaces" other than for the sale of goods and services, "the proportion of users having an account opened from France and allowing access to all or part of the services available from the interface and who have used this interface during the calendar year concerned';

(c) For "targeted advertising" services other than the sale of data, "the proportion of advertisements placed on a digital interface based on data regarding a user who visits this interface while located in France"; and

(d) For the sale of data related to "targeted advertising," "the proportion of users for whom all or part of the data sold were generated or collected at the time of use of a digital interface while they were located in France."[61]

Thus, companies are not required (or allowed) to determine the actual value of the services deemed to have been provided "in France." Rather, the DST requires companies to attribute revenues to France based on the proportion of all their users that are "in France." For example, Amazon may not compute the value of all the transactions on its marketplace where a good is sold to or by a user in France. Rather, it must calculate its global revenue that falls within the definition of "digital interface" services and multiply it by the proportion of all such transactions that involved a user in France. Similarly, for Internet advertising, a company like Facebook could not go one-by-one through its contracts with advertisers and assess the share of ads placed under each contract that were seen by French users. Rather, it is required to calculate global revenue covered by the definition of "targeted advertising" services and multiply it by the share of all such ads that were seen by users in France.

These formulas may, or may not, produce results close to the value of the services actually provided "in France" during a calendar year, as the law defines the terms. For example, if a digital interface collected a flat fee per transaction—so that it earned the same amount of revenue whether a pair of shorts worth $10 or a laptop worth $1000 were sold—then the formula would be accurate. That is, the percentage of revenues equal to the proportion of transactions where a user was "in France" would equal actual revenues from transactions where a user was "in France." This situation is depicted in the table below:

[60] Translation of French DST, Art. 299 bis IV.

[61] Translation of French DST, Art. 299 bis IV.1-4.

	Total Transactions (#)	Average Revenue per Transaction	Actual Revenues (# transactions * average value)	Revenues under DST Formula (% all transactions * total revenues)
World	10,000,000	$10.00	$100,000,000	$100,000,000
"In France"	750,000	$10.00	$7,500,000	$7,500,000
Not "In France"	9,250,000	$10.00	$92,500,000	$92,500,000

Similarly, for "targeted advertising," if the company paying the DST earned the same amount of revenue for every ad viewed, the percentage of all covered revenue equal to the proportion of ads where the viewer was "in France" would equal the actual revenues from placing ads in front of viewers who are "in France." This is depicted below:

	Total Ads Placed	Average Revenue per Ad	Actual Revenues (# ads * average revenue)	Revenues under DST Formula (% all ads * total revenues)
World	5,000,000	$1.00	$5,000,000	$5,000,000
"In France"	500,000	$1.00	$500,000	$500,000
Not "In France"	4,500,000	$1.00	$4,500,000	$4,500,000

Generally, however, the taxable services do not operate in this manner. Rather, digital intermediaries tend to charge sellers a commission based on a percentage of the transaction price, not a flat fee for each transaction.[62] Therefore, the average value of the covered transactions deemed to be "in France," compared to the average value of other covered transactions, determines how close the DST's formula comes to the actual revenues generated from transactions where a user was "in France." If, for example, French Amazon users tend to place low-value transactions, while non-French Amazon users tended to place higher-value transactions, the formula would over-estimate the amount of revenue actually generated from sales to French users. The table below depicts this situation:

	Total Transactions (#)	Average Revenue per Transaction	Actual Revenues (# transactions * average value)	Revenues under DST Formula (% all transactions * total revenues)
World	10,000,000	$10.00	$100,000,000	$100,000,000
"In France"	750,000	$8.00	$6,600,000	$7,500,000
Not "In France"	9,250,000	$10.16	$94,000,000	$92,500,000

[62] *See, e.g.*, Amazon, "Selling on Amazon Fee Schedule," https://sellercentral.amazon.com/gp/help/external/200336920 (accessed Sept. 20, 2019); Airbnb, "What is the Airbnb service fee?", https://www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee (accessed Sept. 20, 2019); Booking.com, "How much commission do I pay?", https://partner.booking.com/en-us/help/commission-invoices-tax/how-much-commission-do-i-pay (accessed Sept. 20, 2019).

The same result would occur if an interface takes a smaller commission in France compared to the commissions it takes in other countries because that also would make the average revenue per transaction "in France" lower than the average revenue per transaction for other transactions.

On the advertising side, the accuracy of the formula depends on the value of the French market, compared to other ad markets. If French consumers are more valuable to advertisers than consumers in other markets, the average revenue per ad impression placed before "in France" users would be higher than the average revenue per ad impression for non-"in France" users. In that situation, the revenues covered by the DST formula would be *below* actual revenues from placing ads in front of users "in France." If French consumers are relatively less valuable to advertisers, the opposite would be true, as depicted below:

	Total Ads Placed	**Average Revenue per Ad**	**Actual Revenues** **(# ads * average revenue)**	**Revenues under DST Formula** **(% all ads * total revenues)**
World	5,000,000	$1.00	$5,000,000	$5,000,000
"In France"	500,000	$.75	$375,000	$500,000
Not "In France"	4,500,000	$1.00	$4,625,000	$4,500,000

Thus, under the DST law, the revenues to which the tax applies may or may not be equal to revenues actually earned by covered companies from providing covered services "in France."

Revenue Thresholds

The DST does not apply to all companies that provide the taxable services "in France," as the law defines it. Rather, the DST applies only to companies that, during the previous calendar year, "collected in return for taxable services" (1) more than €750 million for taxable services provided worldwide, and (2) more than €25 million for taxable services "in France."[63] Where a company is part of a group of companies that provide the taxable services, revenue thresholds are determined at the group level.[64]

These revenue thresholds mean that many companies that provide the taxable services "in France" face no DST liability at all. Both thresholds exclude small companies. Additionally, the global threshold is sufficiently high that it can exclude even companies that are large and successful in France. Deezer, a French music streaming service, provides a useful example. Deezer was launched in 2007. It has 14 million monthly active users and $400 million in revenues and is a leader in the French music streaming market, competing with Spotify and Apple Music.[65] While Deezer would exceed the France revenue threshold by a factor of about

[63] Translation of French Law, Art. 299.III.

[64] Translation of French Law, Art. 299.III.

[65] *See* "Deezer targets more growth with local focus and 'humbleness,'" *music;)ally.com*, Jan. 7, 2019, https://musically.com/2019/01/07/deezer-targets-more-growth-with-local-focus-and-humbleness/; Sophie Sassard, "Deezer: The French music streaming service taking on Spotify, Apple, and Amazon," *Independent*, Sept. 20, 2017,

eight, it still would not be close to the global revenue threshold because about nearly half of its revenues come from France.[66] A foreign company like Apple Music, by contrast, would qualify for the DST while its market share in France was much smaller.[67] As digital interfaces primarily for the supply of content, Deezer and its competitors are excluded from the DST, but the same dynamic could occur with providers of other "digital interface" services or of "targeted advertising" services.

Another category of companies excluded by the revenue thresholds is large companies that provide the covered services as a small part of their business. One such company is French grocery giant Carrefour. In 2018, Carrefour earned €77.92 billion in revenue.[68] Carrefour operates online marketplaces, selling products of third party sellers, in France and several other countries.[69] However, because sales from its online marketplace does not meet the revenue thresholds, Carrefour will face no liability under the DST.

Publicis Group is likely another example. Publicis is the world's third largest communications group and the largest in France, with annual revenue of €9.95 billion in 2018.[70] Publicis markets itself to advertisers as a provider of targeted advertising services. In 2017, for example, Publicis launched a special platform called Publicis Spine that "help[s] clients target consumers on an individual level."[71] In 2019, Publicis acquired Epsilon, a world-leading data marketing company, for $4.4 billion.[72] Publicis CEO Arthur Sadoun explained that the acquisition was essential to keep Publicis competitive in the digital age:

> He noted that when buying a car, a customer would have 900 digital interactions. That means ad clients in that realm need to know how to reach people as they get closer to purchasing a vehicle, and data from Epsilon could help.

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https://www.independent.co.uk/news/business/analysis-and-features/deezer-music-streaming-spotify-amazon-apple-subscritpiton-hans-holger-albrecht-len-blavatnik-a7940896.html.

[66] *See* "Deezer targets more growth with local focus and 'humbleness,'" *music;)ally.com*, Jan. 7, 2019, https://musically.com/2019/01/07/deezer-targets-more-growth-with-local-focus-and-humbleness/.

[67] *See* Caitlin Kelley, "Spotify Reaches 100 Million Paid Subscribers Ahead of Apple Music," *Forbs*, Apr. 29, 2019, https://www.forbes.com/sites/caitlinkelley/2019/04/29/spotify-100-million-paid-subscribers-apple-music/#69d76a55117f.

[68] Carrefour, "2018 Full-Year Results," Feb. 28, 2019, http://www.carrefour.com/sites/default/files/communique_carrefour_resultats_2018_veng_0.pdf.

[69] *See* "Carrefour Launches Marketplace in Spain," *Ecommerce News*, Mar. 26, 2018, https://ecommercenews.eu/carrefour-launches-marketplace-spain/.

[70] "About Publicis Group," https://www.publicisgroupe.com/en/the-groupe/about-publicis-groupe (accessed Sept. 23, 2019); Publicis Group, "2018 Full Year Results," at 1, Feb. 6, 2019, https://www.publicisgroupe.com/sites/default/files/press-release/CP_Resultats_FY2018_GB.pdf.

[71] *See* Lindsay Stein, "Publicis Groupe Creates Data-Infused 'Spine' for Individual Targeting," *AdAge*, Oct. 11, 2017, https://adage.com/article/agency-news/publicis-groupe-creates-data-infused-spine-targeting/310841.

[72] Lindsay Rittenhouse, "Publicis Groupe Completes $4 Billion Acquisition of Epsilon," *AdAge*, July 2, 2019, https://adage.com/article/agency-news/publicis-groupe-completes-4-billion-acquisition-epsilon/2181151.

> "You just take this number and you understand why there is no way for our client to continue to grow profitably if they don't deliver personalized experience at scale," he said. "If you're not able to touch those people within those 900 points in the right way with the right message at the right time and with the right offer. When you start there, you understand why our clients are so interested in Epsilon."[73]

This move was widely seen as part of Publicis's plan to make itself competitive with the major Internet advertising companies.[74] However, Publicis is not expected to be covered by the DST,[75] and, in the absence of another explanation, the revenue thresholds seem to be the likely reason. Havas, another French advertising giant, also markets itself as a provider of targeted Internet advertising services, including a demand side platform and ad performance monitoring software.[76] The revenue thresholds seem the most likely reason Havas is not expected to be covered by the DST.

Payment of DST, Relationship to Other Taxes

The DST is applicable beginning January 1, 2019 and for succeeding calendar years without end date.[77] The DST is "declared and paid by the subject entity" (i) for entities subject to the French value added tax (VAT), with their first quarter or annual declaration, and (ii) in all other cases, no later than April 25 of the year following the year for which the entity is subject to the tax.[78] However, that is only the final declaration and payment for the preceding calendar year. The DST must be pre-paid through "two advance payments paid during the year in which it becomes payable and at least equal to the amount due for the preceding year."[79] The first such payment is due for all companies, "when the tax payable for the preceding year is declared."[80] The second payment is due, (i) for entities liable for the VAT, when the September VAT

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[73] Megan Graham, "Publicis' $4.4 Billion Acquisition Leaves Analysts Skeptical," *CNBC*, Apr. 15, 2019, https://www.cnbc.com/2019/04/15/publicis-4point4-billion-acquisition-of-epsilon-analysts-skeptical.html.

[74] *See* Harriet Agnew, "Publicis Eyes Its Biggest Ever Acquisition in Digital Marketing Push," *Financial Times*, Apr. 1, 2019, https://www.ft.com/content/ffeaf816-54ad-11e9-a3db-1fe89bedc16e; Seb Joseph, "With Epsilon Deal, Publicis Bets on First Party Data for Survival," *Digiday*, Apr. 15, 2019, https://digiday.com/marketing/publicis-epsilon-data/; Lindsay Rittenhouse, "Publicis Groupe Completes $4 Billion Acquisition of Epsilon," *AdAge*, July 2, 2019, https://adage.com/article/agency-news/publicis-groupe-completes-4-billion-acquisition-epsilon/2181151.

[75] *See infra* sec. III.B.

[76] "Havas Launches New Demand Side Platform," *Marketing Interactive*, Jan. 10, 2014, https://www.marketing-interactive.com/havas-launches-affiperf-meta-dsp/; Lara O'Reilly, Havas Launches Platform to Track 'Every Penny' of Digital Ad Buys," *Wall Street Journal*, May 23, 2017, https://www.wsj.com/articles/havas-launches-platform-to-track-every-penny-of-digital-ad-buys-1495522836.

[77] Translation of French Law, III.

[78] Translation of French Law, Article 300.I.

[79] Translation of French Law, Article 1693 quarter.

[80] Translation of French Law, Article 1693 quarter.

declaration is filed, and (ii) in other cases, by October 25.[81] However, for 2019, the DST must be paid in a single advance payment due no later than November 25, 2019.[82]

The DST law establishes relationships between the DST and two other French taxes. First, the law provides that, in calculating revenue covered by the DST, companies may exclude from otherwise covered revenues amounts paid in value added taxes.[83] The French VAT applies to the sale of goods in France. A foreign company could be required to register and pay the French VAT under certain circumstances, including if it imported goods into France for sale other than to a French company with a VAT registration (*e.g.*, selling goods directly to French consumers via distance selling such as over the Internet).[84] Second, under existing French law, the DST will be deductible from the French corporate income tax base.[85] The French corporate income tax is 33.3%. Therefore, a company with French income at least equivalent to their DST liability would see approximately one third of their DST payment offset by a reduction in their income taxes.[86]

B. Covered Companies

It is difficult to predict with certainty what companies will be covered by the DST. As described above, the DST applies only to companies that, during the previous calendar year, "collected in return for taxable services" (1) more than €750 million for taxable services provided worldwide, and (2) more than €25 million for taxable services "in France."[87] Revenue thresholds are determined at the level of the company group.[88] Previously, companies have not been required to publish (or even to collect) data on whether they meet these revenue thresholds. However, one private company report has sought to predict covered companies, based on public information,[89] and French officials have made statements about what companies they expect to be covered.[90] Based on these sources, it is possible to estimate what companies will be covered.

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[81] Translation of French Law, Article 1693 quarter.

[82] Translation of French Law, Article 1694 quarter, I.

[83] Translation of French Law, Art. 299 quarter.

[84] *See* Avalara, "French VAT," https://www.avalara.com/vatlive/en/country-guides/europe/france.html.

[85] Daniel Bunn, Tax Foundation, "France's Digital Services Tax: Facts and Analysis," Mar. 11, 2019, https://taxfoundation.org/france-digital-services-tax/; KPMG, "France: Draft proposal for digital services tax," Mar. 6, 2019, https://home.kpmg/xx/en/home/insights/2019/03/tnf-france-draft-proposal-for-digital-services-tax.html; Baker & McKenzie, "Adoption of the French Digital Services Tax, July 15, 2019, https://www.bakermckenzie.com/en/insight/publications/2019/07/adoption-of-french-digital-services-tax.

[86] *See* Transcript: Section 301 France Digital Services Tax (DST) Public Hearing, at 118, Aug. 19, 2019, *available at* https://ustr.gov/sites/default/files/enforcement/301Investigations/0819USTR.pdf ("Hearing Transcript").

[87] Translation of French Law, Art. 299.III.

[88] Translation of French Law, Art. 299.III.

[89] *See* Julien Pellefigue, Deloitte / Taj, *The French Digital Service Tax: An Economic Impact Assessment*, Mar. 19, 2019.

[90] *See, e.g.*, Joel Giraud (Reporter General), Report of the Committee on Finance, the General Economy and Budgetary Control, Apr. 3, 2019.

Evidence on the record suggests that approximately twenty-seven company groups will be covered by the DST, as depicted in the chart below. Because the DST determines revenues at the group level, the chart lists companies by group but also denotes where multiple subsidiaries or brands of a company group will be covered. For example, Alphabet, Inc., is expected to incur DST liability with respect to Google, LLC and the Google subsidiary YouTube. Match Group is expected to incur DST liability with respect to Match.com, Meetic, and Tinder. Facebook, Inc. will incur liability with respect to Facebook and Instagram. The company groups likely to be covered are as follows:

Company Groups Expected To Be Covered by the DST[91]			
Company Group (Covered Brands)	**Nationality**	**Advertising**	**Marketplace**
Airbnb	USA		X (travel services)
Alibaba	China		X (retail)
Alphabet Inc. (Google, YouTube)	USA	X	X (apps)
Amadeus	Spain		X (travel services)
Amazon	USA	X	X (retail)
Apple	USA		X (apps)
Axel Springer (Seloger)	Germany		X (real estate)
Booking Holdings Inc.	USA		X (travel services)
Criteo	France	X	
eBay	USA	X	X (retail)
Expedia	USA		X (travel services)
Facebook (Facebook, Instagram)	USA	X	
Groupon	USA		X
Match Group (Match, Meetic, Tinder)	USA		X (dating services)
Microsoft	USA	X	
Rakuten	Japan		X (retail)
Randstad	Netherlands		X (human resources)
Recruit	Japan		X (human resources)
Sabre	USA		X (travel services)
Schibsted (Leboncoin)	Norway		X (retail)
Snapchat	USA	X	
Travelport	UK		X (travel services)
Twitter	USA	X	
Uber Technologies, Inc.	USA		X (transportation)
Verizon Communications Inc.	USA	X	

[91] Julien Pellefigue, Deloitte / Taj, *The French Digital Service Tax: An Economic Impact Assessment*, Mar. 19, 2019, at 51; Joel Giraud (Reporter General), Report of the Committee on Finance, the General Economy and Budgetary Control, at 79 (statement of Mr. Giraud), Apr. 3, 2019.

ContextLogic Inc. (Wish)	USA		X (retail)
Zalando	Germany		X (retail)

Thus, about two thirds—seventeen of twenty-seven—of the company groups expected to be covered by the DST will be U.S.-based. The share of U.S.-based company groups is particularly high with respect to targeted advertising services, where eight of the nine company groups expected to be covered are U.S.-based. For digital interface services, twelve of the twenty-one company groups expected to be covered are U.S.-based. One French-owned company group is expected to be covered for targeted advertising services; no French-owned company groups are expected to be covered for digital interface services.

C. The EU Digital Services Tax Proposal

The French DST is based on an EU-wide proposal that would have taxed gross revenues earned by certain companies from supplying certain digital services deemed to be provided in the EU.[92] The European Council (EC) introduced the proposal on March 21, 2018. The EU members debated the proposal at length, including considering various amendments. However, under EU law, tax-related legislation at the EU level requires unanimous member state support,[93] and certain EU members, including Ireland, Sweden, and Denmark, opposed the DST.[94] France was a strong supporter of the EU initiative.[95] After it became clear that the EU proposal was not going to receive unanimous support, the French government proposed a unilateral DST, drawn from the EU proposal but with certain differences.[96]

The EU proposal called for a 3 percent tax on revenues generated by covered companies from providing three categories of services provided in the EU. The taxable services were: (i) Internet advertising "targeted at users," (ii) digital "intermediation services" enabling users to "find other users and interact with them," and (iii) the "transmission of data collected about users and generated from such users' activities on digital interfaces."[97]

Like the French DST, the EU proposal carved out digital interfaces for the supply of "digital content," but the French DST seems to narrow the EU's carve-out to exclude mobile applications. The EU proposal defined "digital content" as "data supplied in digital form, such as

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[92] *See* 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," Mar. 21, 2018.

[93] *See* K&L Gates, "European Commission Unveils Play to Eliminate Unanimous Consent Requirement for Tax Legislation," Feb. 6, 2019, https://www.lexology.com/library/detail.aspx?g=29b77caa-381e-4e63-b2a1-741d7b64f2c2.

[94] Jorge Valero, "The EU's digital tax is dead, long line the OECD's plans," *Euractiv*, Mar. 8, 2019, https://www.euractiv.com/section/economy-jobs/news/the-eus-digital-tax-is-dead-long-live-the-oecds-plans/.

[95] Samuel Stolton, "Le Maire renews push for EU-wide digital services tax," *Euractiv*, Jan. 21, 2019, https://www.euractiv.com/section/digital/news/le-maire-renews-push-for-eu-wide-digital-services-tax/.

[96] *See* Bruno Le Maire, Press Conference, Mar. 6, 2019.

[97] *See* 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," at 7, 13, 17, 24 (art. 3), Mar. 21, 2018.

computer programmes, applications, music, videos, texts, games and any other software, other than the data represented by a digital interface."[98] This definition would cover music providers (like Spotify) and also app sellers such as the Apple Store and the Google Play Store. The French law does not define "content," but statements by French officials show that they expect the DST to cover Apple. As the App Store is the only basis on which Apple could be covered, these statements indicate that "content," as used in the French law, does not cover apps.

The EU proposal also contained revenue thresholds but different ones than the French DST. The EU proposal provided that a company was covered by the tax only if, during the relevant tax year: (i) the total amount of its global annual revenues exceeded €750 million, and (ii) the total amount of taxable revenues earned by the company "within the Union" exceeded €50 million.[99] Notably, in contrast to the French DST, the EU global revenue threshold referred to total revenues, not revenues from the covered services. This difference would affect the number of companies covered by the tax. In particular, large companies that provided the covered services as a small part of their business (like Publicis and Carrefour in the examples discussed above) would meet the EU revenue thresholds far sooner than they would meet the French thresholds.

As with the French DST, the revenues deemed to be provided "in the EU" were to be determined by taking a proportion of covered companies' global revenues from the covered services. For Internet advertising, taxable services "in the EU" were to be calculated based on global revenues using the "number of times an advertisement has appeared on users' devices" in each EU Member State.[100] For "digital intermediation" services resulting in the sale of goods and services, the allocation of taxable revenues to the EU is also determined by the "number of users who conclude such a transaction . . . while using a device in [each] Member State."[101] This rule would result in revenues from the same transaction being covered twice where the buyer and seller were located in different EU members. For "digital intermediation" services not for the sale of goods and services, taxable revenues were to be determined based on "the number of users . . . holding an account which was opened using a device in [each] Member State."[102]

Commentators at the time opined that the EU proposal was aimed at, and would be borne primarily by, a few U.S. digital companies. For example:

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[98] *See* 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," at 18, Mar. 21, 2018.

[99] *See* 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," at 10, Mar. 21, 2018.

[100] *See* 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," at 11, Mar. 21, 2018.

[101] *See* 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," at 11, Mar. 21, 2018.

[102] *See* 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," at 12, Mar. 21, 2018.

- Two U.S. commentators noted that "thresholds for applying the DST are very high and would largely embrace U.S. firms."[103] They estimated that Spotify (a Swedish company) would be one of the very few EU companies that would meet the revenue thresholds but that the content carve-out excluded Spotify from the definition of digital intermediation services.[104]

- Two European commentators stated that, due to the revenue thresholds, "The tax falls mainly upon US multinational firms."[105] The writers noted that an earlier draft of the measure suggested that the Commission had considered higher thresholds that would have carved out *all* European firms but decided that these would have "rendered [the tax's] discriminatory effects all too obvious."[106] Even under the final thresholds, however "[o]nly a few European players are affected by the tax."[107]

- Another commentator stated that there was "no legal or economic rationale for [the revenue] thresholds" and that they ensured that "the vast majority of the digital advertising and intermediary businesses *within* the definition and *above* the threshold are almost exclusively from" the United States or from China.[108]

Indeed, a paper circulated within the EC working group developing the proposal identified seven companies that would be affected by the tax, all but one of which were U.S.-based.[109] Further, the one non-U.S. company that the paper mentioned, Spotify, would be covered only as an advertiser—*i.e.*, for the revenues associated with its ad-supported free service—and not with respect to its subscription service, which provides the vast majority of its total revenue.[110]

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[103] Gary Clyde Hufbauer & Zhiyao Lu, Peterson Institute for International Economics (PIIE), *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, at 5, June 2018.

[104] Gary Clyde Hufbauer & Zhiyao Lu, Peterson Institute for International Economics (PIIE), *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, at 5-6, 8, June 2018.

[105] Johannes Becker & Joachim Englisch, "EU Digital Services Tax: A Populist and Flawed Proposal," *Kluwer International Tax Blog*, Mar. 16, 2018, http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/.

[106] Johannes Becker & Joachim Englisch, "EU Digital Services Tax: A Populist and Flawed Proposal," *Kluwer International Tax Blog*, Mar. 16, 2018.

[107] Johannes Becker & Joachim Englisch, "EU Digital Services Tax: A Populist and Flawed Proposal," *Kluwer International Tax Blog*, Mar. 16, 2018.

[108] Hosuk Lee-Makiyama, European Centre for International Political Economy, *The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST)*, at 7, May 2018, https://ecipe.org/wp-content/uploads/2018/11/The-Cost-of-fiscal-unilateralism-Potential-retaliation-against-the-EU-Digital-Services-Tax-DST-1.pdf.

[109] European Commission, "Taxation of Digital Activities in the Single Market" (Draft), at 7, Feb. 26, 2018, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/taxation-of-digital-economy-2.pdf (citing "Facebook, Google AdWords, Twitter, Instagram, 'free' Spotify, . . . Airbnb, [and] Uber" as companies that would be covered by the tax).

[110] *See* Spotify, "Spotify Technology S.A. Announces Financial Results for First Quarter 2019," Apr. 29, 2019, https://investors.spotify.com/financials/press-release-details/2019/Spotify-Technology-SA-Announces-Financial-Results-for-First-Quarter-2019/default.aspx (showing that, in 2018 and 2019, ad-supported "free" Spotify generated less than 10% of Spotify's total revenues).

Commentators also criticized the structure and rationale of the EU proposal. For example:

- A commentator explained that the proposal was discriminatory because, "Tax policy designed to target a single sector or activity is likely to be unfair and have complex consequences. The digital economy is not something that can easily be separated out from the rest of the global economy."[111]

- Another commentator also argued that the EU proposal "squarely conflicts with the permanent establishment concept affirmed in EU member state bilateral tax treaties with the United States."[112]

- Several commentators argued that the rationales for the proposal—that digital companies have lower tax rates and that users "create value" for digital companies—were both fundamentally flawed.[113]

As discussed in the following sections, all these criticisms have also been made with respect to the EU proposal's successor, the French DST.

IV. DISCRIMINATORY, UNREASONABLE, AND BURDENSOME ASPECTS OF FRANCE'S DIGITAL SERVICES TAX

As described in section II above, the Initiation Notice identified three aspects of the French DST that would be the initial focus of this section 301 investigation: (1) discrimination; (2) retroactive application; and (3) unreasonableness as tax policy, including, in particular, application to revenue not income, extraterritoriality, and focus on a small group of companies.[114] The public comment process yielded input on each of these topics. The Initiation Notice also asked for, and USTR received, public comments on whether "the French DST burdens or restricts U.S. commerce."[115]

This section of the Report describes the findings of the investigation concerning the aspect of the DST that the Initiation Notice identified. Subsection A explains that the evidence suggests that France's DST discriminates against U.S. companies. Subsections

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[111] Daniel Bunn, Tax Foundation, "A Summary of Criticisms of the EU Digital Tax," at 7, Oct. 2018, https://files.taxfoundation.org/20181022090015/Tax-Foundation-FF618.pdf.

[112] Gary Clyde Hufbauer & Zhiyao Lu, Peterson Institute for International Economics (PIIE), *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, at 2, June 2018.

[113] Daniel Bunn, Tax Foundation, "A Summary of Criticisms of the EU Digital Tax," at 4-5, Oct. 2018, https://files.taxfoundation.org/20181022090015/Tax-Foundation-FF618.pdf; Johannes Becker & Joachim Englisch, "EU Digital Services Tax: A Populist and Flawed Proposal," *Kluwer International Tax Blog*, Mar. 16, 2018; Hosuk Lee-Makiyama, European Centre for International Political Economy, *The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST)*, at 4-6, May 2018.

[114] Initiation Notice, at 34043.

[115] Initiation Notice, at 34043.

B through E explain that the features of the DST identified in the Initiation Notice—retroactive application, application to gross revenue rather than income, extraterritoriality, and focus on a small group of digital companies—are inconsistent with prevailing principles of international tax policy and unusually burdensome for affected U.S. companies. Subsection F explains that two rationales that French officials have put forward for the DST's narrow scope—that digital companies have lower tax rates than traditional companies and that individuals create value for digital companies in a unique way—are not persuasive.

A. France's Digital Services Tax Discriminates Against U.S. Digital Companies

The evidence collected in this investigation, including witness testimony, written comments, news reports, and expert commentary, indicates that the French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies. First, statements of French officials show that the DST is intended to target certain U.S. digital companies and not French companies. Second, the selection of the services covered by the tax, including carve-outs in the definition of such services, targets U.S. companies and not French companies. The DST's revenue thresholds likewise target U.S. companies as opposed to French ones. Finally, the DST's relationship to other taxes discriminates against U.S. companies.

1. Statements of French Officials Show that the Digital Services Tax Is Intended to Target U.S. Companies

Statements by French officials responsible for proposing and enacting the French DST, including Minister Le Maire and members of the French parliament, show that the French law, and the EU DST proposal on which it was based, deliberately targeted U.S. digital companies.

First, French officials repeatedly referred to the French DST, and the EU proposal on which it was based, as the "GAFA tax," which stands for Google, Apple, Facebook, and Amazon, or the "GAFAM tax," which also includes Microsoft. Indeed, Minister Le Maire alone mentioned #GAFA in seventy-five tweets between his first day in office and the day France unveiled its DST proposal.[116] Examples of French officials referring to the GAFA or GAFAM tax include:

- On March 27, 2018, discussing the EU DST proposal, Minister Le Maire tweeted: "Yes, the #GAFA will finally pay taxes as claimed by France for months: an example of #Europe that decides and defends its interests!"[117]

- On October 19, 2018, in a speech at the European Parliament supporting the EU DST proposal, Minister Le Maire stated: "It is time for Europe to know what it wants to

[116] *See* Jennifer McCloskey, Information Technology Industry Council, Comment, at 5, Aug. 22, 2019.

[117] Bruno Le Maire (@BrunoLeMaire), Twitter, Mar. 27, 2018, https://twitter.com/brunolemaire/status/978713609697185792?lang=en.

become: a submissive continent that accepts the [tax rate of the] . . . digital giants, Google, Facebook, Amazon, . . . or a sovereign continent."[118]

- On December 17, 2018, multiple members of the National Assembly called on the government to introduce a "GAFAM" tax on digital advertising.[119]

- On December 18, 2018, Mounir Mahjoubi, then Secretary of State for Digital Affairs, tweeted: "Tax #GAFA . . . . In 2019 a 3% tax on the turnover of the giants will be implemented. France will not be a digital colony."[120]

- On January 3, 2019, Minister Le Maire tweeted: "It is not acceptable that those who make the most profit, the #GAFA, pay 14 tax points less than any other SME. France will introduce a taxation of digital giants that will apply from 1 January."[121]

- On January 20, 2019, Minister Le Maire tweeted: "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 by the end of February."[122]

- On January 22, 2019, an official French government website announced: "GAFA tax: a bill is expected to be presented to the Council of Ministers in February."[123] The announcement explained: "The Government is working on a national tax on the so-called GAFA group (referring to the world's four most powerful tech companies: Google,

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[118] Bruno Le Maire, Speech at the European Parliament, Oct. 19, 2018, https://www.europe1.fr/economie/taxation-des-gafa-la-france-peut-elle-convaincre-ses-partenaires-europeens-3784523.

[119] *See* National Assembly, 15th Legislature, Regular Session of 2018-2019, Minutes of Dec. 17, 2018, *available at* http://www.assemblee-nationale.fr/15/cri/2018-2019/20190108.asp (statements of m. Fabrice Brun ("France advocates the introduction of a European tax on the profits of GAFAM, these digital giants often American or Chinese. Minister, you have to be fairly consistent on the subject, even though tax issues at the European level require unanimity"); M. Fabien Roussel ("Mr. Minister, you said a few weeks ago that GAFAM taxation would take place on January 1, 2019, and earlier you told us it will be introduced to the G7. When are we going to move on this subject? In 2019, in 2020, in 2021? We do not want promises anymore, we want actions!"), M. Eric Coquerel ("If I understand correctly, the Government undertakes, through advertising, to tax GAFAM. I conclude that everyone agrees that taxation is an absolute necessity. The question now is: why wait?")).

[120] Mounir Mahjoubi (@mounir), Twitter, Dec. 18, 2019, https://twitter.com/mounir/status/1075054049114972160.

[121] Bruno Le Maire (@BrunoLeMaire), Twitter, Jan 3, 2019 ("Il n'est pas acceptable que ceux qui font le plus de profits, les #GAFA, paient 14 points d'impots de moins que n'importe quella PME. La France mettra en place une taxation des geants du numerique qui s'appliquera des le 1 er janvier."). It is not the case that the GAFA have a significantly lower tax rate than French companies, as discussed in section IV.F.1 below.

[122] Bruno Le Maire (@BrunoLeMaire), Twitter, Jan. 20, 2019, https://twitter.com/BrunoLeMaire/status/1086918944743669760 ("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.")

[123] "GAFA tax: a bill is expected to be presented to the Council of Ministers in February," gouvernement.fr, Jan. 22, 2019, https://www.gouvernement.fr/en/gafa-tax-a-bill-is-expected-to-be-presented-to-the-council-of-ministers-in-february.

Apple, Facebook and Amazon), coming into force this year." The announcement contained the following image:



- On February 26, 2019, Mahjoubi tweeted: "There has been an awareness about the taxation of the digital giants. It is not normal that these companies can develop on French soil by earning billions and paying no taxes. Action is needed at the European level. #GAFA."[124]

- On March 6, 2019, an official government website announced the government's DST proposal. That announcement was entitled: "Taxation: the outlines of the GAFA tax revealed."[125] It further stated: "On Wednesday 6 March 2019, the Minister of Economy and Finance presented a bill aiming to impose a tax on the giants of the digital world. The tax will target the digital sector's leading groups . . . ."

- On March 25, 2019, discussing the government's DST proposal, Mahjoubi stated: "The GAFA tax is very good, very just, and needed."[126]

- On April 2, 2019, multiple members of the National Assembly again expressed support for taxing the GAFA. For example, one member stated: "Basically, taxing more large multinationals, especially the GAFA, is a laudable and shared wish on all the benches of this committee and, I suppose, of our Assembly."[127]

Thus, it is clear that the tax was designed to target particular U.S. companies.

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[124] Mounir Mahjoubi (@mounir), Twitter, Feb. 26, 2019, https://twitter.com/mounir/status/1100302862855360512 ("Il y a eu une prise de conscience sur la taxation des géants du numérique. Il n'est pas normal que ces entreprises puissent se développer sur le sol français en gagnant des millards et en ne payant aucun impôt. Des mesures s'imposent à l'échelle européenne. #GAFA").

[125] "Taxation: the outlines of the GAFA tax revealed," gouvernement.fr, Mar. 6, 2019, https://www.gouvernement.fr/en/taxation-the-outlines-of-the-gafa-tax-revealed.

[126] Mounir Mahjoubi, BFMTV, Mar. 15, 2019, https://twitter.com/BFMTV/status/1110087964925874176 ("[L]a taxe GAFA est très bonne, très juste et on en a besoin").

[127] National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64, Apr. 2, 2019, http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (statement of Mme. Sabine Rubin).

French officials have also expressed that the DST should cover the U.S. "digital giants" *and not* French and European companies, including in order to make the latter group more competitive against the former. For example:

- On March 1, 2019, Mahjoubi stated that the forthcoming DST proposal "should not sanction European actors."[128]

- On March 2, 2019, in an interview with *La Parisien*, Minister Le Maire stated: "We have been cautious in establishing a double threshold; our start-ups are not concerned. Their real problem is to be systematically bought by these digital giants precisely because they are not subject to appropriate taxation."[129]

- On March 2, 2019, a member of the national assembly stated: "We must also highlight the fact that the new tax will be selective. It will only affect the large digital enterprises. In this sector, which benefits from considerable economies of scale, this will give a comparative advantage to French start-ups and young fledgling entrepreneurs that could compete with these large, often foreign, platforms. Discussions and hearings we have had showed that a significant large part of the French enterprises in this sector will be largely spared from the future tax."[130]

- On March 6, 2019, in his press conference announcing the DST proposal, Minister Le Maire stated that the tax is "targeted because it will only affect the largest digital companies with 2 cumulative thresholds. . . . The goal of these thresholds is very clear: we do not want to slow down the innovation of our start-ups or curb the digitization of our SMEs."[131]

- On April 2, 2019, a member of the National Assembly gave a statement in support of the DST, saying: "[T]he overly weak taxation of the digital giants reinforces their monopolistic position on the markets and increases the risks of unfair competition. These monopolistic positions make many small businesses captive to 'GAFA' (Google, Amazon, Facebook, Apple), which weighs considerably on their development

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[128] Elea Pommiers, "Taxation des GAFA: la France peut-elle faire cavalier seul?" *L'Express*, Mar. 1, 2019, https://lexpansion.lexpress.fr/actualite-economique/taxation-des-gafa-la-france-peut-elle-faire-cavalier-seul_2055669.html.

[129] Boris Cassell & Severine Cazes, "'Taxing the digital giants, a question of tax justice,' says 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.

[130] National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64, Apr. 2, 2019, *available at* http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (statement of M. Jean-Noel Barrot "Il faut également souligner que la nouvelle taxe sera sélective : elle ne frappera que les grandes entreprises du numérique. Dans ce secteur qui bénéficie d'économies d'échelle considérables, cela donnera un avantage comparatif aux start-up et aux jeunes pousses françaises qui pourraient concurrencer ces grandes plateformes le plus souvent étrangères. Les discussions et auditions que nous avons eues ont montré qu'une partie significative des entreprises françaises de ce secteur sera largement épargnée par la future taxe.")

[131] Bruno Le Maire, Press Conference, Mar. 6, 2019, *available here*.

conditions."[132] He said that the question was "how to offer [French and European start-ups] a favorable environment." (The incorrect claim that large digital companies have lower tax rates than other companies is addressed in section IV.F.1 below.)

- On August 1, 2019, a Le Maire aid stated that, if Amazon chose to pass on the costs of the DST to its customers that sell products on its platform, "[T]his response makes Amazon less competitive, and so much the better, because its monopoly worries us. . . . This may allow other platforms to recover some of their customers."[133]

Thus, numerous statements by French officials show that the French government designed the DST to tax large U.S. companies. French officials' statements also suggest that they designed the DST to avoid taxing French companies. Some statements also indicate that the French government intended the DST to give French start-ups a competitive edge over large U.S. companies. As shown in the following sections, the structure of the DST reflects, and furthers, these intentions by the French government.

2. The Selection of the Covered Services Discriminates Against U.S. Companies

The French DST, like the EU DST proposal, targets two categories of services where U.S. companies are dominant—Internet advertising and "digital interfaces," covering online marketplaces for goods and services and some subscription services like dating websites. It does not cover other sectors where French companies are more successful, including sectors similar to the covered services. Additionally, within "digital interface" services, the DST excludes particular types of services where French and European companies are particularly successful.

Internet Advertising

As described in section III.B above, eight of the nine company groups expected to be covered under the digital advertising segment of the DST are U.S.-based.[134] As described above, French policymakers expected and desired this outcome. U.S.-based company groups are highly successful in the Internet advertising sector in France, and the French DST does not apply to other sectors, including related sectors such as traditional advertising, where French companies are more successful. Thus, the DST targets U.S. companies by applying only to a type of advertising where U.S. companies are particularly successful.

Internet advertising is a large and growing market that has been, and continues to be, dominated by U.S. companies. According to one estimate, digital ad spending worldwide (including advertising that appears on computers, mobile phones, tablets, and other Internet-connected devices) has grown from $68.4 billion in 2010 (5.8% of all ad spending worldwide) to

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[132] National Assembly, Apr. 2, 2019, *available at* http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp (statement of M. Benoit Potterie).

[133] Boris Cassel, Matthieu Pelloli & Aubin Laratte, "Taxe Gafa: Amazon va faire payer les Français," *Le Parisien*, Aug. 1, 2019, http://www.leparisien.fr/economie/taxe-gafa-amazon-va-faire-payer-les-francais-01-08-2019-8127462.php.

[134] *See supra* sec. III.B.

$283.35 billion in 2018 (45.9% of all ad spending).[135] Google and Facebook are the dominant actors in the market, but other U.S. companies are also global leaders. A market research company estimates that, in 2019, Google and Facebook will account for just over half of all global digital ad spending.[136] Amazon, Microsoft, Verizon, and Twitter are also estimated to be in the top ten recipients of global digital ad spending and, together, these U.S. companies will account for 60% of all such spending in 2019.[137]

U.S. companies are also dominant in France's Internet advertising market. According to a market research company estimate, Google and Facebook account for more than 75% of digital ad spending in France in 2019.[138] Other ad-supported U.S. social media companies are also popular, with Youtube, Instagram, Snapchat, WhatsApp, and Twitter among the top social networks in France, besides Facebook.[139] There are French companies that provide Internet advertising services. Indeed, a plurality of companies that are members of the French Interactive Advertising Bureau (IAB), an organization that develops standards, conducts research, and provides legal support for the online advertising industry, are French.[140] One French company, Criteo, is a large and successful global supplier of advertising software.[141] However, most French companies that supply Internet advertising services are relatively small or are large, traditional advertising companies that provide Internet advertising as a relatively small part of their business.[142]

U.S. companies do not similarly dominate other sectors of the French economy. For example, French firms are nationally and globally successful in the traditional advertising sector. Traditional advertising is still strong in France, accounting for 59% of total ad spending (much higher than in other major markets such as the United States, China, and the UK).[143] Some of the world's largest traditional communications companies are France-based, including the third

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[135] eMarketer, "Worldwide Ad Market Approaches $500 Billion," Jun 13, 2011, https://www.emarketer.com/newsroom/index.php/worldwide-ad-market-approaches-500-billion/; Jasmine Enberg, *Digital Ad Spending 2019*, Mar. 28, 2019, https://www.emarketer.com/content/global-digital-ad-spending-2019.

[136] Jasmine Enberg, *Digital Ad Spending 2019*, Mar. 28, 2019, https://www.emarketer.com/content/global-digital-ad-spending-2019.

[137] Jasmine Enberg, *Digital Ad Spending 2019*, Mar. 28, 2019, https://www.emarketer.com/content/global-digital-ad-spending-2019.

[138] Karin von Abrams, *Digital Ad Spending: 2019, France*, Apr. 17, 2019, https://www.emarketer.com/content/france-digital-ad-spending-2019.

[139] Criteo, "The French Ad-Tech Market in Focus," Feb. 21, 2019, https://www.criteo.com/insights/french-ad-tech-market-2019/.

[140] *See* Interactive Advertising Bureau France, "Les Membres," https://www.iabfrance.com/article/les-membres (accessed Sept. 26, 2019).

[141] *See* "Criteo Ranked Number One in AdTech Worldwide Market Share According to Leading Analyst Firm Report," Sept. 18, 2018, https://www.criteo.com/news/press-releases/2018/09/criteo-ranked-number-one-in-adtech-worldwide-market-share/.

[142] *See* Interactive Advertising Bureau France, "Les Membres," https://www.iabfrance.com/article/les-membres (accessed Sept. 26, 2019) (showing that many of the French company members are small).

[143] Karin von Abrams, *Digital Ad Spending: 2019, France*, Apr. 17, 2019, https://www.emarketer.com/content/france-digital-ad-spending-2019.

and sixth largest groups in the world, as of 2017, Publicis and Havas.[144] These agencies and a few other large French companies "dominate" the French market.[145] Some European countries have excise taxes on advertising services, but France does not.[146] Consequently, traditional advertising in France is not covered by the DST or any other special tax. Thus, the DST targets digital advertising, where U.S. companies are dominant, and does not cover other sectors, including the conventional advertising sector, where French companies are successful.

Several public comments and witnesses at the August 19 hearing pointed out that the focus on digital advertising targeted the tax on U.S. companies, as opposed to French ones. One noted: "advertising in a French newspaper would not be subject to the DST, while advertising through an online publisher would be."[147] During the hearing, a witness stated:

> There are a number of digital and non-digital services that compete with [covered U.S. digital advertising companies] that are not in scope under this law, including outdoor advertising, radio, TV, print. If you're a large advertiser and you're trying to figure out where to invest your ad spend, you are going to face a choice now of whether to invest in the company that is now facing a 3 percent loss of efficiency or competitiveness or the French competitor who is not facing that same penalty.[148]

Another comment recalled that an EC working group paper defined the first covered service in terms of the U.S. companies the tax was supposed to target, referring to "valorization of user data, by means of making available advertisement space (e.g., Facebook, Google AdWords, Twitter Instagram, 'free' Spotify)" (the last of which is only a small portion of Spotify's revenues)."[149] The comment noted that none of the French changes to the scope of the DST lessened the discriminatory design of the EU proposal in this regard.[150]

Thus, the evidence on the record in this investigation suggests that the DST's focus on targeted Internet advertising reflects, and achieves, French policymakers' desire to focus the DST on U.S. companies and not French companies.

Digital Interfaces

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[144] "The Top Advertising & Marketing Groups Worldwide," *Adbrands.net*, https://www.adbrands.net/agencies-index.htm (accessed Sept. 26, 2019); Rupal Parekh, "Paris: An In-Depth Look at the Biggest Ad Market in France," *AdAge*, June 11, 2012, https://adage.com/article/global-news/paris-depth-biggest-ad-market-france/235255.

[145] Rupal Parekh, "Paris: An In-Depth Look at the Biggest Ad Market in France," *AdAge*, June 11, 2012, https://adage.com/article/global-news/paris-depth-biggest-ad-market-france/235255.

[146] *See, e.g.*, Daniel Bunn, Tax Foundation, *Tax Relief is on the Agenda in Austria*, Jan. 14, 2019, https://taxfoundation.org/tax-relief-agenda-austria/.

[147] U.S. Council for International Business, Comment, at 2, Aug. 19, 2019.

[148] Hearing Transcript, at 73 (testimony of Nicholas Bramble, Google).

[149] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 6, Aug. 18, 2019.

[150] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 7, Aug. 18, 2019.

As described in section III.B above, twelve of the twenty-one company groups expected to be covered under the digital interface segment of the DST are U.S.-based.[151] No other country has more than three companies expected to be covered, and no French company groups are expected to be covered. This reflects the fact that U.S. companies have been, and continue to be, successful in the global e-commerce market. However, U.S. companies do not dominate the French e-commerce market. Rather, the way the DST defines digital interface services focuses the tax on U.S. companies rather than on French companies. Thus, the DST targets U.S. companies by applying only to a business model where U.S. companies are unusually successful.

U.S. companies are dominant in the global e-commerce market but not in the French e-commerce market. Top e-commerce companies worldwide include many U.S. companies such as Amazon, WalMart, Netflix, Booking.com, eBay, Expedia, and Uber.[152] There are no French e-commerce companies among the top companies globally. However, French companies do well in the French e-commerce market. Indeed, a majority of the top online retailers in France in 2018 were French.[153] Other French companies—transportation companies, hotels, and music streaming companies, for example —also successfully engage in e-commerce, with some even dominating the French market.[154]

However, the DST's "digital interface" prong will likely cover *no* French company groups due to the way the law defines the covered services. As discussed above, the DST applies only to sales of goods or services where the company operating the digital interface does not itself own or provide the good or service. This distinction has the effect of excluding French companies from the scope of the DST while covering their U.S.-based competitors. For example:

- The top online retailers in France include two U.S. companies—Amazon and eBay—and seven French companies—Cdiscount, Fnac, Vente-Privee, Auchan, Showroomprive, Le Redoute, and Carrefour.[155] Of the two U.S. companies, Ebay does not own any inventory, and a majority of Amazon's sales are made by third party sellers.[156] The

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[151] *See supra* sec. III.B.

[152] *See* Mayank Pratap, "The World's Five Largest eCommerce Companies," *Hackernoon*, Jan. 30, 2019, https://hackernoon.com/the-worlds-five-largest-ecommerce-companies-8dd94dc22614; "List of largest Internet companies," *Wikipedia*, https://en.wikipedia.org/wiki/List_of_largest_Internet_companies (accessed Sept. 27, 2019); Stefan Pajovic, "* Largest E-Commerce Companies in the World," *AxiomQ*, Feb. 19, 2019, https://axiomq.com/blog/8-largest-e-commerce-companies-in-the-world/.

[153] "Ecommerce in France," *Ecommerce News*, Apr. 2019, https://ecommercenews.eu/ecommerce-in-europe/ecommerce-france/.

[154] *See, e.g.*, Gidi Pridor, "The Top Taxi Apps by City: Europe Edition," *TravelPerk Blog*, Mar. 28, 2018, https://www.travelperk.com/blog/top-taxi-apps-europe/; "Deezer targets more growth with local focus and 'humbleness,'" *music;)ally.com*, Jan. 7, 2019, https://musically.com/2019/01/07/deezer-targets-more-growth-with-local-focus-and-humbleness/

[155] "Ecommerce in France," *Ecommerce News*, Apr. 2019, https://ecommercenews.eu/ecommerce-in-europe/ecommerce-france/.

[156] Hearing Testimony, at 44; *see* Rameez M Sydeek, "eBay Business Model: How Does eBay Make Money?" *feedough.com*, Aug. 10, 2019, https://www.feedough.com/ebay-business-model/.

French companies generally own their own inventory.[157] Several of the companies operate online marketplaces for third party sellers, but these are generally a small portion of their business compared to Amazon or Ebay.[158] One exception, Le Redoute, is excluded from the DST by the global revenue threshold, as discussed below.[159]

- French Taxis sell their services by app, as Uber does.[160] Indeed, the French Taxi company launched the app to try to "challenge the popularity of Uber" in the French market.[161] However, French taxi rides arranged and paid for by app are not be covered by the DST because the taxi company itself is providing the service, whereas rides booked through Uber are covered.

- When French hotels book rooms through their own websites, that transaction will not be covered because hotels own the room they are listing. However, the same room booking made through Booking.com or Expedia would be covered by the DST, as would an apartment reservation made through Airbnb.

Thus, by excluding online retail and direct sale of services online, the French DST focuses on U.S.-based companies and excludes French ones engaged in essentially the same business.

Additionally, the French and EU DST proposals carve out types of digital interfaces where European or French companies are particularly successful. Online music sales is a large and growing area of e-commerce and one of the few in which European companies are as successful as U.S. companies.[162] When the EU DST proposal carved out "digital content,"

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[157] *See* Ben Davis, "Vente-Privee: the French pure play you should know about," *Econsultancy*, Feb. 5, 2014, https://econsultancy.com/vente-privee-the-french-pure-play-you-should-know-about/ (describing Vent-Privee's inventory-based business model); Auchan Retail, https://www.auchan-retail.com/en/who-we-are/#our-business (accessed Sept. 26, 2019) (describing Auchan's traditional retail model); "ShowroomPrive's looses plummet, sales slump in H1," *Fashion Network*, July 26, 2019, https://uk.fashionnetwork.com/news/ShowroomPrive-s-losses-plummet-sales-slump-in-H1,1123930.html (showing that Showroom Prive has an inventory model).

[158] Casino Group, *2018 Net Sales*, at 4, Feb. 15, 2019, https://www.groupe-casino.fr/wp-content/uploads/2018/07/2019-01-17-PR-Q4-2018-Sales.pdf (showing that less than a third of Cdiscount's sales comes from its online marketplace); Sucharita Mulpuru, Case Study: French Retailer Darty Boosts Margins Via Its Online Marketplace," Aug. 17, 2019, https://info.mirakl.com/hubfs/Forrester_Case_Study_Darty_mirakl.pdf (stating that sales from the Fnac-Darty third party marketplace remain "modest" and that 20% of visits to Darty come as a result of marketplace items); Chris Dawson, "Focus on FNAC Darty, Carrefour and French Marketplaces," *tamebay.com*, July 11, 2017, https://tamebay.com/2017/07/focus-fnac-darty-carrefour-french-marketplaces.html.

[159] Dan Wilson, "Marketplaces 2018: La Redoute," *Tamebay.com*, Jan. 3, 2018, https://tamebay.com/2018/01/marketplaces-2018-la-redoute.html; La Redoute, "Identity, Facts & Figures," https://www.laredoute-corporate.com/en/identity/facts-figures/ (accessed Sept. 26, 2019) (showing that global turnover from all sales reached €750 in 2016).

[160] *See* Gidi Pridor, "The Top Taxi Apps by City: Europe Edition," *TravelPerk Blog*, Mar. 28, 2018, https://www.travelperk.com/blog/top-taxi-apps-europe/.

[161] Oliver Gee, "France Launches New Tax Apps to Rival Uber," *The Local*, Oct. 4, 2016, https://www.thelocal.fr/20161004/france-launches-new-taxi-apps-to-rival-uber.

[162] *See* Caitlin Kelley, "Spotify Reaches 100 Million Paid Subscribers Ahead of Apple Music," *Forbs*, Apr. 29, 2019, https://www.forbes.com/sites/caitlinkelley/2019/04/29/spotify-100-million-paid-subscribers-apple-music/#69d76a55117f.

commentators suggested that it was to avoid covering the Swedish music streaming giant Spotify.[163] France retained the "digital content" carve-out, as it regards music streaming, where Spotify and the French company Deezer have the largest French market shares.[164] However, France seems to have eliminated the "digital content" carve-out as applied to apps, where two U.S. companies (Apple and Google) are the dominant sellers globally.[165] There has been no public explanation of why the scope of the EU's "content" carve-out was changed for the French DST or why apps are not "content," within the meaning of the French law.

Public comments submitted during this investigation and witnesses at the August 19 hearing explained that the DST's definition of "digital interface" services targeted the tax on U.S. companies, as opposed to French ones. The following are examples of relevant comments:

> "[T]he French DST deliberately discriminates against certain narrowly defined business models. While online intermediation and online advertisement services are subject to the French DST, services that are based on 'digital interfaces' for the delivery of digital content are excluded from the tax."[166]

> "The DST covers a subset of digital commercial activities where U.S. companies are more successful, and excludes revenue models that some of Europe's largest digital service providers rely on."[167]

> "[T]he DST targets a selection of digital services in which U.S. firms are market leaders but excludes digital services where French firms are significant actors. The subsectors targeted include digital platforms and marketplaces for goods and services (e.g., Airbnb, Amazon, and Uber) . . . [but] not . . . other digital services where French firms are significant actors (e.g., financial services, payment services, communications services, or other types of intermediation services)."[168]

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[163] *See* Gary Clyde Hufbauer & Zhiyao Lu, Peterson Institute for International Economics (PIIE), *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, at 5-6, June 2018; Linklaters LLP, "Trade Law Analysis of EU's Digital Tax Proposal," Sept. 6, 2018, https://www.lexology.com/library/detail.aspx?g=3a817cf7-28c7-42fd-ad68-a5ae4b300c9c. As discussed further below, Spotify would have been covered as an advertiser under the EU proposal due to the difference in the global revenue thresholds. However, advertising revenues account for only a small fraction of Spotify's revenues.

[164] *See* "Deezer targets more growth with local focus and 'humbleness,'" *music;)ally.com*, Jan. 7, 2019, https://musically.com/2019/01/07/deezer-targets-more-growth-with-local-focus-and-humbleness/; Sophie Sassard, "Deezer: The French music streaming service taking on Spotify, Apple, and Amazon," *Independent*, Sept. 20, 2017, https://www.independent.co.uk/news/business/analysis-and-features/deezer-music-streaming-spotify-amazon-apple-subscritpiton-hans-holger-albrecht-len-blavatnik-a7940896.html.

[165] *See* Robert Williams, "Study: Mobile app spending to double to $156B by 2023," *Mobile Marketer*, Mar. 29, 2019, https://www.mobilemarketer.com/news/study-mobile-app-spending-to-double-to-156b-by-2023/551579/.

[166] Matthias Bauer, European Centre for International Political Economy, Comment, at 3, Aug. 12, 2019.

[167] Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 3, Aug. 12, 2019.

[168] Caroline Harris, U.S. Chamber of Commerce, Comment, at 2, Aug. 14, 2019.

Thus, as with digital advertising, the DST's definition of the covered service—excluding direct retail and sale of services, as well as carving out interfaces for the delivery of content, and communications—focuses the tax on U.S.-based companies and excludes French companies.

3. The Revenue Thresholds Discriminate Against U.S. Companies

As described in section III.A above, the French DST applies only to companies that earn annual revenues from supplying the covered services of €750 million globally and €25 million "in France."[169] The revenue thresholds focus the DST on U.S.-based company groups and exclude many non-U.S.-based companies that supply the covered services in France. In particular, the global revenue threshold exempts many successful French companies, including world-leading company groups that provide the taxable services as only part of their business. France has not publicly articulated any rationale for either revenue threshold except for general statements by French officials explaining that they shield French start-ups from the tax.

Internet Advertising

As discussed above, eight of the nine company groups expected to be covered under the digital advertising segment of the DST are U.S.-based.[170] In addition to the narrow scope of the tax discussed above, the revenue thresholds contribute to the DST's near-exclusive application to U.S.-based company groups.

Non-U.S. based companies supply targeted advertising services, as defined by the DST, in France. For example, seventy-five of the 120 companies that are members of the French IAB, 62.5% of the total, are French.[171] Sixty-three of the IAB members state on their website or IAB membership page that they offer targeted Internet advertising services to advertisers.[172] Thirty-eight of those companies (60.3% of the total) are French, fifteen are U.S.-based, and ten are based in other countries.[173] Additionally, two large, French traditional advertising companies, Publicis and Havas, also state that they provide targeted advertising services to advertisers. [174]

However, with only one exception, the company groups based outside the United States are not sufficiently successful at supplying targeted advertising services to meet both revenue thresholds. Some of the non-U.S. companies providing the covered services are small start-ups, but some are large companies that generate significant revenue in France and globally each year. For example:

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[169] *Supra* sec. III.A; Translation of French Law, Art. 299.III.

[170] *See supra* sec. III.B.

[171] *See* Interactive Advertising Bureau France, "Les Membres," https://www.iabfrance.com/article/les-membres (accessed Sept. 26, 2019).

[172] *See* Interactive Advertising Bureau France, "Les Membres," https://www.iabfrance.com/article/les-membres.

[173] *See* Interactive Advertising Bureau France, "Les Membres," https://www.iabfrance.com/article/les-membres.

[174] Megan Graham, "Publicis' $4.4 Billion Acquisition Leaves Analysts Skeptical," *CNBC*, Apr. 15, 2019, https://www.cnbc.com/2019/04/15/publicis-4point4-billion-acquisition-of-epsilon-analysts-skeptical.html; Lara O'Reilly, Havas Launches Platform to Track 'Every Penny' of Digital Ad Buys," *Wall Street Journal*, May 23, 2017, https://www.wsj.com/articles/havas-launches-platform-to-track-every-penny-of-digital-ad-buys-1495522836.

- SoLocal Group is a group of digital advertising companies that works with over 700,000 advertisers, including small enterprises and major brands, to reach individuals across Europe.[175] It offers various targeted advertising "solutions," including through partnerships with Google and Facebook (whose revenues from these partnerships presumably are covered by the DST).[176] SoLocal Group recorded €755.8 million in total revenue, including €635.8 million in Internet revenues in 2017.[177] Thus, although SoLocal Group is a large company in France and has revenues in excess of €750 million globally, the DST's global revenue threshold, which applies only to revenues from the covered services, means it will face zero DST liability.

- Orange, S.A. (or Orange Group) is a French multinational telecommunications company that had a 37% share of the French mobile telecommunications market in 2018.[178] In 2018, Orange Group's annual revenues were €41.4 billion.[179] Orange offers a number of programmatic targeted Internet advertising services, including an ad market where advertisers can bid on "3 billion monthly web impressions" that reach 62% of French Internet users; "coaching" packages that include targeting; management of clients' programmatic advertising campaigns; and access to "exclusive first party data" such as socio-demographic data, behavioral data, and customized data.[180] Thus, although Orange Group is a huge and successful company that provides targeted advertising services in France, the DST's revenue thresholds likely mean it will face zero DST liability.

- Performics is the digital marketing agency of Publicis Groupe, the third largest advertising firm in the world.[181] In 2018, Publicis Groupe's annual revenue was €9.95 billion in 2018.[182] Performics offers advertisers "performance media buying" services, including developing a bid strategy "based on the true value of each consumer—with inputs like device geo, previous customer interaction, [and] latent sales data," for their paid search, display, and social media ad campaigns.[183] Performics works "for the biggest brands of the top 100 French advertisers and the biggest e-retailers on the

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[175] *See* IAB France, "Members: SoLocal Group," https://www.iabfrance.com/membre/solocal-group.

[176] *See* Solocal, "Our Solutions," https://www.solocal.com/publicite-digitale (accessed Nov. 18, 2019).

[177] SoLocal Group, "Consolidated Financial Information as of 31 December 2017," at 3, https://www.marketscreener.com/SOLOCAL-GROUP-24706781/pdf/823882/SoLocal%20Group_Financial-report.pdf.

[178] "France Country Commercial Guide – Telecommunications,"

[179] Orange, "Financial Results at 31 December 2018," Feb. 21, 2019, https://www.orange.com/en/Press-Room/press-releases/press-releases-2019/Financial-results-at-31-December-2018.

[180] Orange, "ad market," https://www.orangeadvertising.fr/la-valeur-ajoutee-orange/; Orange, "Ad Perf," https://www.orangeadvertising.fr/ad-perf/.

[181] "About Publicis Group," https://www.publicisgroupe.com/en/the-groupe/about-publicis-groupe (accessed Sept. 23, 2019).

[182] Publicis Group, "2018 Full Year Results," at 1, Feb. 6, 2019, https://www.publicisgroupe.com/sites/default/files/press-release/CP_Resultats_FY2018_GB.pdf.

[183] Performics, "Performics Media Buying," https://www.performics.com/services/performance-media/performance-media-buying/.

market."[184] However, no commentator or French official has ever suggested Publicis Group will be covered by the DST. Thus, although Publicis Groupe is a huge, globally successful advertising company group that provides targeted advertising services in France, the DST's revenue thresholds likely mean it will face zero DST liability.

- Havas Group was the sixth largest advertising and marketing group worldwide in 2017.[185] The group had total annual revenue of €2.3 billion in 2017.[186] Havas is a French-based group and offers, in France, targeted Internet advertising services, including its own demand side platform, Affiperf, and software to monitor the performance of online ads Havas places for clients.[187] As with Publicis Groupe, however, no commentator or French official has ever suggested the DST will cover Havas. Thus, although Havas is a huge, globally successful advertising company group that provides targeted advertising services in France, the DST's revenue thresholds likely mean it will face zero DST liability.

Thus, some of the companies supplying targeted advertising services in France are part of highly successful company groups. However, under France's global revenue threshold, these companies will face *no* DST liability, while their U.S. competitors will be covered to the full extent of their activities "in France," as defined by the DST.

One reason for this discrepancy between U.S.-based and other suppliers of targeted advertising services is that U.S. companies were pioneers in Internet advertising, while many of the non-U.S. companies supplying these services "in France," within the meaning of the DST, supply the covered services as only part of their business. Most of the U.S. companies covered by the DST were founded as Internet companies. Amazon, eBay, Facebook, Google, Instagram, Snapchat, Twitter, and YouTube were all online from their inception, and, from the beginning, their business models were based on delivering the services covered by the DST. Consequently, these services account for the bulk of their revenues.[188] Some of the non-U.S.-based companies

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[184] IAB France Members, "Performics," https://www.iabfrance.com/membre/performics.

[185] "The Top Advertising & Marketing Groups Worldwide," *Adbrands.net*, https://www.adbrands.net/agencies-index.htm (accessed Sept. 26, 2019).

[186] Havas Group, "2018 Fact Sheet," https://www.havasgroup.com/d95a5ea7204-content/uploads/2018/04/Fact-Sheet-2018-EN.pdf.

[187] "Havas Launches New Demand Side Platform," *Marketing Interactive*, Jan. 10, 2014, https://www.marketing-interactive.com/havas-launches-affiperf-meta-dsp/; Lara O'Reilly, Havas Launches Platform to Track 'Every Penny' of Digital Ad Buys," *Wall Street Journal*, May 23, 2017, https://www.wsj.com/articles/havas-launches-platform-to-track-every-penny-of-digital-ad-buys-1495522836.

[188] *See* "Alphabet Announces Fourth Quarter and Fiscal Year 2018 Results," at 1, Feb. 4, 2019, https://abc.xyz/investor/static/pdf/2018Q4_alphabet_earnings_release.pdf (covering Google and Youtube); "Facebook Reports Fourth Quarter and Full Year 2018 Results," Jan. 30, 2019, https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q4/Q4-2018-Earnings-Release.pdf (covering Instagram); Amazon.com, Inc, U.S. Securities and Exchange Commission Form 10-K (2018), at 67, https://www.sec.gov/Archives/edgar/data/1018724/000101872419000004/amzn-20181231x10k.htm; Twitter, "Q4 and Fiscal Year 2018 Letter to Shareholders," at 4, Feb. 7, 2019, https://s22.q4cdn.com/826641620/files/doc_financials/2018/q4/Q4-2018-Shareholder-Letter.pdf; "eBay Inc. Reports Fourth Quarter and Full Year 2018 Results and Announces Capital Structure Evolution," Jan. 29, 2019,

supplying targeted advertising services—Publicis and Havas, for example—were founded as traditional advertising companies and only expanded into targeted Internet advertising more recently, including in order to compete with the U.S.-based pioneers in the space.[189]

Digital Interface Services

As discussed above, twelve of the twenty-one company groups expected to be covered by the DST with respect to "digital interface" services are U.S.-based. No French-owned company groups are expected to be covered. The DST's revenue thresholds, in conjunction with the narrow scope of the services covered by the DST, are largely responsible for this.

As with targeted Internet advertising, non-U.S.-based companies, including French companies, do supply digital interface services in the French market. For example, major French retailors such as Cdiscount, Fnac-Darty, Le Redoute, and Carrefour have all launched online marketplaces where they carry merchandise from third party sellers.[190] For some of these companies, the desire to compete with U.S.-based companies already in the space was a motivating factor for the company to launch the third party marketplace.[191] Chauffer Prive, a ride-sharing company backed by Daimler and BMW and designed to compete with Uber, is another example.[192] The company is a "leading" ride-share provider in France.[193] French companies like ParisAttitude, Paris-Houseing,[194] and Our.sncf, a subsidiary of the French National Railway Company, offers online train, flight, or accommodation booking services that constitute "digital interface" services as defined by the DST.[195]

However, the French DST's revenue thresholds will exclude these French companies from any liability under the DST. Many of these companies are not small start-ups under any definition but major companies that escape the revenue thresholds only because the covered

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https://www.ebayinc.com/stories/news/ebay-q4-2018-results/; Uber Technologies, Inc., U.S. Securities and Exchange Commission Form S-1, at Prospectus Summary p. 2, Apr. 11, 2019, https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm.

[189] *See* Harriet Agnew, "Publicis Eyes Its Biggest Ever Acquisition in Digital Marketing Push," *Financial Times*, Apr. 1, 2019, https://www.ft.com/content/ffeaf816-54ad-11e9-a3db-1fe89bedc16e; Seb Joseph, "With Epsilon Deal, Publicis Bets on First Party Data for Survival," *Digiday*, Apr. 15, 2019.

[190] Chris Dawson, "Focus on FNAC Darty, Carrefour and French Marketplaces," *tamebay.com*, July 11, 2017, https://tamebay.com/2017/07/focus-fnac-darty-carrefour-french-marketplaces.html; Casino Group, *2018 Net Sales*, at 4, Feb. 15, 2019, https://www.groupe-casino.fr/wp-content/uploads/2018/07/2019-01-17-PR-Q4-2018-Sales.pdf; Sucharita Mulpuru, Case Study: French Retailer Darty Boosts Margins Via Its Online Marketplace," Aug. 17, 2019, https://info.mirakl.com/hubfs/Forrester_Case_Study_Darty_mirakl.pdf;.

[191] Chris Dawson, "Focus on FNAC Darty, Carrefour and French Marketplaces," *tamebay.com*, July 11, 2017, https://tamebay.com/2017/07/focus-fnac-darty-carrefour-french-marketplaces.html.

[192] Romain Dillet, "Uber Competitor Chauffer-Prive Rebrands to Kapten," *TechCrunch*, Feb. 6, 2019, https://techcrunch.com/2019/02/06/uber-competitor-chauffeur-prive-rebrands-to-kapten/.

[193] Romain Dillet, "Uber Competitor Chauffer-Prive Rebrands to Kapten," *TechCrunch*, Feb. 6, 2019, https://techcrunch.com/2019/02/06/uber-competitor-chauffeur-prive-rebrands-to-kapten/.

[194] *See* ParisAttitude, https://www.parisattitude.com/ (showing that the sole office location is in France); Paris-Housing, "Our Office," https://www.paris-housing.com/contact-us#our-office;

[195] *See* "Out.sncf," https://www.oui.sncf/; "Oui.sncf, *Wikipedia*, https://en.wikipedia.org/wiki/Oui.sncf.

services still account for a minority of their revenues. For example, Cdiscount is one of the top online marketplaces in France.[196] In the fourth quarter of 2018 alone, its net sales were €725 million.[197] However, the marketplace accounted for less than a third of its gross merchandise volume sales, meaning that, after the value of the goods is excluded, it is nearly certain that Cdiscount will not meet the global revenue threshold.[198] The same is almost certainly true for Carrefour and Fnac-Darty. Each company has total revenues well in excess of €750 million per year,[199] but, for each, their online marketplace accounts for only a small share of those revenues.[200] Le Redoute's revenues reached €750 million in 2016, but, as only half of its sales are by third party sellers, it will not meet France's global revenue threshold.[201]

By contrast, as with targeted Internet advertising, the U.S. companies covered by the DST were founded on providing the services the DST targets. Airbnb, Amazon, Booking (U.S.-owned), eBay, ExpediaGroupon, the Match Group Brands, Uber, and Wish were all establsihed as Internet companies. From the beginning, their business models were based on delivering the services covered by the DST, and these services still account for the bulk of their revenues.[202]

Additionally, the global revenue threshold excludes companies that are successful only or primarily in France. As discussed above, Deezer provides an example of how this dynamic can occur (although music streaming is specifically carved out): a company with significant market share in France may still not qualify for the DST's global revenue threshold if it operates only

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[196] "12 Leading Marketplaces in Europe," *Ecommerce Germany*, Sept. 27, 2019, https://ecommercegermany.com/blog/12-leading-marketplaces-europe.

[197] Casino Group, *2018 Net Sales*, at 4, Feb. 15, 2019, https://www.groupe-casino.fr/wp-content/uploads/2018/07/2019-01-17-PR-Q4-2018-Sales.pdf.

[198] Casino Group, *2018 Net Sales*, at 4, Feb. 15, 2019, https://www.groupe-casino.fr/wp-content/uploads/2018/07/2019-01-17-PR-Q4-2018-Sales.pdf.

[199] "Fnac Darty: Strong Growth of 2018 Results," *GlobalNewsWire*, Feb. 20, 2019 https://www.globenewswire.com/news-release/2019/02/20/1738575/0/en/Fnac-Darty-strong-growth-of-2018-results.html (showing €7.475 billion in revenue for 2018); Carrefour, "Solid Sales Growth in Q4 2018," Jan 22, 2019 http://www.carrefour.com/sites/default/files/communique_carrefour_ca_t4_18_22_01_19_eng_0.pdf (showing sales of nearly €85 billion in 2018).

[200] Chris Dawson, "Focus on FNAC Darty, Carrefour and French Marketplaces," *tamebay.com*, July 11, 2017, https://tamebay.com/2017/07/focus-fnac-darty-carrefour-french-marketplaces.html; Sucharita Mulpuru, Case Study: French Retailer Darty Boosts Margins Via Its Online Marketplace," Aug. 17, 2019, https://info.mirakl.com/hubfs/Forrester_Case_Study_Darty_mirakl.pdf.

[201] Dan Wilson, "Marketplaces 2018: La Redoute," *Tamebay.com*, Jan. 3, 2018, https://tamebay.com/2018/01/marketplaces-2018-la-redoute.html; La Redoute, "Identity, Facts & Figures," https://www.laredoute-corporate.com/en/identity/facts-figures/ (accessed Sept. 26, 2019).

[202] Amazon.com, Inc, U.S. Securities and Exchange Commission Form 10-K (2018), at 67, https://www.sec.gov/Archives/edgar/data/1018724/000101872419000004/amzn-20181231x10k.htm; "eBay Inc. Reports Fourth Quarter and Full Year 2018 Results and Announces Capital Structure Evolution," Jan. 29, 2019, https://www.ebayinc.com/stories/news/ebay-q4-2018-results/; Booking Holdings Inc., U.S. Securities and Exchange Commission Form 10-K (2018), at 3, https://ir.bookingholdings.com/static-files/89094e34-8f33-4153-830f-f3db33342fa9; Match Group Inc., U.S. Securities and Exchange Commission Form 10-K (2018), at 5, https://d18rn0p25nwr6d.cloudfront.net/CIK-0001575189/76f700ec-198b-4870-a18c-4d107a1910d9.pdf; Uber Technologies, Inc., U.S. Securities and Exchange Commission Form S-1, at Prospectus Summary p. 2, Apr. 11, 2019, https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm.

(or primarily) in France.[203] Chauffer Prive is another example.[204] The company is a "leading" ride-share provider in France, generating €160 million in revenue in 2018.[205] It aims to expand into 15 other cities in Europe and quintuple revenues by 2020.[206] Even if it does so, it still would have no liability under the DST, while Uber is covered for all its operations in France.

Public Comments

In public comments and witness testimony at the August 19 hearing, several interested persons expressed that the revenue thresholds rendered the DST discriminatory against U.S. persons. On comment stated that the companies covered by the DST "are predominantly U.S. firms, thanks to the high revenue threshold before a company is subject to the tax."[207] Other interested persons expressed the same view as follows:

> The thresholds were set at arbitrary levels, with the apparent goal of ensuring that foreign companies would shoulder the vast majority of this new tax burden. 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.[208]

> The French DST does not explicitly target American companies by name or nationality, but it accomplishes this goal through its revenue thresholds. By only taxing the revenues of companies that earn more than 750 million Euros annually, the law exempts domestic companies and effectively targets large American technology companies. Through its effects, the revenue thresholds serve as a proxy for nationality – rendering the DST definitively targeted toward, and thus discriminating against, American companies.[209]

> High revenue thresholds: The DST applies only to companies that meet two revenue thresholds . . . A host of successful U.S. technology companies meet these thresholds, while very few (if any) French companies meet both thresholds.[210]

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[203] *See supra* sec. III.A.

[204] Romain Dillet, "Uber Competitor Chauffer-Prive Rebrands to Kapten," *TechCrunch*, Feb. 6, 2019, https://techcrunch.com/2019/02/06/uber-competitor-chauffeur-prive-rebrands-to-kapten/.

[205] Romain Dillet, "Uber Competitor Chauffer-Prive Rebrands to Kapten," *TechCrunch*, Feb. 6, 2019, https://techcrunch.com/2019/02/06/uber-competitor-chauffeur-prive-rebrands-to-kapten/.

[206] Romain Dillet, "Uber Competitor Chauffer-Prive Rebrands to Kapten," *TechCrunch*, Feb. 6, 2019, https://techcrunch.com/2019/02/06/uber-competitor-chauffeur-prive-rebrands-to-kapten/.

[207] Gary Hufbauer, Peterson Institute for International Economics, Comment, Aug. 1, 2019.

[208] Matthew Schruers & Rachel Stelly, Computer & Communications Industry Association (CCIA), Comment, at 5, Aug. 16, 2019.

[209] Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019.

[210] Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 3, Aug. 12, 2019.

> The tax is discriminatory because its in-scope digital services were carefully defined and its revenue thresholds were set high so that it would apply only to a small number of almost entirely non-French companies. . . . When combined, the revenue thresholds and covered services bring numerous U.S., but very few French companies within the tax's ambit.[211]

Differences Between the French DST and the EU Proposal

It is notable that many of the French companies discussed above would have faced DST liability for their taxable services under the EU DST proposal. Unlike the French proposal, the EU DST proposal's global revenue threshold of €750 million per year applied to gross revenues of a company.[212] Under this standard, nearly all of the companies discussed above would face some DST liability. The EU did put forward a rationale for its global revenue threshold, namely that it was designed to focus the tax on large companies, partly for administrative reasons and partly on the theory that "only companies of a certain scale provide digital services for which user contributions play a central role."[213] The EU claimed that threshold itself was chosen, *inter alia*, to harmonize with other EU tax initiatives.[214] France, by contrast, has not made public *any* explanation for the new global threshold of €750 million in revenue from the covered services. France has not articulated any reason for applying a global threshold to revenue from the covered services or for setting the threshold at €750 million per year. France likewise has not made public any explanation of how the country-specific threshold was set at €25 million per year.

Conclusion

For the reasons set out above, the record of this investigation, including comments by interested persons and other evidence, suggests that the global revenue thresholds of the French DST focus the tax on U.S.-based companies, while exempting many non-U.S.-based companies that provide the taxable services in France.

4. The Digital Services Tax's Relationship to National Taxes Discriminates Against U.S. Companies

As discussed above, under French law, DST payments will be deductible expenses against the French corporate income tax (CIT).[215] In an interview with *Le Parisien* on March 2, 2019, Minister Le Maire explained the reason for the relationship between the DST and the corporate income tax as follows:

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[211] Peter Hiltz, Amazon, Written Testimony, at 3, Aug. 12, 2019.

[212] 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," at 10, Mar. 21, 2018.

[213] *See* European Commission, *Commission Staff Working Document Impact Assessment*, at 67-68, Mar. 21, 2018, https://ec.europa.eu/taxation_customs/sites/taxation/files/fair_taxation_digital_economy_ia_21032018.pdf.

[214] *See* European Commission, *Commission Staff Working Document Impact Assessment*, at 67-68, Mar. 21, 2018.

[215] *See supra* sec. III.A.

> Q: The finance committee of the Senate believes that [the DST] will also penalize virtuous companies, who already pay their taxes in France...
>
> We heard this criticism. The amount paid will therefore be deductible from the accounting profit on which the corporation tax is calculated. This will reduce the amount of this tax by up to one third for companies that pay their taxes in France.[216]

Thus, Minister Le Maire confirmed that DST payments would be deductible from the French corporate income tax and that the reason for this decision was to lessen the effect of the tax on any companies that pay income taxes in France.

As Minister Le Maire explained, this relationship to the French CIT can lessen a company's DST liability by up to about a third. The amount a company pays under the DST can be deducted from their "income" for purposes of France's CIT. Therefore, if a company has sufficient income subject to the French CIT to cover the entirety of its payment under the DST, its CIT will be reduced by the value of its DST payment multiplied by its marginal tax rate.[217] France's CIT rate is 33.3 percent.[218] Consequently, the company's CIT liability will be decreased by one third the value of its DST payment. To put it another way, the company's overall tax burden will be increased only by about two-thirds the value of its DST liability, in effect, reducing the additional tax burden imposed by the DST by a third.

By contrast, DST payments likely will not be deductible against corporate income taxes of other countries. As a comment submitted during this investigation explained,

> In the case of a corporate income tax, foreign companies would normally receive at least a partial credit against the corporate tax paid in their own country. Because the DST is levied on revenues rather than income, it is very likely foreign companies will not be entitled to a credit in their home jurisdiction. The reduced ability to offset the DST against other taxes places foreign companies at a disadvantage, as their overall tax burden becomes higher.[219]

Thus, because the DST is based on revenue, not income, DST payments will generally not be deductible or creditable against corporate tax paid in countries other than France.

Under current international tax rules, French companies will pay corporate income taxes in France, while non-French companies may not. Under French law, as under the tax law of the vast majority of countries, corporations established in French are subject to French income

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[216] Boris Cassell & Severine Cazes, "'Taxing the digital giants, a question of tax justice,' says 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.

[217] Hearing Transcript, at 118.

[218] Translation of French DST Law, Article 4.

[219] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 20, Aug. 5, 2019.

tax.[220] However, one of the fundamental principles underlying the current international tax system, as set out in numerous international tax treaties and the OECD model tax convention, is that foreign companies "do not become subject to a country's corporate income tax (CIT) until after they have created a permanent establishment (PE) there."[221] The taxable services are, by nature, services that do not require a physical presence in every country where they are provided. Consequently, foreign companies providing these services "in France," as defined by the DST, may or may not have a permanent establishment in France and pay French income tax.

Before concluding this analysis, it should be emphasized that the possible non-applicability of French income tax to certain foreign companies does not suggest that the foreign companies covered by the DST are paying a lower rate of income tax than French companies. As discussed further in section IV.F.1 below, it is not the case that the companies covered by the tax have relatively low tax rates.[222] Rather, under standard international tax principles, the covered companies (like most companies) simply pay the majority of their income taxes in their country of establishment or in another tax jurisdiction where they operate or are controlled. And as noted, under the law of their home countries, these companies may not be able to offset their liability under the French DST by deducting it from their corporate income tax base.

In sum, to the extent French companies are covered by the DST, the relationship between the DST and the French CIT means that their liability under the DST may be reduced by a third (depending on the French company's level of profitability). Foreign companies, on the other hand, may not to be able to deduct the DST from their corporate income tax liability.

B. The Retroactivity of the Digital Services Tax Is Inconsistent with Tax Principles and Unusually Burdensome for Affected U.S. Companies

The evidence collected in this investigation, from hearing witnesses, written comments, public reports, and other sources, indicates that the French DST's retroactive application is unusual and inconsistent with prevailing tax principles. The record of the investigation also suggests that the DST will be a burdensome tax for covered U.S. companies to administer and that its retroactivity is particularly burdensome.

1. Retroactivity of Substantively New Taxes Is Inconsistent with Tax Principles

As described in section III.A above, the DST was signed into law on July 24 but applies as of January 1, 2019.[223]

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[220] Daniel Bunn, Tax Foundation, "Corporate Income Tax Rates around the World, 2018," at 5, https://files.taxfoundation.org/20190603100114/Tax-Foundation-FF623.pdf.

[221] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 2, 5, Aug. 5, 2019; Grover Norquist, Americans for Tax Reform, Comment, at 1-2, Aug. 8, 2019; Gary Sprague et al., Bakery & McKenzie, Comment, at 3, Aug. 26, 2019; OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, *available at* https://doi.org/10.1787/g2g972ee-en.

[222] *See infra* sec. IV.F.1.

[223] *See supra* sec. III.A.

As a general matter, retroactive application of criminal or civil laws is disfavored. Under tax law principles, existing tax measures may be modified during a tax year,[224] but entirely new taxes should not be applied retroactively. The distinction between existing taxes and a new tax measure arises from basic concepts of fairness, including the international concept of tax certainty. When an existing tax is increased or decreased, the subjects of the tax are already required to collect and report all the information necessary to pay the tax at issue—the increase or decrease simply changes the amount they must pay. That is not the case with an entirely new tax such as the DST. Rather, the DST imposes new record keeping, reporting, filing, and audit obligations on companies.

Tax certainty is an important principle of international taxation. The OECD publication *Addressing the Tax Challenges of the Digital Economy* identifies "certainty and simplicity" as one of the "fundamental principles of taxation."[225] It states that, "Tax rules should be clear and simple to understand, so that taxpayers know where they stand."[226] In keeping with this principle, the OECD has recommended a six-month phase in period for new extraterritorial VAT regimes. It explained that, "the provision of adequate lead time" is important to "promoting a good understanding of [the new tax] while allowing a smoother and proper operational process change" and that "[a] minimum of six months lead time is considered to be a reasonable period."[227] As two comments in this investigation pointed out, the G20 Heads' of State's Declaration reaffirmed their commitment to "enhanced tax certainty."[228] The UN has also endorsed providing "legal and fiscal certainty as a framework within which international operations can confidently be carried on."[229] Other sources confirm that tax certainty is an important principle of international taxation.[230]

The DST is a substantively new tax that will require new reporting and accounting systems to implement. As discussed further in the following sections, the DST is a highly unusual tax for a number of reasons.[231] It applies to gross revenue not income. It is not limited to French companies or companies operating through a "permanent establishment" in France. And it applies on an entirely new basis—namely, to revenues derived from transactions where an

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[224] *See, e.g.*, Erika Lunder et al., Congressional Research Service (CRS), *Constitutionality of Retroactive Tax Legislation*, at 1, Oct. 25, 2012.

[225] OECD, *Addressing the Tax Challenges of the Digital Economy*, at 30 (2014).

[226] OECD, *Addressing the Tax Challenges of the Digital Economy*, at 30 (2014).

[227] OECD, *Mechanisms for the Effective Collection of VAT/GST When the Supplier is not Located in the Jurisdiction of Taxation*, at 51, *available at* https://www.oecd.org/tax/tax-policy/mechanisms-for-the-effective-collection-of-VAT-GST.pdf.

[228] Gary Sprague, Baker & McKenzie, Written Testimony, at 1, Aug. 9, 2019; Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019; *see* "Full Text of the G20 Osaka Leaders' Declaration," June 29, 2019, *available at* https://www.japantimes.co.jp/news/2019/06/29/national/full-text-g20-osaka-leaders-declaration/ ("We reaffirm the importance of . . . enhanced tax certainty.").

[229] United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, at iv, 2017; *see also* Brian J. Arnold, United Nations, *An Introduction to Tax Treaties*, at 11 (2015) ("One of the most important effects of tax treaties is to provide certainty for taxpayers.").

[230] *See, e.g.*, Tax Foundation, "Principles of Sound Tax Policy," https://taxfoundation.org/principles/.

[231] *See infra* secs. IV.C.1, IV.D.1.

individual is located in France (for digital interfaces) or where an individual who sees the ad that is the subject of the transaction is in France (for Internet advertising). Because these are unprecedented or highly unusual features of a tax, companies are not required to—and do not—regularly collect the information that would allow them to comply with the DST.[232] Indeed, companies subject to the DST may not even be paying corporate taxes in France, if they are not operating through a permanent establishment, and certainly have no reason to be tracking revenues associated with transactions involving an individual in France or what share of the ads they place are viewed in France. Therefore, covered companies will have to create new systems to calculate DST liability and for recordkeeping, reporting, and audit purposes.

Thus, the DST significantly alters companies' tax reporting and recordkeeping responsibilities, as well as their overall tax liability, immediately and even for the seven months preceding its enactment.[233] As one comment explained, "Companies will need to engage in significant re-engineering of their internal business and financial reporting systems in addition to creating new filing and audit components."[234] Further, because the tax is retroactive, companies will need to create these systems effective immediately (which the tax assumes is possible, although that may not be the case, as discussed below). In other words, due to the DST's retroactivity, companies began 2019 with a deeply flawed picture of their tax obligations with respect to liability, record keeping, reporting, filing, and auditing. They had no ability to plan for 2019 DST payments prior to 2019 (because DST liability did not exist) and no time to establish necessary recordkeeping and reporting systems (because they could not know they were needed).

On this basis, numerous comments in this investigation agreed that the DST's retroactivity violates the tax policy principle of certainty. One witness stated:

> The DST's retroactivity to January 1, 2019 is extraordinary, particularly given the recent commitment to global tax certainty by G20 heads of state in the Osaka Leaders Declaration and the systems changes needed for the intensive user location tracking and data storage that compliance and audit readiness requires.[235]

One comment agreed that the DST's retroactivity is "extraordinary" in light of the principle of "global tax certainty . . . and the systems changes required for the intensive user location tracking and data storage that compliance and audit-readiness compels."[236] Another stated that the DST's retroactivity "violates international tax norms as retroactivity creates uncertainty for taxpayers as they seek to manage their cash and financial statement tax positions."[237] Still another argued that

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[232] *See, e.g.*, Matthew Schruers, Computer & Communications Industry Association (CCIA), Written Testimony, Aug. 9, 2019; Daniel Bunn, Tax Foundation, Written Testimony, at 2, Aug. 12, 2019;

[233] *See* Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019.

[234] Hearing Transcript, at 24 (testimony of Ms. McCloskey, Information Technology Industry Council).

[235] Hearing Transcript, at 17-18 (testimony of Mr. Gary Sprague, Baker & McKenzie).

[236] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019.

[237] Caroline Harris, U.S. Chamber of Commerce, Comment, at 2, Aug. 14, 2019.

the DST "is per se unreasonable because companies cannot assess the impact that the DST will have on its business nor plan their business operations in response to the tax."[238]

Comments and testimony presented during this investigation also attested that, as a substantively new tax, the DST's retroactivity is highly unusual, if not unprecedented. One witness at the hearing stated: "I can't think of a single instance where a tax of this significance and magnitude has been imposed retroactively."[239] Another witness testified: "In my experience at Facebook, we have not seen a retroactive tax, and certainly not one that is retroactive that shifts fundamentally the way a company would calculate the tax."[240] Another witness confirmed: "We [at Google] have not seen a substantial tax that been retroactive to this extent in the past."[241]

Additionally, one comment pointed out that U.S. courts have expressed concerns about the retroactive application of substantively new taxes.[242] In two cases, *Blodgett v. Holden* and *Untermyer v. Anderson*, the Supreme Court struck down as unconstitutional the retroactive application of the Revenue Act of 1924, which enacted the gift tax.[243] The Court later distinguished these cases on the basis that they dealt with the "creation of a wholly new tax."[244] Other cases that have come before the Court have been found not to involve a "wholly new tax," and the Supreme Court upheld their retroactive application.[245] Applying those principles here, the DST is "wholly new" since, like the gift tax, it applies on a different basis and to a different set of companies than any tax before it. Furthermore, comments in this investigation expressed that, in the commenters' experience, no U.S. tax as novel as the DST had been applied retroactively.[246]

Thus, the record of this investigation suggests that the DST's retroactivity is highly unusual and inconsistent with prevailing principles of tax policy.

2. The Digital Services Tax's Retroactivity Greatly Burdens Affected U.S. Companies

Comments and witness testimony attested to the fact that the DST will be burdensome for covered companies and that the DST's retroactivity adds significantly to those burdens. Further,

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[238] Marianne Rowden, American Association of Exporters and Importers, Comment, at 2, Aug. 19, 2019.

[239] Hearing Transcript, at 27 (testimony of Mr. Gary Sprague, Baker & McKenzie).

[240] Hearing Transcript, at 61 (testimony of Mr. Alan Lee, Facebook).

[241] Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble, Google).

[242] Jennifer McCloskey, Information Technology Industry Council, Comment, at 11, Aug. 22, 2019.

[243] Blodgett v. Holden, 275 U.S. 142, 147 (1928); Untermyer v. Anderson, 276 U.S. 440, 445-446 (1928).

[244] *E.g.*, United States v. Carlton, 512 U.S. 26, 34 (1994).

[245] *See, e.g.*, United States v. Carlton, 512 U.S. 26 (1994); United States v. Hemme, 476 U.S. 558 (1986); United States v. Darusmont, 449 U.S. 292 (1981).

[246] *See* Gary Sprague et al., Bakery & McKenzie, Comment, at 17, Aug. 26, 2019; Hearing Transcript, at 27 (testimony of Mr. Gary Sprague, Baker & McKenzie); Hearing Transcript, at 61 (testimony of Mr. Alan Lee, Facebook); Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble, Google).

the burdensome nature of the DST will affect not only the covered U.S. companies but also their customers, including U.S. small businesses and consumers.

As mentioned above, the DST will require companies to implement new systems to calculate the tax, which will be burdensome. One comment explained: "Taxpayer financial and tax systems will not be configured to track the revenues subject to the French DST and therefore taxpayers will likely be unable to comply without significant additional expense to modify systems."[247] Witnesses at the hearing confirmed that the DST will require them to reengineer their internal business and financial reporting systems in order to comply with the tax.[248] One witness, a trade association, estimated that "associated costs to be in the millions for [the companies] in scope" and that "there will be very high audit uncertainty, which will lead to additional disputes and subsequent costs."[249]

The evidence on the record in this investigation attests that the retroactivity of the tax magnifies the burdens it imposes on the covered U.S. companies. As one comment noted:

> 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.[250]

A witness at the hearing agreed that the DST's retroactively rendered compliance particularly difficult, explaining:

> We're obviously facing sort of a pretty serious challenge of re-engineering our systems to figure out which data is most helpful to calculating our liability under the tax. Going forward, that's very difficult. . . . So, we are taking a pretty serious effort to figure out how we can come into compliance. But because this is such a departure from those international norms, our tax system and other companies' tax systems are not built to make that kind of calculation.[251]

Another witness agreed:

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[247] U.S. Council for International Business, Comment, at 2, Aug. 19, 2019.

[248] Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble, Google); Hearing Transcript, at 60 (testimony of Mr. Alan Lee, Facebook)

[249] Jennifer McCloskey, Information Technology Industry Council (ITI), Written Testimony, at 3, Aug. 12, 2019.

[250] Matthew Schruers & Rachel Stelly, Computer & Communications Industry Association (CCIA), Comment, at 5, Aug. 16, 2019.

[251] Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble, Google); *see* Hearing Transcript, at 60 (testimony of Mr. Alan Lee, Facebook).

> [T]he retroactive application of the new law to January 2019 does not provide companies adequate time to plan or implement new systems to audit users, calculate tax liability in a reliable manner or determine pricing in light of these higher costs. The First French DST payments are due in November – an impossibly short timeframe to expect compliance with a highly-complex, retroactively-applied tax.[252]

Indeed, even France seems to agree that fully complying with the DST on a retroactive basis is impossible because the necessary systems are not in place and the necessary data is not available. Specifically, the DST law provides that, for the 2019 DST payment, the "percentage representing the portion of services connected with France" should be assessed "for the inclusive period between the day after this law is published and 31 December 2019."[253] That is, although the tax applies to revenues generated beginning January 1, 2019, covered companies must calculate the percentage of global revenues from the covered services that are attributable to France based on the July 27-December 31, 2019 period. Thus, the DST does not require the use of systems to calculate the percentage of French users of covered companies prior to the publication of the tax. Nevertheless, what it requires—essentially instantaneous creation of the new recordkeeping, reporting, and audit systems described above—is burdensome enough, as shown by the comments and witness testimony on the record.

Further, the burdens of the DST will not be confined to covered U.S. companies but will extend to the companies and consumers that purchase their services. As one witness at the hearing explained:

> The DST also disproportionately harms [our] selling partners and potentially our customer. We operate in the fiercely competitive and very low-margin global retail market . . . . Due to the highly competitive nature of the consumer business, we cannot absorb this expense if we're to continue making the significant investments in tools and infrastructure to help fuel our selling partners' successes. We have already informed our selling partners that . . . their fees will increase . . . for sales made on Amazon France starting October 1st. As a result, the tax has the potential to impede the efforts of U.S. small and medium-sized businesses to grow and sell into France because it increases their cost of doing business, forcing them to choose between increasing their prices, reducing their other costs, or ceasing to sell to French customers, undermining U.S. SMBs' competitiveness in France.[254]

U.S. consumers using covered companies' services to purchase goods from French sellers could also be affected, if the sellers passed on part of the DST's cost. Finally, U.S. companies,

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[252] Rufus Yerxa, National Foreign Trade Council, Written Testimony, Aug. 12, 2019.

[253] Translation of French DST Law, pp. 9-10.

[254] Hearing Transcript, at 45 (testimony of Mr. Peter Hiltz, Amazon).

including small businesses, seeking to advertise to French consumers could also see their cost of doing so increase.[255]

Thus, the evidence collected in this investigation suggests that the DST's retroactive application renders it unusually burdensome for covered U.S. companies, which, indirectly, will likely burden other U.S. companies and U.S. consumers.

C. The Digital Services Tax's Application to Revenue Is Inconsistent with Tax Principles and Unusually Burdensome for U.S. Affected Companies

The evidence collected in this investigation indicates that the French DST's application to revenue rather than income contravenes prevailing tax principles. The record of the investigation also suggests that the DST's application to revenue rather than income imposes significant additional burdens on covered U.S. companies, relative to an income tax, both in terms of their liability and in terms of the costs of complying with the tax.

1. The Digital Services Tax's Application to Revenue Rather than Income Is Inconsistent with International Tax Principles

As described in section III.A, the French DST applies to gross revenues generated from providing the covered services "in France," within the meaning of the law. Thus, it differs from a tax on income (also called net profit), which taxes a company's income or profit, *i.e.*, the company's gross revenues minus its business expenses.[256] Evidence on the record in this investigation attests that the DST's application to revenue not income is inconsistent with prevailing principles of international tax policy, which recognize income but not gross revenue as a usual and appropriate basis for taxation.

The architecture of the international tax system reflects that corporate income (as defined by domestic law), and not corporate gross revenue, is an appropriate basis for taxation. There are over 3,000 bilateral tax treaties in effect, the majority of which are based on the OECD Model Tax Convention on Income and on Capital and on the UN Model Double Taxation Convention between Developed and Developing Countries.[257] The OECD model treaty provides disciplines on the taxation of "business profits" and other types of income streams (dividends, interest, royalties, capital gains, et al.). However, it makes no provision for taxes on gross revenues.[258] The UN model treaty likewise has disciplines on business profits and numerous other types of income but has no provision for taxes on gross revenues.[259] The U.S. model tax treaty, as well as scores of bilateral tax treaties to which the United States is a party, including

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[255] *See* Hearing Transcript, at 66 (testimony of Mr. Alan Lee, Facebook).

[256] *See, e.g.* United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017.

[257] *See* Brian J. Arnold, United Nations, *An Introduction to Tax Treaties*, at 1 (2015).

[258] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7, Dec. 18, 2017 (on business profits); *see id*. arts. 6, 8-21.

[259] United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017 (setting out disciplines on taxes of business profits); *id.* arts. 6, 8-21 (covering other types of income).

the U.S.-France Tax Treaty, have the same scope in this regard.[260] Thus, the system of international tax treaties reflects that countries generally agreed that income, not revenue, is the appropriate basis for corporate taxation.

Other sources confirm that prevailing tax policy principles support the taxation of corporate income but not of gross revenue. Chapter 2 of the OECD publication *Addressing the Tax Challenges of the Digital Economy*, entitled "Fundamental Principles of Taxation," recognizes two bases for corporate taxation—income and consumption.[261] A tax policy organization noted that "there are few recent empirical studies on gross receipts taxes because of their near-universal abandonment in developed countries."[262] In particular, most European countries rejected revenue-based taxation in the 1960s.[263] Revenue-based taxes have been criticized on the grounds that they "are inefficient, create barriers to economic growth, and generally considered to be unfair tax policy."[264] In particular, because revenue taxes do not account for costs, even relatively low tax rates can have a significant effect on affected companies if profit margins are low.[265]

Additionally, due to its application to revenue not income, the DST contravenes the tax policy principle of avoiding double taxation. Avoiding double taxation—that is, preventing the same income being taxed twice—is a foundational principle of the international tax system. All the tax treaties and model tax treaties discussed above make clear that one of their primary objectives is the elimination of double taxation between countries.[266] Revenue taxes tend to result in double taxation,[267] and the DST is no exception. The DST "creates an additional layer of tax on top of already-existing corporate income taxes . . . and thereby creat[es] double

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[260] *See United States Model Income Tax Convention*, art. 2, 2016 (setting out disciplines on "total income, or on elements of income"); *id.* art. 7 (establishing disciplines on taxes of "business profits"); U.S.-France Tax Treaty, arts. 2, 7, Jan. 1, 1996.

[261] OECD, *Addressing the Tax Challenges of the Digital Economy*, ch. 2: "Fundamental Principles of Taxation," at 32-47 (2014). There are, of course, other appropriate bases for taxation besides income. Consumption is one generally accepted basis for taxation. Value-added taxes and sales taxes are examples of consumption taxes. However, the French DST is not structured as a tax on consumption.

[262] *See* Justin Roxx, "Gross Receipts Taxes: Theory and Recent Evidence," *Tax Foundation*, https://taxfoundation.org/gross-receipts-taxes-theory-and-recent-evidence/.

[263] *See* Bunn, "A Summary of Criticisms of the EU Digital Tax," *TaxFoundation.org*; Tax Foundation, *Tax Harmonization in Europe and U.S. Business* 5-11 (1968), *available at* https://files.taxfoundation.org/legacy/docs/rp16-1.pdf.

[264] Daniel Bunn, "A Summary of Criticisms of the EU Digital Tax," *TaxFoundation.org*, Oct. 22, 2018, https://taxfoundation.org/eu-digital-tax-criticisms/.

[265] Bunn, "A Summary of Criticisms of the EU Digital Tax," *TaxFoundation.org*; Tax Foundation.

[266] *See, e.g.*, OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, preamble, Dec. 18, 2017; United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, preamble, 2017; *United States Model Income Tax Convention*, preamble, 2016; 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 (U.S.-France Tax Treaty), preamble, Jan. 1, 1996.

[267] Bunn, "A Summary of Criticisms of the EU Digital Tax," *TaxFoundation.org*; Tax Foundation.

taxation."[268] Specifically, if a company covered by the DST is profitable, the money associated with providing the covered services in France will be taxed twice—once as "revenue" under the DST and once as "income" under the corporate income tax of the country where the company pays income tax on income associated with the services covered by the DST.[269] This is because it is unlikely that the country in which the company is resident or operates will exclude revenues associated with the DST from its base or otherwise provide a credit or deduction for any DST amount paid.

Comments and witness testimony submitted during this investigation attested that the DST's application to revenue rather than income is inconsistent with prevailing principles of international taxation. Examples of comments on this issue are:

> [T]he French DST . . . abandons the long-held standard of taxing profits by taxing revenues of the targeted technology companies. This violates the principle that companies should only be taxed on their actual gains from doing business, and leaves open the possibility to being taxed on a loss.[270]
>
> The French DST will impose a tax on gross revenue rather than net income, which will be distortive, and is inconsistent with international practice.[271]
>
> The DST applies to taxation of revenue rather than income, which increases the risk of double taxation, and more fundamentally is out of alignment with prevailing tax principles.[272]
>
> A tax imposed on gross revenue has no relationship to net income or profits, which are the only proper bases for a corporate income tax.[273]
>
> The French DST will impose a tax on gross revenue rather than net income, which is inconsistent with international custom and will result in distortions. Gross revenue taxes necessarily result in double (or more) taxation because they apply in addition to income taxes, thereby imposing two taxes on the same underlying income. This result violates fundamental principles of international taxation and goes against longstanding global practices.[274]

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[268] Hearing Transcript, at 44-45 (testimony of Mr. Peter Hiltz, Amazon).

[269] *See* Hearing Transcript, at 69 (testimony of Mr. Nicholas Bramble, Google) ("We're paying a 23 percent effective tax rate. Most of that is going to the U.S. under corporate income tax. It is very likely that many of the same underlying transactions would now be taxed by the U.S. and by France.").

[270] Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019.

[271] Gary Sprague, Baker & McKenzie, Written Testimony, at 1, Aug. 9, 2019.

[272] Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019.

[273] Rufus Yerxa, National Foreign Trade Council, Written Testimony, at 2, Aug. 12, 2019.

[274] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019.

> The tax policy detriments of taxes imposed on gross income are well known. A tax on ordinary business profits, imposed on gross revenue, has no relationship to net income. Such taxes impede economic growth, as they impose a cost on doing business which is not correlated with profit or ability to pay. Gross revenue has no relationship to net income, and therefore such taxes are not limited to taxing the gains of an enterprise, and will drive companies into deeper losses if they are not profitable. Thus, such a tax is likely to harm growing companies, or alternatively, force the cost onto the consumer. These taxes create a significant barrier to conducting cross-border business for low margin and emerging enterprises. Even if the taxes are notionally creditable, the taxes will represent a true cost to a company that is in a low margin or loss position and does not have sufficient taxable income and sufficient domestic tax liability to fully utilize the credits.[275]

Thus, evidence on the record in this investigation suggests that the DST's application to revenue rather than income is inconsistent with principles of international taxation in itself and because it is likely to lead to double taxation.

2. The Digital Services Tax's Application to Revenue Rather than Income Increases the Burden on Affected U.S. Companies

Comments and witness testimony attested that the DST's application to revenue renders it far more burdensome for covered companies than a tax on income would have been.

First, the DST will impose a far greater burden than an income tax on unprofitable companies or companies with a low profit margin. A corporate income tax applies to the profits of a company. Therefore, if a company is not profitable, it will have no corporate income tax liability. The DST, by contrast, applies to companies' gross revenue, meaning that a company's liability will be the same regardless of whether it is profitable. As one comment explained:

> A company that spends $100 and earns $90 is operating at a loss. At a 10% tax on its profits, the normal target of corporate taxation, the company would not be subject to tax. However, if the 10% tax is on the revenues, the $90 in earnings, the tax would be $9 on a company that is already losing money.[276]

A similar problem occurs for low margin businesses, where DST liability may exceed a company's entire profit. As a comment explained: "[We] believe[] that the DST is also actionable because its application to low-margin businesses is unreasonable. The 3% tax on revenues may exceed entire taxable profits."[277] Thus, the DST is far more burdensome for such for zero- or low-profit companies[278] than an income tax would be.

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[275] Gary Sprague et al., Bakery & McKenzie, Comment, at 18, Aug. 26, 2019.

[276] Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019.

[277] U.S. Council for International Business, Comment, at 3, Aug. 19, 2019.

[278] A number of the companies expected to be covered by the DST are zero- or low-profit companies. *See, e.g.*, Sara Ashley O'Brien, "Uber Says It Lost $1.8 Billion in 2018," *CNN*, Feb. 15, 2019, https://www.cnn.com/2019/02/15/tech/uber-2018-financial-report/index.html; "Amazon's Product Sales Climb

This burden on companies that are not profitable or are barely profitable is criticized as inefficient tax policy and is an important reason that revenue taxes are disfavored. As one comment explained, taxing companies "that are in loss positions or that have low margins . . . increases the cost of capital and discourages investment and innovation."[279] Another commented made a similar same point, stating that, by taxing revenue instead of profit, the DST is "a clear disincentive to new businesses that want to enter the marketplace but may require a few years to earn a profit."[280] Nor do the revenue thresholds negate this problem, as companies that supply the covered services globally will qualify for the DST quickly after entering the French market.[281] Another comment stated: "A gross basis tax restricts commerce because companies will be forced to choose among unacceptable options: raise prices to cover the additional cost of the tax or cease to do business because the business is uneconomical."[282]

Second, the DST's application to revenue rather than income means that it is unusually burdensome even for profitable companies. One reason this is the case is that, for profitable companies, the DST will likely result in double taxation. As one witness explained, "The DST creates an additional layer of tax on top of already existing corporate income taxes and French VAT. This type of additive tax will lead to the same stream of income being taxed twice," *i.e.*, once as revenue under the DST and once as income (after expenses are subtracted) under a corporate income tax.[283] Another witness confirmed that, "It is very likely that many of the same underlying transactions would now be taxed by the U.S. and by France."[284] If the DST were on income, tax treaties would prevent such double taxation from occurring.[285]

Additionally, because the DST does not allow for the deduction of costs from gross revenues, the DST is equivalent to an income tax with a far higher rate than its nominal 3 percent level. As one witness explained, "For a business with profit margins of 15 percent, [the DST] is equivalent to an income tax of 23 percent. Rates this high can affect both the competitiveness and viability of even established firms."[286] For example, a company that received $100 million of revenue per year from providing the covered services "in France," under the DST, would incur DST liability of $3 million per year. However, if the company incurred $85 million of costs in order to provide the covered services "in France," its profit would be only $15 million. Thus, the DST would be equivalent to a 20% income tax (in addition to the income tax the company pays).

Nearly 20% in 2018, but only 8% in Q4," *Digital Commerce 360*, Jan. 31, 2019, https://www.digitalcommerce360.com/2019/01/31/amazons-q4-sales/ (showing that Amazon's profit margin in 2018 was 5.7% and that its international operations "continue to lose money").

[279] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019.

[280] Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019.

[281] *See* Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019.

[282] U.S. Council for International Business, Comment, at 3, Aug. 19, 2019.

[283] Peter Hiltz, Amazon, Written Testimony, at 3, Aug. 12, 2019.

[284] Hearing Transcript, at 70 (testimony of Mr. Nicholas Bramble, Google).

[285] *See* U.S.-France Tax Treaty, art. 24, Jan. 1, 1996.

[286] Joe Kennedy, Information Technology and Innovation Foundation, Written Testimony, at 2, Aug. 5, 2019.

Third, the DST's novel scope of application means that it imposes on covered companies significant administrative burdens. As discussed in the preceding section, the DST will require companies to implement new systems, including reengineering their internal business and financial reporting systems, in order to comply with the tax.[287] One reason for this is the DST's application to revenue from providing the taxable services "in France." This scope requires companies to track revenue from particular services, as defined in the French law. Companies were not previously required to categorize revenue streams in this way, and, for companies that supply covered services and services that are not covered, doing so may be burdensome.

For all these reasons, the evidence in this investigation suggests that the DST's application to revenue rather than corporate income—the usual and appropriate basis for taxation—will impose significant additional burdens on covered U.S. companies. Further, as explained in section IV.B.2, these burdens will not be confined to the covered companies but will extend to the U.S. consumers and companies, including SMEs, that purchase their services.[288]

D. The Digital Services Tax's Extraterritoriality Is Inconsistent with International Tax Principles and Unusually Burdensome for Affected Companies

The evidence compiled over the course of this investigation indicates that the French DST's application to revenues unconnected to a physical presence in France contravenes prevailing international tax principles. The record of the investigation also suggests that this aspect of the DST renders it unusually burdensome on covered U.S. companies in terms of their overall tax liability and of the costs of complying with the tax.

1. The Digital Services Tax Is Extraterritorial in a Manner that Conflicts with International Tax Principles

As described in section III.A above, the DST applies to gross revenues of covered companies deemed to be collected in return for providing the covered services "in France."[289] Due to the way the DST law defines taxable services provided "in France," the tax is levied on revenues of companies that may have no physical presence in France and, for covered companies that do have a physical presence in France, on revenues unconnected to that presence. Evidence on the record in this investigation shows that this application to revenues unconnected from companies' presence in France is inconsistent with prevailing principles of international tax policy, which provide that a company is subject to income-type taxation only to the extent the company has a permanent establishment in the taxing country.

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[287] *See supra* sec. IV.B; Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble, Google); Hearing Transcript, at 60 (testimony of Mr. Alan Lee, Facebook).

[288] *See supra* sec. IV.B.2; *see also* Hearing Transcript, at 44 (testimony of Mr. Peter Hiltz, Amazon) ("Fifty-eight percent of the sales on the Amazon websites are made by our selling partners, not by Amazon itself. Most of them are small and medium-sized businesses.").

[289] *See supra* sec. III.A.

The international tax system reflects the principle that companies should not become subject to a country's corporate tax regime except based on a territorial connection to the country. For example, international tax treaties establish that companies do not become subject to a country's income corporate tax system unless it has a "permanent establishment" in that country. The OECD model tax treaty provides that the profits of an enterprise "shall be taxable" only in the country of which the enterprise is a national "unless the enterprise carries on business in [another country] through a permanent establishment situated therein."[290] The UN model treaty similarly provides that the profits of an enterprise are taxable in a country only if "the enterprise carries on business in [that country] through a permanent establishment situated therein."[291] The U.S. model tax treaty and the U.S.-France tax treaty both contain similar provisions.[292]

These and other sources also reflect a common definition of the type of establishment that brings a foreign company within a country's corporate tax system. The OECD model tax treaty, the UN model tax treaty, the U.S. model tax treaty, and the U.S.-France tax treaty all define a "permanent establishment" to mean "a fixed place of business through which the business of an enterprise is wholly or partly carried on."[293] All also provide that the term includes a "place of management," branch, office, factory, workshop, and "place of extraction of natural resources,"[294] A "permanent establishment" does not include, *inter alia*, the maintenance of a fixed place of business solely for the purpose of "purchasing goods or merchandise or of collecting information for the enterprise" or of "carrying on, for the enterprise, any other activity" "provided that . . . the overall activity of the fixed place of business, is of a preparatory or auxiliary character."[295] Other sources confirm that this is the general rule in international tax policy.[296]

Further, the international tax system also reflects the principle that, if a foreign company has a permanent establishment in a country, it is subject to that country's tax regime only to a circumscribed extent. The OECD model tax treaty provides that a country may tax a foreign company only on "the profits that are attributable to the permanent establishment" in that

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[290] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

[291] UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1).

[292] *United States Model Income Tax Convention*, art. 7 ("Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein."); U.S.-France Tax Treaty, art. 7 (same).

[293] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(1); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(1); *United States Model Income Tax Convention*, art. 5(1); U.S.-France Tax Treaty, art. 5(1).

[294] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art.5(2); *United States Model Income Tax Convention*, art. 5(2); U.S.-France Tax Treaty, art. 5(2).

[295] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(4); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(4); *United States Model Income Tax Convention*, art. 5(4); U.S.-France Tax Treaty, art. 5(4).

[296] *See, e.g.*, OECD, Inclusive Framework on Base Erosion and Profit Sharing, Action 7: Permanent establishment status, https://www.oecd.org/tax/beps/beps-actions/action7/.

country.[297] The profits attributable to the permanent establishment "are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions."[298] The U.S. model tax treaty and the U.S.-France tax treaty both contain substantially the same provisions.[299] The UN model treaty is substantially similar. It provides that a country may tax only so much profit as is attributable to the permanent establishment in that country or to other business activities (including sales of goods) carried out in the country that are of "the same or similar kind" as those carried out by the permanent establishment.[300]

Comments and witness testimony in this investigation confirmed that, under prevailing international tax principles, a company is subject to a foreign country's corporate tax system only if, and to the extent that, it operates a permanent establishment in the country. As one comment explained: "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."[301] Other comments explained the reason for this rule, namely, that corporate taxes are levied where companies create value, not where that value is consumed.[302] As one comment stated:

> [A] guiding principle of the corporate tax system is a company must have a PE in a country before it becomes subject to the CIT. This rule partly ensures administrative costs are proportionate to the revenue raised. Without the PE rule, a country could still only tax the proportion of profits associated with the value created within its borders. Because the mere sale is not considered to add value, this amount might be too low to justify the administrative costs to both the country and the firm.[303]

Thus, the evidence in this investigation confirms that the international tax principles require a significant territorial nexus for companies to fall within a country's corporate tax jurisdiction.

The DST contravenes this principle because it is not limited to companies with a permanent establishment in France. As discussed above, the DST applies to companies meeting the revenue thresholds when the two types of taxable services are provided "in France." Digital interface services are provided "in France" when: (1) the seller or buyer of goods or services on a

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[297] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

[298] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(2).

[299] *United States Model Income Tax Convention*, art. 7(1)-(2); U.S.-France Tax Treaty, art. 7(1)-(2).

[300] UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1)-(3).

[301] Gary Hufbauer, Peterson Institute for International Economics, Comment, Aug. 1, 2019; *see also* Grover Norquist, Americans for Tax Reform, Comment, at 1, Aug. 8, 2019 ("Under current international tax rules and treaties, a company is only subject to corporate tax on its profits in countries where it has a physical presence. This nexus requirement precludes issues that can arise from countries having unlimited taxing rights to companies that may operate within their borders but have no presence there.").

[302] Matthew Schruers, CCIA, Written Testimony, at 2, Aug. 9, 2019.

[303] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 5, Aug. 5, 2019.

digital interface is located in France; or (2) an individual in France opens a subscription to a digital interface other than for the delivery of goods or services.[304] Targeted advertising services are provided "in France" when: (1) an individual is located in France at the time she views a targeted ad; or (2) an individual is located in France at the time data concerning her interaction with a targeted ad is sold. Thus, for both categories of services, the location of an individual viewing a website—not the location of the company providing the website—determines whether the DST applies.

A company may supply digital interface services or targeted advertising services "in France," as the DST defines it, without having any physical presence in France at all. For example, if a French user purchases a product on the e-marketplace Wish, Wish's company (ContextLogic, Inc.) is covered by the DST (assuming it meets the revenue thresholds), even though the company has no office in France.[305] (The DST will be additional to the French VAT, which will apply to the transaction and which Wish will be responsible for collecting and remitting to the French government beginning in 2020.[306]) Similarly, if a French user opens an Instagram account and sees an ad, Instagram is covered by the DST (assuming it meets the revenue thresholds), even though it has no office in France.[307] As one comment explained, "Digital firms, including US tech giants, purvey their websites globally with no physical presence in most countries."[308] Consequently, the French DST violates international tax principles by "seek[ing] to tax a company that has no physical presence within its borders."[309]

The DST also contravenes international tax principles because, for companies with a physical presence in France, the revenues to which the DST applies are not limited to those attributable to a permanent establishment. A covered company may have an office in France that carries out a particular, limited function for the company. This office and its operations may be so limited that it does not meet the definition of "permanent establishment," meaning that generally the company would not be subject to corporate taxation in France.[310] Alternatively, the office may meet the definition of permanent establishment but only provide a subset of the services that the company provides. Under existing international tax principles, that would mean the country where the permanent establishment is located would be entitled to tax, not *all* profit the company generates in its territory, but only profit that the permanent establishment might be

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[304] Translation of French DST Law, Art. 299 bis. II.

[305] *See* Wish Careers, https://www.wish.com/careers (accessed Oct. 10, 2019).

[306] Gail Cole, "Marketplaces to be Responsible for VAT Collections in France," *Avalara*, June 6, 2019, https://www.avalara.com/us/en/blog/2019/06/marketplaces-responsible-for-vat-collections-in-france-2020.html.

[307] *See* "Work at Instagram," https://www.instagram.com/about/jobs/ (accessed Oct. 10, 2019).

[308] Gary Hufbauer, Peterson Institute for International Economics, Comment, Aug. 1, 2019.

[309] Grover Norquist, Americans for Tax Reform, Comment, at 2, Aug. 8, 2019.

[310] *See, e.g.*, "INSIGHT: Google Has Won Second Round Against the French Tax Authorities," *Bloomberg*, Mar. 29, 2019, https://news.bloombergtax.com/daily-tax-report-international/insight-google-has-won-second-round-against-the-french-tax-authorities (describing how two French courts found that Google's office in France is not a permanent establishment of Google Ireland).

expected to make if it were an independent company in its (limited) line of business.[311] The DST, by contrast, applies to all revenues from the taxable services provided "in France," regardless of whether the covered company's office in France supplies those services or is merely an auxiliary office supplying a subset of those services or another service entirely.

Nor is the DST a tax on transactions with some particular connection to France. There are, of course, other types of taxes that are recognized as legitimate and consistent with international tax principles. These include various taxes on consumption, including sales taxes, VATs, and excise taxes.[312] These taxes also have some territory-based scope of application (*e.g.*, applying to all purchases in the taxing country). The DST, however, is not such a tax.

Most importantly, the DST is not transaction-based. As discussed above, the DST applies to a particular proportion of global gross revenues from the taxable services earned by companies meeting the revenue services. For companies providing digital interface services, the DST applies to gross revenues from providing the covered services multiplied by the proportion of transactions: (a) for the delivery of goods or services, where one of the users of the interface (*i.e.*, the buyer or the seller of the good or service) was in France; or (b) other than for the delivery of goods or services, where the individual that opened the account is in France.[313] For companies providing targeted advertising, the DST applies to gross revenues from providing the covered services multiplied by (a) the proportion of ads placed that are seen by an individual located in France; or (b) for the sale of data related to targeted advertising, the proportion of data sold that concerns individuals who were located in France when the data was generated. [314] Thus, the DST applies not to particular transactions but to a share of gross revenues.

Further, as described in section III.A above, the DST formulas may or may not produce results close to the value of the transactions involving covered services provided "in France," as defined by the DST law.[315] Providers of digital interface services general earn revenue on a commission basis. Therefore, whether the revenue covered by the French DST is equivalent to the revenue from the digital interface transactions provided "in France" depends on the average value of transactions in France, compared to the average value of transactions of users of the digital interface service outside France. For targeted advertising, the relationship between the revenues covered by the DST and the revenues actually associated with placing ads in front of individuals in France depends on the value of the French ad market, relative to other markets where the advertising company operates.

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[311] *See* OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1)-(2); *United States Model Income Tax Convention*, art. 7(1)-(2); U.S.-France Tax Treaty, art. 7(1)-(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1)-(3).

[312] *See, e.g.*, Institute on Taxation and Economic Policy, Policy Brief: How Sales and Excise Taxes Work, August 2011, *available at* https://itep.org/wp-content/uploads/pb49salesex.pdf; Al Ehrbar, "Consumption Tax," *Library of Economics and Liberty*, *available at*, https://www.econlib.org/library/Enc/ConsumptionTax.html.

[313] Translation of French DST, Art. 299 bis IV.1-4.

[314] Translation of French DST, Art. 299 bis IV.1-4.

[315] *See supra* sec. III.A.

For example, North America is the most valuable ad market in the world. Consequently, for a company that operates mostly in North America, the average value of an ad placed to a person in France is likely below the average value of an ad the company places. In that situation, the revenues covered by the DST would exceed the revenues actually associated with placing ads in front of individuals in France. As one comment explained:

> The formulas for calculating the DST taxable base relies on 'deemed' amounts of French revenue calculated based on prescribed formulas that are not proportional to the revenue generated in France by the provision of the digital service or delivery of the good. The following simple example illustrates this unfair result. Assume a company sells 100 ad impressions in the U.S. for $400 and 100 ad impressions in France for $100. The French DST formula takes total ad impressions delivered to French users (100) divided by total ad impressions delivered globally (200) multiplied by global revenue of $500, which is $250. At a 3% rate, the French DST is $7.50. If the French tax base was based on actual revenue generated from French ad impressions, the French DST would be $3. In this example, the French DST is effectively 7.5% of actual French revenue, even though it is marketed as a 3% tax. Depending on a company's particular facts, the effective rate of the French DST could be even higher.[316]

Thus, evidence on the record in this investigation suggests that, as one comment explained, the DST is "a sharp departure from long-established tax rules" because "value attributable to risks taken and decisions made in one country is claimed by another country, without sufficient justification and outside the long-established framework for international tax policy."[317] In short, the French DST is fundamentally inconsistent with the existing, long-standing international norms governing when a country may exercise taxing jurisdiction over a resident of another country.

Before concluding this section, it should be noted that the 135 countries comprising the Inclusive Framework of the OECD are currently in negotiations to revise international standards for the allocation of taxing jurisdiction, including potential changes to the existing requirement that an enterprise have a permanent establishment in a country to be subject to tax there. Any such agreement to revise the existing international standards would be implemented on a consistent, multilateral basis and would apply prospectively. The retroactive, unilateral adoption of the French DST while these negotiations are underway makes reaching a multilateral agreement more difficult.

2. An Extraterritorial Tax is Unusually Burdensome for Affected U.S. Companies

Evidence on the record in this investigation suggests that the DST's application to revenue streams unconnected to a permanent establishment in France is unusually burdensome for affected U.S. companies.

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[316] Robert Johnson, Silicon Valley Tax Directors Group, Comment, at 19, Aug. 18, 2019.

[317] Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019.

First, comments and witness testimony suggest that the DST's application to revenues unconnected from a permanent establishment in France renders the DST unusually burdensome to administer. As one witness explained:

> In addition to the actual tax liability under the French DST, the law will require new methodologies for calculating the tax. The French, and other DSTs, apply the tax to a new tax base focused on user location. For a company like Facebook, this presents issues as Facebook's revenue is generated directly from advertisers, not users. While we may have the necessary data to calculate the tax, it would require additional time and resources to capture this data and maintain it for these new tax and audit procedures. Without further guidance from the French authorities, we estimate additional tax, compliance, audit, engineering, and maintenance costs.[318]

Other comments and witness testimony confirmed that the DST's reliance on user location (instead of the location of the company providing the service) makes the DST difficult and burdensome to calculate and administer.[319]

Second, the DST will be additional to the existing income and consumption taxes imposed within the architecture of the international tax system. The DST applies to revenue streams unconnected to a permanent establishment in France, meaning that these revenue streams are part of the income that is taxed by other countries where the covered company operates. Therefore, as one witness explained:

> The tax will cause companies to be taxed twice, hindering innovation and economic growth. There are several CompTIA member companies who will be affected by the tax, and they have stated that they already comply with the taxes required of them where they operate. The DST would only increase their tax burden and complicate compliance costs by adding a new tax regime overlapping with their already-existent tax commitments.[320]

Another comment agreed that the DST "will result in double taxation and discourage the spread of digital commerce, one of the strongest forces now lifting the global economy."[321]

Indeed, for some companies, the DST will be the "third level of tax that is imposed on gross revenue alongside an income tax" and a consumption tax such as "the French VAT."[322]

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[318] Alan Lee, Facebook, Written Testimony, Aug. 12, 2019.

[319] *See, e.g.*, Gary Sprague, Baker & McKenzie, Written Testimony, at 1, Aug. 9, 2019; Hearing Transcript, at 62 (testimony of Mr. Nicholas Bramble); Hearing Transcript, at 30 (testimony of Mr. Rufus Yerxa); U.S. Council for International Business, Comment, at 2, Aug. 19, 2019; Matthew Schruers & Rachel Stelly, CCIA, Comment, at 5, Aug. 16, 2019.

[320] Stefanie Holland, Computing Technology Industry Association (CompTIA), Written Testimony, Aug. 12, 2019.

[321] Gary Hufbauer, Peterson Institute for International Economics, Comment, Aug. 1, 2019.

[322] Hearing Transcript, at 9 (testimony of Mr. Rufus Yerxa); *see also id*. at 44-45 (testimony of Mr. Peter Hiltz) ("[The DST] creates an additional layer of tax on top of already-existing corporate income taxes and French VAT").

Covered companies, such as Amazon, eBay, and Wish, that are "digital interfaces" for the sale of goods, will be responsible for collecting and remitting to the French government the French VAT, for each purchase by a consumer in France.[323] Hotel reservation companies like Booking.com also collect and remit the VAT for hotel reservations booked in France.[324] Other covered companies are responsible for collecting various other taxes and remitting them to the French government. Airbnb is responsible for collecting and remitting to the French government a "tourist tax" and additional regional taxes on apartment reservations in France.[325] The DST is imposed on top of those taxes, and on top of the income taxes the companies pay.

Thus, the evidence on the record in this investigation shows that the DST's application to revenues not connected with a company's physical presence in France renders the tax unusually burdensome for covered U.S. companies. Further, as explained in section IV.B.2 and discussed in section IV.C.2, these burdens likely will extend to the U.S. consumers and U.S. companies, including SMEs, that purchase services from the covered companies.[326]

E. The Digital Service Tax Unfairly Targets a Small Group of Digital Companies

The DST was designed to—and does—target a small number of (mostly U.S.-based) digital companies. As described in sections III.B and IV.A above, statements by numerous French officials demonstrate that the DST was conceived and designed to target four companies—Google, Amazon, Facebook, and Apple—the so-called "digital giants."[327] The tax will end up covering companies beyond those four, but the DST's scope and revenue thresholds keep the tax targeted on very few companies and exclusively on digital services. This is inconsistent with international tax principles counseling against targeting the digital economy for different tax treatment than other business models.

As discussed in previous sections, the DST's definition of covered services includes only digital services.

The DST covers targeted Internet advertising but no other forms of advertising, even though traditional advertising and Internet advertising have core features in common. The purpose and key actors (advertiser, publisher, and advertising professionals) of Internet and traditional advertising are the same. Further, like Internet advertising, traditional advertising can incorporate data on individual consumers. Advertisers target certain consumers by placing ads in particular publications or television programs based on data on the individuals who view those

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[323] Gail Cole, "Marketplaces to be Responsible for VAT Collections in France," *Avalara*, June 6, 2019, https://www.avalara.com/us/en/blog/2019/06/marketplaces-responsible-for-vat-collections-in-france-2020.html.

[324] *See* Booking, "Does my Booking.com Commission Invoice Include a VAT Charge?" https://partner.booking.com/en-us/help/commission-invoices-tax/does-my-bookingcom-commission-invoice-include-vat-charge (accessed Oct. 11, 2019).

[325] Airbnb, "Tourist Tax Collection and Remittance by Airbnb in France," https://www.airbnb.com/help/article/2284/tourist-tax-collection-and-remittance-by-airbnb-in-france (accessed Oct. 10, 2019).

[326] *See supra* secs. IV.B.2; IV.C.2.

[327] *See supra* sec. III.B, IV.A.

publications or programs.[328] Additionally, traditional advertising involves using individual data to monitor the effectiveness of ads.[329] Studies have suggested substitutability between Internet and traditional advertising.[330]

The DST's definition of digital interface services likewise covers only online sales of goods and services. For example, the DST covers e-marketplaces but not revenues from retail in physical stores, even though the substance of what is happening (the buying of a product) is the same in the two formats, and e-marketplaces and brick-and-mortar retail are competitors.[331] Similarly, the DST covers revenues from online reservations companies but not from travel agents booking hotel stays. Additionally, by excluding the sale of goods and services owned by the company itself, the narrow definition of the covered services focuses the tax on digital companies and not traditional companies engaged in e-commerce.[332] The revenue thresholds further focus the tax on digital companies by excluding companies that provide the covered services as a small component of their business.[333]

The available evidence suggests that the DST will cover only a small number of companies, most of which are primarily (or exclusively) digital companies. Of the approximately 27 companies expected to be covered by the DST, 21 were founded as digital companies providing the advertising or digital interface services that the DST targets.[334] For all these companies, the covered services continue to provide all or a substantial part of their total revenue. For the other covered companies, digital activities provide varying shares of their total revenue. However, the DST applies only to their revenues from the covered services, so the companies are taxed only to the extent that they are digital companies. Further, as discussed above, the DST will exclude some traditional companies that provide the same or similar services to the covered companies because digital activities are not a sufficiently important part of their business.[335]

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[328] *See* Nielsen, *Advertising & Audiences: State of the Media*, May 2014, at 11, *available at* https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/advertising-and-audiences-report-may202014.pdf.

[329] *See* Nielsen, *Maximize Your TV Advertising Effectiveness*, at 5-7, May 2016, *available at*. https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/tvbe-branding-best-practices-may-2016.pdf.

[330] *See* Avi Goldfarb & Catherine Tucker, "Advertising Bans and the Substitutability of Online and Offline Advertising," *Journal of Marketing Research*, at 35-37, 2011, *available at* https://www.researchgate.net/publication/228321618_Advertising_Bans_and_the_Substitutability_of_Online_and_Offline_Advertising; Dirk Bergemann & Alessandro Bonatti, "Targeting in Advertising Markets: Implications for Offline versus Online Media," *42 RAND Journal of Economics* 417, 435-438 (Fall 2011), *available at* https://pdfs.semanticscholar.org/7235/78609ee4a6e677f20c2ef8e0d96a3b7efbc9.pdf.

[331] *See, e.g.*, Jeremy Bowman, "These Stocks Are Amazon's Biggest Competitors," *Motley Fool*, Aug. 5, 2019, https://www.fool.com/investing/who-are-amazons-biggest-competitors.aspx; Lauren Hirsch, "Retailers Fight Back," *CNBC*, June 13, 2019, https://www.cnbc.com/2019/06/13/retailers-and-restaurants-flex-online-muscle-in-battle-against-amazon.html.

[332] *See supra* sec. IV.A.2.

[333] *See supra* sec. IV.A.3.

[334] These companies are Airbnb, Alphabet, Amadeus, Amazon, Alibaba, Booking, Criteo, eBay, Expedia, Facebook, Groupon, Match Group, Rakuten, Sabre, Snapchat, Travelport Worldwide, Twitter, Uber, Wish, and Zalando.

[335] *See supra* sec. IV.A.3.

The DST's narrow focus on a few digital services is inconsistent with international tax principles, which condemn singling out the digital economy for less favorable tax treatment. As one witness at the hearing testified:

> The new French law would tax revenue from only a handful of e-commerce and internet businesses, on the theory that the digital economy presents new challenges and that only a handful of companies rely on digital business models. However, both the OECD and the European Commission Expert Group on Taxation of the Digital Economy have found that every sector of the economy – ranging from manufacturing to agriculture to healthcare – is becoming digital, and confirmed that unique tax rules targeted at digital practices simply do not make sense.[336]

Other witnesses and comments agreed. Another witness stated that, "the French DST diverges unilaterally from international norms in several respects, including taxing specific digital companies despite the digitalization occurring across all industries."[337] A comment stated that the DST's narrow sectoral focus "explicitly violates OECD's admonishment against trying to ring-fence the digital economy with special rules."[338] Other comments agreed.[339]

The OECD has several times cautioned against creating new tax rules for the digital economy. The 2015 report on the BEPS work program, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015*, stated:

> As digital technology is adopted across the economy, segmenting the digital economy is increasingly difficult. In other words, because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy. Attempting to isolate the digital economy as a separate sector would inevitably require arbitrary lines to be drawn between what is digital and what is not. As a result, the tax challenges and base erosion and profit shifting (BEPS) concerns raised by the digital economy are better identified and addressed by analysing existing structures adopted by MNEs together with new business models and by focusing on the key features of the digital economy and determining which of those features raise or exacerbate tax challenges or BEPS concerns, and developing approaches to address those challenges or concerns.[340]

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[336] Nicholas Bramble, Google, Written Testimony, at 2, Aug. 12, 2019.

[337] Alan Lee, Facebook, Written Testimony, Aug. 12, 2019.

[338] Caroline Harris, U.S. Chamber of Commerce, Comment, at 3, Aug. 14, 2019.

[339] *See* Jennifer McCloskey, Information Technology Industry Council, Comment, at 7, Aug. 22, 2019; Bryan Riley, Free Trade Initiative, National Taxpayers Union Foundation, Comment, at 3, Aug. 26, 2019; Gary Sprague et al., Bakery & McKenzie, Comment, at 4, Aug. 26, 2019.

[340] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report*, at 54, 2015, *available at* https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1571324294&id=id&accname=guest&checksum=EDDD40F665FBCF6AA8E561BDB0E233E4.

A March 2019 public consultation document issued by the OECD pursuant to the Inclusive Framework on BEPS agreed that "it would be difficult, if not impossible, to 'ring-fence' the digital economy from the rest of the economy for tax purposes because of the increasingly pervasive nature of digitalization."[341] Consequently, it recommended changes to international tax rules that do not distinguish between digital and non-digital activities, although they seek to respond to the challenged to the international tax system posed by digital companies.[342] Another document published subsequently pursuant to the same project also recognized "that it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes" and therefore focused on a "systematic solution" applicable to all business models.[343]

Other entities have agreed that it is not possible or advisable to "ring-fence" the digital economy. The International Chamber of Commerce endorsed the OECD's statement that it would be "impossible" to "ring-fence the digital economy" in a non-arbitrary way and encouraged a "long-term global solution" to the challenges posed by the digital economy.[344] The U.S. position—as expressed in international fora—is that any changes to the international tax system should apply across business models and not attempt to ring-fence the digital economy.[345] Further, the United States does not impose taxes that treat digital companies differently (and less favorably) than traditional companies. Even an expert group of the European Commission acknowledged that "there should not be a special tax regime for digital companies. Rather the general rules should be applied or adapted so that 'digital' companies are treated the same way as others."[346]

Thus, the evidence on the record in this investigation suggests that the DST's application to a small group of digital companies is unusual and inconsistent with tax policy principles cautioning against trying to "ring-fence" the digital economy. As one witness testified at the hearing: "I'm not aware of any other tax that is primarily for revenue raising that has a narrow scope like this."[347]

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[341] OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy*, at 5, Feb. 13, 2019, *available at* https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf;

[342] OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy*, at 24-25, Feb. 13, 2019.

[343] OECD, *Programme of Work to Develop and Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, at 26, May 2019, *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.

[344] International Chamber of Commerce (ICC), "Digital Tax Rules Should Be Global and Long-Term in Scope," *iccwbo.org*, Mar. 22, 2018, https://iccwbo.org/media-wall/news-speeches/icc-digital-tax-rules-global-long-term-scope/.

[345] *See* Isabel Gottlieb, "Don't 'Ring-Fence' Digital Economy: Treasury Official," *Bloomberg.Law*, Mar. 27, 2018, https://news.bloomberglaw.com/tech-and-telecom-law/dont-ring-fence-digital-economy-treasury-official.

[346] EC Expert Group on Taxation of the Digital Economy, *Report*, at 44, May 28, 2014, *available at* https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/report_digital_economy.pdf.

[347] Hearing Transcript, at 65 (testimony of Mr. Alan Lee, Facebook).

F. Public Rationales for the Digital Services Tax Are Unpersuasive

France has made various arguments in support of its DST, but all of its rationales rely on incorrect or unproven facts. The French government has argued that large digital services companies are not paying their fair share of taxes compared to the level of taxation that is paid by "traditional companies." The French government has also argued that digital services companies uniquely benefit from the value they obtain from data provided by or concerning their users. Even if true, these arguments would not explain many of the aspects of the DST discussed above, such as the DST's revenue thresholds targeting U.S. companies, its retroactivity, or its application to revenue rather than income. Furthermore, as addressed below, the evidence does not support either of the French government's assertion, *i.e.*, that the digital services companies targeted by the DST have lower overall rates of taxation than the average rate of taxation of large "traditional" companies or that digital services companies uniquely benefit from the value they obtain from data provided by or concerning their users.

1. Covered Companies Do Not Have Lower Tax Rates than Non-Covered Companies

In introducing its DST proposal and in multiple statements since then, the French government has stated that it is necessary to impose this tax because digital companies are not paying their fair share of taxes in France. In its initial proposal for a French DST, the French government stated it needed to move urgently to adopt a DST because large, digital companies have developed without ever paying their fair share of taxes in France. France further argued that French SMEs pay 14 percent more in taxes than digital companies, claiming that the average tax rate of a company in the European Union is 23.2 percent whereas the average tax rate of a digital company in the European Union is 9.5 percent.[348] Subsequent statements by French officials have repeated the assertion of a wide discrepancy in the average tax rate of digital companies versus "traditional" companies. For example, Minister Le Maire stated in an interview with *Le Parisien*, "The digital giants pay 14 tax points less than European SMEs. That these companies pay less tax in France than a very big bakery or cheese producer in Quercy, this poses a problem."[349]

The assertions by the French government appear to be based on the European Commission impact assessment report regarding the EU's proposed DST. The impact assessment report found that a digital business model is subject to an effective tax rate of significantly less than the tax rate for a traditional business.[350] The report stated that a "domestic digital business model" is subject to an effective average tax rate of only 8.5 percent while a "traditional business model" is subject to a 20.9 percent rate, and a cross-border digital business

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[348] *See* Ministere de L'Economie et des Finances, *Project de loi Relative a la Taxation des Grandes Entreprises du Numerique*, Mar. 6, 2019, https://src.bna.com/F9D.

[349] "Taxer les géants du numérique, une question de justice fiscale», affirme Bruno Le Maire" Le Parisien, *available at* http://www.leparisien.fr/economie/taxer-les-geants-du-numerique-une-question-de-justice-fiscale-affirme-bruno-le-maire-02-03-2019-8023578.php.

[350] European Commission, *Commission Staff Working Document Impact Assessment*, at 18, Mar. 21, 2018.

model is subject to an effective average tax rate of only 9.5 percent while a cross-border traditional business is subject to a 23.2 percent rate.[351]

The French or EU assessments, however, lack a factual foundation. Rather, they are based on a single study, and the author of the study has stated that the study does not support the conclusions reached by France and the EU.

The French and EU assessments are based entirely on a 2017 study on taxes (Digital Tax Index 2017: Locational Tax Attractiveness for Digital Business Models") published by PwC Germany and the Center for European Economic Research (ZEW).[352] It is critical to note that shortly after the European Commission published its impact assessment report, PwC put out a statement that the study does not calculate effective average tax rates (EATRs) using tax information for actual companies or sectors of the economy and cannot be used to compare the tax burdens of digital and traditional companies.[353] The lead author of the study also said in multiple interviews that "it is not correct to state that the digital sector is undertaxed" and that "effective tax rates for digital and traditional businesses cannot be compared one-by-one" because digital businesses earn different types of income.[354]

Moreover, other, more relevant studies show that digital companies pay an average effective tax rate that is comparable or even higher than the average tax rate for traditional companies. A study by Copenhagen Economics found that "studies document that digital firms targeted by unilateral digital services taxation proposals pay as much tax as traditional firms."[355] In two studies, the European Centre for International Political Economy (ECIPE) found that real industry data indicates that average effective tax rates of digital companies are at least as high as those of traditional companies. In particular, the ECIPE study shows that for digital companies, the real effective corporate tax rates for both renowned (large) digital companies and less renowned digital companies were significantly higher than the hypothetical tax rates put forward by the French government and the European Commission. In fact, ECIPE concludes that the real average corporate tax rates of large digital companies and other, less renowned digital companies were 26.8 percent and 29.4 percent, respectively.[356] A more recent ECIPE study also found that

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[351] European Commission, *Commission Staff Working Document Impact Assessment*, at 18, Mar. 21, 2018.

[352] "Steuerliche Standortattraktivität digitaler Geschäftsmodelle" *available at* http://ftp.zew.de/pub/zew-docs/gutachten/Studie_Digitale_Geschaeftsmodelle_2017.pdf.

[353] "Understanding the ZEW-PwC Report, "Digital Tax Index, 2017" *available at* https://www.pwc.com/us/en/press-releases/2018/understanding-the-zew-pwc-report.html.

[354] *See e.g.*, "Europe's big tech tax: the latest proposals for a digital services tax," Dec. 11, 2018, *available at* https://www.inlinepolicy.com/blog/europes-big-tech-tax-the-latest-proposals-for-a-digital-services-tax; Jack Schicker, *EU's Study's Author Doubts Digital Transactions Undertaxed*, Law360, Mar. 6, 2018, *available at* https://www.law360.com/articles/1019073/eu-study-s-author-doubts-digital-transactions-undertaxed.

[355] "The Proposed EU Digital Services Tax: Effects on Welfare, Growth and Revenues", Sep. 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.

[356] Matthias Bauer, European Centre for International Political Economy, "Digital Companies and their Fair Share of Taxes: Myths and Misconceptions," Mar. 2018, at 8-9, *available at* http://ecipe.org/publications/digital-companies-and-their-fair-share-of-taxes/.

large U.S. digital services companies had effective corporate tax rates for 2012 to 2017 ranging from 26 percent to 28 percent whereas several prominent French firms had significantly lower effective corporate tax rates, including Renault (17.6 percent), Valeo (19.5 percent), Cap Gemini (21.5 percent), and Essilor Luxottica (21.4 percent).[357]

Comments on the record further contradict the assertions made by the French government and support the argument that there is no compelling evidence that digital companies pay significantly lower effective tax rates than traditional companies. For example, one witness stated:

> Like all companies, our effective tax rate changes over time based on a number of factors such as the success of the company at that time, as well as investment expenses, capital expenditures, employee growth, and research and development (R&D) costs. Facebook pays all taxes as required by law. Our average effective tax rate for the last five full years, has been greater than 26% (FY18-FY15). Factoring in our most recent two quarters our effective tax rate increases to over 28%.[358]

Another witness agreed:

> Corporate income tax is an important way that businesses contribute to the countries and communities where they operate. Google's overall global tax rate has been above 23 percent over the past 10 years, in line with the 23.7 percent average statutory rate across the member countries of the OECD.[359]

Other evidence in the record indicates that entities in the European Commission and French governments have also expressed skepticism about the validity of the claimed disparity in taxation rates between digital and traditional companies. The European Commission was criticized by the European Commission's Regulatory Scrutiny Board, which pointed to "significant shortcomings," including the fact that it did "not show the urgency for the EU to act, before global progress is achieved at the OECD/G20 level."[360] During the consideration of the French DST, a French National Assembly Committee report noted:

> The real problem is therefore not the under-taxation of the GAFAs, because this rate of 22 percent is more or less equivalent to the average rate applicable to large groups in Europe, but the place where these companies pay the corporate income

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[357] Matthias Bauer, European Centre for International Political Economy, "Corporate Tax Out of Control. EU Tax Protectionism and the Digital Services Tax," Feb. 2019, at 24-25, *available at* https://ecipe.org/wp-content/uploads/2019/02/Corporate-Tax-Out-of-Control.pdf.

[358] Alan Lee, Facebook, Written Testimony, Aug. 12, 2019 at 1-2.

[359] Nicholas Bramble, Google, Written Testimony, Aug. 12 2019 at p1.

[360] Joe Kennedy, Information Technology and Innovation Foundation, Aug. 5, 2019, at 18.

> tax. The fundamental question is therefore how the corporate income tax base could be brought back to Europe.[361]

Thus, the evidence on the record in this investigation suggests that digital companies, including the subset of digital companies targeted by the French DST, are not subject to a significantly lower effective average tax rate than traditional companies.

2. Users Do Not Create Value for the Covered Companies in a Unique, Significant Way

The French government has argued that the digital services companies targeted by its DST uniquely benefit from the value they obtain from data provided by or concerning their users in France. This claim of unique benefit appears to rely in large part on the reliance of these services on advances in information and communications technology (ICT). This, French officials have argued, creates a basis for imposing a tax on these companies, regardless of whether they have a presence in France and despite the existing international standard for imposing taxes in the jurisdiction where production is located. These assertions by the French government are generally unsupported and are contradicted by the findings of this investigation.

First, France has not publicly substantiated assertions that user involvement in the services covered by the DST represents value creation, and there is no consensus that this is the case. One comment submitted in this investigation explained:

> In every respect, the real value of an Internet service such as Google Search, Uber, or Amazon Marketplace is the software and business model created by the company. Consumers use these services because they derive great value from them. This in turn attracts other users. But the source of value remains the company, not users. The vast majority of users create little of value to the company, yet they are allowed to use the service for free.[362]

An OECD report agreed that there is no consensus that user involvement creates value for the covered companies, stating, "There are differences of opinion on whether and the extent to which data and user participation represent a contribution to value creation by the enterprise."[363]

Indeed, a comment submitted during this investigation explained and refuted three theories of how users create value for the companies covered by the DST. The first theory, user content creation, is that users add value because some of the covered companies "rely on user-created content to attract other users."[364] However, very few users create content that is valuable for the covered companies. Further, the users that do create content that attracts other users are

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[361] Gary Sprague, Baker & McKenzie, Written Testimony, Aug. 9, 2019 at 1 *citing* French National Assembly, *Report prepared on behalf of the Committee of Finance, General Economy, and Budgetary Control*, at 98 (April 3, 2019) *available at* http://www.assemblee-nationale.fr/15/pdf/rapports/r1838.pdf.

[362] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 2, Aug. 5, 2019.

[363] OECD, *Tax Challenges Arising from Digitalisation–Interim Report 2018: Inclusive Framework on BEPS*, at 25.

[364] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 11, Aug. 5, 2019.

already "being compensated for that value by being able to participate for free" in the site and, in some cases, are also being compensated "in the form of notoriety, fame, and influence, all of which may lead to higher income from other sources."[365] The second theory, user data, is that the companies covered by the DST collect and monetize data about their customers.[366] However, as the comment explained:

> [T]his is not value added. Rather, it is payment. Data is being provided in exchange for receiving the "free" service. There is no reason to think the data is worth any more than the value of the service it is being exchanged for.[367]

Finally, the third theory, user patronage, is that the value digital interface companies generate by connecting users comes "from users on both sides of the market rather than the companies."[368] However, this ignores the fact that the users of the interface gain value from the using the interface and that this value is additional to the value of the good or service received from the other user, for which each user gives or receives payment.[369]

Moreover, the aspects of user involvement that supposedly generate value for the covered companies are not unique to the services covered by the DST. Rather, as one comment in this investigation explained, these features "increasingly characterize many traditional industries."[370] For example, "the Internet of Things increasingly allows [traditional businesses] to put sensors into their products and collect detailed information on use and performance."[371] The auto sector is one example of this phenomenon. Another comment agreed:

> There are a wide variety of other digital and non-digital services where users in a different jurisdiction than the service provider could be said to create value in the same manner as digital platform services and digital advertising services companies. For example, radio and television companies that broadcast advertisements across borders supply a service whose value is dictated by whether users in the foreign jurisdiction tune in or change the channel. Other examples include corporate loyalty programs and market research services that operate across borders and depend upon user involvement.[372]

An OECD report also attests that the "ICT revolution" has enabled companies in all sectors to connect users, provide services remotely, and benefit from user participation and data, stating:

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[365] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 12, Aug. 5, 2019,

[366] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 13, Aug. 5, 2019.

[367] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 13, Aug. 5, 2019.

[368] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 14-15, Aug. 5, 2019.

[369] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 15, Aug. 5, 2019.

[370] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 11, Aug. 5, 2019.

[371] Joe Kennedy, Information Technology and Innovation Foundation, Comment, at 14, Aug. 5, 2019.

[372] Jennifer McCloskey, Information Technology Industry Council, Comment, at 9, Aug 22, 2019.

> For example, *retailers* allow customers to place online orders and are able to gather and analyse customer data to provide personalised service and advertising; t*he logistics* sector has been transformed by the ability to track vehicles and cargo across continents; *financial services* providers increasingly enable customers to manage their finances, conduct transactions and access new products on line; in *manufacturing*, the digital economy has enhanced the ability to remotely monitor production processes and to control and use robots; in the *education* sector, universities, tutoring services and other education service providers are able to provide courses remotely, which enables them to tap into global demand; in the *healthcare* sector, the digital economy is enabling remote diagnosis and the use of health records to enhance system efficiencies and patient experience. The *broadcasting and media industry* have been revolutionised, expanding the role in news media of non-traditional news sources, and expanding user participation in media through user-generated content and social networking.[373]

Another OECD report also agreed that these digital features "will become common features of an even wider number of businesses as digitalization continues."[374] Indeed, the prevalence of user data and user interactions as a basis for transactions throughout the economy was one of the factors that led the OECD to conclude that, "Because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes."[375]

Thus, the evidence on the record in this investigation suggests that users do not create value for the companies covered by the DST in a unique, significant way.

V. CONCLUSIONS

The evidence collected in this investigation indicates that:

(1) The French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies;

(2) The French DST's retroactive application is unusual and inconsistent with prevailing tax principles and renders the tax particularly burdensome for covered U.S. companies;

(3) The French DST's application to revenue rather than income contravenes prevailing tax principles and imposes significant burdens on covered U.S. companies;

(4) The French DST's application to revenues unconnected to a physical presence in France contravenes prevailing international tax principles and is particularly burdensome for covered U.S. companies; and

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[373] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, at 142.

[374] OECD, *Tax Challenges Arising from Digitalisation–Interim Report 2018: Inclusive Framework on BEPS*, at 24.

[375] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, at 142.

(5) The French DST's application to a small group of digital companies contravenes international tax principles counseling against targeting the digital economy for special, unfavorable tax treatment.

Additionally, the two rationales for the DST that French officials have publicly put forward both of these explanations rely on incorrect or unproven assertions.

A range of tools may be appropriate to address these serious matters, including intensive bilateral engagement, WTO dispute settlement, or "imposing duties, fees, or other import restrictions on the goods or services of [France]."

LAW no. 2019-759 dated 24 July 2019 concerning creation of a tax on digital services and modification of the downward correction of the corporation tax (1)

NOR: ECOE1902865L

ELI: https://www.legifrance.gouv.fr/eli/loi/2019/7/24/ECOE1902865L/jo/texte
Alias: https://www.legifrance.gouv.fr/eli/loi/2019/7/24/2019-759/jo/texte

The National Assembly and the Senate have adopted,

The President of the Republic enacts the law with the following content:

Article 1 **For more information on this Article**

I. The general tax code is thus modified:

1. Chapter II of Title II of the first part of the first book is thus reinstated:

“Chapter II

“Tax on certain services provided by large corporations in the digital industry

“Art. 299.-I.-A tax is due on the amounts collected by businesses in the digital industry as defined in III, in return for providing the services defined in II over the course of a calendar year in France.

“II. Taxable services are:

“1. The provision, by electronic communication, of a digital interface allowing users to be in contact with other users and to interact with them, especially for the purpose of delivering goods or providing services directly between these users. However, the provision of a digital interface is not a taxable service:

“a) When the person providing this service uses the digital interface primarily to provide users with:

“- digital content;

“- communications services;

“- payment services, under the meaning of Article L. 314-1 of the monetary and financial code;

“b) When the digital interface is used to manage the following systems and services:

“- interbank settlement systems or financial instrument settlement and delivery systems, under the meaning of Article L. 330-1 of the same code;

“- negotiation platforms defined in Article L. 420-1 of the aforesaid code or negotiating systems of systematic internalizers defined in Article L. 533-32 in the same code;

“- advisory activities for equity investments, under the meaning of Article L. 547-1 of the same code, and, if they facilitate lending, intermediary services for crowdfunding, under the meaning of Article L. 548-1 of the same code;

“- other linking systems listed in an order of the Minister of the Economy, whose activities are subject to authorization and whose service provision is subject to monitoring by a regulatory authority to ensure the security, quality and transparency of transactions related to financial instruments, savings products or other financial assets;

“c) When the purpose of the digital interface is the purchase or sale of services for the purpose of placing advertising under the conditions set forth in 2. of this II;

“2. Services marketed to advertisers, or their agents, for the purposes of placing on a digital interface advertising that is targeted based on user data collected or generated when such interfaces are visited, including when they are produced via interfaces whose provision is not taxable based on c. of 1. of this II. These services may specifically include purchasing, storage, and placement of advertisements, advertising and performance monitoring, and user data management and transmission services.

“Taxable services do not include the services listed in 1. and 2. of this II provided between businesses belonging to the same group, under the meaning of the last paragraph of III.

“III. Businesses listed in I are those, whatever their place of establishment, for which the amounts collected in return for taxable services during the preceding calendar year listed in the same I exceed the following two limits:

“1.750 million EUR for services provided worldwide;

“2.25 million EUR for services provided in France, under the meaning of Article 299 (a).

“For businesses, whatever their form, that are directly or indirectly connected, under the meaning of II of Article L. 233-16 of the code of commerce, the limits listed in 1. and 2. of this III are assessed at the level of the group they constitute.

“Art. 299 bis

I. For the application of this chapter:

“1. France includes its national territory, except for communities governed by Article 74 of the Constitution, New Caledonia, French Southern and Antarctic Territories and Clipperton Island;

“2. The user of a digital interface is located in France if he/she visits the interface by means of a terminal located in France. This terminal’s location in France is determined by any means,

including based on its IP (internet protocol) address, in accordance with regulations on the use of personal data;

“3. Amounts paid for the provision of a taxable service as defined in 1. of Article 299 mean all amounts paid by users of that interface, except those paid for the delivery of goods or the provision of services that constitute, in economic terms, operations independent of the access and use of the taxable service;

“4. Amounts paid in return for the provision of a taxable service as defined in 2. of the same II mean all amounts paid by advertisers or their agents in return for the placement of advertisements or any other operation that is closely related in economic terms.

“II. Taxable services listed in 1. of II of Article 299 are provided in France during a calendar year if:

“1. When the digital interface allows the delivery of goods or the provision of services between interface users, such a transaction is concluded during this year by a user located in France;

“2. When the digital interface does not allow for the delivery of goods or the provision of services, one of its users has, over the course of this year, an account opened from France and that allows him/her to access all or part of the services available on this interface.

“III. Taxable services listed in 2. of II of Article 299 are provided in France over the course of a calendar year if:

“1. For services other than those listed in 2. of this III, an advertisement is placed over the course of this year on a digital interface based on data regarding a user who visits this interface while located in France;

“2. For the sale of data that were generated or collected during the use of digital interfaces by users, data sold over the course of this year are a result of the use of one of these interfaces by a user located in France.

“IV. When a taxable service listed in II of Article 299 is provided in France over the course of a calendar year under the meaning of II or III of this Article, the amount of payments made in return for this provision is defined as the proceeds of the total amounts paid over the course of this year in return for this service multiplied by the percentage representing the portion of these services connected with France for this same year. The percentage is equal:

“1. For the services listed in 1. of II, to the proportion of transactions for the delivery of goods or the provision of services for which one of the users of the digital interface is located in France;

“2. For the services listed in 2. of the same II, to the proportion of users having an account opened from France and allowing access to all or part of the services available from the interface and who have used this interface during the calendar year concerned;

“3. For the services listed in 1. of III, to the proportion of advertisements placed on a digital interface based on data regarding a user who visits this interface while located in France;

“4. For the services listed in 2. of the same III, to the proportion of users for whom all or part of the data sold were generated or collected at the time of use of a digital interface while they were located in France.

“Art. 299 (3).

The operative event of the tax set forth in Article 299 is constituted by the completion of the calendar year during the course of which the business defined in III of the same Article 299 collected amounts in return for the provision in France of taxable services. However, if the subject entity ceases operations, the tax’s operative event occurs when operations are ended.
“The entity subject to the tax is the person who collects the amounts. The tax becomes payable when the operative event occurs.

“Art. 299 (4)

I. The tax set forth in Article 299 is assessed on the amounts, not including value added tax, as defined in section IV of Article 299 (2), collected by the subject entity for the year in which the tax becomes payable, in return for a taxable service provided in France.

“However, this does not take into account amounts paid in return for the provision of a digital interface that facilitates the sale of products subject to excise tax, under the meaning of 1 of the first article of Directive 2008/118/CE of the Council dated 16 December 2008 relative to the general excise tax system and abrogating Directive 92/12/CEE, when there is a direct and indissociable connection with the volume or value of these sales.

“II. The amount of the tax is calculated by applying a 3% rate to the base defined in I of this article.

“Art. 299 (5)

For the application of this chapter, the amounts collected in a currency other than euros are converted by applying the latest exchange rate published in the Official Journal of the European Union, as of the first day of the month in which the amounts are collected.

“Art. 300. I. The tax set forth in Article 299 is declared and paid by the subject entity using the following methods:

“1. For entities subject to the value added tax subject to the normal current taxation schedule listed in section 2 of Article 287, on the annex to the declaration listed in section 1 of the same Article 287 filed for the month of March or the first quarter of the year following that in which the tax becomes payable;

“2. For entities liable for the value added tax subject to the simplified current taxation schedule set forth in Article 302 (7) A, on the annual declaration listed in section 3 of Article 287 filed for the fiscal year during which the tax becomes payable;

“3. In all other cases, on the annex to the declaration set forth in section 1 of the same Article 287, filed with the collection service where the headquarters or primary establishment of the subject entity is located, no later than 25 April of the year following that in which the tax becomes payable.

“II. The tax is paid under the conditions set forth in Article 1693 (4), except by entities subject to the simplified current taxation schedule set forth in Article 302 (7) A, for which it is paid under the conditions set forth in Article 1692. Without prejudice to the provisions in Articles L. 16 C and L. 70 A of the book of fiscal procedures, it is collected and audited using the same procedures and with the same penalties, safeguards, security procedures and privileges as taxes on revenue. Claims are presented, examined and judged according to the regulations applicable to these same taxes.

“III. Since the right to administrative review may be exercised, in accordance with Article L. 177 A of the book of fiscal procedures, the subject entity will maintain, with the support of their accountant, information on the amounts collected monthly in return for each taxable service provided, noting those related to a service provided in France, under the meaning of II and III of Article 299 (2) of this code, and, if applicable, those excluded from the base in application of the second paragraph of I of Article 299 (2), and those monthly quantitative items used to calculate the proportions set forth in IV of Article 299 (2). Information on the exact monthly amounts collected, if applicable, the amount collected in a currency other than euros, and the amount converted into euros following the methods set forth in Article 299 (5), specifying the exchange rate used in application of the same Article 299 (5).

“This information is maintained at the disposal of the administration and is provided to it upon its first request.

“IV. When the subject entity is not established in a member state of the European Union or in any other state that is party to the Agreement on the European Economic Area having reached an agreement with France for administrative anti-fraud and tax evasion assistance and a mutual assistance agreement for the recovery of taxes, it will assign a representative accredited with the competent tax service, subject to the value added tax established in France, who will be required, if applicable, to fulfill the formalities on behalf of the party represented and pay the tax on its behalf.”;

2. II (4) of Section II of the first chapter of book II is thus reinstated:

“II (4): Special tax schedule on certain services provided by large corporations in the digital industry

“Art. 1693 (4).

I. Entities liable for the tax set forth in Article 299 other than those subject to the simplified current taxation schedule set forth in Article 302 (7) A or permitted to file their declarations quarterly in accordance with the last paragraph of section 2 of Article 287 settling this tax through two advance payments paid during the year in which it becomes payable and at least equal to the amount due for the preceding year

“The first advance payment is paid when the tax payable for the preceding year is declared.

“The second advance payment is paid:

“1. For entities liable for the value added tax subject to the normal current taxation schedule listed in section 2 of Article 287, when the annex to the declaration listed in section 1 of the same Article 287 is filed in the month of September;

“2. In other cases, no later than 25 October, when the annex to the declaration set forth in the same section 1 is filed with the collection service for the headquarters or principal establishment of the subject entity.

“II. Subject entities who believe that an advance payment will exceed the amount of the tax due may delay the last payment or reduce its amount.

“When a subject entity uses the option set forth in the first paragraph of this II and the final amount of tax due is more than 20% greater than the amount of advance payments made, default interest as set forth in Article 1727 and penalties set forth in Article 1731 are applicable.

“The interest and penalties listed in the second paragraph of this II are applied to the positive difference between the sum of the amounts of each of the two advance payments made without downward adjustment and the sum of the amounts of each of the two advance payments actually paid.

“III. The amount of tax due is paid when it is declared. If applicable, the amounts to be refunded to the subject entity are charged against the advance payment made at the time of this declaration, then, if necessary, on the amount paid previously in the same year, or, for lack of or insufficient advance payments, refunded.

“Art. 1693 (4) A. If the subject entity ceases operations, the amount of the tax set forth in Article 299 due for the year operations ceased is immediately determined. It is declared, paid, and, if applicable, settled following the methods set forth for the value added tax applicable to it, or within sixty days following the end of operations.

“Art. 1693 (4) B.

I. An entity subject to the tax set forth in Article 299 that is not subject to the simplified current taxation schedule set forth in Article 302 (7) A nor permitted to file its declaration quarterly in accordance with the last paragraph of section 2 of Article 287 may choose to declare and pay the tax for all subject entities in the group, under the meaning of the last paragraph of III of Article 299, to which it belongs. In this case, Article 1693 (3) does not apply to this tax.

“This option is exercised with the agreement of all subject entities in the group.

“II. The subject entity exercising the option set forth in I of this Article presents its request to its appropriate tax service. This option takes effect for payments and refunds occurring beginning with the filing of the declaration for the year following the receipt of the demand by this service.

“III. The option is exercised for at least three years.

“The subject entity waiving the option presents its request for waiver to its appropriate tax service. This waiver takes effect for payments and refunds occurring beginning with the filing of the declaration for the year following the receipt of the request by this service.
“The option applies for the tax due by any new member of the group concerned. If the latter disagrees, the option is waived under the conditions set forth in the second paragraph of this III.

“IV. The declaration filed by the subject entity exercising the option lists the amounts due from each member of the group.

“V. The subject entity exercising the option set forth in section I obtains the refunds of taxes due by the subject entity members of the consolidated group, if applicable, by allocating the amounts due from the other members and pays the duties, interest and penalties set forth in Chapter II of this book as a result of violations by the subject entity group members.

“VI. Each subject entity group member is held jointly with the subject entity exercising the option set forth in I to payment of the tax and, if applicable, corresponding interest and penalties that the subject entity exercising the option set forth in the same I is responsible for paying, up to the amount of duties, interest and penalties that the group member subject entity would owe if the option listed in I had not been exercised.”;

3. In Article 302 decies, after the words “the articles,” the reference “299” is inserted.

II. Title II of the first part of the book of fiscal procedures is thus modified:

1. I (3) of II of the first chapter is thus edited:

“I (3): Tax on certain services provided by large corporations in the digital industry

“Art. L 16 C. The tax administration may request justification from the entity liable for the tax set forth in Article 299 of the general tax code for all items used as the basis for calculating this tax without this request constituting the start of an accounting verification or audit.

“This request specifically informs the subject entity of the points it covers and provides a deadline for responding, which may not be less than two months.

“When the subject entity has not responded or has provided an insufficient response to the request for justification by the deadline provided, the tax administration will send a formal notice to produce or to complete its response within thirty days, specifying, if applicable, the additional information required. This formal notice will list the taxation procedure set forth in Article L. 70 A of this book.”;

2. After the third paragraph of Article L. 48, a paragraph is inserted as follows:

“For the subject entity that is a member of a group listed in Article 1693 (4) B of the general tax code, the information set forth in the first paragraph of this article covers, concerning the tax set forth in Article 299 of the general tax code and the corresponding penalties, on the amounts owed by the subject entity if it does not belong to a group.”;

3. In the last paragraph of the same Article L. 48, after the reference “Article L. 247”, the words “of this book” are inserted;

4. B of I of Section V of the first chapter is supplemented by Article L. 70 as follows:

“Art. L 70 A. When, within thirty days of the receipt of the formal notice listed in the last paragraph of Article L. 16 C, the subject entity has not responded, has not completed its response or has provided insufficient information, the tax administration may proceed with the systematic taxation of the subject entity for the tax set forth in Article 299 of the general tax code.”;

5. Article L. 177 A is thus reinstated:

“Art. L 177 A. By derogation to the first paragraph of Article L. 176 of this book, for the tax on certain services provided by large corporations in the digital industry set forth in Article 299 of the general tax code, the right of administrative review is in force until the end of the sixth year following the year in which the tax becomes payable in accordance with Article 299 (3) of the same code.

“By derogation to the second paragraph of Article L. 196 of this book, for the tax set forth in Article 299 of the general tax code, the right to administrative review is in force until the tenth year following the year in which the tax becomes payable in accordance with Article 299 (3) of the same code.”

III. By derogation to I of Article 1693 (4) of the general tax code, the tax set forth in Article 299 of the same code due for 2019 will be subject to a single advance payment, paid under the following conditions:

1. For entities liable for the value added tax subject to the normal current taxation schedule listed in section 2 of Article 287 of the aforesaid code, when the annex to the declaration listed in section 1 of the same Article 287 is filed in October;

2. In other cases, no later than 25 November, when the annex to the declaration set forth in the same section 1 is filed with the collection service for the subject entity’s headquarters or the primary establishment.

This advance payment is equal to the amount of the tax that would have been paid on the basis of amounts collected in 2018 in return for taxable services provided in France. The percentage of services connected with France defined in IV of Article 299 (2) of the same code is assessed for the inclusive period between the day after this law is published and 31 October 2019. The

advance payment is due from entities that are beyond the thresholds listed in III of Article 299 of the general tax code, determined based on the same amounts and percentages, without prejudice to its refund when it is determined that the necessary conditions for tax liability have not been met.

For tax liability and the payment of the tax set forth in Article 299 of the same code due for 2019, the percentage representing the portion of services connected with France defined in IV of Article 299 (2) of the aforesaid code is assessed for the inclusive period between the day after this law is published and 31 December 2019.

IV. The option set forth in Article 1693 (4) B of the general tax code may, for the tax set forth in Article 299 of the same code due for 2019, be imposed up until 31 October 2019 and take effect starting with the first payment as of that date.

V. Prior to September 30 of each year, the Government will provide a report to Parliament on the negotiations conducted within the Organization for Economic Cooperation and Development to identify and implement a coordinated international solution to strengthen the appropriateness of international taxation rules given economic changes and modern technologies. This report will include, for each proposal in the public consultation document of February 2019, the positions of France, the European Union and each taxing jurisdiction participating in these efforts and the motivation of each of these positions, the status of the negotiations, perspectives on the outcome, and budgetary, tax, administrative and economic impacts for France and French businesses. It will also report, if applicable, on the progress of efforts undertaken on these issues in the context of the European Union or any other relevant international setting. It will specifically inform members of parliament on the possibility of implementing improved cooperation for taxation of the digital economy at the European level.

It will also report on the status of negotiations on the tax on digital services set forth in Article 299 of the general tax code and indicate the date on which a new mechanism implementing the coordinated international solution will be substituted for this tax.

Article 2 **For more information on this Article**

In the absence of prior notice of the tax on digital services set forth in Article 299 of the general tax code to the European Commission in application of Article 108, paragraph 3, of the Treaty on the Functioning of the European Union, the Government will provide, within three months starting with the enactment of this law, a report to Parliament on the reasons why notice of the aforementioned tax was not provided to the European Commission.

Article 3 **For more information on this Article**

Within three months starting with the enactment of this law, the Government will provide a report to Parliament on the status of taxes impacting the retail sector. It will specify the differences in taxation between brick-and-mortar retail businesses and e-commerce businesses, particularly transnational businesses.

This report will develop proposals to arrive at a more equitable tax system for different forms of retail businesses.

Article 4 **For more information on this Article**

I. The second paragraph of section I of Article 219 of the general tax code is supplemented by the following sentence: “By derogation, for fiscal years from 1 January to 31 December 2019, the normal tax rate is set, without prejudice to provisions set forth in 2. of c. of this I, at 33.1/3% for subject entities with revenue equal or greater than 250 million EUR.”

II. The revenue listed in the second sentence of the second paragraph of I of Article 219 of the general tax code includes that realized by the subject entity over the course of the fiscal year or the assessment period, adjusted for twelve months. For the parent company of a group listed in Article 223 A or Article 223 A (2) of the same code, revenue is the sum of revenues of each corporate member of that group.

III. In the first paragraph of 2. of F of I of Article 84 of finance law no. 2017-1837 dated 30 December 2017 for 2018, the words: “, in its version resulting from 1. of this F,” are deleted.
IV. The provisions of I and II apply to fiscal years closed as of 6 March 2019.

Article 5 **For more information on this Article**

Beginning in 2020, prior to 30 September of each year, the Government will provide a report to Parliament on the results of the tax set forth in Article 199 of the general tax code and on its economic impact. This report will also specify the distribution of revenue from the tax based on the service categories listed in II of the same article 299 and on the geographic origin of the subject groups.

The present law will be enacted as a National Law.

Done at Paris, 24 July 2019.

By the President of the Republic: Emmanuel Macron

The Prime Minister, Edouard Philippe

The Minister of the Economy and Finance, Bruno Le Maire

The Minister for Public Action and Accounts, Gérald Darmanin

Parliamentary Undersecretary for the Digital Economy, Cédric O

(1) Preparatory work: Law no. 2019-759.

National Assembly:

Draft law no. 1737;

Report of Mr. Joël Giraud, on behalf of the Finance Committee, no. 1838;

Opinion of Mr. Benoit Potterie, on behalf of the Economic Affairs Committee, no. 1800;

Opinion of Mr. Denis Masséglia, on behalf of the Foreign Affairs Committee, no. 1819;

Discussion of 8 and 9 April 2019 and adoption, following commitment to the accelerated procedure, 9 April 2019 (TA no. 256).

Senate:

Draft law, adopted by the National Assembly, no. 452 (2018-2019);

Report of Mr. Albéric de Montgolfier, on behalf of the Finance Committee, no. 496 (2018-2019);

Committee text no. 497 (2018-2019);

Discussion and adoption 21 May 2019 (TA no. 101, 2018-2019).

National Assembly:

Draft law, modified by the Senate, no. 1975;

Report of Mr. Joël Giraud, on behalf of the Joint Committee, no. 2080;

Discussion and adoption 4 July 2019 (TA no. 304).

Senate:

Report of Mr. Albéric de Montgolfier, on behalf of the Joint Committee, no. 615 (2018-2019);

Committee text no. 616 (2018-2019);

Discussion and adoption 11 July 2019 (TA no. 132, 2018-2019).

THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

July 10, 2019

Minister Bruno Le Maire
Ministry of Economy and Finance
Paris, France

Dear Minister Le Maire:

I am writing to inform you that, in accordance with the relevant provisions of Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation of France's Digital Services Tax (DST) policy, as set out in the bill passed by the National Assembly on July 4, 2019.

The investigation will initially consider several aspects of the DST bill: (1) whether the DST will amount to *de facto* discrimination against U.S. companies, for example, because the revenue thresholds have the effect of subjecting to the DST larger companies – which, in the covered sectors, tend to be U.S. companies – while exempting smaller companies, particularly those that operate only in France; (2) whether the fact that the DST would be a substantively new tax that applies retroactively to January 1, 2019 renders the DST unfair to covered companies; and (3) whether the DST diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.*, its extraterritorial application, the fact that it applies to revenue not income, and its apparent purpose of penalizing certain technology companies for their commercial success. Depending on the course of the investigation, other aspects and features of the DST bill might also be included.

In accordance with Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of France regarding these matter. These issues are of great concern to the Government of the United States. I look forward to working with you or another appropriate official in a cooperative manner to resolve this matter.

Sincerely yours,

Robert E. Lighthizer