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Joseph Barloon
General Counsel
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Docket No. USTR-2019-0009

Dear Mr. Barloon:

The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to present the following comments to the Office of the U.S. Trade Representative (USTR) on the "Section 301 Investigation of France's Digital Services Tax" pursuant to Federal Register Notice (FRN) 2019-15081/Docket No. USTR-2019-0009.

USTR has initiated an investigation with respect to the Digital Services Tax (DST) recently enacted by the Government of France to determine whether it is actionable under Section 301 of the Trade Act of 1974. As the FRN notes, "Actionable matters under Section 301 include, *inter alia*, acts, polices, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce."

The Chamber has repeatedly expressed opposition to the French DST on behalf of U.S. companies that have invested billions of dollars in France and engage in mutually beneficial commercial relationships with citizens and businesses across that country. The Chamber has expressed support for negotiations taking place under the aegis of the Organization for Economic Cooperation and Development (OECD) to forge a multilateral, consensus-based solution to the tax challenges arising from the digitalization of the economy, and many have noted that France's unilateral introduction of its DST is at odds with that undertaking.

In the following comments, the Chamber will lay out the rationale for its opposition to the DST under the three headings suggested by the FRN, namely: the ways the DST discriminates against U.S. companies, the harm related to its retroactive application, and the ways it represents unreasonable tax policy.

Discrimination

The French DST amounts to de facto discrimination against U.S. companies. In fact, the DST appears to violate obligations France and the EU have undertaken as parties to the WTO's General Agreement on Trade in Services (GATS). Specifically, it violates the national treatment principle, which enjoins WTO Members to "accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers" (GATS Article XVII). The GATS explicitly prohibits Members from implementing measures that afford de facto discrimination even when the measure provides "formally identical" treatment.

The DST violates the national treatment principle and discriminates against U.S. companies in three ways. First, thresholds in the DST are set at a level that captures large U.S. technology companies while sparing French industry almost entirely. The DST will apply only to companies with worldwide "qualifying" gross revenues of at least €750 million and French "qualifying" revenues of at least €25 million. These are revenues derived from services deemed to be made or supplied in France excluding value-added taxes (VAT). Published reports, including a comment by the French finance minister, indicate an expectation that the French DST will impact just one French firm.

Second, as just noted, the French DST allows VAT to be subtracted from taxable revenue in calculating the base tax rate. Of course, the United States is one of the very few major world economies that does not impose VAT, so this element of the DST has the effect of expanding the tax base for U.S. firms relative to their European competitors. This approach heightens the impact of the discrimination against U.S. firms. The French DST also provides a deduction for DST payments against French corporate income tax, with discriminatory results similar to those of a tariff applied against sales by foreign companies.

Third, the 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), online intermediation services that depend on the transmission of users' data to other users (e.g., social media), and online advertising services (e.g., Google and Facebook). The DST does not apply to other digital services where French firms are significant actors (e.g., financial services, payment services, communications services, or other types of intermediation services).

Retroactivity

The DST applies retroactively to January 1, 2019. This feature violates international tax norms as retroactivity creates uncertainty for taxpayers as they seek to manage their cash and financial statement tax positions. Some companies covered by the DST may not have been tracking the data necessary to calculate their potential liability back to the beginning of 2019.

The implications of retroactivity will be significant for many firms. Companies that have not been tracking revenue in the prescribed manner will immediately be in a non-compliant position due to the DST's retroactive application. Tax compliance costs and the burden of compliance in numerous jurisdictions will further cut into firms' margins and may lead companies to pull back from activities in France.

Further, the French DST may create audit risks where they did not previously exist. Taxpayers will have little certainty as to the collection of this new tax and will be subject to new audits even in instances where little or no nexus exists with the country.

Unreasonable Tax Policy

The FRN requests input on whether the French DST represents "unreasonable tax policy." The fact that the DST is unreasonable is evident in the multiple ways it conflicts with principles developed as part of the OECD's Inclusive Framework on Base Erosion and Profit Shifting process. Through this process, more than 130 governments are developing a global approach to the challenges posed by digitalization of the economy. Specifically, the French DST conflicts with the following principles:

- No ring fencing of the digital economy;
- The principles of international taxation, including taxation of net income;
- Avoidance of multiple taxation of the same income;
- Providing certainty for taxpayers and minimizing tax disputes;
- Minimizing the compliance burden on tax administrations and taxpayers;
- New taxing regimes should be implemented on a prospective basis;
- Consistency with the principles of proportionality and sustainability; and
- Deviation from the arms-length standard.

The French DST also appears to violate existing tax treaties, which uphold many of these same principles.

The FRN also asks for views on the extent to which the French DST burdens or restricts U.S. commerce. In addition to the problems described above, it is estimated that the DST will generate revenue of approximately €500 million per year, a large majority of which will be paid by U.S. firms. The DST will also impose significant compliance costs and administrative burdens on U.S. firms. For example, companies will need to engage in significant re-engineering of accounting systems to ensure that they can accurately assess DST liability for French advertising transactions. Firms will also need to include new filing and audit components on French accounts. Estimated costs to U.S. firms are in the millions.

The French DST appears to be an attempt to garner leverage in the aforementioned negotiations at the OECD to craft a consensus-based solution to the tax challenges arising from the digitalization of the economy. However, instead of helping the process along, this unreasonable tax policy will likely make consensus even more difficult to attain.

Recommendation

The FRN specifically seeks recommendations on what action, if any, should be taken in response to the French DST. The Chamber recommends that the United States government initiate dispute settlement proceedings at the WTO. As noted above, it is our assessment that the DST violates obligations France has undertaken under the GATS. WTO dispute settlement is a wholly appropriate avenue for addressing the DST's multiple, obvious discriminatory features.

The Chamber does not support the application of tariffs to French goods under Section 301 as a remedy. Such action would add to the potential for an escalating trade war with France and the EU and may elicit additional rounds of retaliatory measures that represent a substantial risk to U.S. economic growth and job creation.

The Chamber further urges the Administration to remain focused on the OECD project to address tax challenges of digitalization that will affect a wide range of U.S. companies. The hard work of Treasury officials and staff in this regard is widely appreciated in the U.S. business community.

The Chamber appreciates the opportunity to offer these comments and is ready to provide additional input as appropriate.

Sincerely,

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U.S. Chamber of Commerce

Caroline L. Harris
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Chief Tax Policy Counsel
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