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U.S. Government investigates a potential threat to U.S. and global e-service providers: France’s Digital Service Tax

19 August 2019

On 10 July 2019, the Office of the U.S. Trade Representative (USTR) initiated an investigation pursuant to Section 301 of the Trade Act of 1974 into France’s Digital Services Tax (DST) to determine whether the tax is discriminatory or unreasonable and burdens or restricts United States commerce. Following an affirmative finding by USTR, the U.S. may take unilateral actions against imports of goods and services from France (including the imposition of a tariff or quota) or may initiate World Trade Organization (WTO) dispute settlement proceedings, among other actions.

Background

The French Parliament passed the DST in early July, and the law was published in the French Offical Journal on 25 July 2019. The DST is a three-percent tax on revenues derived from two categories of digital services: (1) digital interface services that allow users to contact and interact with other users, notably with a view to supplying goods or services between those users, and (2) digital advertising services that enable advertisers to place targeted advertising on a digital interface.

Companies will be subject to the DST if they meet the following criteria: (1) engage in one of the digital services identified above; (2) have at least €750 million in global gross revenues from the activities; and (3) have at least €25 million in gross revenues generated from the activities in France. France’s Finance Minister Bruno Le Maire has stated that approximately 30 companies will meet these criteria. Most of these companies are U.S. firms.

The tax would apply retroactively, beginning 1 January 2019.

Section 301 investigation process

The Trump Administration has undertaken several unilateral measures to correct allegedly unlawful international trade actions by U.S. trading partners. For example, pursuant to Section 301, USTR has imposed 25% ad valorem tariffs on hundreds of billions of dollars of U.S. imports from China.

In announcing the Section 301 investigation of the DST, U.S. Trade Representative Robert Lighthizer stated that the United States is very concerned that the digital services tax "unfairly targets American companies." USTR's investigation will take 12-to-18 months and will assess whether the DST is "unreasonable or discriminatory and burden[s] or restrict[s] U.S. commerce." If the answer is affirmative, then USTR then may take unilateral action in response.

USTR's 10 July Federal Register notice states that the Section 301 investigation will initially focus on the following concerns with respect to the DST:

- **"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.
- **Retroactivity:** The DST would be a substantively new tax that applies retroactively to 1 January 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.
- **Unreasonably 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."

Key dates for the Section 301 investigation include:

- August 12: Interested parties must file requests to appear at the USTR public hearing
- August 19: Interested parties must file written comments with USTR
- August 19: Public hearing at U.S. International Trade Commission
- August 26: Parties must file post-hearing submissions with USTR

USTR has specifically asked for comments with respect to the following:

- Business concerns with the French digital services tax;
- Whether the French DST is unreasonable or discriminatory;
- The extent to which the French DST burdens or restricts U.S. commerce;
- Whether the French DST is inconsistent with France's obligations under the WTO Agreement or any other international agreement; and
- The determinations USTR must make under Section 304 of the Trade Act, including what retaliatory action, if any, should be taken.

Other countries are considering digital services tax

Several countries including other EU Member States are considering moving ahead in enacting a tax measure like France's DST. The day after USTR announced the Section 301 investigation, the UK Government published draft legislation that would impose a two-percent tax on companies with revenues derived from providing a social media platform, search engine, or online marketplace to UK users. The UK tax would apply to companies with global revenues exceeding £500 million, of which more than £25 million of these revenues is derived from UK users starting 1 April 2020. Austria, the Czech Republic, India, Italy, New Zealand, and Spain are also considering such tax measures.

These pan-european developments follow the failure earlier this year to adopt a common approach on DST across all EU Member states through the proposed EU Directive on Digital Advertising Tax (DAT). We anticipate that the new European Commission expected to take office on 1 November 2019 would be asked to re-assess a common EU-wide approach in the near future.

Recommended actions

We recommend that companies assess the possible impact of France's DST on their businesses. Companies should urgently consider whether they should participate in the public comment and hearing process that has been announced. We would be pleased to assist you with both the initial assessment and/or participation in the Section 301 investigation.

Hogan Lovells will closely monitor the Section 301 investigation, France's DST, and other similar tax measures under consideration.

Contacts

Bret S. Cohen
Partner, Washington, D.C.
T +1 202 637 8867
bret.cohen@hoganlovells.com

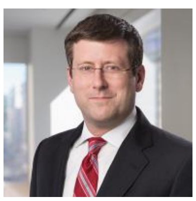
Jonathan T. Stoel
Partner, Washington, D.C.
T +1 202 637 6634
jonathan.stoel@hoganlovells.com

Aline Doussin
Partner, London
T +44 20 7296 2961
aline.doussin@hoganlovells.com

H. Deen Kaplan
Partner, Washington, D.C.
T +1 202 637 5799
deen.kaplan@hoganlovells.com

Warren H. Maruyama
Partner, Washington, D.C.
T +1 202 637 5716
warren.maruyama@hoganlovells.com

Harriet Pearson
Partner, Washington, D.C., New York
T +1 202 637 5477 (Washington, D.C.)
T +1 212 918 5548 (New York)
harriet.pearson@hoganlovells.com



Jared R. Wessel
Counsel, Washington, D.C.
T +1 202 637 6472
jared.wessel@hoganlovells.com

Lindsay K. Brown
Law Clerk, Washington, D.C.
T +1 202-637-2436
lindsay.brown@hoganlovells.com