



DIGITAL SERVICES TAXES

Do They Comply with Tax and Trade Agreements and EU Law?

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Executive Summary

The development and proliferation of digital technologies has led to a wave of digitalization within our economy. While enriching our daily lives and enhancing the welfare of society, digitalization has also upended a host of longstanding legal and regulatory regimes. Among them is the international system for corporate income taxation. Bilateral tax treaties negotiated with brick-and-mortar trade in mind have failed to address the challenges associated with the taxation of digitalized economy.

Concerned about erosion of their tax base and pessimistic about the possibility of reaching a global consensus on the issue, several countries, led by France, have proposed or implemented digital services taxes on the world's largest technology companies to redeem the value of user-created data allegedly exploited by those digital service providers. By using the French Digital Services Tax (hereinafter "the French DST") as a case study, this memorandum aims to assess the compliance of digital services taxes under the frameworks of international tax, international trade and EU law.

International Tax Law

With regard to international tax law, the threshold question that must be answered is which tax treaty applies for purposes of the French DST. Since the French DST is imposed at the "group" level, every company within the group that is subject to the DST can challenge the measure and the treaties on which to base those challenges depend on the tax residence of the challenging companies. Considering that all income tax treaties include similar language and provisions and that many of the U.S. "tech giants" targeted by the French DST have their European headquarters in Ireland, we have chosen to use Ireland-France Treaty (hereinafter "the Treaty") as an example to address the international tax issues raised by the DST.

Our analysis addresses two issues: (1) whether the French DST is a tax covered in Article 1 of the Treaty and (2) whether the French DST violates the non-discrimination clause of the Treaty by disproportionately targeting Irish companies while leaving most French companies exempted from the tax.

As to the first issue, we conclude that the French DST is not a “tax covered” by Article 1 of the Treaty. This conclusion precludes the application of most parts of the Treaty, but it does not prevent the non-discrimination clause (Article 22) as a stand-alone provision from coming into play. As to the non-discrimination issue, Irish companies, their permanent establishments in France and their French subsidiaries might be able to claim discrimination under Article 22. In the end, it is likely that the Irish headquarters of the targeted “tech giants” and their French subsidiaries will succeed in a challenge against the DST based on “nationality discrimination” and “foreign ownership discrimination.”

International Trade Law

With respect to international trade law, there are three legal instruments relevant to a legal analysis of the French DST: (1) The WTO moratorium on customs duties on electronic transmissions; (2) The WTO General Agreement on Trade in Services (hereinafter “the GATS”); and (3) individual bilateral or plurilateral free trade agreements. A challenge against the DST in the trade law context would have to be made by a state – not an individual company. The U.S is the most likely country to challenge France’s DST, so the analysis below is approached from the perspective of a claim by the U.S. against France.

The WTO moratorium on electronic transmissions likely would not cover the French DST, as it is limited specifically to “customs duties” and the French DST is an internal tax. Moreover, the moratorium is not subject to WTO dispute settlement, so it cannot be used as the basis for a legal claim that could compel France to rescind its DST if successful.

The General Agreement on Trade in Services is the primary vehicle through which the U.S. can challenge the French DST under international trade law. The U.S. could potentially bring two type of claims against the French DST under the GATS: national treatment (under Art. XVII) and most-favored nation (hereinafter “MFN”) (under Art. II). National treatment requires that France not discriminate against foreign services or service providers in favor of domestic services and service suppliers. MFN requires that France not discriminate between the services and service suppliers of one foreign

country in favor of those of another foreign country. It is probable that the U.S. could establish that the French DST violates national treatment, and perhaps also MFN. Furthermore, France would not be able to justify these violations under the exceptions in GATS Art. XIV because the French DST cannot satisfy the Art. XIV gatekeeping provision (the so-called chapeau) – which is necessary to successfully invoke any of the exceptions. Ultimately, there is a good chance that the U.S. could prevail in a WTO case challenging the French DST.

While there is no currently no free trade agreement in place between the U.S. and France, as DSTs proliferate to more countries free trade agreements will likely come into play as another legal regime applicable to these measures. As such, it is important to also assess the compliance of a measure like the French DST against now standard provisions in U.S. and European trade agreements.

Under the relevant U.S.-Japan Digital Trade Agreement – lauded as the “gold standard” for rules on digital trade – the U.S. may prevail on a challenge against a measure like the French DST. This is because a French-style DST likely violates the Agreement’s non-discrimination obligation for internal taxes. Moreover, a French-style DST does not qualify the exceptions in the agreement – which mirror GATS Art. XIV.

On the other hand, if the agreement mirrored the EU-Canada Comprehensive and Economic Trade Agreement then a challenge to a French DST-like measure would probably fail. A French-style DST would be consistent with the agreement’s prohibition on customs duties on electronic deliveries because these provisions explicitly exclude internal taxes like a DST. Even assuming the DST violated the national treatment and MFN provisions in the agreement’s trade in services chapter, it would almost certainly be justified under the agreements exceptions provisions – which are significantly more generous than GATS Art. XIV.

EU Law

EU Law can be invoked by subsidiaries of U.S. companies established in EU Member States. Being EU nationals, these subsidiaries have the right to challenge the French DST under EU law.

The EU law analysis focuses on three provisions: (1) Article 401 of the VAT Directive (2) Article 56 of the Treaty on the Functioning of the European Union (TFEU) – the freedom to provide services and (3) the State Aid provisions of the TFEU.

This memorandum concludes that the DST does not have all the essential characteristics that would qualify it as a “turnover tax” for the purposes of the VAT Directive. As such, France is not prohibited from adopting DST in addition to its VAT.

As to the freedom to provide services, this memorandum concludes that, based on recent case law, it is uncertain whether a challenge alleging that the DST constitutes indirect discrimination against foreign companies would succeed.

Finally, it is likely that a challenge alleging that DST constitutes prohibited state aid would succeed. This is because to the design of the DST selectively favors French companies by providing them a competitive advantage in the form of not having to pay the DST.

1 Introduction

Over the last two decades, the emergence of the Internet has prompted an unprecedented wave of innovation and technological development. The result, a digitalized economy, has not only caused a sea change in people’s daily lives, but also led to the most severe regulatory headache the international tax and trade world has ever seen. The existing tax treaty framework, which was negotiated a hundred years ago with brick-and-mortar trade in mind, has proven to be ill-suited to govern the taxation of digital companies and services.¹

The current international tax system is governed by two fundamental principles—source-based and residence-based taxation.² In order for the source country where the revenue is generated to tax the profits made by non-residents, there must be a permanent establishment created by the non-residents within its territory.³ However, because of the intangibility of digital services, revenues are often generated by technology companies without any physical presence within the source country, leaving the source country with no permanent establishment on which to base their taxation rights.⁴ Thus, the inability of the source countries to tax the profits made by “tech giants” in their territory has created a significant void in the current international tax system and left many countries feeling that these companies are not paying their “fair share” of taxes.

In light of the increasing significance of this regulatory void, the Organization for Economic Cooperation and Development (hereinafter “the OECD”), a

¹ See OECD, *Brief on the Tax Challenges Arising from Digitalization: Interim Report 2018 2* (2018) (“OECD Interim Report”), <https://www.oecd.org/tax/beps/brief-on-the-tax-challenges-arising-from-digitalisation-interim-report-2018.pdf>.

² M.F. de Wilde, *Tax Jurisdiction in a Digitalizing Economy: Why ‘Online Profits’ are so Hard to Pin Down*, 43 *Intertax* 796, 796 (2015).

³ See OECD Model Tax Convention on Income and on Capital 2017 (“OECD Model”), art. 7, Nov. 21, 2017.

⁴ *Communication from the Commission to the European Parliament and the Council, Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy*, at 5, COM (2018) 146 final (Mar. 21, 2018).

leading forum for multilateral negotiations on international tax issues, has made addressing the tax challenges raised by digitalization a top priority for the G20 Inclusive Framework on Base Erosion and Profit Sharing (hereinafter “the Framework”). In its most recent statement on the issue, members of the Framework have grouped the challenges into two pillars: (1) nexus and profit allocation and (2) minimum level of taxation. They have also reaffirmed their commitment to reaching a consensus-based solution by the end of 2020.⁵

However, despite the progress made at the international level, several countries⁶ and international entities⁷ have unilaterally proposed or implemented temporary tax measures in an effort to fill in the gap and to hold the world’s largest technology companies accountable for the vast amount of profits they make by collecting and exploiting user data.⁸ These measures come in different shapes and sizes and it is the focus of this memorandum to analyze the tax that sparked the greatest controversy—the Digital Services Tax (hereinafter “the DST”).⁹

There are several countries¹⁰ who have either proposed or enacted DSTs to tax companies that provide digital services with little or no physical presence

⁵ OECD, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the Economy 6* (2020), <http://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf>.

⁶ Belgium, France, Italy, UK, Malaysia, India, Israel, Slovakia. See KPMG, *Taxation of the digitalized economy 4* (2020), <https://tax.kpmg.us/content/dam/tax/en/pdfs/2020/digitalized-economy-taxation-developments-summary.pdf>.

⁷ *Commission Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence*, at 14–19, COM (2018) 147 final (Mar. 21, 2018), https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf.

⁸ See Committee on Finance, General Economy, and Budgetary Control, *Report No. 64* (2019), <http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp> (statement of Mme. Sabine Rubin).

⁹ The most famous of which is the French DST that nearly sparked a trade war between US and EU. See Mark Scott & Elisa Braun, *How the US made France Blink on Digital Tax*, POLITICO (Jan. 23, 2020), <https://www.politico.eu/article/how-the-us-made-france-blink-on-digital-tax-bruno-le-maire-donald-trump-emmanuel-macron-google-facebook-tariffs/>.

¹⁰ Other than France, the UK, Italy, Spain, Austria and Turkey have all imposed similar tax measures to capture the profits made by digital companies within their territory. For the UK, see HM Treasury, *Budget 2020: Delivering on Our Promise to the British People 91* (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data

within the source country. Though their details vary, these DSTs share more than a few common features.

- First, the DSTs only target companies that provide digital advertising and digital interface services whose revenues largely derive from user data generated within the territory of imposing countries.¹¹
- Second, the DSTs, instead of following the permanent establishment rule,¹² choose to target digital companies at the group level and collect on their worldwide revenues as long as they are “generated” within the imposing countries’ territory.¹³
- Third, the DSTs are levied at a flat rate on the gross revenues of targeted companies and no expenses are deductible for the purpose of calculating the tax base.¹⁴

a/file/871799/Budget_2020_Web_Accessible_Complete.pdf#page=94; Italy: Digital Services Tax applicable from 1 January 2020, KPMG(Oct. 17, 2019) (“Italian DST”), https://kdocs.kpmg.it/Marketing_Studio/171019_Italy_Digital_Services_Tax_applicable_from_1_January_2020.pdf; for Spain, see 121/000001 Draft Law on Tax on Certain Digital Services (2020) (“Spanish DST”), http://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-1-1.PDF#page=1; Austria: Legislation Introducing Digital Services Tax, KPMG (Oct. 29, 2019) (“Austrian DST”), <https://home.kpmg/us/en/home/insights/2019/10/tnf-austria-legislation-introducing-digital-services-tax.html>; for Turkey, see DİJİTAL HİZMET VERGİSİ İLE BAZI KANUNLARDA VE 375 SAYILI KANUN HÜKMÜNDE KARARNAMEDE DEĞİŞİKLİK YAPILMASI HAKKINDA KANUN (“Turkish DST”), <https://perma.cc/WZR5-C2F3>.

¹¹ See LOI n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [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] (“French DST”), art. 299-II.1, Légifrance, July 24, 2019, <https://www.legifrance.gouv.fr/eli/loi/2019/7/24/ECOE1902865L/jo/texte>; Italian DST, *supra* note 10; for the UK DST, see Finance Bill 2019-21, HC Bill [114], cl. 42; Spanish DST, *supra* note 10, art. 4(5); Austrian DST *supra* note 10 (covering only online advertising services); Turkish DST, *supra* note 10, art. 1 (covering online advertising, online intermediary services and the provision of digital goods and contents).

¹² The permanent establishment rule limits the source countries’ (the countries imposing DSTs) tax jurisdiction and only allows them to collect taxes on profits attributable to the physical presence/permanent establishment of multinational companies within their own territory. See e.g. OECD Model, *supra* note 3, art. 7.

¹³ See French DST, *supra* note 11, art. 299 III; Italian DST, *supra* note 10; the UK DST, *supra* note 11, cl. 45; Spanish DST, *supra* note 10, art. 8(3); Austrian DST, *supra* note 10; Turkish DST, *supra* note 10, art. 4(1).

¹⁴ See French DST, *supra* note 11, art. 299 I.A; Italian DST, *supra* note 10; the UK DST, *supra* note 11, cl. 45; Spanish DST, *supra* note 10, art. 11; Austrian DST, *supra* note 10; Turkish DST, *supra* note 10, art. 5(3), (5).

Due to the significant commonalities among the various DSTs and for ease of analysis, we have chosen the French DST as the subject of this memorandum since it is leading the charge among DSTs and is largely representative of the legal issues that are likely to arise under the current regimes of international tax, international trade and EU law.

After a brief overview of key features of the French DST, this memorandum aims to provide a comprehensive and detailed analysis of the compliance of the DST with international tax (Section 3), international trade (Section 4) and EU law (Section 5) and to offer guidance as to the remedies available to target companies under each regime.

2 General Overview of the French Digital Services

Tax

The French DST (hereinafter “the DST” unless otherwise specified) imposes a 3% tax¹⁵ on the gross revenues derived from providing three categories of digital services:

- (1) digital interface services that allow users to enter into contract and interact with one another,
- (2) digital advertising services that provide targeted advertising on digital platforms, and
- (3) the sale of data in connection with the two services mentioned above.¹⁶

The subjects of the DST are defined as businesses, whatever their places of establishment, whose revenues collected in return for taxable services during the preceding calendar year exceed the following two limits: 750 million EUR for services provided worldwide and 25 million EUR for services provided in France.¹⁷ These thresholds are assessed at the group level, which means the French DST targets all the companies within a group, regardless of their

¹⁵ French DST, *supra* note 11, art. 299 (4)(II).

¹⁶ *Id.*, art. 299 II (1).

¹⁷ *Id.*, art. 299 III.

residences, that have generated revenues from providing their services in France.¹⁸

Whether by design or accident, compared to other tax measures imposed on digital services,¹⁹ the unique features of the French DST have rendered it a misfit within the current tax regime that centers around the dichotomy of Value Added Tax and Income Tax. Thus, by straddling the two pillars of existing tax regimes, the French DST raises novel and interesting challenges for international tax, international trade and EU law. The next section will assess the DST's compliance with international tax rules.

3 Compliance with International Tax Law

International tax law consists largely of bilateral tax treaties between sovereign states. In order to assess the compliance of DST with international tax law, this section will first identify the tax treaty applicable to the French DST before diving into the two specific questions that arise under the relevant treaties: (1) the scope of the tax covered and (2) the non-discrimination issue.

3.1 The Applicable Tax Treaty

According to Article 299 III of the French DST, the amount of revenues that are subject to the DST will be assessed at the level of the group for the purpose of collecting the tax. The word “group” means the group of companies, “whatever their form, which are linked, directly or indirectly within the meaning of Art. L233-16 of the [French] Commercial Code.”²⁰ Thus, by referring to the French Commercial Code, the French DST essentially covers

¹⁸ *Id.* (imposing the DST on companies linked by a control relationship as defined by II of Article L.233-16 of the French Commercial Code).

¹⁹ Other countries have tried to digital tax that takes the form of equalisation levy or VAT. See e.g. India: Digital Taxation, Enlarging the Scope of “Equalisation Levy”, KPMG (Mar. 24, 2020), <https://home.kpmg/us/en/home/insights/2020/03/tnf-india-digital-taxation-enlarging-the-scope-of-equalisation-levy.html>; Malaysian Digital Service Tax Set for January 2020 Introduction, TAXAMO (Jan. 1, 2020), <https://blog.taxamo.com/insights/malaysia-digital-tax-announcement>.

²⁰ French DST, *supra* note 11, art. 299 III.

all companies that are “controlled, solely or jointly, or over which ... a significant influence” is exerted by the parent company.²¹

The effect of Art. 299 III is clear, it imposes tax liability on all companies, regardless of their tax residences, within the group as long as they have generated revenues subject to the DST. This allows the French tax authority to extend its jurisdiction beyond its territory and subject members of multinational corporations who are incorporated in other States to the DST. Accordingly, the tax treaty that could be invoked to challenge the DST will depend on the residence of the particular company initiating the action.

For example, if the parent company of Google—Alphabet Inc.—is proven to have generated revenue as defined by the DST, that revenue will be taxed despite the fact that it is a U.S. company incorporated in California.²² In order to challenge the imposed tax, Alphabet, as a resident under the U.S.-France Bilateral Income Tax Treaty,²³ will be eligible to base its challenge on the provisions in the U.S.-France Treaty. However, if instead of Alphabet, it is its subsidiary Google Ireland that has generated revenue taxable under the DST, the applicable tax treaty that Google Ireland could invoke to challenge the measure would be the Ireland-France Bilateral Income Tax Treaty. This is because Google Ireland constitutes a resident under the Ireland-France Treaty, but not the US-France Treaty.²⁴ From this example, it is apparent that a number of bilateral tax treaties to which France is a party might be applicable given the diversity of countries in which companies subject to the DST are incorporated or managed.

²¹ Code de commerce [C. COM] [Commercial Code] art. L 233- 16 (Fr.).

²² Alphabet Inc, Annual Report (Form 10-K) (Feb. 4, 2020), at 1. See also Company Profile—Alphabet Inc., BLOOMBERG LAW, <https://www.bloomberglaw.com/company/ticker/GOOGL%20US%20Equity>.

²³ According to Article 1 and 4 of the US-France Bilateral Income Tax Treaty, as a company liable to taxes imposed by US law by reason of its place of incorporation, Alphabet constitutes a resident within the meaning of the Treaty and is eligible for the benefits and protections provided in the Treaty.

²⁴ According to Article 2(7) of Ireland-France Bilateral Income Tax Treaty, Google Ireland constitutes a resident of Ireland within the meaning of the Treaty because it is a company managed and controlled in Ireland. By virtue of its status as a tax resident of Ireland, Google Ireland is entitled to the protection and benefits provided for by the Ireland-France Tax Treaty pursuant to Article 1(2).

At first glance, it might seem impossible to analyze the compliance of French DST under all the relevant treaties. However, thanks to the substantial similarities shared among bilateral tax treaties concluded to date, it is possible to examine the common issues arising under the treaties by analyzing just one treaty as an example. Here, since most of the “tech giants” have headquartered their EU operations in Ireland,²⁵ most of the revenues subject to the DST are likely to be generated by their Irish subsidiaries. Therefore, the following analysis will be conducted under the framework of the Ireland-France Bilateral Income Tax Treaty (hereinafter “Ireland-France Treaty” or “the Treaty”) and any variation in other treaties will be addressed separately in the footnotes.

3.2 “Tax Covered” by Article 1 of Ireland-France Bilateral Income Tax Treaty

As established above, the targeted Irish companies, by reason of their places of management and control, are eligible for the protection of the Ireland-France Treaty. However, in order for the protection to kick in, the tax imposed by the French tax authority – i.e. the DST – must also be a “tax covered” in Article 1.

Pursuant to Article 1(1) of the Treaty, the covered French taxes include “taxes on income imposed on behalf of each Contracting State ... [including] taxes imposed on total income, or on elements of income.” Attached to this general description is a list of enumerated taxes that are typically covered by the Treaty. This list includes the French tax on the income of individuals, the French complementary tax, and the French company tax.²⁶ Moreover, the

²⁵ See Ciara O'Brien, *Google Ireland Takes the Reins for European Services*, IRISH TIMES (Dec. 13, 2018), <https://www.irishtimes.com/business/technology/google-ireland-takes-the-reins-for-european-services-1.3730721>; see also Simon Roughneen, *Ireland Has Become A Mecca for U.S. Companies. Can Trump Lure Them Home?*, L.A. TIMES (Feb. 10, 2017), <https://www.latimes.com/world/europe/la-fg-ireland-economy-2017-story.html>.

²⁶ Convention between Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (“Ireland-France Treaty”), art. 1(3)(a), Mar. 21, 1968.

taxes covered also include “any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of the existing taxes.”²⁷

In order to ascertain whether the DST falls under any of the provisions mentioned above, it is vital to clarify the structure of Article 1.

- On one hand, the Irish and French governments agreed that the list of the three enumerated taxes should be exhaustive and should govern the scope of Article 1 at the time of the signature of the Treaty.²⁸
- On the other hand, taxes imposed after the signature of the Treaty are covered by Article 1 as long as they are “identical, or substantially similar to the existing taxes [the ones enumerated in Article 1(3)(a)].”²⁹
- Moreover, in light of the principle of effective treaty interpretation, the general description contained in Article 1(1) should also be considered when assessing whether the DST is covered by the Treaty.

As a result, in order to determine whether the DST falls within the scope of Article 1, the following analysis discusses two issues: (1) whether the DST is identical or substantially similar to the three enumerated French taxes; and (2) whether the DST constitutes a tax “on total income or on elements of income” in line with the general description in Article 1(1).

3.2.1 The DST Is Likely Not Identical or Substantially Similar to the Three Enumerated French Taxes.

Starting with the ordinary meaning of the provision,³⁰ to be identical is to be the “very same”³¹ or to “have such close resemblance as to be essentially the

²⁷ *Id.*, art. 1(4).

²⁸ See *id.*, the chapeau of art. 1(3). It appears that France has taken the position that the list of enumerated taxes should be exhaustive in several of the tax treaties it concluded. See Patricia Brandstetter, *The Substantive Scope of Double Tax Treaties - a Study of Article 2 of the OECD Model Conventions* (Aug. 2010) (unpublished Ph.D. dissertation, WU Vienna University of Economics and Business), 34.

²⁹ Ireland-France Treaty, *supra* note 26, art. 1(4).

³⁰ Vienna Convention on the Law of Treaties, art. 31 (1), opened for signature May 23, 1969, 1155 UNTS 331 (hereinafter “VCLT”).

³¹ *Identical*, *Oxford English Dictionary* (3rd ed. 2010).

same,”³² while to be substantially similar is to have a “significant or notable resemblance or likeness³³ in essence, in substance, and to a great extent or degree.”³⁴ Thus, the ordinary meanings of the terms suggest that the “substantially similar” standard is lower than that of “identical” – which requires the subsequent tax to be exactly the same as the enumerated ones.

In the context of international tax law, the ordinary meanings of these terms are consistent with the common understanding that the essential characteristics of the taxes, rather than their denomination, should be compared to determine whether they are identical or substantially similar to each other.³⁵ These essential features usually include the taxable event,³⁶ the purpose and objective of the taxes,³⁷ and their relationship with the tax regime as a whole.

As mentioned above, the three enumerated taxes are the French income tax on individuals, the French complementary tax, and French company tax. It is obvious that the DST is nothing like the French income or complementary tax which are imposed on individuals.³⁸ The tax that is most likely to be similar to the DST is the French company tax imposed on the income of companies.³⁹ Thus, to determine whether the DST is at least substantially similar to the French company tax, a comparison of their essential characteristics must be undertaken.

First, as to taxable events, the French company tax is focused on taxing companies based on their ability to pay, as a result, its taxable event is

³² *Identical*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/identical>.

³³ *Similar*, Oxford English Dictionary (3rd ed. 2019).

³⁴ *Substantially*, Oxford English Dictionary (3rd ed. 2012).

³⁵ See London and Mexico Model Tax Conventions – Commentary and Text, League of Nations Doc. C.88.M.88.1946.II.A (1946), at 11.

³⁶ See Brandstetter, *supra* note 28, at 40.

³⁷ See OECD Interim Report, *supra* note 1, ¶¶ 419, 420.

³⁸ Code général des impôts [Tax Code] art. 1, 79 (Fr.).

³⁹ *Id.*, art. 206 (1).

companies making profits.⁴⁰ Though the DST is also imposed on companies, its taxable event is rather different. Article 299 and Article 299 II.2 of the DST stipulate that the tax is levied on the supply of a certain defined category or categories of e-services and imposed on the companies regardless of their economic situation (i.e. profitability).⁴¹ Thus, the DST is triggered solely by the fact that a covered service is *supplied* by a target company. Consequently, the different taxable events of the two taxes make it less likely that the DST is substantially similar to the French company tax.⁴²

Second, the distinct tax bases of the French company tax and the DST demonstrate their different objectives.⁴³ The French company tax is imposed at a flat rate on *the net income* of companies⁴⁴ while the DST is levied at a flat rate on *the total revenues* collected by companies in return for covered digital services.⁴⁵ On the one hand, by deducting business expenses from gross revenues, the French company tax aims only to tax earnings or profits of target companies. On the other hand, without allowing any deduction and by charging a flat rate on companies' gross revenues generated by providing covered services, the DST seeks exclusively to tax the consideration paid for the supplied services without regard to the actual profit margins of the suppliers. Therefore, in light of their different purposes manifested in their tax

⁴⁰ *Id.*, art. 209 (laying out the method of calculating the tax base of the company tax: Income = Gross Revenues – Expenses). The purpose of the company tax, which is the equivalent of corporate income tax, is to tax companies according to their tax positions as indicated by their income. See generally Joachim Englisch, VAT/GST AND DIRECT TAXES: DIFFERENT PURPOSES IN VALUE ADDED TAX AND DIRECT TAXATION: SIMILARITIES AND DIFFERENCES § 3 (M. Lang, P. Melz & E. Kristoffersson eds., 2009).

⁴¹ French DST, *supra* note 11, art. 299, 299 II.

⁴² OECD Interim Report, *supra* note 1, ¶¶ 417, 420 (“A tax that is covered by tax treaties is generally one that is focusing on the supplier, rather than on the supply.... An interim measure would more likely not be considered a covered tax where it is imposed on the supply itself, rather than the supplier and where it focuses exclusively on the expenditure side of the payment – that is to say, the nature and value of the supply.”)

⁴³ Danish Administrative Tax Court (Landsskatteretten) Case No. 1985-5-173, decision of 22 May 1985 (holding that a flat-rate tax on the gross amount of payments on the purchase of a pension could in no way be classified as substantially similar to an ordinary progressive tax on net income).

⁴⁴ French Tax Code, *supra* note 38, art. 206.

⁴⁵ French DST, *supra* note 11, art. 299 bis I.3, I.4

bases, the DST is not likely to be substantially similar to the French company tax.

Third, as to the relationship of the two taxes with the tax regime as a whole, the difference is even more pronounced. Unlike the French company tax that fits comfortably within the broader income tax regime of the French tax system, the DST seems more like an outcast. Despite being a destination-based tax, the DST is imposed on suppliers for the supply of services, it is therefore not a consumption tax that generally falls on the shoulders of consumers.⁴⁶ It also does not belong in the income tax category because it is not creditable against an income tax imposed for the same payment⁴⁷ and is even treated as a deductible expense for income tax purposes for French companies.⁴⁸

In light of the analysis above, apart from the fact that companies ultimately bear both the DST and the French company tax, the two taxes share so few similarities that the DST is likely not substantially similar, let alone identical, to the French company tax. Thus, the DST is likely not identical or substantially similar to any of the three enumerated French taxes.

3.2.2 The DST Is Likely Not a Tax on Total Income or Elements of Income.

After determining that the DST is not identical or substantially similar to the three enumerated French taxes, the general description included in Article 1(1) must also be considered to assess whether the DST constitutes a tax on

⁴⁶ An example of such consumption tax is Value Added Tax, in its rulings, ECJ interpreted the Sixth EC VAT Directive based on the characterization of VAT as a tax on consumption. See Case C-317/94, *Elida Gibbs Ltd. v. Comm'rs of Customs and Excise*, 1996 E.C.R. I-5339, ¶ 19.

⁴⁷ Office of the United State Trade Representative, *Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974* ("Section 301 Report"), at 48 (Dec. 2, 2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

⁴⁸ See *id.*; 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-justicefiscale-affirme-bruno-le-maire-02-03-2019-8023578.php>.

total income, or elements of income – thereby falling within the scope of Article 1.

The argument could be made that even if the DST is levied on total revenue of digital companies, it is still taxing elements of their income, albeit indirectly. At first glance, this argument seems reasonable. It is undeniable that by taxing gross revenues, the DST is reaping part of the profits made by digital companies. One can even argue that the French DST is collecting taxes that are in excess of the income of digital companies, thereby creating heavy burdens on companies with small profit margins.⁴⁹ However, in assessing the nature of a tax measure, it is not the economic effect, but the *essential features* of the taxes that ultimately determine their character.⁵⁰ As was mentioned in Section 3.2.1 above, though the DST imposes tax burdens on companies based on a criterion connected to their economic heft (the revenue threshold), it is not seeking to target that power by imposing a tax on income. Instead, the DST is targeting the supply of digital services by directly taxing the revenues generated while providing such services without any reference to the profitability of the suppliers.⁵¹ By doing so, the DST defies the fundamental principle of income tax that focuses on the economic situation of individual taxpayers.⁵²

This conclusion becomes even more apparent when taking into account the definition of income tax included in both Irish and French law. Although “income” is not defined in the Irish Taxes Consolidation Act 1997, it is clear that individuals and companies are taxed on their profits – which are computed by deducting expenses and other charges.⁵³ Similarly, in the

⁴⁹ Section 301 Report, *supra* note 47, at 58–59.

⁵⁰ See Daniela Hohenwarter et al., *Qualification of the Digital Services Tax Under Tax Treaties*, 47 *Intertax* 140, 144 (2019) (arguing that the EU DST does not fall into the scope of Article 2 of OECD Model Tax Convention).

⁵¹ French DST, *supra* note 11, art. 299 bis I.3, I.4; see OECD Interim Report, *supra* note 1, ¶ 420.

⁵² See Brandtetter, *supra* note 28, at 88.

⁵³ S. Ruane, *Ireland - Corporate Taxation* § 1.2.1, IBFD, https://research-ibfd-org.proxygt-law.wrlc.org/#/doc?url=/document/cta_ie_s_1 (last visited May 8, 2020); S. Ruane, *Ireland -*

French Tax Code, income is calculated by deducting expenses from proceeds made by individuals or companies.⁵⁴ As a result, it seems like Ireland and France are in agreement as to what counts as a tax on income, and it is certainly not a tax imposed on gross revenues of companies or a tax that aims to target the supply of services, instead of the supplier.

Therefore, by failing to count as a tax on income or a tax identical or substantially similar to the three enumerated taxes in Article 1(3)(a), the DST most likely does not fall within the scope of taxes covered by Article 1 of the Treaty.⁵⁵

3.3 The Non-Discrimination Clause of Ireland-France Bilateral Income Tax Treaty

In order to ensure equal tax treatment of nationals of the two Contracting States, the Ireland-France Tax Treaty, instead of restricting the scope of its application to the tax covered in Article 1, has included a non-discrimination clause (Article 22) that applies to “taxes of every kind and description

Individual Taxation § 1.2.1, IBFD, https://research-ibfd-org.proxygt-law.wrlc.org/#/doc?url=/document/ita_ie_s_1 (last visited May 8, 2020).

⁵⁴ French Tax Code, *supra* note 38, art. 1–13.

⁵⁵ The same conclusion can be reached by analysing Article 2 of the U.S.-France Treaty which also provides that a tax will be covered by the Treaty if it is identical or substantially similar to the enumerated French taxes or if it constitutes a tax on income or elements of income. This conclusion is also equally applicable to other DSTs imposed by the UK, Italy, Spain, Austria and Turkey and is consistent with the consensus in the field. See Roland Ismer & Christoph Jescheck, *Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model?*, 46 *Intertax* 573, 575 (opining that the Italian DST, which is identical to the French DST in all respects, falls outside the scope of Article 2 of OECD Model, which has the same language as Article 2 of the Ireland-France Tax Treaty). See also Alessandro Turina, *Which ‘Source Taxation’ for the Digital Economy?*, 46 *Intertax* 495, 518 (2018); CFE Fiscal Committee, *Opinion Statement FC 1/2018 on the European Commission Proposal of 21 March 2018 for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, 58(8) *Eur. Tax’n* 371, 373 (2018); *Opinion of the European Economic and Social Committee on ‘Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence,’* 2018 O.J. (C 367) 1, ns 1.5, 2.4 (referring to the DST as turnover tax or indirect tax); HM Treasury & HM Revenue and Customs, *Digital Services Tax: Consultation*, 31–32 (2018) (opining that the DST does not fall into the scope of Article 2 of OECD Model Tax Convention), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754975/Digital_Services_Tax_-_Consultation_Document_FINAL_PDF.pdf.

[imposed by the Contracting States].”⁵⁶ As a result of its broad scope, even if the DST is not covered by Article 1, the non-discrimination clause still prohibits any discriminatory taxation associated with the DST. The following analysis focuses on this issue and examines whether the French DST in fact violates the non-discrimination clause.

3.3.1 The Non-Discrimination Clause Is Applicable to Irish Companies, Their Permanent Establishments in France and Their French Subsidiaries That Are Subject to the DST.

Despite its broad scope with respect to the taxes covered, the non-discrimination clause of the Ireland-France Treaty only applies to certain categories of persons. Here, the relevant provisions are Article 22 (1), 22 (4) and 22 (5).

According to Article 22 (1) of the Ireland-France Treaty, nationals of Ireland are entitled to equal tax treatment as French nationals.⁵⁷ In defining the word “nationals,” Article 22 (3) provides that “all legal persons ... deriving their status as [nationals] from the law in force in [Ireland]” are nationals for the purpose of the Treaty. Under Irish law, companies registered or incorporated under the Companies Act constitute nationals of Ireland.⁵⁸ As companies registered in Ireland, Irish headquarters of the targeted “tech giants” thus qualify as Irish nationals and are entitled to make a “nationality discrimination” claim based on Article 22 (1) of the Treaty.⁵⁹

⁵⁶ See Ireland-France Treaty, *supra* note 26, art. 22(6).

⁵⁷ *Id.*, art. 22 (1) (“The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.”)

⁵⁸ M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 198, n 97 (2010). In Proceeds of Crime Act of 2010, the nationality jurisdiction of the Act is expanded to include “a company registered under the Companies Act or any other body corporate established under Irish law.” See OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Ireland* ¶ 78 (Dec. 2013), <https://www.oecd.org/daf/anti-bribery/IrelandPhase3ReportEN.pdf>.

⁵⁹ It should be noted that not all non-discrimination clauses in Treaties concluded by France allows companies to make a “nationality discrimination” claim. Article 25 (1) of the US-France Treaty only allows individuals, not companies, to claim discrimination based on nationality. Therefore, for targeted companies who are incorporated in the US, it is likely that they will not

As to Article 22 (4), it is applicable to the permanent establishments created by Irish companies within the French territory.⁶⁰ This provision, though facially applicable, is somewhat irrelevant to the DST. As mentioned in Section 1, the DST is introduced precisely because digital companies are making profits without any physical presence in France. Nevertheless, if an entity established by an Irish company constitutes a permanent establishment, it might be able to claim “permanent establishment discrimination” based on Article 22 (4) if it is subject to the DST.

Finally, Article 22 (5) is applicable to the French subsidiaries of Irish companies.⁶¹ If the French subsidiary of an Irish company is subject to the DST, the subsidiary can make a “foreign ownership discrimination” claim under Article 22 (5).⁶²

As a result, three kinds of discrimination claims can be made by different entities under Article 22 of the Treaty. The following sections will analyze each of these claims in turn.

3.3.2 Irish Companies Subject to the DST Might Be Indirectly Discriminated against by the DST Due to Their Nationality.

As established above, Article 22 (1) prohibits any discrimination by the DST against Irish companies. The relevant inquiry here is whether the DST violates

be able to claim the protection of the non-discrimination clause in US-France Treaty. See S. Comm. on Foreign Relations, Rep. on Income Tax Convention with the French Republic 13 (Comm. Print 1995).

⁶⁰ Ireland-France Treaty, *supra* note 26, art. 22 (4) (“The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities in the same circumstances.”)

⁶¹ *Id.*, art. 22 (5) (“Enterprises of a Contracting State, *the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State*, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected.”)

⁶² In limited circumstances where the subsidiary acts for the parent, the subsidiary constitutes a permanent establishment of the parent and Article 22 (4) will apply. See OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION (“OECD Commentary”), art. 5, ¶¶ 82, 116.

the non-discrimination clause by affording “other or more burdensome” treatment to Irish companies that are “in the same circumstance” as French companies.

3.3.2.1 Irish Companies Subject to the DST Might Be “in the Same Circumstance” as the French Companies Exempted by the Global Revenue Threshold.

In determining whether Irish and French companies are in the same circumstance, the OECD Commentary to a similar provision of the OECD Model Tax Convention (the “OECD Model”) is instructive.⁶³ The Commentary provides that Article 24 (1) (the equivalent of Article 22 (1) of the Treaty) of the OECD Model only “prohibits discrimination based on a different nationality and requires all other relevant factors...be the same.”⁶⁴ This essentially means that when two companies of different nationalities are the same for the purpose and objective of the tax in question,⁶⁵ the foreign company should not be treated differently, whether *de jure* or *de facto*, by the taxing authority.

For purposes of the DST, there are a few factors that might justify a difference in treatment afforded to Irish and French companies. These include the scope of the services covered by the DST, the two-tiered revenue threshold and the deduction allowed under French income tax law based on the residence of the taxpayer.

3.3.2.1.1 The Scope of Services Covered by the DST

In an effort to tax digital services that derive their revenues from user-created data, the DST only taxes companies that offer digital advertising and digital interface services.⁶⁶ The French companies exempted from the DST are

⁶³ Both the US Model Treaty and the US-France Tax Treaty lists OECD Model Tax Convention as a context in which the Treaty is concluded. According to Article 31 (1) of VCLT, contexts can be taken into consideration in deciding the meaning of a treaty provision.

⁶⁴ OECD Commentary, *supra* note 62, art. 24, ¶ 17.

⁶⁵ See Niels Bammens, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL AND EUROPEAN TAX LAW, § 5.5.1 (2012); Bruno Santiago, *Non-discrimination Provisions at the Intersection of EC and International Tax Law*, European Taxation 249, 256 (2009).

⁶⁶ French DST, *supra* note 11, art. 299 bis 3, 4.

mostly companies that conduct traditional advertising or traditional retail business with online presence.⁶⁷ These services, though sharing some similarities with digital advertising and interface services, are reasonably different from them for purposes of the DST. Traditional advertising businesses largely employ traditional media to disseminate information and advertisements without relying on user data and online platform,⁶⁸ and traditional retail businesses, despite their online presence, are making profits by selling their own products, rather than acting as a bridge between potential buyers and sellers.⁶⁹ Therefore, bearing in mind the objective of the DST to only target digital services, the French companies excluded from the DST by virtue of the scope of the services covered are not in the same circumstance as the targeted Irish companies and their exemption does not raise non-discrimination concerns.

3.3.2.1.2 The Two-Tiered Revenue Threshold

With respect to the two-tiered revenue threshold⁷⁰ imposed by the DST, by considering both global and French revenues, the tax distinguishes between three pairs of companies. It distinguishes large companies from SMEs, large multinational companies from companies who mostly offer their services in France,⁷¹ and companies specializing in digital services from companies that offer digital services as one part of their broader portfolio.⁷² The targeted Irish companies usually belong to a group that fall into the former of the three pairs

⁶⁷ Section 301 Report, *supra* note 47, at 36–39.

⁶⁸ 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>.

⁶⁹ Section 301 Report, *supra* note 47, at 39.

⁷⁰ It should be noted here that for every company subject to the DST, its revenue is consolidated with the other companies in the same group to see whether their combined revenue has surpassed the thresholds. See French DST, *supra* note 11, art. 299 III. Therefore, when considering whether an Irish company is in the same circumstance as a French company, we look to the amount of revenues generated by the group to which they belong.

⁷¹ Unlike multinational giants like Google, companies that offer most of their services in France will not be able to meet the global revenue threshold.

⁷² Section 301 Report, *supra* note 47, at 41–44, 45. Companies that only offer digital services as part of their portfolio likely cannot generate enough revenues providing covered services to satisfy both the global and French revenue thresholds.

of companies⁷³ while the exempted French companies tend to fall into the latter.

Some of these distinctions drawn by the DST are legitimate in light of its objectives while others might not be. By using revenue thresholds to target large companies and companies that specialize in digital services, the DST aims to protect SMEs and promote innovation within traditional industries that have yet to catch up with the wave of digitalization.⁷⁴ However, although the DST's objective to target large companies warrants the utilization of a revenue threshold, it cannot be used to justify the global revenue threshold when the French revenue threshold alone could have done the job. In other words, the global revenue generated by a group is not relevant to the objective of the DST to target only large companies.

The argument could be made that a global revenue threshold is employed to target companies that hold a monopoly over their respective markets, like Google in search engine market and Facebook in social media market.⁷⁵ In response to this argument, several points are worth noting:

- First, it is not at all certain whether a tax measure should be used by a country to combat monopoly when it has a well-functioning system of competition law.
- Second, though restricting monopoly is claimed to be the purpose of the DST, the term is nowhere mentioned or defined in the measure itself and it is not clear what definition should be used to determine the relevance of the global revenue threshold.

⁷³ For example, Google Ireland belongs to the group headed by Alphabet Inc., the group certainly is a large multinational company that generates worldwide revenues and specializes in digital services.

⁷⁴ 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>.

⁷⁵ See *id.*

- Third, given the fact that an overwhelming majority (96.3%)⁷⁶ of groups targeted by the DST are foreign multinationals, it is most likely that the global revenue threshold is only a pretext for distinguishing foreign and French companies and does not serve any legitimate purpose of the DST. Therefore, France should bear the burden to prove that the global revenue threshold is a genuine attempt to target monopolies.

Thus, for purposes of the DST, it is most likely that the “groups” of targeted technology companies are in the same circumstance as the French “groups” exempted by the global revenue threshold. This leads to the conclusion that the Irish headquarters of the targeted “tech giants”—who are subject to the DST by reason of the consolidated revenues generated by the “groups” to which they belong—might be in the same circumstance as members of the French “groups” that are exempted by the global revenue threshold.

3.3.2.1.3 Deductions Allowed for the Purpose of French Company Tax

Apart from the threshold, a final claim of discrimination might be asserted based on the fact that only French companies are entitled to deduct their DST as an expense from their income tax base.⁷⁷ However, this claim is likely to fail because the distinction drawn between Irish and French companies are legitimately based on their residences. Due to a lack of residence in France, the targeted Irish companies are not liable for income tax in the same way as their French counterparts. Therefore, with respect to the deductible-expense arrangement under French income tax law, Irish and French companies are not in the same circumstance and the Irish companies are not discriminated against simply because they are not entitled to this benefit reserved solely for French companies.⁷⁸

⁷⁶ According to the Section 301 Report, 26 out of the 27 companies covered by the DST are foreign companies. See Section 301 Report, *supra* note 47, at 26–27.

⁷⁷ Section 301 Report, *supra* note 47, at 48.

⁷⁸ OECD Commentary, *supra* note 62, art. 24 (1), ¶ 7 (“The expression ‘in particular with respect to residence’ makes clear that the residence of the taxpayer is one of the factors that

In conclusion, for the purposes of the DST, most of the “favored” French companies are not in the same circumstance as the targeted Irish companies and are legitimately excluded from the DST. However, Irish and French companies that belong to groups that satisfy the French revenue threshold are likely in the same circumstance for purposes of the DST, and their differential treatment could lead to a successful discrimination claim. The following section analyzes this issue.

3.3.2.2 Irish Companies Subject to the DST Are Likely Afforded “Other or More Burdensome Treatment” than the French Companies Exempted by the Global Revenue Threshold.

are relevant in determining whether taxpayers are placed in similar circumstances. The expression ‘in the same circumstances’ would be sufficiently by itself to establish that a taxpayer who is a resident of a Contracting State and one who is not a resident of that State are not in the same circumstances.”)

With regard to “other or more burdensome” treatment, the OECD Commentary provides that “when a tax is imposed on nationals and foreigners in the same circumstances, it must be *in the same form* as regards both the

Example: If French Company 1 (FC 1) is the same as Google Ireland in terms of the services they provide and the French revenues of their groups, and the only difference between them is the amount of global revenues generated by their groups, Google Ireland is likely to be in the same circumstance as FC 1. By exempting FC 1 and covering Google Ireland, the DST uses the global revenue threshold as a pretext for discriminating against Google Ireland when Google Ireland and FC 1 are in the same circumstance for the purpose of the DST.

basis of charge and the method of assessment, its rate must be the same, and finally, *the formalities connected with the taxation* must not be more onerous for foreigners than for nationals.”⁷⁹ Though not explicitly mentioned in the Commentary, in order to successfully guard against discriminatory taxation, the “other or more burdensome” language includes both *de jure* and *de facto* discrimination.⁸⁰ Here, by using the global revenue threshold as a pretext to distinguish between Irish and French companies, the DST effectively exempts French companies and targets only Irish companies when they are in the same circumstance. Hence, the DST likely constitutes *de facto* discrimination by affording “other or more burdensome” treatment to Irish companies in violation of Article 22(1) of the Ireland-France Treaty.⁸¹

3.3.3 Permanent Establishments Created by Targeted Irish Companies in France Likely Cannot Claim “Permanent Establishment Discrimination” by the DST.

After concluding that the targeted Irish companies are likely discriminated against by the DST due to their nationality, the next question is whether

⁷⁹ *Id.*, ¶ 15 (emphasis added).

⁸⁰ See Bammens, *supra* note 65, § 5.6.2.

⁸¹ Because most of the European DSTs essentially cover the same services as the French DST and also include both a global revenue threshold and a domestic one (see Section I), the conclusion reached here is equally applicable to them and it is most likely that the European DSTs will violate the relevant non-discrimination clause of their respective tax treaties with countries where targeted companies are incorporated given that the language of non-discrimination clauses included in most bilateral tax treaties are the same.

permanent establishments created by the targeted Irish companies in France are also subject to nationality-based discrimination.

If taken literally, Article 22 (4) of the Treaty seems to cover discrimination associated with taxes of “all types and descriptions”⁸² as long as they are “taxes on permanent establishment.”⁸³ This reading of the provision essentially means that the DST, if imposed on permanent establishments, should afford equal treatment to establishments created by Irish and French companies. However, as reasonable as this interpretation may seem, this is not the case.

According to internationally accepted rules of treaty interpretation,⁸⁴ the scope of taxes covered by Article 22 (4) must be read in the context of the Convention, specifically Article 4 of the Treaty.⁸⁵ According to Article 4, “taxes on permanent establishment” are limited to taxes imposed on the business profits that are attributable to such an establishment.⁸⁶ Therefore, despite the seemingly broad scope of Article 22 (4), it is only meant to be applied to taxes on business profits made by permanent establishments.

As a tax on total revenue, the DST certainly does not constitute a tax on business profits and is therefore not subject to the prohibition prescribed in Article 22 (4). As a result, the permanent establishments created by targeted Irish companies will not be able to claim a “permanent establishment discrimination” against the DST.

Example: If Google Ireland has a branch office in France that acts on its behalf, and if the branch office is subject to the DST, the branch office will not be able to claim “permanent establishment discrimination” because as a tax on total revenue, the DST is not covered by Article 22 (4) – which only covers taxes on business profits of permanent establishments – and is not prohibited from discriminating against permanent establishments created by Google Ireland.

⁸² See Ireland-France Treaty, *supra* note 26, art. 22(6).

⁸³ See *id.*, art. 22(4).

⁸⁴ VCLT, *supra* note 30, art. 31(1)(2).

⁸⁵ OECD Commentary, *supra* note 62, art. 24, ¶ 34.

⁸⁶ See Ireland-France Treaty, *supra* note 26, art. 4 (“If the enterprise carries on business as [a permanent establishment], tax may be imposed in the other State on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment.”)

3.3.4 French Subsidiaries of Targeted Irish Companies Are Likely Discriminated against by the DST as Compared to Similar French Companies Exempted by the Global Revenue Threshold.

For French subsidiaries of targeted Irish companies, if they are subject to the DST, they are likely able to base their discrimination claim on Article 22 (5) of the Treaty. The article provides that no subsidiaries of Irish companies shall be afforded “other or more burdensome treatment” as compared with “similar [French] enterprises.”⁸⁷

The Commentary to a similar provision in the OECD Model clarifies that different wording is used in the various sub-provisions of the non-discrimination clause to achieve the same purpose—prohibiting discrimination based on specific grounds.⁸⁸ Therefore, similar to the requirement of “same circumstance” in Article 22 (1) of the Treaty, Article 22 (5), by using “similar enterprises,” only allows a finding of discrimination if French subsidiaries of targeted Irish companies are similar to favored French companies with respect to all factors relevant to the purpose of the DST except for the nationality of their owners.

As discussed in Section 3.3.2 above, the French subsidiaries of Irish companies are likely not similar to exempted French-owned companies because they provide different services and their groups generate different levels of French revenues. However, all else being equal, if the only difference between French-owned companies and their Irish-owned counterparts is that the groups to which they belong do not meet the global revenue threshold, then the two companies are most likely “similar” for the purpose of the DST.⁸⁹

⁸⁷ Ireland-France Treaty, *supra* note 26, art. 22 (5).

⁸⁸ OECD Commentary, *supra* note 62, art. 24, ¶ 3.

⁸⁹ Recall that in Section 3.3.2 above, it is argued that the global revenue threshold is irrelevant to the purpose of the DST to target only large companies and should not be used as a distinguishing factor. Since the only difference between French companies and their Irish-owned French counterparts is the ability of their groups to meet the global revenue threshold, they are likely similar for the purpose of the DST. **Example:** If Google France is the subsidiary of Google Ireland and is similar to French Company 2 (FC 2) — who is the subsidiary of FC 1 — in terms of the services provided and the French revenues generated by their groups, Google France is likely discriminated against by the DST when the DST only covers Google France but not FC 2 simply because the group to which FC 2 belongs does not generate enough revenues to meet the global revenue threshold.

Thus, by using the global revenue threshold to exempt French-owned companies while still covering similar French subsidiaries of Irish companies, the DST affords “more burdensome treatment” to the latter and constitutes *de facto* discrimination.

3.4 Remedies under International Tax Law

As established above, companies subject to the DST might be able to succeed in their challenge against the measure on non-discrimination grounds. Under international tax law, there are three avenues through which such a challenge could be brought by the taxpayer: (1) domestic litigation, (2) Mutual Agreement Procedure and (3) arbitration.

3.4.1 Domestic Litigation

In order to initiate the domestic litigation process, companies subject to the DST must first present their claim to the French tax authority, voicing their disagreement with the tax measure. If the authority rejects their claim or fails to respond within six months, the targeted companies will then be allowed to bring the claim before the French Administrative Court.⁹⁰ If the challenge is successful, any amount of tax paid by the target companies will be reimbursed, and if a tax deferral was requested before the litigation, the expenses related to such a request will also be reimbursed.⁹¹ However, if the target companies are not successful in their claim before the Administrative Court, they can appeal the case to the Administrative Court of Appeals within two months after being notified of the judgment of the lower court and to the Conseil d’Etat if the appellate decision is still unsatisfactory.⁹²

As simple as the procedure appears, it is not clear whether the taxpayers will prevail in their claim against the DST before French domestic courts. Moreover, even if such a challenge may eventually succeed, tax proceedings before French domestic courts usually take eight to ten years to be

⁹⁰ Livre des procédures fiscales [Tax Procedures Book] art. R* 199-1, ¶ 2 (Fr.).

⁹¹ *Id.*, art. L208, ¶¶ 1, 2.

⁹² Code de Justice Administrative [Code of Administrative Justice] art. R 811-2 (Fr.).

resolved.⁹³ Given the high stakes associated with the DST, taxpayers might not be willing or able to wait this long for a court decision that might or might not be in their favor.

3.4.2 Mutual Agreement Procedure

Other than domestic litigation, the tax treaties concluded by France typically include a Mutual Agreement Procedure (hereinafter “MAP”) where disputes relating to the legality of a tax measure can be resolved amicably by the tax authorities of Contracting States, thus avoiding protracted and time-consuming court battles. The following analysis will use the MAP provision in Ireland-France Treaty as an example to illustrate how the target companies might use the procedure to bring a challenge against the DST.

Article 24 of the Ireland-France Treaty – as modified by Article 16 of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (hereinafter “MLI”)⁹⁴ – provides that a company that considers the French DST to be in violation of the Treaty can present its case to the tax authority of either France or Ireland.⁹⁵ If the tax authority concludes that the objection is justified and that it cannot satisfactorily resolve the issue by itself, it must endeavor to reach a solution with the tax authority of the other Contracting State.⁹⁶ Given the fact that the DST is imposed by the French government, Irish companies might have a better chance raising the challenge before the Irish authority that will look more favorably on their interests. For example, Google Ireland may raise a challenge against the French DST before the Irish Tax Authority and, if the Irish authority thinks the challenge is justified and that it cannot resolve the issue on its own, it must endeavor to solve the issue by mutual agreement with the French authority.

⁹³ B. Gibert, France - Transfer Pricing & Dispute Resolution § 3.4, IBFD, https://research-ibfd-org.proxygt-law.wrlc.org/#/doc?url=/document/tpdrtp_fr_s_3 (last visited May 7, 2020).

⁹⁴ Because both Ireland and France have signed and ratified MLI, the MLI becomes binding on both countries except for reservations on May 1, 2019.

⁹⁵ Ireland-France Treaty, *supra* note 26, art. 24 (1); Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (“MLI”), art. 16 (1), *opened for signature* Dec. 31, 2016.

⁹⁶ Ireland-France Treaty, *supra* note 26, art. 24 (2); MLI, *supra* note 95, art. 16 (2).

Under this regime, there are several issues worth noting:

- First, considering that the DST is not a tax covered by the Treaty, there might be concerns about whether the MAP could be used to raise a challenge against the measure. However, it is made clear in Article 16 (4)(a)(i) of the MLI that a non-discrimination claim based on nationality may be raised with “the competent authority of the Contracting Jurisdiction of which [the challenging] person is a national.” This means that Irish companies will be able to bring a nationality discrimination claim before the Irish authority.
- Second, in order to present its objection to the Irish authority, it is sufficient if the challenging company can establish that the DST will result in taxation that is not accordance with the Treaty⁹⁷ and the taxation “appears as a risk which is not merely possible but probable.”⁹⁸ In other words, even if the company has not yet paid their DST, they can still use the MAP to challenge the measure.
- Third, the general time limit for submitting a request for MAP to the Irish authority is three years from the first notification of the DST.⁹⁹
- Fourth, during the process, the challenging companies are usually not involved in the discussions between competent authorities, but they can still present their views to both authorities and provide relevant information.¹⁰⁰
- Fifth, the challenging companies may submit their requests for MAP concurrently with the litigation before French domestic courts. In the event that the request is accepted by the Irish authority, it may request the challenging company to suspend their litigation until MAP is concluded.

⁹⁷ Ireland Office of the Revenue Commissioners, GUIDELINES FOR REQUESTING MUTUAL AGREEMENT PROCEDURE (“MAP”) ASSISTANCE IN IRELAND 5 (2019) (“Ireland MAP Guideline”), <https://www.revenue.ie/en/tax-professionals/tadm/income-tax-capital-gains-tax-corporation-tax/part-35/35-02-08.pdf>.

⁹⁸ OECD Commentary, *supra* note 62, art. 25, ¶ 14.

⁹⁹ Ireland MAP Guideline, *supra* note 97, at 6.

¹⁰⁰ *Id.*, at 7–8.

However, if the company refuses to do so, the Irish authority will likely delay the MAP process pending the outcome of the litigation.¹⁰¹

In view of the above, the MAP provides an alternative procedure through which the companies subject to the DST may succeed in their challenge and obtain a more favorable solution. However, as promising as MAP seems, it has a significant drawback. The competent authorities are only required to *make their best efforts* in negotiating for a solution, they are not obligated to reach a solution if they disagree on certain material issues. Therefore, if the Irish and French authorities are not able to agree on the appropriate treatment of the DST, they are not required to reach an agreement resolving the issue and the challenging companies will likely be left without recourse and will have no choice but to pay the tax. In light of these difficulties, an arbitration procedure was created to improve the likelihood that the issues will finally be resolved despite significant disagreement between competent authorities.¹⁰²

3.4.3 Arbitration

According to Article 19 of MLI, the challenging company can request in writing that the issues unresolved by the MAP be submitted to arbitration and decided by an independent panel of arbitrators. It should be noted that although arbitration seems like an independent process, it is actually an inherent part of the MAP and the issues resolvable by the panel are limited to those that are unresolved during negotiation between competent authorities.¹⁰³

After the issues are submitted to arbitration, the Irish and French authorities will each submit a proposed resolution that addresses all unresolved issues to the arbitration panel. They may also submit supporting position paper and reply submissions to advocate for their positions. Consequently, the competent authorities will be the parties to the arbitration and there is only

¹⁰¹ *Id.*, at 9.

¹⁰² OECD Commentary, *supra* note 62, art. 25, ¶ 64.

¹⁰³ *Id.*, ¶ 68.

limited involvement, if any, of the challenging company during the arbitration process.¹⁰⁴

After confidential deliberation, the panel will choose one of the proposed resolutions and will not provide any explanations or rationale for their decision.¹⁰⁵ The decision of the panel has no precedential value¹⁰⁶ and will only be binding on the competent authorities if accepted by the challenging company.¹⁰⁷ The decision will be deemed not to have been accepted if the challenging company does not withdraw the issues resolved in the arbitration from litigation 60 days after being notified of the panel's decision.¹⁰⁸ The same will be true if the challenging company, after the arbitration is concluded, pursues litigation in domestic courts on the same issues that were resolved in arbitration.¹⁰⁹

Moreover, if it appears that arbitration is no longer suitable for resolving the dispute, it could be terminated by either the competent authorities or the challenging company. The competent authorities, by reaching a mutual agreement resolving the case, will terminate the arbitration whereas the challenging party can stop the process by withdrawing the request for arbitration or for MAP.¹¹⁰

¹⁰⁴ Article 19 of MLI did not explicitly provide for involvement of taxpayers in the arbitration process, but Ireland and France may agree on arbitration procedures that might allow limited participation by taxpayers. See e.g. Memorandum of Understanding regarding the January 13, 2009, signing of the protocol to the US-France income tax convention (2009), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Protocol-Memorandum-of-Understanding-France-1-13-2009.pdf>.

¹⁰⁵ MLI, *supra* note 95, art. 23 (1)(c). Both Ireland and France have chosen to use the “baseball arbitration” process in which no reasoned opinion will be issued by the arbitral panel. See Ireland Department of Finance, TEMPLATE RESERVATIONS AND NOTIFICATIONS UNDER THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING 44 (2019) (“Ireland Ratification to MLI”), <http://www.oecd.org/tax/treaties/beps-mli-position-ireland.pdf>; The French Republic, INSTRUMENT OF RATIFICATION TO THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING 65 (2018) (“France Ratification to MLI”), <http://www.oecd.org/tax/treaties/beps-mli-position-france.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ MLI, *supra* note 95, art. 19 (4)(b)(i), (iii).

¹⁰⁸ *Id.*, art. 19 (4)(b)(i).

¹⁰⁹ *Id.*, art. 19 (4)(b)(iii).

¹¹⁰ *Id.*, art. 22.

Finally, after the arbitration is concluded and a decision rendered by the panel, the Irish and French authorities will have another chance to resolve the issue via mutual agreement if they are not satisfied with the panel's decision. As long as the agreement is reached within three calendar months after the decision is delivered, the arbitration decision will no longer be binding on the authorities.¹¹¹

In sum, the arbitration process offers an ideal alternative to domestic litigation and MAP without foreclosing the possibility of pursuing these other channels altogether. While unable to participate directly in the process, the challenging company has the right to initiate or terminate the process on their own volition or even refuse to accept the arbitration decision if it appears unsatisfactory. Moreover, the arbitration process also provides an incentive for competent authorities to reach a mutual agreement when it becomes clear that arbitration is no longer a desirable way to solve the problem.

As a result, if domestic litigation proves to be unpromising, cumbersome and time-consuming, it might be worthwhile for the companies subject to the DST to make use of the MAP and arbitration process so as to recruit the help of the competent authorities of their resident countries in trying to obtain a more favorable solution to the problems raised by the DST.

3.5 Conclusion on Compliance with International Tax Law

The DST is imposed on every single company within a group as long as they generate revenues as defined by the DST. This leads to the conclusion that there are multiple treaties that could be used as a basis to challenge the DST and the applicable tax treaty in each case depends on the residence of the company challenging the measure.

Under the Ireland-France Treaty, the French DST is likely not a "tax covered" by Article 1. This conclusion precludes the applicability of most parts of the Treaty, but it does not prevent the non-discrimination clause (Article 22) as a

¹¹¹ *Id.*, art. 24 (2); Ireland Ratification to MLI, *supra* note 105, at 45; France Ratification to MLI, *supra* note 105, at 66.

stand-alone provision from coming into play. For the non-discrimination issue, it is possible that Irish companies, their permanent establishments in France and their French subsidiaries might be able to claim discrimination by the DST. Ultimately, however, it is likely that only the Irish headquarters of the targeted “tech giants” and their French subsidiaries are likely to succeed in their challenge against the DST based on “nationality discrimination” and “foreign ownership discrimination.”¹¹²

4 Compliance with International Trade Law

There are three trade law instruments relevant to a legal analysis of the French DST: (1) the WTO moratorium on customs duties on electronic transmissions (hereinafter “the moratorium”); (2) The WTO General Agreement on Trade in Services (hereinafter “the GATS”); and (3) individual bilateral or plurilateral free trade agreements.

It is important to note that, under all of these instruments, a claim challenging a DST must come from a member state – in contrast to the tax context, where an aggrieved individual company itself would bring the claim. The U.S. is the country most likely to bring such a state-to-state challenge. This is because most of the companies affected by the French DST are U.S. companies – although many conduct their French operations through subsidiaries in Ireland or elsewhere. Thus, for purposes of the discussion below, this memorandum will approach the analysis from the perspective of a challenge to the French DST by the U.S. against France.

4.1 The Moratorium on Customs Duties on Electronic Transmissions

In 1998, amid deadlock over how electronic commerce should be treated under WTO rules, members agreed to “not impos[e] customs duties on

¹¹² This conclusion is equally applicable to other DSTs imposed by the UK, Italy, Spain, Austria and Turkey as long as the bilateral income tax treaties concluded by the imposing country include a non-discrimination clause that allows companies to claim discrimination based on nationality and their subsidiaries to claim discrimination based on foreign ownership.

electronic transmissions.”¹¹³ The moratorium has been extended at subsequent ministerial conferences.¹¹⁴ Because the term “electronic transmissions” is not defined, however, the true scope of the moratorium is unclear and therefore likely to be a point of argument between the U.S. and France.

4.1.1 The Moratorium on Customs Duties on Electronic Transmissions Is Likely Not Applicable to the French DST.

The U.S. would likely advance two lines of argument to contend that the moratorium applies to the French DST:

- While conceding that “electronic transmission” is nowhere defined, the context of the declaration supports the proposition that it should encompass digital services like the ones subject to the French DST. The Work Program for Electronic Commerce – which was originally called for in the same declaration that established the moratorium – has defined “electronic commerce” as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”¹¹⁵ Based on this definition, and the fact that electronic commerce was the primary subject matter of the declaration in which the moratorium was enacted, the term “electronic transmission” should be understood to encompass all kinds of electronic commerce including digital services. Therefore, the digital services covered by the French DST should be considered a form of electronic transmission.
- The French DST is prohibited under the moratorium because it acts as a *de facto* tariff on imported digital services. Customs duties are not generally applicable to services, because services do not usually cross the border in the same way that goods do. Because digital services are

¹¹³ See Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2, adopted 20 May 1998.

¹¹⁴ World Trade Organization, Work Programme on Electronic Commerce, General Council Decision of 10 December 2019, WTO Doc. WT/L/1079 (2019).

¹¹⁵ World Trade Organization, Work Programme on Electronic Commerce, General Council Decision of 25 September 1998, WTO Doc. WT/L/274 (1998).

properly considered to be a form of “electronic transmissions” protected by the moratorium, the types of measures prohibited by the moratorium cannot be strictly limited to formal customs duties, since those would generally not govern digital services. Therefore, the moratorium should be read to have a wide scope, encompassing any measures that effectively act as a customs duty on electronic transmission.¹¹⁶ Consequently, the French DST is prohibited by the moratorium because it is functionally equivalent to an import tariff on imported digital services.

France would counter that the moratorium does not cover the DST by contending:

- Under WTO law, form is critically important. The note by the Secretariat for the Council on Trade in Services states “the commitment not to impose customs duties would not preclude recourse to discriminatory measures with an identical effect.”¹¹⁷ The note goes on to state that, therefore, “the commitments on customs duties does not cover internal taxation.”¹¹⁸ Consequently, internal taxes such as the DST are outside the scope of the moratorium.

While the legal positions taken by the Secretariat are not necessarily authoritative, they are considered to be highly persuasive and would likely prove an effective defense of the French DST in this context.

Finally, it is worth noting that General Council decisions cannot be enforced through the WTO dispute settlement mechanism. Art. 1 of the Dispute Settlement Understanding – which governs the use of the WTO’s dispute settlement mechanism – states that only legal claims under the “covered

¹¹⁶ See generally, Gary Clyde Hufbauer & Zhiyao (Lucy) Lu, *The European Union’s Proposed Digital Services Tax: A De Facto Tariff*, Peterson Institute for International Economics Policy Brief 18-15 (2018), <https://www.piie.com/system/files/documents/pb18-15.pdf>.

¹¹⁷ See Council for Trade in Services, *The Work Programme on Electronic Commerce: Note by the Secretariat*, ¶ 34, 35, WTO Doc. S/C/W/68 (Nov. 16, 1998).

¹¹⁸ *Id.* at ¶ 35.

agreements” qualify for dispute settlement.¹¹⁹ General Council decisions, such as the moratorium, are not among the “covered agreements,” so a claim for violating the moratorium does not qualify for WTO dispute settlement. Therefore, even if the U.S. could devise a persuasive argument that the French DST violated this moratorium, it would only be an exercise in “naming and shaming” of France, since France is among the WTO members that have committed to this moratorium.

In conclusion, because France has more persuasive authority on its side, and because the moratorium cannot be used to compel France to revoke or amend the DST, the Moratorium does not appear to be an effective avenue of relief for the U.S. against the French DST.

4.2 General Agreement on Trade in Services

The sections below will proceed as follows. First, this memorandum will provide a general overview describing the structure and operation of the GATS. Next, it will discuss, in turn, each of the two claims that the U.S. might pursue to challenge the French DST in the WTO’s dispute settlement system. Then, assuming the U.S. can establish that the French DST violates one of France’s substantive obligations under the GATS, it will examine whether the DST can yet be justified under one of the exceptions in the GATS. Finally, it will discuss what sort of remedies would be available under the WTO dispute settlement system in the event of a successful U.S. claim.

4.2.1 GATS Overview

The GATS categorizes the provision of services into four “modes.” GATS Article I:2 defines these four modes as the [s]upply of a service:

- (1) from the territory of one Member into the territory of any other Member;
- (2) in the territory of one Member to the service consumer of any other Member;

¹¹⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

- (3) by a service supplier of one Member, through commercial presence in the territory of any other Member; and
- (4) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.¹²⁰

Under GATS, each member state is entitled to decide the service sectors for which it wishes to undertake certain market opening commitments. Moreover, within a given service sector, each member can specify whether or not it wishes to take on those commitments with respect to each mode of supply.

The GATS contains a multitude of legal obligations, many of which are prohibitions of various forms of discrimination. There are two types of GATS claims the U.S. might pursue based on the DST's alleged discrimination against U.S. firms. First, the U.S. might claim that the DST discriminates against U.S. firms in favor of domestic firms – violating the “national treatment” obligation under GATS Article XVII. Second, the U.S. may claim that the DST discriminates against U.S. firms in favor of other foreign firms – violating the “most favored nation” (hereinafter “MFN”) obligation under GATS Article II.

4.2.2 GATS National Treatment Claim

The so-called national treatment obligation, contained in GATS Article XVII, forbids a WTO member state from according less favorable treatment to services and service suppliers of other WTO members than it does to “like” domestic services and service suppliers.¹²¹ However, this obligation only applies to the service sectors that a given WTO member lists in its Schedule of Specific Commitments (hereinafter “GATS Schedule”) and subject to any limitations listed therein.¹²² Thus, in order to establish that the French DST is inconsistent with France's national treatment obligation, the U.S. must demonstrate three things: (1) that France has undertaken the national

¹²⁰ General Agreement on Trade in Services, art. I:2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, (1994). (hereinafter GATS).

¹²¹ GATS, art. XIV:1.

¹²² *Id.*

treatment obligation for the service sectors covered by the French DST; (2) that foreign services and service suppliers that are covered by the French DST are “like” the domestic services and service suppliers not covered by the DST; and (3) that the DST treats the foreign services and service suppliers less favorably than it treats the “like” domestic services and service suppliers. The sections below will address each of these elements in turn. However, before discussing these elements, this memorandum will discuss the threshold question of whether the U.S. can even bring a national treatment claim against the French DST.

4.2.2.1 It Is Unclear Whether the U.S. Can Bring a National Treatment Claim against the French DST Because of the Restriction Imposed by GATS Article XXII.

Before analyzing the merits of whether the French DST violates GATS Article XVII, a key threshold issue must be considered: whether the WTO’s consultation and dispute settlement system is even available as a forum at which the U.S. can bring such a claim. If a U.S. national treatment claim against the French DST is ineligible for the WTO dispute settlement, then the issue of whether the DST violates Article XVII becomes effectively moot.

GATS Article XXII:3 provides:

“A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.¹¹ The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.” (footnote in original).¹²³

In other words, if the French DST falls within the scope of a double-taxation treaty between the U.S. and France, then the U.S. is barred from bringing

¹²³ GATS, art. XXII:3

claims under the GATS Article XVII national treatment provision. If the U.S. and France disagree about whether the DST is covered by such a treaty, the Council for Trade in Services (hereinafter “the Council”) will refer the issue to arbitration for a binding decision on the issue of coverage. Because this analysis proceeds on the basis of a claim by the U.S. against France, the relevant treaty is the U.S.-France Bilateral Income Tax Treaty (hereinafter “the U.S.-France Treaty”).

4.2.2.1.1 France Cannot Block the Council from Referring the Issue of Treaty Coverage to Arbitration.

As a threshold matter, France may attempt to block the Council from referring the issue of coverage to binding arbitration, thereby effectively foreclosing a U.S. national treatment claim against the French DST.

France might argue:

- Because the Council is required to make decisions based on consensus, all members of the Council would need to agree to refer the matter to arbitration.¹²⁴ Therefore, France (as a member of the Council) must give its permission for the Council to validly refer the issue of coverage to arbitration under the Council’s decision-making procedures.

The U.S. would counter:

- The plain language of Article XXII:3 clearly implies that the council need not have consensus to refer the matter to arbitration. The provision uses the word “shall” when discussing how the Council should proceed when the coverage issue is brought before it. The U.S. would argue that the language “shall refer the matter to arbitration” means that the Council does not have the discretion to decide whether to refer the matter to arbitration. It simply *must* do it. Therefore,

¹²⁴ Council for Trade in Services, Rules of Procedure for Meetings of the Council for Trade in Services, WTO Doc. S/L/15 (1995).

because the referral is not a “decision” that the Council is making, the consensus decision-making rule is not applicable.

Because of its strong textual basis, the U.S. position will most likely prevail if such a situation were to arise.

4.2.2.1.2 It Is Unclear Whether France Can Prevent the Coverage Issue from Being Brought before the Council under the Footnote to Article XXII:3.

Article XXII:3 footnote 11 states: “[w]ith respect to agreements on the avoidance of double taxation *which exist on the date of entry into force of the WTO Agreement*, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.” (emphasis added).¹²⁵ Practically speaking, this means that if the U.S.-France Treaty is deemed to “exist” before the WTO agreements entered into force, then France could effectively block the issue of coverage from being decided and prevent the U.S. from bringing its national treatment claim against the French DST.

While this provision may seem straightforward on its face, its application here is unclear. The WTO agreements entered into force on January 1, 1995. The U.S.-France Treaty was signed on August 31, 1994 – before the WTO agreements entered into force. However, the U.S.-France treaty actually entered into force itself on January 1, 1996 – after the WTO agreements entered into force. Footnote 11 is ambiguous as to which of these dates governs for determining whether the U.S.-France Treaty “exists” for purposes of this provision.

France could make three points to argue that the Treaty “exists” when it is signed:

¹²⁵ GATS, art. XXII:3, fn. 11.

- The ordinary meaning of the word “exists” supports the interpretation that the signing date should govern.¹²⁶
- Article 2(1)(a) of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) – which is authoritative for interpreting WTO agreements – defines a treaty as one that is concluded.¹²⁷ Furthermore, VCLT Article 18 imposes an “obligation not to defeat the object and purpose of a treaty prior to its entry into force.”¹²⁸ France would assert that this implies that even though a treaty (such as the U.S.-France Treaty) has not yet entered into force, the treaty still exists insofar as it still carries some legal significance.
- The context of the footnote 11 as a whole supports the interpretation that “exists” does not mean entry into force. Footnote 11 uses the term “entry into force” in referring to the WTO agreements. This indicates that this term must mean something different than “exists,” otherwise the drafters would have used the same term in both instances.

The U.S.’s counterarguments would likely rely on VCLT Article 33, which provides:

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. ... when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.¹²⁹

The WTO agreements are produced in three language – English, Spanish and French – and each version is considered equally authentic for legal purposes. The French version of footnote 11 uses the word “existent,” which is roughly

¹²⁶ *Exist*, *Cambridge Dictionary of American English* (2d ed. 2007) (defines “exist” as to “have the ability to be known, recognized or understood.”).

¹²⁷ VCLT, *supra* note 30, art. 2(1)(a) (“Treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

¹²⁸ VCLT, *supra* note 30, art. 18.

¹²⁹ VCLT, *supra* note 30, art. 33.

equivalent to the word “exist.” The Spanish version, however, uses the term “vigentes,” which here would appropriately be translated as “in force.”

The U.S. could advance two arguments under this provision of the VCLT to assert that the treaty only “exists” when it has entered into force:

- Since the word “exist” in the English and French versions is more ambiguous and general than the Spanish version, the most precise version (i.e. the Spanish version) should control.
- An interpretation based on the Spanish version is best aligned with the “object and purpose” of this treaty. The U.S. would claim that the objective of GATS Article XXII:3 is to prevent conflicts between a country’s legal obligations under the WTO and those in other treaties which bind that country. However, this problem only exists if the other treaty is actually in force, because until that time the country in question is not legally bound by that treaty. Moreover, the alternative interpretation would allow countries to skirt their WTO obligations, without actually taking on any additional obligations under the other treaty. Such a loophole would enable member states to evade their GATS obligations, which cannot be in line with the “object and purpose” of this provision.

This question is debatable, and both sides have strong arguments supporting their preferred interpretation. In addition, it is also unclear how this question would even be litigated, given that it would arise before any sort of dispute settlement body was even constituted. It is possible that the Council would refer the issue to arbitration – but this is not a certainty. For these reasons, it is difficult to predict how this issue would be resolved should the U.S. ever attempt to bring a national treatment claim against the French DST at the WTO.

4.2.2.1.3 The French DST Is Likely Not Covered by the U.S.- France Bilateral Income Tax Treaty.

Assuming the issue of treaty coverage is ultimately referred to arbitration, the next issue to be considered would be whether the French DST “falls within the scope” of a double taxation treaty – specifically, the U.S.-France Treaty. This

memorandum concludes *supra* at footnote 55, that the French DST is likely not within the scope of the U.S.-France Treaty under Article 2 because the DST is not “identical or substantially similar to” the types of taxes enumerated in that section. Furthermore, despite the fact that the Article 25 non-discrimination provision has an expanded scope – covering “any” taxes – it is also not applicable to the French DST because companies are not eligible to claim protection against nationality-based discrimination under this provision.¹³⁰ Therefore, an arbitrator is likely to find that the French DST is not covered by the U.S.-France Treaty and, consequently, is eligible for a national treatment claim against it.

4.2.2.2 The Digital Services Covered by the French DST Are Subject to France’s National Treatment Obligations.

Assuming the U.S. prevails on all issues related to GATS Article XXII:3 and the dispute proceeds to consideration of the merits by a WTO dispute settlement panel, the first issue that would be addressed is whether France has committed to provide national treatment to the digital services affected by the DST. Under GATS, each member state is entitled to decide the categories of services for which it wishes to undertake market opening commitments, including national treatment. Thus, the EU’s GATS Schedule – under which France’s commitments are documented – must be examined to determine the scope of France’s national treatment commitments under GATS Article XVII.¹³¹

¹³⁰ Convention for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, arts. 2, 25, Fr.-U.S., Sep. 9, 1994. (hereinafter “US-France Treaty”). See also *supra* at note 59.

¹³¹ France cannot claim that to the extent that the digital services covered by DST were not available or contemplated at the time its schedule of commitments was agreed, France is still bound by its commitments on the most applicable category for these services. See Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 408, 416(a), WTO Doc. WT/DS363/AB/R (21 December 2009, adopted 19 January 2010). See also Andrew D. Mitchell, Tania Voon, Jarrod Hepburn, *Taxing Tech: Risks of an Australian Digital Services Tax under International Economic Law*, 20 Melb. J. Int’l L. 88, (2019).

4.2.2.2.1 The Digital Services Covered by the French DST Are Covered under France’s Existing GATS Schedule of Commitments.

The French DST sets out two categories of services for coverage. The first category of covered digital services is so-called “digital interface” services. This category of services covers the provision of an electronic interface that users use to connect with other users, especially to buy and sell goods or services between themselves.¹³² Additionally, there are two carve-outs from this provision: (1) where a digital interface provider (i.e., a company operating a website) sells to a user goods or services that it owns; and (2) digital interfaces used “primarily” to provide “digital content,” “communications,” “payment services,” various banking and financial services, or the placement of targeted ads.¹³³ Under the EU’s GATS schedule, the most appropriate classification for this category of digital services is “Computer and Related Services” – especially the subcategories “Software Implementation Services,” “Data Processing Services,” “Data Base Services” and “Other Computer Services.”¹³⁴ For all of these categories, France has undertaken national treatment obligations for all relevant modes of supply.¹³⁵ Therefore, France is bound by its national treatment obligations with respect to companies supplying “digital interface services.”

The second category of digital services covered by the French DST is so-called “targeted advertising” services. This category covers the following internet advertising activities: (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

¹³² Section 301 Report, *supra* note 47, at 14.

¹³³ French DST, *supra* note 11, art. 299 II.1 (b)(c).

¹³⁴ See João Félix Pinto Nogueira, *Taxing the Digital Economy: The EU Proposals and Other Insights*, Chapter 11: The Compatibility of the EU Digital Services Tax with EU and WTO Law: *Requiem Aeternam Donate Nascenti Tributo*, (P. Pistone & D. Weber eds., IBFD 2019), Books IBFD (accessed 30 December 2019). For the EU’s full commitments, see WTO Council on Trade in Services, *European Union Schedule of Specific Commitments*, GATS/SC/157, 7 May 2019.

¹³⁵ GATS, art. I:2.

sale of user data in connection with Internet advertising.¹³⁶ With respect to this category of services, the most appropriate classification is “Other Business Services,” subsector “Advertising.”¹³⁷ Again, France has undertaken full national treatment commitments with respect to all relevant modes of supply for this service sector.¹³⁸ Consequently, this aspect of the French DST can also be challenged by the U.S. for allegedly violating France’s national treatment obligation.

4.2.2.2.2 The Mode of the Digital Services Covered by the DST Is Immaterial for the French DST, But May be Material for Other DSTs.

Although it does not affect the legal analysis of the French DST in particular, it is worth clarifying that both categories of digital services covered by the DST are appropriately characterized as being provided under either mode 1 or mode 3. Determining which of these two modes is applicable will depend on the way in which a particular company delivers their service. If a company delivers its digital service from their U.S. or Irish facilities – e.g. servers in the U.S. or Ireland owned by a U.S. company – into France where they are utilized by French users, then the provision of that service would be under mode 1. If a company delivers its digital service through servers in France owned by its French subsidiary, then that service would be supplied under mode 3. Because France has undertaken national treatment obligations for both modes 1 and 3, it does not matter which of these modes a particular company uses. However, other countries that implement DSTs may not have undertaken commitments for all modes in the relevant sectors – so this is an issue that must be monitored on a case-by-case basis.

¹³⁶ See French DST, *supra* note 11, art. 299, II.2.; See also Section 301 Report, *supra* note 47, at 15.

¹³⁷ See Nogueira *supra* note 133. See also Council for Trade in Services of the WTO, Background Note by Secretariat on advertisement services, S/C/W/47, p. 2, box 1 (WTO 1988).

¹³⁸ *European Union Schedule of Specific Commitments*, *supra* note 133.

4.2.2.3 The US Will Likely Be Able to Establish That U.S. Services and Service Suppliers Covered by the French DST Are “Like” Domestic Services and Service Supplier Not Covered by the DST.

GATS Article XVII only requires non-discrimination between foreign services and service suppliers and “like” domestic services and service suppliers.¹³⁹ The leading case on “likeness” in services is *Argentina – Financial Services*. In that case, the WTO Appellate Body (hereinafter “AB”) set out that the primary criteria for “likeness” in the GATS context is “whether and to what extent the services and service suppliers at issue are in a competitive relationship.”¹⁴⁰ Additionally, factors such as the “nature and characteristics” of the services and the classification of the respective services may be relevant to the “likeness” analysis.¹⁴¹ Finally, the AB clarified that “considerations relating to both the service and service supplier will be relevant” to the analysis.¹⁴² However, the AB cautioned that “likeness can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.”¹⁴³

There are two avenues the U.S. could use to attempt to establish “likeness” under Article XVII: (1) comparison between digital services and comparable non-digital counterparts; and (2) comparison between covered and non-covered digital service suppliers.

¹³⁹ GATS, art. XVII:1.

¹⁴⁰ See WTO Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, adopted 14 April 2016, para 6.34 [hereinafter AB Report in *Argentina-Financial Services*].

¹⁴¹ *Id.*, at ¶ 6.32.

¹⁴² *Id.*, at ¶¶ 6.27–6.29.

¹⁴³ *Id.*, at ¶ 6.26.

4.2.2.3.1 A “Likeness” Comparison of Digital and Non-Digital Services Does Not Provide a Strong Basis for Establishing “Likeness.”

The U.S. might attempt to argue that the covered services provided by U.S. digital services firm are “like” their non-digital counterparts from France which are not covered by the DST. However, it may be difficult to succeed on this line of argument for a couple of reasons.

- First, while some covered digital services have analogous offline versions, others simply do not have an offline equivalent (e.g. social media services). This makes an online-offline comparison of such digital services impossible.
- Second, even where an offline analogue to a covered digital service exists (e.g. advertising), the “nature and characteristics” of the online and offline versions are often quite different. The U.S. may try to counter that, despite their differing characteristics, these online and offline services are still in competition and thus “like.” For example, the U.S. might contend that covered targeted digital advertisements from Google are in competition with traditional billboard advertisements provided by a French traditional advertising company which would not be covered. Even if this line of argument is found to be persuasive, it would still only apply to a narrow set of covered digital services – i.e. those with a clear offline counterpart.

Therefore, a comparison between digital and traditional services will likely not be a strong basis upon which to establish “likeness.”

4.2.2.3.2 The U.S. Can Probably Establish “Likeness” under a Comparison of Covered and Uncovered Digital Service Suppliers.

Under this approach, the U.S. would compare companies that provide essentially identical covered digital services (e.g. targeted digital advertising services). Thus, the focus of this comparison would be whether U.S. service suppliers subject to the DST and French suppliers not subject to the DST were “like.” Under WTO jurisprudence, “[w]hen origin is the only factor on

which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the 'like service suppliers' requirement is met . . . provided [that] . . . domestic and foreign suppliers under the measure are the same in all material respects except for origin.”¹⁴⁴

In arguing that the U.S. and French service suppliers are not “like,” France would point out:

- For purposes of determining coverage, the French DST does not distinguish based on national origin, but on other factors such as a company’s size (as manifested through corporate revenue).

To counter this point, the U.S. might argue:

- While the DST’s revenue thresholds are facially origin-neutral, their design reveals that in practice they do not distinguish based on firm size, but are actually a proxy for national origin.
- Only revenue generated from a covered digital service counts towards the DST’s revenue thresholds. In practice, this design targets U.S. digital advertisement providers – which started as technology companies, pioneered digital advertising and became dominant players in that space.¹⁴⁵ However, it excludes French digital advertisement providers that began as traditional advertising companies and began offering digital advertisement services as part of their portfolio to compete with U.S. providers.¹⁴⁶
- Consequently, DST’s revenue thresholds are a proxy for national origin because they are designed to capture digital advertising suppliers with a business model and background unique to the U.S., but exclude

¹⁴⁴ Report of the Panel, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.975, WTO Doc. WT/DS363/R, (adopted 12 August 2009).

¹⁴⁵ Section 301 Report, *supra* note 47, at 43.

¹⁴⁶ *Id.*

digital advertising suppliers with a business model and background typical to competing French companies.¹⁴⁷

To illustrate, the U.S. could point to French Havas Group – which was the world's sixth largest advertising and marketing group in 2017.¹⁴⁸

- Havas Group has total global and French market revenues that almost certainly meet the DST's thresholds. However, because the revenue Havas Group derived directly from its digital advertising activities do not, on their own, meet the revenue thresholds, this company is not covered by the French DST. By contrast, U.S. firms such as Google and Facebook are covered by the French DST.
- This example demonstrates that the DST's revenue thresholds do not actually distinguish between service suppliers based on firm size. Instead, the revenue thresholds distinguish between otherwise "like" service suppliers – in terms of size and competition between the services provided – on the basis of national origin.

To push back on this line of argument, France may respond:

- Even if the DST's revenue thresholds capture some large digital service suppliers but not others based on a company's background and business model, this does not mean that the thresholds are a proxy for national origin. In fact, these differing backgrounds and business models themselves are the distinguishing factor between digital service suppliers that are covered by the DST and those that are not. In other words, differences in business model are precisely why digital service suppliers covered by the DST are not "like" the digital service suppliers that are not covered.
- Specifically, France would contend that the use of covered digital services by French users adds value to covered digital services companies because the companies monetize the user data to improve

¹⁴⁷ An analogous argument can be made for suppliers of "digital interface" providers. See *Id.*, at 44–45.

¹⁴⁸ *Id.*, at 43.

their services. Consequently, companies with business models that focus on supplying digital services benefit from this “user value creation” in a way that companies with different business models do not. Therefore, they are not “like” uncovered companies, even if the uncovered company offers competing covered digital services.

The U.S. would counter this argument in three ways:

- First, the U.S. would argue that “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” and that “[t]he vast majority of users create little value for the company.”¹⁴⁹
- Second, even if covered U.S. digital services companies do benefit from the data generated by French users, “[t]his is not value added. Rather, it is payment. Data is being provided in exchange for [the user] receiving the ‘free’ service.”¹⁵⁰
- Third, even if French users (and the data they provide) do add value to covered digital service companies, the same is true for many companies not covered by the DST. For example, Havas Group almost certainly benefits from mining data from use of its digital advertising services. Perhaps Havas Group benefits to a lesser extent than Google or Facebook because its digital advertising services are a smaller proportion of its operations – but this is a matter of degree, not a qualitative difference between the firms. Moreover, even some companies that do not provide digital services at all still benefit from user value creation. Examples include “corporate loyalty programs and market research services that operate across borders and depend upon user involvement.”¹⁵¹ Therefore, even if France’s assertions about user created value for digital service companies were true, it still would not provide a basis upon which to distinguish between U.S.

¹⁴⁹ *Id.*, at 74.

¹⁵⁰ *Id.*, at 75.

¹⁵¹ *Id.*

companies that are covered by the French DST and French companies that are not.

In sum, in order to establish that covered U.S. digital service suppliers and excluded French digital service suppliers are not “like,” France would need to demonstrate that the participation of French users does, in fact, add value to companies covered by the DST but not to those which are not covered by the DST. This would provide a legitimate basis upon which the DST distinguishes between covered and uncovered service providers other than national origin. If France fails to do so, the U.S. could make a strong case that the DST’s revenue thresholds are simply a proxy for national origin because, in practice, the DST covers mostly U.S. companies and virtually no French companies.¹⁵² This point is also bolstered by a host of comments made by French officials throughout the legislative process for enacting the DST.¹⁵³ Ultimately, it appears more likely than not that the U.S. will succeed in establishing that the “likeness” element is satisfied.

4.2.2.4 The US Will Likely Succeed in Establishing that the French DST Treats US Service Suppliers Less Favorably than “Like” French Service Suppliers.

Once the U.S. establishes that U.S. digital services and service suppliers and French services and service suppliers are “like”, the question then becomes whether the French DST discriminates between these “like” services and service suppliers. Article XVII:3 provides that a member country discriminates – i.e. gives “less favorable treatment” – if the member provides “formally identical or formally different treatment . . . [which] modified the conditions of competition in favor of [domestic] services or service suppliers . . . compared to like services or service providers of any other [country].”¹⁵⁴ In other words, even if the treatment of the foreign and domestic services or service providers

¹⁵² *Id.*, at 25–27.

¹⁵³ *Id.*, at 31–35.

¹⁵⁴ GATS, art. XVII:3.

is facially neutral, *de facto* origin-based discrimination also qualifies as “less favorable treatment” and a violation of Article XVII.

Assuming that the U.S.’s alleged “likeness” comparison was between U.S. digital service providers and French digital service providers, demonstrating “less favorable treatment” is relatively straightforward. The U.S. could demonstrate “less favorable treatment” on two grounds:

- U.S. providers (which by and large meet the DST’s revenue thresholds) are subject to the DST, and French providers (which virtually always do not meet the revenue thresholds) are not subject to the tax.
- The DST allows covered service providers to reduce their DST liability by up to two-thirds through deductions for payment of the French Corporate Income Tax. The U.S. would argue that this provision favors French firms, because foreign firms would likely not pay the French Corporate Income Tax – and thus not qualify for this deduction – whereas “like” domestic firms would be eligible.

In sum, the U.S. is likely to succeed in demonstrating that the French DST provides “less favorable treatment” to U.S. digital service providers than to “like” French digital service providers, thereby establishing a violation of Article XVII’s national treatment obligation.

4.2.3 Most Favored Nation Claim

The second claim that the U.S. could pursue to challenge the French DST is that the DST violates France’s MFN obligation. The sections below will proceed as follows. The first section will provide an overview of the requirements for establishing an MFN violation and the applicable legal standards for determining whether such a violation has occurred. Then, it will discuss and analyze the arguments that the U.S. and France would make with respect to a challenge to the French DST under the GATS MFN provision.

4.2.3.1 MFN Overview

GATS Article II:1 provides: “[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less

favorable than that it accords to like services and service suppliers of any other country.” In other words, France cannot give more favorable treatment to the services or service providers of, for example, Sweden than to those of the U.S.

The standard for “likeness” in GATS Article XVII national treatment claims and GATS Article II MFN claims is the same.¹⁵⁵ Furthermore, the standard for “less favorable treatment” is identical for both Article XVII and Article II claims – covering both *de facto* and *de jure* discrimination.¹⁵⁶ Finally, while Article II MFN obligations are not contingent upon sector-by-sector commitments as is true with Article XVII national treatment obligations, member states can carve out exceptions for MFN treatment in their GATS Schedule.¹⁵⁷ However, France has not carved out any relevant exceptions to MFN treatment in its schedule.¹⁵⁸

4.2.3.2 It Is More Likely than Not That the U.S. Cannot Establish That the French DST Violates France’s MFN Obligation.

In making its MFN claims, the U.S. will likely want to focus on a specific example of discrimination between the U.S. service suppliers and those of another country. One example the U.S. might employ is discrimination between U.S. companies Apple and Google and Swedish company Spotify.

4.2.3.2.1 Establishing “Less Favorable Treatment” Is Relatively Straightforward.

The French DST carves out “digital content” from coverage under the “digital interface” services category.¹⁵⁹ As a result, Swedish Spotify – a music streaming service – is excluded from the French DST even though it

¹⁵⁵ *Argentina – Financial Services*, ¶¶ 6.22-6.24.

¹⁵⁶ *Id.*, at ¶¶ 6.102–106. See also WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 231-234, WTO Doc. WT/DS27/AB/R (adopted 9 September 1997).

¹⁵⁷ GATS, art. II:2

¹⁵⁸ See *European Communities and Their Member States – Final List of Article II (MFN) Exemptions*, GATS/EL/31, 15 April 1994.

¹⁵⁹ See Section 301 Report, *supra* note 47, at 39–40.

otherwise meets the criteria for coverage. Seemingly, this carve out would also exclude American companies Apple and Google with respect to their provision of digital content – namely, apps – through their app stores. However, the French DST ensures that Apple and Google are covered by the DST by narrowing the scope of the “digital content” carve out such that it explicitly does not cover apps.¹⁶⁰ This structural discrimination would clearly qualify as “less favorable treatment,” so the key question is whether Spotify and the service it provides are “like” Apple and Google and their app store service.

4.2.3.2.2 Establishing “Likeness” Could Be Challenging.

The U.S. would contend that Article II’s “likeness” criteria is met on two bases:

- The services of all three companies are “like” because they provide a platform which allows users to access digital content on their smartphones and other devices. Moreover, in both cases the digital content provided on the platforms was not created by Spotify or Apple or Google, but by other content creators who distribute their content through these platforms. Because of these shared features the services should be considered “like.”
- All three companies are similarly huge with respect to their revenues, user bases and global market share. Therefore, Spotify, Apple and Google are “like” service suppliers – at least with respect to the app store aspect of Apple and Google’s businesses.

France might counter that these service suppliers are not “like” by advancing two arguments:

- The services supplied are not “like” because the provision of music is materially different than the provision of apps. When the comparison is framed this way, the service supplied by Spotify (e.g. delivery of music) is not in a competitive relationship with the service supplied by Apple and Google (e.g. delivery of apps).

¹⁶⁰ *Id.*, at 40.

- Even if the digital platforms themselves are the service that each company supplies, these digital platforms, while similar, are still not in a competitive relationship because they do not compete for the same users. As such, the services supplied by Spotify on the one hand and Apple and Google on the other hand are not “like.”

If the U.S. structured its MFN claim in the manner discussed in this section, it is more likely than not that its claim would fail because, in this example, “likeness” would be difficult to establish.¹⁶¹ However, because MFN discrimination could potentially be established as between the U.S. and a number of other countries, there are numerous other ways in which the U.S. could structure its MFN claim which may or may not be more successful than the claim discussed here.

4.2.4 GATS Article XIV: Exceptions to National Treatment and Most Favored Nation Obligations

Even if the U.S. can demonstrate that the French DST violates France’s national treatment and/or MFN obligations under the GATS, France can still avoid an adverse ruling if it can successfully invoke one of the exceptions in GATS Article XIV. There are three exceptions that France may attempt to invoke in defense of the DST: (1) the exception for direct taxes (Article XIV(d)); (2) the exception for measures covered by double taxation treaties (Article XIV(e)); and (3) the exception for measures necessary to ensure compliance with other domestic WTO compliant measures (Article XIV(c)). In addition, even if France can establish that the French DST qualifies for one of these exceptions, it must still demonstrate that the DST meets the requirements of the Article XIV gatekeeping provision – the so-called “chapeau” – before any violation of national treatment or MFN would be excused. The following sections will address each of the enumerated

¹⁶¹ An MFN claim against Sweden (or any other EU member state) may also be justified under the GATS Art. V exception for “agreements liberalizing the trade in services” (i.e. free trade agreements for customs unions). See GATS, art. V.

exceptions in turn. It will then analyze the French DST's compliance with the Article XIV chapeau.

4.2.4.1 How the Panel Interprets the Article XIV (d) Exception for Direct Taxes Will Determine Whether It Applies to the French DST.

Article XIV(d) allows for a WTO member to implement measures which discriminate against foreign services and service providers in favor of domestic ones – i.e. breach its Article XVII national treatment obligation – if “the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Members. (footnote in original)”¹⁶² The GATS defines ‘direct taxes’ as “all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.”¹⁶³

The U.S. would argue that, in order to invoke this exception, France would need to establish that the DST is a “direct tax” under this definition.

France might contend:

- The DST meets this definition because, as a tax on revenue, it is a tax on “elements of income.”

The U.S. would respond:

- Although the term “income” is not defined with respect to the GATS definition of “direct taxes,” the term is properly interpreted to mean profits. The Agreement on Subsidies and Countervailing Measures (hereinafter “the SCM agreement”) provides a definition of “direct tax”

¹⁶² GATS, art. XIV(d).

¹⁶³ GATS, art. XXVIII(o)

that includes a list of forms of “income” – including “profits.”¹⁶⁴ While this definition does not govern for purposes of GATS Article XIV(d), the U.S. would assert that the SCM Agreement definition forms part of the “context” through which the ambiguous term “income” in the GATS “direct tax” definition should be interpreted.¹⁶⁵ Based on such an interpretation, the DST is not a tax on “elements of income” because it taxes revenue, not profit. Consequently, the French DST is not a “direct tax” and therefore does not qualify for the Article XIV(d) exception.

If a Panel adopted the U.S.’s premise for the terms of debate – i.e. that the DST itself must be a “direct tax” to qualify for this exception – then the U.S. will likely prevail.

France, on the other hand, would likely contend that Article XIV(d) does not require the DST to be a “direct tax” for this exception to apply. France would assert that, under a proper interpretation of Article XIV(d), all that is necessary is that the DST “is aimed at ensuring the equitable and effective⁶ imposition or collection of direct taxes (footnote in original).”¹⁶⁶ Footnote 6 sets out, in relevant part, that:

Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member’s territory; or . . .
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures.¹⁶⁷

¹⁶⁴ See Agreement on Subsidies and Countervailing Measures, fn. 58, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, (1994).

¹⁶⁵ See VCLT, *supra* note 30, art. 31. (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹⁶⁶ GATS, art. XIV(d).

¹⁶⁷ *Id.*, fn 6.

In other words, France would argue that if the DST falls into one of these categories of measures enumerated in footnote 6, then the Article XIV(d) exception can be invoked to justify the DST.

With respect to subparagraph (i), France would likely contend:

- The DST was implemented “in recognition of the fact” that digital services companies do not have tax obligations for the digital services they provide in France because, based on the current global tax regime, their income tax obligations are based on where they have a physical establishment – i.e. outside of France. This measure is meant to compensate for this imbalance resulting from the current global income tax system.

Regarding subparagraph (iii), France might argue:

- Digital service companies generally pay a lower effective tax rate than other types of companies, and that the DST was imposed to ensure that digital service companies do not avoid paying their “fair share” of taxes.¹⁶⁸

The U.S. would counter:

- It is not the case that digital service providers, in fact, pay a lower effective tax rate than other types of companies. The U.S. would point out that France (and the EU) have drawn this conclusion from 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.”¹⁶⁹ Furthermore, “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.”¹⁷⁰

¹⁶⁸ See Ministère 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>.

¹⁶⁹ Section 301 Report, *supra* note 47, at 72.

¹⁷⁰ *Id.*

In sum, France's ability to invoke the Article XIV(d) exception largely depends on what the Panel decides is required to invoke the exception. If the DST itself must fit the GATS "direct tax" definition, then the U.S. will likely prevail. If DST need only qualify as one of the categories of measures enumerated in footnote 6, then it is more likely than not that France will be able to invoke the exception. It is worth noting, however, that even if France successfully invoked this defense, it would excuse a national treatment violation under Article XVII, but not an MFN violation under Article II.

4.2.4.2 The Article XIV (e) Exception Likely Will Not Apply to the French DST Because It Is Not "the Result of" a Double Taxation Treaty.

Article XIV(e) allows a WTO member to adopt a measure inconsistent with the MFN requirement under Article II if "the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound."¹⁷¹ For this exception to apply the measure at issue has to be "the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound."¹⁷²

France would likely take the position that:

- The term "as a result of" is ambiguous and should be interpreted broadly.
- Because of double taxation treaties, such as the U.S.-France Treaty, France is restricted in the changes it can make to its corporate income tax to address the issue of unfairly low effective tax rates for digital service companies. Thus, "as a result of" this double taxation treaty

¹⁷¹ GATS, art. XIV(e).

¹⁷² *Id.*

and the restrictions it imposes, France has to impose the DST to address this issue.

The U.S., on the other hand, would argue:

- A narrow interpretation of the term “as a result of” is more appropriate.
- If the term were interpreted as broadly as France would like, it would defeat the “object and purpose” of the provision. This is because a country could claim that virtually any tax measure is indirectly linked to a double taxation treaty by asserting that because that country could not make some change to its tax regime because of a double taxation treaty, it must instead impose some other tax measure that is beyond the purview of the treaty. This would render the exception’s limitation to double taxation treaties effectively meaningless.
- Under an appropriately narrow interpretation of the provision, the French DST does not qualify as “a result of” double taxation treaties since it is a unilateral measure, not a measure adopted pursuant to any international taxation agreement.

In conclusion, whether the Article XIV(e) exception is available to justify the French DST depends on how broadly the Panel is willing to interpret the term “as a result of.” Given that the U.S.’s narrow interpretation is more in line with the plain reading of the provision, it appears more likely than not that the Panel would adopt that interpretation. Therefore, France will probably not be able to invoke this exception to defend its DST. Moreover, even if France was able to invoke this exception successfully, it would only excuse its violation of its MFN obligation under Article II.

4.2.4.3 The Article XIV(c) Exception for Measures “Necessary to Secure Compliance” Likely Cannot Justify the French DST.

GATS Article XIV(c) provides that WTO members can adopt measure which are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”¹⁷³

France would take the position that:

- The DST is necessary to ensure compliance with other French measures aimed at preventing tax avoidance and tax base erosion. To make this argument, France would need to identify specific domestic measures with this objective and demonstrate that those measure are per se compliant with France’s WTO obligations.
- Assuming France could do so, it would then rely on the panel report in *Argentina – Financial Services*, which found that Argentina’s measure which taxed profits earned from certain financial services supplied by service suppliers of non-cooperative countries at a higher rate than like services from service suppliers of cooperative countries contributed to protecting the tax base because it discouraged the undeclared outflow of capital and the false payment of interest.¹⁷⁴ France would contend that the DST is analogous to the Argentine tax in that case, and should thus qualify for the Article XIV(c) exception.

U.S. would respond:

- There is an insufficient link between the domestic measure that France identified and the DST – specifically, that the DST truly implements or “secures compliance with” that domestic measure.

¹⁷³ GATS, art. XIV(c).

¹⁷⁴ Panel Report, *Argentina – Financial Services*, ¶¶ 7.691-7.692, 7.707. This finding was rendered moot on appeal because the Appellate Body reversed the Panel’s findings on the underlying non-discrimination obligations, and Panama did not appeal this finding. See AB Report, *Argentina – Financial Services*, ¶ 6.231.

- Assuming that France could establish such a link, the U.S. would then assert that the DST is not “necessary” under the meaning of Article XIV(c) because there are a plethora of other ways to prevent tax base erosion that do not discriminate against U.S. companies.

Given the relatively high standards to satisfy the requirements of Article XIV(c), the US is likely to prevail on this issue.¹⁷⁵ As a result, France would not be able to use this exception to justify its discriminatory treatment under Article II and XVII.

4.2.4.4 The French DST Constitutes “Arbitrary or Unjustifiable” Discrimination between Countries.

Even if France could establish that the DST qualifies for one of the exceptions discussed above, it would still need to demonstrate that the chapeau of Article XIV was satisfied before its discriminatory treatment would be excused. The Article XIV chapeau requires that the measure at issue is not “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”¹⁷⁶

The focus of the analysis under this chapeau is on the application of a measure already found to violate a country’s obligations under the GATS but that falls within one of the paragraphs of Article XIV.¹⁷⁷ Specifically, the Panel in *Argentina – Financial Services* explained that there are three types of situations relating to the application of a measure that could constitute a violation of the chapeau: “(i) arbitrary discrimination between countries where like conditions prevail; (ii) unjustifiable discrimination between countries where like conditions prevail; or (iii) a disguised restriction on trade in services.”¹⁷⁸ The Panel then went on to clarify that the existence of one of these situations

¹⁷⁵ Thomas Cottier, Panagiotis Delimatsis & Nicolas Diebold, *Article XIV GATS: General Exceptions*, at 14–15, (2008).

¹⁷⁶ GATS, art. XIV.

¹⁷⁷ Appellate Body Report, US – Gambling, ¶ 339.

¹⁷⁸ Panel Report, Argentina – Financial Services, ¶ 7.745-7.746

is enough to find a violation of the chapeau.¹⁷⁹ However, in practice these three situations are addressed together and are effectively one requirement.¹⁸⁰ Finally, the Panel explained that “the design, the architecture, and the revealing structure of a measure” can be used to discern whether a measure is applied in a manner that is prohibited by the chapeau.¹⁸¹ Simply put, the key question under the chapeau is whether the design and structure of the French DST indicates that it discriminates between the services or service supplier of different countries in an arbitrary or unjustifiable way. Discrimination is considered to be arbitrary or unjustifiable when the purported objective of the measure is at odds with the way the measure is applied (through its design, structure, etc.).

The U.S. would contend that the structure of the French DST arbitrarily discriminates against U.S. digital service suppliers. In doing so, the U.S. would likely advance three arguments:

- In practice the revenue thresholds capture U.S. companies but do not capture virtually any French companies.¹⁸²
- Carve outs in DST coverage were designed to ensure U.S. companies are covered while French companies, which would otherwise be covered, are excluded. In particular, the U.S. would point to: (1) the fact that only revenues from covered digital services count towards the revenue thresholds, which allows for exclusion of large French companies provide digital services but also derive revenue from other sources; (2) the carve out for “digital content,” which excludes major French digital services companies that would otherwise be covered under “digital interface” services; and (3) the carve out for e-commerce retailers who own the inventory that they sell online, which captures

¹⁷⁹ *Id.*

¹⁸⁰ See *id.*; WTO Panel Report, *European Union and Its Member States—Certain Measures Relating to the Energy Sector*, ¶ 7.1244, WT/DS476/R (adopted 10 August 2018).

¹⁸¹ Panel Report, *Argentina – Financial Services*, ¶ 7.748, referring to Appellate Body Report, *EC – Seal Products*, ¶ 5.302.

¹⁸² See Section 301 Report, *supra* note 47, at 25–27.

companies like Amazon and Airbnb but excludes large French retailers like Carrefour that sell their products online.¹⁸³

- There are a multitude of comments by French officials and legislators stating that the DST should be designed to cover U.S. digital service companies but not French companies.¹⁸⁴

Given the huge disparity between the number of U.S. digital service suppliers and French digital service suppliers covered by the DST, as well as the discriminatory comments by French officials, it seems likely that the U.S. will be able to establish that the application of the French DST violates the chapeau of Article XIV. Therefore, even if France is able to establish that the French DST qualifies for one of the exceptions listed in the paragraphs of Article XIV, the DST still would not be excused by Article XIV.

4.2.5 Remedies under WTO Dispute Settlement System

Assuming that the U.S. prevails on one of its claims against the French DST, it is worth examining the relief that might be available to the U.S. and its resident digital services companies. In the event that a WTO dispute settlement Panel concludes the French DST violates the GATS (and the Appellate Body upholds the finding on appeal), there are three forms that the remedy could take. In the first instance, France would be required to come into compliance with the Panel ruling by either amending the DST, such that it no longer breaches France's GATS obligations, or to rescind the DST entirely if it cannot be made compliant.¹⁸⁵ If France fails to comply by amending or rescinding the DST, monetary damages would be called for. The monetary damages due would be equal to the amount of economic harm done by the DST. These damages could be collected either through an agreement by

¹⁸³ See *id.*, at 37–40.

¹⁸⁴ *Id.* at 31–35.

¹⁸⁵ World Trade Organization, *Understanding the WTO: Settling Disputes, A Unique Contribution*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited May 10, 2020).

France to make payments to the U.S., or through the U.S. levying tariffs on France equal to the value of the damages due.¹⁸⁶

There are three drawbacks to the WTO dispute settlement system for U.S. technology companies seeking relief from the French DST.

- First, there is no guarantee that France would comply with an adverse ruling by amending or rescinding the DST. Nor does it seem likely – for political reasons – that France would agree to make affirmative damages payments. Thus, it is likely that any damages would be collected through imposition of tariffs on French imports to the U.S. From the perspective of affected companies, this is somewhat problematic because these companies would have to establish some way to collect money from the U.S. government to compensate for any payments they made under the French DST.
- Second, WTO dispute settlement proceedings often take years to fully play out.¹⁸⁷ This means that, even in the event of a favorable ruling, affected digital service companies could be forced to pay the French DST for an extended period of time before relief might be forthcoming.
- Third, the U.S. is currently blocking new members from being appointed to the WTO's Appellate Body – thereby preventing it from having the quorum necessary to hear cases.¹⁸⁸ This has effectively crippled the WTO dispute settlement system because parties to a dispute cannot exercise their right to an appeal. Consequently, pursuing relief through the WTO dispute settlement system may prove ineffectual because the system simply cannot function properly at this time.

In sum, under ordinary circumstances the WTO dispute settlement system could serve as an effective (albeit somewhat flawed) option for U.S.-based digital services companies to challenge and pursue relief from the French

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Brandon J. Murrill, Congressional Research Service, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System" (2019)*.

DST. However, given the uncertainty surrounding the functioning of the system at this time, challenging the French DST at the WTO may not be worthwhile.

4.2.6 Conclusion on Compliance with GATS

From a legal standpoint, the GATS provides a promising avenue for the U.S. to mount a legal challenge against the French DST. It is probable that the U.S. could establish that the French DST violates the GATS national treatment obligation, and perhaps even the MFN obligation. Furthermore, France would not be able to justify these violations under the exceptions in GATS Article XIV because the French DST cannot satisfy the Article XIV chapeau. In the end, there is a strong chance that the U.S. could prevail in a WTO case challenging the French DST, but there is substantial doubt about whether this would provide meaningful relief to affected U.S. digital services companies.

4.3 Free Trade Agreements

While there is currently no free trade agreement in place between the U.S. and France that would govern the French DST specifically, as DSTs proliferate to more countries, free trade agreements will likely come into play as another legal regime applicable to these measures. As such, it is important to assess the compliance of a measure like the French DST against now standard provisions in U.S. and European trade agreements. This section will examine two recently concluded free trade agreements as models and analyze a DST identical to the French DST to determine whether such a tax would violate the relevant provisions of these free trade agreements. The two agreements that will be examined are (1) The U.S.-Japan Digital Trade Agreement (hereinafter “the U.S.-Japan Agreement”) and (2) The EU-Canada Comprehensive and Economic Trade Agreement (hereinafter “the CETA”). The sections below will discuss these two agreements in turn.

4.3.1 U.S.-Japan Digital Trade Agreement

The U.S.-Japan agreement has been lauded by the current U.S. administration as the “gold standard” on digital trade rules.¹⁸⁹ As such, it appears likely that the digital trade provisions of this agreement will be the template for future trade agreements that the U.S. concludes with other countries. Thus, if a country with which the U.S. has concluded such an agreement attempts to implement a measure like the French DST, the U.S. may seek to challenge that DST under the auspices of the free trade agreement.

The U.S.-Japan Agreement contains two legal obligations that are potentially relevant to a French-style DST. The first is the non-discrimination obligation set out in Article 8 of the agreement. Article 8.1 provides:

Neither Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of the other Party, than it accords to other like digital products.¹⁹⁰

It is critical to note that the scope of this non-discrimination obligation is limited to “digital products.” Unlike in the WTO context, the U.S.-Japan Agreement provides a definition for “digital products.” Article 1 states that “digital product” means “a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.”¹⁹¹

¹⁸⁹ Press Release, White House, President Donald J. Trump Has Secured a Tremendous Victory for American Farmers and Businesses with New Japan Trade Agreements, (Oct. 7, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secured-tremendous-victory-american-farmers-businesses-new-japan-trade-agreements/>.

¹⁹⁰ Agreement between the United States of America and Japan Concerning Digital Trade art. 8.1., Oct. 7, 2019. (hereinafter “U.S.-Japan Agreement”).

¹⁹¹ *Id.*, art. 1(g).

4.3.1.1 It Is Unclear Whether the Digital Services Covered by a French-style DST Are within the Scope of the Non-discrimination Provision.

While the definition of “digital product” is relatively broad, it is not clear that it would encompass the digital services covered by a measure like the French DST – namely, “digital interface” services and “digital advertising” services.

The U.S. would likely take the position that:

- Digital interface services – such as the digital platforms provided by Uber or Amazon – qualify as “computer programs” or “other products” under this definition and are therefore covered by the agreement’s non-discrimination obligation.
- A digital advertising services qualify as a “video, image or sound recording” or are covered by the “other product” category.

The country being challenged may counter that the DST covers digital services, not digital products. They might argue:

- The platforms provided by the likes of Amazon and Uber do not qualify as “digital products” because they constitute services which facilitate the delivery of the real product – i.e. the physical good the consumers order, the car ride, etc.
- The targeted advertising offered by Facebook and Google do not qualify as digital products because what they are selling is not the ad itself – which in some cases is designed by the company whose ad is being placed – but the service of leveraging data to place the ad in front of the specific desired demographic.

Since the application of this “digital products” definition has never been tested, it is difficult to predict which side would prevail.

4.3.1.2 A French-style DST Can More Likely Than Not Be Challenged under the Agreement’s Tax Provisions.

Assuming that the services covered by a measure like the French DST are deemed to be “digital products”, the next issue is whether the DST can be

challenged under the tax provisions in Article 6 of the agreement. Article 6.3 provides that the non-discrimination obligation “shall apply to all taxation measures, other than those on income, on capital gains, on the taxable capital of corporations, on the value of an investment or property (but not on the transfer of that investment or property), or taxes on estates, inheritances, gifts, and generation-skipping transfers.”¹⁹² A measure like the French DST would certainly be covered under this provision. However, Article 6.3 goes on to state that the non-discrimination does not apply to:

(d) a non-conforming provision of any existing taxation measure. . .[or]

(g) the adoption or enforcement of any new taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes, including any taxation measure that differentiates between persons based on their place of residence for tax purposes, provided that the taxation measure does not arbitrarily discriminate between persons, goods, or services of the Parties.⁶ (footnote in original)

The footnote at the end of subsection (g) clarifies that “[t]he Parties understand that this subparagraph must be interpreted by reference to the footnote to subparagraph (d) of Article XIV of the GATS as if the latter subparagraph was not restricted to services or direct taxes.” In other words, the non-discrimination obligation will not apply to internal tax measures like a DST when (1) the DST was in place before the free trade agreement came into force; or (2) the tax measure would be excused under GATS Article XIV(d) and the Article XIV chapeau. Because subsection (g) essentially incorporates GATS Art. XIV(d) and the Article XIV chapeau, the viability of a claim against a measure like the French DST under Article 6 of the U.S.-Japan Agreement would be analyzed the same way as discussed *supra* in sections 4.2.4.1 and 4.2.4.4. Additionally, Article 3 incorporates three of the other exceptions provided in GATS Article XIV, including the exception for measures necessary to ensure compliance with other domestic measures. Again, analysis of the applicability of this exception in the context of the U.S.-Japan Agreement will be the same as the analysis discussed in the WTO

¹⁹² *Id.*, art. 6.8.

context *supra* in section 4.2.4.3. As discussed in the sections above, even if the French DST-like measure could qualify for either of these substantive exceptions, it still would not be excused because it “arbitrarily discriminates” against foreign services and service providers.

4.3.1.3 A French-style DST Likely Complies with the Agreement’s Prohibition on Customs Duties on Electronic Transmissions.

The next issue is whether a measure like the French DST complies with the prohibition on customs duties on electronic transmissions contained in Article 7 of the U.S.-Japan Agreement. Article 7 states that “neither Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of a Party and a person of the other Party.”¹⁹³ Two definitions, provided in Article 1, are pivotal for analyzing whether a measure like the French DST would violate this provision. First, “electronic transmission” or “transmitted electronically” is defined as “a transmission made using any electromagnetic means.”¹⁹⁴ Second, a “customs duty” is defined as including “any duty or charge of any kind imposed on or in connection with the importation of a good, and any surtax or surcharge imposed in connection with such importation.”¹⁹⁵

Because the definition for “electronic transmission” is so sweeping, it is virtually certain that it would encompass the digital services covered by a measure like the French DST. The key question then becomes whether a measure like the French DST is a “customs duty.” As discussed *supra* in section 4.1.1, the U.S. may argue that because a measure like the French DST applies almost exclusively to foreign companies, it acts as a *de facto* charge on the importation of digital services covered by the DST. However,

¹⁹³ *Id.*, art. 7

¹⁹⁴ *Id.*, art. 1(j).

¹⁹⁵ *Id.*, art. 1(f)

this argument is likely to fail, because the “customs duty” definition limits its scope to duties or charges on goods.

4.3.2 The CETA

The electronic commerce chapter of the CETA is very limited as compared to the U.S.-Japan Agreement. The only relevant substantive obligation contained in the CETA is set out in Article 16.3.1, which states “[a] Party shall not impose a customs duty, fee or charge on a delivery transmitted by electronic means.”¹⁹⁶ Here a “delivery” is defined as “a computer program, text, video, image, sound recording, or other delivery that is digitally encoded.”¹⁹⁷ While this definition is rather expansive, it is unclear whether the digital services covered by the French-style DST would qualify as a “delivery” under this definition.

Assuming that the digital services covered by a French-style DST do qualify as a “delivery,” Article 16.3 further narrows the scope of this obligation by stipulating that it “does not prevent a Party from imposing an internal tax or other internal charge on a delivery transmitted by electronic means, provided that the tax or charge is imposed in a manner that is consistent with this Agreement.”¹⁹⁸ Articles 9.3 and 9.5 – contained in the chapter on cross-border trade in services – set out national treatment and MFN obligations that are substantially the same as those contained in GATS Article XVII and II respectively, and arguably govern digital services. Therefore, the analysis of the French DST’s compliance with these provisions will be largely the same as the analysis conducted *supra* in sections 4.2.2 and 4.2.3.

However, even assuming that a French-style DST violates one or both of these obligations, it likely still does not violate the CETA. Article 28.7.4(d) of the agreement contains an exception which states that nothing in the

¹⁹⁶ Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and its Member States of the Other Part art. 16.3.1, Oct. 30, 2016. (hereinafter “CETA”)

¹⁹⁷ *Id.*, art. 16.1

¹⁹⁸ *Id.*, art. 16.3.2

agreement applies “to a taxation measure of a Party that is aimed at ensuring the equitable and effective imposition or collection of taxes.”¹⁹⁹ While the language of this provision largely mirrors that of GATS Article XIV(d), its scope is even broader for three reasons.

- First, it applies to taxation measures aimed at ensuring the equitable and effective imposition of *all* taxes – not just direct taxes.
- Second, there is no corresponding footnote – as is the case with GATS Article XIV(d) – that sets out the types of measures that qualify as “ensuring the equitable and effective imposition” of taxes. Therefore, the country imposing the DST would have more latitude to argue that its DST is aimed at ensuring the equitable and effective imposition of taxes.
- Third, unlike GATS Article XIV, there is no chapeau that requires the DST to not “arbitrarily discriminate” as between countries. While the arguments each side would advance as to whether a French DST-like measure qualifies for this exception would be largely the same as discussed *supra* in section 4.2.4.1 and 4.2.4.4, it is likely that the French DST would ultimately qualify for this exception because of its more generous terms.

In sum, if the U.S. and the EU were to enter into a free trade agreement which was substantially identical to the CETA in the aspects discussed in this section, it seems likely that the U.S. would not be able to mount a successful challenge to the French DST under such an agreement. Even if the U.S. could demonstrate that the DST constitutes a substantive violation of the agreement, it is likely that the DST would still qualify for the exception in Article 28.7.4(d).

4.3.3 Enforceability of Free Trade Agreement Violations

Assuming that a measure like the French DST violated a free trade agreement, the effectiveness of that trade agreement as an avenue to

¹⁹⁹ *Id.*, art. 28.7.4(d).

challenge the measure depends on whether the agreement contains a binding enforcement mechanism. If the agreement at issue contains a bilateral dispute settlement mechanism – as is the case with the CETA – then the U.S. could employ that mechanism for recourse against another party to the agreement that implements a DST that violates the agreement. Without such a mechanism, however, a challenge under a trade agreement would not provide meaningful relief.

4.3.4 Conclusion on Compliance with Free Trade Agreements

If the U.S. were to challenge a measure like the French DST through a hypothetical free trade agreement, the outcome would obviously depend on the substance of the relevant legal provisions in that agreement. If the agreement mirrored the U.S.-Japan Digital Trade Agreement, the U.S. may prevail on a challenge against a measure like the French DST. However, if the agreement mirrored the EU-Canada Comprehensive and Economic Trade Agreement, then a challenge to a French DST-like measure would probably fail. Given that the current U.S. administration seems to favor bilateral and plurilateral free trade agreements to the WTO, it may be the case that free trade agreements will become the primary battlefield for U.S. attempts to challenge or curtail the use of DSTs.

4.4 Conclusion on Compliance with International Trade Law

Because of the French DST's effect on digital services provided by foreign companies in France, international trade law will undoubtedly be a major component of any comprehensive effort by the U.S. and its digital services companies to legally challenge the French DST. The three international trade law instruments discussed in this section offer varying degrees of potential for such a challenge.

The WTO moratorium on electronic transmissions would likely not cover the French DST, so a U.S. challenge to the French DST is unlikely to prevail. However, a U.S. challenge under the GATS – on claims that the French DST violates the national treatment and MFN obligations – would likely succeed because of the DST's discriminatory structure and consequent inability to be

justified under the exception provisions in the GATS. Finally, the U.S.'s ability to challenge a measure like the French DST through a free trade agreement depends on the substance of the relevant provisions. If the agreement mirrored the U.S.-Japan Agreement, a U.S. challenge would likely succeed. However, if the agreement mirrored the CETA, the U.S. challenge would probably fail.

5 Compliance with EU law

The structure of the DST raises a variety of questions on its compliance with EU law. European Union law is a body of law that applies to its Member States and EU citizens – or in the case of legal persons: EU nationals. Thus, the DSTs adopted by EU Member States (such as France, Austria, Italy and Spain) can be challenged under EU law, so long as the challenger is a company that is an EU national. As mentioned above, U.S. parent companies targeted by the DST frequently operate in the EU through their established subsidiaries.²⁰⁰ As such, those subsidiaries – being EU nationals – have the right to challenge a Member State's DST under EU law.

From a procedural perspective, there are two main ways in which EU law may be invoked. First, most EU law provisions have direct effect in the national laws of member states – meaning that, in the event of a dispute, individuals have the right to directly invoke an EU law provision before a domestic court as against, for example, a national law (e.g. French courts enforcing the DST). The challenger may seek any remedies that are available under domestic law. The national court may request a preliminary ruling from the Court of Justice of the European Union (hereinafter “CJEU”) in the event there is a doubt as to how to interpret EU law. Once the CJEU issues its opinion, the national court is obliged to implement that ruling. Thus, it is the national court who will ultimately decide the case and award remedies.

Second, if companies do not wish to wait for an individual dispute to commence, there is a prophylactic way to force a Member State to comply

²⁰⁰ Google Ireland, Facebook Ireland, Apple Ireland etc.

with the requirements of EU law – the so-called infringement procedure.²⁰¹ Under this procedure, businesses would have to file a complaint to the European Commission (hereinafter “the Commission”) which decides whether to open a case. The Commission first gives a recommendation to the Member State in question to change the legislation or enact other measures. In the event that the Member State does not comply with the recommendation, the case will be referred to the CJEU. The decision of the CJEU is final with the additional authority to impose fines on Member States in the event of non-compliance with the ruling. The advantage of this process is that companies need not wait until the DST is collected and, consequently, do not have to face the risk of being sanctioned for not paying DST in order to challenge the tax. However, the Commission has wide discretion with regard to initiating the case. Furthermore, the infringement procedure does not allow for damage awards to the party making the complaint.

State aid rules are enforced through a specific procedure which will be addressed *infra* in Section 5.3.3.2.1. on compliance with the State Aid rules.

There are three key substantive areas of EU law under which the French DST could be challenged: (1) the EU’s VAT Directive, (2) the fundamental freedoms and (3) the state aid rules laid down in the Treaty on the Functioning of the European Union (hereinafter “TFEU”).

5.1 The French DST Complies with Article 401 of the VAT Directive Because It Cannot Be Characterized as a “Turnover Tax.”

To determine whether the VAT Directive applies, it is critical to identify the character of the revenue-based tax at issue. The VAT Directive²⁰² (hereinafter “the Directive”) introduced an EU-wide common system of value-added taxes with the aim to replace and harmonize the various turnover taxes in force in

²⁰¹ On the details of an EU infringement procedure, see https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

²⁰² Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006L0112>.

different Member States. Accordingly, Article 401 of the Directive allows Member States to maintain or introduce additional taxes only when they cannot be characterized as “turnover taxes” under the Directive. Thus, should the DST qualify as a “turnover tax”, it would be prohibited under the VAT Directive.

In analyzing whether a tax can be characterized as a turnover tax for the purposes of Article 401 of the VAT Directive, the CJEU has consistently held that “it is necessary, in particular, to determine whether the tax has the effect of jeopardizing the functioning of the common system of value added tax (VAT) by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT.”²⁰³ The CJEU seems to conflate a turnover tax and a VAT for purposes of the Directive, holding that “Article 401 does not preclude the maintenance or introduction of a tax which does not display one of the essential characteristics of VAT.”²⁰⁴ As a result, even though the DST is in essence a tax on turnover, it seems that for purposes of the Directive it must be compared to a VAT.

Relevant case-law identifies four essential characteristics of a VAT:²⁰⁵

- (1) it applies generally to transactions relating to goods or services;
- (2) it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied;
- (3) it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place;
- (4) the amounts paid during the preceding stages of the process are deducted from the tax payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer.

²⁰³ *Vodafone Magyarország*, C-75/18, EU:C:2018:102, ¶ 66; see also *ROCHE and Others*, C-283/06 and C-312/06, EU:C:2007:598, ¶ 34.

²⁰⁴ *Vodafone Magyarország*, *supra* note 202, ¶ 61; see also *Viking Motors and Others*, C-475/17, EU:C:2018:636, ¶ 38; *Solisnor-Estaleiros Navais* [1997] Case C-130/9 ECR I-5053, ¶¶ 19, 20; *Banca Popolare di Cremona*, C-475/03, EU:C:2006:629, ¶ 27; *GIL Insurance and Others*, ¶ 34.

²⁰⁵ *Vodafone Magyarország* C-75/18, *supra* note 202, ¶ 62; *Banca popolare di Cremona*, *supra* note 203, ¶ 28.

With respect to the French DST, the first, third and fourth elements are not satisfied. Unlike a VAT, this tax is not a general tax as it only applies to the supply of certain digital services. As for the third criterion, the French DST is not always charged at each stage of the production process. In the area of digital advertising, for example, only services marketed directly to advertisers are covered.²⁰⁶ Additionally, French law does not provide a right to deduct tax paid during an earlier stage of the process from DST liability. These are the same criteria that the Court found to be missing in the *Vodafone* case, which concerned a Hungarian tax on the turnover of telecommunications operators.²⁰⁷

In sum, the CJEU would almost certainly conclude that the French DST does not display all the essential characteristics of a VAT and is, consequently, not subject to the prohibition laid down in Article 401 of the VAT Directive.

5.2 Compliance with the Fundamental Freedom Provisions: The Freedom of Establishment and the Freedom to Provide Services

The second avenue for challenging the French DST is under the fundamental freedom provisions laid down in the TFEU. For purposes of the DST, the freedom of establishment and the freedom to provide services are most relevant. These provisions prohibit Member States from adopting any legislation or other measures that would restrict nationals of other Member States in carrying out an economic activity either by being established in the host country (freedom of establishment)²⁰⁸ or by remaining in their country of origin (freedom to provide services).²⁰⁹ National tax measures have the potential to make cross-border economic activity less attractive given that they

²⁰⁶ French DST, *supra* note 11, art. 299 II.

²⁰⁷ *Vodafone Magyarország*, *supra* note 202, ¶¶ 64, 66.

²⁰⁸ Consolidated Version of the Treaty on the Functioning of the European Union art. 49, May 9, 2008, 2008 O.J. (C 115) 47 (“TFEU”).

²⁰⁹ *Id.*, art. 56.

impose additional financial and administrative burdens on businesses. As such, the CJEU has examined such measures on multiple occasions. The landmark cases on corporate tax measures were primarily examining the freedom of establishment, since they were brought by companies legally residing in the Member State that adopted the controversial measure.²¹⁰ With respect to the French DST, the freedom to provide services is at issue as well, because the DST is also levied on companies that are not legally established in the territory of the given Member State.²¹¹

The CJEU's case law provides that national measures which affect the exercise of fundamental freedoms must meet four conditions in order to be consistent with these provisions:²¹²

- (1) They must be applied in a non-discriminatory manner;
- (2) They must be justified by imperative requirements in the general interest;
- (3) They must be suitable for securing the attainment of the objective which they pursue; and
- (4) They must not go beyond what is necessary in order to attain it.

The following sections will assess the French DST under these criteria in light of applicable case law.

5.2.1 It Is Possible That the French DST Constitutes *De Facto* Discrimination Prohibited by the Fundamental Freedoms.

First, the court would need to establish whether the DST discriminates between certain companies. The challenger would argue that the French DST discriminates against foreign-owned companies²¹³ – which pursue their

²¹⁰ See generally *Hervis Sport- és Divatkereskedelmi*, C 385/12, EU:C:2014:47; *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és, C-323/18*, ECLI:EU:C:2020:140; *Vodafone Magyarország*, *supra* note 204.

²¹¹ French DST, *supra* note 11, art. 299 III.

²¹² *Gebhard*, C-55/94, ECLI:EU:C:1995:411, ¶ 37; *Kraus v Land Baden-Wuerttemberg*, C-19/92, ECLI:EU:C:1993:125, ¶ 32.

²¹³ As mentioned, foreign ownership here means that the owner is a national or citizen of another Member State in the EU as they are the ones that are protected by and can invoke EU law.

activities either by establishing a presence in France (in the context of freedom of establishment) or by selling into the French market from another Member State (in the context of freedom of providing services). Notably, in the field of freedom of establishment, the prohibition of discrimination based on nationality is given specific expression in Article 49 of the TFEU.²¹⁴

As previously mentioned, the French DST does not explicitly distinguish between French-owned and foreign-owned companies. However, the structure of the French DST – especially the revenue threshold criteria – results in foreign companies generating more than 80% of the DST’s expected revenue.²¹⁵ In past cases, the CJEU consistently held that facially neutral measures which produce *de facto* discrimination, by applying other differentiating criteria are prohibited.²¹⁶ Therefore, under these cases it would seem that *de facto* discrimination could provide sufficient grounds to find that the French DST violates the fundamental freedoms.²¹⁷

In the *Hervis Sport* case, the Court held that the Hungarian store retail trade tax created *de facto* discrimination against foreign-owned companies because they were taxed unproportionally higher.

- France might argue that this case can be distinguished because the features of the tax at issue materially differ from those of the DST. First, the Hungarian tax applied very progressive rates of taxation on turnover. By contrast, the French DST applies a flat rate of 3%. In response to this, the challenging company might counter that the French DST’s revenue thresholds create essentially the same effect as the Hungarian tax’s progressive rates. In other words, the DST’s revenue thresholds create what amounts to a progressive taxation

²¹⁴ *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, ¶ 25; *Attanasio Group*, C-384/08, ECLI:EU:C:2010:133, ¶ 37.

²¹⁵ As stated by Bruno Le Maire, Minister of the Economy and Finance, before the National Assembly (*Assemblée nationale*, [compte-rendu intégral](#) de la première séance du lundi 8 avril 2019.)

²¹⁶ *Hervis Sport- és Divatkereskedelmi*, *supra* note 213, ¶ 30.

²¹⁷ See Ruth Mason and Leopoldo Parada, “Digital Battlefield in the Tax Wars”, *92 Tax Notes Int’l* 1183. (November, 2018)

scheme – with a 0% rate as the lowest band and a 3% rate as the highest band.

- Moreover, France would point out that the Hungarian tax obliged companies belonging to a group to consolidate their turnover for purposes of calculating the tax base, which had the effect of taxing covered companies on the basis of a “fictitious turnover.” France would contend that this is not a feature of its DST since the tax base includes only revenues actually collected by the subject firm.²¹⁸

However, in the more recent *Tesco* and *Vodafone* cases – which concerned the Hungarian turnover tax on telecommunication services operators – the CJEU seems to limit when *de facto* discrimination is sufficient to constitute a violation. In these cases, The CJEU examined whether the mere fact that foreign-owned or foreign-controlled companies mainly bear the burden of a turnover tax is enough to establish that the tax is prohibited by the fundamental freedoms.²¹⁹ In these cases the CJEU seems to take the position that Member States’ have wide discretion to adopt a system of taxation that they deem most appropriate. The Court held that “the fact that the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be such as to merit, by itself, categorization as discrimination.”²²⁰ This indicates that a tax’s disproportionate effect on foreign businesses, on its own, is not enough to establish prohibited discrimination. The CJEU seems to suggest that the disparate impact of the measure on foreign companies must be the result of some specific differentiating criteria in the measure’s structure that effectively acts as a proxy for national origin – not as a result of other factors such as the nature of the market.

The Court also concluded that turnover was a “neutral criterion” – not a substitute for national origin. This is because the Hungarian market is “dominated by such persons, who achieve the highest turnover in that market”

²¹⁸ French DST, *supra* note 11, art. 299 (4)

²¹⁹ *Tesco-Global Áruházak Zrt.*, C323-18, ECLI:EU:C:2020:140, ¶72

²²⁰ *Id.*, ¶ 52.

and that such a situation is “fortuitous, if not a matter of chance, which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by foreign undertakings.”²²¹ In other words, the fact that foreign firms were disproportionately affected by the Hungarian tax simply reflects the fact that these foreign firms had a dominant market position and therefore higher turnover. Thus, turnover is a neutral criterion because the results it produces are just a reflection of the market reality – not a disguised means of targeting foreign firms. If the market was dominated by domestic firms, the tax would fall primarily on domestic firms.

- France could analogize to this case and argue that the French digital services market is simply dominated by large, foreign undertakings, which is why the tax falls primarily on them. Thus, that fact foreign firms pay a disproportionate amount of the DST does not, in itself, create discrimination under these precedents.
- However, in these cases turnover was assessed in the context of progressive rate taxation and involved domestic revenues only. The foreign-owned company could argue that the application of an additional criterion of “worldwide revenues” to the French DST’s revenue threshold criteria reduces the importance of domestic market share. In fact, the global threshold is sufficiently high to exclude large and successful French companies.²²² In other words, these revenue thresholds are designed to produce results that are not simply a reflection of the state of French market, but to ensure foreign-owned firms are covered while domestic firms are excluded.

Therefore, even under the more limited grounds for *de facto* discrimination under the *Tesco* and *Vodafone* cases, the French DST’s revenue thresholds could be problematic. Nonetheless, French Finance Minister Bruno Le Marie explicitly stated that the goal of the French DST’s thresholds is to target foreign companies and avoid hindering innovation and digitization of French

²²¹ *Id.*, ¶ 72.

²²² Section 301 Report, *supra* note 47, at 22.

start-ups and SMEs.²²³ Notably, in its 2018 Impact Assessment accompanying its own EU-wide proposal for a digital services tax, the European Commission stated that in order to avoid fundamental freedom challenges the “thresholds have to be set in such a way as to not systematically exclude domestic companies from the scope of the tax.”²²⁴

5.2.2 It Is Unclear How the Issue of Comparability Would Be Decided Because It Is Highly Fact-specific.

Under relevant case law, discrimination arises only “through the application of different rules to comparable situations or the application of the same rule to different situations.”²²⁵ Hence, assuming *de facto* discrimination was established, France could still argue that foreign-owned companies are not in an objectively comparable situation to French-owned companies and, as such, differential treatment is justified. Case law varies on which criteria the court uses to examine the comparability of companies’ situations in corporate tax matters. In general, the Court tends to look at the factual circumstances of the case,²²⁶ the overall tax treatment of companies or the objective of the national measure at issue.²²⁷ Given the fact-intensive nature of this inquiry, it is difficult to predict how a court would decide the issue of comparability with respect to the French DST. The potential arguments on both sides are

²²³ Bruno Le Maire, Press Conference, Mar. 6, 2019, 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.

²²⁴ European Commission: Impact Assessment, COM (2018) 147 final, at 148.

²²⁵ Finanzamt Köln-Altstadt v Roland Schumacker, C-279/93, ECLI:EU:C:1995:31, ¶ 30.

²²⁶ Arnoud Gerritse v Finanzamt Neukölln-Nord, C-234/01, ECLI:EU:C:2003:154, ¶ 27; D.M.M.A. Arens-Sikken v. Staatsecretaris van Financien, C-43/07, ECLI:EU:C:2008:170, ¶¶ 55–57.

²²⁷ Commission v. Spain, C-487/08, ECLI:EU:C:2010:310, ¶ 48-51; Commission v. Italy, C-379/05, ECLI:EU:C:2007:323, ¶¶ 51–52; Denkavit Internationaal and Denkavit France, C-170/05, ECLI:EU:C:2006:266, ¶¶ 34–36. For a summary of the case law see Rita Szudoczky, *Convergence of the Analysis of National Tax Measures under the EU State Aid Rules and the Fundamental Freedoms*, 3 *European State Aid Law Quarterly*, 357, 365 (2016)

addressed as part of the comparability analysis in state aid cases, *infra* in Section 5.3.3.1.

5.2.3 It Is More Likely than Not That the French DST Could Not Be Justified by a “Legitimate Public Policy Interest.”

The CJEU has consistently held that a discriminatory national measure may be justified by a legitimate public policy interest, “provided it is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective.”²²⁸ This is a high standard because, assuming discrimination was established, France would not only have to come up with (1) a convincing public policy interest, but it would also have to demonstrate that the DST is a (2) suitable and (3) proportional measure to achieve that objective. Objectives that the Court has examined in previous cases include the ability to pay and the balanced allocation of taxing rights.

5.2.3.1 It Is Unclear Whether the “Ability to Pay” Public Policy Interest Can Justify the French DST.

France could argue that the differential treatment caused by the DST is justified under the “ability to pay” public policy interest, because it targets companies with high revenues – i.e. those with greater ability to pay.

- The foreign-owned company could counter that higher revenues does not necessarily mean greater ability to pay, because even companies with high gross revenue may have low profit margins if their costs are also high.²²⁹
- France could respond that recent case law suggests that revenues could determine “ability to pay”. In the *Tesco* and *Vodafone* cases – which also concerned turnover taxes – the CJEU seemed to accept the Hungarian government’s justification, which was “to impose a tax on

²²⁸ *Hervis Sport- és Divatkereskedelmi*, *supra* note 213, ¶ 42; *Commission v Spain*, C-400/08, EU:C:2011:172, ¶ 73; *CaixaBank France*, C-442/02, EU:C:2004:586, ¶ 17.

²²⁹ This is the Commission’s position in the State Aid cases. See *infra* Section 5.3.3.2.1.

taxable persons who have an ability to pay ‘that exceeds the general obligation to pay tax.’²³⁰

Consequently, it is unclear whether “ability to pay” could be used to justify the French DST based on the currently ambiguous state of the case law.

5.2.3.2 It Is Unlikely That the French DST Can Be Justified by the Need for a “Balanced Allocation of Taxing Rights”.

France (among other EU countries) has stressed that its aim in enacting the DST is to ensure a balanced allocation of taxing rights and that digital companies pay their “fair share” of taxes.²³¹

- France would argue that digital companies do substantial business and generate revenue in France even though they have no physical presence and, consequently, are not subject to source-based corporate income tax under the existing national laws. Additionally, French users provide significant value to these digital services companies. Accordingly, taxing rights should belong to the country where the users of these services are located, instead of the country where the firm’s inventory, personnel and intellectual property reside. As a result, the DST is necessary to compensate and ensure that taxing rights on digital services are balanced.
- On the other hand, the foreign-owned company could argue that France’s policy objective is illegitimate because it is designed as an end-run around the well-established system for international taxation enshrined in bilateral tax treaties and OECD model laws.²³² Furthermore, the DST is not suitable for achieving even France’s state

²³⁰ Tesco-Global Áruházak Zrt., *supra* note 218, ¶ 71.

²³¹ See Joint Initiative of European Ministers on the taxation of companies operating in the digital economy, http://www.mef.gov.it/inevidenza/banner/170907_joint_initiative_digital_taxation.pdf.

²³² See Ruth Mason and Leopoldo Parada, *supra* note 216 at 1196 (November, 2018) (highlighting that the argument based on the balanced allocation of taxing rights goes against internationally accepted tax principles)

goal (i.e. making sure digital services companies are “fairly” taxed) because it is designed to cover only a small subset of digital services companies – namely, large foreign digital services companies.

In light of the strong counterarguments available to a challenging foreign company, it seems highly unlikely that the Court would accept “balanced allocation of taxing rights” as a justification for the French DST.

5.3 Compliance with the State Aid provisions

The third fundamental issue under EU law is whether the *de facto* exemption of domestically-owned companies from the French DST constitutes prohibited State Aid under Articles 107-108 of the TFEU. According to Article 107(1) of the Treaty, “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States.”²³³ In other words, a measure must satisfy the following elements to be qualified as aid within the meaning of Article 107(1):²³⁴

- (1) There must be an intervention by the State or through State resources;
- (2) The intervention must be liable to affect trade between Member States;
- (3) It must confer a selective advantage on an undertaking; and
- (4) It must distort or threaten to distort competition.

²³³ TFEU art. 107(1).

²³⁴ Commission v Deutsche Post, C-399/08 P, EU:C:2010:481, ¶¶ 38–39.

5.3.1 The French DST Constitutes an Intervention by the State through State Resources.

To constitute State aid, a measure must both be imputable to the State and financed through State resources.²³⁵ Since the DST results from an Act of the French Parliament, it is clearly imputable to the French State. As to the measure's financing through State resources, the CJEU has held that "a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favorable financial situation than other taxpayers constitutes State aid."²³⁶ This suggests that once a selective advantage is established, the satisfaction of this first criterion is presumed to be fulfilled. Therefore, the French DST satisfies the first element of prohibited state aid both on its own term and because there is a selective advantage conferred.²³⁷

5.3.2 The French DST Confers an Advantage.

The advantage at issue here is not a positive transfer but an exemption from the DST. It is well-settled that an advantage may be granted through different types of reductions in a company's tax burden.²³⁸ A measure that entails a reduction of a tax burden is said to give rise to an advantage because it places the undertakings to which it applies in a more favorable financial position than other taxpayers and results in a loss of income to the State.²³⁹

²³⁵ Commission Decision in case on the state aid implemented by Poland for the tax on the retail sector, C (2017) 4449 (final), ¶ 34.

²³⁶ *Id.*, ¶ 36; Commission v. Government of Gibraltar and United Kingdom, C-106/09 P and C-107/09 P, EU:C:2011:732, ¶ 72.

²³⁷ See *infra* at Sections 5.3.2 and 5.3.3.

²³⁸ Italy v Commission, C-66/02, EU:C:2005:768, ¶ 78; Cassa di Risparmio di Firenze and Others, C-222/04, EU:C:2006:8, ¶ 132; Ministerio de Defensa and Navantia, C-522/13, EU:C:2014:2262, ¶ 21–31.

²³⁹ Air Liquide Industries Belgium, C-393/04 and C-41/05, EU:C:2006:403, ¶ 30; Banco Exterior de Espana, C-387/92, EU:C:1994:100, ¶ 14.

Thus, the French DST confers an advantage to companies that do not have to pay it.

5.3.3 It Is Likely That the Advantage Conferred by the French DST is Selective.

A measure is selective if it favors certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty. The CJEU has established a three-step analysis for assessing the selectivity of aid schemes.²⁴⁰ First, the common or normal tax regime applicable in the Member State is identified: the so-called “reference system.” Second, it is determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), the third step of the analysis asks whether the derogatory measure is justified by the nature or the general scheme of the reference tax system.²⁴¹ If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) of the Treaty.

5.3.3.1 System of Reference and a Derogation thereof

The “reference system” is a consistent set of rules that generally apply, on the basis of criteria applicable to all undertakings that fall within the system’s scope. The system’s scope is defined in reference to its objective. Defining the reference system is crucial because the companies that fall within the scope of the reference system are the companies that are in a comparable factual and legal situation for purposes of the analysis.

²⁴⁰ See *e.g.*, *Commission v Netherlands (NOx)*, C-279/08 P, EU:C:2011:551.

²⁴¹ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, 1998 O.J. (C 384) 3.

- France would argue that the reference system is identified by the DST itself when it lays down the tax's objective as a "tax on certain services provided by large corporations in the digital industry."²⁴² Under relevant case law, when regimes are aimed at specific groups of taxpayers in a Member State, the reference system is accepted to be defined by the measure itself.²⁴³ As such, France could assert that there was no derogation from the reference system in favor of certain undertakings since the DST applies the same rates and rules to all the companies that fall within its scope.
- The foreign company could maintain that the reference system should include the exempted French-owned companies that do not meet the threshold criteria by arguing that "the reduction *de facto* forms part of the structure of taxation and, although it is exempt from the tax, the corresponding activity falls within its sectoral scope of application."²⁴⁴

According to the Court's case law, when assessing the selectivity of a tax measure, it is not sufficient "to examine whether there is a derogation from the reference system's rules as defined by the Member State concerned itself, but that it must also be ascertained whether the limits or structure of that reference system were defined consistently or, on the contrary, in a clearly arbitrary or biased manner so as to favor some undertakings."²⁴⁵ Thus, it appears that the Court accepted the concept of "*de facto* discrimination" in state aid cases as well.

- The challenging company could argue that the DST was specifically designed in a way as to favor French-owned companies – as

²⁴² French Tax Code, *supra* note 38, tit. II, § 2.

²⁴³ *Société Arcelor Atlantique et Lorraine and Others v Premier ministre and Others*, C-127/07, ECLI:EU:C:2008:292, ¶¶ 25–26.

²⁴⁴ See *Poland v. Commission*, T-836/16 and T-624/17, ECLI:EU:T:2019:338, ¶ 68.

²⁴⁵ Commission Decision on Polish retail tax, *supra* note 233, ¶ 46; See also *Commission and Spain v Government of Gibraltar and United Kingdom*, C 106/09 P and C 107/09 P, EU:C:2011:732, ¶ 106.

evidenced by both the DST's design and the aforementioned statements by French officials.²⁴⁶

In conclusion, it is likely that the advantage conferred by the French DST is selective.

5.3.3.2 Justification by the Nature or General Scheme of the System

Assuming the selective nature of the DST was established, it would be up to France to show that it is justified by the nature and general scheme of the domestic tax system. The Court has held that in order for tax exemptions to be justified by the nature or general scheme of the tax system of the Member State concerned, it is also necessary to ensure that those exemptions are consistent with the principle of proportionality and do not go beyond what is necessary, in that the legitimate objective being pursued could not be attained by less far-reaching measures.²⁴⁷ Therefore, a Court would undertake a three-step test similar to the one conducted to determine whether there is a public policy justification in fundamental freedom cases. Unsurprisingly, the policy objectives frequently invoked in this context overlap with those invoked in similar fundamental freedom cases. Specifically, the following section will examine France's most promising potential ground for justification: the ability to pay.

5.3.3.2.1 It Is Unclear Whether "Ability to Pay" Could Successfully Justify the French DST.

France seems to anticipate relying on differences in ability to pay to justify the French DST in the state aid context.

- The French Council of State has pointed out that "to date the Court of Justice of the European Union has not ruled out that a difference in

²⁴⁶ For the statements see *supra* notes 214, 222. For the DST's design of the thresholds see Section 301 Report, *supra* note 47, at 25–27.

²⁴⁷ *Paint Graphos*, C-78/08 to C-80/09, ECLI:EU:C:2011:550, ¶ 75.

economic power can justify that companies are not viewed in an objectively comparable situation for the purposes of Article 107 of the TFEU."²⁴⁸

The challenging company could respond by pointing out:

- The Commission has taken the position that turnover is actually not a good indicator for ability to pay as it does not account for costs and thus the level of turnover generated cannot automatically be considered as reflecting the ability of an undertaking to pay.²⁴⁹

However, France might counter:

- The General Court,²⁵⁰ has recently held that “it may reasonably be presumed that an undertaking which achieves a high turnover may, because of various economies of scale, have proportionately lower costs than an undertaking with a smaller turnover and that it may, therefore, have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax.”²⁵¹

In response to this, the challenging company could also maintain that:

- In the case of the DST, costs are not the only reason why revenue does not account for the overall profitability of the company. In the DST “revenues” only mean revenues coming from the taxable services. It is well-known that there are large and successful French companies that would be exempt from the DST as they provide the services only as part of their business.²⁵²

²⁴⁸ French National Council: Voir l'avis du Conseil d'État sur le présent projet de loi, point 32., http://www.assemblee-nationale.fr/dyn/15/textes/l15b1737_avis-conseil-etat.pdf.

²⁴⁹ Commission Decision on Polish retail tax, *supra* note 233, ¶ 58. See also Ruth Mason and Leopoldo Parada, “Digital Battlefield in the Tax Wars”, *92 Tax Notes Int'l* 1183. (November, 2018).

²⁵⁰ In State Aid proceedings, the Commission's decision may be appealed to the General Court.

²⁵¹ *Poland v. Commission*, *supra* note 243, ¶ 75.

²⁵² Section 301 Report, *supra* note 47, at 41.

Thus, it is difficult to determine with certainty whether such justification would be accepted or rejected, however, the DST does not appear to be suitable for the traditional “redistributive purpose” observed by other corporate taxes.

5.3.4 The DST Has the Potential to Distort Competition and Affect Intra-Union Trade.

Once a selective advantage is established, the distortion of competition and the effect on intra-Union trade is generally presumed. The DST applies to all businesses deriving revenue from providing digital services in France. France is open to competition and the domestic market for digital services is characterized by the presence of operators from other Member States. Similarly, digital service providers established in France may have – or develop in the future – activities in other Member States.²⁵³ Therefore, any aid in favor of certain industry operators is liable to affect intra-EU trade.

The CJEU has consistently held that operating aid (e.g. tax relief) distorts competition, so that any aid granted selectively to certain undertakings should be considered to distort or threaten to distort competition by strengthening their financial position in the given market.²⁵⁴ Thus, competition would be distorted as French-owned companies would have a competitive advantage in the form of not having to bear the costs of the DST.

5.3.5 The French DST Does Not Qualify for Any of the Available Exceptions

State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2)²⁵⁵ or 107(3)²⁵⁶ of the Treaty.

²⁵³ Commission Decision on Polish retail tax, *supra* note 233, ¶ 62.

²⁵⁴ *Id.*, ¶ 63.

²⁵⁵ The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

France would bear the burden of proving that State aid it grants is compatible with the internal market pursuant to Articles 107(2) or 107(3) of the Treaty.²⁵⁷ The French DST does not appear to pursue any of the objectives listed in the provisions, and therefore likely does not qualify for any of these exceptions.

5.3.6 Remedies

EU State aid rules require Member States to notify the Commission prior to implementing any new aid measures.²⁵⁸ Member States must wait for the Commission's decision before they can put the measure into effect.²⁵⁹

Notably, the French Government explicitly indicated that they did not intend to make this notification before adopting the DST because, in their opinion, the DST does not constitute state aid. The French Parliament specifically addressed this issue in the text of the DST legislation, stating that: "In the absence of prior notice of the DST to the European Commission, 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."²⁶⁰ There was in fact no notice provided to the Commission and the law was eventually adopted. However, the French government has yet to release the aforementioned report.

Any aid that is granted without prior Commission authorization is called "unlawful aid." Affected companies can file a complaint to the Commission against allegedly unlawful state aid. The Commission examines all information it receives and decides whether to launch a formal investigation under Article

²⁵⁶ The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

²⁵⁷ *Olympiaki Aeroporia Ypiresies v Commission*, T-68/03, EU:T:2007:253, ¶ 34.

²⁵⁸ TFEU art. 103 (3).

²⁵⁹ *Id.*

²⁶⁰ French DST, *supra* note 11, art. 2.

108 (2) TFEU. The Commission then adopts a final decision at the end of the formal investigation. In the event of a negative final decision, if the unlawful aid has already been paid out, the Commission may require the Member State to recover the aid with interest from the beneficiary. If the aid takes the form of a tax exemption, there is no transfer of aid paid out by the government and, as such, there is nothing to recover. Here, if the Commission determined that the French DST is unlawful aid, France would most likely be required to abolish or redesign the DST in a way that does not constitute prohibited state aid. All decisions of the Commission are subject to review by the General Court and ultimately by the CJEU.²⁶¹

Companies affected by unlawful state aid can also bring a direct action challenging the aid before Member States' national courts. The national courts must assess the claim even in case of a parallel procedure before the Commission. The potential remedies granted by national courts include: preventing the payment of unlawful aid; recovery of unlawful aid; recovery of illegality interest; damages for competitors and other third parties; and other interim measures against the unlawful aid. Remedies may take a different form in a case against the DST because the allegedly unlawful aid is a tax exemption rather than a positive transfer. Most importantly, the CJEU held that "even if an exemption from a tax is unlawful under State Aid rules, that is not capable of affecting the lawfulness of the actual charging of that tax, so that a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax."²⁶²

In sum, there is no way for a company challenging the DST under the State Aid provisions to avoid paying the tax or recover tax payments that it has already paid. However, a successful challenge could lead to the DST being abolished or redesigned in a way that would probably be more favorable for the challenging companies.

²⁶¹ For more details on the state aid procedure, see https://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html

²⁶² Tesco Global Áruházak, *supra* note 218, ¶ 36.

5.4 Conclusion on Compliance with EU Law

In conclusion, it is challenging to determine the compliance of the DST with EU Law due to the lack of relevant case law with similar factual circumstances.

It seems certain that the DST is not covered by the VAT Directive because it does not possess the requisite features of a VAT. As to a challenge under the EU Treaties' fundamental freedoms, there is a strong argument that the revenue threshold criteria creates *de facto* discrimination by disproportionately targeting foreign-owned undertakings. However, in light of the recent CJEU case law, the likelihood of success of a *de facto* discrimination claim seems somewhat diminished. Finally, a challenge to the French DST under the State Aid provisions of the TFEU has perhaps the greatest chance of success. This is because the French DST provides a selective advantage to smaller French companies by exempting them from the DST and is unlikely to be justified by any legitimate public policy objective or qualify for the applicable exceptions.

6 Conclusion

As discussed in this memorandum, there are a multitude of international law issues that arise in relation to the French DST. This is both a blessing and a curse for any efforts by the digital services companies of U.S. (or another country) to challenge the French DST or one of its similar counterparts in other countries. On the one hand, there are myriad avenues through which the French DST could be legally challenged. On the other, the complexity and novel nature of the legal questions in the international tax, international trade and EU law contexts makes the outcomes very difficult to predict. This memorandum strives to draw attention to the key legal issues and provide an informed guess on how these questions would be resolved.

For issues arising under international tax law, we chose the Ireland-France Treaty as the framework of analysis. Under the Treaty, we conclude that the French DST is not a covered tax. However, it does not prevent the targeted companies from filing discrimination claims based on the non-discrimination clause of the Treaty. Under the non-discrimination clause, the targeted Irish

companies, their permanent establishments in France and their French subsidiaries will be able to make a discrimination claim. Ultimately, it is likely that the targeted Irish companies and their French subsidiaries will prevail in their challenge against the DST on non-discrimination grounds.

As for international trade law, there are three trade law instruments relevant to a legal analysis of the French DST: (1) The WTO moratorium on electronic transmissions; (2) The WTO General Agreement on Trade in Services; and (3) individual bilateral or plurilateral free trade agreements. The WTO moratorium on electronic transmissions would likely not cover the French DST, so a U.S. challenge to the French DST is unlikely to prevail. However, a U.S. challenge under the GATS – on claims that the French DST violates the National Treatment and MFN obligations – would likely succeed because of the DST’s discriminatory structure and consequent inability to be justified under the exceptions provisions in the GATS. Finally, the U.S.’s ability to challenge a measure like the French DST through a free trade agreement depends on the substance of the relevant provisions. If the agreement mirrored the U.S.-Japan Agreement, a U.S. challenge would likely succeed. However, if the agreement mirrored the CETA, the U.S. challenge would probably fail.

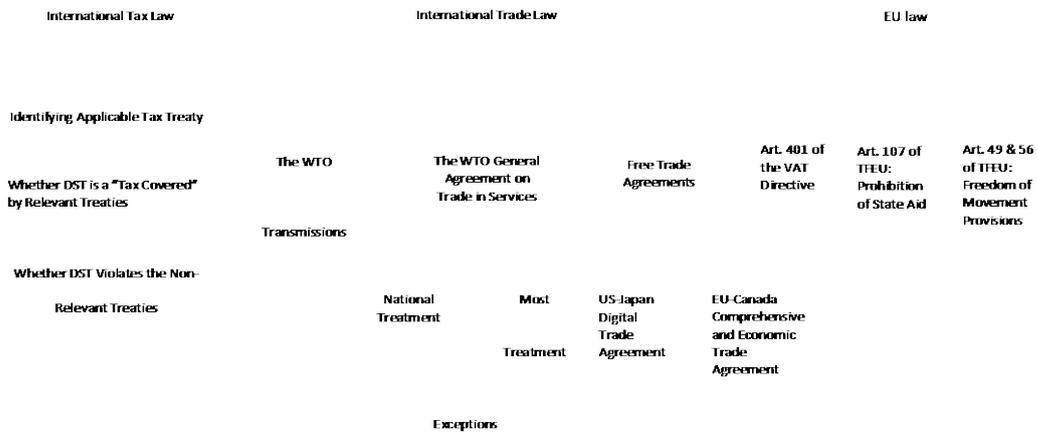
Finally, under EU law, there are three provisions under which the DST may be challenged: (1) Article 401 of the EU VAT Directive; (2) Article 49 & 56 of the TFEU – freedom of movement provisions and (3) Article 107 of the TFEU – the prohibition of State Aid. The French DST most likely cannot be characterized as a turnover tax where the final burden rests on the consumers. Accordingly, Article 401 of the VAT Directive does not prevent France from introducing that tax in addition to its VAT. Foreign companies can bring a challenge under the freedom of movement provisions, but it is difficult to determine whether such challenge would prevail in light of the CJEU’s recent case law on de facto discrimination against foreign-owned companies. Finally, there is a good chance that the targeted foreign companies would succeed in their challenge under the state aid provisions as the DST selectively favors French companies by exempting them from paying the tax.

All in all, despite the multilateral efforts at the OECD level to reach a consensus on how to handle the tax challenges raised by digital economy, it is likely that the DSTs will occupy the stage for the time being. Therefore, it is vital for all stakeholders to obtain a comprehensive understanding of the status of the DSTs under current international law in order to make an informed judgment about whether it is the right approach to tackling the current challenges going forward. It is not the goal of this memorandum to pass judgment on that question. However, we hope that the legal analysis provided in this memorandum can contribute to the discussions surrounding the topic and potentially serve as a steppingstone for a brand-new international tax system that is ready for the digitalized economy of the 21st century.

Appendix

Issue Map

Compliance of DST with International Law



DST Cross-Comparison Table

	French DST	Italian DST	UK DST	Austria DST	Spain DST	Turkey DST
Services covered	<ol style="list-style-type: none"> 1. Targeted Advertising Service 2. Digital Intermediary Service 3. Transmission of data related to targeted advertising service 	<ol style="list-style-type: none"> 1. Targeted Advertising Service 2. Digital Intermediary Services 3. Data selling as relates to digital intermediary services 	<ol style="list-style-type: none"> 1. Targeted Advertising Service 2. Digital Intermediary Services 3. Catch all other revenues arise in connection with UK users and are to be treated as attributable to UK users to such extent as is just and reasonable 	<ol style="list-style-type: none"> 1. Digital Advertising Service on Digital Interfaces 	<ol style="list-style-type: none"> 1. Targeted online advertising services 2. Online intermediary services 3. Data transmission services <p>The transmission of data collected about users generated by the activities of users on digital interfaces</p>	<ol style="list-style-type: none"> 1. Targeted online advertising services 2. The sale of all kinds of audio, visual, and digital content in the digital medium and provision of services aimed at listening, watching, (re) playing (such content on an electronic device) or storing or using (it) in an electronic device"
Tax base	<ol style="list-style-type: none"> 1. Targeted advertising: All amounts paid by advertisers or their agents in return for placement of advertisements or any other application that is closely related in economic terms; 2. Digital interface service: All amounts paid by users of that interface, except those paid for the goods and the provision of services that constitutes, in economic terms, operation independent of the access and use of the taxable service (including warehousing and shipping services). 	world wide revenue from covered digital services that are linked to Italy	<p>The total amount of revenues arising to a member of the group in that period in connection with any digital services activity of any member of the group attributable to UK users (distribution criteria see tax allocation rules).</p> <p>Digital services activity includes a social media platform, b. an internet search engine; OR c. an online marketplace</p> <p>Relevant activity includes associated online advertising business.</p>	<ol style="list-style-type: none"> 1. targeted advertising: the consideration the service provider receives for the provided services from the purchasers. 	<ol style="list-style-type: none"> 1. Targeted Advertising: the total income obtained will be applied to the proportion that represents the number of times advertising appears on devices that are in the territory of the application of the tax. 2. Digital Intermediary Services: the proportion of income that represents the number of users located in the territory of application of the tax. 3. Data Transmission Services: the proportion of income that represents the number of users that have generated said data that are located in the territory of application of the tax. 	<p>Total revenues generated by providing covered services, no deduction of expenses is allowed from the tax base.</p>
Targeted Companies	Group	Group/Separately Residents & Non-residents	Group	Group	Group	Group
Threshold	<p>in the relevant calendar year:</p> <ol style="list-style-type: none"> 1. Company having total revenues of 750 million euros; and 2. Company having total revenue of 25 million euros derived from digital services supplied in France. 	<p>in the relevant calendar year:</p> <ol style="list-style-type: none"> 1. Company having total revenues of 750 million euros from taxable digital services; and 2. Company having total revenue of 5.5 million euros derived from digital services supplied in Italy. 	<ol style="list-style-type: none"> 1. total amount of digital services revenues arising in that period to members of the group exceeds 500 million pounds; 2. the total amount of UK digital services revenues arising in that period to members of the group exceeds 25 million pounds 	<p>in the relevant calendar year:</p> <ol style="list-style-type: none"> 1. Company having total revenues of 750 million euros; and 2. Company having total revenue of 25 million euros derived from digital advertising services supplied in Austria. 	<p>in the relevant calendar year:</p> <p>Net turnover of more than €750 million (globally)</p> <ol style="list-style-type: none"> 1) Total revenues from taxable provisions of digital services in Spain of more than €5 million 	<p>in the relevant year:</p> <ol style="list-style-type: none"> 1) Global gross revenue of 750 million euros; 2) Total revenue from services provided in Turkey of 20 million Turkish lira
Rate	3% on gross revenue	3% on gross revenue	3% on gross revenue	3% on gross revenues	3% on gross revenues	7.5% on all listed revenues, and the president has the authority to alter the tax rate, individually or all together, within the range of 3% to 15%
Status (Effective Date)	retroactively applicable from 01/01/2019	imposed (1/1/2020)	imposed, in force 04/01/2020.	imposed, in force 1/1/2020	imposed on 2/18/2020	imposed, in force 03/01/2020

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