

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

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SECTION 301 FRANCE DIGITAL
SERVICES TAX (DST) PUBLIC HEARING

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MONDAY
AUGUST 19, 2019

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The Hearing was convened in
Conference Rooms I and II of the USTR Annex
Building, 1724 F Street, NW, Washington, D.C. at
9:30 a.m., Kate Hadley, Chair, presiding.

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Council

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P-R-O-C-E-E-D-I-N-G-S

(9:30 a.m.)

CHAIR HADLEY: Good morning, and welcome to this very hot hearing room. We are sorry about that. I know people are still going to be walking in but we are going to get started because we have a lot of questions for our panelists.

The Office of the U.S. Trade Representative in conjunction with the Interagency Section 301 Committee is holding this public hearing in connection with Section -- the Section 301 investigation of France's Digital Services Tax initiated on July 10th, 2019.

Detailed information about this investigation is set out in the Federal Register notice published July 16th, 2019, at 84 FR 34042.

The purpose of today's hearing is to receive public testimony on the French DST. The Section 301 Committee will carefully consider the testimony and the written comments, including post-hearing comments.

1 The 301 Committee will then make a
2 recommendation to the Trade Representative
3 regarding a determination whether the DST is
4 actionable under Section 301 of the Trade Act of
5 1974.

6 Before we proceed with testimony, I
7 will provide some procedural and administrative
8 instructions. I will then ask the agency
9 representatives participating in the hearing
10 today to introduce themselves.

11 The hearing is scheduled for one day
12 and will conclude by lunch. We have three
13 panelists of three or four witnesses with 10
14 individuals scheduled to testify.

15 The provisional schedule has been
16 posted on the USTR website. We will have a five-
17 minute break between panels. Each organization
18 appearing at the hearing is limited to five
19 minutes oral testimony.

20 After the testimony from each panel of
21 witnesses, the Section 301 Committee will have an
22 opportunity to ask questions. Committee

1 representatives will direct their questions to
2 one or more specific witnesses.

3 Post-hearing comments, including any
4 written responses to questions from the Section
5 301 Committee, are due by Monday, August 26th,
6 2019.

7 The rules and procedures for written
8 submissions are set out in the July 16th Federal
9 Register notice. In responding to questions,
10 witnesses should recall that they have an
11 opportunity to provide more detailed or extensive
12 responses in their post-hearing submissions.

13 No cameras, video, or audio recording
14 will be allowed during the hearing. A written
15 transcript of this hearing will be posted on
16 USTR's website and on the Federal Register docket
17 as soon as possible after the conclusion of the
18 hearing.

19 We are pleased to have international
20 trade, tax, and economic experts from a range of
21 U.S. government agencies.

22 If you could introduce yourselves,

1 please, starting at that end.

2 MS. LINTON-GROTZ: Mirea Linton-Grotz,
3 Treasury, trade and investment policy.

4 MS. MAZZONE: Good morning. Jessica
5 Mazzone from the U.S. Department of State and
6 multilateral trade affairs.

7 MR. TANNER: Robert Tanner, USTR,
8 Office of Services and Investment.

9 MR. FLAVIN: Andrew Flavin, U.S.
10 Department of Commerce, International Trade
11 Administration.

12 MR. ROGERS: Mike Rogers, USTR's
13 Europe and Middle East Office.

14 MR. STEPHENS: Andrew Stephens, U.S.
15 Department of Agriculture.

16 MS. CHLEBEK: Claudia Chlebek, U.S.
17 Department of Homeland Security, Customs and
18 Border Protection.

19 CHAIR HADLEY: Thank you very much.
20 We'd now like to hear from the
21 witnesses. Mr. Yerxa, if you would begin.

22 MR. YERXA: Thank you very much, Madam

1 Chairman, and to members of the committee --
2 Interagency Committee. I want to thank you for
3 all your hard work on this issue. It is a hot
4 room but, hopefully, where there's heat there's
5 light and we will try to bring some light on
6 these issues.

7 As you know, I am here representing
8 the National Foreign Trade Council, which is an
9 industry association representing many of the
10 country's largest manufacturers, exporters,
11 service providers.

12 My companies include most of the
13 companies in the digital economy that are being
14 hit by this measure.

15 I want to express the NFTC's deep
16 concern that France's new Digital Services Tax --
17 DST -- is an inappropriate unilateral instrument
18 to solve what is admittedly a global challenge in
19 terms of how we -- how we evolve tax policy to
20 cover new issues.

21 France's DST threatens to undermine
22 the stability of the international tax system,

1 which for decades has provided predictability to
2 tax administrators and tax payers.

3 This is a third level of tax that is
4 imposed on gross revenue alongside an income tax
5 and the French VAT. It has no relationship to
6 net income or profits, which are the only proper
7 basis for corporate income tax.

8 We have a very real concern that once
9 established other jurisdictions could emulate the
10 concept and impose similar taxes on U.S. and,
11 ultimately, on French exports from select
12 sectors.

13 We are also concerned that the DST did
14 not undergo a thorough impact assessment and will
15 be complex to administer an audit, and we are
16 concerned about the potential of the DST to
17 result in double taxation.

18 This unilateral measure would
19 undermine the work of the OECD, which intends to
20 issue analysis and recommendations in 2020 on the
21 tax challenges of the digitalization of the
22 economy.

1 Any derivation or evolution from the
2 currently agreed international tax framework must
3 be driven by a consensus-based and durable
4 rebalancing of taxing rights.

5 Future rules must be clear,
6 predictable, and applied neutrally across
7 industries and business models.

8 By taking this step unilaterally at
9 this time, France's effort undermines the ability
10 of countries to achieve consensus on global
11 standards to guide policy making with respect to
12 tax in the digital economy.

13 The design and legislative intent of
14 France's DST suggests it was tailored to
15 discriminate against U.S. firms while avoiding
16 harm to nearly all French companies.

17 Specifically, the high revenue
18 thresholds in choice of covered services have the
19 effect of carving out most if not all French
20 companies.

21 The actions and rhetoric of the French
22 government further suggest the DST was meant to

1 discriminate against foreign companies.

2 For example, in March the National
3 Assembly adopted an amendment that exempted a
4 narrowly tailored category of advertising
5 intermediaries and exchanges from the new tax and
6 this appears to correspond directly to the
7 business model of Criteo, a Paris-based display
8 advertising platform.

9 French government officials also
10 emphasize repeatedly that a DST is intended to
11 target foreign technology companies.

12 These high-revenue thresholds in
13 choice of covered services may be inconsistent
14 with France's national treatment obligations
15 under the GATS, given EU commitments in data
16 processing services, database services, and
17 advertising services.

18 The high global revenue thresholds and
19 subset of revenue models covered by the tax will
20 cause the tax to be applied primarily to U.S. and
21 to some other foreign firms while excluding like
22 services provided by French or other European

1 firms.

2 Neither criteria appear to support the
3 underlying policy objective to tax digital
4 activities where French users or customers are
5 deemed to play a major role in value creation.

6 Questions have also been raised about
7 the compatibility of the DST with a bilateral
8 U.S.-French tax treaty.

9 This DST essentially makes U.S. firms
10 that are subject to the tax 3 percent less
11 competitive than their rivals. The DST puts the
12 broader U.S. technology sector at risk by
13 discriminating against a platform-based business
14 model common to many U.S. firms.

15 France's DST also jeopardizes tax
16 certainty for many more U.S. firms as other
17 jurisdictions are inspired to adopt similar and
18 potentially even broader measures.

19 This poses a risk to the entire global
20 tax system and escalates the potential of double
21 or multiple taxation, which ultimately would slow
22 cross-border investment and economic growth.

1 In addition, the retroactive
2 application of the new law to January 2019 does
3 not provide companies adequate time to plan or
4 implement new systems to audit users, calculate
5 tax liability in a reliable manner, or determine
6 pricing in light of these higher costs.

7 Ideally, a Section 301 investigation
8 will lead to constructive consultations between
9 the U.S. and France, and to a settlement
10 agreement whereby France agrees to remove the
11 measure.

12 The United States should encourage
13 France to focus on achieving a multilateral
14 consensus to reform global tax rules for the
15 digital age through the process that is underway
16 at the OECD and make clear that their unilateral
17 DST undermines that effort.

18 As the administration seeks to resolve
19 this issue --

20 CHAIR HADLEY: Sir, that's five
21 minutes.

22 MR. YERXA: -- it should not create

1 conditions that would lead to higher costs for
2 input products or raise the taxes on U.S.
3 companies.

4 Thank you.

5 CHAIR HADLEY: Thank you.

6 I was three seconds too early, I
7 guess.

8 [Laughter.]

9 CHAIR HADLEY: Mr. Sprague?

10 MR. SPRAGUE: Gary Sprague of Baker &
11 McKenzie in Palo Alto, California.

12 I appreciate the opportunity to offer
13 the shared views today of Airbnb, Amazon,
14 Expedia, Facebook, Google, Microsoft, Salesforce,
15 Stripe, and Twitter on the French DST, which
16 imposes retroactively a 3 percent tax on gross
17 revenue derived from the provision of certain
18 digital services by companies with in-scope
19 global revenue above 750 million euro.

20 The French tax is unjustifiable in
21 that it infringes international agreements and
22 unreasonable in that it is discriminatory,

1 retroactive, and inconsistent with international
2 tax policy principles.

3 Critically, France's unilateral action
4 undermines development of a common approach to
5 the tax challenges of digitalization and
6 negotiation of international tax rights, which is
7 currently underway at the OECD with the full
8 support and active participation of U.S.
9 Treasury.

10 Very importantly, if the French DST
11 goes unchallenged, it will provide political
12 cover for a dozen or so other countries
13 considering similar measures.

14 The French DST unjustifiably violates
15 France's trade, investment and tax agreements.
16 It infringes the general agreement on trade and
17 services commitments to provide market access and
18 national treatment for computer-related and
19 advertising services and violates the U.S.-French
20 convention of establishment commitments not to
21 impose more burdensome taxation on U.S. companies
22 than on French companies in the same situation.

1 The DST scope and turnover thresholds
2 are crafted to capture principally high-profile
3 U.S. companies. If there were any doubt,
4 statements of French officials confirm the
5 discriminatory intent. For example, French
6 Finance Minister Bruno Le Maire declared, "We
7 dream of having a multiplicity of European
8 digital champions with the turnover of more than
9 750 million euros, which is, unfortunately, not
10 the case."

11 Indeed, the DST is commonly referred
12 to in France as the GAFA tax -- Google, Apple,
13 Facebook, and Amazon -- and Mr. Le Maire often
14 uses the #GAFA in his tweets.

15 Second, the DST violates U.S.-France
16 convention of establishment commitments not to
17 impose extraterritorial taxes and U.S.-France tax
18 treaty commitments not to impose taxes on income
19 or elements of income absent a permanent
20 establishment in France.

21 Statements by French officials confirm
22 that a main purpose of the DST is to avoid

1 France's tax treaty obligations with the United
2 States while extracting additional revenues for
3 France from the U.S. tax base.

4 As a French National Assembly
5 Committee report noted in April 2019, "The real
6 problem is, therefore, not the under taxation of
7 the GAFAs but the place where these companies pay
8 the corporate income tax.

9 The fundamental question is,
10 therefore, how the corporate income tax base
11 could be brought back to Europe."

12 The French DST is unreasonable,
13 unfair, and inequitable in that it is
14 inconsistent with international tax principles
15 and undermines a global approach to taxation of
16 the digitalized global economy.

17 The French DST will impose a tax on
18 gross revenue rather than net income, which will
19 be distortive, and is inconsistent with accepted
20 international practice.

21 The DST's retroactivity to January 1,
22 2019, is extraordinary, particularly given the

1 recent commitment to global tax certainty by G20
2 heads of state in the Osaka Leaders Declaration
3 and the systems changes needed for the intensive
4 user location tracking and data storage that
5 compliance and audit readiness requires.

6 Further, the French measure -- the
7 first DST to be implemented -- undercuts a global
8 solution -- countries are negotiating the global
9 allocation of income tax rights at the OECD. It
10 is unfortunate that France, a leader in the OECD
11 process and the home of the OECD, is now pursuing
12 this unilateral approach.

13 While originally cast as a stop-gap
14 measure to an ultimate OECD solution, the DST's
15 sunset language was removed during the
16 legislative process, making this tax permanent.

17 We believe the OECD is the appropriate
18 forum for developing a common solution. We ask
19 that USTR encourage France to abstain from
20 unilateral action and redouble efforts aimed at a
21 consensus solution from the OECD.

22 We also ask that you urge other

1 countries like Austria, Czech Republic, Italy,
2 and Spain and the U.K. to refrain from similar
3 measures.

4 Thank you for your -- the opportunity
5 to testify.

6 CHAIR HADLEY: Thank you.

7 And we have been asked by those
8 sitting in the back for everyone to speak up. So
9 I am going to try to take the lead.

10 Ms. McCloskey?

11 MS. MCCLOSKEY: I will try and speak
12 up.

13 Good morning. Thank you for the
14 opportunity to testify today. My name is
15 Jennifer McCloskey and I am vice president for
16 policy at the Information Technology Industry
17 Council -- ITI.

18 ITI represents the world's leading
19 information and communications technology -- ICT
20 -- companies. We are the global voice of the
21 tech sector and the premier advocate and thought
22 leader for the ICT industry.

1 The recent enactment of France's
2 unilateral Digital Service Tax, or DST,
3 represents a troubling precedent, unnecessarily
4 departs from progress towards stable
5 international tax reform and will
6 disproportionately impact U.S.-headquartered
7 companies.

8 While we support USTR's effort to
9 investigate France's unilateral action, our
10 ultimate goal is a multilateral solution on
11 appropriate international tax reform and we offer
12 our comments in that spirit.

13 France is the first jurisdiction to
14 enact a DST, which for these purposes refers to a
15 retroactive gross revenue-based tax on a
16 narrowly-defined set of digital services.

17 However, similar policies have been in
18 discussion, particularly in the European Union
19 where numerous countries have proposed or are
20 considering similar measures.

21 In response to the questions contained
22 in the Federal Register notice, we would flag

1 several key concerns with the French measure.

2 First, the limited range of business
3 activities and scope raises questions around both
4 selectivity and policy rationale. France argues
5 that its DST is consistent with the principle
6 that tax should be applied where value is created
7 because customers of digital companies
8 participate in the creation of value.

9 Even if one were to accept this
10 premise, the narrow focus on a subset of digital
11 companies appears to be designed to single out a
12 small number of companies and a fraction of
13 business models, despite the fact that businesses
14 all derive value from their customers.

15 The distinctions drawn by the DST do
16 not have any bearing on the extent to which a
17 company derives value from user participation.

18 In short, there does not appear to be
19 a legitimate principled basis for drawing these
20 distinctions.

21 Second, as suggested earlier, the
22 French tax includes two revenue thresholds that

1 limit the scope to a small subset of companies.

2 Indeed, analysis underpinning the
3 European Commission's proposed DST which served
4 as a template for the French measure suggests
5 that revenue thresholds set by the law minimize
6 impact on European firms while limiting
7 government exposure to claims of selectivity.

8 Language used by French policy makers
9 in advancing this measure puts a finer point on
10 their political intent. The tax has been widely
11 referred to as the GAFA tax, which stands for
12 Google, Apple, Facebook, and Amazon.

13 Key officials have remarked, and I
14 quote, "It's time for these companies to pay the
15 taxes they owe and, further, that the tax should
16 not sanction any European actors."

17 A key assertion underpinning the
18 rationale for DSTs is that certain companies are
19 not paying their fair share in taxes. We
20 recognize that international tax rules need
21 updating to address widespread digitalization.

22 However, there are significant issues

1 with these assertions. All companies, including
2 French companies, currently operate under a
3 framework where taxes applied using an
4 established set of rules dictating where value is
5 created.

6 The predictability afforded by this
7 system has supported the ability of all companies
8 to conduct business globally.

9 Beyond the fact that the DST
10 challenges longstanding income tax rules, it
11 could also disproportionately target low-margin
12 high-investment business models.

13 Given its design, there is a high
14 likelihood that the cost of the tax will be
15 passed down the supply chain. The business
16 models targeted which provide key digital
17 services have enabled significant growth for
18 thousands of small and medium sized businesses.

19 In this regard, the French tax could
20 greatly impact many businesses beyond the 30
21 companies in scope. Further, the propagation of
22 DSTs raises broader concerns around global tax

1 fragmentation.

2 The imposition of taxes targeting
3 different subsets of the digital economy will
4 give rise to a patchwork approach to
5 international taxation.

6 Such taxes will also set a problematic
7 precedent for the ability of governments to
8 single out specific actors and even specific
9 business models whether they be digital or
10 nondigital for the purposes of taxation.

11 These features in particular raise
12 significant concerns in the context of global
13 trade relations and existing international
14 agreements.

15 For those businesses directly in-scope
16 there are also substantial administrative
17 burdens. Companies will need to engage in
18 significant reengineering of their internal
19 business and financial reporting systems in
20 addition to creating new filing and audit
21 components on French accounts.

22 We estimate these costs to be in the

1 millions of dollars. Further, there will be very
2 high audit uncertainty, which will lead to
3 additional disputes and subsequent costs.

4 Throughout our engagement on this
5 issue, which has been extensive, policy makers
6 have largely conceded that DSTs are imperfect
7 solutions to address outdated rules governing our
8 tax system.

9 We agree that these issues must be
10 identified and countries need to work together to
11 negotiate agreeable changes that are income tax
12 based, treaty compliant, foster economic growth
13 and investment, minimize double taxation and,
14 most importantly, do not discriminate against any
15 particular industry or business.

16 Fortunately, that effort is underway
17 at the OECD where more than 130 nations are
18 working to reach consensus on reform of the
19 international tax system.

20 This is the proper forum to address
21 these issues and ITI supports this multilateral
22 approach.

1 Today's hearing is about more than the
2 French Digital Service Tax. It's about
3 preventing widespread application of unilateral
4 taxes. The United States should continue to lead
5 on a consensus-based approach to address tax and
6 trade angles to increasing digitalization of the
7 global economy.

8 Thank you for your time. We
9 appreciate your efforts in identifying these
10 trends early and reviewing through a more
11 critical lens.

12 I look forward to answering your
13 questions.

14 CHAIR HADLEY: Thank you. Thank you
15 for keeping it to exactly five minutes.

16 MS. MCCLOSKEY: Wow.

17 [Laughter.]

18 CHAIR HADLEY: I thought you did that
19 on purpose.

20 Great. I will now invite my
21 colleagues to ask questions. You may, of course,
22 provide additional answers in post-hearing

1 comments.

2 Thank you.

3 MS. LINTON-GROTZ: Thank you.

4 My question is to Ambassador Yerxa and
5 Mr. Sprague.

6 Both of you mentioned the DST's
7 retroactivity in your testimony. In your
8 experience, how unusual is it for a country to
9 impose a substantively new tax with a retroactive
10 application, and can you elaborate on the burden
11 that the retroactive nature of the DST imposes?

12 MR. SPRAGUE: I can't think of a
13 single instance where a tax of this significance
14 and magnitude has been imposed retroactively.
15 Obviously, U.S. business has mentioned this to
16 the French finance ministry.

17 An informal communication back was,
18 essentially, you should have known it was coming.

19 So there were two issues. One is just
20 the tax policy point that it is simply
21 inappropriate to enact tax legislation
22 retroactively.

1 On the administration side that you
2 mentioned, this is a unique tax. There's never
3 been a tax like this in the history of the world.

4 Taxpayers are used to paying tax on
5 net income, and we all know what net income is.
6 There are certain types of cross-border flows
7 where tax is imposed on gross revenue --
8 interest, dividends, rents, royalties, those
9 sorts of things, and we all know what the gross
10 revenue is.

11 But this tax is different. This tax
12 has three different types of in-scope revenue:
13 digital advertising, platform intermediation and
14 transmitting of data.

15 Picking just the digital advertising
16 one, it's actually a global formulary
17 apportionment that takes global advertising
18 revenue, multiplied by a fraction that is
19 essentially impressions in France over global
20 impressions.

21 So in order to comply with this tax,
22 it's not even clicks in France. I mean, most

1 advertising companies get paid when a user
2 clicks.

3 This tax says we don't care about the
4 actual revenue-generating activity. We care when
5 a person, not necessarily even a French citizen,
6 views an impression in France.

7 So in order to comply, a company has
8 to keep track of every user that observed an
9 impression on a device while in France and every
10 user that observed an impression on a device
11 everywhere in the world back to January 1, 2019.

12 So I think it's fair to say that it's
13 essentially impossible to comply with precision,
14 going forward. It's certainly impossible to
15 comply with any sort of precision for the past.

16 MR. YERXA: So I want to answer your
17 question but, on the other hand, I wouldn't want
18 to say anything to suggest that if France simply
19 applied it prospectively that that would be any
20 less objectionable to us.

21 So the retroactive application,
22 obviously, significantly increases the damage to

1 U.S. interests. It's literally impossible to
2 plan and implement new systems and to audit your
3 users and calculate tax liability in a reliable
4 manner well, also having to do that
5 retroactively. It's going to be difficult enough
6 to do it prospectively.

7 But I think the broader point, all the
8 points that Gary just made about why this is such
9 a radical departure from conventional tax
10 principles and policy that had been accepted by
11 the major economies of the world for so long and
12 what kind of impact that's going to have, taking
13 something that bears no relationship whatsoever
14 to net income or profits, and then doing it in a
15 way which is intentionally discriminatory and
16 designed to carve out your own interests, this
17 kind of, you know, self-interested taxation
18 principles really will undermine any confidence
19 in taxation systems.

20 And if other countries start following
21 it, we are, essentially, in a new era of, you
22 know, tax policy wars just like tariff wars,

1 which I don't think are the answer for our
2 problems.

3 MR. FLAVIN: My question is for Ms.
4 McCloskey.

5 You mentioned in your testimony that
6 you estimate the costs associated with compliance
7 to be in the millions.

8 I am wondering if you can provide
9 either now or in post-hearing comments the
10 details of how you arrived at that estimate.

11 MS. MCCLOSKEY: I'll have to provide
12 them in subsequent comments. But thank you for
13 the question and we will definitely make sure to
14 get you some more information. Thanks.

15 MR. TANNER: Thanks. This question is
16 for Mr. Yerxa and Mr. Sprague.

17 So, Mr. Yerxa, you stated that the DST
18 excludes revenue models that some of Europe's
19 largest digital service providers rely on and I
20 think, Mr. Sprague, you mentioned that the scope
21 was crafted to exclude European and French
22 companies.

1 So I wanted to ask both of you if you
2 can provide some more detail on these points. I
3 think there was also specifically a mention of
4 one company -- I believe by Mr. Yerxa -- that had
5 been excluded. So I would appreciate sort of
6 comments specifically on that as well.

7 MR. YERXA: Like Jennifer, I am going
8 to have to provide you some follow-up information
9 on that in writing. I'll certainly have my VP,
10 Cathy Schultz, who's been working on that
11 specific aspect of it, try to give you some more
12 -- some more detail.

13 But, you know, we think it's very
14 clear the way this was tailored was definitely to
15 avoid certain kinds of categories of digital
16 transactions that benefitted French companies and
17 we will provide you that information in writing.

18 MR. SPRAGUE: Yes. It's useful to
19 also take into account the legislative history,
20 if you will, of the EU-proposed directive on the
21 Digital Services Tax because the French tax is
22 basically based on that.

1 So some of the elements of proof about
2 the discriminatory intent, first, you just go
3 through the legislative history and the French
4 parliament. You know, they mention many
5 companies. Every single company mentioned is an
6 American company.

7 While the EC process was developing a
8 proposed directive, German car manufacturers
9 said, well, wait a minute -- our cars gather user
10 data as well.

11 So if the justification for this tax
12 is that businesses that commercialize user data
13 will be subject to the tax, we think that's
14 wrong.

15 And so during the EC process, and this
16 was copied in the French law, there is an
17 exception for any data collected by sensors --
18 car sensors, Internet of Things sensors.

19 So if your policy foundation is
20 commercializing user data, then there's no
21 principled justification for taxing one
22 commercialization of user data and not another

1 commercialization of user data. But that's a
2 pretty clear example where a whole category of
3 user data commercialization was taken off the
4 table because it would bite particularly with
5 European enterprises.

6 But I think the best probative
7 evidence is just looking at the legislative
8 history in the French parliament where they
9 mention a large number of U.S. companies as the
10 intended targets of the tax.

11 MS. MAZZONE: Thank you.

12 My question is for Ms. McCloskey and
13 Mr. Sprague.

14 In your testimony, you both state that
15 the DST's revenue thresholds were crafted to
16 capture successful U.S. companies and exclude
17 like European companies.

18 Can you provide either here or in the
19 post-hearing comment evidence supporting this
20 statement and examples of any like companies that
21 are excluded by the revenue thresholds?

22 MS. MCCLOSKEY: We are preparing a

1 longer analysis that will have some of that
2 information. So look out for our comments
3 afterwards.

4 Thank you.

5 MR. SPRAGUE: Yes. It's very hard to
6 identify, you know, what smaller companies are
7 in-scope in terms of services but not in-scope in
8 terms of revenue.

9 But we will develop the information
10 that's available and present it in the post-
11 hearing comments.

12 MS. CHLEBEK: Good morning.

13 My question is for Mr. Sprague. Are
14 the advertisers who purchase advertising services
15 from the companies that you represent able to
16 reach French consumers via other advertising
17 channels that will not have to pay the DST?

18 If yes, what are some of those
19 channels? Do you have any information on their
20 nationality?

21 Thank you.

22 MR. SPRAGUE: Yeah. That's a superb

1 question, and I think that goes to, you know, the
2 question of like services that are not subject to
3 tax.

4 So if I am -- if I am, say, you know,
5 a U.S. seller of something that I think would be
6 attractive to the French market, I can put an ad
7 in a Paris newspaper or I can advertise on French
8 TV or I can advertise on Sky TV in the U.K.
9 because French consumers will watch Sky TV,
10 especially if they are interested in, you know,
11 American-produced goods, or I can buy a digital
12 ad on an American digital services provider.

13 So that -- so that ad is now going to
14 be subject to tax but the newspaper ad, the radio
15 ad, other forms of advertising -- a billboard --
16 all those other ways of providing exactly the
17 same message to French consumers are not subject
18 to tax.

19 Or if it's a small French platform
20 that's below the -- below the threshold. That's
21 not subject to tax either. So there are plenty
22 of channels of advertising into the French

1 market. It's only those provided by the big
2 American platforms that are subject to tax.

3 CHAIR HADLEY: And if I could ask a
4 follow-up. Your sense is that those other
5 channels -- the nationality breakdown is going to
6 look different than it does in the digital
7 advertising space. Is that right?

8 MR. SPRAGUE: Yes, because if you are,
9 indeed, as was put out as the hypothetical,
10 wanting to advertise towards French users you are
11 going to put your ad on French TV or French radio
12 or French newspapers. My Sky TV example was
13 maybe a little off base.

14 So your choice is how do I reach the
15 French market? I can do it through traditional
16 advertising channels, none of which are subject
17 to this tax, or I can use a digital ad and if I
18 use one of the, you know, high-profile targeted
19 companies there will be -- there will be a tax
20 when it's exactly the same ad, exactly the same
21 marketing message.

22 MR. STEPHENS: This is Andrew Stephens

1 at USDA. I have a related question for Rufus
2 Yerxa.

3 In your testimony you state that
4 French broadcasters and newspapers and U.S. firms
5 covered by the DST directly compete for
6 advertising revenue.

7 Do you have any further information or
8 evidentiary support for that statement?

9 MR. YERXA: I am going to have to
10 provide that to you. I think we -- I think we do
11 -- we did gather some publicly available
12 information on it but we haven't done any
13 separate research.

14 But we gathered some publicly
15 available information and I'll give you those
16 sources.

17 MR. STEPHENS: That would be great,
18 and if any of the witnesses have, like, as Mr.
19 Sprague mentioned, the same ad in different
20 channels it would be interesting to see as well.

21 MR. ROGERS: Good morning. I am
22 Michael Rogers from USTR's Europe office.

1 My question is for Mr. Sprague. In
2 your testimony you referred to the U.S.-France
3 convention of establishment.

4 Are you specifically referring to the
5 U.S.-France Navigation and Commerce Treaty and
6 could you specify the particular provision you
7 are referencing with respect to the commitment?

8 MR. SPRAGUE: Sure. You know, there
9 are two elements of that. One is a prohibition
10 on extraterritorial taxes.

11 You know, this tax is -- sorry -- so
12 the treaty prohibits French taxes imposed
13 extraterritorially. This tax is imposed on
14 providers of the service, even if they have no
15 physical presence in France at all -- no office,
16 no personnel, no assets.

17 There's also an element of that treaty
18 that prohibits taxation -- differential taxation
19 of like kind services.

20 So we think that the same arguments
21 that prove up a violation of the obligations
22 under GATS prove up an obligation under the

1 treaty of establishment.

2 The extraterritoriality of tax is
3 something that's different, something that is in
4 the treaty on establishment and not in the other
5 treaties.

6 And the tax treaty is an independent
7 international obligation that we also believe
8 this tax violates.

9 CHAIR HADLEY: If I can follow up on
10 that last point.

11 So you think that this tax is a
12 covered tax for purpose of the U.S.-France tax
13 treaty and could I ask you to explain that
14 further?

15 MR. SPRAGUE: Sure. The U.S.-France
16 treaty does follow with -- not precision but in
17 all the important elements the U.S. model treaty,
18 which defines as covered taxes all income on --
19 all taxes on income including taxes on elements
20 of income.

21 This is a tax on gross revenue. It's
22 not a tax just on a transaction basis. It's

1 intended to bring the U.S. tax base -- part of
2 the U.S. tax base into France.

3 If you go back into the development of
4 the OECD model treaty, back when the OECD was
5 first coming up with the language of Article 2,
6 Article 2.2, there was a clear intention to make
7 the income or elements of income language broad
8 enough to cover gross base taxes -- what they
9 called in those days indirect taxes.

10 Today, we think of indirect taxes more
11 as VAT type taxes. But in those days, the
12 concept of indirect tax was applied to gross base
13 taxes on cross-border payments for services,
14 rents, royalties, other things like that.

15 And that is the origin of the language
16 tax on income or elements of income. So we do
17 believe that this tax, which was intended to
18 bring part of the U.S. tax base into France, is
19 subject to the prescriptions of the treaty as a
20 tax on either income or elements of income.

21 CHAIR HADLEY: Thank you.

22 Are there any further questions from

1 my colleagues? Well, thank you very much to the
2 witnesses. We will now have a five-minute break
3 before our second panel.

4 Thank you.

5 (Whereupon, the above-entitled matter
6 went off the record at 10:07 a.m. and resumed at
7 10:12 a.m.)

8 CHAIR HADLEY: Thank you very much.

9 We will start with the second panel.
10 Mr. Hiltz, am I pronouncing your name correctly?

11 MR. HILTZ: Yes.

12 CHAIR HADLEY: Hiltz? Okay, great.

13 Thank you.

14 MR. HILTZ: Hiltz, yes.

15 Hello. I'm Peter Hiltz, and I'm
16 Amazon's Director of International Tax Policy and
17 Planning.

18 Thank you for the opportunity to
19 provide comments on behalf of Amazon as part of
20 USTR's Section 301 investigation into France's
21 DST.

22 Amazon has two overreaching concerns

1 with the French law. First, the DST will
2 negatively affect Amazon and the hundreds of
3 thousands of small and medium-sized businesses,
4 that are referred to as SMBs, that use Amazon's
5 services to reach customers in France.

6 Second, unilateral digital tax laws
7 like the French DST are inconsistent with
8 existing international tax policies and are
9 discriminatory, particularly against U.S.-based
10 multinational companies.

11 Amazon believes the international
12 community should, instead, focus on addressing
13 tax challenges resulting from the digitalization
14 of the economy at the OECD. It is the most
15 appropriate venue for reaching consensus on a new
16 international tax framework that broadly
17 addresses concerns with current international tax
18 rules.

19 Amazon is a U.S.-based, global company
20 that employs over 650,000 employees worldwide,
21 more than 275,000 full-time employees in the
22 United States, and nearly 10,000 full-time

1 employees in France.

2 We've opened up Amazon's website to
3 selling partners and made significant investments
4 in tools and services that help them grow their
5 businesses. Fifty-eight percent of the sales on
6 the Amazon websites are made by our selling
7 partners, not by Amazon itself. Most of them are
8 small and medium-sized businesses.

9 We are concerned with the French
10 government's decision to impose a new 3 percent
11 tax on the gross revenue from certain types of
12 digital services that target French customers.
13 The tax is discriminatory for several reasons.

14 First, because its in-scope digital
15 services were carefully defined and revenue
16 thresholds set high, it only applies to a small
17 number of almost entirely non-French companies,
18 but will tax numerous U.S. companies.

19 Second, the DST is a tax on gross
20 revenue and not profit. Therefore, it creates an
21 additional layer of tax on top of already-
22 existing corporate income taxes and French VAT,

1 thereby creating double taxation.

2 The DST also disproportionately harms
3 Amazon's selling partners and potentially our
4 customers. We operate in the fiercely-
5 competitive and very low-margin global retail
6 market, which means that the DST represents an
7 incremental and significant cost to Amazon's
8 consumer business. Due to the highly-competitive
9 nature of the consumer business, we cannot absorb
10 this expense if we're to continue making the
11 significant investments in tools and
12 infrastructure to help fuel our selling partners'
13 successes. We have already informed our selling
14 partners that certain of their fees will increase
15 by 3 percent for sales made on Amazon France
16 starting on October 1st.

17 As a result, the tax has the potential
18 to impede the efforts of U.S. small and medium-
19 sized businesses to grow and sell into France
20 because it increases their cost of doing
21 business, forcing them to choose between
22 increasing their prices, reducing their other

1 costs, or ceasing to sell to French customers,
2 undermining U.S. SMBs' competitiveness in France.

3 The tax also undermines the ongoing
4 work of the OECD to address broader concerns with
5 the current international tax framework. Amazon
6 is a strong and engaged supporter of the OECD's
7 efforts and we believe that an internationally-
8 agreed solution at the OECD is achievable.

9 Unilateral tax measures such as
10 France's DST and other similar digital services
11 tax currently being considered by many other
12 countries harm the chances of reaching consensus.
13 Other countries may now be encouraged to
14 establish similar laws which will likely create a
15 domino effect, leaving businesses with multi-
16 layer taxation on the same stream of income.
17 Business and governments will have to decipher a
18 complex patchwork of tax measures which will
19 inhibit international trade and harm the growth
20 of the global economy.

21 Amazon encourages the U.S. Government
22 and the international community, through the

1 OECD, to continue to focus their efforts on
2 developing global solutions to the international
3 tax challenges. We believe the OECD can achieve
4 a consensus-based solution that addresses
5 concerns with the current international tax
6 framework, is based on sound principles, and is
7 in the best interest of governments, the business
8 community, and our selling partners and
9 customers. We are confident that a globally-
10 agreed approach will benefit all countries and
11 support economic growth.

12 And I thank you for the opportunity to
13 speak to you today. I'm happy to address
14 questions.

15 CHAIR HADLEY: Thank you.

16 Mr. Bramble?

17 MR. BRAMBLE: Thank you to members of
18 the Section 301 Committee for convening today's
19 hearing. We appreciate this opportunity to
20 testify regarding the investigation into France's
21 Digital Services Tax.

22 My name is Nicholas Bramble, and I

1 serve as Trade Policy Counsel for Google.

2 At Google, we are focused on making
3 sure all Americans can use the power of the
4 internet to find new opportunities, including
5 through trade. Through longstanding products
6 like Google Search and Google Ads, and new
7 services like Google Market Finder, we strive to
8 make it simpler for businesses of all sizes to
9 grow and reach customers around the world.

10 International trade requires a
11 consistent and predictable international tax
12 system. No matter whether trade is conducted
13 over air, sea, or the internet, businesses depend
14 upon clear rules of the road on tax and
15 consistency across jurisdictions.

16 Corporate income tax is an important
17 way the businesses contribute to the countries
18 and communities where they operate. Google's
19 overall global tax rate has been over 23 percent
20 for the past 10 years, in line with the 23.7
21 percent average statutory rate across the member
22 countries of the OECD. Most of these taxes are

1 due in the U.S., where most of our products and
2 services are developed.

3 This allocation of corporate tax
4 payments is not unique to Google. American
5 companies pay most of their taxes in the U.S.,
6 just as German, British, French, and Japanese
7 firms pay the majority of their corporate taxes
8 in their home markets. That state of affairs
9 reflects longstanding rules about how corporate
10 profits should be allocated among various
11 countries, based on international consensus and
12 an OECD model treaty that creates the framework
13 for an interlocking system of bilateral tax
14 treaties.

15 This international tax system provides
16 predictability that enables companies, both large
17 and small, to export and to do business in
18 multiple countries without having the same
19 profits taxed twice or being subjected to
20 discriminatory taxation. As our economy evolves,
21 it is very important to modernize this system.
22 At Google, we support international tax reform

1 driven by the OECD process, which can help guide
2 how profits should be allocated among countries.
3 Countries such as the U.S. and Germany have put
4 forward constructive proposals at the OECD to
5 modernize tax rules and require more taxes to be
6 paid in countries where products and services are
7 consumed. In fact, over 130 governments are
8 engaged in talks as part of the Inclusive
9 Framework aimed at modernizing the international
10 tax system.

11 It is important that all countries
12 maintain this multilateral momentum. Efforts by
13 one country to unilaterally change the rules on
14 how profits are allocated among countries can
15 generate new barriers to trade and hamper
16 economic growth.

17 Unfortunately, the enactment of
18 France's Digital Services Tax threatens to
19 undermine the OECD process. It's a sharp
20 departure from long-established rules and
21 uniquely targets a subset of businesses. French
22 government officials have emphasized repeatedly

1 that the DST is intended to target foreign
2 technology companies.

3 Under the DST, the value attributable
4 to risks taken and decisions made in one country
5 is being claimed by another country without
6 sufficient justification and outside the long-
7 established framework of international tax
8 policy. The new French law would tax revenue
9 from only a handful of e-commerce and internet
10 businesses on the theory that the digital economy
11 presents new challenges and that only a handful
12 of companies rely on digital business models.
13 However, both the OECD and the European
14 Commission Expert Group on Taxation of the
15 Digital Economy have found that every sector of
16 the economy, ranging from manufacturing to
17 agriculture, to health care, is becoming digital
18 and confirmed that unique tax rules targeted at
19 digital practices simply do not make sense.

20 While the DST purports to target two
21 subsections of the digital economy, its impact
22 will extend beyond those sectors. The DST is

1 likely to harm a wide range of American and other
2 global businesses that use digital services and
3 ads to reach French consumers. This further
4 underscores the need to pursue international tax
5 reform through the OECD process.

6 The DST departs from prevailing
7 standards in other ways. It unreasonably applies
8 retroactively to January 1st, 2019, which does
9 not allow companies to plan and requires the
10 implementation of new systems to calculate the
11 tax. The DST applies to taxation of revenue
12 rather than income, which increases the risk of
13 double taxation. And more fundamentally, it's
14 out of alignment with prevailing tax principles.
15 The DST will result in unpredictable
16 extraterritorial impact and is likely to generate
17 disputes on whether specific digital activities
18 were supplied in France or in another region.

19 In contrast, other governments,
20 including Sweden, Ireland, and others in the EU,
21 have stated that a consensus-based approach to
22 international tax policy is preferable to a

1 unilateral DST model. It is worth noting that
2 the French DST may spread to other regions. The
3 UK has legislated its own DST, while Spain,
4 Italy, Austria, Czechia, New Zealand, and other
5 countries are considering similar unilateral
6 taxes. These countries are watching the French
7 experience and considering whether a unilateral
8 approach might be easier or more advantageous
9 than pursuing a multilateral agreement at the
10 OECD.

11 Ultimately, a series of cascading
12 unilateral measures would have dangerous
13 repercussions for the OECD's multilateral process
14 and for a wide range of U.S. export sectors.
15 This is a concern for international trade and the
16 wider economy if countries follow the DST model
17 and select specific sectors and groups of foreign
18 companies for targeted tax policies.

19 We support USTR's investigation into
20 these issues. We hope governments can avoid
21 taking unilateral tax actions targeted at
22 specific sectors and, instead, work together to

1 develop a consensus at the OECD around a new and
2 modern framework for coordinated taxation.

3 Thank you.

4 CHAIR HADLEY: Thank you.

5 Mr. Lee?

6 MR. LEE: Good morning. My name is
7 Alan Lee. I am head of Global Tax Policy for
8 Facebook.

9 I want to thank the Committee for this
10 opportunity to appear before you today to discuss
11 the 301 investigation of the French Digital
12 Services Tax. Facebook appreciates and strongly
13 supports the Administration's decision to
14 investigate the French DST under Section 301.

15 In the following testimony, I will
16 explain how the DST is based on false assumptions
17 about the taxes paid by Facebook. Next, I will
18 explain why unilateral measures like the DST are
19 harmful to Facebook and the digital economy and
20 why tax reform requires devising consensus-based,
21 multilateral solutions in forums such as the
22 OECD. Finally, I will explain how the DST's

1 design and structure poses difficulties for
2 Facebook's business model and will hinder growth
3 and innovation in the digital economy.

4 France has sought to justify the DST
5 by arguing that Facebook and other U.S. companies
6 subject to the tax pay 14 percentage points less
7 taxes than European small and medium-sized
8 European companies. The apparent source of this
9 figure is a study on taxes in the digital era
10 that PwC Germany issued in 2017. Notably, when
11 the European Commission cited this same 14
12 percent figure in the impact assessment for its
13 proposed EU-wide DST, the author of the study
14 explicitly stated that the Commission's
15 conclusion was wrong. Like all companies, our
16 effective tax rates change over time based on a
17 number of factors, such as the success of the
18 company at the time, as well as investment,
19 expenses, capital expenditures, employee growth,
20 and R&D costs.

21 Facebook pays all taxes as required by
22 law. Our average effective tax rate for the last

1 five full years has been greater than 26 percent.
2 As a U.S. company headquartered in Menlo Park,
3 California, Facebook pays a significant portion
4 of its taxes in the United States, where our
5 primary functions, leadership, engineering, and
6 product roadmaps, are managed and developed.

7 Under existing international tax
8 norms, these rules apply the same to similarly-
9 situated French companies who pay the majority of
10 their taxes in France. Ultimately, the result of
11 this targeted tax will result in fewer resources
12 available to build and invest.

13 Without question, business models
14 around the world are changing, and international
15 tax rules should adapt to address new challenges
16 that are raised by the digitalization occurring
17 across all sectors of the economy. We believe
18 that ideal policy results from consensus-based
19 processes like that currently being undertaken at
20 the OECD. This need for global agreement becomes
21 even more acute as governments are seeking to
22 modify well-established, fundamental tax

1 principles like profit allocation.

2 As you know, and as others have
3 stated, more than 130 countries, through the OECD
4 and the Inclusive Framework, are discussing how
5 to improve international tax rules with specific
6 regard to the taxation of the digital economy.
7 Unilateral measures like the DST directly
8 undermine these efforts.

9 I'll now address the specifics of how
10 the French DST will affect Facebook's business.
11 Facebook is a free service to more than 2 billion
12 people that regularly use our service. One of
13 our top priorities is to build useful and
14 engaging products that enable people to connect
15 and share through their mobile devices, personal
16 computers, and other surfaces. Facebook also
17 helps people discover and learn what is going on
18 in the world around them and enables them to
19 share their opinions, to share their ideas, their
20 photos and videos, and other activities with
21 audiences ranging from their close friends to the
22 public at large, and to stay connected everywhere

1 by accessing our products.

2 This service is supported in large
3 part by revenue generated from the sale of
4 advertising on our platform. Creating and
5 maintaining a useful and engaging environment for
6 people requires ongoing R&D, capital expenditures
7 -- i.e., data centers -- and a growing employee
8 base. To support this, Facebook generates more
9 than 98 percent of its global revenue by
10 providing relevant advertising to our users.

11 Advertising could reach a customer based on a
12 number of factors besides location, such as age,
13 interests, hobbies, and relevant advertising can
14 be viewed in France by a visitor, but is being
15 served by such an advertisement for other reasons
16 beyond location. So, you could have a non-French
17 user in France that is receiving an advertising,
18 but is not receiving it based on a location
19 preference, for instance.

20 As you are aware, the French DST
21 imposes a 3 percent tax on gross revenues instead
22 of profits of the following activities: targeted

1 advertising, intermediary services, digital
2 interfaces, and the sale of personal data to
3 users. Facebook is subject to the French DST
4 only under the advertising provision, which
5 calculates the tax based on the "advertising
6 revenues" -- within quotes -- generated by French
7 users or users in France.

8 In addition to the actual tax
9 liability, under the French DST, the law will
10 require new methodologies for calculating the
11 tax. The French and other DSTs apply the tax to
12 a new tax base focused on user location. For a
13 company like Facebook, this presents issues such
14 as Facebook's revenue is generated directly from
15 advertisers, not users.

16 While we may have the necessary data
17 to calculate the tax, it would require additional
18 time and resources to capture this data and
19 maintain for these new tax and audit purposes.
20 Under the existing language, with or without
21 further guidance from the French authorities, we
22 expect additional tax compliance, audit,

1 engineering, and maintenance costs.

2 Furthermore, because of the law's
3 revenue thresholds, the revenues we derive from
4 advertising under the French DST will be taxed.
5 The revenue thresholds serve to limit the scope
6 of companies impacted by the DST even further.

7 In addition, the French DST will apply
8 retroactively to January 1st, 2019. Again, this
9 will impose a significant burden on Facebook, as
10 there is little guidance on calculating this new
11 type of tax, and our current systems would
12 require re-engineering of our internal systems to
13 capture this data in a way that fully complies
14 with the law as written.

15 CHAIR HADLEY: Sir, it has been five
16 minutes. If you would conclude?

17 MR. LEE: Sure. In conclusion --
18 (laughter) -- Facebook supports the
19 Administration's initiation of this investigation
20 and we look forward to its outcome as well as a
21 consensus-based solution to international
22 taxation at the OECD.

1 Thank you.

2 CHAIR HADLEY: Thank you.

3 I'll now invite my colleagues to ask
4 questions of the witnesses.

5 MS. CHLEBEK: Thank you.

6 Thank you for your testimonies.

7 My question is to Mr. Lee and to Mr.
8 Bramble. Both of you mentioned the burden
9 imposed by the tax's retroactive application. In
10 your experience, how unusual is it for a country
11 to impose a substantially new tax with
12 retroactive application? Could you provide
13 further explanation of the nature and extent of
14 those burdens? Thank you.

15 MR. LEE: In my experience at
16 Facebook, we have not seen a retroactive tax, and
17 certainly not one that is retroactive that shifts
18 fundamentally the way a company would calculate
19 the tax. So, without further guidance or even
20 with further guidance, it would be a significant
21 burden on us to make sure that we're in full
22 compliance with the law, which is what we would

1 need to do.

2 MR. BRAMBLE: I would agree with that.
3 We have not seen a substantial tax that's been
4 retroactive to this extent in the past. We're
5 obviously facing sort of a pretty serious
6 challenge of re-engineering our systems to figure
7 out which data is most helpful to calculating our
8 liability under the tax. Going forward, that's
9 very difficult. Going backwards, that's even
10 more challenging. I'm not sure we have data
11 available at this point. So, we are taking a
12 pretty serious effort to figure out how we can
13 come into compliance. But because this is such a
14 departure from those international norms, our tax
15 system and other companies' tax systems are not
16 built to make that kind of calculation.

17 MS. MAZZONE: Thank you.

18 I also have a question for Mr. Lee and
19 Mr. Bramble. You both mentioned taxing revenue
20 rather than income is out of alignment with
21 international principles. In your experience,
22 how rare is a national-level tax that applies to

1 revenue, not income? How many other countries
2 currently have such a tax?

3 MR. LEE: So, there are taxes that are
4 based on gross revenue, but that's based on
5 transactions. So, think of that as like a sales
6 tax. Where it's based on income -- so, income,
7 income tax, consumption, consumption tax -- the
8 general principles of income tax require the tax
9 be applied on profit. And the reason for that I
10 think is discussed by some of our other
11 colleagues, that you have companies that could be
12 in a loss position that could be growing,
13 borrowing in order to grow at present, and still
14 be subject to a tax, if it's a gross revenue
15 income tax where you generate actually no profit
16 and you still owe a tax under the law.

17 MR. BRAMBLE: I would agree with that,
18 too. I'm not a tax expert, but I defer to these
19 folks here. But it does seem unexpected. At
20 least the OECD process is targeted towards
21 taxation of income rather than revenues, and we
22 support that process.

1 MR. LEE: It's also unclear where the
2 3 percent comes from as well and what rational
3 basis that has to the underlying policy they're
4 trying to effectuate.

5 CHAIR HADLEY: Could you explain, on
6 the advertising side, how different is this from
7 a tax that is based on a transaction? Why is it
8 different? I mean, to the extent that the tax is
9 based on a French user seeing an ad, why is that
10 kind of different from a normal transaction-based
11 tax that normally does apply to revenue?

12 MR. LEE: So, for us, there's no
13 commerciality between the user and the platform.
14 So, the commercial transaction for Facebook is we
15 sell advertising to the advertiser. That's where
16 there's an agreement and a contract and a
17 negotiation and a payment, ultimately, right?
18 That's sort of the typical step of a commercial
19 transaction. As between the user and the
20 platform, there's no commercial transaction;
21 there's no money changing hands. And so, that I
22 think would be the most fundamental difference

1 here. And you're generating, essentially, an
2 entirely new base where there is no commerciality
3 or revenue.

4 MR. BRAMBLE: And from what I
5 understand, the theory driving is focused on the
6 user. It's being applied in a way that isn't
7 necessarily consistent across the industry.
8 There are plenty of businesses that are in the
9 same way dependent upon user data and user value
10 as in-scope businesses, but they are not in scope
11 under the DST.

12 MR. ROGERS: My question is for Mr.
13 Lee, and it relates to the scope of the tax. How
14 does the scope of the companies covered by this
15 tax compare to the scope of the usual corporate
16 taxes? And to the extent of your knowledge, how
17 many countries currently have a tax that applies
18 to such a small subset of companies?

19 MR. LEE: To the first, I'm not aware
20 of any other tax that is primarily for revenue
21 raising that has a narrow scope like this. So,
22 if you were to create a tax that had a narrow

1 scope, typically, it's to stop a specific
2 behavior. In this case, that would be helping
3 small businesses grow and selling digital
4 advertising and allowing them to access markets
5 that they wouldn't otherwise be able to access.
6 This is not the type of sort of excise tax that
7 you would impose on a specific set of companies.
8 So, I have not seen any sort of similar tax in
9 this vein.

10 And your second question?

11 MR. ROGERS: If you were aware of
12 other countries that have scopes of similar scope
13 -- I'm sorry -- taxes of similar scope.

14 MR. LEE: I'm not, but I am aware that
15 there are countries that are considering it,
16 which is why this investigation and the work that
17 you all are doing is very important.

18 MS. LINTON-GROTZ: My question is for
19 Mr. Hiltz and Mr. Bramble. In your testimony,
20 you both mentioned the risk of double taxation.
21 If you believe that your companies will, in fact,
22 face double taxation once the DST goes into

1 effect, could you provide some more detail as to
2 how this will happen, including the revenue on
3 which this would occur?

4 MR. HILTZ: So, if we think about how
5 the French DST applies to electronic
6 marketplaces, they apply if -- or this particular
7 one applies if there is a French customer or if
8 there is a French seller. So, if you are a small
9 U.S. business who is trying to export and you are
10 selling on the French marketplace, then you'll be
11 subject to that. If you are a U.S. business
12 selling on Amazon U.S., and a French person goes
13 on the internet and goes to the U.S. website,
14 because the inventory is different at the
15 different websites, then that transaction will be
16 subject to tax, as well as being subject to tax
17 in the United States.

18 Because it is an "or" test, if Spain
19 takes this transaction or takes this tax, for
20 example, as they are considering it, and you've
21 got a French customer and a Spanish seller on the
22 U.S. website, both of those countries will then

1 apply the 3 percent tax.

2 Now, if you look at Amazon's 10-K
3 statement, our profit margin on retail is less
4 than the 3 percent tax. So, the tax would, you
5 know, in each country by themselves would exceed
6 our profit margin.

7 MR. BRAMBLE: I guess I would just add
8 that, given the complex nature of cross-border
9 transactions on the internet, and given the novel
10 theory of value underlying this law, it does lead
11 to a situation where multiple countries may want
12 to be able to claim the value associated with a
13 given transaction and subject that to their own
14 domestic tax regimes.

15 CHAIR HADLEY: So, if I can ask a
16 followup, it seemed to me as though both of your
17 answers were focused on the possibility of a
18 country other than France also adopting a Digital
19 Services Tax. So, if you see a possibility for
20 double taxation, absent that outcome, could we
21 have a little further explanation of that?

22 MR. HILTZ: Sure. Because our

1 business is subject to corporate income taxes
2 where it's based. So, the French website is
3 subject to French corporate income tax or
4 wherever -- the other countries that would tax
5 the French website. The United States taxes the
6 U.S. website as well as -- there are other U.S.
7 rules that pick up our income generated by our
8 foreign subsidiaries. And those provisions have
9 crediting provisions and other things that would
10 help alleviate the double taxation. But, unless
11 the U.S. Treasury comes out and says, oh, we're
12 going to tell you that this French DST is
13 creditable against U.S. tax, you know, a gift
14 from the U.S. Treasury to France, then we're
15 subject to, already subject to corporate income
16 tax plus this.

17 MR. BRAMBLE: I have the same basic
18 response. We're paying a 23 percent effective
19 tax rate. Most of that is going to the U.S.
20 under corporate income tax. It is very likely
21 that many of the same underlying transactions
22 would now be taxed by the U.S. and by France.

1 CHAIR HADLEY: Thank you.

2 MR. FLAVIN: My question is also for
3 Mr. Hiltz. I'm wondering, the businesses that
4 sell products to French consumers using Amazon's
5 eMarketplace, will they be able to reach those
6 French consumers via other channels, including
7 but not limited to other online marketplaces?
8 And if so, could you name -- give some examples
9 of those channels? And do you have any
10 information on their nationality?

11 MR. HILTZ: So, if we look at retail
12 websites, you know, what you normally think of as
13 the Amazon sorts of things, and you look at the
14 top 10, three of those are U.S.: Amazon, eBay,
15 and Wish. The rest of the top 10 are French.
16 So, there are French marketplaces.

17 Now one thing that people need to
18 understand about the thresholds, it's 25 million
19 euros of French revenue and 750 million of global
20 revenue. So, you can be a French domestic
21 website with 600 million euros worth of in-scope
22 revenue, and you haven't hit that 750 million

1 number, so you're out of scope, even though you
2 dwarf everything else.

3 So, if you were a U.S. small or
4 medium-sized business, okay, instead of just
5 going to Amazon or eBay and having them help you
6 through the process of selling to France, now
7 you've got to do some investigation. Okay, how
8 do I go to Fnac or CDiscount or some of the other
9 French websites, sign up there, deal with those
10 policies, which, of course, adds -- okay, now I'm
11 dealing with another supplier instead of just one
12 global Amazon or eBay.

13 The other thing that Amazon thinks is
14 important is we do think that electronic
15 marketplace sales and physical sales are
16 substitutes. You can drive to Target and Walmart
17 or you can order off of Target or Walmart or
18 Amazon's website. The Amazon sales in France
19 compared to the physical sales in France of
20 Carrefour or some of the other French majors, you
21 know, the electronic commerce gets dwarfed by the
22 physical. But that would be another avenue for a

1 U.S. business to call up Carrefour and say, "I've
2 got a fantastic product. Let me fly over to
3 France and I will try to sell it to you, so you
4 can sell it to your customers."

5 MS. SCHUBLE: Julia Schuble with the
6 U.S. Department of Agriculture.

7 Sirs, my question is to all three of
8 you. Are the advertisers who use your
9 advertising services to reach French consumers
10 able to reach those consumers via other
11 advertising channels that will not have to pay
12 the DST? If yes, what are some of those
13 channels? And do you have any information on
14 their nationality?

15 MR. LEE: Yes, we consider ourselves
16 a part of the broader advertising ecosystem.
17 More than 92 percent of advertising occurs off of
18 Facebook's platforms. So, any French company
19 that allows for advertising in the French market
20 would not be subject to this DST if they do not
21 qualify under the revenue thresholds or are not
22 in scope.

1 MR. BRAMBLE: I agree. We face very
2 robust competition in the French advertising
3 markets. There are a number of digital and non-
4 digital services that compete with us that are
5 not in scope under this law, including outdoor
6 advertising, radio, TV, print. If you're a large
7 advertiser and you're trying to figure out where
8 to invest your ad spend, you are going to face a
9 choice now of whether to invest in the company
10 that is now facing a 3 percent loss of efficiency
11 or competitiveness or the French competitor who
12 is not facing that same penalty.

13 MR. HILTZ: I don't have any more
14 specific information. We could try to provide
15 something in writing for you.

16 MR. TANNER: Thanks.

17 I wanted to ask a question for all
18 three folks on the panel. I wanted to see if we
19 could spend some time walking us through how
20 you're going to calculate the revenue that is in-
21 scope, essentially covered by this tax. To the
22 best of your understanding right now, I wanted to

1 see if I could ask each of you, in turn. I think
2 probably for Mr. Bramble and Mr. Lee, we're
3 talking mostly about advertising. Mr. Hiltz,
4 you're certainly welcome to comment on that as
5 well, but, obviously, we would be interested in
6 the marketplace issues. So, how you're going to
7 calculate the revenue?

8 I think we've also heard, and
9 certainly read in the comments filed so far, this
10 idea that the French officials apparently are
11 focused on some sort of global divisible by
12 French impressions. So, to the extent you can
13 sort of give us your thoughts on how you would
14 calculate that, it would be very helpful. Thank
15 you.

16 MR. BRAMBLE: Sure. I can start with
17 advertising. So, we're still working on an
18 overall assessment under the law and don't have a
19 number to share at this point about the specific
20 impact. But it does seem likely that our
21 advertising services are in scope. There are
22 some ambiguities under the law in terms of

1 definitions of different forms of advertising.
2 So, I think we're working out some of those
3 definitions. We expect to hear more from French
4 tax authorities in September on some of those
5 issues. Yes, but I will just say that, yes, it
6 does seem clear that advertising services, at a
7 minimum, are in scope.

8 MR. LEE: We're still trying to figure
9 out as well, and we hope that there will be
10 guidance moving forward. But the way we
11 calculate it, or we think we have to calculate
12 it, is you take the total number of, the total
13 amount of global revenue. You divide it by the
14 amount of French revenue. That French revenue is
15 determined by the amount of impressions from
16 French users over the global number of users.
17 So, there's a fraction there that you multiply by
18 the global revenue amount.

19 The difficulty with that is we are
20 supposed to track based on IP address or some
21 other measure of geolocation or other reasonable
22 measure. And we don't know what that means.

1 When you file a tax return, you want to be pretty
2 specific about it; otherwise, you end up with
3 years of audit. And so, it's important for us to
4 get it right. So, there are many times, and very
5 often for good reasons, why companies, for
6 instance, may VPN out of France. And so, from
7 our perspective, we can't always tell if you have
8 a French user or someone in France that's on
9 Facebook viewing an advertisement in France.
10 There could be another situation where you have
11 someone VPNing in and, essentially, generating
12 revenue who may not actually be using one of our
13 products that actually has advertising, but you
14 would be counted as a user in France.

15 So, there are a number of confusing
16 sort of very, very highly detailed questions that
17 we have actually for the French authorities as to
18 how we might calculate this. And we're trying
19 our best efforts, but, again, we don't track
20 users based on their location for audit and tax
21 preparation purposes. And we do it for business
22 purposes, if, say, you wanted to show an

1 advertisement to someone in a specific region,
2 but to actually prepare a return or to prepare a
3 financial statement, that's an entirely different
4 question. And so, we need to pull all of the
5 data that we have available and see exactly what
6 we need to do to comply.

7 MR. BRAMBLE: And just to clarify,
8 that is one of the compliance costs that we are
9 all going to face. To clarify, VPN is virtual
10 private networks. This allows a user to
11 essentially anonymize their geographic location
12 associated with their IP address.

13 We don't really have clear guidance
14 from French authorities on how to process that
15 kind of thing under the law. So, we are still
16 trying to figure out that, among many other
17 things, how we will come to compliance when the
18 location of a user is the key factor under the
19 law.

20 MR. TANNER: Mr. Hiltz, let me just
21 interrupt for one second and ask a followup
22 question, and then, turn to you.

1 So, thank you for those answers. I
2 think one of the questions I want to follow up
3 with is, if there was anything more you could
4 explain in terms of the problematic nature of
5 looking at impressions or IP or other proxies for
6 French users and the actual way you obtain
7 revenues from the advertising model. In other
8 words, is there anything you can explain about
9 the potential discrepancy between associating
10 however you calculate French individuals and the
11 way your business model for advertising actually
12 works?

13 MR. LEE: Yes, I think we can provide
14 you something, just some more detail on paper.

15 The reason why we think basing it on
16 advertiser location is because we actually know
17 that that advertiser has paid us. Like we know
18 that they have a credit card. We know that they
19 have a bank account. There are other ways for us
20 to identify where the location of the advertiser
21 is, because that's where our customer is. And
22 so, for that, that's a real sort of, that's a

1 real world that we can actually identify.

2 But when you have users that are
3 viewing Facebook and they're VPNed in, and we
4 have to assume maybe a certain number are in
5 France but maybe aren't, and they aren't actually
6 generating revenue, direct revenue, from us;
7 they're not paying us in dollars and we're not
8 calculating the location of the user based on
9 their bank account, you know, that gets really
10 tricky fast.

11 And we can give you a little bit more
12 detail on that on a separate piece of paper, to
13 maybe break that out for you as to what the
14 specific differences would be, if that's helpful.

15 MR. BRAMBLE: And, of course, that
16 gets even more complicated on a retroactive basis
17 where the signals that you would try to use to
18 assess the location just aren't available.

19 CHAIR HADLEY: I think we would also
20 be interested in further information, either
21 later or now, on potential differences between
22 using percentage of impressions viewed in France

1 over global advertising revenue, the difference
2 between that versus attempting to kind of
3 precisely quantify the amount of advertising
4 dollars that kind of are attributable to those
5 impressions seen in France. Because, as we
6 understand it, the value of the ad market can
7 potentially create a difference between those two
8 things, and we would be interested in
9 understanding how, if at all, that happens in the
10 French market.

11 MR. LEE: That's right, and it would
12 have an impact. And I can give you more detail
13 on that later. But not all impressions generate
14 revenue. Sometimes you have to click through an
15 advertisement, and sometimes you actually have to
16 click through it and buy something. And so, just
17 viewing an advertisement doesn't necessarily
18 create a revenue-generating event as they
19 describe it for these French DST purposes. So,
20 there are differences.

21 MR. BRAMBLE: I also believe there's
22 a more detailed discussion of challenges with the

1 algorithm that France was using here in the
2 Silicon Valley Tax Directors' filing into the
3 docket. So, I would direct you to those comments.

4 MR. HILTZ: To sort of start with the
5 advertising and to give you some context, Amazon
6 does not track impressions. We track click-
7 throughs, but we don't track impressions.

8 If I go to France on a business trip
9 and it's over the birthday of one of my children,
10 and I go on the Amazon U.S. website and order
11 something for them, any ad that I see is
12 potentially subject to this French tax because I
13 was going in from -- you know, I was sitting in a
14 French hotel. So, the IP address is showing up
15 as France, even though I'm going to the U.S.
16 website, and it's being delivered to, and what
17 I'm buying is being delivered to the United
18 States.

19 So, this particular transaction picks
20 me up twice, once on the advertising side because
21 I saw an advertisement on the U.S. website while
22 I was in France, and second, I was deemed to be a

1 U.S. customer. And therefore, whoever sold me
2 the toy, or whatever it was on the U.S. website,
3 was now under the DST dealing with a French
4 customer. And therefore, that transaction would
5 be picked up on the marketplace side.

6 We haven't had any reason to try to
7 track those sorts of things. And so, we don't
8 have the data to start with. And, yes, this will
9 cost us millions of dollars to write the systems
10 to collect the data in the first place. I mean,
11 ignoring the -- oh, if I was actually on the
12 Amazon network when I went onto the website, then
13 it just shows up as a Seattle IP address instead
14 of a Paris hotel IP address.

15 Looking at the French marketplace
16 standalone, you would think that might be easier,
17 except for the fact that there's lots of people
18 who buy off of the French marketplace who aren't
19 necessarily French, French-speaking Swiss, for
20 example; French-speaking Belgians. And there are
21 a lot of people who sell on the French
22 marketplace who aren't French.

1 And so, we need to try to, instead of
2 taking all the transactions that happen on the
3 French marketplace, now we need to figure out,
4 okay, where did those customers come from? Were
5 they French or not? And where did the sellers
6 come from? Were they French or not?

7 Again, we haven't been collecting a
8 lot of this information. So, we have to build
9 the tools to do it. Retrospective tax
10 legislation like this, you know, we'll do our
11 best to guess, but it's not going to be something
12 that you're happy about signing your name to.

13 MR. BRAMBLE: And we haven't been
14 collecting this kind of location data because no
15 other law has required it. Both for internal
16 financial monitoring purposes and tax compliance
17 reasons, we've had no reason to have this data in
18 place in the past. Hence, the massive re-
19 engineering effort required to start trying to
20 gather it.

21 MR. FLAVIN: I have another question
22 for Mr. Hiltz. In your testimony, you mentioned

1 that the Digital Services Tax is going to impact
2 the small and medium-sized businesses that sell
3 on Amazon's site to customers in France. I'm
4 wondering if you can elaborate on the nationality
5 of those small or medium-sized businesses, and do
6 you know what share are, for example, U.S.
7 companies, French companies, or located
8 elsewhere?

9 MR. HILTZ: We're trying to figure
10 that out because it's not -- we know there are
11 thousands of U.S. small and medium-sized
12 businesses who sell on the French website. We
13 know a lot of them also sell on the German and UK
14 and Italian and Spanish, Japanese websites, that
15 might also end up picking up French customers.
16 There are hundreds and hundreds of thousands of
17 U.S. businesses who sell on the U.S. website, and
18 there's a lot of French customers who buy on the
19 U.S. website because, as I said, the inventory on
20 the different websites is different. And right
21 now, we don't have a good handle on how many in
22 the U.S., you know, businesses selling on the

1 U.S. website will be caught because there's a
2 French customer in one or more of their
3 transactions. We're trying to find that out.

4 MS. SCHUBLE: Sirs, to all three of you
5 again, can you elaborate on the types of
6 businesses that use your advertising services to
7 connect with consumers in France, in particular?
8 Do you have information about the nationality of
9 these businesses and the share that are U.S.-
10 based?

11 MR. BRAMBLE: I'll follow up from
12 Peter's comments. We don't have those numbers
13 offhand. I'm happy to try to follow up and get
14 them to you.

15 We do know that there are hundreds of
16 thousands of U.S. businesses, nonprofits, website
17 publishers, and others that use our services out
18 of the U.S. And part of our objective from the
19 trade side is to make it simpler for those small
20 businesses to export, to reach the market in
21 France and elsewhere. Part of our goal is
22 helping them build export plans to tap into those

1 new markets. So, we're happy to figure out
2 exactly sort of what that scope is and follow up
3 with you there.

4 MR. LEE: Yes, we don't have those
5 numbers offhand, but I can get those for you.

6 MR. HILTZ: And we don't have those
7 numbers. You know, we'll give you what we've got
8 available in written submission.

9 MR. TANNER: Hi. Just one more
10 followup question from me for all three of you.
11 And to the extent you can answer that, and
12 certainly if you can address it in followup
13 comments, that would be appreciated.

14 We're also trying to understand, in
15 terms of how this tax might be calculated by
16 companies such as yourselves, whether there's any
17 information on how to characterize the French
18 markets versus, let's say, like looking at the
19 global totals and sort of imagining an average.
20 Is there a way to characterize, for example, the
21 French advertising market as close to that
22 average, or is it smaller or larger?

1 And so, this would go to things like,
2 do you make the same amount of money clicking
3 through or other metrics with, for example, a
4 U.S. user versus a French user? And similarly in
5 the marketplace, is there any way you can
6 characterize the types of transactions, the types
7 of revenues in terms of these types of
8 transactions in the French market versus looking
9 globally at some kind of average? So, anything
10 you can provide on that today would be welcome,
11 and certainly if you can follow up, that would be
12 appreciated. Thank you.

13 MR. LEE: Sure, I can get more detail
14 for you on that specific question, because we do
15 have information on that. I can tell you, as a
16 general rule, more sophisticated economies tend
17 to have higher, what we call, average revenue per
18 user, which is just a basic take the number of
19 users and divide it by the amount of revenue we
20 have in a country. And that just tells people
21 the relative health of a market.

22 So, you could be a small country with

1 a very large population, but a very sort of not
2 robust economy or not robust consumerist economy.
3 Very few people will be advertising into that
4 market. You can have one advertisement for a
5 shoe that's going to cost a lot less than
6 advertising in another market, just simply
7 because of the nature of the market. That has
8 nothing to do with our business or has nothing to
9 do with sort of advertising in general, but are
10 metrics that advertisers are interested in, just
11 to have a better understanding of sort of how
12 their advertisements are doing in a market.

13 So, we do have some data that I think
14 is on point to your question, and I can submit
15 that as a separate comment. And then, you can
16 let us know whether or not it's what you're
17 looking for.

18 MR. BRAMBLE: We also don't have those
19 numbers offhand. I'm happy to follow up to try
20 to see if we can those to you.

21 MR. HILTZ: I would try to answer your
22 question, but I'm not sure that what I've got

1 here is entirely precisely to your point.
2 Certainly, France is the second largest
3 e-commerce country in Europe. It's not the
4 largest by average in Europe, which is the UK.
5 UK actually is the largest per population average
6 in the world. I need to find out where France
7 sits in that. So, I'll follow up on that.

8 CHAIR HADLEY: Thank you all very much.

9 Are there any further questions?

10 Thank you.

11 We will take a five-minute recess
12 before the third panel.

13 (Whereupon, the above-entitled matter went
14 off the record at 11:00 a.m. and resumed at 11:07
15 a.m.)

16 CHAIR HADLEY: Good morning. We'll
17 start back with our third panel of witnesses.
18 Mr. Kennedy?

19 MR. KENNEDY: Thank you. I'm Joe
20 Kennedy with ITI. The Information Technology and
21 Innovation Foundation is pleased to provide
22 testimony regarding the Office of the United

1 States Trade Representatives investigation of
2 France's new digital service tax.

3 This tax, which other nations are
4 actively considering, represents a radical
5 departure from current practice. And would
6 greatly complicate ongoing efforts by the
7 Organization for Economic Cooperation and
8 Development to negotiate changes to the
9 international tax regime by 2020.

10 The OECD has already made progress in
11 reducing their ability to shift profits to lower
12 tax jurisdictions. And to generate artificial
13 credits and deductions.

14 Yet some nations remain deeply worried
15 about base erosion, especially with the growth in
16 trade and services. In particular, they claim
17 that large internet companies generate
18 significant revenues from their citizens, but pay
19 little, if any, tax.

20 DSTs are best seen as a unilateral
21 move to generate tax revenue from these companies
22 regardless of existing tax treaties or trade

1 agreements.

2 The distribution of taxable profits
3 between countries normally reflects where value
4 is created. The sale of a product usually does
5 not create additional value.

6 The key argument DST supporters make
7 is that their citizens create a large amount of
8 value for certain internet businesses, which
9 company read in the form of profits. These
10 countries claim that they should be allowed to
11 tax the profits from this value.

12 Although this may sound plausible, in
13 the absence of a permanent establishment and the
14 creation of significant value, countries cannot
15 tax the profits associated with import, whether
16 or not -- whether these are goods or services.

17 An IFTI report which came out earlier
18 this year explains why both the premise and the
19 structure of DSTs are mistaken for several
20 reasons. First, in order to get around
21 international treaties, DSTs tax revenues rather
22 than profits.

1 But this end run creates significant
2 economic inequalities. Revenue taxes are
3 especially burdensome for firms with low or
4 negative profit margins, making it harder for new
5 companies to gain scale.

6 Although the tax rate is set at only
7 3 percent, it can also pose a large burden to
8 profitable companies.

9 Second, DSTs clearly discriminate
10 against large foreign companies. France's --
11 French authorities have been very clear that the
12 tax is not expected to affect many French
13 companies.

14 It is true that France could
15 accomplish the same result with a value-added tax
16 on the sales of foreign firms. But only if it
17 also applied the tax equally to sales of domestic
18 companies.

19 Indeed the fact that DSTs tax a
20 proportion of the sales price from foreign
21 services, it's likely a violation of
22 international tax agreements.

1 The argument of user-created value is
2 also misguided. In every respect, the real value
3 of an internet service such as Google search,
4 Uber, or Amazon Marketplace, there's a software
5 and business model created by the company.

6 Consumers use these services because
7 they derive great value from them. This in turn
8 attracts other users.

9 But the source of the value remains
10 the company, not the users. The vast majority of
11 users create little of value to the company, yet
12 they are allowed to use the service for free.

13 Fourth, internet companies are not
14 unique. DSTs target three narrow sources of
15 revenue, the sale of information provided by
16 users, the sale of advertising, and fees for
17 operating a multi-sited platform.

18 Yet the application of the law makes
19 several false distinctions. The internet of
20 things is rapidly expanding the number of
21 industries that benefit by collecting data from
22 their users.

1 Yet the DST would only apply if this
2 information is used by other, not the firm
3 collecting it. The law would apply to internet
4 marketplaces that give buyers a choice of
5 sellers, but not to websites with only one
6 seller.

7 The law would apply -- would not apply
8 to subscriptions revenues even though the current
9 practice of free use is more popular and more
10 egalitarian.

11 For all these reasons, DSTs represent
12 a dangerous trend in international law. The
13 United States should strongly oppose them, even
14 if as it works within OECD to update current tax
15 law to changing the world.

16 Thank you.

17 CHAIR HADLEY: Thank you. Ms. Holland?

18 MS. HOLLAND: Good morning. Thank you
19 for this opportunity to provide comments on USTR
20 Section 301 investigation of France's digital
21 services tax.

22 I'm Stefanie Holland, I'm Vice

1 President of Federal and Global Policy for the
2 Computing Technology Industry Association,
3 ComPTIA.

4 ComPTIA's member companies have
5 several concerns with the DST. First our members
6 are highly concerned with the discriminatory
7 nature of the French government's DST
8 specifically against successful American digital
9 companies.

10 As the minimum thresholds are high
11 enough so that only the largest, most successful,
12 multinational firms will be subject to the tax,
13 the tax requirements will disproportionately harm
14 some of the most successful global enterprises
15 based in the United States.

16 Second, we are concerned with the DST
17 as it is set out in the Joint Committee Bill and
18 subsequently modified by the government of France
19 as it would distort the global marketplace.

20 Although the French Prime Minister has
21 stated that these taxes would be temporary as the
22 government awaits a solution from the OECD, there

1 is no certainty of that given that the original
2 legislation proposed to the French legislator,
3 legislators, had a provision that stated that the
4 DST would apply from 2019 to 2020.

5 The final version that was signed into
6 law, removed the stipulation. The DST would
7 undermine the broader ongoing efforts of the OECD
8 as well as facilitate market distortions.

9 Short term distortions on the global
10 digital marketplace would amount to changes in
11 prices of the affected products. And therefore
12 changes in the products of affected firms
13 impacting consumers.

14 If the tax is left in place for a
15 longer period of time, as the expiration
16 provision was removed, long term ramifications
17 could include discrimination between different
18 types of distributors, between different
19 categories of marketplaces, and between exports
20 from different countries.

21 Third, our members are also concerned
22 with the unreasonable nature of the tax policy

1 that will result in unclear, cumbersome, and
2 expensive implementation processes. It will be
3 difficult to calculate tax obligations given the
4 DST's taxable base would be calculated based on
5 non-public data.

6 Further, it will be difficult to
7 pinpoint exactly which companies meet the
8 criteria to be taxed by the DST.

9 The calculation of French-based
10 revenue being over 25 million Euros, could be
11 imprecise in terms of what revenue will qualify
12 to be included within the constraints of the new
13 law. This will also be difficult to calculate
14 for multinational conglomerates with several
15 taxable entities in different countries.

16 Also, the DST would tax revenues
17 instead of profits. This leaves open the
18 possibility that the tax would negatively affect
19 companies who are in deficit or whose profit
20 margins are narrowing.

21 The tax will also cause companies to
22 be taxed twice, hindering innovation, economic

1 growth, and protecting the bottom line for tax
2 payers.

3 Further, our members are concerned
4 with the fact that the DST is retroactive to
5 January 1, 2019.

6 This retroactivity is a burden and
7 could result in noncompliance. And therefore, it
8 is further uncertainty of the other requirements.

9 Fourth, the French DST is inconsistent
10 with the country's obligations to international
11 agreements, including in the OECD and the WTO.

12 As the OECD has been engaged in a
13 broader, multilateral negotiation on an
14 overarching solution to international taxation,
15 the body has previously found that it is nearly
16 impossible to separate out taxation of the
17 digital economy from the economy at large.

18 This separation is exactly what the
19 DST is seeking to do. And this will prove to be
20 extremely harmful to the global economy.

21 Also, it has been argued that the DST
22 is in violations of provisions of commitments

1 made under the WTO's General Agreement on Trade
2 and Services, the GATS, specifically the national
3 treatment principal, which stipulates that WTO
4 members cannot discriminate against other foreign
5 service providers and consequently favor service
6 suppliers in their own country.

7 CompTIA supports and endorses the
8 ongoing negotiations at the OECD and the United
9 States continued leadership in support of the
10 OECD's work towards a multilateral solution that
11 would reform international tax rules.

12 Further, we urge the U.S. to secure a
13 firm obligation from France that they will
14 abstain from unilateral action and work
15 constructively to reach a multilateral agreement
16 in the OECD.

17 As USTR considers retaliatory measures
18 against the French government, we ask that the
19 U.S. resolve the issues with France in a way that
20 is consistent with international commitments.

21 All and all, the DST is an attempt to
22 target U.S. technology companies. And we

1 encourage the U.S. government to continue working
2 against the DST in favor of finding a more
3 equitable, holistic, and fair taxation solution.

4 Thank you for the opportunity to
5 provide comments.

6 CHAIR HADLEY: Thank you. Mr. Bunn?

7 MR. BUNN: Good morning. My name is
8 Daniel Bunn. I'm Director of Global Projects at
9 the Tax Foundation.

10 Thank you for the opportunity to
11 provide comments on this Section 301
12 investigation.

13 These comments cover four areas, the
14 structure of the French digital services tax, how
15 that structure interacts with domestic and
16 foreign firms, the way that the tax could
17 undermine current multilateral negotiations on
18 international tax, and the cost of potentially
19 escalating the current trade war and alter -- and
20 an alternative response.

21 The French digital services tax is a
22 3 percent tax on certain revenues of large

1 companies. Those certain revenues include
2 revenues from digital interfaces, like online
3 marketplaces and online advertising services.

4 Large companies include firms with
5 global revenues of at least 750 million Euros and
6 revenues from France of at least 25 million
7 Euros.

8 The tax is deductible against French
9 corporate income tax. And the policy is
10 retroactive to the beginning of 2019.

11 As a tax on gross revenue rather than
12 income, the tax will function very much like a
13 tariff, and discriminate between domestic and
14 foreign firms.

15 Foreign firms will face the tax on
16 gross revenues at the point which their services
17 cross the French border, or rather when they hit
18 a French IP address.

19 Companies faced with the digital tax
20 will likely pass this tax onto French consumers
21 in the form of higher prices, as we have already
22 seen in some instances.

1 The retroactivity of the tax adds an
2 additional layer to the already narrow and
3 distortionary design of the tax. Businesses
4 impacted by the tax are having to commit
5 resources to the complex effort of complying with
6 the policy for a time period when they were not
7 previously required to track revenues for a
8 similar purpose.

9 The tax comes at a time when countries
10 are working toward a multilateral solution on
11 international taxation at the OECD. France,
12 rather than waiting for the OECD process to play
13 out, has preempted the process with this policy.

14 French policy makers have at different
15 times suggested that the OECD process is
16 important. And that the French policy is just a
17 temporary measure.

18 However, a provision in an earlier
19 version of the proposal, which would have allowed
20 the tax to expire, was not included in the final
21 legislation.

22 Unilateral action of this kind could

1 undermine the OECD process by showing that
2 countries might not need to adhere to whatever
3 policy will be agreed upon in the coming months.

4 In this way, the French policy is not
5 only harming the targeted companies, it is also
6 creating additional uncertainty around the
7 process at the OECD. Such uncertainty can lead
8 to delayed investment decisions and be a drag on
9 economic growth.

10 Unfortunately the harm of the French
11 digital services tax could be compounded if the
12 United States chooses to respond with retaliatory
13 tariffs. The current trade war has already been
14 costly for Americans and could become even more
15 so.

16 The Tax Foundation estimates that the
17 total impact of imposed and announced tariffs
18 will reduce long-run GDP in the U.S. by 0.6
19 percent. Simply put, this means lower wages and
20 fewer jobs.

21 Additional tariffs in retaliation to
22 the French DST would mean even more harm to U.S.

1 businesses and consumers.

2 Alternatively, the U.S. could use its
3 negotiating position at the OECD to put pressure
4 on France and other countries considering similar
5 policies.

6 At the very least, the U.S. should
7 negotiate to have the OECD explicitly require
8 removal of DSTs and similar unilateral policies
9 as a condition of agreement on new international
10 tax rules.

11 Putting pressure on OECD countries to
12 agree to such a condition in the context of the
13 broader work plan, could help to forestall
14 similar unilateral actions from other countries.

15 In summary, this French policy
16 effectively functions as a tariff on foreign
17 firms. And the U.S. should consider a response
18 to the tax which would increase stability rather
19 than uncertainty for international tax and trade
20 policy.

21 Thank you and I look forward to your
22 questions.

1 CHAIR HADLEY: Thank you. Mr. Schruers?

2 MR. SCHRUEERS: Schruers, yes.

3 CHAIR HADLEY: Schruers, thank you.

4 MR. SCHRUEERS: Thanks. Good morning.

5 My name is Matt Schruers. I'm COO with the
6 Computer and Communications Industry Association.

7 I appreciate the opportunity to convey
8 CCI's views today on the Section 301
9 investigation.

10 CCI is a trade association of internet
11 and technology firms, many of whom export goods
12 and services around the world. And would be
13 affected by this tax in France and other
14 potential taxes in other jurisdictions.

15 CCI welcomes the review of the DST.
16 In the United States officials and lawmakers
17 across the spectrum have already made clear their
18 disapproval of this new tax.

19 CCI believes that this action warrants
20 a substantial and proportionate response from the
21 United States.

22 My testimony focuses on three concerns

1 which I think will repeat many common themes
2 you've heard this morning. First, the
3 discriminatory nature of the tax.

4 Second, the fact that it's a
5 significant departure from international taxation
6 norms. And third, the threat that this tax is
7 going to pose to ongoing multilateral efforts to
8 reach a consensus to an international tax
9 solution.

10 So, first the DST unquestionably
11 targets predominantly United States firms. As
12 you've heard all morning, it's frequently
13 referred to as the GAFA tax. It's been made for
14 U.S. firms.

15 The thresholds have been set at
16 arbitrary levels precisely for the objective of
17 gerrymandering or ring-fencing a basis around
18 U.S. exporters.

19 At most, perhaps one French firm maybe
20 swept up into the scope of the tax out of an
21 estimated 30, based on the reports we've seen.

22 This discriminatory nature of the tax

1 leaves little question about France being out of
2 compliance with international commitments. And
3 certainly its WTO commitments and arguably the
4 law.

5 So second, the DST departs from
6 international norms on tax policy as well as the
7 EU's own decision not to follow this approach
8 earlier this year. Historically, taxes have been
9 levied based on where value is created, not where
10 it's consumed.

11 If we are going to depart from this
12 framework, we should do so on a consensus basis
13 where the methodology and degree by which we're
14 shifting taxation rates, is a universally shared
15 approach.

16 As you know, the DST is a 3 percent
17 tax on revenue, not profits, generated from
18 specific activities carried out in France. This
19 is going to require firms to make complex,
20 retroactive determinations on whether covered
21 activities were supplied in France given
22 ambiguous guidelines in the law.

1 This is likely to lead to differing
2 interpretations. And the retroactive nature of
3 the tax simply compounds this problem.

4 These concerns were part of what
5 motivated the European Union not to follow this
6 approach earlier this year. And leading to
7 France's go it a lone effort.

8 Finally, the French DST and other
9 unilateral measures threaten to undermine the
10 multilateral progress that we've seen at the
11 OECD.

12 CCI has been encouraged by events up
13 until now at the OECD, which has made significant
14 strides toward addressing the problems related to
15 the digitalization of the economy and the shift
16 towards the international trade and services.

17 We think countries should stick to
18 this inclusive and consensus driven approach.
19 So, for those reasons, CCI supports an aggressive
20 response to this problem.

21 We also support an ambitious,
22 multilateral, consensus driven solution to the

1 overall questions around taxation that countries
2 are currently facing. Not this unilateral
3 approach that we've seen France and other
4 countries now considering.

5 In conclusion, we welcome the scrutiny
6 of the French DST. And I'm happy to answer any
7 questions you have.

8 CHAIR HADLEY: Thank you very much,
9 Mr. Schruers. I'll now turn to my colleagues to
10 pose any questions to the witnesses.

11 MR. CHANG: Hello. My name is Won
12 Chang, Department of the Treasury, Trade Office.
13 My question is for Mr. Joe Kennedy, ITIF.

14 In the report accompanying your
15 testimony, you described the focus on revenue
16 rather than income as little more than an end run
17 around international standards and bilateral
18 treaties governing the corporate income tax.

19 In your experience, how unusual are
20 international level taxes on corporate revenues?

21 How long have revenue-based taxes been
22 disfavored and what are the main reasons

1 countries have declined to adopt or maintain
2 them?

3 MR. KENNEDY: Well, I think it --
4 explicit taxes on corporate revenues I think are
5 relatively rare. I'm not aware of any other
6 examples.

7 It's, you know, revenues are similar
8 to, you know, a sales price times quantity. So,
9 it -- functionally it's similar to a VAT.

10 But, -- and VATs are allowed. But, if
11 you're going to do a VAT, you're required to do
12 it evenhandedly. And not create artificial
13 distinctions based on nationality or size.

14 I think the rationale against a revenue
15 tax is usually that it treats companies
16 differently depending upon what their profit
17 margin is.

18 And countries -- or companies in
19 retail industries where they traditionally have
20 very small profit margins, or companies that are
21 growing, and so incurring losses while they're
22 reinvesting revenue into growth, both are

1 disproportionately hit hard.

2 And so, and also international tax
3 treaties specifically apply to taxes on profits.
4 And so the purpose of making this a revenue tax,
5 I think, is pretty clearly to get around -- to
6 make the claim that you're not violating
7 international tax treaties.

8 Because, you know, if -- clearly if
9 they were to put this same tax rate on profits,
10 they would be, I think without question,
11 violating tax treaties.

12 MR. CHANG: Thank you.

13 MR. FLAVIN: I have a question for Mr.
14 Schruers. In your testimony you note that the
15 DST's retroactivity will add to the
16 administrative burden since companies don't
17 regularly collect data associated with location
18 for purposes of tax compliance.

19 Can you give us some examples of the
20 additional administrative burdens that companies
21 will face, specifically due to the retroactivity
22 of the tax?

1 MR. SCHRUERS: Certainly. I think as
2 you've heard previously this morning, firms very
3 based on or on the extent to which they collect
4 this kind of information, some may, some may not,
5 the volume of information though is considerable.

6 And to have records that can
7 substantiate the location of users for what were
8 in most cases going to be non-financial
9 transactions going back to the beginning of the
10 calendar year, is you know, potentially an
11 extraordinary undertaking.

12 It's important to think about what's
13 happening in, particularly in the advertising
14 context. Where this is a multi-sided market that
15 -- or I guess I should say a multi-sided service
16 that links advertisers with viewers.

17 The financial transaction that's
18 happening there is the advertiser pays for the
19 privilege to get in front of viewers' eyeballs.

20 And so the users are, in most cases,
21 receiving services for free. It's an attention
22 market, not a paid service.

1 And so you needn't track that
2 information in the same way, except to optimize
3 the relevance of the advertising.

4 And so, there are, you know, untold
5 numbers of transactions going back to the
6 beginning of the year, where information was
7 provided, services were provided to a user.

8 And now, there's an obligation to
9 quantify those in ways that services didn't know
10 they would need to do when they were furnishing
11 the service earlier this year.

12 MS. SCHUBLE: This question is for Ms.
13 Holland. In your testimony you describe the
14 costs of implementing the DST including
15 calculating tax liability, especially on a
16 retroactive basis and administrate --
17 administering the tax.

18 Do you have any estimates of the costs
19 attributable to implementing the tax?

20 MS. HOLLAND: Thank you for the
21 question. I do not have estimates with regard to
22 specifics on the costs.

1 But I think as we've heard this
2 morning that our members have highlighted, it
3 would be extremely expensive. And further
4 highlight the discriminatory nature of the DST.

5 I can look into it and see if our
6 research entity can track down any specific in
7 terms of numbers you're looking for. Thanks.

8 MR. ROGERS: Good morning. My
9 question is for Mr. Schruers. In your testimony
10 you said that you believed that the DST may
11 violate EU law.

12 And I'm wondering if you could please
13 provide the Committee, now or even -- or in a
14 post-hearing submission what specific provisions
15 of EU law you believe the DST may violate?

16 MR. SCHRUERS: Yeah. I'm happy to
17 follow -- thanks for the question. I'm happy to
18 follow up on that at greater length.

19 But, there have been questions raised
20 as to whether or not this could form, or could
21 constitute a form of state aid that's permitted
22 under -- prohibited, excuse me, under EU law by

1 effectively advantaging domestic firms over non-
2 domestic, non-French firms.

3 I'd be happy to provide additional
4 details on that.

5 MS. CHLEBEK: Good morning. My
6 question is for Mr. Kennedy. In your testimony
7 and the report accompanying it, you argued that
8 the two rationales, user-created value, and low
9 effective corporate tax rates that have been
10 advanced for the EU DST proposal, and the French
11 DST proposal, do not explain the selection of
12 services covered.

13 What do you think does explain the
14 selection of covered services? Thank you.

15 MR. KENNEDY: Well, I think it's
16 pretty clearly if you look at statements, a
17 feeling that these companies create -- generate
18 tremendous profits in European countries.

19 And because of the way that the
20 international tax laws are currently structured,
21 don't pay very many, very much in corporate tax.
22 And there's a feeling one, that this is part of a

1 broader threat.

2 That it would be more and more
3 difficult to tax global services because you can
4 source them from any country and look for the,
5 you know, the lowest corporate rate or the best
6 corporate environment, and sell them worldwide
7 without having any local, or very little local
8 presence.

9 And there's a feeling that, I think,
10 that these companies are on the forefront of
11 doing that. And you know, if they generate --
12 you know, they're incurring, or they're making a
13 lot of profit on French, you know, dealing with
14 French citizens, then somehow that's wrong that
15 they're not paying tax.

16 And rather than, you know, approaching
17 the OECD and trying to renegotiate the rules, or
18 change their application, the countries have just
19 gone ahead unilaterally and changed it.

20 MR. CHANG: My question is for Daniel
21 Bunn of Tax Foundation. In your testimony, you
22 state that the tax will function very much like a

1 tariff and discriminate between domestic and
2 foreign firms.

3 Can you explain -- can you expand on
4 this idea? In what way is the tax like a tariff?

5 MR. BUNN: Thank you for the question.
6 So, on the first point, whether it functions like
7 a tariff.

8 As a tax based on gross revenues,
9 tariffs are taxes on gross revenues. And it
10 applies when services hit the French market,
11 French IP addresses, or however you define those
12 geo-location metrics.

13 Also, because the tax is deductible as
14 like any other cost, against French corporate
15 income tax, companies, foreign companies that may
16 not pay French corporate income tax, would not be
17 able to be in -- would not be in the same
18 position as French companies.

19 So, for the companies that are
20 technically in scope that are French companies,
21 they're in a different situation then foreign
22 companies.

1 MR. CHANG: Thanks.

2 CHAIR HADLEY: Could I ask a follow up
3 about that? You mentioned that French companies
4 maybe in a somewhat different position by virtue
5 of the tax being deductible against the French
6 corporate income tax.

7 Can you explain further, to what
8 extent that would reduce the effect of the DST on
9 a French company?

10 MR. BUNN: So, the value of your
11 deduction is the, simply the DST cost, whatever
12 you tax is there, times your marginal tax rate.
13 And for France, currently the top corporate
14 income tax rate is about 34 percent.

15 But that includes a surtax. So, it
16 could be in the 30 percent times whatever that
17 basis for that deduction is.

18 MR. TANNER: A question for Ms.
19 Holland. You said that some of -- you stated in
20 your comments that some of the harms of the
21 French DST include discrimination between
22 different types of distributors and potential

1 between exports between different countries.

2 I wanted to see if you could explain
3 further how these different types of
4 discrimination would make it more difficult for
5 U.S. companies to compete in France?

6 MS. HOLLAND: Thank you for that
7 question. Absolutely. That is based on comments
8 provided by, from our member companies as we
9 developed these comments.

10 And that is exactly what they believe
11 could certainly happen. I think what's
12 interesting is that there is kind of the short
13 term opportunity for that to happen, given if the
14 DST goes into effect.

15 And then the OECD comes to an
16 agreement, will the French Prime Minister remove
17 the DST as he's verbally agreed to? Although
18 that's not in writing.

19 So, our members' concern then goes
20 into, what are the long term ramifications if
21 indeed they decide not to then remove the DST, if
22 there's a broader OECD solution reached.

1 MR. TANNER: Let me just ask a quick
2 follow up on that. Just in terms of the point
3 about the long term effects.

4 Do you expect the discrimination
5 between distributors or between -- no, let me
6 rephrase that.

7 Is there anything more you sort of can
8 explain your company's concerns on the longer
9 term effects of this potential discrimination
10 between types of distributors?

11 MS. HOLLAND: Given that this is
12 something we have not seen before, this is an
13 analysis at the forefront here.

14 We can certainly look to see if there
15 are more specifics with regard to those types of
16 discriminatory market selection processes that
17 may happen.

18 But, it is, like I said, a new
19 process. And so, this is what our members have
20 provided so far.

21 MS. MAZZONE: I have a question for
22 Mr. Schruers and Mr. Bunn. You both stated that

1 the French DST threatens to undermine progress at
2 the OECD towards international reform at the
3 global level.

4 Can you explain further how the French
5 DST undermines this progress?

6 MR. SCHRUERS: Certainly. Thanks for
7 the question. So, at present I think there's a
8 global consensus that updates to the
9 international approach taxation could benefit
10 everyone.

11 Reduce some uncertainty, and address
12 some concerns perceived or real about
13 inefficiencies resulting from the increased
14 delivery of services. Particularly digitally.

15 Right now, there appears to be a
16 consensus that a multilateral approach to that is
17 being led by OECD with support from all the other
18 intergovernmental institutions. That that's the
19 way to do it.

20 CCI agrees that that's the way to do
21 it. If indeed France can, without consequence,
22 depart from the global consensus and pursue a

1 unilateral approach to increase its tax
2 collections, there is very little disincentive
3 for other countries to follow that path.

4 And then we have the risk of a domino
5 effect, where other countries say, well, if the
6 French can do this with impunity, we're going to
7 do it too.

8 And again, perhaps making some
9 gestures towards rolling those taxes back if and
10 when there's an international solution. Which
11 will have less urgency if everyone starts
12 adopting a unilateral approach.

13 And, of course, it's going to be
14 difficult to get countries to repeal these,
15 assuming that, you know, we do arrive at a
16 consensus driven multilateral solution.

17 MR. BUNN: So, I would echo that. And
18 add that the OECD process has been focused on
19 trying to create stability in international tax.

20 And in renegotiating international tax
21 rules, still pay attention to minimizing or
22 eliminating instances of double taxation.

1 So, for France to, on the one hand,
2 say that the OECD process is important, and it
3 will be, you know, great to have a good outcome
4 from that process.

5 And then on the other hand immediately
6 move forward with this proposal that does create
7 uncertainty, does create double taxation, and it
8 does depart from even the outlines of what we
9 might expect out of the OECD, effectively says
10 that well, regardless of what happens at the
11 OECD, we would like this type of taxation.

12 Which again, is very distortionary and
13 it departs from international tax norms.

14 CHAIR HADLEY: Thank you. Are there
15 any further questions?

16 (No response)

17 CHAIR HADLEY: Then this concludes our
18 public hearing. Thanks to all the witnesses for
19 their testimony.

20 (Whereupon, the above-entitled matter
21 went off the record at 11:41 a.m.)

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Services Tax Public Hearing

Before: USTR

Date: 08-19-19

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