

US Trade Representative Initiates Section 301 Investigation of France's Digital Services Tax

July 2019

Authors: [Scott Lincicome](#), [Brian Picone](#), [Kim Marie Boylan](#), [Alexandre Ippolito](#)

On July 10, 2019, the Office of the United States Trade Representative (USTR) initiated an investigation under Section 301 of the Trade Act of 1974 to determine whether a Digital Services Tax (DST) recently approved by the French Parliament is “unreasonable or discriminatory” or otherwise actionable under Section 301. If USTR’s finding is affirmative, the United States may take unilateral actions against imports of goods and services originating in France (e.g., by imposing retaliatory tariffs), or it may initiate World Trade Organization (WTO) dispute settlement proceedings challenging the WTO-consistency of the DST, among other actions. US digital services companies and Members of Congress of both parties have strongly opposed France’s adoption of the DST and have welcomed USTR’s decision to initiate the investigation. We provide an overview of Section 301 and the next steps in the investigation below.

Background

Section 301 investigations and recent US practice

Section 301 provides the US executive branch with the authority and procedures to enforce US rights under international trade agreements and to respond to certain “unfair” foreign government practices not covered by trade agreements. Section 301 is the principal statutory mechanism under which the President may impose retaliatory measures against foreign countries that violate existing trade agreements or engage in acts that are “unjustifiable” or “unreasonable” and burden US commerce. USTR makes determinations, initiates and conducts investigations, and implements action under Section 301.

When a Section 301 investigation involves an alleged violation of a trade agreement, US law requires that USTR follow the consultation and dispute settlement procedures set forth in the applicable agreement. For example, if the investigation involves a violation of the WTO Agreements, USTR must follow WTO dispute settlement procedures. However, when USTR determines that a Section 301 investigation does not involve an alleged trade agreement violation, the agency may investigate the foreign practices and retaliate unilaterally in the case of

affirmative findings. Remedies authorized by the law include (1) the imposition of duties or other import restrictions on goods; (2) the imposition of fees or restrictions on services; and (3) the negotiation of binding agreements to eliminate the conduct in question or compensate the United States with satisfactory trade benefits.

Prior to 2018, the United States had not taken unilateral action under Section 301 in several decades, having ceased the practice upon the implementation of the WTO Agreements and the creation of the WTO dispute settlement system in 1995. However, the Trump administration has revived the use of Section 301 as a unilateral enforcement mechanism, using the law as the principal means of carrying out its ongoing trade dispute with China. In August 2017, USTR initiated a Section 301 investigation of certain alleged Chinese government practices relating to intellectual property protection. USTR determined in April 2018 that some of the alleged practices involved US rights under the WTO Agreements and accordingly pursued WTO dispute settlement actions; however, USTR also took unilateral action (in the form of increased tariffs on US\$50 billion in annual Chinese imports) in response to other Chinese policies that the agency had found to be “unreasonable or discriminatory.” USTR subsequently has relied on Section 301 to impose duties on an additional US\$200 billion in imports from China, citing China’s failure to eliminate the “unreasonable or discriminatory” practices at issue and its decision to impose retaliatory measures on US goods.

Digital service taxes

In recent months, the US government and US digital services companies have voiced increasing concerns about potential digital services taxes proposed by the European Union and several of its member states. In USTR’s most recent National Trade Estimate (NTE) report published in April 2019, USTR noted that efforts to establish an EU-wide digital services tax had been largely abandoned and that several EU member states (namely France, Italy, Spain, and the United Kingdom) were continuing to pursue such measures unilaterally. USTR took the position that “[s]uch proposals are based on an unprincipled and unsupported distinction between digital companies and non-digital companies” and warned that “[t]he United States opposes proposals by any country to single out digital companies.” Several industry associations representing US technology companies submitted comments to USTR alleging that some of the proposed tax measures would disproportionately affect US companies and appear to violate WTO rules.

Subsequent to the USTR’s announcement, the United States Department of the Treasury (Treasury) also announced that it is continuing to communicate to France its opposition to France’s unilateral DST and is evaluating a range of potential US responses to France’s unilateral adoption of a DST.¹ In addition, Treasury is simultaneously engaging in intensive multilateral discussions with the Organization for Economic Co-operation and Development (OECD) in an effort to reach a comprehensive, multilateral solution.

Initiation of Section 301 Investigation

In a June 10 Federal Register notice, USTR announced that it is initiating a Section 301 investigation into France’s digital services tax and is seeking public comments in connection with the investigation. USTR described the DST measure as follows:

- France will impose a 3 percent levy on revenues that certain companies generate from providing certain digital services to, or aimed at, French users. The tax applies to gross revenues (not income) from providing the covered services to, or aimed at, French individuals. The tax applies retroactively beginning January 1, 2019.
- The DST applies to revenues generated from certain “digital interface” services (e.g., e-marketplaces for goods and services) and certain Internet advertising services. The law excludes certain services that would otherwise be covered, including digital interfaces for the delivery of “digital content.”
- The tax applies only to companies with annual revenues from the covered services of at least €750 million globally and €25 million in France. According to USTR, “[m]any of the companies likely to be covered are

¹ Treasury’s statement, which took the form of a letter to the leadership of the US Senate Committee on Finance, is available [here](#).

not domiciled in France and have no permanent establishment there. Under current international tax rules, these companies do not pay—or expect to pay—taxes to France on the revenue they earn by providing services to, or aimed at, French individuals...Available evidence, including statements by French officials, suggest that France expects the tax to target certain large, US-based tech companies.”

USTR’s description of the DST measure is based on a Joint Committee bill that was pending before the French Senate as of June 10 (the date on which USTR published the notice). The French Senate on June 11 approved the measure.

Possible basis for action under Section 301

As noted above, Section 301 authorizes USTR to take unilateral action where the matter under investigation does not involve a trade agreement, but prohibits USTR from doing so where the matter is covered by a trade agreement (e.g., the WTO Agreements). USTR’s notice does not clearly state whether it believes the DST violates (or may violate) France’s obligations under the WTO Agreements. Instead, the notice merely states that USTR will determine whether the measure is “actionable” under Section 301 and notes that “[a]ctionable matters under section 301 include, *inter alia*, acts, policies, and practices of a foreign country that are unreasonable or discriminatory and burden or restrict U.S. commerce...[a]n act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.” By highlighting only the provisions of Section 301 that pertain to foreign government actions not covered by trade agreements, the notice appears to emphasize the possibility that USTR may take unilateral action in response to the DST.

On the other hand, USTR’s notice (as explained below) requests comments from the public on, *inter alia*, “[w]hether the French DST is inconsistent with France’s obligations under the WTO Agreement or any other international agreement[.]” The notice therefore leaves open the possibility that USTR’s Section 301 investigation will find the DST to be inconsistent with French (EU) commitments under, for example, the WTO’s General Agreement on Trade in Services (GATS) and thus lead to a WTO dispute settlement case, rather than unilateral US action, on the DST.

Focus of the investigation

USTR’s notice states that the investigation “initially will focus on the following concerns with the DST,” as reflected in the joint committee bill that was pending as of July 10:

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

Request for Comments

USTR is inviting interested persons to submit written comments or oral testimony on any issue covered by the investigation. In particular, USTR invites comments with respect to:

-
- Concerns with the French digital services tax, as set out in the joint committee bill or as subsequently modified or adopted by the Government of France, including the three specific concerns identified above;
 - Whether the French DST is unreasonable or discriminatory;
 - The extent to which the French DST burdens or restricts US commerce;
 - Whether the French DST is inconsistent with France's obligations under the WTO Agreement or any other international agreement; and
 - The determinations USTR is required to make under the law, including what action, if any, should be taken.

USTR has requested that interested parties submit comments in accordance with the following schedule:

- **August 12, 2019 at noon EDT:** Deadline for filing requests to appear at the August 19, 2019 public hearing, and for filing a written version of oral testimony
- **August 19, 2019 at noon EDT:** Deadline for written comments
- **August 19, 2019:** Date of public hearing (convened by the Section 301 Committee at 9:30 a.m. in Rooms 1 and 2, 1724 F Street NW, Washington, DC 20508)
- **August 26, 2019:** Deadline for filing post-hearing submissions

Outlook

USTR's initiation of a Section 301 investigation concerning the DST highlights the widespread and bipartisan opposition to such measures within the US government and the US digital services industry, as well as the Trump administration's willingness to use the threat of unilateral trade actions, namely tariffs, to deter foreign government practices that are perceived to disadvantage US interests. The Chairman and Ranking Member of the Senate Finance Committee, Sens. Chuck Grassley (R-IA) and Ron Wyden (D-OR), have applauded USTR's decision to initiate the investigation, as have numerous groups representing the US internet and information technology sectors.

In response to USTR's initiation of the Section 301 investigation, French officials have reiterated their position that the DST is a "temporary" measure that will be removed once OECD member countries agree to new rules relating to digital services and international taxation. France's Finance Minister, Bruno Le Maire, stated that the DST "is based on the diagnosis that there are new business models based on data...The tax is temporary. As soon as the OECD adopts a credible solution, France will withdraw its national tax." He further emphasized that "France is a sovereign state that makes its own fiscal decisions, and will continue to do so[.]"

Actions taken by USTR as a result of the Section 301 investigation could have implications not only for the digital services industry, but potentially for a wide range of industries unrelated to digital services, particularly if USTR decides to take unilateral action as a result of the investigation. For example, should USTR determine that the DST does not involve a trade agreement violation but is otherwise actionable under Section 301, USTR may impose duties or other import restrictions on goods originating in France, or fees or restrictions on services supplied by France, for a duration to be determined by USTR. Section 301 provides that such retaliation may be taken against any good or economic sector, regardless of whether they are related to the measure under investigation, meaning that USTR may retaliate against goods and sectors unrelated to digital services (*e.g.*, transportation equipment, chemicals, beverages, and food and agricultural products, which are among France's top exports to the United States). Though such actions would raise serious questions regarding their consistency with the United States' own obligations under the WTO Agreements, such concerns did not deter the Trump administration from taking unilateral action under Section 301 to combat alleged Chinese trade practices. Some US business groups who are otherwise supportive of the new investigation already have discouraged USTR from using tariffs as a remedy, and others may follow suit on the view that new unilateral actions by the United States will undermine the role of the WTO as a venue for resolving trade disputes. Nevertheless, such unilateral actions

cannot be ruled out, and interested parties may therefore wish to monitor and provide comments on USTR's investigation.

USTR's initiation notice can be viewed [here](#).

White & Case LLP
701 Thirteenth Street, NW
Washington, District of Columbia 20005-3807
United States

T +1 202 626 3600

White & Case LLP
19, Place Vendôme
75001 Paris
France

T +33 1 55 04 15 15

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.