

FRENCH DIGITAL SERVICES TAX AND PROPOSED US RETALIATION MEASURES: PRELIMINARY LEGAL ANALYSIS

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On 2 December, the US authorities announced their intention to impose trade retaliation measures following France's adoption of the digital service tax (known as the "Gafa" tax). They consider that this tax on Internet advertising revenue discriminates against American companies. The European Commission intends, by a communiqué published on 3 December, to stand together behind France. Below is a first analysis of the situation under WTO rules and EU law.

1. IS THE GAFA TAX CONSISTENT WITH THE WTO RULES?

- From a WTO standpoint, the Gafa tax relates to services (the General Agreement on Trade in Services or "GATS") and not to goods. Under the GATS, the European Union is under an obligation not to discriminate between nationals and foreigners ("national treatment") provided that it has signed commitments to this effect.
- Advertising is included in the European Union's schedule of commitments on services. Assuming that numerical advertising is also covered by the commitment and that there are no limitations, the EU must grant services and service suppliers of any other WTO Members, with regard to all measures affecting the provision of services, "treatment no less favourable" than that it grants to its own similar services and service suppliers.
- If the tax really affects the service or service provider as a result of the extra cost involved, the tax would nonetheless only be inconsistent with WTO law if it modifies the conditions of competition in favour of French/EU services or service suppliers in relation to like services or service suppliers of any other WTO Member.
- In any event, even if a discrimination was to be recognised, the GATS provides for several exceptions, including Article XIV (d) which establishes a principle of **"equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members"**. This principle must be taken into account in any analysis on the consistency of this tax with the EU's/France's GATS commitments.

2. WHAT ARE THE POSSIBLE ACTIONS FOR FRANCE AND EUROPE?

- The US action under Section 301 to take retaliatory measures against French products is clearly illegal in the absence of a WTO measure authorising it to impose such measures.

Moreover, the US retaliatory measures also violate Article I of the GATT insofar as the United States discriminates between France and other WTO members contrary to the most-favoured-nation clause. As to substance, for the reasons set out above, it is far from clear that a Panel would find the Gafa tax WTO inconsistent.

- So what are we waiting for?
- An amicable agreement between France and the United States? This would obviously be the best solution for everyone, and the sooner the better for those sectors that are unfairly penalised. It should, however, be recalled that Roquefort cheese had already been "taken hostage" in the context of hormones litigation in the early 2000s. As for wine, this is the second time this year that it has been targeted by retaliation measures, after being unwittingly caught up in the Airbus Boeing dispute.
- In the absence of such an amicable solution, it is necessary, for this case and future cases, to consider the means of action available to the European Union with regard to the WTO legal order, but also to EU law.
- **Under WTO law**, one solution, subject to the time required, would be for the EU to immediately refer the matter to a Panel to adjudicate on the illegality of the US measures. Depending on what the Commission seems to want to propose (arbitration), as an alternative to the Appellate Body (which will cease to function on 10 December), the EU may take its own retaliatory measures for an equivalent amount.

Under the current EU "enforcement regulation", in the process of being amended, there is a possibility for the EU to impose measures when another WTO Member modifies its tariff concessions. In fact, the proposed US measures could be assimilated to such a withdrawal of concessions.

- **Under EU law**, is it logical that by failing to respect their international obligations, the United States prevent EU products from circulating on its territory? The EU, with its own regulations, under the control of the Court of Justice, is also master of its own territory. It might, for legitimate reasons, for example in the general interest or for strategic purposes, decide to restrict access to its very attractive market for certain investments, public procurements or to ensure the coherence of tax policies.
- The EU has always been open. The EU has always respected its DNA, the rule of law. It must find ways to create a new balance of power at the international level, driven by partners who no longer want to play the (best) game of multilateralism. It will take political courage to achieve that goal.