European Commission - Press release

State aid: Commission investigation did not find that Luxembourg gave selective tax treatment to McDonald's

Brussels, 19 September 2018

The Commission has found that the non-taxation of certain McDonald's profits in Luxembourg did not lead to illegal State aid, as it is in line with national tax laws and the Luxembourg-United States Double Taxation Treaty.

At the same time, the Commission welcomes steps taken by Luxembourg to prevent future double non-taxation.

Commissioner Margrethe **Vestager**, in charge of competition policy, said: "*The Commission investigated under EU State aid rules whether the double non-taxation of certain McDonald's profits was the result of Luxembourg misapplying its national laws and the Luxembourg-US Double Taxation Treaty, in favour of McDonald's. EU State aid rules prevent Member States from giving unfair advantages only to selected companies, including through illegal tax benefits. However, our in-depth investigation has shown that the reason for double non-taxationin this case is a mismatch between Luxembourg and US tax laws, and not a special treatment by Luxembourg. Therefore, Luxembourg did not break EU State aid rules.*

Of course, the fact remains that McDonald's did not pay any taxes on these profits – and this is not how it should be from a tax fairness point of view. That's why I very much welcome that the Luxembourg Government is taking legislative steps to address the issue that arose in this case and avoid such situations in the future."

Following an in-depth investigation launched in December 2015, based on doubts that Luxembourg might have misapplied its Double Taxation Treaty with the United States, the Commission has concluded that Luxembourg's tax treatment of McDonald's Europe Franchising does not violate the Double Taxation Treaty with the United States. On that basis the tax rulings granted to McDonald's do not infringe EU State aid rules.

McDonald's Europe Franchising corporate structure

McDonald's Europe Franchising is a subsidiary of McDonald's Corporation, based in the United States. The company is tax resident in Luxembourg and has two branches, one in the United States and the other in Switzerland. In 2009, McDonald's Europe Franchising acquired a number of McDonald's franchise rights from McDonald's Corporation in the United States, which it subsequently allocated internally to the US branch of the company.

As a result, McDonald's Europe Franchising receives royalties from franchisees operating McDonald's fast food outlets in Europe, Ukraine and Russia for the right to use the McDonald's brand.

McDonald's Europe Franchising also set up a Swiss branch responsible for the licensing of the franchise rights to franchisors and through which royalty payments flowed from Luxembourg to the US branch of the company.

McDonald's tax rulings in Luxembourg

In March 2009, the Luxembourg authorities granted McDonald's Europe Franchising a **first tax ruling** confirming that the company did not need to pay corporate tax in Luxembourg since the profits would be subject to taxation in the United States. This was justified by reference to the Luxembourg – US Double Taxation Treaty, which exempts income from corporate taxation in Luxembourg, if it may be taxed in the United States. Under this first ruling, McDonald's Europe Franchising was required to submit proof every year to the Luxembourg tax authorities that the royalties transferred to the United States via Switzerland were declared and subject to taxation in the United States and in Switzerland.

Following this first tax ruling, the Luxembourg authorities and McDonald's engaged in discussions concerning the taxable presence of McDonald's Europe Franchising in the United States (a so-called "permanent establishment"). McDonald's claimed that although the US branch was not a "permanent establishment" according to US tax law, it was a "permanent establishment" according to Luxembourg tax law. As a result, the royalty income should be exempt from taxation under Luxembourg corporate tax law.

The Luxembourg authorities ultimately agreed with this interpretation and, in September 2009, issued a **second tax ruling** according to which McDonald's Europe Franchising was no longer required to prove that the royalty income was subject to taxation in the United States.

Commission assessment

The role of EU State aid control is to ensure that Member States do not give selected companies a better treatment than others, through tax rulings or otherwise. In this context, the Commission's in-depth investigation assessed whether the Luxembourg authorities selectively derogated from the provisions of their national tax law and the Luxembourg – US Double Taxation Treaty and gave McDonald's an advantage not available to other companies subject to the same tax rules.

The Commission concluded that this was not the case.

In particular, it could not be established that the interpretation given by the second tax ruling to the Luxembourg – US Double Taxation Treaty was incorrect, although it resulted in the double non-taxation of the royalties attributed to the US branch. Therefore, the Commission found that the Luxembourg authorities did not misapply the Luxembourg –US Double Taxation Treaty and that the tax advantage conferred to McDonald's Europe Franchising cannot be considered State aid.

McDonald's Europe Franchising's US branch did not fulfil the relevant provisions under the US tax code to be considered a permanent establishment.

At the same time, the Commission found that the Luxembourg authorities could exempt the US branch of McDonald's Europe Franchising from corporate taxation without violating the Double Taxation Treaty because the US branch could be considered a permanent establishment according to Luxembourg tax law. Under the relevant provision in the Luxembourg tax code, the business carried on by the US branch of McDonald's Europe Franchising fulfilled all the conditions of a permanent establishment under Luxembourg tax law.

Therefore, the Commission concluded that the Luxembourg authorities did not misapply the Luxembourg – US Double Taxation Treaty by exempting the income of the US branch from Luxembourg corporate taxation.

Preventing future double non-taxation in Luxembourg

This interpretation of the Luxembourg – US Double Taxation Treaty led to double non-taxation of the franchise income of McDonald's Europe Franchising.

The Luxembourg government presented on 19 June 2018 draft legislation to amend the tax code to bring the relevant provision into line with the OECD's Base Erosion and Profit Shifting project and to avoid similar cases of double non-taxation in the future. This is currently being discussed by the Luxembourg Parliament.

Under the proposed new provision, the conditions to determine the existence of a permanent establishment under Luxembourg law would be strengthened. In addition, Luxembourg would be able to, under certain conditions, require companies that claim to have a taxable presence abroad to submit confirmation that they are indeed subject to taxation in the other country.

Background

Tax rulings as such are not a problem under EU State aid rules, if they simply confirm that tax arrangements between companies within the same group comply with the relevant tax legislation. However, tax rulings that confer a selective tax advantage to specific companies can distort competition within the EU's Single Market, in breach of EU State aid rules.

Since June 2013, the Commission has been investigating individual tax rulings of Member States under EU State aid rules. It extended this information inquiry to all Member States in December 2014.

Regarding investigations concerning tax rulings that have already been concluded by the Commission:

- In October 2015, the Commission concluded that Luxembourg and the Netherlands had granted selective tax advantages to Fiat and Starbucks, respectively. As a result of these decisions, Luxembourg recovered €23.1 million from Fiat and the Netherlands recovered €25.7 million from Starbucks.
- In January 2016, the Commission concluded that selective tax advantages granted by Belgium to at least 35 multinationals, mainly from the EU, under its "excess profit" tax scheme are illegal under EU State aid rules. The total amount of aid to be recovered from 35 companies is estimated at approximately €900 million, including interest. Belgium has already recovered over 90% of the aid.

- In August 2016, the Commission concluded that Ireland granted undue tax benefits to Apple, which led to a recovery by Ireland of €14.3 billion.
- In October 2017, the Commission concluded that Luxembourg granted undue tax benefits to Amazon, which led to a recovery by Luxembourg of €282.7 million.
- In June 2018, the Commission concluded that Luxembourg granted undue tax benefits to Engie of around €120 million. The recovery procedure is still ongoing.

The Commission also has one ongoing in-depth investigation concerning tax rulings issued by the Netherlands in favour of Inter IKEA, and one investigation concerning a tax scheme for multinationals in the United Kingdom.

The non-confidential versions of the decision will be made available under the case number SA.38945 in the State aid register on the Commission's competition website once any confidentiality issues have been resolved. New publications of State aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.

IP/18/5831

Press contacts:

Ricardo CARDOSO (+32 2 298 01 00)
Giulia ASTUTI (+32 2 295 53 44)

General public inquiries: Europe Direct by phone 00 800 67 89 10 11 or by email