

Euro Tax Flash
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Euro Tax Flash from KPMG's EU Tax Centre



Commission opens State aid investigations into tax rulings granted to McDonald's by Luxembourg

State aid – tax rulings - Luxembourg

On December 3, 2015 the European Commission announced it was opening in-depth investigations into tax rulings granted to McDonald's by Luxembourg (see [press release](#)). This is the result of allegations made in the media in the summer of 2014 that McDonald's was receiving advantageous tax treatment in Luxembourg. Following these allegations, the Commission asked McDonald's to provide information on their Luxembourg tax rulings and found that these rulings might have given an unfair advantage to McDonald's in violation of EU State aid rules. In order to validate its preliminary view, the Commission decided to initiate a formal investigation procedure.

Background

The investigation into the McDonald's tax rulings is one of a series of State aid investigations recently launched by the Commission and the third one focusing on Luxembourg, adding to investigations into Fiat and Amazon. Tax rulings have increasingly become the center of attention as their investigation is one of three relevant EU initiatives in the areas of tax transparency (see [ETF 247](#)) and tackling harmful tax competition between Member States and tax avoidance (see [ETF](#)

[253](#)). In December 2014 the Commission ordered all Member States to list all their tax rulings granted since January 1, 2010. Following this request, 15 Member States were asked to provide more detailed information on some of their rulings in December 2014. Since then, the Commission has opened in-depth investigations into tax rulings granted to Amazon, Apple, Fiat, Starbucks and the Belgium excess profit ruling system. In October 2015 the Commission published the first two final decisions which ordered Fiat in Luxembourg and Starbucks in the Netherlands to repay up to EUR 30 million in illegal State aid (see [ETF 262](#)).

European Commission's preliminary findings

According to the European Commission, the royalties received by the Luxembourg company were transferred internally to the US branch, a branch, which according to the European Commission, did not have any real activities. The European Commission provided the following details on the rulings. A first tax ruling given by the Luxembourg authorities in 2009 confirmed that the Luxembourg company was not liable for corporate tax in Luxembourg on the grounds that the profits were subject to taxation in the US. This was justified by reference to the Luxembourg-US Double Taxation Treaty. However, contrary to the assumption of the Luxembourg tax authorities when they granted the first ruling, the profits were not subject to tax in the US. While under the proposed reading of Luxembourg law McDonald's Europe Franchising had a taxable presence in the US, it did not have a taxable presence in the US under US law. The Luxembourg authorities issued a second tax ruling later in 2009, according to which the income of the Luxembourg company was not subject to tax in Luxembourg even if it were confirmed that it was not subject to tax in the US either. According to the European Commission, the Luxembourg tax authorities had thus accepted to exempt almost all of the Luxembourg company's income from taxation in Luxembourg. The Commission now has to clarify whether Luxembourg tax authorities selectively derogated from the provisions of their national tax law and the Luxembourg-US Double Taxation Treaty and thereby granted an unfair advantage to McDonald's which could not have been obtained by other companies in a comparable factual and legal situation. Commissioner Vestager stated on December 3, 2015 that *"a tax ruling that agrees to McDonald's paying no tax on their European royalties either in Luxembourg or in the US has to be looked at very carefully under EU state aid rules. The purpose of Double Taxation treaties between countries is to avoid double taxation – not to justify double non-taxation."*

Next steps

As part of the standard procedure in State aid investigations, the Commission will publish a non-confidential version of the preliminary decision announced today in a few months. This will give a more detailed insight into the case. Final decisions in the investigations of Amazon, Apple and the Belgium excess profit ruling system are still awaited. It seems likely that the two final decisions in the Fiat and Starbucks cases will be appealed to the Court of Justice of the European Union. In view of the lack of case law and guidance on fiscal State aid, an appeal to the Court would be desirable.

EU Tax Centre Comment

In the case of McDonald's, the focus of the European Commission appears to be on the mismatch in the tax treatment of the US branch of the Luxembourg company by Luxembourg and the U.S. and not so much on the justification of the allocation of the royalties received to the US branch. However, transfer pricing and profit allocation within the McDonald's group may ultimately also be relevant for the State aid investigation.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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