EU Direct Tax Newsalert

EU Commission finds that Luxembourg did not grant State aid to McDonalds

PwC's EU Direct Tax Group

EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up. But, it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions. Find out more on: www.pwc.com/eudtg

Interested in receiving our free EU tax news? Send an e-mail to eudtg@nl.pwc.com with "subscription EU Tax News".

For more detailed information, please do not hesitate to contact:

Alina Macovei – PwC Luxembourg
+ 352 49 48 48 3122
alina.macovei@lu.pwc.com

Laurent Mahaux – PwC Luxembourg
+352 49 48 48 2128
laurent.mahaux@lu.pwc.com

Jonathan Hare – PwC UK
+44 (0)20 7804 6772
jonathan.hare@pwc.com

Emmanuel Raingeard – PwC France
+33 155 574 014
emmanuel.raingeard@pwcavocats.com

Or contact any of the other members of **PwC's State Aid Working Group**.

or your usual PwC contact

On 19 September 2018, the European Commission ("EC") issued a press release concerning its final decision in the State aid investigation into tax rulings granted by the Luxembourg tax authorities to a Luxembourg subsidiary of the McDonald's group in relation to the treatment of a branch established in the United States of America ("US").

The EC found that there was no State aid granted by Luxembourg in the case and that the resulting treatment was a correct application by Luxembourg of the Luxembourg-US Double Tax Treaty ("DTT") and domestic provisions.

The text of the final decision has not yet been made public by the EC.

Background

The formal investigation concerned the treatment of profits realised by a Luxembourg subsidiary of the McDonald's group through a branch established in the US.

According to the facts as presented in the preliminary decision of the EC:

- The group obtained two consecutive rulings in Luxembourg.
- The first ruling confirmed that the profits of the US branch were exempt from tax in Luxembourg based on the provisions of the Luxembourg-US DTT as being allocated to a US permanent establishment ("PE") but under the assumption that the US branch was subject to tax in the US.
- The second ruling then confirmed the same exemption of the profits of the US branch but without the assumption or requirement that such profits are taxable in the US at the level of the branch.

Indeed the facts of the case according to the EC's opening decision are that the branch was not subject to tax in the US.

The EC opened an investigation especially by reference to the second ruling, considering initially that Luxembourg misapplied the provisions of the DTT because it allowed exemption of the profits of the US PE without the PE being subject to tax the US.

EC final decision

According to the EC's press release:

- The EC found that Luxembourg correctly applied the provisions of the US-Luxembourg DTT and of the related domestic legislation; and
- The double non-taxation of profits arising in the case resulted from a mismatch between the legislations of the two countries and not by a misapplication of the legal provisions by Luxembourg.

In the press release, the EC Competition Commissioner went on to note however that she welcomes the draft legislative initiatives that Luxembourg made public in June 2018 which aim to prevent situations of double non-taxation of permanent establishments in a treaty context in certain cases (a draft bill which is currently under review by the Luxembourg Parliament).

Please refer in this respect to the PwC Luxembourg Newsalert dated 20 June 2018.

Takeaway

- The decision is the latest in a number of high profile cases concerning State aid and taxation. It is the first one that concludes there is an absence of State aid.
- The text of the final decision will be important for the understanding of the EC's detailed argumentation. It is to be hoped however that it will reduce some of the recent uncertainties concerning the interaction of State aid, the application of DTTs and mismatches arising between domestic legislations of different states.