Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe (notified under document C(2018) 6076) (Only the French text is authentic) (Text with EEA relevance)

Article 1 With the contested tax rulings issued by the Luxembourg tax...
Article 2 This Decision is addressed to the Grand Duchy of Luxembourg....
Signature

(**1**) OJ C 258, 15.7.2016, p. 11.

(**2**) That letter was sent under reference number HT.4020 – Pratiques en matière de ruling fiscal.

(**3**) The present investigation is however confined to the contested tax rulings and is without prejudice to the assessment of the other tax rulings granted by the Luxembourg tax administration in favour of the McDonald's group and its subsidiaries.

(**4**) The trade unions are European Public Service Union (EPSU); European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT); Service Employees International Union (SEIU).

(**5**) OJ C 258, 15.7.2016, p. 11.

(**6**) Form 10-K submitted by McDonald's Corporation to the US Securities and Exchange Commission for 2017, p. 1.

(**7**) Form 8-K submitted by McDonald's Corporation to the US Securities and Exchange Commission on 18 September 2015, p. 2.

(**8**) Form 10-K submitted by McDonald's Corporation to the US Securities and Exchange Commission for 2017, p. 13.

(**9**) Initial ruling request, p. 1.

(**10**) Under a conventional franchise arrangement, McDonald's Corporation owns the land and building or secures a long-term lease for the restaurant location and the franchisee pays for equipment, signs, seating and decor.

(**11**) Form 10-K submitted by McDonald's Corporation to the US Securities and Exchange Commission for 2009.

(**12**) Established markets which include Australia, Canada, France, Germany, the UK and related markets.

(**13**) Markets that the Company believes have relatively higher restaurant expansion and franchising potential including China, Italy, Korea, the Netherlands, Poland, Russia, Spain, Switzerland and related markets.

(**14**) Description of the remaining markets in the McDonald's system, most of which operate under a franchise model.

(**15**) The franchise rights intangibles were: brand development and positioning, advertising and marketing, restaurant design and specifications, restaurant re-imaging, food and menu development, supply chain, operating platform and systems (including training intangibles), systems implementation, franchising administration, business analysis, quality assurance, human resources, legal.

(**16**) Source: McDonald's written response to questions from the European Parliament TAX3 Committee – 18 June 2018.

(**17**) Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed at Luxembourg on 3 April 1996.

(**18**) The territories covered by the Buy-in Agreement and the QCS Agreement included […].

(**19**) According to the information submitted by Luxembourg to the Commission, the US Franchise Branch does not employ any direct staff.

(**20**) Such as coordinating the QCS Agreement between McD Europe and McDonald's Corporation which covers the franchise rights associated with McDonald's European region; performing the accounts payable and accounts receivable function of the branch, maintaining branch accounts in US GAAP.

(**21**) Appendix 4 to the initial ruling request.

(**22**) [List of franchisors in various European countries].

(**23**) In particular, the services are expected to include management and strategic assistance associated with financial operations, operating platform management, supply chain design, real estate development, restaurant design, menu management, local market trend analysis, human resources, quality assurance and marketing, all associated with the European operations.

(**24**) Appendix 8 to the initial ruling request.

(**25**) Appendix 6 to the initial ruling request.

(**26**) Loi du 4 décembre 1967 concernant l'impôt sur le revenu.

(**27**) Convention entre le Grand-Duché de Luxembourg et la Confédération suisse en vue d'éviter les doubles impositions en matière d'impôts sur le revenu et sur la fortune, signed at Bern on 21 January 1993.

(**28**) In the original French: '*En vue de bénéficier de ces exonérations au Luxembourg, la société [McD Europe] doit annuellement apporter la preuve que ces revenus et biens ont été déclarés et soumis aux impôts respectivement en Suisse et aux Etats-Unis*.'

(**29**) P. 3 of the request for a revised ruling.

(**30**) P. 3 of the request for a revised ruling.

(**31**) P. 4 of the request for a revised ruling.

(**32**) Tribunal administratif du Grand-Duché de Luxembourg, Jugement du 3 décembre 2001, n[o]. 12831 du rôle followed by Cour administrative du Grand-Duché de Luxembourg, Jugement du 23 avril 2002, n[o]. 14442c du rôle.

(**33**) Convention entre la France et le Grand-duché de Luxembourg tendant à éviter les doubles impositions et à établir des règles d'assistance administrative réciproque en matière d'impôts sur le revenu et sur la fortune du 1[er] avril 1958.

(**34**) In addition to the description of the business, the tax advisor makes reference to the following criteria to conclude that the US Franchise Branch conducts an established business through a fixed branch: the branch is renting an office space allowing the branch to carry on its activities through a fixed place of business; the branch has access to services, it has a branch manager and 'other employees'; the branch has the formal right to use the facilities; it is anticipated that the office space will be at the disposal of the branch for a long period of time; the branch pays an annual fee to the lessor; the branch will be formally registered in the US; it has its own bank account and McD Europe maintains separate financial statements for the US Franchise Branch; the personnel will be performing their work mainly at the branch's office; a branch letterhead; the branch will be an annual fee for the services of the branch manager; all the above costs are listed in the branch accounts.

(**35**) P. 8 of the request for a revised ruling.

(**36**) P. 8 of the request for a revised ruling.

(**37**) Article 163(1) LIR: '*L'impôt sur le revenu des collectivités frappe le revenu imposable réalisé par le contribuable pendant l'année du calendrier*'.

(**38**) The Luxembourg corporate income tax consists of a corporate income tax on profits ('*impôt sur le revenu des collectivités*' or '*IRC*'), taxed at a rate of 21 %, and, for companies established in Luxembourg City, a municipal business tax on profits ('*impôt commercial*'), taxed at a rate of 6,75 %. In addition, there is a 5 % surcharge on the 21 % tax rate for an employment fund calculated on the IRC. In 2012, the solidarity surcharge was increased from 5 % to 7 % with effect from tax year 2013. With the changes introduced for tax year 2013, the aggregate income tax rate increases from 28,80 % to 29,22 % for companies established in Luxembourg City. In addition, Luxembourg companies are subject to an annual net wealth tax, which is levied at a rate of 0,5 % on the company's worldwide net worth on 1 January of each year.

(**39**) Article 162 L.I.R states: '*1. Les dispositions du titre Ier de la présente loi sont applicables pour la détermination du revenu imposable et des revenus nets qui le composent, pour la détermination du bénéfice de cession ou de liquidation et pour la déclaration, l'établissement et la perception de l'impôt, à moins qu'il n'en soit autrement disposé ci-après ou que l'application de ces dispositions ne se justifie pas, eu égard à la nature spéciale des organismes à caractère collectif. 2. En exécution de l'alinéa qui précède, un règlement grand-ducal spécifiera les dispositions applicables aux organismes à caractère collectif.*'

(**40**) Règlement grand-ducal du 3 décembre 1969 portant exécution de l'article 162 states: '*Les dispositions du titre I de la loi du 4 décembre 1967 concernant l'impôt sur le revenu qui sont applicables en vertu de l'article 162 de la même loi pour l'imposition des organismes à caractère* *collectif visés par le titre II de cette loi sont spécifiée à la liste annexée au présent règlement dont elle fait partie intégrante*.'

(**41**) Steueranpassungsgesetz vom 16. Oktober 1934, Rgesetzbl. I S. 925) (hereinafter 'StAnpG'). In its original (German) version Article 16(1) provides: '*Betriebsstätte im Sinn der Steuergesetze ist jede feste örtliche Anlage oder Einrichtung, die der Ausübung des Betriebs eines stehenden Gewerbes dient*.'

(**42**) Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed at Luxembourg on 3 April 1996.

(**43**) Loi du 5 mars 1999 portant approbation de la Convention entre le Gouvernement du Grand-Duché de Luxembourg et le Gouvernement des Etats-Unis d'Amérique tendant à éviter les doubles impositions et à prévenir la fraude fiscale en matière d'impôts sur le revenu et sur la fortune, signée à Luxembourg, le 3 avril 1996, telle qu'elle a été modifiée par l'échange de lettres entre les deux Gouvernements du 28 août 1996, Journal Officiel du Grand-Duché du Luxembourg, 16 mars 1999, A — No 25. The law was amended in 2010 by Loi du 31 mars 2010 portant approbation des conventions fiscales et prévoyant la procédure y applicable en matière d'échange de renseignements sur demande, Journal Officiel du Grand-Duché du Luxembourg, A — No 51, 6 avril 2010.

(**44**) They are often also called 'double tax agreements' or 'double tax conventions'.

(**45**) OECD Council of Europe, Convention on Mutual Administrative Assistance in Tax Matters, 2011.

(**46**) There are two main model tax conventions for contracting States in order to negotiate the exact terms and provisions of a double taxation treaty: the United Nations Model Tax Convention and the OECD Model Tax Convention. The first OECD MTC was published in 1958 and has been regularly revised and updated since then. The OECD MTC is complemented by the OECD Model Tax Convention Commentaries which explain and interpret the provisions of the OECD MTC and are regularly updated and revised. The OECD Commentaries also provide observations by some countries on specific aspects of the double taxation treaties and on the way these countries interpret some articles of the double taxation treaties under their own internal law.

(**47**) The so-called 'switch-over' allows one contracting State to unilaterally change the method for avoidance of double taxation if the other contracting State applies the treaty or domestic tax law to exempt certain income or capital from taxation or applies the reduced withholding tax rates to dividends, interest or royalties.

(**48**) The essential feature of the credit method, whether granted unilaterally or by bilateral tax treaty, is that the residence State treats a foreign income tax paid to the source State by its residents, within certain statutory limitations, as if it were an income tax paid to itself. When the foreign tax rate is lower than the domestic rate, only the excess of the domestic tax over the foreign tax is payable to the residence State. When the foreign tax is the higher one, the residence State does not collect any tax. The effective overall tax burden is the higher of the domestic tax or the foreign tax.

(**49**) See recital 43. First, in a decision of the French *Conseil d'Etat* of 18 March 1994, France was denied the right to tax capital gains realised by a Luxembourg company on the sale of a property located in France on the grounds that the mere holding of real estate did not constitute a permanent establishment located in France and that commercial income was only taxable in France if it were attributable to a French PE. Following this decision, Luxembourg tried to tax in Luxembourg income and capital gains derived by Luxembourg companies and stemming from real estate located in France. In its *La Coasta* judgment, the Luxembourg administrative court, however, took the opposite view by deciding that the double taxation treaty between France and Luxembourg gave the right to tax real estate income to the State in which real estate was actually located, in the case at hand, France.

(**50**) The *OECD Model Tax Convention* is a model for countries concluding bilateral tax conventions and plays a crucial role in removing tax-related barriers to cross-border trade and investment. It is the basis for negotiation and application of bilateral tax treaties between countries, designed to assist business while helping to prevent tax evasion and avoidance. The OECD Model Tax Convention also provides a means for settling on a uniform basis the most common problems that arise in the field of international double taxation.

(**51**) In the fall of 2014, more than 500 rulings obtained by, in particular, PwC were leaked and published on the internet (Luxleaks Affair).

(**52**) See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 39 and the case-law cited therein.

(**53**) See Case C-399/08 P *Commission v Deutsche Post* ECLI:EU:C:2010:481, paragraph 38 and the case-law cited therein.

(**54**) See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('Notion of aid Notice'), OJ C 262, 19.7.2016, p. 1, paragraph 67 and the case-law cited.

(**55**) Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, paragraph 13.

(**56**) See Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* ECLI:EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* ECLI:EU:C:2014:2262, paragraphs 21 to 31.

(**57**) See Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* ECLI:EU:C:2011:550.

(**58**) See Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* ECLI:EU:C:2011:550, paragraph 65.

(**59**) Recital 84 of the Opening Decision.

(**60**) Recital 91 of the Opening Decision.

(**61**) See recital 44.

(**62**) P. 8 of the request for a revised ruling.

(**63**) See recitals 70, 71, 76 and 92.

(**64**) See recital 92.

(**65**) See recital 72.

(**66**) See OECD, *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation No 6 (1999) (hereinafter 'the 1999 Report'), paragraph 116.

(**67**) Virtual double taxation arises in situations where the source State has a clear right to tax an item of income in accordance with the double taxation treaty, but chooses not to exercise this right under its domestic tax law.

(**68**) Paragraph 32.6 OECD Commentaries on the Model Tax Convention (2000) provides '[t]he phrase "in accordance with the provisions of this Convention, may be taxed" must also be interpreted in relation to possible cases of double non-taxation that can arise under Article 23A. Where the Source State considers that the provisions of the Convention preclude it from taxing an item of income or capital which it would otherwise have had the right to tax, the State of residence should, for purposes of applying paragraph 1 of Article 23 A, consider that the item of income may not be taxed by the State of source in accordance with the provisions of the Convention, even though the State of residence would have applied the Convention differently so as to have the right to tax that income if it had been in the position of the State of source. Thus the State of Residence is not required by paragraph 1 to exempt the item of income, a result which is consistent with the basic function of Article 23 which is to eliminate double taxation'.

(**69**) 1999 Report, paragraph 94.

(**70**) 1999 Report, paragraph 105.

(**71**) 1999 Report, paragraph 109 which reads: '[w]here the State of source considers that the provisions of the convention preclude it from taxing an item of income which it would otherwise have taxed, the State of residence […] is not required by paragraph 1 [of Article 23A] to exempt the item of income […].'

(**72**) Article 23A(4) of the OECD Model Tax Convention reads: 'The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of the Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 11 to such income.'

(**73**) 1999 Report, paragraph 108.

(**74**) See recital 70.

(**75**) See recital 91.

(**76**) In the fall of 2014, more than 500 rulings obtained by, in particular, PwC were leaked and published on the internet.

(**77**) McDonald's has reviewed the advance tax agreements disclosed in this context and has found 25 situations, where the Luxembourg tax authorities confirmed that business profits allocated to a foreign permanent establishment were not taxable in Luxembourg under the relevant double taxation treaty. Permanent establishments were located in the following jurisdictions: France, Germany, Hong Kong, Iceland, Ireland, Japan, the Netherlands, Switzerland, the United Kingdom, Vietnam, and the United States. None of these advance tax agreements impose a condition of taxation of the business profits at the level of the permanent establishment.

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision (EU) 2019/1252.