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)

COMMISSION DECISION (EU) 2019/1252

of 19 September 2018

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 19 June 2013, the Commission sent an information request to the Grand Duchy of Luxembourg requesting detailed information on the country's tax ruling practice[2].

(2) By letter of 24 June 2014, the Commission sent an additional request for information to Luxembourg regarding the McDonald's group. Among others, it requested Luxembourg to provide all the tax rulings issued by its tax administration in favour of the McDonald's group.

(3) On 4 August 2014, the Luxembourg authorities transmitted their reply to the Commission's request for information of 24 June 2014. In particular, the Luxembourg authorities provided two rulings addressed to McD Europe Franchising, S.à.r.l. (hereinafter 'McD Europe') dated 30 March 2009 (hereinafter: the 'initial tax ruling') and 17 September 2009 (hereinafter: the 'revised tax ruling', together the 'contested tax rulings') respectively. In addition, the Luxembourg authorities provided a number of other tax rulings granted by its tax administration to the companies of the McDonald's group[3].

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1252. (See end of Document for details)*

(4) In their reply of 4 August 2014, the Luxembourg authorities also described the tax ruling practice in Luxembourg and explained why they consider that the rulings granted to the McDonald's group do not grant State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter: 'the Treaty').

(5) By letter of 23 March 2015, the Commission requested the Luxembourg authorities to comment on information received from a coalition of trade unions[4] (hereinafter the 'Coalition') concerning State aid allegedly received by McDonald's from the Luxembourg tax authorities.

(6) On 23 April 2015, the Luxembourg authorities transmitted their reply to the Commission's request for information of 23 March 2015.

(7) By letter of 18 May 2015, the Commission asked the Luxembourg authorities, among others, to provide the documents submitted by McD Europe since the date of the initial tax ruling based on the requirement in that ruling to prove that the profits of McD Europe's US Franchise Branch and Swiss Services Branch have been declared and subject to tax in the United States and Switzerland respectively.

(8) By letter of 9 June 2015, the Luxembourg authorities responded to those requests and indicated (providing the relevant documents) that McD Europe's US Franchise Branch had been subject in 2014 to a tax audit in the United States by the Internal Revenue Service (hereinafter: the 'IRS') for tax years 2009 and 2010 and that the IRS confirmed that no changes had to be made to the tax returns filed by McD Europe's US Franchise Branch in the United States.

(9) On 3 December 2015, the Commission adopted the decision to initiate the formal investigation procedure under Article 108(2) of the Treaty on the contested tax rulings on the ground that those rulings could constitute State aid within the meaning of Article 107(1) of the Treaty, which could be incompatible with the internal market (hereinafter: the 'Opening Decision').

(10) By letter of 4 February 2016, the Luxembourg authorities submitted their comments on the Opening Decision.

(11) On 15 July 2016, the Opening Decision was published in the *Official Journal of the European Union*[5]. The Commission invited interested parties to submit their comments on the measure. By letter of 5 August 2016, the Coalition submitted comments. By letter of 9 August 2016, the Commission received comments from McDonald's.

(12) By letter of 30 September 2016, the Luxembourg authorities submitted their comments on the third party observations received by the Commission in response to the Opening Decision.

(13) By letter of 23 November 2016, the Commission sent a further information request to the Luxembourg authorities.

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(14) The Luxembourg authorities replied to that request on 14 December 2016 and 12 January 2017.

2. DETAILED DESCRIPTION OF THE AID MEASURE

2.1. Description of the beneficiary

(15) McDonald's Corporation is a Delaware public limited company with its principal office located in Oak Brook, Illinois, USA, listed on the New York Stock Exchange. It was incorporated on 21 December 1964 and operates and franchises McDonald's restaurants, which serve a locally-relevant menu of food and beverages[(6)].

(16) The company's segments include US, International Lead Markets (Australia, Canada, France, Germany and the United Kingdom), High Growth Markets (China, Italy, Korea, Poland, Russia, Spain, Switzerland and the Netherlands) and Foundational Markets and Corporate[(7)]. Of the 37 241 restaurants in over 100 countries approximately 34 108 are franchised and 3 133 are operated by the company[(8)]. At the time of the contested tax rulings, of the 31 677 McDonald's restaurants worldwide, 21 183 were operated by franchisees, 3 855 were operated by affiliates and 6 639 were operated by McDonald's Corporation and its subsidiaries[(9)]. McDonald's Corporation is therefore primarily a franchisor, with over 80 % of McDonald's restaurants owned and operated by independent franchisees[(10)]. In 2017, McDonald's Corporation had around 400 subsidiaries and 235 000 employees.

(17) In 2017, McDonald's recorded total revenues of USD 22,8 billion, of which USD 12,7 billion was from company-operated sales and USD 10,1 billion from franchised revenues. At the time of the contested tax rulings, McDonald's total revenues amounted to USD 26,216 billion and the company operated 32 478 restaurants[(11)].

(18) Of the total company-operated sales, USD 3,260 billion result from US sales, USD 4,080 billion from sales in International Lead Markets[(12)], USD 4,592 billion from High Growth Markets[(13)] and USD 0,787 billion from Foundational Markets & Corporate[(14)].

(19) Outside of the United States, McDonald's Corporation and its US affiliate, McDonald's International Property Company (hereinafter 'MIPCO') license the right to develop and operate McDonald's restaurants on a market-by-market basis to entities which in most major markets are direct or indirect subsidiaries of McDonald's Corporation.

(20) According to the information provided by the Luxembourg authorities, as of December 2013 the McDonald's group controlled five companies in Luxembourg: (i) McD Europe; (ii) McD Europe Holdings S.à.r.l.; (iii) Luxembourg McD Investments S.à.r.l.; (iv) Lux MC Holdings S.à.r.l.; and (v) McD Luxembourg Holdings S.à.r.l.

(21) McD Europe Holding S.à.r.l., Luxembourg McD Investments S.à.r.l. and Lux MC Holdings S.à.r.l. held shares in other McDonald's subsidiaries in Europe and in the United States, while McD Luxembourg Holdings S.à.r.l. acted as a vehicle for the execution of a centralised cash management agreement with a bank. Luxembourg

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McD Investments S.à.r.l. also held shares in the US company Golden Arches UK LLC, a Delaware limited liability company.

(22) The Commission's investigation and this decision focus on McD Europe, which at the time of the granting of the contested tax rulings was tax resident in Luxembourg with a US Franchise Branch and a Swiss Service Branch. As explained in the ruling requests, McD Europe bought-in to certain pre-existing and future developed franchise rights owned by McDonald's Corporation and MIPCO. As a result, McD Europe acquired beneficial ownership of a number of franchise rights intangibles (hereinafter 'franchise rights')[15]. Subsequently, McD Europe allocated the franchise rights as well as the related obligations to its US Franchise Branch. All royalties that were once received by McDonald's Corporation were then received by McD Europe through its US Franchise Branch located in Oak Brook, Illinois. The Swiss Service Branch, located in Geneva, licensed the franchise rights to franchisors in various European countries and provided various services associated with the franchise rights. In exchange for those services, the US Franchise Branch provided the Swiss Service Branch with a service fee equivalent to the costs of the Swiss Service Branch plus a mark-up. At the time of the contested tax rulings, the Swiss Service Branch had [0-10] employees representing [0-10] FTE. McD Europe and the US Franchise Branch did not have any employees. In 2014, McD Europe had [0-10] FTE, the Swiss Service Branch had [10-20] FTE and the US Franchise Branch had no employees.

(23) In 2015, McDonald's announced a significant reorganisation of its business by grouping together countries around the world based on common market characteristics rather than on the basis of geographical proximity. In December 2016, McDonald's announced a decision to create a new integrated international holding company structure to align with and to support the new business structure.

(24) This resulted in the creation of a unified structure located in the United Kingdom with responsibility for licensing the majority of the company's global intellectual property rights outside the United States. It comprises a mix of UK companies incorporated in the UK and US companies which continue to be incorporated in the US. Those US companies are also tax resident in the UK. This change resulted in the closure of the company's operations in Geneva. The company's other Swiss office remains open and the office in Luxembourg retained responsibility for the Luxembourg restaurants[16].

2.2. The contested tax rulings

(25) The present decision concerns two tax rulings issued by the Luxembourg tax administration in 2009 in favour of McD Europe: the initial tax ruling and the revised tax ruling, both of which concern McD Europe's taxable status in Luxembourg.

(26) The initial tax ruling was issued by the Luxembourg tax administration on 30 March 2009 following a ruling request by McDonald's dated 11 February 2009, supplemented by further documents submitted on 10 March 2009. In response to the initial tax ruling, McD Europe's tax advisor (hereinafter: the 'tax advisor') made a request for a revised tax ruling to the Luxembourg tax administration dated

27 July 2009. That request resulted in the revised tax ruling, which was issued by the Luxembourg tax administration on 17 September 2009.

2.2.1. *The initial tax ruling*

2.2.1.1. *McDonald's corporate structure described in the initial ruling request*

(27) McDonald's initial ruling request of 11 February 2009 describes the structure of the McDonald's group and its presence in Luxembourg. It further describes the restructuring of McDonald's Corporation's franchise rights and McD Europe's two branches in the US and Switzerland respectively. Furthermore, it describes the Luxembourg tax implications of that restructuring based on the application of Luxembourg tax legislation and the Luxembourg – US double tax treaty[17].

(28) In particular, the ruling request describes that in order to centralise the oversight and management of the European franchise rights within McD Europe, the latter entered into a 'Buy-in Agreement' and a 'Qualified Cost Sharing Arrangement' (hereinafter 'QCS Agreement') with McDonald's Corporation and MIPCO. According to the Buy-in Agreement, McD Europe buys-in to certain pre-existing and future developed franchise rights owned by McDonald's Corporation and MIPCO[18]. As a result, McD Europe acquired beneficial ownership of those rights. Subsequently, McD Europe allocated the franchise rights as well as the related obligations to its US Franchise Branch pursuant to a declaration between McD Europe and the US Franchise Branch. All royalties that were once received by McDonald's Corporation were then to be received by McD Europe through its US Franchise Branch. Finally, according to the initial ruling request, all the necessary steps in relation to the franchise rights' restructuring for the McDonald's European region were expected to be implemented on or before 1 March 2009.

(29) According to the initial ruling request, McD Europe's US Franchise Branch has its office in Oak Brook, Illinois, United States of America. That branch assumes various economic risks associated with the development of the franchise rights and bears associated costs. In bearing those costs, the US Franchise Branch is, according to the ruling request, effectively participating in the QCS Agreement with McDonald's Corporation and MIPCO. The related activities at McDonald's Corporation (or its affiliates) that are reimbursed by the US Franchise Branch are directed and performed by employees within McDonald's Corporation.

(30) The US Franchise Branch maintains operations within the United States and is controlled by a branch manager[19] located in the United States who oversees certain activities associated with the franchise rights[20] and who is provided by McDonald's Corporation on a part-time basis under a services agreement in return for a cost-plus charge determined in that services agreement. The US Franchise Branch management services are services related to the management of the branch[21] for which the US Franchise Branch pays USD [10 000-20 000] to McDonald's Corporation annually.

(31) According to the initial ruling request, McD Europe's Swiss Service Branch has its registered office in Geneva, Switzerland. That branch licenses the