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Contents

(1) Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

(1) Text with EEA relevance.

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

Information on the entry into force of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the exchange of letters accompanying the Agreement

Following signature on 14 January 2019, the European Union and the Kingdom of Morocco notified the 4 March 2019 and 18 July 2019 respectively, that they had finalised their internal procedures to conclude the Agreement.

Therefore, the Sustainable Fisheries Partnership Agreement, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement enter into force on 18 July 2019 pursuant to Article 17 of the Agreement.

REGULATIONS

COMMISSION IMPLEMENTING REGULATION (EU) 2019/1248

of 22 July 2019

establishing measures to alleviate a serious threat to the conservation of the eastern Baltic cod (*Gadus morhua*) stock

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC ([1]), and in particular Article 12(1) thereof,

Whereas:

(1) Article 12 of Regulation (EU) No 1380/2013 provides that the Commission may adopt emergency measures on duly justified imperative grounds of urgency relating to a serious threat to the conservation of marine biological resources. The Commission, at the reasoned request of a Member State or on its own initiative, may, in order to alleviate that threat, adopt such emergency measures in the form of immediately applicable implementing acts applicable for a maximum period of six months.

(2) Moreover, paragraph 2 of Article 5 of Regulation (EU) 2016/1139 of the European Parliament and of the Council ([2]) provides that remedial measures are to be taken when scientific advice indicates that the spawning stock biomass of a fish stock covered by that Regulation is below the reference point below which there may be reduced reproductive capacity. Those remedial measures are to ensure the rapid return of the concerned stock to levels above those capable of producing maximum sustainable yield (MSY).

(3) According to scientific advice from the International Council for the Exploration of the Sea (ICES), the eastern Baltic cod (*Gadus morhua*) stock suffers from an unsustainably low biomass due to a combination of declining recruitment, environmental factors and changes in the ecosystem leading to a high natural mortality and an excessive fishing mortality given the status of the stock. The stock is distressed and is expected to have reduced reproductive potential. Recruitment in 2017 was at the lowest point in the ICES time series, and recruitment in 2018 may have been even lower. The spawning stock biomass is at one of the lowest historically observed levels and the biomass of commercial sized cod is presently at the lowest level observed since the 1950s. Moreover, ICES estimates that the biomass will remain below the sustainability reference point in the mid-term even with no fishing at all. In its stock advice for 2020 ICES therefore advises zero catches.

(4) The conservation of the eastern Baltic cod stock is seriously threatened because of the risk of a serious harm to the reproductive capacity of that stock caused by the steep decline of the spawning stock biomass. Moreover, ICES considers that fishing at any level will target the remaining few commercial sized cod, and therefore further deteriorate the stock structure and reduce its reproductive potential, which is already at a historic low. Furthermore, the peak spawning season of eastern Baltic cod stretches from May until August. There are therefore duly justified imperative grounds of urgency for adopting emergency measures because, firstly, the biomass of eastern Baltic cod is at such a dangerously low level that the stock is no longer able to replenish itself and is hence threatened with collapse, secondly, any continued fishing on that stock increases the risk of a its collapse, and, thirdly, the peak spawning season is ongoing.

(5) Emergency measures taken by Member States pursuant to Article 13 of Regulation (EU) No 1380/2013 would not be sufficient to address the situation as they would not ensure a uniform approach in all areas where the stock occurs. Moreover, at this stage, not all Member States have adopted or are intending to adopt such measures. Finally, at a meeting of the Group of Baltic Sea Member States (BaltFish) on 4 June 2019 Member States were not in a position to agree on a common approach.

([1]) OJ L 354, 28.12.2013, p. 22.

([2]) Regulation (EU) 2016/1139 of the European Parliament and of the Council of 6 July 2016 establishing a multiannual plan for certain fish stocks in the Baltic Sea (OJ L 191, 15.7.2016, p. 1).

(6) In the absence of sufficient Member States' measures and in view of the urgency to act in order to avoid a further deterioration of the stock structure and a reduction of its reproductive potential, it is appropriate to provide for remedial measures at the Union level on the basis of Article 12 of Regulation (EU) No 1380/2013.

(7) The management area of eastern Baltic cod comprises ICES subdivisions 25 - 32. In ICES subdivision 24 both cod from the eastern Baltic stock and cod from the western Baltic stock occur, but most of the catches are taken from the eastern Baltic stock. In order to provide adequate protection of the eastern Baltic stock and to avoid a concentration of catches of cod from the eastern Baltic stock in ICES subdivision 24, it is essential that the emergency measures cover ICES subdivision 24.

(8) In the light of scientific advice, it is appropriate to prohibit fishing for the eastern Baltic cod stock until year-end. The measure, however, also needs to be proportionate to its objective.

(9) According to ICES cod abundance and catches are very low in ICES subdivisions 27-32. As the implementation of the measures of this Regulation puts a non-negligible burden on the administration and on fishermen it would be disproportionate to include the areas where eastern Baltic cod hardly occurs in the scope of this Regulation.

(10) Furthermore, in subdivision 24 it is appropriate to exempt from the prohibition fishing for cod up to six nautical miles from shore in areas where the water depth is less than 20 meters by vessels of less than 12 meters length which use passive gears because it is mostly western Baltic cod which occurs in the shallow coastal areas of subdivision 24.

(11) Moreover, in view of the potentially severe socioeconomic implications of a total fishing stop, it is appropriate to target directed cod fisheries such as the directed demersal trawler fisheries, which account for the vast majority of cod from the eastern Baltic stock in subdivisions 24, 25 and 26. Conversely, it is appropriate to exempt from the prohibition the unavoidable by-catches of those fishing activities not directed to cod which are carried out either with active gears with a mesh size not exceeding 45 mm in subdivisions 24, 25 and 26, or by vessels of less than 12 meters length fishing with passive gears in subdivisions 25-26, or in subdivision 24 up to six nautical miles from shore in areas where the water depth is more than 20 meters and, irrespective of the water depth, beyond six nautical miles from shore, in view of the limited part played by those fishing activities in the overall levels of cod catches and taking into account the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield at the same time. ICES estimates that the former account for around 1,5 % of total annual eastern Baltic cod landings. The amount of by-catch landed by the latter is low but as the precise quantity is unknown the by-catch should be limited to 10 % of the landings of each fishing trip.

(12) The number of vessels of less than 12 meters length using passive gears and catching cod as by-catch should not increase as compared to the period from 1 January 2018 to 30 June 2019. As Union vessels fishing with trawls, Danish seines or similar gear of a mesh size of no more than 45 mm cannot target cod, it is not necessary to limit the number of these vessels.

(13) The measures provided for in this Regulation will be submitted to the Committee for Fisheries and Aquaculture in order to obtain its opinion.

(14) For reasons of urgency, this Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation sets emergency measures to alleviate a serious threat to the eastern Baltic cod (*Gadus morhua*) stock.

Article 2

Emergency measures

1. It shall be prohibited for Union fishing vessels to fish for cod in ICES subdivisions 24, 25 and 26, and to retain on board, transfer, tranship, process on board or land cod and fisheries products from cod caught in that area.

2. By way of derogation from paragraph 1, the prohibition to fish for cod shall not apply to Union fishing vessels of less than 12 meters length overall fishing with gillnets, entangling nets or trammel nets, or with bottom set lines, longlines (except drifting lines), handlines and jigging equipment or similar passive gear in subdivision 24 up to six nautical miles measured from the baselines in areas where the water depth is less than 20 meters according to the coordinates on the official sea chart issued by the competent national authorities.

3. The vessels referred to in paragraph 2 shall ensure that their fishing activity can be monitored at any time. Catches of cod by those vessels shall be recorded, landed and counted against the relevant quota in accordance with Article 15 of Regulation (EU) No 1380/2013.

4. By way of derogation from paragraph 1, the following Union fishing vessels shall bring and retain on board any by-catches of cod:

(a) Union vessels fishing with trawls, Danish seines or similar gear of a mesh size not exceeding 45 mm in subdivisions 24, 25 and 26;

(b) Union fishing vessels of less than 12 meters length overall fishing with gillnets, entangling nets or trammel nets, or with bottom set lines, longlines (except drifting lines), handlines and jigging equipment or similar passive gear:

(i) in subdivisions 25-26; or

(ii) in subdivision 24, up to six nautical miles measured from the baselines in areas where the water depth is more than 20 meters according to the coordinates on the official sea chart issued by the competent national authorities, and, irrespective of the water depth, beyond six nautical miles measured from the baselines.

5. The vessels referred to in paragraph 4(b) shall ensure that their fishing activity can be monitored at any time. The incidental by-catches of cod made by those vessels shall not represent more than 10 % of total catch live weight of all marine biological resources landed after each fishing trip.

6. The derogation set out in paragraph 4(b) shall only apply to Union fishing vessels that have recorded catches of cod over the period from 1 January 2018 to 30 June 2019. In the case of a replacement of a Union fishing vessel covered by that derogation, Member States may allow the derogation to apply to another Union fishing vessel meeting the requirements set out in paragraph 4(b) provided that the number of Union fishing vessels covered by the derogation and their overall fishing capacity do not increase.

7. By-catches referred to in paragraph 4 shall be recorded, landed and counted against the relevant quota in accordance with Article 15 of Regulation (EU) No 1380/2013.

Article 3

Entry into force and period of application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply until 31 December 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 July 2019.

For the Commission

The President

Jean-Claude JUNCKER

COMMISSION IMPLEMENTING REGULATION (EU) 2019/1249

of 22 July 2019

amending Annex I to Regulation (EC) No 669/2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules ([1]), and in particular Article 15(5) thereof,

Whereas:

(1) Commission Regulation (EC) No 669/2009 ([2]) lays down rules concerning the increased level of official controls to be carried out on imports of feed and food of non-animal origin listed in Annex I thereto ('the list'), at a designated point of entry ('DPE') into the territories referred to in Annex I to Regulation (EC) No 882/2004.

(2) Article 2 of Regulation (EC) No 669/2009 provides that the list is to be reviewed on a regular basis, and at least biannually, taking into account the sources of information referred to in that Article.

(3) The occurrence and relevance of recent food incidents notified through the Rapid Alert System for Food and Feed, as established by Regulation (EC) No 178/2002 of the European Parliament and of the Council ([3]), information regarding official controls performed by Member States on feed and food of non-animal origin as well as the biannual reports on consignments of feed and food of non-animal origin submitted by Member States to the Commission in accordance with Article 15 of Regulation (EC) No 669/2009, indicate that the list should be amended.

(4) In particular, for consignments of jackfruit (*Artocarpus heterophyllus*) from Malaysia, the data resulting from notifications received through the Rapid Alert System for Food and Feed and information regarding official controls performed by Member States indicate the emergence of new risks to human health due to possible pesticide residues contamination, requiring the introduction of an increased level of official controls. In addition, for groundnuts (peanuts) from the United States of America, data resulting from notifications received through the Rapid Alert System for Food and Feed indicates risks to human health due to possible aflatoxins contamination, requiring the introduction of an increased level of official controls. Entries concerning those consignments should therefore be included in the list.

([1]) OJ L 165, 30.4.2004, p. 1.

([2]) Commission Regulation (EC) No 669/2009 of 24 July 2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC (OJ L 194, 25.7.2009, p. 11).

([3]) Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1).

(5) Commission Regulation (EC) No 1881/2006 ([4]) establishes a maximum level for hydrocyanic acid (cyanide) in unprocessed whole, ground, milled, cracked, chopped apricot kernels placed on the market for the final consumer. In addition, Commission Regulation (EU) 2017/1237 ([5]) provides that the operator who places unprocessed whole, ground, milled, cracked, chopped apricot kernels on the market for the final consumer is to provide upon request from the competent authority evidence of compliance of the marketed product with the maximum level. For consignments of unprocessed apricot kernels from Turkey intended to be placed on the market for the final consumer, data resulting from notifications received through the Rapid Alert System for Food and Feed indicates the emergence of new risks to human health due to the presence of hydrocyanic acid (cyanide), requiring the introduction of an increased level of official controls. An entry concerning those consignments should therefore be included in the list.

(6) Moreover, due to the high frequency of non-compliance with the relevant requirements provided for in Union legislation detected during official controls performed by Member States in accordance with Regulation (EC) No 669/2009, it is appropriate to increase the frequency of identity and physical checks on tea and goji berries from China and peppers and yardlong beans from the Dominican Republic. Entries concerning those consignments should therefore be amended accordingly.

(7) In addition, the list should be amended by decreasing the frequency of identity and physical checks on apricots from Turkey due to the low frequency of non-compliance with the relevant requirements provided for in Union legislation detected during official controls performed by Member States in accordance with Regulation (EC) No 669/2009. Entries concerning those consignments should therefore be amended accordingly.

(8) The existing entry concerning goji berries from China in the list requires the competent authorities to test this commodity for specific pesticides which do not include nicotine. Frequent detections of nicotine in goji berries from China have been reported. It is therefore appropriate to amend the existing entry concerning goji berries from China in Annex I to Regulation (EC) No 669/2009 to require competent authorities to test this commodity for nicotine.

(9) Turnips (*Brassica rapa* spp. *Rapa*) from Lebanon and from Syria prepared or preserved by brine or citric acid present the same risk as the forms of that commodity from Lebanon and from Syria currently listed. The list should therefore be amended to include turnips prepared or preserved by brine or citric acid from Lebanon and from Syria.

(10) In order to ensure consistency and clarity, it is appropriate to replace Annex I to Regulation (EC) No 669/2009 in its entirety.

(11) Regulation (EC) No 669/2009 should therefore be amended accordingly.

(12) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

Article 1

Annex I to Regulation (EC) No 669/2009 is replaced by the text set out in the Annex to this Regulation.

([4]) Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs (OJ L 364, 20.12.2006, p. 5).
([5]) Commission Regulation (EU) 2017/1237 of 7 July 2017 amending Regulation (EC) No 1881/2006 as regards a maximum level of hydrocyanic acid in unprocessed whole, ground, milled, cracked, chopped apricot kernels placed on the market for the final consumer (OJ L 177, 8.7.2017, p. 36).

Article 2

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 July 2019.

For the Commission

The President

Jean-Claude JUNCKER

ANNEX

'*ANNEX I*

Feed and food of non-animal origin subject to an increased level of official controls at the designated point of entry

Feed and food (intended use)	CN code [1]	TARIC sub-division	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved ***(Feed and food)***	— 1202 41 00 — 1202 42 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98		**Bolivia (BO)**	Aflatoxins	50
— Black pepper (*Piper*) ***(Food – neither crushed nor ground)***	ex 0904 11 00	**10**	**Brazil (BR)**	*Salmonella* [2]	20
Goji berries (wolfberries) (*Lycium barbarum* L.) ***(Food - fresh, chilled or dried)***	ex 0813 40 95; ex 0810 90 75	**10** **10**	**China (CN)**	Pesticide residues [3] [4] [5]	20
Sweet peppers (*Capsicum annuum*) ***(Food – crushed or ground)***	ex 0904 22 00	**11**	**China (CN)**	*Salmonella* [2]	20
Tea, whether or not flavoured ***(Food)***	0902		**China (CN)**	Pesticide residues [3] [6]	20
Aubergines (*Solanum melongena*) ***(Food – fresh or chilled)***	0709 30 00		**Dominican Republic (DO)**	Pesticide residues [3]	20
— Sweet peppers (*Capsicum annuum*) — Peppers (other than sweet) (*Capsicum* spp.) — Yardlong beans (*Vigna unguiculata* ssp. *sesquipedalis, vigna unguiculata* ssp. *unguiculata*) ***(Food - fresh, chilled or frozen)***	— 0709 60 10; 0710 80 51 — ex 0709 60 99; ex 0710 80 59 — ex 0708 20 00; ex 0710 22 00	 **20** **20** **10** **10**	**Dominican Republic (DO)**	Pesticide residues [3] [7]	50
— Sweet peppers (*Capsicum annuum*) — Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	— 0709 60 10; 0710 80 51 — ex 0709 60 99; ex 0710 80 59	 **20** **20**	**Egypt (EG)**	Pesticide residues [3] [8]	20
Sesamum seeds ***(Food - fresh or chilled)***	1207 40 90		**Ethiopia (ET)**	*Salmonella* [2]	50

Feed and food (intended use)	CN code [1]	TARIC sub-division	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Hazelnuts, in shell — Hazelnuts, shelled — Flour, meal and powder of hazelnuts — Hazelnuts, otherwise prepared or preserved ***(Food)***	— 0802 21 00 — 0802 22 00 — ex 1106 30 90 — ex 2008 19 19; ex 2008 19 95; ex 2008 19 99	 **40** **30** **20** **30**	**Georgia (GE)**	Aflatoxins	50
Palm oil ***(Food)***	1511 10 90; 1511 90 11; ex 1511 90 19; 1511 90 99	 **90** 	**Ghana (GH)**	Sudan dyes [9]	50
Okra ***(Food – fresh, chilled or frozen)***	ex 0709 99 90; ex 0710 80 95	**20** **30**	**India (IN)**	Pesticide residues [3] [10]	10
Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	ex 0709 60 99; ex 0710 80 59	**20** **20**	**India (IN)**	Pesticide residues [3] [11]	20
Beans (*Vigna* spp., *Phaseolus* spp.) ***(Food – fresh or chilled)***	0708 20		**Kenya (KE)**	Pesticide residues [3]	5
Chinese celery (*Apium graveolens*) ***(Food - fresh or chilled herb)***	ex 0709 40 00	**20**	**Cambodia (KH)**	Pesticide residues [3] [12]	50
Yardlong beans (*Vigna unguiculata* ssp. *sesquipedalis, vigna unguiculata* ssp. *unguiculata*) ***(Food - fresh, chilled or frozen vegetables)***	ex 0708 20 00; ex 0710 22 00	**10** **10**	**Cambodia (KH)**	Pesticide residues [3] [13]	50
Turnips (*Brassica rapa* ssp. *rapa*) ***(Food — prepared or preserved by vinegar or acetic acid)***	ex 2001 90 97;	**11; 19**	**Lebanon (LB)**	Rhodamine B	50
Turnips (*Brassica rapa* ssp. *rapa*) ***(Food — prepared or preserved by brine or citric acid, not frozen)***	ex 2005 99 80	**93**	**Lebanon (LB)**	Rhodamine B	50
Peppers (sweet or other than sweet) (*Capsicum* spp.) ***(Food - dried, roasted, crushed or ground)***	0904 21 10; ex 0904 21 90; ex 0904 22 00; ex 2008 99 99	 **20** **11; 19** **79**	**Sri Lanka (LK)**	Aflatoxins	50

Feed and food (intended use)	CN code ([1])	TARIC sub-division	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved ***(Feed and food)***	— 1202 41 00 — 1202 42 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98		**Madagascar (MG)**	Aflatoxins	50
Jackfruit (*Artocarpus heterophyllus*) ***(Food – fresh)***	ex 0810 90 20	**20**	**Malaysia (MY)**	Pesticide residues ([3])	20
Sesamum seeds ***(Food - fresh or chilled)***	1207 40 90		**Nigeria (NG)**	*Salmonella* ([2])	50
Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	ex 0709 60 99; ex 0710 80 59	**20** **20**	**Pakistan (PK)**	Pesticide residues ([3])	20
Raspberries ***(Food - frozen)***	ex 0811 20 11; ex 0811 20 19; 0811 20 31	**10** **10**	**Serbia (RS)**	Norovirus	10
Sesamum seeds ***(Food - fresh or chilled)***	1207 40 90		**Sudan (SD)**	*Salmonella* ([2])	50
Watermelon (*Egusi, Citrullus* spp.) seeds and derived products ***(Food)***	ex 1207 70 00; ex 1208 90 00; ex 2008 99 99	**10** **10** **50**	**Sierra Leone (SL)**	Aflatoxins	50
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved ***(Feed and food)***	— 1202 41 00 — 1202 42 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98		**Senegal (SN)**	Aflatoxins	50
Turnips (*Brassica rapa* ssp. *rapa*) ***(Food — prepared or preserved by vinegar or acetic acid)***	ex 2001 90 97;	**11; 19**	**Syria (SY)**	Rhodamine B	50
Turnips (*Brassica rapa* spp. *rapa*) ***(Food — prepared or preserved by brine or citric acid, not frozen)***	ex 2005 99 80	**93**	**Syria (SY)**	Rhodamine B	50

Feed and food (intended use)	CN code [1]	TARIC sub-division	Country of origin	Hazard	Frequency of physical and identity checks (%)
Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	ex 0709 60 99; ex 0710 80 59	**20** **20**	**Thailand (TH)**	Pesticide residues [3] [14]	10
— Dried apricots — Apricots, otherwise prepared or preserved [15] ***(Food)***	— 0813 10 00 — 2008 50 61		**Turkey (TR)**	Sulphites [16]	10
Dried grapes (including dried grapes cut or crushed into a paste, without any further treatment) ***(Food)***	0806 20		**Turkey (TR)**	Ochratoxin A	5
Lemons (*Citrus limon, Citrus limonum*) ***(Food – fresh, chilled or dried)***	0805 50 10		**Turkey (TR)**	Pesticide residues [3]	10
Pomegranates ***(Food - fresh or chilled)***	ex 0810 90 75	**30**	**Turkey (TR)**	Pesticide residues [3] [17]	10
Sweet Peppers (*Capsicum annuum*) ***(Food - fresh, chilled or frozen)***	0709 60 10; 0710 80 51		**Turkey (TR)**	Pesticide residues [3] [18]	10
Unprocessed whole, ground, milled, cracked, chopped apricot kernels intended to be placed on the market for the final consumer [19] [20] ***(Food)***	ex 1212 99 95	**20**	**Turkey (TR)**	Cyanide	50
Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	ex 0709 60 99 ex 0710 80 59	**20** **20**	**Uganda (UG)**	Pesticide residues [3]	20
Sesamum seeds ***(Food - fresh or chilled)***	1207 40 90		**Uganda (UG)**	*Salmonella* [2]	50
— Groundnuts (peanuts), in shell — Groundnuts (peanuts), shelled — Peanut butter — Groundnuts (peanuts), otherwise prepared or preserved ***(Feed and food)***	— 1202 41 00 — 1202 42 00 — 2008 11 10 — 2008 11 91; 2008 11 96; 2008 11 98		**United States (US)**	Aflatoxins	10
— Pistachios, in shell — Pistachios, shelled — Pistachios, roasted ***(Food)***	— 0802 51 00 — 0802 52 00 — ex 2008 19 13; ex 2008 19 93	 **20** **20**	**United States (US)**	Aflatoxins	10

Feed and food (intended use)	CN code ([1])	TARIC sub-division	Country of origin	Hazard	Frequency of physical and identity checks (%)
— Dried apricots — Apricots, otherwise prepared or preserved ([15]) ***(Food)***	— 0813 10 00 — 2008 50 61		**Uzbekistan (UZ)**	Sulphites ([16])	50
— Coriander leaves — Basil (holy, sweet) — Mint — Parsley ***(Food - fresh or chilled herbs)***	— ex 0709 99 90 — ex 1211 90 86 — ex 1211 90 86 — ex 0709 99 90	**72** **20** **30** **40**	**Vietnam (VN)**	Pesticide residues ([3]) ([21])	50
Okra ***(Food – fresh, chilled or frozen)***	ex 0709 99 90 ex 0710 80 95	**20** **30**	**Vietnam (VN)**	Pesticide residues ([3]) ([21])	50
Peppers (other than sweet) (*Capsicum* spp.) ***(Food - fresh, chilled or frozen)***	ex 0709 60 99; ex 0710 80 59	**20** **20**	**Vietnam (VN)**	Pesticide residues ([3]) ([21])	50

(1) Where only certain products under any CN code are required to be examined, the CN code is marked “ex”.
(2) Reference method EN ISO 6579-1 or a method validated against it in accordance with the protocol set out in EN ISO 16140-2.
(3) Residues of at least those pesticides listed in the control programme adopted in accordance with Article 29(2) of Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L 70, 16.3.2005, p. 1) that can be analysed with multi-residue methods based on GC-MS and LC-MS (pesticides to be monitored in/on products of plant origin only).
(4) Residues of Amitraz.
(5) Residues of Nicotine.
(6) Residues of Tolfenpyrad.
(7) Residues of Acephate, Aldicarb (sum of aldicarb, its sulfoxide and its sulfone, expressed as aldicarb), Amitraz (amitraz including the metabolites containing the 2,4 -dimethylaniline moiety expressed as amitraz), Diafenthiuron, Dicofol (sum of p, p′ and o,p′ isomers), Dithiocarbamates (dithiocarbamates expressed as CS2, including maneb, mancozeb, metiram, propineb, thiram and ziram) and Methiocarb (sum of methiocarb and methiocarb sulfoxide and sulfone, expressed as methiocarb).
(8) Residues of Dicofol (sum of p, p′ and o,p′ isomers), Dinotefuran, Folpet, Prochloraz (sum of prochloraz and its metabolites containing the 2,4,6-Trichlorophenol moiety expressed as prochloraz), Thiophanate-methyl and Triforine.
(9) For the purposes of this Annex, “Sudan dyes” refers to the following chemical substances: (i) Sudan I (CAS Number 842-07-9); (ii) Sudan II (CAS Number 3118-97-6); (iii) Sudan III (CAS Number 85-86-9); (iv) Scarlet Red; or Sudan IV (CAS Number 85-83-6).
(10) Residues of Diafenthiuron.
(11) Residues of Carbofuran.
(12) Residues of Phenthoate.
(13) Residues of Chlorbufam.
(14) Residues of Formetanate (sum of formetanate and its salts expressed as formetanate (hydrochloride)), Prothiofos and Triforine.
(15) Identity and physical checks may be carried out by the competent authority of the place of destination as indicated in the CED, in accordance with Article 9 (2) of this Regulation.
(16) Reference methods: EN 1988-1:1998, EN 1988-2:1998 or ISO 5522:1981.
(17) Residues of Prochloraz.
(18) Residues of Diafenthiuron, Formetanate (sum of formetanate and its salts expressed as formetanate (hydrochloride)) and Thiophanate-methyl.
(19) “Unprocessed products” as defined in Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ L 139, 30.4.2004, p. 1).
(20) “Placing on the market” and “final consumer” as defined in Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1).
(21) Residues of Dithiocarbamates (dithiocarbamates expressed as CS2, including maneb, mancozeb, metiram, propineb, thiram and ziram), Phenthoate and Quinalphos.’

COMMISSION IMPLEMENTING REGULATION (EU) 2019/1250

of 22 July 2019

making certain imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India subject to registration following the re-opening of the investigation in order to implement the judgments of 10 April 2019, in cases T-300/16 and T-301/16, with regard to Implementing Regulations (EU) 2016/387 and (EU) 2016/388 imposing a definitive countervailing duty and a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([1]), and in particular Article 14 thereof,

Having regard to Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union ([2]), and in particular Article 24 thereof,

Whereas:

1. PROCEDURE

(1) On 18 September 2015 the European Commission ('the Commission') imposed a provisional anti-dumping duty on imports into the Union of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India ('the country concerned') by Commission Implementing Regulation (EU) 2015/1559 ([3]) ('the provisional Regulation').

(2) On 17 March 2016, the Commission adopted Implementing Regulation (EU) 2016/388 imposing a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India ([4]) ('the product concerned'), as amended by Commission Implementing Regulation (EU) 2016/1369 ([5]) ('the anti-dumping Regulation at issue').

(3) On the same date, the Commission adopted Implementing Regulation (EU) 2016/387 imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India ([6]) ('the anti-subsidy Regulation at issue').

(4) Jindal Saw Limited (the exporting producer) and Jindal Saw Italia SpA (its related importer) (together 'the applicants') challenged the anti-dumping and anti-subsidy Regulations at issue in the General Court ('the General Court'). On 10 April 2019 the General Court issued its judgements in cases T-300/16 ([7]) and T-301/16 ([8]) regarding the anti-subsidy and anti-dumping Regulations respectively.

([1]) OJ L 176, 30.6.2016, p. 21, as last amended by Regulation (EU) 2018/825 of the European Parliament and of the Council on 7 June 2018.
([2]) OJ L 176, 30.6.2016, p. 55, as last amended by Regulation (EU) 2018/825 of the European Parliament and of the Council on 7 June 2018.
([3]) Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India (OJ L 244, 19.9.2015, p. 25).
([4]) OJ L 73, 18.3.2016, p. 53.
([5]) Commission Implementing Regulation (EU) 2016/1369 of 11 August 2016 amending Implementing Regulation (EU) 2016/388 imposing a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India (OJ L 217, 12.8.2016, p. 4).
([6]) OJ L 73, 18.3.2016, p. 1.
([7]) ECLI:EU:T:2019:235.
([8]) ECLI:EU:T:2019:234.

(5) In case T-300/16 the General Court found that in the anti-subsidy Regulation at issue the calculation of the amount of benefit resulting from the target export restrictions found in place with respect to iron ore, as regards Jindal Saw Limited ('Jindal Saw'), was in breach of Article 6(d) of Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union ('the basic anti-subsidy Regulation'). In particular, the General Court held that the transport costs actually incurred by Jindal Saw from the mine to its plant in India were higher than those which were taken into account by the Commission, as an average, and included in the calculation of the average purchase price for iron ore in India. In the General Court's view, such difference in transportation costs means that the price at which Jindal Saw sourced iron ore on the Indian market was, in fact, higher than the average purchase price accepted by the Commission to determine the level of remuneration, which had an inevitable impact on the benefit that could be granted to that exporting producer. Accordingly, the Court found that the Commission infringed Article 3(2) and Article 6(d) of the basic anti-subsidy Regulation, in that the Commission wrongly selected at random certain items in the delivery costs of Jindal Saw for the calculation of the standard average transport cost, and the third subparagraph of Article 15(1) of the basic anti-subsidy Regulation, in that the Commission fixed the countervailing duty at a level higher than the countervailable subsidies.

(6) In both cases T-300/16 and T-301/16 the General Court also made findings with respect to the undercutting calculations carried out by the Commission in the anti-subsidy and anti-dumping Regulations at issue. In particular, the General Court found that, since the Commission used the prices of sales made by the selling entities linked to the main Union producer in order to determine the price of the like product of the Union industry while not taking into account the prices of sales of Jindal Saw's selling entities to determine the price of the product concerned produced by Jindal Saw, it cannot be considered that the undercutting calculation was made by comparing prices at the same level of trade. According to the General Court, the error made by the Commission in calculating the price undercutting of the product concerned for Jindal Saw's products had the effect of taking into account undercutting of that price, the importance or even existence of which had not been properly established.

(7) As a result, the General Court found that the Commission infringed respectively Article 8(1) of the basic anti-subsidy Regulation and Article 3(1) of Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union ('basic anti-dumping Regulation'). Since the undercutting as calculated in the anti-subsidy and anti-dumping Regulations at issue was the basis for the conclusion that imports of the product concerned were at the root of the injury to the Union industry, the General Court found that the existence of a causal link between the subsidised and dumped imports and the injury to the Union industry as a necessary condition for the imposition of a countervailing duty in accordance with Article 1(1) and Article 8(5) of the basic anti-subsidy Regulation and of an anti-dumping duty in accordance with Article 1(1) and Article 3(6) of the basic anti-dumping Regulation, could have been tainted as well.

(8) Moreover, the General Court found that it could not be excluded that, if the price undercutting had been calculated correctly, the injury margin of the Union industry would have been established at a level below that of the subsidy rate and the dumping margin respectively. In that case, in accordance with the third subparagraph of Article 15(1) of the basic anti-subsidy Regulation, the amount of the countervailing duty should be reduced to a rate which would be sufficient to remove that injury. Similarly, in accordance with Article 9(4) of the basic anti-dumping Regulation, the amount of the anti-dumping duty should be reduced to a rate which would be sufficient to remove that injury.

(9) As a consequence of those judgments, the anti-dumping and countervailing measures imposed by the anti-dumping and anti-subsidy Regulations at issue in so far as they concern Jindal Saw Limited are not collected, subject to the results of the re-examination, which is unknown at this stage.

(10) Following the General Court's judgments, the Commission decided by means of a Notice [9] ('the reopening Notice'), to partially reopen the anti-subsidy and anti-dumping investigations concerning imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), that led to the adoption of the anti-subsidy and anti-dumping Regulations at issue and to resume them at the point at which the irregularity occurred. The reopening is limited in scope to the implementation of the judgments of the General Court with regard to Jindal Saw Limited.

(9) OJ C 209, 20.6.2019, p. 35.

2. GROUNDS FOR REGISTRATION

(11) The Commission analysed whether it is appropriate to make the imports of the product concerned subject to registration. In that context, the Commission took the following considerations into account.

(12) Article 266 TFEU provides that the Institutions must take the necessary measures to comply with the Courts' judgments. In case of annulment of an act adopted by the Institutions in the context of an administrative procedure, such as anti-dumping or anti-subsidy investigations, compliance with the Court's judgement consists in the replacement of the annulled act by a new act, in which the illegality identified by the Court is eliminated ([10]).

(13) According to the case-law of the Court of Justice, the procedure for replacing the annulled act may be resumed at the very point at which the illegality occurred ([11]). That implies in particular that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the procedure. In a situation where a Regulation imposing definitive trade defence measures is annulled, that means that, subsequent to the annulment, the proceeding is still open, because the act concluding the proceeding has disappeared from the Union legal order ([12]), except if the illegality occurred at the stage of initiation.

(14) As explained in the reopening Notice, and since the illegality did not occur at the stage of initiation but at the stage of the investigation, the Commission decided to reopen the anti-subsidy and the anti-dumping investigations in so far as they concern Jindal Saw Limited, and resumed them at the point at which the irregularity occurred, that is in the context of the original determination relating to the period from 1 October 2013 to 30 September 2014.

(15) According to the case-law of the Court of Justice, the resumption of the administrative procedure and the eventual reimposition of duties cannot be seen as contrary to the rule of non-retroactivity ([13]). The reopening Notice informs interested parties, including importers, that any future liability, if warranted, would emanate from the findings of the re-examination.

(16) Based on the outcome of the reopened investigations, which is unknown at this stage, the Commission will adopt Regulations correcting the mistakes identified by the Court and re-imposing, where warranted, the applicable duty rates. Those newly established rates, if any, will take effect as from the date on which the anti-subsidy and anti-dumping Regulations at issue entered into force.

(17) In relation to past or future liability for anti-dumping or anti-subsidy duties, the following should be noted.

(18) In the reopening Notice, and since the amount of liability resulting from the re-examination is uncertain, the Commission requested national customs authorities to await the outcome of the re-examination before deciding on any repayment claim concerning the anti-dumping and/or countervailing duties annulled by the General Court with respect to Jindal Saw Limited Customs authorities are thus directed to put on hold any claims for reimbursements of the annulled duties until the outcome of the re-examination is published in the Official Journal.

(19) Furthermore, should the re-opening investigations lead to the re-imposition of countervailing and anti-dumping duties, those duties also need to be collected for the period during which the re-opening investigations are carried out. This is considered essential to ensure the effective application of the legally warranted measures during the lifetime of such measures, without any difference based on the time at which imports are taking place, i.e. before or after the reopening of the investigations.

([10]) Joined cases 97, 193, 99 and 215/86 Asteris AE and others and Hellenic Republic v Commission [1988] ECR 2181, paragraphs 27 and 28.

([11]) Case C-415/96 Spain v Commission [1998] ECR I-6993, paragraph 31; Case C-458/98 P Industrie des Poudres Sphériques v Council [2000] I-8147, paragraphs 80 to 85; Case T-301/01 Alitalia v Commission [2008] II-1753, paragraphs 99 and 142; Joined Cases T-267/08 and T-279/08 Région Nord-Pas de Calais v Commission [2011] II-0000, paragraph 83.

([12]) Joined cases 97, 193, 99 and 215/86 Asteris AE and others and Hellenic Republic v Commission [1988] ECR 2181, paragraphs 27 and 28. Case C-415/96 Spain v Commission [1998] ECR I-6993, paragraph 31; Case C-458/98 P Industrie des Poudres Sphériques v Council [2000] I-8147, paragraphs 80 to 85; Case T-301/01 Alitalia v Commission [2008] II-1753, paragraphs 99 and 142; Joined Cases T-267/08 and T-279/08 Région Nord-Pas de Calais v Commission [2011] II-0000, paragraph 83.

([13]) Case C-256/16 Deichmann SE v Hauptzollamt Duisburg, Judgment of the Court of 15 March 2018, paragraph 79 and C & J Clark International Ltd v Commissioners for Her Majesty's Revenue & Customs, judgment of 19 June 2019, paragraph 58.

(20) In this respect, the Commission notes that registration is a tool provided in Articles 14(5) of the basic anti-dumping Regulation and Article 24(5) of the basic anti-subsidy Regulation so that measures may subsequently be applied against imports from the date of the registration. This is the case, for instance, of securing the payment in the event of retroactive application of duties or in anti-circumvention cases. In the present case, the Commission deems it appropriate to register imports concerning Jindal Saw Limited with a view to facilitating the collection of anti-dumping and countervailing duties after the re-opening of the investigations, if warranted.

(21) In line with the jurisprudence of the Court of Justice ([14]), it is noted that, contrary to registration taking place during the period before the adoption of provisional measures, the conditions of Article 10(4) of the basic anti-dumping Regulation and Article 16(4) of the basic anti-subsidy Regulation are not applicable to the case at hand. Indeed, the purpose of registration in the context of Court implementation investigations is not to allow the possible retroactive collection of trade defence measures as envisaged in those provisions. Rather, the reasons for registration are that, as recalled above, in order to ensure the effectiveness of the measures it is appropriate to ensure, to the extent possible, that imports are subject to the correct anti-dumping and anti-subsidy liability without undue interruption from the date of entry into force of the anti-dumping and anti-subsidy regulations at issue until the re-imposition of the corrected duties, if any.

(22) In light of the above considerations, the Commission considered that there are grounds for registration pursuant to Article 14(5) of the basic anti-dumping Regulation and Article 24(5) of the basic anti-subsidy Regulation.

3. **REGISTRATION**

(23) Pursuant to Article 14(5) of the basic anti-dumping Regulation and Article 24(5) of the basic anti-subsidy Regulation, imports of the product concerned produced by Jindal Saw under TARIC additional code C054 shall be made subject to registration in order to ensure that, should the investigations result in re-imposing the measures, anti-dumping duties and countervailing duties of an appropriate amount can be levied on such imports.

(24) As indicated in the reopening Notice, the final liability for payment of anti-dumping and countervailing duties, if any, from the date of entry into force of the anti-dumping and anti-subsidy regulations at issue will emanate from the findings of the re-examination. However, no duties higher than the duties established in the anti-subsidy and anti-dumping regulations at issue shall be collected for the period between 21 June 2019 and the date of entry into force of the results of the reopening investigations. The current countervailing duty applicable to Jindal Saw Limited is 8,7 % and the current anti-dumping duty applicable to the same company is 14,1 %,

HAS ADOPTED THIS REGULATION:

Article 1

1. The Customs authorities shall, pursuant to Article 14(5) of Regulation (EU) 2016/1036 and Article 24(5) of Regulation (EU) 2016/1037, take the appropriate steps to register the imports into the Union of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), with the exclusion of tubes and pipes of ductile cast iron without internal and external coating ('bare pipes'), currently falling under CN codes ex 7303 00 10 and ex 7303 00 90 (TARIC codes 7303 00 10 10, 7303 00 90 10), originating in India, produced by Jindal Saw Limited (TARIC additional code C054).

2. Registration shall expire nine months following the date of entry into force of this Regulation.

3. The rates of the anti-dumping and countervailing duties that can be collected on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), with the exclusion of tubes and pipes of ductile cast iron without internal and external coating ('bare pipes'), currently falling within CN codes ex 7303 00 10 and ex 7303 00 90 (TARIC codes 7303 00 10 10, 7303 00 90 10), originating in India, produced by Jindal Saw Limited (TARIC additional code C054) between the re-opening of the investigations and the date of entry into force of the results of the reopening investigations shall not exceed those imposed by Implementing Regulations (EU) 2016/387 and (EU) 2016/388.

([14]) Case C-256/16 Deichmann SE v Hauptzollamt Duisburg, paragraph 79 and Case C-612/16, C & J Clark International Ltd v Commissioners for Her Majesty's Revenue & Customs, judgment of 19 June 2019, paragraph 58.

4. The national customs authorities shall await the publication of the relevant Commission Implementing Regulation re-imposing the duties before deciding on the claim for repayment and remission of anti-dumping and/or countervailing duties insofar as imports concerning Jindal Saw Limited are concerned.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 July 2019.

For the Commission

The President

Jean-Claude JUNCKER

DECISIONS

COUNCIL DECISION (EU) 2019/1251

of 15 July 2019

on the position to be taken, on behalf of the European Union, within the International Sugar Council as regards the extension of the International Sugar Agreement 1992

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The International Sugar Agreement 1992 ([1]) ('the Agreement') was concluded by Council Decision 92/580/EEC ([2]) and entered into force on 1 January 1993. The Agreement was concluded for a period of three years until 31 December 1995 and since then, regularly extended for further periods of two years. The Agreement was last extended by decision of the International Sugar Council in December 2017 and remains in force until 31 December 2019.

(2) Pursuant to Article 45(2) of the Agreement, the International Sugar Council may extend the Agreement for successive periods, not exceeding two years on each occasion.

(3) The International Sugar Council, during its 55th session to be held on 19 July 2019, is set to decide on the extension of the Agreement up to 31 December 2021.

(4) Before taking its decision to extend the Agreement, the International Sugar Council, during its 55th session, will also vote on a proposal submitted by the Union to amend the Agreement as regards its rules on financial contribution to the International Sugar Organization. That proposal is the result of negotiations conducted by the Commission in line with an authorisation by the Council to open negotiations, on behalf of the Union, namely Council Decision (EU) 2017/2242 ([3]).

(5) A possible rejection of the proposal to amend the Agreement would go against the Union's objectives of modernising the Agreement and thus put the benefits of the extension of the Agreement into question.

(6) It is appropriate to establish the position to be taken, on behalf of the Union, within the International Sugar Council as regards the extension of the Agreement. The extension of the Agreement is in the interest of the Union if the amendment to the Agreement is also agreed upon,

([1]) OJ L 379, 23.12.1992, p. 16.
([2]) Council Decision 92/580/EEC of 13 November 1992 on the signing and conclusion of the International Sugar Agreement 1992 (OJ L 379, 23.12.1992, p. 15).
([3]) Council Decision (EU) 2017/2242 of 30 November 2017 authorising the opening of negotiations to amend the International Sugar Agreement 1992 (OJ L 322, 7.12.2017, p. 29).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken, on behalf of the Union, within the International Sugar Council shall be to vote in favour of the extension of the International Sugar Agreement 1992 for a further period of up to two years, up to 31 December 2021.

However, unless the International Sugar Council approves the Union's proposal to amend the Agreement as regards its rules on financial contribution to the International Sugar Organization, the Commission shall prevent a decision from being taken by consensus concerning the extension of the International Sugar Agreement 1992 and shall abstain from any subsequent vote on that matter.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 15 July 2019.

For the Council

The President

J. LEPPÄ

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)

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]).

(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.

([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).

(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.

(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].

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[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.

(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 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].

[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.

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.

([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.

(31) According to the initial ruling request, McD Europe's Swiss Service Branch has its registered office in Geneva, Switzerland. That branch licenses the franchise rights to franchisors in various European countries ([22]) (hereinafter: 'Master Franchisors'), receives royalty income from the Master Franchisors and provides management, support, development, and other similar or related services associated with the franchise rights ([23]). In exchange for those services, the US Franchise Branch provides the Swiss Service Branch with a service fee equivalent to the costs of the Swiss Service Branch plus a mark-up of [0-10] percent ([24]).

(32) The primary individuals employed, seconded or contracted for by the Swiss Service Branch are the 'Key European Management'. Although the Swiss Service Branch pays the costs related to those individuals, including salaries/bonuses expenses, according to the initial ruling request those costs are ultimately borne by the US Franchise Branch through a reduction in the royalties paid by the Swiss Service Branch to the US Franchise Branch.

(33) Finally, according to the initial ruling request, McD Europe, with its principal place of business in Luxembourg, will provide, through its managers' meetings, general and administrative services, setting up of business strategies and other support services. A fee of EUR [400 000-500 000] per year is to be paid by the US Franchise Branch to McD Europe for those services ([25]).

2.2.1.2. Luxembourg tax implications described in the initial ruling request

(34) According to the tax advisor, McD Europe should be considered as tax resident in Luxembourg pursuant to Article 159(1) of the Luxembourg Income Tax Law ([26]). McD Europe is thus fully liable to corporate income tax in Luxembourg. However, as a Luxembourg tax resident, McD Europe also benefits from all the provisions of any double taxation treaty concluded by Luxembourg.

(35) Furthermore, according to the tax advisor, by virtue of Article 5 of the Luxembourg – US double taxation treaty, the activities of the US Franchise Branch will be considered to be performed in the United States. Consequently, the profits generated by the US Franchise Branch will only be subject to possible taxation in the United States and exempt from corporate income tax in Luxembourg by virtue of Articles 7 and 25 of the Luxembourg – US double taxation treaty.

(36) Similarly, according to the tax advisor, the activities performed by the Swiss Service Branch, i.e. the sub-licensing of the franchise rights to the Master Franchisors, are considered to be performed in Switzerland by virtue of Article 5 of the Luxembourg – Switzerland double taxation treaty ([27]). As a consequence, the profits generated by the Swiss Service Branch will only be taxable in Switzerland and exempt from corporate income tax in Luxembourg by virtue of Articles 7 and 25 of the Luxembourg – Switzerland double taxation treaty.

(37) The initial ruling request concludes with a request to the Luxembourg tax administration to confirm its agreement on the tax advisor's understanding of the Luxembourg tax implications of the transactions described therein.

2.2.1.3. Confirmation by the Luxembourg tax administration

(38) In a letter dated 30 March 2009 (the initial tax ruling), the Luxembourg tax administration confirmed that McD Europe is to be considered as tax resident in Luxembourg and, as such, can benefit from the Luxembourg

([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.

double taxation treaties currently in force. Furthermore, the Luxembourg tax administration confirmed that, in light of the explanations provided in the initial ruling request, the Swiss Service Branch and the US Franchise Branch seem to constitute permanent establishments. The Luxembourg tax administration therefore accepts that the profits of McD Europe that are imputable to those two branches are subject to tax in their respective countries and tax exempt in Luxembourg. The initial tax ruling subsequently concludes that 'in order to benefit from these exemptions in Luxembourg, the company [McD Europe] must submit proof on a yearly basis that those profits have been declared and are subject to tax in Switzerland and the United States respectively' ([28]).

2.2.2. *The revised tax ruling*

2.2.2.1. The request for a revised tax ruling

(39) In response to the initial tax ruling, the tax advisor provided a detailed analysis to the Luxembourg tax administration on whether the income of the US Franchise Branch is taxable in the United States and whether the US Franchise Branch constitutes a permanent establishment from a US perspective.

(40) As regards the question whether the income of the US Franchise Branch is taxable in the US, the tax advisor explains that for a foreign entity (i.e. McD Europe) to be taxable in the United States, it must be engaged in a trade or business within the United States. This is the case where the foreign entity is considered to have effectively connected income which is taxable in the US. According to the tax advisor: '… to have effectively connected income taxable in the US, a foreign entity should have a US trade or business (be engaged in a US trade or business) and have income effectively connected to that business'. The tax advisor then states that the business carried out in the United States does not constitute a US trade or business: 'even though the branch (a) holds the franchise rights associated with the group's European region; (b) assumes various economic risks associated with the development and maintenance of the franchise rights acquired, and (c) conducts certain activities associated with the franchise rights, the global McDonald's organisation view the primary business operations as performed through other members of the group and does not consider the activities of the branch as constituting a US trade or business' ([29]).

(41) As regards the question whether the US Franchise Branch constitutes a permanent establishment in the sense of Article 5 of the Luxembourg – US double taxation treaty from a US perspective, the tax advisor explains that 'it is US domestic law that should be consulted to ascertain whether an entity effectively has a permanent establishment under [the US – Luxembourg double taxation treaty]'. Although the US Franchise Branch has a fixed place of business through which the branch manager conducts certain activities, the tax advisor explains that in order to constitute a PE, the 'business activities in the taxing country [should be] substantial enough to constitute a permanent establishment or fixed bases'. US domestic law thus requires that the operations of the US Franchise Branch 'exceed a certain substance threshold', which, the tax advisor concludes, is not reached.

(42) Turning to the analysis as to whether the US Franchise Branch constitutes permanent establishment from a Luxembourg tax perspective, the tax advisor explains that 'the analysis of whether the US branch of McD Europe constitutes a PE for Luxembourg tax purposes ultimately depends on whether the activities of the branch are seen as a 'business' under Luxembourg domestic law' ([30]). Given that the term 'business' is not defined in the double taxation treaty, Article 3(2) of the Luxembourg – US double taxation treaty stipulates that reference should be made to the meaning it has under the domestic law of the contracting State that applies the double taxation treaty, i.e. Luxembourg domestic law. McD Europe's tax advisor further explains that if under Luxembourg tax law the activities of the US Franchise Branch fall under the definition of a 'business' or 'PE', 'then Luxembourg would expect that the income may be taxed in the US because it may be treated as a PE from a Luxembourg tax perspective. There is however no requirement that the other contracting state (US) effectively taxes this income. Article 25(2)(a) of the double taxation treaty provides that Luxembourg will exempt from tax income that 'may be taxed in the United States'. According to the tax advisor, "there is no reference that there effective taxation should occur' ([31]).

([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.

(43) Further and to support its views, the tax advisor makes a reference to a Decision of the Cour Administrative of Luxembourg, '*La Coasta*' (hereinafter: '*La Coasta* judgment') ([32]) relating to the different interpretations of the Luxembourg-France double taxation treaty ([33]) and ultimately leading to a double non-taxation. According to the tax advisor, the Cour Administrative confirmed that 'the lack of a French PE from a French perspective was irrelevant and so Luxembourg cannot recover its right to tax the income just because France does not consider it as taxable'.

(44) McD Europe's tax advisor then proceeds to analyse whether under Luxembourg tax law the activities of the US Franchise Branch constitute a 'business'. The tax advisor concludes that, based on the facts and circumstances of the specific case, the US Franchise Branch carries on an established business through a fixed place and qualifies as a permanent establishment under Luxembourg law. More particularly, according to the tax advisor under Article 16 *Steueranpassungsgesetz* (tax adaptation law, hereinafter 'StAnpG') the activities of the US Franchise Branch constitute an established business which is conducted through a fixed place ([34]). The business consists of the 'intellectual property activities' of the US Franchise Branch which are further broken down as follows: (i) asset ownership; (ii) risk assumption, i.e. economic risks associated with the development and maintenance of the franchise rights for which it bears the related costs, thereby effectively participating in the QCS Agreement with McDonald's Corporation; (iii) franchise rights oversight, e.g. coordinating the QCS Agreement, monitoring the reimbursement of the costs incurred by the Key European Management; (iv) accounting functions. According to the tax advisor, in conjunction with the interpretation of the Luxembourg – US double taxation treaty from a Luxembourg tax perspective, 'one should come to the conclusion that the [US Franchise Branch] carries on intellectual property activities through a US PE by virtue of Article 5 of the US–Luxembourg Treaty' ([35]).

(45) The tax advisor's analysis concludes with a request to the Luxembourg tax administration to confirm its agreement of this conclusion. The concluding sentence of the analysis states '[t]his letter would supersede your confirmation letter dated 30 March 2009. Therefore, it would be much appreciated if this letter could also confirm our understanding of the Luxembourg tax implications as described in our letter dated 11 February 2009' ([36]).

2.2.2.2. The revised tax ruling issued by the Luxembourg tax administration

(46) By letter of 17 September 2009, the Luxembourg tax administration confirmed its agreement with the tax advisor's interpretation of the Luxembourg – US double taxation treaty in the request for a revised tax ruling as regards the tax treatment under Luxembourg law of the profits generated by McD Europe's US Franchise Branch in the United States.

3. **DESCRIPTION OF THE RELEVANT LEGAL FRAMEWORK**

(47) The ordinary rules of corporate taxation in Luxembourg can be found in the Luxembourg Income Tax Code (*loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu*, 'L.I.R'). Article 159(1) of the L.I.R provides: '*L'impôt sur le revenu des collectivités porte sur l'ensemble des revenus du contribuable.*' Article 160 of the L.I.R provides: '*Sont passibles de l'impôt sur le revenu des collectivités pour leur revenu indigène au sens de l'article 156, les organismes à caractère collectif de l'article 159 qui n'ont ni leur siège statutaire, ni leur administration centrale sur le territoire du Grand-Duché.*'

([32]) Tribunal administratif du Grand-Duché de Luxembourg, Jugement du 3 décembre 2001, n°. 12831 du rôle followed by Cour administrative du Grand-Duché de Luxembourg, Jugement du 23 avril 2002, n°. 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 1er 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.

(48) Article 163 L.I.R provides that the Luxembourg corporate income tax is applicable to the taxable profit of a taxpayer in a given year ([37]). Before 2013, all companies subject to tax in Luxembourg were taxed on their taxable profit at the standard tax rate of 28,80 % ([38]). Since 2013, the standard tax rate is 29,22 %.

(49) The incorporation of double taxation treaties takes place on the basis of Article 134 L.I.R in conjunction with Article 162 L.I.R together with the Grand-Ducal Decree of 3 December 1969.

(50) Article 134 L.I.R provides for individuals that: '*Lorsqu'un contribuable résident a des revenus exonérés, sous réserve d'une clause de progressivité prévue par une convention internationale contre les doubles impositions ou une autre convention interétatique, ces revenus sont néanmoins incorporés dans une base imposable fictive pour déterminer le taux d'impôt global qui est applicable au revenu imposable ajusté au sens de l'article 126*'.

(51) Article 162 L.I.R ([39]) and Grand-Ducal Decree of 3 December 1969 ([40]) make Article 134 L.I.R. also applicable to companies subject to Luxembourg corporate income tax on profits ('IRC' or 'Impôt sur le revenu des collectivités').

(52) Article 16 StAnpG defines the concept of permanent establishment under Luxembourg tax law and refers in this respect to every fixed piece of equipment or place which serves for the operation of an established 'enterprise' or 'business' ([41]).

(53) On 3 April 1996, Luxembourg and the United States signed a double taxation treaty: *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* ([42]). It was implemented in Luxembourg national legislation by law of 5 March 1999 ([43]) and entered into force in both contracting States on 20 December 2000, taking effect on 1 January 2001.

([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.

(54) Double taxation treaties are international agreements between two sovereign states ([44]). Most double taxation treaties are bilateral but multilateral tax treaties also exist, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ([45]).

(55) Double taxation treaties exist to enhance cross-border trade and international investment by eliminating or reducing tax barriers for companies and physical persons trading or investing in two contracting States. If the same income resulting from cross-border operations was taxed by two countries, this would potentially threaten the development of trade or discourage investments between two sovereign states. The most important objective of a double taxation treaty is therefore to avoid or eliminate double taxation where it arises ([46]).

(56) The general scope of application of the Luxembourg – US double taxation treaty is defined in Article 1(1) which provides: 'This Convention shall apply only to persons who are resident of one or both of the Contracting States, except as otherwise provided in the Convention.'

(57) Article 3(2) of the Luxembourg – US double taxation treaty on 'General Definitions' provides: 'As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 27 (Mutual Agreement Procedure), have the meaning that it has under the law of that State concerning the taxes to which the Convention applies.'

(58) Article 5(1) of the Luxembourg – US double taxation treaty defines the concept of PE: 'For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.'

(59) Article 7(1) of the Luxembourg – US double taxation treaty concerning the taxation of business profits provides: 'The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the business profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment.'

(60) Article 25 of the Luxembourg – US double taxation treaty is entitled 'Relief from Double Taxation', Article 25(2) of the Luxembourg – US double taxation treaty provides: 'In Luxembourg double taxation shall be eliminated as follows: (a) where a resident of Luxembourg derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the United States, Luxembourg shall, subject to the provisions of subparagraph (b) and (c), exempt such income or capital from tax, but may, in order to calculate the amount of tax on the remaining income or capital of the resident, apply the same rates of tax as if the income or capital had not been exempted.'

([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.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(61) The Commission decided to initiate the formal investigation procedure because it took the preliminary view that the contested tax rulings granted State aid to McD Europe within the meaning of Article 107(1) of the Treaty and expressed its doubts as to the compatibility of the contested tax measures with the internal market.

(62) In particular, the Commission expressed doubts that the revised tax ruling misapplied Article 25(2) of the Luxembourg – US double taxation treaty and thereby granted a selective advantage to McD Europe.

(63) The Commission applied the three-step analysis to determine whether the revised tax ruling is *prima facie* selective. First, it considered the reference system to be the general Luxembourg corporate income tax system, which has as its objective the taxation of profits of all companies subject to tax in Luxembourg. It also considered that the Luxembourg corporate tax system includes the double taxation treaties to which Luxembourg is a party.

(64) Second, the Commission established whether the revised tax ruling gives rise to a derogation from the reference system leading to a favourable treatment of McD Europe as compared to economic operators that are factually and legally in a similar situation. It considered that in principle, McD Europe is liable to Luxembourg corporate tax on its worldwide profits unless a double taxation treaty applies which allows Luxembourg to exempt the income attributable to its foreign branches from Luxembourg corporate income tax. The Commission expressed doubts that the revised tax ruling complied with Articles 7 and 25 of the Luxembourg – US double taxation treaty as well as Luxembourg law which transposes the double taxation treaty into national law and which, as its guiding principle, requires worldwide taxation of profits.

(65) Article 25 of the Luxembourg – US double taxation treaty prescribes that where a tax resident of Luxembourg derives foreign income which, 'in accordance with the provisions of this Convention, may be taxed in the US', Luxembourg shall exempt such income from tax. To determine whether the income 'may be taxed in US […] in accordance with provisions of this Convention', reference should be made to Article 7 of the Luxembourg – US double taxation treaty.

(66) Under Article 7 of the Luxembourg – US double taxation treaty, the Commission noted that the United States (source State) 'may' only tax the relevant income (i.e. profits generated by McD Europe's US Franchise Branch from franchise right exploitation) to the extent that a permanent establishment exists to whom the business profits can be attributed, otherwise those profits are taxable only in Luxembourg. It then noted that the profits attributed to the US Franchise Branch cannot be taxed in the United States since the US Franchise Branch does not constitute a permanent establishment for US tax purposes. In other words, there is no possibility that those profits 'may be taxed' by the United States within the meaning of Article 25(2) of the Luxembourg – US double taxation treaty. As the Luxembourg tax authorities were fully aware of the non-possibility of taxation, the Commission argues that they should not have agreed to the exemption of the income attributed to the US Franchise Branch from corporate income tax in Luxembourg.

(67) Thus, to avoid conferring a selective advantage, the Commission considered that the Luxembourg tax administration should have only agreed to exempt income from corporate taxation to the extent that the income may be taxed in the United States in accordance with the provisions of the Luxembourg – US double taxation treaty. According to the views expressed by the Commission in the Opening Decision, the fact that the Luxembourg tax administration was fully aware when it issued the revised tax ruling that the US Franchise Branch does not constitute a permanent establishment for US tax purposes means that it was also fully aware that its business income may not be taxed in the United States in accordance with the Luxembourg – US double taxation treaty and that consequently, the confirmation by the Luxembourg tax authorities to exempt the income for corporate tax by virtue of Article 25(2)(a) of the Luxembourg-US double taxation treaty rests on a misapplication of that provision.

(68) Given the absence of a justification for the selective treatment of McD Europe resulting from the revised tax ruling and given that all other conditions for the existence of State aid pursuant to Article 107(1) of the Treaty were fulfilled, the Commission came to the preliminary conclusion that the revised tax ruling issued by the Luxembourg tax administration in favour of McD Europe constituted State aid within the meaning of Article 107(1) of the Treaty. Furthermore, because of its qualification as operating aid, the Commission had doubts as to the compatibility of the contested measures pursuant to Articles 107(2) or (3) of the Treaty.

5. **COMMENTS FROM THE LUXEMBOURG AUTHORITIES ON THE OPENING DECISION**

(69) The Luxembourg authorities submitted their comments on the Opening Decision on 4 February 2016. The Luxembourg authorities argue, first, that the Commission has incorrectly identified the legal framework; second, that the Commission's reasoning in the Opening Decision is fundamentally flawed; and third, that the Commission has not proven the existence of a selective advantage.

5.1. **Comments from the Luxembourg authorities on the legal framework**

(70) The Luxembourg authorities first set out the objective and content of the double taxation treaty, which is the allocation of the right to tax in order to prevent (actual or potential) double taxation, but not to ensure the actual taxation of the taxpayer by one or other of the contracting States or by a third state. A double taxation treaty does not give rise to taxation if no taxation is provided for in national law. The exercise of the power of taxation is an exclusive competence of the contracting State to which that power has been allocated by the double taxation treaty. In the absence of a switch-over-clause ([47]) or the credit method ([48]), the other contracting State cannot unilaterally resolve a problem of non-taxation if the other State does not exercise its power of taxation. According to the Luxembourg authorities, the only possible way of resolving situations of non-taxation is to amend the double taxation treaty.

(71) The Luxembourg authorities also explain that a double taxation treaty is interpreted independently by each contracting State. Luxembourg can therefore not be expected to interpret the Luxembourg – US double taxation treaty by reference to US law.

(72) As regards Luxembourg's domestic law and case-law, the Luxembourg authorities explain that neither the Luxembourg – US double taxation treaty, nor the legal text transposing the double taxation treaty into Luxembourg law, nor any other piece of legislation of Luxembourg national law establishes a principle of actual taxation. It then makes reference to the *La Coasta* judgment ([49]) which acknowledged that double non-taxation could happen despite a correct application of a double taxation treaty, each contracting State being independent from the other in the interpretation of the double taxation treaty.

(73) In this case, the Luxembourg authorities explain that the non-taxation of the US Franchise Branch in the United States is due to the application of US national law and the concept of 'effectively connected income'. The non-taxation in the United States derives from the fact that the United States does not make use of the right to tax assigned to it by the Luxembourg-US double taxation treaty and Luxembourg cannot challenge that. Furthermore, according to Luxembourg, the Commission is not competent to (re-)interpret an international treaty and breaches Articles 4 and 5 of the Treaty on European Union if it decides on the 'correct' interpretation of a bilateral international treaty between a Member State and a third country.

5.2. **Comments from the Luxembourg authorities on the Commission's reasoning**

(74) The Luxembourg authorities consider that the Commission's reasoning is based on two incorrect assumptions: first, that the Luxembourg tax authorities knew or should have known that the US Franchise Branch was not taxable under US law on the date of issuance of the tax ruling; second, that if the Luxembourg tax authorities had known that the US Franchise Branch was not taxable in the United States under US tax law, it had an obligation to tax McD Europe.

([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.

(75) As regards the first assumption of the Commission, the Luxembourg authorities assert that they do not have the competence to assess and interpret foreign tax law. In addition, the Luxembourg tax authorities could not know whether the US Franchise Branch would actually be taxed by the US tax authorities as, first, they did not receive any document or information from the US tax authorities with the request for a tax ruling and, second, the subjective opinion of a private tax advisor cannot be equated with a position taken by the US tax authorities.

(76) As regards the second assumption of the Commission, the Luxembourg authorities submit that if McD Europe is not taxable from the perspective of Luxembourg law, it is irrelevant to know whether or not it is taxable under US law since Luxembourg does not recover its right to tax. The allocation of taxing power is unconditional and final.

5.3. **Comments from the Luxembourg authorities on the Commission's analysis pursuant to Article 107 of the Treaty**

(77) The Luxembourg authorities do not agree with the Commission's legal analysis for establishing the existence of a selective advantage. As regards the definition of the reference system, it only comprises the Luxembourg – US double taxation treaty and the Luxembourg rules and practice relating to double taxation treaties, as interpreted by the Luxembourg courts.

(78) In addition, the Luxembourg authorities observe that the Commission in its Opening Decision only makes reference to Article 159 L.I.R, whereas the correct reference relating to the worldwide taxation of companies subject to corporate income tax also requires the application of Article 160 L.I.R. Furthermore, the incorporation of double taxation treaties takes place on the basis of Article 134 L.I.R in conjunction with Article 162 L.I.R together with the Grand-Ducal Decree of 3 December 1969, none of which were mentioned by the Commission in its Opening Decision. According to the Luxembourg authorities, such lack of clarity is contrary to the requirements of Article 107(1) of the Treaty.

(79) According to the Luxembourg authorities, the Commission also fails to demonstrate any derogation from the double taxation treaty and/or the law as interpreted by Luxembourg courts and Luxembourg practice.

(80) Last but not least, the Luxembourg authorities do not agree with the Commission's determination of an advantage. First, the question of the advantage must be independent of the decision by the US authorities to tax the company. Second, assuming that Luxembourg has an obligation to tax in order to prevent a situation of double non-taxation, an advantage would only exist if the Luxembourg tax authorities had known for certain on the date of issuance of the revised tax ruling that the US Franchise Branch was not actually being taxed by the US authorities. However, the US tax authorities did not take a position on whether the US Franchise Branch was taxable in the United States until five years after the revised tax ruling was issued, i.e. in 2014 in the context of an IRS audit. The Luxembourg tax authorities could not have known this when issuing the contested tax rulings. Third, according to the Luxembourg authorities, the Commission would never have disputed the contested tax rulings if the IRS had concluded at the end of its tax audit, that the US Franchise Branch was taxable in the United States. Given that the United States apply a system of worldwide taxation, the income of McD Europe would be taxed once repatriated to the United States. The result is therefore merely a tax deferral. It is therefore the non-taxation of the US Franchise Branch's income by the US tax authorities after the contested tax rulings have been issued which led to the finding of an advantage to McD Europe according to the Commission.

6. **COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION**

6.1. **Comments from McD Europe**

(81) McD Europe submitted its comments on 9 August 2016. McD Europe, first, disputes the Commission's competence to interpret international and national tax rules; second, it points to a number of flaws in the Commission's interpretation of the Luxembourg – US double taxation treaty; and, third, it argues that the Commission has failed to demonstrate the existence of State aid in favour of McD Europe.

6.1.1. *Comments from McD Europe on the Commission's competence to interpret international and national tax rules*

(82) McD Europe argues that, based on Articles 113, 114, and 115 of the Treaty, Member States have sole jurisdiction to determine their corporate tax regime and to enter into international treaties. Consequently, the Commission's attempt to impose its own interpretation of an international treaty such as the Luxembourg – US double taxation treaty violates Luxembourg's tax sovereignty. In particular, according to McD Europe, the Commission disregards the (correct) interpretation of the double taxation treaty made by the Luxembourg tax authorities by considering that (i) the permanent establishment condition provided for by the double taxation treaty should have been analysed in the light of United States law; and (ii) the taxability in the United States of the US Franchise Branch revenues should have been considered by the Luxembourg tax authorities before deciding that they should not be taxed in Luxembourg.

6.1.2. *Comments from McD Europe on the Commission's interpretation of the Luxembourg – US double taxation treaty*

(83) McD Europe argues that the Commission's interpretation of the Luxembourg – US double taxation treaty is flawed as (i) the Commission's interpretation of the notion of permanent establishment disregards the way double taxation treaties are usually interpreted/applied and runs against Treaty provisions; (ii) the Commission introduces the requirement in the double taxation treaty that the US Franchise Branch's revenues should be taxable in the United States; (iii) the Commission makes reference to provisions of the OECD Model Tax Convention ([50]) that are not applicable to the Luxembourg – US double taxation treaty and/or irrelevant.

(84) As regards the first point, McD Europe argues that a double taxation treaty does not create itself a right to tax if no taxation rights exist under domestic law. Also, each contracting State is independent from the other in the interpretation of the double taxation treaty. Thus, the interpretation that may be given of a particular concept under US law is irrelevant for Luxembourg even though conflicting interpretations between contracting States may lead to double non-taxation. According to McD Europe, the only way of solving this situation of double non-taxation is to negotiate an amendment of the double taxation treaty.

(85) As regards the interpretation of the concept of a PE, McD Europe argues that the wording of the Luxembourg – US double taxation treaty and notably its Article 3 confirms that it belongs to the contracting State that applies the double taxation treaty to interpret it by reference to its own legal system. Hence, in this case, it was for the Luxembourg tax administration to interpret the Luxembourg – US double taxation treaty by reference to its own legal system and to consider that the US Franchise Branch constituted a permanent establishment for the purposes of the double taxation treaty. The conclusion of the IRS audit conducted in 2014 is irrelevant as the Luxembourg tax authorities could not have been aware of the IRS position at the time of the contested tax rulings in 2009 nor could it have retroactively affected the tax rulings.

(86) Second, Articles 7(2) and 25(2)(a) of the Luxembourg – US double taxation treaty do not require that the revenue of the permanent establishment is taxable in the United States. According to McD Europe, following a correct reading of the double taxation treaty provisions, whether the contracting State which, under the double taxation treaty may tax (in this case, the United States), later considers, under its domestic rules, that the revenues are not taxable, is irrelevant for the other contracting State (Luxembourg), which has lost its right to tax the revenues by virtue of the double taxation treaty.

(87) Third, the Commission's reference to an OECD Commentary introduced in 2000 to support its conclusion that, in light of the fact that the US Franchise Branch revenues were not taxable in the United States, the Luxembourg tax authorities should have taxed such income, is irrelevant as the provision in question did not exist when the double taxation treaty was concluded in 1996. A new reading of OECD Commentaries that changes the meaning of Article 23A of the OECD MTC can only be applicable in respect of treaties ratified after the relevant revision of the OECD MTC in 2000. McD Europe further underlines that the OECD MTC is not binding by law but rather considered as a recommendation.

([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.

6.1.3. *Comments from McD Europe on the Commission's analysis pursuant to Article 107 of the Treaty*

(88) According to McD Europe, the Commission's reasoning is based on the erroneous premise that the tax ruling commits State resources. Second, McD Europe did not benefit from any advantage as the Luxembourg tax authorities could not have taxed the revenues attributable to the US Franchise Branch. Third, the Commission did not demonstrate that McD Europe was the only undertaking that benefited from the application of the double taxation treaty and even less that it was part of a selective group of undertakings.

(89) On the first point, McD Europe asserts that tax rulings do not constitute State aid if they are mere interpretations and practical applications of general tax rules in specific cases. They can only constitute State aid if they depart from the general rules through administrative discretion. In the case at hand, the purpose of the tax rulings was to confirm the absence of Luxembourg taxation of business income attributed to the US Franchise Branch under the Luxembourg – US double taxation treaty. The tax ruling did not reduce the tax burden of McD Europe as in the absence of the tax ruling, McD Europe would have had the same tax burden in Luxembourg. The tax ruling does not change or improve the tax situation of McD Europe.

(90) Second, according to McD Europe, the Commission incorrectly concluded that the Luxembourg tax authorities had misapplied the Luxembourg – US double taxation treaty and on that basis, found an advantage in favour of McD Europe. Also, the fact that the United States eventually decided not to tax the royalty income under US domestic tax rules cannot qualify as State aid under EU law. Luxembourg did not recover its taxing right over the US Franchise Branch income because the same income was not taxable under US law. Like the Luxembourg authorities, McD Europe quotes the *La Coasta* judgment to support the principle according to which the Luxembourg tax authorities cannot take into account interpretations done by the other contracting State. However, even if one followed the Commission's reasoning, the advantage that McD Europe would have potentially received from the Luxembourg tax authorities would in fact have resulted from a decision made by the IRS in 2014 not to tax the US Franchise Branch's revenues. Yet, the possible existence of an advantage cannot depend on the attitude of a third country.

(91) Regarding selectivity and in particular the question of derogation, McD Europe states that according to public information available through LuxLeaks ([51]), it appears that many undertakings have benefited from the same treatment as McD Europe. This would not be surprising as the interpretation of the Luxembourg – US double taxation treaty in the tax ruling is perfectly in line with the application of Luxembourg law. The other LuxLeaks rulings demonstrate that the Luxembourg authorities have followed a coherent interpretation of the double taxation treaty, applicable to all taxpayers in a comparable situation within the same system of reference. None of these other tax rulings impose a condition of taxation of the business profits at the level of the PE.

(92) Finally, McD Europe argues that the selective advantage may be considered as justified in order to avoid double taxation and that therefore the measure does not constitute State aid.

6.2. **Comments from other interested parties**

(93) The Coalition submitted its comments on 5 August 2016 in which it expresses its support for the investigation.

(94) It states that given the dominant position of McDonald's in Europe, any aid in favour of McD Europe could distort competition and affect intra-EU trade. According to the Coalition, McDonald's changes in its corporate structure in late 2008 and early 2009, followed by the tax ruling requests, were tax-related and aimed at achieving double non-taxation both in Luxembourg and the United States, thereby gaining a competitive advantage over its competitors.

(95) According to the Coalition, interpretations of double taxation treaties resulting in double non-taxation should not be considered as complying with the letter and spirit of double taxation treaties.

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

(96) Finally, the Coalition calls for Member States that have anti-abuse rules to investigate McDonald's for optimising its corporate tax structure in order to avoid paying taxes. According to the Coalition, the McDonald's case exemplifies the necessity for tax administrations to exchange information about the tax treatments of multinationals and to introduce public country-by-country reporting.

7. **COMMENTS FROM THE LUXEMBOURG AUTHORITIES ON THIRD PARTIES' COMMENTS**

(97) The Luxembourg authorities commented on McD Europe's and the Coalition's observations on the Opening Decision by letter of 30 September 2016.

(98) The Luxembourg authorities stated that the analysis of McD Europe largely coincided with its own analysis.

(99) It considered that the comments sent by the Coalition do not concern the question whether State aid has been granted in favour of McD Europe but are essentially targeting McDonald's worldwide practices, criticising the latter's fiscal, social, and wage policies.

(100) The Luxembourg authorities note that, contrary to the allegations of the Coalition, the purpose of a double taxation treaty is to eliminate double taxation, not to ensure effective taxation. The allocation of taxing rights between two contracting States resulting from a double taxation treaty is definitive and not conditional. Therefore, if the Luxembourg tax authorities contractually waive their taxing rights, they do not recover such taxing rights based on the fact that the other contracting State does not effectively tax such income.

(101) With regard to the call of the Coalition to strengthen anti-tax avoidance tools, the Luxembourg authorities state that it is fully committed to this purpose and that any measures pertaining to transparency and exchange of information between Member States should be discussed and adopted in the appropriate form and following the relevant procedures.

8. **ASSESSMENT**

(102) Following an in-depth investigation and after having thoroughly considered the comments received in response to the Opening Decision, the Commission considers that the concerns raised in the Opening Decision do not lead to the conclusion that State aid has been granted through the contested tax rulings.

8.1. **Existence of aid**

(103) According to Article 107(1) of the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States. It is thus well-established that, for a measure to be categorised as State aid, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking; and, fourth, it must distort or threaten to distort competition ([52]).

(104) For a measure to be categorised as aid within the meaning of Article 107(1) of the Treaty, all the conditions set out in that provision must be fulfilled ([53]). In the following, the Commission will concentrate its assessment on whether the contested tax rulings granted a selective advantage to McD Europe. In the absence of the existence of a selective advantage, the Commission does not need to assess whether the other conditions are fulfilled, as there would be no State aid within the meaning of Article 107 of the Treaty.

([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.

8.2. **Presence of a selective advantage for McD Europe**

(105) Whenever a measure adopted by the State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) of the Treaty ([54]). In establishing the existence of an advantage, reference is to be made to the effect of the measure itself ([55]). As regards fiscal measures, an advantage may be granted through different types of reduction of an undertaking's tax burden and, in particular, through a reduction in the taxable base or in the amount of tax due ([56]).

(106) For the purposes of the selectivity analysis, the Court of Justice has devised a three-step analysis in order to determine whether a particular tax measure is selective ([57]). Under the three-step test, the first step is to identify the common or normal tax regime applicable in the Member State: 'the reference system'. Second, it needs to be determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the reference system, it then needs to be established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation from the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ([58]). If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

(107) It should be underlined that the doubts expressed in the Opening Decision relied on a preliminary definition of the reference system as being the general Luxembourg corporate income tax system, including the double taxation treaties to which Luxembourg is a party. The Commission thought that there could be a selective advantage for McD Europe resulting from a misapplication of the Luxembourg-US double taxation treaty. More precisely, the confirmation by the Luxembourg tax authorities of the exemption of the business income of the US Franchise Branch of McD Europe from corporate tax in Luxembourg by virtue of Articles 5, 7 and 25(2)(a) of the Luxembourg – US double taxation treaty was considered as possibly resting on a misapplication of these provisions. No other type of discrimination or misapplication was considered in the Opening Decision.

(108) The following analysis will be focused on the doubts expressed in the Opening Decision, taking into account that the comments of Luxembourg and other interested parties and the information collected during the investigation have not led the Commission to extend the formal procedure in this specific case, which is only devoted to the rulings granted to McD Europe and to the possible misapplication of Articles 5, 7(1) and 25(2) of the Luxembourg-US double taxation treaty. It should also be kept in mind that the burden of proof of the existence of a selective advantage lies with the Commission (with the exception of the justification of the measure by the basic or guiding principles of that tax system).

(109) It is not established that the contested tax rulings constitute a derogation from the rules set by the double taxation treaty. Such a derogation would exist if the contested tax rulings misapplied (i.e. deviated from) a rule of the double taxation treaty reducing McD Europe's tax liability and thereby giving rise to a discrimination between McD Europe vis-à-vis other undertakings that are legally and factually comparable.

(110) McD Europe is tax resident in Luxembourg. In accordance with Articles 159 and 160 L.I.R., McD Europe is in principle liable to Luxembourg corporate tax on its worldwide profits. However, as regards the profits attributed to its US Franchise Branch, the Luxembourg – US double taxation treaty applies which has been transposed into Luxembourg law by virtue of Article 134 L.I.R, Article 162 L.I.R together with the Grand-Ducal Decree of 3 December 1969. The double taxation treaty limits the taxation rights of Luxembourg in that certain income attributable to a permanent establishment in the US under the double taxation treaty is taxable in the US and not in Luxembourg.

([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.

(111) Article 25(2)(a) of the Luxembourg US double taxation treaty exempts from taxation 'income […] which in accordance with the provisions of this Convention, may be taxed in the United States.' In order to determine what 'may be taxed in the United States', Article 7(1) of the Luxembourg – US double taxation treaty stipulates that business profits generated by a company of one of the contracting States are taxable in that State, except if they are realised by or attributable to a permanent establishment located in the other contracting State. In that case, the first contracting State may assume that the profits attributable to that permanent establishment may be taxed in the other contracting State and accordingly exempt from taxation these profits in order to avoid possible double taxation.

(112) It is therefore decisive under the double taxation treaty whether McD Europe's US Franchise branch constitutes a permanent establishment in the US that generates business profits that are exempt from taxation in Luxembourg. Article 5(1) of the Luxembourg – US double taxation treaty defines a permanent establishment as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. While a permanent establishment is therefore defined in the Luxembourg – US double taxation treaty, the term 'business' is not. Also Article 7 of the Luxembourg – US double taxation treaty includes the notion of 'business profits' which is not defined.

(113) In this situation, Article 3(2) of the Luxembourg – US double taxation treaty considers that any undefined term in the Convention shall have the meaning that it has under the law of the State applying the Convention, i.e. Luxembourg in this case. As explained further in recitals 119 to 121 and contrary to what the Commission asserted in its Opening Decision, in the case of differences in interpretation or factual assessment between the contracting States, it is not decisive for the purposes of applying the double taxation treaty by Luxembourg whether the US Franchise Branch constitutes a permanent establishment under US domestic tax law ([59]) and it is equally not decisive whether the Luxembourg tax authorities knew about the non-taxation of the business income in the US ([60]). If the US Franchise Branch constitutes a permanent establishment that carries out a business in the US according to Luxembourg domestic tax law and therefore has business profits attributable to it, those profits shall be exempt from taxation under Luxembourg tax law pursuant to Article 25(2)(a) of the Luxembourg – US double taxation treaty.

(114) As regards Luxembourg tax law, Article 16 StAnpG defines the concept of permanent establishment and refers in this respect to every fixed piece of equipment or place which serves for the operation of an established 'enterprise' or 'business'. The tax advisor in his ruling request applies the criteria of Article 16 StAnpG to the characteristics of the business carried out by the US Franchise Branch ([61]) and concludes that those criteria are fulfilled. Accordingly, from a Luxembourg tax perspective, 'one should come to the conclusion that the [US Franchise Branch] carries on intellectual property activities through a US PE by virtue of Article 5 of the US–Luxembourg Treaty' ([62]).

(115) In line with the comments received from the Luxembourg authorities and McD Europe in response to the Opening Decision ([63]), the Commission sees no reason to disagree with the assessment of the tax advisor that the US Franchise Branch constitutes a permanent establishment pursuant to Article 16 StAnpG. From the perspective of Luxembourg law, a permanent establishment exists in the US, and it is not established that the Luxembourg tax authorities misapplied the double taxation treaty by considering that the income of the US Franchise Branch 'may be taxed' in the US according to Articles 7(1) and 25(2)(a) of the Luxembourg – US double taxation treaty.

(116) As regards Luxembourg national jurisprudence, the tax advisor as well as Luxembourg and McDonald's in their comments to the Opening Decision ([64]) refer to the *La Coasta* judgment dealing with differing interpretations of the Luxembourg – France double taxation treaty. In that judgment, the Luxembourg administrative court acknowledged that double non-taxation can arise despite a correct application of a double taxation treaty, each contracting State being independent from the other in the interpretation of the double taxation treaty. The main objective of a double taxation treaty is the elimination of both actual and potential double taxation. It does not always ensure actual taxation ([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.

(117) The non-taxation in this case derives mainly from the fact that the US does not make use of its right to tax assigned to it under the double taxation treaty due to the interpretation in US tax law of the term 'business'. The Commission, in its Opening Decision, raised doubts as to whether the double non-taxation of McD Europe's franchise income was due to a difference in interpretation between Luxembourg and the US or a conflict of qualification when applying the Luxembourg – US double taxation treaty. In particular, the wording of Article 25(2)(a) of the Luxembourg – US double taxation treaty ('[i]n Luxembourg double taxation shall be eliminated as follows') seemed to indicate an obligation on Luxembourg to only exempt income in order to eliminate double taxation ([66]).

(118) Thus, the question arose in the context of the preliminary examination whether, in the absence of a case of virtual double taxation ([67]), the double non-taxation in this case was due to a conflict of qualification and Luxembourg could recover its right to tax because of such a conflict. The reference in the Opening Decision to the OECD Commentaries on the Model Tax Convention with respect to conflicts of qualification, in particular, paragraph 32.6 ([68]) thereof should be understood in this context.

(119) A conflict of qualification refers to situations where the contracting States apply different articles of the double tax convention based on the interaction of domestic law with the convention ([69]). According to the OECD Commentaries, in cases of conflict of qualification, the residence State (Luxembourg) has to take the source State's (US) qualification into account ([70]). In other words, where from the source State's perspective, that State has no right to tax an item of income in accordance with the double tax treaty, the State of residence is not required to exempt the income ([71]).

(120) In contrast, differences of interpretation or factual assessment refer to how the contracting States interpret the treaty or apply it to a given set of facts, unrelated to domestic law. Situations of differences of interpretation led to the inclusion of Article 23A(4) in the OECD Model Tax Convention to tackle such cases of double non-taxation ([72]).

(121) As explained at recitals 112 to 117, the Commission has within the formal investigation not found evidence which would corroborate the doubts that the present case might concern a conflict of qualification. The different interpretations of the term 'business' under Luxembourg and US tax law have not led Luxembourg and the US to apply different provisions of the double taxation treaty, but to interpret the same provision, i.e. Article 5 of the Luxembourg – US double taxation treaty, differently. In a case of difference of interpretation, the 1999 Report clarifies that the residence State (Luxembourg) is not obliged to accept the interpretation put forward

([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.'

by the source State (US) ([73]). Thus, in case of differences in interpretation and in the absence of a provision in the double taxation treaty corresponding to Article 23A(4) of the OECD Model Tax Convention (as is the case with the Luxembourg – US double taxation treaty), double-non taxation can arise. Such double non-taxation arising from differing interpretations of the double taxation treaty can either be resolved by negotiating an amendment to the double taxation treaty ([74]) or by using the mutual agreement procedure set out in Article 27 of the double taxation treaty.

(122) In addition, the Commission notes that the non-taxation of the US Franchise Branch's income could also be resolved through a modification of Article 16 StAnpG which currently does not cater for situations where business activities are considered to give rise to a permanent establishment under Luxembourg law but are not sufficient to reach the substance threshold to be considered a permanent establishment under US tax law (see recital 41).

(123) Finally, as raised by McDonald's in its comments to the Opening Decision ([75]), the analysis of other tax rulings granted by Luxembourg and publicly available through the so called Luxleaks affair ([76]) shows that the contested tax rulings do not depart from tax rulings obtained by other taxpayers in line with this interpretation and application of the double taxation treaty by Luxembourg. The assessment of 25 other tax rulings ([77]) demonstrates that the Luxembourg tax authorities have followed a coherent interpretation of the double taxation treaty, applicable to all taxpayers in a comparable situation. No condition of effective taxation is provided for under the double taxation treaty and the tax rulings do not impose such a condition to the extent it is not specifically included in the relevant double taxation treaty.

8.2.1. *Conclusion*

(124) Based on this analysis, the Commission concludes that in this specific case, it is not established that the Luxembourg tax authorities misapplied the Luxembourg – US double taxation treaty. Therefore, on the basis of the doubts raised in the Opening Decision and taking into account its definition of the reference system, the Commission cannot establish that the contested rulings granted a selective advantage to McD Europe by misapplying the Luxembourg – US double taxation treaty.

(125) As the criteria for finding the existence of State aid pursuant to Article 107(1) of the Treaty are cumulative, there is no need to assess the other criteria.

9. **CONCLUSION ON THE EXISTENCE OF AID**

(126) In light of the foregoing, the Commission concludes that the contested tax rulings issued by the Luxembourg tax authorities in favour of McD Europe Franchising, S.à.r.l. do not constitute State aid within the meaning of Article 107(1) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

With the contested tax rulings issued by the Luxembourg tax authorities on 30 March 2009 and 17 September 2009 in favour of McD Europe Franchising, S.à.r.l., Luxembourg did not misapply the Luxembourg – US double taxation treaty and these tax rulings therefore do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union on this basis.

([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.

Article 2

This Decision is addressed to the Grand Duchy of Luxembourg.

Done at Brussels, 19 September 2018.

For the Commission

Margrethe VESTAGER

Member of the Commission

COMMISSION IMPLEMENTING DECISION (EU) 2019/1253

of 22 July 2019

on a pilot project to implement the administrative cooperation provisions set out in Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters by means of the Internal Market Information System

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation') ([1]), and in particular Article 4(1) thereof,

Whereas:

(1) The Internal Market Information System ('IMI'), established by Regulation (EU) No 1024/2012 is a software application accessible via the internet, developed by the Commission in cooperation with the Member States, in order to assist Member States with the practical implementation of information exchange requirements laid down in Union acts by providing a centralised communication mechanism to facilitate cross-border exchange of information and mutual assistance.

(2) Council Decision 2001/470/EC ([2]) sets out cooperation obligations for contact points designated by the Member States. The contact points are required to communicate using the most appropriate technological facilities available in order to reply as swiftly and efficiently as possible to requests for cooperation.

(3) Under Article 8(3) of Decision 2001/470/EC the Commission is to keep a secure, limited-access electronic register, based on the information supplied by the contact points. IMI allows to fulfil that obligation by enabling competent authorities to process requests for cooperation and replies. Such requests should concern access to foreign law and Union instruments relating to cooperation in civil and commercial matters relating to taking of evidence and service of documents.

(4) IMI could be an effective tool in implementing provisions on cooperation set out in Decision 2001/470/EC. It is therefore necessary to carry out a pilot project referred to in Article 4 of Regulation (EU) No 1024/2012.

(5) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark did not take part in the adoption of Decision 2001/470/EC and is not bound by it or subject to its application. For this reason, the term Member State should be understood as all Member States except Denmark.

(6) In accordance with Article 4(2) of Regulation (EU) No 1024/2012 the Commission is to submit an evaluation of the outcome of the pilot project to the European Parliament and the Council. It is appropriate to provide for a date by which such evaluation should be submitted.

(7) The information on the statistics relating to the cooperation requests and replies, provided by the Commission in accordance with Article 8(4) of Decision 2001/470/EC, should cover the use of IMI in the pilot project.

(8) The measures provided for in this Decision are in accordance with the opinion of the Committee established by Article 24 of Regulation (EU) No 1024/2012,

([1]) OJ L 316, 14.11.2012, p. 1.
([2]) Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).

HAS ADOPTED THIS DECISION:

Article 1

The pilot project

Article 5(2)(b) to (e) and Article 8 of Decision 2001/470/EC shall be subject to a pilot project to assess whether the Internal Market Information System ('IMI') would be an effective tool to implement administrative cooperation provisions set out in those articles.

Article 2

Competent authorities

For the purposes of the pilot project, the contact points referred to in Article 2(1)(a) of Decision 2001/470/EC shall be considered as competent authorities.

For the purposes of this Decision, the term 'Member State' shall mean all Member States with the exception of Denmark.

Article 3

Administrative cooperation between competent authorities

For the purposes of cooperation detailed in Article 5(2)(b) to (e) and Article 8 of Decision 2001/470/EC, IMI shall provide the following basic technical functionality:

(a) sending request for information needed for sound cooperation;

(b) responding to requests;

(c) facilitating the coordination of the processing of requests for cooperation in the relevant Member State.

Article 4

Role of the European Judicial Network in civil and commercial matters

The Commission shall consult the European Judicial Network on the following:

(a) the Union instruments relating to cooperation in civil and commercial matters, regarding which information is exchanged in the pilot project;

(b) the structure and categories of data to be exchanged in the pilot project;

(c) the forms to be implemented in IMI for the requests for information and the corresponding replies;

(d) the evaluation of the pilot project prior to its submission to the European Parliament and the Council.

Article 5

Sharing of statistics

The Commission shall provide to the European Judicial Network statistics and information on the usage of IMI and the functioning of the pilot project for the purposes of this Decision.

Article 6

Evaluation

The evaluation of the outcome of the pilot project referred to in Article 4(2) of Regulation (EU) No 1024/2012 shall be submitted to the European Parliament and the Council by 30 June 2023.

Article 7

Entry into force

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 22 July 2019.

For the Commission

The President

Jean-Claude JUNCKER

COMMISSION IMPLEMENTING DECISION (EU) 2019/1254

of 22 July 2019

on harmonised standards on the safety of toys drafted in support of Directive 2009/48/EC of the European Parliament and of the Council

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council ([1]), and in particular Article 10(6) thereof,

Whereas:

(1) In accordance with Article 13 of Directive 2009/48/EC of the European Parliament and of the Council ([2]), toys which are in conformity with harmonised standards or parts thereof, the references of which have been published in the *Official Journal of the European Union*, are to be presumed to be in conformity with the requirements covered by those standards or parts thereof set out in Article 10 and Annex II to that Directive.

(2) By letter M/445 of 9 July 2009 the Commission made a request to the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (Cenelec) for the drafting of new and the revision of existing harmonised standards in support of Directive 2009/48/EC. Directive 2009/48/EC lays down, in point 11 of Part I of Annex II thereto, specific safety requirements for activity toys.

(3) Trampolines are toys for domestic use in which the support structure remains stationary while the activity is taking place and which are primarily intended for children to perform the activity of jumping. Therefore, they are activity toys within the meaning of point (21) of Article 3 of Directive 2009/48/EC.

(4) On the basis of the request M/445 of 9 July 2009, CEN revised harmonised standard EN 71-14:2014+A1:2017 on trampolines for domestic use, the reference to which has been published in the *Official Journal of the European Union* ([3]), in order to also ensure the safety of in-ground ('buried') trampolines that are increasingly being placed on the market. This resulted in the adoption of harmonised standard EN 71-14:2018 on trampolines for domestic use.

(5) The Commission together with CEN has assessed whether harmonised standard EN 71-14:2018 on trampolines for domestic use drafted by CEN complies with the request M/445 of 9 July 2009.

(6) Harmonised standard EN 71-14:2018 satisfies the requirements which it aims to cover and which are set out in Directive 2009/48/EC. It is therefore appropriate to publish the reference of that standard in the *Official Journal of the European Union*.

(7) Harmonised standard EN 71-14:2018 replaces harmonised standard EN 71-14:2014+A1:2017. It is therefore necessary to withdraw the reference to that standard from the *Official Journal of the European Union*. In order to afford toy manufacturers sufficient time to adapt their products to the revised specifications in harmonised standard EN 71-14:2018, it is necessary to defer the withdrawal of the reference to harmonised standard EN 71-14:2014+A1:2017.

(8) Compliance with a harmonised standard confers a presumption of conformity with the corresponding essential requirements set out in Union harmonisation legislation from the date of publication of the reference of such standard in the *Official Journal of the European Union*. This Decision should therefore enter into force on the date of its publication,

([1]) OJ L 316, 14.11.2012, p. 12.
([2]) Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1).
([3]) OJ C 282, 10.8.2018, p. 3.

HAS ADOPTED THIS DECISION:

Article 1

The reference to the harmonised standard on the safety of toys drafted in support of Directive 2009/48/EC, listed in Annex I to this Decision, is hereby published in the *Official Journal of the European Union*.

Article 2

The reference to the harmonised standard on the safety of toys drafted in support of Directive 2009/48/EC, listed in Annex II to this Decision, is hereby withdrawn from the *Official Journal of the European Union* as from the date set out in that Annex.

Article 3

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, 22 July 2019.

For the Commission

The President

Jean-Claude JUNCKER

ANNEX I

No	Reference of the standard
1.	EN 71-14:2018 Safety of toys — Part 14: Trampolines for domestic use

ANNEX II

No	Reference of the standard	Date of withdrawal
1.	EN 71-14:2014+A1:2017 Safety of toys — Part 14: Trampolines for domestic use	22 January 2020

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