European Commission
Directorate-General for Competition
State Aid Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Brussels, August 5, 2016

By Fax: + 32 22961242
By Email: stateaidgreffe@ec.europa.eu

Re: State Aid SA. 38945 (2015/C) (ex 2015/NN) – Alleged aid to McDonald's
Comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union

Dear Madam/Dear Sir,

On behalf of the international trade union coalition representing 32 million workers in Europe, the US, Canada and Puerto-Rico, we wish to express our strong support for the launch of the investigation.

By this letter, we respectfully submit to you our comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") in the case relating to an alleged aid to McDonald's registered under the references State Aid SA. 38945 (2015/C) (ex 2015/NN).

Should you have any questions or comments regarding the broader policy implications around tax and state aid raised in this response, please do not hesitate to get in touch.

1. BACKGROUND

(1) McDonald's is the world's second-largest private sector employer, the largest fast food company, the largest franchisor, the largest retail property owner and one of the largest buyers of agricultural staples like potatoes and beef. The company's business practices touch every corner of the world and reverberate throughout the global economy.

(2) McDonald's track record of low-wage jobs, tax avoidance and conflicts with its workers has caused a unique coalition of trade unions from both the public and private sectors as well as civil society groups to join efforts to hold the company accountable for its practices across the world.

(3) On 24 February 2015, the European and American trade union federations EPSU, EFFAT and SEIU ("the Coalition")[1] joined by the anti-poverty campaign group War on Want released the "Unhappy Meal" report which highlights how McDonald's through a Luxembourg based structure which employs 13 people registered a cumulative revenue of 3.7 billion Euro between 2009-2013, on which it reported only 16 million Euro in tax.[2] One of its tentative conclusions is that a possible ruling between the company and the Luxembourg tax administration could explain the very low amount of corporate income tax paid by the company. This European-focused report was supplemented by the "Golden Dodges" report that was released on 19 May 2015 by IUF, PSI and SEIU. This report revealed how McDonald's is using aggressive strategies to avoid paying tax in some of its largest markets, not only in Europe, but also in the USA and Australia.[3]

(4) McDonald's practices aimed at avoiding tax are coupled with low working conditions standards in most countries around the world: in this respect, the "McJobs" report released by EFFAT, IUF and SEIU on 28 May 2015 underlines McDonalds' global employment practices and the strategies that make the iconic golden arches multinational a symbol of a global race to the bottom on taxes and wages.[4]

(5) McDonald's practices are also continuously denounced at country levels: the last International Mobilisation Day called by unions on 14 April 2016 gathered workers denouncing the company's tax practices and precarious working conditions in more than 300 cities and 40 countries around the world.[5] In addition, three trade unions located respectively in France (CGT), Belgium (ABVV) and the UK (BFAWU) addressed petitions denouncing practices to discourage union representation (France), the use of zero hour contracts (UK) and the introduction of "flexi-jobs" (Belgium) to the PETI Committee of the European Parliament on 11 January 2016.[6] The social consequences of McDonald's tax practices are also questioned before French courts.[7]

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[1] EPSU is the European Federation of Public Service Unions. It is the largest federation of the ETUC and comprises 8 million public service workers from over 265 trade unions; EPSU organises workers in the energy, water and waste sectors, health and social services and local, regional and central government, in all European countries including the EU's Eastern Neighbourhood. EPSU is the recognized regional organization of Public Services International (PSI).
EFFAT is the European Federation of Trade Unions in the Food, Agriculture and Tourism sectors. As a European Trade Union Federation representing 120 national trade unions from 35 European countries, EFFAT defends the interests of more than 22 million workers towards the European Institutions, European employers' associations and transnational companies. EFFAT is a member of the ETUC and the European regional organisation of the IUF.
The Service Employees International Union (SEIU) unites 2 million diverse members in the United States, Canada and Puerto Rico. SEIU members working in the healthcare industry, public sector and in property services believe in the power of joining together on the job to win higher wages, benefits and create better communities, while fighting for a more just society and an economy that works for all of us, not just corporations and the wealthy.
[2] http://www.notaxfraud.eu/sites/default/files/dw/FINAL%20REPORT.pdf.
[3] http://www.world-psi.org/sites/default/files/documents/research/en_golden-dodges-final.pdf.
[4] http://www.effat.org/sites/default/files/news/13957/mcjobs_report.pdf
[5] http://fightfor15.org/april-14-our-biggest-ever-global-strikes-and-protests/.
[6] http://lexpansion.lexpress.fr/actualites/1/actualite-economique/mcdonald-s-appel-a-la-mobilisation-mondiale-de-syndicats-francais-et-americains_1753760.html.
[7] A criminal investigation for "tax fraud laundering" (among other grounds) is in progress in France further to a complaint filed by one of the French trade unions representing McDonald's employees blaming the company for not paying employee profit-sharing in some corporate-owned restaurants resulting in particular from the level of royalties and payments directed to the Luxembourg-based company McD Europe Franchising Sàrl ("McD Europe") which is the beneficiary of the tax rulings currently questioned by the present investigation of the European Commission: see http://www.liberation.fr/france/2015/12/18/eva-joly-cette-plainte-vise-a-mettre-fin-a-l-impunite-fiscale-des-multinationales_1421839; http://www.lesechos.fr/industrie-services/conso-distribution/021968777533-fraude-fiscale-perquisition-chez-mcdonalds-2001531.php#.

(6) The release of the "Unhappy Meal" report led McDonald's being asked to testify twice before the European Parliament's Special Committee of enquiry on tax rulings in November 2015 and March 2016. Despite the will of Members of the European Parliament to understand the types of mechanisms companies set up to limit their tax liabilities, McDonald's answers remained evasive especially regarding the effective tax rate of McD Europe Franchising S.à.r.l. in Luxembourg, the way it passes royalties through multiple branches or subsidiaries and the existence of subsidiaries in tax havens.[8] The coalition also held numerous meetings with members of the European and national parliaments, notably from France, who expressed a strong interest in the McDonald's case.

(7) McDonald's tax arrangements have attracted the attention of several tax and judicial authorities across the world including (but not limited to) in France, Italy, Spain, Brazil and Australia.[9] While these administrative and judicial authorities have jurisdiction to examine McDonald's tax practices under their national laws, the Coalition applauded the European Commission's decision on 3 December 2015 to formally open an investigation on the state aid ground based on the preliminary view that the Luxembourg tax administration granted a selective advantage to McDonald's over competitors which is not compatible with the internal market.

(8) The investigation launched by the European Commission discloses how McDonald's tax advisor requested an initial tax ruling and a revised tax ruling in 2009, the latter having the effect to allow McDonald's double non-taxation of revenues both in Luxembourg and in the United States. In this respect, the European Commission's preliminary view is that *"the tax ruling issued by the Luxembourg tax administration on 17 September 2009 in favour of McD Europe Franchising S.à.r.l. grants State aid to the latter and to the McDonald's Corporation as a whole within the meaning of Article 107(1) TFEU"* and that it *"has doubts as to the compatibility of that State aid with the internal market"*.[10]

(9) In this context, the Coalition wishes to provide the European Commission with the following observations.

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[8] http://www.europarl.europa.eu/news/en/news-room/20160314IPR19295/Google-Apple-IKEA-and-McDonalds-probed-by-Tax-Rulings-II-Committee. See EPSU's press releases: http://www.epsu.org/article/mcdonalds-inability-give-straight-answer-tax-shows-need-further-investigation-eu and http://www.epsu.org/article/meps-get-nothing-same-old-tune-mcdonalds-its-tax-affairs. In particular, when asked about their presence in entities in the Commission 'tax haven' list, McDonald's initially failed to report that the company has subsidiaries in Bermuda, although Bermuda is on the said list.

[9] In France, the newspaper *L'Express* revealed that McDonald's France is subjected to tax adjustment by the French administration for an alleged €300 million: http://lexpansion.lexpress.fr/entreprises/menu-big-fisc-pour-mcdonald-s_1784249.html. In Italy, three consumer associations (CODACONS, MOVIMENTO DIFESA DEL CITTADINO and CITTADINANZATTIVA) filed a complaint with the Italian tax authorities stressing the consequences of McDonald's 2009 change in corporate structure and royalty flows for Italian public finances and taxpayers : see http://www.repubblica.it/economia/2015/10/01/news/esposto_contro_mcdonald_s_sulla_possibile_evasione_fiscale-124010471/. In Spain, El Pais reported a current tax investigation: http://economia.elpais.com/economia/2016/02/20/actualidad/1455994666_356182.html. In August 2015 in Brazil, the General Workers' Union (UGT) filed a complaint asking Brazil's public prosecution service to open an inquiry into allegations of tax dodging, unfair competition, and violations of franchise laws by McDonald's. The tax complaint was filed just days before McDonald's workers and elected officials from around the world testified at an unprecedented global hearing before the Brazilian Federal Senate on the negative social impact of McDonald's business model worldwide. In March 2016, a federal prosecutor opened a criminal investigation into McDonald's and its Latin American master franchise owner, Arcos Dorados Holdings: http://www.nytimes.com/2016/03/04/business/international/brazil-opens-investigation-into-mcdonalds.html?_r=0. In Australia, the press reported a tax adjustment of $77.8 million in 2016: http://www.smh.com.au/business/the-economy/mcdonalds-halves-its-tax-bill-back-pays-78m-20160202-gmjgnk.html.

[10] Invitation to submit comments, section "Decision", O.J.E.U., 15.7.2016, C 258/47

2. COMMENTS ON THE CASE

(10) As a preliminary remark concerning McDonald's footprint in Europe and the consequences of any State aid granted to the company, McDonald's statements clearly establish that the company is in a dominant position in Europe: McDonald's claims to sell more fast food in Europe than its next nine competitors combined.[11] Therefore, as raised by the European Commission, *"any aid in its favour distorts or threatens to distort competition and has the potential to affect intra-Union trade"*.[12]

2.1. McDonald's purpose in changing its corporate structure

2.1.1. Simultaneity of change in corporate structure and requests for tax rulings

(11) Before 2009, McDonald's was directly licensing its "McDonald's System" (trademark, know-how…) from its U.S. based headquarters registered in Delaware (McDonald's Corporation) to subsidiaries (or branches) in European States acting as franchisors.[13]

(12) In late 2008/early 2009, McDonald's decided:

a) to use an existing Luxembourg company called McDonald's Immobilier GmbH, rename it into McD Europe Franchising Sàrl ("McD Europe") and amend its corporate purpose so as to include the acquisition, holding, management, sale, license … of intellectual property;
b) to establish in January 2009 a US branch with their offices located at the same address as McDonald's Corporation and a Swiss branch in Switzerland;[14]
c) to move its European headquarters located in the United Kingdom to the Swiss branch of McD Europe.[15]

(13) McDonald's sent its initial request for a ruling on 11 February 2009,[16] that is immediately after the creation of the US branch[17] and the Swiss branch.[18] Additionally, McDonald's promptness to request a revised tax ruling further to the initial requirement from the Luxembourg tax administration that McDonald's submit proof on a yearly basis that its profits are subject to tax in Switzerland and the United States respectively evidences that McDonald's initial intention was obviously to achieve double non-taxation of its profits both in Luxembourg and in the United States.

(14) These circumstances show that McDonald's change in corporate structure appears to be tax-related and aimed at achieving double non-taxation, thereby gaining a competitive advantage over its competitors.[19]

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[11] McDonald's Europe President Douglas Goare, McDonald's Corporation Europe & APMEA Investor Meeting, May 16, 2014.
[12] Invitation to submit comments, §64, O.J.E.U., 15.7.2016, C 258/42.
[13] Invitation to submit comments, §29, O.J.E.U., 15.7.2016, C 258/35.
[14] McD Europe Franchising Sàrl, Annual accounts, 2013, Note 1.
[15] Julia Kollewe, "McDonald's to move European head office to Switzerland," Guardian, July 13, 2009: http://www.theguardian.com/business/2009/jul/13/mcdonalds-headquarters-move-geneva; Amy Wilson, "McDonald's quits London for Geneva over tax concerns," Telegraph, July 11, 2009: http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/5804940/McDonalds-quits-London-for-Geneva-over-tax-concerns.html.
[16] Invitation to submit comments, §27, O.J.E.U., 15.7.2016, C 258/35.
[17] The US branch was established on 2 January 2009: McD Europe Franchising Sàrl, Annual accounts, 2013, Note 1.
[18] The Swiss branch was established on 29 January 2009: McD Europe Franchising Sàrl, Annual accounts, 2013, Note 1.
[19] This tax-related purpose is reinforced by the fact that McDonald's change of European structure occurred approximately one year after Luxembourg introduced an intellectual property box tax feature thereby reducing the normal corporate tax

2.1.2. Artificial character of the change in corporate structure

(15) In a nutshell, it arises from the European Commission's letter sent to Luxembourg that McD Europe is structured as follows:

a) McD Europe *"acquired beneficial ownership of a number of franchise rights intangibles"* from McDonald's Corporation and MIPCO.[20]

b) McD Europe allocated the franchise rights and obligations to its US Branch: however, the US Branch (located at the same address as McDonald's Corporation headquarters) does not employ any direct staff, but is controlled by a "branch manager" who is "provided by McDonald's Corporation on a part-time basis".[21] In other words, this US Branch has very low, if any, substance in terms of staff and is actually controlled by McDonald's Corporation.

c) Within McD Europe, McDonald's set up an agreement between the US Branch and the Swiss Branch whereby the US Branch allows the Swiss Branch to licence the franchise rights to franchisors in various European countries in return of a service fee.[22] Royalties are then paid to the Swiss Branch which then passes them to the US Branch.
It thus comes out that the franchise rights and obligations, as well as the royalties resulting from licensing the said rights, are not managed or otherwise dealt with by the Luxembourg head office.

d) The head office in Luxembourg is said to *"provide through its managers' meetings general and administrative services, setting up of business strategies and other support services"*.[23]
However, it is doubtful that the Luxembourg head office sets up business strategies, as the Swiss Branch appears to concentrate McDonald's management for Europe.[24] The Luxembourg office, despite being the head office and the place where the company is incorporated, then appears to have a very limited role, if any, in the company's structure.

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rate on most royalties from 29.2 percent to 5.8 percent of taxable income. Although reliance on this tax feature does not appear to be at stake in the investigation of the Commission, the existence of a low-rate IP regime may have acted as a back option in case the treaty loophole was not upheld. Indeed, the UK House of Commons report found that the big four accountancy firms regularly sell schemes that they consider to have a 50% chance of being upheld in court (http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/870/870.pdf p. 5). However, McD Europe Franchising Sàrl's corporate purpose and financial statements do not refer to any research and development: therefore, McDonald's should not be given the possibility to rely on such tax regime: http://europa.eu/rapid/press-release_IP-14-309_en.htm.

[20] Invitation to submit comments, §29, O.J.E.U., 15.7.2016, C 258/35.

[21] Invitation to submit comments, §29 and 31, O.J.E.U., 15.7.2016, C 258/35 and C 258/36.

[22] Invitation to submit comments, §32, O.J.E.U., 15.7.2016, C 258/36.

[23] Invitation to submit comments, §34, O.J.E.U., 15.7.2016, C 258/35.

[24] In 2009, the press reported that McDonald's moved its headquarters from the UK to Switzerland: see footnote 15. Additionally, the Swiss Companies Registry lists M. Douglas Goare and M. Michael Flores as the Swiss Branch's legal representatives (http://ge.ch/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-660-0237009-6&ofrcLanguage=2). M. Douglas Goare is McDonald's President for Europe (http://www.mcdpressoffice.eu/downloads/bio/Douglas_Goare.pdf).

(16) It comes out from McD Europe's structure, whose primary purpose is to manage franchise rights and the royalties paid in return[25], that the Luxembourg office does not manage the franchise rights (they are allocated to the US Branch), does not manage the royalties (they are collected by the Swiss Branch and then directed to the US Branch) and does not seem to manage the company (the company's management is located in the Swiss Branch).

(17) Additionally, the US Branch appears to have very low, if any, substance in terms of staff and is actually controlled by McDonald's Corporation.

(18) Under these circumstances, it may be reasonably considered that McD Europe's structure is artificial and mainly or solely aimed at requesting the benefit of the Luxembourg-US double tax treaty ("the Luxembourg-US DTT") to achieve double non-taxation of the royalties sent to the US Branch of the company.

(19) The artificial character of McD Europe's implementation in Luxembourg may be one additional element to be considered in the selective character of the aid issued by Luxembourg. Indeed, unless Luxembourg allows all McDonald's competitors to rely on artificial structures, then the aid issued to McDonald's should be considered as necessarily providing the company with a competitive advantage.

2.2. Non-compliance of double non-taxation with the letter and spirit of double tax treaties

(20) McDonald's case illustrates the way multinationals look for potential loopholes in tax legislations to reach double non-taxation of substantial revenues and therefore avoid paying a fair share of tax.

(21) In this respect, interpretations of double tax treaties aimed at reaching double non-taxation should not be considered as complying with the letter and spirit of double tax treaties, as raised by the European Commission with regards to the Luxembourg-US DTT[26]

(22) This is also the position adopted by the OECD BEPS Action Plan.[27] Additionally, case-law from some national courts also held that an income should be taxable in one of the contracting States in order to fall within the scope of double tax treaties.[28]

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[25] Indeed, McD Europe's *"net turnover consists of royalties received or receivable under Master Franchise Agreements in connection with the sublease of rights to use the McDonald's restaurant system and related intellectual property in connection with McDonald's franchised restaurants in Europe"*: McD Europe Franchising Sàrl, Annual accounts 2013, note 11.

[26] Invitation to submit comments, §86, O.J.E.U., 15.7.2016, C 258/46.

[27] See OECD (2015), Explanatory Statement of 2015, p. 22: *"A key focus of this work is to eliminate double non-taxation"*; see also Action 2 aiming at "*Neutralizing the Effects of Hybrid Mismatch Arrangements"* in Annex A - Overview of BEPS Package – 15, OECD (2015), Explanatory Statement of 2015, p. 15, which provides that *"A common approach which will facilitate the convergence of national practices through domestic and treaty rules to neutralize such arrangements. This will help to* ***prevent double non-taxation*** *by eliminating the tax benefits of mismatches* ***and to put an end to*** *costly multiple deductions for a single expense,* ***deductions in one country without corresponding taxation in another,*** *and the generation of multiple foreign tax credits for one amount of foreign tax paid (…)."* See also Annex A - Overview of BEPS Package – 15, OECD (2015), Explanatory Statement of 2015, p.16-17: *"*[…] *More targeted rules have been designed to address other forms of treaty abuse. Other changes to the OECD Model Tax Convention have been agreed to ensure that treaties do not inadvertently prevent the application of domestic anti-abuse rules. A clarification that* ***tax treaties are not intended to be used to generate double non-taxation*** *is provided through a reformulation of the title and preamble of the Model Tax Convention."*

[28] The French Conseil d'Etat recently held that "*a person who is tax-exempted in a contracting State because of his status or of his activity cannot be considered as subjected to this tax according to [relevant provisions] of this treaty, neither, consequently, as a resident of this State for the application of this treaty.*" In these cases, the Conseil d'Etat was referring to the provisions of the France-Germany (case Conseil d'Etat 9 Nov. 2015 No.370054 LHV) and France-Spain (case Conseil d'Etat 9 Nov. 2015 No.371132 Santander) double tax treaties which include similar provisions to the Luxembourg-US DTT.

(23) In this respect, the Coalition considers that other investigations regarding the way tax administrations apply double tax treaties between the Unites States and other Member States should be carried out to prevent any other double tax treaty to be used by companies to achieve double non-taxation.

2.3. Reinforcing tools against tax avoidance

(24) While the European Commission's current investigation does not aim at examining the case under national tax grounds, it is worth noting that McDonald's use of the Luxembourg company for a main, if not exclusive, tax purpose (as underlined here above) raises issues concerning the application of General Anti-Abuse Rules under national laws (including in Luxembourg). Member States that have anti-avoidance or anti-abuse rules should investigate McDonald's for aggressively optimising its corporate structure to avoid paying taxes in those countries. In this regard, the application of joint tax audits of cross-border companies, as currently discussed in the EC Platform for Tax Good Governance, to McDonald's should be seriously considered by Member States for the benefit of national tax revenues but also for the EC probe itself. The Coalition also supports the call made by the European Parliament, in the first TAXE report, for the Commission to assess the possibility of modifying State aid rules so that the countries who lost out on the taxes receive any money repaid, where State aid has been found to have taken place, as opposed to the Member State that granted the advantage.[29]

(25) Moreover, McDonald's case exemplifies the necessity for tax administrations to exchange data about the tax treatments granted to multinationals: in McDonald's case, it appears likely that neither European tax administrations, nor the US Internal Revenue Service, knew about the two Luxembourg tax rulings resulting in double non-taxation to McDonald's benefit (despite article 28 of the Luxembourg-US DTT providing for an exchange of information).

(26) The fact that some existing anti-avoidance tools do not seem to have been used to the full is yet another reason why McDonald's case also exemplifies the necessity of a full global public country-by-country reporting ("CBCR"). Public CBCR is a key transparency tool for administrations, trade unions, NGOs, investors and the wider public to assess corporate tax liabilities and, to make sure that the information is actually being used. For the trade unions, it is also critical to implementing workers' fundamental rights to information and consultation on a company's overall economic situation as provided for by the EU directive 2002/14/CE. In times where multinationals rely on communication about their corporate social responsibility on the one hand, multinationals should not be left in a position where they can hide that they avoid paying their fair share of tax by relying on double non-taxation mechanisms on the other hand. In this respect, to be meaningful and effective the scope of the EC proposed directive on public CBCR will need to be much broader.[30]

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Companies deliberately achieving double non-taxation through tax arrangements not only harm competition as raised by the European Commission in the current investigation, but society as a whole.

[29] European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI)), article 134.
[30] http://www.epsu.org/article/trade-unions-ngos-meet-achieve-real-public-country-country-reporting-multinationals

This is the case of McDonald's: the current investigation reveals how the company seeks potential loopholes in double tax treaties and in definitions of concepts (such as the definition of permanent establishments under various laws) to achieve double non-taxation.

This is obviously not what workers, consumers, competitors and States should expect from a company that meanwhile promotes its so-called corporate social responsibility.

In this respect, the Coalition gives its support to the Commission's conclusion that the Luxembourg tax administration conferred a selective advantage to McDonald's further to the request for tax rulings sent by McDonald's tax advisor and considers that all appropriate measures including full recovery of the aid should be taken. This is exactly the type of measures that will contribute to reconnect the EU to citizens' real concerns as according to the latest Eurobarometer 75% of Europeans expect more EU actions against tax dodging.[31]

Yours faithfully,

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EPSU General Secretary	EFFAT General Secretary	SEIU Executive Vice President

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[31] http://www.europarl.europa.eu/external/html/eurobarometer-062016/default_en.htm#taxfraud