



EU Direct Tax Newsalert

European Commission opens in-depth State aid investigation into the Netherlands' tax treatment of Nike

Introduction

On 10 January 2019, the European Commission (EC) announced in a press release that it has opened a formal State investigation into the tax treatment in the Netherlands of two Dutch affiliates of Nike. The text of the opening decision is not yet available. According to the [press release](#), the EC's formal investigation focuses on five tax rulings which were granted to Nike's affiliates from 2006 to 2015, two of which are currently still in force.

Facts outlined in EC's press release

Nike is a US based company involved globally in the design, marketing and manufacturing of footwear, clothing, equipment and accessories, in particular in the sports area. The EC's formal investigation focuses specifically on the tax treatment of two Dutch Nike group companies namely Nike European Operations Netherlands BV and Converse Netherlands BV. According to the EC, these operating group companies, which are responsible for developing, marketing and recording all Nike sales in the EMEA region, acquired a license to use intellectual property (IP) rights from two tax transparent Dutch entities in return for tax-deductible royalty payments.

The EC states that the five tax rulings granted to Nike by the Dutch tax authorities endorsed a method of calculating the royalty payments made from Nike European Operations Netherlands BV and Converse Netherlands BV to the two Dutch tax transparent entities with the result that these companies are taxed on a limited operating margin based on sales.

EC's preliminary assessment

According to the EC's preliminary assessment, the method endorsed in the tax rulings would not be in line with the arm's length principle as the royalty payments would exceed what independent companies would have agreed. Thus, the EC questioned whether the royalty payments reflect economic reality. The EC assessed the economic activity taking place in each of these

companies and concluded that Nike European Operations Netherlands BV and Converse Netherlands BV employ more than 1,000 individuals and are involved in the development, management and exploitation of the IP, whereas the royalty recipients do not carry out any economic activity and have no employees. The EC points out that its investigation will have to determine whether the amount of royalty payments endorsed in these rulings has unduly led to a reduction of the tax base in the Netherlands thereby granting Nike with a selective advantage not available to stand-alone entities or other group companies.

Takeaway

The EC's press release reiterates that tax rulings, which confirm the tax treatment of intra-group transactions applying the relevant national legislation, are not problematic from a State aid perspective unless they confer a selective advantage to certain companies. In the press release, the EC underlines the efforts made by the Netherlands in reforming its corporate tax system. The EC notes in this respect the tightened requirements for tax rulings in respect of international structures, the increased monitoring and management of rulings and the plans to introduce a withholding tax on interest and royalty payments made to companies in tax havens.

This press release is the latest in a number of related high profile cases concerning the EC's approach to State aid, in particular in relation to transfer pricing practices documented in tax rulings. It should be noted that the opening of an in-depth investigation does not prejudice its outcome. In order to properly assess the EC's arguments and their potential implications, it remains to be seen what the detailed EC decision will contain. Finally, it should be noted that most EC decisions in the area of fiscal State aid are currently under appeal before the General Court of the EU.

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