

## UPDATES & OTHER TIDBITS

### Authors

Neha Rastogi  
Nina Krauthamer

### Tags

China  
Foreign Investment  
Intellectual Property  
Netherlands  
State Aid

### NEW FOREIGN INVESTMENT LAW COULD EASE U.S.-CHINA TRADE WAR

In an attempt to resolve the long-standing trade dispute between China and the U.S., China released a draft of its new foreign investment law. The changes are intended to replace the current law, which forces foreign investors to transfer their intellectual property (“I.P.”) and technology in return for access to China’s vast market. The Chinese parliament is expected to pass the law in March.

China can take punitive measures if it encounters discriminatory treatment on investment overseas, and foreign investment that could have an impact on national security would be subject to increased scrutiny.

The current Chinese foreign investment law requires foreign companies proposing to produce and sell goods in China to enter into joint ventures and disclose their I.P. and technology to Chinese partners. The U.S., on the other hand, does not impose any such reciprocal requirements. As a counter measure, the U.S. imposed a 10% tariff on \$200 billion worth of Chinese imports in the last quarter of 2018. The U.S. had threatened to raise the tariff to 25% if the countries did not reach an agreement by March 1, 2019. However the U.S. announced that in view of the recent substantial progress made by the countries to end the trade war, the U.S. will delay the imposition of the increased tariffs.

### EUROPEAN COMMISSION TO INVESTIGATE DUTCH TAX RULINGS FOR STATE AID VIOLATION

The European Commission (“E.C.”) announced in early January that it will be investigating the tax rulings issued by Dutch tax authorities to two Nike group companies based in the Netherlands, Nike European Operations Netherlands BV (“Nike BV”) and Converse Netherlands BV (“Converse BV”), to determine whether the rulings granted unfair advantages to Nike and Converse over other similar businesses and therefore violated E.U. State Aid rules.

Investigations into unfair advantages given to Starbucks have already been completed by the E.C. In 2015, the E.C. ruled that the Netherlands gave tax advantages to Starbucks, leading to a recovery of €25.7 million (\$30 million). The E.C. is also looking into tax agreements between the Dutch government and Ikea.

Nike BV and Converse BV are engaged in the business of developing, marketing, and recording the sales of Nike and Converse products in Europe, the Middle East, and Africa. Nike BV and Converse BV licensed product-related intellectual property

from two other Nike group companies to facilitate their businesses in the Middle East and Africa region. The recipients of the royalty income are transparent entities in the Netherlands and therefore do not pay any Dutch taxes. Nike BV and Converse BV, on the other hand, claim substantial deductions for royalty payments.

The five rulings (two of which are still in effect) issued by the Dutch tax authorities from 2006 to 2015 endorse a method to calculate the royalty payments. As a result of the rulings, Nike BV and Converse BV are only taxed in the Netherlands on a limited operating margin based on sales. The E.C. is concerned that the method of calculating the royalty does not reflect economic reality. The basis of this observation is that Nike BV and Converse BV have more than 1,000 employees and are actively engaged in business activities, while the two Nike group companies have no employees and do not carry out any economic activity.

The E.C. intends to determine whether (i) the Dutch tax rulings supporting these payments have unjustifiably reduced the Dutch taxable income of Nike BV and Converse BV and (ii) selective advantage has been granted to the Nike group by allowing it to pay less tax than similarly placed businesses whose transactions are priced at market rates. In the event that these criteria apply, it would amount to violation of E.U. State Aid rules.



*Disclaimer: This article has been prepared for informational purposes only and is not intended to constitute advertising or solicitation and should not be relied upon, used, or taken as legal advice. Reading these materials does not create an attorney-client relationship.*