



Press and Information

General Court of the European Union

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Judgment in Cases T-760/15 Netherlands v Commission
and T-636/16 Starbucks and Starbucks Manufacturing Emea v Commission

The General Court annuls the Commission's decision on the aid measure implemented by the Netherlands in favour of Starbucks

The Commission was unable to demonstrate the existence of an advantage in favour of Starbucks

In 2008, the Netherlands tax authorities concluded an advance pricing arrangement (APA) with Starbucks Manufacturing EMEA BV (SMBV), part of the Starbucks group, which, inter alia, roasts coffees. The objective of that arrangement was to determine SMBV's remuneration for its production and distribution activities within the group. Thereafter, SMBV's remuneration served to determine annually its taxable profit on the basis of Netherlands corporate income tax. In addition, the APA endorsed the amount of the royalty paid by SMBV to Alki, another entity of the same group, for the use of Starbucks' roasting IP. More specifically, the APA provided that the amount of the royalty to be paid to Alki corresponded to SMBV's residual profit. The amount was determined by deducting SMBV's remuneration, calculated in accordance with the APA, from SMBV's operating profit.

In 2015, the Commission found that the APA constituted aid incompatible with the internal market¹ and ordered the recovery of that aid.

The Netherlands and Starbucks brought an action before the General Court for annulment of the Commission's decision. They principally dispute the finding that the APA conferred a selective advantage on SMBV.

More specifically, they criticise the Commission for (1) having used an erroneous reference system for the examination of the selectivity of the APA; (2) having erroneously examined whether there was an advantage in relation to an arm's length principle particular to EU law and thereby violated the Member States' fiscal autonomy; (3) having erroneously considered the choice of the transactional net margin method (TNMM) for determining SMBV's remuneration to constitute an advantage; and (4) having erroneously considered the detailed rules for the application of that method as validated in the APA to confer an advantage on SMBV.

In today's judgment, the General Court annuls the Commission's decision.

First, the Court examined whether, for a finding of an advantage, the Commission was entitled to analyse the tax ruling at issue in the light of the arm's length principle as described by the Commission in the contested decision.

In that regard, the Court notes in particular that, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation and that, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue and under the normal rules of taxation.

The Court goes on to note that the pricing of intra-group transactions is not determined under market conditions. It states that where national tax law does not make a distinction between

¹ Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014 NN) implemented by the Netherlands to Starbucks (OJ 2017 L 83. p. 38).

integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. The Court holds that, in those circumstances, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated company, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions.

The Court makes clear that the arm's length principle as described by the Commission in the contested decision is a tool that allows it to check that intra-group transactions are remunerated as if they had been negotiated between independent companies. Thus, in the light of Netherlands tax law, that tool falls within the exercise of the Commission's powers under Article 107 TFEU. The Commission was therefore, in the present case, in a position to verify whether the pricing for intra-group transactions accepted by the APA corresponds to prices that would have been negotiated under market conditions.

The Court therefore rejects the claim that the Commission erred in identifying an arm's length principle as a criterion for assessing the existence of State aid.

Second, the Court reviewed the merits of the various lines of reasoning set out in the contested decision to demonstrate that, by endorsing a method for determining transfer pricing that did not result in an arm's length outcome, the APA conferred an advantage on SMBV.

The Court began by examining the dispute as to the Commission's principal reasoning. It notes that, in the context of its principal reasoning, the Commission found that the APA had erroneously endorsed the use of the TNMM. The Commission first stated that the transfer pricing report on the basis of which the APA had been concluded did not contain an analysis of the royalty which SMBV paid to Alki or of the price of coffee beans purchased by SMBV from SCTC, another entity of the group. Next, in examining the arm's length nature of the royalty, the Commission applied the comparable uncontrolled price method (CUP method). As a result of that analysis, the Commission considered that the amount of the royalty should have been zero. Last, the Commission considered, on the basis of SCTC's financial data, that SMBV had overpaid for the coffee beans in the period between 2011 and 2014.

The Court holds that mere non-compliance with methodological requirements does not necessarily lead to a reduction of the tax burden and that the Commission would have had to demonstrate that the methodological errors identified in the APA did not allow a reliable approximation of an arm's length outcome to be reached and that they led to a reduction of the tax burden.

As regards the error identified by the Commission in respect of the choice of the TNMM and not of the CUP method, the Court finds that the Commission did not invoke any element to support as such the conclusion that that choice had necessarily led to a result that was too low, without a comparison being carried out with the result that would have been obtained using the CUP method. The Commission therefore wrongly found that the mere choice of the TNMM, in the present case, conferred an advantage on SMBV.

Likewise, the Court states that the mere finding by the Commission that the APA did not analyse the royalty does not suffice to demonstrate that that royalty was not actually in conformity with the arm's length principle.

As regards the amount of the royalty paid by SMBV to Alki, according to an analysis of SMBV's functions in relation to the royalty and an analysis of comparable roasting agreements considered by the Commission in the contested decision, the Court finds that the Commission failed to demonstrate that the level of the royalty should have been zero or that it resulted in an advantage within the meaning of the Treaty.

As regards the price of green coffee beans, the Court notes that the price of those beans was an element of SMBV's costs that was outside the scope of the APA and that, in any event, the Commission's findings did not suffice to demonstrate the existence of an advantage within the meaning of Article 107 TFEU. The Court notes, in particular, that the Commission was not entitled to rely on matters subsequent to the conclusion of the APA.

The Court then examined the dispute as to the Commission's subsidiary reasoning whereby the APA allegedly conferred an advantage on SMBV because the detailed rules for the application of the TNMM, as endorsed by the APA, were erroneous.

It finds that the Commission did not demonstrate that the various errors it identified in the detailed rules for the application of the TNMM conferred an advantage on SMBV, whether as regards the validation by the APA of the identification of SMBV as the tested entity for the purposes of the application of the TNMM, the choice of profit level indicator or the working capital adjustment and the exclusion of the costs of the unaffiliated manufacturing company.

Consequently, according to the Court, **the Commission has not managed to demonstrate the existence of an economic advantage within the meaning of Article 107 TFEU.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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