

Newsalert EU Direct Tax Group

EU Commission final decisions in Starbucks and Fiat State aid cases

EU Direct Tax Group

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On 21 October 2015, the European Commission (EC) announced in a press release the adoption of final decisions in the formal State aid investigations into transfer pricing agreements between a Dutch Starbucks entity, Starbucks Manufacturing BV (SMBV), and the Netherlands, and Fiat Finance and Trade (FFT) and Luxembourg. The EC largely confirms the preliminary conclusions as expressed in the non-confidential versions of both opening decisions which were published on 14 November 2014 (SMBV) and 30 September 2014 (FFT). The EC has now formally decided that in its opinion both companies have benefited from unlawful State aid granted by the Netherlands and Luxembourg, respectively, and it orders full recovery of all the aid. It estimates that the amounts to be recovered are between EUR 20-30 m. for each company. The EC notes however that it considers that it is for the Dutch and Luxembourg tax authorities to establish the exact amounts based on the methodologies set out by the EC.

Background

Both final decisions by the EC in these investigations pertain to the use of tax rulings on the application of transfer pricing rules. In each case, the EC takes the position that the agreements made between the taxpayer and the Member State do not reflect economic reality and set prices that do not reflect market conditions.

The EC concludes that in each case the agreements reflect the application of transfer pricing rules in a way which gives rise to a particular (favourable) tax base.

Key aspects

The EC has focused on a number of aspects of the agreements with SMBV and FFT which it considered to be of key relevance for further analysis, and, now, its final decisions:

- The EC states that the royalty paid by SMBV for coffee roasting know-how in its view cannot be justified as it would not appear to reflect market value. The EC further notes that independent roasters to whom roasting is outsourced would not appear to be required to pay similar royalties.
- The EC questions the price paid by SMBV for the coffee beans and states that in its view the price is inflated. It further notes that such inflated price would appear to reduce the profits generated from the coffee roasting activities to a level that is not sufficient to cover the payment of the know-how royalty.
- In the FFT case, in the view of the EC, the transfer pricing method leads to a capital base lower than

the company's actual capital due to economically unjustified assumptions.

- Furthermore with regard to FFT in the EC's view the remuneration applied to the lowered capital base would not reflect market rates.

We will need to see how these arguments are developed in the detailed final decisions in order to be able to consider them further.

In its press release, the EC states that in the context of these two investigations it has used for the first time the investigative tools granted by Council regulation (EC) 734/2013 which allows the EC to directly ask for information from Member States as well as from the beneficiary of the aid and their competitors.

Transfer pricing and EU Law

As in its preliminary decisions, the EC asserts in its press release on both final decisions that if the method of taxation for intra-group transfers does not 'correspond to market conditions' and leads to a taxable base that is lower than the one which would result from the correct implementation of that principle, it provides a selective advantage to the company concerned.

Next steps

Further litigation in one or both of the cases before the European Courts appears likely and in that case the Court of Justice of the EU will ultimately have the final say on the validity of the EC's decisions, which could take several years.

In the meantime, the EC's final decisions in the remaining two of its four most advanced investigations, into Apple in Ireland and Amazon in Luxembourg, which also involve the use of tax rulings concerning the application of the transfer pricing rules and the arm's length standard, are expected this Autumn as well. The final decision in the ongoing investigation into the Belgian Excess Profit regime is likely to follow soon thereafter.

The non-confidential version of these decisions will be made available under the case numbers SA.38375 (FFT) and SA.38374 (SMBV) in the State aid register on the EC's DG Competition website once any confidentiality issues have been resolved.

The EC's press release notes that the EC continues to investigate the ruling practices of all Member States and EU Competition Commissioner Vestager indicated both in today's press statement on these decisions as well as when recently appearing before the European Parliament that more EC fiscal State aid tax rulings investigations are entirely possible.