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Is the Arm's Length Principle still valid after the Starbucks and Fiat judgments?

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1. Introduction
2. Legal vs. Economic principles in the two cases
3. Background on EU Commission approach to State Aid
 - EU Commission approach on selectivity test.
 - EU Commission Arm's Length Principle approach.
 - EU Commission vs. OECD: Arm's length Principle.
4. Views of the General Court on the EU Commissions authority
 - The Belgian coordination centres judgment.
 - Tentative conclusions on (i) selectivity and (ii) Commission Arm's length Principle.
5. Conclusive remarks
5. Q&A



‘We are doing this because people are angry’

1. Is there a benefit?
2. Is there an intervention by the State or through State resources?
3. Does the intervention give the recipient an advantage on a selective basis?
4. Is competition distorted or potentially distorted?
5. Is there any potential to affect trade between Member States?

Categories of state aid



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- Two categories triggers European Commission's action:
 - Illegal State Aid
 - No notification and selective
 - Unlawful State Aid
 - No notification

What are the main issues

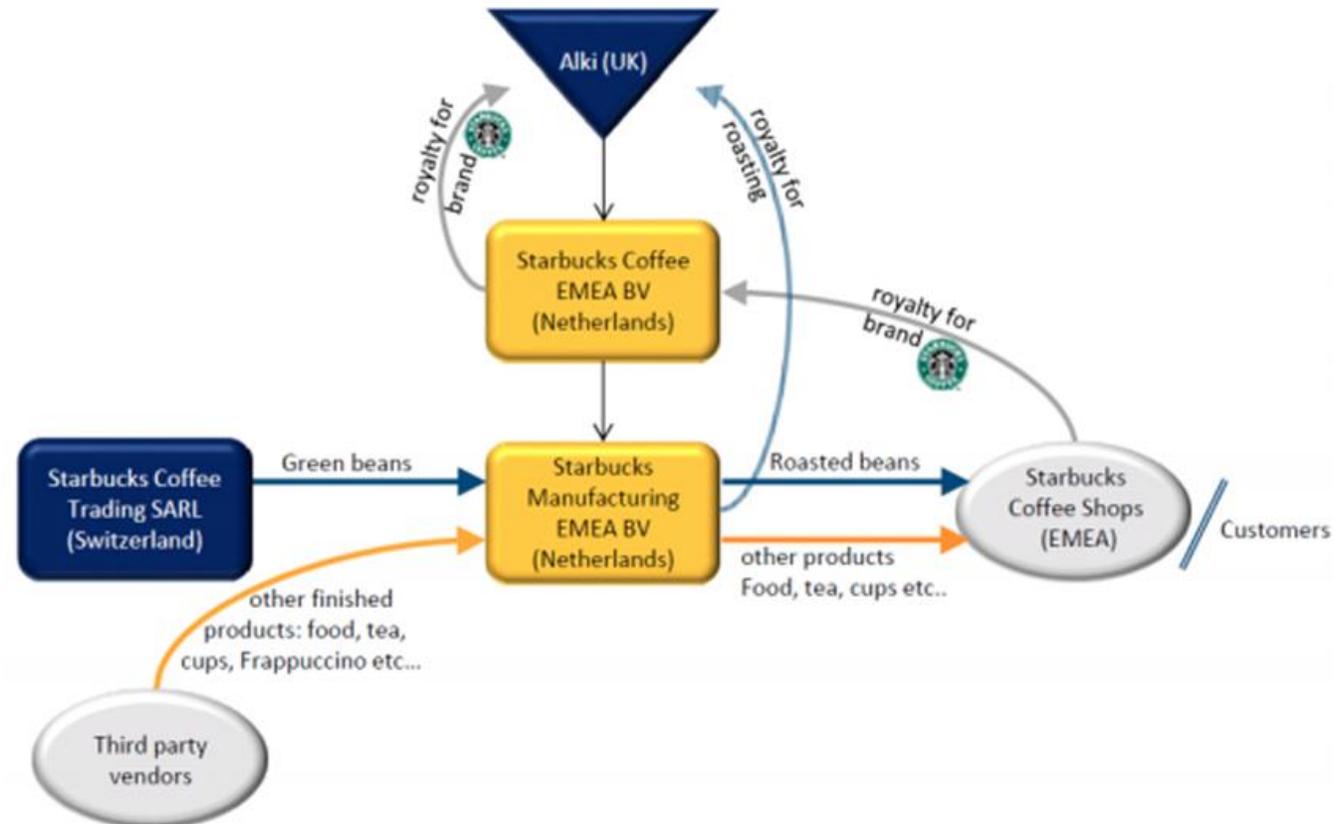


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- State Aid and tax rulings
 - Differences ATR and APA
- Discussion always deals with 'selectivity'
- What is selectivity?
 - A different (more preferential) treatment
 - But how to define different?
 - Compare Dutch *informal capital rulings* with Belgium *excess profit rulings*

EU State Aid: Starbucks

-Structure



Source: EU Commission

EU State Aid: Starbucks

- F/A/R analysis and main arguments of the Commission

OECD Arm's length principle approach – based on OECD/BEPS standard	EU Commission arguments on arm's length principle
<p>F/A/R – Starbucks Manufacturing EMEA BV (“SMBV”) acts as a toller/performs roasting activities.</p> <p>Choice of method – TNMM, based on “risk stripped” operations by SMBV.</p> <p>Level of I/C compensation – MOTC of [9-12]% based on transitional benchmark performed</p>	<p>Para 252. “(...)the general <u>Dutch corporate income tax system constitutes the reference system</u> against which the SMBV APA should be assessed.”</p> <p>Para 263 “(...) the Netherlands accepted by the SMBV APA results <u>in a lowering of SMBV’s tax liability under the general Dutch corporate income tax system as compared to non-integrated companies</u> whose taxable profit under that system is determined by the market, that APA will be deemed to confer a selective advantage to SMBV for the purposes of Article 107(1) of the Treaty.”</p> <p>Para 264 “(...) Thus, for any avoidance of doubt, the arm’s length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, (...), but is a <u>general principle of equal treatment in taxation</u> falling within the application of Article 107(1) of the Treaty, (...)”.</p> <p>Para 265 “ the Commission recalls that is not examining whether the SMBV APA complies with the arm’s length principle as laid down in Article 8b(1) of the CIT or the Decree, but whether the Dutch tax administration conferred a selective advantage on SMBV for the purposes of Article 107(1) of the Treaty (...)”.</p> <p>Para 381 “(...)the Commission considers that the tax advisor <u>incorrectly designated SMBV as a low-risk manufacturer</u>. More specifically, information provided on <u>SMBV’s revenues demonstrates that roasting is not the main source of income of SMBV</u>. (...) income from the sales of roasted coffee (...) represents only [15-20] % of the revenues of SMBV in 2013 and 2014. In 2007, that is, at the time that the SMBV APA was concluded, that proportion was substantively at the same level at [15- 20] %”</p> <p>Para 382 “Instead, <u>SMBV derives most of its profits</u> recorded in the Netherlands <u>from an activity different from roasting</u>. Indeed, SMBV’s reselling function, referred to as providing logistic and administrative services by the Netherlands and Starbucks, appears more important than its roasting activity and accounted for [80-85] % of SMBV’s revenues in 2013 and 2014.”</p> <p>Para 383 “(...) <u>SMBV’s reselling function</u> not only represents the main source of SMBV’s income, but also <u>represents the only source of SMBV’s profit since 2010</u>, considering SMBV’s roasting activity has been loss making since that year, without prejudice to the question whether those losses on the roasting activities were caused by incorrect pricing of the green coffee beans”</p> <p>Para 446 “<u>the Netherlands should take SMBV’s accounting profits, with no deduction of the royalty payment from SMBV to Alki LP from those profits for the licensing of the roasting IP</u>, as the starting point from which SMBV’s tax liability in the Netherlands is determined to properly ensure that the aid granted by the SMBV APA is eliminated through recovery.”</p> <p>Para 450 “In conclusion, the Commission finds that the Netherlands has unlawfully granted State aid to SMBV and the Starbucks group by concluding the SMBV APA, in breach of Article 108(3) of the Treaty”</p>

EU State Aid: Fiat

-Structure



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Source: EU Commission

EU State Aid: Fiat

- F/A/R analysis and main arguments of the Commission

OECD Arm's length principle approach – based on OECD/BEPS standard

F/A/R – FFT is a cash pool leader for the UK and provides treasury services and financing to the EU Fiat group companies.

Choice of method – TNMM. The applicable rates, the form and the maturity of the loans provided and the bonds issued by FFT are different, therefore the use of TNMM.

Level of I/C compensation – Pre-tax return on equity of 6.05% using the CAPM. An appropriate remuneration on the capital at risk and the capital aimed at remunerating the functions performed by the company of EUR 2.542 million on which a range of +/- 10% is envisaged.

EU Commission arguments on arm's length principle

Para 225 "(...) In the Belgian coordination centres judgment, **the Court of Justice endorsed the arm's length principle** as the benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) of the TFEU as a result of a tax measure that determines its transfer pricing and thus its taxable base."

Para 228 "(...)The arm's length principle therefore necessarily forms part of the Commission's assessment under Article 107(1) of the TFEU (...) **independently of whether a Member State has incorporated this principle into its national legal system.** It is used to establish whether the taxable profits of a group company for corporate income tax purposes has been determined on the basis of a methodology that approximates market conditions (...) the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107(1) of the TFEU(...)"

Para 276 "the Commission concludes that even if FFT's hypothetical minimum regulatory capital would have been acceptable as a profit level indicator for the application of the TNMM, the tax advisor underestimated that capital by using an arbitrary and low risk weighting on the assets (excluding most assets from the risk weighting). (...) **the contested tax ruling (...) departs from a market-based outcome in line with the arm's length principle.** Since those choices lead to a reduction of FFT's tax liability under the general Luxembourg corporate income tax system **as compared to non-integrated companies which transact on market terms,** the contested tax ruling should be considered to grant a selective advantage to FFT for the purposes of Article 107(1) of the TFEU."

Para 292 "(...) the Commission considers that the manner in which FFT's tax advisor arrives at the estimated level of required return to be applied to that capital base **does not result in a reliable approximation of a market-based outcome** and therefore is not in line with the arm's length principle (...)"

Para 341 "The Commission considers the contested tax ruling to grant a selective advantage to FFT within the meaning of Article 107(1) of the TFEU, since it leads to a lowering of that entity's taxable profit in Luxembourg as compared to non-integrated companies whose taxable profits are determined by transactions concluded on market terms."



1. **The EU Commission's difficulty with the tax rulings cases**
 - The rulings conformed with national law / the OECD Guidelines.
 - National laws do not all contain the arm's length principle.

2. **The invention of "Commission ALP"**
 - Invention during the course of the Commission investigations – no earlier appearance.
 - The doubtful basis in Forum 187 – Belgian law on transfer pricing.
 - The use of Commission ALP as a tool to assess whether a selective advantage has been granted to integrated companies (i.e. members of a multinational group).

3. **The central issue for Commission ALP** – comparison with a stand-alone enterprise which transacts on the market.

EU Commission vs. OECD: Arm's length Principle



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OECD Transfer pricing guidelines	Commission ALP
<ul style="list-style-type: none">• Highly formalised and developed system based on guidelines• Has moved away from anti-avoidance in favour of an agreed allocation of taxing rights between states• Takes into account the existence of a group relationship – e.g. group synergies• Is based on domestic law rules and tax treaties	<ul style="list-style-type: none">• Novel invention – no details available at all• Looks to compare a member of a group with a stand-alone enterprise: cannot take account of group relationship• Conformity with the OECD TPG does not necessarily ensure that there is no state aid• Operates independently of national law – has existed in principle since 1957• Exists as a tool to determine if an integrated company has received a selective advantage

Possible outcome if the General Court decision is maintained



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- What is the difference between a tool of state aid analysis and a rule of law?
- Will transfer pricing reports for EU Member States need to include a section on “the equivalent outcome for a stand-alone enterprise”?
- How do you demonstrate the equivalent outcome for a stand-alone enterprise?
- What about group synergies?
- Is this the end of the OECD ALP as we know it?

Views of the General Court

- The Belgian coordination centres judgment

In its judgment on the Belgian tax regime for coordination centres, the Court of Justice assessed a challenge to a Commission decision which concluded that the method for determining taxable income under that regime conferred a selective advantage on those centres.

According to the Court, “in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, [...], to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.” The Court then held that “the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition”, which the Court found to “[confer] an advantage on the coordination centres”.

Question:

Is *Belgium and Forum 187 v. Commission* a suitable legal source for an EU "Arm's Length Principle"?

- EC refers to ECJ decision re Belgium coordination centers
- Belgium system allowed taxation based on a cost plus where staff costs and financial costs were excluded
- More specifically
 - *“the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition”,*
- Which the Court found to *“[confer] an advantage on the coordination centres”*.

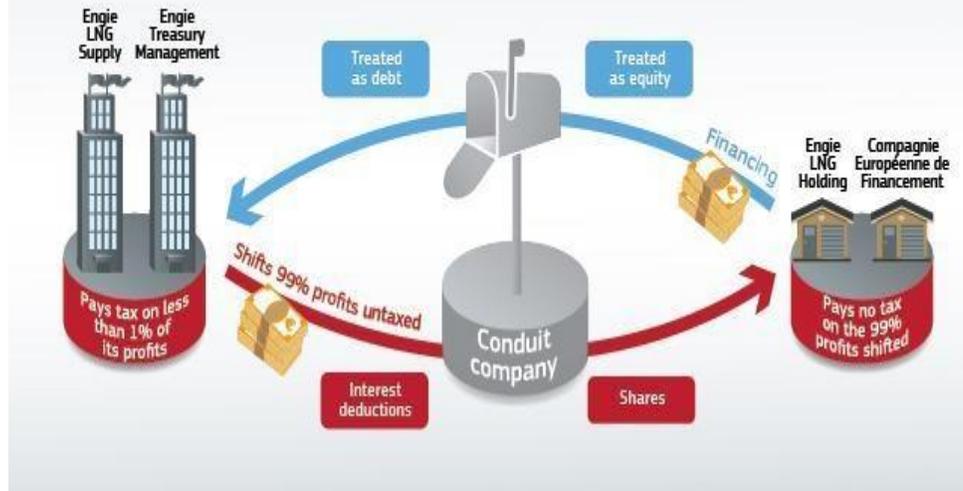
- European Commission:
 - *“The Court has thus accepted that a tax measure which results in a group company charging transfer prices that do not reflect those which would be charged in conditions of free competition, that is prices negotiated by independent undertakings negotiating under comparable circumstances at arm’s length, confers an advantage on that group company in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system.”*
- But what does this mean?

- EC states that MNE's work in many countries and that thus they are able to enjoy benefits that domestic companies cannot enjoy
- EC refers to MNE's which are able to be more cost effective by concentrating services in a central location
- And since domestic companies cannot do the same, the criterion of selectivity has been met
 - Clearly a comparison of dogs with cats
- What does it say about EC's ALP?



- Luxembourg “Swedish parent”
 - EC: *“At this stage, the Commission has doubts that this tax treatment, as endorsed in the Luxembourg tax rulings, can be justified. The Commission is concerned that Luxembourg has accepted a unilateral downward adjustment of Huhtalux's taxable base that may grant the company a selective advantage. This is because it would allow the group to pay less tax than other stand-alone or group companies whose transactions are priced in accordance with market terms. If confirmed, this would amount to illegal State aid.”*

State aid: Commission finds Luxembourg gave illegal tax benefits to Engie (previously GDF Suez)



- Normative cadre in ENGIE: (European) fraus legis
 - Deduction without taxation in conflict with purpose of the Luxembourg CIT



- The Group Financing Exemption provided a derogation from the general CFC rules. It partially (75%) or fully exempted from taxation in the UK financing income received by an offshore subsidiary **from another foreign group company**, even if this income is derived from “UK activities” or the capital being used is “UK connected”. Therefore, a multinational active in the UK using this exemption was able to provide financing to a foreign group company *via* an offshore subsidiary paying little or no tax on the profits from these transactions.

APPENDICES

- What is the basis of EU State aid investigations i.e. how are they able to challenge certain national tax law provisions as anti-competitive?
- If the national law did not have any definition of arm's length principle, how can the OECD's arm's length principle concept be applied against companies?
- Overall, what is the interaction between EU State aid's, OECD's and local/national law's understanding of 'arm's length principle'?



A measure will be considered to be State aid if the measure under examination satisfies the following cumulative criteria:

1. It must confer an economic advantage on the beneficiary (benefit)
2. It must be granted by a Member State or through State resources
3. It must be a selective advantage (it must favour certain undertakings, the production of certain goods, or the provision of certain services);
4. There must be a (potential for) distortion of competition;
5. There must be an effect (or potential effect) on trade between Member States.

Identifying state aid in the form of tax benefits causes considerable difficulty simply because – unlike direct aid by way of financial assistance – rather than the granting of an advantage in the shape of a state benefit, it consists of a dispensation from the disadvantage of taxation.

For tax law measures to be classified as state aid, it is first necessary to identify an advantage and then to determine that the advantage is granted selectively. For this purpose, the following three steps are indicated by the EU Commission to be applied:

- Identifying the ordinary or **normal tax system** applicable in the Member State concerned and demonstrate that the tax measure at issue is a derogation from that system
- Identify whether the **beneficiaries treated differently** than the normal tax system applied to other undertakings in a similar legal and factual situations
- Whether the difference in treatment (if any) is **justified** by the nature of the system

EU State Aid and Tax Rulings

- Commission notice



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The EU, in an attempt to clarify the broadened scope of Article 107(1), released a Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, published on 19 July 2016. **This document discusses (specifically under paragraphs 169 – 174) the case of tax rulings.**

“To sum, tax rulings confer a selective advantage on their addressees in particular where:

- (a) the ruling misapplies national tax law and this results in a lower amount of tax;
- (b) the ruling is not available to undertakings in a similar legal and factual situation; or
- (c) the administration applies a more ‘favourable’ tax treatment compared with other taxpayers in a similar factual and legal situation. **This could, for instance, be the case where the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome. The same applies if the ruling allows its addressee to use alternative, more indirect methods for calculating taxable profits, for example the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, while more direct ones are available.”**

As most of the State Aid Cases are challenged based on transfer pricing principle, the most difficult question to answer in respect of identifying ‘state aid’ under the said tax rulings is to assess what the **normal tax system** in a Member State was that was applied to all undertakings at large and whether it reflected the arm’s length principle for their cross border operations.

Under paragraphs 172 and 173 of the Commission Notice mentioned earlier, the Commission states that ‘arm’s length principle’ is to be the guiding force in assessing tax measures/benefits granted to group companies and that OECD TP Guidelines are also to serve as a reference point in defining the arm’s length principle, **independently of whether a Member State has incorporated this principle into its national legal system and in what form.**

APPENDIX I - EU State Aid: Starbucks



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- F/A/R analysis and main arguments of the Commission

F/A/R analysis of Starbucks "as is"	Standards	EU Commission main arguments
<ul style="list-style-type: none"> Functions 1. Starbucks Manufacturing EMEA BV ("SMBV") primarily processes green coffee and sells roasted coffee to affiliated and non-affiliated parties. SMBV employed 40-60 people, of which [20-30] perform supply chain operations including procurement, planning, logistics and distribution planning 2. Starbucks Coffee EMEA BV ("Starbucks Coffee BV") function's as the Starbucks group's head office for the EMEA region, supporting the group's EMEA business operations. Starbucks Coffee BV licenses certain Starbucks trademarks, technology and knowhow from its shareholder, Alki LP, in return for a royalty payment. 3. Alki LP has no employees on its payroll to perform its role as principal under the Roasting Agreement. Alki LP performs that role through the guidance, expertise and required functions provided by Starbucks entities in the US pursuant a Cost Sharing Agreement. Assets Tangible: The main raw material component of that roasting process is green coffee beans. Intangible: trademarks, technology and knowhow. SMBV licenses a sub-set of IP from Alki LP in order to utilized the coffee roasting manufacturing process and the right to supply coffee. Risks SMBV is presented as a low risk manufacturer. Under the Roasting Agreement, Alki LP acts as the principal that bears all the company risks and performs the associated activities. Alki LP grants SMBV access to the IP rights and takes over the entrepreneurial risk in the business of SMBV such as cost overruns and the sale of the products. Arm's length remuneration (benchmark) A (rounded) mark-up of [9-12] % of operating costs was considered on that basis to reflect an arm's length mark-up for the provision of roasting services and associated supply chain activities by SMBV for its intra-group transactions. 	<ul style="list-style-type: none"> - Art. 8b of the Dutch Corporate Income Tax - Art. 107(1) & 108 (3) TFEU - OECD TP Guidelines (1995, 2010, 2017) - BEPS Action 8-10 Report 	<p>Para 252. "Having determined that the general Dutch corporate income tax system constitutes the reference system against which the SMBV APA should be assessed, it is necessary to establish whether that APA constitutes a derogation from that reference system, leading to unequal treatment between companies that are factually and legally in a similar situation.</p> <p>Para 263 "The Commission's assessment of whether the Netherlands granted a selective advantage to SMBV must therefore consist in verifying whether the methodology accepted by the Dutch tax administration by concluding the APA for the determination of SMBV's taxable profits in the Netherlands departs from a methodology that results in a reliable approximation of a market-based outcome and thus from the arm's length principle. In so far as the methodology the Netherlands accepted by the SMBV APA results in a lowering of SMBV's tax liability under the general Dutch corporate income tax system as compared to non-integrated companies whose taxable profit under that system is determined by the market, that APA will be deemed to confer a selective advantage to SMBV for the purposes of Article 107(1) of the Treaty."</p> <p>Para 264 "(...) Thus, for any avoidance of doubt, the arm's length principle that the Commission applies in its State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention, which is a non-binding instrument, but is a general principle of equal treatment in taxation falling within the application of Article 107(1) of the Treaty, which binds the Member States and from whose scope the national tax rules are not excluded".</p> <p>Para 265 " the Commission recalls that is not examining whether the SMBV APA complies with the arm's length principle as laid down in Article 8b(1) of the CIT or the Decree, but whether the Dutch tax administration conferred a selective advantage on SMBV for the purposes of Article 107(1) of the Treaty by concluding an APA that endorses a profit allocation that departs from the amount of profit that would have been taxed under the general Dutch corporate income tax system if the same transactions had been executed by independent companies negotiating under comparable circumstances at arm's length.</p> <p>Para 381 "(...)the Commission considers that the tax advisor incorrectly designated SMBV as a low-risk manufacturer. More specifically, information provided on SMBV's revenues demonstrates that roasting is not the main source of income of SMBV. As illustrated in Table 2, income from the sales of roasted coffee as recorded under the item "REV PACKAGED COFFEE"206 represents only [15-20] % of the revenues of SMBV in 2013 and 2014. In 2007, that is, at the time that the SMBV APA was concluded, that proportion was substantively at the same level at [15- 20] %"</p> <p>Para 382 "Instead, SMBV derives most of its profits recorded in the Netherlands from an activity different from roasting. Indeed, SMBV's reselling function, referred to as providing logistic and administrative services by the Netherlands and Starbucks, appears more important than its roasting activity and accounted for [80-85] % of SMBV's revenues in 2013 and 2014. In 2007, based on data which was available at the time the SMBV APA was requested, that proportion was [75-80] %. Moreover, at that moment, [10-30] out of [40-60] SMBV's employees were active in that activity. SMBV was also managing three contractual relationships related to distribution and logistics.</p> <p>Para 383 "Contrary to the claim by the Netherlands that the costs of non-coffee products are pass-through costs for SMBV, SMBV in fact records a margin on the resale of non-coffee products. Moreover, SMBV's reselling function not only represents the main source of SMBV's income, but also represents the only source of SMBV's profit since 2010</p>

APPENDIX II - EU State Aid: Fiat



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- F/A/R analysis and main arguments of the Commission

F/A/R analysis of Fiat "as is"	Standards	EU Commission main arguments
<ul style="list-style-type: none"> Functions FFT provides treasury services and financing to the Fiat group companies based (mainly) in Europe (excluding Italy) and also manages several cash pool structures for the Fiat group companies based in the United Kingdom, Denmark, Belgium, the Netherlands, Switzerland, Austria, Germany and Spain. FFT operates from Luxembourg, where its head-office is located, and through two branches, one based in London, United Kingdom and one in Madrid, Spain. FFT has 14 employees, composed of one director, [0-10] front office employees (the front office is based in the United Kingdom), [0-10] back office employees and [0-10] accounting and control employees As regards functions performed, FFT is involved in market funding and liquidity investments; relations with financial market actors; financial coordination and consultancy services to the group companies; cash management services to the group companies; short term ("S/T") and medium term ("M/T") inter-company funding; and coordination with the other treasury companies. Assets Capital: FFT funding comes from instruments such as bond issuance, bank term loans, committed and uncommitted credit lines, etc. Risk Credit risk relative to bank deposits or other similar short term investments is mitigated as FFT deals only with major financial institutions and diversifies the allocation of cash. In relation to the management of financial risks, FFT follows the guidelines established by the relevant internal group policies (foreign exchange risk and interest rate risk). With regard to the exposure to currency risk, FFT manages foreign exchange exposure mainly by using forward foreign exchange contracts and currency swaps. Interest rate exposure is substantially linked to the different duration of liabilities and assets and management. FFT mainly employs Interest Rate Swaps ("IRS") and Forward Rate Agreements ("FRA"). Arm's length remuneration (benchmark) The transfer pricing study determines an appropriate remuneration on the capital at risk and the capital aimed at remunerating the functions performed by the company of EUR 2.542 million on which a range of +/- 10% is envisaged. 	<ul style="list-style-type: none"> - Article 164 of the Luxembourg Income Tax Code. - Circular L.I.R. n° 164/2 - Art. 107(1) & 108 (3) TFEU - OECD TP Guidelines (1995, 2010, 2017) 	<p>Para 225 "The principle that transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length is generally referred to as the "arm's length principle". In the Belgian coordination centres judgment, the Court of Justice endorsed the arm's length principle as the benchmark for establishing whether a group company receives an advantage for the purposes of Article 107(1) of the TFEU as a result of a tax measure that determines its transfer pricing and thus its taxable base."</p> <p>Para 276 "the Commission concludes that even if FFT's hypothetical minimum regulatory capital would have been acceptable as a profit level indicator for the application of the TNMM, the tax advisor underestimated that capital by using an arbitrary and low risk weighting on the assets (excluding most assets from the risk weighting), by applying a lower ratio than the minimum prescribed by the Basel II framework and by not including income from group assets and liabilities in FFT's gross income. The Commission therefore concludes that the contested tax ruling, by accepting those choices, departs from a market-based outcome in line with the arm's length principle. Since those choices lead to a reduction of FFT's tax liability under the general Luxembourg corporate income tax system as compared to non-integrated companies which transact on market terms, the contested tax ruling should be considered to grant a selective advantage to FFT for the purposes of Article 107(1) of the TFEU."</p> <p>Para 292 "(...)the Commission's conclusion on the inconsistent manner in which FFT's tax advisor arrives at the estimated amount of capital to be remunerated for the application of the TNMM, the Commission considers that the manner in which FFT's tax advisor arrives at the estimated level of required return to be applied to that capital base does not result in a reliable approximation of a market-based outcome and therefore is not in line with the arm's length principle for the reasons presented in recitals (293) to (300)."</p>

APPENDIX III - EU Commission vs. OECD: Arm's length Principle



OECD Interpretation	EU Commission Wording
<ul style="list-style-type: none">• MNE – integrated value chain operations• Legal base – Article 9 of the OECD Model tax convention• Group synergies – allocated based on “simulated bargaining power”	<ul style="list-style-type: none">• Local activity – stand alone enterprise based on “general principle of equal treatment in taxation”• Legal base – Article 107 of the TFEU• Group synergies – allocated to “local activity”

Question: How will the arm's length principle (OECD style) vs. the arm's length principle (EU style) develop:
(i) Between internal EU transactions?
(ii) In EU to non-EU transactions?

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