



2025/2402

1.12.2025

COMMISSION DECISION (EU) 2025/2402

of 28 November 2024

on tax rulings SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Netherlands, alleged aid to Starbucks

(notified under document C(2024) 8566)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2), first subparagraph thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1), point (a), thereof,

Having called on interested parties to submit their comments ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) Starbucks Coffee EMEA bv (hereinafter: 'Starbucks Coffee BV') and Starbucks Manufacturing EMEA bv (hereinafter: 'SMBV'), are companies that are indirectly controlled by Starbucks Corporation. The latter company was established in the United States of America and serves as group headquarters. Starbucks Corporation and all the companies controlled by that corporation are referred to hereinafter collectively as 'Starbucks' or the 'Starbucks group'.
- (2) By letter dated 30 July 2013, the Commission requested the authorities of the Kingdom of the Netherlands ('the Netherlands') to provide information on the tax ruling practice in the Netherlands and on all rulings related to Starbucks Coffee BV and SMBV.
- (3) By letter dated 2 October 2013, the Dutch authorities submitted the requested information to the Commission, including the advance pricing agreement ⁽²⁾ ⁽³⁾ concluded in 2008 between the Dutch tax administration and Starbucks Coffee BV, as well as the advance pricing agreement concluded in 2008 between the Dutch tax administration and SMBV (hereinafter: 'SMBV APA'), and supporting documents. The supporting documents specifically include a 2007 transfer pricing report that underpins both APA requests (hereinafter: '2007 Transfer Pricing Report') and exchanges between, on the one hand, the Dutch tax administration and, on the other hand, the tax advisor of Starbucks Corporation, (hereinafter: 'tax advisor'), acting on behalf of Starbucks Coffee BV and SMBV. The Dutch authorities also submitted to the Commission, as part of the supporting documents, an APA concluded between the Dutch tax administration and Starbucks Coffee BV and SMBV in 2001.
- (4) After a preliminary investigation, on 11 June 2014, the Commission decided to open a formal investigation procedure pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter: 'TFEU') on the SMBV APA on the grounds that that APA could constitute State aid within the meaning of Article 107(1) of the TFEU (hereinafter: 'Opening Decision') ⁽⁴⁾. By letter dated 16 July 2014, the Dutch authorities submitted their comments on the Opening Decision.

⁽¹⁾ OJ C 460, 19.12.2014, p. 11.

⁽²⁾ Throughout this Commission Decision, the terms 'tax ruling' and 'APA' are used as synonyms.

⁽³⁾ An advance pricing agreement is an agreement between a tax administration and a taxpayer on the application of tax law regarding (future) transactions. An advance pricing agreement determines, in advance of intra-group transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of an arm's length pricing for those transactions over a fixed period of time. An advance pricing agreement is formally initiated by a taxpayer.

⁽⁴⁾ OJ C 460, 19.12.2014, p. 11.

- (5) On 19 December 2014, the Opening Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the Opening Decision.
- (6) By letter dated 16 January 2015, Starbucks submitted its observations on the Opening Decision. Comments on the Opening Decision were also submitted by the Dutch Association of Tax Advisors (De Nederlandse Orde van Belastingadviseurs, hereinafter: 'NOB'), the Union of Dutch Undertakings & the Dutch Christian Union of Employers (Verbond van Nederlandse Ondernemingen & Nederlands Christelijk Werkgeversverbond, hereinafter: 'VNO-NCW'), ATOZ Tax Advisers Luxembourg, Oxfam International, and the Austrian Chamber of Commerce (Bundesarbeitskammer Österreich, hereinafter: 'BAK').
- (7) By letters dated 20 and 26 March 2015, the Dutch authorities submitted their observations on the comments of third parties to the Opening Decision.
- (8) On 21 October 2015, the Commission adopted Commission Decision (EU) 2017/502 ⁽⁵⁾, closing the formal investigation concerning the SMBV APA. In that Decision, the Commission found that that APA constituted aid within the meaning of Article 107(1) TFEU which was incompatible with the internal market and unlawfully put into effect by the Dutch authorities in breach of Article 108(3) TFEU. The Netherlands was ordered to recover the amount of incompatible and unlawful aid obtained by SMBV.
- (9) On 24 September 2019, the General Court annulled Decision (EU) 2017/502 in its *Starbucks* judgment ⁽⁶⁾, but left the Opening Decision unaffected. That judgment has become final.
- (10) Consequently, the Commission had to re-examine the SMBV APA.
- (11) On 23 December 2020, the Commission asked for additional information from the Dutch authorities concerning the functions, assets and risks involved in SMBV's activities in the Netherlands during the investigated period.
- (12) At the request of the Dutch Permanent Representation to the Union, the Commission organised a meeting on 22 January 2021 to discuss the Commission's additional request for information of 23 December 2020.
- (13) On 18 March 2021, the Dutch authorities submitted answers to the Commission's additional request for information of 23 December 2020.
- (14) On 29 April 2021, a meeting was held between the Commission and representatives of SMBV and of the Dutch authorities to discuss those answers.
- (15) The formal investigation of the contested tax ruling is therefore still open and needs to be closed.

2. DESCRIPTION OF THE MEASURE

2.1. The beneficiary

- (16) The beneficiary of the measure is SMBV, a subsidiary of the Starbucks group incorporated in the Netherlands. The Starbucks group is composed of the Starbucks Corporation and all the companies controlled by that corporation. Starbucks Corporation is the headquarters of the Starbucks group. Starbucks Corporation is situated in Seattle in the United States of America ('USA').
- (17) The Starbucks group is a roaster, marketer, and retailer of specialty coffee, operating in 65 countries. It purchases and roasts coffees that are sold, along with handcrafted coffee, tea and other beverages and fresh food items, through company-operated stores. According to the Starbucks group's annual report for 2014, the Starbucks group sells a variety of coffee and tea products and licenses its trademark through other channels, such as licensed stores, groceries, and national foodservices accounts. In 2014, the Starbucks group had worldwide net revenues of USD 16 448 million and post-tax earnings of USD 2 067 million.

⁽⁵⁾ Commission 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 L 83, 29.3.2017, p. 38, ELI: <http://data.europa.eu/eli/dec/2017/502/oj>).

⁽⁶⁾ Judgment of the General Court of 24 September 2019, *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669.

- (18) The entities of the Starbucks group that pay taxes in the Netherlands are Starbucks Coffee BV and SMBV, who are in a fiscal unity together. Accordingly, they file a single tax return as one entity.
- (19) SMBV is a coffee-roasting house in operation since 2002. Its Amsterdam-based roasting facility is the only such facility located outside the USA. SMBV is supplied with green coffee beans by a Starbucks group Swiss subsidiary, Starbucks Coffee Trading Company SARL, which buys those green coffee beans for the benefit of the entire Starbucks group and its independent licensees. The beans for the EMEA market are subsequently roasted and packaged in the Netherlands.
- (20) SMBV licenses coffee roasting intellectual property (hereafter: 'IP') from Alki Limited Partnership (hereafter: 'Alki LP') – a subsidiary of the Starbucks group incorporated in the United Kingdom which indirectly controls SMBV – which is necessary for the roasting manufacturing processes and for the delivery of roasted coffee beans to shop operators. In return, SMBV pays Alki LP a royalty. Under the terms of a roasting agreement between Alki LP and SMBV, Alki LP acts as the principal for the EMEA region and bears all the company risks for the sale of the products and costs of losses incurred as a result of production, sale, transport, and storage activities.
- (21) Under the terms of a cost-sharing agreement, Alki LP is to pay Starbucks Corporation a royalty for the coffee roasting knowledge, service fees for services provided by Starbucks Corporation to Alki LP, and cost-sharing payments for the development of certain intangible assets.
- (22) As owner of the Starbucks' European coffee-roasting facility, SMBV has to ensure that the correct equipment is used, the correct processes are carried out and roasted beans are produced in line with the specifications provided by Alki LP in the roasting agreement. According to that agreement, SMBV is the owner of the green beans, which it buys from suppliers designated or approved by Alki LP. SMBV ensures that the products, at the time of delivery to its production facility, comply with Alki LP's product specifications, and SMBV is obligated to promptly replace any quantity of defective or non-performing green beans at its own expense. Alki LP, however, bears the risks relating to losses caused by the production, sale, transport, storage, treatment, or use of the coffee beans and has to indemnify SMBV for the product-related compensation claims.
- (23) Alki LP has no employees on its payroll to perform its role as principal under the roasting agreement, nor do its partners have employees on the payroll who perform that role. According to information submitted by the Starbucks group in the formal investigation procedure, Alki LP performs its role through the guidance, expertise and required functions provided by the entities of the Starbucks group in the USA pursuant to a cost-sharing agreement.
- (24) Alki LP is considered a transparent entity for Dutch tax purposes and is thus not liable to corporate income tax under Dutch tax legislation. As a result of that tax transparency, the Dutch tax administration considers a royalty payment from SMBV to Alki LP for the use of IP for the EMEA area to be a direct payment to Starbucks Corporation in the USA.
- (25) Subsidiaries of the Starbucks group conclude contracts with Starbucks Coffee BV for the delivery of their roasted coffee beans and other products. All the products distributed by SMBV (roasted coffee beans, cups, and paper napkins, etc.), either produced by SMBV or bought by SMBV from other suppliers, are sold to shops. Some of the shops are independent, and some are owned by Starbucks. The prices charged by SMBV to the shops are determined by formula developed by other entities of the Starbucks group.

2.2. The measure under assessment

The SMBV APA

- (26) This Decision concerns the SMBV APA. The SMBV APA was in principle binding for 10 years, from 1 October 2007 to 31 December 2017. However, according to information submitted to the Commission, the SMBV APA was terminated on 30 September 2014 due to a material change in the facts set out in section 1 of the APA.

- (27) In the 2007 Transfer Pricing Report, the remuneration was a mark-up of [9-12] (*) % of the relevant cost base.
- (28) According to Article 8b of the Dutch Corporate Income Tax Act 1969 (Wet op de vennootschapsbelasting 1969), such APAs should determine an arm's length remuneration for transfer pricing purposes. By concluding the SMBV APA, the Dutch tax administration thus accepted that the remuneration determined by the tax advisor in the 2007 Transfer Pricing Report for the functions performed by SMBV in the Netherlands (including risk assumed and assets used) constituted an arm's length remuneration (7).
- (29) The 2007 Transfer Pricing Report provided to the Dutch tax administration in the context of the SMBV APA forms an integral part of that APA.
- (30) For the purpose of establishing the taxable base of SMBV, the SMBV APA dealt with the intra-group transactions assessed by the Dutch tax administration. SMBV paid a group company (Alki LP) a fee for the use of coffee roasting IP and paid another group company, Starbucks Coffee Trading Company SARL, for sourcing green coffee beans. Through the SMBV APA, the Dutch tax administration and SMBV determined the taxable remuneration for the roasting services and supply chain activities (i.e., distribution of coffee and non-coffee products) in which SMBV was involved.
- (31) In the SMBV APA, the Dutch tax administration accepted that the level of the royalty payment from SMBV to Alki LP would be determined at the end of each year as the difference between the realised operating profit before royalty expenses and the [9-12] % mark-up on operating expenses. The SMBV APA further provides that the 'royalty payment is deductible for corporate income tax purposes and is not subject to Dutch withholding tax'.

The 2007 Transfer Pricing Report

- (32) The remuneration accepted by the Dutch tax administration in the SMBV APA was based on the transfer pricing analysis prepared by the tax advisor in the 2007 Transfer Pricing Report, which forms an integral part of that APA.
- (33) The 2007 Transfer Pricing Report uses the Transactional Net Margin Method (hereinafter: 'TNMM') as the preferred transfer pricing method to benchmark the operating performance of SMBV. That method is one of the indirect methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group. It approximates what would be an arm's length profit for an entire activity rather than for individual identified transactions. It does not seek to establish the price of goods sold but estimates the profit level that independent companies could be expected to achieve from an activity, such as the sale of goods. It does so by calculating a ratio of profit to an appropriate base (that is, a profit level indicator), such as costs, turnover or fixed investment, and subsequently comparing that ratio to the ratios observed in comparable uncontrolled transactions. The use of the TNMM is further explained in recital 44 of this Decision.
- (34) In the 2007 Transfer Pricing Report, SMBV's tax advisor made a functional analysis of the intra-group and independent transactions of that undertaking for its manufacturing activity. SMBV was characterised as a low-risk coffee roaster.
- (35) As SMBV was considered to be the least complex party to those transactions in terms of functions, assets and risks, the tax advisor used SMBV as the tested party for determining its arm's length remuneration under a TNMM analysis.
- (36) In applying the TNMM to SMBV's manufacturing activities, the tax advisor considered the relevant base for the net profit indicator to be the costs of the services rendered by SMBV, in line with the cost-plus method, which was considered an appropriate methodology for supply chain and manufacturing services.

(*) Confidential information.

(7) From the original Dutch: '[SMBV] wordt geacht een arm's length vergoeding te ontvangen voor haar activiteiten zoals beschreven [in het transfer pricing report] indien de operationele marge [9-12] % van de relevante kostgrondslag bedraagt.'

- (37) The tax advisor, however, was of the opinion that the mark-up should only have been applied to the underlying costs associated with activities where SMBV performed a value-added role^(*). The 2007 Transfer Pricing Report lists those underlying costs as (amongst others) all personnel costs engaged in both manufacturing and supply chain activities, the cost of production equipment (i.e. depreciation) and plant overhead (such as the cost of the facility as such).
- (38) To increase the reliability of the functional analysis, the tax advisor performed a transfer pricing adjustment to account for the fact that the proposed application of the mark-up to SMBV's cost base should not contain a cost component for green coffee beans.
- (39) The comparable companies against which the financial results of SMBV would be benchmarked also incurred raw material costs. The tax advisor therefore applied a raw materials cost adjustment in order to modify the total cost mark-up calculated for each of the companies in the comparable companies set.
- (40) The combination of the adjustments for the cost component for green coffee beans and for the raw material costs changed the estimated remuneration from a median of 7,8 % on total costs to an estimated median of 9,9 % on operating costs. 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.

2.3. The OECD Transfer Pricing Guidelines

- (41) Transfer prices refer to prices charged in commercial transactions between various parts of the same corporate group. Multinational companies have a financial incentive to allocate as little profit as possible to jurisdictions where those profits are subject to higher taxation. That could lead to transfer prices which should not be accepted as a basis for calculating taxable income. To avoid that problem, tax administrations use transfer pricing methodologies according to which they will only accept transfer prices between intra-group companies that are comparable to the ones that would have been agreed by independent companies negotiating under comparable circumstances at arm's length. That is known as the 'arm's length principle'.
- (42) The Organisation for Economic Cooperation and Development (hereinafter: 'OECD') has adopted guidance in the form, notably, of Transfer Pricing Guidelines. Given the non-binding nature of the OECD Transfer Pricing Guidelines, the tax administrations of OECD member countries are simply encouraged to follow those Guidelines. However, in practice, the OECD Transfer Pricing Guidelines serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries, those Guidelines have been given the force of law or explicitly serve as a reference for the purpose of interpreting domestic tax law.
- (43) The OECD's Committee on Fiscal Affairs occasionally adopts updates to its transfer pricing guidelines, such as in 1995 and 2010.
- (44) The use of the TNMM is associated with paragraph 3.26 of the 1995 OECD Transfer Pricing Guidelines. According to those guidelines, the party to the transaction for which a net profit indicator is tested should generally be the company which has the less complex functions. The OECD Transfer Pricing Guidelines state that such an analysis may lead to a range of acceptable outcomes rather than one specific correct outcome. In practice, that acceptable range is often considered to be the interquartile range of observed ratios. Quartiles in a series of data are three points which divide the figures in the set ranked from smallest to largest into four equally populated sets, that is, 25 % of the data are at or below the 25th percentile (also called the lower quartile), 50 % of the data are at or below the second quartile, which is also the median of the set, and 75 % of the data are at or below the 75th percentile (also called the upper quartile). The interquartile range consists of all the values between the lower and upper quartile.

^(*) 'Value added' is used in this case to describe instances where a company takes a product that may be considered homogeneous, with few differences (if any) from that of a competitor and provides potential customers with a feature or add-on that gives it a greater sense of value.

2.4. The Dutch rules on arm's length pricing

- (45) The SMBV APA was concluded on the basis of Article 8b(1) of the Dutch Corporate Income Tax Act 1969 (Wet op de Vennootschapsbelasting 1969) (hereinafter 'CIT'). Article 8b(1), which was inserted in the CIT in 2002, lays down the arm's length principle in the CIT.
- (46) During the investigated period, guidance as to how the Dutch tax administration interprets the arm's length principle laid down in Article 8b(1) CIT was provided in Decision IFZ2001/295M of the Dutch Financial Secretary to the Treasury of 30 March 2001 (hereinafter: 'Transfer Pricing Decree').
- (47) The Transfer Pricing Decree clarifies that, in principle, the arm's length principle forms an integral part of the Dutch CIT. In cases where the OECD Guidelines need to be clarified, the Transfer Pricing Decree specifies the Dutch position in relation to those particular points and seeks, where possible, to remove any confusion.
- (48) In particular, the Transfer Pricing Decree specifies in Chapter 1.2 that the use of an arm's length range is permissible, as a given transfer pricing method will often generate a range of figures, all of which are equally reliable.
- (49) In Chapter 2, the Transfer Pricing Decree deals with the transfer pricing methods described in the OECD Transfer Pricing Guidelines. Based on paragraph 4.9 of those Guidelines, whenever the Dutch tax administration undertakes a transfer pricing audit, the Transfer Pricing Decree specifies that such audit should start from the perspective of the transfer pricing method adopted by the taxpayer at the time of the transaction, provided that such transfer pricing adopted leads to an arm's length outcome for the transaction concerned.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (50) In its decision initiating the formal investigation procedure, the Commission took the preliminary view that the SMBV APA, which accepted the remuneration proposed by SMBV's tax advisor for the functions performed by SMBV in the Netherlands, appeared to constitute State aid within the meaning of Article 107(1) TFEU that is incompatible with the internal market.
- (51) In the Opening Decision, the Commission expressed the following three doubts about the SMBV APA's compliance with the arm's length principle.
- (52) First, the Commission questioned the assumption of the tax advisor in the 2007 Transfer Pricing Report that SMBV did not bear any risk and that it should therefore be classified as a toll or contract manufacturer. In particular, the Commission referred to the evidence of inventory risk recorded in the financial accounts of SMBV, which would contradict the characterisation as a toll manufacturer.
- (53) Second, the Commission questioned two consecutive adjustments by the tax advisor which both seemed to address the same concern regarding the comparability analysis. The first adjustment reduced the cost base to calculate SMBV's taxable base to its operating expenses. The tax advisor considered such adjustment appropriate because SMBV would be a toll or contract manufacturer. The second adjustment, designated 'Conversion Mark-up Adjustment' in the 2007 Transfer Pricing Report, deducted a multiple of Cost of Goods Sold from the profit of companies used as comparables for transfer pricing purposes. That second adjustment, presented by the Netherlands as a 'working capital adjustment', reduced SMBV's taxable base in the Netherlands.
- (54) Third, the Commission questioned the arm's length nature of the royalty paid by SM BV to Alki LP, since the amount of the royalty did not seem to be related to the value of the IP it was meant to remunerate. Due to the use of the TNMM in the transfer pricing analysis, the royalty corresponded in reality to the residual profit of SM BV, i.e. any profit recorded by SMBV above [9-12] % of operating expense was transformed into a tax-deductible royalty.

4. COMMENTS FROM THE DUTCH AUTHORITIES ON THE OPENING DECISION

- (55) The Netherlands submitted their comments to the Opening Decision on 16 July 2014.

- (56) The Netherlands maintained that the remuneration agreed upon in the SMBV APA was at arm's length and that the method (i.e., TNMM, with a cost-based profit level indicator) chosen by the tax advisor was appropriate to determine that remuneration. The Netherlands also stated that the SMBV APA did not confer a selective advantage on SMBV.
- (57) To support that point of view, the Netherlands advanced the following arguments in their comments.
- (58) First, the Netherlands argued that the intention of the Starbucks group had always been to set up an operating, low-risk coffee roasting plant and that the facts and circumstances did not change significantly over the years. Moreover, SMBV performed its functions under the supervision of other group entities which ultimately bore the risks of those transactions.
- (59) The Netherlands therefore regarded SMBV as the 'least complex entity' (and thus the tested party) whose arm's length remuneration must be determined using a benchmarking study for which the TNMM was the most used method internationally. In view of the production functionality of SMBV, SMBV used a cost-oriented profit level indicator. The Netherlands stressed that this approach was in line with the applicable OECD Transfer Pricing Guidelines and with the Transfer Pricing Decree. More specifically, the Netherlands argued that, on the basis of the Transfer Pricing Decree, every taxpayer is in principle free to choose a transfer pricing method, provided that the method chosen leads to an arm's length outcome for the transaction concerned. Given that the Netherlands considered the result of the SMBV APA as an acceptable approximation of a market price, they did not consider it to confer an advantage to SMBV.
- (60) Regarding the comparability adjustments, the Netherlands argued that when the 2007 Transfer Pricing Report was drawn up, there was no indication on how to deal with manufacturers with a low risk profile. The Netherlands acknowledged that the 2010 OECD Transfer Pricing Guidelines did contain more instructions on comparability adjustments, including working capital adjustments, but argued that those examples are only guidelines and that that means that other positions could also have resulted in an arm's length result. Moreover, the Netherlands argued that the assessment of whether the SMBV APA was in line with the arm's length principle must be based on the OECD Transfer Pricing Guidelines that were available at the time, i.e. the 1995 OECD Transfer Pricing Guidelines. Therefore, the Annex to Chapter III of the 2010 OECD Transfer Pricing Guidelines, which shows a working example of a comparability adjustment, could not be applied.
- (61) The Netherlands also performed a sensitivity analysis on the arm's length range, calculated in accordance with the methodology set out in the 2007 Transfer Pricing Report, in order to assess the robustness of the results if some of the parameters were to be modified. Based on those simulations, the Netherlands' conclusion was that if any of the doubts raised by the Commission were to be accepted, that would still have resulted in a remuneration within the arm's length range. In accordance with the 1995 OECD Transfer Pricing Guidelines, no corrections are required when the remuneration falls within the arm's length range.
- (62) The Netherlands further argued that the reference system applied by the Commission as a base for its selectivity analysis, which was the ordinary tax system based on the difference between profits and losses of an undertaking carrying on its activities under normal market conditions, was not correctly identified. According to the Netherlands, the correct reference system should have been Article 8b(1) CIT, which contains the arm's length principle, and the Transfer Pricing Decree that provides further guidance on the application of the arm's length principle. The Netherlands argued that as long as the SMBV APA does not deviate from Article 8b(1) CIT and the Transfer Pricing Decree, there could not have been a selective advantage.
- (63) Finally, the Netherlands observed that if the Commission were to impose its own interpretation of tax principles of the Member States, it would encroach on the sovereignty of the Netherlands.

5. COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION

5.1. Starbucks

- (64) Starbucks submitted its comments on the Opening Decision on 16 January 2015. In addition, Starbucks sent market information to the Commission by letters dated 13 April 2015, 29 May 2015, 10 September 2015, and 23 September 2015.
- (65) Starbucks' comments largely overlapped with those of the Netherlands in as much as both argued that the remuneration in the SMBV APA was at arm's length and did not confer a selective advantage to SMBV.
- (66) Like the Netherlands, Starbucks argued that SMBV only performed limited, low-risk functions in support of Starbucks Corporation serving the EMEA region. Ultimately, other group entities such as Alki LP took commercial responsibility for SMBV's activities and consequently bore the economic risks associated with those transactions (including inventory risk).
- (67) Starbucks therefore concluded that the TNMM constituted the most appropriate transfer pricing method. Starbucks considered that the Dutch tax administration in any event had to start the transfer pricing examination on the basis of the methodology selected by the taxpayer.
- (68) Starbucks recalled that transfer pricing is not an exact science and that the application of any transfer pricing method therefore typically produces a range of figures which could be equally defensible. Any transfer pricing analysis will inherently result in a range of arm's length outcomes and a conclusion on *an* arm's length price and not on *the* arm's length price.
- (69) Starbucks added that it possessed several ad-hoc reports that further substantiated the arm's length nature of the mark-up determined in the SMBV APA.
- (70) As regards the adjustments contained in the 2007 Transfer Pricing Report, Starbucks clarified that the purpose of those adjustments was to account for important differences in the functional profiles of SMBV and the comparable companies included in the sample to arrive at an appropriate arm's length remuneration. According to Starbucks, those adjustments were appropriate, in certain respects conservative, and certainly did not understate SMBV's remuneration for the functions performed.
- (71) Like the Netherlands, Starbucks further argued that the Commission did not correctly identify the reference framework. Starbucks argued that the reference system should be the Dutch system of corporate taxation and more specifically Article 8b(1) CIT, the Transfer Pricing Decree and the administrative practice of the Dutch tax administration. According to both the Netherlands and Starbucks, there could only be a State aid concern if the SMBV APA deviated from the normal interpretation and application of the arm's length principle in the Netherlands. Moreover, Starbucks argued that the Commission had failed to identify a benchmark group of taxpayers and that related and unrelated companies are not always in a comparable legal and factual situation.
- (72) Finally, Starbucks criticised the Commission's approach for being at odds with the Dutch tax administration's 'substance over form approach'. Starbucks further indicated that the Commission could not use information which post-dated the SMBV APA for its assessment.

5.2. Other interested parties

- (73) The NOB argued that the determination of whether a particular tax treatment of a taxpayer under an APA constituted State aid should be based on Dutch legislation, administrative practice, and the application of the arm's length principle at the time that that APA was entered into. The NOB noted that the reference to the prudent independent market operator in the Opening Decision seemed to introduce a new sort of Union standard above and beyond the OECD Transfer Pricing Guidelines for assessing the arm's length nature of the underlying arrangement. It asked for a confirmation that the Commission would use the domestic legal system as a reference framework and no other standard. It further argued that taxpayers have legitimate expectations that APAs that were concluded based on a national interpretation of the domestic laws do not constitute State aid.

- (74) The VNO-NCW expressed its worries on the application of the prudent independent market operator test and urged for the use of the nationally applied transfer pricing rules as the benchmark for assessing selectivity.
- (75) ATOZ argued that it seemed that the Commission takes the view that there exists an objective arm's length standard based on OECD principles which is somehow enshrined in Union law and which transcends Member States national law and practice. However, according to ATOZ, the Commission should have considered whether the SMBV APA was consistent with Dutch law. ATOZ argued that the Commission's approach created legal uncertainty among multinationals.
- (76) Oxfam and BAK in their comments expressed support for the Commission's investigation.
- (77) Company X, a competitor of the Starbucks group which did not want its identity to be disclosed, presented observations to the Commission in response to the Opening Decision concerning the value added by the roasting process to green coffee. It submitted that, on average, that added value would equal 13-17 % of the green coffee cost in the case of roast and ground coffee or coffee in beans.

6. COMMENTS FROM THE NETHERLANDS ON THIRD PARTIES' COMMENTS AND ON COMMENTS BY COMPANY X

- (78) By letters dated 20 and 26 April 2015, the Netherlands expressed their agreement with the observations of Starbucks, the NOB, VNO-NCW and ATOZ. By contrast, the Netherlands did not support the arguments made by Oxfam and BAK.
- (79) By letter dated 11 March 2015, the Netherlands stated that they could not submit any substantive reply to the comments made by company X, as the Netherlands was not provided with the functional analysis and benchmark of the anonymous competitor.

7. ASSESSMENT

- (80) Following the in-depth investigation, after having thoroughly considered the comments received in response to the Opening Decision and in light of the findings of the *Starbucks* judgment, the Commission considers that the concerns raised in the Opening Decision cannot be sustained with respect to the contested tax ruling.

7.1. Existence of aid

- (81) According to Article 107(1) TFEU, any aid granted by a Member State through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the internal market in so far as it affects trade between Member States.
- (82) As held by the Court of Justice of the European Union ⁽⁹⁾, the qualification of a measure as aid within the meaning of Article 107(1) of the TFEU therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.
- (83) In what follows, the Commission will concentrate its assessment on whether the contested tax ruling granted an advantage to SMBV.

7.2. Presence of an advantage for SMBV

- (84) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. In establishing the existence of an advantage, reference is to be made to the effect of the measure itself. As regards fiscal measures, an advantage may be granted through different types of reduction of an undertaking's tax burden and in particular through a reduction in the taxable base or in the amount of tax due.

⁽⁹⁾ Judgment of the Court of Justice of 2 September 2010, *Commission v Deutsche Post*, C-399/08 P, ECLI:EU:C:2010:481, paragraph 39.

- (85) As described in Section 3 of this Decision, the Commission initiated the formal investigation against the Netherlands concerning the SMBV APA based on the three doubts outlined in its Opening Decision.
- (86) The first doubt expressed by the Commission in its Opening Decision was whether the Dutch tax administration was right to accept SMBV's classification as a low-risk toll manufacturer for determining its arm's length remuneration.
- (87) In that regard, the General Court concluded in its judgment that a finding that the methodological requirements of a conventional transfer pricing analysis were not met was not in itself sufficient to show that State aid had been granted. Even if the Commission were right to doubt the applied transfer pricing classification, the Commission would still have to show that that methodological error had resulted in an advantage for SMBV. According to the General Court, in the present case, the Commission failed to demonstrate that advantage to the requisite legal standard ⁽¹⁰⁾.
- (88) The second doubt raised by the Commission was whether the Dutch tax administration was right to accept the first and second adjustments made by the tax advisor when calculating SMBV's remuneration under the SMBV APA. The first adjustment related to the choice of operating expenses as the profit level indicator for calculating SMBV's remuneration. The second adjustment, as described by SMBV, was a working capital adjustment.
- (89) First, the General Court found that the Commission had not demonstrated that the choice of profit level indicator was incorrect ⁽¹¹⁾.
- (90) Second, regarding the working capital adjustment, the General Court found that the Commission's finding that the Starbucks group had provided insufficient justification for the adjustments made to the results calculated using the TNMM did not in itself suffice to show that those adjustments were erroneous or that they conferred an advantage on SMBV. On that basis, the General Court found that the Commission had not demonstrated that the working capital adjustment performed conferred an advantage on SMBV ⁽¹²⁾.
- (91) The last doubt expressed by the Commission was whether the Dutch tax administration was right to accept the method identified in the SMBV APA for calculating the level of royalties payable by SMBV. In that regard, the General Court found that the Commission erred by concluding that the contractual relationships between the Starbucks group and other coffee roasting companies demonstrated that the level of royalty paid by SMBV should have been zero ⁽¹³⁾. The General Court also found that the Commission was wrong to conclude that agreements between the Starbucks group's competitors and other coffee roasting companies demonstrated that the level of royalty paid by SMBV should have been zero ⁽¹⁴⁾.
- (92) The General Court also found that the Commission had not adequately shown that if the level of royalty paid by SMBV was not zero, it should nevertheless be lower than the amount paid under the SMBV APA ⁽¹⁵⁾. The General Court observed that the Commission had not specified in its decision, what alternative level of royalty it regarded as appropriate ⁽¹⁶⁾.

⁽¹⁰⁾ Judgment of the General Court of 24 September 2019, *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, paragraph 427.

⁽¹¹⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, paragraph 501.

⁽¹²⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, paragraph 541.

⁽¹³⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 359.

⁽¹⁴⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, paragraph 358.

⁽¹⁵⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 362.

⁽¹⁶⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, paragraph 368.

- (93) More generally, the General Court found that the Commission was wrong to assume that the value of the IP provided to SMBV was exploited only where products were sold to final customers ⁽¹⁷⁾. The General Court found that since the IP was necessary for SMBV to exercise its economic activity, SMBV did derive value from the use of that IP ⁽¹⁸⁾.
- (94) Furthermore, the General Court found that the Commission was wrong to argue that SMBV was not in a position to pay a royalty for that IP because the activities for which SMBV needed the IP were loss-making ⁽¹⁹⁾. The General Court observed that the information showing that those activities were loss-making was only available from 2010 onwards and thus was not available when the SMBV APA was concluded. In that regard, the General Court noted that if the SMBV APA would have given rise to new aid, the Commission should have been notified of that aid before its implementation, as required by Article 108(3) TFEU. Since the Commission would, in that case, have had to take a position on such a notification using only the information available to it at that time, the General Court found that the Commission could not reproach the Dutch tax administration for not having taken into account information which was not known or reasonably foreseeable at the time the SMBV APA was concluded ⁽²⁰⁾.
- (95) Furthermore, the General Court found that although the Dutch tax administration could have revoked or amended the SMBV APA during its validity period, the Commission had not argued that the Dutch tax administration's decision not to revoke or modify the SMBV APA during its term conferred an advantage on SMBV ⁽²¹⁾. The Commission was therefore not entitled to use such an argument to justify the use of information which was only available after the time the SMBV APA was concluded.
- (96) In summary, the General Court found that the Commission had failed to demonstrate to the requisite legal standard that the SMBV APA conferred an advantage on SMBV, and, as such, in light of the cumulative nature of the factors recalled in recital 82, the Commission had failed to establish that the Netherlands had granted aid to SMBV in violation of Article 107(1) TFEU. The General Court accordingly annulled the Closing decision.
- (97) Pursuant to Article 266 of the TFEU, it is incumbent on the Commission to take the necessary measures to comply with the *Starbucks* judgment of the General Court annulling the Closing Decision.
- (98) To that effect, the Commission gathered further information concerning the business operations of the Starbucks group in the Netherlands through a request for information addressed to the Netherlands. Neither the Dutch authorities' submission in response to that request for information nor a subsequent follow-up meeting between the Commission, the Dutch authorities and the Starbucks group's representative provided evidence confirming, to the requisite legal standard, the doubts raised in the Opening Decision concerning the SMBV APA's compliance with Article 107(1) TFEU.
- (99) Moreover, the Commission's investigation did not reveal any other sources of relevant, reliable financial information from the period when the APA was originally concluded between the Dutch tax administration and SMBV which would be informative for its transfer pricing analysis. That absence of reliable data was particularly pertinent in this case, as the General Court had held that the Commission could not rely on information which was not available at the time that the contested measure was concluded ⁽²²⁾.

⁽¹⁷⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 260.

⁽¹⁸⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 262.

⁽¹⁹⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 273.

⁽²⁰⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 250.

⁽²¹⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 248.

⁽²²⁾ Judgment of the General Court of 24 September 2019 *Netherlands and Others v Commission*, T-760/15 and T-636/16, ECLI:EU:T:2019:669, para. 251.

- (100) Therefore, the Commission must conclude that the formal investigation into the SMBV APA did not demonstrate to the requisite legal standard that the SMBV APA resulted in SMBV improving its net financial position.

Conclusion

- (101) In the present Decision, therefore, the Commission must set aside the doubts expressed in the Opening Decision as to the existence of an advantage. As the criteria for finding the existence of State aid pursuant to Article 107(1) TFEU are cumulative, there is no need to assess the other criteria set out in that provision.

8. CONCLUSION ON THE EXISTENCE OF AID

- (102) In light of the foregoing, the Commission concludes that the SMBV APA does not constitute State aid within the meaning of Article 107(1) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

With the contested advance pricing agreement issued by the tax administration of the Kingdom of the Netherlands on 28 April 2008, the Kingdom of the Netherlands did not confer aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union to Starbucks Manufacturing EMEA bv.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 28 November 2024.

For the Commission
Margrethe VESTAGER
Executive Vice-President
