



EUROPEAN COMMISSION

PRESS RELEASE

Brussels, 11 June 2014

State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)

The European Commission has opened three in-depth investigations to examine whether decisions by tax authorities in Ireland, The Netherlands and Luxembourg with regard to the corporate income tax to be paid by Apple, Starbucks and Fiat Finance and Trade, respectively, comply with the EU rules on state aid. The opening of an in-depth investigation gives interested third parties, as well as the three Member States concerned, an opportunity to submit comments. It does not prejudice the outcome of the investigation.

Commission Vice President in charge of competition policy Joaquín Almunia said: *"In the current context of tight public budgets, it is particularly important that large multinationals pay their fair share of taxes. Under the EU's state aid rules, national authorities cannot take measures allowing certain companies to pay less tax than they should if the tax rules of the Member State were applied in a fair and non-discriminatory way."*

Algirdas Šemeta, Commissioner for Taxation, said: *"Fair tax competition is essential for the integrity of the Single Market, for the fiscal sustainability of our Member States, and for a level-playing field between our businesses. Our social and economic model relies on it, so we must do all we can to defend it."*

The Commission has been investigating under EU state aid rules certain tax practices in several Member States following media reports alleging that some companies have received significant tax reductions by way of "tax rulings" issued by national tax authorities. Tax rulings as such are not problematic: they are comfort letters by tax authorities giving a specific company clarity on how its corporate tax will be calculated or on the use of special tax provisions. However, tax rulings may involve state aid within the meaning of EU rules if they are used to provide selective advantages to a specific company or group of companies.

According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), state aid which affects trade between Member States and threatens to distort competition by favouring certain undertakings is in principle incompatible with the EU Single Market. Selective tax advantages may amount to state aid. The Commission does not call into question the general tax regimes of the three Member States concerned.

Tax rulings are used in particular to confirm transfer pricing arrangements. Transfer pricing refers to the prices charged for commercial transactions between various parts of the same group of companies, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of the same group. Transfer

pricing influences the allocation of taxable profit between subsidiaries of a group located in different countries.

If tax authorities, when accepting the calculation of the taxable basis proposed by a company, insist on a remuneration of a subsidiary or a branch on market terms, reflecting normal conditions of competition, this would exclude the presence of state aid. However, if the calculation is not based on remuneration on market terms, it could imply a more favourable treatment of the company compared to the treatment other taxpayers would normally receive under the Member States' tax rules. This may constitute state aid.

The Commission will examine if the three transfer pricing arrangements validated in the following tax rulings involve state aid to the benefit of the beneficiary companies:

- the individual rulings issued by the Irish tax authorities on the calculation of the taxable profit allocated to the Irish branches of Apple Sales International and of Apple Operations Europe;
- the individual ruling issued by the Dutch tax authorities on the calculation of the taxable basis in the Netherlands for manufacturing activities of Starbucks Manufacturing EMEA BV;
- the individual ruling issued by the Luxembourgish tax authorities on the calculation of the taxable basis in Luxembourg for the financing activities of Fiat Finance and Trade.

The Commission has reviewed the calculations used to set the taxable basis in those rulings and, based on a preliminary analysis, has concerns that they could underestimate the taxable profit and thereby grant an advantage to the respective companies by allowing them to pay less tax. The Commission notes that the three rulings concern only arrangements about the taxable basis; they do not relate to the applicable tax rate itself.

In parallel to these three formal investigations, the Commission will continue its wider inquiry into tax rulings, which covers more Member States.

Luxembourg, contrary to The Netherlands and Ireland, only provided the Commission with a limited sample of the information requested (see [IP/14/309](#)), which included the ruling for Fiat Finance and Trade, but not the complete information demanded by the Commission. The Commission has therefore initiated infringement proceedings against Luxembourg by issuing letters of formal notice.

Background

The Commission is looking at the compliance with EU state aid rules of certain tax practices in some Member States in the context of aggressive tax planning by multinationals, with a view to ensure a level playing field. A number of multinational companies are using tax planning strategies to reduce their global tax burden, by taking advantage of the technicalities of tax systems, and substantially reducing their tax liabilities. This aggressive tax planning practice erodes the tax bases of Member States, which are already financially constrained.

Regarding tax rulings specifically, the preliminary enquiries have shown that the quality and the consistency of the scrutiny by the tax authorities differ substantively across Member States. In particular, the Commission notes that **The Netherlands** seem to generally proceed with a thorough assessment based on comprehensive information required from the tax payer. The Commission therefore does not expect to encounter systematic irregularities in tax rulings. However, at this stage the Commission has concerns that the tax ruling for Starbucks Manufacturing EMEA BV is providing that

company with a selective advantage, because there are doubts whether it is in line with a market-based assessment of transfer pricing.

In the case of **Ireland**, the authorities have been fully cooperative in providing comprehensive replies in response to Commission's requests. The Commission notes that although the transfer pricing rules have been tightened over the years, the tax administration had a significant degree of discretion in the past. The Commission has concerns that such discretion has been used in the case of Apple to grant a selective advantage to that company, reducing its tax burden below the level it should pay based on a correct application of the tax rules. The Commission notes however that the number of tax rulings issued in Ireland relating to transfer pricing arrangements is limited.

The opening of formal investigations allows Member States' authorities to further explain their practices and the Commission to gather further information from interested parties.

The non-confidential versions of the decisions will be made available under the case numbers SA.38373, SA.38374 and SA.38375 in the [State Aid Register](#) on the [competition website](#) once any confidentiality issues have been resolved. New publications of state aid decisions on the internet and in the Official Journal are listed in the [State Aid Weekly e-News](#).

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EUROPEAN COMMISSION

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| <p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p> | | <p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p> |
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Subject: State aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Netherlands
Alleged aid to Starbucks

Sir,

The Commission wishes to inform the Netherlands that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (“TFEU”).

1. PROCEDURE

- (1) By letter dated 30 July 2013, the Commission requested the Dutch authorities to provide information regarding the tax ruling practice in the Netherlands as well as all rulings related to Starbucks Coffee EMEA BV and Starbucks Manufacturing EMEA BV (referred to hereinafter, respectively, as “Starbucks Coffee BV” and “Starbucks Manufacturing BV” and collectively as “Starbucks BV”), as well as their respective financial accounts.

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- (2) On 2 October 2013, the Dutch authorities replied to that request and supplied the tax rulings and supporting documents. These, in particular, concern exchanges between the tax authorities and the tax advisor of Starbucks BV, [...]*, on behalf of Starbucks BV (hereinafter “the tax advisor”).
- (3) On 9 January 2014, the Commission listed in an e-mail addressed to the Dutch authorities a number of queries regarding the transfer pricing arrangements agreed upon in rulings issued by the Dutch authorities.
- (4) On 28 January 2014, the Dutch authorities delivered additional information regarding the rulings practice and replied to a number of questions raised in a meeting with the Commission services held on 15 January 2014.
- (5) By letter dated 7 March 2014, the Commission informed the Dutch authorities that it was investigating whether the tax rulings in favour of Starbucks BV constitute new aid and invited the Dutch authorities to comment on the compatibility of such aid. The Commission invited the Dutch authorities to provide any additional information relating to the transfer pricing arrangements approved in the rulings addressed to Starbucks BV, as well as the tax returns of companies related to Starbucks BV in the Netherlands.
- (6) On 21 March 2014, the Dutch authorities replied to the Commission’s letter dated 7 March 2014. This reply did not contain any additional information on the pricing arrangement. The requested tax returns were provided.
- (7) On 6 May 2014, a meeting was held in Rotterdam between the Dutch tax authorities responsible for the tax rulings and the Commission services during which those authorities reiterated their position that Starbucks Manufacturing BV is a “toll manufacturer”¹ rather than a fully-fledged or contract manufacturer.

2. DESCRIPTION

2.1. Introduction on transfer pricing rulings

- (8) This decision concerns tax rulings which validate transfer pricing arrangements, also known as advance pricing arrangements (“APAs”). APAs are arrangements that determine, 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 the transfer pricing for those transactions over a fixed period of time². An APA is formally initiated by

* Parts of this text have been hidden so as not to divulge confidential information; those parts are enclosed in square brackets.

¹ A toll-manufacturer is a manufacturer that has been stripped of risks typically for tax planning purposes. These risks would have been transferred to another company of the group, in particular raw materials are to be acquired by another company of the group, not the manufacturer that processes them, they are put in consignment in the premises of the manufacturing company. A contract manufacturer is a manufacturer the risk of which have been transferred to another company by contract but to a lesser extent than in the case of a toll-manufacturer.

² APAs differ in some ways from more traditional private rulings that some tax administrations issue to taxpayers. An APA generally deals with factual issues, whereas more traditional private rulings

a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues³.

- (9) Transfer pricing refers in this context to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. The prices set for those transactions and the resulting amounts calculated on the basis of those prices contribute to increase the profits of one subsidiary and decrease the profits of the other subsidiary for tax purposes, and therefore contribute to determine the taxable basis of both entities. Transfer pricing thus also concerns profit allocation between different parts of the same corporate group.
- (10) Multinational corporations pay taxes in jurisdictions which have different tax rates. The after tax profit recorded at the corporate group level is the sum of the after-tax profits in each country in which it is subject to taxation. Therefore, rather than maximise the profit declared in each country, multinational corporations have a financial incentive when allocating profit to the different companies of the corporate group to allocate as much profit as possible to low tax jurisdictions and as little profit as possible to high tax jurisdictions. This could, for example, be achieved by exaggerating the price of goods sold by a subsidiary established in a low tax jurisdiction to a subsidiary established in a high tax jurisdiction. In this manner, the higher taxed subsidiary would declare higher costs and therefore lower profits when compared to market conditions. This excess profit would be recorded in the lower tax jurisdiction and taxed at a lower rate than if the transaction had been priced at market conditions.
- (11) Those transfer prices might therefore not be reliable for tax purposes and should not determine the taxable base for the corporate tax. If the (manipulated) price of the transaction between companies of the same corporate group were taken into account for the assessment of the taxable profits in each jurisdiction, it would entail an advantage for the firms which can artificially allocate profits between associate companies in different jurisdictions compared with other undertakings. So as to avoid this type of advantage, it is necessary to ensure that taxable income is determined in line with the taxable income a private operator would declare in a similar situation.

tend to be limited to addressing questions of a legal nature based on facts presented by a taxpayer. The facts underlying a private ruling request may not be questioned by the tax administration, whereas in an APA the facts are likely to be thoroughly analysed and investigated. In addition, an APA usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer's international transactions for a given period of time. In contrast, a private ruling request usually is binding only for a particular transaction. See, OECD Guidelines, paragraph 4.132.

³ OECD Guidelines, paragraph 4.123. Since APAs concern the remuneration for transactions that have not yet taken place, the reliability of any prediction used in an APA therefore depends both on the nature of the prediction and the critical assumptions on which that prediction is based. Those critical assumptions may include amongst others circumstances which may influence the remuneration for the transactions when they eventually take place.

- (12) The internationally agreed standard for setting such commercial conditions between companies of the same corporate group or a branch thereof and its mother company and thereby for the allocation of profit is the “arm’s length principle” as set in Article 9 of the OECD Model Tax Convention, according to which commercial and financial relations between associated enterprises should not differ from relations which would be made between independent companies. More precisely, using alternative methods for determining taxable income to prevent certain undertakings from hiding undue advantages or donations with the sole purpose of avoiding taxation must normally be to achieve taxation comparable to that which could have been arrived at between independent operators on the basis of the traditional method, whereby the taxable profit is calculated on the basis of the difference between the enterprise’s income and charges.
- (13) The OECD Transfer Pricing Guidelines⁴ (hereinafter the “OECD Guidelines”) provides five such methods to approximate an arm’s length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method (hereinafter “CUP”); (ii) the cost plus method; (iii) the resale minus method; (iv) the transactional net margin method (hereinafter “TNMM”) and (v) the transactional profit split method. The OECD Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). Multinational corporations retain the freedom to apply methods not described in those guidelines to establish transfer prices provided those prices satisfy the arm’s length principle.
- (14) Traditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are at arm’s length⁵. All three traditional transaction methods approximate an arm’s length pricing of a specific intra-group transaction, such as the price of a certain good sold or service provided to a related company. In particular, the CUP method consists in observing a comparable transaction between two independent companies and applying the same price for a comparable transaction between group companies. The cost plus method consist in approximating the income from goods sold or services provided to a group company. The resale minus method consists in approximating the costs of goods acquired from or services provided by a group company. Other elements which enter into the profit calculation (such as personal costs or interest expenses) are calculated based on the price effectively paid to an independent company or are approximated using one of the three direct methods.
- (15) The transactional profit methods, by contrast, do not approximate the arm’s length price of a specific transaction, but are based on comparisons of net profit indicators (such as profit margins, return on assets, operating income to sales, and possibly other measures of net profit) between independent and associated companies as a means to estimate the profits that one or each of the associated

⁴ Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2010

⁵ OECD Guidelines, paragraph 2.3.

companies could have earned had they dealt solely with independent companies, and therefore the payment those companies would have demanded at arm's length to compensate them for using their resources in the intra-group transaction⁶. For this purpose, the TNMM relies on a net profit indicator which refers, in principle, to the ratio of profit weighted to an item of the profit and loss account or of the balance sheet, such as turnover, costs or equity. To this selected item, a margin⁷ is applied which is considered "arm's length" to approximate the amount of taxable profit. When the TNMM is used in combination with a net profit indicator based on costs, it is sometimes referred to as "cost plus" in exchanges between the taxpayer and the tax administration, but this should not be confused with the "cost plus method" described in the OECD Guidelines as described in the previous recital.

- (16) Application of the arm's length principle is generally based on a comparison of the conditions in an intra-group transaction with the conditions in transactions between independent companies. For such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. To be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences.⁸ To establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or companies that would affect conditions in arm's length transactions. The OECD Guidelines list as attributes or "comparability factors" that may be important when determining comparability: the characteristics of the property or services transferred; the functions performed by the parties, taking into account assets used and risks assumed (functional analysis); the contractual terms; the economic circumstances of the parties; and the business strategies pursued by the parties.⁹

2.2. The beneficiary: Starbucks Manufacturing BV

- (17) The present investigation concerns APAs concluded by the Netherlands with Starbucks Manufacturing BV, which is part of the Starbucks Group composed of Starbucks Corporation and all the companies controlled by that corporation. The Starbucks Group is headquartered in Seattle, United States of America ("US").
- (18) The Starbucks Group is a roaster, marketer and retailer of specialty coffee, operating in 62 countries. It purchases and roasts speciality coffees which it

⁶ OECD Guidelines point 1.35.

⁷ The OECD Guidelines refer in this context to a "margin", while Starbucks Manufacturing BV's tax advisor has used the term "mark-up" throughout the transfer pricing report. As commonly used, a "margin" refers to a ratio of operating profit divided by an item of the profit and loss account or of the balance sheet, while a "mark-up" is generally used in reference to a ratio of the gross profit to costs. However, to align the present decision with the transfer pricing report prepared by the tax advisor, the term "mark-up" is used throughout this decision.

⁸ OECD Guidelines point 1.33.

⁹ OECD Guidelines point 1.36.

sells, along with handcrafted coffee, tea and other beverages and fresh food items, through company-operated stores. It also sells a variety of coffee and tea products and licenses its trademarks through other channels such as licensed stores, grocery and national foodservice accounts.

- (19) In 2013, the Starbucks Group had worldwide net revenues of USD 14 892 million and a post-tax net profit of USD 8 million. Net revenues and post-tax earnings amounted to USD 13 299 million and USD 1 384 million respectively in 2012¹⁰. The entities of the Starbucks Group that pay taxes in the Netherlands are Starbucks Coffee BV and Starbucks Manufacturing BV who are in a fiscal unity together. The amount of taxes paid by the fiscal unity was EUR 715 876 in 2011 and EUR [600 000-1 000 000] in 2012. The retail store of the Starbucks group in the Netherlands, Starbucks Coffee Netherlands BV, [paid 0 – 1 000] taxes in the Netherlands in 2010 and 2011, [...].
- (20) The Starbucks Group has four reportable operating segments: 1) Americas, inclusive of the US, Canada, and Latin America; 2) Europe, Middle East, and Africa (hereinafter “EMEA”); 3) China / Asia Pacific (CAP) and 4) Channel Development¹¹. Segment revenues as a percentage of total net revenues for fiscal year 2013 were as follows: Americas (74%), EMEA (8%), CAP (6%), Channel Development (9%), and all other segments (3%). In the US, the Starbucks Group operates 12 903 outlets, 61% of which are exploited directly by itself and 39% are licensed to third parties. In the EMEA, 1 869 shops are operated in more than 25 different countries, of which 987 shops (53%) are licensed to third parties. In China/Asia-Pacific, 3 294 shops are operated, of which 2 628 (80%) are licensed to third parties.
- (21) Starbucks Coffee BV and Starbucks Manufacturing BV are tax resident in the Netherlands. In 2007, those companies employed 143 persons. In 2011, that number was increased to 176 (97 employees at Starbucks Coffee BV and 79 employees at Starbucks Manufacturing BV).
- (22) Starbucks Coffee BV functions as the head office for the EMEA. In this capacity, Starbucks Coffee BV licenses certain Starbucks trademarks, the Starbucks shop format and the Starbucks corporate identity to related and unrelated operators of Starbucks shops. Starbucks Coffee BV holds these intellectual property rights (hereinafter “IP”) in license of its shareholder, Alki LP, against payment of a royalty. In the system applied by Starbucks worldwide, the companies that operate the shops pay a royalty for the use of IP and a royalty for the supply of coffee. These distributor companies may be related as well as unrelated parties. Both parties pay the same royalty. Starbucks thus maintains that a CUP is applied to determine the arm’s length price of intra-group royalty

¹⁰ Financial results for 2013 and 2012 relate to year-ended 29 September 2013 and to year-ended 30 September 2012 respectively. The relatively low post-tax earnings in 2013 are partially explained by a litigation charge recorded for an amount of USD 2.8 billion relating to an arbitration with Kraft.

¹¹ Channel Development segment consists primarily of packaged coffee and tea.

payments to Starbucks Coffee BV¹². Also in the EMEA, similar royalties are paid by related as well as unrelated distributor companies to the EMEA-head office Starbucks Coffee BV¹³.

- (23) Starbucks Manufacturing BV is a coffee-roasting house in operation since 2002. Its Amsterdam-based roasting facility is the only such facility located outside the US. Starbucks Manufacturing BV is supplied with coffee beans by a Starbucks Group Swiss subsidiary, Starbucks Coffee Trading Company SARL (“Starbucks’ Swiss entity”), which buys those beans for the benefit of the entire Starbucks corporate group worldwide and its independent licensees. The beans for the EMEA market are subsequently roasted and packaged in the Netherlands. After roasting and packaging, the beans enter a warehouse located in the Netherlands. Starbucks Manufacturing BV licenses IP from Alki LP which is necessary for the production process and for the delivery of coffee to shop operators in return for which it pays Alki LP a royalty. The delivery of coffee to the Starbucks branches is made on the basis of contracts concluded by those branches with Starbucks Coffee BV. Starbucks Manufacturing BV allegedly does not carry out any sales activities.
- (24) The template for a supply agreement between Starbucks Manufacturing BV and developers provided in the submission by the Netherlands of 2 October 2013, indicates that Starbucks Manufacturing BV can revise the pricing formula of the coffee beans sold [periodically], as stipulated in § 4.1 of the supply agreement and sets invoicing and payment terms, as stipulated in § 4.2 of that agreement. Starbucks Manufacturing BV warrants pursuant to § 8.1 of the supply agreement that the products will be free of defects, that defected goods will be replaced [...].
- (25) The most recent balance sheet figures for Starbucks Manufacturing BV are provided in Table 1:

Table 1

| Assets | 30.09.2012 in EUR | Liabilities | 30.09.2012 in EUR |
|--------------------------|-------------------|---|-------------------|
| Fixed Assets | | Shareholders' equity and liabilities | |
| Intangible fixed assets | 5 385 686 | Shareholders' equity | 69 753 248 |
| Tangible fixed assets | 8 110 763 | Long term liabilities | 28 719 |
| Current assets | | Short-term liabilities | |
| Inventories | 61 619 519 | Trade creditors | 15 253 234 |
| thereof raw material | 35 516 052 | Due to group companies | 30 642 511 |
| thereof work in progress | 222 406 | Due to related parties | 1 907 |
| thereof finished goods | 25 881 061 | Other taxes and social security contributions | 286 612 |
| Trade receivables | 10 148 648 | Other short-term liabilities | 12 018 958 |

¹² This definition is based on paragraph 2.13 until 2.20 of the OECD Guidelines. A (external) Comparable Uncontrolled Price is applied if independent third parties under the same circumstances pay the same price for the same product or service as related parties.

¹³ The applied royalty in principle is 6% of the turnover. Reference is made by the Netherlands to the extract of the hearing the UK House of Commons of November 2012, Q214-Q229.

| | | | |
|--------------------------|--------------------|--------------|--------------------|
| Due from group companies | 25 794 362 | Total | 127 985 189 |
| Due from related parties | 2 287 136 | | |
| Other receivables | 3 997 032 | | |
| Cash and cash equivalent | 10 642 040 | | |
| Total | 127 985 189 | | |

(26) Footnotes to the annual accounts indicate that on 30 September 2012 Starbucks Manufacturing BV's inventory reserves were EUR 1 246 088.

(27) The current ownership relations within the Starbucks Group, insofar as relevant for the Dutch tax administration perspective, are as follows:

§ Starbucks Corporation holds all shares in Starbucks Coffee International Inc (hereinafter "SCI Inc") and in SCI UK I Inc., both established in the US;

§ SCI Inc holds all shares in SCI Europe I Inc (hereinafter "SCIEI") and in SCI Europe II Inc (hereinafter "SCIEII"), both also established in the US;

§ SCI ([>95]% limited partner), SCIEI ([<5]% general partner) and SCIEII ([<5]% general partner) are partners of [CV 1] (hereinafter "[CV 1]"), a Dutch limited partnership (*commanditaire vennootschap*);

§ [CV 1] ([>95]% limited partner), SCIEI ([<5]% general partner) and SCIEII ([<5]% general partner) are partners of [CV 2] (hereinafter: "[CV 2]") also a Dutch limited partnership;

§ [CV 2] ([>95]% limited partner) and SCI UK Inc ([<5]% general partner) are partners of Alki LP, a UK limited partnership;

§ [...];

§ Alki LP holds all IP (certain Starbucks trademarks, the Starbucks shop formats and corporate identity) for the EMEA; this is licenced to Starbucks Coffee BV;

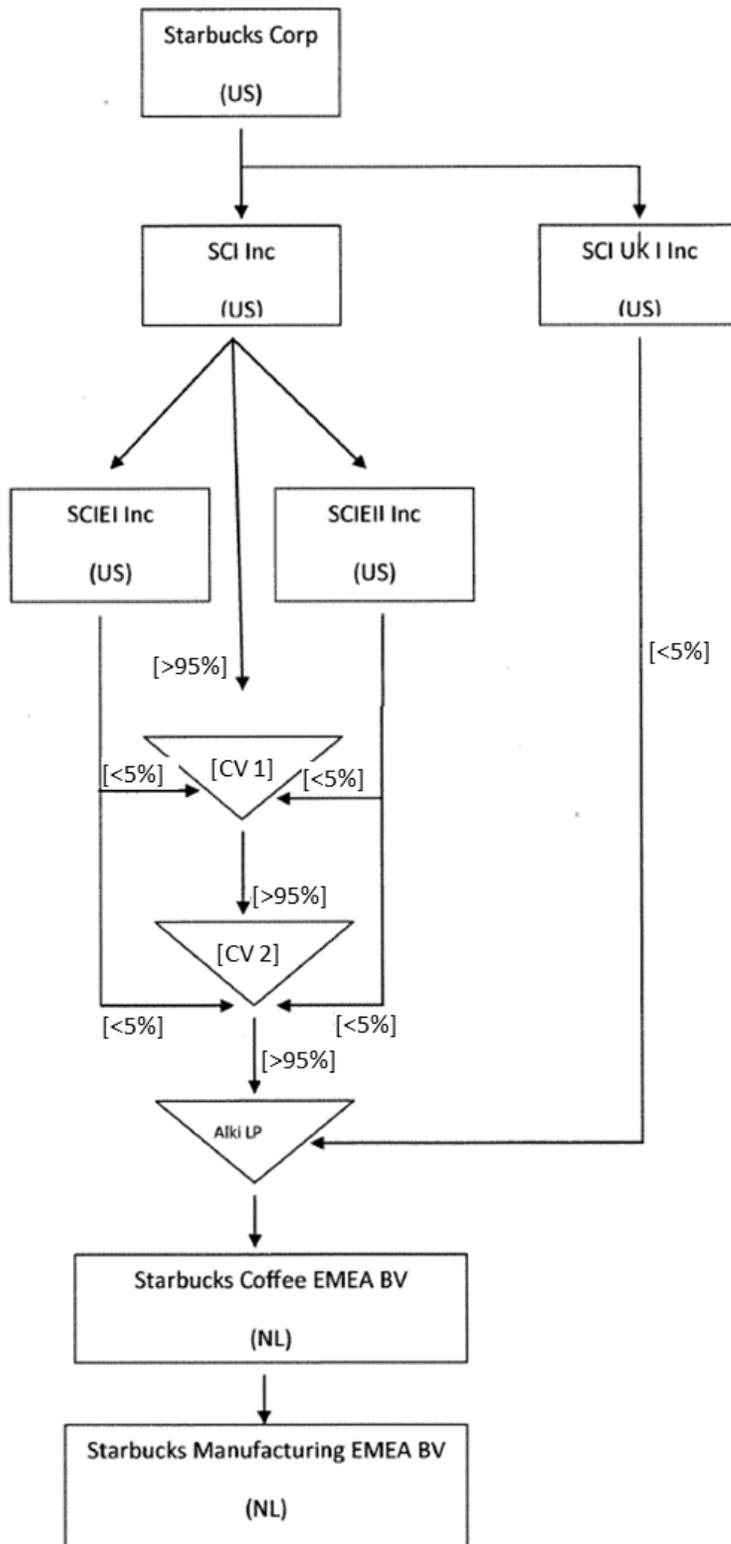
§ Alki LP makes payments¹⁴ to a US Starbucks company. Apart from this, Alki LP has concluded a cost sharing agreement¹⁵ with Starbucks Corporation (US).

The current ownership relations within the Starbucks Group are represented in Figure 1 below (simplified).

¹⁴ [...]

¹⁵ A cost sharing agreement is an agreement between companies of one group to share costs and benefits of developing intangible assets; it is a form of a cost contribution arrangement described in Chapter VIII of the OECD Guidelines.

Figure 1



- (28) [CV 1] and [CV 2] are so-called closed Dutch limited partnerships (*gesloten commanditaire vennootschappen*, “closed CVs”). According to Dutch tax law, a closed CV is considered to be a transparent entity and therefore not liable to corporate income tax. This means that the income of the closed CV is not taxed at the level of the CV, but at the level of the participants in the CV according to their respective shares in the CV. In principle, the Netherlands can therefore only tax the income of a closed CV if the participants in the CV are Dutch residents companies. Alki LP, a UK limited partnership comparable to a closed CV, is also considered a transparent entity for Dutch tax purposes and thus not liable to corporate income tax under Dutch tax legislation. As a result of this tax transparency, a royalty payment from Starbucks Coffee BV to Alki LP for the use of IP for the EMEA area is considered to be a direct payment to Starbucks US¹⁶ from a Dutch tax perspective. [...].

2.3. The contested measure

2.3.1. The APAs

- (29) On 28 April 2008, the Dutch tax administration concluded two APAs with Starbucks Coffee BV and Starbucks Manufacturing BV. The present investigation focuses solely on the APA concluded with Starbucks Manufacturing BV (hereinafter: the “SMBV APA”); the APA concluded with Starbucks Coffee BV will not be examined in the present decision.
- (30) The SMBV APA is based on an agreement from 12 April 2001 between the Dutch tax authorities and the Starbucks Group, which was adjusted and clarified in 2002 and 2004. Several exchanges between those authorities and the Starbucks Group from the start of 2001 describe the set-up of the legal structure as well as the remuneration basis for Starbucks’ Dutch companies, in particular, a fax of 9 August 2002 by which Starbucks informed the tax administration that it would set up a second CV (only one CV was initially envisaged) to avoid that the income of Starbucks’ Swiss entity falls under the US [...] tax [...] legislation¹⁷.
- (31) According to Article 8b of the Dutch Corporate Income Tax Act 1969 (*Wet op de vennootschapsbelasting 1969*) and in accordance with international standards in this area, in particular the OECD Guidelines, APAs should determine an arm’s length remuneration for transfer pricing. In the SMBV APA, the assumption is made that Starbucks Manufacturing BV will use arm’s length transfer prices for transactions with related distributors. This applies, for example, to the arm’s length price of coffee beans. Accordingly, an arm’s length remuneration was agreed between the Dutch tax authorities and Starbucks Manufacturing BV for the functions performed by that company in the Netherlands (including risks assumed and assets used). That remuneration

¹⁶ “Starbucks US” refers to all companies member of the Starbucks group that are resident in the US.

¹⁷ Under the [...] tax rules, the Starbucks’ Swiss entity’s income would likely be taxed if the second CV is not added to the Group structure.

amounts to [9-12]% mark-up on the relevant cost base¹⁸. The relevant cost base is the costs to which Starbucks Manufacturing BV itself adds value.

2.3.2. The 2007 transfer pricing report

- (32) The SMBV APA is based on a transfer pricing report from 2007 prepared by the tax advisor. That transfer pricing report forms an integral part of that APA.
- (33) That report uses the TNMM as the preferred transfer pricing method to benchmark the operating performance of Starbucks Manufacturing BV. According to the OECD Guidelines, the TNMM examines the net profit relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realises from intra-group transactions. In order to be applied reliably, the net profit indicator of the taxpayer from the intra-group transaction should be established by reference to the net profit indicator that that same taxpayer earns in comparable transactions with independent companies. Where this is not possible, the net margin that would have been earned in comparable transactions by an independent company may serve as a guide. A functional analysis of the intra-group and independent transactions is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results¹⁹.

2.3.2.1. Functional analysis

- (34) In transactions between two independent enterprises, compensation will usually reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether transactions or entities are comparable, a functional analysis is necessary. That functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions.²⁰
- (35) According to the functional analysis provided in the transfer pricing report, the focus of Starbucks Manufacturing BV's activities is its Amsterdam-based roasting facility. The main raw material component of the manufacturing process is green coffee beans. The actual roasting process for a particular coffee blend depends on the particular type of green coffee bean used in the recipe and the desired flavour profile. [...].

¹⁸ The relevant cost includes, in particular, all personnel cost engaged both in manufacturing and supply chain activities, the cost of production equipment (i.e. depreciation) and plant overhead (such as the cost of facility as such). It does not include:

- the cost of the Starbucks cups, paper napkins, etc.;
- the cost of the green coffee beans;
- the logistics and distribution cost for services provided by third parties and the remuneration for activities provided by third parties under the so-called 'consignment manufacturing contracts';
- royalty payments to Alki LP.

¹⁹ OECD Guidelines, paragraph 2.58.

²⁰ OECD Guidelines, paragraph 1.42

- (36) Starbucks Manufacturing BV's roasting facility in Amsterdam employs approximately [40-60] full-time equivalent (hereinafter "FTE")²¹ employees. Those employees work primarily in the following areas: roasting operations, packaging operations, maintenance and warehousing. Starbucks Manufacturing BV employees thus perform functions of roasting technician, packaging line operator, equipment maintenance, utilisation of inventory delivered for roasting, quality assurance, and warehouse operations (for temporary storage of green coffee and finished goods). [...].
- (37) In addition to its roasting activities, Starbucks Manufacturing BV performs associated supply chain operations ("SCOs"). SCOs consist of green coffee requirements planning, sourcing and buying; coffee roasting and the distribution of roast coffee; and the sourcing and supply of other products and supplies. The SCOs performed by the [20-30] FTE of Starbucks Manufacturing BV include procurement, planning, logistics, and distribution planning. [...].
- (38) Supply agreements with developers specify a [...] pricing methodology for coffee. Consistent with the [...] policy of Starbucks [...], coffee prices from Starbucks Manufacturing BV to developers are determined by applying a mark-up on fully loaded coffee costs ([...]). Fully loaded coffee costs used for coffee pricing are based on the global average of all coffee costs [...]. Separately, [...] prices for non-coffee items are determined by applying a distribution recovery mark-up on actual costs.
- (39) According to the transfer pricing report, Starbucks Manufacturing BV also operates an intermediary distribution network for a variety of non-coffee items (such as category products for resale, paper cups, napkins, syrups and equipment). It also has a relationship with a consignment manufacturer which is primarily driven by capacity and capability considerations. Currently, Starbucks Manufacturing BV entered into one consignment manufacturing relationship with [unaffiliated company X], which is an unaffiliated company with operations in Switzerland and Malaysia. The main product produced by [unaffiliated company X] is [...]. Starbucks Manufacturing BV sells the majority of the products produced by [unaffiliated company X] to Starbucks [...].

2.3.2.2. *Selection of the TNMM*

- (40) According to the transfer pricing report, the TNMM was selected by the tax advisor over other transfer pricing methods because in Starbucks' specific circumstances the net margin used in the TNMM would be less affected by transactional differences and functional differences²², as compared to standard traditional methods.

²¹ FTE is a manner of accounting for the number of employees.

²² Transactional differences refers to differences between the transactions concluded by the company for which the taxable basis is approximated through a transfer pricing methods and the transactions concluded between independent companies used to determine the arm's length pricing. In the TNMM method this refers to the transactions concluded by comparable companies used to approximate an arm's length margin. Functional differences refers to differences between the

- (41) In applying the TNMM to Starbucks Manufacturing BV's manufacturing activities, the tax advisor considered the relevant base²³ for the net profit indicator to be the costs of the services rendered by Starbucks Manufacturing BV, in line with the cost plus method, which is considered an appropriate methodology for supply chain and manufacturing services.
- (42) However, according to the tax advisor, the mark-up should only be applied to the underlying costs for which Starbucks Manufacturing BV performs a value added role²⁴. The transfer pricing report lists these 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).
- (43) By contrast, according to the tax advisor costs that could not be traced back to Starbucks Manufacturing BV's value-added activities should not be included in the relevant cost base²⁵. As regard Starbucks Manufacturing BV's roasting activities, the tax advisor considered that the sourcing of green coffee beans represent a cost category for which Starbucks Manufacturing BV exercises little to no control. The only control that Starbucks Manufacturing BV can exercise in that context relates to the inventory and roasting risks during the production process ([...]).
- (44) In addition to its roasting activities, Starbucks Manufacturing BV also acts as an intermediary distribution company for items such as Starbucks cups, paper napkins, etc. [...]. Approximately, 50% of Starbucks Manufacturing BV costs relate to "non-coffee COGS"²⁶ which reflects this intermediary distribution role. [...]. The tax advisor therefore considered that the costs relating to these intermediary activities should be excluded from the cost base to which the mark-up applies.
- (45) Finally, another part of Starbucks Manufacturing BV's cost base relates to the consignment manufacturing arrangement and the arrangement with third-party logistics/distribution service providers. According to the tax advisor, Starbucks Manufacturing BV primarily acts as an intermediary in these arrangements. It would therefore not be justified for Starbucks Manufacturing BV to receive a mark-up on tolling fees and/or logistics/distribution fees for activities performed

functions performed by the company of which the taxable basis is approximated by transfer pricing method and the functions performed by comparable companies used to approximate an arm's length margin.

²³ The report refers in this context to paragraph 3.26 of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 1995 (an earlier version of the OECD Guidelines).

²⁴ "Value added" is used 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.

²⁵ The distinction between costs that pertain to value added-activities and costs that would not pertain to such activities does not exist in accounting rules and is operated by the tax advisor. A classification of costs recorded under accounting rules into those two types of costs relies solely on the judgement of the tax advisor.

²⁶ COGS refers to "Cost of Goods Sold" which in the profit and loss accounts ("P&L") represents the cost of goods which are further processed by the company to produce goods.

by third parties, not the least because these third-party fees already represent arm's length prices for the services rendered by the parties involved. Those tolling fees represent approximately [10-20]% of Starbucks Manufacturing BV's cost base.

- (46) The tax advisor therefore considers these three categories of costs to be outside the relevant cost base for the net profit indicator to which the mark-up is to be applied. In that respect, reference is made by the tax advisor to paragraph 7.36 of an earlier version of OECD Guidelines²⁷ which explains that if an associated enterprise only acts as an intermediary in the provision of services, it is important in applying the cost-plus method that the return or mark-up is determined for the performance of that intermediary function rather than for the performance of the services themselves and to pass-on the costs for which it fulfils an intermediary function.

2.3.2.3. *Selection of a peer group and adjustments*

- (47) Finally, to determine the appropriate arm's length range of profitability for the activities performed by Starbucks Manufacturing BV, the tax advisor conducted a search to identify companies operating in Europe with similar functions and risks. A comparable companies search in the Amadeus database²⁸ using the primary NACE Rev 1.1 code 1586 – Processing of tea and coffee to identify companies engaged in the trade of coffee (the buying and selling of coffee not processed by the company itself were not deemed comparable) followed by elimination through the use of additional financial selection criteria and a manual screening by the tax advisor²⁹, ultimately resulted in 20 companies as potentially comparable³⁰.
- (48) The net profit indicator calculated for each company was a mark-up on total costs, which is defined as operating profit divided by total operating costs. The unadjusted mark-up on total costs for those companies from 2001 to 2005 are presented in Table 2.

²⁷ The report refers to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, July 1995 (an earlier version of the OECD Guidelines).

²⁸ The Amadeus Database is a database of comparable financial information for public and private companies across Europe. It is maintained by Bureau van Dijk, or BvD, a publisher of company information and business intelligence.

²⁹ Automated searches in Amadeus resulted in a selection of 240 companies, additional financial selection criteria applied by the tax advisor eliminated 88 companies, reducing the sample to 152 potentially comparable companies.

³⁰ The main elimination criteria were that the companies were engaged in unrelated functions (i.e. distribution, repair, etc), producing unrelated products (i.e. candies, other food products, etc) or that the companies belonged to a group.

Table 2

| Unadjusted mark-up on total costs Weighted average (based on total costs) Manufacturers of coffee Interquartile Range 2001-2005 | |
|--|-------------|
| Number of observations | 20 |
| Lower Quartile | 4.9% |
| Median | 7.8% |
| Upper Quartile | 13.1% |

- (49) However, according to the tax advisor, this set of comparable companies includes full-fledged manufacturers that typically perform more functions and incur risk relating to their raw materials. To increase the reliability of the comparison, the tax advisor performed a first adjustment to account for the fact that the proposed application of the mark-up to Starbucks Manufacturing BV's cost-base does not include the cost component for green beans ("the first adjustment"). The underlying rationale for the first adjustment was based on the assumption that Starbucks Manufacturing BV has no value-added contribution in terms of sourcing those beans while it also incurs little to no risks for the (short-term) inventory.
- (50) By contrast, the comparable companies' returns would, according to the tax advisor, reflect a return on a cost base that includes such raw materials. Therefore, a raw materials cost adjustment was applied by the tax advisor to modify the total cost mark-up³¹ obtained from the comparable companies set into a conversion cost mark-up. That conversion cost mark-up is a function of the proportion of raw material costs in total costs and the mark-up associated with what the tax advisor refers to as "taking title to the raw materials".
- (51) For the raw material cost mark-up in the conversion cost mark-up calculation, the tax advisor estimated, in the absence of any direct benchmarks, the required rate of return of Starbucks Manufacturing BV's manufacturers on their raw materials costs by reference to a risk-free interest rate, specifically the 12-month EURIBOR, increased with a spread of 50 basis points ("the second adjustment"). The 12-month EURIBOR used for each year was the following:

Table 3

| 12-month EURIBOR Rates | | | | | |
|------------------------|-------|-------|-------|-------|-------|
| | 2005 | 2004 | 2003 | 2002 | 2001 |
| Interest Rate | 2.33% | 2.27% | 2.33% | 3.49% | 4.09% |
| Spread | 0.5% | 0.5% | 0.5% | 0.5% | 0.5% |

- (52) According to the tax advisor, in order to make the comparable companies income statement data reflect this estimated difference in opportunity costs, the

³¹ The tax advisor uses the term mark-up although the calculation of the mark-up is based on the operating profit of the comparable companies divided by a cost basis and not on gross profit.

estimated difference is added to the comparable companies material costs. The following formula outlines the combined first and second adjustments:

$$Adj_{Mark-up} = (MU_{Total\ Costs} - (MU_{Raw\ Materials} * RMC))/CC$$

Where,

$Adj_{Mark-up}$ = The consignment manufacturer's adjusted mark-up on conversion costs

$MU_{Total\ Costs}$ = The consignment manufacturer's adjusted mark-up on Total costs

$MU_{Raw\ Materials}$ = The mark-up associated with taking title to raw materials

RMC = Raw Material Cost expressed as a proportion of total costs

CC = Conversion Cost expressed as a proportion of total costs

- (53) The application of the two adjustments resulted in the 2001-2005 adjusted mark-up on conversion costs for the comparable companies as Table 4.

Table 4

| Adjusted mark-up on conversion costs Weighted average (based on total costs) Manufacturers of coffee Interquartile Range 2001-2005 | |
|---|----------------|
| Number of observations | 20 |
| Lower Quartile | 6.6% |
| Median | [9-12]% |
| Upper Quartile | 20.9% |

- (54) On that basis, the tax advisor concluded that during the period 2001 through 2005, independent companies achieved a mark-up on conversion costs in the range of 6.6% to 20.9%, with a median of [9-12]%. Accordingly, the transfer pricing report concludes that the median result, based on weighted averages, represented an appropriate arm's length mark-up for Starbucks Manufacturing BV's activities. Therefore, a (rounded) mark-up of [9-12]% was considered to reflect an arm's length mark-up for the provision of manufacturing/roasting services and associated supply chain activities by Starbucks Manufacturing BV for its intra-group transactions.
- (55) In appendices to the transfer pricing report the list of rejected and accepted companies is provided. The 20 companies accepted for comparison purposes in the transfer pricing report are presented in appendices to that report and reproduced in Table 5:

Table 5

| | company name | country | 2005 | | | | | | 2004 | | | | | | 2003 | | | | | | | | | |
|---------------------|--------------|---------|----------|------------------|-------------|-----------------|--------------------|------------------|----------|------------------|-------------|-----------------|--------------------|------------------|----------|------------------|-------------|-----------------|--------------------|------------------|--|--|--|--|
| | | | turnover | operating profit | total costs | material consts | unadjusted Mark-up | adjusted Mark-up | turnover | operating profit | total costs | material consts | unadjusted Mark-up | adjusted Mark-up | turnover | operating profit | total costs | material consts | unadjusted Mark-up | adjusted Mark-up | | | | |
| 1 | [COMPANY 1] | SPAIN | 11,459 | [...] | 10,276 | 5,020 | 11.51% | [...] | 10,814 | 964 | 9,850 | 5,204 | 9.79% | 17.65% | 11,691 | 887 | 10,804 | 5,991 | 8.21% | 14.91% | | | | |
| 2 | [COMPANY 2] | FRANCE | 1,751 | [...] | 1,737 | 821 | 0.81% | [...] | 1,693 | 54 | 1,639 | 739 | 3.29% | 3.73% | 1,750 | 96 | 1,654 | 748 | 5.80% | 8.26% | | | | |
| 3 | [COMPANY 3] | SPAIN | 1,068 | 42 | 1,026 | 460 | 4.09% | 5.12% | 996 | 199 | 797 | 399 | 24.97% | 47.22% | 970 | 212 | 758 | 418 | 27.97% | 58.87% | | | | |
| 4 | [COMPANY 4] | SPAIN | 1,971 | 61 | 1,910 | 835 | 3.19% | 3.48% | 1,826 | 117 | 1,709 | 697 | 6.85% | 9.65% | 1,621 | 67 | 1,554 | 640 | 4.31% | 5.35% | | | | |
| 5 | [COMPANY 5] | SPAIN | 2,194 | 245 | 1,949 | 1,137 | 12.57% | 26.21% | 2,039 | 205 | 1,834 | 1,074 | 11.18% | 23.06% | 2,046 | 187 | 1,859 | 1,107 | 10.06% | 20.70% | | | | |
| 6 | [COMPANY 6] | SPAIN | 1,102 | 39 | 1,063 | 524 | 3.67% | 4.48% | 1,040 | 47 | 993 | 396 | 4.73% | 6.04% | 1,094 | 58 | 1,036 | 445 | 5.60% | 7.68% | | | | |
| 7 | [COMPANY 7] | FRANCE | 2,484 | 439 | 2,045 | 1,200 | 21.47% | 47.93% | 2,393 | 480 | 1,913 | 1,117 | 25.09% | 56.41% | 2,296 | 512 | 1,784 | 1,049 | 28.70% | 65.62% | | | | |
| 8 | [COMPANY 8] | ITALY | 1,043 | 60 | 983 | 472 | 6.10% | 9.13% | 925 | 140 | 785 | 270 | 17.83% | 25.73% | na | na | na | na | | | | | | |
| 9 | [COMPANY 9] | ITALY | 6,149 | -695 | 6,844 | 2,884 | -10.15% | -10.15% | 5,740 | 308 | 5,432 | 1,750 | 5.67% | 7.05% | 5,578 | 360 | 5,218 | 1,650 | 6.90% | 8.78% | | | | |
| 10 | [COMPANY 10] | ITALY | 6,320 | 346 | 5,974 | 2,702 | 5.79% | 8.24% | 5,142 | 364 | 4,778 | 2,125 | 7.62% | 11.50% | 4,530 | 294 | 4,236 | 1,714 | 6.94% | 9.73% | | | | |
| 11 | [COMPANY 11] | ITALY | 2,262 | 233 | 2,029 | 163 | 11.48% | 12.24% | 2,279 | 217 | 2,062 | 204 | 10.52% | 11.38% | 2,054 | 97 | 1,957 | 198 | 4.96% | 5.20% | | | | |
| 12 | [COMPANY 12] | ITALY | 2,559 | 40 | 2,519 | 645 | 1.59% | 1.59% | 2,591 | 28 | 2,563 | 727 | 1.09% | 1.09% | 2,521 | 186 | 2,335 | 607 | 7.97% | 9.77% | | | | |
| 13 | [COMPANY 13] | SPAIN | 6,748 | 227 | 6,521 | 5,371 | 3.48% | 6.52% | 6,612 | 255 | 6,357 | 5,170 | 4.01% | 9.42% | 6,203 | 253 | 5,950 | 4,696 | 4.25% | 9.58% | | | | |
| 14 | [COMPANY 14] | SPAIN | 5,055 | 512 | 4,543 | 2,286 | 11.27% | 19.82% | 4,733 | 857 | 3,876 | 1,932 | 22.11% | 41.33% | 4,471 | 653 | 3,818 | 2,050 | 17.10% | 33.65% | | | | |
| 15 | [COMPANY 15] | ITALY | 2,609 | 342 | 2,267 | 1,090 | 15.09% | 26.44% | 2,764 | 622 | 2,142 | 789 | 29.04% | 44.36% | 2,982 | 764 | 2,218 | 748 | 34.45% | 50.53% | | | | |
| 16 | [COMPANY 16] | ITALY | 2,524 | 256 | 2,268 | 2,989 | 4.08% | 5.23% | 6,533 | 304 | 6,229 | 3,066 | 4.88% | 6.93% | 6,243 | 478 | 5,765 | 3,026 | 8.29% | 14.33% | | | | |
| 17 | [COMPANY 17] | FRANCE | 1,467 | 79 | 1,388 | 644 | 5.69% | 8.17% | 1,411 | 63 | 1,348 | 629 | 4.67% | 6.34% | 1,368 | 62 | 1,306 | 608 | 4.75% | 6.42% | | | | |
| 18 | [COMPANY 18] | FRANCE | 1,492 | 59 | 1,433 | 366 | 4.12% | 4.56% | 1,330 | 72 | 1,258 | 369 | 5.72% | 6.95% | 1,445 | 174 | 1,271 | 394 | 13.69% | 18.57% | | | | |
| 19 | [COMPANY 19] | SPAIN | 1,264 | 50 | 1,214 | 515 | 4.12% | 5.07% | 1,111 | 60 | 1,051 | 445 | 5.71% | 7.87% | 1,026 | 63 | 963 | 415 | 6.54% | 9.35% | | | | |
| 20 | [COMPANY 20] | ITALY | 10,716 | 528 | 10,188 | 4,614 | 5.18% | 7.13% | 10,078 | 1,206 | 8,872 | 3,504 | 13.59% | 20.66% | 9,199 | 831 | 8,368 | 3,640 | 9.93% | 15.40% | | | | |
| number of companies | | | | | | | | | 20 | 20 | | | | | | | 20 | 20 | | | | | | |
| lower quartile | | | | | | | | | | | | | | | | | | | | | | | | |
| median | | | | | | | | | | | | | | | | | | | | | | | | |
| upper quartile | | | | | | | | | | | | | | | | | | | | | | | | |

Table 5 continued

| | company name | country | 2002 | | | | | | 2001 | | | | | | 2001-2005 | 2001-2005 | | | | |
|---------------------|--------------|---------|----------|------------------|-------------|-----------------|--------------------|------------------|----------|------------------|-------------|-----------------|--------------------|------------------|-------------------------------------|-----------------------------------|-------|-------|-------|---------|
| | | | turnover | operating profit | total costs | material consts | unadjusted Mark-up | adjusted Mark-up | turnover | operating profit | total costs | material consts | unadjusted Mark-up | adjusted Mark-up | unadjusted weighted average Mark-up | adjusted weighted average Mark-up | | | | |
| 1 | [COMPANY 1] | SPAIN | 12,813 | 939 | 11,874 | 7,633 | 7.91% | 14.96% | 13,402 | 850 | 12,552 | 8,753 | 6.77% | 11.80% | 8.71% | [...] | | | | |
| 2 | [COMPANY 2] | FRANCE | 1,759 | 84 | 1,675 | 792 | 5.01% | 5.93% | 1,664 | 109 | 1,555 | 760 | 7.01% | 9.32% | 4.32% | [...] | | | | |
| 3 | [COMPANY 3] | SPAIN | 959 | 219 | 740 | 409 | 29.59% | 61.23% | 965 | 176 | 789 | 463 | 22.31% | 47.47% | 20.63% | 39.50% | | | | |
| 4 | [COMPANY 4] | SPAIN | 1,449 | 104 | 1,345 | 551 | 7.73% | 10.33% | 1,398 | 123 | 1,275 | 555 | 9.65% | 13.55% | 6.06% | 8.05% | | | | |
| 5 | [COMPANY 5] | SPAIN | 2,007 | 191 | 1,816 | 1,182 | 10.52% | 22.69% | 1,955 | 190 | 1,765 | 1,156 | 10.76% | 22.49% | 11.04% | 23.12% | | | | |
| 6 | [COMPANY 6] | SPAIN | 1,086 | 18 | 1,068 | 361 | 1.69% | 1.69% | 861 | -17 | 878 | 355 | -1.94% | -1.94% | 2.88% | 3.63% | | | | |
| 7 | [COMPANY 7] | FRANCE | 2,260 | 481 | 1,779 | 1,068 | 27.04% | 61.66% | 2,201 | 441 | 1,760 | 1,086 | 25.06% | 58.03% | 25.35% | 57.59% | | | | |
| 8 | [COMPANY 8] | ITALY | 909 | 107 | 802 | 299 | 13.34% | 18.90% | na | na | | na | | | 11.95% | 17.94% | | | | |
| 9 | [COMPANY 9] | ITALY | 5,146 | 105 | 5,041 | 1,068 | 2.08% | 2.08% | na | na | | na | | | 0.35% | 1.67% | | | | |
| 10 | [COMPANY 10] | ITALY | 4,226 | 192 | 4,034 | 1,465 | 4.76% | 5.20% | 3,923 | 247 | 3,676 | 1,667 | 6.72% | 8.49% | 6.36% | 8.63% | | | | |
| 11 | [COMPANY 11] | ITALY | 1,732 | 126 | 1,606 | 121 | 7.85% | 8.16% | na | na | | na | | | 8.79% | 9.36% | | | | |
| 12 | [COMPANY 12] | ITALY | 2,808 | 210 | 2,598 | 726 | 8.08% | 9.67% | 2,886 | 184 | 2,702 | 896 | 6.81% | 7.91% | 5.10% | 5.95% | | | | |
| 13 | [COMPANY 13] | SPAIN | 6,324 | 261 | 6,063 | 4,911 | 4.30% | 5.65% | 6,352 | 280 | 6,072 | 5,027 | 4.61% | 4.71% | 4.12% | 7.28% | | | | |
| 14 | [COMPANY 14] | SPAIN | 4,425 | 704 | 3,721 | 2,045 | 18.92% | 37.14% | 4,370 | 837 | 3,533 | 2,052 | 23.69% | 50.16% | 18.28% | 35.19% | | | | |
| 15 | [COMPANY 15] | ITALY | 3,138 | 930 | 2,208 | 880 | 42.12% | 67.39% | 3,334 | 936 | 2,398 | 1,118 | 39.03% | 69.12% | 32.00% | 51.96% | | | | |
| 16 | [COMPANY 16] | ITALY | 5,609 | 465 | 5,144 | 2,839 | 9.04% | 15.26% | 5,407 | 448 | 4,959 | 2,240 | 9.03% | 12.70% | 6.88% | 10.42% | | | | |
| 17 | [COMPANY 17] | FRANCE | 1,397 | 52 | 1,345 | 636 | 3.87% | 3.76% | 1,422 | 64 | 1,358 | 673 | 4.71% | 4.83% | 4.74% | 5.93% | | | | |
| 18 | [COMPANY 18] | FRANCE | 1,514 | 412 | 1,102 | 351 | 37.39% | 53.00% | na | na | | na | | | 14.16% | 18.73% | | | | |
| 19 | [COMPANY 19] | SPAIN | 1,020 | 86 | 934 | 452 | 9.21% | 14.10% | 1,002 | 49 | 953 | 491 | 5.14% | 5.73% | 6.02% | 8.18% | | | | |
| 20 | [COMPANY 20] | ITALY | 8,962 | 714 | 8,268 | 3,829 | 8.64% | 12.64% | 7,885 | 464 | 7,421 | 3,507 | 6.25% | 7.74% | 8.68% | 12.90% | | | | |
| number of companies | | | | | | | | | 20 | 20 | | | | | | | 16 | 16 | 20 | 20 |
| lower quartile | | | | | | | | | 4.9% | 5.8% | | | | | | | 5.7% | 6.7% | 4.9% | 6.6% |
| median | | | | | | | | | 8.4% | 13.4% | | | | | | | 6.9% | 10.6% | 7.78% | [9-12]% |
| upper quartile | | | | | | | | | 16.1% | 29.9% | | | | | | | 16.5% | 35.0% | 13.1% | 20.9% |

2.3.3. Royalty payments by Starbucks Manufacturing BV to Alki LP

- (56) The Profit and Loss accounts (hereinafter “P&L”) of Starbucks Manufacturing BV for the years ending 30 September 2012 and 2 October 2011 (including the previous fiscal year) as presented in its financial statements of Starbucks Manufacturing BV provided by the Dutch authorities in their submission of 2 October 2013, are reproduced in Table 6:

Table 6

| in EUR | 2009/2010 | 2010/2011 | 2011/2012 |
|-------------------------------------|---------------|---------------|---------------|
| Sales | 142 627 243 | 184 159 097 | 286 217 379 |
| Direct Cost of sales | (120 020 824) | (153 275 834) | (252 500 829) |
| Gross Margin | 22 606 419 | 30 883 263 | 33 716 550 |
| General and administrative expenses | (16 835 153) | (14 303 059) | (17 469 758) |
| Foreign currency exchange | (2 266 492) | (2 089 448) | (8 162 650) |
| Operating result | 3 504 774 | 14 490 756 | 8 084 142 |
| Other expenses | (1 079 817) | (12 352 838) | (5 786 211) |
| Interest income | 45 402 | 30 073 | 18 763 |
| Interest expense | (817 041) | (737 371) | (735 233) |
| Result before taxation | 1 653 318 | 1 430 620 | 1 581 461 |
| Corporate income tax | (428 611) | (337 599) | (395 365) |
| Net result for the year | 1 224 707 | 1 093 021 | 1 186 096 |

- (57) The footnotes to the financial statements specify the following regarding the position “Other expenses” in Table 6: “Other expenses relate to a royalty agreement held with the affiliated company [CV 2], which was assigned to Alki LP on December 14, 2006 and is based on a tax ruling with the Dutch tax authorities.”
- (58) The tax ruling to which this footnote relates is the SMBV APA. That footnote thus indicates that Starbucks Manufacturing BV’s auditor interpreted the SMBV APA to generate the royalty payments by Starbucks Manufacturing BV to Alki LP. That royalty is calculated as a residual in the P&L and not as a remuneration of an IP. When constructing the P&L of Starbucks Manufacturing BV, all the input figures other than the royalty are either observed or assumed to be priced at arm’s length. Based on the pricing agreed in the SMBV APA, a taxable profit (the position “Result before taxation” in Table 6) is calculated at approximately [9-12]% of Starbucks Manufacturing BV’s operating expenses (the position “General and administrative expenses” in Table 6). However, as the position “Sales” in Table 6 minus all the accounting costs before the royalty payment³²

³² In detail the pre-tax profit before the royalty payment is equal to “Sales” minus “Direct Costs of Sales” (which represent the costs of raw material consumed in the production process), minus “General and Administrative expenses”, minus “Foreign currency exchange”, plus “Interest income”, minus “Interest expense” in Table 6. For example, for the year 2010/2011, the pre-tax profit before payment of royalty would be equal to EUR [...]. In order to lower the pre-tax to the level agreed in the SMBV APA of around [9-12]% of agreed costs, a tax-deductible royalty of around EUR [...] is paid out to Alki LP, as recorded in the position “Other expenses”.

do not sum up to this taxable profit calculated based on the SMBV APA, the excess profit beyond that [9-12]% mark-up is paid by Starbucks Manufacturing BV to Alki LP in the form of a tax deductible royalty for the manufacturing process patent (the position “Other expenses” in Table 6). The royalty payment thus takes place on the basis of the SMBV APA issued by the Dutch tax authorities, as is indicated in the accounts of Starbucks Manufacturing BV.

2.4. Additional information provided by the Netherlands in support of the SMBV APA

- (59) In a meeting held on 15 January 2014 between the Dutch authorities and the Commission services, the Commission services sought further clarifications on the SMBV APA. On 28 January 2014, the Dutch authorities provided written replies to a number of questions raised by the Commission services in the course of that meeting. To the questions posed by the Commission on the adjustments performed by the tax advisor to Starbucks Manufacturing BV’s cost base, those authorities provided the following explanation:

“Working capital adjustments are examples of such reasonably accurate adjustments and are to-date the most commonly encountered comparability adjustments, if any, in practice. This is shown by the inclusion of a working capital adjustment example in the revised OECD [Guidelines] in Annex to Chapter 3. The pan-European search on the arm’s length results of the manufacturing activities of the Tested Party [which is] Starbucks Manufacturing EMEA BV includes a conversion mark-up adjustment. This is caused by the fact that despite the search steps, differences still remain between [Starbucks Manufacturing EMEA BV] and the comparable companies found. The set of comparable companies includes manufacturers that perform more functions and incur risks both relating to raw materials. This is a common way to do this because unrelated comparable companies which are only involved in conversion hardly exist.

The adjustment in this case is a combination of two comparability adjustments: it combines a working capital adjustment for raw materials inventory on the return of the comparable companies with an adjustment for the raw material costs in the cost base of the comparable companies. The working capital adjustment aims to eliminate the financing element of different inventory levels in the returns of comparable companies. Since [Starbucks Manufacturing EMEA BV] has a consignment manufacturing arrangement, it is compensated for the finance component of the inventory risk [p.28 to study of Starbucks³³]. The adjustment in the cost base of the comparable companies is made to align their cost base with the cost base of Tested Party which will not include the cost component for inventory [p. 28+40³⁴ to study of Starbucks]. So on the one hand the basis on which the remuneration is calculated is adjusted. This basis is adjusted to the level of costs for which Starbucks Manufacturing EMEA BV has

³³ Footnote added: page 28 of the Transfer pricing report contains the consideration reported in recitals (40) to (45) above.

³⁴ Footnote added: page 40 of the Transfer pricing report contains the consideration reported in recitals (48) and (50) above.

added values: the conversion costs. In order to get this result, the denominator (total costs) should be adjusted to conversion costs (total costs minus cost for raw material). On the other hand the cost of financing this raw material must be eliminated from the remuneration. Therefore the numerator (EBIT) should be adjusted with the finance component of the inventory (EBIT minus (inventory x appropriate interest rate). For the appropriate interest rate, guidance can be found in the Annex to Chapter III par. 8 of the OECD [Guidelines]. The combined adjustment thus calculates the conversion cost mark-up equivalent of the total cost mark-up of the comparable companies. The conversion mark-up adjustment in this pan-European search, in other words, is included to eliminate the differences in the conditions of the uncontrolled transactions and transactions of the Tested Party relating to taking title to the raw materials. Adjusting for these raw material entitlement differences leads to an arm's length range that provides a more reliable measure of arm's length results. (see Annex 3: international Transfer Pricing Journal May/June 2008, Pan-European Comparable Searches: Enhancing Comparability Using Comparability Adjustments, more specific par 2.3.2.3)".

- (60) Moreover, asked by Commission for an explanation of the fact that the royalty paid by Starbucks Manufacturing BV fluctuates over the years, the Dutch authorities replied:

“Based on the functional analysis of Starbucks Manufacturing EMEA BV, the Dutch authorities concluded that Starbucks Manufacturing EMEA BV performs routine functions; in the total supply chain Starbucks Manufacturing EMEA BV is not a company with a complex functional profile. The company performs only 'simple' functions and does not make any valuable, unique contribution. Therefore, based on par 3.18 OECD [Guidelines], the company is accepted as tested party. If one comes to the conclusion that a company can be seen as tested party, the functions performed, asset used, risks assumed of the other (un)related parties in the supply chain are not relevant anymore. That's the reason why the Dutch authorities did not focus on the activities of the other companies in the supply chain and the transactions in respect of which Starbucks Manufacturing EMEA BV has no added value. However, the tax authorities in the countries where the other companies in the supply chain are active, should establish an arm's length remuneration for the functions, assets and risks in their country. The arm's length remuneration for those activities is (only) taxable in the respective countries. For example in this case, when the remuneration for the Swiss company can be considered as at arm's length, that result is only taxable in Switzerland³⁵ (not in the Netherlands). Because the Dutch Tax Authorities focused on an arm's length remuneration for Starbucks Manufacturing EMEA BV the explanation of the fluctuations of the royalty paid to Alki LP is not entirely clear to the Dutch authorities. Third parties and related parties pay the same price for roasted coffee and other related Starbucks-products. Starbucks

³⁵ According to the hearing in the UK House of Commons, the Starbucks' Swiss entity has around 30 employees, see Q256 in HM Revenue & Customs: Annual Report and Accounts 2011–12, House of Commons Committee of Public Accounts, 2012. In addition, the method of remuneration of the Swiss entity would be a gross remuneration by means of 20% surcharge to the purchases, see Q257 to Q259 of the same document.

Manufacturing EMEA BV earns a more or less (the operational expenses can fluctuate each year) fixed remuneration and based on the information available to the Dutch authorities, also the Swiss company is remunerated on a fixed level (resulting in a cost related method with a mark-up of 20%). So based on our level of understanding there are several elements that can cause fluctuation:

- The price of green coffee beans which the Swiss company purchases on the world market
- The price of roasted coffee beans which is negotiated by the related and unrelated sales companies (related and unrelated companies pay the same price).
- The operational expenses of Starbucks Manufacturing
- The results of using different currencies.
- Interest rate loans
- These elements are probably not exhaustive.

What the Dutch authorities know is that in the past (years 2001/2002 and 2002/2003) Starbucks Manufacturing EMEA BV was compensated by the IP owner, resulting in a negative royalty for the IP owner. This seems consistent with the used method of rewarding the IP-owner.

Caused by the fact that the Dutch authorities focused on the value added activities of Starbucks EMEA BV, the Dutch authorities are unfortunately not able to explain the rationale behind the fluctuating royalty in detail.” (sic)

- (61) The document provided in Annex 3 by the Dutch authorities in the same submission is the article *Pan-European Comparables Searches: Enhancing Comparability Using Comparability Adjustments* of the International Transfer Pricing Journal of May/June 2008 ". Paragraph 2.3.2.3 of that article is reproduced below:

“2.3.2.3 *Consignment/contract manufacturers*

An example of a situation in which working capital adjustments are inevitable concerns benchmarking consignment manufacturing activities. Consignment manufacturers generally do not bear the cost of their raw materials. In fact some or all of these raw materials are paid for by the clients consigning these raw materials required for manufacturing the final products. The raw materials are sourced at the risk and expense of the clients. As a consequence, consignment manufacturing companies do not own any inventory of raw materials or finished products, and should therefore earn a manufacturing return that excludes compensation for holding inventories.

Based on the above description of a consignment manufacturing company as the tested party, a comparables search would entail a screening on the levels of working capital and inventory in particular. However, in the authors’ experience, it is virtually impossible to find manufacturing companies that do not hold significant inventories. Therefore, instead of directly searching for consignment manufacturing companies, using diagnostic ratios, a more viable approach is first to identify fullfledged manufacturers active in the same line of business. As consignment manufacturers do not take title to the goods, working

capital adjustments can be applied using specific mechanisms as described in 2.3.2.1 to enhance comparability³⁶.

Typically, the above steps provide one with a final set of companies reporting a net cost-plus margin, expressed as operating profit (which is adjusted for working capital) divided by a cost base that includes cost of goods sold and operating expenses. However, a consignment manufacturer may have a (slightly) different cost structure due to the fact that it does not take title to raw materials or own inventory³⁷. Therefore, as a next step, the net cost-plus margin of the comparable companies must be reconciled with the tested party's cost base.

First, a calculation is made to determine the comparable cost of goods sold as a percentage of total costs (Y). With regard to the companies for which Amadeus does not provide cost-of-goods-sold data, the line item 'material costs' may be used instead to determine the material costs as percentage of total costs (Y).

Table [7]

| Company | Sales | COGS | Material costs | Total costs | Operating profit | Net Cost-Plus Margin (%) | COGS or Material costs as % of total costs | Multiplier | Adjusted net cost-plus margin (%) |
|-----------------|-------|-------|----------------|-------------|------------------|--------------------------|--|------------|-----------------------------------|
| A | 1,000 | 460 | 0 | 950 | 50 | 5.26 | 48.42 | 1.94 | 10.20 |
| B | 4,000 | 0 | 2,840 | 3,900 | 100 | 2.56 | 72.82 | 3.68 | 9.43 |
| C | 800 | 290 | 0 | 750 | 50 | 6.67 | 38.67 | 1.63 | 10.87 |
| D | 2,500 | 0 | 1,760 | 2,450 | 50 | 2.04 | 71.84 | 3.55 | 7.25 |
| E | 3,300 | 1,840 | 0 | 3,210 | 90 | 2.80 | 57.32 | 2.34 | 6.57 |
| F | 950 | 0 | 400 | 890 | 60 | 6.74 | 44.94 | 1.82 | 12.24 |
| G | 1,400 | 730 | 0 | 1,340 | 60 | 4.48 | 54.48 | 2.20 | 9.84 |
| H | 1,800 | 0 | 890 | 1,720 | 80 | 4.65 | 51.74 | 2.07 | 9.64 |
| Maximum | | | | | | 6.74 | | | 12.24 |
| 75th percentile | | | | | | 5.61 | | | 10.37 |
| median | | | | | | 4.56 | | | 9.74 |
| 25th percentile | | | | | | 2.74 | | | 8.89 |
| minimum | | | | | | 2.04 | | | 6.57 |

The use of material costs as a proxy for cost of goods sold in the absence of any figures on cost of goods sold is a subject of discussion, as material costs do not necessarily represent all elements of cost of goods sold. Conversely, in an attempt to simulate the cost of goods sold as closely as possible, the use of material costs as a proxy of cost of goods sold is often the only viable approach in using data from Amadeus.

Subsequently, a multiplier can be calculated to be used later on as follows:

$$\text{Multiplier} = 1 / (100\% - Y)$$

³⁶ Ultimately applying a lower percentage to remunerate a consignment manufacturer for its activities performed compared to a full-fledged manufacturer is based on differences in risk profile rather than the activities of the consignment manufacturer. After all, consignment manufacturers can be as technically sophisticated as other (full-fledged) manufacturers.

³⁷ Consignment manufactures may, depending upon the specific case, own equipment or have the equipment consigned. Generally, all consignment manufacturers may have some cost of sales that relate to plant property and equipment and labour force, but generally not cost of sales related to the purchase of raw material, components and inventory.

This multiplier can now be used to multiply the net cost-plus margin to adjust the net cost-plus margin of the comparable companies for the differences in cost base as compared to the tested party.

Table 7 presents a fictitious numerical example of how a cost base adjustment can be applied for consignment manufacturers.” (sic)

- (62) Paragraph 2.3.2.1 of the same article consists of an example of a working capital adjustment. This example, in reference to the OECD documents on comparability, contains the same numerical example of a working capital adjustment as is contained in the Comparability consultation paper by OECD of 2006³⁸. In particular, the working capital adjustment is presented as in the OECD paper as a balance sheet adjustment based on a ratio of receivables minus inventory plus payables³⁹, divided by sales.

2.5. APA provided by the Netherlands regarding a toll manufacturer

- (63) On 17 February 2014, the Dutch authorities provided the Commission with information it requested regarding other companies which received APAs from the Netherlands.
- (64) The documents provided contained one APA relating to a toll manufacturer, to which a toll manufacturing agreement was attached as a supporting document. In that agreement, the Dutch company which obtained the APA is considered a toll manufacturer, while a Swiss entity of the same group is designated as the principal in that agreement. The toll manufacturing agreement clarifies, in particular, that the raw materials and any work in progress shall remain the property of the Swiss entity acting as principle. That agreement further specifies that the Swiss entity, as principle, will provide an insurance to the Dutch entities for any replacement costs of the raw materials.
- (65) A transfer pricing report drawn up for the purposes of that APA explains that the arm's length remuneration is based on a comparison of average return on assets. That report also contains an overview of the average return on assets of companies considered to manufacture comparable goods. The return on assets is obtained through a search of the Amadeus database and no adjustment to these financial results is contained in the report.
- (66) The financial reports provided for the Dutch company which obtained the APA designated as a toll manufacturer show a low level of inventories compared to the other assets of the company for the periods 2008, 2009 and 2010. In 2010 the inventories of that company represented 0.8% of total assets and 3.3% of the trade receivables, while in 2009 and 2008 the inventories stood at 0.9% and 0.6% of the total assets respectively.

³⁸ Comparability: public invitation to comment on a series of draft issues notes, OECD, 10 May 2006.

³⁹ Receivables plus stock minus payables is the most common definition of working capital.

3. ASSESSMENT

3.1. Existence of aid

- (67) According to Article 107(1) TFEU, any aid granted by a Member State or 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 common market, in so far as it affects trade between Member States.
- (68) The qualification of a measure as aid within the meaning of Article 107(1) 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.
- (69) The main question in the present case is whether the SMBV APA confers a selective advantage upon Starbucks Manufacturing BV in so far as it results in a lowering of its tax liability in the Netherlands. If the existence of a selective advantage can be shown, the presence of the other two conditions for a finding of State aid under Article 107(1) TFEU is relatively straightforward.
- (70) As regards the imputability of the measure, the SMBV APA was issued by the Dutch tax authorities, which is part of the Dutch State. In the present case, that APA was used by Starbucks Manufacturing BV to calculate its corporate income tax basis in the Netherlands. The tax authorities accepted the analysis prepared by the tax advisor and on that basis set the tax due. The fact that the transfer pricing analysis of the Dutch authorities focused on Starbucks Manufacturing BV, because Starbucks Manufacturing BV is retained as the tested party, does not mean that it is the exclusive responsibility of other tax authorities to assess the arm's lengths principle of the royalty payment. The assessment whether the royalty payment proceeds at arm's length remains the responsibility of the Dutch tax authorities. As explained in recital (58), the royalty payment takes place on the basis of the SMBV APA issued by the Dutch tax authorities, which is indicated in the accounts of Starbucks Manufacturing BV. Therefore, the decrease of the taxable basis through the royalty expense is imputable to the Netherlands.
- (71) As regards the measure's financing through State resources, provided it can be shown that the SMBV APA resulted in a lowering of Starbucks Manufacturing BV's tax liability in the Netherlands, it can also be concluded that that APA gives rise to a loss of State resources. That is because any reduction of tax for Starbucks Manufacturing BV results in a loss of tax revenue that otherwise would have been available to the Netherlands⁴⁰.
- (72) As regards the fourth condition for a finding of aid, Starbucks Manufacturing BV is a globally active firm, operating in various Member States, so that any aid

⁴⁰ Joined Cases C-106/09 P and C-107/09 P, Commission and Spain v Government of Gibraltar and United Kingdom [2011] ECR I-11113, paragraph 72.

in its favour distorts or threatens to distort competition and has the potential to affects intra-Union trade.

- (73) Finally, as regards the presence of a selective advantage, it follows from the case-law that the notion of aid encompasses not only positive benefits, but also measures which in various forms mitigate the charges which are normally included in the budget of an undertaking⁴¹. At the same token, treating taxpayers on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, particularly, where the exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria.⁴²
- (74) Accordingly, tax rulings should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation. Tax authorities, by accepting that multinational companies depart from market conditions in setting the commercial conditions of intra-group transactions through a discretionary practice of rulings, may renounce taxable revenues in their jurisdiction and thereby forego State resources, in particular when accepting commercial conditions which depart from conditions prevailing between prudent independent operators⁴³.
- (75) In order to determine whether a method of assessment of the taxable income of an undertaking gives rise to an advantage, it is necessary to compare that method to the ordinary tax system, based on the difference between profits and losses of an undertaking carrying on its activities under normal market conditions. Thus, where an APA concerns transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted⁴⁴.
- (76) In this context, market conditions can be arrived at through transfer pricing established at arm's length. The Court of Justice has confirmed that if the method of taxation for intra-group transfers does not comply with the arm's length principle⁴⁵, and leads to a taxable base inferior to the one which would

⁴¹ Case C-143/99, *Adria-Wien Pipeline*, [2001] ECR, I-8365, paragraph 38.

⁴² Case C-241/94 *France v Commission (Kimberly Clark Sopalin)* [1996] ECR I-4551, paragraphs 23 and 24.

⁴³ If, instead of issuing a ruling, the tax administration simply accepted a method of taxation based on prices which depart from conditions prevailing between prudent independent operators, there would also be State aid. The main problem is not the ruling as such, but the acceptance of a method of taxation which does not reflect market principles.

⁴⁴ Commission Decision 2003/757/EC of 17 February 2003, *Belgian Coordination centres*, OJ L 282, 30.10.2003, p. 25, recital 95.

⁴⁵ In particular, rulings allowing taxpayers to use improper transfer pricing methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing may involve State aid- See Commission Decision 2003/438/EC of 16 October 2002 on State aid C 50/2001, *Luxembourg Finance Companies*, OJ L 153, 20.6.2003, p. 40, recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on State aid C 49/2001, *Luxembourg Coordination centres*, OJ L 170, 9.7.2003, p. 20, recitals 46-47 and 50; Commission Decision 2003/755/EC of 17 February 2003, *Belgian Coordination centres*, OJ L 282, 30.10.2003, p. 25, recitals 89 to 95 and the related *Joined Cases C- 182/03 and C-217/03 Belgium and Forum 187 v. Commission* [2006] ECR I-5479, paragraphs 96 and 97; Commission Decision

result from a correct implementation of that principle, it provides a selective advantage to the company concerned.⁴⁶

- (77) The OECD Guidelines are a reference document recommending methods for approximating an arm's length pricing outcome and have been retained as appropriate guidance for this purpose in previous Commission decisions⁴⁷. The different methods explained in the OECD Guidelines can result in a wide range of outcomes as regards the amount of the taxable basis. Moreover, depending on the facts and circumstances of the taxpayer, not all methods approximate a market outcome in a correct way. When accepting a calculation method of the taxable basis proposed by the taxpayer, the tax authorities should compare that method to the prudent behaviour of a hypothetical market operator, which would require a market conform remuneration of a subsidiary or a branch, which reflect normal conditions of competition. For example, a market operator would not accept that its revenues are based on a method which achieves the lowest possible outcome if the facts and circumstances of the case could justify the use of other, more appropriate methods.
- (78) It is in the light of these general observations that the Commission will examine whether the SMBV APA concluded with Starbucks Manufacturing BV comply with the arm's length principle or whether they give rise to a selective advantage conferred by the Dutch tax authorities upon that undertaking. At this stage, the Commission has the following three doubts as regards compliance with that principle:
- (1) Whether the Dutch tax authorities correctly accepted Starbucks Manufacturing BV's classification as a low-risk toll manufacturer when it concluded the SMBV APA with that undertaking;
 - (2) Whether the Dutch tax authorities were right to accept the first and second adjustments made by Starbucks Manufacturing BV's tax advisor when it concluded the SMBV APA with that undertaking; and
 - (3) Whether the Dutch authorities were right to accept Starbucks Manufacturing BV's interpretation of the SMBV APA as regards the calculation of royalties in its P&L, insofar as the level of those royalties is not linked to the value of the IP in question.

The Commission will explain each of these doubts in turn.

2004/76/EC of 13 May 2003, French Headquarters and Logistic Centres, OJ L 23, 28.1.2004, p. 1, recitals 50 and 53

⁴⁶ See Joined Cases C- 182/03 and C-217/03 *Belgium and Forum 187 v. Commission* [2006] ECR I-5479, paragraph 95.

⁴⁷ Cf. Commission Decision 2003/755/EC of 17 February 2003, Belgian Coordination centres, OJ L 282, 30.10.2003, p. 55, recitals 89 to 95 and decision of 5 September 2002 in case C 47/01 German Coordination Centres, OJ 2003 L 177/17, para 27 and 28.

3.1.1. Doubts concerning whether the Dutch tax authorities correctly accepted Starbucks Manufacturing BV's classification as a low-risk manufacturer

- (79) As explained in recital (31), the SMBV APA accepts a mark-up of [9-12]% on the underlying costs for which Starbucks Manufacturing BV performs a value added role to reflect an arm's length remuneration for the provision of manufacturing/roasting services and associated supply chain activities by that undertaking in its intra-group transactions. The determination of the relevant cost base for the application of that mark-up follows from the transfer pricing report and excludes the underlying costs of sourcing green coffee beans and associated (short term) inventory risk (recital (43)), costs incurred in its intermediary distribution role (recital (44)) and costs related to consignment manufacturing arrangements and its arrangement with third-party logistics/distribution service providers (recital (45)).
- (80) The rationale for those exclusions is that Starbucks Manufacturing BV allegedly operates as a "toll manufacturer". As explained in footnote 1, toll manufacturing is an arrangement by which a company, usually by means of specialized equipment or production processes, processes raw materials or semi-finished goods for another company. A toll manufacturer, as opposed to a fully-fledged manufacturer, does not bear the risk of inventories, which are put in consignment. Furthermore, a toll manufacturer is not responsible for setting commercial terms with suppliers and clients; this function is performed by another entity of the group. Finally, a toll manufacturer does not invoice clients directly⁴⁸.
- (81) The Commission's first set of doubts relates to the fact that the arm's length remuneration accepted in the SMBV APA depends on Starbucks Manufacturing BV being considered as a low-risk toll manufacturer, despite evidence pointing to the contrary.
- (82) First, the Commission has doubts that the SMBV APA correctly accepted the assumption that the inventories (raw material as well as finished goods) should be considered as being in consignment, seeing as they appear in the balance sheet of Starbucks Manufacturing BV as illustrated in Table 1. Indeed, for the year 2012, raw material inventories were valued at EUR 35.5 million, which is close to half the total assets of that company. Moreover, as indicated in recital (26), Starbucks Manufacturing BV records provisions for losses of inventory value⁴⁹. These figures undermine the reasoning of the transfer pricing report in which Starbucks Manufacturing BV's cost base is decreased to account for the fact that it does not take title to raw materials.
- (83) Second, it is questionable whether the costs of raw materials (COGS) should be treated as pass-through costs. If not, the net profit indicator would then be total costs from which the applicable mark-up would be equal to 7.8%, according to the overview of the peer comparison results in recital (48). Were that mark-up applied to the total costs of SMBV instead of the [9-12]% mark-up to operating

⁴⁸ This separation of functions was presented by the Dutch authorities in a meeting with the Commission on 6 May 2014.

⁴⁹ Inventory reserves are reserves for loss of value of inventories.

costs accepted in the SMBV APA, Starbucks Manufacturing BV's tax liability for the period 2010-2012, for which figures have been provided to the Commission, would increase several fold depending on the year in question⁵⁰.

- (84) In this regard, the Commission recalls what the OECD Guidelines say regarding the choice of an appropriate method for determining arm's length pricing for manufacturing companies. The OECD Guidelines indicate that full costs or operating expenses may be an appropriate base for a service or manufacturing activity⁵¹. It is further clarified in paragraph 2.93 of those guidelines that “[i]n applying a cost-based transactional net margin method, fully loaded costs are often used, including all the direct and indirect⁵² costs attributable to the activity or transaction, together with an appropriate allocation in respect of the overheads of the business. The question can arise whether and to what extent it is acceptable at arm's length to treat a significant portion of the taxpayer's costs as pass-through costs to which no profit element is attributed (i.e. as costs which are potentially excludable from the denominator of the net profit indicator). This depends on the extent to which an independent party in comparable circumstances would agree not to earn a mark-up on part of the costs it incurs.”
- (85) By contrast, the reference to an earlier version of the OECD Guidelines⁵³ invoked by the tax advisor in the transfer pricing report (see recital (46)), when arguing that the return or mark-up should be determined for the performance of Starbucks Manufacturing BV's intermediary function rather than for the performance of the services themselves, relates to service activities, while the focus of Starbucks Manufacturing BV's activities is roasting/manufacturing.
- (86) Furthermore, it should be noted that the SMBV APA and the compensation mechanism it introduces through the royalty payment ensures that the taxable profit declared in the Netherlands is relatively stable and does not vary according to the commercial sales risks, which reduces the risk of the company.
- (87) Third, paragraphs 9.44 to 9.46 of the OECD guidelines, which are part of the chapter of those guidelines dealing with business restructuring but are nonetheless relevant here, clarify that risk cannot be reduced through transfer pricing arrangements. More precisely, the guidelines explain that “*it is the low (or high) risk nature of a business that will dictate the selection of the most appropriate transfer pricing method, and not the contrary.*”⁵⁴ It is true that agreeing on a transfer pricing method (i.e. such as the TNMM method based on operating costs) and constructing contractual arrangements such as to adjust the

⁵⁰ For example for the year 2010/2011, if the taxable basis would be determined as a 7.8% margin weighted to total costs, it would amount to around EUR 13 million (equal to 7.8% of the sum of EUR 153 275 834 of cost of raw material and EUR 14 303 059 of operating costs), compared to the taxable basis determined on the basis of the APA of EUR 1 430 620 for that year.

⁵¹ OECD Guidelines, paragraph 2.87.

⁵² OECD Guidelines, paragraph 2.47 defines the direct and indirect costs, raw material costs are considered as direct costs.

⁵³ The tax advisor report refers to an earlier version of the OECD Guidelines dated July 1995 and last edited in June 2001. It was replaced by the OECD Guidelines dated July 2010.

⁵⁴ OECD Guidelines, paragraph 9.46.

pre-tax profit each year to this agreement would result in limiting the variation over the fiscal years of the tax liability of the company. However, such a structure constructed through contractual arrangements does not necessarily correspond to the economic reality underlying the transactions and the risks associated with the activity of the company.

- (88) Accepting such an approach would be similar to accepting a fixed lump sum payment each year to the tax authorities by the company. Such a lump sum payment would also take away all variation in the tax liability from the perspective of the tax authorities. If the same logic is followed, the business of the company could be considered as low-risk because there would be no variation of the tax liability between fiscal years. However, such a lump sum payment could hardly be reconciled with the underlying economic reality of the transactions and the risks of the business activity and could not be reconciled with the principles of taxation.
- (89) In any event, the economic rationality of the structure is not apparent, since the structure, as it is described by the tax authorities, might not have been put in place by a prudent independent economic operator. Paragraphs 1.64 to 1.66 of the OECD Guidelines refer to situations where structures are not determined by normal commercial conditions and may have been structured by the taxpayer to avoid or minimise tax. In such cases, the tax authorities could analyse the taxable basis based on a corrected structure that would have been determined by normal commercial conditions.
- (90) Against this background, the Commission questions the economic rationale of Starbucks Manufacturing BV to surrender functions and risk that would contribute to a higher return, which would be in line with a return normally required by manufacturing companies active in the same business. This question is particularly relevant for toll or consignment manufacturing structures, as well as for any structure where risk which is normally borne by independent companies in a similar situation is removed through intra-group contractual arrangements. Indeed, paragraph 9.70 of the OECD Guidelines indicates the possible necessity to remunerate a group entity for the surrender of their riskier profit potential to another group company through contractual arrangements.
- (91) Although the facts of the case seem to indicate that Starbucks Manufacturing BV, contrary to the analysis of the tax advisor and the Dutch authorities, did not surrender all such risks, it is useful to question the economic rationality of a structure where Starbucks Manufacturing BV would have surrendered all risks that can be contractually transferred, in particular the rationality of transferring out the inventory risk. As will be explained in more detail at recital (110), the alleged adjusted mark-up through the second adjustment is [3.6-6.6]% lower than the mark-up on operating costs before the second adjustment and several folds lower in terms of resulting remuneration compared to a situation where no inventory risk adjustment would have been undertaken. It is therefore questionable that the removal of the risk element referred to as taking title to the raw material is at all in proportion to the opportunity costs of surrendering the related remuneration.

- (92) Indeed, based on the information provided by Starbucks Manufacturing BV to the Dutch tax administration, it is the [...] intention of that company to adapt the legal structure in order to [structure] taxation (see for example recital (30)). The tax administration should therefore have analysed the proposed pricing arrangement with this in mind.
- (93) In any event, the Dutch tax authorities failed to request the underlying contracts on the basis of which it could be shown that the level of risk carried by Starbucks Manufacturing BV was limited and instead accepted assumptions relied upon by the tax advisor in the transfer pricing report which lowered the tax base of that company in the Netherlands. The Commission has no indications that a contract between the Starbucks' Swiss entity and Starbucks Manufacturing BV was ever provided to the Dutch tax authorities to substantiate the claim in the transfer pricing report that Starbucks was a toll manufacturer. Such a contract is not contained in the file, nor are the conditions of any risk transfer specified.
- (94) To the contrary, the template for a supply agreement between Starbucks Manufacturing BV and its developers (see recital (24)) seem to indicate that activities such as negotiations of commercial conditions for suppliers and invoicing, as well as a certain degree of price setting determination for the shops is performed by Starbucks Manufacturing BV. By way of comparison, for the APA described in section 2.5. the underlying toll manufacturing contracts specifying the functions performed by the toll manufacturer, the functions performed by the agent and the fact that the former held hardly any inventories were provided to the Dutch tax administration and relied upon in granting that APA to that toll manufacturer.
- (95) In this light, the OECD Guidelines indicate that in cases where a contract stipulates that an entity's risk is reduced, it has also to be verified whether the risk is effectively transferred. Paragraph 9.15 in particular refers to the case "*where a foreign associated enterprise assumes all the inventory risks by contract.*" In this, case, "*when examining such a risk allocation, it may be relevant to examine for instance where the inventory write-downs are taken*".
- (96) Accordingly, at this stage the Commission is of the opinion that the Dutch authorities, in concluding the SMBV APA with Starbucks Manufacturing BV, were wrong to accept the assumption that that undertaking is a toll or contract manufacturer with almost no inventory risk and that the relevant risks have not been removed from the Netherlands. Had such risks been effectively transferred, the tax authorities should have also questioned the economic rational of such transfers.

3.1.2. Doubts on the appropriateness of the first and second adjustments

- (97) Even if the Dutch authorities were right to accept the classification of Starbucks Manufacturing BV's classification as a low risk toll or contract manufacturer and that adjustments to its cost base to apply the mark-up were therefore necessary, *quod non*, the Commission has doubts on the appropriateness of those adjustments.

- (98) At the outset, it should be noted that the reasons invoked for the first and second adjustments (see recitals (49) and (51)) are very similar. In fact, it seems from the transfer pricing report that both adjustments are aimed at addressing the same comparability concern. One of those adjustments therefore seems redundant at this stage.
- (99) As regards the Commission's doubts concerning the first adjustment, reference is made to section 3.1.1 in which the Commission questioned the exclusion of certain costs from Starbucks Manufacturing BV's cost base for the determination of the TNMM. In particular, according to the tax advisor, Starbucks Manufacturing BV should not be remunerated for its second type of activity, which is the distribution of cups and napkins and some other products because it acts as an intermediary, see recital (44). This reasoning of not remunerating intermediaries in a distribution activity does not appear to be founded in either the OECD Guidelines nor could it be observed on the market that economic operators acting as intermediaries would renounce remuneration.
- (100) In addition, Starbucks Manufacturing BV seems to be engaged in other activities than manufacturing, in particular in sales activities of products produced by [unaffiliated company X] (see recital (39)) for which no remuneration is provided in the transfer pricing arrangement accepted by the tax authorities. Given that Starbucks makes a number of adjustments with the intention of not remunerating functions it allegedly would not perform, it seems inconsistent that it does not also adjust its pricing to functions it does perform additionally to its manufacturing functions.
- (101) As regards the Commission's doubts concerning the second adjustment, since the tax advisor considered no direct benchmark to be available for setting the level of the remuneration (recital (51)), a hypothetical raw material remuneration was estimated by reference to the EURBOR interbank interest rate to which a spread of 50 basis points was added, the level of which is not explained. However, given that this adjustment seeks to estimate a return on raw materials that an independent company would claim, it should in principle have been estimated using transfer pricing methods. Such a transfer pricing analysis is missing in transfer pricing report. The tax advisor instead makes the statement that "*this measure should reflect, at least in part, the required rate of return on manufacturing costs*". The reasoning of the tax advisor does not appear coherent, however, as it projects what the tax advisor considers to be a remuneration of raw materials by selecting a certain level of what it considers to be a rate of return on manufacturing cost rather than raw material costs. This inconsistency could be a clerical mistake made by the tax advisor. However, the Dutch authorities seem to have taken it for granted.
- (102) In a similar vein, the tax advisor makes the questionable assumption that EURIBOR is a risk-free rate, whereas EURIBOR is the rate at which banks borrow funds from one another and therefore includes the applicable risk premium of such banks which are part of the benchmark.
- (103) In all cases, the relevant basis of the assessment should be the transformation which the tax advisor has effectively introduced in the financial data of the

sample of 20 companies listed in Table 5. Although this is not apparent from the description in the transfer pricing report of the second adjustment, by analysing the figures in Table 5, it is observed that the tax advisor subtracted in the case of each of the companies of the sample for each year an amount from the profit that is used to calculate the profit margin applied to Starbucks Manufacturing BV to approximate an arm's length remuneration.

- (104) The amount subtracted from the profit realised each year is equal to the described hypothetical return on raw material costs described in recital (51). This reduced operating profit is divided by total costs minus material costs to calculate the adjusted mark-up. This adjustment effectively consists of restating the accounts of the comparable companies⁵⁵ and in this restatement the price paid by the 20 companies for their cost of raw material (COGS)⁵⁶ is increased by 2.77% to 4.59% depending on the year observed⁵⁷. After the profit is reduced in this way, it is divided by the operating costs and presented as an “adjusted mark-up”.
- (105) The Commission has doubts on the consistency of this adjustment. First, to the extent that the sourcing of beans takes place in Switzerland and not in the Netherlands, the related operating expenses (for example employee costs) are recorded in Switzerland⁵⁸ and not in the Netherlands. If the sourcing would have also taken place in the Netherlands, the related operating costs would have increased the taxable basis of Starbucks Manufacturing BV under the transfer pricing method retained by Starbucks. This is, however, not the case. In fact, by applying a mark-up stemming from a comparability study to the operating costs, there does not need to be an issue of exaggerating the remuneration due in the Netherlands because the costs relating to the employees of Starbucks' Swiss entity performing the sourcing activities are not part of the operating costs of Starbucks Manufacturing BV. This is not the case here because the functions performed in Switzerland are not remunerated in the Netherlands, even without the second adjustment.
- (106) Second, according to the tax advisor approximately 50% of the cost of Manufacturing BV would pertain to “non-coffee COGS” which reflect the intermediary distribution of cups and napkins and other products (see recital (44)) above. This reinforces the doubts as to the appropriateness of constructing a hypothetical remuneration on the cost of raw material (COGS) of other companies for which those costs would represent mainly the cost of the green beans.

⁵⁵ In detail: in Table 5 above the operating profit column is divided by the column total costs to arrive to the unadjusted profit. To arrive to the adjusted profit the tax advisor subtracts from the figure provided in the operating profit column the product of the figure in the column material costs and the interest rate provided for the relevant year in Table 3 increased by 50 basis point. This reduced operating profit is divided by total costs minus material costs.

⁵⁶ Material costs are used to estimate the cost of raw materials, because material costs is an entry in the Amadeus database.

⁵⁷ See Table 3.

⁵⁸ See recital (60).

- (107) Third, regarding the necessity of the adjustments, the Dutch authorities refer to the adjustments made as “working capital adjustments” (see recital (59)). However, it is clear from the transfer pricing report and from the comparables adjusted data in Table 5 that the adjustments made are not based on working capital figures. Working capital refers to the need of financing the sum of inventories and account receivables minus the account payables, which cover part of this need. Working capital adjustments are explained and illustrated in an Annex to Chapter III of the OECD guidelines. This guidance was already available at the moment when the SMBV APA was concluded since it was contained in the Comparability consultation paper by OECD of 2006 (recital (62)).
- (108) Furthermore, an annex attached to the reply of the Dutch authorities submitted on 28 January 2014 (recital (61)) contains a description and an illustration of a working capital adjustment, which can also be found in reference to OECD indications (see recital (62)). None of the adjustment made by the tax advisor is made on the basis of the working capital figures.
- (109) Fourth, in its reply of 28 January 2014, the Dutch authorities refer to paragraph 2.3.2.3. of the annexed document (reproduced at recital (61)) to explain the adjustment made by the tax advisor. This adjustment would be used to calculate the conversion cost mark-up equivalent to a total cost mark-up for comparable companies, in particular “*adjusting for these raw material entitlement differences*” among the comparable companies. However, when recalculating the mark-up referred to as “adjusted mark-up” in Table 5 on the basis of the methodology outlined in paragraph 2.3.2.3. and the financial figures provided in the comparison assessment by the tax advisor (reproduced in Table 5), the Commission comes to a different result. This is because the adjustment described in in that paragraph and considered by the Dutch authorities as appropriate to eliminate differences between fully-fledged manufacturers and toll manufacturers does not subtract a hypothetical return on raw materials from the operating profit of the comparable companies.
- (110) Therefore, if the Dutch authorities indeed consider that the method described in paragraph 2.3.2.3 of the annexed document addresses the comparability issues of the 20 companies in the sample and in particular the differences between consignment manufacturers and fully-fledged manufacturers, the tax liability of Starbucks Manufacturing under the application of the SMBV APA should be increased by [36-66]%⁵⁹, because the mark-up calculated on the basis on the adjustment method put forward in that paragraph would lead to a median mark-up of 14.66%, whereas the SMBV APA currently accepts a mark-up of [9-12]%.
- (111) Moreover, according to paragraph 2.3.2.3, the functions of manufacturing are not less complex than that of sourcing, so that any adjustments decreasing the margin should not be based on the functions performed but in consideration of risks.

⁵⁹ If the tax liability is calculated as 14.6% instead of [9-12]% of the same cost basis, it would represent an increase of [36-66]%.

- (112) In any event, the adjustment by the tax advisor seems to have as one of its objectives avoiding remunerating in the Netherlands a function that is performed in Switzerland because it is related to the sourcing of beans, in which Starbucks Manufacturing BV would have no value-added and little to no inventory risk, see recital (49) above. However, the actual result of the adjustment is to lower the mark-up (i.e. regarding the second adjustment the mark-up with the adjustment is [9-12]% and without 14.6%) and the excess compared to a mark-up without the adjustment is paid out in the form of a royalty to Alki LP. The payments or remuneration of Starbucks' Swiss entity performing the sourcing of the beans is not affected by the second adjustment. Thus if the second adjustment would be agreed by the tax authorities, it is Alki LP which would receive a lower payment⁶⁰ not Starbucks' Swiss entity. Therefore, the way in which the SMBV APA is structured provides that a function allegedly performed in Switzerland would be remunerated in the UK, where Alki LP is established as limited partnership, and possibly taxed at the country of the tax residence of the partners of Alki LP. In no event does the remuneration reduction and the corresponding taxable profit reduction in the Netherlands, following the second adjustment, create an additional remuneration in Switzerland or accordingly increase the taxable profit in Switzerland⁶¹.
- (113) It should also be noted that that excess remuneration not attributed to Starbucks Manufacturing BV is transferred to Alki LP, which is therefore compensated for the risk of taking title to raw material. However, the capacity of Alki LP to assume any such risk is not documented in the file. In fact, according to the OECD Guidelines, when assuming such transferred risk, the entity to which the risks are transferred should be able, on the one hand, to control or to delegate control of the risks⁶² (referring here to the monitoring of inventories risk in particular) and, on the other hand, should be able financially to assume such a risk⁶³. The capacity to assume this risk should therefore be analysed before the proposed structure is considered in line with normal competitive conditions.
- (114) On the basis of the above considerations, the Commission is of the opinion that the SMBV APA tolerates questionable adjustments which allow Starbucks Manufacturing BV to lower the resulting corporate income tax basis in the Netherlands which are not in line with conditions prevailing between prudent independent operators, so that the foregone tax revenues not claimed for this activity by the tax authorities would constitute State aid.

3.1.3. Royalty payment and choice of profit line indicator

- (115) Finally, the fact that the royalties due by Starbucks Manufacturing BV to Alki LP are dependent on the difference between the remuneration established in the SMBV APA (the position "Results before taxation" in Table 6) and the

⁶⁰ As the royalty is a residual, if the taxable profit in the Netherlands would be calculated as 14.6% rather than [9-12]% of operating costs, there would be less excess profit paid in the form of the royalty to Alki LP.

⁶¹ Unless the country of tax residence of the partners of Alki LP would be Switzerland, which is not the case according to the information submitted by the Netherlands, see Figure 1.

⁶² OECD Guidelines, paragraph 9.26.

⁶³ OECD Guidelines, paragraph 9.29.

accounting pre-tax profit before the payment of the royalty, as explained in recital (58), leads to a situation in which that royalty payment is calculated as profit in excess of the SMBV agreement and does not reflect the value of the IP.

- (116) The TNMM is one of the two indirect methods for estimating an arm's length remuneration. The Commission's decisional practice, as well as the OECD Guidelines⁶⁴, set a preference for the use of direct methods for setting an appropriate level of taxable profits. In particular, where possible, the CUP method is considered best at approximating conditions close to normal competition⁶⁵. The SMBV APA assumes that all transactions with group companies are priced at arm's length, in particular the raw material price. This assumption seems correct for the sales figures because the CUP method is applied, whereby the sales to related shops are done at the same price as the sales to unrelated shops. As regards the raw material costs, it is the understanding of the Dutch authorities that they are priced equal to the price applied to Starbucks' Swiss entity when it purchases the raw material to which a mark-up of 20% is added. The royalty payment is the only P&L item that needs to be estimated. The Commission acknowledges that if the CUP method were used to value the royalty payments, the Dutch authorities would also have to verify whether other elements of the P&L of Starbucks Manufacturing BV are priced at arm's length, in particular the raw material costs.
- (117) As explained in recital (58), the setting of the royalty payment as the residual profit above the [9-12]% operating costs ensures that the accounting profit before tax is always equal to the one agreed in the SMBV APA. In fact, from the footnotes to the accounts which state that "*other expenses relate to a royalty [...] and is based on a tax ruling with the Dutch tax authorities*", it appears that this royalty payment is generated in accounting terms by the existence of that APA.
- (118) The royalty is thus constructed in such a manner that if sales minus cost of raw material minus operating and other costs is higher than [9-12]% of operating costs, then any such excess is paid in the form of royalty to the Alki LP. This ensures that the accounting profit of Starbucks Manufacturing BV is always equal to the profit agreed in the SMBV APA, as demonstrated by the data presented in Table 6. Indeed, for the three accounting periods provided in that table, the position "Result before tax" equals approximately [9-12]% of the position "General and administrative expense". The fact that the ratio of "Result before tax" to "General and administrative expenses" is not exactly equal to [9-12]% (it is equal to [9-12]% in 2010, [9-12]% in 2011 and [9-12]% in 2012) is not explained. According to the transfer pricing report, some type of costs and in particular cups and napkins are excluded from the cost base (see recital (44)), which could explain these slight variations to the [9-12]% ratio.

⁶⁴ OECD Guidelines, paragraph 2.3

⁶⁵ It is further noted that even in a low risk environment of a toll manufacturer the CUP is recommended by the OECD Guidelines in particular regarding raw material pricing where the raw material is a commodity such as coffee beans (see OECD Guidelines, paragraph 9.165).

- (119) However, according to paragraph 6.16 of the OECD Guidelines “*a royalty would ordinarily be a recurrent payment based on the user’s output, sales, or in some rare circumstances, profits.*” In the present case, the royalty payment is not related to the output, sales, or to profit. In fact, the royalty fluctuates from year to year and is not in line with sales. Indeed, in 2010, 2011 and 2012 the royalty payment from Starbucks Manufacturing BV to Alki LP amounted to respectively EUR 1 million, EUR 12 million and EUR 6 million, while Starbucks Manufacturing BV’s sales do not demonstrate the same fluctuations.
- (120) The fact that the royalty is disconnected through the pricing method from the economic value of the IP is an indication that the pricing method agreed in the SMBV APA might not be the most appropriate means to approximate arm's length pricing. This is, in particular, the case for the two years in which the royalty payment was negative⁶⁶. In these years, the holder of the IP remunerated Starbucks Manufacturing BV for the use the latter made of the IP. In principle, such a situation would not be observed in transactions between prudent independent economic operators.
- (121) According to the Dutch authorities, since Starbucks Manufacturing BV performs a routine function, it is easier to estimate an appropriate return on such a function than to estimate an arm’s length royalty level (recital (60)). In their replies to the questions by the Commission on the variations of the royalty payments, the Dutch authorities indicated that the royalty payment is set according to article 3.18 of the OECD Guidelines. According to article 3.18 of the OECD Guidelines “*as a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner i.e. it will most often be the one that has the less complex functional analysis.*” However, in calculating the appropriate profit attributable to the manufacturing activities through the TNMM method, the tax advisor engaged in a series of adjustments to address the perceived non comparability of the peer group. The fact that following the TNMM method in application of Article 3.18 of the OECD Guidelines requires a certain number of questionable adjustments by the tax advisor, should call into question the appropriateness of the pricing method chosen and thereby the ability to approximate a taxable profit based on the selected method.
- (122) Finally, although the valuation of IP can be complex, this level of complexity might not be the same for the trademark value of Starbucks and a roasting process IP. In this particular case, the IP is described as relating to technical specifications rather than any innovative intangible. As a result of the method adopted in the SMBV APA, the royalty payment is volatile. The Commission considers it questionable whether an independent economic actor would accept such variable royalty payments, both from the perspective of the holder of the IP as from the perspective of the user of that IP. Moreover, the Dutch authorities further indicated in their reply that they are not in a position to explain the volatility of the royalty payment.

⁶⁶ For the fiscal years 2001/2002 and 2002/2003, see recital (60)

(123) Accordingly, at this stage the Commission is of the opinion that by accepting Starbucks Manufacturing BV's use of the SMBV APAs as regards the calculation of royalties in its P&L, in so far as the level of those royalties could be overestimated in view of the value of the IP in question, the Dutch tax authorities conferred an advantage on that undertaking.

3.1.4. Conclusion on the existence of a selective advantage

(124) Based on the above, the Commission is of the opinion that the SMBV APA does not comply with the arm's length principle. Accordingly, the Commission is of the opinion that through the SMBV APA the Dutch authorities confer an advantage on Starbucks Manufacturing BV. That advantage is obtained every year and on-going, when the annual tax liability is agreed upon by the tax authorities in view of that APA.

(125) That advantage is also granted in a selective manner. While APAs that merely contain an interpretation of the relevant tax provisions without deviating from administrative practice do not give rise to a presumption of a selective advantage, rulings that deviate from that practice have the effect of lowering the tax burden of the undertakings concerned as compared to undertakings in a similar legal and factual situation. As noted in recital (31), Article 8b of the Dutch Corporate Income Tax Act 1969 stipulates that APAs should determine an arm's length remuneration for transfer pricing. To the extent the Dutch authorities have deviated from that principle as regards the SMBV APA, the measure should also be considered selective.

3.2. Compatibility of aid

(126) As the measure appears to constitute State aid, it is necessary to examine whether that aid could be considered compatible with the internal market. State aid measures can be considered compatible with the internal market on the basis of the exceptions listed in Article 107(2) and 107(3) TFEU.

(127) At this stage, the Commission has no indication that the contested measure can be considered compatible with the internal market. The Dutch authorities did not present any argument to indicate that any of the exceptions provided for in Article 107(2) and 107(3) TFEU apply in the present case.

(128) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.

(129) Nor does the exception provided for in Article 107(3)(a) TFEU seem to apply, which allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and for the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. Such areas are defined by the Dutch regional aid map. This provision does not seem to apply in this case.

- (130) As regards the exceptions laid in Article 107(3)(b) and (d) TFEU, the aid in question does not appear to be intended to promote the execution of an important project of common European interest nor to remedy to a serious disturbance in the economy of the Netherlands, nor is it intended to promote culture or heritage conservation.
- (131) Finally, according to Article 107(3)(c) TFEU, aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has no elements at this stage to assess whether the tax advantages granted by the contested measure are related to specific investments eligible to receive aid under the State aid rules and guidelines, to job creation or to specific projects.
- (132) At this stage, the Commission considers that the measure at issue appears to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

4. DECISION

In light of the foregoing considerations, the Commission's preliminary view is that the APA in favour of Starbucks Manufacturing EMEA BV constitutes State aid according to Article 107(1) TFEU. The Commission has doubts about the compatibility of such aid with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) TFEU with respect to the measures in question.

The present decision is without prejudice to the 2008 APAs insofar as those APAs relate to the structure Starbucks Coffee BV. As regards that structure, the Commission has not at this stage identified comparable doubts. However, the economic rationality of this structure is not straightforward and the Commission reserves the right to conclude its assessment once it has completed the present formal investigation.

The Commission requests the Netherlands to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. In particular:

- § Describe in detail the type of intellectual property held by Alki LP.
- § Describe Alki LP.
- § Provide the contract(s) between Starbucks Manufacturing BV and its Swiss supplier.

§ Provide the transfer pricing report on the price of the green beans supplied by the Swiss entity of the Starbucks group or in the absence of a report an explanation as how this price is determined.

The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind the Netherlands that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999⁶⁷, which provides that all unlawful aid may be recovered from the recipient..

The Commission warns the Netherlands that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate H
State aid registry
1049 Brussels
Belgium
Fax : +322 296 12 42

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President

⁶⁷ OJ L 83 of 27.3.1999, p. 1, last amended by Regulation 734/2013 of 22 July 2013 OJ L 204 of 31.7.2013, p.15

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Our ref. no.

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Your letter (reference)

Annexes

Date 14 november 2014

Subject Response to the European Commission's opening decision regarding the formal investigation procedure concerning alleged state aid for Starbucks

Letter from the State Secretary for Finance, Eric Wiebes, to the House of Representatives responding to the European Commission's opening decision regarding the formal investigation procedure concerning alleged state aid for Starbucks

In this letter I would like to take a closer look at the publication of the European Commission's opening decision regarding the formal investigation procedure concerning alleged state aid for Starbucks Manufacturing BV.

The European Commission published the non-confidential version of the opening decision in the Starbucks procedure on its website today. In this decision, the Commission explains that it is investigating the Advance Pricing Agreement (APA) between Starbucks Manufacturing BV and the Dutch tax authorities (the 'Starbucks APA') in connection with possible state aid. I am confident that this investigation will ultimately show that no state aid has been provided.

The Starbucks procedure concerns an APA, in which arm's length remuneration was agreed for the activities performed in the Netherlands by Starbucks Manufacturing BV for the Starbucks group.

The basic principle for determining 'transfer prices' is that the remuneration for the function performed, the risks incurred and the assets used may not differ from the remuneration of similar independent companies (the arm's length principle). To calculate the arm's length remuneration, various methods can be used, which are set out in more detail in the OECD's Transfer Pricing Guidelines.

In its opening decision, the Commission doubts three elements of the APA that she wants to investigate further. First, it questions the qualification of Starbucks Manufacturing as a low-risk contract manufacturer while concluding the APA. Second, it questions whether the Dutch tax authorities were right to accept two adjustments to the cost base by the tax consultant, arising from the qualification of Starbucks Manufacturing BV as a contract manufacturer. Irrespective of the correctness of these adjustments, the Commission takes the view that one of the corrections is unnecessary because both corrections serve the same purpose.

Finally, the Commission questions whether the Dutch tax authorities were right to accept Starbucks Manufacturing BV's calculation of the royalties. The Commission believes that this calculation does not reflect the value of the intellectual property rights, because the royalties are linked to the difference between the remuneration agreed in the Starbucks APA and the pre-tax accounting profit before payment of royalties.

On the basis of these doubts, the Commission feels that the Starbucks APA might not comply with the arm's length principle. It therefore believes that the Dutch government may have granted Starbucks Manufacturing BV a selective advantage which qualifies as state aid. The Commission now intends to investigate further whether state aid has actually been provided.

I can inform your House that the arm's length principle has been carefully implemented in Dutch legislation, i.e. in section 8b of the Corporation Tax Act 1969, and that the Transfer Pricing Decree is fully in line with the international standard laid down in article 9 of the OECD Model Tax Convention.

The Dutch tax authorities fully apply the recognised arm's length principle, as further explained in the OECD Guidelines and further elaborated in the Transfer Pricing Decree.

As mentioned in the opening decision, the Dutch tax authorities, on the basis of an analysis of contractual arrangements and a functional analysis, characterised Starbucks Manufacturing BV as a contract manufacturer, i.e. a low-risk manufacturer, especially as it does not run a stock risk. This designation has therefore been sufficiently substantiated.

The existence of arm's length remuneration was determined by means of a benchmark study employing the transactional net margin method (TNMM) – the internationally most commonly used method for the production function, and one recognised by the OECD. On the basis of the OECD Guidelines and national legislation, taxpayers are in principle free to choose the transfer pricing method, provided it results in an arm's length outcome for the transaction in question. The OECD Guidelines and national legislation do not prescribe a specific method for a specific situation. So far the Commission does not seem to acknowledge this.

Based on all the information available, I am convinced that the approved method and remuneration comply with the arm's length principle. Since the transfer prices used by Starbucks Manufacturing BV were determined in accordance with the OECD Guidelines and national legislation based on them, Starbucks Manufacturing BV does not enjoy a selective advantage. In my view, the Commission can only conclude that state aid exists in relation to transfer pricing in a specific case if it can demonstrate that the OECD Guidelines and the arm's length principle have clearly been departed from. The Starbucks APA has been carefully and sufficiently substantiated. The Commission itself stated in its press release of 11 June 2014 that the Netherlands usually carries out thorough assessments based on comprehensive information that the taxpayer is required to provide. The Commission therefore does not expect to encounter systematic irregularities in Dutch tax rulings. The fact that the APA does not depart from the normally applicable tax regime is another indication that no selective measure has been

taken. Since Starbucks Manufacturing BV has not been given an advantage and the selectivity criterion has not been met, Starbucks Manufacturing BV cannot have received state aid. I provided further evidence of this in our response to the Commission's opening decision.

My conviction that the APA with Starbucks Manufacturing BV is fully in line with international transfer pricing standards is consistent with the policy framework applied by the government in its efforts to create an attractive business climate. It is essential to respect internationally agreed standards and to give sufficient and targeted consideration to combating misuse, because only then will the policy pursued be truly sustainable. That is why the Netherlands is actively engaged in the base erosion and profit shifting (BEPS) project of the OECD and G20 and in the European Commission's proposals in this regard. Our renegotiations with 23 developing countries aimed at including anti-abuse provisions in bilateral treaties should also be seen in this light.

Now that the opening decision has been published in the Official Journal of the European Union, all stakeholders, including Starbucks itself, have one month in which to respond.

Since the Commission generally seeks to reach a final decision within 18 months of initiating an investigation procedure, the present case should be concluded by mid-2016.