# Tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands deemed unlawful under the EU State aid rules

The European Commission ("Commission") ruled on 21 October that tax advantages granted by Luxembourg to Fiat and by the Netherlands to Starbucks by means of advance tax rulings were unlawful under the EU State aid rules. The two Member States will be required to recover the aid, in each case amounting to €20-30m, from the companies.

'State aid' refers to any form of 'selective advantage' granted by an EU Member State or through State resources to an entity engaged in an economic activity. Where such aid may distort competition and affect trade between Member States, it is unlawful unless notified to and approved by the Commission or otherwise exempt from the prohibition of unlawful aid.

Advance tax rulings are not of themselves contrary to the State aid rules. However, in the two cases, the aid in question was found to be unlawful as it was deemed to confer unfair advantages on Fiat's financing company, Fiat Finance and Trade, and Starbucks' roasting company. In particular, the Commission found that:

- Fiat and Starbucks each received a selective advantage by means of an advance tax ruling.
- Those advantages reduced the tax paid by each company by "artificial and complex methods" which did not "reflect economic reality".
- This was done, in particular, by setting transfer prices that did not correspond to market conditions.
- In the case of Fiat Finance and Trade, the relevant taxable profits of the company could be determined, as in the case of a bank, by reference to a return on the capital deployed by the bank for its financing activities. The capital base used for that purpose was much lower than the company's actual capital, and the estimated remuneration applied to that capital base was not found to correspond to market conditions.
- In the case of Starbucks, most of the profits of its roasting company were transferred abroad, in particular by means of a substantial royalty for know how in circumstances in which no other Starbucks company or independent roaster was required to pay a royalty, and through the payment of inflated prices for green coffee beans to a Switzerland-based Starbucks entity.

The Commission's full decision, containing additional details of its analysis, will be published in due course in non-confidential form.

Luxembourg and the Netherlands will be required to recover the aid in question from the companies within two months. The Commission has provided them with a methodology to be used in calculating the difference in the amounts of tax paid, and the amounts which would have been payable in the absence of the ruling. The decisions may be appealed to the European General Court.

Additional investigations are pending, and the Commission has widened its review to include advance tax rulings by all EU Member States, as part of its efforts to tackle tax evasion and tax fraud. In the recent investigations, the Commission used for the first time a new power to request information from parties other than the grantor of the aid (which include other Member States, the alleged beneficiary of the aid and competitors). Third parties that can show that they were adversely affected by unlawful State aid may also be entitled to seek redress.

The exposure of individual companies may be significant, in particular as the Commission has the power to investigate allegedly unlawful aid going back for up to 10 years.

Companies that have benefited from advance tax rulings should consider whether those rulings give rise to any potential concerns, and whether any of their tax arrangements should be updated in the light of the principles emerging from the Commission's investigations.

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