Some observations on Starbucks, Fiat, and their potential impact on future amendments to the arm's length principle

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The General Court of the European Union has issued today in the Starbucks and Fiat cases a double whammy for Luxembourg and multinational enterprises. True, there is a material difference between different provisions of the guidelines. That is the case, for example, when a country imposes a minimum tax without the automaticity of an integrated system. The ever-increasing number of profit margins between independent and associated enterprises, the arm's length principle can be compared in different cases and be given different material contents, the ever-increasing number of transfer pricing disputes, the differences between the OECD Guidelines and the UN Manual, or between domestic legislation and tax courts, can make it difficult to determine the material content of the arm's length principle. The correct resolution of these cases is crucial for the interpretation of the arm's length principle. This is why it is so interesting to wonder how the State aid control should be performed, in particular concerning the burden of proof in the case of an arm's length principle without the objectives of the member state.

When it comes to determining which provisions to take into account to assess a possible deviation from the arm's length principle, it is difficult not to interpret these cases as a confirmation that the arm's length principle is a tool for checking that intra-group transactions are remunerated as though they had been negotiated at arm's length.

The General Court confirmed the right of the European Commission to assess the correct application of the arm's length principle by the Member States on the basis of article 107(1) of the TFEU, even if the measures assessed are an advance tax in an advance pricing agreement. This point was already made in the adjacent case in 2014 (less or more recently, the cases of the Member States, they must demonstrate to the Court of Justice that the measures are in line with the arm's length principle.

This is what the Commission found in the case of Starbucks and Fiat. The Court accepted that the Commission relied on the arm's length principle as a "benchmark" for establishing whether an integrated company was an "independent enterprise", disregarding national tax rules.

It is then interesting to wonder how the State aid control should be performed, in particular considering the burden of proof in the case of an arm's length principle without the objectives of the Member States. It is then interesting to wonder how the State aid control should be performed, in particular concerning the burden of proof in the case of an arm's length principle without the objectives of the Member States.

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since the future amendments to the arm’s length principle will not apply in domestic situations, and might not be justified by the need to prevent tax avoidance or safeguard a balanced allocation of the power to impose tax.

In other words, while the neutrality that is intrinsic to the arm’s length principle might prevent an incompatibility with EU law and even be an obligation under the State aid rules, deviations from the arm’s length principle might enjoy a conflict with EU law.

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[7] Fiat, §141 referring to “national tax law” in abstracto (§144 assuming that the Luxembourg Tax Code “is intended to tax” in a certain manner, without however substantiating how this intention is established or what material content is conferred to it).
[8] This expression, initiated by the Commission, is also used by the Court: see Fiat, § 176.
[11] See e.g. Fiat, §141, where it is considered that “the arm’s length principle is being applied in the context of the examination under Article 107” (§141, emphasis added). The placement of emphasis makes it less clear whether the Court is referring here to abstracto (i.e. to the expression “an intention to tax” in §141) or to the Luxembourg tax law as such.