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⁽¹⁾ Text with EEA relevance.

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2017/1283**of 30 August 2016****on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple***(notified under document C(2017) 5605)***(Only the English text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter of 12 June 2013, the Commission requested Ireland to provide information on its tax ruling practice ⁽²⁾. In particular, the Commission requested information on any rulings granted by Ireland in favour of the Apple Group companies Apple Operations International (hereinafter: 'AOI'), Apple Sales International (hereinafter 'ASI') and Apple Operations Europe (hereinafter: 'AOE'). The Commission also requested an illustrative list (at least five examples) of Irish resident companies or permanent establishments of foreign companies which benefitted from tax rulings for similar activities in Ireland.
- (2) By letter of 9 July 2013, Ireland submitted the requested information to the Commission. Ireland indicated in its letter that the Irish tax administration (hereinafter: 'Irish Revenue') had issued rulings to non-resident companies in relation to the allocation of profits to their Irish branch in nine cases. Those cases included the following nine companies: Company [A] ^(*), Company [B], Company [C1], Company [D], Company [E], Company [F], Company [G1], Company [G2] and Company [G3].
- (3) By letter of 26 August 2013, the Commission requested the rulings issued by Irish revenue to those nine companies. It also requested all rulings issued in years 2010, 2011 and 2012 by Irish Revenue. On 25 September 2013, Ireland provided the rulings issued to the nine companies, as well as the rulings issued in years 2010, 2011 and 2012, the latter of which contained a small number of advanced pricing agreements (hereinafter: 'APAs'), including bilateral APAs.

⁽¹⁾ OJ C 369, 17.10.2014, p. 22.

⁽²⁾ Ireland refers to 'advance opinions' instead of 'tax rulings' in its submissions. The Commission, for the purpose of this decision and to ensure consistency with the Opening Decision, will use the notion 'tax rulings'. Substantively, the two notions are the same.

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

- (4) By letter of 21 October 2013, the Commission requested Ireland to provide the rulings issued by Irish Revenue in 1991 and 2007 in favour of ASI and AOE and all essential elements supporting the requests to Irish Revenue to obtain those rulings, in particular, underlying reports of the companies' tax advisor. The Commission also requested information regarding all Apple Group companies tax resident in Ireland, including all rulings in force and the tax returns of those Apple Group companies in Ireland for the years 2010, 2011 and 2012. On 21 November 2013, the Irish authorities submitted the requested information including the rulings of 1991 and 2007 issued in favour of ASI and AOE and the tax returns of the nine companies listed in recital 2.
- (5) By letter of 24 January 2014, the Commission requested an explanation of the rulings provided by Ireland on 25 September 2013. The Commission also requested Ireland to provide all rulings on profit allocation issued since 2004 and all rulings issued prior to that date and still in force, as well as all essential elements supporting those rulings.
- (6) On 6 March 2014, Ireland provided additional rulings on profit allocation in relation to companies whose requests were dealt with by Irish Revenue's 'Large Cases Division'. Ireland provided the rulings, a copy of the correspondence received by Ireland from the company or its tax advisor setting out the basis for the ruling request, and a copy of the reply by Irish Revenue. That information was provided for ten companies: Company [H], Company [I], Company [C2], Company [J], Company [K], Company [D], Company [L], Company [M], Company [N] and Company [O] ⁽³⁾. Ireland further indicated that information in relation to Company [K] had been included in a previous reply.
- (7) By letter of 7 March 2014, the Commission informed Ireland that it was investigating whether the tax rulings issued by Irish Revenue in 1991 and 2007 in favour of ASI and AOE constitute new aid and it invited the Irish authorities to comment on the compatibility of such aid. Noting that the Commission had already requested, by letter of 21 October 2013, all essential elements supporting those rulings, the Commission invited Ireland to provide any additional information related to the tax arrangements endorsed by those rulings, as well as the tax returns of Apple Group companies in Ireland. On 25 March 2014, Ireland submitted the tax returns of ASI and AOE for the years 2004 to 2010.
- (8) By letters of 1 and 28 May 2014, the Irish authorities raised concerns that discussions between the Commission and the Organisation for Economic Cooperation and Development (hereinafter: the 'OECD') may have led to the disclosure of confidential taxpayer information. By letter of 6 June 2014, the Commission responded to those concerns by explaining that the discussions between the Commission and the OECD were of a general nature and that no confidential taxpayer information had been disclosed to the OECD.
- (9) On 11 June 2014, the Commission adopted, in accordance with Article 108(2) of the Treaty, its decision to open the formal investigation procedure into the 1991 and 2007 tax rulings issued by Irish Revenue in favour of ASI and AOE on the grounds that those rulings could constitute State aid within the meaning of Article 107(1) of the Treaty (hereinafter: the 'Opening Decision').
- (10) By letter of 5 September 2014, Ireland submitted its comments on the Opening Decision.
- (11) On 17 October 2014, the Opening Decision was published in the Official Journal ⁽⁴⁾, whereby interested parties were invited to submit their comments on the Commission's investigation. By letter of 17 November 2014, the Commission received comments from Apple. Attached to those comments was an *ad hoc* profit allocation report prepared by its tax advisor [Apple's tax advisor] (hereinafter: 'the [Apple's tax advisor] *ad hoc* report'). Comments were also submitted by Ibec ⁽⁵⁾ and Oxfam and a joint letter was submitted by several trade organisations ⁽⁶⁾.
- (12) On 9 January 2015, a meeting took place between the Commission's services and representatives of Apple, during which Apple explained its new corporate structure in Ireland to the Commission. By email of 19 January 2015, Apple submitted a summary of the key elements of Apple's [...] restructuring in Ireland to the Commission as a follow-up to the meeting of 9 January 2015.

⁽³⁾ As some rulings provided have been addressed to companies of the same group, the nine companies listed in recital 2 and the 10 companies listed in recital 6 belong to 14 different multinational groups.

⁽⁴⁾ OJ C 369, 17.10.2014, p. 22.

⁽⁵⁾ Business and employer association for organisations based in Ireland.

⁽⁶⁾ These trade associations and signatories of the joint letter are: Information Technology Industry Council (ITI), National Foreign Trade Council (NFTC), Semiconductor Industry Association (SIA), Silicon Valley Tax Directors Group (SVTDG), Software Coalition, Software Finance and Tax Executives Council (SofTEC), Tech America, TechNet.

- (13) On 30 January 2015 and 11 March 2015, Ireland submitted its observations on the third party comments received by the Commission in response to the Opening Decision.
- (14) By letter of 4 February 2015, the Commission requested Ireland's views on Apple's new corporate structure in Ireland, as well as all written exchanges between Irish Revenue and Apple regarding that new corporate structure. Ireland replied to that request by letter of 25 February 2015 and provided the requested written exchanges and notes of a conference call of 11 December 2014 between Irish Revenue and Apple. In addition, Ireland asked the Commission to further clarify some aspects of its investigation into the 1991 and 2007 tax rulings which, according to Ireland, seemed to be based on a misapprehension by the Commission as to the applicable national law.
- (15) By letter of 5 March 2015, the Commission sent a request for information to Ireland which related to information on the interest income reported in ASI's and AOE's financial accounts and the allocation of that income within ASI and AOE. In addition, the Commission requested information on the management of the intellectual property licences held by ASI and AOE for the procurement, manufacturing, sales and distribution of Apple products outside of the Americas (hereinafter: the 'Apple IP licences') and whether employees of the Apple group were involved in such management. Ireland replied by letter of 15 April 2015, providing all the requested information, including an annex submitted by Apple. In a second letter sent on the same day, Ireland agreed to a meeting with the Commission.
- (16) On 17 April 2015, the Commission sent a letter to Ireland responding to the latter's request of 25 February 2015 to clarify certain aspects of its investigation into the 1991 and 2007 rulings (hereinafter: the 'letter of 17 April 2015'). The Commission requested Ireland to forward a copy of that letter to Apple.
- (17) On 22 April 2015, a meeting took place between the Commission services and Apple. Ireland was present at that meeting, which focused on the allocation of profit within ASI and AOE.
- (18) By email of 23 April 2015, the Commission invited Apple to comment on the letter of 17 April 2015. In addition, the Commission requested Apple to provide the minutes of the meetings of ASI's board of directors for the same period for which board meeting minutes of AOE's board of directors had previously been provided.
- (19) By letters of 4 May 2015, Ireland and Apple replied to the letter of 17 April 2015. On 7 May 2015, Apple's letter was forwarded to Ireland for comment.
- (20) On 7 May 2015, a meeting took place between the Commission's services and Ireland.
- (21) On 20 May 2015, Ireland commented on Apple's observations on the letter of 17 April 2015.
- (22) On 27 May 2015, Apple submitted all the minutes and resolutions of both ASI's and AOE's board of directors for the requested period in response to the Commission's email of 23 April 2015.
- (23) By email of 9 July 2015, the Commission sent the draft minutes of the meeting of 7 May 2015 to Ireland and invited Ireland to agree or propose changes to those minutes.
- (24) On 17 July 2015, Ireland replied to the Commission's email of 9 July 2015 stating, in particular, that it did not consider the draft minutes to present an accurate or comprehensive record of the 7 May 2015 meeting. Ireland submitted its observations on the meeting and reiterated arguments expressed in its letter of 4 May 2015. In addition, Ireland attached an opinion prepared by Hon. John D. Cooke (hereinafter: the 'Cooke opinion'). By letter of 28 July 2015, the Commission responded to Ireland's letter of 17 July 2015.
- (25) By letter of 14 August 2015, Ireland provided its comments on the minutes of the meeting on 7 May 2015.

- (26) By letter of 7 September 2015, Apple provided its comments on the minutes of the meeting on 7 May 2015. Apple also submitted an opinion prepared by Professor [Apple's advisor] (hereinafter: the '[Apple's advisor] opinion').
- (27) By letter of 11 November 2015, the Commission requested Ireland to provide further clarification on the activities of ASI, AOE and Apple Distribution International (hereinafter: 'ADI') to better understand the functions performed and the risks borne by ASI's and AOE's head offices and their respective Irish branches.
- (28) After several exchanges of letters between Ireland and the Commission on 25 November 2015, 27 November 2015 and 2 December 2015 regarding the scope of the request for information and the deadline to reply, Ireland provided part of the requested information by letter dated 8 December 2015. In that letter, Ireland also indicated that the missing information would be submitted later and that Apple is working on compiling the information requested. It also expressed its concerns in that letter about the manner in which the investigation had proceeded.
- (29) On 21 January 2016, a meeting took place between the Chief Executive Office of Apple Inc. (hereinafter: 'Apple's CEO'), Mr Cook, and the Commissioner for Competition, Ms. Vestager, at which Ireland was also present. By letter dated 25 January 2016, Apple's CEO provided further clarifications regarding the points raised by Apple during the meeting on 21 January 2016. The Commissioner for Competition responded to that letter by letter of 29 February 2016.
- (30) By letter of 29 January 2016, Ireland provided additional information in response to the Commission's request of 11 November 2015.
- (31) By letter of 17 February 2016, Ireland again expressed its concerns about the manner in which the investigation had proceeded, indicating that it considered the rules of procedural fairness and the rights of defence to have been breached by the Commission.
- (32) By letter of 18 February 2016, Apple submitted additional clarifications regarding the points raised during the meeting on 21 January 2016. Apple also submitted an update to the [Apple's tax advisor] *ad hoc* report submitted on 17 November 2014 as part of its comments on the Opening Decision (hereinafter: 'the second [Apple's tax advisor] *ad hoc* report'). Apple indicated in that letter that it was their understanding that the Opening Decision challenged the profit allocation to the Irish branches of ASI and AOE.
- (33) By letter of 18 February 2016, Ireland submitted an unsolicited *ad hoc* profit allocation report prepared by Pricewaterhouse Cooper (hereinafter: the 'PwC *ad hoc* report') that, according to Ireland, supported its view that the profit attribution to the Irish branches of ASI and AOE endorsed by Irish Revenue in the 1991 and 2007 tax rulings was at arm's length.
- (34) By letter of 8 March 2016, the Commission [...] requested some additional [...] information [...]. The Commission also addressed the concerns expressed by Ireland on 17 February 2016 on the scope of the investigation, by explaining that the subject-matter of the investigation consisted in examining whether the allocation of profit to ASI's and AOE's Irish branches endorsed by the 1991 and 2007 tax rulings gave rise to State aid.
- (35) On 14 March 2016, Apple [...] sent a further letter expressing [...] concerns about the fairness of the proceedings. The Commission replied to that letter on 20 April 2016 and sent a copy of its letter to Ireland. In response to the Commission's letter of 20 April 2016, Apple sent a letter to the Commission on 6 May 2016. The Commission replied to the letter of 6 May 2016 on 22 July 2016 and sent a copy of its letter to Ireland. In response to the Commission's letter of 22 July 2016, Apple sent a letter to the Commission on 24 August 2016 expressing Apple's concerns about the fairness of the proceedings.
- (36) On 23 March 2016, Ireland sent two letters to the Commission. By its first letter, Ireland provided part of the information requested by the Commission in its letter of 8 March 2016 and stated that it would provide the remainder of the information on 22 April 2016. By its second letter, Ireland again expressed its concerns about the fairness of the procedure.
- (37) By letter of 22 April 2016, Ireland submitted a letter from Apple dated 22 April 2016 by which Ireland provided to the Commission the information in response to the Commission's request for information of 11 November 2015 and [...] of 8 March 2016.

- (38) On 24 May 2016, Ireland provided additional information to supplement its submission of 22 April 2016. That information consisted of minutes of meetings of ASI's and AOE's board of directors which had previously not been provided.

2. FACTUAL AND LEGAL BACKGROUND

- (39) This Decision concerns two tax rulings issued by Irish Revenue on 29 January 1991 and on 23 May 2007 in favour of ASI and AOE (hereinafter 'the contested tax rulings'). The contested tax rulings endorse methods for ASI and AOE to allocate profit to their respective Irish branches. The contested tax rulings allow ASI and AOE to determine their yearly corporation tax liability in Ireland by applying the profit allocation methods endorsed by Irish Revenue in those rulings. The 1991 ruling was in force until 2007, when it was replaced by the 2007 ruling. The 2007 ruling was in force until Apple's new corporate structure in Ireland was put into place. According to the information provided by Apple, the last financial year to which the 2007 ruling applies is 2014, which ends on 27 September 2014.

2.1. BENEFICIARIES OF THE CONTESTED TAX RULINGS

2.1.1. THE APPLE GROUP

- (40) The Apple Group is composed of Apple Inc. and all companies controlled by Apple Inc. (hereinafter collectively referred to as: 'Apple'). Apple is headquartered in the United States of America (hereinafter: the 'US').
- (41) Apple designs, manufactures and markets mobile communication and media devices, personal computers and portable digital music players. It sells a variety of related software, services, peripherals, networking solutions and third-party digital content and applications. Apple sells its products worldwide through its retail stores, online stores and direct sales force, as well as through third-party cellular network carriers, wholesalers, retailers and value-added resellers. In addition, Apple sells a variety of third-party products compatible with Apple products, including application software and various accessories and peripherals, through its online and retail stores.
- (42) Apple sells to consumers, businesses and governments worldwide. Apple manages its business primarily on a geographic basis. The geographic reporting segments are Americas, Europe ⁽⁷⁾, Japan, Greater China, and Rest of Asia Pacific.
- (43) In 2015, Apple had worldwide net sales of USD 233,7 billion and a net income of USD 53,4 billion ⁽⁸⁾. As of 26 September 2015, Apple held USD 186,9 billion in cash, cash equivalents and marketable securities through foreign subsidiaries ⁽⁹⁾. This amount corresponds substantially to foreign profits which were not subject to taxation ⁽¹⁰⁾.
- (44) Apple's global business is structured around key functional areas centrally managed and directed from the US by executives based in Cupertino, US. The key functional areas in the Apple group are: Research and Development (hereinafter 'R&D'), Marketing, Operations, Sales, and General and Administration.

2.1.2. APPLE'S STRUCTURE IN IRELAND

- (45) The Apple Group includes companies incorporated in Ireland. Amongst the companies of the Apple Group incorporated in Ireland, a distinction can be made between companies incorporated in Ireland that are also tax resident in Ireland, such as ADI, Apple Operations and Apple Sales Ireland, and companies that are incorporated in Ireland but are not tax resident in Ireland, such as AOI, ASI and AOE.

⁽⁷⁾ The Europe segment includes European countries, as well as the Middle East, India and Africa, collectively referred to hereinafter as: the 'EMEA region'.

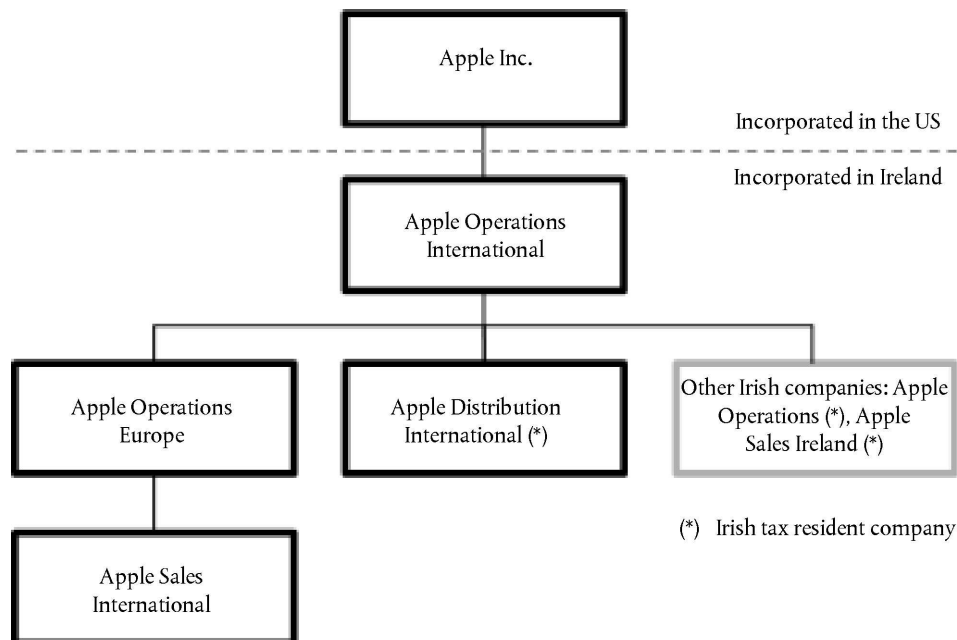
⁽⁸⁾ Accounting and fiscal year end 26 September 2015. Apple's fiscal year is the 52 or 53-week period that ends on the last Saturday of September.

⁽⁹⁾ The public financial accounts of Apple Inc. do not specify which subsidiaries hold this cash, cash equivalents and marketable securities.

⁽¹⁰⁾ See Note 5 to the 2015 Annual report of Apple (K-10 Securities and Exchange Commission public filing), according to which 'Substantially all of [Apple]'s undistributed international earnings intended to be indefinitely reinvested in operations outside the U.S. were generated by subsidiaries organized in Ireland.' Apple set aside a provision in their accounts for possible future taxation of a part of these profits.

- (46) Of the Apple Group companies incorporated and tax resident in Ireland with employees in Ireland, ADI has been contracted by ASI to ensure the distribution of Apple products outside of the Americas, Apple Operations acquires tooling equipment for use by manufacturers and procures components parts from suppliers for sale to manufacturers and Apple Sales Ireland supports Apple's Sales programs locally in Ireland.
- (47) Of the Apple Group companies incorporated in Ireland, but not tax resident in Ireland, ASI is a fully owned subsidiary of AOE, which in turn is a fully owned subsidiary of AOI, which in turn is a fully owned subsidiary of Apple Inc., which is incorporated in the US ⁽¹⁾. AOE and ASI operate in Ireland through branches. Figure 1 demonstrates this corporate structure:

Figure 1

Apple's corporate structure in Ireland**2.1.3. ASI's AND AOE's LACK OF TAX RESIDENCY**

- (48) A company that is incorporated under Irish law or centrally managed and controlled in Ireland, or both, is normally considered tax resident in Ireland and therefore liable to corporation tax on its worldwide profits. This means that companies incorporated in Ireland are, in principle, liable to tax in Ireland, even if they are managed and controlled outside of Ireland.
- (49) However, prior to its modification by the Finance Act 2013 and Finance Act 2014, Section 23A of the Taxes Consolidation Act 1997 (hereinafter: 'TCA 97') provided two exceptions to that rule, allowing for companies incorporated in Ireland to be considered non-resident companies. Under Section 23A TCA 97, a company was not considered a tax resident if (i) it was considered to be a tax resident in another country under the application

⁽¹⁾ In 2006, Apple incorporated Baldwin Holdings Unlimited (hereinafter: 'Baldwin'), a company resident in the British Virgin Islands. Baldwin Holdings Unlimited holds one share as a nominee shareholder in AOI, ASI, AOE and ADI. According to Apple, Baldwin was formed to hold a single share in the Irish subsidiaries because Irish law required that an unlimited company has at least two shareholders. According to Apple, Baldwin was incorporated in the British Virgin Islands because an unlimited company with a shareholder that is an unlimited company governed by the laws of a non-EU Member State is not required to make a public return of its financial statements.

of a double taxation treaty (the so-called treaty exception) or (ii) the company was listed on a recognised stock exchange or ultimately controlled by a person that was resident in a Member State or tax treaty country (the so-called relevant companies exception), and those relevant companies or their subsidiaries had a trading activity in Ireland (the so-called trading exception) ⁽¹²⁾. The second of those exceptions meant that relevant companies incorporated in Ireland with a trading activity in Ireland that were centrally managed and controlled outside of Ireland were not considered tax resident in Ireland. There was no requirement, however, that the companies had a tax residence in another tax jurisdiction.

- (50) ASI and AOE are both incorporated in Ireland. During the time that the contested tax rulings were in force, ASI and AOE were considered to be 'relevant companies' for the purposes of Section 23A TCA 97, since they were both ultimately controlled by a company that is resident in a tax treaty country, namely Apple Inc., which is a tax resident of the US ⁽¹³⁾, and, since ASI and AOE had a trading activity in Ireland through their respective branches and were managed and controlled outside Ireland, the companies were considered to be non-resident companies in Ireland under the trading exception of Section 23A TCA 97.
- (51) ASI and AOE did not have any taxable presence in any other tax jurisdiction besides Ireland during the time that the contested rulings were in force ⁽¹⁴⁾. Indeed, each company operated through a single branch in Ireland and, more important, the companies did not have any taxable presence in the US ⁽¹⁵⁾, the country in which Irish Revenue, in application of Section 23A TCA 97, considered them to be managed and controlled ⁽¹⁶⁾. As regards ASI's and AOE's head offices, those head offices lack any physical presence or employees and are not located in any jurisdiction.
- (52) In sum, ASI and AOE are incorporated in Ireland, but were not tax resident in Ireland during the time that the contested tax rulings were in force. Nor were those companies tax resident in any other tax jurisdiction during that period, since their activities in other jurisdictions and in particular the activities of their head offices, which lacked any physical presence and employees, did not give rise to a taxable presence in the US or any other jurisdiction under the applicable taxation rules. During the time that the contested tax rulings were in force, ASI and AOE could therefore be best described as 'stateless' for tax residency purposes.

2.1.4. FUNCTIONS OF ASI's AND AOE's IRISH BRANCHES AS PRESENTED BY IRELAND AND APPLE

- (53) Ireland and Apple provided descriptions of the functions performed by the Irish branches of ASI and AOE ⁽¹⁷⁾, which were used as a basis to present and support Apple's estimates of the taxable profit of those companies for Irish corporation tax purposes. Those descriptions are presented in recitals 54 to 57.

⁽¹²⁾ Section 23A TCA97 previously provided in its subsection 2: 'Subject to subsections (3) and (4), a company which is incorporated in the State shall be regarded for the purposes of the Tax Acts and the Capital Gains Tax Acts as resident in the State.' Subsection (3) read: 'Subsection (2) shall not apply to a company incorporated in the State if the company is a relevant company and (a) carries on a trade in the State, or (b) is related to a company which carries on a trade in the State.' Section 23A was revised by the Finance Act 2013. Under its new iteration, it is no longer possible for a company incorporated in Ireland to have no tax residency because a company that is incorporated in Ireland will be regarded as a tax resident if the company is not regarded as a tax resident in any other tax jurisdiction. Section 23A in its new iteration applies since 1 January 2015. The Finance Act 2014 introduced a further amendment to Section 23A, where all companies incorporated in Ireland would be deemed to be tax resident in Ireland, except when the company is tax resident in another jurisdiction under the application of a Double Taxation Treaty. This rule also applies since 1 January 2015. However, for companies incorporated before 1 January 2015, a transitory period applies until 31 December 2020.

⁽¹³⁾ According to Apple, and as accepted by the Irish Revenue, both companies are centrally managed and controlled outside of Ireland.

⁽¹⁴⁾ With the exception of AOE's Singapore branch, see recital 111.

⁽¹⁵⁾ In the context of the US Senate hearings, Apple indicated that ASI has no tax residency either in Ireland nor in the US, see Exhibits of hearing of Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.) of the Permanent Subcommittee on Investigations of the US Senate, 21 May 2013, p. 24.

⁽¹⁶⁾ Ireland indicated, in point 12 of its comments to the Opening Decision, that 'all key strategic business decisions in relation to AOE and ASI were taken outside of Ireland and [...] the two companies were functionally managed and controlled in the US'. See also, the Cooke opinion which states: 'It is in my opinion indisputable on the basis of the factual description provided to me of their operations in Ireland, that in the cases of ASI and AOE, the central management and control abides in the United States with the managers of the parent group who alone make all of the strategic decisions as to how the Irish activities will be conducted: for example, what contracts they will conclude, with whom and on what terms.'

⁽¹⁷⁾ According to Apple 'the Irish-source profits of a branch are determined by reference to the activities performed by that branch'. Letter of Apple of 4 May 2015, p. 5.

- (54) As regards ASI, its Irish branch is mainly responsible for the execution of procurement, sales and distribution activities associated with the sale of Apple products to related parties ⁽¹⁸⁾ and third-party customers across the EMEA and APAC regions ⁽¹⁹⁾. Key functions within ASI's Irish branch include: procurement of Apple finished goods from third-party and related-party manufacturers ⁽²⁰⁾; distribution activities associated with the sale of products to related parties in the EMEA and APAC regions ⁽²¹⁾; sales support and distribution activities associated with the sale of products to third party customers across EMEA ⁽²²⁾; activities of the selling and distribution teams ⁽²³⁾, online sales ⁽²⁴⁾; logistics operations ⁽²⁵⁾; and operating AppleCare, Apple's after-sales customer support business, which includes responsibility for warranty, managing the repair programs and repair network including telephone support.
- (55) ASI's Irish branch also fulfils the purchase orders placed by the APAC local country distribution entities. Many activities associated with the distribution into this region are performed by related parties (for example, logistics support) under service contracts with ASI's Irish branch. In addition, ASI's Irish branch is responsible for monitoring day-to-day management of distribution risks, in particular, inventory, warranty and credit limit risks. Since 1 January 2012, ASI's Irish branch has also been responsible for product localisation functions, which were previously performed by AOE's Irish branch.
- (56) As regards AOE, its Irish branch is responsible for the manufacturing and assembly of a specialised range of computer products at its facilities in Ireland, including iMac desktops, MacBook laptops and other computer accessories, all of which are manufactured for the EMEA region ⁽²⁶⁾. AOE's Irish branch supplies all its finished products to related parties. The main activities of AOE's Irish branch involve the ongoing execution of the processes required for the manufacture of products, process design and new product setups. Key functions within AOE's Irish branch include: production planning and scheduling ⁽²⁷⁾; process engineering ⁽²⁸⁾; production and operations ⁽²⁹⁾; quality assurance and quality control ⁽³⁰⁾; and refurbishing operations ⁽³¹⁾.
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- ⁽¹⁸⁾ Related parties are defined for accounting terms as entities which are ultimately controlled by the same person or entity, or on which the same entity or person exercises significant influence, see IAS 24.
- ⁽¹⁹⁾ EMEA stands for Europe, the Middle East, India and Africa. APAC stands for Asia-Pacific.
- ⁽²⁰⁾ ASI's Irish branch buys Apple products from predetermined manufacturers [...]. ASI's Irish branch estimates the expected demand forecast by gathering and analysing regional data and feeding this into the global sales demand forecasting process managed by the US.
- ⁽²¹⁾ These related parties can be local country distribution entities or local country retail store entities. ASI's Irish branch fulfils the purchase orders placed by these related parties and organises the distribution activities to export or deliver the product to those entities.
- ⁽²²⁾ The four key third-party routes to market are: commercial, retail, education and telephone carriers (collectively known as channel customers). ASI's Irish branch contracts with other related-party entities for sales support, marketing and other support services in respect of channel customers in the local EMEA markets. With the input and support services provided by Apple entities in the local market, ASI contracts with the channel partners and accepts and fulfils sales orders after evaluating factors including stock availability, sales demand across all countries and credit risk based on worldwide Apple guidelines.
- ⁽²³⁾ The activities in relation to both the related-party and third-party sales include managing the fulfilment process to the customers to maximise efficiencies within ASI's Irish branch's distribution activities, product allocation and order management, sales execution and managing of key third-party account customers to discuss order requirements.
- ⁽²⁴⁾ The selling and distribution teams also focus on direct sales through and by the online stores. Activities of the selling and distribution teams in relation to the online stores include facilitating the sales and ordering process for consumers, small and medium sized businesses and education customers.
- ⁽²⁵⁾ This includes transporting products primarily from third-party manufacturers in China to the destination markets across the EMEA region. The activities of the logistics function include managing outbound freight of Apple products to channel customers, online store customers and related parties. Some logistics operations activities are performed by related parties under service contracts with ASI's Irish branch.
- ⁽²⁶⁾ According to the [Apple's tax advisor] *ad hoc* report, the products manufactured by AOE's Irish branch represent only a small percentage of Apple's total sales volume in the EMEA region.
- ⁽²⁷⁾ This function ensures the activities within the manufacturing workforce and process flows to maintain a regular and efficient use of resources and the expected level of output.
- ⁽²⁸⁾ Process engineering relates to operation, control and optimisation of processes within the manufacturing activities. The team sets and improves efficient processes for current and new products.
- ⁽²⁹⁾ Activities include all the processes required to transform the various components into the finished goods in accordance with the standards set by Apple Inc. in the US.
- ⁽³⁰⁾ The quality assurance and quality control function involves all the activities by which AOE's Irish branch reviews the quality of all factors involved in production.
- ⁽³¹⁾ This concerns products that have been returned to Apple for various reasons. AOE's Irish branch ensures that before a refurbished Apple product is re-sold, it undergoes a refurbishment process to make sure it meets Apple's quality standards.

- (57) In addition to its core manufacturing activities, AOE's Irish branch also provides shared services to other Apple group companies in the EMEA region, with regard to finance (accounting, payroll and accounts payable services), information systems and technology and human resources. AOE's Irish branch develops Apple-specific process and manufacturing expertise ⁽³²⁾ and uses that expertise to support Apple third-party manufacturers and distribution centres from time to time. AOE's Irish branch is also responsible for monitoring the day-to-day management of manufacturing and inventory risks. Until 1 January 2012, the engineering team within AOE's Irish branch was also responsible for localising Apple products for local markets and executing engineering test programs related to Apple products and software (for example, new software releases) ⁽³³⁾. Since January 2012, this function has been performed by ASI's Irish branch.

2.1.5. ASI's OPERATIONS IN THE EMEA REGION

- (58) ASI sells goods in the EMEA region. ASI did not declare a permanent establishment ⁽³⁴⁾ in the EMEA tax jurisdictions where those goods are sold. Sales are concluded between the clients in different Member State tax jurisdictions and ASI (and ADI) through third-party resellers and Apple retail and online stores. ASI concludes sales contracts by obtaining authorised signatures, and ASI Irish Branch employees execute sales and resolve supply and other issues with customers ⁽³⁵⁾. Sales of ASI are concluded upon signature of an authorised representative ⁽³⁶⁾. For illustration purposes, [80-85] % of ASI's and ADI's total third-party sales revenues in 2014, as determined for Apple's internal reporting ⁽³⁷⁾, was derived from sales within the Union, whereas sales in the overall region of Europe represented [90-95] % of the total third-party sales revenue and sales in the Middle East accounted for [5-10] % of total third-party sales revenue.

2.2. THE CONTESTED TAX RULINGS

2.2.1. THE CONTESTED TAX RULINGS IN SO FAR AS THEY RELATE TO ASI

- (59) In 1991, a method for determining the net profit of the Irish branch of Apple Computer Accessories Ltd (which later became ASI) was proposed by Apple and endorsed by Irish Revenue in a tax ruling. According to that ruling, the net profit to be allocated to ASI's Irish branch would be calculated as 12,5 % of all branch operating costs ⁽³⁸⁾, excluding material for resale.
- (60) In 2007, a modified method for determining the net profit of ASI's Irish branch was endorsed by Irish Revenue in a new ruling. According to that ruling, the net profit to be allocated to ASI's Irish branch would be calculated as equal to [10-15] % on branch operating costs, excluding costs such as charges from Apple affiliates and material costs.

2.2.2. THE CONTESTED TAX RULINGS INSOFAR AS THEY RELATE TO AOE

- (61) In 1991, a method for determining the net profit of the Irish branch of Apple Computer Ltd (which later became AOE) was proposed by Apple and agreed by Irish Revenue in a tax ruling. According to that ruling, the net profit attributable to AOE's Irish branch would be calculated as 65 % of that branch's operating expenses up to an annual amount of USD [60-70] million and 20 % of its operating expenses in excess of USD [60-70] million.

⁽³²⁾ [...].

⁽³³⁾ One of the main tasks of the localization team was to adapt products and services to different languages, regional differences and technical requirements of local markets.

⁽³⁴⁾ Permanent establishment refers to a taxable presence in a jurisdiction.

⁽³⁵⁾ Letter from Ireland of 15 April 2015, Appendix, p. 19.

⁽³⁶⁾ PwC *ad hoc* report, Appendix 1 Apple Sales International (ASI) Branch, p. 11.

⁽³⁷⁾ Letter from Apple of 22 April 2016, p. 12 and Table 10.

⁽³⁸⁾ The 1991 ruling refers to 'operating costs' in respect of ASI and 'operating expense' in respect of AOE, although the two terms refer to the same category of charges.

The application of that method was subject to the proviso that if the overall profit of AOE's Irish branch was less than the figure resulting from the formula, that lower figure would be used for determining the branch's net profits. Operating expenses used in the method were all operating expenses incurred by AOE's Irish branch, including depreciation, but excluding materials for resale and cost-share for intangibles charged from Apple-affiliated companies. A capital allowance can be claimed, which should not exceed by USD [1-10] million the depreciation charged in the accounts ⁽³⁹⁾.

- (62) In 2007, a revised method for determining the net profit of AOE's Irish branch was endorsed by Irish Revenue in a new ruling. According to the method endorsed by that ruling, the tax base of the Irish branch was equal to (i) [10-15] % of branch's operating costs, excluding costs such as charges from Apple affiliates and material costs, (ii) an IP return of [1-5] % of branch turnover in respect of the accumulated manufacturing process technology of the Irish branch and (iii) a deduction for the capital allowances for plant and buildings 'computed and allowed in the normal manner'.

2.2.3. DOCUMENTS AVAILABLE TO IRISH REVENUE WHEN ISSUING THE CONTESTED TAX RULINGS

- (63) The documents provided by Ireland as constituting all essential elements supporting the 1991 ruling include three letters (dated 12 October 1990, 5 December 1990 and 16 January 1991) and two faxes (dated 2 January 1991 and 24 January 1991) from [Apple's tax advisor], as tax advisor of Apple (hereinafter: 'Apple's tax advisor'); one note of an interview dated 30 November 1990 and one note of a meeting dated 3 January 1991 prepared by Irish Revenue; and a letter from Irish Revenue dated 29 January 1991 which confirms that the letters from Apple's tax advisor correctly reflect the method for determining the profits to be allocated to the Irish branches of ASI and AOE as agreed at the meeting on 3 January 1991. That method is described in recitals 59 and 61.

- (64) The following excerpt is taken from the note of the interview of 30 November 1990:

'[Apple's tax advisor] mentioned by way of background information that Apple was now the largest employer in the Cork area with 1 000 direct employees and 500 persons engaged on a sub-contract basis. It was stated that the company is at present reviewing its worldwide operations and wishes to establish a profit margin on its Irish operations. [Apple's tax advisor] produced the accounts prepared for the Irish branch for the accounting period ended 29 September 1989 which showed a net profit of USD 270m on a turnover of USD 751m. It was submitted that no quoted Irish company produced a similar net profit ratio. In [Apple's tax advisor]'s view the profit is derived from three sources-technology, marketing and manufacturing. Only the manufacturing element relates to the Irish branch.

[Irish Revenue] pointed out that in the proposed scheme the level of fee charged would be critical. [Apple's tax advisor] stated that the company would be prepared to accept a profit of USD 30-40m assuming that Apple Computer Ltd will make such a profit. (The computer industry is subject to cyclical variations). Assuming that Apple makes a profit of GBP 100m it will be accepted that USD 30-40m (or whatever figure is negotiated) will be attributable to the manufacturing activity. However if the company suffered a downturn and had profits of less than USD 30-40m then all profits would be attributable [sic] to the manufacturing activity. The proposal essentially is that all profits subject to a ceiling of USD 30-40m will be attributable to the manufacturing activity.

[Irish Revenue] asked [Apple's tax advisor] to state if was there any basis for the figure of USD 30-40m and he confessed that there was no scientific basis for the figure. However the figure was of such magnitude that he hoped it would be seen to be a bona-fide proposal. As it was not possible to gauge the figure in isolation [Apple's tax advisor] undertook to extract details of the actual costs attributable to the Irish branch.'

⁽³⁹⁾ See fax of 24 January 1991 from [Apple's tax advisor] on the capital allowance.

- (65) The following excerpt is taken from the note of the meeting dated 3 January 1991:

'in [Apple's tax advisor's] view it was clear that the company was engaged in transfer pricing. The branch accounts for the accounting period ended 30 September 1989 showed a net profit of USD 269 000 000 on a turnover of USD 751 000 000. No company on the Irish stock exchange came close to achieving a similar result.

Revenue were not prepared to be conclusive as to whether the company was engaged in transfer pricing but were willing to discuss a profit figure for the Irish branch based on a percentage of the actual costs attributable to the Irish branch.

The proposal before the meeting was that the profit attributable to the Irish branch would be cost plus USD [30-40]m and the capital allowances would not exceed USD [10-20]m thereby leaving USD [20-30]m chargeable to Irish tax. Based on the accounts for the accounting period ended 30 September 1990 a profit of USD [30-40]m represented 46 % of the costs attributable to the Irish branch. It was pointed out that this figure greatly exceeded a figure of [10-15] % which is normally attributable to a cost center although it was readily conceded that a figure of [10-15] % was meaningless in relation to the computer industry. It was pointed out that a mark-up of 100 % can be achieved in some industries and in particular the pharmaceutical industry. It was conceded however that the pharmaceutical and computer industries are not directly comparable. Following further discussions it was agreed that, subject to receiving a satisfactory outcome to the capital allowance question, to accept a mark-up of 65 % of the costs attributable to the Irish branch. In addition it was agreed to accept a mark-up of 20 % on costs in excess of USD [60-70]m in order not to prohibit the expansion of the Irish operations.

(...) Arising from further discussions it was agreed that the capital allowances computations would be re-cast in Irish punts ⁽⁴⁰⁾ and the normal rate of wear and tear ⁽⁴¹⁾ would be written for all years. In addition it was agreed that the company's claim would be restricted to a sum of USD [1-10]m in excess of the sum charged for depreciation in the accounts. Based on the schedule of costs submitted for the period ended 30 September 1990 this would ensure that the profits chargeable to Irish tax would be USD [30-40]m.

(...) The format of the accounts to be submitted was then discussed. A proposal to submit a schedule of costs was not accepted. It was agreed that a full profit and loss account would be prepared and a royalty/head office charge would be taken for technology and marketing services provided by the group. In addition the full audited accounts of the company will be submitted.

(...) On a separate issue [Apple's tax advisor] wished to agree a mark-up for a new company whose activities would be confined to sourcing raw material in the State. A mark-up of 10 % was proposed and it was agreed following discussions to accept a mark-up of 12,5 %.'

- (66) The letter from Apple's tax advisor dated 16 January 1991 contains an illustrative account filling format for the Irish branch of Apple Computer Ltd and a capital allowances schedule for Apple Computer Ltd for the years 1985 to 1990. The fax dated 24 January 1991 from Apple's tax advisor confirms the agreement by Apple to the following wording on the capital allowance which substitutes the wording on the capital allowance previously provided by Apple's tax advisor in the letter dated 16 January 1991: 'The capital allowance claimed will not exceed by USD [1-10]m of the depreciation charged in the accounts.'

- (67) The documents provided by Ireland as constituting all essential elements supporting the 2007 ruling consist of a letter dated 16 May 2007 from Apple's tax advisor and a letter dated 23 May 2007 from Irish Revenue confirming its endorsement of the method for determining the profits to be allocated to the Irish branches of ASI and AOE as explained in the letter from Apple's tax advisor. That method is described in recitals 60 and 62. Neither of the two documents provided offer any explanation for the figures '[10-15] % [of Irish located operating costs]/[1-5] % [of the annual turnover of AOE which is derived from products manufactured in Ireland]/[10-15] % [of operating costs of ASI]', endorsed by that ruling, nor is there any indication as to how

⁽⁴⁰⁾ Footnote added: punt refers to the Irish currency at the time of the ruling, the Irish pound.

⁽⁴¹⁾ Footnote added: wear and tear refers to depreciation of material goods.

those figures were arrived at. The letter of Apple's tax advisor contains a number of specifications as to how the agreed method will be applied. In particular, it specifies, for the avoidance of doubt, that ASI's operating costs and AOE's 'Irish located operating costs' exclude all charges from Apple affiliates worldwide, 'above the line' costs such as material costs, customs, freight costs, etc., one-off restructuring costs, and capital costs.

- (68) None of the documents provided in support of the contested tax rulings contain either a contemporaneous profit allocation study or a transfer pricing report.

2.3. DESCRIPTION OF THE RELEVANT NATIONAL LEGAL FRAMEWORK

- (69) Pursuant to Section 21(1) TCA 97, corporation tax in Ireland is charged on the profit of companies. According to Section 76(3) TCA 97, for the purposes of corporation tax, income is computed and the assessment is made under the same Schedules and Cases as apply for the purposes of income tax, and in accordance with the provisions applicable to those Schedules and Cases. In Ireland, income tax under the direct taxation codes is charged by reference to a series of Schedules C, D, E and F, and in Schedule D under a series of Cases I to V. Section 12 TCA 97 provides that '[i]ncome tax shall, subject to the Income Tax Acts, be charged in respect of all property, profits or gains respectively described in the Schedules [C-F] [...] and in accordance with the provisions of the Income Tax Acts applicable to those Schedules' ⁽⁴²⁾. Section 18 TCA 97 lays down the scope of the charge under Schedule D and its subsection 2(2) enumerates the Cases and their scope. It follows from those provisions that corporation tax in Ireland is charged on the profits (income and chargeable gains) of a company however arising, subject to specific exceptions ⁽⁴³⁾.
- (70) The determination of the taxable base for the purpose of calculating the corporation tax due takes the corporate accounting profit of the taxpayer as a starting point ⁽⁴⁴⁾. The corporate accounting profit is then adjusted for tax purposes through additions and deductions of general application provided by the law ⁽⁴⁵⁾, for example, by a capital allowances deduction ⁽⁴⁶⁾. An accounting period is normally the period of 12 months for which the company makes up its accounts ⁽⁴⁷⁾.
- (71) Ireland applies a different tax rate to trading income, non-trading income and capital gains. Section 21 TCA 1997 sets the general rate of corporation tax at 12,5 % ⁽⁴⁸⁾. That rate applies to trading income ⁽⁴⁹⁾ of companies taxed under Case I of Schedule D. Non-trading income is taxed at 25 % ⁽⁵⁰⁾. Irish Revenue has provided guidance on the classification of activities as trading in its 'Guidance on revenue opinions on classification of activities as trading' ⁽⁵¹⁾. According to that guidance document, trading presupposes that the company concerned is carrying on business activities from which its income derives. The activities will vary depending on the nature of the trade

⁽⁴²⁾ Schedule C income concerns profits arising from public revenue dividend payable in Ireland (Section 17 TCA 97), schedule D income is subdivided in five Cases; (i) trading profits; (ii) profits from the exercise of professions; (iii) untaxed interest and foreign income; (iv) any other income or profit not otherwise taxable; (v) rental income from land in Ireland (Section 18 TCA 97), schedule E concerns income from public offices, employment, annuities and pension (Section 19 TCA 97) and schedule F concerns dividends from Irish companies (Section 20 TCA 97).

⁽⁴³⁾ Section 21(1). Examples of such specific exemptions are profits of a non-resident company that cannot be allocated to a branch, see Section 25 TCA 97, or most distributions received from other Irish-resident companies, see Section 129 TCA 97.

⁽⁴⁴⁾ Section 76A TCA 97.

⁽⁴⁵⁾ For example, according to Section 81(2) TCA 97, expenses are generally tax-deductible if they are not of a capital nature and are incurred wholly and exclusively for the purposes of the trade.

⁽⁴⁶⁾ Section 307 and 308 TCA 97

⁽⁴⁷⁾ Section 27(1), (2) TCA 97.

⁽⁴⁸⁾ Section 18, paragraph 1 and 2(a) TCA 1997 in connection with Section 21(1) TCA 97.

⁽⁴⁹⁾ Section 3(1) describes 'trade' as including 'every trade, manufacture, adventure or concern in the nature of trade'.

⁽⁵⁰⁾ According to Section 21A TCA 97, a 25 % tax rate applies to income taxable under Schedule D, case III, IV and V. These cases include amongst others passive income such as interest, royalties and rental income.

⁽⁵¹⁾ Irish Revenue, Guidance on revenue opinions on classification of activities as trading, Available at: <http://www.revenue.ie/en/tax/ct/basis-charge.html>

and will require people with the skill and authority necessary to carry them out ⁽⁵²⁾. Capital gains are taxed at 33 %, with a participation exemption for gains on disposals of certain shareholdings of 5 % or more in companies resident in the Union or tax treaty countries.

(72) According to Section 26 TCA 97, Irish-resident companies are subject to corporation tax on their worldwide profit and capital gains, excluding most distributions received from other Irish-resident companies ⁽⁵³⁾.

(73) Section 25 TCA 97 lays down the scope of the charge to corporation tax in the case of non-resident companies. Section 25 TCA 97 provides, insofar as relevant, the following:

‘(1) A company not resident in the State shall not be within the charge to corporation tax unless it carries on a trade in the State through a branch or agency, but if it does so it shall, subject to any exceptions provided for by the Corporation Tax Acts, be chargeable to corporation tax on all its chargeable profits wherever arising.

(2) For the purposes of corporation tax, the chargeable profits of a company not resident in the State but carrying on a trade in the State through a branch or agency shall be —

(a) any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency, but this paragraph shall not include distributions received from companies resident in the State, [...].’

(74) It follows from that provision that a non-resident company is not within the charge to corporation tax, unless it carries on a trade in Ireland through a branch or agency. Where a non-resident company carries on such a trade, that company is chargeable to corporation tax on ⁽⁵⁴⁾:

— any trading income arising directly or indirectly through or from the branch or agency;

— any income from property or rights used by, or held by or for, the branch or agency; and

— chargeable gains attributable to the branch or agency.

(75) Section 25 TCA 97 was preceded by Sections 8(1) and 8(2) of the Corporation Tax Act 1967, which read:

‘8. (1) A company not resident in the State shall not be within the charge to corporation tax unless it carries on a trade in the State through a branch or agency but, if it does so, it shall, subject to any exceptions provided for by this Act, be chargeable to corporation tax on all its chargeable profits wherever arising.

(2) For purposes of corporation the chargeable profits of a company not resident in the State but carrying on a trade there through a branch or agency shall be

(a) any trading income arising directly or indirectly through or from the branch or agency (but so that this paragraph shall not include distributions received from companies resident in the State); [...].’

⁽⁵²⁾ Guidance on revenue opinions on classification of activities as trading, p. 3.

⁽⁵³⁾ See Section 129 TCA 97.

⁽⁵⁴⁾ Notes for Guidance — Taxes Consolidation Act 1997 — Finance Act 2014 Edition — Part 2, page 24.

- (76) Companies that are not resident in Ireland and do not trade through a branch or agency in Ireland are only liable to income tax on any Irish-source income and to capital gains tax on gains arising on the disposal of certain Irish assets (principally Irish land) ⁽⁵⁵⁾, subject to any treaty relief that may be available.
- (77) To prevent a company being taxed twice on the same income (once with income tax, once with corporation tax), Section 21(2) TCA 97 provides that income tax is not chargeable on the income of a company if the company is resident in Ireland, or, in the case of a company which is not resident in Ireland, if the income is chargeable to corporation tax.
- (78) By Section 42 of the Finance Act 2010, Part 35A was inserted into the TCA 97. According to Ireland, that insertion was the first time that Irish tax law formally recognised the application of the 'arm's length principle' as laid down in Article 9 of the OECD Model Tax Convention on Income and on Capital (hereinafter: the 'OECD Model Tax Convention') and elaborated upon in the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: the 'OECD TP Guidelines'). Part 35A applies to arrangements entered into between associated persons (companies). However, based on the definition of a 'person' in Ireland's domestic tax legislation, any arrangement entered into between a head office and its branch does not fall within the scope of Part 35A.

2.4. GUIDANCE ON TRANSFER PRICING AND PROFIT ALLOCATION TO PERMANENT ESTABLISHMENTS

2.4.1. THE OECD FRAMEWORK AND THE OECD'S ARM'S LENGTH PRINCIPLE

- (79) The OECD has produced several non-binding guidance documents on international taxation. Given their non-binding nature, the tax administrations of the OECD member countries, of which Ireland is one ⁽⁵⁶⁾, are simply encouraged to follow the OECD's framework. Nevertheless, the OECD's framework serves as a focal point and exerts a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries guidance documents forming part of that framework have been given the force of law or serve as a reference for the purpose of interpreting domestic tax law. Therefore, to the extent the Commission refers to the OECD framework in this Decision, it does so because that framework is the result of expert discussions in the context of the OECD and elaborates on techniques aimed to address common challenges in international taxation.
- (80) As explained in recital 15 of the Opening Decision, multinationals can allocate profit within a corporate group by using transfer pricing between separate companies of the same corporate group. Transfer pricing refers to the prices charged for commercial transactions between various companies of the same corporate group. However, transfer pricing can also take place within one company, if the company operates a permanent establishment in a separate jurisdiction. This requires an allocation of that company's profit between its permanent establishment and the other parts of the company.
- (81) The OECD Model Tax Convention, which forms the basis of many bilateral tax treaties involving OECD member countries and an increasing number of non-member countries, contains provisions both on transfer pricing between associated group companies and profit allocation within a company.
- (82) Article 9(1) of the OECD Model Tax Convention on 'associated enterprises' provides: '[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ

⁽⁵⁵⁾ A non-resident company which does not carry on a trade in the State through a branch or agency is chargeable to income tax in respect of income arising from sources within the State. Where a non-resident company has a branch or agency within the State, it is to be charged to income tax and not to corporation tax on income not attributable to the branch or agency. Similarly, capital gains tax is levied on the chargeable gains of a non-resident company where it has no branch or agency in the State or where, if it has a branch or agency in the State, the gains are not attributable to the branch or agency.

⁽⁵⁶⁾ Ireland has been an OECD Member since 17 August 1961.

from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly'. That provision is considered to lay down the authoritative statement for international tax purposes of the OECD's 'arm's length principle' in transfer pricing between associated group companies.

- (83) According to that principle, tax administrations should only accept transfer prices between group companies that are remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length. In this way, multinationals are prevented from manipulating their transfer prices in such a manner that as little profit as possible is allocated to jurisdictions where those profits are subject to higher taxation and as much profit as possible is allocated to jurisdictions where those profits are subject to lower taxation ⁽⁵⁷⁾. The OECD provides guidance on the application of the arm's length principle in the OECD TP Guidelines, of which the latest version was published in 2010 (hereinafter: the '2010 OECD TP Guidelines') ⁽⁵⁸⁾.
- (84) Article 7(2) of the OECD Model Tax Convention on 'business profits' deals with the attribution of profits within a single company. It provides: '[...] the profits that are attributable in each Contracting State to the permanent establishment [...] are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.' Guidance on the application of Article 7 is provided in the OECD's Report on the Attribution of Profits to Permanent Establishments, of which the latest version was published in 2010 (hereinafter: the '2010 OECD Profit Attribution Report') ⁽⁵⁹⁾.
- (85) The 2010 OECD Profit Attribution Report describes the difficulties of allocating profit within a single company as compared to allocating profit between two legally separate companies. Between two legally separate companies, the determination of which company owns the assets and which company bears risk in the relationship between those two companies is determined by legally binding contracts or other ascertainable legal arrangements. This is also the case where the two separate companies are part of the same corporate group, so long as the contracts and legal arrangements reflect the underlying reality. By contrast, the fact that a permanent establishment does not constitute a legal entity separate from the company to which it belongs means that between various parts of the same company there is no single part of the company that could be said to legally 'own' the assets, assume the risks, and possess the capital or contracts with separate companies ⁽⁶⁰⁾. To address that difference, the 2010 OECD Profit Attribution Report determines a common approach to the allocation of profits to permanent establishments of non-resident companies. This is known as the 'Authorised OECD Approach'. That approach allocates to the permanent establishment those profits that the permanent establishment would have earned at arm's length if it were a 'distinct and separate' enterprise performing the same or similar functions under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the non-resident company through the permanent establishment and through the other parts of that company, as expressed in Article 7(2) of the OECD Model Tax Convention.

2.4.2. BRANCH PROFIT ALLOCATION BASED ON SIGNIFICANT PEOPLE-FUNCTION IN THE TWO-STEP AUTHORISED OECD APPROACH

- (86) The 2010 OECD Profit Attribution Report describes the Authorised OECD Approach to the application of the arm's length principle set forth in the OECD TP Guidelines in the context of allocating profit to a permanent establishment. Under the OECD TP Guidelines, the allocation of profit among associated companies is dependent

⁽⁵⁷⁾ Tax administrations and legislators are aware of this problem and tax legislation generally allows the tax administration to correct tax declarations of integrated companies that incorrectly apply transfer prices, by substituting prices which correspond to a reliable approximation of those agreed to by independent companies negotiating under comparable circumstances at arm's length.

⁽⁵⁸⁾ See *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD, 22 July 2010. An earlier version of these guidelines was approved by the OECD Council on 13 July 1995 (hereinafter: the 'OECD 1995 TP Guidelines').

⁽⁵⁹⁾ See *2010 Report on the Attribution of Profits to Permanent Establishments*, approved by the OECD Council of 22 July 2010.

⁽⁶⁰⁾ Point 14 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report.

on the functions performed, the risks incurred and the assets employed by each company ⁽⁶¹⁾. For the allocation of income between a company and its permanent establishment, the Authorised OECD Approach supplements the functional analysis of Article 9(1) of the OECD Model Convention by a first step to address the fact that, legally, the assets, risks, capital and rights and obligations arising out of transactions between different parts of the same company belong to the company as a whole, rather than to any one part of the company, and that there are no transactions between legally distinct companies belonging to the same corporate group ⁽⁶²⁾.

- (87) The Authorised OECD Approach thus consists of a two-step analysis according to which income is allocated to a permanent establishment.
- (88) The first step of that approach is to hypothesise the permanent establishment as a distinct and separate enterprise 'engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise' ⁽⁶³⁾. It is in this context that the notion of 'significant people functions' is introduced. Under the first step, the Authorised OECD Approach allocates to the permanent establishment the economic ownership of assets for which the significant functions relevant to the economic ownership of assets are performed by people in the permanent establishment and also allocates to the permanent establishment those risks for which the significant functions relevant to the assumption and/or management (subsequent to the transfer) of risks are performed by people in the permanent establishment ⁽⁶⁴⁾.
- (89) Under the second step of the Authorised OECD Approach, the OECD TP Guidelines are applied by analogy to the permanent establishment's dealings with other parts of the company to ensure that the performance of all of its functions in relation to those dealings is rewarded on an arm's length basis ⁽⁶⁵⁾.

2.4.3. CONSIDERATIONS REGARDING THE APPLICATION OF THE AUTHORISED OECD APPROACH TO INTANGIBLES

- (90) Section D-2(iii)(c) of the 2010 OECD Profit Attribution Report concerns the allocation of intangibles to permanent establishments. As regards internally developed trade intangibles, point 86 of the Report sets out that, depending on the business organisation model of the enterprises, 'the active decision-making and management may often be devolved throughout the enterprise. An issue arises as to whether this is likely to be the same with regard to the development of intangible property or whether it is more likely that the significant people functions relevant to the determination of economic ownership of intangible assets are performed at a high strategic level by senior management or by a combination of centralised and devolved decision-making functions'. Point 87 explains that 'there is no hard evidence that the decision-making process for the development of intangible property is generally so centralised, especially as the focus for determining the significant people functions relevant to the determination of economic ownership is on the active-decision making and management rather than on simply saying yes or no to a proposal. This suggests that, just as for financial assets, economic ownership may often be determined by functions performed below the strategic level of senior management. This is the level at which the active management of a programme toward the development of an intangible would occur, where the ability to actively manage the risks inherent in such a programme lies.'

⁽⁶¹⁾ Paragraph 1.42 of the 2010 OECD TP Guidelines states: 'In transactions between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, a functional analysis is necessary. This 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.' See point 1.20 of the 1995 TP Guidelines 'In dealings between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, comparison of the functions taken on by the parties is necessary. This comparison is based on a functional analysis, which seeks to identify and to compare the economically significant activities and responsibilities undertaken or to be undertaken by the independent and associated enterprises.' (emphasis added)

⁽⁶²⁾ Point 15 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report.

⁽⁶³⁾ Point 13 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report.

⁽⁶⁴⁾ Point 15 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report.

⁽⁶⁵⁾ Point 17 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report.

- (91) Regarding acquired trade intangibles, point 94 of Section D-2(iii)(c)(3)A(ii) explains that ‘just as with internally developed intangibles property, the key question in determining economic ownership of acquired intangibles is where within the enterprise the significant people functions related to active decision-making relating to the taking on and management of risks are undertaken’ ⁽⁶⁶⁾.

2.4.4. THE OECD TP GUIDELINES

- (92) The OECD TP Guidelines describe five 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 transaction net margin method (hereinafter ‘TNMM’) and (v) the transactional profit split method. The Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). The Guidelines declare a preference for traditional transaction methods, such as the CUP, over transactional profit methods, such as the TNMM, as a means to establish whether transfer pricing is at arm’s length ⁽⁶⁷⁾. The Guidelines further explain that 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.
- (93) The contested tax rulings endorse a profit allocation for ASI and AOE based on one-sided profit allocation methods which, in their application, resemble the TNMM as described in the OECD TP Guidelines. The TNMM is one of the ‘indirect methods’ to approximate an arm’s length pricing of transactions and profit allocation between companies of the same corporate group. The TNMM can be contrasted with the CUP method, which is a ‘direct method’ that compares the price charged for the transfer of property or services in a controlled transaction (that is to say, a transaction between two enterprises that are associated enterprises with respect to each other) to the price charged for the transfer of property or services in a comparable uncontrolled transaction (that is to say, a transaction between enterprises that are independent enterprises with respect to each other), conducted under comparable circumstances. The TNMM approximates what would be an arm’s length profit for an entire activity, rather than for identified transactions. It does not seek to establish the price of goods sold, but estimates the profit independent companies could be expected to make on an activity, such as the activity of selling goods. It does this by taking a base (‘a profit level indicator’), such as costs, turnover or fixed investment, and applying a profit ratio reflecting that observed in comparable uncontrolled transactions to that base.
- (94) The use of the TNMM as a one-sided transfer pricing method — that is, examining the profitability of only one of the parties to the controlled transactions — is often justified by reliance on paragraph 3.18 of the 2010 OECD TP Guidelines, according to which the ‘tested party’, that is to say, the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested, should, in principle, be the company which has the less complex function ⁽⁶⁸⁾. In particular, in cases where one of the parties to a controlled

⁽⁶⁶⁾ Regarding marking intangibles, point 97 of D-2(iii)(c)(3)A(iii) of the 2010 OECD Profit Attribution Report indicated that ‘the fundamental principles as regards marketing intangibles are the same as for trade intangibles.’

⁽⁶⁷⁾ Paragraph 2.3 of the 2010 OECD TP Guidelines provides: ‘As a result, where, taking account of the criteria described at paragraph 2.2, a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method.’ Paragraph 3.49 of the 1995 OECD TP Guidelines provides: ‘Traditional transaction methods are to be preferred over transactional profit methods as a means of establishing whether a transfer price is at arm’s length, i.e. whether there is a special condition affecting the level of profits between associated enterprises. To date, practical experience has shown that in the majority of cases, it is possible to apply traditional transaction methods.’

⁽⁶⁸⁾ In detail, paragraph 3.18 of the 2010 OECD TP Guidelines provides for the following recommendation: ‘When applying a cost plus, resale price or transactional net margin method as described in Chapter II, it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis.’ Paragraph 3.43 of the 1995 OECD TP Guidelines contains a comparable description.

transaction holds intellectual property, which it licenses to its counterparty to perform functions such as manufacturing or distribution, tax advisors often invoke the complexity of establishing a return on that intellectual property for designating the counterparty as the party with the less complex function, establishing a return for the functions performed by that counterparty, and allocating all its profit remaining after deduction of that return, that is to say, all the 'residual profit', to the party holding the IP as a royalty for the use of that IP.

2.5. ADDITIONAL INFORMATION SUBMITTED BY IRELAND IN RESPONSE TO THE OPENING DECISION AND IN THE COURSE OF THE FORMAL INVESTIGATION

- (95) In its Opening Decision, the Commission requested Ireland to provide all such information as may be helpful to assess the contested tax rulings ⁽⁶⁹⁾. In particular, the Commission requested Ireland to provide the financial accounts of ASI and AOE for the period 2004 to 2013, the number of full time equivalent employees (hereinafter: 'FTE') of ASI and of AOE over the same period (each end of reporting period), the FTE of ASI's and AOE's Irish branches, and information about the cost sharing agreements to which ASI and AOE are party. The Commission also requested Ireland to single out the amount of passive income earned by ASI in the profit and loss accounts and to specify if this passive income comes from Ireland.

2.5.1. FINANCIAL INFORMATION OF ASI AND AOE

- (96) The income of both companies is classified in their accounts as deriving from the sale of products, as illustrated by the extracts in Figure 2 and Figure 3. Those accounts indicate that the turnover represents net sales to customers. Both the accounts of ASI and AOE specify (for example for the years 2006 and 2007) that the 'net sales consist primarily of revenue from the sale of products (hardware, software, and peripherals), and extended warranty and support contracts'. As for ASI, other than turnover and comparatively small amounts of interest, it does not record any other significant types of income. In particular, ASI does not appear to record any royalty income. As for AOE, in addition to turnover and comparatively small amounts of interest, it reports large amounts of dividends paid by ASI to AOE for some accounting periods.

Figure 2

Extract from ASI accounts 2007

Apple Sales International

Statement of accounting policies (*continued*) for the year ended 29 September 2007

Revenue recognition

Net sales consist primarily of revenue from the sale of products (hardware, software, and peripherals), and extended warranty and support contracts. The company recognises revenue pursuant to applicable accounting standards.

⁽⁶⁹⁾ See operational part of the Opening Decision (Section 4).

Figure 3

Extract from AOE accounts 2006**Apple Operations Europe**

Statement of accounting policies *(continued)*
for the year ended 30 September 2006

Revenue recognition

Net sales consist primarily of revenue from the sale of products (hardware, software, and peripherals), and extended warranty and support contracts. The Company recognises revenue pursuant to applicable accounting standards.

(97) Selected financial information provided by Ireland is presented in Table 1 for ASI and Table 2 for AOE.

Table 1

ASI financial information (in USD million)

Year	ASI turnover	Profit before tax	Of which interest and investment income net of interest charges	Tax declared in statutory accounts
2003	1 682	165	14	2,1
2004	2 223	268	12	2,1
2005	4 068	725	27	3,9
2006	5 626	1 180	54	6,5
2007	6 951	1 844	122	8,9
2008	10 378	3 127	145	14,9
2009	15 404	5 662	92	3,7
2010	28 680	12 140	127	7
2011	47 281	22 134	64	9,9
2012	[63 000 – 63 500]	[35 000 – 35 500]	[300 – 400]	[1-10]
2013	[62 500 – 63 000]	[26 500 – 27 000]	[1 000 – 1 500]	[1-10]
2014	[67 500 – 68 000]	[24 500 – 25 000]	[900 – 1 000]	[1-10]

Table 2

AOE financial information (in USD million)

Year	AOE turnover	Profit before tax	Of which interest and investment income net of interest charges	Tax declared in statutory accounts
2003	350	11	27,7	7,5
2004	417	25	14,1	2,5

Year	AOE turnover	Profit before tax	Of which interest and investment income net of interest charges	Tax declared in statutory accounts
2005	446	69	20,2	2,9
2006	359	1 277 (*)	61,2	2,7
2007	465	109	63,6	2,0
2008	412 ⁽¹⁾	53	61,9	2,1
2009	358	105	45,7	1,8
2010	372	6 620 (*)	6,2	2,2
2011	519	6 299 (*)	(2,4)	3,0
2012	[400 – 500]	[14 500 – 15 000] (*)	[1-10]	[1-10]
2013	[400 – 500]	[5 000 – 5 500] (*)	[(1-10)]	[1-10]
2014	[500 – 600]	[2 000 – 2 500] (*)	[10-20]	[1-10]

(*) Disclosure: includes in 2006 dividend of USD 1 250 million paid by ASI to AOE and from AOE to AOI, in 2010, 2011, 2012, 2013 and 2014, income from group undertakings amounted to USD 6 575 million, USD 6 253 million, USD [14 500 – 15 000] million, USD [5 000 – 5 500] million and USD [1 500 – 2 000] million respectively.

⁽¹⁾ The turnover figures over 2008 were restated from turnover USD 116 696 and COGS (USD 19 587) to turnover USD 411 802 and COGS (USD 314 693).

(98) The financial information presented in Tables 1 and 2 is based on the company statutory accounts of ASI and AOE, as filed in Ireland. ASI and AOE file full company accounts in Ireland because they are incorporated in Ireland. The Commission requested Ireland ⁽⁷⁰⁾ to clarify whether separate accounts exist for ASI's and AOE's head offices and their respective Irish branches and, if so, to provide such separate accounts. Ireland indicated that the financial accounts for ASI and AOE satisfy the statutory accounting requirements under Irish law and that Irish law does not require ASI and AOE to prepare separate accounts for their Irish branches.

(99) The tax declared by ASI in the statutory accounts is constituted mostly of the tax due to Ireland on the profit of its Irish branches, determined in accordance with the profit allocation methods endorsed by the contested tax rulings ⁽⁷¹⁾, since ASI did not consider itself to have a taxable presence in any other tax jurisdiction. However, following assessments by the tax administrations of [...] and Italy, ASI was considered to be liable for tax in those two jurisdictions. For the years 2013 and 2014, ASI became liable to withholding tax in [...] because the [...] tax administration characterised a fee paid by a [...] Apple company to ASI as a royalty and subjected that payment to a withholding tax ⁽⁷²⁾. For the years 2009 to 2012, ASI became liable for corporation tax in Italy following an assessment by the Italian tax administration which determined that ASI had a taxable presence in Italy during that period ⁽⁷³⁾. As regards the tax declared by AOE in its statutory accounts, that company had a branch in Singapore and was liable to corporation tax in Singapore for the years 2009, 2010 and 2011 ⁽⁷⁴⁾.

⁽⁷⁰⁾ See Commission's letter of 11 November 2015, recital 27.

⁽⁷¹⁾ The tax for which ASI was liable to the Irish tax authorities was set in euros and amounted to around EUR 4,8 million in 2009, EUR 4,8 million in 2010, EUR 7,3 million in 2011, EUR [1-10] million in 2012, EUR [0,7-0,8] million in 2013 and EUR [0,9-1] million in 2014, see letter by Apple dated 22 April 2016, p. 8-9.

⁽⁷²⁾ Amounting to around [...] and [...] for 2013 and 2014 respectively, see letter by Apple dated 22 April 2016, p. 10.

⁽⁷³⁾ The resulting Italian corporate income tax liability of ASI amounted to around EUR [20-30] million in 2009, EUR [40-50] million in 2010, EUR [50-60] million in 2011 and EUR [30-40] million in 2012, see letter by Apple dated 22 April 2016, p. 10. However these amounts have not been recorded in the accounts of ASI presented in Table 1, as the accounts have been issued prior to the assessment by the Italian tax authorities. Ireland did not inform the Commission of a restatement of the accounts of ASI to date.

⁽⁷⁴⁾ The corporate income tax liability of AOE in Singapore amounted to SGD 42 136, SGD 1 810 and SGD 535 for the years 2009, 2010 and 2011, respectively, see letter of Apple of 22 April 2016, p. 10.

- (100) Ireland also provided the component in the interest income reported in the statutory accounts of ASI and AOE, which relates to property of the respective Irish branches of the two companies ⁽⁷⁵⁾. Ireland provided a breakdown of ASI's interest income into 'interest paid in ASI's financial account' and 'interest from property'. For example, in 2012 the interest paid in ASI's financial accounts was USD [500-600] million and interest income from branch property was USD [1-10] million. In its letter of 15 April 2015, Ireland indicated that the interest attributable to ASI's Irish branch and AOE's Irish branch is earned on separately identifiable bank accounts or funds. The day-to-day operations of those bank accounts are controlled by finance and treasury staff based in Cork, Ireland ⁽⁷⁶⁾.
- (101) In the contested tax rulings, the taxable profit of ASI's Irish branch is determined by reference to operating expenses. Separate accounting of operating expenses for the branch is, however, unavailable, since no separate accounts have ever been provided by Apple to Ireland. A detail of operating expenses for ASI as a whole for years 2011 and 2012, as reported in ASI's statutory accounts, is presented in Figure 4 for illustration purposes.

Figure 4

ASI operating expenses in Annual report of 2012

Operating expenses	2012 USD'000	2011 USD'000
Marketing, sales and distribution costs	[400 000-500 000]	604 888
Administration expenses	[100 000-200 000]	139 870
Research and development	[1 500 000-2 000 000]	1 538 036

- (102) In the contested tax rulings, the taxable profit of AOE's Irish branch is determined by reference to operating expenses and turnover. The profit and loss account of AOE as a whole for the years 2011 and 2012 is presented in Figure 5 for illustration purposes.

Figure 5

Profit and loss account of AOE in Annual report of 2012**Profit and loss account***for the year ended 29 September 2012*

		2012 USD'000	2011 USD'000
	Note		
Turnover — continuing operations	1	[400 000-500 000]	518 505
Cost of sales		[(300 000-400 000)]	(426 594)
Gross profit		[90 000-100 000]	91 911
Operating expenses	2	[(10 000-20 000)]	(42 654)
Operating profit — continuing operations		[70 000-80 000]	49 257

⁽⁷⁵⁾ This component amounts to USD [20-30] thousand for AOE over the period 2003-2013, see letter by Ireland dated 15 April 2015, p. 4. As regards ASI this component of interest income from the property of the Irish branch amounts to USD [70-80] million over the period 2003-2013, see letter by Ireland dated 15 April 2015, p. 2 and comments by Ireland to the Opening Decision of 5 September 2014, Folder 3. The respective amounts for 2014 have not been established yet according to Ireland at the date of the Irish letter of 15 April 2015.

⁽⁷⁶⁾ Letter from Ireland of 15 April 2015, p. 3.

		2012	2011
	Note	USD'000	USD'000
Income from group undertakings		[14 500 000-15 000 000]	6 252 591
Other interest receivable and similar income	3	[1 000-10 000]	122
Interest payable and similar charges	4	[(30-40)]	(2 505)
Amounts written off financial assets	11	[(50-60)]	—
Profit on ordinary activities before taxation	5-8	[14 500 000-15 000 000]	6 299 465
Tax on profit on ordinary activities	9	[(1 000-10 000)]	(2 966)
Profit for the financial year		[14 500 000-15 000 000]	6 296 499

- (103) As regards the companies' corporation tax liability in Ireland, the financial accounts of ASI and AOE refer to a 'lower than the standard rate of tax in Ireland' for the periods until 2007. The extract of ASI's audited accounts as reproduced in its annual report for 2007 is reproduced in Figure 6.

Figure 6

Extract annual report of ASI for the period 2007

Tax on profit on ordinary activities

The current tax charge is lower than the standard rate of tax in Ireland. The differences are explained as follows:

	2007	2006
	USD'000	USD'000
Profit on ordinary activities before tax	1 843 933	1 179 637
Current tax at 12,5 % (2006: 12,5 %)	230 492	147 455
<i>Effects of:</i>		
Interest income charged at higher rate (25 %)	2 485	1 610
Adjustment to tax charge in respect of previous periods	—	(131)
Income taxed at lower rates	(224 049)	(142 450)
Total current tax charge	8 928	6 484

- (104) In the periods following 2007, the tax charge of the companies is presented in the financial accounts as calculated by applying a [1-5] % tax rate. That tax rate is described in those accounts as '[t]he average tax rate for all jurisdictions in which [AOE] operates'. The extract of ASI's audited accounts as reproduced in its annual report for 2012 is reproduced in Figure 7.

Figure 7

Extract annual report of ASI for the period 2012**Tax on profit on ordinary activities**

The company is not tax resident in any jurisdiction. It has activities in various countries. The average tax rate for all jurisdictions in which it operates is approximately [1-5] %.

	2012	2011
	USD'000	USD'000
Profit on ordinary activities before tax	[35 000 000-35 500 000]	[22 000 000-22 500 000]
Tax at [1-5] %	[1 000 000-1 500 000]	[800 000-900 000]
<i>Effects of:</i>		
Interest income charged at higher rate (25 %)	[600-700]	620
Income taxed at (lower)/higher rates	[(1 000 000-1 500 000)]	(876 117)
Total current tax charge	[1 000-10 000]	9 862

- (105) Taxes effectively due by ASI in Ireland, according to its tax returns for the period 25 September 2011 to 24 September 2012, amounted to EUR [1-10] million for trading income (the corresponding trading income amounted to EUR [30-40] million), to which tax on interest income of EUR [0,6-0,7] million was added, resulting in a tax liability of EUR [1-10] million ⁽⁷⁷⁾. For the same period, the tax effectively due by AOE in Ireland was EUR [1-10] million for trading income (corresponding to a trading income of EUR [10-20] million), to which a trading relief at source was added, resulting in a tax liability of EUR [1-10] million.
- (106) Ireland indicated that funds identified as being above the working capital needs of ASI and AOE are transferred to ASI and AOE bank accounts and investment funds outside of Ireland which are operated, managed and controlled in the US.
- (107) As regards the bank accounts of ASI used to collect the sales proceeds from customers in the EMEA region, Ireland indicated that the cash flow differs depending on whether the customer is a channel partner, an Apple Online Store user, or if a sale is made in an Apple retail store. If the customer is a channel partner ⁽⁷⁸⁾, Apple receives cash either by wire transfer or through a direct debit into an ASI bank account in the customer's local jurisdiction or in a common ASI bank account in the US or Europe that receives funds from sales in multiple countries. However, according to the overview submitted by Ireland regarding the location of ASI's bank accounts, as of March 2009, no bank account collecting EMEA sales proceeds was located in the US and as of March 2012, only sales proceeds from Iceland, Russia and Turkey and parts of the Middle East and Africa are collected in bank accounts located in the US. All the other sales proceeds are collected in bank accounts located in Europe. Ireland also indicated that Apple's EMEA Treasury group, which consists of three Ireland-based people, groups the cash held in the local accounts in the EMEA region into 'concentration accounts' held in ASI's name on a regular basis. According to Ireland, those accounts are located in the United Kingdom, the US and Switzerland.
- (108) As regards investment funds, according to information provided by Apple, the company providing cash management and investment services to ASI and AOE, on the basis of investment management services agreements concluded with ASI and AOE, is Braeburn Capital Inc. (hereinafter 'Braeburn'), a company located in

⁽⁷⁷⁾ Small differences can be observed between the tax reported in the accounts, presented in Table 1 and Table 2 and in the tax returns, this can be due to currency fluctuations or time period variations in reporting.

⁽⁷⁸⁾ Apple defines channel partners as third-party distributors and retailers who purchase Apple's products for onward resale.

the US. The services include investment and cash management [...]. During the meeting of the boards of ASI and AOE on 24 July 2006, it was decided to retain Braeburn to assist ASI and AOE in managing their cash reserves ⁽⁷⁹⁾. According to Ireland, all income arising from those investments has a non-Irish source and, accordingly, the interest on those investments is not subject to tax in Ireland.

2.5.2. INFORMATION ON EMPLOYEES OF ASI AND AOE

- (109) In its response to the Opening Decision, Ireland indicated that up until 31 December 2011 all employees of Apple in Ireland were formally employed by AOE, with AOE's Irish branch operating a single payroll in Ireland. According to Ireland, such arrangements are not uncommon in Ireland for groups. There was a recharge mechanism in place whereby the costs of AOE employees working on activities of ASI's Irish branch were allocated to that branch on a monthly basis. From 1 January 2012, employment arrangements were reorganised, so that employees were directly employed by the entity whose Irish branch activities they worked on.
- (110) Ireland submitted the FTE ⁽⁸⁰⁾ figures provided by Apple to the Commission. For the period prior to 1 January 2012, the FTEs of AOE's Irish branch were split between ASI's and AOE's Irish branches in accordance with where costs were incurred.

Table 3

FTE for Irish branches of ASI and AOE

Period	ASI Irish branch	AOE Irish branch
25 September 2004	709	783
24 September 2005	839	739
30 September 2006	912	836
29 September 2007	937	544
27 September 2008	1 046	604
26 September 2009	994	707
25 September 2010	1 387	1 091
24 September 2011	1 660	872
29 September 2012	[200-300]	[400-500]
28 September 2013	[300-400]	[700-800]

- (111) In addition to the Irish branch employees, Ireland was informed by Apple that AOE also had FTEs in Singapore, where it had a branch operation originally performing manufacturing activities and later group services associated to distribution activities ⁽⁸¹⁾. Those branch activities ceased in 2009 and the assets of that branch were sold to an Apple affiliate in Singapore. Since then, the Singapore branch has been a dormant branch of AOE. The average number of employees employed in AOE's Singapore branch was 185 in 2004, 189 in 2005, 257 in 2006, 300 in 2007 and 352 in 2008.

⁽⁷⁹⁾ See overview of the minutes of Board meetings held during Directorship of Tim Cook, as provided by Apple to the US Senate permanent subcommittee on investigations in the course of the hearing on Apple, APL-PSI-000342/000343.

⁽⁸⁰⁾ Full Time Equivalent (FTE) is the hours worked by one employee on a full-time basis, it indicates the number of employees, counting part-time employees, proportionately to their hours worked.

⁽⁸¹⁾ According to the information submitted by Apple to the US Senate Permanent Subcommittee, the principal activity of the Singapore branch and its predecessors until 2003 was the manufacture of microcomputers, computer components and peripherals. The Singapore Branch was a party to the CSA to obtain and retain the rights to manufacture and distribute Apple products. After 2003 and until 2009, the Singapore Branch acted as a service provider to Apple affiliates in the APAC region. These services included finance support, information systems and technology support, and supply chain and logistics management, see APL-PSI-000234.

- (112) Ireland submitted that Apple informed it that there were no FTEs employed by ASI or AOE beyond those employed in their respective Irish branches and in AOE's Singapore branch. According to Apple, ASI and AOE were functionally managed and controlled from the US and all significant business decisions (including in relation to matters such as IP, product development, what products and component would be manufactured and sales and marketing strategy) were made in the US and not in the Irish branches of ASI and AOE.

2.5.3. ACTIVITY OF THE ASI's AND AOE's BOARD OF DIRECTORS

- (113) Both Ireland ⁽⁸²⁾ and Apple ⁽⁸³⁾ claim that critical business activities conducted by or for ASI and AOE are conducted outside of Ireland, for example through Apple Inc. employees or the board of directors of ASI and AOE, which, according to Apple, decided, amongst others, to enter into the various amendments of the CSA ⁽⁸⁴⁾ with Apple Inc. Apple further indicated that 'the management and control of ASI and AOE from the US is manifested not only in board meetings, but in the myriad ways' ⁽⁸⁵⁾, without further specification.
- (114) ASI's board of directors consists of three directors and one secretary. Out of those four people, three board members are located in the US and are employed by Apple Inc. The other board member is located in Ireland and employed by ADI. AOE's board of directors consists of two directors and one secretary, of which the secretary and one of the directors are also on the board of ASI. Out of those three people, two board members are located in the US and are employed by Apple Inc. The other board member is located in Ireland and employed by ADI. According to the financial reports of ASI, no remuneration was paid by ASI ⁽⁸⁶⁾ to any of its directors at any time during the period from 2004 to 2014, for which financial accounts have been provided. By contrast, the directors of AOE were remunerated over that period. For example, the company paid USD [...] in 2012 and USD [...] in 2011 for the remuneration of its directors.
- (115) The Commission requested all the minutes of the meetings of ASI's and AOE's board of directors, which Apple provided. The first meeting of ASI's board of directors was held on 5 April 1990 in Dublin, Ireland. The first meeting of AOE's board of directors was held on 15 September 1980 in Dublin, Ireland. For illustration purposes, Table 4 summarises the activity of ASI's board of directors between January 2009 and September 2011 (16 board meetings, 3 annual general meetings and 9 written resolutions) and Table 5 summarises that of AOE's board of directors between December 2008 and September 2011 (13 board meetings, 4 annual general meetings and 12 written resolutions).

Table 4

Resolution by ASI's directors and board meeting minutes

Date	Type of document	Summary ASI minutes
30.1.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Jae Allen, Tim Cook)	Resolving to authorize certain listed individuals to open, maintain, close or otherwise manage ASI's banking, investment, brokerage and other accounts.
11.2.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Jae Allen, Tim Cook)	Resolving to authorize certain listed individuals to open, maintain, close or otherwise manage ASI's banking, investment, brokerage and other accounts.

⁽⁸²⁾ Letter from Ireland of 4 May 2015.

⁽⁸³⁾ Letter from Apple of 4 May 2015.

⁽⁸⁴⁾ Letter from Apple of 4 May 2015.

⁽⁸⁵⁾ Letter from Apple of 4 May 2015.

⁽⁸⁶⁾ Note 6, 7 or 8 to the Annual Accounts of ASI for FY 2004-2013.

Date	Type of document	Summary ASI minutes
18.3.2009	Written resolution of the Directors (Jae Allen and Cathy Kearney)	Granting a power of attorney.
20.7.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Jae Allen and Tim Cook)	Resolving to approve the draft Directors Report and financial statement for FY 2008 and the auditor's remuneration, resolving to hold the Annual General Meeting on 3 August 2009 and resolving to appoint [Apple's tax advisor] as the auditor in place of [...].
3.8.2009	Minutes of Annual General Meeting (Peter Oppenheimer as chair and as corporate representative of both AOI as AOE and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2008, resolving to appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditors and resolving that the next Annual General Meeting might be held outside of Ireland.
23.10.2009	Board Minutes (Peter Oppenheimer as chair and Jae Allen)	Resolving to pay an interim dividend to AOE of USD 3 482 850 781,21 on 27 October 2009 and resolving to pay a further interim dividend to AOE in the amount of the interest accrued on the principal amounts as of 27 October 2009.
10.12.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney and Jae Allen)	Granting a power of attorney to [...], a company registered in Ukraine with 100 % foreign investment to act on behalf of ASI as Apple Value Added Distributor.
10.12.2009	Written resolution of the Directors (Peter Oppenheimer and Cathy Kearney, Jae Allen)	Written resolution and request of the Directors, requesting Tim Cook to resign as a director of ASI and resolving that Tim Cook shall ipso facto vacate his office as a director of ASI.
31.1.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Jae Allen)	Resolving to appoint Elisabeth S. Rafael as a director of ASI.
3.3.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Jae Allen, Elisabeth Rafael)	Resolving to re-appoint Tim Cook as a director of ASI.
31.3.2010	Written resolution of the Directors (Peter Oppenheimer, Tim Cook, Jae Allen, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 800 000 000 on 8 April 2010.
12.5.2010	Board Minutes (Jae Allen as chair, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 1 000 000 000 on 20 May 2010.

Date	Type of document	Summary ASI minutes
16.6.2010	Board Minutes (Peter Oppenheimer as chair, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 600 000 000 on 17 June 2010.
22.6.2010	Board Minutes (Peter Oppenheimer as chair, Elisabeth Rafael)	Approving the grant of powers of attorney to Gary Wipfler, Cathy Kearney and Michael O'Sullivan to act on behalf of ASI. The power of attorney covers the following aspects: (i) correspondence of the company, (ii) relationships with the government and other public offices, (iii) audits, (iv) insurance, (v) purchase, hire-purchase and financing agreement, relating to assets and services, (vi) renting, supplying, deposit agreements and agreements for the use of assets, (vii) transfer of personal property, (viii) taking delivery of goods and issuance of relevant receipts, (ix) work council and (x) commercial contracts.
23.7.2010	Minutes of Annual General Meeting (Peter Oppenheimer as chairman and as corporate representative of both AOI as AOE) and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2009, resolving to re-appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditors, noting that interim dividends totalling USD 5 884 972 906,56 had been declared and paid since the end of FY 2009 to AOE and resolving that the next Annual General Meeting might be held outside of Ireland.
23.7.2010	Board Minutes (Peter Oppenheimer, Elisabeth Rafael as chairwoman)	Resolving to hold the Annual General Meeting on 23 July 2010.
20.9.2010	Board Minutes (Peter Oppenheimer as chairman, Jae Allen)	Resolving to pay an interim dividend to AOE of USD 690 000 000 on 21 September 2010.
17.11.2010	Board Minutes (Peter Oppenheimer as chairman, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 1 750 000 000 on November 18, 2010.
21.12.2010	Board Minutes (Peter Oppenheimer, Elisabeth Rafael as chairwoman)	Approving to grant a temporary power of attorney to Gerard Lane to carry on the day to day operations of ASI due to scheduled annual leaves of the directors of ASI.
4.3.2011	Board Minutes (Peter Oppenheimer as chairman, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 1 000 000 000 on 7 March 2011, noting the resignation of Jae Allen as a director and the appointment of Mark Stevens as a director effective 15 March 2011 and approving the new banking resolution.

Date	Type of document	Summary ASI minutes
21.3.2011	Board Minutes (Peter Oppenheimer as chairman, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 1 000 000 000 on 24 March 2011.
21.4.2011	Board Minutes (Mark Stevens, Elisabeth Rafael as chairwoman)	Resolving to authorize certain listed individuals to open, maintain, close or otherwise manage ASI's banking, investment, brokerage and other accounts.
11.5.2011	Board Minutes (Peter Oppenheimer as chairman, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE of USD 1 000 000 000 on 12 May 2011.
29.6.2011	Minutes of Annual General Meeting (Audrey Fernandez-Elliott as chairman and as corporate representative of both AOI as AOE) and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2010, resolving to re-appoint Elisabeth Rafael, Tim Cook and Mark Stevens as directors of ASI, resolving to re-appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditors, noting and approving that interim dividends totalling USD 11 324 972 906,56 had been declared and paid to AOI since the end of financial year 2009 and resolving that the next Annual General Meeting might be held outside of Ireland.
29.6.2011	Board Minutes (Mark Stevens, Elisabeth Rafael as chairwoman)	Approving the draft Directors Report and financial statement for FY 2010 and the auditor's remuneration, noting that interim dividends totalling USD 11 324 972 906,56 had been declared and paid to AOE since the end of financial year 2009, resolving to hold the annual general meeting on 29 June 2011, noting the resignation of Peter Oppenheimer as director and secretary of ASI and appointing Gene Levoff as director and secretary of ASI in his place.
27.7.2011	Board Minutes (Gene Levoff as chair, Elisabeth Rafael)	Granting a power of attorney.
7.9.2011	Board Minutes (Gene Levoff as chair, Elisabeth Rafael)	Noting that it would be more practical and in the best commercial interest to propose to ASI's members to pay the dividends in the form of fixed income investments. Resolving to recommend to the members an interim dividend to be paid to AOE in the form of fixed income investment with a total projected value of USD 1 502 298 132 on 8 September 2011.
7.9.2011	Board Minutes (Gene Levoff as chair, Elisabeth Rafael)	Resolving to pay an interim dividend to AOE in the form of fixed income investment with a total projected value of USD 1 502 298 132 on 8 September 2011.

Table 5

Resolution by AOE's directors and board meeting minutes

Date	Type of document	Summary AOE minutes
17.12.2008	Board Minutes (Peter Oppenheimer, Gary Wipfler as chair)	Resolving to execute an employment grant agreement.
14.1.2009	Board Minutes (Peter Oppenheimer, Gary Wipfler as chair)	Resolving to authorize certain listed individuals to open, maintain, close or otherwise manage AOE's banking, investment, brokerage and other accounts.
25.2.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler, Tim Cook)	Resolving to execute the Trust Deed and Rules for AOE's pension plan.
20.7.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler, Tim Cook)	Resolving to approve the draft Directors Report and financial statement for FY 2008 and the auditor's remuneration, resolving to appoint Peter Oppenheimer and Cathy Kearney to act as AOE's corporate representatives for the purpose of attending the 2009 Annual General Meeting of ASI, resolving to hold the annual general meeting on 3 August 2009 and resolving to appoint [Apple's tax advisor] as the auditor in place of [...].
22.7.2009	Board minutes (Peter Oppenheimer as chair, Gary Wipfler)	Resolving to execute a Business Transfer Agreement to transfer the business of the AOE Singapore branch to Apple South Asia Pte.Ltd
3.8.2009	Minutes of Annual General Meeting (Peter Oppenheimer as chair and as corporate representative of AOI and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2008, resolving to appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditors and resolving that the next Annual General Meeting might be held outside of Ireland.
23.10.2009	Board minutes (Peter Oppenheimer as chair, Gary Wipfler)	Noting the upcoming receipt of a dividend of USD 3 482 850 781,21 from ASI on 27 October 2009, resolving to pay a dividend of USD 4 607 274 666,29 to AOI, resolving to pay a further interim dividend to AOI in the amount of the interest accrued as of 27 October 2009.
21.12.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving to execute the Supplementary Business Transfer Agreement to transfer the business of the AOE Singapore branch to Apple South Asia Pte.Ltd and grant a power of attorney.

Date	Type of document	Summary AOE minutes
21.12.2009	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Written resolution and request of the Directors, requesting Tim Cook to resign as a director of AOE and resolving that Tim Cook shall ipso facto vacate his office as a director of AOE.
31.3.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving to receive an interim dividend from ASI of USD 800 000 000 on 8 April 2010 and pay the same amount to AOI.
23.4.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving the application for replacement of certificates of title of certain registered property in Singapore.
14.5.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving to receive an interim dividend from ASI of USD 1 000 000 000 on 20 May 2010 and pay the same amount to AOI.
14.6.2010	Minutes of Annual General Meeting (Peter Oppenheimer as chair and as corporate representative of AOI and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2009, resolving to re-appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditor noting that interim dividends totalling USD 5 284 972 906,56 had been paid since the end of FY 2009 to AOI and resolving that the next Annual General Meeting might be held outside of Ireland.
16.6.2010	Board minutes (Peter Oppenheimer as chair, Gary Wipfler)	Noting the upcoming receipt of a dividend of USD 600 000 000 from ASI on 17 June 2010 and resolving to pay the same amount to AOI.
23.7.2010	Minutes of Annual General Meeting (Peter Oppenheimer as chairman and as corporate representative of AOI and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2009, resolving to re-appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditor, noting that interim dividends totalling USD 5 884 972 906,56 had been declared and paid since the end of FY 2009 to AOI and resolving that the next Annual General Meeting might be held outside of Ireland.
23.7.2010	Board minutes (Peter Oppenheimer, Gary Wipfler as chair)	Resolving to hold the annual general meeting on 23 July 2010.
20.9.2010	Board minutes (Peter Oppenheimer, Gary Wipfler as chair)	Noting the upcoming receipt of a dividend of USD 690 000 000 from ASI on 21 September 2010 and resolving to pay a dividend of USD 900 000 000 to AOI.

Date	Type of document	Summary AOE minutes
15.11.2010	Board minutes (Peter Oppenheimer, Gary Wipfler as chair)	Resolving to approve the execution of a property lease for additional warehouse space to facilitate an expansion in production.
17.11.2010	Board minutes (Peter Oppenheimer, Gary Wipfler as chair)	Noting the upcoming receipt of a dividend of USD 1 750 000 000 from ASI on 18 November and resolving to pay the same amount to AOI.
3.12.2010	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Approving the grant of powers of attorney to Cathy Kearney and Michael O'Sullivan to act on behalf of AOE. The powers of attorney cover the following aspects: (i) correspondence of the company, (ii) relationships with the government and other public offices, (iii) audits, (iv) insurance, (v) purchase, hire-purchase and financing agreement, relating to assets and services, (vi) renting, supplying, deposit agreements and agreements for the use of assets, (vii) transfer of personal property, (viii) taking delivery of goods and issuance of relevant receipts, (ix) work council and (x) commercial contracts.
4.3.2011	Board minutes (Peter Oppenheimer as chair, Gary Wipfler)	Noting the upcoming receipt of a dividend of USD 1 000 000 000 on 7 March 2011 and resolving to pay the same amount to AOI.
21.3.2011	Board minutes (Peter Oppenheimer as chair, Gary Wipfler)	Noting the upcoming receipt of a dividend of USD 1 000 000 000 on 24 March 2011 and resolving to pay the same amount to AOI.
26.4.2011	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving to authorize certain listed individuals to open, maintain, close or otherwise manage AOE's banking, investment, brokerage and other accounts.
11.5.2011	Board minutes (Peter Oppenheimer, Gary Wipfler as chair)	Noting the upcoming receipt of a dividend of USD 1 000 000 000 on 12 May 2011 and resolving to pay the same amount to AOI.
23.6.2011	Written resolution of the Directors (Peter Oppenheimer, Cathy Kearney, Gary Wipfler)	Resolving to approve the draft Directors Report and financial statement for FY 2010 and the auditors remuneration, resolving to appoint Audrey Fernandez-Elliott and Cathy Kearney to act as AOE's corporate representatives for the purpose of attending the 2011 Annual General Meeting of ASI, noting that interim dividends totalling USD 12 659 796 428,08 had been declared and paid to AOI since the end of FY 2009, resolving to hold the annual general meeting on 27 June 2011, noting the resignation of Peter Oppenheimer as director and secretary of AOE effective as of 1 July 2011 and appointing Gene Levoff as director and secretary of ASI in his place.

Date	Type of document	Summary AOE minutes
27.6.2011	Minutes of Annual General Meeting (Audrey Fernandez-Elliott as chair and as corporate representative of AOI and Gene Levoff as corporate representative of Baldwin Holdings Unlimited)	Resolving to adopt the Directors Report and financial statement for FY 2010, resolving to re-appoint [Apple's tax advisor] as the auditor, resolving to authorise the Directors to fix the remuneration of the auditor, noting and approving that interim dividends totalling USD 12 659 796 428,08 had been declared and paid to AOI since the end of FY 2009 and resolving that the next Annual General Meeting might be held outside of Ireland.
7.9.2011	Board minutes (Gene Levoff as chair and Gary Wipfler)	Noting that it would be more practical and in the best commercial interest to propose to AOE's members to pay the dividends in the form of fixed income investments. Resolving to recommend to the members an interim dividend to be paid to AOI in the form of fixed income investment with a total projected value of USD 1 502 298 132 on 8 September 2011. Resolving to pay a further interim dividend to AOI in the amount of the interest accrued.
7.9.2011	Written resolution of the members (AOI and Baldwin Holding Unlimited)	Resolving to pay an interim dividend to AOI in the form of fixed income investment with a total projected value of USD 1 502 382 564 on 8 September 2011.
7.9.2011	Appointment of corporate representative for written solution	Appointment by AOI, as a member of AOE, of Gene Levoff as AOI's representative to execute a written solutions on behalf of AOI to declare the recommended interim dividend and to direct payment thereof in specie. Baldwin Holding Unlimited as the other member of AOE appointed Gary Wipfler for this.

2.5.4. COST SHARING AGREEMENT BETWEEN APPLE INC., ASI AND AOE

(116) On 8 December 2015, Ireland provided copies of the cost sharing agreement (hereinafter: the 'CSA') and all agreements to (sub-)transfer intangible property concluded between Apple Inc., AOI, ASI and AOE (and their predecessors) since the establishment of Apple in Ireland ⁽⁸⁷⁾.

(117) According to the information provided, Apple Inc. entered into the CSA with AOE (at the time called Apple Computer Limited) in December 1980. Since then, the CSA has been amended 16 times, most recently in 2013. In 1999, ASI (at the time called Apple Computer International) also became a party to the CSA. At the same time as the CSA was entered into in December 1980, Apple Inc. concluded an 'Agreement to Transfer Intangible Property' with AOI. AOI, in turn, concluded an 'Agreement to sub-Transfer Intangible Property' with AOE, under which AOE was granted an exclusive, royalty-free licence to use the trade names, trademarks, trade secrets and patents in, initially, Western Europe and, later, the EMEA region, and to sublicense those rights and licences ⁽⁸⁸⁾. For that initial transfer of Apple's then-existing intangible property, AOE's predecessor made no buy-in payment.

⁽⁸⁷⁾ On 5 September 2014, Ireland provided the CSA between Apple Inc, ASI and AOE effective as of 30 September 2007.

⁽⁸⁸⁾ Section B.5 of the Agreement to Sub-Transfer Intangible Property of 1 December 1980.

- (118) Under the CSA, Apple Inc., on the one hand, and ASI and AOE, on the other, agreed to combine their R & D efforts and to share the costs and rights relating to the 'Development Programme'. The Development Programme refers to: (i) the development of new intangible property, (ii) the creation of improvements, updates, adaptations, translations, localizations or other modifications to existing intangible property, (iii) the development and improvement of manufacturing processes for any product, and (iv) the development, acquisition and protection of marketing intangibles.
- (119) Intangible property is defined in the CSA as 'all technologies, procedures, processes, designs and design rights, inventions, discoveries, know-how, patents (including patent applications, etc.), copyrights (and other rights of authorship), trade secrets, computer programmes (in source code and object code form), flow charts, formulae, enhancements, updates, translations, adaptations, information, specifications, process technology, manufacturing requirements, quality control standards, marketing intangibles, and any other similar intangible property as defined under Treas. Reg. §1.482-4(b) developed pursuant to the Development Programme.'⁽⁸⁹⁾ Marketing intangibles are defined as 'any and all trademarks, service marks, trade names, trade secrets, trade dress, domain names, business marks, designs, marketing strategies, registrations, pending registrations and copyrights to logos or pictorial depictions, any goodwill and intangible value associated with any marks, and other similar marketing intangible property that is in the commercial exploitation of the products.'⁽⁹⁰⁾
- (120) Under the CSA, the right to use Apple's intangible property to manufacture and sell Apple products is shared among the parties to the agreement. Apple Inc. holds the right to manufacture and sell Apple products in all countries in North and South America (hereinafter collectively designated as: the 'Americas'). ASI and AOE hold the right to manufacture and sell Apple products in markets outside of the Americas. The legal title to all intangible property is held solely in the name of Apple Inc. ASI and AOE have the beneficial ownership in their territory of the intangible property developed as a result of the R & D conducted under the CSA⁽⁹¹⁾. The way in which the beneficial ownership of the intangible property is granted to ASI and AOE has changed throughout the different amendments to the CSA. Until 1988, Apple Inc. granted AOE an exclusive licence under the CSA to use the Apple IP in its territory. In the CSAs concluded and amended since 1988, the rights to the improvements to that IP and newly developed IP are granted on a 'non or co-exclusive' basis⁽⁹²⁾. Since 2007, Apple grants ASI and AOE an exclusive licence to the Apple IP, whereby ASI and AOE grant the same licence back to Apple in the form of a non-exclusive right⁽⁹³⁾.
- (121) Under the CSA, the costs of the R & D for Apple's products are divided among the parties. To calculate each party's share, Apple Inc., ASI and AOE each pay a portion of the pooled costs based on the percentage of product sales that occur in their respective territories. For example, in 2012 Apple's worldwide R & D costs totalled USD [3-3,5] billion. That year, approximately 45 % of Apple's worldwide sales occurred in the Americas. Accordingly, Apple Inc. paid 45 % of the R & D costs under the CSA, while ASI and AOE paid the remaining 55 % of those costs under the CSA. The division of costs in the years 2008 to 2014 is presented in Table 6.

Table 6

Development costs of Apple covered by the CSA and financing of these costs by ASI and AOE

(in USD)

	2008	2009	2010	2011	2012	2013	2014
Total development costs of Apple covered by the CSA	983 005 465	1 211 545 821	1 795 015 606	3 932 919 909	[3 000 000 000 – 3 500 000 000]	[3 500 000 000 – 4 000 000 000]	[7 000 000 000 – 7 500 000 000]

⁽⁸⁹⁾ Section 1.7 of the CSA of 30 September 2007.

⁽⁹⁰⁾ Section 1.12 of the CSA of 30 September 2007.

⁽⁹¹⁾ See recital F of the CSA of 26 September 1999 and recital G of the CSA of 30 September 2007.

⁽⁹²⁾ Section IV (A) of the CSAs of 26 September 1992 and 1999.

⁽⁹³⁾ Section 5.2 and 5.3 of the CSA of 30 September 2007, 5 January 2009 and 29 September 2013.

(in USD)

	2008	2009	2010	2011	2012	2013	2014
Portion financed by ASI	362 836 613	476 479 653	891 205 117	2 202 029 840	[1 500 000 000 – 2 000 000 000]	[2 000 000 000 – 2 500 000 000]	[4 000 000 000 – 4 500 000 000]
Portion financed by AOE	4 126 371	3 170 692	12 813 711	24 134 510	[10 000 000 – 20 000 000]	[10 000 000 – 20 000 000]	[30 000 000 – 40 000 000]
percentage of Apple development costs financed by ASI and AOE (%)	37	40	50	57	[50-55]	[55-60]	[55-60]

- (122) The CSAs of 2009 and 2013 list the functions and risks allocated to the parties to the CSA ⁽⁹⁴⁾. Functions and risks allocated under the CSA to Apple Inc. (referred to as 'Apple' in the CSA) and to both ASI and AOE (collectively referred to as 'International Participant' in the CSA) are summarised in the CSA and presented in Figure 8 and in Figure 9 respectively.

Figure 8

Functions performed by Apple and the International Participant (ASI and AOE) under the CSA

FUNCTIONS	APPLE	INTERNATIONAL PARTICIPANT
Research and Development of the Cost Shared Intangibles	X	X
Quality Control of the Cost Shared Intangibles	X	X
Forecasting, Financial Planning and Analysis in Relation to the Intangible Development Activities	X	
R&D Facilities Management	X	X
Contracting with Related Parties or Third Parties in Relation to the Intangible Development Activities	X	X
Contract Administration in Relation to the Intangible Development Activities	X	X
Selection, hiring and supervision of employees, contractors and sub-contractors to perform any of the Intangible Development Activities	X	X
IP Registration and Defense	X	
Market Development	X	X

⁽⁹⁴⁾ Exhibit B to the CSA of 2009 and Exhibit B to the CSA of 2013.

Figure 9

Risks assumed by Apple and the International Participant (ASI and AOE) under the CSA

RISKS	APPLE	INTERNATIONAL PARTICIPANT
Product Development risk	X	X
Quality Control and Product Quality risk	X	X
Market Development risk	X	X
Market risk	X	X
Political risk	X	X
Foreign exchange risk	X	X
Product liability risk	X	X
Assets risks (fixed/tangible assets)	X	X
Risks related to changes in regulatory regimes	X	X
IP Protection and Infringement risks	X	X
Brand Development and Brand Recognition risks	X	X

- (123) The Commission requested Ireland to clarify what activities the specific functions and risks presented in Figure 8 and Figure 9 refer to and to provide concrete examples of activities performed by ASI and AOE under those functions. The Commission also asked Ireland to identify, in the minutes of the meetings of ASI's and AOE's board of directors, any indication of activities related to the activities listed in Figure 8 and Figure 9 which Ireland or Apple considered to be performed by the boards of ASI and AOE.
- (124) In response to those requests, Ireland and Apple indicated that the tables from the CSA of 2009 and 2013, reproduced in Figure 8 and Figure 9, do not purport to show activities actually performed by the parties to the CSA but merely summarise the activities that each party is authorised to perform under that agreement. Apple further explained that the tables from the CSA of 2009 and 2013, reproduced in Figure 8 and Figure 9, were added to the CSA to satisfy the requirements under temporary regulations issued by the US Treasury Department, effective 5 January 2009, that a cost sharing agreement among related parties reflect the parties' functions and risks ⁽⁹⁵⁾.
- (125) Apple further indicated that the R & D activities listed in the table reproduced in Figure 8 — the cost shared intangibles, quality control of the cost shared intangibles, R & D facilities management, contracting with related parties or third parties in relation to the intangibles development activities and selecting, hiring and supervision of employees and contractors and subcontractors to perform any of the intangible development activities — were performed almost entirely by Apple Inc. employees in the US. Irish Branch employees participated in those activities only to the extent they relate to routine localisation and product testing.

⁽⁹⁵⁾ Letter from Apple of 22 April 2016, p. 15-16.

- (126) Ireland and Apple further stated that ASI and AOE do not have any role in the management of Apple's IP and that they have only a limited role, within the strict parameters set by Apple Inc. executives in the US, in commercial contract negotiations. They also stated that no employee of either ASI or AOE is involved in the creation, acquisition, management and/or protection of the Apple IP. All the functions that drive Apple's profits are directed by Apple Inc. executives in the US and performed largely in the US. Additionally, no IP created or acquired by Apple is legally owned by, or registered to, ASI or AOE. ASI and AOE have only entered into the following commercial contracts in their own capacity: (i) procurement contracts with component suppliers, (ii) contract manufacturing agreements with original equipment manufacturers governing the purchase of finished goods, and (iii) forward sales contracts.
- (127) As regards ASI's and AOE's involvement of the management of the Apple IP, the first mention of any form of IP in the minutes of the board of directors of either company that have been provided to the Commission for the period since ASI and AOE were established (1980 to 2015) is in the minutes of ASI's board meeting on 13 August 2013 and AOE's board meeting on 16 August 2013, where both boards granted powers of attorney to Apple Inc. employees with respect to IP protection ⁽⁹⁶⁾.
- (128) During that same period, the first mention of the CSA in the minutes of the board meetings of ASI and AOE is recorded in the minutes of meetings of August 2014, in which the new corporate structure of Apple in Ireland [...] was discussed and agreed. For AOE's board of directors, a meeting took place on [...] August 2014, which is described as 'held telephonically', during which the [...] was discussed [...]. For ASI's board of directors, that meeting took place on [...] August 2014 in [...]. According to the minutes of that meeting, ASI's directors were also informed at that meeting that discussions had taken place among Apple Inc., ASI and AOE in connection with the CSA. The board agreed to enter into the 2013 CSA at that meeting ⁽⁹⁷⁾.
- (129) The next meeting of ASI's board of directors took place after the end of ASI's financial year 2014, on [...] December 2014, in [...] ⁽⁹⁸⁾. In that meeting, it was decided that [...] jurisdiction of tax residence would be in [...] instead of [...], which had been previously proposed.

2.5.5. INFORMATION ABOUT APPLE DISTRIBUTION INTERNATIONAL

- (130) ADI was incorporated in Ireland in 2009. Since 2012, ADI has assumed certain responsibilities for Apple's distribution activities in the EMEA region. Since 2014, ADI has been responsible for sales, distribution and Apple Online Store activities across the EMEA region and China. ADI receives orders from customers, engages in demand and sales forecasting and provides contract management for channel customers. ADI manages logistics activities associated with delivering products to customers.
- (131) ADI is responsible for providing in-warranty and out-of-warranty after-sales support. Those services are provided through ADI's AppleCare support group. ADI also provides after-sales support through third party call centres and networks of Apple approved service providers.
- (132) Despite declaring profits ⁽⁹⁹⁾, ADI declared no corporation tax liability for the years 2009, 2010 and 2011. This is because ADI had originally calculated its corporation tax liability by applying the profit allocation methods endorsed in the 2007 tax ruling, since that ruling included a 'restructuring clause' ⁽¹⁰⁰⁾ whereby that profit allocation method would also apply to a new subsidiary in the event of a restructuring of Apple's corporate structure in Ireland. However, Irish Revenue took the position that the profit allocation methods endorsed by that

⁽⁹⁶⁾ Apple indicated that pursuant to Section 5.4 of the 2007 CSA and similar provisions of other CSAs, Apple Inc. retained the sole right and responsibility to control all actions to protect Apple's IP. Therefore, all actions with respect to IP protection are initiated, managed and executed from the US (see Apple's letter of 22 April 2016, p. 7). It is not clear in view of this fact why the boards of ASI and AOE have been granting the power of attorney in respect of the protection of the IP, as the two companies would not have any right in this respect under the CSA in the first place.

⁽⁹⁷⁾ AOE's board of directors agreed to enter into the 2013 CSA in the meeting on [...] August 2014, held by telephone.

⁽⁹⁸⁾ The financial years of ASI and AOE run until end September of each year.

⁽⁹⁹⁾ USD [100-200] million in 2011, USD [10-20] million in 2010 and USD [1 000-10 000] in 2009, see statutory accounts of ADI for the respective periods.

⁽¹⁰⁰⁾ Submission of Ireland of 29 January 2016, p. 8-9.

ruling did not apply to the determination of the taxable profit of a resident company. In 2014, ADI accepted Irish Revenue's position and a settlement was reached [...] for all accounting periods up to and including 2012. This resulted in a settlement of EUR [...], comprised of tax [...], interest and penalties. [...].

2.5.6. SERVICE AND DISTRIBUTION AGREEMENTS CONCLUDED BY ASI

- (133) In 2008, ASI concluded a Marketing Service Agreement with Apple Inc. Under that agreement, Apple Inc. allocates a portion of the marketing costs incurred by Apple Inc. to ASI in respect of services performed by Apple Inc. on ASI's behalf ⁽¹⁰¹⁾. Ireland explained that that portion of the marketing costs is allocated to ASI's head office ⁽¹⁰²⁾. However, the contract was concluded between Apple Inc. and ASI without any reference to ASI's head office. Rather, the contract provides the postal address of ASI in Cork, Ireland as the address of the counterparty to the agreement. Furthermore, according to Ireland, ASI's Irish branch incurs local marketing costs directly through contractual agreements with third party marketing companies.
- (134) In 2010, a distribution agreement was concluded between ASI and ADI. Under that agreement, ASI appointed ADI as a non-exclusive global distributor for the sale of Apple products and ADI was granted a non-exclusive licence to certain proprietary rights to promote sales of Apple products. The distribution agreement gave ADI the right to purchase Apple products from ASI or directly from third party manufacturers. ASI and ADI agreed that the aggregate of all charges for products and services supplied under the distribution agreement would be of an amount such that ADI would achieve a net pre-tax profit equal to approximately [1-5] % of [...].
- (135) For ADI to carry out distribution for ASI in the EMEA region, it was agreed in a memorandum of agreement, dated 23 April 2012, that ADI would acquire the assets and assume the liabilities of ASI associated with the distribution in the EMEA region with effect from 1 April 2012. On the assets side, the biggest balance sheet item transferred on 1 April 2012 from ASI to ADI concerned the trade receivables [...]. On the liability side, the biggest balance sheet item transferred from ASI to ADI concerned the [...] Warranty Accrual [...] ⁽¹⁰³⁾.

2.5.7. APPLE'S NEW CORPORATE STRUCTURE IN IRELAND AS OF 2015

- (136) In a meeting on 9 January 2015 ⁽¹⁰⁴⁾, Apple presented its new corporate structure in Ireland to the Commission. That new corporate structure was put into place as a consequence of the modification of Section 23A TCA 97, as from 1 January 2015 ⁽¹⁰⁵⁾, as a result of which an Irish incorporated company could no longer declare its tax residence to be outside of Ireland, while not having any place of tax residency anywhere else, as was the case for ASI and AOE. [...]. Apple indicated that under the new corporate structure the 2007 ruling will no longer be used for determining the taxable base of ASI and AOE in Ireland. [...]. According to the information provided by Apple, the last financial year to which the 2007 ruling applies is 2014, which ends on 27 September 2014, according to the statutory accounts of ASI and AOE.
- (137) Under that new corporate structure, [...].
- (138) According to the information provided by Apple to the Commission on 19 January 2015 ⁽¹⁰⁶⁾, [...].

⁽¹⁰¹⁾ According to Ireland the allocation is made on an arm's length basis in accordance with applicable US Transfer Pricing statutes and regulations, see submission of Ireland of 29 January 2016, p. 3. According to the Marketing Service Agreement, the service fee payable by ASI to Apple Inc. under the agreement is in principle equal to [100-150] % of the 'reasonable costs incurred' and in some cases to [50-100] % of such costs, see Marketing Service Agreement p. 3.

⁽¹⁰²⁾ Submission of Ireland of 29 January 2016, p. 3.

⁽¹⁰³⁾ The Accrued Warranty [...] Support is another large balance sheet item [...].

⁽¹⁰⁴⁾ See recital 12.

⁽¹⁰⁵⁾ See Section 39 of the Finance (No 2) Act 2013 of 18 December 2013, Amendment of Section 23A of Principal Act (company residence).

⁽¹⁰⁶⁾ See recital 12.

- (139) In its letter of 25 February 2015 ⁽¹⁰⁷⁾, Ireland provided additional clarifications regarding the new structure of Apple. In particular, according to notes of a telephone conference on [...] December 2014 between Irish Revenue and Apple, Irish Revenue requested Apple to [...]. According to those notes, it is further specified that, [...].
- (140) By letter of 11 November 2015 ⁽¹⁰⁸⁾, the Commission requested information about [...], as referred to in Apple's submission of 19 January 2015 ⁽¹⁰⁹⁾, as well as any underlying documents such as transfer pricing reports. In its submission of 29 January 2016, Ireland [...]. In its letter of 8 March 2016, the Commission [...]. In a letter dated 23 March 2016, Ireland indicated that Apple had informed Ireland that the [...].
- (141) In the minutes of the meetings of [...] board of directors, provided to the Commission on 24 May 2016, information is presented regarding the [...].
- (142) In particular, in the minutes of [...] board meeting, held in [...] on [...] August 2015, it is stated that [...].
- (143) In the minutes of [...] board meeting held in Cupertino, US, on [...] April 2016, it is recorded that [...].
- (144) Attachment 1 to the minutes of the meeting of [...] April 2016 contains the minutes of the board meeting on [...] August 2015, where changes were introduced and emphasis added, such as striking out [...].

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (145) The Commission decided to initiate the formal investigation procedure because it came to the preliminary conclusion that the contested tax rulings constitute the grant of State aid within the meaning of Article 107(1) of the Treaty by Ireland to Apple, ASI and AOE and that that aid is incompatible with the internal market pursuant to Article 107(2) and (3) of the Treaty.
- (146) In particular, the Commission expressed doubts that the profit allocation methods endorsed by those rulings to determine ASI's and AOE's taxable profit in Ireland reflected a remuneration for ASI's and AOE's Irish branches that a prudent independent operator acting under normal market conditions would have accepted.
- (147) The Commission noted, in particular, that the taxable basis in the 1991 ruling appeared to be negotiated rather than substantiated by reference to comparable transactions and that Irish Revenue did not seem to have had the intention of establishing a profit allocation based on transfer pricing.
- (148) The Commission further observed that no profit allocation study or transfer pricing report was provided to Irish Revenue at the time that either of the contested tax rulings was requested and that methodological choices accepted by Irish Revenue did not seem to be substantiated in any way. It also criticised the endorsement of a one-sided profit allocation method in both rulings, with operating costs excluding costs charged by affiliated companies as a profit level indicator, which was never explained, although it results in materially different outcomes in this case. It therefore had doubts as to the appropriateness of the transfer pricing method chosen for the 2007 ruling.
- (149) The Commission also noted several inconsistencies in the application of the method chosen when determining the profit allocation to AOE and ASI that do not appear to comply with the arm's length principle. As regards the 1991 ruling, those inconsistencies related to the mark-up on the costs attributable to AOE's Irish branch, the

⁽¹⁰⁷⁾ See recital 13.

⁽¹⁰⁸⁾ See recital 27.

⁽¹⁰⁹⁾ See recital 138.

amount of capital allowances agreed for AOE as well as the duration of the 1991 ruling that was applied by Apple for 15 years. As regards the 2007 ruling, the Commission expressed doubts regarding the mark-up of [10-15] % on AOE's branch operating costs, while for ASI a lower mark-up of [10-15] % on operating costs was agreed ⁽¹¹⁰⁾. In addition, the profit allocation to ASI's Irish branch, agreed in the 2007 ruling, did not factor in the evolution of sales. Since the profit recorded by ASI comes from active income, the Commission considered that if growth in sales is not accompanied by an increase in the operating capacity outside of Ireland, it could point to an inconsistency in the allocation of turnover between ASI and its Irish branch.

- (150) In sum, the profit allocation methods agreed for allocating the profit of ASI and AOE to their respective Irish branches were considered to result in a remuneration for those Irish branches that a prudent independent operator acting under normal market conditions would not have accepted and thus to deviate from the arm's length principle. As a result, the Commission reached the preliminary conclusion that those rulings result in a lower tax burden for those companies constituting an advantage for the purposes of Article 107(1) of the Treaty. The Commission considered that advantage to be selective since it is granted only to ASI and AOE and it puts those undertakings in a more favourable position than other undertakings that are in a comparable factual and legal position. The Commission further considered that favourable position selectively granted to the two undertakings to be based on the discretion of Irish Revenue which went beyond the simple management of tax revenue by reference to objective criteria.
- (151) With all other conditions of Article 107(1) of the Treaty being fulfilled and no apparent compatibility basis pursuant to Article 107(2) or (3) of the Treaty, the Commission reached the preliminary conclusion that the contested tax rulings constituted State aid that is incompatible with the internal market.

4. COMMENTS FROM IRELAND ON THE OPENING DECISION

- (152) In its comments on the Opening Decision, Ireland raises several arguments relating mainly to the applicable national rules to determine the existence of an advantage for the purposes of Article 107(1) of the Treaty, the absence of any selective treatment of ASI and AOE and a number of procedural shortcomings.
- (153) With respect to the national rules that applied at the time of the contested tax rulings and that determine a possible advantage, Ireland argues that, contrary to the Commission's assumption and in the absence of any double taxation treaty, Section 25 TCA 97 constitutes the only basis for computing the tax liability for non-resident companies carrying on a trade through a branch in Ireland. According to Ireland, there is no scope for applying general principles developed by the OECD unless those principles are clearly incorporated in Irish law, which, according to Ireland, is not the case here. Section 25 TCA 97 does not refer to the OECD arm's length principle, which is therefore not determinant when allocating profit to an Irish branch.
- (154) However, even if the OECD framework was applicable to this case, it was not until 2010 that an agreement was reached at OECD level on the allocation of profits to a branch of a non-resident company according to Article 7 of the OECD Model Tax Convention, that is after the contested tax rulings were issued, and even then, only in the context of the application of a double taxation treaty, which is not the case here. Neither ASI nor AOE are tax resident either in Ireland or in a country with which Ireland has entered into a double tax treaty.
- (155) Furthermore, the decision-making practice invoked by the Commission to justify the reference to the arm's length principle in the case of Ireland is not applicable as it concerns cases where the Member States had incorporated certain OECD principles into their national law concerning transactions between companies, but then created exceptions for certain taxpayers. Those decisions are not relevant for Ireland as it has not incorporated the arm's length principle into national law and none of the decisions considered the arm's length principle in the context of allocating profits to a branch of a company.

⁽¹¹⁰⁾ Performance and profitability is often measured using ratios presented as 'margins' or 'mark-ups'. The method agreed in the contested tax rulings is referred to by Ireland as consisting of a 'mark-up' on operating costs, whereby the tax base is equal to the agreed percentage. In its comments on the Opening Decision, Apple refers to a 'margin' on operating costs instead of a 'mark-up'. Both terms are used interchangeably in this Decision, unless otherwise specified.

- (156) In addition, the reference in the Opening Decision to the market economy investor test is unconvincing as it confuses two matters which should be kept separate: the State's role as a public authority, and its behaviour in the market place. However, if the Opening Decision should be read as imposing the test on private operators, this would constitute a novel extension of the market economy operator principle. The Commission would effectively be demanding that the taxpayer itself behaves as a market economy investor, even though this standard only refers to actions of the State.
- (157) With respect to selectivity, Ireland submits that although Irish Revenue has to exercise judgment when allocating profit to a branch of a non-resident company, that judgment does not imply that taxpayers are treated on a discretionary basis and therefore selectively favoured over others. Where Irish Revenue is required to exercise judgment, it must do so in an even-handed way, fairly and consistently. According to Ireland, the assessment in this case was entirely consistent with normal administrative practice. There was no departure from the normal basis in computing the tax liability of ASI's and AOE's Irish branches and, hence, no selective treatment.
- (158) According to Ireland, the process leading to the contested tax rulings did not involve any preferential treatment of Apple. From Irish Revenue's point of view, the process is not a bargaining process designed to result in the payment by the company of a fixed amount of tax. Rather, the objective is to ensure that the basis used for the allocation of profits is appropriate.
- (159) As regards the profit allocation agreed to in the contested tax rulings, Ireland considers that the approach taken by Irish Revenue fully reflects the branch's contribution to the overall profits of the company and constitutes a correct application of Section 25 TCA 97. The profit allocation methods agreed to result in a level of taxable profits commensurate with the value of the contribution made by the Irish branch in each case to overall company profitability. In particular, Irish Revenue attached critical importance to the fact that the Irish branches had no rights to, or interest in, the Apple IP licences which was a significant source of the companies' income. Therefore, the Revenue manager did not consider it appropriate or sustainable to attribute value deriving from Apple's unique IP to the Irish branches.
- (160) Ireland also raises a number of arguments relating to the procedure, stating that the Commission has not been impartial in drafting the Opening Decision, including strong, over-assertive language which seems to pre-empt the conclusion in the final decision. Ireland also argues that the Commission has breached Ireland's right to be heard by discussing case-related issues with the OECD without involving Ireland. In addition, it makes reference to the length of time which elapsed between the first alleged aid measure (1991) and the Commission's first investigative steps (2013), which allegedly makes it difficult for Ireland to defend itself and which also renders the situation for taxpayers unpredictable. Finally, Ireland argues that recovery should be excluded because, either, the aid constitutes existing aid, or, because it would be very difficult to calculate the aid amount.

5. COMMENTS FROM INTERESTED PARTIES ON THE OPENING DECISION

5.1. COMMENTS FROM APPLE

- (161) Apple's comments on the Opening Decision overlap to a large extent with Ireland's comments, in particular as regards the applicable national law under which the existence of an advantage should be determined.
- (162) Apple submits that Apple's IP has been and continues to be predominantly developed in the US at Apple Inc.'s headquarters in Cupertino, US. This is where the vast majority of Apple's R & D engineers are located. The executives who make all strategic and final decisions on R & D activity and the commercialisation of ideas from product design through to product launch are also based in the US. Apple Inc. is the sole owner of the legal title to all Apple IP.
- (163) No decisions concerning the exploitation of Apple's IP or the development of Apple products (such as decisions regarding what IP to commercialise and how to manufacture products) are made in Ireland. No employee of the Irish branches has responsibility for R & D or any decision associated with the right to use and exploit Apple's IP. All such decisions are made in the US by Apple Inc. and/or by ASI's and AOE's boards, which manage and control the companies from outside of Ireland.

- (164) Apple's marketing is a key strategic component for the company. The marketing strategy is also controlled and managed from the US where all key decisions are made. All marketing campaigns are designed and developed in the US. The Irish branches have no involvement in the creation and development of marketing campaigns and ASI's Irish branch compensates Apple Inc. for its provision of worldwide marketing services.
- (165) As regard the assessment of the existence of an advantage, the Commission did not identify the correct counterfactual to establish such an advantage, which must be the national tax rules governing the treatment of non-tax resident companies with Irish branches only (that is to say, Section 25 TCA 97) and not OECD principles that carry no force of law in Ireland. Since the profit allocation methods agreed to in the contested tax rulings were consistent with Irish Revenue's administrative practice under Section 25 TCA 97, ASI's and AOE's tax burden was not reduced by those rulings that, therefore, they did not confer any advantage upon it. Equally, the private market operator test cannot be used to impose the arm's length principle for finding an advantage, since that test cannot be applied to the State as it is acting as a public authority, nor to the taxpayer.
- (166) Furthermore, there is no selective treatment in this case, since the contested tax rulings only confirmed the profit to be allocated to the Irish branches in line with Section 25 TCA 97 and related administrative practice and in the same manner as Irish Revenue would apply Section 25 TCA 97 to all other taxpayers in a similar situation. There was also no selective treatment based on discretion as Irish Revenue's power to exercise judgment was limited by objective criteria related to the tax system.
- (167) In addition, even if the arm's length principle applied to the transactions in this case, the [Apple's tax advisor] *ad hoc* report submitted by Apple comes to the conclusion that the profit allocation to the Irish branches falls within the range of appropriate outcomes even under the requirements of current transfer pricing rules, so that the contested tax rulings did not confer any advantage on ASI and AOE. According to that report, ASI and AOE assumed the key risks related to product success and product defect in the international markets. Distributors and resellers of Apple products (related-party and third-party) were protected from those risks through contractual terms, worldwide policies and approaches to distribution (such as controls over inventory). Policies to manage and mitigate business risk were established by Apple Inc. in the US. ASI and AOE had the financial capacity to bear any business risks and to make the necessary strategic decisions to mitigate the exposure of the company to business risks. In particular, the report identifies the economically significant activities of the Irish branches with respect to their functions and factual circumstances, it establishes that the TNMM is the most appropriate profit allocation method to determine their taxable profit, and it establishes that the most appropriate profit level indicator for ASI's Irish branch is the Berry Ratio ⁽¹¹⁾ and for AOE's Irish branch is a mark-up on total costs.
- (168) According to [Apple's tax advisor], in the case of a distributor like ASI who sells goods to other related-party distributors, the only value-adding function is the logistics of distributing the goods; the cost of the goods is merely passed on to the subsequent purchaser of the product. The cost of undertaking the distribution should be the operating expenses of the company. In such a case a company should be remunerated for that expenditure alone. Using the Berry Ratio, the distributor should be given a cost-plus return on the distribution costs (the value-adding costs) of the business. The report then derives profitability data from a set of selected third-party companies with similar functions to those of the Irish branches and evaluates the actual profit allocation in accordance with the rulings in the context of the third-party data. As regards the evaluation of the results of the profit allocation to the Irish branches in accordance with the 1991 ruling, the report establishes a comparable set

⁽¹¹⁾ The Berry Ratio is defined as the ratio of gross profit to total operating expenses. Reference is made by the tax advisor to paragraphs 2.100-2.102 of the OECD TP Guidelines. In the case of a distributor who sells goods to other related-party distributors, the only value-adding function is the logistics of distributing the goods; the cost of goods is merely passed on to the subsequent purchaser of the product. The cost of undertaking the distribution should be the operating expenses of the company. In such a case a company should be remunerated for that expenditure alone. Essentially, using the Berry Ratio in this way gives the distributor a cost plus return on the distribution costs (the value-adding costs) of the business.

of third-party profitability data for the years 2004, 2005 and 2006 ⁽¹¹²⁾ and compares the actual profits attributed to the Irish branches in the financial years 2004 to 2007 with that comparable set. The outcome of the [Apple's tax advisor] *ad hoc* report's comparables study using a Berry ratio regarding ASI is presented in Figure 10 and using a mark-up on total costs ('MTC') regarding AOE is presented in Figure 11.

Figure 10

Arm's length Berry Ratio range by reference to independent selling/distribution entities according to [Apple's tax advisor]

Three year weighted average	Berry Ratio — 2004 to 2006	Berry Ratio — 2009 to 2011
Upper Quartile	1,21	1,40
Median	1,10	1,17
Lower Quartile	1,01	1,06
Number of observations	11	25

Figure 11

Arm's length MTC range by reference to independent manufacturers according to [Apple's tax advisor]

Three year weighted average	MTC — 2004 to 2006	MTC — 2009 to 2011
Upper Quartile	9,3 %	10,1 %
Median	6,5 %	7,5 %
Lower Quartile	4,4 %	4,9 %
Number of observations	8	13

- (169) Based on this study, the [Apple's tax advisor] *ad hoc* report concludes that the profits attributed to ASI's and AOE's Irish branches were fully consistent with the OECD's arm's length principle. The [Apple's tax advisor] *ad hoc* report further presents 'the actual profile' of the Irish branches. The concept of mark-up 'profile' is not defined by [Apple's tax advisor]. In the case of AOE, the mark-up on total costs profile is presented in the report for the years 2011 and 2012, as represented in Figure 12.

Figure 12

Actual mark-up on total costs of AOE according to [Apple's tax advisor] for financial year ('FY') 2011 and 2012

Fiscal Year	MTC (%)
FY11 actual	[5-10]
FY12 actual	[5-10]

⁽¹¹²⁾ According to the report, there was no sufficiently reliable database for earlier years that would permit the analysis required under the OECD TP Guidelines.

- (170) On 17 November 2014, Apple submitted a further *ad hoc* study prepared by [Apple's 2nd advisor] that focuses on two issues raised in the Opening Decision: (i) the claim that the profit allocation applied to ASI's Irish branch did not factor in the evolution of sales ⁽¹¹³⁾ and (ii) the claim that the two different mark-ups (65 % and 20 %) agreed for AOE cannot both be at arm's length ⁽¹¹⁴⁾. It concludes that the contested tax rulings correctly allocated the profit to the Irish branches on a mark-up over costs without factoring in the evolution of sales.
- (171) According to the [Apple's 2nd advisor] *ad hoc* study, taking costs as a basis is to be expected given that the Irish branches are active in a competitive market and third-party operators with whom Apple contracts services similar to those provided by the Irish branches are typically also compensated on the basis of their costs. As regards the fact that the profit allocation does not follow the evolution of sales, [Apple's 2nd advisor] argues that the activities performed by ASI's Irish branch are characterised by economies of scale. Whether the customers of ASI's Irish branch buy large or small volumes of products does not affect costs substantially, as the activities carried out by ASI's Irish branch (such as contacting customers, organising logistics) are largely fixed with respect to the volume of products customers buy.
- (172) In addition, the step-down system designed for AOE can be justified from an economic and commercial perspective. From an economic perspective, the goal of a mark-up on operating costs is to cover non-recurring fixed costs. The initial mark-up of 65 % would then have to cover the fixed costs for the operations as a whole. However, at some point, the amount of margin generated by this mark-up would be more than sufficient to fully cover the initial fixed costs incurred. Thus, no further payment towards fixed cost should be made after a certain level of costs which, according to the [Apple's 2nd advisor] *ad hoc* study, would even justify a step-down from 65 % to 0 %.
- (173) Finally, according to Apple, State aid enforcement is not the appropriate tool to achieve harmonisation of national business taxation laws which the Commission allegedly would do by requiring Member States to observe standards such as the arm's length principle that are extraneous to some Member States' tax systems and thereby render those Member States' tax rulings susceptible to a finding of State aid.

5.2. COMMENTS FROM OTHER INTERESTED PARTIES

- (174) The comments received from other interested parties, namely Ibec and the joint letter signed by several trade associations (hereinafter 'Joint Submission'), do not address the doubts raised in the Opening Decision, but instead focus on the implications of the approach followed in that decision on the business environment. In particular, those comments state that the Commission's initiative would undermine legal certainty and tackle practices under the State aid rules whereas international *fora* like the OECD or other policy channels are better suited and more appropriate to tackle harmful tax competition. The Commission should not strive to harmonise taxation systems where it has no competence through State aid procedures.
- (175) The comments also question the selectivity approach taken by the Commission in situations where tax administrations should have a certain margin of discretion and submit that transfer pricing is not an exact science. Should the Commission conclude that the tax rulings constitute incompatible State aid, recovery should be excluded on the basis of the principle of legitimate expectations and the novelty of the approach.
- (176) In its comments, Oxfam expresses support for the Commission's investigation, encouraging the Commission to increase its investigation capacity also in view of the fact that it may be better placed than national bodies to structurally assess the ruling practice of the Member States. It calls on the Commission to ensure that adequate sanctions are adopted in cases where selective advantages are confirmed and that harmful tax practices are phased out quickly. It also indicates that grandfathering periods of six years in the case of the Irish tax residency rules that facilitate hybrid entity mismatches are much too long.

⁽¹¹³⁾ Opening decision, paragraph 67.

⁽¹¹⁴⁾ Opening decision, paragraph 63.

6. COMMENTS FROM IRELAND ON THIRD PARTIES' COMMENTS

- (177) In its comments on the comments of third parties in response to the Opening Decision, Ireland reiterates its argument that the OECD arm's length principle is not part of Irish law insofar as the allocation of branch profits is concerned and that the Commission has not shown any selective treatment of ASI and AOE, since Irish Revenue's assessment in this case was entirely consistent with normal administrative practice, as also confirmed by Apple's submission. In addition, the [Apple's tax advisor] *ad hoc* report and the [Apple's 2nd advisor] *ad hoc* study demonstrate that the outcome of the application of the contested tax rulings was comparable to that which would have resulted from the application of the arm's length principle.
- (178) Ireland also comments on the arguments in the Joint Submission concerning legal certainty. According to Ireland, the Joint Submission correctly points out that a reasonable and diligent taxpayer could not have foreseen the Commission's *prima facie* finding of incompatible State aid. In addition, the Commission is comparing Ireland's tax rules to an external reference framework, which is contrary to its long-standing case-law that the only valid reference is the national tax system. All this breaches the principle of legal certainty.
- (179) In response to the comments from Oxfam, Ireland states that the Commission should conduct its investigations into the tax ruling practices of Member States in a fair and equally comprehensive manner, irrespective of the size of the Member State. Furthermore, with respect to Oxfam's comment on the Irish tax residency rules, Ireland submits that its company tax residence rules were not designed to facilitate aggressive tax-planning by multinational companies. Ireland points out that the so-called 'Double Irish' tax structure is not, and was never, part of the Irish tax regime, but rather an international tax planning arrangement designed and developed by tax and legal advisors.

7. OTHER EXCHANGES OF COMMENTS AFTER THE OPENING DECISION

7.1. EXCHANGE OF LETTERS AFTER THE LETTER OF 17 APRIL 2015

7.1.1. THE LETTER OF 17 APRIL 2015

- (180) In response to Ireland's request of 25 February 2015 that the Commission set out its assessment resulting from its investigation into the contested tax rulings in more detail, which according to Ireland appeared to be based on a misapprehension by the Commission as to the applicable national law, the Commission services sent the letter of 17 April 2015 to Ireland, asking Ireland to transmit a copy to Apple.
- (181) In the letter, the Commission clarified that, as regards the system of reference for a finding of selectivity, it considered the ordinary tax rules of the Irish corporate income tax system as the appropriate reference system, comprising resident companies and the branches of non-resident companies, whereas Section 25 TCA 97 governed solely the taxation of branches. Next, the Commission summarised its understanding of the activities of ASI and AOE on the basis of the observations it received from Ireland and Apple in response to the Opening Decision as follows: 'since ASI and AOE do not have any economic activities outside of their Irish branches, the activity consisting in the procurement, manufacturing, sales and distribution of Apple products outside the Americas is carried out by the Irish branches of ASI and AOE. Any IP licences of ASI and AOE seem to be exclusively used by and exclusively held for the Irish branches, as the Irish branches are solely responsible of the procurement, manufacturing, sales and distribution of Apple products outside the Americas. This seems also confirmed by the fact that ASI and AOE only have employees in the Irish branches of ASI and AOE and therefore no operating capacity outside of Ireland.' The Commission then explained, in response to claims made by Apple in its observations on the Opening Decision ⁽¹¹⁵⁾, that functions performed by Apple Inc. employees are outside the scope of the assessment of the contested tax rulings: 'fictitious remuneration for services provided for free by the group employees to the supposed benefit of ASI or AOE cannot reduce the profits to be allocated between the ASI and AOE head offices and their respective branches.'

⁽¹¹⁵⁾ See recitals 162 to 164.

- (182) Finally, the Commission responded to the specific claim made by Ireland in its observations on the Opening Decision that the Commission endorsed the fact that no rights in relation to the IP had been attributed to the Irish branches of ASI and AOE. The Commission explained that the Opening Decision only describes the arrangements under the CSAs as regards the allocation of IP as presented by the Irish authorities, but that this had not been endorsed by the Commission in its assessment. The Commission also clarified that, contrary to Ireland's claim, it had not applied the OECD arm's length principle in the Opening Decision as a source of law.

7.1.2. COMMENTS FROM IRELAND IN RESPONSE TO THE LETTER OF 17 APRIL 2015

- (183) In a letter dated 4 May 2015, Ireland claimed that, by the letter of 17 April 2015, the Commission had significantly changed its assessment of the alleged aid, in particular with respect to the reference framework. According to Ireland, that change of assessment constitutes a breach of Ireland's right to a fair hearing. Ireland submitted that the Commission seemed to have abandoned the arm's length principle and that it should therefore issue a new or supplemental Opening Decision setting out the new analysis.
- (184) As regards the reference framework, Ireland claims that it was not clear which reference framework was being proposed by the Commission. ASI and AOE are not tax-resident in Ireland and are taxable under the general rules of corporate taxation. Whereas persons resident in Ireland are taxable on all their income wherever arising, non-residents are, pursuant to Section 25 TCA 97, only taxable on their source income.
- (185) Ireland further explained that all of the income of ASI's and AOE's Irish branches, apart from interest income, is trading income. The branches have no income that results from 'the use/exploitation of IP right' that is separable from the trading income of the branches. In fact, the Irish branches of ASI and AOE have no separate IP income stream, nor would it be correct to treat any part of the branches' income as IP income. Furthermore, Ireland reiterated that Apple's highly valuable technology, design and marketing IP is created, developed and managed in the US and is not in any way attributable to ASI's and AOE's Irish branches. There are also no activities in the branches associated with the management of the licences granted under the CSA. Therefore, the profits of ASI and AOE arising as a result of the CSA are not attributable to the Irish branches.
- (186) Ireland stated that the trading income is net trading income after deductions rather than gross trading receipts. That net income must be 'arising [...] through or from the branch', which means that 'the branch is the causal source of the income, to which the income is properly attributed'. Section 25 TCA 97 cannot be constructed as providing that a flow of gross receipts through a branch determines the attribution of a company's entire income to the branch. Ireland reiterates that such an interpretation would lead to absurd results bearing no relation with economic reality. According to Ireland, the reason why much of the income of ASI and AOE has not been subject to taxation is a result of mismatches between national tax regimes, which cannot be rectified with State aid rules.
- (187) Finally, Ireland maintained that the arm's length principle is not part of the Irish tax regime and that the Commission's 'clarification' in the letter that it applies the OECD rules in the Opening Decision as a 'non-binding' recommendation is far from reflecting the position of the Commission in the Opening Decision. According to Ireland, the Opening Decision relies squarely on the OECD definition of the arm's length principle. If the Commission suggests that there is a second type of 'non-OECD' arm's length principle, it should have heard Ireland's arguments on this point.

7.1.3. COMMENTS FROM APPLE ON THE LETTER OF 17 APRIL 2015

- (188) In a letter dated 4 May 2015, Apple indicated that they take issue with the Commission approach that seems to require that Irish tax resident companies and the Irish branches of ASI and AOE should be treated in the same way and taxed on their worldwide income. According to Apple, the profit-generating activities of a non-resident company occurring outside of Ireland are not relevant to the amount of tax due in Ireland.

- (189) Moreover, Apple claims that the Commission incorrectly attributes all profits to the Irish branches based on the irrelevant and false assumption that ASI and AOE do not have any economic activity outside their Irish branches. Apple claims that critical activities conducted by or for ASI and AOE occur outside of Ireland, and lists as an example that the boards of ASI and AOE decided to enter into the CSA with Apple Inc., while the negotiations with respect to sales, procurement and manufacturing contracts are managed by Apple Inc. executives on behalf of ASI and AOE. Finally, Apple claims that the remainder of the profits, which are not subject to tax in Ireland, are subject to eventual taxation in the US.
- (190) Apple disputes that any IP licences of ASI and AOE have been exclusively used by and exclusively held for the Irish branches. This is because the Commission incorrectly asserts that ASI and AOE have no economic activity outside the Irish branches. Instead, in their roles as a procurement and distribution centre and a routine product assembler, respectively, the Irish branches had only limited access to the licensed IP for assembling and shipping products. Apple claims that even under the Authorised OECD Approach, the Irish branches of ASI and AOE would not be entitled to be allocated profits based on their limited access to the licensed IP, just as an independent enterprise would not be paid a return on similar licensed IP. Apple concludes that the IP rights that drive mark-ups — such as the rights relating to hardware and software design and engineering — are not the rights on which the Irish branches rely to conduct procurement, distribution or assembly activities, which can therefore not be attributed to the Irish branches.
- (191) Apple also does not agree that by mentioning the fact that ‘no rights in relation to the IP concerned are attributed to the Irish branch of AOE/ASI’ in the descriptive part of the Opening Decision, the Commission was not endorsing that fact. According to Apple, the Commission did not dispute that fact in the assessment part of the Opening Decision. As an undisputed fact, it remains relevant and parties can rely on such factual and legal statements set forth in an Opening Decision. Apple also disputes that the Commission used the OECD TP Guidelines merely as a reference document, given that the Commission relied heavily on the guidelines in the Opening Decision.

7.2. EXCHANGE OF LETTERS AFTER THE MEETING BETWEEN THE COMMISSION AND IRELAND ON 7 MAY 2015

7.2.1. THE MEETING ON 7 MAY 2015

- (192) At the request of Ireland, a meeting was held between the Commission’s services and Ireland on 7 May 2015. During that meeting the following topics were discussed: (i) the interpretation of Section 25 TCA97 and the question of territoriality; (ii) the tax treatment of resident and non-resident companies; (iii) the identification of the reference framework; (iv) the private market operator test; (v) the role of the arm’s length principle in Irish and Union law; (vi) and the significance of activities in other companies of the Apple group besides ASI and AOE on the profit allocation within ASI and AOE.
- (193) By email of 9 July 2015, the Commission sent the draft minutes of the meeting on 7 May 2015 to Ireland and invited Ireland to agree or propose changes to those minutes.

7.2.2. LETTERS FROM IRELAND OF 17 JULY 2015 (WITH EXPERT OPINION) AND 14 AUGUST 2015

- (194) In its letter of 17 July 2015, Ireland expressed its opinion on several of the topics discussed during the meeting on 7 May 2015.
- (195) In Ireland’s opinion, the Commission allegedly acknowledged during that meeting that, in line with the applicable rules on residency, ASI and AOE were at all material times non-resident companies and that their tax liability fell

to be assessed by reference to Section 25 TCA 97. This means that Irish Revenue, in line with the principle of territoriality which was not disputed by the Commission, cannot tax the worldwide profits of ASI and AOE, but that the Irish branches are liable to tax only in respect of Irish-source profits. Related to this, Ireland does not agree, as was suggested during the meeting on 7 May 2015, that the reference framework consists of the ordinary corporate tax system. The TCA 97 does not have a single overarching objective. Instead, while the objective of the TCA 97 is to tax the worldwide profits of Irish resident companies, its objective in respect of non-resident companies is to tax Irish-source profits. The reference framework can therefore only be Section 25 TCA 97 and Ireland taxed all of the profits arising to AOE and ASI that were within Ireland's jurisdiction to tax, that is to say, all of the profits of the companies that were attributable to the activities of the Irish branches. Given that the functions performed by ASI's and AOE's Irish branches were essentially routine operational and logistical activities, while the key strategic and commercial decisions were taken by senior management executives in the US, given that the development and exploitation of Apple's IP as main driver of the company's profitability was undertaken outside of Ireland, and given that the decision to participate in the CSA as well as the management and control of the risks under the CSA were located outside of Ireland, the income resulting from the CSA and the economic rights created as a result of the CSA cannot, in any way, be attributed to the Irish branches of ASI and AOE.

- (196) In this context, Ireland considers that the Commission has not given any authority for or explanation of its view that the classification of income as active income is significant in this case and that active income must be actively managed somewhere. All of the income of ASI's and AOE's Irish branches, apart from interest income, is trading income and the branches do not receive any income from the use or exploitation of Apple IP rights that is separable from the trading income of the branches. Accordingly, the only income of the branches that comes within the scope of 'income from property or rights used by, or held by or for, the branch or agency' pursuant to Section 25 TCA 97 is interest income. The Commission cannot argue that the income from the Apple IP should have been taxed in Ireland under Section 25 TCA 97. Ireland could and should only consider the functions of the branches themselves and therefore could only establish that the R & D that generated the IP and the active management of the IP was not in Ireland. Furthermore, it is not relevant where profits are recorded. The profits of ASI and AOE are recorded in the accounts of those companies, but they have not been taxed — other than those of the Irish branches and the investment income arising in the US — because the companies are not resident in the US. This non-taxation of profits is due to a mismatch in the sovereign taxation system and is not relevant for State aid purposes.
- (197) According to Ireland, the Commission also allegedly accepted at the meeting on 7 May 2015 that the arm's length principle and the authorised approach is not part of Irish law in respect of the taxation of branches and that Union law did not require the arm's length principle be 'read into' Section 25 TCA 97. It follows, so Ireland argues, that insofar as the contested tax rulings did not apply the arm's length principle, this did not involve any deviation or derogation from the requirements of the Irish corporation tax regime generally and Section 25 TCA 97 in particular. As regards the Commission's view that the arm's length principle is applicable as a relevant State aid tool, Ireland argues that this represents an entirely new argument and a significant departure from the Commission's position in the Opening Decision, which allegedly made reference to the Irish Revenue's failure to apply the OECD arm's length principle. Moreover, in Ireland's view, the retrospective application of the arm's length principle as a State aid tool finds no support in the case law of the Union courts or the decisional practice of the Commission and can also not be said to derive from the private market operator test or be generally supported by reference to market conditions. Applying the arm's length principle as a State aid tool and suggesting that it has been part of Union law since 1958 would constitute a total rewriting of history and be inconsistent with the principle of legal certainty. Thus, given that the arm's length principle is not part of Irish law, the non-application of the arm's length principle cannot properly be characterised as an advantage either. However, even if the arm's length principle was considered to apply in this case, the [Apple's tax advisor] *ad hoc*

report ⁽¹¹⁶⁾ concludes that the actual profit attribution to the Irish branches is fully consistent with the arm's length principle. If the Commission did not agree with this analysis, it should have notified Ireland accordingly and given it an opportunity to respond.

- (198) With respect to selectivity, Ireland argues that the Commission has failed to carry out any selectivity analysis. In particular, the Commission has never asserted that ASI and AOE were treated favourably in comparison with other branches. The Court of Justice has recognised that resident and non-resident companies are not in the same legal or factual position ⁽¹¹⁷⁾. Obliging Ireland to treat resident and non-resident companies as if they were comparable would be contrary to international practice, international tax principles, such as the principle of territoriality, and inconsistent with Irish national law. Lastly, even if the different treatment was considered to be selective, it would clearly be justified by the nature and/or general scheme of the TCA.
- (199) In its letter of 17 July 2015, Ireland also submitted the Cooke opinion to substantiate the claim by Ireland that ASI and AOE were at all times taxed in accordance with Section 25 TCA 97 and that, accordingly, their tax treatment did not involve any State aid. The Cooke opinion argues that, contrary to the Commission's alleged assertion that Irish Revenue should treat ASI and AOE as if they were tax resident in Ireland and subject them to corporation tax under Section 21 TCA 97, Irish Revenue does not have any latitude or discretion to depart from the explicit content of Section 25 TCA 97. Mr Cooke refers to judgements by both the High Court and the Supreme Court in *McGrath v. McDermott* ⁽¹¹⁸⁾, where it was argued that the court should disregard sophisticated and preordained transactions which had no commercial business purpose other than avoidance of tax. The High Court would have indicated that, in determining whether a liability to tax arises, the court does not look at the substance or financial results of a transaction. It looks at the actual legal effect and legal rights of the parties according to legal ideas and concepts.
- (200) Given that ASI and AOE have their central management and control in the US, the Cooke opinion argues that Irish Revenue correctly treated the subsidiaries as non-resident taxpayers. Under Section 25 TCA 97, it is only the profits that are shown to arise in a trade through or from the branch or agency that come within the tax charge and the Commission conflates companies with branches when it requires that Irish Revenue should charge the trading profits of the company and not of the branch. Furthermore, Irish Revenue had no discretion to have recourse to the arm's length principle by analogy, because that principle did not form part of the Irish tax code at the relevant time. The Cooke opinion concludes that there is no basis in Irish law to tax all of the profits of AOE and ASI in Ireland. The only competence of Irish Revenue in the relevant years was to charge to tax that portion of the profits of ASI and AOE that was commensurate with the activities of its branches in Ireland.
- (201) Finally, according to the Cooke opinion, it would be untenable in commercial reality to insist that the entire revenue of the trades in question was attributable to the functions carried on by the two branches. This is illustrated by the fact that customers do not queue overnight outside Apple stores around the world for the latest iPhone or iPad because they are sold from Cork, but because of the value generated for such products by the extensive investment, engineering and technological innovation, design reputation and all that goes into the Apple product range, most of which is attributable to what is accomplished in the US or elsewhere.

7.2.3. LETTER OF APPLE OF 7 SEPTEMBER 2015 (WITH EXPERT OPINION)

- (202) In a letter of 7 September 2015, Apple commented on the minutes that had been sent by the Commission to Ireland in follow-up to the meeting on 7 May 2015. Apple noted that the Commission failed to show that Apple was advantaged by the contested tax rulings and that ASI and AOE were treated selectively by the Irish Revenue relative to companies in a similar situation.

⁽¹¹⁶⁾ The [Apple's tax advisor] *ad hoc* report is referred to by Ireland in its submission of 18 February 2016, in which Ireland transmitted to the Commission the PwC *ad hoc* report. According to the letter by Ireland on 17 November 2014, Apple forwarded an analysis by [Apple's tax advisor] [...]. So far as Ireland is aware, the Commission has not at any stage taken issue with that analysis or expressed any disagreement with it.

⁽¹¹⁷⁾ Case C-446/03 *Marks & Spencer v Halsey* EU:C:2005:763.

⁽¹¹⁸⁾ [1988] IR 258.

- (203) As regards the correct application of Section 25 TCA 97, the incorrect identification of the reference framework and the non-applicability of the arm's length principle, Apple raises the same arguments as Ireland in its letter of 17 July 2015. With respect to the objective of the Irish corporate income tax system and residency, Apple also makes essentially the same arguments as Ireland. As ASI and AOE are non-resident in Ireland for tax purposes, they are not in a comparable factual and legal situation with Irish resident companies based on the plain language of Ireland's tax law.
- (204) In support of its position, Apple submitted the [Apple's advisor] opinion. That opinion concludes that Ireland properly considered that ASI and AOE were non-resident companies and that Ireland's treatment of ASI and AOE as non-resident companies different from Irish resident companies is consistent with the international tax principle of territoriality. ASI and AOE are therefore not in a legal and factual situation that is comparable with that of Irish resident companies. Moreover, according to that opinion, no Apple IP or profit derived from an Apple IP is attributable to the Irish branches because the 'significant people functions' with respect to IP are all performed outside of Ireland. According to that opinion, to attribute the income to the branches a comparison needs to be made with a hypothetical resident company that is engaged only in local activities, without legally or economically owning or exploiting any IP rights. The allocation of income should thereby follow the functions, risks and assets of the Irish branches and not, pursuant to the 'force of attraction' principle — that has been explicitly rejected by the OECD — lead to attributing non-Irish-source income. The allocation of profits to the Irish branches based solely on the activities taking place in the branches, that is to say, without regard to the activities outside the branches, whether within ASI/AOE or within other Apple group companies was therefore fully in line with the profit allocation to branches as follows from public international law and international tax principles, including the 2010 OECD Profit Attribution Report and Union case law.
- (205) Furthermore, according to the [Apple's advisor] opinion, the Irish branches do not own any IP and have nothing to do with any aspect of the management of IP. All IP management, including all the activities necessary to fund, create, assert and protect IP, occurs outside of Ireland. The 'significant people functions' are all outside of Ireland and thus all the value creation takes place outside of Ireland. The Commission's argument that the boards of ASI and AOE do not actively manage the IP is incorrect. According to the [Apple's advisor] opinion, the ASI and AOE board minutes and further submissions by Apple to the Commission show decision making regarding issues of key strategic importance for ASI/AOE, including dealing with (i) financial matters such as investment decisions, bank account authority and capital maintenance issues; (ii) the consideration and approval of the financial statements; and (iii) delegation of authority within certain parameters in respect of the business activities, all having taken place in the US and not in Ireland.
- (206) According to the [Apple's advisor] opinion, for the purposes of determining the amount of profits to be allocated to the permanent establishment of a non-resident company under the OECD Model Tax Convention (along with the domestic tax rules of many countries), after establishing through a functional analysis what is actually happening within the permanent establishment, a comparison with a (fictitious) resident company has to be made. This comparison ('as if') is made because in the absence of a legally separate entity, no legal yardstick is available for isolating within the non-resident company the amount of profits that is understood to have been earned locally by the non-resident company. When making the comparison, the following point is highly important: the (fictitious) resident company with which the comparison is made is a very particular one; it is a resident company that derives income only from activities or assets in the State in which it is tax resident. While a resident company is, in its State of residence, generally subject to tax on its worldwide income, the resident company in the comparison only earns income from activities or assets in its State of residence. In other words, the comparison has to be made only with a resident company with activities and assets restricted to the country where the non-resident company is active through its permanent establishment. In the case of Apple, ASI's and AOE's Irish branches cannot be treated as if they were the economic owner of such rights. Therefore,

the comparison is to be made with a company that does not legally or economically own such IP rights either (but which has access to the IP, to the limited extent needed to carry on its (product assembly/procurement, sales and distribution) activities.

- (207) According to the [Apple's advisor] opinion, for the determination of whether the IP (and the profits derived therefrom) can be attributed to the Irish Branches, it is irrelevant whether staff or board members of ASI and AOE participated (with or without staff and/or board members of Apple Inc.) in performing these highly relevant 'significant people functions'. Since neither ASI nor AOE are tax-resident in Ireland, the only relevant fact that needs to be established is whether staff or board members performed their significant people functions within the permanent establishment through which ASI and AOE carried on business in Ireland. From the functional analysis of the Irish branches, it is apparent that the functions carried out through and in the permanent establishments in Ireland are restricted to procurement, sales and distribution activities (ASI) and to product assembly (AOE). To the extent those branches use the Apple IP in their activities in Ireland, the rights to which are granted to ASI and AOE under the CSA, they do not do so as a licensor that manages and exploits IP rights.
- (208) Finally, the [Apple's advisor] opinion explains that under the so-called 'force of attraction' principle, all non-branch income arising in a source State is deemed to be attributable to the branch in such source State. The application of this principle, however, has been explicitly rejected by the OECD and its Member States. Comparing resident companies that use their IP in their local business activities, with local branches of non-resident companies that are not the economic owner of such IP, such as ASI's and AOE's Irish branches, would amount to a flagrant breach of OECD principles.

7.3. LETTERS FROM APPLE OF 25 JANUARY 2016, 18 FEBRUARY 2016 (WITH EXPERT OPINION) AND 14 MARCH 2016

- (209) In its letters of 25 January, 18 February and 14 March 2016, Apple explains that Apple, Inc. holds the legal title to the IP which is developed and controlled outside of Ireland and that it would be contrary to Irish law and international tax principles for Ireland to tax any profits resulting from the IP. Furthermore, Apple explains that the profits of ASI and AOE, other than the profits from the activities of the Irish branches, are subject to deferred taxation in the US. Apple also states that the Commission has changed its theory of State aid since the Opening Decision and that the approach of the Commission which intends to impose a massive retroactive tax on Apple by attributing to the Irish branches all of Apple's global profits is contrary to the arm's length principle.
- (210) Together with its letter of 18 February 2016, Apple submitted an update to the [Apple's tax advisor] *ad hoc* report, providing an additional analysis taking into account the submissions made since that report (the second [Apple's tax advisor] *ad hoc* report). The second [Apple's tax advisor] *ad hoc* report describes in more detail the non-branch functions and focuses on the activities performed by the boards of ASI and AOE. The [Apple's tax advisor] *ad hoc* report does not mention the role performed by the boards, but just refers to ASI and AOE as 'the legal entities' compared to 'AOE and ASI Irish Branch'. According to the second [Apple's tax advisor] *ad hoc* report, the ownership, management and funding of the IP should be allocated to ASI's and AOE's non-branch functions⁽¹¹⁹⁾, since ASI and AOE assume the risk and obligations under the CSA, through the authority exercised by the boards acting outside of Ireland. According to the second [Apple's tax advisor] *ad hoc* report, each instance of the CSA was approved and executed by the boards of ASI and AOE outside of Ireland. ASI's and AOE's boards perform active and critical roles with regard to IP management, which takes place outside of Ireland. The boards of ASI and AOE participate in new product introductions and in the process of the worldwide pricing of Apple products outside of Ireland. According to the report, at the direction of ASI's board,

⁽¹¹⁹⁾ The report concludes that 'based on the non-branch functions' performance of significant people functions through the AOE and ASI Boards acting outside of Ireland relating to the CSA participation, IP development, IP management, new products introductions, pricing, contracting, bearing and funding key business risks, and ownership and funding of significant valuable intangible property, it is appropriate to characterise the AOE and ASI Non-Branch Functions as the entrepreneur and beneficial owner of Apple IP outside of the Americas'.

ASI and Apple Inc. entered into a Marketing Service Agreement under which Apple Inc. performs marketing functions on behalf of ASI. Furthermore, the report describes that ASI's board or persons authorised under a power of attorney, negotiate, approve and sign agreements with telecom companies and with suppliers and manufacturers preselected by Apple Inc. to make Apple products for sale outside of the Americas.

- (211) The second [Apple's tax advisor] *ad hoc* report further elaborates on the Authorised OECD Approach with regard to cost sharing agreements and permanent establishments. In that context, that report refers to paragraph 212 of the 2010 OECD Profit Attribution Report where it is stated that a permanent establishment and its head office could be considered as economic co-participants in an activity corresponding to a cost sharing agreement under certain conditions. That report then concludes that this is not the case for ASI, AOE and their respective Irish branches, since no significant people functions relating to the exploitation of IP were employed by or located at the Irish branches, no decisions associated with the exploitation of IP were made in Ireland, and no IP funding risks were borne by the Irish branches. The report finally concludes that, based on the functional analysis, it was justified to select the Irish branches as the less complex entity and tested party for the profit allocation methods endorsed by the contested tax rulings, since the branches only performed relatively routine sales and distribution activities and manufacturing activities and made no unique contributions.

7.4. LETTER FROM IRELAND OF 18 FEBRUARY 2016 (WITH EXPERT OPINION)

- (212) On 18 February 2016, Ireland submitted an 'Expert Opinion on the profit attributed to ASI Irish Branch and AOE Irish Branch between 2007 and 2011' to the Commission, produced by the tax advisor PwC (the PwC *ad hoc* report). The objective of that report was to provide an opinion concerning the arm's length nature of the outcome of the allocation of profit to ASI's and AOE's Irish branches.
- (213) The PwC *ad hoc* report claims to apply the two-step approach of the Authorised OECD Approach. According to that report, the first step of that approach consists of a functional analysis, in which significant people functions are identified. The second step consists of testing the arm's length nature of the pricing applied during the period of application of the contested tax rulings ⁽¹²⁰⁾. Based on a functional analysis, the report concludes that ASI's and AOE's Irish branches did not make a unique, valuable contribution to the Apple global value chain, but merely executed routine activities ⁽¹²¹⁾. The report further identifies areas where the branches did not contribute, such as the creation, management, deployment or strategic direction of Apple IP. The report also indicates that ASI's Irish Branch did not perform any marketing activities.
- (214) In a second part of the PwC *ad hoc* report dedicated to testing the arm's length nature of the arrangement entered into by the Irish branches of ASI and AOE, the report selects profit level indicators, which are the Berry ratio for ASI and a full cost mark-up for AOE. The report calculates the level of the selected indicators for ASI and AOE for the period 2007 to 2011. The outcome is compared to what the report refers to as 'industry basis' for independent companies. The industry basis is presented in the PwC *ad hoc* report in the form of statistical indicators including the upper quartile, the median, the lower quartile and the number of companies included in the sample.

⁽¹²⁰⁾ The two steps as described by the PwC *ad hoc* report are not identical to the two-step approach presented in the OECD Profit Attribution Report, despite the reference made by the tax advisor to the Authorised OECD Approach.

⁽¹²¹⁾ The functional analysis undertaken does not identify significant people function in the head offices of ASI and AOE or the Irish branches. Instead, it refers to senior executives located in the US.

- (215) Regarding ASI, the comparables search undertaken by PwC is based on companies active in wholesale of electrical household appliances, computer products and software and electronic and telecommunication equipment as well as warehousing and support activities for transport ⁽¹²²⁾. The PwC *ad hoc* report then describes three types of risks assumed by ASI's Irish branch. First, ASI's Irish branch faces the inventory risk, in particular associated with carrying insufficient or excessive inventory. Second, ASI's Irish Branch is exposed to warranty risk. ASI performed warranty and aftersales support services. Engineering support and manufacturing processes for AppleCare screening lines were controlled by a US-based team. Third, ASI's Irish branch is exposed to the credit risk of being unable to collect payments from customers. Owing to the group's risk management policy all those risks are very limited.
- (216) The report concludes that with regard to ASI's Irish branch, the average arm's length range of Berry ratio for comparable limited risk service providers is between 108,3 % and 137,95 % with a median of 116,72 %. During the period 2007 to 2011, ASI's Irish branch earned a Berry ratio exceeding the lower quartile.
- (217) With regard to AOE's Irish branch, the average of the arm's length range of full cost mark-up for comparable limited risk manufacturing entities for the period 2007 to 2011 was between 3,19 % and 7,95 % with a median of 5,21 %. During that period, AOE's Irish branch earned a full cost mark-up exceeding that median each year.

7.5. LETTERS FROM IRELAND OF 17 FEBRUARY AND 23 MARCH 2016

- (218) By letters of 17 February and 23 March 2016, Ireland again commented on the alleged inconsistency between the reasoning in the Opening Decision and the Commission's theory of State aid developed since then, as well as the Commission's alleged refusal to engage in a dialogue with Ireland and Apple. According to Ireland, the failure by the Commission to explain its reasoning undermines its rights of defence and it is incumbent on the Commission to explain its case before the final decision is adopted. Furthermore, the absence of any response from the Commission on the expert reports submitted by Ireland and Apple can, in Ireland's view, only be understood as acceptance of the conclusions in those reports by the Commission.
- (219) Ireland also claims the Commission's investigation into the contested tax rulings to be biased as manifested by public statements made by Commission officials prejudging the outcome of the investigation and the repeated requests for information by the Commission. According to Ireland, the requests for large amounts of information covering a wide range of issues show the Commission's determination to find unlawful State aid, disregarding its duty to investigate impartially.

8. ASSESSMENT OF THE CONTESTED MEASURES

8.1. EXISTENCE OF AID

- (220) According to Article 107(1) of the Treaty, 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

⁽¹²²⁾ The full list of 52 companies retained by PwC for the comparison is the following: IRES — S.P.A., ACTIVA DISTRIBUCIO D'ELECTRODOMESTICS, SA, AVESTA, ELECTRODOMESTICS CANDELSA, SA, ELETTROLAZIO S.P.A., B2BIRES S.R.L., M HERMIDA INFORMATICA SA, TEDUIN SA, PROFESSIONNAL COMPUTER ASSOCIES FRANCE, EUROP COMPUTER PERFORMANCE, DACOM S.P.A., COM 2 NETWORKS, ALLNET.ITALIA S.P.A., RECO S.P.A., INFOWORK TECHNOLOGY SL, LINEA 2000, COMPONENTES ELECTRICOS MERCALUZ SA, ENAPEIZ ΔYNAMIKA MEZA E.P.E., SIAM S.R.L., COMERCIANTES DE ELECTRODOMESTICOS CORDOBESES SA, EARPRO SA, REMLE, SA, CONFIG, INTERDAS S.P.A., SANGHA FRANCE, SUMELEC NAVARRA SL, APRA S.P.A., COMERCIANTES DE ELECTRODOMESTICOS DE VALENCIA SA, VERE 85 SA, APLICACIONES TECNOLOGICAS SA, DIGIT ACCESS, AMSTESO ELECTRIC LIMITED, OLISYS, TECNOTEL ITALIA S.R.L. IN LIQUIDAZIONE, TRANS AUDIO VIDEO S.R.L., KONTORLAND AS, CONNECT DATA, FRIGO 2000 S.R.L., NEO TECHNOLOGY, DUWIN SRL, IPOH S.R.L., GIGALOGIE, MIELCO S. P.A. IN LIQUIDAZIONE, FERNANDO CRISTINO, LDA, MOBIMAQUE II — EQUIPAMENTOS DE TELECOMUNICAÇÕES, LDA, INTERPONTO — COMÉRCIO INTERNACIONAL DE EQUIPAMENTOS DE INFORMÁTICA, LDA, TELSERVICE S.R.L., K1 ELECTRONIC GMBH, MT COMPONENTS LIMITED, TULSI IMPORT EXPORT LTD, MEMTEC IBERICA, LAZANAS — XAPAPADAKOU EISAGOGIKI A.E.E.

provision of certain goods is incompatible with the internal market, in so far as it affects trade between Member States. For a measure to be categorised as aid within the meaning of Article 107(1), all the conditions set out in that provision must be fulfilled ⁽¹²³⁾. It is thus well-established that, for a measure to be categorised as State aid, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on an undertaking and, fourth, it must distort or threaten to distort competition ⁽¹²⁴⁾.

- (221) As regards the first condition for a finding of aid, the contested tax rulings were issued by Irish Revenue, which is the tax administration of the Irish State. Those rulings were used by ASI and AOE to calculate their yearly corporation tax liability in Ireland. Irish Revenue has accepted those calculations and, on that basis, accepted that the tax paid by ASI and AOE in Ireland in the years that those rulings were in force corresponds to their corporation tax liability in Ireland. The contested tax rulings are therefore imputable to Ireland. As regards the financing of the measures through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a positive transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid ⁽¹²⁵⁾. In Section 8.2, the Commission will demonstrate that the contested tax rulings result in a lowering of ASI's and AOE's tax liability in Ireland by deviating from the tax that those undertakings would otherwise have been obliged to pay under the ordinary rules of taxation of corporate profit in Ireland. By renouncing tax revenue that Ireland would otherwise have been entitled to collect from ASI and AOE under those rules, the contested tax rulings gives rise to a loss of State resources ⁽¹²⁶⁾.

- (222) As regards the second condition for a finding of aid, ASI and AOE are part of the Apple group, a globally active multinational group operating in all Member States, so that any aid in their favour is liable to affect intra-Union trade. Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of its recipient as compared to other undertakings with which it competes ⁽¹²⁷⁾. Apple designs, manufactures and markets mobile communication and media devices, personal computers and portable digital music players. It sells a variety of related software, services, peripherals, networking solutions and third-party digital content and applications throughout the world. ASI handles the procurement, sales and distribution activities associated with the sale of Apple products to related parties and third-party customers across the EMEA and APAC regions. AOE manufactures a specialised range of computer products for the EMEA market and supplies all its finished products to related parties. To the extent the contested tax rulings relieve ASI and AOE of a tax liability they would otherwise have been obliged to pay under the ordinary rules of taxation of corporate profit in Ireland, the aid granted under those rulings constitutes operating aid, in that it relieves those undertakings from a charge that they would normally have had to bear in their day-to-day management or normal activities. The Court of Justice has consistently held that operating aid in principle distorts competition ⁽¹²⁸⁾, so that any aid granted to ASI and AOE should be considered to distort or threaten to distort competition by strengthening the financial position of ASI, AOE and the Apple group on the markets on which they operate. In particular, by relieving those undertakings of a tax liability they would otherwise have had to bear and which competing undertakings have to carry, the contested tax rulings free up resources for those undertakings to invest in their business operations, thereby distorting competition on the market, so that the fourth condition for a finding of aid is also fulfilled in this case.

⁽¹²³⁾ See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 38 and the case-law cited therein.

⁽¹²⁴⁾ See Case C-399/08 P *Commission v Deutsche Post* EU:C:2010:481, paragraph 39 and the case-law cited therein.

⁽¹²⁵⁾ See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraph 72 and the case-law cited therein.

⁽¹²⁶⁾ See Case C-169/08 *Presidente del Consiglio dei Ministri* EU:C:2009:709, paragraph 58.

⁽¹²⁷⁾ See Case 730/79 *Phillip Morris* EU:C:1980:209, paragraph 11 and Joined Cases T-298/97, T-312/97 etc. *Alzetta* EU:T:2000:151, paragraph 80.

⁽¹²⁸⁾ Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55 (emphasis added). See also Case C-494/06 P *Commission v. Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited and C-271/13 P *Rousse Industry v Commission* EU:C:2014:175, paragraph 44. Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* EU:C:2011:368, paragraph 136. See also Case C-156/98 *Germany v Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

- (223) As regards the third condition for a finding of aid, an advantage for the purposes of Article 107(1) of the Treaty is any economic benefit that an undertaking would not have obtained under normal market conditions, that is to say, in the absence of the State intervention ⁽¹²⁹⁾. Thus, whenever the financial situation of an undertaking is improved as a result of a State intervention, an advantage is present. Such an improvement is shown by comparing the financial situation of the undertaking as a result of the contested measure with the financial situation of that undertaking had the measure not been granted ⁽¹³⁰⁾. An advantage can consist both in the granting of positive economic advantages as well as in the mitigation of charges normally included in the budget of an undertaking ⁽¹³¹⁾. As regards fiscal measures, an advantage may be granted through different types of reduction in an undertaking's tax burden and, in particular, through a reduction in the taxable base or in the amount of tax due ⁽¹³²⁾. As the Commission will demonstrate in Section 8.2.2, the contested tax rulings result in a lowering of ASI's and AOE's corporation tax liability in Ireland by reducing those undertakings' annual taxable profits, and thus their taxable bases, for the purposes of levying corporation tax on those profits under the ordinary rules of taxation of corporate profit in Ireland. The contested tax rulings therefore confer an economic advantage on those companies through a reduction in their taxable base.
- (224) As regards the selective nature of that advantage, the Court of Justice has previously held that in the case of an individual aid measure, as opposed to a scheme, 'the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective' ⁽¹³³⁾, without it being necessary to analyse the selectivity of the measure according to the three-step analysis devised by the Court of Justice for fiscal State aid schemes ⁽¹³⁴⁾. Since the contested tax rulings are individual aid measures granted only to ASI and AOE, a finding that those measures grant an advantage to ASI and AOE already suffices to conclude that that advantage is selective in nature. Nevertheless, for the sake of completeness, the Commission will examine those measures according to the three-step analysis devised by the Court of Justice for fiscal aid schemes to demonstrate that they are also selective under that analysis. However, in so doing, the Commission's assessment of whether the contested measures constitute a derogation from the reference system (the second step of the selectivity analysis) will coincide with its assessment of whether those measures confer an advantage on ASI and AOE ⁽¹³⁵⁾. That is because the identification of the advantage flowing from the tax measure requires a comparison of the economic position of the beneficiary of that measure with the economic position of that undertaking had the measure not been granted, while the identification of the derogation from the reference system requires a comparison of the economic position of the beneficiary of that measure with the economic position of operators who are in a comparable factual and legal situation to the beneficiary in the light of the objectives of that reference system and who do not benefit from the tax measure in question. In other words, where a tax measure results in an unjustified reduction of the tax liability of a beneficiary that would otherwise be subject to a higher level of tax under the ordinary rules of taxation, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference system.

8.2. EXISTENCE OF A SELECTIVE ADVANTAGE

- (225) According to settled case-law, 'Article 92(1) [now Article 107(1)] of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the

⁽¹²⁹⁾ Case C-39/94 *SFEI and Others* EU:C:1996:285, paragraph 60; Case C-342/96 *Spain v Commission* EU:C:1999:210, paragraph 41.

⁽¹³⁰⁾ See Case 173/73 *Italy v Commission* EU:C:1974:71, paragraph 13.

⁽¹³¹⁾ See, for instance, Case C-387/92 *Banco Exterior de España* EU:C:1994:100.

⁽¹³²⁾ See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, 10.12.1998, p. 3.

⁽¹³³⁾ See Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49 and Case C-15/14 P *Commission v MOL* EU:C:2015:362, paragraph 60.

⁽¹³⁴⁾ See Case T-385/12 *Orange v Commission* EU:T:2015:117, paragraph 53.

⁽¹³⁵⁾ In its observations on the Opening Decision, Apple argues that the advantage and selectivity conditions for a finding of State aid should be assessed separately, because they relate to two different aspects of the notion of State aid. However, in light of the fact that the present decision deals with an individual aid measure and since separating those conditions would lead to unnecessary duplication, the Commission has decided to assess the presence of an advantage alongside the second step of the selectivity analysis.

scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity' ⁽¹³⁶⁾.

- (226) In the case of fiscal State aid schemes, the Court of Justice has devised a three-step analysis to determine whether a measure is selective ⁽¹³⁷⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it is determined whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the reference system, it is then established, in the third step of the analysis, whether that measure is justified by the nature or the general scheme of the reference system. A tax measure which constitutes a derogation to the application of the reference system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system ⁽¹³⁸⁾. If that is the case, the tax measure is not selective. The burden of proof in that third step lies with the Member State.

8.2.1. DETERMINATION OF THE REFERENCE SYSTEM

8.2.1.1. *Reference system composed of the ordinary rules of taxation of corporate profit in Ireland*

- (227) As a general rule, a reference system is composed of a consistent set of rules that apply on the basis of objective criteria to all undertakings falling within its scope as defined by its objective. The identification of the reference system therefore depends on elements such as the taxable persons, the taxable base, the taxable events and the applicable tax rates.
- (228) In this case the reference system is the ordinary rules of taxation of corporate profit under the Irish corporate tax system, which have as their intrinsic objective the taxation of profit of all companies subject to tax in Ireland ⁽¹³⁹⁾. As explained in Section 2.3, corporation tax in Ireland is charged on profits (income and chargeable gains) of a company however arising ⁽¹⁴⁰⁾. The calculation of the corporate taxable base takes as its starting point the corporate accounting profit ⁽¹⁴¹⁾. Irish-resident companies are subject to corporation tax on their worldwide income and capital gains ⁽¹⁴²⁾. Non-resident companies operating through a branch or agency in Ireland are subject to corporation tax on the profits connected with their branch or agency and on any capital gains arising on the disposal of assets used for the purposes of the branch or agency ⁽¹⁴³⁾. Companies that are not resident in Ireland and do not trade through a branch or agency in Ireland are only liable to income tax on any Irish-source income and to capital gains tax on gains arising on the disposal of certain Irish assets, subject to any treaty relief that may be available ⁽¹⁴⁴⁾. The corporate tax rate applicable to the profit of all companies subject to tax in Ireland is 12,5 % for profit derived from trading income and 25 % for non-trading income ⁽¹⁴⁵⁾. From the perspective of the aforementioned rules, all companies having an income are considered to be in a similar factual and legal situation, since the objective of those rules is the taxation of profit subject to tax in Ireland. Consequently, all companies subject to tax in Ireland, whether resident or non-resident, are in a comparable factual and legal situation as regards the ordinary rules of taxation of corporate profit in Ireland.
- (229) That reference system includes both non-integrated companies that derive their profit from arm's length transactions carried out on the market and integrated companies that (partly) derive their profit from transactions carried out within the same company or corporate group. The Irish corporate tax system does not distinguish between companies which derive their profit from market transactions only, such as non-integrated

⁽¹³⁶⁾ See C-172/03 *Heiser* EU:C:2005:130, paragraph 40.

⁽¹³⁷⁾ See Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550.

⁽¹³⁸⁾ See Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550, paragraph 65.

⁽¹³⁹⁾ See also Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550, paragraph 50.

⁽¹⁴⁰⁾ See recital 69.

⁽¹⁴¹⁾ See recital 70.

⁽¹⁴²⁾ See recital 72.

⁽¹⁴³⁾ See recital 73.

⁽¹⁴⁴⁾ See recital 76.

⁽¹⁴⁵⁾ See recital 71.

standalone companies, and companies which derive their profit through internal dealings between companies of the same corporate group or between parts of the same company, such as integrated companies. Both types of companies are subject to corporation tax on their taxable profit at the standard corporate tax rate under the ordinary rules of taxation of corporate profit in Ireland. Thus, non-integrated and integrated companies subject to tax in Ireland should be considered to be in a comparable factual and legal situation as regards those rules.

- (230) The fact that the taxable profit of non-integrated and integrated companies is determined in a different manner does not alter this conclusion. In the case of a non-integrated company that transacts on the market, that company's taxable profit can, in principle, be directly observed and calculated on the basis of such market transactions, as it is based on the difference between income and costs in a competitive market. Consequently, a non-integrated company will take its accounting profit as the starting point for determining the taxable base to which Irish corporation tax applies, since that profit is determined on the basis of prices dictated by the market for the inputs acquired and the products and services sold by the company. By contrast, the determination of the taxable profit of an integrated company, whether a company belonging to a corporate group or a company operating in more than one jurisdiction through a branch, requires the use of estimates. That is because an integrated company, whose constituent parts transact amongst themselves, is able to set the prices and conditions of those internal dealings independently of other market participants, which, in turn, determine the taxable profit of the parts of that company taking part in those transactions ⁽¹⁴⁶⁾. This difference in determining the taxable profit of non-integrated and integrated companies is therefore due to the fact that the profits of integrated companies or of branches cannot be observed in a reliable way from the statutory accounts, in contrast to non-integrated companies or companies which do not engage in any form of internal dealings and where the accounts therefore reflect prices negotiated at arm's length on the market. However, this difference in determining the taxable profits of non-integrated companies and integrated companies is merely the means by which to achieve the ultimate goal of determining the taxable base of both types of companies in a manner that ensures that integrated companies are taxed on an equal footing to non-integrated companies under the ordinary rules of taxation of corporate profit.
- (231) Apple argues ⁽¹⁴⁷⁾ that transactions between related companies are not comparable to transactions between unrelated companies. Apple cites the *Groepsrentebox* Decision ⁽¹⁴⁸⁾, where the Commission allegedly accepted that financial relationships between companies belonging to a corporate group and intra-group transactions are different from and not driven by the same competitive and economic rationale as those between unrelated companies, so that they may, therefore, warrant a different tax treatment. As a preliminary matter, the Commission would like to recall that, since each potential aid measure must be assessed on the basis of its own merits under the objective criteria of Article 107(1) of the Treaty, even if the Commission could be shown to have decided differently in another decision, that could not affect the findings of this decision ⁽¹⁴⁹⁾.
- (232) In any event, the Commission does not share Apple's reading of the *Groepsrentebox* Decision. Contrary to what Apple claims, that Decision does not confirm that where a tax measure is granted in favour of a company deriving profits through internal dealings, the reference system must necessarily be limited to companies deriving profits through such dealings. Moreover, the objective of the tax measure at the basis of that Decision is not comparable to this case and, therefore, the conclusions that can be drawn from it are not applicable to this case.
- (233) The *Groepsrentebox* scheme was set up by the Dutch authorities to reduce the difference in tax treatment between the provision of equity capital and loan capital in a group context and, as such, to reduce arbitrage between those two forms of intra-group financing ⁽¹⁵⁰⁾. The Commission observed in the final decision that given the objective of the measure, it is 'only group companies, [and not stand-alone companies,] that are confronted with arbitrage

⁽¹⁴⁶⁾ This is the case for ASI and AOE, where the profits of the two companies have to be attributed between the branches, tax residents in Ireland and the head offices, which are not tax resident in Ireland, although in the specific case of ASI and AOE no other jurisdiction is involved, as the head offices are not tax resident anywhere.

⁽¹⁴⁷⁾ Observations of Apple on the Opening Decision, paragraph 209.

⁽¹⁴⁸⁾ Commission Decision 2009/809/EC of 8 July 2009 on the *groepsrentebox* scheme which the Netherlands is planning to implement (C 4/07 (ex N 465/06)) (OJ L 288, 4.11.2009, p. 26) (hereinafter '*Groepsrentebox* decision').

⁽¹⁴⁹⁾ See Case C-100/15 P *Netherlands Maritime Technology Association v Commission* EU:C:2016:254 paragraph 110 and Case C-138/09 *Todaro Nunziatina & C.* EU:C:2010:291, paragraph 21.

⁽¹⁵⁰⁾ The scheme provided that the positive balance between interest received on group loans and interest paid in the context of intra-group financing transactions was not taxed at the standard corporate tax rate of 25,5 % at the time, but taxed in a 'group interest box' at the rate of 5 %.

between equity capital and loan capital within their group' ⁽¹⁵¹⁾. It was in the light of that observation, as well as of the objective of the scheme which was 'to reduce incentives for arbitrage between financing through a capital injection and a loan, and ensuring tax neutrality in this regard' ⁽¹⁵²⁾, that the Commission considered the reference system in that case to include only companies subject to corporation tax and engaged in intra-group financing transactions ⁽¹⁵³⁾. By contrast, the objective of the contested tax rulings is to determine ASI's and AOE's taxable base for the purposes of levying the Irish corporation tax on that amount.

- (234) While it could be argued that the objective underlying the *Groepsrentebox* Decision is only valid in a group context (being the fact that stand-alone companies are not faced with the issue of arbitrage between different forms of financing), the determination of the taxable base for the computation of the annual corporation tax liability is equally relevant and applicable to entities that derive their profits through internal dealings, as well as standalone domestic companies. Furthermore, ASI functions as the procurement and distribution company of the Apple group and AOE as the manufacturing company. Those companies provide services to other companies of the Apple group. However, the transactions they carry out could also be carried out outside a group context. Indeed, Apple procures most of its inputs from independent manufacturers.
- (235) Those characteristics of this case confirm that the observation of the Commission in the *Groepsrentebox* Decision — that with respect to intragroup debt financing, related companies are not in a legal and factual situation comparable to that of unrelated companies — cannot be generalised for situations where the objective of a tax ruling is to determine the taxable base for the purposes of levying corporation tax on that amount. According to the arm's length principle, commercial and financial relations between associated companies engaging in internal dealings should not differ from relations which would be made between independent companies ⁽¹⁵⁴⁾. It is precisely the objective of transfer pricing rules that transactions between group/associated companies are compared to transactions between independent companies and any deviation needs to be corrected. On this basis, Apple's reliance on the *Groepsrentebox* Decision is misplaced.

8.2.1.2. *The reference system is not restricted to Section 25 TCA 97 only*

- (236) Ireland ⁽¹⁵⁵⁾ and Apple ⁽¹⁵⁶⁾ argue that non-resident companies are not in a comparable factual and legal situation to resident companies since resident companies are taxed on their worldwide income, while non-resident companies are only subject to tax on their locally-sourced income, that is to say, trading income arising directly or indirectly through or from an Irish agency or branch.
- (237) The Commission accepts this distinction, but does not consider its existence to justify the identification of a separate reference system distinct from the ordinary rules of taxation of corporate profit in Ireland. The fact remains that, for the purposes of determining their taxable base and determining their corporation tax liability, both types of companies are in a comparable factual and legal situation as regards the intrinsic objective of those rules, which is to tax the profit of all companies, resident or non-resident, subject to tax in Ireland. ⁽¹⁵⁷⁾
- (238) As regards the method of determining the taxable base, both resident and non-resident taxpayers are taxed on their profit (income and chargeable gains), however arising, this being determined for both Irish resident companies and non-resident companies on the basis of the rules set out in recitals 69 and 70. In this case, even if ASI and AOE are non-resident companies, the Irish branches of ASI and AOE generate income and profits just

⁽¹⁵¹⁾ *Groepsrentebox* decision, recital 85.

⁽¹⁵²⁾ *Groepsrentebox* decision, recital 101.

⁽¹⁵³⁾ *Groepsrentebox* decision, recital 107.

⁽¹⁵⁴⁾ See recital 251.

⁽¹⁵⁵⁾ See letter from Ireland of 4 May 2015, p. 3.

⁽¹⁵⁶⁾ Observations of Apple on the Opening Decision, paragraphs 137, 210.

⁽¹⁵⁷⁾ See, in particular, Section 21(1) TCA 97.

like any resident company engaged in a trading activity and, in the case of source income from the production or sale of goods and services in Ireland, both resident companies and non-resident companies are taxed on the same type of income ⁽¹⁵⁸⁾.

- (239) That non-resident and resident companies are in a comparable situation as regards the method of determining their taxable base is further supported by the case-law of the Court of Justice on the taxation of branches in the context of Article 49 of the Treaty. For example, in its judgment in the case *Royal Bank of Scotland*, the Court held that a company having its seat in Greece and the Greek branch of a company having its seat in another Member State are in an objectively comparable situation. While the Court acknowledged that companies having their seat in Greece are taxed on their worldwide income, whereas non-resident companies are only subject to tax on locally-sourced profit, it further explained ‘that circumstance, which arises from the limited fiscal sovereignty of the State in which the income arises in relation to that of the State in which the company has its seat is not such as to prevent the two categories of companies from being considered, all other things being equal, as being in a comparable situation as regards the method of determining the taxable base’ ⁽¹⁵⁹⁾. Similarly, in its judgment in the case *CLT-UFA*, the Court held that there was no objective justification for treating a company differently and less favourably in respect of its German branch due to the fact that its seat and central administration were in Luxembourg, than would have been the case if it had carried on its activity in Germany in the legal form of a limited liability company or public limited company having its seat and/or its central administration in Germany. In particular, the Court observed ‘that the national legislation on the manner of determining the taxable amount does not draw a distinction between companies with their seat in another Member State, according to whether they pursue their activities through a branch or a subsidiary, which is capable of justifying a difference in treatment between the two categories of companies’ ⁽¹⁶⁰⁾.
- (240) Contrary to Ireland’s claim ⁽¹⁶¹⁾, the Commission does not consider that case-law to mean that resident and non-resident companies must be taxed on the same basis as regards what sources of income fall to be taxed. The Commission accepts that, as a result of the territoriality principle, resident and non-resident companies are taxed on different sources of income, as the Court itself recognised. Rather, the Commission considers that case-law to mean that, since resident and non-resident companies are subject to the same ordinary rules of taxation of corporate profit, the residency status of a corporate taxpayer cannot justify a discriminatory tax treatment for either type of company when determining those companies’ corporation tax liability under those rules. In other words, both types of companies are in a similar factual and legal position as regards the taxation of their corporate profits subject to tax in Ireland.
- (241) As regards the determination of the corporation tax liability, this is determined for both non-resident and resident companies in the same manner, namely by applying the standard corporate tax rate to the amount of net profit earned as a result of the activities of the resident company or of the branch of the non-resident company at the end of the tax year ⁽¹⁶²⁾. Thus, also from that perspective, both types of companies are in a similar factual and legal position as regards the taxation of their corporate profit subject to tax in Ireland.

8.2.1.3. Conclusion on the reference system

- (242) In light of the foregoing, the Commission considers that the reference system against which the contested tax rulings should be examined is the ordinary rules of taxation of corporate profit in Ireland, as set out in recital 228 and further elaborated in Section 2.3, which have as their intrinsic objective the taxation of profit of all companies subject to tax in Ireland. As explained in recitals 229 and 235, that reference system includes both

⁽¹⁵⁸⁾ Only in case of other income, namely income in the form of dividends or interest, are resident companies be taxed on their worldwide income, while non-resident companies will — consequently — not be taxed at all.

⁽¹⁵⁹⁾ Case C-311/97 *Royal Bank of Scotland* EU:C:1999:2664, paragraph 29.

⁽¹⁶⁰⁾ Case C-253/03 *CLT-UFA* EU:C:2006:129, paragraph 29.

⁽¹⁶¹⁾ See, for instance, letter from Ireland of 17 July 2015, paragraphs 32 and 33.

⁽¹⁶²⁾ See, in this regard, Case C-253/03 *CLT-UFA* EU:C:2006:129, paragraph 33: ‘[...] it is necessary to apply a tax rate to the profits made by a branch which is equivalent to the overall tax rate which would have been applicable in the same circumstances to the distribution of the profits of a subsidiary to its parent company.’ See also Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550, paragraph 50.

non-integrated and integrated companies and, as explained in recitals 237 to 241, both resident and non-resident companies. Section 25 TCA 97 should therefore be considered to form an integral and necessary part of that reference system, but not a separate reference system unto itself.

- (243) That the ordinary rules of taxation of corporate profit in Ireland constitute the appropriate reference system in this case is confirmed by the contested tax rulings themselves. The purpose of those rulings is to determine ASI's and AOE's annual taxable profit in Ireland for the purpose of levying corporation tax on that profit under those rules. Indeed, ASI's and AOE's yearly taxable profit in Ireland, which results from the application of the contested tax rulings, is taxed on the basis of Section 21(1) TCA 97 at the standard corporate tax rate of 12,5 % for trading income and 25 % for non-trading income, just like the profit of every other company subject to tax in Ireland, whether non-integrated or integrated, resident or non-resident. Thus, the ultimate goal of the exercise conducted for the purpose of the contested tax rulings is to arrive at an annual taxable profit for ASI and AOE that ensures that those non-resident companies are taxed on their locally-sourced income in a similar manner to non-integrated resident companies under the ordinary rules of taxation of corporate profit in Ireland. As Ireland itself explained in the course of the administrative procedure: 'Revenue, in the course of its normal operations, engages with tax payers, in order to provide clarity as to the application of tax law [...]. The objective is to ensure that the correct Irish tax is paid by these companies on that portion of their profits that is within the scope of Irish corporation tax, including, in relation to non-resident companies, that portion of their profits that is attributable to their Irish branch operations. It is in this context that Revenue engages with Apple Operations Europe and Apple Sales International to ensure that the profits attributed to their Irish branches were commensurate with the activities undertaken by those branches.' ⁽¹⁶³⁾

8.2.2. SELECTIVE ADVANTAGE RESULTING FROM A DEROGATION FROM THE ORDINARY RULES OF TAXATION OF CORPORATE PROFIT IN IRELAND GIVING RISE TO A REDUCTION OF THE TAXABLE BASE

- (244) The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. However, like any other fiscal measure, the granting of a tax ruling must respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, without justification, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that taxpayer's tax liability in the Member State as compared to companies in a similar factual and legal situation.
- (245) The contested tax rulings endorse methods for allocating the profit of ASI and of AOE to their respective Irish branches, which allow those companies to determine their taxable profit and thus their corporation tax liability in Ireland on a yearly basis for the period during which those rulings were in force. Having determined that the ordinary rules of taxation of corporate profit in Ireland, including but not limited to Section 25 TCA 97, constitute the reference system against which the contested tax rulings should be assessed, it is necessary to establish whether those rulings constitute a derogation from that reference system, leading to unequal treatment between companies that are factually and legally in a similar situation. As explained in recital 224, the Commission's assessment whether the contested tax rulings derogate from that reference system will coincide with its identification of the economic advantage conferred on ASI and AOE as a result of those rulings.

8.2.2.1. *The applicability of the arm's length principle in the application of Sections 21(1) and 25 TCA 97*

(a) **Section 25 TCA 97 requires the use of a profit allocation method**

- (246) According to Section 21(1) TCA 97, corporation tax in Ireland is charged on the profit of companies. Section 25 TCA 97 provides that a company not resident in Ireland that carries on a trade through a branch or agency in

⁽¹⁶³⁾ Letter from Ireland of 9 July 2013, Annex 1, p. 9.

Ireland is subject 'to corporation tax on all its chargeable profits wherever arising'. To determine a non-resident company's tax liability in Ireland under Section 21(1) TCA 97, it is therefore first necessary to determine its chargeable profits within the meaning of Section 25 TCA 97.

- (247) For this purpose, Section 25 TCA 97 specifies that chargeable profits are equal to 'any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency, but this paragraph shall not include distributions received from companies resident in the State'. The indication of trading income implies that non-trading, that is to say, passive income, such as interest income and dividends, is excluded from its scope. However, Section 25 TCA 97 applies in situations where, in principle, no separate ownership of assets can be established on the basis of contracts between the various parts of the same non-resident company and where risks and functions cannot be contractually delineated to provide guidance on the chargeable profit of an Irish branch as opposed to the other parts of that company. Section 25 TCA 97 also does not contain any reference as to how to distinguish between trading income recorded in the accounts of the Irish branch (directly or indirectly) as opposed to income which is generated by the other parts of the company outside of Ireland and not directly or indirectly by the Irish branch.
- (248) The wording and purpose of Section 25 TCA 97 thus reveal that that provision can only be applied in connection with a method to allocate profit. Ireland itself acknowledges that Section 25 TCA 97 does not provide guidance on how to determine the chargeable profit of an Irish branch, but requires the use of a profit allocation method ⁽¹⁶⁴⁾, as does Apple ⁽¹⁶⁵⁾. This is also confirmed by the contested tax rulings themselves, the purpose of which is to establish a profit allocation method so that the chargeable profits of ASI's and AOE's respective Irish branches can be determined for the purposes of Section 25 TCA 97 and subsequently taxed under the ordinary rules of taxation of corporate profit in Ireland.

(b) Article 107(1) of the Treaty requires the profit allocation method to be based on the arm's length principle

- (249) According to settled case-law, any fiscal measure a Member State adopts, including a tax ruling endorsing a profit allocation method for determining a branch's taxable base, must comply with the State aid rules, which bind the Member States and enjoy primacy over their national legislation ⁽¹⁶⁶⁾. The Court of Justice has already held that a reduction in the taxable base that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer for the purposes of Article 107(1) of the Treaty ⁽¹⁶⁷⁾. This is because that taxpayer's tax liability, determined under the ordinary rules of taxation of corporate profit, is reduced as compared to independent undertakings whose taxable profit reflects prices determined on the market negotiated at arm's length.
- (250) In its judgment on the Belgian tax regime for coordination centres ⁽¹⁶⁸⁾, the Court of Justice assessed a challenge to a Commission decision which concluded, inter alia, that the method for determining taxable income under that regime conferred a selective advantage on those centres ⁽¹⁶⁹⁾. Under that regime, taxable profits were set at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, 'in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres

⁽¹⁶⁴⁾ Observations of Ireland on the Opening Decision, paragraph 21.

⁽¹⁶⁵⁾ Apple's comments on the Opening Decision, paragraphs 154 and 155: 'Section 25 TCA requires the attribution of profits to the branch.'

⁽¹⁶⁶⁾ See Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 ASBL v. Commission*, EU:C:2006:416, paragraph 81; Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom*, EU:C:2011:732; Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 25, and Order in Case C-529/10 *Safilo* EU:C:2012:188, paragraph 18; See also Case T-538/11 *Belgium v. Commission* EU:T:2015:188, paragraph 66.

⁽¹⁶⁷⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416.

⁽¹⁶⁸⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416.

⁽¹⁶⁹⁾ Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25).

confers an advantage on them, it is necessary, [...], to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.' The Court then held that 'the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition', which the Court found to '[confer] an advantage on the coordination centres' ⁽¹⁷⁰⁾.

- (251) The Court has thus accepted that a tax measure which results in an integrated group company charging transfer prices that do not reflect those which would be charged in conditions of free competition, that is prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length, confers a selective advantage on that company, in so far as it results in a reduction of its taxable base and thus its tax liability as determined under the ordinary rules of taxation of corporate profit. As already explained, the principle that transactions between integrated group companies should be remunerated as if they were agreed to by non-integrated standalone companies negotiating under comparable circumstances at arm's length is referred to as the 'arm's length principle'. In its judgment on the Belgian tax regime for coordination centres, the Court of Justice endorsed the arm's length principle as the benchmark for establishing whether an integrated group company receives a selective advantage for the purposes of Article 107(1) of the Treaty as a result of a tax measure that determines its transfer pricing and thus its taxable base.
- (252) The purpose of the arm's length principle is to ensure that transactions between integrated group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been carried out by non-integrated standalone companies. Otherwise, integrated group companies would benefit from a favourable treatment under the ordinary rules of taxation of corporate profit when it comes to the determination of their taxable base which is not available to non-integrated standalone companies, leading to unequal treatment between companies that are factually and legally in a similar situation in light of the objective of those rules, which is to tax the profits of all companies falling under its scope of taxation, since both companies' taxable profit is taxed at the same corporate income tax rate.
- (253) The same principle applies to the internal dealings of different parts of the same integrated company, such as a branch that transacts with other parts of the company to which it belongs. As explained in recitals 228 to 242, all companies subject to corporation tax in Ireland, whether resident or non-resident, non-integrated or integrated, should be considered to be in a similar factual and legal situation in light of the intrinsic objective of the ordinary rules of taxation of corporate profit in Ireland, which is to tax the profit of all companies subject to tax in Ireland. As explained in recital 230, a non-integrated company's taxable profit is determined by prices dictated by the market for the inputs acquired and the products and services sold by that company, as reflected in its accounts, and it is that profit which forms the starting point for determining its taxable base upon which corporation tax in Ireland is levied on the basis of Sections 21(1) and 26 TCA 97. Consequently, to ensure that a profit allocation method endorsed by a tax ruling does not selectively advantage a non-resident company operating through a branch in Ireland, that method must ensure that that branch's taxable profit, on which corporation tax is levied on the basis of Sections 21(1) and 25 TCA 97, is determined in a manner that reliably approximates a market-based outcome in line with the arm's length principle. A tax ruling that allows a non-resident company to allocate profit to its branch in such a manner that that branch is left with a taxable profit that does not reliably approximate prices determined on the market negotiated at arm's length will confer a selective advantage on that company under the ordinary rules of taxation of corporate profit in Ireland, which is not available to non-integrated companies, in so far as it allows that company to reduce its taxable base and thus its Irish corporation tax liability.
- (254) The Commission therefore considers that, for the purposes of establishing whether a selective advantage has been granted by Irish Revenue to ASI and AOE by way of the contested tax rulings, it is necessary to apply the

⁽¹⁷⁰⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraphs 96 and 97.

principle that transactions within an integrated company should be conducted as if they were carried out between non-integrated companies on the market ⁽¹⁷¹⁾. Only where the prices charged for intra-company transactions, which are used to determine the taxable base of the constituent parts of that company, reliably approximate prices negotiated at arm's length on the market, can the presence of a selective advantage pursuant to Article 107(1) of the Treaty be excluded. This is because it is only in that scenario that non-resident companies will be treated on an equal footing with non-integrated companies, when it comes to the determination of their taxable base and thus their corporation tax liability under the ordinary rules of taxation of corporate profit in Ireland.

(255) Contrary to the claims made by Ireland ⁽¹⁷²⁾ and Apple ⁽¹⁷³⁾, the Commission does not directly apply Article 7(2) and/or Article 9 of the OECD Model Tax Convention or the guidance provided by the OECD on profit allocation or transfer pricing, as described in Section 2.4, in its State aid assessment of tax rulings on profit allocation and transfer pricing. As explained in recital 79, the OECD framework consists of non-binding guidance on profit allocation and transfer pricing methods that do not deal directly with matters of State aid ⁽¹⁷⁴⁾. Rather, when examining a tax ruling under the State aid rules, the Commission applies Article 107(1) of the Treaty and the arm's length principle, as interpreted by the Court of Justice as described in recital 250. However, while the OECD framework is non-binding, the Commission considers that framework to provide useful guidance to tax administrations and multinational enterprises on how to ensure that transfer pricing and profit allocation arrangements produce outcomes in line with market conditions. Therefore, to the extent a profit allocation method departs from the guidance provided by that framework, this provides an additional indication that that method does not result in a reliable approximation of a market-based outcome in line with the arm's length principle. Conversely, a tax ruling endorsing a profit allocation method that fully complies with the guidance provided by the OECD framework in letter and spirit, including the guidance on the choice of the most appropriate transfer pricing method, is unlikely to confer a selective advantage upon its recipient.

(256) Contrary to Ireland's submission ⁽¹⁷⁵⁾, the Commission applies the arm's length principle in this context not as a basis for 'imposing' taxes that would otherwise not be due under the reference system, but as a benchmark to verify whether the taxable profit of a branch, to which the ordinary rules of taxation of corporate profit are applied, is determined in a manner that ensures that non-resident integrated companies operating through a branch in Ireland are not granted favourable treatment under those rules as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length.

(257) Finally, as regards Ireland's insistence that Irish tax law does not allow taxes to be imposed on the basis of general principles ⁽¹⁷⁶⁾, the Commission recalls that the arm's length principle it applies flows from Article 107(1) of the Treaty, as interpreted by the Court of Justice, which binds the Member States and from the scope of which national tax rules are not excluded ⁽¹⁷⁷⁾. That principle therefore applies independently of whether the Member State in question has incorporated the arm's length principle in its national legal system.

⁽¹⁷¹⁾ Apple similarly submits, in its submission of comments on the Opening Decision, paragraphs 154 and 155, that the profit attribution exercise under Section 25 TCA 97 requires that the branch is considered as a 'stand-alone entity'.

⁽¹⁷²⁾ Observations of Ireland on the Opening Decision, paragraphs 38 et seq.

⁽¹⁷³⁾ Observations of Apple on the Opening Decision, paragraphs 228 et seq.

⁽¹⁷⁴⁾ The Commission already made it clear in the Opening Decision that it did not apply the OECD TP Guidelines as a source of law, but rather relied on those guidelines as a reference document, while at the same time referring to the arm's length principle as interpreted by the Court of Justice. In fact, after describing the OECD TP Guidelines and the arm's length principle, the Commission continues at recital 57 to state that 'it is in the light of these general observations that the Commission will examine whether the contested tax rulings comply with the arm's length principle'.

⁽¹⁷⁵⁾ Observations of Ireland on the Opening Decision, paragraph 43.

⁽¹⁷⁶⁾ Observations of Ireland on the Opening Decision, paragraph 42, which make reference to an Irish Supreme Court judgment that reads: 'It is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposed the obligation.' (Texaco (Ireland) Ltd v. Murphy (Inspector of Taxes) [1991] 2 Irish Reports 449 at 454 (Supreme Court)).

⁽¹⁷⁷⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraph 81.

(c) **Conclusion: the standard for assessing whether the contested tax rulings confer a selective advantage on ASI and AOE**

- (258) In light of the foregoing observations, if it can be shown that the profit allocation methods endorsed by Irish Revenue in the contested tax rulings result in a taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle, those rulings should be considered to confer a selective advantage on those companies for the purposes of Article 107(1) of the Treaty, in so far as they lead to a lowering of their corporation tax liability under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable base is determined by the profits they generate under market conditions.
- (259) In Sections 8.2.2.2 and 8.2.2.3, the Commission will demonstrate that the contested tax rulings derogate from the ordinary rules of taxation of corporate profit in Ireland because the methods endorsed by those rulings allow ASI and AOE to determine their annual taxable profit in Ireland in a manner that departs from a reliable approximation of a market-based outcome in line with the arm's length principle.
- (260) First and foremost, the Commission considers Irish Revenue's acceptance of the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, upon which the profit allocation methods endorsed by the contested tax rulings are based, to result in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle ⁽¹⁷⁸⁾.
- (261) By a subsidiary line of reasoning, and without prejudice to the conclusion in recital 260, the Commission considers that even if Irish Revenue were right to have accepted the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, which the Commission contests, the profit allocation methods endorsed by the contested tax rulings still result in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle, since those methods are in any event based on inappropriate methodological choices ⁽¹⁷⁹⁾.
- (262) Before expanding on both lines of reasoning, the Commission observes that the contested tax rulings were issued in the absence of a profit allocation or transfer pricing report prepared by Apple. Only the documentation summarised in Section 2.2.3 was available to Irish Revenue when examining the ruling requests. The Commission expressed doubts concerning the lack of a profit allocation or transfer pricing report in the Opening Decision, which have not been allayed. It was only after the Commission adopted its Opening Decision that Ireland and Apple each produced *ad hoc* profit allocation reports, prepared by PwC and [Apple's tax advisor] respectively, to justify the profit allocation methods endorsed by the contested tax rulings *ex post facto*. For the sake of completeness, the Commission will also consider the explanations provided in those reports, in so far as relevant, although they were not available to Irish Revenue at the time those rulings were issued.
- (263) Finally, the Commission observes that although Ireland argued that Section 25 TCA 97 does not require Irish Revenue to follow the guidance provided by the OECD framework when issuing tax rulings, the profit allocation methods endorsed by the contested tax rulings establish a remuneration for all the activities performed by those branches by relying on the operating expenses of the Irish branches, instead of a remuneration from the separate transactions entered into by those branches with their respective head offices. In other words, the one-sided profit allocation methods endorsed by the contested tax rulings appear to resemble a transfer pricing arrangement based on the TNMM with operating expenses as profit level indicator as described in the OECD TP Guidelines.

⁽¹⁷⁸⁾ See Section 8.2.2.2.

⁽¹⁷⁹⁾ See Section 8.2.2.3.

8.2.2.2. *Selective advantage resulting from Irish Revenue's acceptance of the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland*

(264) As explained in recitals 265 to 321, the Commission considers that Irish Revenue's acceptance of the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, upon which the profit allocation methods proposed by Apple and endorsed by the contested tax rulings are based, results in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle.

(a) Profit allocation within a company involves allocating assets, functions and risks between the various parts of that company

(265) In the contested tax rulings, Irish Revenue endorsed one-sided profit allocation methods for the allocation of profit to the Irish branches of ASI and AOE. Those methods are premised on the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be fully allocated outside of Ireland ⁽¹⁸⁰⁾. On the basis of that assumption, the taxable profit of ASI and AOE in Ireland is determined by using a transfer pricing method resembling the TNMM, with the Irish branches being treated as the 'tested party' and the residual profit of ASI and AOE being allocated outside Ireland ⁽¹⁸¹⁾.

(266) Ireland argues that under Section 25 TCA 97 it only has the competence to tax that portion of the profits of the company which is commensurate with the activities of the Irish branches and that this means that, for profit allocation purposes, only the activities that take place in the Irish branches need to be considered by Irish Revenue ⁽¹⁸²⁾. According to Ireland, the Apple IP licences held by ASI and AOE should not be allocated to the Irish branches for tax purposes, since there are no management activities associated with those licences in those branches ⁽¹⁸³⁾. By endorsing a method for calculating the taxable profit of the Irish branches based on the perspective of the Irish branches only, Ireland contends that Irish Revenue correctly applied Section 25 TCA 97 and did not grant a selective advantage to ASI or AOE.

(267) The Commission does not agree with that line of reasoning.

(268) As explained in Section 8.2.2.1, the application of Section 25 TCA 97 necessitates the use of a profit allocation method premised on the arm's length principle. When two independent companies transact with one another, the price charged for that transaction reflects the functions that each company performs in that relationship, taking into account the assets used and the risks assumed by those companies. Therefore, when associated companies transact with one another, to ascertain whether the price of an intra-group transaction is at arm's length, a comparison of the assets used, the functions performed and the risks assumed by each of those companies is necessary ⁽¹⁸⁴⁾.

(269) Contrary to the situation where transfer pricing is used to set commercial conditions between distinct companies belonging to the same corporate group, in the case of profit allocation between different parts of the same

⁽¹⁸⁰⁾ See, for example, observations of Ireland to the Opening Decision, p. 7, according to which '[The Revenue manager who agreed the 1991 basis of profit attribution] attached critical importance to the fact that the Irish branches had no rights to, or interest in, the Apple intellectual property (IP) which was a significant source of the companies' income.'. See also extract from the interview of 30 November 1990, reproduced at recital 64, stating that 'in [Apple's tax advisor]'s view the profit is derived from three sources-technology, marketing and manufacturing. Only the manufacturing element relates to the Irish branch.'

⁽¹⁸¹⁾ See recital 329.

⁽¹⁸²⁾ See recitals 159 and 200.

⁽¹⁸³⁾ See recitals 113, 185, 195 and 213.

⁽¹⁸⁴⁾ See paragraph 1.42 of the 2010 OECD TP Guidelines, reproduced in footnote 61.

company the allocation of assets, functions and risks is not a given, but is itself determined through the profit allocation exercise. This is because, in the case of profit allocation within a company, none of the constituent parts of that company have separate legal personality and none of those parts can therefore be said to separately own the assets or owe the liabilities of that company. Rather, it is the company as a whole, made up of its constituent parts, which owns assets and is liable vis-à-vis creditors. Indeed, a creditor of such a company could have, as a guarantee, a possible claim on all the assets of the company in the event of its insolvency, irrespective of whether those assets have been allocated internally or for tax purposes to the company's head office or to a particular branch.

- (270) Moreover, in such cases, the ownership of assets cannot be directly observed in the statutory accounts of that company in a reliable manner ⁽¹⁸⁵⁾. While the physical presence of personnel or assets in a particular jurisdiction, such as the location of a plant facility, may provide an indication for the appropriate allocation of those assets within a company, intangible assets owned or held by the company, such as IP licences, cannot be observed in a physical form and are therefore more difficult to allocate for tax purposes. Similarly, since no contractual arrangements can exist between two parts of the same company, the ownership of (tangible or intangible) assets within that company cannot be contractually determined.
- (271) Consequently, since ASI's and AOE's Irish branches do not have a separate legal personality from the companies to which they belong, neither those branches nor any other part of those companies, in particular their respective head offices, could be said to separately own the assets or owe the liabilities of those companies. Accordingly, neither the head offices of ASI and AOE nor their respective Irish branches could be said to separately hold the Apple IP licences. Rather, in each case it is the company as a whole, made up of the various parts of that company, which holds those IP licences.
- (272) To ensure that a profit allocation to a branch results in a reliable approximation of a market-based outcome in line with the arm's length principle, account should be taken of the fact that the assets, risks, capital and rights, and obligations arising out of transactions between that branch and the other parts of the same company belong to the company as a whole, rather than to any one part of the company ⁽¹⁸⁶⁾. The profits to be allocated to a branch are then the profits that that branch would have earned at arm's length, in particular in its dealings with the other parts of the company, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the assets used, the functions performed and the risks assumed by the company through its branch and through the other parts of the company.

⁽¹⁸⁵⁾ Separate accounts can be nevertheless established for internal reporting purposes, although they do not constitute a legally binding delimitation of the possible claims on the assets and such accounts need not be audited or verified externally. However, in the present case, even such an indicative and internal delimitation either did not exist or was not provided to Ireland at the time the contested tax rulings were requested. The fact that ASI did not report separate accounts to Irish Revenue for the head office and the branch was confirmed by Ireland. This was also the case for AOE. See recital 101.

⁽¹⁸⁶⁾ See also Point 14 Section B-3 (i), p. 14 of the 2010 OECD Profit Attribution Report: 'As between unrelated enterprises, the determination of which enterprise owns assets and which bears risk is determined by legally binding contracts or other ascertainable legal arrangements. Similar considerations apply to associated enterprises providing those contracts or legal arrangements reflect the underlying reality [...]. Similarly, in a separate enterprise context no issues generally arise over determining which enterprise possesses the capital. The factual, legal position in a PE context, on the other hand, is that there is no single part of an enterprise which legally owns the assets, assumes the risks, possesses the capital or contracts with separate enterprises. The legal position is thus unhelpful in a PE context, since Article 7(2) requires the PE to be treated as if it were a separate and independent enterprise, performing its own functions, assuming its own risk and owning or using assets on its own. It is therefore necessary under the arm's length principle of Article 7 to develop a mechanism for attributing risks, economic ownership of assets and capital to the hypothetically separate and independent PE, for associating with the hypothetically separate and independent PE the rights and obligations arising out of transactions between separate enterprises and the enterprise of which the PE is a part and for recognising and determining the nature of the dealings (i.e. the intra-enterprise equivalents of separate enterprise transactions) between the hypothetically separate PE and other parts of the enterprise of which the PE is a part.', p. 14.

(273) Ireland appears to acknowledge ⁽¹⁸⁷⁾, as does Apple ⁽¹⁸⁸⁾, that Irish Revenue, when determining the taxable profit of a non-resident company under Section 25 TCA 97, should take account of the assets, functions and risks of its Irish branch. Apple similarly accepts that the profit allocation exercise under Section 25 TCA 97 requires that the branch is considered as a 'stand-alone entity' ⁽¹⁸⁹⁾. However, contrary to the approach suggested by Ireland in recital 266, to ensure that a method for allocating profit to an Irish branch results in a reliable approximation of a market-based outcome in line with the arm's length principle, it was incumbent on Irish Revenue to verify whether the allocation of the Apple IP licences outside of Ireland, instead of to their respective Irish branches, was an allocation that could have been agreed to in an arm's length context. More specifically, faced with the request to validate methods proposed by Apple to allocate profit to ASI's and AOE's Irish branches, it was incumbent on Irish Revenue to first properly examine the assets used, the functions performed and the risks assumed by those companies through their Irish branches and through the other parts of those companies.

(274) Ireland and Apple counter that, in line with the territoriality principle, ASI and AOE may only be taxed on the profit from their activities in Ireland. Ireland's tax charging powers are accordingly confined to the company's Irish source income, as provided for in Section 25 TCA 97 ⁽¹⁹⁰⁾. The Commission agrees with that description of the territoriality principle. However, the territoriality principle, which the Commission does not call into question, concerns the right to tax. That principle does not obviate the need for a tax administration to determine the allocation of assets used, functions performed and risks assumed by a non-resident company through its branch and through the other parts of the company, including IP held by the company as a whole, for the purposes of determining the amount of such source income in a manner that results in a reliable approximation of a market-based outcome in line with the arm's length principle. With this argument, Ireland and Apple appear to confuse the territoriality principle of taxing source income generated through the Irish branches with a diligence to gather factual information on the operations of ASI and AOE so as to ensure an arm's length allocation of assets, functions and risks within those companies for determining their taxable profit in Ireland. In verifying whether a profit allocation method of a non-resident company results in a reliable approximation of a market-based outcome in line with the arm's length principle, no territorial limits apply to information gathering.

(275) When describing where the Apple IP is managed or to whom the Apple IP licences should be attributed, both the ruling request and later submissions by Ireland and Apple contain the indication that the IP is managed outside of Ireland ⁽¹⁹¹⁾. Reference is made to activities carried out by the head offices of ASI and AOE, on the one hand, and to functions and economic activities performed by Apple Inc., on the other, in particular activities performed by Apple executives in the US. However, as a majority of the board members of ASI and AOE are located in the US and, at the same time, employed by Apple Inc. ⁽¹⁹²⁾, it is unclear whether the activities that are being referred to are being attributed to the head offices of ASI and AOE or to Apple Inc. The Commission will examine the impact of both scenarios on the allocation of profit to ASI's and AOE's respective Irish branches in recitals 276 to 307 and recitals 308 to 318, respectively.

⁽¹⁸⁷⁾ Ireland explained that the application of Section 25 TCA 97 requires Irish Revenue to exercise judgment by taking into account the particular facts and circumstances of each case which may include 'the functions performed by any branch, its interest (if any) in the assets of the company, the nature and level of any risks assumed by the branch, and the overall contribution made by the branch to the company's profits.' Observations of Ireland on the Opening Decision, paragraph 21.

⁽¹⁸⁸⁾ Apple submits in its comments on the Opening Decision, paragraphs 154 and 155, that the profit attribution exercise under Section 25 TCA 97 is conducted on the basis of the following criteria: '(i) the branch's activities (in particular, the functions performed, the assets held and the risks borne by the branch), (ii) the value generated by those activities and the actual costs borne by the branch, and (iii) a comparison with other companies in a comparable sector or industry.' According to Apple, these key principles determined the application of Section 25 TCA 97 at the time of the contested tax rulings and continue to apply today. See also, [Apple's advisor] opinion, as described in recital 204.

⁽¹⁸⁹⁾ Apple's comments on the Opening Decision, paragraphs 154 and 155.

⁽¹⁹⁰⁾ Letter from Ireland of 4 May 2015, p. 4.

⁽¹⁹¹⁾ See, for example, recitals 113, 163, 185, 188, 195, 204, 205, 209 and 210.

⁽¹⁹²⁾ See recital 114.

(b) Allocation of assets, functions and risks between a branch with a range of business activities and a head office lacking a physical presence and employees

(276) ASI and AOE are both incorporated in Ireland. However, pursuant to Section 23A TCA 97, ASI and AOE were not tax resident in Ireland during the period the contested rulings were in force. Prior to its modification by the Finance Act 2013, Section 23A TCA 97 allowed for companies incorporated in Ireland to be considered as non-tax resident in Ireland, provided certain conditions were met. Since both ASI and AOE are ultimately controlled by a company that is resident in a tax treaty country, namely Apple Inc., which is a tax resident of the US, and since both companies had a trading activity in Ireland through their respective branches and were managed and controlled outside Ireland, ASI and AOE were considered to be non-resident companies in Ireland under the trading exception of Section 23A TCA 97 ⁽¹⁹³⁾. In that regard, Apple presented ASI's and AOE's tax residence as being 'nowhere' ⁽¹⁹⁴⁾, while Ireland considered the two companies to be 'functionally managed and controlled' in the US ⁽¹⁹⁵⁾. As explained in recital 52, during the period the contested tax rulings were in force ASI and AOE could be best described as 'stateless' for tax residency purposes.

(277) Contrary to Ireland's claim ⁽¹⁹⁶⁾, the Commission's investigation did not examine either the compatibility of Section 23A TCA 97 with the State aid rules, or ASI's and AOE's lack of tax residency resulting from an application of that provision under those rules. Nor did it examine whether the structure and set-up of the Apple group companies in Ireland complies with the State aid rules. Rather, as explained in recital 39, its investigation was concerned with the contested tax rulings and whether the profit allocation methods endorsed by Irish Revenue in those rulings resulted in the grant of State aid.

(278) Nevertheless, the Commission notes that the extract of ASI's audited accounts reproduced in its annual report for 2007, and in Figure 6 in this Decision, appears to start from the premise that ASI's overall accounting profit is subject to the standard Irish corporate tax rate of 12,5 % applicable to trading income. In addition, the explanatory note to the detailed calculation of the tax charge presented in Figure 6 clarifies that '[t]he current tax charge is lower than the standard rate of tax in Ireland. [...]' ⁽¹⁹⁷⁾. In other words, Apple seems to have taken, as a starting point, the overall accounting profit of ASI as the taxable base for the purposes of calculating its corporation tax liability in Ireland, applied the profit allocation methods endorsed by the contested tax rulings as

⁽¹⁹³⁾ See recital 50. In its review of the Irish rulings practice on profit allocation to the branch of a non-resident company (see recitals 384 to 396), the Commission identified situations of other companies incorporated but not tax resident in Ireland, but in the jurisdiction where those companies would have been managed and controlled. Tax residence of companies incorporated in Ireland was presented to be, for example, in [...] (see Company [I]) and in [...] (See Company [D]). In a number of cases the tax residence was not specified in the ruling requests.

⁽¹⁹⁴⁾ Apple's CEO stated 'My understanding is there is not a tax residence for either-for any of the three subsidiaries that you just named [AOI, ASI and AEO]' in Hearing of Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.) of the Permanent Subcommittee on Investigations of the US Senate, 21 May 2013, p. 45. See also Figure 7 of this Decision, reproducing an extract of ASI's 2012 annual report, which states '[t]he company is not tax resident in any jurisdiction'.

⁽¹⁹⁵⁾ See recitals 51, 112 and 200. See also Statements of Tim Cook, CEO of Apple, and Phillip Bullock, Head of Tax Operations, Apple Inc., in: Hearing of Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.) of the Permanent Subcommittee on Investigations of the US Senate, 21 May 2013, p. 41.

⁽¹⁹⁶⁾ See recitals 199 and 200.

⁽¹⁹⁷⁾ When presenting the calculation of the tax charge Apple begins by taking the overall accounting profit of ASI (in fiscal year 2007 approximately USD 1 844 million) and applying the 12,5 % Irish tax rate for trading income to that overall profit to arrive at a theoretical corporation tax liability for ASI in Ireland (approximately USD 230 million). It then adds to that amount the tax charge related to interest income charged at the rate of 25 %. From the resulting theoretical amount of tax due under standard tax rate in Ireland, Apple deducts an amount set in such a manner so as to reduce the theoretical amount of the tax charge to the level of the tax charge endorsed by contested tax rulings for ASI's Irish branch (approximately USD 8,9 million). This deduction of an amount of approximately USD 224 million is presented as an adjustment for 'income taxed at lower rates'.

a means to reduce that base, and accepted that ASI's Irish corporate incomes tax liability was lower than that generally applied to companies subject to tax in Ireland ⁽¹⁹⁸⁾.

(279) That having been noted, in order to determine whether the profit allocation methods endorsed by the contested tax rulings confer a selective advantage (and thus State aid) on companies like ASI and AOE, it must be determined whether those methods result in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle ⁽¹⁹⁹⁾. That depends on whether those methods reliably approximate the level of profit that the Irish branches of those companies would have earned at arm's length, in particular in their dealings with the other parts of their respective companies, if they were separate and independent enterprises engaged in the same or similar activities under the same or similar conditions ⁽²⁰⁰⁾. Seeing as during the period that the contested tax rulings were in force ASI had no other branches outside of Ireland and the only other branch AOE had outside of Ireland was in Singapore, but that branch was never presented by Ireland or Apple as performing functions that generate the overall profits of AOE, the consequence of Irish Revenue accepting the unsubstantiated assumption that the Apple IP licences should be allocated outside of Ireland is that they were allocated to ASI's and AOE's head offices for tax purposes.

(280) Accordingly, before endorsing profit allocation methods that were based on the unsubstantiated assumption that the Apple IP licences should be allocated outside of Ireland, Irish Revenue should have examined whether that allocation within ASI and AOE was an allocation that could have been agreed to in an arm's length context between two unaffiliated companies in a similar situation to the Irish branches and the head offices of ASI and AOE. To do so, it was incumbent on Irish Revenue to confirm that those licences should indeed be allocated outside of Ireland by taking into account the assets used, the functions performed and risks assumed by those companies through the Irish branches and through their respective head offices. As demonstrated in recitals 281 to 293, had Irish Revenue undertaken such an examination, it should have concluded that the absence of activities related to the Apple IP at the level of the respective head offices meant that those licences should be allocated to the Irish branches for tax purposes, which was the only possible consequence of those licences not being allocated to the head offices.

(281) Based on the facts presented to the Commission ⁽²⁰¹⁾, it appears that during the period the contested tax rulings were in force the head offices of ASI and AOE existed on paper only, since ASI and AOE had no physical presence or employees outside of Ireland during that period. In the absence of employees, the only people who could have ensured the functions of the head offices would have been their board of directors.

(282) Apple claims at several instances that ASI's and AOE's boards ensured the functions of IP management ⁽²⁰²⁾. However, the only evidence provided of activities performed by ASI's and AOE's board of directors during the period when the contested tax rulings were in force is the decisions taken in the meetings of the boards, which

⁽¹⁹⁸⁾ A similar process is followed to arrive at the corporation tax liability of ASI's Irish branch in Figure 7, except that Apple applies a [1-5] % corporate income tax rate to ASI's overall accounting profit. The [1-5] % figure is presented as the average tax rate for all jurisdictions in which ASI operates. No further detail or clarification is provided as to how the [1-5] % have been produced by Apple. It does not seem possible to reconcile the [1-5] % with any average of taxes applicable in jurisdictions where ASI operates, as ASI has a taxable presence only in Ireland.

⁽¹⁹⁹⁾ See recital 258.

⁽²⁰⁰⁾ See recital 272.

⁽²⁰¹⁾ Such as the absence of employees, the absence of a permanent establishment and the absence of reference to any office facilities distinct from Apple Inc.

⁽²⁰²⁾ See recitals 113, 163, 189, 205 and 210.

are reflected in the minutes over the relevant timeframe, provided to the Commission during the course of the investigation and illustrated in Table 4 and Table 5 of this Decision. Those minutes do not demonstrate that ASI's and AOE's board of directors performed active and critical roles with regard to the management and effective control of the Apple IP licences. In a submission to the Commission describing the discussions in those board meetings, Apple itself did not identify any IP-related discussions in those minutes when summarising the activities of the boards ⁽²⁰³⁾.

(283) Also noticeably absent from the minutes are any discussions on decisions to enter into or amend the CSA. As explained in Section 2.5.4, the CSA has been amended several times since 1991, most notably in 2009. Contrary to the claim made by Ireland that the boards of ASI and AOE made the critical decisions to participate in the CSA and also to fund the significant costs arising from participating in that agreement ⁽²⁰⁴⁾ and the claim made by Apple that the boards decided on various amendments to the CSA ⁽²⁰⁵⁾, the minutes of the board meetings do not record any discussion on the 2009 amendment or any other discussion regarding the CSA or the Apple IP ⁽²⁰⁶⁾, until the new structure of Apple in Ireland was being discussed at the end of 2014 ⁽²⁰⁷⁾.

(284) Indeed, throughout the entire period from 1980 to 2015 for which minutes have been provided to the Commission, those minutes demonstrate a complete absence of any discussion regarding the CSA, until the minutes of [...] board meeting in August 2014. That meeting of [...] board of directors was the first time an [...]. However, even when referring to the CSA, those minutes point to the involvement of other individuals discussing the CSA on behalf of ASI and AOE, who were not members of the board of directors of ASI or AOE and who were not present at the meeting in question ⁽²⁰⁸⁾. In any event, it is apparent from all of the minutes reviewed by the Commission that ASI's and AOE's board of directors only began discussing the CSA at the end of 2014, [...], and not when [...] the contested tax rulings applied, was in place ⁽²⁰⁹⁾.

(285) The minutes of board meetings provided to the Commission demonstrate that the boards did not engage in any detailed business discussion before the discussions on Apple's new structure in Ireland, as a result of which, according to Apple, the 2007 ruling ceased to be applied to determine ASI's and AOE's yearly taxable profits in Ireland. The summary of the minutes presented in Table 4 and Table 5 illustrates the discussions over the period

⁽²⁰³⁾ Apple summarised the [Apple's advisor] opinion as regards the activities of the board meetings as follows: 'AOE/ASI board minutes (...) show decision making regarding issues of key strategic importance for AOE/ASI, including dealing with (i) financial matters such as investment decisions, bank account authority and capital maintenance issues; (ii) the consideration and approval of the financial statements; and (iii) delegation of authority within certain parameters in respect of the business activities, all having taken place in the US and not in Ireland.' Submission of 7 September 2015, p. 7; see recital 205.

⁽²⁰⁴⁾ See letter from Ireland of 4 May 2015, p. 3.

⁽²⁰⁵⁾ See recital 113.

⁽²⁰⁶⁾ The discussions in ASI's and AOE's board meetings of August 2013 where powers of attorney regarding the defence of IP would have been granted, concern an activity regarding the IP which, according to the CSA, neither ASI nor AOE were able to ensure. Therefore, delegating such activities to US employees of the group was in principle not necessary, as only Apple Inc. was allowed to defend the IP under the CSA even in the absence of any delegation. See recital 127.

⁽²⁰⁷⁾ See Section 2.5.7.

⁽²⁰⁸⁾ The minutes state that the [...]. See Minutes of board meeting of ASI on [...] August 2014, p. 7.

⁽²⁰⁹⁾ See recital 136.

January 2009 to September 2011 for ASI and December 2008 to September 2011 for AOE ⁽²¹⁰⁾. With the exception of one business decision to transfer assets from AOE's Singapore branch to another Apple group company ⁽²¹¹⁾, those minutes show that the discussions in the boards of ASI and AOE consisted mainly of administrative tasks, that is to say approving accounts and receiving dividends ⁽²¹²⁾, not active or critical functions with regard to the management of the Apple IP licences.

- (286) Ireland counters that business decisions are not taken in Ireland ⁽²¹³⁾. However, the minutes of ASI's and AOE's board meetings indicate that various functions, including the full functions of the board, have occasionally been outsourced to employees of Apple located in Ireland ⁽²¹⁴⁾. Therefore, Ireland cannot argue that no important functions have been performed in Ireland. In any event, the minutes of ASI's and AOE's board meetings allow the activities of the head offices to be precisely traced and delimited, which is not the case for the activities taking place in the Irish branches, which each employ hundreds of employees active in different areas.
- (287) Apple argues that the activities of ASI's and AOE's board of directors have been ensured in 'myriad ways' ⁽²¹⁵⁾, without further specification. However, because 'myriad' appears to refer in this context to an undefined and countless set of elements, which therefore could not be verified or circumscribed, a profit allocation method relying on such undefined elements cannot result in a market-based outcome, since an arm's length assessment of that method cannot be conducted in an objective manner. In any event, as a majority of the board members of ASI and AOE are located in the US and, at the same time, employed by Apple Inc., if those activities had been substantial, ASI and AOE would, in principle, be considered to have a permanent establishment in the US. The same applies to the alleged activities of the head offices of ASI and AOE outside of the board meetings. In the case of ASI, the Commission further observes that its board members receive no remuneration and, assuming that the board members are remunerated on market terms, that fact further confirms that their activity is not valuable to ASI's head office.
- (288) Not only did those head offices not perform active or critical functions with regard to the management of the Apple IP licences, they also did not have the capacity to perform such functions during the period that the contested tax rulings were in force. Indeed, the management activities to be performed in relation to the Apple IP, as described in the observations of Apple (such as what IP to commercialise, how to manufacture products and

⁽²¹⁰⁾ The overview table provided by Ireland on 22 April 2016 lists 57 ASI board meetings which took place from the first board meeting of ASI on 5 April 1990 until the end of the accounting period of 2014 (27 September 2014 according to the statutory accounts). Additionally, Apple did not provide the summaries of board meetings provided to the US Senate, held from 2006 to 2012. Apple referred to the summary in the submission of 15 April 2015 (see letter by Apple of 22 April p. 18). The overview provided by Ireland in the form of a table does indeed not list 30 board meetings for the period 2006 to 2012 for which minutes have been provided by Ireland on the same day, 22 April 2016. Minutes of 3 further board meetings which would have taken place over this period have been provided on 24 May 2016 by Ireland. Finally the table of board of directors meetings of ASI submitted by Apple to the US Senate and submitted by Ireland to the Commission on 15 April 2015, lists 5 further ASI board meetings having taken place between 2006 and 2010, for which minutes have not been provided to the Commission by Ireland at all. The number of all board meetings is therefore 90 based on the minutes provided to the Commission and 92 if all the board meetings listed in the submission to the US Senate did effectively take place (minutes have not been provided for meetings of January 2008 and of October 2009 listed in the submission to the US Senate). In both cases the number of board meetings per year for the period 1990 to end September 2014 is on average less than four per year. Additionally, based on the information submitted by Ireland on 22 April 2016, for the years 1993 to 1997 no board of directors meeting took place, decisions have been adopted only through written resolutions of the board of directors. This would have been also the case for the year 2008 based on the information submitted on 22 April 2016.

⁽²¹¹⁾ However, the reference to this business decision only seems to record the transfer as such, which is not related to the management of IP, but constitutes a mere reorganisation of activities, and no discussion on the price or conditions of the transfer seems to have taken place in the board.

⁽²¹²⁾ This is confirmed by the [Apple's advisor] opinion, see recital 205.

⁽²¹³⁾ See point 12 of the Ireland's observations on the Opening Decision of 5 September 2014.

⁽²¹⁴⁾ See, for example, meeting of 22 June 2010 of ASI's board, and meeting of 20 July 2009 of AOE, Table 4 and Table 5 respectively. In both meetings, powers of attorney were delegated to Ms. C. Kearney and Mr M. O'Sullivan, who are employees of Apple based in Ireland, according to the information in the statutory accounts of Irish-based Apple subsidiaries. See also the minutes of the meeting of 15 November 2010 of AOE's board which state that 'David O'Connell facilities manager of Apple Cork had been in negotiation on behalf of the Company [AOE] in conjunction with the local conveyancing solicitors for the Company [AOE], [...], in relation to leasing additional warehouse space convenient to the facility at Apple Cork [...] to facilitate an expansion in production.'

⁽²¹⁵⁾ See recital 113.

the design of marketing campaigns, as well as decisions on the amounts of R & D investment in which the companies should engage) ⁽²¹⁶⁾, require active management and cannot be ensured through occasional board decisions. They therefore could not be performed by ASI and AOE outside their Irish branches, since the head offices did not have the capacity to take active management decisions in the absence of any employees.

- (289) Most crucially, many of the functions and risks listed in the CSA, summarised in Figure 8 and Figure 9 of this Decision ⁽²¹⁷⁾, could only have been performed and assumed by the Irish branches, rather than by the head offices. For example, product quality control cannot be performed by a head office with no employees. Similarly, R & D facility management does not seem practicable without employees. Given that those functions and risks are to be performed and assumed under the CSA, and ASI and AOE are parties to the CSA, the CSA cannot be effectively executed unless the Irish branches participate in its execution ⁽²¹⁸⁾.
- (290) Apple argues on the basis of the [Apple's tax advisor] *ad hoc* report, which also allocates the Apple IP licences outside of Ireland, that ASI and AOE are capable of making the necessary strategic decisions to mitigate the exposure of the company to risk in the normal course of business outside the Irish branches ⁽²¹⁹⁾. It is however clear that, outside their Irish branches, neither ASI nor AOE is able to monitor business risk in the absence of employees. A part of a company that is in no position to manage, control and monitor a risk should not be allocated such a risk for tax purposes ⁽²²⁰⁾. This reflects the economic reality that a rational economic operator would not entrust a risk to a counterparty that is not able to assume and manage such a risk. In that regard, and as further explained in recitals 308 to 318, the Commission cannot accept the reasoning set out in the [Apple's tax advisor] *ad hoc* report and the [Apple's 2nd advisor] *ad hoc* study, both submitted by Apple, which include functions performed by Apple Inc. in the assessment of the allocation of profit of ASI and AOE. The Irish branches of ASI and AOE are not branches of Apple Inc., the latter being a separate legal entity recording profits separate from the profits of ASI and AOE.
- (291) Given the lack of activities at the level of the head offices, only limited risks that can be controlled through occasional board meetings can be properly allocated to the head offices for tax purposes. As noted in recital 285, the minutes of the board meetings reviewed by the Commission mainly refer to discussions on financing decisions, such as decisions on the distribution of dividends and cash management decisions. As regards the latter, both companies derive interest income from the passive management of liquidity, which has been outsourced by their board of directors to Braeburn, as reflected in the minutes of the board meetings ⁽²²¹⁾. Since such passive management functions do not require active day-to-day management and liquidity management is not a core activity of ASI and AOE, the Commission accepts that the interest income of ASI and AOE derived from that passive management function is allocated to the head offices for tax purposes.
- (292) By contrast, ASI's and AOE's head offices should not have been allocated any actively managed IP, such as the Apple IP licences which ASI and AOE have the right to exploit under the CSA, contrary to the unsubstantiated assumption validated by the contested tax rulings. In certain years, no physical board meetings took place: only written resolutions were adopted by the board, which limits the board's decision-making process and the head

⁽²¹⁶⁾ See recital 163.

⁽²¹⁷⁾ See recital 122.

⁽²¹⁸⁾ According to Apple, the tables in Exhibit to the CSA did not list activities that each participant actually performed but activities that each participant was authorised to perform, see recital 124. This *ex post* interpretation by Apple of the CSA is not confirmed by the text of the CSA, which contains no such qualifier or limitation.

⁽²¹⁹⁾ See recital 167.

⁽²²⁰⁾ As also explained in paragraph 1.49 of the 2010 OECD TP Guidelines 'a factor to consider in examining the economic substance of a purported risk allocation is the consequence of such an allocation in arm's length transactions. In arm's length transactions it generally makes sense for parties to be allocated a greater share of those risks over which they have relatively more control.'

⁽²²¹⁾ See recital 108.

offices' capacity to take active management decisions. On the infrequent occasions that the board did discuss the distribution or manufacturing business of ASI, the minutes systematically refer to prior discussions between ASI and other parties ⁽²²²⁾.

- (293) In sum, had Irish Revenue properly confirmed whether the Apple IP licences held by ASI and AOE should be allocated outside of Ireland before endorsing profit allocation methods premised on that assumption, it should have concluded that the head offices of ASI and AOE did not control or manage, nor were they in a position to control or manage, the Apple IP licences in such a manner as to derive the type of income recorded by those companies. Consequently, ASI's and AOE's Irish branches, if they were separate and independent companies engaged in the same or similar activities under the same or similar conditions and taking into account the assets used, the functions performed and the risks assumed by those companies through their branches and through their respective head offices, would not have accepted a profit allocation method based on that assumption, which results in all the profit of ASI and AOE beyond a limited mark-up on a reduced cost base being allocated to the head offices instead of to those branches.
- (294) As demonstrated in recitals 281 to 292, the information needed to establish that conclusion was available to Irish Revenue or could have been made available to it during the period that the contested tax rulings were in force ⁽²²³⁾. That information establishes in a reliable and direct manner that the Apple IP licences held by ASI and AOE should not have been allocated to the head offices for tax purposes. Contrary to the claims made by Ireland ⁽²²⁴⁾, that information should not have been disregarded when allocating profits to the Irish branches, since that information allows Irish Revenue to conclude in a more reliable manner on whether the profit allocation methods proposed by Apple result in a reliable approximation of a market-based outcome in line with the arm's length principle, than by solely relying on information on the activities of the Irish branches.
- (295) In any event, even accepting Ireland's argument that the profit allocation exercise need only be conducted taking into account the assets used, functions performed and risks assumed by the Irish branches, which the Commission contests, Irish Revenue should at the very least have confirmed that the Apple IP licences should not be allocated to the Irish branches of ASI and AOE for tax purposes. As explained in recitals 296 to 304, seeing as those branches were presented to Irish Revenue as ensuring functions for which the use of those licences was crucial and seeing as indications existed that those branches did in fact ensure IP-related functions that were crucial in building brand awareness and brand recognition in the EMEA region, it was incumbent on Irish Revenue to at least have confirmed that the Apple IP licences should not be allocated, fully or in part, to the Irish branches before endorsing profit allocation methods based on the unsubstantiated assumption that the Apple IP licences should be allocated outside of Ireland.
- (296) As regards ASI, its Irish branch was presented to Irish Revenue as executing procurement, sales and distribution activities associated with the sale of Apple products to related parties and third-party customers across the EMEA and APAC regions ⁽²²⁵⁾. Since that branch was authorised to distribute Apple branded products, its activities necessitated access to the Apple brand, which was granted to ASI as a whole in the form of the Apple IP licences. Consequently, even if Irish Revenue did not consider that the Apple IP licences should be allocated to ASI's Irish

⁽²²²⁾ See recital 284 regarding the only discussion on the CSA at board level, which took place in 2014 in the context of the new corporate structure of Apple in Ireland. On 27 March 2012, a discussion took place at the level of the ASI's board of directors regarding the distribution territories of ADI. The minutes of that meeting record that 'it was reported to the [board of directors] Meeting that discussions had been taking place between the Company [ASI] and Apple Distribution International ('ADI') in respect of the proposed appointment of ADI as a distributor for Europe [...]'. That statement points to the fact that ASI's board of directors had no active involvement in the discussions that were reported to it, but rather that other people representing ASI were involved in those discussions.

⁽²²³⁾ Given the information on the absence of operating capacity of the head offices that could have been available to Ireland, it would have been diligent from Ireland to request information on the actual activities of the boards over the application of the contested rulings, to confirm the assumption that the rulings validated that the IP was to be allocated outside of Ireland.

⁽²²⁴⁾ See recitals 266 and 274.

⁽²²⁵⁾ See recital 54.

branch for tax purposes, it should have at the very least analysed how that branch's access to the Apple IP, which it needed to perform its functions, was ensured and set up within the company. There is no evidence that such an analysis was ever conducted.

- (297) Had such an analysis been conducted, it is apparent that ASI's Irish branch, in its capacity of executing procurement, sales and distribution activities associated with the sale of Apple products, ensures a number of functions crucial for the development and maintenance of the Apple brand on the local market and for ensuring customer loyalty to that brand in that market ⁽²²⁶⁾. For instance, ASI's Irish branch incurred local marketing costs directly with third-party marketing service providers in relation to localisation and execution of global marketing strategies. Adapting the brand strategy to the local market was a key function for the development of the brand in the respective regions and the branch was allocated costs of worldwide and local advertising programs to execute that function ⁽²²⁷⁾.
- (298) ASI's Irish branch was also responsible for gathering and analysing regional data to estimate the expected demand forecast for Apple products ⁽²²⁸⁾, which function appears indispensable for the exploitation of the Apple IP in the EMEA region.
- (299) ASI's Irish branch was also fully responsible for operating the AppleCare customer support service, which provides aftersales support and repair services for the entire EMEA region. That function directly reflects on the brand name, with the objective to ensure customer satisfaction, and includes the responsibility for warranty and repair programs ⁽²²⁹⁾. Accordingly, large risks related to the performance of the products and the technology were borne by ASI's Irish branch.
- (300) Finally, [50-60] of ASI's [300-400] FTEs, all of which were located in Ireland, were categorised by Apple in 2014 as R & D personnel ⁽²³⁰⁾.
- (301) As regards AOE, its Irish branch was presented to Irish Revenue as being responsible for the manufacturing and assembly of a specialised range of computer products for the EMEA region. In that capacity, AOE's Irish branch developed Apple-specific processes and manufacturing expertise and ensured quality assurance and quality control functions ⁽²³¹⁾, which are needed to preserve the value of the brand ⁽²³²⁾.
- (302) Moreover, when Apple presented the illustrative account filling format of AOE's Irish branch to Irish Revenue for the purposes of obtaining the 1991 ruling, it allocated the costs associated with the CSA to that branch and not to its head office ⁽²³³⁾. While Irish Revenue does not appear to have examined the terms of the CSA when it issued the contested tax rulings, the fact that the costs of the CSA were allocated to AOE's Irish branch by Apple itself should have made Irish Revenue question the unsubstantiated assumption underlying the profit allocation methods ultimately endorsed by it that the Apple IP licences should be allocated outside of Ireland.

⁽²²⁶⁾ Appendix 1 to the PwC *ad-hoc* report p. 8.

⁽²²⁷⁾ Appendix 1 to the PwC *ad-hoc* report p. 8.

⁽²²⁸⁾ Appendix 1 to the PwC *ad hoc* report p. 10.

⁽²²⁹⁾ Appendix 1 to the PwC *ad hoc* report p. 10-11.

⁽²³⁰⁾ The functional group of those employees was 'Localisation and product testing'. Apple indicated that although the employees are categorised as R & D, they are not involved in the creation, management, deployment or strategic direction of IP, see letter from Ireland of 29 January 2016, p. 27.

⁽²³¹⁾ PwC *ad hoc* report p. 13.

⁽²³²⁾ The AOE Irish branch was also bearing manufacturing and inventory risk, PwC *ad hoc* report p. 13.

⁽²³³⁾ See letter of [Apple's tax advisor] of 16 January 1991, recital 66. That letter contains an appendix entitled 'Apple Computer Ltd Irish Branch Filing Format Illustrative Figures' which lists as the most important cost in the profit and loss account of the branch 'Technology/Marketing Intangibles'.

- (303) Similarly, Apple itself proposed that its Irish branch should receive a return for the Apple IP in the 2007 ruling request. Under the 2007 ruling, [1-5] % of branch turnover was allocated to AOE's Irish branch under the denomination 'IP return' ⁽²³⁴⁾. That proposal should have provided Irish Revenue with an indication that AOE's Irish branch was involved in IP development or some form of management or control of the Apple IP licences.
- (304) Against this background, it was incumbent on Irish Revenue, when presented with the profit allocation methods proposed by Apple to determine ASI's and AOE's taxable profit in Ireland, to confirm at the very least that those companies' Irish branches should not be allocated the Apple IP licences, rather than to accept the unsubstantiated assumption that those licences should be allocated outside of Ireland. Given the Irish branches involvement in the Apple IP, Irish Revenue should not have disregarded any profits derived from the use of the Apple IP licences and the costs incurred under the CSA for the Irish branches.
- (305) In light of all the foregoing reasons, the Commission concludes that the allocation of the Apple IP licences outside of Ireland was not an allocation that could have been agreed to in an arm's length context between two unaffiliated companies. Given the lack of functions performed by the head offices and/or the functions performed by the Irish branches, the Apple IP licences for the procurement, manufacturing, sales and distribution of Apple products outside of the Americas should have been allocated to the Irish branches for tax purposes.
- (306) In light of that conclusion, Ireland's claim that, since the Apple IP that generates the profits recorded by ASI and AOE is located outside of Ireland, the profits derived from that IP should be subtracted from the taxable profits in Ireland in line with the territoriality principle should also be rejected ⁽²³⁵⁾. In any event, the income recorded by ASI and AOE is not income from royalties, but income from sales for which no IP remuneration has been singled out in the companies' financial statements. Indeed, the income recorded by ASI and AOE is indicated as trading income in those companies' financial statements ⁽²³⁶⁾ and has been declared as such to Irish Revenue (with the deduction of interest income). Moreover, as explained in recital 278, the entire income of the two companies (with the exception of the interest income) was reported in the annual accounts of ASI and AOE from 2004 until 2008 as taxable at 12,5 %, which would correspond, according to the classification provided by Ireland, to trading income ⁽²³⁷⁾. As further explained in that recital, only once a theoretical corporation tax liability had been calculated for the entire income of both companies by applying the 12,5 % rate for trading income, was a deduction for 'income taxed at lower rates' applied, reducing the effective tax liability of those companies in Ireland. This fact confirms that the income in question was considered by Apple to constitute trading income and not income from royalties ⁽²³⁸⁾.
- (307) Since neither ASI nor AOE have any physical presence or economic activity outside their Irish branches ⁽²³⁹⁾, the activity consisting of the procurement, sales and distribution of Apple products outside of the Americas performed by ASI and the activity consisting of the manufacturing of computer products for the markets outside of the Americas performed by AOE must be considered to be entirely carried out by their respective Irish branches. The income of ASI and AOE therefore represents active trading income arising from the branch

⁽²³⁴⁾ See recital 62.

⁽²³⁵⁾ See, for example, the Cooke opinion, recital 194.

⁽²³⁶⁾ See recital 96.

⁽²³⁷⁾ See recital 103 and Figure 6, 12,5 % is presented in the accounts as the 'standard rate of tax in Ireland'.

⁽²³⁸⁾ Although from 2008 onwards the theoretical tax liability was no longer calculated by applying a 12,5 % corporate income tax rate but, rather, by applying a [1-5] % rate, an adjustment for 'income taxed at lower rates' was subsequently deducted from the companies' theoretical tax liability to arrive at the effective tax liability of those companies in Ireland, just as in the periods preceding 2008. The [1-5] % tax rate is explained in the accounts in the following terms 'The average tax rate for all jurisdictions in which [ASI] operates is approximately [1-5] %'. See Figure 7. As explained in footnote 198, no further detail or clarification is provided as to how Apple arrived at an average [1-5] % tax rate for ASI. It does not seem possible to reconcile the [1-5] % tax rate with any average of taxes applicable in jurisdictions where ASI operates, since ASI only operates in Ireland.

⁽²³⁹⁾ See recitals 281 et seq.

activity, since there are no employees who could generate such income outside of Ireland ⁽²⁴⁰⁾. In other words, income, such as the trading income recorded by ASI and AOE, should therefore not have been allocated to those companies' head offices either in full or in part. However, even if any of that income could be considered to constitute IP income, Irish Revenue in any event failed to examine which proportion of the resulting residual profit transferred to the head offices, if any, could be attributed to a royalty-type income.

(c) Contributions by Apple Inc. in R & D and the management of the Apple IP licences held by ASI and AOE cannot influence the allocation of profits within ASI and AOE

- (308) As explained in recital 275, Ireland and Apple also argue that R & D and the management of the Apple IP is centred in and directed from Apple's headquarters in the US. According to Ireland and Apple, it is those contributions by Apple Inc. employees that drive ASI's and AOE's profitability, so that Irish Revenue was right to exclude profit deriving from those contributions in the taxable profit of ASI's and AOE's Irish branches ⁽²⁴¹⁾.
- (309) The Commission does not agree with that line of reasoning for the reasons set out in recitals 310 to 318.
- (310) While ASI, AOE and Apple Inc. form part of the same corporate group, they are three distinct legal entities, so any intra-group transactions between those entities are subject to transfer pricing arrangements ⁽²⁴²⁾. For instance, the remuneration of Apple Inc. by ASI and AOE for the development of the Apple IP has been laid down in the CSA ⁽²⁴³⁾, while the remuneration of Apple Inc. by ASI and AOE for marketing services has been laid down in the Marketing Service Agreement ⁽²⁴⁴⁾. The contested tax rulings do not, however, cover those or any other intra-group transactions that ASI and AOE, on the one hand, and Apple Inc., on the other, may have entered into. In other words, the contested tax rulings do not address the question whether the CSA or the Marketing Service Agreement were carried out at arm's length, but rather take the terms and conditions of those agreements as a given, meaning that no transfer pricing arrangement between those three entities for, for example R & D and the management of the Apple IP or marketing services, is endorsed by those rulings. The contested tax rulings only concern the allocation of ASI's and AOE's profit to their respective Irish branches.
- (311) In accordance with the terms of the CSA, ASI and AOE ⁽²⁴⁵⁾ pay Apple Inc. for the R & D activities ensured by Apple Inc. (or other group companies) in relation to the Apple IP. It is therefore the CSA, which ASI and AOE, on the one hand, and Apple Inc., on the other, have entered into, that determines the share of costs and revenue for the development of the Apple IP for each party to that agreement. Under the CSA, the costs of R & D for Apple's products are divided among Apple Inc., ASI and AOE based on the percentage of product sales that occur in their respective territories ⁽²⁴⁶⁾. Indeed, according to ASI's accounts, the component 'Research and development' is the single largest component of its operating expense ⁽²⁴⁷⁾. For example, in the years 2013 and 2014, ASI paid USD [2,0-2,5] billion and USD [4,0-4,5] billion, respectively, for the development of the Apple IP ⁽²⁴⁸⁾. From 2010 to 2014, ASI and AOE combined financed more than half of the Apple IP R & D costs, while Apple Inc. financed less than half of those costs over that same period. In other words, ASI and AOE remunerate Apple Inc. for the development of the Apple IP through the CSA, the cost of which bears on the overall profitability of ASI and AOE.

⁽²⁴⁰⁾ See recital 112.

⁽²⁴¹⁾ See, for example, letter from Ireland of 29 January 2016, p. 25; letter from Apple of 4 May 2015, p. 5; and letter from Apple of 18 February 2016, p. 5.

⁽²⁴²⁾ In the same way, the remuneration of ADI for the distribution services provided by it to ASI is laid down in the distribution agreement between those two associated group companies; see recital 134.

⁽²⁴³⁾ See Section 2.5.4 of this Decision.

⁽²⁴⁴⁾ See recital 133.

⁽²⁴⁵⁾ Collectively referred to as 'the International Participant' in the CSA, see recital 122.

⁽²⁴⁶⁾ See recital 121.

⁽²⁴⁷⁾ See Figure 4.

⁽²⁴⁸⁾ See recital 121.

- (312) Put differently, Apple has thus decided and implemented how to value the activities performed by Apple Inc., on the one hand, and ASI and AOE, on the other, in relation to the Apple IP and their contribution to the value of that IP. This is the outcome of the CSA, where each company participates in the overall costs incurred for the development of the Apple IP on the basis of attribution criteria decided autonomously by Apple. The criterion chosen was to attribute the cost of the Apple IP in proportion to the turnover of each company, which led ASI and AOE to bear most of the R & D development costs. The remuneration of the R & D activities performed by Apple Inc. in relation to the Apple IP has thus already been accounted for by attributing the development costs on the basis of the relevant sales of each party to the CSA, since this was the basis chosen by Apple for the allocation of the share of the Apple IP to each company. Consequently, the profit of each company — Apple Inc., ASI and AOE — is the difference between sales and all relevant costs, including the yearly payments for the development of the Apple IP as determined in the CSA.
- (313) By referring to activities performed in the US in relation to R & D and the management of the Apple IP, Ireland and Apple therefore appear to be referring to the existence of non-remunerated contributions made by Apple Inc. for the benefit of ASI and AOE beyond the remunerated activities performed by Apple Inc. in the context of the CSA and the Marketing Service Agreement, since there is no other trace of Apple Inc. being additionally remunerated for R & D and the management of the Apple IP in the accounts of ASI or AOE. The existence of such non-remunerated contributions cannot, however, influence the allocation of profit within ASI and AOE. As explained in recital 271, ASI's and AOE's head offices, on the one hand, and their respective Irish branches, on the other, do not have separate legal personalities. Rather, they form part of the same legal entity, which holds the Apple IP licence, and it is that entity for which Apple Inc. has performed those alleged non-remunerated contributions as a whole. Accordingly, while the remuneration of Apple Inc. by ASI and AOE for the former's contribution in relation to R & D and the management of the Apple IP could and, in fact does, impact the overall profitability of ASI and AOE, it cannot impact the subsequent allocation of that profit within ASI and AOE and thus the allocation of profit to ASI's and AOE's Irish branches.
- (314) In other words, while such additional contributions could influence the overall profitability of ASI and AOE, had they indeed been performed and had they been effectively priced, which they were not, they cannot impact the subsequent allocation of profits within ASI and AOE. This is because the costs paid for those contributions by ASI and AOE would be carried by those companies as a whole (and not only the head offices or the Irish branches) and would therefore reduce the overall profit of the companies. However, it is only after those costs have been deducted from that profit that the remaining profit of ASI and AOE would need to be allocated between the head offices and their respective Irish branches for tax purposes. In the same vein, the fact that Apple Inc. ensures R & D and designs marketing campaigns for the benefit of ASI and AOE under the CSA and the Marketing Service Agreement, respectively, impacts the overall profitability of ASI and AOE, but it is not pertinent for the purposes of allocating the profit recorded by ASI and AOE between their head offices and their respective Irish branches. Ireland's argument that the value generated by Apple products might require expensive investments might well be correct ⁽²⁴⁹⁾, but, as regards ASI's and AOE's contributions to those investments, they are covered by the CSA and the Marketing Service Agreement, which cannot impact profit allocation within those companies.
- (315) In any event, since there is no trace in ASI's or AOE's accounts that Apple Inc. has been remunerated for R & D and the management of the Apple IP beyond the CSA ⁽²⁵⁰⁾, the argument that contributions by Apple Inc. in R & D and the management of the Apple IP influence the allocation of profits within ASI and AOE is, in any event, without foundation. Ireland and Apple seem to present no more than an abstract claim by Apple Inc. on the profits of other legal entities (ASI and AOE), which goes beyond the contractual arrangements under the CSA or the Marketing Service Agreement and which is beyond the scope of a profit allocation exercise.

⁽²⁴⁹⁾ See recital 201.

⁽²⁵⁰⁾ See recital 313.

- (316) Ireland argues that payments made by ASI and AOE for contributions by Apple Inc. are attributable to the head offices and points, in this regard, to payments under the CSA and Marketing Service Agreement ⁽²⁵¹⁾. Even assuming that payments under the CSA and Marketing Service Agreement could influence the profit allocation within ASI and AOE, which the Commission contests ⁽²⁵²⁾, there is no obvious reason to allocate those payments to the head offices rather than to the Irish branches. As regards the CSA and the Marketing Service Agreement, the terms of those agreements make no distinction between the head offices and the Irish branches. That is to be expected, since from a contractual perspective they form part of the same legal entity. However, to the extent an address is provided for ASI and AOE in those agreements, it is consistently that of the Irish branches ⁽²⁵³⁾. Nevertheless, even if it were accepted that contributions performed by Apple Inc. for the benefit of ASI and AOE could influence the profit allocation within ASI and AOE, there is no indication that, in the absence of the head offices, Apple Inc. would not have performed the same contributions for the benefit of the Irish branches, especially considering that the head offices do not seem to derive any benefit from those contributions in light of the fact that they do not physically exist and have no employees. It has been established in recitals 281 to 290 that the head offices, through their limited activity in the form of board meetings, do not and cannot engage in R & D. This would, indeed, be impossible, since the head offices have neither a physical presence, nor employees. By contrast, as noted in recitals 295 to 304, the Irish branches do seem to engage in activities which directly or indirectly support the Apple IP and Apple has treated them as such in the past. Consequently, even if it is accepted that there were non-remunerated contributions performed by Apple Inc. for the benefit of ASI and AOE and that those non-remunerated contributions could have been considered to influence the profit allocation within ASI and AOE, those contributions should have been allocated to the Irish branches.
- (317) Ireland and Apple further claim that risk is assumed and limited for ASI and AOE through group policies, developed in the US. However, group policies serve the purpose of limiting group specific risks and setting up coordination procedures, meaning that the group itself might require such group policies from its subsidiaries, rather than its subsidiaries benefiting from such policies. In addition, a policy, whether it takes the form of a written document, process or business software, cannot be presented to assume business risk in the absence of any staff. Indeed, as explained in recital 290, an entity that is not in a position to manage, control and monitor a function or risk should not be allocated that risk for tax purposes.
- (318) In conclusion, the Commission cannot accept Ireland's and Apple's argument that ASI's and AOE's profit deriving from contributions performed by Apple Inc. employees should be excluded from the taxable profit of ASI's and AOE's Irish branches, since alleged contributions by Apple Inc. employees in R & D and the management of the Apple IP licences held by ASI and AOE cannot influence the allocation of profit within ASI and AOE.

(d) Conclusion: the contested tax rulings lead to a lowering of ASI's and AOE's corporation tax liability in Ireland

- (319) As concluded in recital 305, the Apple IP licences held by ASI and AOE should not have been allocated outside of Ireland, but to the Irish branches. Consequently, ASI's and AOE's Irish branches, if they were separate and independent companies engaged in the same or similar activities under the same or similar conditions, would not

⁽²⁵¹⁾ See recital 133.

⁽²⁵²⁾ See recital 314.

⁽²⁵³⁾ Where a postal address for ASI and AOE is provided in the different versions of the CSA, it is always an address in Ireland. In the Marketing Service Agreement, the following is provided: 'all notices, elections, offers, acceptances, and demands permitted or requested to be made under this Agreement shall be made in written (...) to the party, addressed as follows:

Apple Inc.
1 Infinite Loop
Cupertino, CA 95014
Attention: Legal Department
Apple Sales International
Hollyhill Industrial Estate
Hollyhill Cork, Ireland
Attention: Controller'
See Marketing Service Agreement p. 6.

have accepted from the perspective of their own profitability that all the profit of ASI and AOE beyond a limited mark-up on a reduced cost base is allocated outside of Ireland. Rather, all profit from sales activities, other than the interest income obtained by ASI and AOE under normal market circumstances ⁽²⁵⁴⁾, should have been allocated to the Irish branches of ASI and AOE.

- (320) The consequence of Irish Revenue accepting the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland is a significant reduction of ASI's and AOE's annual taxable profit in Ireland, which constitutes the taxable base upon which corporation tax is levied under the ordinary rules of taxation of corporate profit in Ireland. The profit allocation methods endorsed by the contested tax rulings therefore cannot be said to result in a reliable approximation of a market-based outcome in line with the arm's length principle.
- (321) In conclusion, by endorsing profit allocation methods premised on that unsubstantiated assumption, Irish Revenue conferred an advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty, in the form of a reduction of their respective annual taxable profit. That advantage was selective in nature, since it resulted in a lowering of ASI's and AOE's corporation tax liability under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length and whose taxable profit is subsequently taxed at the same standard corporate tax rate as ASI's and AOE's locally-sourced profit.
- (322) A similar conclusion is reached following the Authorised OECD Approach for profit allocation to a permanent establishment ⁽²⁵⁵⁾. Although the 2010 OECD Profit Attribution Report was approved by the OECD Council after the contested tax rulings were issued in 1991 and 2007, the Commission merely invokes that non-binding guidance document, as explained in recital 255, as a further indication that the profit allocation methods endorsed by those rulings produce an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. Indeed, no other alternative detailed and comprehensive analyses on methods of attributing profits are available to tax administrations and multinational enterprises to assist them in establishing arm's length conditions for intra-group and intercompany dealings. In any event, that guidance was already available in a similar form in 2008 ⁽²⁵⁶⁾, initial guidance published by the OECD on the attribution of profit to permanent establishments dates from 1993 ⁽²⁵⁷⁾, and the considerations presented in the 2010 OECD Profit Attribution Report relate to the application of Article 7 of the OECD Model Tax Convention to concrete situations.
- (323) According to the Authorised OECD Approach, as a first step of the profit allocation process, recourse should be had to the physical presence of employees or people performing functions on behalf of the enterprise in the head office and in the permanent establishment as an objective means to allocate assets used, functions performed and risks assumed between a head office and its permanent establishment. This is justified by the fact that there is little ambiguity about the physical presence of employees or people performing functions on behalf of the enterprise. In the case of ASI and AOE, all assets, functions and risks, including the IP licences for the procurement, manufacturing, sales and distribution of Apple products outside of the Americas, should be allocated to the Irish branches under the first step, since those companies have no employees or people performing functions on behalf of those companies outside of those branches except for passive management of liquidity outsourced by the board of directors to Braeburn. Moreover, the 2010 OECD Profit Attribution Report, in its considerations specific to intangibles, specifies that, regarding the economic ownership of intangibles, it is the active decision taken below senior management level that is determinant for the allocation of the ownership ⁽²⁵⁸⁾. The head offices of ASI and AOE have no employees below senior management level.

⁽²⁵⁴⁾ See recital 291.

⁽²⁵⁵⁾ See recitals 86 to 89.

⁽²⁵⁶⁾ See *2008 Report on the Attribution of Profits to Permanent Establishments*, approved by the OECD Council of 17 July 2008.

⁽²⁵⁷⁾ See *Attribution of Income to Permanent Establishments*, Issues in International Taxation No 5, OECD, Paris, 1994; reproduced in Volume II of the loose-leaf version of the OECD Model Tax Convention at page R(13)-1, approved by the OECD Council of 26 November 1993.

⁽²⁵⁸⁾ See recitals 90 and 91.

- (324) As regards the second [Apple's tax advisor] *ad hoc* report ⁽²⁵⁹⁾, which Apple submitted as representing an application of the Authorised OECD Approach to this case, the two steps of that approach as presented by [Apple's tax advisor] do not correspond to the two steps of the Authorised OECD Approach as explained in recitals 86 to 89. In particular, that report, just like the contested tax rulings, does not question the allocation of the Apple IP licences to ASI's and AOE's head offices. Instead, step 1 of that approach is presented by [Apple's tax advisor] as an analysis relating to an arm's length range, rather than to allocate assets, functions and risks between ASI's and AOE's head offices and their respective Irish branches, as required under the Authorised OECD Approach ⁽²⁶⁰⁾. A similar misinterpretation of the Authorised OECD Approach is put forward in the PwC *ad hoc* report, which presents the first step of that approach as a functional analysis, but does not consider the allocation of assets and risks as relevant or required in that first step.

8.2.2.3. *Subsidiary line of reasoning: Undervaluation of ASI's and AOE's taxable profit due to the inappropriate methodological choices underlying the one-sided profit allocation methods endorsed by the contested tax rulings*

- (325) Without prejudice to the assessment in Section 8.2.2.2, the Commission considers, by way of a subsidiary line of reasoning, that even if Irish Revenue was right to have accepted the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, which the Commission contests, the profit allocation methods endorsed in the contested tax rulings, which are based on that assumption, nevertheless produce an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. In particular, the Commission considers those methods to undervalue ASI's and AOE's annual taxable profit in Ireland, since they are based on inappropriate methodological choices. Those inappropriate choices result in a lowering of those companies' Irish corporation tax liability as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length.
- (326) The purpose of the assessment undertaken in recitals 327 to 360 is not to determine an arm's length remuneration for the functions performed by the Irish branches. In light of the reasoning set out in Section 8.2.2.2, the Commission does not consider that Irish Revenue was right to have accepted the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, which is the assumption on which the profit allocation methods endorsed by the contested tax rulings is based. Rather, the purpose of that assessment is to show that, even if Irish Revenue had been right to have accepted that unsubstantiated assumption, several of the methodological choices underlying those methods nevertheless result in a taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. In other words, by endorsing those methods, the contested tax rulings should, in any event, be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty also under this subsidiary line of reasoning.
- (327) More specifically, the Commission considers the following methodological choices, underlying the one-sided profit allocation methods endorsed by the contested tax rulings to depart from a market-based outcome: (i) the choice of ASI's and AOE's Irish branches as the focus of the one-sided profit allocation methods, (ii) the choice of operating expense as profit level indicator, and (iii) the levels of accepted returns.

(a) *Unjustified choice of the Irish branches as the focus of the one-sided profit allocation method*

- (328) When direct transfer pricing methods, such as the CUP method, are used to set the price of an intra-group transaction, the outcome is reflected equally for both parties to that transaction. By contrast, when one-sided

⁽²⁵⁹⁾ See recital 210.

⁽²⁶⁰⁾ The report seems to contain further imprecisions: it states that the Irish branch does not undertake any marketing activity, which seems contradicted, by Ireland and Apple.

indirect transfer pricing methods are used, such as the TNMM, the transfer pricing analysis focuses only on the activities performed by one party to the controlled transaction (the 'tested party') and the remuneration for those activities, rather than on separate identifiable transactions and their prices. In the application of the TNMM, it is therefore necessary to select the tested party for which it is possible to benchmark the net margin earned by that party in the controlled transaction against the net margin earned by comparable independent companies in uncontrolled transactions ⁽²⁶¹⁾. To ensure that the estimation of the arm's length remuneration for that transaction is reliable, it is thus essential that the choice of the tested party is the best possible choice.

- (329) In the one-sided profit allocation methods endorsed by the contested tax rulings, which resemble the TNMM, only the activities of ASI's and AOE's Irish branches are taken into account ⁽²⁶²⁾. The contested tax rulings thus accept the choice of the Irish branches as the 'tested party'. Similarly, the Irish branches are identified as the tested party in both the PwC and [Apple's tax advisor] *ad hoc* reports. The choice of the Irish branches as the 'tested party' is premised on the unsubstantiated assumption that ASI's and AOE's Irish branches perform the 'less complex function' as compared to their respective head offices, since the Apple IP licences had been allocated to the latter for tax purposes. The fact that the Irish branches have been chosen as the tested party equally implies that the activities of the head offices are considered to be more complex.
- (330) In the application of the TNMM, entities that are, for example, exposed to risk or own intangible property are often selected as the more complex function ⁽²⁶³⁾. In this respect, it is important to clarify that the mere fact of owning an intangible asset does not necessarily mean that the owner of the intangible asset performs a complex function. Therefore, even if the Apple IP licences held by ASI and AOE should have been allocated outside of Ireland, which the Commission contests, the choice of the Irish branches as the less complex function should be based on a comparison of the functions carried out by those branches as compared to their respective head offices and not on that mere assumption.
- (331) As explained in recital 281, the activities of the head offices are limited to the board meetings of the two companies. The board meetings of the two companies are recorded in the minutes and, as evidenced in the summaries of those minutes provided in Table 4 and Table 5 and the descriptions provided in recitals 127 and 129, those minutes do not demonstrate any complex activities taking place at the level of ASI's and AOE's head offices. According to those minutes, the board meetings mainly deal with decisions on financial management, such as receiving or paying dividends. In particular, the head offices do not seem to perform, nor seem capable of performing, any active and critical roles with regard to R & D or the management of the Apple IP, as explained in recitals 281 to 293.
- (332) By contrast, as explained in recitals 296 to 304, the functions of the Irish branches as presented to Irish Revenue consisted of functions for which the use of those licences was crucial and indications existed that those branches did in fact ensure IP-related functions that were crucial in building brand awareness and brand recognition in the EMEA region.
- (333) Given the limited capacity of the head offices to control any risk as compared to the scope of the activities of their respective Irish branches, the choice of the Irish branches as the tested, less complex, party to the transaction results in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. Consequently, Irish Revenue's

⁽²⁶¹⁾ See, in this context, paragraph 3.18 of the 2010 OECD TP Guidelines: 'The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis.'

⁽²⁶²⁾ Ireland argues that this follows from the application of Section 25 TCA 97, where only the activities that take place in the Irish branches need to be considered.

⁽²⁶³⁾ See recital 94.

acceptance of the profit allocation methods premised on that choice lowers ASI's and AOE's annual Irish corporation tax liability as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. For that reason, the contested tax rulings should be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty.

(b) Inappropriate choice of profit level indicator

- (334) Even if the Irish branches were appropriately considered to be the 'less complex function' and thus properly selected as the tested party for the one-sided profit allocation methods endorsed by the contested tax rulings, which the Commission contests, the profit level indicators chosen for those methods do not result in a reliable approximation of a market-based outcome in line with the arm's length principle.
- (335) The profit level indicator selected for the application of a one-sided transfer pricing method, like the TNMM, is supposed to reflect the functions performed by the tested party in the controlled transaction, which the contested tax rulings accept to be the Irish branches. The profit level indicator proposed by Apple and endorsed by Irish Revenue in both the 1991 and 2007 tax rulings for determining ASI's and AOE's taxable profit for the functions they perform is operating expenses, which for AOE has been combined with a percentage of turnover since the 2007 ruling. Since the two branches perform different functions, the Commission will analyse the functions of each branch separately to conclude whether the choice of operating expenses as profit level indicator was appropriate in each case.
- (336) ASI's Irish branch was presented by Apple to Irish Revenue as performing mainly procurement, sales and distribution activities. The choice of operating expenses as profit level indicator is generally associated with low-risk distributors ⁽²⁶⁴⁾. However, for the reasons set out in recitals 337, 338 and 339, ASI's Irish branch cannot be considered to be a low-risk distributor.
- (337) First, ASI bears turnover risk, which was as high as USD [67,5-68] billion in 2014. Since ASI's head office lacks a physical presence or employees and is therefore unable to bear any product risk, it must be assumed that it is ASI's Irish branch that bears the risks in question. The use of operating expense as profit level indicator does not reflect that risk, since the operating expense of ASI's Irish branch remained relatively stable over the period during which the contested tax rulings were in force. By contrast, ASI's sales substantially increased over that same period. This de-correlation between operating expense and sales calls into question the appropriateness of operating expense as profit level indicator for determining ASI's taxable profit ⁽²⁶⁵⁾.

⁽²⁶⁴⁾ The [Apple's tax advisor] *ad hoc* report seems to consider that sales is not an appropriate profit level indicator for distribution activities. According to that report, sales could only be appropriate in this case for distribution activities limited to logistics, whereas ASI has important customer support functions and provides warranties for all goods sold. See Transactional profits transfer pricing methods, Comments on a series of draft issues notes, [Apple's tax advisor], 30 April 2008, where the tax advisor of Apple states '[Apple's tax advisor] believes that the case can be made for the use of a Berry ratio in some cases in highly integrated groups in which the 'selling' is predominantly undertaken at a regional or global level and the sales company's function is largely logistical.' See also Transactional profits transfer pricing methods, Comments on a series of draft issues notes, [Apple's tax advisor], 30 April 2008, where the tax advisor of Apple states '[Apple's tax advisor] notes the [OECD] Working Party's view that the Berry ratio should only be used to reward sales activities; and that a sales related indicator is more appropriate except in comparable situations when independent parties operating at arm's length would have agreed otherwise.' OECD Working Party is the designation of working groups within the OECD composed in principle of Member States' representatives and dedicated to specific issues such as for example transfer pricing.

⁽²⁶⁵⁾ Opening Decision, recital 67: 'In fact, [...] the sales income of ASI increased by 415 % over the three years 2009-2012 to USD 63,9 billion. For the same period, the operating costs as reflected by the taxable income [...] increased by [15-20] %.'

- (338) Second, ASI provides warranties for all goods sold throughout the EMEA region. Those warranties constituted the most significant liability in the transfer of assets and liabilities from ASI to ADI in relation to that region ⁽²⁶⁶⁾. Since ASI's head office lacks a physical presence or employees and is therefore unable to bear any product risk, ASI's Irish branch must be considered to owe that liability. However, the choice of operating expense as profit level indicator does not reflect that level of risk since, as explained in recital 336, the use of operating expense as profit level indicator is generally associated with low-risk distributors ⁽²⁶⁷⁾.
- (339) Third, ASI systematically relies on third party contractors ⁽²⁶⁸⁾ to ensure its distribution function. Indeed, the turnover generated by ASI is constituted for a large part of goods which are never physically handled in Ireland. The risk borne in respect of products which are not handled in Ireland would be better captured in total sales than in operating expense, because although the payments for outsourced services might be reflected in the operating expense of the branch, this amount would include a remuneration for the third party in providing the services and does not reflect the activity generated costs as such. However, the degree of detail available on ASI's operating expense is insufficient to identify components of the operating expense, such as payment for outsourced costs and staff costs ⁽²⁶⁹⁾.
- (340) For the reasons set out in recitals 337, 338 and 339, the choice of operating expenses as profit level indicator, instead of sales, improperly reflects the risks borne and the significant activities performed by ASI's Irish branch. Those reasons are equally valid for the use of the Berry ratio in the two *ad hoc* reports prepared by PwC and [Apple's tax advisor]. The Berry ratio is also used as a financial ratio to estimate an arm's length remuneration for limited risk distributors ⁽²⁷⁰⁾. The Berry ratio represents a return on a company's value added functions and assumes that those functions are captured in its operating expenses. Since the denominator used in the Berry ratio is operating expense, the use of operating expense in the application of the TNMM and the use of the Berry ratio is, in practice, no more than a presentational difference. In any event, the OECD TP Guidelines describe scenarios in which the Berry ratio may be useful, but those scenarios are different from the scenario in which ASI operates ⁽²⁷¹⁾.
- (341) In conclusion, neither the choice of operating expense as profit level indicator in the contested tax rulings, nor the use of the Berry ratio in the *ad hoc* reports, is appropriate to determine an arm's length remuneration for the functions performed by ASI's Irish branch. The choice of operating expense as profit level indicator instead of sales inappropriately lowers the annual taxable profit of ASI in Ireland, since sales are a broader profit level indicator than operating expense and, in the case of ASI, sales substantially increased over the period during which the contested rulings were in force, whereas ASI's operating expense remained relatively stable ⁽²⁷²⁾. In particular, it results in a very low and stable taxable base for ASI's Irish branch ⁽²⁷³⁾, which does not correctly

⁽²⁶⁶⁾ See recital 135.

⁽²⁶⁷⁾ See, in this context, paragraph 2.87 of the 2010 OECD TP Guidelines that state: 'The denominator should be focussed on the relevant indicator(s) of the value of the functions performed by the tested party in the transaction under review, taking account of its assets used and risks assumed.'

⁽²⁶⁸⁾ See, for example, recital 55.

⁽²⁶⁹⁾ See Figure 4.

⁽²⁷⁰⁾ See, for example, the table on use of profit level indicators in Transfer Pricing Rules and Compliance Handbook, Marc M. Levey, Steven C. Wrappe, Kerwin Chung, 2006.

Return on Assets (ROA)	Formula: Operating Profit/Operating Assets Often Used to Test: Manufacturers
Operating Margin	Formula: Operating Profit/Net Sales Often Used to Test: Distributors
Berry Ratio	Formula: Gross Profit/Operating Expenses Often Used to Test: Low-Function Distributors
Net Cost Plus	Formula: Operating Profit/Total Costs Often Used to Test: Service Providers and Contract Manufacturers

⁽²⁷¹⁾ See paragraph 2.101 of the 2010 OECD TP Guidelines.

⁽²⁷²⁾ See recital 337.

⁽²⁷³⁾ This principle is explained in reference to business restructuring in paragraph 9.10 of the 2010 OECD TP Guidelines that state: 'Business restructurings often result in local operations being converted into low risk operations (e.g. 'low risk distributors', or 'low risk contract manufacturers') and being allocated relatively low (but generally stable) returns on the grounds that the entrepreneurial risks are borne by another party to which the residual profit is allocated.'

reflect the risks assumed by that branch, as described in recitals 337, 338 and 339. That choice therefore results in a lower remuneration for that branch than for an independent company whose taxable profit reflects prices determined on the market negotiated at arm's length. Similar concerns do not arise where sales is used as a profit level indicator for determining the remuneration for the functions performed by ASI's Irish branch.

- (342) That the choice of operating expense as profit level indicator for a company that performs procurement, sales and distribution activities might not result in a reliable approximation of a market-based outcome in line with the arm's length principle is further supported by the guidance provided by the OECD TP Guidelines. Those Guidelines suggest a remuneration based on sales rather than on operating expense for companies performing such functions ⁽²⁷⁴⁾. Similar concerns are also addressed in the OECD TP Guidelines regarding the use of the Berry ratio ⁽²⁷⁵⁾. In any event, the possible choice of total costs as a profit level indicator, which is a broader base than operating expense ⁽²⁷⁶⁾, was never considered for ASI's Irish branch and that choice would have also increased ASI's yearly taxable profit in Ireland.
- (343) As regards AOE, Apple presented its Irish branch to Irish Revenue as being responsible for the manufacturing and assembly of a specialised range of computer products. AOE owns the inventories ⁽²⁷⁷⁾ and would appear to have control and bear the risk for at least part of the costs related to those inventories ⁽²⁷⁸⁾. Since its head office is not in a position to effectively bear that risk in the absence of a physical presence or employees that could manage that risk, AOE's Irish branch should be considered to bear the full risk of the inventories. In such circumstances, a profit level indicator including total costs is more appropriate than operating expenses for a manufacturing company like AOE. Total costs is a broader base than operating expense, since the latter excludes costs related to raw materials, whereas total costs include the main variable component of costs, which are in principle costs of goods sold for a manufacturing company like AOE. The Commission observes, in that respect, that both the PwC and [Apple's tax advisor] *ad hoc* reports propose a mark-up on total costs as a profit level indicator ⁽²⁷⁹⁾.
- (344) By accepting a profit allocation method with operating expense and not total costs as profit level indicator, Irish Revenue conferred a selective advantage on AOE as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. The exclusion of certain costs, such as the cost of goods sold, from the profit level indicator that was endorsed by the contested tax rulings for AOE's Irish

⁽²⁷⁴⁾ See, in this context, paragraph 2.87 of the 2010 OECD TP Guidelines: 'Typically, and subject to a review of the facts and circumstances of the case, sales or distribution operating expenses may be an appropriate base for distribution activities, full costs or operating expenses may be an appropriate base for a service or manufacturing activity, and operating assets may be an appropriate base for capital-intensive activities such as certain manufacturing activities or utilities.'

⁽²⁷⁵⁾ See, in this context, paragraph 2.101 of the 2010 OECD TP Guidelines: 'the issues (...) in relation to pass-through costs equally arise in the application of Berry ratios. In order for a Berry ratio to be appropriate to test the remuneration of a controlled transaction (e.g. consisting in the distribution of products), it is necessary that:

- The value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is proportional to the operating expenses,
- The value of the functions performed in the controlled transaction (taking account of assets used and risks assumed) is not materially affected by the value of the products distributed, i.e. it is not proportional to sales, and
- The taxpayer does not perform, in the controlled transactions, any other significant function (e.g. manufacturing function) that should be remunerated using another method or financial indicator.'

⁽²⁷⁶⁾ See paragraph 2.47 of the 2010 OECD TP Guidelines.

⁽²⁷⁷⁾ According to the financial accounts of AOE, AOE owns both stock of 'raw material' and 'work on progress and finished goods'.

⁽²⁷⁸⁾ See, in this context, paragraph 2.93 of the 2010 OECD TP Guidelines: 'In applying a cost-based transactional net margin method, fully loaded costs are often used, including all the direct and indirect 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.'

⁽²⁷⁹⁾ See recitals 167 and 214.

branch, inappropriately lowers the annual taxable profit of that company in Ireland, as total costs are a broader profit level indicator than operating expense and thus could lower its Irish corporation tax liability.

- (345) In conclusion, the acceptance by Irish Revenue of operating expense as profit level indicator in the profit allocation methods endorsed by the contested tax rulings, instead of sales for ASI's Irish branch and total costs for AOE's Irish branch, inappropriately lowers the annual taxable profit of both companies in Ireland as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. The contested tax rulings should therefore be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty.

(c) The levels of return accepted are too low

- (346) In the contested tax rulings, Irish Revenue accepted different levels of return for ASI's and AOE's Irish branches. As regards ASI, the 1991 ruling accepts a 12,5 % margin on branch operating expense, whereas the 2007 ruling accepts a [10-15] % margin. As regards AOE, the 1991 ruling accepts a 65 % margin on branch operating expense up to USD [60-70] million and a 20 % margin in excess of that amount, whereas the 2007 ruling accepts a [10-15] % margin on branch operating expense with an IP return of [1-5] % of branch turnover in respect of the 'accumulated manufacturing process technology' ⁽²⁸⁰⁾ of the Irish branch. Since no profit allocation reports were prepared by Apple when requesting the contested tax rulings, no contemporaneous explanations exist to substantiate the choice of those levels of return in 1991 and 2007.
- (347) As regards the 1991 ruling, the threshold system agreed for AOE of 65 % of operating expense, decreasing to 20 % above USD [60-70] million, appears to have been arrived at through negotiation and to have depended on employment considerations, as is evidenced by the excerpts reproduced in Section 2.2.3 and in particular the reference to the need 'not to prohibit the expansion of the Irish operations' in those excerpts ⁽²⁸¹⁾. The Court has held in this regard that if a tax administration has broad discretion to determine the beneficiaries or the conditions under which tax relief is granted on the basis of criteria unrelated to the tax system, such as employment considerations, the exercise of that discretion must be regarded as giving rise to a selective advantage.
- (348) The Commission does not agree with Ireland's interpretation of that reference ⁽²⁸²⁾, according to which it would not be unreasonable for a contract manufacturer to accept a reduced mark-up on its costs after it had been generously compensated. The objective of a rational economic operator is to maximise profits given a level of risk and a rational economic operator would not accept lower returns and forego profits because it received otherwise sufficient returns. The Commission also sees no merit in the reading proposed by Apple of that reference ⁽²⁸³⁾, which, according to Apple, should be understood in light of the fact that the incremental fixed investment necessary for expansion would be unlikely to be as large as the initial fixed investments ⁽²⁸⁴⁾. In particular, Apple's argument, presented in an *ad hoc* study prepared by [Apple's 2nd advisor] ⁽²⁸⁵⁾, that profits deriving from efficiencies should be taxed less, cannot be accepted. According to that report, a decreased

⁽²⁸⁰⁾ See ruling request of 16 May 2007, which is the basis of the 2007 ruling, p. 1.

⁽²⁸¹⁾ Observations of Ireland on the Opening Decision, paragraph 119. See recital 65.

⁽²⁸²⁾ Case C-6/12 P Oy EU:C:2013:525, paragraphs 25 to 28 and the case-law cited.

⁽²⁸³⁾ See recital 65.

⁽²⁸⁴⁾ See Observations of Apple on the Opening Decision, paragraph 112.

⁽²⁸⁵⁾ See recital 170.

percentage of taxation on profits beyond a threshold reflects the underlying economies of scale. However, the Commission can find no economic rationale for a company to accept lower profits when it incurs lower costs. Similarly, a decrease in taxation in the case of large companies which benefit from economies of scale is alien to the logic of the tax system. More specifically, if profit generated by economies of scale were taxed less than profit generated by small businesses, large companies would benefit from a double advantage: large companies which are more efficient than their smaller peers would benefit by generating higher profits and, since taxation is levied as a percentage of profits, by being subject to a lower rate of taxation on that profit. Such an additional advantage lies outside the logic of the tax system, which is to tax the profit of all companies subject to taxation in Ireland, regardless of their size and market position. Finally, it may be in line with commercial logic to accept a lower profit margin per unit of goods sold when the quantity sold to a specific client increases. This, however, does not automatically correspond to lower profits recorded in respect of that client's account, since the decreased profits margins per unit could be in principle more than off-set by larger volumes sold to this client. Ireland had no indications as to an underlying pricing strategy by Apple that would correspond to a similar profitability pattern. In any case, incentives similar to rebates on effective taxation rates aimed at attracting an increased activity and employment are not in the logic of the tax system.

- (349) By contrast, the Commission can accept Ireland's ⁽²⁸⁶⁾ and Apple's ⁽²⁸⁷⁾ explanations regarding the capital allowance agreed in the 1991 ruling upon which the Commission expressed doubts in the Opening Decision. In the Opening Decision, the Commission considered Irish Revenue's agreement that the amount of capital allowances be restricted to USD [1-10] million in excess of the sum charged for depreciation in the accounts to be unsubstantiated by any method or justified by any actual expenditures, but rather to appear to be the result of negotiations. Ireland and Apple argued that, on this point, the 1991 ruling limits a tax deduction. In particular, Ireland explained that ASI and AOE were volunteering an annual limit on its drawing down of capital allowances, although ASI and AOE would have been entitled to make higher claims to those allowances over a shorter number of years ⁽²⁸⁸⁾, so that this element of the ruling does not appear to selectively favour those companies when assessed individually and separately from other elements of the ruling.
- (350) As regards the 2007 ruling, an *ex post* reasoning is given in the *ad hoc* reports prepared by PwC and [Apple's tax advisor] for the levels of return agreed for ASI's and AOE's Irish branches. Both reports are based on a comparability study, but whereas the PwC report presents all the companies that the tax advisor considered as comparable for estimating an alleged arm's length return for the two branches, the [Apple's tax advisor] *ad hoc* report does not disclose the comparables used. The [Apple's tax advisor] *ad hoc* report points to comparability issues, in particular material differences in that report ⁽²⁸⁹⁾, but nevertheless proceeds with a comparables database search.
- (351) As a preliminary matter, the Commission considers the use of a comparability study, which is based on a comparables database search, to be an inappropriate means for estimating an arm's length profit for ASI's and AOE's Irish branches. For such a study to produce a reliable approximation of a market-based outcome in line with the arm's length principle, the products sold by the third parties included in the comparability study need to be comparable to the goods sold by ASI and the goods manufactured by AOE. However, the elimination criteria employed by PwC and [Apple's tax advisor] for the selection of comparables do not include any consideration of the fact that Apple sells high quality branded goods and positions its products on the market as such, while the companies selected might position themselves on the market differently. An arm's length return for a distributor

⁽²⁸⁶⁾ Observations of Ireland on the Opening Decision, paragraph 121 et seq.

⁽²⁸⁷⁾ Observations of Apple on the Opening Decision, paragraphs 115 et seq.

⁽²⁸⁸⁾ Observations of Ireland on the Opening Decision, paragraph 127.

⁽²⁸⁹⁾ See [Apple's tax advisor] *ad hoc* TP report, p. 13: 'geographic markets involved, contractual terms, product range and product volumes with respect to the third-party distributors are materially different when compared to those relevant to ASI Irish Branch's activities'.

like ASI cannot be assessed in the absence of such a consideration, particularly since ASI is liable for warranties on the products sold, as explained in recital 338, which in the case of quality branded goods present a non-negligible risk ⁽²⁹⁰⁾, and ASI carries considerable risk for high end goods that are not physically handled by the Irish branch, as explained in recital 339, which is not in principle the case of the comparables selected. In addition, a significant difference between variable cost intensity might be a concern for comparability considering that ASI's operating costs represent a very limited fraction of its sales.

- (352) Next to these general concerns with the use of a comparability study in this case, the Commission takes specific issue with the fact that at least three of the 52 companies chosen by PwC as comparables are in liquidation ⁽²⁹¹⁾. Companies which do not have a sustainable business model cannot, in principle, constitute reliable comparators when establishing an appropriate level of remuneration. As the liquidation status of a significant portion of the sample demonstrates that the sustainability of the business model was not a factor sufficiently taken into consideration in the selection, the representativeness of the overall comparables cannot be established.
- (353) Notwithstanding these general and specific concerns with the comparability studies carried out in the *ad hoc* reports, the Commission examined, for the sake of completeness, what an appropriate level of return would be for ASI using sales and for AOE using total costs, instead of operating expense, as a profit level indicator. The Commission recalls that it does not conduct this analysis to determine an arm's length remuneration for the functions performed by the Irish branches ⁽²⁹²⁾, but rather to demonstrate that, even if Irish Revenue had been right to have accepted the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, which the Commission contests, the inappropriate choice of operating expense and the inappropriately low levels of return accepted by Irish Revenue in the application of the one-sided profit allocation methods endorsed by the contested tax rulings result in an annual taxable profit for ASI and AOE in Ireland that, in any event, departs from a reliable approximation of a market-based outcome for their respective Irish branches.
- (354) As regards ASI, an analysis of a median return on sales ⁽²⁹³⁾ over the same period as the analysis carried out by PwC using the same comparables is presented in Figure 13.

Figure 13

Operating profit mark-up on turnover of the 52 companies selected by PwC

	Average 2007-2011 (%)
Lower quartile (25th percentile)	1,3
Median	3,0
Upper quartile (75th percentile)	4,5

⁽²⁹⁰⁾ The warranty risk is increased with the price of the underlying goods, therefore quality branded goods present a warranty because of their relatively high price, including cost of components. See in this context paragraph 3.37 of the 1995 OECD TP Guidelines that illustrates the following example: 'Assume, for example, that a taxpayer sells top quality video cassette recorders to an associated enterprise, and the only profit information available on comparable business activities is on generic medium quality VCR sales. Assume that the top quality VCR market is growing in its sales, has a high entry barrier, has a small number of competitors, and is with wide possibilities for product differentiation. All of the differences are likely to have material effect on the profitability of the examined activities and compared activities, and in such a case would require adjustment. As with other methods, the reliability of the necessary adjustments will affect the reliability of the analysis. It should be noted that even if two enterprises are in exactly the same industry, the profitability may differ depending on their market shares, competitive positions, etc.'. This example was no longer maintained in the 2010 OECD TP Guidelines.

⁽²⁹¹⁾ The Bureau Van Dijk database used by PwC indicates in respect of companies TECNOTEL ITALIA S.P.A. and MIELCO SPA that these companies are in liquidation, additionally the company MEMTEC IBERICA SL is, according to public sources, also in liquidation.

⁽²⁹²⁾ See recital 326.

⁽²⁹³⁾ Turnover (or operating revenue) are retained in the database search.

								(%)
	EBIT/turnover	2011	2010	2009	2008	2007	average	
1	ACTIVA DISTRIBUCIO D'ELECTRODOMESTICS, SA	1	1	1	1	1	0,66	
2	ALLNET.ITALIA S.P.A.	4	5	4	2	1	3,25	
3	AMSTESO ELECTRIC LIMITED	6	6	6	190	193	80,17	
4	APLICACIONES TECNOLOGICAS SA	12	18	16	18	25	17,50	
5	APRA S.P.A.	2	1	1	2	4	2,06	
6	AVESTA	4	4	5	5	4	4,39	
7	B2BIRES S.R.L.	3	4	3	3	3	3,21	
8	COM 2 NETWORKS	2	3	3	3	4	3,33	
9	COMERCIANTES DE ELECTRODOMESTICOS CORDOBESES SA	0	0	0	0	0	0,14	
10	COMERCIANTES DE ELECTRODOMESTICOS DE VALENCIA SA	1	1	1	1	1	0,98	
11	COMPONENTES ELECTRICOS MERCALUZ SA	2	2	2	7	4	3,47	
12	CONFIG	2	1	0	2	5	1,76	
13	CONNECT DATA	3	0	2	7	7	3,75	
14	DACOM S.P.A.	9	8	8	10	4	7,87	
15	DIGIT ACCESS	4	3	3	4	4	3,49	
16	DUWIN SRL	0	0	0	1	1	0,47	
17	EARPRO SA	2	4	1	16	14	7,37	
18	ELECTRODOMESTICS CANDELSA, SA	1	1	1	0	1	1,09	
19	ELETTROLAZIO S.P.A.	3	2	2	3	1	2,26	
20	EUROP COMPUTER PERFORMANCE	3	3	3	2	4	2,98	
21	FERNANDO CRISTINO, LDA	13	12	12	9	8	10,73	
22	FRIGO 2000 S.R.L.	10	12	12	17	22	14,68	
23	GIGALOGIE	5	5	5	8	5	5,77	

								(%)
	EBIT/turnover	2011	2010	2009	2008	2007	average	
24	INFOWORK TECHNOLOGY SL	1	1	1	0		0,83	
25	INTERDAS S.P.A.	6	2	0	1	0	1,63	
26	INTERPONTO — COMÉRCIO INTERNACIONAL DE EQUIPAMENTOS DE INFORMÁTICA, LDA	2	– 5	3	1	2	0,53	
27	IPOH S.R.L.	2	2	0	4	7	3,17	
28	IRES — S.P.A.	6	6	5	6	6	5,68	
29	K1 ELECTRONIC GMBH	3	2		1	1	1,51	
30	KONTORLAND AS	8	6	10	10	10	8,69	
31	LAZANAS — Xepapadakou Eisagogiki A.E.E.	0	1	2	1	2	1,10	
32	LINEA 2000	10	11	12	10	11	10,74	
33	M HERMIDA INFORMATICA SA	1	2	2	1	1	1,30	
34	MEMTEC IBERICA	3	1	4	5	2	2,97	
35	MIELCO S.P.A. IN LIQUIDAZIONE	1	– 2	1	1	4	1,33	
36	MOBIMAQUE II — EQUIPAMENTOS DE TELECOMUNICAÇÕES, LDA	2	11	5	– 12	3	1,77	
37	MT COMPONENTS LIMITED	4	1	2	1	1	1,74	
38	NEO TECHNOLOGY	2	2	2	3	2	2,07	
39	OLISYS	6	5	6	6	5	5,52	
40	PROFESSIONNAL COMPUTER ASSOCIES FRANCE	6	4	3	4	6	4,50	
41	RECO S.P.A.	1	5	8	2	4	3,96	
42	REMLE, SA	2	3	2	1	1	1,75	
43	SANGHA France	7	3	4	6	4	4,69	
44	SIAM S.R.L.	2	1	2	1	1	1,54	
45	SUMELEC NAVARRA SL	0	0	1	7	10	3,80	
46	TECNOTEL ITALIA S.R.L. IN LIQUIDAZIONE	0	1	2	2	2	1,27	
47	TEDUIN SA	2	1	1	1	1	1,10	

(%)

	EBIT/turnover	2011	2010	2009	2008	2007	average
48	TELSERVICE S.R.L.	0	0	0	0	0	0,17
49	TRANS AUDIO VIDEO S.R.L.	5	4	4	8	8	5,82
50	TULSI IMPORT EXPORT LTD		1	2	1	2	1,74
51	VERE 85 SA		1	1	0	0	0,69
52	ΕΝΑΡΧΕΙΣ ΔΥΝΑΜΙΚΑ ΜΕΣΑ Ε.Π.Ε.	3	3	4	4	4	3,87

- (355) Using the comparables selected by PwC with ASI's Irish branch as the tested party and sales as profit level indicator, the analysis in Figure 13 results in a median return on sales of 3 % with an interquartile range ⁽²⁹⁴⁾ of 1,3 % to 4,5 %. Based on the financial information in Table 1 of this Decision and on the information provided in recital 105 based on tax returns, the trading income of ASI's Irish branch taxed at the standard Irish corporate tax rate of 12,5 % was around USD [40-50] million in 2012, representing about [0,0-0,5] % of ASI's 2012 turnover. That amount is almost 20 times lower than the amount that would result from applying the lower quartile of the analysis in Figure 13, which is based on the corrected PwC comparability analysis.
- (356) In conclusion, even if Irish Revenue had been right to accept a profit allocation method based on a one-sided profit allocation method with ASI's Irish branch chosen as the tested party, which the Commission contests, the taxable profit for ASI in Ireland resulting from an application of the contested tax rulings deviates from a reliable approximation of a market-based outcome in line with the arm's length principle. That deviation leads to a significant reduction of ASI's corporation tax liability in Ireland as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. Those rulings should therefore be considered to grant ASI a selective advantage for the purposes of Article 107(1) of the Treaty
- (357) As regards AOE, the taxable profit for that company in 2012 corresponds to approximately [1-5] % of total costs. That percentage falls within the interquartile range presented in the PwC and [Apple's tax advisor] *ad hoc* reports and is close to the 25th percentile, which is considered by the tax advisor as constitutive of the lower end of an arm's length range. According to [Apple's tax advisor], for the period 2009 to 2011 ⁽²⁹⁵⁾, the lower quartile mark-up on total costs would be [4,5-5,0] % (with a median of [5-10] %) and, according to PwC, for the period 2007-2011 ⁽²⁹⁶⁾, it would be [3,0-3,5] % (with a median of [5-10] %).
- (358) However, the comparability of each company with AOE's Irish branch in the PwC *ad hoc* report is established on the basis of the information available from a commercial database only and there is no justification in that report as to why, in the absence of a detailed analysis of comparability of each company's business and costs structure, the 25th percentile is accepted as the lower end of the range rather than requiring a narrower range to address the comparability concerns ⁽²⁹⁷⁾.

⁽²⁹⁴⁾ The interquartile range is referred to by PwC and by [Apple's tax advisor] as the arm's length range.

⁽²⁹⁵⁾ See Figure 10.

⁽²⁹⁶⁾ See recital 217.

⁽²⁹⁷⁾ Paragraph 3.57 of the OECD 2010 TP Guidelines states in this respect: 'It may also be the case that, while every effort has been made to exclude points that have a lesser degree of comparability, what is arrived at is a range of figures for which it is considered, given the process used for selecting comparables and limitations in information available on comparables, that some comparability defects remain that cannot be identified and/or quantified, and are therefore not adjusted. In such cases, if the range includes a sizeable number of observations, statistical tools that take account of central tendency to narrow the range (e.g. the interquartile range or other percentiles) might help to enhance the reliability of the analysis'.

- (359) In addition, the outcome of the PwC *ad hoc* report is based on a comparison with manufacturing companies only, whereas that report states that AOE's Irish branch is also provides shared services to other Apple group companies in the EMEA region, such as finance (accounting, payroll and accounts payable services), information systems and technology and human resources activities ⁽²⁹⁸⁾. None of those functions is factored into the analysis of the PwC *ad hoc* report, so that that report cannot be used to justify *ex post* that the remuneration of those functions was at arm's length.

(d) Conclusion on the misapplication of the one-sided profit allocation methods in the contested tax rulings

- (360) In conclusion, the Commission considers that even if Irish Revenue had been right to have accepted the unsubstantiated assumption that the Apple IP licences held by ASI and AOE should be allocated outside of Ireland, which the Commission contests ⁽²⁹⁹⁾, the profit allocation methods endorsed in the contested tax rulings still produce an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. Those rulings endorse a taxable remuneration which the Irish branches would not have accepted, from the perspective of their own profitability, if they were separate and independent companies engaged in the same or similar activities under the same or similar conditions. Since those profit allocation methods lower ASI's and AOE's tax liability under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable profit under that system is determined by prices negotiated at arm's length on the market, the contested tax rulings, by endorsing those methods, confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty.

8.2.2.4. Conclusion on the existence of a selective advantage resulting from a derogation from the ordinary rules of taxation of corporate profit in Ireland

- (361) The Commission concludes under both lines of reasoning that the profit allocation methods endorsed by the contested tax rulings result in a lowering of ASI's and AOE's corporation tax liability under the ordinary rules of taxation of corporate profit in Ireland as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. The Commission therefore considers those rulings to grant ASI and AOE a selective advantage for the purposes of Article 107(1) of the Treaty.
- (362) That conclusion is further confirmed by two additional factors, suggesting that the profit allocation methods endorsed by the contested tax rulings do not produce an outcome resulting in a reliable approximation of a market-based outcome in line with the arm's length principle.
- (363) First, as noted in recital 262, the contested tax rulings were issued in the absence of a profit allocation report. As explained in the Opening Decision, the fact that at the time the contested tax rulings were granted no profit allocation report was submitted by Apple to support the profit allocation methods it proposed to Irish Revenue tends to indicate that the methods endorsed by those rulings do not produce an outcome resulting in a reliable approximation of a market-based outcome in line with the arm's length principle
- (364) Second, the 1991 ruling was open-ended without any revision clause and effectively applied for 15 years, until the 2007 ruling was issued. The 2007 ruling, which did have a revision clause, was also open-ended and applied,

⁽²⁹⁸⁾ PwC *ad hoc* report p. 12.

⁽²⁹⁹⁾ Section 8.2.2.2.

according to Apple, for 8 years, until Apple's new corporate structure in Ireland was put into place. An agreement between a tax administration and a taxpayer that has no end date makes predictions as to future conditions on which that agreement is based less accurate, thereby casting doubt on the reliability of the method endorsed by the agreement ⁽³⁰⁰⁾. This applies *a priori* to an open-ended ruling.

- (365) Ireland argues that, notwithstanding the duration of the 1991 ruling, each year's declaration was a 'fresh exercise' and it would not have been possible to use the basis of branch profit attribution laid down in the ruling 'where changes in the facts and circumstances would have rendered that basis unreliable' ⁽³⁰¹⁾. However, it is unclear how Irish Revenue could have been aware of any changes in the facts and circumstances. Apple could just file its yearly tax return on the basis of the 1991 ruling, without any obligation to inform Irish revenue of any major changes ⁽³⁰²⁾. Indeed, unlike the 2007 ruling, the 1991 ruling does not contain any revision clause that determines that the ruling will not continue to apply if there is a major change in the nature of the activities carried on.
- (366) In addition, it is not clear which changes justified replacing the 1991 ruling with the 2007 ruling. In principle an Advance Pricing Arrangement is valid as long as the critical assumptions validated in the ruling are in place ⁽³⁰³⁾. The contested rulings do not identify the critical assumptions. In 2007, it is also not clear what change in critical assumptions if any prompted the request for changes in the 1991 arrangement.
- (367) As regards the 2007 ruling, it is even agreed that if Apple decides to restructure the business of its subsidiaries in Ireland, by adding new Irish companies to the structure or merging existing companies, the profit allocation methods endorsed in the 2007 ruling would continue to apply to any new or merged entity so long as those companies 'carry on broadly the same types of business' as ASI and AOE. While it is true that the 2007 ruling contains a revision clause that determines that the ruling will not continue to apply if there is a major change in the nature of the activities carried on, it is not clear what a major change entails and this has not been explained by Ireland, nor further specified in the ruling. On the basis of the very limited description of the activities of ASI's and AOE's Irish branches in the rulings, it is difficult to determine if a change in the functions performed or the risks managed by the Irish branches would qualify as a major change. As apparently even a business restructuring does not qualify as a 'major change in the nature of the activities', it seems that Apple could apply the favourable tax treatment provided by the contested tax rulings with only limited restrictions under the 2007 ruling.
- (368) In any event, even if the profit allocation methods endorsed by the contested tax rulings corresponded to methods producing a reliable approximation of a market-based outcome in line with the arm's length principle when they were issued, which they did not, the open-ended duration of those rulings calls into question the appropriateness of the profit allocation, given the possible changes to the economic and regulatory environment in the years covered by the rulings ⁽³⁰⁴⁾.

⁽³⁰⁰⁾ See Point 51 of the Annex to Chapter IV of the 2010 OECD TP Guidelines and of the Annex on Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure (MAP APAs) of the 1995 OECD TP Guidelines.

⁽³⁰¹⁾ Observations of Ireland on the Opening Decision, paragraph 130.

⁽³⁰²⁾ At paragraph 72 of its observations on the Opening Decision, Apple states that between 1991 and 2006 it had ongoing interactions with Irish Revenue about the organisational structure and main activities of the Irish branches on the basis of Irish Revenue's general power to monitor compliance with Irish tax rules. However, this does not compensate for the fact that the tax authority should reassess after a certain number of years afresh if the agreement is still valid or needs to be revised, especially in view of the fact that Apple's business developed significantly during this period. In addition, there do not seem to be any records of those alleged ongoing interactions, given that the Commission had asked Ireland, in its letter of 8 October 2013, to provide, together with the contested tax rulings, all elements essential to reason those tax rulings.

⁽³⁰³⁾ Paragraph 4.142 of the OECD 2010 TP Guidelines: 'Provided the critical assumptions are met, an APA can provide the taxpayers involved with certainty in the tax treatment of the transfer pricing issues covered by the APA for a specified period of time.'

⁽³⁰⁴⁾ Opening Decision, recital 65.

8.2.3. ALTERNATIVE LINE OF REASONING: SELECTIVE ADVANTAGE UNDER THE LIMITED REFERENCE SYSTEM OF SECTION 25 TCA 97 ONLY

8.2.3.1. *Selective advantage resulting from a derogation from Section 25 TCA 97 giving rise to a reduction of the taxable base*

- (369) Ireland and Apple argue that the appropriate reference system should be Section 25 TCA 97 only and that the determination of ASI's and AOE's taxable profit was entirely consistent with normal administrative practice under that provision ⁽³⁰⁵⁾. As explained in Section 8.2.1.2 of this Decision, the Commission does not consider the reference system in this case to be restricted to Section 25 TCA 97 only, but rather that that provision forms an integral and necessary part of the reference system identified in Section 8.2.1.1 — the ordinary rules of taxation of corporate profit in Ireland — which has as its intrinsic objective the taxation of profit of all companies subject to tax in Ireland.
- (370) Without prejudice to that conclusion, the Commission considers, by an alternative line of reasoning, that even if Section 25 TCA 97 only were to constitute the appropriate reference system in this case, the contested tax rulings grant ASI and AOE a selective advantage in the form of a reduction of their taxable profit upon which corporation tax is levied under that provision.
- (371) Ireland acknowledges that Section 25 TCA 97 does not provide guidance on how to determine the chargeable profit of a branch, as does Apple ⁽³⁰⁶⁾. However, Ireland claims that the application of Section 25 TCA 97 is not governed by the arm's length principle, but rather requires Irish Revenue to exercise judgment by taking into account the particular facts and circumstances of each case which may include 'the functions performed by any branch, its interest (if any) in the assets of the company, the nature and level of any risks assumed by the branch, and the overall contribution made by the branch to the company's profits' ⁽³⁰⁷⁾. The Commission observes that the criteria listed by Ireland for determining the chargeable profit of a branch — the functions performed, the assets used and the risks assumed by the branch — are essentially the same criteria laid down in Article 7(2) of the OECD Model Tax Convention for allocating profit to the permanent establishment of a non-resident integrated company ⁽³⁰⁸⁾. In other words, Ireland has not put forward, and the Commission has been unable to identify, any other objective standard besides the arm's length principle that ensures Section 25 TCA 97 is applied in a consistent manner ensuring that all integrated non-resident companies are treated equally under that provision.
- (372) Moreover, although Ireland only formally introduced the arm's length principle in its national legal system in the 2010 Finance Act, with effect from 1 January 2011, and that legislation excludes arrangements entered into between a branch and its non-resident head office ⁽³⁰⁹⁾, an analysis of Irish Revenue's ruling practice on the allocation of profit to the Irish branches of non-resident companies, for the subsequent application of Section 25 TCA 97, reveal that the arm's length principle underlies the profit allocation methods endorsed by Irish Revenue in a number of those rulings ⁽³¹⁰⁾.
- (373) For instance, in the case of the Company [B] ⁽³¹¹⁾, extensive reference is made to the arm's length principle in the letter from its tax advisor to Irish Revenue. Company [B] is tax resident in [...], has an Irish branch and is part of

⁽³⁰⁵⁾ Observations of Apple on the Opening Decision, paragraphs 159, 160, and 171. Observations of Ireland on the Opening Decision, paragraph 27. However, neither Ireland nor Apple provided any examples of the 'normal administrative practice' to show the alleged consistency in Irish Revenue's ruling practice.

⁽³⁰⁶⁾ See recital 248.

⁽³⁰⁷⁾ Observations of Ireland on the Opening Decision, paragraph 21. See also Apple's observations on the Opening Decision, paragraphs 154 and 155. Both observations are reproduced in footnotes 187 and 188, respectively.

⁽³⁰⁸⁾ See recital 84.

⁽³⁰⁹⁾ See recital 78.

⁽³¹⁰⁾ Ireland provided seven rulings on the attribution of profits to Irish branches of nine non-resident companies in response to the request to provide rulings on activities in Ireland involving the same kind of tax issue as the contested tax rulings. In response to a further request by the Commission to provide all rulings on profit allocation issued since 2004 and, in addition, all rulings issued prior to that date and still in force, Ireland provided ten additional rulings, including four rulings which appeared to concern profit allocation to a branch (see recitals 3 and 6). Those two submissions are therefore considered to cover the entire rulings practice of Irish Revenue in relation to profit allocation to a branch of integrated non-resident companies.

⁽³¹¹⁾ See recital 385.

a [...] multinational corporate group [the majority of the companies listed in recitals 2 and 6 are part of US multinational corporate groups]. For the purpose of profit allocation to the branch, its tax advisor proposes to consider the head office of Company [B] and its Irish branch as two separate legal entities dealing with each other at arm's length, making reference to the OECD Model Tax Convention. As regards the arm's length principle, the letter states that '[a]lthough Ireland does not have a double tax treaty with [...], the OECD Model does set out guidelines for the calculation of branch profits which may be used as an appropriate benchmark'. In a ruling from 1998, Irish Revenue considered the use of the arm's length principle acceptable for the allocation of profits to the Irish branch.

- (374) In a tax ruling from 2003 regarding Company [A] ⁽³¹²⁾, Irish Revenue agreed to a profit allocation between that non-resident company and its Irish branch based on the arm's length principle. Company [A] is incorporated in [...], with branches in [...] jurisdictions, including Ireland, and part of a [...] multinational corporate group. In the ruling request explaining the situation of the company, the tax advisor makes reference to Section 25 TCA 97, stating, first, that that provision does not give any further guidance on how trading income should be determined, and, second, that it is useful to look at the approach taken by the OECD Model Tax Convention and the arm's length principle. According to the tax advisor, 'the approach adopted in the OECD Model is consistent with Irish domestic law and is, in fact, little more than a restatement of the position under domestic law.' The ruling request puts forward the profit split method, whereby 12,5 % of all profits of the Company [A] are allocated to the Irish branch. That approach was accepted by Irish Revenue and used as a basis for the allocation of profits in the case of Company [A]'s Irish branch.
- (375) In a tax ruling from 2006 regarding Company [F] ⁽³¹³⁾, Irish Revenue agreed to the method proposed by that company for the allocation of profit to its future Irish branch. Company [F] is tax resident in [...], has an Irish branch and is part of a [...] multinational corporate group. As the basis for the profit allocation method proposed by Company [F], its consultant used the OECD arm's length principle which 'requires that the branch profit should be determined on the basis of essentially looking at the branch as a separate entity as far as possible from its head office and that any discussion or negotiation by the branch with its head office should be seen as being on an arm's length basis in terms of determining the profitability of the branch.'
- (376) Finally, in a tax ruling regarding Company [M] ⁽³¹⁴⁾, the tax advisor requests the agreement of the Irish authorities to an 'allocation of profits between [Company [M]] HO [the head office] and Irish branch [which] will reflect the fact that the risks of the Irish Branch will be limited [...]'. The request further clarifies that 'the Irish Branch will operate as a toll manufacturer for [Company [M]] HO [the head office] [...], receiving an arm's length remuneration'.
- (377) Consequently, although the arm's length principle was not explicitly laid down in Irish legislation until 2011 ⁽³¹⁵⁾, in the absence of any other objective standard put forward by Ireland and in light of the fact that that principle appears to have featured in Irish Revenue's tax ruling practice as early as the 1990s as the basis for determining a non-resident integrated company's taxable profit under Section 25 TCA 97, the Commission submits that the arm's length principle is inherent in the application of Section 25 TCA 97.
- (378) The Commission has already demonstrated, in Section 8.2.2.2 and Section 8.2.2.3, that the contested tax rulings endorse profit allocation methods producing outcomes that depart from a reliable approximation of a market-based outcome in line with the arm's length principle, thereby resulting in a reduction of ASI's and AOE's taxable profit for Irish corporation tax purposes and an economic advantage for the purposes of Article 107(1) of the Treaty. On the basis of the reasoning contained in those Sections, the Commission equally considers those tax

⁽³¹²⁾ See recital 387.

⁽³¹³⁾ See recital 392.

⁽³¹⁴⁾ See recital 391.

⁽³¹⁵⁾ It is not referred to in Section 25 TCA 97.

rulings to grant ASI and AOE a selective advantage under the more limited reference system of Section 25 TCA 97, since they result in a lowering of ASI's and AOE's taxable profits under that provision and thus their corporation tax liability in Ireland as compared to other non-resident companies that are also taxed under that provision.

8.2.3.2. *Selective advantage resulting from the exercise of discretion by Irish Revenue in the absence of objective criteria related to the tax system*

- (379) Even assuming that the application of Section 25 TCA 97 is not governed by the arm's length principle, which the Commission contests, the contested tax rulings should still be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty, since they would then be the result of discretion exercised by Irish Revenue in the absence of objective criteria related to the tax system.
- (380) While tax administrations must be afforded a certain discretion to account for the differences between taxpayers when applying their national tax provisions, where a tax administration has broad discretion to determine the beneficiaries or the conditions under which the legislation is applied on the basis of criteria unrelated to the tax system, the exercise of that discretion must be regarded as favouring certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation.⁽³¹⁶⁾ Put differently, rulings that merely contain a correct interpretation of the relevant national tax provisions, without deviating from a consistent administrative practice, do not, in principle, give rise to a selective advantage. By contrast, rulings where discretion is exercised by the tax administrations that is not based on objective criteria related to the tax system, give rise to a presumption of selective advantage.
- (381) The Commission and Ireland are in agreement that Section 25 TCA 97 does not lay down any objective criteria for the allocation of profit between various parts of the same non-resident company⁽³¹⁷⁾. However, Ireland disagrees with the Commission that Section 25 TCA 97 is governed by the arm's length principle. Assuming Ireland is correct and considering that Ireland has failed to put forward any other objective standard for allocating the profit of a non-resident company for the purpose of applying Section 25 TCA 97, this would mean that Irish Revenue's discretion in applying that provision is not based on objective criteria related to the tax system, which gives rise to a presumption of a selective advantage. The Commission has already demonstrated, in Section 8.2.2.2 and Section 8.2.2.3, that the contested tax rulings endorse profit allocation methods that result in a reduction of ASI's and AOE's taxable profit for Irish corporation tax purposes and an economic advantage for the purposes of Article 107(1) of the Treaty. On the basis of the reasoning contained in those Sections, the contested tax rulings should also be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty since they were issued on the basis of Irish Revenue's discretion under Section 25 TCA 97, exercised in the absence of objective criteria related to the tax system.
- (382) Finally, Ireland and Apple argue that the Commission must show that Apple has been treated favourably as compared to other non-resident companies that have been granted tax rulings by Irish Revenue for the purposes of applying Section 25 TCA 97. By this line of reasoning, Ireland and Apple appear to argue that the appropriate reference system is not Section 25 TCA 97 itself, but Irish Revenue's tax ruling practice in relation to non-resident companies.
- (383) From an examination of the tax rulings Ireland submitted to the Commission dealing with the allocation of profits to Irish branches of non-resident companies⁽³¹⁸⁾, which can be considered to cover the entire Irish ruling practice in relation to profit allocation to a branch⁽³¹⁹⁾, the Commission was unable to identify any consistent set

⁽³¹⁶⁾ Case C-6/12 P Oy EU:C:2013:525, paragraph 27.

⁽³¹⁷⁾ See recital 248.

⁽³¹⁸⁾ See recitals 2 and 6.

⁽³¹⁹⁾ The Decision does not prejudice any conclusion on the possible illegal and incompatible nature under State aid rules of any of the rulings described in this Decision except for the rulings granted to ASI and AOE.

of rules that generally apply on the basis of objective criteria to all non-resident companies operating through a branch in Ireland. In other words, Irish Revenue's profit allocation ruling practice is too inconsistent to constitute an appropriate reference system against which the contested tax rulings could be examined for determining whether ASI and AOE received a selective advantage as a result of the rulings.

(384) A number of those rulings are described in recitals 385 to 395 ⁽³²⁰⁾.

(385) *Ruling of February 1998 — Irish branch of Company [B]*: Company [B] is part of a [...] multinational corporate group ⁽³²¹⁾. The Irish branch of that company undertakes the manufacturing of [...], the organisation of the finishing process and the monitoring and administration of the delivery of the goods to customers. According to the ruling request, [...] manufacturing is, in general, by far the most complex activity in the production chain ⁽³²²⁾. The remuneration to be allocated to the Irish branch for tax purposes, proposed by the company's tax advisor and agreed by Irish Revenue, is equal to 117 % of total costs of the Irish branch ⁽³²³⁾, composed in particular of costs of sales and overheads.

(386) *Ruling of May 2001 — Irish branch of Company [C2]*: Company [C2] is a [...] company belonging to a [...] multinational [...] group [C]. The ruling endorses a profit allocation to that company's Irish branch, based on the request of the taxpayer, according to which profit for activities described in the ruling as 'technician purchase and re-sale of products in the context of re-invoicing service' will not be higher than 9 % of the costs of the administrative shared service centre to be located in Ireland.

(387) *Ruling of May 2003 — Irish branch of Company [A]*: Company [A] is part of the [...] multinational group [...] ⁽³²⁴⁾. The Irish branch of that company is described in the ruling request as engaging in the production of [...], as well as ensuring accounting functions for the entire company of which it is part. In the ruling request, Company [A]'s tax advisor makes reference to the OECD Model Tax Convention to propose a profit allocation to the branch. According to the ruling request, although control over the sales of the [...], marketing activities, ownership of IP and treasury functions are all located outside of Ireland, Company [A] does not consider that the Irish branch is a pure 'contract manufacturer', given that Ireland is considered to be a key location in the world for the supply of [...]. A profit allocation based on the profit split method is therefore proposed whereby 12,5 % ⁽³²⁵⁾ of all profits of Company [A] are allocated to the Irish branch, instead of a cost-plus method although the latter would have reduced the taxable profits of Company [A] in Ireland.

(388) *Ruling of September 2003 — Irish branch of Company [N]*: Company [N] is an Irish incorporated non-resident company that is part of a [...] multinational group. According to the ruling request, the activities of Company [N]'s Irish branch will consist of the manufacturing of [...] and the provision of other related services, such as warehousing and shipping. IP relating to those products would be allocated to the head office of Company [N] outside of Ireland and the Irish branch would operate as a toll or contract manufacturer. The Irish branch would

⁽³²⁰⁾ Where the duration of the ruling is not mentioned in the description, this means that the ruling itself does not contain any review clause or any other reference to its duration of validity.

⁽³²¹⁾ See recital 373.

⁽³²²⁾ Other activities of the Irish branch would also include [...]. Also the extent of the use of the Irish facility would be determined outside of Ireland. The [...] head office of the Company [B] is, according to the ruling request, licensed by the [...] mother company to sell and manufacture [...].

⁽³²³⁾ This level of 117 % was calculated by the tax advisor so as to leave to the head office an appropriate return for the rights it holds, which is, according to the tax advisor, 20 % of the turnover, based on standard royalty rate levels for [...]. These levels were calculated based on projections rather than historical figures. The ruling request does not, however, provide any further clarification as to the method employed nor does it provide any indication of *ex post* review.

⁽³²⁴⁾ See recital 374.

⁽³²⁵⁾ The 12,5 % margin is arrived at by calculating the average of the ratio costs of the Irish branch over total costs. It is not specified what cost base is taken as reference, the relevant costs are referred to in the ruling request as 'costs incurred in the operations'.

carry no risk in relation to marketing, R & D, quality control, product liability and inventory. The ruling agrees on an allocation of profits to the Irish branch so as to give rise to the same operating profit in Ireland as would have arisen had the Irish branch been incorporated as a subsidiary of Company [N]. The remuneration agreed in the ruling for the activities of the Irish branch is a mark-up of between 25 and 30 % on the costs of the Irish manufacturing branch. That mark-up is applied to the operating costs of the branch. The ruling also confirms that no Irish capital gains tax would apply in the event of a sale of any IP owned by Company [N], as the Irish branch would have no ownership interest in the IP held by Company [N].

(389) *Ruling of June 2004 — Irish branch of Company [I]*: Company [I] is incorporated in Ireland, but resident in [...]. The company, active in [...], requests that administrative services provided by its Irish branch will be set at cost plus 10 %. According to the ruling request, virtually all IP rights are allocated outside of Ireland. The ruling request does not specify which costs are concerned, but confirms that the branch profits of the company, subject to Irish corporation tax, will be limited to those attributable to the actual activities carried out in Ireland by branch employees.

(390) *Ruling of January 2005 — Irish branch of Company [E]*: Company [E] is registered in [...] and is part of a [...] multinational corporate group. According to the ruling request, the Irish branch produces [...]. Company [E] only has access to patents and related IP rights by virtue of licence agreements with related group companies. Company [E] operates as a 'contract manufacturer' in Ireland. The request indicates that the taxable base of the Irish branch should no longer include an entrepreneurial profit, as was previously the case. The request describes the possibility to move the current manufacturing from Ireland elsewhere and indicates that such a decision would have serious consequences for Irish operations. In an envisaged restructuring, the IP rights which would have been held by Company [E] ⁽³²⁶⁾ will be transferred to a newly created referred to as 'Newco', which will be incorporated in Ireland but tax resident outside of Ireland. In the new structure, the Irish branch would continue its manufacturing activities on behalf of the newly created company referred to as Newco on a contract manufacturing basis. The company requests the confirmation from Irish Revenue that the transfer of IP will not give rise to a capital gains tax in Ireland and that Newco will not have a taxable presence in Ireland. Company [E] will also perform other functions, in particular invoicing on behalf and in the name of Newco. Further title on the sale of products by Company [E] to its customers would pass through Ireland. For those functions and for the manufacturing functions ensured by the branch, the agreed remuneration for tax purposes was set at operating costs of the manufacturing activity plus 100 %.

(391) *Ruling of December 2005 — Irish branch of Company [M]*: Company [M] is incorporated in Ireland, but tax resident outside of Ireland, and is part of a [...] multinational corporate group. Company [M] sells [...] as well as finished goods. The ruling request indicates that to ensure a continuation of the current level of activity and employment in the Irish branch, [...], the group is considering Ireland as a location for new [...], developed by a [...] company of the group. In the new structure described in the request, Company [M] and its Irish branch would operate as if they were two separate legal entities for accounting purposes. Income would be allocated by way of an arm's length manufacturing fee in such a way that the Irish branch would earn the same level of operating profit as would be the case if the manufacturing activity of the Irish branch was carried on by a subsidiary of Company [M]. The head office of Company [M] would license the IP from a [...] company of the group and the Irish branch would operate as a toll manufacturer. As a toll manufacturer, it would produce finished goods to the specification of the head office using raw material owned by the head office of Company [M]. The Irish branch would carry no risk in relation to marketing, R & D, quality control, product liability and inventory. In addition to manufacturing, the Irish branch could assist in invoicing and collection, and in activities related to manufacturing such as warehousing and shipping. The remuneration agreed in the ruling for those activities is a mark-up of 10 % applied to operating costs of the Irish branch.

⁽³²⁶⁾ Despite the fact that Company [E] would have only had access to patents and intellectual property rights by virtue of license agreements from related companies, the ruling request refers to intellectual property rights held by Company [E] prior to the envisaged restructuring.

- (392) *Ruling of July 2006 — Irish branch of Company [F]*: Company [F] is tax resident in [...] and is part of a [...] multinational corporate group. The ruling prolongs an agreement from 1997 under which 15 % of the profit of Company [F] is allocated to the Irish branch for tax purposes. That arrangement is to be reviewed in 2025. The Irish branch is the global headquarters for [...]; it is responsible for the strategic planning of [...] and purchasing and for coordination and supervision of [...], including logistics. The board of directors of Company [F], based in the [...] head office, includes key management of the group. According to the tax advisor of Company [F], the 1997 ruling acknowledged that the IP belonged to the [...] head office and not to the Irish branch. The ruling request contains employment figures of Company [F] in Ireland and the amount of tax paid over the previous 8 years, but it does not contain any accounting data or financial projections for the company.
- (393) *Ruling of December 2006 — Irish branch of Company [C1]*: Company [C1] is a [...] company that is part of a [...] multinational [...] group. The branch manufactures [...]. The business areas of the branch include [...], production, human resources, public affairs, finance, procurement, etc. The ruling request does not refer to the existence of IP used by the Irish branch, which is allocated outside of Ireland. The taxable remuneration of the branch, as agreed in the ruling, consists of a mark-up of 18 % on Irish located operating costs, an 'IP return' of 1,6 % on the annual turnover of the [...] company to which the branch belongs, derived from products manufactured by the Irish branch, and a capital allowance for plant and buildings.
- (394) *Ruling of December 2007 — Irish subsidiaries of group [G]*: Group [G] is a [...] multinational corporate group with three Irish subsidiaries. The ruling therefore appears to concern profit allocation between companies rather than profit allocation to a branch. The ruling was agreed to last for a period of five years, starting from 2008. The ruling request indicates that the functions performed by the Irish subsidiaries consist of the manufacture of [...], sales of [...] and associated products, trading in [...], a shared service centre for the group affiliates worldwide and R & D. Neither the ruling request nor any of the supporting material submitted by Ireland refer to the existence of IP used by the Irish subsidiaries, which is allocated outside of Ireland. For one of the three subsidiaries, described as a manufacturing entity, the ruling agrees on the calculation of the taxable base in Ireland as the sum of 15 % of Irish located operating costs (costs included are listed in the ruling request), an 'IP return' of 0,8 % of annual turnover derived from products manufactured in Ireland and a capital allowance for plant and buildings. For the two other subsidiaries, the ruling agrees on a taxable base equal to 15 % of operating costs (costs included are listed in the ruling request).
- (395) *Ruling of September 2010 — Irish branch of company [D]*: Company [D] is a [...] resident [...] company that is part of a [...] multinational group. According to the ruling request, the group wants to [...] and is considering Ireland as a suitable location for this activity, taking into account anticipated tax costs. An Irish branch would provide high level centralised management services within the group and [...]. The remuneration agreed in the ruling for the centralised management function is a mark-up of 10 % on the total costs incurred in the branch. The 10 % mark-up is based on a benchmarking analysis performed by the company's tax advisor. The profit to be allocated to the [...] function with third parties is determined as the difference between the amounts receivable from third parties and the aggregate of attributable costs incurred in Ireland, head office expenses allocated to the [...] and the arm's length value of services provided by other affiliates of the group.
- (396) The Commission observes a number of discrepancies in those rulings.
- (397) First of all, the choice of methods is not systematic even where the activities being described are similar. For example, the branches of both Company [A] and AOE are represented as manufacturing products using IP held by the company that is not allocated to the Irish branch. The ruling request of Company [A] concludes that the Irish branch of Company [A] is not a contract manufacturer, whereas in the contested tax rulings AOE is

accepted as a contract manufacturer. Accordingly, in the ruling granted to Company [A] the profit split method as described in the OECD TP Guidelines was endorsed ⁽³²⁷⁾, as opposed to the cost plus/TNMM method endorsed for AOE, although the activities described in the ruling request of Company [A] seem to resemble those described in AOE's ruling request. However, if the profit split method had also been chosen for AOE, all the profit of that company would have had to be allocated to its Irish branches, since the operating profits of that branch represent the total operating costs of the company.

- (398) Similarly, in the ruling request for Company [A], the company asks Irish Revenue for a confirmation that the profit allocation to its manufacturing plant should be calculated using a profit split method based on the proportion of total costs of the company represented by the costs of its Irish branch. The profit split method is proposed to calculate the taxable profits of the Irish branch, instead of a cost-plus method, although the latter would have reduced the branch's taxable profit, according to Company [A]. This contrasts with the approach accepted by Irish Revenue in the rulings issued to Companies [B], [C2], [N], [I], [E], [M], and [D], where the taxable base of the Irish branches of those companies was calculated as a percentage of costs, as opposed to a percentage of the total profits of the company ⁽³²⁸⁾.
- (399) The profit split method was also accepted in the case of Company [F], where 15 % of the total profits of the company were allocated to the Irish branch. However, while the description of the functions of the branch in the case of Company [F] contrasts with the description of the functions of the Irish branch of Company [A] — in that Company [A] presented its Irish operations as manufacturing using an IP owned outside of Ireland ⁽³²⁹⁾, whereas Company [F] presented its Irish operations as the global headquarters for the [...] operations of the company — the remunerations agreed upon are based on the same transfer pricing method, the profit split method, and the percentage retained does not significantly differ (15 % for Company [F] and 12,5 % for Company [A]) despite the fact that, in the former case, the operations are described as entailing complexity and business risk and, in the latter case, as being reduced to risk routine operations.
- (400) In addition, many of the rulings allocate profits based on costs, effectively applying the TNMM, where the chosen profit level indicator is costs. However, in some cases the costs taken as a reference are the branch's operating costs, whereas in other cases, for example in the case of Company [B], the cost base used for profit allocation purposes includes costs of sales. This variation in the cost base used as a reference in the rulings does not seem to follow a specific reasoning regarding the appropriateness of a larger or smaller cost base.
- (401) Another apparent difference in treatment of comparable situations is observed comparing Irish Revenue's treatment of the Irish branches of Company [M] and Company [E]. Both companies obtained a ruling in 2005 and the Irish branches of both companies manufacture [...]. Both branches are presented as bearing limited risk — in the case of Company [E], the branch is presented as a contract manufacturer, whereas in the case of Company [M], the branch is presented as a toll manufacturer, which is essentially the same activity — and the ruling requests specify that the raw material used would be owned by the head office. In so far as the branches are the manufacturers, there is no contractual means to allocate such ownership to either the head office or the branch as they are the same legal entity. Therefore, the branches of Company [E] and Company [M] are, in reality, described as bearing very similar risks and providing very similar functions and both branches are involved in

⁽³²⁷⁾ This corresponds to the fifth OECD method rather than to the TNMM.

⁽³²⁸⁾ The determination of the tax base of the Irish branches is set as a percentage of costs in these cases irrespective of whether the company has indicated that an IP should be taken into consideration for the assessment, as in the request by Company [A] it is presented that an IP would be allocated outside of Ireland, as well as in the case of Company [I] for example, whereas in one case the profits split method is retained and not in the other.

⁽³²⁹⁾ The ruling request states that '[the group] [...] do not consider the activities of [Company [A]] in Ireland to be that of a mere 'contract manufacturer'. Whilst the functional analysis [...] has clearly demonstrated that the essence of the activities carried out in Ireland is manufacturing [...]'.

invoicing. In the case of both rulings, the taxable base of the branch is determined as a mark-up on operating costs of the companies' Irish branches ⁽³³⁰⁾. However, in the case of the branch of Company [E] the remuneration agreed by Irish Revenue is a mark-up of 100 % of operating costs, whereas in the case of Company [M] the mark-up agreed by Irish Revenue is ten times lower, at 10 % of operating costs. There is no explanation included in either ruling that could justify those different levels of remuneration, independently of whether the profit allocation methods being endorsed by those rulings reliably approximate a market-based outcome in line with the arm's length principle.

- (402) Finally, in the rulings provided for Group [G] and Company [C1], a method for remuneration is accepted that resembles the method for remuneration accepted in the 2007 contested ruling regarding AOE. That method relies on a combination of a percentage of turnover, labelled as an 'IP return' in the respective rulings requests, with a percentage of operating costs. That method does not correspond to a method presented in the OECD TP Guidelines. The three rulings concern manufacturing in different sectors: [...] for Company [G], [...] for Company [C1] and personal computers for AOE. The Irish branch of Company [G] is described as ensuring a distribution function, whereas the Irish branches of Company [C1] and of AOE do not seem to ensure such a function. Nevertheless, the remuneration accepted for Company [G] in terms of percentage of turnover, labelled as an 'IP return', is the lowest at 0,8 %, compared to 1,6 % for the Irish branch of the Company [C1] and [1-5] % for AOE's Irish Branch. The percentage of costs retained for the calculation of the tax basis of the Irish branch of Company [G] of 15 % of operating costs is also lower than the percentage of 18 % of the operating costs accepted for Company [C1]. Therefore, the agreed remuneration method and parameters for the Irish branch of Company [G] results systematically in a lower taxable base for the Irish branch, than the agreed remuneration method and parameters agreed by Irish Revenue with Company [C1], despite the fact that the Irish branch of Company [G] seems to ensure more functions than the Irish branch of Company [C1]. This difference cannot be explained by the descriptions provided in the respective ruling requests. In particular, the parameters 0,8 %, 1,6 %, and [1-5] % for the IP returns, as well as the percentages of operating costs presented in the ruling requests of Company [G], Company [C1] and AOE, are not substantiated by any calculations.
- (403) In conclusion, an examination of the profit allocation ruling practice of Irish Revenue demonstrates that no consistent criteria are applied to determine the allocation of profits to Irish branches of non-resident companies for the purposes of applying Section 25 tca 97. That examination also confirms that the contested tax rulings were issued on the basis of Irish Revenue's discretion in the absence of objective criteria related to the tax system and that, therefore, those rulings should be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) of the Treaty ⁽³³¹⁾.

8.2.4. ABSENCE OF JUSTIFICATION BY THE NATURE AND GENERAL SCHEME OF THE TAX SYSTEM

- (404) A measure which derogates from the reference system may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of that system ⁽³³²⁾.
- (405) Neither Ireland nor Apple has advanced a conclusive justification for the provision of the selective advantage by way of the contested tax rulings, although the burden of proof in that respect lies on the Member State. Indeed, Ireland has not put forward any justification at all for the selective treatment, whereas Apple argues that the exercise of discretion is intrinsic to the Irish corporate tax system and that the rulings contributed to the effectiveness of the system and were proportionate ⁽³³³⁾.
- (406) The Commission does not consider those arguments to justify the selective treatment of ASI and AOE in this case.

⁽³³⁰⁾ This is also for example the method agreed for ASI in the 2007 ruling.

⁽³³¹⁾ See recital 381.

⁽³³²⁾ See, for example, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550, paragraph 69.

⁽³³³⁾ Observations of Apple on the Opening Decision, paragraphs 216 et seq.

- (407) First, the exercise of discretion by a tax administration, even if it is inherent in the application of certain fiscal rules, cannot in itself justify discrimination between taxpayers that find themselves in a similar factual and legal situation. As the Court of Justice has held ⁽³³⁴⁾, the exercise of discretion by a tax administration in the application of its fiscal rules that is not based on objective criteria related to the tax system, gives rise to a presumption of selectivity and Apple has not succeeded at demonstrating that Irish Revenue's discretion in granting the contested tax rulings is based on objective criteria related to the tax system.
- (408) In any event, the Commission recalls that according to both its primary ⁽³³⁵⁾ and subsidiary ⁽³³⁶⁾ lines of reasoning, as well as its first alternative line of reasoning ⁽³³⁷⁾, it is not the exercise of discretion by Irish Revenue that leads to the grant of a selective advantage in favour of ASI and AOE, but the fact that the contested tax rulings grant ASI and AOE a reduction of their taxable base and thus their corporation tax liability, which is not available to economic operators in a comparable factual and legal situation. By those lines of reasoning, it is the endorsement by Irish Revenue of the profit allocation methods proposed by Apple to determine the taxable profit of ASI and AOE in Ireland that gives rise to a selective advantage, not the exercise of discretion as such in endorsing those methods. That the contested tax rulings also confer a selective advantage on ASI and AOE due to Irish Revenue's exercise of discretion in that context which is not based on objective criteria related to the tax system, is a further alternative line of reasoning supporting the finding of a selective advantage in this case ⁽³³⁸⁾. That line of reasoning is developed to address the claim made by Ireland and Apple that Section 25 TCA 97 is not governed by the arm's length principle and that the demonstration of a selective advantage must be made by comparing the contested tax rulings to Irish Revenue's administrative practice. Accordingly, with the exception of that final line of reasoning, the Commission's conclusion that the contested tax rulings confer a selective advantage on ASI and AOE does not depend on whether the discretion afforded to Irish Revenue in granting those rulings is excessive or how Irish Revenue exercised that discretion, but follows from the fact that those rulings selectively reduce ASI's and AOE's Irish corporation tax liability as compared to economic operators in a comparable factual and legal situation.
- (409) Second, even if the Commission's finding of a selective advantage was based on the exercise of discretion by Irish Revenue, the argument put forward by Apple that 'the [tax rulings] derived from the intrinsic principles of Section 25 TCA97' ⁽³³⁹⁾, without further explaining how this is to be understood or how this could justify the selective treatment, is insufficient to justify the selective treatment in this case. According to the case-law of the Court of Justice, an advantage granted to an undertaking must not only be consistent with the inherent characteristics of the tax system in question, but also as regards the manner in which that system is implemented ⁽³⁴⁰⁾. Therefore, even if Irish Revenue's administrative practice under Section 25 TCA 97 were the correct reference system, which the Commission contests, the manner in which Irish Revenue has implemented Section 25 TCA 97 through the grant of individual tax rulings shows that its exercise of discretion is not based on objective criteria. Such treatment in favour of ASI and AOE can therefore not be justified by the logic or general nature of the tax system.
- (410) Third, a general reference to the 'effectiveness of the tax system' ⁽³⁴¹⁾ to which the tax rulings allegedly contributed cannot justify a selective treatment of certain undertakings under that system. It is true that tax rulings in general are a valid and often-used means by tax administrations to provide legal certainty, but this fact does not exempt tax rulings from scrutiny under the State aid rules.
- (411) In conclusion, the selective treatment offered to ASI and AOE under the contested tax rulings is not justified by the nature and general scheme of the tax system.

⁽³³⁴⁾ Case C-6/12 P Oy EU:C:2013:525, paragraph 27.

⁽³³⁵⁾ Section 8.2.2.2.

⁽³³⁶⁾ Section 8.2.2.3.

⁽³³⁷⁾ Section 8.2.3.1.

⁽³³⁸⁾ Section 8.2.3.2.

⁽³³⁹⁾ Observations of Apple on the Opening Decision, paragraph 218.

⁽³⁴⁰⁾ Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* EU:C:2011:550, paragraph 73.

⁽³⁴¹⁾ Observations of Apple on the Opening Decision, paragraph 219.

8.2.5. CONCLUSION ON THE EXISTENCE OF A SELECTIVE ADVANTAGE

- (412) By endorsing methods for allocating profit to ASI's and AOE's Irish branches that depart from a market-based outcome in line with the arm's length principle, the contested tax rulings result in a lowering of ASI's and AOE's taxable base as compared to non-integrated companies whose taxable profit reflects prices determined on the market negotiated at arm's length. The contested tax rulings therefore result in a reduction of ASI's and AOE's corporation tax liability as determined under the ordinary rules of taxation of corporate profit in Ireland, thereby conferring a selective advantage on those companies for the purposes of Article 107(1) of the Treaty ⁽³⁴²⁾.
- (413) Alternatively, by endorsing methods for allocating profit to ASI's and AOE's Irish branches that depart from a market-based outcome in line with the arm's length principle, the contested tax rulings result in a lowering of ASI's and AOE's taxable base as compared to other non-resident companies operating through a branch in Ireland. The contested tax rulings therefore result in a reduction of ASI's and AOE's corporation tax liability under Section 25 TCA 97, thereby conferring a selective advantage on those companies for the purposes of Article 107(1) of the Treaty ⁽³⁴³⁾.

8.3. CONCLUSION ON THE EXISTENCE OF AID

- (414) In light of the foregoing, the Commission concludes that the contested tax rulings issued by Irish Revenue in favour of ASI and AOE confer a selective advantage on those companies that is imputable to Ireland and financed through State resources, which distorts or threatens to distort competition and which is liable to affect trade between Member States. The contested tax rulings therefore constitute State aid within the meaning of Article 107(1) of the Treaty.
- (415) Since the contested tax rulings give rise to a reduction of charges that should normally be borne by ASI and AOE in the course of their business operations, the contested tax ruling should be considered as granting operating aid to ASI and AOE.

8.4. BENEFICIARIES OF THE CONTESTED MEASURES

- (416) The contested tax rulings grant State aid to ASI and AOE within the meaning of Article 107(1) of the Treaty. However, ASI and AOE form part of a multinational corporate group, namely the Apple group, which is made up of numerous companies, all of which are ultimately controlled by Apple Inc. Separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. As the Court of Justice has previously held, '[i]n competition law, the term 'undertaking' must be understood as designating an economic unit [...] even if in law that economic unit consists of several persons, natural or legal' ⁽³⁴⁴⁾. To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic or organic links ⁽³⁴⁵⁾. In this case, ASI and AOE are ultimately wholly-owned by Apple Inc. ⁽³⁴⁶⁾ and the majority of the members of ASI's and AOE's boards are Apple Inc. employees ⁽³⁴⁷⁾, so that Apple Inc., which is the entity controlling the Apple Group, can also be said to control ASI and AOE through functional, economic and organic links.

⁽³⁴²⁾ Section 8.2.2.

⁽³⁴³⁾ Section 8.2.3.

⁽³⁴⁴⁾ Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

⁽³⁴⁵⁾ Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

⁽³⁴⁶⁾ See recital 47.

⁽³⁴⁷⁾ See recital 114.

- (417) Moreover, it is the Apple Group which took the decision to incorporate ASI and AOE in Ireland and the Apple Group which decided on the structure whereby ASI and AOE would be incorporated in Ireland and those companies' presence in Ireland would be limited to a single branch for each. Therefore, it is the Apple Group as a whole that benefits from the State aid Ireland granted to ASI and AOE by way of the contested tax rulings, since any favourable tax treatment afforded to ASI and AOE by Irish Revenue ultimately benefits the Apple group as a whole by freeing up additional financial resources that can be used to the benefit of the entire corporate group.
- (418) In conclusion, notwithstanding the fact that the Apple Group is organised in different legal personalities, that group should nevertheless be considered as a single economic unit benefitting from the State aid granted by Ireland by way of the contested tax rulings ⁽³⁴⁸⁾.

8.5. COMPATIBILITY OF THE CONTESTED MEASURES

- (419) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) of the Treaty ⁽³⁴⁹⁾ and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) of the Treaty ⁽³⁵⁰⁾. However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Article 107(2) or (3) of the Treaty ⁽³⁵¹⁾.
- (420) Ireland has not invoked any of the grounds for a finding of compatibility in either of those provisions for the State aid it has granted by way of the contested tax rulings.
- (421) Moreover, as noted in recitals 222 and 415, the contested tax rulings should be considered as granting operating aid to ASI, AOE and the Apple group as a whole. In particular, such aid cannot normally be considered compatible with the internal market under Article 107(3)(c) of the Treaty in that it does not facilitate the development of certain activities or of certain economic areas, nor are the tax incentives in question limited in time, digressive or proportionate to what is necessary to remedy a specific economic handicap of the areas concerned.
- (422) Consequently, the State aid granted by Ireland through the contested tax rulings is incompatible with the internal market.

9. UNLAWFULNESS OF THE AID

- (423) According to Article 108(3) of the Treaty, Member States are obliged to inform the Commission of any plan to grant aid (notification obligation) and they may not put into effect any proposed aid measures until the

⁽³⁴⁸⁾ See, by analogy, Case 323/82 *Inter Mills* ECLI:EU:C:1984:345: paragraph 11 'It is clear from the information supplied by the applicants themselves that following the restructuring both SA Intermills and the three manufacturing companies are controlled by the Walloon regional executive and that, following the transfer of the plant to the three newly constituted companies, SA Intermills continues to have an interest in those companies. It must therefore be accepted that, in spite of the fact that the three manufacturing companies each have a legal personality separate from the former SA Intermills, all those undertakings together form a single group, at least as far as the aid granted by the Belgian authorities is concerned [...]'. See also Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraph 102: 'the Commission was correct to hold that the rules governing the determination of taxable income constitute an advantage for the coordination centres and the groups to which they belong.'

⁽³⁴⁹⁾ The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

⁽³⁵⁰⁾ The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

⁽³⁵¹⁾ Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253 paragraph 34.

Commission has taken a final position on the aid in question (standstill obligation). The notification obligation is repeated in Article 2 of Council Regulation (EU) 2015/1589 ⁽³⁵²⁾, and the standstill obligation in Article 3 of that regulation. Article 1(f) of that regulation defines new aid put into effect in contravention of Article 108(3) of the Treaty as unlawful aid.

- (424) The Commission notes that Ireland did not notify the Commission of any plan to issue the contested tax rulings, nor did it respect the standstill obligation. Therefore, in accordance with Article 1(f) of Regulation (EU) 2015/1589, the contested tax rulings constitute unlawful aid, put into effect in contravention of Article 108(3) of the Treaty.

10. ALLEGED PROCEDURAL IRREGULARITIES

- (425) Both Ireland and Apple claim that the Commission has infringed their right to be heard, since the focus of the Commission's investigation had allegedly changed since the adoption of the Opening Decision, as evidenced by the letter of 17 April 2015, and they were allegedly not afforded the opportunity to properly make their views known on the position expressed by the Commission in that letter. As a consequence, Ireland and Apple argue that the Commission should have extended the Opening Decision or adopted a new decision opening the formal investigation procedure, setting out the allegedly new focus of the investigation.
- (426) The Commission considers that the procedural rights of Ireland and Apple have been fully respected in this case.
- (427) The Commission notes, first and foremost, that the scope of the Commission's State aid investigation has remained the same between the Opening Decision and the adoption of this Decision. Both Decisions concern the same measures (the 1991 and 2007 tax rulings issued by Irish Revenue), the same beneficiaries (ASI, AOE and the Apple Group) and the same State aid concerns (whether the profit allocation methods endorsed by those rulings result in an appropriate allocation of profits to ASI's and AOE's Irish branches or confer a selective advantage upon those companies in that it allows them to determine their taxable profit in a manner that departs from an arm's length outcome).
- (428) In the Opening Decision, the Commission expressed its initial doubts on the compliance of the profit allocation methods endorsed by the contested tax rulings with the State aid rules, in particular the arm's length principle as flowing from Article 107(1) of the Treaty. The purpose of an in-depth investigation phase following an Opening Decision is to bring additional elements of fact and law to the Commission's attention. Those elements can further develop or address the Commission's initial doubts as set out in an opening decision. Accordingly, at the end of that procedure, the Commission's analysis may have changed, which implies that the final decision may differ somewhat from the opening decision, without those differences affecting the legality of the final decision ⁽³⁵³⁾.
- (429) It is as a consequence of the extensive written submissions that were provided by Ireland and Apple on the State aid concerns raised by the Commission in the Opening Decision that the Commission's analysis further developed in this case. In response to a request by Ireland to further clarify its State aid assessment in light of those elements and in light of the allegation made by Ireland that the Commission's assessment appeared to be based on a misapprehension by the Commission as to the applicable national law, the Commission's services sent the letter of 17 April 2015 to Ireland in the interest of transparency, which the latter transmitted to Apple. However, since the adoption of the Opening Decision the subject matter of the Commission's State aid investigation has never changed (the profit allocation methods endorsed by the contested tax rulings), nor has its principal doubts as to the compliance of the contested measures with the State aid rules (whether those methods produced a taxable profit for ASI and AOE that complies with the arm's length principle).

⁽³⁵²⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽³⁵³⁾ Case T-424/05 *Italy v. Commission* EU:T:2009:49, paragraph 69; and Cases T-231/06 and T-237/06 *Netherlands and NOS v. Commission* EU:T:2010:525, paragraph 50. See also Case T-242/12 (*SNCF*) v. *Commission* EU:T:2015:1003, paragraphs 345 to 367.

- (430) In any event, since the letter of 17 April 2015, Ireland has been given ample opportunity to make its views known to the Commission on the position expressed in that letter and it has effectively made use of that opportunity on multiple occasions, both in writing and orally ⁽³⁵⁴⁾. As regards Apple, the Commission recalls that, as an interested party, it only has the right to submit observations in response to the Opening Decision. Nevertheless, Apple was given and has effectively made use of the opportunity to submit its observations to the Commission on numerous occasions, both in writing and orally, since the letter of 17 April 2015 was transmitted to it ⁽³⁵⁵⁾.
- (431) Consequently, the Commission considers that Ireland's and Apple's procedural rights have been respected in this case.

11. RECOVERY

11.1. THE RECOVERY OBLIGATION

- (432) Article 16(1) of Regulation (EU) 2015/1589 establishes an obligation on the Commission to order recovery of unlawful and incompatible aid. That provision also provides that the Member State concerned must take all necessary measures to recover unlawful aid that is found to be incompatible with the internal market. Article 16(2) of Regulation (EU) 2015/1589 establishes that the aid is to be recovered, including interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Commission Regulation (EC) No 794/2004 ⁽³⁵⁶⁾ sets out the methods to be used for the calculation of recovery interest. Finally, Article 16(3) of Regulation (EU) 2015/1589 states, that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision'.

11.2. NEW AID

- (433) According to Article 1(c) of Regulation (EU) 2015/1589 "new aid" means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.
- (434) In accordance with Article 17 of Regulation (EU) 2015/1589, the power of the Commission to recover aid is subject to a limitation period of 10 years. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period. Each interruption starts time running afresh. The limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice. Finally, any aid with regard to which the limitation period has expired is deemed to be existing aid.
- (435) The 1991 tax ruling was issued more than 10 years ago. In the present case, the limitation period laid down by Article 17 of Regulation (EU) 2015/1589 was interrupted on 12 June 2013, the date on which the Commission sent a letter to Ireland requesting that it provide the Commission with information on its tax ruling practice and, in particular, information on any rulings granted by Ireland in favour of AOI, ASI and AOE. ⁽³⁵⁷⁾ This means that any aid granted under the 1991 tax ruling before 12 June 2003 must be deemed to be 'existing' aid within the meaning of Article 1(b)(iv) of Regulation (EU) 2015/1589. By contrast, any aid granted after that date, either under the 1991 tax ruling or under the 2007 tax ruling, constitutes 'new' aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589.

⁽³⁵⁴⁾ See the exchange of comments between Ireland and the Commission described in Sections 7.1, 7.2, 7.4 and 7.5

⁽³⁵⁵⁾ See the exchange of comments between Apple and the Commission described in Sections 7.1, 7.2 and 7.3.

⁽³⁵⁶⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

⁽³⁵⁷⁾ See recital 1. The first response by Ireland to the Commission's request for information that concerned the Irish tax ruling practice, on the one hand, and included specific questions on ASI and AOE, on the other, dates from 9 July 2013.

- (436) Ireland argues that any aid granted in this case could only be existing aid, since it arises from Irish Revenue's failure to apply the arm's length principle, which was not applicable in Ireland when it joined the Union on 1 January 1973, and has not been applicable at any time since. According to Ireland, Section 25 TCA 97 merely replicates Section 201 of the Income Tax Act 1967, which was in force at the time Ireland acceded to the Union, and neither provision refers to the arm's length principle or the OECD framework. Thus, given that the legal basis for profit allocation to an Irish branch has not substantially changed since Ireland acceded to the Union, the measure, if it amounts to State aid, constitutes existing aid within the meaning of Article 1(b) of Regulation (EU) 2015/1589 ⁽³⁵⁸⁾.
- (437) That argument cannot be accepted, since the aid granted in this case is individual aid granted to ASI, AOE and the Apple group in the form of the contested tax rulings, which endorse profit allocation methods that grant ASI and AOE a reduction of their taxable base for Irish corporation tax purposes, and not, as Ireland seems to claim, an aid scheme based on Section 25 TCA 97 and Section 201 of the Income Tax Act 1967. Put differently, the aid measure granting the aid is the contested tax rulings as applied by ASI and AOE on a yearly basis to determine those companies' taxable profit for Irish corporation tax purposes and, on the basis of that determination, their yearly corporation tax liability. In other words, the aid granted by those rulings is granted annually, at the moment when the corporation tax has to be paid by ASI and AOE and those companies rely on the profit allocation methods endorsed by those rulings to calculate the amount of tax due. The aid granted to ASI, AOE and the Apple group by way of the contested tax rulings therefore constitutes new aid, granted annually ⁽³⁵⁹⁾.

11.3. LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

- (438) Article 16(1) of Regulation (EU) 2015/1589 provides that the Commission must not require recovery of the aid if this would be contrary to a general principle of law.
- (439) Both Ireland and Apple raise the argument that by opening the formal investigation procedure and calling into doubt, 22 years later, the State aid compliance of the two tax rulings, the Commission has violated the principle of legal certainty. According to Ireland, State aid rules must be predictable and the Commission is not entitled to develop Union law by extending the boundaries of those rules in a novel way or by reference to international developments like the OECD framework ⁽³⁶⁰⁾. By applying the arm's length principle and the OECD framework, in particular the OECD guidance of 2010, the Commission is retrospectively imposing an external reference framework that was not part of Irish domestic law at the time ⁽³⁶¹⁾. Finally, Ireland argues that the Commission's retroactive application of today's principles means that Ireland is being held to a standard that it (and Apple) could not have anticipated when the rulings were issued ⁽³⁶²⁾.
- (440) According to the case-law, the fundamental principle of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers ⁽³⁶³⁾. However, for the principle of legal certainty to apply, there has to have been a prolonged lack of action on the part of the Commission from the

⁽³⁵⁸⁾ Observations of Ireland to the Opening Decision, paragraphs 141 et seq.

⁽³⁵⁹⁾ Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416. The same reasoning was applied by the General Court in Joined Cases T-427/04 and T-17/05 *France and France Telecom v. Commission* EU:T:2009:474, where France Telecom benefitted from a tax exemption and the Commission concluded that the aid was granted annually, i.e. the tax differential due and exempted was calculated on an annual basis and depended, among others, on the level of tax rates voted annually by the local authorities, which conclusion was confirmed by the General Court.

⁽³⁶⁰⁾ Observations of Ireland on the Opening Decision, paragraph 90.

⁽³⁶¹⁾ Comments of Ireland on third parties' comments, paragraphs 22 to 41.

⁽³⁶²⁾ Observations of Apple on the Opening Decision, paragraph 300.

⁽³⁶³⁾ Case C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* EU:C:2002:524, paragraph 140.

moment that it became aware of the aid and a situation of uncertainty. A long lapse of time as such is insufficient to claim legal certainty and a delay can be imputed to the Commission only from the time when it learnt of the existence of the aid. In this case, since the contested tax rulings were never notified to the Commission by Ireland, nor otherwise publicly available, the Commission could only have learnt of the existence of those rulings when their existence was publicly disclosed, which happened for the first time during hearings of the US Senate. Those hearings took place on 21 May 2013, following which the Commission sent a request for information to Ireland on 12 June 2013. The Commission can therefore not be accused of having infringed the principle of legal certainty due to prolonged lack of action since, from the moment that the Commission could have become aware of the rulings (21 May 2013), it took action within less than a month (12 June 2013).

(441) As regards Ireland's argument that the principle of legal certainty has been breached because the Commission is acting against its decisional practice that the only valid reference point is the national tax system, the Commission recalls that the reference system against which it assesses the existence of a selective advantage in this case is the ordinary rules of taxation of corporate profit in Ireland. It further recalls that, while the Member States enjoy fiscal autonomy in the field of direct taxation, any fiscal measure a Member State adopts must comply with the Union State aid rules, which bind the Member States and enjoy primacy over their domestic legislation ⁽³⁶⁴⁾. In that regard, the Commission recalls that Article 107(1) of the Treaty, as interpreted by the Court of Justice, ⁽³⁶⁵⁾ prohibits a fiscal measure which allows an integrated company to determine its taxable profit in a manner that does not reflect a profit which would arise in conditions of free competition, that is to say on the basis of prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length. In adopting this Decision, the Commission is applying Article 107(1) of the Treaty to the contested tax rulings, which the Commission has found to produce an outcome that deviates from the ordinary rules of taxation of corporate profit in Ireland in that they allow ASI and AOE to determine their taxable profit in a manner that does not reflect an arm's length profit. As regards Ireland's argument that the Commission is imposing international standards and applying guidance from 2010 to rulings issued before that date, the Commission recalls that its conclusion in this Decision is based on an infringement of Article 107(1) of the Treaty, which has been a part of Ireland's legal order since 1973, and not the OECD framework. To the extent the Commission refers to the OECD framework in this Decision, it does so because that framework provides value guidance on whether a method for determining the taxable profit of a branch produces a reliable approximation of a market-based outcome in line with the arm's length principle, since it is the result of expert discussions in the context of the OECD and it elaborates on techniques aimed to address common challenges in international taxation.

(442) Finally, in response to the Joint Submission signed by several trade associations, Ireland raised the principle of legitimate expectations as barring recovery in this case. It also referred to the *France Télécom* decision ⁽³⁶⁶⁾ in its observations when arguing that the amount of the aid granted by the contested tax rulings would be difficult to quantify in this case ⁽³⁶⁷⁾. However, a Member State whose authorities have granted aid in breach of Article 108(3) of the Treaty may not plead the legitimate expectations of a recipient to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it were allowed to do so, Articles 107 and 108 of the Treaty would be deprived of all practical force, since national authorities would be able to rely on their own unlawful conduct to render decisions taken by the

⁽³⁶⁴⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraph 81; Joined Cases C-106/09 P and C-107/09 P *Commission v Government of Gibraltar and United Kingdom* EU:C:2011:732; Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 25, and Order in Case C-529/10 *Safilo* EU:C:2012:188, paragraph 18; See also Case T-538/11 *Belgium v. Commission* EU:T:2015:188, paragraph 66.

⁽³⁶⁵⁾ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v. Commission* EU:C:2006:416, paragraphs 95 to 97.

⁽³⁶⁶⁾ Commission Decision 2006/621/EC of 2 August 2004 on the State aid implemented by France for France Télécom (OJ L 257, 20.9.2006, p. 11).

⁽³⁶⁷⁾ Observations of Ireland on the Opening Decision, paragraphs 155 and 156.

Commission under those provisions of the Treaty ineffective ⁽³⁶⁸⁾. Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid ⁽³⁶⁹⁾. Since Apple did not invoke that principle in any of its observations submitted to the Commission, Ireland's reliance on legitimate expectations is for that reason alone unfounded. In any event, where aid is implemented without prior notification to the Commission, the recipient of the aid cannot, in the absence of special circumstances, have a legitimate expectation that the aid is lawful ⁽³⁷⁰⁾.

- (443) As regards the argument raised in the Joint Submission as to the alleged novelty of the approach in this case giving rise to a violation of the principle of legitimate expectations, thus preventing recovery ⁽³⁷¹⁾, the Commission recalls that the principle of legitimate expectations may only apply to an individual in a situation in which an institution of the Union, by giving that person precise assurances, has led him to entertain well-founded expectations ⁽³⁷²⁾. Neither Ireland, nor the Joint Statement demonstrate that the Commission has ever given a precise assurance that the contested tax rulings complied with the State aid rules, or that Article 107(1) of the Treaty does not apply to tax rulings or any similar fiscal measure that endorses a method that allows an integrated company to determine its taxable profit. Quite the contrary, the Commission identified tax rulings as fiscal measures capable of giving rise to State aid in its 1998 Notice on the Application of the State aid rules to measures relating to direct business taxation ⁽³⁷³⁾ and it has applied the State aid rules to fiscal measures enabling integrated companies to determine their taxable profit in a series of decisions since then ⁽³⁷⁴⁾. There is therefore no basis for Ireland to invoke the principle of legitimate expectations to prevent recovery.
- (444) As regards the alleged difficulty in quantifying the aid amount, this case deals with the relatively straightforward situation where a fiscal measure grants its beneficiary a reduction in its taxable base and thus its corporation tax liability. The Commission can identify no difficulty in determining the amount to be recovered in such a situation, and does not see any parallels to the aid measure identified in the France Telecom decision, which concerned a situation where aid was granted on the basis of a public pronouncement by a government minister having the effect of increasing that company's creditworthiness on the market.

11.4. METHOD FOR RECOVERY

- (445) The obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing competitive situation on the market. In this context, the Court of Justice has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it has enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.

⁽³⁶⁸⁾ See Case C-5/89 *Commission v Germany* EU:C:1990:320, paragraph 17, and Case C-310/99 *Italy v Commission* EU:C:2002:143, paragraph 104.

⁽³⁶⁹⁾ See Case T-67/94 *Ladbroke Racing v Commission* EU:T:1998:7, paragraph 183; See also Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA and Diputación Provincial de Vizcaya v Commission* EU:T:2003:217, paragraph 203.

⁽³⁷⁰⁾ Joined Cases C-183/02 P and C-187/02 P *Demasa and Territorio Histórico de Álava v Commission* EU:C:2004:701, paragraph 45.

⁽³⁷¹⁾ Joint Submission, paragraph 16.

⁽³⁷²⁾ See Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v Commission* EU:C:1987:121, paragraph 44, and Case C 537/08 P *Kahla Thüringen Porzellan v Commission* EU:C:2010:769, paragraph 63.

⁽³⁷³⁾ OJ C 147, 20.6.2002, p. 2.

⁽³⁷⁴⁾ See, for example, Commission Decision 2003/81/EC of 22 August 2002 on the aid scheme implemented by Spain in favour of coordination centres in Vizcaya C 48/2001 (ex NN 43/2000) (OJ L 31, 6.2.2003, p. 26); Commission Decision 2003/512/EC of 5 September 2002 on the aid scheme implemented by Germany for control and coordination centres (OJ L 177, 16.7.2003, p. 17); Commission Decision 2003/501/EC of 16 October 2002 on the State aid scheme C 49/2001 (ex NN 46/2000) — Coordination Centres — implemented by Luxembourg (OJ L 170, 9.7.2003, p. 20), paragraph 53; and Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25).

- (446) No provision of Union law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to quantify the exact amount of the aid to be recovered ⁽³⁷⁵⁾. Rather, it is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty ⁽³⁷⁶⁾. Union law merely requires recovery of unlawful aid to restore the position to the *status quo ante* and that repayment be made in accordance with the rules of national law ⁽³⁷⁷⁾. Accordingly, the Commission may confine itself to declaring that there is an obligation to repay the aid at issue and leave it to the national authorities to calculate the exact amount of aid to be repaid ⁽³⁷⁸⁾.
- (447) In relation to unlawful State aid in the form of tax measures, the amount to be recovered should be calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable rule had been applied. As concluded in Section 8.2.2.2 and in particular recital 319, a correct allocation of assets, functions and risks by Irish Revenue at the time the contested tax rulings were issued should have been conclusive as to the allocation of profit within ASI and AOE, so that all profits from sales activities of those companies should have been allocated to the Irish branches of ASI and AOE when the contested tax rulings were in force. In light of the 10 year limitation period laid down by Article 17 of Regulation (EU) 2015/1589, recovery should include aid granted from 12 June 2003 onwards and, since according to Apple the 2014 fiscal year is the last year that the 2007 ruling was applied by ASI and AOE to calculate their taxable profit in Ireland, it should continue until 27 September 2014, which is the date on which ASI's and AOE's 2014 fiscal year ended. Accordingly, all profits from the business activities of ASI and AOE should, as a starting point, be allocated to their respective Irish branches for the period 12 June 2003 to 27 September 2014 for the purposes of calculating ASI's and AOE's corporation tax liability under the ordinary rules of taxation of corporate profit in Ireland. In addition, interest income from property of the Irish branches which has been identified by Apple and Ireland in the statutory accounts ⁽³⁷⁹⁾ should be allocated to the Irish branches of ASI and AOE.
- (448) Apple may claim, to the extent it is sufficiently evidenced, the following deductions from the profit to be allocated to the Irish branches of ASI and AOE:
- (i) interest and investment income attributable to ASI's and AOE's head offices derived from the passive management of liquidity, which has been outsourced by the board of directors of ASI and AOE to Braeburn, as reflected in the minutes of the board meetings ⁽³⁸⁰⁾; this does not include interest income from property of the Irish branches which has been identified by Ireland and Apple in the statutory accounts ⁽³⁸¹⁾;
 - (ii) capital allowances under the 1991 ruling to the extent that the limitation of the drawing-down of capital allowances lead to a disadvantage for Apple ⁽³⁸²⁾; and
 - (iii) the profits of AOE's Singapore branch that were subject to taxation in Singapore ⁽³⁸³⁾.
- (449) The trading profits to be subjected to taxation in Ireland may also be adjusted following an effective restatement of the statutory accounts or tax returns of ASI and AOE following corresponding payments and adjustments to the statutory accounts of other Apple group companies, in line with general rules applicable in Ireland to retroactive restatement of financial accounts or tax returns and provided Apple is able to sufficiently evidence any effective liability towards either Apple Inc. or other Apple group companies in other jurisdictions, for activities or services rendered, such as R & D and marketing activities.

⁽³⁷⁵⁾ Albeit in the context of 'impossibility to recover' and not 'difficulty to quantify the aid amount'.

⁽³⁷⁶⁾ See Case C-441/06 *Commission v France* EU:C:2007:616, paragraph 29 and the case-law cited.

⁽³⁷⁷⁾ Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 297.

⁽³⁷⁸⁾ Joined Cases T-427/04 and T-17/05 *France and France Telecom v Commission* EU:T:2009:474, paragraph 299.

⁽³⁷⁹⁾ See recital 100.

⁽³⁸⁰⁾ See recitals 108 and 291.

⁽³⁸¹⁾ See recital 100.

⁽³⁸²⁾ See recital 349.

⁽³⁸³⁾ See footnote 74.

- (450) Such a restatement could result from a retroactive modification of the CSA or of the Marketing Services agreement. The terms of those agreements have not been examined by Irish Revenue in the context of the contested rulings and, if the financial contributions to the R & D or marketing costs carried by ASI and AOE under those agreements were not in line with a level of contribution that would have been agreed between independent companies negotiating at arm's length, for instance because Apple Inc. employees performed activities for the benefit of ASI and AOE beyond the remunerated contributions covered by the CSA and the Marketing Service Agreement, the existence of such activities, if properly documented, could justify a retroactive modification of the CSA and/or Market Services agreement and give rise to increased *ex post* payments from ASI and AOE to Apple Inc., provided such payments are in line with the arm's length principle.
- (451) Such a restatement could also result from a retroactive modification of the jurisdiction in which the EMEA sales of ASI are recorded where Apple considers those recorded sales did not amount to effective risk taking in the distribution of Apple products and that such risks have been effectively borne in jurisdictions where a more substantial economic activity was taking place than in Ireland. This may be the case, for example, of any of ASI's profits subjected to Italian corporate income tax ⁽³⁸⁴⁾, provided the assessment of the Italian tax administration is recorded by ASI in the respective amounts in the restated statutory accounts of the company and that profits subjected to taxation in Ireland are reduced not more than proportionately to the corresponding amounts of profits subjected to taxation in Italy.

11.5. CONCLUSION

- (452) In conclusion, the Commission finds that Ireland, by issuing the contested tax rulings that enabled ASI and AOE to determine their yearly corporation tax liability in Ireland in the years that those rulings were in force, has unlawfully granted State aid to ASI, AOE and the Apple group, in breach of Article 108(3) of the Treaty, which Ireland is required to recover by virtue of Article 16 of Regulation (EU) 2015/1589 from ASI and AOE,

HAS ADOPTED THIS DECISION:

Article 1

1. The tax rulings issued by Ireland on 29 January 1991 and 23 May 2007 in favour of Apple Sales International, which enable the latter to determine its tax liability in Ireland on a yearly basis, constitute aid within the meaning of Article 107(1) of the Treaty. That aid was unlawfully put into effect by Ireland in breach of Article 108(3) of the Treaty and is incompatible with the internal market.
2. The tax rulings issued by Ireland on 29 January 1991 and 23 May 2007 in favour of Apple Operations Europe International, which enable the latter to determine its tax liability in Ireland on a yearly basis, constitute aid within the meaning of Article 107(1) of the Treaty. That aid was unlawfully put into effect by Ireland in breach of Article 108(3) of the Treaty and is incompatible with the internal market.

Article 2

1. Ireland shall recover the aid referred to in Article 1(1) from Apple Sales International.
2. Ireland shall recover the aid referred to in Article 1(2) from Apple Operations Europe.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

⁽³⁸⁴⁾ See footnote 73.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Ireland shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

1. Within two months following notification of this Decision, Ireland shall submit information to the Commission regarding the method used to calculate the exact amount of aid.
2. Ireland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. Upon a simple request by the Commission it shall immediately submit information on the measures already taken and those planned to comply with this Decision.

Article 5

This Decision is addressed to Ireland.

Done at Brussels, 30 August 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission

