JUDGMENT OF THE GENERAL COURT (Seventh Chamber, Extended Composition)
15 July 2020 (*)
(State aid — Aid implemented by Ireland — Decision declaring the aid incompatible with the internal market and unlawful and ordering recovery of the aid — Advance tax decisions (tax rulings) — Selective tax advantages — Arm's length principle)

In Cases T-778/16 and T-892/16,

Ireland, represented by K. Duggan, M. Browne, J. Quaney, and A. Joyce, acting as Agents, and by P. Gallagher, M. Collins, Senior Counsel, P. Baker QC, S. Kingston, C. Donnelly, A. Goodman and B. Doherty, Barristers,

applicant in Case T-778/16,

supported by

Grand Duchy of Luxembourg, represented by T. Uri, acting as Agent, and by D. Waelbroeck and S. Naudin, lawyers,

intervener in Case T-778/16,

Apple Sales International, established in Cork (Ireland),
Apple Operations Europe, established in Cork,
represented by A. von Bonin and E. van der Stok, lawyers, D. Beard QC, and A. Bates, L. Osepciu and J. Bourke, Barristers,

applicants in Case T-892/16,

supported by

Ireland, represented by K. Duggan, J. Quaney, M. Browne, and A Joyce, and by P. Gallagher, M. Collins, P. Baker, S. Kingston, C. Donnelly, and B. Doherty,

intervener in Case T-892/16,

v

European Commission, represented by P.-J. Loewenthal and R. Lyal, acting as Agents,

defendant,

supported by

Republic of Poland, represented by B. Majczyna, M. Rzotkiewicz and A. Kramarczyk-Szaładzińska, acting as Agents,

intervener in Case T-778/16,

and by

EFTA Surveillance Authority, represented by C. Zatschler, M. Sánchez Rydelski and C. Simpson, acting as Agents,

intervener in Case T-892/16,

APPLICATIONS under Article 263 TFEU for annulment of 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 (OJ 2017 L 187, p. 1),

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of M. van der Woude, President, V. Tomljenović (Rapporteur), A. Marcoulli, J. Passer and A. Kornezov, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written phase of the procedure and further to the hearing of 17 and 18 September 2019,

gives the following

Judgment

I. Background to the dispute

A. History of the Apple Group

1. The Apple Group

The Apple Group, founded in 1976 and based in Cupertino, California (United States), is composed of Apple Inc. and all companies controlled by Apple Inc. (collectively, 'the Apple Group'). The Apple Group designs, manufactures and markets, inter alia, mobile communication and media devices, personal computers and portable digital music players, and sells software, other services, networking solutions and third-party digital content and applications. The Apple Group markets its products and services to consumers, businesses and governments worldwide, through its retail stores, online stores and direct sales force, as well as through third-party cellular network carriers, wholesalers, retailers and resellers. The Apple Group's global business is structured around key functional areas centrally managed and directed from the United States by executives based in Cupertino.

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 (OJ 2017 L 187, p. 1) ('the contested decision'), concerns two advance tax decisions

adopted by the Irish tax authorities in relation to two companies forming part of the Apple Group.

2. ASI and AOE

(a) Company structure

Within the Apple Group, Apple Operations International is a fully owned subsidiary of Apple Inc. Apple Operations International fully owns the subsidiary Apple Operations Europe (AOE), which in turn fully owns the subsidiary Apple Sales International (ASI). ASI and AOE are both companies incorporated in Ireland, but are not tax resident in Ireland.

As stated in recitals 113 to 115 of the contested decision, a significant number of members of the boards of directors of AOE and ASI were directors employed by Apple Inc. and based in Cupertino. Excerpts from resolutions and minutes from annual general meetings and board meetings of ASI and AOE are reproduced in recital 115 (Tables 4 and 5) of that decision. The resolutions of the boards of directors concerned, inter alia, on a regular basis, the payment of dividends, the approval of directors' reports, and the appointment and resignation of directors. Less frequently, those resolutions concerned the incorporation of subsidiaries and powers of attorney authorising certain directors to carry out various activities such as managing banking, relationships with governments and other public offices, audits, insurance, renting, purchase and sale of assets, taking delivery of goods, and commercial contracts.

(b) The cost-sharing agreement

Apple Inc., on the one hand, and ASI and AOE, on the other, were bound by a cost-sharing agreement ('the cost-sharing agreement'). The shared costs concerned, inter alia, the research and development (R&D) of technology incorporated in the Apple Group's products. The initial cost-sharing agreement was signed in December 1980. The parties to that agreement were Apple Inc. (then Apple Computer Inc.) and AOE (then Apple Computer Ltd (ACL)). In 1999, ASI (then Apple Computer International) became a party to that agreement. During the period relevant to the investigation referred to in the contested decision, various amendments were made to the cost-sharing agreement, in order in particular to take into account changes in the applicable regulatory framework.

Under that agreement, the parties agreed to share the costs and the risks associated with the R&D concerning intangibles following development activities connected with the Apple Group's products and services. The parties also agreed that Apple Inc. remained the official legal owner of the cost-shared intangibles, including the Apple Group's intellectual property ('IP') rights. In addition, Apple Inc. granted ASI and AOE royalty-free licences enabling those companies, inter alia, to manufacture and sell the products concerned in the territory that had been assigned to them, that is to say, the world apart from North and South America. Furthermore, the parties to the agreement were required to bear the risks resulting from that agreement, the main risk being the obligation to pay the development costs relating to the Apple Group's IP rights.

(c) The marketing services agreement

In 2008, ASI concluded a marketing services agreement with Apple Inc., in connection with which Apple Inc. undertook to provide marketing services to ASI, including the creation, development and production of marketing strategies, programmes and advertising campaigns. ASI undertook to remunerate Apple Inc. for those services by payment of a fee corresponding to a percentage of the 'reasonable costs incurred' by Apple Inc. in relation to those services, plus a mark-up.

3. The Irish branches

ASI and AOE set up Irish branches. AOE also had a branch in Singapore, which ceased its activities in 2009.

ASI's Irish branch is responsible for, inter alia, carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the regions covering Europe, the Middle East, India and Africa (EMEIA) and the Asia-Pacific region (APAC). Key functions within that branch include the procurement of Apple-branded finished products from third-party and related-party manufacturers, distribution activities associated with the sale of products to related parties in the EMEIA and APAC regions and with the sale of products to third-party customers in the EMEIA region, online sales, logistics operations, and operating an after-sales service. The European Commission stated (recital 55 of the contested decision) that many activities associated with distribution in the EMEIA region were carried out by related parties under service contracts.

AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland such as iMac desktops, MacBook laptops and other computer accessories, which it supplies to related parties for the EMEIA region. Key functions within that branch include production planning and scheduling, process engineering, production and operations, quality assurance and quality control, and refurbishing operations.

B. The contested tax rulings

The Irish tax authorities adopted advance tax decisions, known as 'tax rulings', in relation to certain taxpayers who had made requests to that effect. By letters of 29 January 1991 and 23 May 2007 (collectively, 'the contested tax rulings'), the Irish tax authorities indicated their agreement with the proposals made by the Apple Group's representatives concerning the chargeable profits of ASI and AOE in Ireland. Those rulings are described in recitals 59 to 62 of the contested decision.

1. The 1991 tax ruling

(a) The tax base of ACL, AOE's predecessor

By letter of 12 October 1990, addressed to the Irish tax authorities, the Apple Group's tax advisors described ACL's operations in Ireland, indicating the functions performed by its Irish branch established in Cork (Ireland). In addition, it was stated that the branch was the owner of the assets relating to the manufacturing activities, but that AOE retained ownership of the materials used, works in progress and finished products.

Following the letter from the Apple Group's representatives to the Irish tax authorities of 16 January 1991 and the response from those authorities of 24 January 1991, those authorities confirmed, by letter of 29 January 1991, the terms proposed by the Apple Group, as described below. Thus, pursuant to those terms, confirmed by the Irish tax

authorities, ACL's chargeable profit in Ireland, relating to income from its Irish branch, was calculated on the basis of the following elements:

65% of that branch's operating costs up to an annual amount of [*confidential*](1) and 20% of its operating costs in excess of [*confidential*];

if the overall profit of ACL's Irish branch was less than the figure obtained using that formula, that lower figure was to be used to determine the branch's net profit;

the operating costs to be taken into consideration for that calculation were to include all operating expenses, excluding materials for resale and cost-share for intangibles charged from companies affiliated with the Apple Group;

a capital allowance could be claimed, provided it did not exceed by [*confidential*] the depreciation charged in the relevant accounts.

(b) The tax base of ACAL, ASI's predecessor

By letter of 2 January 1991, the Apple Group's tax advisors informed the Irish tax authorities of the existence of a new company, Apple Computer Accessories Ltd (ACAL), the Irish branch of which was described as being responsible for sourcing products intended for export from Irish manufacturers.

On 16 January 1991 the Apple Group's representatives sent a letter to the Irish tax authorities summarising the terms of the agreement which had been concluded during a meeting between that group and those authorities on 3 January 1991 as regards ACAL's chargeable profit. According to that letter, the calculation of the branch's profit had to be based on a margin of 12.5% of operating costs (excluding materials for resale).

By letter of 29 January 1991, the Irish tax authorities confirmed the terms of the agreement as expressed in the letter of 16 January 1991.

2. The 2007 tax ruling

By letter of 16 May 2007 addressed to the Irish tax authorities, the Apple Group's tax advisors summarised their proposal for revising the method for determining the tax base of the Irish branches of ASI and AOE.

Regarding the Irish branch of ASI (the successor to Apple Computer International, itself the successor to ACAL), it was proposed that the chargeable profit to be allocated to that branch correspond to [*confidential*] of its operating costs, excluding costs such as sums invoiced from affiliated companies within the Apple Group and material costs.

Regarding AOE's Irish branch, the chargeable profit was to correspond to the sum of, on the one hand, an amount corresponding to [*confidential*] of the branch's operating costs, excluding costs such as the sums invoiced from affiliated companies within the Apple Group and material costs, and, on the other, an amount corresponding to the IP return for the manufacturing process technology developed by that branch, namely [*confidential*] of that branch's turnover. A deduction was to be allowed in respect of capital allowances for plant and buildings 'computed and allowed in the normal manner'.

It was proposed that the terms of the future agreement enter into force with effect from 1 October 2007 for both branches, that those terms be applicable for five years if the circumstances remained unchanged, and that they be subsequently renewed on an annual basis. It was also stated that the agreement could be applied to any new entities that might be created or transformed within the Apple Group, provided their activities corresponded to those carried out by AOE, namely manufacturing in Ireland, and by ASI, namely activities not connected with manufacturing, such as sales and services in general.

By letter of 23 May 2007, the Irish tax authorities confirmed their agreement with all the proposals set out in the letter of 16 May 2007. That agreement was applied until the 2014 tax year.

C. The administrative procedure before the Commission

By letter of 12 June 2013, the Commission requested Ireland to provide it with information on the subject of tax rulings practice in its territory, in particular on the subject of the tax rulings that had been granted to certain entities in the Apple Group, including ASI and AOE.

By decision of 11 June 2014, the Commission opened the formal investigation procedure laid down in Article 108(2) TFEU ('the Opening Decision') concerning the contested tax rulings issued by the Irish tax authorities regarding the chargeable profits allocated to the Irish branches of ASI and AOE, on the ground that those rulings could constitute State aid for the purposes of Article 107(1) TFEU. According to the Commission, the contested tax rulings would have been capable of conferring an advantage on the undertakings to which they had been granted if they had endorsed a transfer pricing agreement which departed from the conditions that would have been set between independent market operators (the arm's length principle). That decision was published in the Official Journal on 17 October 2014.

By letters of 5 September and 17 November 2014, Ireland and Apple Inc. submitted their respective observations regarding the Opening Decision.

During the formal investigation procedure, several exchanges and meetings took place between the Commission, the Irish tax authorities and Apple Inc. (recitals 11 to 38 of the contested decision). In addition, Apple Inc. and Ireland submitted two ad hoc reports regarding the allocation of profits to the Irish branches of ASI and AOE, drawn up by their respective tax advisors.

D. The contested decision

On 30 August 2016 the Commission adopted the contested decision. After describing the factual and legal background (Section 2) and the administrative procedure (Sections 3 to 7), the Commission focused on analysing the existence of aid (Section 8).

First, the Commission noted that the contested tax rulings had been granted by the Irish tax administration and were therefore imputable to the State. In so far as those rulings entailed a reduction in the amount of ASI and AOE's tax liability, Ireland had renounced tax revenue, which had given rise to a loss of State resources (recital 221 of the contested decision).

Secondly, as ASI and AOE were part of the Apple Group, operating in all Member States, the contested tax rulings were thus liable to affect trade within the European Union (recital 222 of the contested decision).

Thirdly, in so far as the contested tax rulings had led to a reduction in ASI and AOE's tax bases, for the purpose of establishing corporation tax in Ireland, they conferred an advantage on those two companies (recital 223 of the contested decision).

In addition, according to the Commission, as the contested tax rulings were granted only to ASI and AOE, it could be presumed that they were selective in nature. However, for the sake of completeness, the Commission contended that the contested tax rulings constituted a derogation from the reference framework, namely the ordinary rules of corporation tax in Ireland (recital 224 of the contested decision).

Fourthly, if it were to turn out that the contested tax rulings entailed a reduction in the amount of ASI and AOE's tax liability, those rulings would thus be liable to improve the competitive position of those two companies and, accordingly, to distort or threaten to distort competition (recital 222 of the contested decision).

1. The existence of a selective advantage

In Section 8.2 of the contested decision, the Commission followed the three-step analysis derived from case-law in order to prove the existence of a selective advantage in the present instance. Thus, first of all, it identified the reference framework and provided grounds for applying the arm's length principle in that case. Next, it examined whether there was a selective advantage arising from a derogation from the reference framework. In essence, relying on primary, subsidiary and alternative lines of reasoning, the Commission considered that the contested tax rulings had enabled ASI and AOE to reduce the amount of tax for which they were liable in Ireland during the period when those rulings were in force, namely the period from 1991 to 2014 ('the reference period'), and that this represented an advantage as compared with other companies in a comparable situation. Lastly, the Commission stated that neither Ireland nor Apple Inc. had put forward arguments to justify that selective advantage.

(a) The reference framework

In recitals 227 to 243 of the contested decision, the Commission considered that the reference framework consisted of the ordinary rules of taxation of corporate profit in Ireland, the objective of which was to tax the profits of all companies subject to tax in Ireland. In light of that objective, the Commission considered that integrated companies and stand-alone companies were in a comparable factual and legal situation. Accordingly, section 25 of the Taxes Consolidation Act 1997 ('the TCA 97'), which provides for the taxation of non-resident companies in respect of trading income arising directly or indirectly through the active branch in Ireland, had to be regarded as forming an integral part of the reference framework and not as a separate reference framework.

(b) The arm's length principle

In recitals 244 to 263 of the contested decision, the Commission stated that, under section 25 of the TCA 97, in light of its intended purpose, that provision had to be applied in connection with a profit allocation method. In that regard, it noted that Article 107(1) TFEU required the profit allocation method to be based on the arm's length principle, regardless of whether or not the Member State concerned had incorporated the arm's length principle into its national legal system. The Commission based that consideration on two premisses. First, it recalled that any tax measure adopted by a Member State had to comply with the rules on State aid. Secondly, it contended that it followed from the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), that a reduction in the tax base resulting from a tax measure enabling a taxpayer to employ transfer pricing in intra-group transactions that did not resemble prices that would have been charged in conditions of free competition would confer a selective advantage on that taxpayer for the purposes of Article 107(1) TFEU.

Thus, the Commission contended, on the basis of the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), that the arm's length principle constituted a benchmark for establishing whether an integrated company was receiving a selective advantage for the purposes of Article 107(1) TFEU as a result of a tax measure determining its transfer pricing and thus its tax base. That principle was intended to ensure that intra-group transactions be treated, for tax purposes, in the same way as those carried out between non-integrated stand-alone companies, so as to avoid unequal treatment of companies in a similar factual and legal situation, having regard to the objective of such a system, which was to tax the profits of all companies falling within its fiscal jurisdiction.

As regards the guidelines developed within the framework of the Organisation for Economic Cooperation and Development (OECD), the Commission indicated that these constituted simply useful guidance for tax authorities, to ensure that the profit allocation and transfer pricing methods produce outcomes in line with market conditions.

(c) Selective advantage as a result of the profits derived from the IP licences held by ASI and AOE not being allocated to the Irish branches (primary line of reasoning)

Primarily, in recitals 265 to 321 of the contested decision, the Commission contended that the fact that the Irish tax authorities had accepted, in the contested tax rulings, the premiss that the Apple Group IP licences held by ASI and AOE had to be allocated outside Ireland had led to ASI and AOE's annual chargeable profits in Ireland departing from a reliable approximation of a market-based outcome in line with the arm's length principle.

In essence, the Commission considered that the IP licences held by ASI and AOE for the procurement, manufacture, sale and distribution of the Apple Group's products outside North and South America, which it had identified as 'the Apple IP licences', had contributed significantly to those two companies' income.

Thus, the Commission criticised the Irish tax authorities for having incorrectly allocated assets, functions and risks to the head offices of ASI and AOE, although those head offices had no physical presence or employees. More specifically, regarding the functions related to the IP licences, the Commission contended that such functions could not have been performed only by ASI and AOE's boards of directors, without any staff, as shown by the lack of references to

discussions and decisions in that regard in the board minutes provided to the Commission. Therefore, according to the Commission, in so far as the head offices of ASI and AOE had been unable to control or manage the Apple Group's IP licences, those head offices should not have been allocated, in an arm's length context, the profits derived from the use of those licences. Accordingly, those profits should have been allocated to ASI and AOE's branches, which alone would have been in a position effectively to perform functions related to the Apple Group's IP that were crucial to ASI and AOE's trading activity.

Consequently, by failing to allocate the profits deriving from the Apple Group's IP to ASI and AOE's branches, thereby acting in breach of the arm's length principle, the Irish tax authorities had conferred an advantage on ASI and AOE for the purposes of Article 107(1) TFEU in the form of a reduction in their respective annual chargeable profits. According to the Commission, that advantage was of a selective nature, because it entailed a reduction in ASI and AOE's tax liability in Ireland as compared with non-integrated companies whose chargeable profits reflected prices negotiated at arm's length on the market.

(d) Selective advantage resulting from the inappropriate choice of methods for allocating profits to ASI and AOE's Irish branches (subsidiary line of reasoning)

As a subsidiary argument, in recitals 325 to 360 of the contested decision, the Commission contended that, even if the Irish tax authorities had been correct in accepting the assumption that the Apple IP licences held by ASI and AOE had to be allocated outside Ireland, the profit allocation methods approved by the contested tax rulings had nonetheless resulted in an annual chargeable profit for ASI and AOE in Ireland which departed from a reliable approximation of a market-based outcome in line with the arm's length principle. According to the Commission, those methods were based on inappropriate methodological choices, which had led to a reduction in the amount of tax that ASI and AOE were required to pay as compared with non-integrated companies whose chargeable profits under those rules were determined by prices negotiated at arm's length on the market. Therefore, according to the Commission, the contested tax rulings, by approving those methods, had conferred a selective advantage on ASI and AOE for the purposes of Article 107(1) TFEU.

(e) Selective advantage resulting from the derogation from the reference framework, even assuming that that framework consists solely of section 25 of the TCA 97, by the contested tax rulings, which are not consistent with the arm's length principle (alternative line of reasoning)

Using an alternative line of reasoning, in recitals 369 to 403 of the contested decision, the Commission argued that, even if it had to be considered that the reference framework consisted solely of section 25 of the TCA 97, the contested tax rulings had conferred a selective advantage on ASI and AOE in the form of a reduction of their tax base in Ireland. First, the Commission contended that the application of section 25 of the TCA 97 in Ireland was based on the arm's length principle. However, in the present instance, the Commission had shown that the contested tax rulings had departed from a reliable approximation of a market-based outcome in line with the arm's length principle, which had conferred an economic advantage on ASI and AOE. Secondly and in any event, the Commission argued that, even if it had to be considered that the application of section 25 of the TCA 97 was not based on the arm's length principle, it was necessary to conclude that the contested tax rulings had been issued by the Irish tax authorities on a discretionary basis, in the absence of objective criteria related to the Irish tax system, and that, as a result, they conferred a selective advantage on ASI and AOE.

(f) Conclusion regarding the selective advantage

The Commission concluded that the contested tax rulings gave rise to a reduction in the charges that ASI and AOE would normally have been required to bear in the course of their business operations and that, accordingly, those rulings had to be regarded as having granted those two companies operating aid. However, it contended that, in so far as ASI and AOE were part of the Apple Group, which is multinational in nature, and in so far as that group had to be regarded as a single economic unit for the purposes of case-law, that group had benefited as a whole from the State aid granted by Ireland by way of the contested tax rulings (Section 8.3 of the contested decision).

2. Incompatibility, unlawfulness and recovery of the aid

The Commission noted that those aid measures were incompatible with the internal market under Article 107(3)(c) TFEU and that, as they had not been notified beforehand, they constituted unlawful State aid put into effect in breach of Article 108(3) TFEU (Sections 8.5 and 9 of the contested decision).

Lastly (Section 11 of the contested decision), the Commission stated that Ireland was required to recover the aid granted by the contested tax rulings for the period running from 12 June 2003 to 27 September 2014. It specified that the amount to be recovered had to be calculated on the basis of a comparison between the tax actually paid and that which should have been paid if, had the rulings not been issued, the ordinary rules of taxation had been applied.

Regarding the arguments concerning the infringement of Ireland and Apple Inc.'s procedural rights during the administrative procedure, the Commission stated that, as the scope of its investigation concerning the existence of State aid had remained unchanged from the Opening Decision to the adoption of the contested decision, their rights had been fully respected (Section 10 of the contested decision).

3. Operative part

The operative part of the contested decision reads as follows:

'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.
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.'

II. Procedure and forms of order sought

A. Case T-778/16

By application lodged at the Registry of the General Court on 9 November 2016, Ireland brought the action in Case T-778/16.

1. The composition of the formation of the Court and priority treatment

By decision of 29 November 2016, the President of the Seventh Chamber of the General Court granted Ireland's application to give Case T-778/16 priority treatment under Article 67(2) of the Rules of Procedure of the General Court.

By document lodged at the Court Registry on 9 November 2016, Ireland requested that Case T-778/16 be decided by a Chamber sitting in extended composition. On 18 January 2017 the Court took formal note, in accordance with Article 28(5) of the Rules of Procedure, of the fact that Case T-778/16 had been assigned to the Seventh Chamber, Extended Composition.

As two Members of the Seventh Chamber, Extended Composition, were prevented from sitting, the President of the General Court, by decisions of 21 February 2017 and 21 May 2019 respectively, designated the Vice-President of the General Court and another judge to complete the Chamber.

2. The interventions

By document lodged at the Court Registry on 20 March 2017, the Grand Duchy of Luxembourg applied for leave to intervene in Case T-778/16 in support of the form of order sought by Ireland.

By document lodged at the Court Registry on 30 March 2017, the Republic of Poland applied for leave to intervene in Case T-778/16 in support of the form of order sought by the Commission.

By order of 19 July 2017, the President of the Seventh Chamber, Extended Composition, granted the Grand Duchy of Luxembourg and the Republic of Poland leave to intervene.

3. The applications for confidential treatment

By document lodged at the Court Registry on 26 April 2017, Ireland requested that a part of its application and certain documents appended thereto, including the contested decision, and a part of the defence and certain documents appended thereto be treated as confidential vis-à-vis the Grand Duchy of Luxembourg and the Republic of Poland.

By document lodged at the Court Registry on 31 May 2017, Ireland requested that the name of the Apple Group's tax advisors be treated as confidential vis-à-vis the public.

By documents lodged at the Court Registry on 26 and 29 November 2018, Ireland partially withdrew its applications for confidential treatment.

The Grand Duchy of Luxembourg and the Republic of Poland received non-confidential versions of the documents in question. The Grand Duchy of Luxembourg raised no objections to the applications for confidential treatment made in relation to it, while the Republic of Poland challenged the applications for confidential treatment made in relation to it.

By order of 14 December 2018, *Ireland* v *Commission* (T-778/16, not published, EU:T:2018:1019), the President of the Seventh Chamber, Extended Composition, granted, in part, the applications for confidential treatment made in relation to the Republic of Poland and rejected them as to the remainder. The Republic of Poland received non-confidential versions of the documents in question in accordance with the terms of that order.

4. Forms of order sought

Ireland claims that the Court should:

annul the contested decision;

order the Commission to pay the costs in Case T-778/16.

The Commission contends that the Court should:

dismiss the action in Case T-778/16 as unfounded;

order Ireland to pay the costs in Case T-778/16.

The Grand Duchy of Luxembourg contends that the Court should annul the contested decision, in accordance with the form of order sought by Ireland.

The Republic of Poland contends, in essence, that the Court should dismiss the action in Case T-778/16, in accordance with the form of order sought by the Commission.

B. Case T-892/16

By application lodged at the Court Registry on 19 December 2016, ASI and AOE brought the action in Case T-892/16.

1. The composition of the formation of the Court, priority treatment, and joinder

By document lodged at the Court Registry on 8 February 2017, ASI and AOE applied for priority treatment to be given to Case T-892/16 under Article 67(2) of the Rules of Procedure and requested that that case and Case T-778/16 be joined for the purposes of the written and oral parts of the procedure and of the decision closing the proceedings.

By decision of 6 April 2017, the President of the Seventh Chamber of the General Court granted the application to give Case T-892/16 priority treatment under Article 67(2) of the Rules of Procedure.

Acting on a proposal from the Seventh Chamber, the Court decided, on 17 May 2017, pursuant to Article 28 of the Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

As two Members of the Seventh Chamber, Extended Composition, were prevented from sitting, the President of the General Court, by decisions of 8 June 2017 and 21 May 2019 respectively, designated the Vice-President of the General Court and another judge to complete the Chamber.

2. The interventions

By document lodged at the Court Registry on 30 March 2017, IBEC Company Limited by Guarantee applied for leave to intervene in Case T-892/16 in support of the form of order sought by ASI and AOE. Pursuant to Article 19(2) of the Rules of Procedure, the President of the Seventh Chamber, Extended Composition, referred the decision regarding that application, which fell within his remit, to the Seventh Chamber, Extended Composition. By order of 15 December 2017, *Apple Sales International and Apple Operations Europe* v *Commission* (T-892/16, not published, EU:T:2017:926), the Court rejected IBEC Company Limited by Guarantee's application for leave to intervene.

By document lodged at the Court Registry on 31 March 2017, the EFTA Surveillance Authority applied for leave to intervene in Case T-892/16 in support of the form of order sought by the Commission. By order of 19 July 2017, the President of the Seventh Chamber, Extended Composition, granted the EFTA Surveillance Authority leave to intervene.

By document lodged at the Court Registry on 31 March 2017, Ireland applied for leave to intervene in Case T-892/16 in support of the form of order sought by ASI and AOE. By decision of 28 June 2017, the President of the Seventh Chamber, Extended Composition, granted Ireland leave to intervene.

By document lodged at the Court Registry on 13 April 2017, the United States of America applied for leave to intervene in Case T-892/16 in support of the form of order sought by ASI and AOE. Pursuant to Article 19(2) of the Rules of Procedure, the President of the Seventh Chamber, Extended Composition, referred the decision regarding that application, which fell within his remit, to the Seventh Chamber, Extended Composition. By order of 15 December 2017, *Apple Sales International and Apple Operations Europe* v *Commission* (T-892/16, not published, EU:T:2017:925), the Court rejected the United States of America's application for leave to intervene. The United States of America brought an appeal against that order. By order of 17 May 2018, *United States of America* v *Apple Sales International and Others* (C-12/18 P(I), not published, EU:C:2018:330), that appeal was dismissed.

3. The applications for confidential treatment

During the proceedings, ASI and AOE requested that certain procedural documents be treated as confidential vis-à-vis the EFTA Surveillance Authority. By document lodged at the Court Registry on 1 October 2018, they withdrew that request.

4. Forms of order sought

ASI and AOE claim that the Court should:

annul the contested decision;

in the alternative, annul the contested decision in part;

order the Commission to pay the costs.

The Commission contends that the Court should:

dismiss the action;

order ASI and AOE to pay the costs.

Ireland contends that the Court should annul the contested decision, in accordance with the form of order sought by ASI and AOE.

The EFTA Surveillance Authority contends that the Court should:

dismiss the action in Case T-892/16 as unfounded;

order ASI and AOE to pay the costs in Case T-892/16.

C. Joinder of the cases and the oral part of the procedure

By document lodged at the Court Registry on 8 February 2017, ASI and AOE requested that Cases T-778/16 and T-892/16 be joined.

By decision of 21 June 2017, the President of the Seventh Chamber, Extended Composition, decided not to join Cases T-778/16 and T-892/16 at that stage of the proceedings.

By decision of the President of the Seventh Chamber, Extended Composition, of 9 July 2019, Cases T-778/16 and T-892/16 were joined for the purposes of the oral part of the procedure pursuant to Article 68 of the Rules of Procedure.

Acting on a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, in connection with the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested the parties to answer written questions. The parties complied with that measure of organisation of procedure within the prescribed period.

By document lodged at the Court Registry on 23 August 2019, the Commission requested that certain information contained in its response to the measures of organisation of procedure be treated as confidential vis-à-vis the Grand Duchy of Luxembourg and the Republic of Poland.

The Grand Duchy of Luxembourg and the Republic of Poland received non-confidential versions of that response.

The parties presented oral argument and responded to the oral questions put by the Court at the hearing on 17 and 18 September 2019. At the hearing, ASI and AOE and the Commission made certain observations regarding the report for the hearing, a formal note of which was made by the Court in the minutes of the hearing.

In addition, the parties were heard at the hearing regarding a possible joinder of Cases T-778/16 and T-892/16 for the purposes of the decision closing the proceedings, a formal note of which was made by the Court in the minutes of the hearing.

III. Law

A. Joinder of Cases T-778/16 and T-892/16 for the purposes of the decision closing the proceedings

Pursuant to Article 19(2) of the Rules of Procedure, the President of the Seventh Chamber, Extended Composition, referred the decision regarding the joinder of Cases T-778/16 and T-892/16 for the purposes of the decision closing the proceedings, which fell within his remit, to the Seventh Chamber, Extended Composition.

As the parties were heard at the hearing regarding a possible joinder, it is appropriate to join Cases T-778/16 and T-892/16 for the purposes of the decision closing the proceedings, on account of the connection between them.

B. Pleas in law relied on and framework for examining the present actions

By their actions, Ireland, in Case T-778/16, and ASI and AOE, in Case T-892/16, seek annulment of the contested decision inasmuch as it stated that the contested tax rulings constituted State aid for the purposes of Article 107(1) TFEU and ordered the recovery of sums which would not have been collected from those companies by Ireland as corporation tax.

In support of their actions, Ireland and ASI and AOE raise 9 pleas in law and 14 pleas in law respectively, which overlap for the most part.

In the first place, those pleas are intended, in essence, to challenge the Commission's primary line of reasoning, in particular as a result of errors concerning the assessment of the existence of a selective advantage (first to third pleas in law in Case T-778/16 and first to sixth pleas in law in Case T-892/16) and the assessment relating to the concept of State intervention (part of the second plea in law in Case T-778/16).

More specifically, in the context of challenging the Commission's primary line of reasoning, first, it is alleged that the Commission carried out a joint assessment of the concept of an advantage and the concept of selectivity (part of the second plea in law in Case T-778/16). Secondly, it is alleged that the Commission incorrectly identified the reference framework, inter alia on the basis of incorrect assessments of Irish law (part of the first and second pleas in law in Case T-778/16 and first plea in law in Case T-892/16), misapplied the arm's length principle (part of the first and third pleas in law in Case T-778/16 and part of the first and second pleas in law in Case T-892/16), and inappropriately applied the OECD guidelines (part of the second plea in law in Case T-778/16 and fifth plea in law in Case T-892/16). Thirdly, Ireland and ASI and AOE contest the Commission's assessments relating to activities within the Apple Group (part of the first plea in law in Case T-778/16 and third to fifth pleas in law in Case T-892/16). Fourthly, they contest the assessments relating to the selective nature of the contested tax rulings (part of the second plea in law in Case T-778/16 and sixth plea in law in Case T-892/16).

In the second place, Ireland and ASI and AOE contest the assessments made by the Commission in connection with its subsidiary line of reasoning (fourth plea in law in Case T-778/16 and eighth plea in law in Case T-892/16).

In the third place, Ireland and ASI and AOE contest the assessments made by the Commission in connection with its alternative line of reasoning (fifth plea in law in Case T-778/16 and ninth plea in law in Case T-892/16).

In the fourth place, ASI and AOE contest the recovery of the aid ordered in the contested decision, on the ground that it is impossible to calculate the amount to be recovered under the Commission's subsidiary and alternative lines of reasoning (10th plea in law in Case T-892/16).

In the fifth place, Ireland and ASI and AOE argue that the investigation carried out by the Commission in the administrative procedure was conducted in breach of essential procedural requirements, in particular the right to be heard (6th plea in law in Case T-778/16 and 7th and 12th pleas in law in Case T-892/16).

In the sixth place, Ireland and ASI and AOE contest the recovery ordered by the contested decision in breach of, in particular, the principles of legal certainty and the protection of legitimate expectations (7th plea in law in Case T-778/16 and 11th plea in law in Case T-892/16).

In the seventh place, Ireland and ASI and AOE criticise the Commission for encroaching on the competences of the Member States, invoking, in particular, the principle of fiscal autonomy (8th plea in law in Case T-778/16 and 14th plea in law in Case T-892/16).

In the eighth place, Ireland and ASI and AOE argue that the contested decision contains an inadequate statement of reasons (9th plea in law in Case T-778/16 and 13th plea in law in Case T-892/16).

It is necessary to begin by analysing the pleas in law challenging the Commission's competence to adopt the contested decision before addressing the other pleas in law in the order in which they have been summarised in

paragraphs 90 to 96 and paragraph 98 above.

As a preliminary point and for the purposes of the subsequent assessment of the legality of the contested decision, it should be borne in mind that, in the context of State aid control, in order to assess whether the contested tax rulings constituted such aid, it was for the Commission to demonstrate that the conditions for the existence of State aid for the purposes of Article 107(1) TFEU were satisfied. Although the Commission may classify a tax measure as State aid (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81), it may do so only in so far as the conditions for such a classification are satisfied (see, to that effect, judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 84).

Thus, it was, in principle, for the Commission to provide proof, in the contested decision, of the existence of such aid (see, to that effect, judgments of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 34, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 95). Accordingly, it was for the Commission to demonstrate, in particular, the existence of a selective advantage resulting from the issuing of the contested tax rulings.

It is therefore necessary, in the light of the foregoing considerations, to analyse the pleas in law relied on by Ireland and by ASI and AOE challenging the legality of the contested decision.

C. Pleas in law alleging that the Commission exceeded its competences and encroached on the competences of the Member States in breach of, in particular, the principle of fiscal autonomy (8th plea in law in Case T-778/16 and 14th plea in law in Case T-892/16)

In essence, Ireland and ASI and AOE argue that the contested decision constitutes a breach of the fundamental constitutional principles of the EU legal order governing the division of competences between the Union and the Member States as laid down in, inter alia, Articles 4 and 5 TEU, and of the principle of the fiscal autonomy of the Member States deriving therefrom. They argue that, under EU law as it currently stands, the field of direct taxation falls within the competence of the Member States.

The Commission disputes those arguments. In essence, it recalls that, while the Member States enjoy fiscal sovereignty, any tax measure adopted by a Member State must comply with the EU rules on State aid. Thus, the Member States may not, using tax measures, discriminate between economic operators in a similar situation without giving rise to State aid creating distortions of the market. However, the contested tax rulings enabled ASI and AOE to reduce their chargeable profit as compared to the chargeable profit of other corporate taxpayers falling within the general Irish corporate tax system, giving rise to unlawful and incompatible State aid.

According to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, instances of intervention by the Member States in the field of direct taxation, even if they concern issues that have not been harmonised in the European Union, are not excluded from the scope of the rules on State aid control.

Accordingly, the Commission may classify a tax measure as State aid so long as the conditions for such a classification are satisfied (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraphs 81 and 84). The Member States must exercise their competence in the field of taxation consistently with EU law (judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37). Consequently, they must refrain from taking, in that context, any measure liable to constitute State aid incompatible with the internal market.

Regarding the condition that the measure in question must confer an economic advantage, it should be borne in mind that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

More specifically, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving a transfer of State resources, places the recipients in a more favourable financial situation than that of other taxpayers constitutes State aid for the purposes of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see, also, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

It follows from the foregoing that, as the Commission is competent to ensure that Article 107 TFEU is complied with, it cannot be said to have exceeded its competences when assessing whether, in issuing the contested tax rulings, the Irish tax authorities had granted ASI and AOE favourable tax treatment by enabling them to reduce their chargeable profit as compared with the chargeable profit of other corporate taxpayers in a comparable situation.

In the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Accordingly, such a measure confers an economic advantage on its recipient where it mitigates the burdens normally included in the budget of an undertaking and, as a result, without being a subsidy in the strict meaning of the word, is similar in character and has the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

Consequently, in order to determine whether there is a tax advantage, it is necessary to compare the recipient's situation resulting from the application of the measure in question with its situation had the measure in question not been adopted (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 114), and had the normal rules of taxation been applied.

Ireland and ASI and AOE argue that the Commission exceeded its competences inasmuch as it relied on a unilateral and incorrect interpretation of Irish tax law, in particular section 25 of the TCA 97. In addition, it imposed procedural rules for assessing national taxation that do not exist in Irish law. Furthermore, the Commission exceeded its competences by stating as a ground for adopting the contested decision that ASI and AOE were stateless for tax residency purposes.

In that regard, first, it should be noted that, pursuant to section 25 of the TCA 97, non-resident companies carrying on their trade in Ireland through a branch are taxed, with regard to their trading income, only on the profits resulting from trade directly or indirectly attributable to that Irish branch. It should also be noted that, pursuant to section 25 of the TCA 97, it is necessary to determine the trading income actually obtained directly or indirectly through the Irish branch and that that provision does not lay down any specific method for determining the profits attributable to the Irish branches of non-resident companies.

It is apparent from Ireland's written pleadings and from the oral arguments of the parties at the hearing that, for the purpose of applying section 25 of the TCA 97, account must be taken of the factual background and the situation of the branch in Ireland, in particular the functions performed, the assets used and the risks assumed by that branch.

In those circumstances and as can be seen from the case-law cited in paragraph 111 above, in order to determine whether there was an advantage in the present instance, the Commission had to be able to analyse ASI and AOE's tax treatment resulting from the application of the contested tax rulings against the tax treatment which those two companies would have received under the normal rules of taxation applicable in Ireland if the rulings in question had not been issued.

Therefore, it cannot be argued that the Commission unilaterally applied the substantive tax rules and carried out a de facto tax harmonisation when analysing whether the chargeable profits of ASI and AOE, calculated under the contested tax rulings, corresponded to profits made by their Irish branches, taking into account the functions performed, the assets used and the risks assumed by those branches, which would have been taxable under section 25 of the TCA 97.

Secondly, concerning the arguments that the Commission imposed procedural rules for assessing national taxation, thereby rewriting Irish tax law, Ireland disputes the complaints raised by the Commission regarding the contested tax rulings on the ground that they were not based on profit allocation reports (recitals 262 and 363 of the contested decision), that they had not been properly reviewed (recital 368 of the contested decision) and that, before issuing those rulings, the Irish tax authorities had not investigated other companies within the Apple Group, regardless of where those companies were operating (recital 274 of the contested decision).

In that regard, it should be borne in mind that it is apparent from the contested decision that the Commission concluded that there was a selective advantage, primarily, as a result of the non-allocation of the Apple Group's IP licences to the Irish branches of ASI and AOE (recitals 265 to 321 of the contested decision), on a subsidiary basis, as a result of the inappropriate choice of methods for allocating profits to those Irish branches (recitals 325 to 360 of the contested decision) and, in the alternative, as a result of the contested tax rulings derogating from section 25 of the TCA 97 on a discretionary basis (recitals 369 to 403 of the contested decision).

Accordingly, it cannot be considered that the Commission relied on the complaints of a procedural nature summarised in paragraph 117 above in order to conclude that there was a selective advantage in the present instance. In those circumstances, the complaints relied on by Ireland must be set aside as ineffective.

Thirdly, regarding the statement that ASI and AOE were stateless for tax residency purposes, it should be noted that it is true that in, inter alia, recitals 52, 276, 277 and 281 of the contested decision, the Commission highlighted the fact that it considered ASI and AOE to be stateless for tax residency purposes in its reasoning leading to the conclusion that ASI and AOE did not exist outside Ireland except on paper.

However, the fact that the Commission emphasised in the contested decision that ASI and AOE were stateless for tax residency purposes does not mean that it based its conclusion that there was a selective advantage on that statement.

In those circumstances, for the same reasons as those set out in paragraph 119 above, it is necessary to set aside as ineffective the complaints relied on by Ireland and by ASI and AOE relating to the Commission having exceeded its competences by considering ASI and AOE to be stateless for tax residency purposes.

Having regard to the foregoing considerations, the 8th plea in law in Case T-778/16 and the 14th plea in law in Case T-892/16, alleging that the Commission exceeded its competences and that it encroached on the competences of the Member States, must be rejected.

In so far as the Commission was competent, in the context of State aid control, to examine whether the contested tax rulings had constituted such aid, it is therefore necessary to go on to analyse the pleas in law relied on by Ireland and by ASI and AOE which are intended to challenge the merits of each line of reasoning set out by the Commission in the contested decision in order to demonstrate the existence of a selective advantage in the present instance.

D. Pleas in law alleging errors made in connection with the Commission's primary line of reasoning

By way of reminder, in its primary line of reasoning, the Commission contended, in essence, that, in so far as the head offices of ASI and AOE were unable to control or manage the Apple Group's IP licences, those head offices should not have been allocated, in an arm's length context, the profits derived from the use of those licences. Accordingly, those profits should have been allocated to ASI and AOE's branches, which alone would have been in a position effectively to perform the functions related to the Apple Group's IP that were crucial to ASI and AOE's trading activity.

In addition, in response to the written questions put by the Court, the Commission specified that the phrase 'profits derived from the use of the Apple IP licences', which appears, inter alia, in recital 304 of the contested decision, had to be understood as meaning the profits resulting from the allocation of the economic ownership of the Apple Group's IP licences to the Irish branches. According to the Commission, the profits resulting from the use of the Apple Group's IP licences correspond to the profits derived from all of ASI and AOE's sales activities.

Ireland and ASI and AOE contest the Commission's primary line of reasoning, claiming, in essence, that the Commission erred in concluding that there was a selective advantage.

First, Ireland criticises the method of analysis used by the Commission in its primary line of reasoning inasmuch it did not analyse the advantage and selectivity conditions separately.

Next, Ireland and ASI and AOE challenge the conclusions reached following the analysis in the Commission's primary line of reasoning. They argue that errors were made in the assessment of the reference framework and normal taxation under Irish tax law owing to the incorrect application by the Commission of section 25 of the TCA 97, its application of the arm's length principle and its analysis in the light of the OECD 2010 Report on the Attribution of Profits to Permanent Establishments of 22 July 2010 ('the Authorised OECD Approach'). Ireland and ASI and AOE challenge the Commission's factual assessments concerning the activities within the Apple Group.

Lastly, Ireland and ASI and AOE contest the Commission's conclusions regarding the selective nature of the contested tax rulings, in so far as, first, such selectivity cannot be presumed in the present instance and, second, ASI and AOE were not granted a derogation and did not receive selective treatment as compared with other undertakings in a comparable situation. Ireland claims that, in any event, even if such treatment were established, it would have been justified by the nature and the general scheme of the Irish tax system.

The Commission disputes the arguments relied on by Ireland and ASI and AOE.

It is appropriate to go on to analyse the pleas contesting the Commission's primary line of reasoning by following the order of the complaints summarised in paragraphs 128 to 130 above.

1. Joint examination of the conditions of advantage and selectivity (part of the second plea in law in Case T-778/16)

Ireland argues that the Commission disregarded principles well established in case-law by conflating the conditions of advantage and selectivity and complains that the Commission failed to examine those two concepts separately.

In that regard, it should be borne in mind that selectivity and advantage are two separate conditions. In respect of advantage, the Commission must show that the measure improves the financial situation of the recipient (see, to that effect, judgment of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 15). In respect of selectivity, the Commission must show that the advantage is not enjoyed by other undertakings in a legal and factual situation comparable to that of the recipient in the light of the objective of the reference framework (judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

However, it is not inconceivable that those conditions may be examined together where it is apparent from the examination carried out by the Commission, first, that the measure in question confers an economic advantage on its recipient and, second, that that advantage is not enjoyed by undertakings in a comparable legal and factual situation.

Further, concerning tax measures more specifically, as is rightly contended by the Commission, the examination of advantage overlaps with the examination of selectivity in so far as, for those two conditions to be satisfied, it must be shown that the contested tax measure leads to a reduction in the amount of tax which would normally have been payable by the recipient of the measure under the ordinary tax regime which would, therefore, be applicable to other taxpayers in the same situation. Moreover, it is apparent from the case-law of the Court of Justice that those two conditions may be examined together as the 'third condition' laid down by Article 107(1) TFEU, requiring there to be a 'selective advantage' (see, to that effect, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 32).

It is apparent from the contested decision that, in its analysis of whether there was a selective advantage (Section 8.2 of the contested decision), the Commission examined to what extent the contested tax rulings had led to a reduction in the amount payable by ASI and AOE in the form of corporation tax in Ireland in order to show that those rulings had given those companies an economic advantage. In addition, the Commission defined the reference framework as being the ordinary rules of taxation of corporate profit in Ireland (Section 8.2.1.1 of the contested decision). Moreover, in connection with its primary, subsidiary and alternative lines of reasoning (Sections 8.2.2.2 to 8.2.3.2 of the contested decision), the Commission examined whether, by reducing those undertakings' annual chargeable profits, the contested tax rulings had derogated from that reference framework, in order to establish that those rulings were selective in nature.

In so far as the Commission did in fact examine both the advantage condition and the selectivity condition, it is irrelevant that that examination covered both conditions simultaneously. It cannot therefore be held that the Commission erred in law simply because it examined them together.

The complaint raised by Ireland relating to the fact that the conditions of advantage and selectivity were examined together must therefore be rejected as unfounded.

2. Identification of the reference framework and assessments concerning normal taxation under Irish law (part of the first and second pleas in law in Case T-778/16 and first, second and fifth pleas in law in Case T-892/16)

(a) Reference framework

In recitals 227 to 243 of the contested decision, the Commission stated that the relevant reference framework for its analysis of whether there was a selective advantage was 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 that Member State.

The Commission considered that that reference framework included both non-integrated and integrated companies because Irish corporation tax does not distinguish between those companies.

In addition, the Commission considered that even though resident and non-resident companies were taxed on different sources of income, in the light of the intrinsic objective of those rules, namely the taxation of profit of all companies subject to tax in Ireland, both types of company were in a comparable factual and legal situation. Consequently, those rules included section 25 of the TCA 97, which therefore could not be considered to constitute a separate reference framework in itself.

Ireland and ASI and AOE contest that definition of the reference framework and claim, in essence, that the relevant reference framework in the present instance is section 25 of the TCA 97, a separate charging provision applicable specifically to non-resident companies which are not in a situation comparable to that of resident companies. In addition, according to Ireland and ASI and AOE, the matter of whether an undertaking is integrated or non-integrated is not the issue in the present instance; instead, the issue is the taxation of non-resident companies.

It should be noted that, when analysing tax measures in the context of Article 107(1) TFEU, the determination of the reference framework is relevant for examining both the advantage condition and the selectivity condition.

As has been noted in paragraph 110 above, in the case of tax measures, the very existence of an advantage can be established only by comparison with so-called 'normal' taxation. It is precisely that so-called 'normal' taxation that is established by the reference framework.

In addition, in order to classify a domestic tax measure as selective, it is necessary to begin by identifying and examining the ordinary or normal tax regime applicable in the Member State concerned (judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

Moreover, the Court of Justice has confirmed its case-law according to which it is sufficient, in order to establish the selectivity of a measure that derogates from an ordinary tax system, to demonstrate that that measure benefits certain operators and not others, although all those operators are in an objectively comparable situation in the light of the objective pursued by the ordinary tax system (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 76).

Indeed, while it is not always necessary, in order for it to be established that a tax measure is selective, that it should derogate from an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard where the effect of that measure is that two categories of operators are distinguished and are subject, a priori, to different treatment, namely those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system, although those two categories are in a comparable situation in the light of the objective pursued by that system (judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 77).

In addition, the Court of Justice has held that the legislative means used are not a decisive element for the purpose of determining the reference framework (judgment of 28 June 2018, *Lowell Financial Services* v *Commission*, C-219/16 P, not published, EU:C:2018:508, paragraphs 94 and 95).

It is apparent from case-law that it is the rules of taxation to which the recipient of the measure that is regarded as constituting State aid is subject that form the reference framework. It is also apparent from case-law that the substantive scope of the reference framework can be defined only in relation to the measure that is regarded as constituting State aid. Therefore, the purpose of the measures at issue and the legal framework of which they form part must be taken into consideration when determining the reference framework.

Moreover, the Commission explained its interpretation of the concept of reference framework in the notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1). Although that notice cannot bind the Court, it may nevertheless serve as a useful source of guidance (see, to that effect and by analogy, judgment of 26 July 2017, *Czech Republic* v *Commission*, C-696/15 P, EU:C:2017:595, paragraph 53).

Paragraph 133 of the notice referred to in paragraph 151 above states, inter alia, that the reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings that are subject to it and the technicalities of the way in which it functions.

Therefore, it is in the light of the foregoing considerations that the Court must assess whether the Commission correctly identified the relevant reference framework for examining the selectivity of the contested tax rulings.

In the present instance, upon reading the contested tax rulings, as described in paragraphs 11 to 21 above, it is clear that they were issued in order to allow ASI and AOE to determine their chargeable profits in Ireland for the purposes of corporation tax in that Member State.

Accordingly, the contested tax rulings form part of the general Irish corporation tax regime, the objective of which is to tax the chargeable profits of companies carrying on activities in Ireland, be they resident or non-resident, integrated or stand-alone.

It must be noted that, under that general Irish regime, according to the description — which is not contested by the parties — set out in recital 71 of the contested decision, corporation tax in Ireland is charged on the profits of companies (section 21(1) of the TCA 97). In addition, Ireland applies a different rate to trading income, non-trading income and capital gains. Section 21 of the TCA 97 sets the general rate of corporation tax at 12.5%. That rate applies to the trading income of companies taxed under the TCA 97, while non-trading income is taxed at a rate of 25% and

capital gains are taxed at a rate of 33%. However, capital gains on disposals of certain shareholdings are subject to an exemption.

Moreover, as is stated in recital 72 of the contested decision, under section 26 of the TCA 97, resident companies are subject to corporation tax calculated on the basis of their worldwide profits and capital gains, excluding most distributions received from other companies resident in Ireland.

Lastly, under section 25 of the TCA 97, the wording of which is set out in recital 73 of the contested decision, a non-resident company is not to be within the charge to corporation tax unless it carries on a trade in Ireland through a branch or agency. If it does so, that company is to be taxed on all of its trading income arising directly or indirectly from the branch or agency and from the property or rights used by or held by or for the branch or agency as well as on capital gains attributable to the branch or agency.

Under section 25(1) of the TCA 97, non-resident companies are not to be taxed in Ireland unless they carry on a trade there through a branch or agency; if they do so, they must pay corporation tax on all of their chargeable profits. Section 25(2)(a) of the TCA 97 defines chargeable profits as 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.

Therefore, although the first part of the first sentence of section 25(1) of the TCA 97 could be understood as establishing a derogation from the normal taxation regime in favour of non-resident companies, the second part of that sentence makes that regime applicable to non-resident companies carrying on a trade in Ireland through a branch, which must pay corporation tax on all of their chargeable profits. Thus, in accordance with that provision, those companies are also subject to the conditions for the application of corporation tax.

When seen from that perspective, resident and non-resident companies carrying on a trade in Ireland through a branch are in a comparable situation in the light of the objective pursued by that regime, namely the taxation of chargeable profits. The fact that the latter's chargeable profits are specifically defined in section 25(2)(a) of the TCA 97 does not establish that section as the reference framework; rather, that provision is the legislative means used for the purpose of applying corporation tax to that category of company. As is apparent from the case-law cited in paragraphs 148 and 149 above, the fact that, pursuant to those legislative means, one category of company is treated differently as compared with other companies does not mean that those two categories of company are not in a comparable situation in the light of the objective pursued by that regime.

Therefore, the provisions concerning the chargeable profits of companies that are not resident in Ireland laid down in section 25 of the TCA 97 cannot in themselves constitute a specific regime that is separate from the ordinary rules. That provision in isolation is insufficient for the purpose of consistently applying corporation tax to those non-resident companies.

In those circumstances, it is appropriate to consider that the Commission did not err when it concluded that the reference framework in the present instance was the ordinary rules of taxation of corporate profit in Ireland, the intrinsic objective of which was the taxation of profit of all companies subject to tax in that Member State, and, consequently, that that framework included the provisions applicable to non-resident companies laid down in section 25 of the TCA 97.

Therefore, the complaints raised by Ireland and ASI and AOE concerning the reference framework defined in the contested decision must be rejected.

In view of the reference framework defined in the contested decision, namely the ordinary rules of taxation of corporate profit, which include, in particular, the provisions of section 25 of the TCA 97, it is necessary to analyse the complaints raised by Ireland and ASI and AOE regarding the Commission's interpretation of those provisions.

(b) The Commission's assessments concerning the normal taxation of profits under Irish tax law

In the contested decision (in particular in recitals 319 to 321 of that decision), as part of its primary line of reasoning, the Commission maintained that the fact that the Irish branches of ASI and AOE were not allocated the profits derived from the Apple Group IP licences held by ASI and AOE meant that the determination of the annual chargeable profits of ASI and AOE in Ireland departed from a reliable approximation of a market-based outcome in line with the arm's length principle, with the result that the amount that would otherwise have been payable by ASI and AOE as corporation tax in Ireland was reduced.

The Commission's analysis in this regard is based on the consideration, outlined in recitals 244 to 263 of the contested decision, that the application of section 25 of the TCA 97 for the purpose of allocating profits to a branch required the application of a profit allocation method which, under Article 107(1) TFEU, had to be based on the arm's length principle. In addition, in recital 272 of the contested decision, the Commission referred to the Authorised OECD Approach when it stated that the profits to be allocated to a branch were the profits that that branch would have earned at arm's length if it had been a separate and independent enterprise engaged in identical or similar activities under identical or similar conditions, taking into account the functions performed, the assets used, and the risks assumed by the company through its branch.

Ireland and ASI and AOE contest each element of the reasoning described in paragraphs 166 and 167 above.

First, Ireland and ASI and AOE take issue with the Commission's application of section 25 of the TCA 97 in connection with its primary line of reasoning in so far as it complained, in essence, that the Irish tax authorities had not required all of ASI and AOE's profits to be allocated to their Irish branches.

Secondly, Ireland and ASI and AOE dispute that Article 107 TFEU gives rise to an arm's length principle as relied on by the Commission in its reasoning and, consequently, argue that no such principle is applicable in Ireland.

Thirdly, Ireland and ASI and AOE submit that the Authorised OECD Approach does not apply to Irish tax law. They argue that, in any event, even if it were assumed that the Authorised OECD Approach could be applied in the present

instance, the Commission was wrong to conclude, on the basis of that approach, that the profits relating to the Apple Group IP licences held by ASI and AOE should have been allocated to their Irish branches.

Therefore, it is necessary to examine, first, the complaints raised by Ireland and ASI and AOE concerning the application of section 25 of the TCA 97, then, the matter of whether the Commission was entitled to rely on an arm's length principle arising from Article 107 TFEU in its analysis and, lastly, the application in the present instance of the Authorised OECD Approach.

(1) Application of section 25 of the TCA 97 (part of the second plea in law in Case T-778/16 and of the first plea in law in Case T-892/16)

In the present instance, it is not in dispute that:

ASI and AOE are companies that are incorporated in Ireland but which are not considered to be tax resident in Ireland, as the Commission acknowledged in recital 50 of the contested decision;

section 25 of the TCA 97 contains provisions that apply specifically to non-resident companies under which, where a non-resident company carries on a trade in Ireland through a branch, that company is to be taxed, inter alia, on all of its trading income arising directly or indirectly from the branch;

the non-resident companies ASI and AOE carried on a trade in Ireland through their respective branches.

Therefore, it is necessary to analyse whether the Commission was entitled to consider that, under section 25 of the TCA 97, when determining ASI and AOE's profits in Ireland, the Irish tax authorities should have allocated the Apple Group's IP licences to the Irish branches of those two companies.

Under Irish tax law, and in particular under section 25 of the TCA 97, in the case of non-resident companies carrying on their trade in Ireland through a branch, only the profits derived from trade directly or indirectly attributable to that Irish branch, on the one hand, and all income from property or rights used by, or held by or for, the branch, on the other, are taxable.

It is true, as the Commission correctly points out and as Ireland and ASI and AOE acknowledge, that section 25 of the TCA 97 does not lay down any specific method enabling it to be established which profits are directly or indirectly attributable to the Irish branches of non-resident companies and makes no reference to the arm's length principle for the purposes of that attribution.

Nevertheless, it is clear that section 25 of the TCA 97 relates only to the profits derived from trade that the Irish branches have carried on themselves and excludes profits derived from trade carried on by other parts of the non-resident company in question.

Ireland and ASI and AOE submit that that taxation mechanism precludes, in principle, an approach in which the entirety of the non-resident company's profits are examined and, to the extent that those profits cannot be allocated to other parts of that company, are allocated by default to the Irish branches (an 'exclusion' approach).

In that regard, Ireland and ASI and AOE rely on the opinion of an expert in Irish law, the relevance of which is not contested as such by the Commission. According to that opinion, when determining the chargeable profits of non-resident companies carrying on a trade in Ireland through their Irish branches, the relevant analysis for the application of section 25 of the TCA 97 must cover the actual activities of those Irish branches and the value of the activities actually carried out by the branches themselves. That opinion is based, inter alia, on the judgment of the High Court, Ireland, in *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd.* [1988] I. R. 10 note 4507 ('the judgment in *Dataproducts*'). The judgment in *Dataproducts* was also relied on as precedent both in support of the arguments of Ireland and Apple Inc. during the administrative procedure and in support of the arguments of Ireland and ASI and AOE in the present dispute.

It is apparent from the judgment in *Dataproducts* that the profits derived from property that is controlled by a non-resident company cannot be regarded as such as being profits attributable to the Irish branch of that company even if that property has been made available to that branch.

Similarly, it is apparent from that judgment that property belonging to a company that is not resident in Ireland and controlled by the executives of that company, who are also not resident in Ireland, cannot be allocated to that company's Irish branch, even if that property is made available to that branch. In so far as the staff and directors of the Irish branch did not have control of the property in question, the income from that property could not be attributed to that branch for the purposes of taxation in Ireland. That remains the case even where it is only the Irish branch that has employees and physical property and the non-resident company has no physical property, employees or business activities other than those of the Irish branch. The non-resident company with no employees was considered to control that property through its management bodies.

Therefore, it is clear from the judgment in *Dataproducts* that the question that is relevant when determining the profits of the branch is whether the Irish branch has control of that property.

In the present instance, as has been stated in paragraphs 37 to 40 above, in its primary line of reasoning the Commission contended, in essence, that where the profits from trading activity were derived from the Apple Group's IP, the licences for which were held by ASI and AOE, those profits should have been allocated to the Irish branches in so far as those companies had no physical presence or employees outside those branches and, therefore, were unable to control those licences.

In the light of the judgment in *Dataproducts*, when determining which profits are attributable to the Irish branch of a company that is not tax resident for the purposes of section 25 of the TCA 97, the property held by that company cannot be allocated to the Irish branch if it has not been established that that property is actually controlled by that branch. In addition, it is apparent from that judgment that the fact that the non-resident company has neither employees nor any physical presence outside the Irish branch is not in itself a decisive factor preventing the conclusion that it is that company which controls that property.

If the Apple Group IP licences held by ASI and AOE were not controlled by the Irish branches, it would be wrong to allocate all of the income generated by the companies arising from those licences to those branches under section 25 of the TCA 97. Only the profit derived from the trading activity of the Irish branches, including that carried on on the basis of the Apple Group IP licences held by ASI and AOE, should be regarded as relating to the activities of those branches.

It follows from the foregoing that, when it considered that the Apple Group's IP licences should have been allocated to the Irish branches in so far as ASI and AOE were regarded as having neither the employees nor the physical presence to manage them, the Commission allocated profits using an 'exclusion' approach, which is inconsistent with section 25 of the TCA 97. In its primary line of reasoning, the Commission did not attempt to show that the Irish branches of ASI and AOE had in fact controlled the Apple Group's IP licences when it concluded that the Irish tax authorities should have allocated the Apple Group's IP licences to those branches and that, consequently, under section 25 of the TCA 97, all of ASI and AOE's trading income should have been regarded as arising from the activities of those branches.

In those circumstances, it should be held that, as Ireland and ASI and AOE rightly argue in their complaints in the second plea in law in Case T-778/16 and in the first plea in law in Case T-892/16, the Commission erred, in its primary line of reasoning, in its assessment of the provisions of Irish tax law relating to the taxation of the profits of companies that are not resident in Ireland but which carry on a trade there through a branch.

As the Commission's primary line of reasoning is based on a series of assessments concerning the normal taxation of profits under Irish tax law, it is necessary to go on to examine the arguments raised by Ireland and ASI and AOE regarding the other inherent aspects of those assessments.

(2) The arm's length principle (part of the first and third pleas in law in Case T-778/16 and of the first and second pleas in law in Case T-892/16)

In essence, Ireland and ASI and AOE, supported in that regard by the Grand Duchy of Luxembourg, submit that the arm's length principle is not part of Irish tax law and that no freestanding obligation to apply that principle emerges from Article 107 TFEU, any other provision of EU law, or the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416). Ireland submits that, in any event, the Commission itself applied the principle inconsistently in so far as it failed to take into consideration the economic reality, structure and particular features of the Apple Group.

The Commission, supported in that regard by the Republic of Poland and the EFTA Surveillance Authority, disputes those arguments and contends, in essence, that the method used to determine the chargeable profits under section 25 of the TCA 97 must produce a reliable approximation of a market-based outcome and, therefore, an approximation based on the arm's length principle, which would have been applied by the Irish tax authorities in the past when applying double taxation treaties.

It is therefore necessary to examine, in the first place, whether the Commission was entitled to rely on the arm's length principle in order to determine whether there was a selective advantage and, if so, in the second place, whether the Commission correctly applied that principle in its primary line of reasoning.

(i) Whether the Commission was entitled to rely on the arm's length principle in order to determine whether there was a selective advantage

First, it should be borne in mind that, in recitals 244 to 248 of the contested decision, the Commission maintained that, in so far as section 25 of the TCA 97 did not state how the chargeable profits of an Irish branch were to be determined, that provision had to be applied by using a profit allocation method.

Secondly, in recital 249 of the contested decision, the Commission stated that, according to the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), a reduction in the taxable base that resulted from a tax measure that enabled a taxpayer to employ transfer prices in intra-group transactions that did not resemble prices which would have been charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length conferred a selective advantage on that taxpayer for the purposes of Article 107(1) TFEU.

In addition, in recitals 251 and 252 of the contested decision, the Commission specified that the purpose of the arm's length principle was 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 stand-alone companies. Otherwise, integrated group companies would benefit from favourable treatment under the ordinary rules of taxation. According to the Commission, in the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), the Court of Justice endorsed the arm's length principle as a benchmark for establishing whether an integrated group company received a selective advantage for the purposes of Article 107(1) TFEU as a result of a tax measure that determined its transfer pricing and thus its taxable base.

Thirdly, in recital 255 of the contested decision, the Commission stated that the same principle applied to the internal dealings of different parts of a single integrated company, such as a branch that transacts with other parts of the company to which it belongs. According to the Commission, to ensure that a profit allocation method endorsed by a tax ruling does not confer a selective advantage on a non-resident company operating through a branch in Ireland, that method must generate a chargeable profit that is a reliable approximation of a market-based outcome in line with the arm's length principle. In recital 256 of the contested decision, it added that it applied the arm's length principle not as a basis for 'imposing' taxes that would otherwise not be due under the reference framework, but as a benchmark to verify whether the chargeable profit of a branch was determined in a manner that ensured that it was not granted

favourable treatment as compared with non-integrated companies whose chargeable profits reflected prices negotiated at arm's length on the market.

Fourthly, with regard to the legal basis of that principle, the Commission stated in recital 255 of the contested decision that it did not directly apply Article 7(2) or Article 9 of the OECD Model Tax Convention or the guidance provided by the OECD on profit allocation or transfer pricing, which were non-binding but which nonetheless constituted useful guidance on how to ensure that transfer pricing and profit allocation arrangements produce outcomes in line with market conditions.

In addition, in recital 257 of the contested decision, the Commission stated that the arm's length principle that it applied was derived from Article 107(1) TFEU, as interpreted by the Court of Justice, which was binding on the Member States and from the scope of which national tax rules were not excluded. It noted that that principle therefore applied regardless of whether the Member State in question had incorporated that principle in its national legal system.

The Commission concluded from this, in recitals 258 and 259 of the contested decision, that, if it could be shown that the profit allocation methods endorsed in the contested tax rulings resulted in a chargeable profit for ASI and AOE in Ireland that departed from a reliable approximation of a market-based outcome in line with the arm's length principle, those rulings had to be considered to confer a selective advantage, in so far as they had led to a lowering of the amount of corporation tax payable in Ireland as compared with non-integrated companies whose taxable base was determined by the profits they generated under market conditions.

It should be emphasised at the outset that, as is apparent from, inter alia, recitals 258 and 259 of the contested decision, referred to in paragraph 198 above, the Commission relied on the arm's length principle in its analysis of whether the contested tax rulings gave rise to a selective advantage, in particular in its primary line of reasoning.

In addition, it should be borne in mind, as has been stated in paragraph 163 above, that the reference framework that was relevant for the analysis of the advantage condition in the present instance was the ordinary rules of taxation of corporate profit in Ireland, the intrinsic objective of which was the taxation of profit of all companies subject to tax in that Member State, and, consequently, that that reference framework included the provisions applicable to non-resident companies laid down in section 25 of the TCA 97.

It is therefore necessary to examine whether the Commission was entitled to use the arm's length principle to analyse in, inter alia, its primary line of reasoning whether the allocation of profits to the Irish branches of ASI and AOE, as endorsed in the contested tax rulings, had conferred a selective advantage on those companies.

In the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Consequently, such a measure confers an economic advantage on its recipient where it mitigates the burdens normally included in the budget of an undertaking and, as a result, without being a subsidy in the strict meaning of the word, is similar in character and has the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

Accordingly, in order to determine whether there is a tax advantage, it is necessary to compare the recipient's situation resulting from the application of the measure in question with its situation had the measure in question not been adopted (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 114) and had the normal rules of taxation been applied.

In the first place, it should be borne in mind that the dispute in the present instance centres around the taxation of companies that are not tax resident in Ireland and which carry on a trade in that State through their Irish branches. The issue therefore lies in determining what profits must be allocated to those branches for corporation tax purposes as part of 'normal' taxation, taking into account the normal rules of taxation applicable in the present instance, as referred to in paragraph 200 above, which include the provisions that apply to non-resident companies set out in section 25 of the TCA 97.

Therefore, the question that is relevant in the present instance is not linked to the prices of intra-group transactions within a group of undertakings, as was the situation in the case that gave rise to the judgment of 24 September 2019, *Netherlands and Others* v *Commission* (T-760/15 and T-636/16, EU:T:2019:669).

It is true that the allocation of profits to a branch of a company may lend itself to the application by analogy of the principles applicable to the prices of intra-group transactions within a group of undertakings. In the same way as the prices of intra-group transactions between companies integrated in a single group of undertakings are not determined under market conditions, the allocation of profits to a branch of a single company is not carried out under market conditions.

However, in order for those principles to be applied by analogy, it must be clear from national tax law that the profits derived from the activities of the branches of non-resident undertakings should be taxed as if they resulted from the economic activities of stand-alone undertakings operating under market conditions.

In that regard, in the second place, it should be borne in mind that, as has been stated in paragraph 161 above, from the perspective of the conditions for the application of the corporation tax regime in Ireland, under section 25 of the TCA 97, both resident companies, on the one hand, and non-resident companies carrying on a trade in Ireland through a branch, on the other, are in a comparable situation in the light of the objective pursued by that regime, namely taxing the chargeable profits of those companies, be they resident or non-resident.

In addition, as has been noted in paragraph 179 above, when determining the chargeable profits of non-resident companies carrying on a trade in Ireland through their Irish branches, the relevant analysis for the application of section 25 of the TCA 97 must cover the actual activities of those Irish branches and the value of the activities actually carried out by the branches themselves.

Moreover, it should be noted that, when questioned explicitly on this point in a written question put by the Court and orally at the hearing, Ireland confirmed that, for the purposes of the application of section 25 of the TCA 97, as referred to in paragraph 209 above, the value of the activities actually carried out by the branches is to be determined according to the value of that type of activity on the market.

Accordingly, under Irish tax law, the profit resulting from the trading activity of such a branch is to be taxed as if it were determined under market conditions.

In those circumstances, when the Commission examines, in connection with the power conferred on it by Article 107(1) TFEU, a tax measure concerning the chargeable profits of a non-resident company carrying on a trade in Ireland through a branch, it may compare the tax burden of such a non-resident company resulting from the application of that tax measure with the tax burden resulting from the application of the normal rules of taxation under national law to a resident company, placed in a comparable factual situation, carrying on its activities under market conditions.

Those findings are borne out, *mutatis mutandis*, by the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), as the Commission correctly pointed out in the contested decision. The case that gave rise to that judgment concerned Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the ordinary rules 'based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'.

Thus, although, through the tax measure concerning the chargeable profits of a non-resident company carrying on a trade in Ireland through a branch, national authorities have accepted a certain level of profit attributable to that branch, Article 107(1) TFEU allows the Commission to check whether that level of profit corresponds to the level that would have been obtained through carrying on that trade under market conditions, in order to determine whether there is, as a result, any mitigation of the burdens normally included in the budget of the undertaking concerned, thus conferring on that undertaking an advantage for the purposes of that provision. The arm's length principle, as described by the Commission in the contested decision, is thus a tool enabling the Commission to make that determination in the exercise of its powers under Article 107(1) TFEU.

Moreover, the Commission rightly noted, in recital 256 of the contested decision, that the arm's length principle served as a 'benchmark' for verifying whether the chargeable profit of a branch of a non-resident company was determined, for the purposes of corporation tax, in a manner that ensured that non-resident companies operating through a branch in Ireland were not granted favourable treatment as compared with resident stand-alone companies whose chargeable profits reflected prices negotiated at arm's length on the market.

In the third place, it should also be stated that when the Commission uses that tool to check whether the chargeable profit of a non-resident company carrying on a trade in Ireland through a branch pursuant to a tax measure corresponds to a reliable approximation of a chargeable profit generated under market conditions, it can identify an advantage for the purposes of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation.

In the fourth place, it is true, as Ireland and ASI and AOE submit, that when the contested tax rulings were issued in 1991 and 2007 respectively, the arm's length principle had not been incorporated into Irish tax law either directly, notably by incorporating the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the Committee on Fiscal Affairs of the OECD on 27 June 1995 and revised on 22 July 2010 ('the OECD Transfer Pricing Guidelines'), or by incorporating the Authorised OECD Approach for the purposes of allocating profits to branches of non-resident companies.

Nevertheless, even though that principle had not been formally incorporated into Irish law, as has been stated in paragraphs 210 above, Ireland confirmed that the application of section 25 of the TCA 97 by the Irish tax authorities required the actual activities of the Irish branches in question to be identified and the value of those activities to be determined according to the market value of that type of activity.

In addition, it must be pointed out that it is apparent from the judgment of the High Court in *Belville Holdings v. Cronin* [1985] I. R. 465, which is relied on by the Commission in its written response to the questions put by the Court, and the scope of which was debated by the parties at the hearing, that, as early as 1984, it was the position of the Irish tax authorities that, where the declared value of a transaction between associated undertakings did not correspond to the value that would have been negotiated on the open market, that value had to be adjusted so that it did correspond to the market value. That approach, which was endorsed in principle by the High Court, involved adjustments equivalent to those proposed on the basis of the arm's length principle, in particular in the OECD Transfer Pricing Guidelines.

Moreover, as the Commission rightly pointed out, the arm's length principle was included in the double taxation treaties signed by Ireland with the United States of America and with the United Kingdom of Great Britain and Northern Ireland in order to resolve situations of potential double taxation. Thus, those treaties determine the profits that each State that is a party to those treaties may tax when a company established in one of those States carries on a trade in the other State through a permanent establishment. Therefore, it must be concluded that, at least in its bilateral relations with those States, Ireland agreed to apply the arm's length principle in order to avoid taxpayers being subject to double taxation.

In the fifth place, as is correctly argued by Ireland and ASI and AOE, the Commission cannot, however, contend that there is a freestanding obligation to apply the arm's length principle arising from Article 107 TFEU obliging Member States to apply that principle horizontally and in all areas of their national tax law.

In the absence of EU rules governing the matter, it falls within the competence of the Member States to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97).

Although it is true that this does not mean that each tax measure affecting, inter alia, the basis of assessment taken into account by the tax authorities is exempt from the application of Article 107 TFEU (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 103 and 104), the fact remains that, at the current stage of development of EU law, the Commission does not have the power independently to determine what constitutes the 'normal' taxation of an integrated undertaking while disregarding the national rules of taxation.

Nevertheless, although so-called 'normal' taxation is to be determined according to the national tax rules and in spite of the fact that those rules must be used as a reference point when establishing the very existence of an advantage, the fact remains that, if those national rules provide that the branches of non-resident companies, as concerns the profits derived from those branches' trading activity in Ireland, and resident companies are to be subject to the same conditions of taxation, Article 107(1) TFEU gives the Commission the right to check whether the level of profit allocated to the branches that has been accepted by the national authorities for the purpose of determining the chargeable profits of those non-resident companies corresponds to the level of profit that would have been obtained if that activity had been carried on under market conditions.

In those circumstances, it is necessary to reject the arguments of Ireland and ASI and AOE put forward in the first plea in law in Case T-778/16 and in the first and second pleas in law in Case T-892/16, inasmuch as they complain that, in the present instance, the Commission, in view of the Irish tax authorities' application of section 25 of the TCA 97, checked, by reference to the arm's length principle — which, according to the contested decision, the Commission used as a tool — whether the level of profit allocated to the branches for their trade in Ireland, as accepted in the contested tax rulings, corresponded to the level of profit that would have been obtained through carrying on that trade under market conditions.

(ii) Whether the Commission correctly applied the arm's length principle in its primary line of reasoning

In Ireland's third plea in law in Case T-778/16, it claims that the Commission's own application of the arm's length principle in its primary line of reasoning was inconsistent because it failed to take into account the economic reality, structure and particular features of the Apple Group.

In that regard, it is appropriate to bear in mind what has been stated in paragraphs 209 and 210 above, namely that, when determining the chargeable profits of non-resident companies carrying on a trade in Ireland through their Irish branches, the relevant analysis for the application of section 25 of the TCA 97 must cover the actual activities of those branches and the market value of the activities actually carried out by the branches themselves.

In its primary line of reasoning, the Commission concluded that the Apple Group IP licences held by ASI and AOE should have been allocated to the Irish branches due to the lack of staff and physical presence of those two companies, without attempting to show that that allocation followed from the activities actually carried on by those Irish branches. In addition, the Commission inferred from that conclusion that all of the trading income of ASI and AOE should have been regarded as arising from the activities of the Irish branches without attempting to show that that income was representative of the value of the activities actually carried out by the branches themselves.

In those circumstances, it must be held that the arguments raised by Ireland in the third plea in law in Case T-778/16, inasmuch as they contest the Commission's conclusions in its primary line of reasoning based on the arm's length principle, are well founded.

For the reasons set out in paragraph 188 above, it will be necessary to go on to examine the arguments raised by Ireland and ASI and AOE regarding the Commission's assessments in its primary line of reasoning concerning the Authorised OECD Approach.

(3) The Authorised OECD Approach (part of the second and fourth pleas in law in Case T-778/16 and fifth plea in law in Case T-892/16)

In essence, Ireland and ASI and AOE submit that the Authorised OECD Approach does not form part of the Irish tax system and, in particular, does not apply in the context of the taxation of non-resident companies provided for in section 25 of the TCA 97. That provision is not based on the Authorised OECD Approach. Moreover, Ireland and ASI and AOE submit that, even if it is assumed that the allocation of chargeable profits under section 25 of the TCA 97 should have been carried out in accordance with the Authorised OECD Approach, the Commission misapplied that approach inasmuch as it failed to examine the functions actually performed within the Irish branches of ASI and AOE.

It is therefore necessary to examine, in the first place, whether the Commission was entitled to rely on the Authorised OECD Approach when it verified whether there was a selective advantage and, if so, in the second place, whether the Commission correctly applied that approach in its primary line of reasoning.

(i) Whether the Commission was entitled to rely on the Authorised OECD Approach

As has been stated in paragraph 202 above, in the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation, as this allows it to be verified whether those measures lead to a reduction in the tax burden on the recipients of the measures in question as compared with the burden that those recipients would normally have had to bear had the measures not been adopted.

Accordingly, it is Irish tax law that the Commission should have used for its comparison to verify whether the contested tax rulings had created an advantage and whether that advantage was selective.

As is apparent from the considerations set out in paragraph 195 above, the Commission explicitly stated in recital 255 of the contested decision that it did not directly apply Article 7(2) or Article 9 of the OECD Model Tax Convention or the guidance provided by the OECD on profit allocation or transfer pricing. Further, as has been pointed out in paragraph 217 above, the Authorised OECD Approach has not been incorporated into Irish tax law.

However, even though the Commission was entitled to observe that it cannot be formally bound by the principles developed within the OECD and, more specifically, by the Authorised OECD Approach, the fact remains that, in its primary line of reasoning, in particular in recitals 265 to 270 of the contested decision, it relied, in essence, on the Authorised OECD Approach when it considered that profit allocation within a company involved allocating assets, functions and risks among the various parts of that company. Moreover, the Commission itself refers directly to the Authorised OECD Approach when substantiating its considerations, for example in footnote 186 of the contested decision.

In that regard, it should be noted that the Authorised OECD Approach is an approach that is based on work carried out by groups of experts and which reflects international consensus regarding profit allocation to permanent establishments. It is, therefore, certainly of practical significance when interpreting questions relating to that profit allocation, as the Commission acknowledged in recital 79 of the contested decision.

Moreover, it should be borne in mind, as Ireland itself acknowledged in paragraph 123 of its application without being challenged in that regard by the Commission, that, when applying section 25 of the TCA 97 it is necessary to look at the facts and circumstances of the branches in Ireland, including the functions performed, the assets used and the risks assumed by the branches. In addition, it should also be borne in mind that, when questioned specifically on that point in a written question put by the Court and orally at the hearing, Ireland confirmed that, in order to determine the profits to be allocated to branches for the purposes of section 25 of the TCA 97, it was necessary to carry out an objective analysis of the facts that included, first, identifying the 'activities' performed by the branch, the assets it uses for its activities, including intangibles such as IP, and the related risks that it assumes and, second, determining the value of that type of activity on the market.

Contrary to what is claimed by Ireland in its arguments concerning the differences between section 25 of the TCA 97 and the Authorised OECD Approach, it is clear that there is essentially some overlap between the application of section 25 of the TCA 97 as described by Ireland and the functional and factual analysis conducted as part of the first step of the analysis proposed by the Authorised OECD Approach.

In those circumstances, the Commission cannot be criticised for having relied, in essence, on the Authorised OECD Approach when it considered that, for the purposes of applying section 25 of the TCA 97, the allocation of profits to the Irish branch of a non-resident company had to take into account the allocation of assets, functions and risks between the branch and the other parts of that company.

(ii) Whether the Commission correctly applied the Authorised OECD Approach in its primary line of reasoning

Ireland and ASI and AOE submit, in essence, that the Commission's primary line of reasoning is inconsistent with the Authorised OECD Approach, inasmuch as the Commission considered that the profits relating to the Apple Group's IP licences should necessarily have been allocated to the Irish branches of ASI and AOE, in so far as the executives of ASI and AOE did not perform active or critical functions with regard to the management of those licences.

In that regard, it should be borne in mind that, in accordance with the Authorised OECD Approach as described, inter alia, in recitals 88 and 89 of the contested decision, the aim of the analysis in the first step is to identify the assets, functions and risks that must be allocated to the permanent establishment of a company on the basis of the activities actually performed by that company. It is true that the analysis in that first step cannot be carried out in an abstract manner that ignores the activities and functions performed within the company as a whole. However, the fact that the Authorised OECD Approach requires an analysis of the functions actually performed within the permanent establishment is at odds with the approach adopted by the Commission consisting, first, in identifying the functions performed by the company as a whole without conducting a more detailed analysis of the functions actually performed by the branches and, second, in presuming that the functions had been performed by the permanent establishment when those functions could not be allocated to the head office of the company itself.

In its primary line of reasoning the Commission considered, in essence, that the profits of ASI and AOE relating to the Apple Group's IP (which, according to the Commission's line of argument, represented a very significant part of the total profit of those two companies) had to be allocated to the Irish branches in so far as ASI and AOE had no employees capable of managing that IP outside those branches, without, however, establishing that the Irish branches had performed those management functions.

Accordingly, as Ireland and ASI and AOE rightly argue, the approach followed by the Commission in its primary line of reasoning is inconsistent with the Authorised OECD Approach.

In those circumstances, as is rightly argued by Ireland and ASI and AOE in their complaints in the second and fourth pleas in law in Case T-778/16 and in the fifth plea in law in Case T-892/16, it must be found that the Commission erred in its application, in its primary line of reasoning, of the functional and factual analysis of the activities performed by the branches of ASI and AOE, on which the application of section 25 of the TCA 97 by the Irish tax authorities is based and which corresponds, in essence, to the analysis provided for by the Authorised OECD Approach.

(4) Conclusions regarding the identification of the reference framework and the assessments of normal taxation under Irish law

In the light of the foregoing considerations, it must be found that the Commission did not err when it identified as the reference framework in the present instance the ordinary rules of taxation of corporate profit, which include, in particular, the provisions of section 25 of the TCA 97.

In addition, the Commission did not err when it relied on the arm's length principle as a tool in order to check whether, in the application of section 25 of the TCA 97 by the Irish tax authorities, the level of profit allocated to the branches for their trading activity in Ireland as accepted in the contested tax rulings corresponded to the level of profit that would have been obtained by carrying on that trading activity under market conditions.

Moreover, the Commission cannot be criticised for having relied, in essence, on the Authorised OECD Approach when it considered that, for the purposes of applying section 25 of the TCA 97, the allocation of profits to the Irish branch of a non-resident company had to take into account the allocation of assets, functions and risks between the branch and the other parts of that company.

However, it must be found that, in its primary line of reasoning, the Commission made errors concerning the application of, first, section 25 of the TCA 97, as has been stated in paragraph 187 above, second, the arm's length principle, as has been stated in paragraph 229 above, and, third, the Authorised OECD Approach, as has been stated in paragraphs 244 and 245 above. In those circumstances, it is appropriate to conclude that the Commission's primary line of reasoning was based on erroneous assessments of normal taxation under the Irish tax law applicable in the present instance.

For the sake of completeness, it will, however, be necessary to go on to examine the complaints raised by Ireland and ASI and AOE regarding the Commission's factual assessments concerning the activities within the Apple Group.

3. The Commission's assessments concerning the activities within the Apple Group (first plea in law in Case T-778/16 and third and fourth pleas in law in Case T-892/16)

As has been stated in paragraph 177 above, section 25 of the TCA 97 relates to the profits derived from trade that the Irish branches have carried on themselves. In addition, it should be borne in mind that, as has been stated in paragraph 238 above, when applying section 25 of the TCA 97, it is necessary to look at the facts and circumstances of the branches in Ireland, including the functions performed, the assets used and the risks assumed by the branches.

Moreover, the Commission itself emphasised in recitals 91 and 92 of the contested decision that, when dealing with the issue of the allocation of intangible property, such as IP, to permanent establishments, the Authorised OECD Approach relies on the concept of significant people functions related to the management of the property in question and decision-making, in particular with regard to the development of the intangible property.

It is therefore appropriate to examine the complaints raised by Ireland and ASI and AOE in the first plea in law in Case T-778/16 and in the third and fourth pleas in law in Case T-892/16 regarding the Commission's factual assessments concerning the activities within the Apple Group.

Ireland and ASI and AOE submit, in essence, that the activities and functions performed by the Irish branches of ASI and AOE, identified by the Commission, represented only a tiny part of their economic activity and their profits and that, in any event, those activities and functions included neither management nor strategic decision-making concerning the development or marketing of the IP. Rather, Ireland and ASI and AOE submit that all strategic decisions, in particular those concerning product design and development, were taken following an overall commercial strategy determined in Cupertino and implemented by the two companies in question through their management bodies and, in any event, outside the Irish branches. Consequently, there is no justification for allocating the Apple Group's IP licences to the Irish branches.

(a) Activities of ASI's Irish branch

As has been stated in paragraph 9 above, ASI's Irish branch is responsible for, inter alia, carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the areas covering the EMEIA and APAC regions.

In recitals 289 and 290 of the contested decision, the Commission referred to product quality control, R&D facilities management and business risk as being functions that necessarily had to be allocated to the Irish branches given that, outside those branches, ASI and AOE had no staff capable of carrying out those functions.

More specifically, the Commission emphasised that, in so far as the Irish branch of ASI was authorised to distribute Apple-branded products, its activities necessitated access to that brand, which was granted to ASI as a whole in the form of the Apple Group's IP licences (recital 296 of the contested decision).

The Commission then asserted that ASI's Irish branch performed 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. By way of example, it stated that ASI's Irish branch had incurred local marketing costs directly with marketing service providers (recital 297 of the contested decision). In addition, ASI's Irish branch was responsible for gathering and analysing regional data to estimate the expected demand forecast for Apple-branded products (recital 298 of the contested decision). Moreover, the Commission highlighted the fact that there were [*confidential*] full-time equivalent employees ('FTEs') categorised as R&D personnel based in Ireland (recital 300 of the contested decision).

First, with regard to the 'exclusion' approach to allocation adopted by the Commission in recitals 289 to 295 of the contested decision, which involved attributing to the Irish branches of ASI and AOE the quality control, R&D facilities management and business risk management functions solely on the basis that ASI and AOE had no staff outside their Irish branches, it is necessary to recall the considerations set out in paragraphs 243 and 244 above, which states that such an approach is inconsistent with Irish law and with the Authorised OECD Approach. The Commission did not succeed, by that reasoning, in showing that those functions had actually been carried out by the Irish branches.

In order to substantiate its assessment, the Commission relies on Exhibit B to the cost-sharing agreement as amended in 2009 which includes two tables, reproduced in Figures 8 and 9 of the contested decision (recital 122 of the contested decision), concerning all of the relevant functions relating to intangible property subject to the agreement in question and the related risks. Each of those functions and risks has an 'x' next to it in the columns for, respectively,

Apple Inc. (identified as 'Apple') and ASI and AOE (identified collectively as 'International Participant'), except for IP Registration and Defence, which is solely associated with Apple Inc.

In respect of the intangible property that is subject to the cost-sharing agreement, that is to say essentially all of the Apple Group's IP, the functions listed in Exhibit B to that agreement cover R&D, quality control, forecasting, financial planning and analysis in relation to development activities, R&D facilities management, contracting with related parties or third parties in relation to development activities, contract administration in relation to development activities, selection, hiring and supervision of employees, contractors and subcontractors to perform development activities, IP registration and defence, and market development.

The risks listed in Exhibit B to the cost-sharing agreement relating to all of the Apple Group's IP include, inter alia, product development risk, product quality risk, market development risk, product liability risk, fixed and tangible asset risk, IP protection and infringement risk, brand development and recognition risk, and risks related to changes in regulatory regimes.

As Apple Inc. claimed in the administrative procedure and as ASI and AOE have argued before the Court, it is apparent from the exhibit in question that it lists the functions that the parties to the cost-sharing agreement were authorised to perform and the associated risks that they might have been required to assume. However, the Commission provided no evidence to show that ASI or AOE, let alone their Irish branches, had actually performed any of those functions.

In addition, with regard to those functions and risks, the Commission contends that it is 'clear' that, with no employees outside their Irish branches, ASI and AOE would not have been able to monitor such risks. However, the Commission provides no evidence that demonstrates that the staff of the branches in question actually performed those functions and managed those risks.

Moreover, Ireland — supported in this regard by Apple Inc. in the administrative procedure and by ASI and AOE before the Court — claimed that ASI's branch had had no staff until 2012, before which all of the staff had been employed by the Irish branch of AOE. That information is stated in recital 109 of the contested decision and was confirmed during the hearing. If the Commission's argument that ASI would not have been able to perform such functions outside its branch given its lack of staff had to be followed, this would mean that, for a large part of the period covered by the Commission's examination, ASI's Irish branch, which also had no staff, would have been equally unable to perform those functions.

In the same vein, the Commission relies on the fact that ASI's board of directors would not have been in a position to perform those functions or assume those risks purely through occasional board meetings. However, the Commission did not attempt to establish that the management bodies of the Irish branches of ASI and AOE had actually actively managed, on a day-to-day basis, all of the functions and risks relating to the Apple Group's IP listed in Exhibit B to the cost-sharing agreement.

Lastly, it can be concluded that the activities and risks listed in Exhibit B to the cost-sharing agreement, mentioned in paragraphs 261 and 262 above are, in essence, all of the functions at the heart of the Apple Group's business model, which is centred on the development of technological products. With regard, in particular, to the risks listed in Exhibit B, they can be regarded as key risks which are inherent to that business model. The Commission argues, in essence, that ASI's Irish branch performed all of those functions and assumed all of those risks relating to the Apple Group's activities outside North and South America without providing evidence of the actual performance of those functions or assumption of those risks by the branch in question. Given the extent of the Apple Group's activities outside North and South America, which represent approximately 60% of the group's turnover, the Commission's assertion in that regard is not reasonable.

Secondly, with regard to the activities and functions that the Commission listed in recitals 296 to 300 of the contested decision as having actually been performed by ASI's Irish branch, it should be noted that, in the present instance, none of those activities or functions, regardless of whether they are taken individually or as a whole, justifies allocating the Apple Group's IP licences to that branch.

With regard to quality control, ASI and AOE claimed, without being challenged by the Commission on the point, that thousands of people around the world worked in the quality control function, while only one person was employed in that function in Ireland. In addition, they stated that those functions could even be outsourced through agreements with third-party manufacturers.

In that regard, it is clear that, in the absence of other evidence, it cannot be concluded from the fact that a function such as quality control is crucial for the reputation of the Apple brand, whose products were distributed by ASI's Irish branch, that that function was necessarily performed by that branch.

As regards the management of risk exposure in connection with the branches' normal activity, the Commission put forward only a single argument, in which it claimed that it was 'clear' that, in so far as ASI had no employees, it could not control and monitor commercial risks. In that regard, it is sufficient to refer to paragraph 266 above, according to which it was for the Commission to prove with specific evidence that the branches of ASI and AOE had performed the functions and assumed the risks that were allocated to them. Consequently, the Commission's reasoning, far from leading to a clear result, is insufficient to prove that that type of function was actually performed by ASI's Irish branch.

ASI and AOE claimed, without being challenged on the point by the Commission, that no one employed by the Irish branches was responsible for R&D facilities management.

With regard to the [*confidential*] FTEs categorised as employees in the R&D function, ASI and AOE provided detailed explanations regarding the specific tasks performed by those employees, namely ensuring products meet safety and environmental standards in the region [*confidential*], testing products to ensure they meet technical standards in the region [*confidential*], assisting a Cupertino-based team with software delivery [*confidential*], translating software into

various languages of the region [*confidential*] and administrative support [*confidential*]. They argue that those activities are clearly support roles and, as important as they may be, they cannot be regarded as key functions that determine that the Apple Group's IP licences should be allocated to the Irish branches in question.

With regard to the local marketing costs incurred directly with marketing service providers, the fact that ASI's Irish branch incurred those costs does not mean that that branch is responsible for designing the marketing strategy itself. As ASI and AOE claim, without being challenged on the point by the Commission, ASI's Irish branch had no staff assigned to the marketing function.

As for the activities involving gathering and analysing regional data, Ireland and ASI and AOE do not dispute that ASI and AOE were involved in such activities during the relevant period. However, as Ireland and ASI and AOE submit, without being challenged on the point by the Commission, those activities seem to have consisted of merely gathering data which was to be added to a database of worldwide scope. Those statistical data treatment activities seem to be support activities rather than activities that are essential for all of ASI's trading activity. In any event, the fact that the Irish branches are responsible for gathering data is insufficient to justify allocating the Apple Group's IP licences to those branches.

With regard to the activities relating to the AppleCare service, in recital 299 of the contested decision the Commission stated, on the basis of the ad hoc report submitted by Ireland, that these were after-sales support and repair services for Apple-branded products covering the entire EMEIA region, for which ASI's Irish branch was responsible. The Commission considered that, in so far as the objective of that function was to ensure customer satisfaction, it had a direct link to the Apple brand.

In that regard, it is apparent from the ad hoc report submitted by Ireland, on which the Commission itself relied, that ASI's Irish branch performed a number of so-called 'execution' functions, operating in accordance with the guidance and strategy decided in the United States, including some relating to the AppleCare service. As part of that service, the responsibilities of ASI's Irish branch were described as being linked to the warranty and repair programmes for Apple-branded products, repair network management, and telephone support for customers. The tasks specifically performed by ASI's branch were described as the collection of data on product failures and the monitoring of those failures and of returned products, which were sent to the analytics teams in the United States. The report also notes that ASI's branch was responsible for managing suppliers of repair services, which were centrally approved by the Apple Group, and for distributing spare parts within the supplier network. That description matches the description in the ad hoc report submitted by Apple Inc. The Commission did not challenge that description of the tasks relating to the AppleCare service performed by ASI's Irish branch.

At the hearing, ASI and AOE confirmed that AppleCare was a service provided by the Irish branch, which bore the costs of the infrastructure and staff connected with that service. That staff was, inter alia, responsible for answering questions from users of Apple-branded products through a call centre.

On the basis of the description of the AppleCare service given by Ireland and ASI and AOE, to which the Commission makes reference in the contested decision, it can be summarised as after-sales support for users of Apple-branded products, which includes the repair and exchange of defective products. The nature of the support service provided by the Irish branch involves assisting in the implementation of the warranty itself, for which ASI is responsible. Moreover, such an after-sales service is not linked to the design, development, manufacture or sale of the products themselves.

Although the quality of an after-sales service may have a significant impact on the perception of the brand and may be the impetus for product improvements, the fact that those activities were performed by ASI's Irish branch does not necessarily mean that the Apple Group's IP licences should be allocated to it. After-sales services are often outsourced without it being necessary to allocate the IP of the company in question to the external supplier in question.

Thirdly, the analysis of the activities of ASI's Irish branch, including the functions assessed by the Commission as justifying the allocation of the Apple Group's IP licences to that branch, indicates that they are routine functions performed in accordance with instructions from executives based in the United States which do not contribute significant added value to ASI's activities taken as a whole. In that regard, it should be noted, in particular, that the ad hoc reports submitted by Apple Inc. and Ireland include a detailed analysis of the activities of ASI's Irish branch. Those two reports concluded that those activities were routine and characterised them as supply, sale and distribution activities that were of limited risk. Although the Commission disputes the latter assessment, it has not, as such, challenged the description of those activities and functions provided by Ireland and Apple Inc.

Fourthly, the Commission argued that those activities and functions performed by ASI's Irish branch necessitated access to the Apple brand. Although the activities of ASI's Irish branch may have had an impact on the image and prestige of the Apple brand and it may even have been necessary to use the Apple Group's IP in order to perform those activities, that access to and use of the brand by the branch could have been assured through licences specific to that branch's needs without it being necessary to allocate all of the IP licences in question to that branch. Therefore, the Commission did not succeed in showing, through its arguments, that the Apple Group IP licences held by ASI had to be allocated to its branch.

After analysing the functions and activities performed by ASI's Irish branch which the Commission had identified as justifying allocating the Apple Group IP licences held by ASI to that branch, it must be concluded that these are support activities for implementing policies and strategies designed and adopted outside of that branch, in particular with regard to the research, development and marketing of Apple-branded products.

In those circumstances, it must be concluded, as was argued by Ireland and ASI and AOE, that the Commission erred when it considered that the functions and activities performed by ASI's Irish branch justified allocating the Apple Group's IP licences and the income arising from those licences to that branch.

(b) Activities of AOE's Irish branch

As has been stated in paragraph 10 above, AOE's Irish branch is responsible for the manufacture and assembly of iMac desktops, MacBook laptops and other computer accessories. Those activities take place in Ireland. It supplies its products to related parties within the Apple Group.

In recital 301 of the contested decision, the Commission stated that AOE's Irish branch developed specific processes and manufacturing expertise and ensured quality assurance and quality control functions which were needed to preserve the value of the Apple brand.

In addition, in recitals 301 and 302 of the contested decision, the Commission stated that the costs covered by the cost-sharing agreement associated with that branch were taken into account in the 1991 tax ruling and that in the 2007 tax ruling [*confidential*] of its turnover had been allocated as IP return. On the basis of those factors, the Commission inferred that the Irish authorities should have concluded that AOE's Irish branch was involved in IP development or in the management and control of the Apple Group's IP licences.

First, the findings in paragraphs 259 to 272 above apply equally to AOE's Irish branch, in so far as the Commission's arguments concerning quality control, R&D facilities management and business risk management functions refer indiscriminately to ASI and AOE's Irish branches.

Secondly, concerning, more specifically, the specific processes and manufacturing expertise, the parties agree that those functions were actually performed by AOE's Irish branch. However, Ireland and ASI and AOE dispute the conclusions that the Commission draws from that fact.

In that regard, it should be noted that those specific processes and that expertise were developed by AOE's Irish branch itself in the context of its manufacturing activities. Although those processes and that expertise may benefit from protection through certain IP rights, they are limited in scope and are specific to the activities performed by that Irish branch. Consequently, those processes and that expertise are insufficient to justify allocating all of the Apple Group's IP licences to that branch.

Thirdly, as Ireland and ASI and AOE claim and the Commission acknowledges, the contested tax rulings took account of the contributions made by AOE's Irish branch to the Apple Group's IP.

First, in the 1991 tax ruling, as the Commission notes in recital 302 of the contested decision, the contribution made by AOE's Irish branch to the costs associated with the cost-sharing agreement was included in the operating costs on the basis of which AOE's chargeable profits were calculated. Consequently, part of AOE's chargeable profits was deemed to be calculated by taking into account part of the Apple Group's IP. However, the Commission has provided no evidence to substantiate its argument set out in recital 302 of the contested decision according to which, given that part of the costs relating to the Apple Group's IP had been taken into account when AOE's chargeable profits were calculated, the Irish tax authorities should have allocated all of the Apple Group's IP licences to AOE's Irish branch.

Second, in the 2007 tax ruling, the existence of IP specific to the manufacturing activities of AOE's Irish branch and the corresponding remuneration were recognised expressly when the return on the IP developed by that branch was included in the formula for the calculation of AOE's chargeable profits. In that regard, the Commission provided no evidence to substantiate its argument set out in recital 303 of the contested decision that, in the light of the remuneration relating to the IP developed by AOE's Irish branch, that branch must have been involved in the development, management or control of the licences covering all of the Apple Group's IP. The fact that remuneration for the IP developed specifically in the context of the manufacturing activities of AOE's Irish branch was allocated to that branch does not mean that the licences covering all of the Apple Group's IP must also be attributed to it.

Consequently, the Commission cannot base its conclusion that the profits from all of the Apple Group's IP should have been allocated to AOE's Irish branch solely on the involvement of that branch in the creation of specific processes and the development of expertise in the manufacture of the products for which it is responsible.

In those circumstances, it must be concluded, as Ireland and ASI and AOE argued, that the Commission erred when it considered that the functions and activities performed by AOE's Irish branch justified allocating the Apple Group's IP licences and the income arising from them to that branch.

(c) Activities other than those of ASI and AOE's branches

As has been stated in paragraphs 37 to 40 above, the Commission's primary line of reasoning in the contested decision is based on the contention that the Apple Group IP licences held by ASI and AOE should have been allocated to their Irish branches because, aside from those branches, ASI and AOE had no physical presence and no employees capable of performing key functions and managing the licences in question, whereas the branches of ASI and AOE were the only part of those companies with a tangible presence and employees.

It is necessary to examine the arguments put forward by Ireland and ASI and AOE in which they contest the Commission's contention and claim, in essence, that the Apple Group's strategic decision-making was centralised in Cupertino and that ASI and AOE implemented those decisions through their management bodies without the Irish branches actively having taken part in that decision-making.

(1) Strategic decision-making within the Apple Group

Ireland and ASI and AOE claim that the 'centre of gravity' of the Apple Group's activities was in Cupertino and not in Ireland. All strategic decisions, in particular those concerning the design and development of the Apple Group's products, were taken, in accordance with an overall business strategy covering the group as a whole, in Cupertino. That centrally decided strategy was implemented by the companies of the group, which include ASI and AOE, which acted through their management bodies, much like any other company, according to the rules of company law applicable to them.

In that regard, it should be noted, in particular, that ASI and AOE submitted evidence, in the administrative procedure and in support of their pleadings in the present instance, on the centralised nature of the strategic decisions within the Apple Group taken by directors in Cupertino and then implemented subsequently by the various entities of the group,

such as ASI and AOE. Those centralised procedures concern, inter alia, pricing, accounting decisions, financing and treasury and cover all of the international activities of the Apple Group that would have been decided centrally under the direction of the parent company, Apple Inc.

More specifically, with regard to decisions in the field of R&D — which is, in particular, the functional area behind the Apple Group's IP — ASI and AOE provided evidence showing that decisions relating to the development of the products which were then to be marketed by, inter alia, ASI and AOE, and concerning the R&D strategy which was to be followed by, inter alia, ASI and AOE had been taken and implemented by executives of the group based in Cupertino. It is also apparent from that evidence that the strategies relating to new product launches and, in particular, the organisation of distribution on the European markets in the months leading up to the proposed launch date had been managed at the Apple-Group level by, inter alia, the Executive Team under the direction of the Chief Executive Officer in Cupertino.

In addition, it is apparent from the file that contracts with third-party original equipment manufacturers ('OEMs'), which were responsible for the manufacture of a large proportion of the products sold by ASI, were negotiated and signed by the parent company, Apple Inc., and ASI through their respective directors, either directly or by power of attorney. ASI and AOE also submitted evidence regarding the negotiations and the signing of contracts with customers, such as telecommunications operators, which were responsible for a significant proportion of the retail sales of Apple-branded products, in particular mobile phones. It is apparent from that evidence that the negotiations in question were led by directors of the Apple Group and that the contracts were signed on behalf of the Apple Group by Apple Inc. and ASI through their respective directors, either directly or by power of attorney.

Consequently, in so far as it has been established that the strategic decisions — in particular those concerning the development of the Apple Group's products underlying the Apple Group's IP — were taken in Cupertino on behalf of the Apple Group as a whole, the Commission erred when it concluded that the Apple Group's IP was necessarily managed by the Irish branches of ASI and AOE, which held the licences for that IP.

(2) Decision-making by ASI and AOE

With regard to ASI and AOE's ability to take decisions concerning their essential functions through their management bodies, the Commission itself accepted that those companies had boards of directors which held regular meetings during the relevant period, and reproduced extracts from the minutes of those meetings confirming that fact in Tables 4 and 5 of the contested decision.

The fact that the minutes of the board meetings do not give details of the decisions concerning the management of the Apple Group's IP licences, of the cost-sharing agreement and of important business decisions does not mean that those decisions were not taken.

The summary nature of the extracts from the minutes reproduced by the Commission in Tables 4 and 5 of the contested decision is sufficient to allow the reader to understand how the company's key decisions in each tax year, such as approval of the annual accounts, were taken and recorded in the relevant board minutes.

The resolutions of the boards of directors which were recorded in those minutes covered regularly (that is to say, several times a year), inter alia, the payment of dividends, the approval of directors' reports and the appointment and resignation of directors. In addition, less frequently, those resolutions concerned the establishment of subsidiaries and powers of attorney authorising certain directors to carry out various activities such as managing bank accounts, overseeing relations with governments and public bodies, carrying out audits, taking out insurance, hiring, purchasing and selling assets, taking delivery of goods and dealing with commercial contracts. Moreover, it is apparent from those minutes that individual directors were granted very wide managerial powers.

In addition, with regard to the cost-sharing agreement, it is apparent from the information submitted by ASI and AOE that the various versions of that agreement in existence during the relevant period were signed by members of the respective boards of directors of those companies in Cupertino.

Moreover, according to the detailed information provided by ASI and AOE, it is the case for both ASI and AOE that, among ASI's 14 directors and AOE's 8 directors on their respective boards for each tax year during the period when the contested tax rulings were in force, there was only one director who was based in Ireland.

Consequently, the Commission erred when it considered that ASI and AOE, through their management bodies, in particular their boards of directors, did not have the ability to perform the essential functions of the companies in question by, where appropriate, delegating their powers to individual executives who were not members of the Irish branches' staff.

(d) Conclusions concerning the activities within the Apple Group

It is apparent from the foregoing considerations that, in the present instance, the Commission has not succeeded in showing that, in the light, first, of the activities and functions actually performed by the Irish branches of ASI and AOE and, second, of the strategic decisions taken and implemented outside of those branches, the Apple Group's IP licences should have been allocated to those Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland.

In those circumstances, it is necessary to uphold the complaints raised by Ireland in the first plea in law in Case T-778/16 and by ASI and AOE in the third and fourth pleas in law in Case T-892/16 regarding the Commission's factual assessments concerning the activities of the Irish branches of ASI and AOE and the activities outside of those branches.

4. Conclusion regarding the Commission's assessment that there was a selective advantage on the basis of its primary line of reasoning

In the light of the findings in paragraph 249 above regarding the Commission's erroneous assessments of normal taxation under the Irish tax law applicable in the present instance and the findings in paragraph 310 above regarding

the Commission's erroneous assessments of the activities within the Apple Group, it is necessary to uphold the pleas in law alleging that, in its primary line of reasoning, the Commission did not succeed in showing that, by issuing the contested tax rulings, the Irish tax authorities granted ASI and AOE an advantage for the purposes of Article 107(1) TFEU.

It is therefore not necessary to examine the pleas in law contesting the Commission's assessments in its primary line of reasoning regarding the selectivity of the measures at issue and the lack of justification for them.

Therefore, it is appropriate to go on to examine the pleas in law submitted by Ireland and ASI and AOE contesting the assessments made by the Commission in connection with its subsidiary and alternative lines of reasoning in the contested decision.

E. Pleas in law contesting the assessments made by the Commission in connection with its subsidiary line of reasoning (fourth plea in law in Case T-778/16 and eighth plea in law in Case T-892/16)

In connection with its subsidiary line of reasoning in the contested decision (recitals 325 to 360), the Commission contended that, even if the Irish tax authorities had been fully entitled to accept that the Apple Group IP licences held by ASI and AOE should not have been allocated to their Irish branches, the profit allocation methods endorsed in the contested tax rulings had nonetheless led to a result departing from a reliable approximation of a market-based outcome in line with the arm's length principle, because those methods undervalued the annual chargeable profits of ASI and AOE in Ireland.

More specifically, in particular in recitals 328 to 330 of the contested decision, the Commission contended that the profit allocation methods endorsed in the contested tax rulings constituted one-sided profit allocation methods which resembled the transaction net margin method ('the TNMM') laid down by the OECD Transfer Pricing Guidelines.

According to the Commission, the profit allocation methods endorsed by the contested tax rulings were vitiated by errors resulting from (i) the choice of ASI and AOE's Irish branches as the focus or 'tested party' in one-sided profit allocation methods (recitals 328 to 333 of the contested decision), (ii) the choice of the operating costs as the profit level indicator (recitals 334 to 345 of the contested decision), and (iii) the levels of return accepted (recitals 346 to 359 of the contested decision). According to the Commission, each of those errors entailed a reduction in the tax liability of those companies in Ireland as compared with non-integrated companies whose chargeable profits reflected prices negotiated at arm's length on the market (recital 360 of the contested decision).

Thus, it must be held that all the assessments made by the Commission in connection with its subsidiary line of reasoning seek to establish the existence of an advantage that was granted to ASI and AOE because the profit allocation methods approved by the contested tax rulings had not led to arm's length profits.

In that regard, it should be noted that the mere non-observance of methodological requirements, in particular in connection with the OECD Transfer Pricing Guidelines, is not a sufficient ground for concluding that the calculated profit is not a reliable approximation of a market-based outcome, let alone that the calculated profit is lower than the profit that should have been obtained if the method for determining transfer pricing had been correctly applied. Thus, merely stating that there has been a methodological error is not sufficient, in itself, to demonstrate that the tax measures at issue have conferred an advantage on the recipients of those measures. Indeed, the Commission must also demonstrate that the methodological errors that have been identified have led to a reduction in the chargeable profit and thus in the tax burden borne by those recipients, in the light of the tax burden which they would have borne pursuant to the normal rules of taxation under national law had the tax measures in question not been adopted.

It is in the light of the foregoing considerations that the arguments put forward by Ireland and by ASI and AOE regarding the Commission's assessments as summarised in paragraphs 315 to 317 above must be analysed.

Ireland and ASI and AOE raise, first, complaints regarding the Commission's assessments of the application of the TNMM and the fact that it relied on instruments developed within the OECD. Next, Ireland and ASI and AOE contest the three methodological errors specifically referred to by the Commission, namely those concerning the choice of ASI and AOE's Irish branches as the 'tested party' for the profit allocation methods, the choice of the operating costs as the profit level indicator, and the levels of return accepted in the contested tax rulings.

1. The assessment made regarding the profit allocation methods endorsed by the contested tax rulings in the light of the TNMM

The parties disagree, in essence, as to the extent to which the Commission was entitled to rely, for the purposes of its subsidiary line of reasoning, on the arm's length principle, as laid down in the OECD Transfer Pricing Guidelines, to which the Authorised OECD Approach refers. More specifically, they disagree as to whether the Commission was entitled to use the TNMM, as laid down in, inter alia, those guidelines, in order to ascertain whether the profit allocation method endorsed by the contested tax rulings had led to ASI and AOE's chargeable profits being lower than those of a company in a comparable situation.

In the first place, concerning the application of the Authorised OECD Approach, it is necessary to recall the considerations set out in paragraphs 233 to 245 above. Thus, in essence, although the Authorised OECD Approach has not been incorporated into Irish tax law, the way in which section 25 of the TCA 97 is applied by the Irish tax authorities overlaps, for the most part, with the analysis proposed by the Authorised OECD Approach. First, the application of section 25 of the TCA 97, as described by Ireland in its application and as confirmed by Ireland during the hearing, requires, first, an analysis of the functions performed, the assets used and the risks assumed by the branches, which, in essence, corresponds to the first step of the analysis proposed by the Authorised OECD Approach. Second, regarding the second step of that analysis, it should be borne in mind that the Authorised OECD Approach refers to the OECD Transfer Pricing Guidelines. In that regard, neither Ireland nor ASI and AOE have challenged the Commission's assertion, set out in, inter alia, recital 265 of the contested decision, that the profit allocation methods

approved by the contested tax rulings resembled the one-sided transfer pricing methods referred to in the OECD Transfer Pricing Guidelines, such as the TNMM.

In the second place, it should be noted that, in the context of the administrative procedure, Ireland and Apple Inc. submitted ad hoc reports, drawn up by their respective tax advisors, which specifically relied on the TNMM for the purpose of demonstrating that ASI and AOE's chargeable profits in Ireland, which were declared in Ireland on the basis of the contested tax rulings, fell within an arm's length range. Ireland and ASI and AOE cannot criticise the Commission for having relied on the Authorised OECD Approach or for having used the TNMM in connection with its subsidiary line of reasoning, when they themselves relied thereon in the context of the administrative procedure.

Having regard to the foregoing, the complaints regarding the use by the Commission of the TNMM, as laid down in, inter alia, the OECD Transfer Pricing Guidelines, in order to ascertain whether the profit allocation method endorsed by the contested tax rulings had led to a reduction in ASI and AOE's tax liability must be rejected.

In those circumstances, it will be necessary to go on to examine Ireland and ASI and AOE's arguments regarding the application by the Commission of the TNMM in connection with its subsidiary line of reasoning, in order to assess whether the Commission succeeded in demonstrating that the contested tax rulings had conferred an advantage on ASI and AOE.

In that regard, the parties disagree as regards the Commission's statements relating to three errors in the profit allocation method endorsed by the contested tax rulings, concerning, first, the choice of the branches as tested parties, second, the choice of the operating costs as the profit level indicator and, third, the levels of return accepted.

2. The choice of ASI and AOE's Irish branches as the 'tested party' when applying the profit allocation methods

It should be borne in mind that, in recitals 328 to 333 of the contested decision, the Commission noted that, even assuming that the Apple Group's IP licences had been correctly allocated to the head offices of ASI and AOE, those head offices had been unable to perform complex functions without any staff or physical presence. By contrast, according to the Commission, the Irish branches had performed IP-related functions that were crucial in building brand awareness and brand recognition in the EMEIA region. The Commission inferred from this that the Irish branches of ASI and AOE had been incorrectly chosen as tested parties.

In that regard, it should be noted that the TNMM constitutes a one-sided method of determining transfer pricing. It consists in determining, relative to an appropriate base, the net profit obtained by a taxpayer, namely the 'tested party', from a controlled transaction or from controlled transactions which are closely linked or continuous. In order to determine the appropriate base, it is necessary to choose a profit level indicator, such as costs, sales or assets. The net profit indicator obtained by the taxpayer from a controlled transaction must be determined by reference to the net profit indicator that the same taxpayer or an independent undertaking obtains from comparable transactions on the free market. The TNMM therefore requires the identification of a party to the transaction in respect of which an indicator is tested. This is the 'tested party'.

In addition, according to the OECD Transfer Pricing Guidelines of 2010, to which the Commission makes reference in, inter alia, recitals 94 and 255 of the contested decision as useful guidance, and which are also relied on by the ad hoc reports submitted by Ireland and Apple Inc., the choice of tested party must be in line with the functional analysis of the transaction. Furthermore, it is stated that, as a general rule, the tested party is the party to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be identified. This will most often be the party that has the least complex functional analysis.

First, it should be emphasised that, in the contested decision, in particular recital 333 thereof, the Commission merely asserted that the error as to the determination of the entity to be tested had led to a decrease in ASI and AOE's chargeable profit.

As has been stated in paragraph 319 above, the mere non-observance of methodological requirements when applying a profit allocation method is not a sufficient ground for concluding that the calculated profit is not a reliable approximation of a market-based outcome, let alone that the calculated profit is lower than the profit that should have been obtained if the method for determining transfer pricing had been correctly applied.

Accordingly, the mere statement by the Commission that there is a methodological error resulting from the choice of tested party in connection with the profit allocation methods used in respect of the Irish branches of ASI and AOE approved by the contested tax rulings, even assuming that error is established, is not sufficient, per se, to demonstrate that those tax rulings conferred an advantage on ASI and AOE. Indeed, the Commission would also have needed to demonstrate that such an error had led to a reduction in the chargeable profit of those two companies that they would not have obtained had those rulings not been issued. However, in the present instance, the Commission did not put forward evidence to prove that the choice of ASI and AOE's Irish branches as tested parties had led to a reduction in the chargeable profit of those companies.

Secondly and in any event, it should be noted that in the context of the TNMM, it is necessary to choose a party to test beforehand, according to, in particular, the functions performed by that party, in order to be able subsequently to calculate the return in a transaction related to those functions. The fact that it is normally the party that performs the least complex functions that is chosen does not predetermine the functions that are actually performed by the chosen party or the way in which the return for the functions performed is established.

Indeed, the OECD Transfer Pricing Guidelines do not state which party to the transaction must be chosen, but recommend choosing the undertaking for which reliable data regarding the most closely comparable transactions can be found. It is then specified that this often means choosing the associated undertaking which is the least complex of the undertakings concerned by the transaction and which does not have any valuable intangibles or unique assets. It

follows that those guidelines do not necessary require that the least complex entity be chosen, but that they simply advise choosing the entity for which the greatest amount of reliable data exists.

Thus, provided that the functions of the tested party have been correctly identified, and that the return for those functions has been correctly calculated, the fact that one party or another has been chosen as the tested party is irrelevant.

Thirdly, it should be borne in mind that the Commission based its subsidiary line of reasoning on the premiss that the Apple Group's IP licences were correctly allocated to the head offices of ASI and AOE.

In that regard, as is correctly emphasised by Ireland and ASI and AOE, it should be noted that IP constitutes the key asset for an undertaking, such as the Apple Group, whose business model is essentially based on technological innovations. That IP may therefore be regarded, in the present instance, as a unique asset for the purposes of the OECD Transfer Pricing Guidelines.

However, as is apparent from the Authorised OECD Approach, in principle, in the case of an undertaking such as the Apple Group, the mere fact of one of the parties being the owner of the IP involves the performance of significant people functions in relation to that intangible, such as active decision-making as regards setting up the development programme giving rise to that IP and active management of that programme. Allocating the IP to a part of the undertaking may therefore be considered an indication that that part performs complex functions.

It follows that the Commission cannot claim, in its subsidiary line of reasoning, that the Apple Group's IP was correctly allocated to the head offices of ASI and AOE and, at the same time, that it is the Irish branches of those two companies which performed the most complex functions in relation to that IP, without providing any evidence as to the actual performance of such complex functions by those branches.

By contrast, as has been stated in paragraphs 281 and 290 above, the Commission did not succeed in demonstrating in the present instance that those branches had actually performed functions and made crucial decisions in respect of the Apple Group's IP, in particular as regards its design, creation and development.

Fourthly, it should be noted that the contested tax rulings are based on the descriptions of the functions performed by the Irish branches of ASI and AOE set out in the requests made by the Apple Group to the Irish tax authorities. As is apparent from recitals 54 to 57 of the contested decision, those functions consist in the procurement, sale and distribution of Apple-branded products to related parties and third-party customers in the EMEIA region (in the case of ASI's branch) and in the manufacture and assembly of a specialised range of computer products in Ireland (in the case of AOE's branch).

It must be pointed out that those functions may be regarded, prima facie, as easily identifiable and not particularly complex. In any event, they do not constitute unique and specific functions for which it is difficult to identify the comparables. On the contrary, these are common and relatively standard functions in commercial relations between undertakings.

It is true that the information submitted by the Apple Group to the Irish tax authorities prior to the issuing of the contested tax rulings was very concise on the subject of the functions, assets and risks of ASI and AOE's Irish branches. The contested tax rulings were issued after the Apple Group's tax advisors sent the Irish tax authorities some short letters in which they briefly described the activities of ASI and AOE's branches and proposed a methodology for calculating the chargeable profits of those two companies in Ireland. The content of those exchanges is fairly vague and makes it apparent that the discussions between the Irish tax authorities and the Apple Group's tax advisors at the two meetings held were decisive for the purpose of determining the chargeable profit of those companies, without there being any documented objective and detailed analysis regarding the functions of the branches and the assessment of those functions.

Thus, unlike the ad hoc reports that were submitted by Ireland and Apple Inc. *ex post facto* in the context of the administrative procedure, no profit allocation report or any additional information was provided to the Irish tax authorities prior to the issuing of the contested tax rulings.

Furthermore, as was confirmed at the hearing, the information concerning the activities of ASI and AOE's Irish branches provided before the 1991 tax ruling were not significantly added to prior to the issuing of the 2007 tax ruling and were not subsequently updated.

That lack of evidence submitted to the Irish tax authorities concerning the functions actually performed by the Irish branches and the assessment of those functions for the purpose of determining the profit to be allocated to those branches may be regarded as a methodological defect in the application of section 25 of the TCA 97, which requires an analysis to be conducted at the outset regarding the functions performed, the assets used, and the risks assumed by the branches.

However, as regrettable as that methodological defect is, the Commission, in carrying out its State aid control under Article 107 TFEU, cannot, for its part, confine itself to stating that the choice of ASI and AOE's Irish branches as the tested parties when applying the profit allocation method was incorrect, without proving that the functions actually performed by those branches constituted particularly complex or unique functions, or functions that were difficult to identify, so that the comparables for such a one-sided profit allocation method would not have been identifiable or reliable and, consequently, the resulting allocation would necessarily have been incorrect.

Furthermore and in any event, even assuming that such an error in the profit allocation method is established, as has been outlined in paragraphs 319 and 332 above, the Commission must prove that the profit allocation in question led to a mitigation of the tax burden of the companies in question as compared with the tax burden which they would have borne had the contested tax rulings not been issued, such that an advantage was actually granted.

However, the Commission has not submitted any evidence in connection with its subsidiary line of reasoning to demonstrate that such a methodological defect, resulting from the lack of information submitted to the Irish tax

authorities, led to a reduction in the tax base of ASI and AOE as a result of the application of the contested tax rulings.

Having regard to the foregoing considerations, it is necessary to uphold the complaints raised by Ireland and by ASI and AOE regarding the Commission's statements concerning the incorrect choice of ASI and AOE's Irish branches as the tested parties when applying the profit allocation methods on which the contested tax rulings were based.

3. The choice of the operating costs as the profit level indicator

As a preliminary point, it should be borne in mind that, in the contested tax rulings (see paragraphs 12 to 21 above), the chargeable profits of the Irish branches were calculated as a margin of the operating costs.

In recitals 334 to 345 of the contested decision, the Commission argued that, assuming that the Irish branches could have been regarded as the tested parties for the purposes of the one-sided profit allocation method, the choice of those branches' operating costs as the profit level indicator was incorrect. According to the Commission, the profit level indicator in a one-sided profit allocation method must reflect the functions performed by the tested party, which was not the situation in the present instance. Indeed, the Commission contended that ASI's sales, and not the operating costs of its Irish branch, were a better reflection of the activities carried on and the risks assumed by the Irish branch and thus of its contribution to ASI's turnover.

Consequently, the Commission (recital 345 of the contested decision) concluded that, because of the use of the operating costs as the profit level indicator in the profit allocation method approved by the contested tax rulings, the chargeable profits of ASI and AOE in Ireland did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle. As a result, in its view, the Irish tax authorities had conferred a selective advantage on ASI and AOE as compared with non-integrated companies, whose chargeable profits reflected prices negotiated at arm's length on the market.

(a) The choice of the operating costs as the profit level indicator for the Irish branch of ASI

Regarding, specifically, the Irish branch of ASI (recital 336 of the contested decision), the Commission considered that it was inappropriate to rely on the operating costs, which would be 'generally' recommended for analysing the profits of low-risk distributors. It contended that the Irish branch of ASI was not such a distributor, in so far as that branch had assumed risks connected with turnover, warranties, and third-party contractors.

It should be noted at the outset that the Commission did not specifically state the source on which it was relying in order to make such an assertion. In addition, the use of the term 'generally' indicates that it was not ruling out the use of operating costs as a profit level indicator in certain situations.

Besides the fact that the argument presented by the Commission is imprecise, it should be noted that such an argument is not in line with the OECD Transfer Pricing Guidelines, on which the Commission relied in connection with its subsidiary line of reasoning, as is correctly argued by Ireland and ASI and AOE. It follows from paragraph 2.87 of those guidelines that the profit level indicator must be focused on the value of the functions of the tested party, taking account of its assets and its risks. Therefore, according to those guidelines, the choice of profit level indicator is not fixed for any type of function, provided that that indicator reflects the value of the function in question.

In any event, it is necessary to examine whether the Commission succeeded in demonstrating that the choice of the operating costs as the profit level indicator was not appropriate in the present instance and, in so far as the risks assumed by the branches must be taken into account, whether it was correct to conclude that the Irish branch of ASI had assumed risks connected with turnover, warranties, and third-party contractors.

(1) The appropriate profit level indicator

In recitals 340 and 341 of the contested decision, the Commission contended that the choice of the operating costs as the profit level indicator was not appropriate, inasmuch as that choice did not properly reflect the risks assumed and the activities carried out by the Irish branch of ASI, and that sales would have been a more appropriate indicator. It contended that, for the same reasons, the Berry ratio used in the ad hoc reports submitted by Ireland and Apple Inc. was not suitable for determining an arm's length return for the functions performed by that branch.

In the first place, it should be noted that the Commission bases its statements, in essence, on the argument that the Irish branch of ASI must be regarded as having assumed risks and performed functions relating to ASI's operations, in so far as that company would have been unable to do so itself given its lack of staff and physical presence.

In that regard, it should be borne in mind that the considerations outlined, in connection with assessing the primary line of reasoning, in paragraph 259 above, according to which the allocation of functions, and thus profits, to a branch using an 'exclusion' approach is not in line with either Irish law or the Authorised OECD Approach, in so far as such an analysis does not enable it to be demonstrated that those functions were actually performed by the Irish branches.

Accordingly, in order to demonstrate that the choice of the operating costs of the Irish branch of ASI as the profit level indicator for that branch was incorrect, the Commission could not allocate the functions performed and risks assumed by ASI to its Irish branch without demonstrating that that branch had actually performed those functions and assumed those risks.

In the second place, it should be noted that, in recital 342 of the contested decision, the Commission itself refers to paragraph 2.87 of the OECD Transfer Pricing Guidelines. As has been noted in paragraph 357 above, both sales and operating costs may constitute an appropriate profit level indicator under those guidelines.

More specifically, it is stated in paragraph 2.87 of the OECD Transfer Pricing Guidelines that the choice of the profit level indicator should be relevant for the purpose of demonstrating the value of the functions of the tested party in the transaction under review, taking account of its assets and its risks.

However, the Commission, by stating, in recitals 337 and 338 of the contested decision, that the use of the operating costs as the profit level indicator does not reflect the risks connected with turnover, warranties, and products handled by third-party contractors and that the sales figure would be more appropriate as a profit level indicator, does not answer the question whether the operating costs suitably reflect the value contributed by the Irish branch of ASI in

view of the functions, assets and risks assumed by that branch. Indeed, the Commission merely states that ASI's sales would have been an appropriate profit level indicator without demonstrating why, in the present instance, the operating costs of its branch were not capable of reflecting the value which that branch had contributed to the company's operations through the functions, risks and assets for which it had actually been responsible within that company.

In the third place, regarding the Berry ratio, it should be borne in mind that that ratio was used in the ad hoc reports submitted by Ireland and Apple Inc. as the profit level indicator in order to prove *ex post facto* that the profits allocated to ASI and AOE under the contested tax rulings fell within the arm's length ranges.

However, in recital 340 of the contested decision, the Commission rejected the use of that ratio as a financial ratio for estimating the arm's length remuneration in the present instance. The Commission contended that the situations in which the Berry ratio could be used according to the OECD Transfer Pricing Guidelines did not correspond to the situation of ASI's Irish branch.

In that regard, it should be noted that, in paragraph 2.101 of the OECD Transfer Pricing Guidelines, to which the Commission refers in recital 342 of the contested decision, it is stated that, in order for the Berry ratio to be an appropriate means of testing the remuneration of a controlled transaction, it is necessary, first, that the value of the functions performed in the controlled transaction be proportional to the operating costs, second, that the value of the functions performed in the controlled transaction not be materially affected by the value of the products distributed, in other words, that it not be proportional to the turnover, and, third, that the taxpayer not perform, in the controlled transactions, any other significant function (for example, manufacturing) that should be remunerated using another method or another financial indicator.

First of all, it must be noted that, in the contested decision, the Commission did not argue that the value of the operating costs taken into account in the contested tax rulings was not proportional to the value of the functions performed by the Irish branch of ASI, as described in recitals 54 and 55 of the contested decision. It must be pointed out that the Commission has not put forward arguments or submitted evidence demonstrating that not all the costs that should have been regarded as operating costs were taken into consideration and that that failure to take those costs into consideration led to a selective advantage for ASI and AOE. Nor did it seek to demonstrate that the value allocated to the costs that had been taken into account was too low and that a selective advantage had resulted from it. Indeed, it merely contested the very principle of taking operating costs into account as a profit level indicator.

Next, it should be noted that there is no connection between the operating costs of the Irish branch of ASI and that company's turnover. That lack of correlation was acknowledged by the Commission itself in recital 337 of the contested decision.

Lastly, it is necessary to recall the considerations set out in paragraphs 342 and 343 above concerning the non-complex and easily identifiable nature of the functions performed by the Irish branch of ASI. That branch, in essence, performed distribution functions. It was not responsible for manufacturing functions or other complex functions connected with, inter alia, technological development or IP.

Accordingly, contrary to the Commission's assertions, the conditions for applying the Berry ratio, as stated in the OECD Transfer Pricing Guidelines, are satisfied in the case of ASI's Irish branch.

Having regard to the foregoing considerations, it must be held that the Commission did not succeed in demonstrating that the choice of the operating costs was not appropriate as a profit level indicator for ASI's Irish branch.

In any event, even assuming that it can be argued, as is asserted by the Commission in recital 336 of the contested decision, that operating costs cannot serve as a profit level indicator except for 'low-risk' distributors, it is necessary to assess whether the Irish tax authorities were entitled to consider that the Irish branch of ASI had not assumed the risks that, according to the Commission, should have been allocated to that branch.

(2) The risk connected with turnover

In recital 337 of the contested decision, the Commission noted that ASI had assumed the risk connected with turnover and that, in so far as its head office had no staff to manage those risks, 'it [had to] be assumed' that the Irish branch had assumed those risks. It added that the choice of the operating costs did not reflect that risk, which was borne out by the fact that the operating costs had remained relatively stable during the reference period whereas the turnover had increased exponentially.

First of all, it must be pointed out that the Commission's argument is based, according to the very wording of the contested decision, on an assumption.

Next, it should be noted that the Commission was not in a position to explain in the contested decision exactly what the risk connected with turnover was.

When it was questioned in that regard during the hearing, the Commission stated that that risk was rather an inventory risk, namely the risk that the products listed in ASI's inventory, the distribution of which was ensured by the Irish branch, would remain unsold.

In order to support its argument that the Irish branch of ASI had assumed the risk connected with a potential decrease in ASI's sales, the Commission merely allocated that risk using an exclusion approach, which, as has been stated in paragraphs 361 and 362 above, does not constitute a valid basis for allocation.

In addition, at the hearing, the Commission referred to Figure 9 of the contested decision (set out in recital 122 of that decision), which reproduces a table included in the cost-sharing agreement concerning the allocation of risks between Apple Inc., on the one hand, and ASI and AOE, on the other. As has been stated in paragraphs 263 to 268 and paragraph 271 above, that table compiles the list of risks which ASI could be called on to assume, but does not prove that those risks were actually borne by ASI. What is more, that table concerns ASI, and not its Irish branch.

By contrast, Apple Inc., ASI and AOE submitted, in the context of both the administrative procedure and the present action, evidence demonstrating that the framework agreements with the manufacturers of Apple-branded products (or OEMs) had been concluded centrally in respect of the Apple Group as a whole by Apple Inc. and ASI in the United States.

In addition, Apple Inc., ASI and AOE submitted evidence concerning other framework agreements, also concluded centrally in respect of the Apple Group as a whole, concluded with the main buyers of Apple-branded products, namely telecommunications operators, in particular in the EMEIA region.

Furthermore, Apple Inc., ASI and AOE submitted evidence concerning the international pricing policy for Apple-branded products, which is set centrally in respect of the Apple Group as a whole.

It must be pointed out that the evidence submitted shows that the Irish branch of ASI did not take part in negotiations relating to framework agreements or in the signing of such agreements, whether they be those concluded with the suppliers of the products it distributes, namely the OEMs, or those concluded with the customers to whom it distributes Apple-branded products, such as telecommunications operators. Indeed, that branch is not even mentioned in those agreements.

In addition, the evidence submitted shows that the Irish branch of ASI had no decision-making powers concerning supply (namely determining the products to be manufactured), demand (namely determining the customers to whom the products were to be sold), or the prices at which those Apple-branded products were sold, in particular in the EMEIA region, in so far as those elements were determined under the framework agreements.

Accordingly, as is correctly argued by ASI and AOE, the Irish branch of ASI cannot be allocated the risks inherent in products remaining unsold or a drop in demand, in so far as both supply and demand are determined centrally, outside that branch.

The evidence submitted confirms the role of ASI's Irish branch that emerges from the ad hoc reports submitted by Ireland and Apple Inc., according to which that branch, as a distributor, was responsible for ensuring the flow of products between producers and customers and for gathering and communicating at group level information regarding supply and demand forecasts for the EMEIA region and regarding inventory levels. The fact that the Irish branch of ASI performed 'monitoring' functions for the EMEIA region does not mean that it is deemed to have assumed the economic risk that might have resulted from a decrease in ASI's turnover in that region.

Lastly, concerning the assertion, set out in recital 337 of the contested decision, that ASI's sales increased exponentially during the reference period whereas the operating costs of its Irish branch remained stable, it should be pointed out that that fact is more an indication of the limited impact of the activities carried out by the Irish branch of ASI on ASI's trading activity as a whole.

In addition, such a fact is not sufficient, in itself, to call in question the choice of the operating costs as the profit level indicator. Indeed, the Commission established its line of reasoning without indicating the reason why an increase in ASI's sales would have necessarily involved an increase in the profits to be allocated to its Irish branch.

Consequently, it must be held that the Commission did not succeed in demonstrating that the Irish branch of ASI was responsible for the risk connected with turnover.

(3) The risk connected with product warranties

In recital 338 of the contested decision, the Commission stated that, in so far as ASI provided warranties for all the products sold in the EMEIA region and in so far as those warranties constituted its most significant liability, the risks relating thereto could not have been assumed by ASI, which had no staff, but, necessarily, by its Irish branch.

More specifically, the Commission contended, in recital 338 of the contested decision, that those risks constituted ASI's most significant liability, which was transferred to Apple Distribution International (ADI), a company related to the Apple Group. The Commission referred, in that regard, to recital 135 of the contested decision, in which it is explained that ADI took over distribution activities in the EMEIA region on ASI's behalf and that, to that end, under a protocol dated 23 April 2012, ADI assumed ASI's liabilities, the most significant element of which was the provisions relating to product warranties.

First, those factual elements highlighted by the Commission bear witness to the fact that the warranties for Apple-branded products in the EMEIA region were assumed by ASI and that the provisions for those warranties were part of that company's liabilities until 2012. However, that information does not, in itself, enable a connection to be established between the risks represented by those warranties granted by ASI, given material expression in the provisions set out in the liabilities of that company's balance sheet, and its Irish branch. In addition, the Commission's theory is not valid for the years after 2012, when those risks were transferred to ADI. However, the Commission did not confine its line of reasoning to the period prior to 2012.

Secondly, the risk connected with product warranties cannot be allocated to the Irish branch of ASI if that branch is not responsible, from an economic point of view, for claims invoking such a warranty. The Commission did not adduce evidence demonstrating that the Irish branch of ASI had assumed such a responsibility.

Thirdly, while it is not disputed that the Irish branch of ASI managed the AppleCare after-sales service, as has been noted in paragraphs 276 to 278 above, the functions performed by that branch in connection with that service are, however, of an ancillary nature in relation to the warranties themselves.

In order to challenge the Commission's line of argument, Ireland and ASI and AOE rely on, inter alia, the ad hoc reports which they submitted and on which the Commission itself relied, which describe the activities of the Irish branches connected with warranties for Apple-branded products. According to those reports, the Irish branch of ASI was responsible, in connection with the AppleCare service, for, in essence:

gathering data regarding defective products;

managing the network of authorised third-party repairers;

distributing components for repair within that network;

managing the call centre.

Having regard to the ancillary nature of those functions, it may not be concluded, in the absence of other evidence, that the Irish branch of ASI bore the economic consequences connected with product warranties, as ASI and AOE confirmed during the hearing.

In addition, the fact relating to the significant number of employees assigned to the AppleCare service is not, in itself, decisive, in view of the fact that that service includes the call centre for the after-sales services, which is, naturally, a function that requires a large number of staff.

Furthermore, the Commission did not adduce other evidence demonstrating that the staff of ASI's Irish branch would have been actively involved in adopting decisions significantly affecting the risks connected with warranties for Apple-branded products sold by ASI and that that branch was ultimately responsible for those risks, economically speaking, by virtue of those warranties.

In those circumstances, it cannot be inferred from the fact that the Irish branch of ASI managed the AppleCare service that that branch assumed the risks connected with warranties for Apple-branded products.

(4) The risks connected with the activities of third-party contractors

In recital 339 of the contested decision, the Commission contended that, in so far as ASI systematically outsourced its distribution function to third-party contractors outside Ireland, the total sales figure would have been a more appropriate profit level indicator, in view of the risk borne by the Irish branch in relation to products which were not handled in Ireland.

It should be noted at the outset that the response to the question as to what risk would have been created by the circumstance referred to in paragraph 401 above and how that risk would have been borne by the Irish branch of ASI is not clear from reading recital 339 of the contested decision. Such an assessment, which lends itself to diverging interpretations, cannot be accepted as validly supporting the Commission's subsidiary line of reasoning.

In any event, when questioned on that point during the hearing, the Commission stated that the risk when ASI outsourced its distribution functions to third-party contractors while remaining the owner of those products was the same type of risk as that referred to in recital 337 of the contested decision, namely a risk connected with the possibility of a decrease in demand and the possibility of unsold products.

Accordingly, assuming that the risk referred to by the Commission in recital 339 of the contested decision can be understood as being the same type of risk as the risk connected with turnover identified in recital 337 of the contested decision, the same considerations as set out in paragraphs 376 to 390 above also apply to this type of risk, which has still not been shown to have been assumed by the Irish branch of ASI.

Furthermore, assuming such a risk exists, the mere fact that certain distribution activities have been outsourced to third-party contractors outside Ireland, cannot, without further information, support the argument that such a risk had to be allocated to the Irish branch of ASI.

Indeed, the fact that, following transactions with suppliers and customers negotiated and organised in the United States, the distribution of the products in question is handled outside Ireland by third-party contractors would rather strengthen the argument that the risks that could derive therefrom are not borne by the Irish branch of ASI.

It is apparent from the foregoing considerations that the Commission did not succeed in demonstrating that the risks identified in recitals 336, 337 and 339 of the contested decision had actually been borne by the Irish branch of ASI.

(b) The choice of the operating costs as the profit level indicator for the Irish branch of AOE

Regarding AOE, in recitals 343 and 344 of the contested decision, the Commission noted that, in view of the fact that AOE had no physical presence and had no employees capable of managing the risks outside its Irish branch, that branch had to be regarded as assuming all the risks, in particular those relating to inventories. In those circumstances, it considered that a profit level indicator including the total costs would have been more appropriate than the operating costs.

The Commission bases its arguments on the OECD Transfer Pricing Guidelines. However, it should be noted that, as has been stated in paragraph 357 above, those guidelines do not recommend the use of any particular profit level indicator, such as the total costs, and do not preclude the use of operating costs as a profit level indicator.

In addition, according to paragraph 2.93 of the OECD Transfer Pricing Guidelines, to which the Commission refers in recital 343 of the contested decision, 'in applying a cost-based [TNMM], fully loaded costs are often used'. Accordingly, it is not inconceivable, in principle, that operating costs may constitute an appropriate profit level indicator.

Furthermore, the Commission's argument that a profit level indicator including the total costs is better suited to a manufacturing company such as AOE cannot succeed in the present instance. Indeed, as has been stated in paragraph 12 above, it is AOE and not its Irish branch that has ownership of the materials used, works in progress and finished products. In so far as the total costs take into account the costs of all those elements, the use of the total costs as the profit level indicator does not seem, contrary to the Commission's assertions, the most suitable way of reflecting the value of the functions actually performed by AOE's Irish branch, taking into account in particular that branch's assets.

In those circumstances, the Commission did not succeed in demonstrating that its recommended profit level indicator based on the total costs would be more appropriate in the present instance for the purpose of determining the arm's length profits for the Irish branch of AOE.

(c) Conclusions regarding the choice of the operating costs as the profit level indicator

Having regard to the foregoing considerations, it must be concluded that the Commission did not succeed in demonstrating, in the contested decision, that the choice of the operating costs of the Irish branches of ASI and AOE as the profit level indicator when applying a one-sided profit allocation method was inappropriate.

In addition and in any event, the Commission also did not submit evidence demonstrating that such a choice, as such, necessarily had to lead to the conclusion that the contested tax rulings had reduced ASI and AOE's tax liability in Ireland.

In that regard, the Court finds that neither the exchanges preceding the issuing of the contested tax rulings, nor Ireland and ASI and AOE when questioned on that point in the context of the present proceedings, were able to provide a sufficient explanation of the reason for the inconsistencies detected in those rulings concerning the operating costs, used as the basis for calculating the chargeable profit of the branches in the 1991 tax ruling and which were no longer included as the basis for calculating the chargeable profit of the branches in the 2007 tax ruling.

However, even where there are inconsistencies which show defects in the methodology used to calculate the chargeable profits in the contested tax rulings, it is necessary to recall the considerations set out in paragraph 348 above, from which it follows that the Commission cannot confine itself to invoking a methodological error but must prove that an advantage has actually been granted, inasmuch as such an error has actually led to a reduction in the tax burden of the companies in question as compared to the burden which they would have borne had the normal rules of taxation been applied. However, it must also be specified that the Commission did not argue in the contested decision that the exclusion of certain categories of operating costs used as a basis for calculating the profit allocated to the branches of ASI and AOE had given rise to an advantage for the purposes of Article 107(1) TFEU.

Accordingly, the complaints raised by Ireland and by ASI and AOE in relation to the Commission's statements regarding the methodological error relating to the choice of the operating costs as the profit level indicator for the Irish branches of ASI and AOE in connection with its subsidiary line of reasoning must be upheld.

4. The levels of return accepted in the contested tax rulings

In recitals 346 to 359 of the contested decision, the Commission challenged the levels of return of ASI and AOE's Irish branches accepted by the contested tax rulings, while noting that the Irish tax authorities had not been provided with any profit allocation reports or any other explanation by the Apple Group supporting the proposals made by that group that had led to the contested tax rulings.

First, concerning ASI, in recital 346 of the contested decision, the Commission noted that the 1991 tax ruling had accepted as the chargeable profit a 12.5% margin on the operating costs of its Irish branch, while the 2007 tax ruling had accepted a [*confidential*] margin.

Second, concerning AOE, in recital 347 of the contested decision, the Commission noted that the chargeable profit endorsed by the Irish tax authorities corresponded to [*confidential*] of the operating costs, a percentage which would have decreased to [*confidential*] if the chargeable profit had exceeded [*confidential*]. In the 2007 tax ruling, the chargeable profit corresponded to [*confidential*] of the branch's operating costs, increased by a return of [*confidential*] of the turnover, in respect of the IP developed by AOE. In addition, it emphasised that AOE's chargeable profit seemed to have been arrived at through negotiation and to have depended on employment considerations as was demonstrated by the taking into account of the need 'not to prohibit the expansion of the Irish operations' in the discussions preceding the issuing of the 1991 tax ruling.

It is apparent from recitals 348 and 349 of the contested decision that the explanations provided during the administrative procedure by Ireland and by Apple Inc. regarding the calculation of ASI and AOE's chargeable profits did not convince the Commission. It considered that the returns accepted by the Irish tax authorities for the Irish branches of ASI and AOE had been based on significantly reduced profit margins, although there would not have been any economic rationale for a company to accept such low profits.

In particular, concerning the 2007 tax ruling, in recitals 350 to 359 of the contested decision, the Commission focused on the *ex post* reasoning set out in the ad hoc reports prepared by Ireland and the Apple Group's respective tax advisors relating to the levels of return agreed for the Irish branches of ASI and AOE. According to the Commission, those reports had been based on a comparability study, the relevance of which was disputed on the ground that the products offered by the companies selected for comparability purposes were not comparable to the high-quality branded products offered by the Apple Group. More specifically, the Commission argued that the risks connected with warranties for high-end goods assumed by ASI were not comparable to those borne by the companies selected in the study for their products. In addition, it highlighted the fact that at least 3 companies out of the 52 selected were in a situation of compulsory liquidation.

Furthermore, in recitals 354 and 355 of the contested decision, the Commission, for the sake of completeness, nevertheless carried out its own assessment of the level of return which should have been allocated to ASI and AOE, using the same comparable companies reproduced in the ad hoc report submitted by Ireland but using as the profit level indicator the turnover (resulting from sales) for ASI and the total costs for AOE. Following that corrected analysis, the Commission came to the conclusion that the levels of return accepted in the contested tax rulings were excessively low.

Regarding ASI, in recital 355 of the contested decision, the Commission stated that, taking the sales of the companies chosen in the comparability study as the profit level indicator, in 2012, the average return was 3%, with an interquartile range of 1.3 to 4.5%. However, the Commission noted that the trading income allocated to the Irish branch of ASI for 2012 as chargeable profits under the 2007 tax ruling was around [*confidential*], that is, around [*confidential*] of ASI's turnover in 2012. That return was almost 20 times lower than that obtained by the Commission in its corrected analysis.

Regarding AOE, in recital 357 of the contested decision, the Commission noted that its chargeable profit in 2012 had amounted to around [*confidential*] of the total costs of the Irish branch. That percentage fell within the interquartile range presented in the ad hoc reports submitted by Ireland and the Apple Group's respective tax advisors and was close to the 25th percentile, which the tax advisors had considered to be the lower end of an arm's length range. Thus,

the Commission noted that, according to the ad hoc report submitted by Apple Inc., for the period from 2009 to 2011, the lower quartile mark-up on total costs would have been [*confidential*] with a median of [*confidential*] and, according to the ad hoc report submitted by Ireland, for the period from 2007 to 2011, the lower quartile mark-up on total costs would have been [*confidential*] (with a median of [*confidential*]).

However, in recitals 358 and 359 of the contested decision, the Commission specified that those reports could not support the *ex post* conclusion that the remuneration of the functions performed by the Irish branch of AOE was in line with the arm's length principle. First of all, it called in question the comparability of the data in so far as no detailed analysis of the comparability of the business or cost structure of the companies selected had been provided. Next, it explained that the 25th percentile had been used as the lower end of the range, which corresponded to an overly broad approach, in particular having regard to the comparability concerns identified in the ad hoc reports in question. Lastly, the Commission noted that, in the ad hoc reports, the comparison had been carried out only in relation to manufacturing companies, whereas the Irish branch of AOE had also provided shared services to other companies from the Apple Group in the EMEIA region, such as financial services, information systems and technology, and services relating to human resources.

On the basis of those statements, in recital 360 of the contested decision the Commission concluded that the contested tax rulings had approved a remuneration which the Irish branches would not have accepted, from the perspective of their own profitability, if they had been separate and independent undertakings carrying on identical or similar activities under identical or similar conditions.

The parties disagree both as to the existence and as to the impact of the errors identified by the Commission as regards the levels of return accepted by the contested tax rulings and the *ex post* validation thereof proposed in the ad hoc reports prepared by Ireland and the Apple Group's respective tax advisors.

(a) The remuneration of the Irish branches of ASI and AOE endorsed by the 1991 tax ruling

In the first place, the Commission complains that the Irish tax authorities accepted, in the contested tax rulings, the levels of return for the Irish branches of ASI and AOE without such levels of return being substantiated by any reports.

First, it should be noted that Ireland and ASI and AOE argue that, at the time the contested tax rulings were issued, the submission of a profit allocation report was not required under the applicable Irish tax law, which has not been contested by the Commission.

Second, it should be noted that the Commission's complaint relates to an error of methodology (or a lack thereof), in so far as it concerns defects in the method for calculating the chargeable profits endorsed by the contested tax rulings, resulting from a lack of profit allocation reports.

It is true that the explanations provided by the Apple Group to the Irish tax authorities as justification for the proposed levels of return, as reproduced in recital 64 of the contested decision, were brief. The Apple Group asserted that the proposed levels were above a mark-up of 15%, which would ordinarily have been achieved by a 'cost center', but below a mark-up of 100%, which could be common in the pharmaceutical industry, which was not comparable to the IT sector. In addition, it should be borne in mind that the Apple Group acknowledged before the Irish tax authorities that its proposal was not based on any scientific grounds, but that it considered that such a proposal resulted in a sufficiently high amount of chargeable profits.

In that regard, the Court notes that neither the exchanges preceding the issuing of the contested tax rulings nor Ireland and ASI and AOE when questioned on that point in the context of the present proceedings were able to provide a sufficient explanation of the exact reason for the indicators and figures used to calculate the chargeable profits of ASI and AOE. Thus, there is no concrete and contemporary piece of evidence explaining the reasons for the level of the percentages of the operating costs accepted in the contested tax rulings, let alone for the changes in those percentages over time.

However, it must be pointed out that, apart from raising the issue of the lack of profit allocation reports, the Commission did not conduct its analysis in such a way as to demonstrate that, as a result of that calculation, the tax actually paid by ASI and AOE on the basis of the contested tax rulings was less than that which should have been paid under the normal rules of taxation, had the contested tax rulings not been issued.

Thus, for the same reasons as those set out in paragraph 332 above, the mere finding of an error as regards the methodology leading to the calculation of the profits to be allocated to the branches is not sufficient to demonstrate that the contested tax rulings conferred an advantage on ASI and AOE.

In the second place, the Commission complained that the Irish tax authorities had accepted, without justification, a threshold for AOE's chargeable profits, namely [*confidential*], beyond which the chargeable profits no longer corresponded to 65% of the Irish branch's operating costs, but to [*confidential*] of those costs. According to the Commission, a rational economic operator would not accept lower returns and forgo a part of its profits, if its operating costs were increasing, which indicated an increase in the volume of its activities, even if those returns were sufficient to cover its costs and achieve a certain level of profit.

The Commission argued that that threshold constituted tax relief which had been granted on the basis of criteria unrelated to the tax system, such as employment considerations, and that, accordingly, it was deemed to confer a selective advantage.

In that regard, Apple Inc. claimed, in its observations following the Opening Decision, that that departure was justified by the fact that the incremental fixed investment necessary for expansion was greater at the start of operations than when those operations were ongoing. Furthermore, in the responses to the written questions from the Court, ASI and AOE confirmed that the threshold of [*confidential*] had never been reached and that, accordingly, the second, lower percentage had never been used for the purpose of calculating AOE's chargeable profits. The Commission has not contested that information.

In the first place, it should be noted that, while it is true that it has been held that, if the competent authorities have a broad discretion to determine, inter alia, the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion may be regarded as giving rise to a selective measure (judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 27), the fact remains that, in order to determine whether State measures may constitute State aid, regard must primarily be had to the effects of those measures on the undertakings favoured (see judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 212 and the case-law cited).

In any event, the mere allusion, during the exchanges between the Irish tax authorities and the Apple Group preceding the 1991 tax ruling, to the fact that the Apple Group was one of the largest employers in the region where the Irish branches of ASI and AOE were established does not prove that ASI and AOE's chargeable profits were determined on the basis of employment-related issues. Indeed, it is apparent from the report of the exchange in question, reproduced in recital 64 of the contested decision, that the allusion to employees of the Apple Group in the region in question was made to provide information regarding the background to and expansion of the group's operations in the region and not to provide consideration for the proposal regarding the allocation of the profits to the Irish branches in question.

Thus, in the absence of other evidence, the Commission cannot argue that the tax ruling in question was issued as consideration for the potential creation of jobs in the region.

In the second place, it should be noted that the threshold in question was never reached and that, accordingly, the profits of AOE's Irish branch were never allocated on the basis of the lower percentage provided for by the 1991 tax ruling.

Indeed, AOE's turnover significantly decreased between the period preceding the 1991 tax ruling, namely USD 751 million in 1989, as stated in recital 64 of the contested decision, and 2006, the last year in which the 1991 tax ruling was applied, namely USD 359 million, as stated in recital 97 of the contested decision.

Therefore, even assuming that the Commission's assertions regarding a lack of justification from an economic perspective for the threshold laid down by that ruling are proved, it cannot argue that an advantage was granted as a result of the inclusion of a threshold in the 1991 tax ruling, when such a mechanism was not actually implemented.

In the third place, even if the Commission's argument were to be understood as meaning that the levels of return accepted by the Irish tax authorities were too low for the functions performed by the branches, in view of the assets and risks relating to those functions, that argument cannot succeed without other evidence.

The Commission's subsidiary line of reasoning is based on the premiss that the Irish tax authorities could have correctly allocated the Apple Group's IP licences to the head offices, which, according to the OECD Transfer Pricing Guidelines, implies the performance of complex or unique functions. However, as can be seen from the conclusions expressed in paragraph 348 above, the Commission did not succeed in demonstrating that the Irish branches of ASI and AOE had performed the most complex functions.

In addition, particularly as regards ASI, the Commission bases its reasoning on the consideration that the Irish branch assumed very significant risks in relation to the Apple Group's activities. However, as can be seen from the conclusions expressed in paragraph 407 above, the Commission did not succeed in demonstrating that those risks had actually been borne by the Irish branch of ASI.

Accordingly, in the absence of other evidence, the Commission did not succeed in demonstrating that the levels of return established under the 1991 tax ruling had been too low to remunerate the functions actually performed by the Irish branches of ASI and AOE, in view of their assets and their risks.

(b) The remuneration of the Irish branches of ASI and AOE endorsed by the 2007 tax ruling

Besides the complaint relating to the lack of a profit allocation report in support of the 2007 tax ruling, which has been set aside for the same reasons as those set out in paragraphs 430 to 435 above, the Commission challenged the remuneration of the Irish branches of ASI and AOE, in the form of the profits allocated to those branches, under the 2007 tax ruling, by contesting the ad hoc reports submitted by Ireland and Apple Inc. in order to provide *ex post* evidence of the fact that those profits fell within arm's length ranges. In particular, the Commission called in question the reliability of the ad hoc reports submitted by Ireland and Apple Inc. because the companies chosen for the comparability study on which those reports were based were not comparable to ASI and AOE.

(1) The choice of the companies used in the comparability studies

In the contested decision, the Commission noted, inter alia, two errors concerning the comparability of the companies chosen in the comparability study with the Irish branch of ASI. First, in recital 350 of the contested decision, the Commission stated that it was not possible to identify the companies chosen in the ad hoc report submitted by Apple Inc. Second, in recital 351 of the contested decision, the Commission emphasised that the selection of the comparable companies in the comparability study had not taken account of the fact that, unlike those companies, the Apple Group sold high-quality branded products and positioned its products as such on the market. In that regard, the Commission noted that, although ASI was responsible for warranties on the products sold which, in the case of high-quality branded products, presented a very high risk, the comparable companies used were not exposed to such a risk.

Concerning the comparability with the Irish branch of AOE, the Commission noted (in recital 359 of the contested decision) that the ad hoc report submitted by Ireland had taken into account only manufacturing companies, whereas AOE also provided shared services to other companies from the Apple Group in the EMEIA region, such as financial services, information systems and technology, and services relating to human resources.

It should be noted at the outset that, even assuming that the errors identified by the Commission regarding the ad hoc reports submitted by Ireland and Apple Inc. *ex post facto* are proved and that they invalidate the conclusions in

those reports, the Commission could not infer therefrom that the contested tax rulings had led to a reduction in ASI and AOE's tax liability in Ireland.

Those reports were submitted by Ireland and Apple Inc. in order to demonstrate *ex post facto* that the profits allocated to the Irish branches of ASI and AOE under the contested tax rulings fell within arm's length ranges. The submission of those ad hoc reports by Ireland and Apple Inc. cannot alter the burden of proof concerning the existence of an advantage in the present instance, which rests with the Commission, as recalled in paragraph 100 above.

In any case, it is necessary to examine whether the defects identified by the Commission in the ad hoc reports submitted by Ireland and Apple Inc. are proved and may invalidate the conclusions in those reports.

First, it should be noted, as Ireland and ASI and AOE correctly submit, that analysing transfer pricing is not an exact science and it is not possible to check for exact results as to what is considered to be an arm's length level. In that regard, it is necessary to recall paragraph 1.13 of the OECD Transfer Pricing Guidelines, which states that the objective of determining transfer pricing is 'to find a reasonable estimate of an arm's length outcome based on reliable information' and that 'transfer pricing is not an exact science but does require the exercise of judgment on the part of both the tax administration and taxpayer'.

Secondly, concerning the undertakings chosen for the comparability study serving as the basis for the ad hoc report submitted by Apple Inc., ASI and AOE submit that, during the administrative procedure, Apple Inc. asked the Commission several times for its observations regarding that ad hoc report, without any specific question regarding the data from the comparability study being raised. The Commission does not dispute those arguments. In addition, in the present action ASI and AOE have submitted the data used for that ad hoc report, stating that they were taken from the same database as was used in the ad hoc report submitted by Ireland. The Commission has not raised any further specific objections with regard to the ad hoc report submitted by Apple Inc.

Thirdly, in so far as the Commission challenged the use, with regard to the two ad hoc reports submitted by Ireland and Apple Inc., of a comparability study, which was based on a search in a database containing comparable data, the following points should be noted.

First of all, in so far as the Commission's complaints must be understood as challenging the use of a database containing comparable data as such, they cannot succeed. Indeed, without the support of a database, it would not be possible to carry out, in connection with the second step in the one-sided profit allocation method, a comparability study that enables the profits to be regarded as arm's length profits to be estimated, which presupposes that it is possible to make such an estimate using comparable companies.

However, the Commission did not provide evidence to support excluding, as such, the use of databases drawn up by specialised independent companies, such as the database that was used in the ad hoc reports submitted by Ireland and Apple Inc. As is correctly argued by Ireland and ASI and AOE, those databases are created using the Statistical Classification of Economic Activities in the European Community (NACE) and, in the absence of evidence demonstrating defects which invalidate those databases, they constitute an empirical basis for carrying out the comparability studies.

Next, regarding the Commission's arguments contesting the comparability of the companies chosen for the comparability study, concerning the Irish branch of ASI, it should be noted that the Commission merely relied on the same arguments as it had raised regarding the choice of the operating costs as the profit level indicator, namely that ASI was responsible for warranties on sold products and that it assumed a significant risk in respect of high-end products handled by third-party subcontractors, whereas the companies chosen did not assume those kinds of significant risks and therefore were not comparable. However, for the same reasons as those expressed in paragraphs 391 to 402 above, those arguments must be rejected.

In addition, as has been stated by Ireland and ASI and AOE, it should be noted that, in so far as, as concluded in paragraph 413 above, operating costs could not be ruled out as a profit level indicator in the present instance, the high-quality nature of the brand would have no significant impact on comparability in the present instance. Indeed, as ASI and AOE correctly submit, the fact that a company distributes high-quality branded products cannot necessarily have an impact on its operating costs as compared to the operating costs which it would have to bear if it distributed lower-quality products. This has been demonstrated in the present instance by the fact, acknowledged by the Commission itself in recital 337 of the contested decision, that the operating costs of the Irish branch of ASI had remained relatively stable in relation to the exponential increase in ASI's sales.

Regarding the reservations as to the comparability of the manufacturing companies chosen in connection with the comparability study with regard to the Irish branch of AOE, because of the ancillary functions which that branch would have performed in addition to manufacturing activities, it should be noted that those ancillary functions are not representative of all the functions performed by that branch, as is correctly argued by Ireland and ASI and AOE. In that regard, those parties rely in particular on the analysis of the activities of AOE's Irish branch in the ad hoc reports submitted by them, which, on that specific point, was not contested by the Commission.

Lastly, regarding the fact, referred to by the Commission, that 3 of the 52 companies chosen for the comparability study have become companies in liquidation, such reservations cannot affect the reliability of that study as a whole. In addition, those companies were put into compulsory liquidation after the tax years in respect of which the study was conducted. Furthermore, contrary to the Commission's assertions, it does not appear, in view of the considerations set out in paragraph 455 above, that 3 companies, out of the 52 targeted in the study in question, represents a significant proportion liable to distort the outcome of the comparability study.

In those circumstances, it must be concluded that the Commission did not succeed in calling in question the reliability of the comparability studies on which the ad hoc reports submitted by Ireland and Apple Inc. are based and, accordingly, in establishing that those reports are not reliable.

(2) The corrected comparability analysis conducted by the Commission

It should be noted that, in recitals 353 to 356 of the contested decision, the Commission conducted its own comparability analysis, which may be designated as 'the corrected comparability analysis'.

In its corrected comparability analysis, the Commission sought to assess whether the remuneration for the Irish branches of ASI and AOE as endorsed by the contested tax rulings fell within arm's length ranges.

In the first place, concerning the Irish branch of ASI, the Commission used the data from the companies selected in the ad hoc report submitted by Ireland, taking the Irish branch of ASI as the tested party and the sales as the profit level indicator. Those data were reproduced in Figure 13, set out in recital 354 of the contested decision. The Commission thus compared the profits allocated to the Irish branch of ASI in relation to ASI's sales with the median return on sales of the companies selected in the ad hoc report submitted by Ireland, for the years 2007 to 2011.

It should be noted at the outset that it is true that the Commission's approach, consisting in comparing the results of its own analysis, on the one hand, and ASI's chargeable profits under the contested tax rulings, on the other, could have enabled it, in principle, to demonstrate the existence of a selective advantage.

However, the conclusions of the corrected comparability analysis conducted by the Commission cannot invalidate the conclusions of the ad hoc reports submitted by Ireland and Apple Inc., according to which the profits of the Irish branches of ASI and AOE, determined pursuant to the contested tax rulings, fell within arm's length ranges.

First of all, it must be pointed out that the Commission's corrected comparability analysis relies on sales as a profit level indicator for the purpose of applying the TNMM. However, as is apparent from the considerations expressed in paragraphs 402 and 412 above, it has not been demonstrated that the use of the operating costs as the profit level indicator was inappropriate in the present instance. In addition, it has not been demonstrated that the use of sales would have been more appropriate.

Next, it should be borne in mind that the analysis conducted by the Commission in connection with its subsidiary line of reasoning is based on the premiss that, in essence, the functions performed by the Irish branch of ASI were of a complex nature and were decisive for the success of the Apple brand and, accordingly, of ASI's trading activity. In addition, according to the Commission, that branch had assumed significant risks in relation to ASI's activities. However, as has been concluded in paragraphs 348 and 407 above, the Commission did not succeed in demonstrating that the Irish branch of ASI had performed complex functions and assumed those significant risks.

Lastly, in recitals 353 to 355 of the contested decision, the Commission sought to assess the median return on sales of comparable undertakings against the median return on ASI's sales, as a function of the profit allocated to its Irish branch under the 2007 tax ruling. However, that approach is not in line with either the Authorised OECD Approach or section 25 of the TCA 97, in so far as the return on ASI's sales cannot reflect, in the case of its Irish branch, the value of the functions actually performed by that branch, for the following reasons.

First, as stated in paragraphs 384 and 385 above, the distribution functions guaranteed by the Irish branch of ASI consisted in the procurement, sale and distribution of Apple-branded products under framework agreements negotiated outside that branch. Accordingly, the added value contributed by the Irish branch of ASI cannot be grasped by examining the return on ASI's sales.

Second, the functions actually performed by the Irish branch of ASI did not have a decisive impact on either the Apple Group's IP or the Apple brand, as has been stated in paragraph 341 above. Those two factors are intrinsically linked and may be brought together under the Apple brand designating high-quality products, which was regarded by the Commission itself in recital 351 of the contested decision as decisively affecting the value of ASI's sales. For this reason, the return on ASI's sales does not provide a realistic image of the actual contribution of its Irish branch to those sales.

In those circumstances, the conclusions of the corrected comparability analysis conducted by the Commission concerning the remuneration of ASI's Irish branch, an analysis which used sales as a profit level indicator, cannot invalidate the conclusions of the ad hoc reports submitted by Ireland and Apple Inc., which used the operating costs as the profit level indicator.

In the second place, concerning AOE's remuneration, as the Commission itself noted in recital 357 of the contested decision, the results of the comparability analysis used by the Commission, as summarised in paragraph 425 above, show that the profits allocated to the Irish branch of AOE in Ireland under the contested tax rulings fell within ranges which could be regarded as being arm's length ranges.

Accordingly, the results of the analysis conducted by the Commission, in essence, confirm the conclusions derived from the ad hoc reports submitted by Ireland and by Apple Inc., according to which the profits allocated to the Irish branch of AOE fell within arm's length ranges. In that regard, it should be noted, in the light of the considerations expressed in paragraph 455 above regarding the transfer pricing analyses, that the fact that those results fall more towards the lower end of an arm's length range cannot invalidate those results.

Having regard to the foregoing considerations, the complaints raised by Ireland and by ASI and AOE in respect of the Commission's statements regarding the methodological error relating to the levels of return accepted in the contested tax rulings must be upheld.

5. Conclusions regarding the assessments made by the Commission in connection with its subsidiary line of reasoning

The findings made above concerning the defects in the methods for calculating the chargeable profits of ASI and AOE demonstrate the incomplete and occasionally inconsistent nature of the contested tax rulings. However, in themselves, those circumstances are not sufficient to prove the existence of an advantage for the purposes of Article 107(1) TFEU.

Indeed, the Commission did not succeed in demonstrating that the methodological errors to which it had referred with regard to the profit allocation methods endorsed by the contested tax rulings, consisting in the choice of the Irish branches as tested parties (paragraph 351 above), the choice of the operating costs as the profit level indicator

(paragraph 417 above), and the levels of return accepted by the contested tax rulings (paragraph 478 above) had led to a reduction in ASI and AOE's chargeable profits in Ireland. Accordingly, it did not succeed in demonstrating that those rulings had granted those companies an advantage.

In those circumstances, the pleas in law relied on by Ireland and by ASI and AOE, alleging that, in connection with its subsidiary line of reasoning, the Commission has not succeeded in demonstrating the existence of an advantage in the present instance for the purposes of Article 107(1) TFEU must be upheld.

F. Pleas in law contesting the assessments made by the Commission in connection with its alternative line of reasoning (fifth plea in law in Case T-778/16 and ninth plea in law in Case T-892/16)

The Commission set out its alternative line of reasoning in recitals 369 to 403 of the contested decision, which is divided into two alternative parts.

In the first place, in recitals 369 to 378 of the contested decision, the Commission contended that the arm's length principle was inherent in the application of section 25 of the TCA 97 and that, in so far as the contested tax rulings derogated from that principle, they conferred a selective advantage on ASI and AOE in the form of a reduction of their taxable base.

In the second place, in recitals 379 to 403 of the contested decision, the Commission contended that, even assuming that the application of section 25 of the TCA 97 was not governed by the arm's length principle, the contested tax rulings still had to be regarded as granting ASI and AOE a selective advantage in so far as those rulings were the result of the discretion exercised by the Irish tax authorities.

Ireland and ASI and AOE contest, in essence, the assessments made by the Commission in both parts of the alternative line of reasoning.

1. First part of the Commission's alternative line of reasoning

In the first part of its alternative line of reasoning, the Commission considered that the contested tax rulings derogated from section 25 of the TCA 97, on the ground that the arm's length principle was inherent in that section (recital 377 of the contested decision). The Commission then referred to its subsidiary line of reasoning, in which it considered that the contested tax rulings did not allow a reliable approximation of a market-based outcome in line with the arm's length principle to be calculated and, therefore, concluded that those rulings had granted ASI and AOE a selective advantage (recital 378 of the contested decision).

In that regard, it is sufficient to note that, in so far as the first part of the Commission's alternative line of reasoning is based on statements that it made in its subsidiary line of reasoning and that, as has been found in paragraph 481 above, the Commission cannot rely on that reasoning in order to conclude that there was an advantage in the present instance, it must be held that the Commission is equally unable to rely on the first part of its alternative line of reasoning in order to conclude that there was a selective advantage in the present instance.

In those circumstances, it must be concluded that, in the first part of the alternative line of reasoning, the Commission did not succeed in demonstrating that the contested tax rulings had granted ASI and AOE a selective advantage.

2. Second part of the Commission's alternative line of reasoning

In the second part of its alternative line of reasoning, the Commission contends that, even assuming that the application of section 25 of the TCA 97 was not governed by the arm's length principle, the contested tax rulings still conferred a selective advantage on ASI and AOE in so far as those rulings were issued by the Irish tax authorities on a discretionary basis.

First, the Commission maintained that it had shown in its primary and subsidiary lines of reasoning that the contested tax rulings had endorsed profit allocation methods that resulted in a reduction in the chargeable profits of ASI and AOE in Ireland and that conferred an economic advantage for the purposes of Article 107(1) TFEU.

Second the Commission stated that, in so far as section 25 of the TCA 97 does not lay down any objective criteria for the allocation of profits among the various parts of a single non-resident company, the Irish tax authorities' discretion in applying that provision is not based on objective criteria related to the tax system, which means that it can be presumed that the contested tax rulings are selective. In addition, the Commission examined 11 tax rulings that had been sent to it by Ireland and observed that those rulings contained a number of discrepancies, on the basis of which it considered that the Irish tax authorities' practice concerning tax rulings was discretionary as no consistent criterion was used to determine the profits to be allocated to the Irish branches of non-resident companies for the purpose of applying section 25 of the TCA 97.

The Commission concluded from the above that the contested tax rulings had been issued on the basis of the Irish tax authorities' discretion in the absence of objective criteria related to the tax system and that, therefore, those rulings had to be considered to confer a selective advantage on ASI and AOE for the purposes of Article 107(1) TFEU.

With regard to the conclusions reached by the Commission, first, it should be noted that, in so far as the Commission did not succeed in showing that there was an advantage through its primary and subsidiary lines of reasoning, it cannot, solely through its alternative line of reasoning as described above, show that there is a selective advantage in the present instance. Even assuming that it were established that the tax authorities had discretion, the existence of such discretion does not necessarily mean that it was used to reduce the tax liability of the recipient of the tax ruling as compared with the liability to which that recipient would normally have been subject.

Therefore, the Commission's alternative line of reasoning is insufficient to establish the existence of State aid for the purposes of Article 107(1) TFEU.

Second and in any case, the Commission did not succeed in showing that the Irish tax authorities had exercised a broad discretion in the present instance.

It is necessary to recall the case-law stating that, in order to establish the selective nature of a tax advantage, it is not necessary for the competent national authorities to have the discretionary power to grant the benefit of that measure. However, the existence of such discretion may be such as to enable those authorities to favour certain undertakings or the production of certain goods to the detriment of others, in particular where the competent authorities have the discretionary power to determine the beneficiaries and the conditions of the measure granted on the basis of criteria unrelated to the tax system (judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591, paragraph 55).

It is clear that, in recital 381 of the contested decision, the Commission limited itself to stating that Ireland had not identified any objective standard for allocating the profits of a non-resident company for the purpose of applying section 25 of the TCA 97. In that same recital, it concluded directly from the above that 'this would mean that [the Irish tax authorities'] discretion in applying that provision [was] not based on objective criteria related to the tax system, which [gave] rise to a presumption of a selective advantage'.

As has been pointed out in paragraphs 238 and 239 above, in order to apply section 25 of the TCA 97, it is necessary to carry out an objective analysis of the facts that includes, first, identifying the activities performed by the branch, the assets it uses for its functions and the related risks that it assumes and, second, determining the value of that type of activity on the market. Such an analysis corresponds, in essence, to the analysis proposed by the Authorised OECD Approach.

Consequently, the Commission cannot argue that the Irish tax authorities' application of section 25 of the TCA 97 did not involve the use of any consistent criterion in order to determine the profits to be allocated to the Irish branches of non-resident companies.

It is true that, in the present instance, the Irish tax authorities' application of section 25 of the TCA 97 in the contested tax rulings was insufficiently documented. As has been stated in paragraphs 347 and 433 above, the information and evidence in support of that application were very concise. That lack of documented analysis is indeed a regrettable methodological defect in the calculation of ASI and AOE's chargeable profits, endorsed in the contested tax rulings. However, such a defect is, in itself, insufficient to show that the contested tax rulings were the result of a broad discretion exercised by the Irish tax authorities.

Third, the 11 tax rulings concerning the allocation of profits to the Irish branches of non-resident companies examined by the Commission in recitals 385 to 395 of the contested decision are not of such a kind as to show that the Irish tax authorities have a broad discretion which leads to the recipient companies being given favourable treatment as compared with other companies in a comparable situation.

As is apparent from recitals 385 to 395 of the contested decision, each of those 11 tax rulings relates to companies with entirely different activities. As the Commission itself noted in recital 88 of the contested decision, the allocation of profits among several associated companies depends on the functions performed, the risks assumed and the assets used by each company. It should therefore be concluded that the 11 tax rulings approve different profit allocation methods simply because the situations of the taxpayers are different. Therefore, the fact that those different situations were taken into account when the rulings in question were issued does not in any way show that the Irish tax authorities had any discretion.

It follows from the foregoing considerations that the Commission cannot rely on the second part of its alternative line of reasoning in order to conclude that there was a selective advantage in the present instance.

Consequently, the pleas in law relied on by Ireland and ASI and AOE alleging that, in its alternative line of reasoning, the Commission did not succeed in showing that there was a selective advantage in the present instance for the purposes of Article 107(1) TFEU must be upheld, without there being any need to examine the complaints alleging breaches of essential procedural requirements and of the right to be heard raised by ASI and AOE regarding the Commission's assessments in its alternative line of reasoning.

G. Conclusions regarding the Commission's assessment concerning the existence of a selective advantage

In view of the conclusions set out in paragraphs 312, 481 and 504 above, in which the Court finds that the pleas in law relied on by Ireland and ASI and AOE against the assessments made by the Commission in connection with its primary, subsidiary and alternative lines of reasoning must be upheld, it must be concluded that the Commission did not succeed in showing, in the present instance, that, by issuing the contested tax rulings, the Irish tax authorities had granted ASI and AOE a selective advantage for the purposes of Article 107(1) TFEU.

In that regard, it should be borne in mind that, although, according to the settled case-law cited in paragraph 100 above, the Commission may classify a tax measure as State aid, it may do so only in so far as the conditions for such a classification are satisfied.

In the present instance, as the Commission did not succeed in showing to the requisite legal standard that there was a selective advantage for the purposes of Article 107(1) TFEU, the contested decision must be annulled in its entirety without it being necessary to examine the other pleas in law raised by Ireland and ASI and AOE.

IV. Costs

Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of Ireland, in the context of Case T-778/16, and those of ASI and AOE, in accordance with the form of order sought by those companies.

In accordance with Article 138(1) of the Rules of Procedure, Ireland, in the context of Case T-892/16, the Grand Duchy of Luxembourg, the Republic of Poland and the EFTA Surveillance Authority are to bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

Joins Cases T-778/16 and T-892/16 for the purposes of the present judgment;

Annuls 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;

Orders the European Commission to bear its own costs and to pay those of Ireland, in the context of Case T-778/16, and those of Apple Sales International and Apple Operations Europe;

Orders Ireland, in the context of Case T-892/16, the Grand Duchy of Luxembourg, the Republic of Poland and the EFTA Surveillance Authority to bear their own costs.

Van der Woude Tomljenović Marcoulli

Passer Kornezov

Delivered in open court in Luxembourg on 15 July 2020.

E. Coulon M. van der Woude

Registrar President

Table of contents

A. Joinder of Cases T778/16 and T892/16 for the purposes of the decision closing the proceedings
B. Pleas in law relied on and framework for examining the present actions
C. Pleas in law alleging that the Commission exceeded its competences and encroached on the competences of the Member States in breach of, in particular, the principle of fiscal autonomy (8th plea in law in Case T778/16 and 14th plea in law in Case T892/16)
D. Pleas in law alleging errors made in connection with the Commission's primary line of reasoning
1. Joint examination of the conditions of advantage and selectivity (part of the second plea in law in Case T778/16)
2. Identification of the reference framework and assessments concerning normal taxation under Irish law (part of the first and second pleas in law in Case T778/16 and first, second and fifth pleas in law in Case T892/16)
(a) Reference framework
(b) The Commission's assessments concerning the normal taxation of profits under Irish tax law
(1) Application of section 25 of the TCA 97 (part of the second plea in law in Case T778/16 and of the first plea in law in Case T892/16)
(2) The arm's length principle (part of the first and third pleas in law in Case T778/16 and of the first and second pleas in law in Case T892/16)
(i) Whether the Commission was entitled to rely on the arm's length principle in order to determine whether there was a selective advantage
(ii) Whether the Commission correctly applied the arm's length principle in its primary line of reasoning
(3) The Authorised OECD Approach (part of the second and fourth pleas in law in Case T778/16 and fifth plea in law in Case T892/16)
(i) Whether the Commission was entitled to rely on the Authorised OECD Approach
(ii) Whether the Commission correctly applied the Authorised OECD Approach in its primary line of reasoning
(4) Conclusions regarding the identification of the reference framework and the assessments of normal taxation under Irish law
3. The Commission's assessments concerning the activities within the Apple Group (first plea in law in Case T778/16 and third and fourth pleas in law in Case T892/16)
(a) Activities of ASI's Irish branch
(b) Activities of AOE's Irish branch
(c) Activities other than those of ASI and AOE's branches
(1) Strategic decision-making within the Apple Group
(2) Decision-making by ASI and AOE
(d) Conclusions concerning the activities within the Apple Group
4. Conclusion regarding the Commission's assessment that there was a selective advantage on the basis of its primary line of reasoning
E. Pleas in law contesting the assessments made by the Commission in connection with its subsidiary line of reasoning (fourth plea in law in Case T778/16 and eighth plea in law in Case T892/16)
1. The assessment made regarding the profit allocation methods endorsed by the contested tax rulings in the light of the TNMM
2. The choice of ASI and AOE's Irish branches as the 'tested party' when applying the profit allocation methods
3. The choice of the operating costs as the profit level indicator
(a) The choice of the operating costs as the profit level indicator for the Irish branch of ASI
(1) The appropriate profit level indicator
(2) The risk connected with turnover
(3) The risk connected with product warranties
(4) The risks connected with the activities of third-party contractors
(b) The choice of the operating costs as the profit level indicator for the Irish branch of AOE
(c) Conclusions regarding the choice of the operating costs as the profit level indicator
4. The levels of return accepted in the contested tax rulings
(a) The remuneration of the Irish branches of ASI and AOE endorsed by the 1991 tax ruling
(b) The remuneration of the Irish branches of ASI and AOE endorsed by the 2007 tax ruling
(1) The choice of the companies used in the comparability studies
(2) The corrected comparability analysis conducted by the Commission

---

* Language of the case: English.

---

1 Confidential information omitted.