JUDGMENT OF THE COURT (Grand Chamber)

10 September 2024 (*)

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(Appeal – State aid – Article 107(1) TFEU – Tax rulings issued by a Member State – Selective tax advantages – Allocation of profits generated by intellectual property licences to branches of non-resident companies – Arm's length principle)

In Case C-465/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 September 2020,

European Commission, represented by L. Flynn, P.-J. Loewenthal and F. Tomat, acting as Agents,

appellant,

the other parties to the proceedings being:

Ireland, represented by M. Browne, Chief State Solicitor, A. Joyce and J. Quaney, acting as Agents, and initially also by P.W. Baker, KC, C. Donnelly, Senior Counsel, A. Goodman, Senior Counsel, S. Kingston, Senior Counsel, and B. Doherty, Barrister-at-Law, and subsequently by P.W. Baker, KC, C. Donnelly, Senior Counsel, P. Gallagher, Senior Counsel, A. Goodman, Senior Counsel, B. Doherty, Barrister-at-Law, and D. Fennelly, Barrister-at-Law,

Apple Sales International Ltd, established in Cork (Ireland),

Apple Operations International Ltd, formerly Apple Operations Europe Ltd, established in Cork,

represented by D. Beard, KC, J. Bourke, Barrister, L. Osepciu, Barrister, C. Riis-Madsen, advokat, E. van der Stok, advocaat, and A. von Bonin, Rechtsanwalt,

applicants at first instance,

Grand Duchy of Luxembourg, represented initially by A. Germeaux and T. Uri, and subsequently by A. Germeaux and T. Schell, acting as Agents, and by J. Bracker and D. Waelbroeck, avocats,

Republic of Poland,

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

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, K. Jürimäe, C. Lycourgos, E. Regan, T. von Danwitz, Z. Csehi and O. Spineanu-Matei, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl (Rapporteur) and M. Gavalec, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 23 May 2023,

after hearing the Opinion of the Advocate General at the sitting on 9 November 2023,

gives the following

Judgment

1 By its appeal, the European Commission asks the Court of Justice to set aside the judgment of the General Court of the European Union of 15 July 2020, *Ireland and Others* v *Commission* (T-778/16 and T-892/16, EU:T:2020:338; 'the judgment under appeal'), by which the General Court annulled 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 decision at issue').

I. Background to the dispute

2 The background to the dispute, as set out in paragraphs 1 to 47 of the judgment under appeal, may, for the purposes of the present proceedings, be summarised as follows.

A. History of the Apple Group

1. The Apple Group

3 The Apple Group, founded in 1976 and established in Cupertino (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 managed and directed from the United States by executives based in Cupertino.

2. ASI and AOE

4 Within the Apple Group, Apple Operations International Ltd (AOI) is a fully owned subsidiary of Apple Inc. AOI fully owns the subsidiary Apple Operations Europe Ltd (AOE),

formerly known as ‘Apple Computer Ltd (ACL)’. AOE fully owns the subsidiary Apple Sales International Ltd (ASI), formerly known as ‘Apple Computer Accessories Ltd (ACAL)’, and subsequently, ‘Apple Computer International’. ASI and AOE are both companies incorporated in Ireland, but are not tax resident in Ireland.

5 As stated in recitals 113 to 115 of the decision at issue, a significant number of members of the boards of directors of ASI and AOE 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 of that decision. The resolutions of the boards of directors generally concerned matters such as the payment of dividends, the approval of directors’ reports, or the appointment and resignation of directors. Less frequently, those resolutions concerned the incorporation of subsidiaries and the grant of powers of attorney to certain directors covering activities such as managing banking; relationships with governments and public offices; audits; concluding insurance contracts; renting, purchase and sale of assets; taking delivery of goods; and commercial contracts.

6 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 cost-sharing agreement was initially concluded in December 1980 between Apple Inc., then known as ‘Apple Computer Inc.’, and ACL. In 1999, Apple Computer International became a party to that agreement. The cost-sharing agreement was amended several times, in order, in particular, to take account of changes in the applicable regulatory framework.

7 Under that agreement, the parties agreed to share the costs and the risks of R & D activities concerning intangibles developed in connection with the Apple Group’s products and services development programme. 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 to use the Apple Group’s IP, inter alia, to manufacture and sell the products concerned in all territories apart from North and South America. Lastly, the parties to the cost-sharing 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.

8 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, in return, to pay Apple Inc. 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

9 ASI and AOE each have a branch in Ireland. Those branches do not have a separate legal personality.

10 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 entities and third-party customers in the regions covering Europe, the Middle East, India and Africa (EMEIA) and the Asia-Pacific (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 entities in the EMEIA and APAC regions, sales support and distribution activities associated with the sale of products to third-party customers in the EMEIA region, online sales, logistics operations, and operation of an after-sales service. The Commission stated, in recital 55 of the decision at issue, that many activities associated with the distribution into the APAC region were performed by related entities under service contracts.

11 AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland, such as desktops, laptops and other computer accessories, which it supplies to related entities 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

12 By letters of 29 January 1991 and 23 May 2007, the Irish tax authorities issued tax rulings concerning the determination of ASI's and AOE's chargeable profits in Ireland (collectively, 'the contested tax rulings'), in accordance with the proposals made in that regard by the Apple Group's representatives. Those tax rulings are described in recitals 59 to 62 of the decision at issue.

1. The 1991 tax ruling

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

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

14 Following an exchange of letters, the Irish tax authorities agreed, by letter of 29 January 1991, to the Apple Group's proposal that ACL's chargeable profit in Ireland, attributable to income from its Irish branch, should be calculated using the following method:

– the net profit attributable to the Irish branch corresponds to 65% of that branch's operating costs up to an annual amount of [*confidential*] (1) and 20% of its operating costs in excess of that amount;

– if the overall profit of the Irish branch is less than the amount thus obtained, that overall profit is used to determine that branch's net profit;

– the operating costs to be taken into consideration for the calculation of the Irish branch's net profit include all operating expenses of that branch, excluding materials for resale and costs for intangibles charged from companies affiliated with the Apple Group; and

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

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

15 By letter of 2 January 1991, the Apple Group's tax advisors informed the Irish tax authorities of the existence of ACAL, the Irish branch of which was described as being responsible for sourcing from Irish manufacturers products intended for export.

16 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 the determination of ACAL's chargeable profit. According to that letter, the calculation of the branch's profit was to be based on a margin of 12.5% of branch operating costs, excluding material for resale.

17 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

18 By letter of 16 May 2007, the Apple Group's tax advisors proposed to the Irish tax authorities that they revise the method for determining the tax base of the Irish branches of ASI and AOE.

19 As regards the Irish branch of ASI, the Apple Group proposed that the chargeable profit allocated to that branch be equal to [*confidential*] of its operating costs, excluding costs such as charges from affiliated companies within the Apple Group and material costs.

20 As regards AOE's Irish branch, the Apple Group proposed that the chargeable profit allocated to that branch be determined by adding to the amount corresponding to [*confidential*] of its operating costs, excluding costs such as charges from affiliated companies within the Apple Group and material costs, an amount equal to [*confidential*] of its turnover, representing the IP return in respect of the accumulated manufacturing process technology of that branch. The group also requested capital allowances for plant and buildings 'computed and allowed in the normal manner'.

21 The Apple Group proposed that the new agreement enter into force with effect from 1 October 2007 for both branches, that it be applicable for a period of five years, unless the circumstances changed, and that it subsequently be renewed on an annual basis. It also suggested that that 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 ASI and by AOE, respectively.

22 By letter of 23 May 2007, the Irish tax authorities agreed to all the proposals set out in the letter of 16 May 2007. That agreement was applied until the end of the tax year, on 27 September 2014.

C. The administrative procedure before the Commission

23 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.

24 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, on the ground that those tax rulings could constitute State aid for the purposes of Article 107(1) TFEU. After considering whether the transfer pricing arrangements contained in the contested tax rulings departed from the conditions that would have been set between independent market operators, and thus from the arm's length principle, the Commission found that those tax rulings were capable of conferring an advantage on the undertakings to which they had been granted. That decision was published in the *Official Journal of the European Union* on 17 October 2014.

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

26 During the formal investigation procedure, several exchanges and meetings took place between the Commission, the Irish tax authorities and Apple Inc. In addition, Ireland and Apple Inc. 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 decision at issue

27 On 30 August 2016 the Commission adopted the decision at issue, which concerns the contested tax rulings. 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).

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

29 Secondly, the Commission found that, 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 decision at issue).

30 Thirdly, the Commission noted that, in so far as the contested tax rulings had led to a reduction in ASI's 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 decision at issue).

31 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 found that those tax rulings constituted a derogation from the relevant reference framework, defined as the ordinary rules of corporation tax in Ireland (recital 224 of the decision at issue).

32 Fourthly, the Commission noted that since the contested tax rulings resulted in a lowering of ASI's and AOE's tax liability, they were liable to improve the competitive position of those two companies and, accordingly, to distort or threaten to distort competition (recital 222 of the decision at issue).

1. The existence of a selective advantage

33 In Section 8.2 of the decision at issue, the Commission followed the three-step analysis derived from case-law in order to prove the existence of a selective advantage in the present case. Thus, first of all, it identified the reference framework and provided grounds for applying the arm's length principle. 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 that reduction in the amount of tax represented an advantage as compared to 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

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

(b) The arm's length principle

35 In recitals 244 to 263 of the decision at issue, the Commission stated that it was apparent both from the wording of section 25 of the TCA 97 and from its purpose that that provision, which does not provide guidance on how to determine the chargeable profit of an Irish branch, could only be applied by using a profit allocation method. In that regard, it noted

that Article 107(1) TFEU required that method to be based on the arm's length principle, regardless of whether or not Ireland had incorporated that principle into its national legal system. The Commission based that finding 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 does not resemble prices charged in conditions of free competition confers a selective advantage on that taxpayer for the purposes of Article 107(1) TFEU.

36 Thus, the Commission contended 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 would be treated, for tax purposes, in the same way as those carried out between non-integrated standalone companies. Its application would avoid unequal treatment of companies in a similar factual and legal situation having regard to the objective of the ordinary rules of corporate taxation, which is to tax the profits of all companies falling within the scope of that tax.

37 As regards the guidelines developed within the framework of the Organisation for Economic Co-operation 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) The Commission's primary line of reasoning concerning the existence of a selective advantage as a result of the profits derived from the IP licences held by ASI and by AOE not being allocated to the Irish branches

38 Primarily, in recitals 265 to 321 of the decision at issue, the Commission contended that the fact that the Irish tax authorities had accepted, in the contested tax rulings, the premiss that the Apple Group's IP licences held by ASI and AOE had to be allocated outside Ireland had led to ASI's 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.

39 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 had contributed significantly to those two companies' income.

40 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 outside Ireland. More specifically, regarding the functions related to the IP licences, the Commission found that such functions could not have been performed only by the boards of directors of ASI and AOE, without any head office staff of those companies. It noted, in that regard, the lack of references to discussions and

decisions in relation to IP in the board minutes that had been provided to it. 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. Consequently, those profits should have been allocated to ASI's and AOE's branches, which alone were in a position effectively to perform functions related to the Apple Group's IP that were crucial to ASI's and AOE's trading activity.

41 Therefore, by not allocating the profits deriving from the Apple Group's IP to ASI's 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 resulted in a lowering of ASI's and AOE's tax liability in Ireland as compared to non-integrated companies whose chargeable profits reflect prices negotiated at arm's length on the market. The Commission added, lastly, that a similar conclusion could be reached by applying the approach authorised by the OECD for profit allocation to a permanent establishment ('the Authorised OECD Approach').

(d) The Commission's subsidiary line of reasoning concerning the existence of a selective advantage resulting from the inappropriate choice of methods for allocating profits to ASI's and AOE's Irish branches

42 As a subsidiary argument, in recitals 325 to 360 of the decision at issue, the Commission found that, even assuming that the Irish tax authorities were justified in allocating outside Ireland the Apple Group's IP licences held by ASI and AOE, the profit allocation methods approved by the contested tax rulings had, in any event, resulted in the annual chargeable profits for those two companies in Ireland departing 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 to non-integrated companies whose chargeable profits, under ordinary rules of taxation of profits in Ireland, are determined by prices negotiated at arm's length on the market. Therefore, according to the Commission, by approving those methods, the contested tax rulings had conferred a selective advantage on ASI and AOE for the purposes of Article 107(1) TFEU.

(e) The Commission's alternative line of reasoning concerning the existence of a selective advantage resulting from the derogation from the reference framework that consists of section 25 of the TCA 97

43 Alternatively, the Commission argued, in recitals 369 to 403 of the decision at issue, that assuming that the reference framework did consist 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 found that the application of

section 25 of the TCA 97 in Ireland was based on the arm's length principle. However, in the present case, 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) The Commission's conclusion concerning the existence of a selective advantage

44 The Commission concluded that the contested tax rulings had reduced 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 found that, in so far as ASI and AOE were part of the Apple Group, which is multinational, and in so far as that group had to be regarded as a single economic unit for the purposes of case-law, that group as a whole had benefited from the State aid granted by Ireland by way of the contested tax rulings (Sections 8.3 and 8.4 of the decision at issue).

2. Incompatibility, unlawfulness and recovery of the aid

45 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 decision at issue).

46 Lastly, the Commission stated that Ireland was required to recover the aid granted by the contested tax rulings for the period from 12 June 2003, after which the aid was no longer time-barred and thus had to be deemed to be 'new' aid, to 27 September 2014, when those tax rulings ceased to be applied. It specified that the amount to be recovered had to be calculated on the basis of a comparison between the tax actually paid and the tax which should have been paid if, had the tax rulings not been issued, the ordinary rules of taxation of profits had been applied (Section 11 of the decision at issue).

47 In response to the arguments concerning the infringement of Ireland's 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 decision at issue, those rights had been fully respected (Section 10 of the decision at issue).

II. The procedure before the General Court

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

49 By application lodged at the General Court Registry on 19 December 2016, ASI and AOE brought the action in Case T-892/16 for annulment of the decision at issue.

50 By decision of 28 June 2017, the President of the Seventh Chamber, Extended Composition, of the General Court granted Ireland leave to intervene in support of the form of order sought by ASI and AOE in Case T-892/16.

51 By orders of 19 July 2017, the President of the Seventh Chamber, Extended Composition, of the General Court granted the Grand Duchy of Luxembourg and the Republic of Poland leave to intervene in support of the forms of order sought by Ireland and the Commission, respectively, in Case T-778/16, and granted the EFTA Surveillance Authority leave to intervene in support of the form of order sought by the Commission in Case T-892/16.

III. The judgment under appeal

52 After deciding that it was appropriate for Cases T-778/16 and T-892/16 to be joined for the purposes of the decision closing the proceedings, on account of the connection between them (paragraph 87 of the judgment under appeal), the General Court noted that, in support of their respective actions, Ireland, and ASI and AOE, were raising 9 pleas in law and 14 pleas in law, respectively, and that those pleas in law overlapped for the most part.

53 The General Court recalled, as a preliminary point and for the purposes of the assessment of the legality of the decision at issue, that, in the context of State aid control, in order to assess whether the contested tax rulings constituted such aid, the Commission was required to demonstrate that the conditions for the existence of State aid for the purposes of Article 107(1) TFEU were satisfied, and, in particular, that those tax rulings had conferred a selective advantage (paragraphs 100 and 101 of the judgment under appeal).

54 As regards the actual assessment of the pleas in law relied on, the General Court, in the first place, rejected the eighth plea in law in Case T-778/16 and the fourteenth plea in law in Case T-892/16, by which it was alleged that the Commission had exceeded its competences and that it had encroached on the competences of the Member States (paragraphs 103 to 123 of the judgment under appeal). The Court inferred from this that, 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 was necessary to go on to analyse the pleas in law relied on by Ireland and by ASI and AOE that sought to challenge the merits of each stage of the reasoning which the Commission had set out in the decision at issue in order to demonstrate the existence of a selective advantage in the present case (paragraph 124 of the judgment under appeal).

55 In the second place, the General Court examined the pleas in law alleging errors made in connection with the Commission's primary line of reasoning (paragraphs 125 to 313 of the judgment under appeal).

56 First of all, it rejected as unfounded the complaints concerning (i) the fact that the conditions of advantage and selectivity were examined together (paragraphs 133 to 139 of the

judgment under appeal), and (ii) the reference framework as defined in the decision at issue (paragraphs 140 to 164 of the judgment under appeal).

57 Next, in view of the fact that the reference framework defined in the decision at issue, namely the ordinary rules of taxation of corporate profit in Ireland, included, in particular, the provisions of section 25 of the TCA 97, the General Court ruled that it was necessary to analyse the complaints raised by Ireland and by ASI and AOE regarding the Commission's interpretation of those provisions (paragraph 165 of the judgment under appeal).

58 In that regard, the Court declined to accept the Commission's primary line of reasoning in relation to the existence of an advantage on two grounds.

59 First, the Court found that, in its primary line of reasoning, the Commission had made errors concerning the application of section 25 of the TCA 97 (paragraph 187 of the judgment under appeal), of the arm's length principle (paragraph 229 of that judgment) and of the Authorised OECD Approach (paragraphs 244 and 245 of that judgment). The Court inferred from this 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 case.

60 Secondly, the Court upheld the complaints raised by the applicants, which it examined 'for the sake of completeness' (paragraph 250 of the judgment under appeal), regarding the Commission's factual assessments concerning the activities within the Apple Group. It held that, in the present case, the Commission had 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, secondly, of the strategic decisions taken and implemented outside of those branches, the profits generated by the exploitation of the Apple Group's IP licences should have been allocated to those branches when determining the annual chargeable profits of ASI and AOE in Ireland (paragraphs 310 and 311 of the judgment under appeal). The Court referred in that context, first, to the limited activities of the Irish branches of ASI and AOE as indicated in the decision at issue and, secondly, to the strategic decisions taken and implemented outside of those branches by the directors and employees of Apple (paragraphs 255 to 302 of that judgment) and by the directors of ASI and of AOE (paragraphs 301 and 303 to 309 of that judgment).

61 In the third place, as regards the Commission's subsidiary line of reasoning as to the existence of an advantage, the Court upheld the complaints raised in respect of, first, the Commission's statements concerning the incorrect choice of ASI's and AOE's Irish branches as the tested parties when applying the profit allocation methods on which the contested tax rulings were based (paragraphs 328 to 351 of the judgment under appeal); secondly, the Commission's statements regarding the methodological error relating to the choice of the operating costs as the profit level indicator for those branches (paragraphs 352 to 417 of that judgment); and, thirdly, the Commission's statements regarding the methodological error relating to the levels of return accepted in the contested tax rulings (paragraphs 418 to 478 of that judgment). The Court indicated that, while the defects found in the methods for

calculating the chargeable profits of ASI and AOE demonstrated the incomplete and occasionally inconsistent nature of the contested tax rulings, those defects were not sufficient, in themselves, to prove the existence of an advantage for the purposes of Article 107(1) TFEU (paragraph 479 of the judgment under appeal).

62 In the fourth and last place, the Court considered that the pleas in law relied on by Ireland and by ASI and AOE alleging that, in its alternative line of reasoning, the Commission had not succeeded in showing that there was a selective advantage for the purposes of Article 107(1) TFEU had to be upheld, without there being any need to examine the complaints alleging infringements of essential procedural requirements and of the right to be heard raised by ASI and AOE regarding the Commission's assessments in that line of reasoning (paragraphs 486 to 504 of the judgment under appeal).

63 In the light of those considerations, having found that the Commission had not succeeded in showing to the requisite legal standard that there was an advantage for the purposes of Article 107(1) TFEU, the General Court annulled the decision at issue in its entirety, without examining the other pleas in law and complaints raised by Ireland and by ASI and AOE, ordered the Commission to bear its own costs and to pay those incurred by the applicants in Cases T-778/16 and T-892/16, and decided that Ireland, in the context of Case T-892/16, the Grand Duchy of Luxembourg, the Republic of Poland and the EFTA Surveillance Authority were to bear their own costs.

IV. The procedure before the Court of Justice and the forms of order sought by the parties to the appeal

64 The Commission brought the present appeal by a document lodged on 25 September 2020.

65 By a document lodged on 23 April 2023, ASI and AOE's lawyers informed the Court that, following a merger under Irish law, AOE had been absorbed by AOI with effect from 2 April 2023. AOI therefore replaced AOE as a party to the present case.

66 By its appeal, the Commission claims that the Court should:

– set aside the judgment under appeal;

– reject the first to fourth and eighth pleas in Case T-778/16, and the first to fifth, eighth and fourteenth pleas in Case T-892/16;

– refer the case back to the General Court for it to rule on the pleas in law which have not yet been examined; and

– reserve the costs of the proceedings at first instance and on appeal.

67 Ireland contends that the Court should:

– dismiss the appeal as inadmissible and/or unfounded; and

– order the Commission to pay the cost of these proceedings.

68 ASI and AOI contend that the Court should:

– dismiss the appeal; and

– order the Commission to pay their costs.

69 The Grand Duchy of Luxembourg contends that the Court should:

– dismiss the appeal; and

– order the Commission to pay the cost of these proceedings.

70 The EFTA Surveillance Authority claims that the Court should:

– allow the appeal in its entirety;

– refer the case back to the General Court for consideration of the pleas not already assessed; and

– reserve the costs of the proceedings at first instance and on appeal.

V. The appeal

71 The Commission relies, in support of its appeal, on two grounds of appeal. The first relates to the grounds of the judgment under appeal by which the General Court held that the primary line of reasoning leading the Commission to find that there was an advantage was erroneous. The second is directed against the grounds of the judgment under appeal that relate to the examination of the Commission's subsidiary line of reasoning.

A. Preliminary considerations

72 The Commission submits that the appeal essentially revolves around the question whether the General Court was permitted to take functions performed by Apple Inc. into account when rejecting the findings of the decision at issue that the contested tax rulings conferred an advantage on ASI and AOE under Article 107(1) TFEU. By invoking functions performed by Apple Inc. when rejecting those findings, the General Court had disregarded fundamental tax principles and the rules interpreting them and, in so doing, had misapplied the notion of 'advantage', in breach of that provision. In its reply, the Commission explains that while the Court endorsed the correct legal test, based on a comparison of the functions of ASI and AOE with those of their branches, for a finding of advantage under that provision, it applied a different, erroneous test, based on a comparison of the functions of those branches with those of Apple Inc., to reject the findings of the decision at issue as to the existence of an advantage.

73 In that regard it must be noted that, according to settled case-law, action by Member States in areas that are not subject to harmonisation by EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. The Member States must thus refrain from adopting any tax measure liable to constitute State aid that is incompatible with

the internal market (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 104 and the case-law cited).

74 In that regard, it follows from well-established case-law that the classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between the Member States. Thirdly, it must confer a selective advantage on the beneficiary. Fourthly, it must distort or threaten to distort competition (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 105 and the case-law cited)

75 So far as concerns the condition relating to selective advantage, it requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 106 and the case-law cited).

76 In order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate, as a third step, that that differentiation is justified, in the sense that it flows from the nature or general structure of the system of which those measures form part (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 107 and the case-law cited).

77 The determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 108).

78 Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation

of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 109 and the case-law cited).

79 For the purposes of assessing the selective nature of a tax measure, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of selectivity, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 110 and the case-law cited).

80 In that context, it must be stated, in the first place, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 111 and the case-law cited).

81 In the second place, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment, the taxable event and any exemptions to which the tax is subject (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 112 and the case-law cited).

82 It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system for direct taxation, that identification being itself an essential prerequisite for assessing not only the existence of an advantage, but also whether it is selective in nature (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 113 and the case-law cited).

83 That conclusion is, however, without prejudice to the possibility of finding that the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 114 and the case-law cited).

84 In the present case, the Commission did not refer, in the decision at issue, to the fact that the tax system at issue had been configured according to manifestly discriminatory parameters intended to circumvent the principles applicable under EU law on State aid, as referred to in the case-law recalled in the preceding paragraph of the present judgment.

85 The Commission actually found, in the context of its primary line of reasoning, that, by the contested tax rulings, the purpose of which was to determine the chargeable profits of non-resident Irish companies ASI and AOE under section 25 of the TCA 1997, the Irish tax authorities had conferred an advantage on those companies for the purposes of Article 107(1) TFEU in the form of a reduction in their respective annual chargeable profits, by not allocating to the branches of those companies the profits generated by the exploitation of the Apple Group's IP, thereby acting in breach of the arm's length principle. As a subsidiary point, the Commission found that, even assuming that the Irish tax authorities were justified in allocating those profits outside Ireland, the profit allocation methods approved by the contested tax rulings had, in any event, resulted in the annual chargeable profits for ASI and AOE in Ireland departing from a reliable approximation of a market-based outcome in line with the arm's length principle.

86 The appeal must be examined with those preliminary considerations in mind.

B. First ground of appeal, alleging errors in the assessment of the primary line of reasoning concerning the existence of an advantage

87 By its first ground of appeal, the Commission claims that the General Court made several errors in criticising its primary line of reasoning concerning the finding in the decision at issue of advantage. This ground of appeal consists of three parts.

88 At the outset, it must be recalled that, by its primary line of reasoning, the Commission had essentially found that, 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's 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's and AOE's trading activity. The Commission thus found that, by the contested tax rulings, the Irish authorities had wrongly accepted that the Apple Group's IP licences and the profits derived from them had to be fully allocated outside Ireland, namely to the head offices of ASI and AOE, without verifying whether those licences and profits should be attributed, wholly or in part, to the Irish branches of those companies under section 25 of the TCA 97.

89 The Commission's primary line of reasoning is therefore based, as is apparent from recitals 265 to 321 of the decision at issue, on the premiss that, in order to allocate the profits correctly in accordance with the separate entity approach and the arm's length principle laid down by that provision, the competent Irish authorities were required to verify whether the profits derived from the use of the Apple Group's IP licences held by ASI and AOE did not,

wholly or in part, have to be attributed to their Irish branches. The failure to verify as required by that provision resulted, according to the Commission, in a lowering of the tax burden for those companies, conferring a selective advantage on them.

90 The Commission reached that conclusion having found in particular that, while there was no proof that the head offices of ASI and AOE were taking any decisions or performing any functions in relation to the Apple Group's IP licences, or that they had the capacity to do so (recitals 281 to 293 of the decision at issue), the Irish branches performed several functions for which the use of those licences was crucial (recitals 294 to 304 of that decision). The Commission recognises in its decision that key functions in relation to the Apple Group's IP were performed by Apple Inc., either as parent company of the Apple Group or under the cost-sharing agreement, but it explains that that is not relevant for the purposes of the allocation of ASI's and AOE's profits among their respective head offices and branches, and relevant only in the light of the reference framework applicable (recitals 308 to 318 of that decision).

91 The General Court rejected that primary line of reasoning for two reasons, which, as is apparent from paragraph 312 of the judgment under appeal, concern (i) the Commission's assessments of normal taxation under the Irish tax law applicable in the present case, to which the first part of the first ground of appeal relates, and (ii) the Commission's assessments of the activities within the Apple Group, to which the second and third parts of the first ground of appeal relate.

92 More specifically, the Court held:

– that, in finding that the Apple Group's IP licences had to be allocated to the branches by default because ASI and AOE had neither employees nor any physical presence outside the Irish branches, the Commission had allocated profits using an 'exclusion' approach, that it had not correctly assessed the activities of those companies in Ireland and that it had based its reasoning on an incorrect assessment of normal taxation under Irish law (paragraphs 166 to 249 of the judgment under appeal);

– that ASI's and AOE's branches in Ireland did not control the Apple Group's IP licences and did not generate the profits which the Commission claimed they achieved (paragraphs 251 to 295 of the judgment under appeal); and

– that the agreements and activities of ASI and AOE outside Ireland showed that those companies were in a position to develop and manage the Apple Group's IP and to generate profits outside Ireland and that those profits were, consequently, not subject to tax in Ireland (paragraphs 296 to 311 of the judgment under appeal).

1. First part of the first ground of appeal

(a) Arguments of the parties

93 By the first part of the first ground of appeal, the Commission submits that on account of the General Court's finding that the Commission had relied on an 'exclusion' approach in its

analysis, the judgment under appeal was vitiated by an error of law, a breach of procedure and a failure to state reasons.

94 First, the Commission argues that, in paragraphs 125, 183 to 187, 228, 242, 243 and 249 of the judgment under appeal, the General Court misinterpreted the decision at issue when it ruled that the Commission's primary line of reasoning concerning the existence of an advantage relied solely on the lack of employees and physical presence in the head offices of ASI and AOE, and that the Commission had not attempted to show that the Irish branches in fact performed functions justifying the allocation to them of profits from the exploitation of the Apple Group's IP licences held by ASI and AOE.

95 The Commission emphasises that, contrary to what is stated by the General Court, the Commission did not rely on an 'exclusion' approach in its analysis in the decision at issue in support of its primary line of reasoning concerning the existence of an advantage. According to the Commission, it follows from the structure and content of that decision that, on the contrary, it clearly examined the actual functions performed both by the head offices and by the Irish branches of ASI and AOE in relation to the Apple Group's IP licences held by those companies in justifying the allocation of profits from the exploitation of those licences to those branches for tax purposes. Paragraphs 255 to 295 of the judgment under appeal confirm that the Commission examined the functions actually performed by those branches in relation to the Apple Group's IP licences. While the General Court may disagree – as it did, moreover, in its second reason for rejecting the Commission's primary line of reasoning – with the Commission's assessment that the functions performed by the Irish branches justified the allocation to them of profits from the exploitation of the Apple Group's IP licences, there is no doubt that the Commission examined those functions in the decision at issue.

96 By ruling that the Commission relied on an 'exclusion' approach in its analysis in order to allocate the Apple Group's IP licences held by ASI and AOE to the Irish branches, the General Court had therefore misinterpreted the decision at issue and, consequently, made an error of law.

97 Secondly, the fact that the General Court failed properly to consider the structure and content of the decision at issue and the explanations given in the Commission's written submissions on the functions performed by the head offices and the Irish branches in relation to those licences is, the Commission claims, a breach of procedure.

98 Thirdly, the General Court's acknowledgement, in paragraphs 268 to 283, 286 and 287 of the judgment under appeal, that the Commission had, in that decision, examined the functions performed by the Irish branches in justifying the attribution of the Apple Group's IP licences to those branches for tax purposes means that its judgment is vitiated by contradictory reasoning and, therefore, by a failure to state reasons.

99 In its reply, the Commission maintains that, contrary to what is asserted by Ireland and by ASI and AOI, the first part of the first ground of appeal, which seeks in particular to show that the General Court misinterpreted the decision at issue, is neither ineffective nor

inadmissible. As regards the merits of that part, the Commission claims that recitals 288 and 289 of that decision, the only recitals to be referred to by the Court, by Ireland and by ASI and AOI to argue that it had relied on an 'exclusion' approach in its analysis, do not form part of the analysis of the Irish branches' activities in recitals 294 to 304 of that decision that led it to allocate the Apple Group's IP licences to those branches. Recitals 288 and 289 were intended to respond to an argument which Apple Inc. put forward during the administrative procedure.

100 Ireland contends that the General Court correctly found that the Commission had relied on an 'exclusion' approach. It is apparent from the decision at issue that the Commission actually found that a non-resident company's profits were to be attributed by default to its Irish branches to the extent that those profits could not be attributed to other parts of that company. The Court not only held that such an approach was fundamentally inconsistent with Irish law, the arm's length principle and the Authorised OECD Approach, it also held that the Commission's factual assertions as to the alleged 'absence of any activities within [ASI and AOE] outside Ireland related to the Apple [Group's] IP licences' were incorrect. In that regard, the Court made detailed factual findings, in paragraphs 251 to 310 of the judgment under appeal, about the branches and ASI's and AOE's decision-making in the United States, and found that the Commission's claims about the actual activities of the Irish branches and the head offices of those companies were inaccurate.

101 Ireland also claims that since the Commission identifies no error of law, the first part of the first ground of appeal is inadmissible and/or unfounded. It is also ineffective. Even if the General Court made an error of law, it follows from its factual findings concerning the Irish branches that the worldwide profits linked to the Apple Group's IP licences could not be attributed to those branches; therefore such an error of law would have no bearing on the merits of the judgment under appeal.

102 ASI and AOI contend that the first part of the first ground of appeal must be rejected as inadmissible as regards the alleged misinterpretation of the decision at issue, and, in any event, as unfounded in its entirety.

103 In their submission, the General Court did not err in finding that the Commission had relied on an 'exclusion' approach in its analysis to establish an advantage. The Court was correct to find that the Commission had in large part based its analysis on the fact that profits of ASI and AOE 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 [the Apple Group's IP] licences' (paragraphs 39 and 183 of the judgment under appeal). That finding reflected the Commission's line of reasoning set out in recital 289 of the decision at issue that relevant functions and risks 'could only have been performed and assumed by the Irish branches, rather than by the head offices', because the head offices had no employees. Furthermore, the Commission was seeking to distort the meaning of the judgment under appeal, since the Court had expressly recognised that the decision at issue was not limited to the 'exclusion' approach. Moreover, the judgment under appeal was not vitiated by a breach of procedure because the Court fully examined the Commission's

arguments on the Irish branch activities and head office activities outside Ireland. Furthermore, the General Court set out detailed reasons for rejecting the Commission's arguments, which enabled the parties to understand the reasons for its judgment, and the Court of Justice to exercise its power of review. In any event, the Commission's arguments amounted to a challenge of the General Court's findings of fact and, as such, should be declared inadmissible.

104 The Grand Duchy of Luxembourg submits that the General Court correctly concluded that the Commission's allocation of profits did not accord with Irish tax rules. It observes that the Commission does not dispute, in its appeal, the Court's interpretation of section 25 of the TCA 97, but seeks to apply the same 'exclusion' approach as that which underlay the decision at issue.

105 The EFTA Surveillance Authority, lastly, argues that the Commission did not rely on an 'exclusion' approach in its assessment to allocate the Apple Group's IP licences, but examined in detail the functions performed, the assets used and the risks assumed by ASI's and AOE's head offices and by their Irish branches in relation to those licences. The General Court's finding that the Commission had relied on an 'exclusion' approach in its analysis in the decision at issue to allocate to those branches profits from the exploitation of the Apple Group's IP licences was consequently based on a misinterpretation of that decision, which constituted an error of law.

(b) Findings of the Court

106 The first part of the Commission's first ground of appeal is directed against paragraphs 125, 183 to 187, 228, 242, 243 and 249 of the judgment under appeal, by which the General Court held that, by allocating profits generated by the exploitation of IP licences, for tax purposes, to the Irish branches on the ground that the head offices of ASI and AOE had no employees or physical presence to ensure their control and management, the Commission had allocated profits using an 'exclusion' approach which was inconsistent with section 25 of the TCA 97, the arm's length principle and the Authorised OECD Approach. The Commission raises, in that regard, three complaints alleging, in essence, that the General Court misinterpreted the decision at issue, that it committed a breach of procedure and that the judgment under appeal was vitiated by contradictory reasoning.

107 It is appropriate, at the outset, to decide whether the first part of the Commission's first ground of appeal is admissible and effective, which Ireland and ASI and AOI dispute.

(1) Admissibility and effectiveness of the Commission's arguments

108 In the first place, so far as concerns the admissibility of the Commission's arguments, Ireland and ASI and AOI contend that the first part of the first ground of appeal must be rejected as inadmissible, as regards the alleged misinterpretation of the decision at issue. They claim, in essence, that any error in the interpretation of the decision at issue cannot be treated in the same way as an error of law that is capable of being challenged before the Court

of Justice. The Commission's arguments could be declared admissible only if it were established that the General Court had distorted the content of that decision.

109 That plea of inadmissibility cannot be upheld.

110 It should be noted that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is to be limited to points of law. The General Court has exclusive jurisdiction to find and appraise the relevant facts. Save where those facts have been distorted, their appraisal does not, therefore, constitute a point of law which is subject as such to review by the Court of Justice on appeal (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 29, and of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 71).

111 As it is, by claiming that the General Court wrongly found that the Commission had, in the decision at issue, followed an 'exclusion' approach that is not consistent with the functional analysis required under Irish law, and in particular section 25 of the TCA 97, the Commission seeks to call into question the Court's understanding of the reasoning set out in that decision and, ultimately, of the legal test for identifying whether there is an advantage for the purposes of Article 107(1) TFEU for the benefit of the Apple Group companies.

112 Such a question constitutes a point of law that may be subject to review by the Court of Justice in an appeal (see, to that effect, judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 47 and the case-law cited).

113 In the second place, as to whether the line of argument put forward in support of this part is effective, Ireland is wrong to argue that even if the General Court made the error of law to which this part relates, it follows from the factual findings, set out in the judgment under appeal, in relation to the activities of the Irish branches that the worldwide profits generated by the Apple Group's IP licences could not be attributed to those branches.

114 In that regard, it is, admittedly, well established that a ground of appeal directed against the reasoning of a judgment under appeal which has no effect on the operative part of that judgment is ineffective and must, therefore, be rejected (see, to that effect, judgments of 12 July 2001, *Commission and France* v *TF1*, C-302/99 P and C-308/99 P, EU:C:2001:408, paragraphs 26 to 29, and of 20 December 2017, *EUIPO* v *European Dynamics Luxembourg and Others*, C-677/15 P, EU:C:2017:998, paragraphs 49 and 50).

115 As the Advocate General noted, in essence, in point 22 of his Opinion, in so far as the General Court relied, with regard to the Commission's primary line of reasoning, on the two grounds referred to in paragraph 91 of the present judgment, it was for the Commission to put forward, in support of its appeal, complaints in relation to those two grounds. Accordingly, the fact that the complaints developed in the context of each of the parts of the first ground of appeal, considered separately, are not in themselves sufficient, if upheld, to have the

judgment under appeal set aside cannot lead to a finding that they are ineffective, since they must be taken into consideration in the context of the first ground of appeal as a whole.

116 The argument alleging that the first part of the first ground of appeal is ineffective must therefore be rejected and, consequently, the substance of that first part must be examined.

(2) Substance

(i) First complaint, alleging that the decision at issue was misinterpreted

117 The Commission submits that, in paragraphs 125, 183 to 187, 228, 242, 243 and 249 of the judgment under appeal, the General Court misinterpreted the decision at issue when it found that the Commission's primary line of reasoning in relation to the existence of an advantage relied solely on the lack of employees and physical presence in the head offices of ASI and AOE, and that the Commission had not attempted to show that the Irish branches of those companies in fact performed functions justifying the allocation to them of profits generated by the exploitation of the Apple Group's IP licences held by those companies. The Court had therefore incorrectly inferred from the decision at issue that the Commission had allocated profits using an 'exclusion' approach.

118 It must be noted that the Commission does not dispute, by its appeal, the Court's findings in paragraphs 180 to 182, 184, 209, 227 and 242 of the judgment under appeal, according to which the Commission was required to carry out a functional analysis in order to identify the Irish branches' 'actual' activities related to the Apple Group's IP licences when allocating profits generated by the exploitation of those licences to ASI and to AOE, instead of presuming that those activities existed by relying on the lack of employees and physical presence in the head offices of ASI and AOE. As the Commission stated in its reply, it does not therefore intend to contest the fact that the 'exclusion' approach is indeed contrary to Irish tax law, and in particular to section 25 of the TCA 97.

119 According to the Commission, however, it did not at all follow an 'exclusion' approach in its reasoning when it found that the profits generated by the exploitation of the IP licences should have been allocated, for tax purposes, to the Irish branches on the ground that the head offices of ASI and AOE had neither employees nor physical presence outside those branches to ensure the control and management of those licences.

120 In the present case, it follows, first, from the decision at issue that the Commission's reasoning is based on the premiss that the application of section 25 of the TCA 97 required the prior determination of a profit allocation method, which is not defined in that provision, and, moreover, that that method had to lead to an outcome consistent with the arm's length principle. That premiss was not called into question by the General Court which, however, emphasised, in accordance with the findings in the judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P and C-898/19 P, EU:C:2022:859, paragraphs 96 to 105), that, contrary to the Commission's position, Article 107(1) TFEU does

not lead to an obligation for the Member States to apply that principle, irrespective of the content of the national tax law applicable to the taxation of the companies in question.

121 In paragraph 221 of the judgment under appeal, the General Court clearly rejected the Commission's contention that there was a freestanding obligation to apply the arm's length principle arising from Article 107(1) TFEU obliging Member States to apply that principle horizontally and in all areas of their national tax law.

122 The General Court added, in paragraph 224 of the judgment under appeal, that 'normal' taxation is to be determined according to the national tax rules and that those rules must be used as a reference point when establishing the very existence of an advantage. It nevertheless made clear 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 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 such branches, which 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.

123 The application of the arm's length principle in the present case is based, therefore, as the General Court recognised in paragraphs 210, 211, 218 to 220 and 247 of the judgment under appeal, on Irish tax rules on the taxation of companies and, accordingly, on the reference system identified by the Commission and confirmed by the Court. In that regard, the Court explicitly acknowledged, in paragraph 239 of the judgment under appeal, that, contrary to Ireland's contention, the application of section 25 of the TCA 97, as described by Ireland, corresponded in essence to the functional and factual analysis conducted as part of the first step of the Authorised OECD Approach, the aim of that first step being to identify the assets, functions and risks that must be allocated to a company's permanent establishment.

124 Those findings of the General Court caused it in particular to rule, in paragraphs 247 and 248 of the judgment under appeal, that the Commission had not erred 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 of ASI and AOE 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, and when it relied, in essence, on the Authorised OECD Approach for the purposes of applying that provision, while taking into account the allocation of assets, functions and risks between those branches and the other parts of those companies. Those findings must be taken as read, in so far as they have not been validly called into question by the other parties in the context of the present appeal.

125 Secondly, it should be noted that the Commission found, with regard to the profit allocation method based on the arm's length principle which, in its view, the Irish tax authorities should have followed under section 25 of the TCA 97, that the profits to be

allocated to the branch of a non-resident company pursuant to that section are 'the profits that that branch would have earned at arm's length, in particular in its dealings with the other parts of the company, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the assets used, the functions performed and the risks assumed by the company through its branch and through the other parts of the company' (recital 272 of the decision at issue). Therefore, according to the Commission, it was incumbent in this instance on the Irish authorities, before approving the profit allocation method proposed by Apple Inc., to verify whether, as Apple Inc. claimed, the IP licences and related profits had to be allocated outside Ireland. In order to do so, they should have compared the functions performed, the assets used and the risks assumed by ASI and AOE through their head offices and their Irish branches (recital 273 of the decision at issue).

126 Thirdly, the Commission analysed, in turn, the relevance and the reality of the functions performed by the head offices of ASI and AOE (recitals 276 to 294 of the decision at issue), by the branches of ASI and AOE (recitals 295 to 304 of that decision) and by Apple Inc. (recitals 308 to 318 of that decision). In particular, it concluded that an allocation outside Ireland of profits generated by the IP licences held by ASI and AOE would not have been agreed to by the Irish branches of those companies if they had been separate and standalone companies acting under normal market conditions and, moreover, that, given the lack of functions performed by the head offices and/or given the activities carried out by those branches, those IP licences should have been allocated to the Irish branches for tax purposes (recital 305 of the decision at issue).

127 Fourthly, the Commission concluded from its examination as a whole that, having regard to the method used by the Irish tax authorities for allocating the IP licences and the related profits, the contested tax rulings had resulted in a significant reduction of ASI's and AOE's annual taxable profit in Ireland and had, therefore, granted those companies a selective advantage for the purposes of Article 107(1) TFEU (recitals 320 and 321 of the decision at issue).

128 It thus follows from the steps in the reasoning set out in the decision at issue that the Commission first of all found that, in order to determine, in accordance with section 25 of the TCA 97, ASI's and AOE's taxable profit in Ireland under the arm's length principle, it was appropriate to compare the functions performed, respectively, by the head offices and by the Irish branches of those companies in relation to the IP licences. Next, in applying that test, it carried out a separate examination of the role assumed by each of those head offices and each of those branches in relation to those licences. Following that examination, it found, on the one hand, an absence of functions in relation to the IP licences in the case of the head offices and, on the other, particularly in recitals 296 to 303 of the decision at issue, an active role by the Irish branches resulting from the assumption of a series of functions and risks associated with the management and use of those licences. Furthermore, the finding of the absence of 'active or critical' functions performed by the head offices is based on the lack of

evidence to the contrary from Apple Inc., in conjunction with the finding that those head offices lacked the actual capacity to perform those functions. Thus, the Commission's primary line of reasoning is based not only on the lack of functions performed by the head offices in relation to the IP licences, but also on the analysis of functions actually performed by the branches in relation to those licences.

129 Therefore, as the Advocate General noted, in essence, in point 29 of his Opinion, it was not the finding that the head offices had neither employees nor physical presence outside the Irish branches that led the Commission to conclude that the IP licences and related profits had to be allocated to those branches. The Commission drew that conclusion after linking two separate findings, that is to say, first, the absence of active or critical functions performed and risks assumed by the head offices and, secondly, the multiplicity and centrality of the functions performed and risks assumed by those branches, applying the legal test set out in recital 272 of the decision at issue.

130 The finding in paragraph 186 of the judgment under appeal that, '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', is thus a distortion of the content of the decision at issue.

131 On the basis of all the foregoing considerations, the General Court erred in law when it found, by misinterpreting the decision at issue, that the Commission had confined itself to an 'exclusion' approach in its primary line of reasoning.

132 It follows that the first complaint in the first part of the first ground of appeal must be upheld.

(ii) Second and third complaints

133 In view of the fact that the first complaint in the first part of the first ground of appeal has been upheld, there is no need to examine the other complaints in that part, which are directed against the same finding of the General Court.

2. Second part of the first ground of appeal

(a) Arguments of the parties

134 By the second part of its first ground of appeal, the Commission submits that the General Court's implicit acceptance, in paragraphs 255 to 302 of the judgment under appeal, that the functions performed by Apple Inc. had to be taken into account for the purpose of determining ASI's and AOE's chargeable profit in Ireland caused that judgment to be vitiated by breaches of procedure, a failure to state reasons, errors of law and a distortion of the national law applicable.

135 First, those paragraphs are, according to the Commission, vitiated by a breach of procedure and an infringement of the obligation to state reasons. The Commission states that

it explained, in recitals 308 to 318 of the decision at issue and in its pleadings at first instance, why the functions performed by Apple Inc. in relation to the Apple Group's IP were irrelevant when assessing the contested tax rulings, whether the functions were performed 'for the benefit' or 'on behalf' of ASI and AOE. The fact that the General Court invoked functions performed by Apple Inc. when rejecting the Commission's primary line of reasoning, without taking those explanations into account or addressing the question whether Apple Inc.'s employees could be considered to perform functions 'on behalf' of ASI and AOE for the purposes of attributing profit, constitutes a breach of procedure and a failure to state reasons. Lastly, by invoking Apple Inc.'s functions, the Court contradicted the legal test which it approved, for the application of section 25 of the TCA 97, in paragraphs 240 and 248 of the judgment under appeal in which it referred to the functions performed, assets used and risks assumed by the branches and by the companies to which they belong, without mentioning functions performed by Apple Inc. That contradiction constitutes a failure to state reasons.

136 Secondly, the Commission claims that, in paragraphs 267, 269, 273 to 275, 277, 281, 283 and 298 to 302 of the judgment under appeal, the General Court, by invoking functions performed by Apple Inc. when rejecting the allocation to the Irish branches of the Apple Group's IP licences held by ASI and AOE, disregarded the separate entity approach and the arm's length principle. Consequently, it misqualified the facts set out in paragraphs 251 to 311 of that judgment when it ruled that the Commission had failed to demonstrate, in the decision at issue, the existence of an advantage under Article 107(1) TFEU.

137 That error of law consists, in the first place, in a misinterpretation of Article 107(1) TFEU and in a distortion of national law. First, since Apple Inc. does not hold the Apple Group's IP licences, the functions it performs in relation to that IP cannot determine the allocation of those licences to the head offices of ASI and AOE or to their branches. Next, it follows from the separate entity approach and the arm's length principle that Apple Inc., on the one hand, and ASI and AOE, on the other, should be treated as separate entities for tax purposes, and that their commercial and financial relations, which are governed by intra-group transactions, should be priced at arm's length. When attributing profits of ASI and AOE between their respective head offices and branches, all that matters are the functions performed by those head offices and branches. The functions in relation to the Apple Group's IP performed by Apple Inc. 'for the benefit' or 'on behalf' of ASI and AOE could not therefore, as a general rule, be attributed to the head offices or to the branches of those companies. Lastly, according to the Commission, while group policies may form the basis for intra-group transactions between associated companies of a multinational corporate group, they cannot be taken into account for profit attribution to a permanent establishment of a non-resident company belonging to that group, as explained in recital 317 of the decision at issue and in the Commission's pleadings at first instance.

138 In the second place, it is claimed that, by incorrectly invoking functions performed by Apple Inc. when rejecting the Commission's decision, in accordance with the separate entity approach, the arm's length principle and the Apple Group structure, to allocate the Apple

Group's IP licences held by ASI and AOE to their Irish branches, the General Court disregarded that approach and that principle. In so doing, it misapplied the notion of advantage in Article 107(1) TFEU and/or distorted national law in paragraphs 255 to 302 of the judgment under appeal.

139 As regards, first of all, quality control, R & D facilities management and business risk management, mentioned in paragraphs 259 to 267 and 288 of the judgment under appeal, the Commission's view is that all the functions and all the risks on which the General Court relied when rejecting its primary line of reasoning concerning the existence of an advantage were assumed by Apple Inc. either as the parent company of the Apple Group under group policies, or 'for the benefit' of ASI and AOE under the cost-sharing agreement. As the Commission explained in recitals 308 to 318 of the decision at issue, those functions and those risks are irrelevant for the allocation of ASI's and AOE's profits between their respective head offices and branches.

140 Next, the Commission argues that, in paragraphs 268 to 284 of the judgment under appeal, the General Court improperly invoked functions performed by Apple Inc. when examining each of the functions which the Commission had identified in the decision at issue as having been performed by ASI's Irish branch. In fact, the policies and strategies designed and developed by Apple Inc. played no role in the allocation of ASI's profit between its head office and its branch.

141 In addition, as regards the functions performed by AOE's Irish branch, which the General Court addressed in paragraphs 285 to 295 of the judgment under appeal, the Court was wrong, according to the Commission, to find that they did not justify the Commission's allocation of the Apple Group's IP licences to that branch.

142 Lastly, as to the examples of strategic decisions within the Apple Group, invoked in paragraphs 298 to 302 of the judgment under appeal, they are irrelevant for the purposes of allocating ASI's and AOE's profits between their respective head offices and branches. As regards, in particular, the alleged evidence of contracts that 'were negotiated and signed by the parent company, Apple', mentioned in paragraph 301 of the judgment under appeal, these were produced not during the administrative procedure, but for the first time before the General Court, in Case T-892/16, and are therefore, in the Commission's submission, inadmissible. So far as concerns the powers of attorney under which Apple Inc. directors allegedly signed those contracts 'on behalf' of ASI, three of them were submitted only at the stage of the reply produced in that case. There was no reason for not submitting those powers of attorney at the stage of the application, and, by relying on them, the Court had committed a breach of procedure. In any event, that evidence was irrelevant for the attribution of ASI's and AOE's profits between their respective head offices and branches.

143 In its reply, the Commission rejects the defendants' claim that the General Court found that only functions performed by the Irish branches were relevant when applying section 25 of

the TCA 97, and therefore did not (need to) invoke functions performed by Apple Inc. to reject its primary line of reasoning in relation to the existence of an advantage.

144 The Commission claims in that regard that, in paragraphs 240, 242, 247 and 248 of the judgment under appeal, the General Court endorsed the legal test set out in recitals 265 to 274 of the decision at issue, based solely on the account taken, for a finding of advantage, of the activities carried out, the assets used and the risks assumed by the head offices and branches of ASI and AOE. Ireland, ASI and AOI and the Grand Duchy of Luxembourg may not agree with the findings set out in those paragraphs, but as those findings have not been challenged in a cross-appeal, they now have the force of *res judicata* (judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 110). The Commission notes, lastly, that, contrary to what is contended by Ireland, ASI, AOI and the Grand Duchy of Luxembourg, the General Court actually applied a different test from that which it endorsed, relying on a comparison between the functions performed by the Irish branches of ASI and AOE, on the one hand, and those performed by Apple Inc., on the other.

145 Ireland contends that the Commission's claims concerning functions 'performed by Apple [Inc.]' are inadmissible, ineffective and, in any event, unfounded.

146 First, Ireland maintains that those claims misrepresent the judgment under appeal. It argues that, contrary to what the Commission claims, the rejection, in the judgment under appeal, of the primary line of reasoning is based not on the alleged 'functions performed by Apple [Inc.]', which are irrelevant to the assessment of the activities of the Irish branches, but on the actual activities of those branches and on the fact that the Commission had provided no evidence that those branches had actually performed the key functions and managed the risks related to the Apple Group's IP. The General Court had, in response to claims made by the Commission, found that all the strategic decision-making in relation to the Apple Group's IP in fact occurred in the United States and that ASI's and AOE's directors in fact had the ability to perform, and had performed, essential functions of those companies.

147 Secondly, according to Ireland it cannot be claimed that the General Court committed a breach of procedure or failed to state reasons. The Court, which was not required to respond to every point made before it, did address the Commission's arguments as to the role of Apple Inc.'s employees. As to the evidence about signing contracts, the admissibility of which is contested by the Commission, Ireland submits that this was only part of the evidence relied on by the Court to support its finding in paragraph 302 of the judgment under appeal. In any event, contrary to the Commission's claim, an action for annulment cannot be based on information not provided during the administrative procedure, if that information was available at the time and should have been considered by the Commission (judgments of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71, and of 22 May 2019, *Real Madrid Club de Fútbol* v *Commission*, T-791/16, EU:T:2019:346, paragraph 118).

148 Thirdly, Ireland submits that the Commission's claims of infringement and misapplication of Article 107 TFEU and of distortion of national law are in reality a direct challenge to the General Court's factual findings. In particular, the Commission did not put forward any arguments or evidence in support of the assertion that the Court had distorted Irish law. That assertion is therefore, for that reason, inadmissible. Nor did the Commission explain on what grounds the judgment under appeal infringes Article 107(1) TFEU, because of an infringement or disregarding of the separate entity approach or of the arm's length principle.

149 In any event, the Commission's arguments are, it is claimed, ineffective. Ireland maintains that the facts found by the General Court show that it follows from the application of the Authorised OECD Approach invoked by the Commission that the profits on which tax was actually paid by ASI and AOE were in line with the arm's length principle. Even if the General Court had made legal errors and breached Article 107 TFEU or distorted national law, *quod non*, that could not alter those findings of fact which the Commission cannot challenge if there has been no distortion of the evidence.

150 ASI and AOI contend that the second part of the first ground of appeal must be rejected as inadmissible and, in any event, as unfounded and/or ineffective.

151 As a preliminary point, they argue that the fundamental flaw in the Commission's approach is that its assessment of the activities of ASI and AOE in Ireland is erroneous. In their submission, the General Court considered the extensive evidence and – rightly – concluded that the functions and activities undertaken by the Irish branches meant that the level of taxation of those companies in Ireland was correct under national tax law. As such, none of the arguments made by the Commission provide a basis for overturning the judgment under appeal.

152 First, according to ASI and AOI, the Commission is wrong to claim that the General Court infringed Article 107 TFEU and distorted national law. The Commission misrepresented the judgment under appeal and sought, in reality, to challenge the Court's factual findings. Yet the Commission did not indicate which specific evidence the Court had distorted and in what way.

153 Secondly, in their submission, the Commission is wrong to argue that the judgment under appeal is vitiated by a breach of procedure and failure to state reasons, in that the General Court failed to respond to its arguments concerning 'functions performed by Apple [Inc.]' and the employees of Apple Inc. acting for and on behalf of ASI and AOE. In fact, the General Court had, by a sufficient statement of reasons which enabled the parties to understand the reasons for its decision and the Court of Justice to exercise its power of review at the appeal stage, examined and rejected those arguments.

154 Thirdly, ASI and AOI submit that it cannot properly be claimed that the General Court relied on inadmissible evidence. In the first place, the Commission wrongly contends that the Court relied on evidence relating to the activities of ASI and AOE outside Ireland which was

produced for the first time in the application lodged in Case T-892/16. In any event, the Court was required to take into account all information which was relevant and which could have been obtained by the Commission during the administrative procedure (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71). In the second place, the Commission also wrongly argued that certain powers of attorney granted by ASI and AOE were inadmissible. Those companies had in fact informed the Commission of the significance of powers of attorney during the administrative procedure, including by providing it with the minutes of the board meetings. ASI and AOI argue that they were therefore entitled to include that evidence with their application and that the Court was correct to admit and consider it, even if the Court ultimately relied on facts and evidence available in the Commission's case file as a basis for its judgment. ASI and AOI also maintain that the Commission's complaint is in any event ineffective, in so far as the powers of attorney, which relate to the functions of those companies outside Ireland, cannot affect the Court's finding that the Commission erred in its assessment of activities of those companies in Ireland.

155 The Grand Duchy of Luxembourg states that it intends only to respond to certain points which are raised by the Commission in its appeal and which concern cross-cutting issues, particularly the primary line of reasoning relating to the existence of an advantage and the principles and standard of proof that are relevant when examining the contested tax rulings. By contrast, it does not address the Commission's arguments as to the division of functions between the various Apple Group entities. In that regard, the Grand Duchy of Luxembourg simply observes that these are exclusively questions of fact which cannot, according to settled case-law, be addressed in an appeal.

156 On the substance, the Grand Duchy of Luxembourg submits, first, that the Commission cannot rely on fundamental tax principles, in particular the arm's length principle and the separate entity approach, which the Commission defines autonomously and without regard to the national rules of taxation. The General Court had, in particular, correctly observed that the very existence of an advantage may be established only when compared to 'normal' taxation (paragraph 223 of the judgment under appeal) and thus that it was Irish tax law alone that the Commission should have used for its comparison to verify whether the contested tax rulings had created an advantage (paragraph 234 of the judgment under appeal). Secondly, the Commission completely ignores the first section of the judgment under appeal, in which it is unequivocally concluded that the Commission misapplied Irish tax law, and makes no comment on the conclusive findings of the Court as regards the interpretation of that law, in particular section 25 of the TCA 97 which concerns the taxation of companies not resident in Ireland. Thirdly, the Grand Duchy of Luxembourg claims that, while it is not necessary for the Court to take the functions of Apple Inc. into account in order to annul the decision at issue, it was correct and relevant to do so in order to confirm that the Irish branches had not 'actually' performed all functions relating to the Apple Group's IP.

157 The EFTA Surveillance Authority, lastly, endorses the Commission's position. It maintains that, to comply with the separate entity approach and the arm's length principle, the Irish tax authority, when applying section 25 of the TCA 97, should have assessed the functions performed by the Irish branches of ASI and AOE relative to the functions performed by their head offices in relation to the Apple Group's IP licences held by those companies. This was confirmed by the General Court, in paragraph 248 of the judgment under appeal, when it stated 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'. The Court had not, however, applied that test when it rejected the Commission's primary line of reasoning, in paragraphs 251 to 302 of the judgment under appeal.

(b) Findings of the Court

158 In essence, the second part of the first ground of appeal is directed against paragraphs 251 to 311 of the judgment under appeal, in which the General Court examined the Commission's assessments relating to the activities within the Apple Group, analysing in turn the activities of ASI's Irish branch (paragraphs 255 to 284 of the judgment under appeal), the activities of AOE's Irish branch (paragraphs 285 to 295 of that judgment) and the activities outside those branches (paragraphs 296 to 309 of that judgment).

159 The Commission submits, in that regard, that, in so far as Apple Inc. is an entity separate from ASI and AOE, the functions which it performed in respect of the IP of the Apple Group in its capacity as parent company of the group or under intra-group agreements, whether 'for the benefit' of the group as a whole or specifically of ASI and AOE, or 'on behalf of' the latter companies, have no bearing on the division of profits from the exploitation of the Apple Group's IP licences held by those two companies for the procurement, manufacture, sale and distribution of the Apple Group's products outside North and South America.

160 The Commission relies on two complaints in that context. The first complaint is that the General Court committed a breach of procedure and adopted insufficient and contradictory reasoning. The second complaint concerns an infringement of Article 107(1) TFEU, a distortion of Irish law and a breach of procedure because evidence that was inadmissible was taken into account.

161 On the basis of largely overlapping arguments, Ireland, ASI and AOI, as well as the Grand Duchy of Luxembourg, submit that the complaints raised by the Commission are inadmissible in part, ineffective and, in any event, unfounded.

162 It is appropriate to consider, in the first place, the second complaint put forward by the Commission.

(1) Second complaint, alleging infringement of Article 107(1) TFEU, distortion of Irish law and breach of procedure

163 The Commission submits that, by relying on functions performed by Apple Inc., the General Court disregarded the separate entity approach and the arm's length principle on which section 25 of the TCA 97 is based. Since, in accordance with the case-law, an error in the interpretation or application of national law constitutes an error in the interpretation and application of Article 107(1) TFEU, the Court also disregarded that provision. More specifically, according to the Commission, the Court correctly interpreted Irish law by stating, in paragraph 248 of the judgment under appeal, 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, in paragraphs 255 to 302 of that judgment, it applied a different and incorrect 'legal test', by comparing the functions performed by the Irish branches of ASI and AOE to those performed by Apple Inc. rather than to those performed by the head offices of those two companies in Ireland.

164 The Commission also invokes a breach of procedure in that the General Court allegedly relied on inadmissible evidence.

(i) Admissibility

165 The admissibility of the present complaint has been challenged in two respects.

166 First, Ireland, ASI and AOI and the Grand Duchy of Luxembourg submit that that complaint is inadmissible in so far as it seeks to challenge the General Court's assessment of the facts and evidence.

167 That argument cannot succeed.

168 In an appeal, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the evidence adduced before the General Court has been distorted, that assessment therefore does not constitute a point of law which is subject to review by the Court of Justice (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 30 and the case-law cited).

169 The jurisdiction of the Court of Justice to review the findings of fact by the General Court therefore extends, inter alia, to the substantive inaccuracy of those findings as apparent from the documents in the file, distortion of the evidence, the legal characterisation of the evidence, and whether the rules relating to the burden of proof and the taking of evidence have been observed (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 31 and the case-law cited).

170 In this instance, the Commission submits that, by taking into account the functions of Apple Inc., the General Court made an error that vitiates the factual analysis which it carried

out in paragraphs 251 to 311 of the judgment under appeal and the results of that analysis, giving rise to a misapplication of national law and an infringement of Article 107(1) TFEU. As it is, by its second complaint in support of the second part of the first ground of appeal, the Commission seeks in essence to call into question the test underpinning the Court's analysis, which, it claims, disregards the relevant reference framework, and criticises the Court's characterisation of the facts on that basis. The Commission's arguments cannot therefore be rejected as inadmissible.

171 Secondly, Ireland and ASI and AOI also submit that the present complaint is inadmissible as it seeks to challenge the General Court's findings on Irish law, without relying on a distortion of that law. In particular, Ireland submits that the Commission relies on a misinterpretation of the case-law resulting from the judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505), when it states, in essence, that any error in the interpretation and application of national law constitutes an error in the interpretation and application of Article 107(1) TFEU.

172 This line of argument cannot be accepted either.

173 In that regard, it must be borne in mind that the jurisdiction of the Court of Justice ruling on an appeal against a decision given by the General Court is defined by the second subparagraph of Article 256(1) TFEU. That provision states that an appeal is to be on points of law only and that it must be made 'under the conditions and within the limits laid down by the Statute'. In a list setting out the grounds that may be relied upon in that context, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union states that an appeal may be based on infringement of EU law by the General Court (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 76 and the case-law cited).

174 It is true that, in principle, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted. The Court of Justice cannot, however, be deprived of the possibility of reviewing whether such assessments themselves constitute an infringement of EU law (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 77 and the case-law cited).

175 The question whether the General Court adequately defined the relevant reference framework and, by extension, correctly interpreted the constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal. The arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 78 and the case-law cited).

176 To concede that the Court of Justice is not in a position to determine whether the General Court made no error of law when it endorsed the definition of the relevant reference framework, the interpretation thereof and the application thereof as the decisive parameter for the purpose of examining whether there was a selective advantage would be tantamount to accepting that the General Court may have infringed a provision of primary EU law, namely Article 107(1) TFEU, without any possibility of that infringement being found in an appeal, which would contravene the second subparagraph of Article 256(1) TFEU (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 79 and the case-law cited).

177 In this instance, the Commission argues that, while the General Court correctly identified, in paragraph 248 of the judgment under appeal, the legal test applicable under Irish law in the context of the primary line of reasoning relating to the existence of an advantage for the purposes of Article 107(1) TFEU, it nevertheless applied a different test, thereby calling into question the choice of reference system against which the existence of a selective advantage must be analysed, as part of the first step identified in paragraph 79 of the present judgment. By its arguments, the Commission seeks more particularly to challenge the Court's assessment of section 25 of the TCA 97. That point is of crucial importance for the analysis to be carried out on the basis of Article 107(1) TFEU, since it affects the definition of 'normal' taxation under Irish law, in the light of which the existence of an advantage within the meaning of that provision is to be assessed.

178 It must therefore be held that by inviting the Court of Justice to review whether the General Court correctly determined the scope of the national law applicable to the taxation of non-resident companies and how it has been applied in the present case, the Commission seeks to challenge what the General Court considered to be the correct reference system for defining normal taxation, for the purposes of the analysis of the existence of a selective advantage under Article 107(1) TFEU.

179 Having regard to all of the above considerations, the grounds of inadmissibility put forward, respectively, by Ireland, by ASI and AOI and by the Grand Duchy of Luxembourg must be rejected.

(ii) Substance

– *Account taken of inadmissible evidence*

180 The Commission claims that the General Court was wrong to refer to the evidence mentioned in paragraph 301 of the judgment under appeal in ruling that contracts with third-party original equipment manufacturers ('OEMs'), which were responsible for manufacturing a large proportion of the products sold by ASI, and contracts with customers such as telecommunications operators had been negotiated by directors of the Apple Group and had been signed by Apple Inc. and by ASI through their respective directors, either directly or by power of attorney.

181 According to the Commission, that evidence, consisting, first, of several email exchanges between Apple Inc. directors concerning contracts with OEMs and telecommunications operators and, secondly, of four powers of attorney granted by ASI to Apple Inc. directors in relation to the signing of contracts with OEMs and those operators, could not be taken into account by the General Court as it had not been produced during the administrative procedure and, as regards the powers of attorney, also because these were submitted only with the reply before the General Court, or were never produced.

182 ASI and AOI do not dispute that that evidence was not produced during the administrative procedure. They claim, however, that the Commission was informed of the activities of ASI's and AOE's US-based directors and of the existence and importance of the powers of attorney in question, and that if the Commission had conducted an appropriate investigation, it could have obtained all the relevant evidence. ASI and AOI also maintain that the Commission's complaint is ineffective, as the powers of attorney concerned do not call into question the General Court's finding in relation to the Commission's assessment of the activities of ASI and AOE in Ireland.

183 In that regard, it is apparent from well-established case-law that the lawfulness of a decision concerning State aid falls to be assessed by the EU judicature in the light of the information available to the Commission on the date when the decision was adopted and which could have been obtained, upon request by the Commission, during the administrative procedure (judgment of 10 November 2022, *Commission* v *Valencia Club de Fútbol*, C-211/20 P, EU:C:2022:862, paragraph 85 and the case-law cited).

184 The Commission cannot be criticised for not having taken into account any matters of fact or of law which could have been submitted to it during the administrative procedure, but which were not, since the Commission is under no obligation to examine, of its own motion and on the basis of prediction, what information might have been submitted to it (see, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 60).

185 In this instance, as regards, in the first place, email exchanges between Apple Inc. directors concerning contracts with OEMs and telecommunications operators, it is apparent from the file in the case before the General Court that, for the most part, those exchanges merely reported on activities carried out by Apple Inc. employees in the context of the cost-sharing agreement and did not contain any implicit or explicit reference to ASI. The documents concerned are therefore unrelated to the subject matter of the administrative procedure, in so far as they related to the activities of an entity separate from ASI and to intra-group relationships unrelated to the subject matter of the contested tax rulings.

186 Accordingly, it cannot be claimed that, assuming it could have envisaged that that evidence existed, the Commission was required to request that it be produced during the administrative procedure. It was, on the contrary, incumbent on ASI and AOE to submit that evidence to the Commission during the administrative procedure, if they were of the view that

it would establish the reality and relevance of the centralised nature of strategic decisions within the Apple Group taken by directors of that group in Cupertino.

187 As regards, in the second place, the powers of attorney relating to the signing of contracts with OEMs and telecommunications operators, it is not disputed that this is evidence on which the General Court relied in paragraph 301 of the judgment under appeal. It is also common ground that the full list of the powers of attorney granted by the directors of ASI and AOE was provided only as an annex to the application at first instance submitted by those companies, that three of those powers of attorney, relating to contracts with OEMs, were produced only at the reply stage, and that the fourth, relating to contracts with telecommunications operators, was never produced. Nor is it disputed that the minutes of meetings of the boards of directors of ASI and AOE submitted during the administrative procedure ('the minutes examined by the Commission') did not mention the powers of attorney relating to the signing of contracts with OEMs, but only that relating to the signing of contracts with telecommunications operators, which, as has been stated, was never produced.

188 As regards the information brought to the Commission's attention during the administrative procedure, it must be noted that, in its observations of 7 September 2015, annexed to ASI and AOE's application before the General Court, the Apple Group refers to the existence of a system of powers of attorney issued by ASI's and AOE's boards of directors for the purpose, inter alia, of negotiating and signing contracts with OEMs and telecommunications operators. Those observations are, however, as the Advocate General indicated in point 50 of his Opinion, limited to a vague and unsubstantiated reference.

189 In those circumstances, the Commission cannot be criticised for not having obtained the powers of attorney in question during the administrative procedure. It is, in particular, necessary to take into account the fact that it had requested and examined all of ASI's and AOE's board minutes during the reference period, which mention those powers of attorney only briefly.

190 Lastly, it must be noted that, contrary to ASI and AOE's contention, the Commission's complaint is not ineffective.

191 It was by relying on the evidence referred to in paragraph 301 of the judgment under appeal, and in particular on certain powers of attorney, that the General Court found, in the subsequent paragraph, that the Commission had 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.

192 It is in the light, in particular, of that assessment that the General Court ruled, in paragraph 310 of that judgment, that the Commission had not shown that the profits from the exploitation of the Apple Group's IP licences should have been allocated to those branches when determining the annual chargeable profits of ASI and AOE in Ireland, and that it ultimately upheld, in paragraph 312 of that judgment, the pleas in law directed against the

Commission's primary line of reasoning alleging that the Irish tax authorities had not granted an advantage to ASI and AOE.

193 Accordingly, the argument that, by taking inadmissible evidence into account in support of its assessment in paragraph 301 of the judgment under appeal, the General Court committed a breach of procedure must be upheld.

– *Legal test applicable under Irish law for the purposes of determining the profits of a non-resident company*

194 While the parties agree that the relevance of functions performed by an entity – in this case by Apple Inc. – that is separate from the non-resident company whose chargeable profit in Ireland is to be assessed must be excluded in the context of the functional analysis required for the purposes of applying section 25 of the TCA 97, the parties' positions diverge as regards the scope and content of the analysis required under Irish law.

195 The Commission submits that the legal test applicable under Irish law for the purposes of determining the profits of a non-resident company that are chargeable in Ireland was correctly identified by the General Court in paragraph 248 of the judgment under appeal, and that that test must take into account the 'allocation of assets, functions and risks between the branch and the other parts of that company'.

196 Ireland, however, submits that the relevant analysis for the application of section 25 of the TCA 97 must cover, as the General Court stated in paragraph 227 of the judgment under appeal and as it confirmed in several other paragraphs of that judgment, the 'actual activities [of the Irish branches of a non-resident company] and the market value' of those activities. For their part, ASI and AOI submit that, in paragraphs 182 to 186 of the judgment under appeal, the Court made it clear that, under Irish law, the profits derived from IP can be attributed to the Irish branch of a non-resident company only if the IP that generates them is controlled by the branch.

197 Ireland and ASI and AOI, which submit that the activities performed by the head offices are entirely irrelevant to the application of section 25 of the TCA 97, contend, in essence, that paragraph 248 of the judgment under appeal, on which the Commission relies, concerns the application of the Authorised OECD Approach, not that of section 25 of the TCA 97, and that, in any event, it is apparent in particular from paragraph 242 of that judgment that that approach does not support the comparative analysis on which the Commission relies, an analysis which is contrary to Irish law.

198 In that regard, it is common ground that the General Court found, notably in paragraph 242 of the judgment under appeal, that both section 25 of the TCA 97 and the arm's length principle and Authorised OECD Approach require, for the purpose of determining the chargeable profits in Ireland of a non-resident company, the use of a 'functional' analysis to identify the activities performed, the assets used and the risks assumed by the branch of that company in Ireland.

199 In that regard, the General Court accepted, in paragraph 240 of the judgment under appeal, that in order to identify the functions actually performed by the Irish branch of a non-resident company for the purposes of applying section 25 of the TCA 97, it was necessary to take into account 'the allocation of assets, functions and risks between the branch and the other parts of that company'. Moreover, it stated, in paragraph 242 of that judgment, that the analysis aimed at identifying 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 could not 'be carried out in an abstract manner that ignores the activities and functions performed within the company as a whole'.

200 Such an interpretation is consistent with the actual wording of section 25 of the TCA 97 which requires, for the purpose of determining the chargeable profits of a non-resident company in Ireland, that the 'trading income arising directly or indirectly through or from the branch … and any income from property or rights used by, or held by or for, the branch …' be identified. It follows in particular from the finding in paragraph 248 of the judgment under appeal that such an interpretation requires, as the Advocate General, in essence, indicated in point 57 of his Opinion, a comparison of the activities performed in relation to those assets by the various parts of that company; such a comparison makes it possible to verify whether the allocation of assets within the non-resident company, accepted by the tax authorities as the basis for determining chargeable profits in Ireland, is consistent with the actual allocation of functions, assets and risks between the various parts of that company.

201 The interpretation advocated by Ireland and by ASI and AOI, according to which it is appropriate, for the purposes of allocating profits generated by the management of IP rights under section 25 of the TCA 97, to take account only of the entity that actually holds those rights, means, ultimately, as regards non-resident companies, systematically allocating the profits generated by the exploitation of those rights to the head offices of those companies. However, in so far as those head offices are, by definition, outside Ireland, such income would as a matter of principle avoid any taxation in that Member State.

202 In that regard, the General Court found that it was necessary to take into account, for the purposes of applying section 25 of the TCA 97, the allocation of assets, functions and risks between the Irish branches and the other parts of ASI and AOE, and did not consider itself bound, under Irish law, to analyse the role that may have been played by Apple Inc.

203 It follows from all of these considerations that the test for determining the profits of a non-resident company held by the General Court to be applicable under section 25 of the TCA 97 requires the allocation of assets, functions and risks between the branch and the other parts of that company to be taken into account, without requiring any account to be taken of the role played by separate entities.

204 It is necessary, therefore, to consider whether, as the Commission maintains, the General Court actually relied on the functions performed by Apple Inc. in relation to the Apple

Group's IP or whether, as Ireland and ASI and AOI submit, the Commission's reasoning distorts the grounds of the judgment under appeal on that point.

– *Account taken by the General Court of Apple Inc.'s functions*

205 In the first place, the Commission submits that the General Court referred to the functions performed by Apple Inc. in paragraphs 259 to 267 and 288 of the judgment under appeal when it examined recitals 289 to 295 of the decision at issue, which attributed to the Irish branches the quality control, R & D facilities management and business risk management functions.

206 In that regard, it follows from paragraphs 260 to 264, 266 and 267 of the judgment under appeal that, in its assessment of the facts, the General Court did in fact take account of the functions and risks assumed by Apple Inc., it being noted that Ireland and ASI and AOE were agreed on the fact that those functions and risks, relating to all of the Apple Group's IP, and to its development and management, were for the most part assumed by Apple Inc. as the parent company of the group or under the cost-sharing agreement, and centralised by Apple Inc. in Cupertino.

207 In the second place, the Commission maintains that the General Court improperly invoked functions performed by Apple Inc. when examining the functions which the Commission had regarded as having been performed by ASI's branch.

208 In paragraphs 268 to 284 of the judgment under appeal, the General Court examined the activities and functions referred to in recitals 296 to 300 of the decision at issue as having actually been performed by that branch. It found that those activities and those functions, whether taken individually or as a whole, did not justify allocating profits from the exploitation of the Apple Group's IP licences to that branch. The activities examined by the General Court included quality control, various R & D activities and management of local marketing costs.

209 In that respect, as regards quality control, it must be noted, as the Commission submits, that the Commission found in the decision at issue that that function was among those listed in the cost-sharing agreement and associated, in that agreement, with Apple Inc. and with ASI and AOE. In those circumstances, when, in paragraph 269 of the judgment under appeal, the General Court mentions ASI and AOE's assertion that 'thousands of people around the world worked in the quality control function, while only one person was employed in that function in Ireland', it is necessarily referring to activities performed by entities that are separate from ASI and AOE and, in particular, to the activities of Apple Inc.

210 As regards paragraphs 273 and 275 of the judgment under appeal, when it states that the R & D functions and the activities involving gathering and analysing regional data performed by employees of ASI's branch are 'support' activities, the General Court once again compares those functions and activities to those performed at worldwide level by entities outside ASI. Lastly, group policies and strategies developed by Apple Inc. are expressly referred to in paragraph 277 of that judgment, where the Court described the after-sales

support and repair service, *AppleCare*, for which that branch was responsible in the EMEIA region, as an '"execution" [service], operating in accordance with the guidance and strategy decided in the United States'. In the same vein, paragraphs 281 and 283 of that judgment contain an overall assessment by the General Court of the 'support' and 'implementing' nature of the activities of that branch.

211 In the third place, the Commission considers that the General Court referred to the activities of Apple Inc. when examining the functions performed by AOE's Irish branch identified in recital 301 of the decision at issue.

212 On that point, it must be noted that, in paragraph 290 of the judgment under appeal, the General Court states, with regard to the specific processes and expertise developed by that branch in the context of its manufacturing activities, that although those competences may benefit from protection through certain IP rights, 'they are limited in scope and are specific to the activities performed by that ... branch', which is insufficient to justify allocating all of the Apple Group's IP licences to that branch. That reference to all of that group's IP licences means, implicitly but definitely, that, as the Commission rightly states, in that paragraph the Court compared the competences developed by the Irish branch of AOE to all of the R & D functions relating to the Apple Group's IP.

213 In the fourth and last place, the Commission submits that, in paragraphs 298 to 302 of the judgment under appeal, the General Court took into account functions performed by Apple Inc. when it examined the activities performed outside the branches of ASI and AOE.

214 In that regard, it is apparent from several passages of the judgment under appeal, and in particular from paragraphs 299 and 300 of that judgment, that the General Court noted Apple Inc.'s functions and its role as parent company of the group, first, when it set out, in general, the 'centralised nature of the strategic decisions within the Apple Group taken by directors in Cupertino' and, secondly, more specifically, with regard to decisions in the field of R & D – which is the functional area behind the Apple Group's IP – when it recalled the fact that 'decisions relating to the development of the products ... and concerning the R & D strategy ... had been taken and implemented by executives of the group based in Cupertino'. Similarly, the Court found that 'the strategies relating to new product launches and, in particular, the organisation of distribution on the European markets ... had been managed at the Apple-Group level by, inter alia, the Executive Team under the direction of the Chief Executive Officer in Cupertino'.

215 As the Advocate General stated in point 67 of his Opinion, it follows from those findings that, in all the paragraphs of the judgment under appeal criticised by the Commission, the General Court relied, explicitly or implicitly, on the functions performed by Apple Inc. in relation to the Apple Group's IP under the cost-sharing agreement or the marketing services agreement or in its capacity as parent company of the group, comparing those functions to those performed by the Irish branches in relation to the IP licences. Consequently, contrary to what is contended by Ireland and by ASI and AOI, the Commission's argument relating to the

account taken by the Court of functions performed by Apple Inc. is based neither on a misreading of the judgment under appeal nor on its distortion.

– *Impact of taking into account the activities and functions performed by Apple Inc. on the legal classification of the facts*

216 Ireland and ASI and AOI submit, in essence, that the Commission's argument that Apple Inc.'s activities were erroneously taken into account is in any event ineffective since, even assuming that the General Court took those activities into consideration, its findings following its examination of the facts are based on an analysis of the activities of the Irish branches and the head offices and on the statement that the functions performed by those branches were 'routine', which, according to the Court, was not sufficient to justify the allocation of the IP licences and related profits to those branches.

217 In that regard, it is apparent from paragraph 310 of the judgment under appeal that the General Court's assessment that the Commission had not succeeded in showing that profits from the exploitation of the IP licences should have been allocated to the Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland is based on the examination of the activities actually carried out by those branches and, moreover, on the 'strategic decisions taken and implemented outside of those branches'.

218 In paragraphs 298 to 309 of the judgment under appeal, the General Court noted, first, the existence of a centralised decision-making system within the Apple Group, with Apple Inc. at its head, including as regards the management and development of the group's IP, and, secondly, the ability of the head offices of ASI and AOE to take, through their respective boards of directors or under a system of delegation of powers to individual board members, 'the company's key decisions …, such as approval of the annual accounts'. However, it did not find that those head offices had participated in the adoption of the strategic decisions taken by Apple Inc., or that they were actually involved in the implementation of those decisions or in the active management of the IP licences. The only finding in that regard, set out in paragraph 307 of the judgment under appeal, according to which ASI and AOE had provided information from which it was apparent that the various versions of the cost-sharing agreement had been signed by members of their respective boards of directors in Cupertino, is disputed by the Commission in the third part of its first ground of appeal, which will be examined below.

219 Thus, in view of the importance, within the scheme of the judgment under appeal, of the examination of the activities and functions of Apple Inc. in relation to the Apple Group's IP, and the close link between that examination and the examination of the activities of ASI's and AOE's branches in Ireland, it cannot be maintained that the argument as to the account taken of those activities and functions by the General Court is ineffective.

220 Having regard to all of those considerations, the Commission rightly argues that, in order to rule that the evidence to support the allocation of profits from the exploitation of the IP licences to the branches of ASI and AOE was insufficient, the General Court wrongly

compared the functions performed by those branches in relation to those licences to the functions performed by Apple Inc. in relation to the Apple Group's IP, rather than to those actually performed by the head offices in connection with those licences. That is particularly apparent from the Court's interim findings at the various stages of its analysis of the facts and, in particular, in paragraphs 266 and 302 of the judgment under appeal, in which it stated, first, that the Commission had not attempted to establish that the management bodies of the Irish branches 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 … the cost-sharing agreement' and, secondly, that, in so far as the strategic decisions concerning the development of the products underlying the Apple Group's IP had been taken in Cupertino on behalf of the group as a whole, the Commission had erred in finding that that IP had necessarily been managed by those branches.

221 It thus follows from the judgment under appeal that the General Court's assessment that the Commission erred in finding that the branches of ASI and AOE performed 'significant people functions' in relation to the Apple Group's IP is based largely on an examination of functions performed at the level of Apple Inc., which the Court itself considered not to be relevant in the present case, according to its interpretation of Irish law.

222 The Commission's argument that functions performed by Apple Inc. were erroneously taken into account is therefore well founded. It follows that the second complaint in the second part of the first ground of appeal must also be upheld.

(2) First complaint, alleging insufficient and contradictory reasoning in the judgment under appeal and a breach of procedure

223 In view of the fact that the second complaint in the second part of the first ground of appeal has been upheld, there is no need to examine the first complaint in that part, which is directed against the same finding of the General Court.

3. Third part of the first ground of appeal

(a) Arguments of the parties

224 By the third part of its first ground of appeal, the Commission claims, in essence, that, in paragraphs 301 and 303 to 309 of the judgment under appeal, the General Court infringed the separate entity approach, the arm's length principle and, consequently, Article 107(1) TFEU and distorted national law by finding that formal acts taken by the directors of ASI and AOE constituted functions performed by their head offices in relation to the Apple Group's IP licences held by those companies. The Court's failure to consider the Commission's explanations in the decision at issue and in its written submissions as to why those acts did not constitute functions performed by the head offices of ASI and AOE for the purposes of the application of the separate entity approach and the arm's length principle is, the Commission argues, a breach of procedure and represents a failure to state reasons. In addition, the

Court's reliance on inadmissible evidence in support of its finding also demonstrates a breach of procedure.

225 In the first place, as regards the claim that the judgment under appeal is vitiated by a breach of procedure and failure to state reasons, the Commission recalls the content of the explanations it provided both in recitals 280 to 294 of the decision at issue and in response to the arguments which Ireland and ASI and AOE, respectively, had put forward in their applications at first instance. In the Commission's submission, it is apparent in particular that the head offices of ASI and AOE could not be regarded as having actually performed any functions in relation to the IP licences held by those two companies. The minutes of the meetings of ASI's and AOE's boards of directors, which constituted the only evidence of decisions taken by their head offices, do not demonstrate that the head offices performed any such functions. By relying, however, on those minutes and requiring the Commission to prove that key decisions of ASI and AOE were not adopted in those meetings, the General Court imposed a standard of proof on the Commission that was impossible to meet. Lastly, by accepting ASI and AOE's argument that granting powers of attorney to Apple Inc. executives to sign contracts with OEMs and telecommunications operators 'on behalf of' ASI and AOE fell within functions performed by the head offices of those companies, when the evidence to support that argument was produced for the first time during the proceedings and was therefore inadmissible, the General Court had committed a breach of procedure.

226 In the second place, the Commission argues that, by finding that formal acts taken by the directors of ASI and AOE constitute functions performed by the head offices of those companies in relation to the Apple Group's IP licences, the General Court infringed the separate entity approach and the arm's length principle, which constitutes an infringement of Article 107(1) TFEU and a distortion of national law.

227 The Commission claims, first, that the attribution of profit to a branch requires a functional analysis, that is to say, an examination of the functions performed, the assets used and the risks assumed by that branch relative to those of the company to which it belongs. It is, in line with the Authorised OECD Approach, a question of identifying the 'significant people functions' of that branch and of the other parts of that company by reference to 'the active decision-making and management rather than … simply saying yes or no to a proposal'. In the present case, the General Court was wrong, in paragraphs 301 and 303 to 309 of the judgment under appeal, to equate formal acts taken by the directors of ASI and AOE to functions performed by the head offices of those companies. If adoption of a power of attorney or signing of agreements could suffice to characterise the performance of a function, it would render meaningless the notion of 'significant people functions' for the purposes of the functional analysis.

228 Secondly, in the Commission's submission, by equating, in paragraphs 301, 306 and 307 of the judgment under appeal, the adoption of powers of attorney, the signing of agreements with OEMs and telecommunications operators under those powers of attorney, and the signing of the cost-sharing agreement with functions performed by the head offices of ASI and

AOE, the General Court disregarded the separate entity approach and the arm's length principle, which constitutes a misapplication of Article 107(1) TFEU and a distortion of national law. The Commission also considers that, by accepting, in paragraph 308 of the judgment under appeal, Ireland's and ASI and AOE's argument that the mere physical presence of a director constitutes a function performed by the head offices, without considering or refuting the Commission's own arguments in that regard, the judgment under appeal was vitiated by the Court's breach of procedure and a failure to state reasons.

229 Ireland contends, in the first place, that the third part of the first ground of appeal should be rejected as ineffective. The Commission's arguments are not in fact capable of calling into question the General Court's main factual finding that the activities of the Irish branches do not justify allocating the Apple Group's IP licences and resulting profits to them. In so far as the decision at issue wrongly asserts that profits from the exploitation of those licences must be attributed to those branches, it should therefore in all events be annulled.

230 In the second place, Ireland claims that the arguments put forward by the Commission are, in any event, unfounded.

231 As regards, first, the minutes of board meetings, Ireland argues that, under the guise of an alleged breach of procedure and failure to state reasons, the Commission seeks in reality to challenge findings of fact in respect of those meetings and the weight given by the General Court to the evidence before it.

232 According to Ireland, the same applies as regards, secondly, functions performed by the head offices of ASI and AOE. The Commission complains that the General Court found that those head offices could have performed functions in relation to the IP licences, essentially contesting factual findings and the weight placed on the evidence by the Court. The Commission failed, however, to identify any error of law by the Court in that regard.

233 ASI and AOI contend that the third part of the first ground of appeal, by which the Commission seeks to reargue the facts, is inadmissible and, in any event, unfounded and ineffective.

234 In the first place, as regards the minutes of board meetings, ASI and AOI claim, first of all, that the Commission misrepresents the evidence by saying that the minutes were the only evidence of decisions taken by ASI and AOE outside Ireland that was provided during the administrative procedure, whereas the General Court relied in particular on other evidence showing that the cost-sharing agreements had, in fact, been signed by directors of those companies based in the United States and that those directors and persons acting on behalf of those companies had negotiated and entered into the agreements with OEMs and telecommunications operators. ASI and AOI go on to argue that the reasoning in paragraph 304 of the judgment under appeal is, in any event, sufficient to enable the Commission to understand the basis for the General Court's decision and the Court of Justice to exercise its power of review. Lastly, ASI and AOI state that the General Court did not impose an impossible standard of proof on the Commission; rather, it found that the Commission

could not limit itself to examining ASI's and AOE's board minutes, when those companies had informed it that the minutes were not a comprehensive account of the US-based directors' activities and had provided it with copious evidence of those activities during the administrative procedure.

235 In the second place, ASI and AOI submit that the negotiation and signing of contracts with OEMs and telecommunications operators, by US-based directors or, under powers of attorney, by Apple Group employees, were 'significant people functions' performed by ASI and AOE outside Ireland. Furthermore, contrary to what is argued by the Commission, the General Court relied on the signing of cost-sharing agreements or the adoption of powers of attorney not to show that the head offices of ASI and AOE were engaged in 'significant people functions', but to find, in paragraphs 303 to 309 of the judgment under appeal, that the Commission had erred when it considered that the management bodies of ASI and AOE, in particular their boards of directors, 'did not have the ability to perform the essential functions' of those companies. There is therefore no contradiction in the judgment under appeal, and no breach of the notion of advantage under Article 107(1) TFEU or distortion of national law.

236 In the third place, the Commission's complaint that the General Court disregarded the separate entity approach and the arm's length principle, and therefore infringed Article 107(1) TFEU and distorted national law, is based on the false premiss that the negotiation and signature of the contracts in question were functions performed by Apple Inc. rather than by individuals acting for and on behalf of ASI.

237 The Grand Duchy of Luxembourg supports the arguments put forward by Ireland, ASI and AOI.

238 The EFTA Surveillance Authority, lastly, endorses the arguments put forward by the Commission. In its submission, formal acts, such as the adoption of a power of attorney or the signing of an agreement, do not constitute functions actually performed by ASI's and AOE's head offices in relation to the Apple Group's IP licences. Such acts are merely the formalisation by directors of ASI and AOE of functions actually performed by Apple Inc., such as the negotiation and signing of commercial contracts with customers such as telecommunications operators or OEMs. Consequently, while the General Court laid down the relevant test, in paragraph 242 of the judgment under appeal, for determining the existence of an advantage, it applied the wrong test when rejecting the Commission's primary line of reasoning, set out in paragraphs 303 to 309 of the judgment under appeal.

(b) Findings of the Court

239 By the third part of its first ground of appeal, directed against paragraphs 301 and 303 to 309 of the judgment under appeal, the Commission disputes specifically the General Court's findings relating to the activities of the head offices of ASI and AOE.

240 In the first place, the Commission maintains that the General Court did not respond to the argument raised before it that the minutes which the Commission had examined were the

only evidence produced by Ireland and by Apple Inc. during the administrative procedure to demonstrate the existence of functions performed by the head offices.

241 In the present case, in paragraph 305 of the judgment under appeal, the General Court considered, in the exercise of its jurisdiction to assess evidence, that, despite their summary nature, the extracts from the minutes examined by the Commission were sufficient to 'allow the reader to understand how the company's key decisions [had been] taken and recorded in [those] minutes'.

242 Such an assessment – which enables the Commission to understand the reasons for the importance attached to those minutes by the General Court, even if those minutes were the only evidence provided during the administrative procedure relating to the functions of the head offices – is not amenable to appeal before the Court of Justice, except in cases of distortion, which the Commission has not invoked.

243 In the second place, the Commission considers that, in paragraph 304 of the judgment under appeal, the General Court imposed on it a burden of proof which was impossible to discharge.

244 In paragraph 304, the General Court ruled that 'the fact that the minutes [examined by the Commission] 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'.

245 As the Advocate General stated, in essence, in point 85 of his Opinion, the reasoning set out in paragraph 304 of the judgment under appeal, were it to be confirmed, would preclude the Commission from being able to rely on the fact that a company's board minutes do not mention certain categories of decision to support its assessment that those decisions do not exist. However, such reasoning does in fact impose an excessive burden of proof on the Commission.

246 In the third place, the Commission challenges paragraph 306 of the judgment under appeal, particularly in so far as the General Court states that 'it is apparent from [the minutes examined] that individual directors were granted very wide managerial powers'. It argues that, although those minutes occasionally recorded the grant of powers of attorney by the boards of directors, the fact remains that only one of those powers of attorney concerned the conclusion of contracts with OEMs and telecommunications operators.

247 In that regard, in so far as the Commission seeks, by that line of argument, to call into question the assessment of the probative value of the entry in the minutes of the power of attorney referred to in the preceding paragraph, it is in principle for the General Court alone to make that assessment (see, to that effect, judgments of 15 June 2000, *Dorsch Consult* v *Council and Commission*, C-237/98 P, EU:C:2000:321, paragraph 50, and of 12 July 2005, *Commission* v *CEVA and Pfizer*, C-198/03 P, EU:C:2005:445, paragraph 50); as the

Advocate General indicated in point 87 of his Opinion, no rule or principle of EU law prohibits the Court from relying on a single piece of evidence to establish the relevant facts.

248 In the fourth place, the Commission challenges the General Court's finding, as set out, more particularly, in paragraphs 301, 306 and 307 of the judgment under appeal, that acts, such as granting powers of attorney for the purposes, in this case, of negotiating, signing or amending agreements, constitute functions actually carried out by the head offices of ASI and AOE in relation to the IP licences. The Commission accepts, in particular, that negotiations to conclude commercial contracts, such as those with OEMs and telecommunications operators, are capable of constituting 'significant people functions' for the purposes of the functional and factual analysis to be carried out on the basis of section 25 of the TCA 97. However, in the present case, those functions would have been performed by employees of Apple Inc. on behalf of the entire Apple Group or for the benefit of ASI and AOE, rather than by the head offices of ASI and AOE. Paragraphs 301, 306 and 307 of the judgment under appeal are, it is claimed, also vitiated by inadequate and contradictory reasoning.

249 The Commission's arguments are based on a misreading of the judgment under appeal.

250 In finding that ASI's and AOE's directors had participated, directly or under a power of attorney, in negotiations with OEMs and telecommunications operators or in the conclusion of commercial contracts or intra-group agreements, the General Court did not intend to confirm that the head offices of those two companies had performed 'significant people functions' in relation to the IP licences; rather, it merely found, in particular in paragraphs 302 and 309 of the judgment under appeal, that the decision at issue had erroneously concluded that the Apple Group's IP was necessarily managed by the branches of those companies, since their head offices did not have the ability to take decisions relating to the management of those licences.

251 In those circumstances, while, as has been noted in paragraphs 193 and 222 of the present judgment, the General Court's reasoning is based on inadmissible evidence and on errors in taking into account functions performed by Apple Inc., the Commission's arguments, summarised in paragraph 248 of the present judgment, cannot be accepted.

252 It follows from all of those considerations that the third part of the first ground of appeal is, for the reason set out in paragraph 245 of the present judgment, well founded in part.

4. Conclusions on the first ground of appeal

253 In the light of all of the above considerations, the first ground of appeal must be upheld.

254 It is apparent from the examination of that ground of appeal, first, that the General Court erred in law by finding, in particular in paragraphs 183 to 187, 228, 242 and 243 of the judgment under appeal, that the Commission had adopted an 'exclusion' approach in its examination of the activities performed, the assets used and the risks assumed by the Irish branches of ASI and AOE for the purposes of applying section 25 of the TCA 97 and, therefore, determining the chargeable profits in Ireland of those non-resident companies. Consequently,

it erred when it held, in paragraph 249 of the judgment under appeal, 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 case.

255 The General Court also committed a breach of procedure by taking inadmissible evidence into account in support of its assessment in paragraph 301 of the judgment under appeal (see paragraph 193 of the present judgment).

256 Secondly, by focusing, in its examination of the Commission's findings with regard to activities within the Apple Group, on the functions and risks assumed by Apple Inc. in relation to IP, instead of concentrating solely on the activities performed by the Irish branches and by the head offices, respectively, of ASI and AOE in relation to the management and exploitation of the IP licences, the General Court proceeded to characterise the facts examined by applying a different legal test from that which the Court had itself considered applicable under section 25 of the TCA 97. That reference framework requires account to be taken of the allocation of assets, functions and risks between the branch and the other parts of the non-resident company and, in accordance with the tax principles applicable under Irish law, precludes the role of separate entities, such as a parent company of the non-resident company, from being taken into consideration (see paragraph 222 of the present judgment).

257 Thirdly, the General Court imposed an excessive burden of proof on the Commission by finding, in paragraph 304 of the judgment under appeal, that the fact that the minutes examined by the Commission do not give details of 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 (see paragraph 245 of the present judgment).

258 In those circumstances, the General Court erred when it ruled 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 case and, moreover, upheld the complaints raised by Ireland and by ASI and AOE regarding the Commission's factual assessments of the activities of the Irish branches of ASI and AOE and of activities outside those branches.

259 In the light of the errors established on examination of the first ground of appeal, the judgment under appeal must be set aside in so far as it upholds the complaints against the primary line of reasoning relating to the existence of a selective advantage, raised by Ireland in the context of the first to third pleas in law in Case T-778/16 and by ASI and AOE in the context of the first to fifth pleas in law in Case T-892/16, annuls the decision at issue, and rules on costs.

VI. The actions before the General Court

260 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court of Justice sets aside the decision of the General Court, it

may either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

261 It is apparent from the applications at first instance that the pleas put forward by Ireland and by ASI and AOE, respectively, sought, in the first place, to challenge the Commission's primary line of reasoning by criticising 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 (third part of the second plea in law in Case T-778/16).

262 In the second place, Ireland and ASI and AOE argued 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 (sixth plea in law in Case T-778/16 and seventh and twelfth pleas in law in Case T-892/16).

263 In the third place, Ireland and ASI and AOE claimed that the recovery ordered by the decision at issue was in breach, in particular, of the principles of legal certainty and the protection of legitimate expectations (seventh plea in law in Case T-778/16 and eleventh plea in law in Case T-892/16).

264 In the fourth place, Ireland and ASI and AOE criticised the Commission for encroaching on the competences of the Member States, invoking, in particular, the principle of fiscal autonomy (eighth plea in law in Case T-778/16 and fourteenth plea in law in Case T-892/16).

265 In the fifth and last place, Ireland and ASI and AOE argued that the decision at issue was inadequately reasoned (ninth plea in law in Case T-778/16 and thirteenth plea in law in Case T-892/16).

266 In the present case, the Court of Justice has the information necessary to rule on all of those pleas. Those pleas were in fact the subject of an exchange of arguments before the General Court and their examination does not require any further measure of organisation of procedure or inquiry to be taken in the case, having regard to the issues which must be resolved in order to bring the dispute to an end.

267 The Court of Justice considers, therefore, that the state of the proceedings is such that it may give final judgment in those actions, and that it should do so within the limits of the matter before it (see, to that effect, judgments of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 108 and the case-law cited, and of 5 March 2024, *Kočner* v *Europol*, C-755/21 P, EU:C:2024:202, paragraph 112).

A. Pleas relating to the assessment of the existence of a selective advantage

268 In the context of challenging the Commission's primary line of reasoning, first, Ireland complained that the Commission had carried out a joint assessment of the concepts of advantage and selectivity (part of the second plea in law in Case T-778/16).

269 Secondly, both Ireland and ASI and AOE complained that the Commission had incorrectly identified the reference framework, inter alia, on the basis of incorrect assessments of normal taxation under 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 plea in law and third plea in law in Case T-778/16 and part of the first plea in law and second plea in law in Case T-892/16), and inappropriately applied the Authorised OECD Approach (part of the second plea in law in Case T-778/16 and fifth plea in law in Case T-892/16).

270 Thirdly, Ireland and ASI and AOE contested the Commission's factual 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).

271 Fourthly, they criticised the findings 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).

1. Joint examination of the conditions of advantage and selectivity

272 Ireland argues, in essence, 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 conditions separately.

273 Since, for the reasons set out in paragraphs 134 to 138 of the judgment under appeal, the General Court rejected Ireland's complaint criticising the joint examination of the conditions of advantage and selectivity, and Ireland did not challenge the merits of that part of the judgment under appeal in the context of a cross-appeal, the setting aside of that judgment by the Court of Justice does not affect that judgment inasmuch as the General Court rejected that complaint (see, to that effect, judgments of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 109, and of 23 November 2021, *Council* v *Hamas*, C-833/19 P, EU:C:2021:950, paragraph 81).

274 Article 178(1) of the Rules of Procedure of the Court of Justice provides that the form of order sought in the cross-appeal is to seek to have set aside, in whole or in part, the decision of the General Court, without limiting the scope of the form of order sought to the decision of the General Court as set out in the operative part of that decision, unlike Article 169(1) of those rules, which relates to the form of order sought in the appeal. It follows that, in the present case, Ireland could have brought a cross-appeal challenging the General Court's rejection of the line of argument put forward at first instance. In the absence of such a cross-appeal, the judgment under appeal has the force of *res judicata* in so far as the General Court rejected that line of argument (see, to that effect, judgments of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 110, and of 23 November 2021, *Council* v *Hamas*, C-833/19 P, EU:C:2021:950, paragraph 82).

275 However, the complaint put forward by Ireland, criticising the joint examination of the conditions of advantage and selectivity, overlaps in part with the complaints directed more specifically against the findings relating to the selective nature of the contested tax rulings, examined in paragraphs 294 to 311 of the present judgment. Those various complaints will, therefore, be addressed together.

2. Identification of the reference framework and the Commission's findings concerning the normal taxation of profits under Irish tax law

276 In the first place, as regards identification of the reference framework, it must, for the same reasons as those set out in paragraphs 273 and 274 of the present judgment, be held that, in so far as the complaints raised by Ireland and by ASI and AOE in relation to the reference framework, as defined in the decision at issue, were rejected in the judgment under appeal on the grounds set out in paragraphs 144 to 162 thereof, and in the absence of a cross-appeal, the judgment under appeal has the force of *res judicata*. It follows that the Court of Justice does not need to rule on those complaints.

277 In the second place, as regards the findings relating to the normal taxation of profits under Irish tax law, it follows, first of all, from the considerations in paragraphs 120 to 130 of the present judgment that it has not been established that the Commission allocated profits using only an 'exclusion' approach, which would be inconsistent with section 25 of the TCA 97, when it found that the Apple Group's IP licences should have been allocated to the Irish branches of ASI and AOE in so far as the head offices of those companies had neither the employees nor the physical presence necessary to manage those licences. It cannot therefore reasonably be argued that the Commission did not attempt to show that the Irish branches of ASI and AOE had in fact performed activities in connection with the Apple Group's IP licences justifying the allocation to those branches, by the Irish tax authorities, of the Apple Group's IP licences held by ASI and by AOE, and consequently, under section 25 of the TCA 97, all of ASI's and AOE's trading income being regarded as arising from the activities of those branches.

278 Next, Ireland and ASI and AOE claimed, 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, that, in view of the Irish tax authorities' application of section 25 of the TCA 97, the Commission could not check by reference to the arm's length principle 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. For the same reasons as those set out in paragraphs 273 and 274 of the present judgment, in so far as the judgment under appeal rejected those arguments on the grounds set out in paragraphs 192 to 225 thereof, and in the absence of a cross-appeal, the judgment under appeal has the force of *res judicata*. There is therefore no need to rule on those arguments.

279 In addition, for the reasons set out in paragraphs 233 to 239 of the judgment under appeal, the General Court rejected the complaint that the Commission had 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. In the absence of a cross-appeal, that judgment has, to that extent, the force of *res judicata*. There is therefore no need to rule on that complaint.

280 Lastly, as is apparent from the examination of the first ground of appeal, it has not been established that the Commission misapplied the arm's length principle in its primary line of reasoning, by failing to take into account the economic reality, structure and particular features of the Apple Group, in particular functions relating to the management of that group's IP that were performed in Cupertino. The arguments raised by Ireland in the third plea in law in Case T-778/16 must therefore be rejected, inasmuch as they relate to the conclusions which, on the basis of the arm's length principle, the Commission reached by its primary line of reasoning.

281 Having regard to all of those considerations, the Court of Justice must reject all of the pleas directed against the Commission's findings that relate to its primary line of reasoning and deal, on the one hand, with identification of the reference framework and, on the other, with normal taxation under the Irish law applicable in the present case.

3. The Commission's findings concerning activities within the Apple Group

282 Ireland and ASI and AOE submitted, in essence, that the activities and functions performed by the Irish branches of those two companies, identified by the Commission, represented only a tiny part of the economic activity and profits of those companies and that, in any event, those activities and functions included neither management nor strategic decision-making concerning the development or marketing of the IP.

283 According to Ireland and ASI and AOE, all strategic decisions, particularly those concerning product design and development, would have been taken following an overall commercial strategy determined in Cupertino and implemented by the management bodies of the two companies in question, outside the Irish branches. Consequently, there was no justification for allocating the Apple Group's IP licences to the Irish branches.

284 It follows from the examination of the first ground of appeal that the General Court wrongly accepted the relevance of the functions performed by Apple Inc. to the allocation of the profits of ASI and AOE between their respective head offices and branches (second part) and, moreover, erred in law when it found that the management bodies of ASI and AOE had, directly or under a power of attorney, performed essential functions in respect of the IP licences (third part).

285 In addition, as the Commission notes, the allocation for tax purposes of the Apple Group's IP licences to the Irish branches of ASI and AOE and the subsequent allocation of profits generated by the use of those licences stem directly from the correct application of the

relevant tax principles to the structure of the Apple Group as set up by Apple Inc. itself under the cost-sharing agreement described in paragraphs 6 and 7 of the present judgment.

286 Thus, the need to take into account, for the purposes of applying section 25 of the TCA 97, the allocation of assets, functions and risks between the Irish branches and the other parts of ASI and AOE, without regard to any role that may have been played by Apple Inc., arises solely from the Apple Group's decision to transfer the costs and risks related to that group's IP under the cost-sharing agreement.

287 Contrary to what the General Court held in paragraph 310 of the judgment under appeal, the Commission has therefore succeeded in showing that, in the light of, first, the activities and functions actually performed by the Irish branches of ASI and AOE and, secondly, the absence of consistent evidence establishing that strategic decisions were taken and implemented by the head offices of those companies outside Ireland, the profits generated by the exploitation of the Apple Group's IP licences should have been allocated to those branches when determining the annual chargeable profits of ASI and AOE in Ireland.

288 In those circumstances, it is also necessary to reject 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 those branches.

4. Selective nature of the contested tax rulings

(a) Arguments of the parties

289 Ireland and ASI and AOE, supported by the Grand Duchy of Luxembourg, claim, first of all, that the Commission made an error by characterising the contested tax rulings as individual aid measures solely because they applied only to ASI and AOE and, accordingly, by wrongly presuming them to be selective. They argue that the case-law relied on by the Commission does not support its finding in the present case, particularly in view of the fact that, first, the contested tax rulings are available to all taxpayers who seek them; secondly, the contested tax rulings merely apply section 25 of the TCA 97 to the facts related in the requests to the Irish tax authorities; and, thirdly and consequently, equivalent tax rulings could have been issued in respect of any company in a situation comparable to that of ASI and AOE that had sought them.

290 Next, Ireland and ASI and AOE maintain, in essence, that, in the context of the three-step selectivity analysis, the Commission followed a biased approach to selectivity, invoking a fictitious reference system and claiming that there was a derogation from rules which did not actually apply to any taxpayer in a situation comparable to that of ASI and AOE.

291 According to those applicants, in order to establish the selectivity of the contested tax rulings, the Commission should have shown that they caused different treatment of companies which, in the light of the objective of the measure, are in a comparable situation. Given the objective of the contested tax rulings, resident and non-resident companies are not

in a legally and factually comparable position with respect to the determination of their profits subject to tax in Ireland.

292 Lastly, Ireland submits that, in so far as the Commission demonstrated the selective nature of the contested tax rulings, *quod non*, the different treatment of non-resident companies was justified by the nature and scheme of the Irish tax system, and in particular by the territorial limit to Ireland's taxation power.

293 The Commission, supported by the Republic of Poland and the EFTA Surveillance Authority, contests the arguments put forward by Ireland and by ASI and AOE.

(b) Findings of the Court

294 In essence, Ireland and ASI and AOE criticise 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 case and, secondly, ASI and AOE were not granted a derogation and did not receive selective treatment as compared to other undertakings in a comparable situation. Ireland claims that, in any event, even if such treatment were established, it was justified by the nature and by the general scheme of the Irish tax system.

295 It is apparent from the case-law that, while the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings (judgment of 21 September 2023, *Fachverband Spielhallen and LM* v *Commission*, C-831/21 P, EU:C:2023:686, paragraph 35 and the case-law cited), 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, secondly, that that advantage is not enjoyed by undertakings in a comparable legal and factual situation.

296 Concerning tax measures more specifically, 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 if that recipient had been subject to the 'normal' tax system applicable to other taxpayers in the same situation.

297 As the Court has made clear, the examination that the Commission must carry out in order to establish the selectivity of a fiscal aid scheme coincides, so far as concerns the identification of the reference system or 'normal' tax system, with the examination that must be carried out in order to verify whether the measure at issue has the effect of conferring an advantage on its beneficiaries (judgment of 21 September 2023, *Fachverband Spielhallen and LM* v *Commission*, C-831/21 P, EU:C:2023:686, paragraph 41).

298 In the present case, it must be noted that, in its joint examination of advantage and selectivity, the Commission followed the three-step selectivity analysis of a national tax measure: (i) identification of the appropriate reference system; (ii) assessment as to whether the measures at issue constituted a derogation from that system; and (iii) assessment as to whether such a derogation is justified by the nature and general scheme of that system.

299 With regard, in the first place, to the applicants' arguments that the Commission wrongly relied on the presumption of selectivity that attaches to individual measures, which has emerged from the case-law (see, to that effect, judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489), those arguments must be declared ineffective.

300 Even on the assumption that the contested tax rulings implement section 25 of the TCA 97, which is a provision that benefits all non-resident companies in a general and abstract manner, and cannot therefore be described as 'individual aid', it must be noted that those tax rulings were examined in the light of the three-step method of analysis applicable to fiscal aid schemes that has been laid down in the case-law recalled in paragraph 76 of the present judgment.

301 In short, even if the Commission had not been entitled to rely on a presumption of selectivity in the present case, that error could not have affected its finding of selectivity unless it had failed to establish, at the end of that three-step analysis, that the contested tax rulings had led to a reduction in the amount of tax that would normally have been payable by the recipient of the measure if that recipient had been subject to the 'normal' tax system applicable to other taxpayers in the same situation.

302 In the second place, it has not been established that the Commission adopted a biased approach in its three-step analysis of selectivity.

303 As regards, first, identification of the reference system, for the reasons set out in paragraph 276 of the present judgment, in so far as the complaints raised by Ireland and by ASI and AOE in relation to the reference framework, as defined in the decision at issue, were rejected in the judgment under appeal, and in the absence of a cross-appeal, the judgment under appeal has the force of *res judicata*.

304 Secondly, the complaint that the Commission did not demonstrate that the contested tax rulings constitute a derogation from the reference framework which it identified cannot succeed.

305 In fact, the Commission has demonstrated to the requisite standard that those tax rulings have the effect that ASI and AOE enjoy favourable tax treatment as compared to resident companies taxed in Ireland which are not capable of benefiting from such advance rulings by the tax administration, that is, in particular, non-integrated standalone companies, integrated group companies that carry out transactions with third parties or integrated group

companies that carry out transactions with group companies with which they are linked by fixing the price of those transactions at arm's length, even though those companies are in a comparable factual and legal situation as regards the objective of that reference system, which is to tax profits generated in Ireland.

306 Thus, in so far as the contested tax rulings reduce the annual amount of tax which ASI and AOE are required to pay in Ireland – as compared, in particular, to non-integrated companies whose taxable profit reflects prices determined on the market and negotiated at arm's length – those tax rulings involve different treatment that can, in essence, be classified as a derogation and as discriminatory (see, to that effect, 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 54).

307 In the third place, as regards the question whether the discrimination caused by the contested tax rulings is justified by the nature and logic of the system of taxation in Ireland, it is well established that a measure which creates an exception to the application of the general tax system may be justified if that measure results directly from the basic or guiding principles of that tax system. In that connection, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime, which are extrinsic to it, and, on the other hand, the mechanisms inherent in the tax system itself, which are necessary for the achievement of such objectives. Consequently, tax advantages which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements under Article 107(1) TFEU (see, to that effect, judgments of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 65 to 70, and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 48).

308 In the present case, it should be noted that, at the end of the reasoning set out in recitals 404 to 411 of the decision at issue, the Commission found that none of the arguments put forward during the administrative procedure, based, in essence, on the exercise of the discretion enjoyed by Irish Revenue, the Irish tax administration, Irish Revenue's practice, and the 'effectiveness of the tax system' to which the contested tax rulings are supposed to contribute, justified the treatment of ASI and AOE, which consisted in granting those companies a selective advantage.

309 Ireland has been unable to explain on what grounds the Commission's findings in that part of the decision at issue are incorrect. In particular, Ireland does not indicate why the territoriality principle, on which it relies, necessarily requires favourable treatment for non-resident companies. It is, however, for the Member State which has introduced a differentiation between undertakings in relation to tax charges to show that it is actually justified by the nature and general scheme of the system in question (judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 62 and the case-law cited).

310 The Commission was therefore right to find, in the decision at issue, that the different tax treatment of ASI's and AOE's profits as a result of the contested tax rulings was not justified by the nature or by the general scheme of the Irish tax system.

311 In those circumstances, the complaints put forward by the applicants in respect of the examination of the selectivity of those tax rulings in the decision at issue must be rejected.

B. Whether there has been an intervention by the State or through State resources

1. Arguments of the parties

312 Ireland submits that the Commission erroneously concluded that there was an intervention by the State or through State resources. First, it contends that there was no 'intervention' in so far as, in the present case, the opinions issued by the Irish tax administration did not modify the rights and obligations of a taxpayer, but merely applied national tax law to the taxpayer's particular situation. Secondly, Ireland maintains that, contrary to the view taken by the Commission in recital 221 of the decision at issue, it did not renounce tax revenue by refraining from taxing all the profits of ASI and AOE, since it is only the profits of those two companies' branches which are subject to tax in Ireland under section 25 of the TCA 97.

313 The Commission, first, claims that the contested tax rulings are imputable to Ireland because they were issued by its tax administration, Irish Revenue, which is an organ of the State. Those tax rulings, and Ireland's acceptance of ASI's and AOE's tax returns on the basis of those tax rulings, cannot be dissociated from one another. Secondly, according to the Commission, since the contested tax rulings lowered ASI's and AOE's chargeable profit for the purposes of section 25 of the TCA 97, Ireland renounced tax revenue and thus State resources.

2. Findings of the Court

314 According to settled case-law, a measure may be classified as an intervention by the State or as aid granted 'through State resources' if, first, the measure is granted directly or indirectly through those resources and, secondly, the measure is imputable to a Member State (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 32 and the case-law cited).

315 In the first place, the condition that a measure must be imputable to a Member State requires an assessment as to whether the public authorities were, in one way or another, involved in the adoption of that measure (see, to that effect, judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 49).

316 In the present case, the Commission found, in recital 221 of the decision at issue, that the contested tax rulings were imputable to Ireland, because they were issued by its tax administration, Irish Revenue, which is an organ of the State. It noted more specifically that those tax rulings had been used by ASI and by AOE to calculate the amount of corporation tax

they were required to pay annually in Ireland, and that the Irish tax administration accepted those calculations and, on that basis, accepted that the tax paid by those companies in Ireland in the reference period corresponded to their corporation tax liability.

317 By those findings, the Commission established that the public authorities were involved in issuing the contested tax rulings. Accordingly, Ireland's claim that the measures at issue cannot be classified as interventions that are imputable to the State must be rejected.

318 In the second place, as regards the condition that the advantage must be granted 'through State resources', it is apparent from the case-law of the Court that a State measure which grants certain undertakings exclusion from the obligation to pay a tax constitutes State aid, even if it does not involve the transfer of State resources, since it involves the renunciation by the authorities concerned of tax revenue which they would normally have received (see, to that effect, judgment of 17 November 2009, *Presidente del Consiglio dei Ministri*, C-169/08, EU:C:2009:709, paragraph 57 and the case-law cited).

319 It is not necessary to establish a transfer of State resources in every case for the advantage granted to one or more undertakings to be capable of being regarded as State aid within the meaning of Article 107(1) TFEU. In particular, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid (judgment of 19 March 2013, *Bouygues and Others* v *Commission and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 100 and 101).

320 In the present case, the Commission did not err when it found, in recital 221 of the decision at issue, that Ireland had renounced tax revenue from ASI and AOE since the contested tax rulings endorse methods for allocating profits which produce an outcome that separate and standalone undertakings operating under normal market conditions would not have accepted. Those tax rulings reduce the chargeable profits of ASI and AOE for the purposes of applying section 25 of the TCA 97 and, therefore, the amount of corporation tax which they are required to pay in Ireland, as compared to other companies taxed in Ireland whose chargeable profits reflect prices determined on the market in line with the arm's length principle. Such measures therefore mitigate the charges which are generally included in the budget of an undertaking, in accordance with the case-law cited in paragraph 319 of the present judgment.

321 It follows that the third part of the second plea in law in Case T-778/16 must also be rejected.

C. Pleas in law alleging infringement of essential procedural requirements, and in particular of the right to be heard

1. Arguments of the parties

322 Ireland submits that the Commission infringed a number of essential procedural requirements, and in particular the right to be heard, in the context of the procedure that led to the adoption of the decision at issue. It claims that the Commission thus did not offer it any real opportunity to engage in an adversarial debate.

323 It argues, first, that the scope of the Commission's investigation of the lawfulness of the contested tax rulings changed between the adoption of the Opening Decision and the adoption of the decision at issue. First of all, the Commission was not consistent regarding the legal basis of the requirement that Irish Revenue should have applied the arm's length principle in the contested tax rulings. Next, those two decisions were incompatible in their approach to the reference system. Lastly, the Irish authorities had not been in a position to make known their views on the truth and relevance of the facts and on the matters on which the Commission relied in support of its conclusions.

324 Secondly, Ireland maintains that the decision at issue contains factual findings on which it was never given a chance to comment. That decision thus set out, for the first time, comments on the expert reports submitted by the applicants during the administrative procedure and discussion of the opinions issued by the Irish tax authorities to other taxpayers, which meant that Ireland was not in a position to comment on them.

325 Thirdly, Ireland asserts that Commission officials made public statements that prejudged the outcome of the formal investigation procedure, in particular in 2015, well before the decision at issue was adopted.

326 Fourthly, the Commission acted in breach of its duties of care and impartiality, part of the principle of good administration, with regard to its analysis of Irish tax law and taking all relevant information into account. In Ireland's submission the decision at issue seems to have been influenced by irrelevant considerations, including as regards the Irish tax system and activities of the Apple Group. In particular, the fact, noted by the Commission, that the bulk of ASI's and AOE's income was not taxed in any State is, in reality, the result of disparities and mismatches between the Irish and US tax systems.

327 ASI and AOE also contend, first in support of their seventh plea in law, that the Commission infringed several essential procedural requirements. Recalling that the alleged beneficiary of State aid must have had the opportunity effectively to participate in the formal investigation procedure, those applicants maintain that the primary line of argument ultimately adopted by the Commission – according to which the IP rights of the Apple Group which they hold had to be attributed to the Irish branches – was not set out in the Opening Decision, and, moreover, that the Commission's informal communications did not give Apple Inc. sufficient opportunity effectively to address that primary line of argument.

328 Secondly, in their twelfth plea in law, ASI and AOE submit that the Commission failed to fulfil its obligation to conduct a diligent and impartial investigation, as it is required to do in the field of State aid. They state that the decision at issue rests on the erroneous assessment that the functions and activities of the boards of directors of those companies were entirely

described within the minutes of meetings, despite Apple Inc.'s statement to the contrary. The Commission should therefore have given Apple Inc. the opportunity to provide additional information in that regard.

329 The Commission, supported by the Republic of Poland and the EFTA Surveillance Authority, contests all of those claims.

2. Findings of the Court

330 In accordance with Article 4(4) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), the Commission must initiate a formal State aid investigation procedure, informing the interested parties, where, after a preliminary examination, it has doubts as to the compatibility of the measure in question with the internal market. It follows that the Commission is not required to present a complete analysis of the measure at issue in its decision initiating that procedure. However, the Commission must define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments.

331 In the present case, in the Opening Decision, which follows several exchanges of letters between the Irish authorities and the Commission's services and which calls on interested parties to submit their comments, the Commission set out the reasons for its preliminary conclusion that the contested tax rulings constituted a grant of State aid, for the purposes of Article 107(1) TFEU, by Ireland for the benefit of Apple Inc., ASI and AOE, and that that aid was incompatible with the internal market under Article 107(2) and (3) TFEU. In particular, the Commission expressed doubts that the profit allocation methods endorsed by those tax rulings to determine ASI's and AOE's taxable profit in Ireland reflected remuneration for ASI's and AOE's Irish branches that a prudent independent operator acting under normal market conditions would have accepted.

332 First, as regards the complaint that the Commission changed its approach between the Opening Decision and the decision at issue, it must be borne in mind that the Commission is required to initiate the formal investigation procedure if, after a preliminary examination, doubts are raised as to the compatibility with the internal market of the measure examined.

333 In accordance with Article 6(1) of Regulation 2015/1589, where the Commission decides to initiate the formal investigation procedure, that decision may be confined to summarising the relevant issues of fact and law, to including a provisional assessment as to the aid character of the measure in question and to setting out the doubts as to its compatibility with the internal market.

334 It follows that the classification of a measure as State aid in a decision initiating the formal investigation procedure is merely provisional. The purpose of initiating that procedure is precisely to enable the Commission to elicit all such views as may be necessary for it to be able to take a definitive decision on that point.

335 It thus follows from Article 9 of Regulation 2015/1589 that, at the end of the formal investigation procedure, the Commission's analysis may have changed, as it may ultimately decide that the measure does not constitute aid or that the doubts as to its compatibility have been removed (see, to that effect, judgment of 14 December 2023, *EDP España* v *Naturgy Energy Group and Commission*, C-693/21 P and C-698/21 P, EU:C:2023:989, paragraph 63). Accordingly, the decision to initiate the formal investigation procedure and the decision to close that procedure may differ in certain respects, without those differences being such as to vitiate the latter decision.

336 Thus, even if the Commission's assessment were to have changed between the decision to initiate the formal investigation procedure and the decision to close that procedure, that change does not necessarily affect the legality of the latter decision. Only a change in position that affects the nature of the measures concerned or their legal classification, thus resulting in a change in the subject matter of the formal investigation procedure, can require the Commission to notify the interested parties again, so that they are in a position to put forward their comments in that regard (see, to that effect, judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 71).

337 In the present case, the Opening Decision sufficiently defined the framework of the Commission's formal investigation procedure and was sufficiently clear to enable the applicants to understand the Commission's doubts as to the compatibility of the contested tax rulings with the internal market and to give them the opportunity to state their position.

338 Moreover, the Opening Decision defines with sufficient clarity the framework of the Commission's analysis, including as regards the arm's length principle. In that regard, the Commission was not required to inform the interested parties as to how its analysis changed during the formal investigation procedure nor to reply to every report submitted to it, in so far as it did not effectively change the actual subject matter of that procedure.

339 Secondly, the statements of Commission staff mentioned by ASI and AOE, which do not reflect the Commission's position or that of one of its Members, are irrelevant. Remarks of officials and agents of the Commission do not demonstrate that the Commission prejudged its decision, even if they express a clear opinion as to the outcome of the formal investigation procedure in relation to the contested tax rulings.

340 Thirdly, it has not been established that, as Ireland maintains in its sixth plea in law and as ASI and AOE claim in their twelfth plea, the Commission breached the principle of good administration and failed to conduct a diligent and impartial examination of the file by not requiring the disclosure of information which appears likely to confirm or to refute other information which is relevant for the examination of the measure at issue, but whose reliability cannot be considered to be sufficiently established.

341 If the applicants had been of the view that information concerning the Irish tax system and activities within ASI and AOE outside Ireland was relevant, they should, in accordance with the case-law recalled in paragraph 184 of the present judgment, have disclosed it during

the administrative procedure. The fact that they did not disclose it cannot be ascribed to a failure on the part of the Commission to fulfil its obligation to conduct a diligent and impartial investigation.

342 Ultimately, the applicants were sufficiently informed of the initiation of a formal investigation procedure concerning the contested tax rulings and of the fact that that procedure concerned the issue whether the profit allocation methods endorsed by those tax rulings were appropriate or whether they conferred a selective advantage on ASI and AOE. The applicants had the opportunity to put forward all the comments they deemed relevant as interested parties and did in fact take the opportunity to do so.

343 It follows that there is no basis for the claim put forward by Ireland and ASI and AOE that their procedural rights were disregarded and that the Commission breached the principle of good administration, in so far as it correctly performed, with the means it had at its disposal, its task of putting the interested parties in a position of being able to submit their comments effectively during the formal aid investigation procedure.

344 The sixth plea in law in Case T-778/16 and the seventh and twelfth pleas in law in Case T-892/16 must therefore be rejected.

D. Pleas in law alleging breach of the principles of legal certainty and protection of legitimate expectations

1. Arguments of the parties

345 Ireland and ASI and AOE claim, in essence, that the Commission breached the principles of legal certainty and non-retroactivity by ordering Ireland, on the basis of a novel interpretation of Article 107(1) TFEU, to recover State aid allegedly granted. Ireland also maintains, for the same reason, that the Commission disregarded the principle of the protection of legitimate expectations.

346 According to ASI and AOE, the Commission's interpretation could not have been foreseen at the time when the contested tax rulings were issued in the course of 1991 and 2007, since the Commission had not articulated it in its notices on State aid. Moreover, the Authorised OECD Approach and the OECD Price Transfer Guidelines, adopted in 2010, on which the Commission relies in the decision at issue, were not in existence at the time the contested tax rulings were issued. In those circumstances, the Commission should not have ordered the recovery of aid on the basis of Article 16(1) of Regulation 2015/1589.

347 In addition, in so far as the contested tax rulings constitute an application of the rules on taxation of non-resident companies, now in section 25 of the TCA 97, which have not been amended at least since 1967, that is to say, before Ireland's accession to the European Union, the alleged aid measures should be considered to be existing aid which cannot, therefore, be recovered.

348 According to Ireland, the Commission breached the principles of legal certainty, non-retroactivity and protection of legitimate expectations by ordering it to recover, on the basis of an interpretation of Article 107(1) TFEU that was not foreseeable at the time when the contested tax rulings were issued, State aid which Ireland allegedly granted. In particular, the Commission's use of the arm's length principle attests to a novel approach in matters of State aid. Furthermore, Ireland contends that the decision at issue is an egregious breach of Apple Inc.'s right to know the extent of its legal obligations and not to suffer negative repercussions from an application of the law that was not foreseeable at the time of the relevant facts. For that reason also, the Commission should not, therefore, have ordered the recovery of aid.

349 The Grand Duchy of Luxembourg essentially supports those arguments.

350 The Commission, supported by the Republic of Poland and the EFTA Surveillance Authority, contests the merits of those arguments.

2. Findings of the Court

351 Under Article 16(1) of Regulation 2015/1589, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary, unless this would be contrary to a general principle of EU law.

352 In the present case, the Commission did not commit an error of law by requiring Ireland, pursuant to Article 2 of the decision at issue, to recover the aid at issue. Contrary to what is claimed by the applicants, supported by the Grand Duchy of Luxembourg, such an obligation contravenes neither the principle of legal certainty nor the principle of the protection of legitimate expectations.

353 In the first place, the principle of legal certainty – which is one of the general principles of EU law – requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100).

354 In other words, the persons concerned must be able to know precisely the extent of the obligations which EU rules impose on them, ascertain unequivocally what their rights and obligations are and take steps accordingly (judgment of 11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraph 49).

355 As is apparent from the Court's case-law, the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers (judgments of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 140, and of 22 April 2008, *Commission* v *Salzgitter*, C-408/04 P, EU:C:2008:236, paragraph 100).

356 It must, however, be stated that that principle cannot be invoked unless the Commission is shown to have clearly breached its duty of diligence and manifestly failed to exercise its supervisory powers. In particular, where an aid measure was granted without having been notified, the mere fact that there was a delay by the Commission in ordering recovery of the aid does not in itself suffice to render that recovery decision unlawful on the basis of the principle of legal certainty (see, to that effect, judgment of 22 April 2008, *Commission* v *Salzgitter*, C-408/04 P, EU:C:2008:236, paragraph 106).

357 In recital 440 of the decision at issue, the Commission explained that although the contested tax rulings were issued in 1991 and 2007, they were never notified to it. Furthermore, the Commission was aware of neither their existence nor their content before May 2013 and publication of the report of hearings of the Permanent Subcommittee on Investigations of the United States Senate on the Apple Group's global tax situation. The Commission sent its first request for information to Ireland one month later, on 12 June 2013.

358 In the present case, while the Commission's reasoning did indeed apply to tax rulings, it appears not only that it was not novel in its decision-making practice, as illustrated by the decisions cited by the Commission in its written submissions at first instance, but, above all, it could not have appeared to be unforeseeable in the light of the principles established by the earlier case-law relating to State aid of a fiscal nature.

359 Accordingly, the Commission did not breach the principle of legal certainty by ordering recovery of the State aid.

360 In the second place, the same finding must be made with regard to the principle of the protection of legitimate expectations, a fundamental principle of EU law, which allows any trader whom an institution has caused to entertain justified expectations to rely on those expectations (see, to that effect, judgment of 24 March 2011, *ISD Polska and Others*, C-369/09 P, EU:C:2011:175, paragraph 123 and the case-law cited).

361 In view of the mandatory nature of the supervision of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is in conformity unless it has been granted in compliance with the procedure laid down in Article 108 TFEU (judgment of 24 November 2020, *Viasat Broadcasting UK*, C-445/19, EU:C:2020:952, paragraph 42 and the case-law cited).

362 Moreover, it does not appear that the Commission's conduct was such that it caused justified expectations to be entertained as to the conformity of the contested tax rulings in the light of the law on State aid.

363 Consequently, the Commission did not breach the principle of the protection of legitimate expectations by ordering recovery of the State aid.

364 In the third place, the Court must reject the applicants' argument that, in essence, the Commission breached the principle of non-retroactivity by basing the decision at issue on an authorised OECD approach that post-dated the contested tax rulings. As the Commission

stated in recital 441 of the decision at issue, its approach is based on an infringement of Article 107(1) TFEU, which has been part of Ireland's legal order since its accession in 1973, and not on a failure to have regard to the framework defined at OECD level. The Commission referred to that framework only in so far as it offers valuable guidance for the purpose of determining whether a method for fixing the taxable profit of a branch produces a reliable approximation of a market-based outcome in line with the arm's length principle.

365 In the fourth and last place, the argument that the measures at issue should be classified as 'existing' aid within the meaning of Article 1(b)(iv) of Regulation 2015/1589, in so far as section 25 of the TCA 97 reproduces rules that existed before Ireland's accession to the European Union, cannot succeed either. The relevant measures in this case consist in the contested tax rulings and not in the rules on taxation of non-resident companies applicable under Irish law.

366 Having regard to those considerations, the seventh plea in law in Case T-778/16 and the eleventh plea in law in Case T-892/16 must be rejected.

E. Pleas in law alleging that the Commission exceeded its competences and encroached on the competences of the Member States in breach, in particular, of the principle of fiscal autonomy

1. Arguments of the parties

367 Ireland and ASI and AOE, supported by the Grand Duchy of Luxembourg, argue, in essence, that the decision at issue constitutes a breach of the fundamental constitutional principles of the EU legal order governing the division of competences between the European 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.

368 Ireland and ASI and AOE argue, more specifically, 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 decision at issue that ASI and AOE were 'stateless for tax purposes'.

369 The Commission, supported by the Republic of Poland and the EFTA Surveillance Authority, contests 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 rules of EU law on State aid.

2. Findings of the Court

370 According to the case-law of the Court, action by Member States in areas that are not subject to harmonisation under EU law is not excluded from the scope of the provisions of the FEU Treaty on monitoring State aid. Thus, the Member States must exercise their competence in the field of direct taxation, such as that which they hold in the area of the adoption of tax rulings, in compliance with EU law and, in particular, the rules on State aid established by the FEU Treaty. They must therefore refrain, in the exercise of that competence, from adopting measures which may constitute State aid incompatible with the internal market within the meaning of Article 107 TFEU (judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraphs 120 and 121 and the case-law cited).

371 Accordingly, direct tax measures, such as tax rulings granted by the Member States, may be classified as State aid provided that all the conditions for the application of Article 107(1) TFEU recalled in paragraph 74 of the present judgment have been satisfied (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 119).

372 As regards more particularly the condition that the measure in question must grant an economic advantage, it should be noted that, according to settled case-law, 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).

373 In order to determine whether there is a tax advantage, it is necessary to compare the situation of the beneficiary as a result of the application of the measure in question with the situation the beneficiary would be in if that measure had not been adopted and the normal rules of taxation had been applied to that beneficiary (see, to that effect, judgment of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission*, C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 92).

374 In the present case, it should be noted, first, 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 that provision does not set out any specific method for determining the amount of profit attributable to the Irish branches of non-resident companies.

375 It is apparent from Ireland's written submissions and from the oral arguments of the parties at the hearing that, for the purposes 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.

376 In those circumstances and as can be seen from the case-law cited in paragraph 373 of the present judgment, in order to determine whether there was an advantage in the present case, the Commission had to be able to compare ASI's and AOE's tax treatment resulting from

the application of the contested tax rulings with the tax treatment which those two companies would have received if those tax rulings had not been issued and the normal rules of taxation in Ireland had been applied to them.

377 Accordingly, the Commission cannot be accused of having unilaterally applied the substantive tax rules and carried out a de facto tax harmonisation when it analysed whether the chargeable profits of ASI and AOE in Ireland, calculated in accordance with the profit allocation methods endorsed by the contested tax rulings, corresponded to profits which, had those tax rulings not been issued, would have been imputed to the Irish branches of those two companies under section 25 of the TCA 97, in view of the functions performed, the assets used and the risks assumed by those branches.

378 Secondly, in support of its argument that the Commission imposed procedural rules for assessing national taxation that are unrelated to Irish law, Ireland submits that, in recitals 262, 274, 363 and 368 of the decision at issue, the Commission had stated that the contested tax rulings were not based on profit allocation reports, that they had not been properly reviewed and that, before issuing those tax rulings, the Irish tax authorities had not investigated other companies within the Apple Group, regardless of where those companies were operating.

379 In that regard, it should be borne in mind that the Commission found that there was a selective advantage, primarily, in recitals 265 to 321 of the decision at issue, because the Apple Group's IP licences were not allocated to the Irish branches of ASI and AOE; on a subsidiary basis, in recitals 325 to 360 of that decision, because of the inappropriate choice of methods of allocating profits to those Irish branches; and, alternatively, in recitals 369 to 403 of the decision at issue, because the contested tax rulings derogated, on a discretionary basis, from section 25 of the TCA 97.

380 Accordingly, the Commission cannot be considered to have relied on an infringement of procedural rules in order to conclude that there was a selective advantage in the present case. In those circumstances, Ireland's complaints as recalled in paragraph 368 of the present judgment must be rejected as ineffective.

381 Thirdly, as regards the characterisation of ASI and AOE as 'stateless for tax purposes', it must be stated that, admittedly, in particular in recitals 52, 276, 277 and 281 of the decision at issue, the Commission did use that characterisation in connection with its reasons for finding that those two companies had no physical presence outside Ireland.

382 However, the fact that the Commission adopted that characterisation does not mean that it relied on it in concluding that there was a selective advantage. On the contrary, the recitals of the decision at issue referred to in paragraph 379 of the present judgment show that that is not the case.

383 In those circumstances, for the same reasons as those set out in paragraph 380 of the present judgment, the complaints relied on by Ireland and by ASI and AOE to the effect that

the Commission exceeded its competences by characterising ASI and AOE as 'stateless for tax purposes' must be set aside as ineffective.

384 Having regard to the foregoing considerations, the eighth plea in law in Case T-778/16 and the fourteenth 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.

F. Pleas in law alleging a failure to state reasons in the decision at issue

1. Arguments of the parties

385 The applicants contend that the decision at issue, which is deficient in several respects due to numerous instances of inadequate reasoning, does not meet the requirements of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union.

386 According to the applicants, the Commission's reasoning in the decision at issue is not clear and unequivocal and does not, therefore, enable the EU judicature to exercise its power of review.

387 First of all, that decision lacks any coherence as to the rule Ireland is said to have breached, particularly as regards the sources and scope of the arm's length principle set out in recitals 255 to 257 of the decision at issue. Next, recital 451 of the decision at issue, which suggests that the amount of aid to be recovered may be reduced by retroactive recording of the EMEIA sales of ASI in countries other than Ireland, contradicts the Commission's finding, in recitals 412 and 413 of that decision, that Ireland issued tax rulings which lowered ASI's chargeable profits as compared to those which would have been taxed if ASI had been subject to the ordinary rules. Furthermore, in its consideration of whether the alleged aid was liable to affect intra-EU trade, the Commission failed to set out adequate reasoning. Lastly, the Commission contradicted itself when it acknowledged, in recitals 50 and 416 of the decision at issue, that ASI and AOE were managed and controlled from the United States while at the same time claiming, in recital 286 of that decision, that those companies were actually controlled from Ireland.

388 The Commission, supported by the Republic of Poland and the EFTA Surveillance Authority, contests those claims.

2. Findings of the Court

389 It is clear from settled case-law that the obligation to state reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited).

390 The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, those errors will affect the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect. It follows that objections and arguments intended to establish that a measure is not well founded are irrelevant in the context of a ground of appeal alleging an inadequate statement of reasons or a lack of such a statement (judgment of 18 June 2015, *Ipatau* v *Council*, C-535/14 P, EU:C:2015:407, paragraph 37 and the case-law cited).

391 Furthermore, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that act in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to carry out its review (judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 73 and the case-law cited).

392 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that article must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63, and of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 198 and the case-law cited).

393 In the present case, not only were Ireland and ASI and AOE closely involved in the formal investigation procedure, but it must be stated first of all that they were, in the light of their written submissions before the General Court, in a position effectively to challenge the merits of the decision at issue.

394 Next, there are no lacunae in the decision at issue that would have prevented the Court of Justice from fully exercising its power of review.

395 As to the remainder, lastly, it must be noted that the applicants do not seek to criticise the failure to give reasons for the statements contained in the decision at issue, but the substance of those statements.

396 Accordingly, the ninth plea in law in Case T-778/16 and the thirteenth plea in law in Case T-892/16 and, therefore, all of the pleas directed against the Commission's primary line of reasoning must be rejected as unfounded.

397 Consequently, it must be held that the selective nature of the advantage granted to ASI and AOE by the contested tax rulings has been established to the requisite legal standard, on the basis of the Commission's primary line of reasoning in the decision at issue, and it is not therefore necessary to examine the pleas in law and arguments put forward by Ireland and by

ASI and AOE to challenge the assessments made by the Commission in connection with its subsidiary and alternative lines of reasoning. The actions must, therefore, be dismissed.

VII. Costs

398 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

399 According to Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

400 In the present case, since the Commission's appeal has been allowed and the actions of Ireland and of ASI and AOE against the decision at issue dismissed, Ireland and ASI and AOI must, in accordance with the form of order sought by the Commission, be ordered to bear their own costs and to pay the costs incurred by the Commission in the present appeal and at first instance.

401 Article 140(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

402 The Grand Duchy of Luxembourg and the Republic of Poland shall therefore bear their own costs.

403 According to Article 140(2) of the Rules of Procedure, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the EFTA Surveillance Authority is to bear its own costs when it intervenes in proceedings.

404 Consequently, the EFTA Surveillance Authority must bear its own costs in the proceedings at first instance and on appeal.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets aside the judgment of the General Court of the European Union of 15 July 2020, *Ireland and Others* v *Commission* (T-778/16 and T-892/16, EU:T:2020:338), in so far as it upholds the complaints raised by Ireland in the context of the first to third pleas in law in Case T-778/16 and by Apple Sales International Ltd and Apple Operations Europe Ltd in the context of the first to fifth pleas in law in Case T-892/16, 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, and rules on costs;

2. Dismisses the actions of Ireland and of Apple Sales International Ltd and Apple Operations International Ltd;

3. Orders Ireland, Apple Sales International Ltd and Apple Operations International Ltd to bear their own costs and to pay those incurred by the European Commission in the present appeal and at first instance;

4. Orders the Grand Duchy of Luxembourg, the Republic of Poland and the EFTA Surveillance Authority to bear their own costs.

Lenaerts	Bay Larsen	Jürimäe
Lycourgos	Regan	von Danwitz
Csehi	Spineanu-Matei	Ilešič
Bonichot	Jarukaitis	Kumin
Jääskinen	Wahl	Gavalec

Delivered in open court in Luxembourg on 10 September 2024.

A. Calot Escobar	K. Lenaerts
Registrar	President