V

(Γνωστοποιήσεις)

ΔΙΑΔΙΚΑΣΙΕΣ ΠΟΥ ΑΦΟΡΟΥΝ ΤΗΝ ΕΦΑΡΜΟΓΗ ΤΗΣ ΠΟΛΙΤΙΚΗΣ ΑΝΤΑΓΩΝΙΣΜΟΥ

ΕΥΡΩΠΑΪΚΗ ΕΠΙΤΡΟΠΗ

ΚΡΑΤΙΚΗ ΕΝΙΣΧΥΣΗ — ΙΡΛΑΝΔΙΑ

Κρατική ενίσχυση SA.38373 (2014/C) (ex 2014/NN) — Εικαζόμενη ενίσχυση στην Apple

Πρόσκληση υποβολής παρατηρήσεων σύμφωνα με το άρθρο 108 παράγραφος 2 της Συνθήκης για τη λειτουργία της Ευρωπαϊκής Ένωσης

Κείμενο που παρουσιάζει ενδιαφέρον για τον ΕΟΧ

(2014/C 369/04)

Με επιστολή της 11ης Ιουνίου 2014, που αναδημοσιεύεται στην αυθεντική γλώσσα του κειμένου της επιστολής στις σελίδες που ακολουθούν την παρούσα περίληψη, η Επιτροπή κοινοποίησε στη Ιρλανδία την απόφασή της να κινήσει τη διαδικασία του άρθρου 108 παράγραφος 2 της Συνθήκης για τη λειτουργία της Ευρωπαϊκής Ένωσης σχετικά με το ανωτέρω μέτρο ενίσχυσης.

Τα ενδιαφερόμενα μέρη μπορούν να υποβάλουν τις παρατηρήσεις τους επί της ενίσχυσης για την οποία η Επιτροπή κινεί τη διαδικασία εντός προθεσμίας ενός μηνός από την ημερομηνία δημοσίευσης της παρούσας περίληψης και της επιστολής που ακολουθεί, στην ακόλουθη διεύθυνση:

European Commission
Directorate-General for Competition
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1049 Bruxelles
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Οι παρατηρήσεις αυτές θα κοινοποιηθούν στην Ιρλανδία. Το απόρρητο της ταυτότητας του ενδιαφερόμενου μέρους που υποβάλλει τις παρατηρήσεις μπορεί να ζητηθεί γραπτώς, με μνεία των σχετικών λόγων.

Διαδικασία

Στις 12 Ιουνίου 2013, η Επιτροπή ζήτησε από την Ιρλανδία να της παράσχει πληροφορίες σχετικά με την πρακτική των φορολογικών αποφάσεων (tax rulings) στην Ιρλανδία, ιδίως τυχόν φορολογικές αποφάσεις που αφορούν τις Apple Operations International, Apple Sales International (ASI) και Apple Operations Europe (AOE). Η Ιρλανδία υπέβαλε τις πληροφορίες κατά τη διάρκεια της προκαταρκτικής έρευνας.

Περιγραφή των μέτρων για τα οποία η Επιτροπή κινεί τη διαδικασία

Το 1991 και το 2007, η Ιρλανδία συμφώνησε, μέσω φορολογικών αποφάσεων που εξέδωσε η φορολογική διοίκηση, επί του κατανεμητέου στα ιρλανδικά υποκαταστήματα AOE και ASI φορολογητέου κέρδους.

Αξιολόγηση των μέτρων

Στο παρόν στάδιο, η Επιτροπή έχει λόγους να θεωρεί ότι οι φορολογικές αποφάσεις που αφορούν την Apple συνιστούν κρατική ενίσχυση σύμφωνα με το άρθρο 107 παράγραφος 1 της Συνθήκης. Ως εκ τούτου, η Επιτροπή έχει αμφιβολίες ως προς το ότι εάν η Apple καταβάλλει επαρκές ποσό φόρων στην Ιρλανδία. Οι αποφάσεις είναι καταλογιστέες στην Ιρλανδία και μπορεί να συνιστούν χρήση κρατικών πόρων υπό μορφή απώλειας φορολογικών εσόδων. Σύμφωνα με τη νομολογία του Δικαστηρίου της Ευρωπαϊκής Ένωσης (συνεκδικαζόμενες υποθέσεις C-182/03 και C-217/03 Forum 187), οι φορολογικές αποφάσεις δύνανται να παρέχουν πλεονέκτημα στην επιχείρηση την οποία αφορούν εάν με αυτές τις αποφάσεις εγκρίνεται συμφωνία περί καθορισμού των τιμών που αποκλίνει από τους όρους που θα είχαν συνομολογηθεί μεταξύ ανεξάρτητων φορέων της αγοράς (αρχή του πλήρους ανταγωνισμού).

Η Επιτροπή εξέτασε κατά πόσο οι συμφωνίες περί καθορισμού των τιμών που περιέχονται στις φορολογικές αποφάσεις, οι οποίες καταρτίστηκαν μετά από συμφωνία των ιρλανδικών φορολογικών αρχών και της Apple, αποκλίνουν από τους όρους που θα είχαν συνομολογηθεί μεταξύ ανεξάρτητων φορέων της αγοράς. Στην προκειμένη περίπτωση, οι μέθοδοι που χρησιμοποιήθηκαν για να καθοριστεί η κατανομή των κερδών στα δύο υποκαταστήματα ASI και AOE δεν στηρίζονται σε οικονομική εκτίμηση, φαίνεται δε, τουλάχιστον εν μέρει, να εμπνέονται από λόγους σχετικούς με την απασχόληση, γεγονός που εγείρει αμφιβολίες ως προς το εάν ένας συνετός και ανεξάρτητος φορέας της αγοράς θα είχε αποδεχθεί παρόμοιο καθεστώς τιμολόγησης στην ίδια κατάσταση. Αντιθέτως, οι αρχές αποδέχτηκαν τον υπολογισμό του κέρδους που αναλογεί στα καταστήματα βάσει του πραγματικού κόστους, χωρίς η επιλογή αυτή να είναι αιτιολογημένη. Καθόσον το κόστος πρέπει κανονικά να αποτελεί κατάλληλο δείκτη για τα καθαρά κέρδη στις περιπτώσεις των συνήθων λειτουργιών στις οποίες δεν απαιτείται ειδική αξία, όπως αποκλειστικό δικαίωμα διανοητικής ιδιοκτησίας, το οποίο υφίστατο τουλάχιστον σε σχέση με την AOE, η Επιτροπή εκφράζει αμφιβολίες σχετικά με την καταλληλότητα της επιλεχθείσας μεθόδου καθορισμού των τιμών μεταβίβασης.

Δεδομένου ότι η εν λόγω ενίσχυση συνιστά νέα ενίσχυση και ότι καμία από τις παρεκκλίσεις που προβλέπονται στο άρθρο 107 παράγραφοι 2 και 3 δεν ισχύει, η Επιτροπή αποφάσισε να κινήσει την επίσημη διαδικασία έρευνας.

ΚΕΙΜΕΝΟ ΤΗΣ ΕΠΙΣΤΟΛΗΣ

'The Commission wishes to inform Ireland that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

1. **PROCEDURE**

(1) By letter of 12 June 2013, the Commission requested Ireland to provide information on the practice of tax rulings in Ireland. In particular, the Commission requested information on any rulings granted in favour of Apple Operations International, Apple Sales International ("ASI") and Apple Operations Europe ("AOE"). By letter dated 9 July 2013, Ireland submitted the requested information to the Commission.

(2) On 21 October 2013, the Commission requested additional information relating to Apple Inc., in particular, it requested information regarding all companies related to Apple which are tax resident in Ireland, all rulings in force and all elements essential to support the tax ruling as provided by the addressee of the tax ruling to the Irish tax authorities, the Office of the Revenue Commissioners ("Irish Revenue") and, in particular, the underlying tax advisor's report and, specifically, the rulings granted in 1991 and 2007. On 21 November 2013, the Irish authorities submitted the requested information, […] (*).

(3) By letter of 24 January 2014, additional explanations regarding Apple Inc. were requested, in particular, on turnover figures. On 5 March 2014, the Irish authorities provided the requested information.

(4) By letter of 7 March 2014, the Commission informed the Irish authorities that it was investigating whether the tax rulings in favour of Apple constitute new aid and invited the Irish authorities to comment on the compatibility of such aid. Noting that the Commission had already requested, in its request of 21 October 2013, all essential elements underlying the tax rulings, the Commission invited Ireland to provide any additional information related to the transfer pricing arrangements on which the Irish tax authorities provided a positive opinion in the tax rulings of 1991 and 2007, […].

(5) On 25 March 2014, the Irish authorities replied to that request for information by submitting all the tax returns of Apple-related companies in Ireland since 2004. On 29 May 2014 the Irish authorities informed the Commission by letter that the turnover figures provided in their letter dated 5 March 2014 regarding Apple Operations Europe were not correct and provided corrected figures.

2. **DESCRIPTION**

2.1. **Introduction to transfer pricing rulings**

(6) This decision concerns tax rulings which validate transfer pricing arrangements, also known as advance pricing arrangements ("APAs"). APAs are arrangements that determine, in advance of intra-group transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time ([1]). An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues ([2]).

(7) Transfer pricing refers in this context to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set for goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group. The prices set for those transactions and the resulting amounts calculated on the basis of those prices contribute to increase the profits of one subsidiary and decrease the profits of the other subsidiary for tax purposes, and therefore contribute to determine the taxable basis of both entities. Transfer pricing thus also concerns profit allocation between different parts of the same corporate group.

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

([1]) APAs differ in some ways from more traditional private rulings that some tax administrations issue to taxpayers. An APA generally deals with factual issues, whereas more traditional private rulings tend to be limited to addressing questions of a legal nature based on facts presented by a taxpayer. The facts underlying a private ruling request may not be questioned by the tax administration, whereas in an APA the facts are likely to be thoroughly analysed and investigated. In addition, an APA usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer's international transactions for a given period of time. In contrast, a private ruling request usually is binding only for a particular transaction. See, OECD Guidelines, paragraph 4.132.

([2]) OECD Guidelines, paragraph 4.123. Since APAs concern the remuneration for transactions that have not yet taken place, the reliability of any prediction used in an APA therefore depends both on the nature of the prediction and the critical assumptions on which that prediction is based. Those critical assumptions may include amongst others circumstances which may influence the remuneration for the transactions when they eventually take place.

(8) Multinational corporations pay taxes in jurisdictions which have different tax rates. The after tax profit recorded at the corporate group level is the sum of the after-tax profits in each county in which it is subject to taxation. Therefore, rather than maximise the profit declared in each country, multinational corporations have a financial incentive when allocating profit to the different companies of the corporate group to allocate as much profit as possible to low tax jurisdictions and as little profit as possible to high tax jurisdictions. This could, for example, be achieved by exaggerating the price of goods sold by a subsidiary established in a low tax jurisdiction to a subsidiary established in a high tax jurisdiction. In this manner, the higher taxed subsidiary would declare higher costs and therefore lower profits when compared to market conditions. This excess profit would be recorded in the lower tax jurisdiction and taxed at a lower rate than if the transaction had been priced at market conditions.

(9) Those transfer prices might therefore not be reliable for tax purposes and should not determine the taxable base for the corporate tax. If the (manipulated) price of the transaction between companies of the same corporate group were taken into account for the assessment of the taxable profits in each jurisdiction, it would entail an advantage for the firms which can artificially allocate profits between associate companies in different jurisdictions compared with other undertakings. So as to avoid this type of advantage, it is necessary to ensure that taxable income is determined in line with the taxable income a private operator would declare in a similar situation.

(10) The internationally agreed standard for setting such commercial conditions between companies of the same corporate group or a branch thereof and its mother company and thereby for the allocation of profit is the "arm's length principle" as set in Article 9 of the OECD Model Tax Convention, according to which commercial and financial relations between associated enterprises should not differ from relations which would be made between independent companies. More precisely, using alternative methods for determining taxable income to prevent certain undertakings from hiding undue advantages or donations with the sole purpose of avoiding taxation must normally be to achieve taxation comparable to that which could have been arrived at between independent operators on the basis of the traditional method, whereby the taxable profit is calculated on the basis of the difference between the enterprise's income and charges.

(11) The OECD Transfer Pricing Guidelines ([3]) (hereinafter the "OECD Guidelines") provides five such methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price method (hereinafter "CUP"); (ii) the cost plus method; (iii) the resale minus method; (iv) the transactional net margin method (hereinafter "TNMM") and (v) the transactional profit split method. The OECD Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods). Multinational corporations retain the freedom to apply methods not described in those guidelines to establish transfer prices provided those prices satisfy the arm's length principle.

(12) Traditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are at arm's length ([4]). All three traditional transaction methods approximate an arm's length pricing of a specific intra-group transaction, such as the price of a certain good sold or service provided to a related company. In particular, the CUP method consists in observing a comparable transaction between two independent companies and applying the same price for a comparable transaction between group companies. The cost plus method consist in approximating the income from goods sold or services provided to a group company. The resale minus method consists in approximating the costs of goods acquired from or services provided by a group company. Other elements which enter into the profit calculation (such as personal costs or interest expenses) are calculated based on the price effectively paid to an independent company or are approximated using one of the three direct methods.

(13) The transactional profit methods, by contrast, do not approximate the arm's length price of a specific transaction, but are based on comparisons of net profit indicators (such as profit margins, return on assets, operating income to sales, and possibly other measures of net profit) between independent and associated companies as a means to estimate the profits that one or each of the associated companies could have earned had they dealt solely with independent companies, and therefore the payment those companies would have demanded at arm's length to compensate them for using their resources in the intra-group transaction ([5]). For this purpose, the TNMM relies on a net profit indicator which refers, in principle, to the ratio of profit weighted to an item of the profit and loss account or of the balance sheet, such as turnover, costs or equity. To this selected item, a margin is applied which is considered "arm's length" to approximate the amount of taxable profit. When the TNMM is used in combination with a net profit indicator based on costs, it is sometimes referred to as "cost plus" in exchanges between the taxpayer and the tax administration, but this should not be confused with the "cost plus method" described in the OECD Guidelines as described in the previous recital.

([3]) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, OECD, 2010

([4]) OECD Guidelines, paragraph 2.3.

([5]) OECD Guidelines point 1.35.

(14) The application of the arm's length principle is generally based on a comparison of the conditions in an intra-group transaction with the conditions in transactions between independent companies. For such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. To be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences ([6]). To establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or companies that would affect conditions in arm's length transactions. The OECD Guidelines list as attributes or "comparability factors" that may be important when determining comparability: the characteristics of the property or services transferred; the functions performed by the parties, taking into account assets used and risks assumed (functional analysis); the contractual terms; the economic circumstances of the parties; and the business strategies pursued by the parties. ([7])

(15) The arm's length principle applies not only to transactions between separate companies within a group but also to "transactions" between a company and its permanent establishments, for example a branch. In fact, transfer pricing can also take place within one company if the company operates a branch or permanent establishment in a separate jurisdiction. In that case, the arm's length principle is applicable by analogy, as confirmed in the 2010 report on the attribution of profits to permanent establishments of the OECD ([8]).

2.2. **The beneficiary: the Apple Group**

2.2.1. The Apple Group

(16) The present decision concerns tax rulings on the attribution of profits to a branch granted by Ireland to the Apple Group, composed of Apple Inc. and companies controlled by Apple Inc. (hereinafter collectively referred to as "Apple"). Apple is headquartered in the United States of America ("US").

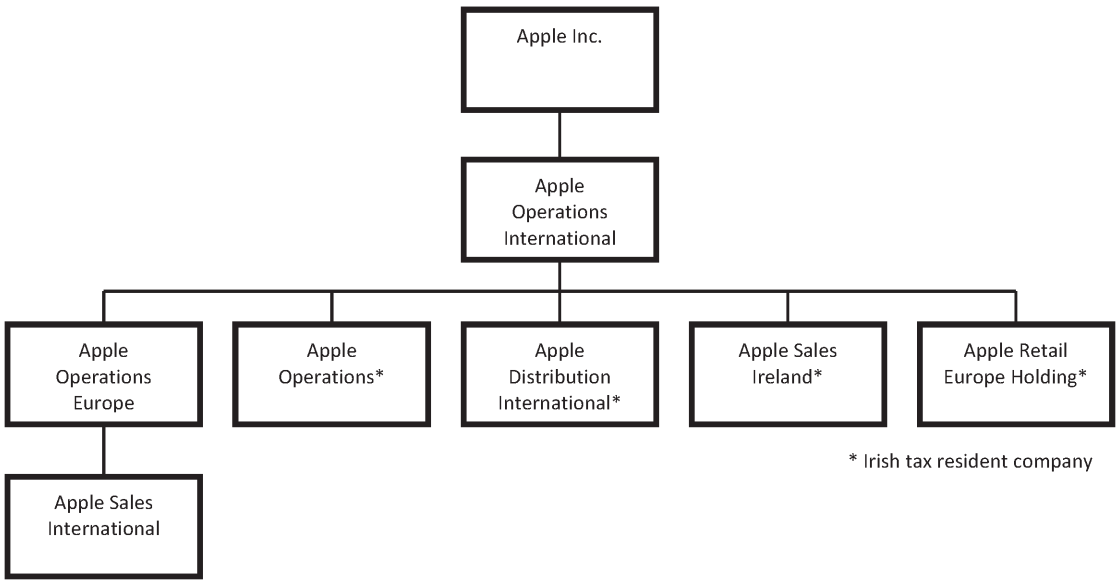
(17) Apple designs, manufactures and markets mobile communication and media devices, personal computers and portable digital music players. It sells different related software, services, peripherals, networking solutions and third-party digital content and applications. Apple sells its products worldwide through its retail stores, online stores and direct sales force, as well as through third-party cellular network carriers, wholesalers, retailers and value-added resellers. In addition, Apple sells a variety of third-party products compatible with Apple products, including application software and various accessories, through its online and retail stores.

(18) Apple sells to consumers, businesses and governments worldwide. Apple manages its business primarily on a geographic basis. The reporting geographic segments are Americas, Europe, Japan, Greater China, and Rest of Asia Pacific.

2.2.2. Apple's structure in Ireland

(19) Apple includes companies incorporated in Ireland as represented in the chart below (Apple Inc. is incorporated in the US, all other companies on the chart are incorporated in Ireland; of the companies incorporated in Ireland, Apple Operations International, ASI and AOE are not tax resident in Ireland).

([6]) OECD Guidelines point 1.33.
([7]) OECD Guidelines point 1.36.
([8]) Report on the Attribution of Profits to Permanent Establishments, OECD, 2010



(20) In 2013, Apple had worldwide net sales of USD 170 910 million and a net income of USD 37 037 million. In 2012 and 2011, net sales amounted to USD 156 508 million and USD 108 249 million respectively ([9]). According to data provided by Apple to the Permanent Subcommittee on Investigations of the US Senate ("the Permanent Subcommittee"), ASI recorded pre-tax income for the years 2009-2011 as indicated in the table below ([10]).

Pre-tax income in USD bn	2009	2010	2011
Apple Inc.	3,4	5,3	10,7
Apple Sales International	4	12,1	22
Other	0,6	1,1	1,5
Total	**8**	**18,5**	**34,2**

(21) According to data provided by Apple to the Permanent Subcommittee, ASI's sales revenues for fiscal years 2009, 2010, 2011 and 2012, were USD 12,4 billion, USD 28,8 billion, USD 47,5 billion and USD 63,9 billion respectively ([11]). This represents a 415 % increase of sales revenues over the period 2009 to 2012.

(22) In their reply of 5 March 2014, the Irish authorities provided the following turnover figures for the Irish operations of AOE and ASI (as corrected by the submission by the Irish authorities dated 29 May 2014). These figures are calculated on the basis of the remuneration attributable to the Irish branch of the companies concerned as indicated in their tax returns.

Turnover Irish operations EUR	2010	2011	2012
Apple Operations Europe	[50 000 000 - 60 000 000]	[70 000 000 - 80 000 000]	[60 000 000 - 70 000 000]
Apple Sales International	[400 000 000 - 450 000 000]	[550 000 000 - 600 000 000]	[400 000 000 - 450 000 000]

([9]) Yearly figures at 28 September 2013. Apple's fiscal year is the 52 or 53-week period that ends on the last Saturday of September.

([10]) Apple does not report standalone accounting data for its subsidiary Apple Sales International, certain stand alone figures were reported in Exhibits of hearing of Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.) of the Permanent Subcommittee on Investigations of the US Senate, 21 May 2013.

([11]) Offshore profit shifting and the U.S. Tax Code-Part 2 (Apple Inc.), Hearing, Permanent Subcommittee on Investigations of the US Senate, 21 May 2013.

(23) Based on those tax returns, the taxable income of the respective branches is reproduced in the table below ([12]):

Taxable profit EUR	2009	2010	2011	2012
Apple Operations Europe	[10 000 000 - 20 000 000]	[10 000 000 - 20 000 000]	[10 000 000 - 20 000 000]	[10 000 000 - 20 000 000]
Apple Sales International	[30 000 000 - 40 000 000]	[30 000 000 - 40 000 000]	[50 000 000 - 60 000 000]	[40 000 000 - 50 000 000]

(24) The taxable income in the table above was taxed at 12,5 %, except for limited components taxed at 25 % mainly represented by interest payments received. Additionally to the taxable amounts calculated based on the percentages provided for in the ruling of 1997, the taxable basis is adjusted by a limited amount of tax reliefs. The effective tax payable amounts are represented in the table below:

Total tax payable in Ireland EUR	2010	2011	2012
Apple Operations Europe	[1 000 000 - 10 000 000]	[1 000 000 - 10 000 000]	[1 000 000 - 10 000 000]
Apple Sales International	[1 000 000 - 10 000 000]	[1 000 000 - 10 000 000]	[1 000 000 - 10 000 000]

2.2.3. Apple Operations Europe (AOE)

(25) AOE, formerly Apple Computer Ltd, is a 100 % subsidiary of Apple Operations International (an Irish-incorporated non-tax resident company with no branch in Ireland). AOE is an Irish incorporated non-tax resident company carrying on a trade through a branch in Ireland. The main activity of AOE's Irish branch is the manufacture of a specialised line of personal computers. The company's branch purchases materials from related companies and sells manufactured products to a related company according to specified requirements. AOE's Irish branch also provides shared services to Apple companies in Europe, the Middle East and Africa (EMEA) region, including payroll services, centralised purchasing and a customer call centre.

(26) AOE is party to a cost sharing agreement ([13]) whereby, together with other Apple Inc. subsidiaries, it shares R & D costs and risks of developing certain Apple products. Apple Inc. holds the legal title to all Apple IP, while AOE has IP rights under that cost sharing agreement. No rights in relation to the IP concerned are attributed to the Irish branch of AOE.

2.2.4. Apple Sales International (ASI)

(27) ASI, formerly Apple Computer International and originally Apple Computer Accessories Ltd, is a 100 % subsidiary of AOE. ASI is an Irish-incorporated non-resident company that is carrying on a trade through a branch in Ireland. The main activities of the branch relate to:

— procurement of Apple finished goods from third-party manufacturers (including a third-party manufacturer in China), […],

— onward sale of those products to Apple-affiliated companies and other customers, and

— logistics operations involved in supplying Apple products from the third-party manufacturers to Apple-affiliated companies and other customers.

(28) All strategic decisions taken by ASI, including in relation to IP, are taken outside of Ireland. As with AOE, ASI is a party to the R & D cost sharing agreement with other Apple Inc. subsidiaries under which the total costs of the group's worldwide R & D are pooled. ASI's Irish branch has no authority to make decisions relating to Apple IP or the cost sharing agreement. No rights in relation to the Apple IP concerned are attributed to the Irish branch.

([12]) Tax reporting periods finish end September each year for 2010 and 2011 and for 2012 the figures provided do not cover September 2012 and only account for 11 months to end August 2012.

([13]) A cost sharing agreement is an agreement between companies of one group to share costs and benefits of developing intangible assets; it is a form of a cost contribution arrangement described in Chapter VIII of the OECD Guidelines.

(29) According to the information provided by the Irish authorities, the territory of tax residency of AOE and ASI is not identified.

2.3. **The contested measure**

2.3.1. Tax rulings in favour of AOE and ASI

(30) The present decision concerns rulings on profit allocation to branches granted by Irish Revenue in 1991 and 2007 in favour of AOE and ASI (referred to collectively as "the contested rulings" and separately as "the 1991 ruling" and "the 2007 ruling")

Apple Operations Europe (AOE)

(31) In 1991, a basis for determining Apple Computer Ltd's (subsequently AOE's) Irish branch net profit was proposed by Apple and agreed by Irish Revenue. According to that ruling, the net profit attributable to the AOE branch would be calculated as 65 % of operating expenses up to an annual amount of USD [60-70] million and 20 % of operating expenses in excess of USD [60-70] million. This was subject to the proviso that if the overall profit from the Irish operations was less than the figure resulting from this formula, that lower figure would be used for determining net profits. Operating expenses included in the formula were all operating expenses incurred by Apple Computer Ltd's Irish branch, including depreciation but excluding materials for resale and cost-share for intangibles charged from Apple-affiliated companies.

(32) In 2007, a revised approach for remunerating the Irish branch of AOE was agreed which was based on (a) a [10-20]% margin on branch operating costs, excluding costs not attributable to the Irish branch such as […] and material costs, and (b) an IP return of [1-9]% of branch turnover in respect of the accumulated manufacturing process technology of the Irish branch.

Apple Sales International (ASI)

(33) In 1991, a basis for determining Apple Computer Accessories Ltd's (subsequently ASI) Irish branch net profit was proposed by Apple and agreed by Irish Revenue. According to that ruling, the net profit attributable to the ASI branch would be calculated as 12,5 % of all branch operating costs, excluding material for resale.

(34) A modified basis for determining net profit was agreed for the ASI branch in 2007 with a [8-18]% margin on branch operating costs, excluding costs not attributable to the Irish branch, such as […] and material costs.

2.3.2. Documents available to Irish Revenue when concluding the rulings

(35) The documents provided by Ireland as constituting all elements essential to support the 1991 ruling include […] letters (dated […] 1990, […] 1990 and […] 1991) and […] faxes (dated […] 1991 and […] 1991) by […] as tax advisor of Apple, one note of an interview dated […] 1990 and one note of a meeting dated […] 1991 by Irish Revenue, and a letter by Irish Revenue dated […] 1991 which confirms that the letters of [tax advisor] correctly reflect the agreement reached at the meeting of […] 1991. The agreement as described at recitals (31) and (33) is contained in the letter by [tax advisor] dated […] 1991.

(36) The following excerpt is taken from the note of the interview of […] 1990:

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

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

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

(37) The following excerpt is taken from the note of the meeting dated […] 1991:

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

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

The proposal before the meeting was that the profit attributable to the Irish branch would be cost plus $[28-38]m and the capital allowances would not exceed $[8-18]m thereby leaving $[18-28]m chargeable to Irish tax. Based on the accounts for the accounting period ended […] 1990 a profit of $[28-38]m represented 46 % of the costs attributable to the Irish branch. It was pointed out that this figure greatly exceeded a figure of [10-20]% which is normally attributable to a cost center although it was readily conceded that a figure of [10-20]% was meaningless in relation to the computer industry. It was pointed out that a mark-up of 100 % can be achieved in some industries and in particular the pharmaceutical industry. It was conceded however that the pharmaceutical and computer industries are not directly comparable. Following further discussions it was agreed that, subject to receiving a satisfactory outcome to the capital allowance question, to accept a mark-up of 65 % of the costs attributable to the Irish branch. **In addition it was agreed to accept a mark-up of 20 % on costs in excess of $[60-70]m in order not to prohibit the expansion of the Irish operations** ([14]).

(…) Arising from further discussions it was agreed that the capital allowances computations would be re-cast in Irish punts ([15]) and the normal rate of wear and tear ([16]) would be written for all years. In addition it was agreed that the company's claim would be restricted to a sum of $[1-10]m in excess of the sum charged for depreciation in the accounts. Based on the schedule of costs submitted for the period ended […] 1990 this would ensure that the profits chargeable to Irish tax would be $[30-40]m.

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

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

(38) The letter by [tax advisor] dated […] 1991 contains a capital allowances schedule for Apple Computer Ltd for the years 1985 to 1990. The fax dated […] 1991 by [tax advisor] confirms the agreement by Apple to the following wording on the capital allowance which substitutes the wording on the capital allowance previously provided by [tax advisor] in the letter dated […] 1991: "*The capital allowance claimed will not exceed by USD [1-11]m of the depreciation charged in the accounts*."

(39) The documents provided by Ireland as constituting all elements essential to support the 2007 ruling consists of a letter dated […] 2007 by […] as tax advisor of Apple. The letter contains the agreement as described at recitals (32) and (34). A second document provided by Ireland regarding the 2007 ruling is a letter dated […] 2007 by Irish Revenue confirming agreement to the method of calculating the profits attributable to the Irish branches of AOE and ASI as explained in the letter by the [tax advisor's] employee representing Apple.

(40) Neither of the two documents provided regarding the 2007 ruling offer any explanation as to the figures "*[10-20]% [of Irish located operating costs]/[1-9]% [of the annual turnover of AOE which is derived from products manufactured in Ireland]/[8-18]% [of operating costs of ASI]*" agreed upon in that ruling, nor is there any indication as to how those figures are derived. The letter dated […] 2007 contains a number of specifications as to how the agreed method will be applied. In particular, it is specified that "*Irish located operating costs*" of AOE, as well as operating costs of ASI for the avoidance of doubt, exclude […], "*above the line*" costs such as material costs, customs, freight costs etc., once-off restructuring costs and capital costs.

(41) None of documents provided, in support of the contested rulings, contain either a transfer pricing report or any cost sharing agreement. According to exhibits of the hearing on Apple of the Permanent Subcommittee, AOE and ASI had a cost sharing agreement with Apple Inc. ([17]). That agreement would have first been established in 1980. Under the current agreement, the Irish subsidiaries have the right to distribute Apple products in territories outside the Americas in exchange for contributing to jointly-financed R & D efforts in the US ([18]).

([14]) Emphasis added by the Commission.

([15]) Footnote added: punt refers to the Irish currency at the time of the ruling the Irish pound.

([16]) Footnote added: wear and tear refers to depreciation of material goods

([17]) Exhibits of hearing of Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.) of the Permanent Subcommittee on Investigations of the US Senate, 21 May 2013.

([18]) Testimony of Apple Inc. before the Permanent Subcommittee on Investigations US Senate, 21 May 2013.

2.3.3. Information provided by the Irish authorities following the Commission's request

(42) As regards the agreements in the rulings in favour of AOE, the Irish authorities express the view in their letter of 25 March 2014 that AOE's Irish branch was essentially a contract manufacturer and provider of shared services for related Apple entities. The [10-20]% margin on the Irish-based costs of those low-risk functions, together with the [1-9]% of turnover return on manufacturing know-how developed by the Irish branch, delivered an aggregate attribution of profit to the Irish branch that would have been commensurate with the activities undertaken in Ireland.

(43) As regards the agreements in the rulings in favour of ASI, the Irish authorities express the view in their letter of 25 March 2014 that ASI's branch was considered to carry out routine, albeit important, functions in the procurement and onward sale and supply of goods for Apple. It would therefore have had no special valuable assets. Although the Irish branch arranged the procurement and onward sale and supply of goods (which did not pass though the Irish branch), the goods concerned derived their value largely from intangibles created in the US. There were also no indications that the Irish branch bore significant risks in relation to the activities of ASI.

(44) Furthermore, according to Irish authorities' letter of 25 March 2014, Irish Revenue was satisfied that the agreed margin on operating costs delivered a net profit commensurate with the value added by the Irish branch. On the basis of a branch-focused analysis of the operations undertaken in Ireland, it would have been clear that the main profit-generating functions and assets were not located in Ireland. All significant risks and all intellectual property would have been borne and economically owned elsewhere in the ASI enterprise or the Apple group and the profit attribution to the Irish branch would have represented full remuneration of its role in that process.

2.3.4. Information about the length of APAs in EU countries

(45) The 1991 ruling does not contain an expiry date and seems to have been in force until the 2007 ruling was issued. An overview of the length of validity of APAs concluded in a number of other Member States is provided in the table below ([19]):

Country	Period
France	The APA defines its duration (three to five years)
Germany	3-5 years
Hungary	The application may be requested for three to five years and may be extended (once)
Italy	Once an agreement has been reached, it remains in force for three years
Lithuania	The decision made is valid for the current and following five financial years
Luxembourg	Such written confirmation is limited to five years
Netherlands	APA is applicable for a period of four to five years unless longer-term contracts are involved.
Poland	An APA will be concluded for a maximum period of five years, with the possibility of extending the period by another five years.
Portugal	The maximum duration of an APA (duration from APA application to final conclusion) is 300 days for unilateral APAs and 480 days for bilateral APAs.
Romania	The APA can be issued for a period of up to five years

([19]) International Transfer Pricing 2013/2014, PwC and Information on bi- or multilateral mutual agreement procedures under double taxation agreements for reaching Advance Price Agreements ("APA") aimed at granting binding advance approval of transfer prices agreed between international associated enterprises, 5 October 2006, German Federal Ministry of Finance

Country	Period
Spain	The final resolution is effective for the period of time decided in the agreement, but cannot exceed four years
Sweden	Involved for a predetermined period of three to five years
United Kingdom	HMRC expects most APAs to be for a maximum term of five years

3. **ASSESSMENT**

3.1. **Existence of aid**

(46) According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States.

(47) The qualification of a measure as aid within the meaning of Article 107(1) therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

(48) The main question in the present case is whether the rulings confer a selective advantage upon Apple in so far as it results in a lowering of its tax liability in Ireland. If the existence of a selective advantage can be shown, the presence of the other two conditions for a finding of State aid under Article 107(1) TFEU is relatively straightforward.

(49) As regards the imputability of the measure, the contested rulings were issued by Irish Revenue, which is part of the Irish State. In the present case, those rulings were used by Apple to calculate its corporate income tax basis in Ireland. Irish Revenue has accepted those calculations and on that basis set the tax due.

(50) As regards the measure's financing through State resources, provided it can be shown that the contested rulings resulted in a lowering of Apple's tax liability in Ireland, it can also be concluded that those rulings give rise to a loss of State resources. That is because any reduction of tax for Apple results in a loss of tax revenue that otherwise would have been available to Ireland ([20]).

(51) As regards the fourth condition for a finding of aid, Apple is a globally active firm, operating in various Member States, so that any aid in its favour distorts or threatens to distort competition and has the potential to affects intra-Union trade.

(52) Finally, as regards the presence of a selective advantage, it follows from the case-law that the notion of aid encompasses not only positive benefits, but also measures which in various forms mitigate the charges which are normally included in the budget of an undertaking ([21]). At the same token, treating taxpayers on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, particularly, where the exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria. ([22])

(53) Accordingly, rulings should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation. Tax authorities, by accepting that multinational companies depart from market conditions in setting the commercial conditions of intra-group transactions through a discretionary practice of tax rulings, may renounce taxable revenues in their jurisdiction and thereby forego State resources, in particular when accepting commercial conditions which depart from conditions prevailing between prudent independent operators ([23]).

(54) In order to determine whether a method of assessment of the taxable income of an undertaking gives rise to an advantage, it is necessary to compare that method to the ordinary tax system, based on the difference between profits and losses of an undertaking carrying on its activities under normal market conditions. Thus, where a ruling concerns transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that a prudent independent operator acting under normal market conditions would have accepted ([24]).

([20]) Joined Cases C-106/09 P and C-107/09 P, Commission and Spain v Government of Gibraltar and United Kingdom [2011] ECR I-11113, paragraph 72.

([21]) Case C-143/99, Adria-Wien Pipeline, [2001]ECR, I-8365, paragraph 38.

([22]) Case C-241/94 *France v Commission (Kimberly Clark Sopalin)* [1996] ECR I-4551, paragraphs 23 and 24.

([23]) If, instead of issuing a ruling, the tax administration simply accepted a method of taxation based on prices which depart from conditions prevailing between prudent independent operators, there would also be State aid. The main problem is not the ruling as such, but the acceptance of a method of taxation which does not reflect market principles.

([24]) Commission Decision 2003/757/EC of 17 February 2003, Belgian Coordination centres, OJ L 282, 30.10.2003, p. 25, recital 95.

(55) In this context, market conditions can be arrived at through transfer pricing established at arm's length. The Court of Justice has confirmed that if the method of taxation for intra-group transfers does not comply with the arm's length principle ([25]), and leads to a taxable base inferior to the one which would result from a correct implementation of that principle, it provides a selective advantage to the company concerned. ([26])

(56) The OECD Guidelines are a reference document recommending methods for approximating an arm's length pricing outcome and have been retained as appropriate guidance for this purpose in previous Commission decisions ([27]). The different methods explained in the OECD Guidelines can result in a wide range of outcomes as regards the amount of the taxable basis. Moreover, depending on the facts and circumstances of the taxpayer, not all methods approximate a market outcome in a correct way. When accepting a calculation method of the taxable basis proposed by the taxpayer, the tax authorities should compare that method to the prudent behaviour of a hypothetical market operator, which would require a market conform remuneration of a subsidiary or a branch, which reflect normal conditions of competition. For example, a market operator would not accept that its revenues are based on a method which achieves the lowest possible outcome if the facts and circumstances of the case could justify the use of other, more appropriate methods.

(57) It is in the light of these general observations that the Commission will examine whether the contested rulings comply with the arm's length principle.

(58) The Commission notes, in the first place, that the taxable basis in the 1991 ruling was negotiated rather than substantiated by reference to comparable transactions. Moreover, according to the excerpt reproduced at recital (37), the authorities did not seem to have had the intention of establishing a profit allocation based on transfer pricing. Instead, according to that excerpt, Irish Revenue accepted the calculation of profit attributable to the branch of AOE on the basis of actual costs without this choice being reasoned in any way. The fact that the methods used to determine profit allocation to ASI and AOE result from a negotiation rather than a pricing methodology, reinforces the idea that the outcome of the agreed method is not arm's length and that a prudent independent market operator would not have accepted the remuneration allocated to the branches of ASI and AOE in the same situation, which serve as a basis for calculating the tax liability.

(59) Furthermore, Section V.C of the OECD Guidelines, although non-binding, lists the type of information that may be useful when determining transfer pricing for tax purposes in accordance with the arm's length principle ([28]). Regarding the 1991 ruling, the Commission observes, in particular, that no transfer pricing report was included in the documents provided by the Irish authorities to support the calculation of taxable profits as confirmed in that ruling, which is a common manner by which a transfer pricing proposal is made to tax authorities.

(60) In the second place, the Commission recalls that the OECD Guidelines set certain requirements for the choice of the appropriate transfer pricing method to comply with the arm's length principle ([29]). The method proposed by the tax advisor and accepted by Irish Revenue in the 2007 ruling for profit allocation is in effect the TNMM, with operating costs […] as a net profit indicator. The choice of that particular net profit indicator is neither explained by the tax advisor nor by Irish Revenue, although that choice results in materially different outcomes in the present case ([30]). The 2007 ruling also fails to explain the choice of operating costs as net profit indicator rather than a larger cost basis, such as costs of goods sold. While costs can be an appropriate net profit indicator for routine functions or production process not requiring a specific valuable such as a unique intellectual property right, the 2007 ruling regarding the branch activities of AOE as described in recital (32) acknowledges the existence of a specific know-how in the branch which is remunerated at [1-9]% of branch turnover. The Commission therefore has doubts as to the appropriateness of the transfer pricing method chosen for the 2007 ruling.

([25]) In particular, rulings allowing taxpayers to use improper transfer pricing methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing may involve State aid- See Commission Decision 2003/438/EC of 16 October 2002 on State aid C 50/2001, Luxembourg Finance Companies, OJ L 153, 20.6.2003, p. 40, recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on State aid C 49/2001, Luxembourg Coordination centres, OJ L 170, 9.7.2003, p. 20, recitals 46-47 and 50; Commission Decision 2003/755/EC of 17 February 2003, Belgian Coordination centres, OJ L 282, 30.10.2003, p. 25, recitals 89 to 95 and the related Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v. Commission [2006] ECR I-5479, paragraphs 96 and 97; Commission Decision 2004/76/EC of 13 May 2003, French Headquarters and Logistic Centres, OJ L 23, 28.1.2004, p. 1, recitals 50 and 53

([26]) See Joined Cases C- 182/03 and C-217/03 *Belgium and Forum 187 v. Commission* [2006] ECR I-5479, paragraph 95.

([27]) Cf. Commission Decision 2003/755/EC of 17 February 2003, Belgian Coordination centres, OJ L 282, 30.10.2003, p. 55, recitals 89 to 95 and decision of 5 September 2002 in case C 47/01 German Coordination Centres, OJ L 177, 2003/17, para 27 and 28.

([28]) Paragraphs 5.16 to 5.27 of the OECD Guidelines, as well as paragraph 5.4 thereof.

([29]) See Chapter II, part I of the OECD Guidelines, in particular paragraph 2.8

([30]) For example in 2011, the taxable profit of ASI represented only around [less than 0,2]% of the sales of ASI (see recitals (21) and (23)). Therefore if a margin on sales indicator would have been retained as a net profit indicator, the resulting taxable profit would have been much higher, for any benchmark sales margin above [0,2]%. In detail, the turnover of the ASI subsidiary is taken as reference as no branch turnover seems to be reported (other than the turnover provided in recital (22) by the Irish tax authorities in 2014 and which are according to the submission calculated on the basis of the taxable basis and not according to accounting figures). According to recital (21) the sales of ASI for 2011 amounted to USD 47,5 billion, which at the EUR/USD exchange rate 2011 average exchange rate of 1,3920, represents around EUR 34,1 billion. Comparing the 2011 taxable profit in Ireland of ASI of EUR [50 000 000 — 60 000 000] (see recital (23)) to this sales figure results in a margin on sales of around [less than 0,2]%.

(61) In the third place, the Commission notes several inconsistencies in the application of the transfer pricing method chosen when determining profit allocation to AOE and ASI that do not appear to comply with the arm's length principle.

(62) On the one hand, as regards the 1991 ruling, the Commission notes, first, that according to recital (37) the mark-up of 65 % of the costs attributable to the AOE Irish branch appear to be reverse engineered so as to arrive at a taxable income of around USD [28-38] million, although according to recital (36) the figure of USD [28-38] million does not have any economic basis.

(63) Second, the margin on branch costs agreed in the 1991 ruling, as described at recital (31), is either 65 % or 20 % depending on whether the operating costs are below or above USD [60-70] million. According to the excerpt at recital (37), the reduction of the margin after a certain level above USD [60-70] million would have been motivated by employment considerations, which is not a reasoning based on the arm's length principle. In particular, the two margins of 20 % and 65 % are relatively far apart and, should the margin of 65 % effectively constitute an arm's length pricing, the margin of 20 % would be unlikely to fall within the same range of pricing, while applying the same degree of prudence.

(64) Third, on the amount of accepted capital allowances, which is restricted to USD [1-11] million in excess of the sum charged for depreciation in the accounts (see recital (38) above), this agreement is not motivated in economic terms nor substantiated by any methodology explained in the documents provided by Apple to Irish Revenue. According to the Taxes Consolidation Act 1997 ([31]), a capital allowance can be claimed for plant and machinery expenditures if the plant and machinery are used for the purpose of a trade. However, the agreement on the amount, in particular on the level of the USD [1-11] million cap, does not seem justified by any actual plant or machinery expenditures, but was rather the result of negotiations, as described in recitals (36) and (37) above.

(65) Fourth, as regarding the duration of the 1991 ruling, this ruling was applied by Apple for 15 years without revision. Even if the initial agreement was considered to correspond to an arm's length profit allocation, *quod non*, the open-ended duration of the 1991 ruling's validity calls into question the appropriateness of the method agreed between Irish Revenue and Apple to arrive to that allocation in the latter years of the ruling's application, given the possible changes to the economic environment and required remuneration levels. The Commission notes, in particular, that that duration is much longer than the length of APAs concluded by other Member States, as illustrated at recital (45) above.

(66) On the other hand, as regards the 2007 ruling, first, whereas according to the information reported in the note of the meeting of […] 1991 reproduced at recital (37) a mark-up of [10-20]% was considered "*meaningless in relation to the computer industry*", this mark-up was agreed in the 2007 ruling as a mark-up on the branch operating costs of AOE, while for ASI a lower mark-up of [8-18]% on operating costs was agreed. Although the required remuneration for the type of industry covered might have changed significantly between 1991 and 2007, there is an apparent contradiction between this statement and the subsequent agreement.

(67) Second, the profit allocation to the ASI Irish branch, agreed in the 2007 ruling, does not factor in the evolution of sales. In fact, according to recital (21) the sales income of ASI increased by 415 % over the three years 2009-2012 to USD 63.9 billion ([32]). For the same period, the operating costs as reflected by the taxable income (which represents around [8-18]% ([33]) of operating costs of the branch according to the ruling of 2007) increased by [10-20]% (see recital (23) above) ([34]). As a large part of the operating capacity of ASI as a whole seems to be located in Ireland, the discrepancy between the sales growth and the growth of the Irish operating capacity, cannot be explained.

(68) That discrepancy could point to an inconsistency in the allocation of turnover between ASI and its Irish branch. The income of ASI of USD 63.9 billion for 2012 and the respective amounts for previous years as indicated in recital (21) represent sales income, which is an active income and generates operating expenses. If the 415 % increase in sales is only due to an increase in price and not an increase in volumes, it would not be inconsistent that the operating expense of the ASI branch only increase by [10-20]% over the same period. However if the sales volumes increased, the operating costs of either the Irish branch of ASI or the operating costs that ASI incurs outside of Ireland should have increased significantly as well. At this stage, the increase in sales cannot be related to a comparable increase in operating costs, which could point to an inconsistency in the profit allocation to the Irish activities.

(69) Based on the above, the Commission is of the opinion that the contested rulings do not comply with the arm's length principle. Accordingly, the Commission is of the opinion that through those rulings the Irish authorities confer an advantage on Apple. That advantage is obtained every year and on-going, when the annual tax liability is agreed upon by the tax authorities in view of that ruling.

([31]) Section 284 of chapter 2 of the Taxes Consolidation Act, 1997, http://www.irishstatutebook.ie/1997/en/act/pub/0039/

([32]) USD 63,9 billion in 2012 compared to USD 12,4 billion in 2009.

([33]) Because of the limited effect of interest income and of tax reliefs, the taxable income is not exactly equal to [8-18]% of operating costs, see recital (24).

([34]) EUR [40 000 000-50 000 000] in 2012 compared to EUR [30 000 000-40 000 000] in 2009.

(70) That advantage is also granted in a selective manner. While rulings that merely contain an interpretation of the relevant tax provisions without deviating from administrative practice do not give rise to a presumption of a selective advantage, rulings that deviate from that practice have the effect of lowering the tax burden of the undertakings concerned as compared to undertakings in a similar legal and factual situation. To the extent the Irish authorities have deviated from the arm's length principle as regards Apple, the contested rulings should also be considered selective.

(71) Given that the rulings were concluded after the entry into force of the Treaty in your country, the measure constitutes new aid within the meaning of Article 1(c) of Council Regulation (EC) No 659/1999. However, any potential recovery would be prescribed for aid granted before 12 June 2003, in accordance with Article 15 of that regulation.

3.2. **Compatibility of aid**

(72) As the measure appears to constitute State aid, it is necessary to examine whether that aid could be considered compatible with the internal market. State aid measures can be considered compatible with the internal market on the basis of the exceptions listed in Article 107(2) and 107(3) TFEU.

(73) At this stage, the Commission has no indication that the contested measure can be considered compatible with the internal market. The Irish authorities did not present any argument to indicate that any of the exceptions provided for in Article 107(2) and 107(3) TFEU apply in the present case.

(74) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.

(75) Nor does the exception provided for in Article 107(3)(a) TFEU seem to apply, which allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and for the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. Such areas are defined by the Irish regional aid map. This provision does not seem to apply in this case.

(76) As regards the exceptions laid in Article 107(3)(b) and (d) TFEU, the aid in question does not appear to be intended to promote the execution of an important project of common European interest nor to remedy to a serious disturbance in the economy of Ireland, nor is it intended to promote culture or heritage conservation.

(77) Finally, according to Article 107(3)(c) TFEU, aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest. The Commission has no elements at this stage to assess whether the tax advantages granted by the contested measure are related to specific investments eligible to receive aid under the State aid rules and guidelines, to job creation or to specific projects.

(78) At this stage, the Commission considers that the measure at issue appears to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

4. **DECISION**

In the light of the foregoing considerations, the Commission's preliminary view is that the tax ruling of 1990 (effectively agreed in 1991) and of 2007 in favour of the Apple group constitute State aid according to Article 107 (1) TFEU. The Commission has doubts about the compatibility of such State aid with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) TFEU with respect to the measures in question.

The Commission requests Ireland to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. In particular:

— Provide the financial accounts of ASI and AOE for the period 2004-2013, in particular the P&L accounts.

— In the case of ASI single out in the P&L the amount of passive income each year and specifying if such passive income comes from Ireland.

— Provide the number of full time equivalent employees (hereinafter "FTE") of ASI and of AOE over the same period (each end of reporting period). Provide the FTE of the Irish branch of ASI and of AOE for the same period (each end of accounting period).

— Provide the cost sharing agreement between Apple Inc., ASI and AOE in all its variations since 1989 until the last modification.

— Describe in detail the type of intellectual property covered by the cost sharing agreement.

The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Ireland that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999 ([35]), which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Ireland that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.'

([35]) OJ L 83, 27.3.1999, p. 1, last amended by Regulation (EC) No 734/2013 of 22 July 2013 OJ L 204, 31.7.2013, p. 15.