Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 9 November 2023 [1]

**Case C-465/20 P**

**European Commission**
**v**
**Ireland,**
**Apple Sales International,**
**Apple Operations International, formerly Apple Operations Europe,**
**Grand Duchy of Luxembourg,**
**Republic of Poland,**

**EFTA Surveillance Authority**

(Appeal – State aid – Advance tax decisions (tax rulings) – Selective tax advantages)

## I. Introduction

1. The present case is part of a series of somewhat extensive cases concerning the application of Article 107(1) TFEU to 'tax rulings'. As is well known, a 'tax ruling' allows undertakings to apply to the tax administration for an 'advance decision' concerning the tax to which they will be subject and thus to obtain an official position from that administration on the application of national tax rules and assurances as to the tax treatment that will be applied to them. There is no doubt that State aid rules cannot be used to achieve surreptitiously tax harmonisation in the way of which there are political obstacles or to tackle harmful tax competition. Exploiting the advantages of disparities between tax systems does not involve the grant of aid and tax competition between States is not prohibited per se. However, the European Commission must be able to verify whether, by means of a tax measure, such as an advance decision, a Member State grants a selective advantage to a particular undertaking. In such cases, undertakings that already have significant market power per se, as is the case of Apple, also in relation to the dynamics of digital markets, which favour concentration of such power, may find themselves at an advantage in relation to competitors, which compromises the level playing field between undertakings. The purpose of the State aid rules is to avoid those consequences, which harm competition and adversely affect innovation and consumers.

[1] Original language: Italian.

2. The Commission seeks to have set aside the judgment of 15 July 2020, *Ireland and Others* v *Commission* ('the judgment under appeal'),[2] by which the General Court annulled Commission Decision (EU) 2017/1283 of 30 August 2016 ('the decision at issue'),[3] concerning two advance tax decisions adopted by the Irish tax authorities in relation to Apple Sales International (ASI) and Apple Operations Europe (AOE), two companies forming part of the Apple Group (together, 'the advance decisions').

## II. Facts and background to the dispute

3. Founded in 1976 and based in Cupertino, California (United States), the Apple Group is composed of Apple Inc. and all companies controlled by Apple Inc. Its global business is structured around key functional areas centrally managed and directed from the United States (paragraph 1 of the judgment under appeal). Apple Operations International (AOI) is a fully owned subsidiary of Apple Inc. AOI fully owns the subsidiary AOE, which in turn fully owns the subsidiary ASI. ASI and AOE are both companies incorporated in Ireland, but are not tax resident in Ireland (paragraph 3 of the judgment under appeal).[4] ASI and AOE set up Irish branches (together, 'the Irish branches'). ASI's Irish branch is responsible for, inter alia, carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the regions covering Europe, the Middle East, India and Africa (EMEIA) and the Asia-Pacific region (APAC). Key functions within that branch include the procurement of Apple-branded finished products from third-party and related-party manufacturers, distribution activities associated with the sale of products to related parties in the EMEIA and APAC regions and with the sale of products to third-party customers in the EMEIA region, online sales, logistics operations, and operating an after-sales service. AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland such as iMac desktops, MacBook laptops and other computer accessories, which it supplies to related parties for the EMEIA region. Key functions within that branch include production planning and scheduling, process engineering, production and operations, quality assurance and quality control, and refurbishing operations (paragraphs 9 and 10 of the judgment under appeal).

4. During the period covered by the decision at issue – that is to say, from 1991 to 2014 ('the relevant period') – 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. Under that agreement, the parties agreed to share the costs and the risks associated with the R&D concerning intangibles following development activities connected with the Apple Group's products and services. They also agreed that Apple Inc. remained the owner of the cost-shared intangibles, including the intellectual property ('IP') rights. In addition, Apple Inc. granted ASI and AOE each a royalty-free licence enabling those companies to manufacture and sell the Apple products concerned in the territory that had been assigned to them, that is to say, the world apart

[2] T-778/16 and T-892/16, EU:T:2020:338.

[3] On State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (OJ 2017 L 187, p. 1).

[4] In recitals 49 to 52 of the decision at issue, the Commission stated that, under the Irish law applicable during the relevant period, ASI and AOE, although incorporated in Ireland and having a trade activity in that country, were not considered tax resident in Ireland, since they were directly or indirectly controlled by a company resident in the United States (Apple Inc.). However, since, beyond the Irish branches, ASI and AOE had no tax presence in the United States or elsewhere, the Commission concluded that they were 'stateless for tax residency purposes'.

from North and South America ('the IP licences').[5] The parties to the agreement were required to bear the risks resulting from that agreement. The main risk was the obligation to pay the development costs relating to the IP rights. During the relevant period, various amendments were made to the cost-sharing agreement, in order in particular to take into account changes in the applicable regulatory framework (paragraphs 5 and 6 of the judgment under appeal).

5. In 2008, ASI concluded a marketing services agreement with Apple Inc. ('the marketing services agreement'), in connection with which Apple Inc. undertook to provide marketing services to ASI, including the creation, development and production of marketing strategies, programmes and advertising campaigns. ASI undertook to remunerate Apple Inc. for those services by payment of a fee corresponding to a percentage of the 'reasonable costs incurred' in relation to those services, plus a mark-up (paragraph 7 of the judgment under appeal).

## A. The advance decisions

6. By letter of 12 October 1990, addressed to the Irish tax authorities, the Apple Group's tax advisors described the operations of Apple Computer Ltd (ACL), AOE's predecessor, in Ireland, indicating the functions performed by that company's Irish branch established in Cork (Ireland). They stated that that branch was the owner of the assets relating to the manufacturing activities, but that AOE retained ownership of the materials used, works in progress and finished products. By letter of 2 January 1991, the Irish tax authorities were informed of the existence of a new company, Apple Computer Accessories Ltd (ACAL), ASI's predecessor, the Irish branch of which was described as being responsible for sourcing products intended for export from Irish manufacturers. By letter of 29 January 1991 ('the 1991 advance decision'), the Irish tax authorities confirmed the terms proposed by the Apple Group as regards the calculation of ACL and ACAL's chargeable profits in Ireland. ACL's chargeable profit was calculated on the basis of a percentage of the operating costs of its Irish branch, set at 65% of those costs up to an annual amount [*confidential*] and at 20% in excess of that amount [*confidential*]. If the overall profit was less than the figure obtained using that formula, that lower figure was to be used to determine the net profit. The operating costs to be taken into consideration for that calculation were to include all operating expenses, excluding materials for resale and cost-share for intangibles charged from companies affiliated with the Apple Group. ACAL's chargeable profit was calculated on the basis of a margin of 12.5% of the operating costs of its Irish branch (excluding materials for resale) (paragraphs 11 to 16 of the judgment under appeal).

By letter of 16 May 2007 addressed to the Irish tax authorities, the Apple Group's tax advisors summarised their proposal for revising the method for determining the tax base of the Irish branches of ASI and AOE. In both cases, it was proposed that the chargeable profit correspond to a percentage of the operating costs, excluding costs such as sums invoiced from affiliated companies within the Apple Group and material costs. In the case of AOE's Irish branch, it was proposed to add an amount corresponding to the IP return for the manufacturing process technology developed by that branch, corresponding to a percentage of its turnover. It was also proposed that the agreement would enter into force for both branches from 1 October 2007, be applicable for five years, be subsequently renewed on an annual basis, and be applicable to any new entities created or transformed within the Apple Group, provided their activities

[5] In the judgment under appeal, the General Court refers to those licences as 'Apple Group IP licences'. That designation, which I will keep unchanged in the quotations from sections of the judgment under appeal, is disputed by the Commission, which considers it imprecise in that it allegedly does not reflect the fact that they are territorially limited licences conferred on ASI and AOE.

corresponded to those carried out by AOE and ASI. By letter of 23 May 2007 ('the 2007 advance decision'), the Irish tax authorities confirmed their agreement with all the proposals. That agreement was applied until the 2014 tax year (paragraphs 17 to 21 of the judgment under appeal).

## B. The decision at issue

7. In the decision at issue, the Commission concluded that the advance decisions, giving rise to a reduction in the tax charges that ASI and AOE would have been required to bear, had granted those companies, during the relevant period, operating aid from which the Apple Group as a whole had benefited (recitals 417 and 418). It declared that aid unlawful and incompatible with the internal market under Article 107(3)(c) TFEU (Article 1 of the decision at issue) and ordered its recovery (Article 2 of the decision at issue).

8. In Section 8.2 of that decision, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, the Commission followed the three-step analysis derived from case-law. [6]

9. As regards the first step, concerning the identification of the reference framework, it considered that that framework consisted of the ordinary rules of taxation of corporate profit in Ireland, the objective of which was to tax the profits of all companies subject to tax in that country. In the light of that objective, the Commission considered that all companies subject to tax in Ireland, whether resident or non-resident, integrated or non-integrated, were in a comparable factual and legal situation. It accordingly considered that Section 25 of the Taxes Consolidation Act 1997 ('the TCA 97'), relating to the taxation of non-resident companies, formed an integral part of the reference framework and not a separate reference framework (recitals 227 to 243 of the decision at issue). Under that section, a non-resident company is not to be within the charge to corporation tax unless it carries on a trade in Ireland through a branch or agency. If it does so, that company is to be taxed 'on all of its trading income arising directly or indirectly from the branch or agency and from the property or rights used by or held by or for the branch or agency …' (see paragraph 158 of the judgment under appeal).

10. As regards the second step, the purpose of which was to assess the existence of a selective advantage arising from a derogation from the reference framework, the Commission first of all stated that, in light of its wording and intended purpose, Section 25 TCA 97 had to be applied in connection with a profit allocation method which would allow for generating a taxable profit in a manner 'that reliably approximates a market-based outcome in line with the arm's length principle' (recital 253). That principle, 'the purpose [of which] is to ensure that transactions between integrated group companies are treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been carried out by non-integrated standalone companies' applies, in fact, 'to the internal dealings of different parts of the same integrated company, such as a branch that transacts with other parts of the company to which it belongs' (recitals 252 and 253). In that context, the Commission also stated that it would not directly apply the guidelines developed in the context of the Organisation for Economic Co-operation and Development (OECD), as set out in, inter alia, Article 7(2) and Article 9 of the OECD Model Tax Convention and the 2010 report on the attribution of profits to permanent establishments, approved by the OECD Council on 22 July 2010, which describes the approach authorised by the OECD to the application of the arm's length principle as defined in the OECD

[6] See, inter alia, 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 68; 'the judgment in *Fiat Chrysler*').

Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[7] in the context of the attribution of profits to permanent establishments ('the authorised OECD approach'),[8] but that it would take it into account as useful guidance on how to ensure that profit allocation and transfer pricing arrangements produce outcomes in line with market conditions (recital 255). The Commission then conducted its analysis on the basis of three separate lines of reasoning, each of which made it possible to conclude that there was a selective advantage in the present case. For the purposes of the present case, only the first two, primary and subsidiary, lines of reasoning are relevant. On the basis of the *primary line of reasoning* (recitals 265 to 321 of the decision at issue), the Commission considered that the fact that, in the advance decisions, the Irish tax authorities had accepted the unsubstantiated claim that the IP licences should be allocated for tax purposes outside Ireland – and thus to ASI's and AOE's head offices ('the head offices'), not to their Irish branches – had led to those companies' annual chargeable profits departing from a reliable approximation of a market-based outcome in line with the arm's length principle. On the basis of the *subsidiary line of reasoning* (recitals 325 to 360 of the decision at issue), the Commission considered that, even if the Irish tax authorities had been correct in accepting that assumption, the outcome would have been the same since the profit allocation methods approved by the advance decisions were based on inappropriate methodological choices, which had nevertheless led to a reduction in the amount of tax that ASI and AOE were required to pay as compared with non-integrated companies whose chargeable profits were determined by prices negotiated at arm's length on the market.

11. Lastly, as part of the third step of its analysis, the Commission stated that neither Ireland nor Apple had put forward arguments to justify the selective advantage conferred by the advance decisions (recitals 404 to 411 of the decision at issue).

## III. The proceedings before the General Court and the judgment under appeal

12. Ireland (Case T-778/16) and ASI and AOE (Case T-892/16) brought actions against the decision at issue. In Case T-778/16, the Grand Duchy of Luxembourg was granted leave to intervene in support of the form of order sought by Ireland, and the Republic of Poland was granted leave to intervene in support of the form of order sought by the Commission. In Case T-892/16, the EFTA Surveillance Authority was granted leave to intervene in support of the form of order sought by the Commission, and Ireland was granted leave to intervene in support of the form of order sought by ASI and AOE. The cases were joined for the purposes of the oral part of the procedure. In support of their action, Ireland, on the one hand, and ASI and AOE, on the other, put forward, respectively, 9 and 14 pleas in law, which overlap to a large extent and which the General Court examined together.

13. In the judgment under appeal, in so far as it is relevant for the purposes of the present case, the General Court first rejected the pleas put forward by Ireland and by ASI and AOE alleging that the Commission exceeded its competences and was in breach of the principle of fiscal autonomy of

[7] July 2010, OECD Publishing, Paris, https://doi.org/10.1787/20769717 ('the OECD Transfer Pricing Guidelines').

[8] In recitals 87 to 89 of the decision at issue, the Commission explained that the authorised OECD approach consists of a two-step analysis according to which income is allocated to a permanent establishment. The first step of that approach is to hypothesise the permanent establishment as a distinct and separate enterprise 'engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise'. It is in this context that the notion of 'significant people functions' is introduced. Under the first step, the authorised OECD approach allocates to the permanent establishment the economic ownership of assets for which the significant functions relevant thereto are performed by people in the permanent establishment. Under the second step, the OECD Transfer Pricing Guidelines are applied by analogy to the permanent establishment's dealings with other parts of the company to ensure that the performance of all of its functions in relation to those dealings is rewarded on an arm's length basis.

the Member States (paragraphs 103 to 124). Secondly, it examined the pleas alleging errors made by the Commission in connection with its *primary line of reasoning*. In that context, it began by rejecting the complaint raised by Ireland relating to the fact that the conditions of advantage and selectivity were examined together. It then examined the complaints alleging errors in the identification of the reference system and normal taxation under Irish tax law. Following that examination, the General Court concluded that the Commission's primary line of reasoning was based on 'erroneous assessments of normal taxation under the Irish tax law applicable in the present instance' (paragraph 249 of the judgment under appeal). Finally, the General Court examined 'for the sake of completeness' the complaints directed against the Commission's factual assessments concerning the activities within the Apple Group, concluding that 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 IP licences should have been allocated to those branches when determining the annual chargeable profits of ASI and AOE in Ireland (paragraph 310 of the judgment under appeal). Lastly, the General Court examined the pleas relating to the assessments made by the Commission in connection with its *subsidiary line of reasoning*. At the end of its analysis, while acknowledging that 'the defects in the methods for calculating the chargeable profits of ASI and AOE demonstrate the incomplete and occasionally inconsistent nature of the [advance decisions]' (paragraph 479 of the judgment under appeal), it considered that those deficiencies were insufficient to prove the existence of an advantage for the purposes of Article 107(1) TFEU.

14. The General Court therefore annulled the decision at issue in its entirety, without examining the other pleas raised by Ireland and by ASI and AOE, ordered the Commission to pay the costs incurred by the applicants in Cases T-778/16 and T-892/16 and declared that Ireland, in Case T-892/16, the Grand Duchy of Luxembourg, the Republic of Poland and the EFTA Surveillance Authority were each to bear their own costs.

## IV. The procedure before the Court of Justice and the forms of order sought

15. By application lodged at the Registry of the Court of Justice on 25 September 2020, the Commission sought to have set aside the judgment under appeal. Ireland, ASI and AOE, the Grand Duchy of Luxembourg and the EFTA Surveillance Authority submitted their written observations. By letter of 4 April 2023, ASI and AOE's lawyers informed the Court that, following a merger under Irish law, AOE had been absorbed by AOI from 2 April 2023. AOI's name was therefore substituted for that of AOE as a party to the present case. The parties presented oral argument at the hearing on 23 May 2023. The Commission claims that the Court should set aside the judgment under appeal, reject the first, second, third, fourth and eighth pleas in Case T-778/16 and reject the first, second, third, fourth, fifth, eighth and fourteenth pleas in Case T-892/16, refer the case back to the General Court for consideration of the remaining pleas and reserve the costs before the General Court and the Court of Justice. ASI and AOI contend that the Court should dismiss the appeal and order the Commission to pay the costs. Ireland contends that the Court should dismiss the appeal and order the Commission to pay the costs. The EFTA Surveillance Authority contends that the Court should uphold the appeal in its entirety, refer the case back to the General Court for consideration of the remaining pleas and reserve the costs before the General Court and the Court of Justice. The Grand Duchy of Luxembourg contends that the Court should dismiss the appeal in its entirety and order the Commission to pay the costs incurred by it.

## V. The appeal

16. The Commission puts forward two grounds in support of its appeal, each divided into several parts. The first ground of appeal concerns the paragraphs of the judgment under appeal by which the General Court criticised the primary line of reasoning. The second is directed against the part of that judgment in which the General Court overturned the subsidiary line of reasoning.

### A. Preliminary observations

17. As seen, on the basis of the cost-sharing agreement, during the relevant period, ASI and AOE held the IP licences and paid Apple Inc. a sum intended to finance the group's R&D activity. The justification for the cost-sharing agreements is to avoid a situation in which, given the uncertainty of the results of the investment in R&D, it is not possible to recoup losses which may be incurred by the company that made the investment. R&D costs are allocated between the group companies, just as any returns are allocated in proportion to the percentage of costs attributed to the company. That is the justification for the agreement, but it should be borne in mind that, in the practice of multinationals, an intra-group cost-sharing agreement may make it possible to allocate costs and related profits in jurisdictions where taxation is lower. In the present case, by disconnecting the allocation of part of the costs and profits relating to Apple's IP from the place where the group's R&D activity was mainly carried out, that is to say, in California, the head office of Apple Inc., those costs and profits were moved towards ASI and AOE. As stated above, those companies, although incorporated in Ireland, were not, during the relevant period, tax resident in Ireland or in any other tax jurisdiction. In Ireland, their tax liability was limited, on the basis of Section 25 of the TCA 97, to the profit of their Irish branches, with the result that the profit not attributed to those branches was not, in essence, finally taxed in any place. [9] The crux of the issue is therefore how, since Section 25 of TCA 97 is silent, the profit attributable to the Irish branches was determined. Given that the greater part of ASI's and AOE's profit derived from the IP licences, for the purposes of such a determination, the preliminary question was how those licences were to be attributed within those companies, taking account of their various subdivisions, that is to say, the head offices on the one hand and the Irish branches on the other. It is essentially on those points that the divergence between Ireland and the Commission develops. The advance decisions had approved the method of determining ASI's and AOE's tax base proposed by Apple, which entailed the actual allocation of the IP licences and the greater part of the profits of those companies outside the Irish branches. According to the Commission, such attribution of profits reduced the tax liability of ASI and AOE, conferring a selective advantage within the meaning of Article 107(1) TFEU on ASI and AOE, and entailed tax aid for the Apple Group as a whole.

### B. The first ground of appeal

18. The first ground of appeal is divided into three parts.

[9] Before the General Court and at the hearing before the Court of Justice, the Commission assessed the tax actually paid on ASI's and AOE's profit at 1% in 2003 and 0.005% in 2004. ASI and AOE argue that the profits of those companies during the relevant period were subject to deferred tax in the United States on foreign income.

### *1. The first part of the first ground of appeal*

19. By the first part of the first ground of appeal, the Commission submits that the General Court misinterpreted the decision at issue, committed a breach of procedure and used contradictory reasoning by stating, in paragraphs 125, 183 to 187, 228, 242 and 243 of the judgment under appeal, that, in finding that the IP licences should have been allocated to the Irish branches for tax purposes, since the head offices of ASI and AOE had no employees or physical presence to ensure their control and management, it 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. ASI and AOI, Ireland and the Grand Duchy of Luxembourg submit that the complaints raised by the Commission are inadmissible, ineffective and, in any event, unfounded.

#### *(a) Analysis*

##### *(1) Admissibility*

20. I would point out 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 lies on points of law only. The General Court has exclusive jurisdiction to find the facts, except in a case where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess the evidence adduced.[10] The establishment of those facts and the assessment of that evidence do not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice.[11]

21. ASI and AOI submit that the allegation of an error of interpretation of the act challenged before the General Court does not constitute reliance on an error of law, except where that act is distorted as a result of a manifestly incorrect reading thereof by the General Court. In support of their objection, they rely on the judgments of 27 January 2000, *DIR International Film and Others* v *Commission*,[12] and of 30 November 2016, *Commission* v *France and Orange*.[13] In the first of those judgments, the Court of Justice stated that although, in proceedings for annulment, the General Court may be led to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons, it cannot do so where there is no material factor to justify such a course of action, since, in that case, it substitutes its own reasoning for that of the author of the act, committing an error of law challengeable before the Court of Justice.[14] Although it is true that, in that judgment, the Court concluded that there was a distortion of the content of the decision at issue,[15] it is not possible to infer from that finding, as ASI and AOI would like to do, the conclusion that *only* a manifestly incorrect reading of the contested act by the General Court may be relied on at the appeal stage. Such an inference would, moreover, conflict with the way in

[10] See judgment of 27 April 2023, *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo* v *Commission* (C-492/21 P, EU:C:2023:354, paragraph 106).

[11] See judgment of 22 June 2023, *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo* v *Commission* (C-163/22 P, EU:C:2023:515, paragraph 99).

[12] C-164/98 P, EU:C:2000:48 ('the judgment in *DIR International*').

[13] C-486/15 P, EU:C:2016:912 ('the judgment in *Commission* v *France and Orange*').

[14] See judgment in *DIR International*, paragraph 42.

[15] See judgment in *DIR International*, paragraph 48.

which the Court of Justice has applied that precedent to the contrary.[16] As regards the judgment in *Commission* v *France and Orange*, it is sufficient to note that, in paragraph 102 of that judgment, on which ASI and AOI rely, the Court of Justice merely noted the lack of arguments put forward by the Commission in support of its allegation that the decision challenged before the General Court was distorted. That point therefore does not provide any evidence in support of the objection of inadmissibility raised by ASI and AOE. I also note that the Court has already expressly rejected a similar objection in the judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*,[17] in which it held that the correctness of the interpretation given by the General Court to the decision the lawfulness of which it was called upon to assess in an action for annulment constitutes an admissible question of law at the appeal stage.[18] More generally, the question of the correct interpretation of a decision of the Commission adopted on the basis of the first paragraph of Article 108(2) TFEU cannot be shielded from review by the Court of Justice on appeal, on the pretext that it is a 'question of fact'. Although I do not rule out the possibility that there may be cases in which reliance on an error of interpretation of such an act might actually seek to obtain a re-examination by the Court of Justice of the findings of fact made by the General Court, that is not, in my view, manifestly the case with regard to the complaint under consideration, which concerns the correct understanding of the reasoning followed by the Commission and the legal test which it applied. In the present case, by relying on an incorrect interpretation of the decision at issue, the Commission has therefore raised an error of law capable of being challenged at the appeal stage.

22. Ireland submits that the first part of the first ground of appeal is ineffective because, even if the General Court had misinterpreted the decision at issue, the non-allocation to the Irish branches of the profits generated by the IP licences would still be confirmed solely on the basis of the factual findings on the activities of those branches contained in the remainder of the judgment under appeal. In that regard, I would point out that it is settled case-law that a ground of appeal directed against points in the grounds of a judgment under appeal which have no effect on the operative part of that judgment is ineffective and must be rejected.[19] In the judgment under appeal, the General Court did not merely find that the primary line of reasoning was based on erroneous assessments in relation to normal taxation under the applicable Irish tax law, but also examined, and upheld, the complaints raised by Ireland and by ASI and AOE against the factual assessments made by the Commission concerning the activities of the Apple Group. It follows that, in order to challenge usefully the General Court's findings relating to the shortcomings in the primary line of reasoning, findings which are based on two different and independent sets of grounds, it was for the Commission to put forward complaints against those two sets of grounds. This is exactly how the first ground of appeal is structured. The first part of that ground of appeal seeks to criticise the General Court's finding that, in the context of its primary line of reasoning, the Commission applied an 'exclusion' approach, whereas the second and third parts seek to challenge the grounds by which the General Court set aside those factual assessments. The fact that the complaints developed in the context of each of those parts, considered separately, are

[16] See judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 142 to 144). See also judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraphs 70 to 79).

[17] C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 47. See also judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192, paragraph 121).

[18] See also, implicitly, judgments of 20 September 2017, *Commission* v *Frucona Košice* (C-300/16 P, EU:C:2017:706, paragraphs 35 to 37); of 14 November 2019, *Silec Cable and General Cable* v *Commission* (C-599/18 P, EU:C:2019:966, paragraph 82); and of 31 January 2019, *Pandalis* v *EUIPO* (C-194/17 P, EU:C:2019:80, 102 to 109); and order of 7 September 2017, *Natural Instinct* v *M. I. Industries* (C-218/17 P, EU:C:2017:655, paragraph 4).

[19] See judgment of 27 April 2023, *Fondazione Cassa di Risparmio di Pesaro and Others* v *Commission* (C-549/21 P, EU:C:2023:340, paragraph 80 and the case-law cited).

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. Ireland's objection must therefore, in my view, be rejected.

*(2) The merits*

*(i) The first complaint: error of interpretation of the decision at issue*

23. As a preliminary point, it should be noted that the Commission does not dispute that an 'exclusion' line of reasoning is incompatible with Section 25 of the TCA 97, with the arm's length principle or with the authorised OECD approach. It states, however, that it did not apply such a line of reasoning. That said, I consider that it is necessary to recall briefly the essential points of the Commission's primary line of reasoning. Following the structure of the decision at issue, that reasoning comprises four parts.

24. In the first part, set out in Section 8.2.2.1 of that decision, the Commission set out the two premisses on which it relied in the remainder of its analysis. It stated, first, that the application of Section 25 of the TCA 97 requires the prior determination of a profit allocation method, which is not defined in that provision, and, secondly, that that method must lead to an outcome consistent with the arm's length principle. The correctness of both of those premisses was expressly recognised by the General Court – the first in paragraph 113 of the judgment under appeal and the second in paragraphs 211 and 212 – and was not challenged in the context of an independent appeal against the judgment under appeal or, incidentally, in the context of the present case. Despite the absence of challenges in that regard, it should in any event be pointed out that the General Court's findings on the application of the arm's length principle in the context of Section 25 of the TCA 97 are fully in line with the judgment in *Fiat Chrysler*, where the Court held that the Commission is entitled to rely on that principle only if and to the extent that its application is provided for by the tax legislation of the Member State concerned.[20] First, in paragraph 221 of the judgment under appeal, the General Court expressly rejected the Commission's argument that Article 107(1) TFEU gives rise to a freestanding obligation for the Member States to apply that principle. Secondly, it is apparent, more specifically, from paragraphs 210, 211, 218 to 220 and 247 of that judgment that the application of the arm's length principle in the present case is based on the Irish tax rules on the taxation of companies and is justified by the reference system identified by the Commission and endorsed by the General Court. In addition, it is not clear that methods or criteria for applying the arm's length principle have been laid down in the administrative practice of the Irish tax authorities, which the Commission actually disregarded in favour of parameters and rules external to the national tax system. By contrast, in paragraph 239 of the judgment under appeal, the General Court found that there was an overlap between the application of Section 25 of the TCA 97 as described by Ireland and the functional and factual analysis conducted as part of the first step of the analysis proposed by the authorised OECD approach.[21] Lastly, as the General Court found, in paragraph 433 of that judgment specifically, Ireland itself was unable to provide a sufficient explanation of the exact reason for the parameters used in the advance decisions to calculate the chargeable profits of ASI and AOE.

[20] See, in particular, paragraphs 73 and 74 and 96 to 105 of the judgment in *Fiat Chrysler*.

[21] In accordance with the authorised OECD approach, the aim of the analysis in the first step is to identify the assets, functions and risks that must be allocated to the permanent establishment of a company.

25. In the second part of its primary line of reasoning, set out in Section 8.2.2.2(a) of the decision at issue, the Commission specified the profit allocation method based on the arm's length principle that the Irish tax authorities should, in its view, have followed under Section 25 of the TCA 97. In recital 272 of that decision, it stated that the profits to be allocated to the branch of a non-resident company pursuant to that article must be regarded as 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'. Therefore, according to the Commission, it was incumbent, in the present case, on the Irish authorities, before approving the profit allocation method proposed by Apple, to verify whether, as claimed by the latter, the IP licences and related profits had to be allocated outside Ireland, and, 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, respectively (recital 273).

26. In the third part of its primary line of reasoning, the Commission itself carried out that verification, following the approach set out in recital 275 of that decision, which involved the analysis of the two different scenarios relied on by Ireland and Apple to justify the allocation of the IP licences outside Ireland. Those scenarios, based, first, on the functions performed by the head offices and, secondly, on those performed by Apple Inc., were examined in Section 8.2.2.2(b) of the decision at issue (recitals 276 to 307) and Section 8.2.2.2(c) of that decision (recitals 308 to 318), respectively. It was in the context of the examination of the first of those scenarios that the Commission allegedly applied the 'exclusion' approach criticised by the General Court. It is therefore necessary to recall briefly the two separate stages of that examination. In the first stage, in recitals 281 to 293, the Commission examined the situation of the head offices. It first observed that, during the relevant period, those head offices existed only 'on paper', having neither employees nor physical presence outside Ireland, and that the functions assigned to them could be performed only by the members of their respective boards of directors (recital 281). However, the only evidence made available to it for activities carried out by those boards did not allegedly provide any indication of activities related to the IP licences, or any discussion or decision relating to the conclusion of or amendment to the cost-sharing agreement, at least until the end of 2014 (recitals 282 to 285). In that context, it rejected as vague and unsubstantiated Apple's claim that activities of ASI's and AOE's board of directors had been ensured in 'myriad ways', noting, moreover, that, if those activities had actually been substantial, ASI and AOE would have been regarded as having a permanent establishment in the United States, given that the greater part of the members of those boards were based there (recital 287). Next, in recitals 288 and 289, on which the General Court inter alia relies, the Commission stated, first, that not only was there no evidence of activities performed by the head offices in relation to the IP licences, but that those head offices also did not have the capacity to perform active management functions in that context, and, secondly, that, due to the absence of personnel of the head offices, those functions, including those attributed to ASI and AOE by the cost-sharing agreement, could have been performed only by the Irish branches.[22] The Commission therefore concluded, in recital 293 of the decision at issue, that the head offices 'did not control or manage, nor were they in a position to control or manage, the … IP licences in such a manner as to derive the type of income recorded by those companies'. In the second stage of its examination, the Commission took into consideration the situation of the Irish branches in order to demonstrate that an analysis carried out taking into account only the functions performed, the assets used and

[22] A similar line of argument is set out in recitals 290 and 323 of the decision at issue, while a more general reference to the lack of physical presence and personnel of the head offices appears in numerous recitals and in the title of Section 8.2.2.2(b) of that decision.

the risks assumed by those branches would have led to the same result. In recitals 296 to 303 of the decision at issue, it thus listed the functions performed by those branches which, in its view, should have led the Irish tax authorities not to accept without further scrutiny Apple's unfounded assertion that the IP licences and related profits had to be allocated in their entirety outside Ireland. In recital 305 of the decision at issue, the Commission concluded, first, that such a profit allocation did not reflect a distribution that would have been agreed to by the Irish branches if they had been separate and standalone companies operating under normal market conditions and, secondly, that, given the lack of functions performed by the head offices and/or the functions performed by the Irish branches, the IP licences should have been allocated to the latter for tax purposes.

27. Finally, in the fourth part of its primary line of reasoning, set out in Section 8.2.2.2(c), the Commission elaborated on the points in its previous analysis, finding that, having regard to the method used by the Irish tax authorities for allocating the IP licences and the related profits, the advance decisions had led to a significant reduction in ASI's and AOE's taxable profits in Ireland and had therefore granted those companies a selective advantage within the meaning of Article 107(1) TFEU.

28. The following conclusions can be drawn from the foregoing as regards the approach followed by the Commission in its primary line of reasoning. First, it considered applicable – pursuant to Section 25 of the TCA 97 and in order to ensure, in accordance with that section, a determination of ASI's and AOE's chargeable profits in accordance with the arm's length principle – a legal test consisting in a *comparison* of the functions performed by the head offices and the Irish branches, respectively, with regard to the IP licences. Secondly, in applying that test, it carried out a *separate examination* of the role assumed by each of those entities in relation to those licences. Thirdly, at the end of that examination, it found, first, a complete *absence of functions* in relation to the IP licences with regard to the head offices and, secondly, an *active role*, resulting from the assumption of a series of functions – some of which are considered 'crucial' – and risks associated with the management and use of those licences with regard to the Irish branches. Fourthly, the finding of the absence of relevant functions performed by the head offices is based on the lack of evidence adduced by Apple to the contrary, in conjunction with the finding that those head offices lacked actual capacity to assume those functions. Fifthly, the Commission's reasoning is not based exclusively, or principally, on the finding of the *absence of personnel and physical presence of the head offices*, despite that repeated finding in the recitals of the decision at issue, but rather on the lack of *functions* performed by the latter in relation to the IP licences.

29. It follows that, contrary to what the General Court stated in the contested points of the judgment under appeal, it was not the finding, in itself, that the head offices had neither employees nor physical presence that led the Commission to conclude that the IP licences and related profits had to be allocated to the Irish branches, but rather the linking of two separate findings – that is to say, first, the complete absence of functions and risks assumed by the head offices and, secondly, the multiplicity and centrality of those assumed by the branches – carried out in the context of the application of the legal test set out in recital 272 of the decision at issue, which specifically required a comparison between the functions performed, the assets used and the risks assumed by the various parties which made up ASI and AOE.

30. On the basis of all the foregoing considerations, I consider that the General Court erred in law when it concluded, by misinterpreting the decision at issue, that the Commission had adopted an 'exclusion' approach in its primary line of reasoning. That error vitiates not only the conclusions

reached by the General Court in paragraphs 187 and 188 of the judgment under appeal with regard to Section 25 of the TCA 97, but also the grounds of that judgment by which the General Court criticised the Commission's other findings in relation to the normal taxation of profits under Irish tax law, concerning the arm's length principle (paragraphs 228 and 229) and the authorised OECD approach (paragraphs 243 and 244), respectively. It was on the basis of the same error of interpretation that the General Court concluded that the method followed by the Commission in the decision at issue was not consistent with that principle or with that approach.

*(ii) Second complaint: procedural irregularity*

31. In the context of the second complaint in the first part of its first ground of appeal, referring to the judgment of 24 October 2013, *Land Burgenland and Others* v *Commission*,[23] the Commission submits, in essence, that the General Court committed a procedural irregularity by ignoring the analysis of the functions performed by the Irish branches set out in recitals 296 to 303 of the decision at issue and the observations which it submitted at first instance explaining those functions in more detail.

32. That complaint cannot, in my view, be upheld. Without there being any need to dwell on the irrelevance of the precedent relied on by the Commission – in which the Court of Justice noted that the General Court failed to examine arguments set out briefly in the application initiating proceedings and developed only subsequently by the applicant during the procedure – it is sufficient to note that the Commission is, in essence, seeking a finding of procedural irregularity as regards the fact that the General Court adopted an interpretation of the decision at issue which is different from that which it supported. As pointed out in point 18 of this Opinion, it was for the General Court not only to interpret that decision, but it was also entitled to depart from the interpretation supported in the course of the proceedings by the Commission, where that was justified. In the present case, it is apparent from a reading of the judgment under appeal as a whole that, in concluding that the Commission had relied on an 'exclusion' approach, the General Court did not fail to take into consideration any of the elements of the decision at issue, including the analysis of the functions performed by the Irish branches, but merely interpreted in a different way from the Commission the weight of those separate elements and their structure in the scheme of that decision. In those circumstances, the Commission's complaint is therefore not a standalone one and is indissociable from the claim that there was an error of interpretation.

*(iii) The third complaint: contradictory and inadequate reasoning*

33. By the third complaint in the first part of its first ground of appeal, the Commission asserts that the General Court failed to state reasons in two respects.

34. First, relying on the same arguments as those put forward in support of the complaint of procedural irregularity just examined, the Commission submits that the judgment under appeal does not contain adequate reasoning in so far as it concludes that the primary reasoning is based on an 'exclusion' approach, since the reasons for the General Court's failure to take into account the analysis of the functions of the Irish branches carried out by the Commission are not stated. In that regard, I consider, in essence, for the same reasons as those set out in point 28 of this Opinion, that the Commission's criticism must be rejected as unfounded.

[23] C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 112.

35. Secondly, the Commission maintains that the reasoning in the judgment under appeal is vitiated by contradictions. In that regard, it must be pointed out that there is a clear tension between, on the one hand, the conclusions reached by the General Court in paragraphs 186, 228 and 243 of the judgment under appeal, according to which the Commission had not attempted to show that the allocation of the IP licences to the Irish branches followed from the activities actually carried out by the latter and, on the other hand, paragraphs 283, 284 and 295 of that judgment, in which the General Court considered, by contrast, that the Commission had identified the functions performed by those branches which, in its view, justified such an allocation. That tension is not explained, as ASI and AOI suggest, by interpreting the judgment under appeal as meaning that the General Court actually criticised the Commission not for having followed an 'exclusion' approach but for having followed a 'mixed' approach. Such an interpretation is precluded by the clear wording of that judgment and also by the relationship between the various parts of that judgment in which the points giving rise to the contradictory reasoning relied on by the Commission form part. Paragraphs 255 to 295 of the judgment under appeal form part of the third part of the grounds relating to the analysis of the primary line of reasoning. It is apparent from paragraph 250 of that judgment that the assessments set out in that part were carried out 'for the sake of completeness', as the General Court had already concluded, at the end of the second part of its analysis, that the primary line of reasoning was 'based on erroneous assessments of normal taxation under the Irish tax law applicable in the present instance'. In other words, paragraphs 255 to 295 of the judgment under appeal, in the overall rationale of the General Court's reasoning, are superfluous. The conclusion set out in paragraph 249 does not appear to be intermediate in nature or require the remainder of the analysis set out in paragraphs 255 to 295 of that judgment, which was carried out by the General Court for the sake of completeness alone. The third complaint in the first part of the first ground of appeal, in so far as it alleges the existence of contradictory reasoning, must therefore, in my view, be upheld.

### *(b) Conclusions on the first part of the first ground*

36. In the light of all the foregoing considerations, I propose that the Court uphold the first part of the first ground of appeal.

## *2. The second part of the first ground of appeal*

37. 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, reviewing in turn the activities of ASI's Irish branch (paragraphs 255 to 284), the activities of AOE's Irish branch (paragraphs 285 to 295) and the activities outside those branches (paragraphs 296 to 309). The Commission challenges the General Court's implicit acceptance of the relevance of the functions performed by Apple Inc. for the purpose of determining ASI's and AOE's chargeable profits in Ireland. It submits that, in so far as Apple Inc. is an entity separate from ASI and AOE, the functions which it performs in respect of the IP of the Apple Group in its capacity as parent company or under intra-group agreements, whether 'for the benefit' of the group as a whole or specifically of those companies, or 'on behalf of' those companies, have no bearing on the question as to which of the Irish branches or head offices the territorially limited licences held by those companies had to be allocated to for tax purposes. The Commission raises two separate complaints. The first alleges a procedural irregularity and inadequate and contradictory reasoning; the second alleges an infringement of Article 107(1) TFEU, a distortion of Irish law and a procedural irregularity. By arguments which

overlap to a large extent, ASI and AOE, as well as Ireland and the Grand Duchy of Luxembourg, submit that the complaints raised by the Commission are inadmissible in part, ineffective and, in any event, unfounded. Addressing in reverse order the submissions raised by the Commission, I will begin by examining the second complaint.

### *(a) The second complaint*

38. The Commission submits, primarily, that, by relying on the functions of Apple Inc., the General Court infringed 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 judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission* ('the judgment in *Andres*'),[24] an error in the interpretation and application of national law constitutes an error of interpretation and application of Article 107(1) TFEU, the General Court also allegedly infringed that provision. More specifically, according to the Commission, the General 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 with those performed by Apple Inc. rather than with those carried out by the head offices. In the alternative, the Commission submits that the infringement of the arm's length principle and of the separate entity approach constitutes a manifest distortion of national law. Lastly, the Commission asserts that the General Court committed a procedural irregularity consisting of relying on inadmissible evidence.

#### *(1) Admissibility*

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

40. I have already pointed out that 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, save where the findings of fact made by it are substantively inaccurate and where the clear sense of the evidence adduced before it has been distorted.[25] However, the Court of Justice has stated that, where the General Court has determined or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn therefrom. The jurisdiction of the Court of Justice to review extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed and whether the General Court has taken the right legal criteria as the basis for its appraisal of the facts and evidence.[26] In the present case, as has been stated, the Commission submits that, by taking into account the functions of Apple Inc., the General Court committed an error vitiating the factual analysis which it carried out in paragraphs 251 to 311 of the judgment under appeal and the results to which that analysis led, giving rise to a misapplication of national law and an infringement of Article 107(1) TFEU. Therefore, the Commission's arguments relate to

[24] C-203/16 P, EU:C:2018:505, paragraphs 77 to 81.

[25] See, to that effect, judgment of 8 June 2023, *Severstal and NLMK* v *Commission* (C-747/21 P and C-748/21 P, EU:C:2023:459, paragraphs 45 and 46 and the case-law cited).

[26] See judgment of 2 March 2021, *Commission* v *Italy and Others* (C-425/19 P, EU:C:2021:154, paragraph 53).

the conformity with Irish law of the parameter on the basis of which the General Court classified the facts (the 'legal test' applied by the General Court) and the legal consequences arising therefrom. In those circumstances, it seems clear to me that the present complaint does not seek as a whole to challenge the findings of fact or the appraisal of the evidence by the General Court. That does not exclude the possibility that some of the criticisms made by the Commission on individual elements of the factual analysis carried out by the General Court may, taken in isolation, prove to be inadmissible on that basis. Such a possibility will be examined in the course of the analysis.

41. ASI and AOI, as well as Ireland and the Grand Duchy of Luxembourg, 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 judgment in *Andres* when it states, in essence, that any error in the interpretation and application of national law constitutes an error of interpretation and application of Article 107(1) TFEU.

42. I would point out that, according to settled case-law, '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'. By contrast, 'since the assessment, in the context of an appeal, of the legal classification which has been given to that national law by the General Court in the light of a provision of EU law constitutes a question of law, it falls within the jurisdiction of the Court of Justice'.[27] In paragraphs 79 to 81 of the judgment in *Andres*, relied on by the Commission, the Court of Justice stated that, while the 'content [and] the scope of national law' as found by the General Court are not, in principle and save where the clear sense of that law has been distorted, open to challenge at the appeal stage, the classification as a 'reference framework' attributed to the rules of that law, and therefore the correct delimitation by the General Court of the relevant reference system, instead, is. In the judgment in *Fiat Chrysler*, the Court of Justice further clarified that the question as to whether, in making that delimitation, the General Court correctly applied a legal test, such as the arm's length principle, is, 'by extension', a question of law which can be reviewed by the Court of Justice on appeal.[28]

43. In the light of the principles set out above and the current state of the case-law, the interpretation of the judgment in *Andres* proposed by the Commission appears open to criticism. The automatic mechanism on which it is based effectively removes the distinction, confirmed in the judgment in *Fiat Chrysler*, between, on the one hand, findings of the General Court aimed at clarifying the *content and scope* of the national law and its *application* in the present case and, on the other hand, findings relating to that law, on which the correct delimitation of the reference system for the purposes of the application of Article 107(1) TFEU depends, and therefore the identification of the provisions of national law which fall within that reference system.[29]

44. In fact, the dispute between the parties raises the delicate issue of the boundary between findings of facts and their legal classification in the light of the General Court's assessments of national law on State aid. The latter consists, as is known, in the process of attributing the relevant facts previously established to a given legal category or legal concept, from which the

[27] See judgment in *Andres*, paragraph 78.

[28] Judgment in *Fiat Chrysler*, paragraph 85.

[29] According to settled case-law, the determination of the reference framework must follow from an objective examination 'of the content, the structure and the specific effects of the applicable rules under the national law' of the Member State concerned (see judgment in *Fiat Chrysler*, paragraph 72 and the case-law cited).

identification of the rules of law applicable to the case arises. Since this is an essentially cognitive process, it differs from a mere finding of fact and, having regard to its essential importance in the context of the legal reasoning, it may, as discussed above, be subject to review on appeal. If it is considered that the error regarding the definition of the meaning and scope of a provision of national law or its application, raised on appeal, may, in so far as it affects the delimitation or application of the reference system, have an effect on the connection of the case to the concept of selective advantage within the meaning of Article 107(1) TFEU, that error should, in my view, be open to review by the Court, in so far as it is an error in the legal classification of national law on the basis of a provision of EU law. [30]

45. The actual scope of the principles set out in point 37 of this Opinion remains, in any event, to be clarified by the Court of Justice and the dividing line between admissible complaints on appeal and inadmissible complaints, as regards the General Court's findings relating to national law, remains fluid.

46. In my view, however, the foregoing does not affect the admissibility of the arguments put forward by the Commission in the present complaint. First, the Commission unreservedly endorses the legal test which, in its view, the General Court held to be applicable in the present case under Irish law for the purposes of analysing the existence of an advantage within the meaning of Article 107(1) TFEU. Secondly, although the Commission claims that national law has been misapplied to the circumstances of the present case, it is only in so far as, according to the Commission, the General Court in fact applied a different legal test from that correctly identified. The challenge raised by the Commission therefore seems to me to be among those which, in paragraph 85 of the judgment in *Fiat Chrysler*, the Court held to be admissible 'by extension', in so far as it ultimately sought to call into question the choice of reference system in the context of the first stage of the analysis of the existence of a selective advantage.

47. In any event, contrary to what ASI and AOI as well as Ireland submit, the Commission also explicitly relies on a distortion of Irish law, which must necessarily lead the Court to assess the substance of the Commission's arguments, at least in order to verify whether such a distortion has been proved sufficiently.

48. In the light of the foregoing, the grounds of inadmissibility put forward by Ireland and by ASI and AOI based on the alleged challenge by the Commission of assessments relating to Irish law must, in my view, also be rejected.

*(2) Merits*

*(i) Taking into account inadmissible evidence*

49. I consider it necessary to begin by examining the complaint alleging a procedural irregularity as a result of the taking into account of inadmissible evidence, in so far as it affects the validity of the evidentiary basis on which the General Court relied. The Commission claims that the evidence referred to in paragraph 301 of the judgment under appeal, from which it was apparent, according to the General Court, that the contracts with third-party original equipment manufacturers ('OEMs'), which are responsible for manufacturing a large proportion of the products sold by ASI, and the contracts with customers such as telecommunications operators, had been negotiated by directors of the Apple Group and signed by Apple Inc., and ASI through their

[30] See, to that effect, Opinion of Advocate General Kokott in *Commission* v *Luxembourg and Others* (C-457/21 P, EU:C:2023:466, point 88).

respective directors, either directly or by power of attorney, is inadmissible. According to the Commission, that evidence, consisting, first, of several email exchanges between Apple Inc. directors concerning contacts with OEMs and telecommunications operators and, secondly, of four powers of attorney issued by ASI to Apple Inc. directors ('the powers of attorney relating to the signing of contracts with OEMs and telecommunications operators'), [31] could not be taken into account by the General Court, since they had not been produced during the administrative procedure and, for three of those powers of attorney, also because they had been produced late before the General Court, only at the stage of the reply. ASI and AOI do not dispute that that evidence was produced for the first time before the General Court. They claim, however, that the Commission was aware of the activities of ASI's and AOE's US-based executives and of the existence and importance of the abovementioned powers of attorney and that, if the Commission had conducted an appropriate investigation, it could have obtained all the relevant evidence.

50. In that regard, I note that, according to settled case-law, the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted. [32] In the judgment of 20 September 2017, *Commission* v *Frucona Košice*, [33] the Court of Justice clarified that the information 'available' to the Commission includes that which seemed relevant to the assessment to be carried out and which could have been obtained, upon request, by the Commission during the administrative procedure. [34] In the present case, as regards, in the first place, the email exchanges between Apple Inc. directors concerning contacts with OEMs and telecommunications operators, I note that it is apparent from the file before the General Court that almost all of those exchanges merely report on activities carried out by Apple Inc. employees in the context of the cost-sharing agreement and that they do not contain any implicit or explicit reference to ASI. They are therefore documents which the Commission considered to be 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 advance decisions. In my view, therefore, it cannot be said that, even if it were able to envisage its existence, it was required to request the production of that evidence during the administrative procedure. By contrast, it was incumbent on Apple, in particular in the light of the position taken by the Commission, to adduce all the evidence at its disposal in order to demonstrate that those negotiations were in fact conducted on behalf of ASI's head offices and not on behalf of the Apple Group as a whole. As regards, in the second place, the powers of attorney relating to the signing of contracts with OEMs and telecommunications operators, I note, first of all, that it is not disputed that this is the main evidence, if not the only 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 issued by the directors of ASI and AOE was provided only as an annex to their application at first instance and that the text of three of those powers of attorney was produced only at the reply stage, whereas the fourth, according to the Commission's assertions which were not contradicted by ASI and AOI, was never produced. [35] Nor is it disputed that the minutes of the meetings of the boards of directors of ASI and AOE presented during the administrative procedure ('the minutes examined by the Commission') did not mention the powers of attorney relating to the signing of the contracts with the OEMs, but

[31] It is apparent from the file that these are, in particular, powers of attorney issued to the CEO and to the vice-president of Apple Inc.

[32] See judgment of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 91 and the case-law cited).

[33] C-300/16 P, EU:C:2017:706, paragraph 71 ('the judgment in *Commission* v *Frucona Košice*').

[34] See also judgment of 29 June 2023, *TUIfly* v *Commission* (C-763/21 P, EU:C:2023:528, paragraph 47).

[35] ASI and AOI merely assert that they provided the Commission with the minutes of the meeting of the board of directors of ASI of 27 July 2011 in which the power of attorney in question is referred to, but do not comment on the Commission's assertion that the text of that power of attorney (which from the minutes appear to be included as an annex to those minutes) was never produced.

only that relating to the signing of the contracts with telecommunications operators, which, however, as noted, was never produced. As regards the information brought to the Commission's attention during the administrative procedure, I note that Apple's observations of 7 September 2015, annexed to ASI's and AOE's application before the General Court, refer to the existence of a system of powers of attorney issued by ASI's and AOE's boards of directors, inter alia, for the purpose of negotiating and signing contracts with the OEMs and telecommunications operators. However, those observations are limited to a vague and unsubstantiated reference. [36] In those circumstances, I consider that the Commission cannot be criticised for not having obtained the powers of attorney in question during the administrative procedure, in particular given that it had, in any event, requested and examined all the minutes of the meetings of the board of directors of ASI and AOE during the relevant period, without finding practically any trace of those powers of attorney. Instead, in my view, it was incumbent on Apple, in order to substantiate its reconstruction of the facts, to produce those powers of attorney at as early a stage as possible, without waiting for the last occasion available to it to do so in the context of the proceedings before the General Court.

51. The Commission's arguments alleging a procedural irregularity resulting from the taking into account of inadmissible evidence must therefore, in my view, be upheld.

*(ii) The legal test applicable under Irish law*

52. The Commission submits that the legal test applicable under Irish law for the purposes of determining the chargeable profits of a non-resident company in Ireland was correctly identified by the General Court in paragraph 248 of the judgment under appeal and must take into account the 'allocation of assets, functions and risks between the branch and the other parts of that company'. By contrast, Ireland submits that the relevant analysis for the purposes of the application of Section 25 of the TCA 97 must cover, as the General Court stated, in particular in paragraph 227 of the judgment under appeal, and 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. ASI and AOI, for their part, submit that, in paragraphs 182 to 186 of the judgment under appeal, the General 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. Like Ireland, ASI and AOI maintain that the activities carried out by the head offices have no bearing on the application of Section 25 of the TCA 97. Lastly, Ireland as well as ASI and AOI submit, in essence, that paragraph 248 of the judgment under appeal on which the Commission relies concerns the application of the authorised OECD approach, not Section 25 of the TCA 97, and, in any event, that 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.

53. The brief presentation of the parties' main arguments above makes it possible to make two preliminary observations. The first is that all the arguments set out above exclude the relevance, for the purposes of the application of Section 25 of the TCA 97, of the functions performed by an

[36] The observations of 14 April 2015, to which ASI and AOI also referred, merely assert that the terms of the contracts with OEMs and telecommunications operators are defined centrally by executives in Cupertino and that, prior to 2013, executives in the United States signed those contracts on behalf of ASI on the basis of the power of attorney. They also state that, once formalised, those contracts were performed by ASI's Irish branch through the issuance of purchase orders. Similarly, Ireland's observations of 29 January 2016 merely assert that the contracts with OEMs are signed and performed by executives of ASI. Before the General Court, ASI and AOE produced a document explaining the arrangements for the joint (Apple Inc. and ASI) negotiation and signature of the contracts with the OEMs. They also produced one of those contracts which bore, for ASI, the signature of an employee of Apple Inc., designated director of ASI for the reference financial year.

entity separate from the non-resident company whose chargeable profit must be assessed in Ireland, even if it is associated with it, such as Apple Inc. in the present case. A profit allocation criterion such as that advocated by Ireland and ASI and AOI, which takes account exclusively of the activities actually carried out by the Irish branches, necessarily and logically leads to the result of excluding from the relevant analysis under that section the functions performed by Apple Inc. The second consideration is that the judgment under appeal lacks clarity as to the definition of the profit allocation method governing the application of Section 25 of the TCA 97. That is, however, a point 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 within the meaning of Irish law in the light of which the existence of an advantage within the meaning of that provision must be assessed. On the basis of several paragraphs of the judgment under appeal, the parties identified three criteria for allocating profits to the Irish branch of a non-resident company, the first requiring proof of control by the branch of the asset from which the profits to be allocated derive ('control criterion', paragraphs 182 to 185 of the judgment under appeal), the second is based on the activities actually carried out by the branch and the assessment of their market value ('actual activities criterion', essentially paragraphs 179, 218, 219 and 227 of the judgment under appeal), and the third involves the allocation of assets, functions and risks between the branch and the other parts of the company ('criterion for allocating functions within the company', paragraphs 240, 242 and 248 of the judgment under appeal).

54. In those circumstances, it is necessary, in so far as possible, to seek a coherent reading of the judgment under appeal on that point, starting from the undisputed premiss of that judgment, according to which, in order to determine the chargeable profits in Ireland of a non-resident company, it is necessary to carry out a 'functional … analysis' to determine the activities performed, the assets used and the risks assumed by its branch in Ireland. That analysis is required by Section 25 of the TCA 97, the arm's length principle and the authorised OECD approach.[37] The opposing positions of the parties differ as regards the *subject matter* of that analysis in the present case.

55. I consider that a coherent reading of the judgment under appeal does not permit the inference that the General Court considered that a criterion which was focused *exclusively* on the activities of the Irish branches of the non-resident companies was applicable under Irish law. Admittedly, as stated in paragraph 177 of the judgment under appeal, Section 25 of the TCA 97 'relates only to the profits derived from trade that the Irish branches have carried on themselves and excludes profits derived from trade carried on by other parts of the non-resident company in question'. However, the Commission did not err in considering that such a statement is limited, in essence, to recalling the principle of fiscal territoriality and does not, in itself, constitute specification of a profit allocation method for the purposes of Section 25 of the TCA 97 – let alone a method of allocation for property which generates profits – which precludes taking into account the functions assumed by the other parts of the non-resident company. In that regard, I agree with the Commission that such a preclusion is not apparent anywhere in the judgment under appeal. In particular, it cannot be inferred, as Ireland and ASI and AOI maintain, from paragraphs 179 to 184 of that judgment, in which the General Court referred to the judgment of the High Court, Ireland, in *S. Murphy (Inspector of Taxes) v. Dataproducts (Dub.) Ltd*.[38] In that judgment, the High Court carried out an extensive analysis of the functions performed by the Irish branch of the company Dataproducts, resident in the Netherlands, and by the executives of that company outside Ireland, respectively, as well as a comparison of those functions and the risks assumed by that

[37] Paragraph 1.42 of the transfer pricing guidelines specifies that the functional analysis seeks to 'identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions'.

[38] [1988] I.R. 10 note 4507 ('the judgment in *Dataproducts*').

company through the various parts of it, before concluding that the property in question, a Swiss account, the proceeds of which had been made available, in part, to the Irish branch, was controlled not by the latter but by the Netherlands head office of Dataproducts and that, therefore, the sums at issue could not constitute chargeable profits in Ireland. That judgment is therefore rather an illustration of a profit allocation method such as that relied on by the Commission.

56. In the light of the foregoing, it is clear that the General Court, first, expressly accepted, in paragraph 240 of the judgment under appeal, that, in order to determine the functions actually performed by the Irish branch of a non-resident company for the purposes of the application of 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'. Secondly, it held, 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'.

57. Thirdly, the very wording of Section 25 of the TCA 97 supports this, in so far as it requires the identification of 'trading income arising directly or indirectly' from the branch and from property or rights 'used by, or held by or for, the branch …'. It is difficult to see how it would be possible to carry out such an operation, which involves, inter alia, determining the economic ownership of the property held by the company in question, without taking into consideration, by comparing them, 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 profits 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.

58. In the light of the foregoing, I consider that the Commission's interpretation of the judgment under appeal is correct where it states that the criterion 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 account to be taken of the allocation of assets, functions and risks between the branch and the other parts of that company and excludes the taking into account of the role played by separate entities.

59. I would add that, in the present case, the need to limit the analysis to relations between the head offices and the Irish branches arises, however, from the choice made by Apple Inc., in its commercial autonomy, to transfer, under the cost-sharing agreement, part of its profits to ASI and AOE. It is therefore a matter of distributing such profits to the various subdivisions of those companies, from which Apple Inc. remains separate. The consequence of applying a different criterion, as highlighted correctly by the Commission, is to fail to take into account the reality of that agreement and of the tax structure of the Apple group, which are factors that the Irish tax authorities could not disregard in a comprehensive assessment of the method for determining the chargeable profit of ASI and AOE proposed by the group. Otherwise, this would therefore lead to the paradoxical outcome that the assets legitimately transferred by Apple Inc. outside the United States and the related profits, when determining the tax due in Ireland, would return – only virtually – to the United States, further reducing the tax liability of the group.

*(iii) The taking into account of the functions of Apple Inc. by the General Court*

60. It is necessary at this stage to ascertain whether, as the Commission maintains, the General Court actually relied on the functions performed by Apple Inc. in relation to the IP of the Apple Group or whether, as Ireland and ASI and AOI submit, the Commission's reasoning distorts the grounds of the judgment under appeal on that point.

61. First, the Commission submits that the General Court referred to the functions performed by Apple Inc. in paragraphs 259 to 267 and paragraph 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 functions of exercising quality control, managing R&D facilities and managing business risk. In that regard, I note that, in paragraphs 260 to 267 of the judgment under appeal, the General Court referred in general to all the functions and risks listed in Exhibit B to the cost-sharing agreement and relating to the intangible property covered by that agreement,[39] 'that is to say essentially all of the Apple Group's IP' (paragraph 261) which, under that agreement, ASI and AOE were authorised to perform or might have been required to assume. In paragraphs 263 and 264 of the judgment under appeal, the General Court held that the Commission had provided no evidence to show that ASI or AOE, let alone their Irish branches, had actually performed any of those functions or that the staff of the branches had actually managed those risks. In paragraph 266 of that judgment, it reiterated 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 Exhibit B to the cost-sharing agreement'. As the Commission rightly points out, the functions and risks listed in paragraphs 261 and 262 of the judgment under appeal are normally reserved, in a multinational, to the holding company of the group. In the present case, moreover, as the General Court pointed out in paragraph 267 of that judgment, they are, in essence, 'all of the functions at the heart of the Apple Group's business model, which is centred on the development of technological products' and the 'key risks which are inherent to that business model'. Furthermore, it is apparent from the file before the General Court, in addition to the decision at issue, that the Commission, Ireland and ASI and AOE agreed on the fact that those functions and risks, *relating to all of the Apple Group's IP, and its development and management*, were for the most part assumed by Apple Inc., as the holding company of the group or under the cost-sharing agreement, and centralised by it in Cupertino. The Commission therefore does not err in stating that, in the paragraphs of the judgment under appeal which have just been examined, the General Court included in its assessment of the facts functions and risks assumed by Apple Inc.

62. Secondly, the Commission submits that the General Court wrongly set out the functions of Apple Inc. in paragraphs 268 to 295 of the judgment under appeal. In those paragraphs, the General Court examined the activities and functions listed in recitals 296 to 300 of the decision at issue as having actually been performed by ASI's Irish branch and concluded that those activities and functions, taken individually or as a whole, did not justify the allocation of the IP licences to that branch. The activities and functions examined by the General Court included quality control, various R&D activities and the management of local marketing costs.

[39] Exhibit B to the cost-sharing agreement, as amended in 2009, included two tables concerning the relevant functions relating to intangible property subject to the agreement and the related risks. Each of those functions and risks had an 'x' next to it in the columns for, respectively, Apple Inc. (identified as 'Apple') and ASI and AOE (identified collectively as 'International Participants'), except for IP Registration and Defence, which was associated solely with Apple Inc. (see paragraph 260 of the judgment under appeal).

63. In that regard, as regards quality control, I note that that function was among those listed in the cost-sharing agreement and associated with Apple Inc. and ASI and AOE. In those circumstances, it is clear that when, in paragraph 269 of the judgment under appeal, the General Court refers to 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 referring to activities performed by entities separate from that company and in particular to activities performed by Apple Inc.[40] This is also true, in my view, of paragraph 274 of the judgment under appeal, in which the General Court stated that the fact that the ASI branch incurred the local marketing costs 'does not mean that that branch is responsible for designing the marketing strategy itself'. According to the marketing services agreement, the design of that strategy is, in actual fact, the responsibility of Apple Inc.

64. As for 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 activities with those performed at the worldwide level by entities outside ASI. There is an express reference to group policies and strategies developed by Apple Inc., lastly, in paragraph 277 of the judgment under appeal, as regards the activities of ASI's branch in relation to the AppleCare service, which is described as an 'execution' activity 'in accordance with the guidance and strategy decided in the United States', and in paragraphs 281 and 283 of that judgment, which contain an overall assessment by the General Court regarding the 'support' and 'executive' nature of that branch's activities.

65. Thirdly, 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. In paragraph 290 of the judgment under appeal, the General Court states, with regard to the specific processes and manufacturing expertise developed by that branch in the context of its manufacturing activities, that, although that expertise may benefit from protection through certain IP rights, 'they are limited in scope and are specific to the activities performed by that … branch', which 'are insufficient to justify allocating all of the … IP licences to that branch'. It is, in my view, clear that such a 'quantitative' assessment is possible only in so far as the expertise developed by AOE's Irish branch is, as the Commission rightly states, compared to all of the R&D functions relating to the Apple Group's IP. By contrast, in so far as it seeks to challenge a factual assessment carried out by the General Court, it is necessary to reject the Commission's line of argument directed against paragraphs 291 to 294 of the judgment under appeal, according to which the IP developed by AOE's Irish branch represented a unique and valuable contribution, which cannot be reconciled with limited remuneration such as that provided for in the advance decisions.

66. Lastly, the Commission submits that the General Court took into account the functions performed by Apple Inc. in paragraphs 298 to 302 of the judgment under appeal, when it examined the activities performed outside the branches of ASI and AOE. In that regard, there is no doubt that, in paragraphs 299 and 300 in particular of that judgment, the General Court recalled Apple Inc.'s functions and its role as parent company when, first, 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 – recalled the fact that 'decisions relating to the

[40] While it is true that, in paragraph 269 of the judgment under appeal, it is stated that quality control could even be outsourced through agreements with third-party manufacturers, there are no further indications in the judgment under appeal as to the existence of such agreements concluded by ASI and AOE.

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 General Court found that 'the strategies relating to new product launches and, in particular, the organisation of distribution on the European markets … [were] managed at the Apple-Group level by, inter alia, the Executive Team under the direction of the Chief Executive Officer in Cupertino'. [41]

67. It follows from the foregoing analysis that, in all the paragraphs of the judgment under appeal criticised by the Commission, the General Court relied, more or less implicitly and in any event clearly, 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 role as parent company, comparing those functions with those performed by the Irish branches in relation to the IP licences. Thus, contrary to the assertions of Ireland and ASI and AOI, the present complaint is not based on a misreading of the judgment under appeal, let alone a distortion of that judgment.

*(iv) Impact of taking into account Apple Inc.'s activities on the legal classification of the facts*

68. Ireland and ASI and AOI submit, in essence, that the present complaint is, in any event, ineffective since, even assuming that the General Court took into consideration the functions of Apple Inc., the conclusions which it reached at the end of its examination of the facts are based on an analysis of the activities of the Irish branches and the head offices and on the finding that the functions performed by those branches were 'routine', which, according to the General Court, were insufficient to justify the allocation to the latter of the IP licences and related profits.

69. In that regard, I note that it is apparent from all the findings of fact made by the General Court, as summarised in paragraph 310 of the judgment under appeal, that the conclusion set out in that paragraph, according to which the Commission had not succeeded in showing that 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, first, on the assessment of the activities actually performed by those branches and, secondly, on the 'strategic decisions taken and implemented outside of those branches'.

70. Assuming that the latter element includes a reference to the functions performed by the head offices, it is necessary to analyse more closely the assessments set out in paragraphs 298 to 309 of the judgment under appeal, in which the General Court examined the arguments of Ireland and ASI and AOE, according to which the latter, through their management bodies, had *implemented* the strategic decisions relating to the design and development of the Apple Group's products taken in a centralised way for the group as a whole in Cupertino.

71. In those paragraphs, the General Court found, first, that ASI and AOE had provided evidence of the centralised nature of those decisions and, as regards, in particular, decisions in the field of R&D, evidence showing, first, 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 and, secondly, that strategies relating to new product launches and the organisation of distribution on the European markets, were managed at the Apple Group level by, inter alia, the Executive Team under the direction of the Chief Executive Officer in Cupertino (paragraphs 298 to 301). I note that, in that part of its assessments – with the exception of paragraph 301, referred

[41] Without being challenged on that point by ASI and AOI, the Commission stated that the 'Executive Team' and the Chief Executive Officer of the group to which the General Court refers are the executives and the CEO of Apple Inc., respectively.

to in points 42 to 43 of this Opinion – the General Court did not in any way imply either direct or indirect participation of the head offices in the adoption of decisions relating to R&D and in the design of marketing and distribution strategies at the Apple Group level referred to above.

72. Secondly, the General Court took into consideration the decision-making role played by the head offices. It noted, first, with regard to ASI and AOE's ability to take decisions concerning their essential functions through their management bodies, that the Commission itself accepted that those companies had boards of directors which held regular meetings during the relevant period, and reproduced extracts from the minutes of those meetings in tables included in the decision at issue. The General Court went on to state that 'the resolutions of the boards of directors which were recorded in those minutes covered regularly (that is to say, several times a year), inter alia, the payment of dividends, the approval of directors' reports and the appointment and resignation of directors' and, less frequently, concerned 'powers of attorney authorising certain directors to carry out various activities such as managing bank accounts, overseeing relations with governments and public bodies, carrying out audits, taking out insurance, hiring, purchasing and selling assets, taking delivery of goods and dealing with commercial contracts'. The General Court also noted that it was apparent from those minutes that 'individual directors [had been] granted very wide managerial powers' (paragraph 306) and concluded that the Commission had erred when it considered that ASI and AOE, through their management bodies, in particular their boards of directors, did not have the ability to perform the essential functions of those companies by, where appropriate, delegating their powers to individual executives who were not members of the Irish branches' staff (paragraph 309). In that regard, I would point out that neither that conclusion nor the evidence drawn from the minutes examined by the Commission and referred to in paragraphs 305 and 306 of the judgment under appeal provides any indication as to the actual involvement of the boards of directors of the head offices in the taking of decisions relating to the management of the IP licences. In that regard, in paragraph 304 of the judgment under appeal, the General Court merely stated that the fact that those minutes 'do not give details of the decisions concerning the management of the … IP licences, of the cost-sharing agreement and of important business decisions does not mean that those decisions were not taken'. I will come back to that point later, which is disputed by the Commission in the third part of its first ground of appeal.

73. It follows from the foregoing that, in paragraphs 298 to 309 of the judgment under appeal, the General Court found, first, that there was a centralised decision-making system within the Apple Group, belonging to Apple Inc., including as regards the management and development of the group's IP and, secondly, the ability of the head offices to take, through their respective boards of directors, 'the company's key decisions …, such as approval of the annual accounts', including through a system of delegation of powers to individual board members. However, it did not find that the head offices had participated in the taking 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 various versions of the cost-sharing agreement had been signed by members of their boards of directors in Cupertino, is disputed by the Commission in the third part of its first ground of appeal, the analysis to which I refer. It follows that the objection raised by ASI and AOI and by Ireland, which alleges that the present complaint is ineffective, must be rejected.

*(3) Conclusions on the second complaint*

74. In the light of the foregoing considerations, I consider that the Commission is right when it submits that the General Court reached the conclusion that there was insufficient evidence to allocate the IP licences to the branches by erroneously comparing the functions performed with regard to those licences by the latter with those performed by Apple Inc. with regard to the Apple Group's IP rather than with those performed by the head offices in relation to those licences. That is particularly apparent from the intermediate conclusions reached by the General Court in 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 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 Exhibit B to 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 the management of that IP had necessarily been assumed by their Irish branches. The second complaint of the second part of the first ground of appeal is therefore, in my view, well founded.

***(b) The first complaint***

75. In the context of the first complaint in the second part of its first ground of appeal, the Commission submits that, while relying, in paragraphs 255 to 302 of the judgment under appeal, on several important functions performed by Apple Inc. directors or employees with regard to Apple IP, the General Court did not take a position on recitals 308 to 318 of the decision at issue, in which it set out the reasons why it considered that those functions were irrelevant for the purposes of assessing the advance decisions in the light of Article 107(1) TFEU. Similarly, the General Court failed to consider the arguments put forward by the Commission at first instance concerning the irrelevance of the functions performed by Apple Inc. 'for the benefit' of ASI and AOE or 'on behalf' of the head offices. The judgment is therefore allegedly vitiated by an inadequate statement of reasons.

76. In that regard, I note, first, that the irrelevance of the functions performed by Apple Inc. with regard to the Apple Group's IP for the purposes of determining ASI's and AOE's chargeable profits in Ireland was expressly and repeatedly submitted by the Commission during the administrative procedure and before the General Court and the Court of Justice.[42] I note, secondly, that it is clear from the decision at issue, the file before the General Court and the judgment under appeal that the position of ASI and AOE (now ASI and AOI) and of Ireland, from the initial stages of the administrative procedure, was based on the assertion that the management of Apple's IP, including the licences held by those companies, took place centrally, from Apple's headquarters in Cupertino. I would point out, thirdly, that, in points 50 to 55 of this Opinion, I stated that, in the factual analysis carried out in paragraphs 255 to 302 of the judgment under appeal, the General Court, on several occasions, implicitly or expressly, directly or indirectly, compared the functions performed by the Irish branches in relation to the IP licences with those assumed by Apple Inc. with regard to the Apple Group's IP in the context of intra-group agreements or in its capacity as parent company. Lastly, I note that, despite the arguments to the contrary put forward by ASI and AOI and Ireland, it is, in my view, clear from a reading of the relevant paragraphs of the judgment under appeal that the General Court did not in

[42] In its appeal, the Commission begins by asserting that the issue at the heart of the appeal specifically concerns the legality of the General Court's taking into account of the functions performed by Apple Inc.

any way take a position on the arguments relied on by the Commission in recitals 308 to 318 of the decision at issue, or on the arguments put forward by the latter during the proceedings at first instance concerning the possibility that Apple Inc.'s functions could be taken into account in determining ASI's and AOE's chargeable profits in Ireland in so far as they are performed 'for the benefit' or 'on behalf' of the head offices. In particular, contrary to what Ireland claims, paragraphs 298 to 309 of the judgment under appeal do not constitute taking a position on those arguments. Even if, in those paragraphs, the General Court had implicitly accepted the relevance, for the purposes of the functional and factual analysis to be carried out under Section 25 of the TCA 97, of the functions carried out by employees of entities separate from the non-resident company 'for the benefit' or 'on behalf' of the latter or of parts thereof, it is clear that it did not in any way justify that relevance or respond to the arguments put forward by the Commission to the contrary.

77. It is certainly true, as both ASI and AOI and Ireland submit, that, according to settled case-law, the duty of the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state the reasons for its judgments does not require an account to be provided that follows exhaustively and one by one all the arguments put forward by the parties to the dispute and that the reasoning may therefore also be implicit. [43] However, in the present case, given the centrality of the question of the importance of the functions performed by Apple Inc. in the context of the Commission's primary line of reasoning and in the overall rationale of the reasoning which led the General Court to uphold the actions brought by ASI and AOE and Ireland on that point, I consider that the latter's failure to take a position explicitly on that question gives rise to a failure to state reasons which prevents the Court of Justice from knowing the reasons for rejecting one of the fundamental arguments of the Commission's analysis in the context of its primary line of reasoning and in the course of the proceedings before the General Court, and interferes with the exercise of the review which the Court of Justice is called upon to carry out in the context of the present appeal.

78. The grounds of the judgment under appeal are also vitiated by a contradiction, as the Commission also argued, since the General Court, on the one hand, held, in paragraphs 240, 242 and 248 of the judgment under appeal, that, in order to determine whether a tax decision allocating profits to the Irish branch of a non-resident company complied with the 'normal' tax regime in Ireland, it was necessary to take into account the allocation of assets, functions and risks between the branch and the other parts of that company and, on the other hand, in paragraphs 255 to 302 of that judgment, relied largely on the functions performed by an entity separate from ASI and AOE.

79. The first complaint in the second part of the first ground of appeal must therefore, in my view, be upheld.

### *(c) Conclusions on the second part of the first ground of appeal*

80. On the basis of all the foregoing considerations, I propose that the Court should uphold the second part of the first ground of appeal.

[43] See judgment of 22 June 2023, *Gmina Miasto Gdynia and Port Lotniczy Gdynia-Kosakowo* v *Commission* (C-163/22 P, EU:C:2023:515, paragraph 85).

### *3. The third part of the first ground of appeal*

81. 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 more specifically the General Court's assessments relating to the activities carried out by the head offices. It raises two separate complaints which should be examined together. By its first complaint, the Commission alleges a procedural irregularity consisting in the failure of the General Court to take into consideration the arguments in defence which it put forward at first instance, in the adoption of defective and contradictory reasoning and in the reliance on inadmissible evidence. By its second complaint, it alleges infringement of Article 107(1) TFEU and/or distortion of national law. Ireland, ASI and AOI and the Grand Duchy of Luxembourg consider those complaints to be inadmissible and/or ineffective and, in any event, unfounded.

82. The Commission first submits that the General Court did not respond to its argument put forward in defence that the minutes examined by the Commission were the only item of evidence produced by Apple and Ireland during the administrative procedure in order to demonstrate the existence of functions performed by the head offices.

83. In that regard, I would point out that, according to settled case-law already referred to in this Opinion, first, in the context of 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 and, secondly, the duty of the General Court to state the reasons for its judgments does not require it to provide an account that follows exhaustively and one by one all the arguments put forward by the parties to the dispute. In the present case, in paragraph 305 of the judgment under appeal, the General Court considered, in the exercise of its exclusive 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 … were taken and recorded in [those] … minutes'. Such an assessment – which enables the Commission to understand the reasons for the importance which the General Court attached to those minutes, even if they were the only item of evidence provided during the administrative procedure relating to the functions of the head offices – is not open to criticism before the Court of Justice, except in cases of distortion, which has not been relied on by the Commission.

84. Secondly, the Commission submits that, in paragraph 304 of the judgment under appeal, the General Court imposed on it a burden of proof which was impossible to discharge. In that paragraph, as already explained, the General Court stated 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'.

85. In that regard, I agree with the Commission. I do not see how it is possible, as the General Court appears to do in paragraphs 305 and 306 of the judgment under appeal, to infer from the minutes of the board of directors of a company evidence in favour of the taking of decisions with a specific subject matter in the absence of express or implicit indications to that effect. On the other hand, it is instead, in my view, possible, as the Commission did in the decision at issue, to infer from such a lack of indications, and in the *absence of evidence to the contrary*, factors which argue in favour of the non-existence of such decisions, in particular where it appears that that company, in practice, if not by legal obligation, normally records the relevant decisions taken by its board of directors in the minutes of its meetings. In so far as it does not allow the Commission to rely on that evidence, when it comes to proving the existence of negative facts which, by their

nature, cannot be demonstrated, but only deduced from presumptions based on established positive facts or by evidence of a positive fact to the contrary, paragraph 304 of the judgment under appeal imposes, in my view, an unjustifiably excessive burden of proof on the Commission.

86. Thirdly, the Commission challenges paragraph 306 of the judgment under appeal where, inter alia, the General Court states that 'it is apparent' from the minutes that it examined 'that individual directors [had been] granted very wide managerial powers'. It argues that, although the minutes in question occasionally recorded the grant of delegation of powers by the board of directors, the fact remains that only one of those powers of attorney concerned the conclusion of contracts with OEMs and telecommunications operators.

87. 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 abovementioned power of attorney, I would point out, first, that that assessment falls, in principle, within the exclusive jurisdiction of the General Court and, secondly, that no rule or principle of EU law prohibits, in principle, the General Court from relying on a single piece of evidence to establish the relevant facts.[44] The complaint must therefore, in my view, be rejected. I would point out, however, that the Commission also challenges the admissibility as evidence of the power of attorney in question, on the ground that it was not produced during the administrative procedure. In that regard, I refer to the analysis carried out in points 42 and 43 of this Opinion. As I observed there, that power of attorney, although referred to in the minutes of the meeting of the board of directors of ASI of 27 July 2011, as the Commission asserts without being challenged by ASI and AOI, has not been produced to date. It follows that the General Court can have relied only on the entry in the minutes of the grant of that power of attorney and not on the text of it.

88. Fourthly, the Commission challenges the General Court's conclusion set out, in particular, in paragraphs 301, 306 and 307 of the judgment under appeal that 'formal acts' such as issuing a power of attorney for the purposes of negotiating an agreement or signing it (in the present case, the various amendments to the cost-sharing agreement made during the relevant period) constitute functions actually performed by the head offices in relation to IP licences. The Commission accepts that, in particular, the carrying out of negotiations for the conclusion of commercial contracts, such as those with OEMs and telecommunications operators, is 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 were allegedly performed by employees of Apple Inc., on behalf of the entire Apple Group or for the benefit of ASI and AOE, not by the head offices. Those points are also allegedly vitiated by inadequate and contradictory reasoning.

89. In that regard, it should be noted that, in the overall rationale of the reasoning carried out by the General Court in paragraphs 251 to 311 of the judgment under appeal, the assessments set out in paragraphs 303 to 309 of that judgment are intended to demonstrate that the head offices of ASI and AOE – by means of resolutions adopted by their respective boards of directors and, in particular, through a system of delegation of powers issued to individual directors or to individual executives who were not members of the branches' staff – had the ability to perform the 'essential functions' of those companies. That is apparent in particular from paragraph 303 of the judgment under appeal, which sets out the subject matter of the analysis carried out by the General Court, as well as from paragraphs 305 and 309 thereof, which set out the conclusion of

[44] See order of 11 September 2019, *Camomilla* v *EUIPO* (C-68/19 P, EU:C:2019:711, paragraph 10 and the case-law cited).

that analysis, according to which the Commission had erred in finding, in the decision at issue, that, in the absence of employees and a physical presence, the head offices did not have the ability to perform functions on behalf of those companies. On the other hand, there is no express statement in paragraphs 303 to 309 of the judgment under appeal that the head offices were involved in the adoption of decisions relating to the management of the IP licences, with the exception of paragraph 304 – where, as seen, the General Court merely asserts, by a line of reasoning which is, in my view, open to criticism, that the absence of traces of such decisions in the minutes examined by the Commission does not mean that those decisions were not actually taken – and paragraph 307 relating to the signing of the cost-sharing agreement, which nevertheless concerns an intra-group agreement which is in principle excluded from the subject matter of the advance decisions. As regards, lastly, paragraph 301 of that judgment, it is included in the analysis devoted to the centralised way in which strategic decisions are taken within the Apple Group.

90. I am therefore not convinced that it is correct to interpret paragraphs 301, 306 and 307 of the judgment under appeal in the manner suggested by the Commission. It seems to me that, in finding that ASI's and AOE's directors had participated, directly or by way of power of attorney, in negotiations with OEMs and telecommunications operators or even in the conclusion of commercial contracts or intra-group agreements, the General Court did not intend to assert that the head offices had performed 'significant people functions' in relation to the IP licences, but, rather, to find that the decision at issue had erroneously concluded that the Apple Group's IP was necessarily managed by the Irish branches, since the head offices did not have the ability to take decisions relating to the management of the IP licences (see, inter alia, paragraphs 302 and 309 of the judgment under appeal).

91. In those circumstances, it appears that the Commission's argument should be rejected in so far as it is based on a misreading of the judgment under appeal. For the same reasons, the counter-arguments put forward by Ireland and ASI and AOI that the signing of the amendments to the cost-sharing agreement and the powers of attorney relating to the negotiations and conclusion of contracts with OEMs and telecommunications operators prove that decisions relating to the management of IP licences were taken by the head offices must be rejected. There is no such finding in the judgment under appeal.

92. That said, I note that the difficulty of attributing an unequivocal meaning to the findings set out in paragraphs 301 and 307 of the judgment under appeal and of clearly defining their scope is, once again, attributable to the General Court's failure to take a position on the question of whether, and under what conditions, 'significant people functions' performed by the parent company on behalf or for the benefit of that company outside Ireland may be taken into account in the allocation for tax purposes of the economic ownership of property that generates profits held by a non-resident company, the chargeable profit of which in Ireland should be defined for the purposes of Section 25 of the TCA 97. In that regard, I refer to point 61 of this Opinion.

93. In fact, the analysis of the activities outside the Irish branches set out in paragraphs 296 to 309 of the judgment under appeal appears to be influenced by the premiss, which, as has been seen, is erroneous, underlying the General Court's examination of the complaints against the Commission's primary line of reasoning, that is to say that the latter had used an 'exclusion' approach. Starting from such a premiss, it was not necessary, in order to invalidate the primary line of reasoning as a whole, to demonstrate that the head offices had *actually performed* significant functions with regard to the IP licences, but it was sufficient to prove that they had

the *ability* to take those decisions or, even more generally, the ability to take '[key company] decisions' (paragraph 305 of the judgment under appeal) or decisions 'concerning [the] essential functions' of ASI and AOE (paragraph 303 of the judgment under appeal).

94. In any event, if the Court of Justice were to consider that the General Court had implicitly held, in paragraphs 301 and 307 of the judgment under appeal, that, by issuing to executives of Apple Inc. – whether or not they were members of ASI's and AOE's boards of directors – delegations of powers for the signing of intra-group contracts or agreements, the head offices had actually performed, with regard to the IP licences, relevant functions for the purposes of the analysis to be carried out under Section 25 of the TCA 97, I agree with the Commission that the purely formal nature of those acts and the amalgamation of functions performed by the group holding company with the functions attributable to the head offices to which such a delegation system gives rise do not support such a conclusion.

95. In the light of the foregoing, I consider that the third part of the first ground of appeal is in part admissible and well founded, as set out at the end of the examination of the individual complaints raised.

### *4. Conclusions on the first ground of appeal*

96. On the basis of all the foregoing considerations, the first ground of appeal is, in my view, well founded. By focusing on the functions and risks assumed by Apple Inc. with regard to the Apple Group's IP, instead of focusing solely on the activities performed by the branches and the head offices, respectively, with regard to the management and use of the IP licences, the General Court carried out a factual analysis and classification of the facts examined in the light of a different legal test from that which it itself considered applicable under Section 25 of the TCA 97, which requires the taking into account of the allocation of assets, functions and risks between the branch and the other parts of that company and, pursuant to the arm's length principle, precludes the taking into account of the role played by separate entities.

## C. Second ground of appeal

97. The second ground of appeal is directed against the grounds of the judgment under appeal by which the General Court upheld the complaints raised by Ireland and ASI and AOE against the Commission's subsidiary line of reasoning. I recall that, in the context of that reasoning, set out in recitals 325 to 360 of the decision at issue, the Commission contended that, even if it were accepted that the IP licences had to be allocated outside Ireland, the profit allocation methods endorsed in the advance decisions had nonetheless led to undervaluing the annual chargeable profits of ASI and AOE in Ireland in so far as they were based on inappropriate choices, which had produced a result departing from a reliable approximation of a market-based outcome in line with the arm's length principle. More specifically, after finding that the advance decisions had adopted one-sided profit allocation methods similar to the transaction net margin method ('the TNMM') laid down by the OECD Transfer Pricing Guidelines,[45] the Commission concluded that the Irish tax authorities had endorsed three erroneous methodological choices, relating to the identification of the Irish branches as 'tested parties' – that is to say, as parties on whose activities the analysis carried out in the context of the selected one-sided profit allocation method focused

[45] The TNMM, described in paragraph 2.58 et seq. of the OECD Transfer Pricing Guidelines, examines the net profit relative to an appropriate base (for example, costs, sales, assets) that a taxpayer realises from a controlled transaction. This applies to only one of the companies involved in the transaction: the 'tested' party.

(recitals 328 to 333 of the decision at issue) – to the choice of the operating costs as the profit level indicator (recitals 334 to 345 of the decision at issue) and to the levels of return accepted (recitals 346 to 359 of the decision at issue).

98. The second ground of appeal is divided into three parts. The first part relates to an error in the determination of the standard of proof to be applied in order to establish the existence of an advantage in the case of advance decisions relating to the allocation of profits, the second relates to a procedural irregularity and the third relates to an infringement of Article 107(1) TFEU and/or a distortion of national law.

### *1. First part of the second ground of appeal*

99. By the first part of its second ground of appeal, directed against paragraphs 349, 416, 434 and 435 of the judgment under appeal (which refer to paragraphs 319 and 332 thereof), the Commission submits that the General Court adopted an incorrect standard of proof in considering that it was for the Commission to demonstrate that the profit allocation set out in the advance decisions had led to a reduction in ASI's and AOE's tax liability as compared with that which those companies would have borne under the normal rules of taxation and that the finding of methodological errors was not sufficient.[46] It submits that, when assessing, in the light of the arm's length principle, whether an advance decision such as that at issue gives rise to an advantage for the purposes of Article 107(1) TFEU, the applicable standard of proof is the same as in the case of recourse to the market economy operator test and that, therefore, it is for the Commission only to prove the 'plausibility' of an advantage, while it is for the Member State concerned to demonstrate that such an advantage is justified. The Commission also refers to the judgment of 8 December 2011, *France Télécom* v *Commission*,[47] in which, apart from situations in which the private investor test is applied, the Court of Justice held that, in order to establish the existence of an advantage within the meaning of Article 107(1) TFEU, it is sufficient to provide proof that the national measure at issue is inherently capable of reducing the tax burden of the recipient undertakings.

100. ASI and AOI as well as Ireland submit that the first part of the second ground of appeal is ineffective since, even assuming that, as the Commission claims, it was for Ireland and Apple to demonstrate the absence of an advantage, the latter discharged that burden of proof by submitting ad hoc reports on the allocation of profits to the Irish branches, drawn up by their respective tax advisors, from which it was apparent that the tax base of those companies had been determined in accordance with Section 25 of the TCA 97 and the arm's length principle ('the ad hoc reports').

101. In that regard, it is certainly true that, in its analysis of the levels of return accepted in the advance decisions (paragraphs 418 to 478 of the judgment under appeal), the General Court, first, confirmed the reliability of the comparability study set out in the ad hoc reports which validated *ex post* those returns (paragraphs 450 to 464 of the judgment under appeal) and, secondly, found that the corrected comparability analysis carried out by the Commission in recitals 353 to 356 of the decision at issue ('the corrected comparability analysis') was not capable of invalidating the conclusions set out in those reports (paragraphs 469 and 477 of the judgment under appeal). However, in the context of the third part of its second ground of appeal, the

[46] I note that the General Court set out the same standard of proof in the judgment of 24 September 2019, *Netherlands and Others* v *Commission* (T-760/15 and T-636/16, EU:T:2019:669).

[47] C-81/10 P, EU:C:2011:811, 'the judgment in *France Télécom*', paragraphs 24 to 27.

Commission criticised the sections of the judgment under appeal in which the General Court essentially endorsed the calculation methodology used in the ad hoc reports and found that the corrected comparability analysis was incapable of calling into question the conclusions of those reports. The question of whether the present complaint is ineffective therefore depends on the outcome of the analysis of those criticisms.

102. On the substance, ASI and AOI, as well as Ireland and the Grand Duchy of Luxembourg, submit that the Commission seeks, in essence, to obtain a reversal of the burden of proof. ASI and AOI also submit that the Commission's complaint has no factual basis, since the General Court concluded that none of the three methodological errors found by the Commission in the decision at issue had been demonstrated.

103. I would point out that, according to settled case-law, it is for the Commission to prove the existence of 'State aid' within the meaning of Article 107(1) TFEU and thus also to prove that the condition of granting an advantage is fulfilled.[48] In particular, the Commission is required, in the interests of sound administration of the fundamental rules of the TFEU relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose.[49] Moreover, the Court has previously held that the Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage.[50] Those principles also apply when the Commission applies the private operator test. It is the latter that has the burden of proving that the conditions for the application of that test have not been satisfied[51] and to assess, in the light of all relevant evidence, whether the recipient company would manifestly not have obtained comparable facilities from a private operator.[52] Therefore, even applying the private operator principle, the Commission cannot rely merely on 'plausible' allegations, the accuracy of which it is not required to prove.[53] With regard to the judgment in *France Télécom*, I would point out that it is apparent in particular from paragraph 19 of that judgment that, even though the characteristics of the tax regime at issue had not made it possible to determine in advance for each tax year the precise level of taxation for that year, it was nevertheless accepted that that regime was capable of resulting, and in fact had resulted, in the beneficiary's liability to tax being lower than it would have been if the general law regime had been applied.

104. That said, I note that, in the present case, the finding of an advantage within the meaning of Article 107(1) TFEU, which the Commission reached at the end of its subsidiary line of reasoning, is not based on 'a mere hypothesis, which was neither confirmed nor rebutted by the information at [its] disposal',[54] or on mere 'plausible assertions', but on the finding of specific errors vitiating, according to the Commission, the profit allocation method accepted in the advance decisions and affecting the various elements of the calculation that led to the determination of ASI's and AOE's

[48] See judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169, paragraph 62).

[49] See judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland* (C-933/19 P, EU:C:2021:905, paragraph 114 and the case-law cited).

[50] See judgment of 17 September 2009, *Commission* v *MTU Friedrichshafen* (C-520/07 P, EU:C:2009:557, paragraphs 55 and 58).

[51] See judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland* (C-933/19 P, EU:C:2021:905, paragraph 108 and the case-law cited).

[52] See, to that effect, judgment of 29 June 2023, *TUIfly* v *Commission* (C-763/21 P, EU:C:2023:528, paragraph 79 and the case-law cited).

[53] See, to that effect, judgment of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (C-148/19 P, EU:C:2020:354, paragraph 53).

[54] See judgment of 17 September 2009, *Commission* v *MTU Friedrichshafen* (C-520/07 P, EU:C:2009:557, paragraph 52).

chargeable profits. In my view, it cannot be ruled out that, as the Commission maintains, fundamental errors in the determination of the methodology applicable to the profit allocation operation for the purposes of calculating the tax base of a non-resident company operating through a branch may necessarily lead to an undervaluation of those profits compared to an arm's length result and are therefore *inherently* or *manifestly capable* of reducing the tax burden of that company compared with taxation regarded as normal. In such cases, the Commission may, in my view, be entitled to rely, in order to prove the existence of a selective advantage within the meaning of Article 107(1) TFEU, on proof of the existence of such an error and on the fact that the Member State concerned has failed to demonstrate that it has no effect on whether the level of profits thus calculated corresponds to an arm's length value. [55] The General Court therefore, in my view, incorrectly assessed the standard of proof in the case of decisions such as that at issue.

105. In the present case, however, it must be noted that, following a detailed analysis, challenged by the Commission both as to the substance and from the perspective of compliance with the limits of judicial review, the General Court held that the methodological errors identified in the decision at issue had not been demonstrated and merely found, in essence, that there was no contemporaneous data justifying the choices relating to the calculation method accepted in the advance decisions. Therefore, the error with regard to the standard of proof would have no real impact on the correctness of the conclusions reached by the General Court if the complaints put forward by the Commission in the second and third parts of that plea were shown to be unfounded. It is therefore necessary to examine those complaints.

### *2. The second and third parts of the second ground of appeal*

106. By the second part of its second ground of appeal, the Commission submits that, at several points in its analysis, the General Court relied on arguments which did not appear in the applications lodged by ASI and AOE and by Ireland, but were based on documents annexed to them – the ad hoc reports, to which the applicants had made only general references, in particular. The Commission was therefore not given the opportunity to take a position on some of the grounds which had led to the annulment of the decision at issue. Moreover, the General Court raised of its own motion some of the complaints examined.

107. Those objections will be examined in the course of the analysis relating to the complaints raised in the context of the third part of the second ground of appeal. At this stage, I would merely point out that, according to settled case-law, in order to guarantee legal certainty and the sound administration of justice, the summary of the pleas in law which must appear in the application, in accordance with Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 of that statute, and Article 76(d) of the Rules of Procedure of the General Court, must be sufficiently clear and precise to enable the defendant to prepare its defence and the competent court to rule on the action. [56] Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the application. It is not for the General Court to seek and identify, in the annexes, the pleas and arguments on which it may consider the action

[55] Interpreting, to that effect, paragraph 211 of the judgment of 24 September 2019, *Netherlands* v *Commission* (T-760/15, EU:T:2019:669), see judgment of 12 May 2021, *Luxembourg and Amazon* v *Commission* (T-816/17 and T-318/18, EU:T:2021:252, paragraphs 309 to 311). The latter judgment has been appealed by the Commission in Case C-457/21 P, currently under deliberation.

[56] See, to that effect, judgment of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 41).

to be based.[57] Similar requirements are called for where a submission is made in support of a plea in law raised before the General Court.[58] It follows that the applicant is required to set out in a sufficiently systematic manner the arguments relating to each plea, and the General Court cannot be obliged to reconstruct the legal structure intended to support that plea.[59]

108. By the third part of its second ground of appeal, the Commission submits that the General Court infringed Article 107(1) TFEU and/or distorted national law when, at the end of its factual analysis, it concluded that the subsidiary line of reasoning did not make it possible to establish the existence of an advantage within the meaning of that provision. In particular, the Commission challenges the General Court's legal characterisation of the facts, which, in its view, infringes the separate entity approach and the arm's length principle. It raises three complaints, first, alleging errors made by the General Court in the analysis relating to the choice of the Irish branches as 'tested parties' for the purposes of applying the selected profit allocation method (paragraphs 328 to 351 of the judgment under appeal), secondly, relating to the choice of the operating costs as the profit level indicator (paragraphs 352 to 417 of the judgment under appeal) and, thirdly, relating to the levels of return accepted (paragraphs 418 to 478 of the judgment under appeal). Ireland and ASI and AOI submit that the complaints raised in the context of that part of the second ground of appeal are inadmissible as a whole, as they seek to challenge factual and ineffective assessments, and are also unfounded.

### *(a) The first complaint*

109. By the first complaint of the third part of the second ground of appeal, directed against paragraphs 337 to 343 of the judgment under appeal, the Commission challenges, first, the classification of the functions performed by the Irish branches as 'less complex' for the purposes of choosing the tested party. That classification is allegedly the consequence of an incorrect assessment of those functions by reference to the Apple Group's IP, not to the IP licences held by ASI and AOE. Since it seeks to challenge the incorrect legal classification of the functions performed by the Irish branches, that complaint is, in my view, admissible. I refer in that regard to point 39 of this Opinion.

110. As regards the substance, I would point out that, in the context of the analysis of the first ground of appeal, I have come to the conclusion that the General Court's assertion that the Irish branches performed 'routine' functions with regard to the IP licences is based on a comparison between those functions and those performed by Apple Inc. with regard to the Apple Group's IP and that, in making that comparison, the General Court infringed the arm's length principle which, according to the findings in the judgment under appeal, governed the application of Section 25 of the TCA 97. That error also affects the assessment which led the General Court to approve the choice of the Irish branches as tested parties, as is apparent from paragraph 341 of the judgment under appeal in particular, which refers to the conclusions of the factual analysis carried out in the context of the examination of the pleas in the action against the primary line of reasoning.

[57] See, to that effect, judgment of 16 March 2023, *GABO:mi* v *Commission* (C-696/21 P, EU:C:2023:217, paragraphs 47 and 48 and the case-law cited).

[58] See judgment of 11 September 2014, *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 41).

[59] See, to that effect, judgment of 16 March 2023, *GABO:mi* v *Commission* (C-696/21 P, EU:C:2023:217, paragraph 49 and the case-law cited).

111. Admittedly, as Ireland in particular submits, in paragraph 340 of the judgment under appeal, the General Court stated that, since the subsidiary line of reasoning was based on the premiss that 'the Apple Group's IP [had been] correctly allocated to the head offices', the Commission could not claim, at the same time, that it was the Irish branches 'which performed the most complex functions in relation to that IP'. However, that assertion is based on an error in logic. Although it is true that, in the context of its subsidiary line of reasoning, the Commission accepted the premiss that the IP licences had to be allocated to the head offices, that does not mean, as the General Court instead appears to hold, that the latter also took for granted that there was evidence capable of justifying such an allocation – which it disputed – and, in particular, the exercise, by the head offices, of significant people functions in relation to those licences.

112. More generally, contrary to what ASI and AOI in particular claim, the General Court did not, in any part of the grounds of the judgment under appeal relating to the choice of the Irish branches as 'tested parties', conclude that, *in the relationship between the Irish branches* and the head offices, the former were the least complex entities.[60] It is apparent from paragraphs 3.18 and 3.19 of the 2010 version of the OECD Transfer Pricing Guidelines that the choice of the party to be tested must be consistent with the functional analysis of the transaction and requires the role played *respectively* by the various parties involved in the transaction to be taken into consideration (see also the end of paragraph 2.59). It follows that the grounds put forward by the General Court in paragraphs 333 to 336 of the judgment under appeal and in paragraphs 342 and 343 thereof do not by themselves make it possible, in so far as they take into account only the situation of the Irish branches, to invalidate the premiss on which the Commission relied in its subsidiary line of reasoning, that is to say that the head offices, as parties to the transaction which performed the less complex functions, should have been tested.

113. Secondly, the Commission challenges paragraph 335 of the judgment under appeal, in which the General Court held that the OECD Transfer Pricing Guidelines do not necessarily require that the entity that performs the least complex functions be chosen as the party to be tested in the context of the TNMM, but merely recommend choosing the entity in respect of which there is the largest amount of reliable data. It submits that, in that paragraph, the General Court found of its own motion that there had been an error of interpretation of those OECD guidelines which had not been raised by the applicants at first instance. That argument is, in my view, based on a misinterpretation of the judgment under appeal and must therefore be rejected. Paragraph 335 of the judgment under appeal, read in the context of the reasoning set out by the General Court in paragraphs 334 to 336 of that judgment, does not specifically criticise the decision at issue, but merely gives reasons for the conclusion set out in paragraph 334 and confirmed in paragraph 336 that, 'provided that the functions of the tested party have been correctly identified, and that the return for those functions has been correctly calculated, the fact that one party or another has been chosen as the tested party is irrelevant'.

114. Thirdly, the Commission challenges the validity of that conclusion. It submits that, contrary to what the General Court stated in paragraph 336 of the judgment under appeal, the choice of the party to be tested is a fundamental step in the application of the TNMM. That challenge is, in my view, admissible even though it is directed against the interpretation of the OECD Transfer Pricing Guidelines accepted by the General Court. I refer in that regard to the considerations set out in point 39 of this Opinion.

[60] Paragraphs 342, 343 and 371, to which ASI and AOI refer, merely emphasise the 'non-complex and easily identifiable nature' of the functions performed by the Irish branches, but do not make any comparison with those performed by the head offices.

115. On the substance, I agree with the Commission as to the importance which, in the context of those guidelines, is attributed to the choice of the party to be tested in the event of the application of the TNMM. It is apparent from paragraphs 3.18 and 3.19 in particular of the 2010 version of those guidelines – on which the General Court in all likelihood relied in paragraph 335 of the judgment under appeal – that the possibility of conducting a comparative analysis based on reliable data, which makes it possible to identify correctly the transfer price to be allocated to the transaction at issue in accordance with the arm's length principle, depends on that choice. The Commission is therefore right when it states that that choice is not neutral, but decisively influences the reliability of the result of the analysis carried out under the TNMM.

116. On the basis of the foregoing and within the limits set out above, I consider that the first complaint in the third part of the second ground of appeal is well founded.

### *(b) The second complaint*

117. By the second complaint of the third part of its second ground of appeal, the Commission challenges paragraphs 352 to 417 of the judgment under appeal, in which the General Court set aside the conclusions set out in the decision at issue that, even assuming that the choice of the Irish branches as tested parties was correct, the choice of taking ASI's and AOE's operating costs as the profit level indicator had led to chargeable profits of those companies in Ireland which did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle.

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

118. In recitals 336 to 342 of the decision at issue, the Commission considered that the choice of the operating costs of ASI's Irish branch as the profit level indicator did not properly reflect the risks assumed and the activities carried out by that branch and therefore its contribution to ASI's turnover. For the same reasons, it considered that the Berry ratio, a profit level indicator based on the ratio between gross profit and operating expenses used in the ad hoc reports, did not make it possible to determine an arm's length return for the functions performed by that branch. According to the Commission, ASI's sales would have been a more appropriate indicator. The validity of that conclusion was rejected by the General Court in paragraphs 359 to 407 of the judgment under appeal.

119. First, the Commission submits that the General Court failed to take account of the functional analysis set out in the decision at issue when, in paragraph 360 of the judgment under appeal, it stated that the Commission had based its statements relating to the unsuitability of the operating costs to reflect the functions performed by ASI's Irish branch on an exclusion approach. In that regard, I refer to the discussion carried out in the context of the examination of the first part of the first ground of appeal. The same error also vitiates paragraph 365 of the judgment under appeal, in which the General Court concluded that the Commission had, in essence, merely stated that ASI's sales would have been an appropriate profit level indicator. I agree with the Commission that, in that paragraph, the General Court conducted a compartmentalised reading of the decision at issue by not taking account of the analysis set out in other parts of it, in recitals 294 to 305 in particular, which list the functions and risks which the Commission considered to have been assumed by, inter alia, ASI's Irish branch.

120. Secondly, the Commission challenges paragraphs 366 to 372 of the judgment under appeal, in which the General Court criticised the rejection, in recital 340 of the decision at issue, of the Berry ratio as a suitable financial ratio for estimating the arm's length remuneration in the present case. The Commission submits, first of all, that, in their respective actions, ASI and AOE as well as Ireland confined themselves on that point to mere references to the content of the ad hoc reports. An examination of the file before the General Court, including the replies to the General Court's written questions, confirms that allegation as regards Ireland. ASI and AOE addressed the issue more substantially, while limiting their analysis to only one of the conditions required for the application of that indicator. The Commission therefore does not err in stating that the General Court's examination of the Berry ratio is largely unconnected with the arguments raised by the applicants and discussed at first instance.

121. The Commission then puts forward a series of arguments to show that the General Court erred in law in the assessment made in paragraphs 366 to 372 of the judgment under appeal. It submits, in essence, that the General Court's conclusion is based on an incorrect classification of ASI's Irish branch as a routine logistical service provider without assuming any risk. ASI and AOI as well as Ireland assert that such a classification cannot be called into question at the appeal stage. That objection must, in my view, be rejected. In so far as that classification depends on the correct application of the principles laid down in the OECD Transfer Pricing Guidelines on which Apple and Ireland relied to justify *ex post* the advance decisions as well as the appropriateness of the operating costs as the profit level indicator of the ASI branch, the arguments raised by the Commission do not fall outside the limits of the Court's review of the facts at the appeal stage. In that regard, I refer to point 39 of this Opinion.

122. On the substance, the arguments raised by the Commission against the General Court's assessments relating to the application of the Berry ratio must be considered together with the complaints directed against paragraphs 375 to 407 of the judgment under appeal. In those paragraphs, the General Court, after examining the risks which, according to the Commission, had to be allocated to ASI's Irish branch and which justified a profit level indicator of that branch based on sales and not on operating costs, concluded that none of those risks had actually been assumed by that branch. If those complaints were well founded, they would show that the General Court relied on an incorrect classification of ASI's branch as a 'low-risk distributor' for the purposes of applying the OECD Transfer Pricing Guidelines. It is true that it appears to follow from paragraph 374 of the judgment under appeal that the analysis set out in paragraphs 375 to 407 of the judgment under appeal is superfluous, given the interpretation of paragraph 2.87 of the OECD Transfer Pricing Guidelines accepted by the General Court in paragraph 357 of that judgment.[61] However, the complaints put forward by the Commission are not ineffective for that reason alone. In paragraphs 357 and 364 of the judgment under appeal, the General Court acknowledges that, according to paragraph 2.87 referred to above, the ability of the profit indicator chosen to correctly reflect the value of the functions performed by the tested party depends, inter alia, on the risks assumed by it.

123. The Commission challenges, in turn, paragraphs 375 to 390 of the judgment under appeal, relating to the risk connected with turnover (recital 337 of the decision at issue, in which that risk is defined as 'inventory risk'), paragraphs 391 to 400 of that judgment, relating to the risk connected with the warranty for Apple products (recital 338 of the decision at issue) and

[61] In paragraph 357 of the judgment under appeal, the General Court finds that it follows from paragraph 2.87 of the Transfer Pricing Guidelines that 'the choice of profit level indicator is not fixed for any type of function, provided that that indicator reflects the value of the function in question' and that, accordingly, 'both sales and operating costs may constitute an appropriate profit level indicator under those guidelines' (see paragraph 363 of the judgment under appeal, which refers to paragraph 357 thereof).

paragraphs 401 to 407 of that judgment, relating to the risk associated with relations with third-party contractors (recital 339 of the decision at issue). As in the context of the first ground of appeal, the Commission submits, in essence, that the General Court applied an incorrect legal test contrary to the arm's length principle in classifying the Irish branch of ASI as a low-risk distributor by comparing the risks assumed by that branch with the risk policies of Apple Inc.

124. However, the analysis of the grounds of the judgment under appeal confirms the approach criticised by the Commission. First of all, with regard to the risk connected with turnover, the evidence referred to by the General Court in paragraphs 381, 382 and 383 of the judgment under appeal refers to the centralised conclusion by Apple Inc. of framework agreements with the OEMs and the main buyers of Apple products and to the definition, again at centralised level, of the international pricing of Apple products. Moreover, in paragraphs 385 and 386 of the judgment under appeal, the General Court concluded, on the basis of all the evidence submitted, including the ad hoc reports, that the risks inherent in products remaining unsold or a drop in demand could not be allocated to the Irish branch of ASI in so far as both supply and demand were 'determined centrally, outside that branch' (paragraph 386). As regards, next, the risk connected with product warranties, the conclusion reached by the General Court in paragraph 400 of the judgment under appeal that it cannot be inferred from the fact that the Irish branch of ASI managed the AppleCare service that that branch assumed the economic consequences connected with warranties for Apple products, is based on the finding that the functions performed by that branch were of an ancillary nature – a finding which, as I have already explained in point 52 of this Opinion, follows from the linking of functions performed by the latter with those performed by Apple Inc., not with those assumed by the head offices. Lastly, with regard to the risks connected with the activities of third-party contractors, I note that, in essence, the General Court merely refers to the considerations set out in paragraphs 376 to 390 of the judgment under appeal concerning the risk connected with the possibility of a decrease in demand and the possibility of unsold products, to which the risk relating to products not managed in Ireland is equated because they have been subcontracted outside that Member State. In the discussion of the first ground of appeal, to which I refer, I came to the conclusion that the allocation of profits to a non-resident company under Section 25 of the TCA 97 and the arm's length principle which it incorporates must be limited to taking into consideration the situation of the various parties which make up that company in their relations with each other. However, in the decision at issue, the Commission, while not denying that policies relating to centralised risk management had been put in place by Apple Inc., demonstrated, without being overruled on the point by the General Court, and without limiting itself, as has been seen, to an exclusion approach, that, in relation to the head offices, the Irish branch of ASI had assumed a certain level of risk. On the other hand, as has been seen, in order to rule out the assumption by the Irish branch of ASI of the risks referred to in recitals 337, 338 and 339 of the decision at issue and to classify that branch as a 'low-risk distributor' whose profits could be correctly reflected by means of an indicator based on operating expenses, the General Court relied on the functions performed by Apple Inc. and on the centralised management by the latter of all the risks considered and therefore, once again, on an incorrect legal criterion.

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

125. The Commission challenges paragraphs 408 to 412 of the judgment under appeal in which the General Court concluded that it had not succeeded in demonstrating that, as set out in recitals 343 to 345 of the decision at issue, the profit level indicator based on total costs was more appropriate for the purposes of determining the arm's length profits for AOE's Irish branch.

126. It submits, first of all, that neither ASI and AOE nor Ireland had raised any complaints against those recitals of the decision at issue. In addition to not being challenged, that fact is confirmed by the file before the General Court and is, moreover, consistent with the fact that, as is apparent in particular from recitals 167 and 343 of the decision at issue, the same ad hoc reports proposed an indicator based on the total costs for the AOE branch. In those circumstances, the General Court, in my view, exceeded the limits of its power of review by raising of its own motion and upholding complaints which had not been put forward by the applicants and which related to points of the decision at issue which the latter had, at least implicitly, approved. I would also point out that, according to settled case-law, it is not for the Courts of the European Union in the context of their review of complex economic assessments made by the latter in the field of State aid – such as those relating to the definition of the most appropriate profit indicator in the context of the application of the TNMM – to substitute their own economic assessment for that of the Commission.[62] That court carries out, in that context, a limited review which is necessarily confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.[63] In the present case, I note that, in paragraphs 409 and 410 of the judgment under appeal, the General Court noted that the OECD Transfer Pricing Guidelines on which the Commission relied in recitals 343 and 344 of the decision at issue 'do not recommend the use of [a] particular profit level indicator, such as the total costs, and do not preclude the use of operating costs …'. Without it being necessary to take a position on the General Court's reading of the abovementioned guidelines, which the Commission does not explicitly challenge, I would merely point out that, even assuming that that reading were correct, the mere fact that 'it is not inconceivable, in principle, that operating costs may constitute an appropriate profit level indicator' (paragraph 410 of the judgment under appeal) does not in itself constitute a factor on which the General Court could rely, without substituting its own discretion for that of the Commission and its own arguments for those of the parties.

127. It is certainly true that, according to the case-law just referred to, in its review of the complex economic assessments made by the Commission, the Courts of the European Union must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In the present case, at the end of its examination, the General Court did not find that there had been an error of assessment, but rather that there was insufficient evidence capable of supporting the Commission's argument. However, that classification alone does not, in my view, make it possible to overcome the essential part of the reasoning of the General Court, which states, in essence, that one of the indicators accepted in its view by the OECD Transfer Pricing Guidelines is more appropriate than that designated by the Commission.

128. It is also true that, in paragraph 95 of the judgment in *Fiat Chrysler*, the Court stated that, without harmonisation in that regard, any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States. However, as I have already stated in point 21 of this Opinion, the present case differs from that which gave rise to that judgment. In any event, it must be held that, as the Commission submits, the General Court failed to take account of the argument which it put forward in the decision at issue and at first instance that, in view of the functions and risks actually assumed by AOE's Irish branch, in particular when compared with those assumed by that company's head office, the circumstance, on which the

[62] See, to that effect, judgment of 29 June 2023, *TUIfly* v *Commission* (C-763/21 P, EU:C:2023:528, paragraph 76 and the case-law cited).

[63] See judgment of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission* (C-148/19 P, EU:C:2020:354, paragraph 56 and the case-law cited).

General Court relies in paragraph 411 of the judgment under appeal, that that branch did not have ownership of the raw material, semi-finished products and finished products did not in itself allow total costs to be regarded as inapplicable as a profit indicator and, in any event, did not permit the application of such an indicator, which had moreover been endorsed by Apple's and Ireland's advisors themselves, to be regarded as manifestly incorrect.

*(3) Conclusions on the second complaint*

129. On the basis of all the foregoing considerations, I consider that the second complaint of the third part of the second ground of appeal is also well founded.

***(c) The third complaint***

130. By the last complaint in the third part of the second ground of appeal, the Commission challenges paragraphs 418 to 478 of the judgment under appeal, in which the General Court set aside the reasoning which had led it to reject, in recitals 346 to 359 of the decision at issue, the levels of return of the Irish branches of ASI and AOE accepted in the advance decisions.

131. As regards the 1991 advance decision, the Commission had submitted, first, that the levels of return accepted were not justified and, secondly, that the threshold laid down for AOE, above which its chargeable profits were no longer calculated on the basis of the percentage of 65% of the operating costs of the Irish branch of that company, constituted tax relief which would have been granted on the basis of criteria unrelated to the tax system, such as employment considerations (recital 347 of the decision at issue). The General Court invalidated those assessments, in essence, on two grounds. First, in paragraphs 440 and 441 of the judgment under appeal – on the basis of its own assessment of the evidence, which cannot be called into question at the appeal stage and which, moreover, is not disputed by the Commission – the General Court considered that the circumstance that the abovementioned 65% threshold had been accepted by the Irish authorities on the basis of employment-related considerations had not been established. In paragraph 444 of the judgment under appeal, it also stated that the fact that that threshold had never been reached, and therefore the ceiling mechanism provided for in the 1991 advance decision had never been implemented, ruled out the presence of an advantage within the meaning of Article 107(1) TFEU.

132. The Commission submits that, in making that finding, the General Court erred in law by confusing the condition relating to the existence of an advantage within the meaning of that provision and the quantification of the sums to be repaid which may even be zero. It refers in support of its argument to the judgment of 13 February 2014 in *Mediaset*.[64] In that regard, I note that the facts of the case which gave rise to that judgment, which concerned identifying the beneficiaries of a tax aid scheme and quantifying for each of them the amount to be repaid, differ from those of the present proceedings, in which it is instead necessary to determine whether the provision, in an advance decision, of an individualised method of calculation which was never actually applied can give rise to an advantage within the meaning of Article 107(1) TFEU. At least in so far as the advantage identified by the Commission in the decision at issue corresponds to the extent of the tax relief which would have resulted from the application of the abovementioned

[64] C-69/13, EU:C:2014:71, paragraphs 36 and 37. See, to that effect and in similar circumstances, judgment of 15 September 2022, *Fossil (Gibraltar)* (C-705/20, EU:C:2022:680, paragraph 41).

threshold, the circumstances of the present case appear more akin to a situation in which the aid was decided upon but not paid. Therefore, it seems to me that the Commission's argument should be rejected.

133. Secondly, in paragraphs 445 to 447 of the judgment under appeal, the General Court held, in essence, that, in so far as the Commission challenged the levels of return accepted by the Irish tax authorities as being too low for the functions performed by the Irish branches, in view of the assets and risks inherent to those functions, it had not demonstrated that the branches had performed functions of such a kind as to be remunerated by higher levels of return. The General Court refers in that regard to the conclusions set out in paragraphs 348 and 407 of the judgment under appeal. On this point, I therefore refer to the considerations already set out in the analysis of the first and second complaints of the third part of the second ground of appeal.

134. As regards the levels of return accepted in the 2007 advance decision, the Commission had first of all called into question the reliability of the comparability studies on which the ad hoc reports were based, since the companies selected by those studies were not, in its view, comparable to ASI and AOE. In paragraphs 450 to 464 of the judgment under appeal, which are not the subject of the complaint, the General Court concluded that the Commission had not succeeded in demonstrating the alleged errors. The Commission had then carried out the corrected comparability analysis referred to in point 72 of this Opinion, using the companies selected in the abovementioned ad hoc reports, and adopting as the profit level indicator, for ASI, sales and, for AOE, total costs. The General Court, while acknowledging that such an analysis would have enabled the Commission to demonstrate the existence of a selective advantage (paragraph 468 of the judgment under appeal), nevertheless rejected its validity on three grounds, all of which are challenged by the Commission. First, the General Court, referring to paragraphs 402 to 412 of the judgment under appeal, noted that the Commission had not demonstrated that the use of the operating costs as the profit level indicator was inappropriate in the present instance (paragraph 470 of the judgment under appeal). On that point, I refer to what has already been set out in the context of the examination of the second complaint of the third part of the second ground of appeal. Secondly, the General Court, referring to paragraphs 348 to 407 of the judgment under appeal, recalled that the analysis carried out by the Commission in the context of its subsidiary line of reasoning was based on the premiss that the Irish branch of ASI had performed complex functions and assumed significant risks, but that that premiss had not been demonstrated.

135. The Commission submits that the General Court misinterpreted the decision at issue and that the corrected comparability analysis was based on the premiss that ASI could not be regarded as a provider of basic logistics services, which justified taking sales as a profit level indicator, but not on the premiss that the functions performed by the latter were 'of a complex nature and were decisive for the success of the Apple brand' (paragraph 471 of the judgment under appeal). In that regard, it is not disputed that the corrected comparability analysis was carried out on the assumed premiss that the situation of ASI was comparable to that of the companies selected in the ad hoc reports, since it is based on the data of those companies (recital 354 of the decision at issue). While it is true that the criticisms put forward by the Commission with regard to that comparability in recital 351 of the decision at issue were based, in particular, on the 'non-negligible' or even 'considerable' nature of the risks assumed by ASI in relation to those companies, it must be acknowledged that, in so far as it uses the latter's data, the corrected comparability report necessarily disregards those criticisms. Moreover, the Commission explicitly states, in recital 353 of the decision at issue, that the corrected comparability analysis is carried out 'notwithstanding [the] general and specific concerns with

the comparability studies carried out in the ad hoc reports'. Therefore, irrespective of any other consideration, the General Court does not, in my view, correctly interpret the decision at issue when, in paragraph 471 of the judgment under appeal, it suggests that that comparability report is based on the unsubstantiated premiss that the functions performed by ASI were 'of a complex nature and were decisive for the success of the Apple brand'. Finally, in paragraphs 473 and 474 of the judgment under appeal, the General Court recalls the grounds already set out earlier on the basis of which it invalidated the Commission's reasoning on the inappropriateness of the choice of sales as the profit level indicator for ASI. In that regard, I would therefore simply refer to what has already been said in the analysis of the second complaint of the third part of the second ground of appeal.

136. On the basis of all the foregoing considerations, I consider that the present complaint must also be upheld in so far as it follows from the foregoing.

### *3. Conclusions on the second ground of appeal*

137. It is apparent from an analysis of the second and third parts of the second ground of appeal, taken together, that the General Court erred in the definition of the standard of proof incumbent on the Commission. It also appears that it made a series of errors of law in the analysis which led it to conclude that the Commission had not demonstrated the methodological errors identified in the context of its subsidiary line of reasoning. In those circumstances, the second ground of appeal must, in my view, be considered well founded in its entirety.

## D. Referral of the case back to the General Court

138. In accordance with Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to set aside the decision of the General Court. It may 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. It follows from the foregoing that the appeal is well founded and that the judgment must be set aside in its entirety. The complaints raised by Ireland and ASI and AOE at first instance, relating to the alleged 'exclusion' approach, must be definitively rejected. For the rest, I consider that, in the light of the errors of law committed by the General Court, which vitiate its assessments as regards both the primary line of reasoning and the subsidiary line of reasoning, the Court of Justice does not have before it the elements enabling it to give final judgment on the actions at first instance and that the cases must be referred back to the General Court, reserving the costs, so that the latter may carry out a new analysis and rule on the pleas not examined.

## VI. Conclusion

139. In the light of the foregoing considerations, I propose that the Court of Justice should set aside the judgment under appeal, refer the cases back to the General Court and reserve the costs.