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## Apple State Aid Case

*Explanation of the main lines of argument in Ireland's annulment application lodged with the General Court of the European Union on 9 November 2016*

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The Commission has misunderstood the relevant facts and Irish law

The Commission Decision of 30 August 2016 (the Decision) wrongly asserts that two Opinions given in 1991 and 2007 by the Irish Revenue Commissioners “renounced” tax revenue that Ireland would have otherwise been entitled to collect from the Irish branches of Apple Sales International (ASI) and Apple Operations Europe (AOE). The Opinions involved no departure from Irish law. The ordinary tax rules applicable to branches in Ireland of non-resident companies are in Section 25 of the Taxes Consolidation Act 1997. The Opinions simply applied Section 25, which in accordance with the territoriality principle, taxes only the profits attributable to the branch, not the non-Irish profits of the company.

The Decision also mischaracterises the activities and responsibilities of the Irish branches of ASI and AOE. These branches carried out routine functions, but all important decisions within ASI and AOE were made in the USA, and the profits deriving from these decisions were not properly attributable to the Irish branches of ASI and AOE.

The Commission's attribution of Apple's intellectual property licences to the Irish branches of AOE and ASI is not consistent with Irish law and, moreover, is inconsistent with the principles it claims to apply, as is its stated refusal to take into account the activities of Apple Inc.

### 1. The Commission has misapplied State Aid law

The Commission's assertion that ASI and AOE were granted an “*advantage*” is incorrect. The Opinions did not depart from “*normal*” taxation, because ASI and AOE did not pay any less tax than was properly due under Section 25.

The Commission also wrongly claims that the Opinions were selective. The Commission's reference system wrongly ignores the distinction between resident and non-resident companies.

The Commission attempts to re-write the Irish corporation tax rules so that, in respect of Opinions, the Revenue Commissioners should have applied the Commission's version of the arm's length principle (“ALP”). This principle is not part of EU law or the relevant Irish law in

relation to branch profit attribution, and the Commission's claim is inconsistent with Member State sovereignty in the area of direct taxation.

2. The Commission has wrongly applied the arm's length principle

Even if ALP were legally relevant (which Ireland does not accept) the Commission has failed to apply it consistently or to examine the overall situation of the Apple group.

3. The Commission has wrongly concluded that the tax treatment of ASI and AOE was not consistent with arm's length principle

The Commission wrongly rejected expert evidence submitted by Ireland showing that, even if ALP applied (which Ireland does not accept), the tax treatment of ASI and AOE was consistent with that principle.

4. The Commission's alternative line of reasoning misunderstands Irish law

The Commission is wrong to maintain that ALP is inherent in Irish law, that Section 25 was applied inconsistently or that Section 25 confers any impermissible discretion. Section 25 confers no such discretion on the Revenue Commissioners.

5. The Commission has failed to follow required procedures

The Commission never clearly explained its State aid theory during the Investigation, and the Decision contains factual findings on which Ireland never had the chance to comment. The Commission breached the duty of good administration by failing to act impartially and in accordance with its duty of care.

6. The Commission wrongly invokes novel legal rules

The Commission infringed the principles of legal certainty and legitimate expectations by invoking alleged rules of EU law never previously identified. These are novel and their scope and effect are wholly uncertain. The Commission invokes OECD documents from 2010, but (even if they were binding) these could not have been foreseen in 1991 or 2007.

7. The Commission has exceeded its powers and interfered with national tax sovereignty

The Commission has no competence, under State aid rules, unilaterally to substitute its own view of the geographic scope and extent of the Member State's tax jurisdiction for those of the Member State itself. The purpose of the State aid rules is to tackle State interventions which confer a selective advantage. The State aid rules by their nature cannot remedy mismatches

between tax systems on a global level.

8. The Commission has failed to provide proper reasons for its decision

The Commission has manifestly breached its duty to provide a clear and unequivocal statement of reasons in its Decision, in relying simultaneously on grossly divergent factual scenarios, in contradicting itself as to the source of the rule that Ireland is said to have breached, and in suggesting that Ireland granted aid in relation to profits taxable in other jurisdictions.

***A summary of the legal arguments advanced by Ireland in its action before the General Court will be published in due course in the Official Journal of the European Union.***