



Brussels, 10.1.2019
C(2019) 6 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.51284 (2018/NN) – Netherlands
Possible State aid in favour of Nike**

Sir,

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

1. PROCEDURE

- (1) On 30 July 2013, the Commission sent a request for information to the Netherlands regarding its tax ruling practice.¹
- (2) By letter of 24 January 2014, the Commission requested information from the Netherlands concerning the advanced tax rulings granted to and the advanced

¹ SA.37419.

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pricing agreements (“APAs”)² concluded with companies of the Nike group that are tax resident in the Netherlands. By letter of 17 February 2014, the Netherlands replied to that request.

- (3) On 22 November 2017, the Commission sent a subsequent request for information to the Netherlands concerning Nike. By letter of 20 December 2017, the Netherlands requested an extension for the deadline to reply to that request, which the Commission granted by letter of 21 December 2017. On 22 January 2018, the Netherlands submitted a partial reply to the Commission’s request for information of 22 November 2017.
- (4) On 26 January 2018, the Commission sent the Netherlands a reminder for the missing information. By letter of 14 February 2018, the Netherlands provided another partial reply to the Commission’s request for information of 22 November 2017.
- (5) On 5 March 2018, the Commission reminded the Netherlands that information was still missing in response to its request for information of 22 November 2017. By letter of 19 March 2018, the Netherlands provided the missing information.
- (6) By letter of 14 May 2018, the Commission requested the Netherlands to submit further information, to which the Netherlands replied by letters of 12 June 2018 and 31 October 2018.
- (7) On 20 November 2018, a meeting was held between the Commission and the Netherlands to discuss the documents submitted by the Netherlands with its reply of 31 October 2018 and the further State aid procedure.

2. FACTUAL AND LEGAL BACKGROUND

2.1. Beneficiaries of the contested measures

2.1.1. The Nike group

- (8) The Nike group is active in the design, development, worldwide marketing and sale of athletic footwear, apparel, equipment, accessories, and services (“the Nike products”). It is the largest seller of athletic footwear and athletic apparel in the world. It sells its products through Nike-owned retail stores and internet websites, and through independent distributors and licensees established worldwide. In 2003, the Nike group acquired the Converse group.
- (9) The Nike group is controlled by Nike, Inc., which was incorporated in 1967 and is headquartered in Beaverton, Oregon, United States of America (“U.S.”). In 2017, the Nike group’s global revenues were USD 34.35 billion and it had 74 400 employees worldwide.
- (10) Nike’s presence in the Netherlands dates back to 1992, when it opened an office in Hilversum with 20 employees.³

² An APA is an agreement between a tax administration and a taxpayer that determines in advance and for a defined period of time an appropriate set of criteria for calculating the arm’s length value of intra-group transactions to which that taxpayer is a party. In the Netherlands, an APA is formally initiated by the taxpayer and concluded by agreement between the taxpayer and the tax administration.

³ See: <https://uk.investinholland.com/success-stories/nike/>

2.1.2. Nike Europe Holding B.V.

- (11) Nike, Inc. holds various Dutch companies, including Nike Europe Holding B.V. (“NEH”), through various U.S. companies of the Nike group, including Converse, Inc.
- (12) NEH was established on 23 August 1993. Its function is to act as the main holding company for Nike group entities outside the U.S.⁴ NEH holds the shares in its wholly-owned subsidiaries, including Nike European Operations Netherlands B.V. (“NEON”) and Converse Netherlands B.V. (“CN BV”), as well as various other Dutch and non-Dutch companies.
- (13) NEH has no employees in the Netherlands, but provides central warehousing services in the Europe, Middle East, and Africa (“EMEA”) region⁵ through its Belgian branch “the Nike Customer Service Centre” (“the CSC”),⁶ located in Laakdaal, Belgium.⁷ The CSC started its operations in January 1997. In 2016, the CSC had 2 537 employees.⁸ The CSC is mainly responsible for the warehousing and logistics of footwear and apparel. The CSC is remunerated on a cost-plus mark-up basis in accordance with tax rulings granted to it by the Belgian tax administration. Those tax rulings are not the subject-matter of this Decision.⁹
- (14) NEH holds the shares, via NEON, in Nike Retail BV (“NR BV”) and of other non-Dutch resident companies. NEH, NEON, and NR BV form a fiscal unit (tax consolidated group) with NEH acting as the head of the unit. As from 6 November 2012, CN BV is also part of that fiscal unit.¹⁰ Every legal person governed under Dutch private law (or a comparable foreign legal entity) that is subject to corporate income tax in the Netherlands could act as a head of a fiscal unit that it can form with its subsidiaries (either a Dutch BV or NV or a comparable foreign legal entity), as long as all these companies have their place of effective management in the Netherlands and certain other conditions are fulfilled.¹¹ As such, the entities forming part of a fiscal unit file a single tax return in which the entity acting as head of the fiscal unit, i.e. NEH, includes the income of all companies of the fiscal unit. However, the Commission understands that under Dutch corporate tax law each company continues to be separately liable to Dutch corporate income tax.
- (15) A simplified structure of the Nike group in Europe as described above is illustrated in Figure 1 below:

⁴ Letter of 23 April 2015 from NEH's tax advisor to the Dutch tax administration, Section 2.1.1, p. 2.

⁵ The EMEA countries are mentioned in Exhibit A “licensed territory” of the NEON Licence Agreement.

⁶ NEH financial report 2015, p. 2. Also mentioned as European Logistic Centre (“ELC”) in the 2010 NEON transfer pricing report, p. 14.

⁷ NEH financial report 2008, p. 2.

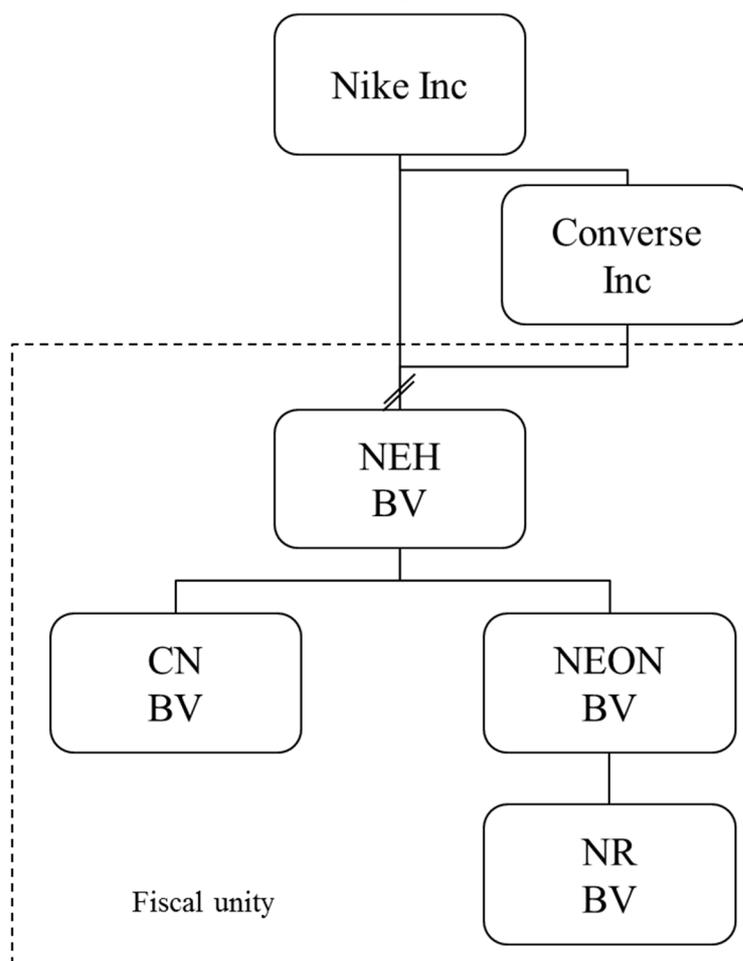
⁸ NEH financial report 2016, p. 23.

⁹ Ruling [...], Nike Customer Service Centre, [...] and Ruling [...], Nike EMEA Logistics Centre, [...].

¹⁰ NEON financial report 2012/2013, p. 39.

¹¹ For example, the head of the fiscal unit shall own at least 95% of the shares of its subsidiaries. Under certain conditions, a non-resident company with a permanent establishment (PE) in the Netherlands can be part of a fiscal unit (but then only the PE) or a Dutch resident parent company and its Dutch resident subsidiaries can form a fiscal unit even if the shares in the subsidiary are held by a non-resident company.

Figure 1 – Simplified structure of the Nike group in Europe and NEH’s fiscal unit



2.1.3. Nike Europe Operations Netherlands B.V.

- (16) NEON was established on 2 September 1994 and began its operations in the same year.¹² Since 2006, NEON has been acting as the sales and distribution principal and regional headquarters of the Nike group in the EMEA region. Its activities, referred to as “principal activities” or “wholesale distribution activities” comprise of product design, sales management, pricing and discount policies, inventory management, customer services, marketing management including market research, local advertising and promotion, including athlete sponsorship and endorsement contracts within the EMEA region. NEON is also responsible for sales forecasting, ordering, warehousing, treasury, and finance.
- (17) As from 2005, NEON obtained an exclusive licence to use the Nike intellectual property and distribute Nike products in the EMEA region (the “Nike EMEA IP”). NEON also obtained the licence from Hurley Phantom CV (“HP CV”), an entity of the Nike group registered in the Netherlands, to the Hurley trademarks, trade names and patents for the non-U.S. territory (the “Hurley non-U.S. IP”).¹³ NEON also entered into two agreements with Nike, Inc. regarding apparel and

¹² See: <https://drimble.nl/bedrijf/hilversum/17151848/nike-european-operations-netherlands-bv.html>.

¹³ 2015 NEH transfer pricing report (“2015 NEH TP Report”), Section 4.4, p. 22.

footwear products.¹⁴ According to those agreements, Nike, Inc. acts as a non-exclusive buying agent of NEON taking responsibility for manufacturing, negotiations with third parties, quality control, transportation, and insurance with regards to these product lines.¹⁵

- (18) To support NEON in all its activities throughout the EMEA region, NEON and NEH established various branches and subsidiaries. NEH is responsible for warehousing and logistics through the CSC, which acts under the supervision of NEON.¹⁶ NEON also established separate companies, called “Nike Commission Agents”, which act on behalf of NEON as marketing and sales agents in their dedicated territories, such as Nike Deutschland GmbH and Nike Czech s.r.o. NEON coordinates the activities of those Nike Commission Agents and customises their marketing and sales strategies¹⁷ to ensure consistency and coherence with Nike’s broader EMEA strategy.¹⁸ The Nike Commission Agents support NEON’s activities by implementing sales and marketing strategies in their dedicated territories, as customised by NEON to fit local requirements.¹⁹ The Nike Commission Agents also provide support to NEON in identifying and proposing prospective sports clubs and individual athletes for sponsorship endorsements, which NEON then negotiates and concludes.²⁰
- (19) In 2009, Nike reorganised its activities worldwide. As a result of that reorganisation, NEON’s headcount was reduced by 250 employees²¹ in all of the four main functional categories: product business units, sourcing and production, marketing and sales, and finance and administration. More specifically, NEON’s role in the category of product business units, which is responsible for product design and development, was reduced from 350 employees to 172 employees. Despite those headcount reductions, NEON continued to be involved in the design and product development of specific footwear used for some European sports, such as indoor football and rugby.²² NEON’s main tasks as regional headquarters, such as HR, Treasury, IT services, and legal services, etc. also remained unchanged after the reorganisation. In 2015, those tasks were further extended to include finance-related functions, such as controlling, financial planning and analysis, as well as supply chain management functions, such as assortment planning and buying planning. As from 2015, NEON also started to

¹⁴ Apparel buying Agency Agreement effective 1 March 2000 between Nike, Inc. and NEON (“Apparel buying Agency Agreement”) and the Footwear buying Agency Agreement, effective from 1 March 2000 between Nike, Inc. and NEON (“Footwear buying Agency Agreement”).

¹⁵ Apparel buying Agency Agreement, recitals A – E, p. 1.

¹⁶ 2006 NEON Functional Analysis 2006 and 2010 (“2006 NEON Functional Analysis”), Section 3.1, p. 9. This functional analysis, which was submitted by the Netherlands to the Commission, comprises two sections: a functional analysis of 2006 and a functional analysis of 2010. The original functional analysis of 2006 was not submitted to the Commission. References to the 2006 NEON Functional Analysis refer to the section of 2006 in the document submitted.

¹⁷ 2006 NEON Functional Analysis, p.9.

¹⁸ 2006 NEON Functional Analysis, p. 17.

¹⁹ 2006 NEON Functional Analysis, p.9.

²⁰ 2006 NEON Functional Analysis, p. 16.

²¹ Letter of 21 May 2010 from NEON to the Dutch tax administration and 2010 NEON TP Report Section 4.3 p. 18 and Section 4.4.1 p. 22.

²² 2010 NEON TP Report, Section 4.4.1 p. 21, as further confirmed in NEON transfer pricing report 2015 (“2015 NEON TP Report”), Section 4.3.1, p. 23.

implement and took responsibility for the Nike group's e-commerce business in the EMEA region.²³

- (20) In financial year 2006/2007, NEON's consolidated revenue was EUR 3.54 billion with a net profit of EUR 84.21 million. The consolidated book value of NEON's total assets was EUR 1.48 billion and its average number of employees was 3 336, of which 1 775 were working outside the Netherlands.²⁴ In business year 2015/2016, NEON achieved revenues of EUR 8.4 billion with a net profit of EUR 772 million and assets worth EUR 4.87 billion. In 2015/2016, NEON employed 9 270 persons, with 7 318 working outside the Netherlands.²⁵ The growth of NEON's business for the years 2006/2007 to 2015/2016 is illustrated in Table 1 below, which displays its earnings before interest and taxes ("EBIT").²⁶

Table 1

NEON	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016
	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000	EUR '000
Net turnover	€ 3,536,438	€ 3,734,763	€ 3,902,182	€ 3,686,000	€ 3,907,285	€ 4,394,437	€ 4,735,930	€ 5,528,056	€ 7,256,904	€ 8,401,307
cost of sales	€ 2,365,216	€ 2,297,232	€ 2,651,560	€ 2,456,839	€ 2,761,719	€ 3,128,248	€ 2,912,149	€ 2,966,843	€ 3,873,279	€ 4,973,316
Total operating expenses	€ 1,182,091	€ 1,211,060	€ 1,219,101	€ 1,122,348	€ 1,118,294	€ 1,185,046	€ 1,187,897	€ 1,636,620	€ 2,413,577	€ 2,435,576
Depreciation	missing information	€ 21,525	€ 19,499	€ 21,506	€ 19,740	€ 23,985	€ 30,893	€ 35,389	€ 53,947	€ 67,235
Commitments expenses	€ 44,800	€ 47,900	€ 54,100	€ 55,500	€ 60,200	€ 71,200	€ 80,500	€ 92,900	€ 136,100	€ 145,900
Personal expenses	€ 164,059	€ 173,382	€ 178,057	€ 169,077	€ 176,407	€ 212,854	€ 265,041	€ 305,932	€ 432,589	€ 468,516
Audit fees and services	€ 775	€ 725	€ 687	€ 737	€ 765	€ 927	€ 1,019	€ 1,029	€ 1,407	€ 1,334
Restructuring activities			€ 27,200	€ 1,900	€ -	€ -	€ -	€ -	€ -	€ -
other costs not explained	€ 972,457	€ 967,528	€ 939,558	€ 877,428	€ 861,182	€ 876,080	€ 810,444	€ 1,201,370	€ 1,789,534	€ 1,752,591
EBIT	-€ 10,869	€ 226,471	€ 31,521	€ 106,813	€ 27,272	€ 81,143	€ 635,884	€ 924,593	€ 970,048	€ 992,415

2.1.4. Nike International Limited and Nike International C.V.

- (21) Nike International Limited ("NIL") is a Bermuda resident company of the Nike group established on 12 November 1980.²⁷ NIL is the owner of the Nike trademarks, trade names and patents for all non-U.S. markets, except [*East Asian markets*]* (the "Nike non-U.S. IP"). NIL carries the R&D cost related to this IP on the basis of a cost sharing agreement which it concluded with Nike, Inc. (the "Nike CSA")²⁸. Nike, Inc.'s IP comprises Nike trademarks, trade names and patents. Nike, Inc. owns Nike's IP pertaining to the U.S., [*East Asian markets*] ("the Nike U.S. IP").²⁹
- (22) NIL is managed by a board, whose members reside either in Bermuda or in the U.S. According to information provided by the Netherlands, the management or parts of the management of the board meet several times a year outside the Netherlands. From the information provided by the Netherlands, it seems that NIL has no employees, but a certain number of Nike, Inc. headquarter employees

²³ 2015 NEON TP Report, Section 4.3.6 p. 34.

²⁴ NEON financial report, 2007/2008.

²⁵ NEON financial report, 2015/2016.

²⁶ NEON financial reports 2007/2008 to 2015/2016. The financial report 2006/2007 was not submitted to the Commission.

²⁷ Orbis Database.

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

²⁸ 2006 NEON APA, Section 1, p. 2. No date mentioned when the cost sharing agreement was concluded.

²⁹ 2006 NEON APA, Section 1, p. 2.

based in the U.S. have been appointed as authorised managers of NIL to run its day-to-day business.³⁰

- (23) As from 1 June 2005, NIL granted NEON an exclusive license to the Nike EMEA IP through the conclusion of an IP licence and exclusive distribution agreement (the “NEON Licence Agreement”). By virtue of that agreement, NEON is the exclusive distributor of licensed goods in most EMEA countries.³¹ NEON is also authorised to manufacture worldwide and subcontract the manufacture worldwide of products bearing the Nike name and other trademarks for sales in the EMEA region.³² According to the NEON Licence Agreement, the remuneration in the form of a royalty due by NEON to NIL for exercising the exclusive right to use the Nike EMEA IP in the EMEA region is calculated as “*the difference between the operating profit of NEON and [2-5%] of its total revenues*”.³³
- (24) The NEON Licence Agreement was amended and restated with effect from 1 June 2008. The most important amendments concern the increase of the royalty rate “*to the difference between the operating profit of NEON and [2-5%] of its total revenues*” and an extension of the list of countries for which NEON is designated as the exclusive Nike EMEA IP licensee.³⁴ The rest of the NEON Licence Agreement remained unchanged.
- (25) In 2015, NIL transferred the Nike IP described in recital (21), including the Nike EMEA IP, to Nike International C.V. (“NI CV”), a company registered in the Netherlands.³⁵ As a *commanditaire vennootschap* (limited partnership), NI CV is transparent for Dutch tax purposes and not subject to Dutch corporate income tax as determined by the Dutch Corporate Income Tax Act (*Wet op de vennootschapsbelasting 1969*, the “Wet Vpb”). The activities of NI CV are similar to those of NIL described in recitals (21) to (24).³⁶
- (26) The financial reports submitted by the Netherlands to the Commission do not detail the level of the annual royalty payments due by NEON to NIL/NI CV. The Netherlands submitted a document entitled “Ex-Post Review of Payments under the NEON License Agreements during the Period 2007–2017” (the “2018 NEON Ex-Post Review”)³⁷ which provides data on those payments. Those data have been used to compile Table 2 below.³⁸

³⁰ Letter of 19 March 2018 from the Netherlands to the Commission, Section 10, p. 5 – 6.

³¹ List of countries of the EMEA region detailed in Exhibit A of the NEON Licence Agreement.

³² NEON Licence Agreement, Section 2.1.1 p. 3. See also 2008 NEON Licence Agreement, Section 2.1.1, p. 3.

³³ NEON Licence Agreement, Section 10 p. 8. See also 2008 NEON Licence Agreement, Section, 10 p. 8.

³⁴ Mainly in Asia-Pacific and Americas ([*North and South American countries*]). See Exhibit A of the 2008 NEON Licence Agreement.

³⁵ The 2015 NEON TP Report describes NI CV as holder of all non U.S Nike IP without mentioning [*East Asian markets*] specifically.

³⁶ 2015 NEON TP Report, Section 3.2, p. 17.

³⁷ “NEON Ex Post Review of payments made under the Licence and Distribution Agreements during the period 2007-2017”, July 2018; submitted as an annex to the Letter of 31 October 2018 from the Netherlands to the Commission.

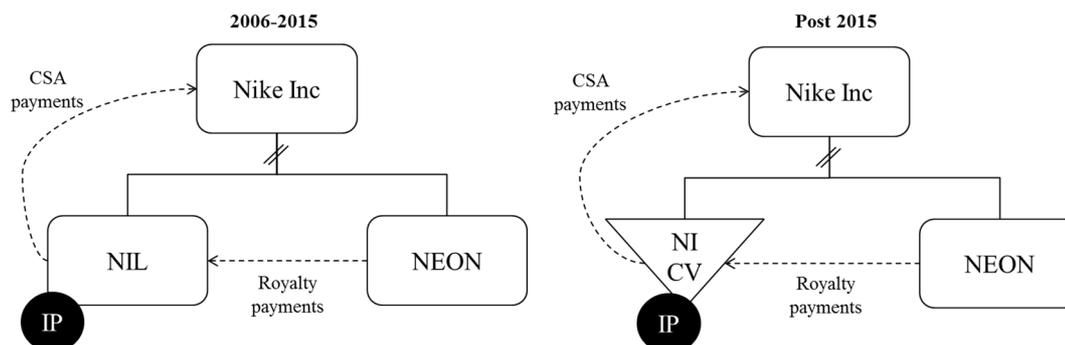
³⁸ The position “operating profit before royalty” was calculated by the Commission using data provided by the Netherlands.

Table 2

NEON	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016	2016/2017
	EUR '000										
total revenues from licensed product sales	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]
royalty to NIL/NI CV	[13-18%]	[13-18%]	[18-23%]	[18-23%]	[13-18%]	[8-13%]	[8-13%]	[13-18%]	[13-18%]	[18-23%]	[13-18%]
[2-5%] of total revenues	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]	[2-5%]
operating profit before royalty	[18-23%]	[18-23%]	[23-28%]	[18-23%]	[18-23%]	[13-18%]	[8-13%]	[13-18%]	[13-18%]	[18-23%]	[13-18%]

(27) A simplified structure of NEON displaying the use of the Nike EMEA IP between 2006 and 2015 and after 2015 is shown in Figure 2:

Figure 2 – Simplified structure of the use of the Nike EMEA IP



(28) In 2015, NI CV and HP CV, the legal owners of the non-U.S. IP for Nike and Hurley, entered into a licence agreement with NEH in relation to the non-U.S. and non-EMEA markets (the “Nike and Hurley non-U.S. IP”). NEH then licensed the Nike and Hurley non-U.S. IP to NEON via a royalty-free licence agreement. Subsequently, NEON sub-licensed the Nike and Hurley non-U.S. IP to third parties³⁹ and some entities of the Nike group outside of the U.S. and the EMEA region, such as [Central and South American companies of the group], against payment of royalties.⁴⁰ For instance, the licence contracts between NEON and [Central and South American companies of the group] are based on a royalty rate of [5-20%] on sales.⁴¹

2.1.5. Converse Netherlands BV

(29) Since July 2003, Nike, Inc. owns Converse, Inc., through NEH, and with it the Converse companies, including CN BV.⁴²

(30) CN BV is a subsidiary of Converse, Inc. and NEH. It was formed in 2003 and is located at NEON’s EMEA headquarters’ campus in Hilversum, the Netherlands.⁴³ From 2003 to 2010, the majority of Converse’s EMEA sales were concluded by third-party distributors, who distributed Converse footwear, apparel, and accessories throughout the EMEA region under licence. Only a small part of Converse’s EMEA sales was handled directly by CN BV. The business was

³⁹ The Commission has yet not received any information about these third parties.

⁴⁰ 2015 NEH TP Report, Section 3.1, p. 16.

⁴¹ License Agreements between NEON and [Central and South American companies of the group], 1 June 2008, section 10, p. 7.

⁴² See Figure 1.

⁴³ 2010 CN BV APA, Section “Partijen”.

primarily related to strategic accounts, like [...], and distribution in some smaller EMEA countries.⁴⁴

- (31) As from 2010, Converse restructured its activities in Europe to regain control of its brand.⁴⁵ As part of that restructuring, CN BV was established as the European headquarters of Converse, centralising all of Converse's European trading and distribution activities.⁴⁶ After the licensing and distribution agreements with third parties in Europe expired, CN BV took over Converse's entire UK business in 2010, France in 2012, Germany in 2015 and Benelux, Italy, Spain and Portugal in 2016.⁴⁷
- (32) Prior to that restructuring, CN BV's revenue was EUR 86 million in 2010 with a net profit of EUR 2.0 million and 36 employees.⁴⁸ In 2016, after CN BV completed the restructuring and took over Converse's European operations, its revenue increased to EUR 577.4 million with a net profit of EUR 72.1 million. The number of employees tripled to 118.⁴⁹ The increase of activities by CN BV is illustrated in Table 3 below:⁵⁰

Table 3

CN BV	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015	2015/2016
	EUR '000									
Net turnover	18705	36283	€ 49,437	€ 45,313	€ 85,957	€ 144,932	€ 309,031	€ 429,241	€ 591,980	€ 577,355
cost of sales	10591	19602	€ 29,783	€ 36,328	€ 63,982	€ 113,760	€ 190,846	€ 238,029	€ 397,724	€ 394,094
Total operating expenses	2403	2993	€ 3,892	€ 6,016	€ 20,554	€ 26,869	€ 42,418	€ 56,699	€ 106,206	€ 96,577
Depreaction	44	180	€ 157	€ 147	€ 172	€ 549	€ 608	€ 457	€ 439	€ 556
Personal expenses	1015	1562	€ 1,374	€ 2,219	€ 5,052	€ 1,699	€ 4,545	€ 10,014	€ 12,799	€ 16,681
Audit fees and services	26	38	€ 38	€ 42	€ 53	€ 58	€ 75	€ 146	€ 238	€ 621
other costs not explained	€ 3,348	€ 4,337	€ 5,071	€ 8,046	€ 25,381	€ 27,961	€ 46,280	€ 66,110	€ 118,328	€ 112,081
EBIT	€ 5,711	€ 13,688	€ 15,762	€ 2,969	€ 1,421	€ 4,303	€ 75,767	€ 134,513	€ 88,050	€ 86,684

- (33) CN BV's activities comprise of regional headquarter functions, such as marketing management, sales management (ordering and warehousing), establishing product pricing and discount policies, adapting designs to local market needs, and distribution activities, as well as bearing the inventory risk, marketing risk and other business risks.⁵¹ CN BV receives support from NEON to fulfil its headquarter functions, in particular, as regards finance, human resources, accounting, treasury, and IT support services.⁵² CN BV is supported in its distribution role by its own Commission Agents,⁵³ which are subsidiaries of CN BV and act in their territories as sales and marketing support on behalf of CN BV. Those companies do not sell products to customers directly.⁵⁴
- (34) Prior to 2010, Converse, Inc. granted CN BV a direct licence for the use of its IP in certain countries of the EMEA region in exchange for a royalty payment.⁵⁵ From 2010 to 2015, CN BV obtained an [...] sub-licence to Converse's IP for all

⁴⁴ 2010 CN BV TP Report, Section 2.2, p. 6

⁴⁵ Letter of 27 September 2009 from CN BV to the Dutch tax administration, Section 2, p. 4.

⁴⁶ 2010 CN BV APA, Section 1.

⁴⁷ Letter of 27 September 2009 from CN BV to the Dutch tax administration, p. 4.

⁴⁸ CN BV financial report 2010/2011.

⁴⁹ CN BV financial report 2015/2016.

⁵⁰ CN BV financial reports 2006/2007 to 2015/2016.

⁵¹ 2010 CN BV TP Report, p. 12 to 16.

⁵² 2015 CN BV TP Report Section 3.1, p. 14 and Section 3.2, p. 15.

⁵³ 2010 CN BV TP Report Section 2.4, p. 8.

⁵⁴ 2015 CN BV TP Report Section 3.2, p. 15-16.

⁵⁵ Letter of 27 September 2009 from CN BV to the Dutch tax administration, Section 1.2, p. 2.

non-U.S. markets except [*East Asian markets*] (“the Converse EMEA IP”) from All Star CV (“AS CV”),⁵⁶ which in turn licensed it from Converse Inc.⁵⁷ From 2015, CN BV obtained an [...] license to the Converse EMEA IP from AS CV, as a result of which it became the [...] distributor of Converse licensed goods in the EMEA region. Finally, CN BV assumed additional activities following the expiry of the licence contracts with third-party distributors throughout the EMEA region.⁵⁸

2.1.6. All Star C.V.

- (35) AS CV was established in 2010. It is registered in the Netherlands, but transparent for Dutch tax purposes.⁵⁹ AS CV is therefore not subject to Dutch corporate income tax on basis of the Wet VpB. AS CV has no office or other fixed place of business at its disposal in the Netherlands.⁶⁰
- (36) From 2010 to 2015, AS CV licensed the Converse EMEA IP from Converse, Inc., which it in turn sub-licensed to CN BV, the regional headquarters of the Converse group. In 2015, after the Converse EMEA IP was transferred from Converse, Inc. to AS CV, AS CV concluded a cost sharing agreement with Converse, Inc. (the “Converse CSA”) under which AS CV is charged R&D costs as well as brand related costs.⁶¹ The Converse IP comprises Converse trademarks, trade names and patents. Converse, Inc. owns the Converse IP pertaining to the U.S., [*East Asian markets*] (“the Converse U.S. IP”). A simplified structure for the use of the Converse EMEA IP after 2015 is shown in Figure 3:

⁵⁶ 2010 CN BV APA, Section 1, p. 1.

⁵⁷ Dividing the intellectual property in regions such as in Nike is not mentioned in the submitted documents directly.

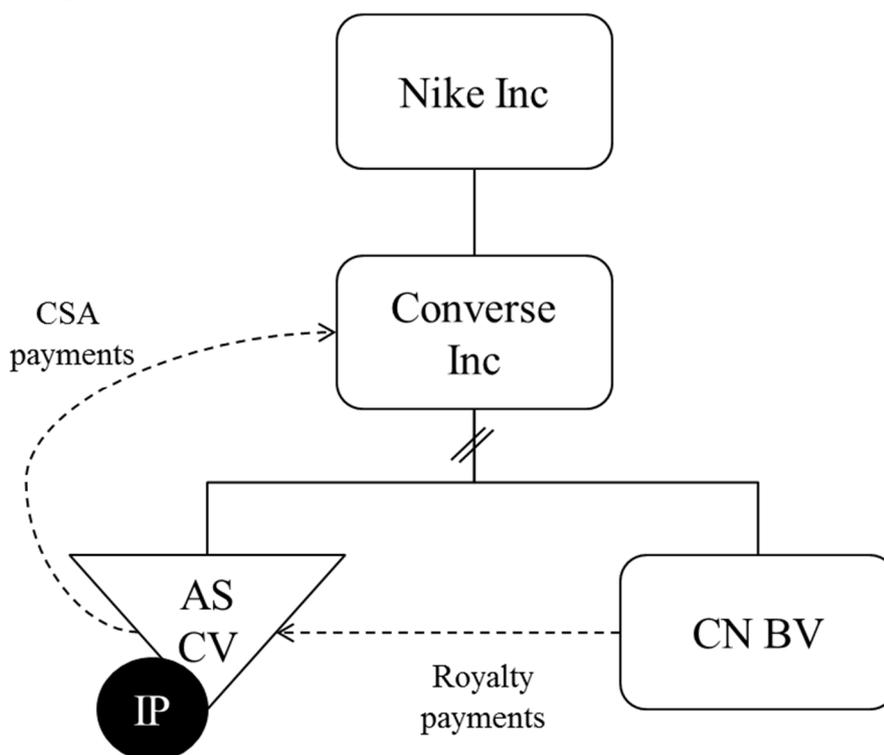
⁵⁸ 2015 CN BV TP Report Section 2.3.3, p. 11.

⁵⁹ Letter of 13 November 2009 from CN BV to the Dutch tax administration. The exact date of establishment is unknown.

⁶⁰ Letter of 27 November 2009 from CN BV to the Dutch tax administration, Section 1.3, p. 4.

⁶¹ 2015 CN BV TP Report Section 3.2, p. 15. No indication is given as to when the CSA was concluded.

Figure 3 – Simplified structure for the use of Converse EMEA IP



- (37) For the non-U.S. and non-EMEA IP of Converse, the same structure was used as that established for the non-U.S. and non-EMEA Nike IP, described in recital (28).

2.2. The contested measures

- (38) The present decision concerns three APAs concluded between the Dutch tax administration and NEON in 2006, 2010 and 2015 (“the NEON APAs”) and two APAs concluded between the Dutch tax administration and CN BV in 2010 and 2015 (“the CN BV APAs”). Those APAs endorse a transfer pricing arrangement which determines the annual royalty due by NEON and CN BV in return for the [...] licence to respectively the Nike EMEA IP and the Converse EMEA IP. The level of that annual royalty in turn determines the annual taxable profit and thus the annual corporate income tax liability of respectively NEON and CN BV in the Netherlands.

2.2.1. The contested measures granted to NEON

2.2.1.1. The 2006 NEON APA

- (39) On 22 September 2006, NEON requested an APA from the Dutch tax administration. Although the Dutch authorities have not supplied the Commission with any *ex ante* transfer pricing report submitted in support of that request, a request made in 2010 for a renewal of the APA was supported by a document entitled “Functional Analysis”, which included a section describing some of the functions performed and risks assumed by NEON in September 2006.⁶² That document fails to describe the different transactions entered into by NEON, including the NEON Licence Agreement concluded with NIL. That document

⁶² Functional Analysis, Section 4.

also fails to analyse whether any of the functions performed by NEON and NIL are valuable. It only concludes that NEON exercises routine functions and should be remunerated with a [2-5%] operating margin on total revenue. It also contains no justification or reasoning regarding the choice of the transfer price method to price the transaction under review. Neither that document, nor any other document supporting the 2006 APA request, describes the functions performed or risks assumed by NIL.

- (40) In support of its 2006 APA request, NEON also submitted a benchmark analysis entitled “NIKE’s EMEA Distribution Operations Comparable Companies Search 2006”, dated October 2006 (the “2006 NEON Comparable Companies Study”), to the Dutch tax administration on 6 November 2006. The objective of the 2006 NEON Comparable Companies Study is to “*identify independent wholesalers of sportswear and associated products similar to those of NIKE. The results of the comparable search will be used to establish an arm’s length range of returns for Nike’s EMEA distribution operations*”.⁶³ That study lists several wholesale distributors allegedly comparable to NEON and concludes that a remuneration for NEON’s functions equal to an operating margin of [2-5%] of NEON’s total revenues is at arm’s length.
- (41) On the basis of that request, the Dutch tax administration concluded an APA with NEON on 29 November 2006, which entered into force on 1 June 2006 (“2006 NEON APA”). The 2006 NEON APA should have been applicable until 31 May 2015, but was replaced by a subsequent APA concluded by the Dutch tax administration and NEON in 2010. The stated objective of the 2006 NEON APA is to “*agree on the arm’s length character of transfer prices to establish [NEON’s] profit from international group transactions and the tax consequences of [NEON’s] planned transactions or existing facts and circumstances*”.⁶⁴ The 2006 NEON APA establishes that a [2-5%] operating margin calculated on the basis of NEON’s total revenues⁶⁵ constitutes an arm’s length remuneration for NEON’s activities.⁶⁶ The royalty that NEON needs to pay at the end of the year to NIL is calculated as the difference between the “realised operational profit from the principal activities” and the [2-5%] operating margin. The realised operational profit from the principal activities includes all NEON’s interest income and costs, currency and hedge results and costs for options on shares.⁶⁷ The 2006 NEON APA states that if the operating margin achieved by NEON before the deduction of royalty costs is less than [2-5%] of the total revenue, NEON is not obliged to

⁶³ 2006 NEON Comparable Company Study, Section A.

⁶⁴ 2006 NEON APA, Section 1.

⁶⁵ According to the 2006 NEON APA, “total revenue” includes the gross revenue of NEON plus the currency results relating to the sales and licence income from third parties minus discounts and defect products cf. 2006 NEON APA Section 3, p. 3. The NEON Licence Agreement defines the total revenue as follows: “Total Revenue” means all revenues of Licensee during the relevant Agreement Year from all sources including Net Annual Sales Revenues, foreign currency exchange, royalty revenue from Licensee’s sub-licence of the Trademarks in the Licensed Territory pursuant to Section 12, and revenue from soccer-related licensing activity. “Total Revenue” shall not include the revenue of the branches or any licensing revenues from group holding and licensing activities outside of the Licensed Territory.

⁶⁶ The 2006 NEON Comparable Companies Study 2006 also contains no justification or reasoning of the choice of the transfer price method. The used method is the transactional net margin method. See 2010 NEON TP Report Section 5.4, p. 38.

⁶⁷ 2006 NEON APA, Section 3, p.3. Interest from “*Duurzaam overtollige liquide middelen*” of NEON (essentially spare cash that can be invested) is excluded from the realised operational profit.

pay any royalties to NIL. Finally, the APA confirms that NEON can deduct the royalty paid to NIL from its profits, thus reducing its corporate tax base in the Netherlands. The royalty paid to NIL is also not subject to dividend withholding tax.

2.2.1.2. *The 2010 NEON APA*

- (42) By letter dated 21 May 2010, NEON requested an APA renewal from the Dutch tax administration because of changes to the business activities of Nike, Inc. and NEON.⁶⁸ That request was supported by a document entitled “Transfer Pricing Documentation Report” (the “2010 NEON TP Report”). NEON’s functional analysis in the 2010 NEON TP Report is largely similar to that in the 2006 Functional Analysis.
- (43) The 2010 NEON TP Report does not explain the functions performed by NIL beyond stating that it holds, defends, and protects the Nike EMEA IP.⁶⁹ The 2010 TP Report merely states that, notwithstanding the fact that NEON is responsible for marketing functions, NIL will bear all the risks, considering its role as legal owner of the Nike EMEA IP. Based on this functional analysis, that report concludes that NEON’s functions can be considered “routine” with an emphasis on the regional execution of Nike’s global strategy.⁷⁰
- (44) In contrast to the 2006 NEON Comparable Companies Study, the 2010 NEON TP Report explains the different transfer pricing methods and selects the transactional net margin method (“TNMM”) in light of the missing transactional data for transactions between affiliates.⁷¹ The 2010 NEON TP Report also includes a benchmarking study to calculate NEON’s arm’s length remuneration. It concludes that an arm’s length remuneration for NEON’s wholesale distribution activities should be an operating margin on sales in the range of [1-5%] and [2-5%] with a median of [2-5%].
- (45) On the basis of that request, the Dutch tax administration concluded an APA with NEON on 1 October 2010, which entered into force on 1 December 2010 (the “2010 NEON APA”). The 2010 NEON APA was applicable until 31 May 2015.⁷² The 2010 NEON APA describes NEON’s functions in an identical manner to the 2006 NEON APA, except for the transfer of the apparel design business from NEON to Nike, Inc. in the U.S.⁷³ The 2010 NEON APA stipulates that the remuneration of NEON’s activities is considered at arm’s length “*if it obtains an operating margin of [2-5%] of the total revenue for its activities as principal (including its headquarter activities)*”.⁷⁴

⁶⁸ The 2010 NEON APA is based on the 2006 NEON APA and the 2010 NEON TP Report.

⁶⁹ 2010 NEON TP Report, Section 3.1 p. 12.

⁷⁰ 2006 NEON Functional Analysis, p. 26, confirmed by 2010 NEON TP Report, Section 4.5, p. 32.

⁷¹ 2010 NEON TP Report, Section 5.4, p. 38.

⁷² 2010 NEON APA, Section 14.

⁷³ Letter of 21 May 2010 from NEON to the Dutch tax administration, p. 1.

⁷⁴ In contrast to the 2006 Comparable Companies Study, the 2010 NEON TP Report explains the different methods and selects the transactional net margin method as the most appropriate method due to the lack of transactional data between affiliates.

2.2.1.3. The 2015 NEON APA

- (46) In light of the impending expiry of the 2010 NEON APA, NEON requested, by letter of 31 March 2015, the renewal of the APA from the Dutch tax administration. That request was supported by a transfer pricing report (the “2015 NEON TP Report”). The objective of the 2015 NEON TP Report is to “*document an arm’s length return for activities performed by NEON under a licence of intellectual property from NI CV*”.⁷⁵ NEON’s functional analysis in the 2015 TP Report is largely similar to that described in the 2010 TP Report. The 2015 NEON TP Report specifies NI CV’s role as the entrepreneurial IP owner of the Nike EMEA IP.⁷⁶ The 2015 NEON TP Report also includes a benchmarking study to calculate the arm’s length remuneration of NEON. In contrast to the previous years, the explanation and choice of the transfer pricing method is more detailed. The suggested arm’s length remuneration for NEON’s wholesale distribution activities is in the range of [1-5%] and [2-5%] of NEON’s total revenue with a median of [2-5%].
- (47) On the basis of that request, the Dutch tax administration concluded an APA with NEON on 28 May 2015, which entered into force on 1 June 2015 (the “2015 NEON APA”). The 2015 NEON APA is applicable until 31 May 2020.⁷⁷ The 2015 NEON APA describes NEON’s functions in an identical manner to the 2010 NEON APA, except for a reference to the growing e-commerce sector and an increase in the functions of Nike, Inc. and NEON in that regard. According to that description, NEON manages and develops the e-commerce sector of Nike, Inc. in the EMEA region. NEON is also responsible for financing-related activities, such as controlling, financial planning and analysis, as well as for the supply chain management related activities such as assortment planning and buying planning. The 2015 NEON APA stipulates that the remuneration to NEON is considered at arm’s length “*if it obtains an operating margin of [2-5%] of the total principal revenue*”.⁷⁸ In addition, the 2015 NEON APA establishes a remuneration to NEON for its e-commerce activities, which is considered to be at arm’s length “*if it obtains an operating margin of [1-5%] of the total e-commerce revenue*”. Finally, by the 2015 NEON APA the Dutch tax administration endorsed all statements of the 2015 NEON TP Report.

2.2.2. The contested measures granted to CN BV

2.2.2.1. The 2010 CN BV APA

- (48) In 2009, CN BV made a request to the Dutch tax administration for an APA. That request was later supplemented with a report entitled “Transfer pricing documentation for APA request” (the “2010 CN BV TP Report”).⁷⁹ The 2010 CN BV TP Report includes a functional analysis of the parties to the transaction and considers that AS CV will bear all the risks, considering its role as legal owner of the Converse EMEA IP. On the basis on that functional analysis,

⁷⁵ See 2015 NEON TP Report, Section 1.2 (“Scope and Use of this Report”).

⁷⁶ 2015 NEON TP Report, Section 5.5, p. 63.

⁷⁷ 2015 NEON APA, Section 14.

⁷⁸ The operational profit from the principal activities includes income from liquid assets equal to [2-5%] of principal revenue of NEON. The operating margin is recalculated every year depending on the actual realised total principal revenue. This is illustrated in the 2015 NEON TP Report, Section 6.4.2.5, p. 85.

⁷⁹ CN BV 2010 APA, Section 1.

the report concludes that CN BV's functions can be considered "routine" as compared to the role of AS CV and can be assimilated to wholesale distribution activities. On the basis of that conclusion, the 2010 CN BV TP Report explains the different transfer pricing methods and selects the TNMM on the grounds that that method is less affected by transactional differences and more tolerant to functional differences between analysed companies. Finally, the report includes a benchmarking study to calculate the arm's length remuneration for CN BV. The suggested arm's length remuneration for CN BV's wholesale distribution activities is in the range of [1-5%] to [2-5%] of CN BV's total revenue with a median of [2-5%].

- (49) On the basis of that request, the Dutch tax administration concluded an APA with CN BV on 15 February 2010, which entered into force on 1 June 2010 (the "2010 CN BV APA") and should have remained in force until 31 May 2020, but was replaced by a subsequent APA concluded in 2015. The objective of the 2010 CN BV TP Report was to determine "*an arm's length remuneration for CN BV*".⁸⁰ The APA stipulates that the remuneration to CN BV for its functions is considered at arm's length "*if it obtains a commercial operating margin of [2-5%] of the total revenue*".⁸¹ The royalty that CN BV needs to pay at the end of the year to AS CV is calculated as the difference between the "commercial operational profit from the principal activities" and the [2-5%] operating margin. The commercial operational profit from the principal activities includes all CN BV's interest income and costs, currency results, hedge results and costs for options on shares.⁸² The 2010 CN BV APA further confirms that CN BV can deduct the royalties paid to AS CV from its annual profits, thus reducing its corporate tax base.

2.2.2.2. *The 2015 CN BV APA*

- (50) By letter of 30 July 2015, CN BV requested a renewal of the 2010 CN BV APA from the Dutch tax administration. That request is supported by a document entitled "Transfer Pricing Documentation Report" dated July 2015 (the "2015 CN BV TP Report"). Like the 2010 CN BV TP Report, the 2015 CN BV TP Report includes a functional analysis of the parties to the transaction and considers that AS CV will bear all the risks, considering its role as legal owner of the Converse EMEA IP. Based on that functional analysis, the report concludes that CN BV's functions can be considered "routine" compared to the role of AS CV and can be assimilated to wholesale distribution activities. For the same reasons as those given in the 2010 CN BV TP Report, it selects the TNMM as the applicable transfer pricing method. On the basis of a benchmarking study, the 2015 CN BV TP Report proposes an arm's length remuneration for CN BV's wholesale distribution activities in the range of [2-5%] to [2-6%] of CN BV's total revenue with a median of [2-5%].
- (51) On the basis of that request, the Dutch tax administration concluded an APA with CN BV on 7 September 2015, which entered into force on 1 June 2015 and is

⁸⁰ 2010 CN BV TP Report, p. 4.

⁸¹ The total revenue includes the gross revenue of CN BV plus the currency results and licence income from third parties minus discounts and defect products. See CN BV 2010 APA, Section 3.

⁸² CN BV 2010 APA, Section 3. The commercial operational profit from the principal activities does not include interest income that relates to the "*duurzaam overtollige liquide middelen*" of CN BV. "*Duurzaam overtollige liquide middelen*" is essentially spare cash that can be invested.

valid until 31 May 2020 (the “2015 CN BV APA”). The 2015 CN BV APA replaces the 2010 CN BV APA. The objective of the 2015 CN BV APA is to “document an arm’s length return for activities performed by CN BV under a licence of intellectual property from AS CV.”⁸³ The 2015 CN BV APA is identical to the 2010 CN BV APA, except for the adjustment of the level of CN BV’s operating margin. The 2015 CN BV APA stipulates that the remuneration of CN BV for its activities is considered at arm’s length “if it obtains an operating margin of [2-5%] of the estimated principal revenue”⁸⁴ For the period of validity of the APA, that remuneration is recalculated every year as laid down in the 2015 CN BV TP Report.

2.3. The relevant legal and regulatory framework

2.3.1. OECD Guidance on Transfer Pricing

- (52) A transfer price is the price established for tax purposes at which associated enterprises transfer physical goods, IP or provide services among themselves. When independent companies transact with each other, the conditions of the transaction, including the price, is determined by market forces. By contrast, companies forming part of the same group (“associated companies”) may establish conditions in their intra-group relations that differ from those that would have been established had the group members been acting as independent enterprises.⁸⁵
- (53) The Organisation for Economic Cooperation and Development (“OECD”) has adopted for its member countries guidance on taxation and the determination of transfer prices for tax purposes.⁸⁶ Although non-binding, OECD member countries are encouraged to follow that guidance.⁸⁷ Moreover, the OECD’s guidance serves as a focal point and exerts a clear influence on the tax practices of OECD member (and even non-member) countries. In numerous member countries, OECD guidance documents have been given the force of law or serve as a reference for interpreting domestic tax law. Therefore, to the extent the Commission refers to the OECD guidance in this Decision, it does so because that guidance is the result of expert discussions in the context of the OECD and elaborates on techniques aimed at addressing common challenges in international taxation.⁸⁸
- (54) According to Article 9(1) of the OECD Model Tax Convention on Income and on Capital, “[w]here [...] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any

⁸³ 2015 CN BV TP Report, Section 1.2 p. 4.

⁸⁴ The operational profit from the principal activities includes income from liquid assets equal to [2-6%] of principal revenue. The operating margin is recalculated every year depending on the actual realised total principal revenue. In the 2015 CN BV TP Report, p. 67, is a scale to see the specific operating margin for specific total revenues.

⁸⁵ See 1995, 2010 and 2017 OECD TP Guidelines, paragraphs 5 to 7 of the preface.

⁸⁶ The Netherlands has been a member of the OECD since 1961.

⁸⁷ See, for example, 1995 OECD TP Guidelines, preface, paragraph 16: “OECD Member countries are encouraged to follow these Guidelines in their domestic transfer pricing practices, and taxpayers are encouraged to follow these Guidelines in evaluating for tax purposes whether their transfer pricing complies with the arm’s length principle [...]”

⁸⁸ See 1995, 2010 and 2017 OECD TP Guidelines, paragraphs 5 to 7 of the preface.

*profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.”*⁸⁹ That provision is considered to lay down the arm’s length principle for transfer pricing purposes in international taxation. According to the arm’s length principle, intra-group transactions should be priced as if they were agreed to by independent companies negotiating under comparable circumstances at arm’s length. The arm’s length principle is the international transfer pricing standard that OECD member countries have agreed should be used for tax purposes by multinational groups and tax administrations in order to avoid double taxation, to prevent fiscal evasion and to promote international trade, investment and fair competition.⁹⁰

- (55) The OECD provides further guidance to tax administrations and multinational enterprises on the application of the arm’s length principle for transfer pricing in the OECD transfer pricing guidelines (the “OECD TP Guidelines”). The latest version of the guidelines was published on 10 July 2017 (the “2017 OECD TP Guidelines”). Previous versions of the OECD TP Guidelines were published in 2010 (the “2010 OECD TP Guidelines”) and 1995 (the “1995 OECD TP Guidelines”).⁹¹
- (56) The OECD TP Guidelines provide five methods to approximate an arm’s length pricing of controlled transactions and profit allocation between companies of the same corporate group: (i) the comparable uncontrolled price (“CUP”) method;

⁸⁹ OECD Model Tax Convention on Income and on Capital, Article 9(1).

⁹⁰ See also the 1995 OECD TP Guidelines, paragraph 1.7: “*There are several reasons why OECD Member countries and other countries have adopted the arm’s length principle. A major reason is that the arm’s length principle provides broad parity of tax treatment for MNEs and independent enterprises. Because the arm’s length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these tax considerations from economic decisions, the arm’s length principle promotes the growth of international trade and investment.*” See also the 2010 OECD TP Guidelines, paragraph 1.8.

⁹¹ According to the OECD’s recommended approach to its Model Tax Convention, changes or additions to the commentaries may be relied upon where they include clarifications on previous versions, but not when they contain substantive alterations to the provisions or to past practice. See OECD Model Tax Convention Commentary, 2010, paragraph 35: “[*Ambulatory interpretation of tax conventions*] Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles. However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.” In a similar vein, changes or additions to the OECD TP Guidelines can be applied because they reflect the consensus of the OECD member countries on the application of the arm’s length principle laid down in Article 9 of the OECD Model Tax Convention. A specific example is the clarifications introduced in paragraph 3.18 of the 2010 OECD TP Guidelines on the application of the TNMM. The 1995 OECD TP Guidelines referred to the TNMM as a method of “last resort”, which should preferably be avoided. That is why scant guidance was given on that method in that version of the guidelines. As explained in paragraphs 3.52 to 3.55 of the 1995 OECD TP Guidelines, the OECD urged its members to record their experiences with the application of the TNMM to enable the Committee on Fiscal Affairs to undertake an intensive period of monitoring of the application of the that method to revise the guidelines. The guidelines were updated in 2010, taking into account the experience and consensus on the application of the TNMM.

(ii) the cost plus method;⁹² (iii) the resale minus method;⁹³ (iv) the TNMM;⁹⁴ and (v) the transactional profit split method.⁹⁵ The OECD TP Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods).⁹⁶

- (57) The OECD TP Guidelines refer to the CUP method as a “direct” transfer pricing method.⁹⁷ That method compares the price and the other conditions agreed for the transfer of goods or services in an intra-group transaction to the price and the other conditions agreed for the transfer of goods or services in comparable uncontrolled transactions (i.e. transactions between unaffiliated companies) conducted under comparable circumstances.⁹⁸

⁹² The cost plus method establishes the cost plus mark-up of the supplier in the controlled transaction by reference to the cost-plus mark-up that the same supplier or an independent supplier earns in comparable uncontrolled transactions. See 1995 OECD TP Guidelines paragraphs 2.32 and 2.33 and 2010 OECD TP Guidelines, paragraphs 2.39 and 2.40.

⁹³ The resale price method establishes the resale price margin (the gross margin on the resale price) of the reseller in the controlled transaction by reference to the resale price margin that the same reseller or an independent enterprise earns on items purchased and sold in comparable uncontrolled transactions. See 1995 OECD TP Guidelines paragraphs 2.14 and 2.15 and 2010 OECD TP Guidelines, paragraphs 2.21 and 2.22.

⁹⁴ See recital (58) *et seq.*

⁹⁵ The profit split method identifies the combined profit (or loss) to be split between the associated companies party to the intra-group transactions being priced and then splits those profits between them on an economically valid basis that approximates the division of profits that would have been anticipated and reflected in an agreement made at arm’s length. The OECD Guidelines describe two approaches to divide the combined profits among the associated companies: the contribution analysis and the residual analysis. The contribution analysis splits the combined profits on the basis of the relative value of the functions performed (taking account assets used and risks assumed) by each of the parties involved in the intra-group transactions being priced. The residual analysis uses a two-step approach to divide the profits. In a first step, each company is allocated a basic (or routine) profit appropriate for the functions it performs, assets it uses and risks it assumes based on a comparison of the market returns achieved for similar transactions by independent enterprises. In other words, the first step essentially corresponds to the application of the TNMM. In a second step, the residual profit remaining after the first step has been concluded is allocated among the parties in a manner that approximates how independent parties would have divided that profit at arm’s length. The profit split method is usually considered an appropriate method where both parties to the intra-group transaction make unique and valuable contributions to that transaction, because in such a case independent parties would be expected to share the profits of the transaction in proportion to their respective contributions. See 1995 and 2010 OECD TP Guidelines Glossary and 1995 OECD TP Guidelines; paragraph 3.7; 2010 OECD TP Guidelines, paragraphs 2.109 and 2.115.

⁹⁶ For the selection of the most appropriate method paragraph 2.3 of the 2010 OECD TP Guidelines states that “[t]raditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are arm’s length [...] As a result, where, taking account of the criteria described at paragraph 2.2, a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method.” See also paragraph 2.49 of the 1995 OECD TP Guidelines.

⁹⁷ 1995 OECD TP Guidelines, paragraph 2.7: “Where it is possible to locate comparable uncontrolled transactions, the CUP Method is the most direct and reliable way to apply the arm’s length principle. Consequently, in such cases the CUP Method is preferable over all other methods.” See also 2010 OECD TP Guidelines, paragraph 2.14 and 2017 OECD TP Guidelines, paragraph 2.15.

⁹⁸ 1995 OECD TP Guidelines; paragraph 2.7: “Following the principles in Chapter I, an uncontrolled transaction is comparable to a controlled transaction (i.e. it is a comparable uncontrolled transaction) for purposes of the CUP method if one of two conditions is met: a) none of the differences (if any) between the transactions being compared or between the enterprises undertaking those transactions could materially affect the price in the open market; or, b) reasonably accurate adjustments can be

- (58) The OECD TP Guidelines refer to the TNMM as an “indirect” method to approximate the arm’s length prices of a controlled transaction. The TNMM examines the net profit relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realises from a controlled transaction. The net profit indicator (or profit level indicator)⁹⁹ of the taxpayer from the controlled transaction at stake should be established by reference to the same net profit indicator that would have been earned in comparable uncontrolled transactions.
- (59) When applying the TNMM, it is necessary to choose the party to the controlled transaction for which a net profit indicator is selected and tested. As a general rule, the “tested party” within a TNMM-based analysis is the less complex of the two related parties involved in the controlled transaction under assessment. The choice of the less complex entity is determined on the basis of a “functional analysis”, i.e. an analysis of the functions performed by the associated enterprises, taking into account the assets used and the risks assumed.¹⁰⁰ If a company performs “routine” functions¹⁰¹, uses non-unique assets, assumes low risks and therefore does not make any unique and valuable contribution to the controlled transaction, it will normally be considered the less complex entity.
- (60) Once the operating profit of the less complex entity has been determined, the residual profit from the controlled transaction (i.e. the combined profit from the controlled transactions minus the operating profit of the less complex entity) will be allocated to the more complex party (i.e. the non-tested party).¹⁰² The more complex entity, by virtue of its unique and valuable functions (taking into account the assets used and risks assumed), is thus assumed to be entitled to the excess

made to eliminate the material effects of such differences”. See also the 2010 OECD TP Guidelines, paragraph 2.14 and the 2017 OECD TP Guidelines, paragraph 2.15.

⁹⁹ A “net profit indicator”, also called a “profit level indicator”, is defined by the Glossary of the 2010 OECD TP Guidelines as: “*The ratio of net profit to an appropriate base (e.g. costs, sales, assets).*” According to paragraph 2.80 of the 2010 OECD TP Guidelines, “net profit” does not include non-operating items of the profit and loss account such as interest income and expenses, income taxes and exceptional and extraordinary items of a non-recurring nature. Indeed, the net profit indicated by the OECD Guidelines corresponds to the operating profit. In particular, in applying the TNMM, the net profit indicator generally can be the ratio of the operating profit to sales, to the total operating costs (COGS plus operating expenses) or to assets, depending on facts and circumstances of the case. “COGS” stands for cost of goods sold, and represents mainly the direct and indirect costs attributable to the production of a company, while operating expenses indicate expenditures that a business incurs to engage in any activities not directly associated with the production of goods or services related to the enterprise as a whole, such as supervisory, general, and administrative expense. Revenue in the income statement minus COGS corresponds to the company’s gross margin.

¹⁰⁰ The Glossary to the 1995 and 2010 OECD TP Guidelines describes a functional analysis as “[a]n analysis of the functions performed (taking into account assets used and risks assumed) by associated enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions.” That analysis “*seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions.*” See 1995 OECD TP Guidelines, paragraph 1.20. See also 2010 OECD TP Guidelines, paragraph 1.42, and 2017 OECD TP Guidelines, paragraph 1.51. See also Glossary to the 2017 OECD TP Guidelines.

¹⁰¹ The OECD TP Guidelines do not define the term “routine”. The Commission understands this term to refer to functions that are not unique, i.e. “benchmarkable” functions for which uncontrolled comparable transactions can be found.

¹⁰² See paragraph 2.121 of the 2010 OECD TP Guidelines where the concept of residual profit is delineated for the application of the profit split method, but it is valid, *mutatis mutandis*, when TNMM is applied. See also paragraph 9.10 of the 2010 OECD TP Guidelines. See in the same sense, paragraphs 3.5 and 3.19 of the 1995 OECD TP Guidelines.

return from the transactions after the less complex entity has been remunerated by use of the TNMM.

2.3.2. Description of the relevant national legal framework

- (61) In the Netherlands, corporate income tax is levied pursuant to the Wet Vpb. According to Article 2 Wet Vpb, companies registered in the Netherlands, like NEON and CN BV, are resident taxpayers. According to Article 7 Wet Vpb, resident taxpayers are subject to Dutch corporate income tax on the taxable amount, i.e. their annual taxable profit minus losses of previous years. According to the “total profit” concept (*totale winstbegrip*) enshrined in Article 3.8 of the Income Tax Act (*Wet inkomstenbelasting 2001*, “WIB”),¹⁰³ which also applies to corporate taxpayers by virtue of Article 8 Wet Vpb, profit is the amount of collective benefits (positive and negative) derived from the enterprise. Pursuant to Article 3.25 WIB, which also applies to corporate taxpayers by virtue of Article 8 Wet Vpb, a taxpayer’s annual profit must be determined on the basis of the sound business principle (*goed koopmansgebruik*).¹⁰⁴ That principle refers to the reasonable and consistent allocation of costs and income to the year to which they relate.
- (62) Article 8b (1) Wet Vpb, which was inserted into the Dutch corporate income tax code in January 2002, codifies the arm’s length principle in the domestic tax law of the Netherlands. That provision provides: “*Where an entity participates, directly or indirectly, in the management, control or capital of another entity, and conditions are made or imposed between these entities in their commercial and financial relations (transfer prices) which differ from conditions which would be made between independent parties, the profit of these entities will be determined as if the last mentioned conditions were made*”. Prior to the insertion of Article 8b (1), the arm’s length principle was already considered to apply in Dutch corporate tax law as flowing from the total profit concept.¹⁰⁵ The arm’s length principle was only codified by Article 8b (1) to remove any uncertainty foreign investors might have had about the applicability of that principle in Dutch corporate tax law.¹⁰⁶

¹⁰³ Article 3.8 WIB provides: “*Winst uit een onderneming (winst) is het bedrag van de gezamenlijke voordelen die, onder welke naam en in welke vorm ook, worden verkregen uit een onderneming.*”

¹⁰⁴ Article 3.25 WIB provides: “*De in een kalenderjaar genoten winst wordt bepaald volgens goed koopmansgebruik, met inachtneming van een bestendige gedragslijn die onafhankelijk is van de vermoedelijke uitkomst. De bestendige gedragslijn kan alleen worden gewijzigd indien goed koopmansgebruik dit rechtvaardigt.*”

¹⁰⁵ See Tweede Kamer, kamerstukken, vergaderjaar 1997-1998, 25087, nr.4, p. 38 (“*De «arm’s length» benadering is onderdeel van het Nederlandse belastingrecht. Specifieke wetgeving om de nieuwe [OESO]-richtlijnen te implementeren is niet nodig*”) and kamerstukken, vergaderjaar 2001-2002, 28034, nr. 3, p. 19 (“*Nationaal maakt het [arm’s-length]beginsel onderdeel uit van het winstbegrip van artikel 3.8 van de Wet inkomstenbelasting 2001 [...], dat ook geldt voor de vennootschapsbelasting*”). See also Resolutie Staatssecretaris van Financiën 25 april 1985, 084-2737 (“*Wanneer een in Nederland belastingplichtige onderneming transacties verricht met verbonden ondernemingen, dient te worden gezien of de voorwaarden welke zijn overeengekomen met de (verbonden) ondernemingen ten behoeve waarvan de werkzaamheden worden verricht, met het „at arm’s length” beginsel in overeenstemming zijn*”). This is also confirmed by the 2011 Dutch TP Decree that implements the OECD’s arm’s length principle into Dutch tax law. In its introduction, that Decree states: “*The policy of the Netherlands on the arm’s length principle in the field of international tax law is that this principle forms part of the Netherlands’ system of tax law as a result of its incorporation in the broad definition of income recorded in section 3.8 WIB.*”

¹⁰⁶ See Tweede Kamer, kamerstukken, vergaderjaar 2001-2002, 28034, nr. 3, p. 19 (“*Anders dan veel OESO-landen kent de Nederlandse wetgeving evenwel niet een expliciet voorschrift op het punt van*

- (63) Guidance on how the Dutch tax administration interprets the arm's length principle was first provided in the Dutch Transfer Pricing Decree of 30 March 2001 (hereafter "the 2001 TP Decree"),¹⁰⁷ which was adopted even before that principle was codified in Article 8b (1) Wet Vpb. The preamble to that Decree stated the following:

"[...] The policy of the Netherlands on the arm's length principle in the field of international tax law is that this principle forms an integral part of the Netherlands' system of tax law as a result of its incorporation in the broad definition of income recorded in Section 3.8 of the Income Tax Act 2001. In principle, this means that the OECD Guidelines apply directly to the Netherlands under Section 3.8 of the Income Tax Act 2001. There are a number of areas in which the OECD Guidelines provide scope for individual interpretation by the member countries. In a number of other areas, practical experience has shown that the OECD Guidelines are in need of clarification. This decree explains the Netherlands' position in relation to these particular points and seeks, where possible, to remove any confusion."

- (64) As regards the choice of transfer pricing method, Chapter 2 of the 2001 TP Decree stated the following:

"Chapter II of the OECD Guidelines discusses the three traditional transaction methods introduced in Paragraphs 1.68 to 1.70 (i.e. the comparable uncontrolled price method, the resale price method and the cost-plus method), whilst Chapter III examines the methods known as the transactional profit methods (i.e. the profit-split method and the transactional net margin method or TNMM). Depending on the circumstances, a choice of one of these five accepted methods has to be made. The methods can supplement each other. The OECD Guidelines are based on a certain hierarchy of the methods where a preference exists for the traditional transaction methods. On the one hand, transactional profit methods are considered more or less as methods of last resort. On the other hand, the OECD Guidelines state that the tax authorities need to start a transfer pricing audit from the perspective of the method chosen by the taxpayer (see Paragraph 4.9 of the OECD Guidelines).

In accordance with Paragraph 4.9 of the OECD Guidelines, whenever the Netherlands' tax administration undertakes a transfer pricing audit, it should start from the perspective of the method adopted by the taxpayer at the time of the transaction. This complies with Paragraph 1.68 of the OECD Guidelines. The implication is that taxpayers are in principle free to choose a transfer pricing method, provided that the method adopted leads to an arm's length outcome for the transaction in question. In certain situations, however, some methods will generate better results than others. Although taxpayers may be expected to base their choice of a transfer pricing method on the reliability of the method for the particular situation, taxpayers are definitely not expected to weigh up the advantages and disadvantages of all of the various methods and then explain why the method that was ultimately adopted generates the best

het arm's-lengthbeginsel. In internationaal verband leidt dit tot het kritische geluid dat de toepassing van het arm's-lengthbeginsel in Nederland onvoldoende is gewaarborgd").

¹⁰⁷ Transfer Pricing Decree 2001 (Besluit verrekenprijzen) of 30 March 2001, IFZ2001/295M.

results in the prevailing conditions (i.e. the best method rule). Certain situations are also suited for a combination of methods. At the same time, taxpayers are not obliged to use more than one method. The only obligation resting on the taxpayer is to explain why the decision was taken to adopt the particular method that was adopted.”

- (65) The TNMM was described in Chapter 2.5 of the 2001 TP Decree. That chapter referred to the relevant paragraphs in the 1995 OECD TP Guidelines for further guidance.
- (66) The 2001 TP Decree was supplemented by the Decree of 21 August 2004,¹⁰⁸ both of which were subsequently replaced by the Decree of 14 November 2013,¹⁰⁹ which was in turn replaced by the Decree of 22 April 2018.¹¹⁰

3. POSITION OF THE NETHERLANDS

- (67) The Netherlands are of the opinion that the contested APAs do not confer a selective advantage to NEON and CN BV and therefore do not constitute State aid. According to the Netherlands, the APAs confirm the arm’s length remuneration for the functions performed, risks assumed and assets used by NEON and CN BV in transactions with other entities within the Nike group and comply with the Dutch rules on transfer pricing.
- (68) The Netherlands argue that the TNMM was applied in accordance with the OECD TP Guidelines when concluding the NEON APAs.¹¹¹
- (69) According to the Netherlands, NIL’s functions include (i) the legal ownership of the Nike non-U.S. IP, (ii) development of Nike non-U.S. IP through participation in the CSA with Nike, Inc., (iii) legal protection of the Nike non-U.S. IP (including registration and protection) and (iv) commercial exploitation of Nike’s non-U.S. IP as the [...] distributor.¹¹² As regards assets used, the Netherlands state that NIL holds also some key assets such as the non-U.S. trademark rights and Nike IP and the NEON Licence Agreement whereby NEON acts as [...] distributor in specific areas. Finally, the Netherlands explain that the risks borne by NIL include (i) the risk of value decrease of the Nike brand, (ii) the costs related to unsuccessful R&D and marketing initiatives and (iii) the financial risks, as regards the NEON Licence Agreement with NEON.
- (70) According to the Netherlands, NEON merely holds a licence to use the Nike EMEA IP against a royalty payment and does not possess any valuable intangible assets.
- (71) As regards NEON’s headquarter functions, the Netherlands argue those functions do not entail the assumption of entrepreneurial risks. Rather, NEON’s role is

¹⁰⁸ Transfer Pricing Decree of 21 August 2004; IFZ 2004/680M.

¹⁰⁹ Transfer Pricing Decree of 14 November 2013; IFZ 2013/184M.

¹¹⁰ Transfer Pricing Decree of 22 April 2018; nr. 2018-6865.

¹¹¹ Letter of 19 March 2018 from the Netherlands to the Commission, Section 11, p. 6 and Section 14, p. 7.

¹¹² Letter of 19 March 2018 from the Netherlands to the Commission, Section 10, p. 6.

limited to that of managing the distribution of Nike products in a specific region, which entails limited risks.¹¹³

- (72) As regards NEON's procurement functions, the Netherlands explain that, up until 2009, it was Nike, Inc. that managed procurement services for NEON and other entities responsible for distribution within the Nike group. Those services included the identification of third-party manufacturers, assistance with the procurement itself, quality control of the products, planning and negotiating of contracts with manufacturers, assistance with the storage and transportation of the products and assistance with buying insurance. For those activities, Nike, Inc. received a remuneration of a [0-10%] mark-up on the factory invoice price of the footwear and equipment products¹¹⁴ and a remuneration of a [0-10%] mark-up on the invoice price of the apparel products.¹¹⁵ In 2009-2010, the Nike group restructured its procurement activities. Since then, those activities are, at least in relation to NEON, performed by NTC's Singapore branch. NTC's remuneration for that activity is similar to the remuneration Nike, Inc. enjoyed prior to 2010. The Netherlands further point to the fact that that mark-up is supported and justified by transfer pricing studies commissioned by Nike, Inc. and endorsed by the U.S. tax administration (the Internal Revenue Service). The Dutch tax administration accepted those mark-ups as an arm's length remuneration for the transactions in question.¹¹⁶
- (73) As regards NEON's marketing activities, the Netherlands explain that Nike, Inc. is responsible for formulating the groups marketing strategy. NEON merely executes that strategy by entering into specific endorsement contracts with, for example, football clubs or federations, such as Manchester United Football Club or the Brazilian football association. For the performance of that activity, NEON receives a royalty based on the revenue generated by distributors with (the sale of) those football team related products.¹¹⁷
- (74) Consequently, the Netherlands argue that NEON is the least complex entity as compared to NIL and was therefore correctly chosen as the tested party for the application of the TNMM. According to the Netherlands, this is justified by the fact that any profit NEON realises above the arm's length remuneration is due to the Nike EMEA IP owned by NIL and should be paid as royalty to NIL. The Netherlands argue that the same consideration applies to the choice of the tested party for the application of the TNMM as endorsed by the CN BV APAs.
- (75) Finally, the Netherlands rely on the 2018 NEON Ex-Post Review to argue that the royalty payments under the NEON Licence Agreement were at arm's length during the period 2007-2017. According to that review, NEON obtained access to three assets/benefits under the NEON Licence Agreement: first, the right to use the Nike brand and its components, i.e. trademarks, logos, marketing, image, slogans, associations and messaging (the "Brand"); second, access to the product technology and designs for footwear and apparel developed or acquired by the global IP owners, which the 2018 NEON Ex-Post Review identifies as

¹¹³ Letter of 31 October 2018 from the Netherlands to the Commission, Section 2, p. 2.

¹¹⁴ Footwear buying Agency Agreement, Section 7, p. 6.

¹¹⁵ Apparel buying Agency Agreement, Section 7, p. 6.

¹¹⁶ Letter of 19 March 2018 from the Netherlands to the Commission, Section 10, p. 5.

¹¹⁷ Letter of 19 March 2018 from the Netherlands to the Commission, Section 8, p. 4.

NIL/NICV and Nike, Inc. without distinction (the “Product Technology”); and third, the right to receive strategic direction from those global IP owners on how to implement the Nike brand and the product strategy, such as on pricing policies or marketing campaigns (the “Strategic Direction”). After describing those three assets/benefits, the Review subsequently tests the reasonableness of the level of the royalties rates paid by NEON under the NEON Licence Agreement by reference to publicly available data on the level of royalty rates applied between allegedly comparable independent parties and concludes that the average rate paid by NEON during the period 2007-2017 did not exceed a market rate.

4. ASSESSMENT OF THE CONTESTED MEASURES

4.1. Existence of aid

- (76) According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods, shall be incompatible with the internal market, in so far as it affects trade between Member States. For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be the result of an intervention by the State which is financed through State resources. Second, the measure must be liable to affect trade between Member States. Third, it must confer a selective advantage on its recipient. Fourth, it must distort or threaten to distort competition.¹¹⁸
- (77) As regards the first condition, the contested APAs were issued by the Dutch tax administration, which is an organ of the Dutch State, and are therefore imputable to the Netherlands. Those APAs entailed an acceptance by that administration of transfer pricing arrangements that enabled NEON and CN BV to assess their annual corporate income tax liability in the Netherlands and to file their annual corporate income tax declarations in reliance thereof, which were in turn accepted by the Dutch tax administration.¹¹⁹ The Commission therefore takes the provisional view that there has been an intervention by the Netherlands.
- (78) As regards the financing of the contested measures through State resources, the Court of Justice has consistently held that a measure by which the public authorities grant a tax exemption which, although not involving a positive transfer of State resources, places the undertaking to whom it applies in a more favourable financial situation than other taxpayers may constitute State aid.¹²⁰ In Sections 4.2 and 4.3, the Commission takes the provisional view that the contested APAs resulted in a lowering of NEON’s and CN BV’s corporate income tax liability in the Netherlands as compared to similarly situated corporate taxpayers. Consequently, by renouncing tax revenue that the Netherlands would have otherwise been entitled to collect from NEON and CN BV under the Dutch corporate tax rules, the Commission provisionally concludes that the APAs should be considered to give rise to a loss of State resources.

¹¹⁸ Joined Cases C-20/15 P *Commission v World Duty Free* EU:C:2016:981, paragraph 53 and the case-law cited.

¹¹⁹ As explained in recital (14), NEH, as the head of the fiscal unity, prepares and files the tax declarations on behalf of the fiscal unity.

¹²⁰ See Joined Cases C-106/09 P and C-107/09 P *Commission v. Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraph 72 and the case-law cited.

- (79) As regards the second condition for a finding of aid, NEON and CN BV are part of the Nike group, a multinational group operating throughout the world, including in several Member States. NEON and CN BV operate the retail business of Nike and Converse respectively and develop the trademark of Nike and Converse in the EMEA region respectively. The products and services concerned by those businesses are subject to trade between Member States, so that any State intervention by the Netherlands in NEON's and CN BV's favour is liable to affect intra-Union trade.¹²¹ On that basis, the Commission provisionally concludes that the second condition for a finding of State aid is met.
- (80) Similarly, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of an undertaking as compared to other undertakings with which it competes.¹²² To the extent that the contested APAs relieve NEON and CN BV of corporate income taxes they would have otherwise been obliged to pay, the potential aid granted as a result of those APAs constitutes operating aid, in that it relieves NEON and CN BV from a charge that they would have normally had to bear in their day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition,¹²³ so that any such aid should be considered to distort or threaten to distort competition by strengthening the financial position of its recipient on the markets on which it operates. The Commission therefore provisionally concludes that the fourth condition for a finding of aid is present as regards the contested APAs.
- (81) As regards the third condition for a finding of aid, a distinction is made between the conditions of advantage and selectivity to ensure that not all State measures that confer an advantage (i.e. that improve an undertaking's net financial position) constitute State aid, but only those which grant such an advantage in a selective manner to certain undertakings or certain categories of undertakings or to certain economic sectors.¹²⁴ As explained in Section 4.2, the Commission takes the provisional view that the contested APAs confer an advantage on NEON and CN BV by accepting a level of annual taxable profit that departs from a reliable approximation of a market-based outcome in line with the arm's length principle. As a result, those companies' taxable base is reduced for the purposes of determining their annual corporate income tax liability in the Netherlands. As explained in Section 4.3, the Commission takes the provisional view that that advantage is selective in nature. First and foremost, that is because the contested APAs grant an advantage solely to NEON and CN BV, and, according to settled

¹²¹ Case C-494/06 P *Commission v Italy and Wam* EU:C:2009:272, paragraph 54 and the case-law cited. See also Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 112.

¹²² Case 730/79 *Phillip Morris* ECLI:EU:C:1980:209, paragraph 11. Joined Cases T-298/97, T-312/97 etc. *Alzetta* ECLI:EU:T:2000:151, paragraph 80.

¹²³ Case C-128/16 P *Commission v. Spain* EU:C:2018:591 paragraph 84. See also C-271/13 P *Rousse Industry v Commission* EU:C:2014:175, paragraph 44; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato "Venezia vuole vivere" and Others v Commission* EU:C:2011:368, paragraph 136; Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55; and Case C-156/98 *Germany v Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

¹²⁴ See Case C-20/15 P *Commission v World Duty Free Group* EU:C:2016:981, paragraph 56 and Case C-6/12 P *Oy* EU:C:2013:525, paragraph 18.

case-law,¹²⁵ in the case of an individual measure, “*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*”, without it being necessary to analyse the selectivity of the measure according to the selectivity analysis devised by the Court of Justice for schemes (primary provisional finding of selectivity).¹²⁶ Nevertheless, for the sake of completeness, the Commission will also demonstrate why it provisionally considers the contested APAs to be selective under the selectivity analysis for schemes in that they favour NEON and CN BV as compared to all other corporate taxpayers in the Netherlands (first provisional subsidiary finding of selectivity) and as compared to other corporate taxpayers in the Netherlands that belong to a multinational corporate group (second provisional subsidiary finding of selectivity).

4.2. Advantage

- (82) Whenever a measure adopted by the State improves the net financial position of an undertaking, an advantage is present for the purposes of Article 107(1) TFEU.¹²⁷ In establishing the existence of an advantage, reference is to be made to the effect of the measure itself.¹²⁸ As regards fiscal measures, an advantage may be granted through different types of reduction of an undertaking’s tax burden and, in particular, through a reduction of the taxable profit or the amount of tax due.¹²⁹
- (83) The Court of Justice has previously held that “*[i]n order to decide whether a method of assessment of taxable income [...] confers an advantage on [its beneficiary], it is necessary [...] to compare that [method] with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.*”¹³⁰ In other words, a measure that enables a taxpayer to employ transfer prices in its intra-group transactions that do not resemble prices which would be charged between independent undertakings negotiating under comparable circumstances at arm’s length confers an advantage on that taxpayer. Indeed, it is the prices charged by independent companies on the market or, as stated by the Court of Justice, “*the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition*”,¹³¹ that determine their taxable income. If a tax administration allows associated group companies to charge prices for their intra-group transactions that are below market prices, an economic advantage is conferred upon those companies in the form of a tax base reduction. Consequently, the Court of Justice has accepted that the benchmark for assessing

¹²⁵ Case C-15/14 P *Commission v MOL* EU:C:2015:362, paragraph 60. See also Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty Free Group* EU:C:2016:981, paragraph 55 and Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49.

¹²⁶ Case C-211/15 P *Orange v. Commission* EU:C:2016:798, paragraphs 53 and 54.

¹²⁷ Case C-417/10 *3M Italia* EU:C:2012:184, paragraph 38.

¹²⁸ Case 173/73 *Italy v. Commission* EU:C:1974:71, paragraph 13.

¹²⁹ See Case C-66/02 *Italy v Commission* EU:C:2005:768, paragraph 78; Case C-222/04 *Cassa di Risparmio di Firenze and Others* EU:C:2006:8, paragraph 132; Case C-522/13 *Ministerio de Defensa and Navantia* EU:C:2014:2262, paragraphs 21 to 31.

¹³⁰ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95.

¹³¹ See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 95.

the existence of an advantage in cases such as the present is the arm's length principle.

- (84) The essence of the arm's length principle is to ensure that transactions concluded between associated companies (controlled transactions) are priced for tax purposes under the same conditions as comparable transactions concluded at arm's length between independent companies (uncontrolled transactions). When there are conditions made or imposed between two associated companies in their intra-group transactions which differ from those which would be made between independent companies in uncontrolled comparable transactions, the arm's length principle requires appropriate transfer pricing adjustments to be performed to neutralise such differences and thereby ensure that the associated companies are not treated more favourably than independent (stand-alone) companies for tax purposes.¹³² In this way, the profit that the associated companies derive from their intra-group transactions is determined and ultimately treated no more favourably than the profit derived from transactions concluded by independent companies at arm's length on the market.
- (85) Since the essence of the arm's length principle is to reflect the economic realities of the controlled taxpayer's particular conditions and apply as a benchmark the conditions applied in comparable transactions between independent parties to determine the profit derived from its intra-group transactions, the first step of a transfer pricing analysis is to delineate the transaction to price, by identifying the commercial and financial relations between associated companies and the conditions and economically relevant circumstances attaching to those relations. Such an analysis normally focuses on the observation of the contractual terms underlying the transaction, the functions performed by each of the parties, the characteristics of the property transferred or of the services provided, the economic circumstances of the parties and the market, and the business strategies pursued.¹³³ Once that analysis has been conducted, the next step of a transfer pricing analysis is to select an appropriate transfer pricing method to price the transaction(s) observed. To ensure that the transfer price for the intra-group transaction reliably approximates a price negotiated at arm's length on the market, the most reliable method should be chosen depending on the circumstances of the case.¹³⁴

¹³² That the focus in transfer pricing is on the pricing of intra-group transactions clearly follows from paragraph 1.6 of the 1995 OECD TP Guidelines. See also paragraph 1.6 of the 2010 OECD TP Guidelines, which reads: "*Because the separate entity approach treats the members of an MNE [multinational enterprise] group as if they were independent entities, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. Such an analysis of the controlled and uncontrolled transactions, which is referred to as a "comparability analysis", is at the heart of the application of the arm's length principle*". That focus on the pricing of intra-group transactions is reaffirmed in paragraph 1.15 of the 1995 OECD TP Guidelines, as well as in paragraph 1.33 of the 2010 OECD TP Guidelines: "*Application of the arm's length principle is generally based on a comparison of the conditions in a controlled transaction with the conditions in transactions between independent enterprises. [...]*".

¹³³ See paragraph 1.36 of the 2010 OECD TP Guidelines.

¹³⁴ See paragraph 2.2 of the 2010 OECD TP Guidelines: "*[t]he selection of a transfer pricing method always aims at finding the most appropriate method for a particular case.*" See also paragraph 1.42 of the 1995 OECD TP Guidelines.

- (86) The aforementioned assessments are normally carried out by way of a transfer pricing report.¹³⁵ As a preliminary remark, the Commission observes that none of the documents submitted in support of the 2006, 2010 or 2015 APA requests delineate the controlled transaction for which the contested APAs were requested and concluded. As regards the NEON APAs, that transaction is the arrangement between NIL/NI CV and NEON for the [...] licence to the Nike EMEA IP granted by the former in exchange for the payment of a royalty by the latter under the NEON Licence Agreement. As regards the CN BV APAs, that transaction is the arrangement between AS CV and CN BV for the [...] license to the Converse EMEA IP granted by the former in exchange for the payment of a royalty by the latter under the CN BV Licence Agreement. Given that those transactions are not properly delineated in the documents supporting the APA requests, the value-added functions for those transactions are also not properly identified, while according to the OECD TP Guidelines that should be done as part of any transfer pricing assessment.¹³⁶
- (87) On the basis of the information it has received from the Netherlands, the Commission has reasons to doubt that the transfer pricing arrangements endorsed in the contested APAs result in transfer prices that resemble what would be charged between independent undertakings negotiating under comparable circumstances at arm's length. Despite the absence of a proper delineation of the controlled transactions under assessment and in the absence of a complete functional analysis of both parties to those respective transactions, the Netherlands appear to have accepted transfer pricing arrangements based on the TNMM with NEON and CN BV as the tested party and an operating margin on total revenues as profit level indicator. As a result of those arrangements, NEON and CV BV are remunerated with a low, but stable level of profit based on a limited margin on their total revenues reflecting those companies' allegedly "routine" distribution functions. The residual profit generated by those companies in excess of that level of profit is then entirely allocated to NIL/NI CV respectively AS CV as an allegedly arm's length royalty in return for the [...] licence to the Nike EMEA IP and the Converse EMEA IP under the NEON Licence Agreement and the CN BV Licence Agreement respectively.
- (88) First and foremost, the Commission takes the provisional view that the Dutch tax administration was wrong to endorse the premise that NEON and CN BV performed "routine" distribution functions. Instead, the information supporting the APA requests should have led the Dutch tax administration to conclude that those companies performed more unique and valuable functions in relation to the Nike and Converse EMEA IP than the functions performed by NIL/NI CV and AS CV. Assuming the absence of any comparable uncontrolled transactions to price the NEON and CN BV Licence Agreements, the Commission provisionally considers that only a transfer pricing arrangement based on the TNMM with NIL/NI CV and AS CV as tested parties, could have led to a reliable approximation of market-based outcome for those intra-group transactions. Since, applying the TNMM to NIL/NV CV and AS CV, instead of NEON and CN BV,

¹³⁵ Section V of the OECD Guidelines provides guidance on the types of information that may be useful when determining transfer pricing for tax purposes in accordance with the arm's length principle (see in particular paragraph 5.17 of the 1995 OECD TP Guidelines and of the 2010 OECD TP Guidelines).

¹³⁶ 1995 OECD TP Guidelines, paragraphs 1.17 and 1.21 and 2010 OECD TP Guidelines, paragraphs 2.59 to 2.61.

would result in a lower annual royalty payment than the transfer pricing arrangements endorsed by the contested APAs, the Commission provisionally concludes that the Dutch tax administration conferred an advantage on NEON and CN BV by improperly reducing their taxable base in the Netherlands.

(89) In the alternative, the Commission has doubts that the TNMM was in fact the most reliable transfer pricing method to price the NEON and CN BV Licence Agreements. First, there is no trace in any of the documentation submitted to the Commission that the Dutch tax administration actually examined that no comparable uncontrolled transactions were available to apply the CUP method when it concluded the contested APAs. To the contrary, those documents indicate that comparable uncontrolled transactions may have existed as a result of which the arm's length level of the royalty payment would have been lower and thus NEON's and CN BV's taxable base would have been higher than that endorsed by the contested APAs. Second, assuming no comparable uncontrolled transactions exist with which to perform a CUP analysis and further assuming that NIL/NV CV and AS CV could also be considered to perform unique and valuable functions (*quod non*), a transfer pricing arrangement based on the Profit Split Method would have been more appropriate to price the NEON and CN BV Licence Agreements than the TNMM. The application of the Profit Split Method leads to a portion of the residual profit from the NEON and CN BV Licence Agreements being attributed to NEON and CN BV instead of the totality of that profit being attributed to NIL/NI CV and AS CV respectively. That translates into a lower annual royalty payment and thus a higher taxable base for NEON and CN BV in the Netherlands. Since NEON's and CN BV's taxable base in the Netherlands would have been higher if either the CUP method or the Profit Split Method had been used instead of the TNMM to price the intra-group transactions endorsed by the contested APAs, the Commission provisionally concludes that the Dutch tax administration conferred an advantage on NEON and CN BV by improperly reducing their taxable base in the Netherlands.

(90) In the further alternative, the Commission provisionally concludes that even if the TNMM was the most appropriate transfer pricing method and NEON and CN BV were correctly selected as the tested party for the application of that method (*quod non*), the profit level indicator that was chosen to determine those companies' remuneration was inappropriate in light of their functional analyses. Had a profit level indicator been chosen that properly reflected the functional analysis of NEON and CN BV, that would have led to a lower royalty payment and thus a higher taxable base for those companies in the Netherlands.

4.2.1. Primary provisional finding of advantage: the contested APAs are based on flawed functional analyses

(91) The Commission's primary provisional finding of advantage is that the transfer pricing arrangements endorsed by the contested APAs are based on flawed functional analyses for the purposes of applying the TNMM. As demonstrated in the following three subsections, the information submitted in support of the contested APAs indicates that only NEON and CN BV perform unique and valuable functions in relation to the intra-group transactions forming the subject-matter of those APAs. NIL/NI CV and AS CV play no more than a passive role, holding the Nike and Converse EMEA IP and passing-on the royalties they receive from NEON and CN BV respectively to Nike, Inc. to cover the costs of the CSAs. By endorsing transfer pricing arrangements based on the premise that

NEON and CN BV performed “routine” distribution functions, the Commission provisionally concludes that the Dutch tax administration conferred an advantage on those companies in the form of a tax base reduction.

4.2.1.1. Functional analyses of NEON and NIL/NI CV

(a) Functions performed

- (92) As observed in recital (86), the controlled transaction forming the subject-matter of the NEON APAs is the arrangement by which NIL/NI CV has granted an [...] licence to the Nike EMEA IP to NEON in exchange for the payment of a royalty under the NEON Licence Agreement. According to the NEON TP Reports, the key-value driving functions linked to the Nike EMEA IP are design, research and development, production, and marketing.¹³⁷ Research and development functions are performed by Nike, Inc. As regards product design and marketing for the EMEA region, that is done jointly by Nike, Inc. and NEON. In particular, NEON is responsible for the specific design of regional Nike products and takes the strategic business and commercial decisions relevant thereto. Finally, as explained in recital (96), NEON also plays a key role in marketing, which is of primary importance for the development, enhancement, and exploitation of the Nike EMEA IP.¹³⁸
- (93) In the documentation supporting the NEON APA requests, NEON is described as fulfilling key functions in four business areas: (1) product business, (2) sourcing and production, (3) marketing and sales, and (4) finance and administration.¹³⁹
- (94) As regards the product business, NEON is active in the areas of apparel, footwear and sports equipment. In apparel, NEON is responsible for developing the products and contributing to reflect the different trends in the EMEA region.¹⁴⁰ In footwear, NEON has a minor role in design changes for the EMEA markets.¹⁴¹ NEON is responsible for providing research and development support for the design of European specific footwear, such as indoor football and rugby.¹⁴² In sports equipment, the involvement of NEON is mainly advisory.¹⁴³
- (95) As regards sourcing and production, NEON purchases most of its Nike products from Nike Trading Company B.V. (“NTC”).¹⁴⁴ NEON is responsible for sourcing

¹³⁷ 2010 NEON TP Report, Section 2.1.6, p. 11.

¹³⁸ See: <https://hbr.org/1992/07/high-performance-marketing-an-interview-with-nikes-phil-knight>. Phil Knight, one of Nike’s founders, describes the importance of those functions as follows: “*But now we understand that the most important thing we do is market the product. We’ve come around to saying that Nike is a marketing-oriented company, and the product is our most important marketing tool. What I mean is that marketing knits the whole organization together. The design elements and functional characteristics of the product itself are just part of the overall marketing process.*”

¹³⁹ 2006 NEON Functional Analysis, Section 4.3, p. 13.

¹⁴⁰ 2006 NEON Functional Analysis, Section 4.4, p. 13-14, confirmed by the 2010 NEON TP Report, Section 4.4.1, p. 22.

¹⁴¹ 2010 NEON TP Report, Section 4.4.1, p. 22.

¹⁴² See 2010 NEON TP Report, Section 4.4.1, p. 21. (Indoor football footwear in Spain and rugby boots in the UK). See also 2015 NEON TP Report, p. 22-23 (for the support activities in the apparel sector there is a research and development agreement between NEON and NI CV).

¹⁴³ 2006 NEON Functional Analysis, Section 4.4, p. 15; confirmed 2015 NEON TP Report, Section 4.3.1, p. 24.

¹⁴⁴ NTC with the Singapore branch is the main manufacturing company in the Nike Group and responsible for the manufacturing of nearly all Nike Products. NTC is not a Member of the Dutch fiscal unit.

footwear and apparel to be sold in the EMEA region directly from third-party manufacturers.¹⁴⁵ It places consolidated orders with NTC on the basis of its sales projections in line with its market expectations.¹⁴⁶ It formally takes title to those products prior to clearing customs at the Laakdal warehouse in Belgium. The NEON Licence Agreement also authorises NEON to manufacture and subcontract the manufacture of products bearing the Nike name and other trademarks.¹⁴⁷ To that end, NEON has concluded an agreement with Nike, Inc. to obtain assistance in selecting third-party manufacturers and in purchasing production, scheduling, and storage and transportation services of the Nike products.¹⁴⁸

- (96) As regards marketing of Nike products, NEON is active in the advertisement and promotion of the Nike Products in the EMEA region and bears its own costs for marketing and sales activities. Like Nike, Inc., NEON is responsible for concluding endorsement contracts with global and regional athletes, as well as for the coordination of the global advertising campaign throughout the EMEA region, which are key functions in relation to the control over the Nike brand and have enabled NEON to expand and diversify its business in that region. Those endorsement contracts are formally approved by Nike, Inc. in the light of the global advertising campaign. Nike, Inc.'s or NEON's costs are then shared via a worldwide promotion allocation mechanism.¹⁴⁹ As of 2010, NEON, together with Nike, Inc., has developed the Nike brand, whereas promotion activities are either financed by Nike, Inc. or NEON. Those costs are also charged through the worldwide promotion allocation mechanism to affiliated companies.¹⁵⁰ Nike's global and EMEA marketing plans are jointly developed by Nike, Inc. and NEON. NEON also manages and evaluates market research and retail marketing with the support of third parties and the Nike Commission Agents.¹⁵¹ Finally, since the Nike EMEA IP does not entail any customer data, it also falls within NEON's marketing responsibility to identify, address, develop and maintain Nike's customer base in the EMEA region.
- (97) As regards sales, NEON establishes the European sales plans based upon global plans from Nike, Inc. and establishes and implements the future sales strategy in the EMEA region, including the selection of focus products and the next season's planning.¹⁵² NEON records the sales' proceeds deriving from the sale of Nike's products in the EMEA region and bears responsibility for the establishment and management of a price list and discount policy, based on information received from its affiliated local companies.¹⁵³ To achieve that, NEON must be aware of

¹⁴⁵ 2010 NEON TP Report, Section 4.4.2 p. 22-23. Nike, Inc. however is responsible for managing and coordinating the production activities across the globe (see p. 22).

¹⁴⁶ 2010 NEON TP Report, Section 4.4.2 p. 22 and 2015 NEON TP Report, Section 4.3.2 p. 24-25.

¹⁴⁷ NEON Licence Agreement 2005, Section 2, p. 3.

¹⁴⁸ Footwear buying Agency Agreement, recital C, p. 1 and similar Apparel buying Agency Agreement, recital C. p. 1.

¹⁴⁹ 2006 NEON Functional Analysis, Section 4.3.3, p. 15-16.

¹⁵⁰ 2010 NEON TP Report "Brand marketing consists of sports marketing, advertising, retail resources and public relations", p. 25, confirmed by 2015 NEON TP Report, Section 4.3.4, p. 27-30.

¹⁵¹ 2006 NEON Functional Analysis, Section 4.3.3, p. 17. 2010 NEON TP Report Section 4.4.3, p. 25. In fact, the 2010 report stresses five functions are necessary: design, research & development, production and marketing, see 2010 NEON TP Report, Section 2.1.6, p. 11.

¹⁵² 2006 NEON Functional Analysis 2006, Section 4.3.3, p. 17 – 18, confirmed by 2010 NEON TP Report, p. 26 and 2015 NEON TP Report, Section 4.3.5, p. 30-34.

¹⁵³ 2006 NEON Functional Analysis, Section 4.3.3, p. 18, confirmed by 2010 NEON TP Report, p. 27, also confirmed by TP Report 2015, Section 4.3.5, p. 30-34.

the main regional and local competitors and market dynamics in the EMEA region. NEON is also responsible for key customers in the EMEA region, such as [...]. NEON is responsible for the entire distribution process, bearing the risk for processing, administration and the execution of orders in the EMEA region.¹⁵⁴ In this capacity, NEON engages NEH as subcontractor to operate the warehouse in Laakdal, Belgium.¹⁵⁵

- (98) Finally, as from 2015, NEON manages and develops the e-commerce business of Nike, Inc. in the EMEA region. NR BV is responsible for the execution of the operational e-commerce activities, such as catalogues, customer services, fraud monitoring, website (language) localisation, site monitoring and technical operations, digital marketing execution, reviewing consumer behaviour etc. NEON is primarily responsible for finance-related activities, such as controlling, financial planning and analysis, as well as for the supply chain management related activities such as assortment planning and buying planning. NEON also provides operational support activities in the areas of implementation, testing and maintenance. Finally, NEON is responsible for the inbound and outbound logistics of products to [*third party retailer*].¹⁵⁶ In that capacity, NEON pays a service fee to Nike, Inc. and NR BV for the global operational e-commerce related support services rendered.¹⁵⁷
- (99) NEON is further described as operating Nike's regional headquarters for the EMEA region with similar facilities to Nike Inc.'s headquarters in Beaverton, Oregon, U.S.¹⁵⁸ As regards finance and administration, NEON performs management and an ongoing review of the budget process, administration, preparation, and maintenance of accurate financial information and implementation of its financial growth strategies in the EMEA region.¹⁵⁹ NEON is responsible for implementing a rolling [...] strategic plan and forecasting the annual budget plan for which it prepares the annual fiscal, business and human resources plan.¹⁶⁰ NEON is also responsible for accounting, reporting, treasury, capital budgeting and invoicing.¹⁶¹ Finally, NEON manages the administration, such as warranty management and quality control, legal review of contractual agreements, payroll administration, HR and IT support and development and maintenance of specific software for local agents.¹⁶²
- (100) By contrast, the documentation submitted in support of the NEON APA requests fails to identify any key value-driving functions that could be attributed to NIL/NI CV, the other party to the controlled transaction under assessment. To the extent the NEON TP Reports describe NIL/NI CV's main functions at all, they do so as the "entrepreneurial" holding of the Nike EMEA IP, passively taking part in

¹⁵⁴ 2006 NEON Functional Analysis, Section 4.3.3 p. 20, confirmed by 2010 NEON TP Report, p. 27.

¹⁵⁵ 2006 NEON Functional Analysis, Section 4.3.3, p. 19, confirmed 2010 NEON TP Report, p. 28.

¹⁵⁶ [*Third party retailer*] is an independent Irish company that provides its services to Nike, Inc., [...]

¹⁵⁷ 2015 NEON TP Report, Section 4.3.5, p. 34-36.

¹⁵⁸ 2006 NEON Functional Analysis, Section 4.1, p. 12, confirmed by the 2015 NEON TP Report Section 4.1, p. 19.

¹⁵⁹ 2006 NEON Functional Analysis, Section 4.3.4, p. 19.

¹⁶⁰ 2006 NEON Functional Analysis, Section 4.3.4, p. 20.

¹⁶¹ 2006 NEON Functional Analysis, Section 4.3.4, p. 20, confirmed by 2010 NEON TP Report Section 4.4.4, p. 29-30.

¹⁶² 2006 NEON Functional Analysis, Section 4.3.4, p. 20-21, confirmed by 2010 NEON TP Report Section 4.4.4, p. 29-30.

the CSA, and bearing responsibility, at least formally, for infringement management in relation to that IP. In other words, NIL/NI CV performs very limited functions (if any) in relation to the Nike EMEA IP and Nike's retail business in the EMEA region, given the complete absence of employees and its lack of operation capacity. The mere holding of a complex asset, such as IP rights, cannot be considered as fulfilling unique and valuable functions in relation to those rights, particularly not if the entrepreneurial risks related to the Nike EMEA IP are managed and controlled by another entity (in this case NEON).¹⁶³ Indeed, under the NEON Licence Agreement, NIL/NI CV has passed on the licensing rights it acquired to that IP to NEON.

- (101) Consequently, the Commission takes the provisional view that whereas NEON performs economically significant activities and undertakes significant responsibilities in relation to the Nike EMEA IP and Nike's business in the EMEA region, no evidence was provided to the Dutch tax administration demonstrating that NIL/NI CV performs any such functions or assume any such responsibilities in the context of the NEON Licence Agreement.

(b) Assets used

- (102) A party to an intra-group transaction can only be attributed a return on an asset for transfer pricing purposes to the extent that it exercises control over its use and the risk(s) associated with that use. The determinative factor in every functional analysis is not the assets passively owned by any of the parties to the intra-group transaction under analysis, but the assets actually used.¹⁶⁴ The mere legal ownership of an asset, without using it to undertake any functions or incur any risks, does not give rise to any remuneration beyond the value of the asset itself.¹⁶⁵ Nor does the mere legal ownership of or license to an asset in itself mean

¹⁶³ The OECD/G20 Base Erosion and Profit Shifting Project: Aligning Transfer Pricing Outcomes with Value Creation ACTIONS 8-10: 2015 Final Reports, p. 10 states: “[f]or intangibles, the guidance clarifies that legal ownership alone does not necessarily generate a right to all (or indeed any) of the return that is generated by the exploitation of the intangible. The group companies performing important functions, controlling economically significant risks and contributing assets, as determined through the accurate delineation of the actual transaction, will be entitled to an appropriate return reflecting the value of their contributions.” See also 1995 OECD TP Guidelines, paragraph 1.23 and 2010 OECD TP Guidelines, paragraph 1.45

¹⁶⁴ That the emphasis is on the use of an intangible is made clear in 2017 OECD TP Guidelines, paragraph 6.71 provides: “If the legal owner of an intangible in substance:

- performs and controls all of the functions [...] related to the development, enhancement, maintenance, protection and exploitation of the intangible;
- provides all assets, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles; and
- assumes all of the risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible,

then it will be entitled to all of the anticipated, ex ante, returns derived from the MNE [multinational enterprise] group's exploitation of the intangible. To the extent that one or more members of the MNE [multinational enterprise] group other than the legal owner performs functions, uses assets, or assumes risks related to the development, enhancement, maintenance, protection, and exploitation of the intangible, such associated enterprises must be compensated on an arm's length basis for their contributions. This compensation may, depending on the facts and circumstances, constitute all or a substantial part of the return anticipated to be derived from the exploitation of the intangible”. See also 1995 OECD TP Guidelines, paragraph 1.20 and 1.22 2010 OECD TP Guidelines, paragraph 1.42, and 1.44 where the emphasis is clearly on the “use” of the asset.

¹⁶⁵ As explained in the 1995 OECD TP Guidelines, paragraph 2.26: “If it cannot be demonstrated that the intermediate company either bears a real risk or performs an economic function in the chain that has

that the owner in fact develops, enhances, manages, or exploits that asset. The owner of an asset needs to effectively use the asset in question to justify a remuneration representing a return on that asset.

- (103) On the basis of the information presented to the Dutch tax administration in support of the APA requests, NEON appears to actively use the Nike EMEA IP by performing the functions of development, enhancement, management, and exploitation in relation to the Nike EMEA IP by operating Nike's business in the EMEA region. By contrast, NIL/NI CV appears to merely passively hold the Nike EMEA IP. The fact that, pursuant to the CSA concluded with Nike, Inc., NIL/NI CV is considered the legal owner of the Nike EMEA IP is irrelevant in this regard for the reason given in the preceding recital. No evidence has been provided that NIL/NI CV actually uses the Nike EMEA IP, rather than merely passing this asset on to NEON. NIL/NI CV also appears to lack any employees that could perform any active functions associated with the Nike EMEA IP. Consequently, the Commission has doubts whether NIL/NI CV could be said to "use" the Nike EMEA IP within the meaning of the OECD TP Guidelines in a manner that justifies the level of the annual royalty payments made under the NEON Licence Agreement as endorsed by the NEON APAs.

(c) Risks assumed

- (104) An analysis of risks is relevant to determine the arm's length remuneration of a controlled transaction since, in the open market, the assumption of increased risk is compensated by an increase in the expected return.¹⁶⁶ In order to determine which party assumes the main entrepreneurial risks (in particular the market risk, the strategic risk and the operational risk), it is necessary to analyse which party controls and bears the costs related to the management and exploitation of the business. In that analysis, account should be taken, first, of the contractual arrangements between the parties and, second, of the actual conduct of the parties.¹⁶⁷

increased the value of the goods, then any element in the price that is claimed to be attributable to the activities of the intermediate company would reasonably be attributed elsewhere in the MNE [multinational enterprise] group, because independent enterprises would not normally have allowed such a company to share in the profits of the transaction." See also 2010 OECD TP Guidelines, paragraph 2.33 and 2017 OECD TP Guidelines, paragraph 2.39. As further explained in the 2017 OECD TP Guidelines, paragraph 6.59: "*Group members that use assets in the development, enhancement, maintenance, protection, and exploitation of an intangible should receive appropriate compensation for doing so. Such assets may include, without limitation, intangibles used in research, development or marketing (e.g. know-how, customer relationships, etc.), physical assets, or funding. One member of an MNE [multinational enterprise] group may fund some or all of the development, enhancement, maintenance, and protection of an intangible, while one or more other members perform all of the relevant functions. When assessing the appropriate anticipated return to funding in such circumstances, it should be recognised that in arm's length transactions, a party that provides funding, but does not control the risks or perform other functions associated with the funded activity or asset, generally does not receive anticipated returns equivalent to those received by an otherwise similarly-situated investor who also performs and controls important functions and controls important risks associated with the funded activity. [...]"*

¹⁶⁶ See 1995 OECD TP Guidelines, paragraph 1.23 and 2010 OECD TP Guidelines, paragraph 1.45.

¹⁶⁷ See 2010 OECD TP Guidelines, paragraphs 1.47, 1.48, 1.53 and 9.34 as well as paragraphs 1.25 and 1.26 and 1.29 of the 1995 OECD TP Guidelines. In particular paragraph 1.48 of the 2010 OECD TP Guidelines states: "*In line with the discussion below in relation to contractual terms, it may be considered whether a purported allocation of risk is consistent with the economic substance of the transaction. In this regard, the parties' conduct should generally be taken as the best evidence*

- (105) The starting point to determine whether a party to an intra-group transaction has assumed economically significant risks is the contractual assumption of risks between the parties to that transaction. The Commission has not yet received a copy of all contractual arrangements between all parties to the controlled transaction, nor a copy of the CSA concluded between NIL/NI CV and Nike, Inc. However, since NIL/NI CV is the legal owner of the Nike EMEA IP, the Commission considers, based on the available information, that it is likely that the CSA attributes the inherent risks pertaining to that IP to NIL/NI CV. Indeed, the 2015 NEON TP Report asserts that NI CV is the ultimate risk-bearing company, being the legal owner of the Nike EMEA IP.¹⁶⁸
- (106) However, neither NIL nor NI CV appear to have employees and therefore would appear to have no (or a very limited) operational capacity. Moreover, both NIL and NI CV seem to engage in contractual arrangements with group entities only and are accordingly dependent on other group entities for their revenue generation. In particular, they are dependent on NEON and its successful commercialisation of the Nike EMEA IP for their own accumulation of profits.
- (107) When the risk allocation set out in the intra-group contractual arrangement does not reflect the underlying economic reality, it is the parties' actual conduct and not the contractual arrangements that should be taken into account for transfer pricing purposes.¹⁶⁹ A party to whom risks are contractually attributed should be able, on the one hand, to control those risks (operational capacity)¹⁷⁰ and, on the other, to financially assume those risks (financial capacity).¹⁷¹ In this context, control should be understood as the capacity to take decisions on the risk and to manage it.¹⁷² It is therefore crucial to determine how the parties to the licensing arrangement operate in relation to the management of those risks, and in particular which party or parties perform control functions and risk mitigation functions, which party or parties encounter upside or downside consequences of

concerning the true allocation of risk" and paragraph 1.53 " [...]it is therefore important to examine whether the conduct of the parties conforms to the terms of the contract or whether the parties' conduct indicates that the contractual terms have not been followed or are a sham. [...]". Furthermore., according to paragraph 9.34 of the 2010 OECD TP Guidelines "[a]s a starting point, the tax administration would examine the contractual terms between the parties and whether they have economic substance, determined by reference to the conduct of the parties, and are arm's length".

¹⁶⁸ 2015 NEON TP Report, Section 4.6, p. 47.

¹⁶⁹ The 1995 OECD TP Guidelines present this consideration in paragraph 1.26, according to which, "*in relation to contractual terms, it may be considered whether a purported allocation of risk is consistent with the economic substance of the transaction. In this regard, the parties' conduct should generally be taken as the best evidence concerning the true allocation of risk.*" Paragraph 1.39 further provides that "*contracts within an MNE [multinational enterprise] could be quite easily altered, suspended, extended, or terminated according to the overall strategies of the MNE [multinational enterprise] as a whole and such alterations may even be made retroactively. In such instances tax administrations would have to determine what is the underlying reality behind a contractual arrangement in applying the arm's length principle.*" See also 2010 OECD TP Guidelines, paragraph 1.67 and 9.14. 2017 OECD TP Guidelines, paragraph 1.88.

¹⁷⁰ See 2010 OECD TP Guidelines, paragraph 9.23 and 9.26. See also 1995 OECD TP Guidelines, paragraph 1.25-1.27 and 2017 OECD TP Guidelines, paragraph 1.61, 1.65 and 1.70.

¹⁷¹ See 2010 OECD TP Guidelines, paragraph 9.29. See also 1995 OECD TP Guidelines, paragraph 1.26 and 2017 OECD TP Guidelines, paragraph 1.64.

¹⁷² See 2010 OECD TP Guidelines, paragraph 9.23. See also 1995 OECD TP Guidelines, paragraph 1.25 and 2017 OECD TP Guidelines, paragraph 1.61 and 1.65.

risk outcomes, and which party or parties have the financial capacity to assume those risks.¹⁷³

- (108) The 2015 NEON TP Report differentiates between various risks and states that NEON, as the operating entity in the EMEA region, bears market risks. In particular, NEON bears the costs of its operations itself and does not recharge them to another entity. NEON also bears inventory risk after the products arrive at the CSC.¹⁷⁴ That includes the risk of defective and unsold products. NEON also bears customer credit risks if a customer becomes unwilling or unable to pay the purchase amount.¹⁷⁵ For the e-commerce business, the credit risk is shifted from NEON to [*third party retailer*], as the main operating company. In addition, NEON bears foreign exchange risk and product liability risk. Finally, NTC bears warranty risk as the operating company, while NEON is only responsible for the warranty claims from customers.
- (109) Given the presence of a significant number of employees including senior executive management functions at NEON and its capacity to generate revenues, against which it is able to absorb its costs and counter the financial impact in case of materialising risks, the Commission considers, at this stage, that NEON has the necessary operational and financial capacity to assume the relevant risks in relation to the development, enhancement, and exploitation of the Nike EMEA IP. Consequently, the Commission takes the provisional view that even if certain risks are contractually attributed to NIL/NI CV in the licensing arrangements, that attribution does not appear to be in line with economic reality, since that entity lacks the operational or financial capacity to control those risks.

4.2.1.2. *Functional analyses of CN BV and AS CV*

(a) Functions performed

- (110) As observed in recital (86), the controlled transaction forming the subject-matter of the CN BV APAs is the arrangement by which AS CV has granted an [...] licence to the Converse EMEA IP to CN BV in exchange for the payment of a royalty under the CN BV Licence Agreement. Like the Nike EMEA IP, the key value driving functions for the Converse EMEA IP are the design, research and development, production, and marketing and sales of the IP. Research and development and the greater proportion of product design are done by Converse, Inc. Production is mainly done by CTC under the supervision of CN BV and Converse, Inc. The design, coordination, execution and localisation of global

¹⁷³ According to paragraph 1.49 of the 2010 OECD TP Guidelines, paragraph 1.49, a “*factor to consider in examining the economic substance of a purported risk allocation is the consequence of such an allocation in arm’s length transactions. In arm’s length transactions it generally makes sense for parties to be allocated a greater share of those risks over which they have relatively more control.*” The same requirement is presented in point 1.27 of the 1995 OECD TP Guidelines and illustrated in the following terms: “*suppose that Company A contracts to produce and ship goods to Company B, and the level of production and shipment of goods are to be at the discretion of Company B. In such a case, Company A would be unlikely to agree to take on substantial inventory risk, since it exercises no control over the inventory level while Company B does. Of course, there are many risks, such as general business cycle risks, over which typically neither party has significant control and which at arm’s length, could therefore be allocated to one or the other party to a transaction. Analysis is required to determine to what extent each party bears such risks.*” See also 2017 OECD TP Guidelines, paragraph 1.59-1.60.

¹⁷⁴ The Nike Commission Agents do not bear any inventory risk.

¹⁷⁵ 2015 NEON TP Report, Section 4.4, p. 41-45.

marketing campaigns, which benefit all members of the Converse group, are the responsibility of Converse Inc. Pursuant to the CSA, the costs for the global marketing campaigns are shared between Converse, Inc. and AS CV. CN BV is responsible for the localisation, development and approval of the regional marketing plans and budgets. CN BV charges any costs for customisation and for research and development to AS CV.¹⁷⁶

- (111) As stated by CN BV to the Dutch tax administration,¹⁷⁷ marketing is the main function to increase the value of a trademark (e.g. the sponsorship and the endorsement contracts with different athletes and Teams over the world and especially in Europe¹⁷⁸). In the context of the CN BV Licence Agreement, CN BV does all marketing for the EMEA region. In particular, CN BV has primary responsibility for the marketing of footwear, apparel, equipment, and accessory products in the EMEA region. As explained in recital (31), CN BV was established as the headquarters for the Converse's business in the EMEA region, following the implementation of a new growth plan to react to a lack of marketing efforts undertaken by third-party distributors.¹⁷⁹ After CN BV took over the control of the marketing functions in 2010, its turnover increased six fold.¹⁸⁰ That increase appears to be due to the fact that CN BV's role as headquarter in the EMEA region became more important through an increasing number of territories managed directly by CN BV. Those headquarter functions are thus key value-adding functions to the Converse EMEA IP in Europe.
- (112) Based on the information presented to the Dutch tax administration in support of the CN BV APA requests, CN BV also performs a range of unique and valuable functions in the context of the CN BV Licence Agreement in relation to Converse's business in the EMEA region. CN BV takes the ultimate decision on products that are manufactured and distributed within the EMEA region.¹⁸¹ According to the 2010 CN BV TP Report, CN BV manages all sales activities (sales principal), such as handling of sales and production orders, invoicing, defining customer terms, discounts and monitoring the delivery in the EMEA region.¹⁸² CN BV also controls and implements the product pricing and the discount policies based on internal global group instructions and guidance.¹⁸³ CN BV is responsible for all future orders and the processing, administration and execution of these orders. It has the right to decline orders from Commission Agents and third party customers in the EMEA region.¹⁸⁴ CN BV is also responsible for sourcing all products from Converse Trading Company B.V. ("CTC")¹⁸⁵ and for inventory management, customer services, marketing, local advertising and promotion and logistics, as well as forecasting, ordering, warehousing, treasury and finance. CN BV relies on other group companies, such

¹⁷⁶ 2015 CN BV TP Report, Sections 4.1.1, pp. 17-18 and 4.1.4, pp. 21-22.

¹⁷⁷ Letter from CN BV to the Dutch tax administration from 27 September 2009, Section 2, p. 4.

¹⁷⁸ See recital (73).

¹⁷⁹ Letter from CN BV to the Dutch tax administration from 27 September 2009, Section 2, p. 4.

¹⁸⁰ See recital (32).

¹⁸¹ 2012 AS CV / CN BV License and Distribution Agreement, Section 7.1., p.5

¹⁸² 2010 CN BV TP Report, p. 14; See also 2015 CN BV TP Report, Section 4.1.5, pp. 22-23.

¹⁸³ 2010 CN BV TP Report, pp. 16-17.

¹⁸⁴ 2010 CN BV TP Report, p. 15.

¹⁸⁵ CTC with its Singapore branch is responsible for managing product procurement as well as logistics assistance to customers. CTC has no Employees in the Netherlands and is not part of the fiscal unit in the Netherlands.

as NEON, for typical back-office functions, e.g. finance and accounting, treasury, HR and IT.¹⁸⁶

- (113) By contrast, AS CV appears to have very limited functions in relation to the Converse EMEA IP and Converse's business in the EMEA region, if any, given the complete absence of employees. The CN BV TP Reports describe AS CV as being the "entrepreneurial" IP holding company.¹⁸⁷ No other information has been provided to the Commission that would indicate and describe the nature of any other valuable functions, besides merely holding the Converse EMEA IP.
- (114) Consequently, the Commission takes the provisional view that whereas CN BV performs economically significant activities and undertakes significant responsibilities in relation to the Converse EMEA IP and Converse's European operations, no evidence was provided to the Dutch tax administration demonstrating that AS CV performs any such functions or assume any such responsibilities in the context of the CN BV Licence Agreement.

(b) Assets used

- (115) CN BV neither legally nor economically owns any significant intangible assets. The intangible assets that are used in CN BV's operations are licensed to it by AS CV.¹⁸⁸
- (116) However, according to the available information, CN BV actively uses the Converse EMEA IP by performing the functions of development, enhancement, and exploitation of the Converse EMEA IP by operating Converse's business in the EMEA region. By contrast, AS CV does not appear to actively contribute to the development, enhancement, or exploitation of the Converse EMEA IP. It merely holds legal title to that asset and, as explained in recital (113), the mere legal ownership of an IP is subordinate to the actual use of the asset, that is actually performing active functions necessary to exploit the asset and assume the associated risks of that use.

(c) Risks assumed

- (117) As explained in recitals (105) to (107), the starting point of any risk analysis is the contractual arrangement between the parties, checked against the actual conduct of those parties and whether that conduct mirrors the contractual arrangements.
- (118) The 2015 CN BV TP Report describes the market risks connected to the Converse EMEA IP as being borne, upon global guidance, by CN BV, as the operating entity in the EMEA region, and by AS CV, as the legal IP owner.¹⁸⁹ Both the 2010 and 2015 CN BV TP Reports state that, in the long term, all risks are borne by AS CV as the IP owner.¹⁹⁰ However, according to the available information, AS CV has no employees and therefore appears to lack the operational capacity to control the aforementioned risks. AS CV seems to engage solely in contractual arrangements with group entities and is accordingly dependent on other group entities for its revenue generation. In particular, AS CV is dependent on CN BV

¹⁸⁶ 2015 CN BV TP Report, Section 3.1, p. 14.

¹⁸⁷ 2015 CN BV TP Report Section 4.4, p. 29.

¹⁸⁸ 2015 CN BV TP Report, Section 4.3, p. 27-28.

¹⁸⁹ 2010 CN BV TP Report Section 3.4.2 p. 18 and also 2015 CN BV TP Report Section 4.2, p. 25-26.

¹⁹⁰ 2010 CN BV TP Report, Section 3.4, p. 18-20.

and its successful commercialisation of the Converse EMEA IP for its accumulation of profits.

- (119) By contrast, CN BV assumes multiple and considerable risks pertaining to the functions it performs. As sales principal, CN BV takes the ultimate decision on products manufactured and distributed in the EMEA region¹⁹¹ and therefore bears the inventory risk such as losses, shrinkage or market collapse¹⁹² CN BV also bears the customer credit risk, foreign exchange risk and product liability risks. The various risks are limited through credit and customer qualification checks and other risk management systems performed by CN BV, based on global standards and guidance.¹⁹³ Warranty risk is borne by NTC, as Nike's global purchasing company. CN BV is, however, responsible for warranty claims from customers.¹⁹⁴ Moreover, given the presence of employees at CN BV and its capacity to generate revenues against which it is able to absorb its costs and financial impact of its risks materialising, the Commission considers that only CN BV appears to have the necessary operational and financial capacity to assume the relevant risks in relation to the development, enhancement, management and exploitation of the Converse EMEA IP.
- (120) In conclusion, the Commission takes the provisional view that even if certain risks are contractually attributed to AS CV by virtue of the CN BV Licence Agreement, that risk allocation does not appear to be in line with economic reality, since AS CV does not appear to have the operational or financial capacity to control those risks.

4.2.1.3. Provisional conclusions on the functional analysis for the choice and application of the appropriate transfer pricing method

- (121) On the basis of the provisional functional analyses performed in Sections 4.2.1.1 and 4.2.1.2., the Commission provisionally concludes that the Dutch tax administration was wrong to endorse transfer pricing arrangements in the contested APAs with NEON and CN BV as tested parties for the application of the TNMM. Those arrangements, which attribute a level of profit to those companies that corresponds to a tiny portion of the combined net operating profits arising from the controlled transactions in which they are engaged,¹⁹⁵ do not reflect the economic reality of the relationships between those entities, on the one hand and NIL/NI CV and AS CV, on the other, as described in the documentation supporting the APA requests.

¹⁹¹ 2012 AS CV / CN BV License and Distribution Agreement, Section 7.1., p.5

¹⁹² 2010 CN BV TP Report, Section 3.4.1, pp. 17-18 and 2015 CN BV TP Report, Section 4.2, p. 26.

¹⁹³ 2010 CN BV TP Report, Section 3.4.2-3.4.6, pp. 18-19 and 2015 CN BV TP Report, Section 4.2, p. 26.

¹⁹⁴ 2015 CN BV TP Report, Section 4.2, p. 27.

¹⁹⁵ Whereas the residual profit is attributed to NIL/NI CV and AS CV respectively as a remuneration for the licence (for transfer pricing purposes). When the TNMM is applied, the operating profit is used as an indirect means to establish the price at arm's length of the controlled transaction. Therefore, the licence fee allegedly at arm's length to be paid by NEON to NIL/NI CV corresponds to NEON's income minus NEON's operating profit calculated according to the APA, minus NEON's other operating costs. The licence fee allegedly at arm's length should therefore be equal to the licence fee agreed in the NEON Licence Agreement and recorded in the commercial accounts plus the informal capital.

- (122) On the basis of that documentation, the Commission provisionally concludes that only NEON and CN BV perform unique and valuable functions, use assets and assume risks in relation to the development, enhancement, and exploitation of the Nike EMEA IP and Converse EMEA IP, in relation to the Nike's and Converse's business in the EMEA region and as regards their respective roles as the headquarters of Nike and Converse in the EMEA region. By contrast, no evidence was provided showing that NIL/NV CV and AS CV perform such functions, use such assets and assume such risks. NIL/NI CV and AS CV appear to fulfil no more than an intermediary role in relation to the relevant IP: transferring the royalty payments from NEON and CN BV to Nike, Inc. or Converse, Inc. respectively via the applicable CSAs.¹⁹⁶
- (123) Similarly, the 2018 NEON Ex-Post Review does not contain a detailed analysis of the functions performed, assets used and risks assumed of both parties to the NEON Licence Agreement, i.e. NEON and NIL/NI CV. Rather, it assumes NEON to have the profile of a low-risk distributor and focuses on valuing the three assets/benefits received by NEON from the global IP owners, which collectively encompasses Nike, Inc. and NIL/NI CV, under the NEON Licence Agreement.¹⁹⁷ The Review's failure to distinguish between the different owners of the different Nike IP means that NIL/NI CV functions, assets, and risks are never properly delineated. As explained in recitals (21) and (25), the subject-matter of the NEON Licence Agreement is the licensing of the Nike EMEA IP and NEON's counterparty under that agreement is NIL/NI CV, not Nike, Inc. That distinction is important since, given the fact that NIL/NI CV appears to have no employees, it does not appear capable to exercise the "Strategic Direction" functions that the Review claims it to perform for the benefit of NEON,¹⁹⁸ which allegedly justify the level of the annual royalty payment for the Nike EMEA IP as endorsed by the NEON APAs.
- (124) The Commission observes in this regard that since the controlled transactions covered by the contested APAs are the NEON and CN BV Licence Agreements, only functions actually performed (taking into account assets used and risks assumed) by the parties to those intra-group transactions are relevant for transfer pricing purposes.¹⁹⁹ Consequently, any (possible) functions performed in relation to the Nike and Converse EMEA IP by other Nike group entities that are not a party to that agreement, including Nike, Inc. and Converse Inc., are irrelevant for the transfer pricing analysis of those controlled transactions.
- (125) Consequently, assuming the TNMM is the most reliable transfer pricing method to price the NEON and CN BV Licence Agreements, NIL/NI CV and AS CV should have been considered the parties with the less complex functional analysis in relation to those controlled transactions and thus the tested party for the

¹⁹⁶ Also in the years 2010 to 2015 via a licence agreement between AS CV and Converse, Inc.

¹⁹⁷ See Recital (75).

¹⁹⁸ 2018 NEON Ex-Post Review, Section 3.2.3, p.15: "The strategic direction provided by the global IP owners has allowed NEON to focus on its distribution business in the territory. The strategic direction includes, but is not limited to, *pricing policies and strategies, marketing campaigns, and other initiatives developed for the US and global market which NEON then executed in its territory.*"

¹⁹⁹ 1995 OECD TP Guidelines, paragraph 1.20; 2010 OECD TP Guidelines, paragraph 1.42 and 2017 OECD TP Guidelines, paragraph 1.51.

application of that method.²⁰⁰ That would lead to a significant portion of the combined net operating profits arising from the controlled transactions under assessment being attributed to NEON and CN BV and thus an increase in their taxable base in the Netherlands as compared to the transfer pricing arrangements endorsed by the contested APAs. It appears therefore that the result of the contested APAs endorsed by the Dutch tax administration is to artificially inflate the royalty payments under the NEON and CN BV Licence Agreements beyond the level that independent undertakings negotiating at arm's length under comparable circumstances would have agreed. Since those royalty payments are deducted from those entities' operational profits to determine their taxable profit for Dutch corporate income tax purposes, the Commission considers, at this stage, that by concluding the contested APAs the Netherlands conferred an advantage on NEON and CN BV in the form of a tax base reduction.

4.2.2. Subsidiary provisional findings of an advantage

4.2.2.1. *Doubts surrounding the choice of transfer pricing method*

- (126) Besides revealing the economic characteristics of the controlled transaction under analysis, the functional analysis is also relevant for selecting the most appropriate transfer pricing method to price that transaction. According to the OECD TP Guidelines, the choice of a transfer pricing method should take account of the respective strengths and weaknesses of each method, their appropriateness in view of the nature of the controlled transaction, the availability of reliable information and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them.²⁰¹
- (127) As explained in recital (56), the OECD TP Guidelines express a preference for traditional transaction methods, like the CUP method,²⁰² over transactional profit methods, like the Profit Split Method or the TNMM.²⁰³ In particular, the OECD TP Guidelines provide that “[w]here it is possible to locate comparable uncontrolled transactions, the CUP method is the most direct and reliable way to apply the arm's length principle. Consequently, in such cases the CUP method is preferable over all other methods.”²⁰⁴ Consequently, it is first necessary to examine whether comparable uncontrolled transactions exist that could be used to price the intra-group transaction under examination under the CUP method before turning to another transfer pricing method
- (128) Based on the information received from the Netherlands, the IP that forms the subject-matter of the controlled transactions under assessment – the Nike EMEA IP, the Converse EMEA IP and the Hurley non-U.S. IP – also forms the subject-matter of other licensing arrangements with third parties²⁰⁵ and other group

²⁰⁰ See 1995 OECD TP Guidelines, paragraph 3.43. See also 2010 OECD TP Guidelines, paragraph 3.18. See also footnote 96 above.

²⁰¹ Paragraph 1.21 of the 1995 OECD TP Guidelines. See also paragraph 2.2 of the 2010 OECD TP Guidelines.

²⁰² See recital (57).

²⁰³ Paragraphs 3.49 and 3.50 of the 1995 OECD TP Guidelines. This preference for traditional transaction methods has been maintained in paragraph 2.3 of the 2010 OECD TP Guidelines.

²⁰⁴ Paragraph 2.7 of the 1995 OECD TP Guidelines. See also paragraph 2.14 of the 2010 OECD TP Guidelines.

²⁰⁵ See footnote 39.

companies.²⁰⁶ Those third parties and other group entities appear to perform functions similar to NEON and CN BV for their specific regions, yet the royalties paid by them in return for a right to exploit the Nike and Converse EMEA IP are significantly lower than that paid by NEON to NIL/NICV and by CN BV to AS CV. For example, the licence agreements concluded between NEON and [*Central and South American companies of the group*] respectively result in a royalty rate of [5-20%] on sales.²⁰⁷

- (129) The Commission acknowledges that intragroup agreements constitute controlled transactions that generally cannot be relied on as comparables in the context of a transfer pricing assessment. While in the specific circumstance of sub-licensing it can therefore be difficult to find a comparable uncontrolled transaction, NEON's licensing agreements with third parties could possibly have been relevant. Consequently, the Dutch tax administration should have at least assessed those third party agreements to identify whether any comparable uncontrolled transactions existed, looking at the characteristics and conditions of the transactions, before endorsing transfer pricing arrangements based on the TNMM in the contested APAs. However, none of the documentation supporting the APA requests provides any explanation on the absence of comparable uncontrolled transactions for the application of the CUP method. The Commission recalls, in this regard, that the 2001 Dutch TP Decrees, like the OECD TP Guidelines, expressed a clear preference for the CUP method where comparable uncontrolled transactions are available.²⁰⁸
- (130) As regards the CUP-like comparability analysis contained in the 2018 NEON Ex-Post Review that was used to corroborate the arm's length level of the average royalty rate paid by NEON under the NEON Licence Agreement using data on allegedly comparable independent operators,²⁰⁹ the Commission has doubts as to the functional analysis on which it is based. Not only does it fail to distinguish between the functions performed by NIL/NICV and Nike Inc., it is also based on a very limited functional profile of NEON as a low-risk wholesale distributor, the accuracy of which the Commission contests under its primary provisional finding of advantage.²¹⁰
- (131) In concluding the APAs, the Dutch tax administration appears to have accepted the use of the TNMM without undertaking the typical search procedure for transfer pricing assessments. While the search for the most appropriate method does not require that all methods should be analysed in depth or tested in each case to arrive at the selection of the most appropriate method,²¹¹ if the functional analysis of the parties to the transaction under review indicate that more than one party to that transaction is performing unique and valuable functions, the choice of a transfer pricing method should at least take into consideration the potential application of the Profit Split Method. In the present case, the provisional

²⁰⁶ NEH TP Report 2015 Section 3.1 p. 16.

²⁰⁷ See recital (28).

²⁰⁸ See Chapter 2.1 of the 2001 Decree: "(...) *If a comparable price is available, the comparable uncontrolled price method (commonly known as the CUP method) will, in general, be the most direct and the most reliable method in determining the transfer price, so that this method is to be preferred over other methods*".

²⁰⁹ The 2018 NEON Ex-Post Review used the 22 May 2018 version of the RoyaltyStat Database.

²¹⁰ See recitals (92) *et seq.*

²¹¹ See 2010 OECD TP Guidelines, paragraph 2.8.

functional analyses of NEON and CN BV performed respectively in sections 4.2.1.1 and 4.2.1.2 above, indicate that those entities also perform such functions in the context of the intra-group transactions under assessment. Consequently, even assuming that the Dutch tax administration was right to accept the use of an indirect transfer pricing method and further assuming that it was right to accept the premise that NIL/NI CV and AS CV perform unique and valuable functions (*quod non*), a transfer pricing arrangement based on the Profit Split Method would have been more reliable to price those controlled transactions than one based on the TNMM.

- (132) Since in that hypothesis all parties to the intra-group transactions under assessment perform unique and valuable functions, they would be expected to share the profits of these transactions in proportion to their respective unique and valuable contributions. Consequently, the application of a Profit Split Method (based on a contribution analysis) would ultimately lead to a higher remuneration for NEON and CN BV than that resulting from the transfer pricing arrangements based on the TNMM endorsed by the contested APAs.²¹² The Commission therefore takes the provisional view that the endorsement of transfer pricing arrangements based on the TNMM instead of the Profit Split Method in the contested APAs resulted in an advantage for NEON and CN BV in the form of a tax base reduction.

4.2.2.2. *Doubts surrounding the choice of profit level indicator*

- (133) Even assuming that the TNMM was the most appropriate transfer pricing method to price the NEON and CN BV Licence Agreements and further assuming that NEON and CN BV were correctly chosen as the tested party for the application of the TNMM (*quod non*), the Commission has doubts regarding the profit level indicator chosen for determining those entities' taxable profit for Dutch corporate income tax purposes. Under the contested APAs, the profit level indicator for the allocation of profit to NEON and CN BV is an operating margin on total revenues. NEON's and CN BV's total revenues derive not only from their principal headquarter activity in the EMEA region, but also from the sub-licensing to third parties and other group companies of non-EMEA IP which NEON and CN BV hold, via NEH, under a royalty-free licence.²¹³ However, for the determination of the remuneration for a specific transaction on the basis of the TNMM, only the income generated by the controlled transaction, in this case the NEON and CN BV License Agreements should be taken into account for the calculation of the royalty.²¹⁴ Those agreements only concern a licence to the Nike and Converse IP for the EMEA region, so that the determination of the royalty to be paid to NIL/NI CV under those agreements should be limited to revenue derived from sales in the EMEA region. Consequently, the Commission takes the provisional view that by including revenue derived from the sub-licensing of IP outside the EMEA Region in the base to which the profit level indicator is applied, the contested APAs artificially inflate the level of the annual royalty payment, which in turn reduces NEON's and CN BV's taxable base for Dutch corporation tax purpose. Thus, the Commission provisionally concludes that the contested APAs confer an advantage on those entities for that reason as well.

²¹² See recital (56) and the description in the footnote about the Profit Split Method.

²¹³ See recital (41). See 2015 NEH TP Report, Section 3.1, p. 16.

²¹⁴ See 2017 OECD TP Guidelines, paragraph 2.64.

4.2.3. Provisional conclusions on the finding of advantage

- (134) For all the foregoing reasons, the remuneration for NEON and CN BV as endorsed by the contested APAs appears to have been lower than what independent undertakings negotiating at arm's length under comparable circumstances would have agreed. Consequently, the Commission provisionally concludes that the Netherlands granted an advantage to NEON and CN BV in the form of a tax base reduction by way of the contested APAs.

4.3. Selectivity

- (135) According to settled case-law, *“the assessment of [the condition of selectivity] requires a determination whether, under a particular legal regime, a national measure is such as to favour ‘certain undertakings or the production of certain goods’ over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.”*²¹⁵ The selectivity analysis thus consists in determining whether one or certain undertaking(s) enjoy an advantage with regard to other undertakings that are in a comparable legal and factual situation and, if they do, whether that differentiated treatment can be justified by the nature or logic of the tax system of which the measure is a part.
- (136) For the purposes of establishing selectivity, the Court of Justice has made a distinction between individual measures and schemes. According to the Court, *“the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.”*²¹⁶
- (137) In other words, the identification of a group of undertakings or certain sectors of the economy in a given Member State, which benefit from a measure to the exclusion of economic operators in a similar factual and legal situation, is relevant within the context of the assessment of the selectivity of schemes, which can, at least potentially, be of a general application. By contrast, in the case of individual aid measures, which are addressed to only one undertaking in view of its specific circumstances, such an analysis is not necessary.²¹⁷

²¹⁵ Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty Free Group* EU:C:2016:981, paragraph 54 and the case-law cited.

²¹⁶ Case C-15/14 P *Commission v. MOL* EU:C:2015:362, paragraph 60. See also Joined C-20/15 P and C-21/15 P *Commission v. World Duty Free Group* EU:C:2016:981, paragraph 55; Case C-211/15 P *Orange v. Commission* EU:C:2016:798, paragraph 53 and 54; and Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49.

²¹⁷ See Case T-314/15 *Greece v Commission* EU:T:2017:903, paragraph 79 *“dans le cas où est en cause une aide individuelle, la présomption de sélectivité s’opère indépendamment de la question de savoir s’il existe sur le ou les marchés concernés des opérateurs se trouvant dans une situation factuelle et juridique comparable.”*

4.3.1. Primary provisional finding of selectivity

- (138) The contested APAs are individual measures. They endorse a method to determine the annual taxable profit of NEON and CN BV respectively and, indirectly, price a specific intra-group transaction to which those taxpayers are a party. Those measures therefore concern the tax situation of NEON and CN BV only and can only be used by those taxpayers to assess their annual corporation tax liability in the Netherlands. Any reduction of their tax revenue is based individually on their results. Therefore, to the extent that the Commission is right to provisionally conclude that the contested measures confer an economic advantage on NEON and CN BV, those measures should also be presumed selective in light of the case-law reproduced in recital (137).
- (139) Indeed, since the test laid down by the Court of Justice for the finding of an advantage in cases like the present also contains elements of selectivity, in that it is based on a comparison of the position of the beneficiary of a tax assessment measure with the position of independent companies taxed under the Member State's ordinary corporate income tax system²¹⁸, the provisional finding of an economic advantage in Section 4.2 also necessarily establishes that the contested measures favour NEON and CN BV in comparison to independent (standalone) companies and companies forming part of a multinational corporate group that employ arm's length transfer prices for their intra-group transactions.
- (140) The Commission can therefore provisionally conclude that the contested measures selectively favour NEON and CN BV as compared to all other corporate taxpayers in the Netherlands.

4.3.2. Subsidiary provisional findings of selectivity

- (141) Although the Commission may provisionally presume that the contested APAs are selective since they are individual measures that grant an advantage to their respective recipients, it will also examine, for the sake of completeness, whether those APAs may be considered selective under the selectivity analysis devised by the Court of Justice for aid schemes.²¹⁹ Under that analysis, it is necessary to

²¹⁸ See recital (83).

²¹⁹ The Court has variously applied a two-step and three-step analysis to the classification of schemes as selective. Under the two-step analysis, the first step consists of determining whether the beneficiaries of the scheme are treated favourably in comparison to other undertakings that are in a comparable legal and factual situation. If they are, the measure can be considered to be *prima facie* selective. The second step then consists in establishing whether that difference in treatment can be justified by the nature and logic of the tax system of which the scheme forms a part. See, e.g., Joined Cases C-234/16 and C-235/16 *ANGED* EU:C:2018:281, paragraph 35; Case C-74/16 *Congregación de Escuelas Pías Provincia Betania*, EU:C:2017:496, paragraphs 68 to 72; Case C-323/16 P *Eurallumina v. Commission* EU:C:2017:952, paragraph 62; Case C-487/06 P *British Aggregates/Commission* EU:C:2008:757, paragraphs 82 et seq.; Case C-172/03 *Heiser* EU:C:2005:130, paragraphs 40 et seq.; and Case C-143/99 *Adria-Wien Pipeline et Wietersdorfer & Peggauer Zementwerke* EU:C:2001:598, paragraphs 41 et 42. Under the three-step analysis, the first step consists in identifying the ordinary or normal tax system applicable in the Member State concerned: the "reference framework". The second step consists in demonstrating that the tax measure at issue constitutes a derogation from that framework, in so far as it differentiates between operators who, in the light of the objective pursued by that framework, are in a comparable factual and legal situation. If the scheme is found to derogate from the reference framework and can therefore be deemed *prima facie selective*, the third step requires an assessment of whether that derogation may nevertheless be justified by the nature and logic of the reference framework. See, e.g., Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*

begin by defining the appropriate reference framework and then determining whether the measure in question gives rise to discrimination under that framework.²²⁰ According to the case-law, that determination depends on the purpose of the measure²²¹ and the objectives of the wider framework of which it forms a part.²²²

4.3.2.1. *Favourable treatment in comparison to all other taxpayers*

- (142) The purpose of the contested APAs is to allow NEON and CN BV to determine their respective annual taxable profit and thus their respective annual corporate income tax liability under the ordinary rules of taxation of corporate profit in the Netherlands. The Commission therefore considers the wider reference framework under which those measures were adopted and against which they should be examined to be the Dutch corporate income tax system. That reference framework has as its objective the taxation of profits of all companies subject to tax in the Netherlands.²²³ In light of that objective, the Commission provisionally concludes that all companies subject to corporate income tax in the Netherlands, whether operating independently on the market or operating as part of a multinational corporate group are in a comparable factual and legal situation when it comes to determining their Dutch corporate income tax liability.
- (143) The Commission does not consider that the reference framework should be limited to taxpayers belonging to a multinational corporate group only, like NEON and CN BV, simply because only those companies need to resort to transfer pricing of intra-group transactions and Article 8b(1) Wet Vpb only applies to those companies.
- (144) First, all corporate taxpayers, whether they operate independently on the market or form part of a multinational corporate group, are taxed on the same taxable event – the generation of profit – and at the same tax rates under the Dutch corporate income tax system. By limiting the reference framework only to companies forming part of a multinational corporate group, an artificial distinction is introduced between associated companies and standalone companies based on their company structure which the Dutch corporate income tax system does not, in general, take into account when taxing the profits of companies falling within its tax jurisdiction.
- (145) Second, companies belonging to a multinational corporate group do not need to resort to transfer pricing to assess their taxable income in all instances. Where a group company transacts with non-associated companies (either independent standalone companies or companies forming part of another multinational corporate group) its profit from those transactions reflects prices negotiated at arm's length on the market, just like for independent companies transacting

EU:C:2011:550, paragraph 49 and Joined Cases C-20/15 P and C-21/15 P *Commission v. World Duty Free* EU:C:2016:981, paragraph 57.

²²⁰ See Case C-203/16 P *Andres (faillite Heitkamp BauHolding) v Commission* EU:C:2018:505, paragraph 89.

²²¹ See, Case C-143/99 *Adria-Wien Pipeline et Wietersdorfer & Peggauer Zementwerke* EU:C:2001:598, paragraph 41 and Case C-279/08 P *Commission v. Netherlands (NoX)* EU:C:2011:551, paragraph 62.

²²² See Joined Cases C-106/09 P *Commission v. Government of Gibraltar and United Kingdom* EU:C:2011:732, paragraph 75 and Joined Cases C-20/15 P and C-21/15 P *World Duty Free v. Commission* EU:C:2016:981, paragraph 54.

²²³ See C-78/08 to C-80/08 *Paint Graphos* EU:C:2009:417, paragraph 50.

between themselves. It is only in instances where a group company transacts with associated companies that it must estimate the prices it charges for those intra-group transactions. However, the fact that a group company might resort to transacting with associated companies and, in those situations where it does, it must resort to transfer pricing does not mean that group companies are in a different factual and legal situation to other taxpayers for corporate income tax purposes in the Netherlands.

- (146) Third, profit derived from transactions concluded between unrelated companies and profit derived from intra-group transactions between related companies are taxed in the same way under the Dutch corporate income tax system.²²⁴ That system is based on the separate entity approach which entails that companies belonging to the same corporate group are considered to constitute distinct entities for tax purposes. Such companies are then subject to tax as if they were operating independently from companies belonging to the same corporate group. Thus, the fact that income has been generated from an intra-group transaction does not mean it is subject to special exemptions, a different tax rate or a different manner to determine the taxable profit. On the contrary, profit derived from intra-group transactions should be determined in exactly the same manner as profit derived from transactions between unrelated companies. To eliminate any effects of special conditions imposed between integrated companies in their intra-group transactions it is necessary to apply the arm's length principle to such transactions. Thus, the arm's length principle forms a necessary part of any tax system based on the separate entity approach. Seen in this light, the purpose of the separate entity approach and the arm's length principle is to align the tax treatment of transactions concluded between associated group companies with the tax treatment of transactions concluded between independent companies on the market, so that the former are treated no more favourably than the latter under the Dutch corporate income tax system. Indeed, the arm's length principle was applied in Dutch tax law even before Article 8b(1) Wet Vpb was adopted. As explained in recital (61), that principle was considered to apply by virtue of the total profits concept enshrined in Article 3.8 of the Income Tax Act,²²⁵ which also applies to corporate taxpayers by virtue of Article 8 Wet Vpb. The incorporation of Article 8b(1) Wet Vpb was meant only to confirm that group companies and independent companies should be treated in a similar manner under the general Dutch corporate income tax system and taxed on profits that derive from their business activities, irrespective of whether those activities are carried out in an intra-group context. The introduction of that provision into the Dutch tax code was not meant to apply a different tax treatment for companies belonging to a multinational corporate group. Consequently, the different manner in which the taxable profit is necessarily arrived at in the case of controlled and uncontrolled transactions has no bearing for the determination of the reference framework in the present case. Since the profit of all corporate taxpayers is taxed in the same manner under the Dutch corporation tax system, without any distinction as to its origin, all corporate taxpayers should be considered to be in a similar factual and legal situation.

²²⁴ See Section 2.3.2 above.

²²⁵ Article 3.8 of the Income Tax Act 2001 provides: "*Winst uit een onderneming (winst) is het bedrag van de gezamenlijke voordelen die, onder welke naam en in welke vorm ook, worden verkregen uit een onderneming.*"

- (147) Fourth, accepting the argument that the reference framework should be limited to companies belonging to a multinational corporate group simply because the latter may conclude transactions with associated companies would open the door to Member States adopting fiscal measures that blatantly favour multinationals over independent companies. Companies belonging to a multinational corporate group can and do engage in the same activities as independent companies and those two types of companies can and do compete with one another. Since both types of companies are taxed on their total taxable profit at the same corporate income tax rate under the Dutch corporation tax system, any measure allowing the former to reduce its taxable base upon which that standard tax rate is applied grants it a favourable tax treatment in the form of a reduction of its corporate income tax liability as compared to the latter, which in turn distorts competition and affects intra-EU trade.
- (148) For all the foregoing reasons, the Commission considers independent companies and group companies to be in a comparable factual and legal situation. In Section 4.2 the Commission reached the provisional conclusion that the contested tax measures result in a taxable profit for NEON and CN BV that departs from a reliable approximation of a market-based outcome in line with the arm's length principle, which therefore lowers its taxable profit for corporate income tax purposes. By contrast, companies transacting with unrelated parties and companies belonging to a multinational corporate group that employ arm's length transfer prices in their intra-group transactions are taxed on a level of profit in the Netherlands that reflect prices negotiated at arm's length on the market. For this reason, the Commission provisionally concludes that the contested measures derogate from the Dutch corporation tax system in that they appear to grant a favourable tax treatment to NEON and CN BV in the form of a tax reduction that is not available to other corporate taxpayers in the Netherlands.

4.3.2.2. Favourable treatment in comparison with corporate taxpayers belonging to a multinational group

- (149) The Commission further provisionally concludes that even if the reference framework were limited to Article 8b(1) Wet Vpb, which codifies the arm's length principle for multinational groups in Dutch tax law, the contested APAs should still be considered to favour NEON and CN BV as compared to other corporate taxpayers belonging to a multinational group. Pursuant to that provision, corporate taxpayers belonging to a multinational group that transact with affiliated companies of the same group must determine their transfer prices in accordance with the arm's length principle.
- (150) As demonstrated in Section 4.2, the Commission preliminarily considers the contested APAs to confer an advantage on NEON and CN BV in the form of a tax reduction by endorsing a transfer pricing arrangement that does not result in prices negotiated at arm's length on the market. Given that those transfer prices are not at arm's length, the identified advantage appears to confer a selective treatment upon NEO and CN BV in comparison with other corporate taxpayers belonging to a multinational corporate group which must determine their transfer prices in accordance with the arm's length principle laid down in Article 8b (1) Wet Vpb.

4.3.3. Justification by the nature or general scheme of the system

- (151) As regards all three provisional findings of *prima facie* selectivity, a tax measure that discriminates between comparable undertakings may nevertheless be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of that tax system.²²⁶ If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.
- (152) At this stage, the Netherlands have not pointed to any possible justification for the *prima facie* selective treatment resulting from the contested APAs for NEON and CN BV. In any event, the Commission has not been able to identify at this stage any possible ground for justifying that preferential treatment that could be said to derive directly from the intrinsic, basic or guiding principles of either reference framework mentioned above or where it could be the result of inherent mechanisms necessary for the functioning and effectiveness of those frameworks.²²⁷

4.3.4. Provisional conclusions on the finding of selectivity

- (153) In light of the foregoing, the Commission provisionally concludes that the advantage identified in Section 4.2 is selective because it is granted by way of an individual measure. Alternatively, the Commission concludes that that advantage favours NEON and CN BV as compared to all other Dutch corporate taxpayers in general and as compared to other Dutch corporate taxpayers belonging to a multinational group that engage in intra-group transactions in particular.

4.4. Provisional conclusions on the existence of aid and the beneficiaries of that aid

- (154) For all the foregoing reasons, the Commission provisionally concludes that the contested APAs constitute State aid within the meaning of Article 107(1) TFEU in favour of NEON and CN BV.
- (155) Those companies form part of a multinational group, i.e. the Nike group. As the Court of Justice has previously held, “[i]n competition law, the term ‘undertaking’ must be understood as designating an economic unit [...] even if in law that economic unit consists of several persons, natural or legal.”²²⁸ Therefore, separate legal entities may be considered to form one economic unit for the purpose of the application of State aid rules. That economic unit is then considered to be the relevant undertaking benefitting from the aid measure. To determine whether several entities form an economic unit, the Court of Justice looks at the existence of a controlling share or functional, economic, or organic links.²²⁹
- (156) In the present case, NEON and CN BV are owned and controlled by Nike, Inc., which is the ultimate parent company of the Nike group. Moreover, it was the

²²⁶ Joined Cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2009:417, paragraph 65.

²²⁷ Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* ECLI:EU:C:2009:417, paragraph 69.

²²⁸ Case C-170/83 *Hydrotherm* EU:C:1984:271, paragraph 11. See also Case T-137/02 *Pollmeier Malchow v Commission* EU:T:2004:304, paragraph 50.

²²⁹ Case C-480/09 P *Acea Electrabel Produzione SpA v Commission* EU:C:2010:787 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* EU:C:2006:8, paragraph 112.

Nike group as a whole that took the initiative to establish its EMEA operations in the Netherlands and designate NEON and CN BV as the headquarters of those operations. Finally, transfer pricing, by its very nature, affects more than one company, because a profit decrease in one company normally increases the profit of its associated counterparty. Consequently, notwithstanding the fact that that group is organised in different legal personalities and the contested APAs concern the tax treatment of NEON and CN BV respectively, the Nike group must be considered as a single economic unit benefitting from the contested APAs²³⁰.

(157) In conclusion, to the extent the contested APAs grant State aid to NEON and CN BV, the Commission further provisionally considers that aid to be granted to the Nike group as a whole.

4.5. Unlawfulness of the aid

(158) If the Commission's provisional conclusion on the existence of aid is confirmed, the Commission subsequently notes that the Netherlands have implemented that aid in the absence of any notification pursuant to Article 108(3) TFEU. Consequently, the aid in question was granted unlawfully.²³¹

(159) Moreover, the aid in question has been granted in each individual year that NEON and CN BV relied on the contested APAs for the assessment of their taxable profit and thus their Dutch corporate tax liability and the Dutch tax administration subsequently accepted the tax declaration based on that assessment.

(160) Consequently, the Commission concludes that the aid has been granted in each year from 2004 to the present and, in the absence of a previous notification, it constitutes unlawful aid.

4.6. Compatibility with the internal market

(161) State aid is deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) TFEU²³² and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) TFEU.²³³ It is the Member State granting the aid that bears the burden of proving that the aid in question is compatible with the internal market pursuant to Article 107(2) or (3) TFEU.²³⁴

²³⁰ See, by analogy, Case 323/82 *Intermills* EU:C:1984:345, paragraph 11. See also Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, paragraph 102: “the Commission was correct to hold that the rules governing the determination of taxable income constitute an advantage for the coordination centres and the groups to which they belong”.

²³¹ Case C-667/13 *Banco Privado Português and Massa Insolvente do Banco Privado Português* EU:C:2015:151, para. 59 and the case-law cited. See also Article 1(f) of Regulation (EC) No. 659/1999 which defines “unlawful aid” as “new aid put into effect in contravention of Article [108(3) TFEU].”

²³² The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

²³³ The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.

²³⁴ Case T-68/03 *Olympiaki Aeroporia Ypiresies v Commission* EU:T:2007:253, paragraph 34.

(162) At this stage, the Commission has no indication that possible aid granted to NEON and to CN BV as a result of the contested APAs is compatible with the internal market. In particular, those APAs appear to result in a reduction of charges that should normally be borne by the entity concerned in the course of its business. An exemption from those charges should therefore be considered to constitute operating aid. Such aid cannot normally be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.²³⁵

5. CONCLUSION

In the light of the foregoing, the Commission has come to the provisional conclusion that the Netherlands granted State aid to NEON and CN BV within the meaning of Article 107(1) TFEU by way of the contested APAs. That State aid benefitted not only NEON and CN BV, but the Nike group as a whole. That aid is granted on an annual basis, when those companies used the contested APAs to assess and declare their corporate income tax liability in the Netherlands. Given its doubts concerning the compatibility of that aid with the internal market, the Commission has decided to initiate the procedure laid down in Article 108(2) TFEU with respect to the contested APAs.

The Commission requests the Netherlands to submit its comments on this Decision and to provide all such information that may assist in the assessment of the contested APAs within one month of the date of receipt of this letter. In particular, the Commission wishes to receive the information listed in the Annex to this Decision.

In view of the technical complexity of the case, and of the fact that the information provided by the Netherlands during the course of the preliminary investigation is insufficient to allow the Commission to complete its substantive assessment, the Commission might be in need of additional information from other sources. Therefore, in the event that the Netherlands will not be in a position to fully respond to the information listed in the annex within one month from receipt of this letter, the Commission will consider requesting, pursuant to Article 7 of Council Regulation (EU) No 2015/1589, the beneficiaries of the contested APAs, i.e. NEON, CN BV, NEH or any other company of the Nike group, to provide the information requested from the Netherlands above. In that case, the Netherlands will be invited to agree with this request on the basis of Article 7 (2) b) of Council Regulation (EU) No 2015/1589.²³⁶

The Commission requests the Netherlands to forward a copy of this letter to the potential beneficiaries of the aid identified herein immediately.

The Commission wishes to remind the Netherlands that Article 108(3) TFEU has suspensory effect, and would draw its attention to Article 16 of Council Regulation (EU) No 2015/1589,²³⁷ which provides that all unlawful aid may be recovered from the recipient of that aid.

²³⁵ Case T-308/11 *Eurallumina v Commission* EU:T:2014:894, paragraphs 85 and 86.

²³⁶ OJ L 248 of 24.9.2015, p. 9.

²³⁷ OJ L 248 of 24.9.2015, p. 9.

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

If this letter contains confidential information that should not be published please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic languages on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>

Your request should be sent electronically to the following address:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

ANNEX

1. General information request

- (1) For each of the entities NEON, NI CV, AS CV, NIL and HP CV provide a complete list of all license agreements and similar agreements which were concluded with third parties. List all the transactions by year and company for all years covered by the investigation, i.e. 2006-2017. In addition, for each transaction provide a short explanation of its purpose and of the remuneration agreed.
- (2) For each of NIL, NI CV, NEH, NEON, AS CV, CN BV, and HP CV provide separate detailed organisation charts including revised versions and updates for the period 2006 to 2017.
- (3) Provide detailed company charts of the Nike group's entities in the EMEA region including revised versions and updates for the period 2006 to 2017.
- (4) Which entities of the Nike group active in the EMEA region have the people functions to execute IP protection, brand protection, and related functions? Please list the respective entities. For each entity, explain the responsibilities, job titles and name the current job holders of these functions.
- (5) Provide a list which includes the following information: for all years covered by the investigation, i.e. 2006-2017, provide on a per-year-basis a short explanation of each IP-infringement litigation or settlement case concerning the Nike EMEA IP and the Converse EMEA IP. In addition, provide any underlying court opinions or settlement agreements for the cases already concluded.
- (6) Provide the partnership agreements, including all annexes and all revised versions of NI CV, AS CV and HP CV.
- (7) Provide all buying agency agreements concluded between NTC and NEON and CTC and CN BV.

2. Requested Information concerning the fiscal unity

- (8) Provide all the forms that the NEH fiscal unity companies fill in to apply for the fiscal unity (formulier: verzoek om fiscal eenheid) and all changes to that fiscal unity between 2006 to 2017
- (9) Explain the calculation of the tax reconciliation in the NEH fiscal unit for each year.

3. Requested Information concerning Nike, Inc., NEH, NEON, NIL, NI CV, HP CV

- (10) Provide the cost sharing agreement between Nike, Inc. and NIL, including all annexes and all revised versions for the period 2006 to 2015.
- (11) Provide the cost sharing agreement between Nike, Inc. and NI CV, including all annexes and all revised versions for the period 2015 to 2017.

- (12) Provide the cost sharing agreement between Nike, Inc. and HP CV including all annexes and all revised versions for the period 2006 to 2017.
- (13) Provide all licence agreements including all annexes and all revised versions between NIL and NEON from 2006 to 2015.
- (14) Provide all licence agreements including all annexes and all revised versions between NIL and NEH from 2006 to 2015.
- (15) Provide all licence agreements including all annexes and all revised versions between NI CV and NEON from 2015 to 2017.
- (16) Provide all licence agreements including all annexes and all revised versions between NI CV and NEH from 2015 to 2017.
- (17) Provide all licence agreements between HP CV and NEH including all annexes and all revised versions from 2006 to 2017.
- (18) Provide all licence agreements between HP CV and NEON including all annexes and all revised versions from 2006 to 2017.
- (19) Provide a list of all licence agreements of Nike, Inc. with other Nike group entities or third parties for the years 2006 to 2017.
- (20) Provide a list of all licence agreements of NIL with other Nike group entities or third parties for the years 2006 to 2015.
- (21) Provide a list of all licence agreements of NI CV with other Nike group entities or third parties for the years 2015 to 2017.
- (22) Provide a list of all licence agreements of NEH with other Nike group entities or third parties for the years 2006 to 2017.
- (23) Provide a list of all licence agreements of NEON with other Nike group entities or third parties for the years 2006 to 2017.
- (24) Provide a list of all licence agreements of HP CV with other Nike group entities or third parties for the years 2006 to 2017.
- (25) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships) by NEON for the years 2006 to 2017.
- (26) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships) by NIL for the years 2006 to 2015.
- (27) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships) by NI CV for the years 2015 to 2017.
- (28) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships) by HP CV for the years 2006 to 2017.
- (29) Provide the agreement, including all annexes and all revised versions and other supporting and related documents, in particular the financial evaluation concerning the IP transfer between NIL and NI CV and Nike, Inc. and NIL, respectively.

- (30) Provide the agreements, including all annexes and all revised versions and other supporting and related documents, concerning the relationship between NEON and the Commission Agents for the years 2006 to 2017.
- (31) Provide the research and development agreements, including all annexes and all revised versions and other supporting and related documents, between NEON and NIL.
- (32) Provide the research and development agreements, including all annexes and all revised versions and other supporting and related documents, between NEON and NI CV.
- (33) Provide the yearly financial reports, including also the yearly numbers of employees, for NIL (2006-2015), NI CV (2015-2017) and HP CV (2006-2017) and NEON (2006/2007).
- (34) Provide the amounts of the royalties paid by NEON during the period 2006 to 2015 to NIL and the accounting figures on the basis of which the royalty has been calculated in each accounting period. In particular, submit the invoices by which NIL requested the royalty payments from NEON (cf. licence agreement NEON-NIL, paragraph 10.4) during said period.
- (35) Provide the amounts of the royalties paid by NEON during the period 2015 to 2017 to NI CV and the accounting figures on the basis of which the royalty has been calculated in each accounting period.
- (36) Provide the original 2006 Functional Analysis of NEON.
- (37) Provide all transfer pricing studies including NEH or the fiscal unit for the years 2006-2015.
- (38) Provide the transfer pricing study between NTC and Nike, Inc. as mentioned in the letter of the Dutch authorities to the Commission, dated 19 March 2018, paragraph 9.

4. Requested Information concerning Converse, Inc., AS CV, CN BV

- (39) Provide the cost sharing agreement between Converse, Inc. and AS CV, including all annexes and all revised versions, for the period 2010 to 2017.
- (40) Provide all licence agreements between Converse, Inc. and CN BV, including all annexes and all revised versions, from 2006 to 2017.
- (41) Provide all licence agreements between Converse, Inc. and AS CV, including all annexes and all revised versions, from 2010 to 2017.
- (42) Provide all licence agreements between AS CV and CN BV, including all annexes and all revised versions, from 2010 to 2012.
- (43) Provide all licence agreements between AS CV and NEH, including all annexes and all revised versions, from 2010 to 2017.
- (44) Provide a list of all licence agreements of Converse, Inc. with other Nike group entities or third parties for the years 2006 to 2017.
- (45) Provide a list of all licence agreements of AS CV with other Nike group entities or third parties for the years 2006 to 2017.

- (46) Provide a list of all licence agreements of CN BV with other Nike group entities or third parties for the years 2006 to 2017.
- (47) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships), by CN BV for the years 2006 to 2017.
- (48) Provide a list of sponsorships and endorsement contracts concluded (full and partial sponsorships), by AS CV for the years 2010 to 2017.
- (49) Provide the license agreement, including all annexes and all revised versions, concluded with All Star DACH GmbH.
- (50) Provide the agreement, including all annexes and all revised versions and other supporting and related documents, in particular the financial evaluation concerning the IP transfer between Converse, Inc. and AS CV.
- (51) Provide the agreements, including all annexes and all revised versions and other supporting and related documents, concerning the relationship between CN BV and the Commission Sales Support Agents for the years 2006 to 2017.
- (52) Provide the research and development agreements, including all annexes and all revised versions and other supporting and related documents, between CN BV and AS CV.
- (53) Provide the yearly financial reports, including also the yearly numbers of employees, for AS CV (2006-2017).
- (54) Provide the amounts of the royalties paid by CN BV during the period 2006 to 2010 to Converse, Inc. and the accounting figures on the basis of which the royalty has been calculated in each accounting period.
- (55) Provide the amounts of the royalties paid by CN BV during the period 2010 to 2017 to AS CV and the accounting figures on the basis of which the royalty has been calculated in each accounting period.