EUROPEAN COMMISSION

Brussels, 18.12.2017
C(2017) 8753 final

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 […]	PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid SA.46470 (2017/NN) – Netherlands

Possible State aid in favour of Inter IKEA

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 ("Treaty").

1. PROCEDURE

(1) Following allegations in the press regarding tax avoidance practices by Inter IKEA Group ("Inter IKEA") and the report published on 12 February 2016 by the Greens/European Free Alliance group at the European Parliament, the Commission, by letter of 7 April 2016, requested the Netherlands to provide information about Advanced Tax Rulings (hereafter "ATR") and Advanced Pricing Agreements (hereafter "APA") granted to the companies of Inter IKEA.[1]

[1] That letter was sent under reference SA.37419 – Tax rulings Netherlands.

Zijne Excellentie de Heer Halbe ZIJLSTRA
Minister van Buitenlandse Zaken
Bezuidenhoutseweg 67
NL – 2500 EB Den Haag

(2) By letter of 24 May 2016, the Netherlands replied to that request by submitting, in particular, copies of APAs issued by the Dutch tax administration in favour of the company Inter IKEA Systems BV (hereafter "*Systems*") on 9 March 2006 (hereafter the "2006 APA") and on 19 December 2011 (hereafter the "2011 APA").

(3) By letter of 19 August 2016, the Commission sent an additional request for information to the Netherlands with further questions concerning the 2006 APA and the 2011 APA.

(4) By letter of 17 November 2016, the Netherlands replied to that request and submitted the requested information concerning the 2006 and 2011 APAs.

(5) By letter of 27 January 2017, the Commission indicated that on the basis of the preliminary analysis of the information submitted by the Netherlands, it was concerned that the 2006 APA and the 2011 APA might endorse a method for determining *Systems*' profit in a manner that would not result in a reliable approximation of a market-based outcome in line with the arm's length principle and therefore might have conferred a selective advantage upon *Systems*. In the same letter, the Commission requested the Netherlands further information in relation to its reply of 17 November 2016 as well as other complementary information.[2]

(6) By letter of 15 May 2017, the Netherlands replied to the Commission's request for information of 27 January 2017. Part of the information requested was provided by the Netherlands on 10 and 24 April 2017.

(7) On 26 June 2017, a meeting was held between the Commission services and representatives of the Dutch tax administration.

(8) By letter of 11 September 2017, the Netherlands provided further information and clarifications in relation to the Commission's request for information of 27 January 2017.

2. INTRODUCTION

(9) The present decision concerns the 2006 APA and 2011 APA concluded between the Dutch tax authorities and *Systems*, a company of Inter IKEA in charge of operating the franchising business of the "IKEA" shops (see section 3.1).

(10) The 2006 APA indirectly determined for tax purposes the annual licence fee which *Systems* paid to another company of Inter IKEA established in Luxembourg, I.I. Holding S.A. (hereafter "*Holding*"), for a set of proprietary rights necessary for the exploitation of the franchising business of IKEA (Section 4.1). That licence fee reduced *Systems*' taxable profit[3] shifting a substantial part of that profit to *Holding*. The profit shifted to *Holding* in Luxemburg was not taxed there, since it was subject to a special exemption regime for holding companies, which expired at the end of 2010. At the present stage, the Commission has doubts whether the licence fee indirectly determined in the 2006 APA was at arm's length and therefore whether the 2006 APA resulted in an annual taxable profit for *Systems* from 2006 to 2011 that corresponds to a reliable

[2] That letter was sent under reference SA.46470 – Potential aid to Inter IKEA – Netherlands.
[3] In this decision "taxable profit" must be understood as the profit before tax.

approximation of a market-based outcome in line with the arm's length principle (see Section 7.2.1).

(11) In 2011, *Systems* acquired the proprietary rights in question. Consequently, *Systems* ceased to pay the licence fee and the 2006 APA became without object. The 2011 APA sets out that the acquisition price to be paid by *Systems* for the proprietary rights is at arm's length. It also sets out that the intercompany loan granted to *Systems* for the acquisition has been concluded under arm's length conditions and that therefore the interest is fully deductible. This interest deduction reduces the taxable profit of *Systems* in the Netherlands (see Section 4.2). At this stage, the Commission has doubts whether, in particular, the price agreed for the proprietary rights as agreed in the 2011 APA corresponds to an arm's length price and therefore whether the 2011 APA results in an annual taxable profit for *Systems* from 2012 onwards that corresponds to a reliable approximation of a market-based outcome in line with the arm's length principle (see Section 7.2.2).

3. FACTUAL AND LEGAL BACKGROUND

3.1. Beneficiary of the contested measures: Systems

(12) IKEA was founded in 1943 by Mr Ingvar Kamprad in Sweden initially as a mail-order business selling pencils, postcards, and other merchandise.[4] Over the years, the business was developed into showroom retail stores selling self-assembly furniture and home furnishings with attractive designs and prices, with stores in several countries.[5]

(13) In the early 1980s, Mr Ingvar Kamprad decided to change the exploitation of the IKEA business to a franchising model. To this end, it was decided "*to separate the ownership of the retail operation from the ownership of the concept and the IKEA brand*".[6] The IKEA business was thus split into two groups, INGKA (owner of most retail shops) and Inter IKEA. According to the Netherlands, Inter IKEA and INGKA are two separate groups with no shareholder relationship and separate management.[7]

(14) Inter IKEA is a group of companies active, *inter alia*, in the development and franchising of unique marketing systems for the retail sale of furniture, home furnishing and related products for interior decoration as well as related activities such as a shop restaurants. Inter IKEA owns the "IKEA formula", a set of intangible assets including the IKEA trademark, the IKEA Franchise Concept[8] and know-how which is franchised to IKEA stores around the world.

4 See http://www.inter.ikea.com/en/about-us/milestones/.

5 *Ibid*., for the milestones of IKEA's history.

6 See http://www.inter.ikea.com/en/about-us/milestones/.

7 See letter of the Netherlands of 24 May 2016.

8 See http://inter.ikea.com/en/about-us/business-in-brief/. According to the website *"[t]he IKEA Concept is the core asset of Inter IKEA Group and its franchising operation. The overall purpose of Inter IKEA Group is to secure continuous improvement, development, expansion and a long life of the IKEA Concept*".

(15) Inter IKEA is owned by Interogo Foundation, based in Liechtenstein and established in 1989. According to the Inter IKEA website, Interogo Foundation is an "*enterprise foundation*" ("*Unternehmensstiftung*") registered under Liechtenstein law.[9]

(16) Inter IKEA's consolidated revenue in 2015 was EUR 3.7 billion, the earnings before interest, tax, depreciation and amortisation (EBITDA) was EUR 998 million with a net profit of EUR 625 million. Total assets consolidated book value was EUR 15.9 billion.[10]

(17) *Systems* is a company of the Inter IKEA group established in 1983 in the Netherlands. *Systems* is the franchisor and the owner of the IKEA Franchise Concept.[11] According to the Netherlands, the shares of *Systems* are owned by a Netherlands-based holding, Inter IKEA Systems Holding BV, which is in turn owned by a Luxembourg-based holding, Inter IKEA Holding SA (hereafter "IIHSA"). IIHSA's shares are held by the Interogo Foundation.[12]

(18) As of November 2017, *Systems* had agreements with 11 independent franchisee groups in 49 countries, operating 411 stores, 361 of which were owned by the INGKA Group.[13] In the European Union, there are franchisees in 23 Member States.[14]

(19) *Systems* is responsible for managing contract and business relationships with the franchisees and initiates, coordinates and manages the provision of services of other related parties and external service providers, such as product design and range selection, supply and distribution, manufacturing, and design services relating to the opening and refurbishment of stores.[15] Its main source of income is the franchise fee paid by franchisees as well as the income from the sale of catalogues.

---

9 See http://inter.ikea.com/en/about-us/Our-owner. In addition to the franchising activities, Inter IKEA is also present in the investment business. Since May 2016, Inter IKEA has been reorganised into two separate divisions. Inter IKEA Holding B.V. in the Netherlands is the holding company of the IKEA franchising-related division. Interogo Holding AG in Switzerland is the holding company of the investment businesses. Both holdings are owned by Interogo Foundation (see http://inter.ikea.com/en/media/news/2015-inter-ikea-group-annual-report-published/).

10 See http://inter.ikea.com/en/media/news/2015-inter-ikea-group-annual-report-published/.

11 See http://inter.ikea.com/en/about-us/business-in-brief/. See also letter from the Netherlands of 24 May 2016. According to Inter IKEA website, after its incorporation *Systems* "*starts to conceptualise the IKEA business model into what is now the IKEA Concept*" (http://inter.ikea.com/en/about-us/milestones/).

12 See letter from the Netherlands of 24 May 2016. Following the reorganisation of the company in 2016, IIHSA moved from Luxembourg to Switzerland and was renamed into what now is Interogo Holding AG, head of the investment business of Interogo (see footnote 55).

13 See website http://franchisor.ikea.com/ikea-franchisees/.

14 See website http://franchisor.ikea.com/ikea-franchisees/

15 See the description in the Transfer Pricing Report provided with the 2006 APA, Section 1.1.
According to the letter from the Netherlands of 15 May 2017 (Annex 1), certain services are outsourced by *Systems* to other Inter IKEA subsidiaries (such as legal services - including protection of the trade name and trademark -, architectural services and store design) (for details, see footnote 71). Other functions such as design and setting and developing the IKEA product range, purchase and managing the supply chain of the IKEA product range and manufacturing of certain IKEA products were outsourced by *Systems* to non-related parties belonging to the INGKA Group (namely the entities IKEA of Sweden AB and IKEA Supply AG). On 31 August 2016, Inter IKEA Group acquired from the INGKA Group these activities (see Commission Decision of 13.06.2016, case M.8047 - INTER IKEA HOLDING / PARTS OF INGKA HOLDING).

(20) *Systems* is also responsible for administering, maintaining and improving the intellectual property related to the franchising business, which includes marketing and research activities, as well as product testing and training.[16] *Systems* is the owner of the IKEA Concept Centre in Delft (the Netherlands). The IKEA Concept Centre includes a test store which - in addition to being a normal IKEA shop[17] - operates as a pilot store since 1992. The IKEA Concept Centre also includes a training centre for existing and potential new franchisees (IKEA Business College).[18] Finally, *Systems* is responsible for the publishing and supply of catalogues to the franchisees.[19]

(21) In 2015, *Systems* had a total of 983 FTEs, divided as follows: 226 FTEs employed in franchise activities, 492 in the IKEA Concept Centre in Delft, and 265 employed for activities outside the Netherlands.[20]

3.2. The exploitation of the IKEA business: 1983 - 2011

(22) When the IKEA business was split in the early 1980s into two groups, Inter IKEA and INGKA, Mr Kamprad transferred a large number of the retail companies to the INGKA Group, more specifically to a Netherlands Foundation, the INGKA Foundation - head of the INGKA Group - which today owns most of the IKEA stores.[21] At the same time, the proprietary rights concerning the IKEA business which had been developed until that date - including trademarks, the IKEA trade name and copyright as well as underlying know-how or formulae (hereafter the "PRs")[22]- were transferred in 1983 to Inter IKEA, in particular to *Holding*,[23] a company controlled by the Interogo Foundation[24] and subject to the special "Holding 1929" tax regime Luxembourg.[25]

---

16 See the description in the TP Report provided with the 2006 APA, Section 4.3.

17 With the exception of the IKEA Delft store, all IKEA stores operate under franchise agreements with *Systems* (http://inter.ikea.com/en/about-us/business-in-brief).

18 See letter from the Netherlands of 24 May 2016. See also http://inter.ikea.com/en/about-us/milestones/ and http://franchisor.ikea.com/a-home-for-the-ikea-concept/.

19 See the description in the TP Report provided with the 2006 APA, Section 4.1.2.

20 Letter from the Netherlands of 15 May 2017, Annex 1.

21 See http://www.inter.ikea.com/en/about-us/milestones/. This decision does not concern INGKA.

22 See letter from the Netherlands of 24 May 2016, footnote 4. More in detail, according to the letter of the Netherlands of 15 May 2017 (Annex 1), the PRs represent "*the following intangible property rights: (i) distinctive and recognisable brands, trade names, trademarks and domain names, service brands, copyrights, logos, emblems, and advertising and promotional slogans (including, without any restriction, 'IKEA'); (ii) a certain unique trade dress, including store design and lay-out, store interior and décor, restaurant design and lay-out; (iii) other intellectual property rights, including but not limited to, the secret IKEA know-how, patents, designs, plans, utility models, databases, photos and computer programs*".

23 Formerly IKEA Holding International, S.A. See the letter from the Netherlands of 17 November 2016, Annex 1. "*July 1, 1983: The founder of IKEA transferred the developed rights (possibly through a non-related entity), and outside the Netherlands, to the Luxembourgish IKEA Holding International SA*". Furthermore, according to the licence agreement signed on 1 July 1983 by *Holding* and *Systems*, "*[a]ll the material and territorial rights of Mr Kamprad to the IKEA trademarks have been transferred to IKEA Lux*" (Recital 3).

24 See "Report on Handling" submitted by the Netherlands with its letter of 24 May 2016, page 4.

25 The Holding 1929 regime was approved by Luxembourg Law of 31 July 1929. Under this regime, which expired at the end of 2010, holding companies were not subject to any direct taxes in Luxembourg, such as corporate income tax (*impôt sur le revenu des collectivités*), municipal business tax (impôt commercial communal) and net worth tax (*taxe sur la valeur nette*). Accordingly, dividends, interest, royalties and capital gains earned by a company subject to the Holding 1929 regime were not taxable in Luxembourg.

(23) Simultaneously, on 1 July 1983 *Holding* concluded a licence agreement with *Systems* (hereafter the "Licence Agreement") authorizing the latter to use the PRs to create and develop the IKEA Franchise Concept upon the payment of a licence fee.[26] The IKEA Franchise Concept is the set of intangible assets necessary to operate the IKEA business under the franchise model.[27] The IKEA Franchise Concept is then franchised by *Systems* to essentially all worldwide IKEA stores[28] (mostly owned by INGKA). Under the franchise agreements, the franchisees pay a franchise fee of 3% of the stores' net franchisee turnover[29] to *Systems* in exchange for the use the IKEA Franchise Concept.[30]

(24) Under the terms of the Licence Agreement, *Holding* licensed to *Systems* the right to use and exploit the PRs by selecting and combining its different components, thereby "*creating a unique marketing and retailing concept […] for the sale of furniture and furnishings*" (the IKEA Franchise Concept) which is then franchised by *Systems* to retailers.[31] *Systems* is also authorised to register the PRs and undertakes to protect these rights, although *Holding* remains the legal and beneficial owner.[32] The Licence

---

Similarly, payments of dividends, royalties and interest were not subject to any withholding taxes either (see Commission Decision of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies).

26 See 2006 APA, paragraph 1.4 and Letter of the Netherlands of 15 May 2017, response to question A.6 in Annex 2. See also Agreement of 30 August 2006 between *Systems* and *Holding*, recitals b and c.

27 The IKEA Franchise Concept is defined in the 2006 APA as a "*unique marketing and retail concept for the sale of furniture and (home) furnishings*" (paragraph 1.4). The same or similar definitions of the IKEA Franchise Concept appear in the Licence Agreement (Recital 5) and the 2011 APA (paragraph 1.7). According to the Netherlands (letter of 15 May 2017, Annex 1 and response to question A.6 in Annex 2), the IKEA Franchise Concept is "*a unique system in the retail trade [owned by [Systems]. […] It consists of a distinctive and unique combination of design, interior and outdoor accessories, corporate systems and methods (including systems for the sale of food and beverages), corporate standards, advertising and marketing techniques (including the IKEA catalogue and the IKEA website), client clubs, digital components, and applications that support the roll-out of retail trade systems*".

28 According to the Netherlands (letter of 15 May 2017, Annex 1), with the exception of three warehouses, IKEA franchisees are independent of the Inter IKEA group. Also the test store in Delft (Netherlands) is owned by *Systems* (http://www.inter.ikea.com/en/about-us/business-in-brief/) (see Recital (20)).

29 From an accounting perspective, net turnover or net sales are gross sales minus sales allowances, sales discounts and sales returns.

30 See 2006 APA, paragraph 3.1.

31 See Licence Agreement, Article I. See also Letter of Understanding signed by *Holding* and *Systems* effective as of 1 January 1996.
According to the Licence Agreement, *Systems* is "*a company especially established with the objective of, in a more consistent and controlled manner, creating and franchising a unique marketing and retailing concept, THE IKEA FRANCHISING CONCEPT, for the sale of furniture and furnishings. The main objective of [Systems] is to acquire and systematize for such a concept essential components and to continuously administer and improve the IKEA FRANCHISE CONCEPT*" (Recital 5). *Systems* undertakes "*to use THE IKEA PROPRIETARY RIGHTS in full compliance with the directives provided by [Systems] and not to conduct […] business inconsistent with the unique characteristics, goodwill and reputation attached to THE IKEA PROPRIETARY RIGHTS* " (Recital e). Under the Licence Agreement, *Systems* is also authorised to exploit the IKEA trademarks "*by licensing third party producers and/or product range or similar companies to use the IKEA trademarks in direct connection with products distinguished by IKEA design and quality, provided, however, that these products are exclusively intended for marketing or retailing through IKEA units authorised thereto*" (Article III.a.).

32 See Licence Agreement, clause II.b), Letter of understanding of November 1998, paras. 2 and 3, and letter from the Netherlands of 15 May 2017, Annex 1.

Agreement is applicable in the countries specified in an annex to the Licence Agreement and in other countries separately agreed between the parties.[33]

(25) *Holding* and *Systems* signed several letters of understanding and supplementary agreements aimed at amending, complementing and/or clarifying several aspects of the Licence Agreement (hereafter, jointly: the "Letters of Understanding"). The most relevant are the following:

(i) A letter of understanding effective on 1 January 1996 extends the term of the Licence Agreement from three to five years (tacitly renewable).

(ii) A supplementary agreement dated 15 November 1990 deals with the setting up and opening by *Systems* of the test store in Delft in 1992.

(iii) A supplementary agreement of 30 August 2006 contemplates that in case of termination of the Licence Agreement, *Systems* will be entitled to transfer the IKEA Franchise Concept to *Holding*, in which case *Holding* will pay a price equal to the different costs and expenses that *Systems* shall incur for the termination of the franchise activities.

(iv) The payment by *Systems* of the licence fee to *Holding* is governed by a letter of understanding of 30 August 2006, effective as of 1 January 2006 ("Licence Fee Letter"). According to this letter, *Systems* must pay to *Holding* a fee corresponding to 70% of *Systems*' "franchise income".[34] The Licence Fee Letter defines "franchise income" as "*any franchise and license fee due to [Systems], plus the IKEA Business College (IBC) fees, plus the net catalogue income*[35] *and minus any marketing support paid to franchisees*".[36] The fee is paid every four months.[37]

(v) A further letter of understanding signed on 30 August 2006, effective as of 1 January 2006, governs the splitting between *Holding* and *Systems* of certain "miscellaneous" costs and expenses incurred by the latter relating partly to the PRs and partly to the IKEA Franchise Concept ("Cost split Letter").[38] According

33 Licence Agreement, clause III.b. and c. The Netherlands has not submitted a copy of Appendix B. However, in its letter of 15 May 2017, the Netherlands explained (response to question A.7.i) that the agreement was concluded only in respect of certain countries and that any new countries are not covered by the agreement unless expressly agreed by the parties.

34 See Licence Fee Letter, paragraph I.a. The "franchise income" is referred in other documents as "franchise revenue".

35 "Net catalogue income" is defined as "*the balance between all income received by [Systems] for the sale of IKEA Catalogues and all costs […] paid by [Systems] related to the IKEA Catalogues*" (Licence Fee Letter, paragraph I.b).

36 See Licence Fee Letter, paragraph I.a.

37 On 31 May, 30 September and 31 January of each year (Licence Fee Letter, paragraph I.a.).

38 According to the Cost split Letter, paragraph II these costs include the following: (1) services received from Inter IKEA Holding Service, S.A., Belgium, in respect of legal support regarding the IKEA Franchise Concept, including the IKEA Trade Marks and other intellectual property; (2) services received from Inter IKEA Systems Service AB, Inter IKEA Systems A/S and Inter IKEA Systems S.A.; (3) IKEA Franchise concept staff employed by *Systems*; (4) Franchise Concept tests, including tests in the IKEA Store in Delft; (5) Maintenance of IKEA Trademarks and other intellectual property rights; (6) IKEA

to the Cost split Letter, those costs are divided as follows: 40% are deemed to relate to the IKEA Franchise Concept and, consequently, this part of the costs is incurred by *Systems* for its own account.[39] The remaining 60% of the costs are deemed to be incurred by *Systems* on behalf of *Holding* and therefore, shall be reimbursed by *Holding* to *Systems* every four months.[40]

(26) In its letter of 15 May 2017, the Netherlands clarified how the licence fee should be calculated and the relationship between the licence fee and the cost split. According to the Netherlands, "*the licence fee amounts to 70 %* [of *System*'s "franchise income"] *after deduction of costs. The costs are defined as 9 % of the same basis on which the licence fee is calculated. This means that the gross licence fee amounts to 79 % of the relevant basis of calculation* [the franchise income]. *[Systems] states that since 1996 it has been agreed by the parties that if the real costs were to be higher than the estimated 9 %, the excess would be shared between [Systems] and the licensor*".[41]

(27) The Netherlands has provided figures showing that, for each year between 2006 and 2009, the costs incurred by *Systems* on behalf of *Holding* that should be reimbursed by *Holding* to *Systems* have been calculated as 9% of the franchise income[42]. These figures also show that the (gross) licence fee to be paid by *Systems* to *Holding* has been determined as 79% of the franchise income.[43] Therefore the licence fee effectively paid by *Systems* to *Holding* amounted to the difference between these two percentages, i.e. 70% of the franchise income.[44]

(28) On December 2009, the PRs and the rights and obligations under the Licence Agreement were transferred from *Holding* to the company Largo Brands Corporation AVV, a subsidiary of Interogo Foundation[45] established in Aruba (hereafter "*Largo*").[46] Therefore, as of that date, *Largo* replaced *Holding* as licensor of the PRs to *Systems*. The Netherlands has not provided the terms of this transfer.[47]

(29) The transaction between *Systems* and *Holding*/*Largo* is the subject-matter of the 2006 APA.

Business College Costs, including training courses; (7) Establishment group employed or engaged by *Systems*; and (8) costs related to third party service providers.

39 See Cost split Letter, paragraph III.

40 On the same yearly dates in which *Systems* pays the Licence Fee to *Holding* (Cost split Letter, paragraph III).

41 Letter of the Netherlands of 15 May 2017, Annex 3.

42 See the item "Costs of I.I. Holding SA" in Figure 5 in Recital (63).

43 See the item "Licence Payment" in Figure 5 in Recital (63).

44 See also the letter of 17 November 2016, Annex 2, response to question B.(d)(iii) including the table showing the net royalty amounts paid. This is furthermore confirmed by the figures which appear in the minutes of the meetings between *Systems* and *Largo* held on 20 October 2010 and 24 March 2011 provided by the Netherlands with Letter of 15 May 2017, Annex 3.

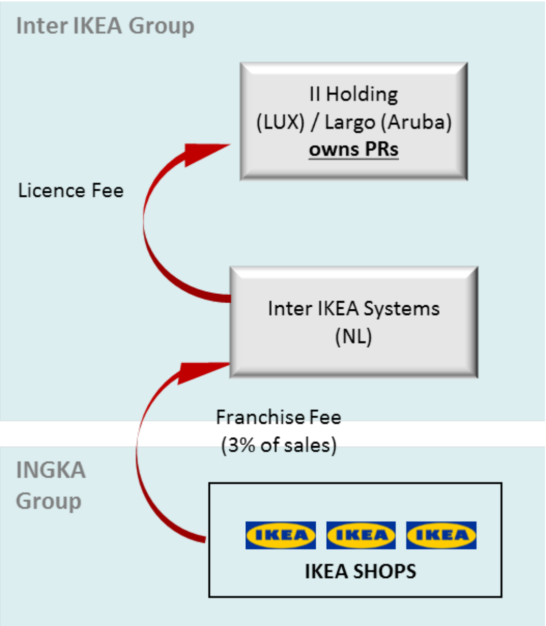
45 See Letter from the Netherlands of 17 November 2016, Annex 1.

46 Letter from the Netherlands of 17 November 2016, Annex 1. See also letter from the Netherlands of 24 May 2016. See also the letter of *Largo* to *Systems* of 18 June 2010, provided by the Netherlands on 10 April 2017. According to the Netherlands, *Largo* has an exempted tax-on-profits status due to its charitable character (see "Report on Handling" submitted by the Netherlands with its letter of 24 May 2017).

47 Letter from the Netherlands of 17 November 2016, Annex 2, response to question A(viii).

(30) The different entities involved in the transactions described above are represented in Figure 1 below.

Figure 1 – Exploitation of the IKEA business until 2011 under the 2006 APA



3.3. The exploitation of the IKEA business since 2011

(31) On 21 December 2011, Interogo Foundation and *Systems* signed a Sale and Purchase Agreement (the "Sale and Purchase Agreement")[48] by which *Systems* acquired the beneficial ownership of the PRs.[49] According to the Sale and Purchase Agreement, the value of the PRs was EUR 9 billion. After the acquisition of the PRs by *Systems* the Licence Agreement was terminated.

(32) The acquisition took place through two transactions: on the one hand, Interogo contributed to *Systems* 40% of the beneficial interest in the PRs – representing an amount of EUR 3.6 billion – as share premium reserves.[50] On the other hand, Interogo sold to *Systems* the remaining 60% of the beneficial interest of the PRs for a purchase price of EUR 5.4 billion (hereafter "the Purchase Price").[51] Both transactions were effective on 1 January 2012.[52] The Purchase Price was converted into a loan (hereafter

48 Submitted by the Netherlands by letter of 24 May 2016.

49 The Commission does not know how and when the PRs were transferred from *Largo* to Interogo Foundation or the price for such transfer.

50 See Sale and Purchase Agreement, Article 3.

51 See Sale and Purchase Agreement, Article 4.1.

52 See Sale and Purchase Agreement, Article 5.

"the Loan") granted by Interogo Foundation to *Systems*.[53] As a consequence, *Systems* remained indebted towards Interogo Foundation with an amount of EUR 5.4 billion.[54]

(33) The terms of the Loan are defined in a loan agreement signed by Interogo Foundation and *Systems* on 21 December 2011 (hereafter the "Loan Agreement").[55] It bears a fixed yearly interest of 6%, which is claimed to have been determined at arm's length on the basis of two quotation letters made by BNP Paribas and ING and the assessment of Inter IKEA's chief financial officer.[56] According to the terms of the Loan Agreement, the Loan is unamortised and has a 12 years maturity.[57]

(34) According to the Netherlands, the initial value of EUR 9 billion is based on the expected future cash flows generated by the PRs and the value attributed to the "IKEA" brand by the external brand consultancy Interbrand.[58] The Netherlands submitted a letter sent by the tax advisor to the Dutch tax administration on 8 November 2011 which includes an evaluation of the PRs prepared by Inter IKEA "*roughly determined on the basis of a discounted cash flow method*".[59]

(35) The discounted cash flow applied is reproduced in Figure 2 below. The table bears the title "*Inter IKEA Systems BV (Franchisor of IKEA Retail Concept). Valuation of IP rights*" and includes a calculation of high and low estimates of the discount rate and a cash flow estimate for the years after 2012. The valuation ranges between EUR 8.6 billion and EUR 12.8 billion.

---

53 See Sale and Purchase Agreement, Article 4.2.1.

54 According to the Netherlands, the debt was ultimately transferred to Interogo Holding AG in Switzerland (see footnote 55).

55 See Sale and Purchase Agreement, Articles 4.2.1 and 4.2.2. See Loan Agreement provided by the Netherlands by letter of 11 September 2017. According to the Netherlands (letter of 11 September 2017), the rights of Interogo Foundation under the Loan Agreement were transferred to the Luxemburg entity Interogo Finance S.A. Interogo Finance S.A. was liquidated at the end of 2015 and its activities (including the rights attached to the Loan) were transferred to IIHSA in Luxembourg. The seat of IIHSA moved from Luxembourg to Switzerland and was renamed into what is now Interogo Holding AG.

56 Quotations have been made by the two banks for a 12 years fixed rate loan of approximately EUR 5 billion to IKEA. The quotation letters do not refer to the specific terms of the loan or to any financial analysis.

57 See Loan Agreement, Article 1.2.

58 See "Report on handling" drafted for the Commission, submitted by the Netherlands with its letter of 24 May 2016.

59 Letter from the tax advisor to the tax administration of 8 November 2011, submitted by the Netherlands with its letter of 24 May 2016.

Figure 2 – Discounted cash-flows for the estimation of the value of the PRs

Inter IKEA Systems BV (Franchisor of the IKEA Retail Concept)
Valuation of IP rights

Discount rate:	High	Low	
- Risk Free Rate	[...]		(See risks below)
- Market risk premium			
- Beta (06/11 study)			
- Country risk (06/11 Study)			
After Tax (years 2012-2024)			*(Tax rate of)*
After Tax (years 2025+)			*(Tax rate of)*

	Franchise Fees	*Media Margin*	*Other revenues*	*Operating expenses*	*Income Tax(%)*	Operating profit
2012	[...]					
2013						
2014						
2015						
2016						
2017						
2018						
2019						
2020						
2021						
2022						
2023						
2024						
2025+	Growth per year / Income tax at					

HIGH RESULT	*€ (000)*	12,838,236
LOW RESULT	*€ (000)*	8,556,865

Important risks to consider:

1- Expansion and success of the IKEA Retail concept (30 years)
2- Cost development of the Franchisor (30 years)
3- Geopolitical risks (Middle East, New Markets, etc.)
4- Aging population in Europe (Core market)
5- Sustainability of the media revenues (Paper Catalogue)

(36) The Netherlands also submitted together with the 2011 APA and the Sale and Purchase Agreement a table showing a valuation of the IKEA brand by Interbrand (www.interbrand.com) amounting to USD 12.5 billion in 2010.[60]

(37) The Sale and Purchase Agreement contains a price adjustment mechanism[61] whereby, if on 31 December 2023[62] the fair market value of the PRs is different than EUR 9 billion, the amount of the debt towards Interogo Foundation will be adjusted (upwards or downwards) at that same date so that it will still represent 60% of the amount of the fair

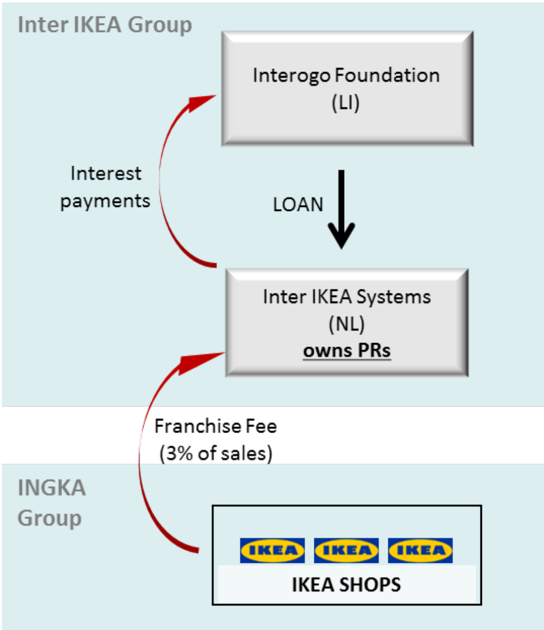
60 Information submitted by the Netherlands with its letter of 24 May 2016.
61 See Sale and Purchase Agreement, Article 4.3.
62 Or, if earlier, the last day of the year in which the 2011 APA expires or is terminated (Sale and Purchase Agreement, Article 1).

market value of the PRs.[63] The Sale and Purchase Agreement does not determine the methodology to calculate the fair market value of the PRs.[64]

(38) The acquisition of the PRs by *Systems* is the object of the second of the contested measures (the 2011 APA).

(39) The transactions described above are represented in Figure 3 below.

Figure 3 –Exploitation of the IKEA business since 2011 under the 2011 APA



4. THE CONTESTED MEASURES

(40) The contested measures are the 2006 APA and the 2011 APA. An APA is an agreement between a tax administration and a taxpayer which determines, in advance and for a set period of time, an appropriate set of criteria for calculating the arm's length value of cross-border intra-group transactions. An APA is formally initiated by a taxpayer.

4.1. The 2006 APA

(41) The title of the 2006 APA is "APA Settlement Agreement". It was signed on 9 March 2006 between *Systems* and the Dutch tax administration. The object of the 2006 APA is to determine "*the taxable margin on the franchise, catalogue and service activities and the value of the IKEA FRANCHISE CONCEPT on termination of the licence agreement between [Systems] and [Holding]*".[65] The 2006 APA is valid from 1 January 2006 to 31 December 2010, with an automatic extension for one subsequent five-year period

[63] A similar adjustment is foreseen in relation to the contribution of the share premium reserves of EUR 3.6 billion (Article 4.4.).

[64] The fair market value must be agreed by the parties. In the absence of an agreement, it will be determined by transfer pricing specialists appointed by *Systems* (see Sale and Purchase Agreement, Article 4.3.2).

[65] See 2006 APA, Section 2.

provided the facts and circumstances on which it is based do not change significantly. On 23 December 2010, KPMG Meijburg & Co (hereafter the "tax advisor") sent a letter to the Dutch tax administration requesting a five-year extension since the facts on which the 2006 APA was based "*have not substantially altered*" (sic). This request was approved by the Dutch tax administration on 28 December 2010.[66]

(42) According to Section 1, the 2006 APA is based on exchanges between the parties between 2002 and 2005 as well as on a transfer pricing report dated 18 September 2005.[67] In its letter of 24 May 2016, the Netherlands submitted a copy of the transfer pricing report of *Systems* (hereafter the "TP Report") prepared by the tax advisor dated September 2005.[68] In addition, the 2006 APA indicates a number of facts and circumstances on which the agreement is based, which are summarised below:

(i) *Holding* is the owner of the PRs and *Systems* has acquired from *Holding* under the Licence Agreement the right to exploit these rights.

(ii) *Systems* has developed the IKEA Franchise Concept, is responsible for its maintenance and improvement as well as for the negotiation of the franchise and service agreements.[69]

(iii) *Systems* runs the test store in Delft.[70] It also provides specific services to franchisees related to the setting up and refitting of stores. For these purposes, *Systems* has concluded service agreements with other Inter IKEA companies. Some of these services are purchased by *Systems* and charged to the franchisees without any mark-up.[71]

---

66 Letter from the tax advisor of 23 December 2010, submitted by the Netherlands with letter of 24 May 2016.

67 See 2006 APA, paragraph 1.2.

68 The TP Report is labelled "Draft for discussion purposes". The Commission assumes that this is the report on which the 2006 APA is based. The Netherlands also provided another version of the same document dated 4 June 2004.

69 See 2006 APA, paragraph 1.4.

70 See 2006 APA, paragraph 1.5.

71 See 2006 APA, paragraphs 1.6 and 3.8. According to the TP Report (Section 3) and the agreements provided by the Netherlands, services provided to *Systems* by other group companies are the following: (i) renting of premises for the pilot store and office space provided by Inter IKEA Systems Holding BV; (ii) administration and marketing services provided by Inter IKEA Systems S.A., Belgium (agreements of 1 October 1993 and 1 January 2010), including sales services and marketing methods to use in the stores, marketing analyses, training and information, negotiations for the purchase and production of the catalogues, IT services, for which Inter IKEA Systems SA charges *Systems* on a cost-plus 6% basis; (iii) project support services provided by Inter IKEA Systems Service AB (Sweden), including store architecture, store design and layout as well as range and goods supply, charged at a cost plus 6% basis (agreements of 1 September 1997, 1 January 2010 and 1 September 2013); (iv) general management services by Inter IKEA Systems A/S, Denmark (agreements of 31 July 1986 and of 1 October 1993), charged at a cost plus 6% basis, until the liquidation of this company in 2009; (v) legal support including trademark protection by Inter IKEA Holding Services S.A., Belgium (agreement of 1 January 1994); (vi) treasury services by Inter IKEA Treasury S.A.; and (vii) purchasing of paper and other printing materials by IFPM Ltd. All these services are charged to *Systems* on a cost-plus 6% basis except the rent of the offices, for which *Systems* pays an open market rent, and the paper purchasing, which is charged at a cost plus 5% basis.

(iv) *Systems*' risks in relation to franchise activities are limited to a debtor risk of 30% of the franchise revenue and to a foreign exchange risk for franchise fees received in foreign currency.[72]

4.1.1. Tax treatment of Systems

(43) According to the 2006 APA, *Systems* has full entitlement to the franchise and catalogue revenue related to the IKEA Franchise Concept which is paid by franchisees.[73]

(44) The 2006 APA stipulates that the remuneration to *Systems* for its activities is considered at arm's length "*if it obtains an operating margin*[74] *of 5% of the franchise and service revenue*".[75] Any operating margin realised by *Systems* which exceeds 5% of the franchise and service revenue will be considered an informal capital contribution to *Systems* by Inter IKEA and thus will not be subject to taxation.[76] The table included in paragraph 3.7 of the 2006 APA, which is reproduced below as Figure 4, summarises this:

Figure 4 – Summary of the provisions of the 2006 APA as per paragraph 3.7 of the 2006 APA.

Assuming:	Basis as in para. 3.2.	100	
	Licence payment	-/- 70	(70 % of basis)
	Costs II Holding SA	-/- x	(60 % of costs)
	Costs IIS BV	-/- y	(40 % of costs)
	Profit contributions	-/- 5	(5 % of basis)
	Informal capital	100-/-70-/-x-/-y-/-5	

(45) The table explains how to calculate the informal capital contribution, i.e. the part of *Systems*' operating profit[77] which will not be subject to taxation. "Basis as in para. 3.2." refers to the "franchise revenue" as defined in paragraph 3.2 of the 2006 APA ("*franchise and licence revenue plus net catalogue revenue minus marketing support contributions to franchisee(s)*"). According to the table, in order to obtain the informal capital contribution, the basis is reduced by the following costs items: (i) "licence payment" (70% of the "franchise revenue"); (ii) "Costs II Holding SA" (which seems to refer to the 60% of the miscellaneous costs which are allocated to *Holding*); and (iii) "Costs IIS BV" (which seems to refer to the 40% of the miscellaneous costs which are allocated to *Systems*). The resulting amount is reduced by "profit contributions", which seems to refer to *Systems*' operating margin which is subject to taxation (5% of the

---

72 See 2006 APA, paragraph 1.7.

73 See 2006 APA, paragraph 3.1. The franchise fee paid by franchisees amounts to 3% of the net franchisee turnover, whereas "*settlement for the catalogues takes place after ordering*".

74 Operating margin in the 2006 APA must be understood as the operating profit.

75 See paragraph 3.5. Remuneration for specific services to franchisees is excluded from this arm's length remuneration. These services are charged at a fee of 5% cost-plus. Where other service companies are involved, the cost of these services is passed on to franchisees without mark-up (see paragraphs 3.8 and 1.6) (see footnote 71).

76 See 2006 APA, paragraph 3.5. The informal capital contribution is substantially a unilateral downwards transfer pricing adjustment of the recorded operating profit performed in the tax declaration of the company.

77 Operating profit is the profit generated from the core business of a company before interest and taxes.

franchise revenue). The final amount is the informal capital contribution, which is not subject to taxation.

(46) The 2006 APA indicates that the Licence Agreement will be extended for the period of the APA. In case of termination of the Licence Agreement, *Systems* will keep the ownership of the IKEA Franchising Concept. However, according to the 2006 APA, without access to the PRs, the value of the IKEA Franchising Concept "*tends to zero and Systems […] will be faced with the costs of closing the franchise division*".

4.1.2. The TP Report

(47) The 2006 APA is based on the TP Report. The object of the TP Report is to "*review whether the conditions under which the transfer prices for the transactions between [Systems], located in the Netherlands, and group companies abroad, are consistent with the arm's length principle, as defined by the OECD's Transfer Pricing Guidelines for Multinational Enterprise and Tax Administrations*".[78]

(48) The TP Report describes the different transactions between *Systems* and other companies of Inter IKEA.[79] However, according to Section 3.2, its analysis concentrates on one transaction: the payment of the licensee fee by *Systems* to *Holding*.[80] The TP Report assumes that the rest of the inter-company transactions are at arm's length.[81]

(49) In order to estimate the licence fee, the TP Report determines the operating profit *Systems* should obtain in the market, in view of the functions performed, the risk assumed and the assets used. The operating profit recorded by *Systems* which exceeds that amount should indirectly be considered the price of the licence fee paid to *Holding* for transfer pricing purposes.

Functional analysis

(50) The TP Report divides *Systems*' functions into franchise operations, on the one hand, and catalogue operations, on the other. Franchise operations are further subdivided between IKEA Franchise Concept maintenance and management of the franchise contracts.[82] The IKEA Franchise Concept maintenance consists of marketing research and concept improvement, testing and training, and concept documentation.[83] Management of the franchise contracts function consists of maintaining client relationships, communication, sales support, management of outsourced services and general management.[84] Catalogue operations function consists of material purchasing, catalogue production, quality control, sales support and general management.[85] The TP

[78] TP Report, Section 1.
[79] TP Report, Section 3.1.
[80] TP Report, section 3.2.
[81] See TP Report, Section 3.2. See also letter from the tax advisor to the Dutch tax authorities of 10 May 2005. For an outline of other intercompany transactions, see footnote 71.
[82] TP Report, Section 4.1.
[83] TP Report, Section 4.3.1.
[84] TP Report, Section 4.2.1.
[85] TP Report, Section 4.4.1.

Report considers that no other independent party performs this exact same bundle of activities.[86]

(51) In terms of risk analysis, the TP Report distinguishes the following risks: market risk,[87] credit and collection risk, foreign exchange risk, liability risk and inventory risk.[88]

(52) As regards the IKEA Franchise Concept maintenance function, the TP Report considers that it bears no risk. All risks related to the maintenance and to the improvement of the IKEA Franchise Concept are borne by the management of the franchise contracts function.[89] The IKEA Franchise Concept maintenance function neither owns nor employs any relevant assets.[90]

(53) As far as the management of the franchise contracts function is concerned, the TP Report considers that *Systems*' market risk is limited given that *Systems* only retains 30% of the franchise fees.[91] The TP Report also considers that a decrease of the franchise fees is unlikely considering the high number of potential new franchisees. The risk from new competitors is also limited due to high entry barriers.[92] According to the TP Report, credit and collections risk is limited to 30% of the franchise fees, as licence fee payments are conditional upon the actual receipt of franchise payments on a cash basis.[93] Foreign exchange risk is also very low since, upon receipt of cash in foreign currency, *Systems* immediately converts such cash into euros. Finally, the limited liability risks would be demonstrated by the fact that claims in relation to the franchise contracts have never occurred in the past and are insured.[94] As regards the assets owned and used, the TP Report concludes that the intangible assets owned by *Systems* in relation to this activity have a value close to zero. The reason for this is that the IKEA Franchise Concept cannot be used and has no value without the components of the PRs, which are owned by *Holding*.[95]

(54) Finally, as regards the catalogue operations function, according to the TP Report the market risks are limited: [75-95]% of the revenues are contractually secured as the franchisees are obliged to purchase the annual IKEA catalogue. Prices of the catalogues are determined by the management of the franchise contracts function and there is no risk of obsolescence as the life span of catalogues is only one year.[96] Inventory risks are also very limited since catalogues are sent to franchisees upon completion and contractually the risks are shifted to the paper seller and to the printer.[97] Credit and

86 TP Report, Section 4.1.3.2.
87 Market risk includes factors such as product price risks, risk of other competitors entering the market, product obsolescence risk.
88 TP Report, Sections 4.2.2. and 4.4.2.2.
89 However, as explained in Recital (53), the management of the franchise contracts' function bears only limited risks.
90 See TP Report, Sections 4.3.2. and 4.3.3.
91 According to the TP Report, *"[…] Since the license payment is based on the franchise income, [Systems] only bears 30% of the risk with respect to the income flow*".
92 See TP Report, Section 4.2.2.1.
93 See TP Report, Section 4.2.2.2.
94 See TP Report, Sections 4.2.2.3. and 4.2.2.4.
95 See TP Report, Section 4.2.3.
96 See TP Report, Section 4.4.2.1.
97 See TP Report, Section 4.4.2.2.

collection as well as liability risks are also very limited.[98] As regards the assets, the catalogue operations function only uses the PRs for which a fee is paid to *Holding*.[99]

(55) The TP Report concludes that *Holding* bears all major risks related to the transaction under review[100] and that the different functions of *Systems* (the IKEA Franchise Concept maintenance function, the management of the franchise contracts function and the catalogue operations function) do not add any unique and valuable contribution to the transaction under review.

Selection of TP method and conclusion

(56) The TP Report considers that the so-called transfer pricing traditional methods (the Comparable Uncontrolled Price Method, the Resale Price Method and the Cost-Plus Method)[101] cannot be applied to test the compliance of the license fee with the arm's length principle. According to the TP Report, the Comparable Uncontrolled Price method could not be used as there was no adequate information available to identify or analyse other franchise companies operating in similar manner as *Systems*. Also Inter IKEA does not contract any company or entity to perform identical activities as *Systems*. The Resale Price Method was discarded due to a lack of comparable data in the available databases and the disparity in accounting standards across Europe which makes gross margin data not always comparable. The Cost-Plus Method was also not considered appropriate as it relies also on gross margins (hence the lack of comparable data) and it usually applies to service activities, routine manufacturing assembly or production of goods that are sold to related parties.

(57) As regards the indirect methods, i.e. the profit split method and the transactional net margin method (hereafter "TNMM"), the profit split method was considered not suitable since this method is used in situations where both parties own significant intangible assets. In this sense, the TP Report considers that in the present case "*[Systems] […] does not contribute intangible property to the […] Group activities, all such is (eventually) owned by [Holding]*".[102]

(58) The TP Report therefore uses the TNMM to determine the appropriate level of operating profit for each of the three functions performed by *Systems*.[103] As regards the management of the franchise contracts' function, since this function bears limited risks and performs a sale support services, the TP Report tests its "operating margin"[104] against those of independent comparable companies. In relation to the IKEA Franchise Concept maintenance function and to the catalogue operations function, since these functions perform routine services and bear virtually no risk, the TP Report tests the Net

98 See TP Report, Sections 4.4.2.4. and 4.4.2.5.
99 See TP Report, Section 4.4.3.
100 See TP Report, Section 4.6.2.
101 See Recital (81) for an explanation on the different transfer pricing methods.
102 See TP Report, Section 5.5.
103 For an explanation on the TNMM method, see Recitals (82) *et seq*.
104 The operating margin in the context of the application of TNMM is the profit level indicator consisting of ratio of operating profit to sales. See TP Report, Section 6.2.1.

Cost Plus Mark-Up of these functions[105] against those of independent comparable companies.[106]

(59) The TP Report presents the results (i.e. the operating margin or Net Cost Mark- Up) of comparable companies on a percentile basis along "interquartile ranges". Applying the TNMM with respect to the set of comparable companies identified for each of the functions, the TP Report endorses the arm's length nature of the operating profit of the three functions as long as the tested party operates, for each of the functions, between the 25th and the 75th percentile.[107]

4.1.3. Addenda to the 2006 APA and the transfer of the PRs to Largo Brands Corporation

(60) Two addenda to the 2006 APA have been signed after 2006. In 2007 an addendum was signed to include certain intellectual property rights related to logistics activities.[108]

(61) On 11 May 2010, *Systems* and the Dutch tax administration signed an addendum to the 2006 APA pursuant to which *Largo* replaced *Holding* in relation to the provisions of the 2006 APA.

4.1.4. Implementation of the 2006 APA

(62) Table 1 below presents the revenue declared by *Systems*, its taxable profit and the corporate income tax due in the years covered by the 2006 APA (from 2006 to 2011) according to the tax returns of *Systems* provided by the Netherlands:[109]

Table 1 – *Systems* revenue, taxable profit and tax due from 2006 to 2011 according to tax returns

Figures in EUR	2006	2007	2008	2009	2010	2011
Revenue	940,532,000	1,038,586,000	1,094,920,000	1,089,669,532	1,150,987,105	1,171,724,000
Taxable profit	32,315,410	35,012,602	31,085,022	46,040,901	51,237,306	51,100,088
Tax due	9,564,431	8,926,138	7,911,555	11,729,429	13,054,512	12,765,021

105 The Net Plus Mark-Up (also called mark up on total costs) is the ratio of operating profit to total operating costs. See TP Report, Section 6.3.1.

106 See TP Report, Section 5.6.

107 See TP Report, Sections 6 and 7.

108 By letter of 3 August 2006 (submitted by the Netherlands with its letter of 24 May 2006), the tax advisor informed the Dutch tax administration that Inter IKEA was developing a "pellet" (ledge) with intellectual property rights related to logistics activities. On 2007, *Systems* and the Dutch tax administration signed an addendum to the 2006 APA (the Netherlands submitted two addenda - one signed on 14 November 2007 and another one signed on 14 November 2006 and 29 March 2007 – with essentially the same content) which covers the margin of the "ledge activities" as well as the value of the logistics concept on termination of the Licence Agreement (Section 2). According to the addendum, the 2006 APA provisions are applicable to the ledge revenue and costs. *Holding* is also owner of all rights pertaining to the "pellet" and *Systems* is granted under the Licence Agreement and Letters of Understanding the right to exploit the rights creating a logistics concept which will be made available to third parties under agreements. Thus, ledge revenues will be treated as franchise revenues and ledge costs will be allocated between *Systems* and *Holding* according to the methodology foreseen in the 2006 APA (see addendum, paragraphs 3.10 and 3.11). This addenda does not modify the remuneration for the licence.

109 Tax returns provided by the Netherlands with its letter of 24 May 2016.

(63) At the request of the Commission, the Netherlands provided[110] the table reproduced in Figure 5 below which shows the calculation of the taxable profit and of the informal capital for each of the years covered by the 2006 APA:

Figure 5 - Items of paragraph 3.7 of 2006 APA according to the Netherlands (amounts in EUR)

	2006	2007	2008	2009	2010	2011
Basis*	[500.000.000 - 600.000.000]	[600.000.000 - 700.000.000]	[700.000.000 - 800.000.000]	[700.000.000 - 800.000.000]	[700.000.000 - 800.000.000]	[700.000.000 - 800.000.000]
Licence payment	[400.000.000 - 500.000.000]	[500.000.000 - 600.000.000]	[500.000.000 - 600.000.000]	[500.000.000 - 600.000.000]	[600.000.000 - 700.000.000]	[600.000.000 - 700.000.000]
Total costs**	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]
Costs of I.I. Holding SA***	[50.000.000 - 60.000.000]	[50.000.000 - 60.000.000]	[60.000.000 - 70.000.000]	[60.000.000 - 70.000.000]	[70.000.000 - 80.000.000]	[70.000.000 - 80.000.000]
Informal Capital	[60.000.000 - 70.000.000]	[80.000.000 - 90.000.000]	[90.000.000 - 100.000.000]	[90.000.000 - 100.000.000]	[100.000.000 - 110.000.000]	[110.000.000 - 120.000.000]
Profit	[20.000.000 - 30.000.000]	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]
Other Result****	[1.000.000 - 10.000.000]	[1.000.000 - 10..000.000]	[-10.000.000 - 0],	[1.000.000 - 10.000.000]	[10.000.000 - 20.000.000]	[10.000.000 - 20.000.000
Taxable profit	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]	[30.000.000 - 40.000.000]	[40.000.000 - 50.000.000]	[50.000.000 - 60.000.000]	[50.000.000 - 60.000.000]

* Relates to the balance of calculated franchise fees, catalogue revenue, marketing support and other costs.

** These are the total costs paid by Systems. They therefore also include the costs still awaiting calculation paid for I.I. Holding SA. […]

*** Relates to the costs calculated with I.I. Holding SA which, netted with total costs (column above), gives the costs for Systems.

**** This chiefly pertains to the results of the concept store in Delft, Netherlands.

(64) According to the table, the "Basis" is reduced by the "Licence payment" (which corresponds to 79% of the "Basis") and by the difference between the "Total costs", i.e. all costs paid by *Systems* and the "Costs II Holding SA", i.e. the "miscellaneous costs related to the PRs and to the IKEA Franchise Concept" which are allocated to *Holding* and which correspond exactly to 9% of the "Basis". The resulting amount is then reduced by the informal capital in order to obtain the taxable profit.

(65) The Netherlands has also provided,[111] at the request of the Commission, the table reproduced in Figure 6 indicating how the "Basis" in the above table has been calculated for each year covered by the 2006 APA according to the definition of "franchise revenue" in the 2006 APA.[112]

110 Letter of the Netherlands of 17 November 2016, Annex 2.

111 Letter of the Netherlands of 15 May 2017, Annex 3.

112 *"[F]ranchise and licence revenue plus the net catalogue revenue minus marketing support contributions to franchisee(s)*" (see 2006 APA, paragraph 3.2, recital (43)).

Figure 6 - Calculation of "Basis" (franchise revenue) according to the Netherlands (amounts in EUR)

	2006	2007	2008	2009	2010	2011
Franchise fee income	[500.000.000-600.000.000]	[600.000.000-700.000.000]	[600.000.000-700.000.000]	[600.000.000-700.000.000]	[700.000.000-800.000.000]	[700.000.000-800.000.000]
Net catalogue income	[70.000.000 - 80.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[80.000.000 - 90.000.000]	[40.000.000 - 50.000.000]
Marketing support	-[30.000.000 - 40.000.000]	-[40.000.000 - 50.000.000]	-[50.000.000 - 60.000.000]	-[50.000.000 - 60.000.000]	-[60.000.000 - 70.000.000]	-[50.000.000 - 60.000.000]
Other income	[1.000.000 - 10.000.000]	[1.000.000-10.000.000]	[1.000.000 - 10.000.000]	[1.000.000 - 10.000.000]	[900.000 - 1.000.000]	[800.000 - 900.000]
Basis	**[500.000.000 -600.000.000]**	**[600.000.000-700.000.000]**	**[700.000.000-800.000.000]**	**[700.000.000-800.000.000]**	**[700.000.000-800.000.000]**	**[700.000.000-800.000.000]**

4.2. The 2011 APA

(66) The title of the 2011 APA is "APA Determination Agreement". It was signed on 19 December 2011 between *Systems* and the Dutch tax administration. The 2011 APA concerns the "*arm's length character of the value of the IKEA PROPRIETARY RIGHTS at the time of the acquisition of those rights by Systems*".[113] The 2011 APA is effective from 1 January 2012 and applies for a period of 12 years (i.e. until 31 December 2023).[114]

(67) The 2011 APA is based on the assumption that *Systems* will acquire the PRs for an initial amount of EUR 9 billion.[115] As a consequence, *Systems* will hold after the acquisition the legal and economic ownership of both the PRs and the IKEA Franchise Concept[116] and therefore will not owe any remuneration to any other parties for the use of the PRs.[117] The 2011 APA also states that the Loan will bear an "*objective interest […] which shall be set at the beginning at a fixed percentage of the principal*".[118]

(68) In relation to the price adjustment mechanism described in Recital (36), the 2011 APA stipulates that it may give rise - in case of an increase in the value of the PRs - to future payment obligations which are attributable to and accrue in previous years.[119] Therefore, the 2011 APA allows *Systems* to set aside tax provisions for the interest related to those future payment obligations. The tax provisions are justified based on the fact that, although these potential obligations will materialise only on 31 December 2013, "*the risk and the accumulation of the obligation has its origin in the first several years*".[120]

113 See 2011 APA, Section 2.
114 See 2011 APA, Section 15.
115 See 2011 APA, paragraph 1.2.
116 See 2011 APA, paragraphs 1.6 and 1.7.
117 See 2011 APA, paragraphs 1.9.
118 See 2011 APA, paragraph 1.13.
119 See 2011 APA, paragraph 1.15. Financing for future payment obligations will be provided by the same entity financing the initial price and will be limited to 60% of the price adjustment (paragraph 1.15).
120 See 2011 APA, paragraph 1.16.

4.2.1. Tax treatment of Systems

(69) The 2011 APA stipulates that *Systems* shall not depreciate the PRs during the life of the APA.[121] It also stipulates that the interest due on the Loan (respecting the 60/40 debt/equity-ratio set out in the Sale and Purchase Agreement) is considered to be at arm's length and can be deducted, no interest deduction limitations being applicable.[122]

(70) As regards the price adjustment mechanism, the provisions set aside will also be tax deductible.[123] The 2011 APA does not explain how these provisions are calculated.

4.2.2. Implementation of the 2011 APA

(71) As of 2012, the acquired PRs were booked on *Systems*' balance sheet as an intangible asset, with a value of EUR 9 billion. No amortisation has been recorded.[124]

(72) Table 2 below presents the revenue declared by *Systems* from 2012 to 2014, the taxable profit and the corporate income tax due according to the tax returns provided by the Netherlands:[125]

---

121 See 2011 APA, paragraph 1.5.

122 According to the 2011 APA, paragraph 4.5 "*no interest deduction limitation measures such as those included in the Act on Corporate Taxation of 1969 or elsewhere are applicable*" (see also paragraph 4.4). The Commission notes that at the time in which the 2011 APA was granted, the Dutch Corporate Income Tax Act 1969 contained a thin capitalisation rule in Article 10d. The rule potentially limited the deductibility of intercompany interest to the extent that it was due on "excess debt". Excess debt was defined as debt exceeding a debt-equity ratio of 3:1 with a minimum threshold for the excess debt of EUR 500.000. Optionally, the taxpayer could apply the debt-equity ratio of the group to which it belonged if that happened to be more favourable. In their letter of 17 November 2016 (Annex 2, response to question C(ii)) the Netherlands in addition stated the following: "*With regard to the financial ratio of 40 % equity and 60 % borrowed capital there is no available transfer-pricing or economic analysis. Nor do Dutch laws and regulations require this. Dutch legislation imposes no limits on interest deductions relating to financing with borrowed capital that does not pertain to the purchase of intangible assets. In this type of situation therefore there is no legal basis on which to enforce a specific ratio between equity and borrowed capital. The OECD guidelines do not address the issue of arm's length equity ratios either. On request, the legal, political and regulatory frameworks are used to determine in advance what share of the assets acquired is financed by either equity or borrowed capital, resulting in the deductible interest costs. This is how the tax authorities attempt to curb erosion of the tax base. However, the starting point remains that taxpayers are free to determine their own equity/borrowed capital ratio. In this case, INTER IKEA Systems BV opted for a financing strategy with 40 % equity, which the tax authorities do not regard as aggressive financing of the rights purchased.*" The Commission reserves the right to verify if the thin capitalisation rule contained in Article 10d Dutch Corporate Income Tax Act 1969 has been respected.

123 See 2011 APA, paragraph 3.2. Paragraph 4.6 further specifies that these provisions "*shall be deemed to be an expense to the extent that there is a reasonable amount of security that such charges will actually have to be paid*". Later, on the date in which the price adjustment mechanism goes into effect, the amount of these provisions shall be paid, after which the provisions will be released (paragraph 3.5).

124 In 2012, the total amount of fixed assets recorded in *Systems*' balance sheet was EUR 9,3 billion, of which EUR 9 billion was the PRs (see *Systems*' tax returns provided by the Netherlands with the letter of 24 May 2016).

125 Tax returns provided by letter of the Netherlands of 24 May 2016.

Table 2 - *Systems* revenue, taxable profit and tax due from 2012 to 2014 according to tax returns provided by the Netherlands

Figures in kEUR	2012	2013	2014
Revenue	[1.000.000 - 1.500.000]	[1.000.000 - 1.500.000]	[1.000.000 -1.500.000]
Taxable profit	[200.000 - 300.000]	[300.000 - 400.000]	[300.000 - 400.000]
Tax due	[40.000 - 50.000]	[50.000 - 60.000]	[50.000 - 60.000]

(73) The table reproduced in Figure 7 below shows how the taxable profit has been obtained for each of the years 2012 – 2014, in conformity with the 2011 APA, as provided by the Netherlands.[126]

Figure 7 - Items of Section 5 of the 2011 APA according to the Netherlands

	2012	2013	2014
Basis according to 1.18	[800.000.000 - 900.000.000]	[900.000.000 - 1.000.000.000]	[900.000.000 - 1.000.000.000]
Operating costs	[100.000.000 - 200.000.000]	[100.000.000 - 200.000.000]	[100.000.000 - 200.000.000]
Financing costs	324,000,000	324,000,000	324,000,000
Allocation to provision	[100.000.000 - 200.000.000]	[100.000.000 - 200.000.000]	[100.000.000 - 200.000.000]
Payment transfer functions	-[40.000.000 - 50.000.000]	-[20.000.000 - 30.000.000]	-[10.000.000- 20.000.000]
Profit contribution	[200.000.000 - 300.000.000]	[200.000.000 - 300.000.000]	[300.000.000 - 400.000.000]
Other income	[8.000.000- 9.000.000]	[7.000.000 - 8.000.000]	[8.000.000- 9.000.000]
Taxable profit	[200.000.000 - 300.000.000]	[300.000.000 - 400.000.000]	[300.000.000 - 400.000.000]
Corporation tax	[60.000.000 - 70.000.000]	[70.000.000 - 80.000.000]	[80.000.000- 90.000.000]
Transferable withholding	-[10.000.000 - 20.000.000]	-[20.000.000 - 30.000.000]	-[20.000.000 - -30.000.000]
Payable corporation tax	[40.000.000 - 50.000.000]	[50.000.000 - 60.000.000]	[60.000.000 - 70.000.000]

(74) The "basis" represents the franchise income, which is defined as franchise and license income plus net catalogue income minus marketing support contributions to franchisees.[127] In order to obtain the taxable profit, the basis is reduced by several costs items ("operating costs", "financing costs", "allocation to provision", "payment transfer

126 Letter of the Netherlands of 17 November 2016, Annex 2.
127 See 2011 APA, Article 1.18.

functions"). The "financing costs" of EUR 324 million represent the 6% per annum interest rate paid on the EUR 5.4 billion Loan for the acquisition of the beneficial ownership of the PRs. This amount is the same every year since the capital of the Loan is not amortised.[128] The "allocation to provision" constitutes the amount set aside for future financing costs resulting from the price adjustment mechanism.[129]

5. THE RELEVANT LEGAL AND REGULATORY FRAMEWORK

5.1. OECD Guidance on Transfer Pricing

(75) A transfer price is the price established for tax purposes at which, in a multinational group, associated enterprises transfer cross-border physical goods, intangible property or provide services among them. When independent companies (i.e. "non-integrated companies") transact with each other, the conditions of the transaction, including the price, is determined by market forces. By contrast, companies integrated in the same group ("associated or integrated 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.[130] This can lead to profit shifting from one jurisdiction to another.

(76) The Organisation for Economic Cooperation and Development ("OECD") has published guidance on taxation for its member countries and the determination of transfer prices for tax purposes.[131] Although that guidance is non-binding, OECD member countries are encouraged to follow the OECD's framework.[132] Moreover, the OECD's framework serves as a focal point and exerts a clear influence on the tax practices of OECD member (and even non-member) countries. Additionally, 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 framework in this Decision, it does so because that framework is the result of expert discussions in the context of the OECD and elaborates on techniques aimed to address common challenges in international taxation.[133.]

(77) According to Article 9(1) of the OECD Model Tax Convention on Income and on Capital: "*Where (…) conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which*

[128] This means that the 6% interest is calculated every year on the total amount of the Loan (EUR 5.4 million).

[129] "Payment transfer functions" refers to expenses initially contemplated only for four years (2012-2015) resulting from the transfer to *Systems* of certain functions previously performed by affiliated group companies. According to the Netherlands (letter of 24 May 2016), contrary to what had been assumed at the date of the 2011 APA, these functions were finally developed autonomously by *Systems*, without the need for any transfer. Consequently, as there was no ground for any remuneration, the deductions, according to the Netherlands, have been corrected (see also letter of 15 May 2017, Annex 3).

[130] See 1995 OECD TP Guidelines, paragraph 6 of the preface.

[131] The Netherlands is a member of the OECD since 1961.

[132] For example, see 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 .[...]*".

[133] See 2010 OECD TP Guidelines, paragraphs 6 and 7 of the preface. In the same sense, see paragraphs 6 and 7 of the 1995 OECD TP Guidelines.

would be made between independent enterprises, then any 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".[134] That provision is considered to lay down the arm's length principle for transfer pricing purposes in international taxation.

(78) 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.[135]

(79) Under most corporate income tax systems, including that of the Netherlands, the members of a group are treated and taxed as separate entities rather than as inseparable parts of a single unified business (the "separate entity approach"). To ensure the correct application of the separate entity approach, OECD member countries have adopted the arm's length principle. Pursuant to the arm`s length principle, OECD member countries have agreed that, for tax purposes, the profits of associated companies may be adjusted when the conditions of the commercial and financial relations in a given transaction between associated parties (the "controlled transaction") differ from those they would expect to find between independent enterprises in comparable transactions under comparable circumstances (i.e. in "comparable uncontrolled transactions").[136].This is the essence of the "arm's length principle".[137]

(80) 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 (hereafter "OECD TP Guidelines"). The latest version of the guidelines was published on 10 July 2017 (hereafter "2017 OECD TP Guidelines"). Previous versions of the OECD TP Guidelines were published in 2010 (hereafter "2010 OECD TP Guidelines") and 1995 (hereafter "1995 OECD TP Guidelines").[138]

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

135 See 2010 OECD TP Guidelines, paragraphs 1.8 *et seq*.

136 2010 OECD TP Guidelines, paragraph 1.3. In general, the domestic tax legislation of the OECD member countries allow the national tax administrations to adjust the tax base declared by associated companies where inappropriate transfer prices have been applied.

137 See 2010 OECD TP Guidelines, paragraph 1.6.

138 Later changes and additions to the commentaries and guidelines related to the OECD Model Tax Convention which do not lead to a change of wording of the OECD Model Tax Convention itself, are considered to be applicable to the interpretation of the articles set out herein. The rationale for this approach is that the OECD commentaries and guidelines, including the OECD TP Guidelines, are considered to capture the international consensus on the application of the principles set out in the OECD Model tax convention, see to this regard OECD Model Tax Convention Commentary, 2010, para. 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***

(81) 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 method[139]; (ii) the cost plus method[140]; (iii) the resale minus method[141]; (iv) the Transactional Net Margin Method (TNMM)[142]; and (v) the transactional profit split method[143]. The OECD TP Guidelines draw a distinction between traditional transaction methods (the first three methods) and transactional profit methods (the last two methods).[144]

***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**."* (Emphasis added).

139 The comparable uncontrolled price method is referred to as a direct transfer pricing method. It approximates the arm's length price of an intercompany transaction by reference to the price and the other conditions agreed in comparable uncontrolled transactions (i.e. transactions between non-associated companies) conducted under comparable circumstances. See 1995 OECD TP Guidelines paragraphs 2.6 and 2.7 and 2010 OECD TP Guidelines, paragraphs 2.13 and 2.14.

140 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.

141 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.

142 See Recital (82) *et seq*.

143 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.

144 For the selection of the most appropriate method the 2010 OECD TP Guidelines state, in paragraph 2.3, that "*Traditional 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*". In the same sense, see paragraph 2.49 of the 1995 OECD TP Guidelines.

(82) TNMM is one of the "indirect methods" to approximate an arm's length pricing of a controlled transaction. It establishes the net profit indicator (or profit level indicator)[145] of the taxpayer from the controlled transaction at stake by reference to the same net profit indicator in comparable uncontrolled transactions.

(83) 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 study is the less complex of the two related parties involved, i.e. the entity that performs simple functions and does not make any valuable, unique contribution in relation to the controlled transaction.[146] This is because the less complex party is the one for which the most reliable comparables can be found.[147] In other words, it will not be feasible for complex entities adding unique and valuable contributions to the transaction to find reliable comparables.[148] For this reason, the OECD TP Guidelines indicate that this method is suitable "*in cases where one of the parties makes all the unique contributions involved in the controlled transaction, while the other party does not make any unique contribution"*. Vice versa, this method is not appropriate *"if each party to a transaction makes valuable, unique contributions […] In such a case, a transactional profit split method will generally be the most appropriate method"*.[149] The choice of the less complex entity will be determined on the basis of what is called 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. If a company has routine (i.e. benchmarkable) functions and assets, assumes low risks and therefore does not make any valuable and unique contribution to the controlled transaction, it will normally be considered the less complex entity.

---

145 A "net profit indicator", also called "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.

146 See 2010 OECD TP Guidelines, paragraph 3.19. According to paragraph 3.43 of the 1995 OECD TP Guidelines, "*[t]his will often entail selecting the associated enterprise that is the least complex of the enterprises involved in the controlled transaction* ***and that does not own valuable intangible property or unique assets***" (emphasis added).

147 2010 OECD TP Guidelines, paragraph 3.18. See also 1995 OECD TP Guidelines, paragraph 3.43

148 Indeed, a complex entity which makes unique contributions does not satisfy the comparability standard requirements for applying the TNMM through a benchmark analysis in a commercial database. Such a benchmark analysis for an entity adding unique and valuable contributions to a transaction would by definition not be reliable because those distinctive features (i.e. its valuable and unique contributions to the intercompany transaction) cannot be found in other companies. In other words, comparables for such contributions are seldom found because they are a key source of economic advantage. The fact that the less complex entity should be used as a tested party in the TNMM is indicated in the 1995 and 2010 OECD TP Guidelines.

149 See 2010 OECD TP Guidelines, paragraph 2.59. See also paragraph 3.43 of the 1995 OECD TP Guidelines for similar reference.

(84) 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).[150] The more complex entity, by virtue of its non-routine (i.e. unique and valuable) contributions, should by definition be entitled to the excess return from the combined transactions after the less complex and routine functions' entity has been remunerated through the TNMM. This is so also because the more complex entity bears the risk of a loss in case the combined transactions did not generate a profit.

5.2. Description of the relevant national legal framework

(85) *Systems* tax liability in the Netherlands is determined on the basis of the Netherlands Corporation Tax Act 1969 *(Wet op de Vennootschapsbelasting 1969)* (hereafter "CIT").

(86) According to Article 2 CIT, companies established in the Netherlands, like *Systems*, are resident taxpayers. According to Article 7 CIT, 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,[151] which also applies to corporate taxpayers by virtue of Article 8 CIT, profit is the amount of collective benefits (positive and negative) derived from the enterprise. Pursuant to Article 3.25 of the Income Tax Act 2001 (*Wet inkomstenbelasting 2001*), which also applies to corporate taxpayers by virtue of Article 8 CIT, a taxpayer's annual profit must be determined on the basis of the sound business principle (*goed koopmansgebruik*).[152] This principle refers to the reasonable and consistent allocation of costs and income to the year to which they relate.

(87) Article 8b(1) CIT, which was inserted into the CIT in January 2002, lays down the arm's length principle in the domestic tax law of the Netherlands and reads as follow: "*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) into the CIT, the arm's length principle was already considered to apply in Dutch corporate tax law as flowing from the total profit concept.[153] The arm's length

---

150 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.

151 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.*"

152 Article 3.25 of the Income Tax Act 2001 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.*"

153 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-*

principle was only codified into Article 8b(1) CIT to remove any uncertainty foreign investors might have had about the applicability of that principle in Dutch corporate tax law.[154]

(88) Guidance as to how the Dutch tax administration interprets the arm's length principle laid down in Article 8b(1) CIT is provided in the Dutch Transfer Pricing Decree of 30 March 2001 (hereafter "the Decree").[155] The preamble to the Decree states 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.[156] 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*".

(89) With regard to the transfer pricing methods, under Chapter 2, the Decree states 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*

]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 bezien 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 Decree that implements the OECD's arm's length principle into Dutch tax law. In its introduction, the 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 of the Income Tax Act 2001.*"

154 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 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*").

155 Transfer Pricing Decree 2001 (*Besluit verrekenprijzen*) of 30 March 2001, IFZ2001/295M. The Decree was replaced in 2013 (together with the Decree of 21 August 2004, IFZ 2004/680M which supplemented the 2001 Decree and amended it with respect to certain points). However, the 2004 Decree is not relevant in this case) by the Decree of 14 November 2013, IFZ 2013/184M, International Tax Law. Transfer pricing method, application of the arm's length principle and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. As the two APAs date from 2006 and 2011, the Decision will refer to the 2001 Transfer Pricing Decree.

156 Footnote added by the Commission. As in 2001 article 8b was not yet codified in the CIT, transfer pricing adjustments, both for personal as for corporate income tax purposes, were made based on Article 3.8 of the Income Tax Act 2001 (which through article 8 CIT also applied to corporate taxpayers).

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 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."

(90) Under Chapter 2.5 of the Decree, the TNMM method is described and refers to the relevant paragraphs in the 1995 OECD TP Guidelines for further explanations.

(91) The Dutch tax authorities[157] explained that, under Dutch tax law, the rules for forming a provision or for making additions to a provision in a tax year are based on the general *sound business principle*. Based on case-law of the Dutch Supreme Court interpreting this principle,[158] a tax deductible allocation to a provision in a tax year for (tax deductible) expenses made after the end of that year is allowed, provided three cumulative criteria are met:

157 Letter of the Netherlands of 15 May 2017, Annex 3, response to question A.17. iii.
158 See Hoge Raad 26 August 1998, nr 33417 (ECLI:NL:HR:1998:AA2555).

- The expenses are caused by facts and circumstances preceding the balance sheet date;
- The expenses are also allocable to that preceding period; and
- It is reasonably certain that the future expenses will be made.

6. POSITION OF THE NETHERLANDS

(92) In its letter of 15 May 2017, the Netherlands submitted its position in relation to the arm's length nature of the remuneration for *Systems*' activities and to the qualification of *Systems* as a routine entity. According to the Netherlands, *Systems* made "*absolutely no contribution to the IKEA brand and (franchise) concept before 1983*". The most important core values and value drivers of the brand and concept were developed over the preceding forty years (1943-1982). After 1983, the founder of IKEA continued to play a prominent role in maintaining and improving the brand and concept and this activity took place outside the Netherlands. The Netherlands considers that the TP Report correctly stated that *Systems* was never the owner of the PRs and that 95% or more of the economic risks did not affect *Systems*.

(93) The Netherlands argues that according to Dutch legislation and regulations based on the OECD TP Guidelines in force in 2006, the arm's length nature of the remuneration of *Systems* was established on the basis of the functions performed in the Netherlands, the assets used and the associated risks and that this complied with the OECD TP Guidelines in force at the time and was consistent with standard transfer pricing practice. These were identified on the basis of research, prior consultation and information supplied by *Systems* (including the TP Report). It was repeatedly stated by *Systems*, and confirmed by the Dutch authorities in their investigations leading to the APAs that these were "important, routine functions".

(94) The Netherlands considers that APAs are consistent with Dutch legislation and regulations in force at the time, based on the OECD TP Guidelines and TP practice as applied to all undertakings subject to Dutch corporation tax. The Netherlands claims that no specific exceptions were made and/or granted for *Systems*. Therefore, the Netherlands conclude that no selective tax advantage has been granted to *Systems* which could be qualified as State aid.

(95) In relation to the price paid for the PRs and the assumption that the IKEA Franchise Concept had no value, the Netherlands explains that prior to 2012, *Systems* did not own the PRs. These rights had not been created by *Systems*, nor were they partially or entirely transferred to this entity before 2012. *Systems* was allowed to use these intangible fixed assets under the Licence Agreement concluded with *Holding*. *Systems* was thus given the opportunity to exploit the PRs within the framework of a franchise concept. According to the Netherlands, without access to the PRs, *Systems* would have not been able to perform its franchise activities. Up until 2006, in the event of the Licence Agreement not being renewed, *Systems* had absolutely no right to any compensation for termination. It was only from 2006 onwards that *Systems* obtained a contractual right to receive compensation up to a maximum of the termination costs if the Licence Agreement was not renewed. This limited compensation would be in line, according to the Netherlands, with Dutch civil law. In its response, the Netherlands

identifies one specific case,[159] in which no compensation for loss of profits was granted to the distributor after the agreement allowing the use of the brand was terminated.[160]

(96) According to the Netherlands, without access to the PRs, the activities of *Systems* and the IKEA Franchise Concept would have little or no value. This would also support the conclusion that the activities of *Systems* were of a routine nature. The Netherlands therefore concludes that the legal and economic reality is that the "management" of *Systems* had little or no independent value. As a consequence, *Systems* had no right to (part of) the value of the PRs. This would be in line with the OECD arm's length principle applied by the Netherlands. The Netherlands then points to various cases involving independent third parties in which the legal owner of a right does not renew a licence and takes over the exploitation of that right itself, or grants a licence to another party, without the former licensee being entitled to part of the value of the intangible asset, the company value or compensation for loss of profit. In the present case, as *Systems* could be replaced by *Holding*, it ran the risk of the contract being terminated or not renewed if, for example, (i) performance was inadequate, (ii) the brand owner's instructions were not followed, and (iii) the compensation it demanded from the licensor for its activities was too high. In this case, an independent licensor would choose another, cheaper option, to replace *Systems*. In the Netherlands' view, the fact that in 1990 the brand owner imposed on *Systems* the requirement to open the Delft test store shows that this scenario is not entirely fictitious and would show the decision power exercised by *Holding*.[161] If *Systems* had failed to comply, it would have lost its access to the PRs, with all the negative consequences that this would have entailed.

(97) The Netherlands indicates that the PRs are valuable intangible assets given the success of the furniture stores worldwide and the increasing revenue flows they produce in the form of a franchise fee. The fact that *Systems* already owned the IKEA Franchise Concept does not detract from the value of the PRs. The initial valuation of the PRs at EUR 9 billion must be viewed in conjunction with the price adjustment mechanism. Without this mechanism, it is safe to assume that the seller would have preferred to translate the positive expectation of future profits into a higher price. The Loan involved in the purchase of the rights (60% of the initial valuation) and the accompanying terms and conditions were assessed by the Dutch authorities and accepted as arm's length. In addition, the size of the debt, at 60% of the purchase price of the rights is reasonable in business terms.

(98) Since no specific exceptions were made and/or granted to *Systems*, the Netherlands is of the view that in this case no selective tax advantage has been granted to *Systems* which could be qualified as State aid.

(99) Finally, in relation to the price adjustment mechanism, the Netherlands considers that the provisions which have been set up and deducted pursuant to this mechanism are consistent with Dutch legislation and regulations, the OECD Transfer Pricing Guidelines and economic reality, since the potential additional payment(s) due as a

---

159 Judgment of the Supreme Court of 21 June 1991, *Mattel-Borka* (ECLI:NL:HR:1991:ZC0291).

160 The Netherlands also submitted an annex containing a summary of a case concerning the company Absolute Vodka in which, apparently, no compensation for loss of profits after contract period was granted or agreed. However, no court reference has been provided for this case.

161 See also letter of the Netherlands of 11 September 2017, Annex 1, footnote 6.

result of the price adjustment mechanism is caused by higher profits realised over preceding years. The Netherlands also indicate that they did not dispute the deductibility of the provision because it was of no fiscal relevance. Assuming that *Systems* had the option to form a provision or depreciate on the PRs, since the annual allocation to the provision (and the corresponding cost) is lower than the potential depreciation of the PRs acquired, the taxable profit declared would in any case be higher than it would have been if these rights were depreciated. In particular the Netherlands explain that the allocation to the provision was EUR 135 million in 2012, EUR 133 million in 2013 and EUR 144 million in 2014. Applying a depreciation term of 45 years to the value of the PRs (EUR 9 billion) would have resulted in annual depreciation costs of EUR 200 million, which exceeds the allocation to the provision. As a consequence, the Netherlands concludes that there was no fiscal interest in contesting the provisions. Therefore, the Netherlands considers that the setting up of the provision in *Systems*' balance sheet and the corresponding deduction is in line with Dutch legislation and regulations and cannot lead to a selective advantage which could be qualified as State aid.[162]

7. ASSESSMENT OF THE CONTESTED MEASURES

7.1. Existence of aid

(100) According to Article 107(1) of the Treaty, 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.

(101) According to settled case-law, for a measure to be categorised as aid within the meaning of Article 107(1), all the conditions set out in that provision must be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition.[163]

(102) As regards the first condition, both the 2006 and 2011 APAs were issued by the Dutch tax administration, which is an organ of the Netherlands. Those rulings entailed an acceptance by that administration of transfer pricing arrangements which enabled *Systems* to assess its corporate income tax liability in the Netherlands on an annual basis during the periods covered by the respective APAs. *Systems* subsequently prepared its annual corporate income tax declaration on the basis of the provisions of the APAs, which were accepted by the Dutch tax administration as corresponding to *Systems*' corporate income tax liability in the Netherlands. Moreover, both APAs contain a clause whereby the Dutch tax administration waives the possibility of including in assessments or appeals in relation to *Systems*' tax returns any positions or arguments which differ

[162] Other more specific observations submitted by the Netherlands in the letter of 15 May 2017 and in previous correspondence with the Commission are addressed in section 7.2.
[163] Joined Cases C-20/15 P *Commission* v *World Duty Free* EU:C:2016:981, paragraph 53 and the case-law cited.

from the provisions of the APAs.[164] The contested measures are therefore imputable to the Netherlands.

(103) As regards the measure's financing 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.[165] At this stage, the Commission considers that the 2006 and 2011 APAs have resulted in a lowering of *Systems*' corporate income tax liability in the Netherlands as compared to similarly situated corporate taxpayers. Consequently, by renouncing to tax revenue that the Netherlands would have otherwise been entitled to collect from *Systems*, the Commission provisionally concludes that the contested measures should be considered to give rise to a loss of State resources.

(104) As regards the second condition for a finding of aid, *Systems* is part of Inter IKEA, a multinational group operating in several Member States. *Systems* operates a business which develops and franchises marketing systems for the retail sale of furniture, home furnishing and related products. Franchise rights are granted to companies in different Member States and the intermediary services rendered to franchisees and the products sold to final customers are subject to trade between Member States. Therefore, any State intervention in *Systems*' favour is liable to affect intra-Union trade,[166] so that the Commission provisionally concludes that the second condition for a finding of State aid has been met.

(105) 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.[167] To the extent the contested measures relieve *Systems* of corporate taxes it would otherwise have been obliged to pay, the aid granted as a result of those APAs constitutes operating aid, in that it relieves *Systems* from a charge that it would have normally had to bear in its day-to-day management or normal activities. The Court of Justice has consistently held that operating aid distorts competition,[168] so that any aid granted to any company of Inter IKEA should be considered to distort or threaten to distort competition by strengthening its financial position 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 measures.

(106) As regards the third condition for a finding of aid, the granting of a selective advantage, the function of an APA is to determine, in advance and for a set period of time, an

---

164 See clauses 11 of the 2006 APA and of the 2011 APA.

165 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.

166 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.

167 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.

168 Case C-172/03 *Heiser* EU:C:2005:130, paragraph 55. 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-156/98 *Germany* v *Commission* EU:C:2000:467, paragraph 30, and the case-law cited.

appropriate set of criteria for calculating the arm's length value of certain controlled transactions. In doing so, an APA establishes in advance the application of the ordinary tax system to a particular controlled transaction in view of its specific facts and circumstances, which in turn will enable the taxpayer to determine its corporate income tax liability during the relevant period. However, like any other fiscal measure, an APA must respect the State aid rules. Where an APA endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, without justification, that APA will confer a selective advantage on its addressee in so far as that selective treatment results in a lowering of that taxpayer's tax liability in the Member State as compared to companies in a similar factual and legal situation. At the present stage, the Commission considers that the tax treatment granted by the 2006 and 2011 APAs have resulted in lowering *Systems*' corporate income tax liability in the Netherlands as compared to Dutch corporate taxpayers in a comparable factual and legal situation, thereby giving rise to a selective advantage.

(107) In Section 7.2, the Commission will explain why it considers at this stage that the 2006 and 2011 APAs appear to confer an economic advantage on *Systems* by endorsing a transfer pricing arrangement that produces an outcome that departs from a reliable approximation of a market-based outcome in line with the arm's length principle.

(108) In Section 7.3, the Commission will explain why it considers, at this stage, that that advantage is selective in nature. First and foremost, the Commission provisionally concludes that the advantage granted by the 2006 and 2011 APAs is selective in nature because those APAs are individual measures granted only to *Systems*. According to settled case-law, in the case of an individual measure, like the contested APAs, "*the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective*",[169] without it being necessary to analyse the selectivity of the measure according to the three-step selectivity analysis devised by the Court of Justice for State aid schemes.[170] Nevertheless, for the sake of completeness, the Commission will also demonstrate why it provisionally considers the contested APAs to be selective in nature under the three-step selectivity analysis developed by the Court of Justice for aid schemes.

7.2. Advantage

(109) 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) of the Treaty.[171] In establishing the existence of an advantage, reference is to be made to the effect of the measure itself.[172] As regards fiscal measures, an advantage may be granted through

---

169 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 and Case C-270/15 P *Belgium v Commission* EU:C:2016:489, paragraph 49.

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

171 Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke EU:C:2001:598, paragraph 41.

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

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.[173]

(110) 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.*"[174] In other words, an APA 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, in so far as it results in a reduction of the company's taxable profit under the ordinary corporate income tax system that does not reflect a reliable approximation of a market-based outcome.

(111) It is the Commission's provisional view that the contested APAs endorsed transfer prices that do not resemble prices which would be charged between independent undertakings negotiating under comparable circumstances at arm's length. As explained in Recital (87), the principle that associated group companies should price their intra-group transactions at arm's length is inherent in the general Dutch corporate income tax system. Consequently, it is the Commission's provisional view that the contested APAs conferred an economic advantage to *Systems* for the purposes of Article 107(1) of the Treaty by enabling that undertaking to reduce its annual taxable profit for corporate income tax purposes in the Netherlands

7.2.1. The 2006 APA

(112) The Commission considers at this stage that the 2006 APA may have granted an advantage to *Systems* since it results in a reduction of that company's corporate income tax liability in the Netherlands which does not seem to reflect a reliable approximation of a market-based outcome in line with the arm's length principle. In fact, the 2006 APA appears to enable *Systems* to employ transfer prices in its intra-group transactions with *Holding*[175] that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length.

(113) The Commission's provisional conclusion is based on two lines of reasoning. First, the Commission considers that when applying the TNMM, the 2006 APA may have improperly considered *Systems* as the less complex entity and as the tested party. Second, even if *Systems* had been correctly identified as the tested party, the application of the TNMM endorsed by the 2006 APA appears to contain certain methodological

[173] 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. See also point 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ C 384, of 10.12.98, p. 3.

[174] See Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* EU:C:2005:266, para. 95.

[175] All references made to *Holding* throughout Section 7.2.1 are considered to be applicable to *Largo* for the tax years 2010 and 2011, when *Largo* replaced *Holding* in relation to the provisions of the 2006 APA.

mistakes. These two lines of reasoning are explained in subsections 7.2.1.1 and 7.2.1.2 respectively.

7.2.1.1. The Commission has doubts that *Systems* was correctly considered as the less complex entity for the purposes of applying the TNMM

(114) The Commission considers at this stage that the 2006 APA endorses the application of the TNMM based on an incorrect assumption that *Systems* is an entity performing simple functions, assuming low risk and not adding any valuable and unique contribution to the transaction with *Holding*. As a consequence of applying the TNMM to *Systems* as tested party, the 2006 APA attributes this company an operating profit (i.e. identified as net profit in the OECD TP Guidelines) which corresponds to a minor (i.e. routine) portion of the combined net profits arising from the controlled transaction in which the associated enterprises are engaged, whereas the residual profit is attributed to *Holding* as a remuneration for the license (for transfer pricing purposes).[176] The Commission considers at this stage that this conclusion ignores the economic reality of the relationship between *Systems* and *Holding* and therefore deviates from the arm's length principle.

(115) Following the logic of the 2006 APA, in order to determine whether the licence granted by *Holding* to *Systems* has been priced at arm's length, the Commission will analyse whether the operating profit allocated to *Systems* by the 2006 APA, equivalent to "*an operating margin of 5% of the franchise and service revenue"*,[177] reflects a reliable approximation of a market-based outcome in line with the arm’s length principle. This analysis should be based, in line with OECD TP Guidelines, on an analysis of the functions performed, the risks assumed and the assets used by each of the parties (a functional analysis).[178]

(116) The Commission notes at the outset that, under the OECD framework, the less complex party is considered to be the entity that performs simple functions and that does not add any unique and valuable contribution to the controlled transaction[179] or, in other words, the entity which performs “'*benchmarkable' functions (e.g. manufacturing, distribution, services for which comparables exist) and does not make any valuable, unique contribution (in particular does not contribute a unique, valuable intangible)*".[180] This statement seems difficult to reconcile with *Systems*' role as owner, creator and developer

176 When 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 *Systems* to *Holding* corresponds to *System's* franchise income minus *System*'s operating profit calculated according to the APA, minus *System*'s other operating costs. The license fee allegedly at arm's length should therefore be equal to the license fee agreed in the License Agreement and recorded in the commercial accounts plus the informal capital.

177 2006 APA, paragraph 3.5.

178 See 2010 TP OECD Guidelines, paragraph 1.42: "*In transactions between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed). Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, a functional analysis is necessary. This functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions*". In the same sense, see paragraphs 1.21, 1.22 and 1.23 of the 1995 OECD TP Guidelines.

179 See 2010 OECD TP Guidelines, paragraph 3.19 and paragraph 3.43 of the 1995 OECD TP Guidelines

180 OECD Paper "Transfer Pricing Methods", July 2010, paragraph 58.

of an intangible like the IKEA Franchise Concept, which is defined in the 2006 APA as a "*unique marketing and retail concept"*[181] and which, according to the Netherlands, "*consists of a distinctive and unique combination"* of a wide array of elements such as "*design, interior and outdoor accessories, corporate systems and methods (including systems for the sale of food and beverages), corporate standards, advertising and marketing techniques (including the IKEA catalogue and the IKEA website), client clubs, digital components, and applications that support the roll-out of retail trade systems*".[182] The creation, development and management of know-how of this complexity, as well as its implementation and transmission to the franchisees appears to be a valuable and unique contribution in relation to the controlled transaction that could not be easily benchmarked in the market.

(117) The Commission has analysed the functions performed, risks assumed and assets owned by *Systems* and *Holding* to generate the combined profit made by the franchising of the IKEA Franchise Concept based on the PRs (hereafter the "franchise business"). The preliminary functional analysis conducted by the Commission supports the conclusion that *Systems* adds a valuable contribution to this business. This would mean that *Systems* would have been incorrectly selected as the tested party in the 2006 APA under the TNMM application, thereby affecting the allocation of (and in particular lowering) the profits relevant to establish *Systems'* tax burden in the Netherlands. The Commission's functional analysis is set out in the following paragraphs.

Analysis of functions

(118) *Systems* performs the following categories of functions, which will be analysed separately: (i) creation, development and maintenance of the IKEA Franchise Concept, as well as maintenance of the PRs; (ii) management of the franchise contracts, coordination and bundling of services rendered by third parties; and (iii) catalogue operations.[183] For the development of these functions, *Systems* employed in 2015 almost 1000 FTEs.[184] By contrast, according to the Netherlands, *Holding* does not have any employees beyond the three members of the board of directors.[185]

(i) Creation, development and maintenance of the IKEA Franchise Concept and of the PRs

(119) The creation, development and maintenance the IKEA Franchise Concept consists of the administration, maintenance and improvement of the IKEA Franchise Concept and includes marketing research and concept improvement, testing and training, and concept documentation.[186]

---

181 2006 APA, paragraph 1.4. The same or similar definitions appear in the Licence Agreement (Recital 5) and the 2011 APA, paragraph 1.7.

182 See Letter of the Netherlands of 15 May 2017, Annex 1 and response to question A.6 in Annex 2.

183 This categorisation of the functions performed by *Systems* is based on the TP Report (see Section 4.1.).

184 See Recital (21). Almost half of these FTEs were employed at the Delft test store.

185 Letter of the Netherlands of 15 May 2017, Annex 3, response to question B.5.i.

186 See TP Report, Section 4.3.1. The description of these functions provided by the TP Report is as follows: "Marketing research and concept improvement" includes the performing of marketing and consumer surveys which are used to adjust and improve the IKEA Franchise Concept including, for instance, changes to the architectural layout of the IKEA stores. It also includes changes in range presentations or

(120) The Licence Agreement[187] and Letters of Understanding[188] expressly indicate that the IKEA Franchise Concept was created by *Systems*, which is its legal and economic owner. The development of this intangible requires a wide range of functions, such as development of new ideas, products and layouts, design of products, definition of product ranges, experimentation of new ideas and sampling of products in the test store in Delft,[189] market research, training to franchisees (managers and staff) on marketing techniques and on the implementation of the IKEA Franchise Concept, preparation and improvement of documents and other support media, including manuals for franchisees on the conceptualisation of the IKEA Franchise Concept.[190] The Commission at this stage considers that the creation, development and implementation of such a complex intangible through the performance of such a wide array of functions constitutes a unique and valuable contribution to the franchise business.

(121) Moreover, from the information provided, it seems that in the performance of these functions *Systems* acted independently. In fact, *Holding*'s involvement in the management of the franchise business appears to be, *a priori*, rather limited. It is true that in order to develop and exploit the IKEA Franchise Concept, *Systems* needs the PRs which are owned by *Holding*. However, besides a generic obligation imposed on *Systems* to use the PRs in compliance with its "directives", the Licence Agreement assigns no specific role or obligation to *Holding* in relation with the management, development, enhancement or exploitation of the PRs or of the IKEA Franchise Concept.

(122) Even though the legal owner of the PRs appears to be *Holding*, the Commission considers at this stage that *Systems* was also responsible for adopting the decisions regarding the maintenance, enhancement and protection of those rights and assumed the relative costs.

(123) *Systems* seems to be the responsible party for the legal protection of the PRs. According to article 1.3 of the 2006 APA, *Systems* is responsible for safeguarding the integrity of these rights (including legal action on breaches of trademark rights and the like). The Licence Agreement and Letters of Understanding confirm that *Systems* is authorised to

---

in sale methods or analyses and development of new ideas which can be suggested by franchisees, as well as the testing of these ideas at the test store in Delft before its incorporation to the IKEA Franchise Concept (Section 4.3.1.1). "Testing and training" consists of the test and sampling of new products, which takes place at the test store in Delft, as well as training to and education of management and staff of the franchisees at the IKEA Business College (section 4.3.1.2.). "Concept documentation" includes the development of documents related to the IKEA Franchise Concept and manuals for the staff (section 4.3.1.3).

187 Licence Agreement, Recital 5.

188 See in particular the supplementary agreement of 30 August 2006 between *Systems* and *Holding*, recitals b and c.

189 The purpose of the test store is "*demonstrating that all parts of THE IKEA FRANCHISE CONCEPT are fully operative and that any adjustments of THE IKEA FRANCHISE CONCEPT are tested in practice before implementation*" (see Supplementary Agreement 15 November 1990, paragraph I.a).

190 See footnote 186.
According to Inter IKEA website (http://franchisor.ikea.com/a-home-for-the-ikea-concept/), the Concept Centre is where "*new solutions are developed, documented and analysed from a conceptual viewpoint*". Also, in the Concept Centre *Systems* provides "*systematic transfer of IKEA know-how [and] communicate[s] proven solutions to all IKEA retailers, so that each and every one can benefit from these in their business*".

register the PRs.[191] The Netherlands has not submitted any evidence demonstrating any role by *Holding* in the adoption of decisions concerning the legal protection of the PRs. On the contrary, the minutes of the meetings held between *Systems* and *Largo* on 20 October 2010, 24 March 2011 and 19 October 2011[192] show that *Systems* adopted the decisions concerning the legal protection of the PRs and of the IKEA Franchise Concept and informed *Largo* on an *ex post facto* basis.[193]

(124) Moreover, *Systems* seems to be the entity that bears the costs related to the PRs. It is true that, according to the Cost split Letter, the costs relating to the PRs were incurred by *Systems* on behalf of *Holding* and were to be reimbursed by the latter.[194] However, the clarifications provided by the Netherlands in its letter of 15 May 2017[195] as well as the actual conduct of the parties seem to indicate that the costs related to the PRs were in fact borne by *Systems*. This issue is addressed in detail in recitals (146) and following.

(125) The Commission at this stage considers that all this confirms that *Systems* performed unique and valuable contributions to the franchise business.

(ii) Management of relationships with franchisees and with third party providers

(126) The management of relationships with franchisees and with third party providers includes the following functions: "maintaining client relationships", "communication", "sales support", "management of outsourced services" and "general services".[196] These functions relate to the provision and coordination of different services to ensure the

[191] See Recital (24). See Licence Agreement, clause II.b); Letter of understanding of November 1998, paragraphs. 2 and 3; and letter from the Netherlands of 15 May 2017, Annex 1.

[192] Provided by the Netherlands on 10 April 2017.

[193] See minutes of the meeting of 20 October 2010, section 5.1010; minutes of the meeting of 24 March 2011, section 5.0311; minutes of the meeting of 19 October 2011, section 5.0311. In particular, section 5.031 in the last two minutes specifically mention manuals and handbooks prepared by *Systems* in relation to the use of the PRs. In this respect, the protection of the trademark is considered a key driver to the creation of intangible value (see chapter VI of the 2017 OECD TP Guidelines, which incorporated the 2015 Final Report "Aligning Transfer Pricing Outcomes with Value Creation", Actions 8-10, OECD/G20 Base Erosion and Profit Shifting Project)

[194] See Recital (25).

[195] Letter of the Netherlands of 15 May 2017, Annex 3, response to question A.15.

[196] See TP Report (section 4.2.1). The description of these functions provided by the TP Report is as follows: "maintaining client relationships" includes the establishment and maintenance of relationships with franchisees worldwide - including potential franchisees -, management of relationships with other parties providing services to franchisees and "*securing the proper positioning and market penetration on the individual markets*" (section 4.2.1.1). "Communication" includes the management of the information flows with franchises as regards, in particular, the enforcement of new elements of the IKEA Franchisee Concept (section 4.2.2.2). "Sales support" includes services to franchisees such as consultancy services for implementation of the IKEA Franchise Concept, mainly in relation to the starting and remodelling of IKEA stores (section 4.2.1.3). "Management of outsourced services" include the collection of all services necessary to manage client relationships and the franchise contracts. The services provided by other related parties of the Inter IKEA group include protection of PRs, store design, project support, marketing services, etc. (section 4.2.1.4; see also footnote 71). "General management" means the provision of services such as finance, administration or IT (section 4.2.1.5). According to the TP Report, *Systems* also collects the franchise fees from franchisees and manages new franchisee applications, assessing the adequacy of applicants and signing the franchise contracts (section 4.2.1. *in fine*).

management of the stores and more in general the development and growth of the franchise business.

(127) In its letter of 15 May 2017, the Netherlands identified what are, in its view, the "*essential functions*" to "*give shape, supervise, maintain and improve*" the basic principles on which the IKEA business is based: "*(a) the conception and design of products; (b) purchasing, production and logistics […]; (c) the award of franchise contracts (choice of location); [and] (d) marketing strategy*"[197]. As explained in Recitals (124) to (127), *Systems* has a pivotal role in the franchise business.

(128) As regards the conception and design of products, the Netherlands confirms that before 1983 this function was performed internally, but that after that date it was allocated to IKEA of Sweden AB, an entity of the INGKA group. According to the Netherlands, *Systems* "*bears ultimate responsibility for the product range*" and "*this responsibility is usually delegated to Ikea of Sweden, which until 2016 belonged to Ingka Group*. *For example, regarding the inclusion of a particular colour for a small cup the power of decision will lie with Ikea of Sweden. But when it has to be decided whether to include the design of a new kitchen line in the product range, the decision will be taken by [Systems] itself, within the framework established by I.I. Holding SA/Largo Brands Corporation AVV*."[198] The Netherlands also clarifies that "*responsibility for the inclusion of newly designed products in the product range lies with Inter Ikea Systems BV*".[199]

(129) The analysis of the documents provided by the Netherlands[200] shows no involvement by *Holding* or any other Inter IKEA company besides *Systems* in the execution of this role. This is expressly confirmed by the Netherlands in its letter of 15 May 2017, when it acknowledges that "*[o]nly Ikea of Sweden AB has anything to do with determining and developing the products and product range*" and that "*[t]here is no involvement of any other entity, except that [Systems] checks that the products remain with the limits of the product range*".[201] Furthermore, it is not clear what is meant by the "*framework established by I.I. Holding SA/Largo Brands Corporation AVV*".

(130) Therefore, from the information provided it seems that *Systems* had the final decision power - and therefore the control over the business risk – in relation to the conception

---

197 See letter of 15 May 2017, Annex 3, response to question A.5.i.

198 In this regard, the Netherlands has provided copy of a Product Range Assignment Agreement signed on 30 March 2012 by *Systems* and IKEA of Sweden AB. No prior versions of this agreement have been provided to the Commission. Under this agreement, *Systems* assigns IKEA of Sweden to establish and provide the IKEA product range and to develop products to be included in the product range, as well as to develop the relevant presentation and communication content and packaging solutions (clauses 1.1, 1.6, 1.7, 3.1). Such products shall bear the IKEA trademark so that they can be sold in IKEA stores, "*only as long as […] in [Systems]' judgment, [they] fulfil the standards, specifications and instructions set by [Systems]*" (clause 4.1). All products shall be given the designation "*Design & Quality IKEA of Sweden*" (clause 4.2). IKEA shall approve the products before they are incorporated in the product range (clause 5.3).

199 See letter of 15 May 2017, Annex 3.

200 The Product Range Assignment Agreement specifies that is for *Systems* to give specifications and instructions to IKEA of Sweden AB (clause 4.1) and to approve the products included in the range (clause 5.3).

201 See letter of 15 May 2017, Annex 3.

and design of products and the definition of the product range. Moreover, since the other entity involved in this function (IKEA of Sweden AB) is an independent party, which by definition is remunerated at arm's length, it plays no role in the creation of value within Inter IKEA.

(131) As regards the purchasing and supply, the Netherlands claims in its letter of 15 May 2017 that *Systems* plays no role in these functions. However, the contracts provided by the Netherlands do not support this statement. On the contrary, these contracts show that *Systems* entrusted to a company of the INGKA Group (IKEA Supply AG) the right to purchase IKEA products from certain independent producers (designated by *Systems*)[202] so that they would be supplied to IKEA shops. This company shall perform its functions in accordance with the instructions given by *Systems*.[203]

(132) As to the identification and approval of potential franchisees, the Netherlands argues that, prior to 2012, "*responsibility for the requirements to be met and for decision-making lay with [Holding/Largo]*".[204] In its letter of 17 November 2016, the Netherlands indicated that *Holding* and *Largo* "*had the final power of decision on the approval of the franchisees. The senior executives had the decisive vote or veto on proposed decisions by [Systems] on granting new franchise agreements for new franchisees or entering new markets*".[205] In the same letter, the Netherlands stated that the choice of new locations, markets and franchisees was the "*exclusive prerogative of the licensor*", represented by senior executives outside the Netherlands.[206] Finally, in its letter of 5 May 2017, the Netherlands clarifies that the 1983 Licence Agreement "*was concluded only in respect of certain countries […]. It follows that new countries are not covered by the license unless expressly agreed*."

(133) The Commission at this stage raises doubts regarding these statements. The scope of the Licence Agreement is indeed limited to certain countries mentioned in an appendix,[207] which means that the extension to additional countries requires, as an amendment to the Licence Agreement, the consent of both parties.[208] In the Commission's view, this cannot be interpreted as a "*decisive vote*", *a* "*veto*" or an "*exclusive prerogative*" of *Holding* so that new franchise agreements can be granted or to choose new locations, markets or franchisees. In fact, once a certain country is included in the scope of the Licence Agreement (initially or at a later stage by common consent of *Systems* and

---

202 Agreement between *Systems* and IKEA Supply AG (formerly IKEA Trading und Design AG) of 25 April 1990 as well as supplementary letters of 30 August 1995 and 16 March 2007. Under this agreement, IKEA Supply AG is granted rights to purchase IKEA products from certain independent producers designated by *Systems*.
The Netherlands has also provided copies of commission agreements concerning the production of catalogues signed between *Systems* and IKEA Catalogue Services AB (Sweden) of 18 November 1996 and 23 December 2000.
Also, the contract between *Systems* and Ikea of Sweden AB mentions that *Systems* has granted IKEA Supply AG the right to produce and purchase the products for the purpose of ultimate sale to the franchisees.

203 See clause 2 of the agreement of 25 April 1990.

204 See letter of 15 May 2017, Annex 3, response to question A.5.i.

205 See letter of 17 November 2016, Annex 2, response to question A.iv.

206 See letter of 17 November 2016, Annex 2, response to question A.iv.

207 Not provided to the Commission.

208 See Recital 4.1.

Holding), the Licence Agreement and Letters of Understanding assign no right or responsibility to *Holding* as regards the selection of new locations or franchisees within that country. In other words, contrary to what the Netherlands claims, the text of the Licence Agreement and of the Letters of Understanding do not contemplate any specific obligation for *Systems* to request an authorisation or consent from any other group company in order to appoint new franchisees or conclude new franchise contracts in territories included in its scope.

(134) The other documents provided by the Netherlands seem to be consistent with the Commission's interpretation of the Licence Agreement. In particular, the applications sent by *Systems* to *Largo* for its authorisation on 28 March 2011[209] concerning Estonia, Morocco and Latvia do not refer to new franchisees but to "*a new country/territory*". Similarly, the minutes of the meeting between *Largo* and *Systems* of 24 March 2011 refer to these applications as "*new countries*".

(135) Moreover, the minutes of the meetings between *Largo* and *Systems* of 24 March 2011 and 20 October 2010 suggest that *Systems* is the responsible entity to prepare the strategic expansion plan of the franchising business. These minutes do not show any active involvement of *Largo* as regards the expansion plan.[210] Finally, the description of functions in the TP Report is consistent with this interpretation since it describes *Systems* as the entity responsible for conducting market researches and surveys as well as for assessing the adequacy of new franchisee applicants.[211] In short, even if *Holding* or any other group companies were to have any role in the approval of new franchisees, this role would seem to be purely passive.

(136) Finally, as regards the marketing strategy, the Netherlands indicate that *Systems* "*does not actually conduct any activities relating to global or local marketing*".[212] In particular, "*the franchisees are responsible for sales activities [and] [Systems] organises only the compilation, printing and delivery of the Ikea catalogues*".[213] Consequently, beyond monitoring the content of the catalogue in consultation with the franchisees, "*Systems plays no further role in the development, expansion and implementation of [marketing] strategy*".[214] Furthermore, according to the Netherlands, *Systems* has no marketing expenditure, but only marketing support or marketing contributions to help safeguard the continuity of the franchise revenue of franchisees

209 Provided by the Netherlands with letter of 10 April 2017.

210 Inter IKEA website (http://franchisor.ikea.com/how-to-become-an-ikea-franchisee-2/) indicates the following, in relation to the activity of *Systems* as regards new countries and franchisees: "*Inter IKEA Systems B.V. is constantly evaluating new countries and is following a long-term strategic expansion plan, which sets our priorities of future growth, where to put focus and when*". […] "*Entry to a new country is made after thorough market studies and franchisees are carefully evaluated prior to selection. When selecting franchisees, Inter IKEA Systems B.V., among other things, evaluates the following: experience, local market knowledge and presence, corporate culture and values, financial strength and ability to carry through the investment penetrating a country in full and in a large-scale retail environment format*".

211 See Recitals (119) and (126).

212 See letter of 15 May 2017, Annex 3, response to question A.3.i.

213 See letter of 15 May 2017, Annex 3, response to question A.3.i.

214 See letter of 15 May 2017, Annex 3, response to question A.5.i.

which, due to extreme external circumstances, are experiencing temporary difficulties.[215]

(137) The Commission considers at this stage that, contrary to what the Netherlands claims, *Systems* appears to be the entity responsible for a wide range of commercial, marketing, strategic and planning activities of the franchising business.

(138) First, *Systems* is responsible for the creation and development of the IKEA Franchise Concept, an intangible which includes corporate systems, advertising and marketing techniques as well as distribution techniques.[216]

(139) Second, *Systems* selects new franchisees, negotiates and signs franchise contracts, establishes and maintains contract relationships and conducts market research and surveys.[217]

(140) Third, *Systems* seems to design and implement specific marketing and commercial strategies and seems to be responsible for their application. This is confirmed by the TP Report, according to which *Systems* is responsible for "*securing the proper positioning and market penetration on the individual markets*"[218]. The Netherlands has also confirmed that *Systems* decides on the marketing support contributions to franchisees.[219] Moreover, the minutes of the meetings between *Systems* and *Largo* provided by the Netherlands show that *Systems* prepares the expansion plans,[220] sets strategic goals,[221] develops and tests new commercial projects and ideas,[222] creates manuals[223] and provides training of which it then informs *Largo*.[224]

---

215 See letter of 15 May 2017, Annex 3, response to question A.5.ii. In response to question A.3.i. the Netherlands confirm that "*[t]he decision to provide this financial support was made by Inter Ikea Systems BV*". In the same response the Netherlands clarified that this ‘marketing support’ is financial assistance to specific franchisees encouraged to make greater efforts to develop their new or existing territory and/or market or occasionally experiencing economic difficulties. According to the letter of 17 November 2016, Annex 2, response to question B.(d)(ii) marketing support contributions are financial contributions to franchisees to help them penetrate new markets or expand in existing ones and may consist of financial contributions to franchisees or compensation for the external consultants' costs. For instance, the Netherlands mentions as an example the support to the Greek franchisee during the years of crisis.

216 See Recitals (126) *et seq*.

217 See Recitals (119) and (126).

218 See footnote 196.

219 See footnote 215.

220 See minutes of the meeting of 20 October 2010, section 3.1010; minutes of the meeting of 19 October 2011, section 3.0311.

221 See minutes of the meeting of 19 October 2011, section 3.0311.

222 See references to the "*Bedroom Project*" or the "*Market Hall Project*" or "*Effective and Efficient Communication*" in the minutes of the meeting of 19 October 2011, section 3.0311 and in the minutes of the meeting of 24 March 2011, section 3.0311.

223 See footnote 193.

224 In this regard, it is worth mentioning that, according to paragraph 1.61 of the 2010 OECD TP Guidelines, *"[…] some business strategies, such as those involving market penetration or expansion of market share, involve reductions in the taxpayer's current profits in anticipation of* ***increased future profits***" (e.g. additional return over the routine one). Also, according to paragraph 1.62 "*[w]here a company has undertaken market development activities at its own risk and enhances the value of a product through a trademark or trade name or increases goodwill associated with the product, this situation should be reflected in the analysis of functions for the purposes of establishing comparability*". In other words, the

(141) Fourth, *Systems* performs coordination and bundling activities with related service providers[225] and with third parties, which includes marketing-related activities such as design of products, or the definition of IKEA's product range.[226] All these services are performed under the coordination and following instructions by *Systems*.

(iii) Catalogue operations

(142) The catalogue operations' function includes material purchasing, catalogue production, quality control, sales support and general management[227]. According to the Netherlands, the IKEA catalogue is part of the Franchise Concept developed by *Systems*.[228] The Netherlands has confirmed that the catalogue is part of the market strategy of the franchise business.[229] It has also indicated that *Systems* "*is responsible for the production, publication and distribution of the Ikea catalogue*" and that "*[it] monitors the contents of the catalogue in consultation with the franchisees*".[230] Neither the Licence Agreement nor the TP Report assign any role to *Holding* in relation to catalogue operations.

(iv) Additional arguments raised by the Netherlands as regards *Systems*' functions

(143) The Netherlands argues that Mr Kamprad played a relevant role in the franchising business as founder, member of Interogo Foundation's advisory board, non-executive chairman of the board of IIHSA and manager of *Holding*.[231] In support of this argument, the Netherlands has submitted[232] the reports of three visits made by Mr Kamprad to the Inter IKEA test store in Delft on 7 March 2006, 7 March 2007 and 10 March 2008 as well as a document authored by Mr Kamprad concerning the opening of this store in 1992.[233] The detailed comments made by Mr Kamprad in these visits would demonstrate, according to the Netherlands, his close involvement in the business during his tenure as a member of the advisory board of Interogo Foundation.

(144) In the Commission's view, the reports merely summarise Mr Kamprad's reflections on the visits to the test store, including comments, appreciations and indications on the store and its layout, organization and the display of products. However, the Netherlands

related party in charge of setting the business strategies and bearing the related costs should be properly remunerated (i.e. receive increased future profits). See also paragraph 1.34 of the 1995 OECD TP Guidelines.

225 See footnote 71. According to the TP Report (sections 3.1 and 3.2), these intercompany services have been priced at arm's length attributing to the service providers a routine remuneration (full cost plus 6%). This routine remuneration (using a TNMM method) confirms that, according to the TP Report, these related service providers are considered less complex entities that perform routine or simple functions and that, consequently, *Systems* is considered the more complex party which provides a unique and valuable contribution to the transaction.

226 See Recitals (128) to (130). Services provided by independent parties are by definition at arm's length. Therefore they are not relevant for transfer pricing purposes, regardless of their relative importance in the value chain.

227 See TP Report, Section 4.4.1.

228 See letter of 15 May 2017, Annex 3, response to question A.6. See also Recital (23).

229 See letter of 15 May 2017, Annex 3, response to question A.5.i.

230 See letter of 15 May 2017, Annex 3, response to question A.5.i.

231 Letter of the Netherlands of 15 May 2017, Annex 3, response to question A.1.

232 By letter of 25 April 2017

233 The title of the document is "Supplement to IKEA DEAS. Introducing IKEA Delft".

has not explained the periodicity of these visits (only three reports have been provided), in which capacity Mr Kamprad acted during the visits (founder, member of an advisory board, non-executive manager or any role entrusted directly by *Systems*) or whether the comments provided by Mr Kamprad were of a binding nature or mere recommendations.

(145) The Netherlands also refers, more in general, to the role of the Interogo Foundation and the senior executives of *Holding* to protect the key values of the IKEA Formula, performing the most important functions and adopting strategic decisions.[234] In this regard, the Netherlands refers to the minutes of the meetings between *Systems* and *Largo* held on 20 October 2010, 24 March 2011 and 19 October 2011.[235]

(146) The Commission considers at this stage that these minutes do not support the statement that senior executives of Inter IKEA entities other than *Systems* performed unique and valuable contributions and prepared and adopted strategic decisions concerning the franchising business. First, according to the minutes, the participants in the meetings were two representatives of *Systems* and one representative of *Largo*. Therefore, *Systems* appears to have a majority of members in this informal body. Second, the Commission does at this stage not have the rules governing the composition, quorum and voting in these meetings, their periodicity, the legal nature of this informal body and its powers. The minutes provided merely show a presentation by the representatives of *Systems* on different topics such as new franchisees, expansion plans, financial projections and business plans prepared by *Systems*, ongoing projects related to marketing, communication and training, reporting of results achieved, catalogues distributed or actions taken as regards legal protection of the trademark. *Largo*'s representative's role seems to be limited to being informed of the actions, policies and strategies devised and implemented by *Systems*. *Systems*' representatives do not seek from *Largo*'s representative any authorisation or consent in relation to the issues discussed[236] and the latter does not provide any instructions, guidance or input on any of the topics. In short, the minutes of these meetings support the preliminary conclusion that *Largo* had a limited and passive involvement in the management of the franchising business.[237]

(147) This seems confirmed by the fact that as a result of the acquisition of the PRs by *Systems*, the 2011 APA contemplated a transfer to *Systems* of functions previously performed by affiliated group companies during the four accounting years after the acquisition of the PRs by *Systems*, in exchange for an objective compensation.[238] In this regard, the Netherlands informed in its letter of 17 November 2016 that such functions had "*quickly*" been developed internally by *Systems*, so no compensation was finally

[234] See letter of the Netherlands of 17 November 2016, Annex 2, response to questions A.(ii) and A.(iii) and Letter of 15 May 2017, Annex 3, response to question A.3.i.

[235] See letter of 15 May 2017, Annex 3, response to question A.2.i.

[236] The only topic in which the minutes indicate that an authorisation is required from *Largo* is the entry in new territories, as it has already been mentioned in Recitals (132) *et seq*.

[237] Furthermore, no minutes have been provided of any meeting between *Systems* and *Holding* during the period 2006-2010.

[238] See footnote 129.

due for any transfer.[239] In the Commission's view, the fact that the functions were so easily developed by *Systems* suggests either that such functions were already being performed internally by this entity before 2012 or that those functions did not add a significant value to the business and could be easily replicated by *Systems*.

(148) The fact that *Holding* performed no valuable functions for the franchise business seems also confirmed by the fact that this company was, until the end of 2009, an exempt 1929 holding company under Luxembourg tax law.[240] Companies authorised to benefit from this tax regime were prevented by Luxembourg law from "*carrying on any industrial or commercial activity or providing any kind of service*", "*carrying on the activities of […] manager on behalf of any company for consideration, unless the other company is a subsidiary*" or having "*direct involvement in the affairs of its subsidiaries*".[241]

(v) Preliminary conclusion

(149) The preliminary analysis of the functions performed by *Systems* and *Holding* confirms that, contrary to what the 2006 APA assumes, *Systems* appears to make a unique and valuable contribution to the franchising business. This seems to contradict *Systems*' consideration as a tested party and therefore "less complex" party of the transaction for the purposes of applying the TNMM. On the contrary, Holding appears to perform limited functions.

Analysis of risks assumed

(150) The 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.[242] In order to determine which party (*Systems* or *Holding*) was assuming the main entrepreneurial risks (in particular the market risk, the strategic risk and the operational risk), the Commission has analysed which party controls and bears the costs related to the management and exploitation of the franchise business. In this analysis the Commission has taken into account, first, the contracts between *Systems* and *Holding* (Licence Agreement and Letters of Understanding), and second, the actual conduct of the parties.[243] The preliminary

239 See letter of 15 May 2017, Annex 3, response to question A.8. The Netherlands declares that the intention at the time of the transaction was that there would be a transitional period in which know how of this kind would be transferred by the senior management of the group. This did not in fact happen, because the senior staff appointed by *Systems* built up the necessary expertise very quickly. No such transfer seems to have taken place either when the PRs were transferred from *Holding* to *Largo* in 2009.

240 See footnote 25.

241 See Commission Decision of 19 July 2006 on aid scheme C 3/2006 implemented by Luxembourg for '1929' holding companies and 'billionaire' holding companies, Recital 28(a), 28(d) and 28(h).

242 1995 OECD TP Guidelines, paragraph 1.23 and 2010 OECD TP Guidelines, paragraph 1.45

243 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 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*

conclusion of the Commission is that *Systems* seems to control and bear a significant proportion of the costs of the franchise business.

(151) In view of the information submitted, a distinction should be made in this case in terms of cost allocation between the following categories of costs: (i) catalogue costs and marketing contributions; (ii) miscellaneous costs incurred by *Systems* relating to the PRs and to the IKEA Franchise Concept; and (iii) other costs.

(i) Catalogue costs and marketing contributions

(152) According to the Licence Fee Letter, *Systems* must pay to *Holding* a fee corresponding to 70%[244] of *Systems*' "franchise income", which is defined as "*any franchise and license fee due to [Systems], plus the IKEA Business College (IBC) fees, plus the net catalogue income and minus any marketing support paid to franchisees*".[245] At the same time, "*Net catalogue income*" is defined as "*the balance between all income received by [Systems] for the sale of IKEA Catalogues and all costs […] paid by [Systems] related to the IKEA Catalogues*".[246] This means that there are two cost items which are excluded from the base from which the licence fee is calculated: the costs related to the IKEA catalogues and the marketing support paid to franchisees.[247] As a consequence, when *Holding* receives a licence fee corresponding to 70% of the "*franchising revenue*", it is at the same time contributing to 70% of these costs.

(153) The Commission does not have the information concerning the amount of catalogue costs. In relation to marketing contributions, the information provided by the Netherlands[248] shows that they represent a limited proportion of the total costs incurred by *Systems* (excluding the licence fee paid to *Holding*), as it is shown in the table below.

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".

244 The licence fee was set at 70% of the franchise income since 1996 (see letter of understanding of 13 December 1995). Initially, it amounted to 90% (see Licence Agreement, clause IV). In 1993, it was increased to 95% (see letter of understanding of 15 December 1992) and to 74% in 1995 (see letter of understanding of 20 December 1994).

245 Licence Fee Letter, paragraph I.a.

246 Licence Fee Letter, paragraph I.b.

247 Marketing support to franchisees or marketing contributions are economic contributions paid by *Systems* to franchisees which are going through temporary difficulties due to extreme circumstances (see explanation in Recital (136)).

248 See Figure 6 in Recital (64).

Table 3. - Marketing contributions, % over total costs (amounts in EUR million)

	2006	2007	2008	2009	2010	2011
Marketing contributions	[30 - 40]	[40 - 50]	[50 - 60]	[50 - 60]	[60 - 70]	[50 - 60]
Systems' total operating costs	[800 - 900]	[900 - 1.000]	[900 - 1.000]	[900 - 1.000]	[900 - 1.000]	[1.000 - 1.100]
Licence fee paid to *Holding*	[400 - 500]	[500 -600]	[500 -600]	[500-600]	[600 -700]	[600 -700]
Marketing costs / *Systems*' total costs excluding License fee	[10 - 15]%	[10 -15]%	[10 -15]%	[10 -15]%	[15 -20]%	[10 -15]%

Source: table prepared by the Commission on the basis of the information provided by the Netherlands.

(154) In conclusion, *Holding* seems to bear 70% of the marketing contributions (which represent a limited proportion of the total costs of the franchising business) and of the catalogue costs and *Systems* bears the remaining 30%.

(ii) Miscellaneous costs incurred by *Systems* relating to the PRs and to the IKEA Franchise Concept

(155) According to the Cost Letter, 40% of the miscellaneous costs related to the PRs and to the IKEA Franchise Concept are incurred by *Systems* for its own account (those related to the IKEA Franchise Concept) whereas the remaining 60% should be reimbursed by *Holding* to *Systems* (as costs related to the PRs).[249] However, as illustrated in Recitals (26) and (27), the Netherlands has clarified - and the actual conduct of the parties confirms – that the costs attributed to *Holding* have been calculated each year as 9% of the franchise income. These costs are reimbursed by *Holding* to *Systems* by way of compensation from the licence fee. Consequently, the gross licence fee, which amounts to 79% of the franchise income, is reduced to a net amount of 70% of the franchise income which is actually paid by *Systems* to *Holding*.[250]

(156) In the Commission's view, this means that the licence fee to be paid by *Systems* to *Holding* will never be affected by the amount of these costs. In other words, the economic impact of these miscellaneous costs are in practice borne exclusively by *Systems*. Thus, the miscellaneous costs have no impact in the amount of the licence fee that *Systems* pays every year to *Holding* under the Licence Agreement (i.e. 70% of the franchise income).[251]

249 See Recital (25).

250 This is consistent with previous versions of the Letters of Understanding which expressly indicate that the percentage of the licence fee should be calculated "*after deduction of costs*" (see letters of understanding of 20 December 1994 and 13 December 1995 provided by the Netherlands on 10 April 2017).

251 According to the Netherlands, since 1996 the parties agreed that if the miscellaneous costs related to the PRs were to be higher than the estimated 9% of the franchise income, the excess would be shared between *Systems* and *Holding* (See Letter of the Netherlands of 15 May 2017, Annex 3, response to question A.15). This seems to contradict the statement of the tax advisors according to which "*[…] as per the date this Agreement enters into force [Systems] and [Holding] will no longer cap the cost allocation to [Systems] on basis of a fixed percentage of the franchise income, but intent to agree an allocation of cost on a budget basis […]*" (see page 15 of the letter of 9 December 2002 from the tax advisor to the Netherlands tax authorities (reference 4360/GB/05803), which is considered part of the 2006 APA). It is

(iii) Other costs

(157) Costs incurred by *Systems* other than marketing contributions, catalogue costs and miscellaneous costs related to the PRs and the IKEA Franchise Concept are borne entirely by *Systems* since the Licence Agreement and Letters of Understanding do not provide for any allocation between *Holding* and *Systems*. The figures provided by the Netherlands do not show any actual reimbursement of these costs by *Holding* (or *Largo*) when the 2006 APA was in force.

(158) In conclusion, *Systems* bears 30% of the marketing contributions (which represent a limited proportion of the total costs of the franchise business) and of the catalogue costs and, in practice, seems to bear the remaining costs. In any event, the Commission notes that even if *Holding* seems to bear 70% of the marketing contributions and of the catalogue costs, the preliminary analysis performed by the Commission[252] shows that the control over the related risks seems to be borne by *Systems*. In the Commission's preliminary view, this seems to contradict the assumption of the 2006 APA to consider *Systems* as the less complex entity with limited market risk.

(iv) Other risks: financial risks, transactional risks, liability risks

(159) The Commission has also analysed which party assumed risks other than the main entrepreneurial risks. As regards the financial risks, according to the License Fee Letter, the license fee is calculated according to the "*franchise and license fee <u>due</u> to Systems*".[253] As a consequence, *Systems* seems to bear in full the bad debt risk over the entire amount of the franchise fees.[254] As regards the bad debt risk related to the catalogue sales, the license fee is calculated according to the "income received" and "costs paid" by *Systems*. Therefore, the bad debt risk for those sales seems to be cash-based, i.e. limited to the 30% of the net catalogue income.[255]According to the TP Report, *Systems* also bears the foreign exchange risk in relation to the franchise fees.[256]

(160) *Systems* has also full capacity for determining the price of the catalogues which means that it assumes the market and transactional risk for these operations. *Systems* assumes as well a limited inventory risk.[257] Furthermore, *Systems* assumes the liability risk in

---

also not supported by the actual conduct of the parties which shows that, in practice, these costs never deviated from the 9% threshold during the whole life of the 2006 APA (see Figure 5 in Recital (63)). In any case, even the miscellaneous costs deviating from the 9% threshold had ever been shared between *Systems* and *Holding*, the fact remains that, up to such limit, the risk would have been entirely borne by *Systems*. In the Commission's view, this is incompatible with the qualification of *Systems* as an entity performing simple functions and with limited market risk.

252 See Recitals (118) to (142)

253 License Fee Letter, Article IV a. Emphasis added by the Commission.

254 The TP Report indicates (paragraph 4.2.2.2) that that license fee payments are conditional upon the actual receipt of any franchise fee income on a cash basis, which allows it to conclude that the potential bad debt risk incurred by *Systems* is limited to 30 % of the receivables. However, this seems to be based on previous versions of the Letter of understanding according to which the license fee would correspond to a percentage of the franchise income "received" by *Systems* (for instance Letter of Understanding of 13 December 1995).

255 In this respect, the TP Report (paragraph 4.4.2.4) states that *Systems* bears the credit and collection risk related to the catalogues.

256 TP Report, paragraphs 4.2.2.3 and 4.4.2.3.

257 TP Report, paragraph 4.4.2.2.

case of any claims in relation to the franchise contracts and the product liability for the catalogues, i.e. it bears the cost of a claim or return of a faulty product.[258]

(v) Other arguments raised by the Netherlands

(161) In its letter of 15 May 2017, the Netherlands justifies in several instances the arm's length nature of the costs incurred by each party making reference to the terms of the 2006 APAs. According to this argument, since the 2006 APA sets *Systems*' remuneration as 5% of the franchise revenue, this would ensure that only 5% of the costs are actually at its expense and that the remaining 95% are at the expense of *Holding*.[259]

(162) The Commission questions the validity of this argument. The Netherlands tries to support the arm's length character of the 2006 APA using the own terms of the 2006 APA. Following such a circular line of reasoning would make any tax ruling, by definition, at arm's length. Contrary to what the Netherlands suggests, the transfer pricing method and the level of remuneration set by such method do not determine the attribution of functions and risks between related parties involved in intercompany transactions. It is the exact opposite: the transfer pricing method must be determined on the basis of the functional analysis and, *inter alia*, on the analysis of the contractual terms of the agreements and of the conduct of the parties.[260]

(163) In conclusion, from the analysis of the contracts between the parties and their actual conduct, the Commission preliminarily concludes that *Systems* assumes risks in a way which appears to be incompatible with the attribution of most of the profit generated by the franchise business to *Holding*.

---

258 TP Report, paragraphs 4.4.2.4 and 4.4.2.5. Even though *Systems* is insured again such risk, it bears the cost of the insurance.

259 See response to question A.3.i.: "*This assistance has also been called 'marketing support'. Up to and including 2011, 95 % of these costs were borne by [IIH] and later by Largo […], the other 5 % being borne by [Systems]*"; response to question A.5.ii: "*The 5 % net fee for [Systems] based on the transactional net margin method ('TNMM') ensures that 5 % of the marketing-support payments are at the expense of [Systems]. This is because the remuneration paid to [Systems] is defined as 5 % of the franchise-fee revenue plus the catalogue revenue minus the marketing support*"; response to question A.13: "*[…] the same applies to the expenses incurred in respect of these intangible assets. In order to avoid a recurring discussion with Inter Ikea Systems BV and its advisors regarding the allocation of these costs, the agreement was formulated in such a way that allocation is not an issue. The mechanism of the agreement concluded in 2006 ensures that allocating more than 40 % of the costs to [Systems] does not affect the remuneration paid to [Systems]. As can be seen from Section 3.7 of the 2006 APA, allocating excessive costs to [Systems] causes the amount of informal capital to decline. The 5 % arm's length remuneration is consequently maintained. Thus neither the actual distribution of costs nor the nature of the costs play any role whatsoever in determining the amount of remuneration paid to Inter Ikea Systems BV*".

260 This is expressly clarified in the OECD TP Guidelines: "*Concerning the transfer pricing method used to test the prices, margins or profits from the transaction, it should be the most appropriate transfer pricing method to the circumstances of the case. In particular, it should be consistent with the allocation of risk between the parties (provided such allocation of risk is arm's length), as the risk allocation is an important part of the functional analysis of the transaction. Thus, <u>it is the low (or high) risk nature of a business that will dictate the selection of the most appropriate transfer pricing method, and not the contrary</u>*" (see 2010 OECD TP Guidelines, paragraph 9.46, emphasis added by the Commission. See also 2010 OECD, paragraphs 1.45, 1.47 and 1.48 as well as 1.23, 1.25 and 1.26 of the 1995 OECD TP Guidelines).

Analysis of assets used

(164) *Systems* and *Holding* contribute to the franchise business with two main valuable assets: the IKEA Franchise Concept and the PRs, respectively. The IKEA Franchise Concept has been created and developed by *Systems*. As indicated previously, this already seems to be at odds with the qualification of *Systems* as an entity not adding any valuable and unique contribution to the franchise business.[261]

(165) As regards the PRs, the information provided seems to indicate that *Systems* performs functions and bears costs related to the PRs.[262] Based on this, the Commission preliminarily concludes that *Holding* seems to be a mere legal owner of the PRs. The mere legal owner of the PRs cannot be entitled to receive all the residual profit of the franchise business after paying a limited return to *Systems* for its allegedly routine functions.[263] The legal owner of an intangible would be entitled to such an excess return provided it performed totally the functions, contributed the assets and assumed the risks related to the development, enhancement, maintenance, protection and exploitation of the intangible. Where, as it seems to be the case here, the functions performed and the risks assumed by *Holding* as the legal owner of the IP are limited,[264] the mere legal ownership cannot justify the allocation of the residual profit generated by the franchise business to its owner.

(166) The Netherlands argue that the fact that *Systems* was entitled only to a limited indemnity in case of termination of the Licence Agreement by *Holding*[265] confirms that the IKEA Franchise Concept does not have any value, as it would indicate that *Systems* bore the risk of the contract being terminated or not renewed.[266] Thus, the Netherlands considers that the termination clause as set up between *Systems* and *Holding* would correspond to the market behaviour of independent parties.[267] The Netherlands refers in

261 See Recital (83). See also paragraph 2.59 of the 2010 OECD TP Guidelines: "*[…] a one-sided method (traditional transaction method or transactional net margin method) may be applicable in cases where one of the parties makes all the unique contributions involved in the controlled transaction, while the other party does not make any unique contribution. In such a case, the tested party should be the less complex one […]*".

262 See Section (149) (ii).

263 This is consistent with the approach adopted by the 1995 and 2010 OECD TP Guidelines. In particular, according to paragraph 6.14 of the 1995 OECD TP Guidelines, "[a]*rm's length pricing for intangible property must take into account for the purposes of comparability the perspective of both the transferor of the property and the transferee. […] Given that the licensee will have to undertake investments or otherwise incur expenditures to use the licence it has to be determined whether an independent enterprise would be prepared to pay a licence fee of the given amount considering the expected benefits from the additional investments and other expenditures likely to be incurred*". In the same vein, paragraph 1.47 the 2010 OECD TP Guidelines (as well as paragraph 1.25 of the 1995 OECD TP Guidelines) stress the importance of the functions performed in relation to the allocation of risks between the parties and the importance of decisions and responsibilities related to the marketing expenses.

264 See Recitals (118) to (160).

265 Agreement of 30 August 2006 (see Recital (25)); for the period before 2006, see Licence Agreement, clause III.d).

266 See letter of 15 May 2017, Annex 3, response to question A.18*"[…] This agreement must be viewed from the perspective of the independent position of the owner of the rights. If the owner of the rights were to decide to terminate the licence held by Inter Ikea Systems BV for the use of the rights, Inter Ikea Systems BV would no longer be able to recoup any investments it had made. This agreement therefore fits seamlessly with the routine nature of Inter Ikea Systems BV's activities. […]*"

267 See letter of 15 May 2017, Annex 2

this respect to two precedents that would confirm this position: a judgment of the Dutch Supreme Court of 1991 in the case *Mattel-Borka*[268] and another case concerning the company *Absolute Vodka*.[269]

(167) At this stage, the Commission cannot follow this line of reasoning. The fact that the Licence Agreement attributes no or limited value to the IKEA Franchise Concept is not in itself an argument to support that its value at arm's length tends to zero. The determination of whether independent parties would have agreed or not to a termination indemnity must be verified taking into account the rights and other assets of the parties and the options realistically available in the market.[270] In this respect, a termination indemnity in an intercompany contract and its quantification should necessarily reflect the functions performed, the risks assumed, the investment made by the licensee *vis a vis* the licensor, looking at the economic substance of the transaction as also illustrated by the OECD TP Guidelines.[271]

(168) The Commission considers at this stage that it would not have been realistic for *Holding* to find an independent party ready to incur costs and perform the functions similar to those incurred and performed by *Systems* and not receiving a remuneration during the duration of the contract or a termination indemnity to compensate its valuable and unique contributions to the business.[272] Indeed, the Commission notes that for the transaction to be considered at arm's length, the risk of termination should be compensated either in the form of increased profits during the duration of the contract or in the form of a termination indemnity.[273]

(169) In relation to the precedents mentioned by the Netherlands, the Commission cannot express any opinion as regards the *Absolute Vodka* case, as it did not have access to the judgment or to the relevant facts of the case beyond a summary provided by the Netherlands. In any case, the Netherlands has not justified why the relationship between the parties in this case is comparable to the relationship between *Holding* and *Systems*.

(170) The judgment in the *Mattel-Borka* case is about the termination of a distribution agreement and the question whether the principal, in addition to respecting the term for the termination still needs to pay an indemnification for damages.[274] However, the

---

[268] Judgment of the Supreme Court of 21 June 1991, *Mattel-Borka* (ECLI:NL:HR:1991:ZC0291).

[269] The Netherlands does not provide any court reference for this case, but only an annex containing a summary of the case.

[270] See to this regard the 2010 OECD TP Guidelines, paragraph 9.106.

[271] See the 2010 OECD TP Guidelines, paragraph 1.48 and 1.49 for the general recommendations on the allocation of risk and paragraph 9.111 and 9.112 for business restructurings.

[272] See to this regard the 2010 OECD TP Guidelines, paragraph 9.112 *"[…] At arm's length the party making the investment might not be willing to assume with no guarantee a risk (termination risk) that is controlled by the other[…]*".

[273] See the 2010 OECD TP Guidelines, paragraph 9.112.

[274] In the judgment the German based Mattel had concluded an exclusive distributorship agreement with a non-related Dutch company Borka. In spring 1984 Mattel decided that it wanted to handle the distribution activities in the Netherlands internally. On 13 July 1984 it terminated the distribution agreement effective as of 1 January 1985, respecting the cancellation term of the distribution agreement. Parties negotiated between July and December 1984 about a cash settlement as compensation for Borka and after failing to agree went to Court. The lower, higher and superior court all held that Mattel should compensate Borka for any investments and expenses which Borka had made prior to the cancellation in order to ensure the expected future fulfilment of its duties as a distributor. This is regardless of whether the term for cancellation has been respected. The expenses/investments made by Borka that required compensation

information contained in the judgement is not sufficient to compare the facts with the relationship between *Holding* and *Systems*. In particular, a proper transfer pricing analysis would require that the functions performed, risks incurred and assets used are properly delineated. The fact that the civil judge did not recognize any "profit element" in the compensation for Borka, but simply a reimbursement of costs, does not mean that the Borka-Mattel's relationship is comparable to the relationship between *Holding* and *Systems*.

(171) In view of the above, the Commission at this stage questions the assumption underlying the 2006 APA according to which the IKEA Franchise Concept has a value which, without the PRs, tends to zero.[275] Whereas it is true that there is an interdependency between both set of intangibles, such interdependency works in both directions: the PRs would also have a much lower value if they were to be deprived of the IKEA Franchise Concept and all the value generated by *Systems* during the period of validity of the Licence Agreement. Therefore, the Commission at this stage questions the validity of the argument according to which the interdependency between both set of intangibles should be resolved by assigning all the value of the franchise business to the (legal) owner of the PRs and none to the (legal and economic) owner of the IKEA Franchise Concept, as it ignores the contribution of each of them to the business.[276]

Conclusion

(172) In conclusion, the preliminary functional analysis carried out by the Commission corroborates the fact that the 2006 APA seems to have improperly considered *Systems* as the less complex entity in its relationship with *Holding*. Thus, by considering *Systems* as the tested party in the application of the TNMM, the 2006 APA seems to depart from a reliable approximation of a market-based outcome in line with the arm's length principle, leading to an underestimation of its taxable profit.

7.2.1.2. Methodological mistakes in the application of TNMM on *Systems* as tested party

(173) As a subsidiary argument, even if *Systems* had been correctly identified as the less complex party (*quod non*), the Commission takes the preliminary view that the application of the TNMM to *Systems*[277] contains some methodological mistakes, leading to an underestimation of the operating profit of *Systems*. Ultimately, this results

included marketing expenses, investments in a showroom and the costs for releasing personnel. There is no "profit element" in this compensation, it is simply reimbursing costs.

275 See 2006 APA, section 4. See also "Report on Handling", page 4 ("*the franchise concept has value only together with the property rights*").

276 The letter of the tax advisor to the Netherlands tax authorities of 9 December 2002 (number 4360/GB/05803) which is considered part of the 2006 APA (see paragraph 1.2) seems to contradict the notion that the IKEA Franchise Concept would have no value. In that letter, on page 9, the tax advisor indicates that "*If [Systems], would sell the IKEA FRANCHISE CONCEPT, the income derived from such a sale - in principle - would be for the account of [Systems]. However, a sale of the IKEA FRANCHISE CONCEPT is according to the terms and conditions of the license agreement not possible. Furthermore, if the IKEA FRANCHISE CONCEPT could have been sold any income relating to the various components of the IKEA PROPRIETARY RIGHTS on which the IKEA FRANCHISE CONCEPT is built, would have to be allocated to II Holding S.A.*" (emphasis added by the Commission). In the Commission's view, this statement confirms that the parties acknowledged that the IKEA Franchise Concept would have a market value (although they attribute such value entirely to *Holding*).

277 The conclusions of the TP Report, as part of the 2006 APA, seem to have been accepted by the Netherlands, including the division of *Systems*' overall activities into three functions.

in an underestimation of the taxable profit of *Systems* which departs from a reliable approximation of a market-based outcome in line with the arm's length principle.

(174) First of all, the Commission notes that the operating profit for *Systems*' functions set out by the 2006 APA is based on one single profit level indicator i.e. 5% operating margin applied to the "*franchise revenue plus net catalogue revenue minus marketing support contributions to franchisees*" (hereafter in this section "base of calculation" or "base for calculating"). Furthermore, according to the 2006 APA, a 5% mark-up is applied on the costs of services provided directly to franchisees by *Systems*. This mark-up does not apply if *Systems* acts merely as a pass-through of expenses between group companies and the franchisees.

(175) However, the Commission notes that the TP Report identifies three different (allegedly routine) functions performed by *Systems*: the catalogue operations function, the management of the franchise contracts function and IKEA Franchise Concept maintenance function, as described in section 7.2.1.1, which are tested with different profit indicators.[278] The management of the franchise contracts function is tested with the "operating margin"[279] whereas the IKEA Franchise Concept maintenance function and the catalogue operations function are tested with "mark-up on total costs".[280] The overall operating profitability of *Systems* is the sum of the profitability of the three different functions performed by *Systems* (the management of the franchise contracts' function, the IKEA Franchise Concept maintenance's function and the catalogue operations' function).

(176) According to the Commission, in order to calculate correctly the overall operating profit of *Systems*, in compliance with the TP Report, the following steps should have been followed:

(i) First, the operating profit of each function should be calculated separately. Therefore, the actual operating costs related to the catalogue operations function and to the IKEA Franchise Concept maintenance function should have been identified and the relevant mark-up at arm's length applied on them.[281] For the management of the franchise contracts function, the sales related to this function must be identified and the operating margin at arm's length should be applied on them.

(ii) Second, the profitability of the catalogue operations function, of the IKEA Franchise Concept maintenance function and of the management of the franchise contracts function should be added up to obtain the overall operating profit for *Systems*.

(177) However, these steps seem to have been misapplied. First of all, the operating costs related to the catalogue operations function and to the IKEA Franchise Concept maintenance function have not been identified. Second, the sales related to the

---

278 The TP Report considers that no other independent party performs this exact same bundle of activities than *Systems*. See TP Report, Section 4.1.3.2

279 Operating profit/sales. See 2010 OECD TP Guidelines, paragraph 2.90.

280 Operating profit/total operating costs (attributable to the function). See 2010 OECD TP Guidelines, paragraph 2.92 and following.

281 Operating costs related to the catalogue operations function and the IKEA Franchise Concept maintenance function should also include, if any, costs of services provided by associated companies to franchises.

management of the franchise contracts function have been incorrectly calculated since the net catalogue income as well as the marketing support contributions should have been excluded from the base of calculation of the operating margin.[282] Third, even if the use of one single profit level indicator was correct (i.e. the operating margin set out in the 2006 APA), the base for calculating the operating margin has been incorrectly established, since it should include only franchise revenue plus catalogues revenue (catalogue costs and the marketing contributions should be excluded).[283] This would have led to an increase of the base of calculation and consequently to an increase of the operating profit (and therefore of the taxable profit) of *Systems*.

(178) In addition, the TP Report seems to have included loss-making comparables[284] in the comparability analysis. However, since the TP Report and the 2006 APA assume that *Systems* incurs no or very limited market risk, it should also not incur any losses.[285] This is precisely one of the assumptions justifying the application of the TNMM on *Systems* as tested party. In other words, there seems to be an inconsistency between the assumptions of the TP Report and the methodology used: if *Systems* incurs a substantial market risk and can incur losses, then the application of the TNMM is questionable, as it has been explained in subsection 6.2.1.1. If in the benchmark analysis for the catalogue operations function the loss-making comparables had been excluded from the benchmark analysis, this would have increased the first quartile of the mark-up on total costs from 2.2% to 2.8%, thus increasing the operating profit.

(179) Fourth, since the arm's length remuneration in the 2006 APA determines *Systems*' "operating profit", this means that the net financial results and the net extraordinary results of each year should also be added to the remuneration agreed in the 2006 APA in order to determine whether *Systems*' taxable profit is correct.[286] However, from the information provided by the Netherlands,[287] it seems the net financial results and the net extraordinary results have not been added to the operating profit, which could lead to a reduction of the taxable profit of *Systems*.

(180) In conclusion, the Commission takes the preliminary view that the TNMM applied on *Systems* as a tested party has been misapplied, leading to a decrease of the total operating profit of *Systems*, and consequently of its taxable profit.

7.2.1.3. Conclusion on the 2006 APA

(181) At this stage, the Commission considers that the 2006 APA conferred an advantage by endorsing transfer prices that departs from a reliable approximation of a market-based outcome in line with the arm's length principle leading to a reduction of the taxable profit of *Systems*.

282 The net catalogue revenue (catalogue revenue minus catalogue costs) indeed refers to the catalogue operations function. Furthermore, the net catalogue revenue includes costs contrarily to what the 2010 OECD TP Guidelines (paragraph 2.90) prescribe in order to determine the operating margin. Similarly, marketing support contributions should be excluded from the base of calculation of the operating margin as they are a cost component.

283 When the operating margin is used as profit level indicator only revenues (from third parties) should form the base of calculation (i.e. and not profit elements or costs elements such as the net catalogue revenue or marketing support contributions) (see 2010 OECD TP Guidelines, paragraph 2.90).

284 Comparables in a weighted average loss position in the period covered by the benchmark analysis.

285 See 2010 OECD TP Guidelines, paragraph 3.65

286 See 2010 OECD TP Guidelines, paragraph 2.80.

287 See Figure 5.

(182) This is due, in the context of the application of the TNMM, to the improper identification of *Systems* as the less complex entity, and thus the tested party, in its transaction with *Holding*. However, even if *Systems* had correctly been identified as the tested party, the TNMM seems to have been misapplied.

7.2.2. The 2011 APA may have granted an advantage to Systems

(183) The Commission considers at this stage that the 2011 APA may have granted an advantage to Systems since it endorses a tax treatment that does not seem to reflect a reliable approximation of a market-based outcome in line with the arm's length principle. This preliminary conclusion is based on several arguments concerning first, the value of the PRs and the terms of the Loan granted by Interogo Foundation to Systems for the acquisition of such PRs and, second, the price adjustment mechanism agreed in the Sale and Purchase Agreement.

(184) As regards, first, the value of the PRs and the terms of the Loan, the conclusions of the Commission are based on two arguments. First, the Commission considers at this stage that the EUR 9 billion value attributed by Inter IKEA to the PRs and accepted by the 2011 APA may not reflect the price that non-associated companies would have agreed to pay for these rights in the market. Consequently, by endorsing the deduction of interest resulting from the Loan granted to finance part of this value, the tax treatment granted to *Systems* by the 2011 APA may not reflect a reliable approximation of a market-based outcome in line with the arm's length principle. Second, even if the value of the PRs correctly reflected their market value, the Commission has doubts as to whether some of the terms of the Loan would have been agreed by independent undertakings negotiating under comparable circumstances at arm's length.

(185) Second, the Commission considers at this stage that the price adjustment mechanism may have not been agreed between independent undertakings negotiating under comparable circumstances at arm's length. Accordingly, by allowing the deduction of the amounts allocated to the provision set up by *Systems* pursuant to this mechanism, the 2011 APA endorses a tax treatment that does not reflect a reliable approximation of a market-based outcome in line with the arm's length principle. Moreover, even if the price adjustment mechanism was to be considered at arm's length, the Commission considers that the deductions may not be compliant with Dutch law.

(186) These doubts will be explained in detail in the following sections.

7.2.2.1. The price of the PRs does not seem to reflect their market value

(187) The Commission considers at this stage that the EUR 9 billion value attributed to the PRs and accepted by the 2011 APA may be higher than the price that independent operators would have agreed to pay for these rights in the market at arm's length. The consequence of this would be that by endorsing the deduction of the interest generated by the Loan[288] granted by Interogo Foundation to *Systems* to finance the payment of the Purchase Price, the 2011 APA would be granting a tax treatment to *Systems* that does not reflect a market-based outcome.

[288] The interest paid every year is the result of applying a 6% interest rate to the principal of the Loan, as the principal is not amortised.

(188) The value of the PRs has been calculated taking into account the estimates of the consolidated future operating profits of the franchise business. Essentially, this means that the entire consolidated profit of the franchise business has been attributed by the 2011 APA to the PRs. This is based on the premise that, without access to the PRs, the IKEA Franchise Concept has no value.[289]

(189) As indicated at Recital (164), the Commission at this stage questions the validity of this assumption. The profit of the franchise business has been generated by the combination of both the PRs and the IKEA Franchise Concept, which is already owned by *Systems*. Whereas the Commission accepts the interdependence between the PRs and the IKEA Franchise Concept, it considers that this cannot lead to the attribution of no value to the latter. If anything, the interdependence would also work in the opposite direction: the PRs have a more limited value if deprived from the IKEA Franchise Concept created by *Systems*. It seems therefore economically illogical that *Systems* would be willing to pay for something it already owns: the IKEA Franchise Concept, and the future profits attached to it. Therefore, the profits of the franchise business which are attributable to the IKEA Franchise Concept should have been subtracted in order to estimate the value of the PRs.

(190) Moreover, as explained in Recitals (118) to (120), (152) and (153), *Systems* has performed valuable functions and assumed risks related to the PRs. The logical consequence of this is that, in order to determine the value of the PRs, the remuneration of *Systems* for these functions should have also been subtracted from the expected profits of the franchise business.

(191) In short, the Commission considers that the profits to be discounted in order to estimate the value of the PRs should be equivalent to the licence fee at arm's length that *Systems* would have had to pay to the owner of the PRs in the absence of the sale.

(192) The Commission considers that in view of the direct link between the Purchase Price and the Loan, a reduction in the value of the PRs would necessarily entail a reduction of the interest deducted every year by *Systems*. In fact, the 2011 APA expressly accepts Inter IKEA's decision that 60% of the value of the PRs would be financed with debt by means of the Loan.[290] Moreover, the rationale of the Loan is to enable *Systems* to pay the Purchase Price.[291] Furthermore, according to the price adjustment mechanism, any change in the value of the PRs should lead to a proportional adjustment of the Purchase Price, which demonstrates that the intention of Inter IKEA was to keep the same ratio between equity and debt in the transaction, independently of the value of the PRs. In view of these facts, any reduction according to the arm's length principle in the value of the PRs should necessarily lead to a corresponding reduction of the Purchase Price and, consequently, of the amount of the Loan under the same terms.[292]

289 See 2006 APA, section 4. See also "Report on Handling", page 4 ("*the franchise concept has value only together with the property rights*").

290 See 2011 APA, paragraphs 1.11, 1.12, 1.13 and 4.1.

291 See Sale and Purchase Agreement, whereas (E) and (F).

292 The reduction would be the logical consequence of the fact that the amount the Loan exceeding the arm's length Purchase Price would lack any commercial rationale. From a transfer pricing perspective, the 2010 OECD Guidelines in paragraph 1.65 (see in the same line paragraph 1.37 of the 1995 OECD Guidelines)

(193) In addition, the Commission observes that the methodology used for estimating the future consolidated profits of the franchising business has not been properly substantiated. In fact, the documentation provided by the Netherlands includes only a limited discounted cash-flow model without any explanation. Similarly, the Netherlands has not explained the methodology used by Interbrand to estimate the value of the "IKEA" brand or whether a differentiation has been made between the PRs and the IKEA Franchise Concept.

(194) In conclusion, at this stage the Commission considers that by endorsing the deduction of the interest of the Loan, the 2011 APA seems to be granting a tax treatment to *Systems* that would depart from a reliable approximation of a market-based outcome at arm's length.

7.2.2.2. The terms of the Loan seem not to be at arm's length

(195) In any event, even if the value of the PRs were to reflect their market value at arm's length (*quod non*), the Commission doubts that, given the credit worthiness of *Systems*, an independent lender (or a pool of independent lenders) would have accepted to grant, at a fixed interest rate of 6%, a loan of the same amount and under the same terms as the Loan.[293][294]

(196) The Commission considers that, also from a transfer pricing perspective, the quotation letters by ING and BNP Paribas as well as the internal note prepared by Inter IKEA's chief financial officer do not justify the arm's length character of the terms and the amount of the Loan. From a transfer pricing perspective, bank quotes which are not binding and are not the result of an actual credit analysis do not reflect the actual terms and conditions under which a bank would be willing to lend.[295] In the present case, the scarce reliability of the quotes is confirmed by the limited information provided to the banks by Inter IKEA and the absence of any financial analysis in them.[296]

---

contemplate the possibility to re-characterize or disregard transactions where, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price.

293 See paragraph 1.65 of the 2010 OECD TP Guidelines (see in the same line paragraph 1.37 of the 1995 OECD Guidelines), which expressly foresees the possibility to disregard an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, the investment would be expected to be structured in a different way considering its economic substance, with the result that the loan may be treated as equity. In other words, the interest-bearing debt could be re-characterized as equity if borrowing entity as an independent enterprise could not have obtained access to a similar level of debt from a third party lender.

294 If the amount of the Loan was revised downwards due to a reduction of the Purchase Price in line with section 7.2.1.1, that would not prevent the Commission to investigate whether the terms of the Loan are at arm's length according to the arguments raised in the present section.

295 See http://www.ird.govt.nz/transfer-pricing/practice/transfer-pricing-practice-financing-costs.html, or page 429 of Transfer Pricing and Intra-Group Financing, edited by A. Bakker and M.M. Levey, IBFD, 2012 "*Bank quotes are typically not accepted by the Dutch tax authorities because they do not represent (1) a "consumed transaction" and (2) for commercial reasons a bank can quote a rate as desired by their client, in most cases not representing a binding offer*".

296 The letter by BNP confirms that they have only made a "*theoretical exercise*" "*without however performing any credit analysis*".

(197) Moreover, one of the banks as well as Inter IKEA's chief financial officer raise themselves doubts in their letters on System's capacity to raise EUR 5 billion of external financing given the economic circumstances in 2011.[297]

(198) The Commission shares these doubts. First, the Commission considers at this stage that an independent lender would not have accepted to grant a non-amortising loan. The fact that the loan is not subject to periodic amortisation before maturity substantially increases the risk for the lender. Any distribution of dividends or increase of debt would potentially put at risk the ability of the borrower to reimburse the entire amount of the principal.[298] The Commission's doubts seem to be corroborated by the quotation letter of BNP provided by the Netherlands, which suggests to structure the financing with an amortisation schedule.[299]

(199) Second, the Commission considers that a 12-year maturity would not be appropriate for such a corporate loan, especially without amortisation. This seems to be corroborated by BNP Paribas in the letter quoting loan conditions when it indicates that "*the 12 y maturity is not neither maturity demanded by investors on a corporate name*" (sic), that "*there is no visibility in the market for an issue of this size and this maturity*" and that "*over the last years, there has been no transaction with a 12 Y maturity. The longest we have seen […] is bearing a maturity of 7 Y*".[300]

(200) Third, based on *Systems*' financial statements, the Commission has serious doubts that an independent lender would consider that *Systems* is in a position to repay more than EUR [4.1 - 4.8] billion of principal over 8 years. Indeed, using *Systems*' 2012 financial statements, the Commission estimates *Systems*' self-financing capacity to be at around EUR [650 - 750] million annually.[301] The Commission therefore considers at this stage that an independent lender would estimate the maximum repayment capacity of *Systems* over 8 years at around EUR [5.2 - 6.0] billion including interests and principal.[302] Considering an amortising loan with a maturity of 8 years and a fixed interest rate of 6%, *Systems* would have the capacity to repay a maximum amount of EUR [4.1 - 4.8] billion of principal over 8 years. However, the Commission has doubts that an independent lender would accept to lend to *Systems* even EUR [4.1 - 4.8] billion given

297 In its letter, Inter IKEA's chief financial officer indicates that due to financial difficulties "[c]*apital has become scarce and all large banks are known to be undercapitalised*" and it confirms not only that the banks consulted did not have the capacity to finance such a large amount but that, even through syndication involving a large pools of banks, "*the success of this action remains very uncertain in the current context*".

298 This scenario is not purely hypothetical considering that, based on *Systems* 2013 accounts, *Systems* seems to have distributed dividends up to EUR [300 - 400] million in 2013.

299 See letter by BNP Paribas: "*another thought I have could be to structure this 12 Y facility with an amortisation scheme in order to reduce its duration to something which could be more acceptable to banks*".

300 For instance, for an 8-year amortised loan of EUR 5.4 billion, the total interest to be paid would amount to EUR 1.4 billion, while *Systems* currently pays EUR 3.9 billion of interest for the intercompany non-amortised 12-year loan.

301 The self-financing capacity means the net results of the entity in question plus the non-cash related expenses (i.e. basically the provisions and the financial expenses). In the case of *Systems*, its net result in 2012 was EUR [300 - 500] million, plus non cash related expenses of EUR [280 - 330] million.

302 According to the debt service ratio, the debt service should usually not exceed a range of 1.15 – 1.35 times the self-financing capacity. A ratio below one means that the borrower does not have sufficient capacity to service the debt.

that the debt should usually not exceed 3 times its self-financing capacity (EUR [1.95 - 2.25] billion in the case of *Systems*).

(201) In conclusion, considering *Systems*' credit worthiness and the amounts at stake, the Commission has doubts that an independent lender would have granted a similar financing facility.

(202) Moreover, according to price adjustment mechanism, the indebtedness of *Systems* towards Interogo Foundation should be adjusted upwards (or downwards) at the termination date depending on the adjusted value of the PRs. Even if this price adjustment mechanism was considered in line with the arm's length principle, which the Commission contests in section 7.2.2.3, the Commission doubts that an independent lender would commit to potentially increase the amount of the loan in 12 years' time. Therefore, the provisions for future interest payments related to the potential increase of the debt do not appear to be at arm's length.

7.2.2.3. The price adjustment mechanism in 2023 seems not to be at arm's length

(203) The 2011 APA accepts a series of tax consequences resulting from the price adjustment mechanism included in the Sale and Purchase Agreement. These include:

- An increase of the fiscal book value of the PRs in *Systems*' tax accounts to the extent that the market value of the PRs on 1 January 2023 exceeds the market value of the PRs on 1 January 2012;

- This increase is financed by a capital contribution as well as an additional intercompany loan, so that the debt/equity ratio of 60/40 is respected;

- Annual tax deductible allocations to a provision for interest due on this future additional loan.

(204) The Commission has doubts whether such a price adjustment mechanism would have been agreed in conditions of free competition between independent undertakings negotiating at arm's length under comparable circumstances.

(205) The Netherlands justifies this clause with the impossibility for the tax authorities to verify the accuracy of the cash estimates used to estimate the value of the PRs. Thus, the price adjustment mechanism would allow an *ex-post* verification before the statutory recovery period has elapsed.[303] The Netherlands mentions a judgment of the Dutch Supreme Court in which this type of mechanisms is applied.[304] Finally, the Netherlands claims that the use of price adjustment clauses is very common in the market and supports this statement with several cases reported by public sources.[305]

(206) The valuation of intangible property may in some circumstances be "highly uncertain", and that in such a case a price adjustment clause may be justified as also recognised by

303 See letter of the Netherlands of 17 November 2016, Annex 2, response to question A(ix).

304 Supreme Court judgment of 17 August 1998, No. 32.997 BNB 1998/385.

305 See letter of the Netherlands of 17 November 2016, Annex 2, response to question A(x) mentions price adjustment clauses cited in several public sources, for instance, the 2015 Annual Report of ITV, Plc., the websites of the Dutch company DSM or of the French company Altice.

the OECD TP Guidelines. In particular, in cases where the price based on anticipated benefits alone does not provide an adequate protection against the risks posed by the high uncertainty in valuing the intangible property, the parties may include price adjustment clauses in the terms of the agreement to protect either the seller or the acquirer against subsequent developments that might not be predictable.[306] However, the Commission at this stage questions that the existence of uncertainty *per se* justifies an *ex post* adjustment without an analysis on what independent enterprises would have agreed in comparable circumstances.[307] In this respect, independent companies would take into account the extent to which subsequent developments are foreseeable and predictable.[308] Also, an *ex-post* adjustment of the price of a transaction where there is no reason to consider that the valuation was sufficiently uncertain at the outset would represent an inappropriate use of hindsight.[309]

(207) In view of the above, the Commission understands that, in general terms, a price adjustment mechanism could have been agreed in situations where, for instance, the intangible had recently been developed (a new trademark or patent), thus where high uncertainty about the response of the market at the moment of the sale exists. This position seems to be consistent with the relevant provisions of Dutch law, as have been communicated by the Netherlands to the Commission.[310]

(208) The judgment of the Supreme Court mentioned by the Netherlands[311] would corroborate this interpretation. The case refers to the development of new projects, in particular the transfer of building projects by a project developer to a holding entity, where the holding entity contracts the project developer to realise the projects. The holding entities (including the projects) are subsequently sold after realisation. The tax authorities'

---

306 See 2010 TP Guidelines, paragraph 6.30.

307 This is also illustrated by the 2010 TP Guidelines, paragraph 3.73:"[*t]he mere existence of uncertainty should not require an ex post adjustment without a consideration of what independent enterprises would have done or agreed between them*".

308 See 2010 TP Guidelines, paragraph 6.29.

309 See 2010 TP Guidelines, paragraph 9.88. See also Example 1 in the 2010 TP Guidelines, Annex to Chapter VI - Examples to Illustrate the Guidance on Intangible Property and Highly Uncertain Valuation, where the ex-post adjustment of the price due to events which were unpredictable at the time of the sale agreement (new capabilities of the drug licensed) is considered an inappropriate use of hindsight.

310 "*The Dutch Tax Department will likewise, in certain circumstances, take the view that it is not commercially sensible to agree a fixed price if the valuation at the time of the transaction is highly uncertain, because independent third parties in a similar situation would not have agreed a fixed price. In such cases an adjustment clause should be included in the agreement between the associated parties, with the price partly depending on subsequent revenue. An example would be a situation in which <u>a new intangible asset is developed and transferred to an associated enterprise at a time when its success is not yet fully apparent, for example because the intangible asset has not yet generated any revenue</u> and considerable uncertainty surrounds the estimate of future revenue. In these circumstances the valuation at the time of the transaction is highly uncertain and it is reasonable to include a* price *adjustment clause*" (paragraph 5 of the Dutch TP Decree (Decree of 14 November 2013 nr. IFZ 2013/184M, which contains the Dutch interpretation of paragraphs 6.28-6.35 of the OECD TP Guidelines. Emphasis added by the Commission).
In any case, the Commission notes that both the OECD Guidelines and the Dutch Decree mentioned above are intended to serve as a reference for situations where a taxpayer sells an asset and where the tax authorities should be allowed to increase the taxable profit through a price adjustment mechanism if such would also have been agreed in comparable unrelated circumstances. In this case, the Netherlands is using these provisions to reduce the tax liability of the taxpayer.

311 Supreme Court judgment of 17 August 1998, No. 32.997 BNB 1998/385.

position was that the project developer should be taxed on the complete profit of the project, minus an administration fee for the holding entity. The Supreme Court allowed this given that the transfer of the project by the developer to the holding against a (low) fixed fee at the start of the project was not arm's length. As a consequence, the Court considered that a price adjustment mechanism would have been agreed at arm's length because at that time the profitability of the project was highly uncertain, since only the location/permit was known. The Court also considered that such a mechanism would have been agreed because a contractual relationship existed during the whole period between the transferor (project developer) and the holding company.

(209) The situation in the present case is seemingly different. The activity has been going on for decades and the intangible in question (the PRs) existed and had been developed for more than 50 years, and more than 30 years through a franchising formula. Thus, both the seller and the purchaser had all the necessary information to estimate the future profits generated by PRs and were in principle in a position to predict the future market response on the intangible. In these circumstances, where transferor and transferee had been exchanging information on the performance of the intangible for decades, the Commission takes the preliminarily view that independent undertakings would not have agreed to include such a price adjustment mechanism in the sale agreement.[312]

(210) Moreover, even if there was high uncertainty at the time of the sale (*quod non*), the Commission considers that the allocation of risks by independent undertakings negotiating in the market at arm's length should be consistent with the economic substance of the transaction.[313] The Commission takes the preliminary view that the fact that any *ex post* unforeseen over-performance of the franchise business is attributed entirely to the PRs seems difficult to reconcile with the fact that *Systems* already owned before the acquisition of the PRs a valuable intangible (the IKEA Franchise Concept) and performed functions and assumed risks both related to the IKEA Franchise Concept and to the PRs.[314] For this reason, the Commission takes the view that any "high uncertainty" should have led to the attribution to *Systems* of at least part of any *ex post* unforeseen over-performance of the franchise business.

(211) Finally, the Commission notes that the price adjustment mechanism contemplated in the Sale and Purchase Agreement does not specify how such adjustment must be implemented in practice (factors and variables to be considered, method of calculation of the adjustment, etc.). This seems to leave a wide discretion to the parties to implement a price adjustment on which to base the tax deductions.

---

312 As regards the other cases from public sources cited by the Netherlands, although the Commission has not been able to verify the facts of these cases, it does not seem from the description provided that they could be considered comparable to the specific situation of the case at stake.

313 This is illustrated by the 2010 TP Guidelines, paragraph 1.48

314 In other words, the party to which the risk should be allocated is the party that performs the functions related to the intangibles and/or contributes to the control over the economically significant risks. This party will be entitled to the differences between actual and anticipated profits or required to bear losses that are caused by these differences if such risk materialises.

7.2.2.4. The deduction of the provision for future interests payments related to the price adjustment mechanism seems in conflict with Dutch law

(212) The 2011 APA accepts that *Systems* sets aside tax deductible provisions for future interest expenses that will be due in case of a potential upward adjustment of the Purchase Price. The Commission considers at this stage that, even if the price adjustment mechanism was to be considered at arm's length (*quod non*), the deduction of the amounts allocated to this provision might not be compliant with Dutch law.

(213) The Commission doubts whether the legal basis and general rules for forming a tax deductible provision under Dutch corporate tax law have been respected. As mentioned in Recital (88), Dutch tax law allows forming a provision in a tax year for expenses in future tax years if three cumulative criteria are met:

- the expenses are caused by facts and circumstances preceding the balance sheet date;
- the expenses are also allocable to that preceding period; and
- it is reasonably certain that the future expenses will be made.

(214) While it would suffice to deny the tax deductible provision if one of the conditions was not met, the Commission doubts that any of these conditions is met in this case. The Commission in particular does not understand how interest expenses related to a potential future loan and due in future tax years can be considered allocable to a current tax year. Any price increase under a price adjustment mechanism can be caused by past facts and circumstances, but such relation seems far too indirect for interest that will be due in later years if the payment under the price adjustment mechanism would be debt financed. And even if it were, the interest expenses are certainly not allocable to past years. Interest accrues exclusively over the period during which a debt exists and must be allocated to those years only. Notwithstanding the fact that the Commission also doubts the arm's length character of any future loan (see Recital (199)), forming a provision in tax years after 2012, 2013 and later for interest expenses accruing only after 1 January 2024 on such potential loans for a potential price increase, seems in any case difficult to reconcile with the criteria set by Dutch law, and this regardless of how they have been calculated.

(215) Allowing tax deductible provisions in conflict with the general rules under Dutch tax law would constitute a misapplication of the *sound business* principle under Dutch law based on the jurisprudence of the Dutch Supreme Court. Such misapplication would allow *Systems* to reduce its taxable profit and hence its tax liability in the years during which the provisions were formed and would therefore confer an advantage to *Systems*.

7.2.2.5. Conclusion on the 2011 APA

(216) The Commission considers at this stage that by allowing a reduction of Systems' taxable profit due to the deduction of the interest of the Loan, the 2011 APA conferred an advantage on Systems. This is based on the preliminary conclusions that the amount of the Loan is based on an overestimated value of the PRs and on incorrectly considering that an independent lender would have granted a similar financing facility under comparable conditions.

(217) Moreover, at this stage, the Commission also considers that the 2011 APA conferred an advantage to *Systems* by endorsing the deduction of provisions for future interest related to the price adjustment mechanism in a way which departs from a reliable approximation of a market-based outcome at arm's length and which also seems to be in conflict with the *sound business* principle under Dutch law.

7.3. Selectivity

(218) 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.*"[315]

(219) A distinction is made between the conditions of advantage and selectivity to ensure that not all State measures that confer an advantage constitute State aid, but only those which grant such an advantage in a selective manner. What this means is that measures of purely general application do not constitute State aid, since they are not selective in nature.[316]

7.3.1. First provisional finding of selectivity

(220) The Court of Justice has made a clear and explicit distinction between individual aid measures and aid schemes and has indicated that in the case of individual aid measures, which are addressed to only one undertaking in view of its specific circumstances, the analysis of whether the measure in question confers an advantage to the exclusive benefit of certain undertakings or certain sectors of activity is not necessary.[317]

(221) The contested APAs are individual measures. They have been granted by the Dutch tax administration and they concern the tax situation of *Systems* only. They can be used only by this entity to assess its yearly taxable profit and its corporate income tax liability in the Netherlands. Therefore, assuming the Commission's provisional conclusion that the contested measures confer an economic advantage on *Systems* is correct, it can also presume that those measures are selective in nature.

7.3.2. Subsidiary provisional findings of selectivity

(222) Although the Commission may presume the selectivity of the contested APAs, it will also examine, for the sake of completeness, whether the APAs could be considered selective in nature under the three-step analysis devised by the Court of Justice for aid

---

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

316 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.

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

schemes.[318] In order to classify a national tax measure as selective under that analysis, the Commission must begin by identifying the ordinary or normal tax system applicable in the Member State concerned (the "reference system") and thereafter demonstrate that the tax measure at issue is a derogation from that system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation.[319] A tax measure which constitutes a derogation to the application of the reference system 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.[320] If that is the case, the tax measure is not selective. The burden of proof in that last step lies with the Member State.

7.3.2.1. Favourable treatment as compared to all Dutch corporate taxpayers

(223) The contested APAs were granted to *Systems* to allow it to determine its annual taxable profit for the purposes of determining its corporate income tax liability under the ordinary rules of taxation of corporate profit in the Netherlands. The Commission therefore considers the reference system to be the general Dutch corporate income tax system, which has as its objective the taxation of profits of all companies subject to tax in the Netherlands.[321]

(224) As explained in recital (86) above, companies established in the Netherlands are resident taxpayers,[322] which are subject to corporate income tax on their taxable amount.[323]

(225) While the determination of taxable profit in the case of non-integrated/domestic standalone companies that transact on the market is rather straightforward, as it is based on the difference between income and costs in a competitive market, the determination of taxable profit in the case of integrated group companies like *Systems* requires the use of proxies. Standalone, non-integrated companies can take their accounting profits as a starting point for determining the taxable profit to which the Dutch corporate income tax applies, since those profits are dependent on prices dictated by the market for the inputs acquired and the products and services sold by the company. By contrast, an integrated company that transacts with companies of the same corporate group will first have to estimate the prices applied to those intra-group transactions for determining their taxable profits that estimate being determined by the same company controlling the group instead of being dictated by the market.

(226) This difference in determining the taxable profit of non-integrated companies and integrated companies has no bearing on the objective of the Dutch corporate income tax system, which aims to tax profits of all companies subject to tax in the Netherlands, whether non-integrated or integrated. Since under the general Dutch corporate income tax system, the profits of all companies resident in the Netherlands are taxed in the same

318 Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417.

319 Joined C-20/15 P and C-21/15 P *Commission* v. *World Duty Free Group* EU:C:2016:981, para. 57 and the case-law cited.

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

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

322 Article 2 CIT 1969.

323 Since 2011, the standard CIT rate is 25 %. There are two taxable profit brackets. A lower rate of 20 % applies to the first income bracket, for taxable profit up to EUR 200 000. From 2006 to 2011, the CIT rate varied from 25,5% to 29,6% with different income bracket amounts.

manner without any distinction as to group and independent companies, both types of companies should be considered to be in a similar factual and legal situation in light of the intrinsic objective of that system.[324] Consequently, the Commission considers that the reference system cannot be limited only to group companies, solely because only they need to revert to the arm's length principle enshrined in Article 8b(1) CIT and interpreted the Decree when determining the transfer prices of their intra-group transactions. Such a limited reference system would introduce an artificial distinction between companies based on their corporate structure for the purpose of determining their taxable profit, which the general Dutch corporate income tax system does not recognise when taxing profits of companies falling within its tax jurisdiction.

(227) The general Dutch corporate income tax system is based on the "separate entity approach" and only by ensuring that integrated companies are taxed at an arm's length level of profit can it be assured that they are not selectively favoured as compared with non-integrated companies.[325] In light of the total profit concept, enshrined in Section 3.8 of the Income Tax Act 2001, no distinction is made between income and profits derived by a group company or a standalone company. As explained in recital (86), the "arm's length principle" was applied in Dutch tax law even before Article 8b(1) CIT entered into force on the basis of the total profit concept. Finally, Article 8b(1) CIT and the Decree is meant precisely to ensure that group and stand-alone companies are treated in a similar manner under the general Dutch corporate income tax system and taxed on profits that derive from their business activities, whether those activities are carried out in an intra-group context or not. That provision and that Decree are merely the means by which to achieve the ultimate goal of taxing integrated group companies on an equal footing with non-integrated standalone companies under the ordinary rules of taxation of corporate profits and not a reference system unto itself.

(228) Since the 2006 and 2011 APAs determine the operating profit as the starting point to determine the taxable profit of *Systems* for the purpose of levying corporate income tax under that system, it is the general Dutch corporate income tax system that constitutes the reference system against which those APAs should be examined to determine whether Inter IKEA has benefitted from a selective advantage. As explained in Section 7.2, the 2006 APA and the 2011 APA appear to endorse transfer pricing arrangements that result in a taxable profit for *Systems* 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 all taxed on a level of profit in the Netherlands that, as a starting point, reflects prices negotiated at arm's length on the market. For this reason, the Commission provisionally concludes that the contested APAs appear to derogate from the general Dutch corporate income

324 In general, all undertakings having an income are considered to be in a similar legal and factual situation from the perspective of direct company taxation.

325 According to the "separate entity approach", a parent and its subsidiary are considered to constitute two distinct entities for tax purposes. See 2010 OECD TP Guidelines (Annex A.89), para 1.6: "*[…]. By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances, the arm's length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business. Because the separate entity approach treats the members of an MNE group as if they were independent entities, attention is focused on the nature of the dealings between those members.*"

tax system and that they therefore appear to grant a favourable tax treatment to *Systems* that would not be available to other corporate taxpayers in the Netherlands.

(229) Finally, to the extent that the Commission's provisional conclusion in Section 7.2.2.4 is well-founded that the 2011 APA also misapplies the *sound business* principle under Dutch law by allowing the deduction of the provision for future interests payments, that misapplication should be considered to entail a derogation from the general Dutch corporate income tax system, in general, and that principle, in particular, thereby leading to a difference in treatment *vis-à-vis* undertakings in comparable factual or legal situation.

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

(230) Without prejudice to the provisional conclusions in Sections 7.3.1 and 7.3.2.1, the Commission further provisionally concludes that even if the reference system is to be limited to Article 8b(1) CIT and the Decree and that therefore only companies belonging to a multinational corporate group can be considered to be in a similar factual and legal situation, the contested measures should be considered to favour *Systems* as compared to those taxpayers as well.

(231) Article 8b(1) was incorporated into Dutch tax law before the contested measures were adopted. That provision is considered to codify the arm's length principle under Dutch tax law. Pursuant to that provision, companies belonging to a multinational corporate group that transact with associated companies must determine their transfer prices in line with that principle. As provisionally demonstrated in Section 7.2, the Commission considers the contested measures to produce a taxable profit for *Systems* that does not reflect prices negotiated at arm's length on the market. It therefore lowers *Systems'* corporate income tax liability in the Netherlands as compared to companies belonging to a multinational corporate group that must determine their transfer prices in compliance with Article 8b(1) CIT and the Decree.

(232) In light of the foregoing, the Commission provisionally concludes that the advantage identified in Section 7.2 is selective in nature because it favours *Systems* as compared to other corporate taxpayers belonging to a multinational corporate group that engage in intra-group transactions and that, by virtue of Article 8b(1) CIT and the Decree, must estimate the prices for their intra-group transactions in a manner that reflects prices negotiated by independent parties at arm's length on the market.

(233) Finally, to the extent that the Commission's provisional conclusion in Section 7.2.2.4 is well-founded that the 2011 APA also misapplies the *sound business* principle under Dutch law by allowing the deduction of the provision for future interests payments, that misapplication should be considered to entail a derogation from that principle thereby leading to a difference in treatment *vis-à-vis* undertakings in comparable factual or legal situation.

Justification

(234) As regards any possible justification for the discrimination caused by the contested APAs in favour of *Systems*, the Commission recalls at this stage that the burden of establishing such a justification lies with the Member State. In any event, the Commission has not been able to identify at this stage any possible ground for justifying the preferential treatment from which *Systems* benefits as a result of those measures that

could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the system.[326]

(235) In light of the foregoing, the Commission concludes that if it were to conclude that the 2006 and 2011 APAs confer an economic advantage to *Systems*, such advantage would be selective in nature.

7.4. Conclusion on the existence of aid

(236) For all the foregoing reasons, the Commission considers, at this stage, that the contested APAs constitute State aid within the meaning of Article 107(1) of the Treaty. Therefore, in the absence of any notification pursuant to Article 108(3) of the Treaty, the measure would be considered unlawful aid.

(237) The present decision is without prejudice to the assessment of whether the tax treatment granted by other Member States to Inter IKEA companies entails State aid, in particular whether *Holding* complies with the conditions set out by Luxembourg law to benefit from the *Holding* 1929 regime.

7.5. Compatibility with the internal market

(238) State aid is deemed compatible with the internal market if it falls within any of the grounds listed in Article 107(2) of the Treaty[327] and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the grounds listed in Article 107(3) of the Treaty.[328] It is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to Article 107(2) or (3) of the Treaty.[329]

(239) At this stage, the Commission has no indication that aid afforded to *Systems* and to Inter IKEA as a whole as a result of the contested APAs could be considered compatible with the internal market. In particular, the Commission considers that the contested APAs appear to result in a reduction of charges that should normally be borne by the entity concerned in the course of its business, and that the exemption of those charges should therefore be considered to constitute operating aid. According to Commission practice, such aid can normally not 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.[330]

---

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

327 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.

328 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.

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

330 Decision of 21 October 2015 in case SA.38375, Luxembourg – *alleged aid to FFT*, OJ L 351, of 22.12.2016, p. 1, under appeal, paragraph 347 *et seq*. See also judgment of 16 October 2014, *Eurallumina* v *Commission*, T-308/11, EU:T:2014:894, paragraphs 85 and 86.

CONCLUSION

In the light of the foregoing considerations, the Commission's preliminary view is that the Advanced Pricing Agreements concluded between the Dutch tax administration and Inter IKEA systems BV on 9 March 2006 and on 19 December 2011 constitute State aid within the meaning of Article 107(1) of the Treaty granted to Inter IKEA Systems BV and to the Inter IKEA group as a whole. That aid is granted annually when those companies used those Advanced Pricing Agreements to calculate their annual corporate income tax liability in the Netherlands. The Commission has doubts as to the compatibility of that State aid with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) of the Treaty with respect to these agreements.

The Commission requests the Netherlands to submit its comments on this Decision and to provide all such information as may help to assess the contested Advanced Pricing Agreements, 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 to the fact that the information provided by the Netherlands during the course of the preliminary investigation is not sufficient 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 fully respond to the information listed in the annex within one month from receipt of this letter, the Commission, pursuant to Article 7 of Council Regulation (EU) No 2015/1589, will consider requesting the beneficiary i.e. Inter IKEA Systems BV or any other company of the Inter IKEA 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.[331]

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

The Commission wishes to remind the Netherlands that Article 108(3) of the Treaty has suspensory effect, and would draw its attention to Article 16 of Council Regulation (EU) No 2015/1589,[332] which provides that all unlawful aid may be recovered from the recipient of that aid.

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 which 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 publication of

331 OJ L 248 of 24.9.2015, p. 9.
332 OJ L 2015 L 248/9.

the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid registry
1049 Brussels
Belgium
Fax : +322 296 12 42

Yours faithfully,
For the Commission

Margrethe VESTAGER
Member of the Commission

ANNEX

(1) Besides the documents concerning the visits of Mr Ingvar Kamprad to the IKEA Delft store in 7 March 2006, 7 March 2007 and 10 March 2008, provide any other supporting documents evidencing the "close involvement" of Interogo Foundation and/or Mr Kamprad in the development and expansion of the IKEA formula or their influence on the activities of Inter IKEA Systems BV during the period from 1983 to 2011. Include in your response, to the extent available, any internal documents, minutes of meetings, decision-making procedures, communications, inter-company contracts.

(2) In relation to Mr Kamprad, indicate if he has been employee or has held any position within Inter IKEA Systems BV from 1983 or if there has been some direct contractual relationship between Mr Kamprad and Inter IKEA Systems BV in the same period.

(3) In general, indicate the role of Mr Kamprad and/or other family members in the management of Inter IKEA during the period 2006-2012 and provide evidence of their influence on Inter IKEA Systems BV´ activities. Please indicate any position in the corporate bodies of any of the group companies as well as any managerial position that Mr. Kamprad and/or other family members may have held within the group.

(4) Provide any documents evidencing that long-term strategic decisions other than the formal acceptance of new territories were adopted by entities outside the Netherlands. Include in your response, to the extent available, any internal documents, minutes of meetings, decision-making procedures, communications, intercompany contracts

(5) Indicate the name of the senior executives of Inter IKEA Systems BV from 1983, their position and powers.

(6) Besides the minutes of the meetings held between Inter IKEA Systems BV and Largo Brands Corporation AVV on 20 October 2010, 24 March 2011 and 19 October 2011, provide copies of all other minutes of meetings held between Inter IKEA Systems BV and I.I. Holdings SA and/or Largo Brands Corporation AVV from 1983 until 2011.

(7) Explain which are the powers and responsibilities of the advisory board of Interogo Foundation in relation to the business of the Inter IKEA group and notably of Inter IKEA Systems BV, and in particular in relation to the adoption of strategic decisions concerning the management of the IKEA formula. Indicate the composition of the Interogo Foundation advisory board from 2006 until 2011. Indicate the voting powers of Mr Kamprad and other family members.

(8) Indicate the powers and responsibilities of the Chairman of Inter IKEA Holding, S.A, in particular in relation to the adoption of strategic decisions concerning the management of the IKEA formula.

(9) Indicate if the registered owner in the EU of the rights which are part of the IKEA Proprietary Rights is I.I. Holdings SA, Inter IKEA Systems BV or any other entity of the Inter IKEA group.

(10) Please provide Appendixes A and B to the Licence agreement between I.I. Holding S.A. and Inter IKEA Systems BV of 1 July 1983 (including any subsequent amendments of such Appendixes).

(11) Paragraph 3.4 of the 2006 APA mentions certain "*miscellaneous costs related partly to IKEA Proprietary Rights and partly to the IKEA Franchise Concept*" to which a 40/60 apportionment ratio between Inter IKEA Systems BV and I.I. Holding S.A. applies. According to the letter from the Netherlands of 17 November 2016, "*in the years until 1996, a record was kept of concept-related costs and rights-related costs*" which has produced this 40/60 ratio. In view of this, please provide the following information:

(i) Please explain what these "miscellaneous costs" are.

(ii) Explain what the other (i.e. non miscellaneous) costs are and why the apportionment ratio should not be applied to the latter.

(iii) Provide the record containing the cost apportionment until 1996.

(iv) Provide the breakdown of the total costs of Inter IKEA Systems BV from 2006 to 2011. Distinguish between catalogue costs, miscellaneous and non-miscellaneous costs, marketing contributions to franchisees, other marketing expenses (i.e. other than contributions to franchisees), consultancy services provided by sister companies, internal and outsourced costs related to the development, enhancement, maintenance, protection and exploitation of the IKEA Proprietary Rights and of the IKEA Franchise Concept, possibly divided into the aforementioned categories.

(12) As regards the price adjustment mechanism agreed in the agreement for the acquisition of the IKEA Proprietary Rights, explain in detail how the value of the provisions set aside from 2012 onwards by Inter IKEA Systems BV was established.

(13) For each of the companies and periods referred below, please provide (i) the composition of the board and any corporate governing bodies; (ii) senior executive managers, describing the responsibilities and powers of each of them; (iii) by laws and any other internal documents showing how these entities are governed and how decisions are adopted, including the competences, quorum and voting rights and procedures in each corporate body; (iv) minutes of board meetings and of other corporate bodies' meetings; (v) any documents showing the communication of strategic decisions from these entities to Inter IKEA Systems BV in the referenced period:

(i) I.I. Holding S.A., from 2006 to 2009.

(ii) Largo Brands Corporation AVV, for 2010 and 2011.

(iii) Inter IKEA Holding SA, from 2006 to 2011; and

(iv) Interogo Foundation, from 2006 to 2011.

(14) Provide the following information: (a) number of employees of I.I. Holding S.A. from 2006 until 2009; (b) describe the functions of each of them. Provide the same information for Largo Brands Corporation AVV for years 2010 and 2011.

(15) According to the 2011 APA, paragraph 4.5 "*no interest deduction limitation measures such as those included in the Act on Corporate Taxation of 1969 or elsewhere are applicable*". Explain if the thin capitalisation rule contained in former Article 10d of the Dutch Corporate Income Tax Act 1969, which was in place at the time when the 2011 APA was granted, was applicable to the case at hand.

(16) Indicate the price at which the IKEA Proprietary Rights were transferred in 1983 to I.I. Holding SA. Indicate how such price was calculated and if it represents the market value of the rights at that time. Provide any contracts or internal documents supporting your answer. If contracts or other documents are not available, provide statements from Mr Ingvar Kamprad or from any other managers concerning the price and how it was calculated.

(17) Indicate how the value of the IKEA Proprietary Rights is reflected in the financial statements of I.I. Holdings SA after 1983 and if they have been subject to amortisation.

(18) Provide catalogue income and expenses for Inter Ikea Systems BV from 2005 to 2012.

(19) Provide the following information concerning the transfer of the IKEA Proprietary Rights from I.I. Holdings SA to Largo Brands Corporation AVV in 2009: (i) value of the IKEA Proprietary Rights at the date of the transfer, (ii) structure of the financing; (iii) supporting contracts.

(20) Any evidence that the loan granted by Interogo Foundation to Inter IKEA Systems BV was provided at arm's length.

(21) Inter Ikea Systems BV and I.I. Holding SA accounts for 2015 and 2016.