

# 17 Ireland Apple escrow fund

**17.1** The Ireland Apple escrow fund is a multi-billion-euro fund held under the terms of a formal agreement between the Minister for Finance (the Minister) and Apple Sales International and Apple Operations Europe (jointly referred to as Apple), pending the final outcome of legal challenges to the findings of a State aid investigation undertaken by the European Commission (the Commission). The investment and management of the fund is jointly overseen by the Minister and Apple. The Minister delegated functions in that regard to the National Treasury Management Agency (NTMA).

## Origin of the escrow fund

**17.2** In June 2014, the European Commission opened a formal investigation procedure into the tax opinions issued by the Revenue Commissioners in 1991 and 2007 to Apple. The investigation was focused on establishing whether these opinions conferred any advantage on the Apple Ireland subsidiaries relative to competitors, such that they constituted State aid.

**17.3** In August 2016, the Commission issued a decision ('the Commission's decision') concluding that Ireland had given illegal State aid to Apple.<sup>1</sup>

**17.4** The Commission ordered Ireland to recover, from Apple, the alleged State aid plus interest, related to a ten-year period from 2003 up to 2014.<sup>2</sup> The Commission estimated that the State aid allegedly granted was in the order of €13 billion. Both the Irish Government and Apple separately appealed the Commission's decision.

**17.5** Notwithstanding Ireland's appeal against the Commission's decision, the Irish Government complied with its obligation to recover the alleged State aid plus interest from Apple. The Minister agreed with Apple that the amounts collected would be held in an escrow fund until the legal process is completed.

**17.6** The Revenue Commissioners computed the alleged State aid to be collected by reference to the Commission's decision. The sum was €13.1 billion plus interest of €1.2 billion. Apple transferred €14.3 billion into the escrow account between May and September 2018.<sup>3</sup>

**17.7** An oral hearing on the case took place in the General Court of the European Union (GCEU) in September 2019. On 15 July 2020, the GCEU issued its judgement annulling the Commission's decision that Ireland had granted unlawful State aid to Apple. An appeal of the GCEU's judgement had to be made by 25 September 2020.

**17.8** The EU Commission announced on 25 September its decision to lodge an appeal of the GCEU judgement to the Court of Justice of the European Union (CJEU). As a result, the monies will remain in escrow pending a final decision by the European Court. This process of litigation could take a number of years.

<sup>1</sup> Commission Decision on State Aid SA.38373 of 30 August 2016.

<sup>2</sup> Article 9, Chapter V of the Commission Regulation (EC) No 794/2004 of 21 April 2004. The Ireland Apple case is the largest State aid recovery ever ordered.

<sup>3</sup> Figures in this report have been rounded.

## Oversight and management of the fund

- 17.9** Placement of the funds in an escrow account allows the escrow parties (the Minister and Apple) to determine how these funds are invested until a final judgement by the European Court, and the ultimate owner of the fund is determined.
- 17.10** In April 2018, the Minister and Apple entered into an escrow framework deed. This sets out the detailed legal agreement governing the collection and payment of funds from Apple, and any required releases from the escrow account. The arrangements for oversight, management and monitoring of the fund are summarised in Annex 17A. As indicated, the investment and management of the fund is jointly overseen. The Minister has delegated the State's responsibility for oversight to the NTMA, including the appointment of State representatives to the investment committee for the fund. Jointly, the parties have appointed a number of financial services firms to act as investment managers and as escrow agent/custodian of the fund.

## Investment strategy

- 17.11** The investment principles and parameters for the escrow fund are set out in the investment policy. The objective of the investment policy is to preserve the capital value of the escrow fund to the greatest extent possible in light of the prevailing market conditions. The agreed risk appetite in respect of the escrow fund is 'low', with investments permitted only in securities that have a low degree of inherent risk, such as highly-rated fixed-income securities of short to medium-term duration. The investment committee reviews the ongoing appropriateness of the investment policy.<sup>1</sup>
- 17.12** The escrow fund is exposed to different market, liquidity and credit risks. The risk management programme for the fund seeks to minimise the potential adverse effects of the risks on its financial performance.
- 17.13** The management and monitoring of risks is carried out by the investment managers. The escrow agent/custodian independently monitors compliance by the investment managers with their mandates and reports to the NTMA and Apple on a daily basis. The investment manager mandates are consistent with the investment policy for the fund. Compliance with the investment policy is considered by the investment committee on a quarterly basis. Regular meetings are held between the investment committee and the investment managers to review the investment managers' performance and that of the overall escrow fund.

<sup>1</sup> The investment committee comprises three representatives of the NTMA and three representatives of Apple. An NTMA representative chairs the committee.

<sup>2</sup> This arises from the terms of Section 12 of the NTMA Act 1990.

<sup>3</sup> The financial statements of the escrow fund are prepared pursuant to Section 28(5) of the National Treasury Management Agency (Amendment) Act 2000.

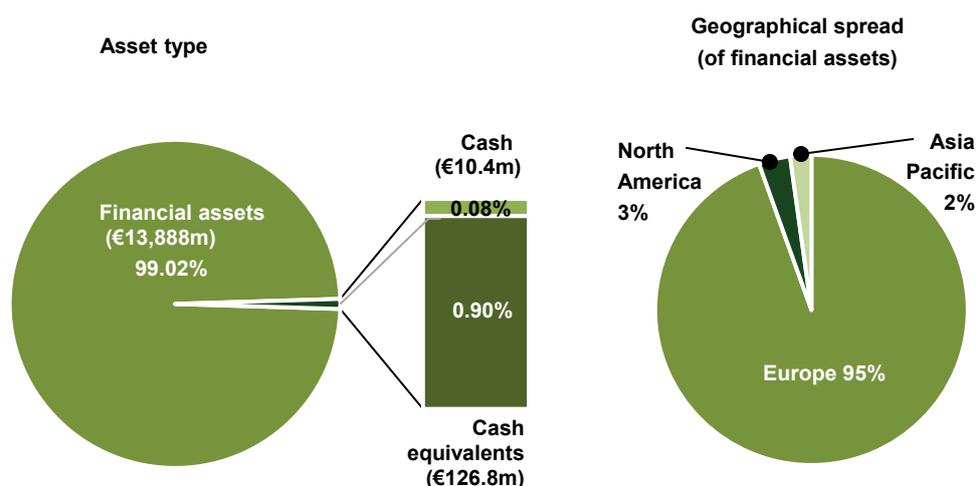
## Performance of the escrow fund

- 17.14** As a consequence of the Minister's delegation of the investment functions, the NTMA is required to prepare annual financial statements to be audited by the Comptroller and Auditor General, and to be presented (following audit) to the Houses of the Oireachtas.<sup>2</sup>
- 17.15** The financial statements of the escrow fund are prepared in accordance with International Financial Reporting Standards (IFRS), as directed by the Minister.<sup>3</sup> All financial assets of the escrow fund are priced at fair value, which is the quoted market value at the close of trading on the period end date.

**17.16** In line with the investment policy, the escrow fund is invested in highly-rated euro-denominated fixed income securities, or held as cash and cash equivalents. Fixed income securities include sovereign, quasi sovereign and corporate bonds. Cash and cash equivalents include cash and other short-term investments (with maturities of three months or less).

**17.17** At 31 December 2019, the total assets held in the escrow fund amounted to €14,025 million (2018: €14,271 million). A breakdown of the assets is shown in Figure 17.1.

**Figure 17.1 Assets of escrow fund as at 31 December 2019**



Source: Financial statements of the Ireland Apple escrow fund 2019

**17.18** The total net assets of the fund<sup>1</sup> reduced in 2019 by €249 million to €14,020 million (2018: €14,269 million). The reduction was primarily due to a 'third country adjustment' amounting to almost €209 million and tax charges of €3 million (see below). The remaining €37 million decline for the year reflects the current negative interest rate environment and negative yields on highly-rated euro sovereign and quasi-sovereign bonds, and fund operating expenses. Between May and December 2018 the decline in value of the fund was €16 million.

### ***Third country adjustment claim***

**17.19** The Commission's decision noted that the profits to be subjected to tax in Ireland, for the period covered by the decision, could be reduced if Apple was required to pay taxes in another jurisdiction in respect of (some of) the same profits. Such reductions are referred to as 'third country' adjustments and are provided for in the escrow framework deed. The Minister for Finance determines the validity of any third country adjustment applications made by Apple in accordance with the escrow framework deed.

**17.20** In May 2019, Apple made a claim for a third country adjustment.

**17.21** On 23 July 2019, following the appropriate determinations by the Minister for Finance, with advice from the Revenue Commissioners, almost €209 million was transferred from the fund to Apple in respect of the third country adjustment claim by Apple.

<sup>1</sup> The difference between the total assets and the total net assets is liabilities of the fund outstanding at the year-end.

### **Taxation**

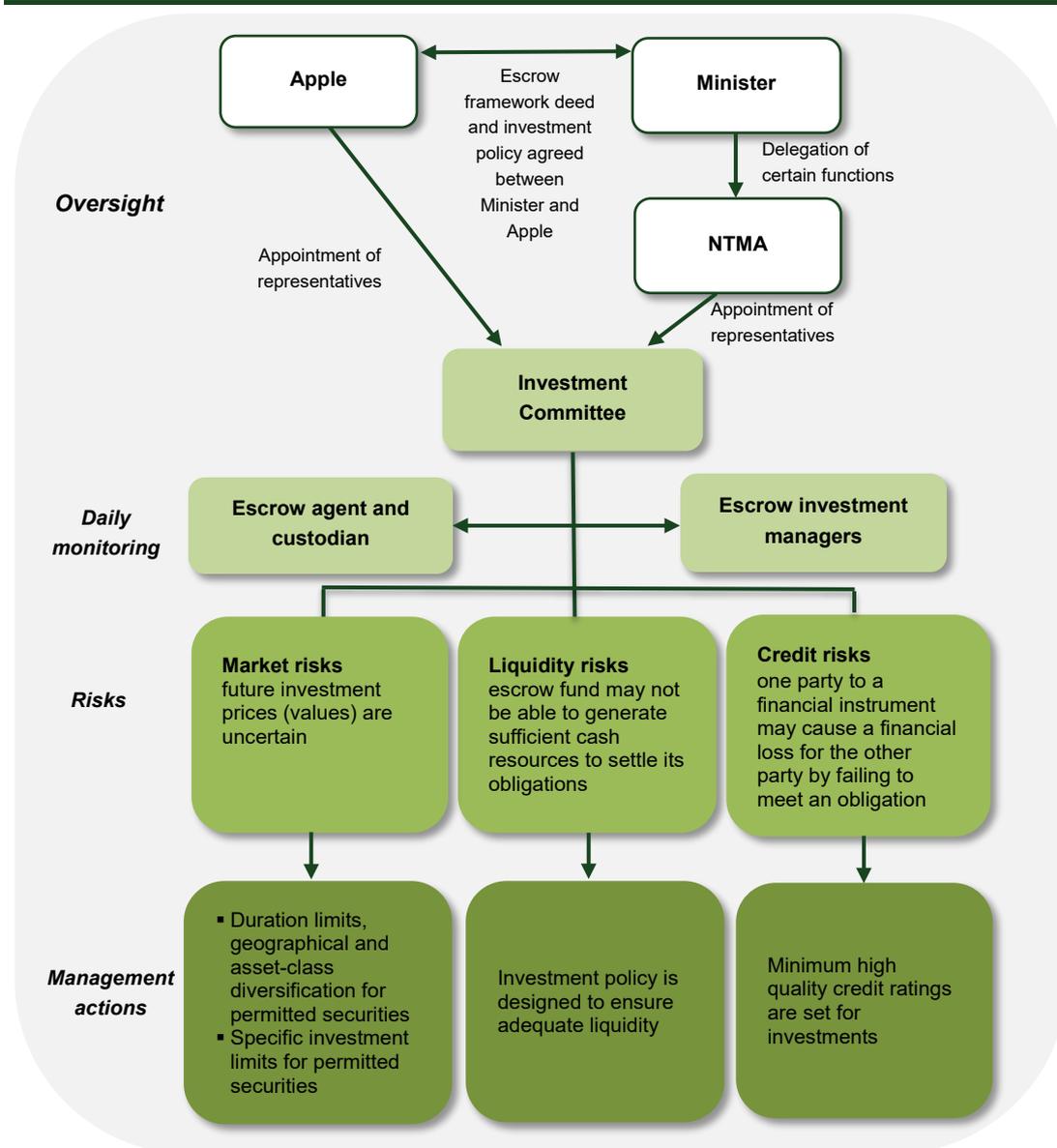
- 17.22** The NTMA (acting as agent of the Minister) and Apple have engaged tax advisors to provide tax advice in respect of the fund.
- 17.23** Payments totalling €9 million (including VAT) were incurred by the fund in respect of fees for the investment managers and escrow agent/custodian from their respective dates of appointment to the end of 2019. Pending confirmation of the appropriate VAT arrangements, the VAT on these fees was accrued in the 2019 financial statements. All VAT amounts due were paid to the Revenue Commissioners in 2020.
- 17.24** The fund's financial statements for 2019 included an expense in the amount of €2 million in respect of withholding tax. This was applied by the escrow agent/custodian on certain investment gains. Subsequent to the 2019 year-end and following discussions with the NTMA and Apple, the escrow agent/custodian determined that it should not have applied the withholding tax in those cases. The NTMA has stated that the fund was refunded in 2020 for the amounts withheld in 2019.

### **Costs associated with establishment of the escrow fund**

- 17.25** Separate to the administration costs incurred directly by the fund, other State bodies incurred costs directly associated with the State aid recovery process and the establishment of the escrow fund. The total costs incurred in relation to this process up to the end of 2019 were approximately €4.04 million (including VAT). This includes all legal costs, consultancy fees and any other associated costs. It excludes the costs of the appeal case taken to the European Courts.

## Annex 17A

Figure 17A.1 Oversight, management and monitoring of the escrow fund <sup>a, b, c</sup>



Source: Financial Statements of the Ireland Apple escrow fund, 2019. Analysis by the Office of the Comptroller and Auditor General.

- Notes:
- a The role of BNYM as the escrow agent and custodian is to open and maintain escrow bank/securities accounts as well as to hold, apply and realise the escrow funds in accordance with the terms and conditions of the escrow agent/custodian agreement.
  - b The investment managers — Amundi Asset Management, Blackrock Investment Management (UK) Limited and Goldman Sachs Asset Management — are responsible for the management of investments in accordance with an investment manager mandate to preserve the fund's capital to the greatest extent possible in light of prevailing market conditions.
  - c The escrow fund is held by BNYM, as escrow agent and custodian. The investment and management of the escrow fund is jointly overseen by the Minister and Apple through an investment committee. The Minister for Finance is the beneficial owner for the duration of the escrow fund in accordance with the agreed escrow framework deed.

