

## 20 Ireland Apple escrow fund

**20.1** 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, pending the outcome of legal challenges to the findings of a State aid investigation undertaken by the European Commission (the Commission).

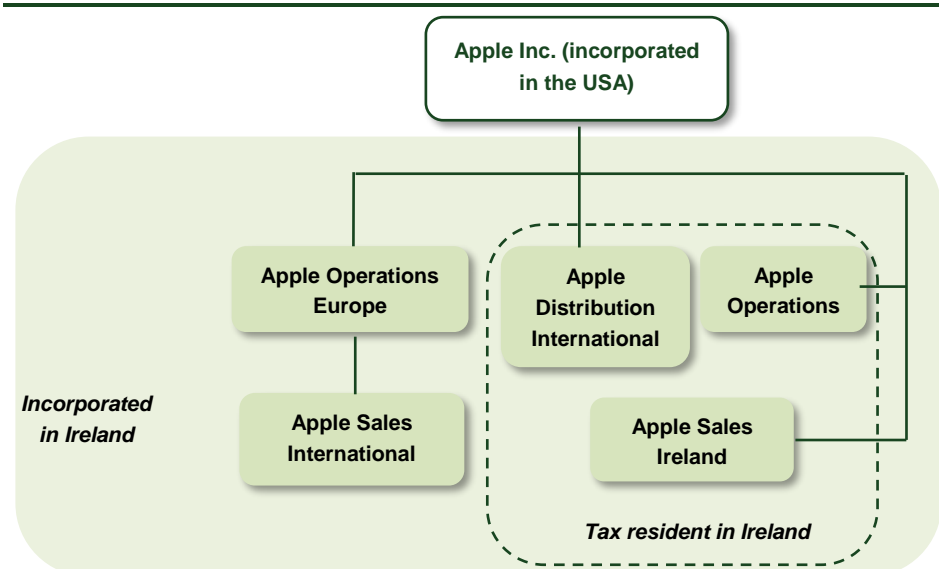
### Origin of the escrow fund

**20.2** The Treaty on the Functioning of the European Union (Lisbon Treaty) includes a general prohibition on the provision of State aid which distorts or tends to distort competition.<sup>1</sup> There are some exceptions, including aid to remedy a serious disturbance in the economy of a member state. Under the Lisbon Treaty, a new State aid scheme requires prior approval by the Commission.

**20.3** The corporate structure of Apple in Ireland is outlined in Figure 20.1. Two of Apple's subsidiaries, Apple Sales International (ASI) and Apple Operations Europe (AOE), although incorporated in Ireland, were not tax-resident in Ireland, in accordance with Section 23A of the Taxes Consolidation Act 1997.<sup>2</sup> Prior to its modification by the Finance Acts 2013 and 2014, Section 23A provided that a company incorporated in Ireland was not non-tax resident in Ireland if

- it was considered to be tax resident in another country for the purpose of a double taxation treaty, or
- the company was listed on a recognised stock exchange or ultimately controlled by a person that was resident in an EU member state or tax treaty country, and the relevant company or its subsidiaries had a trading activity in Ireland.<sup>3</sup>

**Figure 20.1 Apple's corporate structure in Ireland<sup>a</sup>**



<sup>1</sup> State aid is described in Article 107 of the Treaty on the Functioning of the European Union (TFEU) as 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.

<sup>2</sup> As amended by Section 43 of the Finance Act 2014.

<sup>3</sup> This includes a company incorporated in Ireland carrying on a trade in the State and centrally managed and controlled outside of Ireland.

Source: European Commission Decision of 30.08.2016 on State Aid SA.38373

Note: a This corporate structure was in place until 2015.

- 20.4** Section 25 of the Taxes Consolidation Act 1997 provides the legal basis for computing the chargeable profits of a non-resident company that carries on a trade in the State through a branch or agency. Profits from activities undertaken by a non-resident company that are not attributable to an Irish branch, are not chargeable to Irish corporation tax. The Revenue Commissioners (Revenue) issued two tax opinions (in 1991 and 2007) about the attribution of profits to the Irish branches of ASI and AOE.<sup>1</sup>
- 20.5** The 1991 and 2007 Revenue opinions dealt with the application of tax law to certain specific transactions or situations.<sup>2</sup> An opinion may be provided by Revenue where the issues are complex, information is not readily available or there is uncertainty in relation to the application of tax law to a particular transaction or situation and the opinion may assist the taxpayer in filing a tax return as required under the legislation.
- 20.6** In June 2014, the European Commission opened a formal investigation procedure into the 1991 and 2007 tax opinions issued by Revenue to AOE and ASI. The investigation was focused on establishing whether these opinions conferred any advantage on the Apple Ireland subsidiaries, such that they constituted State aid.
- 20.7** In August 2016, the Commission issued a decision concluding that Ireland had given illegal State aid to the two Apple subsidiaries.<sup>3</sup>
- 20.8** The Commission ordered Ireland to recover alleged State aid plus interest from Apple, related to a ten-year period. The Commission estimated that the State aid allegedly granted was of the order of €13 billion. The Ireland Apple case is the largest State aid recovery ever ordered. Both the Irish Government and Apple separately appealed the Commission's decision and the case is ongoing. The full process of litigation could take several years.
- 20.9** 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.<sup>4</sup> The Minister agreed with Apple that the amounts collected would be held in an escrow fund until the legal process was completed.
- 20.10** Revenue computed the alleged State aid to be collected by reference to the Commission's decision. The estimated sum was €13.1 billion plus interest of €1.2 billion.

<sup>1</sup> The 1991 opinion was in place until 2007, when it was replaced by the 2007 opinion. The 2007 opinion remained in place until 2014.

<sup>2</sup> Ireland does not have a statutory system of binding tax rulings and there is no provision in Irish law for the issuing of such rulings. However, Ireland does issue non-binding advisory opinions on the application of tax law to specific transactions or situations.

<sup>3</sup> Commission Decision on State aid SA.38373 of 30.08.2016.

<sup>4</sup> Article 9, Chapter V of the Commission Regulation (EC) No 794/2004 of 21 April 2004.

## Oversight and management of the fund

- 20.11** Placement of the funds in an escrow account is intended to allow for the proper management and monitoring of the investment to preserve its value to the greatest extent possible in light of the prevailing market conditions. It also allows all parties (the Minister and ASI and AOE) to share control over the funds and to determine how these funds are invested until the appeal is finalised.
- 20.12** In April 2018, the Minister for Finance and ASI and AOE entered into an escrow framework deed giving legal effect to arrangements for the recovery of the alleged State aid. The deed sets out the detailed legal agreement governing the collection and payment of funds from ASI and AOE, and any required releases from the escrow fund. The arrangements include appointment of an escrow agent and custodian and investment managers, and provide for oversight and management of the escrow fund in accordance with an agreed investment policy.

**20.13** To give effect to the establishment of the escrow fund, the Minister delegated to the National Treasury Management Agency (NTMA) the following functions<sup>1</sup>

- procurement and appointment of an escrow agent and custodian
- procurement and appointment of one or more investment managers
- negotiation of an investment policy for the escrow fund.

Procurement and appointment of the escrow agent and custodian and investment managers was undertaken by the NTMA on behalf of the Minister in conjunction with ASI and AOE.

**20.14** The Minister also delegated certain of his functions in relation to the investment of the escrow fund to the NTMA, including inter alia<sup>2</sup>

- the negotiation and execution of, and performance of, obligations under an escrow agent and custodian agreement
- the negotiation and execution of, and performance of, obligations under an investment management agreement
- appointment of the Ireland members of the fund's investment committee and other rights and obligations in relation to that committee
- oversight of the investment and management of the fund in accordance with the escrow deed.

### ***Escrow agent and custodian***

**20.15** At the direction of the Minister, the NTMA, jointly with ASI and AOE, appointed the Bank of New York Mellon (BNYM) to provide escrow agency and custodian services, following a competitive tender process. 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 release the escrow funds in accordance with the terms and conditions of the escrow agent/custodian agreement.

### ***Investment managers***

**20.16** Three investment managers — Amundi Asset Management, Blackrock Investment Management (UK) Limited and Goldman Sachs Asset Management International — were appointed to provide investment management services in June 2018, following a competitive tender process. The investment managers 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.

<sup>1</sup> Statutory Instrument No. 331 of 2017.

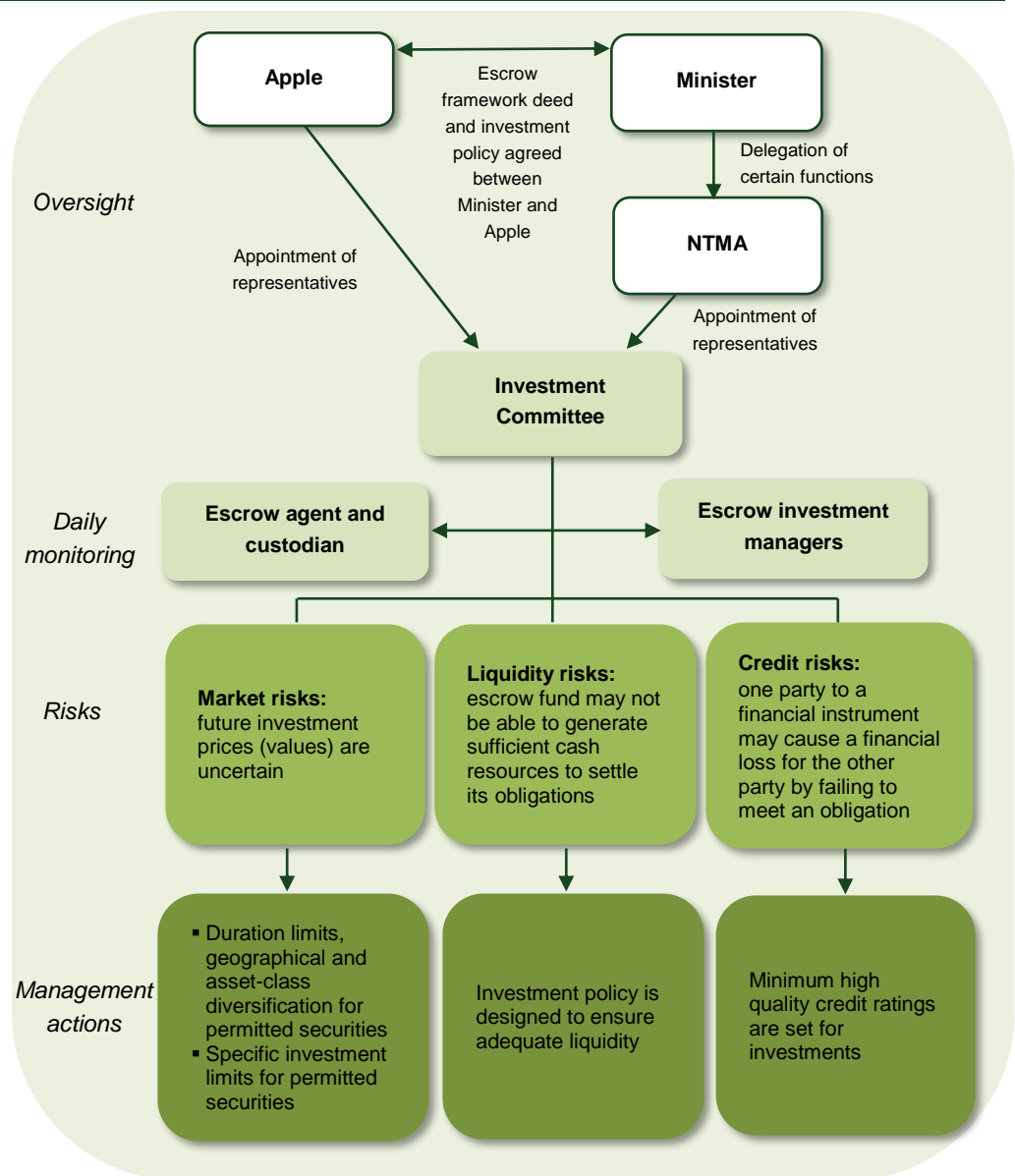
<sup>2</sup> Statutory Instrument No. 157 of 2018.

**Investment committee**

**20.17** An investment policy was developed through negotiation between the NTMA, ASI and AOE, and was submitted by the NTMA to the Minister for approval. The policy was approved in February 2018 and forms part of the escrow framework deed.

**20.18** 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 ASI and AOE through an investment committee.<sup>1</sup> The oversight arrangements in respect of the escrow fund are presented in Figure 20.2. The Minister for Finance is the beneficial owner for the duration of the escrow fund in accordance with the agreed escrow framework deed.

**Figure 20.2 Oversight, management and monitoring of the escrow fund**



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

Source: Financial Statements of the Ireland Apple Escrow Fund, 2018. Analysis by the Office of the Comptroller and Auditor General.

## Investment strategy

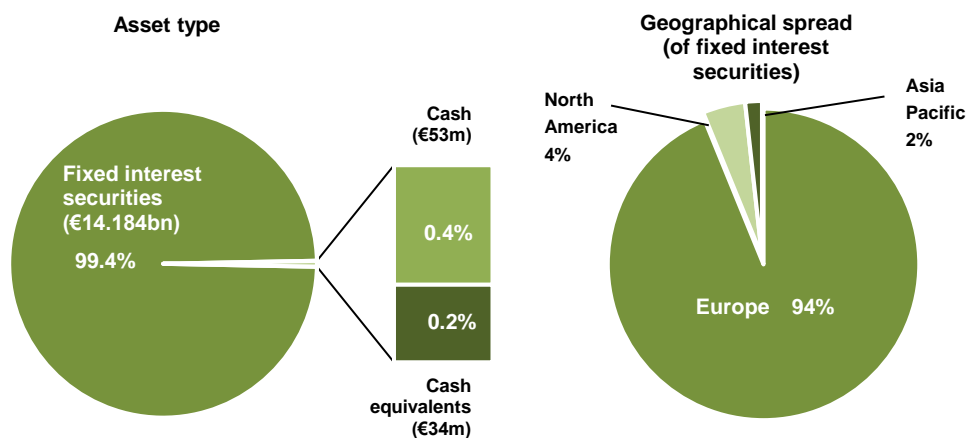
- 20.19** The investment principles and parameters for the escrow fund are set out in the investment policy. The objective of the investment policy is to preserve the capital value of the escrow fund to the greatest extent possible in light of prevailing market conditions. The agreed risk appetite in 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.
- 20.20** The escrow fund is exposed to different market, liquidity and credit risks. The escrow fund's risk management programme seeks to minimise the potential adverse effects of the risks on the escrow fund's financial performance (see Figure 20.2).
- 20.21** The management and monitoring of risks is carried out by the investment managers, while the escrow agent and custodian independently monitor compliance with the investment manager mandates and reports to the NTMA and ASI and AOE on a daily basis. The investment manager mandates are consistent with the investment policy for the escrow fund. Compliance with the investment policy is considered by the Investment Committee on a quarterly basis. Regular meetings with the Investment Committee and the investment managers are held to review the investment managers' performance and that of the overall escrow fund.

## Performance of the escrow fund

- 20.22** As a consequence of the Minister's delegation of the investment functions, the NTMA is required to prepare, on an annual basis, financial statements to be audited by the Comptroller and Auditor General, and to be presented following audit to the Houses of the Oireachtas.<sup>1</sup>
- 20.23** The financial statements of the escrow fund are prepared in accordance with the International Financial Reporting Standards (IFRS), as directed by the Minister.<sup>2</sup>
- 20.24** The collection of the alleged State aid commenced in May 2018 with the first of a series of twelve payments to the escrow fund. The final payment was received in September 2018. The lodgements totalled €14.285 billion.
- 20.25** In line with the investment policy, the escrow fund is invested in highly rated euro-denominated fixed income securities, and 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.
- 20.26** All financial assets of the escrow fund are valued in the statement of financial position at fair value, which is the quoted market value at the close of trading on the period end date.
- 20.27** At 31 December 2018, the financial assets held in the escrow fund amounted to €14.271 billion. A breakdown of the assets is shown in Figure 20.3.

<sup>1</sup> This arises from the terms of Section 12 of the NTMA Act 1990.

<sup>2</sup> The financial statements of the escrow fund are prepared pursuant to Section 28(5) of the National Treasury Management Agency (Amendment) Act 2000.

**Figure 20.3 Assets of escrow fund as at 31 December 2018**

Source: Financial statements of the Ireland Apple Escrow Fund 2018

**20.28** The value of the fund assets decreased between September 2018, when the transfer of funds from Apple into the escrow fund was completed, and the end of December 2018. This was the result of changes in the value of the financial assets, combined with interest expenses, resulting in an overall decrease of €14 million in the value of the fund. A further €2 million in operating expenses had been accrued at the year end.

**20.29** The performance of the escrow fund will be determined by the prevailing interest rate environment and the asset credit quality over the duration of the escrow fund which is currently unknown. For illustrative purposes, the NTMA estimates that in the current negative interest rate environment, the escrow fund could decline by 0.5% per annum.<sup>1,2</sup> On a €14 billion fund, this would amount to a loss of c. €70 million per annum.

### Costs associated with establishment of the escrow fund

**20.30** Additional costs associated with the recovery process and the establishment of the escrow fund total approximately €3.9 million (including VAT) to date.<sup>3</sup> This includes all legal costs, consultancy fees and any other associated costs incurred by all State parties involved in the process.<sup>4</sup>

1 Public Accounts Committee meeting of 4 July 2019.

2 This is equivalent to a loss of around €5 million a year for each billion euro held.

3 These costs were incurred by the Department of Finance, Revenue Commissioners, Chief State Solicitor's Office, NTMA and the Central Bank of Ireland.

4 These costs do not include costs associated with the Commission's investigation and the appeal of the Commission's decision.