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Transfer Pricing 2022

Ireland: Law & Practice
and
Ireland: Trends & Developments

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IRELAND

Law and Practice

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CONTENTS

1. Rules Governing Transfer Pricing p.4
- 1.1 Statutes and Regulations p.4
- 1.2 Current Regime and Recent Changes p.4

2. Definition of Control/Related Parties p.6
- 2.1 Application of Transfer Pricing Rules p.6

3. Methods and Method Selection and Application p.6
- 3.1 Transfer Pricing Methods p.6
- 3.2 Unspecified Methods p.7
- 3.3 Hierarchy of Methods p.7
- 3.4 Ranges and Statistical Measures p.7
- 3.5 Comparability Adjustments p.7

4. Intangibles p.7
- 4.1 Notable Rules p.7
- 4.2 Hard-to-Value Intangibles p.8
- 4.3 Cost Sharing/Cost Contribution Arrangements p.8

5. Affirmative Adjustments p.8
- 5.1 Rules on Affirmative Transfer Pricing Adjustments p.8

6. Cross-Border Information Sharing p.9
- 6.1 Sharing Taxpayer Information p.9

7. Advance Pricing Agreements (APAs) p.10
- 7.1 Programmes Allowing for Rulings Regarding Transfer Pricing p.10
- 7.2 Administration of Programmes p.10
- 7.3 Co-ordination between the APA Process and Mutual Agreement Procedures p.11
- 7.4 Limits on Taxpayers/Transactions Eligible for an APA p.11
- 7.5 APA Application Deadlines p.11
- 7.6 APA User Fees p.11
- 7.7 Duration of APA Cover p.11
- 7.8 Retroactive Effect for APAs p.11

8. Penalties and Documentation p.11
- 8.1 Transfer Pricing Penalties and Defences p.11
- 8.2 Taxpayer Obligations under the OECD Transfer Pricing Guidelines p.12

9. Alignment with OECD Transfer Pricing Guidelines p.12
- 9.1 Alignment and Differences p.12
- 9.2 Arm's-Length Principle p.12
- 9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project p.12
- 9.4 Impact of BEPS 2.0 p.12
- 9.5 Entities Bearing the Risk of Another Entity's Operations p.13

10. Relevance of the United Nations Practical Manual on Transfer Pricing p.13
- 10.1 Impact of UN Practical Manual on Transfer Pricing p.13

11. Safe Harbours or Other Unique Rules p.13
- 11.1 Transfer Pricing Safe Harbours p.13
- 11.2 Rules on Savings Arising from Operating in the Jurisdiction p.14
- 11.3 Unique Transfer Pricing Rules or Practices p.14

12. Co-ordination with Customs Valuation p.14
- 12.1 Co-ordination Requirements between Transfer Pricing and Customs Valuation p.14

13. Controversy Process p.15
- 13.1 Options and Requirements in Transfer Pricing Controversies p.15

14. Judicial Precedent p.15
- 14.1 Judicial Precedent on Transfer Pricing p.15

14.2 Significant Court Rulings p.15

15. Foreign Payment Restrictions p.15
15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions p.15
15.2 Restrictions on Outbound Payments Relating to Controlled Transactions p.16
15.3 Effects of Other Countries' Legal Restrictions p.16

16. Transparency and Confidentiality p.16
16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes p.16
16.2 Use of "Secret Comparables" p.16

17. COVID-19 p.16
17.1 Impact of COVID-19 on Transfer Pricing p.16
17.2 Government Response p.16
17.3 Progress of Audits p.17

1. RULES GOVERNING TRANSFER PRICING

1.1 Statutes and Regulations

Ireland's transfer pricing rules are set out in Part 35A of the Taxes Consolidation Act 1997 (TCA) (the "TP Rules"). Part 35A was introduced in the Finance Act 2010 and was amended by the Finance Act 2019, the Finance Act 2020 and the Finance Act 2021. Prior to the Finance Act 2019, transactions agreed before 1 July 2010 were outside the scope of the TP Rules; however, with effect for chargeable periods commencing on or after 1 January 2020, the TP Rules apply to transactions agreed before this date.

The Finance Act 2019 also incorporated the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, including the guidance on hard-to-value intangibles and the application of the transactional profit split method (the "TP Guidelines"), replacing reference to the 2010 OECD Transfer Pricing Guidelines, into the TP Rules. As a result, when considering the TP Rules, a taxpayer must have regard to the TP Guidelines, such that the TP Rules provide that the "arm's-length amount" is to be determined in line with the TP Guidelines. The TP Rules further provide that any additional guidance published by the OECD will be considered part of the TP Guidelines once designated by the Irish Minister for Finance. In this regard, the transfer pricing guidelines on financial transactions published by the OECD in February 2020 were incorporated into the TP Rules with effect from 8 December 2021.

The Irish Revenue Commissioners ("Revenue") issued updated guidance on the TP Rules in February 2021 to provide clarity to taxpayers on the practical application of the TP Rules.

In brief, subject to certain exemptions between Irish associated persons, the TP Rules require domestic and international transactions between associated persons to be at arm's length. If an associated person has understated income or gains or overstated allowable losses or expenses – ie, the transaction was not at arm's length – Revenue may make an adjustment for tax purposes.

1.2 Current Regime and Recent Changes

Overview of Recent Changes

Ireland did not have an extensive transfer pricing regime prior to the introduction of the TP Rules as inserted by the Finance Act 2010.

As noted above, the TP Rules were significantly altered by the Finance Act 2019. Some important changes implemented pursuant to the Finance Act 2019 include:

- incorporation of the TP Guidelines into domestic Irish law;
- extension of the TP Rules to capture non-trading transactions (save for certain Irish-to-Irish transactions) and certain capital transactions (where the market value exceeds EUR25 million);
- removal of grandfathering provisions relating to transactions that occurred prior to 1 July 2010; and
- the introduction of formalised documentation requirements for taxpayers in line with the requirements of the TP Guidelines (eg, a master file and local file in line with the TP Guidelines for certain taxpayers).

Furthermore, the TP Rules are to be construed in accordance with the TP Guidelines, and any further OECD guidance designated by the Irish Minister for Finance will be considered part of the TP Guidelines. The OECD's latest edition of its transfer pricing guidelines, issued on 20 January 2022, is not yet incorporated into the TP Rules. However, this is not expected to give rise

to any significant differences in practice as the latest edition of the guidelines effectively incorporates into a single publication the changes to the TP Guidelines resulting from subsequent reports, which have themselves been specifically incorporated into Ireland's TP Rules or, where not incorporated, are regarded as best practice by Revenue.

Recent Updates to the Irish-to-Irish Exemption

The TP Rules apply to all transactions unless the transaction falls within the scope of the Irish-to-Irish transaction exemption. The exemption, as introduced in the Finance Act 2019, gave rise to interpretative difficulties in relation to its application. In addition, Revenue guidance does not include significant detail on the Irish-to-Irish exemption, nor did it address the interpretative issues. A number of amendments to the Irish-to-Irish exemption were included within the Finance Act 2020; however, as these also gave rise to interpretative difficulties, they ultimately were never commenced. The Finance Act 2021 addresses some of the interpretative difficulties for chargeable periods commencing on or after 1 January 2022.

The treatment of Irish-to-Irish transactions has a separate rule as a result of Ireland's dual-rate system. Ireland operates two corporation tax rates: a 12.5% rate applies to trading transactions and a 25% rate applies to non-trading transactions. For example, interest on an intercompany balance could be taxable at 25% as non-trading income in one group company and deductible at 12.5% (or not at all) in another group company. Therefore, the rule for Irish-to-Irish transactions ensures that the TP Rules do not give rise to negative tax arbitrage within the Irish tax system.

Accordingly, for Irish-to-Irish transactions:

- the transfer pricing rules will not apply to the transaction if both Irish resident parties enter the transaction otherwise than in the course of a trade (ie, the profits or gains or losses of the supplier and acquirer arising from the relevant activities are chargeable to tax under Case III, IV or V of Schedule D (non-trading income) but not Case I or II (trading income)); for accounting periods commencing on or after 1 January 2022, it is sufficient that, where no consideration is payable or receivable under the transaction, the supplier and acquirer would be chargeable to tax under Case III, IV or V of Schedule D if any consideration were paid or received under the transaction;
- if one party enters the transaction in the course of a trade, the transfer pricing rules will apply to that party in respect of the transaction, but the rules permit an upward adjustment of profits only (similar to the existing rules); and
- where an Irish party enters into a transaction with another Irish party otherwise than in the course of a trade, the transfer pricing rules can still apply if that Irish-to-Irish transaction is connected to another transaction with a non-resident party and the main purpose of the Irish-to-Irish transaction is to obtain a tax advantage.

Domestic Incorporation of the Authorised OECD Approach

In addition, the Finance Act 2021 introduced into Irish law the application of the OECD development mechanisms (ie, the "authorised OECD approach") for the attribution of income to a permanent establishment of a non-resident company operating in Ireland for accounting periods commencing on or after 1 January 2022. Prior to the Finance Act 2021, the general rule was that once a trade was carried on in Ireland through a

branch or agency, all the profits arising from the contracts or services were taxable.

2. DEFINITION OF CONTROL/RELATED PARTIES

2.1 Application of Transfer Pricing Rules

The TP Rules require domestic and international transactions between associated persons to be at arm's length.

The TP Rules define associated enterprises in line with the TP Guidelines. For the purpose of the TP Rules, two persons will be associated if the other person is (directly or indirectly) participating in the "management, control or capital" of the other or the same person is participating in the "management, control or capital" of both persons. This would include parent companies involved in the management, control or capital of their subsidiaries.

The meaning of "control" in terms of the TP Rules is the power of a person to secure (i) by means of the holding of shares or the possession of voting power in or in relation to that or any other company, or (ii) by virtue of any powers conferred by the articles of association or another document regulating that or any other company, that the affairs of a company are in accordance with the intentions of the person. A more flexible definition of control is included at Section 432 of the TCA, which addresses scenarios whereby a person may exercise control by means other than percentage shareholding. However, this more flexible test does not apply for the purposes of the TP Rules.

In partnerships, it is necessary to "look through" to the rights of the individual partners. "Control" for the purposes of a partnership means a right to a share of more than 50% of the assets or income.

Under the TP Rules, the arm's-length amount is the amount of the consideration that independent parties dealing at arm's length would have agreed in relation to the supply and acquisition. The TP Rules state that it is to be construed in accordance with the TP Guidelines, including the interpretation of the arm's-length amount.

The TP Rules do not include a definition of a "controlled transaction". However, the TP Rules apply to any "arrangement":

- involving the supply and acquisition of goods, services, money, intangible assets or anything else of commercial value;
- where, at the time of the supply and acquisition, the person making the supply and the person making the acquisition are associated; and
- the profits, gains or losses arising from the relevant activities are within the charge to tax in the case of either or both of them.

An arrangement is given a very broad definition and includes any transaction, action, course of action, course of conduct, scheme or plan and any agreement, arrangement of any kind, understanding, promise or undertaking. Moreover, the arrangement may be express or implied and it does not need to be legally enforceable for it to fall within the provisions of the TP Rules.

3. METHODS AND METHOD SELECTION AND APPLICATION

3.1 Transfer Pricing Methods

There is no specific list of transfer pricing methods included in the TP Rules. The TP Rules

approve the transfer pricing methods applied under the TP Guidelines.

There are two broad categories of methodology approved for use in Ireland in line with the TP Guidelines: traditional transaction methods and transactional profit methods.

The traditional transaction methods approved for use in Ireland are the:

- comparable uncontrolled price (CUP) method;
- the cost plus method; and
- the resale price method.

The transactional profit methods approved in Ireland are:

- the transactional net margin method; and
- the profit split method.

Revenue is pragmatic in its approach to the transfer pricing method most suitable to be applied to a transaction.

3.2 Unspecified Methods

Methods that are not provided for under the TP Guidelines are generally not accepted by Revenue, albeit the fact that the TP Guidelines refer to the use of unspecified methods means it is theoretically possible to seek to use such unspecified methods, provided they can be shown to provide an arm's-length amount in line with the OECD arm's-length principle. Therefore, global formulary apportionment methods will not be accepted as they are not listed in the TP Guidelines.

There is, as yet, no Irish case law or Revenue guidance that discusses the suitability of particular methodologies.

3.3 Hierarchy of Methods

The TP Rules do not impose a hierarchy of methods, nor has any supplementary guidance been published by Revenue indicating a hierarchy of methods.

3.4 Ranges and Statistical Measures

There are no specific provisions in the TP Rules, nor guidance relating to the use of ranges or other statistical measures to be used with the arm's-length assessment. In practice, reliance will be placed on the TP Guidelines in relation to the use of ranges and statistical measures.

3.5 Comparability Adjustments

There is no specific requirement for comparability adjustments. There is little established practice in Ireland as regards when comparability adjustments will be sought, but they may be sought in certain circumstances, in line with the guidance in the TP Guidelines. As of yet, Revenue has not published supplementary guidance for their application in Ireland, and in practice, this is looked at on a case-by-case basis.

4. INTANGIBLES

4.1 Notable Rules

The TP Rules do not provide a definition for "intangible property", but intangibles are defined elsewhere in the TCA, where the definition focuses on legally protected intangibles and intangibles for accounting purposes. The TP Rules follow the TP Guidelines, and therefore one should refer to Chapter VI of the TP Guidelines when discussing transfer pricing rules on intangibles in Ireland.

The scope of the TP Rules includes the supply and acquisition of intangibles. The TP Rules do not set out rules that apply to transactions involving intangibles specifically, nor has Reve-

nue provided guidance on transactions involving intangibles in a transfer pricing context.

Ireland recognises the distinction between legal and beneficial ownership of intangibles. This distinction is often set out in contract between the parties. The appropriate pricing of transactions will necessarily involve an examination of these contractual agreements.

The TP Rules do not specify methodologies to be used in relation to intangibles. In practice, Revenue will follow the TP Guidelines; ie, the use of traditional transaction methods and transactional profit methods are acceptable.

4.2 Hard-to-Value Intangibles

The transfer pricing legislation does not specify a valuation method in relation to intangibles. The discounted cash flow, acquisition or capitalised cost method could be used. Revenue, in its guidance, states that robust documentation must be provided to support a valuation of "intangible assets". The TP Rules do not specifically refer to the use of after-the-fact evidence to reprice a transaction that involves hard-to-value intangibles. However, Revenue will follow the guidance set out in Chapter VI of the TP Guidelines, which allows for the use of ex post evidence to determine an arm's-length price in certain circumstances.

The introduction and application of Directive 2018/822 (DAC 6) means that cross-border arrangements involving hard-to-value intangibles between EU member states, or between EU member states and third countries, must be reported to Revenue and are subject to the automatic exchange of information between tax authorities. An arrangement must be reported within 30 days from the date on which the first step of the arrangement took place. In the case of persons advising on such arrangements, they must report within 30 days from the date on which the advice was given.

For the purposes of DAC 6, the term "hard-to-value intangibles" covers intangibles or rights in intangibles for which, at the time of their transfer between associated persons:

- no reliable comparables exist; and
- at the time the transaction was entered into, it was difficult for specified reasons to predict the level of ultimate success of the intangible at the time of the transfer.

DAC 6 took effect from 1 July 2020, but applies to arrangements that were first implemented on or after 25 June 2018. Ireland exercised a right to defer reporting obligations, and as a result, reporting to Revenue commenced in January 2021.

4.3 Cost Sharing/Cost Contribution Arrangements

The TP Rules do not specifically legislate for cost contribution arrangements. However, cost sharing and cost contribution arrangements are often encountered in practice. The TP Rules are aligned with the TP Guidelines, and therefore the interpretation of cost sharing and cost contribution arrangements in the context of the TP Rules will be in line with the TP Guidelines. There is, as yet, no case law in Ireland discussing this issue.

5. AFFIRMATIVE ADJUSTMENTS

5.1 Rules on Affirmative Transfer Pricing Adjustments

A taxpayer may make a transfer pricing-related adjustment after filing a tax return. The rules around making such an adjustment depend on the context in which the adjustment is made.

If the adjustment is made prior to a Revenue compliance intervention, the taxpayer may seek to "self-correct without penalty" provided that the correction is made within 12 months of the due date for the relevant return and a payment of the additional tax accompanies the correction. A taxpayer will not be able to self-correct without penalty if Revenue has contacted the taxpayer in relation to any type of Revenue compliance intervention or where the self-correction relates to an instance of deliberate behaviour that featured in a period prior to the period to which the self-correction relates.

A taxpayer may also seek to correct an innocent error that is not deliberate in nature and the error cannot be attributed to the taxpayer failing to take reasonable care to comply with their tax obligations. Similarly, Revenue may also allow a technical adjustment, which arises due to differences in the interpretation or application of the Irish tax rules. Revenue will not allow a technical adjustment where the issue relates to a matter that is well established in case law/precedent.

A taxpayer may also make a "qualifying disclosure" to Revenue. A qualifying disclosure is made in writing and must include a payment of tax and any interest owed. Any penalties owing will usually be agreed between the taxpayer and Revenue. A qualifying disclosure may be prompted or unprompted.

A prompted disclosure is a disclosure that is made following notification of a Revenue audit but before the audit commences, whereas an unprompted disclosure is one that is made by a taxpayer before any notification of an investigation or audit is received.

The quantum of any penalty payable to Revenue following a qualifying disclosure depends on the nature of the disclosure (ie, prompted or unprompted), category of behaviour (careless or deliberate), the level of co-operation by the taxpayer with Revenue and whether the taxpayer had made any previous disclosures.

While a taxpayer may amend tax returns, a taxpayer may not take a deduction for an expense that arises as a result of a transfer pricing adjustment in another jurisdiction. Instead, a taxpayer must rely on any reliefs that may be available pursuant to the relevant double tax treaty, such as a mutual agreement procedure (MAP) or a correlative adjustment.

6. CROSS-BORDER INFORMATION SHARING

6.1 Sharing Taxpayer Information

All tax treaties into which Ireland enters contain a provision through which the contracting countries agree to exchange information. Some tax treaties into which Ireland has entered are aligned with the OECD Model Tax Treaty, which includes provisions on the exchange of information between tax authorities for the purposes of each states' domestic laws. In addition, Ireland has entered into information exchange agreements with certain states.

Ireland has also ratified the Convention on Mutual Administrative Assistance in Tax Matters, which contains articles on the exchange of information in tax matters between signatory states.

The EU Directive on Mutual Assistance for the Exchange of Information (2011/16) and the EU Directive on Mutual Assistance for the Recovery of Claims Relating to Taxes, Duties and Other Measures (2010/24) are applicable in Ireland and provide for the exchange of information and mutual assistance between member states in relation to taxation. The use of the directives on exchange of information has become increasingly prevalent in the EU in recent years.

DAC 6 also provides for the automatic exchange of information on arrangements that are potentially aggressive, both between member states and between member states and third-party countries. Certain categories of transactions that involve transfer pricing are caught within the DAC 6 reporting requirements, namely:

- arrangements involving safe harbour rules;
- arrangements involving the transfer of hard-to-value intangibles (see **4.2 Hard-to-Value Intangibles**); and
- arrangements that involve intra-group cross-border transfer of functions, risks and/or assets, where the projected annual earnings before interest and taxes of the transferor(s) within the three-year period post transfer are less than 50% of the projected amount if the transfer had not been made.

DAC 6 took effect in Ireland on 1 July 2020 under Part 33 of the TCA, but the reporting obligations were deferred to January 2021 for commencement.

Ireland also exchanges information on country-by-country reports, advance pricing agreements and financial account information under the Foreign Account Tax Compliance Act and the Common Reporting Standard.

Furthermore, Ireland is subject to international agreements on the exchange of country-by-country (CBC) reports pursuant to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement for exchanges of CBC reports (CBC MCAA). The CBC MCAA provides for the automatic exchange of information of CBC reports of multinational enterprise (MNE) groups between signatory states in which the MNE groups operate. As of January 2021, Ireland has 64 bilateral relationships activated under the CBC MCAA or exchanges under the EU Council Directive (2016/881/EU) and under bilateral competent authority agreements.

The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes published a peer review report in 2017 on Ireland's exchange of information processes. The report showed that there is satisfaction with the quality and timeliness of the information provided by Ireland under these processes. Ireland is rated "compliant" in terms of the exchange of information between tax authorities.

7. ADVANCE PRICING AGREEMENTS (APAS)

7.1 Programmes Allowing for Rulings Regarding Transfer Pricing

Ireland's bilateral APA programme has been effective since 1 July 2016. It replaced Revenue's ad hoc APA approach. The formalised APA programme provides certainty and clarity to taxpayers when applying for and operating under a bilateral APA. Revenue has also published and updated guidelines on bilateral APAs.

Bilateral APAs are, in practice, more common than multilateral APAs. Revenue has confirmed that it will not enter into unilateral APAs.

There has been a significant uptake in Ireland's APA programme in recent years. Revenue's annual report notes that in 2020, the Irish competent authority received 22 APA requests and five APAs were concluded following negotiations with the competent authorities of other countries.

7.2 Administration of Programmes

Revenue administers the programme for APAs in Ireland. In its Role of the Competent Authority guide, Revenue emphasises its importance in relation to APAs.

7.3 Co-ordination between the APA Process and Mutual Agreement Procedures

There is co-ordination between the APA process and MAPs. Access to the APA programme is subject to the MAP terms in the applicable double tax treaty.

In relation to the negotiation of APAs, Revenue adheres to the best practice set out in Communication 2007/71 on Guidelines for Advance Pricing Agreements within the EU and the accompanying report.

7.4 Limits on Taxpayers/Transactions Eligible for an APA

The types of taxpayers who can apply for an APA are limited to a company tax resident in Ireland or a permanent establishment of a non-resident country.

Revenue will, in practice, only accept a request for an APA for transactions in which a significant amount of Irish tax is potentially at issue, a fundamental principle is being considered, or if the transaction is complex or involves a high likelihood of double taxation arising in the absence of an APA.

7.5 APA Application Deadlines

A taxpayer's APA request should be submitted before an audit process begins, and in advance of the first accounting period to be covered by the APA. However, Revenue, in its guidance, states that it will agree to an APA that covers a prior accounting period, a "rollback period".

7.6 APA User Fees

There is no fee payable for applying for or concluding an APA.

7.7 Duration of APA Cover

An APA will be granted for a specific period, typically for three to five years. The APA period cannot exceed five years (excluding rollback periods).

7.8 Retroactive Effect for APAs

Where APAs have been sought for transactions that are already occurring, rollback periods may be applied by Revenue.

8. PENALTIES AND DOCUMENTATION

8.1 Transfer Pricing Penalties and Defences

The TP Rules provide that taxpayers must prepare transfer pricing documentation. There is currently no requirement to file transfer pricing documentation with Revenue. However, the TP Rules contain provisions for penalties that apply where a taxpayer fails to provide Revenue with transfer pricing documentation following a request from Revenue.

A penalty of EUR4,000 will apply where a taxpayer fails to provide Revenue with its transfer pricing documentation within 30 days of a written request by Revenue. If the taxpayer is of such a size that they are required to prepare a local file, the penalty is increased from EUR4,000 to EUR25,000 and EUR100 for each day the failure continues. The increased penalty applies to failure to provide any of the transfer pricing documentation, as opposed to a failure to provide the local file specifically.

In the event of a transfer pricing adjustment, this will not give rise to other tax-geared penalties contained in the TCA where:

- the taxpayer has prepared the files within the time limit;
- the taxpayer has provided them to Revenue within the time limit; and

- a reasonable effort was made to ensure the files were accurate.

8.2 Taxpayer Obligations under the OECD Transfer Pricing Guidelines

The TP Rules require the preparation of a master file and local file in accordance with the TP Guidelines for taxpayers meeting certain thresholds. The requirement under the TCA to submit a country-by-country report applies to Irish-headquartered MNEs or MNE groups with annual consolidated group revenue of EUR750 million or more.

9. ALIGNMENT WITH OECD TRANSFER PRICING GUIDELINES

9.1 Alignment and Differences

Ireland's TP Rules are closely aligned with the TP Guidelines. The TP Rules explicitly state that they are to be construed in accordance with the TP Guidelines. Moreover, the Minister for Finance may designate that the TP Rules be construed in accordance with further OECD guidance.

9.2 Arm's-Length Principle

Ireland's TP Rules fully apply the arm's-length principle in accordance with the TP Guidelines and do not recognise the use of a formulary approach, for example.

9.3 Impact of the Base Erosion and Profit Shifting (BEPS) Project

Ireland is fully engaged in the BEPS project, which has clearly influenced many of the changes in the Irish tax and transfer pricing landscape in recent years.

The TP Rules align with the requirements set out in the TP Guidelines, as amended by the work of the BEPS project.

Country-by-country reporting requirements under BEPS Action 13 form one of the four BEPS minimum standards. Ireland enacted country-by-country reporting regulations (SI No 629 of 2015) to implement the recommendations as set out in the BEPS Action 13 Final Report.

The TP Rules have introduced the requirement for taxpayers to prepare and maintain a master file and local file, as recommended under BEPS Action 13.

Ireland has committed to implementing the BEPS Action 14 Final Report: Making Dispute Resolution Mechanisms More Effective minimum standard, and having this standard reviewed by other member states. Ireland's peer-reviewed report on this matter was published in August 2018. Moreover, Ireland, as a member of the EU, is subject to the EU dispute resolution directive (Council Directive (EU) 2017/1852). The directive was transposed into Irish law in 2019 and provides taxpayers with the right to request a so-called EU MAP between member states. A taxpayer has three years in which to request a MAP and if initiated, all other related MAPs (ie, one commenced under the relevant double taxation agreement, or DTA) must be concluded.

9.4 Impact of BEPS 2.0

Ireland supports the OECD's Pillar One and Pillar Two proposals and has been an active participant in tax reform discussions. In 2021, Ireland held a public consultation on the OECD proposals to seek stakeholder input prior to ultimately signing up to the OECD Inclusive Framework agreement in October 2021.

As with most jurisdictions, the OECD's Pillar One and Pillar Two proposals will significantly impact the Irish tax and transfer pricing landscape.

- Amount A under Pillar One proposes a divergence from normal application of the arm's-

length principle under the TP Rules. Pillar One is likely to see a reduction in Irish corporation tax receipts through a realignment of taxing rights. It is anticipated that the volume of disputes will increase as a result of Pillar One, which may put strain on Irish competent authority resources.
- The move to a global minimum effective tax rate of 15% is a step towards greater tax certainty, which is broadly welcomed by multinational taxpayers in Ireland. As part of the negotiations, Ireland received assurances that the 12.5% headline corporation tax rate can remain in force for companies below the Pillar Two threshold of EUR750 million revenue. Ireland intends to ensure that the use of R&D tax credits can continue to support innovation and growth in compliance with the OECD framework. It is anticipated that the complex compliance framework under Pillar Two will put a strain on taxpayer resources, particularly given the extent of existing documentation and compliance obligations under the TP Rules.

Ireland intends to follow the OECD's ambitious timeline of broad implementation by 2023. Many of the measures to implement the proposals will be included in the Finance Bill 2022, which is expected to be published in October 2022. As at the date of publication, there remains a lot of uncertainty around the legal and technical implementation of Pillar One and Pillar Two. Therefore, the practical interaction with the TP Rules remains to be seen. In the meantime, multinational taxpayers in Ireland are closely following the OECD implementation to consider and model the impact on their transfer pricing policies.

9.5 Entities Bearing the Risk of Another Entity's Operations

The TP Rules do not attempt to deal with specific areas of discussion on the application of the arm's-length principle. Rather, the TP Rules incorporate the TP Guidelines and questions regarding the appropriate allocation of risk will be determined based on the application of the TP Guidelines to the particular scenario, including a review of the contractual terms underpinning the arrangement, such as guaranteeing a return for a particular entity in an arrangement.

10. RELEVANCE OF THE UNITED NATIONS PRACTICAL MANUAL ON TRANSFER PRICING

10.1 Impact of UN Practical Manual on Transfer Pricing

The TP Rules do not rely on or reference the United Nations Practical Manual on Transfer Pricing.

11. SAFE HARBOURS OR OTHER UNIQUE RULES

11.1 Transfer Pricing Safe Harbours

The TP Rules do not specifically provide for any safe harbours. However, as the TP Guidelines are explicitly incorporated into the TP Rules, Chapter VII of the TP Guidelines on "low value intra-group services" also forms part of the TP Rules. In this context, Revenue follows the guidance contained in Chapter VII of the TP Guidelines when determining an arm's-length charge for such services. Revenue notes in its guidance that it will accept a mark-up of 5% of the cost base of a low-value intra-group service without requiring a taxpayer to carry out a benchmarking study to support the rate.

DAC 6 contains the requirement that arrangements involving the use of unilateral safe harbour rules will be reportable and subject to automatic exchange of information. DAC 6 has been implemented in Ireland and arrangements from

1 July 2020 are reportable. Revenue has published guidance on the implementation of DAC 6 in Ireland.

11.2 Rules on Savings Arising from Operating in the Jurisdiction

The TP Rules do not specifically refer to location savings and there is no Revenue guidance or established practice in this regard.

11.3 Unique Transfer Pricing Rules or Practices

The TP Rules provide that certain arrangements between associated Irish entities should not be subject to the TP Rules. In order to qualify for the exemption, both parties to an arrangement must be Irish taxpayers and one or both must not enter the transaction in the course of a trade. Where one party enters the transaction in the course of a trade, the TP Rules will apply to that party; however, the TP Rules do not extend to the counterparty provided the counterparty qualifies for the exemption. The Finance Act 2020 amended the exemption to provide for clearer application to certain qualifying loan arrangements between Irish suppliers and acquirers. The updated exemption is subject to a ministerial commencement order and, as such, the exemption as introduced pursuant to the Finance Act 2019 continues to apply. The legislation implementing this exemption is complex and is causing some confusion in practice as to the ambit of the exemption (see **1.2 Current Regime and Recent Changes** for recent developments regarding this exemption).

Small and medium-sized enterprises (SMEs) are technically within the scope of the TP Rules; however, the relevant legislative provisions, applying the TP Rules to SMEs, must first be commenced by the Minister for Finance. In this regard, SMEs are not currently subject to the TP Rules. The definition of SMEs is based on the EU Commission Recommendation of 6 May 2003 (OJ No L124, 20 May 2003) and includes groups of companies where the groups employ less than 250 employees and have a turnover of less than EUR50 million or assets of less than EUR43 million. The economic interests of controlling shareholders are also taken into account when applying this test.

12. CO-ORDINATION WITH CUSTOMS VALUATION

12.1 Co-ordination Requirements between Transfer Pricing and Customs Valuation

The TP Rules do not give a definition for customs duty and there is no general legislation or guidance from Revenue on the co-ordination between transfer pricing and customs valuation. Therefore, the TP Rules apply in the same manner as they do to other related-party transactions.

Customs duty is based primarily on the value of the goods, as well as the origin and type of goods. The value of the goods will usually be determined by the transaction value; ie, the invoice price plus cost of transport, insurance, and other payments to be made. If the transaction value is not available, Revenue provides a hierarchy of other valuation methods.

A transfer pricing adjustment may present facts that affect a valuation for customs duty purposes, and in those cases the customs authorities should be notified.

Revenue is ultimately responsible for tax and customs duty in Ireland, and therefore where issues arise, Revenue may make further enquiries.

13. CONTROVERSY PROCESS

13.1 Options and Requirements in Transfer Pricing Controversies

Revenue has established a "transfer pricing unit" (TPU). The TPU will conduct reviews of taxpayers' transfer pricing by way of an "aspect query" or formal audit.

An aspect query is used to target a specific risk reported on Revenue's risk review system. The TPU will request detailed information on the taxpayer's business to support its transfer pricing self-assessment. The TPU may conduct functional interviews as part of this process. It operates similar to a formal audit, but is not regarded as equivalent as it is intended to be more collaborative in nature. Nevertheless, either the aspect query or audit process may result in an amended assessment to tax in Ireland. For all compliance interventions notified after 1 May 2022, the aspect query framework will be replaced with risk reviews, which are focused interventions to examine a risk or a small number of risks on a return. Risk reviews and audits will be in accordance with Revenue's updated Code of Practice for Revenue Compliance Interventions, which takes effect on 1 May 2022.

An appeal against a transfer pricing adjustment is made in the same manner as appeals against other tax assessments. An appeal is made to the Tax Appeals Commission (TAC) against the assessment under the relevant provisions of the TCA. TAC decisions are final unless the case is stated to the High Court on a point of law. Cases cannot be brought before the High Court on questions of fact. Appeals from the High Court are made to the Court of Appeal, and from there to the Supreme Court. At the time of writing, there have been no published decisions of TAC on the TP Rules (and, therefore, no decisions from the higher courts either).

A taxpayer does not have to pay the disputed tax before making an appeal to TAC. However, if the taxpayer does not pay the tax and subsequently loses the appeal, they will be subject to interest, and possible penalties, on a late payment.

There may also be parallel avenues of litigation associated with transfer pricing enquiries through seeking judicial review in the High Court.

14. JUDICIAL PRECEDENT

14.1 Judicial Precedent on Transfer Pricing

No transfer pricing-specific dispute has been determined by TAC or the Irish courts as yet, and therefore there is no developed domestic judicial precedent system on transfer pricing. However, the TPU is actively involved in a number of transfer pricing audits and it is inevitable that a case will come before the courts in due course.

14.2 Significant Court Rulings

There are no significant court rulings on transfer pricing in Ireland.

15. FOREIGN PAYMENT RESTRICTIONS

15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions

The TP Rules do not restrict outbound payments relating to uncontrolled transactions.

However, other provisions of the TCA provide that payments such as royalties or interest may be subject to Irish withholding tax (WHT) unless an exemption is available. The TCA provides for broad exemptions from WHT, such as where the payments are between group members or where the payments are made to a recipient that

is resident in a jurisdiction with which Ireland has concluded a double tax treaty. Moreover, some of Ireland's double tax treaties provide that no WHT or a reduced rate of WHT applies to certain payments.

15.2 Restrictions on Outbound Payments Relating to Controlled Transactions

The TP Rules apply in the normal manner to outbound payments between associated entities and the same WHT considerations as detailed in **15.1 Restrictions on Outbound Payments Relating to Uncontrolled Transactions** also apply.

15.3 Effects of Other Countries' Legal Restrictions

A taxpayer will be denied a deduction for any payments made to a connected person resident outside of Ireland in the context of a transfer pricing adjustment made to the connected person's profits. This rule applies both to payments to double tax treaty jurisdictions and non-double tax treaty jurisdictions. A deduction will only be allowed where relief is obtained under the relevant DTA.

16. TRANSPARENCY AND CONFIDENTIALITY

16.1 Publication of Information on APAs or Transfer Pricing Audit Outcomes

Information submitted to Revenue in connection with an APA or transfer pricing audit is treated as confidential. Revenue publishes certain aggregated statistics in its annual report on APAs, and also provides statistics to the European Commission on APAs in Ireland. This information may be made public by the European Commission, but reported in such a way that does not identify the taxpayer. Revenue's annual report also contains aggregated statistical information on the number of transfer pricing audits conducted and the outcomes. Revenue noted in its 2020 annual report that 31 transfer pricing audits had been initiated by the end of 2020; at the time of writing, figures for 2021 have not yet been released.

16.2 Use of "Secret Comparables"

Revenue will apply the general guidance in the TP Guidelines in determining the appropriate use of comparables. In practice, Revenue would not support the use of secret comparables, which aligns with the TP Guidelines.

17. COVID-19

17.1 Impact of COVID-19 on Transfer Pricing

The OECD has published guidance on the transfer pricing implications of the COVID-19 pandemic. As the TP Rules and Revenue's approach to transfer pricing is closely aligned with that of the OECD, this guidance will likely inform the response to the changing landscape in Ireland as a result of the pandemic. Revenue has not published guidance on the specific impact of COVID-19 on the TP Rules.

There continues to be increasing audit and compliance intervention activity in Ireland irrespective of COVID-19 as Revenue works remotely to continue its investigation activities.

17.2 Government Response

Revenue implemented a number of temporary policies or approaches with the intention of relieving some of the challenges that the COVID-19 pandemic placed on businesses; for example, suspension on interest for late payments for taxes for SMEs, debt warehousing schemes for tax liabilities and reduction of the rate of VAT.

Revenue extended the filing deadline for tax returns for 2019 and penalties were not applied where returns were late due to COVID-19. The late filing surcharge applies as normal to corporation tax returns filed for accounting periods ending October 2020 onwards.

Revenue provided temporary concessions in relation to the tax residency status of individuals in Ireland who are unable to move jurisdiction due to COVID-19, and also where an individual is unable to return to Ireland for tax purposes. The concession will not apply where the individual's departure is after 1 June 2020 unless they were prevented from leaving the state on, or by, 1 June 2020, due to contracting COVID-19.

Revenue revised its guidance on audits and investigations. While COVID-19 restrictions were in place, Revenue sought to conduct enquiries remotely where possible. As the restrictions in Ireland are removed, normal practice relating to audits has been resumed. Compliance interventions by the TPU are generally operating as normal.

17.3 Progress of Audits

Audits and aspect queries by Revenue did not stall during the pandemic. However, Revenue updated its guidance on the operation of these functions to account for the COVID-19 pandemic. Where possible, operations were conducted remotely and on-site investigations were limited. While there may be administrative delays as a result of the pandemic restrictions, as restrictions are removed, normal progress of audits has resumed.

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Trends and Developments

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Transfer Pricing Documentation – Practical Application of the New Rules and Scope

Previously, Ireland's transfer pricing rules only applied to certain trading transactions. With effect for accounting periods commencing on or after 1 January 2020, the majority of intra-group transactions are now required to be on arm's-length terms and documented appropriately. With respect to FY 2020 and onwards, taxpayers are required to have transfer pricing documentation in place no later than the date on which a return for the chargeable period is due to be filed. As a result of these changes, throughout 2021, the Irish transfer pricing documentation process was much more involved for many taxpayers operating in Ireland as multinational enterprises (MNEs) in Ireland met their first specific transfer pricing documentation deadlines.

Importantly, the Irish Revenue Commissioners ("Revenue") guidance notes that the local file (where required) must contain information showing how the transfer pricing policy was actually applied in each period. This also includes a reconciliation with the financial results recorded on the income statement of the company (and/or tested party) and explaining how the actual consideration payable or receivable on each arrangement complies with the arm's-length requirement. There is no specific guidance on what Revenue would expect to see in such reconciliation, but it should ensure that the information contained in the local file and the corresponding financial statements can be correlated. MNEs preparing local files for Irish transfer pricing purposes should be mindful of the obligation to reconcile financial information, particularly where there are accounting or local generally accepted accounting principles adjustments.

Compliance and Technology Sophistication

As tax compliance obligations increase globally, tax authorities and taxpayers in Ireland are investing in complex technology. Revenue has invested significant resources in data analytics software and data plays an integral role in all Revenue interventions. Revenue has software that matches the data collected to specific taxpayers and the data is typically used to collate a picture of a taxpayer's behaviour and tax affairs. Revenue uses risk software to apply algorithms to generate risk scores, which can highlight cases for appraisal to case workers. As is the case with tax authorities globally, a huge wealth of data is now available to Revenue.

The first exchanges of country-by-country reporting data between tax administrations took place in June 2018 and Revenue uses this information to inform high-level transfer pricing risk assessments and to evaluate other BEPS-related risks. Based on the most recently published Revenue statistics, in 2020, Ireland exchanged country-by-country reporting data with 64 jurisdictions. Revenue effectively collates the data it receives from internal sources (such as tax returns), external sources (such as banks and government bodies) and foreign sources (under exchange of information). Interestingly, Revenue has openly stated that social networks are a source it uses to feed into its data collection; for example, to confirm the levels and roles of employees on the ground in Ireland.

Given the significant volumes of data involved with tax compliance and the interplay of such

data with other complex issues such as the EU General Data Protection Regulation, privilege and confidentiality, taxpayers need to ensure proper processes are put in place with respect to information being shared with tax authorities. For example, when documents are provided to tax authorities, they should typically be reviewed from a privilege and data protection perspective. In addition, MNEs operating in Ireland are becoming increasingly aware of the value of data analytics in managing their tax affairs and achieving efficiencies across compliance obligations. As a result, we are continuing to see that key decision-makers in MNEs are seeking to rely on data analytics in business planning decisions and risk assessment.

Irish Transfer Pricing Audit Activity

Unsurprisingly given the increased availability of taxpayer information, there continues to be a year-on-year increase in audit activity in Ireland. According to Revenue's 2021 headline statistics, Revenue completed 464,060 risk management interventions across all tax heads. This is a significant increase from 378,536 in 2020, clearly reflecting an increase in Revenue's audit capabilities. Based on the most recent and more granular breakdown of transfer pricing audit activity, by the end of 2020, Revenue had initiated 31 transfer pricing audits. Thirteen of these audits were finalised, resulting in a yield of EUR81.6 million and a restriction in trading losses of EUR31.9 million, and amended corporation tax assessments made with total underpaid corporation tax identified of approximately EUR482 million. As Revenue had a closing inventory of 80 transfer pricing cases at the end of 2020, there is expected to be an increase in the 2021 statistics once published by Revenue.

As the majority of transfer pricing audits are appealed to the Tax Appeals Commission (or are referred for judicial review where relevant), it is anticipated that Ireland's first transfer pricing-specific appeal decision is imminent. It is hoped that this would provide key insights into the Irish interpretation and application of transfer pricing issues.

Changes to Ireland's Compliance Intervention Framework

MNEs in Ireland should be cognisant of upcoming developments relating to the compliance intervention framework in Ireland. Revenue recently published a revised Code of Practice for Revenue Compliance Interventions (the "Code"). It comes into effect on 1 May 2022 and is a total replacement of its predecessor, the 2019 code of conduct. Importantly, compliance interventions made prior to 1 May 2022 will continue under the 2019 version of the code.

The Code sets out a new Compliance Intervention Framework that provides a graduated response to taxpayer behaviour ranging from the provision of voluntary opportunities to correct any mistakes identified to the imposition of criminal penalties in cases of serious fraud or evasion. The new framework contains three graduated compliance intervention levels: Level 1, Level 2 and Level 3.

Level 1

Level 1 compliance interventions essentially remind taxpayers of their obligations and provide them with the opportunity to correct mistakes without the cost of a more detailed inquiry. This intervention will only occur where Revenue has not yet engaged in a detailed examination or review of the matters under consideration.

Level 2

Level 2 interventions focus on confronting compliance risks and will consist of risk-based reviews/checks on data provided by taxpayers in their tax returns. There are two types of Level 2 interventions: Risk Audits and a new form of Revenue enquiry called a "Risk Review".

Taxpayers will no longer have the opportunity to make an unprompted qualifying disclosure once a Level 2 notification has been issued. Instead, a prompted qualifying disclosure can be made in the period between the date on which the taxpayer is notified by Revenue that a Level 2 compliance intervention will start and the date of commencement of that Level 2 compliance intervention.

A Risk Review essentially replaces the aspect query. It is a focused intervention to examine a risk or a small number of risks on a return. However, it is equivalent to a Revenue Audit in terms of the scope of the qualifying disclosure that can be made by the taxpayer in response to the notification. Crucially, the key difference between an aspect query and a Risk Review is that when a taxpayer was notified of an aspect query, an unprompted qualifying disclosure could still be made in respect of tax underpayments. This option is not available for a Risk Review.

Level 3

Level 3 compliance interventions will consist of a "Revenue Investigation" focusing on tackling high-risk practices and cases displaying risks of suspected fraud and tax evasion. A Revenue Investigation consists of an examination of a taxpayer's affairs where Revenue believes that serious tax evasion may have occurred or a Revenue offence may have been committed and may lead to criminal prosecution.

Historically, transfer pricing-related compliance interventions were typically initiated by way of aspect queries. As such, it is anticipated that transfer pricing interventions will likely fall under Level 2 interventions.

Quest for Taxpayer Certainty

MNEs operating in Ireland are continuing to closely follow OECD-led global tax reform. Certainty continues to be a key aspiration for MNE taxpayers. Tax authorities are continuing to increase local transfer pricing adjustments. That, coupled with the increased audit activity in Ireland, has resulted in an uptake in taxpayers seeking to enter into an advanced pricing agreement (APA). Revenue's annual report notes that in 2020, the Irish competent authority received 22 APA requests and five APAs were concluded following negotiations with the competent authorities of other countries. This is a notable increase from the two APAs granted by the Irish competent authority in 2019.

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