

Transfer Pricing Forum

Transfer Pricing for the International Practitioner

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 **Bloomberg
Tax & Accounting**

APRIL 2021

Ireland

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Legislation

In terms of recent changes impacting the Irish transfer pricing landscape, the Irish transfer pricing rules were extensively overhauled for accounting periods beginning on or after January 1, 2020¹. At a high level, the significant changes introduced with effect from January 1, 2020 include:

- The incorporation into Irish law of the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the 2017 OECD Guidelines), together with OECD Guidance issued in 2018 on Hard to Value Intangibles and the OECD Guidance issued in 2018 on the Transactional Profit Split Method;
- The application of the transfer pricing legislation based on the substance of an arrangement where the substance is inconsistent with the form of the arrangement;
- Provision for the legislation to expressly permit re-characterisation of transactions by the Irish Revenue Commissioners (Irish Revenue) where parties acting at arm's length would not have entered into such arrangements;
- The extension of the rules to non-trading transactions save for certain Irish-to-Irish non-trading transactions (see further details below);
- The application of the rules to capital transactions where the market value of the asset exceeds €25 million, which significantly broadens the scope of the Irish transfer pricing regime;
- The introduction of enhanced documentation requirements, which include an OECD master file and local file approach and an express timeline for the preparation of supporting documentation. New penalty provisions also apply (see further details below);
- The removal of grandfathering provisions that existed for transactions entered into before July 1, 2010; and
- The introduction of a framework to extend transfer pricing rules to SMEs. The date of implementation of this framework is subject to Ministerial Order which is not expected to be passed in 2021 due to current economic conditions.

As noted above, one of the significant changes for Irish taxpayers in Finance Act 2019 was the expansion of the transfer pricing rules to non-trading transactions. This expansion carved out an exemption for non-trading transactions where both parties to the transaction are within the charge to Irish tax, provided certain conditions were satisfied². This carve-out is referred to as the "Irish to Irish" exemption. Essentially, the exemption applies only in circumstances where:

¹ Taxes Consolidation Act 1997, as amended by the Finance Act 2019, Secs. 835A-835HB (inclusive).

² Taxes Consolidation Act 1997, sec 835E TCA 1997.

- The supplier and acquirer are both 'Qualified Relevant Persons'; and
- The profits, gains or losses of the supplier or acquirer from the relevant activities are chargeable to tax under Case III, IV and V of Schedule D and taken into account for tax purposes.

Following its introduction, the application of this exemption caused much consternation and uncertainty for taxpayers, as in practice, the ambit of the exemption is limited. The key issue faced by taxpayers in considering the exemption as introduced was that it lacked clarity, particularly with respect to interest-free loan arrangements as there would be no profits.

To address the issue, Finance Act 2020 introduced further changes to the "Irish-to-Irish" exemption to specifically legislate for "qualifying loan arrangements" to benefit from the "Irish-to-Irish" exemption to make it clear that a taxpayer must have profits or gains or losses chargeable to tax under Schedule D, the computation of which directly takes account of the actual results of the arrangement. The new changes in Finance Act 2020 render it clear that where the actual consideration payable or receivable is not greater than a nominal amount then that will not be sufficient to be considered to be "taken into account" in the tax computation.

While the Finance Act 2020 clarifications apply from January 1, 2021, they require an implementation order before coming into effect, which has not yet been passed³.

In February 2021, Irish Revenue issued new guidance on Ireland's overhauled transfer pricing regime⁴. While this guidance provides some further clarity to taxpayers, the practical application of the "Irish-to-Irish" rules remains an area of complexity.

Cases and Rulings

No case on transfer pricing has yet been decided by the Irish courts. There are no transfer pricing cases currently before the Irish courts, other than cases that may be before the Tax Appeals Commission and such information is not publicly available.

While there are no litigated cases on Ireland's transfer pricing rules, decisions of foreign courts can be of persuasive authority in Ireland and can be followed at the option of the Irish courts. In this context, recent judgments by the European Courts on state aid taxation matters such as the Apple⁵, Fiat⁶ and Starbucks⁷ cases, to which Ireland / Irish taxpayers were a party, provide insight into the interpretation of transfer pricing rules. Accordingly, such judgments may be instructive as to how the Irish courts would consider such issues.

³ As at March 19, 2021 such implementation order has not yet been passed.

⁴ Irish Revenue Tax and Duty Manual, Part 35A-01-01, Document last reviewed February 2021.

⁵ Cases T-778/16, T-892/16.

⁶ Cases T-755/15, T-759/15.

⁷ Cases T-760/15, T-636/16.

Transfer Pricing Documentation

Enhanced transfer pricing documentation requirements are one of the key changes introduced by the recent overhaul of the Irish transfer pricing regime. Irish Revenue's recently published transfer pricing guidance⁸ outlines the documentation obligations following these updates.

The Irish legislation requires that "*records as may reasonably be required*"⁹ must be maintained and must be available upon request by Revenue for the purposes of determining whether the profits or gains or losses have been computed on an arm's length basis.

The key change under the new rules is that in-scope MNEs are now also required under the Irish rules to prepare and have available upon written request by a Revenue officer, a master file and local file in line with Annex I and II of Chapter V of the 2017 OECD Guidelines. A master file must be prepared if the total revenue of the worldwide group exceeds €250 million and a local file must be prepared if the total revenue of the worldwide group exceeds €50 million.

Importantly, while Irish Revenue guidance previously advised that '*best practice*' was for documentation to be prepared at the time the terms of a transaction were agreed, Irish legislation now explicitly requires the relevant documentation to be prepared no later than the filing date for the return for the chargeable period. In light of this timeframe, many Irish taxpayers are currently preparing their first set of transfer pricing documentation under the new enhanced rules.

The relevant documentation must be made available within 30 days of receipt of a written request from a Revenue officer¹⁰. A penalty of €4,000 will be imposed where the documentation is not provided within this 30-day timeframe. If the taxpayer is within the scope of the local file obligations, the penalty is increased to €25,000 plus €100 per day for as long as the failure continues.

A key benefit to preparing transfer pricing documentation in a timely manner in accordance with the rules is the possibility to mitigate tax-based penalties on any subsequent adjustments. The rules provide that tax-based penalties will not be applied where the records are prepared on time and are delivered within the required timeframe in response to a request from Irish Revenue. The taxpayer must also demonstrate that they have made 'reasonable efforts' to comply with the legislation and that the records are accurate, notwithstanding a transfer pricing adjustment.

The key takeaway is that for many taxpayers, the scope of transactions that must be analyzed and documented has significantly increased. It is therefore strongly recommended that all taxpayers with transactions that are potentially in-scope carefully review such transactions in the context of the new rules to ensure they are appropriately documented where relevant.

⁸ Irish Revenue Tax and Duty Manual, Part 35A-01-01, Document last reviewed February 2021.

⁹ Taxes Consolidation Act 1997, sec 835G TCA 1997.

¹⁰ Taxes Consolidation Act 1997, sec 835G TCA 1997.

Transfer Pricing Examinations/Audits

While some audit and compliance intervention activities were temporarily suspended from March 2020 due to COVID-19, there continues to be increasing audit activity in Ireland. To give a sense of the increase, in 2020 Irish Revenue engaged in a total of 599,530¹¹ compliance interventions (across all tax heads), which is a significant increase from 567,100¹² in 2019. This increased activity is also evident in the transfer pricing space. By the end of 2019, Irish Revenue had initiated 24 transfer pricing audits, 7 of which resulted in a yield of €136,000, a restriction in trading losses of €26.6 million, with underpaid corporation tax identified of approximately €144 million¹³.

This increase is similarly mirrored in the MAP / APA space. In recent years, on foot of the work carried out at the OECD level, there has been a marked increase in the number of MAP processes and requests for APAs. In 2019, Irish Revenue completed 11 MAPs following engagement with Competent Authorities of other jurisdictions and 2 APAs were granted¹⁴. It is expected that these figures will progressively increase in the coming years as taxpayers seek certainty in respect of the pricing of their transactions.

Given the enhanced transfer pricing documentation obligations and compliance regime described above, it is anticipated that transfer pricing documentation will be requested by Irish Revenue on a prompter and more frequent basis, which may lead to increased compliance interventions.

Impact of COVID-19

While Irish Revenue continued its work within the parameters of Irish COVID-19 restrictions, some intervention activities were temporarily suspended from March 2020.

With COVID-19 conditions and restrictions impacting almost all areas of business in Ireland, taxpayers are faced with a number of challenges in ensuring that transfer pricing compliance obligations are met notwithstanding the unique economic conditions. In general terms, transfer pricing policies and arrangements are based on past data, which would not take into account the most recent market conditions. Therefore, companies cannot simply rely on past policies without further analysis and potential adjustments. This will create uncertainty for taxpayers who are seeking to prepare contemporaneous documentation to support transfer prices in a quickly evolving situation.

Irish Revenue have not publicly commented on their approach to assessing transfer pricing issues related to COVID-19 challenges. However, in considering the appropriateness of taxpayers' transfer pricing documentation, Irish Revenue will likely have due regard to the recently published OECD guidance on transfer pricing implications of COVID-19. This guidance provides helpful clarification and support for taxpayers and tax administrations in evaluating the application of transfer pricing rules for the period impacted by COVID-19.

¹¹ Irish Revenue Headline Results 2020.

¹² Irish Revenue Headline Results 2019.

¹³ Data per Irish Revenue's Annual Report 2019.

¹⁴ Data per Irish Revenue's Annual Report 2019.

Finally, as noted above, the framework to extend transfer pricing rules to SMEs was included but not implemented in the new rules. In light of the challenges facing SMEs in the wake of COVID-19, it is not anticipated that the application of these rules to SMEs will be implemented in the near future.

What Can We Expect in 2021?

Building on the significant changes in recent years, it is anticipated that there will be further developments to the Irish transfer pricing landscape in 2021.

The Department of Finance recently published a 2021 Update to Ireland's Corporation Tax Roadmap. The 2021 update sets out Ireland's progress in implementing changes required at the EU level under the ATAD Directive and the BEPS project since the publication of the initial Corporation Tax Roadmap 2018. It also addresses further actions to be taken on existing commitments from the 2018 Roadmap and beyond. The 2021 update summarises the actions taken to date, which include fundamental reform of the Irish transfer pricing rules with effect from January 1, 2020. It also signals Ireland's commitment to extend transfer pricing rules to the taxation of branches in Ireland in line with the Authorised OECD Approach. It is anticipated that such work will commence in early 2021, with the introduction of the necessary legislation in Finance Bill 2021.

With regards to Ireland's transfer pricing regime as a whole, it is also important to keep Ireland's general transfer pricing rules in line with new and emerging international best practices. Ireland will be proactive in adopting any new emerging standards where appropriate.

Looking ahead to 2021, Irish taxpayers are continuing to familiarize themselves with the impact of the new rules, which significantly impact the implementation of inter-group transactions and cross-border arrangements. These changes, in particular, the application of the "Irish-to-Irish" rules, will continue to be a key focus of the Irish transfer pricing rules throughout 2021.

Taxpayers that may not have had transactions coming within the scope of Ireland's transfer pricing rules prior to the recent changes will need to carefully consider the impact of these rules. This will be particularly important in the context of preparing supporting transfer pricing documentation with the introduction of an express timeline for preparation and the application of penalties where documentation is not in place.

Finally, we expect that transfer pricing will continue to be a growing area of focus of Irish Revenue in 2021, with an increasing number of aspect queries and audits.

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