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# **Transfer Pricing Forum**

**Transfer Pricing for the International Practitioner**

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# Ireland

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## Legislation (e.g., new legislation or regulations that have impacted the transfer pricing landscape in your country.)

The Irish Finance Bill 2018 (the “**2018 Bill**”) introduced a legislative amendment with respect to the application of domestic time limits under the Mutual Agreement Procedure (“**MAP**”). Section 57 of the 2018 Bill amends section 959AA of the Taxes Consolidation Act 1997 (“**TCA**”) which provides for time limits on assessments made or amended by a Revenue Officer. This provision should come into force once the Bill is enacted, i.e., before the end of 2018. When seeking MAP assistance with regard to adjustments made to previous financial years, in circumstances where the Double Taxation Agreement (“**DTA**”) remains silent as to the time limit for when a request for MAP assistance is to be brought, the OECD Model Tax Convention on Income and on Capital (“**OECD MTC**”) allows contracting states to the DTA to be able to apply domestic time limits. This essentially allows contracting states to regulate how long or when a taxpayer can bring a claim.

In Ireland, under section 865(4) TCA, a claim for MAP adjustment must be made within 4 years after the end of the chargeable period to which the claim relates. “Chargeable period” is defined under section 321(2) TCA as an accounting period in the case of a company. The effect of section 57 of the 2018 Bill ultimately allows for the making and amending of assessments outside the four-year time limit in the case of bilateral MAPs reached between the competent authority of Ireland and the competent authority of another jurisdiction with which Ireland has a DTA. As a consequence of section 57 of the 2018 Bill, any time limits that apply or restrict the availability of MAP to a taxpayer are ultimately removed.

According to the Explanatory Memorandum to the 2018 Bill, the amendment provided by section 57 serves the purpose of ensuring that Ireland implements and follows the standards agreed to under the OECD BEPS initiative. However, as the amendment only applies to bilateral MAPs, unilateral forms of relief (such as correlative relief) do not benefit from the amendment. Furthermore, this extension to reopen tax years outside the four-year limit is only available to Irish Revenue and an equivalent right is not available to Irish taxpayers.

As detailed below, it is anticipated that further legislative changes will be introduced in the short term affecting Ireland's transfer pricing regime.

## Cases and Rulings (e.g., recent transfer pricing cases or rulings, as well as changes in the volume or types of transfer pricing cases being litigated.)

There have been no cases or rulings in Ireland in 2018 which have had a significant impact on transfer pricing interpretation in an Irish context. This is both because transfer pricing audits are in their relative infancy and there is a general preference for taxpayers to reach a resolution with Irish Revenue rather than litigate. As the Irish transfer pricing unit becomes more active we anticipate that some cases on transfer pricing will begin to go through the formal appeals process. Irish practitioners continue to monitor developments in Europe in relation to the various state aid tax cases that may have an impact on the application of transfer pricing principles across Europe.

## Transfer Pricing Documentation (e.g., new master file or local file requirements, as well as other documentation or reporting requirements.)

*Review of Ireland's Corporation Tax Code (the “Coffey Report”)*

In 2016 a review of Ireland's corporation tax code was undertaken by means of the Coffey Report. The Coffey Report addressed certain issues pertaining to Ireland's corporate tax system including transfer pricing and is used to form the basis of Ireland's potential policies on transfer pricing. The Coffey report highlighted a number of key areas of focus in relation to Ireland's transfer pricing regime:

- Currently section 835C(1)(c) TCA provides that transfer pricing legislation only applies to profits / gains arising from income within the charge to tax under Case I or II of Schedule D. Therefore, transfer pricing rules do not apply to non-trading income under Case III, Case IV and Case V of Schedule D. The Coffey Report noted that extending domestic legislation to non-trading transactions could poten-

tially have an impact on group financing structures. Changes in this area could have an impact on bona fide intra-group financing which includes intra-group treasury operations. As a result, recourse to external credit markets and associated costs could potentially be avoided by groups.

- The Coffey report notes that transfer pricing rules do not currently extend to capital transactions. This is due to the fact that legislation governing chargeable gains and capital allowances already provide for concepts equivalent to the arm's length principle and allow for the adjustment of capital values to reflect those equivalent concepts. It was recommended that, due to existing provisions which impose equivalents to the arm's length value to chargeable gains, any extension of transfer pricing rules should be commensurate to the risk of mispricing occurring.
- Consideration was also given to the extension of transfer pricing rules to transactions that pre-date 1 July 2010. Currently, Part 35A TCA which provides for Ireland's Transfer Pricing rules applies to accounting periods beginning on or after 1 January 2011 and does not extend to transactions agreed before 1 July 2010. It was recommended that transactions prior to 1 July 2010 be brought within the scope of Part 35A TCA.
- BEPS Action 13 aimed to develop rules in relation to transfer pricing documentation in order to increase transparency for tax administration. Section 835F TCA provides that companies in an arrangement must "have available such records as may reasonably be required" in order to establish whether the trading income of the company should be subject to transfer pricing rules. The Coffey Report argues that section 835F TCA may not create an unqualified requirement to furnish transfer pricing documentation in line with OECD Transfer Pricing Guidelines and BEPS. Consequently, it is recommended that amendment to Irish legislation should be made in order to provide for this.
- The Coffey Report acknowledges the difficulties that may be faced in extending Ireland's transfer pricing rules to Small and Medium Enterprises ("SMEs"). Notwithstanding this, the Coffey Report recommends that consideration should be given to extending the transfer pricing rules to SMEs, having regard to whether the administrative burden of doing so would be proportionate to the risks of transfer mispricing in such SMEs.

#### *Corporation Tax Roadmap*

Ireland's Corporation Tax Roadmap ("CT Roadmap") was published in September 2018 and constitutes another milestone in relation to Ireland's tax reform. Along with outlining the next steps Ireland is to take regarding the Anti-Tax Avoidance Directive and other EU directives, it also addressed matters regarding the implementation of the OECD BEPS and the Coffey Report recommendations.

The CT Roadmap acknowledged the need for Ireland to update its domestic legislation regarding transfer pricing to reflect the 2017 update to the pre-existing 2010 OECD Transfer Pricing Guidelines – likely with effect from 1 January 2020. Ultimately, along with updating the legislation on a general basis, the CT Roadmap also outlined that the following actions should be considered and implemented in accordance with updating Ireland's transfer pricing legislation:

- "Application of TP legislation to arrangements the terms of which were agreed before 1 July 2010 (prior to the introduction of the 2010 OECD Transfer Pricing guidelines);
- Application of TP rules to SMEs, having regard to whether the resulting administrative burden would be proportionate to the risks of transfer mispricing occurring in SMEs.

- Extension of domestic transfer pricing rules to non-trading income and to capital transactions having regard to whether this would improve the existing provisions applying arm's length values; and
- Obligations relating to transfer pricing documentation."<sup>1</sup>

The above actions are broadly in line with the Coffey Report recommendations on the further implementation of Ireland's commitments under BEPS Actions 8, 9, 10 and 13. The CT Roadmap states that it is also Ireland's intention to initiate a public consultation in 2019. This is to ensure stakeholder input, and to highlight whether any further changes are necessary to be introduced in order to ensure that transfer pricing rules in Ireland are fully effective.

The CT Roadmap also acknowledged the Coffey Report recommendation for transfer pricing changes to be implemented by 2020. However, in order to reflect Ireland's pro-active stance in achieving globally agreed standards regarding transfer pricing, Ireland hopes and intends to move forward with the introduction of new rules in 2019. This will be achieved by means of introducing the new transfer pricing rules in the Finance Bill 2019 that will have effect from 1 January 2020.

### **Transfer Pricing Examinations/Audits (e.g., any changes in the tax authorities' focus on transfer pricing issues during an examination or changes in the way tax authorities audit transfer pricing issues, as well as a discussion of any changes or enhancements to the MAP process.)**

Ireland's Transfer Pricing Unit have been increasing their activity in the area of transfer pricing compliance reviews (known as aspect queries – a form of pre-audit enquiry) and transfer pricing audits. This follows similar processes to Ireland's peers worldwide with detailed examination of TP models, functional interviews, etc., resulting in some adjustments being proposed. While the general approach is for taxpayers to seek resolution without resorting to litigation, it is anticipated that certain cases will go through the formal appeals process in due course.

On the international stage, the multilateral audit mechanism is now being used by various tax authorities in Europe, with resulting tax adjustments in a coordinated manner. More generally, the trend is for increasing transfer pricing adjustments globally and therefore, an increase in taxpayers seeking correlative relief claims in Ireland. Taxpayers are also considering the use of strategic bilateral Advance Pricing Agreements ("APAs") to provide certainty for the future, with the Irish Competent Authority seeing a significant increase in APA applications.

### **What Can We Expect in 2019? (e.g., any anticipated transfer pricing developments or issues that we should be aware of as we enter 2019.)**

Ireland soon hopes to complete ratification of the OECD BEPS Multilateral Instrument ("MLI") which will result in changes to Ireland's DTAs if they are categorised as covered tax agreements under the MLI, with the aim of the MLI generally coming into effect for Ireland from the beginning of 2020. Ireland has generally adopted the dispute resolution mechanisms in place under the MLI as per Article 35 and thus, these provisions will become relevant as the MLI enters into force.

Upon completion of ratification of the MLI prior to the end of 2018 and the MLI coming into force in 2019, it is the case that the dispute resolution mechanisms provided for by the MLI will apply to the relevant Irish DTAs in 2019. Ultimately, whether the dispute resolution mechanisms come into play under a specific DTA will depend on whether that DTA is (1) a covered tax agreement and (2) whether the relevant DTA has adopted elements of Article 16 (related to MAP) of the MLI.

As outlined above, it is anticipated that changes will be introduced to the Irish transfer pricing regime later in 2019, with effect from 1 January 2020. These will include the adoption of the 2017 OECD Transfer Pricing Guidelines, but will also likely involve other changes.

Overall, we expect the current trend of increased transfer pricing audit adjustments from various tax authorities globally (including Ireland from a domestic perspective) to continue. Increased uncertainty is expected as tax authorities seek to find a common understanding of the application of the 2017 OECD Transfer Pricing Guidelines.

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<sup>1</sup> Ireland's Corporation Tax Roadmap September 2018, p. 23.