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Transfer Pricing 2023

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Ireland: Law & Practice

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Ireland: Trends & Developments

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IRELAND

Law and Practice

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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, the Finance Act 2021 and the Finance Act 2022. 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 2022 updated the definition of "transfer pricing guidelines" to refer to the 2022 version of the OECD Transfer Pricing Guidelines (the "TP Guidelines"), which incorporates the OECD's Revised Guidance on the Transactional Profit Split Method, Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles and Transfer Pricing Guidance on Financial Transactions.

Therefore, with effect from chargeable periods commencing on or after 1 January 2023, the TP Rules provide that the "arm's length amount" is to be determined in accordance with the 2022 version of 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 brief, the TP Rules provide that 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, Irish Revenue Commissioners ("Revenue") may make an adjustment for tax purposes.

Revenue issued an updated version of their guidance on the TP Rules in December 2022 to provide clarity to taxpayers on the practical application of the TP Rules.

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.

The TP Rules were significantly altered by the Finance Act 2019. Some important changes implemented pursuant to the Finance Act 2019 include:

- 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).

On 8 December 2021, Ireland's minister for finance signed a statutory instrument to formally incorporate into Irish law the OECD's 2020 guidance on the transfer pricing of financial transactions. Prior to this, the OECD's guidance on financial transactions had not yet been formally incorporated into Ireland's TP Rules. As noted,

the OECD's latest edition of its TP Guidelines, issued on 20 January 2022, incorporates all supplemental guidance issued by the OECD subsequent to the 2017 edition of the TP Guidelines.

The Finance Act 2021 introduced into the Irish TP Rules 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. For accounting periods commencing on or after 1 January 2022, income attributable to a permanent establishment of a non-resident company operating in Ireland is to be computed as the amount of income which the permanent establishment would have earned if it were a separate and independent company engaged in the same or similar activities and under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the notionally separate company and the other parts of the non-resident company. In giving effect to the notionally separate company approach, the new rules are to be construed in so far as possible in a way that is consistent with Article 7(2) of the OECD Model and the guidance contained in the OECD Attribution of Profits to Permanent Establishments Report.

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. This exemption was introduced in the Finance Act 2019, however, the exemption introduced gave rise to interpretative difficulties regarding its application. A number of amendments to the Irish-to-Irish exemption were included in the Finance Act 2020, however, as these too gave rise to interpretative difficulties, they were ultimately never implemented. The Finance Act 2021 addressed 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 the Irish-to-Irish exemption to be satisfied:

- each party's Irish tax computation must take account of any consideration payable/receivable;
- where there is no consideration, each party's Irish tax computation must take account of the consideration if any were charged;
- the supplier to the transaction (eg, a lender under a loan agreement) must not have entered into the transaction in the course of a trade; and
- neither party to the transaction can be a "Section 110" company (ie, a securitisation company qualifying for treatment under Section 110 of Ireland's tax code).

Where an acquirer to a transaction (eg, a borrower under a loan agreement) cannot satisfy the hypothetical test in the second condition, above, there is a further carve-out which examines the activities of the acquirer in the course of enter-

ing into the transaction. The carve-out looks at whether such activities give rise to, or are capable of giving rise to, taxable profits, gains or losses (including tax-exempt dividends) for the acquirer, directly or indirectly.

Updated Revenue Guidance was introduced to provide further clarity on the relevant provisions. Helpfully, the Revenue Guidance confirms that for chargeable periods which commenced on or after 1 January 2020 and before 1 January 2022 Revenue will accept returns which are filed in accordance with the Irish-to-Irish exemption in accordance with the Finance Act 2021. The clarified exemption is a welcome development on the initial iteration of the exemption and should provide greater certainty to taxpayers going forward.

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 the consideration 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 supply and acquisition, the person making the supply and the person making the acquisition are associated; and
- where 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, although 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 regarding when comparability adjustments will be sought, but they may be sought in certain circumstances, in line with the guidance in the TP Guidelines. To date, 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 Revenue 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.

DAC 6

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.

Self-Correction

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 where 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.

Qualifying Disclosures

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.

Transfer Pricing Adjustment in Another Jurisdiction

While a taxpayer may amend tax returns, a taxpayer may not make 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

Treaties Aligned with the OECD Model Tax Treaty

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.

The Convention on Mutual Administrative Assistance in Tax Matters

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.

EU Directives

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 directives have been used increasingly for exchange of information in the EU in recent years.

DAC 6

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.

Other Platforms for Exchanging Information

Ireland also exchanges information on country-by-country (CbC) 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 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. Since January 2021, Ireland has activated 64 bilateral relationships 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.

The Finance Act 2022 transposed the provisions of DAC 7 which facilitate information-sharing in the context of a new legal framework for joint audits. Accordingly, given the multi-jurisdictional nature of transfer pricing disputes, joint audits may become more common in the coming years.

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 2021, the Irish competent authority received 11 APA requests and three 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 that is 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 "roll-back 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 roll-back periods).

7.8 Retroactive Effect for APAs

Where APAs have been sought for transactions that are already occurring, roll-back 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 it is required to prepare a local file, the penalty is increased from EUR4,000 to EUR25,000 plus 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.

CbC reporting requirements under BEPS Action 13 form one of the four BEPS minimum standards. Ireland enacted CbC 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 and Amount B under Pillar One is intended to simplify and streamline the arm's length principle based on the guidance provided in the TP Guidelines. While the Pillar One technical work continues, overall, Pillar One is likely to see a reduction in Irish corporation tax receipts through a realignment of taxing rights. On the basis of the current iteration of the Pillar One rules, 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 was also an active participant in the EU negotiations on the EU Minimum Tax Directive which was ultimately unanimously approved by all EU member states in December 2022. In mid-2022, Ireland held a consultation on its implementation of the Pillar Two

Minimum Tax Directive to give effect to the OECD's Pillar Two regime. The Irish government is actively working to transpose these rules and has indicated Ireland's intention to elect to apply a qualified domestic top-up tax.

- Ireland intends to ensure that the use of research and development (R&D) tax credits can continue to support innovation and growth in compliance with the OECD framework, and the Finance Act 2022 introduced changes to the R&D tax credit regime to ensure its effectiveness. It is anticipated that the complex computation and 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 of Pillar Two by the end of 2023. A further consultation on the Pillar Two rules was launched on 31 March 2023. The consultation documentation put forward an initial draft implementing legislation and confirmed that the main draft implementing rules will be included in the Finance Bill 2023, which is expected to be published in October 2023. There continues to be a lot of uncertainty around the legal and technical implementation of Pillar One and Pillar Two. Therefore, the practical impact on the Irish 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. This includes 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

As set out above, the TP Rules provide that certain arrangements between associated Irish entities should not be subject to the TP Rules. The Finance Act 2022 provided for a clearer application to certain qualifying loan arrangements between Irish suppliers and acquirers (see **1.2 Current Regime and Recent Changes** for recent developments regarding this exemption).

The Finance Act 2019 provided for small and medium-sized enterprises (SMEs) to be brought within the scope of the TP Rules. However, the relevant legislative provisions remain subject to commencement by the minister for finance, which has not yet occurred. In this regard, SMEs are not currently within the scope of the TP Rules and there is no indication that the rules will be applied to SMEs in the immediate future.

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

The Transfer Pricing Unit

Revenue has established a "transfer pricing unit" (TPU). The TPU will conduct reviews of taxpayers' transfer pricing by way of a compliance intervention.

Risk-Based Reviews/Checks

Prior to 2022, an "aspect query" was a form of compliance intervention used to target a specific risk reported on Revenue's risk review system. For all compliance interventions notified after 1 May 2022, the aspect query framework has been 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 must be carried out in accordance with Revenue's updated Code of Practice for Revenue Compliance Interventions, which took effect on 1 May 2022. Transfer pricing audits are "Level 2" compliance interventions conducted in compliance with the Code of Practice for Revenue Compliance Interventions and comprise risk-based reviews/checks on data provided by taxpayers in their tax returns. These risk-based reviews/checks can range from Revenue's examination of a single issue within a return to a comprehensive tax audit.

The Tax Appeals Commission

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 the TAC focussing specifically on the application of 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 the 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.

Judicial Review

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 the 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, a number of which are under appeal at the TAC 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 when the payments are between group members or when 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 it 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 2021 annual report that 42 transfer pricing audits had been initiated between 2015 and the end of 2021, 19 of which have been finalised. At the time of this update, the 2022 figures 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 are closely aligned with that of the OECD, this guidance will likely inform Revenue's consideration of periods during the pandemic. Revenue did not publish guidance on the specific impact of COVID-19 on the TP Rules.

Audit and compliance intervention activity continued in Ireland irrespective of COVID-19, as Revenue worked remotely on its investigation activities. As COVID-19-related restrictions eased in Ireland, Revenue returned to conducting in-person compliance 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 of 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 were unable to move jurisdiction due to COVID-19, and also where an individual was unable to return to Ireland for tax purposes.

While COVID-19 restrictions were in place, Revenue sought to conduct enquiries remotely where possible. As the restrictions in Ireland have been removed, normal practice relating to audits has been resumed and compliance interventions by the TPU are 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. In its 2021 annual report, Revenue noted the intention to move to an increased level of on-site activity in 2022, having carried out a number of successful remote interventions during the pandemic.

Trends and Developments

Contributed by:
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Matheson LLP

Matheson LLP puts its primary focus on serving the Irish legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Matheson has offices in Dublin, Cork, London, New York, Palo Alto and San Francisco. The firm has 800 people working across these six offices, including 121 partners and tax principals and over 540 legal, tax and digital services professionals. The Matheson tax team is the largest tax practice group among Irish law firms, with over 40 lawyers and tax advisers and 19 partners and tax principals. The size of the Matheson tax practice has enabled the tax team to specialise, which distinguishes Matheson from the tax departments of other Irish law firms. This ability to specialise has become more important in recent years with global and European tax initiatives having a fundamental impact on both current and future tax laws, increasing the complexity and range of issues that tax advice has to cover.

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Ireland's Audit and Compliance Landscape

Transfer pricing audit activity continues to be a key feature of the Irish tax landscape. The Irish Revenue Commissioners ("Revenue") have adopted a strong and principled stance with regard to transfer pricing compliance interventions.

Revenue is now engaging in risk reviews and audits under the new Code of Practice for Revenue Compliance Interventions (the "Code"). The Code came into effect on 1 May 2022 and is a total replacement of its predecessor, the 2019 code of conduct. The new framework contains three graduated compliance intervention levels: Level 1, Level 2 and Level 3.

Self-reviews, known as Transfer Pricing Compliance Reviews ("TPCRs") are facilitated by Irish transfer pricing legislation. By completing a TPCR a company can review its own transfer pricing compliance and this affords the taxpayer the opportunity to provide Revenue with an assessment of that compliance. TPCRs are categorised as "Level 1" interventions for the purposes of the Code. This means that an "unprompted disclosure" is available to the taxpayer, which can mitigate penalties arising on any incompliance identified.

However, in practice, fully fledged transfer pricing audits have become more common than collaborative compliance through TPCRs. Aspect queries, which were common transfer pricing compliance interventions, have been removed from the new compliance framework. Aspect queries have been replaced by "Risk Reviews" under Level 2 of the Code and Revenue's most recent transfer pricing guidance (updated in December 2022), confirms that transfer pricing audits are Level 2 compliance interventions under the Code. Once a Level 2 intervention is notified, a taxpayer is entitled to make a prompted qualifying disclosure which can mitigate penalties (but not to the same extent as a disclosure that is unprompted), however, an unprompted qualifying disclosure will not be available. The updated Revenue transfer pricing guidance further confirms that transfer pricing compliance enquiries relating to chargeable periods on or after 1 January 2020 may be initiated and carried out by a Revenue officer. This facilitates Revenue in carrying out audits, whereas for chargeable periods commencing before 1 January 2020, compliance enquiries could only be initiated by an "authorised officer" who was specifically authorised in writing for the purposes of Part 35A of the Taxes 1997.

Revenue also operates a Co-operative Compliance Framework (CCF) for larger taxpayers (ie, those typically within the scope of transfer pricing rules), which is run by Revenue's Large Corporates Division (LCD). The CCF approach involves Revenue and the taxpayer meeting on a regular basis (including an Annual Risk Review Meeting) and agreeing actions to ensure tax compliance. Transfer pricing compliance can form part of a taxpayer's Annual Risk Review Meeting, and Revenue's guidance on the CCF notes that the Revenue CCF case manager will determine if a Revenue transfer pricing specialist should attend the Annual Risk Review Meeting. Review of transfer pricing reports forms an integral part of the CCF case manager's meeting preparation, so having detailed transfer pricing documentation available to demonstrate compliance with the legislation is essential. Importantly, notwithstanding CCF membership, Revenue can commence a transfer pricing audit at any time outside of the CCF engagement.

Revenue's transfer pricing audit focus in recent years has been varied and it ranges from review-

ing wider group transfer pricing policies and broader transactions to specific transactions focused on targeted areas. The increased audit activity and capabilities are borne out in the statistical data of recent years which has seen a steady increase in compliance intervention activity, even throughout the pandemic. Revenue's 2021 Annual Report noted that in the period from 2015 to the end of 2021, Revenue initiated 42 transfer pricing compliance interventions, 19 of which were finalised. A significant number of amended corporation tax assessments were also made as a result of transfer pricing compliance interventions carried out by Revenue, with Revenue reporting that the total underpaid corporation tax identified was approximately EUR74 million. Revenue's 2021 Annual Report acknowledges that the majority of the amended assessments are currently under appeal and it is clear that a number of transfer pricing disputes are making their way through the Tax Appeals Commission process. However, it is also clear that both Revenue and taxpayers are open to settlement in appropriate cases and the vast majority of cases are taking this path, rather than getting to the point of a final decision at the Tax Appeals Commission. The latest Annual Report for 2022 had not been published at the date of this article, but it's expected that the upward trajectory of transfer pricing audits will continue.

Ireland as an Effective Transfer Pricing Dispute Resolution Location

Dispute resolution continues to be an area of growing importance given the overall trend of increased tax disputes. Revenue acts as the Irish competent authority resolving disputes regarding relief from double taxation that arise under Ireland's double taxation agreements and negotiating advance pricing agreements (APAs) to agree a basis for cross-border transfer pricing between associated companies.

During 2021, the Irish Competent Authority resolved 172 disputes, 17 of which concerned transfer pricing disputes related to attribution or allocation of profits between Ireland and the other country concerned. On 22 November 2022, the OECD published mutual agreement procedure (MAP) statistics for 2021 and acknowledged competent authorities who performed particularly well in 2021 with awards. Having been awarded the "most improved jurisdiction" in the OECD 2020 MAP awards, the Irish competent authority went further this year, winning in more award categories than any other jurisdiction. The Irish competent authority's increased workload and dispute resolution effectiveness was recognised by the following awards:

- Ireland won an award for taking the shortest average time to close MAP cases in the non-transfer pricing category, taking approximately five months to close non-transfer pricing MAP cases;
- Ireland came first in the caseload management category for having the highest closing ratio of transfer pricing and other cases (in other words, of the jurisdictions with the most MAP cases, Ireland closed more cases than any other jurisdiction);
- Ireland (together with the UK) won the "co-operation" category for having the most MAP cases fully resolved through agreement by a pair of jurisdictions in the non-transfer pricing category; and
- Ireland won second place for having the smallest portion of pre-2016 cases in its inventory.

The statistics highlight Ireland's ability to resolve MAP cases and recognise the significant increase

in the effective caseload management by the Irish competent authority in recent years. The OECD data objectively demonstrates that Ireland is now among the most effective jurisdictions for MAP resolution, as shown by the OECD's statistics and recognised by their awards. That said, the data confirms that transfer pricing cases still take significantly longer to reach conclusion than the BEPS Action 14 recommended timeframe of 24 months. It's anticipated that the increased in-person meetings taking place between competent authority teams following the pandemic will assist in reducing this timeframe.

The growing APA trend continues as taxpayers are seeking certainty amid the unsettled world of international tax reform. Revenue's 2021 Annual Report notes that the Irish competent authority received 11 APA requests and three APAs were concluded following negotiations with the competent authorities of other countries. While the number of requests is down from 2020, when the Irish competent authority received 22 requests, the interest in entering into APAs remains strong among taxpayers in Ireland with a view to tax reform coming down the tracks.

The OECD recently published guidance on bilateral APAs which highlights 29 best practices that should be followed by tax authorities negotiating APAs (the "Best Practice Guidelines"). Many of the practices detailed in the Best Practice Guidelines are already reflected in the Irish competent authority's operation of its APA programme. While the Best Practice Guidelines are not binding on tax authorities, it is anticipated that they will enhance overall efficiency in the negotiation of APAs globally. The global implementation of the practices detailed in the guidelines should ensure that the programme continues to deliver certainty for Irish taxpayers in an efficient manner going forward.

In February 2023, the OECD also published a Manual on the Handling of Multilateral MAPs and APAs ("MoMA"). The MoMA is intended to serve as a guide to multilateral MAP and APA processes from both a legal and procedural perspective. Similar to the Best Practice Guidelines, the MoMA does not impose a set of binding rules, but it instead seeks to complement the existing framework for MAPs and APAs based on tax treaty rights and existing OECD guidance. Under the Irish framework, the Irish competent authority is willing to consider entering into a series of bilateral MAPs/APAs as a way of dealing with multilateral situations where issues involve more than two tax jurisdictions. The MoMa therefore provides welcome guidance to further enhance co-operation and certainty for taxpayers considering MAPs and APAs.

Irish Reaction to Reform on the Horizon

The international tax agenda is rapidly evolving and complex. As in other jurisdictions, taxpayers in Ireland are closely following international tax developments driven by the OECD's Pillar One and Pillar Two proposals and the EU Commission's tax agenda.

Ireland has fully participated in the OECD's proposals and was actively engaged in the protracted EU negotiations on the EU Minimum Tax Directive. Ireland has signalled its commitment to transpose the EU Minimum Tax Directive that was ultimately unanimously approved by all EU member states in December 2022. In mid-2022, Ireland held a consultation on its implementation of the EU Minimum Tax Directive. As expected, Ireland has indicated the intention to elect to apply a qualified domestic top-up tax and Ireland intends to follow the ambitious plan to broadly implement Pillar Two by the end of 2023. A further consultation on the Pillar Two rules was launched on 31 March 2023. The consulta-

tion documentation put forward an initial draft implementing legislation and confirmed that the main draft implementing rules will be included in the Finance Bill 2023, which is expected to be published in October 2023. As part of the consultation process, stakeholders are encouraged to share practical tax and transfer pricing ramifications based on modelling being undertaken.

Key elements of Pillar One are still under development but it is evident that transfer pricing rules will be significantly impacted by the changes, with the rules resulting in a divergence from the normal application of the arm's length principle. The impact on future-looking transfer pricing policies and APAs currently under negotiation is being carefully considered by taxpayers in Ireland. On the basis of the current iteration of the Pillar One rules, 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.

Notwithstanding the long-term efforts to simplify and streamline transfer pricing, it's clear from the direction of travel of international tax reform that effective dispute resolution is going to be fundamental to taxpayers. We anticipate therefore that the number of cases before the Irish competent authority will further increase.

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