



Ireland's Finance Bill 2019 overhauls transfer pricing regime

Global Transfer Pricing Alert 2019-034

Ireland's Finance Bill 2019, released on 17 October 2019, contains legislative changes to Ireland's tax laws announced on Budget Day and changes in law that will apply to impacted taxpayers for accounting periods beginning on or after 1 January 2020.

The legislative changes follow the publication of "*Ireland's Transfer Pricing Rules Feedback Statement*" in September 2019 which contained draft transfer pricing legislation. For prior coverage, see [Global TP Alert 2019-025](#).

Finance Bill 2019 transfer pricing developments

Finance Bill 2019 contains provisions that fundamentally overhaul Ireland's domestic transfer pricing law, as contained in Part 35A of the Taxes Consolidation Act, 1997 (TCA 1997). The changes broadly follow the draft law issued in September 2019 and are expected to be finalized and passed into law before the end of December 2019. The new provisions will be effective for accounting periods beginning on or after 1 January 2020, with the proposed provisions relating to small and medium-sized groups (SMEs) subject to a Ministerial Order.

The key changes contained in the Finance Bill are as follows.

Alignment of Ireland's domestic law with 2017 OECD transfer pricing guidelines

Ireland's domestic transfer pricing law is currently aligned with the 2010 version of the OECD transfer pricing

guidelines. The amendments to Part 35A TCA 1997 will explicitly refer to the guidelines published by the OECD, which will be applicable for accounting periods beginning on or after 1 January 2020, including:

- The 2017 OECD transfer pricing guidelines, as issued on 10 July 2017;
- The Guidance for Tax Administrations on the Application of the Approach to Hard-To-Value-Intangibles, issued on 4 June 2018;
- The Revised Guidance on the Application of the Transactional Profit Split Method, issued on 4 June 2018; and
- Any additional guidance the OECD may publish subsequent to the updating of the current domestic legislation, which may be brought forward by Ministerial Order.

New transfer pricing documentation requirements

Ireland's transfer pricing documentation requirements will be updated to provide specific requirements for companies within scope to prepare transfer pricing documentation in accordance with Annex I and II of the 2017 OECD transfer pricing guidelines (that is, the master file and local file approach).

The Finance Bill provides for consolidated group revenue-based thresholds to apply before it is necessary to prepare the master file and/or local file as follows:

- Master file revenue threshold: EUR 250 million
- Local file revenue threshold: EUR 50 million

The due date for completion of relevant documentation is contemporaneous with the filing of the annual corporation tax return for the chargeable period concerned, nine months after the end of an accounting period but in any event no later than the 23rd day of said month. Accordingly, the relevant transfer pricing analysis for the year ending 31 December 2020 would be required to be completed on or before 23 September 2021. The relevant documentation must be made available upon request in writing by the Irish Revenue within 30 days. There is no requirement to file transfer pricing documentation with the corporation tax return.

New transfer pricing penalty provisions

The Finance Bill also contains new measures relating to penalties for non-provision of information and transfer pricing documentation to Irish Revenue within the required time frame. When a taxpayer fails to provide records that determine whether profits or gains have been computed in accordance with the transfer pricing rules (when the appropriate thresholds apply) within 30 days from the date of the request, a standard penalty of EUR 4,000 applies.

When a taxpayer is a person to whom the local file threshold applies, and that taxpayer fails to provide relevant information requested by Irish Revenue within 30 days from the date of the request, the standard penalty is increased to EUR 25,000. A further penalty of EUR 100 per day will also apply when failure to comply with a request by Irish Revenue continues. Any taxpayer that forms part of a multinational group meeting the master file revenue threshold of EUR 250 million will equally meet the local file revenue threshold. The increased penalty therefore is inherently geared towards larger groups, with the smaller penalty of EUR 4,000 applicable to smaller groups.

In addition, the Finance Bill contains new provisions regarding tax-geared penalties in relation to transfer pricing adjustments. If it can be demonstrated that the taxpayer has prepared its transfer pricing documentation contemporaneously with the date of filing the annual corporation tax return, the relevant documentation and information is provided to Irish Revenue within 30 days of a request, and the taxpayer has made reasonable efforts to comply with the transfer pricing law, then any transfer pricing adjustment will be ignored in the determination of a tax-geared penalty that may apply.

Extending transfer pricing rules to non-trading transactions

At present, Ireland's transfer pricing law is applicable only to trading transactions, taxed under Case I or II of Schedule D. The new law broadens the application of the arm's length principle to non-trading transactions taxed under Cases III to V of Schedule D.

The rules relating to non-trading transactions are modified in certain circumstances to ensure the basic rules of transfer pricing will be disappplied:

- When two Irish tax resident companies transact with each other and the underlying arrangement is a non-trading transaction taxed under Case III to V rules (for example, lending transactions, whether interest-free or interest bearing, or rental income) *for both companies*, there will be no requirement to apply transfer pricing principles to either party; and
- When one of the Irish tax resident companies is taxed under Case III to V rules for the arrangement and the second Irish tax resident company is taxed under Case I or II rules, then the transfer pricing rules apply only to the Case I or Case II company.

Arm's length pricing will need to be applied under the new law in other circumstances, including:

- When one of the parties to the transaction is a foreign (that is, non-Irish tax resident) associated party; and
- The arrangement between the two Irish tax resident companies is part of a scheme involving a second

arrangement (i.e., with a foreign associated party) and the sole or main purpose of the first arrangement between the two Irish tax resident companies is to obtain a tax advantage in connection with the second arrangement.

In the context of Section 110 companies operating in Ireland, while the new rules and requirements will apply to such entities, there is an important exclusion in respect of profit-participating notes issued by such entities. Separate new anti-avoidance provisions are being introduced in the Finance Bill dealing with Section 110 companies.

Extending transfer pricing rules to capital transactions

The Finance Bill contains measures that extend the transfer pricing rules to capital transactions and capital allowances from 1 January 2020. The law is amended to allow for the application of transfer pricing rules in computing arm's length chargeable gains or allowable losses on the transfer of tangible and intangible assets between related parties. The law indicates that the transfer pricing rules will not apply in computing the chargeable gain or allowable loss when certain circumstances apply, including:

- When the market value of the asset does not exceed EUR 25 million upon disposal or acquisition; or
- When disposal or acquisition occurs where other sections of the tax acts apply (for example, company reconstructions and amalgamations, certain intragroup transfers, etc.).

The EUR 25 million threshold includes the value of any other asset that had at any time formed part of the asset being disposed/acquired, and the value of any asset subject to any scheme in place to avoid reaching the EUR 25 million threshold to disapply transfer pricing rules.

Measures are also being introduced to deal with the interaction of transfer pricing and capital allowances to ensure that the transfer pricing provisions do not apply in certain circumstances, such as:

- In the determination of capital allowances on capital expenditure when the total expenditure incurred on the asset does not exceed EUR 25 million;
- In the determination of certain allowances to be levied under the tax amortization regime for qualifying intangible assets under Section 291A TCA 1997;
- In the determination of a balancing allowance or charge when the market value of the asset at the time of the event giving rise to the balancing adjustment does not exceed EUR 25 million;
- Other circumstances apply whereby the acquirer and supplier of the asset make certain joint elections for capital allowances purposes, certain transfers governed by other sections of the Irish tax acts (e.g., company

reconstructions and amalgamations, mergers, farm buildings, and transactions involving certain financial institutions).

Grandfathered arrangements

The existing domestic Irish transfer pricing rules allow for exemption from the transfer pricing law for certain arrangements entered into before 1 July 2010, to the extent the terms and conditions of such arrangements did not subsequently change. The Finance Bill contains provisions that will remove this exemption for chargeable periods beginning on or after 1 January 2020.

The updated domestic transfer pricing documentation requirements outlined above are modified for arrangements that were considered "grandfathered" under the old transfer pricing rules. The Finance Bill stipulates that documentation is not required to be provided to Irish Revenue for "grandfathered" arrangements when both parties to the arrangement are Irish tax resident companies.

It should be noted that even though transfer pricing documentation requirements may not apply in some cases as outlined above, such arrangements still need to be priced at arm's length.

Application of transfer pricing rules to SMEs

Irish tax resident companies that are part of an SME group are currently outside the scope of Irish transfer pricing documentation requirements. The exemption is based on EU Recommendation 2003/361/EC ("the Commission recommendation"), as issued by the European Commission on 6 May 2013.

Under the proposed changes, companies classified as "small enterprises" will continue to fall outside the ambit of Ireland's domestic transfer pricing documentation requirements, but nevertheless will still be required to adhere to the arm's length principle. Within the meanings outlined in the Commission recommendation, "small enterprises" are defined as enterprises that employ fewer than 50 persons on a group basis and whose annual consolidated turnover and/or annual balance sheet total does not exceed EUR 10 million.

Companies classified as "medium enterprises" will be subject to the domestic transfer pricing law provisions (including documentation requirements) once the measures are implemented. The documentation requirements for medium enterprises will be reduced in some circumstances when the monetary consideration for certain transactions does not exceed EUR 1 million.

The proposed changes affecting SMEs as contained in the Finance Bill will be effective once a Ministerial Order is implemented at a future date.

New recharacterization provisions

The domestic law contained in Part 35A TCA 1997 will be amended to include specific measures that allow recharacterization of transactions for transfer pricing purposes. When the form of the financial or commercial arrangement is inconsistent with the substance of the relations between related parties transacting with each other, the arm's length conditions may be determined by the actual commercial or financial arrangements in place between the parties.

Other miscellaneous provisions

The Finance Bill also contains measures dealing with the interaction of transfer pricing and dispute resolution tools available to taxpayers through Ireland's domestic appeal process and mutual agreement procedure (MAP), which is available through Ireland's network of double taxation agreements.

The Appeal Commissioners are required to stay proceedings under a domestic appeal upon an application by both parties (the taxpayer and Irish Revenue) to allow MAP in relation to the dispute to proceed. The domestic appeal proceedings are to be stayed until the conclusion of the MAP process. A new measure is also to be introduced that provides that a tax assessment or amended tax assessment will not become final and conclusive when the affected taxpayer invokes MAP or submits a complaint under the European Union (Tax Dispute Resolution Mechanisms) Regulations 2019 within 30 days of issue of the assessment.

Deloitte comments

The Irish tax landscape continues to change as a result of OECD and EU developments. As a consequence of the transfer pricing changes included in the Finance Bill, a number of transactions that were outside existing rules are now caught, and multinational entity groups will have to ensure the pricing is consistent with the arm's length principle and aligned with where value is created. Further, a review of historic pricing arrangements is highly recommended to ensure the arrangements are consistent with the latest OECD guidance. Finally, Ireland's domestic transfer pricing law for the first time explicitly states that companies will now be required to prepare formal Irish transfer pricing documentation and new substantial penalties can apply when such documentation is not prepared in a timely manner.

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