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Transfer Pricing 2024

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Ireland: Law & Practice and Trends & Developments

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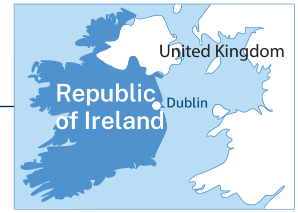
Matheson LLP

IRELAND



Law and Practice

Contributed by:
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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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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 substantially amended by the Finance Act 2019 and then further amended by 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 – the 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. Revenue issued further guidance in December 2023 regarding transfer pricing documentation requests. The guidance issued in December 2023 largely reiterates the existing statutory requirements and the processes set out in the Code of Practice for Revenue Compliance Interventions. However, it highlights the emphasis placed on transfer pricing documentation by Revenue and, from a taxpayer perspective, the importance of preparing robust transfer pricing documentation within the statutory time limits.

The guidance also serves as a reminder that compliance with the TP Rules can form part of Co-Operative Compliance Framework (CCF) annual risk review meetings. Where this is the case, the Revenue team may request a taxpayer's transfer pricing documentation as part of the CCF annual risk review meeting. The CCF is a co-operative framework for larger taxpayers that are typically within the scope of transfer pricing rules. The framework involves the taxpayers engaging regularly with Revenue to manage tax compliance on an ongoing basis.

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, which implemented some important changes including:

- 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, and this is the version to be applied with respect to chargeable periods commencing on or after 1 January 2023.

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.

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 introduced exemption 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, though as these also 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 entering 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 if 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 ensure that the affairs of a company are in accordance with the intentions of the person:

- by means of the holding of shares or the possession of voting power in or in relation to that or any other company; or
- by virtue of any powers conferred by the articles of association or another document regulating that or any other company.

A more flexible definition of control is included in Section 432 of the Taxes Consolidation Act, 1997 (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 in computing the profits, gains or losses chargeable to tax, the TP Rules should 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 "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 where, 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);
- the 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 automatically take a deduction for an expense that arises as a result of a transfer pricing adjustment in another jurisdiction. Instead, a taxpayer must rely on any reliefs that may be available pursuant to the relevant double tax treaty, such as a mutual agreement procedure (MAP) or a correlative adjustment.

6. Cross-Border Information Sharing

6.1 Sharing Taxpayer Information

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 after 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 until January 2021 for commencement.

Ireland has also implemented Directive 2021/514 ("DAC 7"), which provides for automatic exchange of information relating to certain platform operators.

Other Platforms for Exchanging Information

Ireland also exchanges information on country-by-country (CbC) reports, advance pricing agreements (APAs) 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. Ireland has activated 77 bilateral relationships under the CbC MCAA or exchanges under EU Council Directive (2016/881/EU) and 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 that facilitate information-sharing in the context of a new legal framework for joint audits. The Finance Act 2023 further supplemented the transposition of DAC 7 by implementing legislation to regulate the conducting of joint audits. Accordingly, given the multi-jurisdictional nature of transfer pricing disputes, joint audits are expected to 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. 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 2022, the Irish competent authority received 12 APA requests and four 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, 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
- 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 the files 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 CbC 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 Base Erosion and Profit Shifting (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 to 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 on 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 Pillar One Amount A technical work continues, overall, Pillar One is likely to see a reduction in Irish corporation tax receipts through a realignment of taxing rights. It is expected that the volume of disputes will increase as a result of Pillar One, which may put strain on Irish competent authority resources.

In February 2024, the OECD Inclusive Framework published a report on Amount B under Pillar One. This report provides a simplified approach to transfer pricing rules, with a particular focus on low-capacity jurisdictions. Ireland has not publicly confirmed the proposed approach to the adoption of the Amount B rules.

Finance (No 2) Act 2023 implemented the Pillar Two framework in Ireland by transposing the EU Minimum Tax Directive (Council Directive (EU) 2022/2523) into Irish law. The Finance Act provides that the Irish Pillar Two legislation shall be construed to ensure that effect be given to the OECD Model Rules and OECD Pillar Two guidance. The OECD's December 2023 Administrative Guidance was not included in the Finance (No 2) Act 2023 as signed into law on 18 December 2023, but was subsequently brought into effect by Ministerial Order dated 20 December 2023. Ireland has not yet published detailed guidance on the Pillar Two rules, but has issued high level notes for guidance regarding the Pillar Two provisions contained in the Finance (No 2) Act 2023. The move to a global minimum effective tax rate of 15% is a step towards greater tax certainty, which is broadly welcomed by multinational taxpayers in Ireland. As part of the negotiations, Ireland received assurances that the 12.5% headline corporation tax rate can remain in force for companies below the Pillar Two threshold of EUR750 million revenue.

Ireland intends to ensure that the use of 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. The Finance (No 2) Act 2023 introduced further changes, including increasing the R&D tax credit rate from 25% to 30% with a view to maintaining the level of support provided by the credit to many businesses in operating in Ireland. It is expected 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.

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 are 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 previously, 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 focusing specifically on the application of the TP Rules (and, therefore, no decisions from the higher courts either). Matheson acted for the taxpayer in Ireland's first transfer pricing appeal heard by the TAC. The determination in that case, which was successful for the taxpayer, will be publicly available in the coming months.

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, as noted, the first determination regarding a transfer pricing appeal will be published in the coming months. In addition, the TPU is actively involved in 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.

While not a TP measure, the Finance (No 2) Act 2023 also introduced new defensive measures on the tax treatment of distributions (including dividends), royalties and interest payments to recipients in zero-tax jurisdictions and jurisdictions included on the EU's list of non-cooperative jurisdictions. The new rules limit the availability of domestic WHT exemptions where payments are made to entities in the such jurisdictions.

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 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 payments to 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 2022 annual report that 51 transfer pricing audits had been initiated between 2015 and the end of 2022, 25 of which have been finalised. At the time of this update, the 2023 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.

Trends and Developments

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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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Transfer Pricing Audit Landscape in Ireland

During the past year, the Revenue Commissioners ("Revenue") has continued to actively audit multinational enterprises (MNEs) in Ireland. With effect from 1 May 2022, Revenue is engaging in transfer pricing (TP) compliance interventions under the new Code of Practice for Compliance Interventions, which places a greater emphasis on collaborative compliance. The new framework has three graduated compliance levels: Level 1, Level 2 and Level 3.

Revenue is technologically sophisticated and has made significant investments in software with advanced data analytics capability. Taxpayers are selected for compliance intervention based on the presence of various risk indicators. In light of data analytics technology, Revenue's TP audits have been more focused and strategic in recent years.

In terms of trends, Revenue's TP audit focus is varied, and ranges from reviewing wider group TP policies and broader transactions to specific transactions focused on targeted areas. Given that the Organisation for Economic Co-operation and Development (OECD's) 2020 guidance on the TP of financial transactions was formally incorporated into Irish TP rules in 2021, the arm's length nature of financial transactions involving MNEs is now being closely examined by Revenue. It is expected that documentation of and support for TP policies applied to financial transactions will form an audit trend in the coming years.

Revenue's annual report contains aggregated statistical information on the number of conducted TP audits, and the outcomes. In its most recently available annual report, Revenue noted that 51 TP compliance interventions were initiated in the period from 2015 to the end of 2022.

During 2023, Matheson acted for a multinational taxpayer in the first Irish TP appeal heard by the Tax Appeals Commission (Tax Court) in Ireland. The taxpayer successfully won the appeal, and the assessments were set aside. The determination has not yet been publicly released; however, this landmark case is a significant development for Irish TP, and, given the nature and range of the issues considered, the determination will be of relevance to most multinational companies. Prior to this determination, no TP-specific appeal had been heard by the Tax Appeals Commission or the Irish courts since TP rules were first introduced in Ireland in 2010.

Currently, there are a number of TP assessments under appeal at the Tax Appeals Commission, with the likelihood of further appeals being heard by the Tax Appeals Commission in the near future.

The Importance of Robust TP Documentation

Updated Revenue Guidance

There has been a renewed focus on the importance and quality of TP documentation. On 18 December 2023, Revenue published new guidance on "Requests for Transfer Pricing Documentation" (the "Guidance"). The Guidance largely reiterates the existing statutory requirements and processes set out in the Code of Practice for Revenue Compliance Interventions. However, the publication of specific guidance by Revenue demonstrates the emphasis placed on TP documentation and, from a taxpayer perspective, the importance of preparing robust TP documentation within the statutory time limits.

The Guidance details the operational policy of Revenue's TP Audit Branches in the Large Corporates Division for requesting TP documentation from taxpayers as part of the risk assessment/appraisal process. It also sets out how TP documentation requests fit within Revenue's compliance intervention framework, noting that TP documentation requested during a Revenue appraisal constitutes a "Level 1" compliance intervention (the lowest level of the compliance intervention framework). The Guidance also notes that a taxpayer's master file and local file will always be requested when a "Level 2" TP intervention is initiated (which can be a risk review or audit).

The Guidance includes a reminder of TP documentation obligations, and notes the requirement for taxpayers to have prepared their TP documentation no later than the date on which the tax return for the chargeable period is due to be filed. On that basis, the Guidance notes the expectation that the master file and local file should already be prepared and readily available upon request from Revenue. Importantly, a recent development is that the corporation tax return (CT1) in Ireland now contains mandatory questions regarding TP documentation. Taxpayers must confirm whether the company qualifies for an SME exemption and whether the company is required to prepare a local file and master file.

The Guidance highlights the role a taxpayer's master file and local file play in assisting Revenue's TP Audit Branches, to help better identify TP risks and facilitate more targeted risk-based TP interventions in being opened. The Guidance notes that the taxpayer's TP documentation informs Revenue's decision as to whether there is sufficient risk to proceed to audit or risk review. The Guidance also summarises a non-exhaustive list of the information generally reviewed by the TP Audit Branch for TP risk appraisals. This list includes information such as:

- financial statements;
- corporation tax returns and computations;
- payroll information for company employees filed with Revenue;
- country-by-country (CbC) reports;
- information on cross-border transactions submitted as part of the mandatory disclosure regime;
- intellectual property registries; and
- company websites.

The Guidance also provides a reminder that compliance with the TP rules can form part of co-operative compliance framework (CCF) annual risk review meetings. Where this is the case, the Revenue team may request a taxpayer's TP documentation as part of the CCF annual risk review meeting. CCF is a co-operative framework for larger taxpayers that typically fall within the scope of TP rules.

Finally, the Tax and Duty Manual (TDM) reiterates the relevant statutory penalties for non-compliance with the TP documentation requirements, and notes the importance of TP documentation in seeking protection from tax-geared penalties. In the event of a TP adjustment, tax-geared penalties will generally not be applied where:

- the taxpayer has prepared the files within the time limit;
- the taxpayer has provided the files to Revenue within the time limit; and
- a reasonable effort was made to ensure the files were accurate.

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. The Finance Act 2023 further supplemented the transposition of DAC 7 by implementing legislation to regulate the conducting of joint audits. Accordingly, given the multi-jurisdictional nature of TP disputes, joint audits are expected to become more common in the coming years.

CbC tax reporting

In light of the interaction of CbC tax reporting with Pillar Two safe harbours, there has also been a renewed focus on the quality of CbC reports. CbC reporting requirements apply to MNE groups with consolidated group revenue of EUR750 million or more in the preceding fiscal year. CbC reports provide a breakdown of revenue, profits, taxes and other indicators of economic activities for each jurisdiction in which the MNE group operates.

The OECD has implemented the "Transitional CbCR Safe Harbour" as a temporary safe harbour to ease the administrative burden for MNEs. The CbCR Safe Harbour has been incorporated into Ireland's Pillar Two legislation, which came into effect for accounting periods commencing on 31 December 2023. As the operation of MNE TP policies and TP adjustments can impact on the application of the CbCR Safe Harbour, MNEs seeking to rely on the CbCR Safe Harbour should review their existing CbC reports, processes and source data to ensure that they are qualified for purposes of the CbCR Safe Harbour.

Separately, on 22 June 2023, public CbC reporting requirements took effect in Ireland with the entry into force of the EU (Disclosure of income tax information by certain undertakings and branches) Regulations (the "Regulations"). The Regulations require in-scope MNEs to publicly disclose corporate tax information. In addition, non-EU multinationals with subsidiaries and branches in the EU must comply with the same reporting obligations as EU multinational undertakings. Where the information is not available, the subsidiary or branch must request the information from the ultimate parent or standalone company. The application of the regulations begins in the first financial year on or after 22 June 2024, with 2025 as the first potential year for reporting, to be published in 2026. An in-scope undertaking must publish the tax report on its own website, unless it makes the report available to the public on the website of the Companies Registration Office (CRO) in Ireland, in which case the company must reference this on its own website and provide information on where the report can be found.

Potential Impact of OECD and EU Developments on Irish TP

Several important tax policy developments have emerged from the OECD and the EU during the past year, which will have a significant impact on TP and the application of the arm's length principle.

Pillar Two

The Finance (No 2) Act 2023 implemented the OECD's Pillar Two framework in Ireland by transposing the EU Minimum Tax Directive (Council Directive (EU) 2022/2523) into Irish law. The Act provides that the Irish Pillar Two legislation must be construed to ensure that effect be given to the OECD Model Rules and OECD Pillar Two guidance.

The arm's length principle plays a key role in the application of the Pillar Two rules, and it is essential that taxpayers are able to support the arm's length nature of intra-group arrangements. The Irish Pillar Two rules require certain adjustments where transactions between constituent entities of an MNE group are not consistent with the arm's length principle. It is therefore essential that MNE groups within the scope of the Irish Pillar Two rules consider the impact of the Pillar Two rules on TP policies and ensure that the arm's length nature of arrangements can be supported.

Pillar One – Amount B

In February 2024, the OECD Inclusive Framework published a report on Amount B under Pillar One. This report provides a simplified approach to TP rules regarding certain baseline distribution activities, with a particular focus on low-capacity jurisdictions. Ireland has not publicly confirmed the proposed approach to the adoption of the Amount B rules; however, the introduction of simplified rules and documentation regarding baseline distribution activities would be widely welcomed by taxpayers in Ireland.

EU TP Directive

On 12 September 2023, the EU Commission issued a proposal for a Directive on TP (the "EU TPD"). If implemented, the EU TPD is not expected to materially affect how TP applies to Irish taxpayers in practice, as the proposal is based on the same OECD principles that form the basis for the existing Irish rules.

The Irish TP rules formally incorporate the arm's length principle and the OECD TP guidelines into Irish law. Therefore, the implementation of the EU TPD should reflect the principles underpinning Ireland's existing TP rules. However, the proposed EU framework for applying TP rules would broaden the scope of Irish TP rules if the EU TPD was implemented as proposed.

Achieving Certainty in an Uncertain Tax Landscape

The growing advance pricing agreement (APA) trend continues, as taxpayers continue to seek certainty amid the unsettled world of international tax reform. This is particularly the case given the implementation of Pillar Two in many jurisdictions. Revenue's 2022 annual report noted that the Irish competent authority received 12 APA requests and that four APAs were concluded following negotiations with the competent authorities of other countries.

CHAMBERS GLOBAL PRACTICE GUIDES