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Irish Department of Finance Changes to Local Transfer Pricing Regulation

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In February 2019, the Irish Department of Finance opened a public consultation regarding the direction that its transfer pricing (TP) regulations ought to follow after the release of the 2017 OECD Transfer Pricing Guidelines (TPG) and following an independent review (Coffey Review) signalling the need for reform.¹ Ireland's previous TP rules were provided for in Part 35A of the Taxes Consolidated Act 1997 and based on the 2010 OECD TPG.² The amendments to the transfer pricing rules replacing certain clauses presented in Part 35A were finally signed by the Irish President on 22 December 2019³ and described in Finance Act 2019 Number 45, with effect from 1 January 2020.⁴

In this article, we summarise the Irish Department of Finance's key message to taxpayers.

Changes to Irish TP Regulation

The main changes in Irish legislation are represented by the adoption of the 2017 OECD TPG and certain supplementary guidance.⁵ The update to the new guidelines includes:

- Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles - BEPS Actions 8-10—approved on 4 June 2018 by the Inclusive Framework on BEPS;
- Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS Actions 8-10—approved on 4 June 2018 by the Inclusive Framework on BEPS; and
- Any additional guidance published by the OECD on or after the date of the passing of the Finance Act 2019 as the Irish Minister for Finance may designate by order.

Other changes compared to the regulation previously in place include:

- The introduction of a requirement to prepare master file and local file documentation, subject to a €250m and €50m annual group consolidated revenue threshold respectively;⁶

- The introduction of a deadline for preparing TP documentation in line with the Irish corporation tax return filing deadline;⁷
- An extension of the TP rules to include non-trading transactions;⁸
- The removal of grandfathering for transactions originating prior to 1 July 2010;⁹
- The application of TP rules to capital transactions where the market value of the asset exceeds €25 million;¹⁰
- An explicit focus on the substance of the commercial and financial relationships in a transaction and extending capability for the tax authorities to re-characterise transactions where parties acting at arm's length would not have entered such arrangements;¹¹ and
- The application of the TP rules to medium-sized enterprises in respect of transactions where the consideration payable exceeds EUR 1 million.¹²

Lastly, changes have been made to the TP-specific penalties:

- A EUR 4,000 fine for failure to provide transfer pricing documentation within the 30-day statutory timeline;^{13,14} and
- For entities of such size as to fall under the local file/master file requirements, a EUR 25,000 fine for failure to provide these files within the 30-day statutory timeline, plus EUR 100 for each additional day.¹⁵

What This Means for Taxpayers

One of the main regulatory changes means taxpayers with non-trading transactions will fall within the scope of Ireland TP laws for the first time. Previously, only “trading” transactions were subject to Ireland’s TP requirements. Whilst the term “trading” is not clearly defined in the legislation, market participants tend to view it as referring to activities undertaken by persons or entities in line with the revenue-generating part of their business. This wider scope of transactions falling under the new TP rules may mean transactions such as lending or licensing arrangements having non-trading characteristics may no longer be exempt. This means taxpayers will not need to devote as many resources to distinguishing “trading” and “non-trading” transactions, but they will need to ensure that these non-trading transactions meet the new TP legislation.

Another level of complexity may be added in the case where legacy transactions are no longer subject to the grandfathering protection. This is likely to result in the need for a new functional analysis and benchmarking exercise.

The introduction of the BEPS Actions 8-10 into Irish legislation creates the need for taxpayers to analyse transactions by considering the relational dynamics between the related parties and their contribution to value creation. Moreover, in-depth analysis about what drives value, and the related parties’ roles and responsibilities in this respect, is now a fundamental starting point of a transfer pricing analysis. This type of analysis is particularly relevant when considering hard-to-value intangibles, and other complex transactions such as financial transactions.

Lastly, new documentation requirements mean the master files and local files can be requested by the Irish tax authorities, the Revenue Commissioners. Whilst upfront lodgement is not required with the tax return,¹⁶ taxpayers will need to ensure they have these documents (along with their regular TP documentation) prepared by the time the corporate tax return is lodged in case the Revenue Commissioners provide a written request for the master and/or local files. The taxpayer is advised to prepare these files proactively alongside the tax return and TP documentation to minimise discrepancies, uncertainties, and misalignment of facts and circumstances. Readily available and contemporaneous documentation also acts as a useful signal of the taxpayer's willingness to cooperate and be compliant with the new TP laws.

NERA Can Work Collaboratively with You and Your Legal and Tax Advisors

NERA's Global Transfer Pricing Practice helps clients minimise tax risks resulting from transfer prices. This is achieved by our TP experts utilising market-based pricing techniques including value-chain and industry structure analyses, benchmarking studies, and other types of economic analyses. Our experts rely on rigorous valuation methodologies to design intercompany pricing policies grounded in sound business strategy and well-established economic principles. The results are TP solutions that meet both your business objectives and the arm's length requirements in line with the new Irish legislation.

The standard of our independent advice has strengthened our reputation with tax authorities and we have practical experience in assisting clients in negotiating successfully with the Irish Tax Authority. We can also ensure that your TP policies and documentation complies with current Irish tax legislation and the OECD's updated 2017 TPG.

For further information on or questions about the issues examined in our response, please contact NERA Associate Director Amanda Pletz or NERA Managing Director Dr. Emmanuel Llinares.

Notes

- ¹ Seamus Coffey, *Review of Ireland's Corporation Tax Code Presented to the Minister for Finance and Public Expenditure and Reform*, 2017.
- ² OECD, *Ireland Transfer Pricing Country Profile*, 2017, available at <https://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profile-ireland.pdf>.
- ³ President of Ireland, *2019 Legislation*, 2020, available at <https://president.ie/en/the-president/2019-legislation>.
- ⁴ Number 45 of 2019, Irish Finance Act 2019, Pt. 1. S.27, 835HB, (2)(a).
- ⁵ Ibid, 835D. (1)(a)-(c).
- ⁶ Ibid, 835G. (1).
- ⁷ Ibid, 835G. (5)(a).
- ⁸ Ibid, 835E. (1)-(3).
- ⁹ Ibid, 835HB. (5)(a).
- ¹⁰ Ibid, 835HA. (1).
- ¹¹ Ibid, 835C. (5)(a)-(b).
- ¹² Ibid, 835F. (5)(a)(ii).
- ¹³ The EUR 4,000 penalty will mainly be levied in cases where a medium-sized enterprise has not provided TP documentation to Irish Revenue within the 30-day statutory timeline. It may also be levied in circumstances where additional information is requested on top of the local file/master file.
- ¹⁴ Number 45 of 2019, Irish Finance Act 2019, Pt. 1. S.27, 835G, (6)(a).
- ¹⁵ Ibid, 835G. (6)(b).
- ¹⁶ Ibid, 835G. (5)(b).

About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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