4 September 2019
Global Tax Alert
News from Transfer Pricing

Ireland publishes Transfer Pricing Feedback Statement

On 2 September 2019, Ireland's Department of Finance published a Feedback Statement regarding proposed updates to Ireland's transfer pricing (TP) rules. The Feedback Statement summarizes the proposed updated TP legislation and provides a final short window until 13 September 2019 to seek input from stakeholders.

The Feedback Statement is part of the ongoing consultation process on the implementation of various commitments arising from the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) reports, related European Union (EU) Directives, and the recommendations set out in the Coffey Review[1] as outlined in the Corporation Tax Roadmap published by the Irish Government on 5 September 2018.[2] The Feedback Statement follows a Public Consultation in February 2019.[3]

It is currently the intention (except where specifically noted below) to legislate for the updates to the TP rules in Finance Bill 2019 with a view that the updates will be effective for accounting periods beginning on or after 1 January 2020.

The key changes are as follows:

- Adoption of the 2017 OECD Transfer Pricing Guidelines (TPG). Notably, this brings into Irish law the DEMPE[4] concept, an updated framework to align profits with value creation. Implementation of the Approach to Hard-to-value Intangibles[5] and the Revised Guidance on the Application of the Transactional Profit Split Method[6] which were released after the updated 2017 OECD TPG.

This highlights Ireland's commitment to implementing international best practice from a TP perspective.

- Introduction of a requirement to prepare master file and local file documentation, subject to a €250m and €50m annual group consolidated revenue threshold respectively. The proposed statutory deadline for preparing TP documentation in line with the corporation tax return filing deadline, e.g., for a company with a fiscal year end 31 December 2020, it is expected that TP documentation would be in place by 23 September 2021.
- Inclusion of language which expressly applies the substance over form provisions in the 2017 OECD TPG. The sample legislation would require taxpayers to consider not just the arm's-length pricing of related-party transactions, but also whether independent parties "would" have entered into the particular related-party transactions in the first instance. The legislation further allows for the re-characterization of transactions by Irish Revenue. Where the consideration is in excess of the arm's-length amount, the excess will be treated as a distribution.
- Extension of TP rules to non-trading transactions. Certain domestic transactions will continue to be outside the scope of the rules.
- Extension of TP rules to capital transactions as follows:
  - For assets where capital allowances are being claimed, TP applies where the amount of expenditure on acquisition exceeds €25m. This specifically includes intangible assets.
  - TP also applies on disposal of assets where the value of the asset on disposal is more than €25m.
  - The draft legislation includes anti-avoidance provisions to prevent taxpayers from artificially separating transactions into a series of transactions to avoid reaching capital expenditure/market value thresholds.
- Removal of the exemption for transactions which are grandfathered under existing legislation (i.e., outside the scope of Irish TP rules if entered into before 1 July 2010).
- Extension of TP rules to Small and Medium sized Enterprises (SMEs[7]) where the aggregate consideration for the related-party cross-border transaction is more than €1m or value of assets is more than €25m. Commencement of this provision will be subject to Ministerial Order. From a TP documentation perspective, small enterprises could be exempt and there will potentially be simplified documentation requirements for medium sized enterprises.[8]

The Department of Finance has indicated that further consultation is required for the extension of TP rules to branch profit attribution and therefore this will not be effective at the beginning of 2020.

The Department of Finance has asked stakeholders to provide any further comments or queries by 13 September 2019. While the time frame is short, EY will continue to engage with key stakeholders during this period, seeking changes and clarifications as appropriate.

Endnotes

1. The Coffey Review was an independent review of Ireland's corporation tax code published in September 2017. See EY Global Tax Alert, *Ireland publishes Independent Review of Irish Corporate Tax Code*, dated 14 September 2017.
2. https://assets.gov.ie/27357/24077dbc248e404695386e0a10fd6b24.pdf.
3. https://assets.gov.ie/6476/03d7a81a4cf64b91913bb130ceda5162.pdf.
4. Control of development, enhancement, maintenance, protection and exploitation of IP and associated risk management.
5. Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles – BEPS Actions 8 – 10, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris – approved by the Inclusive Framework on BEPS on 4 June 2018
6. Guidance for Tax Administrations on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Actions 8 – 10, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris – approved by the Inclusive Framework on BEPS on 4 June 2018.
7. An SME is an enterprise with less than 250 employees and either (i) turnover less than €50m or (ii) assets less than €43m. This is an annual test, applied at group level.
8. A medium enterprise is defined as one with fewer than 250 but greater than 10 employees and either (i) annual turnover not exceeding €50m but greater than €2m or (ii) Assets not exceeding €43m but greater than €2m.

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