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Global Tax Alert

News from Transfer Pricing

Ireland publishes Finance Bill 2019 – Transfer pricing updates

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On 17 October 2019, Ireland's Department of Finance published Finance Bill 2019 which implements the tax elements of the 2020 Budget measures, clarifies aspects of the Budget announcements, and also provides for previously unannounced measures.

The Finance Bill introduces changes to the transfer pricing rules signaled in the Transfer Pricing Feedback Statement, issued in September 2019.

The Feedback Statement was 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 September Feedback Statement followed a Public Consultation in February 2019.[3]

The Department of Finance has now provided certainty of its intentions by legislating for the following updates to the transfer pricing rules in Finance Bill 2019. These changes (except where specifically noted below) will be effective for accounting periods commencing on or after 1 January 2020.

The key changes are:

- 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

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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 transfer pricing 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.
- Introduction of a deadline for preparing transfer pricing (TP) documentation in line with the Irish 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.
- Introduction of TP specific penalties as follows:
  - Where information to support the TP policies of a company is requested by Irish Revenue and not provided within the 30-day statutory timeline, a penalty of €4,000 will apply.
  - Where a local file/master file is requested by Irish Revenue and not provided within the 30-day statutory timeline, a penalty of €25,000 will apply, along with a further penalty of €100 per day until the documentation is provided.
  - It is envisaged that the €4,000 penalty will mainly be levied in cases where a medium enterprise has not provided TP documentation to Irish Revenue within the 30-day statutory timeline (see below). It may also be levied in circumstances where additional information is requested in addition to the local file/master file that could reasonably be required to support the arm's-length nature of the transaction.
- Where the company prepares its documentation on or before the documentation deadline, provides such documentation to Irish Revenue within the 30-day statutory timeline and demonstrates reasonable efforts to comply with TP legislation then any TP adjustment will be ignored for purposes of determining whether a tax-geared penalty applies to the company.
- 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. Domestic transactions, including transactions involving s110 companies, will continue to be outside the scope of the rules, subject to certain anti-avoidance provisions.
- Extension of TP rules to capital transactions as follows:
  - For assets where capital allowances are being claimed, transfer pricing applies where the amount of expenditure on acquisition exceeds €25m. This specifically includes intangible assets.
  - Transfer Pricing 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.

  The application of TP rules to capital transactions, and capital allowances will be on a prospective basis, applying to capital expenditure incurred on or after 1 January 2020. Any capital allowances on capital expenditure incurred prior to 1 January 2020 shall continue to be outside the scope of transfer pricing.
- 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). It should be noted however that the new master file/ local file documentation requirements will not apply to grandfathered arrangements.

The Department of Finance has indicated that the extension of TP rules to Small and Medium sized Enterprises (SMEs[7]) will be implemented in the future by way of Ministerial Commencement Order. Such rules would extend transfer pricing to SMEs where the aggregate consideration for the related-party cross-border transaction is more than €1m or value of assets is more than €25m. From a TP documentation perspective, small enterprises will be exempt and there will be simplified documentation requirements for medium sized enterprises.[8]

Multinational enterprises should review their TP documentation to ensure it is aligned with OECD master file/local file format. Companies should also review any intercompany transactions which may previously have fallen outside the scope of Irish transfer pricing and which may now be subject to the new Irish TP rules.

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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