Bloomberg Tax

Transfer Pricing Forum

Transfer Pricing for the International Practitioner

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Ireland

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1. Briefly describe the transfer pricing documentation and tax return disclosure requirements in your jurisdiction.

TP documentation requirements

Irish transfer pricing rules require taxpayers falling within the rules' application to "*have available such records as may reasonably be required for purposes of determining*" whether their trading income has been computed in line with the 2010 OECD Transfer Pricing Guidelines (the "**2010 TPG**"), and that the required records be prepared "*on a timely basis*." Taken together, these requirements can be viewed as providing taxpayers with a degree of flexibility regarding the form of documentation to be produced. This flexibility should, in turn, ensure that the administrative burden of producing documentation adequately reflects the relevant risk at issue.

Irish Revenue guidance

In August 2017, the Irish Revenue Commissioners ("**Irish Revenue**") issued a guidance note that provides additional information concerning the documentation requirements contained in Irish transfer pricing legislation. This guidance note confirms that the primary purpose of having transfer pricing documentation available is to enable taxpayers, if requested, to readily establish to Irish Revenue's satisfaction that their transfer prices are consistent with the 2010 TPG.

The Irish transfer pricing rules do not require that transfer pricing documentation is kept in a prescribed or standard form. A taxpayer may therefore choose the form in which the necessary information and documentation are kept. Recognising that one size does not fit all, Irish Revenue's guidance note states: "*[t]he actual documentation required will be dictated by the facts and circumstances of the transactions*," that "*the manner of meeting the requirement . . . may take account of the cost and administrative burden involved*."

Accordingly, complex transactions will, broadly speaking, require more detailed documentation than straightforward or more routine transactions.

Irish Revenue's guidance note confirms that best practice is for the documentation to be prepared at the time a transaction's terms are agreed and that "*the documentation should exist by the time the tax return falls to be made*." Furthermore, the guidance note states that a taxpayer should review the required documentation regularly "*to determine whether the pricing remains at arm's length*."

Irish Revenue have confirmed that documentation that has been prepared in accordance with either the 2010 TPG or the Code of Conduct adopted by the EU Council in relation to transfer pricing documentation is acceptable for the purposes of the Irish transfer pricing rules. Therefore, documentation prepared by an associated company for tax purposes in another jurisdiction which can be made available to Irish Revenue should suffice for Irish tax purposes, also.

Post-OECD BEPS developments

Ireland's domestic transfer pricing documentation rules have not been amended as a result of the OECD BEPS project. In February 2019, the Irish Department of Finance (the "**Department**") published its consultation paper on the Irish transfer pricing rules (the "**Consultation Paper**"). In the Consultation Paper, the Department confirmed that the transfer pricing documentation obligations prescribed in the 2017 OECD Transfer Pricing Guidelines (the "**2017 TPG**") will be incorporated into domestic Irish law in late 2019. Accordingly, we expect the OECD Master File/Local File ("**MF/LF**") approach will apply in an Irish transfer pricing context for accounting periods beginning on or after 1 January 2020.

Although separate Master and Local Files are not currently (technically) required, the information required to be kept on Master and Local Files may be considered to be reasonably required for the purposes of determining whether a taxpayer's trading income has been computed in accordance with the arm's length principle. In practice therefore, it is best practice that taxpayers comply with the BEPS Action 13 documentation requirements in order to satisfy Irish domestic obligations. Importantly, it should be noted that taxpayers are not required to file transfer pricing documentation with Irish Revenue when filing their tax returns.

Once the MF/LF approach has been formally introduced into Irish domestic law, MNE groups with headquarters in Ireland must include information in the Master File that would not have necessarily been required under previous documentation rules – for example, information on intangibles and financing arrangements. Therefore, Irish headquartered MNE groups ought to consider how this will align with the Local File(s), CbC reporting and other information published by the group.

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For Irish subsidiaries, the group's Master File should be reviewed from an Irish perspective to ensure that the information it contains is consistent with the Irish subsidiaries' profile(s), and aligns with the Irish transfer pricing documentation and CbC reporting information.

Record keeping obligations

Generally, for Irish tax purposes records must be retained for a period of at least six years after the completion of the relevant transaction to which they relate, and Irish Revenue have specific powers of inquiry in this regard. An authorised officer of Irish Revenue may, for example, request that a taxpayer produce such documentation for inspection.

Tax return disclosure obligations

Taxpayers whose activities fall within the scope of the Irish transfer pricing rules must have transfer pricing documentation available, ideally on a contemporaneous basis. Taxpayers need not file such documentation with Irish Revenue when filing their tax returns. Rather, taxpayers should be in a position to provide such documentation, if requested by Irish Revenue, through a compliance intervention, e.g., through a Corporate Compliance Framework ("**CCF**") meeting, an 'aspect query' or on audit.

Irish Revenue's guidance note states that transfer pricing documentation is "*fundamental to validating and explaining the pricing of intra-group transactions*." Therefore, the following items should be clearly identifiable in any such documentation:

(I) the associated persons for the purposes of the application of the Irish transfer pricing rules;

(II) the nature and terms of transactions within the scope of the transfer pricing legislation;

(III) the method by which the pricing of transactions was arrived at, including any study of comparables and any functional analysis undertaken;

(IV) how the method referred to above has produced arm's length pricing;

(V) any budgets, forecasts or other papers containing information relied on in arriving at arm's length terms; and

(VI) the terms of relevant transactions with both third parties and associates.

Over the coming years, we expect Irish Revenue's approach (in practice) to transfer pricing documentation and related requirements will develop, and further practical guidance should emerge.

2. In recent years, have the tax authorities changed or modified their audit approach? (e.g., increase in staffing and/or increase in funding with respect to the transfer pricing audit function; use of risk assessment tools or data mining tools to identify audit targets; use of joint or coordinated audits, etc.). If risk assessment tools are used, what factors are typically analyzed?

Before a formal regime was introduced in April 2010, the transfer pricing provisions in Irish tax legislation were limited in scope. Accordingly, Irish Revenue did not dedicate significant resources to transfer pricing matters until recently.

In 2015, Irish Revenue established a dedicated transfer pricing audit branch (the "**TPU**") within its Large Cases Division ("**LCD**"). The TPU has nationwide responsibility for conducting risk-driven transfer pricing audits and other transfer pricing compliance interventions.

TPU and the TPCR

The TPU conducts transfer pricing audits in the same manner as regular corporation tax audits. Under Ireland's self-assessment system, the burden of proof in the event of an audit by Irish Revenue falls on the taxpayer. Following the introduction of transfer pricing rules in Ireland, Irish Revenue's initial preferred approach was to reach out to taxpayers in a collaborative manner to understand the transfer pricing models used. This was effected through the relatively informal Transfer Pricing Compliance Review ("**TPCR**") program, which was established in 2012.

Under the TPCR program, taxpayers were selected on a risk assessment basis to conduct a self-review on their transfer pricing for a specified period. Having concluded a TPCR, Irish Revenue issued a post-review letter informing the taxpayer either that no further TPCR inquiry would be necessary, or that there were issues for further discussion as part of the TPCR process. The TPCR process ran quite smoothly and was seen as a good opportunity to assist Irish Revenue in understanding the taxpayer's business without the pressures associated with a formal audit.

Aspect queries

Following the TPU's establishment in 2015, however, Irish Revenue's focus has now shifted to compliance interventions through 'aspect queries' or formal audits. An 'aspect query' can be regarded as a targeted intervention for the purpose of checking a particular risk that has been identified by Irish Revenue's risk review systems. Typically, the TPU initiates an 'aspect query' by sending a letter to a taxpayer stating that Irish Revenue intend to examine and review the taxpayer's transfer pricing policy. This initial letter will, broadly, contain a request for high-level information, such as transfer pricing reports, intercompany agreements, etc. The 'aspect query' process is very similar to the formal audit process, as through the process the TPU will request detailed information on the taxpayer's business to support the transfer pricing policy adopted and will also conduct functional interviews, etc.

According to Irish Revenue's published guidance, an 'aspect query' is not in itself regarded as being equivalent to a formal audit. The primary reason/benefit of the review being conducted as an 'aspect query' rather than a formal audit is that it should allow a more collaborative process, with the ability for taxpayers to make qualifying disclosures at an early stage with the benefit of reduced penalties. In the author's experience, the 'aspect query' process is a robust examination of the taxpayer's transfer pricing policies and may result in assessments being raised in respect of a transfer pricing adjustment. There is at least one case of such a transfer pricing assessment being appealed to the Irish Tax Appeals Commission (in the public domain), with others potentially in the pipeline.

CCF program

Irish Revenue launched the CCF program as part of an initiative to create a more collaborative relationship between the Irish tax authorities and some of Ireland's large corporate taxpayers. As part of the CCF program, Irish Revenue officials arrange an annual risk review meeting with the taxpayer; the practice has been to have members of the TPU present to discuss and understand the taxpayer's transfer pricing policies, with a view to identifying any areas of risk that will require further examination through Revenue's compliance intervention framework.

Notably, transfer pricing modernisation has been a key focus of the Department's proposals for Irish corporate tax reform over the past 18 months. Following an independent expert's report reviewing the Irish Corporate Tax Code (the "Report"), the Department published its "Corporation Tax Roadmap" and, more recently, the Consultation Paper in which several proposals first contained in the Report have been announced as being considered for implementation in 2019. It is expected that, in line with this modernisation, Irish Revenue will continue to develop their transfer pricing capabilities, which should further enhance Ireland's standing as the jurisdiction of choice for MNE groups doing business in the EMEA (Europe, the Middle East and Africa) markets.

Identifying audit targets

In their annual report for 2017, Irish Revenue note that the "vast majority of [taxpayers] are voluntarily tax and duty compliant . . . meet their filing and payment obligations on time and submit accurate returns and declarations." Accordingly, Irish Revenue adopt a risk-based approach to compliance activity, targeting resources where the compliance risk is greatest and keeping any intrusion on compliant taxpayers to a minimum. Typically, Irish Revenue determine the type of compliance intervention undertaken by evaluating the risks identified and the nature of taxpayers' behaviour.

One of Irish Revenue's key tools for identifying targets for compliance interventions is the Risk Evaluation Analysis and Profiling ("**REAP**") system. REAP rates taxpayers across all the main tax heads and in respect of customs and excise duties. 'Risk' in this context is understood as meaning the risk posed to Irish Revenue's core business of collecting the correct taxes and duties from taxpayers at the right time. Irish Revenue designed the REAP system to analyse significant data (including third-party data) that Irish Revenue holds on tax and duty cases and to attribute 'scores' to the cases analysed based on the level of risk identified. Sources of Irish Revenue's data include datasets drawn from tax returns and declarations, as well as from sources such as third-party financial institutions, payment intermediaries and other government agencies. In addition, Irish Revenue evaluate via REAP data available under the automatic exchange programmes with foreign intermediaries and tax administrations. REAP prioritises cases based on risk, thereby enabling Irish Revenue to focus attention on cases which are considered to require most attention.

In addition to REAP, Irish Revenue undertakes a Random Audit Programme and a Re-Audit Programme. The objectives of the Random Audit Programme are to measure and track compliance with tax legislation, to act as an indicator of the effectiveness of Irish Revenue's risk-based approach and to provide for the possibility that all taxpayers may be selected for audit. The objectives of the Re-Audit Programme are to assess the impact of auditing in encouraging compliance. The Re-Audit Programme, in particular, has been designed to provide an indicative measure of the rate of recidivism and to inform processes for dealing with recurring non-compliance. However, any case may be subject to re-audit where Irish Revenue's tools identify additional risks.

As mentioned above, Irish Revenue are also utilising the CCF programme to gather information and understanding of a taxpayer's transfer pricing policies, with a view to determining whether any particular area requires further investigation.

3. Do the tax authorities focus on certain types of transactions? (e.g., intangibles, financing transactions, commodities, etc.).

As highlighted above, the Irish transfer pricing regime is still in its relative infancy. Irish Revenue have continually noted that they will adhere to the 2010 TPG and have not published specific guidance relating to any particular transfer pricing sector – other than low-value intra-group services – preferring, instead, to rely on international standards. In a transfer pricing context, Irish Revenue cannot be said to focus on certain types of transactions, but rather employ the risk assessment tools outlined above to identify particular areas of interest.

In the author's experience, more recent compliance interventions by Irish Revenue have examined a number of transactions involving intangibles, including high-value and hard-to-value intangibles, but financing and other types of transactions are also being examined.

4. Do the tax authorities rely on BEPS-related concepts during its audits? (e.g., DEMPE analysis, new approach for hard-to-value intangibles, expanded use of profit splits, use of risk assessment framework, etc.).

Irish Revenue have not published specific transfer pricing guidance or rules regarding the transfer pricing of intangibles. The 2010 TPG should therefore remain the applicable standard until the 2017 TPG are incorporated into domestic law in Ireland from January 1, 2020.

In practice, Irish Revenue are not seeking to apply the particular standards in the 2017 TPG, but they are focusing and highlighting the importance of functionality and control over risk in applying the 2010 TPG, relying on the standards and language in the 2010 TPG to support this line of argument. Irish Revenue have always accepted the use of various methods, as provided for in the 2010 TPG, including profit split methodologies, and there has not been any particular shift in choosing one methodology over another.

Irish Revenue has also confirmed that Chapter VI of the 2010 TPG is relevant to the application of Ireland's Knowledge Development Box ("**KDB**") ('patent box') regime. In this regard, Irish Revenue's published guidance relating to the KDB confirms that taxpayers claiming KDB relief in respect of embedded IP should apply transfer pricing principles to determine the appropriate amount of profits allocable to the relevant qualifying IP. Furthermore, the 2010 TPG will be applied by Irish Revenue in the context of Ireland's capital allowances regime for IP to ensure that the IP-derived profits for the purpose of determining the maximum amount of relief which can be claimed annually are at arm's length. The 2017 TPG, and related concepts, will apply to these regimes upon implementation of the 2017 TPG, with effect from January 1, 2020.

Most taxpayers are now actively reviewing their transfer pricing policies with respect to intangibles to ensure that they are aligned with the standards prescribed by the 2017 TPG, incorporating a focus on DEMPE functionality. Further, in cases involving advance pricing agreements, regard is now had to the standards in the 2017 TPG.

5. Do transfer pricing penalties apply in your jurisdiction? If so, what can be done to mitigate these penalties?

The Irish transfer pricing rules do not provide for any specific penalty provisions. Therefore, the generally applicable corporate tax interest and penalty provisions will apply. Typically, interest and penalties would only be imposed following an audit process to determine whether the requirements of Irish tax rules are being met.

There is a broad range of potential penalties both for failing to maintain documentation and in respect of any underpayment of tax. Irish Revenue may hold a company liable to a surcharge of 5% of its corporation tax liability (up to a maximum of EUR 12,695) where a return is filed within two months after the due date. In cases where the return is filed after the two-month deadline, a company may be liable for a surcharge of 10% of its tax liability (up to a maximum of EUR 63,485).

If a company fails to pay its tax liabilities (including any preliminary tax obligations), interest may be imposed. The interest is imposed at a daily rate of 0.0219% (c. 8% annually). The interest accrues from the date the tax was due.

Penalties may be imposed at a rate ranging from 3% to 100% of underpaid taxes, depending on the category of default (careless behavior without significant consequences, careless behavior with significant consequences, or deliberate behavior), the taxpayer's level of cooperation on audit, and whether the taxpayer makes a prompted or unprompted qualifying disclosure. The determination of the amount of such penalties is in accordance with the Revenue Audit Code of Practice, which outlines the various categories and factors that will determine the amount of any penalty.

6. Please describe any challenges taxpayers face in preparing their transfer pricing documentation in light of these changes in the audit process.

The Irish rules on transfer pricing documentation, together with Irish Revenue's approach to compliance interventions, are not in themselves generally viewed as the source of the challenges for taxpayers. Instead, developments, such as the adoption of the OECD's MF/LF approach to transfer pricing documentation and the incorporation of the 2017 TPG, with their emphasis on DEMPE and functionality, into Irish domestic law are expected to pose the greatest challenges for taxpayers in the near future in preparing documentation. For example, it is likely that in preparing transfer pricing documentation, MNE groups operating from Ireland will need to complete more interviews/questionnaires in order to build a more robust functional analysis.

Further, some of the principal challenges faced by taxpayers in the Irish Revenue compliance interventions include obtaining and providing a large volume of information to support the transfer pricing policies adopted, including agreements, board minutes, financial statements etc., creating concerns regarding confidentiality of the taxpayer's information, exchange of information concerns, and more general concerns in relation to a taxpayer's control over their commercial documentation.

More generally, in the context of preparing Master and Local Files, there appears, based on Chapter V of the 2017 TPG, to be a degree of flexibility for taxpayers in how to provide and structure the necessary information. When devising approaches to preparing transfer pricing documentation, MNE groups could consider different approaches, depending on the salient facts and overall strategy. For example, for certain businesses a modular approach may be considered appropriate, where the Master File's content is split between a main Master File and separate business line Master Files, with only the relevant business line information included (versus having all the different business lines' information) in one Master File. Under this approach, only the relevant modules of the Master File would be used as part of each local subsidiary's transfer pricing documentation suite, jointly with a local file that is tailored to the local operations. However, when taking this approach the OECD has clarified that the entire Master File covering all business lines should be available to each country's tax authorities. Alternatively, a taxpayer may choose to summarise the business information in the Master File, thus limiting the information included in this document, while providing more detailed information in the Local Files to meet the local documentation requirements. The author expects consistency will become a critical area of focus in this regard. The written words in the Master and Local Files should provide the background to the data in the taxpayer's CbC report(s) and should be consistent with other relevant documents, such as local tax/information returns. This should be carefully considered throughout the planning process relating to transfer pricing documentation, as any changes in future documentation are likely to be scrutinised by local tax authorities.

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