The Transfer Pricing Law Review

Third Edition

Editors
Steve Edge and Dominic Robertson

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THIRD EDITION

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PREFACE

It has been a great pleasure to edit this third edition of *The Transfer Pricing Law Review*. This publication aims to give readers a high-level overview of the principal transfer pricing rules in each country covered in the *Review*. Each chapter summarises the country's substantive transfer pricing rules, explains how a transfer pricing dispute is handled, from initial scrutiny through to litigation or settlement, and discusses the interaction between transfer pricing and other parts of the tax code (such as withholding taxes, customs duties, and attempts to prevent double taxation).

Other than Brazil, which adopts a mechanical approach, all the countries covered in this *Review* apply an arm's-length standard and adhere, at least to some extent, to the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (the OECD Guidelines). However, as the chapters make clear, there remains significant divergence, both in countries' application of the arm's-length standard (e.g., the transactions it applies to, the pricing methods preferred and whether secondary adjustments are imposed) and in the documentation requirements imposed. Transfer pricing practitioners, therefore, cannot simply assume that the OECD Guidelines contain all the answers but must in fact engage with their detailed application within each country.

However, as (almost) all large economies apply an arm's-length standard in transfer pricing, case law from other countries can often shed light on how the OECD Guidelines should be applied – for instance, the Canadian decision in *Cameco*, on the Canada Revenue Agency's power to recharacterise transactions on arm's-length grounds, will be valuable reading for anyone involved in a similar debate with their own tax authorities.

As we have said in earlier editions of the *Review*, transfer pricing rules will continue to be high on the corporate tax agenda for many years to come, and they are continuing to evolve at a rapid pace. Over the next year or so, we expect the following to be the three areas of principal focus.

First, more countries than has hitherto been the case have adopted the recommendations on transfer pricing from Actions 8–10 of the Base Erosion and Profit Shifting Action Plan (which attribute more value to significant people functions rather than capital or contractual risk allocation) . This is likely to lead to more disputes in the short to medium term, especially where functions are split across different countries and allocating returns between them can be a difficult and contentious exercise.

Second, the European Commission is continuing to use its state-aid powers to drive the transfer pricing agenda. Many of the high-profile transfer pricing state-aid cases (*Apple*, *Amazon*, etc.) will shortly reach the EU's General Court. Recently, in the opening decision in *Huhtamaki*, the Commission criticised a Luxembourg regime that provided for transfer pricing adjustments that reduced Luxembourg companies' taxable profits, arguing that this should only be done where necessary to avoid actual double taxation. In contrast, it could be argued that the Luxembourg regime is consistent with the principle that a country should tax the value that, at arm's length, is actually generated there.

Third, digital taxation continues to dominate the transfer pricing debate, with several countries announcing digital services taxes, or other regimes, such as the UK tax on offshore receipts in respect of intangible property, which operate independently of arm's-length transfer pricing rules. More broadly, the OECD's current consultation on taxing the digital economy proposes several measures that expressly depart from the arm's-length standard – for example, by deeming that all or part of the reward from marketing intangibles arises in the customer's jurisdiction, even if none of the functions controlling that intangible are located there.

Finally, we would like to thank the authors of all of the country chapters for their comprehensive and illuminating analysis of each country's transfer pricing rules; and the publishing team at Law Business Research for their diligence and enthusiasm in commissioning, coordinating and compiling this *Review*.

Steve Edge and Dominic Robertson
Slaughter and May
London
June 2019

Chapter 11

IRELAND

Joe Duffy and Catherine O'Meara[1]

I OVERVIEW

Formal transfer pricing legislation was introduced in Ireland for the first time through the Finance Act 2010 for accounting periods commencing on or after 1 January 2011 in respect of transactions, the terms of which were agreed on or after 1 July 2010. Ireland's transfer pricing legislation is set out in Part 35A of the Taxes Consolidation Act 1997 (TCA).[2] The Irish transfer pricing legislation is currently under review as part of a modernisation project and it is expected that new legislation will be introduced in late 2019, to take effect from 1 January 2020.

Before the introduction of transfer pricing legislation in 2010, there were limited circumstances in which an 'arm's-length' or 'market-value' rule applied in Irish tax legislation. However, there was certainly some familiarity with the concept. For example, capital gains tax rules always required the imposition of market value on certain transactions undertaken otherwise by means of a bargain and arm's length;[3] interest in excess of a 'reasonable commercial return' may be reclassified as a distribution;[4] and, historically, income or losses qualifying for the (no longer applicable) 10 per cent corporation tax rate for manufacturing operations were calculated as they would for 'independent parties dealing at arm's length'.[5]

The transfer pricing legislation introduced in 2010 certainly broadened the scope of application of transfer pricing in Irish tax legislation. As might be expected, where the transfer pricing rules apply, an arm's-length amount should be substituted for the actual consideration in computing taxable profits. The arm's-length amount is the consideration that independent parties would have agreed in relation to the arrangement in question.[6] The transfer pricing legislation applies equally to domestic and international arrangements but does not apply to small and medium-sized enterprises.[7]

Irish tax legislation requires that the profits or gains of a trade carried on by a company must be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law.[8] Therefore, Irish transfer pricing legislation may result in an adjustment to the accounting profits for tax purposes. Where a transaction is

1 Joe Duffy and Catherine O'Meara are partners at Matheson.
2 Taxes Consolidation Act 1997 (as amended up to Finance Act 2017).
3 Section 547 TCA.
4 Section 130 TCA.
5 Section 453 TCA. Deleted by Finance Act 2012 Section 54.
6 Section 835C TCA.
7 Section 835E TCA.
8 Section 76A TCA.

undertaken at undervalue this may be a deemed distribution by the company for Company Law purposes, and if the company does not have distributable reserves this may be an unlawful distribution by the company.

However, there are a number of unusual aspects to the Irish transfer pricing rules that are worth noting and that are currently being considered as part of a Department of Finance public consultation process on the modernisation of Ireland's transfer pricing rules, launched on 18 February 2019.

First, the transfer pricing legislation applies to any 'arrangement' involving the supply and acquisition of goods, services, money or intangible assets. For these purposes, arrangement is very broadly defined and it captures any kind of agreement or arrangement whether it is, or is intended to be, legally enforceable. However, the transfer pricing legislation does not apply to any arrangement that was agreed before 1 July 2010.[9] This grandfathering of existing arrangements is not limited by time and as long as the terms do not change then an arrangement in place before 1 July 2010 may be excluded from the Irish transfer pricing legislation, potentially indefinitely. Practically, the expectation of the Irish Revenue Commissioners (Irish Revenue) is that this grandfathering of transactions predating 1 July 2010 will be lost through the passage of time, where actual trading relationships change, even though contractual terms may not. As part of the transfer pricing legislative reform, it is expected that arrangements predating 1 July 2010 would cease to be grandfathered.

Second, the transfer pricing legislation applies where the supplier and acquirer in question are 'associated'. Two persons are associated if one person participates in the management, control or capital of the other, or the same person participates in the management, control or capital of each of the two persons. However, the first person is participating in the management, control or capital of the other person only if that other person is a company controlled by the first person. The transfer pricing rules will, therefore, necessarily involve at least one corporate entity.[10] However, the transfer pricing rules do not apply in a single corporate entity. Therefore the transfer pricing rules do not apply in determining the pricing between the head office of a company and a branch of that company. Transfer pricing legislative reform is likely to see the application of the authorised Organisation for Economic Co-operation and Development (OECD) approach to branch profit attribution.

Third, the transfer pricing legislation will only apply to profits or losses arising from the relevant activities that are taxed as the profits of a trade or profession.[11] This is an unusual aspect of the Irish transfer pricing rules that is worth considering in the context of the Irish corporation tax rates. In Ireland, corporate trading profits are taxable at 12.5 per cent while other non-trading or passive income (e.g., interest income) is typically taxed at 25 per cent. Rather unhelpfully, trading is defined in Irish legislation as including 'every trade, manufacture, adventure or concern in the nature of a trade'. While there is extensive case law on the meaning of trading, the case law is typically very old and originates from a time when trading profits were taxable and non-trading profits were not taxable (in the absence of a capital gains tax). Typically, a trade in Ireland involves regular activity conducted in Ireland by persons engaged in the revenue generating part of that business. Very often, it is clear whether a particular activity constitutes a trade; however, it is not always clear in the context of intra-group loans or an intra-group licence arrangement, which can have

9 Section 42 Finance Act 2010.

10 Section 835B TCA.

11 Section 835C TCA.

trading and non-trading characteristics depending on the facts. This means it is possible for an Irish company to make an interest-free loan or grant a royalty-free licence where the level of activity does not rise to the level of a trade. The Irish transfer pricing rules will not apply to the non-trading arrangement and the Irish company is not obliged to charge interest on the loan or charge a royalty on the licence. However, where the company is making a number of loans or granting a number of licences, this may increase the likelihood that the company is actually trading and that the transfer pricing rules will apply requiring the imposition of an interest charge or royalty. Other noteworthy consequences of the rule, whereby transfer pricing legislation only applies to trading transactions, include the fact that capital transactions are not covered by the transfer pricing legislation (though the market value rule mentioned above may apply) and non-trading shareholder transactions are not captured either. The transfer pricing rules are likely to apply in some way to non-trading transactions as from 1 January 2020. There is some concern over a potential mismatch in the application of transfer pricing rules to wholly domestic Irish transactions. For example, non-trading interest income could be taxable at 25 per cent in one group company while deductible at 12.5 per cent in the other group trading company.

Fourth, the Irish transfer pricing legislation can only operate to increase the Irish taxable profit.[12] Therefore the rules can only increase understated income or reduce overstated expenses.

Fifth, the Irish transfer pricing legislation should be construed to ensure, as far as practicable, consistency with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. However, the relevant OECD Transfer Pricing Guidelines referenced in the Irish transfer pricing legislation are the guidelines approved by the Council of the OECD on 13 July 1995, as modified by the updates of 16 July 2009 and the revision of 22 July 2010 (namely the 2010 Transfer Pricing Guidelines).[13] The 2017 OECD Transfer Pricing Guidelines have not yet been incorporated into Irish law but are likely to apply as from 1 January 2020. This is more relevant in respect of dealings between Irish companies and persons resident in non-double-tax treaty partner jurisdictions. The 2017 OECD Transfer Pricing Guidelines are considered to already apply to the interpretation of the arm's-length principle for the purposes of Ireland's double-tax treaties.

These unusual aspects of the Irish transfer pricing rules have raised questions as to whether the rules are still fit for purpose. As a result, the transfer pricing rules are under review and changes to the transfer pricing rules can be expected over the coming years. Possible future changes to the transfer pricing rules are considered in Section X.

II FILING REQUIREMENTS

There is very little legislation detailing the documentation requirements for transfer pricing purposes. Quite simply, the legislation requires the taxpayer to have available, on a timely basis, such records as may reasonably be required for the purposes of determining whether the trading income has been computed in accordance with the requirements of the transfer pricing legislation.[14] The transfer pricing legislative reform process is considering enhanced

12 Section 835C TCA.
13 Section 835D TCA.
14 Section 835F TCA.

documentation requirements as outlined in Annexes I and II of Chapter V of the 2017 OECD Transfer Pricing Guidelines to ensure implementation of the best practice recommendation in BEPS Action 13.

Irish Revenue has issued guidance on the expectations regarding transfer pricing documentation.[15] The guidance issued by Irish Revenue notes that there is no requirement for documentation to be kept in a standard form. The legislation does not require that the taxpayer itself must prepare the documentation or that the documentation must be in Ireland. Furthermore, if appropriate documentation has been prepared by an associated company for tax purposes in another country, it should be sufficient that the documentation can be made available if required. Although not binding, Irish Revenue accepts the EU Council code of conduct entitled 'EU Transfer Pricing Documentation' and Chapter V of the OECD Transfer Pricing Guidelines as representing good practice.

The actual documentation required will depend on the facts and circumstances and the documentation maintained should be commensurate with the risk involved whereby complex and high value transactions would generally require more detailed documentation than simple high volume transactions.

The guidelines issued on documentation (without being prescriptive) suggest that the relevant documentation maintained should clearly identify:

a the associated persons for the purposes of the legislation;
b the nature and terms of transactions within the scope of the legislation;
c the method, functional analysis and comparables used;
d how this has resulted in arm's-length pricing;
e relevant budgets or forecasts relied upon; and
f the terms of the relevant transactions.

It is best practice that the documentation is prepared or available at the time the terms of the transaction are agreed. There is no obligatory time frame for review and updating of transfer pricing documentation; however, it should be reviewed at regular intervals to determine whether the pricing remains at arm's length.

Ireland has introduced legislation to implement country-by-country reporting requirements.[16] The Irish country-by-country reporting closely mirrors the OECD model legislation and relies on it for certain definitions. It should be noted that there are some differences between the OECD model legislation and the Irish country-by-country reporting legislation. Primarily in relation to options to appoint a surrogate parent entity or EU designated entity to provide the country-by-country report on behalf of the multinational group. Where there is a conflict, the Irish legislation takes precedence. Currently, there is no Irish legislation in respect of public country-by-country reporting, though this is an area of interest to the European Commission and ultimately may be introduced as an EU directive.

15 Transfer Pricing Documentation Obligations Part 35a-01-02, August 2017.
16 Section 891H TCA and Taxes (Country-by-Country Reporting) Regulations 2016.

III PRESENTING THE CASE

i Pricing methods

As mentioned above, the Irish transfer pricing legislation states that in computing the taxable profits and losses of a taxpayer, the legislation shall be interpreted to 'ensure, as far as practicable, consistency' with the OECD Transfer Pricing Guidelines. The Irish transfer pricing rules do not prescribe any preferred transfer pricing methodology or methodologies. Provided the methodology is appropriate in the circumstances and adheres to general OECD principles, it should be acceptable. Therefore the identification of the most appropriate transfer pricing method, either traditional transaction methods (CUP, resale price and cost-plus) or a transactional profit method (transactional net margin and transactional profit split), and the application of that method should be in accordance with the OECD Transfer Pricing Guidelines.

Irish Revenue has published guidance on a simplified approach in respect of low-value intra-group services.[17] In summary, where a cost-based method is determined to be the most appropriate transfer pricing method for determining an arm's-length price for low value intra-group services, Irish Revenue is prepared to accept a markup of 5 per cent of the relevant cost base without the a requirement for a benchmarking study. The guidance also sets out the documentation requirements for the taxpayer to avail of this simplified approach for low value intra-group services.

Low value intra-group services are services performed by entities within a multinational group for other entities within the same group and are typically administrative, routine and supportive services that are ancillary to the main business and do not involve valuable intangibles or risk for the service provider. Irish Revenue is prepared to accept a markup of 5 per cent of the cost base without a requirement for a benchmarking study to be carried out by the taxpayer to support this rate.

However, supporting documentation is required and must include the following information:

a a description of the services provided or received;
b the identity of the recipient or provider of the service;
c an explanation of why the services are considered to be low-value services;
d the rationale for the provision or receipt of the services;
e a description of the benefits of each category of services;
f an explanation and justification of the allocation key chosen;
g confirmation of the markup applied;
h written contracts, and any amendments to the same, for the provision of services;
i calculations of the final fee charged showing the calculation of the cost base, the application of the allocation key to that cost base and the application of the markup to the apportioned cost base;
j confirmation that shareholder costs and duplicate costs have been excluded from the cost base; and
k confirmation that no markup has been applied to pass-through costs.

Irish Revenue accepts that the EU guidelines on low-value added intra-group services represent good practice.

17 Guidelines on Low Value Intra-Group Services, Part 35A-01-03, March 2018.

ii Authority scrutiny and evidence gathering

On transfer pricing matters, Irish Revenue does not typically engage in dawn raids. The taxpayer will be provided with reasonable notice of an upcoming visit or intention to initiate an audit. This is typically followed by a series of written request for further information or explanations. This may be supplemented by requests for meetings with representatives of the taxpayer and interviews with relevant persons employed by the taxpayer.

While Irish Revenue will seek to understand the taxpayer's business and obtain an overview of its global business, in the normal course of events the primary focus is typically on the direct intra-group relationships to which the Irish resident taxpayer is a party. Irish Revenue does not typically consider arrangements to which the Irish taxpayer is not a party or seek to allocate profit share per jurisdiction throughout a multinational group.

Irish Revenue may also serve notice on a financial institution and other third parties to make books, records or other documents available for inspection, if they contain information relating to a tax liability of a taxpayer, even if the taxpayer is not known to the officer but is identifiable by other means. The officer authorised must have reasonable grounds to believe that the financial institution or other third party is likely to have information relating to this liability.

Irish Revenue is a strong advocate for international cooperation on tax matters. Ireland has entered into a more than 70 double-taxation treaties and numerous tax information exchange agreements under which Irish Revenue cooperates with foreign authorities in the exchange of tax information. Irish Revenue has information exchange obligations arising from Ireland's membership of the European Union and the OECD, both of which involve automatic exchange of information relating to cross-border tax rulings and advance pricing agreements.

IV INTANGIBLE ASSETS

There are no particular rules in Ireland addressing transfer pricing in respect of intangible assets, although the amortisation available on the acquisition of intangible assets is limited to the amount 'which would have been paid or payable for the asset in a transaction between independent persons acting at arm's length'.[18] There is no further guidance on the meaning of arm's length in this context. However, Ireland has strongly endorsed the outcomes of the BEPS project, including the report on Actions 8–10.

The 2017 OECD Transfer Pricing Guidelines have not yet been incorporated into Irish law. Therefore in non-double-tax treaty transfer pricing cases the development, enhancement, maintenance, protection and exploitation of intangibles (DEMPE) principles, to the extent they are not reflected in the 2010 OECD Transfer Pricing Guidelines, should not have direct application. This is particularly relevant from an Irish perspective in the context of royalty payments from Irish resident companies to IP holding companies resident in a non-double-tax treaty jurisdiction. However, the DEMPE principles are relevant in double-tax treaty cases.

18 Section 291A TCA.

V SETTLEMENTS

There is no publicly available information on transfer pricing settlements concluded with Irish Revenue. However, in practice it is clear that Irish Revenue places great importance on reaching settlements that can be supported by appropriate evidence and are based on OECD principles. Under Irish Revenue's internal quality assurance programme, a selection of audits and ultimately settlements are monitored to ensure quality.

A taxpayer may make a voluntary disclosure of an underpayment of tax before an audit has commenced to benefit from reduced penalties. Once an audit has commenced, and through the appeals process, the opportunity to settle remains open, though the level of penalty mitigation may be reduced.

Once a settlement is agreed, the outstanding tax plus interest and penalties is paid and the audit is closed. In certain circumstances, where significant penalties are imposed as part of the settlement, Irish Revenue is obliged to publish the name and address of the taxpayer along with the default amount and applicable tax head.[19]

As Irish Revenue will endeavour to conclude a transfer pricing settlement based on OECD principles, they will generally accept a similar methodology going forward as long as the facts and circumstances have not changed. While a settlement discussion may be broadened and extended into a bilateral advance pricing agreement Irish Revenue will no longer agree to a unilateral advance pricing agreement in any circumstances.

VI INVESTIGATIONS

Irish Revenue maintains scrutiny on the transfer pricing matters within the framework of the existing tax compliance infrastructure with support from a team of economists. Separately Irish Revenue's competent authority team manage international transfer pricing disputes and bilateral or multilateral advance pricing agreements. Irish Revenue has published guidance on its approach to transfer pricing investigations.[20]

Upon the introduction of the transfer pricing legislation in 2010, it was recognised that there was not a significant level of experience or understanding of the transfer pricing policies of multinationals operating in Ireland. Therefore within the context of monitoring transfer pricing compliance, in November 2012 Irish Revenue initiated a system of transfer pricing compliance reviews.[21] This comprised a non-audit intervention whereby the tax inspector would make a request for information on the transfer pricing policy within a multinational group. The information requested would include:

a the group structure;
b details of transactions by type and associated companies involved;
c pricing and transfer pricing methodology for each type of transaction;
d the functions, assets and risks of parties;
e a list of documentation available or reviewed; and
f the basis for establishing how the arm's-length standard is satisfied.

19 Section 1086 TCA.
20 Monitoring Compliance with Transfer Pricing Rules, Part 35A-01-01, June 2018.
21 See Revenue Operational Manual 35A-01-01.

This initial non-audit intervention could lead to a more traditional audit. Over time, as experience has grown, transfer pricing audits are more common and are handled in a similar manner to audits under other tax heads. Irish Revenue has noted that the deployment of its resources will take into account risk factors and, therefore, it is unlikely that transactions between persons that involve no overall loss of revenue will be targeted.

An authorised officer can require a taxpayer to deliver, or to make available for inspection, books, records and other documents (including transfer pricing documents) or to furnish information relevant to the taxpayer's tax liability under the legislation. An authorised officer can also apply to the High Court for an order directing the person concerned to comply with the officer's requirements in respect of books, records and other information.[22]

The statute of limitations for raising an assessment is four years from the end of the accounting period in which the relevant tax return is delivered.[23] This typically means the accounting period remains open for audit for five years from the end of the accounting period in question.

Once an assessment is raised the taxpayer has 30 days to lodge an appeal to the assessment in writing. The case then moves forward to the Tax Appeals Commissioners for determination. Further appeal on points of law may be made to the High Court, Court of Appeal and ultimately the Supreme Court through the regular court system. It is worth noting that settlement negotiations can continue during the period following the issuing of an assessment and lodging an appeal.

VII LITIGATION

i Procedure

To make an appeal to an assessment the taxpayer must submit a formal notice of appeal to the Tax Appeals Commission, along with a copy of the notice of assessment or the letter of notification containing the decision to be appealed. The notice of assessment or the letter or notification will state the time limit for making an appeal but it is generally 30 days from the date on the notice of assessment or the letter or notification.

For the Tax Appeal Commissioner to accept the appeal, the taxpayer must have submitted a tax return and paid the amount of tax declared on the return. It is not necessary to pay the tax assessed by Irish Revenue in the notice of assessment. If this condition is not satisfied, Irish Revenue may object to the leave to appeal and will notify the taxpayer of the objection. While Irish Revenue can object to the acceptance of the appeal, it is a matter for the Tax Appeals Commission to accept or refuse to accept the appeal.

Most appeals end up being settled by an agreement between taxpayers and Irish Revenue rather than being decided by the Tax Appeals Commission. The appeal to the Tax Appeals Commission will remain open for the duration of any discussions with Irish Revenue. However, the Tax Appeals Commission may decide to proceed with the appeal if it thinks that it is unlikely to be settled by agreement or it is unlikely to be settled within a reasonable period.

Most appeals that end up with the Tax Appeals Commission are decided following an oral hearing before an Appeal Commissioner. A hearing involves the Appeal Commissioner

22 Part 38 TCA.

23 Part 41A TCA.

listening to arguments and evidence presented by the taxpayer and an Irish Revenue official. Both parties may be represented by a tax adviser or lawyer. Before an oral hearing takes place, the Tax Appeals Commission may ask the taxpayer or Irish Revenue to provide additional information about the matter being appealed. The Tax Appeals Commission can decide not to have an oral hearing but, instead, to make a decision based on written material provided by the taxpayer and Irish Revenue. This is more likely to happen where the matter being appealed is straightforward.

Whether your appeal is decided with or without an oral hearing, the taxpayer is given a detailed written decision that explains why the Appeal Commissioner made the decision. All decisions are published on the Commission's website[24] but do not identify the particular taxpayer involved. To date, there have been no transfer pricing decisions published.

Either party may appeal a decision of the Appeal Commissioners to the High Court on a point of law but this is not a complete re-hearing of the appeal. Therefore, the ability to appeal will depend on the decision made by the Appeal Commissioner and the reasons given for making that decision.

ii Recent cases

There has been no case law or Tax Appeals Commissioners decision on Ireland's transfer pricing legislation, although there are cases awaiting hearing. In a case that pre-dated the transfer pricing legislation, *Belville Holdings v. Cronin*,[25] the High Court considered whether a parent company was obliged to charge for services provided to subsidiaries in circumstances where it was otherwise incurring losses as a result of expenses incurred. The High Court held that the parent company should be obliged to charge expenses incurred managing its subsidiaries but only to bring the transaction within the realm of being a bona fide transaction in the ordinary course of business.

VIII SECONDARY ADJUSTMENT AND PENALTIES

Irish Revenue is not entitled to impose secondary adjustments under transfer pricing legislation where those adjustments do not relate to an understatement of trading profits.

The transfer pricing legislation does not contain any specific penalties. Therefore, normal taxation and penalty provisions will apply. Therefore both fixed and tax-geared penalties may apply. The applicable tax-geared penalty can be as much as 100 per cent of the underpaid tax. Irish Revenue is prepared to mitigate penalties to an amount as low as 3 per cent of the underpaid tax. The applicable percentage will depend on whether there has been a qualifying disclosure, it is a first offence, it is careless behaviour or deliberate behaviour and whether consequences are significant.[26]

Where the taxpayer does not agree on the liability to a penalty then it is a matter for the court to determine whether that person is liable to a penalty.

24 www.taxappeals.ie.
25 III ITR 340.
26 See Code of Practice for Revenue Audit and other Compliance Interventions, February 2017.

IX BROADER TAXATION ISSUES

i Diverted profits tax and other supplementary measures

Ireland has not introduced a diverted profits tax or other measures to supplement transfer pricing rules.

ii Double taxation

To avoid double taxation on transfer pricing matters, taxpayers may request mutual agreement procedure assistance under the terms of the relevant double-tax treaty or the EU Arbitration Convention.

The legal basis for a mutual agreement procedure request falls under the equivalent of Article 25 of the OECD's Model Tax Convention on Income and on Capital in the relevant double-tax treaty. In international transfer pricing matters it is typically advisable for each affected taxpayer to make a separate request for mutual agreement procedure assistance to the competent authority of the country in which it is resident. Under the multilateral instrument agreed as part of the BEPS process Ireland has opted to allow a taxpayer approach the competent authority of either jurisdiction. The mutual agreement procedure request must be submitted in writing within the time limit applicable in the relevant double-tax treaty (which is typically three years, but may vary by treaty) or the EU Arbitration Convention (which is three years from the first notification of the action that results or is likely to result in double taxation). The time period typically begins from the date of the first tax assessment notice or equivalent.

The minimum information to be provided as part of a mutual agreement procedure request under a double-tax treaty includes details of the relevant tax periods, the nature of the action and the names and addresses of the relevant parties. For a valid request under the EU Arbitration Convention, the request should also include details of the relevant facts, copies of assessments, details of litigation commenced and an explanation of why the principles of the EU Arbitration Convention have not been observed.[27]

Double taxation can also be avoided by means of settling an advance pricing agreement. Importantly Irish Revenue is prepared to conclude a multilateral or bilateral advance pricing agreement with double-tax treaty partner jurisdictions. Irish Revenue will not conclude unilateral pricing agreements. Irish Revenue has issued detailed guidelines on the processes for advance pricing agreements.

A request for a mutual agreement procedure can be distinguished from a request for a correlative adjustment where a foreign associated taxpayer has settled a case unilaterally with its foreign tax administration with regard to a transaction with its Irish associated taxpayer, and the associated Irish taxpayer subsequently makes a claim to Irish Revenue for a correlative adjustment. Irish Revenue will consider the appropriateness of such claims and will only allow a correlative adjustment to the profits of the Irish taxpayer to the extent that it considers the adjustment to be at arm's length.

Double taxation may be unavoidable in a situation where a non-negotiable tax settlement has been agreed in one jurisdiction and Irish Revenue does not consider the settlement reached to reflect an arm's-length position.

27 See Tax and Duty Manual Part 35-02-08.

iii Consequential impact for other taxes

Where a transfer pricing adjustment is simply booked as an adjustment to taxable profits and there is no adjustment to the actual price charged and invoiced as between the associated entities then there should be no VAT impact. Where the adjustment is charged and invoiced then VAT returns should be amended as appropriate. The VAT recovery consequences will then depend on the VAT profile of the entity in question.

For customs purposes the price paid or payable is taken as the transaction value for customs purposes. So a transfer pricing adjustment that results in a change in the price paid may be relevant to any market valuation used as part of customs reporting. In light of the recent decision of the European Court of Justice in *Hamamatsu Photonics Deutschland*,[28] the impact of pricing adjustments on the customs valuation declared on the importation of the goods is unclear. Irish Revenue has not published guidance or otherwise commented on the decision to date.

X OUTLOOK AND CONCLUSIONS

The Irish transfer pricing rules were only introduced in 2010, but following the BEPS process, some aspects are already looking outdated. On 2 September 2016, the government decided to arrange for a review of Ireland's corporation tax code by an independent expert to be appointed by the Minister for Finance. In September 2017, following extensive consultation, the relevant report was published.[29] In February 2019, the Irish Department of Finance commenced a public consultation to consider the recommendations in the independent expert report.

The public consultation is seeking comments on the following recommendations:

a Ireland should provide for the application of the OECD 2017 Transfer Pricing Guidelines incorporating BEPS Actions 8, 9 and 10 in Irish legislation;

b Irish domestic transfer pricing legislation should be applied to arrangements, the terms of which were agreed before 1 July 2010;

c consideration should be given to extending transfer pricing rules to small and medium-sized enterprises, having due regard to the administrative burden and risks;

d consideration should be given to extending domestic transfer pricing rules to non-trading income and capital transactions; and

e there should be a specific obligation on Irish taxpayers who are subject to domestic transfer pricing legislation to have available the transfer pricing documentation outlined in Annex I and II of Chapter V of the OECD 2017 Transfer Pricing Guidelines to ensure implementation of BEPS Action 13.

While the independent expert report suggested that changes should take place no later than the end of 2020, it seems likely that changes will be introduced with effect from 1 January 2020.

Irish Revenue has recognised transfer pricing as an important tool for raising tax revenues and defending the existing Irish tax base. The number of domestic and international transfer pricing disputes is increasing. In the meantime, the Irish transfer pricing rules are ready for modernisation and we will see changes later this year. It remains to be seen whether the changes to the rules will help alleviate the potential for disputes in this area.

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28 C-529/16.

29 Review of Ireland's Corporation Tax Code presented to the Minister for Finance and Public Expenditure and Reform by Seamus Coffey, September 2017.

Appendix 1

ABOUT THE AUTHORS

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Joe Duffy is a partner in the tax group at Matheson. Joe has 20 years' experience in corporate tax law and advises on international restructurings, mergers and acquisitions, tax controversy, and transfer pricing. Joe's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical and technology sectors.

Joe speaks regularly on international tax matters in Ireland and abroad. He has also written extensively on international tax matters. Joe has been an active participant in the American Chamber of Commerce in Ireland tax working group for many years.

Joe is a qualified solicitor, chartered accountant and tax adviser in Ireland, and has qualified as an attorney in New York. Joe previously worked in a Big Four accountancy practice and as in-house tax counsel for a US multinational.

CATHERINE O'MEARA

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Catherine O'Meara is a partner in the tax department at Matheson. Catherine has over 10 years' experience advising multinational corporations doing business in Ireland on Irish corporate tax.

Catherine has a particular interest in transfer pricing, competent authority matters and business restructurings, and also has extensive experience in structuring inward investment projects, mergers and acquisitions and corporate reorganisations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT and consumer brand sectors.

Catherine speaks regularly on international tax matters and has published articles in leading tax journals. Catherine is currently chair of the International Fiscal Association Ireland (IFA Ireland). Catherine is a Chartered Tax Adviser and a member of the Law Society of Ireland.

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