



An Roinn Airgeadais
Department of Finance

Ireland's Transfer Pricing Rules Feedback Statement

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Contents

1	Introduction	3
2	Transfer Pricing Rules	6
3.	Next Steps	23

1 Introduction

In February of this year a public consultation was launched to gather the views of stakeholders regarding a proposed update of Ireland's transfer pricing rules.

Transfer pricing is the practice used by multinational enterprises to set a price for transactions carried out between different associated business entities. Transfer prices are significant for both taxpayers and tax administrations because they determine in large part the income and expenses, and therefore taxable profits, of associated enterprises, in different jurisdictions.

CURRENT DOMESTIC TRANSFER PRICING LEGISLATION

Ireland's current transfer pricing rules are provided for in Part 35A of the Taxes Consolidation Act 1997. Part 35A sets out the requirement that transfer prices must be in accordance with the arm's length principle and directly incorporates the OECD 2010 Transfer Pricing Guidelines into Irish law. The 2010 OECD guidelines have been superseded by the revised 2017 guidelines which must now be legislated for before they can have effect in Irish law.¹

The current Irish legislation is limited in scope in that it does not apply to small and medium enterprises, non-trading transactions, or intra-company transactions all the terms of which were agreed before 1 July 2010.

OECD BEPS PROCESS

The OECD Base Erosion and Profit Shifting (BEPS) process sought to address weaknesses in the international tax framework which provided opportunities for base erosion and profit shifting. An action plan on BEPS was endorsed in 2013 and 13 reports were published as part of the BEPS package in October 2015.²

BEPS Actions 8 – 10 sought to ensure that transfer pricing outcomes are in line with the concept of 'Value Creation' and Action 13 provides guidance for tax administrations in developing rules and/or procedures on documentation to be prepared by taxpayers to demonstrate that their transaction satisfies the arm's length principle.

¹ Other than for the purposes of Ireland's double taxation treaties, for which the 2017 guidelines are already effective.

² <http://www.oecd.org/ctp/beps/>

The outcomes of these BEPS Actions have been directly incorporated in the 2017 OECD Transfer Pricing Guidelines. Primary legislation is required before these new OECD Guidelines are applicable in Irish law.³

The Coffey review recommended that Irish transfer pricing legislation should be updated to incorporate the 2017 OECD Transfer Pricing Guidelines and that consideration should also be given to:

- Applying transfer pricing rules to arrangements the terms of which were agreed prior to 1 July 2010 and which are currently outside the scope of transfer pricing legislation.
- Applying transfer pricing rules to small and medium enterprises (SMEs).
- Extending transfer pricing rules to non-trading income and capital transactions.
- Obliging taxpayers to have available the transfer pricing documentation outlined in Annex I and II of Chapter V of the 2017 OECD Transfer Pricing Guidelines.

Ireland's Corporation Tax Roadmap was published in September 2018⁴ and indicated the Minister's intention to update Ireland's transfer pricing rules in 2019.

The Roadmap also indicated an intention to have a public consultation in early 2019 to allow for the necessary changes to the tax code to be introduced in Finance Bill 2019 and to come into force from the beginning of 2020.

TRANSFER PRICING PUBLIC CONSULTATION

On 18 February 2019 a public consultation was launched. The transfer pricing public consultation⁵ was designed in such a way as to indicate the Minister for Finance's intended direction in respect of certain recommendations contained in the Coffey Review and allow stakeholder input.

15 responses were received providing valuable input into the 7 distinct areas where contributions were sought.

There was broad agreement that the 2017 OECD Transfer Pricing Guidelines should be incorporated into Irish legislation with some suggesting a proportionate approach to documentation requirements depending on company size.

³ other than for the purposes of Ireland's double taxation treaties, for which the 2017 guidelines are already effective.

⁴ <https://assets.gov.ie/4158/101218132506-74b4db520e844588b3d116067cec9784.pdf>

⁵ <https://www.gov.ie/en/consultation/af7206-irelands-transfer-pricing-rules/>

There was almost universal support for the application of transfer pricing rules to pre-July 2010 transactions with some calling for relaxed documentation requirements.

The extension of transfer pricing rules to SMEs was not favoured by respondents with a number suggesting if rules were to be extended it should be done with reduced documentation requirements.

Extending the rules to non-trading and capital transactions brought almost universal calls for caution. There was however broad recognition of the rationale for extending transfer pricing rules to cross-border non-trading transactions. The majority of submissions called for capital transactions to remain outside the scope of transfer pricing rules citing that the existing provisions are sufficient.

2 Transfer Pricing Rules

As indicated in the public consultation document, the updating of Ireland's transfer pricing rules is being considered in a number of areas. This Chapter aims to provide examples of what the legislation achieving the objectives outlined in the public consultation document may look like and reflects on some of the comments made in the responses received.

When enacted, the new provisions could apply for chargeable periods commencing on or after 1 January 2020.

2.1 Basic rules on transfer pricing

To fully incorporate the 2017 OECD Transfer Pricing Guidelines and the additional changes under consideration into Irish legislation, it is likely that the existing legislation governing the basic rules on transfer pricing would need to be updated and expanded.

A potential approach to updating section 835C, which sets out the basic rules on transfer pricing, could be as follows:

835C Basic rules on transfer pricing

- (1) Subject to this Part, this section applies to any arrangement—
 - (a) involving the supply and acquisition of goods, services, money, assets (including intangible assets) or anything else of commercial value,
 - (b) where, at the time of the supply and acquisition, the person making the supply (in this Part referred to as the 'supplier') and the person making the acquisition (in this Part referred to as the 'acquirer') are associated, and
 - (c) the profits or gains or losses arising from the relevant activities are within the charge to tax in the case of either the supplier or the acquirer or both.
- (2)
 - (a) If the amount of the consideration payable (in this Part referred to as the 'actual consideration payable') for an acquisition under any arrangement to which this section applies exceeds the arm's length amount, then the profits or gains or losses of the acquirer that are chargeable to tax shall be computed as if the arm's length amount were payable instead of the actual consideration payable.
 - (b) If the amount of the consideration receivable (in this Part referred to as the 'actual consideration receivable') for a supply under any arrangement to which this section applies is less than the arm's

length amount, then the profits or gains or losses of the supplier that are chargeable to tax shall be computed as if the arm's length amount were receivable instead of the actual consideration receivable.

- (3) In this section the 'arm's length amount' of consideration for a supply and acquisition under an arrangement refers to the amount of consideration that independent parties dealing at arm's length would have agreed in relation to the supply and acquisition and subsections (4) and (5) shall apply for the purposes of determining the amount of that consideration.
- (4) The arm's length amount of consideration for a supply and acquisition under an arrangement shall be determined by—
 - (a) identifying the actual commercial or financial arrangement between the supplier and the acquirer (the 'identified arrangement');
 - (b) identifying the conditions (the 'arm's length conditions') that independent parties dealing at arm's length would be expected to agree in relation to the identified arrangement; and
 - (c) applying the most appropriate transfer pricing method contained in the transfer pricing guidelines (as defined in section 835D) to determine the arm's length amount of consideration for the identified arrangement based on the arm's length conditions.
- (5) For the purposes of subsection (4)(a)—
 - (a) the identified arrangement shall be based on the substance of the relations between the supplier and the acquirer where the form of the arrangement is inconsistent with the substance of those relations;
 - (b) if independent parties dealing at arm's length—
 - (i) would not have entered into the identified arrangement;
and
 - (ii) would instead have entered into other commercial or financial relations,

identification of the arm's length conditions for the identified arrangement shall be based on those other commercial or financial relations; and
 - (c) if independent parties dealing at arm's length would not have entered into the commercial or financial relations in the identified arrangement, the identification of the arm's length conditions shall be based on that absence of commercial or financial relations.
- (6) The reference to a supply or acquisition of an asset in subsection (1)(a) shall, in relation to a chargeable asset, include a disposal or acquisition, as the case may be, of the chargeable asset and, without prejudice to the

generality of the foregoing, any reference in section 835I to a disposal of a chargeable asset shall for the purposes of this Part be construed as being a reference to a supply of the asset.

- (7) Where the actual consideration payable under an arrangement exceeds the arm's length amount and any amount of that excess is treated as a distribution under any provision of the Tax Acts then, for the purposes of subsection (2)(a), the profits or gains or losses of the acquirer shall be computed as if, instead of the actual consideration payable, an amount equal to the arm's length amount less the amount treated as a distribution were payable.

2.2 Incorporation of the OECD 2017 Transfer Pricing Guidelines into Irish legislation

The transfer pricing public consultation signalled the Minister's intention to include a direct reference to the 2017 OECD Transfer Pricing Guidelines in Irish legislation. This position was supported by the vast majority of respondents to the public consultation, with some suggesting that consideration be given to the potential timing of the introduction of the legislation.

To incorporate the 2017 OECD Transfer Pricing Guidelines in Irish legislation, section 835D, which provides that the basic rules on transfer pricing are to be construed in accordance with OECD guidelines, could be updated as follows:

835D Principles for construing rules in accordance with OECD Guidelines

- (1) In this section—

'Article 9(1) of the OECD Model Tax Convention' means the provisions which, at the date of the passing of the Finance Act 2019, were contained in Article 9(1) of the Model Tax Convention on Income and Capital published by the OECD;

'OECD' means the Organisation for Economic Cooperation and Development;

'transfer pricing guidelines' means—

- (a) the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations published by the OECD on 10 July 2017;
- (b) the 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;
- (c) the Revised Guidance 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; and

- (d) such additional guidance, published by the OECD on or after the date of the passing of the Finance Act 2019, as may be designated by the Minister for Finance for the purposes of this Part by order made under subsection (3).
- (2) For the purpose of computing profits or gains or losses chargeable to tax, this Part shall be construed to ensure, as far as practicable, consistency between—
- (a) the effect which is to be given to section 835C, and
 - (b) the effect which, in accordance with the transfer pricing guidelines, would be given if double taxation relief arrangements incorporating Article 9(1) of the OECD Model Tax Convention applied to the computation of the profits or gains or losses, regardless of whether such double taxation relief arrangements actually apply,
- but this section shall not apply for the purposes of construing this Part to the extent that such application of the section would be contrary to the provisions of double taxation relief arrangements that apply to the computation of those profits or gains or losses.
- (3) The Minister for Finance may, for the purposes of this Part, by order designate any additional guidance referred to in paragraph (d) of the definition of “transfer pricing guidelines” in subsection (1) as being comprised in the transfer pricing guidelines.
- (4) Every order made by the Minister for Finance under subsection (3) shall be laid before Dáil Éireann as soon as may be after it is made and, if a resolution annulling the order is passed by Dáil Éireann within the next 21 days on which Dáil Éireann has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

2.3 Removal of the exemption for arrangements in place since pre-July 2010

The public consultation indicated a preference to bring arrangements, the terms of which were agreed before 1 July 2010, within the scope of transfer pricing rules for chargeable periods commencing from 1 January 2020. Stakeholders almost universally supported doing so with some suggesting that there should be reduced or simplified documentation requirements for such arrangements.

In order to bring these arrangements within the scope of transfer pricing rules going forward, it would be necessary to include a provision in the Finance Bill amending Finance Act 2010. That provision could be as follows:

- (X) (a) Section 42 of the Finance Act 2010 is amended in subsection (2) by deleting “other than any such arrangement the terms of which are agreed before 1 July 2010”.
- (b) Paragraph (a) applies for chargeable periods beginning on or after 1 January 2020.

2.4 Enhanced Transfer Pricing Documentation Requirements

Following the recommendation in the Coffey review to include specific requirements in Irish transfer pricing legislation for companies to prepare and maintain a Master File and Local File in line with Annex I and II of Chapter V of the 2017 OECD Transfer Pricing Guidelines, the public consultation indicated an intention to introduce enhanced transfer pricing documentation requirements from 1 January 2020. Many of the respondents to the public consultation welcomed this position.

However, in view of the significant additional compliance burden this would place on companies, some respondents suggested that there should be a revenue threshold for the application of the enhanced documentation requirements. It was also suggested by some respondents that transfer pricing documentation requirements should be relaxed in certain cases, including in relation to arrangements the terms of which were agreed before 1 July 2010.

If enhanced documentation requirements, in line with Annex I and II of Chapter V of the 2017 OECD Transfer Pricing Guidelines, are to be included in Irish legislation, section 835F could be updated as follows:

835F Documentation and enquiries

(1) In this section—

‘constituent entity’, ‘fiscal year’ and ‘MNE group’ have the same meanings as in section 891H;

‘local file’ means a report containing the information specified in Annex II to Chapter V of the transfer pricing guidelines;

‘local file revenue threshold’ means €50 million;

‘master file’ means a report containing the information specified in Annex I to Chapter V of the transfer pricing guidelines;

‘master file revenue threshold’ means €250 million; and

‘relevant period’ means, in relation to a relevant person who is a constituent entity of an MNE group, the fiscal year of the MNE group that ends on the last day of the chargeable period of the relevant person and, if a fiscal year of the MNE group does not end on the last day of

the chargeable period of the relevant person, the fiscal year which began on the first day of the chargeable period of the relevant person.

- (2) A relevant person in relation to an arrangement to which section 835C(1) applies shall have available and, upon a request made in writing by a Revenue officer, shall provide such records as may reasonably be required for the purposes of determining whether, in relation to the arrangement, the profits or gains or losses of the person that are chargeable to tax have been computed in accordance with this Part.
- (3) The records referred to in subsection (2) shall include—
 - (a) a master file where the relevant person is a constituent entity of an MNE group and the total revenue of the MNE group in the relevant period is at, or above, the master file revenue threshold;
 - (b) a local file where the relevant person is a constituent entity of an MNE group and the total revenue of the MNE group in the relevant period is at, or above, the local file revenue threshold.
- (4) Subsection (2) shall not apply in the case of an arrangement all the terms of which were agreed before 1 July 2010, and which have not changed on or after that date, where, in relation to the arrangement, the supplier and the acquirer are qualifying relevant persons.
- (5)
 - (a) The records referred to in subsections (2) and (3) shall be prepared no later than the date on which a return for the chargeable period concerned is required to be delivered.
 - (b) Where a Revenue officer makes a request in writing under subsection (2), the relevant person shall provide such records to the Revenue Commissioners within 30 days from the date of the request.
- (6) Subsection (3) of section 886 shall apply to the records referred to in subsections (2) and (3) as it applies to records required by that section.

2.5 Extension of transfer pricing rules to SMEs

The public consultation sought views from stakeholders around the possible extension of transfer pricing rules to SMEs. The majority of stakeholders did not favour extending the rules to SMEs, the primary reason provided for not doing so being the cost and administrative burden of compliance with transfer pricing documentation requirements.

Stakeholders suggested that if SMEs are brought within the scope of the transfer pricing rules, there is a need to be proportionate in relation to the documentation requirements. Some stakeholders also raised the issue of the timing of any such

extension of the rules to SMEs particularly in the context of the uncertainty for Irish SMEs caused by a potential exit of the UK from the European Union.

One possible way to address these concerns is to tailor transfer pricing documentation requirements for SMEs depending on their size, with an exemption from transfer pricing documentation requirements for small enterprises and reduced and simplified transfer pricing documentation requirements for medium enterprises. Reflecting this approach, section 835E could be updated as set out below.

In relation to the timing of the application of transfer pricing rules to SMEs, and to address the issues around uncertainty, legislation extending transfer pricing rules to SMEs could be made subject to a Ministerial Commencement Order.

835E Small or medium-sized enterprise

(1) For the purposes of this section—

‘Annex’ means the annex to the Commission Recommendation;

‘medium enterprise’ means an enterprise which—

- (a) falls within the category of micro, small and medium-sized enterprises as defined in the Annex, and
- (b) is not a small enterprise as defined in the Annex.

(2) For the purposes of subsection (1), the Annex shall have effect as if—

(a) in the case of an enterprise which is in liquidation or administration, the rights of the liquidator or administrator (in that capacity) were left out of account when applying Article 3(3)(b) of the Annex in determining for the purposes of this Part whether—

- (i) that enterprise, or
- (ii) any other enterprise (including that of the liquidator or administrator),

is a small or medium-sized enterprise,

(b) Article 3 of the Annex had effect with the omission of paragraph 5 of that Article,

(c) the first sentence of Article 4(1) of the Annex had effect as if the data to apply to—

- (i) the headcount of staff, and
- (ii) the financial amounts,

were the data relating to the chargeable period of the enterprise concerned (instead of the period described in the said first sentence of Article 4(1) of the Annex) and calculated on an annual basis, and

- (d) Article 4 of the Annex had effect with the omission of the following provisions—
 - (i) the second sentence of paragraph 1 of that Article,
 - (ii) paragraph 2 of that Article, and
 - (iii) paragraph 3 of that Article.
- (3) Section 835F shall not apply to a relevant person in a chargeable period if that person is a small enterprise for that chargeable period.
- (4) Section 835F shall apply to a relevant person who is a medium enterprise in a chargeable period only in respect of a relevant arrangement.
- (5) For the purposes of subsection (4), a relevant arrangement is an arrangement involving a relevant person who is a medium enterprise and—
 - (a) in a case where the profits or gains or losses arising to the medium enterprise from the relevant activities are within the charge to tax under Schedule D—
 - (i) the other party to the arrangement is not a qualifying relevant person, and
 - (ii) the aggregate consideration accruing to, or payable by, the medium enterprise under the arrangement in the chargeable period exceeds €1 million, or
 - (b) in a case where the arrangement involves the supply or acquisition of an asset, which constitutes a disposal or acquisition, as the case may be, of a chargeable asset for the purposes of the Capital Gains Tax Acts or corporation tax on chargeable gains—
 - (i) the other party to the arrangement (referred to in this paragraph as the “other person”) is not resident for the purposes of tax in the State and—
 - (I) where an asset is supplied to the other person under the arrangement, the asset is not, immediately after its acquisition by that other person, a chargeable asset, or
 - (II) where an asset is acquired from the other person under the arrangement, the asset was not, immediately prior to its acquisition by the medium enterprise, a chargeable asset in relation to that other person, and

- (ii) the market value of the asset disposed of or acquired, as the case may be, exceeds €25 million.
- (6) Where section 835F applies to a relevant person who is a medium enterprise, for the purposes of subsection (2) of that section, the medium enterprise shall be required to provide the following information—
- (a) a description of the business of the medium enterprise, including its organisational structure, business strategy and key competitors; and
 - (b) in relation to each relevant arrangement—
 - (i) a copy of all relevant agreements,
 - (ii) a description of the transfer pricing method used and the reasons the method was selected, along with evidence to support the price selected as being the arm's length amount,
 - (iii) the amount of consideration payable or receivable, as the case may be, under the arrangement, and
 - (iv) a description of the functions performed, risk assumed and assets employed.

2.6 Extending transfer pricing rules to Non-Trading Income (other than Capital Transactions)

The public consultation indicated an intention to extend transfer pricing rules to non-trading transactions where this would prevent aggressive tax planning arrangements. The majority of replies to the public consultation recognised this policy intent in the context of the extension of transfer pricing rules to cross border non-trading transactions. Some respondents suggested this extension could potentially be delayed until 2021. The majority of respondents noted that fully domestic non-trading transactions do not pose the types of risks of international aggressive tax planning which are posed by cross border transactions.

The extension of transfer pricing rules to non-trading transactions could be delivered by updating section 835C (see 2.1 above), by updating section 835A and by including a new section 835CA as follows:

835A Interpretation

- (1) In this Part —
- ‘arrangement’ means—
- (a) any transaction, action, course of action, course of conduct, scheme or plan,

- (b) any agreement, arrangement of any kind, understanding, promise or undertaking, whether express or implied and whether or not it is, or is intended to be, legally enforceable, and
- (c) any series of or combination of the circumstances referred to in paragraphs (a) and (b);

‘chargeable asset’ in relation to a person, means an asset which, if it were disposed of by the person at any time, the gain accruing to the person would be a chargeable gain;

‘chargeable period’ has the same meaning as in section 321(2);

‘Commission Recommendation’ means Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises;

‘double taxation relief arrangements’ means arrangements having effect by virtue of section 826;

‘group’ means a company which has one or more 75 per cent subsidiaries together with those subsidiaries;

‘relevant activities’, in relation to a person who is one of the persons between whom an arrangement is made, means that person’s activities which comprise the activities in the course of which, or with respect to which, that arrangement is made and shall include activities involving the disposal and acquisition of an asset or assets;

‘relevant person’, in relation to an arrangement, means a person who is within the charge to tax in respect of profits or gains or losses, the computation of which profits or gains or losses takes account of the results of the arrangement;

‘Revenue officer’ means an officer of the Revenue Commissioners;

‘tax’ means income tax, corporation tax or capital gains tax.

- (2) References in this Part to ‘control’, in relation to a company, shall be construed in accordance with section 11.

835CA Modification of basic rules on transfer pricing for arrangements between qualifying relevant persons

- (1) For the purposes of this Part, “qualifying relevant person” means a relevant person—
 - (a) who is chargeable to income tax or corporation tax under Schedule D in respect of the profits or gains or losses arising from the relevant activities; and

- (b) who, where that person is chargeable to income tax in respect of the profits or gains or losses arising from the relevant activities, is resident in the State for the purposes of tax for the chargeable period or periods in which a charge arises.
- (2) This section shall apply to an arrangement involving a supplier and an acquirer who are qualifying relevant persons.
- (3) Where, in relation to an arrangement referred to in subsection (2), a supplier or an acquirer, as the case may be, is chargeable to tax under Schedule D, other than under Case I or II of Schedule D, in respect of the profits or gains or losses arising from the relevant activities, section 835C shall not apply in computing the amount of the profits or gains or losses arising to the supplier or the acquirer, as the case may be, from the relevant activities.
- (4) Subsection (3) shall not apply in the case of—
 - (a) a supplier or an acquirer who is within the charge to tax under Case I or II of Schedule D in respect of the profits or gains or losses arising from the relevant activities, or
 - (b) an arrangement involving a supplier and an acquirer who are qualifying relevant persons (in this paragraph referred to as the “first-mentioned arrangement”) which is made as part of, or in connection with any scheme involving the acquirer in relation to the first-mentioned arrangement, or a person associated with the acquirer, entering into an arrangement with a person or persons who are not qualifying relevant persons (in this paragraph referred to as the “second-mentioned arrangement”) and the main purpose of the first-mentioned arrangement is to directly or indirectly obtain a tax advantage in connection with the second-mentioned arrangement.
- (5) For the purpose of subsection (4)(b), “tax advantage” has the same meaning as in section 811C.
- (6) A relevant person is required to maintain and have available such records as may reasonably be required for the purposes of determining whether the requirements of this section are met.

2.7 Extending transfer pricing rules to Capital Transactions

The public consultation sought the opinion of stakeholders on whether the current market value rules that apply to capital transactions are sufficient or whether transfer pricing rules should be extended to capital transactions.

The current legislation for capital gains tax and capital allowances imposes a market value/open market price requirement in relation to the pricing of

transactions between connected persons. The broad consensus among stakeholders was that existing market value rules are sufficient in ensuring that the correct amount of tax is paid in respect of capital transactions. Some stakeholders suggested that if transfer pricing rules were to be applied to capital transactions, they should not apply in respect of transfers of assets that qualify for certain reliefs under existing legislation. This would include, for example, transfers of assets within an Irish group.

The application of the arm's length principle could improve certainty in relation to the valuation of capital assets as well as improving the documentation available in support of such valuations. A possible approach is to extend transfer pricing rules only to capital transactions above a certain material threshold. Capital transactions below the threshold could continue to be subject to existing market value rules.

To achieve this possible approach in relation to capital allowances, section 835H could be updated as follows:

835H Interaction with capital allowances provisions

- (1) Section 835C shall not apply in computing the amount of—
 - (a) any allowances to be made to the acquirer under the provisions of the Tax Acts in respect of capital expenditure incurred on an asset where the total amount of capital expenditure incurred on the asset does not exceed €25 million,
 - (b) any allowances to be made to the acquirer in respect of capital expenditure incurred on a specified intangible asset to which section 291A applies in circumstances where, under section 288(3C), the amount of that expenditure is deemed, for the purposes of Chapters 2 and 4 of Part 9, to be the amount of expenditure still unallowed on the specified intangible asset,
 - (c) any balancing allowance or balancing charge to be made to, or on, the supplier of an asset under the provisions of the Tax Acts where at the time of the event giving rise to the balancing allowance or balancing charge, as the case may be, the market value of the asset does not exceed €25 million, or
 - (d) any allowances to be made to an acquirer in respect of capital expenditure incurred on an asset, or any balancing allowance or balancing charge to be made to, or on, the supplier in respect of the supply of that asset, in circumstances where—
 - (i) the acquirer and supplier make a joint election under—
 - (I) section 289(6), or
 - (II) section 312(5)(a),

- (ii) the supply and acquisition of the asset occurs as part of the transfer of the whole or part of a trade to which—
 - (I) section 308A(3),
 - (II) section 310(3),
 - (III) section 400(6),
 - (IV) section 631(2), or
 - (V) section 670(12)applies,
 - (iii) the supply and acquisition of the asset occurs in the course of a merger to which section 633A applies,
 - (iv) the supply and acquisition is of an interest in farm land to which section 658(9) applies,
 - (v) the supply and acquisition of the asset occurs in the course of a conversion of a building society to a company, to which paragraph 1 of Schedule 16 applies, or
 - (vi) the supply and acquisition of the asset occurs in the course of a transfer, to which paragraph 2 of Schedule 17 applies, from a trustee savings bank to a successor company.
- (2) (a) In determining whether, for the purposes of subsection (1)(a), the capital expenditure incurred on an asset (referred to in this paragraph as the “first-mentioned asset”) exceeds €25 million (referred to in this paragraph and paragraph (b) as the “€25 million threshold”), there shall be added to the capital expenditure incurred on that asset any capital expenditure incurred on another asset where—
- (i) that other asset had, at any time, formed part of the same asset as the first-mentioned asset, and
 - (ii) as part of a scheme to avoid reaching the €25 million threshold in relation to the first-mentioned asset and the other asset, was acquired by the acquirer under a separate arrangement.
- (b) In determining whether, for the purposes of subsection (1)(c), the market value of an asset (referred to in this paragraph as the “first-mentioned asset”) exceeds the €25 million threshold, there shall be added to the market value of that asset the market value of any other asset which—

- (i) had at any time formed part of the same asset as the first-mentioned asset, and
 - (ii) as part of a scheme to avoid reaching the €25 million threshold in relation to the first-mentioned asset and the other asset, was supplied by the supplier under a separate arrangement.
- (3) Where section 835C applies in computing any deductions or additions to be made to the acquirer or supplier of an asset, as the case may be, in respect of allowances and charges relating to capital expenditure on an asset—
- (a) subject to subsection (4), this Part shall apply notwithstanding any provision in Parts 9, 10, 23, 24, 24A, 29 and 36 of, and Schedule 18B to, the Tax Acts as to the computation of allowances or charges relating to capital expenditure, and
 - (b) the amount of any balancing charge to be made on the supplier of an asset shall not exceed the amount of capital expenditure incurred by the supplier on that asset.
- (4) Section 835C shall not apply instead of any other provision of Parts 9, 10, 23, 24, 24A, 29 and 36 of, and Schedule 18B to, the Tax Acts if its application would result in the amount of—
- (a) any allowances to be made to an acquirer in respect of capital expenditure incurred on an asset being higher, or
 - (b) any balancing allowance to be made to a supplier arising from the supply of an asset being higher, or
 - (c) any balancing charge to be made on a supplier arising from the supply of an asset being lower,
- than would be the case under any provision or provisions of Parts 9, 10, 23, 24, 24A, 29 and 36, and Schedule 18B to, the Tax Acts.

The application of transfer pricing rules to capital transactions within the scope of capital gains tax or corporation tax on chargeable gains, and which are above a material threshold, could possibly be achieved by the following new section:

835I Interaction with provisions dealing with chargeable gains

- (1) Subject to this section, section 835C shall apply for the purposes of computing—
- (a) the amount of any chargeable gain or allowable loss arising to a supplier on the supply of an asset under any arrangement which, for the purposes of the Capital Gains Tax Acts or the Corporation

Tax Acts in so far as they apply to chargeable gains, constitutes a disposal of a chargeable asset, and

- (b) in the case of an acquirer of an asset under an arrangement to which section 835C applies, the amount of any consideration for the acquisition of the asset which is taken into account in determining the amount of any gain arising to the person on a subsequent supply of the asset, which for the purposes of the Capital Gains Tax Acts or the Corporation Tax Acts in so far as they apply to chargeable gains, constitutes a disposal of a chargeable asset.
- (2) Section 835C shall not apply in computing the amount of any chargeable gain or allowable loss arising to a supplier on the disposal of a chargeable asset under an arrangement where—
- (a) the market value of the asset does not exceed €25 million,
 - (b) the asset is disposed of to a company in circumstances where it is treated for the purposes of corporation tax on chargeable gains or capital gains tax, under—
 - (i) subsection (2) or (2A) of section 615,
 - (ii) section 617(1),
 - (iii) section 632(1),
 - (iv) section 633, or
 - (v) paragraph 5(2) of Schedule 17,as having been acquired for a consideration of such amount as would secure that on the disposal neither a gain nor a loss would accrue to the company making the disposal,
 - (c) the asset is transferred in the course of a conversion of a building society into a successor company to which paragraph 3(1) of Schedule 16 applies,
 - (d) section 606(2) applies in relation to the disposal of the asset, or
 - (e) the asset is disposed of by a person who is an individual to a company and, immediately after its acquisition by the company, the asset is a chargeable asset in relation to that company.
- (3) Section 835C shall not apply for the purpose of determining the amount of any consideration for the acquisition of a chargeable asset by an acquirer where—
- (a) the market value of the chargeable asset acquired does not exceed €25 million, or

(b) for the purposes of corporation tax on chargeable gains or capital gains tax, under—

- (i) any of the provisions mentioned in subparagraphs (i) to (iv) of subsection (2)(b) or paragraph 5(3) of Schedule 17, or
- (ii) section 631(3),

the acquirer is treated as if the acquisition of the asset by the person making the disposal had been the acquirer's acquisition of the asset.

(4) In determining whether, for the purposes of subsection (2)(a) or (3)(a), the market value of an asset (referred to in this paragraph as the "first-mentioned asset") exceeds €25 million (referred to in this subsection as the "€25 million threshold"), there shall be added to the market value of that asset the market value of any other asset which—

- (a) had at any time formed part of the same asset as the first-mentioned asset, and
- (b) as part of a scheme to avoid reaching the €25 million threshold in relation to the first-mentioned asset and the other asset, was supplied or acquired by the supplier or acquirer, as the case may be, under a separate arrangement.

(5) (a) Where—

- (i) the gain of a supplier chargeable to tax in relation to the disposal of a chargeable asset is, by virtue of section 835C, computed as if, instead of the actual consideration receivable for the disposal under an arrangement, the arm's length amount were receivable, and
- (ii) the asset is, in relation to the acquirer under the arrangement, a chargeable asset,

then the acquirer shall be treated as having acquired the asset for a consideration equal to the arm's length amount.

(b) Paragraph (a) shall not apply in relation to an arrangement unless and until the tax due and payable for the chargeable period by the supplier mentioned in paragraph (a)(i) in respect of the disposal, the gain on which was, by virtue of section 835C, computed as if, instead of the actual consideration receivable under the terms of the arrangement, the arm's length amount were receivable, has been paid.

(6) (a) Where section 835C applies in computing the amount of any chargeable gain or allowable loss arising to the supplier on a disposal of a chargeable asset under an arrangement, or in treating

the acquirer as having acquired an asset under an arrangement for a consideration equal to the arm's length amount then, subject to paragraph (b), this Part shall apply notwithstanding any other provision of Parts 19, 20 and 22 of, and Schedule 14 to, the Tax Acts as to the computation of chargeable gains and allowable losses.

(b) Section 835C shall not apply instead of any other provision of Parts 19, 20, 22 of, and Schedule 14 to, the Tax Acts—

(i) if its application would result—

(I) in the amount of any chargeable gain arising to the supplier on a disposal of a chargeable asset under an arrangement being lower, or

(II) the amount of any allowable loss arising to the supplier on a disposal referred to in Clause (I) being higher, or

(ii) if, by virtue of its application, the acquirer would be treated as having acquired an asset under an arrangement for a consideration that is higher

than would be the case under any provision or provisions of Parts 19, 20, 22 of, and Schedule 14 to, the Tax Acts.

2.8 Extension of transfer pricing rules to branch profit attribution

The public consultation sought stakeholder feedback on the possible application of transfer pricing principles in connection with the attribution of profits to branches.

While this was broadly supported, stakeholders raised a number of significant issues which would have to be addressed to ensure its practicality. Some of these issues are sector specific impacts, interaction with tax treaties, and interaction with other areas of legislation. Some stakeholders called for further consultation on this issue.

Given the already extensive changes being brought forward to transfer pricing legislation this year, coupled with the need for further consideration of the potential implications of applying transfer pricing principles to branches, it is proposed that this issue will be further considered and addressed at a later time.

3 Next Steps

The issues addressed in this document will continue to be considered by the Department until 13 September 2019. However, stakeholders are encouraged to contact the Department at the earliest opportunity in the event of any queries or comments, in order to ensure the timely preparation of legislation for publication in Finance Bill 2019.

Any queries on the material enclosed can be directed to the Department via the original consultation email address: tpreview@finance.gov.ie

Alternatively, responses may be directed by post to:

Update of Ireland's Transfer Pricing Rules
International Tax Team
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2 D02 R583

Freedom of Information

Any interested parties are reminded that such contact is subject to the provisions of the Freedom of Information Acts.



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