



An Roinn Airgeadais  
Department of Finance

# Ireland's Transfer Pricing Rules Public Consultation

February 2019

Prepared by the Tax Division,  
Department of Finance  
[finance.gov.ie](http://finance.gov.ie)

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# 1 Consultation Period

The consultation period will run from 18th February 2019 to 2nd April 2019. Any submissions received after this date may not be considered.

## How to Respond

The preferred means of response is by email to: [tpreview@finance.gov.ie](mailto:tpreview@finance.gov.ie)

Alternatively, you may respond by post to:

Transfer Pricing Rules – Public Consultation,  
Tax Division,  
Department of Finance,  
Government Buildings,  
Upper Merrion Street,  
Dublin 2  
D02 R583

Please include contact details if you are responding by post.

When responding, please indicate whether you are contributing to the consultation process as a professional adviser, representative body, business representative or member of the public.

## Freedom of Information

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be published on the website of the Department of Finance.

## Meetings with key stakeholders

The Department of Finance and Revenue may also invite key stakeholders to meet with them, including representative bodies, tax professionals and other interested groups or individuals.

## After the Consultation

Tax policy issues from this public consultation will form part of the Minister for Finance's considerations in the updating of Transfer Pricing Rules in corporation tax law.

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## 2 The Consultation Questions

In responding to this consultation you are invited to:

- Give your views on the specific questions set out below. You don't have to answer every question – you can choose to answer any or all of the questions.
- Provide details of any alternative approaches or options you feel might be beneficial in dealing with the issues being addressed.
- Provide details of relevant issues not covered in this paper.
- Where appropriate, provide some analysis of the Exchequer cost/yield of your preferred option.
- Comment generally on the direction you would like to see tax policy in this area to develop.

Your views are important as they may help influence the taxation treatment and policy to be applied in the future.

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## 3 Introduction

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 Consolidated 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.<sup>1</sup>

Part 35A defines associated persons, and ensures that if transactions are not carried out at arm's length so that the profits are understated, the profits are to be computed as if the transactions were carried out at arm's length.

Companies are considered to be associated where one company is directly or indirectly involved in the management, control, or capital of the other company or a person is directly or indirectly involved in the management, control, or capital of both.

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 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 November 2015.<sup>2</sup>

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

<sup>2</sup> <http://www.oecd.org/ctp/beps/>

BEPS Actions 8 – 10 sought to ensure that transfer pricing outcomes are in line with the concept of ‘Value Creation’.

Action 8 focused on transfer pricing issues relating to transactions involving intangible assets, on the basis that misallocation of the profits generated by intangibles, which are often highly mobile, has led to base erosion and profit shifting. The main objective of Action 9 was to ensure that the assumption of risk is allocated to the company which has control over the risk and the financial capacity to assume the risk. Action 10 focused on other high-risk areas such as addressing allocation of profits which have resulted from transactions that are not commercially rational, and neutralising the use of certain payments, such as management fees and head office expenses, which may be used to erode the tax base.

The final BEPS OECD guidelines which emerged from the work on BEPS Actions 8 to 10 responds to these issues and ensures that the transfer pricing rules secure outcomes that see operational profits allocated to the economic activities which generate them. The guidelines are also designed to ensure that capital-rich entities without any other relevant economic activities (so-called “cash boxes”) will not be entitled to any excess profits.

BEPS 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. Action 13 outlined a three-tiered approach to transfer pricing documentation consisting of a Master File, a Local File and a Country-by-Country Report. The Master File seeks to provide a high-level overview of a multinational group’s transfer pricing practices with respect to their global, economic, legal, financial and tax context. The Local File will provide detailed information relating to specific intercompany transactions.

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.<sup>3</sup>

## COFFEY REVIEW

Following a Government decision in September 2016 the Minister for Finance appointed an independent expert to carry out a review of Ireland’s Corporation Tax Code. One of the terms of reference was to consider how best to further implement

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<sup>3</sup> other than for the purposes of Ireland’s double taxation treaties, for which the 2017 guidelines are already effective

Ireland's commitments under the OECD BEPS project to tackle harmful tax competition and aggressive tax planning.

Chapter 6 of the review focused on Further Implementing Ireland's Commitments under BEPS: Actions, 8, 9, 10 and 13 and made the following recommendations:

*6) Ireland should provide for the application of the OECD 2017 Transfer Pricing Guidelines incorporating BEPS Actions 8, 9 and 10 in Irish legislation.*

*7) Domestic transfer pricing legislation should be applied to arrangements the terms of which were agreed before 1 July 2010.*

*8) Consideration should be given to extending transfer pricing rules to SMEs, having regard to whether the concomitant imposition of the administrative burden associated with keeping transfer pricing documentation on SMEs would be proportional to the risks of transfer mispricing occurring.*

*9) Consideration should be given to extending domestic transfer pricing rules to non-trading income. There is a strong rationale to extend domestic transfer pricing rules to non-trading income where it would reduce the risk of aggressive tax planning.*

*Consideration should also be given to extending transfer pricing rules to capital transactions, having regard to whether such an extension would improve the existing provisions which already apply arm's length values to companies' transactions relevant to chargeable gains and capital allowances.*

*10) 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.*

*11) If it is decided to implement any or all of Recommendations 6, 7, 8, 9 and 10, this should take place no later than end 2020, which is the year to which the OECD and G20 have agreed to extend their co-operation on BEPS to complete the current work.*

## **POST COFFEY REVIEW CONSULTATION**

In October 2017 the Department of Finance launched a Public Consultation Paper "Review of Ireland's Corporation Tax Code"<sup>4</sup>. That consultation contained a number of questions on transfer pricing, including:

<sup>4</sup> <https://www.finance.gov.ie/updates/public-consultation-review-of-irelands-corporation-tax-code/>

- On the implementation of the 2017 OECD Transfer Pricing Guidelines;
- The application of transfer pricing rules to pre-1 July 2010 arrangements;
- The extension of transfer pricing rules to Small and Medium enterprises;
- The extension of transfer pricing rules to non-trading income and to capital transactions; and
- The required level of transfer pricing documentation.

Further detail on the consultation and responses received are available on the Department of Finance website.<sup>5</sup>

The tax policy issues arising from that public consultation formed part of the Minister for Finance's considerations on the recommendations provided in the Coffey Review of Ireland's Corporation Tax Code and the implementation of the ATADs. This culminated in the Government's publication of Ireland's Corporation Tax Roadmap in September 2018<sup>6</sup>.

The Roadmap acknowledged, building on from the Coffey review, the need to update transfer pricing rules and it was considered desirable 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 in to force from the beginning of 2020.

## **PURPOSE OF THIS CONSULTATION**

Ireland is committed to implementing global standards agreed during the OECD BEPS process and has taken a range of actions in this regard. The commitment to legislate for changes to our transfer pricing regime is consistent with this overall approach. In addition, strengthening of our transfer pricing regime is an important element in defending the robustness of Ireland's tax regime in international fora. It is ultimately intended that Ireland's transfer pricing regime will be consistent with international best practice for such rules as developed at the OECD.

This public consultation is designed to indicate the Minister's intended direction in respect of certain recommendations contained in the Coffey Review and allow stakeholder input on the considerations outlined above.

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<sup>5</sup> <https://www.finance.gov.ie/updates/submissions-to-corporation-tax-review-consultation/>

<sup>6</sup> <https://www.finance.gov.ie/wp-content/uploads/2018/09/Corporate-Tax-Roadmap-Web.pdf>



## 4 Proposed Reforms to Ireland's Transfer Pricing Rules

### OECD 2017 TRANSFER PRICING GUIDELINES

The Coffey review recommends incorporating the 2017 OECD Transfer Pricing Guidelines directly into Irish legislation.

The OECD Transfer Pricing Guidelines provide guidance on the application of the arm's length principle, which requires that transactions between associated enterprises are priced as if the enterprises were independent, operating at arm's length and engaging in comparable transactions under similar conditions and economic circumstances. The 2017 Transfer Pricing Guidelines represent the most current version, and they incorporate the guidance set out in the BEPS Actions 8-10 report and the BEPS Action 13 report.

In order to achieve this objective it is intended to directly reference the 2017 OECD Transfer Pricing Guidelines in the Taxes Consolidation Act.

#### **Incorporation of the OECD 2017 Guidelines into Irish legislation**

It is intended that Irish transfer pricing legislation will be amended to include a direct reference to the 2017 OECD Transfer Pricing Guidelines.

Do you consider that this proposed course of action will give rise to any specific issues?

### REMOVAL OF GRANDFATHERING FOR PRE 1 JULY 2010 ARRANGEMENTS

Section 835D of the Taxes Consolidation Act provides that arrangements, the terms of which were agreed prior to 1 July 2010, are not subject to domestic transfer pricing legislation. The Coffey Review recommends that transfer pricing rules be applied to arrangements the terms of which were agreed before 1 July 2010. On foot of this recommendation, it is intended to remove this grandfathering provision with effect from 1 January 2020.

#### **Removal of the exemption for arrangements in place since pre July 2010**

It is intended to extend the transfer pricing legislation to arrangements the terms of which were agreed before 1 July 2010, commencing from 1 January 2020.

Do you consider that this proposed course of action will give rise to any specific issues?

## EXTENSION OF TRANSFER PRICING RULES TO SMES

The Coffey Review recommends that ‘consideration should be given to extending transfer pricing rules to SMEs, having regard to whether the concomitant imposition of the administrative burden associated with keeping transfer pricing documentation on SMEs would be proportional to the risks of transfer mispricing occurring’.

The logic for extending the transfer pricing rules to small and medium sized enterprises is to ensure that the rules are applied to all companies operating in Ireland. However, this must be balanced with the need to ensure that the onus of compliance is not overly burdensome and disproportionate to any risk of mispricing.

A potential path forward could be to extend transfer pricing rules to cover SMEs but to introduce a tiered level of documentation necessary to comply with the rules. The documentary burden could potentially be linked with the size of the business.

### Extension of transfer pricing rules to SMEs

Do you consider that transfer pricing legislation should be extended to small and medium enterprises?

What level of documentation do you feel would be appropriate to require SMEs to maintain to demonstrate compliance with transfer pricing rules?

If transfer pricing rules are extended to SMEs, what other measures might be considered to mitigate the compliance burden for SMEs?

What particular issues do you consider might arise from the application of transfer pricing rules to SME transactions with effect from 1 January 2020?

## EXTENSION OF TRANSFER PRICING RULES TO NON-TRADING TRANSACTIONS

Ireland’s current transfer pricing legislation only applies to profits or gains or losses arising from income within the charge to tax under Case I or II of schedule D. Therefore, transfer pricing rules do not apply to non-trading income chargeable to tax under Case III, Case IV and Case V of Schedule D.

The Coffey review recommends that consideration should be given to extending domestic transfer pricing rules to non-trading income. Coffey noted that ‘there is a strong rationale to extend domestic transfer pricing rules to non-trading income where it would reduce the risk of aggressive tax planning’.

Capital transactions are also not subject to the current transfer pricing legislation. The Coffey Review recommended that ‘consideration should also be given to extending transfer pricing rules to capital transactions, having regard to whether such an extension

would improve the existing provisions which already apply arm's length values to companies' transactions relevant to chargeable gains and capital allowances'.

### **Extending Transfer Pricing Rules to non-Trading Income and Capital Transactions**

It is intended to extend the transfer pricing rules to non-trading income chargeable to tax under Case III, Case IV and Case V of Schedule D where such an extension would reduce the risk of aggressive tax planning as recommended by the Coffey Review.

Are there any issues which may arise through the extension of transfer pricing rules to non-trading income and how may any such issues be resolved?

Do you believe that the current market value rules are sufficient so that capital transactions do not need to be subject to separate transfer pricing rules? Could these rules be supplemented by additional documentation requirements?

### **TRANSFER PRICING DOCUMENTATION**

Current Irish legislation requires that taxpayers involved in transactions that are within the scope of the transfer pricing legislation are required to have such documentation available as may reasonably be required to demonstrate compliance with the legislation, and specifically that the trading income is computed in accordance with the requirements of the legislation.

The Coffey review recommends that there should be a specific obligation on Irish taxpayers who are subject to 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 the best practice recommendation in BEPS Action 13.

The 2017 OECD Guidelines provide for the preparation and maintenance of both a Master File and Local File by multinational groups. The Master File includes specific documentation around the organisational structure and description of the structure of the business; intangibles; intercompany financial activities; and the companies financial and tax positions. The Local File requires specific information be held on the group's local entity including details on relevant transactions and financial information.

It is intended to introduce these documentation requirements for transfer pricing from 1 January 2020.

### **Extending Transfer Pricing Documentation**

What particular issues do you consider might arise if the enhanced documentation requirements were to apply from 1 January 2020?

Are there any circumstances in which the documentation requirements should be reduced or limited in specific respects?

## APPLICATION OF TRANSFER PRICING RULES TO BRANCHES

Transfer pricing rules are applied in respect of transactions between separate legal entities. The taxation of branch profits is dealt with by Section 25 of the Taxes Consolidation Act.

The intention of amending Ireland's transfer pricing rules is to implement OECD principles and ensure Ireland's rules keep pace with the evolving international tax environment. In this light, it is appropriate to consider whether any change should be made to the taxation of branches in Irish law as part of overall transfer pricing reform.

The OECD have developed the 'Authorised OECD Approach' as a mechanism for applying by analogy the guidance found in the OECD Transfer Pricing Guidelines for the purpose of determining the profits attributable to a branch.

Ireland's Corporation Tax Roadmap noted that the introduction of rules for the attribution of branch profits in Ireland in line with the Authorised OECD Approach would be considered as part of this consultation process.

### **Application of the Authorised OECD Approach to branch profit attribution.**

Do you consider that the Authorised OECD Approach to attribution of branch profits would be an appropriate approach to adopt into Irish law?

If the Authorised OECD Approach is adopted in Irish law, what documentation requirements should apply?

Is there an alternative approach that should be considered in this context?

Are there any industry or sector-specific considerations that should be borne in mind, particularly in relation to financial and insurance companies, in relation to branch profit attribution?

Are there any special considerations required in respect of SMEs?

## ANY OTHER ISSUES?

Are there any other issues which you believe should be considered as part of the reform of Ireland's transfer pricing legislation?