



Performance

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E X P E C T E X C E L L E N C E

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## Tax Briefing

# The New Irish Transfer Pricing Regime

An overview of the new rules and the opportunity presented between now and 1 July 2010 to put arrangements in place that will fall outside the new regime.

### Introduction

Until very recently, Ireland did not have any material transfer pricing legislation. However, in the Finance Act 2010 (enacted in April 2010), new transfer pricing rules have been introduced which apply for accounting periods beginning 1 January 2011 and relate to arrangements entered into after 1 July 2010, which presents an opportunity for effective tax planning.

The introduction of the proposals is motivated by a desire to align Ireland with the international norm and formally adopt both the OECD Transfer Pricing Guidelines and the “arm’s length” principle. As a member of the OECD and an onshore low-tax location, the attractiveness of Ireland is further enhanced by this re-alignment.

The increased transparency can be welcomed by multinationals as they should be able to defend the level of income and expenses attributed to their Irish operations more readily.

### Scope

#### Basic rule

The proposed new rules apply to an “arrangement” involving the supply and acquisition of goods, services, money or intangible assets between associated companies. The definition of arrangement is extremely broad so as to encompass agreements or arrangements whether or not they are legally enforceable.

#### Effect

The basic rule will increase the consideration or reduce the expenses of a company from a trading transaction with an associated party where those figures differ in comparison to an arm’s length transaction. The actual amounts under the arrangement must result in an understatement of profits for Irish tax calculation before the rules will apply. Therefore the rules are one-way and do not inhibit an overstatement of Irish profits.

*This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.*

### Endorsement of OECD principles

The rules and the arm's length standard are to be interpreted in accordance with the OECD Transfer Pricing Guidelines as they would apply to Art. 9(1) of the OECD Model Tax Convention. This is subject to any inconsistent provisions of an applicable double taxation treaty. Uniformity with the OECD provisions is a clear endorsement of the international norms.

### Non-trading

The rules are only applicable where the transaction is taxed as a trading activity for either or both of the parties. Furthermore the profits or losses which may be adjusted are only those which are chargeable at the 12.5% rate, i.e. Irish trading rather than passive income.

### Territoriality

The rules apply to cross border and domestic transactions. Where both parties to an arrangement are chargeable to Irish tax and the arrangement is adjusted to arm's length terms, the other affected company can make a claim to have their profits or gains or losses reduced to the arm's length amount as well. This reduces the chance of double taxation.

Where a reduction is applied to the profits of an affected person any foreign tax credit they may have will be proportionately reduced.

### Small or medium-sized enterprises

The new legislation includes a specific carve out for enterprises of a certain size based on the definition of micro, small and medium-sized enterprises as defined in the Annex to Commission Recommendation 2003/361/EC of 6 May 2003, subject to certain amendments. Broadly speaking this means that enterprises with fewer than 250 employees and either turnover of less than €50 million or assets of less than €43 million are outside the scope of the proposed regime.

### Activities within the scope

The new legislation will automatically apply to intra group arrangements between Irish trading entities. In addition, where an Irish trading company is entering into group arrangements with entities in jurisdictions which do not have transfer pricing legislation in force, care needs to be taken to ensure that the actual amounts received or paid by the Irish entity are on an arms length basis.

### Activities outside the scope

As the new transfer pricing regime only applies where there is an understatement of Irish trading receipts or an overstatement of trading expenses/deductions, it should not apply to:

- » interest free loans;
- » dividends;
- » guarantees;
- » capital transactions; and
- » lease or royalty payments

which do not form part of a trade.

### Documentation requirement

Records must be prepared on a timely basis as may reasonably be required for the purposes of determining whether an arrangement has been conducted at arm's length. Provision is made for an authorised officer of the Revenue to request this information.

The new transfer pricing regime does not impose an onerous burden on enterprises nor does it prescribe specific documentation requirements. Therefore it is likely that records prepared by enterprises operating in other transfer pricing jurisdictions will suffice, without the need to prepare specific Irish records.

### Effective Date and Opportunity to Act

The new regime takes effect for accounting periods beginning on or after 1 January 2011 and only in relation to any arrangement in place or agreed on or after 1 July 2010. Therefore arrangements entered into before 1 July 2010 will not be subject to the transfer pricing rules. It is unclear whether amendments to existing arrangements after this date will be caught. However, we would advise that prior to making any amendments to existing arrangements the impact of any such amendments should be carefully considered.

The "grandfathering" of arrangements agreed before 1 July 2010 creates a planning opportunity for taxpayers to put arrangements into place which are excluded. It also means that companies will need to have a clear de-lineation between intra-group arrangements in place before 1 July 2010 (which will fall outside the transfer pricing regime) and arrangements entered into after that date. Entities have a real opportunity now to look at their intra-group arrangements and to document, where possible, all such arrangements during this "window" before 1 July 2010.

### Conclusion

The adoption of the OECD transfer pricing model is intended to bring Ireland into line with other EU states and international norms. This is a further enhancement to Ireland's current status as a preferred onshore location. Therefore this new regime should largely be viewed as a

positive development for enterprises with operations in Ireland at a time when the transparent apportionment of the income and profits of multinationals is of some importance.

Moreover the new rules are very much in the way of a light touch as they are only applicable where there has been an underestimation of trading profits in Ireland. The administrative burden placed on enterprises is expected to be minimal.

### Contacts

If you require any further information on these new rules and the opportunity to plan between now and 1 July 2010, please contact:



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