40.
Ireland

Introduction
As part of the 2010 Finance Act, enacted in April 2010, Ireland has finally introduced broad-based transfer pricing legislation. The legislation endorses the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and adopts the arm's-length principle. The introduction of general transfer pricing legislation in Ireland was widely anticipated and brings the Irish tax regime into line with international norms in this area. The new regime applies to domestic as well as international related party arrangements and comes into effect for accounting periods commencing on or after 1 January 2011, in relation to certain arrangements entered into on or after 1 July 2010.

Prior to the publication of the new legislation, the transfer pricing provisions contained within the Irish tax legislation were previously only of limited application, and few resources were devoted to the issue by the Irish tax authorities. Despite the absence of local regulations and scrutiny prior to the 2010 Finance Act, transfer pricing was already a significant issue both for multinationals operating in Ireland and for Irish companies investing abroad because of the transfer pricing regulations in place in many overseas jurisdictions where the affiliates trading with Irish companies were located. For this reason, it is considered that the introduction of equivalent transfer pricing rules into the Irish system is not expected to result in significant changes to the underlying pricing for these transactions.

Statutory rules
Part 35A of transfer pricing legislation
Part 35A, Section 835A to Section 835H, of the 1997 Taxes Consolidation Act (Part 35A), contains Ireland's newer domestic law dealing with transfer pricing. Part 35A confers a power on the Irish tax authorities to recompute the taxable profit or loss of a taxpayer where income has been understated or expenditure has been overstated as a result of certain non-arm's-length arrangements. The adjustment will be made to the Irish taxable profits to reflect the arrangement had it been entered into by independent parties dealing at arm's length.

The new transfer pricing rules apply to arrangements entered into between associated persons (companies) on or after 1 July 2010, involving the supply or acquisition of goods, services, money or intangible assets and relating to trading activities within the charge to Irish tax at the trading rate of 12.5%. However, an exemption from the new rules is available for small- and medium-sized enterprises.

Two unique characteristics
The new regime includes many features expected of a jurisdiction introducing transfer pricing rules for the first time, but interestingly the legislation contains the following two unique characteristics:

- The new regime is confined to related party dealings that are taxable at Ireland's corporate tax rate of 12.5% (i.e. trading transactions[1]).
- A 'grandfather' clause whereby arrangements entered into between related parties prior to 1 July 2010, are excluded from the new transfer pricing rules.

Exclusion of non-trading activities
The new transfer pricing regime is confined to related party dealings that are taxable at Ireland's corporate tax rate of 12.5% (i.e. trading transactions). Activities that are deemed to be non-trading or 'passive' in nature and which are taxable at the higher rate of 25% will be excluded from the scope of the new regime.

Passive income for the purposes of the new regime may include interest, royalties, dividends and rents from property where the income arising is not derived from an active trade. In practice, each transaction must be examined in the context of the company and its business to determine if it will constitute trading or passive income.

The question of whether a trade exists will initially be decided by the taxpayer because the Irish tax system is based on the principle of self-assessment. The term 'trade' is defined in Irish tax legislation as including 'every trade, manufacture, adventure or concern in the nature of trade'. However, the legislation does not outline specific rules for distinguishing between trading and non-trading activities. Guidance as to what constitutes trading is available from case law and from a set of rules known as the 'Badges of Trade', which have been laid down by the courts in various cases over the years and which were set out in the 1954 report of the UK Royal Commission on Taxation. This report and the approach of the courts have been adopted into practice in Ireland to examine the specific facts of an individual case and look for the presence, or absence, of common features or characteristics of trade.

In addition to the available case law, it is possible for a taxpayer to make a submission to the Irish tax authorities to seek an advance ruling on whether trading activities are being carried out.

The distinction between whether a company's activities are deemed to be trading or passive in nature is therefore crucial for determining whether the related party transactions will fall within the scope of the new regime. The determination will depend on the specific facts and circumstances of each case.

Grandfather clause
The other unique characteristic in the legislation is that the transfer pricing rules will apply only to arrangements entered into on or after 1 July 2010. The term 'arrangement' is defined within the draft legislation as 'arrangements or agreements, whether or not legally enforceable or intended to be legally enforceable'. The Irish tax authorities have not yet provided any guidance on how they will interpret what a new arrangement will be.

1 Certain 'excepted trades' are taxed at Ireland's higher corporate tax rate of 25% as are subject to Irish transfer pricing rules. Excepted trades are limited to dealings in land other than construction activities, working with certain minerals and petroleum activities, section 21A of the Taxes Consolidated Act 1997 refers.

Other key features of the new transfer pricing regime

Associated persons

Part 35A will apply only to arrangements between associated persons. Two persons party to an arrangement will be considered associated if one person participates in the management, control or capital of the other person or if a third person participates in the management, control or capital of each of the two persons party to the arrangement. A person is deemed to be participating in the management, control or capital of another person if that other person is a company and is controlled by the first person.

Nature of related party dealings

Part 35A applies only to related party arrangements involving 'the supply and acquisition of goods, services, money or intangible assets'. It is noted that all these terms are commonly used in the OECD Transfer Pricing Guidelines, with the exception of the term 'money'. The OECD guidelines instead use the terminology 'financial relations'.[2] The Irish tax authority has not issued any guidance on how it will interpret the term 'money'; therefore, this represents an area where further clarification from the Irish tax authorities can be expected in the future.

Effective date

Part 35A will come into effect for accounting periods commencing on or after 1 January 2011, in relation to any arrangement entered into on or after 1 July 2010. For example, a company with a 31 December year-end will be subject to the new transfer pricing rules for the year ended 31 December 2011, and any subsequent year but only in relation to arrangements entered into on or after 1 July 2010.

Understatement of Irish profits

The new regime is 'one way', facilitating an upwards adjustment to taxable profits where the profits of an Irish taxpayer are understated as a result of non-arm's-length transfer pricing practices. The regime confers a power on the Irish tax authorities to recompute the taxable profit or loss of a taxpayer where income has been understated or where expenditure has been overstated. The adjustment will be made to reflect arrangements that would be entered into by independent parties.

Exemption for small- and medium-sized enterprises

Part 35A contains an exemption from the transfer pricing rules for small and medium enterprises (SMEs). The definition of a SME is assessed at a group level and is based on the definition in the EU Commission Recommendation of 6 May 2003. In this regard, a group will be regarded as a SME if it has:

- fewer than 250 employees, and
- either a turnover of less than 50 million euro (EUR) or assets of less than EUR 43 million.

This exemption is likely to have the effect of excluding a large number of domestic Irish companies from the new transfer pricing regime.

Summary

Following is a summary of the conditions that need to be met for the Irish transfer pricing rules to apply to an arrangement:

2 OECD Guidelines, Chapter I, I-3

- The taxpayer does not qualify as a small- or medium-sized enterprise.
- The arrangement involves the supply or acquisition of goods, services, money or intangible assets.
- At the time of the supply, the supplier and the acquirer are associated.
- The profits, gains or losses arising from the relevant activities are within the charge to Irish tax under Case I or Case II of Schedule D (that is, trading transactions within the charge to tax at the 12.5% trading rate).
- The consideration payable or receivable under the arrangement is not at arm's length and results in an understatement of Irish profits.
- The terms of the arrangement were agreed on or after 1 July 2010.

Branches
Based on the definition of 'person' as defined in domestic Irish tax legislation, any arrangements entered into between a branch and its head office will not fall within the scope of the transfer pricing rules on the basis that a branch and head office cannot constitute two separate persons. However, a transaction between an Irish branch and a foreign affiliated company will fall within the scope of the rules on the basis that this will constitute a relationship between two separate persons.

Other rules and regulations

Documentation
Part 35A states that companies will need to provide documentation 'as may reasonably be required' and that documentation will need to be prepared 'on a timely basis'. The Irish tax authorities issued further guidance (Tax Briefing Issue 07 of 2010) on the documentation that is required to be prepared by taxpayers to be compliant with the transfer pricing rules.

The guidance note supports the legislative basis and indicates that a company is required to have transfer pricing documentation available for inspection if requested by the Irish tax authorities.

Reference is made to the fact that the purpose of the documentation should be to demonstrate compliance with the transfer pricing rules. The Irish tax authorities have stated that the form and manner that the documentation takes 'will be dictated by the facts and circumstances of the transactions' and recognise that the cost involved in preparing the documentation should be 'commensurate with the risk involved'. As an example, the guidance note states that the Irish tax authorities would expect complex transactions to have more detailed documentation in place in comparison with simple transactions.

Notably, the guidance note states that 'it is best practice that the documentation is prepared at the time the terms of the transaction are agreed'. Additionally, the guidance note states that 'for a company to be in a position to make a correct and complete Tax Return', appropriate transfer pricing documentation should exist at the time the tax return is filed. It is worth noting that the taxpayer can maintain documentation in a form 'of its own choosing'. Additionally, where documentation exists in another territory which supports the Irish arrangement, this will also be sufficient from an Irish transfer pricing perspective, on the basis that the documentation is in English. The Irish tax authorities have also confirmed that they will accept documentation that has been prepared in accordance with either the OECD

Transfer Pricing Guidelines or the code of conduct adopted by the EU Council under the title 'EU Transfer Pricing Documentation'.

The Irish tax authorities have set out a comprehensive list of information that must be included in the documentation that is prepared. The 'documentation must clearly identify':

- associated persons for the purposes of the legislation
- the nature and terms of transactions within the scope of the legislation
- the method or methods by which the pricing of transactions was arrived at, including any benchmarking study of comparable data and any functional analysis performed
- how that method has resulted in arm's-length pricing or where it has not, what adjustments were made and how the adjustment has been calculated
- any budgets, forecasts or other papers containing information relied on in arriving at arm's-length terms, etc., or in calculating any adjustment, and
- the terms of relevant transactions with both third parties and associates.

The Irish tax authorities have confirmed that transfer pricing documentation must be available for relevant arrangements 'that take place in accounting periods beginning on or after 1 January 2011'. The Irish tax authorities have also confirmed that documentation requirements will not apply to so-called grandfathered arrangements, the terms of which were agreed before 1 July 2010. The guidance note states that an arrangement will qualify for this 'transitional treatment' if:

- the terms of the pre-1 July 2010, agreement clearly envisage the transaction, and
- the application of these terms delivers the price of the transaction.

Other regulations

Prior to the introduction of the new transfer pricing regime, domestic transfer pricing provisions in Irish tax legislation, with one exception, were specific to particular types of transactions or to particular categories of taxpayer. A brief summary of these limited provisions is set out as follows.

Section 1036

One other general transfer pricing provision is contained in Section 1036, Taxes Consolidation Act 1997. This section applies where, for example, an Irish company carries on business with an overseas affiliate and, through the control exercised over the Irish company, the Irish company produces either no profits or less than the ordinary profits that might be expected to arise. In these circumstances, the overseas affiliate will be chargeable for Irish income tax in the name of the Irish company as if it were an agent of the Irish company.

Although a broad-based section, Section 1036 is not supported by any guidance from the Irish tax authorities on the application of the legislation, and definitions are not provided for key terms such as 'close connection and substantial control' included in the section. Further, the section focuses on whether the profits realised by an Irish company are commensurate with the ordinary profits expected, rather than whether the prices for the international related party transactions entered into by the Irish company are at arm's length.

Owing to these uncertainties, it is not believed that this section is applied in practice.

Companies engaged in businesses qualifying for incentive tax rates
Among the more limited transfer pricing provisions which had been enacted were those applying to Irish companies qualifying for Ireland's incentive tax rate of 10%. The 10% incentive tax rate dates to the early 1980s and was known as 'manufacturing relief'. The relief is due to expire on 31 December 2010, and the introduction of a specific transfer pricing regime in Ireland has been timed to coincide with the expiration of manufacturing relief.

VAT and transfer pricing
On 2 April 2007, the Irish government enacted anti-avoidance legislation in relation to transactions between connected persons. This legislation gives the Irish tax authorities the power to impute an open-market value to the amount on which VAT is chargeable on a supply of goods or services. The legislation is a transposition of Article 80 of EU Council Directive No. 2006/112/EC, an EC directive that member states were not necessarily obliged to enact locally.

Other domestic transfer pricing provisions
Other anti-avoidance provisions have been enacted for:

- the transfer of land between connected persons
- the charge to capital gains tax on the sale of assets to connected persons
- the transfer of trading stock to a connected person at the time a trade is discontinued, and
- the exemption from tax in Irish tax legislation for income arising from certain qualifying patents.

In the last point, the provisions apply where the payer and beneficial recipient are connected, stating that the exemption will apply only to as much of the payment as would have been made by an independent person acting at arm's length.

Legal cases
Although Ireland's new transfer pricing legislation is effective only for accounting periods commencing on or after 1 January 2011, the decision of the Irish High Court in the case of *Belville Holdings Limited v Cronin* in 1985 suggests that the Irish courts have been willing in the past to impose arm's-length pricing in transactions between related parties.

The transaction considered in this case was the provision of management and other head-office services by Belville Holdings Limited, an Irish company, to its Irish resident subsidiary companies. As well as holding shares in subsidiaries, Belville Holdings Limited carried on a trade of managing its subsidiaries and providing finance to them. For all periods up to the year ended 30 October 1978, the total expenses incurred by Belville Holdings Limited were apportioned among the subsidiaries and recharged to them. This company policy changed with effect from the period commencing 1 November 1978, whereby only the operating expenses directly incurred for the benefit of the subsidiaries were recharged; other expenses not specifically allowable to the subsidiaries were borne by Belville Holdings Limited. This had the effect of trading losses being incurred by Belville Holdings Limited following the change of policy.

The case focused on two accounting periods, the period ended 30 June 1979, and the year ended 30 June 1980, in which Belville Holdings Limited and all but two

of its subsidiaries realised trading losses. Belville Holdings Limited did not receive management fees from its subsidiaries in these periods. However, the two profitable subsidiaries paid over their entire profits in each period to Belville Holdings Limited as dividends. Under tax legislation in force at the time, Belville Holdings Limited, by virtue of the trading loss it incurred in each period, claimed a repayment of the tax credits attaching to the dividends received from its two subsidiaries.

The Inspector of Taxes rejected the repayment claim of Belville Holdings Limited. The Irish tax authorities took the view that the losses of Belville Holdings Limited were not genuine trading losses, on the basis that Belville Holdings Limited had arranged its policy for recharging its management expenses to facilitate the claim for repayment of the tax credits. This position was upheld in the Appeal Court, which relied on the UK case of *Petrotim Securities Limited v Ayres* (1963) in stating that notional management fees equivalent to the market value of the services provided by Belville Holdings Limited should be included as assessable income of Belville Holdings Limited.

On appeal by Belville Holdings Limited to the High Court, the judge upheld the position of the Appeal Commissioners that notional management fees should be included in the tax computation of Belville Holdings Limited. However, the High Court also found that there was no evidence to uphold the Appeal Commissioner's arbitrary estimation of the market value of the services provided, which was set at 10% of the income of each of the two subsidiaries. For this reason, the High Court upheld the appeal of Belville Holdings Limited, but crucially did not refer the matter back to the Appeal Commissioners to reconsider a more appropriate valuation of the notional management fees.

The issue later arose as to whether the High Court division in Belville Holdings Limited had definitively found in favour of the taxpayer or whether the High Court intended to refer the matter back to the Appeal Commissioners. A Supreme Court hearing found that the High Court decision could be interpreted only as being in favour of Belville Holdings Limited.

In conclusion, although the Irish courts never ruled on an appropriate market value for the notional management fees, the case of *Belville Holdings Limited v Cronin* indicates that the Irish courts may support the Irish tax authorities in applying arm's-length pricing for transactions between connected persons. No other such cases have come before the Irish courts since 1985, and it is doubtful whether the Belville Holdings case could be solely relied upon in consideration of transactions between an Irish company and an international related party prior to the effective date of the new transfer pricing rules.

Burden of proof

Under Ireland's self-assessment system, the burden of proof in the event of an audit by the Irish tax authorities will fall on the taxpayer.

Tax audit procedures

Selection of companies for audit

Legislation permits the Irish tax authorities to carry out an inspection of tax returns filed under self-assessment. The purpose of such an inspection is to satisfy the Irish tax authorities that a return is complete and accurate.

Ireland

The Irish tax authorities are not obliged to disclose why they have picked a particular company or tax return for inspection. However, the selection of a return for inspection does not mean that the Irish tax authorities have evidence that tax has been underpaid. In many cases, the return is selected for audit for straightforward reasons, such as the level of turnover or profits generated by the company or the industry sector in which the company operates.

In the past, it would have been unusual for the Irish tax authorities to audit an Irish taxpayer for the sole reason of reviewing the arm's-length nature of its international related party dealings. Rather, transfer pricing issues have been considered as part of a general corporation tax audit. However, with the introduction of Part 35A, it can be expected that the Irish tax authorities will begin to enforce the new rules with specific transfer pricing audits for larger multinational groups.

The first opportunity that the Irish tax authorities will have to audit any related party arrangements and apply the new transfer pricing rules will come in 2012, when companies file their corporate tax returns for their 2011 financial year.

The annual corporation tax return form does not require an Irish company to disclose details to the Irish tax authorities on the type and value of the international related party dealings entered into by the taxpayer.

The provision of information and the duty of the taxpayer to cooperate

Auditors of the Irish tax authorities are fully entitled to inspect any original record of transactions conducted in the period under audit which is relevant to the company's tax position, or any document that links an original record to the company's finalised financial statements. Recent legislation has significantly widened auditors' inspection powers. An auditor is now entitled to inspect any document that relates to the company's business, not just records the company is obliged to maintain for tax purposes.

Part 35A states that only authorised officers, designated in writing by the Irish tax authorities, may make enquiries in relation to transfer pricing. The Irish tax authorities have yet to clarify who will be an authorised officer, but it is expected to be inspectors within the Large Cases Division of the Irish tax authorities.

The audit procedure

The Irish tax authorities will conduct a tax audit under the terms of the Charter of Taxpayers' Rights. Under the charter, the Irish tax authorities are obliged to approach the audit on the assumption that the company is fully tax compliant and its returns are correct. Prior to commencing the audit, the auditor can be expected to have carried out a detailed review of the company's tax files under all tax heads. The auditor will also have conducted a review of any information contained within the Irish tax authorities regarding the company's industry sector.

Also relevant to the audit procedure in Ireland is the Irish tax authorities' Code of Practice for Tax Audits, which sets out the procedures to be followed by the Irish tax authorities in their conduct of an audit and in reaching a settlement with the taxpayer. In notifying the company of their intention to undertake an audit of the company's tax affairs, the Irish tax authorities give the company until a specified date to decide whether it needs additional time to prepare a written disclosure of any

negligent underpayments of tax. In the context of an audit by the Irish tax authorities, a disclosure states the amounts of any tax liabilities previously undisclosed for the taxheads or periods within the scope of the audit enquiry, together with the company's calculation of the associated interest and penalties arising from the undisclosed liabilities. The disclosure must be accompanied by payment of the total liability arising in respect of tax, interest and penalties. (*Details on the calculation of interest and penalties are set out under Additional tax and penalties section*).

Audits generally commence with an opening meeting between the company and the official(s) of the Irish tax authorities carrying out the audit. In the situation where the taxpayer decides to make a written or verbal disclosure in relation to the returns under review, this will be presented to the auditor at the opening meeting. The auditor may ask for more information concerning the disclosure.

The initial audit work is likely to be devoted to checking the accuracy of any disclosure made by the taxpayer following notification of the tax audit. The auditor will then commence the inspection of the books and records supporting the tax return being audited.

We expect the Irish tax authorities will adopt the same approach for dealing with transfer pricing audits.

Revised assessments and the appeals procedure

Following an audit, the Irish tax authorities may make an assessment where they are dissatisfied with a return or returns made by the company. Generally, a time limit of four years applies to the making of assessments where a full return has been made.

Where a taxpayer is dissatisfied with an assessment raised by the Irish tax authorities, the taxpayer has the right to appeal against the assessment. This appeal must be in writing and be made within 30 days of the issue of the assessment. The appeal can be resolved by an agreement reached with the Irish tax authorities or by means of a hearing in front of the Appeal Commissioners.

Depending on the decision of the Appeal Commissioners, the taxpayer may have further avenues to appeal for a re-hearing to the Circuit Court, or to the High Court or Supreme Court on a point of law.

Additional tax and penalties

Part 35A does not contain any specific penalty provisions with respect to a transfer pricing adjustment. In the absence of specific penalty provisions being included, the Irish tax authorities have indicated that the general corporate tax penalty provisions and the Code of Practice will apply to assessments raised due to transfer pricing adjustments under the new transfer pricing rules. The Finance (No.2) Act 2008 formally introduced Ireland's tax geared penalty system with the new penalty regime applying to cases of tax default occurring on or after 24 December 2008.

Under the general corporate tax penalty provisions, interest arises on underpaid tax at a daily rate of 0.0273%, which is 9.96% per annum.

Also in their Code of Practice, the Irish tax authorities have set out a 'penalty' grid, which shows the penalties charged for each of three categories of default on the part

of the taxpayer. The least serious category of default is 'careless behaviour without significant consequences' (with a 20% penalty), and the most serious is 'deliberate behaviour' (with a 100% penalty). The grid also shows that the penalty level can be reduced where the taxpayer cooperates during the audit with the Irish tax authorities. (Essentially this means that the taxpayer complies with all reasonable requests made by the Irish tax authorities for records and assistance.) The grid is reproduced here:

No Qualifying Disclosure	Category of Default	No Co-operation	Co-operation only
All defaults where there is no qualifying disclosure	Careless behaviour without significant consequences	20%	15%
	Careless behaviour with significant consequences	40%	30%
	Deliberate behaviour	100%	75%

An additional penalty grid is provided which shows how the level of penalty can be reduced based on the level of disclosure made by the taxpayer and whether or not another disclosure was made within the previous 5 years. The two types of disclosure are:

- a prompted qualifying disclosure; where the disclosure is made as a consequence of a notification letter received from the Irish tax authorities that the taxpayer has been selected for audit, or
- an unprompted qualifying disclosure; where no notification of audit is received from the Irish tax authorities.

The additional grid is reproduced here:

Penalty Table 1	Category of Default	Qualifying disclosure on or after 24/12/2008	
All defaults where there is a qualifying disclosures in this category.		Prompted qualifying disclosure and co-operation	Unprompted qualifying disclosure and co-operation
All qualifying disclosures in this category	Careless behaviour without significant consequences	10%	3%
First qualifying disclosure in these categories	Careless behaviour with significant consequences	20%	5%
	Deliberate behaviour	50%	10%
Second qualifying disclosure in these categories	Careless behaviour with significant consequences	30%	20%
	Deliberate behaviour	75%	55%
Third or subsequent qualifying disclosure in these categories	Careless behaviour with significant consequences	40%	40%
	Deliberate behaviour	100%	100%

It remains to be seen how the Irish tax authorities will apply the Code of Practice to transfer pricing cases. The authorities have clarified in Tax Briefing Issue 07 of 2010 that 'the quality of the supporting documentation will be a key factor in determining whether the adjustment should be regarded as correcting an innocent error or as being a technical adjustment'.

Resources available to the tax authorities

The Irish tax authorities do not have a dedicated transfer pricing unit. When transfer pricing issues have arisen, resources have been drawn from international tax specialists or the Large Cases Division of the Irish tax authorities. Going forward, only authorised officers designated in writing by the Irish tax authorities may make enquiries in relation to transfer pricing. The Irish tax authorities have yet to clarify who will be authorised officers, but they are expected to be inspectors within the Large Cases Division of the Irish tax authorities.

Use and availability of comparable information

Should an Irish company not have internal comparable data to support the arm's-length nature of its international related party transactions, it may be able to obtain data on the gross and net margins of comparable companies operating in Ireland by acquiring the annual returns of relevant companies from the Companies Registration Office.

All companies registered in Ireland are obliged to file an annual return with the Companies Registration Office, unless an exemption from filing applies. Depending on the size of the company, financial statements may be required to be filed with the annual return.

Risk transactions and industries

There are not considered to be particular related party transactions or industry sectors that could be regarded as facing a higher-than-normal risk of a transfer pricing enquiry from the Irish tax authorities.

To some extent, Irish taxpayers could be considered (indirectly) to be at a higher risk of a transfer pricing review should overseas tax authorities, which have developed extensive transfer pricing regulations, focus their attention on transactions or industries that include overseas affiliates of an Irish taxpayer.

Limitation of double taxation and competent authority proceedings

Irish companies normally contemplate competent authority proceedings in respect of transfer pricing adjustments imposed by overseas tax authorities on international related parties that trade with the Irish companies, rather than transfer pricing adjustments imposed by the Irish tax authorities.

Currently all of Ireland's tax treaties contain a mutual agreement procedure. The Irish tax authorities are willing to support requests for competent authority relief on application by Irish taxpayers, subject to the facts and circumstances of the cases coming within the provisions of the relevant double tax treaty.

It should also be noted that as a member of the European Union, Ireland is bound by the Code of Conduct to eliminate double taxation in the area of transfer pricing, approved by the EU Council of Finance and Economic Ministers on 7 December 2004. The Code of Conduct aims to ensure more effective and uniform application by EU member states of the 1990 Arbitration Convention (90/436/EEC), which was designed to deal with double taxation issues faced by taxpayers arising from transfer pricing adjustments.

Advance pricing agreements (APA)

Ireland does not have a formal APA procedure for Irish companies to agree prices with the Irish tax authorities for international related party transactions. However, the Irish tax authorities have been willing to negotiate and conclude bilateral advance pricing agreements with treaty partners, and they are generally willing to consider entering such negotiations once a case has been successfully accepted into the APA programme of the other jurisdiction. It remains to be seen whether Ireland will formalise its APA procedures in light of the recent introduction of the new transfer pricing rules.

It should also be noted that the Irish tax authorities have, upon request, provided inward investors with advance rulings on key tax issues relevant to the decision to establish operations in Ireland. Until recently, these advance rulings were generally provided on a company's qualification for Ireland's manufacturing relief. Of late, the key tax issue upon which taxpayers are requesting advance rulings from the Irish tax authorities is whether income from a particular activity would be regarded as trading income (taxed at 12.5%) or passive income (taxed at 25%).

In May 2003, the Irish tax authorities released a document titled *Guidance on opinions on classification of activities as trading*. This document was prepared in response to the growing number of advance opinions being requested of the Irish tax authorities on the appropriate classification of particular activities for taxation purposes. While its main purpose is to clarify the procedure for requesting an advance opinion, the document from the Irish tax authorities also provides significant practical guidance on the tax authorities' attitude about what constitutes a trading activity.

The practical guidance is found in a number of examples set out in the document. These examples are used by the Irish tax authorities to illustrate their thinking on three key issues discussed in the document:

- The notion that trading presupposes activity.
- The distinction between trading and investment.
- The importance of the role of the applicant company in a group structure.

It should be noted that the Irish tax authorities have chosen not to set threshold criteria (such as number of employees, value of tangible fixed assets, etc.) which, once met or exceeded, would automatically deem an activity to be considered a trade.

Liaison with customs authorities

It is understood that there is no liaison between the income tax authorities and the customs authorities, even though they are both under the same Board of Management and are controlled by the Minister for Finance.

Nevertheless, there is a significant overlap between the methods applied by the Customs Service to value a transaction between related parties and the methods contained in the OECD Guidelines to assess compliance with the arm's-length principle. Companies also must take care to ensure that any transfer pricing policies implemented are also appropriate from a customs perspective and vice versa.

OECD issues

Ireland is a member of the OECD, and the Irish tax authorities have publicly recognised that the OECD Guidelines are the internationally accepted standard for the allocation of profits among entities of a multinational. The new transfer pricing rules endorse the OECD Guidelines, and Part 35A should be construed in a manner that best ensures consistency with the OECD Guidelines.

Joint investigations

Under the terms of Ireland's tax treaties and the EU Mutual Assistance Directive, the Irish tax authorities can and do exchange information with treaty partners and fellow EU member states. Generally, Ireland's tax treaties also allow for communication between Ireland and the treaty partners for the purposes of implementing the provisions of the double tax treaty.

Thin capitalisation

There are no specific thin capitalisation rules in Ireland, but some provisions in the Irish tax legislation can deny a full deduction for interest payments in certain circumstances.

Interest payments to overseas affiliates may, depending on the location of the recipients, be reclassified as distributions in certain situations, and therefore would not be tax-deductible.

Other provisions apply to deny an interest deduction in circumstances where borrowings from a related party are used to acquire share capital from (or lend to) a company which immediately before the loan was connected with the borrower.

The reader is urged to consult with an Irish tax adviser concerning the application of the deemed distribution and restriction on deductibility of interest rules.

Management services

The new transfer pricing rules will apply to the provision of management services where those services represent an arrangement for the purposes of Part 35A as described previously. Where an Irish company is paying for management services, the general rules on deductible expenses will apply. Generally this means that a payment will be deductible for tax purposes where a company receives a benefit from the management services provided, once the payment is connected with the company's trade and was at an arm's-length price.

When a company is providing services, it should be remunerated for those services on an arm's-length basis and be seen to be generating income from the services provided to ensure a tax deduction is obtained for the costs it incurs in providing the services. This would usually be achieved by adding a profit element or mark-up to the cost of providing the services.