

## Minutes

### TALC Subcommittee 'BEPS Implementation' Meeting

Date 12 October 2020

Location & Time Skype Meeting 10.00 am

#### **Feedback received on draft transfer pricing TDM (Part 35A-01-01)**

There was a discussion on issues pertaining to the draft transfer pricing TDM (Part 35A-01-01) under the following headings:

#### ***Financial Transactions (accurate delineation, dealing with loans, quantum of debt etc.)***

- Revenue commenced the discussions by outlining that feedback had been received regarding the final paragraph in section 4.4.3 of the draft TDM. In particular, there was a query raised on whether taxpayers will require external evidence to defend the quantum of debt borrowed. Revenue clarified that the wording that is used in the draft TDM is that “companies could potentially...”. It is open to the taxpayer to take that approach should they wish. It is up to the taxpayer to outline and support their basis upon which a transaction is at arm’s length. Revenue clarified that the draft TDM refers to using internal and external information and therefore was not drafted to require an external quantum of debt benchmarking if this cannot be undertaken.
- Revenue outlined that feedback had been received on the wording included in the draft TDM on the OECD Guidance on Financial Transactions (published in February 2020) and queries had been raised on the application of the guidance; in particular, given that it was not yet implemented into Irish law. Revenue confirmed that while this guidance is not yet implemented into Irish law, the draft TDM outlines Revenue’s policy that the guidance will be considered best practice when considering transfer pricing issues associated with financial transactions. It reflects Revenue’s understanding of how the arm’s length principle should be applied to financial transactions. Revenue does not see anything in the OECD Guidance on Financial Transactions that conflicts with the 2017 OECD Transfer Pricing Guidelines or the application of the arm’s length principle.
- In terms of the re-characterisation/non-recognition provision contained in section 835C(5) TCA 1997, in response to some queries that had been raised in feedback, Revenue clarified that they are not proposing to vary their approach to or go any further to than that which is provided for in Chapter I, D.2. of the 2017 OECD Transfer Pricing Guidelines, which provides for exceptional circumstances. Revenue suggested that they could possibly add further wording in the TDM to clarify this point.
- In relation to pre-existing loans, practitioners raised concerns regarding the difficulties and challenges they foresee with providing information in terms of the retrospective/historical application. Practitioners mentioned that there may be limited availability of historical data. Revenue acknowledged the challenges on data retention; however, compliance with the new Part 35A is still an obligation of the taxpayer. There was no grandfathering. Revenue outlined that the relevant approach would be dependent on each individual company’s facts and circumstances (for example, their policy on retention of records). Revenue confirmed that if information is available, they would expect this information to be provided. However, in circumstances where information is not available, Revenue expect that the taxpayer provides information that is available and expects the taxpayer to confirm why relevant information may not be available. Revenue opined that they are aware that taxpayers are only obliged to keep information according to the statutory time limits. However, if relevant information is retained it should be provided or if it is no longer retained this should be confirmed/explained.

- Practitioners requested that the application of quantum of debt analysis should only apply to loans entered into after 1 January 2020. Revenue clarified that this would not be possible. Under the legislation all arrangements are in scope and there is no grandfathering.
- Section 4.4.3 of the draft TDM refers to the Article 9 of the OECD Model Tax Convention. Practitioners requested that the guidance be clear that tax treaty provisions are only relevant for tax treaty purposes and are not part of the interpretation or application of domestic law transfer pricing provisions. Revenue confirmed that they understood the point being raised; however, s835D(2)(b) TCA 1997 specifically refers to Article 9(1) of the OECD Model Tax Convention.
- There were a couple of points made by practitioners in respect of practical considerations with respect to debt capacity analysis. Revenue outlined that they have no objection to considering a borrower and its consolidated group (i.e. including its subsidiaries) as that would be considered by a third-party lender. However, Revenue stated that this would only take into account companies which it owns (in the same way the ownership of other assets would be considered). They also clarified that they do not intend to provide guidance on issues such as “comfort letters” or “implicit support” as it is very much related to the facts and circumstances of specific cases.
- In respect of historical or pre-existing loan arrangements, practitioners had requested that the TDM include specific and practical guidance regarding what might be considered as “reasonable efforts” for penalty protection purposes. Revenue stated that this is very much facts and circumstances dependant and their view is that it is already covered by the existing wording in the draft TDM.
- Also, on the quantum of debt, practitioners raised further specific cases and scenarios for Revenue to consider. Revenue confirmed that it cannot comment on specific examples and would not be in a position to provide more details in the TDM than that which had already been provided.
- Practitioners noted that in 2010 when transfer pricing rules were first introduced, they had understood that they did not contain thin capitalisation rules. Revenue outlined that, based on the current legislation, Revenue can examine the quantum of debt in addition to other factors including the interest rate and terms and conditions of the loan.

### **Documentation Requirements**

- In the feedback received, a request for a *de minimis* carve out threshold was requested by practitioners to reduce the burden of analysis and documentation required for pre-existing loan arrangements. Revenue confirmed that there is no *de minimis* carve out included in legislation in relation to pre-existing loans arrangements, so this is not possible. Practitioners raised the point that there is a *de minimis* carve out included for SME’s in relation to documentation requirements. Revenue confirmed that the different treatment for SME’s documentation is legislated for specifically in section 835F TCA 1997 if certain conditions are met. However, a carve out specifically for pre-existing loan arrangements is not legislated for in Part 35A TCA 1997.
- Questions were raised by practitioners regarding the obligation to reconcile transfer pricing documentation and the local file to financial accounts. Revenue outlined that seeing a transfer pricing policy in isolation without understanding how it is booked and reflected in the accounts is meaningless from a compliance perspective. Revenue confirmed that in cases where this is not possible, a “documentation penalty” would not apply so long as the taxpayer has prepared its documentation in line with the Annexes to the 2017 OECD Transfer Pricing Guidelines.

- In the feedback practitioners raised some queries on the company file simplification and a request was made to provide further details. Revenue stated that it is not possible to be more specific as it very much depended upon the specific facts and circumstances of specific cases. Revenue noted that compliance interventions will be carried out on a company level and it is necessary that the documentation is available to support the position taken by each individual company. Revenue clarified that taxpayers can use practical approaches to streamline the presentation of the consolidated country file where there are large numbers of similar entities but this would vary on their specific facts and circumstances.

### ***Penalties***

- Practitioners asked Revenue to expand on the views on the application of “technical adjustments” in the context of the draft TDM. Revenue confirmed that the application of technical adjustments is covered in the Code of Practice and they will not be commenting on its application specifically with regard to transfer pricing.

### ***Distributions***

- Revenue outlined that some feedback had been received seeking clarification as to whether the offset available under section 835H TCA 1997 would be available in respect of interest that is non-deductible arising from a debt capacity analysis (due to section 835C(7) TCA 1997). Revenue confirmed that s835C(7) TCA 1997 refers to amounts "treated as a distribution under any provision of the Tax Acts". An amount of interest adjusted under s835C TCA 1997 is not treated as a distribution under the Tax Acts by virtue of the operation of section 835C(2)(a).
- It had also been noted in some of the feedback that section 4.4.3 of the draft TDM states that excess amounts of debt (following a quantum of debt analysis) will be regarded as a contribution to equity but the TDM doesn't state that the interest will be regarded as a distribution for tax purposes. Revenue confirmed that the understanding was correct - where there is a transfer pricing adjustment to an interest expense under the transfer pricing rules, the transfer pricing rules themselves do not turn an interest expense into a distribution for tax purposes. Revenue stated that this point will be clarified in the updated TDM.

### ***Capital transactions/provisions***

- Practitioners requested clarification from Revenue on the documentation requirements in relation to a transaction, for example, where section 626B may apply. Practitioners had queried how taxpayers should evidence in practice their rationale for not preparing and maintaining transfer pricing documentation associated with an acquisition in anticipation of a transaction that has not yet happened i.e. being a subsequent disposal. Revenue confirmed that it is ultimately up to the taxpayer to weigh up how likely such a treatment would be and that it is a call for the taxpayer to make. If the taxpayer is uncertain then they should prepare and maintain appropriate documentation.
- Clarification had been requested on how taxpayers should evidence in practice that the transfer pricing amount would be higher in the case of an acquisition or lower in the case of a disposal (and thereby transfer pricing rules can be disapplied) without having some form of transfer pricing evidence or documentation. Revenue clarified that the TDM states that transfer pricing documentation requirements will not apply, it does not state that no documentation requirements apply. It is up to the taxpayer to maintain sufficient documentation to support the position taken by them. Revenue outlined as a general point, where a transaction is clearly well below the relevant threshold, the level of documentation required would be less than where a transaction is close to the threshold, where there would be an expectation of more detailed documentation to support the position taken.

## **Miscellaneous**

- Revenue noted that more examples were requested by practitioners in the recent feedback received. Revenue outlined that a lot of examples have been included to date in the draft TDM and there is a limit to the number of examples that can actually be covered in a TDM. Revenue also outlined that there are detailed examples included in the 2017 OECD Transfer Pricing Guidelines.

## **Section 835E**

- Revenue acknowledged that significant feedback had been received in respect of section 835E. The following areas were discussed:

### Background to the exclusion

Revenue commenced discussions on section 835E by providing background detail to the provision.

### Definition of 'relevant person' and 'qualifying relevant person'

Revenue acknowledged some of the points that had been made in the feedback in relation to the definitions of 'relevant person' and 'qualifying relevant person'. Revenue confirmed that they had sought to clarify the position in the draft TDM. In particular, Revenue confirmed that they didn't consider 'nothing' or a zero figure to be regarded as taken into account in the result of an arrangement.

### Relevant activities

In relation to 'relevant activities', in the context of section 835E, practitioners outlined their view that indirect uses of a loan, for example, could be within the scope of 'relevant activities' (as it may be used to fund activities that generate profits). They also outlined that the indirect aspect already included in the definition of 'qualifying relevant person' would imply that an indirect use is within the scope of the exclusion. Revenue confirmed that their view on this is set out in the draft guidance.

### Case V

It was pointed out that the current TDM in Appendix 1 was framed in a manner that was specific to trading circumstances but excluding Case V scenarios. Revenue confirmed that they are amenable to possibly extending the scope to cover certain Case V scenarios.

### Free use of property

In some of the feedback, the issue of the free use of property had been raised. Revenue asked practitioners in what circumstances this would arise. Practitioners noted that keeping property separate from a trading company is a prevalent structure from an SME perspective and the reasons for this are not for tax purposes. They confirmed that it doesn't tend to happen in multinational company structures.

### Holding Companies

Practitioners highlighted that the exclusion should apply in multi-tiered holding company structures. Revenue outlined that there was a limit on the number of tiers of holding companies that could come within the exclusion.

### Distributions

Practitioners raised concerns regarding the requirement to pay dividends where it was not possible e.g. due to Covid-19 circumstances. Revenue confirmed that the position would remain as per the draft TDM. However, they would be pragmatic in terms of the distribution requirements if such extenuating circumstances were to continue into the future and over a prolonged period of time.

**Action points**

Revenue confirmed that there will be an updated version of the TDM circulated in due course.

**Attendees of meeting of 12 October 2020:**

**CCAB – I:** Enda Faughnan, Maud Clear, Kevin Doyle, Warren Novis

**ITI:** David Fennell, Anne Gunnell, Stephen Ruane, Neil Casey,  
Kevin Norton

**Independent rep:** Sharon Burke

**Law Society:** Caroline Devlin, Andrew Quinn, Aidan Fahy

**Revenue:** Jeanette Doonan, John Quigley, Aidan O'Connor, John  
Bradley, Sheila Mullally, Audrey Bridgeman