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# Bilateral Advance Pricing Agreement Guidelines

A more recent version of this manual is available

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## Glossary of terms and abbreviations

Term	Meaning
APA	<p>Advance Pricing Agreement (also commonly referred to as Advance Pricing Arrangement) is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.<sup>1</sup></p> <p>References in these Bilateral Advance Pricing Agreement Guidelines to an “APA” refer to a bilateral APA unless otherwise specified.</p>
Arm’s length principle	<p>The international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. It is set out in Article 9 of the OECD Model Tax Convention as follows:</p> <p>“where conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly”.</p>
BEPS	Base Erosion and Profit Shifting
Compensating adjustment	An adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer’s opinion, an arm’s length price for a controlled transaction, even though this price differs from the amount actually charged between associated enterprises. This adjustment would be made before the tax return is filed. <sup>2</sup>
Critical assumption(s)	The assumption(s) on which the ability of the methodology to accurately reflect the arm’s length pricing of future transactions is based. <sup>3</sup>

<sup>1</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016), Glossary.

<sup>2</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016), Glossary.

<sup>3</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016), Annex to Chapter IV, paragraph 43.

MAP	Mutual Agreement Procedure
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
OECD Model Tax Convention	Model Tax Convention on Income and on Capital, Full Version (as it read on 15 July 2014)
PE	Permanent Establishment
TCA 1997	Taxes Consolidation Act 1997
Transfer Pricing Branch	Transfer Pricing Branch of Revenue's International Tax Division

A more recent version of this manual is available.

## PART 1 – INTRODUCTION

1. In October 2015, the OECD issued its final reports on a package of measures or ‘actions’ as part of the Base Erosion and Profit Shifting (“BEPS”) Project. The final report on Action 14 – *Making Dispute Resolution Mechanisms More Effective*, which was part of the final package of measures, contains a best practice recommendation that countries should implement bilateral advance pricing arrangement programmes.<sup>4</sup>
2. Recognising the Action 14 recommendation, as well as the need for greater certainty in relation to the taxation of cross-border transactions entered into by multinational enterprises (“MNEs”), Ireland decided to introduce a formal bilateral advance pricing agreement (“APA”) programme. Prior to the introduction of the formal programme, Ireland accepted requests for bilateral APAs on an *ad hoc* basis in situations where a double tax treaty partner has agreed to enter into a bilateral APA negotiation. The introduction of a formal programme provides certainty to taxpayers with respect to the process involved in applying for a bilateral APA and the ongoing reporting and administrative requirements once an APA has been entered into.
3. The purpose of this document – *Bilateral Advance Pricing Agreement Guidelines* (“the Guidelines”) – is to provide taxpayers with guidance on the operation of Ireland’s bilateral APA programme. The Guidelines will be updated as required.

## PART 2 – BILATERAL APA PROGRAMME OVERVIEW

4. Ireland’s bilateral APA programme is effective from 1 July 2016 and applies to bilateral APA applications made to Revenue on or after this date. Accordingly, the Guidelines do not apply with respect to (i) bilateral APAs which have been signed prior to 1 July 2016 and (ii) formal bilateral APA applications which have been submitted to Revenue before 1 July 2016 (but in respect of which an APA has not been concluded as of 1 July 2016).
5. The bilateral APA programme only applies to transfer pricing issues (including the attribution of profits to a permanent establishment (“PE”).
6. An application for a bilateral APA may be made by a company which is tax-resident in Ireland for the purpose of the relevant double tax treaty and also by a PE in Ireland of a non-resident company in accordance with the provisions of the relevant treaty.
7. The bilateral APA programme is intended to apply in respect of a transaction(s) where the transfer pricing issues involved are complex, e.g. there is significant doubt over the appropriate application of the arm’s length principle, or where, for any other reason, there would otherwise be a high likelihood of double taxation arising (in the absence of a bilateral APA).

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<sup>4</sup> *Action 14: 2015 Final Report – Making Dispute Resolution Mechanisms More Effective*, Best Practice 4, para. 48.

8. A bilateral APA provides certainty to taxpayers that, as long as the terms and conditions of the APA are satisfied, the transfer pricing issues covered by the APA will not be subject to audit adjustments by the tax authorities of either country which is party to the APA.
9. Ireland's bilateral APA programme is conducted within the legal framework of the double tax treaty which Ireland has entered into with the other jurisdiction concerned, i.e. there must be a double tax treaty in place in order for a bilateral APA application to be considered. APAs are conducted under the Mutual Agreement Procedure ("MAP") Article of the relevant treaty where the relevant enabling provision is present in the treaty.
10. The bilateral APA programme is administered by the Transfer Pricing Branch. Certain officers within this Branch are specifically authorised by Revenue to be an *authorised representative* for the purposes of being a competent authority under the terms of Ireland's double taxation agreements and conventions, i.e. the officers concerned have the authority to conclude bilateral APAs with Ireland's double tax treaty partners. The Transfer Pricing Branch also deals with requests from taxpayers for MAP assistance to resolve transfer pricing disputes with treaty partners.
11. The bilateral APA programme is a voluntary programme: Taxpayers can choose whether or not to enter into it. Revenue is committed to operating the programme on the basis of trust and mutual cooperation with the taxpayer and the other tax administration in order to ensure the efficient and fair processing of requests for an APA. Revenue expects that taxpayers considering a bilateral APA request will adopt a similar approach to the programme and regards taxpayer cooperation as critical to the success of the programme.
12. Revenue is under no obligation to accept a request from a taxpayer for a bilateral APA and may, following consultation with the competent authority of the foreign tax administration, terminate consideration of the APA request at any time prior to conclusion of the APA. Such termination is only likely to occur in exceptional circumstances. The taxpayer can also withdraw from the APA programme at any time prior to the conclusion of the APA.
13. Transparency is a fundamental aspect of the bilateral APA programme. Throughout the APA process, the taxpayer should ensure that both tax administrations are provided with the same information at the same time. This applies to *any* information submitted by the taxpayer to either tax administration as part of the APA process.
14. In negotiating bilateral APAs, Revenue considers that each case is unique and is based on a specific set of facts and circumstances. The APA terms agreed between Revenue and the foreign tax administration do not create a precedent for transactions involving the same taxpayers for any years other than those years included in the APA period (including any roll-back period) or for transactions involving taxpayers other than those specified in the APA.
15. Revenue will endeavour to conclude bilateral APA cases within 24 months of receipt of the formal bilateral APA application from the taxpayer. Concluding APAs within this 24

month period is dependent on a number of factors as outlined in Part 4 of the Guidelines.

16. Revenue does not charge an application fee for entry into the bilateral APA programme but applicants should note that, depending on the jurisdiction, a fee may be charged by the other tax administration involved in the negotiation of a bilateral APA.
17. The rules and procedures governing the bilateral APA process vary from country to country. For instances where a double tax treaty partner has requirements which differ from those set out in these Guidelines, Revenue is willing to consider applying those other requirements, if such application may be appropriate in the specific case.
18. **References in these Guidelines to an “APA” refer to a bilateral APA unless otherwise specified.**

## PART 3 – PURPOSE AND SCOPE OF APA

### *What is an APA?*

19. An APA is a binding agreement between tax administrations in two countries governing how *future* transactions between associated taxpayers established in their respective jurisdictions will be treated for tax purposes. An APA can cover a single transaction or a series of transactions.
20. The *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016)*<sup>5</sup> describe an Advance Pricing Arrangement as “an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.”<sup>6</sup>
21. The terms “Advance Pricing Agreement” and “Advance Pricing Arrangement” are used interchangeably in international commentary. For the purpose of these Guidelines, the term Advance Pricing Agreement is used.
22. The purpose of an APA is to prevent disputes between a tax administration and the taxpayer with respect to the specific transaction(s) covered by the APA and to avert the risk of double taxation or taxation not in accordance with the relevant double tax treaty. An APA provides taxpayers with certainty about their transfer pricing methodologies and may prevent examinations and litigation of major transfer pricing issues that would be costly and time consuming for both taxpayers and tax administrations. It also provides an opportunity for tax administrations and taxpayers to cooperate with each other in a non-adversarial environment.

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<sup>5</sup> On 23 May 2016, the OECD Council approved the amendments to the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* incorporating the 2015 BEPS reports on Actions 8-10 and Action 13.

<sup>6</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016)*, Glossary.

23. The final APA agreed between both tax administrations will typically specify the transaction(s) and period covered by the APA, the transfer pricing methodology and its application to the covered transaction(s) and the critical assumptions on which the APA is based.
24. Where the transfer pricing issues involve *more than* two tax jurisdictions, of which Ireland is one, Revenue will consider entering into a series of bilateral APAs as a way of dealing with such multilateral situations. If requested by the taxpayer, Revenue is also willing, in such cases, to consider conducting multilateral meetings with the other tax administrations – subject to the terms of the relevant double tax treaties and the agreement of the other tax administrations.
25. Revenue will not enter into unilateral APAs, i.e. an agreement solely between the taxpayer and Revenue and not involving another competent authority.
26. A request for an APA is separate from a request for an opinion/confirmation that the taxpayer's analysis of the tax consequences of a proposed transaction is acceptable to Revenue. Separate guidance is available on requesting such an opinion/confirmation<sup>7</sup>. For the avoidance of doubt, such guidance is not relevant to, and does not cover, requests for APAs.

### **Cases suitable for APA**

27. The option to apply for an APA will be open to all taxpayers. An application may be made by a taxpayer for an APA in respect of the following:
  - Transactions between separate business enterprises; and
  - Transactions between parts of the same business enterprise operating in different countries (e.g. between a head office and a PE or between two separate PEs), subject to the provisions of the relevant double tax treaty.
28. A case which would require determining whether or not a PE exists for tax purposes will not qualify for admission into the APA programme. However, where there is agreement between the taxpayer and both tax administrations that a PE does exist, the attribution of profit to that PE may be the subject of an APA (depending on its suitability as outlined below).
29. Prior to accepting an APA application, Revenue will consult with the other tax administration to establish whether they are prepared to enter into APA negotiations on the particular case.
30. The suitability of a transaction(s) for an APA will depend on the facts and circumstances of each particular case. In order for a request for an APA to be accepted, the transaction(s) covered in an APA application will need to be complex or involve a high likelihood of double taxation arising (in the absence of an APA).

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<sup>7</sup> Tax Briefing Issue 04 of May 2014 and *Guidelines on Revenue's Service to Practitioners and Business Taxpayers*

31. Some of the factors which Revenue will consider when deciding whether to accept a request for an APA are outlined below. These factors will be consistently applied for all taxpayers. The list is not exhaustive.

**Factors which are more likely to result in a request for an APA being accepted by Revenue**

- Significant doubt over the transfer pricing methodology to be used in applying the arm's length principle.
- There is a high likelihood of double taxation arising if there is no APA in place, e.g. the same transaction(s) has already been subject to MAP in respect of an earlier year.
- Taxpayer is applying a bespoke transfer pricing methodology to the transaction(s).
- Application of transfer pricing methodology is complex and/or requires complex calculations, e.g. certain profit split calculations.
- Reliable comparables are not readily available and/or significant and complex adjustments are required to the comparables.
- The transactions which are to be covered by the APA have already been entered into or are about to be entered into (i.e. are not hypothetical) and are not expected to change throughout the APA period.

**Factors which are more likely to result in a request for an APA being rejected by Revenue**

- The transactions are routine and there is unlikely to be significant doubt over the application of the appropriate transfer pricing methodology in determining the arm's length price.
- The transactions to be covered by the APA represent a small portion of the Irish entity's overall cross-border transactions.
- The transactions which are the subject of the APA appear to be part of a scheme or arrangement, the purpose of which or one of the purposes of which is the avoidance of tax or, alternatively, Revenue is of the view that the transaction may facilitate the avoidance of tax by a third party.
- The taxpayer is involved in a case with the Tax Appeals Commission or in court proceedings in respect of a matter which is related to the transactions covered by the APA.
- Where the APA request is rejected by the relevant double tax treaty partner, Revenue will also reject the request as a bilateral agreement will not be possible.

## APA term & roll-back

32. An APA will be granted in respect of a specific fixed period of time, typically between 3 and 5 years (excluding any roll-back years). Revenue is willing to consider other fixed periods subject to the agreement of the other tax administration. In its APA application, the taxpayer must propose a term to be covered by the APA.
33. In accordance with the BEPS Action 14<sup>8</sup>, Ireland will provide for the roll-back of APAs in appropriate cases. This will be subject to the applicable time limits of both countries which are party to the APA. Additionally, the relevant facts and circumstances in the roll-back period must be the same and this will be subject to verification by Revenue. Other factors which will be considered by Revenue include the following:
- Whether there are any ongoing audits or examinations in respect of the period(s) or transaction(s) which are to be covered by the roll-back; and
  - Whether there are any appeal or judicial proceedings under way in either jurisdiction in relation to the prior periods concerned.
34. In determining whether to grant a roll-back, the Transfer Pricing Branch will consult with the Revenue office which is responsible for dealing with the tax affairs of the taxpayer.

## PART 4 – APA PROCESS

35. The APA process is made up of a number of distinct stages as follows:
- (i) Pre-filing<sup>9</sup>;
  - (ii) Formal APA application;
  - (iii) Evaluation of APA application and negotiation of APA;
  - (iv) Formal Agreement; and
  - (v) Annual Reporting.
36. Revenue will endeavour to conclude APA cases within 24 months of receipt of the formal APA application from the taxpayer. This is dependent however on a number of factors such as the complexity of the case, the cooperation of the taxpayer and the number of rounds of negotiations required. To the extent that there are significant repeated delays by the taxpayer in providing the relevant information to Revenue, this may lead to Revenue terminating the APA process.
37. At any time up to the conclusion of the APA with the other tax administration, the taxpayer or Revenue may withdraw from the APA process. In the event that Revenue withdraws from the process, it will provide the taxpayer with its reasons for doing so. If

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<sup>8</sup> Action 14: 2015 Final Report – Making Dispute Resolution Mechanisms More Effective, section I, A, 2.7, paragraph 33.

<sup>9</sup> While these Guidelines, consistent with international usage in relation to APAs, refer to the “pre-filing” stage, for the avoidance of doubt this refers to the pre-application stage.

the taxpayer is dissatisfied with Revenue's decision to withdraw, it may seek a review as outlined in the following paragraph.

38. Apart from any other remedies available, where a taxpayer is dissatisfied with a decision made by Revenue in relation to its request for an APA, its APA application or any aspect of the APA, it is entitled to make a complaint and have the decision reviewed in accordance with Revenue's Complaint and Review Procedures.<sup>10</sup>

### **(i) Pre-filing**

39. At the pre-filing stage, a taxpayer or their agent can contact a member of the Transfer Pricing Branch on an informal basis to discuss any queries they have in relation to a potential APA application (see Part 7 for relevant contact details). Revenue encourages taxpayers to arrange a pre-filing meeting to discuss the case as our experience shows that this enhances the efficiency of the process.
40. The purpose of the pre-filing meeting is broadly to enable the parties establish whether an APA is appropriate. The meeting allows for a discussion of the taxpayer's circumstances and the particular issues that they would like to be considered under the APA, e.g. the parties involved, the transaction(s) and period to be covered, the proposed transfer pricing methodology (if decided upon), whether there are any existing related transfer pricing matters under enquiry from another tax administration. An indicative list of the items which Revenue would typically expect to be addressed at the pre-filing meeting is contained in Appendix 1.
41. The pre-filing meeting gives Revenue the opportunity to explain to the taxpayer how the APA process works, to identify any problems with the APA proposal at an early stage and to deal with any queries which the taxpayer may have. Following a pre-filing meeting, Revenue will normally be able to give an indication of whether it is likely to accept an application from a taxpayer for an APA.
42. If, following the pre-filing meeting, Revenue needs additional information to determine whether the taxpayer should make a formal application, it will request such information from the taxpayer.
43. Where Revenue believes that a case is not suitable for an APA, it will discuss this with the taxpayer. In the event that Revenue continues to believe that the case is not suitable for an APA, it will issue a letter to the taxpayer outlining the reasons. The taxpayer may seek to have the matter reviewed if it still wishes to be admitted into the programme (see paragraph 38).
44. Revenue strongly recommends that APA pre-filing meetings are conducted on a named basis. Recognizing international guidance that preliminary discussions *may* be conducted on an anonymous basis<sup>11</sup>, Revenue would be prepared, on an exceptional basis, to consider conducting pre-filing meetings on an anonymous basis. However,

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<sup>10</sup> *Revenue Complaint and Review Procedures Leaflet – CS4*

<sup>11</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2016)*, Annex to Chapter IV, paragraph 32; *Guidelines for Advance Pricing Agreements within the EU (COM (2007) 71 final)*, para. 22, as published by the Commission of the European Communities.

Revenue will not admit a taxpayer into the APA programme until the identity of the taxpayer is known.

### **(ii) Formal APA application**

45. The formal application should be submitted by the taxpayer before the beginning of the first accounting period to be covered by the APA. Revenue may, depending on the circumstances, be prepared to accept applications after this time.
46. Three hard copies of the APA application should be sent to the Director of the Transfer Pricing Branch at the address specified in Part 7.
47. An indicative list of information which should form part of the APA application is included at Appendix 2. This list is not exhaustive. Broadly, the information includes an executive summary, details on the company background, industry analysis, the covered transactions, functional analysis, economic analysis (covering the proposed transfer pricing methodology, search for comparables and any adjustments thereto) and details of any related audit enquiries. Revenue is prepared to adopt a flexible approach to facilitate the taxpayer in its submission where the information requirements of both tax administrations differ. This should be discussed with Revenue prior to submission of the APA application.
48. The information supplied as part of the APA application must be correct and complete in all material respects, and must be in one of the official languages of Ireland (English or Irish). Where detailed calculations are included in the application these should, as far as possible, be submitted electronically. The secure *Revenue File Transfer System* may be used for this purpose. This should be discussed with Revenue at the pre-filing meeting. The taxpayer should ensure that the information provided in the APA application to Revenue is also provided to the other tax administration at the same time.
49. Revenue will consult with the foreign tax administration prior to admitting a taxpayer into the programme. Where Revenue is satisfied that a particular transaction(s) is suitable for an APA, it will issue an acceptance letter to the taxpayer confirming that it is prepared to engage in negotiations with the competent authority of the foreign tax administration.
50. Similar to the pre-filing stage, in cases where Revenue denies entry into the APA programme, it will issue a letter to the taxpayer outlining the reasons why the case is not considered suitable for an APA. The taxpayer may seek to have the matter reviewed if it still wishes to be admitted into the programme (see paragraph 38).
51. All of the information submitted by the taxpayer throughout the APA process will be retained by Revenue. Therefore, original documents should not be submitted.

### ***(iii) Evaluation of APA application and negotiation of APA***

52. This stage of the APA process has two distinct phases. The first phase involves the evaluation by Revenue of the application submitted by the taxpayer. The second phase involves Revenue negotiating the terms and conditions of the APA with the competent authority of the foreign tax administration.
53. Revenue will perform a detailed evaluation of the application and, if necessary, may seek clarifications from the taxpayer on the information submitted or may request additional information. The taxpayer should respond to such requests for additional information in a timely manner, generally within 60 days of the request. Revenue is willing to extend the time in certain circumstances where it may take longer for the taxpayer to prepare the information requested, e.g. for additional benchmarking analysis.
54. Revenue may request a site visit and/or conduct interviews with appropriate personnel from the taxpayer's organisation in order to get a better understanding of the case. Where a taxpayer wishes to have joint meetings with representatives of both tax administrations in order to share relevant information, Revenue is generally prepared to participate in such meetings.
55. The evaluation phase allows Revenue to formulate its view of the transfer pricing methodology, comparables, APA term (including any roll-back), critical assumptions and ultimately the appropriate arm's length pricing for the transaction(s). This may take the form of a position paper issued to the other tax administration. The position paper will be subject to the confidentiality restrictions of the relevant double tax treaty.
56. Following evaluation of the APA application, Revenue will enter into negotiations with the competent authority of the foreign tax administration. The negotiation phase allows both competent authorities to resolve any differences which arise between the competent authorities with the objective that one agreed set of terms and conditions can be provided to the taxpayer. The taxpayer will not be a party to these negotiations. Revenue will keep the taxpayer informed of upcoming negotiations with the other competent authority and of the outcome of such negotiations.
57. In the event that Revenue is unable to reach agreement with the competent authority of the foreign tax administration, Revenue will notify the taxpayer within 30 days of the competent authority meeting, setting out the reasons why agreement could not be reached. Revenue is not obliged to engage in further discussions with the other competent authority where Revenue or the other competent authority believes that agreement cannot be reached.

### ***(iv) Formal agreement***

58. Where agreement is reached between Revenue and the competent authority of the foreign tax administration on the terms and conditions of an APA, Revenue will notify the taxpayer in writing of the agreed terms and conditions within 30 days of the

competent authority meeting. Revenue will request the taxpayer to respond in writing within 30 days of receipt of the letter from Revenue to confirm whether they accept these terms.

59. It may be the case that the terms of the APA agreed between Revenue and the other competent authority differ from what the taxpayer requested. Where the taxpayer does not agree with the APA terms agreed between both competent authorities, Revenue is willing to consult with the taxpayer and the other competent authority to see whether any modification can be made to the terms and conditions so that a final set of terms and conditions can be achieved which are agreeable to the taxpayer, Revenue and the other competent authority. In the event that no agreement is reached, the taxpayer is not obliged to accept the terms and may withdraw from the APA process. In this case, the taxpayer should confirm in writing to Revenue that it is withdrawing from the APA process. Revenue will then liaise with the other competent authority in order to close the case.
60. Where the taxpayer is willing to accept the terms of the APA agreed between Revenue and the competent authority of the foreign tax administration, it should confirm this in writing to Revenue. Revenue will then liaise with the other competent authority in order to finalise the APA.
61. While not an exhaustive list, set out below are the terms that are typically agreed between the two competent authorities:
- Nature of the covered transaction(s);
  - Term for which the APA will be effective (including any roll-back period);
  - Transfer Pricing Methodology used;
  - Compensating adjustments;
  - Critical assumptions; and
  - Taxpayer annual reporting requirements.
62. The Irish taxpayer entity will be requested to sign an agreement with Revenue. The agreement will set out the terms of the APA as agreed between Revenue and the competent authority of the foreign tax administration. The agreement represents a commitment by the taxpayer to adhere to the terms of the APA. The agreement should be signed by an authorised signatory, i.e. a person who has the authority within the MNE to commit the taxpayer to the terms of the APA.

### **(v) Annual reporting**

63. The taxpayer must comply with the annual reporting requirements specified in the APA. The Irish entity which is engaged in transactions covered by the APA must file an annual report with the Revenue office specified in the APA, and with the Transfer Pricing Branch, by the due date for filing of the annual corporate income tax return of that entity.
64. As part of its annual report, the taxpayer must provide the information specified in the APA. Typically, this will include the following:

- A statement of whether the taxpayer has complied with the terms and conditions of the APA (including the critical assumptions);
  - A statement of whether the critical assumptions underlying the transfer pricing methodology remained valid throughout the period covered by the report;
  - Financial data for the period comparing the actual results for the covered transaction(s) with the targeted arm's length result agreed in the APA;
  - Details of any compensating adjustments made to stay within the targeted arm's length range agreed in the APA;
  - Details of any pending requests to modify, renew or cancel the APA; and
  - Identification and correction of any incorrect or incomplete information which has been submitted to Revenue which comes to the taxpayer's attention prior to submission of the annual report and which has, or could have, a material impact on the APA.
65. If Revenue has queries in relation to the APA following receipt of the annual report, it may request the taxpayer to provide additional information or clarification.
66. Where the taxpayer provides additional information (i.e. over and above what is specified in these Guidelines) to the foreign tax administration as part of its APA annual reporting in that jurisdiction, the taxpayer should notify the Director of the Transfer Pricing Branch that such additional information is being provided. Revenue may request, depending on the nature of the information, that the taxpayer provide a copy, or where relevant an officially translated copy, of this information to Revenue.
67. In the event that a taxpayer no longer applies the terms of the APA, e.g. due to a change in business model or other restructuring within the business, the taxpayer should notify Revenue of this within 60 days from the date on which the APA is no longer applied.

## PART 5 – ADMINISTERING AN APA

### *Audit*

68. For those transactions which are covered under the terms of the APA, the extent of any audit would be limited, under normal circumstances, to determining (i) the taxpayer's compliance with the terms and conditions of the APA and (ii) whether the circumstances and critical assumptions necessary for the continued application of the chosen transfer pricing methodology continue to exist. All other transactions not covered by the APA may be audited by Revenue in the normal manner in accordance with the provisions of the Taxes Consolidation Act 1997 ("TCA 1997") and the Code of Practice for Revenue audits<sup>12</sup>.

<sup>12</sup> *Code of Practice for Revenue Audit and other Compliance Interventions* (as updated in November 2015)

## **Consequences of non-compliance**

69. In the event that a taxpayer does not comply with the terms and conditions of an APA, Revenue may, at its discretion, consult with the other competent authority on the appropriate action to take. This may include, but is not limited to, the following:

- (i) Revoking or Cancelling the APA
- (ii) Revising the APA

### **(i) Revoking or Cancelling the APA**

70. Revoking an APA means that the terms of an APA are no longer effective for any part of the period specified in the APA. Where Revenue revokes an APA, the taxpayer's position will be the same as if the APA had never been agreed. Revocation will be retroactive to the first day of the period covered by the APA.

71. Cancelling an APA means that the terms of an APA are no longer effective for a period commencing after the start of the period covered by the APA. Where Revenue cancels an APA, the effective date of cancellation will be determined by reference to the event that led to the cancellation. The taxpayer's position, for the period from the effective date of cancellation, will be the same as if the APA had never been agreed.

72. Before Revenue revokes or cancels an APA, it will first consult the competent authority of the foreign tax administration and will also discuss the case with the taxpayer. The taxpayer will be given an opportunity to respond before Revenue takes a final decision on revoking or cancelling the APA.

73. In the event that Revenue revokes or cancels an APA, Revenue will notify the taxpayer and the competent authority of the foreign tax administration, specifying the reason(s) for the revocation or cancellation.

74. Revenue may revoke or cancel an APA where it is established that any of the following situations have arisen:

- There has been a misrepresentation, mistake or omission in the information submitted by the taxpayer, whether as part of the formal APA application, any further information submitted as part of the APA application or negotiation process, the annual reports or any other related information;
- For the full period or part of the period of the APA, the participating taxpayer(s) failed to comply with a material term or condition of the APA; or
- The tax administration in the foreign jurisdiction has revoked or cancelled the APA.

Additionally, an APA can be cancelled if:

- One or more of the critical assumptions proved to be materially incorrect;
- There was a material departure from one or more of the critical assumptions;

- There has been a change in tax law or in a provision of a double tax treaty that is materially relevant to the APA and it has not been possible to revise the APA to take account of the changed circumstances; or
  - There has been a failure to conclude a revised APA in a situation where matters have arisen which would otherwise require the revision of an APA (see paragraphs 77 – 80 below).
75. Where an APA is revoked or cancelled by the tax administration of the foreign jurisdiction, the taxpayer must notify the Director of the Transfer Pricing Branch and the Revenue office that deals with their tax affairs without delay and, in any event, no later than 30 days of revocation or cancellation.
76. Revenue may waive cancellation of the APA if the taxpayer can show reasonable cause, to the satisfaction of Revenue, and if the taxpayer agrees to make any adjustment proposed by Revenue to correct the misrepresentation, mistake, omission or non-compliance, or take into account the changes in critical assumptions, tax law or treaty provisions relevant to the APA.

### **(ii) Revising the APA**

77. Revenue, with the agreement of the other competent authority, may seek to revise an APA rather than cancelling it. This may occur where, for example –
- There has been a change in any of the critical assumptions or in the terms and conditions of the APA; or
  - There has been a change in law and/or a change in a double tax treaty that impacts the Irish tax treatment of transactions covered by the APA.
78. Where a taxpayer believes that a revision may be required to an APA, it should notify the Director of Revenue's Transfer Pricing Branch within 30 days of becoming aware of the need for such revision. The taxpayer should specify the reasons for the proposed revision. Revenue will then liaise with the taxpayer and the other competent authority.
79. Where agreement cannot be reached between the two competent authorities on a revised APA, or the taxpayer does not accept the terms of a revised APA negotiated between the two competent authorities, Revenue will cancel the existing APA.
80. Where agreement is reached between the two competent authorities on a revision to an APA and this revision is accepted by the taxpayer, the revised APA will indicate the date from which the revision is effective and from which the terms of the original APA are no longer effective.

### **Renewing an APA**

81. Where a taxpayer wishes to seek a renewal of an APA, it is encouraged to make early contact with Revenue's Transfer Pricing Branch to discuss this.
82. Revenue may request the taxpayer to make a submission outlining any changes to the material facts and circumstances and critical assumptions from the original APA, and

also addressing the continued appropriateness or otherwise of the transfer pricing methodology employed, e.g. new benchmarking, further interviews, financial information or forecasts may be required.

83. The renewal of an APA is not automatic. It is dependent on a number of factors including the consent of both competent authorities and on the taxpayer demonstrating that the critical assumptions contained in the original APA continue to apply.
84. Where the transfer pricing issues differ from the original APA, Revenue may request the taxpayer to submit an application for a new APA.

## **PART 6 – CONFIDENTIALITY & PROTECTION OF INFORMATION**

85. The information submitted to Revenue as part of the APA process, e.g. the APA application, the annual reports confirming the taxpayer's compliance with the APA terms and any other information submitted to Revenue by the taxpayer in connection with the APA application or the APA, will be treated as confidential in accordance with the provisions of the TCA 1997.
86. The exchange of information between Revenue and the competent authority of the treaty partner country in relation to an APA shall be carried out in accordance with the provisions of the relevant double tax treaty. Information exchanged under Ireland's double tax treaties is confidential and may only be used and disclosed in accordance with the provisions of the treaty.
87. Revenue may make public certain aggregated statistics in relation to the operation of its APA programme. Each year, Revenue publishes statistics in its Annual Report and also provides statistics to the European Commission covering, for example, the number of APAs in force, the number of APA requests received during the year and the number of APAs granted during the year. This information is subsequently made publicly available by the European Commission. The statistics are reported in a form that does not identify taxpayers or their confidential business information.

### ***Council Directive (EU) 2015/2376 of 8 December 2015***

88. In December 2015, a European Union ("EU") Directive was adopted which requires certain information to be exchanged between Member States of the EU on advance cross-border rulings and advance pricing arrangements issued by Member States.
89. Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ("the Directive") provides for the mandatory automatic exchange of information on advance cross-border rulings and advance pricing arrangements. Under the Directive, Revenue is obliged to automatically exchange basic information in relation to advance pricing arrangements with the other Member States of the EU and to communicate a subset of this information to the European Commission. A list of the information to be

exchanged is set out in Article 1(3) of the Directive (which inserts a new Article 8a into Directive 2011/16/EU<sup>13</sup>) and is also contained in Appendix 3 of these Guidelines. Member States are required to apply the provisions of the Directive with effect from 1 January 2017. Following the exchange of such information, a Member State may request Revenue to provide additional information including the full text of the APA.

90. Under the Directive, where Revenue enters into an APA with a non-EU country under a double tax treaty and the provisions of that treaty do not permit disclosure of the information received under the treaty to a third-party country, Ireland is still obliged to exchange certain information. The information to be exchanged with other Member States and the European Commission shall be based on the taxpayer's request that led to the issuance of the APA rather than the APA itself.

## PART 7 – CONTACT DETAILS

91. Submission of all information related to an APA application should be made in three hard copies and addressed to:

Director, Transfer Pricing Branch  
International Tax Division  
Office of the Revenue Commissioners  
New Treasury Building, Dublin Castle  
D02 F342  
Dublin 2, Ireland

92. For any queries in relation to the operation of the APA programme, please contact the Transfer Pricing Branch on +353 1 858 9714 or +353 1 858 9377.

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<sup>13</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

**Appendix 1: Indicative list of items to be discussed at APA pre-filing meeting**

1. High level overview of the MNE's business and corporate structure.
2. Parties to the APA and the jurisdictions involved.
3. Nature of the transactions to be covered under the APA, years to be covered (including whether a roll-back is being requested), and the amounts involved.
4. Proposed Transfer Pricing Methodology (if decided upon).
5. High level overview of any transfer pricing audits related to the transactions which are the subject of the APA discussions.
6. Any other information which taxpayer considers important and relevant to the APA application.

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## **Appendix 2: Indicative list of information to be included as part of APA application**

(Note – this list is not exhaustive and the taxpayer should provide such further information as it considers to be relevant to the APA application)

- 1. Cover Letter requesting APA**
- 2. Executive Summary**
  - a. Taxpayer entities involved.
  - b. Covered transactions.
  - c. Proposed APA term (indicating if a roll-back is requested and specifying the years).
  - d. Proposed transfer pricing methodology.
  - e. Legal basis for APA application (relevant double tax treaty and provisions thereof).
  - f. Estimated value (in Euro) of the covered transactions over the proposed APA term.
  - g. Reason why taxpayer believes an APA is appropriate for the transactions.
- 3. Company background information**
  - a. Overview of the organisation, including its background, history, ownership structure, operations, operating environment and markets.
  - b. Overview of the relevant taxpayer group entities (including their tax residency status and how they fit into the corporate structure of the group).
  - c. Financial year-ends and functional currency for all the parties to the covered transaction(s).
  - d. Total consolidated revenue for the group for the most recent financial year for which this information is available.
- 4. Industry analysis**
  - a. A description of the industry, including industry-specific practices.
  - b. Taxpayer's position within the industry, including market share and main competitors.
- 5. Overview of Covered Transactions**
  - a. Description of transaction flows.
  - b. Overview of relevant legal agreements governing the covered transaction(s).
- 6. Functional Analysis**
  - a. A description of the functions performed, assets owned/employed and risks assumed by each of the parties to the covered transaction(s).
  - b. Characterisation of the parties to the covered transaction(s).
- 7. Economic Analysis**
  - a. Selection of transfer pricing methodology (including critical assumptions made in selecting that method, reasons for rejecting the methods which were not selected).
  - b. Search for comparables (including a description of the search and screening processes and the rationale for accepting the comparables selected and for rejecting those not selected).
  - c. Description of adjustments made to the comparables selected.
  - d. Financial information for the selected comparables.

- e. Summary of the application of the proposed transfer pricing methodology to each of the parties to the covered transaction(s).

**8. Financial information**

- a. Financial statements for the previous three years for each taxpayer entity which is a party to the covered transaction(s).
- b. Financial projections for each of the taxpayer entities (at an entity level) for the proposed period of the APA.
- c. Financial projections for the each of the taxpayer entities for the proposed covered transaction(s) for the period of the APA.

**9. Audit**

- a. Details of any tax authority enquiries relevant to the issues in the APA application.
- b. Confirmation of when the time limit on tax authority audit enquiries expires in each jurisdiction for the roll-back years proposed to be covered by the APA.

**10. Other**

A copy of any previous or existing rulings or advance pricing agreements (whether unilateral, bilateral or multilateral) issued by other Tax Authorities, which relate to similar transaction(s) to those covered by the APA application.

**11. Legal Agreements**

Copy of all relevant legal agreements.

### Appendix 3: Information to be automatically exchanged under Council Directive (EU) 2015/2376 of 8 December 2015

Article 1(3) of Council Directive (EU) 2015/2376 of 8 December 2015 (“the Directive”) inserts a new Article 8a into Directive 2011/16/EU<sup>14</sup>. Article 8a(6) outlines the information that is to be automatically exchanged by a Member State under the Directive and includes the following (to the extent that it relates to advance pricing arrangements)<sup>15</sup>:

- a. Identification of the person, other than a natural person, and, where appropriate, the group of persons to which it belongs;
- b. Summary of the content of the advance pricing arrangement, including a description of the relevant business activities or transaction(s) or series of transactions without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process or of information which would be contrary to public policy;
- c. Dates of issuance, amendment or renewal of the advance pricing arrangement;
- d. The start date of the period of validity of the advance pricing arrangement, if specified;
- e. The end date of the period of validity of the advance pricing arrangement, if specified;
- f. Type of advance pricing arrangement;
- g. Amount of the transaction or series of transactions if such amount is referred to in the advance pricing arrangement;
- h. Description of the set of criteria used for determination of the transfer pricing or the transfer price itself;
- i. Identification of the method used for determination of the transfer pricing or the transfer price itself;
- j. Identification of the other Member States, if any, likely to be concerned by the advance pricing arrangement;
- k. Identification of any person, other than a natural person, in the other Member State, if any, likely to be affected by the advance pricing arrangement (indicating to which Member States the affected persons are linked); and
- l. An indication of whether the information being communicated is based on the advance pricing arrangement itself or on the request for the advance pricing arrangement (see Note 1 below).

The Directive further provides that the information referred to under points a, b, h and k shall not be communicated to the European Commission.

#### Note 1

In cases where Revenue enters into an APA with a non-EU country and the provisions of the relevant double tax treaty do not permit disclosure of the information received under the treaty to a third party country, the information to be exchanged with other Member States

<sup>14</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

<sup>15</sup> Article 1(4) of the Directive, which adds a new paragraph to Article 20 of Directive 2011/16/EU, provides for the adoption of a standard form to be used for the exchange of information on advance cross-border rulings and advance pricing arrangements. The standard form will contain the components for exchange of the information listed in Article 8a(6) but may also contain other related fields linked to these components that are necessary to achieve the objectives of Article 8a.

and the EU Commission shall be based on the taxpayer's request that led to the issuance of the APA rather than on the APA itself.

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