Reporting obligation under Polish mandatory disclosure rules

The legislative process introducing mandatory disclosure rules (MDR) into the Polish tax system has been finalized (publication in the Journal of Laws). Ministry of Finance initiated public consultations with the aim to issue Guidelines in support of new rules

On 23 November 2018 the Act amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Tax and several other acts of 23 October 2018 (draft bill no. 2860), introducing i.a. mandatory reporting rules was published in the Journal of Laws (finalization of the legislative process).

The purpose and aim of the reporting obligation

Ministry of Finance has been planning the introduction of rules imposing the reporting obligations since October 2017, when the tax consultations in respect of MDR were initiated. In May 2018 the Council of the European Union adopted the Directive introducing the obligation to disclose cross-border tax planning arrangements (DAC6).

During initial discussions, in particular at the EU level, it was stressed that the reporting should be applicable only to the potentially aggressive tax planning arrangements aiming at tax avoidance. However the reporting obligation arising from provisions of the DAC6, as well as Polish regulations, is not directly linked with the aggressive tax planning/tax avoidance elements. Consequently, the reporting obligation is to be applied broadly to all tax arrangements fulfilling hallmarks and conditions specified in the Polish law.

The main assumptions of the DAC6 have been presented in our Tax Alert dated June 2018.

Even though the Polish Act constitutes an implementation of DAC6, both regulations differ significantly, i.a. the Polish Act extends the reporting obligation to other arrangements than cross-border tax arrangements within the meaning of DAC6 (e.g. domestic arrangements) and significantly accelerates the entry into force date (1 January 2019 instead of 1 July 2020 as laid down in the DAC6).

The scope of reporting obligation

Tax arrangements subject to the reporting obligation may be divided into:

1. cross-border arrangements within the meaning of DAC6; and
2. other arrangements, including domestic arrangements, as well as other cross-border arrangements.

Ad. 1. The reporting obligation is dependent on fulfilling the cross-border criteria that is when an arrangement (i.e. action or a group of related actions with at least one party being a taxpayer or which may result in/are expected to result in an obligation to pay or lack of obligation to pay tax) concerns at least two jurisdictions and certain additional conditions are met. Cross-border test will not be met if an arrangement concerns solely VAT, excise or customs duties.

Furthermore, in order for the arrangements to be reportable they must include:

- at least one generic hallmark defined in the article 86a paragraph 1 point 6 letters a-h of the Tax Ordinance (e.g. arrangements based on largely standardized documentation) and satisfy a 'main benefit test'; or
- at least one of the specific hallmarks.

The main benefit test is satisfied when, taking into account all relevant facts and circumstances, a person acting reasonably, driven by legitimate purposes other than achieving a tax benefit could justifiably choose an alternative route (way of dealing/action), not resulting in obtaining the tax benefit reasonably expected or arising from the arrangement (i.e. arrangement in question), and the said tax benefit constitutes the main or one of the main benefits, which the person is expecting to obtain vis-à-vis such arrangement.

Ad. 2. Other arrangements subject to reporting do not have to meet the cross-border test, i.e. both cross-border as well as domestic arrangements may fall in this group. They must, however include:

- at least one of the generic hallmarks (not limited to letters a-h as above) together with the main benefit test; or
- at least one of the specific hallmarks (analogously to the case of cross-border arrangement within the meaning of DAC6); or
• at least one of the other specific hallmarks laid down in the Article 86a § 1 point 1 of the Tax Ordinance (entirely new category of hallmarks as compared to the DAC6).

Arrangements other than cross-border arrangements within the meaning of DAC6 are reportable only when the “qualified taxpayer” test is satisfied, that is in when:

• revenues, deductible costs or value of assets (within the meaning of Polish Accounting Act) of the user (i.e. taxpayer) exceed in the current or previous financial year EUR 10 million; or
• the arrangement concerns assets or rights having FMV exceeding EUR 2.5 million; or
• the user (taxpayer) is related (within the meaning of Polish CIT/PIT provisions) to a person that meets the above thresholds.

**Persons subject to the reporting obligation**

Subject to the reporting obligation are:

• **promoter**, i.e. any person that designs, markets, makes available, implements or manages the implementation of an arrangement;

• **supporter**, i.e. any person that (having regard the required duty of care applicable) undertakes to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or supervising the implementation of an arrangement;

• **user (taxpayer)**, i.e. any person to whom the arrangement is made available, for whom such arrangement is implemented or who is ready to it or has taken the first step in such implementation.

In principle, the primary reporting obligation lies with the promoter.

The user (taxpayer) will generally be obliged to report the arrangement if the promoter relies on the professional privilege exemption, or in the event no promoter is involved (arrangement designed in house).

**The scope of disclosed information**

The scope of reportable information is broad and includes i.a.:

• identification of the user (taxpayer);
• a summary of the arrangement;
• details of the business activity to which the arrangement is applicable;
• detailed description of the arrangement;
• value of the tax benefit (if applicable).

Professional privilege exemption does not apply to standardized (marketable) arrangements (arrangements that could be implemented by or made available to more than one user (taxpayer) without the need to substantially change its key assumptions, in particular concerning the undertaken or planned steps/actions).

Reporting will be made electronically using XML format (similarly to SAF reporting).

The user (taxpayer) that, during a settlement period, performs a step/action that constitutes a part of an arrangement or obtains tax benefit as a result thereof will be obliged to submit a statement regarding the above within the deadline for the submission of a tax return. Such statement will have to be signed by all members of the taxpayer’s management board.

**Reporting deadline**

The reporting obligation must be fulfilled within 30 days, counting from:

• the day after the reportable tax arrangement is made available, or
• the day after the reportable tax arrangement is made ready for implementation; or
• the day when then first step in its implementation had been made, whichever occurs first.

The foregoing is applicable both to the promoter and user.

**Penalties**

Non-fulfilment of reporting obligation in the correct manner will constitute a criminal offence on the basis of Polish Fiscal Penal Code and will be subject to fine of up to 720 daily rates (currently approx. PLN 20 million).

Additionally, promoters as well as persons employing them or actually paying them remuneration, whose revenues or costs in the previous financial year exceeded PLN 8 million, will be obliged to implement an internal MDR procedure.

Failure to meet this obligation may result in an administrative fine of up to PLN 10 million.

**Entry into force and transitional period**

Polish MDR regulations will enter into force on 1 January 2019.

Covered by the obligation will be also:

• cross-border tax arrangements within the meaning of DAC6 provided that the first step of the arrangement was implemented after 25 June 2018; and

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• arrangements other than cross-border tax arrangements within the meaning of DAC6 provided that the first step of the arrangement was implemented after 1 November 2018.

The deadline for reporting the above arrangements will be:
• 6 months from the date of entry of the Act into force for promoters,
• 9 months from the date of entry of the Act into force for users (taxpayers).

Public consultations
The Ministry of Finance announced the intention of issuing interpretation guidelines in respect of MDR provisions. This will be preceded by public consultations which will be open for all interested parties until 9 December 2018.

The Ministry plans to organize at least one meeting with the public during the consultation process.

KPMG Poland intends to participate in the meetings and to present its official written standpoint re MDR guidelines.

Consequences for taxpayers and promoters
Having the above in mind both promoters as well as taxpayers should take active approach in anticipation of entry into force of the MDR rules. In many instances, it will be the taxpayers, and not the promoters (advisors), that will be obliged to report the arrangements. In order to address potential risks stemming from the MDR provisions proper internal processes should be designed and initiated which would evaluate the scope of future reporting obligations.

Please contact us if you would like to obtain more information on the aforementioned changes or discuss their potential impact for your organization.

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