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In this Issue:

- New withholding tax obligations from 1 January 2019: how to act with the due care?
- The amended beneficial owner statement means not only new obligations for tax remitters, but also several practical issues in the application of WHT regulations
- A WHT remitter's statement as a 'simple' way to take advantage of preferential WHT rules
- Clearance opinion as a proper alternative solution for the remitter's statement regarding select types of payments
- Once WHT is collected: the specific procedure for tax refunds

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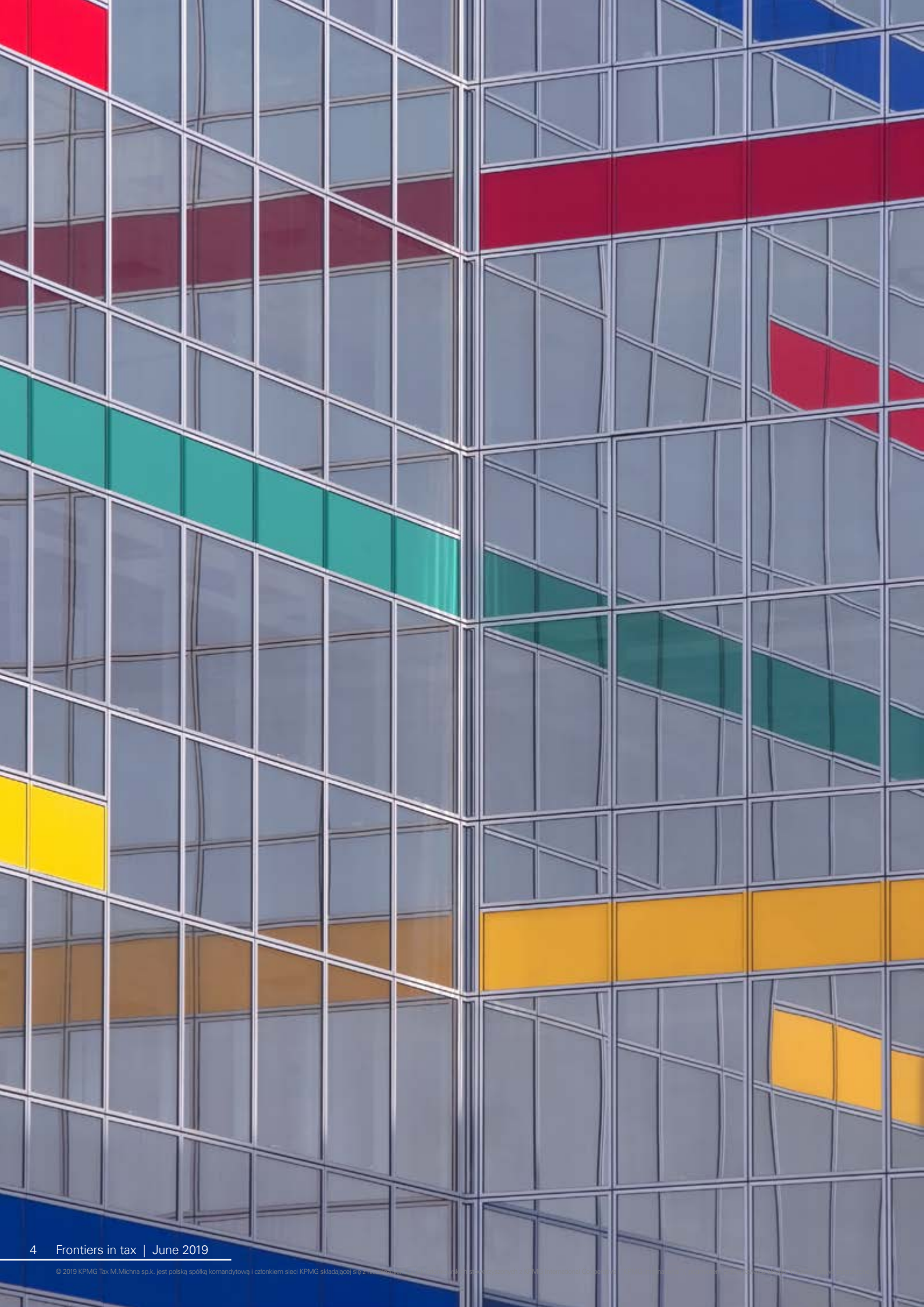
In this Issue



Introduction

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As announced by representatives of Poland's Ministry of Finance, work on other major amendments to the CIT Act is not expected in 2019, which means that 2020 should be a somewhat quieter period for corporate taxpayers. This is certainly good news: two full years – the present and the subsequent – is still too short a time for an in-depth analysis and comprehensive implementation of all the changes the legislator made taxpayers face with the amendment of the latter half of 2018, which they are presently trying their best to learn and adapt to.

We are reluctant to try to formulate a political opinion on solutions already adopted. In order to avoid considering their diplomatic quality, let us stick to the business issues. As is the case with conducting business operations, creating a state's financial policy is comparable to a game – tough and intractable at times, particularly in the international context. What we have in mind is, basically, shrewdness and artfulness: the features without which becoming successful in business is hard to achieve. These characteristics are no less important when it comes to fighting for investors and for positioning the economy as a space that fosters business operations, which helps create a beneficial image of the country as a preferred jurisdiction to invest and grow capital. Just take a look at the more or less recent events in the realm of international tax law: while the trend for fighting against aggressive tax planning is quite evident, apparently not everybody is enthusiastic about it, rather, they profess to be the leading advocates of change. A well-informed question can now be posed, why has the United States not joined the Multilateral Instrument (MLI), one of the fruits yielded from the BEPS initiative? You do not have to be Machiavelli and your real-life conduct does not have to be so different from what you declare in the international arena. Speaking of the Polish MDR regulations, whose scope is much broader than what Directive DAC 6 provides, and taking special note of the pace at which they have been implemented, it is worth observing that you do not have to simultaneously be a Stakhanovite of sorts. In our opinion, the fiscal services and the legislator in this country should keep a more reasonable balance among complying with international requirements, protecting local taxpayers and attracting investment.

Things look similar as far as withholding tax is concerned. The Polish legislator's actions appear internally inconsistent. On the one hand, a Polish Investment Zone has been created, development of local R&D activities promoted, along with placement and development of industrial property in Poland (with some very interesting Innovation Box solutions implemented). On the other hand, investors are facing difficulties when withdrawing their invested resources. It is common knowledge that interest and dividends are the simplest mechanisms in this respect. The new regulations, which drastically modify the existing rules of WHT collection, hit these very mechanisms in the first place.

Assessing these most recent changes, we may say 'Thank you, top-of-the-class, we can do without you.' Such is the title of a book by the Polish psychologist and author Jacek Santorski, and it well renders the sentiments shared by most taxpayers in respect to the new regulations. For one thing, Polish taxpayers are much astonished with the sophistication and finesse of these regulations (there are very few comparable ones indeed); for another, hardly anyone would sympathise with them.

This publication is meant to show our readers, in a possibly clear and practical fashion, the intricacies related to the amendments and modifications to the collection of WHT. Let us remark that at the moment this volume went to press, the relevant explanations of the Minister of Finance were not published yet, not even in a draft form. We should hope that a number of our doubts will soon disappear, once these explanations are published. And, let us expect that the black scenarios will be replaced by the in dubio pro tributario interpretation.

New withholding tax obligations from 1 January 2019: how to act with the due care?

As of 1 January 2019, WHT tax remitters are required to act with 'due care', when applying the reduced WHT rate, WHT exemption or not remitting WHT (under specific provisions of the CIT Act or relevant double tax treaties). The due care obligation applies to all payments (regardless of the amount i.e. regardless of the PLN 2,000,000 threshold, above which WHT must be collected at the standard rate set out in the CIT Act) subject to WHT according to the amendments to the CIT Act. As the term 'due care' is not defined in the CIT Act, tax remitters may find it difficult to comply with the new obligation in terms of interpretation and applying it in practice.

Reasonable verification requirements for WHT non collection or application of WHT reduced rates

The amended section 26(1) of the CIT Act requires from WHT remitters to exercise due care, taking into account nature and scale of their business activities, when verifying whether they meet the statutory requirements for applying WHT rate lower than the standard WHT rate. In accordance with the amended provisions, the degree of due care depends on two factors only - nature and scale of WHT remitter's business. This means that measures taken by the WHT remitter should be proportionate. Consequently, in particular WHT remitters acting on large-scale should adapt their internal procedures of verification of requirements to apply WHT reduced rates.

When defining the due care standard, it is worth to refer to other tax regulations. In particular, in the area of VAT, it is an established view based on a large number of court cases that the measures taken to comply with the due care obligation should be reasonable. This means that the tax authorities should verify whether the taxpayer took all measures that can reasonably be expected under the circumstances. On the grounds of WHT, it is justified to assume that WHT remitter acts with due care if he takes reasonable and possible measures to verify the recipient of a payment subject to WHT, as well as the terms of the payment. Such reasonable measures should be defined in advance, and performed in advance. The standard of due care should be regarded as stricter if the payment is made to a related recipient.

On the other hand, the regulations on the prevention of money laundering and terrorism financing (AML) require institutions that make payments to take reasonable steps to verify the ultimate beneficial owner and capital structure of the recipient of the payment. Similarly to the AML regulations, it would be appropriate for WHT remitters to set up an internal procedure for verifying the terms of payments, including documentation, and to delegate duties related to WHT to competent employees.

Understanding business reasons

WHT regulations require acting with due care when verifying the requirements for application of WHT exemption, WHT reduced rate or not collecting WHT. Verification of conditions should not only be based on the provisions dealing with withholding tax directly, i.e. the provisions on the subject of taxation, the status of the recipient of the payment and the withholding tax rates, but cover facts and circumstances as well.

In the case of payments subject to WHT, tax authorities may apply the General Anti-Avoidance Rules (GAAR) or Specific Anti Avoidance Rules (SAARs). Before making a payment subject to WHT, the tax remitter should eliminate the risk of application of anti-abusive rules

> Consequently, in particular WHT remitters acting on large-scale should adapt their internal procedures of verification of requirements to apply WHT reduced rates.

by tax authorities. Therefore, when making a payment subject to WHT, the WHT remitter should know and understand the business reasons for the transaction in respect to which the payment is made, as well as the ownership/capital structure of the payment recipient.

Liability of the tax remitter for not collecting WHT

According to Article 30 of the Tax Ordinance, the tax remitter is liable for the uncollected WHT or for the WHT it has collected but not paid to the tax authorities. This rule does not apply if the WHT remitter's failure to collect the tax was not due to the remitter's fault. However, we underline that the WHT remitter's liability cannot be eliminated if, for example, the taxpayer and WHT remitter are related parties. This means that the WHT remitter should exercise a special degree of due care when making payments to its related parties. Therefore, as it is not possible for the WHT remitter to transfer his liability to the taxpayer that is the WHT remitter's related party, it is necessary for the WHT remitter not only to obtain but also to verify the data and documents received from the taxpayer to be able to benefit from a WHT exemption, a reduced WHT rate or WHT non collection.

The law provides for severe penalties for failure to exercise due care when verifying the requirements for application of WHT exemption, reduced WHT rate or WHT non collection. The WHT remitter risks payment of the standard WHT rates as set in the CIT Act (most often 20% or 19%), plus late-payment interest. Moreover, the WHT remitter may have to pay additional penalty under the Tax Ordinance (known as the "additional tax liability"), which is most often 10% of WHT base, i.e. the payment subject to withholding tax. Regardless of the penalties provided for in the CIT Act and the Tax Ordinance, individuals responsible for withholding tax may be subject to high penalties under the Penal Fiscal Code.

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The amended beneficial owner statement means not only new obligations for tax remitters, but also several practical issues in the application of WHT regulations.

The new definition contains additional requirements to be met for a person or entity to be regarded as the beneficial owner of a payment. Before the amended regulations became effective on 1 January 2019, the recipient of a payment was regarded as the beneficial owner of the payment if it was determined that the payment was made to the recipient for their benefit and that they were not acting as an intermediary, representative, trustee or other person obliged to transfer all or part of the payment to another entity.

In accordance with the present definition of beneficial owner, the paying entity is also required to examine the financial situation of the recipient of the payment, which includes what is referred to as the 'substance', i.e. whether the recipient is actually engaged in business activities in the country of establishment. There are a few practical implications to the new requirements imposed on payers.

In accordance with the new definition of beneficial owner, which became effective on 1 January 2019, the recipient of a payment may be regarded as the beneficial owner of the payment if they meet all of the following criteria:

a) they receive the payment for their own benefit, can independently decide on its use and bear the economic risk related to the loss of this amount or part thereof;

b) they are not an intermediary, representative, trustee or other entity legally or effectively obliged to transfer all or part of the payment to another entity;

c) they conduct real economic activity in their country of their registered officeseat in the case of payments received in connection with the business activity conducted, within the meaning of the provisions on controlled foreign corporations (CFCs).

Two preferences, two statements

In respect of WHT, which normally applies to passive income, there are two basic sources of tax preferences:

- so called "participation exemptions", where no WHT must be paid if certain requirements are met, including the requirement regarding capital links between the counterparties. These exemptions are provided for in the CIT Act, following the implementation of certain EU directives (Section 21(3) of the CIT Act for royalties and interest, and Section 22(4) for dividend payments);

- reduced rates provided for in **double tax treaties**.

Under the OECD Model Tax Convention and bilateral double tax treaties ("**DTT**s"), one of the measures to prevent what is referred to as treaty shopping (the practice of structuring an international transactions or operations in a way that allows to take advantage of a particular tax treaty) is the beneficial owner clause. In respect of passive income i.e. dividends, interest and royalties (Articles 10, 11 and 12 of the Model Convention), the application of a reduced WHT rate provided for in by the DTT in the source country is conditional upon the recipient of a payment being regarded as the beneficial owner of the payment.

The term "beneficial owner" is not defined in the Model Convention, however, the definition of this term has been developed by practice based on (a) the Commentary on the Model Tax Convention and (b) decisions of the Court of Justice of the European Union (CJEU). In practice, the definition of beneficial owner established under the Model Convention is more favourable (broader) than the new definition contained in the CIT Act, as the former focuses on the recipient's freedom to decide on the use of the received payment.

Application of the new definition

The change of the definition of beneficial owner becomes particularly important in light of the change of the rules of the WHT collection effective from 1 January 2019. The newly introduced requirement of due care and the collection of WHT on the standard rate (with the option to claim a refund of the collected tax) after exceeding the threshold of PLN 2,000,000 in payments to the same taxpayer, together with the amended definition of beneficial owner, practically means that a WHT remitter is required to examine the business substance of its foreign counterparty and its status as the beneficial owner of the payments received (in particular, to exclude the possibility that the recipient is only an intermediary).

After exceeding the threshold of PLN 2,000,000 in payments to the same entity, it will be possible to benefit from preferential rules of collecting WHT on interest, royalties and dividends, if the remitter submits a statement confirming, among other things, that the foreign taxpayer has all the documents required to apply the WHT exemption. After the verification of taxpayer by the WHT remitter, the remitter has no knowledge justifying the assumption that there are circumstances that would exclude the possibility of applying a reduced WHT rate, an exemption or non-collection of tax, resulting from specific provisions of law or DTTs.

For the purposes of the statement, the WHT remitter is required to verify compliance with, in particular, the requirements specifically defined for the application of a particular preference. This means that the WHT remitter has to verify whether the recipient may be regarded as the beneficial owner of interest and royalties that benefit from a participation exemption. This verification must include all the requirements contained in the definition of a beneficial owner set out in the CIT Act, which includes an examination of the recipient's business substance.

It is, however, unclear whether this requirement should apply to the payment of dividends or fees for intangible services, regardless of the basis of the preference applied.

If a tax preference is to be applied under a DTT, the WHT remitter, in principle, will be required to verify whether the beneficial owner requirements are met only if the DTT contains a beneficial ownership clause. It is important to note at this point that such a clause will, in principle, not apply in the case of a contract for the supply of intangible services (e.g. such management or advisory services). Although these are subject to WHT under the CITAct, they are regarded as business gains not subject to WHT under the DTTs. There are certain arguments in support of the view that a Polish WHT remitter, when making a statement regarding beneficial owner status of a recipient of the payment, should rely on the definition of beneficial owner that is based on the Commentary on the Model Tax Convention and the CJEU's decisions, rather than on the Polish statutory definition. This is because (a) international treaties take priority over domestic law and (b) there are no formal grounds in the CIT Act that make it conditional for the application of preferences under DTTs upon the fulfilment of the requirements contained

in the Polish statutory definition of beneficial owner. It is, however, questionable whether tax authorities would accept such arguments and whether they would require that the beneficial owner requirement must be verified and satisfied in respect of all payments subject to WHT under the CIT Act.

In the above cases, the responsibility for verifying the extent of the recipient's freedom to use a payment received from a WHT remitter and for verifying the business substance of that recipient will, in principle, lie with the WHT remitter. It is important to note that a entity that has made a false statement faces a financial penalty equal to 10% of the payment subject to WHT, as well as personal penalties, i.e. as an individual, for persons making a false statement.

The obligation to verify whether the recipient of a payment meets the requirements of the beneficial owner may prevent the application of any tax preferences in cases where it is difficult or impossible to identify the recipient, e.g. in the cases of cash pooling arrangements. Practical implications may occur also if a WHT remitter knows (or should know by acting with due care) that the recipient of a payment (e.g. interest or a payment for services) from the agent transfers the payment to another entity without a mark-up. The new provisions do not make it clear whether it is permitted to apply the preferences provided for a direct relationship between the payer (a WHT remitter) and the final recipient (i.e. with no intermediary), or whether it is necessary, in each case, to apply the standard WHT rate set out in the CIT Act (usually 20% or 19%).

The problem of DTTs that do not contain a beneficial ownership clause

Some DTTs do not contain a beneficial ownership clause, in which case preferential treatment of payments is not conditional upon the recipient's right to decide how the payment received is used. The participation exemptions and preferences available under DTTs are not competitive with each other, which means that a taxpayer that is not eligible to benefit from the former, maybe eligible to benefit from the latter, or vice versa. It may seem a better choice, in certain situations, to apply a participation exemption rather than a preference under a DTT, if the treaty provides for the collection of withholding tax in the source country. In particular, in the case of royalties, the above may reduce the risk of making a false statement on the satisfaction of the requirements for the application of a WHT preference and, therefore, the risk of the WHT remitter having to pay a penalty. As regards the choice of the legal basis and the extent to which the recipient's status should be verified, it is always advisable to consult a tax professional.

Irrespective of the above arguments and questions, it is important for a WHT remitter to ensure that verifying the status of the recipient of payments is part of the remitter's standard internal procedures, as such verification is crucial for the remitter to meet the acting with due care requirement laid down in the new regulations.

> The term "beneficial owner" is not defined in the Model Convention, however, the definition of this term has been developed by practice based on (a) the Commentary on the Model Tax Convention and (b) decisions of the Court of Justice of the European Union (CJEU).

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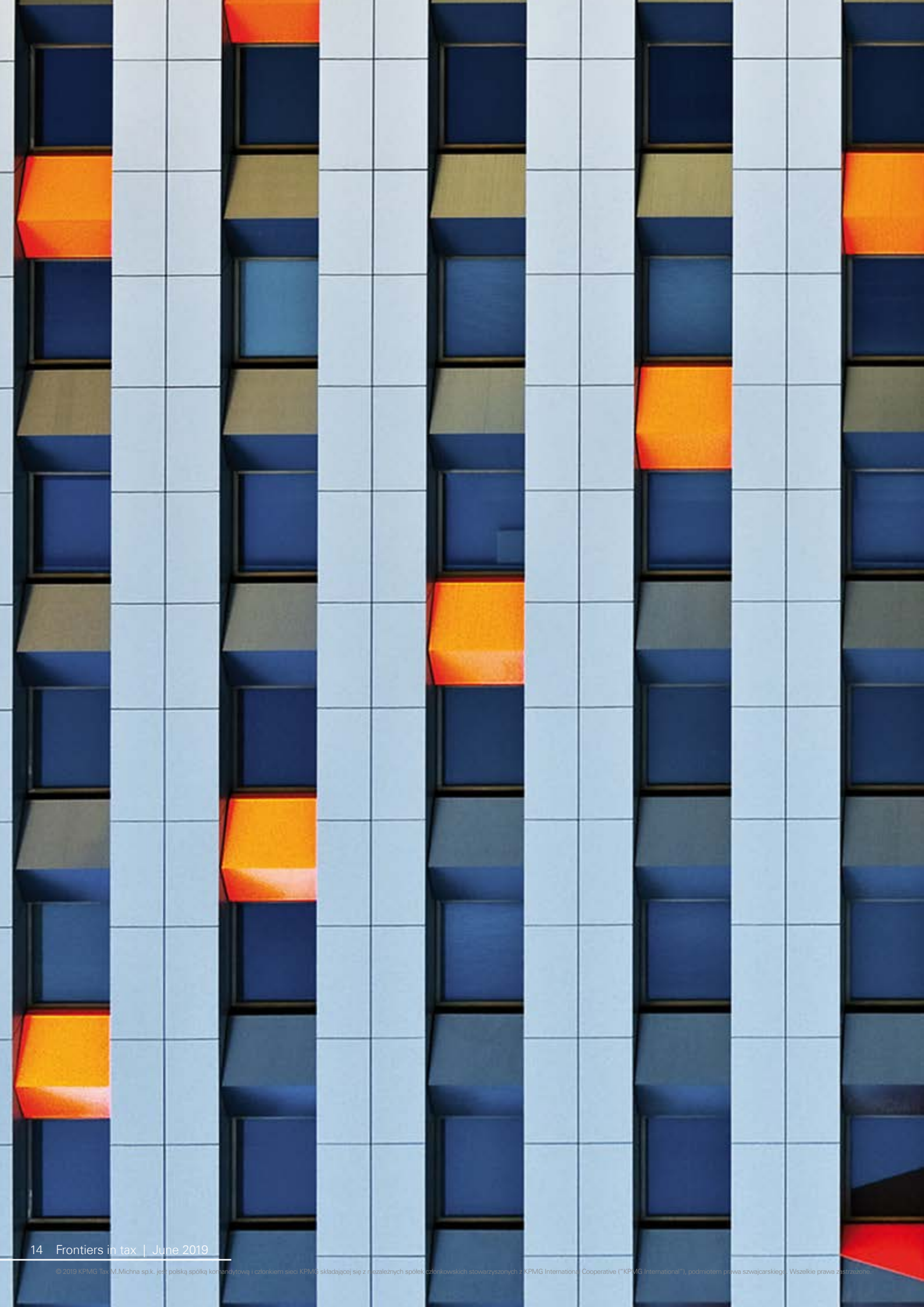

A WHT remitter's statement as a 'simple' way to take advantage of preferential WHT rules

In any of the cases in which the total amount of payments made by a Polish WHT remitter to the same taxpayer in accordance with Section 21(2) and (22(1) of the CIT Act exceeds PLN 2,000,000 in a tax year, it is not always a requirement for him to collect WHT calculated at the standard rates set out in Polish tax regulations. The Polish law provides two options for which preferential tax terms may be applied. One of the options requires the WHT remitter to submit an appropriate statement to the tax authorities (in the CIT Act, this statement is provided for in Section 26(7a) and subsequent sections).

The text of the statement and submission requirements

The 'tax WHT remitter's statement' is provided for in relation to payments in respect of which an WHT exemption from WHT, a reduced rate or WHT non collection may apply (under specific provisions of the CIT Act or relevant double tax treaties). The purpose of the statement is to confirm that the WHT remitter has the documents required by tax regulations to benefit from preferential WHT rules under specific provisions of the CIT Act or relevant double tax treaties and that the WHT remitter is unaware of any circumstances that would exclude the application of preferential WHT rules in the case at hand. The statement must be prepared in electronic format and its logical structure must be consistent with that defined in the Public Information Bulletin (WH-OSC form). The person responsible for submitting the statement is the manager of the WHT remitter under the meaning of the Polish Accounting Act (generally this is understood to mean the member of the management board). The statement must be submitted to the tax office for the taxpayer (the recipient of the payment) no later than on the date of payment (although the standard forms on the collection, or non-collection, of the tax need not be filed until the following month). It is necessary to stress that if the WHT remitter is a company with a multi-member board, the statement must be signed by each member personally (not only those members who are engaged in the WHT remitter's financial or tax matters). It is not permitted to authorise another person to sign the statement.

Validity of the statement

It is also important to note that this statement is deemed to be valid until the last day of the second month following the month in which it was made (and submitted). If a WHT remitter makes further payments to the same taxpayer once the statement is submitted, the remitter may benefit from the preferential rules throughout the validity period of the statement. After that period, the WHT remitter must submit the same statement again.

Verifying documents and information

It may seem that submitting the statement by way of a WHT remitter is an easy way to be eligible for preferential tax rules. It needs to

> The shift of the full liability for making an accurate statement to the WHT remitter and any person acting on behalf of the WHT remitter was expected to act as a deterrent to taxpayers tempted to take advantage of the 'statement' option excessively.

be stressed, however, that the submission of the statement must be preceded by a careful examination in search of evidence of any factors or circumstances that may prevent the application of a reduced rate, an exemption or WHT non collection under general or specific provisions of double tax treaties (cf. *New withholding tax obligations from 1 January 2019: how to act with the due care?*). The amended provisions of tax law do not contain any standard rules and/or methods for such examinations, which may increase the risk of tax authorities challenging the accuracy of such statements. It is, however, unquestionable that such examinations should be carried out with due care and in accordance with the established views of legal scholars, market practices and decided court cases (e.g. regarding the status of the beneficial owner of a payment or the conduct of genuine business activities).

Liability for the submission of a statement subsequently challenged by tax authorities

In the context of the above considerations, it is important to remember that both the Polish Penal Fiscal Code and tax regulations provide for a number of penalties. The person making a statement on behalf of a taxpayer is criminally liable for any inaccuracies in the statement. Under the Polish Penal Fiscal Code, that person may be subject to a financial penalty of 720 "daily rates" and/or imprisonment. Furthermore, the Tax Ordinance authorises the tax authorities to assess whether to apply an additional tax liability equal to 10% of WHT base in respect of which the WHT remitter applied a reduced rate or collected no tax (this percentage may be doubled in certain situations). The shift of the full liability for making an accurate statement to the WHT remitter and any person acting on behalf of the WHT remitter was expected to act as a deterrent to taxpayers tempted to take advantage of the 'statement' option excessively. In practice, however, this shift of liability may discourage WHT remitters from using this option. On the one hand, WHT remitters are required to take special care before making the statement. On the other, they may feel insecure or concerned about the possibility of tax authorities imposing statutory penalties on them.

Summary

In accordance with the document explaining the reasons for the government's proposal to introduce the changes discussed above, the idea behind the 'statement' option is to simplify WHT accounting between WHT remitters and payment recipients whose business relations are based on trust and who know that they meet the requirements for the application of preferential tax rules. However, given the extensive scope of the examination on the part of the WHT remitter, as well as the potential penalties, the WHT remitter should, before making the statement, examine all the information and documents received from its foreign counterparty and consult a tax adviser with any questions or concerns.

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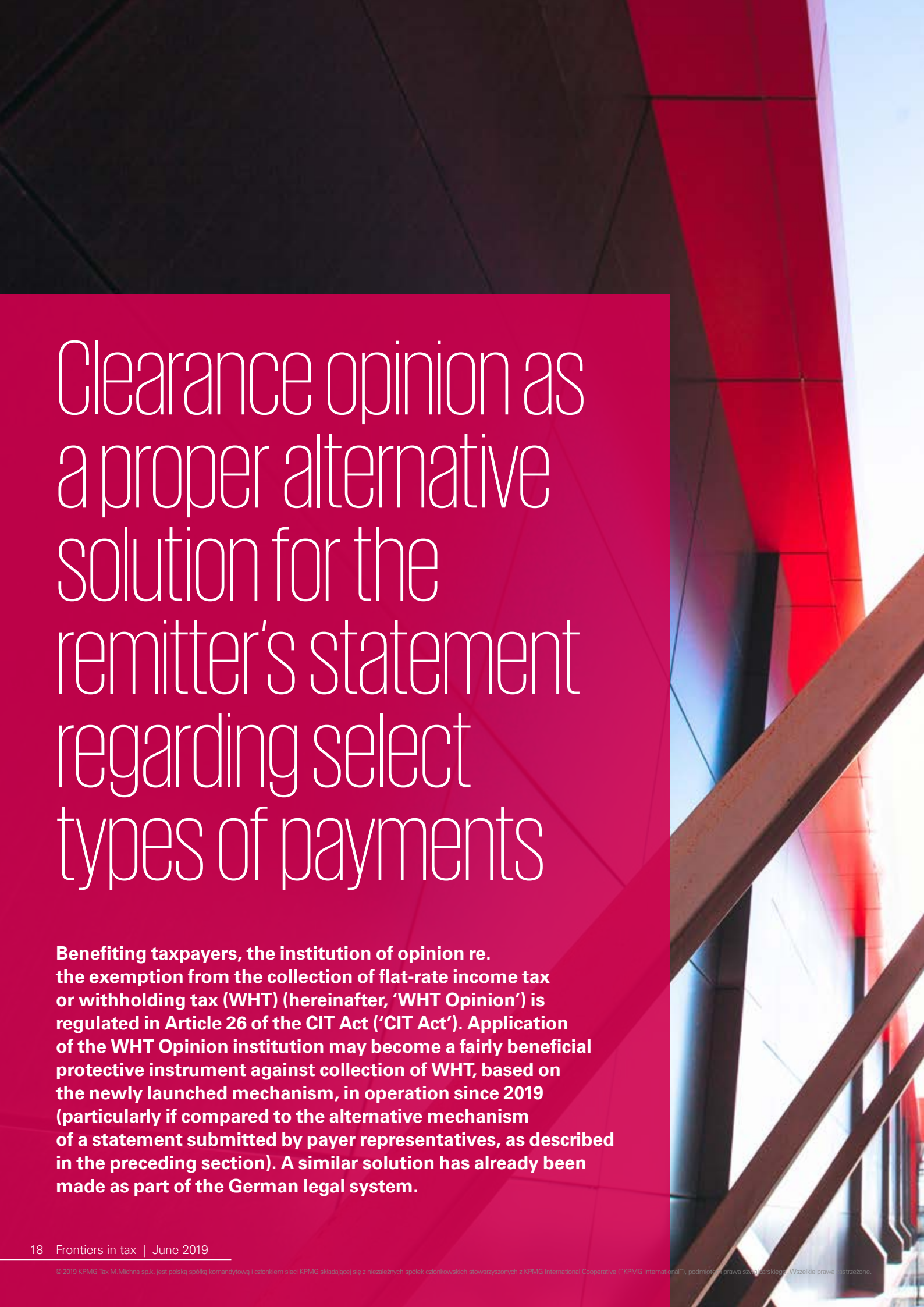

Clearance opinion as a proper alternative solution for the remitter's statement regarding select types of payments

Benefiting taxpayers, the institution of opinion re. the exemption from the collection of flat-rate income tax or withholding tax (WHT) (hereinafter, 'WHT Opinion') is regulated in Article 26 of the CIT Act ('CIT Act'). Application of the WHT Opinion institution may become a fairly beneficial protective instrument against collection of WHT, based on the newly launched mechanism, in operation since 2019 (particularly if compared to the alternative mechanism of a statement submitted by payer representatives, as described in the preceding section). A similar solution has already been made as part of the German legal system.

Payments and entities eligible to receive WHT Opinion

Consideration has to be given to that WHT Opinion can only be received in respect of a limited catalogue of payments, royalties, dividends, and other selected revenue/income from share in profits of legal persons benefiting from so-called participation exemptions implemented in the CIT Act (primarily, Art. 21, clause 3 and Art. 22, clause 4) under the relevant EU Directives. In respect of a number of payments, such as intangible services which are treated as subject to WHT under the CIT Act and, in light of most of the double taxation treaties, as company profits (not subject to WHT), no application for WHT Opinion is possible.

The application for issuance of WHT Opinion is submitted by the (i) taxpayer who, with the amounts receivable obtained, has earned revenue subject to WHT; or (ii) remitter, if under obligation to bear the economic burden of paying WHT. Thus, only in the event that the agreement giving rise to the payments contains a so-called gross-up clause, the WHT opinion is requested by the remitter. In any other case, the possibility of obtaining a WHT Opinion is addressed to the taxpayer (in most cases, a foreign entity to which the amount receivable is paid).

Requirements for application for WHT Opinion

To take advantage of the WHT Opinion institution, the applicant has to comply with a series of requirements. Their fulfilment is based on reliable documentation submitted and a meticulously prepared application for the tax authority. In this context, it is key that comprehensive analysis be made at the preparatory stage, so that the tax authority, which has the right to refuse to issue the opinion, may grant the application a positive outcome. The procedure for obtaining the opinion has several stages as directed by the CIT Act.

In drafting the application, the starting point is to give evidence that there is an indisputable basis for exemption from WHT. Analysis is then applied to the conditions set forth in the CIT Act with respect, inter alia, to the tax residence of the payer and the recipient of the amount receivable, the holding of the appropriate capital share and of the beneficial owner status.

At the application preparation stage, it is no less important to verify whether the taxpayer (usually not a Polish tax resident) who is subject to the tax obligation, actually conducts business operations in the country where their registered office is located. At this point, the point of reference is the verification criteria which is listed in the CIT Act provisions regarding taxation on controlled foreign companies/corporations, their practical application being determined by the tax rulings and decisions of administrative courts.

Special attention should also be paid to the potential risks in the field of tax abuse, such as the use of entities with an undocumented tax history, newly-established, or registered in jurisdictions considered to apply harmful tax competition. At the application preparation stage, the entire factual and legal structure within which the WHT exemption would be expected to be applied should be verified for its real character, in order to exclude the option to apply the general or specific anti-avoidance rule.

Practical considerations

No less importantly, the application for WHT Opinion is to be submitted for each title separately. The above analysis regarding the premises upon which the issuance of WHT Opinion may be denied should therefore be employed with each particular title based whereupon the receivables subject to WHT are paid.

When preparing the application, it is required that the attached documentation correspond

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To take advantage of the WHT Opinion institution, the applicant has to comply with a series of requirements. Their fulfilment is based on reliable documentation submitted and a meticulously prepared application for the tax authority.

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with the facts. The application form includes an Applicant's statement confirming that the facts presented reflect the reality and the documentation attached is compliant with the respective original copies. Submitting a statement means that an untrue content of the application will result in the applicant's liability under the Fiscal Penal Code.

In this context, in-depth analysis carried out prior to submitting the application for WHT Opinion is definitely recommendable.

Moreover, it is worth pointing to the fact that the application for an opinion regarding the application of a WHT exemption submitted by the taxpayer [WH-WOZ], contains a field for the NIP (Tax Identification Number) identifier. Consequently, the WHT taxpayer applying for the opinion ought to obtain and indicate the Polish NIP number.

Protective power

Designed for those entities subject to WHT, WHT Opinion constitutes in practice a multidimensional instrument whose use calls for expert analysis. However, insofar as the facts related to the payments made have not been essentially altered, the Opinion shall retain protective power for the applicant within thirty-six (36) months of its issuance.

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Once WHT is collected: the specific procedure for tax refunds

One of the key amendments brought into effect as of the beginning of 2019 as part of the new regulations on the WHT refers to the specific procedure for the refund of WHT as laid down in the (newly added) Article 28(b) of the CIT Act. The regulation introduces the rules for refunds of WHT collected by the WHT remitter with respect to the payments made to the same taxpayer, should these payments exceed PLN 2,000,000 in total for the given year and the WHT remitter has resolved to collect the tax. This implies that no statement of the representatives of the WHT remitter has been submitted, or no "clearance opinion" on the application of exemption has been obtained.

Application for a WHT refund

A specific application must be submitted to receive a WHT refund. In the first place, it has to be determined which entity is eligible for the refund. The application can be submitted by the taxpayer (i.e., the entity that receives the payment from Poland) as well as the WHT remitter, only if the latter has borne the economic burden of this tax (has funded the tax's cost with their own means). The latter situation occurs, for instance, when the contractual gross-up clause of the payment has been applied.

The application can only be submitted electronically and it should be addressed to the Head of the Tax Office with jurisdiction over the taxpayer's registered office; for non-residents, to the Head of the Tax Office competent in taxation of foreign persons.

Technically, the application is submitted using specific forms: WH-WCZ for taxpayers and WH-WCP for WHT remitters (the specimens have already been published on the official website of the Ministry of Finance of the Republic of Poland). The applicant is obligated to specify in the application all the relevant information indispensable for identifying the entity receiving the payment (incl. the taxpayer's foreign tax identification number) and the nature of the payment itself (title of payment, period of payment, etc.). Moreover, the applicant is obligated to specify the amount of tax to be refunded, plus give any other relevant information and contact details.

It is worth remembering that the application comprises the applicant's statement that the facts presented in the application are true and that the attached documentation is consistent with the originals (the statement also refers to the documents submitted at the consecutive stages of the procedure). It is therefore critical that, on submitting the application, the applicant should be certain as to the legitimacy of a tax refund. To this end, detailed analysis is recommended in respect of the documents whereupon the tax is expected to be refunded, to fulfil the conditions regarding the status of the beneficial owner and genuine business activity. Otherwise, the applicant may be exposed to penal fiscal consequences (such as the charge of having submitted untrue statements to the tax authority).

Documents attached to the application

The scope of the documentation to be submitted together with the WHT return application is part of the specific procedure to be discussed separately. The CIT Act enumerates a number of documents to be attached to the application. It should be emphasised that it is an open-ended list and the tax authority may require other documents as well (the application form allows for complementary documents to the already-submitted application).

One of the documents to be attached to the application is the valid certificate of the taxpayer's residence. It has to be made certain that the certificate is in the appropriate form (the original, a notarised copy or an electronic format, if provided for by the respective foreign jurisdiction). The certificate should be valid for the period covering the tax refund period.

Attached to the application there should also be documents related to bank transfers or, indicating the method of payment or transfer of the paymentss subject to WHT. Furthermore, the applicant is to attach documentation related to the commitment to pay the receivables (which, in practice, usually means an agreement or contract, order/commission, or acknowledgment of delivery).

For payments for which exemption is applicable pursuant to the provisions implementing EU directives relating to dividends (Article 22(4)), and payments of interest and royalties (Article 21(3)),

> A specific application must be submitted to receive a WHT refund. In the first place, it has to be determined which entity is eligible for the refund.

the taxpayer's statement should be added confirming that the conditions for the application of WHT exemption have been met with regards to the receivables paid.

If the application is submitted by the taxpayer, there should be a separate statement attached to the application confirming that the taxpayer is (i) the beneficial owner of the receivables obtained (as per the new definition) and (ii) the entity that bears the tax obligation with respect to receivables being subject to application for a WHT refund. The obligation to submit the latter statement appears to be a sort of protection in the event of the lack of the beneficial owner clause in the double tax treaty applicable to case in question. Yet, even then the tax authority may test the status of the taxpayer under principles similar to those employed in verifying the beneficial owner status.

In addition, the application submitted by a taxpayer must include a statement that it conducts genuine business activity in the country of its registered office for tax purposes with which the gained revenue is connected – provided that such receivables are gained in relation to the business activity conducted.

When the application is submitted by the WHT remitter, it should be supplemented with documents indicating the obligation to bear the economic burden of the tax from the WHT remitter's own means (such as contractual arrangements comprising gross-up clauses).

The last document to be produced is a justification that the terms/conditions specified in the statements as regards the tax obligation, the beneficial owner status and genuine business activity have been met.

It must be emphasised that the list of documents specified above is open-ended.

Tax refund procedure

The tax refund procedure itself raises a number of questions of interpretation. Apart from the need to meet a whole lot of formal conditions, the applicant wishing to obtain a refund has to take into account the long-lasting verification procedure conducted by the tax authority.

As a rule, the tax is refunded without undue delay, no later than within six (6) months of the day the application is received. However, the regulations determining the specific procedure in question specify that the tax authority is supposed to take action consisting of applying for tax-related information to the competent authority of the other country, in order (inter alia) to reassure that the conditions for the refund have been met (incl. beneficial owner status and genuine business activity of the foreign taxpayer). In practice, actions consisting in the exchange of information between tax authorities of the different countries last for months.

What is more, in certain justifiable cases the tax authority may extend the date previously indicated for the refund basically for an indefinite period, until the application has been verified. It therefore seems that the six-month period indicated for the refund may turn out to be practically unrealistic (impossible to meet under the presently-binding refund principles), and the possibility of receiving interest for the extended tax refund period may prove illusory (for reasons beyond the tax authority's control).

At the same time, in certain specific cases, the CIT Act provides for the option to verify the validity of a refund after the lapse of the six-month period under the separate relevant procedures (incl. tax control/inspection, customs and fiscal control, tax proceedings, as well as tax control/inspection carried out within the country of the taxpayer's registered office for tax purposes).

Once the application has been verified, the tax authority resolves, as a general rule by means of a decision, whether to refund the tax or deny the refund. The latter option means, in practice, starting a dispute with the taxpayer or WHT remitter, as the case may be.

In sum, as regards the regulations laying down the procedure for a refund of WHT, it is easy to come to the conclusion that receiving a tax refund can be a difficult task. The way the regulations are constructed (including the open-ended list of documents and no final dates provided for closing a case by the tax authority) means that the applicant cannot possibly be certain of the date by which they can expect a refund and/or the form in which the procedure would be concluded. It should be expected that even in the clearest situation possible the procedure in question would not be completed within six months.

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KPMG Publications

The KPMG analyses and reports are an output of our expertise and experience.The publications take up issues important to enterprises operating in Poland and globally.

PIT 2018 Annual tax returns of Polish taxpayers – PIT 2018

KPMG Poland's study entitled Annual tax returns of Polish taxpayers – PIT 2018 was carried out by way of Computer-Assisted Telephone Interview (CATI) on a representative sample of 1,000 adult Poles. The respondents included those who were obligated to settle with the Tax Office for the year 2018. The group did not include persons for whom a tax return is prepared and submitted by the Social Insurance Institution [ZUS]. The study was carried out between 4th March and 13th March, 2019, by the Norstat market survey company. The purpose was to recognise the method in which Polish taxpayers have settled their income taxes for the year 2018.

Defending against cyber attacks: the Cyber Safety Barometer

KPMG Poland's report entitled Defending against cyber attacks: the Cyber Safety Barometer was compiled on the basis of a study done with a group of one hundred enterprises, with the Computer-Assisted Telephone Interview (CATI) method. The participants included individuals responsible for IT safety and security (board members, directors in charge of security, chairpersons, IT directors and other persons responsible for the area). The study was carried out in February 2019 by the Norstat market survey company.

Support for innovation: tax instruments. How do enterprises pursue R&D activities?

KPMG Poland's report entitled Support for innovation: tax instruments. How do enterprises pursue R&D activities? was prepared based on a study conducted on a sample of 150 companies with annual revenue in excess of 30 million zlotys, pursuing R&D activities in Poland. The study was conduct in January 2019, with the Computer-Assisted Telephone Interview (CATI) method. The objective was to learn what enterprises' opinions are regarding the available tax incentives and the role these instruments have in building an innovative economy.

Global Lease Accounting Survey. Lease accounting is here: Are you ready?

KPMG International's report entitled Global Lease Accounting Survey. Lease accounting is here: Are you ready? presents the key challenges faced, or potentially faced, by enterprises when it comes to implementing the new accounting standard in the area of leasing. The study was joined by more than eight hundred companies worldwide, of which over 550 have their registered offices in the both America, less than 100 in EMEA countries and almost 150 in ASPAC. Both public and private enterprises, representing all the main branches of industry, were taken into account.

Report: PSD2 and Open Banking. A revolution, or an evolution?

The report entitled PSD2 and Open Banking. A revolution, or an evolution? was prepared by KPMG in cooperation with the Polish Bank Association [ZBP]. The purpose was to get an insight into how banks, cooperative banks, and non-banking sector entities in Poland perceive the regulatory change. The study was also joined by customers, as without them the idea of open banking would have been pointless. The consumer research was carried out on a sample of 1,210 respondents, using the Computer-Assisted Telephone Interview (CATI) method, in December 2018. The second part of the study, conducted among banks, cooperative banks, and non-banking sector companies covered a total of seventy-three persons, of whom nearly 50% worked for banks, 22% were employed with cooperative banks, and 31% with TPP organisations (incl. payment institutions, fintechs, and other).

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