

# Mandatory Disclosure Rules

## Implementation of mandatory disclosure rules in Poland

This article provides a summary of the Polish mandatory disclosure rules under DAC6 and wider.

### Status

On November 23, 2018, legislation to introduce mandatory disclosure requirements (MDRs) into Polish domestic law was published in the Polish Journal of Laws. While the MDR provisions introduced in Poland incorporate the requirements of EU Directive 2018/822 (DAC6) into Polish law, the legislation extends beyond the minimum requirements imposed by DAC6 to cover a wider scope of potentially reportable arrangements.

The Polish MDR provisions became applicable on January 1, 2019, far in advance of the July 1, 2020 deadline set under DAC6.

Please note that the summary is based on information available as at October 15, 2020.

### Scope

The scope of the Polish MDR legislation extends beyond the scope of the Directive to cover i.a.:

- 1) Domestic arrangements;
- 2) An additional set of hallmarks for both domestic and cross border arrangements;
- 3) Other taxes (i.e. not only direct taxes);
- 4) Extraterritorial applicability to non-resident (including non-EU) intermediaries and taxpayers.

Points 1) and 2) above apply to “qualified taxpayers”. The definition of this term and further details on these categories of hallmarks are discussed further below.

### Definitions

The Polish MDR legislation uses the terms “promoter” and “supporter” as opposed to the definitions of intermediary contained in the Directive. The Polish legislation also uses the term “user” rather than relevant taxpayer. However, the definitions of these terms are generally in line with the equivalent definitions in DAC6.

#### 1) Promoter

A promoter is defined in Polish legislation as any person that designs, markets, makes available, implements or manages the implementation of an arrangement;

#### 2) Supporter

A supporter is defined as any person (having regard to 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, organizing, making available for implementation or supervising the implementation of an arrangement.

#### 3) User

A user (taxpayer) is defined as any person to whom the arrangement is made available, for whom such arrangement is implemented, who is ready to implement the arrangement or has taken the first step in the implementation.

A taxpayer will be a “qualified taxpayer” where:

- 1) Revenues, deductible costs or the value of assets of the taxpayer exceed EUR 10million in the current or previous financial year; or
- 2) The arrangement involves assets or rights having a fair market value in excess of EUR 2.5million; or
- 3) The taxpayer is related to a person that meets the thresholds under point 1) above.

## Hallmarks & Main Benefit Test

Under Polish MDR legislation, hallmarks are categorized into (1) generic, (2) specific and (3) other specific.

Generic hallmarks are subject to the main benefit test, whereas the test is not applicable where a specific hallmark or an other specific hallmark is triggered.

The main benefit test is satisfied when:

- taking into account all relevant facts and circumstances,
- a person acting reasonably and driven by legitimate purposes other than achieving a tax benefit
- could justifiably choose an alternative course of 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 expected to obtain from the arrangement.

### Generic hallmarks

The majority of the generic hallmarks in Polish legislation are aligned with the hallmarks contained in categories A, B and paragraphs (b)(i), (c) and (d) of the category C hallmarks in DAC6. These are summarized as follows:

- The use of confidentiality clauses with respect to the method of gaining a tax advantage;
- Contracts where the remuneration is contingent on the amount of the tax advantage resulting from the arrangement;
- The use of uniform or standardized documentation;
- The acquisition of a loss-making company, cessation of the main activity of the company and use of the company's loss to reduce a tax liability;
- Arrangements involving circular payment flows;
- Cross-border deductible payments where the payee has a place of residence, registered office or management in a jurisdiction in which the:
  - corporate tax rate is less than 5%;

- payments are subject to a total exemption or a preferential tax regime.

- Reclassification of income which results in a lower rate of taxation.

Note that although the latter hallmark shares characteristics of DAC6 hallmark B2, Polish implementation largely refers to a change in the qualification of income (revenue) into any other source of income (revenue), or a change in taxation rules, resulting in effective lower taxation, exemption or exclusion from taxation.

These generic hallmarks are applicable to cross-border and domestic scenarios (with the exception of the cross-border deductible payments hallmark).

However, where an arrangement falls within the scope of one of these hallmarks, but concerns a type of tax that is otherwise excluded from DAC6, i.e. VAT or excise, the arrangement would be deemed reportable as a non-DAC6 arrangement.

Polish legislation also contains the following generic hallmarks which are additional to those in DAC6:

- A situation where the taxpayer undertakes to cooperate with the promoter (or to pay the promoter compensation) if certain steps of the arrangement are implemented;
- A situation where the contract does not explicitly include a success fee but, in reality, the promoter of the arrangement pays a success fee or refunds the fee to the taxpayer if the tax advantage was not realized;
- A situation where the contract does not explicitly contain a success fee or confidentiality obligation but, in reality, the reasonably acting promoter or user would want a success fee or confidentiality obligation to exist.

As noted above, each of the generic hallmarks is subject to the main benefit test.

### Specific hallmarks

Polish MDR legislation also contains a number of specific hallmarks which are aligned to certain categories of specific hallmarks in DAC6. These are summarized below:

- Cross-border deductible payments where the payee does not have a place of residence, registered office or place of management;

## Hallmarks (cont.)

- Cross-border deductible payments where the payee has a place of residence, registered office or place of management in a jurisdiction that engages in harmful tax competition (as defined under Polish law or EU rules);
- Depreciation is claimed by the same or multiple taxpayers in different jurisdictions;
- Double tax relief is claimed in multiple jurisdictions regarding the same income or asset;
- There is a material difference (at least 25%) in the consideration for the transfer of an asset between jurisdictions;
- Arrangements that result in the circumvention of the Exchange of Tax Information provisions between jurisdictions;
- Arrangements that involve the existence of non-transparent ownership structures;
- The use of unilateral safe harbor rules in respect of transfer pricing arrangements;
- The transfer (including domestic) of hard-to-value intangible assets between related parties;
- The intra-group transfer (including domestic) of functions and/or risks and/or assets which result in a 50% reduction of projected EBIT of the transferor in the three-year period after the transfer.

These hallmarks are not subject to the main benefit test.

## Other specific hallmarks

Polish MDR legislation also includes other specific hallmarks, which are summarized below:

- An arrangement that has an impact in excess of PLN 5 million (approximately EUR 1.10 million) on a deferred income, deferred asset or deferred liability balance;
- An arrangement where the taxpayer would be obliged, in the absence of a tax exemption or double taxation agreement, to withhold tax in excess of PLN 5 million;
- A situation where a non-resident generates Polish revenue / income in a calendar year which is in excess of PLN 25 million (approximately EUR 5.8 million);

- A situation where income is paid to a non-Polish resident taxpayer and the difference between the tax payable in the taxpayer's home jurisdiction is in excess of PLN 5 million in a calendar year when compared against the tax that would have been payable had the taxpayer been tax resident in Poland.

## Reporting - Intermediaries

In principle, the primary reporting obligation lies with the promoter of the arrangement. Under the Polish MDR legislation, both EU and non-EU intermediaries may be required to report in Poland. This represents an extension of the scope of DAC6 (which requires an intermediary to have a presence / nexus in the EU).

## Internal MDR Procedure

Promoters with revenues or costs exceeding a PLN 8 million (approximately EUR 1.8 million) threshold are required to have in place an internal procedure for prevention of non-compliance with the reporting obligation.

Companies acting as a service provider for other group entities may be considered „promoter“ and thus may also be required to implement the internal MDR procedure.

Note that the obligation to implement and use internal MDR procedure is not limited to Polish residents.

## Legal Professional Privilege

Polish MDR legislation includes provisions allowing certain intermediaries (e.g. lawyers, tax advisors and certain financial advisors) to benefit from legal professional privilege.

Where legal professional privilege is claimed, the intermediary should inform the user and all other intermediaries of this fact in writing.

## Reporting - User

A user will generally be required to report an arrangement if the intermediary relies on legal professional privilege or in the event that no intermediary is involved (i.e. the arrangement is developed in-house).

Users are also subject to certain additional reporting requirements. In particular, a user that performs a step / action that constitutes part of an arrangement or obtains a tax advantage from an arrangement will be obliged to submit a statement alongside its tax return outlining details of the actions taken or the tax advantage obtained (Polish MDR-3 form).

## Reporting Timelines

### Original reporting timelines

The reporting obligation must be fulfilled within 30 days from the day:

- After the reportable tax arrangement is made available; or
- After the reportable tax arrangement is ready for implementation; or
- When the first step in its implementation has been made;

whichever occurs first.

The deadlines above are applicable for both intermediaries and taxpayers and apply from January 1, 2019 onwards.

Polish MDR legislation also introduced a transitional reporting period for certain pre-existing arrangements, i.e.:

- Cross-border arrangements within the meaning of DAC6 where the arrangement was implemented (first step occurred) after June 25, 2018; and
- Other arrangements where the implementation (first step) took place between November 1, 2018 and December 31, 2018.

Reporting of these arrangements was required to take place within six months of the date the MDR legislation entered into force (i.e. January 1, 2019) for promoters and nine months for users.

### Revised reporting timelines

As a result of a combination of different provisions applicable to different types of arrangements, there are three different categories of deferral regimes in Poland:

1. *On-going reporting of DAC6 arrangements*, i.e. cross-border arrangements reportable under the DAC6 regime and not under the Polish MDRs:

- reporting deadlines (30 days) start running from January 1, 2021, i.e. the first reporting deadline will be January 31, 2021;
- this rule applies to cross-border tax arrangements for which the reporting deadline did not pass prior to March 31, 2020, with ambiguities concerning all cases where the first step in implementation took place prior to July 1, 2020.

2. *On-going reporting of other (non cross-border tax arrangements) arrangements:*

- Deferral has been in place since March 31, 2020 as a result of domestic anti-COVID 19 regulations. This deferral applied to all types of arrangements, i.e. both cross-border tax arrangements as well as other arrangements, however for the former group deferral based on this regulation ended on June 30, 2020.
- Deferral ends 30 days from the date when the State of Epidemic in Poland (which is in force at the date of this report) is abolished.

3. *Re-reporting of cross-border tax arrangements* for which the first step in implementation occurred between June 26, 2018 and June 30, 2020 (new rules that entered into force on July 1, 2020 and are simultaneously being deferred) has been deferred until:

- December 31, 2020 – in case of promoters (primary intermediaries);
- January 31, 2021 – in case of users (relevant taxpayers);
- February 28, 2021 – in case of supporters (secondary intermediaries).

## Penalties

Non-fulfilment of reporting obligations in the correct manner will constitute a criminal offence in accordance with the Polish Fiscal Penalty Code and will be subject to a fine of up to 720 times of the current applicable daily rates, i.e. a total fine of approximately PLN 25 million (EUR 5.5 million).

Failure to correctly implement the required MDR internal procedures may result in a fine of up to PLN 10 million (approx. EUR 2.2 million).

For more information, please refer to KPMG's [EU Mandatory Disclosure Rules page](#) or contact the following:

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