

MDR regulations in Poland – impact on non-Polish entities and individuals

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In brief

Restrictive and broad Mandatory Disclosure Rules („MDR”) have been implemented into the Polish tax system since January 2019. At the end of January 2019 Polish Ministry of Finance issued an official document explaining some of the aspects of MDR (“Explanations”).

Non-Polish entities / individuals may have reporting obligations working as promoters / supporters or being the beneficiary.

Not only advisors, but also group entities, asset/investment managers and other entities/individuals involved in dealing with Polish related arrangements may have to report tax schemes directly to Polish tax authorities. Moreover, those identified as promoters (may be any entity acting to the benefit of other group entities) are obliged also to have special internal procedure regarding mandatory disclosure rules.

Non-compliance with those regulations is subject to sanctions up to EUR 5m. These sanctions can be applied to non-Polish individuals and not just entities.

Selected aspects of MDR in Poland:

Introduction

The Polish Mandatory Disclosure Rules (in force since Jan 2019) legislation has much wider scope compared to DAC6 Directive, in particular:

- An extended definition of reportable tax arrangements to comprise not only cross-border but also domestic tax arrangements,
- A wider definition of covered taxes including VAT (with respect to the domestic tax arrangements)

Polish MDR require the reporting of:

- cross-border tax schemes, in relation to

which the first activity related to their implementation was made after 25 June 2018;

- domestic tax schemes, in relation to which the first activity related to their implementation was made after 1 November 2018.

Reporting deadlines

Reporting obligation regarding tax schemes shared or implemented on or after 1 January 2019 arises as a general rule within 30 days from the date the scheme is shared or implemented. In some situations reporting may be as short as 5 working days.

The ‘trigger events’ which start the 30 day disclosure timeline are capable of being

satisfied very early in the development of a proposal. Merely verbally sharing an idea which could be implemented may start the clock.

Parties that offer/make available (promoters), provide assistance/support in the implementation (supporters), or the taxpayers exercising arrangements will be required to disclose information on reportable arrangements to the authorities.

Promoter

Promoter is defined as any person / entity, especially tax advisor, attorney, legal advisor, bank / financial institution employee advising clients, that designs, markets, makes

available, implements or manages the implementation of an arrangement.

In practice, it is very common that within multinational groups, head entities play significant role in decisions impacting tax position of their Polish subsidiaries. This may result in them and their employees being the promoter, which has implications for their reporting obligations, and in the majority of cases requires them to have an internal procedure.

Supporter

Supporter is defined as any person / entity, in particular a certified auditor, public notary, person providing bookkeeping services, accountant, or financial director, bank or other financial institution, as well as their employees, 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, organizing, making available for implementation or supervising the implementation of an arrangement.

Lawyers and law firms may be treated as supporters. This refers also to shared service centres and their employees.

Although, the supporter is primarily obliged to ask the entity ordering the work to confirm whether the arrangement constitutes tax scheme, in some cases it may be obliged to report a tax scheme to Polish tax authorities independently.

Beneficiary

Beneficiary is defined as any person / entity to whom the arrangement is made available, for whom such arrangement is implemented or that is ready to it or has taken any steps in such implementation.

Generally, any entity having a link to Polish taxes may become a beneficiary. In many cases, beneficiary will be obliged to report a tax scheme by itself, especially when the promoter is covered by professional secrecy or when he does not comply with his obligations (often when promoter has no link to Poland, e.g. local advisor).

Also arrangements prepared internally (without any support of promoter) may have to be reported to Polish tax authorities. In such a case it is the beneficiary's obligation.

Sanctions

Failure to report or other non-compliance may result in fines:

- up to EUR 2.5m with respect to entity being a promoter,
- up to EUR 5m with regard to individuals responsible for such non-compliance.

Hallmarks

In order to be reportable, an arrangement must contain one of the hallmarks. The hallmarks cover a wide range of features and only some of them require main tax benefit test to be satisfied.

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 and the said tax benefit constitutes the main or one of the main benefits, which the person is expecting to obtain vis-a-vis such arrangement.

It needs to be underlined that some Polish hallmarks have different wording than those in DAC6 Directive. Moreover, Poland introduced 4 "other specific hallmarks" which do not require main benefit test and are the most difficult to interpret. As a result the scope of reporting in Poland may be much wider than in other EU countries.

At the current stage it is not possible to provide extensive manual explaining when given hallmarks may be met. Ministry of Finance Explanations are ambiguous and it is still unclear whether certain activities constitute tax scheme.

The possible breadth of the hallmarks can, however, be demonstrated by considering some simple examples:

- making a loan to a Polish subsidiary with annual interest exceeding around EUR 6m benefitting from nil withholding tax under a double tax treaty/EU Interest & Royalty Directive is likely to be disclosable (no main benefit test),
- any arrangement resulting in a non-Polish resident receiving annual

income from a Polish resident exceeding around EUR 6m is likely to be disclosable (no main benefit test).

What needs to be reported?

The scope of reporting is wide and covers *inter alia*:

- data identifying the person disclosing the information and the user the tax scheme has been made available to, including information about the company or name and surname, date and place of birth, tax ID, place of residence, registered office or management board,
- summary of the tax scheme, its name (if applicable), description of the business activity the tax scheme applies to,
- an exhaustive description of the arrangement constituting a tax scheme, along with an indication of the value of particular

transactions, tax scheme assumptions, activities performed as part of the tax scheme and their chronology, and links between related entities,

- indication of other known entities obliged to provide information on the tax scheme.

How to report?

It is only possible to report via Ministry of Finance website. Unfortunately, IT system established by Ministry of Finance to fulfil reporting obligations (similarly as regulations and Explanations) is only in Polish and as of now we do not expect any translations in this respect.

The obligation to implement MDR procedure

Promoters with revenues / costs exceeding EUR 1.8m p.a. are obliged to have internal procedure ensuring that MDR obligations are addressed properly.

Entities from capital groups benefiting from tax advisory

services may also be required to implement a formal MDR compliance procedure if, for example, other entities in the same capital group also benefit from results of these services.

The formal MDR procedure must also be implemented by entities employing natural persons, who act as promoters in relation to e.g. related parties of their employer.

The Ministry of Finance emphasized that lack of a mandatory MDR compliance procedure can result in sanctions up to EUR 2.5m.

Acting via proxy

Information on tax schemes may be submitted by a proxy who can also sign a document (file). Still, in some cases (reporting by beneficiary on MDR-3 form), additional signatures from authorised persons (e.g. all board members) are required.

Let's talk:

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