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INTERNATIONAL TAX REVIEW

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Businesses brace for controversial Polish mandatory disclosure rules

12 December 2018

Tax heads and advisors are in the dark about how Poland's mandatory disclosure rules (MDR) will work. Poland's measures go beyond the EU Directive and could set a standard among EU nations implementing MDR.

Businesses and their advisors expressed consternation about Poland's MDR law in conversations with *International Tax Review*. Companies say the vagueness of the regulations will probably lead them to significantly over-reporting in order to avoid being caught up in audits and handed hefty fines. Advisors, meanwhile, see a possible unconstitutional threat to the professional secrecy that is the basis of their industry. They further warn that the rules could lead to a form of 'advisor shopping' by taxpayers across the EU as they seek out countries introducing lighter reporting requirements.

Poland's law goes further than the measures specified in EU Council Directive 2018/822, passed on May 25 2018. The directive, which must be implemented into national legislation by EU member states by the end of 2019, only refers to cross-border tax arrangements. Poland's law applies to domestic arrangements as well, although only data on cross-border arrangements will be shared with other EU governments.

Poland has become the first country to implement the directive. Dominik Kaczmarek, director of Poland's tax system department, told *International Tax Review* that his department was "relatively advanced in the drafting process [of its own MDR legislation] when the EU directive was enacted", which is why they were in a

position to implement the rules so quickly. Sources told *ITR* that the next country to implement MDR is likely to be Italy.

The Polish law also includes many more hallmarks than the EU directive. As a result, the scope of what must be reported to the tax authorities is far broader.

Anna Kacprowska, director of tax policy and tax settlements at PZU Capital Group, said the Polish legislation, which comes into force on January 1 2019, is still shrouded in uncertainty.

"Unfortunately, even if an in-depth analysis of the underlying documents and assumptions is carried out, it might be difficult to assess whether a given tax arrangement will be subject to the reporting obligation due to the vague nature of the provisions," she told *ITR*. "This introduces new intrinsic risk for promoters as well as taxpayers."

The finance ministry's consultations "have not resulted in practical guidance", Kacprowska continued. "There is still a long way to go to come up with reasonable best market practice."

Others suggested the confusion will not be confined to Poland because some of it stems from provisions in the EU directive.

"There are some open clauses, open provisions [in the Polish law]," said Maciej Woźnica, senior consultant at TPA Poland. "Some of these clauses are derived directly from the directive, so I think they will also [cause problems] in other countries."

Kaczmarek said that the decision to make domestic arrangements reportable, as well as cross-border ones, was "a well-thought-out and sovereign decision of the Polish government".

"Inclusion of the domestic tax arrangements is perhaps even more crucial for the state revenues than the sole implementation of DAC6 cross-border rules," he continued, referring to the mandatory automatic exchange of reportable information between European governments.

"We are happy that MDR will be in force in Poland from the beginning of 2019."

Time is running out to provide clarity

There is less than a month until the MDR law comes into force in Poland. Like the EU directive, Poland's obligations are effectively retrospective: the reporting obligation will apply to all arrangements dating back to June 2018, just after the directive was passed.

The Polish finance ministry has just opened a consultation on the guidance it intends to issue to help clarify the scope of the reporting requirements. One tax advisor described the idea of the government consulting on their interpretation of an already-passed law as "nonsensical".

Meanwhile, tax departments trying to work out how to comply with the law – with no extra staff or resources – are likely to err on the side of over-reporting.

"We will have no extra staff", said the head of tax at one of Poland's 10 largest companies, who asked for anonymity in order to speak candidly. "My department, the tax department, has about 40 people. The board members already think that's too many and we should do it with the people we have. I think every company has the same problem."

"Of course, it's not comfortable, but it's an EU directive, so I understand that we are, all around Europe, obliged to prepare such reports. The problem is that most of us don't understand the rules in our law.

"I'm afraid that we will sometimes over-report to avoid the risk. We will report much more than we are really obliged to, and it will be a lot of work for everyone."

Asked when they anticipated full clarity on the scope of the rules, the tax head sighed: "I don't know. We have nothing from our Minister of Finance, but we know that they will issue something. But what it will be and when it will be, I don't know."

The introduction of the law "really was too fast", they said.

Polish advisors take umbrage at the drafting of the Polish law

Meanwhile, the Polish National Council of Tax Advisers, an industry group, has published a statement criticising the new law, which it depicts as an existential threat to professional secrecy, "the foundation of public trust professions and a guarantor for all taxpayers of the protection of their fundamental rights and civil liberties".

The legislation "violates the principle of the democratic law and the principle of proper legislation derived from it," it claims.

Anna Misiak, one of the council's vice-presidents, also questioned whether the Polish tax authorities was ready to receive the torrent of data that the new law would siphon its way. "I think that the new law will require a lot of work on the administration side, too, and it is not ready for that," she said.

Responding to the statement, Kaczmarek, the government tax director, said: "There are rules of confidentiality, the breach of which violates the essence of trust between the professional and his client. This includes all personal, family, civil, criminal and penal matters related to the defence of client's interests in administrative or court proceedings. These issues are out of scope of the Polish MDR provisions. However, tax advice aimed at avoiding taxation and achieving tax benefits cannot be treated equally with these private matters. Advisory services aimed at reducing tax revenues may negatively affect the public interest."

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Alexander Hartley

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"Pursuant to the Act, an intermediary who is entitled to professional secrecy (for example, a tax advisor) will be required to report bespoke tax arrangements only if the client (the relevant taxpayer) exempts him from the obligation to keep them confidential," Kaczmarek added.

Kaczmarek drew a comparison between disclosing a client's reportable arrangements and filing a tax return on their behalf.

Companies may shop around for foreign advisors

Variation in the way that different countries implement the directive could have another unintended consequence, advisors and business leaders suggested. Natural variation in implementation will likely lead to some jurisdictions having stricter requirements for reporting cross-border transactions, and some more relaxed ones. Yet, as long as countries are sharing the data they collect, companies and their advisors will only need to report their cross-border arrangements to the authorities in one country – the country where the main intermediary is based. This applies only to the cross-border transactions addressed in the directive, and not to domestic transactions such as those covered by the Polish law.

This is bound to incentivise businesses to "centralise [their tax advice] in more relaxed jurisdictions", said Woźnica, the senior consultant at TPA. "In some states the reporting obligations may be a bit more relaxed than in Poland, so there will be some kind of attempt to centralise these tax schemes in such countries."

The head of tax at the large Polish company agreed that shopping around for advisors in laxer jurisdictions was a likely consequence of the directive. "I think that it will be normal," they said.

So a directive ultimately aimed at preventing countries from shifting their profits to low-tax jurisdictions may end up incentivising them to shift their tax advisory services to jurisdictions with more relaxed reporting requirements.

In spite of the confusion still surrounding MDRs, Misiak, the vice-president of the National Council, suggested that the Polish experience could provide salutary lessons as other countries implement their own MDRs over the next 12 months. "I think it could be a good experience for other countries to see what results actually are after implementation of the directive in Poland." But that will be little comfort to taxpayers in Poland.

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