

Poland's implementation of EU ATAD 2 anti-hybrid measures enters into force from 1 January 2021

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From 1 January 2021, Polish regulations implementing the European Union (EU) Anti-Tax Avoidance Directive - ATAD 2¹ will enter into force. The purpose of the regulations is to prevent the exploitation of hybrid mismatches. Specifically, the regulations provide for non-deductibility of payments giving rise to a:

- ▶ Double deduction - where the same payment is deductible from the tax base in more than one jurisdiction
- ▶ Deduction without inclusion - if the payment is deducted from the tax base in Poland:
 - a) with no matching inclusion of the payment in the taxpayer's tax base in another jurisdiction, or
 - b) where the payment qualifies for a tax relief in the recipient's jurisdiction solely due to characteristics of this payment

Also, the regulations deny tax deductibility for payments that, directly or indirectly, finance expenses resulting in the hybrid mismatch, if the transaction is made between associated enterprises or under the so-called structured arrangement. This could be understood as a rule limiting the deductibility of payments made by the Polish company if the hybrid mismatch is exploited at the level of entities higher in the group's structure or through a payment chain.

The following hybrid mismatch arrangements are addressed by the Polish implementing regulations:

- ▶ Hybrid entity mismatches: situations where an entity is qualified as opaque under the laws of one jurisdiction (i.e., a taxable entity under the laws of that jurisdiction) and qualified as transparent by another jurisdiction (i.e., the partners of the entity are taxable on their share of profit under the laws of that other jurisdiction).
- ▶ Hybrid financial instrument mismatches: situations where the qualification of a financial instrument or the payment differs between two jurisdictions (e.g., the instrument is considered as debt in the payer jurisdiction and as equity in the payee jurisdiction).
- ▶ Hybrid transfers: situations where the underlying return on the transferred financial instrument is treated for tax purposes as derived by more than one party of the arrangement.
- ▶ Hybrid permanent establishment (PE) mismatches: situations where the business activities in a jurisdiction are treated as being carried on through a PE by one jurisdiction while those activities are not treated as being carried on through a PE in the other jurisdiction.
- ▶ Tax residency mismatches: Situations where a taxpayer is resident for tax purposes in two or more jurisdictions.

In practice, the new regulations may be of interest (among others) for:

- ▶ Capital groups conducting business through PEs or entities with their registered seat in countries applying the preferential tax regime (not only considered to be “tax havens” but also based in typical EU holding jurisdictions).
- ▶ Polish companies making payments to entities operating under a specific tax regime (e.g., investment funds) which provide for a tax relief of payments due to their characteristics.
- ▶ Capital groups with internal financing involving entities with their seat outside of the EU (e.g., the United States).

The Polish implementation of the EU ATAD II constitutes an additional limitation on deductibility of costs that should be analyzed along with the others, such as EBITDA²-based limits on costs of financing and costs of services provided by related parties or maximum thresholds for tax deductible debt-leverage costs set by maximum debt capacity transfer pricing regulations. Taking into consideration the complexity of regulations, lack of history of similar regulations in Poland and the potential broad impact, international groups should thoroughly analyze during 2020 whether the new regulation influences their tax position in Poland.

Endnotes

1. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards discrepancies in the qualifications of hybrid structures regarding third countries.
2. EBITDA: Earnings before interest, taxes, depreciation and amortization.

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