

Poland issues draft bill to implement EU ATAD 2 anti-hybrid measures

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Poland's Ministry of Finance published, on 23 August 2019, a draft bill setting forth several provisions to implement certain anti-hybrid measures (as an implementation of the European Union (EU) Anti-Tax Avoidance directive ATAD 2).¹

Generally, hybrid mismatches may occur when jurisdictions have different regulations in the tax qualification of sources of income or types of entities, which results in double deduction of payments as tax deductible costs or in deduction of costs without inclusion as taxable revenues on the other side of the transaction. The following hybrid mismatch arrangements are addressed by ATAD 2:

- *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 made under it 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 laws of two jurisdictions differ on whether the transferor or the transferee of a financial instrument has the ownership of the payments on the underlying asset.
- *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.
- *Imported mismatches*: Situations where the effect of a hybrid mismatch between parties in third countries is shifted into the jurisdiction of a Member State through the use of a non-hybrid instrument thereby undermining the effectiveness of the rules that neutralize hybrid mismatches. This includes a deductible payment in a Member State under a non-hybrid instrument that is used to fund expenditure involving a hybrid mismatch.

- *Tax residency mismatches*: Situations where a taxpayer is resident for tax purposes in two or more jurisdictions.

The key purpose of implementing the ATAD 2 into the Polish legal order is to counteract the situation of double tax deductions or the tax deduction of costs without recognition of corresponding revenues. To achieve this goal, some topics have been defined differently than envisaged by ATAD 2.

The Polish Ministry of Finance opened a consultation on the draft bill and comments are due 2 September 2019. The provisions may also be subject to further amendments during the legislative process.

If approved, the effective date of the new provisions will be 1 January 2020.

Endnote

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. The draft bill also proposes measures implement automatic exchange of information on reportable cross-border arrangements (DAC6), but a separate Alert will be issued on this matter.

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