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REPORT

From: General Secretariat of the Council

To: Delegations

Subject: Code of Conduct Group (Business Taxation)
- Report to the Council

Poland - Act on the settlement of disputes regarding double taxation and the conclusion of advance pricing agreements (PL014): (*Co-operative compliance program for certain large taxpayers*)

Agreed description

I. Background

1. Many Member States currently run co-operative compliance (CC) programs, which aim primarily at ensuring tax compliance of taxpayers. Despite certain differences, these approaches all involve a preliminary evaluation of the taxpayer's behavior and risk profile. Companies that commit to co-operative compliance do so on a voluntary basis. The relationship is based on transparency, trust and cooperation. Co-operative compliance is a response to new problems faced by the tax authorities, such as (1) globalisation and the increasing complexity of tax schemes and business structures; or (2) frequent changes in legislation and the inflation of tax and accounting data available to the tax authorities. To date the Group has not looked at these regimes.
2. Poland has notified to the Group a newly adopted measure during 2019 (see WK 1036/2020 REV1) which concerns its CC program. The measure is recent and is intended as a pilot measure, broadly similar to other compliance programs recently introduced and ran by other Member States.
3. The Commission services table hereafter a summary conclusion in respect of the Polish measure.

II. Summary description of the measure

Qualifying taxpayers

4. Poland adopted measures dealing with the co-operative compliance between taxpayers and the tax administration. Taxpayers with a declared income in the year prior to the tax year above EUR 50 million can apply for a co-operative compliance agreement (CC agreement) with the National Revenue Administration, NRA (*Krajowa Administracja Skarbowa, KAS*)¹.

Content of the CC agreement

5. In the CC agreement, the taxpayer has the opportunity to agree with the NRA on matters related to his tax obligations².

¹ This amounts to about 2.700 taxpayers in 2019 according to the data from the Ministry of Finance.

Therefore, the requirements to take part in the CC program include:

- (1) revenues greater than €50 million in the previous tax year;
- (2) the taxpayer must enter into a CC agreement with the head of the tax administration;
- (3) the taxpayer is subject to an initial tax audit for the year of application plus two previous years; and
- (4) the taxpayer will be required to introduce internal tax procedures, correctly satisfy its tax obligations, and report any disputed tax issues to the head of the tax administration.

² According to article 20zb, within the framework of such cooperative compliance agreement, the taxpayer has the opportunity **to conclude in writing an agreement** with the KAS on matters related to his tax obligations:

- 1) on the interpretation of tax provisions (tax rulings);
- 2) on advance pricing (APA),
- 3) non-application of the GAAR (safeguarding an opinion on the non-application of the GAAR);
- 4) the amount of tax liability forecast for the next year in the CIT; and
- 5) any other agreement which is necessary to ensure proper implementation of the cooperation compliance agreement.

6. The CC agreement actually may protect the taxpayer from an additional tax liability or against a tax control since these taxpayers are perceived as fully transparent towards the tax authority [Head of the NRA]: e.g. reductions for late payment interest or for fees for services rendered by the tax administration (*rulings, APAs, safeguarding opinion on the non-application of the GAAR*³), no criminal tax proceedings, a new form of simplified CIT prepayment, or exclusion from the MDR for schemes other than cross-border schemes.

7. Similar to any taxpayer in the standard tax procedure, taxpayers concluding a CC agreement can apply for the same types of advance rulings while benefiting from reductions in fees and simplified procedure and less strict documentation requirements.

³ In exchange of a fee at the amount of 50% of the fee payable for standard safeguarding opinion.

8. A taxpayer concerned with the application of the GAAR may request for a special protective opinion from the Head of NRA⁴ (*safeguarding opinion on the non-application of the GAAR*). The opinion is binding for the tax authorities. However, the Head of NRA may change it if it conflicts with the verdicts of the Constitutional Tribunal or the European Court of Justice. The tax agreement in the matter of GAAR should be understood as a quasi-safeguarding opinion, having the same protective legal effects as the safeguarding opinion issued in the standard tax procedure. The difference is that the procedure for concluding tax agreements under CC is simplified. The safeguard opinion must be issued within 6 months (in certain complicated cases, up to 15 months) and the fee for the opinion is set at PLN 20,000 (50% if the taxpayer has concluded a CC agreement).
9. The taxpayer applying for such a safeguarding opinion actually asks that the Head of NRA establishes – with respect to transactions that are planned, commenced or completed, to which the GAAR may potentially apply – the absence of abusive behavior. As the tax opinion is binding for the tax authorities they can no longer challenge the transaction/ arrangement in a future audit⁵.

⁴ National Revenue Administration; as a 1 March 2017, **The National Revenue Administration (NRA) is a merger of tax administration, fiscal control and Customs Service.**

Tax administration in Poland lies in the hands of two kinds of authorities: governmental ones (for CIT, PIT, VAT, excise duties ...), and local governmental ones (real estate tax, vehicle tax). In addition, the tax authorities also include:

- i. the Head of NRA whose competences include matters related to **tax avoidance, including advance safeguarding tax rulings, and the conclusion of APAs,**
- ii. the Director of the National Revenue Information System responsible for **issuing individual advance tax rulings,** and
- iii. the Minister of Finance responsible for issuing general advance tax rulings.

⁵ as only the Head of NRA can change it and only if it conflicts with the verdicts of the Constitutional Tribunal or the CJEU.

III. Summary conclusion

Beneficiaries *de jure*

10. The CC program is a measure that applies generally to all taxpayers with income above EUR 50 million.
11. It is thus designed to apply generally to all qualifying taxpayers, resident taxpayers or non-residents with a permanent establishment in Poland.

Nature of the measure

12. On one hand, the measure is mainly of a procedural nature, and provides for the reduction of fees for certain services rendered by the tax administration and of the amount of late payment interest, or the absence of criminal proceedings and the exclusion from mandatory disclosure rules (MDR). These procedural aspects do not fall under the scope of the Code of Conduct.
13. On the other hand, conclusion of certain tax agreements, such as advance rulings, APAs and non-application of GAAR, may predetermine tax obligations and potentially lower such taxes, issues which fall under the scope of the Code of Conduct.
14. Based on the original notification and subsequent clarifications⁶ by the Polish authorities, the measure, in the Commission services' view, does not pass the gateway criterion since there is no indication that the aim or effect of the measure is to provide for a significantly lower effective level of taxation than that which generally applies in Poland.

⁶ Email of 24/03/2020.

Content of the CC agreement

15. Taxpayers entering a CC agreement may conclude several types of advance rulings or agreements.
16. To better understand the scope of the measure the Commission services contacted the Polish authorities to ask for further information regarding the possibility, within the framework of CC agreements, to conclude such agreements with the Head of NRA, in particular *safeguarding an opinion on the non-application of the GAAR and any other agreement which is necessary to ensure proper implementation of the cooperation compliance agreement* (email of 24/03/2020).
17. It appears that by “issuing a safeguarding opinion which protects the taxpayer from any future application of the GAAR, and that can be changed only in exceptional circumstances, the Head of the NRA limits the fiscal control/ auditing competences of the tax authority in charge of the particular taxpayer and pre- determines the tax liability of that taxpayer in respect of the particular transaction/ arrangement.
18. While entering a CC agreement can be a tool to lower the tax burden and administration and increase tax certainty for any Polish taxpayer, the conclusion following a simplified procedure of *advance rulings, APAs and safeguarding opinions on the non-application of the GAAR* is relevant in particular for Polish taxpayers with cross-border links or Polish PEs of foreign taxpayers.

IV. Follow-up

19. In light of the aforementioned under point III, it is the Commission services' view that the measure does not seem to raise any special concerns at the moment, and therefore **does not need to be assessed** by the Code of Conduct Group.
20. However, there remains a general concern that the CCP overall – *simplified procedure to conclude rulings, APAs* and especially the *possibility for large taxpayers to safeguard an opinion on the non-application of the GAAR* [which is binding for the tax authorities and cannot be changed unless there is a judgement of the Constitutional Court or of the CJEU] might lead to a preferential treatment. Any future decision of the Group on the adequacy of these agreements/ opinions would need to take into account the structure and concept of Corporate Compliance agreements in general and should not be based on the Polish system only.
21. Given the fact that there is no data yet on the application of the Polish CCP and the Group has not dealt with Corporate Compliance Agreements before, we suggest to monitor the effects of the Polish regime, in order to decide at a later point in time whether a closer look into the regime and Corporate Compliance Agreements in general is needed.
22. The **Group should monitor** its effects in the coming years. Such monitoring should allow it to establish the concrete effects of the measure.
23. The Polish authorities should report to the Group for the first time after three years from the application of the measure (i.e. July 2023)⁷ any relevant data allowing the Group to determine the effects of the measure and at least the data indicated in the Annex.

⁷ The CC program is of course facultative and, in the initial pilot phase, only 20 taxpayers will be allowed to participate (out of the almost 2.700 qualifying taxpayers). Therefore, there is a need to give some time to see the actual effects of the measure.

24. In parallel, the **Commission services propose to examine the CC programs of other Member States**, in order to clarify when such programs comply with the Code of Conduct. CC programs are not designed to provide tax advantages to taxpayers. The primary aim of cooperative compliance is to ensure tax compliance through an enhanced relationship with the taxpayer and, in some cases, certain procedural advantages. This analysis would ensure that CC programs do not go beyond this primary aim and do not allow taxpayers benefitting from such programs to pay less tax.

Poland should send to the Group any relevant data and at least the following:

1. the number of qualifying taxpayers;
2. the number of taxpayers having entered a CC agreement;
3. how many of the taxpayers having entered a CC agreement were residents and how many were non-residents (domestic PE of foreign taxpayers);
4. within the resident taxpayers, how many had final Polish shareholder(s) and how many had final foreign shareholder(s);
5. the overall number of taxpayers in a CC agreement having concluded any of the tax agreements (with the number of tax rulings, APAs or safeguarding opinions on the non-application of the GAAR);
6. how many of the taxpayers having concluded any of the tax rulings were residents and how many were non-residents (domestic PE of foreign taxpayers);
7. the number of taxpayers having received a *safeguarding opinion on the non-application of the GAAR*;
8. how many of such taxpayers were domestic owned (final Polish shareholder) and how many were foreign owned (final foreign shareholder);
9. in respect of what type of transaction/ arrangements have the safeguarding opinions been issued;
10. what were the amounts involved by those arrangements.
