THE

# Private Wealth & Private Client Review

Seventh Edition

**Editor**
John Riches

THE LAWREVIEWS

# THE PRIVATE WEALTH & PRIVATE CLIENT REVIEW

SEVENTH EDITION

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# PREFACE

## I INTRODUCTION

As I reflect on the developments of the last 12 months, the overriding theme is that of continuing regulatory change in the private wealth arena. A sense of increasing pace and convergence in particular stand out in comparison with earlier years.

The pace component is best seen in the introduction of new regimes or the updating of existing rules. The theme of convergence is based upon how centrally significant the concept of 'beneficial ownership' is becoming to many of the initiatives. A third strand is an increasing divergence between the European Union and the United States in this arena: the European Union continues to force the pace on transparency, while the United States proceeds at a much more leisurely speed and gives greater weight to privacy concerns than its European neighbours.

Clients whose assets are fully declared and are in compliance with their tax obligations are becoming increasingly sensitive to the massive complexity and increased regulatory burden that falls upon service providers and the attendant costs that they are obliged to meet. This is leading to a mindset in which additional elements of complexity in asset-holding structures are being viewed with a greater degree of scepticism. In some cases, it is also leading to a review as to whether existing structures, whether trusts or holding companies, are still the best means of achieving the family's objectives and warrant additional cost and regulation.

While these compliant families fully understand the need for transparency to tax and regulatory authorities, there is growing concern about the pressure for public disclosure in the context of beneficial ownership registers when the disclosure relates not to businesses that trade and engage with the public at large, but to family asset-holding structures.

A review of the preamble to the EU's Fifth Anti-Money Laundering Directive (5 AMLD) shows that, while apparent lip service is paid to respecting an individual's right to privacy, the argument that greater public or quasi-public access to information with respect to many private asset-holding structures is required to combat the fight against terrorism and money laundering appears to hold sway. The fact that any private asset-holding structure of this type will be obliged to provide comprehensive and detailed beneficial ownership information to regulated service providers such as banks, trust and corporate service providers, legal advisers and accountants is not regarded as sufficient by EU policymakers.

5 AMLD also exemplifies a mindset in which those whose family structures (such as trusts and foundations) are managed outside the EU are subjected to a greater degree of transparency than for EU-managed structures. The rationale for this approach is that, as non-EU jurisdictions have not embraced the same degree of transparency for corporate

registers, it is necessary to render the entities that hold assets with an EU connection, such as real estate, or those with an ongoing EU 'business relationship', to public scrutiny. I deal with this in greater depth below.

Tax authorities have been swift to fasten onto the increased scope of these measures. While fighting terrorism and drug-smuggling was their original purpose, they have enabled tax authorities to widen the net of information that is collected and reported on citizens who are neither terrorists nor drug barons but who hold significant wealth in complex asset-holding structures.

In the rest of this foreword, I will consider two specific areas:

*a* the Organisation for Economic Co-operation and Development (OECD)'s revised Common Reporting Standard (CRS) Commentary with a focus on trust guidance; and

*b* the wide-reaching implications of the EU's 5 AMLD and the meaning of 'control' in a trust context with regard to UK and Maltese trust registers.

### i CRS Revised Handbook (April 2018) with a focus on the amendments to trust guidance

CRS applies to trusts when:

*a* a trust is a reporting financial institution (RFI); or

*b* a trust is a passive non-financial entity (NFE) that maintains an account with an RFI.

One of the key issues under discussion under the CRS and the first version of the CRS Commentary was the status of 'protectors'.

The CRS framework provides for reporting in the context of trustees who are RFIs to be made of persons who are treated as having an 'equity interest' in the trust fund. In this context, Section VIII.C.4 of the CRS states that an equity interest is held 'by any person treated as a settlor or a beneficiary of all or a portion of the trust or any other natural person exercising ultimate effective control over the trust'.

By contrast, in relation to a trust that is a passive NFE, it is necessary to identify controlling persons in relation to the trust. In the CRS, Section VIII D.6 defines 'controlling person' on the basis that the expression is intended to correspond to the term 'beneficial owner' as described in Recommendation 10 and the interpretative note on Recommendation 10 of the Financial Action Task Force (FATF) guidance as adopted in February 2012. In the case of a trust, controlling persons means 'settlor, the trustees, the protector (if any), the beneficiary or class of beneficiaries and any other natural person exercising ultimate effective control over the trust'.

In its FAQ issued in June 2016, the OECD took the position that, where a trust is an RFI, a protector 'must be treated as an account holder irrespective of whether it has effective control over the trust'. This response does not address the clear distinction in the CRS itself between the holders of equity interests in a trust that is an RFI (which only includes protectors if they actually exercise ultimate effective control; see above) when contrasted with the 'controlling persons' definition of a trust that is a passive NFE (which includes protectors regardless of the powers they hold; see above).

The Secretariat of the OECD previously confirmed that it is their intention that protectors of trusts that are RFIs should be reported, and the FAQ was discussed in and approved by the relevant working party of the OECD.

The second version of the Commentary has amended Paragraph 253 to read:

> *The Equity Interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. The reference to any other natural person exercising ultimate effective control over the trust, at a minimum, will include the trustee* ***and the protector*** *as an Equity Interest Holder.*[1]

Until the legal basis for this is made clear in the CRS treaty itself, it is considered that there is a reasonable basis for forming the opposite conclusion.

The new Commentary also provides further clarity on what reporting is required when an account is closed or a beneficiary removed:

> *Where an account is closed during the year, the fact of closure is reported (****in addition to any distributions made prior to closure****). A debt or Equity Interest in a trust could be considered to be closed, for example, where the debt is retired, or where a beneficiary is* ***definitely*** *removed.*[2]

The other main amendments to the Commentary relate to the obligation to look through equity interest holders and controlling persons, which are themselves entities. Paragraph 256 has been amended to read:

> *Where an Equity Interest (such as the interest held by a settlor, beneficiary* ***or any other natural person exercising ultimate effective control over the trust****) is held by an Entity, the Equity Interest holder will instead be the Controlling Persons of that Entity. As such, the trust will be required to look through a settlor,* ***trustee, protector*** *or beneficiary that is an Entity to locate the relevant Controlling Person. This look through obligation should correspond to the obligation to identify the beneficial owner of a trust under* ***domestic*** *AML / KYC procedures.*[3]

The new Commentary notes that, in looking through entities,

> *The Controlling Persons of Passive NFE are defined in the CRS as natural persons exercising control over the Entity. The CRS definition of the term Controlling Person corresponds to the term beneficial owner as set out in Recommendation 10 and the accompanying Interpretative Note of the 2012 FATF Recommendations.*
>
> *The identity of beneficial owner of a legal person is defined as any natural person who ultimately has controlling ownership interest which is usually defined on the basis of a threshold. Footnote 30 to the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) gives an exemplary ownership threshold of 25%.*

1 Emphasis added.
2 Emphasis added.
3 Emphasis added.

Although, earlier in the Commentary it notes that:

> *It is important to point out that the ownership threshold for legal persons of 25% that is specified in footnote 30 in the Interpretative Note to Recommendation 10 of the 2012 FATF Recommendations (as printed in March 2012) is only indicative.*
>
> *Should the ownership structure analysis result in doubt as to whether the person(s) with the controlling ownership interest are the beneficial owners or where no natural person exercises control through ownership interest the analysis shall proceed to identifying any other natural person(s) exercising control of the legal person through other means. As a last resort, if none of the previously mentioned tests result in identification of the beneficial owner(s), the senior managing official(s) will be treated as the beneficial owner(s).*

Various examples are given on how to look through entities. Unfortunately, the new Commentary does not cover more complex structures that had previously been raised with the OECD, such as where a purpose trust owns a private trust company.

### ii Trust registers: implications of 5 AMLD and the meaning of 'control'

The key text for 5 AMLD was published in December 2017 and endorsed by a legislative resolution of the European Parliament on 19 April 2018. It was then adopted by the EU Council on 14 May 2018. On 19 June 2018, the text for 5 AMLD was then published in the Official Journal of the European Union. EU Member States must transpose 5 AMLD into their national law by 10 January 2020.

#### *Enlarged scope of registration*

4 AMLD limits the scope of trusts requiring registration on a domestic trust register in the relevant EU Member State to those that generate tax consequences; 5 AMLD widens this scope to all trusts that 'reside or are established' in the Member State concerned. It also applies to *fiducie*, *treuhand* or *fideicomiso* as well as to foundations (which fall within the concept of legal arrangements). In practice, in the case of trusts, this will be the place where the trustee resides and not referenced to the governing law of the trust itself.

#### *Non-EU resident trusts: registration*

There is a requirement for non-EU resident trusts to register in two instances. The proposed new Article 31(3a) of 5 AMLD, for a trust established or residing outside the European Union, reads:

> *Member States shall require that the beneficial ownership information of express trust and other types of legal arrangements when having a structure or functions similar to trusts shall be held in a central beneficial ownership register set up by the Member State where the trustee of the trust or similar legal arrangement is established or resides.*

> *Where the place of establishment or residence of the trustee of the trust or similar legal arrangement is outside the Union, the information referred to in paragraph 1 shall be held in a central register set up by the Member State where the trustee enters into a* ***business relationship*** *or* ***acquires real estate*** *in the name of the trust or similar legal arrangement.*[4]

On business relationships, the existing text of Article 3(13) of 4 AMLD, which is not amended by draft 5 AMLD, states: 'a business relationship means a business, professional or commercial relationship that is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration.'

It is unclear what these words mean in practice. In the broader sense, they could be taken to include sourcing professional advice from a counterparty in an EU Member State. It is understood that the intent at the time 4 AMLD was finalised was to focus on 'business trusts'. The European Union was informed at the time by STEP and other commentators that this expression did not have any well-established meaning given that the vast majority of business activity conducted in a trust context would, for reasons of liability protection, be conducted through the mechanism of underlying companies. It remains to be seen what sort of guidance will be provided on this topic. If given a wide meaning, it could mean any use of professional advisers for legal, tax accounting or investment advice within the EU could trigger a requirement to register.

So far as the acquisition of real estate is concerned, it would seem this is confined to situations of EU real estate held at the trust level alone and not where such real estate is held via an underlying entity.

The regulations make provision to allow a trust to provide evidence of registration in one Member State through a 'certificate of proof of registration or an excerpt . . . of the register' to avoid the need for duplicated registration.

***Public access***

5 AMLD allows for a modified form of public access to the trust register by 'persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud'.

At present, there is no clearly understood meaning as to what constitutes 'legitimate interest'. The implications of the 5 AMLD preamble are, however, that NGOs and investigative journalists with anti-corruption profiles should normally be seen as being able to assert a legitimate interest. This may well be a matter where different EU jurisdictions take a variety of approaches.

There is also a requirement to interlink the various EU registers by 2021, and a requirement to provide mechanisms for the verification of data. The absence of any verification mechanism to date has been seen as a major limiting factor in the utility of beneficial ownership registers. How this verification will be policed is unclear.

The qualified public access on the basis of legitimate interest needs to be contrasted with circumstances where full public access is proposed. This is in the case of use of a non-EU holding company by a trust that either resides in an EU Member State or, it would seem, becomes registrable as a result of an EU business relationship or holding of EU real estate as noted above.

4 Emphasis added.

Article 31(4) of 5 AMLD considers the situation for trusts owning a controlling interest in a non-EU company:

> *The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms to ensure that the information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to:*
>
> a. *competent authorities and FIUs, without any restriction;*
> b. *obliged entities, within the framework of customer due diligence in accordance with Chapter II;*
> c. *any person or organisation that can demonstrate a legitimate interest;*
> d. ***any person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means.***[5]

Article 30(1) is the requirement for EU companies to maintain a public register of beneficial owners. Thus, for all non-EU companies, any person can, on written request, obtain information on an EU-resident trust that controls it. It is understood at this stage that privacy may be afforded to EEA-resident companies that maintain a public register. This would mean Liechtenstein companies may not fall within the scope of sub-paragraph (d) as it is an EEA member.

It is not clear how an individual would in the first instance learn of the existence of a trust in these circumstances. There is also no recognition in these rules that non-EU companies may be subject to any form of public beneficial ownership register in their own jurisdiction (given the UK's recent proposals to extend public registers of corporate entities to its overseas territories).

### iii The UK's position: Brexit transition

A recent UK parliamentary report stated:

> *Although these dates all fall after the UK's projected exit from the EU in March 2019, it now appears likely the Government will agree to a post-Brexit transitional period during which EU law would continue to apply in the UK as if it were still a Member State. In those circumstances, the new AMLD would have to be implemented if its transposition dates occur within that period (which, considering the Prime Minister has said the transition is likely to be "around two years", is likely to be the case for all three types of register).*

It is therefore anticipated, given the imminent application of 5 AMLD, that the United Kingdom will be obliged to comply with it, at least during the transitional period. Given that the United Kingdom has also been within the vanguard of transparency initiatives with its European neighbours, it would be unsurprising if it continued to apply 5 AMLD in some

5 Emphasis added.

form once the Brexit transition has concluded. Whether the public access component for trusts would be watered down remains to be seen. It is understood that the Labour Party advocates full public access to the UK trust register.

It is also unclear whether UK companies will be regarded as 'non-EU' for this purpose post-Brexit, but it is assumed they will be regarded as equivalent.

### iv Meaning of 'control' in the context of EU trust registers

FATF 2012 Recommendations: Recommendations 10, 24 and 25 require trustees and financial institutions to identify 'the ownership and control structure of the customer'. I now turn to the two examples of trust registers in the EU that have been implemented under 4 AMLD, the forerunner to 5 AMLD. This throws an interesting light upon the extraordinary width of whom should be regarded as a beneficial owner in the context of a trust.

Section 5(2) of the UK's Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which came into force on 26 June 2017, require that trustees register:

*a* a settlor;
*b* trustees;
*c* named beneficiaries;
*d* beneficiaries who have received a distribution from the trust; and
*e* anyone who exercises 'ultimate control' over the management of the trust.

Section 2(1)(e) Malta's Trusts and Trustees Act (Register of Beneficial Owners) Regulations (the RBO Regulations), which came into force on 1 January 2018, require that trustees register:

*a* a settlor;
*b* trustees;
*c* named beneficiaries;
*d* a protector; and
*e* anyone exercising 'ultimate and effective control over the trust by any means', including any other person:
- whose consent is to be obtained; or
- whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

FATF 2012 Recommendation 10: financial institutions must identify 'any other natural person exercising ultimate effective control over the trust'.

In the context of the EU's 4 AMLD and the trust register, Her Majesty's Revenue and Customs have stated that 'control' means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to:

*a* dispose of, advance, lend, invest, pay or apply trust property;
*b* approve proposed trust distributions;
*c* vary or terminate the trust;
*d* add or remove a person as a beneficiary or to or from a class of beneficiaries;
*e* appoint or remove trustees or give another individual control over the trust; and
*f* direct, withhold consent to or veto the exercise of a power mentioned above.

In the context of the 4 AMLD and the beneficial ownership register for trusts, Malta's RBO Regulations have stated that 'control' means anyone exercising 'ultimate and effective control over the trust by any means', including any other person whose consent is to be obtained; or whose direction is binding in terms of the terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee.

The definition of 'material actions' means the following actions or any other actions achieving the same result:

*a* the amendment of the trust instrument;

*b* the addition or removal of any beneficiary, or any person from a class of beneficiaries, or any action affecting the entitlement of a beneficiary;

*c* the appointment or removal of trustees or protectors or to give another individual control over the trust;

*d* the acceptance of an additional settlor as may be applicable in terms of the terms of the trust instrument;

*e* the change of the proper law of the trust; and

*f* the assignment or transfer of all or most of the assets of the trust or the termination or revocation of the trust.

CRS imports into the concept of 'controlling persons' a direct link to the FATF defined terms of 'beneficial owners'. The CRS Commentary states at Paragraph 132:

> *Subparagraph D (6) sets forth the definition of the term 'Controlling Persons'. This term corresponds to the term 'beneficial owner' as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the Financial Action Task Force Recommendations (as adopted in February 2012),* ***and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.***[6]

On this basis, it is highly likely that the expanded definition of control that is implicit in the UK and Maltese trust registers in an anti-money laundering context that flows from the FATF 2012 framework will, over time, result in more significant disclosure being required in a CRS tax information exchange context. This is an example of the aforementioned convergence theme (see Section I).

As a separate matter, the FATF has recently been reviewing the 2008 Guidance to Trust and Corporate Service Providers. It is possible that the amended text will also give more detailed guidance on the meaning of a 'natural person exercising effective control' in a trust context. This will have a direct impact on CRS reporting for trusts in the light of the linkage mentioned above in the CRS model treaty.

The significant extensions are most likely to impact influence exercised:

*a* by committees where, to date, it has been argued that no one individual can personally decide upon a course of action;

*b* in an indirect manner by a family individual who does not serve as a protector as such but instead has a power to appoint or remove protectors; and

*c* by those with negative 'veto' powers but without positive powers to decide upon specific matters that impact the relevant trust.

6 Emphasis added.

It could be timely, therefore, for advisers to consider whether current governance arrangements for the oversight of trusts are still 'fit for purpose' or not.

## II CONCLUSION

What can be said at this stage is that advisers must continue to keep themselves informed on the important changes to the regulatory and transparency arena. There is no sign that the pace of reform is slowing at this point, quite the opposite.

In the longer term, it remains to be seen whether the degree of transparency and attendant public disclosure that the EU has embraced will be adopted more widely in the rest of the developed world. It is clear that the United States has been much slower to adopt measures that override privacy in such a sweeping manner.

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August 2018

**Chapter 33**

# POLAND

*Sławomir Łuczak and Karolina Gotfryd*[1]

## I INTRODUCTION

Poland is a neutral jurisdiction to individuals of significant wealth, which means that Poland provides neither positive nor negative regulations for the wealthiest individuals. On the one hand, the lack of such taxes as wealth tax and exit tax, and relatively low tax rates, makes Poland an attractive place to keep personal wealth. On the other hand, Poland conforms with current global trends aimed at closing the remaining loopholes in its tax system through the introduction of various regulations, such as controlled foreign corporation (CFC) rules, general anti-abuse rules (GAAR), new transfer pricing documentation requirements and taxation of joint-stock partnerships. It is significant that Poland participates in the Base Erosion and Profit Shifting (BEPS) project and implements the Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation. Poland has signed many double tax treaties (more than 80 conventions) and international agreements on the exchange of information on tax matters. These act as a deterrent to individuals who intend to keep their wealth in Poland.

## II TAX

There are two types of tax obligation in Poland: unlimited and limited. Unlimited tax obligation is constituted when individuals with their place of residence in Poland are taxed on their worldwide income, regardless of where the income is earned. The limited tax obligation arises when individuals do not have a place of residence in Poland, and they are taxed solely on their income derived from Polish sources. It should be stressed that, from 2017, the Polish legislator has extended a list of circumstances in which the income of non-residents is deemed to be generated in Poland. The extended list includes:

*a* any kinds of operation undertaken in Poland, including operation of a foreign facility located in Poland;

*b* a property located in Poland or rights to such a property, including sales thereof in its entirety or part, or sales of any rights to such a property;

*c* securities and derivative financial instruments not being securities allowed for public trading in Poland in the regulated stock exchange market, including those obtained through sales of such securities or instruments and exercising rights stemming from them;

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*d* the deed of ownership transfer of shares in a company, the whole of entitlements and obligations in a company not being a legal person or deeds of participation in an investment fund or a collective investment scheme where at least 50 per cent of the value of assets, directly or indirectly, constitute properties located in Poland or rights to such properties; and

*e* regulated titles due, including left for disposal, paid or deducted by natural persons, legal persons or organisational units not having a legal entity, with residence, registered office or management in Poland, irrespective of the place where the agreement was concluded or where the service is delivered.

A progressive income tax scale that is widely used in other EU countries, such as France, Sweden and the Netherlands, is applied to individuals in Poland. Tax rates vary depending on income earned, defined as: 'the total revenue minus tax deductible costs, earned in a given taxable year'. The Polish tax bands are relatively low: 18 per cent and 32 per cent. Poland is in ninth position in the ranking of progressive tax rates in EU countries regarding higher tax rates (32 per cent), and in 14th position concerning lower tax rates (18 per cent).[2] Nevertheless, according to statistics, only approximately 3 per cent of taxpayers pay the higher tax band of 32 per cent.[3] Most wealthy taxpayers optimise their profits using regulations intended for natural persons conducting business activity. These individuals are taxed according to the tax scale; however, at their request, they may tax their income at a 19 per cent flat rate, which is dedicated to natural persons conducting a business activity. It may be assumed that the most affluent Polish taxpayers are self-employed in Poland for tax purposes.

The richest Poles often derive their income from capital gains (dividends, interests, profit on the sale of shares), which are not covered by social security contributions, and it is taxed with a 19 per cent flat-rate tax (whereas in Germany and Ireland it is 25 per cent and in Scandinavian countries it is more than 30 per cent). Income from capital gains is not counted in the overall income.

In many countries, high tax rates are connected with a high tax-free personal allowance; however, this is not the case in Poland, where the tax-free amount is the lowest of all EU countries (approximately €750).[4] It is worth stressing that the Polish Constitutional Tribunal recently issued a judgment (Case No. K 21/14) in which it stated that the level of tax-free amount is unconstitutional insofar as it does not provide a correction mechanism for the tax-free amount to ensure a minimum standard for living. Hence, from 2018 the tax-free allowance for low earners has been increased to 8,000 zlotys. In cases of earnings higher than 8,000 zlotys, the allowance is decreasing depending on the income. Where yearly earnings exceed 127,000 zlotys, the personal allowance is not applicable at all.

A taxpayer's personal and family situation may be taken into account in the tax system, especially in relation to income tax, in the form of reliefs and tax exemptions.[5]

2 Statistics presented in PWC's Report: www.pwc.pl/pl/media/2016/2016-04-26-poziom-podatku-dochodowego-w-polsce-sredni-na-tle-innych-krajow-ue.html.

3 Information provided in the Polish Ministry of Finance statistics: www.finanse.mf.gov.pl/documents/766655/5008832/Informacja.

4 Statistic presented in PWC's Report: www.pwc.pl/pl/media/2016/2016-04-26-poziom-podatku-dochodowego-w-polsce-sredni-na-tle-innych-krajow-ue.html.

5 K Święch, *Pozycja rodziny w polskim prawie podatkowym*, Warsaw 2013, p. 133.

Poland, like most other EU countries, provides various tax credits, such as an internet tax credit, a tax credit for an individual retirement security account and a tax credit for charitable donations. Since the Polish tax system is in favour of families in many tax respects, a large part of tax credits concern a taxpayer's personal situation. Therefore, Polish income tax provides a child tax credit, joint taxation (with children) of single parents and joint taxation of spouses, the aim of which is to ensure a family has a reduced financial burden. At this point it should be noted that the preferential treatment of families also appears in gift and inheritance tax, where the immediate family members of the testator are exempted from tax.

As of 1 January 2015, numerous amendments to the Polish Personal Income Tax Act relating to cross-border structuring entered into force, such as the introduction of CFC rules, new transfer pricing documentation requirements and comprehensive regulations regarding the provision of information on interest payments, implementing Directive 2014/48/EU of 24 March 2014. The above changes aim to close loopholes in the Polish tax system.

From an individual taxpayer's perspective, the most crucial change is the introduction of CFC rules that revolutionise international tax planning and optimisation. The Polish legislator's aim was to tax income derived by Polish tax residents from foreign companies when such income is not taxed in the company's country of residence or the tax is too low (lower than 14.25 per cent). From 2018, the Polish legislator introduced the effective tax rate instead of a nominal rate. This means that a subsidiary company will be considered as CFC, when the income tax actually paid by the company is lower than the tax that it would pay in Poland. Under new provisions, an additional income tax (19 per cent) is imposed on shareholders holding at least a 50 per cent (25 per cent until 2017) direct or indirect holding in entities deriving their revenues mainly (more than 33 per cent) from passive income (i.e., dividends, interests, royalties, share disposals). CFC rules also affect taxpayers who are shareholders of entities that have a seat or place of management in a tax haven. Polish taxpayers who own CFCs will also need to keep a register of qualifying foreign entities and a record of transactions occurring in the foreign entities, and file a special annual return in Poland.

As for transfer pricing documentation, new provisions impose new requirements on taxpayers conducting related-party transactions, which means more comprehensive information on related-party transactions should be disclosed to the tax authorities. Under these new provisions, taxpayers are obliged to prepare more extensive transfer pricing documentation (in particular, local files are expanded). According to the new provisions, taxpayers whose annual revenues and expenses exceed €20 million in the preceding financial year are also obliged to provide master file documentation that includes, among others, the group's capital structure, transfer pricing policy and detailed information on intellectual property. Additionally, the biggest Polish taxpayers with consolidated revenues exceeding €750 million are obliged to provide country-by-country reporting. It should be stressed that some changes in transfer pricing provisions are favourable for taxpayers whose revenues and expenses do not exceed €2 million in a given year, as they do not need to prepare transfer pricing documentation.

As already mentioned above, Polish tax law provides for neither wealth tax nor exit tax. However, recently, the Polish government revealed details of the solidarity tax. The tax will be paid by taxpayers earning over 1 million zlotys a year and the rate will be 4 per cent from the surplus over this amount. The solidarity tax, together with a part of the Labour Fund contribution (amounting to 0.15 per cent of its base), will be credited to the Solidarity Support Fund for the disabled. In this way, the Polish government wants to raise funds to support the disabled. The solidarity tax will be paid for the first time on income obtained in 2019, which the taxpayer will settle by making a statement in 2020. Nevertheless, the government has not provided for the detailed draft of the law.

## III SUCCESSION

The Polish law of succession is mainly regulated in the Polish Civil Code. However, specified provisions regarding the law of succession are also found in other statutory laws (e.g., banking law, labour law and the Code of Commercial Companies). The right to inherit is protected by the Polish Constitution, which states that everyone has the right of succession and this right is equally protected by the law.

The law of succession is based on legal principles, namely testamentary freedom and the protection of relationships between family members.[6]

The right to succession may result from two sources: the will or the statute (the Polish Civil Code). It should be noted that a will takes precedence over the statutory inheritance. A testate succession occurs when a testator (a person with full legal capacity) expresses his or her last will through one of three forms of will. The first is the simplest: the will should be written entirely by the hand of the testator, who must sign and date it. The second may be made in the form of a notarial deed. The third is to make a will by declaring its content orally before a local government officer in the presence of two witnesses.

Statutory succession should be applied when no (valid) testament exists or the persons who were appointed as heirs in the testament disclaimed the testament or are unable to become heirs. There are four groups of heirs under Polish succession law. The range of these entities is determined by family ties, such as blood ties, marriage or adoption.

In the first group, the surviving spouse and descendants will inherit. Here, the principle that children and a spouse inherit in equal parts applies; however, the spouse's share cannot be less than a quarter of the entire estate. In the second group, in the absence of descendants, the spouse and deceased's parents will inherit. In this case, the inheritance attributable to the spouse must correspond to half of the deceased's estate. If the deceased's parents have died, the inheritance attributable to this parent goes to the testator's siblings or, if the deceased's siblings have died, their children. The third group of heirs is entitled to the succession solely when there are no heirs in the first two groups. This category includes the deceased's grandparents or, if they are also deceased, their children. The fourth group consists of children of the deceased person's spouse whose parents were not alive when the estate was opened. Last of all, the municipality in which the decedent last resided will inherit, or, if the deceased's residence cannot be determined or is located abroad, the State Treasury.

Here, it should be indicated that the sequence of the inheritance and the range of the entities entitled to the succession presented above is a result of amendments to Polish succession law from 2009. So far, provisions in scope of statutory succession have been rigorous and have prevented grandparents and their descendants from succession. Another key change is the testator's stepchildren's entitlement to the succession; however, they inherit only when their parents have passed away. The amendment was designed to strengthen family ties and limit the municipality's and State Treasury's access to the succession in a situation where a member of the testator's family is still alive.

6 W Borysiak, Polish law of succession – general information, provided on the website: http://polishprivatelaw.pl/polish-law-of-succession-general-information/.

It is noteworthy that heirs may either accept succession without the limitation of liability for debts (simple acceptance), or accept succession with the limitation of such liability (acceptance with benefit of inventory). Alternatively, heirs may reject the inheritance within a time limit of six months from the day when they became aware of their title to inherit. Until 2015, when no statement of intent was submitted within the prescribed time limit, heirs were deemed to have accepted the inheritance and were liable for debts without any limit. Such a state of affairs was deemed socially unfair. Therefore, since 18 October 2015, provisions concerning liability for debts under succession have been changed to be analogous with the latest European codifications. According to the new regulation, if heirs do not do anything within a time limit of six months from the day they become aware of their title to inherit, their liability for debts will be limited to the assets of inheritance (acceptance with benefit of inventory).

A testator may appoint an executor to ensure that all the testamentary provisions will be properly conducted; however, the executor cannot be treated as a fiduciary or a trustee.

Polish law forbids mutual wills and contracts of inheritance, with the only exception to this rule being a contract of renunciation of inheritance, in which a person who belongs to one of the classes of statutory heirs renounces his or her statutory inheritance after the testator's death.

There have been no changes affecting personal property, such as developments on prenuptial agreements and same-sex marriages. Same-sex marriages are illegal in Poland; therefore, people in a same-sex relationship are not subject to intestate succession. However, there are no obstacles to prevent either party in such a relationship from drawing up a will that decides who will receive a party's estate. It should be noted that Polish succession law protects the closest relatives of a deceased person by forced share. Only descendants, a surviving spouse, and the deceased's parents have the right to a statutory portion.

Nevertheless, a person in a same-sex relationship can receive the right to a tenancy from the deceased partner. This was confirmed by the Supreme Court in its resolution (Case No. III CZP 65/12) of 28 November 2012, in which it was held that the person of the same sex who is connected through emotional, physical and economic ties with the tenant may receive the right to the tenancy from the deceased partner just as a wife or a cohabiting partner.

Prenuptial agreements do not change the rules for passing on inheritance, including the intestate succession rules, which are binding when the testator does not draw up a will. This means that spouses who have concluded a prenuptial agreement inherit from each other according to succession law principles. This agreement may affect the seizure of assets of the inherited wealth only (there is no succession of the couple's property, only the individual property of the deceased spouse).

Natural persons are the only taxpayers of inheritance tax. Inheritance tax is imposed on acquisitions as a result of inheritance of property (movable and immovable) located in Poland, and property rights exercised in Poland, including money. Tax is also applied to the acquisition of property located outside Poland and rights exercised abroad if at the time of the deceased's death, the beneficiary was a Polish national or had a permanent place of residence in Poland. If neither the deceased nor the beneficiary were Polish citizens or had permanent residence in Poland at the moment of death, inheritance tax is not levied.

Payers of inheritance tax are grouped into three categories depending on their relationship with the testator. The first group consists of the spouse, descendants (children, grandchildren, etc.), ascendants (parents, grandparents, etc.), sons-in-law, daughters-in-law, siblings, stepfathers, stepmothers and parents-in-law. The second includes descendants of siblings (nieces, nephews, etc.), siblings' spouses, siblings of spouses, the spouse's siblings' spouses, other descendants' spouses' siblings of parents (aunties, uncles, etc.) and stepchildren's descendants and spouses. Finally, the third group includes other acquiring parties, including unrelated parties.

Determining the base and rate of Polish inheritance tax depends on the specific tax group the testator belongs to and on the minimum tax-exempt amount. Currently, tax-exempt amounts are as follows:

*a* for acquirers from tax group 1: 9,637 zlotys;
*b* for tax group 2: 7,276 zlotys; and
*c* for tax group 3: 4,902 zlotys.

Tax on inheritance applies to the acquisition of ownership of assets over the tax-free amount.

The table below presents the rates of Polish inheritance tax:

| Taxable base | | |
|---|---|---|
| Above | Up to | Tax scale |
| (1) from acquirers in group I | | |
| – | 10,278 zlotys | 3% |
| 10,278 zlotys | 20,556 zlotys | 308.30 zlotys plus 5% of the surplus over 10,278 zlotys |
| 20,556 zlotys | – | 822.20 zlotys plus 7% of the surplus over 20,556 zlotys |
| (2) from acquirers in group II | | |
| – | 10,278 zlotys | 7% |
| 10,278 zlotys | 20,556 zlotys | 719.50 zlotys plus 9% of the surplus over 10,278 zlotys |
| 20,556 zlotys | – | 1,644.00 zlotys plus 12% of the surplus over 20,556 zlotys |
| (3) from acquirers in group III | | |
| – | 10,278 zlotys | 12% |
| 10,278 zlotys | 20,556 zlotys | 1,233.40 zlotys plus 16% of the surplus over 10,278 zlotys |
| 20,556 zlotys | – | 2,877.90 zlotys plus 20% of the surplus over PLN 20,556 zlotys |

The taxpayer has 14 days from the day the decision of the revenue office determining the tax rate (unless it was collected earlier by the notary) has been delivered to pay the inheritance tax.

Poland is unique among tax jurisdictions across the world for exempting the testator's immediate family members from inheritance tax. This is aimed at accumulating the family's wealth across generations, and therefore the provisions of inheritance tax give preference to the family. The beneficiaries need to report the acquisition to the competent head of their tax office within six months of the day the tax obligation has arisen.

On 6 June 2018, the Supreme Administrative Court issued a precedential judgment that may revolutionise the taxation of donations (Case No. II FSK 1525/16 and II FSK 1526/16 ). In this ruling it is stated that a taxpayer who, by executing the order of a testator or donor, purchased a thing for himself or herself for money from the inheritance or donation, will not pay tax on the part of the estate issued in accordance with this order.

In practice, this means that with the appropriate order in the donation, all taxpayers – particularly from the third tax group, who settle with the tax authorities according to the highest tax rates – could avoid paying the tax. Moreover, the testator or donor's immediate family would be released from the obligation to report the acquisition of the gift or inheritance to the tax authorities.

On 8 June 2018, the Polish parliament passed an Act on the management of the succession of the individual enterprise. The Act has been submitted to the Senate (the upper house of the Polish parliament) and to the President.

The main assumption of the Act is to enable a smooth continuation of a company's operation after the death of its owner.

Sole proprietorship is the most popular form of conducting business activity in Poland. The vast majority of Polish entrepreneurs (80 per cent) operate on the basis of an entry into the Central Register and Information on Business (CEIDG). Currently, when the owner of a company entered into CEIDG dies, his or her heirs may not continue running the business. The entrepreneur's death results in the expiry of many company rights (e.g., to use TIN or licences and concessions, and obtain tax rulings).

The new law assumes that, after the death of the owner of the enterprise, the company will be able to retain employees, TIN and continuity of tax settlements; it is also possible to execute concessions or permits and tax rulings obtained by the entrepreneur, as well as commercial contracts concluded by him or her. The new regulations are also aimed at enabling entrepreneurs to set up the succession manager who will take over the running of the company after the owner's death.

According to the Act, the succession manager will manage the company from the death of the person running the company until such time as the inheritance is divided between the heirs. The succession manager will be appointed by a business owner or a spouse or the people inheriting the enterprise – after the death of the business owner – and may be a natural person who has full legal capacity, regardless of whether he or she is related to the entrepreneur or not, and regardless of whether he or she professionally deals with property management. The Polish legislator intends to introduce an incentive to take over and run family businesses.

The incentive takes the form of an exemption from inheritance tax on the acquisition of an enterprise. At present, only the testator's immediate family may benefit from such exemption. After the change of the regulations, the tax exemption will also apply to the persons who will run the business, regardless of the relationship with the deceased entrepreneur. The condition for obtaining the exemption will be the notification of the purchase of the enterprise to the head of the tax office and running the acquired company for at least five years.

The new regulation should encourage the continuation of the company, even if the immediate family of the deceased entrepreneur does not have relatives who will undertake to continue the business.

## IV WEALTH STRUCTURING AND REGULATION

For wealth structuring, Polish taxpayers commonly use regulations and structures available in Poland as well as in foreign countries. So far, trusts and private foundations are unknown to the Polish legal system, and therefore they are not widely exercised in Poland. However, it is increasingly being argued that it is necessary to introduce the institution of the family foundation into the Polish legal system. Nevertheless, the wealthiest taxpayers willingly benefit from foreign foundations and trusts located in countries that provide these regulations, such as Austria, Liechtenstein, the United Kingdom, and the Netherlands.

Until 2017, optimisation structures in Poland were established by using closed-end funds. However, in January 2017 the taxation of investment funds was changed. The new provisions have repealed the existing regulations constituting a basis for exemption from corporate income tax for Polish closed-end investments funds (CIF) and foreign collective investment institution of a closed type.

In practice, this means that profits of these funds derived from participation in Polish or foreign tax partnership; from interest on loans granted to such entities; from interest on equity contributions to such entities; from donations and fully and partially free-of-charge performances of such entities; from securities issued by these entities and from the sale of participation in such entities are subject to the standard income tax of 19 per cent.

Above-mentioned exclusions from the corporate income tax (CIT) exemption aim at the elimination of tax-optimisation schemes involving Polish CIF, which has been a part of the chain of tax transparent vehicles, including Luxembourg special limited partnership.

However, it should be noted that some types of CIF income are still exempt within specific exemption and considering the above exclusions (e.g., income from real property directly owned by CIF).

Polish open-end funds and special open-end funds (not applying the policies of closed-end funds) may benefit from full tax exemption without any limitations.

As for funds from the European Union or European Economic Area, there is CIT exemption for them when:

*a* they are subject to income tax in the state where they have their registered office on all of their income, wherever obtained;
*b* the only subject of their activity is collective investment of funds raised through a public offering of participation units in securities and money-market instruments;
*c* they operate pursuant to a licence from the competent financial market regulator in the state where they have their registered office;
*d* their activity is subject to direct supervision by the competent financial market regulator of the state where they have their registered office;
*e* they have a depository holding the fund's assets; and
*f* they are managed by entities operating pursuant to a licence from the competent financial market regulator of the state where such entities have their registered office.

The above eligibility for CIT exemption will only be applicable in cases when foreign funds operate in a country with which Poland has concluded a double tax treaty or other international agreement allowing Polish tax authorities to receive tax information from the tax authorities of the investment funds.

The CIT exemption is not applicable to collective investment undertakings when:

*a* they operate in the form of a closed-type collective investment undertaking or are an open-type collective investment undertaking operating under the investment rules and restrictions applicable to closed-type collective investment undertakings; and
*b* under their founding documents their participation units are not offered through a public offering or admitted to regulated trading or an alternative trading system and can also be acquired by natural persons only if they make a one-time acquisition of participation units of no less than €40,000.

Until 2014, the use of a joint stock partnership was possible for tax optimisation purposes; however, the Polish legislator became aware of this well-known trend and decided that joint-stock partnerships are subject to corporate income tax. Imposing corporate income tax on joint-stock partnerships that were tax-transparent forced taxpayers to find other ways to find tax optimisations. Limited partnerships (LPs) turned out to be an effective alternative. An LP is a very popular form of conducting business as it enables the partners' liability to be limited and is not subject to CIT. It should be clarified that LPs are entities without a legal personality and they are created by two types of partner: a partner whose liability for the company's obligations is unlimited and who conducts the company's affairs and represents it in all issues before third parties; or a partner with limited liability who is obliged to a fixed amount, which does not need to reflect the partner's contribution to the LP.

To connect benefits from limited liability (not only for tax arrears purposes) with the tax advantages resulting from the tax transparency of partnerships, it is worth considering the establishment of a hybrid company, such as a limited liability company or limited partnership.[7]

The general partner in this entity is a limited liability company that conducts the company's affairs and represents it, and, therefore, its liability is unlimited (in practice, it will be limited exclusively to the company's assets because of its legal nature). A limited partner is a natural person who can also be a shareholder of a general partner.

Tax burden optimisation for income tax is carried out through an appropriate profit distribution between general and limited partners. To achieve a measurable benefit in the tax law area, profit distribution should be done in a way that the profit of the general partner is considerably lower than the profit of the limited liability partner (e.g., unlimited liability partner: 1 per cent; and limited liability partner: 99 per cent).

This interesting hybrid is a type of partnership that is neither a taxpayer of CIT nor personal income tax. This means the partners in a limited partnership (natural persons) should pay personal income tax. The taxpayer's income from participating in a partnership is determined proportionally to the right to a share in the partnership's profit. This income is cumulated with general income subject to the progressive tax rate. The taxable person may tax its income from non-agricultural activity according to the linear rate of personal income tax at 19 per cent.

As for a limited liability company, it is a capital company and, therefore, it is double taxed, which means that taxes are paid both by the company (19 per cent on income earned) and the shareholders (19 per cent from dividends); hence, why a general partner's profit should be reduced to the minimum.

While discussing different ways of tax optimisation, issues regarding the general anti-avoidance rule in Poland should not be omitted. The fate of this clause in Poland seemed to be tortuous, but eventually the Polish government enacted a GAAR, which came into force on 15 July 2016.[8] The general anti-avoidance rule was created as a new tool that the tax authorities may apply to reclassify business operations where a taxpayer was demonstrated to have obtained substantial tax profits through tax-avoidance strategies. Achieving 'tax benefit' through artificial arrangements prejudges the possibility of applying the anti-abuse rule. The term 'tax benefit' should be understood as 'reducing, avoiding or postponing the taxpayer's

7 M Jamroży, et al, *Spółka osobowa prawa handlowego. Aspekty prawno-podatkowe, optymalizacja podatkowa*, Warsaw 2012, p. 315.

8 GAAR was originally introduced in the 2003 Tax Ordinance Act and this provision continued to be applied until May 2004 when the Polish Constitutional Court held that the GAAR provision was unlawful because it did not meet the constitutional requirements of appropriate legislation and repealed this rule. Since then, the Polish tax law system did not have a general anti-avoidance rule until 2017; however, some attempts in the past were made to introduce this clause with regard to closing remaining loopholes in Polish tax law.

tax liability, creating a tax payment surplus or an entitlement to a tax refund, or increasing the amount of tax payments surplus or tax refund'. To decide whether a legal arrangement is artificial or not, various factors should be taken into account, such as excessively complex transactions. It should be noted that when a taxpayer obtains a 'tax benefit' that does not exceed 100,000 zlotys in a given settlement period, the GAAR will not be applied.

The clause allows the tax authorities to ignore artificial legal arrangements, which means taxpayers may be obliged to pay the avoided tax with default interest and become exposed to criminal fiscal liability. To protect taxpayers from the tax authorities' discretionary powers, the Council for Tax Avoidance Matters, a collegiate body independent of the tax authorities, was created. The Council issues non-binding opinions on whether the GAAR should be applied in a given case or not, at the request of the taxpayer or the competent authority. Moreover, the taxpayer may apply to the Minister of Finance to issue an opinion, which disallows the application of the GAAR. The cost of this opinion is 20,000 zlotys.

The Polish GAAR is applicable as *lex generalis* to other specific anti-avoidance rules. The Polish Ministry of Finance states that the GAAR should be applied only as a last resort when other measures (i.e., specific anti-abuse rules) fail.

It is noteworthy that, since May 2017, the Polish Ministry of Finance has been publishing a series of documents, including a warning about the possibility of applying GAAR to certain aggressive tax-optimisation schemes. The Ministry warns in its statements against application of the tax optimisation using closed-end investment funds and bonds purchased as part of a group of affiliates; tax capital groups and the structures with use of foreign companies.

The Polish legal system covers money laundering in criminal law provisions, securities law, banking law and certain provisions of a *lex specialis* nature (including EU legislation).[9] Criminalisation and preventing money laundering is based on the Penal Code (in particular, Article 299), the Act of 16 November 2000 on counteracting money laundering and financing terrorism, the Act of 28 October 2002 on the Acts prohibited under the Punishment Act, and the Act of 31 January 1989 on banking law.

The definition of 'money laundering' in Polish law is broad, as it covers not only funds from an illegal activity but also legal funds that are 'hidden' from taxation.

The Act on counteracting money laundering sets out obliged entities' duties related to preventing money laundering and financing terrorism. This Act implements Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005. The new Directive (EU) 2015/849 preventing money laundering is in the process of being implemented by Poland.

In the provisions of the Act, information such as the following may be found: the definitions of 'obliged entities' and 'beneficial owner'; competent authorities responsible for counteracting money laundering and financing terrorism; obliged entities' responsibilities; principles for providing information to the General Inspector; the procedure for suspending transactions and blocking accounts; specific restrictive measures against persons, groups and entities; controlling obliged entities; protecting and disclosing collected data; and pecuniary penalties and penal provisions.

Besides credit and financial institutions, obliged entities are: auditors, external accountants, tax advisers, notaries, and other independent legal professionals, such as

9 K Nowicki, Ł Woźniak, *Prawne regulacje dotyczące prania brudnych pieniędzy* (in:) J Grzywacz, et al, *Pranie brudnych pieniędzy*, Warsaw 2005, p. 75.

attorneys and legal advisers. The personal scope of this Act also covers an entrepreneur (both natural and legal person) conducting a transaction exceeding the equivalent of €15,000 who is obliged to register such transaction. This obligation also occurs when a transaction is carried out by more than one single operation but the circumstances indicate that they are linked and that they were divided into operations of less value with the intent of avoiding the registration requirement.

The Act on counteracting money laundering sets out several duties of obliged entities, which include registering any transaction exceeding €15,000, keeping specified records, carrying out ongoing analyses of conducted transactions, conducting risk assessment for money laundering, and financing terrorism and applying financial security measures.

A new act on counteracting money laundering came into force on 13 July 2018. The most important changes resulting from this act will be lowering the threshold for reporting cash transactions up to €10,000 and increased penalties for violation of duties from 750,000 zlotys up to a maximum of €5 million or 10 per cent of the turnover shown in the financial statements for the last financial year. New obliged entities, such as entrepreneurs operating in the cryptocurrency and trust sectors, will be covered by the anti-money laundering responsibilities and the introduction of open and publicly available central registry of beneficial owners, effective as of 13 October 2019.

Poland is not a member of the Financial Action Task Force (FATF); however, it is involved in the group's activities. Poland not only replies to the questionnaires sent by FATF's experts, but also participates in the meetings of the working parties (i.e., FATF and Moneyval).[10]

## V OUTLOOK AND CONCLUSIONS

It may be assumed that there is a regressive tax regime in Poland, as taxes for the most affluent people are lower than in other Western countries, whereas for the poorest, they are higher. Poland does not have a national tax policy for the richest individuals; most wealthy Poles have their wealth taxed outside the territory of Poland in countries that provide more advantageous tax treatment, such as Luxembourg, Cyprus and the Netherlands.[11] Poland has begun its battle to prevent tax avoidance and tax evasion through introducing numerous regulations designed to combat this negative phenomenon. It would not be an exaggeration to say that Poland is becoming a less tax-friendly country, which consciously limits the possibility of tax optimisation.

For several years, there has been a trend in Europe to close remaining loopholes in national tax law to prevent aggressive tax planning, tax avoidance and tax evasion: from the flagship project of the Organisation for Economic Co-operation and Development – BEPS to the work carried out by the Commission in the area of anti-avoidance package and domestic regulations of particular countries.

10 Information provided on the Polish Ministry of Finance's website: www.mf.gov.pl/documents/764034/1002265/FATF.notatka.08.08.2014.pdf.

11 Information provided in the article: Czy najbogatsi Polacy odprowadzają dochody do rajów podatkowych?, available on the website: www.totalmoney.pl/artykuly/173464,konta-osobiste,czy-najbogatsi-polacy-odprowadzaja-dochody-do-rajow-podatkowych,1,1.

The Ministry of Finance has not conducted an analysis concerning the estimation of the scale of BEPS from the results of the Supreme Chamber of Control's report.[12] So far, the BEPS action plan has had little influence on Polish domestic tax law.

Nevertheless, significant changes have been made in Polish tax law recently. As of 1 January 2015, numerous amendments to the Polish Personal Income Tax Act have entered into force. Changes include the introduction of CFC rules, strengthening thin-capitalisation rules and the introduction of a number of new transfer pricing documentation requirements. However, only the transfer pricing provisions reflect the OECD's recommendations provided for in the BEPS project and they remain in line with the guidelines included in the Final Report of Action 13.

In contrast, the BEPS project has had a huge impact on Polish tax treaty law. In its answer to the letter of 8 February 2016 concerning the impact of BEPS on treaty policy, the Polish Ministry of Finance stated that the Ministry is actively engaging in the BEPS project, which has been assessed as an important initiative to prevent the loss of tax revenues at national and international levels.[13] This approach would seem to be supported by the actions taken by the Polish Ministry of Finance.

During the period from 2012 to 2015, Poland concluded seven new double tax treaties, eight protocols amending double tax conventions and 15 agreements on the exchange of information on tax matters. According to the Polish Ministry of Finance, the main objectives of the above-mentioned are to limit the use of double tax treaties; to reduce opportunities for aggressive tax planning; to strengthen control mechanisms through an effective exchange of tax information; and to extend the list of types of income generated in a state where it will be covered by a credit method and it will be taxable in that state. The Polish Ministry of Finance stated that it recommends implementing selected solutions of the BEPS Action Plan. The Polish Ministry of Finance will propose new BEPS provisions concerning the principal purpose test; permanent establishment with the anti-avoidance rule; the tie-breaker rule; and hybrid entities to its treaty partners. Because of the wide scope of work undertaken in the BEPS project, the analysis evaluating proposed measures that should be introduced into the Polish tax system or in double tax treaties concluded by Poland are still in hand.

The Ministry of Finance explained that Poland is a member of the Developing a Multilateral Instrument to Modify Bilateral Tax Treaties OECD *ad hoc* group that developed during the course of the BEPS project, and whose objective is to speedily and consistently implement the proposal of new treaty provisions using the multilateral instrument. The Polish Ministry of Finance sees this initiative as an extremely important and effective means of combating tax avoidance and tax fraud and, therefore, Poland volunteered to participate in this group in April 2015. As a result, on 7 June 2017, Poland became a signatory to the Multilateral Convention to implement tax-treaty-related measures to prevent BEPS (MLI). Poland has reported 78 out of 89 double tax treaties to subject to the MLI. Given the fact

12 Information provided in the Report of the Supreme Chamber of Control: Wystąpienie pokontrolne, Nadzór organów podatkowych i organów kontroli skarbowej nad prawidłowością rozliczeń z budżetem państwa podmiotów z udziałem kapitału zagranicznego, Warszawa 2015, p. 10. See: www.warszawa.kskarbowa.gov.pl/documents/3864021/4464296/NIK+05092014.pdf.

13 A response to the request for access to the public information lodged by the author to the Polish Ministry of Finance on 8 February 2016 (PK2.824.16.2016).

that the MLI has been recently signed, it may take some time to conclude the final scope of double tax treaties and the scope of their amendments. At this moment, it is too early to see or to predict the effectiveness of the above-mentioned measures.

The OECD places emphasis not only on the BEPS project, but also on the automatic exchange of tax information between Member States. Poland, as a member of the Early Adopters Group, has started exchanging information about the bank accounts of individuals.[14] On 4 April 2017, a new Act on the exchange of tax information with other states came into force, which adapts Polish law to the requirements of the Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation. The Act's main purpose is to bring together issues concerning the exchange of tax information in a single Act, including the implementation of automatic exchange of information on tax matters, also in respect of individual tax rulings at cross-border level and advance pricing agreements. The Act specifies, among others, the principles of mandatory automatic exchange of information in the field of taxation; the disclosure obligations of financial institutions regarding the exchange of information on bank accounts; the scope of exchanged information; the procedure for the notification; rules concerning reporting obligations; and the principles of due diligence of the financial institutions that are obliged to report.

The Act also provides regulations enabling the automatic exchange of tax information with third countries (outside the EU) under the Common Reporting Standard procedure. It should be stressed that Poland concluded a separate agreement on the exchange of tax information with the United States (the Foreign Account Tax Compliance Act (FATCA)). FATCA entered into force as of 1 December 2015 and its main aim is to impose an obligation on Polish financial institutions to obtain and exchange information with the tax authorities about US residents and citizens in Poland.

14 Information provided on the website: https://www.oecd.org/tax/exchange-of-tax-information/global-forum-AEOI-roadmap-for-developing-countries.pdf, p. 4.

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Karolina Gotfryd graduated with a law degree with honours from Warsaw University Law School. She studied for one semester at Cologne University Law School. She took part in numerous tax law seminars and summer tax schools at Jagiellonian University in Cracow, and at Vienna University of Economics and Business. She participated in the EUCOTAX (European Universities COoperating on TAXes) Wintercourse 2016 in Vienna and her area of research was 'SAAR - in a post BEPS world'. She is a finalist of the 'Eye on tax' competition 2015, organised by EY. She gained experience in legal practice at international law firms in Warsaw and London. She is a member of the International Fiscal Association (IFA).

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