

Mandatory Disclosure Rules

TAX ALERT

Table of contents

SCOPE OF POLISH MDR LEGISLATION	2
REPORTABLE SCHEMES	2
TAX SCHEME.....	2
PROMOTER, USER, SUPPORTER	3
WHO IS OBLIGED TO REPORT SCHEMES?	4
FOREIGN ENTITIES ALSO SUBJECT TO REPORTING OBLIGATION	4
FORM TYPES	4
REPORTING DEADLINES.....	5
INTERNAL PROCEDURES	5
FINES FOR FAILURE TO INTRODUCE THE INTERNAL PROCEDURE	6
FINES FOR BREACH OF MDR REGULATIONS	6
EXAMPLES OF TAX SCHEMES.....	6
Restructuring of remuneration.....	6
Self-employment	7
9% CIT rate	7
50% of costs for authors	7
Payments subject to WHT.....	7
Non-resident's income	7
Avoidance of double taxation in more than one country	8
Structures with transparent companies	8
Payments to tax havens	8
Transfer of intangible assets.....	8
Transfer of functions, assets and risks	8
Deferred tax	9
Acquisition of a company with a loss	9
R+D relief	9



Magdalena Zasiewska

Tax Adviser
Head of Taxes

magdalena.zasiewska@jara-law.pl



Dorota Dąbrowska

Tax Adviser
Tax Manager

dorota.dabrowska@jara-law.pl

SCOPE OF POLISH MDR LEGISLATION

The new regulations transpose the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("Directive"), however their scope is much wider than this of the Directive. They provide for the reporting obligation not only with respect to cross-border schemes (as in case of the Directive), but also **domestic tax schemes**. Moreover, the Polish regulations refer not only to **direct taxes but also to indirect taxes (VAT, excise), so called local taxes such as real estate tax** and other arrangements governed by tax provisions. However, the MDR regulations do not cover customs duties.

REPORTABLE SCHEMES

Under the MDR regulations there are three types of schemes that must be reported:

- a) tax scheme,
- b) standardized tax scheme,
- c) cross-border tax scheme (excluding VAT and excise).

In case of schemes other than cross-border schemes, the reporting obligation under the MDR regulations does not arise if the requirement of a qualified user is not met, which means user whose the revenues/costs/assets do not exceed a PLN equivalent of **EUR 10 million** or if the implemented arrangement refers to assets or rights whose market value does not exceed an equivalent of **EUR 2.5 million** or if a user is not **an affiliated entity**.

TAX SCHEME

A tax scheme is an arrangement which:

- a) meets the requirement of the main benefit and has a generic hallmark,
- b) has a specific hallmark or
- c) has any other specific hallmark.

A tax scheme is broadly defined by several dozen requirements and hallmarks, however it suffices to meet only two or in some cases even one of them for the arrangement to be deemed as a tax scheme. It is important that a tax scheme covers not only **tax optimizations but also entirely legal actions**. In many cases it will not be necessary to gain a tax benefit for the reporting obligation to arise.

Cross-border tax scheme is an arrangement which meets the cross-border requirement and:

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

- a) meets the requirement of the main benefit and has any of the generic hallmarks referred to in art. 86a § 1 item 6 (a)-(h) of the Tax Code or
- b) has a specific hallmark.

Cross-border tax schemes will be automatically exchanged with other member states.

Standardized tax scheme is a tax scheme which may be implemented or made available at **more than one user** without the need to change its substantial assumptions, in particular with respect to the type of actions undertaken and planned as part of this tax scheme.

PROMOTER, USER, SUPPORTER

Promoter is an individual, legal person or entity, in particular a tax advisor, attorney, legal counsel, bank employee or employee of other financial institution advising customers, also if such entity does not have a place of residence, registered office or management board in the country, who designs, offers, makes available or implements the arrangement or manages the implementation of the arrangement. It is also possible that there are **several promoters** for one particular scheme and potentially the reporting obligation will rest on each of them. For instance, not only a **consulting company** which designs or implements the arrangement being a tax scheme is a promoter, but also a counsel, lawyer, attorney working with such company on a given arrangement as a so called **self-employed person**. Also an **in-house counsel in a group of affiliated entities** or **a company from a group (e.g. shared services center)** which advises other entities from the group with respect to a reportable arrangement may be a promoter.

User (taxpayer) is an individual, legal person or entity, to whom/which an arrangement is made available or at whom/which an arrangement is being implemented or who/which is prepared to implement an arrangement or has undertaken activities aiming at implementation of such arrangement. Generally, **user** is a taxpayer, **regardless of its legal form, place or residence, registered office or management board**. In case of entities transparent for the purposes of income taxes (**such as a limited partnership (*spółka komandytowa*) or general partnership (*spółka jawna*)**), also its partners may be users, if the arrangement causes tax consequences for them. A tax remitter who gains a tax benefit consisting in not being obliged to collect the tax may also be a user.

Supporter is an individual, legal person or entity, in particular an auditor, notary, **person providing bookkeeping services, accountant or CFO**, bank or other financial institution, including their **employee**, who – exercising generally expected due care, having regard to the professional nature of the business, specialization and object of the undertaken activities – decided to provide, directly or through other persons, aid, assistance or advice regarding designing, marketing, organizing, making available for implementation and supervising the

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

implementation of an arrangement. A supporter may be a **group company**, in particular a **shared services center**, which provides bookkeeping services and prepares tax scheme documentation.

WHO IS OBLIGED TO REPORT SCHEMES?

Generally, the reporting obligation lies with promoters. **Promoters** bound by the professional secrecy obligation (such as tax advisers, legal counsels, attorneys, financial advisers, bank employees) are not obliged to report a tax scheme if they have not been exempt from the professional secrecy obligation by their client. Nevertheless, they still have certain information obligations to the Head of the National Revenue Administration (NRA) and toward users (clients). In such case the reporting obligation rests with the client as a **user** and the promoter must inform the user of such fact and provide him with all information necessary to fill out the MDR-1 form. It is possible that in some cases also a **supporter** (an entity/person assisting with the scheme implementation (which, for instance, draws up agreements and other tax scheme documents)) is obliged to report an arrangement being a tax scheme. The reporting obligation also rests with a **user** who used the scheme in a tax settlement (MDR-3 form).

FOREIGN ENTITIES ARE ALSO SUBJECT TO REPORTING OBLIGATION

Poland is the first country to transpose the Directive. As a result, under the Polish regulations foreign entities may be obliged to report tax schemes regarding Polish taxes to the Head of NRA (for instance a foreign entity registered in Poland for VAT purposes or a Polish permanent establishment of a foreign enterprise). Under the MDR regulations, a promoter, user or supporter is exempt from reporting a tax scheme to the Head of NRA, provided that a promoter, user or supporter accordingly is able to prove that a cross-border tax scheme has been properly reported to competent authorities in another member state under provisions of this member state implementing requirements set out in Article 8ab of the Directive.

FORM TYPES

The arrangements are reported through mandatory forms (<https://mdr.mf.gov.pl/#/>). The regulations provide for four reporting forms:

- **MDR-1** Tax Scheme Information (to be filed by a promoter, user, supporter);
- **MDR-2** Tax Scheme Notice (to be filed by a promoter, supporter);
- **MDR-3** User's Tax Scheme Information (to be filed by a user);

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

- **MDR-4** Quarterly Information on Making a Standardized Tax Scheme Available (to be filed by a promoter, supporter).

The aforementioned forms do not exhaust all information obligation resting on promoters, users and supporters as for some of them the legislator has not provided a special form. These obligations may involve for instance informing other users of an MDR arrangement about their obligations towards the Head of NRA or providing the user with information on a reportable tax scheme, or supporter's approaching the entity ordering services to obtain a written statement that the arrangement is not a tax scheme.

REPORTING DEADLINES

The schemes must be reported within 30 days from the day after a tax scheme is made available, the day after a tax scheme is made ready for implementation or the day when the first step regarding tax scheme implementation is made – whichever occurs earlier.

In case of standardized schemes a promoter or supporter must submit – within 30 days from the end of a quarter – an information on users (MDR-4) to whom the marketable tax scheme was made available in a given quarter.

Also schemes implemented before 1 January 2019 are subject to reporting, including:

- cross-border tax schemes within the meaning of the Directive, if the first step regarding their implementation was made after 25 June 2018 and
- tax schemes other than cross-border tax schemes within the meaning of the Directive, if the first step regarding their implementation was made after 1 November 2018.

The deadline for reporting these schemes is 6 months from the day when the act entered into force – if the tax scheme is reported by a promoter, or 9 months – if the tax scheme is reported by a user.

INTERNAL PROCEDURES

Moreover, promoters – legal persons and unincorporated entities – with revenues or costs exceeding PLN 8 million in the previous year, employing promoters or actually paying them remuneration, are obliged to implement an internal procedure for counteracting avoidance of the reporting obligation. All entities meeting the aforementioned requirements must implement said procedure **regardless of whether the object of their business includes tax advisory services**. The obligation to implement the said procedure applies, among other things, to an entity employing a natural person (for instance a CFO, in-house counsel) and pays remuneration to this person, and this person acts as a promoter towards other entities. Often **group companies** which advice other companies from the group or do so through so called **group advisers** will be obliged to

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

implement the aforementioned procedure. The procedure should be implemented and complied with as of 1 January 2019.

FINES FOR FAILURE TO INTRODUCE THE INTERNAL PROCEDURE

Failure to implement the internal procedure is subject to a fine of up to PLN 2,000,000. If it is found in a final and non-appealable judgment that a tax scheme has not been reported to a competent authority (offence under Article 80f of the act of 10 September 1999 – Penal Fiscal Code) by a promoter being an individual employed or actually receiving remuneration from another promoter who did not fulfil the obligation to implement the internal procedure, the said fine may go up to **PLN 10,000,000**.

FINES FOR BREACH OF THE MDR REGULATIONS

Failure to fulfil the reporting obligation constitutes an offense under the Penal Fiscal Code carrying the penalty of up to 720 daily rates (**PLN 21,600,000**). Said penalty may be imposed for failure to report a scheme or reporting it untimely (MDR-1) and (MDR-4) and for failure to provide information by a user (MDR-3). A fine of up to 720 daily rates may also be imposed on a person who, despite being obliged to do so:

- does not inform in writing the entity obliged to report a tax scheme about this obligation or does so after the deadline;
- does not provide the entity obliged to report a tax scheme with information on the reportable tax scheme or does so after the deadline;
- does not inform in writing the entities obliged to provide information on a tax scheme that he or she will not provide the information on the tax scheme or will do so after the deadline;
- does not approach the entity ordering services with a separate letter for obtaining a written statement that the arrangement is not a tax scheme or does so after the deadline.

EXAMPLES OF TAX SCHEMES

Restructuring of remuneration

A tax scheme may be a situation when source of certain incomes (revenues) or taxing rules are changed what results in actually lower taxes, tax exoneration or exemption, and at the same time the requirement of the main benefit is met. An example may be an arrangement consisting in designing a structure of financial instruments (derivative instruments) in order to gain a tax benefit consisting in re-classification of remuneration under an

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

employment relationship – in form of a cash award – taxed at a progressive rate of up to 32%, to the source of capital gains in order to apply the 19% rate.

Self-employment

A situation when a 19% flat-rate PIT is chosen for revenues from non-agricultural business is not automatically subject to the reporting obligation. However, a tax scheme arises if a flat-rate tax is chosen to gain a tax benefit resulting from changing an employment contract to so called self-employment even though the work is in fact provided in a subordination relationship.

9% CIT rate

A tax scheme may arise when a contract is artificially divided to be performed by several affiliated companies applying a preferential 9% rate.

50% of costs for authors

A tax scheme arises when actions undertaken as part of an arrangement are based on a mostly standardized arrangement documentation, for instance a promoter provided a user with a documentation on requirements for applying 50% of tax-deductible costs (master rules for applying 50% of tax-deductible costs), based on which the user undertakes actions to implement new rules of remunerating employees, and the aim of such implementation is primarily PIT reduction.

Payments subject to WHT

A tax scheme arises when a hypothetical tax which would be collected by the tax payer if relevant double tax treaty or tax exemptions under domestic law did not apply, exceeded PLN 5 million in a calendar year. In such case the WHT payer is obliged to report the tax scheme. An example might be payment of dividends, interest or royalty payments to a non-resident in the amount of approx. PLN 25 million in a calendar year.

Non-resident's income

A tax scheme arises when a non-resident subject in Poland to a limited tax liability gains income (revenue) in a given calendar year exceeding PLN 25 million (for instance a Polish permanent establishment of a foreign enterprise). In order to determine the limit of PLN 25 million, all incomes (revenues) gained or expected to be

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

gained by a non-resident in a calendar year must be added up, regardless of their source. Goods transactions are not added up. The tax scheme isn't to be Reported by the user (non-resident).

Elimination of double taxation in more than one country

A tax scheme arises when a taxpayer may apply several methods of double taxation elimination to the same income or property (for instance tax credit used for the same tax payment in more than one country) under regulations of different tax jurisdictions.

Structures with transparent companies

A premise for a tax scheme is also a non-transparent ownership structure. According to the Ministry of Finance, such non-transparent structure is for instance a situation when a user is a transparent partnership whose partners are partnerships whose partners are partnerships and so on, which makes it difficult to identify the entities obliged to pay the tax.

Payments to tax havens

A tax scheme arises if cross-border payments between affiliated entities within the meaning of the MDR regulations are classified as tax-deductible costs and the payment recipient does not reside, is not seated or managed in any of the countries or resides, is seated or managed on a territory or in a country with harmful tax competition.

Transfer of intangible assets

The reporting obligation arises when rights to intangible, difficult to evaluate, assets are transferred between affiliated entities, in particular, if the transferred rights do not have reliably comparable value and were not recorded in the balance sheet. An example of such intangible assets might be a customer data base or customer relationships which are often transferred as part of transfer of enterprise or an organized part thereof.

Transfer of functions, assets and risks

The reporting obligation arises when functions, risks or assets are transferred between affiliated entities, if the anticipated yearly EBIT of the transferring entity (entities) in a three-year period after such transfer would be lower than 50% of the anticipated yearly EBIT to be realised if such transfer did not take place.

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl

Deferred tax

A reportable tax scheme may arise if an arrangement affects the user's deferred income tax or assets or deferred tax provisions exceeding PLN 5,000,000 in a calendar year. According to the Ministry of Finance, the reporting obligation does not apply if the impact on the deferred income tax results from new accounting standards (both the International Financial Reporting Standards and National Accounting Standards), if mandatory. This means that a tax scheme may arise if the new accounting standards are applied voluntarily.

Acquisition of a company with a loss

A tax scheme may arise if as part of an arrangement purposeful actions are taken to acquire a company with a loss, close the main business of such company and use such loss to reduce tax liabilities, including by transferring such losses to an entity based in another country or accelerating use of such losses.

R+D relief

Generally, tax reliefs do not give rise to a tax scheme. Nevertheless, the reporting obligation arises if the major or one of the major objectives of incurring expenses is benefiting from a research and development relief (and not economic incentives) and promoter's remuneration in a given arrangement is paid on a success fee basis.

JARA DRAPAŁA & PARTNERS Sp. K.
North Gate Tower
ul. Bonifraterska 17
00-203 Warszawa

T: +48 22 246 00 30
F: +48 22 246 00 31
E: office@jara-law.pl