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## Mandatory reporting of tax schemes (MDR)

On 14 November, the President of the Republic of Poland signed an amendment to the Tax Code implementing Council Directive (EU) 2016/1164. The changes, which come into effect on 1 January 2019, include the introduction of the requirement to disclose tax schemes (*mandatory disclosure rule*). This imposes a number of new obligations on business entities using the services of, inter alia, tax advisers, advocates, attorneys-at-law, financial institutions, or carrying on other activities that could lead to tax advantages being achieved. Consequently, some areas of tax and legal advice could require verification in terms of whether the reporting requirement under the new provisions arises.

### Substance of the new provisions – reporting planned activities to NRA Head

The amendment introduces the requirement for information about **tax schemes** (definition below) **to be sent to the Head of the National Revenue Administration (NRA)** within 30 days of the day following a scheme being made available or implemented, or the first related activity being performed.

The reporting requirement applies to situations where an entity using a scheme meets the **eligibility criterion** based on revenue-cost-asset threshold (**a taxpayer's revenues, costs or assets of a value of over EUR 10 million, or things or rights covered by the scheme of a value of over EUR 2.5 million**). However, if the scheme is of a cross-border nature, it always has to be reported regardless of whether or not it meets the above criterion.

The reporting requirement is imposed not only on the user. It also covers **promoters**, i.e. persons and entities that provide information on activities having the features specified in provisions that could lead to a tax advantage (tax schemes) being obtained by the users or implement such schemes at users. **Promoters are therefore generally tax advisers, advocates, attorneys-at-law, and other client advisers.** In specified situations, this requirement also falls on persons **aiding** the scheme implementation process (such as **notaries, chief accountants**, etc.)

If the disclosure of information about a tax scheme breaches **professional secrecy**, and the promotor was not released by the user from this obligation, the user itself is obliged to disclose the tax scheme to the NRA Head. In this case, the promotor notifies the NRA Head only of the date the tax scheme is made available (without disclosing details) and sends the user details of the tax scheme. Provision of the above information on a standard tax scheme does not constitute a breach of professional secrecy.

Information about a tax scheme includes the identification data of the provider and the user, **an exhaustive description of the arrangements, the purposes that the scheme is to achieve, the estimated value of the scheme**, the activities conducted and the current scheme implementation stage.

## What is a tax scheme?

**A tax scheme** is a transaction or a group of related transactions to which at least one party is a taxpayer or that gives rise or could give rise to a tax liability, that meets the conditions laid down in provisions, and has the hallmarks specified in provisions.

**A tax scheme meets the main benefit criterion** if the implementation of other non-tax objectives of the activity could be done in a different way that does not give rise to a tax advantage, and the tax advantage is the main or one of the main benefits that the taxpayer expects to achieve. **Hallmarks** are features of a legal or economic nature enabling a given arrangement to be classified as a tax scheme.

**A cross-border tax scheme** is an arrangement that meets the cross-border criterion and the main benefit criterion, and that also has a general or special hallmark.

## To whom does the amendment apply?

The new law applies to three groups of entity: **users, promoters, and service providers (intermediaries)**.

- **The user** is an individual, legal entity or unincorporated organisational unit to which is made available or at which is implemented or which is prepared to implement or which has carried out transactions serving to implement arrangements.
- **The promoter** is, inter alia, a tax adviser, advocate, attorney-at-law, employee of a bank that develops, offers, provides or manages the implementation of arrangements.
- **The service provider** is an entity, inter alia, a certified auditor, notary, accountant, that assists with, supports, or advises on the development, distribution, making available or supervision of implementation of arrangements.

## How are entities liable?

Promoters, users or service providers that do not comply with the requirement to report tax schemes could **bear liability for tax offences** for failing to comply with provisions on reporting tax schemes. We recommend that the above rules be taken into account in planning future activities and transactions that could give rise to the reporting obligation. Moreover, in connection with obligations imposed on advisers, they may expect to be provided with information on the

economic rationale for the planned activities at the offer stage. Preparing this information in advance may enable doubts to be avoided as regards the reporting of tax schemes or eliminate obvious situations from these considerations.

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