

The Problematic Aspects of Tax Scheme Reporting in Poland from 2019 to 2023

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Abstract

The introduction of regulations on the reporting of tax schemes is a key element of the European Union's policy to combat tax avoidance. Directive DAC6, applicable in all EU Member States, imposed on them an obligation to implement uniform rules for the identification and reporting of certain tax arrangements. Poland, in implementing the directive, introduced some of the most extensive and restrictive regulations within the entire EU. This chapter presents the key differences between EU-level and Polish regulations, discusses solutions adopted in other Member States, and analyses the process of creating a reportable tax scheme. Particular attention is also paid to interpretative challenges and issues related to professional secrecy.

Keywords: tax optimization, Polish tax system, tax avoidance, GAAR, MAAR, tax law compliance, tax planning, CIT, PIT, Estonian CIT, tax reliefs, anti-abuse regulations, BEPS, CRS, tax system complexity, tax burden, transfer pricing, tax havens, international tax regulations

1. Introduction

The efficient functioning of the state requires stable financial revenues, the most important of which in European Union countries are taxes. Therefore, ensuring the correctness of tax settlements and tightening the tax system are of particular importance. The introduction of Directive DAC6 created a new mechanism for supervising potentially risky tax arrangements, which has also been implemented in Poland.

The aim of this paper is to assess Polish regulations concerning the reporting of tax schemes and to identify problems arising from their implementation. The topic was selected due to the growing importance of tax advisers in a rapidly changing legal environment, as well as the fact that the MDR regulations were introduced during the COVID-19 pandemic, resulting in numerous delays and a lack of clear guidance for taxpayers.

The article discusses the main challenges in implementing MDR provisions and the degree of compliance of Polish regulations with European Union law. The article consists of five sections addressing this issue.

2. Differences Between the EU Directive and Polish Regulations

Directive 2018/822 was implemented into Polish law through the Act of 23 October 2018 (Act of 23 October 2018 amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act and certain other act), which introduced an extensive set of measures aimed at "tightening" the tax system. These changes were incorporated into a new Chapter 11a of the Polish Tax Ordinance. Polish regulations are pioneering at the EU level, as Poland was the first country to implement the solutions provided for in the Directive (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, OJ L 139, 5.6.2018, p. 1.) and to apply them as early as 1 January 2019. The Polish legislator decided to introduce significantly broader regulations on the reporting of tax schemes than those contained in EU provisions.

The first difference lies in the fact that the reporting obligation in Poland covers not only cross-border schemes involving at least two jurisdictions, but also domestic tax schemes, which is not required under the Directive (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, OJ L 139, 5.6.2018, p. 1.). The Polish legislator sought to obtain information on local tax schemes as well and therefore decided to make use of the option of extended implementation, in accordance with recital 10 of the Directive (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, OJ L 139, 5.6.2018, p. 1.). As a result, the obligation to report domestic tax schemes was also introduced.

The second difference concerns the scope of taxes covered by the reporting obligation. In Poland, the obligation applies not only to schemes related to direct (income) taxes, as provided for in the Directive, but also to schemes involving other types of taxes—direct, indirect, and local—such as VAT or property tax. EU regulations impose only an obligation to report cross-border tax schemes and do not require reporting arrangements related to value-added tax. In contrast, the Polish legislator, aiming to obtain the broadest possible range of information on tax practices used by Polish taxpayers, decided to require the reporting of tax schemes related to VAT or excise duty within the framework of domestic or standardized tax schemes. With regard to domestic schemes, arrangements involving VAT are also subject to reporting. The only exception is customs duties. In the case of arrangements concerning customs duties, regardless of their characteristics and whether they meet the criteria of a cross-border, domestic, or standardized tax scheme, there is no obligation to inform the Head of the National Revenue Administration (KAS) (Tax Explanations of 31 January 2019: Information on Tax Schemes (MDR), Ministry of Finance, p. 12).

Another difference is the expanded catalogue of hallmarks triggering the reporting obligation. Polish regulations provide for 24 hallmarks, whereas the Directive lists only 15. The Polish legislator supplemented the MDR provisions with additional hallmarks not included in the Directive. These hallmarks are generally not linked to the generation of a tax advantage and constitute the so-called catalogue of other specific hallmarks. Only 11 hallmarks require the existence of a potential tax advantage for reporting purposes, while for the remaining hallmarks reporting is mandatory in all cases (Act of 29 August 1997 – Tax Ordinance¹).

A further difference concerns the number of entities obliged to report. In Poland, the two categories provided for in the MDR Directive—namely the relevant taxpayer and the intermediary—were divided into three separate categories: the user (corresponding to the relevant taxpayer), and the promoter and supporter (corresponding to the intermediary). The Directive does not require the introduction of three categories, but only two. Not all Member States have incorporated the supporter institution into their legal systems, focusing exclusively on two entities obliged to report tax schemes (Nelkiewicz, 2023).

The Polish legislator also introduced an obligation to subsequent reporting via the MDR-3 form, which is not provided for in EU law (Act of 29 August 1997 – Tax Ordinance²). The obligation to submit the MDR-3 notification may rest solely with the user. Under the MDR-3 filing, the user informs the Head of the National Revenue Administration that a tax scheme was applied in a given settlement period (Pahl, 2022, p. 978).

Furthermore, Polish MDR regulations include additional definitions not present in the MDR Directive, such as disclosure of a scheme, implementation of a scheme, and the concept of a qualified user (Żak, 2023).

In conclusion, the scope of Polish regulations on the reporting of tax schemes has been significantly extended beyond the requirements arising from EU law. By implementing the Directive into national law, the Polish legislator introduced additional regulations and substantially broadened the reporting obligations, which enables more effective monitoring of efforts to tighten the Polish tax system. As a result of these extensive provisions, Polish tax authorities will gain comprehensive information on taxpayer behavior and trends within the Polish tax system. The adopted solutions impose the obligation to report domestic tax schemes on those taxpayers whose activities related to so-called tax optimization may lead to significant losses in the revenues of the state budget and local government units (Justification to the government bill amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act and certain other acts, Sejm of the Republic of Poland, 8th term, Sejm paper No. 2860, pp. 105–106).

3. Regulations on Tax Schemes in Other EU Countries

Most European Union countries implemented the Directive (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, OJ L 139, 5.6.2018, p. 1) in 2020, with reporting starting at the beginning of 2021. This timeline was made possible by extensions granted by the EU in response to the COVID-19 pandemic. However, countries such as Poland, France (Cordier-Deltour, R. Enache), Malta, and Romania introduced these regulations earlier (Haslehnner, Pantazatou, 2022). Member States had the option to broaden the scope of reporting, determine sanctions for non-compliance, and take other decisions in this regard, but they were obliged to implement the Directive so that their national provisions were no narrower than the EU regulation. In many countries, regulations on the reporting of tax schemes largely constitute a direct transposition of EU law into national law, introducing only the minimum new obligations for taxpayers (<https://crido.pl>). Only a few EU countries, such as Poland, have additionally decided to introduce a reporting obligation for domestic tax schemes. For example, in the United Kingdom, similar domestic reporting rules existed even before the introduction of MDR regulations (Niedźwiecki).

The first example is Ireland, as its regulations are the closest to the EU Directive. Ireland was one of the few EU countries that already had a reporting obligation for domestic arrangements related to aggressive tax planning before the EU regulations were introduced (Modzelewski, 2022, p. 258). The Irish legislator imposes the reporting obligation solely on cross-border schemes, in line with the EU Directive. The implementation of MDR provisions exists as a separate set of rules in relation to previously existing domestic scheme regulations. Irish MDR rules do not cover arrangements related to VAT, customs duties, or excise duties, and include only the hallmarks listed in the Directive. Two entities are distinguished as subject to the reporting obligation: the intermediary and the relevant taxpayer. Reporting deadlines are set by the Directive. Arrangements that must be disclosed by the intermediary or the relevant taxpayer largely mirror the provisions of the Directive (Burke, Enach, 2020). As the example of Ireland demonstrates, the introduction of MDR provisions into national regulations can take the form of an almost direct incorporation of EU law into the national legal system.

The next country considered is Germany, which has many transactions with Poland. The current form of German tax scheme regulations also largely corresponds to EU law (Modzelewski, 2022, p. 236). Initially, the German legislator planned to extend the scope of the introduced regulations compared to the requirements of the Directive to include domestic schemes. However, after extensive debates and opposition, German law does not currently require the reporting of domestic schemes. German regulations also distinguish two entities obliged to provide information on tax schemes: the intermediary and the relevant taxpayer, i.e., the user. MDR rules cover all taxes collected for the state or territorial/administrative authorities, including local authorities. However, arrangements concerning turnover taxes, such as VAT, customs duties, or excise duties, are excluded from the reporting obligation. The hallmarks included in German law also correspond to those listed in the Directive (Litwinow, 2023, p. 14-26).

An interesting case is Portugal. As in Poland, Portuguese regulations have been significantly expanded compared to the provisions directly resulting from the Directive. Since 2008, the Portuguese tax system had rules requiring the disclosure of certain tax operations aimed at preventive action against tax avoidance and aggressive tax planning. These were among the first such regulations introduced in Europe. These provisions were repealed and replaced with new regulations based on the EU Directive (Litwinow, 2023, pp. 14 – 26). In Portugal, the obligation to report applies not only to cross-border schemes but also to domestic arrangements, referred to as internal arrangements. Internal arrangements cover income taxes, VAT, and other taxes, including property tax and stamp duties. Two entities are obliged to report tax schemes: the relevant taxpayer and the intermediary. The hallmarks were directly incorporated into Portuguese law without adding any further ones. In principle, the primary reporting obligation in Portugal rests with the intermediary. Portuguese regulations are particularly notable compared to Polish rules due to the almost unrestricted obligation to report schemes by persons bound by professional secrecy, such as lawyers (Alves, 2021).

The implementation of EU rules into the national laws of Member States allows flexibility in expanding these rules and adapting them to domestic regulations. As a result, each Member State has introduced its own regulations on reporting tax schemes. Most countries opted for the minimum necessary, implementing EU provisions directly into their national legal framework. However, some countries, taking advantage of the obligation to implement MDR provisions, introduced additional rules or significantly expanded already existing domestic regulations. The examples of the EU countries discussed above, together with the EU and Polish regulations presented in the previous section, highlight substantial differences in the implementation of the Directive. Polish and Portuguese MDR regulations stand out for extending reporting to domestic schemes and for including taxes beyond those specified in the Directive. In contrast, Ireland and Germany, like most other EU countries, opted for a straightforward transposition of the Directive's provisions into national law.

4. Creating a Reportable Tax Scheme

The regulations presented in the previous section indicate which arrangements qualify as reportable tax schemes. Many practical doubts arise in the application of these provisions, as certain activities undertaken by taxpayers—which are fully lawful and frequently practiced—may be treated as reportable tax schemes. It is therefore necessary to examine selected situations in order to illustrate, in practice, how the process of identifying and reporting a tax scheme works.

The first example concerns a situation in which a Polish company, XYZ, unrelated to the real estate sector, decides to sell a property located in Poland to a Polish company, ABC, also unrelated to real estate, in which XYZ wishes to become a shareholder. Prior to the transaction, XYZ consults a tax adviser, who recommends selling the property rather than contributing it as capital in kind (*aport*). In this situation, the first step is to determine whether the company is dealing with a reportable tax scheme. The arrangement's characteristics must be considered. In a standard property sale, the main benefit criterion and other hallmarks are generally not met. However, it is necessary to analyze whether the legislator has explicitly addressed a similar situation in the law or other legal acts. It turns out that in the MDR tax guidance, the Minister of Finance indicates that, in the case of a property sale, an alternative course of action may be available. It may be advantageous, from a tax perspective, to effect a sale rather than a capital contribution. In such a case, the arrangement becomes a reportable tax scheme, because XYZ, which chose to proceed with the sale, had the option of acting in another rational manner, namely, contributing the property (Tax Explanations of 31 January 2019: Information on Tax Schemes (MDR), Ministry of Finance, p. 20). The creation of this tax scheme is not entirely obvious, however, because a sale and a capital contribution are fundamentally different transactions with different tax consequences. A sale involves a financial flow, whereas a capital contribution does not. In a capital contribution, shares in the company are obtained, thereby engaging capital. In a sale, it is not necessary to become a shareholder, and if one already is, the capital engagement is not increased. Nevertheless, because this example is included in the guidance, if one variant is more advantageous, the arrangement becomes a reportable tax scheme.

The next step is to identify who is responsible for reporting the scheme. The promoter in this case is the tax adviser who recommended the property sale, which was more advantageous than the capital contribution. The adviser is bound by professional secrecy and, therefore, informs the company that it is obliged to report the tax scheme to the user. In this case, the company has 30 days to submit the report to the Head of the National Revenue Administration (KAS) using the MDR-1 form.

The issue of non-resident income may also arise in the context of a property sale. If the seller were a non-resident, and the income from the transaction exceeded PLN 25 million, the sale would also constitute a reportable tax scheme. There are many other scenarios involving property sales that can create reportable tax schemes, and each such transaction must be analyzed individually.

Another example concerns the 50% tax-deductible cost allowance. In this scenario, company XYZ employs workers whose tasks do not entitle them to apply the 50% tax-deductible cost allowance. After consulting with a legal adviser, XYZ amends its internal work regulations to include provisions enabling the use of this allowance (for instance, by adding a clause regarding the creative nature of the work and the resulting intellectual property rights) (Art. 22, Act of 15 February 1992 on Corporate Income Tax). As a result of these amendments, employees can benefit from the 50% tax-deductible cost allowance.

In this case, the first step is to consider whether this arrangement constitutes a reportable tax scheme. The main benefit criterion is met because XYZ, if it had acted in a manner guided by purposes other than obtaining a tax advantage, could have chosen not to include such a provision in the work regulations. The tax benefit is thus the primary, or one of the primary, objectives of the arrangement. Although the mere application of the 50% cost allowance may seem not to meet the main benefit criterion - since the taxpayer is not doing anything special to access it, but merely meets existing conditions - it becomes relevant here because the regulations were specifically amended to satisfy the requirements for applying the 50% allowance. Since this was done solely to obtain a tax benefit, the main benefit criterion is satisfied.

The general hallmark is also present, as the documentation has been significantly standardized - in this case, through the work regulations. Additionally, the general hallmark of a change in tax rules is met. The next step is to determine the entity obliged to report the scheme. The legal adviser - acting as the promoter - who provided the arrangement to XYZ is responsible for submitting the report to the Head of the National Revenue Administration (KAS) using the MDR-1 form, provided that XYZ has waived professional secrecy. In other situations involving increases in deductible costs, the qualified user criterion should also be considered. Typically, an employee's income does not exceed EUR 10 million. However, if the employer or another related entity meets this criterion, the arrangement also becomes a reportable tax scheme.

The scenarios and case studies presented above clearly illustrate that identifying a tax scheme and determining whether it must be reported requires analysis not only of the specific situation but also of applicable legal acts concerning MDR regulations in Poland. Each situation in practice is unique and requires individual assessment, without applying standardized solutions.

To further illustrate the complexity of interpreting tax scheme reporting rules in Poland, the following examples illustrate situations in which taxpayers may have considerable doubts about whether a reportable tax scheme arises. One such example is the payment of dividends. In most cases, the main benefit criterion is not met. However, attention must be paid to the general and specific hallmarks, particularly the situation in which a payer of income tax is obliged to collect tax exceeding PLN 5 million during the calendar year, and relevant double taxation agreements or exemptions do not apply to payments made or expected under the arrangement. This occurs, for instance, when dividends are paid abroad and either no tax is withheld, or a reduced rate is applied under a double taxation agreement, or the dividend is paid to a country with which Poland has no such agreements, resulting in a tax obligation exceeding PLN 5 million within the calendar year. In such cases, the dividend payment becomes a reportable event under the tax scheme. Additionally, the hallmark concerning non-resident income may also be met. If the dividend is paid to a non-resident shareholder and their income exceeds PLN 25 million annually, a reportable tax scheme arises.

Another common example is the acquisition of services that may be treated as deductible costs from a related party located in a tax haven. In such cases, a specific hallmark may be triggered. Whether it applies depends on the circumstances of the transaction. If there is a rational explanation for the transaction, the hallmark is not triggered. Only if the transaction is deliberately executed to transfer funds to a tax haven does it constitute a reportable tax scheme (<https://dziendobrypodatki.pl>). Interpretation of this hallmark should be clarified in accessible guidance, for example in future updates of MDR tax guidance, as this situation can arise in any transaction treated as a deductible cost, not only with a related party.

Arrangements using unilateral safe harbor simplifications related to transfer pricing are another common example. Avoiding the obligation to prepare transfer pricing documentation generally does not constitute a reportable tax scheme. However, avoiding the obligation to determine transfer prices may trigger reporting. Application of the OECD safe harbor guidelines does not, in itself, create a reportable scheme, whereas the Polish-specific simplification regarding interest rates on loans, credits, or bonds, if its conditions are met, constitutes a reportable tax scheme.

Recently, client transfers from a sole proprietorship to a limited liability company have become more common. This may trigger a hallmark related to the transfer of functions, risks, or assets between related entities if the transferring entity's annual financial result before interest and taxes (EBIT) over a three-year period after the transfer falls below 50% of the projected annual EBIT had the transfer not occurred. In such cases, functions, risks, assets, property, or client bases are transferred between related entities. If this transfer results in a significant drop in annual financial performance (exceeding 50% compared to the hypothetical scenario without the transfer) and the qualified user criterion is met, the arrangement becomes a reportable tax scheme.

Considering the above situations, which frequently occur in practice, tax schemes exist in the daily operations of many taxpayers and often do not aim to achieve any tax benefit. This can seem absurd, as the purpose of reporting tax schemes is to detect potential tax avoidance. On the other hand, reporting such schemes may make the process less stressful for the taxpayer, as tax authorities are usually well-informed about these transactions. Nevertheless, the reporting obligation is time-consuming, requires significant effort, and in many cases, the reported arrangements are not related to intentional tax avoidance or tax optimization.

5. Issues Related to the Implementation of MDR Regulations into Polish Law

In most European Union countries, DAC6 implementation occurred only in 2020, with the first reporting taking place at the beginning of 2021. This provided those countries with an additional 2 years to adjust their regulations and prepare taxpayers, unlike Poland. While a potential downside is the obligation to report schemes for 1.5 years rather than 6 months, as was the case in Poland, such an approach could have avoided the need to repeatedly report tax schemes introduced by the Minister of Finance in 2020. In most Member States, MDR regulations constitute a direct transposition of the EU Directive and are less extensive than the Polish provisions.

The legislative process for introducing MDR regulations in Poland, particularly its pace, sparked considerable controversy. The Scientific Council at the National Chamber of Tax Advisers (KIDP) noted that the procedure for drafting the Act could raise concerns regarding compliance with the fundamental principles enshrined in the Constitution (Position of the Scientific Council at the National Chamber of Tax Advisors regarding the obligation to report tax schemes of 6 November 2018).

The difficulties arising from the application of tax scheme reporting rules stem not only from the speed of their implementation, which did not allow taxpayers to thoroughly analyze the regulations, but also from the complexity and significantly expanded structure of the rules compared to EU provisions, which are difficult for the average taxpayer to understand. Furthermore, the regulations are imprecise and ambiguous. Even the guidance issued by the Minister of Finance has done little to clarify the situation. The poor quality of these regulations also stems from unnecessary haste on the part of the legislator. Despite having an additional year to implement the Directive, the legislator opted for the quickest possible enactment, leaving no time to incorporate comments submitted during the tax consultations that began in October 2017 or to consider potential amendments to the MDR regulations (Letter of 20 October 2017, Ministry of Finance, No. SP3.8021.2.2017, Notification on the commencement of tax consultations regarding the obligation to report tax schemes).

According to tax advisers, the extended implementation of the Directive did not contribute to more effective prevention of tax optimization, but rather generated uncertainty among entrepreneurs who may act as promoters or supporters. MDR regulations continue to raise numerous interpretative questions, and taxpayers face difficulties in their practical application. This situation may undermine the principles of proportionality and the freedom to conduct business (Position of the Scientific Council at the National Chamber of Tax Advisors regarding the obligation to report tax schemes of 6 November 2018).

6. Professional Secrecy in the Context of Polish Tax Scheme Regulations

Polish regulations regarding the reporting of tax schemes are significantly stricter than the EU Directive, requiring companies to report more tax schemes than would be mandated under EU law. Moreover, these regulations impose an obligation to report schemes, even when doing so may conflict with professional secrecy. The Directive itself binds Member States only to the objective of improving the functioning of the internal market. Member States have some discretion in choosing appropriate measures to achieve this objective, but this discretion is not unlimited, as their actions are constrained by the norms of primary European Union law. A major criticism of the Polish MDR regulations concerns limitations on maintaining professional secrecy, which is incumbent upon representatives of various public trust professions, such as tax advisers, advocates, and legal counsels. Questions have also been raised regarding the compliance of these limitations with the Constitution, (Skiworska, 2021, p. 165).

Tax advisers, advocates, and legal counsels are recognized as public trust professions. They are constitutionally regulated in Article 17(1) of the Constitution of the Republic of Poland, which establishes the right to create professional self-governing bodies (Art. 17, Constitution of the Republic of Poland of 2 April 1997). Professional secrecy is regulated by statutes governing the activities of specific public trust professions and by professional codes of ethics. For example, the Act of 5 July 1996 on Tax Advisory requires tax advisers to keep confidential all facts and information learned in connection with the performance of their profession. They cannot be examined as witnesses regarding such facts and information unless they are released from the obligation of secrecy under other laws (Art. 37, Act of 5 July 1996 on Tax Advisory Services). Similar legal provisions apply to legal counsels and advocates. Failure to maintain professional secrecy may result in disciplinary liability; violations are adjudicated by disciplinary courts, and noncompliance can lead to expulsion from the professional self-governing body (Kurek, 2014, p. 167-168).

In the context of tax scheme reporting, tax advisers most often act as promoters, responsible for submitting information about the tax scheme to the Head of the National Revenue Administration (KAS). In practice, they report the scheme only if the client releases them from the obligation of professional secrecy (Art. 86b of the Act of 29 August 1997 – Tax Ordinance). Legal provisions enable the legislator to introduce exceptions to professional secrecy, allowing interference in such confidentiality, usually in the interest of state authorities. To fully understand this issue, it is necessary to examine how this conflict is addressed under the EU MDR.

In its judgment of 8 December 2022 concerning Belgian advocates, the Court of Justice of the European Union (CJEU) upheld the inviolability of professional secrecy. The case concerned EU MDR regulations and was referred to the Court as a preliminary ruling by the Belgian Constitutional Court, following requests from Belgian bar associations. The complaints related to national laws implementing EU Directive 2018/822, which mandated the disclosure of client tax schemes and thereby potentially infringed attorney-client confidentiality. The CJEU ruled that an advocate is not required to inform tax authorities or other participants in the client's tax planning if doing so would violate professional secrecy. The judges emphasized that tax authorities can still obtain information on planned and executed tax optimization from other parties not bound by professional secrecy. This ruling applies to all entities providing legal assistance who are obliged to maintain professional secrecy and represents strong support for the fundamental principles protecting the right to legal assistance (Judgment of the Court of Justice of the European Union (Grand Chamber) of 8 December 2022, *Orde van Vlaamse Balies, IG, Belgian Association of Tax Lawyers, CD, JU v Vlaamse Regering*, Case C-694/20).

In January 2020, the National Chamber of Tax Advisers (KIDP) submitted a complaint to the Constitutional Tribunal of the Republic of Poland regarding provisions of Chapter 11a of the Tax Ordinance concerning the reporting of tax schemes. The allegations involved a potential violation of Article 17 of the Constitution of the Republic of Poland, which addresses professional secrecy, and sought a review of the compliance of Chapter 11a with the Constitution (National Council of Tax Advisors, Application for review of compliance of the act with the Constitution of the Republic of Poland). The complaint specifically concerned provisions obliging promoters and supporters to report tax schemes, as these rules affect not only taxpayers themselves but also individuals participating in tax planning. The filing of this request serves not only to protect values such as the independence of professional self-governing bodies but also to safeguard society's common good. Professional secrecy is essential to maintaining trust in certain professions.

The legislator did not specify the form of exemption from the obligation to maintain professional secrecy. In the case of tax schemes, such an exemption is provided by statute. This approach appears to undermine the ability to build trust between the client and the representative of a public trust profession, which is necessary for the profession to be considered a public trust profession. In its complaint, the National Chamber of Tax Advisers pointed out that only a court may release a tax adviser from professional secrecy, while the Tax Ordinance provisions regarding MDR grant clients the right to do so (<https://kidp.pl>). To date, this case has not been resolved, and no judgment has been issued. According to OECD recommendations, the primary reporting obligation should rest with the beneficiary, i.e., the taxpayer. However, an alternative approach is also recognized, in which the obligation could rest with the promoter, who could be exempted from it to comply with professional secrecy. Among its proposals, the organization also suggested assigning promoters tasks such as informing beneficiaries of their obligation to report a scheme and notifying tax authorities of its occurrence, without disclosing its specific details (Gorgol, 2018, p. 76). However, under the EU Directive, and consequently under Polish law, the promoter—referred to as the intermediary in the Directive—bears the primary obligation to report tax schemes. In situations where a conflict arises between the reporting obligation and professional secrecy, there should be a possibility of exemption from the obligation. In such cases, the intermediary should only be required to inform another intermediary or, if none exists, the taxpayer, of the obligation to report the scheme (Skwierska, 2021, p. 172). Under Polish regulations, the promoter is obliged to report standardized tax schemes and inform the beneficiary of the necessity to report other schemes. If the beneficiary fails to meet this obligation, the promoter must notify the Head of the National Revenue Administration (KAS) of the occurrence of the scheme (Art. 86j, Act of 29 August 1997 – Tax Ordinance).

In these cases, reporting obligations have been regulated without the need for exemption from professional secrecy. In other situations where the promoter is required to report a tax scheme, it is necessary that the promoter be released from the obligation of maintaining professional secrecy. However, the regulations do not specify the precise form of this release. It is evident that Polish regulations impose greater restrictions on professional secrecy than the EU Directive and OECD recommendations. As previously noted, international legal solutions in this area are controversial, making the Polish implementation even more restrictive. Primarily, this indicates that the Polish legislator places greater emphasis on strengthening the tax system than on protecting professional secrecy (Dmowski, 2022, p. 53). Nevertheless, it should be noted that release from professional secrecy is possible upon a court's order (Art. 180 of the Act of 6 June 1997 – Code of Criminal Procedure). In the context of reporting tax schemes, the obligation could be assigned to the beneficiary if the promoter is bound by professional secrecy (Dmowski, 2022, p. 53).

Professional secrecy remains an obligation for public trust professions such as tax advisers, lawyers, and legal counsels, rather than a personal right (Judgment of the Constitutional Tribunal of 22 November 2004, case No. SK 64/03).

The National Chamber of Tax Advisers (KIDP) has highlighted the risk of an expansion of the grey market in legal services, as uncertainties regarding the maintenance of professional secrecy may lead taxpayers to attempt tax planning independently or with the assistance of unqualified persons, in order to minimize their tax burden without involving a legal adviser. Reporting a tax scheme could also trigger a tax audit for the given taxpayer (Kondratowska-Muszyńska, 2019).

In summary, Polish regulations on reporting tax schemes raise concerns about the limitation of professional secrecy for tax advisers, lawyers, and legal counsels. This may negatively affect demand for legal advisory services in Poland, potentially resulting in lower-quality tax filings and greater difficulties for taxpayers in understanding Polish tax law. A ruling by the Constitutional Tribunal concerning the complaint of the National Chamber of Tax Advisers, as well as potential amendments to the relevant legislation, is therefore highly anticipated.

Another key issue is the obligation to maintain professional secrecy. The provisions on reporting tax schemes introduced into Polish law impose a duty on representatives of certain public trust professions—such as tax

advisers, legal counsels, lawyers, notaries, and auditors—to report tax schemes made available to their clients to the Head of the National Revenue Administration (KAS) (Czerniak, 2021, p. 20-24). Professionals in these fields have expressed concerns that this obligation may violate their legally mandated duty of confidentiality.

When implementing the MDR provisions, the Polish legislator also amended the regulations on professional secrecy for these professions, adding a provision stating that the obligation to maintain professional secrecy does not apply to information provided under Chapter 11a, Section III, of the Tax Ordinance. This wording formally exempts these professionals from the obligation of maintaining secrecy and was not required by the Directive (Babiarz et al., 2019, p. 625-626). The issue of professional secrecy has raised such constitutional concerns that the National Chamber of Tax Advisers submitted a request to the Constitutional Tribunal seeking a declaration that, among other things, Article 86b of the Tax Ordinance is unconstitutional. This request has not yet been considered (<https://trybunal.gov.pl/>). Tax authorities should not have the right to demand such information from a tax adviser or other public trust professional without fulfilling the relevant legal requirements regarding the exemption of that individual from the duty of professional secrecy. It is worth noting that Recital 8 of the MDR Directive emphasizes that in certain situations, the reporting obligation may not be enforceable against an intermediary due to professional secrecy. The European Council (Opinion of the European Economic and Social Committee on the proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [COM(2017) 335 final – 2017/0138 (CNS)], OJ C 197, 8 June 2018, p. 29) has indicated that in such circumstances, when tax authorities need to obtain information on arrangements involving potentially aggressive tax planning, and professional secrecy limits reporting, the obligation should be shifted to the taxpayer benefiting from the arrangement. Tax advisers perceive a potential threat to professional secrecy, in part, due to the definition of a “general hallmark,” which includes a confidentiality obligation and a detailed specification of fees for services provided by the advising entity. Further uncertainty arises from the statutory provision requiring a promoter bound by professional secrecy to inform other parties obligated to report that, due to their secrecy obligations, they will not inform the Head of KAS about a specific tax scheme (Act of 29 August 1997 – Tax Ordinance. (1997/2025)). The law states, however, that professional secrecy is not breached if the promoter has been released from it by the client (Act of 29 August 1997 – Tax Ordinance. (1997/2025)). Yet, there is no specified procedure for how such a release should occur. Providing information about a standardized scheme does not breach professional secrecy, although in some cases, disclosing information about a universal scheme may suffice to identify the beneficiary (Act of 29 August 1997 – Tax Ordinance. (1997/2025)), thus constituting a violation of professional secrecy (Szubielska, 2019, p. 202-211).

It is also worth noting the sanctions faced by taxpayers for failing to comply with reporting obligations. The highest penalties among European countries amount to several tens of thousands of euros, with Luxembourg leading in this respect, where the maximum penalty is EUR 250,000. Converted into Polish zlotys, this amount is approximately PLN 1.12 million, which is nevertheless relatively low compared to the highest penalty limit in Poland, which reaches PLN 26 million (<https://crido.pl/blog-taxes/polski-mdr-na-tle-europy>).

Due to such high penalties, taxpayers take all possible measures to protect themselves against potential sanctions. Given the numerous doubts surrounding the application of the MDR regulations, persons subject to these provisions began submitting applications for individual tax interpretations to the Director of the National Revenue Information (KIS). Unfortunately, the Director of KIS refused to issue interpretations of the provisions on reporting tax schemes, explaining that these regulations are procedural rather than substantive and therefore cannot be subject to official interpretation.

Such refusals were challenged by taxpayers before the voivodeship administrative courts, which initially agreed with the position taken by the Director of KIS (The Voivodeship Administrative Court in Opole, judgment of 12 February 2020, I SA/Op 528/19, *Legalis* No. 2297151; the Voivodeship Administrative Court in Kraków, judgment of 28 May 2020, I SA/Kr 1419/19, *Legalis* No. 2512916; and the Voivodeship Administrative Court in Lublin, judgment of 10 July 2020, I SA/Lu 714/19, *Legalis* No. 2485055). Currently, however, the prevailing line of case law holds that these provisions may be the subject of individual tax interpretations (The Voivodeship Administrative Court in Warsaw, in the judgments of: 10 January 2020, III SA/Wa 1718/19, *Legalis* No. 2516549; 11 March 2020, III SA/Wa 2423/19, *Legalis* No. 2448655; 23 April 2020, III SA/Wa 2395/19, *Legalis* No. 2419864; 29 April 2020, III SA/Wa 2402/19, *Legalis* No. 2370311; 30 April 2020, III SA/Wa 2430/19, *Legalis* No. 2419695; 22 May 2020, III SA/Wa 445/20, *Legalis* No. 2486884; and 27 May 2020, III SA/Wa 512/20, *Legalis* No. 2512934; the Voivodeship Administrative Court in Białystok, judgment of 30 September 2020, I SA/Bk 556/20, *Legalis* No. 2490098; and the Voivodeship Administrative Court in Gdańsk, judgment of 2 March 2021, I SA/Gd 1165/20, *Legalis* No. 2554458), a view also shared by the Supreme Administrative Court (NSA) (Judgment of the Supreme Administrative Court of 8 December 2021, III FSK 4548/21). According to the NSA,

taxpayers may apply for individual interpretations regarding obligations related to the reporting of tax schemes, as confirmed in the judgment of 28 January 2021 (Supreme Administrative Court, 2021, I FSK 1703/20).

In its decision, the NSA noted that the provisions of Chapter 11a of Section III of the Tax Ordinance Act lack uniformity, as they encompass both substantive and procedural legal norms. Nevertheless, in the context of the obligation to submit information on a tax scheme, these specific provisions should be regarded as regulations concerning the substance of material tax law. The possibility of issuing individual interpretations is also supported by the issuance of official explanatory notes to these provisions.

In light of the above, it may be expected that the Director of the National Revenue Information will accept the validity of the dominant judicial approach and begin issuing individual tax interpretations of the MDR regulations (Kręski, 2023), a position also supported by the voivodeship administrative courts (<https://www.gofin.pl>).

Another issue arises regarding the timely issuance of confirmations of the assignment of the Tax Scheme Number (NSP). Due to the excessive number of reported schemes, the tax authority was initially unable to analyse such a large volume of notifications. Fearing penalties, taxpayers report excessive amounts of information, leading to irrational data accumulation and contradicting the objective of introducing regulations resulting from the directive. As a consequence, obtaining reliable information on aggressive tax optimisation schemes used by taxpayers has become impossible (Wilk, 2019, p. 16-22).

Despite this, the Head of the National Revenue Administration (KAS) has been analysing reported tax schemes in increasing detail. It is important that the NSP be assigned on the basis of the information included in the notification, while additional requests for clarification of the submitted details, apart from raising doubts as to their legal basis, further prolong the process of assigning the NSP (<https://www.prawo.pl>). From the perspective of entities obliged to report tax schemes, delays in issuing confirmations of NSP assignment create difficulties in fulfilling their information obligations towards other participants in the tax scheme. Failure to assign the NSP within the statutory seven-day period results in a dilemma as to whether to wait for the NSP to be issued or to provide substitute information (<https://www.prawo.pl>).

The final issue discussed concerns the issued tax explanations, comprising approximately 100 pages, which do not resolve existing doubts and are not updated on an ongoing basis. On 31 January 2019, explanations regarding the MDR provisions were published, i.e. one month after the regulations entered into force. The Minister of Finance, aware of the limited scope of these explanations, declared at the time of their issuance that further explanatory acts would be prepared. To date, however, no new explanations have appeared that would expand the scope of interpretation of the MDR regulations (Tax Explanations of 31 January 2019: Information on Tax Schemes (MDR), Ministry of Finance.).

The lack of new explanations does not result from the disappearance of doubts among taxpayers regarding the practical application of the tax scheme reporting provisions. Interested parties continue to have numerous uncertainties, in particular concerning hallmarks, activities subject to the reporting obligation, and the scope of professional secrecy. Many questions continue to arise, yet the Minister of Finance does not provide answers.

In conclusion, although the tax scheme reporting regulations have been in force for almost 5 years, they continue to raise numerous problems and uncertainties regarding their practical application. The provisions on tax scheme reporting constitute an important element of the EU system for counteracting aggressive tax optimisation. The analysis shows that although the DAC6 Directive establishes a common framework, its implementation differs significantly among Member States. Poland has adopted solutions that go far beyond the minimum EU requirements, which has led both to increased transparency and to numerous practical difficulties. Issues related to the interpretation of the regulations, reporting obligations, and the scope of professional secrecy demonstrate that these regulations still require further clarification. Understanding these issues is crucial for the proper application of the law and for minimising risk for taxpayers and advisers.

Conclusion

In Polish regulations on the reporting of tax schemes, in addition to implementing the EU Directive, additional obligations were introduced, including the reporting of domestic schemes. This article presented an evaluation of these regulations and identified the problems arising from their implementation.

Polish regulations have been significantly expanded beyond the Directive, leading to numerous interpretative uncertainties. Additional provisions not directly derived from EU law have created interpretative chaos, while the obligation to maintain professional secrecy has further complicated the practical application of MDR. The rapid pace of implementation during the COVID-19 pandemic exacerbated these issues, making both the interpretation of the regulations and the reporting process more difficult.

The introduction of these regulations has raised more questions than it has provided benefits for the tax system, especially given that most reported schemes are lawful and widely used. Imprecise wording and the broad scope of the reporting obligation have led to over-reporting, without materially enhancing the protection of tax revenues.

The institution of reporting tax schemes is important; however, Polish regulations require significant changes. It is necessary to clarify the rules, limit excessive reporting scope, and develop new guidance that addresses the issues raised in recent years. With the reinstatement of reporting deadlines, further interpretative challenges are expected unless the tax authorities issue appropriate interpretations or guidelines.

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