

# Cross-border transactions with Russia subject to MDR reporting

## I. EU with a new list of tax havens

On 14 February 2023 the EU economy and finance ministers decided at an ECOFIN meeting to add the Russian Federation to the EU list of non-cooperative jurisdictions for tax purposes, adopted by the Council of the European Union (so-called tax havens). This will have numerous tax consequences. One of the most significant will be the requirement to identify cross-border tax schemes relating to transactions with related parties from Russia. The updated list was published in the Official Journal of the European Union on 21 February 2023 (C 64/17).

## II. Transactions with tax havens subject to MDR

In accordance with the provisions of the Tax Ordinance, where payments classifiable as tax-deductible costs are made to a related party that has its registered office, management or residence in a state that applies harmful tax competition, as well as is included in the EU list of non-cooperative jurisdictions for tax purposes, a tax scheme (MDR) is to be identified. The newest EU list of tax havens includes the following states: American Samoa, Anguilla, the Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, the Russian Federation, Samoa, Trinidad and Tobago, the Turks and Caicos Islands, the US Virgin Islands, and Vanuatu. As a result, transactions with Russia now require the identification of tax schemes.

The EU economy and finance ministers have decided to add the Russian Federation to the EU list of non-cooperative jurisdictions for tax purposes, adopted by the Council of the European Union, i.e. the list of so-called tax havens. As a result, it is now a requirement to identify cross-border tax schemes with related parties from Russia.

## III. Benefit criterion irrelevant in transactions with Russia

A tax scheme is defined as an arrangement constituting an action or a set of related actions (planned), at least one party to which is a taxable person, or which affect or may affect the formation or non-formation of a tax liability. In addition, a tax scheme must also meet the main benefit criterion. It needs to, however, be stressed that in the case of Russia, there does not have to be a tax advantage or even an action aimed at the achievement of such. It is therefore necessary to report every tax scheme. The value of the transaction is also irrelevant: any transaction may be a tax scheme, even one concluded for a dollar.



## IV. User must be identified in cross-border schemes

In order for a reporting obligation to arise, the arrangement must meet the definition of a tax scheme, and for schemes other than cross-border tax schemes, also the criterion of qualified user. Under the regulations, the qualified user criterion is met if: the user's revenues or costs, or the value of its assets as defined in accounting regulations, determined based on the records in the books of account, exceeded in the previous or current financial year the equivalent of 10 million euro, the arrangement pertains to items or rights with a market value in excess of 2,5 euro, or the user is a related party as defined in income tax regulations.

## V. Reporting obligation for three categories of entities

Three categories of entities may be required to report information about tax schemes: advisor, user, contributor. The above entities may be subject to reporting obligations irrespective of whether their place of residence, registered office or management is in Poland, EU member state, or a third country. Where a user's, advisor's or contributor's reporting obligation relates to a cross-border tax scheme, the regulations provide for a course of action by indicating the state that should receive information about the tax scheme, as well as the reporting procedure.

## VI. Advisors are those who provide professional services

An advisor is an individual, legal person or organizational entity without legal personality, and in particular a tax advisor, lawyer, attorney at law, employee of a bank or another financial institution that advises clients, also in cases when the entity has no residence, registered office or management in the state, who designs, offers, makes available or implements an arrangement or manages its implementation.

## VII. Reporting applies to user and contributor

A user is an individual, legal person or organizational entity without legal personality, to whom the arrangement is made available or for whom it is being implemented, or who is prepared to implement the arrangement or has performed an action aimed at implementing the arrangement. Whereas a contributor is an individual, legal person or organizational entity without legal personality, and in particular a certified auditor, notary public, bookkeeper, accountant or finance director, bank or another financial institution, as well as their employee, who with the due diligence generally required in their activities, subject to the professional nature of the activities, area of expertise and subject of the activities, has undertaken to provide, directly or through others, assistance, support or advice on the design, marketing, organization, making available for implementation or supervising the implementation of the arrangement.



## VIII. Strictly defined MDR reporting deadlines

The advisor reports information about the tax scheme to the Head of National Tax Administration (KAS) within 30 days: of the day following the day on which the tax scheme was made available, the day following the day on which the tax scheme was implemented or the day on which the first activity associated with its implementation was performed - whichever of these events comes first. The user reports information about the tax scheme to the Head of KAS within 30 days of: the day following the day on which the tax scheme was made available, the day following the day on which the tax scheme was prepared for implementation, or the day on which the first activity associated with its implementation was performed - whichever comes first. The deadline by which the contributor should fulfill MDR reporting obligations depends on the type of obligation and amounts to: 5 working days of the day on which the contributor had or should have had concerns about whether the given arrangement could constitute a tax scheme; 30 days of the day on which the contributor provided, directly or through others, assistance, support or advice on the design, marketing, organization, preparation for implementation or supervision of implementation of the tax scheme, if he has observed or should have observed that the arrangement he is contributing to constitutes a tax scheme.



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## IX. Tax scheme not the same as tax avoidance

The fact that an arrangement is recognized as a tax scheme is not tantamount to the arrangement being covered by the scope of the general anti-avoidance rule or special regulations counteracting avoidance of taxation. A situation may, therefore, arise where an arrangement made for predominantly legitimate economic reasons does not meet the “artificial course of action” criterion as defined in the anti-avoidance rule, and will therefore become subject to mandatory reporting. This is because MDR regulations have a wider scope of application than the regulations directed at combating tax avoidance.



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