

Transfer Pricing Alert

KPMG in Poland

March 2017

New obligations and exchange of information in the scope of transfer pricing

The new act on the exchange of tax information with other countries imposes on entities belonging to large multinational corporations the obligation to indicate to the tax administration which unit from the group (and in which country) submits the country-by-country report. Moreover, the act clarifies the rules of the exchange of tax information between different countries.

On March 20th, the Polish President signed the Act on the exchange of tax information with other countries of March 9th, 2017 ("the Act").

The Act imposes on the entities belonging to groups that are subject to the obligation to submit the country-by-country report, a duty to indicate the reporting entity of the group. The new regulations also introduce provisions where the obligation to submit the country-by-country report may rest with an entity from the group other than the ultimate parent entity. Moreover, the Act introduces new and clarifies current regulations regarding the exchange of information regarding personal income, exchange of information on accounts reported by financial institutions and – important from a transfer pricing perspective – exchange of information concerning individual tax interpretations, securing tax opinions and decisions regarding arrangements for fixing transaction prices (advanced pricing agreements - APA). The details of the regulations introduced by the Act are presented below.

Transfer of regulation regarding country-by-country reporting

Despite the fact that the provisions regarding country-by-country reporting were introduced to the corporate income tax law in 2015 (effective since January 1st 2016), the legislator decided to move these provisions to the new Act.

The purpose of this was in particular to ensure that all provisions regarding the automatic exchange of information between countries are contained within a single legal act.

Who shall be affected by country-by-country reporting obligations?

The obligation to submit the country-by-country report rests with capital groups whose **consolidated revenue for the previous financial reporting year exceeds EUR 750 million**. Moreover, to be subject to this obligation such groups need to consist of at least two entities domiciled in different countries/territories or an entity domiciled in one country or territory, but operating through a permanent establishment located in another country or territory. While determining the obligation to submit the country-by-country report for **the first reporting year (i.e. the fiscal year stating after December 31st 2015), the consolidated revenue generated by the group during the current (not the previous) financial year should be taken into consideration.**

Obligations of groups whose ultimate parent entity has its registered office or management board in Poland

According to the new Act, **the ultimate parent entity** of the group (whose consolidated revenue exceeds EUR 750 million) that has its domicile or management board in Poland, shall **submit – within**

12 months from the end of reporting year (by means of electronic communication) – **a country-by-country report**, that includes:

1. identification data of the entities belonging to the group;
2. financial data of these entities (including information about the amount of earned income, profit/loss before taxation, income tax paid, income tax due, share capital, undistributed profit from previous years, number of employees, material assets and type of activity of entities belonging to the group of entities) – broken down by countries or territories;
3. additional information or explanations about the data provided.

The first year for which the ultimate parent entity may be required to submit information about a group of entities is **the reporting year beginning after December 31st 2015.**

Obligation of groups whose ultimate parent entity has its registered office or management board abroad

In general, national entities belonging to groups generating consolidated revenue over EUR 750 million, whose ultimate parent entity has its registered office or management board abroad, are not subject to the obligation

to submit a country-by-country report. Compared however to the previous regulations, the new Act introduces an institution called **secondary reporting**, i.e. provides situations, where not the ultimate parent entity, but another group's entity that is based in Poland will be obliged to submit the country-by-country report.

Therefore, an entity – other than the ultimate parent entity – belonging to the group whose consolidated revenue exceeds EUR 750 million and having its registered office/management board in Poland or operating in Poland through the permanent establishment **will be required to submit the country-by-country report** for the reporting financial year, if the ultimate parent entity has its registered office or management board in a country/territory, which:

1. does not impose on that ultimate parent entity the obligation to submit the country-by-country report for a given financial year, or
2. has not entered into an appropriate international agreement on the exchange of information with Poland within 12 months from the end of the reporting year, or
3. has suspended the automatic exchange of information about groups of entities for reasons other than those permitted by relevant international agreements.

If such other entity does not obtain all the required data from the ultimate parent entity, it will be obliged to inform about this fact in the country-by-country report as well as to submit the data it has managed to gather.

Regulations concerning the secondary reporting described above do not apply when a group has appointed another entity from the group ("surrogate parent entity") to submit the country-by-country report, provided however, that such

appointed entity has to collect all the data required by the Act with regards to the country-by-country reporting.

The first year for which the entity from the group – other than the ultimate parent entity – is obliged to submit the country-by-country report is the **reporting financial year starting after December 31st 2016**. Nevertheless, the surrogate parent entity appointed by the group to submit the report may submit it – instead of the ultimate parent entity – already for a reporting year starting after December 31st 2015.

Automatic exchange of information about groups of entities

Within the automatic exchange of the tax information, the head of the National Tax Administration (*Krajowa Administracja Skarbowa* – "KAS") – not later than 15 months from the end of the reporting year – forwards the obtained information on the groups of entities to the competent authorities of these member states or the competent authorities of the states that are parties to an appropriate agreement between the competent authorities, in which at least one of the entities from the group has its registered office/management board. For the first year this deadline is prolonged to 18 months.

Notification obligations in the scope of country-by-country reporting

With regards to every group that generates consolidated revenue higher than EUR 750 million (whether or not its ultimate parent entity has its registered office/management board in Poland), each entity having its registered office / management boards in Poland or operating in Poland through a permanent establishment, is also obliged **–by the last day of the reporting financial year –** to:

1. notify the head of KAS, that it is the ultimate parent entity, surrogate parent entity or another entity submitting the country-by-country report, or

2. **indicate** to the head of KAS **the reporting entity**, providing also the country or territory in which the country-by-country report will be submitted.

In the first year for which the ultimate parent entity is obliged to submit the country-by-country report (i.e. the fiscal reporting year beginning after 31st December, 2015) this deadline has been prolonged by 10 months.

Penalties

Entities from the groups that fail to meet the obligations imposed by the described Act, are subject to a financial penalty that may be imposed by the decision of the head of KAS of up to PLN 1 million.

In addition, the discussed Act introduces Article 80d into the Fiscal Penal Code, according to which a person that – contrary to the provisions of the Act – is acting on behalf of or in the interest of the taxpayer (...) submits the false information for the purposes of the country-by-country reporting, is subject to a penalty up to 240 daily rates.

Automatic exchange of information on tax interpretations and decisions regarding transaction prices

Moreover, as it was mentioned above, the Act introduces the regulations on the automatic exchange of information concerning individual tax interpretations, advance (securing) tax opinions and decisions on advanced pricing agreements (APA).

According to its provisions, the head of KAS forwards to the appropriate body of the member state information on the issued individual tax interpretations, securing tax opinions (hereinafter collectively referred to as "interpretations") and decisions on advanced pricing agreements regarding the transactions, groups of transaction or other economic events of a cross-border nature. The information subject to exchange includes:

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| <ol style="list-style-type: none"> 1. identification data of an entity; 2. value of the transaction or set of transactions indicated in the decision / interpretation; 3. indication of countries affected by this interpretation or decision and all foreign entities whose tax obligations may be affected by the transaction, set of transactions or other event covered by the interpretation/decision; 4. a summary of the interpretation (including a description of the actual or future events) or the decision (including: indication of the type and subject of the transaction, description of the criteria for choosing the method of pricing and indication of the method and algorithm used to calculate the transaction price); 5. indication of the source of the exchanged information (whether it is an interpretation/decision or just a request application that had initiated the tax proceedings which resulted in the interpretation/decision being issued). | <p>The description of the facts covered by the interpretation/advanced pricing arrangement should be prepared in such a manner not to disclose any business, industrial, professional or production information or any other information the disclosure of which could be contrary to the public interest.</p> <p>Certain elements of the exchanged information are to be also communicated to the European Commission, so that it may monitor and evaluate the effectiveness of the automatic exchange of information.</p> <p>The requirement for automatic exchange will however not extend to information concerning decisions on advanced pricing agreements with regard to which the competent authority for the foreign entity (affiliated with the local entity) is an authority of a country located outside of the European Union and the ratified international agreement concluded by Poland with that country does not permit the disclosure of such information to the entity that is not a party to such an agreement. However, in such cases the head of KAS will exchange the information</p> | <p>arising from the request that was the basis for initiating the proceedings resulting in such decision.</p> <p>If you have any questions or concerns regarding the information described above, do not hesitate to contact us.</p> |
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