

## Bulgaria publishes draft proposal on Mandatory Disclosure Rules

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### Executive summary

The Bulgarian Government published draft legislation on 4 October 2019, accompanied by explanatory notes implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive). Under DAC6, taxpayers and intermediaries are required to report cross-border reportable arrangements from 1 July 2020. However, reports will retrospectively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.<sup>1</sup>

The draft legislation is under public consultation and comments on the proposals are required by 3 November 2019.

The Bulgarian draft legislation is subject to the formal legislative process and is likely to be amended before final enactment. If implemented as currently proposed, the Bulgarian Mandatory Disclosure Rules (MDR) legislation will be broadly aligned to the requirements of the Directive. The motives/rationales contain some useful interpretations which clarify the concepts and terms used in the Directive.

The draft legislation is expected to be finalized by the end of 2019.

## Detailed discussion

### Background

The Council of the European Union Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation (the Directive or DAC6) entered into force on 25 June 2018.<sup>2</sup>

The Directive requires intermediaries (including EU-based tax consultants, banks and lawyers) and in some situations, taxpayers, to report certain cross-border arrangements (reportable arrangements) to the relevant EU member state tax authority. This disclosure regime applies to all taxes except value added tax (VAT), customs duties, excise duties and compulsory social security contributions.<sup>3</sup> Cross-border arrangements will be reportable if they contain certain features (known as hallmarks). The hallmarks cover a broad range of structures and transactions. For more background, see EY Global Tax Alert, [Council of the EU reaches an agreement on new mandatory transparency rules for intermediaries and taxpayers](#), dated 14 March 2018.

EU Member States are to adopt and publish national laws required to comply with the Directive by 31 December 2019. Bulgaria will introduce domestic legislation, which will take effect from 1 July 2020.

### Scope of taxes covered

The scope of the taxes covered under the Bulgarian draft legislation is aligned with the Directive and applies to all taxes except VAT, customs duties, excise duties and compulsory social security contributions.

### Reportable arrangements

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. The hallmarks can be distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

The definition of “Reportable arrangements” included in the Bulgarian draft legislation is aligned with the DAC6 definition.

### Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined.

The Bulgarian draft legislation provides some clarifications on the definition of “Safe harbor rules” for the purposes of interpreting hallmark E1- arrangements involving the use of unilateral safe harbor rules. The term is defined as “a statutory rule that exempts a certain category of taxpayers from obligations that would be applicable under the general procedure, replacing them with exclusive and/or simplified obligations.”

### Main benefit test

In accordance with DAC6, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

According to the Bulgarian draft legislation, “tax advantage means any benefit or advantage of a taxable person that may result in the reduction of the tax base or tax due, tax avoidance or payment deferral, tax relief or tax relief in excess, as well as other advantages or benefits that could improve a person’s tax position.”

### Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries which can report, the obligation will shift to the taxpayers.

The Bulgarian draft legislation exempts intermediaries which are subject to LPP, such as lawyers. There is neither accompanying guidance, nor official comments as to which intermediaries particularly could apply LPP. However, the intermediaries exempted due to LPP are still required to notify within 14 days from the reporting triggering event date, the other intermediaries (if any) of their reporting obligation or, if other intermediaries are not known, to

notify the taxpayers of their reporting obligation, as well as to notify the Executive Director of the National Revenue Agency of the other intermediaries (if any) or the taxpayers subject to the reporting obligation.

In accordance with DAC6, the Bulgarian draft legislation differentiates between two types of intermediaries:

- 1) The first group includes "any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border tax arrangement."
- 2) The second group includes "any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement."

According to the draft Bulgarian legislation, where a cross-border tax arrangement is designed by an employee of the taxpayer, the obligation to report lies with the taxpayer.

However, the draft Bulgarian legislation does not provide any clarity on whether an "in house" tax team could be regarded as an intermediary.

The draft Bulgarian legislation requires that each relevant taxpayer specify information about their use of the arrangement in annual Corporate Income Tax and Personal Income Tax returns in each of the years for which they use it.

### Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting under the Directive (from 1 July 2020) are when the reportable arrangement is "made available for implementation"; or when the reportable arrangement is "ready for implementation" or when "the first step of implementation has been made." The same trigger events apply in the Bulgarian draft legislation.

Under the Directive, reporting starts from 1 July 2020 and exchanges between jurisdictions from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

The Bulgarian reporting deadlines are expected to be aligned with DAC6.

### Penalties

► The following types of failures and anticipated monetary penalties are provided for in the Bulgarian draft legislation:

- 1) *Failure to provide information on a cross-border tax arrangement* is subject to penalties of between €1000 and €2,500 for individuals and from €2,500 to €5,100 for legal entities and sole traders.
- 2) *Reporting incomplete/incorrect information* is subject to penalties ranging from €500 to €1,500 for individuals and ranging from €1000 to €4,000 for legal entities and traders.
- 3) *Failure to notify the other intermediaries (if any) or the taxpayers* of their reporting obligation is subject to penalties of between €1,000 and €2,500 for individuals and between €2,500 and €5,100 for legal entities and sole traders. This type of penalty is applicable only to the exempt intermediaries due to LPP.
- 4) *Failure to notify the Executive Director of the National Revenue Agency of the list of other intermediaries or taxpayers* who are obliged to provide information on a cross-border tax arrangement is subject to penalties of between €100 to and €400 for individuals and between €250 and €760 for legal entities and sole traders. This type of penalty is applicable only to the intermediaries exempt due to LPP.
- 5) *Non-fulfilment of the obligation to notify the other intermediaries or taxpayers of the unique number issued with regard to a cross-border tax arrangement upon initial submission of information* to the respective tax authorities is subject to penalties ranging from €100 to €400 for individuals and ranging from €250 to €760 for legal entities and sole traders. This type of penalty is applicable only to intermediaries or taxpayers who made the initial provision of information; in the case of repeated infringements, a penalty of twice the amount shall be imposed.

In general, under the Bulgarian draft law, intermediaries or taxpayers are stipulated as the liable parties.

## Next steps

The Bulgarian draft legislation has clarified some questions with respect to the interpretation and implementation of DAC6, however many questions remain unanswered. The ongoing public consultation may raise further questions. The Council of Ministers will present the formal draft legislation by 20 December, which will then be debated by the Bulgarian Parliament. It is anticipated that the subsequent legislative process will provide more clarification.

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the regulations included in the draft legislation, taxpayers and intermediaries who have operations in Bulgaria should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations/specific deadlines.

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## Endnotes

1. See EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), date 5 June 2018.
2. Ibid.
3. DAC6 sets out a minimum standard. Member States can take further measures; for example, (i) introduce reporting obligations for purely domestic arrangements; (ii) extend the scope of taxes covered; (iii) bring forward the start date for reporting.

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