

## Romania enacts final MDR legislation

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### Executive summary

On 28 January 2020, the Romanian Government approved the Romanian Government Ordinance implementing the European Union (EU) Directive on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

The Romanian legislation will enter into force on 1 July 2020 and will be effective from 1 July 2020.

The final Romanian Mandatory Disclosure Rules (MDR) legislation is broadly aligned to the requirements of the Directive.

The final legislation contains few changes compared to the draft legislation published in January 2020.<sup>1</sup>

### 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.

The key differences between the final Romanian legislation and the Directive are as summarized below.

### Scope of taxes covered

The scope of taxes covered under the Romanian final legislation is fully 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 overall definition of "Reportable Arrangements" included in the final Romanian legislation aligns with the DAC6 definition and does not include any additional hallmarks.

### Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. The Romanian final legislation does not provide clarification on these elements but mentions that

the Romanian tax authority will publish future guidance on their website detailing how to apply the hallmark provisions. No reference is made as to the exact date for publication of this guidance.

### 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.

The MBT included in the Romanian final legislation is the same test as stipulated by the Directive.

### 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 final Romanian legislation mentions that intermediaries, which are subject to an obligation to maintain professional secrecy (this could include lawyers), can only report the cross-border arrangement to the tax authority after obtaining the written agreement of the relevant taxpayer. If the taxpayer's written agreement is not obtained, there is no obligation for the intermediary to directly report the arrangement to the tax authority. However, in such case, the intermediary must notify in writing, without delay, any other intermediary with respect to the reporting obligation, or where there is no other intermediary, the intermediary must notify the relevant taxpayer of their obligation to report.

DAC6 defines two categories of intermediaries: promoters and service providers. The Romanian final legislation defines intermediaries by reference to the same two categories. Only intermediaries that have nexus in Romania (as defined in accordance with Article 3, Paragraph 21 of the Directive), have an obligation to report in Romania.

The final Romanian legislation does not provide clarity on whether employees of an entity can themselves be regarded as intermediaries and does not provide clarity on whether an "in house" tax team could be regarded as an intermediary.

## 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 reporting trigger events apply in the final Romanian MDR 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 Romanian reporting deadlines are fully aligned with DAC6.

In addition, in accordance with Article 8ab, paragraph 11, of the Directive, taxpayers are required to file information about their use of the arrangement with the Romanian tax authority in each of the years for which they use the arrangement.

## Penalties

The following penalties apply based on the Romanian final legislation:

- ▶ A fine ranging from RON20,000 (approx. €4,000) to RON100,000 (approx. €20,000) in the case of failure to report or late reporting by intermediaries or relevant taxpayer.
- ▶ A fine ranging from RON5,000 (approx. €1,000) to RON30,000 (approx. €6,000) for the intermediary in the case of a failure to notify another intermediary or the relevant taxpayer when the intermediary subject to professional secrecy obligations did not obtain the written agreement of the taxpayer to make the report.

## Next steps

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 regime enacted in the final legislation, taxpayers and intermediaries who have operations in Romania 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, [Romania issues draft mandatory disclosure regime legislation](#), dated 24 January 2020.
2. For background on MDR, see EY Global Tax Alert, [EU publishes Directive on new mandatory transparency rules for intermediaries and taxpayers](#), dated 5 June 2018.
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.

For additional information with respect to this Alert, please contact the following:

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