

## Bulgaria enacts final legislation to implement Mandatory Disclosure Rules

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### Executive summary

The Bulgarian National Assembly approved, on 31 December 2019, the amendments to the Tax and Social Insurance Procedure Code 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 Bulgarian legislation entered into force on 1 January 2020 and will be effective from 1 July 2020.

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

No explanatory notes or further guidance were issued with the legislation amendments. It is not yet known when the National Revenue Agency or the Ministry of Finance will issue further guidance.

### 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>1</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>2</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 Bulgarian legislation and the Directive are summarized below. This Alert also highlights any clarifications provided by the Bulgarian Council of Ministers or amendments to the Bulgarian legislation during the legislative process.

### Scope of taxes covered

The scope of taxes covered under the final Bulgarian 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 definition of a “reportable arrangement” in the final Bulgarian legislation closely follows the definition set out by DAC6.

### Hallmarks A-E of the Directive

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

The final Bulgarian legislation refers to the hallmarks as “**categories**” and provides some further clarification on the interpretation of certain terms included in these categories.

For example, in respect of hallmark D2, the legislation specifies that the term “beneficial ownership” in an arrangement, involving a non-transparent legal or beneficial ownership chain, will be understood in accordance with the meaning given to this term in the *Bulgarian Measures Against Money Laundering Act (2018)* or analogous Member State legislation.

The final Bulgarian legislation also 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 or transactions from obligations or rules that would be applicable under the general procedure, replacing them with exclusive and/or simplified obligations or rules.”

### 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 final Bulgarian 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.” The final Bulgarian legislation does not provide further clarity on whether the tax advantage in respect of the MBT must arise in respect of EU taxes or otherwise.

### Intermediaries

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. DAC6 defines two categories of intermediaries: promoters and service providers. The final Bulgarian legislation defines intermediaries by reference to the same two categories.

In the Bulgarian final legislation, the term “**consultant**” is used to refer to intermediaries. Only intermediaries (consultants) with nexus in Bulgaria (as defined) have reporting obligations in Bulgaria.

In accordance with the Directive, under the Bulgarian final legislation, an intermediary (consultant) shall be exempt from the reporting obligation in Bulgaria when they have proof that they have reported the arrangement in another Member State or have proof that another intermediary (consultant) has already filed the same information about the reportable cross-border arrangement. However, the reporting obligation will still stand when the arrangement consists of stages or parts and each intermediary is involved in a separate stage or part.

The Directive also 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 taxpayer.

The final Bulgarian legislation exempts intermediaries (consultants) from the reporting obligation due to LPP, unless the relevant taxpayer waives the LPP and consents to the information in respect of the reportable cross-border arrangement being reported. It is important to note that the legislation has a broad scope and the LPP exemption covers all professionals who have a legal obligation to uphold LPP and not solely lawyers or tax advisors.

In circumstances where the LPP applies, the exempt intermediary must notify the other intermediaries in respect of the reporting obligation, or, if no such intermediaries are known, the exempt intermediary must notify the relevant taxpayer that the obligation to report has shifted to them. The deadline for the notification is 14 days following the date when a reporting obligation arises for the intermediary (consultant).

In circumstances in which an exemption from reporting due to LPP applies, the Executive Director of the National Revenue Agency (NRA) must also be notified by the exempt intermediary as to the identification of the persons obliged to report the reportable arrangement (even if the reporting obligation shifts to an intermediary or relevant taxpayer in another Member State).

The NRA and the Ministry of Finance have been requested to provide general clarifications on the categories of Intermediaries (consultants) who are expected to be covered by LPP and who will therefore be eligible for exemption from the obligation to report due to LPP.

It should be noted that the final Bulgarian legislation does not provide clarity on whether an “in house” tax team could be regarded as an intermediary (consultant).

## 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 final Bulgarian 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 reporting deadlines in the final Bulgarian legislation fully align with DAC6.

Furthermore, in accordance with the option provided for in Article 8ab, Paragraph 11 of the Directive, the final Bulgarian legislation imposes an obligation on relevant taxpayers to file information about their use of the reportable cross-border arrangement in the annual corporate income tax or personal income tax declaration for each of the years which they use the reportable arrangement.

## Penalties

The final Bulgarian legislation outlines the types of breaches which give rise to different penalties for individuals, sole traders, or legal entities in their capacity as intermediaries or taxpayers, namely:

- ▶ Failure to disclose information and for submitting incorrect or incomplete reports will trigger fines.
- ▶ Intermediaries exempt from reporting due to LPP will be subjected to monetary penalties if they fail to notify the relevant taxpayer or other intermediaries (if any) of the cross-border arrangement of their duty to report. A penalty will also apply if the Executive Director of the NRA has not been informed that the obligation to report the arrangement has shifted to another party (even when that the obligation arises in another Member State).
- ▶ Fines will also apply for failures to notify other intermediaries or relevant taxpayers as to the issued unique identification number in respect of the reportable arrangement.

The highest fines will be applicable when the intermediary or relevant taxpayer fails to report the reportable cross-border arrangement and when an intermediary that is exempt from reporting due to LPP fails to notify the other intermediaries or relevant taxpayer of their subsequent reporting duty. The penalty is between BGN2,000 and BGN5,000 (approximately €1,000 to €2,500) for individuals and between BGN5,000 to BGN10,000 (€2,500 to €5,000) for sole traders and legal persons.

Where repeated offenses occur in the same category, the final Bulgarian legislation allows for the fine to be doubled.

## Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. 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 in the deadlines provided.

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## Endnotes

1. 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.
2. 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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