

EU DAC6 Directive implemented into Romanian law

Romania implemented the EU DAC6 Directive through the passage of Government Ordinance no. 5/2020, which amended Law no. 205/2015 on the Fiscal Procedure Code. Published in the Official Gazette on 31 January 2020, Ordinance 5/2020 will enter into force on 1 July 2020.

DAC6 is the name commonly given to EU Directive 2018/822 of 25 May 2018 that amended Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. DAC6 entered into force on 25 June 2018.

Consistent with Action 12 of the OECD Base Erosion and Profit Shifting Project, DAC6's objective is to provide a transparent framework for clamping down on tax avoidance and evasion in the EU.

The provisions of Ordinance 5/2020 are similar to DAC6 in regard to the definitions of cross-border arrangements, reportable cross-border arrangements, hallmarks, relevant taxpayers, marketable arrangements and bespoke arrangements.

Who reports?

In principle, the reporting obligation is binding on the intermediary.

Ordinance 5/2020 defines the intermediary as any person that designs, markets, organises or makes available for implementation or manages the implementation of reportable cross-border arrangements. Intermediary also refers to any person that – in 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 directly or indirectly to provide aid, assistance or design advice, marketing, organising, making available for implementation or managing the implementation of reportable cross-border arrangements.

Lawyers, accountants, tax and financial advisors, bankers and consultants qualify as intermediaries who must disclose information that is within their knowledge, possession or control.

Intermediaries should have a connection with Romania by meeting at least one of the following conditions: be residents for tax purposes in Romania, have Romanian permanent establishment through which the services for the arrangements are provided, be constituted in Romania or be regulated by Romanian law, or be part of a Romanian professional body.

The Ordinance provides that if the reporting obligation breaches the legal professional privilege of the intermediary, he will report the information regarding cross-border arrangements only if it receives prior written consent from the taxpayer. If the intermediary does not receive written consent of the taxpayer, he has the obligation to notify in writing, without delay, any other intermediary, or a relevant taxpayer if no other intermediary exists concerning the reporting obligation.

If no intermediary is involved in the arrangement, the reporting obligation will lie with the relevant taxpayer.

A "relevant taxpayer" is any person whom reportable cross-border arrangements is made available for implementation, who is ready to implement reportable cross-border arrangements or has implemented the first step of such any arrangements.

What is reportable?

There is no definition of the concept of “arrangement” in DAC6 or Ordinance 5/2020.

To qualify as reportable an arrangement must:

- Have a cross-border dimension: it must concern more than one member state or a member state and a third country; and
- Contain at least one of the features known as hallmarks.

The Ordinance transposes the DAC6's five categories of hallmarks. The hallmarks are divided into generic and specific hallmarks. The generic hallmarks and some of the specific hallmarks only apply if the main benefit test is satisfied.

What needs to be reported?

The information that needs to be reported includes:

- Identification of all taxpayers and intermediaries involved, including their tax residence, name, date and place of birth (if an individual), tax identification number, and any of the relevant taxpayer's associated enterprises (where applicable);
- Details of the relevant applicable hallmarks;
- A summary of the arrangements, including a summary of relevant business activities;
- The date the first step in implementation was or will be made;
- Details of the relevant local law;
- The value of the cross-border reportable arrangements;
- Identification of relevant taxpayers or any other person in any member state likely to be affected by the arrangements.

What are the reporting deadlines?

The reporting deadline is 30 days from the earliest of the following dates: the day on which the arrangement is made available for implementation, the day it is ready for implementation and the day the first implementation step is made.

When the intermediary has provided aid, assistance or advice in respect to the reportable cross-border arrangements, the 30-day term starts on the day after the aid, assistance or advice was provided.

The Ordinance provides for ongoing quarterly reporting obligations for marketable arrangements. Intermediaries must report new or updated information on these arrangements every three months.

The relevant taxpayer must report information regarding the utilisation of cross-border arrangements each year it is utilised.

If the intermediary has the obligation to report in more than one member state, he will be exempt from the reporting obligation in Romania if he presents to the Romanian tax authority conclusive evidence that the arrangements were already reported to the competent authority in another member state.

If more intermediaries have reporting obligations for cross-border arrangements, they will be exempt from reporting if they have conclusive evidence that the arrangements were already reported to the Romanian tax

authority.

Such reporting exemptions are also applicable for relevant taxpayers.

First reporting deadline

The intermediaries or the relevant taxpayers will make the first report by 31 August 2020 for reportable cross-border arrangements for the period 25 June 2018 to 1 July 2020.

Sanctions

Ordinance 5/2020 provides sanctions for the failure to comply with the reporting obligation or, in case of intermediaries, the failure to notify any other intermediary or the relevant taxpayer.

The fine levied against intermediaries or relevant taxpayers for non-reporting or delayed reporting is between RON 20,000 and RON 100,000 (EUR 4,200 and EUR 21,000). The fine that intermediaries will pay for failure to comply with the notification obligation is between RON 5,000 and RON 30,000 (EUR 1,000 and EUR 6,300).

Reporting form and guidelines

The Romanian tax authority will issue the form that should be filled out for reporting within 60 days from the publication of the Ordinance. Also, the authority will publish a guide regarding the application of the hallmarks.

For more information on this Ordinance and how to best comply, contact local CMS experts Roxana Popel and Andrei Tercu or your regular CMS advisor.

Given the impact of this Ordinance, CMS Romania will host trainings/webinars on the topic. If you would like to attend or be informed on these, please send an email to [Roxana Popel](#) or [Andrei Tercu](#).