

18 February 2020

Fiscal Bulletin



Summary:

1. **Government Ordinance No. 5/2020 for amending and supplementing Law No. 207/2015 regarding the Fiscal Procedure Code (“GO No. 5/2020”)**
2. **Government Ordinance No. 6/2020 for amending and supplementing Law No. 227/2015 regarding the Fiscal Code (“GO No. 6/2020”)**

Legal enactments amending the Fiscal Code and the Fiscal Procedure Code

GO No. 5/2020, published in Official Gazette No. 68 on 31 January 2020, and GO No. 6/2020 published in Official Gazette No. 72 on 31 January 2020 amend Law No. 207/2015 on the Fiscal Procedure Code (the “**Fiscal Procedure Code**”) and Law No. 227/2015 on the Fiscal Code (the “**Fiscal Code**”).

1. **Transposition of Council Directive (EU) 2018/822 (the “DAC6 Directive”) in the Romanian fiscal legislation**

GO No. 5/2020 transposes in the Fiscal Procedure Code the provisions of Council Directive (EU) 2018/822 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (“**DAC6**”).

The DAC6 Directive provides for the obligation of intermediaries (and, in specific cases, of taxpayers) to report potentially aggressive cross-border tax-planning arrangements. This type of arrangements can be identified based on two categories of hallmarks: those which satisfy the main benefit test and those which are directly reportable.

The main benefit test will be satisfied if the main benefit or one of the main benefits of such arrangement is the obtaining of a tax advantage.

The reporting obligation is applicable, in general, to any intermediary involved in designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Intermediaries which, under the law, are bound by the duty of professional secrecy (e.g., lawyers) shall file information on reportable cross-border arrangements only with the written consent of the relevant taxpayer. In the absence of such consent, they must notify other intermediaries, and in the absence of another intermediary, they shall notify the relevant taxpayer on the reporting obligations. If there is no intermediary, the reporting obligation lies with the taxpayer.

The provisions of DAC6 Directive transposed in the Romanian law will enter into force on 1 July 2020, having effects as of 25 June 2018. Thus, as of 1 July 2020, the intermediaries (in certain cases, the taxpayers) have the obligation to file information on each reportable cross-border arrangement within 30 days. This term begins on the day after:

- The reportable cross-border arrangement is made available for implementation; or
- The reportable cross-border arrangement is ready for implementation; or
- The first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first.

However, considering that DAC6 has effects as of 25 June 2018, if the aforementioned events occurred from 25 June 2018 to 1 July 2020, the reportable cross-border arrangements must be reported until 31 August 2020.

The form to be used for filing information on reportable cross-border arrangements shall be approved by order of the ANAF President within 60 days as of the publication of GO 5/2020. ANAF shall also issue guidelines to detail how the hallmarks on reportable cross-border transactions are to be applied.

GO No. 5/2020 lays down the following penalties for failure to meet the reporting obligations in due time:

- Fine ranging from RON 20,000 to RON 100,000 for intermediaries' or relevant taxpayers' failure to report or late reporting of reportable cross-border arrangements;
- Fine ranging from RON 5,000 to RON 30,000 for intermediary's failure to meet the obligation to notify another intermediary or the relevant taxpayer.

2. Transposition of Council Directive (EU) 2017/952 (the "ATAD II Directive") in the Romanian law

On 28 January 2020, GO No. 6/2020 implementing in the Fiscal Code the provisions of ATAD II Directive was approved. The provisions entered into force on 3 February 2020 and they are almost identical to those of ATAD II Directive.

Hybrid mismatches are the consequence of differences in the legal qualification of payments or tax residency of entities. These differences occur when the legal systems of two jurisdictions interact. Such hybrid mismatches often lead to double deductions or to deductions of income in a Member State without including such income in the taxable base of the other Member State.

The role of ATAD II Directive is to neutralize the effects of such hybrid mismatches.

Thus, the main measures implemented in the Fiscal Code concerning hybrid mismatches are as follows:

- If a hybrid mismatch results in a double deduction, the deduction is granted only in the Member State in which such payment has its source;
- If a hybrid mismatch results in a deduction without inclusion in the taxable base of another Member State, the payer's Member State refuses the deduction of such payment.

Editors

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