

## Tax & Legal Weekly Alert

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### In this issue:

#### **OECD published the Transfer Pricing Guidance on Financial Transactions**

On February 11, 2020, OECD published the Transfer Pricing Guidance on Financial Transactions. It complete the BEPS: Actions 4, 8-10, being transposed as a new chapter in the OECD Transfer Pricing Guide, Chapter X.

#### **The Authority for the Digitalization of Romania. Revitalization of public administration modernization?**

Thursday, February 13, 2020, Government Decision no. 89/2020 regarding the organization and functioning of the Authority for the Digitalization of Romania ("ADR") has been published in the Official Gazette of Romania. The new authority shall assume the role of carrying out and coordinating the implementation of public policies and strategies regarding the digital transformation of public administration.



## OECD published the Transfer Pricing Guidance on Financial Transactions

The Romanian tax legislation specifically stipulates the use of the OECD Transfer Pricing Guidelines in establishing the local transfer pricing rules. References in this respect can be found both in the Fiscal Code (art. 11, para. 4) and in the Order no. 442/2016.

Therefore, the new TP Guidance is a valid tool from a local perspective, for both tax authorities and taxpayers, to justify the financial transactions from a transfer pricing perspective.

In addition to the existing legislation, the report identifies and presents transfer pricing issues relevant for financial transactions. It also presents examples to illustrate the principles discussed in the report.

The structure and the content of the new report are presented as follows:

**Section A** represents an introduction of the report and presents the purpose and the background of the Guidelines.

**Section B** provides guidance on the application of the principles presented in Section D.1 of Chapter I of the OECD Transfer Pricing Guidelines.

- **Section B.1** of this report elaborates on how the accurate delineation analysis, presented under Chapter I, applies to the capital structure of a company within a MNE group. It also clarifies that the recommendations presented in that section does not prevent countries to apply the local legislation in order to address capital structure and interest deductibility under their domestic legislation.

From a practical standpoint, this section clarifies the circumstances in which a loan agreement between related parties classifies as an ordinary loan, capital contribution, or other kind of payment. Thus, this section presents relevant factors that may be useful indicators, such as the presence of a fixed repayment date, the obligation to pay interest and the ability of the debtor to obtain loans from independent financial institutions.

- **Section B.2** outlines the economically relevant characteristics regarding the terms and conditions surrounding the financial transactions.

From a practical perspective, this section suggests that besides the economic substance of an intra-group financing transaction, the economic conditions, the financial strategy of the group, or the financing options of the debtor and creditor represent fundamental elements for the transfer pricing analysis. Moreover, the lender's and borrower's perspectives are mentioned as important factors within a transfer pricing analysis, outlining the importance of the functional analysis, as well as the debtor's creditworthiness, credit risk and economic circumstances.

**Sections C, D and E** address specific issues related to the pricing of financial transactions carried out within MNE groups (e.g. treasury functions, intra-group loans, cash pooling structures, hedging, guarantees and captive insurance). This analysis elaborates on both the accurate delineation and the pricing of the controlled financial transactions.

Finally, **Section F** provides guidance on how to determine a risk-free rate of return and a risk-adjusted rate of return.

For further questions regarding the aspects mentioned in this alert, please contact us.



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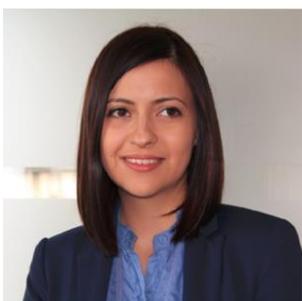
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## The Authority for the Digitalization of Romania. Revitalization of public administration modernization?

Thursday, 13 of February 2020, Government Decision no. 89/2020 regarding the organization and functioning of the Authority for the Digitalization of Romania ("ADR") has been published in the Official Gazette of Romania. The new authority shall assume the role of carrying out and coordinating the implementation of public policies and strategies regarding the digital transformation of public administration.

Once the Government Decision enters into force, ADR will take over the Ministry of Communication and Informational Society's ("MCIS") prerogatives arising from normative acts related to the field of informational society and information technology, together with the prerogatives of the Authority for the Digitalization Agenda of Romania ("ADAR")

Read below a summary of the objectives, function and prerogatives of the new authority relevant for the business environment.

### 1. ADR's scope and objectives

The Authority for the Digitalization of Romania has as a primary objective to support and contribute to (i) the digital transformation of Romania's economy and society, and (ii) to implement electronic governance with regards to the Romanian public administration.

ADR will take over the employees of ADAR and from MCIS's structures. We hope that the new organization will accelerate the digital transformation of public services and of the economy, but it remains to be seen how much the new authority's practices and involvement will change in compared to previous ones.

### 2. Duties and responsibilities

ADR has extensive prerogatives to achieve its objectives and implement the digital reform, including attributions in the following domains:

- **regulation, supervision and control** – elaborates and issues opinions on draft normative acts in its field of activity; issues technical standards and regulations; supervises and controls the compliance with the legal framework in its field of activity (further details in section 3 below);
- **strategy and planning** – drafts national strategies in the field of digital transformation, automation, robotization and artificial intelligence and coordinates their implementation;
- **reporting** – publishes annually the Catalog of public services, with the purpose of monitoring the progress of digital transformation of the public administration; issues quarterly the report on digitalization which contains, amongst others, the summary of ADR's activity, up-to-date progress and the level of compliance of public authorities with the legal framework within ADR's field of competence;
- **representation and European affairs** – coordinates the application of international agreements in the fields of information technology signed by Romania; on the basis of a mandate, approved by the prime-minister, supports Romania's position in the process of negotiation and enactment

of European initiatives in the field of digitalization and represents Romania in international cooperation bodies in this field;

- **projects and technical assistance** – advises, initiates and ensures the financing of programs and projects in the field of digital transformation; supports entities with powers in the field of public procurement in the elaboration of technical solutions with regards to information technology projects; advises in the process of analyzation of operational flows.

### **3. ADR is the new supervisory and control authority in numerous fields related to digitalization**

ADR's powers include supervision and control of compliance with the laws and regulations regarding the technology field, including the legal framework that regulates the usage of technology solutions in important sectors of the economy, as follows:

- **electronic signature and provision of trust services** – exercises supervisory powers over qualified trust service providers established on Romanian territory, in accordance with eIDAS<sup>1</sup> Regulation, as well as those of the regulatory and supervisory authority in the fields of electronic signature, time stamps and electronic archiving of documents;
- **electronic commerce** - supervises and controls compliance with the legal provisions in the field of electronic commerce, including those concerning the registration of commercial transactions by electronic means;
- **consumer protection** – exercises the capacity of competent authority for the implementation of Regulation (EU) 2017/2394<sup>2</sup> on cooperation between national authorities responsible for the enforcement of consumer protection laws, having powers such as:
  - access to any documents, data or information for the application of Regulation (EU) 2017/2394;
  - can impose on any natural or legal person whether public or private, the obligation to make available any information in order to establish whether or not an infringement sanctioned by Regulation (EU) 2017/2394 has occurred;
  - performs on-the-spot inspections, can enter any premises, on any land or in any means of transportation used by the inspected entity to carry out its activity, in order to examine, confiscate or obtain copies of the information, data or of documents required for the inspection;
- **financial services** - approves payment instruments with remote access, such as internet banking, home-banking, phone-banking or mobile-banking;
- **alternative transport services** – approves or authorizes, amongst others, the online alternative transport platforms

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<sup>1</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

<sup>2</sup> Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

- **cross-border portability of online content services** – coordinates the application of Regulation (EU) 2017/1128<sup>3</sup> on cross-border portability of online content services in the internal market;
- **registry of “.ro” domains** - regulates the operation of the register for the “.ro” domain name;

In order to perform its supervisory functions, the empowered staff of ADR has the right to request documents and companies are under the obligation to present such documents or to respond to any other solicitation necessary to verify the compliance with legislation in ADR’s field of activity.

#### **4. Collaboration with the business community. The National Council for Digital Transformation**

In order to support digitalization programs and strategies, ADR will cooperate with the private sector in order to consult on areas of common interest.

To facilitate this collaboration, the National Council for Digital Transformation ("**NCDT**") will be set up as a consultative body at ADR level, the composition of the NCDT will include at least five members representing the private sector and five members representing civil society.

Membership in the NCDT is approved by decision of the president of the ADR, based on a substantiated request sent by the entity that wishes to be represented within the NCDT.

#### **5. Takeover of patrimony and judicial position of MCIS an ADAR**

From the entry into force of the decision establishing the ADR, the acts establishing and organizing the MCIS and ADAR will be repealed.

In this regard, in addition to the staff of the two authorities, ADR will also take over all rights and obligations of those entities in the field of information technology and information society, including movable and immovable assets in their administration or ownership, as well as any disputes in which they are involved.

For further questions regarding the aspects mentioned in this alert, please [contact us](#).



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<sup>3</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.



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