Translation from Romanian

**GEO no. 42/2017 for the amendments and supplementation of Law no. 207/2015 regarding the Tax Procedure Code**

ISSUED BY: THE GOVERNMENT OF ROMANIA

PUBLISHED IN THE OFFICIAL GAZETTE NO. 438 of 13 June 2017

 Considering that, as rightful member state of the European Union, Romania is required to transpose and implement the directives adopted by the European Union,

 considering that Romania is required to transpose the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation by 4 June 2017, while also having the obligation to communicate to the Commission the text of these measures,

 considering that the member states are to apply the related measures starting from 5 June 2017,

 considering that any delay of the Romanian authorities may lead to the start of the action of the member state’s failure to comply with its obligations, in accordance with art. 258 of the Treaty on the Functioning of the European Union,

 in order to avoid the application of penalties against Romania, in accordance with art. 260 para. (3) of the Treaty of the Functioning of the European Union, which accelerates the mechanism of pecuniary penalties if the European Commission brings a case in front of the Court of Justice of the European Union regarding the fact that Romania failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure,

 taking into account the Communication (2017)/C 18/02 under which the European Commission shall request the Court of Justice of the European Union to apply to the Member States that exceed the terms for the transposing of directives both penalty payments and a lump sum fine, which, in the case of Romania, in accordance with the Communication COM [C(2016)5091] will be at least 1,849,000 euro,

 considering the necessity to conduct all diligences for the transposing in due time of the Directive 2016/881/EU and for the notification of the transposing measures before the notification of the Court of Justice of the European Union,

 taking into account that the automatic exchange of information regarding the reports per individual country among the Member States contributes to the discouragement of aggressive tax planning practiced by the multinational enterprise group, since they will have the information necessary for the identification of the multinational enterprise group that practice aggressive tax planning and for a corresponding reaction,

 considering that some of the consequences of aggressive tax planning include double deductions both in the state of origin and in the state of residence, double non-taxation, i.e. taxation that is not applied in the state of origin, nor is it applied in the state of residence of the group, which leads to the reduction of the tax base and, thus, of the level of the taxes,

 taking into account that the lack of requirements relating to transparency, enforced on multinational enterprise groups in relation to the structure, their transfer pricing policy, as well as their internal transactions with related parties, allows that they shift artificially significant income to tax havens in order to reduce their taxes, which has a negative impact on the state budget because of the failure to allocate the profit in the jurisdiction of their activity,

 taking into account the fact that the urgent adoption of these measures will enforce it upon the groups of multinational enterprises to distribute correctly their profit according to the tax jurisdictions in which they conduct their activity,

 considering that these elements concern the general public interest and that they are urgent and extraordinary matters the regulation of which cannot be delayed,

 pursuant to art. 115 para. (4) of the Constitution of Romania, republished,

 **The Government of Romania** adopts this emergency ordinance.

 ART. I

 Law no. 207/2015 regarding the Tax Procedure Code, published in the Official Gazette of Romania, Part I, no. 547 of 23 July 2015, as further amended and supplemented, is amended and supplemented as follows:

 **1. At article 286, letter i) is amended and it shall include the following:**

 “i) automatic exchange of information:

 1. for the purposes of art. 291 para. (1), art. 2911 and of art. 2913, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals. For the purposes of art. 291 para. (1), available information means information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State;

 2. for the purposes of art. 291 para. (4), the systematic communication of predefined information on residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals;

 3. for the purposes of any other provisions of this chapter, with the exception of art. 291 para. (1) and (4), art. 2911 and art. 2913, the systematic communication of predefined information supplied in accordance with points 1 and 2.

 For the purposes of art. 291 para. (4) and (7), art. 304 para. (2) and art. 308 para. (2) and (3), any capitalized term shall have the meaning that it has under the corresponding definitions set out in annex no. 1 to the present code. For the purposes of art. 2913 and of annex no. 3 to this code, any capitalized term shall have the meaning that it has under the corresponding definitions set out in this annex.”

 **2. After article 2912 a new article, article 2913, is introduces and it shall include the following:**

 “ART. 2913

 **Scope and conditions of mandatory automatic exchange of information on the country-by-country report**

 (1) An ultimate parent-entity of a multinational enterprise group that is resident for tax purposes in Romania or another reporting entity, in accordance with section II of annex no. 3 to the present code, is required to file a country-by-country report with respect to its Reporting Fiscal Year within 12 months of the last day of the Reporting Fiscal Year of the multinational enterprise group in accordance with section II of annex no. 3 to this code.

 (2) The competent authority of Romania where the country-by-country report was received pursuant to para. (1) shall, by means of automatic exchange and within the deadline laid down in para. (4), communicate the country-by-country report to any other Member State in which, on the basis of the information in the country-by-country report, one or more constituent entities of the multinational enterprise group of the Reporting Entity are either resident for tax purposes or subject to tax with respect to the business carried out through a permanent establishment.

 (3) The country-by-country report shall include the following information with respect to the multinational enterprise group:

 a) aggregate information relating to the amount of revenue, profit/loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets different from cash or cash equivalents with regard to each jurisdiction in which the multinational enterprise group operates;

 b) identification of each constituent entity of the multinational enterprise group, specifying the jurisdiction of tax residence of that Constituent Entity and, where different from that jurisdiction of tax residence, the jurisdiction under the laws of which that constituent entity is organized, and the nature of the main business activity or activities of that constituent entity.

 (4) The communication shall take place within 15 months of the last day of the Fiscal Year of the multinational enterprise group to which the country-by-country report relates. The first country-by-country report shall be communicated for the Fiscal Year of the multinational enterprise group commencing on or after 1 January 2016, i.e. within 18 months after the last day of that fiscal year.”

 **3. At article 299, after paragraph (5), three new paragraphs, paragraphs (6) - (8), are added and they shall include the following:**

 “(6) Notwithstanding paragraphs (1) - (4), information communicated between Member States pursuant to art. 2913 shall be used for the purposes of judging high-level transfer-pricing risks and other risks related to base erosion and profit shifting, including assessing the risk of non-compliance by members of the multinational enterprise group with applicable transfer-pricing rules and where appropriate, for economic and statistical analysis.

 (7) Transfer-pricing adjustments by the tax authorities of the receiving Member State shall not be based on the information exchanged pursuant to art. 2913.

 (8) The competent Romanian authority may use the information received, pursuant to art. 2913, from the other Member State competent authorities, as a basis for making further enquiries into the multinational enterprise group’s transfer-pricing prior arrangements provided under art. 52, or into other tax matters in the course of a tax audit, and, as a result, appropriate adjustments to the taxable income of a Constituent Entity may be made.”

 **4. At article 303, paragraph (7) is amended and it shall include the following:**

 “(7) The linguistic arrangements adopted by the European Commission, pursuant to art. 20 para. (5) of the Directive 2011/16/EU, does not prevent the competent Romanian authority from communicating the information under art. 2911 and 2913 in Romanian. Nevertheless, such linguistic arrangements may provide that the key elements of such information should also be communicated in another official and working language of the European Union.”

 **5. At article 303, after paragraph (7) a new paragraph is added, paragraph (8), and it shall include the following:**

 “(8) The automatic exchange of information regarding the country-by-country report pursuant to art. 2913 is executed by using the type-form approved by order of the president of the National Agency of Tax Administration (ANAF).”

 **6. At article 304, after paragraph (3) a new paragraph is added, paragraph (4), and it shall include the following:**

 “(4) Notwithstanding para. (1), the information communicated under art. 2913 para. (2) shall be provided exclusively by electronic means using the CCN network.”

 **7. At article 306, paragraph (3) is amended and it shall include the following:**

 “(3) The competent Romanian authority shall send to the European Commission a yearly assessment of the effectiveness of the automatic exchange of information referred to in art. 291, 2911 and 2913, as well as the practical results achieved, by using the form and the transmission conditions adopted by the European Commission, in accordance with art. 23 of the Directive 2011/16/EU."

 **8. At article 336 paragraph (1), after letter ţ) two new letters are added, letters u) and v), and they shall include the following:**

 “u) the delayed filing by the reporting entities of the country-by-country report, pursuant to art. 2913 para. (1), or the transmission of incorrect or incomplete information;

 v) the reporting entities’ failure to file the country-by-country report, in accordance with art. 2913 para. (1).”

 **9. At article 336 paragraph (2), after letter k) two new letters are added, letters l) and m), and they shall include the following:**

 “l) with a fine from 30,000 lei to 50,000 lei in the case of the acts provided at para. (1) letter u);

 m) with a fine from 70,000 lei to 100,000 lei in the case of the acts provided at para. (1) letter v).”

 **10. After annex no. 2, a new annex is added, annex no. 3, having the content provided in the annex to this emergency ordinance.**

 ART. II

 The model and the contents of the country-by-country report provided under art. 2913 para. (1), as well as of the notifications provided in annex no. 3, section II, points 7 and 8 of Law no. 207/2015 regarding the Tax Procedure Code, as further amended and supplemented, are approved by order of the president of the National Agency of Tax Administration.

 ART. III

 This emergency ordinance enters into force on the day of its publication in the Official Gazette of Romania, Part I, except for art. I point 9, which enters into force in 10 days after the publication.

 \*

 The provisions of this emergency ordinance transpose art. 1 and sections I and II of annex III to the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, published in the Official Journal of the European Union, series L, no. 146 of 3 June 2016.

 ANNEX

 (Annex no. 3 la Law no. 207/2015)

 **RULES**

 **of reporting for multinational enterprise groups**

 SECTION I

 **Definitions of the terms**

 The following terms are defined below:

 1. Group means an assembly of enterprises related through ownership or control such that it is either required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange.

 2. Enterprise means a form of conducting business by any person referred to in art. 286 letter k), with the exception of the individuals (natural persons).

 3. Multinational enterprise group means any Group that includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdiction and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and is not an excluded multinational enterprise group.

 4. Excluded multinational enterprise group means, with respect to any fiscal year of the group, a group having total consolidated group revenue of less than EUR 750 000 000 or an amount in local currency approximately equivalent to EUR 750 000 000, as reflected in the consolidated financial statements of the group for such preceding fiscal year.

 For every fiscal year of reporting, the computation of the amount in lei shall use the exchange rate of January 2015, communicated by the National Bank of Romania.

 The total consolidated income is determined in accordance with Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, transposed in the national legislation.

 5. Constituent entity means any of the following:

 a) a separate business unit of a multinational enterprise group that is included in the Consolidated Financial Statements of the multinational enterprise group for financial reporting purposes, or would be so included if equity interests in such business unit of a multinational enterprise group were traded on a public securities exchange;

 b) any such business unit that is excluded from the multinational enterprise group’s consolidated financial statements exclusively on size or materiality grounds;

 c) any permanent establishment of any separate business unit of the multinational enterprise group mentioned at letters a) or b), provided the business unit drafts a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes.

 6. Reporting entity means the constituent entity tasked with filing, on behalf of the multinational enterprise group, a country-by-country report in accordance with art. 2913 para. (3) in the jurisdiction of their residence for tax purposes. The reporting entity may be the ultimate parent entity, the surrogate parent entity or an entity described at section II point 1.

 7. Ultimate parent entity means a Constituent Entity of a multinational enterprise group that meets the following criteria:

 a) it owns directly or indirectly a sufficient interest in one or more other constituent entities of such multinational enterprise group, such that it is required to prepare Consolidated Financial Statements under accounting principles generally applied in its jurisdiction of tax residence or would be so required if its equity interests were traded on a public securities exchange in its jurisdiction of tax residence;

 b) there is no other constituent entity of such multinational enterprise group that owns directly or indirectly an interest described in letter (a) in the first mentioned constituent entity.

 8. Surrogate parent entity means a constituent entity of the multinational enterprise group that has been appointed by this multinational enterprise group, as a sole substitute for the ultimate parent entity, to file the country-by-country report in that constituent entity's jurisdiction of tax residence, on behalf of such Group, when one or more of the conditions set out in section II, point 1 letter b) apply.

 9. Fiscal year means an annual accounting period with respect to which the ultimate parent entity of the multinational enterprise group prepares its financial statements.

 10. Reporting fiscal year means that Fiscal Year the financial and operational results of which are reflected in the country-by-country report referred to in art. 2913 para. (3).

 11. Qualifying competent authority agreement means an agreement that is between authorized representatives of Romania and those of a non-Union jurisdiction that are parties to an International Agreement and that requires the automatic exchange of country-by-country reports between the signing jurisdictions.

 12. International agreement means the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral tax convention, or any tax information exchange agreement to which to which Romania is a party and which, by its clauses, provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information.

 13. Consolidated financial statements means the financial statements of a multinational enterprise group, where the assets, liabilities, income, expenses and cash flows of the ultimate parent entity and the constituent entities are presented as those of a single economic entity.

 14. Systemic failure regarding a jurisdiction means either that a jurisdiction has a qualifying competent authority agreement in effect with Romania, but has suspended automatic exchange, for reasons other than those that are in accordance with the terms of that Agreement, or that a jurisdiction otherwise persistently failed to automatically provide to Romania the country-by-country reports in its possession, regarding the multinational enterprise groups that have constituent entities in Romania.

 SECTION II

 **General reporting requirements**

 1. A constituent entity resident in Romania, which is not the ultimate parent entity of a multinational enterprise group, files a country-by-country report regarding the reporting fiscal year of a multinational enterprise group in which it is included, if the following criteria are met:

 a) the entity is resident for tax purposes in Romania;

 b) they fulfil one of the following conditions:

 (i) the ultimate parent entity of the multinational enterprise group does not have the obligation to file a country-by-country report in its jurisdictions of tax residence;

 (ii) the jurisdiction in which the ultimate parent entity is resident for tax purposes has a current international agreement to which Romania is a party, but does not have a qualifying competent authority agreement in effect to which Romania is a party, by the time specified in art. 2913 para. (1), or filing the country-by-country report for the reporting fiscal year;

 (iii) there has been a systemic failure of the jurisdiction of tax residence of the ultimate parent entity that has been notified by the competent Romanian authority to the constituent entity that has its tax residence in Romania.

 2. Without prejudice to the obligation of the ultimate parent entity mentioned in art. 2913 para. (1) or its surrogate parent entity to file the first country-by-country report for the fiscal year of the multinational enterprise group commencing on or after 1 January 2016, the obligation for the constituent entities provided at point 1 of this section applies to the country-by-country reports regarding the reporting fiscal years that begin on or after 1 January 2017.

 3. A constituent entity resident in Romania, as defined under point 1 of this section, requests its ultimate parent entity to provide it with the information required to enable it to meet its obligations to file a country-by-country report, in accordance with art. 2913 para. (3). Unless they obtain or get all the pieces of information required for the drafting of the multinational enterprise group report, the constituent entity files a country-by-country report that includes all the available pieces of information obtained or acquired and notifies the competent Romanian authority that the ultimate parent entity refused to make the necessary information available. This shall be without prejudice to the competent Romanian authority’s right to apply the penalties provided in their national legislation. Furthermore, the competent Romanian authority informs all the competent authorities of the Member States in relation to this refusal.

 4. Where the same multinational enterprise group has more than one constituent entity with tax residence in the European Union and one or more of the conditions set out at letter b) point 1 of this section applies, the multinational enterprise group may appoint one of these constituent entities to file the country-by-country report in accordance with art. 2913 para. (3), with respect to a reporting fiscal year, within the deadline specified at art. 2913 para. (1), and to notify to the competent Romanian authority that the filing is intended to satisfy the filing requirement of all the constituent entities of such multinational enterprise group that are resident for tax purposes in the European Union. Pursuant to art. 2913 para. (2), the competent Romanian authority communicates the country-by-country report that it received to any other Member State in which, on the basis of the information in the country-by-country report, one or more constituent entities of the multinational enterprise group of the reporting entity are either resident for tax purposes or are subject to tax with respect to the business conducted through a permanent establishment.

 5. If a constituent entity cannot obtain or acquire all the necessary pieces of information, provided under art. 2913 para. (3), in order to file a country-by-country report, such constituent entity is not eligible to be appointed reporting entity for the multinational enterprise group in accordance with point 4 of this section. This rule shall be without prejudice to the obligation of the constituent entity to notify the competent Romanian authority that the ultimate parent entity has refused to make the necessary information available.

 6. By exception from points 1 - 5 of this section, when one or more of the conditions set out in point 1 letter b) of this section apply, a constituent entity is not required to file a country-by-country report regarding the reporting fiscal year, if the multinational enterprise group in which they are a constituent entity made available a country-by-country report in accordance with art. 2913 para. (3), with respect to such fiscal year through a surrogate parent entity that files that country-by-country report with the tax authority of its jurisdiction of tax residence on or before the date specified in art. 2913 para. (1) and that, in case the surrogate parent entity is tax resident in a jurisdiction outside the Union, satisfies the following conditions

 a) the jurisdiction of tax residence of the surrogate parent entity requires the filing of country-by-country reports in accordance with the requirements of art. 2913 para. (3);

 b) the jurisdiction of tax residence of the surrogate parent entity has a qualifying competent authority agreement in effect to which Romania is a party by the time specified in art. 2913 para. (1), for the filing of the country-by-country report for the reporting fiscal year;

 c) the jurisdiction of tax residence of the surrogate parent entity has not notified the competent Romanian authority of a systemic failure;

 d) the jurisdiction of tax residence of the surrogate parent entity is notified no later than the last day of the reporting fiscal year of such multinational enterprise group by the constituent entity resident for tax purposes in its jurisdiction that it is the surrogate parent entity;

 e) a notification was sent to the competent Romanian authority, in accordance with point 8.

 7. A constituent entity of a multinational enterprise group, which has tax residence in Romania, a required to notify to the competent Romanian authority whether they are the ultimate parent entity or the surrogate parent entity or the constituent entity designated under points 1 - 5 of this section, until, at the latest, the last day of the reporting fiscal year of such multinational enterprise group, but not later than the last day of filing the tax return of such constituent entity for the previous fiscal year.

 8. If a constituent entity of a multinational enterprise group that has its residence for tax purposes in Romania is not the ultimate parent entity, nor is it the constituent parent entity designated under points 1 - 5 of this section, that entity is required to notify to the competent Romanian entity the reporting entity’s identity and residence for tax purposes by the last day of the reporting fiscal year of that multinational enterprise group, but not later than the last day for the filing of the tax return for that constituent entity for the previous fiscal year.

 9. The country-by-country report specifies the currency in which the amounts mentioned in the related report are expressed.

 ---------------