



France publishes transposition order to implement EU DAC6 directive into domestic law

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On 22 October 2019, the French government published Ordinance No. 2019-1068 of 21 October 2019 (the Ordinance) regarding the mandatory automatic exchange of tax information in relation to reportable cross-border arrangements.

The Ordinance follows the requirements mandated by the European Directive 2018/822 of 25 May 2018 amending Council Directive 2011/16/EU (known as the DAC 6 Directive) to increase transparency and combat tax evasion and avoidance. The Ordinance reiterates the provisions of DAC 6 (together the DAC 6 Regulation) almost identically.

DAC 6 Regulation applies to all taxes, except VAT, excise and customs duties, and social security contributions.

Objectives of DAC 6

The DAC 6 Regulation requires intermediaries (defined as any person designing, marketing, organising or making available for implementation or managing the implementation of a cross-border arrangement), or taxpayers (when there is no reporting intermediary) to declare to the competent tax authorities all cross-border arrangements that contain one or more hallmarks, as referred to in new Article 1649 AH of the General Tax Code (the Hallmarks). Such reported information will be included in a central European register, to which all European Member States will have access. Further information requests may follow the initial reporting.

In practice, the intermediaries concerned may include banks, law firms, chartered accountants or other financial advisors. The taxpayers do not have to be a French or EU resident to have a reporting obligation under this Regulation.

Reportable arrangements

Under new Article 1649 AD of the General Tax Code, “any arrangement in the form of an agreement, arrangement or plan, whether or not it is enforceable, concerning France and another state, whether or not a member of the EU, shall be considered as cross-border.” Thus, there are no reporting obligations for domestic arrangements under the DAC 6 Regulation.

Consistent with DAC 6, there are five categories of Hallmarks:

- Category A: General hallmarks related to the Main benefit test:
 - a confidentiality clause not to disclose the tax advantage provided by the arrangement;
 - the fees related to the tax advantage provided; and
 - standard documentation.
- Category B: Specific hallmarks linked to the main benefit test:
 - artificial acquisition of a corporation in order to use its losses;
 - conversion of income into capital or other income taxed more modestly or not taxed at all; and
 - “circular” transactions.
- Category C: Specific hallmarks related to cross-border transactions:
 - deduction of intra-group income for the benefit of a beneficiary “who is not resident in a jurisdiction (a) not taxed (b) located in a non-cooperative state,” exempt (c) or with preferential tax treatment;
 - double deduction for depreciation of the same asset;
 - double exemption for the same income; and
 - a transfer of asset(s) with consideration at less than fair market value.
- Category D: Specific hallmarks concerning arrangements that have the effect of preventing the automatic exchange of information (common standard reporting or CRS) or the identification of beneficial ownership.
- Category E: Specific hallmarks concerning transfer pricing:
 - use of unilateral safe harbour rules (statutory mechanisms simplifying transfer pricing analysis);
 - transfer of hard-to-value intangibles (due to the absence of reliable comparables and significant uncertainties about future cash flows); and
 - international transfers of functions, risks or assets intended to result in a 50% decrease in earnings (before interest and taxes) within three years.

Reporting obligations

It is the intermediaries' obligation to assess whether a cross-border arrangement contains one of the listed Hallmarks and must be declared. An exemption based on professional secrecy may be granted by Member States under DAC 6. In France, the new article 1649 AE, 4° of the General Tax Code provides that an intermediary subject to an obligation of professional secrecy (such as a lawyer) may declare the cross-border scheme with the agreement of the taxpayer. In the absence of such an agreement, the intermediary subject to professional secrecy must notify either the other intermediaries involved or the taxpayer regarding their reporting obligation.

Where several intermediaries are involved in a reportable arrangement, the reporting obligation is incumbent on each of them unless they can prove that this information has already been transmitted by another intermediary.

The obligation to report will be incumbent on the taxpayer concerned in the event there is no reporting intermediary or the intermediaries involved are able to claim an exemption based on professional secrecy.

Reporting procedures and timelines

The information contained in the declaration will be specified later by a separate decree. The administration should also publish comments on the new system by the end of the year. Further guidelines from the French tax authorities are

expected to be published for consultation in the near future.

The DAC 6 Regulation is applicable as from 1 July 2020, but entered into force on 25 June 2018. Consequently, all reportable cross-border arrangements must be reported to the French tax authorities by 31 August 2020 at the very latest.

Consequences of non-compliance

Failure to meet a reporting obligation will subject the taxpayer to a fine which may not exceed EUR10,000 for each failure. This fine may not exceed EUR5,000 for the first offence of the current calendar year and the three preceding years, and the amount of the fine imposed on the same intermediary or taxpayer concerned may not exceed EUR100,000 per calendar year.

The terms of the DAC 6 Regulation and any administrative comments should be carefully analyzed, particularly with regard to the reporting and assessment of the various Hallmarks. Attention should also be given to the transposition procedures, which may vary from one Member State to another.

To learn more, please contact the authors.

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