

## France publishes official tax guidelines on Mandatory Disclosure Rules

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### Executive summary

In October 2019, the French Tax Code (FTC) was supplemented with Articles 1649 AD to 1649 AH, implementing the European Union (EU) Directive 2018/822 of 25 May 2018 on the mandatory disclosure and automatic exchange of cross-border tax arrangements (referred to as DAC6 or the Directive).

On 9 March 2020, the French Tax Authorities (FTA) published official detailed draft guidance (referred to herein as the official tax guidelines or draft guidance) regarding the interpretation of the French Mandatory Disclosure Rules (MDR).<sup>1</sup> The draft guidance is subject to a public consultation until 30 April 2020 but may be relied upon until the final guidance is issued. The draft guidance provides some clarity on the definitions of the terms of the Directive and sets out how the FTA anticipate the reporting process to operate. It also provides some details regarding the information to be reported, although more details are expected to be provided in a decree that will be published shortly.

Additional draft guidance, dedicated to hallmarks, will be published at a later stage, which will also be subject to a public consultation.

The key differences between the official tax guidelines and the Directive are summarized below. This Alert also highlights any clarifications provided by the guidance.

## Detailed discussion

### Arrangements

The Directive does not define the term “arrangement.” It only indicates that an arrangement may include a series of arrangements and may comprise more than one step or part.

The French official tax guidelines clarify the definition of the term “arrangement” and provide some examples of measures that should be considered to qualify as arrangements.

Pursuant to the French legislation, the term “arrangement” covers any agreement, scheme or plan, whether it is enforceable. The French official tax guidelines indicate that all the steps and transactions which give effect to the arrangement also fall within the scope of this definition, specifying that the term “arrangement” is to be interpreted in a broad sense. It includes any agreement, scheme, mechanism, transaction or series of transactions, whether they are enforceable. In particular, it covers the creation, attribution, acquisition or transfer of the income itself or of the ownership or right in respect of which the income is due. It also covers the incorporation, acquisition or dissolution of a legal person, or the subscription of a financial instrument.

An example of such an arrangement given is where measures/steps are taken to hold meetings of the board of directors of a company in a State other than the State of residence of the company to claim that the company has changed its residence.

Three additional examples provided by the FTA are:

**Example 1:** Arrangements relating to intra-group financing or refinancing of operations.

For this example, the FTA states that, the arrangement includes (i): the initial transaction where the new financing is injected into the group (e.g., via capital contribution, loan, etc.); (ii) all subsequent steps; and (iii) intra-group transactions that make it possible to know and understand the use of this financing, in particular transactions carried out with a view to, or as a result of, the financing or refinancing.

**Example 2:** Arrangements relating to the acquisition of a new company or group of companies.

In this case, the arrangement includes the acquisition, financing and any pre- or post-acquisition restructuring (including possible exit scenarios from the structure put in place when these have been defined).

However, the FTA clarify that no arrangement exists where a taxpayer simply waits until the expiration of a certain period of time, or legal period, to carry out a transaction which is exempt from tax.

**Example 3:** A company established in France waits until the end of a two-year period to sell a shareholding it holds in a company established in Spain in order to avail of the long-term capital gains exemption provided for in a of I of Article 219 of the FTC.

### Reportable arrangements

Under the Directive, an arrangement is reportable if:

- ▶ The arrangement meets the definition of a cross-border arrangement; and
- ▶ The arrangement meets at least one of the hallmarks A-E specified in Annex IV of the Directive.

Under DAC6, cross-border arrangements are defined as arrangements concerning more than one Member State or a Member State and a third country. The hallmarks can be distinguished as hallmarks which are subject to the main benefit test (MBT), and those which by themselves trigger a reporting obligation without being subject to the MBT.

The French official tax guidelines confirm that an arrangement is deemed to be cross-border when two conditions are met:

- ▶ The arrangement concerns France and another State, whether that State is located in the EU or outside the EU.
- ▶ The participants in the arrangement are connected, by their residence or activity, to France and another State, whether that State is located in or outside the EU.

It also clarifies that “participants in the arrangement” are intermediaries, relevant taxpayers, associated enterprises and any person likely to be concerned by the arrangement.

The draft guidance also provides for the following example of a cross-border reportable arrangement.

**Example:** A company established in France (buyer) acquires 50% of the shares of a company established in Finland from a French company (seller).

In this scenario, the arrangement is cross-border because the company established in Finland is an associated enterprise (i.e., the French company’s holding exceeds 25% of the voting rights, capital or profit rights) and is therefore a participant in the arrangement whose registered office is outside France.

## Hallmarks A-E of the Directive

Most elements of the hallmarks included in DAC6 are not expressly defined. As stated above, clarifications on the general and specific hallmarks will be provided in additional draft guidance to be issued specifically in relation to hallmarks.

### Main benefit test

In accordance with DAC6, the MBT will be satisfied if it can be established that the main benefit or one of the main benefits which, having regard to all relevant facts and circumstances, a person may reasonably expect to derive from an arrangement, is the obtaining of a tax advantage.

The French official tax guidelines state that the MBT is to be analyzed in a global manner, considering the tax effects in both EU and non-EU States and indicates that a deferred taxation is considered as a tax advantage.

The French official tax guidelines also indicate that the extent of the tax advantage is to be determined in particular by the value of the tax advantage obtained in relation to the value of the other advantages derived from the arrangement. For example, if the tax advantage and the commercial advantage are the main benefits derived from the arrangement and a marginal benefit in terms of geographical location is also derived from the arrangement, one of the main benefits derived from the arrangement is a tax advantage.

According to the FTA, the main determining factor is whether the cross-border arrangement would have been carried out in the same way if the advantage did not exist.

The draft guidance also states that where the main benefit obtained in France by means of the cross-border arrangement results from the use of a tax incentive scheme carried out in accordance with the intention of the French legislator, that main benefit is not considered to be a main tax benefit. This test is subject to compliance with the legislator's intent.

### Intermediaries

DAC6 defines two categories of intermediaries: promoters and service providers. The French official tax guidelines define intermediaries by reference to the same two categories.

The guidelines specify that a service provider who intervenes in or acquires knowledge of the reportable cross-border arrangement after it has been implemented or after the advice leading to the implementation of the arrangement has

been given, is not considered to be an intermediary, provided that the service provider has not provided any aid, assistance or advice with respect to designing, marketing or organizing the reportable cross-border arrangement.

The guidance also clarifies that when a natural person is an employee of a company and acts on behalf of that company, it is the company that is considered to be the intermediary.

In accordance with the French legislation, the French official tax guidelines provide that permanent establishments of French intermediaries located outside France are exempt from the reporting obligation.

### Intermediaries exempt from reporting owing to Legal Professional Privilege

Under the Directive, intermediaries with EU nexus have the primary obligation to report arrangements to the tax authority. The Directive gives Member States the option to exempt intermediaries from the obligation to report where the reporting obligation would breach legal professional privilege (LPP). If there are no intermediaries which can report, the obligation will shift to the taxpayers.

As mentioned in our previous Global Tax Alert,<sup>2</sup> French legislation provides that intermediaries who are exempt from reporting (due to LPP under Article 226-13 of the French Penal Code) have to report cross-border arrangements if they have the relevant taxpayer's agreement to do so. The guidance clarifies that the agreement can be spontaneously given by the relevant taxpayer or can be obtained at the request of the intermediary.

The guidance also specifies that the same rule applies when LPP binds the intermediary to another intermediary. For example, if a service provider is engaged by a promoter to provide advice on a reportable cross-border arrangement, the reporting by the service provider (who is exempt from reporting owing to LPP) is made only with the agreement of his client, (i.e., the promoter). If the promoter refuses, he will be responsible for the obligation to report.

The French official tax guidelines confirm that the LPP exemption only applies to professions whose organizational texts (law or regulation) make explicit reference to Article 226-13 of the French Penal Code. These include lawyers, notaries, accountants and persons referred to in I of Article L. 511-33 of the Monetary and Financial Code (CoMoFi) (by reference to Article L. 571-4 of the CoMoFi) in particular.

As provided for in the French legislation, in the absence of the relevant taxpayer's agreement, intermediaries (exempt from reporting owing to LPP) must notify any other intermediary of its reporting obligation. If there is no other intermediary, the notification must be addressed to the relevant taxpayer. In such a case, intermediaries exempt from reporting due to LPP must also transmit to the relevant taxpayer the information that must be reported. The French legislation specifies that these notifications should be made by any means necessary to meet the reporting deadlines.

The draft guidance provides clarity regarding this notification process.

- ▶ According to the draft guidance, the notification may be made by registered or unregistered letter with acknowledgement of receipt.
- ▶ The notification must be made within the period normally available to the intermediary (who is not exempt from reporting owing to LPP) to report the arrangement. For notified persons who are required to report the arrangement, the 30-day period begins upon receipt of the notification.
- ▶ In the event, the notified intermediary is himself exempt from reporting owing to LPP and has not received the agreement of his client allowing him to report the arrangement, this intermediary in turn notifies the persons that are required to report the arrangement (intermediary or relevant taxpayer) of which he is aware within 30 days following the date on which he himself received the notification.
- ▶ The time limit for all intermediaries to report the arrangement to the FTA may not exceed 90 days from the date of issuance of the first notification.
- ▶ In the case of a notification to the relevant taxpayer, the notification must be accompanied by any information of which the intermediary is aware, which is in his possession or control, enabling him to report the arrangement.
- ▶ More precisely, the draft guidance provides that the intermediary, within the limit of the information in his possession, of which he has knowledge or control, must enable the relevant taxpayer to report the information provided for in Article 344 G octies A of Annex III to the FTC, to the FTA, in particular:
  - A summary of the content of the reportable cross-border arrangement
  - Detailed information on the legal provisions used
  - An estimation of the value of the reportable cross-border arrangement

- The identification of the hallmarks that make the cross-border arrangement reportable.

- ▶ The draft guidance also states that any intermediary or relevant taxpayer who has received notification of the obligation to report an arrangement from an intermediary who is exempt from reporting owing to LPP (and who has not obtained the agreement to report the arrangement), may review the initial assessment made by the intermediary who notified him, based on the facts and circumstances that make it possible to classify the arrangement as reportable, and to conclude that the arrangement is not reportable.
- ▶ In the event that this revision results in a failure to report an arrangement by the notified intermediary or taxpayer, such failure to file a report should not give rise to liability of the intermediary who notified any other intermediary or the taxpayer.

### **Exemption of the obligation to report in the case of reporting of the information by another intermediary**

Pursuant to the French tax official guidelines, an intermediary is exempt from reporting information in his possession, control or knowledge if he can prove by any means: (i) that the same information has already been reported in France or another Member State; or (ii) that the same information must be reported by an intermediary or a relevant taxpayer who has received notification of his reporting obligation, provided that the intermediary availing himself of the exemption has not received such notification.

This second scenario refers to the situation of an intermediary who is exempt from reporting owing to LPP who has not obtained the prior agreement of his client to report the arrangement incumbent upon him, and who must therefore notify any other intermediary or the taxpayer of the obligation to report the arrangement.

### **Relevant taxpayer**

A relevant taxpayer is defined by the Directive as any person to whom a reportable cross-border arrangement is made available for implementation, or who is ready to implement a reportable cross-border arrangement or has implemented the first step of such an arrangement.

The definition of the relevant taxpayer is the same under the French legislation. The draft guidance clarifies that the relevant taxpayer is the user of, or is a party to, the

reportable cross-border arrangement and provides for some examples regarding the definition of the relevant taxpayer.

**Example 1:** Within a group, the parent company (Company A) designs a reportable cross-border arrangement used by other group companies (Company B and Company C). In this case, these companies have the following roles:

- Company A: Promoter
- Company B: Relevant taxpayer
- Company C: Relevant taxpayer

The roles are the same in the event that the parent company involves service provider intermediaries providing aid, assistance or advice on specific points.

**Example 2:** Company A designs a reportable cross-border device used by itself and other companies in the same group (Company B and Company C). In this case, these companies have the following roles:

- Company A: Promoter and relevant taxpayer
- Company B: Relevant taxpayer
- Company C: Relevant taxpayer

In this case, Company A reports the arrangement as an intermediary and identifies itself in the list of relevant taxpayers.

The roles are the same in the event that the parent company involves service provider intermediaries providing aid, assistance or advice on specific points.

**Example 3:** A portfolio management company organizes a reportable cross-border arrangement used by a collective investment undertaking (CIU). In this case, these entities have the following roles:

- Management company: Promoter
- CIU: Relevant taxpayer

## Reporting deadlines

Under DAC6, for intermediaries (and relevant taxpayers), the trigger events for reporting under the Directive (from 1 July 2020) are when the reportable arrangement is “made available for implementation”; or when the reportable arrangement is “ready for implementation”; or when “the first step of implementation has been made.” Reporting starts from 1 July 2020 and exchanges between jurisdictions from 31 October 2020. However, reports will retroactively cover arrangements where the first step is implemented between 25 June 2018 and 1 July 2020.

The French legislation reporting deadlines fully align with DAC6. The guidance clarifies that reportable cross-border arrangements whose first step was implemented before 25 June 2018 and which take effect after 25 June 2018 should not be reported. However, any change to such arrangements must be reported if the change qualifies it as a reportable cross-border arrangement. It is irrelevant whether this change was anticipated and provided for in the contractual provisions of the original arrangement.

The French tax official guidelines specify that the signature of a legal document, a decision taken in a general meeting to implement an arrangement or the recording of a transaction in the accounts are considered as the first step of implementation.

## Arrangement reference and reporting reference

The French tax official guidelines specify that where an intermediary or relevant taxpayer reports an arrangement, the French tax authorities allocate to the report an “Arrangement Reference” and a “Reporting Reference.”

The Arrangement Reference is the unique identification number of the arrangement, assigned when the arrangement is reported for the first time.

The Arrangement Reference is attached to the reported arrangement and is subsequently reiterated by any other person who files a report relating to the same arrangement.

In this respect, the intermediary or relevant taxpayer who filed the initial report communicates the Arrangement Reference to any person, of which it is aware, who is bound by the obligations provided for in Article 1649 AD of the FTC, as well as to any other person, of which it is aware, who may be subject to equivalent obligations in another EU Member State, whether another intermediary, or a relevant taxpayer, resident or established for tax purposes in France, or subject to another Member State. The communication of this reference is concomitant with the filing of the report by the initial intermediary/taxpayer so that any other person subject to the reporting requirement can report within the required time limits.

Any other person who files a report relating to a given arrangement, fills in the Arrangement Reference so that each of the reports relating to that same arrangement can be linked to that arrangement in the secure central directory.

The Reporting Reference is the unique identification number of the report, allocated when the report is filed to the FTA. Each newly filed report is assigned a unique Reporting Reference.

The Reporting Reference is personal information that should not be disclosed. In particular, it allows to modify or consult the report that has been filed.

## Content of the report

The French tax official guidelines give some clarifications on the information to be reported as follows:

- ▶ The intermediary or relevant taxpayer who has filed the reportable cross-border arrangement must indicate the persons that are associated enterprises of the relevant taxpayer only to the extent that they participated in the arrangement.
- ▶ In determining shareholding percentages and in particular regarding indirect shareholdings, the draft guidance follows the directive and specifies that the shareholding percentages must be multiplied successively at the different levels. A person holding more than 50% of the voting rights shall be deemed to hold 100% of those rights.
- ▶ The summary of the content of the reportable cross-border arrangement must include in particular:
  - The reference to the name of the arrangement by which it is usually known. In this particular case, the usual English terminology may be used.
  - A description of relevant business activities or arrangements: this description must not give rise to the disclosure of information covered by commercial, industrial or professional secrecy.
  - A factual description of the implementation steps of the arrangement.
  - A description of the financial flows relating to the arrangement and their amount.
  - The tax treatment of the transactions and implementation steps.
  - The tax treatment of the implemented arrangement.
- ▶ The value of the arrangement refers to the valuation of the amounts involved in the reportable cross-border arrangement and must be assessed on a case-by-case basis, depending on the nature of the arrangement. This may include the amount of the transaction giving rise to a cross-border arrangement, such as a sale, acquisition, loan or capital investment. The amounts involved are valued at their nominal value.
- ▶ A person affected by an arrangement is defined as any third party affected by the arrangement, whether a natural or legal person or any other entity that is neither an intermediary, a relevant taxpayer nor an associated enterprise.

## Reporting methods

The draft guidance states that the report will be made electronically by logging on to the private area or the professional area of the FTA's website ([www.impots.gouv.fr](http://www.impots.gouv.fr)). This reporting feature will shortly be available on the website.

Intermediaries will be required to report cross-border arrangements on the professional area of the FTA's website.

Intermediaries and relevant taxpayers who are not registered, will be required to take the necessary steps to obtain a tax ID in order to access their dedicated area and file the report. For taxpayers not established in France, these procedures are to be carried out via the Nonresident Tax Department.

The French official tax guidelines also clarify that the reporting of a cross-border arrangement does not constitute an administrative position by the FTA on this arrangement.

Similarly, the reporting a cross-border arrangement does not constitute recognition by the intermediary or relevant taxpayer of the potentially aggressive nature of the reported arrangement.

## Articulation with anti-abuse rules and other reporting obligations

The guidance specifies that this disclosure requirement applies regardless of the circumstance that:

- ▶ The reportable cross-border arrangement would be in compliance with existing applicable anti-abuse rules.
- ▶ The information to be filed has already been filed pursuant to provisions other than those provided for in Article 1649 AD of the FTC.

## Penalties

As mentioned in our previous Global Tax Alert,<sup>3</sup> under French legislation, penalties up to a maximum of €10,000 for failures to report, or failures to notify, are expected to apply. The amount of the penalty cannot exceed €5,000 for the first failure to report of the current calendar year and the three previous years. The amount of the penalty applied to the same intermediary or taxpayer cannot exceed €100,000 per year.

The French official tax guidelines do not give any more clarification regarding penalties.

## Next steps

Determining if there is a reportable cross-border arrangement raises complex technical and procedural issues for taxpayers and intermediaries. Due to the scale and significance of the regime enacted in the legislation and official tax guidelines, taxpayers and intermediaries who have operations in France should review their policies and strategies for logging and reporting tax arrangements so that they are fully prepared for meeting their obligations.

## Endnotes

1. See EY Global Tax Alert, [France publishes legislation on Mandatory Disclosure Rules](#), dated 23 October 2019.
2. Ibid.
3. Ibid.

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