

## France publishes final guidance 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).

The French Tax Authorities (FTA) subsequently published official detailed draft guidance regarding the definitions of the terms and the reporting process under the French Mandatory Disclosure Rules (MDR) on 9 March 2020. The FTA published additional official detailed draft guidance dedicated to hallmarks on 29 April 2020.

On 25 November 2020, the FTA published the final guidance (referred to herein as the official tax guidelines or final guidance) regarding: (i) the definitions of the terms and reporting process under French MDR; and (ii) the hallmarks.

This Alert only highlights the modifications and clarifications provided by the final guidance. The elements that are not discussed in this Alert have not been modified in the final guidance. Additional details on these elements can be found in previous EY Global Tax Alerts.<sup>1</sup>

## Detailed discussion

### Participants in the arrangement

Under the final guidance, the following are considered to be participants in the arrangement, which is relevant when establishing whether an arrangement is cross-border:

- ▶ The relevant taxpayer
- ▶ Associated enterprises when they have an active role in the arrangement
- ▶ Any person or entity that has an active role in the arrangement

The French official tax guidelines provide an example of a company established in France that acquires 50% of the shares of a company established in Finland from a French company in order to agree with its subsidiary on a new division of certain activities.

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 has an active role in the arrangement, therefore the Finnish company is a participant in the arrangement whose registered office is outside France.

### Intermediaries

The French official tax guidelines indicate that where a natural person is associated or bound by a collaboration agreement or provision of services to a structure with or without legal and fiscal personality (e.g., a law firm) and acts in the name of the latter or on its behalf, it is the structure, represented by a duly authorized person, which is to be considered as the reporting intermediary (e.g., a lawyer associated with a law firm identified by its box number within its Bar Association).

Regarding service providers, the final guidance states that any person has the right to provide evidence to prove that he or she did not know and could not reasonably be expected to know that he or she was participating in a reportable cross-border arrangement. For this purpose, that person may rely on all relevant facts and circumstances, available information and his or her expertise and understanding.

### Legal Professional Privilege (LPP)

French legislation states 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 their client's agreement to do so.

The final guidance clarifies that an intermediary subject to LPP must inform his client and take all steps to ensure that the client is able to inform him of his decision to waive LPP no later than the day before one of the triggering events of the reporting requirement occurs. The day before one of the triggering events of the reporting requirement occurs means:

- ▶ The day of on which the reportable cross-border arrangement is made available for implementation.
- ▶ The day on which the reportable cross-border arrangement is ready for implementation.

Or

- ▶ The day before the day on which the first step in the implementation of the reportable cross-border arrangement has been made.

However, if the client's agreement is given after the day of the triggering event of the reporting requirement, an administrative lenience allows that the 30-day period to report the arrangement applies from the day the intermediary obtains this agreement.

As a general rule, the decision to waive LPP may not be made later than 30 days after the triggering event of the reporting requirement.

The client's agreement or disagreement must be expressly given and may be evidenced by any means.

The recommended time limit for all intermediaries to report the arrangement to the FTA is 90 days from the date of issuance of the first notification. If the period elapsing between the date of issuance of the first notification and the date of the reporting of the arrangement exceeds 90 days, it is incumbent on the reporting person to be able to justify this delay by any means.

The French legislation also provides that in the absence of the client's agreement, intermediaries (exempt from reporting due to LPP) must notify any other intermediary of its reporting requirement. 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 final guidance specifies that this information must contain a summary of the content of the reportable cross-border arrangement written in French and, as far as possible, in English language.

## Relevant taxpayer

The French official tax guidelines indicate that in the case of a partnership or other fiscally transparent entity, the relevant taxpayers are the partner(s) of such structures unless the structure has opted for a tax regime providing for its own taxation.

The final guidance specifies that a relevant taxpayer subject to the reporting requirement is exempted from it only to the extent that he can prove, by any means, that another relevant taxpayer has already filed a report containing all the required information.

## Reporting deadlines

The French legislation states that the intermediary should report the arrangement within 30 days from the first of the following dates:

- ▶ The day after the day on which the reportable cross-border arrangement is made available for implementation.
- ▶ The day after the day on which the reportable cross-border arrangement is ready for implementation.
- ▶ The day on which the first step in the implementation of the reportable cross-border arrangement has been made.

The final guidance indicates that the date of the earliest triggering event is used to calculate the 30-day period and that an arrangement does not need to be enforceable to be made available for implementation. The tax official guidelines also provide three examples regarding the computation of the reporting deadlines.

*Example 1:* The reportable cross-border arrangement is made available on 28 January. The deadline starts the next day, 29 January, and expires 30 days later, on 27 February at 11:59 pm.

*Example 2:* The reportable cross-border arrangement is ready for implementation on 28 January. The deadline starts the next day, 29 January, and expires 30 days later, on 27 February at 11:59 pm.

*Example 3:* The first step in the implementation of the reportable cross-border arrangement is made on 28 January. The deadline starts on the same day, 28 January, and expires 30 days later, on 26 February at 11:59 pm.

The final guidance also clarifies that where the relevant taxpayer is subject to the reporting requirement, it is the date of the earliest triggering event that must be taken into account to calculate the 30-day period.

## Content of the report

The French official tax guidelines provide for some clarifications regarding the information to be communicated in the report:

- ▶ The intermediary or relevant taxpayer who has filed the reportable cross-border arrangement must indicate, for each relevant taxpayer, the persons that are associated enterprises that have participated in the arrangement. Conversely, associated enterprises that have not participated in the arrangement do not have to be reported.
- ▶ The detailed information on hallmarks must be made in French but it is recommended that it is also written in English.
- ▶ Contrary to what was indicated in the draft guidance, the summary of the content of the reportable cross-border arrangement does not need to contain: (i) a factual description of the implementation steps of the arrangement; (ii) a description of the financial flows relating to the arrangement and their amount; (iii) the tax treatment of the transactions and implementation steps; (iv) the tax treatment of the implemented arrangement.
- ▶ The summary of the content of the reportable cross-border arrangement must be made in French but it is recommended that it is also written in English.
- ▶ The details of the national provisions that form the basis of the reportable cross-border arrangement are any relevant French or foreign law provision. In particular, it must be explained how this provision is applied within the framework of the arrangement. A mere reference to the text of the law does not constitute detailed information. This information must be made in French but it is recommended that it is also written in English.
- ▶ A person likely to be affected is a third party, whether a natural or legal person or any other entity that is neither an intermediary, a relevant taxpayer, nor an associated enterprise, but which takes an active part in the arrangement.

## Reporting method

The final guidance states that intermediaries and relevant taxpayers who do not have a tax ID will be required to take the necessary steps to obtain one in order to access their dedicated area on the FTA's website and file the report.

For professional taxpayers not established in France, these procedures are to be carried out via the Nonresident Tax Department or the following website: <https://www.impots.gouv.fr/portail/international/professionnel>.

For private individuals, the steps to be taken to register in France are detailed on the following website: <https://www.impots.gouv.fr/portail/international/particulier>.

### Hallmark A.1

Hallmark A.1 refers to an arrangement where the relevant taxpayer or a participant in the arrangement undertakes to comply with a condition of confidentiality which may require them not to disclose how the arrangement could secure a tax advantage vis-à-vis other intermediaries or the tax authorities.

The final guidance clarifies that this hallmark covers agreements that prohibit, inter alia, the disclosure of information relating to the fiscal engineering of the arrangement to other intermediaries or the tax authorities. A simple general confidentiality clause included in the agreement prohibiting the disclosure of information relating to the fiscal engineering of the arrangement to third parties even without express mention of the tax authorities or other intermediaries also meets the criteria for hallmark A.1.

### Hallmarks A.3 and B.2

Hallmark A.3 refers to an arrangement that has substantially standardized documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customized for implementation.

Hallmark B.2 refers to an arrangement that has the effect of converting income into capital, gifts or other categories of revenue which are taxed at a lower level or exempt from tax.

The French official tax guidelines provide for an example of a cross-border arrangement that includes a share savings plan (*Plan d'Épargne en Actions*) and an employee shareholding agreement:

► Arrangement linked to the share savings plan

Hallmark A.3: Although the share savings plan documentation is standardized, the share savings plan was not designed by an intermediary but by the legislator to promote companies' equity capital (provided that the use of the share savings plan in this arrangement is in line with the intention of the French legislator).

Hallmark B.2: The share savings plan does not convert the income or capital gains received but merely provides for a legal exemption in line with the legislator's intention.

According to the final guidance, the share savings plan does not meet the characteristics of hallmarks A.3 and B.2.

► Employee shareholding arrangement

Hallmark A.3: The employee shareholding arrangement designed to transform salaries into capital gains is standardized for the group's executives.

Hallmark B.2: The salary is converted into a less heavily taxed capital gain (flat rate or even exemption with the share savings plan, instead of the progressive scale of income tax).

According to the tax official guidelines, the employee share ownership arrangement has the characteristics of both hallmark A.3. and hallmark B.2.

The final guidance also indicates that standardized procedures using standardized documentation or model framework agreements, such as certain routine market operations (for example the acquisition of exchange-traded financial instruments) can meet the characteristics of hallmark A.3. However, such arrangements should not be reportable as long as the tax benefit derived is provided for by French law and that the use of such products is in accordance with the legislator's intention.

### Hallmark C.1

Hallmark C.1 refers to an arrangement that involves deductible cross-border payments made between two or more associated enterprises where at least one of the following conditions occurs:

- (a) The recipient is not resident for tax purposes in any tax jurisdiction.
- (b) Although the recipient is resident for tax purposes in a jurisdiction, that jurisdiction either:
  - (i) does not impose any corporate tax or imposes corporate tax at the rate of zero or almost zero; or
  - (ii) is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the Organisation for Economic Cooperation and Development (OECD) as being non-cooperative.
- (c) The payment benefits from a full exemption from tax in the jurisdiction where the recipient is resident for tax purposes.
- (d) The payment benefits from a preferential tax regime in the jurisdiction where the recipient is resident for tax purposes.

The final guidance defines the term “recipient” as the person liable to pay tax on the payment. The determination of the recipient follows specific rules when the company is:

- ▶ A company or group subject to the taxation regime provided for in article 8 of the French Tax Code (partnership);
- ▶ An undertaking for collective investment (UCI) governed by [Article L. 214-1 of the Monetary and Financial Code \(CoMoFi\)](#) and [Article L. 214-191 of the CoMoFi](#) (undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (FIA)); or
- ▶ A company, group or similar body formed on the basis of European Union law and located in a Member State of the European Union (EU).

In such cases, the beneficiary is the shareholder, partner or unitholder of the transparent company, provided that the company did not opt for the corporate tax regime.

### Hallmark C.2

Hallmark C.2 refers to the case where deductions for the same depreciation on the asset are claimed in more than one jurisdiction.

The French official tax guidelines specify that this hallmark refers to arrangements in which tax deduction for the same depreciation on the same asset is claimed in more than one jurisdiction without double income being recognized for accounting and tax purposes.

### Hallmark C.4

Hallmark C.4 refers to an arrangement that includes transfers of assets and where there is a material difference in the amount being treated as payable in consideration for the assets in those jurisdictions involved.

The final guidance indicates that this hallmark does not apply to mergers and similar operations in accordance with [Directive 2009/133/EC](#) of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

### Hallmark D.1.f

Hallmark D.1.f refers to arrangements that undermine, or exploit weaknesses in, the due diligence procedures used by Financial Institutions to comply with their obligations to report Financial Account information, including the

use of jurisdictions with inadequate or weak regimes of enforcement of anti-money-laundering legislation or with weak transparency requirements for legal persons or legal arrangements.

The final guidance removed the only example that was given to illustrate the characterization of this hallmark.

### Hallmark E.3

Hallmark E.3 refers to an arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the projected annual earnings before interest and taxes (EBIT), during the three-year period after the transfer, of the transferor or transferors, are less than 50% of the projected annual EBIT of such transferor or transferors if the transfer had not been made.

The final guidance specifies that the assessment of the decrease in profit must be made on the basis of the information available at the time of the transfer, and the decrease must be inherent in the functions and/or risks and/or assets transferred.

The French official tax guidelines provide for that this hallmark does not apply to mergers and similar operations in accordance with [Directive 2009/133/EC](#) of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

The final guidance indicates that the annual EBIT is defined as the operating income under French GAAP.

### 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.

## Endnote

1. See EY Global Tax Alerts, [France publishes official tax guidelines on Mandatory Disclosure Rules](#), dated 17 March 2020 and [France publishes additional official tax guidelines on Mandatory Disclosure Rules](#), dated 13 May 2020.

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