

# France implements DAC6

October 29, 2019

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## In brief

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The French government on October 21, adopted Ministerial Order #2019-1068 ('the Order') transposing into French law the EU Council Directive 2018/822/EU on cross-border tax arrangements ('DAC6' or 'EU MDR'). DAC6 has been in force since June 25, 2018.

The Order was published in the French Legal Gazette on October 22, 2019.

The Order's provisions take effect July 1, 2020, with specific transitional measures applicable to arrangements implemented between June 25, 2018, and June 30, 2020.

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## In detail

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### Transposition into French law of DAC6

Pursuant to the EU Council Directive 2018/822/EU regarding mandatory automatic exchange of information in the field of taxation with respect to reportable cross-border arrangements, intermediaries and taxpayers are subject to new reporting obligations involving certain cross-border tax planning arrangements.

France had until December 31, 2019, to implement DAC6.

The Order closely follows the EU Directive's scope, hallmarks and reporting requirements. It also introduces six new articles to the French Tax Code (Articles 1649 AD to 1649 AH and 1729 C ter).

#### Scope

The DAC6 reporting obligations to local tax authorities focus on cross-border tax planning arrangements that meet certain characteristics or hallmarks intended to highlight risk of tax avoidance and enable more effective audits.

Pursuant to the Order, only cross-border arrangements are in scope of the reporting obligation. The arrangements must involve France and another jurisdiction (whether or not in the European Union). Domestic arrangements are therefore excluded.

Observation: The Order does not expressly exclude cross-border arrangements involving customs and excise duties or VAT. However, we assume that such arrangements are not within scope of the French legislation.

Cross-border arrangements that are within scope of DAC6 may involve all types of taxpayers (individuals, corporations, etc.).

Although the Order does not provide a precise definition of what constitutes an arrangement, additional details are provided with respect to its form (i.e., an agreement, a scheme or a plan, whether legally enforceable or not) and its structure (i.e., it can involve several arrangements, several parties, or several steps).

### Hallmarks

The Order precisely aligns with the five categories of listed hallmarks provided by DAC6. It does not include any new ones, nor are there significant differences or amendments to the DAC6 hallmarks. These hallmarks are listed (categories A to E) under new Article 1649 AH-II of the French Tax Code.

The reporting obligation only arises if one of these hallmarks is triggered.

The hallmarks follow different reporting rules depending on their types (general or specific). For hallmarks listed under categories A, B and some of category C, the arrangement is reportable only if it triggers the 'main benefit test' (i.e., the main objective or one of the main objectives that a person can reasonably expect from the arrangement, based on all the relevant facts and circumstances, is to obtain a tax benefit).

### Reporting obligations

The reporting obligation falls on the intermediary or taxpayer according to detailed ordering rules regarding the parties and jurisdictions involved.

As a primary rule, intermediaries located in France (under the same definition provided by DAC6) have to file information with the French Tax Authorities with respect to cross-border arrangements in which they participate (such as conception, commercialization, organization, management, execution, and advice).

As a secondary rule, such obligation shifts to the taxpayer when (i) no intermediary is involved (such as in-house tax planning); (ii) the intermediary is subject to a legal professional privilege (for example, an attorney or bank) under French law (and has not obtained express approval from the taxpayer); or (iii) the intermediary is located outside of the European Union. Notification information to other intermediaries or the taxpayers applies to privileged intermediaries.

Electronic filing is required, and unless exceptions apply, must occur within 30 days of the first of the following dates:

- the day after the arrangement becomes available for implementation
- the day after the arrangement becomes ready for implementation
- the day that the first implementation step occurs

Intermediaries involved in an arrangement in which they only provide assistance or advice related to the reportable arrangement need to report within 30 days of the day following the date on which they provided such assistance or advice.

Updated filing obligations for intermediaries will also apply on a quarterly basis. Furthermore, each year, taxpayers must declare their use of applicable cross-border arrangements during the previous year to the tax authorities.

The precise information to be reported in filing, as well as the updated and annual taxpayer filing obligations will be provided in an upcoming Decree.

### Penalties

Each failure to meet the reporting obligation or its notification is subject to a maximum EUR 5K penalty (or EUR 10K in case of repeated failure during the current calendar year and the three preceding years). A maximum EUR 100K penalty threshold applies for each intermediary or taxpayer for each applicable calendar year.

Next steps

The Order's provisions will take effect on July 1, 2020. Cross-border arrangements with an initial implementation step that occurs between June 25, 2018, and June 30, 2020, must be reported by intermediaries no later than August 31, 2020.

Draft tax guidelines open for public consultation are expected to be released in the coming weeks.

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## The takeaway

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Taxpayers and intermediaries operating in France and in Europe need to understand the importance and impact of DAC6. Impact assessment, analysis and timely action are needed to ensure compliance on and after July 1, 2020. The use of technology through appropriate data and reporting tools will be key to satisfying these multiple new reporting requirements in a coordinated manner.

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## Let's talk

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For a deeper discussion of how this issue might affect your business, please contact:

### International Tax Services, United States

Guillaume Barbier  
+1 347-276-7441  
[g.barbier@pwc.com](mailto:g.barbier@pwc.com)

### International Tax Services, France

Emmanuel Raingeard de la Bletiere  
+33 1 56 57 40 14  
[emmanuel.raingeard@avocats.pwc.com](mailto:emmanuel.raingeard@avocats.pwc.com)

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