



ASSOCIATION
FRANÇAISE
DES MARCHÉS
FINANCIERS

FINANCIAL MARKET PROFESSIONALS

FR Professional guide - EU DAC 6

Summary

**Mandatory Disclosure Regime (MDR)
Automatic Exchange of Information (AEI)**

DAC 6 FR PROFESSIONAL GUIDE Summary

1. AMAFI is the professional association that represents financial market participants established in France at national, European and international levels, whether they are credit institutions, investment firms or trading and post-trade infrastructures, wherever they operate and regardless of the place of residence of their clients and counterparties. Its members, of which roughly a third are subsidiaries or branches of foreign entities, work in various market segments and activities, be it on their own behalf or that of clients, in organised and over-the-counter markets dealing in equity and fixed-income securities as well as derivatives, including commodities derivatives.

2. Directive 2018/822/EU of 25 May 2018, referred to as "DAC 6", imposes mandatory reporting of certain **"potentially aggressive" cross-border arrangements identified in the presence of predefined hallmarks**. This directive was transposed into French law in Articles 1649 AD to 1649 AH of the French General Tax Code (CGI). To support the implementation of the new reporting system, the French Tax Administration (DGFIP) has established an online [portal dedicated to "Reporting cross-border arrangements"](#), which presents the legal framework of DAC 6, contains the source texts, provides "specifications" to guide professional users on the requirements for establishing and filing documents under the reporting system, provides for a future FAQ section and has a specific email address for DAC 6 users: dac6@dgifp.finances.gouv.fr.

3. **Market operators are affected by this reporting requirement**, which primarily targets intermediaries and, in certain situations, relevant taxpayers. In order **to help make it easier for its members to meet their reporting requirements**, AMAFI wanted to provide them with **a tool to decipher the DAC 6 regulation in the form of a Professional Guide**. **Volume 1** presents the legislative, regulatory and doctrinal framework of DAC 6. **Volume 2** offers a common base for interpreting the typical activities of financial market participants with respect to DAC 6. The analysis provided is based on the discussions held by AMAFI in working groups dedicated to DAC 6 and supervised by the Tax Committee.

The Guide also refers to the work, recommendations, framework agreements, etc. issued by other national and international financial sector organisations, such as the International Capital Market Association (ICMA), the International Swaps and Derivatives Association (ISDA), the International Securities Lending Agreement (ISLA), the Securities Industry and Financial Market Association (SIFMA), the Association for Financial Markets in Europe (AFME), the European Banking Federation (EBF), the French Asset Management Association (AFG), the French Association of Securities Professionals (AFTI), the French Banking Federation (FBF), the Association of German Banks (Bankenverband), etc.

4. Despite the care taken in their drafting, the elements of appreciation presented in this Guide do not constitute an interpretation of the DAC 6 regulation within the meaning of French law. This interpretation remains subject to the control of the judge, only authority competent to interpret the law. Therefore, it is up to those wishing to use them to form, under their responsibility and with the assistance, as may be relevant, of their counsel, their own opinion regarding the relevance of the analyses developed in the Guide.

The purpose of this document is to briefly present the **key assessment aspects explored without going into as much detail as the rationale outlined** in the Guide. In this sense, it must therefore be used with great caution and be understood as an inseparable part of the interpretative documents provided as a whole.

VOLUME 1: LEGISLATIVE AND DOCTRINAL FRAMEWORK

DAC 6 Legal framework

5. [Directive 2018/822/EU of 25 May 2018](#) amends Directive 2011/16/EU on administrative cooperation in the field of taxation and essentially aims to establish **an automatic exchange of information** declared on cross-border transactions that present a **risk of aggressive tax planning**, referred to as "**reportable cross-border arrangements**".

6. It was transposed in France by [Order No. 2019-1068 of 21 October 2019](#) on the automatic and mandatory exchange of information in the field of taxation in relation to reportable cross-border arrangements. This order introduces Articles [1649 AD](#) through [1649 AH](#) into the French General Tax Code, which establish an obligation **for intermediaries and relevant taxpayers to report any cross-border arrangement** to the tax authorities if it **satisfies certain conditions**.

7. The purpose of this report is twofold. In addition to its dissuasive influence, it primarily aims to increase transparency by providing the tax authorities with comprehensive and relevant information, in a timely manner, on tax structures that could be used for aggressive tax planning purposes. It is subsequently intended to identify those who promote and use these structures. As such, **the DAC 6 report does not constitute recognition of the potentially aggressive nature** by the reporting entity/person or the **approval of the validity or tax treatment of the arrangement concerned by the tax authorities**.

8. The **content of the information to be reported** is specified in [Decree No. 2020-270 of 17 March 2020](#), which sets out the information to include in reports of any cross-border arrangements mentioned in Article 1649 AD of the French General Tax Code, codified in [Article 344 section 8A of Appendix III to the French General Tax Code](#). The **reporting deadlines for marketable arrangements** are specified in [Decree No. 2020-1769 of 30 December 2020](#), which sets out the quarterly reporting deadlines for updating the information contained in reports of any cross-border arrangements referred to in Articles 1649 AD to 1649 AH of the French General Tax Code, codified in [Article 344 section 8B of Appendix III to the French General Tax Code](#).

9. [Article 1729 C section 3 of the French General Tax Code](#) provides for **penalties** in the event of failure to meet the reporting obligation and, where applicable, the notification requirement.

10. Due to the **health crisis** and following [Directive 2020/876/EU of 24 June 2020](#), [Article 53 of Law No. 2020-935 of 30 July 2020](#) amends Article 2 of Order No. 2019-1068 and **postpones the first reporting deadlines** as follows:

- **No later than 31 January 2021** for arrangements made available for implementation, or ready to be implemented, or whose first stage of implementation was completed between 1 July 2020 and 31 December 2020, or where the intermediaries provided aid, assistance or advice, directly or through other persons, between 1 July 2020 and 31 December 2020;
- **No later than 28 February 2021** for arrangements whose first stage was implemented between 25 June 2018 and 30 June 2020.

11. These provisions are subject to **guidelines** [BOI-CF-CPF-30-40](#), the latest version of which was published in the Official Public Finance Bulletin (*Bulletin Officiel des Finances Publiques* or BOFIP) on 25 November 2020.

Reporting procedures

12. [Specifications aimed at professionals](#) for establishing and filing documents related to reportable arrangements ("standardised XML") to send to the tax authorities are available on the [Portal dedicated to "Reporting cross-border arrangements"](#).

13. For the filing of "standardised XML" documents, a **transitional procedure** is to be used **from 1 January to 30 April 2021**: professional users will connect to the DGFIP's "Passtrans" application with an FTP client. To obtain the username and password required, professional users are to send a request to the following address: dac6@dgfip.finances.gouv.fr. The sFTP protocol will then be used to submit the report and the technical acknowledgement will act as an acknowledgement of receipt. Once filed, the report will be subject to deferred processing by the DGFIP in May 2021. Professionals will then be able to retrieve the processing summary for reports filed in their filing area by using their username and password.

The **target procedure** will be available in **May 2021**, when the reporting platform is stabilised in its final version: users are subject to authentication on the portal in the professional area they have created (https://inscriptionpro.impots.gouv.fr/opale_inscription/indexCreationEspace.jsp). Once authenticated, users will connect to the "DAC 6 framework" application and choose EDI mode. They will then be redirected to the "Passtrans" application to file their reports using the HTTPS protocol. Lastly, the following day, they will be able to retrieve the processing summary for their reports.

Application of DAC 6 to the financial sector: suggested interpretations

➤ *What characterises a cross-border arrangement?*

14. **An arrangement involving only intermediaries and relevant taxpayers who are French tax residents is not intended to be characterised as cross-border just because the operators concerned use a non-resident service provider that is neither a promoter nor a service provider within the meaning of DAC 6.**

15. In addition, **an arrangement would be characterised as cross-border** where participants are established in two different States, **regardless of the location of the assets** for which the arrangement is made. In the particular case of derivatives, **the fact that the underlying asset is a foreign security does not satisfy the cross-border criterion, which relates not to assets but to persons participating in the arrangement.**

➤ *Framework agreements used by the financial marketplace*

16. According to the analysis carried out by market participants, **the model framework agreements used by the financial marketplace** (ISDA master agreements; FBF-AFTI framework agreements, 2011 GMRA, GMSLAs, Euromaster agreements, etc.) **are generally not marketable arrangements** within the meaning of DAC 6 if they require significant adjustments prior to their implementation.

17. Furthermore, **in the absence of hallmarks other than hallmark A3** as provided for by Article 1649 AH of the French General Tax Code and provided that the tax advantage gained is provided for by French law and that the use of these products complies with the intent of the legislator, **arrangements based on model framework agreements that include financial products, transactions and instruments generally used by financial intermediaries should not be reported.**

➤ *Content of the report*

18. **Financial intermediaries do not have to carry out additional inquiries to collect information intended to characterise the arrangement under DAC 6.** They must merely have the capacity, via internal procedures, to use the information they have at their disposal when preparing the report in relation

to their exchanges with their clients, particularly for regulatory purposes, and specifically those implemented by Compliance departments. **Information collected under the Know Your Customer (KYC) or Anti-Money Laundering (AML) regulations, for example, is likely part of the information that can be used to meet DAC 6 requirements.**

➤ *Relationship between DAC 6 obligations, anti-abuse rules and other reporting obligations*

19. The **DAC 6 report** is intended to be "**self-sufficient**". The reporting requirement under DAC 6 exists **independently from any other reporting or anti-abuse rule** established elsewhere.

20. Furthermore, **customer information reported in strict compliance with the DAC 6 regulation does not constitute a breach of the AML-CFT disclosure ban provided for in [Article L. 561-18 of the French Monetary and Financial Code](#)**. As such, the two are separate.

➤ *Reporting requirement in several Member States*

21. **Where the intermediary is a branch or permanent establishment of a company with its head office in France and is located outside of France but within the EU**, the related cross-border arrangement does not require a DAC 6 report in France. **Provided that the French head office does not also play an intermediary role** within the meaning of DAC 6, it will **not have a DAC 6 reporting requirement in France**.

22. In addition, **branches of companies with head offices in France that are located outside the EU lie outside the scope of directive DAC 6**.

➤ *Professional secrecy*

23. In the absence of any other administrative clarification, market operators should be able to consider, on a case-by-case basis, that **a lack of response to an express request to waive professional secrecy is equivalent to an express refusal** that keeps them bound to secrecy and relieves them of the DAC 6 reporting requirement in exchange for the notification of this requirement to another intermediary or relevant taxpayer.

24. Additionally, as with the administrative guidelines published in the BOFiP regarding promoters ([BOI-CF-CPF-30-40-10-20-20201125, §165](#)), **the time required for service providers to request the waiver of professional secrecy from clients should be assessed in relation to the date of the event triggering its own reporting obligations, or on the day the aid, assistance or advice relating to a reportable arrangement is provided**.

25. Furthermore, **the administrative concession for promoters** when they receive the client's approval beyond the date of the event triggering their reporting obligation ([Art. 1649 AG, I, 1°, a, b or c of the French General Tax Code](#)) **is intended to apply to service providers** when the client's consent is granted beyond the date of the event triggering its own reporting obligation ([Art. 1649 AG, I, 2° of the French General Tax Code](#)).

VOLUME 2: PROCESSING TYPICAL TRANSACTIONS CARRIED OUT BY ISPs

Routine financial intermediation transactions

26. As with the guidelines issued by the tax authorities with regard to payment service providers and credit institutions carrying out routine banking transactions ([BOI-CF-CPF-30-40-10-20-20201125, §90](#)), **investment service providers authorised to operate in the regulated financial sector that carry out routine financial intermediation transactions¹ are not considered service providers within the meaning of DAC 6** ([Art. 1649 AE of the French General Tax Code](#)). These transactions include:

- Receipt and transmission of orders (RTO) on behalf of third parties;
- Execution of orders on behalf of third parties;
- Underwriting;
- Guaranteed investments;
- Non-guaranteed investments;
- Operation of a multilateral or organised trading facility.

On the other hand, financial institutions shall be considered service providers **if they are aware that their intervention**, regardless of its nature, **constitutes aid, assistance or advice** with respect to designing, marketing or organising a **reportable cross-border arrangement** ([BOI-CF-CPF-30-40-10-20-20201125, §90](#)).

Other categories of typical ISP transactions: temporary transfers of ownership, derivatives and structured products

What characterises a cross-border arrangement?

27. Whether or not an arrangement is characterised as cross-border is based on the persons participating in the arrangement and not the location of the assets for which the arrangement was made. The cross-border criterion is therefore not met solely because:

- **the underlying of a derivative contract** (option, future, TRS, swap, etc.) entered into between two counterparties **is a foreign security**;
- **the underlying of a structured product** (certificate, EMTN, etc.) **is a foreign security**.

28. What's more, in the event of a temporary transfer of securities, **the company issuing the securities should not be qualified as "participant in the arrangement"**. As such, in the event that only the company issuing the securities lent is a resident of a Member State (and lenders/borrowers are not residents of a Member State), the transaction is not considered to be cross-border.

Understanding the characteristics of the arrangement – reason to know

29. The following are unlikely to give ISPs reason to know that they are participating in a reportable arrangement:

- **sole participation in a lending/borrowing transaction**: neither the tax motivations of counterparties, nor the final use of the securities borrowed (custody or disposal of the position, retention period, etc.) are, in principle, brought to the attention of the ISP.

¹ These are investment service providers as defined in Article L. 531-1 of the French Monetary and Financial Code carrying out routine financial intermediation transactions as part of the investment services listed in Article L. 321-1 of the same code.

- **sole participation in a derivative transaction:**
 - for derivatives transactions admitted to trading on a regulated market: given the anonymity inherent in the market, by definition neither the identities nor much less the motivations and potential advantages obtained by other participants are known to the financial intermediary, whose sole objective is to offer bid and ask prices.
 - for derivatives transactions not admitted to trading on a regulated market: it is unlikely that ISP intermediaries will be informed of all the specific characteristics of their clients and any tax advantages obtained by the latter, especially since they generally have large portfolios of financial instruments across several financial institutions.
- **the issuance of structured products:** these issuances constitute considerable volumes of transactions and, in most cases, it is unlikely that ISP will know all the tax details and characteristics of its clients, especially since the latter likely have large portfolios of financial instruments across several financial institutions.

However, the assumption **that arrangements are designed to generate identified tax impacts must be retained**. Where applicable, **ISP must analyse the arrangement against the hallmarks** of the directive.

➤ *Main benefit test*

30. Securities lending/borrowing, derivatives and transactions entered into in connection with the issuance of structured products should not be considered reportable arrangements, as the tax advantage is generally incidental compared to non-tax advantages.

For certain temporary securities acquisitions, the tax advantage criterion is presumed not to be met, namely:

- **French securities transactions of less than 45 days**, since they are subject to the withholding tax provided for in [Article 119 bis A of the French General Tax Code](#),
- **French securities transactions with a maturity of more than 45 days** due to the existence of primary economic and commercial advantages
- **EU securities transactions (outside of France) subject to foreign rules**, within a minimum holding period (e.g. 45 days).

For other temporary acquisitions, a case-by-case analysis would be required. Particular attention should be paid to **lending counterparties in locations on the EU list of non-cooperative jurisdictions, tax havens or countries not party to a tax treaty**.

In any event, the assessment of the primary nature of the advantage depends on the trader's position in the transaction chain, its operational set-up and its motivations (its structuring and its legal and financial characteristics).

➤ *Relevant hallmarks*

31. The identification of a hallmark depends on the specific facts and circumstances of each arrangement.

32. Hallmark A2 (the receipt of fees/interest/remuneration set by reference to the amount of the tax advantage) **should generally not be satisfied for:**

- **Securities lending transactions:** fees paid in connection with these transactions are determined on the basis of various market considerations (supply, demand, liquidity of the security, etc.). **Even though the withholding tax rate may be one of the criteria used to**

set the security lending fee when a dividend has been paid, it is not necessarily the deciding factor: the security lending rate depends on other factors such as the liquidity of the security, the existence of a security transaction but also the borrower's position (e.g. short/fail hedge).

However, the transaction may be reportable under hallmark A2 if payments are not determined primarily based on general market factors but mainly reflect or depend on the advantageous tax treatment that one of the parties to this agreement obtains and the other reporting conditions of DAC 6 are satisfied elsewhere.

- **Derivatives:** buy and sell prices are determined on the basis of mathematical models (e.g. the Black-Scholes model) and are derived from observable market parameters such as the share price, the discount rate linked to the currency, the estimated volatility, the number of calendar days between the calculation day and the maturity of the derivative, and the dividend rate. The estimated dividend rate, which takes into account the expectations of the various market participants, is therefore one aspect of pricing, among others. As such, **the pricing method for a derivative should not be confused with a fee fixed directly based on the amount of the tax advantage.**
- **Structured products:** in the event that the tax advantage is simply taken into account in the price of the transaction, the latter being largely determined by the other structuring factors of the product, there will generally be no direct link between the tax advantage and the pricing. **Hallmark A2 should therefore not apply to structured products unless the product has been specifically structured to generate identified tax advantages.**

33. Hallmark A3 (an arrangement that has substantially standardised documentation and/or structure and is available to more than one relevant taxpayer without a need to be substantially customised for implementation) **should generally not be satisfied for securities lending, derivatives and structured products** simply due to the use of ISDA, ISLA or other model framework agreements as the starting point for negotiations.

These agreements were not developed as "pre-established" tax products or "mass-marketed arrangements" for tax purposes, whose standardised terms and conditions are specifically related to tax advantages. **The tax clauses they may contain are intended solely to assign tax risks and responsibilities between the parties.**

34. Hallmark B2 (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) should generally not be satisfied for derivatives and structured products. **The mere choice of holding an underlying asset synthetically rather than physically does not constitute an arrangement involving a conversion of income.**

35. Category D hallmarks are also relevant to financial activities. They refer to arrangements designed to circumvent the common reporting standard (CRS) and Opaque Offshore Structures aimed at bypassing the rules for the automatic exchange of financial information (AEOI) defined by the OECD in 2018. Since the AEOI reporting requirements particularly concern the **chain of securities professions** represented within AFTI, the AMAFI Guide includes **the comments** made by **AFTI in Volume 1** rather than providing its own analysis.

DAC 6 Reportability in Financial Intermediation – Summary

- As with the processing of routine banking transactions as referred to in the BOFiP, **routine financial intermediation transactions carried out by ISPs approved by the ACPR** (RTO, execution of orders on behalf of third parties, underwriting, guaranteed/non-guaranteed investments, operation of a multilateral or organised trading facility) **should not be reported**.
- **Temporary transfers of securities** (securities lending, repurchase agreements, collateral) **and derivatives should generally not be reported subject to unusual situations** that will need to be analysed on a case-by-case basis.
- **Similarly, structured product issuances should generally be excluded from the DAC 6 reporting obligation**, including:
 - **structured products listed** on a regulated market or MTF (Multilateral Trading Facility), considering the anonymity;
 - **structured products** whose **underlying assets** are fixed-income products, ETFs or units of UCITS marketed to the **general public**;
 - **structured products that do not offer to replicate the performance of the underlying asset(s) in a symmetrical manner**. This category **includes** products offering an **optional component or a conditional** component;
 - **unlisted structured products offering to replicate diversified indices or baskets of indices** whose components do not mainly result in a tax advantage.

However, **other transactions as well as certain unusual transactions** combining structured products and potentially other instruments for the purpose of gaining identified tax advantages **will need to be analysed in detail** to determine their reportability under DAC 6.

