ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

大成 DENTONS

FR Professional guide - EU DAC 6

Volume 2 - Typical I S P transactions Investment Services Provider

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FR PROFESSIONAL GUIDE
DAC 6 - VOLUME 2

Treatment of typical I S P transactions

This Guide presents the French rules (*see Volume 1, Annex 1*) resulting from the transposition of the "DAC 6" directive (*see Volume 1, Annex 2*) instituting an obligation to report cross-border tax arrangements that present risks of aggressive tax planning. This directive is itself inspired by the work of the OECD (*see Volume 1, Annex 3*).

Through the elements of appreciation presented here, the Association wishes to guide its members in the implementation of their DAC 6 obligations in the form of a two-volume Professional Guide:

- Volume 1 presents the legislative, regulatory and doctrinal framework of the DAC 6 rules;
- Volume 2 proposes, in an effort to facilitate the implementation of this reporting obligation in financial intermediation, a common interpretative base for typical activities of trading and finance professionals under DAC 6.

In addition to the directive's legal framework, the elements implemented by France in the context of its French transposition are taken into account, notably order No. 2019-1068 of October 21, 2019, decree No. 2020-270 of March 17, 2020, decree No. 2020-1769 of December 30, 2020, the *BOI-CF-CPF-30-40-*... of November 25, 2020, the subsequent legislative developments and the clarifications provided by the Administration in response to the questions asked by professional organizations or in the context of public interventions.

To accompany the implementation of the new reporting system, the DGFiP put on line, mid-December 2020, a Portal dedicated to the "Reporting of cross-border arrangements". It presents the legal framework of the DAC 6 rules, regroups the source texts, provides a "specifications" professional user guide for the constitution and filing of files relating to the reporting system, includes a future FAQ "Frequently Asked Questions" section and provides a specific email address for DAC 6 users: dac6@dgfip.finances.gouv.fr.

To develop a reading grid of the "DAC 6 regulation", the AMAFI has relied on different dedicated task forces, whose analyses were then taken into account by its Tax Committee to address the issues specific to financial market participants.

To be as exhaustive as possible, the Guide also refers to the works, recommendations, master agreements… issued by other professional bodies of the financial sector, whether domestic or international, such as the ICMA (International Capital Market Association), ISDA (International Swaps and Derivatives Association), ISLA (International Securities Lending Agreement), SIFMA (Securities Industry and Financial Market Association), AFME (Association for Financial Markets in Europe), FBE (European Banking Federation), AFG (French Financial Management Association), AFTI (French Association of Securities Professionals), FBF (French Banking Federation), *Bankenverband* (Association of German banks)…

Developed in a prospect of self-regulation intended to facilitate a harmonized DAC 6 approach in financial intermediation, this Guide is designed to evolve through successive incrementations depending on the interpretations that will be given in light of the evolution of the work setting the legal and regulatory framework (order, decree, decision, BOFiP, rulings...) on the one hand, and doctrinal and implementation

work, on the other hand. It is thus built around an iterative process and may be updated again in light of other elements of appreciation that it may be deemed useful to take into account after its publication. The user is thus invited to refer to the latest version available on the association's website.

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 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 here.

Principally, the Association proposes **in this Volume 2** a common interpretative base for the **DAC 6 treatment** of some large categories of **investment services** made by financial market operators (**routine financial intermediation, temporary transfers of ownership, derivatives, structured notes**). The analysis thus proposed is intended to facilitate a harmonized approach of reporting practices in financial intermediation.

When it participates in an arrangement as a simple service provider or as a designer, even as a relevant taxpayer, the Investment Service Provider (ISP) implements one or more legal structures.

The question here, in light of its DAC 6 reporting obligations, is less that of the legal structures used than that of the characteristics (economic, financial,...) of the arrangement itself examined as a whole, to characterize it as reportable or non-reportable.

Consequently, a category of product or transaction cannot, from the outset, be considered, by its nature, as included in the scope of the arrangement. However, the objective analysis of the different characteristics of the typical transactions made by the ISP in light of the DAC 6 hallmarks is part of the process leading the operator to identify whether it is participating in an arrangement that needs to be reported or not. The elements of appreciation presented below may contribute to this analysis.

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I. ROUTINE FINANCIAL INTERMEDIATION TRANSACTIONS

1. By analogy to the doctrine issued by the tax administration regarding payment providers and credit institutions making routine banking transactions (*BOI-CF-CPF-30-40-10-20-20201125, §90*), should not be considered as service provider intermediary within the meaning of DAC 6 (French General Tax Code, Art. 1649 AE) **the investment service providers authorized to operate in the regulated financial sector that make routine financial intermediary arrangements**[1], i.e.:

- Receipt and transmission of orders on behalf of third parties,
- Execution of orders on behalf of third parties,
- Underwriting,
- Guaranteed placement,
- Non-guaranteed placement,
- Operation of a multilateral or organized trading facility.

On the other hand, a financial institution must be considered as a service provider intermediary in the event **it is aware that its intervention**, whatever its nature, **constitutes aid, assistance or advice** relating to the design, marketing or organization **of a reportable cross-border arrangement** (*BOI-CF-CPF-30-40-10-20-20201125, § 90*).

2. The description, the objectives and the regulatory framework governing these arrangements are discussed below.

[1]These are investment service providers as defined in Article L. 531-1 of the French Monetary and Financial Code making routine financial intermediation transactions in the context of the investment services listed in Article L. 321-1 of the same Code.

Relevant transaction	Description and objectives	Regulatory framework
1. Receipt and transmission of orders on behalf of third parties	The receipt and transmission of orders on behalf of third parties is defined in Article D. 321-1 of the French Monetary and Financial Code as **the fact of receiving and transmitting** to an investment service provider or to an entity established in a State not member of the European Union and not part of the agreement on the European Economic Area and having an equivalent status, **on behalf of a third party, orders concerning financial instruments**. The main objective of this transaction is **facilitating the meeting of supply and demand on the financial instruments**.	The provision of this service is governed by the MiFID II directive, whose provisions are transposed in the AMF's general regulations (*Articles 314-62 to 314-63*) and the French Monetary and Financial Code. The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).
2. Execution of orders on behalf of third parties	The execution of orders on behalf of third parties is defined in Article D. 321-1 of the French Monetary and Financial Code as the fact of **concluding purchase or sale agreements relating to one or more financial instruments on behalf of a third party**. It includes the financial instruments subscription agreements contracted by an investment firm or credit institution at the time of their issuance.	The provision of this service is governed by the MiFID II directive, whose provisions are transposed in the French Financial Markets Authority's general regulations (*Article 314-64*) and the French Monetary and Financial Code. The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).
3. Underwriting	The underwriting service is defined in Article D. 321-1 of the French Monetary and Financial Code as the fact of **subscribing or acquiring financial instruments directly from the issuer or seller in order to sell them**. Its objective is to **guarantee** to a firm issuing financial instruments **the placement of the securities issued**.	The provision of this service is governed by the MiFID II directive, whose provisions are transposed in the French Monetary and Financial Code (*Article D. 321-1*).

Relevant transaction	Description and objectives	Regulatory framework
		The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).
4. Guaranteed placement	The guaranteed placement service is defined in Article D. 321-1 of the French Monetary and Financial Code is the transaction of **seeking subscribers or acquirers on behalf of an issuer or seller** of financial instruments and **guaranteeing to the latter a minimum amount of subscriptions or purchases by undertaking to subscribe or acquire the non subscribed/purchased financial instruments**. The purpose of this transaction is to **guarantee** to the issuer of financial instruments **a minimum amount of subscriptions or purchases**.	The provision of this service is governed by the MiFID II directive, whose provisions are transposed in the French Monetary and Financial Code (*Article D. 321-1*). The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).
5. Non-guaranteed placement	The non-guaranteed placement service is defined in Article D. 321-1 of the French Monetary and Financial Code as the transaction of **seeking subscribers or acquirers** on behalf of an issuer or seller of financial instruments **without guaranteeing to the latter a subscription or purchase amount**. This transaction has **initial purposes in common** with underwriting and guaranteed placement services, i.e. the search for subscribers or acquirers of financial instruments issued by the entity contracting this service. However, **contrary to the guaranteed placement service, the service provider is not required to guarantee to the issuer a minimum subscription amount**.	The provision of this service is governed by the MiFID II directive, whose provisions are transposed in the French Monetary and Financial Code (*Article D. 321-1*). The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).

Relevant transaction	Description and objectives	Regulatory framework
6. Operation of a multilateral or organized trading facility	The operation of a multilateral facility consists in **ensuring the meeting of multiple buying and selling interests expressed** by third parties on financial instruments, **so as to conclude transactions on these instruments**. The operation of a multilateral trading facility can regroup in particular some of the transactions mentioned above, and guarantees the offer of a service similar to the one that is proposed by a regulated market, but in a more flexible operating framework, notably allowing the MTF to list securities without having to obtain the issuer's agreement.	The transactions managed by multilateral trading facilities (MTF) and organized trading facilities (OTF) are governed respectively by the provisions of Articles D. 424-1 to D. 424-4-2 of the French Monetary and Financial Code, as well as by the provisions of Articles R. 425-1 to D. 425-3 of the same Code. They are also governed by the provisions of Book V, Title II of the AMF's general regulations. The providers of this service are subject to an **approval** given by the French Prudential Supervisory and Resolution Authority (**ACPR**).

II. OTHER CATEGORIES OF TYPICAL TRANSACTIONS MADE BY ISP

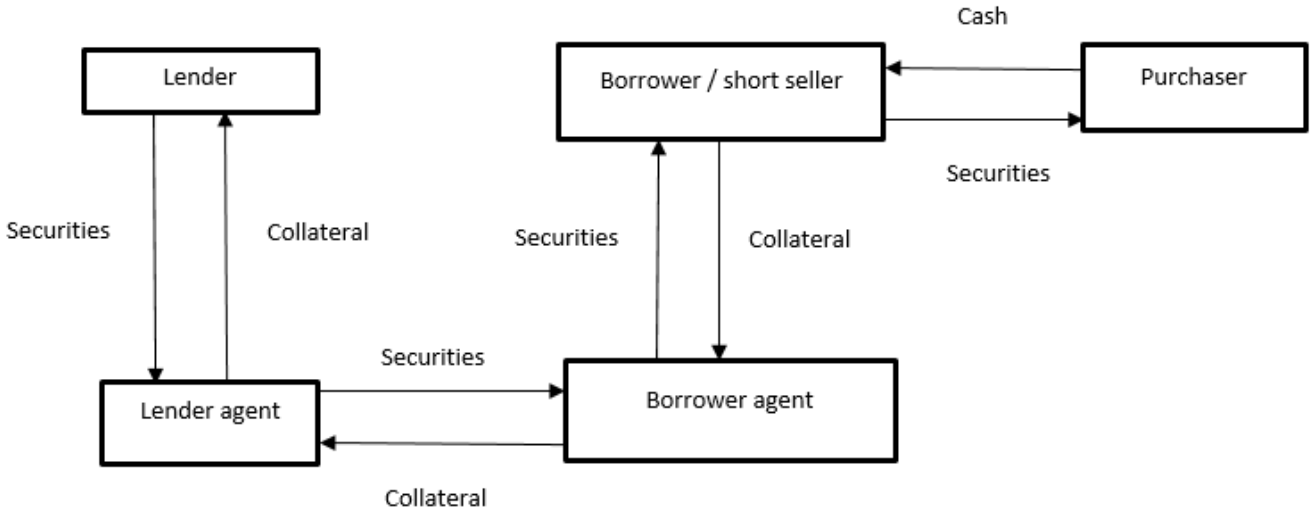
1. Temporary transfers of securities (stock lending, repurchase, collateral...)

Temporary transfers of securities (stock lending, repurchase, collateral...)	
Description and objectives[2] of temporary transfers of securities	The temporary transfers of capital securities are transactions consisting in transferring ownership of a capital security from one counterparty to another in exchange of a transfer of cash, or security (share or bond), with an obligation to return the securities at the end of the contract. Depending on the type of transaction, the terms of payment of the interest, income transfer and/or capital gains resulting from the securities vary. These transactions notably cover repurchase transactions (repurchase/delivery), securities lending or collateral upgrade transactions (bond lending, against delivery of shares as collateral). In general, securities lending is a common financial service that provides liquidity and contributes to ensuring the smooth operation of the equity markets. According to the ISLA (International Securities Lending Association), the current total value of the securities loaned in the entire world exceeds two thousand billion dollars. Securities lending notably: ▪ facilitates the financial institutions' market making activities; ▪ increases the financial markets' liquidity; ▪ moderates the volatility of prices; ▪ covers a direct or indirect short sale; ▪ enables the termination of a transaction where the settlement has failed, without generating significant over-cost at the depositary level (*buy-in*); ▪ permits the lending of less liquid assets by receiving as collateral more liquid assets that can then be used as collateral or guarantee for other transactions.

[2] These transactions are not structured to obtain a tax advantage but correspond to intrinsic operating needs of capital markets.

Temporary transfers of securities (stock lending, repurchase, collateral...)	
	▪ **For the original lenders**, the reasons that led them to loan their securities can be diverse. In any event, this allows them to have: ➢ an improvement of the profitability of their portfolio; ➢ monetization of optional dividends; ➢ a reduction of the financing needs. ▪ **For the intermediary borrower**, the lending activities fulfill a commercial purpose: to offer a commercial intermediation service between borrowers and lenders. ▪ **For the ultimate borrower**, the lending activities can fulfill several purposes that are not generally known to the intermediary: ➢ coverage of short sales; ➢ holding a cushion of securities to compensate for any technical failure in the proper execution of operations; ➢ management of the collateral of other transactions. ▪ **For the original lender and the ultimate borrower**, the quantification of tax and non-tax advantages generally proves to be impossible (absence of knowledge of the objectives pursued by each among the objectives above). Notably, the intermediary ISP in the lending chain (*agent lender*) cannot evaluate the principal nature of any tax advantage likely to be derived from the arrangement. **Thus, the lending transactions generally do not have to be reported.** For the detailed analysis of this category of transactions, note should be taken of the ISLA's position paper relating to DAC6, it being specified that in some specific circumstances as defined by the ISLA in its aforementioned paper (case where the securities lending is specifically structured to obtain a tax advantage, or where it is artificial or where a party has specific knowledge that the main benefit of the arrangement is a tax advantage), the relevant intermediaries should analyze the arrangement to determine whether it is reportable drawing from the reading grid proposed below.

➢ ***Example of temporary transfers of equity securities: the lending of equity securities in the context of a short sale of securities***



Securities lending is a transaction by which a counterparty transfers securities, the borrower undertaking to return equivalent securities on a future date or when the counterparty transferring the securities so requests; this transaction is considered as a loan of securities by the counterparty transferring the securities and as a borrowing of securities by the counterparty to which they are transferred. This transaction also results in principle in the delivery of a collateral (cash or securities) to guarantee the transaction.

A temporary transfer transaction can, between its inception and its maturity date, cover various corporate actions, such as for example ex dividend. In such a case, when the securities borrowing results in the transfer of ownership of the securities, the borrower acquires the right to dividend as well as the voting right in general meetings. The intermediary in a lending chain receives, then transmits, a payment taking into account the dividend paid on the underlying asset ("manufactured dividends").

Temporary transfers of securities (stock lending, repurchase, collateral...)	
	According to the ISLA master agreement (or similar master agreement), the lender's remuneration paid by the borrower, acting as principal or in a lending chain, is composed of: ▪ A payment equivalent to the dividend collected ("*manufactured dividends*"): the principle is the freedom to set between the parties to decide the amount to be paid. Failing such agreement, the borrower will have to pay to the lender an amount equivalent to the dividend that it would have collected if it had not loaned the shares (most frequent practice); ▪ Fixed fee in respect of loaned securities. This remuneration is freely determined by the parties and takes into account the liquidity of the security/ underlying basket, currency, maturity of the deal, the possibility or not to interrupt the transaction in advance (*breakable*)...
Cross-border nature	A temporary transfer of securities should be considered as a cross-border arrangement if the counterparties (e.g. the borrower and the lender for securities lending) are not established for tax purposes in the same jurisdiction when one of them is established in an EU member State. ▪ Special situations: ➢ The company issuing the loaned securities should not qualify as a "participant in the arrangement". Thus, in the situation where only the company issuing the loaned securities resides in a member State (and the lenders/borrowers do not reside in a member State), the transaction should not be considered as cross-border; ➢ A temporary transfer of securities between an EU permanent establishment and a non-EU permanent establishment should be considered as a cross-border arrangement when one of the participants operates its activity in a member State through a permanent establishment located in this jurisdiction.
Role played by the ISP	The ISP can be a designer, a service provider (i.e. intermediation role between borrowers and lenders) or a relevant taxpayer.

Temporary transfers of securities (stock lending, repurchase, collateral...)	
Knowledge of the characteristics of the arrangement **"Reason to know"**	Through this type of transaction, the ISP play an essential role ensuring the liquidity and availability of the equity securities at all times. However, **neither the counterparties' tax considerations, nor the ultimate use of the loaned securities** (holding or sale of the position, holding period, etc.) **are in principle brought to the knowledge of the ISP acting as service providers**. Thus, **the participation in a lending transaction should not give to the intermediary ISP reasons to know that it is participating in an arrangement likely to be reported.** Following the administrative interpretation, the intermediary "*is not required to go beyond the requirements set out in the professional rules and know your client knowledge rules applicable when it collects and reports the information necessary for the reporting set out in Article 1649 AD of the French General Tax Code*" (*BOI-CF-CPF-30-40-20-20201125, §130*). On the other hand, if the intermediary ISP: • has specific knowledge relating to the counterparties' tax status; • designs or promotes an arrangement based on the counterparties' tax characteristics, it will have to analyze the arrangement in light of the relevant hallmarks of the Directive to determine if this arrangement must be reported.
Main benefit test[3] **"MBT"**	Temporary transfer of securities are likely to generate a tax advantage, in the event the lender receives a "manufactured dividend", of a nominal amount exceeding the dividend it would have received if it had not temporarily transferred the securities. Regarding temporary transfer of French securities, this "*MBT*" criterion of the main benefit may be considered as not fulfilled, for transactions of less than 45 days, due to the subjection of these transactions to French withholding tax (see Article 119 bis A of the French General Tax Code). Transactions with a maturity of over 45 days around the ex dividend date should also benefit from a presumption of constitution of a non-main tax advantage, taking into account the existence of main economic and commercial advantages (integration of these transactions in a logic of long-term holding and risk taking).

[3]Arguments to be developed and documented by each operator, depending on circumstances specific to the relevant arrangements.

Temporary transfers of securities (stock lending, repurchase, collateral...)	
	Regarding EU securities (outside France) and subject to foreign rules, the transactions falling within a minimum holding period (for example: 45 days), this "*MBT*" criterion could also be presumed not fulfilled for the same reasons as for French securities: no main tax advantage since falling within a logic of holding and risk taking. For the other transactions, a case by case analysis will undoubtedly be necessary, **in particular attention should be paid to the lending counterparties located in an ETNC, in a tax haven or in a State that has not signed a tax treaty**. The main benefit criterion must be appreciated "objectively". In this regard, the BOFiP indicates that "*the importance of the tax advantage is notably determined depending on the value of the tax advantage obtained compared to the value of the other advantages derived from the arrangement*" (*BOI-CF-CPF-30-40-10-10-20201125, §150*). In this regard, **the tax advantage will be considered as the main benefit or one of the main benefits of an arrangement when it represents a significant part of the total advantage that may derived from the arrangement**. **With respect to the particular case of the stock lending, when the tax advantage is ancillary in comparison with the non-tax advantages, the tax benefit criterion will not be fulfilled** (*see above Description and objectives of the temporary transfers of ownership*). Moreover, in most cases, the financial intermediary, acting as service provider, has no knowledge of the counterparties' tax considerations or the ultimate use of the loaned securities (*see above Knowledge of the characteristics of the arrangement*). For the residual cases likely to be subject to the DAC 6 reporting obligation, the appreciation of the main nature of the tax advantage should notably depend on the operator's position in the chain of transactions, its operational set-up and its motivations (structuration of the transaction and specific legal and financial characteristics).
Relevant hallmarks* ***The main benefit criterion must be fulfilled for the presence of the hallmarks discussed***	• **A2 - collection of fees (or interest or remuneration) fixed by reference to the amount of the tax advantage?** In the context of some securities lending transactions, the commissions paid are determined based on various market considerations, notably supply, demand and the security's liquidity. Even if the withholding tax rate can be one of the criteria used for fixing the stock lending commission when a dividend payment has been anticipated, it is not necessarily decisive. The stock

Temporary transfers of securities (stock lending, repurchase, collateral...)	
here to lead to reporting a cross-border arrangement	lending rate depends on other factors such as the security's liquidity, the existence of a corporate action but also the borrower's position (ex: coverage of a short or fail), ... **Therefore, hallmark A2 should not generally be considered as fulfilled**. However, if the payments are not determined mainly by reference to general market factors but reflect or depend essentially on the improved tax treatment that one of the parties to this agreement obtains, the transaction could be reportable under hallmark A2, if a tax advantage is one of the main benefits of the transaction and that the other DAC 6 reportability conditions are also met. As the case may be, the reportable nature is to be determined depending on facts and circumstances. • **A3 - standardized documentation and/or structure available to more than one relevant taxpayer without a need to be substantially customized?** Regarding hallmark A3, the BEPS 2015 final report on action 12, which inspired the DAC 6 Directive, refers to "*a **prefabricated tax product** that can be used as such, or after limited modifications*". This is a "double" hallmark that, in addition to the presence of a main tax benefit, must satisfy two conditions: a. **The arrangement is based on substantially standardized documentation and/or structure.** This condition is difficult to appreciate. Documentation is standardized when it includes standardized legal documents that require little or no modifications to adapt to the client's situation, that do not need to receive additional important professional advice or services for their particular needs and that may be implemented as such. The client purchases this standardized documentation and not specific tax advice to respond to its specific facts and circumstances. The same reasoning applies to the standardized structures. According to the positions expressed orally by the administration, this hallmark concerns highly standardized arrangements. b. **The arrangement is available to more than one relevant taxpayer without a need to be substantially customized for implementation.** For the hallmark to be fulfilled, the substantially standardized documentation/structure, when the arrangement is sold to the client, is immediately available to be implemented by the client without any substantial modification being required. It is not necessary for the arrangement to be effectively sold to several taxpayers.

Temporary transfers of securities (stock lending, repurchase, collateral...)

> "***Many*** *banking and* ***financial*** ***products, instruments and transactions*** *are offered to a broad public based on standardized documentation. They* ***can meet the characteristics set out in hallmark A.3****.* ***However****, in the absence of other hallmarks set out in Article 1649 AH of the French General Tax Code, and provided the tax advantage derived is provided for by French law and use of these products complies with the legislator's intention, the arrangements that include such banking and financial products, instruments and transactions* ***do not need to be reported****.* ***This is the case notably*** *of standardized procedures that use standardized documentation or* ***model master agreements,*** *such as certain* ***routine market transactions***" (*BOI-CF-CPF-30-40-30-10-20201125, §110*)

The master agreements generally used by financial intermediaries for **temporary transfers of securities likely not to be reported are the following:**

- The master agreements relating to **repurchase agreements** or **international securities lending** such as the **GMRA 2011** (Global Master Repurchase Agreement) published jointly by the SIFMA (Securities Industry and Financial Markets Association) and the ICMA (International Capital Market Association),
- The **GMSLA 2010** (Global Market Securities Lending Agreement) issued by the ISLA (International Securities Lending Association); or
- Their domestic equivalents such as (non-exhautive list):
  - the **FBF** master agreement on **repurchase agreements** published by the FBF (French Banking Federation),
  - the **FBF-AFTI** (French Association of Securities Professionals) master agreement on **securities lending,**
  - the **DRV** (*Deutsche Rahmenvertrag für Wertpapierpensionsgeschäfte* – **Repos**) on repurchase agreements and
  - the **DRV** (*Deutsche Rahmenvertrag für Wertpapierdarlehen*) on securities lending published by the Bankenverband (Association of German bank)s;
- The **Euromaster** (Master Agreemen for Financial Transactions) master agreement on **repurchase agreements or securities lending** publised by the **FBE** (European Union Banking Federation) in cooperation with the European Savings Banks Group and European Association of Cooperative Banks.
- …

They are contractual models including generic provisions with preestablished conditions with which the market counterparties are familiar. The parties may customize the master agreement to reflect their own views concerning certain risks and the nature of the commercial relation with their client or counterparty.

Temporary transfers of securities (stock lending, repurchase, collateral...)	
	In practice, modifications to these master agreements are common and the negotiations are conducted in the context of an integration process based on legal and tax expertise. There are specific parameters on which the parties have to agree (determination of the branches of legal entities parties to the agreement, acceptable guarantees, offsetting provisions, applicable late payment interest rates...). In addition, the essential conditions of the individual transactions governed by these master agreements, such as pricing, must be agreed separately. These master agreements have been developed in time for commercial reasons and ensure a consistent sharing of the commercial and legal risks between the counterparties. They were not developed as tax products and, the tax clauses that they may contain are solely intended to allocate the tax risks and liabilities between the parties. In line with the work of the OECD aimed at seizing “”prefabricated” tax products”, the term “standardized documentation” of hallmark A3 means the “mass arrangements” whose standardized conditions are specifically related to the tax advantage from which the co-contracting party may benefit without substantial customization to its situation. Therefore, it does not apply to commercially standardized master documentation such as described above. The absence of systematic characterization of hallmark A3 regarding the master agreements used by the financial market is comforted by the new wording of the BOFiP. Now referring to financial transactions, as requested by the AMAFI, in addition to the banking transactions previously referred to, the Administration abandons the imperative characterization of hallmark A3 in favor of a simply optional characterization: *Many banking **and financial** products, instruments and transactions are offered to a broad public based on standardized documents. They ~~consequently meet~~ **may fulfil** the characteristics set out in hallmark A.3.* **In conclusion, a temporary transfer of securities arrangement (stock lending, repurchase, collateral...) based on a master agreement such as those mentioned above does not constitute, under normal circumstances, a “mass arrangement” for tax purposes likely to be reported**. This appreciation is supported by the administration that mentions their non-reportable nature, in the absence of other hallmarks set out in Article 1649 AH of the French General Tax Code assumming the tax advantage derived is provided for by French law and use of these products complies with the legislator’s intention (*BOI-CF-CPF-30-40-30-10-20201125, §110*).

Temporary transfers of securities (stock lending, repurchase, collateral...)	
	• **B2 - conversion of income into another category of revenue taxed at a lower level?** The question of knowing whether a temporary transfer of securities arrangement operates a conversion of income into another category of revenue taxed at a lower level is open to debate and **depends on facts and circumstances specific to each arrangement**.
Regulatory documentation and framework	▪ Regulation SFTR (EU) 2015/2365 in Article 3(7) ▪ Article 119 bis A of the French General Tax Code
Reportability under DAC 6	In light of the analysis grid proposed above, **temporary transfers of securities should not generally be reported in the absence of characterization of the relevant hallmarks**. However, the analysis of the facts and circumstances specific to the arrangement may lead to characterizing the presence of such or such hallmark.

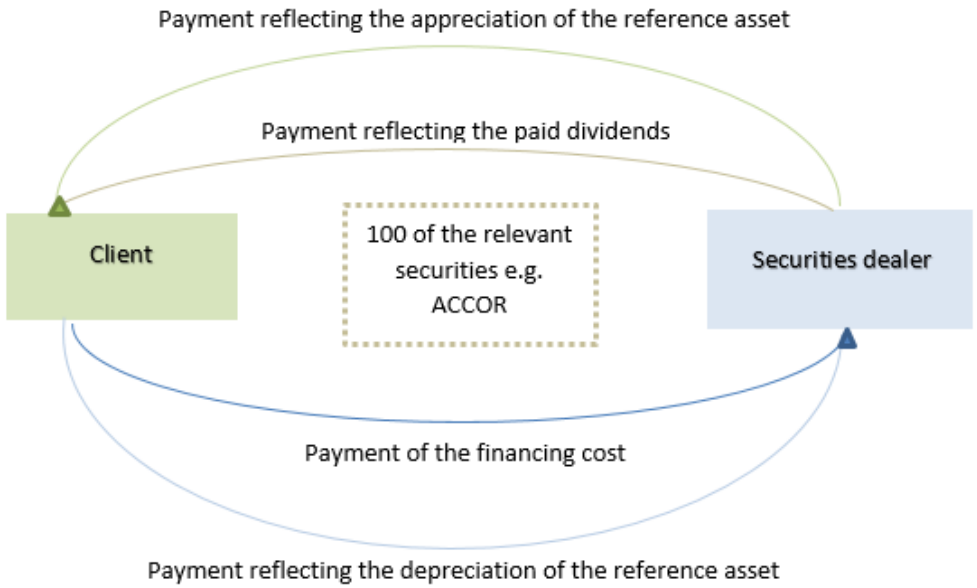
2. Derivatives

Derivatives	
Description and objectives of derivatives	Derivatives are financial instruments whose value is "derived" from that of the underlying asset whose associated risks they transfer. As specified by the European Commission, they "*trade and redistribute risks generated in the real economy, and are accordingly important tools for economic agents to transfer risk*"[4]. There are a variety of reasons why a client may want to acquire economic exposure through a derivative among which to: - generate financial leverage with an accessible investment and (or) an allocation between different asset classes (cross-asset); - cover a position; - acquire, for "sophisticated" investors, complex exposures (to the volatility of the underlying, the estimate of dividends for the next coming years, the correlation between different sectors, between different currencies, etc.); - obtain different balance sheet, prudential and accounting treatment; - serve a general investment strategy to manage more efficiently the risk related to a type of share or portfolio. - minimize the purchase price of the targeted asset(s) (securities or other assets); - avoid the management and account fees related to the direct holding of an asset; - benefit from lesser constraint and operational cost (acquisition of derivative replicating the performance of a basket of shares/bonds vs. purchase of each share/bond composing this basket); - access to certain underlying assets, notably on emerging markets, which would not be possible through a direct holding of the asset; - acquire exposure to appreciation and depreciation. Moreover, the subscription of a derivative contract requires a minimum prerequisite from the client in terms of expertise or capital to conclude an agreement with a securities dealer or the purchase of a structured note replicating the same performance.

[4] Commission Communication: *Ensuring efficient, safe and sound derivatives markets, Commission of European Communities*, COM (2009) 332 final, July 3, 2009, §2.1

Derivatives	
	Example: Futures (see below *Example of derivatives*) have, in addition to the appeal of being a negotiable leveraged security, several economic and commercial advantages compared to a direct acquisition of the underlying asset. In the case of the acquisition of a future EuroStoxx 50, the direct acquisition of the underlying assets composing this index would involve: - a higher administrative burden (than a synthetic exposure via a future), - a greater initial financial investment and would generate carrying costs related to the deposit accounts **Thus, transactions on derivatives do not generally have to be reported.** In this respect, a detailed analysis of this category of transaction is set out in the joint AFME-ISDA note (Association for Financial Markets in Europe, International Swaps and Derivatives Association) on DAC 6 published in June 2020. However, in some specific situations defined by the AFME et the ISDA in the aforementioned note (when the tax advantage represents a significant part of the total benefit of the arrangement, that this tax advantage is contrary to the legislator's intention and that the arrangement concerned fulfils one of the DAC 6 hallmarks), the intermediaries concerned should analyze the arrangement to determine whether it is reportable based on the reading grid proposed below.
Examples of derivatives	• **Options:** An option is a contract pursuant to which a party known as the "purchaser" of the option acquires in exchange for payment of a premium to the other party, known as "seller" of the option, the right, but not the obligation, to purchase (call) or sell (put) a given quantity of an underlying asset at a predetermined exercise price, during a given period or on a given date. Example: For the sale of an option to purchase X shares ("call"), the seller receives a premium remunerating the risk that it is assuming. This risk is potentially unlimited in the absence of upper limit for the maximum price that the underlying asset may reach. The purchaser of the option to purchase X shares has, in exchange for the payment of the premium, the right to purchase a quantity of X shares at a given price ("exercise price") during a given period or on a given date. If during this given period or on the given date, the market price of the X shares is greater than the exercise price, the purchaser of the option may

Derivatives	
	have an interest in exercising its call option ("exercise"). In the event the option is then exercised, the seller, "assigned by the purchaser", will have the obligation to deliver to the purchaser of the call said shares at the option's exercise price. • **Futures** Futures are standardized derivative contracts traded on organized markets to purchase or sell based on a price fixed in advance, a given quantity of financial assets (the underlying, that can be a financial instrument or raw material) on a future date (maturity date). On the maturity date, these contracts are liquidated either by physical delivery of the underlying by the seller, or in cash, at the market price (case of a physical delivery). Example: an investor wishes to be exposed to the performance of the European stock markets via the EuroStoxx 50 index. To do so, it must use a future that replicates the performance of said index. • **Total Return Swap (TRS):** A total return swap (TRS) is a swap agreement between two counterparties that exchange the total performance (appreciation/depreciation, potential income) of 2 assets referenced by the contract. For example, in the case of an equity TRS, one of the counterparties undertakes, during the entire term of the swap, to pay the performance (appreciation/depreciation, potential income) of a share (or basket of shares or stock exchange index) and the other to pay the performance, in the form of interest (agreed rate, fixed or variable) defined by reference to a notional amount (equity vs cash). There are also TRS equity vs equity and TRS equity vs bonds.

<table>
<tr><th colspan="2">Derivatives</th></tr>
<tr><td></td><td> 

In the example above, the client receives a payment reflecting the increase in value of the reference asset (basket of ACCOR shares) multiplied by the principal (100) and a payment calculated based on the dividends paid with respect to the reference asset. The securities dealer receives a payment reflecting the decrease in value of the reference asset multiplied by the principal (100) and a payment of the financing cost.</td></tr>
<tr><td>Cross-border nature</td><td>Concerning derivatives, the cross-border nature of an arrangement is established when:

(i) the counterparties are not established for tax purposes in the same jurisdiction and;</td></tr>
</table>

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	(ii) at least one of them is established in a European Union member State. **The fact that the underlying of a contract concluded between two counterparties is a foreign security does not characterize the cross-border nature of an arrangement, as the criterion used relates to the persons participating in the arrangement**. The tax administration considers that are participants in a reportable arrangement "*the relevant taxpayer, the associated enterprises when they are active in the arrangement, [and] any other person or entity that is active in the arrangement*" (*BOI-CF-CPF-30-40-10-10-20201125, §70*).
Role played by the ISP	Depending on the role played by the ISP (structuration, distribution, subscription ...), the latter may be a service supplier, a designer or a relevant taxpayer.
Knowledge of the characteristics of the arrangement **"Reasons to know"**	The objective analysis of the characteristics of the arrangement must be conducted in light of the relevant DAC 6 hallmarks within the limits of the information of which the intermediary ISP "*has knowledge, that is in its possession or under its control on the date of the trigger of the reporting obligation*" (*BOI-CF-CPF-30-40-20-20201125, §130*). In the case of transactions on listed derivatives, the ISP deal with the market. Thus, given the anonymity inherent in the market, the identities and even less the motivations and **potential advantages derived by the other participants in these transactions are not, by definition, known to the financial intermediary**, whose objective is only to propose bid and offer prices. For unlisted derivatives, it is also unlikely that the intermediary ISP is informed of all the characteristics specific to its client and potential tax advantages derived by the latter, especially since it generally has a broad portfolio of financial instruments with several financial institutions. Thus, **the participation in a transaction on derivatives should not give the intermediary ISP reasons to know whether it is participating in an arrangement having to be reported**. According to administrative interpretation, the intermediary "*is not required to go beyond the requirements set out by the professional rules and know your client rules applicable when it collects and reports the information necessary for the report provided for in Article 1649 AD of the French General Tax Code*" (*BOI-CF-CPF-30-40-20-20201125, §130*). On the other hand, when the intermediary ISP processes a derivative whose advantage(s) is(are) mainly tax related, it will have to analyze the arrangement in light of the directive's hallmarks.

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sk	**The client's freedom to choose between a physical holding of a security or synthetic holding cannot, as such, constitute a presumption that one of the main advantages of a derivative contract is obtaining a tax benefit**. The choice to use a financial instrument depends on a certain number of considerations, each financial instrument having specific legal, commercial and - sometimes - tax consequences. Example: many hedge funds implement investment strategies based exclusively on derivatives, that they use to acquire exposure to increases and/or decreases on a wide range of underling assets. The criterion of the main benefit must be appreciated "objectively". In this respect, the BOFiP specifies that "*the importance of the tax benefit is notably determined depending on the value of the tax advantage compared to the value of the other advantages derived from the arrangement*" (BOI-CF-CPF-30-40-10-10-20201125, §150). From this point of view, **the tax advantage will be considered as the main benefit or one of the main benefits of an arrangement when it represents a significant part of the total benefit that may be derived from the arrangement**. **In the specific case of derivatives, the tax advantage is generally ancillary compared with the non-tax advantages** (see above, *Description and objectives of derivatives*).
Relevant hallmarks* ***"The main benefit criterion must be fulfilled for the presence of the hallmarks discussed here to lead to reporting a cross-border arrangement.***	• **A2 - collection of fees (or interest or remuneration) fixed by reference to the amount of the tax advantage?** According to the administration, hallmark A2 concerns "*arrangements that present a direct link between the tax advantages obtained by the relevant taxpayer and the fees invoiced by the intermediary to its client*" (BOI-CF-CPF-30-40-30-10-20201125, §70). Accordingly, this hallmark is applicable if the remuneration received has a direct link with the tax advantage obtained by the taxpayer. As an example, the BOFIP cites as a reportable arrangement "*the amount of the fees of a tax lawyer (...) calculated based on a percentage of the tax savings made pursuant to the arrangement*" (BOI-CF-CPF-30-40-30-10-20201125, §60). The bid and offer prices are determined depending on mathematical models (for example, the Black-Scholes model) and come from parameters observable on the market such as the share price, discount rate linked to the currency, the estimated volatility, the number of calendar days between the date of calculation and the maturity of the derivative, and the dividend rate. The estimated dividend rate that takes into account the anticipations of the different market players is thus a pricing element among others.

Derivatives

Consequently, **the pricing method of a derivative should not be confused with the calculation of fees fixed by direct reference to a tax advantage. Therefore, hallmark A2 should not generally be applicable to derivatives.**

- **A3 - standardized documentation and/or structure available to more than one relevant taxpayer without a need to be substantially customized? (ex: ISDA agreement)**

Concerning hallmark A3, the BEPS 2015 final Report on action 12, which inspired the DAC 6 Directive, refers to "*a **prefabricated tax product** that can be used as such, or after limited modifications*". This is a "double" hallmark that, in addition to the presence of a main tax benefit, must satisfy two conditions:

a. **The arrangement is based on a substantially standardized documentation and/or structure.** This condition is difficult to appreciate. Documentation is standardized when it includes standardized legal documents that require little or no modifications to adapt to the client's situation, that do not need to receive additional important professional advice or services for their particular needs and that may be implemented as such.

   The client purchases this standardized documentation and not specific tax advice to meet to its specific facts and circumstances. The same reasoning applies to standardized structures. According to the positions expressed orally by the administration, this hallmark concerns highly standardized arrangements.

b. **The arrangement is available to more than one relevant taxpayer without a need to be substantially customized to be implemented.** For the hallmark to be met, the substantially standardized documentation/structure, when the arrangement is sold to the client, is immediately available to be implemented by the client without any substantial modification being required. It is not necessary for the arrangement to be effectively sold to several taxpayers.

"***Many banking and financial products, instruments and transactions** are offered to a broad public based on standardized documentation. They **can meet the characteristics set out in hallmark A.3**. **However**, in the absence of other hallmarks set out in Article 1649 AH of the French General Tax Code, and assuming the tax advantage derived is provided for by French law and use of these products complies with the legislator's intention, the arrangements that include such banking and financial products, instruments and transactions **do not need to be reported**. **This is the case notably** of standardized procedures that*

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*use standardized documentation or **model master agreements**, such as certain **routine market transactions**. Example: **Acquisition of financial instruments traded on a stock exchange"** (BOI-CF-CPF-30-40-30-10-20201125, §110).*

The master agreements generally used by the financial intermediaries for **derivatives likely not to be reported are the following**:

- The master agreements on international **derivatives** such as the **ISDA Master Agreement** published by the ISDA (International Swaps and Derivatives Association) or
- Their domestic equivalents such as (non-exhaustive list):
  - the **FBF** master agreement on **financial futures instruments** published by the FBF (French Banking Federation);
  - the **DRV** (*Deutsche Rahmenvertrag für Finanztermingeschäfte*) master agreement on **financial futures instruments** published by the Bankenverband (Association of German banks);
- The **Euromaster** (Master Agreement for Financial Transactions) master agreement on transactions on **derivatives** published by the **FBE** (European Union Banking Federation) in cooperation with the European Savings Banks Group and the European Association of Cooperative Banks.
- …

Such master agreements do not generally take on the characteristics of hallmark A3. These agreements ensure a consistent sharing of the commercial and legal risks between the counterparties. They generally undergo significant adjustments as part of the negotiations between the parties.

The counterparties have to customize the master agreement to reflect their own points of view concerning certain risks and the nature of the commercial relation with their counterparty. There are specific parameters on which the parties must agree in the master agreement - for example, the determination of the branches of the legal entities parties to the agreement, acceptable guarantees, offsetting provisions and applicable late payment interest rates. In addition, the essential conditions of the individual transactions governed by the master agreement, such as pricing, must be agreed separately.

These master agreements have been developed in time for commercial reasons and ensure a consistent sharing of the commercial and legal risks between the counterparties. They were not developed as tax products and, the tax clauses that they may contain are only intended to allocate the risks and tax liabilities between the parties.

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	In line with the work of the OECD aimed at seizing "the "prefabricated" tax products, the term "standardized documentation" of hallmark A3 means the "mass arrangements" whose standardized conditions are specifically related to the tax advantage from which the co-contracting party may benefit without substantial customization to its situation. Therefore, it does not apply to commercially standardized master documentation such as described above. The absence of systematic characterization of hallmark A3 regarding the master agreements used by the financial market is comforted by the new wording of the BOFiP. Now referring to financial transactions, as requested by the AMAFI, in addition to the banking transactions previously referred to, the Administration abandons the imperative characterization of hallmark A3 in favor of a simply optional characterization: *Many banking **and financial** products, instruments and transactions are offered to a broad public based on standardized documents. They ~~consequently meet~~ **may fulfil** the characteristics set out in hallmark A.3.* **In conclusion, a derivative arrangement based on a master agreement such as those mentioned above does not constitute, under normal circumstances, a "mass arrangement" for tax purposes likely to be reported**. This appreciation is supported by the administration that mentions their non-reportable nature, in the absence of other hallmarks set out in Article 1649 AH of the French General Tax Code and assuming the tax advantage derived is provided for by French law and use of these products complies with the legislator's intention (*BOI-CF-CPF-30-40-30-10-20201125, §110*). • **B2 - conversion of income into another category of revenue taxed at a lower level?** For the analysis of this hallmark, the Association considers that it must be held that the conversion is by nature a change of state compared to an initial starting situation that is to be compared with a later situation and not with a hypothetical situation. Thus, hallmark B2 is not intended to compare for example an investment in a financial product subject to a specific tax regime (arrangement A) with a theoretical investment in another financial product subject to a different tax regime (arrangement B) when these two arrangements have different legal effects or economic benefits and arrangement A, considered as a whole, does not fulfil the main tax benefit criterion.

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	The tax administration specifies that hallmark B2 refers to "*cross-border arrangements converting profits into capital, gifts or any other category of revenue and resulting in the application of a low or zero taxation*" (BOI-CF-CPF-30-40-30-10-20201125, §180). **The simple choice of a synthetic holding rather than a physical holding of an underlying asset is not an arrangement that involves a conversion of income**. When the decision is made to invest in a derivative at a moment T 0 with potentially type X income, the income to which the taxpayer will be entitled in time will not be converted. In a moment T 1, the income to which the taxpayer will be entitled will still be type X income. More generally, in the context of derivatives, there is no conversion of income compared to the initial starting situation. Conversion is by nature a change of situation compared to an initial starting situation that is to be compared with a later situation and not with another hypothetical situation. **Therefore, hallmark B2 should not be applicable to derivatives.** In any event, **the characterization of hallmark B2 depends on facts and circumstances specific to each arrangement.**
Regulatory documentary and framework	• Annex I, section C of directive MiFID II (EU) 2014/65 • Article 2(5) of the EMIR regulation (EU) 648/2012 • Directive MiFID II (EU) 2014/65 in Article 4(1)(46) and annex 1 Section C • Article 2(6) of the EMIR regulation (EU) 648/2012 • For the TRS: Guidelines for competent authorities and UCITS management companies on ETFs and other UCITS issues ➢ *Nota*: Level 3 text not relevant for the definition of a TRS but sole specific regulatory reference for this type of derivative.
Reportability under DAC 6	**Subject to atypical situations, derivatives should not generally be reported: neither the tax benefit criterion, nor the DAC 6 hallmarks should be considered as fulfilled.** More specifically, **all of the derivatives listed should be excluded from the scope of the report** when the intermediary on the market does not have any specific information or knowledge of a potential tax advantage that could be derived by the user from the arrangement. Regarding OTC derivatives, they should not be reported, in the absence of preponderant tax advantage compared to the commercial and economic advantages related to the intrinsic mechanism of the derivative.

Derivatives	
	In accordance with DAC 6's purpose, **the situations ruled atypical** either due to the financial conditions compared to the market conditions, or due to their simultaneous combination with other arrangements **have to be analyzed more precisely on a case by case basis**.

3. Structured notes

Structured notes	
Description and objectives of structured notes	They are debt securities whose income can be based in all or part on the performance of one or more financial assets (a share, a basket of shares, a share index, or any other type of underlying or basket of various underlying (static or dynamic)). Structured notes: • offer companies access to more flexible financing with respect to maturity dates, issue currency and repayment terms; • offer investors investment and placement solutions; • generate financial leverage, accessible investment and an allocation between different asset categories (cross-asset); • offer complex exposures to investors (to the volatility of the underlying, to the estimate of the dividends for the next few years, to the correlation between different sectors, between different currencies, etc.); • benefit from a different balance sheet, prudential and accounting treatment; • facilitate the establishment of a general investment strategy allowing the client to manage more efficiently the risk related to a type of share or portfolio; • access certain underling assets, notably on emerging markets, which would not be possible through a direct holding of the asset; • acquire an exposure to appreciations and depreciations. These notes also offer several financial advantages: ▪ the purchase cost of the underlying (securities) may be higher (the direct holding of an asset generates multiple costs notably management and account costs); ▪ the constraint and operational cost are less high to enter in a structured note replicating the performance of a basket of shares/bonds rather than purchase each share/bond composing this basket (and to get shares in/out when the basket is dynamic).
Examples	Structured notes can notably take the following forms: ▪ **Structured certificates or bonds**

Structured notes	
	Certificates are debt securities backed by other assets or related to the performance of other assets issued by credit institutions or investment firms whose purpose is to offer investment and/or savings solutions to investors. An issuance is accompanied by final conditions (document describing the terms of the transaction) when they are issued in the context of a base prospectus. Like the derivatives mentioned above, structured instruments offer investors a linear performance or a non-linear performance compared to the performance of an underlying asset (that can be, for example, raw material, currency, bond, share, index or a combination thereof). ▪ **Euro medium term notes (EMTN):** EMTN are medium maturity debt securities, issued by companies wishing to access the market seeking financing. An issuance is accompanied by the publication of a prospectus (document describing the terms of the transaction) by the issuing company, valid for all future issuances.
Cross-border nature of the arrangement	Regarding structured notes, the cross-border nature of an arrangement should be established when: (i) the counterparties are not established for tax purposes in the same jurisdiction and; (ii) at least one of them is established in a European Union member State. **The mere fact that the underlying of the certificate or EMTN is a foreign security does not characterize the cross-border nature of a transaction on this security since this characterization is attached to the persons participating in the arrangement**. The tax administration considers as participants in a reportable arrangement "*the relevant taxpayer, the associated enterprises when they are active in the arrangement [and] any other person that is active in the arrangement*" (*BOI-CF-CPF-30-40-10-1020201125, §70*).
Role played by the ISP	Depending on the role played by the ISP (issuance, structuration, distribution or subscription), it can be a provider of services, a designer or a relevant taxpayer. Thus, it could be considered as: ▪ intermediary designer of an EMTN;

Structured notes	
	▪ intermediary provider of services, if it places or distributes a structured note.
Knowledge of the characteristics of the arrangement **"Reason to know"**	**In principle, the motivations, the final use of an arrangement by a client or the tax advantage that it is likely to derive therefrom are not known to the intermediary ISP. But this would not be the case in the event of arrangements designed for the purpose of generating identified tax impacts.** The "reasons to know" (to be differentiated from knowledge of the client's motivations) that an arrangement is reportable in accordance with DAC 6 depend on the role played by the ISP ("knowing" designer or provider of services) and requires in any event an objective analysis of the characteristics of the transaction in light of the applicable DAC6 hallmarks. Through its offer of structured notes, the ISP proposes first of all investment solutions and placement products. The tax motivation or ultimate use of the arrangement (holding or sale of the position, holding period, etc.) is not generally known to the intermediary ISP. In the case of structured notes listed on a regulated market or MTF (Multilateral Transaction Facility) given the anonymity, the potential main tax advantages derived by the investors are, by definition, unknown to the designer intermediary whose purpose is solely to propose prices depending on supply and demand. In such case, the "reason to know" criterion seems difficult to be considered as fulfilled. In the other cases, the issuances of structured notes constitute considerable volumes of transactions and, in most cases, it is unlikely that the intermediary ISP knows all the facts and tax characteristics of its clients, especially since the latter probably have a large portfolio of financial instruments with several financial institutions. Therefore, the "reason to know" criterion would not generally be fulfilled, save in special circumstances justifying it.
Main benefit test **"MBT"**	**The comparative analysis of a direct holding of a security and the subscription of a note/certificate whose performance faithfully reflects the performance of these securities cannot constitute a relevant comparison to determine the presence of a main tax benefit, when the holding of the certificate / "note" of an asset has multiple consequences from commercial, legal, regulatory points of view.**

Structured notes	
	The client's freedom of choice between a physical holding of a security or synthetic holding cannot therefore, as such, constitute a presumption that one of the main advantages of an issuance of structured notes is a tax advantage. Given the economic motivations reffered to above, the fact that a structured note replicate substantially the performance (and notably the income of the underlying that may be subject, as the case may be, to withholding tax) of underlying security(ie)s is not sufficient in itself to deduce therefrom the presence of a mainly tax benefit. In principle, **the transactions subscribed in the context of an issuance of structured notes that can be indifferently implemented under the same conditions or circumstances by a client that would obtain or not a tax advantage, cannot be considered as reportable arrangements with respect to the main tax benefit**. The main benefit criterion must be appreciated "objectively". In this respect, the BOFiP specifies that "*the size of the tax advantage is notably determined in light of the value of the tax advantage obtained compared to the value of the other advantages derived from the arrangement*" (*BOI-CF-CPF-30-40-10-10-20201125, §150*). From this point of view, **the tax advantage will considered as the main benefit or one of the main benefits of an arrangement when it represents a significant part of the total benefit that may be derived from the arrangement**. When the structured note is intended to replicate an index or a basket of shares or when it presents an optional (warrant) or conditional component, the mainly tax benefit criterion cannot, in any event, be fulfilled. We reserve the specific cases where the issued note is specifically designed to give entitlement to a tax advantage identified with the holders.
Relevant hallmarks* ***"The main benefit criterion must be fulfilled for the presence of the hallmarks discussed here to lead to reporting***	The main tax benefit must be jointly present with the hallmarks below to be considered as a reportable arrangement under DAC 6. • **A 2 - collection of fees (or interest or remuneration) fixed by reference to the amount of the tax advantage?** This hallmark only covers arrangements that present a direct link between the tax advantages obtained by the relevant taxpayer and the fees invoiced by the intermediary to its client. As an example, the BOFIP cites as a reportable arrangement "*the amount of the fees of a tax lawyer (...) calculated based on a percentage of the tax savings made pursuant to the arrangement*" (*BOI-CF-CPF-30-40-30-10-20201125, §60*).

Structured notes	
a cross-border arrangement.	In the event the tax advantage is simply be taken into account in the price of the transaction, the latter being very largely determined by other structuration factors of the note, there will generally not be any direct link between the tax advantage and pricing. **Therefore, hallmark A2 should not be applicable to structured notes, unless the note has been precisely structured so as to generate identified tax advantages**. • **A3 - standardized documentation and/or structure available to more than one relevant taxpayer without a need to be substantially customized?** Concerning hallmark A3, the BEPS 2015 final report on Action 12, which inspired the DAC 6Directive, refers to "*a **prefabricated tax product** that can be used as such, or after limited modifications*". It is a "double" hallmark, that, in addition to the present of a main tax benefit, must meet two conditions: a. **The arrangement is based on a substantially standardized documentation and/or structure.** This condition is difficult to appreciate. Documentation is standardized when it includes standardized legal documents that require little or no modifications to adapt to the client's situation, that do not need to receive substantial additional advice or professional services for their specific needs and that can be implemented as such. The client purchases this standardized documentation and not specific tax advice to meet its specific facts and circumstances. The same reasoning applies to standardized structures. According to the positions expressed orally by the administration, this hallmark concerns highly standardized arrangements. b. **The arrangement is available to more than one relevant taxpayer without a need to be substantially customized to be implemented.** For the hallmark to be met, the substantially standardized documentation/structure, when the arrangement is sold to the client, is immediately available to be implemented by the client without any substantial modification being required. It is not necessary for the arrangement to be effectively sold to several taxpayers. Hallmark A3 covers "mass arrangements", whose standardized conditions are specifically related to the tax advantage and can confer this tax advantage without substantial customization to the client's situation. Thus, structured notes should not, under normal circumstances, be legitimately characterized as "mass arrangements" for tax purposes.

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However, although most issuers document their structured notes via issuance programs whose terms and conditions meet the requirements of the Prospectus Directive (and coming Prospectus Regulation), this standardized documentation is first and foremost intended to provide maximum transparency and includes generic standard provisions that will be completed and adapted (strain of) transaction by (strain of) transaction (ex: pay-off, underlying, etc.). However, in general, each issuance is the subject of a specific detailed term-sheet.

> "***Many banking and financial products, instruments and transactions*** *are offered to a broad public based on standardized documentation. They* ***can meet the characteristics set out in hallmark A.3****. However, in the absence of other hallmarks set out in Article 1649 AH of the French Tax Code, and provided the tax advantage derived is provided for by French law and use of these products complies with the legislator's intention, the arrangements that include such banking and financial products, instruments and transactions* ***do not need to be reported****.* ***This is the case notably*** *of standardized procedures that use standardized documentation or* ***model master agreements****, such as certain* ***routine market transactions****. Example:* ***Acquisition of financial instruments traded on a stock market***" (*BOI-CF-CPF-30-40-30-10-20201125, §110*).

In principle, structured notes were not developed as tax products and the tax clauses that the issuance programs may contain are only intended to specify the tax regime applicable to the products.

For the aforementioned reasons, **hallmark A3 should not be considered as being fulfilled simply as a result of the use of the model standard final conditions**. These agreements are not, by nature, tax schemes and are also not the subject of minimum customization when they are used for specific transactions with specific clients.

The term "standardized documentation and/or structure" should be interpreted in this perspective, as this has been developed with respect to the ISDA documentations, rather than being considered as applying to commercially standardized master documentation such as described above.

This being said, if the structure of the transaction was specifically documented and structured to entitle to a specific tax advantage and this advantage is the main benefit, the structured note could fall under this hallmark.

Structured notes	
	• **B2 - conversion of income into another category of revenue taxed at a lower level?** For the analysis of this hallmark, the Association considers that it must be held that the conversion is by nature a change of state compared to an initial starting situation that is to be compared with a later situation and not with a hypothetical situation. Thus, hallmark B2 is not intended to compare for example an investment in a financial product subject to a specific tax regime (arrangement A) with a theoretical investment in another financial product subject to a different tax regime (arrangement B) when these two arrangements have different legal effects or economic benefits and arrangement A, considered as a whole, does not fulfill the main tax benefit criterion. **The simple choice of a synthetic holding rather than a physical holding of an underlying asset is not generally an arrangement that involves a conversion of income**. When the decision is made to invest in a structured note at a moment T 0 with potentially type X income, the income to which the taxpayer will be entitled in time will not be converted. In a moment T 1, the income to which the taxpayer will be entitled will still be type X income. More generally, in the context of structured notes, there is no conversion of income compared to the initial starting situation. Conversion is by nature a change of state compared to an initial starting situation that is to be compared with a later situation and not with another hypothetical situation. **Therefore, hallmark B2 should not be applicable to structured notes.** However, in accordance with the purpose of the DAC 6 scheme, the situations deemed atypical either due to the financial conditions compared to market conditions, or due to their simultaneous combination with other arrangements should be analyzed on a case by case basis. In any event, **the characterization of hallmark B2 depends on facts and circumstances specific to each arrangement**.
Regulatory documentation and framework	▪ ESMA Opinion on Structured Retail Products – Good practices for product governance arrangements, March 2014 ▪ IOSCO, regulation of retail structured products, December 2013 ▪ *"Structured Retail Products – the EU market"*, ESMA Report on Trends, Risks and Vulnerabilities, pp. 52-65, September 2018 ▪ Prospectus Regulation ▪ PRIIPS Regulation (notice of information – quid intended for retail clients) ▪ MIFID

Structured notes	
Reportability under DAC 6	Issuances of structured notes should be excluded from the DAC 6 reporting obligation, notably: ▪ structured notes listed on a regulated market or MTF (Multilateral Transaction Facility) given the anonymity; ▪ structured notes whose underlying assets are interest rate products, ETF or general public OPCVM units should be excluded; ▪ structured notes not offering to replicate symmetrically the performance of the underlying asset(s). Are notably to be included in this category notes offering an optional component or a conditional component; ▪ unlisted structured notes offering to replicate diversified indexes or baskets whose composition does not have for main effect to obtain a tax advantage. On the other hand, the other transactions as well as **some atypical transactions combining structured notes and potentially other instruments in order to generate identified tax effects will have to be analyzed in detail to determine their reportability under DAC 6**.