Tax risk management for asset managers

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Webinar

Agenda

Introduction

- Focus on specific tax risks
  - DAC 6: are you compliant?
  - Predicate tax offences: on your radar?
  - Foreign tax risks: What to look out for?
- Managing Transfer Pricing risks: key aspects
- What are the current trends re. VAT risk management?
- Key takeaways

Introduction

Current context

Focus on specific tax risks

DAC 6 : are you compliant?
The Luxembourg rules in a nutshell

Background

- Amendment to the EU Directive 2011/16/EU (DAC 6) to include mandatory automatic exchange of information in relation to **reportable cross-border arrangements**

Purpose

- **Disclosure** of "potentially aggressive tax planning arrangements" to the authorities of a Member State
- **Automatic exchange** of information between authorities of Member States

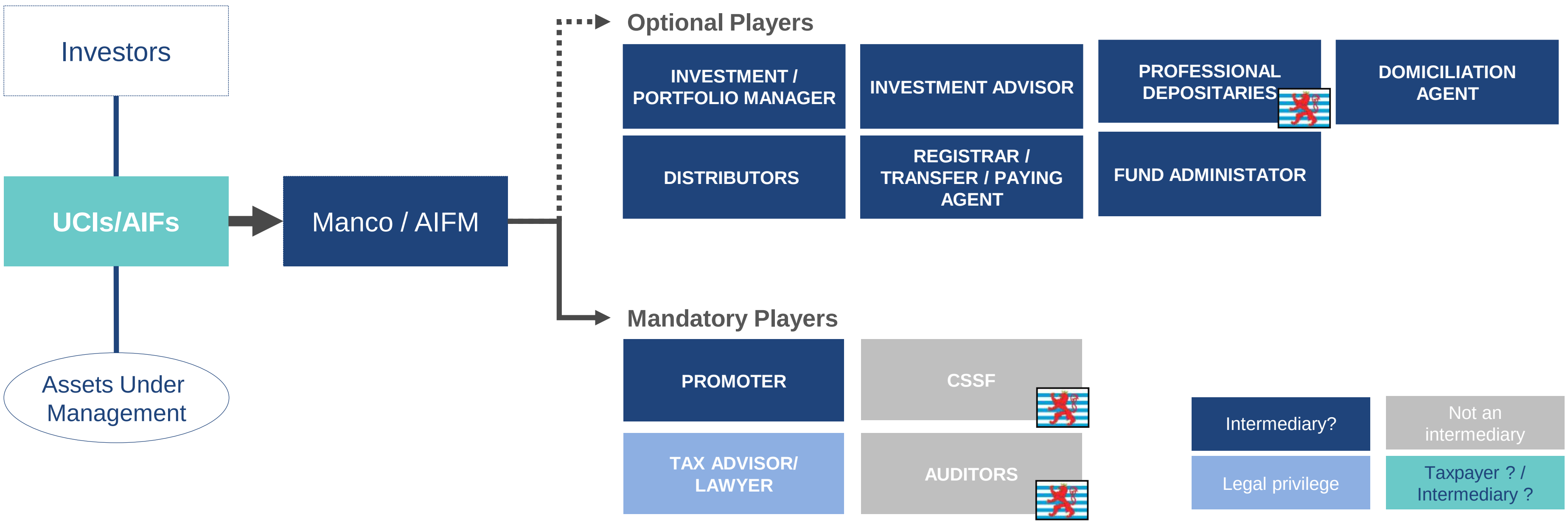
Scope

- **Intermediary / taxpayer** (and EU relevance for at least one participant)
- **Cross-border arrangements** (concerning several EU Member States, or an EU Member State and a third country)
- One of the "**hallmarks**" is met, potentially together with a **main benefit test**
- All taxes levied in the EU except VAT, customs duties, excise duties and compulsory social security contributions

Penalties

- Up to **EUR 250,000 per breach**

DAC 6 : are you compliant?
Illustration



Case-by-case assessment of the reporting obligations of each player in the investment fund structure and of each transaction

Assessment & reporting solutions to be implemented

Predicate tax offenses: on your radar?

Legal framework

- Law of 23 Dec 2016 extending the money laundering predicate offences to aggravated tax fraud and tax evasion
- CSSF circular 17/650 of 20 Feb 2017 - guidance
- CSSF circular 20/744 of 3 July 2020 – specific indicators on tax fraud for the asset management industry
- LTA circular of LG-A n°67 of 28 July 2021 – guidance on concepts & applicable penalties

Scope

Aggravated tax fraud	Tax evasion
1 month/ 3 years imprisonment	1 month/ 5 years imprisonment
€25k – 6 X the amount evaded	€25k – 10 X the amount evaded
Sanctions for money laundering	Sanctions for money laundering

Predicate tax offenses: on your radar?

AM industry: analysis based on specific indicators

- Complex investment structuring
- Tax base erosion
- Investment transactions
- Efficient portfolio management techniques
- SICAR utilization
- Subscription tax
- Investor tax reporting

- Assessment at investor and investment level
- Risk-based approach

Documentation of each structure / transaction is key

Implementation / review of **internal AML policy** & processes

Training of relevant people

Foreign tax risks: What to look out for?

- **Tax specificities** in every countries to be duly considered before investment
- **Acquisition structuring**: ensure that VAT and registration duties impacts are duly analyzed, in particular for **real estate** acquisitions
- **Teleworking in foreign jurisdictions** to be carefully analysed before offering this flexibility

Seek for global tax advice

Implement appropriate tax due diligence processes

Consider use of third-party insurance

Managing Transfer Pricing risks: key aspects

Context

What has changed?

- Wave of new international transfer pricing guidance
- Soft law
- No official position by most tax administrations
- Risk of selective use at the tax authorities' own advantage
- Increasing transfer pricing litigation

Impacts

- Move towards more detailed legal agreements:
  - that meet the parties' needs
  - that are operated in an arm's length way
- Search for more tax certainty (Advance Pricing Agreements, Mutual Agreement Procedures)

Impacts on legal agreements

More detailed and commercial legal agreements	Agreements to meet the parties' needs	More commercial operation of agreements
▪ Loan agreements must have loan-like features	▪ Loan agreements should allow the borrower to obtain the lowest interest (subject to commercial considerations) ▪ No transaction should exceed a commercially rational size	▪ Lender or guarantor to demand payments when they are due ▪ Appropriate action to be taken by one of the parties if the terms and conditions of an agreement are broken, except in exceptional circumstances ▪ Options to be exercised except in exceptional circumstances ▪ Appropriate action to be taken by one of the parties if other terms and conditions that would have been agreed by independent parties are broken

Conclusions

Setting interest rates, guarantee fees and cash pooling charges now involves new considerations and documentation

Taxpayers are advised to:

- bring additional expertise from within and outside the organization
- add economics skills and resources to research and explain transfer pricing policies, especially how the transfer pricing policies have responded to the pandemic
- improve the drafting of legal agreements
- improve the monitoring of the operation of legal agreements

What are the current trends re. VAT risk management?

Summary - Current trends re VAT risk management

Trend #1

Increased exposure for personal VAT liability for managers/directors

Trend #2

Limitation on VAT recovery

Trend #3

Increased VAT litigation cases

Our recommendations / best practices

How to best deal the relationships with the VAT authorities

Trend #1

Increased exposure for personal VAT liability for managers/directors

Who is concerned?	**Managing directors and any de jure or de facto managers** who are in charge of the day-to-day management of a company
In what cases?	**Tortious breach** ("*inexécution fautive*") of their obligations in case of: ▪ VAT obligations of the company have not been complied with; ▪ VAT due has not been paid.
What liability?	**Personal and joint liability** for the payment of the VAT due
Sanctions	VAT authorities have the right to: ▪ **Require the Company** to pay the VAT due; ▪ **Issue a secondary liability decision** (*"décision d'appel en garantie")* in order to recover the VAT payable by the company personally from directors/managers. ➨ Secondary liability decision can be contested by way of objection.

Trend #2

Limitation on VAT recovery

VAT authorities' practice in Luxembourg:

- Direct allocation method to be applied wherever possible; for non-allocable (general) costs, special prorata methods (other than based on turnover) are to be prioritized (Circulars 765 and 765-1).
- Input VAT deduction of mixed holding companies often limited to the ratio of turnover generated from output transaction allowing for input VAT deduction; i.e. input VAT deduction rejected to the extent that costs exceed VAT-able turnover.
- Verifications whether invoice amounts and payment amounts match.
- Request for proof of effective payment; netting operations might be challenged by the VAT authorities and therefore need to be properly documented.

Trend #3

Increased VAT litigation cases

- Main area = deduction of input VAT
  - Allocation of costs for the purposes of a taxable activity
  - Charge of proof
- Contribution of commercial debts
- Retroactivity of VAT cessation
- VAT exemption for intermediation services
- Procedural aspects
  - Deadline
  - Sending a claim via email (without acknowledgment of receipt)
  - Motivation of claim

Best practices

How to best deal the relationships with the VAT authorities

Prior to the VAT audit

- **Objectively analyze your own case** and identify in advance any gray areas / risk areas / possible shortcomings / weaknesses
- **Be prepared**
- **Be calm and sure of oneself**
- **Do not underestimate any request** of the VAT authorities

During the VAT audit

- **Be professional in all circumstances**
- **Be well accompanied**
- **Be reactive**
- **Don’t let yourself be destabilized**
- **Positive attitude**
- **Proactive attitude** (anticipation)
- **Be transparent**

After the VAT audit

- **Do the follow up**
- **Check the VAT assessment notices** (in line or not with the annual VAT returns)
- **Analyze any possible new PV and react in the case may be**
- **Analyze any new VAT taxation notices** (in line or not with the claims) and react in the case may be
- **Check the VAT statements**

Key takeaways

Key takeaways

Do's	Don'ts
▪ Implement / adapt internal policies ▪ Monitor legislative changes / new administrative guidance ▪ Ensure a holistic assessment (each player / transaction) ▪ Monitor compliance on an ongoing basis ▪ Insert appropriate wording in the legal documentation ▪ Be prepared to answer questions from investors and Luxembourg tax authorities ▪ Use of third-party insurance ▪ Adapt the corporate governance model ▪ Increase substance ▪ Have relevant documentation (e.g. in terms of transfer pricing) readily available	▪ Burying your head in the sand ▪ Implementing a "one-fits-all" approach ▪ Transferring responsibility for monitoring to other players

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