

Xavier BETTEL, Yuriko BACKES et S.A.R. le Grand-Duc héritier au World Economic Forum à Davos

## La « Coopération dans un monde fragmenté »

Pour la huitième fois, le Premier ministre, ministre d'État, Xavier Bettel, a participé au World Economic Forum (#WEF23) du 16 au 18 janvier 2023 à Davos en Suisse. Lors de son déplacement, le Premier ministre a été accompagné de la ministre des Finances, Yuriko Backes et de S.A.R. le Grand-Duc héritier.

Cette année, la thématique du forum portait sur la « Coopération dans un monde fragmenté ».

Le Premier ministre a eu l'occasion de rencontrer de nombreux décideurs dans les domaines politiques et économiques, et d'aborder des sujets d'actualité politique, économique, écologique et sociale.

Le Premier ministre a notamment rencontré Chuck Robbins, président et CEO de Cisco, Dan Schulman, prési-



de g. à dr. : S.A.R. le Grand-Duc héritier, Yuriko BACKES et Xavier BETTEL © ministère d'État

dent et CEO de Paypal, Francesco Ceccato, CEO de Barclays Bank Ireland PLC, Cristiano Amon, président et

CEO de Qualcomm Incorporated, Colm Kelleher, Chairman UBS AG, Susan Pointer, vice-présidente,

International Public Policy and Government Affairs, Amazon, Adaire Fox-Martin, présidente, Google Cloud International, Runa Khan, Founder, Friendship, Nick Clegg, président, Affaires Globales, Meta Platforms Inc., Roy Gori, président et CEO Manu Life, Thomas Buberl, CEO Axa SA, Onur Genç, CEO, BBVA SA, Anne Richards, Fidelity International, Lakshmi N. Mittal, directeur exécutif et Aditya Mittal, CEO, Arcelor Mittal Limited, Jared Cohen, président, Affaires globales, The Goldman Sachs Group Inc et Jane Fraser, CEO, Citi.

Xavier Bettel a également eu l'opportunité de s'échanger avec des personnalités de la politique internationale comme Najla Bouden, Première ministre de la Tunisie, Maia Sandu, présidente de la Moldavie, Eknath Sambhaji Shinde, chef ministre de Maharashtra, Inde, Sviatlana Tsikhanouskaya, Leader des forces démocratiques Belarus, Alain Berset, président de la Confédération suisse et Olena Zelenska, première dame de l'Ukraine.

Le focus des discussions était notamment axé autour des différents défis auxquels le monde est confronté en ce moment, dont la guerre d'agression de la Russie menée contre l'Ukraine et ses implications économiques, la crise climatique et écologique et le besoin de coopérer de façon concertée et multilatérale afin de faire face à tous ces défis.

Les avancées des nouvelles technologies et du numérique figuraient également de manière éminente à l'agenda du World Economic Forum 2023.

De son côté, Yuriko Backes a profité de son séjour à Davos pour rencontrer la nouvelle conseillère fédérale des Finances suisse, Karin Keller-Sutter.

Lors de cette entrevue bilatérale, les ministres ont fait le point sur la réforme de la taxation internationale des entreprises, la situation macroéconomique mondiale et les relations économiques et financières entre les deux pays.

Source : ministère d'État / ministère des Finances

## Why the asset management sector must include tax matters in their internal audit plans

Internal audit, the third line of defense,<sup>(i)</sup> is an integral part of an organization's internal governance arrangements. All asset management professionals must implement an internal audit function as per the relevant Commission de Surveillance du Secteur Financier's (CSSF) circulars. This function's scope includes all the organization's activities and functions and their associated risks, the effectiveness of their internal control, all matters of prudential interest, and also reflect the developments and innovations provided for and their risks<sup>(ii)</sup>.

As asset management professionals must follow significant tax requirements, their associated risks should also be evaluated so their internal audit plans can cover them appropriately. However, despite regulatory attention and the risks of tax matters rising significantly in the past few years, tax often does not receive the attention it deserves in risk-based multi-year internal audit plans.

This article focuses on three main topics that should be considered and reviewed with sufficient granularity, amongst others.

### Anti-money laundering (AML) in tax matters

In response to tax fraud being made a predicate money laundering offense, the CSSF and the Financial Intelligence Unit (FIU) issued Circular 17/650 on 17 February 2017 on professionals' duties relating to tax crimes. The CSSF then complemented this with Circular 20/744, issued on 3 July 2020, which provided nine specific indicators that apply to collective investment activities and professionals providing asset management services (jointly referred to as the "Circulars").

The Circulars require professionals to strengthen their client tax due diligence concerning their AML obligations. Professionals must perform assessments to evaluate the risk of tax fraud that could arise when providing services to their clients. Based on this risk assessment, asset management industry professionals must implement a specific methodology that applies the Circulars' indicators depending on their activities and the parties involved (e.g., depositary services, transfer agents, central administrations, management companies, etc.).

The CSSF's recent communication regarding their on-site inspections at management companies to prevent tax offenses



highlighted that these tax matters were not sufficiently covered in internal audit plans.<sup>(iii)</sup> The results uncovered key weaknesses in the following three areas:

- i. AML tax risk assessments;
- ii. Verifications performed by the control functions; and
- iii. The application of some indicators for the investment management sector.

The CSSF's communication reminds control functions and professionals of the investment management sector to include tax matters in their compliance monitoring plans and internal audits. The controls should not be limited to the Circulars' AML policies and procedures; professionals should also ensure their mitigation measures include, in a proportionate manner, all the Circulars' relevant tax-specific indicators concerning collective investment activities. Therefore, AML procedures and policies for tax matters must be appropriately set up to reflect that the Circulars' requirements have been considered.

### Sixth Directive on Administrative Co-operation (DAC 6)<sup>(iv)</sup>

DAC 6 requires intermediaries and taxpayers to disclose cross-border arrangements (any transaction with one or more hallmarks) to tax authorities and mandates the automatic exchange of this information among EU Member States. DAC 6 aims to enhance transparency, reduce uncertainty over beneficial ownership, and dissuade intermediaries from designing, marketing and implementing harmful tax structures.

Luxembourg's Law of 25 March 2020 that transposed DAC 6 defines two categories of intermediaries:

- (i) Promoters: any person that designs, markets, organizes, makes available for implementation or manages the implementation of a reportable cross-border arrangement; and
- (ii) Service providers: any person that, having regard to the relevant facts and circum-



stances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organizing, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Investment funds generally are not considered promoters under DAC 6 because they do not actively participate in designing, marketing or implementing reportable arrangements. However, they could be regarded as service providers under DAC 6 if investors use them as part of a wider reportable cross-border arrangement, and they know or could reasonably be expected to know about reportable cross-border arrangements.

Under Luxembourg's Law of 25 March 2020, Luxembourg tax authorities can assess the procedures and processes set up to comply with reporting obligations. If these authorities have questions, request information or perform an audit, the company must justify its relevant actions and decisions and show it acts in good faith.

Therefore, professionals should have internal procedures, a training plan and comprehensive defense documentation in place for all arrangements under scope; this documentation can provide an overall picture of how the company's operations and businesses apply and comply with DAC 6's requirements.

Notably, the Luxembourg tax authorities have already sent letters to certain Luxembourg market players who may be considered intermediaries protected by DAC 6's legal professional privilege.<sup>(v)</sup> They requested, within a relatively short time period, information linked to these players' notification and reporting obligations, such as their written procedures, technical descriptions of their IT systems, their in-



ternal and/or external control process to identify and address the risks of non-compliance, and a description of other measures put in place (e.g., staff training).<sup>(vi)</sup>

Intermediaries that do not benefit from this exemption, such as management companies or Luxembourg funds, may also receive these requests in the near future.

### Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS)

According to the Luxembourg FATCA and CRS regulations,<sup>(vii)</sup> Luxembourg financial institutions must provide certain information on financial accounts held by reportable persons to the Luxembourg tax authorities annually, which then transmit this information to the relevant tax authorities.

Unless they meet specific conditions that exempt them from this reporting requirement, investment funds and management companies are, in principle, classified as reporting financial institutions and must be registered for FATCA and file an annual reporting.

In June 2020, a new FATCA/CRS law,<sup>(viii)</sup> which amended existing legislation, explicitly obliged Luxembourg financial institutions to keep records of actions taken for 10 years and supporting evidence to ensure they comply with their due diligence and reporting obligations. In addition, the Luxembourg tax authorities could request access to the financial institution's register of actions, supporting evidence, and policies and procedures.

Generally, investment funds delegate their FATCA and CRS due diligence and reporting obligations to another party, such as the management company or a transfer agent. Nevertheless, as investment funds remain responsible for this compliance, funds must properly oversee this process.

The Luxembourg tax authorities have already sent notifications to some Luxembourg investment funds requesting:

- i. Information about their FATCA/CRS status;
- ii. Written explanation and documentation supporting this status;
- iii. Written justification on why no reports (including nil reports) have been filed; and
- iv. Copies of self-certifications provided to other counterparties.

### Penalties

The penalties of non-compliance with these different regulations alone merit their inclusion in professionals' internal audit plans:

- DAC 6: a fine of EUR250,000 per missing, late or wrong reporting.
- FATCA/CRS: a lump sum fine of EUR10,000, plus another fine up to EUR250,000 that can be increased by a maximum of 0.5% of the amounts not reported for FATCA/CRS.
- AML: the CSSF may issue warnings, reprimands, administrative fines (up to millions of euros) or occupational prohibitions. These administrative or prudential sanctions are without prejudice to the imposition of criminal sanctions (imprisonment and/or a fine) by criminal courts against professionals that deliberately violate their legal provisions.

Are you ready to cover these tax topics in your next internal audit plan?

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- i) Management being the first line of defense, and compliance the second line of defense.
- ii) CSSF, circular 18/698 dated 23 August 2018
- iii) CSSF, AML/CFT controls applied in terms of preventing tax offences, November 8, 2022.
- iv) Council Directive (EU) 2018/822 amending Directive 2011/16/EU (DAC 6) as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements as transposed into Luxembourg legislation by the Law of 25 March 2020.
- v) Lawyers, auditors and chartered accountants, operating within limits applying to their respective professions, benefit from a reporting information waiver (legal professional privilege).
- vi) Please note that this article was published after the judgement of the Court of Justice of the European Union (Case C-694/20) was published, where the Court considers that a lawyer's obligation to inform other intermediaries involved is not necessary and infringes the right to respect their client communications. Therefore, this article does not cover this judgment's practical consequences.
- vii) The FATCA Law dated 28 March 2014, and the Luxembourg CRS Law dated 18 December 2015.
- viii) The Law of 18 June 2020.