

Conference organized by the
Institute for Austrian and International Tax Law, Vienna

Controlled Foreign Company Legislation

RUST CONFERENCE 2019
QUESTIONNAIRE

GUIDELINES

Controlled Foreign Company Legislation

1. Characteristics of [adjectival form for your country, e.g. French] CFC Legislation

Describe the basic characteristics of your country's CFC legislation:

- What are the main policy considerations regarding CFC legislation in your country? Have the policy rationales changed over time as corporate income tax rates have fallen, ownership of companies has spread more geographically and countries have moved away from worldwide to (partially) territorial systems?
- How is income attributed from the CFC to the shareholder? Does your country follow a piercing the veil / deemed dividend approach?
- How does your country define a CFC? What are the control requirements? Are also lower-tier companies covered? How does your country define low taxation (e.g. white list or black list, percentage of the domestic nominal or effective tax rate)?
- How does your country define CFC income? Does the CFC legislation apply to active and passive income alike or only to certain specific types of passive income? Does the CFC charge include all income received by the CFC, or only income that has been diverted from your country? What are the exemptions and thresholds in your country?
- How does your country compute CFC income? What happens if the CFC does not provide accounts to resident shareholders (e.g. deemed rate of return)?
- What are the rules to prevent or eliminate double taxation?
- How is income earned by lower-tier subsidiaries treated?
- Does your country apply CFC legislation only to corporations or also to individuals as shareholders?

2. Implementation of Articles 7 and 8 of the Anti-Tax-Avoidance Directive

If your country is an EU country:

- How will your country implement Articles 7 and 8 of the Anti-Tax-Avoidance Directive (ATAD)?
- What are the basic changes vis-à-vis the current CFC legislation in force?
- Will your country opt for Article 7(2)(a) or (b) of the ATAD?
- Will your country go beyond the minimum standard?

3. Special CFC Rules

Does your country have different types of CFC rules? Some countries have specific CFC rules for extremely passive income under which the control requirement is lowered (e.g. in Germany Section 7(6) of the AStG for income which is of a “capital investment nature”). Other countries have specific rules for passive foreign investment companies (PFICs) under which they oblige the shareholders to choose between current taxation on the income of the PFIC or a deferral of such income subject to a deemed tax and interest regime.

What are typical ways to avoid falling under the scope of CFC legislation? Does your country have other anti-deferral rules (e.g. for funds and trusts)?

4. CFC Legislation and Other Anti-Abuse Provisions

What is the relationship between CFC legislation and (other) anti-abuse provisions? If your country has a general anti-avoidance provision, are investments made through mere letterbox companies covered by the general anti-avoidance provision or by CFC legislation? Can the general anti-avoidance rule still apply if an investment is not covered by CFC legislation (e.g. if the income is not regarded as passive, if the participation threshold is not met by a few percentage points or if the income is taxed a little bit higher than the low-income threshold), or can you conclude – e contrario – that investments which are outside the scope of the domestic CFC legislation cannot be regarded as abusive?

5. CFC Legislation and Tax Treaties

What is the relationship between CFC legislation and tax treaties? Can tax treaties limit the application of CFC legislation (see e.g. the *Schneider* judgment

of the French *Conseil d'État*) or does your country follow the view that CFC legislation is not affected by tax treaties (see e.g. the *A Oyj Abp* judgment of the Finnish Supreme Administrative Court; see *also* paragraph 81 of the Commentary on Article 1 of the OECD Model and paragraph 14 of the Commentary on Article 7 of the OECD Model)? If your country is of the view that treaties can limit the application of CFC legislation, will the introduction of the new Article 1(3) of the OECD Model (2017) change the picture?

6. CFC Legislation and Constitutional Law / EU law

Are there constitutional limits on the implementation of CFC legislation? If your country is an EU country: What are the possible conflicts between your CFC legislation and the fundamental freedoms? Does your country limit the application of CFC legislation to wholly artificial arrangements? How does your country see the requirements of the free movement of capital in the context of the design of CFC legislation in relation to third countries? Does your country believe that Articles 7 and 8 of the ATAD are compatible with primary EU law?

7. Improving the Current Rules

What are the main flaws of the CFC rules currently in force in your country? How would you attempt to improve the CFC rules of your country? How can effective rules be achieved that do not unduly increase compliance costs and administrative burdens? Although one of the benefits of CFC rules can be their relatively mechanical application, CFC rules that are entirely mechanical might not be as effective as rules that allow more flexibility. However, flexibility can also create uncertainty, which could affect the costs of both applying and complying with CFC rules. CFC rules must strike a balance between the reduced complexity inherent in mechanical rules and the effectiveness of more subjective rules.

8. Outlook: The Future of CFC Legislation

How does your country believe CFC legislation will develop in the future?

After the United States enacted Subpart F legislation in 1962, many countries followed this approach and introduced CFC legislation, as well. For instance Germany enacted its CFC legislation in Article 7 et seq. of the AStG in 1972, France in Article 209B of the CGI in 1980 and the United Kingdom in Section 747 of the ICTA in 1984. During the last decade, one could observe an opposite trend. Corporate tax rates have been declining in countries with strong CFC legislation, thereby reducing the tax rate differences between high- and low-tax countries and making CFC legislation less relevant. Many countries shifted from a worldwide tax system to a (partially) territorial system. Companies escaped US Subpart F legislation through inversions or check-the-box regulations. In Europe, the *Cadbury Schweppes* judgment of the ECJ made it more difficult for countries to apply CFC legislation. The French *Conseil d'État* declared its CFC legislation to be incompatible with tax treaties.

However, in recent years this trend now seems to have been reversed and the interest in CFC legislation seems to have been revived. In Europe, countries are obliged to implement the CFC legislation of the ATAD by the end of 2019. In addition, as part of the OECD BEPS project, the Action 3 Final Report ("Designing Effective Controlled Foreign Company Rules") encourages countries to introduce robust CFC legislation or to adapt their already existing rules to make them more robust.

Does your country think that countries should have robust CFC legislation? How does your country see the future of CFC legislation?

Some countries favour a global minimum tax for (digital) companies (see the French-German initiative at the EU level). Would expanded CFC legislation be a good solution to make sure that corporate income is taxed everywhere at a minimum level?

The tax revenue gained from CFC legislation is relatively small. On the other hand, the administrative effort to comply with CFC legislation is very high for both enterprises and tax administrations alike. Can CFC legislation be justified by having a deterrent effect against shifting passive income to low-tax jurisdictions?

Some developing countries might not even have the capacity to administer CFC legislation effectively. Is it advisable for those countries to introduce (simplified) CFC legislation?

Does your country believe that a general anti-abuse rule would be sufficient to tackle the artificial shifting of income to other countries? Should the focus be on the development of provisions similar to the CCCTB so that CFC legislation would no longer be necessary?

How should capital importing countries address the type of risk targeted by CFC legislation when the parent entities of MNEs operating in their territories are located elsewhere?

Paper length: 20 pages, Times New Roman 12 pt.

Format: preferably Microsoft Word

Bibliographic references (footnotes) and quotations: Follow the IBFD guidelines, for download under <https://www.ibfd.org/Authors-Correspondents/Publish-book-IBFD>

The Questionnaire does not necessarily have to be followed question by question (e.g. where there is nothing to report from your jurisdiction). Rather, the Questionnaire should stimulate your thinking around the various topics outlined.

Deadline for delivery of the paper: 15 May 2019

Provide a **brief biographical statement** (3-5 lines) for the List of Contributors in the book by the above-mentioned deadline. Ensure that **graphics and charts** in the final version are **black-and-white** or **greyscale only** (*no* colour graphics are allowed for the book!), and email them as separate files in xlsx, docx, pptx, jpg or tif format. Resolution of images must be at least **300 DPI** to ensure good quality for printing.

The national reports (papers) will be made available for download on a password-protected conference website, so that the conference participants can be well prepared for the discussions.

On the basis of the national reports, we will identify the most relevant topics and select speakers who will present selected issues in a three-minute input statement to stimulate public debate and discussion.

After the conference, there will be a short period of time granted for authors to include the findings of the conference in their respective papers. We will organize linguistic editing of the final reports.

If you have any questions or concerns, do not hesitate to contact us at renee.pestuka@wu.ac.at. We will be happy to assist you.