vided by ATAD hence seems too restrictive in practice, both as regards the qualifying assets and the duration.

### 3.6. Refusal to use the options of interest/ guarantee granted by ATAD

It is interesting to note that the Bill does not take advantage of the option granted by the ATAD to charge interest or to subject the instalment payment facility to the provision of a guarantee. This is in line with the currently applicable rules on exit taxation in Luxembourg.

## 4. Conclusion

The Bill implements more or less literally Article 5 ATAD as regards mandatory exit tax legislation throughout the EU. The new five-year instalment payment facility will become applicable in Luxembourg as of 1 January 2020.

Out of the several possible exit taxation mechanisms, which have been considered by the CJEU as proportionate restrictions of the fundamental freedoms, the ATAD does not, in our view, contain the least restrictive. In this regard, the authors consider that the amendments to transpose ATAD into Luxembourg legislation to render the Existing Deferral Mechanism, in line with the aforementioned case law of the CJEU, as unnecessary.

The provisions of ATAD may prevent double non taxation situations on transfers involving Member States, but in the authors' view, a more elegant proposal would have been possible.

# Bill of law n° 7318 implementing the ATAD - overview and selected questions in relation to the forthcoming CFC regime

Guy van der Heyden, *Partner, PwC*

Johan Leonard, *Partner, NautaDutilh*

*An overview of the controlled foreign corporation ("CFC") regime introduced under Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the so-called Anti-Tax Avoidance Directive [the "ATAD"]) appeared in previous editions, in two separate parts. The first part*[1] *described the rules of the ATAD and the options which were available to Luxembourg. The second part*[2] *dealt with the potential interactions of the ATAD's CFC rules with EU law and Luxembourg's double tax treaties.*

*In the meantime, the draft Bill n° 7318 (the "Bill") was published by the Luxembourg Government on 19 June 2018 with the aim of implementing the ATAD into Luxembourg domestic law for financial years starting as from 1 January 2019. At the time of the finalisation of this article*[3]*, the legislative process to approve the Bill had not been completed. Therefore, the text of the Bill could still be amended before the final vote by the Luxembourg Parliament.*

## 1. The implementation of the ATAD and the choices made by the Luxembourg law-makers

As a reminder, the ATAD introduced a set of rules aiming at directly taxing in the hands of a company the undistributed income of some of its controlled foreign subsidiaries or permanent establishments to the extent this income is not subject to a level of taxation which is deemed sufficient when compared to the level of taxation which would have occurred if realised by the taxpayer itself in its jurisdiction. Under the Bill, the CFC regime is to be introduced through a new Article 164*ter* inserted in the Luxembourg income tax law ("*ITL*").

### 1.1. What constitutes a CFC

Article 164*ter*(1), items 1. and 2., in line with the ATAD, provides that an entity will be deemed to be a CFC if (i) either it is a foreign permanent establishment (a "*PE*")[4]

1 J. Leonard, "The introduction of CFC rules in Luxembourg – Part 1: Overview of the CFC rules under the anti-tax avoidance Directive", *RGFL*, 2017/3, pp. 63-67.

2 J. Leonard, "The introduction of CFC rules in Luxembourg – Part 2: Interactions with EU law and double tax treaties", *RGFL*, 2018/2, pp. 37-43.

3 This article has been finalised on 3 November 2018.

4 Although the Bill does not specify which PEs are targeted by the CFC rules, it seems reasonable to consider that only the PEs of the taxpayer itself should fall within the scope of the Luxembourg CFC rules. This approach appears consistent with the fact that the Bill does not provide any guidance as to which PEs could qualify as a CFC under these rules (for instance, the Bill could have provided that the targeted PEs are those of the taxpayer and of foreign companies meeting the 50% control test). Any control test is irrelevant if the scope of the CFC rules is (as we believe) restricted to the PEs of the taxpayer itself and not those of other entities.

of a Luxembourg taxpayer, or it is a subsidiary of a Luxembourg taxpayer to the extent that the taxpayer holds, together with its associated enterprise, a direct or indirect participation of more than 50% in the subsidiary (it being understood that this threshold concerns the participation in the share capital, voting rights, or the entitlement to the income of the subsidiary); and (ii) the subsidiary or PE is subject to an effective level of taxation which is lower than 50% of the Luxembourg corporate income tax that would have been due had the provisions of the ITL applied to the relevant income.

## 1.2. Clarification of the concept of "associated enterprise" and the determination of the control threshold

The Bill, as complemented by its accompanying commentary, provides information on the concept of "associated enterprise" and how to determine whether a company is to be considered as being controlled by the taxpayer for the purpose of applying the CFC rules.

It is important to note that the application of this concept of "associated enterprise", as defined under Article 164*ter*(2) ITL, is not limited in scope to the CFC regime, but also applies to the ITL in its entirety, including *inter alia* some other measures of the Bill (*e.g.*, the carve-out of "stand-alone" entities from the interest deduction limitation that would otherwise apply for entities which are not part of an accounting consolidated group and have no associated enterprise within the meaning of the definition set out under the CFC provisions of Article 164*ter* ITL). As a note, the concept of "related enterprise" (*entreprise liée*) of Articles 56 and 56*bis* ITL is not to be confused with this concept of "associated enterprise" (*entreprise associée*) for the purpose of applying these provisions, as the definitions differ slightly.

Article 164*ter*(2) ITL specifies that associated enterprises may be any resident or non-resident individuals, entities subject to Luxembourg corporate income tax, or entities which are transparent under Luxembourg law. The association threshold is set at 25% or more, based on legal or economic control, directly or indirectly. The threshold applies to entities held by the relevant taxpayer, as well as entities or individuals that hold the taxpayer in line with the association threshold.

For illustration purposes, let us assume that a Luxembourg taxpayer (L) holds a 30% equity stake in a foreign company (F1) which holds 60% of the share capital of a subsidiary located in another jurisdiction (F2).

In this scenario, it would appear that F1 should not be considered as a CFC of L, given that L does not control F1 (as it does not hold more than 50% of F1). However, if F2 is located in a low-taxed jurisdiction, F2 should be considered as a CFC of L, given that F1 qualifies as an associated enterprise of L (as L holds 25% or more in F1) and that L, "together with its associated enterprises" (*i.e.* F1 in the case at hand), controls over 50% of F2. L would have to include 18% (30% multiplied by 60%) of the undistributed profits of F2 that qualify as "CFC income" (see below)[5]. It is interesting to note that, even if F1 were to be situated in a low-taxed jurisdiction, the CFC rules could not apply to any of F1's undistributed income, even though the same rules would apply to the relevant portion of the income of its own subsidiary, F2.

## 1.3. Low-taxed income

To fall within the scope of the CFC regime, the effective tax burden of the CFC must be compared to the effective taxation which would have been borne by the CFC had it been a Luxembourg company subject to corporate income tax. A level of taxation falling below half of the corporate income tax which would have been borne had the income been subject to Luxembourg taxation in accordance with the ITL will be deemed as too low, and thus would qualify the entity as a CFC when the control condition is met.

The final tax burden of the CFC which will be the basis for this assessment includes all taxes borne by the CFC which are comparable to the Luxembourg corporate income tax (*impôt sur le revenu des collectivités*, the "*Luxembourg CIT*"), taking into account potential subsequent tax refunds or the absence of effective recovery from the local tax authorities. It would thus not seem to take into account potential withholding tax, which could increase the foreign tax burden to a level exceeding the threshold of 50% of the Luxembourg CIT. However, withholding tax should remain creditable against the Luxembourg CIT burden on its "CFC income" (see below), even if, as discussed below, one might question the practical application of this rule. Also, the question arises of whether income tax levied by a regional subdivision of a State may be deemed comparable to the Luxembourg CIT and thus taken into account to determine whether the CFC is subject to a low level of taxation. It would seem to the authors that, unless levied at a pure local level (city taxes), it would be unfair not to take this level of taxation into consideration, as this would be against the spirit of the law and not meet the policy considerations underlying the CFC rules as recommended by the OECD[6] and implemented through the ATAD.

Given that the Bill provides that the reference framework is the Luxembourg CIT which would be due when applying the provisions of the ITL ("[…] *conformément aux dispositions de la présente loi*"), it would seem that theo-

5 Even in the scenario where 100% of the income is attributable to the significant functions performed in Luxembourg.

6 As a reminder, the OECD BEPS project aims at fighting tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.

retical benefits under Luxembourg double tax treaties should *prima facie* not be taken into consideration to determine the tax burden of the CFC if it were a Luxembourg entity, strictly speaking. However, we believe that this restrictive approach could lead to unfair and unjustified results and thus think that a flexible interpretation may have to be adopted when applicable.

Within the draft text of Article 164*ter*(2) ITL, one important precision is that the income attributable to any foreign PE of the CFC is to be disregarded for the purpose of determining whether or not the CFC's income is subject to a sufficient level of taxation, so long as the PE's income is exempt or not subject to taxation in the jurisdiction of the CFC. The reason given for this is to prevent CFCs from being able to fall outside the scope of the CFC rules by combining the tax borne by the CFC and its PE in their respective jurisdictions.

It should be mentioned that the French version of the ATAD seems slightly misleading regarding the application of this rule. It provides that "*l'établissement stable d'une société étrangère contrôlée qui n'est pas imposable ou qui est exonérée d'impôt sur le territoire où elle est située n'est pas pris en considération*". The use of the feminine "*exonérée*" seems to refer to the tax treatment of the CFC (feminine in French) in its jurisdiction, irrespective of the existence of the PE (masculine in French). The English version of the ATAD appears clearer by providing that "the permanent establishment of a controlled foreign company that is not subject to tax or is exempt from tax in the jurisdiction of the controlled foreign company shall not be taken into account". The Bill does not use the terms "*société étrangère controlée*" under this provision but refers to "*organisme à caractère collectif au sens de l'alinéa 1er*" which is a masculine, therefore the second part of the provision could refer to either of the CFC or the PE and consequently, the English version of the ATAD is useful to give this provision the meaning which was intended under the ATAD. Accordingly, when the income of the PE of a CFC is exempt in the hands of the CFC (which may or may not be otherwise subject to a sufficient level of taxation in its jurisdiction on its other sources of income), the income attributable to the PE should not be taken into account in the context of this provision.

Based on this principle, it seems that, in a structure where a Luxembourg company controls a foreign subsidiary located in a tax haven and its only income is attributable to a foreign permanent establishment that is not subject to effective taxation in its jurisdiction either, the foreign undistributed income does not seem to be captured by these CFC rules (based on our view that the only PE targeted by the CFC rules are those of the taxpayer itself). Of course, other tax issues would arise from such a structure, but not directly through the application of the Bill's CFC rules.

What about the corporate tax which would be levied on the CFC income in jurisdictions other than its own? This could be the case if the CFC were to be held indirectly by the Luxembourg taxpayer through another entity located in a jurisdiction that imposes tax on the undistributed profits of the CFC under its own CFC rules. From international tax policy perspective, it could be questioned whether there is any need for a CFC to remain characterised as such at the level of a taxpayer up the chain when another jurisdiction at a closer intermediary level already applies CFC rules implementing the ATAD, making it unnecessarily complicated to manage when faced with a multi-tier structure involving more than one EU jurisdiction. However, the ATAD and the Bill are clear on this: the taxation which is to be taken into consideration for the purpose of checking whether or not the 50% threshold for the level of corporate income tax which would have be levied in the CFC's jurisdiction is passed, is limited to the tax supported by the CFC itself on its own income. It does not include tax that would be levied on the undistributed income of the CFC at an intermediary level due to the application of CFC rules in another jurisdiction (or even to another entity in Luxembourg) because that is tax owed and supported by a parent of the CFC and not by the CFC itself. This provision only concerns the determination of whether an entity formally speaking qualifies as a CFC. By application of tax credit rules, it should be possible to reduce or fully mitigate the actual impact of this conclusion, as addressed further in this article.

As a final note on this point, the impact of any losses brought forward available to the CFC needs to be taken into consideration, to avoid any situation where an entity would fall within the scope of the CFC rules due to an insufficient level of taxation albeit only attributable to a legitimate offset of its losses brought forward against its income[7].

## 1.4. CFC income and the "options"

The ATAD left Member States with two alternatives when implementing the CFC regime: (i) the "categorical" approach ("*Option A*") which, in a nutshell, targets entities based on the passive nature of their assets and the income they generate, and (ii) the "transactional" approach ("*Option B*") which aims at discouraging the shifting of profits to low-taxed jurisdictions under "non-genuine arrangements".

Article 164*ter*(3) confirms that Luxembourg has opted for Option B which, as previously discussed, appears to involve a more subjective and less automatic approach than Option A, and means that the tax authorities will

7 Chambre des députés du Grand-Duché de Luxembourg (chd.lu), projet de loi n° 7318, commentaire des articles, p. 19, § 3, *in fine*.

need to assess whether an underlying structure constitutes a "non-genuine arrangement" or not.

Accordingly, the undistributed income of an entity or PE, which qualifies as a CFC based on the principles discussed earlier, is to be included in the Luxembourg taxpayer's taxable base if it arises from "non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage". This is the case if the CFC (i) would not own the assets which generate its income; or (ii) would not have undertaken the risks; were it not controlled by the taxpayer where the significant people functions[8], which are relevant to those assets and risks, are carried out and play an essential role in generating the CFC income. The net income[9] to be included in the taxable base is to be determined based on the arm's length principle set out under Articles 56 and 56*bis* ITL.

Beyond the theoretical considerations triggered by this concept of "non-genuine arrangements"[10], one could wonder about the practical application of the rule in Luxembourg. There is a high chance that, in most cases (if not virtually all), CFC rules would apply in Luxembourg only if the tax authorities challenge the genuine nature of the arrangement. Under Option A, other than having to address the subjective question of the application of a carve-out granted for a CFC with substantive economic activity in its jurisdiction, it seems that a taxpayer might have to report spontaneously CFC income based on objective factors, *i.e*. the existence of a low-taxed foreign subsidiary holding passive income generating assets. Under the Bill which applies Option B, it is hard to conceive a scenario where a taxpayer would voluntarily report a structure as being artificial and thus spontaneously increase its taxable base to include the relevant CFC income[11]. Accordingly, discussions related to the application of the CFC rules are most likely to arise in the context of tax adjustments issued by the tax authorities against a taxpayer's tax returns. To be able successfully to challenge a structure and apply the CFC rules of the Bill, it would have to be demonstrated not only that the significant people functions which have generated the CFC income were not performed by the CFC, but also that these functions were effectively carried on in Luxembourg. There should not be any income inclusion in the absence of significant people functions in Luxembourg in relation to the assets and risk of the CFC, even if the Luxembourg taxpayer has an important presence in Luxembourg (unrelated to the income stream arising in the CFC). The correlation between the functions and the CFC income would need to be demonstrated.

The seemingly basic notion of "undistributed income" can also lead to questions, in particular in the presence of a multi-tier structure. If the CFC is held through intermediate subsidiaries, it would seem fair to consider that the income has been distributed (and thus not targeted by the rules) if a dividend has been paid by the CFC, even if this dividend has not made its way up the chain to the Luxembourg taxpayer.

## 1.5. The income inclusion

Income which has to be included by the taxpayer under the provisions of Article 164*ter* ("*CFC income*") will be treated as commercial profit[12] in the hands of the Luxembourg taxpayer, and expenses will only be deductible to the extent linked with the CFC income. If the CFC income of a given year is negative, it is not included in the taxable base of the taxpayer, as to do so would actually reduce its tax burden. The negative CFC income is however taken into consideration in subsequent tax years, so that future positive income will be reduced by any previously non-deducted negative CFC income. There is however a timing limitation: negative income realised by the CFC prior to 2019 may not be taken into account.

The Bill provides that, in cases where the CFC is a separate corporate entity, the portion of the CFC income to be included in the taxpayer's taxable base is to be computed in proportion to its participation in a CFC. Even if all significant people functions were to be performed by the taxpayer, that does not mean that CFC income has to be a portion of the profit which exceeds the taxpayer's economic rights in the CFC. Conversely, if the CFC is a PE of the taxpayer, all of the CFC income would be deemed to be attributable to the taxpayer, as the PE is 100% part of that taxpayer.

The inclusion is to occur in the tax year of the taxpayer during which the financial year of the CFC ends.

Upon actual distribution of dividend by the CFC, the taxable base of the taxpayer will be reduced by the portion of the distribution that was previously included because of the application of the CFC provisions. The Bill provides that this rule only applies if the dividend is included in the net income of the taxpayer ("*ces bénéfices distribués sont inclus dans le revenu net du contribuable*"). In the same vein, the Bill goes on and adds that the deduction is limited to the portion of the dividend which is subject to tax in Luxembourg ("[…] *jusqu'à concurrence du mon-*

8 The Bill, as the ATAD in the French version, only refers to important functions ("*fonctions importantes*") where the ATAD in the English version uses the terms "significant people function", which is, in our view, more specific than the French version and the Bill.

9 As further discussed below, negative CFC income is not included in the taxable base of the taxpayer but can be carried forward to offset positive CFC income of subsequent tax years.

10 See J. Leonard, "The introduction of CFC rules in Luxembourg – Part 2: Interactions with EU law and double tax treaties", *op. cit.*, pp. 37-43, for a discussion on this concept and the correlations with EU case-law.

11 The same comment could have been made had Option A been chosen, due to the carve-out for CFCs carrying on a substantive economic activity.

12 The qualification as commercial income could have an adverse impact in case the CFC income inclusion occurs at the level of a SICAR, as it should not qualify as income deriving from transferable securities within the meaning of the SICAR law.

*tant imposable de ces distributions de bénéfices*"), which seem to indicate that if the dividend is already exempt (we assume that this targets income which would already be exempt under the participation exemption regime either under Article 166 ITL or in accordance with a dividend exemption granted under a tax treaty), there would be no deduction for previously included CFC income.

This principle makes sense, obviously, but given that a CFC is by definition an entity which is subject to a level of taxation which is lower than half of the Luxembourg CIT it would have borne in Luxembourg, the cases where this precision would apply seem to be very limited, taking into account the fact that, unless the subsidiary is EU-based or unless a tax treaty provides otherwise, it needs to meet the "subject-to-tax test" in order for its dividends to be exempt in the hands of the taxpayer, this test being comparable to the one under the CFC rules. One could think of cases where a distinction is made at the level of the Luxembourg parent between the dividend generated from income which was subject to tax in the hands of the subsidiary, which benefits from the exemption of Article 166 ITL, and the dividend generated from income which did not meet the "subject-to-tax test". Another scenario might be where an EU-based subsidiary falls under the rules of the Luxembourg CFC regime due to a specific domestic tax treatment of a given activity. The Luxembourg participation exemption would remain available without any consideration to the actual effective taxation of the subsidiary to the extent it is an entity listed in the Parent-Subsidiary Directive and is subject to the normal corporate income tax regime in its jurisdiction (and the holding requirements are met) even if, for the purpose of the Luxembourg CFC rules it might be considered as being in a low-taxed jurisdiction. Another case would be a situation where the dividend is exempt under a conventional participation exemption granted under a double tax treaty which does not explicitly impose a subject-to-tax test (*e.g.*, the Luxembourg-Switzerland tax treaty). But if the dividends of a CFC were to be exempt under the participation exemption regime for some reason, then the simple way to avoid the negative effect of the CFC rules would be to distribute profit before the end of each financial year, so there is no "undistributed profit" to be included as commercial profit in the hands of the taxpayer.

What about the case where the Luxembourg taxpayer holds an entity that must be regarded as a CFC through an intermediary company (for instance a Dutch BV), and the Luxembourg taxpayer included the CFC income in its taxable base given that it carried out the significant people functions which have generated the CFC income? Let us assume that the CFC rules did not even apply at the level of the Dutch BV. (As mentioned, the CFC regime imposed under the ATAD may likely lead to potential inconsistencies in practice, in particular when faced with a structure set up as a chain of companies located in the EU. The Netherlands might apply Option A and, accordingly, may not qualify a subsidiary as a CFC due to the nature of its income or because it will apply the carve-out for entities carrying out "substantive economic activity"). The same entity, held in our example by the Luxembourg taxpayer through the Dutch BV, would be in the scope of the Luxembourg CFC regime if Luxembourg considers that the arrangement is non-genuine and that the income is generated by significant people functions performed in Luxembourg. The exclusion for previously included CFC income only seem to cover the situation where the CFC distributes the dividend to the taxpayer, *i.e.* in case of a direct participation in the CFC ("*lorsque la société étrangère controlee* […] *distribue des bénéfices au contribuable* […]"). Therefore, in our example, a dividend from the Dutch BV would not lead to a deduction for previously included CFC income in the hands of the Luxembourg taxpayer. It will only be exempt under the participation exemption regime, if the conditions are met. Although it would be complicated to conceive a scenario where the formal requirements of the participation exemption regime would not be met in a situation like the one at hand, the exemption on a dividend from the BV in our example could be denied based on the related anti-abuse rule. A similarly undesirable outcome would be achieved if the BV were to be replaced by a subsidiary that is not subject to tax but whose income does not fall within the scope of the Luxembourg CFC rules. The Luxembourg company would be subject to tax on the CFC income inclusion and, upon a subsequent distribution of the income to the intermediate company and then up to the Luxembourg company, no deduction should be granted to the Luxembourg company, regardless that the underlying source was the previously undistributed CFC income which has been included in the Luxembourg taxable base. The CFC income would be taxed twice in the hands of the Luxembourg company, economically speaking.

Similar rules apply for a capital gain in relation to a CFC which is a subsidiary or a PE – previously included CFC income should be taken into consideration to reduce the portion of the taxable capital gain which relates to the CFC income. The remarks and questions mentioned above in relation to the dividend regime similarly apply to situations involving capital gains, in particular when dealing with multi-tier structures.

The taxable base for municipal business tax ("*MBT*") purposes will not include CFC income. However, the above rules in relation to profit distributions from the CFC, or in relation to capital gains in relation to the CFC, will also only apply for Luxembourg CIT purposes, meaning that dividends or capital gains which were subject to tax, but reduced by previously included CFC income for Luxembourg CIT purposes, will remain fully taxable for MBT purposes.

And finally, the Luxembourg taxpayer can credit foreign taxes which were incurred in relation to the CFC income, in order to reduce its Luxembourg CIT burden, up to the amount of the Luxembourg CIT, and in line with existing provisions in relation to creditable taxes. The precision that the creditable amount may not exceed the Luxembourg CIT is once again puzzling as, by definition, the level of taxation on the CFC income is presumably below 50% of the Luxembourg CIT. Is this limitation, which was not foreseen by the ATAD (and the same is true for the limitations provided in relation to dividends and capital gains related to CFC income, ensure that the avoidance of double taxation does not actually lead to an excessive benefit for the taxpayer if another exemption applies), in place to cover the case where the combination of the taxation of the CFC in its jurisdiction and the withholding tax levied upon distribution of profit by the CFC actually exceeds the Luxembourg CIT on the CFC income? Indeed, as mentioned earlier, it seems that withholding tax borne by the entity would not be taken into consideration to consider whether it is subject to low taxation and thus qualifies as a CFC. However, as confirmed in the commentary, withholding tax may be credited by the taxpayer in the context of the inclusion of the CFC income. However, in practice, from a timing perspective, withholding tax will most likely be levied at a later stage when profit is distributed, after the tax year during which the CFC income was included in the taxpayer taxable base. Unless it is possible and acceptable to reopen and amend retroactively the tax returns of the taxpayer for the tax year during which the relevant CFC income was included in order to account for the related withholding tax levied down the road, then it is easy to envisage unfair scenarios where withholding tax may actually never be credited[13] and the taxpayer ends up with an excessive overall tax burden which is not in line with the objectives of the ATAD CFC regime or the OECD BEPS project.

## 2. Remarks on the application of the Luxembourg CFC rules in an international context

As mentioned earlier, the potential interplay between the Luxembourg CFC rules and, on the one hand, EU law and, on the other hand, the existing tax treaties concluded by Luxembourg, has been addressed in a previous article.

On this topic, it should be noted that neither the *exposé des motifs* of the Bill nor the commentary on the articles of the Bill make any reference to a potential incompatibility with the fundamental freedoms provided for in the EU treaties. There is no indication that the measures introduced by the ATAD are to be considered as a set of rules implementing an exhaustive and comprehensive harmonisation of a matter on a EU-wide level (which, if that would be the case, would mean that these measures could no longer be assessed on their conformity with EU primary law[14]). The various options that have been left to the Member States in many areas of the ATAD seem to indicate that the ATAD should not be construed as constituting such an exhaustive and comprehensive harmonisation. Considering that the Government has opted for Option B, the possibility of a potential conflict of the CFC rules with the EU Court of Justice's position on the freedom of establishment as determined in the Cadbury-Schweppes case seems however more limited.

Furthermore, there is no mention in the Bill's *exposé des motifs* and commentary to any potential incompatibility of the CFC rules foreseen by Article 164*ter* LIR with the double tax treaties concluded by Luxembourg. This is as such probably not surprising as one can assume that it was not the intention of the Government to point out potential legal uncertainties that might exist and be embedded in a political agreement and compromise reached between various EU Member States. Although the likelihood that discussions would arise on this subject between a taxpayer and the Luxembourg tax administration will probably be quite limited given that Option B has been chosen, it cannot be entirely excluded that the Luxembourg tax administration and the Luxembourg administrative courts may have to express their views one day on the reasoning developed by the French *Conseil d'État* in the *Schneider* case of 2001[15]. This could be a particular issue where the double tax treaty concerned does not contain a provision aligned with Article 1(3) of the latest version of the OECD Model Tax Convention, which establishes the principle that a double tax treaty does not affect the right of a contracting state to tax its own residents.

According to Article 164*ter*(4), 8°, LIR, a foreign tax credit is to be granted on the basis of Articles 134*bis* and 134*ter* LIR against the fraction of the tax relating to the net income to be included in the net income of the taxpayer, for the tax assessed and paid abroad by the CFC. Based on the wording of the commentary to Article 164*ter* LIR, the foreign tax assessed and paid by the CFC that entitles to a foreign tax credit in accordance with Article 134*bis* and Article 134*ter* LIR includes withholding tax. The question arises whether this concerns the withholding tax suffered by the CFC when itself receiving the non-distributed income or whether it is related to the withholding tax paid by the CFC upon a subsequent distribution of the income to the Luxem-

13 Crediting withholding tax at the time of the distribution will in principle not be possible, as the dividend will not be taxed in the hand of the taxpayer in accordance with the rules of Art. 134*ter* ITL.

14 ECJ, 14 June 2018, C-440/17.

15 C.E. fr. (ass.), 28 juin 2002, n° 232276, *Sté Schneider Electric*, Juris-Data n° 2002-080182.

bourg taxpayer that previously included the income as CFC income (thereby implementing OECD recommendations in this respect). Assuming that the intention is to allow for a tax credit for withholding tax borne upon distribution by the CFC to the Luxembourg taxpayer, it should be noted that there is currently no indication as to how a potential (or likely) time gap between the moment of inclusion of the CFC income and the subsequent distribution of the previously included CFC income as a dividend would be dealt with in terms of ensuring that the taxpayer will be able to claim a foreign tax credit (*i.e.* the withholding tax on the dividend distributed by the CFC) on income that was included as CFC income in a previous year. Could it be that the intention is to allow for a credit of the withholding tax borne in a given year on the CFC income included in the taxable base of the taxpayer during that same year, even if these two amounts are not related? It would be desirable for this point to be further elaborated on in the context of the legislative process of the Bill and through the issuance of accompanying Grand-Ducal decrees.

In line with the provisions of the ATAD itself, the Bill does not contain any provisions regarding priority rules in case the CFC income would be part of the taxable basis of multiple taxpayers in different countries as a result of separate jurisdictions applying their own CFC rules, leaving taxpayers exposed to over-taxation in multiple EU territories. The fact that the same income would equally be included as CFC income in other EU Member States (being parent or subsidiary companies of the Luxembourg company that has significant people functions in relation to the income) would not be a ground for non-inclusion as CFC income in Luxembourg. The possibility to reduce or offset the Luxembourg income tax burden on the CFC income through foreign tax credits as provided by Articles 134*bis* and 134*ter* LIR would not fix the issue in this particular situation. Indeed, the new Article 164*ter*(4), 8°, LIR provides for a tax credit only in respect of taxes due and paid by the CFC. Therefore, income taxes suffered by other related entities in respect of the CFC income included in Luxembourg would not seem to qualify for a tax credit, which is unfortunate as this would have provided for a relatively straightforward solution to avoid an unjustified multiple taxation of the same income. One could assume that the Luxembourg Government did not want to create potential escape possibilities that were not explicitly provided for in the ATAD. Amending the ATAD itself may therefore appear as a necessity, to avoid placing the EU in its entirety in a competitively disadvantageous situation compared to the rest of the world.

# Fiscalité des bitcoin, blockchain et la technologie « des registres distribués »

Laurent Engel, *Partner, KPMG Luxembourg société coopérative*

La bulle des bitcoin et autres cryptomonnaies a éclaté ces derniers mois, et la CSSF a prévenu du risque de perte sur investissement en raison de leur haute volatilité et de leur qualité d'investissements spéculatifs. La CSSF insiste également sur le fait que les cryptomonnaies ne constituent pas de réelles monnaies et ne sont, de ce fait, ni contrôlées ni garanties par une banque centrale ou un système de garantie des dépôts. Il n'en reste pas moins que la valeur des cryptomonnaies a connu une augmentation sans précédent sur la période totale depuis leur création en 2009. Ce qui soulève un certain nombre de questions fiscales.

## 1. La technologie blockchain – fonctionnalité

Il paraît utile d'exposer, quoique de façon simplifiée, quelques concepts à base de la technologie dite « des registres distribués » (DLT – *Distributed Ledger Technology*), qui peut être conçue comme un système d'exploitation de données sur lequel « tourne » une cryptomonnaie[1]. Ainsi, la *DLT* soutenante au bitcoin est la blockchain et inversement, le bitcoin constitue une modalité d'application parmi d'autres de la blockchain. Il fonctionne sur base d'un réseau *peer-to-peer* dont les participants sont ceux qui ont activé un programme informatique à cet effet.

Le terme « registre distribué » implique qu'il s'agit d'un grand livre de comptes public et décentralisé. En effet, la chaîne de toutes les opérations effectuées depuis qu'une cryptomonnaie existe est sauvegardée dans le réseau. Chaque participant au réseau est le dépositaire d'un segment de la chaîne, et le réseau pris en son intégralité contient la chaîne entière.

C'est le potentiel de transfert décentralisé de valeurs qui est à la base du succès de la technologie blockchain. L'absence d'émetteur central permet aux parties à un transfert de cryptomonnaie d'éviter le contrôle d'un tiers. Ainsi, si à l'occasion d'une transaction financière « clas-

1 A. Schlund et H. Pongartz, « Distributed Ledger Technologie und Kryptowährungen – eine rechtliche Betrachtung », *DStR*, 2018, p. 598.