

Brexit, Trade and Tax

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Brexit, Trade and Tax (1)

Agenda

- Tax and the Brexit negotiations
- Tax and third countries – like the UK
- Tax and the Ireland/NI Protocol
- Tax, the UK, WTO and post-Brexit trade agreements
- The UK's post-Brexit tax strategy – external/internal

Brexit, Trade and Tax (2)

Tax and the Brexit negotiations

The Political Declaration para 77

“uphold the common high standards ... at the end of the transition period in the areas of state aid.....and **relevant tax matters**. The Parties should in particular...commit to the principles of **good governance** in the area of taxation and to the curbing of **harmful tax practices**”

Brexit, Trade and Tax (3)

Tax and the Brexit negotiations

PD implements “External Tax Strategy for Effective Taxation”

COM(2016) 24 final

“Certain negotiations were delayed as third countries found the wording of the clause to be unclear on the scope of the good governance requirements.” (para 3.1)

Brexit, Trade and Tax (4)

Tax and the Brexit negotiations

Titles of the draft agreements:

UK: “Comprehensive Free Trade Agreement” plus mezedes

EU: “New Partnership with the UK”

Is it surprising agreement is difficult?

Tax and the Brexit negotiations

EU draft includes:

- LPFS 2:1, 2:25 and 2:26 state aid, tax good governance, standards
- Includes X-border tax rulings and tax-planning
- Protocol - VAT and mutual assistance on taxes

Tax and the Brexit negotiations

UK draft “International Tax Cooperation and Standards” (art 29.1)

- “promote good governance in tax matters and improve international cooperation in the tax area”.
- “good governance...reflecting the OECD principles concerning fair tax competition, the global standards on tax transparency and exchange of information, and the OECD minimum standards against Base Erosion and Profit Shifting....”

Tax and the Brexit negotiations

Contrasts in LPF approach:

- extent, eg, in relation to tax rulings?
- enforceability?
- conflict between “new partnership” and “FTA” continues

Tax and third countries – like the UK

UK draft agreement Art 3.3: an FTA provision?

A product originates in a Party:

- when used there in production of a product, and it originates in:
 - (a) the other Party;
 - (b) a relevant partner country; (RPC incl. EU partners)
 - (c) a GSP country.

Tax and third countries – like the UK

Deal or no deal – selected results of 3rd country status

- Cumulation and EU agreements
- UK binding origin and EU binding origin to UK EORI
- UK binding tariff and EU binding origin to UK EORI
- Various authorisations

Tax and third countries – like the UK

Deal or no deal – selected results

- The Border Operating Model
- GVMS and the Kent access permit
- Increased use of transit regimes
- Decreased attraction of UK landbridge

Tax and third countries – like the UK

Deal or no deal – selected results of 3rd country status

- UK/EU VAT imports and exports
- LoB provisions in tax treaties
- Direct tax directives
- Instruments for X-border co-op and EU databases

Tax and the Ireland/NI Protocol

NI subject to:

- TFEU Arts 30 and 110 – duties and internal tax (Art 5.5)
- 2010/24/EU mutual assistance - tax recovery (Art 5.4, Annex 2)
- EU VAT and excise law on goods (Art 8, Annex 3)
- EU state aid (Art 10)

Tax and the Ireland/NI Protocol

- No duty GB → NI if direct transport unless “at risk” (Art 5.1)
- Goods presumed “at risk” unless:
 - no commercial processing in NI
 - Joint Committee criteria met (Art 5.2)
- What are the Joint Committee criteria?

Tax and the Ireland/NI Protocol

- Tax/duties “excepted matter” if applying to all UK: NI Act 1998
- The substantive and procedural tax law of UK/NI is affected
- EU state aid law applies:
 - “in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.”

Tax and the Ireland/NI Protocol

Some administrative results:

- 3 EU customs codes - GB (UK, CI, IoM), XI and XU
- UK has 2 VAT regimes – GB: goods and services
NI: goods – EU VAT
services – UK VAT

Tax and the Ireland/NI Protocol

Some UK legislative results:

- the Internal Market Bill
- the Taxation (Post-Transition Period) Bill

Tax and post-Brexit trade agreements

Old question: What does EU law do to tax?

New question: What does the EU/UK agreement do to tax?

New question: What do UK and WTO agreements do to tax?

Tax and post-Brexit trade agreements

One answer: FA 2020, section 97

To retaliate with tariffs the SoS must:

- have regard to international arrangements
- be authorised under international law

Tax and post-Brexit trade agreements

Tax exclusion clauses:

“The provisions of this Agreement shall not apply to taxation.”

Denmark/Russia Bilateral Investment Treaty 1993 quoted in *Rosinvest* 2010

Tax and post-Brexit trade agreements

Tax exclusion in bilateral trade agreements:

“This Agreement applies to taxation measures only in so far as such application is necessary to give effect to the provisions of this Agreement.”

UK/Japan Comprehensive Economic Partnership Agreement
Art 14.2

Tax and post-Brexit trade agreements

Other provisions affecting tax systems include:

- protection for tax agreements (Art 1.4.3)
- effective or equitable imposition/collection (Arts 1.4.6/8.3.2)
- subsidy includes “tax concession” (Art 12.6.2)

Note correlation with EU/Japan and GATS

Post-Brexit UK tax strategy

- Why does the EU have an external tax strategy?
- Does the UK need one?
- If so, should domestic policy choices be made first?
- What should a UK external tax strategy look like?

Post-Brexit UK tax strategy

Selected articles:

- “Tax and the UK/Japan Comprehensive Economic Partnership Agreement” [2020] British Tax Review 605-608
- “*Ireland and Apple v European Commission*: the competent exercise of competences” [2020] British Tax Review 609-620.
- “FA 2020, section 97 international trade disputes [2020] British Tax Review 497-499
- “EU Tax and Customs Negotiations: Where are we now?”
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