Reprinted from British Tax Review Issue 3, 2022

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

To subscribe, please go to
http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=338&productid=6614.

Full text articles from the British Tax Review are also available via subscription to *www.westlaw.co.uk*, or *https://www.checkpointworld.com*.

SWEET & MAXWELL

Brexit and the UK Direct Tax System—18 Months On

Philip Baker[*]

Dilpreet K. Dhanoa[**]

Abstract

This article considers the impact of Brexit on the UK direct tax system 18 months after the UK left the EU. The authors are of the view that the impact of Brexit has been minimal and have suggested reasons for this: the impact of external events; the fact that direct taxation generally remained within the competence of individual Member States; the UK's decision to continue to apply retained EU law; the dominant importance of OECD policy; the limited tax provisions in the Trade and Cooperation Agreement; and, the absence of any tax policy plans with respect to Brexit. The article explores these reasons and makes cautious predictions about the short-term future of direct taxation and the impact of Brexit.

Introduction

The UK ceased to be a member of the EU at midnight (Central European time (CET)) on 31 January 2020. This was followed by an implementation period during which effectively the same rules continued to apply as if the UK had not left the EU, and that ended at midnight (CET) on 31 December 2020. "Brexit" refers to this process.[1]

At the time of writing it is nearly 18 months, therefore, since the UK departed completely from the EU. This provides an opportunity to assess the impact of Brexit on the UK's direct tax system.[2] The authors' assessment is that, some 18 months on, the impact of Brexit on the direct tax system of the UK has been minimal. In this article we seek to justify this conclusion and to explain the reasons why the impact has been minimal. Identifying those reasons then provides a basis for some prognostication as to the medium-term future and, in particular, for how long

[*] QC (Barrister), Field Court Tax Chambers, Gray's Inn and Visiting Professor, Faculty of Law, University of Oxford.
[**] Barrister, Field Court Tax Chambers, Gray's Inn.

[1] There have been some excellent articles both leading up to and subsequent to Brexit. The authors have drawn on those articles here but have not necessarily cited each article on each occasion (partly as the same point is made in multiple articles). Particularly helpful have been the following: Judith Freedman and Glen Loutzenhiser, "Tax policy in the UK post-Brexit" (2022) 38 *Oxford Review of Economic Policy* 188; Belema Obuoforibo, "Brexit and the EU Tax Directives: The Emerging UK Tax Landscape" [2021] *European Taxation* 307; Alice Pirlot, "Some observations on the tax-related provisions in the EU-UK Trade and Cooperation Agreement" [2021] B.T.R. 1; Jasper Korving and Jerome van der Have, "Brexit: The Direct and Indirect Effect of the EU-UK Trade and Cooperation Agreement" [2022] *Intertax* 28; Christiana Panayi, "Brexit and Corporate Taxation: New Perspectives" (2022) 31(1) *E.C. Tax Review* 50; Francesco de Lillo, Teresa Morales and Oana Popa, "Brexit: Selected Tax Implications of the Trade and Cooperation Agreement" [2021] *European Taxation* 165.

[2] In this article the authors are concerned only with income tax, corporation tax and capital gains tax; other articles in this Issue deal with other tax developments. The specific issues relating to Northern Ireland and the Northern Ireland Protocol are not considered in this article.

the reasons for this minimal effect will either continue to prevail or cease to have an impact as time moves on.

In this article five broad reasons (with at least one containing a number of subsidiary matters) are identified which, in the authors' view, have meant that the impact of Brexit has been minimal.

The impact of "events"[3]

Brexit came at a time when a wide variety of other considerations had impacted on Government policy and fiscal policy in particular; these other "events" have had a much greater impact on fiscal policy than Brexit. In particular, Brexit took place at a time when the UK was passing through a series of lockdowns as a result of the COVID-19 pandemic, in which the UK was particularly hard hit.[4] Most institutions gathering data on COVID-19 have the UK recorded somewhere in its "Top 10" of reported cases and deaths for the pandemic outbreak.[5] Not only was the Government preoccupied with dealing with the pandemic, but the economic costs of the pandemic—in the form of increased expenses on healthcare and support payments for individuals and businesses—were dominating the immediate fiscal policy (and have left a legacy which will dominate fiscal policy for some time to come).

Subsequently the Russian invasion of Ukraine, and the repercussions (particularly the economic repercussions) have also begun to dominate Government policy. The rising cost of fuel, as a key factor in the rising cost of living crisis, has dominated and will continue to dominate fiscal policy much more than Brexit.[6] In the period since Brexit these events—the COVID-19 pandemic and the rising cost of living crisis—have had a much greater impact on fiscal and budgetary policy than exit from the EU. In the summary of their article on "Tax Policy in the UK Post-Brexit", Freedman and Loutzenhiser[7] say this:

> "The strong overall message is that financial and international pressures and constraints are more important to the direction of tax policy than the fact that the UK has left the EU."

The authors entirely agree.

[3] Harold MacMillan is reported to have been asked what was so difficult about being Prime Minister, and to have answered: "Events, my dear boy, events."

[4] Worldometer, "Coronavirus cases", *https://www.worldometers.info/coronavirus/#countries* [Accessed 27 June 2022].

[5] See, for example: Henrik Pettersson, Byron Manley and Sergio Hernandez, "Tracking Covid-19's global spread" (27 June 2022) *CNN Health*, *https://edition.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/* [Accessed 27 June 2022]; Hannah Ritchie et al, "United Kingdom: Coronavirus Pandemic Country Profile" (27 June 2022) *Our World in Data*, *https://ourworldindata.org/coronavirus/country/united-kingdom* [Accessed 27 June 2022]; FT Visual & Data Journalism team, "Coronavirus tracked: see how your country compares" (23 June 2022) *Financial Times*, *https://ig.ft.com/coronavirus-chart/?areas=eur&areas=usa&areas=zaf&areas=grc&areas=hun&areas=gbr&areasRegional=usny&areasRegional=usnh&areasRegional=uspr&areasRegional=usdc&areasRegional=usfl&areasRegional=usmi&cumulative=0&logScale=0&per100K=1&startDate=2021-06-01&values=deaths* [Accessed 27 June 2022].

[6] On fiscal policy post-Brexit, see Freedman and Loutzenhiser, "Tax Policy in the UK Post-Brexit" (2022) 38 *Oxford Review of Economic Policy* 188. In their conclusion the authors say: "On the direct tax side there are few immediate major impacts, and the loss of benefits under the relatively few EU tax Directives may be offset over time by the UK negotiating similar benefits in its bilateral tax treaties."

[7] Freedman and Loutzenhiser, "Tax policy in the UK post-Brexit" (2022) 38 *Oxford Review of Economic Policy* 188.

Direct taxation in the EU legal order (pre- and post-Brexit)

One of the main reasons why the impact of Brexit on direct taxation has been minimal is that the influence of EU law has always been far less over direct taxation than over many other issues (including, for example, indirect taxation). Direct taxation remains, fundamentally, a matter of national competence within the EU with integration (both positive and negative) interstitial rather than comprehensive.[8] As a consequence, the UK as a Member State was, by and large, able to follow an independent tax policy, subject to limited constraints arising largely from the fundamental freedoms in the Treaty on the Functioning of the European Union (TFEU) and the state aid rules. It is not the case, therefore, that with Brexit the UK is suddenly free to follow an independent tax policy and adopt measures from which it was constrained in earlier years.

This general position is subject to some important limitations and to a key consideration in relation to the post-Brexit legal position.

So far as the post-Brexit legal position is concerned, an important factor to mention is that the UK did not abandon all the rules of EU law at midnight on 31 December 2020. Having been a member of the EU for the best part of 50 years, a very large part of the UK legal system in general has been influenced by European law, and it would have been impossible (and would have created huge legal lacunae) to simply wipe away all EU law. Whilst the European Union (Withdrawal) Act 2018 explicitly states:

> "The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day."[9]

It goes on to state that the principle *does* still apply after the UK formally exits the EU

> "so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day".[10]

Despite the rhetoric around one of the principal purposes for the UK's departure being that it would regain its sovereignty, preservation of certain EU principles is integral to past legislation that was enacted under the auspices of EU law, which connected it to UK law, and the inclusion of such a provision to retain certain EU law principles

> "represents the general commitment of successive UK governments to ensuring that, where EU law is retained, in principle it is retained as properly understood at the time".[11]

Consequently, under the UK legislation implementing Brexit, much of the existing body of EU law continues to apply as "retained EU law".[12] This includes all directly applicable EU legislation[13] and existing case law of the CJEU as it existed at the time of Brexit.[14] Only a limited number of

[8] European Union, "Taxation", *https://european-union.europa.eu/priorities-and-actions/actions-topic/taxation_en#:~:text=The%20EU%20does%20not%20have,the%20collected%20taxes%20are%20spent* [Accessed 27 June 2022].
[9] European Union (Withdrawal) Act 2018 (2018 Act) s.5(1).
[10] 2018 Act s.5(2).
[11] Simon Whittaker, "Retaining European Union law in the United Kingdom" (2021) 137 L.Q.R. 477.
[12] See 2018 Act ss.2–7.
[13] 2018 Act s.3.
[14] 2018 Act s.6.

courts, primarily courts of final appeal (such as the Supreme Court), may depart from existing decisions of the CJEU, and then on the same grounds that they would have departed from their own decisions.[15]

One change, of course, was that from the time of Brexit, UK courts and tribunals could no longer make a reference to the CJEU for a preliminary ruling. Going forward, therefore, the UK courts will be left to their own devices to determine the correct interpretation of EU law which continues as retained EU law. However, in the short to medium term, the continued validity of retained EU law has meant that there was no legal revolution in tax (as well as in other fields). Furthermore, any future CJEU decisions will be considered by the UK courts on a discretionary basis only—with persuasive (as opposed to binding) effect at best. In short, the UK courts are no longer bound by any principles laid down or decisions made by the CJEU but may be persuaded to adopt them.

While it is correct that direct taxation has largely remained the province of domestic law and policy, this is subject to three important exceptions: the direct tax directives; the existing case law of the CJEU; and state aid law. Each of these needs to be considered in the context of the minimal impact of Brexit.

The direct tax directives

Against a background under which direct taxation has remained primarily a matter for national law, only a small number of directives applicable to direct taxation have been adopted over the past 30 years. These include directives dealing with substantive tax law and some dealing with administrative cooperation. All of these directives ceased to have effect as from Brexit, but, as is explained in the following, the impact of their ceasing to have effect is considered to be minimal in practice.

The first directive for consideration is the "Parent-Subsidiary Directive".[16] It was adopted to broaden the scope and improve the existing operation of the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. The original directive (90/435/EC)[17] was designed to eliminate tax obstacles in the area of profit distributions between groups of companies in the EU by: first, abolishing withholding taxes on payments of dividends between associated companies of different Member States; and, secondly, preventing double taxation of parent companies on the profits of their subsidiaries.

The Parent-Subsidiary Directive[18] provided for the elimination of withholding tax on dividends paid by a subsidiary to a parent. Since the UK has no withholding tax on outbound dividends, the abolition has no effect on those dividends. So far as inbound dividends are concerned, most of the UK's double taxation conventions with other EU Member States provide for the elimination of withholding tax; in principle, in the case of a small number of states, inbound dividends may be subject to a 5 per cent or a 10 per cent withholding tax (and one can assume that, in time, the

[15] 2018 Act s.6(4).
[16] Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2004] OJ L7/41.
[17] Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225/6.
[18] Directive 2003/123.

relevant double taxation conventions will be amended to eliminate that withholding where possible).[19] Most categories of dividends received by UK companies are also exempt from tax in the UK under domestic law.

Similarly, the second directive—the Interest-Royalties Directive[20]—eliminated withholding tax on certain cross border payments of interest and dividends. In principle, there could be a withholding tax on certain outbound payments of interest and royalties from the UK, but in most cases the relevant double taxation convention will eliminate the withholding tax (and in the case of outbound payments of interest can usually be eliminated by using the quoted Eurobond exception).[21] The UK has formally repealed the legislation giving effect to the Interest-Royalties Directive[22] but, as explained, this simply means that the withholding rate under the double taxation convention will apply. Similarly, in the case of inbound interest and royalties, many of the UK's double taxation conventions will already eliminate or significantly reduce the withholding tax on interest and royalties.

In rather limited circumstances the Merger Directive[23] provided a measure of tax relief on cross border mergers. In practice, these remain relatively rare in a format that comes within the scope of the directive. The UK has not repealed the legislation that gives effect to the relief provided for by this directive.[24]

Although not a directive, the Arbitration Convention[25] provided in principle for a dispute resolution mechanism in the case of transfer pricing adjustments. The UK tax authorities have announced that they will no longer accept applications under the Convention.[26] However, a number of the UK double taxation conventions contain provisions for mandatory binding arbitration on the failure of mutual agreement procedure, and the UK is one of those countries that supports Part VI of the Multi-Lateral Instrument[27] and, when implemented, this would provide for arbitration of disputes that might previously have fallen within the scope of the Convention.

[19] Alison Dickie and David Haworth, "Brexit: tax competition between the UK and the EU 27", *Tax Journal*, 11 February 2021.
[20] Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L157/49. See Tim Sarson, "International developments for November 2020", *Tax Journal*, 27 November 2020, Issue 1511, 19. See also Edoardo Traversa, "Interest Deductibility and the BEPS Action Plan: nihil novi sub sole?" [2013] B.T.R. 607.
[21] Freedman and Loutzenhiser, "Tax Policy in the UK post-Brexit" (2022) 38 *Oxford Review of Economic Policy* 188.
[22] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L310/34 (which consolidated a number of earlier instruments including Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States [2005] OJ L58/19).
[23] Directive 2009/133.
[24] Corporation Tax (Implementation of the Mergers Directive) Regulations 2011 (SI 2011/1431). See also HMRC, Internal Manual, *Company Taxation Manual* (16 April 2016), CTM06000.
[25] 90/436/EEC: Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises of 23 July 1990 [1990] OJ L225/10.
[26] See HMRC, Policy Paper, *Legislating the Double Taxation Dispute Resolution (EU) Regulations 2020* (1 December 2020), *https://www.gov.uk/government/publications/legislating-the-double-taxation-dispute-resolution-eu-regulations-2020/legislating-the-double-taxation-dispute-resolution-eu-regulations-2020* [Accessed 27 June 2022].
[27] OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2016), *https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm* [Accessed 27 June 2022].

Shortly before Brexit the EU adopted a Tax Dispute Resolution Directive.[28] This entered into force in the UK for a short period of time prior to Brexit. While they are of a narrower scope, provisions for mandatory binding arbitration under double taxation conventions will, to a certain extent, replace the provisions of this directive.

Finally, the Anti-Tax Avoidance Directive[29] (ATAD) ceased to apply to the UK on Brexit. Even before the adoption of ATAD the UK was essentially compliant with its provisions because, in part, of the UK's compliance with the OECD BEPS proposals on combatting tax avoidance.[30] The UK has made no changes to the anti-avoidance legislation post-Brexit, and it is unlikely that the UK will make any changes to its law because the ATAD has ceased to apply.

Putting all of this together, the fact that the substantive law direct tax directives have ceased to apply has had minimal impact on the UK tax system.

Turning to the directives on administrative cooperation, the Directive on Administrative Cooperation[31] in the form of DAC1 to DAC5 essentially mirror approaches to administrative cooperation adopted under the aegis of the OECD, which the UK would have complied with even if there were no EU directives on the subject matter.

So far as DAC6 (exchange of information in respect of cross border avoidance arrangements) is concerned, very shortly after Brexit, and with a certain amount of publicity, it was announced that the UK would not be implementing all of the hallmarks and would only retain hallmarks from Category D. Category D relates to specific hallmarks concerning automatic exchange of information and beneficial ownership.[32] HMRC's decision to only apply DAC6 in limited circumstances means that the UK is not obliged to implement what some might perceive as an onerous reporting regime, while still complying with the OECD Common Reporting Standard (CRS). Only arrangements which have the effect of undermining or circumventing the CRS or obscuring beneficial ownership will be reportable. The retention of this limb reflects the UK's ongoing commitment under the Trade and Cooperation Agreement (TCA)[33] to implement the

[28] Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L265/1.

[29] Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1.

[30] The small changes that were made to give effect to ATAD have not been reversed and are unlikely to be reversed: Council Directive 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries [2017] OJ L144/1 (Anti-Tax Avoidance Directive-ATAD).

[31] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC [2011] OJ L64/1.

[32] Hallmark D is based on the OECD's Model Mandatory Disclosure Rule (MMDR) and, coupled with the CRS, requires financial institutions in countries which have signed up to the standard to make annual reports of non-residents holding bank accounts and other financial accounts. Following a consultation (which ran from 30 November 2021 to 8 February 2022, HMRC, Consultation: *Mandatory Disclosure Rules* (TSO, 2021), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037442/HMRC_consultation_Mandatory_Disclosure_Rules.pdf* [Accessed 27 June 2022]), HMRC now intend to issue secondary legislation dealing with international tax enforcement and what amounts to "disclosable arrangements" (draft statutory instrument, The International Tax Enforcement (Disclosable Arrangements) Regulations 2022, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037380/Draft_Mandatory_Disclosure_Rules.pdf* [Accessed 27 June 2022]).

[33] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10 (30 April 2021) (TCA), discussed further below.

OECD minimum standards against BEPS. It also lessens the compliance burden for many businesses that already have significant reporting requirements to meet.[34]

Part of the decision not to adopt more than Category D of DAC6 was, in all likelihood, due to the fact that the UK was one of the earliest countries to introduce the disclosure of tax avoidance schemes, and already had arrangements for disclosure which were regarded as sufficiently broad to provide all the information that HMRC would find useful. The hallmarks in DAC6 that the UK chose not to implement related to information which, one would assume, HMRC did not consider would be necessary or useful. This does mean that, in principle, the disclosure requirements applicable in the UK to cross-border arrangements are more limited than those applicable in EU Member States that are required to fully implement DAC6. Of course, where the arrangements have a connection with another EU Member State, the full disclosure requirements will be maintained in that other state. While, in principle, this might be seen as a reflection of the new-found freedom of the UK not to implement aspects of EU directives which the UK considered unnecessary (or possibly just silly), it does not realistically undermine the conclusion that the impact of Brexit has, so far, been minimal.[35]

The other aspect of administrative cooperation is mutual assistance in the recovery of taxes. So far as direct taxes are concerned, article 100 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement)[36] provides that claims under the Mutual Assistance in Recovery Directive[37] will continue to benefit from cross-border arrangements for five years after Brexit. When the directive ceases to apply, there will be alternative arrangements either under existing double taxation conventions between the UK and other EU Member States

[34] Under the UK's current mandatory disclosure rules, "intermediaries" (including law firms, accountants and tax advisors), or in some instances a taxpayer, will be obliged to notify HMRC of an arrangement which is "cross-border" and satisfies Hallmark D. The amended UK regulations (the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (SI 2020/25), originally made on 9 January 2020, and in force from 1 July 2020) provide that in circumstances where an intermediary is required to report an arrangement in both an EU Member State and the UK, the obligation to report is only in the state which features highest in the list in the directive. How to determine which state comes higher usually is as follows: the state where the intermediary is resident for taxes purposes comes higher than the state where it has a PE (though this depends on which services are performed). However, the same does not apply in reverse. DAC6 only relieves reporting where a report is made in another Member State. With the UK having left the EU, in instances where a UK tax resident firm is operating in an EU Member State through a PE (which is an intermediary for DAC6 purposes) it could have to report a Hallmark D arrangement in both the UK and the relevant Member State.

XML Schema is the EU's bespoke platform that facilitates exchanges of information reported under DAC6. In the wake of Brexit and nearly 18 months on since officially leaving the EU, the UK is no longer part of the system and does not have access to it. Furthermore, it is not obligated to share reports with the EU and the same is true in reverse. Cooperation will therefore be subject to more defined and limited obligations under bilateral double taxation treaties, which means that it is unlikely that information will be exchanged automatically. Exchanges will likely only happen following a specific request, or spontaneously.

[35] See Freedman and Loutzenhiser, "Tax policy in the UK post-Brexit" (2022) 38 *Oxford Review of Economic Policy* 188.

[36] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384 I/1 (Withdrawal Agreement).

[37] Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1.

or under the Multilateral Convention on Administrative Assistance (MCAA).[38] Presumably, to the extent that it is necessary, during the five-year extension the UK will put in place any arrangements necessary to fill gaps in the provisions under tax treaties and the MCAA.[39]

More broadly, both with regard to the substantive direct tax directives and the directives on administrative cooperation, the provisions previously made under the directives will no doubt be replaced by provisions under double taxation conventions (with amendments to those conventions where necessary). Thus, the UK will become more reliant upon bilateral conventions and multilateral arrangements, just like the rest of the world outside the EU. There is no reason to think that, once any amendments are made to the relevant tax treaties, the provisions on withholding taxes or on administrative cooperation will be significantly different from those under the EU direct tax directives. Once again, the conclusion is that the fact that all of these directives have ceased to apply in the UK has had minimal impact and will have minimal impact in the short and medium term.

Court of Justice case law

In the absence of direct integration through EU legislation, the Court of Justice (which term includes both the current Court of Justice of the European Union—CJEU—and the ECJ) has played an important role through judgments applying the fundamental freedoms to direct tax rules in Member States.[40] In this process, the UK has fought and lost a number of high profile cases in the last 30 years, and has had to respond to those defeats by making changes in domestic legislation, or has had to respond to cases involving other Member States. This has included litigation such as the *Cadbury Schweppes Plc v IRC* (*Cadbury Schweppes*) case[41] concerning controlled foreign companies (CFC) legislation, *Marks & Spencer Plc v Halsey (Inspector of Taxes)* (*Marks & Spencer*)[42] involving cross-border loss relief, and the various cases concerned with cross-border inbound and outbound dividends, including the Test Claimants in the *FII Group Litigation v HMRC* (*FII Litigation*)[43] and the cases concerning advance corporation tax.[44] Major changes have been forced upon the UK as a result of the outcome of these cases, including, for example, the abandonment of the imputation system for dividends and the wholesale redrafting of the CFC legislation in 2013.[45]

[38] OECD, *Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (Paris: OECD Publishing, 2011), *https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm#:~:text=Legend-,The%20multilateral%20Convention%20on%20Mutual%20Administrative%20Assistance%20in%20Tax%20Matters,the%20fundamental%20rights%20of%20taxpayers* [Accessed 27 June 2022].

[39] OECD, *Multilateral Competent Authority Agreement of 7 December 2016* (Paris: OECD Publishing, 2016), *https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/*.

[40] See Philip Baker QC, "What will Brexit mean for the UK tax system—the view from August 2016" [2016] B.T.R. 375.

[41] *Cadbury Schweppes Plc v IRC (Cadbury Schweppes)* (C-196/04) EU:C:2006:544; [2006] S.T.C. 1908.

[42] *Marks & Spencer Plc v Halsey (Inspector of Taxes) (Marks & Spencer)* (C-446/03) EU:C:2005:763; [2006] S.T.C. 237.

[43] *Test Claimants in the FII Group Litigation v HMRC (FII Litigation)* (C-35/11) EU:C:2012:707; [2013] S.T.C. 612. See also: *Test Claimants in the FII Group Litigation v HMRC* [2021] UKSC 31; [2021] S.T.C. 1597.

[44] *Metallgesellschaft Ltd v IRC; Hoechst AG v IRC* (C-397/98 and C-410/98) EU:C:2001:134; [2001] S.T.C. 452. See also *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34; [2007] S.T.C. 1559.

[45] Taxation (International and Other Provisions) Act 2010 Pt 9A.

One might have thought in these circumstances that, as soon as Brexit took place, there would be a rush of legislative changes to reinstate the previous position. That simply has not happened, except to one rather minor extent. In the Autumn Budget 2021, an announcement was made that a change would remove a provision for cross-border loss relief that had been introduced as a consequence of *Marks & Spencer*.[46] As a result of the decision in that case the UK had to allow cross-border relief, in order not to restrict taxpayers' freedom of establishment. However, following the Budget announcement with effect from 27 October 2021, the Government repealed the cross-border relief rules in Chapter 3 of Part 5 of the Corporation Tax Act 2010 (CTA 2010). Sections 107 and 188BI CTA 2010 were also amended to remove separate rules for European Economic Area resident companies. This means that all non-UK resident companies can only surrender losses of a UK permanent establishment as group relief if it is not possible for the loss to be deducted from non-UK profits of any person for any period.[47]

Aside from the fact that recent events have (as explained above) meant that there were more pressing concerns impacting on UK tax policy than any desire to turn back the clock and reverse changes produced as a consequence of any of these judgments, there may be several reasons why wide-scale reversal of changes has not been carried out and is not, apparently, on the table.

First, some of those judgments led to a change in UK tax law which was consistent with a broader shift in international practice or with broader domestic considerations in the UK. Thus, for example, the abandonment of the UK's imputation system was matched by a similar development in those EU countries (and some non-EU countries) that also had imputation systems. The move towards a more territorial corporate tax system was equally matched by a similar international trend. The reform of the UK CFC rules, driven as it was by the immediate issue of the judgment in *Cadbury-Schweppes*,[48] was also implemented because the previous UK legislation was overdue for reform and needed to reflect the new, more territorial system.

Secondly, and perhaps more controversially, some of the changes removed existing provisions of UK law that might have made the UK less competitive or had otherwise represented unjustifiable barriers to investment and trade into and out of the UK. At the end of the day, the implementation of the fundamental freedoms is intended to achieve a removal of barriers to cross-border trade and investment and the movement of goods and persons. Narrowing the scope of anti-avoidance provisions and giving taxpayers the opportunity to show that they were genuinely engaged in cross-border investment would have been beneficial to the UK in any case, even if the particular amendment to the law was prompted by a judgment of the CJEU.

This is an important consideration when one looks to the future where new judgments of the CJEU will not be directly applicable to the UK, but may lead to the removal of barriers to cross-border trade and investment in the remaining Member States of the EU. The UK Government may conclude that it should make an equivalent change in order that those Member States do not have a competitive advantage. To take a potential example, a provision for the deferral of tax (or a provision for payment of tax in instalments) by a corporate taxpayer changing its

[46] *Marks & Spencer* EU:C:2005:763.
[47] See also HMRC, Policy Paper, *Abolition of cross-border group relief* (27 October 2021), *https://www.gov.uk/government/publications/abolition-of-cross-border-group-relief/abolition-of-cross-border-group-relief* [Accessed 27 June 2022].
[48] *Cadbury Schweppes* EU:C:2006:544.

residence may no longer be required in the UK under EU law, but countries that have such measures in their tax laws may be seen as a more attractive location for corporate domicile than those jurisdictions that do not.

It may be going too far to suggest that tax policy makers in the UK have learnt to love the judgments of the CJEU. However, they may have learnt that some of the legislative changes that have been prompted by those judgments have not been as disastrous as it might once have been feared, and the changes may have contributed to a more attractive tax regime after all.

Although not a tax case, in *Tunein Inc v Warner Music UK Ltd* (*Tunein*)[49] the Court of Appeal set out clearly in eight reasons why the UK should not rush to depart from EU law in the wake of Brexit. First, domestic law remained unchanged.[50] Secondly, a need for consistency was essential between domestic and international legislative frameworks.[51] Thirdly, there was the "difficult task" of interpreting certain concepts of a "communication to the public" and the CJEU's "unrivalled experience in confronting this issue in a variety of factual scenarios".[52] Fourthly, academic commentary on the EU case law principles went both ways—there was both criticism and support.[53] Fifthly, using a comparative analysis from other jurisdictions (such as Australia, the US and Canada) was not necessarily the most helpful as "the statutory framework differs in those countries and the case law cannot be said to offer settled or consistent guidance".[54] Sixthly, there was a danger of creating legal uncertainty by "return[ing] to the drawing board".[55] Seventhly, departure without good cause from established principles cannot be helpful.[56] Eighthly, UK courts retain (and have always retained) the jurisdiction to apply a common sense approach in the event certain EU law principles cannot be directly translated into domestic law, and this has always been a judicial tool to be usefully employed.[57] The Court of Appeal's concluding rationale that CJEU principles should be applied has broad applicability and can be applied to tax cases. The eight reasons given by the court provide a sound basis and starting point for policy makers and judges to consider whether it would in fact be useful, practical or even sensible to depart from established EU law principles which have become a part of UK law.

One change that took place immediately upon Brexit was that UK courts ceased to be able to make references to the Court of Justice for preliminary rulings. Because much of existing EU law, including the case law of the Court of Justice as at the time of Brexit, continues to apply as retained EU law (as explained above), the UK courts will, going forward, be on their own and will have to work out for themselves any disputes as to the scope and meaning of retained EU law.

There is already an interesting example of this in the *Volkerrail Plant Ltd v HMRC* (*Volkerrail*).[58] The question before the First-tier Tribunal (FTT) was whether or not the taxpayers

[49] *Tunein Inc v Warner Music UK Ltd (Tunein)* [2021] EWCA Civ 441; [2022] 2 All E.R. 35.
[50] *Tunein* [2021] EWCA Civ 441 at [78].
[51] *Tunein* [2021] EWCA Civ 441 at [79].
[52] *Tunein* [2021] EWCA Civ 441 at [80].
[53] *Tunein* [2021] EWCA Civ 441 at [81].
[54] *Tunein* [2021] EWCA Civ 441 at [82].
[55] *Tunein* [2021] EWCA Civ 441 at [83].
[56] *Tunein* [2021] EWCA Civ 441 at [87].
[57] *Tunein* [2021] EWCA Civ 441 at [88].
[58] First-tier Tribunal decision: *Volkerrail Plant Ltd v HMRC* [2020] UKFTT 476 (TC). See also Upper Tribunal decision: *HMRC v Volkerrail Plant Ltd (Volkerrail Plant)* [2022] UKUT 78 (TCC); [2022] S.T.C. 735.

were entitled to make claims for group relief in respect of the UK permanent establishment (PE) of a Dutch resident company. In seeking the disapplication of section 403D(1)(c) of the Income and Corporation Taxes Act 1988 (ICTA), the appellants argued that in *HMRC v Philips Electronics UK Ltd* (*Philips Electronics*)[59] the CJEU decided that the provision amounted to an unlawful restriction on the freedom of establishment. HMRC advanced the case that the later decision of *NN A/S v Skatteministeriet* (*NN*)[60] overruled *Philips Electronics*. They argued that section 403D(1)(c) ICTA 1988 was not an unlawful restriction on the freedom of establishment, as the prevention of a double deduction of losses by cross-border groups is a legitimate public policy objective. In the alternative, HMRC argued that the provision should not be disapplied but given a conforming interpretation.[61]

The FTT handed down a decision which sought to disapply the pre-Finance Act 2013 cross-border group relief restriction—thus permitting the taxpayers' group relief claims. It took a very strict approach in adhering closely to existing CJEU case law at the time—holding that the restriction was incompatible with the freedom of establishment. However, the Upper Tribunal (UT) overturned that decision, and permitted HMRC's appeal on the grounds that the UK restriction was based on a policy of preventing the double deduction of losses. It went further to state that the restriction imposed was justified (with respect to its restriction on the freedom of establishment), but it operated disproportionately. Whilst holding that it was incompatible with EU law, the UT determined that the provision in question (section 403D ICTA 1988) could be "read down" so as to comply with EU law. In determining whether *NN* overturned *Philips Electronics*, the UT took the view that the CJEU had formulated the restriction on freedom of establishment to which the Danish tax provisions gave rise in *NN* differently from the restriction found in *Philips*.[62]

As this case illustrates, UK courts are now on their own when determining the meaning of retained EU law. One intriguing prospect that the future holds is whether UK case law may be cited before the Court of Justice in the future as to the meaning of EU rules. A further prospect is that divergent opinions may be held by the UK courts and the Court of Justice on the same point of EU law.

State aid

One aspect of EU law that may have constrained UK tax policy in the past was the state aid rules in article 107 et seq. of the TFEU.[63] The UK has, in the past, faced a small number of infringement actions based on state aid law. It may also be that some tax policies that the UK Government would have wished to follow had to be abandoned because of state aid concerns.

As part of the TCA that was concluded at the end of 2020, and which provides for the future relationship between the UK and the EU following Brexit, the UK undertook to introduce a new

[59] *HMRC v Philips Electronics UK Ltd* (C-18/11) EU:C:2012:532; [2013] S.T.C. 41.
[60] *NN A/S v Skatteministeriet* (C-28/17) EU:C:2018:526.
[61] The provision giving rise to this case has since been repealed by the Corporation Tax Act 2010.
[62] *Volkerrail Plant* [2022] UKUT 78 (TCC) at [30].
[63] Treaty on the Functioning of the European Union (26 October 2012) [2012] OJ C326/47.

subsidy regime.[64] The regime that the UK is putting in place is, with little doubt, significantly more flexible than the EU state aid rules.[65] In principle, under that new regime the UK Government will enjoy greater freedom to provide fiscal subsidies than under the previous state aid regime of EU law.[66] In the immediate post-Brexit period, however, there is no indication that the change has, as of yet, had more than minimal consequences.

One of the policies with fiscal implications that has been introduced since Brexit has been the introduction of a number of freeports.[67] It has been suggested that the freeports could not have been introduced before Brexit because of state aid rules. However, it is also the case that the state aid rules might have impacted on the design of the freeport regime, but would not have prevented the UK from introducing the regime as a whole. Certainly, the introduction of the freeports in the form that has been adopted hardly provides strong evidence that Brexit has a more than minimal impact on direct tax policy.

Interim conclusion: The ending of the EU law constraints on UK tax policy

Drawing these points together, the evidence of the period since Brexit supports the conclusion, in the authors' view, that Brexit has had a minimal impact on the direct tax system. Whether that will continue to be the case remains to be seen, and is considered further below.

The dominance of developments within the OECD

Undoubtedly one of the significant reasons why Brexit itself has had a minimal impact on UK direct taxation is because so much direct tax policy in the international and domestic field is being led by multilateral developments within the OECD. Since the start of the BEPS project in 2013, the UK has not only been a leader in the project but also a taker of the outcomes from the project. At the time of Brexit, of course, the OECD had moved on to "BEPS 2.0", being the Two-Pillar Solution which has been developed through the Inclusive Framework since 2017. In October 2021 the UK was one of the countries that signed up to the agreement to implement the Two-Pillar Solution, and in 2022 the UK is taking a lead on the implementation of the Pillar Two Global Anti-Base Erosion Model Rules (GloBe) proposals.[68]

Leaving aside the BEPS project, the UK is actively involved in other aspects of the work of the OECD, including work relating to the development of the Model Tax Convention, transfer pricing matters, and the automatic exchange of information for revenue purposes. So long as the

[64] TCA Chs 3–4 (arts 363–382). See also Philip Baker QC, "Fiscal subsidy control in the post-Brexit era" [2021] B.T.R. 14 and Philip Baker QC, "Fiscal subsidy control in the post-Brexit era (Part 2)" [2021] B.T.R. 361.
[65] Barry Rodger and Andreas Stephan, "The impact of Brexit on the Competition and Markets Authority" (2021) 42(7) E.C.L.R. 393.
[66] See Nicholas Crafts, "Brexit and control of subsidies" (2022) 38 *Oxford Review of Economic Policy* 154, 162–162.
[67] Dominic Webb and Ilze Jozepa, *Government policy on freeports* (TSO, 2022), House of Commons Library No.8823. Following a consultation (February-July 2020), the Government is seeking to establish eight freeports as national hubs for global trade and investment across the UK. A number of benefits are to be attached to these freeports in the following areas: customs, tax (including stamp duty land tax relief, enhanced structures and buildings allowance, enhanced capital allowances, employer national insurance contributions relief, business rates), planning, infrastructure (with each freeport to receive up to £25 million of seed capital funding to be principally used to address infrastructure gaps), and innovation.
[68] HMRC and HM Treasury, *OECD Pillar 2—Consultation on Implementation* (TSO, 2022).

OECD remains the leading body on international tax, developments through the OECD and the Inclusive Framework are going to have the most influential impact on international (and some domestic) aspects of UK direct tax policy.

Of course, this is also true of the EU Member States themselves. Since the start of the original BEPS project in 2013, the European Commission has brought forward a number of proposals that have tracked—and in some situations gone further than—the BEPS outcomes. Since Brexit, there is no reason why the UK would go further than the OECD recommendations, even if the European Commission brings forward proposals that go further. As in the case of DAC6 (discussed above), the EU proposals go further than the exchange of information required by the OECD mandatory disclosure regime.[69] As that example shows, the UK is likely to go no further than the OECD consensus (though no doubt any more extensive proposals that come out from the EU will be examined by the UK to see whether it is advantageous to adopt them).

One result of Brexit is that the UK will need to rely more upon the same double taxation convention structures as other non-EU countries. These are negotiated based on texts prepared using the OECD Model Tax Convention on Income and on Capital.[70] So, in terms of the general development of international tax policy, the UK will be taking its lead, like other non-EU countries, from the OECD.

The limited impact of the tax provisions in the Trade and Cooperation Agreement

The terms of the TCA—which governs the relationship between the UK and the EU after Brexit—impose few constraints on UK tax policy and, to that extent, perhaps contribute to the minimal impact of Brexit.[71] While the Withdrawal Agreement[72] contained little in relation to taxation, the Political Declaration annexed to it contained a relatively innocuous commitment to the principles of good governance in the area of taxation:

> **“Political declaration on future relationship**
>
> XIV. **Level playing field for open and fair competition**
>
> 77. Given the Union and the United Kingdom’s geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. …The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing

[69] OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* (Paris: OECD Publishing, 2018), *https://www.oecd.org/tax/exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.htm* [Accessed 27 June 2022].
[70] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (Paris: OECD Publishing, 2017), *https://doi.org/10.1787/mtc_cond-2017-en* [Accessed 27 June 2022].
[71] Mention has already been made of the provisions in the TCA relating to the regulation of subsidies, including fiscal subsidies, which replace the state aid provisions.
[72] 2018 Act.

of harmful tax practices…In so doing, they should rely on appropriate and relevant Union and international standards”.[73]

This commitment to international standards in the Withdrawal Agreement was put into slightly more concrete form in Chapter 5 of Title XI[74] TCA which provides as follows:

“CHAPTER 5—TAXATION

ARTICLE 383

Good governance

The Parties recognise and commit to implementing the principles of good governance in the area of taxation, in particular the global standards on tax transparency and exchange of information and fair tax competition. The Parties reiterate their support for the OECD Base Erosion and Profit Shifting (BEPS) Action Plan and affirm their commitment to implementing the OECD minimum standards against BEPS. The Parties will promote good governance in tax matters, improve international cooperation in the area of taxation and facilitate the collection of tax revenues.

ARTICLE 384

Taxation standards

1. A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period, in relation to:
   (a) the exchange of information, whether upon request, spontaneously or automatically, concerning financial accounts, cross-border tax rulings, country-by-country reports between tax administrations, and potential cross-border tax planning arrangements;
   (b) rules on interest limitation, controlled foreign companies and hybrid mismatches.
2. A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period in respect of public country-by-country reporting by credit institutions and investment firms, other than small and non-interconnected investment firms.

ARTICLE 413

Taxation

1. Nothing in Titles I to VII, Chapter 4 of Title VIII, Titles IX to XII of this Heading or Heading Six shall affect the rights and obligations of either the Union or its

[73] HM Government, *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom* (TSO, 2019), Ch.XIV, “Level playing field for open and fair competition”, para.77.
[74] Trade and Cooperation Agreement Title XI deals with: “Level playing field for open and fair competition and sustainable development”.

Member States and the United Kingdom, under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention shall prevail to the extent of the inconsistency. With regard to a tax convention between the Union or its Member States and the United Kingdom, the relevant competent authorities under this Agreement and that tax convention shall jointly determine whether an inconsistency exists between this Agreement and the tax convention.

2. Articles 130 and 138 shall not apply to an advantage accorded pursuant to a tax convention.

3. Subject to the requirement that tax measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and investment, nothing in Titles I to VII, Chapter 4 of Title VIII, Titles IX to XII of this Heading or Heading Six shall be construed to prevent the adoption, maintenance or enforcement by a Party of any measure that:
   (a) aims at ensuring the equitable or effective[75] imposition or collection of direct taxes; or
   (b) distinguishes between taxpayers, who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested.

4. For the purposes of this Article, the following definitions apply:
   (a) ‘residence’ means residence for tax purposes;
   (b) ‘tax convention’ means a convention for the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation; and
   (c) ‘direct taxes’ comprise all taxes on income or capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, taxes on wages or salaries paid by enterprises and taxes on capital appreciation.

[75] “Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which: (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party’s territory; or apply to non-residents in order to ensure the imposition or collection of taxes in the Party’s territory; or (ii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or (iii) apply to consumers of services supplied in or from the territory of the other Party or of a third country in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party’s territory; or (iv) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party’s tax base.”

ARTICLE 770

Global cooperation on issues of shared economic, environmental and social interest

1. The Parties recognise the importance of global cooperation to address issues of shared economic, environmental and social interest. Where it is in their mutual interest, they shall promote multilateral solutions to common problems.
2. While preserving their decision-making autonomy, and without prejudice to other provisions of this Agreement or any supplementing agreement, the Parties shall endeavour to cooperate on current and emerging global issues of common interest such as…Taxation…To that end, they shall endeavour to maintain a constant and effective dialogue and to coordinate their positions in multilateral organisations and forums in which the Parties participate, such as…the Organisation for Economic Co-operation and Development".

Somewhat uniquely, article 383, quoted above, imposes good governance obligations on the UK in respect of taxation. However, in concrete terms, the UK has sought to adopt and adhere to the global standards on tax transparency and exchange of information and fair tax competition and to the OECD minimum standards against BEPS (which, without any question of a doubt, the UK would have observed in any event).

Similarly, article 384, quoted above, requires the UK not to reduce the level of protection below those *agreed in the OECD as at the end of December 2021* in respect of exchange of information, rules on interest limitation, controlled foreign companies and hybrid mismatches. Those are all commitments that the UK has already made through its participation in the OECD, and so impose, in practice, no real restraint on the UK. In principle, if the UK held any notions of adopting a new, swash-buckling approach to international taxation after Brexit, with the intention of becoming (as some people suggested) "Singapore-on-Thames", then in principle these commitments in the TCA would have prevented that. However, there is no reliable evidence to suggest that it was ever the intention of the UK Government to adopt such a strategy.

The provisions of the TCA in relation to taxation do not, therefore, significantly constrain UK tax policy in practice. They could be pointed to as evidence of the minimal impact of Brexit. They simply confirm a commitment of the UK to do what the UK would have been doing in any event.

The references to the OECD standards in the TCA provisions reinforce the point made earlier that it is the OECD that has the dominant influence on the international aspects of UK direct tax policy, and that influence continues irrespective of Brexit.

The absence of policy plans to take advantage of Brexit

Some reference was made to the EU influence on tax policy during the rather desultory "debate" that preceded the Brexit referendum.[76] However, it is perfectly reasonable to say that those who advocated Brexit never enunciated any clear plans to take advantage of the new-found freedom that Brexit would bring in the context of tax policy. In tax policy, as in many other matters,

[76] Juliette Ringeisen-Biardeaud, "'Let's take back control': Brexit and the Debate on Sovereignty" (2017) *Revue Française de Civilisation Britannique* XXII-2.

Brexit was seen as an end in itself, without those who advocated it having any clear idea of what they might do with the freedom once it might be achieved.

There is no evidence that the politicians who were advocating for Brexit wanted to do so in order to implement certain tax policies that they had previously been unable to implement. Equally, there is no evidence that Treasury officials or special advisers had an oven-ready plan for tax reform post-Brexit once the constraints of membership of the EU were removed. Maybe Brexit would have had more than minimal impact on tax policy if the advocates of Brexit had a well-thought-through plan for direct tax reform: they simply did not.

An interim conclusion on the impact of Brexit 18 months on

The authors trust that enough has been said above to justify their assertion that Brexit has had a minimal impact on UK direct taxation. They have also put forward some suggested reasons why this has been the case. From the point of view of UK individual and corporate taxpayers, the authors would maintain that a reasonable assessment is that no changes of real substance have occurred between the position one minute before midnight (CET) on 31 December 2020 and the time of writing this article. With very few exceptions, a direct taxpayer could take the view that Brexit has been a non-event.

Some prognostications about the medium-term future

If the authors are correct in identifying some of the reasons why Brexit has had a minimal impact on the UK direct tax system, how far will the continued impact of those reasons influence the medium-term future?

Some of those factors will continue to have an impact for a number of years to come. There is no indication that those who advocated Brexit are suddenly going to come up with a post-Brexit, free-of-EU-constraint, tax policy for implementation. Broader world events—whether the repercussions of the pandemic or the economic crisis—will dominate fiscal policy for several years to come. The UK will continue to play a leading role and take its direction from activities in the OECD, and the competitive pressure from international tax trends will continue to be of primary significance. The tax-good-governance commitments in the TCA only preserve the position at the time of Brexit and may become irrelevant as the international tax world moves on.

In principle at least, UK tax policy and EU direct tax policy might gradually follow divergent paths. If the European Commission continues to seek to go further than the OECD, then there is no reason to think that the UK would take those further steps unless they were seen to be in the interests of the UK or they created such competitive pressure that, even if it was not in the UK's interests, the UK would be damaged if it did not follow the same course.

The fact that the UK will not be obliged to implement any future EU direct tax directives, and UK courts will no longer be able to make references to the CJEU for preliminary rulings will, again in principle, feed into this divergence of the policy path. It is also possible (but by no means certain) that an EU without the UK will be able to make progress on certain tax proposals that were stalled by the UK's objections during the period it was a member of the EU. The European Commission has published a roadmap of proposals which includes a replacement for

the Common Consolidated Corporate Tax Base (CCCTB) proposals and a deduction for the cost of equity.[77] It remains to be seen, now that the UK has left, taking its veto on tax proposals with it, whether the remaining Member States have an appetite for some of these reforms that the UK opposed.

Invariably, some have commented that Brexit will give the UK an opportunity to become more competitive and attract greater investment. How this will work practically in terms of the TCA limiting the UK's ability to diverge from standards agreed to promote a "level playing field" is yet to be seen though. The authors of this article have no crystal ball. However, they would not be entirely surprised if a similar article written five years from now or even 10 years from now would come to exactly the same conclusion: that Brexit has had a minimal impact on UK direct taxation.

[77] Business in Europe: Framework for Income Taxation (BEFIT); Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century COM/2021/251 final.