

Brexit: Transition brings tax-related controversy

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There is only one legal certainty about Brexit. On 29 March 2019 EU law will cease to apply in the United Kingdom, as a result of the UK having given notice of withdrawal on 29 March 2017. This is clear from Article 50(2) of the Treaty on European Union.

Draft withdrawal agreement

A Draft Agreement on the withdrawal of the United Kingdom from the European Union was published on 19 March 2018 and has received broad political approval in principle on transitional arrangements.

The draft identifies three levels of agreement: green text is agreed at negotiators' level and is subject only to technical legal revisions; yellow text is agreed on the policy objective but drafting changes or clarifications are required and text remaining text is proposed by the EU on which no agreement has yet been reached.

The draft addresses transitional arrangements for the UK withdrawal which is expected to end on 31 December 2020 (Article 121). EU law is generally applicable during that period (Article 122(1)), but subject to numerous exceptions. After expiry of the transitional period, EU law will cease to apply, except as may be agreed in the withdrawal agreement.

The Court of Justice of the EU will have jurisdiction to hear cases concerning EU law as applied in the UK for a period of eight years after the transitional period (Article 151) and its judgements will have the same effect in the UK as in the EU (Article 151).

It is notable that EU proposals to extend the directives on administrative cooperation in tax matters for five years remain unagreed (Articles 94 and 95). They are, Regulation (EU) No 904/2010 on administrative cooperation and combating VAT fraud, Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation on excise duties and Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties and other measures.

Curiously, one item that has been agreed is the indefinite immunity from UK taxation and social security contributions for EU officials and employees (Articles 106 to 108).

Brexit tax litigation

The post withdrawal legal regime has already attracted a significant tax related case. In *Minister for Justice v O'Connor* [2018] IESC 3, the Irish Supreme Court has had to consider the implications of Brexit on the loss of fundamental rights for EU citizens in the UK if the UK ceases to be part of the EU. The case concerns an Irish national, Mr O'Connor, who was convicted of tax fraud in the UK. While on bail, Mr O'Connor fled to the Republic of Ireland. The UK sought to have him returned to the UK by the issue of a European Arrest Warrant. The European Arrest Warrant was resisted on the basis that Brexit gives rise to a situation where an EU citizen surrendered to UK is at risk of imprisonment there beyond time when UK is EU member of the Union. As a result, rights enjoyed as EU citizen are not available at that time. This would mean, in particular, that the protection of the EU Charter of Fundamental Rights of The European Union, or access to the Court of Justice of the EU, as well as rights in EU legislation establishing the European Arrest Warrant and on the transfer of prisoners to allow them to serve their sentences in their home states would no longer apply. The Irish Supreme Court concluded that the question should be referred to the Court of Justice of the EU.

Coercive powers of states

The coercive powers of the state in both criminal law and taxation are both recognised as matters that, in principle, will not be enforced by the foreign courts (See Schwarz on Tax Treaties, 5th Edition, Chapter 22). These powers can only be exercised by way of cooperation cross-border within a constitutional legal framework such as the EU, or by treaty between the states concerned. The exercise of these powers, and the civil and human rights safeguards against their abuse form part of an indissociable whole.

The same issue will arise in relation to other instruments for administrative cooperation between member states on exchange of information and assistance in collection of taxes. If the UK leaves the EU, then administrative cooperation in taxation between the UK and EU member states will be on an entirely different footing.

While the *O'Connor* case involves the loss of fundamental rights by a citizen of the EU under EU law as result of a withdrawal from the EU by the United Kingdom, British nationals will similarly lose those rights in relation to their tax affairs in the remaining member states.

Taxation and International Human and Civil Rights

Similar observations might be made about the context in which international administrative cooperation is exercised outside the EU. The multilateral Joint Convention on Administrative Assistance in Tax Matters was developed by the OECD and the Council of Europe for participation by members of those organisations only. Membership in each case required states to become party to the European Convention on Human Rights (ECHR) and to adhere to minimum standards of democracy and the rule of law. Since 2010, any state may be invited to become a party to the Convention.

British Prime Minister, Theresa May, who before the 2017 election said that she would like to see the Human Rights Act (which gives effect to the ECHR) go, has since only confirmed that the UK will remain a signatory to the European Convention of Human Rights for the next Parliament, that is until the elections scheduled for 2020. That will coincide with the end of the proposed transitional period for UK departure from the EU.

Cynics argue that these rights are only exploited by criminals and other not deserving of protection of civil and human rights. I grew up in Apartheid South Africa. I have been there before.

Schwarz on Tax Treaties, 5th Edition can be purchased here. The book is also available online on Kluwer International Tax Law. For more information please click here.

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