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Corporate Tax and Treaty Consequences of Brexit

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The possible tax consequences that might result from Britain's exit from the European Union has become a most important one in considering U.K. investment and trade with the other member states as well as the U.K. as a hub for international business. In a single article such as this, it is impossible really to convey the number of issues and their complexity. However, to introduce readers to the scope of the issues, I have taken a somewhat selective approach, surveying generally what the departure from the EU means, and then looking at corporate tax and some issues related to tax treaties that will provide an idea of considerations that are already troubling practitioners in the United Kingdom.[2]

The European Union as we know it today was formed in 2007 by the Treaty of Lisbon, which came into effect on Dec. 1, 2009. The principal constituting instruments are the Treaty on European Union (the TEU) and the Treaty on the Functioning of the European Union.[3] Predecessors to Article 49 of the TEU, which have been used several times since the European Community and then the European Union came into existence, authorizes additional countries to join the union. The Treaty of Lisbon introduced into the TEU Article 50, which briefly outlines a mechanism for a country to withdraw from the Union.[4]

PROCESS FOR WITHDRAWAL FROM EU

Article 50 specifies that a member state deciding to withdraw may so decide ''in accordance with its own constitutional requirements.'' A state that does so must then notify the EU Council of its intention to withdraw. This brings membership of the EU to an end at a time agreed between the withdrawing state, the EU and the remaining member states. The steel fist in that perhaps-not-quite-velvet glove in Article 50(2) is that, if an agreement is not reached within two years from the notification of intent to withdraw, the EU Treaties automatically cease to apply to the withdrawing member, in effect terminating membership without further steps. Thus, notification starts the running of a time limit to conclude negotiations for an agreement that determines the ongoing relationship between the withdrawing state and the EU. A longer time period for termination of membership may be agreed between the withdrawing state and the EU (with the agreement of all remaining member states) under Article 50(3).

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[2] This article is an expansion and update of remarks made at the 70th Congress of the International Fiscal Association in September 2016.

[3] Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, as amended by Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 23, 2007, 2007 O.J. (C 306) 1. The consolidation of these treaties (2012 O.J. (C 326) 13)) will be referred to hereafter as the informally as the ''EU Treaties.''

[4] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 23, 2007, 2007 O.J. (C 306) 1, Art. 2(58) [hereafter ''Treaty of Lisbon''].

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In a Jan. 17 speech, Prime Minister Theresa May signaled an intention to make a clean break voluntarily,[5] leaving open the possibility that the U.K.'s relationship with the EU will end without participation in the European single market. This will have a significant impact on taxation.

Until now, Article 50 has probably been one of the least studied parts of the EU Treaties. No country has left the EU until now, so there is no precedent to flesh out specifically what some of its provisions mean. For example, in the area of international relations, it is not obvious what the ''constitutional requirements'' for providing the notification of withdrawal might be. In normal treaty practice, termination or denunciation of a treaty is the responsibility of whatever agency serves in the executive function of a government. It is up to the executive to serve notice of termination or notice that the treaty no longer applies, in accordance with the relevant treaty provisions and applicable public international law. The EU Treaties are profound in their effect on the law of member states.

ACT OF PARLIAMENT REQUIRED

Although the U.K. government claimed that by ''royal prerogative,'' the executive is entitled to give notice of withdrawal under Article 50 without legislative approval, this claim has been challenged in the courts. On Jan. 24, 2017, the Supreme Court of the United Kingdom ruled that, that an Act of Parliament is required to authorize the executive to give notice of the decision of the U.K. to withdraw from the European Union.[6] The Court found that the European Communities Act of 1972, which gave effect to U.K. membership of the EU, operates as a partial transfer of law-making powers, an assignment of legislative competences, by Parliament to EU institutions. Consequently, EU law is an independent and overriding source of U.K. domestic law that can be changed only by a decision of Parliament. The Supreme Court also considered whether the Northern Ireland, Scottish and Welsh legislatures had to be consulted. It ruled that although those legislatures have responsibilities to comply with EU law, relations with the EU and other foreign affairs matters are reserved to the U.K. government and Parliament, not to those institutions that need not be consulted. As a result, Prime Minister May's public commitment that a Parliamentary vote would be taken on the negotiated exit agreement — which, if concluded, would be completed long after the notice of intent to withdraw is given — fell short of the constitutional requirements.[7] So, Parliament must authorize the executive to give notice of withdrawal for such notice to be validly given under Article 50.

IMPACT OF EU ON U.K. LAW

The scope of the EU's presence in U.K. internal law and external relations is deep and complex. A simple listing of areas that, under the TFEU, the EU has either overriding jurisdiction or some level of coordinating competence includes the following:

- the customs union and the free movement of goods;
- agriculture and fisheries;
- immigration, border control and the free movement of workers;
- security and cooperation in various legal matters;
- regulation of transportation;
- competition and antitrust policy (the source of the state-aid uproar);
- monetary and economic policy;
- employment law;
- public health matters;
- consumer protection;
- research and development in technology and space matters;
- environmental regulation;
- energy regulation;
- social policy and social security; and
- industrial policies.

This daunting list of areas in which the EU establishes coordinated requirements for member states means that the participation of virtually every U.K. administrative agency will be engaged to negotiate continuing relations with remaining member states. While the U.K. has been an EU member, the management of external relations in the areas of EU competency has been handled by the EU Commission. After termina-

[5] James Masters, *Theresa May Commits to Brexit Vote in U.K. Parliament*, CNN.com (Jan. 17, 2017).

[6] *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant); REFERENCE by the Attorney General for Northern Ireland from the High Court of Justice in Northern Ireland: In the matter of an application for leave to apply for judicial review by Agnew and others; REFERENCE of a devolution issue by the Court of Appeal of Northern Ireland: In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5.

[7] Prime Minister Theresa May has promised a ''Great Repeal Bill.'' Mason, Rowena, *Theresa May's 'Great Repeal Bill': What's Going to Happen and When?* The Guardian (Oct. 2, 2016).

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tion of EU membership the U.K. will need to, and be free to, negotiate appropriate agreements with countries that are not EU member states.

At the same time, a number of critically important areas that are governed by the rules that establish the single European market will come under examination, namely the fundamental freedoms: free movement of goods, services, capital and persons and the freedom of establishment for business.

When membership of the EU ceases, the EU Treaties and all EU law cease to apply to the withdrawing member state as a matter of EU law. The status of EU law as it applied up to that time as a matter of U.K. law will depend on the manner in which the EU law in question has been given effect in the United Kingdom. In some cases, EU rules are given effect in U.K. internal law by the overall provisions of the European Communities Act of 1972.[8] In those cases, the future of those rules will be determined by the ''Great Repeal Act'' promised by the government.

In the corporate tax field, EU law is primarily given effect by U.K. legislation to transpose the various EU direct tax directives (for example the parent-subsidiary directive)[9] into U.K. domestic law. Much of the U.K. international tax regime has been shaped by decisions of the Court of Justice of the European Union.[10] Once the EU Treaties have ceased to have effect, those rules will continue in the U.K. until repealed or amended. They will no longer be susceptible to challenge under EU principles.

AUTOMATIC WITHDRAWAL

The combined burden of simultaneously negotiating a new arrangement with the EU, negotiating and implementing EU arrangements with bilateral trade deals around the world, and revising the U.K.'s own laws as EU law, *per se*, goes away has been predicted (reasonably) to outstrip the government's capacity to complete such a vast undertaking within anything like two years. This means that absent an agreed extension of that time, or an unforeseen ease of completing all of these tasks, the likelihood is very substantial that the exit from the EU will happen automatically by operation of Article 50. And that means that, although all sorts of theories are much debated in the U.K. — ''we could adopt the Norwegian model,'' the ''Albanian model'' (no one has explained what that is) — the only way to approach the subject of what ''Brexit'' will mean, is to understand what happens once that two-year period expires, assuming no agreement, and EU laws cease to apply.

IMPACT ON VAT, TRADE

Article 50(3) sets out the consequences of a state giving notice of withdrawal. The outcome is simply that the EU Treaties cease to apply to the state in question. In other words, EU law, except as incorporated into domestic legislation, is no longer applicable to the particular state. Departure from the EU will mean that Value Added Tax, a tax imposed by EU law will not be required for the United Kingdom. More importantly, the supply of goods and services between the U.K. and remaining member states would become international transactions with border customs controls. This will have a big impact on U.K. trade with the EU, since around 44% of U.K. exports go to other member states and about 57% of U.K. exports are to the remaining European Union. Brexit also means, in the context of corporate taxation, the loss of certain fundamental freedoms in the remaining member states as far as U.K. persons and businesses are concerned.

FOUR FREEDOMS OF THE EU

The EU's four fundamental freedoms are: (1) freedom of movement of goods; (2) freedom to establish and provide services; (3) freedom of movement for persons; and (4) freedom of movement of capital. The freedom of movement of goods deals with the unified customs territory and the ability to ship products within the EU unburdened by virtually any territorial regulation. The freedom to establish and provide services applies to a wide variety of fields, including financial services and banking and professions; this principle enables banks or service firms established in, say, London to operate throughout the remainder of the EU without separate licensing or restrictions,

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[8] European Communities Act 1972 (c. 68).

[9] Council Directive 90/435/EEC, On the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, 1990 O.J. 225 6 (EC), amended by Council Directive 2003/123/EC, 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 O.J. (L. 007) 41.

[10] For example, corporate group ownership through non-resident (*Imperial Chemical Industries plc (ICI) v. Colmer (HMIT)* (Case C-264/96)); Corporate group cross-border loss relief *(Marks & Spencer plc v. Halsey (HMIT)* (Case C-446/03)); *Revenue and Customs Comm'rs v. Philips Electronics UK Ltd* (Case C-18/11)); Dividends paid by UK companies to non-residents (*Metallgesellschaft Ltd & Ors v. IR Comm'rs & Attorney-General* (Case C-397/98)); Dividends received by U.K. companies from non-resident companies (*Test Claimants in FII Group Litigation v. IR Comm'rs* (Case C-446/04)); Controlled Foreign Companies (*Cadbury Schweppes plc & Anor v. IR Comm'rs* (Case C-196/04)); *Test Claimants in CFC and Dividend Group Litigation v. IR Comm'rs* (Case C-201/05)); Thin capitalization, transfer pricing (*Test Claimants in Thin Cap Group Litigation v. R & C Comm'rs* (Case C-524/04)).

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and includes the ability to enforce judgements between countries.[11]

The freedom of movement for persons gives EU nationals a right to live and work anywhere within the EU. While this has been a source of sensitivity in the public perception, it affects everything from U.K. citizens' easy ability to travel to a vacation property on the continent to U.K. businesses' ability to hire, as needs may dictate, either low-cost workers for modest jobs (such as construction or restaurant service) or highly skilled workers for specialty positions (such as software programming or financial products design), and have them be able to stay in U.K. along with their families, without formal immigration regulation.

The free movement of capital is the one area in which exiting the EU might have a more limited effect, as the basic freedom is the prohibition of restrictions on the movement of capital and payments — not just internally but also between member states and non-EU countries. Some of the European Union's direct tax liberalizations exist under the principle of the free movement of capital. Notwithstanding that, ''third'' countries face some disadvantages as member states may retain distinctions between residents and nonresidents with regard to tax law and regulations,[12] such that would not be maintained in relation to other EU member states.

EU INCOME TAX DIRECTIVES WILL CEASE

To turn to specific EU income tax legislation that will be affected, the loss of which should cause some concern, the most significant will be the Parent-Subsidiary Directive,[13] the Interest and Royalties Directive,[14] and the Merger Directive.[15] When the EU Treaties cease to apply to the U.K., these directives, which oblige member states to grant harmonized tax treatment to companies in other member states, will no longer cover the United Kingdom. The loss of the fundamental freedoms and of the direct tax directives in the first instance raises the question as to whether income tax treaties could substitute for the lost benefits. Clearly the role of tax treaties between the U.K. and other member states is going to take on a much increased significance. Initially, one must note that the directives are of uniform application, which income tax treaties, being bilateral by their nature, are not. When you look at the income tax treaties the U.K. has with other member states, what you see is material variability, and positive rates of withholding tax on items otherwise covered by the direct tax directives, including some treaties with major trading partners of the United Kingdom.

Parent-Subsidiary Directive

The Parent-Subsidiary Directive — the first of these three most prominent income tax coordination measures to be adopted — requires member states to abolish withholding taxes on dividends paid between associated companies of different member states, and concomitantly requires measures to prevent double taxation of parent companies on the profits of their subsidiaries. At the present time, a 10% ownership participation constitutes ''association'' under this directive. The parent company's state is required to grant double tax relief either by exempting the dividend, or by providing an indirect credit against the parent company's tax on the dividend, in relation to the subsidiary's underlying tax.

In some respects, the structure of the directive (as amended) parallels the dividend Article (10) of an

[11] Croft, *Brexit: Law Firms Set for the Great EU Demerger*, Financial Times (Oct. 5, 2016). Among the reactions to loss of this freedom, it has been reported that a majority of London law firms are planning to move some or all of their operations to the continent, to have a footprint in the EU after the U.K. exit. Philip Georgiadis, *Major Law Firms Prepare for Brexit*, Financial News (Nov. 24, 2016). While advising on effects of the exit is a growth industry, M&A work is said to have slowed as a result of the Brexit vote. Seal, *A Tale of Two Brexits at Four of London's Biggest Law Firms*, Bloomberg News (July 14, 2016). *See also* Johnson, *Seven Ways Brexit Will Impact International Law Firms*, Legal Week (June 27, 2016).

[12] For example, the European Court's decisions regarding inclusion of EU member state companies or branches in certain groupings for various tax purposes, noted above in footnote 8, do not necessarily apply to non-member states. In Case C-265/04, *Bouanich v. Skatteverket* (Swedish Local Tax Board), E.C.R. 2006 I-00923, the court held that members may not discriminate against similarly situated nonresidents in characterization of share repurchases, but left for factual determination whether alternative treatment under an income tax treaty effectively eliminated the differential treatment.

[13] *See* above n. 9.

[14] Council Directive 2003/49/EC, On a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States, as amended (April 6, 2004 (2004/66/EC), April 29, 2004 (2004/76/EC), and November 20, 2006 (2006/98/EC)).

[15] Council Directive 90/434/EEC, July 23, 1990, On the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States, 1990 (O.J. L 225) 1. After a number of amendments, the Merger Directive has been consolidated into a single text, as Council Directive 2009/133/EC, 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 and to the transfer of the registered office of an SE or SCE between Member States, 2009 O.J. (L 310) 34.

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OECD[16] Model-patterned income tax treaty: It defines dividends similarly, sets a relatively low ownership threshold (10%) for the benefit to take effect, and offers double tax relief of the same kinds as an income tax treaty. However, in the absence of the directive, U.K. companies will need to rely on individual tax treaties to secure comparable benefits, and these will not uniformly offer comparable protections. Only some of the U.K.'s modern income tax treaties with EU member states have built in a zero rate for dividends from the other party's companies at ownership thresholds similar to that in the directive. For example, Article 11 of the 2008 treaty with France does this, as does Article 10 of the treaty with Hungary. But others have not: for example, Article 10 of the 2010 treaty with Germany. Some treaties with EU member states may still carry fairly high withholding tax rates.

Furthermore, the directive not only applies its exemption-and-double-tax-relief benefit to dividends from EU associated companies but, by reason of its amendment in 2004,[17] applies a similar exemption to profits of permanent establishments located in one member state and operated by a company resident in another member state. The U.K.'s tax system provides a tax credit for foreign permanent establishment profits by way of default,[18] with an elective exemption,[19] which might offset the loss of the exemption provided by the directive. However, the elective exemption applies to all of a company's foreign branches, whether within the EU or not, and is permanent. In view of that, certain situations could arise in which the domestic provisions result in less favorable overall protection than the directive. U.K. income tax treaties also provide for foreign tax credits, but if the domestic exemption or credit are not equivalent substitutes for the directive, they would have to be individually evaluated.

Interest and Royalties Directive

Similarly, the language of the Interest and Royalties Directive has parallels to the language of interest and royalties Articles 11 and 12 of the OECD Model Treaty, as it was in effect when the directive was adopted. But, as with the dividend article of a treaty, the vagaries of individual treaty negotiations and more recent changes to those articles in the OECD Model, leave potentially significant gaps between the current EU-wide protections of the directive and the individually tailored protections of specific income tax treaties.

As with the dividend article of income tax treaties, some of the U.K.'s treaties do permit source-country taxation of interest, royalties, or both. For example, Article 11 of the U.K. treaty with Italy permits taxation of interest at 10% (subject to a number of exceptions), and royalties at 8%; Articles 11 and 12 of the treaty with Croatia permit taxation of interest and royalties, respectively, at 5%. Most obviously, treaties that do not provide the zero rate called for in the Interest and Royalties Directive will put U.K. entities at a disadvantage compared to their former position. A more complex analysis may be required in determining whether the definitions of ''interest'' and ''royalties'' provide an equivalent scope of coverage, even if a comparable exemption applies. While the directive's definition of ''interest'' more or less mirrors that in the OECD's recent model income tax treaties, there has been a material difference with regard to ''royalty'' since the definition in the OECD Model of 1992.

The directive's definition of ''royalty'' includes the phrase ''payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties,'' thus including as ''royalties'' payments under equipment leases or other similar charges, while treaties containing that terminology remove them from consideration as business profits. This means that the payment effectively becomes exempt under the directive, but apart from the possible existence of a positive rate under an applicable treaty, it alternatively could be attributed to a permanent establishment in a treaty context and become subject to full corporate taxation.[20]

Merger Directive

Finally, loss of protection under the Merger Directive will take away the gain deferral mechanisms provided in that directive. The Merger Directive covers cross-border mergers or reorganizations in which transferred assets (and liabilities) forming a branch of activity are transferred to one or more receiving companies in exchange for shares. Assets that can obtain deferral include shares in acquisitions of a majority holding by an acquiring company. As the result of a 2005 amendment, the directive covers ''spin offs.''[21] The directive provides deferral of gain on transferred

[16] Organization for Economic Cooperation and Development.

[17] Council Directive 2003/123/EC, 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 O.J. (L 007), 41.

[18] Taxation (International and Other Provisions) Act 2010, Part 2, ch. 2.

[19] Corporation Tax Act 2009, Part 2, ch. 3A.

[20] This would be especially true if the equipment itself were deemed to be a permanent establishment.

[21] These are partial divisions under which the splitting company is not dissolved, but continues to exist. It transfers part of its assets and liabilities, which constitute a branch or branches of ac-

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assets if the receiving company connects them to a permanent establishment in the transferring company's member state. In certain cases of ''triangular'' reorganizations, the assets may be connected to a permanent establishment in another member state. In all cases, the receiving company must carry over the tax values of the transferred assets.

The future of cross-border mergers and reorganizations is at best seriously unclear, and is likely to return to pre-directive days when such transactions virtually could not be done without taxation of gain. Certainly the capital gains articles of income tax treaties, such as the OECD's model Article 13, clearly will not be adequate substitutes. Those articles deal mainly, if not exclusively, with providing exemptions from or reductions in capital gain tax that the source state would impose. Because the OECD model is based on retention of residence tax jurisdiction to the extent possible, treaty capital gains articles will offer nothing like the extensive deferral protection that the merger directive provides.

TAX CONTROVERSIES EXPECTED TO SURGE

The changes described above will lead by themselves to many tax controversies. When added to the changes in international tax structuring and positions that will be brought about by the implementation of the OECD's ''base erosion and profit shifting'' (BEPS) actions, tax controversies are certain to increase dramatically. This will bring about a need for mechanisms to settle disputes and coordinate tax enforcement. Two important measures in this regard will go away when the EU Treaties cease applying to the United Kingdom.

Arbitration Convention

In the transfer pricing area, the Arbitration Convention supplements the basic mutual agreement procedure in bilateral treaties between member states.[22] This requires member states consulting on a transfer pricing dispute to resolve the matter within a two-year period. Unresolved disputes may, if the taxpayer chooses, go to a binding arbitration for resolution. The mutual agreement article of most income tax treaties will not offer nearly the same protection as this Convention for two main reasons. First, most mutual agreement articles fall short of requiring the competent authorities to reach an agreement. Typical language requires them only to ''endeavor'' to do so, leaving open many opportunities to fail, at the cost of the taxpayer. Second, because treaties don't necessarily compel an actual agreement, binding arbitration in mutual agreement proceedings is a distinctly minority phenomenon. Even though many governments are clamoring for it to become standard, it does not appear likely to reach universal acceptance.[23]

The Arbitration Convention is in a curious status vis-à-vis a U.K. departure from the EU. It is a separate convention from the EU Treaties, so remains in effect on a recurring automatic five-year renewal, the next one of which is due to occur in 2019. The renewal happens, though, only if no signatory objects. There is also a specific provision, not for termination, but for states to initiate a call for revision of the convention. There is no U.K. position on the future of the Arbitration Convention so far. There is some thinking among transfer pricing specialists that this silence is a benefit to both parties, and since it hasn't come into the spotlight in the same way immigration has, it may not be a target of the U.K.'s team negotiating an exit. In that case the Arbitration Convention could operate to the side of everything else that is going on. With the U.K. out of the EU generally, it seems highly possible that this efficient mechanism for settling transfer pricing disputes might still receive at least one objection on its next renewal date, and thus cease to provide its current protection. In addition, the EU Commission is proposing to replace the Arbitration Convention with a directive that would exclude the U.K. after withdrawal from the EU.

Exchange-of-Information Directives

The end of the EU relationship will also bring to an end directives that deal with collaboration between European tax administrations on exchange of information and the assistance in collection of taxes, including the agreements that the EU has negotiated with certain third countries such as Switzerland and other neighboring territories dealing with these issues. These agreements tend to mirror the exchange-of-information provisions in income tax treaties, and the Multilateral Convention on Administrative Assistance (MCAA), which parallels much of the OECD's BEPS work. However, under the EU umbrella, the exchange of information is mandated and given built-in time

tivity, to another company, in exchange for shares in the receiving company. These securities are then transferred to the shareholders of the transferring company.

[22] Convention 90/436/EEC, On the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, 1990 O.J. (L 225) 10.

[23] The OECD's multilateral instrument, which was released on November 25, 2016, and is intended to modify contracting states' income tax treaties, was unable to reach agreement on mandatory arbitration; it only encourages members to adopt it by specific agreement.

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limits, and the administrative assistance is provided some standards to reduce opportunities to frustrate it. However, as this is all driven by directives, which no longer would apply to the U.K., it would have to operate under tax treaties and the MCAA.

Non-Discrimination

Finally, there is the question whether OECD Model Article 24 — the non-discrimination article — can help either with any of these issues, or at least help to prohibit discrimination that might take place. Article 24 only prohibits limited categories of discrimination in the host country. It says nothing about origin state discrimination.

LIMITATIONS ON BENEFITS

Bilateral income tax treaties between member states also raise important questions. A question currently circulating in the U.K. tax professional field is whether U.K. companies would benefit from EU-based holding, financing or licensing companies. This really raises a question of both directive and treaty shopping in the 21st century. Everything that has happened in relation to the OECD/G20 BEPS project in the last few years would suggest that it's going to be very difficult for U.K.-based companies actually to access the directives or, indeed, treaties between member states. So we are looking at a very, very different regime for U.K.-based businesses in their operations in Europe.

TREATY ABUSE

Just speculating a bit about the future of tax treaties, if we look at the EU's published recommendation on treaty abuse, we already see some tension. For example, the EU supports the anti-commissionaire language that we see in BEPS Action 7. Although commissionaires do not work in countries that recognize agencies, as the U.K. does, U.K. businesses may find an increasing need to deal with continental countries through permanent establishment — avoiding structures. The U.K. seems unlikely to be a party that is going to sign up to that anti-commissionaire position. Both the EU and the U.K. agree that treaties should have a principal purpose test, so there we can anticipate treaty provisions that would not support U.K. structuring to minimize the treaty disadvantages I've mentioned above. And then we've got the application of the EU anti-avoidance directive and its application to third countries — which, of course, the U.K. will be.

STATE AID ISSUES REMAIN

Finally, in relation to harmful tax competition, the EU prohibitions on state aid would cease to apply to the U.K. tax system, a possible bright spot on the Brexit tax horizon, there are some questions around whether the U.K. will be entirely free of state aid issues by exiting. In the EU commission's strategy for effective taxation with third countries, one of the issues they raise is the possibility that state aid provisions should be included in third-country agreements and assessing countries for inclusion on the EU tax haven blacklist. So those are the things the U.K. tax negotiators will face in their discussions.

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