Department of Law
Spring Term 2018

Master Programme in International Tax Law and EU Tax Law
Master’s Thesis 30 ECTS

Brexit
Perspectives from the International Tax Paradigm

Author: Aditya Perakath
Supervisor: Katia Cejie
<table>
<thead>
<tr>
<th>LIST OF ABBREVIATIONS AND DEFINITIONS</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>1.1 PROBLEM DESCRIPTION</td>
<td>5</td>
</tr>
<tr>
<td>1.2 THESIS OBJECTIVE</td>
<td>8</td>
</tr>
<tr>
<td>1.3 OUTLINE</td>
<td>10</td>
</tr>
<tr>
<td>1.4 DELIMITATIONS</td>
<td>11</td>
</tr>
<tr>
<td>1.5 CHOICE OF TOPIC</td>
<td>14</td>
</tr>
<tr>
<td>1.6 MATERIALS</td>
<td>15</td>
</tr>
<tr>
<td>1.7 METHODS</td>
<td>16</td>
</tr>
<tr>
<td>2. RESTRICTIONS ON MARKET FREEDOMS</td>
<td>19</td>
</tr>
<tr>
<td>2.1 INTRODUCTION</td>
<td>19</td>
</tr>
<tr>
<td>2.2 PROVISIONS OF THE TRANSITION AGREEMENT</td>
<td>20</td>
</tr>
<tr>
<td>2.3 SOURCES OF LAW POST-BREXIT</td>
<td>21</td>
</tr>
<tr>
<td>2.4 INHERITANCES AND GIFT TAXES</td>
<td>22</td>
</tr>
<tr>
<td>2.5 CONCLUSION</td>
<td>24</td>
</tr>
<tr>
<td>3. RETRACTION OF ECJ JURISDICTION</td>
<td>26</td>
</tr>
<tr>
<td>3.1 INTRODUCTION</td>
<td>26</td>
</tr>
<tr>
<td>3.2 ARGUMENTS OVER SOVEREIGNTY</td>
<td>26</td>
</tr>
<tr>
<td>3.3 PROVISIONS OF THE TRANSITION AGREEMENT</td>
<td>28</td>
</tr>
<tr>
<td>3.4 WHY DOES IT MATTER?</td>
<td>31</td>
</tr>
<tr>
<td>3.5 CADBURY SCHWEPPES</td>
<td>32</td>
</tr>
<tr>
<td>3.5.1 FACTS</td>
<td>32</td>
</tr>
<tr>
<td>3.5.2 LEGAL ISSUES</td>
<td>33</td>
</tr>
<tr>
<td>3.5.3 HOLDING</td>
<td>34</td>
</tr>
<tr>
<td>3.6 IMPACT OF BREXIT</td>
<td>36</td>
</tr>
<tr>
<td>3.7 CONCLUSION</td>
<td>39</td>
</tr>
<tr>
<td>4. CONCLUSION</td>
<td>41</td>
</tr>
<tr>
<td>5. LIST OF SOURCES</td>
<td>43</td>
</tr>
<tr>
<td>5.1 TREATIES</td>
<td>43</td>
</tr>
<tr>
<td>5.2 STATUTES</td>
<td>43</td>
</tr>
<tr>
<td>5.3 EU DIRECTIVES AND REGULATIONS</td>
<td>43</td>
</tr>
<tr>
<td>5.4 LETTERS</td>
<td>44</td>
</tr>
<tr>
<td>5.5 BOOKS</td>
<td>44</td>
</tr>
<tr>
<td>Abbreviation / Definition</td>
<td>Expansion / Meaning</td>
</tr>
<tr>
<td>---------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
</tr>
<tr>
<td>Brexit</td>
<td>The UK’s exit from the EU and Euratom</td>
</tr>
<tr>
<td>Brexit Deadline</td>
<td>0000 hours Central European Time on March 30, 2019</td>
</tr>
<tr>
<td>CFC</td>
<td>Controlled Foreign Company</td>
</tr>
<tr>
<td>CS</td>
<td>Cadbury Schweppes</td>
</tr>
<tr>
<td>CS Ireland</td>
<td>Two Cadbury Schweppes group entities located in Dublin, Ireland</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>Euratom</td>
<td>European Atomic Energy Community</td>
</tr>
<tr>
<td>Final Agreement</td>
<td>The final terms and conditions negotiated for the UK’s Full Withdrawal</td>
</tr>
<tr>
<td>Four Freedoms</td>
<td>The free movement of goods, services, people, and capital across national borders within the European single market</td>
</tr>
<tr>
<td>Full Withdrawal</td>
<td>The UK’s position in relation to the EU after the end of the Transition Period</td>
</tr>
<tr>
<td>Member State</td>
<td>Member state of the EU</td>
</tr>
<tr>
<td>Model Convention</td>
<td>OECD Model Tax Convention on Income and on Capital</td>
</tr>
<tr>
<td>Multilateral Instrument / MLI</td>
<td>Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
</tr>
<tr>
<td>Abbreviation / Definition</td>
<td>Expansion / Meaning</td>
</tr>
<tr>
<td>---------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>Transition Agreement</td>
<td>The draft agreement to govern UK-EU relations during the Transition Period</td>
</tr>
<tr>
<td>Transition Period</td>
<td>The period from the Brexit Deadline through December 31, 2020</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>VAT</td>
<td>Value-added tax</td>
</tr>
<tr>
<td>Withdrawal Bill</td>
<td>European Union (Withdrawal) Bill 2017–19 (UK)</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
1. Introduction

1.1 Problem Description

On March 29, 2017, Ms. Theresa May, Prime Minister of the United Kingdom of Great Britain and Northern Ireland (“UK”), notified Mr. Donald Tusk, President of the European Council, that pursuant to the results of the British referendum held on June 23, 2016 and in accordance with the European Union (Notification of Withdrawal) Act 2017, the UK was invoking Article 50(2) of the Treaty on the European Union (“TEU”) and Article 106a of the Treaty Establishing the European Atomic Energy Community, thereby giving formal notice of its intentions to withdraw from the European Union (“EU”) as well as the European Atomic Energy Community (“Euratom”).

---

2 European Union (Notification of Withdrawal) Act 2017, c. 6 (UK). This Act received the Royal Assent on 16 March 2017. See Letter from Theresa May to Donald Tusk, supra note 1.
5 Because nuclear energy is a politically sensitive topic in Europe, Euratom has never been subsumed into the EU (unlike other European market communities such as the European Coal and Steel Community). The legal basis for Euratom remains its own distinct treaty, not the Treaty on the Functioning of the European Union. However, the constituents of Euratom are the same as the constituents of the EU. Euratom uses many of the key institutions of the EU, including the European Commission, the European Council of Ministers, and the European Court of Justice (“ECJ”). Leaving the EU but not Euratom would therefore mean that the UK would remain subject to the jurisdiction of the ECJ—and would require the free movement of EU nuclear scientists and overseers across UK borders. Both of these were politically unacceptable to the UK government. See, e.g., Robert J. Downes, What Is Euratom And Why Has It Emerged As a Brexit Battleground?, BULLETIN OF THE ATOMIC SCIENTISTS (July 24, 2017), https://thebulletin.org/what-euratom-and-why-has-it-emerged-brexit-battleground10969; Alan Tovey, What Is Euratom, Why Is There a Row About It, and Why Does It Matter?, THE TELEGRAPH: BUSINESS (July 10, 2017), https://www.telegraph.co.uk/business/2017/07/10/explainer-euratom-row-does-matter/;
Under Article 50 of the TEU, the UK’s exit from the EU and Euratom (popularly known as “Brexit”) will take effect at 0000 hours Central European Time on March 30, 2019 (“Brexit Deadline”), unless every member state of the EU (“Member State”) agrees to extend this deadline. Because of the number of Member States holding vetos, an extension of the Brexit Deadline is extremely unlikely.

Although other territories have previously withdrawn from various postwar European communities, the UK is the first sovereign country to

---

6 Article 50 of the TEU provides: “1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. . . . 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.” Treaty on the European Union, supra note 3, at 43–44.

7 There are currently twenty-seven Member States of the EU other than the UK. Any one of them could potentially block an extension of the Brexit Deadline.

8 See Maia de la Baume, Greenland’s Exit Warning to Britain, Politico (June 22, 2016), https://www.politico.eu/article/greenland-exit-warning-to-britain-brexit-eu-referendum-europe-vote-news-denmark/ (“Greenland, as part of Denmark, joined what was then the European Economic Community in 1973. After the introduction of home rule in 1979, the push to leave the EU gathered pace, mostly because of concerns about losing control over fishing rights its main source of revenue. The people of Greenland had voted against EU membership in 1972, but had to join because of their ties to Denmark. When a second referendum was finally held a decade later, 52 percent voted to quit the bloc.”). See also Keri Phillips, Greenland: The Only Country to Have Left The EU, ABC: NEWS (Nov. 8, 2016), http://www.abc.net.au/news/2016-11-09/greenland-the-only-country-to-have-left-the-eu/8005036. Similarly, Algeria ceased to be a member of the European common market upon independence from France in 1962, and the French overseas territory of Saint Barthélemy changed its status to become an overseas country/territory associated with the EU in 2012. See Three Other Countries That Left the EU, THE SPECTATOR (Apr. 1, 2017), https://www.spectator.co.uk/2017/04/three-other-countries-that-left-the-eu/; Page on Withdrawal from the European Union, WIKIPEDIA, https://en.wikipedia.org/wiki/Withdrawal_from_the_European_Union#Saint_Barth.

---
initiate withdrawal from the full European Union, and the first to do so through the mechanisms of Article 50 of the TEU and Article 218 of the Treaty on the Functioning of the European Union (“TFEU”).

The UK’s status as a world power means that Brexit is a hugely controversial sociopolitical event. European leaders see Brexit as a threat to the stability of the EU and the larger concept of a postwar Europe integrated through trade and commerce, and are keen to avoid setting a precedent that might induce the withdrawal of any more Member States. Nevertheless, the economic size of the UK, the volume of UK-EU trade, and the UK’s close geographical proximity to mainland Europe mean that both sides recognize the importance of a negotiated agreement to govern UK-EU relations post-Brexit.

On March 19, 2018, negotiators agreed on a draft agreement to govern UK-EU relations (“Transition Agreement”) for an initial period of roughly 1¾ years from the Brexit Deadline, i.e. from March 29, 2019 through December 31, 2020 (“Transition Period”). The Transition Agreement is

---

10 See Adam Luedtke, Brexit & Migration: A Disastrous Vote That Accomplishes Nothing, POLICY TRAJECTORIES (July 14, 2016), http://policytrajectories.asa-comparative-historical.org/2016/07/brexit-and-migration-a-disastrous-vote-that-accomplishes-nothing/ (“There is no historical analog[ue] for a country [as influential as the UK] withdrawing from a supranational federation as deeply and multi-dimensionally integrated as the EU.”)
11 See de la Baume, supra note 8 (“The negotiations were a surprisingly unpleasant job . . . . The EU member states would not take us seriously because they were not willing to accept that you should or could leave.”) (quoting Lars Vesterbirk, Greenland’s former representative to the EU who led the negotiations for Greenland’s exit).
12 In the absence of any other agreement, post-Brexit trade between the UK and EU would have to be carried out under default World Trade Organization (“WTO”) tariffs. See Letter from Theresa May to Donald Tusk, supra note 1, at 3.
conditional on, and will not have legal effect unless, a final treaty of withdrawal is concluded and ratified by both sides prior to the Brexit Deadline.  

1.2 Thesis Objective

This thesis aims to examine the potential consequences of Brexit for international and EU tax law applying to UK and EU citizens/legal persons, with specific reference to issues of international double taxation during the Transition Period and after the end of the Transition Period (“Full Withdrawal”). Specifically, this thesis considers two aspects of Brexit which are likely to have the most significance for international tax law in the UK: (1) restrictions on market freedoms; and (2) retraction of ECJ jurisdiction.

First, while the impetus for Brexit has primarily been political, the ties that it seeks to sever are nevertheless legal. As part of the EU, citizens of the UK enjoy the “Four Freedoms” that underpin the central concept of the European single market: the free movement of goods, services, persons, and capital across national borders. Of these, the free movement of workers across EU-UK borders and its perceived effects on British workers was a major stimulus for Brexit. The EU position from the start of negotiations

---


15 Treaty on the Functioning of the European Union, supra note 9, arts. 28–29.

16 Treaty on the Functioning of the European Union, supra note 9, arts. 56–62.

17 Treaty on the Functioning of the European Union, supra note 9, arts. 45–55.

18 Treaty on the Functioning of the European Union, supra note 9, arts. 63–66.

19 See, e.g., Eight Reasons Leave Won the UK’s Referendum on the EU, BBC (June 24, 2016), http://www.bbc.com/news/uk-politics-eu-referendum-36574526 (“The [referendum] result suggested that concerns about levels of migration into the UK over the past 10 years, their impact on society, and what might happen in the next 20 years were more widely felt and ran even deeper than people had suspected.”); Geoffrey Smith, 5 Reasons Why The Brits Have Turned in Favor of Brexit, FORTUNE (June 14, 2016), http://fortune.com/2016/06/14/brexit-britain-eu-vote-referendum-supporters/ (“Immigration. This could actually be arguments 1 through 10, but its many nuances are
has been that the UK cannot have free access to the European single market unless it also accepts these four freedoms;\(^{20}\) the UK position has been exactly the opposite.\(^{21}\) As one commentator has stated, “In an ideal world, many Brexit campaigners would like to retain access to the single market, but also getting rid of freedom of movement.”\(^{22}\)

Second, the other major sticking point in Brexit negotiations that is relevant to international and EU tax law\(^{23}\) is the continued jurisdiction of the European Court of Justice (“ECJ”)\(^{24}\) over the UK. The ECJ is the final judicial authority on matters of international tax within the EU;\(^{25}\) the EU

---

\(^{20}\) *Merkel Warns Britain It Must Accept ‘Four Freedoms’*, DW (Jan. 9, 2017), http://p.dw.com/p/2VXBi (“Access to the single market can only be possible on the condition of respecting the four basic freedoms. Otherwise one has to talk about limits to access.”) (quoting German Chancellor Angela Merkel).

\(^{21}\) Jean-Claude Piris, *Britain Is Deluding Itself over Single Market Access*, FINANCIAL TIMES (Nov. 16, 2017), https://www.ft.com/content/7a3d13ee-cabf-11e7-8536-d321d0d897a3 (“[A]fter Brexit, the British government hopes to retain partial access to the EU’s internal market under the same conditions as a member state . . . .”).


\(^{23}\) Other major points of negotiation not directly relevant to tax law, such as the payment of dues to the EU and the status of the Ireland-UK land border are not addressed in this thesis. See Douglas A. Rediker, *The Brexit Options, Explained*, BROOKINGS (Jan. 5, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/01/05/the-brexit-options-explained/ (“What have been some of the thorniest negotiation issues to date? First was the U.K.’s agreement to continue to pay upwards of £40 billion (and possibly far more) into the EU budget through at least the end of 2020. This issue was non-negotiable for the EU, and failure on this point would have effectively concluded the negotiations before they began. . . . Second was the U.K.’s agreement to avoid re-imposing a hard border between Northern Ireland and Ireland . . . The EU position remained largely static, starting from the premise that there was no way of preventing a hard border in Ireland without Northern Ireland remaining de facto aligned with the EU. In the end, it was up to the British to come around to largely accepting the EU’s position.”).

\(^{24}\) The official name of the ECJ is simply the “Court of Justice.” Accordingly, it is often referred to as the “CJEU”; however, “ECJ” is an accepted alternative and is the preferred abbreviation used in this thesis.

\(^{25}\) Treaty on the European Union, *supra* note 3, art. 19(1) (“The Court of Justice of the European Union shall . . . ensure that in the interpretation and application of the Treaties
wishes this to continue. Pro-Brexit political factions in the UK have argued that this, along with the UK’s inability to refuse entry to EU workers on account of the freedom of movement of people under the TFEU, have diluted the UK’s sovereignty and worked against its national and economic interests.

1.3 Outline

Chapter 2 of this thesis first examines the first-stated goal above, viz. an analysis of the consequences for international tax of the removal of EU single-market freedoms consequent to Brexit. After a short introduction, the chapter examines the provisions of the Transition Agreement that pertain to EU market freedoms and their continuance in the UK during the Transition.
Period and thereafter. Next, the chapter considers what sources of law, if any, might replace the EU framework treaties (and the freedoms enshrined therein) post Brexit. The chapter ends by looking at a specific category of income subject to taxation, namely inheritances and gift taxes, as an example of how the field of international tax may be affected by Brexit.

Chapter 3 of this thesis examines the next-stated goal above, viz. an analysis of the consequences for international tax of the removal of the supervisory jurisdiction of the ECJ subsequent to Brexit. After a short introduction followed by some political background (explaining the jostling of the UK and EU for ultimate sovereignty), the chapter examines the provisions of the Transition Agreement that pertain to the ECJ and the jurisdiction of EU courts in the UK during the Transition Period and thereafter. Next, the chapter considers what sources of law, if any, might replace the EU framework treaties (and the freedoms enshrined therein) post Brexit. The chapter ends by looking at a specific ECJ case pertaining to international taxation in the UK—the *Cadbury Schweppes* case—28—as a second example of how the field of international tax may be affected by Brexit.

The thesis ends with a conclusion in chapter 4, which ties together the analysis in the preceding two chapters. Finally, chapter 5 contains a full bibliography of all the sources referred to and cited / relied on in the body of this thesis.

### 1.4 Delimitations

The multiple and multidimensional aspects of Brexit necessitate some demarcation of the subjects that will be addressed in this thesis, and the topics that will be omitted.

---

First, this thesis focuses only on the particular aspects of international tax law mentioned above, insofar as applicable to direct taxation: i.e., taxes on income and capital within the meaning of the OECD Model Tax Convention on Income and on Capital (“Model Convention”). As a customs union, the EU is designed to have uniform rules on indirect taxation. Consequently, Brexit is likely to have a large impact on indirect taxes such as VAT, customs duty, and excise duty within the UK.\(^{29}\) For example, unless an alternative arrangement is agreed,\(^{30}\) the UK would need to develop its own domestic customs duty law to replace the currently-applicable EU directives, regulations, and council decisions.\(^{31}\) However, the potential effects of Brexit on indirect taxation, such as value-added tax (“VAT”) and customs and excise duties are excluded from the scope of this thesis.

Second, this thesis considers the potential effects of Brexit only on UK and EU persons, businesses, and branches. Several different categories of affectees fall under this umbrella: e.g., UK citizens resident in other EU countries, UK citizens resident in the UK but earning income in other EU countries, EU citizens resident in the UK, EU citizens not resident in the UK but earning income in the UK, companies and other business associations tax-resident in the UK but with permanent establishments in the EU or vice versa, and group companies setting arm’s-length prices across UK/EU borders. However, the consequences for other categories and types of


\(^{30}\) Mr. Jeremy Corbyn, the leader of the opposition Labour Party in the UK, is in favour of negotiating a permanent UK-EU customs union very similar to the one now in place, although not amounting to full membership of the single EU internal market. See Alex Hunt & Brian Wheeler, Brexit: All You Need to Know About the UK Leaving the EU, BBC: NEWS (May 10, 2018), http://www.bbc.com/news/uk-politics-32810887.

\(^{31}\) See DELOITTE, Ireland; see also UK Leaving the EU: Briefing Paper on Direct and Indirect Tax Implications—June 2016, DELOITTE (June 2016), https://www2.deloitte.com/uk/en/pages/tax/articles/uk-leaving-the-eu.html (last accessed May 17, 2018) [hereinafter DELOITTE, Briefing Paper]. However, VAT is already contained within UK law and would continue to be assessed within the UK post Brexit, although there may be practical changes in the manner of assessment. Id.
international businesses and citizens of other countries will not be examined. For example, this thesis will not consider how Brexit might affect the taxation of the UK subsidiary of a US company, or a Japanese tax-resident performing services in the UK.

Third, this thesis does not carry out a clause-by-clause Brexit analysis of the major EU directives dealing with direct taxes, such as the Parent-Subsidiary Directive, the Merger Directive, the Interest-Royalty Directive, the Anti-Tax Avoidance Directive, or the Recovery and Mutual Assistance Directive. Similarly, issues relating to the OECD’s BEPS project (as contained in the Anti-Tax Avoidance Directive and otherwise) are not cogitated in this thesis.

Finally, this thesis does not attempt to be a full survey of all the historical, political, and social issues behind and reasons for the Brexit vote. It should be read neither as a chronicle of Brexit-related events, nor as an

---

1.5 **Choice of Topic**

I have always been fascinated by the concept of the European Union. World history in the first half of the twentieth century was dominated by European politics, rivalries, and wars. Along with postwar decolonialism and the rise of the United States as a world power, the second half of the twentieth century witnessed European supranational integration on a scale not seen since the thirteen American colonies adopted their Articles of Confederation in 1777. The sixty-eight years since the formation of the European Coal and Steel Community (the precursor to the modern EU)\(^{38}\) have proven to the world that economic ties can achieve that which wars never can—lasting peace.\(^{39}\) The European single market is not just a commercial phenomenon, but a geopolitical one, culminating in the fall of the Berlin Wall and the end of the Bosnian War towards the end of the twentieth century. To many young people today, the thought of war between European powers is so unlikely as to not constitute a serious concern.

But against this backdrop of success lies a streak of right-wing nationalism of the type usually associated with the National Socialist German Workers’ Party. These fringe parties enjoy varying degrees of political success in different European countries.\(^{40}\) That the UK (and, across the ocean, its daughter the US) should be the country in which such nationalism found its ultimate expression was shocking to me, and sadly ironic, given the UK’s history of combating such extremism in the two World Wars.

---


\(^{39}\) The role of the United Nations, an organization with a history coextensive to that of the EU, should also not be forgotten.

Nationalism, in the sense of asserting national sovereignty at the cost of international cooperation, is not compatible with some of the basic tenets of international tax law, especially the principle of tax neutrality and the mitigation of international double taxation.\(^{41}\)

The idea to examine the effects of Brexit on some principles of international tax law was partly inspired by my Scottish classmate in the 2017-18 International and European Tax Law Master’s program here in Uppsala. He felt strongly that Brexit was a poor move for his country, and being Scottish, resented the fact that Scotland was being dragged out of the EU thanks to its more dominating southern cousin, England.\(^{42}\)

1.6 Materials

There are some immediately-apparent issues with my choice of topic. First, because this thesis is being written during the continuance of ongoing negotiations for the final Brexit withdrawal agreement, its findings and conclusions must necessarily contain an element of conjecture, subject to testing on the touchstone of political reality. In the absence of any real historical precedent, there is little guidance for either side on how best to proceed. Both sides must be well aware that their actions will form a precedent that will be remembered for decades (if not centuries) to come. The EU political leadership may be particularly concerned with taking a hard line in negotiations, at least partly with the intent of sending a message of deterrence to any other Member States who might harbour their own secret notions of leaving.

Second, given the topical and evolving nature of the subject-matter of this thesis, there is very little traditionally-published scholarly material

\(^{41}\) See Martin Berglund & Katia Cejie, Basics of International Taxation: From a Methodological Point of View 19, 29 (2014).

available to be used as resources. Most sources cited in this thesis are articles and news stories published on the internet. This, in itself, does not necessarily reduce their legitimacy. However, as they are not peer-reviewed, they may be of reduced scholarly value.

Third, the Brexit negotiations are proceeding on an extremely aggressive timeline. The two years prescribed by Article 50 TEU is barely sufficient to negotiate and conclude a large corporate transaction, let alone agree on the myriad trade and policy issues that go along with Brexit. Accordingly, the conclusions of this thesis may be quickly rendered out of date after Full Withdrawal. For example, in the time between preparing the synopsis and proposal for this thesis in February 2018 and completing the final draft in May 2018, the draft Transition Agreement was agreed and published, immediately changing the Brexit roadmap for the future and providing a sense of the respective bargaining power and negotiating priorities of the two sides.

1.7 Methods

Subject to the foregoing concerns, it is my hope that this thesis may fulfil a small research gap in the field of international and EU tax law, albeit one that may be quickly rendered out of date once the deadline for Full Withdrawal passes. Although some private consulting firms have prepared and published summaries of the consequences of Brexit (and many more have undoubtedly kept them unpublished), such summaries are typically used either as internal training and knowledge-building manuals, or as teasers to induce clients to consult with the firms for full Brexit transitioning advice.

Traditionally, legal research and scholarship has followed similar methods as those of legal practice. Academic papers in law are written (for the most part) by persons who have undergone the same legal training as
judges and advocates. Usually, this method is to describe and analyze sources of positive law, such as statutes and cases of precedent. This is called the “doctrinal legal method” in common-law jurisdictions, and the “legal-dogmatic method” in civil-law jurisdictions.

One major function of the legal-dogmatic method has traditionally been to “criticise[], explain[], correct[] and direct[] legal doctrine.” Legal-dogmatic method has been said to “sit[] and wait[] for case law and draft bills to come along, so those can be commented upon.”

However, there is no legal doctrine to criticise in this thesis. Brexit is not a legal topic in the same sense that, say, the law of torts or constitutionalism is. Professor Jan Vranken has argued that the traditional method of textual analysis and common legal reasoning is, in many jurisdictions, being supplemented with “external perspectives or data from beyond current positive law.” He further reasons that:

[T]he debate should not concern itself with legal techniques, but rather with the underlying arguments and facts: legal-political options, thoughts, values and interests. At present, these are usually either omitted entirely or too vague, which means that they cannot be checked and cannot develop. It is quite understandable that a judge works this way, for example because of a lack of time, but it does not mean that scholars should limit themselves in the same way. They especially should be expected to perform such analysis and testing.

---

44 Id.
45 Id. (quoting Peter Birks).
46 Id.
47 Id.
Their results will undoubtedly find their way into judicial practice once it becomes commonplace.\textsuperscript{48}

The legal method followed in this thesis is an example of what Prof. Vranken is arguing for above. Because Brexit is primarily a socio-political phenomenon, there is necessarily an importation of value-judgments and contextual reasoning in its analysis, even when the analysis is based in the legal sphere of international taxation.

A final note on formatting conventions: This thesis is written primarily in American English and associated grammar, with some variation in spelling. Because it is the system in which I have the most training, citations in this thesis conform to The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

\textsuperscript{48} Id.
2. Restrictions on Market Freedoms

2.1 Introduction

The key characteristic of Brexit is uncertainty. Until the final terms and conditions for the UK’s Full Withdrawal are negotiated (the “Final Agreement”), no aspect of Brexit is known for certain and cannot be predicted with confidence. This uncertainty extends equally to issues of international taxation.

In terms of restrictions on EU single-market freedoms, the possible forms that Brexit may take can be arrayed on a “hardness” spectrum. At one end of the scale lies a “soft” Brexit, which may be defined as “the UK leaves the EU but remains part of the Customs Union and/or Single Market, as a sort of quasi-EU member without voting power and perhaps with less constraints on its sovereignty.”49 At the other end is a “hard” Brexit: “leaving both the EU’s Customs Union and Single Market, ending the EU budget payments and withdrawing from the jurisdiction of the European Court of Justice.”50

This chapter considers the possible issues of international taxation that may arise in the context of a hard Brexit. (By considering the “hardest” alternative, it is easy to slide the scale down to understand the “softer” options.) Unlike indirect taxes, direct taxes in the EU are primarily assessed at the national level rather than at the EU level. Due to this low level of harmonization across Member States, even a hard Brexit is not likely to have a major effect on direct taxes in the UK.51 Nevertheless, there are still some areas of potential concern.

50 Id.
51 DELOITTE, Ireland (“Unlike indirect taxes, direct taxes are not expressly dealt with by the EU treaties. Direct taxes are solely an area of national competency, which only must be exercised in accordance with the EU treaties. Therefore, direct taxes are less likely to be directly affected by Brexit.”).
2.2 **Provisions of the Transition Agreement**

Article 21 of the Transition Agreement provides that the right of equal treatment codified in Article 24 of the Citizens’ Rights Directive\(^52\) shall be preserved throughout the Transition Period. Consequently, all EU citizens living in the UK (and their family members who have the right of permanent residence) must be treated on an equal footing with British subjects resident in the UK. Similarly, UK citizens resident in the EU (and their family members enjoying permanent residence) must be given equal treatment as a citizen by the government of their host state.\(^53\) This right of equal treatment would extend to any tax treaty benefits enjoyed by the resident alien as well, in respect of any applicable income subject to tax by the source state or residence state (as the case may be).\(^54\)

Article 22 of the Transition Agreement is entitled “Rights of Workers.” Apart from preserving the reciprocal right of UK and EU citizens to work in the other territory during the continuance of the Transition Period,\(^55\) it also preserves the rights of workers to “tax and social advantages” in their host state.\(^56\) This means that “[w]here national law allows tax advantages, for example tax deductions in relation to contributions for an occupational pension and private sickness and invalidity insurance, it is discriminatory not to allow equivalent deductions in relation to contributions paid in a migrant worker's Member State of origin.”\(^57\)

---


\(^{53}\) Transition Agreement, supra note 13, art. 21.

\(^{54}\) Id. art 22(1)(e).

\(^{55}\) Id. art 22(1)(e).

\(^{56}\) Id. art 22(1)(e).

\(^{57}\) Aleksandra Czekaj-Dancewicz, *Analytical Note on Social and Tax Advantages and Benefits Under EU Law*, EUROPA (Oct. 2013),
Article 95 of the Transition Agreement provides that the Mutual Assistance Directive\(^{58}\) shall continue to apply for a period of five years after the end of the Transition Period, i.e. even after Full Withdrawal, in respect of claims related to amounts that became due before the end of the Transition Period. In addition, UK is a signatory to the OECD-sponsored Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, commonly known as the “Multilateral Instrument” or “MLI”\(^{59}\). Thus, Brexit is unlikely to impair the existing information-sharing and administrative support regime between the UK and the EU for the assessment and recovery of taxes, and enforcement of anti-avoidance regulations.\(^{60}\)

The other tax-related clauses of the Transition Agreement pertain to either indirect taxes\(^{61}\) or income/privileges of EU civil servants in the UK.\(^{62}\)

### 2.3 Sources of Law Post-Brexit

Bilateral tax treaties form the main mechanism through which issues of international juridical double taxation are remedied. This is true even within the EU. Tax treaties between EU countries are widely based on the Model Convention.\(^{63}\)

\(^{58}\) Supra note 36.


\(^{60}\) This appears to be a good example of bureaucrats realizing that the realities of on-the-ground implementation can be quite different from lofty political goals.

\(^{61}\) Transition Agreement, supra note 13, arts. 47, 94.

\(^{62}\) Id. arts. 99, 103, 106, 107.

\(^{63}\) FAQs on Double Taxation, EUROPEAN COMMISSION: TAXATION & CUSTOMS UNION, https://ec.europa.eu/taxation_customs/frequently-asked-questions/citizens-web-site-faq/double-taxation_en (last accessed May 17, 2018) (“EU countries’ double tax treaties are generally based on the Model Convention drafted by the [OECD].”).
Although EU law (in the form of EU legislation and regulations) is hierarchically superior to such bilateral treaties,\(^{64}\) it only comes into play when there is a cross-border element which satisfies the scope of application of one the Four Freedoms.\(^{65}\) If there is a restriction on the complainant, whereby he or she receives less favourable treatment under a comparable situation, and the grounds of justification for the restriction do not satisfy the proportionality principle, then the ECJ may hold that one or more of the free movement EU treaty articles comprising the Four Freedoms cause the restriction to be invalid under EU law.\(^{66}\) Apart from this, there are no general EU-wide measures for mitigation or avoidance of international juridical double taxation.

The UK presently has tax treaties with no less than 138 countries, including all 27 other Member States of the EU.\(^{67}\) Since none of these treaties make reference to membership of the EU, or depend on EU membership as a precondition for their viability, they will continue in full force and effect and will not be affected by Brexit unless some additional modificatory action is taken by the parties.

However, EU law will no longer overlay these treaties. The consequence of this is addressed in chapter 3, \textit{infra}, in the context of the removal of the UK from the jurisdiction of the ECJ.

2.4 \textbf{Inheritances and Gift Taxes}

Although the primary takeaway from an analysis of the Transition Agreement is that the market-freedom restrictions that may arise following Brexit will have little direct effect on direct taxation, there is one area of specific concern which may be highlighted. Some EU jurisdictions discriminate between EU/EEA residents and non-EU/EEA residents in the

\(^{64}\) BERGLUND \& CEJIE, \textit{supra} note 41, at 82.
\(^{65}\) \textit{Id.} at 73–82; see also directives cited \textit{supra} Section 2.2.
\(^{66}\) See, e.g., Case C-169/03, Wallentin v. Riksskatteverket, 2004 E.C.R. I-06443.
arena of succession and inheritance taxes. Challenges to such discrimination
have been brought before both national and European courts.

For example, in 2011, the European Commission referred Spain to the
ECJ on account of Spanish rules on inheritance taxes and gift taxes. In
Spain, certain autonomous regions offer up to 99% relief from succession
taxes to their residents, while the national rules applicable to persons
ineligible for such resident benefits offer a maximum exemption of just €
15,000 (fifteen thousand euros). In 2014, the ECJ ruled that this
discrimination against non-residents was illegal under EU single-market
freedom principles. Specifically, the discrimination was held violative of
freedom of movement of persons and capital under Article 63 of the TFEU
and Article 40 of the Agreement on the European Economic Area. The ECJ
followed its earlier decision in Yvon Welte v. Finanzamt Velbert,
where it held that German inheritance tax rules violated the rights under European
legislation of a Swiss national and resident who held property and bank
accounts in Germany.

Accordingly, in 2015 new Spanish rules came into force which
allowed residents of the EU/EEA to also benefit from local rules on
inheritance and gift taxes. With Brexit, EU citizens resident in the UK would
presumptively be ineligible for such benefits. However, earlier this year, the
Spanish Supreme Court held that such rules must also apply to persons

68 Good News for UK Nationals About Spanish Succession Tax and Brexit, Blevins
succession-tax-supreme-court-ruling-non-eu-eea-residents.
69 Case C-127/12, European Comm’n v. Kingdom of Spain, http://eur-
lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0127. Note that this decision
was not published in English.
70 Spain: Court of Justice of European Union Rules Against the Spanish Inheritance and
Gift Tax Legislation, ECIJA.COM (Oct. 7, 2014), https://ecija.com/sala-de-prensa/spain-
court-of-justice-of-european-union-rules-against-the-spanish-inheritance-and-gift-tax-
legislation/.
71 Case C-181/12, http://eur-lex.europa.eu/legal-
content/EN/TXT/?uri=CELEX:62012CJ0181.
72 ECIJA.COM, supra note 70.
resident outside the EU/EEA. Although this ruling is not binding on Spanish tax authorities in all circumstances, it provides a precedent to argue that residents of the UK post Brexit should also be entitled to the beneficial local tax rules in case of any inheritance or gifts received from Spain, or in respect of property located in Spain. A similar argument could also be made by persons resident in Spain and receiving inheritances or gifts from the UK.

2.5 Conclusion

We have seen that with the signing of the Transition Agreement, the UK and EU have extended the status quo ante for the next 2½ years. Due to the low harmonization of direct taxation in the EU and the mechanism of bilateral treaties at the national level rather than EU-wide legislation, Brexit in and of itself is not likely to instigate significant double taxation issues for UK residents in the EU and EU residents in the UK. The Transition Agreement and the MLI mean that topical BEPS and tax-avoidance concerns will continue to be addressed as they have been pre-Brexit. The scope of any future changes in the tax paradigm, after the end of the Transition Period, will ultimately be determined by how the UK and EU negotiate the Final Agreement for Full Withdrawal. This cannot be known or predicted at present. However, it may be safe to assume that any such shift in the existing international and EU tax paradigm will mainly relate to indirect taxes.

---

74 Blevins Franks, supra note 68.
75 Id.
76 Note that the Transition Agreement is conditional on the successful negotiation of a Final Agreement. See supra text accompanying note 14.
77 Deloitte, Ireland, supra note 29.
78 Id.
The next chapter examines whether the same result flows from the forthcoming retraction of ECJ jurisdiction over the UK, or whether this aspect of Brexit is likely to have a more material impact in the arena of international and EU taxation.
3. **Retraction of ECJ Jurisdiction**

3.1 **Introduction**

The second prong of Brexit relevant to international taxation, as delimited in this thesis, is the moving out of the UK from under the jurisdiction of the European Court of Justice in matters pertaining to European law, including EU tax law. This chapter looks at some ECJ case law on international taxation affecting UK companies and businesses, and an analysis of how such legal principles and antecedents might change as a consequence of the ECJ ceasing to have jurisdiction over the UK upon Full Withdrawal. Of particular interest here is whether Brexit will, per se, cause a *de facto* change in (any part of) the law, or whether the existing precedents will continue to be binding until and unless changed by UK courts\(^\text{79}\) with prospective effect (i.e., *de jure* changes only).

This chapter begins with a review of the political background leading up to the execution of the Transition Agreement, and thence the Transition Agreement itself, seeking to identify any provisions therein which may affect the jurisdiction of the ECJ or extend extant EU law to the UK during the Transition Period or thereafter. Next, this chapter considers an exemplary ECJ ruling pertaining to the UK, the *Cadbury Schweppes* case,\(^\text{80}\) as an example to see whether the holding thereunder will continue to be binding in UK law after Brexit.

3.2 **Arguments over Sovereignty**

On March 2, 2018, Ms. Theresa May made a speech in Mansion House, London, informing the public of the UK’s goals in the “next phase” of Brexit negotiations.\(^\text{81}\) Among other things, the Prime Minister claimed that

---

\(^{79}\) Or, conceivably, by the British Parliament through domestic legislation (or by the UK government through the mechanism of the Final Agreement).


\(^{81}\) Darren Hunt, *Theresa May Delivers STRONG Message to EU: ‘ECJ Jurisdiction Will END in UK Post-Brexit’*, EXPRESS (Mar. 2, 2018, 2:27 PM),
“future EU treaties and hence EU law will no longer apply in the UK” post Brexit.\textsuperscript{82} She continued to say that the Final Agreement for Brexit “must therefore respect the sovereignty of both the UK and the EU’s legal orders, that means the jurisdiction of the ECJ in the UK must end.”\textsuperscript{83} Here, Ms. May was echoing her previously-stated position, best summarized in her January 2017 statement that:

\begin{quote}
We will take back control of our laws and bring to an end the jurisdiction of the European Court of Justice in Britain. . . . Our laws will be made in Westminster, Edinburgh, Cardiff, and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country.\textsuperscript{84}
\end{quote}

However, even Ms. May was cognizant that, to use a reference from Tolkien, “one does not simply walk away” from the jurisdiction of Europe’s highest court. She recognized that the ECJ would continue to be relevant in several situations post-Brexit. For example, the UK’s European Union (Notification of Withdrawal) Act 2017\textsuperscript{85} will “bring EU law into UK law”; accordingly, British courts will continue to apply European precedent where appropriate—to disputes where EU law applies, and to disputes arising under future post-Brexit UK laws—as they would with courts from any other global jurisdiction.\textsuperscript{86} Further, post-Brexit the ECJ will continue to exercise jurisdiction over the UK’s participation in any EU or EEA agency, as it would over any non-EU nation.\textsuperscript{87} Examples of such agencies would include

\begin{itemize}
\item \url{https://www.express.co.uk/news/uk/926311/Brexit-news-UK-Theresa-May-speech-EU-European-Court-of-Justice-European-Union.}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{itemize}
the European Air Safety Agency and the European Medicines Agency.\(^88\) And finally, the ECJ will continue to have the quasi-constitutional jurisdiction to determine whether agreements the EU has struck—including the Final Withdrawal agreements with the UK (if any)—are legal and valid under the EU’s own laws and treaties.\(^89\)

But beyond these limited situations, Ms. May was adamant that “the ultimate arbiter of disputes about our future partnership cannot be the court of either party.”\(^90\) The previous month (i.e. in February 2018), European negotiators had already proposed that the ECJ be the designated forum for resolution of any and all Brexit-related disputes.\(^91\) One senior EU official was quoted as saying, “The Brits know our position and they’ve not put out their own position, so what can we do?”\(^92\)

As it turned out, this official may have been right. The draft Transition Agreement that was unveiled later in March 2018 revealed that the EU had apparently gained the upper hand when it came to negotiating the position of the ECJ during the Transition Period and beyond.

### 3.3 Provisions of the Transition Agreement

Article 4(4) of the Transition Agreement states that the provisions of the Transition Agreement referring to EU law, concepts, provisions etc. shall be interpreted and applied in conformity with the relevant case law of the ECJ handed down before the end of the Transition Period.\(^93\) Even after the end of the Transition Period, Article 4(5) requires the judicial and administrative authorities of the UK (presumably including its tax

\(^89\) Id.
\(^90\) Id.
\(^91\) Alex Barker & Laura Hughes, *EU to Demand Indefinite ECJ Oversight After Brexit*, FINANCIAL TIMES (Feb. 27, 2018), https://www.ft.com/content/9a147cfa-1b3e-11e8-aaca-4574d7dabfb6.
\(^92\) Id.
\(^93\) Transition Agreement, *supra* note 13, art. 4(4).
authorities) to have “due regard” to relevant case law of the ECJ that is handed down after the end of the Transition Period.\textsuperscript{94} And Article 4(1) of the Transition Agreement requires that where the Transition Agreement provides for the application of EU law in UK, it shall produce in respect of the UK “the same legal effects” as those produced in EU Member States.\textsuperscript{95} For example, when Article 22 of the Transition Agreement is applied such that migrant EU workers in the UK after the Brexit Deadline are entitled to tax deductions in relation to pension and insurance contributions paid in their home states (see Section 2.2, \textit{supra}), UK courts will be barred from deciding cases in a manner that is at variance with any ECJ holdings in this regard.

Next, Article 63 of the Transition Agreement is titled: “Jurisdiction, Recognition, and Enforcement of Judicial Decisions, and Related Cooperation Between Central Authorities.”\textsuperscript{96} The provisions of Article 63 provide that in the UK, as well as in other EU Member States in respect of “situations involving” the UK, the jurisdiction provisions of various EU regulations and directives shall continue to apply in respect of any legal proceedings instituted before the end of the Transition Period.\textsuperscript{97} Thus, for example, under the 2012 EU regulation on jurisdiction and recognition/enforcement of judgments, any person domiciled in a Member State may, in general, be sued in the courts of that Member State in respect of civil and commercial matters, regardless of the person’s nationality.\textsuperscript{98} The courts of other Member States shall recognize and enforce any judgments of other courts made under this regulation. Contracting parties are also free to select the courts of one Member State as the designated forum to resolve disputes.\textsuperscript{99} However, this regulation specifically does not extend to “revenue,

\textsuperscript{94} Id. art. 4(5).
\textsuperscript{95} Id. art. 4(1).
\textsuperscript{96} Id. art. 63.
\textsuperscript{97} Id.
\textsuperscript{99} Id.
customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority.”\textsuperscript{100} Article 63 also deals with similar regulations and directives in respect of intellectual property, family law and matrimonial matters, but not in respect of tax matters. Therefore, Article 63 of the Transition Agreement does not per se give EU courts any special jurisdiction over UK tax matters post the Brexit Deadline.

Articles 64 and 65 of the Transition Agreement extend the applicability of various EU regulations and directives pertaining to administrative, quasi-judicial, and law enforcement cooperation post the Brexit Deadline.\textsuperscript{101} However, like Article 63, they do not apply to questions of international taxation.

Finally, we come to Chapter 1 of Title X of the Transition Agreement, entitled “Judicial Procedures.” This chapter of the Transition Agreement contains four articles dealing with the ECJ. The first, Article 82, provides that until the end of the Transition Period, the ECJ shall continue to have jurisdiction over any proceedings brought by or against the UK, including the jurisdiction to issue preliminary rulings upon request from courts and tribunals of the UK. The next, Article 83, provides that before the end of the Transition Period, the European Commission or a Member State may approach the ECJ if it feels that the UK has failed to fulfil an obligation under a foundational treaty of the EU or the Transition Agreement. Further, after Full Withdrawal, the ECJ shall still have jurisdiction to give preliminary rulings upon request by UK courts and tribunals in respect of matters which occurred prior to the end of the Transition Period. Article 84 deals with procedural matters. Finally, Article 85 of the Transition Agreement provides that any ECJ judgments or orders made pursuant to the foregoing provisions shall be binding and enforceable in the UK.

\textsuperscript{100} Id. art. 1(1).
\textsuperscript{101} Transition Agreement, supra note 13, arts. 63–64.
3.4 Why Does It Matter?

Given that, as previously discussed, direct taxation is handled at the national and bilateral-treaty level rather than at the EU level, what is the relevance of these provisions of the Transition Agreement? Why does it matter to the field of international and EU taxation whether or not the ECJ will continue to exercise jurisdiction over the UK?

The answer to this question has two parts. First, even though they have come to some agreement on the ECJ’s position during the Transition Period, the UK and EU have not agreed on the future rule of the ECJ after Full Withdrawal. As mentioned earlier, the UK’s position is that neither the ECJ nor the Supreme Court of the UK should be the final arbiter of disputes arising out of Brexit (which there are certain to be).\(^\text{102}\) Since the UK has not provided a realistic alternative to the ECJ in this regard, the EU’s chief negotiator, Mr. Michel Barnier, said in April 2018 that the EU will insist that the final Brexit agreement include provisions investing the ECJ with permanent judicial oversight over future UK-EU relations, adding that “without an agreement on governance, there is no credibility of this treaty.”\(^\text{103}\) As a major point of negotiation between the UK and the EU, this has the potential to define much of the final form that a post-Brexit UK-EU agreement will assume, including the level of cooperation in areas such as international double taxation, transfer pricing, tax avoidance, and so on.

Second, the UK and the rest of the EU are not unrelated entities. As regards problems of international double taxation between two Member States—and the UK remains a Member State as on date—EU law, in the form of ECJ interpretation of EU treaty freedoms, cannot be ignored. The ECJ has already made pronouncements on issues of international taxation which affect persons and businesses resident in the UK. In the next section of this

\(^{102}\) See supra Section 3.2.
chapter, one such illustrative ruling is examined to see whether anything in its holding or ratio decidendi may cause it to be per se inapplicable during the Transition Period or after Full Withdrawal. The Cadbury Schweppes case was chosen because it deals with EU treaty freedoms that will be inapplicable in the UK, to some extent, post Brexit. Due to paucity of time, a larger survey of ECJ case law dealing with the UK could not be carried out.

3.5 **Cadbury Schweppes**

3.5.1 **Facts**

In 1996, the Cadbury Schweppes group, a beverage and confectionary conglomerate headquartered in the UK, was disputing its tax bill with the UK tax authorities. The dispute pertained to the tax treatment in the UK of the profits made in that year by two subsidiary group companies based in Dublin, i.e. in Ireland and thus within the EU. Under the tax laws of the UK, as a tax resident of the UK Cadbury Schweppes (“CS”) was subject to corporation tax on its worldwide profits, including profits made outside the UK through foreign branches or offshore agencies of the parent company. It was not taxed on profits earned by a non-resident subsidiary—unless the foreign subsidiary fell within the scope of the Controlled Foreign Company (“CFC”) exception.\(^{104}\)

At the time, a CFC was a non-resident company in which the UK parent held a greater than 50% stake. The profits of a CFC were attributed to the UK-resident company and taxed in its hands, by means of a tax credit for the tax paid by the CFC in the source state. The purpose of the CFC taxation by the UK was to reduce tax avoidance through profit-shifting: The CFC legislation only applied when the tax paid by the CFC in the source state was less than 75% of what would have been paid in the UK on the same profits, and there were quantitative (repatriated profit- or public holding-based), qualitative (motive-based), and geographic (location-based) exceptions

designed to exempt “genuine” offshore subsidiaries from taxation through their UK parents.\footnote{105}

The Irish CS entities (collectively, “CS Ireland”) were involved in internal group financing—their purpose was to raise finance and then provide that finance to other entities in the CS group. The UK tax authorities determined that a primary reason for establishing CS Ireland (replacing earlier subsidiaries based in Jersey, UK) was to take advantage of the much lower tax rates offered in Irish special economic zones, and reduce the withholding tax on dividends paid within the group under the scheme of the Parent-Subsidiary Directive, as it stood enacted at that time. Accordingly, they found that the CS Ireland entities were CFCs who did not qualify for an exemption; thus, they assessed CS UK to tax in the amount of GBP 8.3m on profits made by CS Ireland in fiscal year 1996.\footnote{106}

3.5.2 \textbf{Legal Issues}

In the national court, CS UK challenged the UK’s CFC taxation regime as being violative of the treaty freedoms of the EU single market, in particular the freedom of establishment found in (present) Article 49 TFEU and other articles of the EU treaties. Freedom of establishment, in its

\footnote{105} \textit{Id.} \textit{¶} 3–12. \textit{See also} Ross Fraser, \textit{Reviewing the ECJ’s Judgment in Cadbury Schweppes}, INTERNATIONAL LAW OFFICE (Oct. 20, 2006), https://www.internationallawoffice.com/Newsletters/Corporate-Tax/United-Kingdom/Herbert-Smith-LLP/Reviewing-the-ECJs-Judgment-in-Cadbury-Schweppes (“The United Kingdom operates a credit method for taxing the profits of non-UK subsidiaries of UK parent companies. In principle, the United Kingdom charges corporation tax on dividends received from non-UK subsidiaries, but allows credit against that tax for overseas tax paid by the non-UK subsidiaries on the profits out of which the dividends are paid (ie, underlying tax). Where the rate of underlying tax is close to the UK rate, it does not matter much to the UK exchequer whether dividends are paid or not. However, where the underlying tax rate is significantly lower than the UK rate, the Exchequer may lose out if dividends are not paid by the non-UK subsidiaries. The controlled foreign company rules set out to prevent this loss by requiring payment of a sum by an appropriate member of the UK group to bring the total paid by the group to the Exchequer up to the amount which would have been paid had the non-UK subsidiary been resident for tax purposes in the United Kingdom. The rules contain elaborate carve-outs which disapply them in closely defined circumstances. The purpose of the carve-outs is to minimize compliance costs and other disadvantages to the taxpayer in cases where the loss to the Exchequer results from normal business arrangements.”)}

\footnote{106} Cadbury Schweppes, 2006 E.C.R. at \textit{ ¶} 13–21.
European avatar, means that any laws or delegated legislation which have the effect of restricting the nationals of one Member State from establishing businesses in another Member State, or which restrict the provision of services across Member State lines, are prohibited.\textsuperscript{107}

The UK authorities sought an interlocutory ruling from the ECJ on whether choosing to establish a business in another Member State solely for the purpose of taking advantage of a more favourable tax regime amounts to “abuse” of the treaty freedom of establishment. In other words, it asked whether “prevention of tax avoidance” and “diversion of profits liable to United Kingdom tax” were sufficient to justify a restriction on such treaty freedom in the form of the offshore CFC tax, and if so, whether such restriction was proportionate having regard to its purpose and the available exemptions for “genuine” offshore CFCs.\textsuperscript{108}

3.5.3 Holding

In its judgment, the ECJ held that it is true that nationals of a Member State, under cover of the rights of a treaty freedom, cannot attempt to improperly circumvent their own national legislations.\textsuperscript{109} However, the court held, merely seeking to profit from tax advantages in another jurisdiction cannot deprive EU persons of the right to rely on the provisions of an EU treaty freedom, even if the chosen tax advantage of the foreign jurisdiction is the primary motivator for establishment there.\textsuperscript{110} Although direction taxation is within Member States’ national competence, such individual competence must nevertheless be exercised consistently with EU law.\textsuperscript{111}

The ECJ found that the UK’s CFC legislation involved discriminatory treatment of UK-resident companies “on the basis of the level of taxation

\textsuperscript{107} Treaty on the Functioning of the European Union, supra note 9, arts. 49, 56.
\textsuperscript{108} Cadbury Schweppes, 2006 E.C.R. at ¶ 27.
\textsuperscript{109} Id. ¶ 35.
\textsuperscript{110} Id. ¶¶ 35–37.
\textsuperscript{111} Id. ¶ 40.
imposed on the company in which they have a controlling holding.”112 The court determined that:

Where the resident company has incorporated a CFC in a Member State in which it is subject to a lower level of taxation within the meaning of the legislation on CFCs, the profits made by such a controlled company are, pursuant to that legislation, attributed to the resident company, which is taxed on those profits. Where, on the other hand, the controlled company has been incorporated and taxed in the United Kingdom or in a State in which it is not subject to a lower level of taxation within the meaning of that legislation, the latter is not applicable and, under the United Kingdom legislation on corporation tax, the resident company is not, in such circumstances, taxed on the profits of the controlled company.113

Referring to its previous case law, the ECJ stated that such a discriminatory restriction can only be justified if it is: (1) narrowly tailored to achieve its objective, and (2) justified by “overriding reasons of public interest.”114 The only restrictions that would be so justifiable would be those on the creation of “wholly artificial arrangements which do not reflect economic reality,” for the sole purpose of tax avoidance.115 Accordingly, the court held, the UK’s CFC legislation “must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties”116 that despite the existence of tax motives for offshore establishment, CS

112 Id. ¶ 43.
113 Id. ¶ 44.
114 Id. ¶ 47.
115 Id. ¶ 55.
116 Such factors may include “the existence of premises, staff and equipment.” Sara Catley, Cadbury Schweppes: How Sweet It Is to be Loved By EU, THOMSON REUTERS: PRACTICAL LAW (Sep. 27, 2006), https://uk.practicallaw.thomsonreuters.com/1-204-7986?. 
Ireland was *bona fide* incorporated in Ireland and carried on “genuine economic activities” there.\(^{117}\)

This proof would have to be submitted to, and determined by, the national courts or authorities in the UK (not by the ECJ itself).

### 3.6 Impact of Brexit

The *Cadbury Schweppes* case was received by some commentators as a “victory” for CS. For example, one report in a conservative newspaper stated that:

Cadbury Schweppes has won a crucial test case against the Treasury in the European Court of Justice that could open the floodgates to other multinationals and blow a hole in the UK government's tax revenues. . . . The Cadbury case goes to the heart of tax-avoidance legislation set up in 1988 to prevent UK companies from establishing subsidiaries in low-tax countries within the EU. The ECJ overruled this legislation and will now allow UK multinationals to take advantage of low tax regimes abroad, as long as the subsidiary is not ‘wholly artificial’.\(^{118}\)

However, others sounded a note of caution:

Claimant companies may collect financial winnings before the Special Commissioners but, ultimately, HMRC will seek to recover the lost revenue, and in doing so it may argue that cases such as *Cadbury Schweppes* have forced it to take steps that are

\(^{117}\) *Id.* ¶ 76.

damaging to the UK’s overall attractiveness as a tax jurisdiction.\textsuperscript{119}

There appeared to be a general consensus that it would be “quite difficult” for EU Member States to prove that something is wholly artificial.\textsuperscript{120} In other words, UK companies were likely to be able to reduce their UK tax burden by offshoring subsidiaries. Accordingly, this ECJ decision was just the sort of impingement on British sovereignty that is (or has historically been) despised by pro-Brexit factions of British society. For example, the former UK Secretary of State for Education and Justice, Mr. Michael Gove, “accused the ‘unaccountable’ Luxembourg court of extending its reach every week.”\textsuperscript{121} The politician went on to claim:

\begin{quote}
It is hard to overstate the degree to which the EU is a constraint on ministers’ ability to do the things they were elected to do, or to use their judgment about the right course of action for the people of this country . . . . I have long had concerns about our membership of the EU but the experience of government has only deepened my conviction that we need change. Every single day, every single minister is told: “Yes Minister, I understand, but I’m afraid that’s against EU rules.” I know it. My colleagues in government know it. And the British people ought to know it too: Your government is not, ultimately, in control in hundreds of areas that matter.
\end{quote}

\textsuperscript{119} Catley, \textit{supra} note 116.
In this context, Brexit is likely to satisfy the majority *zeitgeist* in the UK—if it allows the UK tax authorities to reintroduce the CFC rules they wanted to prior to *Cadbury Schweppes*. But will it?

We have seen that the Transition Agreement extends the jurisdiction of the ECJ over the UK at least until the end of the Transition Period.\textsuperscript{122} Thereafter, the UK remains committed to ousting the jurisdiction of the court. Although Teresa May said that the UK’s internal legislation to domestically effect Brexit will “bring EU law into UK law,”\textsuperscript{123} the latest version of the European Union (Withdrawal) Bill 2017–19 (the “Withdrawal Bill”)\textsuperscript{124} appears to implement this only for EU-derived UK domestic legislation (in section 2 thereof) and direct EU legislation (in section 3 thereof).

Section 7 of the Withdrawal Bill is titled “Interpretation of Retained EU Law.” It provides that after “exit day,” a UK court or tribunal is not bound by any future decisions rendered or principles laid down by the ECJ, although it may “have regard to” them. Previously-rendered EU case law will still govern questions pertaining to retained EU legislation or EU-derived UK legislation, although the UK High Court and Supreme Court will not be bound and may choose to depart from ECJ precedent in the same manner that they may depart from their own common-law precedent.\textsuperscript{125} In considering such questions, the principle of supremacy of EU law would, according to the Withdrawal Bill, no longer apply.

Therefore, it would be theoretically possible for the UK tax authorities to, after Full Withdrawal, reintroduce their CFC delegated legislation which was challenged in *Cadbury Schweppes*. An affected UK company would then have to bring a new challenge to the legislation. Because UK courts do not

\textsuperscript{122} See supra Section 3.3.

\textsuperscript{123} See supra text accompanying note 81.

\textsuperscript{124} House of Lords Bill 102, https://publications.parliament.uk/pa/bills/lbill/2017-2019/0102/lbill_2017-20190102_en_2.htm#pb1-11g1 (last accessed June 1, 2018). This version of the bill has finished all three readings in the House of Commons and the House of Lords. If the latest recommendations of the House of Lords are accepted by the Commons, the bill will then proceed for the Royal Assent (and become law).

\textsuperscript{125} Id. § 7.
exercise the power of judicial review, post-Brexit the only challenge to such legislation could be that it was *ultra vires* the delegating statute. The EU treaty freedoms could not be relied on, unless: (1) the finally-negotiated agreement for Full Withdrawal provides otherwise; or (2) the UK’s BEPS obligations under the MLI are relevant at the time.

It would appear, however, that Brexit per se, without any further action by any government or private actor, would not in and of itself change the holding of *Cadbury Schweppes* and thus result in a modification to UK law.

### 3.7 Conclusion

The more one studies the ECJ, the more it becomes clear that it is firmly entrenched in the very concept of Europe itself. As the BBC has noted:

> [O]nly a completely clean break gets rid of the ECJ entirely. . . . Every time you dig beneath the surface of Brexit you stumble across the European Court of Justice. To get rid of it entirely would mean cutting all the ties we have, setting up dozens of regulatory bodies of our own, and starting many things from scratch.\(^\text{126}\)

Because even a post-Brexit UK cannot simply exist on its own, without trade and commerce with the rest of the EU, some level of post-Brexit ECJ involvement is inevitable for the UK, even if only on account of agency participation.

For the field of international and EU tax, we have seen that the general retraction of ECJ jurisdiction after Brexit is unlikely to have any immediate legal effects. It may have very real practical effects, as companies located in the UK try to reduce their tax burden under the new paradigm of commerce with the EU as an external country and not a Member State. However, many

\(^{126}\) Morris, *supra* note 88.
European companies may choose to move their tax residency from the UK to mainline EU based on larger market considerations other than tax. Even considering only the aspect of tax optimization, there are two limitations. One, such optimization in the ECJ-free UK can only begin after Full Withdrawal, and not during the Transition Period. This is still a couple of years away. And two, while there was not sufficient political will in the UK to remain in the EU, there was adequate will to remain invested in the OECD’s BEPS project and the MLI. This general anti-avoidance project is an unprecedented example of global cooperation, and is likely to keep increasing in importance in the decades to come.
4. Conclusion

When I set out to write this thesis, I was under the impression that it would be a rather straightforward exercise. I made my initial outline on the assumption that I would simply need to consider four categories of persons: UK nationals living in the EU, EU nationals living in the UK, UK nationals living in the UK but earning income from the EU, and EU nationals living in the EU but earning income from the UK. It would be a simple matter, thought I, of devoting one paragraph of my thesis to each such category, and setting out their respective positions pre- and post-Brexit.

When I attempted to go down this path, I found that I was running into trivial results. The situations above were not of sufficient complexity to warrant more than a few sentences each. The impact of Brexit on international tax was not to be found here.

The impact of Brexit was certainly evident everywhere though. From initially being worried that I would not have enough to write about, as I studied Brexit more I struggled to find ways to properly delimit my writing so that I could address a manageable number of issues without being swamped by the vast tide of Brexit complexity out there.

The first issue I addressed was the EU “treaty freedoms.”\(^{127}\) In many ways, these freedoms encapsulate the very essence of what it means to be European today. The Union that is the EU is at its most basic a customs union; a union of markets, not nations. Would the loss of freedoms enjoyed by burghers of this Union have consequences for international taxation of UK persons and businesses? As we have seen, this is ultimately a political question.\(^{128}\) The answer will be what the parties want it to be. We know the agreed position through the rest of this decade: The status quo ante will continue through the Transition Period; thus, the answer to the first question

\(^{127}\) See supra text accompanying notes 15–22.

\(^{128}\) See supra Section 2.5.
of this thesis is: The removal of EU treaty freedoms from the UK will not (at first) have significant ramifications for international and EU tax law—because they are not being removed just yet. It is not possible at this point in time to predict what will happen post Full Withdrawal in 2020.

The second issue, namely the retraction of ECJ jurisdiction, ended up essentially being a repackaged version of the first issue. The ECJ derives its power from the EU treaties: it enforces the founding principles of the EU and tests national legislation against the freedoms guaranteed therein. Thus, the second question addressed by this thesis is quite similar to the first; the answer, however, is different. ECJ jurisdiction is such a visible symbol of EU sovereignty that the Brexiteers have ensured that it will be removed much earlier than the treaty freedoms. Although the negotiators for the exact terms of Full Withdrawal are still on opposite sides of the fence, the UK’s domestic Withdrawal Bill specifically ousts the ECJ’s jurisdiction as soon as it can.\textsuperscript{129} So will the loss of the ECJ have consequences for international taxation of UK persons and businesses? Yes, it will—but not on its own. It is more a clearing of a path through the trees; the road through the forest is yet to be laid.\textsuperscript{130}

Perhaps it is apposite to end with a sporting metaphor:

If you’re Manchester United and you go to play Real Madrid, you don’t let Madrid nominate the referee. But the EU sees the footballing metaphor rather differently: the UK is choosing to leave a league of 28 teams. If it wants to come back to play the odd friendly, the EU would argue, it has to accept that the panel of referees will remain the same.\textsuperscript{131}

\textsuperscript{129} See supra Section 3.6.
\textsuperscript{130} Id.
\textsuperscript{131} Morris, supra note 88.
5. List of Sources

5.1 Treaties


- Consolidated Version of the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 2012 O.J. (C 327) 1


5.2 Statutes

- European Union (Notification of Withdrawal) Act 2017, c. 6 (UK)

- European Union (Withdrawal) Bill 2017–19, HL Bill 102 (UK)

5.3 EU Directives and Regulations


5.4 **Letters**

- Letter from Theresa May to Donald Tusk (Mar. 29, 2017)

5.5 **Books**


- **MARTIN BERGLUND & KATIA CEJIE**, **BASICS OF INTERNATIONAL TAXATION: FROM A METHODOLOGICAL POINT OF VIEW** 19, 29 (2014)

5.6 **Cases**

- Case C-80/94, Wielockx v. Inspecteur der Directe Belastingen
- Case C-169/03, Wallentin v. Riksskatteverket, 2004 E.C.R. I-06443


5.7 Scholarly Publications


5.8 Other Articles


• Alan Tovey, What Is Euratom, Why Is There a Row About It, and Why Does It Matter?, THE TELEGRAPH: BUSINESS (July 10, 2017),
https://www.telegraph.co.uk/business/2017/07/10/explainer-euratom-row-does-matter/


- Maia de la Baume, *Greenland’s Exit Warning to Britain*, Politico (June 22, 2016),

- Keri Phillips, *Greenland: The Only Country to Have Left The EU*, ABC: NEWS (Nov. 8, 2016),
  http://www.abc.net.au/news/2016-11-09/greenland-the-only-country-to-have-left-the-eu/8005036

- *Three Other Countries That Left the EU*, THE SPECTATOR (Apr. 1, 2017),
  https://www.spectator.co.uk/2017/04/three-other-countries-that-left-the-eu/

- Adam Luedtke, *Brexit & Migration: A Disastrous Vote That Accomplishes Nothing*, POLICY TRAJECTORIES (July 14, 2016),


- *The UK and EU Agree Terms for Brexit Transition Period*, BBC (Mar. 19, 2018),

- Alice Foster, *Brexit: What Are the “Four Freedoms” of the European Union?*, Express (June 30, 2016),

- *Eight Reasons Leave Won the UK’s Referendum on the EU*, BBC (June 24, 2016),

- Geoffrey Smith, *5 Reasons Why The Brits Have Turned in Favor of Brexit*, FORTUNE (June 14, 2016),
Jean-Claude Piris, *Britain Is Deluding Itself over Single Market Access*, FINANCIAL TIMES (Nov. 16, 2017), [https://www.ft.com/content/7a3d13ee-cabf-11e7-8536-d321d0d897a3](https://www.ft.com/content/7a3d13ee-cabf-11e7-8536-d321d0d897a3)

Merkel Warns Britain It Must Accept ‘Four Freedoms’, DW (Jan. 9, 2017), [http://p.dw.com/p/2VXBi](http://p.dw.com/p/2VXBi)

Douglas A. Rediker, *The Brexit Options, Explained*, BROOKINGS (Jan. 5, 2018), [https://www.brookings.edu/blog/order-from-chaos/2018/01/05/the-brexit-options-explained/](https://www.brookings.edu/blog/order-from-chaos/2018/01/05/the-brexit-options-explained/)


• Alex Barker & Laura Hughes, EU to Demand Indefinite ECJ Oversight After Brexit, FINANCIAL TIMES (Feb. 27, 2018), https://www.ft.com/content/9a147cfa-1b3e-11e8-aaca-4574d7dabfb6


• Harry Wallop, Cadbury Wins Landmark Tax Case Against Treasury, THE TELEGRAPH (Sep. 12, 2006, 12:01 AM),
https://www.telegraph.co.uk/finance/2947160/Cadbury-wins-landmark-tax-case-against-Treasury.html

- Ross Fraser, *Reviewing the ECJ’s Judgment in Cadbury Schweppes*, INTERNATIONAL LAW OFFICE (Oct. 20, 2006),

- Sara Catley, *Cadbury Schweppes: How Sweet It Is to be Loved By EU*, THOMSON REUTERS: PRACTICAL LAW (Sep. 27, 2006),
  https://uk.practicallaw.thomsonreuters.com/1-204-7986

- David Gow, *Partial Victory for Cadbury Schweppes in UK Tax Challenge*, THE GUARDIAN: BUSINESS (May 2, 2006, 7:03 PM),
  https://www.theguardian.com/business/2006/may/03/cadburyschwitzesbusiness


5.9 **Other Webpages**


