

**UK INTERNATIONAL CORPORATION TAX POLICY
AFTER BREXIT: COMPETITION AND REFORM IN A
CHANGING ECONOMY**

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ABSTRACT

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This thesis concerns the UK's competitive position as a player in the world of international corporation tax, dealing in particular with the impact of Brexit within this context. The main aim of the thesis is to identify and analyse the key legal changes brought by Brexit to determine the constraints it has placed on the UK's corporation tax policymaking ability, addressed both in general and through a specific case study on the use of tax incentives to attract investment funds to the UK.

The thesis begins by first establishing a framework for analysis which situates the project within the broader theoretical and legal contexts. It then addresses the relevant legal impacts of Brexit from an overarching perspective, and finally applies these points to the specific perspective of the case study. In addition to identifying the impact of Brexit on UK international corporation tax, these analyses are built on to make suggestions for the UK's engagement with future tax reforms (both domestically and internationally).

The thesis makes three main conclusions. The general descriptive conclusion is that Brexit imposes novel and uncertain constraints on the UK's corporation tax policymaking ability, specifically as a result of commitments made in the EU-UK TCA and the new subsidy

regime stemming from this. The case study-specific conclusion is that the UK's current approach to attracting investments funds may nonetheless be a success following Brexit, in light of the likely compliance of the QAHC regime with the identified constraints and the apparent future direction of EU tax law. Following all this, the main normative conclusion is that if the UK wishes to attract investment through corporation tax reform it should do so by introducing broad regimes which take advantage of the UK's unique position, improving administration with respect to its tax system, and reforming certain tax treaties.

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ATAD	Anti-Tax Avoidance Directive
BEPS	Base erosion and profit shifting
EBITDA	Earnings before interest, taxes, depreciation, and amortisation
EU	European Union
EU-UK TCA	EU-UK Trade and Cooperation Agreement
FDI	Foreign direct investment
GDP	Gross domestic product
GloBE	Global Anti-Base Erosion (rules)
HM	His/Her Majesty's (eg, HM Treasury)
HMRC	His/Her Majesty's Revenue and Customs
IMF	International Monetary Fund
MNE(s)	Multinational enterprise(s)
OECD	Organisation for Economic Cooperation and Development
QAHC	Qualifying asset holding company
SCA 2022	Subsidy Control Act 2022

UK/United Kingdom	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
VAT	Value-added tax

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Financial Services and Markets Act 2000	pp 18, 81
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Retained EU Law (Revocation and Reform) Act 2023	pp 52, 53
Subsidy Control Act 2022	pp 14, 34, 51, 55, 57-61, 65-67, 76, 83, 84, 87
Tax Information Exchange Agreement (Taxes on Income) (Jersey) Order 2005, SI 2005/1261	p 52
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INTRODUCTION

The last ten years have brought significant changes to the United Kingdom and to the wider world. The UK's departure from the European Union, the COVID-19 pandemic, and other major societal and political changes have been coupled with continuing globalisation and the ever-increasing digitalisation of businesses. Tax plays a crucial role in responding to these changes as it can profoundly impact economies, the provision of public goods and services, and the relationship that both natural and incorporated persons have with the political state. The following is an attempt to establish how one facet of the UK tax system can be used in light of these changes for the benefit of the country, and an attempt to set out how other potential reforms might best be assessed in light of the current state of affairs.

More precisely, this thesis will seek to answer the question of what effect the changing international landscape has on the UK's competitive position as a player in the world of international corporation tax, specifically in terms of the currently uncertain policy constraints and opportunities the UK faces as a result of Brexit. Following a general analysis of the key legal changes of Brexit within this context, the identified constraints and opportunities will be applied to a case study on the use of tax incentives to attract investment funds to the UK. This case study will offer a practical analysis which tests the limits of the UK's policymaking ability, illustrates the UK's unique situation, and explores one possible route through which the UK may seek to attract greater foreign investment and support its economy and society more generally.

The main aim of this thesis is to identify and analyse the key legal changes brought by Brexit to determine the constraints it has placed on the UK's corporation tax policymaking ability, addressed both in general and through the specific context of the case study. In light of this aim

the thesis will address three complementary issues, each of which currently merit significant attention. The first issue is the uncertainty surrounding the precise legal effect that the UK's withdrawal from the EU and key elements of the Brexit deal have on corporation tax in the UK. The second issue is the uncertainty regarding how these legal changes might impact both the UK's competitive position and the approaches that the UK may take to improve this position (the specific context of tax incentives for investment funds being of focus here). The third issue is the question of the effect that all this should have on the UK's future engagement with corporation tax reforms on both the domestic and international levels.

In addressing the issues set out above, the thesis makes three main conclusions. The first is a general descriptive conclusion that Brexit imposes novel and uncertain constraints on the UK's corporation tax policymaking ability, specifically as a result of commitments made in the EU-UK Trade and Cooperation Agreement and the new subsidy regime which stems from this. Furthermore, as is made especially evident by the EU's Foreign Subsidies Regulation, the UK's competitive position will often continue to be significantly impacted by developments in the EU (with Brexit simply meaning that the UK has less influence over these developments). The second is a case study-specific conclusion that the UK's current approach to attracting investment funds may nonetheless be a success following Brexit, in light of the likely compliance of the qualified asset holding company regime with the identified constraints and the apparent future direction of EU tax law. Following all this, the third is a normative conclusion that if the UK wishes to attract investment through corporation tax reform it should do so by introducing broad regimes which take advantage of the UK's unique position, improving administration with respect to its tax system, and reforming tax treaties with certain European states.

The structure of the thesis is as follows:

CHAPTER ONE sets out the project's chosen framework for analysis, and deals with a few preliminary points. This first chapter addresses the literature on tax competition and tax design, and in doing so establishes a framework which adopts the criteria of economic efficiency, administrative efficiency, and equity. The chapter also situates the project within the broader literature and explains its intended significance.

CHAPTER TWO addresses the UK's current situation with regard to international corporate taxation. This chapter briefly addresses domestic law, EU law, and international developments; and then outlines the tax implications of the broader Brexit deal as constituted by the EU-UK Withdrawal Agreement, the EU-UK Trade and Cooperation Agreement (EU-UK TCA), and the subsidy regime provided for by the Subsidy Control Act 2022 (SCA 2022). In analysing the current situation as a whole (and in light of the points made in chapter one), the chapter determines the relevant constraints and opportunities for the UK's policymaking ability.

CHAPTER THREE applies the points made in the previous two chapters to the specific case study on tax incentives for investment funds. This chapter will address existing and hypothetical tax reforms, focusing particularly on the qualifying asset holding company (QAHC) regime as an example of a recent effort on the part of the UK to improve its competitive position following Brexit. In analysing these reforms, the chapter will illustrate the practical effect of the established policymaking constraints, highlight the unique position in which the UK finds itself following Brexit, and even demonstrate what appears to be a Brexit-related success for the UK.

CHAPTER ONE – FRAMEWORK

To understand what the UK's current competitive position as a player in the world of international corporation tax is, it is first necessary to set out the concept of tax competition. Furthermore, in order to analyse the UK's situation in light of the constraints and opportunities that will later be identified, it is necessary to specify the criteria under which this situation will be assessed. This first chapter will serve each of these purposes and explain the intended significance of the project as a whole, establishing the framework to be used for the remainder of the thesis and synthesising from the surrounding literature to situate the thesis within this context.

Chapter one will be split into three sections. The first section will deal with preliminary points, setting out the project's intended significance and identifying underlying assumptions. The second section will provide a brief explanation and discussion of the concept of tax competition and its issues and implications. The third section will address and justify the chosen criteria for analysis, integrating this with the previous sections to arrive at an overall framework for analysis.

1.1 Preliminary points

As explained in the introduction, this thesis aims to identify and analyse the key legal changes brought by Brexit to determine the constraints it has placed on the UK's corporation tax policymaking ability, both in general and within the context of the case study. The intended significance of the project lies in the fact that the UK's situation in this particular area is currently unclear, as there is uncertainty in the tax law elements of the Brexit deal and the resulting constraints on the UK's policymaking ability. A better understanding of this ability and of the UK's situation in general (as explored more practically through the case study) might

offer not only academic benefits, but also benefits for policymakers in assessing both domestic tax reforms and the country's engagement with ongoing and future international reforms.

The importance of addressing this uncertainty – and thereby improving the understanding of the UK's policymaking ability – lies in the potential of using corporation tax policy to make the UK a more competitive venue for foreign investment¹. This point leads to a key assumption being made by this project: that attracting investment in this way is both significant and of value to the UK.

An immediate justification for this assumption stems from the fact that the UK has been facing high inflation, low growth, increased public debt, shrinking household income, and increased unemployment². In light of these issues, the Institute for Fiscal Studies' 2023 Green Budget report points to two 'recessions' (one brought by the COVID-19 pandemic, and one brought by a terms of trade shock partly due to high energy prices)³. Although these 'recessions' have had a global impact, economic growth in the UK has been poor even when compared to other countries such as the US, Germany, or the 27 EU Member States as a whole⁴. Within the context of this thesis, it is most important to recognise that the UK's rate of business investment has been strikingly low when compared to other developed countries⁵. This has been a problem since before the aforementioned 'recessions', as in 2019 the UK had the lowest business investment amongst G7 countries and was well below the OECD average of 13.6% of GDP

¹ See section two of this chapter with respect to the concept of tax competition, and the relationship between tax policy and competitiveness.

² Stuart Adam and others, *IFS Green Budget: October 2023* (The Institute for Fiscal Studies 2023).

³ *ibid*, esp ch 2.

⁴ Carl Emmerson, Paul Johnson and Nick Ridpath, *The Conservatives and the Economy, 2010–24* (The Institute for Fiscal Studies 2024).

⁵ *ibid* 12-13.

(the UK having the third-lowest in the OECD with 10.5% of GDP).⁶ In addition to this, experimental statistics suggest that there is a significant disparity between growth in outward foreign direct investment and inward foreign direct investment in the UK⁷.

These points suggest not only that the UK's economy is in a difficult situation, but also that this situation may be improved by encouraging greater investment and greater foreign investment in particular⁸. Although some steps have already been taken to address these issues, the fact that this is all clearly of concern to politicians and the Government only further highlights the significance and value of attracting investment. Some immediate examples are the foreign dividends, interest relief, and QAHC regimes, each of which are addressed in detail in chapter three's case study. Another example is the introduction of permanent full expensing for qualifying capital expenditure, which was made with a stated policy objective of 'stimulat[ing] business investment in plant and machinery'⁹. Permanent full expensing may indeed meet this objective¹⁰, but it is worth noting that not all recent reforms can necessarily be said to promise similar effects in bolstering the UK economy. For example, the post-Brexit

⁶ Stuart Adam and others, *IFS Green Budget: October 2022* (The Institute for Fiscal Studies 2022), esp ch 6.

⁷ Office for National Statistics, 'Foreign Direct Investment, Experimental UK Subnational Estimates: 2021' (*Office for National Statistics*, 2023) <<https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/articles/foreigndirectinvestmentexperimentaluksubnationalstatistics/2021>> accessed 3 March 2024; cited in the absence of a more developed alternative.

⁸ Note, however, recommendations made regarding the importance of promoting long-term economic growth as opposed to 'pursuing international competitiveness in the short term'; House of Commons Treasury Committee, *Edinburgh Reforms One Year On: Has Anything Changed?* (House of Commons 2023).

⁹ HM Treasury, 'Capital allowances — permanent full expensing for companies investing in plant and machinery' (*HM Government*, 2023) <<https://www.gov.uk/government/publications/capital-allowances-permanent-full-expensing/capital-allowances-permanent-full-expensing-for-companies-investing-in-plant-and-machinery>> accessed 8 April 2024. Note that the 2022 IFS Green Budget report referenced in the previous paragraph had itself suggested offering an immediate deduction of capital expenses as a way to encourage inward investment.

¹⁰ See estimates of a £14 billion increase in total business investment in the short and medium term; Office for Budget Responsibility, *Economic and Fiscal Outlook - November 2023* (Office for Budget Responsibility 2023) ch 2, esp 34.

Edinburgh Reforms to the financial sector¹¹ were found by the House of Commons' Treasury Committee to have not made a 'substantial difference to the UK economy' one year on¹². Various changes had been made as part of these reforms, including the revocation of a list of retained EU legislation¹³ and changes to financial regulation (including the addition of the objective of 'competitiveness and growth' as part of the Financial Conduct Authority's general duties¹⁴). In addition to all this, some of the latest references to the Government's desire 'to have a fair and internationally competitive tax system'¹⁵ further emphasise the fact that the UK is aware of the continuing importance of competitiveness within the broader context of international taxation.

The economic issues facing the UK and the issue of low investment in particular are continuing problems, and other developments further support the point that this is of immediate concern to the UK. The Harrington Review of Foreign Direct Investment, established in light of concerns regarding the UK's competitive position with respect to MNEs and foreign investors¹⁶, is of particular interest in this regard. Although the review points out that overall greenfield FDI¹⁷ is high in the UK, it nonetheless recognises that the levels of such investment

¹¹ HM Treasury, 'Financial Services: The Edinburgh Reforms' (*HM Government*, 2022) <<https://www.gov.uk/government/collections/financial-services-the-edinburgh-reforms>> accessed 3 March 2024.

¹² House of Commons Treasury Committee, *Edinburgh Reforms One Year On: Has Anything Changed?*.

¹³ Financial Services and Markets Act 2023, sch 1. See also chapter two of this thesis.

¹⁴ *ibid* ch 3, esp s 25. This objective refers to the 'international competitiveness' of the UK economy and is inserted as a secondary objective into the Financial Services and Markets Act 2000.

¹⁵ As expressed in the recent policy changes for non-domiciled individuals; HM Treasury, 'Spring Budget 2024: Non-UK domiciled individuals policy summary' (*HM Government*, 2024) <<https://www.gov.uk/government/publications/spring-budget-2024-non-uk-domiciled-individuals-policy-summary/spring-budget-2024-non-uk-domiciled-individuals-policy-summary>> accessed 7 March 2024.

¹⁶ Department for Business & Trade and HM Treasury, *Harrington Review of Foreign Direct Investment* (HM Government 2023).

¹⁷ Greenfield foreign direct investment occurs where a foreign parent company invests in a country through the establishment of a subsidiary in that country.

differ between sectors (with manufacturing being discussed as a sector with low FDI). The review also highlights the aforementioned point that business investment is low in the UK relative to other G7 countries, whilst pointing out the link between business investment and FDI. In this regard, the review identifies improving inward investment as a way for the UK to address not only general economic problems but also policy challenges stemming from climate change commitments and various development ambitions.¹⁸

The need to deal with these issues by encouraging greater foreign investment is precisely what necessitates a closer look at the constraints and opportunities for UK corporation tax policy. This thesis therefore intends to improve the current understanding of what the UK can do to become a more attractive location for investment, both in general and within the specific case study regarding investment funds.

Before moving on, it should be pointed out that corporation tax policy cannot be viewed in isolation as a single instrument through which to bring economic or societal change. In reality, tax works as a part of larger state systems and is not the only way nor perhaps even the best way with which to achieve such changes¹⁹. For example, the Harrington Review referenced above sets out various factors that may influence international investment decisions including not only potential tax breaks and the underlying tax system in a country, but also market factors, language and culture, infrastructure, and non-tax policies that may be specifically targeted at encouraging foreign investment²⁰. The Review is right in considering each of these factors, but

¹⁸ Department for Business & Trade and HM Treasury, *Harrington Review of Foreign Direct Investment* pt 1.

¹⁹ Tax nonetheless remains an important part of such systems. Murphy and Nagel even call taxes ‘the most important instrument by which the political system puts into practice a conception of economic or distributive justice’; Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002) 3.

²⁰ Department for Business & Trade and HM Treasury, *Harrington Review of Foreign Direct Investment*, pt 1. For more on the relative importance of non-tax factors, see IMF and others, 'Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment: a Report to the G-20 Development Working Group by the IMF, OECD, UN, and World Bank' (2015) World Bank Working Paper 100756 11-12

this is not to say that analyses of tax or indeed even a small element of a tax system (such as in this project) cannot produce useful results. This being said, it is nonetheless important to recognise that wider contexts remain relevant when considering policy changes.

It is also important to recognise that issues of corporation tax and tax more generally can be heavily contested, and opinions as to the design of the tax system and the weighing of criteria such as those set out in section 3 of this chapter may differ vastly between individuals. The following will therefore attempt to proceed from a neutral standpoint, being explicit in its application of the chosen criteria and considering relevant alternatives and counterarguments. This thesis will make the necessary assumption that it is justifiable for the UK to improve its competitive position through corporation tax reform for the purpose of supporting its economy, subject to the importance of the other considerations set out in the remainder of this chapter.

1.2 The concept of tax competition

As a concept, tax competition refers to competition occurring between states seeking to offer more attractive tax rules to corporations and individuals in order to incentivise them to locate themselves or their activities in these states. States may wish to create such incentives to encourage investment and raise greater tax revenues, and through this support their own economic development, labour markets, and ability to pay off state debts.

The fact that states might compete in this way is a result of the design of the international tax system and its operation in the modern, globalised world. With respect to corporation tax the current system treats different parts of a multinational group as separate

<<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/794641468000901692/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment-a-report-to-the-g-20-development-working-group-by-the-imf-oecd-un-and-world-bank>> accessed 21 June 2024.

entities, applying the arm's length principle (ALP)²¹ to align the prices of intra-group transfers to the prices that would be charged if the transfer had been between independent parties²². Taxing rights over each entity are allocated on the bases of source and residence²³, with primary taxing rights over active and passive income generally being allocated to source and residence states respectively²⁴.

When applied to an increasingly interconnected and digitalised world, the fundamentals of this design – much of which stem from the work of the League of Nations in the 1920s and the OECD from the 1950s onward – do not properly account for the fact that taxpayers have become much more mobile and therefore more able to shift themselves, their activity, and their capital between states²⁵. The continued reliance on the source-residence dichotomy and on separate entity taxation means that taxpayers can manage and reduce their tax liability by relocating their economic activity or tax residences²⁶. Corporations and multinationals in particular²⁷ are especially well-equipped for this due to their ability to utilise groups of

²¹ OECD Model Tax Convention on Income and on Capital: Condensed Version 2017 (Organisation for Economic Cooperation and Development 2017) (OECD Model Tax Convention), Article 9.

²² The application of the ALP in practice, however, is anything but straightforward; Richard S Collier and Joseph L Andrus, *Transfer Pricing and the Arm's Length Principle After BEPS* (Oxford University Press 2017), esp chs 3-4; see also Michael P Devereux and others, *Taxing Profit in a Global Economy* (Oxford University Press 2021) 100 et seq.

²³ The source basis for taxation can be understood as allocating taxing rights to states where relevant activities (such as economic activity leading to income) take place. The residence basis for taxation can be understood as allocating taxing rights to states where relevant persons (such as the persons entitled to income) are resident.

²⁴ This allocation of taxing rights stems from double tax treaties first introduced in the 1920s and can be seen today in the OECD Model Tax Convention.

²⁵ In this context, mobility can be regarded as including both 'real mobility' and 'tax mobility' in that taxpayers are able to make these shifts through both actual relocation and through tax planning without any actual relocation (escaping taxation in a state through the 'stroke of a pen'); Joel Slemrod, 'Location, (Real) Location, (Tax) Location: An Essay on Mobility's Place in Optimal Taxation' (2010) 63(4) *National Tax Journal* 843.

²⁶ Economic activity and even tax residence are somewhat mobile factors on which to base the allocation of taxing rights, especially compared to the destination of sales; see Devereux and others, *Taxing Profit in a Global Economy* 168 et seq.

²⁷ It is important to note that many of these points are also relevant with regard to individual taxation. For example, the further increase of individual mobility with the growth of remote working in recent years poses interesting questions about the future of personal income taxes and state competition within this context; see

companies and significant resources to engage in tax planning (subject to the operation of transfer pricing, interest deduction limitation, and other anti-avoidance rules²⁸). To provide a few examples, multinationals could use foreign subsidiaries to locate manufacturing or research and development in states offering favourable tax treatment (such as through patent box regimes²⁹), route passive income through subsidiaries in states with favourable withholding tax rules³⁰, or change the residence of parent companies to lower-tax jurisdictions through inversion³¹.

As a result, increasingly mobile taxpayers may approach tax as less of a civil obligation and more of a price attached to their choice to locate themselves, their activity, and their capital in a certain place. Marketisation occurs within the relationship between state and taxpayer, in the sense that states effectively become market actors offering taxpayers location-based benefits in exchange for the price of the tax system³². Such benefits may include the provision of public goods and services and the presence of legal and financial systems, and the ‘price’ of the tax system will involve not only the cost of tax liability itself but also the cost and ease of administration. It is also important to recognise that the tax relationship offered by these states

Rita de la Feria and Giorgia Maffini, 'The Impact of Digitalisation on Personal Income Taxes' (2021) 2 *British Tax Review* 154.

²⁸ Devereux and others, *Taxing Profit in a Global Economy* 100 et seq.

²⁹ With respect to the UK’s patent box regime, see Sarah Lord and Andy Jacott, 'A new era for the UK patent box' *Tax Journal* (<<https://www.taxjournal.com/articles/-a-new-era-for-the-uk-patent-box>> accessed 17 April 2024).

³⁰ See, for example, Google’s double-Irish-Dutch sandwich as identified by Kleinbard; Edward D Kleinbard, 'Stateless Income' (2011) 11 *Florida Tax Review* 699.

³¹ Tax inversion occurs where a company merges with or acquires a foreign company, relocating their headquarters to the country of that foreign company in the process. For one example, see Chris Capurso, 'Burgers, Doughnuts, and Expatriations: An Analysis of the Tax Inversion Epidemic and a Solution Presented Through the Lens of the Burger King-Tim Hortons Merger' (2016) 7(2) *William and Mary Business Law Review* 579.

³² Tsilly Dagan, 'The Marketization of Tax Sovereignty' in Cohen Jean, Arato Andrew and Busekist Astrid von (eds), *Forms of Pluralism and Democratic Constitutionalism* (Columbia University Press 2018); and Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press 2018). See also Charles M Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64(5) *Journal of Political Economy* 416.

is fragmented³³, in the sense that corporations and individuals are not only able to take advantage of favourable tax regimes as a whole but also pick and choose the specific tax rules which apply to them³⁴. All this complicates states' decisions regarding tax policy, as the tax rules that are imposed directly affect the attractiveness of these states to potential investors. States therefore compete amongst themselves in order to be more attractive in relation to each other³⁵.

The way in which the UK engages with international corporation tax policy, then, must therefore account for both the ability of corporations to shift income and activity, and the ability of states to compete and attract investment. Of course, many criticisms have rightly been lodged against the current international tax system which enables this state of affairs, including criticisms of its reliance on the source and residence bases for taxation³⁶, its taxation of group members as separate entities (in light of significant theoretical and practical issues with the application of the ALP)³⁷, and its overall administrative complexity for both taxpayers and administrators³⁸. The state of affairs itself can also be immediately criticised, as such shifting and competition leads to distortions to economic efficiency and lower overall revenues with which to fund public spending. It is also worth recognising that the complexity of the system

³³ This concept is adopted from the work of Dagan, who refers to both marketisation and fragmentation; Tsilly Dagan, 'The Global Market for Tax and Legal Rules' (2017) 21 Florida Tax Review 148.

³⁴ For example, an individual may be tax resident in a country but maintain a foreign domicile such that the country imposes a tax on income but not on capital transfers.

³⁵ In this context, states can also be seen as acting strategically by giving regard to the policies of other states; Charles I Kingson, 'The Coherence of International Taxation' (1981) 81 Columbia Law Review 1151.

³⁶ See arguments in favour of a destination basis for taxation, including the destination-based cashflow tax (DBCFT) and the residual profit allocation by income tax (RPAI); Devereux and others, *Taxing Profit in a Global Economy*.

³⁷ *ibid* 101 et seq. See also arguments in favour of unitary apportionment systems; Sol Picciotto and Jeffery M Kadet, 'The Transition to Unitary Taxation' (2022) 108(4) Tax Notes International 453.

³⁸ Devereux and others, *Taxing Profit in a Global Economy*, esp 122 et seq.

has only further increased due to certain efforts to curtail income and activity shifting³⁹, and as a result of the introduction of special allowances and regimes (such as the patent box regime referenced earlier) to incentivise investment in specific industry sectors⁴⁰.

The main purpose of this section, however, is not to add to the various existing criticisms nor to propose an overarching reform to the international tax system in light of these. Instead, it is enough to establish what tax competition is and take the issues surrounding it into account, as all of this is highly relevant to the overarching question of the UK's competitive position in the world of international corporation tax.

Before continuing, there are two key qualifications which need to be made regarding the concept of tax competition. The first qualification is that the preceding discussion did not provide any empirical evidence for tax competition actually occurring between states, nor any link between policy decisions and competitiveness. The most immediate and often-cited example of tax competition is the global 'race to the bottom' on corporation tax rates, but even though a decline in tax rates can generally be seen this cannot be taken as proof of such competition. As is rightly recognised by Devereux, Lockwood, and Redoano in the context of finding empirical evidence of a relationship of strategic interaction between corporate tax rates in different states⁴¹, it may be possible for such relationships to arise not because of genuine tax competition but instead because of yardstick competition (policy-makers following each

³⁹ See, for example, Pillar 2's GloBE rules; John Vella, Michael P Devereux and Heydon Wardell-Burrus, 'Pillar 2's Impact on Tax Competition' (2022) <<https://ssrn.com/abstract=4203395>> accessed 20 April 2024.

⁴⁰ If Pillar 2 is successful in stopping the 'race to the bottom' on corporation tax rates (see below), then tax incentives may be expected to rely further on more specific (and less transparent) elements of tax systems; as a starting point, see *ibid*.

⁴¹ Michael P Devereux, Ben Lockwood and Michela Redoano, 'Is there a "Race to the Bottom" in Corporate Taxes? An Overview of Recent Research' (2003) University of Warwick, Centre for the Study of Globalisation and Regionalisation <https://warwick.ac.uk/fac/soc/pais/research/csgr/research/keytopic/race/lockwood_overview_may03.pdf> accessed 15 November 2023.

other in light of voters' perceptions of foreign tax rates) or a 'common intellectual trend' between countries which influences policy decisions⁴². In a similar sense, tax policy decisions may be made with various factors in mind such that it is difficult to show empirical support for these claims.

Whilst not undermining the importance of these points, this thesis will nonetheless proceed on the basis that tax competition does occur, and (most importantly) that the UK's policy decisions can affect its competitiveness as a venue for investment. In light of the latter point, a relationship will be assumed between corporation tax policy and the competitiveness of states within the world of international corporation tax.

The second qualification is that the extent to which states may be attractive to corporations as potential venues for investment depends on more than simply the tax treatment that these states may offer. As explained in the previous section, various other factors may be relevant in incentivising or disincentivising investment in a particular place. The implication of this is that tax competition cannot be regarded as perfect competition⁴³, in the sense that within the international tax market explained above states and taxpayers do not engage without restrictions. This makes it difficult to identify the precise strength of incentives offered by competing states, and therefore further complicates any attempt to quantify the precise change in a state's competitive position resulting from a change in corporation tax policy.

Although it is important to recognise this limitation, it should be emphasised that various links between corporation tax and investment have nonetheless been demonstrated in

⁴² In the paper referenced above Devereux, Lockwood, and Redoano ruled out yardstick competition (stating that corporation taxes were not a 'salient political issue for voters'). Today, however, it can be said that the taxation of corporations is a much more immediate issue in the minds of voters such that yardstick competition remains potentially relevant. See, for example, calls from politicians for corporations to pay their 'fair share of tax'; Adam Gabbatt, 'Biden says it's time for richest Americans to pay 'their fair share' of taxes' *The Guardian* (<<https://www.theguardian.com/us-news/2021/may/03/joe-biden-taxes-corporations-richest-americans>> accessed 15 November 2023).

⁴³ Dagan, *International Tax Policy: Between Competition and Cooperation* ch 1.

the literature⁴⁴. This thesis will therefore assume that corporation tax treatment is always a significant influencing factor on corporations' decisions as to whether, where, and how much to invest. Different tax policies will be addressed in light of this assumption and the prior assumption of a relationship between corporation tax policy and competitiveness, notwithstanding the likely significance of other factors. As a final point, it is worth noting that although there is less to be referenced in support of a link between corporation tax and economic growth itself⁴⁵, this thesis will focus more directly on the impact of reforms on incentives to invest and not on the broader economic impact that these reforms may bring⁴⁶.

1.3 Criteria for analysis

Tax policies, and tax systems more generally, can and have been analysed by various criteria. This thesis will assess the UK's post-Brexit situation by reference to the country's competitive position in the world of international corporation tax, but this should not be taken to suggest that competitiveness is the only relevant consideration in this context. In analysing the UK's situation and competitive position, this thesis will use a framework for analysis which adopts the criteria of economic efficiency, administrative efficiency, and equity. The following will explain each of these in order and justify their inclusion in the framework.

⁴⁴ For example, see Kevin A Hasset and R Glenn Hubbard, 'Tax Policy and Business Investment' in Alan J Auerbach and Martin Feldstein (eds), *Handbook of Public Economics*, vol 3 (Elsevier 2002); Michael P Devereux and Giorgia Maffini, 'The Impact of Taxation on the Location of Capital, Firms and Profit: a Survey of Empirical Evidence' (2007) Oxford University Centre for Business Taxation Working Papers 0702 <<https://ideas.repec.org/p/btx/wpaper/0702.html>> accessed 29 April 2024; and Ruud A de Mooij and Sjeef Ederveen, 'Corporate tax elasticities: a reader's guide to empirical findings' (2008) 24(4) *Oxford Review of Economic Policy* 680.

⁴⁵ For one example, see Jens Matthias Arnold and others, 'Tax Policy for Economic Recovery and Growth' (2011) 121 *The Economic Journal* F59.

⁴⁶ Note the IFS' point that 'empirically disentangling the effects of corporation tax on growth is inherently difficult' such that analyses may need to be broken up in this sort of way; Adam and others, *IFS Green Budget: October 2022* 245.

The first criterion is economic efficiency. For the purposes of this thesis, an economically inefficient tax policy can be understood as one which imposes an excess burden or excess cost on private economic agents, this cost being in addition to the unavoidable cost of tax liability. The extra cost imposed by such inefficiency is distortive on the economic decisions made by taxpayers and can result in deadweight losses⁴⁷. For example, in the simple context of the sale of goods the imposition of tax will increase the overall price that purchasers pay or decrease the overall price that sellers receive (or both), meaning that some purchasers or sellers (or both) that were willing to engage in the market pre-tax are no longer willing to do so, resulting in a cost to society. Within the context of taxes on corporate profit, tax can distort investment decisions due to the additional cost that tax liability represents, incentivise businesses to finance through debt rather than equity (the riskier form of financing being preferred due to the deductibility of interest payments but not dividends in many tax systems), and impact choices as to the legal form of businesses or the distribution or retention of their profits (depending on the particular tax treatment of these choices)⁴⁸.

In light of these potential inefficiencies, the inclusion of economic efficiency as a criterion for analysis is particularly important when considering the incentives created by a tax policy aimed at making the UK a more attractive venue for investment. Questions of economic efficiency must be considered next to any question of attractiveness with respect to potential investors, as the key purpose of improving the UK's competitive position in the first place should be to support the UK's economy. It should be emphasised, however, that economic efficiency is not the only relevant factor with respect to competitiveness or tax policy more

⁴⁷ Deadweight losses are created when supply and demand are out of equilibrium; see example in text immediately below.

⁴⁸ Devereux and others, *Taxing Profit in a Global Economy* 41 et seq.

generally; in this regard, the analyses in this thesis will only consider the extent to which economic efficiency can be maximised whilst the goal of competitiveness and the importance of the other chosen criteria is also respected⁴⁹.

The second criterion is administrative efficiency. For the purposes of this thesis, administrative efficiency can be understood as efficiency regarding the costs borne by both taxpayers and states in their use of the tax system⁵⁰. As with economic efficiency, questions of administrative efficiency must also be considered next to questions of attractiveness as the administrative costs related to a certain tax policy directly impact the extent to which that policy may support the UK's economy more generally. In addition to this, administrative efficiency can also itself be seen as an attractive element as the potential of easier engagement with tax systems can increase the incentives for a corporation to invest in a certain country. Just as with economic efficiency, the analyses in this thesis will only consider the extent to which administrative efficiency can be maximised whilst maintaining the other important factors. To maximise such efficiency, compliance costs (for taxpayers), institutional costs (for governments), and other costs (such as those borne by both sides if legal services are engaged for interpretative assistance) should be minimised as far as possible.

This conception of administrative efficiency also brings into question three other important principles with respect to the operation of the tax system: simplicity, certainty, and stability. Although each of these have independent significance, for the purposes of this thesis they will be addressed as part of this criterion. Simplicity (both in the rules of the system and

⁴⁹ The trade-off between economic efficiency and other considerations such as equality is of key concern in optimal tax theory; see James Mirrlees, 'An Exploration in the Theory of Optimum Income Taxation' (1971) 38(2) *The Review of Economic Studies* 175; Stuart Adam and others, *Tax by Design: The Mirrlees Review* (The Institute for Fiscal Studies 2011) ch 2; and Devereux and others, *Taxing Profit in a Global Economy* 46 et seq.

⁵⁰ Devereux and others, *Taxing Profit in a Global Economy* 53 et seq.

in how it can be engaged with) is important as complexity can burden taxpayers and states alike with additional administration and ensuing costs⁵¹. The fact that complexity abounds in the current tax system on both a domestic and international level⁵² only further highlights the importance of ensuring that reforms simplify the system or are at least simple themselves⁵³. Similarly, certainty in the tax system and in the tax treatment that may be faced by taxpayers is another important principle to consider⁵⁴; a lack of certainty can itself result in additional legal and other costs for taxpayers and states that may seek interpretative advice or the litigation of contentious legal issues. Finally, stability (ie, the extent to which the tax system stays the same)⁵⁵ should also be considered as another principle which can significantly impact ease of administration; within the context of corporations and MNEs in particular this principle is particularly important as these parties may be especially concerned with questions of stability when making investment decisions⁵⁶. Administrative efficiency must therefore not only be considered in a narrow sense but also with regard to the practical effects that complexity,

⁵¹ See the work of the now-closed Office of Tax Simplification, eg, Office of Tax Simplification, 'Review of Simplification: Approach and Interpretation' (*HM Government*, 2022) <<https://www.gov.uk/government/publications/ots-review-of-tax-simplification/review-of-simplification-approach-and-interpretation>> accessed 22 July 2024.

⁵² In recent years the international tax system is becoming significantly more complex as a result of the ongoing work of the OECD and potential future developments in the UN; see chapter two.

⁵³ Note Kay's statement in 1985 that the tax system is 'mainly complicated because of attempts to buttress bits of the system that do not work and probably never could have worked'; John A Kay, 'Is Complexity in Taxation Inevitable?' (1985) Institute for Fiscal Studies Working Paper 57 <http://www.kessler.co.uk/wp-content/uploads/2012/04/Kay_Is_Complexity_in_Taxation_Inevitable.pdf> accessed 22 July 2024. More recently, however, see Freedman's writing on complexity (and its inevitability in a complex society); Judith Freedman, 'Managing tax complexity: the institutional framework for tax policy-making and oversight' (2015) Oxford University Centre for Business Taxation Working Papers 1508 <<https://core.ac.uk/reader/288287950>> accessed 22 July 2024.

⁵⁴ See Adam Smith's Canons of Taxation; Adam Smith, *Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations* (MobileReference 2009).

⁵⁵ Devereux and others, *Taxing Profit in a Global Economy* 56.

⁵⁶ On the importance of consistency in economic policy, see the recent work of the IFS regarding the previous UK government; Emmerson, Johnson and Ridpath, *The Conservatives and the Economy, 2010–24*.

certainty, and stability can have on such efficiency, with each of these principles potentially impacting the attractiveness of states as venues for investment.

The third criterion is equity⁵⁷. For the purposes of this thesis, equity can be understood as requiring fairness in both the design of a tax policy and in its implications for society; these two sorts of equity will be labelled ‘tax equity’ and ‘societal equity’. Although questions of either sort of equity may not often directly impact the attractiveness of a state imposing a certain tax policy, the inclusion of equity amongst the criteria for analysis is justified as equity issues cannot be neglected for multiple reasons. If domestic corporations feel that their tax treatment is unfair when compared to foreign corporations, for example, such corporations may themselves look to shift activity elsewhere; this can impact the domestic economy and the domestic employment opportunities that are offered. In addition to this, both economic and political problems can result from sentiments of inequity held by both corporations and taxpayers, and it can be said that public perceptions of ‘fairness’ in the tax systems have worsened in recent times⁵⁸. Although these issues are complex, both tax equity and societal equity should simply be regarded as important goals for society such that equity cannot be neglected as a criterion⁵⁹. It is also worth pointing out that issues of administrative efficiency (and the related principles highlighted previously) in the tax system can also have a significant impact on equity, as those with less resources may be disproportionately impacted by the additional costs created by such issues.

⁵⁷ Similar to a criterion of ‘fairness’; see eg, Adam and others, *Tax by Design: The Mirrlees Review*, 33 et seq. See also Devereux and others, *Taxing Profit in a Global Economy* 34 et seq.

⁵⁸ Calls from politicians for corporations to pay their ‘fair share of tax’ can again be referenced in this context; Gabbatt, ‘Biden says it’s time for richest Americans to pay ‘their fair share’ of taxes’.

⁵⁹ Note also Murphy and Nagel’s view that taxes are ‘the most important instrument by which the political system puts into practice a conception of economic or distributive justice’; Murphy and Nagel, *The Myth of Ownership: Taxes and Justice* 3.

Of course, the greatest difficulty in relying on equity as a criterion results from an inherent uncertainty as to what equity actually means in a given context and what can be regarded as ‘fair’⁶⁰. Questions of societal equity in the wider implications of a specific corporation tax policy will indeed be difficult to address, such that caution will be exercised when doing so. Questions of tax equity in the design of a corporation tax policy itself, however, can be addressed with more confidence as the approach taken will simply compare the tax treatment of different corporations and their stakeholders. The approach will be assisted by dividing equity into two elements. The first element is horizontal equity, which requires that taxpayers in a similar position with regard to income and assets are treated similarly for tax purposes such that they pay similar amounts in taxes⁶¹. The second element is vertical equity⁶², which requires that taxpayers in different positions should be treated in proportion to their position, such that (for example) corporations with greater income pay more income tax. With respect to the specific context of international corporation tax policy, both of these elements of equity are relevant as the tax treatment faced by different corporations should be regarded as equitable irrespective of whether this means similar treatment for corporations in similar positions, or proportional treatment for corporations in different positions. In this context, differences between the treatment of multinationals with parent companies in the UK and multinationals with foreign parent companies may be especially relevant, as may differences between the treatment of corporations involved in different industries or the treatment of corporations of different sizes.

⁶⁰ Devereux and others, *Taxing Profit in a Global Economy* 34 et seq.

⁶¹ Horizontal equity effectively requires neutral treatment with respect to analogous persons, activities, and items. The promotion of horizontal equity can therefore also minimise distortions and therefore promote economic efficiency; Adam and others, *Tax by Design: The Mirrlees Review* 34.

⁶² *ibid*; see also 362.

Finally, there are two key qualifications to be made with regard to equity. The first qualification is that societal equity (this point being less relevant with respect to tax equity) may look very different on domestic or global levels, as achieving high levels of societal equity in the UK would not at all mean that societal equity is achieved on a global level. This thesis, however, will choose to solely consider questions of domestic societal equity in light of the focus on the UK. The second qualification is that tax incidence⁶³ can have a significant impact on equity, in the sense that changes to corporation tax policy can end up indirectly impacting employees, consumers, and shareholders. Although this point is difficult to quantify⁶⁴, tax incidence is nonetheless relevant and will be kept in mind throughout the analyses.

As a final point, it is worth noting that other criteria can also be relevant and are arguably worth including in the framework for analysis. Of course, the aforementioned principles of simplicity, certainty, and stability are important to consider but for the purposes of this thesis will be addressed under the criterion of administrative efficiency. Robustness to avoidance⁶⁵ is another criterion which is of major importance when considering tax reform in general, but less immediately important in light of this thesis' focus on encouraging investment. Where nonetheless relevant, questions of such robustness can be dealt with under the criterion of economic efficiency as they may alter the actual economic impact of proposed reforms. Finally, another important criterion is the respect that the tax system shows for personal and collective

⁶³ Tax incidence can be understood as the ways in which the burden of tax is actually carried (eg, an increase in corporation tax may result in an increase in prices or a decrease in after-tax profits, dividends paid, or wages paid).

⁶⁴ The exact tax incidence of an increase corporation tax rates, for example, has not been clearly set out.

⁶⁵ ie, how difficult it is for taxpayers to engage in tax avoidance with respect to the system; Devereux and others, *Taxing Profit in a Global Economy* 50 et seq.

identity⁶⁶. This criterion is also of less immediate importance within the context of this thesis, but where necessary can be addressed when considering societal equity.

⁶⁶ Dagan, *International Tax Policy: Between Competition and Cooperation* 20 et seq.

CHAPTER TWO – THE SITUATION FOR THE UK

This chapter will outline the UK's current situation with regard to international corporate taxation in light of the UK's withdrawal from the EU and key elements of the Brexit deal. Relying on the framework for analysis set out in chapter one, the chapter will establish the overall impact that Brexit has had on the UK's competitive position, and the general considerations that the UK should account for when considering domestic and international corporation tax policy. The key points identified in this chapter will later be applied to the specific context of the investment fund case study in chapter three.

Chapter two will be split into three sections. The first section will briefly address the UK's general approach to international corporate taxation under domestic law and international agreements, and the pre-Brexit relevance of EU law within this context. The second section will identify the tax policy implications of Brexit and the overall EU-UK Withdrawal Agreement, with particular focus on the EU-UK TCA and the SCA 2022. The third section will synthesise the previous sections to highlight key areas of concern, determine the impact of all this on the UK's competitive position, and set out the thesis' general descriptive and normative conclusions.

2.1 The UK and international corporate taxation

As set out in section 2 of chapter one, as part of the current international tax system corporations in a group are treated as separate entities (applying the ALP with respect to the prices of intra-group transfers) and taxed on the bases of source and residence. For UK tax purposes, UK-source income can generally be regarded as income arising from sources within the UK

(including UK patents⁶⁷); a corporation is UK resident if they satisfy either the common law test of central management and control⁶⁸, or the statutory test of incorporation in the UK⁶⁹. UK resident corporations are liable to corporation tax on worldwide profits⁷⁰ (subject to an exemption for profits of foreign permanent establishments⁷¹), whereas non-resident corporations are liable to corporation tax on trading profits stemming from a permanent establishment in the UK or certain profits related to UK property⁷².

It may already be evident that the international aspects of corporation tax in the UK stem not only from domestic law but also from international agreements⁷³, and from double taxation agreements in particular. The UK has an extensive tax treaty network, being party to treaties⁷⁴ with over 100 territories⁷⁵, each of which may reduce or exempt certain amounts from tax in the context of double taxation⁷⁶, including through the provision of a tax credit in the UK. Generally speaking, these treaties allocate taxing rights over active income to countries in which the income in question has its source, and taxing rights over passive income to countries in which the recipient of the income is resident. Where a corporation is considered resident

⁶⁷ Corporation Tax Act 2009, ss 914-915.

⁶⁸ *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455.

⁶⁹ Corporation Tax Act 2009, ss 13-18.

⁷⁰ *ibid*, s 5(1).

⁷¹ *ibid*, ch 3A.

⁷² *ibid*, s 5.

⁷³ See the end of this section with respect to the impact of EU law.

⁷⁴ These treaties generally concern the taxation of income and capital and are generally based on the OECD Model Tax Convention. Note that the UN Model Double Taxation Convention is also of relevance; United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations 2021).

⁷⁵ It is also worth noting that the UK has implemented the OECD's Multilateral Convention which enables the modification of existing tax treaties on the OECD level; OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Organisation for Economic Cooperation and Development 2017).

⁷⁶ More specifically, these treaties are concerned with juridical double taxation (ie, where one amount is taxed twice in the hands of the same person), as opposed to economic double taxation (where two persons both pay tax on the same amount).

under both UK law and the law of another country, a tiebreaker test such as one referring to the corporation's place of effective management⁷⁷ is often also applied.

The UK also offers unilateral relief in this context. The receipt of most foreign dividends by UK-resident corporations is now generally exempt from income tax⁷⁸ (such that the UK is regarded as effectively operating a territorial tax system with regard to such dividends). UK-resident corporations can elect to exempt the profits of foreign permanent establishments⁷⁹. Taxpayers can also take advantage of a tax credit with respect to certain foreign tax payments⁸⁰.

In recent years, this general approach to international corporation tax has been impacted by various policy changes, brought on both domestic and international levels. Briefly setting out some of these changes provides an opportunity to not only better understand the situation for the UK, but also begin to consider how tax policy has and might be altered in order to achieve various goals, including that of increasing the UK's competitiveness as a venue for investment.

On the domestic level, the aforementioned territorial system with regard to foreign dividends is a result of a key reform introduced in 2009⁸¹ (as previously, a tax credit was claimable with respect to foreign tax paid on these dividends). This reform followed a discussion document⁸² which regarded the change as improving on the tax credit system (which was seen to be both complicated and costly in terms of compliance), and political sentiment

⁷⁷ As sourced from the OECD Model Tax Convention, Article 4(3).

⁷⁸ Corporation Tax Act 2009, pt 9A. See chapter three of this thesis.

⁷⁹ Corporation Tax Act 2009, s 18A. See again chapter three of this thesis.

⁸⁰ Taxation (International and Other Provisions) Act 2010, s 18.

⁸¹ Finance Act 2009.

⁸² HM Treasury and HM Revenue & Customs, *Taxation of the Foreign Profits of Companies: A Discussion Document* (HM Treasury 2007).

that the switch to exemptions in this context would improve the UK's competitiveness.⁸³ More recent changes include the shift to permanent full expensing⁸⁴, and the UK's introduction of a QAHC regime following a 2020 announcement of a review of the UK funds regime. This regime was introduced with a stated policy objective of enhancing 'the UK's competitiveness as a location for asset management and for investment funds'⁸⁵; see chapter three's case study for a detailed discussion of the regime. All this being said, it is also worth noting that there have been various other domestic developments brought for policy reasons other than enhancing competitiveness or increasing investment. One example of this is the UK's introduction of a 2% digital services tax applying to certain corporate groups providing social media, search engine, or online marketplace services, intended as a temporary measure whilst international reforms are ongoing⁸⁶.

On the international level, perhaps the most well-recognised and salient reforms stem from the OECD's recent work on the Base Erosion and Profit Shifting (BEPS) project and the proposed two-pillar solution⁸⁷. The BEPS project sought to address various problems with the international tax system which resulted in taxpayers being able to erode the tax base and shift profit between low-tax jurisdictions (ie, base erosion and profit shifting) under a guiding

⁸³ See chapter three for discussion of the foreign dividends and interest relief regimes stemming from the 2009 reforms.

⁸⁴ See chapter one.

⁸⁵ HM Revenue & Customs, 'New tax regime for Asset Holding Companies (AHCs)' (*HM Government*, 2021) <<https://www.gov.uk/government/publications/new-tax-regime-for-asset-holding-companies-ahcs/new-tax-regime-for-asset-holding-companies-ahcs>> accessed 5 June 2024.

⁸⁶ HM Treasury and HM Revenue & Customs, *Digital Services Tax: Consultation* (HM Government 2018); see also National Audit Office, *Investigation into the Digital Services Tax* (National Audit Office 2022).

⁸⁷ It is worth recognising that developments in the UN are also underway following the consensus-based adoption of a resolution calling for a 'framework convention on international tax cooperation'; United Nations General Assembly Resolution 78/230 on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations (United Nations 2023).

principle of taxing profits in line with value creation⁸⁸. The project produced 15 Actions with various outcomes, including Actions concerning tax base erosion through interest deductions (Action 4), treaty abuse (Action 6), hybrid mismatch arrangements (Action 2), and transfer pricing (Actions 8, 9, and 10).⁸⁹ Many of these Actions effectively closed tax planning loopholes in the existing international corporation tax system, but it was Action 1's statement of an intention to address the tax challenges of the digital economy that led to an even more significant development in the form of the proposed two-pillar solution.

The proposed two-pillar solution generally applies to large MNEs and is made up of Pillar 1 and Pillar 2. Pillar 1 involves a reallocation of taxing rights to market countries, achieved by splitting deemed non-routine profit between market jurisdictions in proportion to their share of a group's consumer revenues (Amount A), and certain rules relating to the ALP (Amount B). Pillar 2 imposes a global minimum effective tax rate of 15% on the excess profit of MNEs with consolidated revenues exceeding €750 million, given effect through the Global Anti-Base Erosion (GloBE) rules which enable the collection of a top-up tax by either the country in which the MNE's subsidiary makes the profit in question (through the qualified domestic minimum top-up tax), the country of the MNE's parent (through the income inclusion rule), or the country of a different subsidiary of the MNE (through the under-taxed payments rule). Pillar 2 also includes the Subject to Tax Rule (STTR), which requires treaty amendments to allow a withholding tax on certain payments taxed below a certain amount in the country of

⁸⁸ One might query the appropriateness of the principle of 'value creation' for these purposes; see Devereux and others, *Taxing Profit in a Global Economy* 108-110.

⁸⁹ OECD/G20 Base Erosion and Profit Shifting Project, *OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement* (Organisation for Economic Cooperation and Development 2015). For empirical research on BEPS, see Ernesto Crivelli, Ruud A de Mooij and Michael Keen, 'Base Erosion, Profit Shifting and Developing Countries' (2015) International Monetary Fund Working Paper/15/118 <<https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf>> accessed 21 June 2024.

receipt.⁹⁰ Although limited progress has been made on Pillar 1, at the time of writing over 30 countries have enacted legislation implementing Pillar 2's GloBE rules (including South Korea, Japan, and the 27 EU Member States as a result of the Pillar 2 Directive⁹¹) with various other countries such as Canada and Australia having published draft legislation⁹². In light of the design of the rules themselves (under which different countries may be able to collect the top-up tax), this extent of adoption suggests that the global minimum tax is or will soon be operative. Nevertheless, it should also be recognised that the specifics of Pillar 2 continue to be impacted by technical clarifications and amendments⁹³.

These examples provide a useful illustration of recent changes to the international tax system, both for the UK and on a broader level. They also highlight some of issues that states may face when considering their engagement with this system, including the potential of leveraging the underlying structure of the system to introduce policies aimed at increasing competitiveness or attracting investment. States are nonetheless also clearly concerned with issues such as base erosion and profit shifting, and the taxation of the digital economy. The discussion of the OECD's recent reforms, however, also highlights that these efforts to deal with systemic issues are effectively attached to the current system whilst its underlying

⁹⁰ OECD/G20 Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Organisation for Economic Cooperation and Development 2021).

⁹¹ Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L 328/1. Note that the Directive required transposition into the domestic law of Member States by 31 December 2023.

⁹² PwC, 'OECD Pillar Two Country Tracker' (PwC, 2023) <<https://www.pwc.com/gx/en/services/tax/pillar-two-readiness/country-tracker.html>> accessed 21 June 2024.

⁹³ For recent amendments in the UK (including the implementation of the under-taxed payments rule, see HM Revenue & Customs, 'Multinational Top-up Tax: Undertaxed Profits Rule and Other Amendments' (*HM Government*, 2021) <<https://www.gov.uk/government/publications/multinational-top-up-tax-adoption-of-the-undertaxed-profits-rule-and-other-amendments/multinational-top-up-tax-undertaxed-profits-rule-and-other-amendments>> accessed 21 June 2024. For recent administrative guidance, see OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*, June 2024 (Organisation for Economic Cooperation and Development 2024).

structure and presumptions are maintained; in this regard, the changes add serious complexity to the system and introduce new policymaking constraints on countries such as the UK for a generally uncertain extent of improvement. As both international reforms and unilateral measures continue to be developed and adopted by countries – for the purposes of both dealing with systemic issues that are taken advantage of by corporations, and offering these corporations various tax advantages – the understanding of the competitive position of countries such as the UK must continue to be updated. Notwithstanding this point, it will be clear from the remainder of this chapter that the UK is in a unique competitive position as a result of its past membership of the EU.

Before the effect of Brexit on UK corporation tax can be assessed, it is also necessary to identify the pre-Brexit relevance of EU law within this context. The remainder of this section will therefore provide a brief outline of the key impacts that EU law has had on corporation tax in the UK. For the purposes of this thesis, focus will be placed on EU Directives concerning direct taxation, conflicts between domestic law and the principle of non-discrimination, and the prohibition of state aid. Finally, the EU's new Foreign Subsidies Regulation will be addressed as a post-Brexit development which should nonetheless be of key concern to the UK.

As a starting point, it should be noted that the EU has had a relatively limited impact on laws relating to direct taxation, at least when compared to indirect taxation⁹⁴ or non-tax

⁹⁴ Direct taxation refers to taxation where the same person bears the remittance (ie, delivery) and the burden (ie, payment) of the tax in question, such as personal income taxes or corporation tax. Indirect taxation refers to taxation where these things are borne by different persons, such as value-added tax.

areas such as consumer protection⁹⁵ or labour⁹⁶. The most significant impact of the EU within the field of taxation can be seen in the requirement for the positive harmonisation⁹⁷ of legislation concerning indirect taxation⁹⁸ and the ensuing common system of VAT within the Union. This system was provided for by the Sixth Directive⁹⁹ and later replaced by the Principal Directive¹⁰⁰, and has been implemented in the UK through the Value Added Tax Acts¹⁰¹. Direct taxation is not subject to any similar treaty provision¹⁰², such that positive harmonisation is only possible (but not required) by virtue of Article 115 TFEU. This Article provides for the issuing of Directives for the approximation of Member State rules which ‘directly affect the establishment or functioning of the internal market’. In practice, the restriction to matters affecting the internal market has been interpreted very broadly¹⁰³ such that the EU has

⁹⁵ See, for example, Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29; and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

⁹⁶ See, for example, Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9; and Articles 49-55 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

⁹⁷ ie, the introduction of common standards to take effect in or be implemented into domestic law.

⁹⁸ Article 113 TFEU.

⁹⁹ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment [1977] OJ L 145/1.

¹⁰⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1.

¹⁰¹ Value Added Tax Act 1994; see also the Value Added Tax Act 1984 (the 1994 Act’s predecessor).

¹⁰² Note, however, Article 112 TFEU’s application to direct taxes.

¹⁰³ This is illustrated by the European Commission’s BEFIT proposal, which included a stated aim of simplifying tax rules and increasing tax certainty such that the risk of litigation and double taxation would be reduced, ‘thus improv[ing] [the] competitiveness and efficiency of the Single Market’; European Commission Directorate-General for Taxation and Customs Union, *Proposal for a Council Directive on transfer pricing* (2023) COM/2023/529 final, Explanatory Memorandum 3.

nonetheless been able to introduce a range of Directives with a significant impact on corporation tax¹⁰⁴.

The most important of these Directives concern cross-border movement, administration, and anti-avoidance measures. With respect to cross-border movement within the internal market, the Parent-Subsidiary Directive exempts withholding taxes on the cross-border payment of dividends from subsidiaries in Member States to parent companies in other Member States and prohibits the economic double taxation of parent companies on the profits made by their subsidiaries¹⁰⁵. Similarly, the Interest and Royalties Directive exempts withholding taxes on interest and royalty payments made by companies in Member States where the beneficial owners of such payments are in different Member States¹⁰⁶. The Parent-Subsidiary and Interest and Royalties Directives have been the subject of recent series of cases in the Court of Justice of the European Union (CJEU) and the Danish courts concerning a Member State's right to refuse the relevant withholding tax exemptions on the grounds of an abuse of rights stemming from artificial arrangements; these cases are of particular relevance within the context of the case study and will therefore be returned to in chapter three. Another important Directive is the Merger Directive, which concerns mergers, divisions, transfers of assets, and exchanges of shares between companies from two or more Member States and provides for an exemption from tax for certain income and capital gains stemming from these reorganisational events (such that these taxes are effectively deferred until a later chargeable

¹⁰⁴ This being said, it should be recognised that the issuing of directives under Article 115 (and Article 113) requires unanimity in the Council and a consultation with the European Parliament and the Economic and Social Committee.

¹⁰⁵ Subject to various conditions; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast) [2011] OJ L 345/8 (Parent-Subsidiary Directive).

¹⁰⁶ Subject to various conditions; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157/49 (Interest and Royalties Directive).

event)¹⁰⁷. With respect to administration, key Directives include the regularly-updated Directive on Administrative Cooperation in the Field of Taxation (DAC)¹⁰⁸, the Directive on Mutual Assistance for the Recovery of Claims¹⁰⁹, and the Tax Dispute Resolution Directive¹¹⁰. With respect to anti-avoidance measures, the EU has introduced two Anti-Tax Avoidance Directives¹¹¹ implementing the OECD’s BEPS Actions (and sometimes going further than required by these Actions) and has published a proposal for a third such Directive dealing with shell entities¹¹².

In addition to Directives, another important impact of EU law on corporation tax stems from conflicts between domestic law and the principle of non-discrimination. Although direct taxation falls under the competence of Member States, they are required to ‘exercise that competence consistently with [EU] law and avoid any discrimination on grounds of nationality’¹¹³. In light of this requirement and following actions brought by taxpayers¹¹⁴ and

¹⁰⁷ Subject to various conditions; Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (Codified version) [2009] OJ L 310/34 (Merger Directive).

¹⁰⁸ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation [2011] OJ L 64/1 (DAC).

¹⁰⁹ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84/1 (Directive on Mutual Assistance for the Recovery of Claims).

¹¹⁰ Note that this Directive concerns tax disputes faced by persons, not tax administrations; Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265/1 (Tax Dispute Resolution Directive).

¹¹¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1 (ATAD I); and Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries [2017] OJ L 144/1 (ATAD II).

¹¹² European Commission Directorate-General for Taxation and Customs Union, *Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU* (2021) COM/2021/565 final (Unshell Directive). Note also the BEFIT proposal referenced above.

¹¹³ Joined cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, para 37.

¹¹⁴ Under the preliminary reference procedure provided for by Article 267 TFEU.

the European Commission¹¹⁵, the CJEU has made various rulings impacting various UK rules including on cross-border loss relief¹¹⁶, controlled foreign company legislation¹¹⁷, dividends paid to foreign parent companies¹¹⁸, and thin capitalisation¹¹⁹.

An element of EU law which is of particular relevance for this thesis is the prohibition of state aid in Article 107 TFEU (notwithstanding the Commission's power to approve aid that is compatible with the internal market¹²⁰). Article 107(1) provides that:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

This provision regarding aid 'in any form whatsoever' can apply to tax measures, and within the tax context has been clarified as requiring that the measure in question (1) confers an advantage reducing the charges borne by the recipient, (2) is granted by the Member State or through Member State resources, (3) affects competition and trade between Member States, and (4) is "specific or selective in that it favours 'certain undertakings or the production of certain goods'"¹²¹. For tax measures, the second requirement will effectively always be fulfilled, and the third requirement will be fulfilled 'if the recipient firm carries on an economic activity involving trade between Member States'¹²². The first and fourth requirements

¹¹⁵ Under the procedures provided for by Articles 258 and 260 TFEU.

¹¹⁶ Case C-446/03 *Marks & Spencer plc v Halsey (Inspector of Taxes)* [2005] ECR I-10837.

¹¹⁷ Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-07995.

¹¹⁸ Joined cases C-397/98 and C-410/98.

¹¹⁹ C-524/04 *Thin Capitalisation GLO Test Case* [2007] ECR I-2107.

¹²⁰ Article 107(3) TFEU; note also Article 108 TFEU, which enables the Council to decide that aid is in fact compatible with the internal market where this decision is 'justified by exceptional circumstances'.

¹²¹ Commission Notice on the application of the State aid rules to measures relating to direct business taxation [1998] OJ C 384/3, pt B and esp para 12.

¹²² *ibid*, para 11.

(advantage, and specificity or selectivity), however, are more complicated. Whether an advantage has been conferred by a Member State can be assessed by the use of the private investor test (asking whether ‘the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State’¹²³). Whether there is specificity or selectivity in the conferring of this advantage is assessed by identifying the reference system (‘the “normal” tax system applicable in the Member State concerned’) and demonstrating that the tax measure in question is a derogation from that system¹²⁴. In recent years there has been continued uncertainty as to the precise application of these rules in the context of corporation tax following a number of high-profile cases in which the European Commission has challenged decisions made by tax authorities in countries such as Ireland, Luxembourg, and the Netherlands with respect to the tax treatment of MNEs¹²⁵.

As a final point, one post-Brexit development within EU law which may actually have a major impact on the UK notwithstanding its departure from the Union is the recently-introduced Foreign Subsidies Regulation¹²⁶. This Regulation applies to foreign subsidies, which are deemed to exist where a third country such as the UK provides financial contributions which confer a benefit on an ‘undertaking’ (ie, an economic operator¹²⁷) that engages in an economic activity in the internal market (economic activity including public procurement procedures, which are subject to additional rules in Chapter 4 of the Regulation).

¹²³ C-124/10 P *Commission v EDF* [2012] ECR I-0000, esp para 79.

¹²⁴ Joined Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe and Ireland v European Commission* ECLI:EU:C:2022:859, esp para 68.

¹²⁵ See, for example, Joined Cases T-778/16 and T-892/16 *Ireland v Commission* ECLI:EU:T:2020:338 (the decision of the CJEU is expected in 2024 following an appeal by the European Commission); Case C-457/21 P *Commission v Amazon.com and Others* ECLI:EU:C:2023:985; Case T-760/15 *Netherlands v Commission* ECLI:EU:T:2019:669; and Joined Cases C-885/19 P and C-898/19 P.

¹²⁶ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L 330.

¹²⁷ *ibid*, Article 2(1).

For the purposes of the Regulation, a ‘financial contribution’ includes ‘the foregoing of revenue that is otherwise due’ such that tax measures will fall under its provisions.¹²⁸ Where a foreign subsidy is ‘liable to improve the competitive position of an undertaking in the internal market’ and in doing so ‘actually or potentially negatively affects competition in the internal market’, a distortion is deemed to exist (subject to some *de minimis* exceptions)¹²⁹. The Regulation provides for the ability of the Commission to both impose proportional redressive measures to remedy these distortions, and accept proportional commitments offered by undertakings themselves which ‘fully and effectively’ remedy these distortions¹³⁰. Undertakings which pass certain thresholds are also required by detailed rules to report the receipt of financial contributions of at least €1 million¹³¹, with additional reporting requirements applying in the case of contributions ‘most likely to distort the internal market’¹³².

As a result of the Foreign Subsidies Regulation, tax measures adopted in countries outside the EU (including the UK) to support businesses engaging in economic activity in the EU may be counteracted. Many businesses must also consider whether they are in receipt of tax measures amounting to a financial contribution in light of the reporting requirements. The Regulation is therefore an important and striking development which has been recognised as potentially having a very broad application, with much of its practical effect depending on the meaning of ‘financial contribution’ and potentially even on the CJEU’s interpretation of

¹²⁸ *ibid*, Article 3.

¹²⁹ *ibid*, Article 4. See also Article 5 with respect to certain categories of foreign subsidies that are ‘most likely to distort the internal market’.

¹³⁰ *ibid*, Article 7. Note that Article 7 also provides for the ability of the Commission to impose reporting and transparency requirements. See also Articles 9-18 with respect to the review of foreign subsidies, including provisions relating to interim measures (Article 12) and penalties for non-cooperation (Article 17).

¹³¹ *ibid*, ch 3 (with respect to mergers) and ch 4 (with respect to public procurement procedures).

¹³² *ibid*, Article 5.

subsidy control tests within the context of the EU's internal state aid rules (addressed above)¹³³. In this sense, the Regulation may significantly impact potential steps taken by the UK to improve its competitive position following Brexit; it is also unclear how this Regulation might interact with the subsidy control provisions in the EU-UK TCA addressed in the next section of this chapter.

2.2 Brexit and the EU-UK Withdrawal Agreement

Both the UK's general approach to the international corporation tax system and many of the key changes to this system have received significant attention in recent years¹³⁴. The relative position of the UK and the legal situation in which it finds itself in the years after Brexit, however, has been less explored. In line with the aims of this project, this section will outline the tax policy implications of Brexit and the overall EU-UK Withdrawal Agreement, building on the existing literature in this area in order to offer an overarching view¹³⁵ which will later be analysed and further explored through the case study.

¹³³ Jill Gatehouse and Rob Jones, 'Tax and the EU Foreign Subsidies Regulation' (2024) 3 *British Tax Review* 353. This note usefully highlights the guidance provided by the EU Commission as to the meaning of financial contribution (such as the confirmation that the notification of tax measures of general application could also be required by the Regulation), and continuing uncertainties as to this meaning.

¹³⁴ For example, in the context of the proposed two-pillar solution considerable academic attention has been levied on both the technical elements of the proposal and the decision-making process behind it; see Vella, Devereux and Wardell-Burrus, 'Pillar 2's Impact on Tax Competition'; and Allison Christians and Laurens van Apeldoorn, 'The OECD Inclusive Framework' (2018) *Bulletin for International Taxation* (respectively). With respect to developments within the UK, see the discussion of the 2009 reforms in the previous section and in chapter three.

¹³⁵ Pirlot's note on the EU-UK TCA (addressed below) highlights the importance of considering that Agreement by reference not only to the Agreement itself but also the EU-UK Withdrawal Agreement and its Protocol on Northern Ireland; Alice Pirlot, 'Some Observations on the Tax-Related Provisions in the EU-UK Trade and Cooperation Agreement' (2021) 1 *British Tax Review* 1.

Following the 2016 referendum in which UK citizens (and Irish and commonwealth citizens resident in the UK) voted to leave the EU, and the UK's triggering of Article 50(2) TEU¹³⁶ in 2017, the European Union (Withdrawal) Act 2018 came into force in the UK. This Act repealed the European Communities Act 1972¹³⁷ and incorporated existing direct EU legislation (as effective on the day of the UK's exit from the EU) into the UK's domestic law as retained EU law¹³⁸, with the key exception of the European Charter of Fundamental Rights¹³⁹. The Act also provides for the continuing availability of 'rights, powers, liabilities ...' that are recognised and available in domestic law by virtue of the European Communities Act 1972 (with a specific exception for such 'rights, powers, liabilities ...' that arise under EU Directives if they have not been recognised by EU or UK courts¹⁴⁰), and for the ability of government ministers to make secondary legislation to address 'deficiencies' in retained EU law resulting from this implementation¹⁴¹.¹⁴²

After the conclusion and ratification of the Brexit deal by both the EU and the UK, the UK left the EU on 31 January 2020. The EU-UK Withdrawal Agreement¹⁴³ covering the arrangements for the UK's withdrawal from the EU then entered into force on 1 February 2020

¹³⁶ Consolidated Version of the Treaty on European Union [2012] OJ C 326/15 (TEU), Article 50(2).

¹³⁷ By virtue of which the UK had joined the EU.

¹³⁸ European Union (Withdrawal) Act 2018, s 3.

¹³⁹ *ibid*, s 5(4).

¹⁴⁰ *ibid*, s 4.

¹⁴¹ European Union (Withdrawal) Act 2018, s 8.

¹⁴² Various elements of the 2018 Act led to some uncertainty; see Jeremy Woolf, 'EU withdrawal: a half-hearted separation?' *Tax Adviser* (<<https://www.taxadvisermagazine.com/article/eu-withdrawal-half-hearted-separation>> accessed 23 July 2024).

¹⁴³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] C 384 I/01 (EU-UK Withdrawal Agreement).

(having provided for a transition period which would last until 31 December 2020)¹⁴⁴. The Withdrawal Agreement sets out various citizens' rights¹⁴⁵, separation provisions¹⁴⁶, financial provisions¹⁴⁷, institutional provisions¹⁴⁸, and the aforementioned transition period¹⁴⁹. Within the context of tax, the Withdrawal Agreement is mainly concerned with indirect taxation¹⁵⁰. The key provisions are Article 99 (which provides for administrative cooperation with respect to indirect tax), and Article 100 (which provides for mutual assistance for the recovery of claims relating to taxes, duties, and other measures). There are also various Articles which deal with ongoing provisions with respect to the transition period, including Article 51 (concerning ongoing VAT matters), Article 104 (concerning the EU's assets, revenues, and other property situated in the UK), and Articles 92 and 93 (concerning state aid). It is additionally worth highlighting Article 5, which provides for the mutual assistance of the EU and UK 'in full mutual respect and good faith' in carrying out tasks flowing from the Withdrawal Agreement¹⁵¹ and the taking of 'all appropriate measures ... to ensure fulfilment of the obligations' arising from the Agreement and refraining 'from any measures which could jeopardise the attainment of the objectives' of the Agreement¹⁵².

¹⁴⁴ In the UK, this Agreement entered into force by virtue of the European Union (Withdrawal Agreement) Act 2020.

¹⁴⁵ EU-UK Withdrawal Agreement, pt 2.

¹⁴⁶ *ibid*, pt 3.

¹⁴⁷ *ibid*, pt 5.

¹⁴⁸ *ibid*, pt 6.

¹⁴⁹ *ibid*, pt 4.

¹⁵⁰ In line with the greater significance of EU law for indirect taxation (as opposed to direct taxation); see section 1 of this chapter.

¹⁵¹ EU-UK Withdrawal Agreement, Article 5, para 1.

¹⁵² *ibid*, Article 5, para 2.

The Withdrawal Agreement also makes special arrangements for Northern Ireland through the Northern Ireland Protocol¹⁵³. For tax purposes, the first set of key provisions can be found in Article 5, which deals with customs duties. The second set of key provisions can be found in Article 8, which applies certain rules of EU law relating to VAT and excise duty¹⁵⁴ to the UK in respect of Northern Ireland, and (subject to these provisions and to the rules operative in the Republic of Ireland) requires the UK to collect VAT and excise duty accordingly (with revenues being kept by the UK). The third set of key provisions can be found in Article 10, which applies certain EU rules on state aid¹⁵⁵ to the UK in respect of measures affecting trade between Northern Ireland and the EU (where the trade in question is otherwise subject to the protocol)¹⁵⁶. The Northern Ireland Protocol has since been significantly amended by the Windsor Framework, which was agreed by the UK Government and the European Commission in 2023 in response to various economic and political issues arising in Northern Ireland in the years immediately following the entering into force of the Protocol¹⁵⁷. Some of the issues in question – and the post-Brexit arrangements for Northern Ireland more generally – continue to be a significant problem and pose particularly interesting tax questions for both Northern Ireland and the UK as a whole. For the purposes of this thesis, however, these

¹⁵³ EU-UK Withdrawal Agreement, Protocol on Ireland/Northern Ireland (Northern Ireland Protocol).

¹⁵⁴ The rules being listed in Annex 3 of the Protocol.

¹⁵⁵ The relevant provisions, including the general prohibition of state aid in Article 107 TFEU, are listed in Annex 4 of the Protocol.

¹⁵⁶ As will be explained below, EU state aid rules do not otherwise apply to the UK with respect to any aid granted after the end of the transition period.

¹⁵⁷ Decision No 1/2023 of the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework [2023] (Windsor Framework). Note also a recent update in Decision No 1/2024 of the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 16 May 2024 amending the Decision of the Joint Committee No 1/2023 [2024].

questions will generally be left to one side as they mainly concern indirect taxes¹⁵⁸; further research on these points is intended for the future.

An important element of the Windsor Framework which is nonetheless within the scope of this thesis is its amendment of Article 10 of the Northern Ireland Protocol (ie, the Article dealing with the application of state aid rules). As understood by the UK Government, Article 10 of the original Protocol had meant that EU state aid rules would apply to any aid that ‘could affect trade in goods and electricity between Northern Ireland and the EU’, with there being a risk of this being broadly applied ‘in cases where there is only a theoretical or highly tangential link between aid to a company in Great Britain and potential trade on the island of Ireland’¹⁵⁹. In an effort to remove this risk and the corresponding risk that investment in or trade with Northern Ireland would be discouraged, the Windsor Framework restricts the scope of state aid rules to aid for which there is a ‘proven real, genuine and material link to Northern Ireland’s trade with the EU’. The UK Government’s view is that this restriction keeps ‘the overwhelming majority of subsidies’ away from the application of state aid and instead under the UK’s new subsidy regime¹⁶⁰, such that (together with a set of exemptions allowing the granting of aid without notification or approval, and the retention of flexibilities for certain traders) the risks of broad application and the discouragement of trade are addressed.¹⁶¹ Although the amendment may rightly be regarded as significantly restricting the application of state aid rules

¹⁵⁸ Windsor Framework, Articles 3 and 4, Section 2, and Section 3 (section 3 concerning the establishment of an ‘enhanced coordination mechanism related to the functioning of the Protocol in the areas of VAT and excise’).

¹⁵⁹ HM Government, *The Windsor Framework: A New Way Forward* (HM Government 2023) para 41.

¹⁶⁰ See the discussion of the EU-UK TCA and the SCA 2022 below.

¹⁶¹ HM Government, *The Windsor Framework: a New Way Forward*, paras 42-43. For detailed guidance from the UK Government and European Commission, see Department for Business, Energy & Industrial Strategy, and Department for Business & Trade, ‘Guidance on the scope and application of Article 10 of the Windsor Framework’ (HM Government, 2023) <<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/guidance-on-the-scope-and-application-of-article-10-of-the-windsor-framework>> accessed 26 July 2024; and Communication from the Commission Notice to stakeholders on the withdrawal of the United Kingdom and EU rules in the field of state aid [2023] OJ C 202/25 (respectively).

with respect to Northern Ireland, public authorities and businesses alike must still consider the potential of these rules applying. This means that the subsidy control arrangements for Northern Ireland continue to be a source of complexity and administrative costs for these parties, such that the discouragement of trade may still be likely. This point is furthered by the fact that both the UK's new subsidy regime and EU state aid rules will apply with respect to aid for which the recipients in question 'are from sectors both within and outside the scope of Article 10'¹⁶².

Returning more generally to the broader UK, another recent update is the Retained EU Law (Revocation and Reform) Act 2023. This Act makes major changes with respect to retained EU law, revoking a list of EU legislation¹⁶³ including regulations on European administrative cooperation¹⁶⁴ and information exchange agreements¹⁶⁵. The Act repeals the aforementioned provision for the continuing availability of 'rights, powers, liabilities ...' in section 4 of the 2018 Withdrawal Act¹⁶⁶. The Act also repeals general principles of EU law¹⁶⁷ and the principle of the supremacy of EU law¹⁶⁸ (which, as suggested by the explanatory notes, is also intended to abolish any requirement to interpret national legislation consistently with EU law 'so far as possible')¹⁶⁹. As recognised by Woolf, the effect of the 2023 Act is that EU

¹⁶² Department for the Economy, 'State aid and Subsidy Control after EU exit' (*HM Government*, 2023) <<https://www.economy-ni.gov.uk/articles/state-aid-and-subsidy-control-after-eu-exit>> accessed 26 July 2024.

¹⁶³ Retained EU Law (Revocation and Reform) Act 2023, s 1 and sch 1. Note also the repeal of further EU legislation as provided for by the Financial Services and Markets Act 2023 (see chapter one of this thesis).

¹⁶⁴ The European Administrative Co-Operation (Taxation) Regulations 2012. Note that these regulations had concerned mutual assistance following the introduction of the aforementioned DAC.

¹⁶⁵ See, for example, the Tax Information Exchange Agreement (Taxes on Income) (Jersey) Order 2005, SI 2005/1261.

¹⁶⁶ Retained EU Law (Revocation and Reform) Act 2023, s 2.

¹⁶⁷ *ibid*, s 4.

¹⁶⁸ *ibid*, s 3.

¹⁶⁹ *ibid*, explanatory notes paras. 87-92.

law likely no longer has any significance with respect to direct taxes, and although the Value Added Tax Act 1994 remains part of UK law¹⁷⁰ the EU directives on VAT may no longer be relied on through the aforementioned section 4 provision. Woolf also rightly points out that the repeal of both the general principles of EU law and the requirement to interpret consistently with EU law raises a question of whether previous UK decisions which relied on these elements will continue to be binding.¹⁷¹ This is another point of interest but will be left to one side in line with this thesis' focus on corporation tax.

As a result of the agreements and statutes addressed above, the most direct impact of Brexit on UK corporation tax is that the relevant elements of EU law outlined in the previous section of this chapter do not generally apply in the UK anymore. This includes the highlighted EU Directives such as the Parent-Subsidiary Directive, Interest and Royalties Directive, Merger Directive, and Directives on administration and anti-avoidance measures. The repeal of the principle of the supremacy of EU law and the general principles of EU law¹⁷² also means that CJEU decisions on the basis of these Directives, EU law principles, or the prohibition of state aid no longer impact UK tax law. State aid rules themselves generally no longer apply to aid granted by the UK after the end of the transition period (see the discussion of the Northern Ireland Protocol and Windsor Framework above), but potential subsidies that the UK may offer continue to be restricted as a result of the new subsidy regime stemming from the EU-UK TCA (addressed in significant detail below) and by the EU's recently-introduced foreign subsidies regulation (addressed at the end of the previous section).

¹⁷⁰ The UK's VAT rules have since often been updated by legislation, including recently in the Finance Act 2022 and Finance Act 2024; see also s 28 of the 2024 Act with respect to the interpretation of VAT law following the European Union (Withdrawal) Act 2018 and the Retained EU Law (Revocation and Reform) Act 2023.

¹⁷¹ Jeremy Woolf, 'The relevance of EU law: a significant diminishment' *Tax Adviser* (<<https://www.taxadvisermagazine.com/article/eu-withdrawal-half-hearted-separation>> accessed 23 July 2024).

¹⁷² Retained EU Law (Revocation and Reform) Act 2023, s 3.

For the purposes of this thesis, it is worth returning to the discontinued application of the Parent-Subsidiary and Interest and Royalties Directives. The loss of these Directives has a substantial detrimental impact on the UK's competitive position, as withholding taxes may now be imposed with respect to the payment of dividends, interest, and royalties from companies in EU Member States to companies in the UK. Of course, this is subject to the bilateral tax treaties that the UK has with individual Member States, but the change nonetheless means that businesses need to make claims under the relevant treaties when previously withholding tax was simply exempted. Furthermore, the UK's tax treaties with Member States do not always reduce the rate of withholding to zero, such that relevant payments made to the UK from certain countries (including Germany with respect to dividends, and Italy with respect to dividends and royalties¹⁷³) will in fact be subject to a substantial rate of withholding. The fact that companies receiving these payments can no longer benefit from the Directives if they choose to locate in the UK means that the UK is made significantly less attractive as a location for such companies¹⁷⁴. In addition to all this, in light of the importance of administrative efficiency for taxpayers¹⁷⁵ the loss of the EU Directives on administration (such as the DAC, the Directive on Mutual Assistance for the Recovery of Claims, and the Tax Dispute Resolution Directive highlighted above) may further place the UK at a disadvantage in light of continuing cooperation within the EU. Brexit has already resulted in administrative difficulties for HMRC

¹⁷³ PwC, 'Worldwide Tax Summaries: Corporate - Withholding Taxes' (*PwC*, 2024) <<https://taxsummaries.pwc.com>> accessed 27 July 2024.

¹⁷⁴ Paul Stainforth, 'HMRC should prioritise renegotiation of the European double tax agreements, says CIOT' *Tax Journal* (<<https://www.taxjournal.com/articles/hmrc-should-prioritise-renegotiation-of-the-european-double-tax-agreements-says-ciot->> accessed 28 July 2024).

¹⁷⁵ See chapter one.

in terms of cooperation with other tax authorities¹⁷⁶, and it is not difficult to imagine these issues affecting taxpayers' engagement with the tax system as well.

In addition to these significant legal changes, two other sources of law that are especially important with respect to corporation tax policy are the EU-UK TCA and the SCA 2022. The EU-UK TCA¹⁷⁷ constitutes the trade agreement between the EU and UK following Brexit, and addresses various matters including tax and subsidy control. The SCA 2022¹⁷⁸ is domestic legislation in the UK which (along with the EU-UK TCA) effectively replaces EU state aid rules. As will be clear from the discussion below, both of these add unique and uncertain elements to the UK's legal situation, especially in light of the reference to tax standards and good governance in the EU-UK TCA and the operation of the subsidy regime provided for in both the EU-UK TCA and the SCA 2022.

Beginning with the tax-related provisions of the EU-UK TCA, it is useful to adopt a distinction drawn by Pirlot which divides the relevant provisions of the agreement into those which are 'traditional' (being similar to provisions in other trade agreements), and those which are 'new'¹⁷⁹. In the agreement, the traditional provisions address customs and export duties (including the prohibition of customs duties on any non-excepted goods originating in the other party¹⁸⁰, and a restriction on export duties 'in excess of the tax or charge that would be imposed

¹⁷⁶ Judith Freedman and Glen Loutzenhiser, 'Tax policy in the UK post-Brexit' (2022) 38(1) *Oxford Review of Economic Policy* 188.

¹⁷⁷ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L 149/10 (EU-UK TCA).

¹⁷⁸ Subsidy Control Act 2022 (SCA 2022).

¹⁷⁹ Pirlot, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement'.

¹⁸⁰ EU-UK TCA, Article 21.

on like goods when destined for domestic consumption'¹⁸¹), internal taxes¹⁸², and a carveout for double tax agreements¹⁸³. The EU-UK TCA also provides for a tax exception, in that nothing in the majority of the agreement 'shall be construed to prevent the adoption, maintenance or enforcement by a Party of any measure that ... aims at ensuring the equitable or effective imposition or collection of direct taxes', 'subject to the requirement that tax measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and investment'¹⁸⁴.

Sticking with the distinction drawn by Pirlot, the 'new' tax-related provisions of the EU-UK TCA are significant in the sense that similar provisions could not be found in any other trade agreements concluded by the EU or UK at the time¹⁸⁵. Dealing first with the references to tax standards and governance, Article 383 provides that:

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

This Article is contained within Title XI of the agreement, which more generally provides that the EU and UK recognise that trade and investment between the parties 'require conditions that ensure a level playing field for open and fair competition' and that such trade and investment

¹⁸¹ *ibid*, Article 22.

¹⁸² *ibid*.

¹⁸³ *ibid*, Article 413.

¹⁸⁴ *ibid*.

¹⁸⁵ Pirlot, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement'.

‘take[s] place in a manner conducive to sustainable development’¹⁸⁶. Furthermore, Article 384 provides that:

A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period [1 February – 31 December 2020, during which the UK generally continued to be treated as a Member State save for engagement in EU institutions], in relation to:

- (a) the exchange of information, whether upon request, spontaneously or automatically, concerning financial accounts, cross-border tax rulings, country-by-country reports between tax administrations, and potential cross-border tax planning arrangements;
- (b) rules on interest limitation, controlled foreign companies and hybrid mismatches.

These provisions can rightly be regarded as unique inclusions in a trade agreement¹⁸⁷, but when considering the implication that the EU-UK TCA has on the UK’s competitive position with respect to international corporation tax the even more crucial point is that their precise effect is quite uncertain. Even if the reiteration of ‘support’ for the OECD’s BEPS project is accepted as part of a set commitment to the OECD’s minimum standards against BEPS (see section 1 of this chapter), the reference to ‘good governance in tax matters’ and ‘the global standards on fair tax competition’ (to simply highlight a few elements of Article 383) is especially vague. For both parties, a key question is to what extent this provision can actually be relied on to contest a measure taken by the other party.

Even more issues arise within the new subsidy regime, which is provided for in both the EU-UK TCA¹⁸⁸ and in the SCA 2022¹⁸⁹. The EU-UK TCA addresses subsidy control in similar ways to other trade agreements, but (again using Pirlot’s distinction set out above) also includes

¹⁸⁶ EU-UK TCA, Article 355.

¹⁸⁷ Just as Pirlot rightly points out; Pirlot, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement'.

¹⁸⁸ EU-UK TCA, ch 3 of Title XI.

¹⁸⁹ For a useful outline of subsidy regime as set out in the EU-UK TCA, see Philip Baker, 'Fiscal subsidy control in the post-Brexit era' (2021) 1 *British Tax Review* 14; with respect to the SCA 2022, see Philip Baker, 'Fiscal subsidy control in the post-Brexit era (part 2)' (2021) 4 *British Tax Review* 361.

‘new’ provisions. Amongst these new provisions is the definition of ‘subsidy’ in Article 363, which refers to financial assistance that (i) arises from the resources of the agreement’s parties (including, importantly, from ‘the forgoing of revenue that is otherwise due’), (ii) confers an economic advantage on one or more economic actors¹⁹⁰, (iii) is ‘specific’ in benefitting ‘certain economic actors over others in relation to the production of certain goods or services’, and (iv) ‘has, or could have, an effect on trade or investment between the Parties’^{191, 192}

Uniquely, the EU-UK TCA then goes further with respect to subsidies being ‘specific’, providing that:

- (a) ‘a tax measure shall not be considered as specific unless:
 - (i) certain economic actors obtain a reduction in the tax liability that they otherwise would have borne under the normal taxation regime; and
 - (ii) those economic actors are treated more advantageously than others in a comparable position within the normal taxation regime; for the purposes of this point, a normal taxation regime is defined by its internal objective, by its features (such as the tax base, the taxable person, the taxable event or the tax rate) and by an authority which is autonomous institutionally, procedurally, economically and financially and has the competence to design the features of the taxation regime;
- (b) notwithstanding point (a), a subsidy shall not be regarded as specific if it is justified by principles inherent to the design of the general system; in the case of tax measures, examples of such inherent principles are the need to fight fraud or tax evasion, administrative manageability, the avoidance of double taxation, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, or the need to respect taxpayers' ability to pay;
- (c) notwithstanding point (a), special purpose levies shall not be regarded as specific if their design is required by non-economic public policy objectives, such as the need to limit the negative impacts of certain activities or products on the environment or human health, insofar as the public policy objectives are not discriminatory.’¹⁹³

In incorporating these provisions into domestic law, the SCA 2022 provides its own definition of ‘subsidy’ in section 2 (this being effectively the same as the one provided in the EU-UK

¹⁹⁰ ‘Economic actor’ is defined in Article 363.1(a).

¹⁹¹ As recognised by Pirlot, this latter condition appears less strict than similar conditions under the WTO Agreement on Subsidies and Countervailing Measures; Pirlot, ‘Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement’.

¹⁹² EU-UK TCA, Article 363.1(b).

¹⁹³ *ibid*, Article 363.2.

TCA, with financial assistance through ‘the foregoing of revenue that is otherwise due’ again being included). With respect to the requirement of such subsidies being ‘specific’¹⁹⁴, the Act provides that ‘[f]inancial assistance is not to be regarded as being specific if the distinction in the treatment of enterprises is justified by principles inherent to the design of the arrangements of which that financial assistance is part’¹⁹⁵. The Act then goes on to list examples of the ‘principles that may be relevant in a particular case’ with regard to financial assistance in the form of a measure, listing:

- (a) the need to fight fraud or tax evasion;
- (b) administrative manageability;
- (c) the avoidance of double taxation;
- (d) the principle of tax neutrality;
- (e) the progressive nature of income tax and its redistributive purpose;
- (f) the need to respect taxpayers’ ability to pay;¹⁹⁶

The following subsections then provide that:

- (4) Financial assistance given by a public authority in the form of a tax measure is not to be regarded as being specific unless—
 - (a) one or more enterprises obtain a reduction in the tax liability that it or they would otherwise have borne under the normal taxation regime, and
 - (b) that enterprise or those enterprises are treated more advantageously than one or more other enterprises in a comparable position under the normal taxation regime.
- (5) For the purposes of subsection (4), the normal taxation regime is to be identified from—
 - (a) the internal objective of the regime,
 - (b) the features of the regime (such as the tax base, the taxable person, the taxable event or the tax rate), and
 - (c) the fact that the public authority whose regime it is—
 - i. is autonomous institutionally, procedurally, economically and financially as regards the regime, and
 - ii. (has the competence to design the features of the regime.¹⁹⁷

¹⁹⁴ SCA 2022, s 2(1)(c).

¹⁹⁵ SCA 2022, s 4(2).

¹⁹⁶ *ibid*, s 4(3).

¹⁹⁷ *ibid*, s 4(4)-4(5); the following subsections then go onto address special purposes levies as in the EU-UK TCA.

The first point to note in light of these provisions is that some of the wording is markedly different from (albeit similar to) the prohibition of state aid Article 107 TFEU. Article 107(1) refers to aid which ‘distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’, whereas the new subsidy regime (with respect to subsidies being ‘specific’) refers to aid which ‘benefits ... certain economic actors over others in relation to the production of certain goods or services’¹⁹⁸. In addition to this, the new provisions explicitly address tax and do so in a detailed manner unlike Article 107 TFEU; the operation of the latter with respect to tax has been clarified by various decisions of the CJEU and other elements of EU law¹⁹⁹. Furthermore, as Baker recognises, the EU-UK TCA’s requirement that subsidies have or could have an effect on trade or investment between the EU and the UK is of course different to the state aid rules which consider effects on trade between Member States within the internal market²⁰⁰. In light of assumptions in the EU that subsidies for large businesses (and especially large businesses that operate across borders in the internal market) generally do effect trade between Member States, a key question for the UK is how similar issues will be assessed in the context of the UK’s own domestic internal market.

The references to the ‘normal’ taxation regime in both the EU-UK TCA and the SCA are relatively clear in their purpose of assessing differences in treatment between economic actors despite a potential question of what the ‘internal objective’ of the regime is; as Baker recognises, these inclusions codify the European Court and European Commission’s approach of identifying departures from a reference system²⁰¹. There may be some uncertainty, however, concerning whether the ‘normal’ taxation regime will be regarded as all the legislation behind

¹⁹⁸ EU-UK TCA, Article 363.1(b); see also SCA 2022, s 2(1)(c) (where the wording is almost the same).

¹⁹⁹ See the previous section of this chapter.

²⁰⁰ Baker, ‘Fiscal subsidy control in the post-Brexit era’.

²⁰¹ *ibid*; see also the previous section of this chapter.

a particular tax or simply a ‘self-contained’ part of the regime (Baker mentions the transfer pricing regime as an example of the latter)²⁰². Within the context of this thesis, it is interesting to consider whether a part of a tax regime with a specific purpose of offering tax incentives to certain economic actors and thereby increasing the UK’s competitiveness could possibly ever be argued to itself be the ‘normal’ taxation regime.

This issue regarding the purpose behind a certain rule or tax regime is also important with respect to the provision that subsidies will not be specific (with the regime therefore not applying) ‘if justified by principles inherent to the design of the general system ...’²⁰³. Here, the reference to the ‘general system’ may exclude consideration of principles behind specific parts of the tax system with special purposes, but the fact that tax principles are nonetheless referred to in general (and the list of example principles provided) is a particularly remarkable inclusion. As Baker points out, the UK does not otherwise have an enshrining of such principles (unlike other jurisdictions) such that their inclusion in the EU-UK TCA has brought principles such as tax neutrality, the ability to pay, and the progressivity and redistributive purpose of income tax into operation in the UK ‘through the back door’²⁰⁴.

Interestingly, the inclusion of these principles points back to criteria similar to those addressed at the end of chapter one of this thesis. As will hopefully be clear from that section, principles of tax design and tax policy may be of key importance but will often have not only their meaning but also the extent to which they should be protected be disagreed upon. The principles listed (including administrative manageability, tax neutrality, and the ability to pay) may all be something that a tax system should seek to achieve, but there is inherent uncertainty regarding not only what these principles mean but also which other principles should fall under

²⁰² *ibid.*

²⁰³ EU-UK TCA, Article 363.2(b); see also SCA 2022, s 4(2)-4(3).

²⁰⁴ Baker, ‘Fiscal subsidy control in the post-Brexit era’.

consideration. It may be arguable, for example, that supporting the competitiveness of the UK (which may be served through offering tailored tax incentives) is itself an important principle²⁰⁵ that could justify the use of a tax measure which might otherwise be regarded as ‘specific’ and therefore potentially fall under the regime. Furthermore, no guidance is offered with regard to how principles may be balanced or overridden if they conflict; for example, it is easy to conceive the principle of administrative manageability conflicting with the need to fight fraud (such that it is unlikely that these principles were assumed to work in harmony with each other).

As a whole, this subsidy control regime has been regarded as softer than its state aid predecessor²⁰⁶, but its precise operation will remain significantly uncertain in light of the issues set out above such that even the strength of the regime is unclear. The same point goes for the references to tax standards and good tax governance in the EU-UK TCA. Nevertheless, in the following chapter this thesis will attempt to assess the potential application of these constraints within the practical context of the case study on tax measures targeted at attracting investment funds to the UK.

Before moving on, it is also worth pointing out that these issues of uncertainty are compounded when considering the next logical question of what would happen if one party determines that the other has breached one of the commitments such as those found in the taxation or subsidy control chapters. The EU-UK TCA provides for the resolution of disputes by a Partnership Council consisting of representatives of both the EU and UK, with the council having the power to adopt decisions, make recommendations, and adopt amendments to the agreement (amongst

²⁰⁵ See chapter one.

²⁰⁶ Baker, 'Fiscal subsidy control in the post-Brexit era (part 2)'.

other things)²⁰⁷. From the meetings of this council to date²⁰⁸, little can be discerned with respect to how disputes might be resolved if at all. In addition to this, it may also be possible for disputes under Title XI (ie, disputes concerning both chapters) to fall under the EU's new complaints mechanism²⁰⁹ (following Pirlot's reasoning that this mechanism, applying to trade and substantiable development chapters, would also apply in the context of the tax chapter as part of Title XI). If this mechanism does apply, there is nonetheless a question of whether effective resolution is possible (as similar trade agreements do not provide for the imposition of sanctions).²¹⁰

With regard to the subsidy regime in particular, Article 374 also provides for the ability of the EU or UK to take 'remedial measures' after consideration and written discussion of a subsidy considered to cause or have a serious risk of causing 'a significant negative effect on trade or investment' between the parties. The taking of remedial measures is limited by the requirement that a party's assessment of such effects is based on facts²¹¹ and reliable evidence²¹², and is restricted to 'what is strictly necessary and proportionate in order to remedy the significant negative effect caused or to address the serious risk of such an effect' with priority given to 'measures that will least disturb the functioning' of the EU-UK TCA.

²⁰⁷ EU-UK TCA, Article 7.

²⁰⁸ European Commission, 'Meetings of the EU-UK Partnership Council and Specialised Committees under the Trade and Cooperation Agreement' (*European Commission Directorate-General for Communication*, 2024) <https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement_en> accessed 27 July 2024.

²⁰⁹ European Commission, 'Single Entry Point' (*European Commission Directorate-General for Trade, Access2Markets*, 2024) <<https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0>> accessed 27 July 2024.

²¹⁰ Pirlot, 'Some Observations on the Tax-Related Provisions in the EU-UK Trade and Cooperation Agreement'.

²¹¹ EU-UK TCA, Article 374.5.

²¹² *ibid*, Article 374.6.

These provisions add further uncertainty regarding the practical application of the taxation and subsidy control chapters. Although the provision for remedial measures in the subsidy control chapter at least offers a structured ground for disputes, comparing this to the established procedure of the Commission challenging the decisions of tax authorities in the CJEU under state aid law highlights the lack of real experience in and therefore greater certainty as to the operation of these remedial measures in practice²¹³. In addition to this, the Partnership Council appears at this point in time to be a relatively weak enforcement mechanism, in light of which it might be argued that the taxation chapters' provisions are somewhat diminished in significance²¹⁴. Instructively, the Government's own view is that '[t]here are no provisions constraining [the UK's] domestic tax regime or tax rates' in the taxation chapter of Title XI²¹⁵. This statement may be technically correct with respect to the OECD-related commitments addressed above (although Pirlot nonetheless points out that the chapter nonetheless offers an additional legal basis for these commitments²¹⁶), but it would be wrong to suggest that the references to 'good governance in tax matters' and 'the global standards on fair tax competition' make no difference to tax law in the UK. It should not be presumed that the UK's own tax regime necessarily follows (or should follow) the same standards and principles of good governance as those that might be adopted by the OECD²¹⁷

²¹³ This should not be taken to suggest that the recent challenges made by the CJEU under state aid law (or the outcome of these challenges) have necessarily been easy to predict in recent years; see the previous section of this chapter.

²¹⁴ Pirlot argues that 'the sustainable development chapters should primarily be seen as a way for the EU to reinforce its dialogue with trade partners on sensitive sustainability issues and "strengthen the existing multilateral governance structures"' including in the context of international tax standards; Pirlot, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement'.

²¹⁵ HM Government, 'UK-EU Trade and Cooperation Agreement: Summary' (*HM Government*, 2020) <https://assets.publishing.service.gov.uk/media/602cf3dbd3bf7f031ce1360e/TCA_SUMMARY_PDF_V1-.pdf> accessed 27 July 2024.

²¹⁶ Pirlot, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement'.

²¹⁷ In this context, the UK's interest relief regime provides a useful example of a set of rules which was regarded as going against the OECD's standards (in this case, the BEPS project's standard on interest restriction); see chapter three.

or as those that might have been envisioned by those drafting the EU-UK TCA. Of course, this inconsistency in the interpretation of the taxation chapter only adds to the substantial uncertainty identified above. In the context of the UK's policymaking ability and competitive position with respect to potential investors (who may likely be seeking certainty and stability²¹⁸) such uncertainty is a significant issue.

The potential of disputes should also be recognised as adding administrative complexity to the UK's tax system, in addition to the existing administrative difficulties which have resulted from Brexit²¹⁹. Overall, the substance of the Brexit deal as constituted by the overall EU-UK Withdrawal Agreement, UK statutes, and the EU-UK TCA and SCA 2022 does not only add such complexity in terms of the tax regime, but as evident from the above discussion also changes the constraints and opportunities for the UK's policymaking ability in unique and uncertain ways.

2.3 Situational analysis

The preceding sections of this chapter have addressed the UK's situation with respect to international corporation tax, both in general terms and with regard to the specific impact of Brexit. The remainder of this chapter will synthesise the issues addressed above to highlight key areas of concern with respect to the policymaking constraints, establish the effect of the overall situation on the UK's competitive position, and in light of these points set out the thesis' general descriptive and normative conclusions.

²¹⁸ See chapter one.

²¹⁹ Freedman and Loutzenhiser, 'Tax policy in the UK post-Brexit'; see also earlier in this section.

Within the context of corporation tax in the UK, one key legal change brought by Brexit is the general loss of relevant elements of EU law. As identified earlier, this includes important Directives (on cross-border movement, administration, and anti-avoidance measures), the jurisprudence of the CJEU on the basis of the principle of non-discrimination, and the prohibition of state aid. Another key legal change has occurred in the form of the overall EU-UK Withdrawal Agreement itself, and the arrangements made for Northern Ireland under the Northern Ireland Protocol and Windsor Framework (providing for the continuing applicability of state aid rules in certain circumstances). A key legal change which is of particular significance for this thesis stems from the EU-UK TCA and the subsidy regime provided for by that Agreement and the SCA 2022, as addressed in detail in the previous section. Finally, a more indirect key legal change is the applicability of the EU's new Foreign Subsidies Regulation with respect to the UK being a non-EU Member State.

Each of these elements demonstrate the significant impact that Brexit has had on the UK's approach to international corporation tax. Although the UK is clearly no longer constrained by many aspects of EU law and may therefore be able to take advantage of certain opportunities, it should also be clear that Brexit has introduced significant constraints on the UK's corporation tax policymaking ability. In this regard, there are four key areas of concern which the UK should account for as potentially having a major impact on this ability, each of which have been addressed in further detail earlier in this chapter and will be returned to in the case study. The first is the general issue of the subsidy regime's effective application, especially in light of the question of how subsidies addressing the UK's own domestic internal market will be assessed compared to the operation of state aid rules (which consider effects on trade between Member States), the relative uncertainty regarding the effective raising and resolution of disputes, and the issue of state aid rules continuing to apply in certain circumstances with respect to Northern Ireland. The second is the question of how potential subsidies may

nonetheless not be regarded as ‘specific’ for the purposes of this regime, which relies on the interpretation of the regime’s references to a ‘normal taxation regime’ and to ‘principles inherent to the design of the general system’²²⁰. The third is the lack of certainty regarding the meaning of the commitments to tax standards and good tax governance in Article 383 of the EU-UK TCA. The fourth is the question of how potential subsidies may otherwise be dealt with by the EU’s new Foreign Subsidy Regulation, and how this Regulation might interact with the subsidy control provisions in the EU-UK TCA.

In light of each of these issues, this thesis’ general descriptive conclusion is that Brexit imposes novel and uncertain constraints on the UK’s corporation tax policymaking ability. The loss of many elements of EU law relevant to direct taxation has effectively been coupled with the introduction of new rules that the UK must comply with, such that the UK’s policymaking ability is now limited by the new subsidy regime and the commitments made in the EU-UK TCA (and even the application of the Foreign Subsidy Regulations). Furthermore, the major constraints are novel in the sense that they are unique with respect to other trade agreements and subsidy control regimes, and (partly due to this uniqueness) their precise effect is uncertain. Significant uncertainty also stems from the lack of clarity regarding what may actually be disputed in practice, and the relatively vague meaning of many of the key provisions. What should be clear despite this uncertainty, however, is that these legal changes do constitute at least somewhat of a constraint on the UK as a result of Brexit. In addition to all this, the aforementioned application of the Foreign Subsidy Regulation also demonstrates that developments in the EU do and will likely continue to significantly impact the UK even though it is no longer a member of the Union. The potential impact of the Regulation on the introduction of tax measures by the UK (notwithstanding the uncertainty regarding the

²²⁰ EU-UK TCA, Article 363.2; see also SCA 2022, s 4.

interaction of this Regulation with the EU-UK TCA) constitutes an additional constraint on the UK's policymaking ability, and one which the UK was not directly involved in establishing. In this sense, another impact of Brexit with respect to corporation tax appears to be that the UK has given up its seat at the table of the EU, whilst still being significantly affected by some of the decisions made at this table.

The key changes highlighted above have a significant impact on the UK's competitive position, in the sense that they restrict the sorts of corporation tax policies that the UK may be able to introduce to make itself a more attractive venue for investment. What is perhaps most interesting about these changes is that they only impact the UK, whereas other reforms such as those developed in the OECD²²¹ extend to many other countries. The UK therefore stands out as a non-EU country which has nonetheless struck a significant and detailed trade agreement (resulting also in a new subsidy regime which generally replaces the prior application of state aid rules), is now subject to the novel and uncertain constraints highlighted above, and which must contend with the differing impact of all of this with respect to Northern Ireland. Furthermore, the loss of key Directives on cross-border movement and administration poses an additional and detrimental impact on the UK's competitive position (as addressed in detail in the previous section of this chapter). Notwithstanding all these issues, the UK's departure from the EU does also mean that it is otherwise generally unrestricted by EU law such that there is the potential for the UK to leverage its new opportunities to improve its competitive position²²².

The overall uniqueness of the UK's current situation, however, only further adds to the uncertainty identified earlier, and this uncertainty – together with the overall complexity of the

²²¹ See section 1 of this chapter.

²²² This potential will be returned to in chapter three, in which the points highlighted in this chapter will be applied to the specific context of tax incentives for investment funds.

situation, especially with respect to Northern Ireland – poses significant issues in light of this thesis’ criteria for analysis²²³. Perhaps the most immediate of these issues is the impact that the overall situation has on administrative efficiency, as the administrative issues resulting from the loss of the key Directives and the added complexity of the overall EU-UK Withdrawal Agreement (again, this being an especially significant issue with respect to Northern Ireland) are exacerbated by the issue of certainty identified above and even simply the impact that these changes have had on the general stability of the UK’s approach to international corporation tax. The loss of the Parent-Subsidiary and Interest and Royalties Directives also introduces potential distortive effects (due to the imposition of withholding taxes and the administrative cost of claiming relief under tax treaties) and in doing so harms economic efficiency. Finally, equity is also impacted by many of these points, including the potential disproportionate impact of the aforementioned administrative issues for companies with less resources (harming vertical equity). Horizontal equity is also harmed as UK companies with EU subsidiaries (as opposed to UK subsidiaries) must account for the imposition of withholding tax and additional administrative obligations with respect to certain payments made by their subsidiaries (in light of the loss of the aforementioned key Directives on cross-border movement); this state of affairs is perhaps especially problematic in light of the fact that this difference may likely not have existed when an EU subsidiary was originally set up. Even more fundamental issues of equity stem from the arrangements for Northern Ireland, under which businesses trading in Northern Ireland (as opposed to businesses trading in other parts of the UK) face unique and complicated rules which also differ depending on the industry in which the business operates. The broader potential implications for Northern Ireland in light of these issues also threaten to harm societal equity and perhaps even the respect for personal and collective identity shown by the tax

²²³ See chapter one.

system²²⁴, at the very least with regard to the effects of the complicated arrangements (including the potential discouraging of investment).

In recognition of each of these points and in light of the assumption made in chapter one that the UK would be justified in introducing tax measures to improve its competitive position, this thesis' normative conclusion is that if the UK wishes to reform corporation tax for this purpose it should do so by introducing broad regimes which take advantage of the UK's unique position, decreasing the administrative complexity of the tax system, and reforming tax treaties with certain European states. This conclusion is made up of three key recommendations. The first recommendation stems from the identified constraints in the EU-UK TCA and subsidy regime and the analysis of these constraints, as a relatively broad tax policy will reduce the risk of issues arising under the subsidy regime (especially in light of the provision for subsidies not being regarded as 'specific' under the regime) and may even promote economic efficiency in offering more neutral treatment between corporations. The UK should of course also take advantage of its unique position in doing so, in light of the point that there may also nonetheless be policymaking opportunities as a result of Brexit; this argument will be elaborated on within the more practical analysis of the case study. Building on all this, the second recommendation of this conclusion accounts for the various administrative issues identified above and the impact that relative administrative efficiency may likely have on the UK's competitive position. This recommendation is that the UK should seek to improve administrative efficiency by addressing some of the issues stemming from the overall EU-UK Withdrawal Agreement, pursuing further international administrative cooperation, or at least improving its domestic tax administration. Finally, the third recommendation accounts for from the identified detrimental impact of the loss of the Parent-Subsidiary and Interest and Royalties

²²⁴ See chapter one.

Directives; in this regard, the UK should address the potential of withholding tax being imposed and perhaps even the fact that relevant businesses need to make a claim under treaties even where rate of withholding will effectively be zero. This could be achieved through the reform of bilateral treaties with countries such as Germany and Italy, or even through a broader multilateral measure or cooperation with the EU.

CHAPTER THREE – CASE STUDY: ATTRACTING INVESTMENT FUNDS

As is clear from the previous chapter, Brexit has a significant impact on the UK's approach to international corporation tax, in light of both the novel and uncertain constraints it imposes on the UK's policymaking ability, and the effect that these constraints and potential post-Brexit opportunities can have on the UK's competitive position. This chapter will now apply these points to a specific case study on the use of tax incentives to encourage investment funds to locate in the UK. More specifically, the case study will address the tax treatment of corporate structures and various cashflows that are particularly relevant within this context, focusing specifically on the recently-introduced QAHC regime. These points will be addressed by reference to the legal situation set out in chapter two (returning to the four key areas of concern identified at the end of that chapter) and the framework for analysis set out in chapter one.

Chapter three will be split into three sections. The first section will set out the fundamentals for the case study, including a brief discussion of the UK's foreign profits and interest relief regimes as introductory examples. The second section will address the QAHC regime and test this regime (and hypothetical reforms to it) with respect to the identified policymaking constraints. The third section will analyse the regime in light of the UK's competitive position and the criteria for analysis, and set out the thesis' case study-specific and normative conclusions (the latter conclusion building on its introduction in chapter two).

3.1 Case study fundamentals

The selection of this case study (and considering incentives for investment funds in general) is justified for three key reasons beyond the potential impact on investment in the UK. Firstly, the

UK can perhaps be regarded as having a comparative advantage in hosting investment funds in light of the country's institutional infrastructure with respect to its legal system, financial services sector, educational institutions, and its extensive tax treaty network.²²⁵ With regard to tax treaties in particular the case study is also especially important with respect to the loss of the Parent-Subsidiary and Interest and Royalties Directives as addressed in the previous chapter. Secondly, there is a historical precedent for UK policymakers seeking to attract investment funds, as evident from the foreign profits regime (see section 1 below), and also a general relevance of investment fund-targeted tax measures outside the UK²²⁶. Thirdly, various elements of the potential policies targeted to attract investment funds may also be relevant for other areas (such as headquarter companies, or even research and development) such that their exploration is valuable beyond the confines of this case study.

It is also important at this stage to recognise that the regimes and hypotheticals addressed in this case study are only directly relevant with respect to attracting a certain type of investment and should not be understood simply as measures seeking to attract investment to the UK in general. More specifically, encouraging the location of investment funds or holding companies in the UK may lead to an investment in the UK's financial and other professional services sectors, or perhaps to an investment in office space and labour (which may itself bring further benefits to the country such as prestige or top-earner employees). Attracting this sort of activity, however, may be unlikely to lead to economic boosts to other sectors of industry or productivity, and in this regard the UK should be careful in considering precisely what sort of investment and growth they are seeking to incentivise.

²²⁵ See chapter two. See also Artem Vasyutin and Sophie Hatton, 'Analysis — UK holding companies: why they are still holding strong?' *Tax Journal* (<<https://www.taxjournal.com/articles/uk-holding-companies-why-they-are-still-holding-strong-#:~:text=The%20UK%20has%20many%20benefits,no%20withholding%20tax%20on%20dividends.>> accessed 7 May 2024).

²²⁶ See, for example, the Irish and Luxembourgish regimes referenced later in this chapter.

The remainder of this section will briefly address the UK's foreign dividends and interest relief regimes as introductory examples with which to further set out the fundamentals for this case study. Within the context of this thesis, these regimes are of particular interest in light of the issue of competitiveness and the question of the constraints placed on the UK's policymaking ability.

As set out in section 1 of chapter two, in past years the UK switched to a territorial tax system for foreign dividends such that the receipt of certain foreign dividends by UK-resident companies would simply be exempt from UK taxation²²⁷. Specific rules apply depending on whether dividends are received by 'small companies'²²⁸ or 'non-small companies'²²⁹, but for the purposes of this discussion it is sufficient to note that these rules effectively mean that most dividends received by either type of company will fall under an exemption²³⁰. Since this reform, the UK has also enabled UK-resident companies to elect into an exemption under which all profits arising in a foreign permanent establishment (ie, branches as opposed to subsidiary companies) are also exempt, with the qualifications that the election is irrevocable and that no relief will be given in the UK for the losses suffered by the PE²³¹. These changes constitute the UK's shift away from a worldwide system of taxation under which foreign receipts were taxable in the UK subject to taxpayers being able to claim a tax credit with respect

²²⁷ Corporation Tax Act 2009, pt 9A. See also Finance Act 2009, sch 14.

²²⁸ Corporation Tax Act 2009, pt 9A, ch 2. See s 931S for the definition of 'small companies'.

²²⁹ *ibid*, pt 9A, ch 3.

²³⁰ Although this discussion concerns foreign dividends, note that the receipt of dividends from UK-resident companies is also tax exempt.

²³¹ Corporation Tax Act 2009, s 18A et seq. See also Finance Act 2011, sch 13.

to foreign tax already paid on these items²³² (note that this is still the system used by the UK with respect to other amounts).

The reforms set out in the previous paragraph were introduced following a 2007 discussion document by HM Treasury and HMRC which concerned reforms to the UK's taxation of foreign profits. The document's proposal to switch to an exemption system for foreign dividends (in this case, applying to dividends paid by companies in which the recipient company had at least a 10% shareholding interest) was justified by reference to the complexity and ensuing compliance costs of the existing credit system²³³. More generally, the document and its reform proposals cited the need to 'improve the competitiveness and attractiveness of the UK as a location for multinational business'²³⁴. Interestingly enough, the subsequent IFS Green Budget report also regarded exemption systems as being easier to make compatible with EU law due to their ensuring that investment returns would be taxed only in source states without 'interference' from residence states²³⁵.

The aforementioned issue of competitiveness could also be seen in another aspect of the 2009 reforms: the preservation of the UK's then-generous interest relief rules. Under these rules companies benefitted from an extensive ability to claim deductions with respect to interest payments²³⁶, and the 2009 reforms mostly protected these rules with the introduction of a cap calculated by reference to the wider multinational group's external finance costs. Although various anti-avoidance rules were also introduced, the high cap for interest deductions continued to be an attractive factor for MNEs. Later on, however, the UK introduced a much

²³² Taxation (International and Other Provisions) Act 2010, s 18.

²³³ HM Treasury and HM Revenue & Customs, *Taxation of the Foreign Profits of Companies: A Discussion Document*.

²³⁴ *ibid* 10.

²³⁵ Stuart Adam and others, *IFS Green Budget: January 2008* (The Institute for Fiscal Studies 2008) 255.

²³⁶ See Finance Act 1996.

stricter cap as a result of the Action 4 of the BEPS project (regarding the limitation on interest deductions)²³⁷. The new cap limits a multinational group's UK interest relief to 30% of its UK EBITDA, an amount determined by a ratio of the group's worldwide net interest to EBITDA, or a *de minimis* threshold of £2 million.²³⁸

The UK's approaches to foreign dividends and interest relief are useful examples in this context as they demonstrate reforms introduced by the UK which were targeted at (and appear likely to have been successful in) increasing the attractiveness of the UK to investment funds or companies engaging in financing activities more generally. The exemption of dividends and foreign dividends in particular from UK tax provides a significant tax incentive for dividend-receiving companies to be located in the UK, and in this sense is a precedent for later financing-related tax incentives such as the QAHC regime. The development of the interest relief regime is significant for similar reasons, but also because it serves as an example of external constraints (in this case, BEPS Action 4) impacting the UK's ability to introduce policies designed to increase its competitiveness.

Viewing all this from the perspective of the impact of Brexit on the UK's competitive position, two themes can be raised which will be returned to later on in this case study. Firstly, the two regimes addressed above are both quite broad in their application, covering all or the majority of taxable amounts within their specific area of corporation tax (the receipt of dividends and the payment of interest, respectively). Investment fund-targeted regimes that offer incentives in a similarly broad way may be unlikely to raise issues with the new subsidy regime or could at least be considered under the 'normal' taxation regime²³⁹, although questions may still arise over the interaction of such regimes with the references to tax standards and

²³⁷ See section 1 of chapter two.

²³⁸ HM Treasury and HM Revenue & Customs, *Tax Deductibility of Corporate Interest Expense: Consultation on Detailed Policy Design and Implementation* (HM Treasury 2016).

²³⁹ EU-UK TCA, Article 363.2(a); see also SCA 2022, s 4(4)-4(5).

good tax governance in the EU-UK TCA²⁴⁰, the reference to principles in the subsidy regime²⁴¹ (if issues could in fact be raised under this regime), or the EU's new Foreign Subsidies Regulation. Secondly, the impact of BEPS on the interest relief regime in particular may be quite different from the potential impacts of Brexit on other regimes, in the sense that the BEPS project imposed its constraints on many countries and not simply the UK. The UK may bear greater administrative costs with respect to the policymaking process (and even the managing of potential disputes) due to the fact that the country is alone in determining how to move forward in light of the novel and uncertain constraints of the overall EU-UK Withdrawal Agreement²⁴².

3.2 Incentivising investment funds to locate in the UK

This section will address investment fund-targeted incentives that the UK may offer today, applying the points highlighted in chapter two within a specific and practical context. Although there are many potential tax policies that could be introduced to encourage investment funds to locate in the UK, this section will deal with the recently-introduced QAHC regime as a regime which is specifically targeted at certain companies involved in investment businesses and an example of an effort on the part of the UK to improve its competitive position following Brexit.

²⁴⁰ EU-UK TCA, Article 383.

²⁴¹ *ibid*, Article 363.2(b).

²⁴² This is in contrast with the constraints imposed by BEPS, following which the UK's headline interest relief cap of 30% of UK EBITDA was consistent with approaches in other countries; HM Treasury and HM Revenue & Customs, *Tax Deductibility of Corporate Interest Expense: Consultation on Detailed Policy Design and Implementation*.

As will be shown, the QAHC regime not only usefully illustrates the constraints established in chapter two, but also appears to be generally compliant with these constraints. Furthermore, in light of developments in the EU the QAHC regime may prove to put the UK in an even more competitive position with respect to attracting investment funds, highlighting what may prove to be a post-Brexit benefit.

The QAHC regime was introduced following a 2020 consultation on the tax treatment of asset holding companies²⁴³, after which the Government concluded that an ‘appropriately targeted, proportionate and internationally competitive tax regime’ for these companies was justified on policy grounds and by reference to potential economic and fiscal benefits²⁴⁴. The Explanatory Notes for the regime state an aim of ‘recognis[ing] circumstances where intermediate holding companies are used only to facilitate the flow of capital, income and gains between investors and underlying investments, to tax investors broadly as if they had invested [directly] in the underlying assets, and to enable the intermediate holding companies to pay tax that is proportionate to the activities they perform’²⁴⁵. As recognised by Squires, the consultation documents referenced above also underline a policy trade-off between ensuring the robustness of the regime’s eligibility criteria (addressed below) and maintaining the overall regime’s intended straightforwardness and simplicity²⁴⁶.

²⁴³ HM Treasury, *Tax treatment of Asset Holding Companies in Alternative Fund Structures: Consultation* (HM Government 2020).

²⁴⁴ HM Treasury, *The Tax Treatment of Asset Holding Companies in Alternative Fund Structures Government Response and Second Stage Consultation* (HM Government 2020).

²⁴⁵ Finance Act 2022, Explanatory Notes.

²⁴⁶ Sarah Squires, ‘Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies’ (2022) 4 *British Tax Review* 353, 355.

The regime itself is provided for in schedule 2 of the Finance Act 2022 (and introduced by section 14 of that Act)²⁴⁷. In essence, the regime determines eligible companies²⁴⁸ and then applies altered tax rules with respect to the calculation of certain profits and gains of such companies (in an effort to make the tax treatment of indirect investment through these companies effectively neutral relative to direct investment, in line with the aim set out above). The eligibility requirements constitute a significant portion of the regime, and (as pointed out by Squires) may be intended to do the majority of work in maintaining the regime's scope in light of the limited inclusion of anti-avoidance rules²⁴⁹. There are seven requirements for a company to be a QAHC and therefore fall under the regime²⁵⁰, including that the company in question is a UK resident company, is not a real estate investment trust (REIT)²⁵¹ or securitisation company, does not have equity securities that are listed or traded on any public markets or exchanges, and has made a notification to HMRC that they will enter into the regime²⁵². The other requirements are regime-specific conditions on ownership, activity, and investment strategy. The activity condition simply requires that 'the main activity of the company is the carrying on of an investment business' with other activities being ancillary and not carried on to 'any substantial extent'.²⁵³ Building on this, the investment strategy condition

²⁴⁷ Note that a few updates to the regime were introduced by s 35 and sch 4 of the Finance (No. 2) Act 2023 (what follows will deal with the latest version of the regime at the time of writing). See also Sarah Squires, 'Finance (No.2) Act 2023 Notes: Section 35 and Schedule 4: investment vehicles' (2023) 4 British Tax Review 437.

²⁴⁸ Finance Act 2022, sch 2, pt 1; see paragraph below.

²⁴⁹ Squires, 'Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies' 356.

²⁵⁰ Finance Act 2022, sch 2, para 2.

²⁵¹ The REIT regime provides tax benefits for certain property investment companies; see Corporation Tax Act 2010, pt 12.

²⁵² See Finance Act 2022, sch 2, para 14. Note that QAHCs may also make an exit notification to HMRC if they wish to leave the regime; see sch 2, pt 3.

²⁵³ *ibid*, para 13. Note the statement in HMRC's internal manual that 'the provision of intra-group management services to investee companies' could meet the requirement of being ancillary and not carried on to a substantial extent; HM Revenue & Customs, 'HMRC Internal Manual: Investment Funds Manual - Eligibility criteria:

requires that the company's strategy does not involve the acquisition of listed or traded equity securities (or interests deriving their value from such securities) other than for changing the control of their issuer so that they are no longer listed or traded. Companies are nonetheless able to satisfy this condition whilst directly holding certain listed or traded equity securities if they make an election to treat these securities as not listed or traded; dividends from these securities are then subject to corporation tax by virtue of this election (note that anti-avoidance rules apply in this context, and note also that the election is revoked only if the company in question ceases to be a QAHC).²⁵⁴

The ownership condition is much more complex, but essentially requires that no more than 30% of the company's 'relevant interests' are held by investors that do not fall into 'category A' (ie, at least 70% is held by category A investors), and additionally that non-category A investors do not hold more than a 30% 'relevant interest' in securities which provide greater entitlement to certain classes of profits or assets.²⁵⁵ For these purposes, relevant interests amount to the greater of an investor's beneficial interest to a proportion of profits, beneficial interest to a proportion of assets on a winding up, or proportion of voting power; detailed rules on the determination of such interests are provided in subsequent paragraphs.²⁵⁶ The meaning of 'category A' investors is then provided for from paragraph 8 onwards, with a list for the category including QAHCs, 'qualifying fund[s]', 'relevant qualifying investor[s]', 'intermediate company[ies]', and certain public authorities.²⁵⁷ Qualifying funds are defined as funds which meet a diversity of ownership condition which would itself effectively be met by

Activity Condition (IFM40255)' (*HM Government*, 2024) <<https://www.gov.uk/hmrc-internal-manuals/investment-funds/ifm40255>> accessed 6 May 2024.

²⁵⁴ Finance Act 2022, sch 2, para 13.

²⁵⁵ *ibid*, para 3(1).

²⁵⁶ *ibid*, para 3(2) and 3(3) et seq.

²⁵⁷ *ibid*, para 8.

certain collective investment schemes or alternative investment funds (accounting for such schemes or funds being part of multi-vehicle arrangements)²⁵⁸, funds which are not close, or funds at least 70% controlled by category A investors.²⁵⁹ The list of relevant qualifying investors is provided after that definition, including persons such as those acting in long-term insurance businesses, UK REITs or foreign equivalents, certain collective investment vehicles, trustees or managers of pension schemes, and certain charities²⁶⁰. Intermediate companies are then defined as companies that meet the regime’s activity condition (set out above) and are also ‘wholly or almost wholly owned’ by other category A investor(s) that are not QAHCs (with further rules being provided later on in that section).²⁶¹ The consequence of these provisions is that category A investors are effectively the ‘good’ investors for the purposes of the regime; the fact that the ownership condition nonetheless permits non-category A investors to hold 30% of relevant interests is a significant allowance which potentially extends the benefits of the regime to a much wider set of companies²⁶². With all this being said, companies seeking to enter into the regime are also able to take advantage of a provision in the regime under which they will be treated as meeting the ownership condition (if all other conditions are met) for a period of two years.²⁶³ It is worth noting that there is also a continuing requirement for QAHCs to ‘take reasonable steps to monitor whether the ownership condition is met’.²⁶⁴

²⁵⁸ Para 58 of pt 12 provides that ‘collective investment scheme’ has the meaning given by s 235 of Financial Services and Markets Act 2000.

²⁵⁹ Finance Act 2022, sch 2, para 9.

²⁶⁰ *ibid*, para 10.

²⁶¹ *ibid*, para 11.

²⁶² This is an important point and will be returned to later on.

²⁶³ Finance Act 2022, para 16. Note that a similar wind-down period applies to companies exiting the regime; see para 28.

²⁶⁴ *ibid*, para 12.

Although the activity condition set out above refers only to the carrying out of an investment business, only certain activities within such a business are ‘ring fenced’ within the benefits of the regime. These are listed as activities with respect to overseas land, ‘qualifying shares’, creditor relationships (that are not engaged by the QAHC in for the purposes of a trade or UK property business), and derivative contracts related to these assets.²⁶⁵ Qualifying shares are defined as ‘any shares apart from shares whose disposal would ... be regarded as a disposal of an asset deriving at least 75% of its value from UK land’.²⁶⁶ For corporation tax purposes, the ring fence business of a QAHC is treated as separate from other activities and from activities carried out before/after the company entered/exited the regime²⁶⁷, and a deemed disposal at market value is provided for with respect to assets moved in or out of the ring fence²⁶⁸.

The tax benefits of the QAHC regime, then, apply to eligible companies with respect to their QAHC ring fence business; income and gains from UK real property (including through UK property-rich companies) and trading income are subject to normal corporation tax rules. The particular benefits enjoyed with respect to ‘ring fenced’ activities, however, differ for different asset types. There is an exemption from corporation tax with respect to investment in qualifying shares²⁶⁹ or overseas property businesses²⁷⁰. Finance income is not exempt as the regime instead increases the relief for finance costs, such as through allowing deductions for the payment of results-dependent interest and interest that might be in excess of a reasonable

²⁶⁵ *ibid*, para 20. Note Squires’ point that these activities ‘are, in broad terms, linked to particular types of fund investment strategy—private equity, credit and real estate’; Squires, 'Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies' 357.

²⁶⁶ Finance Act 2022, sch 2, para 53; note also the reference to Taxation of Chargeable Gains Act 1992, sch 1A, pt 2.

²⁶⁷ Finance Act 2022, sch 2, para 20.

²⁶⁸ *ibid*, paras 22-23.

²⁶⁹ *ibid*, para 53 (with respect to gains stemming from the disposal of such shares). Note that dividends would be exempt from corporation tax anyway by virtue of Corporation Tax Act 2009, pt 9A.

²⁷⁰ Finance Act 2022, sch 2, para 53 (with respect to the disposal of overseas land); para 52 (with respect to the profits of such businesses, subject to the condition that these profits are taxable overseas).

commercial rate of return, disapplying loan relationship paid interest rules, and changing hybrid mismatch rules and the corporate interest restriction²⁷¹.²⁷² Finally, in addition to the tax benefits connected to the income and gains of QAHCs, distributions made by QAHCs to investors also enjoy beneficial treatment. The regime exempts withholding tax on interest paid by QAHCs (with this applying to the broader categories of interest as noted above). Furthermore, the repayment of share capital by QAHCs is only subject to capital gains tax such that non-UK investors should not have to pay tax in the UK on receipt of such repayments (except for where the shares in question are qualifying employment-related securities, or for certain repayments for the purpose of satisfying the ownership condition)²⁷³, and is also not subject to stamp duty or stamp duty reserve tax²⁷⁴.

Analysing the QAHC regime as a post-Brexit effort to attract investment to the UK provides some significant and interesting insights. A key point to recognise in light of the general descriptive conclusion reached in chapter two – and building on the analysis of UK’s rules on foreign dividends and interest relief earlier in this chapter – is that the regime has a quite a broad scope despite the complexity of its ownership condition. The new subsidy control provisions in particular are therefore unlikely to be an issue as it would be difficult to argue that the tax benefits of the regime treat QAHCs more advantageously than others in a ‘comparable position within the normal taxation regime’²⁷⁵, especially in light of the regime’s

²⁷¹ *ibid*, pts 6 and 7. As recognised by Squires, these changes reflect the types of financing commonly used by fund structures; Squires, 'Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies' 359-360.

²⁷² Note that transfer pricing rules are extended to ensure their operation with respect to the amounts earned by QAHCs; Finance Act 2022, sch 2, pt 6.

²⁷³ Such repayments are regarded as not being ‘distributions’ for corporation tax purposes; *ibid*, paras 47 and 48.

²⁷⁴ *ibid*, para 54.

²⁷⁵ EU-UK TCA, Article 363.2(a); see also SCA 2022, s 4(4)-4(5).

aim of neutral treatment between direct investment and investment through an intermediate holding company²⁷⁶. As highlighted in chapter two, what exactly the ‘normal taxation regime’ may be in this context is unclear, but if this is interpreted as something such as the UK’s approach to intermediate holding companies or even the QAHC regime itself, then it may even be possible for the regime’s internal aim of neutrality to be the ‘internal objective’ used for the purposes of defining the ‘normal taxation regime’²⁷⁷. Furthermore, even on a broader interpretation of ‘normal taxation regime’ the similarities between aspects of the QAHC regime and other rules in the UK²⁷⁸ may also point in favour of compliance with these new subsidy control provisions.

It also appears possible that the regime’s aim of neutrality means that it could be justified by ‘the principle of tax neutrality’, such that any potential subsidies under the regime would nonetheless not be regarded as specific²⁷⁹. There is also an interesting question with respect to the meaning of the reference to ‘the avoidance of double taxation’ as another one of these justifying principles²⁸⁰, as this principle could be understood as extending to cover tax measures which are in place for the avoidance of economic double taxation. Such an interpretation could potentially mean that the QAHC regime would also be justified by this principle, as the regime effectively prevents certain investments from being taxed twice simply because they are made through an intermediate holding company. It is perhaps likely that the

²⁷⁶ Finance Act 2022, Explanatory Notes.

²⁷⁷ EU-UK TCA, Article 363.2(a); see also SCA 2022, s 4(4)-4(5).

²⁷⁸ Squires points out that there are in certain places ‘strong echoes’ of the REIT regime’s ring fencing concept, the securitisation company regime’s rules which disregard distributions for corporation tax purposes, and the genuine diversity of ownership test in sch 5AAA of the Taxation of Capital Gains Act 1992; Squires, ‘Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies’ 355-356.

²⁷⁹ EU-UK TCA, Article 363.2(b); see also SCA 2022, s 4(2)-4(3).

²⁸⁰ *ibid.*

inclusion of this principle had been understood as referring to juridical double taxation²⁸¹, but this point nonetheless further highlights the significant uncertainty regarding these new constraints.

In addition to all this, it would also be difficult to imagine a criticism of the regime on the basis of the UK's commitments to tax standards and good tax governance²⁸² or issues with disputes especially when considering that EU countries such as Luxembourg and Ireland²⁸³ also offer tax incentives for investment vehicles in their own investment fund regimes. Furthermore, in light of the various reasons for the likely general compliance of the regime with these constraints it would also be difficult to imagine issues arising with respect to the EU's new Foreign Subsidy Regulation (notwithstanding the uncertainty regarding the Regulation's interaction with the EU-UK TCA). However, the only element of the regime which may be problematic with respect to both the subsidy control provisions and the commitments in the EU-UK TCA is the allowance of up to 30% of relevant interests to be held by non-category A investors. With respect to subsidy control, the fact that this effectively extends the regime to a much wider set of companies may in fact mean that there are additional companies in a comparable position which are in fact at a disadvantage relative to QAHCs. With respect to the commitments in the EU-UK TCA, the extent to which this should actually be of concern is substantially uncertain and likely depends not only on the precise interpretation of these commitments but also on what sort of investors actually end up holding relevant

²⁸¹ See chapter one.

²⁸² EU-UK TCA, Article 383.

²⁸³ As a starting point, see KPMG, 'Why Luxembourg remains attractive for investment' (KPMG, 2024) <<https://kpmg.com/xx/en/home/insights/2020/10/why-luxembourg-remains-attractive-for-investment.html>> accessed 28 July 2024; and KPMG, 'Ireland - a Center for Internationally Distributed Investment Funds and Securitization Structures' (KPMG, 2024) <<https://kpmg.com/xx/en/home/insights/2020/08/ireland-internationally-distributed-investment-funds.html>> accessed 28 July 2024 (respectively).

interests in QAHCs (and perhaps on the operation of parallel ownership constraints in the aforementioned European funds regimes).

The points above suggest that the UK's approach to attracting investment through the QAHC regime appears to be generally successful in terms of compliance with the established post-Brexit constraints (with the 30% allowance for non-category A investors being the only likely potential issue), notwithstanding the significant uncertainty surrounding the precise effect of these constraints. In this regard, the regime is useful in demonstrating the practical application of the established post-Brexit constraints within the specific context of tax incentives for investment funds. However, it is clear from the analysis above that the regime in its current form is unlikely to cause major issues with respect to these constraints. The remainder of this section will therefore address a few constraint-testing hypothetical reforms to the current QAHC regime in an attempt to further illustrate the changing boundaries within which the UK can exercise its policymaking ability. The following hypotheticals have been chosen simply by reference to their potential impact on competitiveness and the issues that they raise with respect to the identified constraints.

If the UK wishes to make the QAHC regime even more 'internationally competitive'²⁸⁴, it may be able to do so by extending the regime's scope, increasing the tax benefits provided by the regime, or both. Focusing on a potential extension of scope, this could take the form of a relaxing of the ownership constraints such as through altering or removing the requirement to have a minimum amount of category A investors (notwithstanding the potential risk of the 30% allowance already being problematic). This could see the regime being taken advantage of by corporations under the majority or even full control of non-qualifying investors or funds

²⁸⁴ HM Treasury, *The Tax Treatment of Asset Holding Companies in Alternative Fund Structures Government Response and Second Stage Consultation*; see earlier in this section.

that do not meet the current diversity of ownership condition. Although such a reform would mean that an even broader set of enterprises could receive the advantageous treatment of the regime, it does not necessarily follow that the tax measures of the regime would continue to be unlikely to be regarded as ‘specific’²⁸⁵. This is because a relaxing of ownership constraints could result in companies that are not pure ‘holding’ companies (acting as intermediaries for investments in line with the regime’s aim of neutrality) being involved, such that the counterfactual under the test of economic actors in a comparable position should also bring into consideration other (more active) companies and not simply investors that choose not to use holding companies.

Depending on the specifics of the reform, however, the receipt of advantageous treatment under the QAHC regime by a broader set of companies may significantly strain or indeed fall foul of the subsidy regime if the different treatment of certain comparable economic actors (ie, other companies that also engage in activity beyond that of pure ‘holding’ companies) is properly recognised. Of course, it may be said that the QAHC regime would in and of itself form a ‘normal taxation regime’²⁸⁶, but whether this would be arguable at all is uncertain. Furthermore, such a reform may nonetheless also raise issues with respect to the commitment to good tax governance in the EU-UK TCA²⁸⁷. Of course, more information would be necessary to properly assess the impacts of these constraints, both with respect to the hypothetical reform in question and the practical operation of the constraints themselves. A greater understanding of the latter may only be possible following relevant disputes under these constraints, but even before this stage is reached it should be clear that the EU-UK TCA and

²⁸⁵ EU-UK TCA, Article 363.2; see also SCA 2022, s 4.

²⁸⁶ EU-UK TCA, Article 363.2(a); see also SCA 2022, s 4(4)-4(5).

²⁸⁷ EU-UK TCA, Article 383.

the subsidy regime impose constraints which may significantly impact the UK's ability to introduce investment-targeted reforms.

Similar issues are raised when considering a hypothetical reform which would extend the scope of the QAHC regime by relaxing or removing the activity condition altogether. The broadening of the current ring fence could see the regime's benefits extend to activities such as trading in financial instruments that are not derived from the current ring-fenced activities, trading in non-qualifying shares (ie, 'shares whose disposal would ... be regarded as a disposal of an asset deriving at least 75% of its value from UK land'²⁸⁸), or even trading in UK land. The inclusion of activities relating to UK land could also be constituted by some sort of mixing of the QAHC regime with the REIT regime referenced earlier, such that a single corporate structure could offer significant tax benefits for a much more significant range of investment activities. Although such a far-reaching reform may be difficult to conceptualise, it should be pointed out that just like the QAHC regime the REIT regime has itself been subject to various reforms in recent years which have worked to broaden access to the regime's benefits²⁸⁹. In light of this point, it is of key importance to consider the impact that the identified constraints might have on further reforms. The application of the subsidy regime's test of economic actors in a comparable position may again be different if the ring fence is extended to a broader set of activities (especially activities with respect to UK land). The good tax governance commitment in the EU-UK TCA, although itself more abstract, may also again raise issues.

As a final point, it is worth recognising that these issues would also likely be raised by a reform which instead seeks to extend the tax benefits of the regime (as opposed to or in addition to extending its scope). In a similar way to the broadening of the ring fence, a reform

²⁸⁸ Finance Act 2022, sch 2, para 53.

²⁸⁹ Most recently, see HM Revenue & Customs, 'Real Estate Investment Trust Regime Amendments' (*HM Government*, 2023) <<https://www.gov.uk/government/publications/amendments-to-the-real-estate-investment-trust-regime/real-estate-investment-trust-regime-amendments>> accessed 19 June 2024.

such as one which would introduce a full exemption from corporation tax or even an exemption for investments related to UK land (not simply an exemption for investments in the current ring-fenced activities) would again lead to consideration of a different group of economic actors in a comparable position and potential issues under the good tax governance commitment.

3.3 Case study analysis

This final section of the thesis will analyse the QAHC regime and its compliance with the identified policymaking constraints (as addressed above) to provide further insights regarding the UK's competitive position with respect to international corporation tax after Brexit. In doing so and applying the chosen criteria for analysis, this section will also set out the thesis' case study-specific conclusion and add onto the thesis' normative conclusion already established in chapter two.

The application of the identified policymaking constraints to the QAHC regime demonstrates how these constraints might operate within the context of tax incentives for investment funds. It also supports the conclusion made in chapter two that the key legal changes brought by Brexit do in fact impose novel and uncertain constraints on the UK's corporation tax policymaking ability. The impact that these constraints and Brexit more generally have on the UK's competitive position has been addressed in that previous chapter, but within the specific context of this case study this question of competitiveness raises slightly different points.

The significant tax incentives offered by the QAHC regime, together with the fact that this regime seems generally compliant with the identified post-Brexit constraints, strongly imply that the UK is still able to support and improve its competitive position within the world

of international corporation tax following Brexit. Of course, the strength of this implication is limited by the various uncertainties regarding the UK's situation which have been highlighted previously, and by the apparent lack of (and inherent difficulty in finding) direct evidence regarding the precise impact of the regime on the UK's competitive position. With respect to the latter point, however, it can be said that the QAH regime has been regarded by persons in the investment fund industry as a successful and competitive measure taken by the UK to increase investment²⁹⁰. The competitiveness of the UK in this sense is a result of not only the regime itself, but also of the broader contexts within the investment fund industry.

More specifically, the UK appears to be in an especially competitive position relative to EU Member States with respect to its attractiveness to investment funds, in light of current and potential future developments in the EU. The first of these developments is the potential introduction of substance requirements in the proposed Unshell Directive²⁹¹. Such requirements may significantly reduce the attractiveness of European investment fund regimes (including the Luxembourgish and Irish regimes referenced earlier) due to the fact that the current draft Directive's carveout no longer covers fund holding companies²⁹². The fact that the UK is no longer required to implement Directives such as Unshell is a key part of its unique position following Brexit, and at least with respect to EU Member States is something which appears to place the UK in an especially competitive position in the context of investment fund regimes.

²⁹⁰ Comments made by an advisor to this industry can be cited in support of this claim; further information is available on request.

²⁹¹ Unshell Directive; see also chapter two of this thesis.

²⁹² This being said, there have been discussions over an exemption for holding vehicles; James McCredie and Rhiannon Kinghall Were, 'ATAD 3: EU Crackdown on Shell Entities - Is There Any Sign of Life?' (*Macfarlanes LLP*, 2023) <<https://www.macfarlanes.com/what-we-think/in-depth/2023/atad-3-eu-crackdown-on-shell-entities-is-there-any-sign-of-life/>> accessed 7 May 2024.

The second EU development which likely has a significant impact on the UK's competitive position in this context is the CJEU's trend of increasing opposition to the use of intermediate investment companies. This trend is apparent from the recent Danish cases noted in chapter two, in which the CJEU relied on EU law's general principle against the abuse of rights to hold that Member States could be required to refuse the Parent-Subsidiary and Interest and Royalties Directives' withholding tax exemptions where artificial arrangements are used to route the relevant receipts through companies that are able to obtain the exemption but are not the beneficial owner of the receipts in question.²⁹³ This treatment of intermediate companies is in stark contrast to the benefits provided under the UK's QAHC regime, and appears to be entirely inconsistent with the UK regime's aim of neutral treatment. Despite the other identified issues regarding the loss of these Directives for the UK, the fact that the UK will presumably not be subject to current or future restrictions stemming from this general opposition to intermediate investment companies has been regarded as significantly boosting the competitiveness of the UK's own regime²⁹⁴.

In light of these points, this thesis' case-study specific conclusion is that the UK's current approach to attracting investment funds (at least with respect to the QAHC regime) appears to constitute a post-Brexit success for the country. This conclusion relies on the likely general compliance of the QAHC regime with the identified constraints (notwithstanding potential issues regarding the 30% allowance of non-category A investors), and the significant attractiveness of the UK relative to EU Member States with respect to the Unshell proposal and the CJEU's decisions in the recent Danish cases. Together, the current situation for the UK and

²⁹³ Joined Cases C-116/16 and C-117/16 *Skatteministeriet v T Danmark and Y Denmark Aps* ECLI:EU:C:2019:135 (dividend withholding tax); Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others v Skatteministeriet* ECLI:EU:C:2019:134 (interest withholding tax).

²⁹⁴ Again, see comments made by an advisor to the investment fund industry; further information is available on request.

for EU Member States may even suggest that the UK's approach to attracting investment funds through the QAHC regime is something that (if both the regime and the EU developments continue) will be made possible or at least significantly more effective as a result of Brexit. In this regard, the regime appears to be a striking (and potentially rare) example of a true Brexit success for the UK.

This conclusion should, however, be qualified by the point that the UK's competitive position has otherwise detrimentally been impacted by Brexit in various ways; without even considering the impact of the UK's departure from the EU internal market or the various issues with Northern Ireland addressed earlier in this thesis, this detrimental impact is immediately demonstrated by the impact of the loss of key Directives on cross-border movement and administration and the significant uncertainty regarding the UK's overall situation following Brexit²⁹⁵. Furthermore, the conclusion should not be taken to suggest that Brexit may have placed the UK in a similar advantageous position with respect to other types of tax incentives. It should also be emphasised that the apparent success of the UK in attracting investment through this particular tax incentive does not itself say anything about whether the UK is attracting the right type of investment in the first place; this is an important point and will be elaborated on below.

As an example of an ostensibly successful measure taken by the UK to improve its competitive position, the QAHC regime should also be analysed using the criteria established in chapter one of this thesis. In this regard, the fact that the regime seeks to improve the UK's competitiveness through effectively removing distortions between investing directly and investing through an asset holding company can immediately be noted as a positive with

²⁹⁵ See chapter two.

respect to economic efficiency. The relative straightforwardness of the regime and its structure of ‘ring fencing’ qualifying activities may also suggest strong performance on the grounds of administrative efficiency, although the complexity of the ownership condition and the potential of borderline cases that do not fall into the categories drawn by the regime present potential sources of additional compliance and administrative costs for taxpayers and HMRC (respectively).

Considering the QAHC regime in light of the criterion of equity is more complicated. The regime’s aim of neutrality appears to support horizontal equity, but its allowance of 30% of non-category A investors may also (depending on the practical use of this allowance) harm vertical equity in the sense that some non-‘good’ investors are able to take advantage of the regime’s significant tax benefits whilst those with less resources are subject to standard rules. More fundamentally, as alluded to earlier there is also an important question of how the QAHC regime performs with respect to societal equity and even tax equity more generally. Within the broader context of the UK’s society, it should not be presumed that tax incentives should be targeted at the investment fund industry, as perhaps other industries such as those with a larger level of physical investment or labour needs (such as manufacturing or research and development) would bring a more beneficial form of investment to the country.

Although the QAHC regime may therefore have a mixed performance with respect to the criterion of equity, it appears to perform well with respect to the criteria of economic efficiency and administrative efficiency. This point, taken together with the apparent success of the regime, again leads to the normative conclusion of this thesis first set out in chapter two. To reiterate, this conclusion is that if the UK wishes to reform corporation tax for the purpose of attracting investment it should do so by introducing broad regimes which take advantage of the UK’s unique position, decreasing the administrative complexity of the tax system, and reforming tax treaties with certain European states. Although each of the three

recommendations are supported by the points made in this chapter, this chapter's conclusion regarding the apparent success of the QAHC regime is especially important with respect to the first recommendation²⁹⁶. The fact that this regime seems to have a significant positive impact on the UK's competitive position with respect to investment funds, in light of both the regime itself and the EU developments addressed above, strongly supports the suggestion that the UK should indeed seek to introduce broad regimes and also take advantage of its unique position when doing so.

²⁹⁶ The prior discussion of the UK's competitive position with respect to the QAHC regime also demonstrates the importance of administrative efficiency and the detrimental impact of the loss of key Directives, as also addressed in the previous chapter.

CONCLUSIONS

The final part of this thesis will reiterate and cohesively set out the three main conclusions reached in the previous chapters. It will then briefly reconsider the broader contexts within which this thesis is situated to highlight additional considerations regarding the UK's approach to international corporation tax competition after Brexit, and identify key areas in which further attention is needed.

The thesis' first conclusion is that Brexit imposes novel and uncertain constraints on the UK's corporation tax policymaking ability. This general descriptive conclusion was reached in chapter two following the chapter's analysis of the overall EU-UK Withdrawal Agreement, despite its recognition of the general lack of applicability of EU law concerning direct taxation in the UK following Brexit (notwithstanding the significant issues arising with respect to Northern Ireland). The commitments made in the EU-UK TCA and the corresponding subsidy regime impose significant restrictions on the introduction of tax policies which may be especially targeted towards certain companies or otherwise fall foul of the subsidy regime or the commitment to good tax governance, and must therefore be regarded as significant constraints on the UK's policymaking freedom following Brexit.

It should be reemphasised, however, that these constraints are both novel and uncertain, in that they cannot entirely be found in other trade agreements or rules on subsidy controls and in that (partly as a result of their uniqueness) the precise effect of these constraints and any dispute procedures remains unclear. The extent to which these key legal changes will actually limit the UK's policymaking ability is therefore uncertain, but the changes do nonetheless clearly constitute somewhat of a limitation. In addition to this, post-Brexit developments in the EU have and will likely continue to impact the UK and its competitive position notwithstanding

its departure from the Union. This is made especially evident by the EU's recently-introduced Foreign Subsidies Regulation, which indicates that another major impact of Brexit on UK corporation tax is the reduced influence of the UK with respect to at least some multilateral reforms. In a sense, the UK can be regarded as having given up its seat at the table of the EU, whilst still being significantly affected by some of the decisions made at this table.

The thesis' second conclusion is that the UK's current approach to attracting investment funds as partly constituted by the QAHC regime may nonetheless be a success following Brexit. This case-study specific conclusion was reached in chapter three, in which the QAHC regime was demonstrated to likely be both compliant with the aforementioned constraints and successful in placing the UK in a uniquely attractive position for investment funds in Europe. With respect to the latter point, the potential future direction of EU tax law – in light of the Unshell proposal and the recent series of Danish cases on withholding taxes – suggests that the UK's departure from the European Union has or will result in a benefit for the country's competitiveness in this regard.

Consideration of the UK's potential post-Brexit competitive position as a location for investment funds, however, should be qualified by a few points. The first is that the UK's competitive position is also generally detrimentally impacted by Brexit, most immediately so as a result of the discontinued application of key Directives on cross-border movement and administration. The second is that this thesis' focus on the QAHC regime and incentives for investment funds more generally should not be taken to suggest that the conclusions reached in the case study can be applied to other areas of corporation tax incentives. Other areas require further attention, and the UK's position with respect to other financing-related incentives (for example) may likely be even more vulnerable to the issues caused by the discontinued Directives mentioned earlier. The third point which qualifies this conclusion is that the fact that the UK may be successful in attracting investment through encouraging the location of

investment funds in the country says nothing about whether the UK is attracting the right type of investment, or whether this investment will necessarily support the UK's economy in the right way.

The thesis's third conclusion is that in light of the previous two conclusions, if the UK does wish to attract investment through corporation tax reform it should do so by introducing broad regimes which take advantage of the UK's unique position, decreasing the administrative complexity of the tax system, and reforming tax treaties with certain European states. This normative conclusion was reached in both chapter two and chapter three, and is made up of three key recommendations. The first recommendation builds on the identified constraints of the EU-UK TCA and the subsidy regime and recognises the QAHC's likely success and possible compliance with these constraints. A key lesson which can be learned from this is that the UK may likely be able and successful in introducing regimes which are broad in applying to a large set of companies, and following the analysis in chapter three such regimes may perform well on the grounds of economic efficiency and even administrative efficiency and equity. The discussion of the apparent future direction of EU tax law also demonstrates the importance of the UK recognising its unique post-Brexit situation when considering reforms, and the UK should therefore also keep a close eye on EU developments in order to leverage its position as a European country outside of the Union.

The second and third recommendations of this normative conclusion are perhaps more straightforward but are nonetheless of major significance; the UK should seek to improve administration with respect to its tax system, and reform tax treaties with certain European states. These two recommendations are especially relevant within the context of Brexit due to the impact of the discontinued application of the aforementioned Directives on cross-border movement and administration. More specifically, the UK is at a disadvantage with respect to the imposition of withholding tax as a result of the lack of the Parent-Subsidiary and Interest

and Royalties Directives, with a claim now needing to be made by businesses under the relevant tax treaties and in some cases a substantial rate of withholding tax nonetheless being imposed. The UK should, at the very least, address the second issue and seek the reform of bilateral treaties with EU countries such as Germany and Italy; a broader multilateral measure or some cooperation with the EU in this regard could be even more useful if the UK wants to be competitive with respect to companies which receive dividends, interest, or royalties from the EU. Furthermore, the various post-Brexit administrative issues identified in this thesis and the lack of the DAC, Directive on Mutual Assistance for the Recovery of Claims, and the Tax Dispute Resolution Directive also means that the UK may be at a relative disadvantage with respect to administration. In light of the importance of administrative efficiency for taxpayers and the state alike, the UK should also seek to improve its position by addressing some of the issues stemming from the overall EU-UK Withdrawal Agreement, pursuing further international administrative cooperation, or at least improve the administration of its domestic tax system.

This thesis began with a reference to some of the last ten years' most significant changes for both the UK and the wider world. At the time of the thesis' completion, recent events suggest that significant change will only continue at its current rate. What future changes might mean for the UK's economy and broader society is uncertain, but it should be apparent from the points raised in this thesis that Brexit will likely continue to have a significant and complex impact on the country.

The analyses in this thesis sought to establish the effect that Brexit has had on the legal constraints under which the UK can introduce corporation tax policies, the competitive position of the UK within the world of international corporation tax in light of this, and measures taken by the UK to improve this position with respect to investment funds. To achieve this, the thesis

had to assume a relationship between corporation tax policies and competitiveness, the significance and value of attracting investment through such policies, and the potential of the UK generally doing so successfully. In addition to these assumptions, it was also necessary to assume that the UK would be justified in introducing tax measures to improve its competitive position in the first place.

It is the latter assumption which raises another important qualification of the points made in this thesis, as there are multiple potential reasons why the UK should not seek to implement such measures, or at least focus its resources in other areas. The first and most direct of these reasons is that in offering tax incentives to groups such as the investment fund industry, the UK may likely be working against an opposing need to increase tax revenues. A greater understanding of the precise economic impact of regimes such as the QAH regime would be useful in determining whether the UK has struck the right balance between competitiveness and revenue-raising, but it should not be taken as granted that the offering of tax incentives is an appropriate option for the UK to take when seeking to support its economy in light of the broader economic and budgetary issues the country is currently facing. Another potential reason against the offering of tax measures targeted at improving the UK's competitive position with respect to investments funds is the point that the UK may do better for its economy or society by attracting a different type of investment; nevertheless, this thesis' focus on the UK corporation tax and investment funds is useful in demonstrating the situation that the UK is currently in. This is important regardless of which sort of reforms may be justifiable, as a greater understanding of the constraints and opportunities faced by the UK can help the country better assess the best way to move forward in the future.

As a final point and in light of the discussion above, it is also worth identifying a few key areas in which further attention is needed. Tax measures targeted at increasing the UK's

competitiveness other than the investment fund-targeted incentives addressed in this thesis are of course of major significance. In this regard, potential measures which could be of interest include the established post-Brexit freeports²⁹⁷, the tax treatment of individual remuneration, and the UK's compliance with Pillar 2's GloBE rules (including its approach to the substance-based income exclusion)²⁹⁸. Analysis of these measures may raise additional issues with respect to the established policymaking constraints, and may also be useful in providing a more overarching understanding of the UK's current situation if considered in light of the points already raised in this thesis.

Perhaps most importantly, however, research is needed regarding the special arrangements made for Northern Ireland under the Windsor Framework; as identified in chapter two, the complicated situation has some important implications for corporation tax but is especially relevant with respect to VAT. More generally, a greater understanding of the effect of Brexit on VAT and the implications of this on the future direction of indirect tax policy in the UK²⁹⁹ would also be an important contribution to the current literature³⁰⁰.

²⁹⁷ Department for Levelling Up, Housing and Communities, 'Information and guidance on Freeports operating within England' 2023) <<https://www.gov.uk/guidance/freeports>> accessed 6 January 2024.

²⁹⁸ See chapter two with respect to the Pillar 2 more generally.

²⁹⁹ The EU's VAT One Stop Shop is of particular interest with regard to administrative issues; see European Commission Directorate-General for Taxation and Customs Union, *Explanatory Notes on VAT E-commerce Rules* (European Commission 2020).

³⁰⁰ See, for example, Judith Freedman, 'Tax and Brexit' (2017) 33 *Oxford Review of Economic Policy* S79.

BIBLIOGRAPHY

BOOKS:

Collier RS and Andrus JL, *Transfer Pricing and the Arm's Length Principle After BEPS* (Oxford University Press 2017)

Dagan T, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press 2018)

Devereux MP and others, *Taxing Profit in a Global Economy* (Oxford University Press 2021)

Murphy L and Nagel T, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002)

Smith A, *Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations* (MobileReference 2009)

BOOK SECTIONS:

Dagan T, 'The Marketization of Tax Sovereignty' in Jean C, Andrew A and Astrid von B (eds), *Forms of Pluralism and Democratic Constitutionalism* (Columbia University Press 2018)

Hasset KA and Hubbard RG, 'Tax Policy and Business Investment' in Auerbach AJ and Feldstein M (eds), *Handbook of Public Economics*, vol 3 (Elsevier 2002)

GOVERNMENT DOCUMENTS:

Department for Business & Trade and HM Treasury, *Harrington Review of Foreign Direct Investment* (HM Government 2023)

European Commission Directorate-General for Taxation and Customs Union, *Explanatory Notes on VAT E-commerce Rules* (European Commission 2020)

European Commission Directorate-General for Taxation and Customs Union, *Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU* (2021)

European Commission Directorate-General for Taxation and Customs Union, *Proposal for a Council Directive on transfer pricing* (2023)

HM Government, *The Windsor Framework: A New Way Forward* (HM Government 2023)

HM Treasury, *The Tax Treatment of Asset Holding Companies in Alternative Fund Structures Government Response and Second Stage Consultation* (HM Government 2020)

HM Treasury, Tax treatment of Asset Holding Companies in Alternative Fund Structures: Consultation (HM Government 2020)

HM Treasury and HM Revenue & Customs, Taxation of the Foreign Profits of Companies: A Discussion Document (HM Treasury 2007)

HM Treasury and HM Revenue & Customs, Tax Deductibility of Corporate Interest Expense: Consultation on Detailed Policy Design and Implementation (HM Treasury 2016)

HM Treasury and HM Revenue & Customs, Digital Services Tax: Consultation (HM Government 2018)

House of Commons Treasury Committee, Edinburgh Reforms One Year On: Has Anything Changed? (House of Commons 2023)

OECD/G20 Base Erosion and Profit Shifting Project, OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement (Organisation for Economic Cooperation and Development 2015)

OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Organisation for Economic Cooperation and Development 2021)

OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), June 2024 (Organisation for Economic Cooperation and Development 2024)

Office for Budget Responsibility, Economic and Fiscal Outlook - November 2023 (Office for Budget Responsibility 2023)

JOURNAL ARTICLES AND WORKING PAPERS:

Arnold JM and others, 'Tax Policy for Economic Recovery and Growth' (2011) 121 *The Economic Journal* F59

Baker P, 'Fiscal subsidy control in the post-Brexit era' (2021) 1 *British Tax Review* 14

Baker P, 'Fiscal subsidy control in the post-Brexit era (part 2)' (2021) 4 *British Tax Review* 361

Capurso C, 'Burgers, Doughnuts, and Expatriations: An Analysis of the Tax Inversion Epidemic and a Solution Presented Through the Lens of the Burger King-Tim Hortons Merger' (2016) 7(2) *William and Mary Business Law Review* 579

Christians A and van Apeldoorn L, 'The OECD Inclusive Framework' (2018) *Bulletin for International Taxation*

- Crivelli E, de Mooij RA and Keen M, 'Base Erosion, Profit Shifting and Developing Countries' (2015) International Monetary Fund Working Paper/15/118 <<https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf>> accessed 21 June 2024.
- Dagan T, 'The Global Market for Tax and Legal Rules' (2017) 21 Florida Tax Review 148
- de la Feria R and Maffini G, 'The Impact of Digitalisation on Personal Income Taxes' (2021) 2 British Tax Review 154
- de Mooij RA and Ederveen S, 'Corporate tax elasticities: a reader's guide to empirical findings' (2008) 24(4) Oxford Review of Economic Policy 680
- Devereux MP, Lockwood B and Redoano M, 'Is there a “Race to the Bottom” in Corporate Taxes? An Overview of Recent Research' (2003) University of Warwick, Centre for the Study of Globalisation and Regionalisation <https://warwick.ac.uk/fac/soc/pais/research/csgr/research/keytopic/race/lockwood_overview_may03.pdf> accessed 15 November 2023.
- Devereux MP and Maffini G, 'The Impact of Taxation on the Location of Capital, Firms and Profit: a Survey of Empirical Evidence' (2007) Oxford University Centre for Business Taxation Working Papers 0702 <<https://ideas.repec.org/p/btx/wpaper/0702.html>> accessed 29 April 2024.
- Freedman J, 'Managing tax complexity: the institutional framework for tax policy-making and oversight' (2015) Oxford University Centre for Business Taxation Working Papers 1508 <<https://core.ac.uk/reader/288287950>> accessed 22 July 2024.
- Freedman J, 'Tax and Brexit' (2017) 33 Oxford Review of Economic Policy S79
- Freedman J and Loutzenhiser G, 'Tax policy in the UK post-Brexit' (2022) 38(1) Oxford Review of Economic Policy 188
- Gatehouse J and Jones R, 'Tax and the EU Foreign Subsidies Regulation' (2024) 3 British Tax Review 353
- IMF and others, 'Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment: a Report to the G-20 Development Working Group by the IMF, OECD, UN, and World Bank' (2015) World Bank Working Paper 100756 <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/794641468000901692/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment-a-report-to-the-g-20-development-working-group-by-the-imf-oecd-un-and-world-bank>> accessed 21 June 2024.
- Kay JA, 'Is Complexity in Taxation Inevitable?' (1985) Institute for Fiscal Studies Working Paper 57 <http://www.kessler.co.uk/wp-content/uploads/2012/04/Kay_Is_Complexity_in_Taxation_Inevitable.pdf> accessed 22 July 2024.
- Kingson CI, 'The Coherence of International Taxation' (1981) 81 Columbia Law Review 1151
- Kleinbard ED, 'Stateless Income' (2011) 11 Florida Tax Review 699

Mirrlees J, 'An Exploration in the Theory of Optimum Income Taxation' (1971) 38(2) *The Review of Economic Studies* 175

Picciotto S and Kadet JM, 'The Transition to Unitary Taxation' (2022) 108(4) *Tax Notes International* 453

Pirlot A, 'Some Observations on the Tax-Related Provisions in the EU–UK Trade and Cooperation Agreement' (2021) 1 *British Tax Review* 1

Slemrod J, 'Location, (Real) Location, (Tax) Location: An Essay on Mobility's Place in Optimal Taxation' (2010) 63(4) *National Tax Journal* 843

Squires S, 'Finance Act 2022 Notes: Section 14 and Schedule 2: qualifying asset holding companies' (2022) 4 *British Tax Review* 353

Squires S, 'Finance (No.2) Act 2023 Notes: Section 35 and Schedule 4: investment vehicles' (2023) 4 *British Tax Review* 437

Tiebout CM, 'A Pure Theory of Local Expenditures' (1956) 64(5) *Journal of Political Economy* 416

Vella J, Devereux MP and Wardell-Burrus H, 'Pillar 2's Impact on Tax Competition' (2022) <<https://ssrn.com/abstract=4203395>> accessed 20 April 2024.

NEWSPAPER ARTICLES:

Gabbatt A, 'Biden says it's time for richest Americans to pay 'their fair share' of taxes' *The Guardian* (<<https://www.theguardian.com/us-news/2021/may/03/joe-biden-taxes-corporations-richest-americans>> accessed 15 November 2023).

Lord S and Jacott A, 'A new era for the UK patent box' *Tax Journal* (<<https://www.taxjournal.com/articles/-a-new-era-for-the-uk-patent-box>> accessed 17 April 2024).

Stainforth P, 'HMRC should prioritise renegotiation of the European double tax agreements, says CIOT' *Tax Journal* (<<https://www.taxjournal.com/articles/hmrc-should-prioritise-renegotiation-of-the-european-double-tax-agreements-says-ciot>> accessed 28 July 2024).

Vasyutin A and Hatton S, 'Analysis — UK holding companies: why they are still holding strong?' *Tax Journal* (<<https://www.taxjournal.com/articles/uk-holding-companies-why-they-are-still-holding-strong-#:~:text=The%20UK%20has%20many%20benefits,no%20withholding%20tax%20on%20dividends.>>> accessed 7 May 2024).

Woolf J, 'EU withdrawal: a half-hearted separation?' *Tax Adviser* (<<https://www.taxadvisermagazine.com/article/eu-withdrawal-half-hearted-separation>> accessed 23 July 2024).

Woolf J, 'The relevance of EU law: a significant diminishment' Tax Adviser (<<https://www.taxadvisermagazine.com/article/eu-withdrawal-half-hearted-separation>> accessed 23 July 2024).

OTHER SECONDARY SOURCES:

Adam S and others, IFS Green Budget: October 2023 (The Institute for Fiscal Studies 2023)

Adam S and others, IFS Green Budget: January 2008 (The Institute for Fiscal Studies 2008)

Adam S and others, Tax by Design: The Mirrlees Review (The Institute for Fiscal Studies 2011)

Adam S and others, IFS Green Budget: October 2022 (The Institute for Fiscal Studies 2022)

Emmerson C, Johnson P and Ridpath N, The Conservatives and the Economy, 2010–24 (The Institute for Fiscal Studies 2024)

National Audit Office, Investigation into the Digital Services Tax (National Audit Office 2022)

WEB PAGES:

Department for Business EIS and Department for Business & Trade, 'Guidance on the scope and application of Article 10 of the Windsor Framework' (HM Government, 2023) <<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/guidance-on-the-scope-and-application-of-article-10-of-the-windsor-framework>> accessed 26 July 2024

Department for Levelling Up, Housing and Communities, 'Information and guidance on Freeports operating within England' (2023) <<https://www.gov.uk/guidance/freeports>> accessed 6 January 2024

Department for the Economy, 'State aid and Subsidy Control after EU exit' (HM Government, 2023) <<https://www.economy-ni.gov.uk/articles/state-aid-and-subsidy-control-after-eu-exit>> accessed 26 July 2024

European Commission, 'Meetings of the EU-UK Partnership Council and Specialised Committees under the Trade and Cooperation Agreement' (European Commission Directorate-General for Communication, 2024) <https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement_en> accessed 27 July 2024

European Commission, 'Single Entry Point' (European Commission Directorate-General for Trade, Access2Markets, 2024) <<https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0>> accessed 27 July 2024

HM Government, 'UK-EU Trade and Cooperation Agreement: Summary' (HM Government, 2020)
<https://assets.publishing.service.gov.uk/media/602cf3dbd3bf7f031ce1360e/TCA_SUMMARY_PDF_V1-.pdf> accessed 27 July 2024

HM Revenue & Customs, 'Multinational Top-up Tax: Undertaxed Profits Rule and Other Amendments' (HM Government, 2021)
<<https://www.gov.uk/government/publications/multinational-top-up-tax-adoption-of-the-undertaxed-profits-rule-and-other-amendments/multinational-top-up-tax-undertaxed-profits-rule-and-other-amendments>> accessed 21 June 2024

HM Revenue & Customs, 'New tax regime for Asset Holding Companies (AHCs)' (HM Government, 2021) <<https://www.gov.uk/government/publications/new-tax-regime-for-asset-holding-companies-ahcs/new-tax-regime-for-asset-holding-companies-ahcs>> accessed 5 June 2024

HM Revenue & Customs, 'Real Estate Investment Trust Regime Amendments' (HM Government, 2023) <<https://www.gov.uk/government/publications/amendments-to-the-real-estate-investment-trust-regime/real-estate-investment-trust-regime-amendments>> accessed 19 June 2024

HM Revenue & Customs, 'HMRC Internal Manual: Investment Funds Manual - Eligibility criteria: Activity Condition (IFM40255)' (HM Government, 2024)
<<https://www.gov.uk/hmrc-internal-manuals/investment-funds/ifm40255>> accessed 6 May 2024

HM Treasury, 'Financial Services: The Edinburgh Reforms' (HM Government, 2022)
<<https://www.gov.uk/government/collections/financial-services-the-edinburgh-reforms>> accessed 3 March 2024

HM Treasury, 'Capital allowances — permanent full expensing for companies investing in plant and machinery' (HM Government, 2023)
<<https://www.gov.uk/government/publications/capital-allowances-permanent-full-expensing/capital-allowances-permanent-full-expensing-for-companies-investing-in-plant-and-machinery>> accessed 8 April 2024

HM Treasury, 'Spring Budget 2024: Non-UK domiciled individuals policy summary' (HM Government, 2024) <<https://www.gov.uk/government/publications/spring-budget-2024-non-uk-domiciled-individuals-policy-summary/spring-budget-2024-non-uk-domiciled-individuals-policy-summary>> accessed 7 March 2024

KPMG, 'Ireland - a Center for Internationally Distributed Investment Funds and Securitization Structures' (KPMG, 2024)
<<https://kpmg.com/xx/en/home/insights/2020/08/ireland-internationally-distributed-investment-funds.html>> accessed 28 July 2024

KPMG, 'Why Luxembourg remains attractive for investment' (KPMG, 2024)
<<https://kpmg.com/xx/en/home/insights/2020/10/why-luxembourg-remains-attractive-for-investment.html>> accessed 28 July 2024

McCredie J and Kinghall Were R, 'ATAD 3: Eu Crackdown on Shell Entities - Is There Any Sign of Life?' (Macfarlanes LLP, 2023) <<https://www.macfarlanes.com/what-we-think/in-depth/2023/atad-3-eu-crackdown-on-shell-entities-is-there-any-sign-of-life/>> accessed 7 May 2024

Office for National Statistics, 'Foreign Direct Investment, Experimental UK Subnational Estimates: 2021' (Office for National Statistics, 2023) <<https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/articles/foreigndirectinvestmentexperimentaluksubnationalstatistics/2021>> accessed 3 March 2024

Office of Tax Simplification, 'Review of Simplification: Approach and Interpretation' (HM Government, 2022) <<https://www.gov.uk/government/publications/ots-review-of-tax-simplification/review-of-simplification-approach-and-interpretation>> accessed 22 July 2024

PwC, 'OECD Pillar Two Country Tracker' (PwC, 2023) <<https://www.pwc.com/gx/en/services/tax/pillar-two-readiness/country-tracker.html>> accessed 21 June 2024

PwC, 'Worldwide Tax Summaries: Corporate - Withholding Taxes' (PwC, 2024) <<https://taxsummaries.pwc.com>> accessed 27 July 2024