- *Increasing the cost of robots:* The government could also substantially increase the rate of VAT payable on the purchase of robotic technology, and deny firms that use this technology the ability to deduct such payments from the VAT they have to account for on the sale of their goods and services.
- *Increasing the rate of VAT payable on value added by robots:* Firms would only have an incentive to invest in robots with AI if they were more productive than workers; i.e. if they added more value and were therefore more profitable. It would theoretically be possible to require firms to monitor the value added by the robots they deploy, and subject it to a higher rate of VAT on the sale of its goods and services. Alternatively, firms whose ratio of turnover to the number of employees was above a specified level could be required to charge a higher rate of VAT on their goods and services. Either approach would reduce or eliminate the cost or price competitive advantage that firms which automated would have over competitors that continued to employ workers. The first option, namely disaggregating the current single rate of VAT to impose a split rate, would not be permissible under the current system. It might be legally feasible after Brexit, however. It would be highly complex, costly and unpopular with businesses. It would also conflict with the government's unstated objective of maintaining the continuity and congruency of the VAT regime with that in the EU.

Some concluding thoughts

The government should urgently develop a legislative definition and ethical-legal framework for robots. It should also take steps to introduce corporate reporting requirements on their deployment, to gather information that would facilitate remedial action like the introduction of new taxes. The government has demonstrated a palpable lack of leadership in facing up to the substantial risks posed by the rapid diffusion of robotic technologies. This is evidenced by the government's pusillanimous response to the recommendations in the House of Commons Committee on Science and Technology's thoughtful report on *Robotics and artificial intelligence* earlier this year.

The government should urgently develop a legislative framework for robots

The government kicked the committee's recommendation for the creation of a 'National Robotics and Autonomous Systems Strategy' into the long grass. It similarly fudged the committee's recommendation for the establishment of a standing commission on AI to examine the social, ethical and legal implications of recent and potential developments in AI.

Responsibility for monitoring these developments and taking appropriate action to counter potential risks is divided between four government departments: Business Energy and Industrial Strategy (BEIS); Education; Work and Pensions; and the Treasury. There is an urgent need for better and more visible coordination between them. The government needs to demonstrate that it has a plan for addressing the risks, and to involve interested and informed parties in formulating possible solutions. The First World War General Helmuth von Moltke said 'no plan survives contact with the enemy'; but it would at least demonstrate that the government was aware of the risks and had thought about how to deal with them.

The Treasury should take the lead in planning and coordinating the government response. It is aware of the risk to tax revenues and public finances. It carries more clout than the other departments, and it is more likely to deliver the timely development and delivery of the necessary legislative remedies. ■

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Analysis

An end to the 'direct jurisdiction' of the CJEU: 'red line' or pink blur?

Speed read

Post-Brexit, unless the UK government changes its current stance, the UK courts will no longer be able to seek preliminary rulings from the CJEU. However, the CJEU is likely to remain a highly relevant source of case law in the tax world for the indefinite future. This is because, under the EU (Withdrawal) Bill, the UK courts are likely to follow the CJEU in interpreting retained EU law (which is likely to include, in particular, VAT and customs issues). Furthermore, the government's recent Brexit position paper on enforcement and dispute resolution suggests at least an indirect role for the CJEU as regards interpreting any future UK commitments made under a 'deep and special partnership' which mirror EU law.

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The Court of Justice of the EU (CJEU) has for many years been a crucial player in the tax world. In indirect tax, it is the ultimate interpreter of the Principal VAT Directive and in various important ways has upheld the rights of taxpayers under that directive. And in other areas of tax, its interpretations of EU rules, such as freedom of establishment and state aid, have had a major impact on tax law.

One of the prime minister's 'red lines' in her Lancaster House speech at the beginning of this year was that the 'jurisdiction' of the CJEU in the UK would end after Brexit. Since then, we have seen the publication of the EU (Withdrawal) Bill ('the Bill') and the government's 'future partnership paper' on enforcement and dispute

resolution ('the paper').

These documents have cast some light on the extent to which the CJEU will remain a force in the world of UK tax after Brexit.

The Bill

The central aim of the Bill is to retain, on the day after Brexit, the substance of EU law as it applied in the UK on the day before Brexit, subject to a wide power granted to ministers to make modifications to correct 'deficiencies'. As far as the CJEU is concerned, its pre-Brexit judgments will remain binding on UK courts in relation to retained EU law, subject to the Supreme Court's power to depart from that case law on the same basis that it can depart from its own previous rulings (clause 6(4)). However, under clause 6(1)(b), no UK court will have the power after exit day to make a reference to the CJEU; and, under clause 6(2), courts are to have regard to, rather than be bound by, subsequent CJEU judgments that relate to retained EU law. It should also be noted that key EU principles – such as the requirement to disapply national rules in an area governed by EU law if they are inconsistent with general principles of EU law, and the right to *Francovich* damages – will, under the Bill, vanish on Brexit (see Sch 1 paras 3 and 4). Note also that the EU Charter of Fundamental Rights will not be 'carried over' into retained EU law (clause 5(4)). So even pre-Brexit CJEU case law will often be of somewhat uncertain application.

The paper

The paper deals with a different problem. Any post-Brexit arrangements with the EU (whether a transitional arrangement or a long term 'deep and special partnership' (DSP)) will involve the UK in very substantial commitments to the EU. Those commitments will need to be enforceable and any disputes as to the meaning of those commitments resolved. Since many of these likely commitments (e.g. on customs, state aid, non-discrimination and VAT) will affect tax, this is also a key issue for tax practitioners. (Note, in particular, the UK government's statement in its paper on future customs arrangements that it wants to mitigate the paperwork and cash-flow consequences that would follow if the UK is treated as outside the EU for VAT purposes. That would indicate an objective to remain in some form part of the EU VAT system.)

The paper avoids setting out any clear preferences as to a dispute resolution mechanism (DRM), other than to rule out the 'direct jurisdiction' of the CJEU (a term which is not defined). It proclaims that any commitments made by the UK under the DSP agreement will be implemented in UK law and enforced by the effective and independent UK courts. It then notes that disputes 'between the EU and the UK on interpretation or application' of the DSP agreement will need to be resolved by an independent DRM; but rejects the notion that that DRM could be the CJEU. It appears from all this that the UK does not see the need for any rules of direct effect/applicability of the DSP agreement, nor for any form of preliminary reference procedure from UK courts to a supranational court (though neither of these are expressly ruled out). Moreover, even in relation to UK/EU disputes, the UK is clear that the DRM will not be the CJEU.

That, though, does not remove the CJEU from the picture. The paper recognises that where the UK's commitments under the DSP agreement mirror EU law, the case law of the CJEU will be highly relevant. It notes that the Court of Justice of the European Free Trade Association (EFTA) (which interprets the European Economic Area (EEA) Agreement in relation to the three EFTA/EEA states) is bound by CJEU case law up to the date of that Agreement and has to take 'due account' of subsequent case law. The paper also points out that this provision – and other similar 'due account' provisions in the Lugano Convention and the agreements between the EU and Iceland and Norway on Schengen – may well be suitable where the parties to the treaty at issue want to avoid divergent interpretation. Finally, the paper notes that several of the agreements between the EU and other European states have provisions allowing for both parties voluntarily, or for an independent arbitration panel, to refer disputes to the CJEU for a binding determination.

Where does this leave us?

So there are two reasons why the CJEU is likely to remain a highly relevant source of case law in the tax world for the indefinite future. The first is that, under the Bill, the UK courts are likely to follow the CJEU in interpreting retained EU law (which, for many years, is likely to include, in particular, VAT and customs issues). And the second is that any DSP agreement that remotely achieves the UK's objectives will involve commitments (including commitments relevant to tax) which mirror EU law; thereby, as the paper accepts, involving at least an indirect role for the CJEU. (Indeed, in relation to VAT, it may be noted that even the EFTA court would be an inappropriate DRM, since at present it has no VAT competence at all, VAT not being an EEA matter.)

It is therefore likely that tax lawyers will still be citing, and arguing about, CJEU cases in the UK courts for many years

It is therefore likely that tax lawyers will still be citing, and arguing about, CJEU cases in the UK courts for many years. The key differences will be that, unless the government abandons its 'red line', the UK courts will no longer be able to seek preliminary rulings from the CJEU (which must be part of whatever is meant by 'direct jurisdiction'); that the UK will have no or very limited rights to make submissions to it; and that there will no longer be UK judges serving on it. Finally, absent the UK, English is likely to be a rather less important language for the CJEU: tax practitioners wanting to keep up to speed with its case law – as they are likely to have to – should think about perfecting their French. ■

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