The Cross-Border Trade Bill

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The Taxation (Cross-Border Trade) Bill (the Bill) was introduced in Parliament on 20 November 2017. The purpose of the Bill is to ensure that, post-Brexit, the UK has a functioning import duty, excise duty and VAT regime, so that the tax treatment of cross-border trade both with EU and non-EU countries reflects the eventual outcome of the continuing Brexit negotiations.

The problem, of course, is that no-one knows what that outcome will be.

The Bill therefore tries to accommodate all plausible outcomes, from a 'hard' Brexit to a Brexit of varying degrees of 'softness', leaving it to the government to decide, nearer the time, which provisions of the Bill should be brought into force and which should be dropped.

Interaction with the European Union (Withdrawal) Bill

The Withdrawal Bill will, in general, incorporate into domestic law on exit day all directly effective EU law in force immediately before exit day.

Without further legislative provision, this would mean that a large body of EU-derived law relating to VAT, import duty and excise duty would be absorbed into UK domestic law on exit day. Depending on the outcome of the Brexit negotiations, this may be an inappropriate result. The Bill therefore switches off some of this EU law and, where appropriate, substitutes replacement provisions.

Import Duty

Import duty (the duty charged on bringing goods into the UK) is currently an exclusive competence of the EU. Current UK legislation therefore neither contains a charge to import duty nor specifies any rates of import duty. The Bill therefore provides the UK with its own post-Brexit import duty regime. It does this by disapplying any directly effective EU law, whether deriving from EU regulations, EU treaties or any other source, that concerns import duty (and would otherwise be preserved by the Withdrawal Bill); and imposes a new charge to tax on imports of goods from any non-UK country.

The import duty provisions of the Bill account for substantially the greater part of the Bill. They follow the common practice for UK indirect tax legislation of setting out only the broad principles that are to apply, leaving the detail to be dealt with under various regulations.

The stated intention is to create a regime that will operate in much the same way as the EU import duty regime currently does, while giving the UK the flexibility to adopt a different approach from the EU model where this is thought to be necessary or beneficial.

As drafted, the import duty provisions of the Bill apply to all future importations of goods, regardless of the country of origin of the goods. This would mean imports from EU countries becoming subject to import duty, customs control and related procedures for the first time since the inception of the single market in 1993. Whether this will actually happen depends entirely on where the Brexit negotiations eventually lead.

In order to allow the import duty provisions of the Bill to cater for all possible outcomes of those negotiations, the Bill gives the government

extensive powers to make changes to those provisions.

- Clause 30 authorises HM Treasury to issue regulations that would make further provision in relation to import duty, either to supplement the provisions in the Bill or, where the existing provisions of the Bill 'do not cater for the UK's import duty requirements', to make some different type of provision.

- Clause 54 goes one stage further by giving the government unrestricted power to make 'such provision as [the government] considers appropriate in consequence of this Act'. This includes a 'power to make transitional or transitory provision' – no doubt with an eye to the possible need to cater for any post-Brexit transitional period that is negotiated with the EU.

- Clause 51 goes well beyond the above two provisions by authorising the government to lay regulations that are considered to be appropriate 'in consequence of, or otherwise in connection with, the withdrawal of the United Kingdom from the EU. Any such regulations may amend primary legislation as well as secondary; and could make provision which amends, or even repeals, the Bill itself once enacted.

The existence of these exceptionally wide-ranging powers means that the import duty (and other) provisions of the Bill cannot simply be taken at face value. They are nothing more than a starting-point: and the final outcome of the Brexit process may result in a significantly different ending-point.

VAT

The VAT provisions of the Bill are much shorter. That is because UK law does, of course, already have a self-standing VAT regime. All that the Bill therefore has to do is to adapt that regime to a post-Brexit environment. It does this in two main ways.

Distinction between EU and non-EU

The Bill removes the distinction between a cross-border movement of goods or services involving an EU member state and a cross-border movement involving a non-EU country. This has several consequences.

First, an import of goods from an EU member state will cease to attract acquisition VAT (clause 41(2)(a)). Instead, it will incur a charge to import VAT on arrival of the goods at the UK port of entry, in the same way as if those goods emanated from outside the EU (Clause 41(2)(b)). Whilst this change should not affect the substantive VAT position of an importer, there will be a significant difference between import VAT and acquisition VAT from a cash-flow perspective.

Acquisition VAT, being a self-supply charge, does not have to be accounted for until an importer submits its VAT return for the relevant period (so that there is no cash-flow cost at all for a fully taxable trader). Import VAT, by contrast, must normally be paid up-front in order to clear the imported goods through Customs control. It is possible to agree a duty deferment facility with HMRC, although that normally allows, on average, only 30 days credit, and this may require the importer to pay for a bank guarantee as security.

Second, the zero-rating of an export of goods from the UK to an EU member state, which at present is effectively restricted to exports to business customers, will apply regardless of the customer's status (Sch 8, 30(5))), so that all exports of goods, without regard to their destination or the identity of the customer, will be zero-rated.

Third, there will be a significant extension to the circumstances in which a cross-border supply of services to a *non*-business person can be effectively zero-rated. The relief from UK VAT of a supply, to a non-business person, of most consultancy and professional services (and of miscellaneous other services) will apply regardless of where the customer is located, instead of being

restricted to supplies of such services to customers established in non-EU countries, as is currently the case. This means that a UK professional adviser with an EU client will be able to treat his supply as free of UK VAT regardless of whether the client is a business or private person.

Disapplication of EU Regulations

Clause 42(1) of the Bill also disapplies any EU regulations on VAT, which would otherwise remain in force after exit day under the Withdrawal Bill. The UK will therefore have much greater flexibility, after exit day, to shape and structure the domestic VAT regime in whichever way it wants: e.g. by extending the categories of supplies that are zero-rated or exempt.

This does not mean, however, that the UK VAT system will become completely detached from EU VAT principles.

First, the Bill acknowledges that the Principal VAT Directive may 'remain relevant' to the interpretation of UK VAT law (clause 43(5)), such as interpreting legislation passed in order to implement an EU Directive in accordance with the provisions of that Directive.

Second, the Bill states that 'the principle of EU law preventing the abuse of the VAT system (see, for example, the cases of *Halifax* (Case C-255/02) and *Kittel* (Case C-439/04) continues to be relevant'. While it is understandable that HMRC should want those anti-avoidance principles to remain in force after exit day, the legislative basis for this is not entirely clear.

Under the Withdrawal Bill, decisions of the CJEU made before exit day remain relevant only for the purposes of determining questions concerning the 'validity, meaning or effect of any *retained EU law*'. UK law relating to VAT is, of course, largely to be found in VATA 1994, which suggests that the draftsman assumed that VATA 1994 is 'EU-derived domestic legislation'. While the detailed provisions and structure of UK VAT legislation owe much to the EU Directives on VAT, the tax itself was enacted (by FA 1972) before the UK's accession to the EU; and its stated purpose of doing that (according to the White Paper on VAT published in March 1972 – Cmnd. 4929) was nothing to do with the EU: it was simply to produce a fairer system of UK indirect taxation than the system then in force. It is, perhaps, open to question whether VATA 1994 is definitely a piece of 'EU-derived domestic legislation' and, therefore, whether the courts will be compelled, after exit day, to continue to interpret the provisions of that Act by reference to pre-exit day CJEU decisions, such as *Halifax* and *Kittel*.

Notwithstanding all the above, it is by no means a foregone conclusion that the UK VAT system will actually take the form set out in the relevant provisions of the Bill post-Brexit. Unlike the import duty provisions of the Bill, the VAT provisions come into force only if and when regulations are made specifying their commencement date (clause 55(3)). Comments made in the explanatory notes to the Bill show that this may never happen. Depending entirely, once again, on the ultimate outcome of the withdrawal negotiations, the government may elect to legislate for different changes to be made to the VAT system from those provided for under the Bill. For example, if the future trading relationship between the UK and the EU was an arrangement broadly similar to the current single market and EU Customs Union, only minor changes to the current UK VAT regime would be needed.

Excise duty

The provisions in the Bill concerning excise duty largely adopt the same overall approach as the VAT provisions. That is, their objective is to leave the UK with a fully self-standing excise duty regime post-Brexit, without giving any real clue as to what that regime might look like. Depending on where the EU withdrawal negotiations ultimately lead, that objective may be accomplished by bringing into force the provisions of Part 4 of the Bill, or an

amended version of those provisions, or some entirely different provisions.

Conclusion

The publication of the Bill reinforces the need for businesses engaged in cross-border trade to be aware that, following Brexit, their imports and exports may be subject to a materially different import duty, VAT and (where applicable) excise duty regime from that which currently applies. It will, however, be the withdrawal negotiations, rather than the domestic legislative process, which will determine the detailed nature of that future indirect tax regime. While the current provisions of the Bill spell out one form which that regime could take, the political and economic reality is that those provisions could easily end up being replaced by something completely different. There is simply no way of telling, at the present time, what that 'something different' might be.

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