European and External Relations Committee
The EU referendum and its implications for Scotland
Written submission from the Chartered Institute of Taxation

1 Introduction

1.1 This is a response by the Chartered Institute of Taxation (CIOT) to the European and External Relations Committee of the Scottish Parliament’s call for evidence: Scotland’s relationship with the EU. The submission incorporates comments from the CIOT’s Low Incomes Tax Reform Group (LITRG). We welcome the opportunity to offer our comments on the tax implications following the EU referendum.

1.2 The UK Government held a referendum on the UK’s membership of the EU on 23 June. The question put to the electorate was ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ Overall, of those who voted, 48.1% voted in favour of remaining and 51.9% voted in favour of leaving.\(^1\) In Scotland, 62% voted in favour of remaining and 38% voted in favour of leaving.

1.3 The tax implications of a UK withdrawal from the EU are detailed and complex. In the time available and the length of submission requested, it is possible only to highlight key issues. We take as a baseline the position that would arise if no agreement is reached under article 50(2) of the Treaty on European Union (TEU), and the European Treaties cease to apply to the UK. That, by implication, forms a basis for comparison with the existing position and for exploring possible alternatives. An analysis of the tax implications of each theoretical option is a substantial undertaking beyond the scope of this submission. We would welcome an opportunity to contribute to that exercise.\(^2\)

1.4 Tax implications for Scotland will depend on the precise details of the new relationship of the UK with the EU following Brexit and on any further devolution of UK tax powers to Scotland that may be agreed within the UK. However, because of the many different options, we do not comment on these possibilities.

1.5 The CIOT objectives for the tax system include:
   - A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences;
   - Greater simplicity and clarity, so people can understand how much tax they should be paying and why;
   - Greater certainty, so businesses and individuals can plan ahead with confidence;

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\(^2\) For example, membership of the EEA would mean being subject to the EU fundamental freedoms and state aid rules, but without EU citizenship. Membership of other international organisations such as the World Trade Organisation (WTO) might mean being subject to rules similar to those in the EU, such as the WTO prohibition on ‘fiscal support’.
• A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented);
• Responsive and competent tax administration, with a minimum of bureaucracy.

1.6 *Tax Adviser* is the journal of the CIOT and the Association of Taxation Technicians (ATT). There is an article considering the impact of Brexit on the tax system in the August 2016 issue, and there will be further articles in the September 2016 and October 2016 issues.\(^3\) Those articles reflect the views of their authors only.

1.7 The CIOT is an educational charity concerned with promoting the education and study of the administration and practice of taxation. For more details see the statement at section 9 below. The LITRG is an initiative of the CIOT to give a voice to the unrepresented taxpayer. For more details see the statement at section 10 below.

2 Executive summary

2.1 Tax policy options for the UK and Scotland may be given effect either unilaterally, by the UK or Scottish Parliaments, or by treaty with other states or international organisations or through various combinations. While leaving the EU will in theory provide many options for unilateral tax changes favouring UK or Scottish taxpayers, in practice these may be restricted by international considerations, such as relationships with the EU, other international organisations and other states, and also international rules, projects or trends, particularly the OECD/G20 Base Erosion and Profit Shifting project.\(^4\) It is important to bear in mind that some EU principles may have effectively become part of UK law and may continue to be applied by the UK’s Courts unless new legislation changes it.

2.2 Tax is collected in the UK, and in Scotland, because our Parliaments pass legislation allowing for its collection. Nevertheless, EU law plays an important role, particularly in relation to cross-border investment, trade and work. Once the UK leaves the EU, in areas where it has implemented a European Directive, some changes will be needed, simply because the UK legislation deals with its relations with other EU member states, but otherwise it is possible that the same legislation will stay in place and continue to apply, unless it is amended or repealed. Some EU law has direct effect in the UK, for example, this is often the case with European Regulations. This means there is no UK legislation in place. Therefore, when the UK leaves the EU, that law will cease to have effect, unless equivalent UK law is passed to replace it.

2.3 There are a number of practical implications for taxpayers, particularly in the areas of social security, VAT and customs duties. The loss of European citizenship for British nationals and the loss of rights under the EU fundamental freedoms may mean that the remaining EU member states have greater ability to adopt tax measures that discriminate against British

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\(^3\) Articles can be viewed at: [http://www.taxadvisermagazine.com/](http://www.taxadvisermagazine.com/).

nationals and businesses, particularly where such discrimination already exists in other member states in relation to non-EU nationals and businesses.

2.4 Subject to any further changes in the powers devolved to Scotland and the rest of the UK, the tax implications for Scotland will be much the same as those for the rest of the UK. It should be noted that there are no immediate changes following the outcome of the referendum. There is a period of negotiation, which will only commence once the UK has notified the EU under Article 50 TEU. During that time, EU law continues to apply to the UK. The EU treaties will cease to apply to the UK when the withdrawal agreement enters into force or two years after the notification under Article 50, unless an extension is agreed.

3 EU law and tax

3.1 EU law affects taxation in five key ways. Firstly, the competence of taxation must be exercised in accordance with the four fundamental freedoms – free movement of goods, freedom of movement for workers, right of establishment and freedom to provide services, free movement of capital. Secondly, the rules on state aid and harmful tax practices prohibit tax reliefs and incentives that harm cross-border competition. Thirdly, direct tax directives set out rules designed to facilitate cross-border investment and establish a framework for administrative cooperation among tax authorities. Fourthly, in relation to indirect tax, member states are required to apply VAT as enacted in the VAT directives. Fifthly, the EU Arbitration Convention is a multilateral treaty to which all member states are a party. Its purpose is to resolve transfer pricing disputes and resulting double taxation by mutual agreement between the competent authorities, failing which, by arbitration. The convention makes no provision for a state withdrawing from the EU to be excluded from its operation.

3.2 There is some uncertainty about the future influence of rulings of the Court of Justice of the EU (CJEU), which interprets EU law. It is likely that withdrawal by the UK will require repeal of the European Communities Act 1972. In this case, the UK may no longer be bound by CJEU rulings. There are likely to be practical issues about what will happen to appeals and cases already in motion, but as yet undecided. Going forward, the UK and Scottish parliaments will be able to reverse the impact of judgments of the CJEU by legislating for a different interpretation, or making amendments where CJEU rulings have been incorporated into UK or Scottish law.

3.3 Equally, UK persons are unlikely to benefit, to the extent they have previously been able to as EU citizens, from the equivalent constraints imposed on the continuing member states as regards the tax rules that they make.

4 State aid rules and the fundamental freedoms

4.1 The EU rules on state aid will generally no longer apply after withdrawal from the EU, although they are sometimes included in agreements with non-EU

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5 Convention 90/436/EEC.
member states. The Commission can approve aid that meets certain policy criteria. Areas of UK tax law currently affected by the EU rules on state aid include tonnage tax, the patent box regime, the Enterprise Investment Scheme, Seed Enterprise Investment Scheme and Research and Development.

4.2 State aid rules can restrict the ability of devolved legislatures to exercise devolved tax powers, unless certain conditions are met. (The same rules also constrain member states’ national legislatures). In terms of Scotland’s devolved taxes, the UK’s withdrawal from the EU should not affect the Scottish Parliament’s ability to legislate on existing devolved taxes or proposals on air passenger duty, income tax and VAT assignment. Historically, the devolution of aggregates levy to Scotland has been delayed, because of uncertainty regarding whether or not some aspects of the tax infringed state aid rules, but in principle, the state aid rules do not affect the power to devolve this tax to Scotland.

4.3 The CJEU has jurisdiction where it has been claimed that the tax laws of member states infringe the EU fundamental freedoms (see paragraph 3.1). Both inbound and outbound discrimination is prohibited. When the UK leaves the EU, the remaining states will be able to maintain or adopt tax rules that treat UK individuals or businesses less favourably than EU nationals, and there would be no EU remedy. EU states may also treat their own individuals and businesses transacting with or investing in the UK less favourably than if they carry out the same activity in the EU.

4.4 Where UK tax law has been ruled to infringe the fundamental freedoms, often the UK Parliament has enacted legislation to bring the UK rules in line with EU law. This UK legislation will continue to apply, unless it is amended or repealed. In other cases the law has not been amended, but the UK courts have adopted a ‘conforming interpretation’ of the UK law or HMRC have applied the rules in accordance with EU law (see paragraph 5.4). Here, it would appear that such practices could be changed.

5 EU direct tax directives

5.1 EU tax directives will cease to apply to the UK on withdrawal from the EU and repeal of the European Communities Act, which would follow.

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6 State aid is any advantage granted by public authorities through state resources on a selective basis to any organisations that could potentially distort competition and trade in the EU.
8 Sections 357A ff., Corporation Tax Act 2010.
12 Portugal v Commission (Case C 88/03).
13 See https://www.gov.uk/government/publications/revenue-and-customs-brief-6-2015-reinstatement-of-aggregates-levy-exemptions-exclusions-and-reliefs for information on the investigation by the European Commission into whether certain exemptions, exclusions and reliefs were lawful under state aid rules.
14 Royal Bank of Scotland v Greece (Case C 311/97).
15 Finanzamt Köln-Altstadt v Schumacker (Case C 279/93).
16 For example, the anti-avoidance provisions in the transfer of assets abroad legislation (Section 742A, Income Tax Act 2007) and the law on attribution of gains to members of non-resident companies (Section 13, Taxation of Chargeable Gains Act 1992).
5.2 The Interest and Royalties Directive\textsuperscript{17} and the Parent-Subsidiary Directive\textsuperscript{18} remove withholding taxes on interest, royalties and dividends paid by a company in one member state to a company in another; the latter also prevents double taxation by requiring the member state of the parent company either to exempt the distribution or to give credit for tax paid by the subsidiary. The UK has double tax treaties with the other EU member states, which often eliminate or reduce withholding tax on dividends, interest and royalties. Where the tax treaty does not eliminate the withholding tax, the recipient of interest or royalties may claim credit for the withholding tax. UK companies are able to eliminate double taxation of dividends either by exemption or by credit for the foreign tax. Losing the benefit of these directives may mean a company sees its effective tax rate increase. The Interest and Royalties Directive also establishes a single procedural regime for claims. Without its benefit, UK companies will be subject to the double tax treaty claim procedures of each member state, resulting in greater compliance costs.

5.3 The Merger Directive\textsuperscript{19} provides for deferral of tax for cross-border reorganisations for companies and groups operating in the EU. Although the terms of the directive have been generally enacted into UK tax law, since the directive only applies to companies in EU member states, other member states would not be required to apply these rules to UK companies or to permanent establishments of EU companies in the UK, potentially denying tax relief to UK companies. In addition, customs duties and import VAT may arise on such reorganisations.

5.4 The Capital Duties Directive\textsuperscript{20} which regulates tax on corporate finance, currently means that the UK cannot impose stamp duty reserve tax on the issue of shares into depositary and clearance systems, despite UK legislation imposing such a charge.\textsuperscript{21} UK law has not been amended to reflect the correct EU law position, but HMRC practice is not to tax these transactions. It appears that HMRC might be free to do so upon withdrawal from the EU.

5.5 EU directives on cooperation among tax authorities of all member states establish an institutional framework for ensuring proper compliance. They cover all aspects of the administration and enforcement of member state tax laws, notably through extensive and detailed exchange of information and mutual assistance in the collection of taxes. Similarly, bilateral tax treaties with other member states provide for exchange of information, with some also providing for mutual assistance in the collection of taxes. Although the OECD Multilateral Convention on Mutual Assistance, which provides for exchange of information and mutual assistance in the collection of taxes, will continue to apply, it permits reservations by contracting states and objections to the reservations of other states. So, in the absence of EU law, there will be no

\textsuperscript{17} Council Directive 2003/49/EC.
\textsuperscript{18} Council Directive 2011/96/EU.
\textsuperscript{20} Council Directive 2008/7/EC.
single coherent regime for administrative cooperation with the remaining member states.

6 VAT, customs duties and excise duties

6.1 VAT is a tax underpinned by EU directives, with UK legislation implementing it,\(^{22}\) so it will remain in place, unless the UK takes active steps to abolish it. Going forward, the UK will be able to make changes to VAT, either to retain alignment with the EU, or to diverge. Leaving the EU may open up more options to the UK. For example, the UK will be able to extend the scope of zero rating, lower rates and VAT exemptions and choose its own rates.\(^{23}\) EU VAT law limits the ability of member states to impose further turnover taxes similar to VAT. In theory, it would be possible for the UK to adopt other turnover taxes or indeed to allow the devolved administrations to do so, but the lack of borders to prevent cross-border arbitrage might make this impractical.

6.2 The UK is currently part of a customs union with all other EU member states, to which the VAT system of import and export procedures is tied. Within this union goods can move to and from EU member states without the imposition of customs duties or import VAT. The base of customs duty imposed on goods entering the UK, its reliefs and its rates (but not its management) are governed wholly by EU rules, meaning that new UK legislation will be needed in order to impose duties on imports.

6.3 In terms of excise duties, there is currently some EU influence. Excise duties are subject to EU directives that permit products subject to excise duty to move between member states in bond. EU directives also impose a structure and rate bands for excise duties. Although the EU directives will no longer apply, the UK implementing legislation will remain in place.

6.4 For businesses, there will be several practical implications in respect of VAT and customs duties. In essence, all cross-border transactions (both cross-border goods and services transactions) will be treated the same, irrespective of whether the transaction is with an EU or a non-EU entity.

6.5 Once the UK leaves the EU, it would also leave the EU customs union. As a result, not only would goods from the EU into the UK be classed as imports (rather than acquisitions) and be subject to UK customs duties (see paragraph 6.2) and import VAT, but goods from the UK into the EU would be classed as exports (rather than dispatches) and subject to EU customs duties and import VAT.

6.6 UK-based businesses who trade in the EU will no longer have to complete intrastat returns to record the movement of goods within the EU, or EC sales lists to record supplies of goods and services by UK-based businesses to EU business customers. However, increased compliance will result from import and export declarations and procedures, and VAT border procedures in both

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\(^{23}\) More specifically, it could choose to use VAT reliefs to support individuals with disabilities, as this might prove more effective than benefits or grants aimed at supporting those with disabilities.
the UK and the EU state. Customs posts will need to be established at all ports of entry from the EU to deal with goods coming from the EU, and UK exports to the EU will be subject to the same customs procedures in the state of import as currently apply to third countries. UK retailers who make postal consignments to private individuals in the EU may have to establish warehouses in the EU, otherwise their goods will be subject to import VAT in the EU, payable by the recipient before delivery.

6.7 The UK will no longer be able to offer the mini one-stop shop (MOSS), which currently applies to UK businesses selling digital services to non-business customers in the EU. Instead, UK businesses will have to either register for MOSS in an EU state or register and account for VAT in all EU states in which they sell services. UK businesses involved in the supply of goods between three different businesses in three different EU member states will no longer benefit from triangulation.²⁴

6.8 EU VAT schemes, for example, the tour operators’ margin scheme (TOMS), the distance selling rules, the rules on use and enjoyment and the rules for specified supplies in the financial services sector may no longer apply to the UK. This may affect the applicability or the recoverability of VAT for both parties.

6.9 The VAT and Administrative Cooperation Regulation,²⁵ which allows information-sharing on VAT between EU members, will no longer apply to the UK. It is unclear whether existing treaties would be sufficient to permit exchanges with the UK after withdrawal.

7 Possible implications for individuals

7.1 For individual taxpayers there are some potential implications both in respect of tax and social security (UK National Insurance contributions).

7.2 Currently cross-border workers within the EU and their employers benefit from the Regulation on the coordination of social security systems,²⁶ which prevents double contributions being paid, by requiring only one member state’s contributory regime to apply. It also contains mechanisms for regulating benefits in such cases. This will no longer apply to UK nationals working in the EU and EU nationals working in the UK. The UK only has a limited number of bilateral social security treaties which are uneven in their scope and effect, so withdrawal from the EU will increase the exposure to double contributions of UK workers who spend time working in the EU. The lack of a single unified regime will increase compliance costs for UK employers.

7.3 UK nationals will lose their EU citizenship established by Article 21 of the Treaty on the Functioning of the EU (TFEU). This will expose UK nationals and residents to the same risks of discriminatory taxation in the remaining member states faced by other third country citizens and nationals. The UK

²⁴ HMRC VAT Notice 725.
and Scottish parliaments will similarly be free to impose discriminatory taxes on EU residents and nationals, subject to limitations in double tax treaties. For example, restrictions could be placed on the availability of UK personal allowances.27

8 Acknowledgement of Submission

8.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

9 The Chartered Institute of Taxation

9.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,600 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.

10 The Low Incomes Tax reform Group

10.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

LITRG works extensively with HM Revenue & Customs and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and

this often makes life difficult for those we try to help.

The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT’s primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

The Chartered Institute of Taxation
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