

# **From Haven to Blacklist: UK, EU, and Caribbean Co-operation on Tax Avoidance after Brexit**

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# ***From Haven to Blacklist: UK, EU, and Caribbean Co-operation on Tax Avoidance after Brexit***

Stuart MacLennan\*

## **Abstract**

The role of Caribbean states and territories in facilitating tax avoidance is a contentious one. For almost 20 years, institutions including the OECD, the EU, and, more recently, the G20 have sought to develop measures to curtail tax avoidance. An increasingly globalised economy and the relative ease with which capital flows internationally, however, means that national or even regional solutions to the problems of tax avoidance have proved insufficient. These institutions have, therefore, sought to bring outside actors, in particular those in the Caribbean, into line with what are increasingly broadly accepted international standards on taxation. Although sometimes grudgingly, most countries and territories that are conventionally regarded as tax havens are gradually moving towards compliance with these international norms. Attempts at imposing new tax rules on tax havens, in particular by the EU, have not been without controversy, and it is arguable that without the United Kingdom as a moderating influence within the EU, coordinated action against tax havens will become stricter still, which will affect the Caribbean more than any other region in the world. This chapter considers these issues in three sections. First, this chapter examines previous and current efforts at tackling tax avoidance, in particular in the EU, with particular reference to the Caribbean. Second, this chapter outlines the shifting and, at times, diverging approaches to taxation between the UK and EU. Third, this chapter considers the relationship between Caribbean countries and territories and the EU, and the UK, and the effect that the UK's exit from the EU will have on the latter's approach to Caribbean tax havens. This paper concludes that while the UK's exit from the EU will result in a diminution of the influence of Caribbean countries and territories within the EU with respect to tax policy, the prevailing global trend is towards stricter rules on tax avoidance, and that further action against tax havens, including those in the Caribbean, may be inevitable.

## **Keywords**

Tax, Brexit, EU law, CARICOM, Overseas Territories

## Introduction

The Caribbean has long played a central role in global tax avoidance. For many decades, there appeared to be little onus to do anything to curtail the practices of tax havens. Indeed, at one time, there was a considerable body of literature which took the view that tax havens were a somewhat benign phenomenon which actually mitigated the effects of large states' 'sub-optimal' levels of taxation.<sup>1</sup>

Concern about tax havens, however, began to grow in the late 1990s. The subsequent financial crisis of 2007-08, the resultant recession, and relatively slow rate of recovery has resulted an unprecedented squeeze on the public finances of most developed nations. Consequently, a new onus has emerged to close the tax gap between expected revenues and actual returns. Historically, the role of co-ordinating national tax laws was first assumed by the League of Nations, and, following the Second World War, the Organisation for European Economic Co-operation, later the Organisation for Economic Co-operation and Development (OECD).

While the OECD has proved a formidable co-ordinator of tax laws, the fact that the body, in particular its Committee on Fiscal Affairs, operates on the basis of consensus means that 'creative ambiguity' has often prevailed over decisive action.<sup>2</sup> In this respect, the OECD could be described as a secretariat without an executive.

Although the Group of 20 summit (G20) has existed at a ministerial level since 1999,<sup>3</sup> it was only in response to the financial crisis that the grouping took on a top-level focus as well as an enhanced role in financial management.<sup>4</sup> In contrast to the OECD, the G20, as a top-level summit, could be described as a secretariat without an executive.

The complementariness of these bodies respective deficiencies was obvious, and, consequently, when the G20 reached conclusions as to the necessary actions to tackle harmful tax avoidance, the OECD was the obvious administrative body to turn the broadly agreed principles into substantive action. The result of this impetus is the ongoing work of the OECD on base erosion and profit shifting (BEPS).

In tandem with the efforts of the OECD, many states, in particular the United Kingdom, have taken unilateral action to tackle the problem of tax avoidance. Furthermore, the European Union, which has previously only ever taken extremely limited involvement with matters of direct taxation, has sought a 'piece of the action' through re-orienting its role as the guardian of free competition in the internal market, as well as legislative intervention. However, it should not be assumed that this apparent unity of purpose is matched by either a common approach or a common objective. There remains considerable disagreement between EU Member States as to how problems of tax avoidance should be tackled. There also exists, as this paper reveals, a notable schism between those EU Member States with colonial and/or

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<sup>1</sup> Joel Slemrod, 'Why Is Elvis on Burkina Faso Postage Stamps? Cross-Country Evidence on the Commercialization of State Sovereignty' (2008) 5 *Journal of Empirical Legal Studies* 683.

<sup>2</sup> Hugh J. Ault, 'Reflections on the role of the OECD in developing international tax norms' (2008) 34 *Brook. J. Int'l L.* 757, p. 763.

<sup>3</sup> G7 Finance Ministers, 'Report of G7 Finance Ministers to the Köln Economic Summit' (1999) available at <http://www.g8.utoronto.ca/finance/fm061999.htm> accessed 29 November 2018.

<sup>4</sup> G20, 'London Summit – Leaders' Statement' (2 April 2009) available at <http://www.g20.utoronto.ca/2009/2009communiqué0402.pdf> accessed 29 November 2018

post-colonial interests in the Caribbean, and those without. One of the more controversial interventions of the EU has been the decision of the council to ‘blacklist’ non-cooperative tax jurisdictions.

This paper is split into three sections. It commences by examining the efforts that have been taken so far to tackle tax avoidance at national, regional, and international levels. This paper proceeds to consider the different approaches and objectives of the UK, the EU, and the Caribbean states in addressing the issue of tax avoidance.

Finally, this paper examines the role of the United Kingdom as a bridge between the Caribbean and the EU. In addition to the political and cultural connections between the UK and many Caribbean states, the UK also has a constitutional responsibility to represent a number of Caribbean territories in their foreign relations. This paper concludes that a close relationship between the United Kingdom and European Union is of considerable importance to Caribbean states, in particular where matters of taxation are concerned, and that without the UK as a moderating influence within the Europe, the EU may well be minded to pursue more aggressive policies against tax avoidance and harmful tax competition.

### **Previous and Current Efforts at Tackling Tax Avoidance**

Although issues of tax avoidance have gained considerable impetus since the financial crisis of 2007-08, concerns had been mounting about perceived harmful tax practices for over a decade beforehand. This stands in sharp contrast to the near-century of international tax policy that preceded these concerns. At the turn of the 20<sup>th</sup> century the principal concern was double taxation; however, by the turn of the 21<sup>st</sup>, double non-taxation became the focus of states’ attention.

In the past two decades, a notable pattern of action has emerged. First, the OECD recognises the existence of a problem, and commissions work at a technocratic level to research the issue and develop proposals. Then the OECD agrees recommendations, which often go far beyond what might be reasonably expected of a body that works entirely upon consensus and lacks any formal decision-making or enforcement mechanisms. Following the OECD’s initiative, and normally in parallel with the work of the OECD that follows, the EU identifies how the issues identified particularly affect its Member States, and seeks to pursue measures which reflect those particular concerns, the significantly stronger legal frameworks that exist in the EU to act on those measures, as well as, increasingly, the EU’s economic and political power to impose its will on others.

#### *OECD Report on Harmful Tax Competition*

In 1996, in response to a request from the OECD’s Ministerial Council Meeting to take action to tackle what it perceived to be harmful tax competition, the OECD Committee on Fiscal Affairs commenced a two-year project investigating the effects of harmful tax competition and ways of combating it. This impetus was endorsed by the Group of Seven (G7) states in the communique agreed at their Lyon summit:

We strongly urge the OECD to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices.<sup>5</sup>

The G7 repeated their endorsement of the OECD's effort at their subsequent summit in Denver in 1997.<sup>6</sup>

The CFA reported in 1998 and their findings were broadly welcomed by member governments. Their report defined a tax haven as those territories or countries with 'no or only nominal taxation which is usually coupled with a reduction in regulatory or administrative restraints.'<sup>7</sup> The report identified four criteria for identifying tax havens: no or nominal taxation, or a perception that the state or territory offers itself as a place to escape higher taxation; lack of effective information exchange; a lack of transparency; and the absence of a requirement that any taxable activity be substantial.<sup>8</sup>

Although not specifically directed at Caribbean nations, their follow-up report – 'Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices' – identified 35 states and territories which, in the view of the CFA, met the 1998 report's criteria to qualify as a tax haven, the preponderance of which were located in the Caribbean.<sup>9</sup>

The report was not without its critics. CARICOM loudly protested the inclusion of its members on the OECD's list. Vaughn James was even more scathing in his criticism, arguing that the OECD

like the pirates who plied the waters of the Caribbean during the sixteenth through nineteenth centuries, has, through its ill-advised anti-harmful tax competition initiative, effectively robbed fourteen CARICOM nations of their sovereign right to determine their tax and economic policies.<sup>10</sup>

The OECD's early action on tax havens did achieve some success, albeit limited. Progress was made, in particular, with respect to transparency and information exchange, although subsequent scandals betrayed the limitations of what was achieved. Robert Kudrle described the harmful tax competition initiative as a 'damp squib'.<sup>11</sup>

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<sup>5</sup> G7, 'Economic Communiqué: Making a Success of Globalization for the Benefit of All' (*G7 Information Centre, University of Toronto*, 28 June 1996) available at <<http://www.g8.utoronto.ca/summit/1996lyon/communique.html>> accessed 4 September 2018.

<sup>6</sup> G7, 'Confronting Global Economic and Financial Challenges: Denver Summit Statement by Seven' (*G7 Information Centre, University of Toronto*, 21 June 1997) available at <<http://www.g8.utoronto.ca/summit/1997denver/confront.htm>> accessed 4 September 2018

<sup>7</sup> OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998), p. 21.

<sup>8</sup> *Ibid.*, p. 23.

<sup>9</sup> OECD, *2000 Progress Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (OECD Publishing 2000).

<sup>10</sup> Vaughn E James, 'Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of Their Tax and Economic Policy Sovereignty' (2002) 34 *The University of Miami Inter-American Law Review* 1, p. 5.

<sup>11</sup> Robert T Kudrle, 'The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib' (2008) 8 *Global Economy Journal*.

## *European Union: From Code of Conduct, to Action Plan, to Blacklist*

In 1998, in response to growing concerns about base erosion within the EU, the European Council set up the Code of Conduct Group (Business Taxation). The initial focus of the group's efforts was preferential tax regimes in certain Member States. The work of the Code of Conduct Group did achieve some success in engendering a common approach to harmful tax practices among EU Member States. With consensus emerging, the EU increasingly turned its sights beyond its own members to third states. An early example of the EU's outward focus can be seen in the action against the United States initiated by the EU within the WTO in *Foreign Sales Corporations*.<sup>12</sup> The Appellate Body affirmed the decision of the Dispute Settlement Body that the United States' Foreign Sales Corporations legislation constituted a preferential regime and, therefore, an export subsidy prohibited under arts III:4 and XVI of the GATT, as well as arts 3(a) and (b) of the SCM Agreement.<sup>13</sup>

In 2008, ECOFIN agreed that Member States would seek to export good practice to third states through the inclusion of a clause in bilateral agreements. The clause required parties to 'commit themselves to implement the principles of good governance in the tax area as subscribed to by Member States at Community level.'<sup>14</sup> Third countries broadly resisted this move, however, fearing a loss of tax sovereignty.<sup>15</sup>

The EU, therefore, decided to take a more unilateral approach, and in 2012 the Commission published a recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.<sup>16</sup> The 2012 recommendation proposes that Member States should publish blacklists of states that do not conform with certain minimum standards with respect to transparency, exchange of information, and harmful tax practices. The Commission recommends that Member States should renegotiate, suspend, or even terminate double taxation conventions with states that appear on those blacklists. The 2012 recommendation undoubtedly recommends a shift in the EU's approach from collaboration to imposition, which Kalloe has described as 'one sided and punitive'.<sup>17</sup> It transpires, however, that the 2012 recommendation was merely an opening salvo to the more aggressive action that followed.

Following the agreement of the OECD's 15 Base Erosion and Profit Shifting (BEPS) Actions,<sup>18</sup> the European Commission published a communication to both the Council and Parliament 'A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action'.<sup>19</sup> Under action 4, on tax transparency, the European Commission proposed 'a more common approach to third country non-

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<sup>12</sup> US: WTO, Appellate Body Report of 20 February 2000, DS108, *United States Foreign Sales Corporations*.

<sup>13</sup> The authorisation of countermeasures up to the value of USD 4043 million per year remains the largest in WTO history.

<sup>14</sup> ECOFIN, Council Conclusions of 14 May 2008, 8850/08, 23.

<sup>15</sup> Vinod Kalloe, 'European Union-EU Tax Haven Blacklist—Is the European Union Policing the Whole World?' (2018) 58 *European taxation* 47, 51.

<sup>16</sup> Commission Recommendation 2012/771/EU of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters [2012] OJ L 338.

<sup>17</sup> *Supra* n.15, p.51.

<sup>18</sup> OECD, 'BEPS 2015 Final Reports' (2015) available at <<http://www.oecd.org/ctp/beps-2015-final-reports.htm>> accessed 26 November 2018.

<sup>19</sup> European Commission, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action* (2015).

cooperative tax jurisdictions<sup>20</sup>, while under action 5 on improving coordination, the Commission proposed reforming the Code of Conduct on Business Taxation. While in 2012 the Commission recommended Member States maintain individual backlists of uncooperative tax jurisdictions, the 2015 proposal envisaged the EU throwing its collective weight behind a common blacklist of tax havens.

In 2016, ECOFIN agreed the criteria<sup>21</sup> against which jurisdictions are to be assessed for the purposes of blacklisting. The criteria fall into three categories, the first of which is tax transparency. States should have taken steps to implement automatic exchange of information (the ‘Common Reporting Standard’) by 2017, with the first exchanges of information taking place by 2018. States should have a ‘largely compliant’ rating by the Global Forum with respect to OECD exchange of information requests. Sovereign states should have ratified OECD Multilateral Convention on Mutual Administrative Assistance (‘the OECD Multilateral Convention’) or should have an equivalent network of conventions in place. Non-sovereign territories should be participating in the OECD Multilateral Convention or an equivalent network of conventions. Until 30 June 2019 meeting two out of three of these sub-criteria is sufficient to be regarded as compliant with respect to tax transparency. The Council also agreed that a fourth criteria on beneficial ownership registers should be agreed and adopted at a later date.

The second criterion concerns fair taxation. States and territories should not operate harmful preferential tax regimes as set out in the EU Code of Conduct, nor should they facilitate offshore structures aimed at attracting profit shifting without any real economic activity. Finally, states should have committed to implement to the OECD agreed minimum anti-BEPS standards by the end of 2017. Implementation of the OECD minimum standards will be incorporated as an independent criterion at a later date.

In December 2017, the Council agreed its initial blacklist.<sup>22</sup> The initial blacklist included the Caribbean states of Barbados, Grenada, Saint Lucia, and Trinidad and Tobago, as well as American Samoa, Bahrain, Republic of Korea, United Arab Emirates, Guam, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Samoa, and Tunisia. Furthermore, Belize, Bermuda, Cayman Islands, Curacao, Jamaica, Montenegro, and Saint Vincent & the Grenadines were among those states included on a separate ‘greylist’. Determinations on Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, US Virgin Islands, Turks and Caicos Islands were deferred following the devastation caused by Hurricane Irma.

Table 1: EU Blacklist, 5 December 2017

Blacklist:	Greylist:
American Samoa, Bahrain, Barbados, Republic of Korea, United Arab Emirates, Grenada, Guam, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia.	Albania, Andorra, Armenia, Aruba, Belize, Bermuda, Bosnia and Herzegovina, Botswana, Cabo Verde, Cayman Islands, Cook Islands, Curacao, Faroe Islands, Fiji, Greenland, Guernsey, Hong Kong, Jamaica, Jersey, Jordan, Lichtenstein, Labuan Island, Macedonia, Malaysia, Maldives, Isle of Man, Morocco, Mauritius, Montenegro, Nauru, Niue, New Caledonia, Oman, Peru, Qatar, Saint Vincent & the

<sup>20</sup> *Ibid.*, p.12.

<sup>21</sup> Council of the European Union, *Criteria and process leading to the establishment of the EU list of noncooperative jurisdictions for tax purposes* (14166/16, 2016).

<sup>22</sup> Council Conclusions on the EU list of non-cooperative jurisdictions for tax purposes [2017] OJ C 438.

	Grenadines, San Marino, Serbia, Seychelles, Switzerland, Swaziland, Taiwan, Thailand, Turkey, Uruguay, Vanuatu, Vietnam.
<b>Total: 17</b>	<b>Total: 47</b>
Postponed:	
Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, US Virgin Islands, Turks and Caicos Islands.	

Together with the Council's decision as to which jurisdictions to include on their blacklist, the Council also agreed that, at a minimum, EU Member States *should* apply at least one of the following defensive measures to blacklisted states and territories:

1. Reinforced monitoring of certain transactions;
2. Increased audit risks for taxpayers benefiting from the regimes at stake;
3. Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.<sup>23</sup>

The evident objective of these measures is to ensure that non-compliant jurisdictions are perceived by taxpayers as riskier places to do business.

The Council also agreed a number of additional measures which Member States *may* take. These include:

1. Non-deductibility of costs;
2. Controlled Foreign Company (CFC) rules;
3. Withholding tax measures;
4. Limitation of participation exemption;
5. Switch-over rule;
6. Reversal of the burden of proof;
7. Special documentation requirements;
8. Mandatory disclosure by tax intermediaries of specific tax schemes with respect to cross-border arrangements.

While the above are actions to be undertaken by Member States, the EU has also begun applying punitive measures against tax havens at a Union-wide level too. Regulation 2017/1601 provides that those entities in receipt of guarantees from the European Fund for Sustainable Development may not enter into new or renewed operations with entities incorporated or established in jurisdictions on the EU blacklist, or that 'do not effectively comply with Union or internationally agreed tax standards on transparency and exchange of information.'<sup>24</sup>

The EU's blacklists, as well as the defensive measures being applied to tax havens have, understandably, attracted criticism that the EU is seeking to 'police the whole world'.<sup>25</sup> Nevertheless, it appears that this process has produced a significant measure of success, and fairly quickly. In just-

<sup>23</sup> *Ibid.*

<sup>24</sup> Art. 22, Regulation (EU) 2017/1601 of the European Parliament and of the Council of 26 September 2017 establishing the European Fund for Sustainable Development [2017] OJ L 249/27.

<sup>25</sup> Kalløe, *supra* n.15.



over six months, thirteen states or territories were moved from the blacklist to the greylist. At time of writing, only one Caribbean state remains on the blacklist – Trinidad and Tobago – as well as the US Virgin Islands territory.

Table 2: EU Blacklist, 25 May 2018

Blacklist:	Greylist:
American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago, US Virgin Islands.	Albania, Andorra, Anguilla, Antigua and Barbuda, Armenia, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermuda, Bosnia and Herzegovina, Botswana, British Virgin Islands, Cabo Verde, Cayman Islands, Cook Islands, Dominica, Republic of Korea, Curacao, United Arab Emirates, Faroe Islands, Fiji, Granada, Greenland, Guernsey, Hong Kong, Jamaica, Jersey, Jordan, Lichtenstein, Labuan Island, Macao SAR, Qatar, Former Yugoslav Republic of Macedonia, Malaysia, Maldives, Isle of Man, Marshall Islands, Morocco, Mauritius, Mongolia, Montenegro, Nauru, Niue, New Caledonia, Oman, Panama, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Serbia, Seychelles, Switzerland, Swaziland, Taiwan, Thailand, Tunisia, Turkey, Turks and Caicos, Uruguay, Vanuatu, Vietnam.
Total: 7	Total: 65

## Tax Avoidance and the EU: Differing Approaches and Objectives

We have seen, above, an increasingly coordinated and concerted effort at tackling the problems of global tax avoidance – in particular among EU states. While there is, at least, a common recognition of the problems, it is not at all clear that the Member States favour a common approach to tackling these problems. Even less evident is the existence of a common set of objectives from efforts at tackling global tax avoidance. This section seeks to consider the efforts, discussed above, that have been taken to tackle the problems of tax avoidance, in their domestic and regional political contexts, as well as the limitations of those approaches.

### *United Kingdom*

Since the 1980s, the United Kingdom has been the foremost advocate of a competitive internal market.<sup>26</sup> Sensing an opportunity to export her government’s domestic market reforms to Europe, thus entrenching them in the UK’s legal order, Margaret Thatcher, together with West German Chancellor Helmut Kohl forged a consensus amongst European leaders that led to the adoption of the Single European Act in 1986.<sup>27</sup>

<sup>26</sup> Geoffrey Garrett, ‘International Cooperation and Institutional Choice: the European Community’s internal market’ (1992) 46 *International Organization* 533, 534.

<sup>27</sup> Kenneth Armstrong and Simon Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998), p. 21.

In the past decade the UK has also been one of the leading advocates for tackling BEPS through international consensus and rules-based reform. The UK was an early adopter of CFC and General Anti-Avoidance Rules (GAAR), as well as pioneering a new Diverted Profits Tax (the so-called ‘Google Tax’). Despite these efforts at tackling what it perceives as harmful tax practices, the UK continues to regard tax policy as a central tool in promoting a competitive economy. While a decade ago the UK’s Corporation Tax was levied at a rate of 28%, it presently stands at 19%, and is set to fall to 17% by 2020.<sup>28</sup> These rate reductions come on top of a number of targeted reliefs, such as the Patent Box,<sup>29</sup> although the UK’s system of capital allowances is somewhat less competitive than those of many other developed countries.

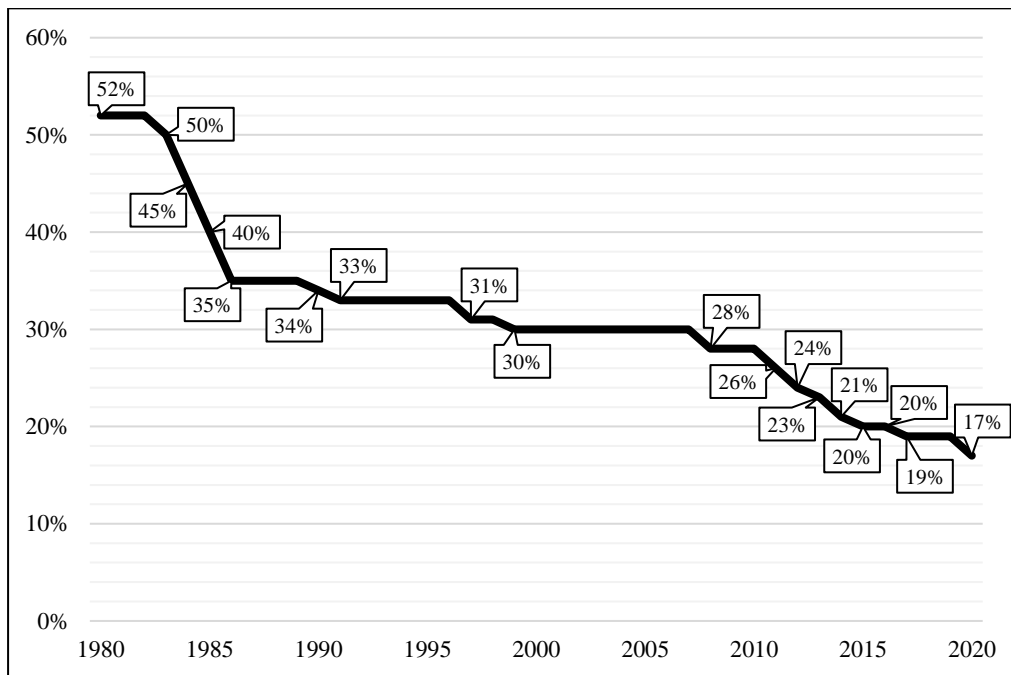


Figure 1: UK Standard Rate of Corporation Tax 1980-2020

The UK’s objectives when it comes to international tax policy can therefore be summarised as follows: clamping down on tax competition that is opaque and secretive, while continuing to use taxation as a tool for enhancing the UK’s competitiveness – quite the balancing act. While it might be tempting to conclude that there is a tension or, worse still, a degree of hypocrisy underlying the UK’s approach, a more charitable conclusion is that the UK has no problem with jurisdictions competing on tax provided that all jurisdictions play by the same rules. This stands in contrast to an apparent desire on the part of some states, in particular in the EU, to eliminate tax competition altogether.

### European Union

In recent years, the European Union has given extensive consideration to questions of direct taxation and tax avoidance. This is somewhat remarkable, given the limited competence the EU has over matters of direct taxation.

<sup>28</sup> HMRC, ‘Corporation Tax to 17% in 2020’ (HMRC, 2016) available at <<https://www.gov.uk/government/publications/corporation-tax-to-17-in-2020>> accessed 18 September 2018.

<sup>29</sup> Part 8A, Corporation Tax Act 2010.

The principal grant of competence to the EU over matters of taxation can be found in Art. 113 TFEU, which provides that

[t]he Council [of Ministers] shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

By far the most significant action the EU has taken in this field is the abolition of turnover taxes and the establishment of a common system of Value Added Tax (VAT) across the EU.

The EU treaties contain no grant of competence over matters of direct taxation to EU institutions, with the only substantive tax rule being Art. 110 TFEU's prohibition on discriminatory tax treatment.<sup>30</sup> Despite this, the EU institutions, in particular the Court of Justice, and the Commission, have successfully used Art. 49 TFEU (on freedom of establishment) and, more recently, and more controversially, Art. 107 TFEU (on state aid), to engage with questions of direct taxation. Perhaps somewhat perversely, the Commission's attempt to use Art. 107 TFEU is aimed at combating harmful tax avoidance, while the effect of Art. 49 TFEU, through a string of case before the Court, has been to vitiate national rules designed to limit opportunities for tax avoidance.<sup>31</sup>

Article 49 of the Treaty on the Functioning of the European Union (TFEU) prohibits restrictions upon freedom of establishment of nationals of Member States in the territory of another Member State including establishment of companies. Article 58 TFEU further prohibits any restrictions on the free movement of capital. National laws, including tax laws, which infringe upon those rights are, in almost all circumstances, not permitted. This has resulted in a number of laws designed to clampdown on tax avoidance being struck down by the ECJ.

The case of *Sandoz* concerned a requirement to pay Austrian stamp duty on loans.<sup>32</sup> Austrian law contained a provision designed to prevent the arrangement of loans outside of Austria to avoid paying the tax. In his opinion on the case, Advocate General Leger took the view that

[t]he principle of the free movement of capital was introduced inter alia in order to enable Community nationals to enjoy the most favourable conditions for investing their capital available to them in any of the States which make up the Community.<sup>33</sup>

The Court agreed with the Advocate General's position, holding that the measure

deprives residents of a Member State of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside the national territory.

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<sup>30</sup> Art. 65 TFEU contains an explicit exclusion for tax laws from the scope of Art. 63 TFEU on free movement of capital.

<sup>31</sup> Brady Gordon, 'Tax Competition and Harmonisation under EU Law: Economic Realities and Legal Rules' [2014] 39 *European Law Review* 790.

<sup>32</sup> Case C-439/97, *Sandoz* [1999] ECR I-07041.

<sup>33</sup> Opinion of AG Leger, *ibid*, para. 47.

Accordingly, such a measure is likely to deter such residents from obtaining loans from persons established in other Member States.<sup>34</sup>

It follows that such legislation constitutes an obstacle to the movement of capital within the meaning of Article [63 TFEU].

If the very purpose of free movement is to ensure the allocation of resources to their most efficient location, it logically follows that measures which inhibit shopping around for the most favourable environment for those resources must surely be unlawful.

A more pertinent example is the decision of the ECJ in *Cadbury Schweppes*.<sup>35</sup> At issue in the case was whether the UK's controlled foreign corporation (CFC) rules, an anti-avoidance measure designed to prevent companies from shifting profits outside of the UK to avoid tax, were compatible with the treaties. The Court in *Cadbury Schweppes* reiterated its earlier pronouncement in *Barbier* that

a Community national cannot be deprived of the right to rely on the provisions of the Treaty on the ground that he is profiting from tax advantages which are legally provided by the rules in force in a Member State other than his State of residence.

[...]

the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty.<sup>36</sup>

In other words, under EU Law the fact that a company shifts its operations to another EU state (such as Ireland or the Netherlands) to take advantage of more favourable tax treatment cannot be prohibited. Anti-avoidance rules may not be applied, even where there is an explicit intention to avoid tax, where the taxpayer nonetheless carries on genuine economic activities. Such tax rules are only effective where they target wholly artificial arrangements – an extremely low bar. The author has previously argued that the effect of this line of case law on the UK's flagship anti-avoidance measure, the Diverted Profits Tax, is to empty the tax of almost all practical effect.<sup>37</sup>

Brady Gordon argues that such consequences arise not merely as an unintended spill over effect from the application of Art. 49 TFEU. Rather, Gordon argues that the facilitation of competition, not just across the Member States, but between them, is a core objective of European economic integration. According to Gordon, 'the empirical effects of tax competition are demonstrably concomitant with the objectives of EU law and tax policy'.<sup>38</sup>

The tension between the twin objectives of, on the one hand, clamping down on abusive tax avoidance while, on the other, maintaining a competitive economic environment is a familiar one for

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<sup>34</sup> *Supra* n.32, para. 19.

<sup>35</sup> Case C-196/04, *Cadbury Schweppes* [2006] ECR I-8031.

<sup>36</sup> John A Swain, 'State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective' (2003) 45 *Wm. & Mary L. Rev.* 319, para. 71.

<sup>37</sup> Stuart MacLennan, 'The Questionable Legality of the Diverted Profits Tax Under Double Taxation Conventions and European Union Law' (2016) 44 *Intertax* 903.

<sup>38</sup> *Supra* n.31.

tax lawyers. While policymakers, ideally, seek to balance these two objectives, when they come into conflict the decision as to which objective to favour is a matter of political choice. It is in this political choice that the divergent objectives of EU Member States plays a significant role.

For most of the 20<sup>th</sup> century, a degree of low-level tax avoidance has been viewed as a price worth paying for a competitive market economy, both within the EU and beyond. In recent years, however, a marked shift towards the objective of tackling that tax avoidance has taken place and is widely recognised. Consequently, and despite its lack of direct competence in the field of direct taxation, the EU has sought to embrace this shift in objective and take action.

Despite the supposed lack of competence over matters of direct taxation, the effects of tax avoidance on the functioning of the internal market has led to the EU utilising Art. 115 TFEU to act. Art. 115 TFEU provides that

the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.<sup>39</sup>

The flagship piece of legislation in this field is the 2016 Anti-Avoidance Directive, which mandates Member States to introduce five anti-avoidance measures where they have not already done so:

1. CFC rules;
2. Switchover rules;
3. Interest limitation rules;
4. Exit taxation; and,
5. A general anti-avoidance rule.

The fact that an EU directive mandates Member States to implement CFC rules more than a decade after the Court of Justice so famously limited the effects of the UK's CFC rules in *Cadbury Schweppes* illustrates the shift in the EU's priorities.

However, it is arguable that the EU's approach to tax competition, generally, remains considerably more sceptical than that of the UK. In 2011, the European Commission proposed a directive to harmonise the corporate tax bases of EU Member States – the Common Consolidated Corporate Tax Base (CCCTB). Under this proposal, every Member State's corporate tax base would be identical, while leaving each Member State to decide upon its own corporate tax rates and bands. This, in the opinion of the Commission, retains the positive competitive effects of tax competition, while eliminating its harmful effects:

[f]air competition on tax rates is to be encouraged. Differences in rates allows a certain degree of tax competition to be maintained in the internal market and fair tax competition based on rates offers more transparency and allows Member States to

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<sup>39</sup> Art. 115 TFEU.

consider both their market competitiveness and budgetary needs in fixing their tax rates.<sup>40</sup>

However, while the case for CCCTB on grounds of simplification and reducing compliance costs is clear, it is less clear as to why the CCCTB is necessary on competition grounds. The prevailing trend in tax policy in developing countries over the preceding two decades has been of steady but slowly declining tax rates, coupled with targeted reliefs designed to reflect national priorities. The principal economic gain from free competition is specialisation. At a fiscal level, the use of targeted reliefs to facilitate specialisation is entirely consistent with the overall objectives of tax competition.

There has long existed a broad consensus among Member States that the use of targeted reliefs to attract profit shifting without any underlying economic activity does constitute harmful tax competition. The CCCTB, however, seeks to eradicate corporate tax competition on all grounds, bar rate. While the Commission's proposal expressed support for fair tax competition,<sup>41</sup> the CCCTB goes far beyond what is necessary to combat harmful tax competition, thus breaching one of the general principles of the EU: proportionality.

The 2011 proposal did not gain much traction, with the UK, and other, smaller, states firmly opposed. In 2015 the Commission revived the proposal, and it is arguable that without opposition from the UK, the measure stands a greater chance of adoption.<sup>42</sup> The fact that Brexit might potentially have breathed new life into the proposal illustrates the increasing divergence between the UK and EU on matters of tax avoidance.

## **Tax, Brexit, and the Caribbean**

Caribbean states and territories have long viewed the United Kingdom as something of an 'honest broker', in particular where questions of tax and financial services are concerned. This might be explained, in part, by the fact that the UK, as discussed above, looks more favourably upon tax competition, in general, than other Member States. In addition to this, however, the UK's long-standing constitutional and legal links to numerous Caribbean states and territories should not be overlooked.

The foregoing section identifies the tension between the EU's fundamental pro-competition objective and its more recent aim of tackling tax avoidance. Although Brexit will remove one of the EU's stalwart supporters of the competitiveness agenda, numerous Caribbean states and territories participate in formal dialogue with and decision-making within EU institutions.

### *Formal Role of Caribbean Countries and Territories in EU Decision Making*

There is, arguably, no region in the world with more substantial geopolitical links to the EU than the Caribbean. The islands of Guadeloupe and Martinique are both *Départements d'Outre-mer* (Overseas Departments) of France, making them part of the internal territory of the French Republic and are,

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<sup>40</sup> Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)' COM (2011) 121, p.4.

<sup>41</sup> *Ibid.*

<sup>42</sup> Dan Neidle, 'The Relaunching of the Common Consolidated Corporate Tax Base' [2016] *Tax Journal* 8.

therefore, within the territory of the EU. In addition, the French territory of Saint Martin, though a *Collectivité d'Outre-mer* (Overseas Collectivity) since 2007,<sup>43</sup> remains within the territory of the EU.

Beyond those territories that are within the territory of the EU, a number of Caribbean Islands comprising the EU's overseas countries and territories ('OCTs') maintain strong constitutional links with EU Member States, and, consequently, formal institutional links with the EU through the Association of Overseas Countries and Territories ('the Association'). The Association finds its basis in Art. 198 TFEU, although its origins can be found in Art. 227(3) of the Treaty of Rome.<sup>44</sup>

Although the Association's members are spread across the globe, the majority of its members are situated within the Caribbean. These territories include the former French *Département* of Saint Barthélemy; five British Overseas Territories (Anguilla, British Virgin Islands, the Cayman Islands, Montserrat, and the Turks & Caicos Islands), and six territories (Aruba, Bonaire, Curaçao, Saba, Sint Eustatius, and Sint Maarten) previously comprising the Netherlands Antilles.

The broad aim of the Association, as mandated by Art. 198 TFEU is to 'promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.'<sup>45</sup> Institutional co-operation within the Association takes the form of the OCT-EU Forum, trilateral consultations between OCTs, their respective Member States, and the European Commission, and working parties.

Among the objectives of the Association is the promotion of

cooperation in the tax area in order to facilitate the collection of legitimate tax revenues and to develop measures for the effective implementation of the principles of good governance in the tax area, including transparency, exchange of information and fair tax competition.<sup>46</sup>

The association is also intended to promote 'regulatory convergence with recognised international standards on regulation and supervision in the area of financial services',<sup>47</sup> including the OECD Agreement on exchange of information on tax matters, and the G20 'Statement on Transparency and exchange of information for tax purposes'.<sup>48</sup>

It is evident, therefore, that Association is seen by the EU as a means of bringing the OCTs into alignment with their own objectives. Beyond the Association, however, a number of other Caribbean

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<sup>43</sup> Like Saint Martin, the *Collectivité* of Saint Barthélemy also transitioned from *Département* status in 2007, but, unlike Saint Martin, left the territory of the EU at this point.

<sup>44</sup> 'Les pays et territoires d'outremer dont la liste figure à l'Annexe IV du présent Traité font l'objet du régime spécial d'association défini dans la quatrième partie de ce Traité.', Art. 227(3), Treaty Establishing the European Economic Community (25 March 1957).

<sup>45</sup> para. 2.

<sup>46</sup> Art. 73, Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') OJ L 344/1.

<sup>47</sup> Art. 71, *ibid.*

<sup>48</sup> *Ibid.*

states have extensive links with the EU through their historical links with the UK. Thirteen of the fifteen full members of the Caribbean Community (CARICOM).<sup>49</sup>

In general terms, these efforts have, thus far, proved successful, with OCTs moving (at times, somewhat grudgingly) into alignment with international standards on taxation. This is evidenced by the number of states – thirteen out of twenty – that featured on the EU blacklist being quickly shifted to the greylist.<sup>50</sup> These advances have, arguably, been made possible by the ‘good cop, bad cop’<sup>51</sup> routine between the UK and the EU with respect to tax co-operation, discussed below. It may well be the case, however, that without the UK as a moderating influence on tax matters within the EU, it becomes more difficult to bring Caribbean states, countries, and territories into alignment with the EU on tax matters.

### *The UK as Foreign Representative for British Overseas Territories*

The power to establish legal frameworks for overseas territories forms part of the crown prerogative.<sup>52</sup> Consequently, the constitutions of each of the Overseas Territories are provided for by Orders in Council – legal instruments enacted by the Queen with the advice of the Privy Council of the United Kingdom, albeit in reality the provider of that advice is the UK Government. Although the constitutions of each of the territories differ from one another, every one of those constitutions circumscribes the power of the territories’ governments to conduct foreign policy.

For example, the Constitution of Anguilla, Art. 28(2)(a) provides that the Governor is not obliged to act on the advice of the Executive Council on ‘any matter that in his opinion relates to defence, external affairs or internal security’.<sup>53</sup> A more recent example can be found in Art. 55 of the Cayman Islands Constitution, which provides for an explicit grant of authority over external affairs to the Governor, subject to the delegation to local ministers on matters relating to:

- (a) the Caribbean Community, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, or any other Caribbean regional organisation or institution;
- (b) other Caribbean regional affairs relating specifically to issues that are of interest to or affect the Cayman Islands;
- (c) tourism and tourism-related matters;
- (d) taxation and the regulation of finance and financial services; and
- (e) European Union matters directly affecting the Cayman Islands.<sup>54</sup>

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<sup>49</sup> One of these members, Montserrat, is a full member though not an independent sovereign state. Two full members of CARICOM are not, strictly, situated in the Caribbean: Belize, in Central America; and Guyana, in South America.

<sup>50</sup> See tables 1 & 2.

<sup>51</sup> Susan E. Brodt and Marla Tuchinsky, ‘Working Together but in Opposition: An Examination of the “Good-Cop/Bad-Cop” Negotiating Team Tactic’ 81 *Organizational Behavior and Human Decision Processes* 155.

<sup>52</sup> *Phillips v Eyre* (1870) L.R. 6 Q.B. 1.

<sup>53</sup> Anguilla Constitution Order 1982, Schedule 1.

<sup>54</sup> Cayman Islands Constitution Order 2009, Schedule 1.



These powers, however, remain subject to extensive control by the Secretary of State in the UK. In general, any significant act of foreign policy done by any of the overseas territories requires a form of prior authorisation from the Secretary of State, known as an ‘entrustment’.<sup>55</sup>

The international role of the overseas territories has expanded significantly in recent years. Four of the five territories in the Caribbean, as well as Bermuda, participate in CARICOM as associate members, while the sixth, Montserrat, is a full member of CARICOM. Nevertheless, in 2008, the Secretary of State refused to grant Montserrat an entrustment to join the CARICOM single market and economy (CSME).

In a private meeting of the House of Lords EU Select Committee, the Premier of the British Virgin Islands, Dr. Orlando Smith, described the United Kingdom’s role in EU discussions as a ‘champion for those countries that are properly regulated jurisdictions’.<sup>56</sup> Similarly, the Secretary to the Cabinet of Bermuda ‘acknowledged that the UK’s membership of the EU provided significant support for Bermuda’<sup>57</sup> and expressed his concern about the loss of the UK’s voice at the negotiating table. Judith Freedman hypothesises that ‘the fact that the UK is not at the table at the EU may make it more likely that the dependent territories will have to introduce changes or will suffer sanctions introduced at EU level’.

Of course, it should not be inferred from the foregoing that the UK always acts in the interests of its overseas territories. In April 2018, the Sanctions and Anti-Money Laundering Act 2018 (‘the 2018 Act’) received royal assent, to the near-universal dismay of the UK’s Caribbean territories. Of particular concern is the requirement on Overseas Territories under s51 to develop and publish registers of companies’ beneficial owners. While s51(1) requires the Secretary of State to assist the Overseas Territories to do so on a voluntary basis, s51(2) of the Act requires the Secretary of State to prepare a draft order to compel compliance on the part of any territory that has not complied by the end of 2020.

Commenting on the 2018 Act, Dr. Smith said it ‘calls into question our very relationship with the UK’,<sup>58</sup> while the Premier of the Cayman Islands, Alden McLaughlin, described the measure ‘a gross affront to the constitutional relationship we currently have with the United Kingdom.’<sup>59</sup> While not a single member of the House of Commons voted against any element of the Sanctions and Anti-Money Laundering Bill, a small minority of peers supported an amendment by Lord Naseby to reject the mandate on British Overseas Territories.<sup>60</sup> The former President of the Supreme Court of the United Kingdom, Lord Neuberger of Abbotsbury, described clause 51 as ‘old-style colonialism’.<sup>61</sup>

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<sup>55</sup> For a more detailed discussion of the constitutional relationship between the UK and its overseas territories, see, in particular, Ian Hendry and Susan Dickson, *British Overseas Territories Law* (2 edn, Bloomsbury Publishing 2018).

<sup>56</sup> L Jay of Ewelme, ‘Letter from the House of Lords EU Select Committee to the Secretary of State for Exiting the European Union’ (*House of Lords*, 13 September 2017) available at <<https://www.parliament.uk/documents/lords-committees/eu-select/Correspondence-2017-19/11-09-17-Overseas-Territories-letter-to-David-Davis-MP.pdf>> accessed 8 September 2018.

<sup>57</sup> *Ibid.*

<sup>58</sup> Madison Marriage and Henry Mance, ‘Why British overseas territories fear transparency push’ *Financial Times* (London, 3 May 2018).

<sup>59</sup> *Ibid.*

<sup>60</sup> HL Deb 21 May 2018, vol 791, col 924.

<sup>61</sup> HL Deb 21 May 2018, vol 791, col 931.

## *Tax Avoidance and the UK post-Brexit*

The UK has, arguably, led the way on combating tax avoidance. At times, the UK's efforts at combating tax avoidance appear to have been stymied by the limitations placed on the UK by EU law, in particular, the jurisprudence of the CJEU. As is discussed above, the CJEU has substantially curtailed a number of the UK's efforts at combating tax avoidance, in particular in cases such as *Cadbury Schweppes*<sup>62</sup> and *Marks and Spencer*.<sup>63</sup>

Brexit, therefore, arguably creates new opportunities to introduce anti-avoidance measures which, at present, are not compatible with EU law. One possibility lowering the threshold for the application of CFC rules and the DPT to behaviour that is 'harmful', as opposed to the higher standard of 'abusive'. Another possibility might be the removal of loss relief for cross-border losses, or the imposition of new withholding taxes on interest, dividends, and royalties. Such approaches, however, would not be consistent with the broad tenor of British government policy in the field of taxation, in particular in the context of Brexit. The UK appears committed to using Brexit to enhance its competitiveness, in particular in the field of taxation. In addition to the planned cuts to corporation tax, there is evidence that government ministers and MPs view Brexit as an opportunity to introduce a litany of new reliefs and incentives.<sup>64</sup>

Nonetheless, the UK remains committed to BEPS and to tackling harmful tax practices, generally. As Judith Freedman, rightly, argues '[t]he tension between tax competitiveness and opposition to tax avoidance will not be removed by Brexit.'<sup>65</sup> It seems likely that the United Kingdom will continue to steer the course it has been following for decades: tightening rules on tax avoidance and evasion, while enhancing its own competitiveness through reductions in headline rates of tax.

## **Conclusion**

Despite efforts at economic diversification, many Caribbean states and territories remain highly reliant upon inflows of foreign capital. Consequently, Caribbean states and territories are particularly sensitive to the tax policies of capital exporting nations.

There has been a marked shift in attitude, in the EU in particular, away from the view of taxation as a tool for enhancing competitiveness and towards regarding tax competition as a threat to Member States' fiscal bases. The past two decades have seen numerous efforts at clamping down on tax avoidance and the use of tax havens. While many of these efforts, initially, achieved very little by way of results, recent measures, including the EU Action Plan have achieved a modest degree of success. While many of these measures have been met with grudging acceptance by haven states, in particular in the Caribbean, some measures have encountered outright resistance. Consequently, economic muscle has been flexed, and the threat of 'defensive measures' against haven states has been deployed.

Throughout this process, however, the United Kingdom has been demonstrably more sympathetic to Caribbean states and territories. This is likely due, in part, to the constitutional links, both extant and historic, between the UK and numerous Caribbean states and territories. It is possible that the UK's exit from the European Union will result in the Caribbean losing one of its most effective

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<sup>62</sup> *Supra* n.35.

<sup>63</sup> Case C-446/03, *Marks and Spencer* [2005] ECR I-10837.

<sup>64</sup> Edward Malnick, 'Sajid Javid says no deal would be opportunity for 'tax incentives' and attracting global talent' *The Telegraph* (London, 15 September 2018).

<sup>65</sup> Judith Freedman, 'Tax and Brexit' (2017) 33 *Oxford Review of Economic Policy* 79.

advocates in EU decision-making. Despite this sympathetic view, however, the UK remains willing to impose stricter tax rules upon its unwilling territories, and continues to implement sophisticated anti-haven legislation.

The prevailing trend in international tax law is clearly towards tougher anti-haven rules, with the states, both within the EU and beyond, willing to flex their political and economic muscle in order to compel haven states to fall into line. While Brexit may remove the brake on the pursuit of tougher anti-haven rules within the EU, it may be that, given the prevailing trend in international tax policy, movement towards such rules is inevitable either way.

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