Taxation Measures and the Free Trade Agreement

European Union – Australia Free Trade Agreement

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Introduction

Given the volume of trade and investment between Australia and the European Union (EU), a Free Trade Agreement (FTA) indeed had been long awaited. After Australia's recent FTA with the United Kingdom (UK) post Brexit,[1] EU member states which are amongst the biggest Australian export markets (e.g. the Netherlands), import markets (e.g. Germany, Italy) and in-bound investors (e.g. Luxembourg, Netherlands, Germany, France) are still not part of any free trade deal. To that end, the EU-Australia FTA is a welcome initiative.

In making suggestions, this submission confines to certain income tax measures in the FTA under negotiation.

Income tax measures and the EU–Australia FTA

Traditionally, very few tax measures constitute part of FTAs. This is consistent with the fact that the tax relations between the trade partners are generally governed by the double tax agreements (DTAs). For example, the WTO model under General Agreement on Trade in Services (GATS) provides that in relation to tax measures, DTAs will override the international trade law regime.[2]

Nevertheless, it has been witnessed that the modern FTAs have incorporated certain additional measures that seek to enhance the scope of such measures in FTAs beyond the WTO regime. The fact is illustrated by the tax measures added to some of the contemporary FTAs as follows:

(1): Certain tax measures have found locus in recent FTAs pursuant to the growing shift in the international tax order under the G-20/OECDS's Base Erosion Profit Shifting (BEPS) plan.[3] The bits and pieces of the BEPS anti-tax avoidance drive have crept into some new FTAs. For example, the

[1] Australia – United Kingdom Free Trade Agreement (UK–Australia FTA) (effective 31 May 2023) <https://www.dfat.gov.au/trade/agreements/in-force/aukfta/official-text>.

[2] General Agreement on Trade in Services (GATS) 1869 UNTS 183 (effective 1 January 1995) arts XXII(3), XIV(e).

[3] On BEPS plan, see, for example, OECD, *Addressing Base Erosion and Profit Shifting* (OECD Publications, 2013); OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publications, 2013); OECD, *BEPS 2015 Final Reports* (2015) <https://www.oecd.org/tax/beps-2015-final-reports.htm>.

signatories to the trade deals under EU-New Zealand FTA,[4] EU-Singapore FTA,[5] and the EU-UK FTA[6] have committed to certain aspects of anti-avoidance campaign.

(2): Under traditional FTAs, the scope of the expression "tax convention" confines to DTAs. However, recent FTAs have broadened the definition of "tax convention" that catches international commitments of parties beyond DTAs. For example, under UK–Australia DTA:

> "tax convention" means a convention for the avoidance of double taxation, or any other international taxation agreement or arrangement;[7]

This would mean that the expression tax convention referred to in the UK–Australia FTA not only catches DTAs but also extends to the other international tax commitments of parities such as the Multilateral Instrument (MLI),[8] convention on administrative assistance in tax matters,[9] and so forth.

Furthermore, certain recent FTAs have gone beyond the above definition to catch the international commitments of parties no matter even if those commitments are not exclusively confined to tax matters as, for example, the EU–New Zealand FTA states:

> "tax convention" means a convention for the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation that either any Member State, the Union or New Zealand are party to.[10]

The definition above also explicitly covers international tax instruments of parties such as New Zealand's Agreement with the United States on the Foreign Account Tax Compliance Act,[11] an agreement that arguably may not be a tax exclusive instrument since it also aims at curbing corruption, organised crime, and terror financing.

(3): A tax measure which relates the primacy of DTAs over FTAs is part of FTAs worldwide including those concluded by Australia. For example, the UK–Australia FTA states:

> Nothing in this Agreement affects the rights and obligations of the Parties under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention prevails to the extent of the inconsistency.[12]

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[4] Free Trade Agreement between New Zealand and the European Union art 10.66 (singed 9 July 2023, came into force 1 May 2024) <https://www.mfat.govt.nz/assets/Trade-agreements/EU-NZ-FTA/Chapters/0.-Title-Contents-and-Preamble.pdf>.

[5] EU–UK Trade and Cooperation Agreement, art 384 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf>.

[6] Free Trade Agreement between the European Union and the Republic of Singapore art 8.50(4) [2019] OJ L294/3.

[7] UK–Australia FTA (n 1), art 31.4(1).

[8] OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting < OECD Convention on Mutual Administrative Assistance in Tax Matters <https://www.taxpolicy.ird.govt.nz/tax-treaties/multilateral-convention-beps>.

[9] OECD Convention on Mutual Administrative Assistance in Tax Matters <https://www.taxpolicy.ird.govt.nz/tax-treaties/multilateral-convention-beps>.

[10] EU–New Zealand FTA, (n 4), art 25.3(1)(c).

[11] Agreement between the Government of the United States of America and the Government of New Zealand to Improve Tax Compliance and Implement FATCA (signed 12 June 2014, came into force 3 July 2014) <https://home.treasury.gov/system/files/131/FATCA-Agreement-NewZealand-6-12-2014.pdf>.

[12]

A parallel measure is likely to be part of the EU–Australia FTA under negotiation. However, it needs closer attention as discussed below.

In the case of EU, the Union does not have any DTA with Australia. These are the EU member states that (might) have DTAs with Australia. Therefore, the measure at hand would be applicable only to those EU member states that have already entered into DTAs with Australia. At present, only 18 out of 27 EU member states have DTAs with Australia, whereas nine others (Croatia, Cyprus, Estonia, Latvia, Lithuania, Luxembourg, Portugal, Romania, and Slovenia) do not have any DTA with Australia. It would therefore mean that in case of any tax-related issue between the parties, the matter cannot be resolved by the competent authorities under DTAs. Instead, such matters would need settlement under the usual dispute settlement apparatus of the FTA. It would therefore be inevitable to insert an enabling clause in the EU–Australia FTA which provides a recourse to resolution of any tax dispute under the standard dispute settlement mechanism of the FTA.

(4): Another income tax measure added to recent FTAs relates to authorisation of a party to take appropriate action in response to any arbitrary, unjustifiably discriminatory or inherently trade-restrictive measures of the other party. No doubt such powers of the affected party are part of most the FTAs worldwide that replicate the provisions of the footnote 6 to Article XIV(d) of GATS provision. However, certain recent FTAs have widened the scope of these powers of the affected party. For example, in the recently-concluded UK–New Zealand FTA[13] and UK–Australia FTA,[14] the scope of the powers of assigned to the affected party has been extended to the trade in goods sector (alongside the pre-existing trade in services sector under GATS).

(5): A couple of minor additions of tax measures in the recently-concluded UK–New Zealand FTA and the UK–Australia FTA are also worth attention for their potential to contributing positively to the bilateral trade and investment activities. For example, a measure on sharing tax information to the respective SMEs,[15] and another tax measure on the non-deductibility of expenses incurred in committing offences of bribery and corruption.[16]

In the end, I provide a couple of comments on the rationale behind such additions and their potential benefits. The key rationale of adding tax measures discussed above is founded on the changing international tax order pursuant to the BEPS plan. Aligning the international trade deals with the corresponding shifts in the international tax regime may increasingly become inevitable to achieve efficiency. Furthermore, the additions of tax measures discussed for the FTA under negotiation do not deviate from the WTO regime; instead, they supplement and further deepen the WTO objectives of liberalisation of trade and investment.

[13] Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (signed on 28 February 2022, came into force 3 May 2023) art 32.4(7)(e), note 5 <https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/NZ-UK-Free-Trade-Agreement.pdf>.
[14] UK–Australia FTA (n 1), art 31.4(6)(d), note 5.
[15] UK–New Zealand FTA (n 13), art 24.2(2),(3)(i); and UK–Australia FTA (n 1), art 19.2(3)(h).
[16] UK–New Zealand FTA (n 13), art 28.3(7); and UK–Australia FTA (n 1), art 28.9(5).