

# Critical Thinking in the Time of COVID-19: What To Consider Next From a European Tax Litigation and Enforcement Perspective

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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One Manhattan West  
New York, NY 10001  
212.735.3000

40 Bank Street  
Canary Wharf  
London, E14 5DS  
44.20.7519.7000

In this series, “Critical Thinking in the Time of COVID-19,” Skadden’s European tax practice examines the next stage of analysis for corporates that have begun digesting the economic and legal impact of COVID-19 on their businesses. In this edition, our London-based tax team covers the area of UK tax litigation and enforcement.

## Operation of the Courts

The UK has made temporary changes to the operation of the courts system.

While many of the changes are not tax case-specific, they are likely to directly impact all businesses that are currently conducting disputes with HM Revenue and Customs (HMRC) or that are likely to face potential disputes as a result of being unable to meet tax demands not deferred by the UK government as part of its crisis package.

## General Court Operation

Over the past two weeks, the lord chancellor and lord chief justice have issued multiple sets of guidance and emergency measures. Key measures concerning civil cases, which cover the majority of tax disputes, include the following:

- The civil court system has moved away from in-person hearings; by default, hearings are now conducted over the telephone or by video, wherever possible. The UK government is currently working to expand this capability. Remote hearings are already taking place (including in the UK Supreme Court) and advocates report that the process has worked very effectively. However, for those with approaching trial, preparing for remote hearings is likely to be very different than for in-person hearings, and interviewing witnesses and preparing witness statements or pleadings will likely become more challenging over the next few months, given the mandate to avoid nonessential gatherings of more than two persons.
- The lord chief justice’s current guidance states that conducting hearings remotely will not always be possible and that those who must attend court in person should take precautions. It is unclear whether this advice will be amended in light of the “lock-down” imposed on 24 March 2020; indeed, as of 30 March 2020, over half of all court and tribunal buildings were closing temporarily, with only 158 court buildings remaining open in order to hold the most essential hearings. For now, parties to pending cases must wait to see if they fall into that category and, if so, whether there is space in the system to schedule a hearing date.

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- Effective 19 March 2020, the fee for requesting an adjournment can be waived in certain cases where COVID-19 is a factor. Parties looking to delay their cases should consider taking advantage of this option, as COVID-19 issues are likely to affect every area of preparation for trial.

## Specific Tax Court Measures

In response to the COVID-19 pandemic, new pilot practice directions (the Practice Directions) have been put in place that grant new case management powers to the Tax Chambers of the First-Tier Tribunal (the FTT) and Upper Tribunal. These Practice Directions, amongst other things:

- Increase the ability of tribunals to conduct cases without a hearing on the basis of papers.
- Mandate that cases should be heard remotely, where it is reasonably practicable to do so and in accordance with the overriding objective.
- Mandate that tribunals take into account COVID-19 when considering applications for the extension of time for compliance with directions and the postponement of hearings.

All these factors need to be taken into account when preparing for a case and considering a possible application to the court for further directions.

Most notably for tax cases, effective 24 March 2020, all proceedings are stayed in the FTT for a period of 28 days and all time limits in current proceedings are extended by the same period. Furthermore, the president of the FTT stated that until further notice:

“[T]here will be no hearings at which persons are physically present in any proceedings in the Tax Chamber of the [FTT]. A hearing involving physical attendance may take place only with the permission of the [president of the FTT] or his delegate. Such permission will only be granted if it is a priority case and necessary to do so in all the circumstances.”

## Timelines

When making the decision to litigate, taxpayers should consider the highly uncertain timeframe — and therefore cost — for the period of the hearing, given the issues discussed above, as well as

the potential inability of HMRC or its solicitors to provide or make available material or personnel to the court in a timely fashion.

In some cases it may be sensible to approach HMRC with a view to a mutual agreement regarding a deferred action, without involving the court’s directions, at least for the next six to eight weeks.

## Tax Enforcement and Liability

In an attempt to support business, the UK government has suspended VAT payments for all businesses and income tax payments for self-employed persons.

- Businesses are not required to make any VAT payments to HMRC from 20 March 2020 to 30 June 2020 and they have until the end of the 2020/21 tax year to pay any liabilities accumulated during this period. It is not necessary to make an application to HMRC to make use this measure.
- Self-employed persons with income tax payments due on 31 July 2020 can defer such payments until 31 January 2021. As with VAT deferrals, no application needs to be made to HMRC to make use of this measure and no penalties or interest for a payment received by 31 January 2021 will be charged.

The UK government has also expanded the “Time to Pay” scheme to all businesses or self-employed persons who are in financial distress as a result of COVID-19 and have outstanding tax liabilities or likely will be unable to meet a payment of tax that is, or soon will, be due.

It is yet to be seen whether this attitude to revenue collection expands into a slower enquiry or enforcement process on outstanding disputes with HMRC. No statements have yet been made by HMRC or the UK Treasury about ongoing enforcement actions.

However, we expect that disputes that are underway will slow down in the face of HMRC’s greatly increased workload. We continue to monitor the situation closely and in some cases will approach HMRC to discuss timetabling issues in relation to ongoing enquiries and enforcement actions. Deadlines for providing information, in particular, may require extension by mutual consent, and we recommend corporates look closely at opportunities in this regard, especially if their response times are likely to be hampered by lack of access to office facilities and files.

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## Contacts

### **James Anderson**

Partner / London  
44.20.7519.7060  
james.anderson@skadden.com

### **David M. Edwards**

Partner / London  
44.20.7519.7287  
david.edwards@skadden.com

### **Alex Jupp**

Partner / London  
44.20.7519.7224  
alex.jupp@skadden.com

### **Jonathon J. Egerton-Peters**

Counsel / London  
44.20.7519.7159  
jonathon.egerton-peters@skadden.com

### **Joshua Atkinson**

Associate / London  
44.20.7519.7007  
joshua.atkinson@skadden.com