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RECENT DEVELOPMENTS IN INTERNATIONAL TAXATION

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1 INTRODUCTION

The ongoing "Brexit" process, and its accompanying domestic political upheaval, has remained the dominant story in the UK over the past year and shows no signs of abating over the next 12 months.

The repeated failure of the UK government to secure a Parliamentary majority in favour of the Withdrawal Agreement negotiated with the EU resulted in a six month extension to the "Brexit" deadline (currently scheduled for 31 October 2019) and the resignation of the Prime Minister.

Both candidates to be the next Prime Minister of the UK openly accept the possibility of a "no deal Brexit", whilst the EU state that they are not prepared to negotiate any changes to the version of the Withdrawal Agreement published in November 2018. It remains unclear whether there is a majority in the UK Parliament for any of the possible Brexit outcomes.

With sufficient Parliamentary support, the next Prime Minister could call a General Election to seek a new mandate. Such an election could in turn result in a number of different outcomes, including another minority Conservative government (having to rely again on the support of minority political parties with their own Brexit agenda) or arguably the most left-wing Labour government for at least 40 years taking power.

It is impossible to predict what this will all mean for the UK tax landscape over the next 12 months. However, it seems likely that any one of the many possible political outcomes will impact significantly on domestic tax policy, whether, for example, to maximise the benefit of any Brexit "deal dividend", to minimise the impact to the economy of a "no deal" Brexit or to implement a new Labour government's much wider proposed reform to the UK tax system.

2 DEVELOPMENTS IN UK TAX OVER THE PAST 12 MONTHS

2.1 Anti-avoidance

Anti-fragmentation rules: New rules targeting "profit fragmentation arrangements" by companies and individuals came into force in April 2019. These rules sit alongside a vast array of other anti-avoidance provisions capable of being used by the UK tax authorities to target the artificial diversion of business profits offshore. In contrast with certain other anti-avoidance regimes, there is no *de minimis* exemption, and so UK SMEs involved in any cross-border arrangements must consider the rules carefully.

Controlled Foreign Company ("CFC") rules: Minor changes were made to the UK's existing CFC rules in order to ensure they were fully compliant with ATAD from 1 January 2019. In addition, the EU commission announced in April 2019 that it had concluded its state aid investigation into the foreign company exemption in the UK CFC rules and had found that it amounted to illegal state aid in part. In June 2019, the UK government appealed against the decision on a number of grounds. Any businesses potentially affected by the ruling need to consider whether to make their

own appeals, particularly if they have different grounds of appeal to those raised by the UK government.

Diverted profits tax ("DPT") facility: The UK tax authorities launched a new facility in January 2019 that is intended to encourage a more open and collaborative approach to resolve cases where the diverted profits tax regime may apply. The authorities have promised the attention of a dedicated, specialised team and faster turnaround times in a bid to encourage more multinational enterprises to start a dialogue on the complex issues involved in any DPT assessment.

EU Anti Tax Avoidance Directive ("ATAD"): In addition to the CFC rules (see below), minor changes have also been made to the UK's existing hybrid mismatch and exit charge regimes with effect from 1 January 2020 to ensure they comply with ATAD.

'No Safe Havens' paper: The UK government published the third iteration of its strategy for offshore tax compliance in March 2019. The report affirms its commitment to challenge offshore non-compliance through the pursuit of three main aims: (i) leading internationally – promoting collaboration between international tax authorities and cross-border information sharing; (ii) assisting compliance – encouraging taxpayers and their agents to voluntarily disclose to regularise their tax position and mitigate exposure to penalties; and (iii) responding appropriately – exploiting ever-increasing data on tax payers' overseas arrangements to take appropriate civil and criminal action in response to offshore non-compliance.

Offshore receipts in respect of intangible property: From 6 April 2019, any person neither resident in the UK nor in a jurisdiction with which the UK has a double tax treaty that includes a non-discrimination provision is subject to UK income tax on any receipts in respect of intangible property that enables, facilitates or promotes the sale of goods or services in the UK. This charge was originally contemplated as a new form of withholding tax on royalties, but for various reasons this approach has been dropped.

Permanent establishment: The definition of permanent establishment under domestic law has been amended with effect from 1 January 2019 in line with the relevant BEPS recommendation in order to deny access to the exempt activities provision when a business activity has been artificially fragmented to avoid creating a permanent establishment. This is to ensure that the changes made to the permanent establishment definition in double tax treaties pursuant to the MLI (see paragraph 2.3 below) have effect as intended.

2.2 Taxation of immovable property

Non-resident capital gains tax ("CGT"): From 6 April 2019, all non-UK residents disposing of direct or indirect interests in UK real estate fall within the scope of UK CGT. Prior to this change, most non-UK residents were only within the scope of UK CGT if they held UK residential property. The impact of the change, which brings the UK into line with most OECD jurisdictions, has been lessened by rebasing commercial property to its April 2019 market value. There are specific rules dealing

with the position of non-resident collective investment vehicles holding direct or indirect interests in UK real estate that are intended to avoid multiple layers of charge.

Non-resident corporation tax: Currently, non-UK resident companies holding UK real estate are subject to income tax at the basic rate (currently 20%) on UK property income. The Finance Act 2019 has introduced new rules to bring companies of this nature within the scope of UK corporation tax, rather than income tax, which will come into effect from 1 April 2020. As noted below, the UK corporation tax rate from 1 April 2020 will be 17%.

2.3 Cross-border

Intra-group transfers: Various provisions within the UK tax code grant relief for transfers between group entities provided the transferee is within the scope of UK tax. In contrast, if the transferee is outside the scope of UK tax, the transfer will be a taxable disposal. In *Gallaher Ltd v HMRC* [2019] UKFTT 0207 (TC), the First-tier tribunal found that these provisions were incompatible with the EU principle of freedom of establishment in respect of their application to the transfer of shares by a UK company to its Dutch resident indirect parent, with the effect that no UK tax charges should arise (even on a deferred basis). Due to the wider potential consequences of this decision, it is likely that it will be appealed by the UK tax authorities.

OECD Multilateral Instrument ("MLI"): The MLI came into force in the UK on 1 October 2018. To the extent any UK tax treaty counterparties have completed a similar implementation process and the treaty is a "covered tax agreement", the MLI has effect for withholding tax from 1 January 2019 and, for UK income tax and corporation tax, from 6 April 2019 and 1 April 2019 respectively. The UK tax authorities have helpfully begun publishing "synthesised texts" of affected double tax treaties that incorporate the MLI provisions, including the treaties with Australia, Finland, France, Singapore and the Slovak Republic.

3 NOTABLE POTENTIAL FUTURE DEVELOPMENTS

Brexit: The current version of the Withdrawal Agreement anticipates a transition period up to December 2020 to enable a more gradual winding-down of current EU-UK arrangements. EU law (including any provisions relating to tax) will continue to apply during this period. In the event of a "no deal" Brexit, the UK has in many areas sought to incorporate existing EU provisions into the domestic tax code in order to minimise disruption to business. However, whilst the position as far as the UK is concerned may remain to a greater or lesser extent unchanged, the position of the relevant Member State will depend on that state's approach to the UK post-Brexit (subject to any applicable tax treaty). As such, businesses operating in the UK and EU are likely to have to navigate two (or more) separate systems, increasing the overall compliance burden, as well as the risk of double taxation.

Corporation tax rate: The rate of corporation tax in the UK is proposed to reduce from 19% to 17% from April 2020.

Digital services tax: The UK government is taking unilateral action by introducing a digital services tax of 2% from April 2020 on revenues from social media platforms, search engines or online marketplaces that are linked to the participation of UK users. Revenue thresholds (relevant global annual revenue of at least £500m and annual revenue linked to UK user participation of at least £25m) mean the new tax is only likely to apply to larger multinationals (going some way to satisfying the public clamour for these companies to pay their "fair share" of tax). There is a safe-harbour intended to assist loss-making or low profit margin businesses. The regime is also intended to be an interim measure until a multilateral solution is agreed and implemented.

EU tax disclosure rules: Despite Brexit, the UK government currently intends to introduce additional disclosure obligations in compliance with the "DAC6" directive. Although the earliest deadline for filing disclosures is expected to be 31 August 2020, it is retrospective in effect and any cross-border transactions that have taken place since 25 June 2018 are potentially caught.

Stamp Duty Land Tax ("SDLT") surcharge: The government has consulted on a new 1% SDLT surcharge on the acquisition of residential property in England and Wales by non-UK residents to be introduced in a "future Finance Bill". In addition to the existing 3% SDLT surcharge that can apply in certain circumstances, this would increase the top rate of SDLT on residential property to 16%.