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The year in review

***Ben Fryer** and **Barbara Onuonga** provide an overview of some of the key UK tax developments in 2019 with potential implications for the financial services sector.*

Amidst Brexit-related uncertainty and attendant political turmoil on the one hand, and wider proposals to re-write the principles of international taxation – in particular as they apply to the "digital economy" and multinational businesses – on the other, UK tax policy has followed a somewhat tentative path in 2019. It has been a case of not wanting to rock the boat too much, whilst being seen to be keeping up with the competition.

Unusually, there has been no Budget in 2019 – the 2019 Budget had been expected to take place on 6 November 2019, but this was expressed to be conditional on the UK leaving the EU on 31 October 2019, with a deal. Thus, following Parliament's vote on 19 October 2019 to delay any approval of a Brexit deal until detailed withdrawal legislation is passed (resulting in the extension of the Brexit deadline until 31 January 2020), the Chancellor of the Exchequer cancelled the proposed Budget.

We did, however, see Finance Act 2019 receive Royal Assent on 12 February 2019, and draft Finance Bill 2019–20 legislation and other materials published on 11 July 2019, including draft legislation and guidance for the UK's digital services tax (DST), plus draft legislation for a number of other, mainly previously announced, measures that are likely to be of interest to readers.

This annual review will summarise the key tax developments – in UK tax legislation and English case law – over the course of 2019 with potential relevance to the financial services sector.

Domestic legislation

UK real estate tax – implications for funds

Readers will no doubt be aware of the significant changes to the taxation of non-resident investors in UK real estate with effect from 6 April 2019, initiated by consultation papers in 2017 and enacted in Finance Act 2019.

Broadly, non-UK residents will now be taxable on gains on disposals of directly held interests in any type of UK land. Non-UK residents may also be taxed on any gains made on the disposals of significant interests in entities that directly or indirectly own interests in UK land. For tax to be imposed, generally the entity being disposed of must be "property rich" (broadly, where at least 75 per cent of the gross market value of the entity's qualifying assets at the time of disposal is derived from UK land), and the non-UK resident must be a "substantial investor" (broadly, where at the date of disposal or at any time within two years prior to disposal, the non-UK resident holds, or has held directly or indirectly, at least a 25 per cent interest in a property rich entity).

The default position for collective investment vehicles (CIVs) will be that they are treated for capital gains purposes as if they were companies. The CIV definition in the legislation is broad and should capture most UK property rich

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Jersey Property Unit Trusts (JPUTs) and Guernsey Property Unit Trusts (GPUTs), as well as widely-held offshore funds.

An investment in such a fund will be treated as if the interests of the investors were shares in a company, so that where the fund is UK property rich, a disposal of an interest in it by a non-UK resident investor will be chargeable to UK tax under the new rules. CIVs may therefore be subject to corporation tax as a result of being treated as companies.

Non-UK resident investors in CIVs that are UK property rich will be chargeable on gains on disposals of an interest in a UK property rich CIV regardless of their level of investment. They will not benefit from the 25 per cent ownership threshold.

The 25 per cent substantial indirect interest test may be re-applied for certain funds where the CIV is only temporarily UK property rich. In these cases, the fund will need to meet a genuine diversity of ownership or non-close test, and be targeting UK property investments of no more than 40 per cent of fund gross asset value in accordance with its prospectus or other fund documents.

CIVs that are already treated as transparent for UK tax purposes will be able to elect (irrevocably) to be treated as a partnership for the purposes of capital gains (and related provisions), thereby ensuring that the investors are taxed on disposals of the underlying assets of the partnership.

Alternatively, under an election for exemption, the CIV itself will not suffer tax on either direct or indirect disposals on the proportion of any gains attributable to the CIV holding UK land. The investors remain taxable on any disposal of an interest in a CIV that is a UK property rich entity. The election for exemption is only available to non-UK resident companies that are the equivalent of UK real estate investment trusts (REITs) and some partnerships. An extensive set of qualifying criteria needs to be met in order to be able to make the election for exemption. Where a CIV ceases to meet any of the qualifying criteria, this will trigger a deemed disposal and reacquisition of the interests of all the investors in the CIV.

On 17 September 2019, HMRC published, for consultation, draft regulations (and draft explanatory notes) to amend the UK property rich CIV rules, generally with effect from 6 April 2019 in relation to disposals made on or after that date.

Broadly, the draft regulations seek to: (1) clarify that CIVs constituted before 6 April 2019 may meet the genuine diversity of ownership condition and that exempt investors (for example, pension funds) continue to benefit from exemption if they invest in CIVs through holding vehicles; (2) refine the definition of what constitutes a CIV so that only the principal company of a non-resident group falls within the definition; and (3) give HMRC the ability to require CIVs that make transparency elections to file partnership returns for disposals and to provide investors' details on the making of a transparency election.

Hybrid capital instrument regime

A new hybrid capital instrument (HCI) regime came into force in place of the regulatory capital securities regime from 1 January 2019. Prior to 1 January 2019, the taxation of regulatory capital instruments issued by banks and insurers was governed by the Taxation of Regulatory Capital Securities Regulations, SI 2013/3209 as amended (the RCS regulations). The analysis under the RCS regulations broadly required a determination that the instrument met the regulatory capital requirements and that a targeted anti-avoidance rule was not applicable.

Pursuant to the new HCI regime, the terms and conditions of each hybrid capital instrument will need to be analysed to ensure that it meets the definition of hybrid capital instrument for tax purposes. The definition of hybrid capital instruments is detailed in the new section 475C of the Corporation Tax Act 2009. This provision states that a loan relationship is a hybrid capital instrument if:

- it makes provision under which the debtor can defer or cancel a payment of interest;
- it has no other significant equity features; and
- the debtor has made an election in respect of the loan relationship which has effect for the period. This election is ineffective where there are arrangements, the main purpose, or one of the main purposes, of which is to obtain a tax advantage for any person.

Section 475C(2) Corporation Tax Act 2009 provides that a loan relationship will have "no other significant equity features" if:

- it gives neither voting rights in the debtor nor a right to exercise a dominant influence over the debtor;
- it contains no provision for altering the amount of the debt other than, in qualifying cases only, conversion into the debtor's (or quoted parent's) ordinary share capital or a reduction in the amount of the debt (provided that, where the reduction is temporary, any subsequent write-back cannot increase the debt beyond its original amount); and
- the creditor is only entitled to receive more than interest and repayment of the debt following conversion, in qualifying cases, into the debtor's ordinary share capital or the share capital of its quoted parent company.

A much more limited class of tax advantages apply to HCIs than to regulatory capital securities under the RCS regulations. For example, there is now no general rule that any coupon payment on an HCI is not a distribution for tax purposes – as would have been the case under the RCS regime. HCIs have to follow the general distribution provisions pursuant to Part 23 of the Corporation Tax Act 2010 with some limited modifications (including that a HCI cannot be an equity note and the entitlement to defer or cancel a payment of interest is ignored when determining whether a HCI is results dependent). The HCI technical note refers to HMRC Brief 24/14, which sets out HMRC's views about whether provisions to "bail in" an instrument issued by a financial institution make that instrument results dependent. This may be helpful in the distribution analysis but does raise issues in relation to reliance on HMRC guidance in order to interpret primary legislation.

Capital loss carry forward restriction

The corporate income loss restriction was introduced with effect from 1 April 2017. Under the relevant rules, only 50 per cent of a company's profits or gains in an accounting period can be offset by carried forward income losses, subject to the application of a £5 million deductions allowance.

Capital losses were exempted from these rules. However, from 1 April 2020, draft legislation contained in Finance Bill 2019–20 will restrict companies' use of carried-forward capital losses to 50 per cent of the capital gains arising in an accounting period, subject to the existing £5 million deductions allowance which a group will now have to allocate between capital as well as income losses. It will apply to gains arising on or after 1 April 2020 but the restriction will apply to all carried-forward capital losses, whenever arising. Current year losses can be utilised without restriction.

Anti-forestalling measures have been put in place to stop companies from incurring chargeable gains before 1 April 2020. The anti-forestalling provision states that if a company has an accounting period ending before 1 April 2020, a deduction in respect of a chargeable gain will not be allowed if the main purpose or one of the main purposes of the relevant arrangements (entered into on or after 29 October 2018) is to secure a tax advantage by reason of the capital loss restriction not having yet come into effect.

Corporate interest and debtor relationships

The Corporate Interest Restriction (CIR) rules were introduced in Finance Act (No 2) 2017. The essential aim of the CIR rules is to restrict a group's deductions for interest expense and other financing costs to an amount which is commensurate with its activities taxed in the UK, taking into account how much the group borrows from third parties.

Schedule 11 to Finance Act 2019 makes a number of changes to the CIR legislation that is contained in Taxation (International and other Provisions) Act 2010. Most of the changes made by Schedule 11 have been made to ensure that the legislation works as it was intended, in response to industry representations. A summary of the salient changes is as follows:

- Unused interest allowance and an excess debt cap amount can be carried forward where a new holding company is inserted between the ultimate holding company of the worldwide group and its shareholders;
- The public infrastructure exemption rules have been amended to ensure that a company can be a "qualifying infrastructure company" if it holds a pension fund asset and/or deferred tax asset in respect of qualifying infrastructure activities;
- An amendment has been made to ensure that REITs do not suffer a double restriction where the financing-cost ratio test results in any excess being charged to corporation tax; and
- The calculation of "adjusted net group-interest expense" has been amended to ensure that it deals correctly with capitalised interest and that debt releases with a connected company outside of the group do not distort the calculation.

The majority of the changes take effect for periods of account of worldwide groups beginning on or after 1 January 2019.

Digital taxation

The UK will introduce a DST from 1 April 2020 as a "temporary" response to the tax challenges arising from digitalisation, with a proposed 2 per cent tax on UK revenues (not profits) on specific digital businesses. Draft legislation for the DST has been included in Finance Bill 2019–20.

The DST will be levied on "in-scope activities", namely (a) social media platforms, ie targeting revenues from businesses that monetise users' engagement with the platform; (b) search engines, ie targeting platforms that generate revenue by monetising users' engagement with the platform and with other closely integrated functions; and (c) online market places, ie targeting businesses which generate revenue by using an online market place platform to allow users to advertise, list or sell goods and services on such platform. Certain businesses are specifically excluded from the definition of in-scope activities, including the provision of financial or payment services, the sale of own goods online and the provision of online content.

High financial thresholds are proposed for the DST. The tax will only be payable by businesses whose global revenues from the in-scope activities are at least £500 million. Tax will not be levied on the first £25 million of revenue from in-scope business activities linked to the participation of UK users. Additionally, there is a safe harbour provision for low margin and loss-making businesses, which allows for a reduced effective rate of tax to be paid.

Entrepreneurs' Relief

A number of changes were introduced by Finance Act 2019 relating to Entrepreneurs' Relief (ER), namely with respect to: (i) an increase in the qualifying holding period; (ii) dilution measures; and (iii) the 5 per cent shareholding test.

In order to be eligible for ER on interests in companies, a minimum shareholding of 5 per cent and director or employee status in the company must be met throughout a minimum period immediately preceding a disposal of shares or securities. This period increased from 12 to 24 months in respect of disposals on or after 6 April 2019.

As the tests for ER need to be satisfied for a two-year period prior to disposal, ER could cease to be available if an individual's shareholding is diluted below 5 per cent due to a company issuing further shares. From 6 April 2019, if the further share issue is made for commercial reasons, ER will remain available on the gain accrued on shares or securities up to the point an individual's shareholding falls below 5 per cent due to the share issue.

The 5 per cent shareholding test used to be based on a requirement for an individual to own at least 5 per cent of the ordinary share capital in the company, and by virtue of that shareholding, to be able to exercise at least 5 per cent of the voting rights in the company. The test has now been extended to include a requirement for the individual to be entitled to receive either: (i) 5 per cent of the dividends and assets available to "equity holders" on a winding-up of the business; or (ii) 5 per cent of the sale proceeds due to holders of ordinary shares on a disposal of the company.

Stamp duty

Draft legislation has been published in Finance Bill 2019–20 proposing changes to the calculation of stamp duty and Stamp Duty Reserve Tax for certain connected company transactions. The legislation extends the market value rule now at sections 47 and 48 Finance Act 2019 (which applies in respect of transfers of listed shares or securities to connected companies) to transfers of unlisted securities to connected companies. Such transfers will be caught by the extended market value rule where there is an issue of shares by way of (part) consideration for the transfer.

Prior to the proposed extension, the stamp duty payable on the transfer of UK shares in a share-for-share exchange would be calculated by reference to the value of shares issued in consideration. The extension of the market value rule to transfers of unlisted securities to connected companies is intended to discourage "swamping", ie tax planning whereby the value of newly issued consideration shares is low in the context of share-for-share exchanges.

Profit fragmentation

Schedule 4 of the Finance Act 2019 introduced new rules to target arrangements through which a UK resident carrying on a business transfers a disproportionate part of their profits to offshore persons or entities in low-tax jurisdictions and whereby a related individual receives, or could receive, some kind of benefit from the value transferred.

Broadly, these rules apply where: (i) there is a provision between a UK-resident person or entity and an overseas person or entity; (ii) as a result of the provision, value is transferred from the UK-resident person or entity to the overseas person or entity which derives from the profits of a business chargeable to UK income tax or corporation tax; (iii) the value transferred exceeds what would be agreed between independent parties acting at arm's length; (iv) a related individual is able to enjoy the profits that have been diverted; and (v) there is a tax mismatch (very broadly, the tax payable overseas is less than 80 per cent of the reduction in UK tax) and it is reasonable to conclude that the main purpose, or one of the main purposes, for which the arrangements were entered into was to obtain a tax advantage. These new rules came into effect in respect of value transferred on or after 1 or 6 April 2019 for corporation tax and income tax purposes, respectively.

Offshore receipts in respect of intangible property

Also by virtue of provisions contained in Finance Act 2019, new "offshore receipts in respect of intangible property" (ORIP) rules took effect from 6 April 2019. The new rules are designed so that a charge to UK income tax will arise to certain non-UK residents (broadly those resident in jurisdictions that do not have a double tax treaty that contains a non-discrimination article) in respect of income from intangible property that is referable to sales of goods or services in the UK, where the intangible property (or rights over that property) are held in a no- or low-tax jurisdiction.

A tax exemption applies where the tax payable by the non-UK resident in relation to income that is referable to the sale of goods or services in the UK is at least 50 per cent of the UK income tax charge that would otherwise arise. In addition, there is a £10 million de minimis UK sales threshold. Targeted anti-avoidance rules have effect for arrangements entered into on or after 29 October 2018.

Group financing exemption in the UK CFC regime

The Finance Act 2019 contains changes to the UK taxation of controlled foreign companies (CFCs) taking effect from 1 January 2019. The CFC regime introduced in 2012 operates by reference to "gateways", through which CFC income must pass if it is potentially to be subject to a CFC charge. For non-trading lending activity in low-taxed CFCs, income can pass through a relevant "sub-gateway" either if the capital being deployed has been sourced from the UK part of the group, or if the "significant people functions" (SPFs) in respect of the lending activity are located in the UK. Formerly, the so-called "group-financing exemption" could prevent income on certain loans (broadly, loans to other non-UK members of the relevant group) from passing through either sub-gateway. From 1 January 2019, the exemption only protects against the UK capital sub-gateway, and not the UK SPFs one.

Intangible fixed assets

The UK Government undertook a consultation in early 2018 on the corporate Intangible Fixed Assets (IFA) regime. The scope of the consultation was to review the IFA regime and to consider potential reforms.

Finance Act 2019 introduced two important changes to the IFA regime; namely, the ability to defer IFA degrouping charges for "relevant disposals", and a reinstatement of amortisation relief for goodwill and other customer-related intangibles in the context of IP-intensive business acquisitions. This reform will be welcomed, although more reform will likely be required involving the alignment of the rules between pre and post-2002 intangibles.

Joint and several liability of directors on corporate insolvency

On 11 April 2018, the government published a discussion document entitled "Tax Abuse and Insolvency". Following a consultation in respect of the discussion document, draft legislation has been included in Finance Bill 2019–20 to allow HMRC to make directors and other persons involved in tax avoidance or evasion jointly and severally liable for a company's tax liabilities, if there is a risk that the company may enter insolvency.

Directive on Administrative Cooperation

The Council Directive 2018/822 of 25 May 2018 amending the 2011 EU Directive on Administrative Cooperation (DAC 6) envisages mandatory reporting of cross-border arrangements affecting at least one EU member state that fall within one of a number of "hallmarks". The reporting obligations fall on "intermediaries", a broadly defined term that potentially catches a number of different players involved in reportable arrangements, including banks, lawyers, accountants, other advisers and corporate services companies.

On 22 July 2019, HMRC published draft regulations and a consultation document with respect to DAC 6, which the government has committed to implementing, Brexit notwithstanding. The draft regulations closely follow the Directive itself and refer back in various places to definitions and the operative provisions of DAC 6. It should be noted, however, that the draft regulations are in some respects wider than DAC 6, in particular in the way they define "tax advantage" as potentially catching a tax advantage anywhere, and not just in the jurisdictions to which DAC 6 applies.

HMRC's views on certain aspects of the UK's implementation of DAC 6, as expressed to date in the consultation document, also throw up some significant points of interest. For example, HMRC has stated that for an arrangement to "concern" multiple jurisdictions, those jurisdictions must be of some "material relevance" to the arrangement – so, it is understood that HMRC would not view a non-UK resident acting solely through its UK permanent establishment and entering into an arrangement with a UK counterparty, with no implications for jurisdictions other than the UK, as a reportable cross-border arrangement. HMRC also expressed the somewhat controversial view that the legal professional privilege exclusion from reporting will not exempt lawyers from making reports in all cases.

The UK implementing regulations will come into force on 1 July 2020, but will apply to reportable cross-border arrangements the first step in the implementation of which took place on or after 25 June 2018. It is expected that legislation will be formally enacted by the end of this year. The first notifications will be due in August 2020.

Domestic case law

***HMRC v Joint Administrators of Lehman Brothers International* [2019] UKSC 12**

The Supreme Court's decision in this case reviews the statutory background to the yearly interest provisions and case law going back to *Bebb v Bunny* (1854) 1 K&J 216. Agreeing with the Court of Appeal, the Supreme Court found that statutory interest paid under the Insolvency Rules 2016 rule 14.23(7) is yearly interest subject to a deduction of tax at source under section 874 Income Tax Act 2007 (ITA).

The administration of Lehman Brothers had generated an unprecedented surplus after payment of all provable debts, amounting to approximately £7 billion, of which circa £5 billion was estimated to be payable by way of statutory interest (before any deduction of income tax). The periods in respect of which interest was payable under rule 14.23(7) ranged from around four years (which expired when the first interim distribution to proving creditors was made) to five-and-a-half years, when the final dividend to creditors was made. The pertinent question was whether or not statutory interest payable by administrators to creditors out of a surplus is "yearly interest".

The Supreme Court noted that the statutory interest in this case shared many of the relevant features with the contractual provision for interest in *Chevron Petroleum (UK) Ltd v BP Petroleum Development Ltd* [1981] STC 689. The relevant question in this case was: "what period of durability is to be identified for interest payable in a single lump sum as compensation for the payee being out of the money in the past, for the purpose of deciding whether it is to be treated as yearly interest?" Applying the principles in *Hay (1924)* VIII TC 636, the Supreme Court concluded that the relevant period was the period in respect of which the interest was calculated, because that was the period during which the loss of the use of money had been incurred, for which the interest was compensation.

It is significant that the Supreme Court identified the categories of yearly interest assessment as the determination of whether: (a) interest which accrues over time is yearly interest; and (b) an entitlement to money described as interest but which does not accrue over time can be regarded as yearly interest. This case concerned the second category as the statutory interest did not arise on borrowed money, nor did it accrue over time. Accordingly, this decision may be relevant to consideration, for example, of whether interest paid for late completion of a property or share purchase is yearly interest, or whether interest payable on a judgment (for the period between the damages occurring and judgment being given) is yearly interest.

***Stephen Warshaw v HMRC* [2019] UKFTT 268 (TC)**

In this case, the First-tier Tribunal (FTT) found that preference shares could make up part of the shareholder's holding in "ordinary share capital" for the purposes of the application of ER. "Ordinary share capital" is defined in section 989 of ITA as follows:

> *"ordinary share capital, in relation to a company, means all the company's issued share capital (however described), other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits."*

The issue was whether the preference shares held by Mr Warshaw were ordinary share capital as defined by section 989 ITA. If so, Mr Warshaw would have been entitled to ER on the disposal of his shares. It was accepted that the relevant shares gave a right to a dividend and that there were no other rights to share in the profits. Accordingly, the key consideration was whether the preference shares had a right to dividends at a fixed rate. The preference shares carried the right to a fixed (10 per cent) and cumulative dividend. If there were insufficient reserves to pay dividends in a particular year, the company's articles of association provided that payment would be deferred to a subsequent year. In this event, the dividend would constitute 10 per cent of an increased amount, being the sum of the subscription price and the aggregate unpaid dividends. The unpaid dividend was compounded until it was eventually paid.

HMRC argued that as the rate of the dividend remained fixed, the shares could not be ordinary share capital. However, the tribunal agreed with Mr Warshaw's counsel and stated that both the percentage element and the amount to which it is applied to identify the rate of the dividend need to be taken into account. Accordingly, if, as in the present case, at the time the preference shares are issued the articles of association provide that only one of these, the percentage element, is fixed and the amount to which that percentage is to be applied may vary, those shares cannot be regarded as having a right to a dividend at a fixed rate and are therefore ordinary share capital as defined by section 989 ITA.

This case is significant because most cumulative preference shares provide for compounding and accordingly may fall within the definition of ordinary share capital. This is particularly relevant in determining the percentage of ownership of ordinary share capital for grouping purposes in addition to the application of particular tax reliefs including ER, the substantial shareholding exemption and the dividend exemption rules.

HMRC v Hargreaves Lansdown Asset Management [2019] UKUT 246 (TCC)

In this case, the Upper Tribunal (UT) found that payments of bonuses by an investment platform were "annual payments" and charged to tax pursuant to section 683 of the Income Tax (Trading and Other Income) Act 2005.

As a "platform service provider", Hargreaves Landsdown (HL) would present a range of investment products offered by investment providers to retail investors and help its clients to invest in their chosen products. In order to pass on part of the benefit of a reduced annual management charge to investors, HL would pay a loyalty bonus. HMRC considered that such loyalty bonuses were "annual payments" and that HL was required to withhold and account for UK income tax on any loyalty bonuses.

The Upper Tribunal (UT) stated that the term "annual payment" is not defined in legislation and its meaning is to be found in case law. It was accepted that the payments were income payments and that they were paid under a legal obligation. The two issues were therefore whether the payments were recurrent and represented "pure income profit".

The UT held that the loyalty bonuses were recurring as they were paid on a monthly basis, under a binding contractual obligation on a continuing basis. The UT rejected HL's proposition that the necessary quality of recurrence was not present because HL can reduce the amount of a loyalty bonus to zero. The UT also noted that the relevant arrangements were marketed as long-term investments and as such it was unlikely that investors would dispose of their investments and cease to be entitled to the loyalty bonus within a short time period.

In relation to the "pure income profit" question, the UT concluded that a payment constitutes pure income profit if it can be established that such payment is a taxable receipt in the hands of the recipient without any deduction for expenses. In order to reach a determination, the UT analysed the relevant contractual arrangements. It is interesting to note that the UT's decision focused on its overall impression of the entirety of the commercial arrangements.

Gallaher Ltd v HMRC [2019] UKFTT 207 (TC)

In *Gallaher*, the FTT considered the compatibility with European Union law of the limitation to UK corporation taxpayers of the relief in the "no-gain no-loss" provisions contained in section 171 of the Taxation of Capital Gains Act 1992. The FTT held that the difference in treatment between a purely domestic transfer, and one to a group company in a different EU or EEA state, was a restriction of the Netherlands parent company's right to freedom of establishment which could not be justified, unless the UK company was given the option to pay the extra tax over five years. In the absence of such an option, the FTT concluded that the transfer to the Netherlands company should be treated in the same way as a domestic transfer. From 11 July 2019, companies may apply with immediate to effect, to defer payment of up to the amount of corporation tax on profits or gains attributable to affected group asset transfers.

Finance Bill 2019–20 introduces draft legislation to allow companies to defer payment of tax that arises on certain transactions with group companies in the EEA. This is intended to provide certainty for UK business following the FTT decision in *Gallaher*.

Outside influences

As noted at the beginning of this article, developments in the UK tax arena over the course of 2019 very much need to be considered in the context of wider changes to the architecture of international taxation.

In particular, the OECD attempts to craft a "consensus-based solution" to the taxation of the digital economy by the end of 2020 – embodied by the two pillar approach set out in its Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy – mark a potentially ground-breaking shift in the way taxation will apply to multinational businesses. The development of the global anti-base erosion (GloBE) proposal under Pillar Two contemplates radical new principles of international taxation that would extend beyond the sphere of purely digitally focused businesses, by way of:

- an income inclusion rule that would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate;
- an undertaxed payments rule that would operate by way of a denial of a deduction for a payment to a

related party if that payment was not subject to tax at or above a minimum rate;

- a switch-over rule to be introduced into tax treaties, which would permit a residence jurisdiction to switch from an exemption to a credit method where the profits attributable to a permanent establishment or derived from immovable property are subject to an effective rate below the minimum rate; and
- a subject to tax rule that would complement the undertaxed payment rule by subjecting a payment to withholding or other taxes at source.

These developments represent a significant moving of the international tax goalposts, which could very well impact those in the financial services sector too.

DAC 6 enshrines another overarching set of rules that is concerning many taxpayers and advisers alike, especially as there continues to be a large amount of uncertainty regarding how the rules are to be applied in practice (notwithstanding the impending deadline for implementation), and the retrospective application of the rules to reportable cross-border arrangements implemented on or after 25 June 2018 is a cause for considerable anxiety for those within scope of the reporting requirements.

As this annual review has been published very close to the 12 December 2019 general election, it does not consider tax changes that may be implemented in consequence. However, for a variety of reasons, 2020 promises to be anything but quiet in tax terms and many will be monitoring developments with great interest.

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