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Post-BREXIT Tax Considerations

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Opening Remarks

- **Strained relations with the EU**
- Brexit has its roots many years ago
- 2005 Labour Party Manifesto – referendum pledge on EU
- 2008 EU Reform Treaty aka “**Treaty of Lisbon**”
 - *"complete the process started by the Treaty of Amsterdam [1997] and by the Treaty of Nice [2001] with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action"*
- Opponents claimed:
 - centralize the EU
 - weaken democracy by "moving power away" from national electorates.
- Brown rejected call for referendum in March 2008
- Despite backbench rebellion
- Straw polls at time showed 89% against

Brexit

- A shock – to say the least
- Lots of rhetoric from Remain and Leave
- Threats from **Juncker** and Hollande et al
- ATAD – the straw that broke the camel’s back / creeping supranational law
- **Sovereignty** a major issue for the UK
- There are opportunities for the UK
- BUT – Article 50: *“Should I stay or should I go now?”*
- Recent **conflicting** claims from BoJo and May

EU Overview – What do we get?

- EU is a CUSTOMS UNION & a SINGLE MARKET
- No customs duties within the EU's territory / common external tariffs with third countries
- Harmonised and integrated VAT system
- Corporate taxes not harmonised - **yet**
- EU treaties do not require / contemplate harmonisation
- Corporate income taxes remain within national competencies
- BUT : PSD / Mergers Directive and Interest and Royalties
- HOWEVER - Court of Justice of the European Union (CJEU) and Commission
- EC now very active against:
 - **State aid**
 - Discrimination
 - Restrictions of the fundamental freedoms

EU Overview

- Further restrictions on direct taxes:
 - **CFC rules** – *Vodafone*
 - **Transfer Pricing – State Aid**
 - **Transfer of Assets** – *Fisher*
- Erosion of fiscal sovereignty looks set to continue
- Commission active in pushing for “Common Consolidated Corporate Tax Base”
- CCCTB - a single corporate income tax system to match the single VAT system
 - States able to choose the tax rates that suits them
 - Rules for computing taxable profits set by EU

Post Brexit Models

- Three options
- Each will affect UK's relationship in different ways
- Which way will we go?

Post Brexit Models - Norway

Norwegian model

- Member of the European Free Trade Association (EFTA)
- Access to network of global free trade arrangements
- Party to the European Economic Area Agreement
- Access to single market
- **BUT - must comply with:**
 - Free movement of goods
 - Free movement of workers
 - Free movement of capital
 - Provision of cross-border services.
- EU demands full adoption of the above
- UK unlikely to succeed in negotiating **derogations**

Post Brexit Models - Switzerland

Swiss model

- Switzerland also a member of EFTA
- Not party to the EEA Agreement
- Accesses the EU single market via a regularly updated bilateral agreement
- Swiss model unwieldy
- EU unlikely to permit similar arrangements

Post Brexit Models - Canada

Canadian model

- Relationships with the EU and Member States formed via World Trade Organization
- UK is already a member
- Post Brexit Britain will continue to be member of:
 - OECD
 - G20
 - WTO

Post Brexit VAT

- VAT law is harmonised
- Very unlikely VAT system will be overhauled – VAT receipts are large!
- Some discretion over rates and collection methods
- UK has been granted derogations allowing the zero-rating of certain classes of goods – **Jaffa Cakes** / live animals for human consumption
- Customs duties on imports into the single market are also harmonised
- “Import” VAT when:
 - goods enter the EU from the UK; and
 - when EU goods enter the UK.
- VAT likely recoverable – but cashflow cost
- EFTA: suspends customs and excise duties and VAT on goods that pass through the UK en route to an EU destination

Post Brexit – Direct Taxes

- A Brexit will end the UK's obligations and rights under:
 - The Parent-Subsidiary Directive
 - The Mergers Directive
 - Interest and Royalties Directive
 - VAT Directive
- Domestic legislation re the above likely to remain in place post-Brexit
- UK's DTA's will remain in place – well negotiated/low rates
- Not all DTA's have 0% withholding tax (e.g. Germany & Italy)
- **UK holding company regime – SSE / Foreign Profits / Div WHT**
- Divergence between DTAs and Directives will create complexity for MNEs

Post Brexit - Changes to CFC Rules

- EU CFC rules cannot apply to subsidiaries established in another EU Member State unless “**wholly artificial**”
- Absent this businesses deterred from exercising their freedom of establishment
- Post Brexit UK might reintroduce UK tax rules that have been held to be contrary to EU law
- Could take time...but...
- Some UK rules remain on the **statute book** even though contrary to EU law
- Would likely become effective automatically upon Brexit

Post Brexit - State Aid

- The Commission very active in challenging MS domestic tax laws
 - Discriminatory
 - Fundamental freedoms
 - **State aid**
 - Apple
 - **McDonalds**
 - Fiat
 - Amazon
 - **MMD Shipping!**
- Luxembourg, Luxembourg, Luxembourg...
- State Aid not relevant when UK ceases to be party to TFEU...Or is it?
- Very technical BUT – if UK joins EEA then it would continue to be subject to these restrictions

CCCTB and ATAD

- Further harmonisation in the form of
 - Anti-Tax Avoidance Directive; and
 - CCCTB
- Little consultation (unlike BEPS)
- Purpose of ATAD to implement BEPS recommendations throughout EU on consistent and uniform basis
- But, goes beyond BEPS in some instances...
- Common corporate tax rate through the back door?
- However, UK groups with EU interests will still be exposed to the above

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ATAD

	BEPS recommendations	ATAD measure
Interest limitation rule	Cap interest deductions at 10-30%	30% of EUR 3m on loans after 18 June 2016.
Exit tax	Not considered	Immediately pay the tax or defer payment over 5 years → contrary to EU law?
GAAR	Not considered except DTA context	Apply where domestic law fails. Goes beyond 'egregious' abuse targeted by UK GAAR.
CFC	BEPS permits territorial approach	'One size fits all', extends to arrangements with third countries.
Hybrid mismatch	Close down all hybrid benefits	In line with BEPS recommendations. UK implemented rules that doesn't require the other state to have anti-hybrid rules.
Switch over clause	Not considered	Measure forcing MS to apply credit method on dividends or gains on disposals of shares where income or gain is not taxable in original company at 40% of the CT rate in the recipient country. Thankfully dropped at the 11th hour. But could we see it in future?

Brexit – the Positives

- UK is a member of G20, OECD and WTO independently from EU membership
- DTA's and other agreements will continue to be available
- More freedom over implementation of BEPS
- Rumours that UK will not sign Multilateral Instrument / amend PE definition (DPT)
- ATAD
- Restore tax sovereignty – how competitive?
- 15% Rate already scrapped!
- Avoids:
 - Anti-Tax Avoidance Directive and the General Anti-Abuse Rule
 - CCCTB

Brexit – The Negatives

- Potentially ends access to the single market
- Exposure to additional taxes (e.g. import duties)
- Loss of influence over EU policy may impact UK business in the longer term
- UK will lose protection against discriminatory EU tax measures
- Rewrite of legislation
- Tougher commercial environment

6. Non-Doms

- Unlikely to be affected by BREXIT
- Remittance Basis of Taxation
- Remittance Basis Charge
- Deemed domicile rules from 1 April 2017
- Capital Taxes Treaties remain unaffected (France, Italy, Pakistan, India)

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