EXPLANATORY MEMORANDUM TO

THE DOUBLE TAXATION RELIEF AND INTERNATIONAL TAX ENFORCEMENT (BRAZIL) ORDER 2023

2023 No. [XXXX]

1.1 Introduction

1.2 This explanatory memorandum has been prepared by His Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument brings into effect a Convention and Protocol (the 2022 Arrangements), and an Agreement (the 2005 Arrangements), made by the Government of the United Kingdom and the Government of Brazil. The 2022 Arrangements are for the avoidance of double taxation of cross-border economic activity and relate to tax enforcement. They suspend the effect of both the 2005 Arrangements, which are limited to the avoidance of double taxation of profits derived from shipping and air transport, and an Agreement made in 2010 (the 2010 Arrangements) which are limited to the avoidance of double taxation of salaries, wages and other remuneration derived by a member of the crew of an aircraft operated in international traffic. Consequently, the 2005 and 2010 Arrangements will not have effect as long as the 2022 Arrangements have effect.

2.2 The instrument also revokes the Double Taxation Relief (Shipping and Air Transport Profits) (Brazil) Order 1968, which gave effect to a 1967 Agreement in relation to the avoidance of double taxation of profits derived from shipping and air transport, and makes provision that anything done under that Agreement is to be treated as done under the 2005 Arrangements.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

5.1 Victoria Atkins MP, Financial Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of the Double Taxation Relief and International Tax Enforcement (Brazil) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2022 Arrangements have been signed by the Governments of Brazil and the United Kingdom and this instrument is being made to give effect to the Arrangements in United Kingdom legislation. The 2022 Arrangements are specified in Schedule 2 to the instrument. The instrument also gives effect to the 2005 Arrangements which replicate the application of an earlier agreement, with effect from 1 January 1967, that had already been given effect by SI 1968 No. 572 but was not given effect to in Brazilian domestic law. SI 1968 No. 572 is revoked by the instrument. The 2010 Agreement was given effect to by SI 2011 No. 2723. Both the 2005 Arrangements and the 2010 Arrangements are suspended by the 2022 Arrangements and have effect if and when the 2022 Arrangements are not in effect.

7. Policy background

What is being done and why?

7.1 The purpose of Double Taxation Agreements (DTAs) is to prevent income or gains being taxed both in the territory in which they arise and the territory in which the recipient is resident. They do this either by allocating an exclusive right to tax the income or gain to one of the territories, or by providing that one territory must give relief for the tax charged in the other territory in respect of the same income or gain. DTAs also provide additional protection for taxpayers by including specific measures that combat discriminatory tax treatment. More generally, DTAs benefit taxpayers by ensuring certainty of treatment and, as far as possible, by reducing compliance burdens.

7.2 DTAs also protect the Exchequer by including provisions to combat tax avoidance and evasion. For example, measures providing for the exchange of information between revenue authorities make it more difficult for residents of both territories to evade taxation by concealing assets offshore.

7.3 Like all of the United Kingdom's more recent DTAs, the 2022 Arrangements largely follow the Organisation for Economic Cooperation and Development's (OECD) latest Model Tax Convention on Income and on Capital (OECD Model). In doing so, they encourage and maintain international consensus on the appropriate tax treatment of cross-border economic activity, promoting international trade and investment.

7.4 The 2022 Arrangements include the minimum standards recommended by the OECD/G20 Base Erosion and Profit Shifting (BEPS) project. The BEPS project created a single set of consensus-based international tax rules to protect against tax avoidance while offering increased certainty and predictability to taxpayers. These provisions are now included in the 2017 version of the OECD Model.

7.5 The following paragraphs in this section explain the provisions of the 2022 Arrangements including the reasons for material departures from the OECD Model

Title and preamble

7.6 The title and preamble of the 2022 Arrangements follow the latest OECD Model. The change to the OECD Model arose from the BEPS Action 6 Report on preventing the granting of treaty benefits in inappropriate circumstances. The statement in the preamble that the territories intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping

arrangements, is one of the elements of the minimum standard on preventing treaty abuse agreed under the BEPS project.

Article 1 (Persons covered)

7.7 Article 1 sets out the general scope of the 2022 Arrangements. The 2022 Arrangements include two provisions from the OECD Model that were introduced following the BEPS project. The first concerns the treatment of income or gains derived through fiscally transparent persons such as partnerships. This provision confirms that the benefits of the 2022 Arrangements are only due where such income is effectively taxed in the hands of a resident of one of the territories.

7.8 The second provision clarifies that the 2022 Arrangements do not prevent a territory taxing its own residents except where they explicitly provide as such. This puts beyond doubt that the provisions of a DTA cannot be used to circumvent anti-avoidance rules in a territory's domestic tax law.

Article 2 (Taxes covered)

7.9 Article 2 lists the taxes to which the 2022 Arrangements are to apply. The existing United Kingdom taxes to which the 2022 Arrangements will apply are income tax, corporation tax and capital gains tax. The existing Brazil taxes to which the Arrangements will apply are the federal income tax and the social contribution on net profit.

Article 3 (General definitions)

7.10 Article 3 defines a number of terms used in the 2022 Arrangements and provides a rule for determining the meaning of terms not defined. In particular, the 2022 Arrangements include a definition of a "pension scheme", relevant to Articles 4, 10, 11 and 29, to ensure that schemes not treated as a separate person fall within the definition. The United Kingdom also uses a definition of "national" that differs from the OECD Model in order to reflect more accurately the provisions of its domestic law.

Article 4 (Resident)

7.11 Article 4 establishes the meaning of "resident of a Contracting State" and lays down detailed rules for resolving cases where individuals or other persons may be considered residents of both territories for tax purposes under their domestic laws. Unlike the OECD Model, the provisions of paragraph 1 include reference to "place of incorporation" as this condition establishes company residence under the domestic laws of the United Kingdom and Brazil.

7.12 Paragraph 2(a) also confirms that a pension scheme that is established in either territory will be considered to be a resident. Paragraph 2(b) does not have an equivalent in the OECD Model, but reflects the United Kingdom's preference for confirming that certain non-profit organisations will enjoy the benefits of the 2022 Arrangements even if they are generally exempt from taxation.

7.13 Paragraph 4 provides a tiebreaker for persons other than individuals which are resident in both territories under paragraph 1 of the Article. Under the 2022 Arrangements the competent authorities will determine the residence status of such persons by mutual agreement. This uses the wording introduced to the OECD Model

following the BEPS project and prevents companies manipulating their tax residence for tax avoidance purposes.

Article 5 (Permanent establishment)

7.14 Article 5 defines the term "permanent establishment" (PE) for the purposes of the 2022 Arrangements. Taken together with Article 7, it describes the circumstances and manner in which enterprises of one territory may be taxed on their business profits arising in the other.

7.15 It has a wider scope than the OECD Model. In particular, it has a lower threshold of 183 days for a building site to give rise to a PE. It also deems there to be a PE where services are provided by an enterprise in the other territory for more than 183 days in total in a 12-month period, and in some circumstances where an insurance enterprise insures risks in the other territory in line with Brazil's preference.

7.16 The Article includes in paragraph 4.1 a rule recommended by the BEPS project that prevents companies from fragmenting their activities in order to avoid the PE threshold. The Article does not adopt other amendments to the definition of PE that were recommended by the BEPS project.

Article 6 (Income from immovable property)

7.17 Article 6 allows the territory in which the property is situated to tax income from immovable property. It also defines immovable property. The Article materially replicates the equivalent provisions of the OECD Model.

Article 7 (Business profits)

7.18 Article 7 provides that unless an enterprise of one territory carries on business in the other through a PE situated there, its profits will be taxable only in its territory of residence. Where the enterprise has a PE in the other territory, that territory will be entitled to tax profits attributable to the PE. The provisions of this Article follow the relevant applicable provisions in the pre-2010 OECD Model, which continues to be the preference of many states, including Brazil.

Article 8 (International shipping and air transport)

7.19 Article 8 governs the taxation of shipping and air transport operated in international traffic. It follows the OECD Model in providing that profits of an enterprise of one territory from the operation of ships or aircraft in international traffic shall be taxable only in that territory. In line with United Kingdom preferences, the provision also clarifies that certain incidental income will be included in profits from the operation of ships and aircraft in international traffic.

Article 9 (Associated enterprises)

7.20 Article 9 governs the evaluation for tax purposes of transfers of goods, services, finance and intangible property between associated enterprises. It is based on the "arm's length" principle, which requires such transfers to be evaluated as if they had taken place between independent enterprises.

7.21 Where an adjustment is made to the profits of an enterprise by one territory, the other territory will make an appropriate adjustment to the amount of tax charged on those profits, in order to relieve the double taxation which might otherwise arise as a result of an adjustment by only one territory. This adjustment must be made in accordance

with the mutual agreement procedure provided in Article 27. However, paragraph 3 ensures that a territory is not required to make such an adjustment unless it is in accordance with the time limits provided in its domestic law and paragraph 4 ensures that there is no requirement to make any adjustments under the Article in cases of fraudulent or negligent conduct.

Article 10 (Dividends)

7.22 Article 10 contains the rules for the taxation of dividends paid by a company that is a resident of one territory to a resident of the other territory. It allows the territory where the company paying the dividend is resident to tax the dividend but where the beneficial owner of the dividend is resident in the other territory the rate of tax is limited depending on the circumstances. Dividends received by pension schemes are exempt. Dividends paid by a Real Estate Investment Trust may be taxed up to 15%. Otherwise, a rate of 15% applies unless the beneficial owner is a company that holds at least 10% of the capital of the paying company, in which case a rate of 10% can apply.

7.23 The definition of dividends in paragraph 3 of the Article differs slightly from the OECD Model by excluding instruments not found under the domestic law of either territory and in the manner in which it aligns the definition with income categorisation under domestic law.

7.24 Paragraph 5 of the Article departs from the OECD Model in permitting a territory to withhold tax at source at a rate of up to 10% on the amount of post-tax profits of a PE in the territory. This is analogous to a tax on dividends and has been included in line with Brazil's preference.

Article 11 (Interest)

7.25 Article 11 contains the rules for the taxation of interest arising in one territory and paid to a resident of the other territory. It provides that a territory may tax interest arising there but where the interest is beneficially owned by a resident of the other territory the rate of tax is limited. Various rates between 0% and 15% apply depending on the type of lending on which the interest arises. Interest received by pension schemes and governmental agencies is exempt. The rate of tax on interest on regularly-traded listed bond and securities, on credit on purchase of machinery and equipment and on loans granted by banks and insurance companies is limited to 10% in most circumstances but a lower rate of 7% applies to infrastructure loans of at least 5 years.

7.26 The definition of interest departs from the OECD Model to reflect the United Kingdom's preference for clarifying that the Article does not apply to amounts that are within the definition of a dividend in Article 10 and Brazil's preference to include income treated as interest under their domestic law.

7.27 Unlike the OECD Model, the "special relationship" provision at paragraph 6 applies where the amount of interest paid is excessive "for whatever reason". This permits the territories to take into account both the rate of the interest and the amount of the debt in determining whether interest paid is excessive. In other respects, the Article largely follows the OECD Model.

Article 12 (Royalties)

7.28 Article 12 contains the rules for the taxation of royalties paid by a resident of one territory to a resident of the other territory. In line with Brazil's preferences, it provides that the territory where royalties arise may tax the royalties; but where the royalties are beneficially owned by a resident of the other territory, the rate of tax that may be charged is limited to 10%. The definition of royalties extends to payments for the right to use equipment (leasing) and so is wider in scope than the OECD wording. Unlike the OECD Model, the "special relationship" provision at paragraph 6 applies where the amount of royalties paid are excessive "for whatever reason". This allows the territories to consider all factors in determining whether royalties paid are excessive.

Article 13 (Fees for technical services)

7.29 Article 13 contains the rules for taxation of fees for technical services paid by a resident of one territory to a resident of the other territory. This departs from the OECD Model, which does not include such an article. The provisions in the Article follow the United Nations Model Tax Convention in line with Brazil's preference but they are time-limited, applying only for the first four years from the date that the 2022 Arrangements take effect. During that period the Article allows the territory where the fees for technical services arise to tax the fees. However, where the fees are beneficially owned by a resident of the other territory the rate of tax is limited to 8% if the fees arise in the first two years and to 4% if they arise in the third and fourth years.

7.30 Fees for technical services are generally treated as arising in a territory if the payer is resident in that territory. Fees for technical services are defined as payment for services of a managerial, technical or consultancy nature with certain limited exceptions.

Article 14 (Capital gains)

7.31 Article 14 contains the rules for the taxation of gains deriving from the alienation of property situated in one territory by a resident of the other. It provides that the territory where the gain arises is allowed to tax that gain under its domestic law in almost all circumstances (the exception being where the gain derives from the disposal of a ship or aircraft of enterprises operating in international traffic). This is wider in scope than the OECD Model, in line with Brazil's preference.

Article 15 (Independent personal services)

7.32 Article 15 contains the rules for the taxation of income derived from individuals resident in one territory performing professional and other independent services in the other territory. It provides two separate tests of when such income may be taxed in the territory where the services are performed. First, where the individual provides services through a fixed base, which in practice is the same as the test in Article 5 of whether there is a permanent establishment. Second, where the individual is present in the territory for at least 183 days in any twelve-month period. It follows the United Nations Model and has been included to reflect Brazil's preference.

Article 16 (Employment income)

7.33 Article 16 contains the rules for the taxation of employment income and follows the OECD Model in all material respects, except that it is also subject to the application of Article 21, which is not an OECD Model Article.

Article 17 (Directors' fees)

7.34 Article 17 follows the OECD Model and provides that directors' fees may be taxed in the territory of which the company paying them is a resident.

Article 18 (Entertainers and sportspersons)

7.35 Article 18 contains the rules for the taxation of income derived from personal activities as an entertainer or sportsperson. It follows the current OECD Model in all material respects.

Article 19 (Pensions)

7.36 Article 19 contains the rules for the taxation of pensions. It provides that all pensions, other than those in respect of government service, are taxable only in the territory where the recipient is resident. This departs from the OECD Model, which only applies to pensions paid in respect of past employment.

Article 20 (Government service)

7.37 Article 20 contains rules for the taxation of remuneration paid to an individual in respect of government service, including pensions. The general rule is that the remuneration is only taxable in the territory to which the services are rendered. However, there is an exception for remuneration, other than pensions and other similar remuneration, paid to locally engaged staff. Such remuneration is taxable only in the territory where the individual is resident, provided that the individual is subject to tax there.

7.38 The provisions are generally in line with the OECD Model, apart from the provision in subparagraph 1(b) to ensure that remuneration, other than pensions and other similar remuneration, paid to locally engaged staff in a territory will not be exempt from tax in both territories.

Article 21 (Teachers and researchers)

7.39 Article 21 is included as a preference of Brazil. It is not in the OECD Model. It is based on considerations mentioned in the commentary on the UN Model tax convention. It applies where an individual from one territory visits the other territory for no more than two years for the purpose of teaching, giving lectures or carrying out research at an educational or cultural institution there, at the invitation of the Government of the other territory. It ensures that remuneration from these activities is exempt from tax in the territory of visit where it is paid from a source outside that territory. The exemption in the Article does not apply where the remuneration arises from a source within the territory of visit, for instance where paid by the institution itself.

Article 22 (Students)

7.40 Article 22 contains the rules which govern the taxation of visiting students and business apprentices. Its provisions follow the OECD Model.

Article 23 (Other income)

7.41 Article 23 contains the rules for the taxation of income not dealt with elsewhere in the 2022 Arrangements. There are some deviations from the OECD Model. Paragraph 1 confirms that the benefits of the Article are only due where the recipient of the income

is the beneficial owner. This is in line with similar conditions in Articles 10, 11, 12 and 13. The general rule in paragraph 1 is that 'other income' within Article 23 is taxable only in the territory where the beneficial owner is resident but paragraph 3 provides an exception to this rule where the income arises in the other territory: in which case that territory may also tax the income. Paragraph 4 includes a "special relationship" provision equivalent to those found in Articles 11, 12 and 13.

Article 24 (Offshore activities)

7.42 Article 24 contains special rules about the treatment of income and gains arising from activities carried on offshore in connection with exploration, exploitation and extraction of natural resource. Where these rules apply they take precedence over the application of any other provision in the 2022 Arrangements.

7.43 Paragraphs 3, 4 and 5 contain rules setting out when an enterprise of a territory that carries on offshore activities in the other territory is deemed to be doing so through a PE and so would be taxable on profits attributable to the PE.

7.44 Paragraph 6 contains the rules for the taxation of income and gains from rights related to natural resources, for gains from property used in connection with offshore activities, and shares deriving their value (or the greater part thereof) from such rights or property.

7.45 Paragraphs 7 and 8 contain the rules about taxation of income from employment connected with offshore activities where a resident of one territory performs duties of employment in the other territory.

Article 25 (Elimination of double taxation)

7.46 Article 25 sets out the methods by which each territory will relieve double taxation and apart from paragraphs 5 and 6 is broadly based on the equivalent article in the OECD Model, modified to reflect each territory's domestic double taxation relief rules. Paragraph 1 sets out the provision applying to Brazil and provides for relief by way of credit. Paragraph 2 details the corresponding provisions that apply in the United Kingdom, which generally provide for relief by way of credit, but also include provisions that exempt dividends and the profits of PEs from tax in line with domestic law.

7.47 Paragraphs 3 and 4 determine which territory is obliged to provide credit relief in the unusual situation where both territories can tax a resident on the income, profits or gains. Paragraph 3 removes the obligation for Brazil to provide relief for United Kingdom tax where the income in question is taxable in the United Kingdom solely because it is income of a resident of the United Kingdom and paragraph 4 is an equivalent provision relating to relief for Brazilian tax.

7.48 Paragraph 5 is included to ensure that if income or gains are subject to tax in the United Kingdom under the remittance basis then Brazil is only obliged to provide relief under the 2022 Arrangements to the extent that the income or gain is taxed in the United Kingdom.

7.49 Paragraph 6 is included at the preference of the United Kingdom to state expressly that where a person is denied the benefits of the 2022 Arrangements through Article 29 (Entitlement to benefits), they are not entitled to credit relief under Article 25. This will ensure that the person cannot instead claim credit relief under unilateral relief rules in domestic legislation.

Article 26 (Non-discrimination)

7.50 Article 26 provides that, subject to certain conditions, neither territory shall impose discriminatory taxes or connected requirements on the nationals, PEs and enterprises of the other. Paragraph 5 confirms that the provisions of the Article only apply to the taxes covered by the 2022 Arrangements. In line with United Kingdom preferences, paragraph 6 deals separately with personal allowances granted to residents and nationals, confirming that the Article does not require these to be granted to such persons where they are not resident in the territory in question.

Article 27 (Mutual agreement procedure)

7.51 Article 27 establishes a procedure for resolving difficulties arising from the interpretation or application of the 2022 Arrangements and meets the minimum standard on improving dispute resolution agreed under Action 14 of the BEPS project. It departs from the OECD Model in line with Brazil's preferences by providing that a person may only present their case to a competent authority of the territory where they are resident and also does not include a provision for mandatory binding arbitration. But it otherwise follows the OECD Model provisions, including a deadline of three years for a person to present their case, confirmation that mutual agreements will be implemented notwithstanding time-limits in domestic law and a provision confirming that the competent authorities may consult to eliminate double taxation in cases not covered by the Arrangements.

Article 28 (Exchange of information)

7.52 Article 28 follows the latest OECD Model and provides for the exchange of certain information between the competent authorities of the two territories in compliance with international standards.

Article 29 (Entitlement to benefits)

7.53 Article 29 contains detailed rules about the circumstances where a person is entitled to benefits under the 2022 Arrangements. The approach taken in this Article is in line with Brazil's preference and broadly follows that provided as an alternative in the OECD model but with some departures.

7.54 Paragraph 1 provides the general rule that a resident of a territory is only entitled to benefits under the 2022 Arrangements if they are a "qualified person". Paragraph 2 sets out the various categories of persons who are automatically "qualified", which include individuals, companies whose principal class of shares is regularly traded on a recognised stock exchange, pension funds, and entities where at least 50% of their shares are owned, directly or indirectly, by persons who themselves are qualified persons under one of the other categories.

7.55 Even where a resident of a territory is not a qualified person that resident may still be entitled to benefits under the 2022 Arrangements if it falls within any of the circumstances given in paragraphs 3, 4 and 5.

7.56 Paragraph 3 provides that a resident of a territory is entitled to benefits under the 2022 Arrangements with respect to an item of income where it emanates from the active conduct of business by that resident. However, if a company derives offshore income, except dividends, from any of the activities listed in subparagraph (d) which is either not taxed, or is taxed at a preferential rate that is less than 75% of the rate applied to similar onshore income, then the territory where the income arises is not required to

apply any limits on tax provided for in the 2022 Arrangements, even if the company is regarded as being engaged in the active conduct of business. The exception for dividends in this rule is included because dividends received by United Kingdom companies are generally exempt from tax in the United Kingdom.

7.57 Paragraph 4 provides that a resident of a territory is entitled to benefits where at least 75% of its shares are owned directly or indirectly by "equivalent beneficiaries" (as defined in paragraph 6) for specified periods.

7.58 Paragraph 5 provides that where benefits are denied to a resident of a territory because it is not qualified or entitled to benefits under any other provisions of the Article, the competent authority of the territory where the benefits are denied may nevertheless exercise their discretion to grant benefits under the 2022 Arrangements if they are satisfied that it was not a principal purpose of the arrangements to obtain such benefits.

7.59 Paragraph 8 provides that the benefits of the 2022 Arrangements do not apply to income of an enterprise that is attributed to a PE of that enterprise in a third jurisdiction where the total effective rate of tax payable is less than the rate of company tax applicable in the territory where the enterprise is resident. It is a modified version of a rule in the OECD Model, included in line with Brazil's preference, that is aimed at arrangements whereby income is routed through a PE situated in a jurisdiction with a lower tax rate.

7.60 Paragraphs 9 and 10 include the "the principal purpose test" (PPT) which denies treaty benefits to a person who seeks to take advantage of the provisions of the 2022 Arrangements to secure a result which is contrary to the object and purpose of the 2022 Arrangements. The PPT is one of the elements of the minimum standard on preventing treaty abuse agreed under Action 6 of the BEPS project.

Article 30 (Members of diplomatic missions and consular posts)

7.61 Article 30 ensures that diplomatic or consular officials shall not receive less favourable treatment under the 2022 Arrangements than they are entitled to under international law or under the provisions of special agreements (such as the Vienna Convention on Diplomatic Relations). The Article follows the OECD Model.

Article 31 (Entry into force)

7.62 Article 31 contains the provisions governing how and when the 2022 Arrangements will enter into force and take effect. It also provides that the existing 2005 and 2010 Agreements relating to double taxation of profits from air and shipping transport and air crew salaries will be suspended as soon as the 2022 Arrangements take effect. This is because the scope of 2022 Arrangements, once they take effect, will cover the matters which would previously have been in scope of the 2005 and 2010 Arrangements.

Article 30 (Termination)

7.63 Article 30 contains the provisions that govern how the 2022 Arrangements can be terminated and how that termination has effect. Its provisions follow the preferences of both jurisdictions and are in line with similar provisions in other DTAs entered into by the United Kingdom.

Protocol

7.64 The Protocol contains clarificatory and additional material relating to the Articles above and forms an integral part of the 2022 Arrangements.

7.65 Paragraph 1 of the Protocol confirms that the 2022 Arrangements should not be read as preventing a territory from applying its domestic anti-avoidance and anti-evasion rules. This interpretation is in line with current international understanding in the Commentary of both the United Nations and OECD Model Tax Conventions and the reference to the United Nations Model is included as Brazil's preference.

7.66 Paragraph 2 makes clear that the definitions of each territory given in Article 3 are only for the purpose of the 2022 Arrangements and do not affect the position in issues of territorial sovereignty in other contexts.

7.67 Paragraph 3 clarifies that a territory will only allow a corresponding adjustment after the other territory has made a transfer pricing adjustment to the profits of an enterprise under Article 9 if it agrees with the adjustment that has been made.

7.68 Paragraph 4 applies in the event of Brazil agreeing a DTA after 29 November 2022 with another territory that provides for lower rates of tax or exemptions on dividends, interest or royalties than those provided for in the 2022 Arrangements. If that were to occur then Brazil would need to consult with the United Kingdom to consider whether to update the 2022 Arrangements.

7.69 Paragraph 5 is included to reflect a particular provision in Brazilian domestic law that treats certain payments in respect of a company's equity as interest. It ensures that such payments are considered to be interest for the purpose of Article 11 (Interest). It also ensures that the exemption from tax on interest paid to government agencies provided for in paragraph 2(b) of Article 11 only applies where the interest is received by the agency in connection with its functions of a public nature.

7.70 Paragraph 6 reflects Brazil's domestic interpretation of the meaning of payments for "know-how" for the purpose of Article 12 (Royalties), which is not limited to payments for information arising from previous experience and could extend to payments for newly-created information.

7.71 Paragraph 7 is a "most favoured nation" provision that ensures that if after 29 November 2022 Brazil agrees a DTA with another OECD country, except one in Latin America, that provides for a lower rate of tax on fees for technical services than those in paragraph 2 of Article 13, or for any exemption, then that treatment will instead apply.

7.72 Paragraph 8 ensures that Article 17 (Directors' fees) applies also to members of administrative and fiscal councils in Brazil, who are similar to directors under Brazil's corporate governance rules.

7.73 Paragraph 9 clarifies various points on the application of Article 26 (Non-discrimination). Subparagraph (a) clarifies that the tax on the profits of a PE after corporate tax provided for in paragraph 5 of Article 10 is not considered to be discrimination for the purposes of Article 26. Subparagraph (b) makes clear that Brazil's domestic rules that prevent the deduction of royalty payments paid to a resident of the United Kingdom in determining the taxable income of a PE in Brazil do not conflict with Article 26. Subparagraph (c) confirms that paragraph 6 of Article 26 prevents Brazilian nationals who are not resident in the United Kingdom from

being entitled to United Kingdom personal allowances, but where they are resident in the United Kingdom they are entitled to such allowances.

7.74 Paragraph 10 confirms that where a tax measure falls within the scope of the 2022 Arrangements the dispute resolution procedures in Article 27 of the 2022 Arrangements would apply in precedence to those in the General Agreement on Trade in Services unless the competent authorities of both territories consent to bringing it before the Council for Trade in Services.

7.75 Paragraph 11 provides that Brazil will only make requests for information under Article 28 (Exchange of Information) in relation to its federal taxes.

7.76 Paragraph 12 relates to the application of Article 29 (Entitlement to benefits). Although "active conduct of business" is not defined in the 2022 Arrangements, subparagraph (a) of paragraph 12 sets out a non-exhaustive list of factors that must be considered in determining whether a person who is carrying on any of the four activities listed in paragraph 3(d) of Article 29 is engaged in the active conduct of business. Subparagraph b) makes clear that where a competent authority of a territory exercises their discretion to grant benefits under the 2022 Arrangements, it applies only in respect of benefits in that territory and does not oblige the other territory to grant benefits. Subparagraph c) clarifies what is meant by "relevant double taxation agreement" in the definition of "equivalent beneficiary" in paragraph 6 of Article 29.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Consolidation is not appropriate as the 2022 Arrangements do not amend another statutory instrument.

10. Consultation outcome

10.1 HMRC does not consult on the contents of individual DTAs, the details of which are treated as confidential until the agreement is signed. However, HMRC regularly consults with external interested parties, including business representatives, about the United Kingdom's network of DTAs.

11. Guidance

11.1 General guidance on the operation of the United Kingdom's double taxation agreements can be found on the HMRC pages of the gov.uk website at:

https://www.gov.uk/hmrc-internal-manuals/international-manual/intm150000

or in the Double Taxation Relief Manual at:

https://www.gov.uk/hmrc-internal-manuals/double-taxation-relief

This Manual will be updated once the 2022 Arrangements enter into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies. The provisions of the 2022 Arrangements do not introduce new tax burdens; rather, they

ensure that relief from United Kingdom tax under the arrangements is only granted in circumstances where it was intended.

12.2 There is no, or no significant, impact on the public sector.

12.3 A Tax Information and Impact Note has not been produced for the Order as it gives effect to a double taxation agreement. Double taxation agreements impose no obligations on taxpayers, rather they seek to eliminate double taxation and fiscal evasion.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific steps are proposed to minimise the impact of the requirements on small businesses (employing up to 50 people).

13.3 The basis for the final decision on what action to take to assist small businesses is that the DTA only applies if they have taxed income arising in Brazil. As with other businesses, the impact is negligible. No special approach for small businesses is therefore necessary.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that both Governments will keep the arrangements scheduled to the instrument under consideration to ensure that it continues to meet the policy objectives set out above in Section 7.

14.2 The instrument does not include a statutory review clause. None is required under section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015 because the power by which this instrument is made is being exercised so as to make or amend provisions imposing, abolishing, or varying any tax duty, levy, or other charge or provisions in connection with such provisions.

15. Contact

15.1 Daniel Berry at HMRC Telephone: 03000 585972 or email: daniel.berry@hmrc.gov.uk can be contacted with any queries regarding the instrument.

15.2 James Dunstan, Deputy Director, International Relations and Capacity Building, at HMRC can confirm that this Explanatory Memorandum meets the required standard.

15.3 Victoria Atkins MP, Financial Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.