

The Latest on BEPS and Beyond

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EY Tax News Update: Global Edition

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Highlights

The new year started off with a public consultation in an area where the international tax community can expect significant development: digital taxation. On 14-15 January 2021, the OECD organized a public consultation meeting to provide stakeholders the opportunity to discuss the feedback on the OECD Pillar One and Pillar Two Blueprints that the OECD/G20 Inclusive Framework on BEPS [published](#) on 12 October 2020. While that meeting was ongoing, the European Commission (the Commission) presented its roadmap for the development of a European Union (EU) digital levy and initiated public consultations. Both consultation processes have their own dynamics.

The public consultation meeting hosted by the OECD followed a written consultation that attracted thousands of pages of comments. The public consultation meeting brought out the main concerns that were shared by a broad audience. One major concern relates to the connecting of two different systems: the existing international tax rules and the new overlay of the OECD's Pillar One of the Unified Approach. This approach is designed to result in a partial reallocation of taxing rights to the benefit of market jurisdictions. However, the issue to address is how can this be ensured without creating double taxation. Another concern was related to the complexity of the proposed rules where commentators called for a simple system. Again, the issue to address is can simplicity be ensured while taking account of the diversity in business models in the industries that will be affected by these new rules.

At the same time, the EU continues to apply pressure on the global negotiations. Since the Commission was charged to [develop](#) a digital levy, it has now initiated the legislative process. The point of departure is a general public consultation [launched](#) together with the publication of a roadmap. While the Commission closely follows and considers the developments at the OECD level, it is also exploring various additional options, including: (i) a corporate tax top-up relating to digital activities; (ii) a tax on revenues created by digital activities; and (iii) a tax on digital business to business transactions. Interestingly, the Commission expressly refers to the need to consider different business models in the digital economy. It will also consider issues around competitiveness, productivity and compliance costs. This seems to suggest that the Commission already took note of comments to the OECD proposals and is open to receiving additional insights. Interested businesses have until 11 February to provide their initial feedback or can comment more extensively in a more detailed consultation that will run until 12 April.

The Commission plans to publish its proposal in June 2021. By that time, the G20 is also expecting results from the negotiations in the Inclusive Framework on BEPS. It is yet unclear where the European and global efforts will lead, but it is clear that the next few months will be key for businesses and other stakeholders to share their insights with policy makers.

OECD

On 21 December 2020, Barbados deposited its instrument of ratification of the Multilateral Convention (MLI) with the OECD. Barbados removed the tax treaty with the Caribbean Community (CARICOM) and Ghana from its list of Covered Tax Agreements (CTAs) and added a reservation on Article 16(5)(c) (Mutual Agreement Procedure). The MLI will enter into force for Barbados on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Barbados of its instrument of ratification, i.e., 1 April 2021.

Also, on 18 December 2020, Germany and Pakistan deposited their respective instrument of ratification of the MLI with the OECD. At the time of depositing the instrument of ratification, jurisdictions must confirm their MLI positions.

Accordingly, Germany removed 22 tax treaties from its list of CTAs and added the tax treaty with Greece. Pakistan added three tax treaties (Brunei Darussalam, Bulgaria and Hong Kong) to its list of CTAs and changed its preliminary positions by removing the reservations on:

- ▶ Article 4 (dual resident entities)
- ▶ Article 5 (elimination of double taxation)
- ▶ The specific anti-abuse rules of Articles 8-11
- ▶ Articles 12-15 regarding permanent establishment
- ▶ Article 35 (entry into effect)

Further, Pakistan chose to apply a simplified limitation on benefits (LOB) provision pursuant to paragraph 6 of Article 7 (prevention of treaty abuse). The MLI will enter into force for these jurisdictions on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by their instrument of ratification, i.e., 1 April 2021.

On the same date, Switzerland notified that it has completed its internal procedures for the entry into effect of the MLI provisions with respect to the CTAs with Lithuania and the Czech Republic, which is required when a signatory has made the reservation in Article 35(7)(b) of the MLI. The MLI will have effect on the notified CTAs with respect to taxes withheld at source on 1 January 2022 and with respect to all other taxes on 17 July 2021.

On 18 December 2020, the OECD released [guidance](#) on the transfer pricing (TP) implications of the COVID-19 pandemic, representing the consensus view of the 137 members of the Inclusive Framework on BEPS. The guidance notes the unique economic conditions arising from the COVID-19 pandemic and the government responses to the pandemic. It also notes the practical challenges for the application of the arm's-length principle which result from these developments. The guidance relies on the application of the arm's-length principle and the OECD TP Guidelines for Multinational Enterprises (MNEs) and Tax Administrations 2017 (OECD TP Guidelines) for addressing issues that may arise or be exacerbated in the context of the COVID-19 pandemic, rather than on developing specialized guidance beyond what is currently addressed in the OECD TP Guidelines.

See EY Global Tax Alert, [OECD releases guidance on transfer pricing implications of COVID-19 pandemic](#), dated 23 December 2020.

On 15 December 2020, the OECD released the [fourth annual peer review report](#) on BEPS Action 5 for the compulsory spontaneous exchange of certain tax rulings. The report covers 124 jurisdictions, assesses the 2019 calendar-year period and contains recommendations for 43 jurisdictions to improve their legal or operational framework to identify and exchange tax rulings. Further, almost 20,000 tax rulings within the scope of the transparency framework had been issued and over 36,000 exchanges of information had taken place by 31 December 2019.

This report is the final report for the peer review process on BEPS Action 5, as agreed under the current review methodology. The Inclusive Framework is now working on a peer review process for Action 5 for the years 2021 through 2025.

See EY Global Tax Alert, [OECD releases fourth peer review report on BEPS Action 5 on the Exchange of Information of Tax Rulings](#), dated 18 December 2020.

On 7-8 December 2020, the OECD Forum on Tax Administration (FTA) held its annual plenary meeting attended virtually by more than 300 delegates and 53 jurisdictions which are members of the FTA. The discussions covered multiple tax administration issues and also focused on the responses to the global pandemic, digital transformation and tax certainty. Four reports were released, addressing tax issues for Small and Medium-Sized Enterprises, the digital transformation of tax administrations, international tax debt management, and the compliance of financial institutions with information submission requirements.

See EY Global Tax Alert, [OECD's FTA hosts virtual meeting of tax administration leaders](#), dated 18 December 2020.

European Union

the Commission published a [roadmap](#) including a public consultation for the introduction of a digital levy on 14 January 2021. In July 2020, EU leaders requested the Commission to propose such levy as a new EU-own resource to support the EU's borrowing and repayment capacity in the context of the EU's recovery package, the Next Generation EU.

The roadmap informs citizens and stakeholders about the Commission's plans and invites feedback on the intended initiative. The first feedback period for the initiative ends on 11 February 2021. The roadmap highlights that the EU is still committed to reaching a global agreement, and that the roadmap and consultation should be seen as supplementing ongoing work at the G20 and OECD level on a reform of the international corporate tax framework.

On 18 January 2021, the Commission also [launched](#) the more extensive public consultation process on the introduction of a digital levy. This consultation runs until 12 April and allows the public to provide more extensive feedback through a questionnaire.

The Commission expects to put forth a proposal for a Directive during the first half of 2021.

See EY Global Tax Alert, [European Commission launches consultation on EU digital levy](#), dated 15 January 2021.

As of 1 January 2021, Portugal assumed the rotating six-month Presidency of the Council of the EU following the German Presidency. Portugal will hold the Presidency of the Council of the EU until 30 July 2021. Recently, the Portuguese Presidency of the Council of the EU published its Programme of Work (the [program](#)), including the focus areas for the six-month period of its Presidency.

In the tax area, the program indicates that the main priorities of the Portuguese Presidency during its term will be among others:

- ▶ Addressing the challenges of European taxation, including the model for taxation of the digital economy, under the principles of fairness and tax efficiency
- ▶ Strengthening of good governance mechanisms and global tax transparency
- ▶ Stepping up the fight against tax fraud, evasion and avoidance through non-cooperative jurisdiction
- ▶ Aligning tax policy with the objective of decarbonization

In addition, the Portuguese Presidency expects progress on the discussion on tax reporting as the program states that "the Presidency will seek to create the conditions for reaching a political agreement on the revision of the rules on disclosure of information concerning tax on revenues for certain companies and branches."

Argentina

On 21 December 2020, the Argentinian Tax Authorities (AFIP) launched on their website a new regime (Regimen IPF) to ensure compliance with the new Mandatory Disclosure Regime (MDR). When reporting an international arrangement in the AFIP's system, taxpayers and tax advisors should report each arrangement separately, indicating under which implementation period the arrangement falls. Additionally, taxpayers should include a clear and detailed description of the arrangement in Spanish (ranging between 500 and 1500 words) and a clear and detailed description of the tax advantages or benefits.

However, it is important to note that the Bar of the City of Buenos Aires and various Professional Councils of Economic Sciences have challenged the legality of the MDR regime in court. Taxpayers should follow the progress of these challenges, as the MDR regime may be found partially or entirely invalid.

See EY Global Tax Alert, [Argentina's tax authorities launch the "Régimen IPF" service to ensure compliance with mandatory disclosure regime](#), dated 7 January 2021.

Australia

On 10 December 2020, the Australian Taxation Office (ATO) released the final version of Schedule 3 to its Practical Compliance Guideline PCG 2017/4 in relation to outbound interest-free loans between related parties. The final Schedule applies from 1 January 2020 to both new and existing instruments and outlines the ATO's views on factors that taxpayers are required to consider in risk scoring an outbound interest-free loan arrangement. The final Schedule is largely unchanged from the draft Schedule (released on 12 August 2020) and the ATO maintains the presumption that interest-free outbound loans between related parties are high risk, before consideration of any other characteristics of the financing arrangement.

See EY Global Tax Alert, [Australian Taxation Office releases final guidance on outbound interest-free loans between related parties](#), dated 11 December 2020.

Belgium

On 30 December 2020, Belgium published in the *Official Gazette* a law containing urgent tax and anti-fraud measures. In particular, the law introduces: (i) technical changes in the wording of the applicable provisions of the tax code related to the Earnings Before Interest, Taxes, Depreciation and Amortization (EBITDA)-based interest deduction limitation rule that may have given rise to interpretation issues; and (ii) some defensive measures against jurisdictions listed on the EU list of non-cooperative jurisdictions. With respect to the latter, changes are made to the so-called "Cayman tax" (look-through tax), the controlled foreign company (CFC) regulation, the dividends received deduction and the reporting requirements for payments to "tax havens."

The Law entered into force on 31 December 2020 and is applicable to taxable periods closing on 31 December 2020 and onwards.

Cameroon

On 29 December 2020, Cameroon ratified the OECD MLI by way of Presidential Decree No. 2020/798. Cameroon submitted its provisional MLI positions at the time of signature, listing its reservations and notifications as well as the five CTAs it wishes to be covered by the MLI. The instrument of ratification still needs to be deposited with the OECD before the MLI will enter into force with respect to its CTAs. A definitive list of reservations and notifications will also need to be provided upon the depositing the instrument of ratification.

Czech Republic

In December 2020, the Czech General Financial Directorate published a document providing answers to selected questions on interpretation and application of the MDR as implemented into the Czech law. The document generally does not contain many practical examples but the topics covered therein include the following: (i) reporting language; (ii) transitory period; (iii) precondition for reportable cross-border arrangements; and (iv) reporting of an arrangement in another EU Member State.

See EY Global Tax Alert, [Czech Tax Authority issues guidance on selected DAC6 questions](#), dated 22 December 2020.

Denmark

On 21 December 2020, the Danish Parliament enacted [Bill L 69 C](#) to amend Denmark's application of the MLI regarding the reservation on arbitration panels under Part VI of the MLI, to which Australia and Canada objected in October 2020. The Bill amends the reservation Denmark made under paragraph 2(a) of Article 28 (reservations) of the MLI by deleting paragraph 2 of Denmark's reservation, which states that arbitration will apply to a tax case only insofar as the parties agree that the chair of the arbitration panel will be the judge and that Denmark is allowed to publish the abstracts from the decision made by the arbitration panel.

The Bill is applicable from 1 January 2021.

France

On 16 December 2020, the French Tax Authorities published guidelines on the MLI. The guidelines present the general principles of application of the MLI (presentation, articulation with tax treaties and rules regarding entry into force), as well as the options chosen by France and their effects on CTAs. The guidelines are available in French [here](#).

On 25 November 2020, the French Tax Authorities published the French specifications for the reporting of cross-border schemes under DAC6 and the MDR. The specifications describe the information to be collected and the specific XML forma to be used for the creation and filing of reports relating to the reportable arrangements, with a view to their submission to the tax authorities. The filing procedure is also described, establishing a transitional filing procedure between January 2021 and the end of April 2021, until the platform is finalized in May 2021 and the established procedures are available.

See EY Global Tax Alert, [French Tax Authorities publish specifications for reporting of cross border arrangements under DAC6 and MDR](#), dated 18 December 2020.

Germany

On 3 December 2020, the German Ministry of Finance (BMF) updated the Administrative Principles Procedures (AP 2020) that were first put in place in 2005 to provide guidance regarding the obligations of taxpayers when undergoing a TP examination. The updated AP 2020 contains additions due to the changes in Germany's tax law after the BEPS project.

The AP 2020 focuses solely on procedural aspects which play an important role in German tax audits. Some of the relevant issues to consider are the following: (i) the AP 2020 does not make any reference to the DEMPE (Development, Enhancement, Maintenance, Protection and Exploitation) concept from the OECD; (ii) it sets forth comprehensive precautionary evidence obligations for taxpayers that are involved in cross-border transactions; (iii) it clarifies that documentation needs to be provided in German but other languages and in particular English may be accepted at the discretion of the tax authorities; (iv) insufficient documentation triggers an estimation right for German tax authorities, e.g., if the represented facts are not complete or not correct or the documentation does generally not allow for an appropriate review by an informed third party in an appropriate amount of time; and (v) it highlights that the German tax authorities have the discretion to select the most appropriate TP method to test the arm's-length nature of transfer prices if an alternative method is more likely to result in appropriate results.

Germany's AP 2020 represents an element (in addition to the tax law and executive orders) of German tax provisions. Although not binding on taxpayers and courts, the AP 2020 is important to taxpayers since it serves as additional guidance for the interpretation and illustration of the tax law and executive order.

See EY Global Tax Alert, [German Ministry of Finance issues new Administrative Principles regarding examination of income allocation between internationally associated enterprises](#), dated 16 December 2020.

Hungary

On 30 December 2020, Hungary published the [Decree 19/2020 \(XII.30.\)](#) in the *Official Journal* providing a list of non-cooperative jurisdictions for tax purposes. The list contains the following jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.

The list is applicable from 1 January 2021 and is based on the EU's list. Further, from 1 January 2021 onwards, certain exemptions cannot be applied under the CFC rules if the concerned entity/permanent establishment is resident in a listed non-cooperative jurisdiction.

Ireland

On 22 and 23 December 2020, the Irish Revenue Commissioners published [eBrief 235/2020](#) and [eBrief 238/2020](#), which focus on EU MDR. The eBrief 235/2020 provides technical step by step guidance on how to set up a DAC6 reporting obligation and file a DAC6 return on the Revenue Online Services. The eBrief 238/2020 provides updated general guidance on DAC6 particularly with regard to Hallmark C.

Also on 23 December, the Department of Finance published its [Feedback Statement](#) on the implementation of the EU Anti-Tax Avoidance Directive's (ATAD) Interest Limitation Rules (ILR). The Feedback Statement builds on the November 2018 public consultation on the implementation of the ATAD's ILR. Due to the complexity of the ATAD ILR and its interaction with domestic legislation, the Department of Finance has published this Feedback Statement to respond to the views expressed in replies to the public consultation and to set out possible approaches to some of the technical aspects of the ILR.

The Feedback Statement notes that a two-stage approach to the development of ILR legislation is being taken. First, it is intended to develop a robust legislative approach to the operation of the ILR, including carryforward provisions, on a single company basis (the focus of this Feedback Statement). When the framework of the interest limitation and carryforward on a single company basis is firmly established, legislative approaches will then be developed to consider the notional local group and group ratio options. The Feedback Statement contains consultation questions on a range of technical and policy issues relevant to the development of those options.

The consultation period will run until 8 March 2021 with a second feedback statement expected to be published in mid-2021. The views of stakeholders will be important in ensuring that Ireland's ILR, when introduced with effect from 1 January 2022, meets the standards required under ATAD while also being clear and operable in practice and remaining consistent with Ireland's long-standing focus on the taxation of activities with substance in Ireland.

Luxembourg

On 8 January 2021, the Luxembourg Tax Authorities (LTA) published a Circular clarifying certain technical aspects of the interest limitation rules applicable since 1 January 2019 in Luxembourg further to the implementation of the EU ATAD into Luxembourg domestic legislation at the end of 2018.

The Circular notably confirms among others that a symmetric approach regarding the definition of relevant expenses (borrowing costs) and interest income should be applied. The Circular also provides some clarifications on the concept of "subsequent modification" in the context of the grandfathering clause according to which interest on loans that were concluded before 17 June 2016 is excluded from the borrowing costs definition, and provides some clarifications on the method to determine non-deductible exceeding borrowing costs in presence of grandfathered interest and interest on loans used to fund long-term public infrastructure projects.

See EY Global Tax Alert, [Luxembourg Tax Authorities issue guidance on interest limitation rules](#), dated 12 January 2021.

Netherlands

On 31 December 2020, the Netherlands published in the *Official Gazette* the document [no. 64029](#) providing an updated list of low-tax jurisdictions for 2021. The list includes the following: (i) countries that have a statutory corporate income tax rate of less than 9%, i.e., Anguilla, the Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turkmenistan, Turks and Caicos Islands, Vanuatu and the United Arab Emirates; and (ii) countries that are on the EU's list of non-cooperative jurisdictions. The Dutch list of low-tax jurisdictions is relevant for the Dutch CFC rules, the conditional withholding tax on interest and royalty payments, and eligibility for obtaining advance certainty with the Dutch tax authorities.

Also on 31 December, Netherlands published in the *Official Gazette* regulation [no. 63397](#) to implement regulations that provide additional guidance for the application of the conditional withholding tax on interest and royalties from 2021 onwards.

From 1 January 2021 onwards, a conditional withholding tax on interest and royalty payments is applicable to related companies established in jurisdictions that are included on the Dutch list of low-tax jurisdictions and in abusive situations. This new withholding tax was already enacted late 2019.

The new rules are applicable from 1 January 2021.

Oman

On 29 December 2020, the Oman Tax Authorities, in light of the circumstances related to the pandemic, extended the deadline to submit the County-by-Country (CbC) reporting notification for entities whose financial years end on 31 December 2020. The new deadline has been extended up to 30 April 2021.

Peru

On 2 December 2020, after having received confirmation from the Global Forum that Peru met the standard on the safety and security of the information, the Peruvian Tax Administration enforced the deadline to file the CbC reports for reporting fiscal years 2017, 2018, and 2019. If certain conditions are met, the new deadline to file the CbC reports for Peruvian Taxpayers that belong to an MNE with an Ultimate Parent Entity nonresident in Peru, is now the last business day of January 2021.

Philippines

On 23 December 2020, the Bureau of Internal Revenue of Philippines published [Revenue Regulation 34-2020](#) (the regulation) to streamline the guidelines and procedures for the submission of BIR Form No. 1709 (RPT Form), TP Documentation and other supporting documents by providing safe harbors and materiality thresholds.

The regulations provide a list of taxpayers which are required to submit a "Related Party transaction" (RPT) form along with their annual tax returns to verify that taxpayers are reporting their transactions at arm's length. Further, the regulations provide that taxpayers required to submit the RPT form, are also required to prepare TP documentation and submit the same within 30-calendar days upon receipt of a request by the BIR if any of the following thresholds are met: (i) the annual gross revenue is greater than PHP150 million (approximately US\$3.1 million) and the total amount of related party transactions is greater than PHP90 million

(approximately US\$1.8 million); or (ii) the related party transactions involving sale of tangible goods exceeds PHP60 million (approximately US\$1.2 million) and/or other related party transactions other than tangible goods is greater than PHP15 million (approximately US\$300,000); or (iii) if TP documentation is required to be prepared during the immediately preceding taxable period for exceeding either (i) or (ii) above.

The regulation came into effect on 23 December 2020.

Spain

On 29 December 2020, the Spanish Parliament approved final legislation to implement the EU Council Directive 2018/822 (DAC6). The Spanish legislation was published in the *State Official Gazette* on 30 December 2020 and entered into force on 31 December 2020, being effective from that same date.

The final Spanish MDR legislation is broadly aligned to the requirements of the Directive. The Spanish reporting deadlines will be included in the regulations setting forth the Spanish MDR, which have not yet been released, so the reporting deadline is still uncertain.

See EY Global Tax Alert, [Spanish Parliament approves final legislation to implement MDR](#), dated 8 January 2021.

Switzerland

On 22 December 2020, the competent authority of Switzerland published a report containing statistical 2019 data on the mutual agreement procedures under the double taxation agreements concluded by Switzerland.

According to the statistics, the average time taken for the procedures in Switzerland in 2019 was 21 months (23 months for TP and 20 months for other mutual agreement procedures).

United Kingdom

On 24 December 2020, the United Kingdom (UK) and the EU reached an agreement in its discussions on the UK-EU Trade and Cooperation Agreement ([UK-EU TCA](#)). The UK-EU TCA sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programs.

In the field of taxation, the EU and the UK included specific arrangements in the UK-EU TCA which should ensure a certain level of coordination, including:

- ▶ Rules on cooperation in trade and indirect tax
- ▶ Special rules on prohibition of defined subsidies including tax subsidies
- ▶ A good governance clause
- ▶ Commitments to uphold existing OECD taxation standards on exchange of tax information, anti-tax avoidance, and public tax transparency for financial institutions

The UK-EU TCA is provisionally applicable since 1 January 2021, after having been agreed by EU and UK negotiators on 24 December 2020.

See EY Global Tax Alert, [UK and EU reach trade agreement](#), dated 29 December 2020.

Recently, Her Majesty Revenue and Customs (HMRC), announced the UK's approach to the MDR following the end of the Brexit transition period on 31 December 2020.

HMRC has advised that MDR reporting in the UK will still be required for a limited time, but only for arrangements which meet hallmarks under category D (undermining reporting obligations or obscuring beneficial ownership). Further, in the coming year, the UK will consult on and implement the MDR rules inspired by BEPS Action 12 as soon as practicable, to replace the EU Directive DAC6 and transition from EU to international rules.

See EY Global Tax Alert, [UK Government announces approach to UK MDR post UK-EU Brexit Agreement](#), dated 5 January 2021.

United States

On 7 January 2021, the United States (US) Trade Representative published a [statement](#) announcing its decision to suspend the tariff action in the France digital services tax (DST) investigation. This decision was made in light of the ongoing investigation of similar DSTs adopted or under consideration in 10 other jurisdictions. According to the statement, "a suspension of the tariff action in the France DST investigation will promote a coordinated response in all of the ongoing DST investigations."

On 30 November 2020, the US Internal Revenue Service (IRS) updated the [website](#) that includes an up-to-date listing of the jurisdictions with which the US Competent Authority has entered into a CAA for the automatic exchange of CbC reports and the jurisdictions that are in negotiations for a CAA. In this update, the IRS added Monaco to the list of countries with which the US has signed a CAA for the automatic exchange of CbC reports.

Vietnam

On 5 November 2020, the Vietnam Government issued Decree 132/2020/ND-CP (the Decree) to provide guidance on tax administration of enterprises with related party transactions. Among other items, the Decree: (i) sets forth regulations on the deductibility of loan interest; (ii) broadens the definition of related parties; (iii) narrows the arm's-length range; (iv) provides detailed guidance on taxpayers' obligations relating to CbC reporting; and (v) lists the cases for which an exemption to prepare TP documentation applies.

The Decree is applicable from 20 December 2020 for period 2020 and future years.

See EY Global Tax Alert, [Vietnam issues guidance on related party transactions and transfer pricing](#), dated 14 December 2020.

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