From a Dutch perspective, the Enhanced Part is also treated as the Deemed Loan 1. However, contrary to the OECD guidelines, Dutch tax law[2] allows the BV to process the "secondary transaction" in the form of a deemed loan from the Parent to the BV (**Deemed Loan 2**). In its tax return, the BV deducts 35 interest expenses on the Bank Loan and 15 deemed interest expenses on the Deemed Loan 2. However, the 15 deducted by the BV is not picked up at the level of the Parent as it is considered an exempt deemed dividend accruing on the Deemed Contribution into the BV.

As per the beginning of this year, one may question whether the BV's deduction of the deemed interest expenses on the Enhanced Part will be denied under the Dutch hybrid mismatch rules (i.e. ATAD II). ATAD II intends to neutralise tax benefits arising from differences between jurisdictions in the tax treatment of entities, financial instruments, permanent establishments or tax residency. Arguably, a different view on the processing of a "secondary transaction"[3] should not qualify as a 'hybrid mismatch'. Moreover, during Dutch parliamentary discussions on the implementation of ATAD II, it was mentioned that differences in tax outcomes that are solely attributable to differences in the application of transfer pricing rules are not considered to be a 'hybrid mismatch'. Instead, the Dutch government announced that undesired transfer pricing mismatches will be dealt with separately in the scope of a planned assessment of the wider application of the arm's length principle. But how about DAC6...?

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Ukraine

New proportionate TP adjustment rules introduced into Ukrainian tax law since May 2020

Ukrainian TP rules provided for a proportionate adjustment mechanism since 2013. It is defined as the right of a party in a controlled transaction to adjust its tax liabilities following a TP adjustment of the other party conducted to ensure that conditions of the transaction are at arm's length.

Yet, until recent changes, the procedure of such adjustment was not clear. Namely, the Tax Code only mentioned that the proportionate adjustment should be carried out following the procedure and on conditions set forth by the applicable Double Tax Treaty ("DTT").

Law 466-IX (in force since May 2020) introduced comprehensive changes into the Tax Code of Ukraine including the implementation of the Base Erosion and Profit Shifting ("BEPS") three-tier reporting standard. Introduction of the rules detailing the procedure of proportionate TP adjustment is one of such important changes.

The right to initiate proportionate adjustment is available to the taxpayer who receives from its counterparty in a controlled transaction the notification about accomplished TP adjustment of tax liabilities in the country of its residence. Such a right is available only in the event that Ukraine has concluded DTT with the country of the counterparty.

2 Dutch Decree, dated 22 April 2018, nr. 2018-6865, section 9.

3 According to the OECD Guidelines (in par. 4.68) a "secondary transaction" can take the form of "constructive dividends" (i.e. company benefitting shareholder), "constructive equity contributions" (i.e. shareholder benefitting company), or "constructive loans" (i.e. either).

Following such a notification, the taxpayer may apply to the tax authority informing about the intention to make a proportionate adjustment in the period or periods of the controlled transaction. The application should be accompanied with a calculation of the amount of adjustment for each period, other documents that formed the basis for the TP adjustment by the counterparty and also the TP documentation.

The tax authority has 30 workdays to consider the application and after this period adopts one of the following decisions:

- to confirm possibility of such proportionate adjustment;
- to disallow it in full or partially if it considers such adjustment to be unfounded or due to the absence of required documents. The tax authority must provide grounds for refusal;
- to initiate a TP audit of the taxpayer to study the grounds for the proportionate adjustment and to adopt one of the aforementioned decisions based on the results of such audit.

In the case that the tax authority fully or partially disallows proportionate adjustment, the taxpayer has the right to apply to the Ministry of Finance to initiate consideration of the case according to the Mutual Agreement Procedure ("MAP") according to applicable DTT.

In summary, since May 2020 Ukrainian taxpayers have the mechanism which may be followed to accomplish proportionate adjustment of its tax liabilities in the event of a TP adjustment of the counterparty in the transaction. In future it may prove to be an efficient tool for implementation of the group TP policy goals in transactions involving Ukrainian subsidiaries or to avoid double taxation triggered by one-sided TP adjustments.

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Argentina

"Argentine Transfer Pricing News - 2020 Second Trimester"

The milestone of the 2020 second trimester is certainly the enactment of the new transfer pricing regulations. On 15 May, the Argentine Revenue Service ("ARS") released the much-awaited general resolution 4717 ("GR 4717").

New Transfer Pricing Regs (GR 4717)

Here's a brief summary of the GR 4717 main aspects:

1. *Tested party:* GR 4717 provides that the tested party is the Argentine affiliate, as the general rule. However, it does allow testing all affiliated parties – even those residing outside Argentina – when the profit split method is applied.

2. *Business restructurings:* it regulates in detail the tax consequences of cross-border business restructurings within the affiliated group. The resident party is required to account an arm's length remuneration when it undertakes new risks or functions, or when it transfers a business line out of the country. In parallel, it is also required to account for an arm's length loss when the business restructuring results in the need to pay out an indemnification or a similar outlay. For benchmarking purposes, the new GR 4717 requires a consideration of the effects of civil and commercial laws, market standards and domestic case law, whenever applicable. Such economic analysis needs to be included in the annual transfer pricing ("TP")