



ICLG

The International Comparative Legal Guide to:

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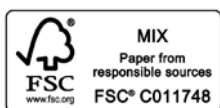
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General Chapter:

1	The Road to (VAT) Recovery – William Watson, Slaughter and May	1
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Country Question and Answer Chapters:

2	Albania	Boga & Associates: Alketa Uruçi & Andi Pacani	7
3	Andorra	Arqués Ribert Junyer Advocats: Daniel Arqués i Tomàs & Mireia Ribó i Bregolat	12
4	Angola	Manuel Gonçalves Advogados (MGA): Alexandra do Nascimento Gonçalves & Fernanda Mualeia	19
5	Australia	Greenwoods & Herbert Smith Freehills: Adrian O'Shannessy & Tony Frost	24
6	Austria	Schindler Attorneys: Clemens Philipp Schindler & Martina Gatterer	32
7	Belarus	Sysouev Bondar Khrapoutski: Anastasia Malakhova & Andrei Kosov	40
8	Belgium	Lexelis Advocaten: Patrick Vanhaute	46
9	Bolivia	Guevara & Gutiérrez S.C.: Mauricio Dalman	55
10	Brazil	Matts Filho, Veiga Filho, Marrey Jr e Quiroga Advogados: Luiz Felipe Centeno Ferraz & Renata Correia Cubas	60
11	Bulgaria	Baker Tilly Klitou and Partners Business Services EOOD: Svetla Marinova & Radostina Doneva	66
12	Canada	Thorsteinssons LLP: Michael Colborne & Michael McLaren	72
13	Colombia	Cárdenas & Cárdenas Abogados: Camilo Cortés & Martha Reyes	78
14	Congo – D.R.	BTM Lawyers SCA: Natacha Latere & Gustave K. Luzolo	84
15	Cyprus	Andreas Neocleous & Co LLC: Elias Neocleous & Philippos Aristotelous	89
16	France	Bredin Prat: Yves Rutschmann & Marion Méresse	95
17	Germany	P+P Pöllath + Partners: Michael Best & Nico Fischer	102
18	Ghana	Bentsi-Enchill, Letsa & Ankomah: Seth Asante & Frank Nimako Akowuah	109
19	Greece	Kyriakides Georgopoulos Law Firm: Panagiotis Pothos & Georgia Balopoulou	115
20	Hong Kong	DLA Piper: Patrice Marceau & Jennifer Wu	122
21	Iceland	LEX Law Offices: Garðar G. Gíslason & Garðar Viðir Gunnarsson	127
22	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Freddy Karyadi & Chaterine Tanuwijaya	132
23	Ireland	Maples and Calder: Andrew Quinn & David Burke	139
24	Japan	Nagashima Ohno & Tsunematsu: Shigeki Minami	145
25	Kazakhstan	GRATA Law Firm: Assel Ilyassova	152
26	Kosovo	Boga & Associates: Alketa Uruçi & Andi Pacani	157
27	Liechtenstein	Ospelt & Partner Attorneys at Law Ltd.: Alexander Ospelt & Martin Gassner	162
28	Lithuania	Juridicon Law Firm: Laimonas Marcinkevicius & Ingrida Steponavičienė	168
29	Luxembourg	MNKS: Raquel Guevara	178
30	Malta	Avanzia Taxand Limited: Walter Cutajar & Mary Anne Inguanez	186
31	Mexico	Calderón, González y Carvajal, S.C.: Alejandro Calderón Aguilera & Arturo Carvajal Trillo	193
32	Nigeria	Bloomfield Law Practice: Bode Adegoke & Busayo Adedeji	199
33	Norway	Advokatfirma Ræder DA: Rolf H. Nicolaissen & Sigurd Garmann Tuntland	203
34	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados: António Lobo Xavier & António Pedro Braga	209

Continued Overleaf →

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Country Question and Answer Chapters:

35	Puerto Rico	Ferraiuoli LLC: Pedro P. Notario-Toll & Reinaldo A. Díaz-Pérez	215
36	Romania	Deloitte Tax: Dan Bădin & Daniel Petre	220
37	Russia	YUST: Maxim Rovinskiy & Ekaterina Boldinova	225
38	Senegal	GENI & KEBE: Rahimine Toure & Ndèye Absatou Ndiaye	231
39	Sweden	Kilpatrick Townsend & Stockton Advokat KB: David Björne	236
40	Switzerland	Lenz & Staehelin: Pascal Hinny & Jean-Blaise Eckert	244
41	Ukraine	ICF Legal Service: Natalya Ulyanova & Oleg Derlyuk	253
42	United Kingdom	Slaughter and May: Zoe Andrews & William Watson	259
43	USA	Seyfarth Shaw LLP: John P. Napoli & Michael Rosenthal	267

Colombia

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1 Tax Treaties and Residence

1.1 How many income tax treaties are currently in force in Colombia?

There are eight treaties in force on the avoidance of double taxation, i.e. those with: India; South Korea; Mexico; Switzerland; Chile; Canada; Spain; as well as the Andean Community treaty. In 2016 two treaties will enter into force (with the Czech Republic and Portugal).

There are treaties in force with Argentina, Brazil, Chile, France, Germany, Italy, Venezuela and the USA about income derived from transportation activities.

1.2 Do they generally follow the OECD Model Convention or another model?

The treaties generally follow the OECD model; however, in some treaties there are articles that also use the UN model. The Andean Community and the transportation treaties do not follow the OECD model.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

Yes, all treaties shall be incorporated into domestic law. Furthermore, a ruling issued by the Constitutional Court is also required before being enforceable.

1.4 Do they generally incorporate anti-treaty shopping rules (or “limitation on benefits” articles)?

In general, treaties do incorporate rules regarding anti-treaty shopping.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

No, treaties are not overridden by rules of domestic law.

1.6 What is the test in domestic law for determining corporate residence?

A company is a Colombian entity (i.e. resident for Colombian tax purposes) if it is incorporated under Colombian law, if it has its

domicile in the country, or if it has its effective place of management in Colombia.

In this regard, effective place of management is “the place where commercial, critical and necessary management decisions are made to carry out the activities of the company or entity”. Law 1739 excludes from this rule foreign companies that meet certain requirements.

2 Transaction Taxes

2.1 Are there any documentary taxes in Colombia?

Colombian tax law provides for stamp tax. Nonetheless, as of 2010 the stamp tax rate is 0%.

There are some taxes when documents are issued via a notary and/or have to be registered before the Chamber of Commerce or the real estate registry. As an example, a 0.7% registration tax will be levied on the increasing of capital in a company.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Colombia has the following:

- (i) value added tax (VAT), that is an indirect national tax on services provided within Colombia, and on sales and imports of physical movable goods, which general tax rate is 16%; however, there are some goods or services with rates of 5% and 0%; and
- (ii) national consumption tax, that is an indirect tax levied on the sale of vehicles, telecommunications, food and beverages, with rates of 4%, 8% and 16%.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

VAT is not applicable when the goods/services have been expressly excluded (not taxed) or exempted (0% rate).

Some of the relevant exclusions that can be noted are most groceries, fruit, electric energy, medicines, rubber, paper, pencils, medical services, certain transportation services, interests, public utility services (except for telephone services), housing rental, education services, tickets (cultural events, sporting events, movies), and certain services related to agricultural activities.

Some of the relevant VAT-exempt goods or services are: goods that are exported or sold within the country to international commercialisation companies to the extent the goods are effectively exported; notebooks,

books and magazines of a cultural and scientific nature, newspapers and other periodical obligations; export of services provided that certain conditions are complied with; and tourism services provided to foreigners.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

As general rule, the VAT paid can be treated as input VAT (discountable tax) to the extent (i) the good or service acquired can be treated as a cost or expense for income tax purposes, and (ii) it is related to the VAT-taxable activity; otherwise such amount would be considered as a higher value of the cost or expense.

In the case of exporters and producers of exempt goods/services, input VAT can be recovered via a tax refund.

2.5 Are there any other transaction taxes payable by companies?

The following transaction taxes are payable by companies:

- Financial Transactions Tax (“FTT”): this is accrued by the performance of financial transactions any time there is a debit in an account held in a local bank. The FTT will be applicable until 2021, subject to an annually decreasing rate of 0.4% until 2018, 0.3% for 2019, 0.2% for 2020 and 0.1% for 2021. The financial transactions tax is supposed to be eliminated in 2022. 25% of the tax paid is deductible for income tax and fairness tax (“CREE”) purposes.
- Taxes on the purchase of real estate property: when purchasing land or any real estate in Colombia it is necessary that the following taxes are paid:
 - Registration Tax: 1% of the total purchase price.
 - Registration Right: 0.5% of the total purchase price.
 - Notary rights: 0.3% plus VAT at a 16% rate.

2.6 Are there any other indirect taxes of which we should be aware?

No, there are no other indirect taxes.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

As a general rule, there is 0% withholding, provided that dividends are paid from profits on which income tax is levied at the distributing company level.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

As a general rule, royalties will be subject to a 33% withholding tax rate. In case of software royalties, the withholding tax rate will be 26.4%. Double taxation agreements (“DTAs”) establish a maximum rate of 10%.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

A 14% withholding tax rate would apply if the credit is granted for a

year or more; otherwise a 33% would apply. DTAs establish reduced withholding rates. There are some loans that are not considered as possessed in Colombia, thus no withholdings are applicable.

3.4 Would relief for interest so paid be restricted by reference to “thin capitalisation” rules?

According to thin cap rules, as a general rule, only interest generated over loans (local/foreign; related/unrelated) up to three times the tax equity of the taxpayer (as of 31 December of the previous year) is deductible (3:1 ratio). The proportion of interest arisen from the debt that exceeds the cap referred to above is not deductible.

3.5 If so, is there a “safe harbour” by reference to which tax relief is assured?

There are not any “safe harbours” for tax purposes.

3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

Thin capitalisation rules are applicable over loans with local or foreign and related or unrelated parties.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

In certain DTAs where interest is subject to 0% withholding, deductibility of such interest could be limited.

3.8 Is there any withholding tax on property rental payments made to non-residents?

A 33% withholding income tax rate will be applicable on the payment or accrual. DTAs establish a maximum rate of 10% in the rental of industrial, commercial or scientific equipment.

3.9 Does Colombia have transfer pricing rules?

Colombian regulations regarding transfer pricing rules are in accordance with the spirit of the OECD Guidelines. Transfer pricing rules apply to income taxpayers’ engaging in cross-border transactions with foreign related parties. Furthermore, the rules are also applicable when the related party is located in a Free Trade Zone.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

As of 2013, Colombia has two types of income tax: the first is the regular income tax with a rate of 25% and the second one is CREE, which rate is 9%.

Additionally, there is a surcharge of CREE, and it shall be paid by CREE taxpayers that have a CREE taxable income exceeding COP\$800,000,000 (approximately US\$335,000). The surcharge will be of 5% in 2015, 6% in 2016, 8% in 2017 and 9% in 2018. The surcharge will be discontinued in 2019.

For Industrial Users of goods and services located in a Free Trade Zone, the income tax rate is 15% and they are not subject to CREE.

There is a 10% capital gains tax (e.g. on gains in the sale of fixed assets owned for more than two years).

Regardless of the general rules explained above, Law 1429 of 2010 ruled by Decree 545 of 2011, established an income tax benefit for small enterprises (companies and individuals, excluding branches) with fewer than 50 employees and total assets not exceeding 5,000 monthly minimum legal wages, and incorporated as of 29 December 2010. These entities are subject to the following reduced income tax rates:

- 0% income tax rate during the first two years of activity;
- 6.25% effective income tax rate during the third year;
- 12.5% effective income tax rate during the fourth year;
- 18.75% effective income tax rate during the fifth year; and
- 25% as from the sixth year and after.

In addition, during their first five years of activities, small enterprises are not subject to:

- withholding income tax; and
- the presumptive income tax regime.

On the other hand, foreign companies without a permanent establishment in Colombia are charged income tax at a rate of 39% in 2015, 40% in 2016, 42% in 2017, 43% in 2018 and 33% in 2019, and on an ongoing basis. Foreign individuals' income tax rate is 33%. The 10% capital gains tax (e.g. on gains in the sale of fixed assets owned for more than two years) is also applicable for foreigners.

In special cases (e.g. technical services, technical assistance services, consultancies, etc.) the foreigner is not liable to file an income tax return in Colombia to the extent the relevant income tax withholding is applied, and thus the amount withheld will be the final tax. Payments abroad for technical services or technical assistance rendered by companies or individuals domiciled in non-tax haven jurisdictions, are subject to a 10% withholding rate. In the same way, interest originated on loans granted by foreign companies is usually taxed at a 14% withholding rate.

Please note that in the sale of goods a 14% withholding tax would apply, and the foreigner will be liable to file the income tax return in order to identify the income tax or the capital gain triggered.

4.2 Is the tax base accounting profit subject to adjustments, or something else?

Yes, taxable profits are usually higher than the accounting profits, as the Colombian Tax Code establishes rules in order to identify the expenses that can be treated as costs or deductions for income tax purposes.

4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

Usually the adjustments are related to deductibility of expenses for tax purposes. For example, expenses incurred abroad which have not been subject to income tax withholding have a limited deductibility.

Penalties paid for tax purposes are not tax-deductible. Accounting provisions are not tax-deductible. Expenses that have been accounted for in a specific taxable year can be rejected if the expense corresponds to a different taxable year.

4.4 Are there any tax grouping rules? Do these allow for relief in Colombia for losses of overseas subsidiaries?

No, there are no tax grouping rules. Tax losses may not be taken

by the shareholders. Tax losses may not be taken by a third party except when a merger or split-off takes place, provided the business is the same.

4.5 Do tax losses survive a change of ownership?

As general rule, tax losses survive a change of ownership of the company.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Tax is not imposed at a different rate on retained profits in Colombia.

4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

- Real Estate Tax is a municipal tax that is accrued on 1 January of each year. The taxable base is at least the cadastral assessment in force for the concerned year or the commercial self-assessment done by the owner of the real estate. The rates of the real estate tax range between 0.5% and 1.6%. If the land is not urbanised, a maximum 3.3% tax rate might apply.
- Industry and Commerce Tax accrues on the performance of commercial or industrial activities or the rendering of services within a municipal jurisdiction. The rate varies depending on the activity or service involved. The highest rate is 1.4%.
- Law 1739 created the National Wealth Tax (“NWT”) (*Impuesto a la Riqueza*) for the years 2015, 2016, 2017 (and 2018 for individuals). The taxable event is the possession of wealth (i.e. gross equity less debts) equal to or higher than COP\$1,000 million (approx. US\$435,000) on 1 January 2015.

Taxpayers are, among others, (i) resident individuals and Colombian companies that are income tax taxpayers, and (ii) individuals that do not have a residence in Colombia and foreign companies in relation to their wealth possessed directly or indirectly within the country.

In the depuration of NWT's tax base, among others, the equity value of shares in Colombian companies can be detracted from the tax base, whether they are held by the taxpayer directly or indirectly through trusts or similar vehicles.

Finally, Law 1739 established for taxable years 2015, 2016 and 2017 a tax which is complementary to NWT, in order to include assets which have not been reported to the Tax Authorities or to exclude the reporting of non-existing liabilities. The tax base will be the non-declared assets' equity value; if the assets are classified as goods, the tax base will be the fiscal cost of the goods. The complementary NWT tax shall be paid only once, and the tax rate will depend on the year in which the taxpayer decides to disclose the relevant assets or non-existing liabilities. The tax rate will be 10% in 2015, 11.5% in 2016 and 13% in 2017.

The NWT or its complementary tax is not deductible or creditable for Colombian income tax purposes.

5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

Capital gains are considered as those arising from the disposal of assets of any type, which have been part of the fixed assets of the taxpayer for a term of two years or more. Capital gains are subject

to income tax at a rate of 10%. Capital losses can be offset with capital gains only.

5.2 Is there a participation exemption for capital gains?

No, there is not any participation exemption for capital gains; however, there is a benefit in portfolio investments, by which income tax is not levied in Colombia on the profit in the sale of publicly listed shares that do not exceed 10% of the outstanding shares of an entity during the same fiscal year.

DTAs establish some rules in order to identify whether income tax can be levied on capital gains in Colombia.

5.3 Is there any special relief for reinvestment?

As general rule, there is not any special relief for reinvestment; however, DTAs with Spain and Chile include a reduction of the income tax rate applicable to dividends that are taxed at the shareholder level.

5.4 Does Colombia impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Income tax is not levied on indirect sales of shares in Colombia as long as the seller is not a Colombian resident or a Colombian company. On the contrary, direct sales of shares owned in a Colombian company, or assets located in Colombia at the time of the sale, are charged income tax or capital gains tax, as applicable.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

Some companies can be formed through private documents and only a registration tax would be due. In the case of certain companies and branches of foreign corporations, there is the need to pay notary fees, calculated on the amount of capital designated for the formation of the company at a 0.3% rate plus VAT at 16%, and there is a registration tax calculated on the same base at a 0.7% rate.

6.2 What is the difference, if any, between the taxation of a locally formed subsidiary and the branch of a non-resident company?

While income tax is levied on subsidiaries, and CREE on their worldwide income, branches are only subject to income tax and CREE with respect to their domestic (Colombian) source income attributable to the branch.

In case a subsidiary receives foreign-source income and such income was taxed abroad, the subsidiary will be able to take a discount (tax credit) for the income tax paid abroad, provided some rules are met. Since branches of foreign entities are not subject to Colombian income tax upon their foreign-source income, they cannot claim any tax credits corresponding to taxes paid abroad upon foreign-source income.

If the Colombian subsidiary invests abroad, as regards the dividends received from foreign entities the subsidiary would have the right to apply an underlying tax credit.

Branches cannot benefit from the reduced income tax rates established by Act 1429 of 2010 ruled by Decree 545 of 2011.

The branch's head office will be jointly and severally liable with its own equity for the tax liabilities of the Colombian branch.

The tax liability of the shareholders in the case of corporations or in the case of a simplified shares corporation ("SAS") is limited to the amount of the capital contributed. In other words, the shareholders are not jointly and severally liable for the tax liabilities of the subsidiary.

6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

The income, cost and expenses attributable to the branch shall be supported in a study of the functions, assets, risks and personnel involved in obtaining the attributable income.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

Profits transferred to a foreign head office are deemed as dividends; therefore, if dividends (paid either by a branch or a subsidiary) are distributed from profits that have been taxed at the subsidiary/branch level, the withholding income tax rate would be 0%, otherwise the dividends would be subject to a withholding tax of 33% when distributed (in the case of subsidiaries) to the shareholders and transferred to the main office (in the case of branches of foreign entities).

6.5 Would a branch benefit from double tax relief in its jurisdiction?

A branch is not Colombian-resident for DTA purposes.

6.6 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

Please refer to question 6.4.

7 Overseas Profits

7.1 Does Colombia tax profits earned in overseas branches?

As mentioned before, income tax is levied on Colombian companies' worldwide income; thus profits earned in overseas branches will be subject to taxation in Colombia. Tax credits might apply.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Yes, income tax will be levied in Colombia on dividends from a non-resident company; however, the Colombian company will have the right to apply an underlying tax credit.

7.3 Does Colombia have "controlled foreign company" rules and, if so, when do these apply?

Colombia does not have controlled foreign corporation legislation.

8 Taxation of Real Estate

8.1 Are non-residents taxed on the disposal of real estate in Colombia?

Yes, income tax or capital gains tax, as applicable, will be levied on income which has arisen from the sale of real estate located within Colombian territory. Question 4.1 above explains the income tax rate and the capital gains tax rate.

8.2 Does Colombia impose tax on the transfer of an indirect interest in real estate located in Colombia and, if so, what constitutes an indirect interest?

Income tax and capital gains tax are not levied on indirect sales in Colombia.

8.3 Does Colombia have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

There is no special tax regime for REITs.

9 Anti-avoidance

9.1 Does Colombia have a general anti-avoidance or anti-abuse rule?

Law 1607 (Article 122) introduced a general anti-abuse rule in tax matters (the “substance over form” rule in the case of “tax abuse”). According to this rule, abuse implies the use or implementation of any type of entity or legal act to alter or artificially modify the tax effects that would otherwise be generated for the taxpayer or his/her related party, with the sole purpose of obtaining some kind of tax advantage or benefit and not as a result of commercial reasons.

Payments that are Colombian-source income such as interest, commission, fees, royalties, rental payments, compensation for

personal services or exploitation of all industrial property or know-how, technical services, technical assistance or royalties, or financial leasing, to parties either resident or domiciled, or that have their business operations in tax haven tax jurisdictions, are subject to withholding at a rate of 33%.

Additionally, Law 1739 introduces an obligation to file an annual tax return in order to inform the Tax Authorities of the assets located in jurisdictions other than Colombia.

Finally, as mentioned in question 4.7 above, the tax complementary to NWT has been created.

9.2 Is there a requirement to make special disclosure of avoidance schemes?

No, there is not any requirement to make special disclosure of avoidance schemes.

10 BEPS and Tax Competition

10.1 Has Colombia introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

No, at the moment Colombia has not introduced any legislation related to BEPS; however, it is expected that some rules in that regard will be adopted.

10.2 Does Colombia maintain any preferential tax regimes such as a patent box?

There are some special tax exemptions for income tax purposes. For example: (i) in the case of new medicinal products and software developed in Colombia, protected by new patents registered in Colombia, provided some requirements are met; or (ii) the income obtained for hotel services provided in new hotels or hotels that have been remodelled, to the extent some requirements are met.

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- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
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- Private Equity
- Product Liability
- Project Finance
- Public Procurement
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- Securitisation
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- Telecoms, Media & Internet
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