



Deloitte interview with Pascal Saint-Amans and Tomas Balco  
from the OECD Centre for Tax Policy and Administration  
The future of transfer pricing in the financial services sector

## **Interviewed**

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## Interviewer:

Ralf Heussner - Transfer Pricing, Deloitte

## Interviewed:

Pascal Saint-Amans - OECD Director  
Centre for Tax Policy and Administration

Welcome to this Deloitte interview with the Organization for Economic Co-operation and Development. My name is Ralf Heussner and I am a Tax Partner with Deloitte focusing on Financial Services Transfer Pricing. We are here today with Pascal Saint-Amans and Tomas Balco from the OECD's Centre for Tax Policy and Administration to discuss the status-quo and future of transfer pricing in the financial services sector.

This is a very busy period for you and the OECD. Thank you for taking the time for this interview, especially given the public consultation meetings that took place earlier this week here in Paris. Pascal, let me dive directly into our discussion with a first question for you.

**Ralf Heussner (RH): We have seen the release of the consultation document on the digitalized economy, the releases of the BEPS discussion draft on the transfer pricing aspects of financial transactions, as well as the additional guidance on the attribution of profits to permanent establishments last year. Looking at the big picture, can you please give us an outline of where we stand with respect to these different work-**

**streams, how they can be linked together, the anticipated future work of the OECD, as well as the key challenges you are facing?**

**Pascal Saint-Amans (PS-A):** The agenda of the OECD is still very busy on tax: transparency, BEPS and re-writing international tax rules to address tax challenges of digitalization of the economy. We have delivered on BEPS, but there were some issues left in terms of functions and transactions, and that is why we are finalizing a paper on it. We are coming to an end on this, through the implementation of Action 4. This Action has been revitalized by the US tax reform and the fact that they have implemented Action 4 and going even further.

In the field of transfer pricing, what I believe is really important today is the discussion on tax and digitalization. Why so? A number of countries, after BEPS, are still left with issues related to the amount of tax we should collect on activities deployed in our territory without having the nexus—the permanent establishment according to the current definition. Countries like France, Italy, Spain, Indonesia, Argentina and other countries all over the world are not satisfied with the current state of play

and with the conclusions of BEPS Action 1 report, delivered at the end of 2015. These countries have opened the debate. In the end of 2017, the US, which had been closed to such discussion, after implementing its tax reform, came back to say they are open to have a conversation not limited to highly digitalized business models, even though countries like the UK believe it should be limited. However, let's have an overall discussion on re-allocation of taxing rights recognizing more rights to tax to the market jurisdiction. If we do so, we need to revise the nexus—permanent establishment definition—but we also need to revisit transfer pricing rules. The UK made its approach to highly digitalized business models, recognizing that even more limited scope, there would be a need of a profit split or a new rule to allocate profits, and so did the US. India and the G24, a group of developed countries, said they have a significant economic approach, which is about allocating taxing rights and creating a nexus, whether a number of sales to market jurisdictions. There would be a need to allocate more right to tax to the market jurisdictions through a method, which would depart from the arm's length principle and would introduce some sort of formula.

This is about the fundamentals of transfer pricing, allocation of taxing rights with a twist, which has come from a traditional country, very residence base, namely the US. This echoes the requests, from India, China and others. In the broad picture, it fits in the discussion of introducing a

minimum tax, which is what the US has done with GILTI. There is a much broader agenda coming in with a lot of political interest. The public consultation in Paris has shown the interest of different stakeholders in the matter.

**RH: One concern specific to the current work relates to a potential migration down the path of a formulary apportionment. This would move far beyond the current agreed upon international tax architecture that essentially requires some form of physical (and not digital) presence to be taxed in a country and allocating profits according to the arm's length principle. First of all, is this a valid concern and what is the future of the arm's length principle?**

**PS-A:** In the current conversation, which is taking place on the tax challenges on the digitalization of the economy, there are two pressure points:

Nexus: there is consensus to say that the traditional definition of permanent establishment is probably outdated and needs to be revisited. This is consensual, although the scope may not be. The UK says that the scope should be limited to user contribution, while some others say it should be broader.

Secondly, there is probably more skepticism and questioning on allocation of profit. Here I would think that countries would agree that the arm's length principle

is the structure of transfer pricing. I am not sure that anyone today, including from countries like India or China, think we should get rid of it. There are a number of NGOs campaigning and saying that we should move to unitary taxation. I still think that among governments, the transfer pricing as currently implemented through the arm's length principle, are what the governments want.

However, there is also the recognition that it does not work as well as it should and it needs a fix that goes beyond the DEMPE introduced by Actions 8-10 on the BEPS Actions. There seems to be a merging consensus that we need to go beyond. The inclusive framework for BEPS implementation: 129 countries agreed to write down there that the solutions and proposals to be explored go beyond the arm's length principle, which may introduce formula. We are not going from the arm's length principle to unitary taxation. We are probably about to change the rules and introduce some kind of formula to fix what a number of countries think it needs to be fixed.

We can see with the US tax reform, a vote of no confidence to the arm's length principle, which is the BEAT: it is a way for US legislators; we can see a doubt on the ability of the arm's length principle to protect the US taxable base. Moreover, the fact that the BEAT was adopted is a strong signal from the US that there is a need to fix it. Many countries have previously asked for this, but there was a blockage

from US and other countries. Today there is an open debate on which kind of formula could be introduced; there is the current proposal from US and the code from India and developing countries. There should be some sort of recognition of marketing, intangible marketing, market place, through a simplified approach or not, and this is what we are currently working on. We are not planning to get rid of the arm's length principle, but we are maybe considering fixing it through introducing some sort of formula.

**RH: Secondly, what future challenges do you anticipate in this field, especially with respect to implementation aspects of these sweeping changes of the international tax framework covering the allocation of taxation rights and allocation/ attribution of profits?**

**PS-A:** The challenges ahead of us are very big.

The first challenge is before implementation, political agreement of the right policy—this policy being about reallocation of taxing rights is not easy because the dividing lines are many. The conversion of interests between big and small countries is not very big. Interests of big countries do not necessarily converge with the interests of small countries. It is a very complex issue, but what gathers the countries is that, if we do not fix it, we will face unilateral measures everywhere as we have seen in the digital economy. The first challenge is the policy agreement.

The second challenge is a policy agreement on a solution that can be administered by all countries. The inclusive framework gathers 129 countries, but you need all these countries to be able to implement. What is common between a remote African country and a very sophisticated tax country with transfer pricing specialists? A country with no transfer pricing rules and a country which has decades of experience in transfer pricing. You need a solution that can be implemented by all, and what matters at the end of the day is for countries to benefit from elimination of double taxation. If you want to ensure that, you need all the countries to implement the same rules. We need to embed the administrative concern in the policy solution we are developing.

The other challenge is to ensure we levelled the playing field for all countries and that all countries come together at the same time. Finally yet importantly, how do you prevent disputes and solve them? We hope that a simplified approach could limit the risks of disputes. This is the last challenge in 18 months' time.

**RH: We observe (not only triggered by the BEPS initiative) a rise of tax controversies related to transfer pricing and an increasing number of double or even multiple taxation cases. Is the current controversy environment also an area of concern for the OECD? Also, what are potential actions that the OECD is considering with respect to dispute prevention and dispute resolution?**

**PS-A:** The role of the OECD in the world of tax sovereignty is to facilitate conversation and come up with common rules that will eliminate double taxation, also not facilitate double non-taxation situations (emphasis brought by BEPS project). As regards to the elimination of double taxation, there are instruments such as article 24 of OECD Model Tax Convention, which we know has limits, which was designed at the time where countries favored strongly sovereignty, would not agree on arbitration, and would not agree to be bound on an outcome—they would just endeavor to eliminate double taxation. We know these limitations and we try during BEPS project to design other instruments: a peer review of how MAPS were designed, as a minimum standard to be reported to G20 leaders. We think this is the way to resolve disputes, when tax commissions know they are being reviewed, and the review will be brought to the attention of ministers and leaders, you put more resources there. Solving disputes and favor arbitrations, even though, some countries consider this a taboo and not possible because of sovereignty, i.e. China, Japan and India reluctant. We know that it may be good for coalition of the willing, but this coalition of the willing, will not gather all the countries in the world. So, we need to work on prevention. The best way to prevent disputes is to have a sound clear tax policy and that is about the solutions we are to develop in the future. Even with best solutions, you have risks. You mitigate risks with a preventive matter. The way to do it is to get tax administrations to work together with taxpayers in advance

of tax assessments. In China, 2016, we have pushed for the ICAP—International Compliance Assurance Program. You have taxpayers willing to get comfort from tax administrations, by being more transparent and using CbCr outcome, sitting with tax authorities, sharing the tax affairs and do a risk assessment with the tax administration. We are confident thus is a way of preventing disputes. Another way is to through joint tax audits. Taxpayers may not like it but they should. When you have the tax auditors of several countries doing the same job, they have to agree on the same method, especially in transfer pricing they have to agree on one mark up or one methodology, and as a result we do not need to go to the map if they agree at this stage. The ICAP and joint audits, when you look at the big picture, when you have more cooperation, we may be in a better position to prevent disputes.

**RH: Could you please expand on the ICAP (International Compliance Assurance Program) and the work carried out on this area as one of the four risk assessment work streams that is currently being undertaken by the OECD? What are the key themes arising from these work streams and has there been any particular focus on the financial services industry or any specific transactions?**

**PS-A:** PICAP program is still at the very early stage, we have a pilot test with a few companies, which have volunteered, and we are in the first meetings where the

tax administrations are working with the companies and there is a good diversity of companies. We very much welcome the commitment and volunteering of functional industries that want to be part of ICAP program and interact with tax administrations.

**RH: With respect to BEPS, are you satisfied with the progress and speed of the implementation of the BEPS initiative overall?**

**PS-A:** Yes, we are satisfied with the implementation of BEPS, including the speed. In 2012, there was nothing and we just started introducing the idea of BEPS. We delivered in October 2015, and since then all the minimum standards have been implemented in all countries: harmful tax practices (more than 150 regimes have been reviewed), exchange of tax rulings (21,000 tax rulings have been exchanged), the MLI (88 countries have signed), and CbCr, which is a big success in companies filling it and countries exchanging the information. The speed of implementation has been very fast and, more importantly, we have been able to gather many countries, all G24, all OECD countries and developing countries, which work together and do not only review the implementation but they are working on the next step, which is the tax challenge of the digitalization of the economy.

**RH: What are your thoughts on the concern that the risk of non-consensus approaches and uncoordinated domestic measures by tax authorities**

**has drastically increased and that this will lead to a further increase in tax controversies?**

**PS-A:** We share that concern. Our job is to eliminate double taxation and reach consensus. So, when we do not see consensus, when we see unilateral measures, when we see countries unable to compromise, we are not very happy because the response to that is to take the unilateral measures. Many countries complain, but if we do not act, unilateral measures will increase even more. We are in an environment of tax sovereignties and the best option to regulate all of this is to reach for consensus with the different countries and work together. If we had not done BEPS, do you think you would have more or fewer disputes? Do you think we would have one system or multiple systems? One template for CbCr or several templates? We need to think of the counterfactual.

**RH: What are the OECD's and your own priorities on tax for the next few years and where do you see the OECD dedicating resources with respect to the BEPS Actions or other areas concerning transfer pricing?**

**PS-A:** Only one priority big and political pressure addressing the tax challenges of the digitalization of the economy, through the two peer approach which has been made public a few weeks ago on which we will put all the resources for the months and probably couple of years to come as

regards to the policy. As regards to the implementation of BEPS, keeping the review process, making sure that we have more countries if more want to join, leveling the playing field and we need to invest a lot in training, capacity building in developing countries, emerging economies, paying attention to development. If we want to prevent disputes, if we want to have a global consensus of all countries, we need to be inclusive and that means providing capacity in all these countries. Pascal, thank you very much for your time. It is good to see the OECD being so active in this area and still in implementation mode on BEPS. This is a challenging environment and we are looking forward to continuing the interaction with you. Let's now dive into some more transfer pricing specific questions in the second part of our interview with Tomas Balco, the Head of the Transfer Pricing Unit at the OECD CTPA.

## Interviewer:

Ralf Heussner - Transfer Pricing, Deloitte

## Interviewed:

Tomas Balco - OECD Head of the Transfer Pricing Unit

### RH: What is the current focus of your work in the transfer pricing side of the OECD?

**Thomas Balco (TB):** The current work of the transfer-pricing unit is focused on three main areas. There is lot of preparatory work for digital taxation streams. Another important part, is the follow-up work on the BEPS project; the final report of Actions 8-10 from 2015, did not cover all the areas foreseen to be done in the BEPS projects, what was left unfinished was:

- Guidance on the profit split
- Additional guidance related to attribution of profits to PE
- Additional guidance to the practical application of the new concept of hard to value intangibles
- Unfinished guidance on financial transactions.

Some of the work has started in the BEPS project and it was unfinished, some after, and has not moved fast enough. Part of the reason is because you go from the formation of 30+ OECD countries to the formation of inclusive framework for BEPS, the remaining guidance had to be negotiated with all countries part of the inclusive framework for BEPS. It is quite difficult to achieve consensus. Unlike other areas from the BEPS actions, areas, which are best practices, where it is easier to achieve consensus, the guidance on TP needs consensus. We do not move forward until there is consensus. The work

of the unit was focused on finalizing this work; we have been able to finish three work streams in 2018 and published. The financial transaction is the only one missing, but there was a development with publishing the discussion draft. There is not a consensus text yet. We want to engage the professional community to inform and be involved in our decisions. After the draft on financial transactions was published, there were 25 items outstanding and by November, only two issues remained to be resolved in financial transactions.

We are also involved in the process of implementation guidance, when countries request for our assistance and monitoring such implementation and dialogue with countries. One example is the project with Brazil. We are engaged in a dialogue with its tax authorities, as Brazil follows a different approach to transfer pricing and what would be the options of alignment of the Brazilian tax system to international transfer pricing rules. The final action report of BEPS has mandated some work to be finished by 2020 to allow input from business community to the standards, i.e. CbCr. The hard to value intangible concept will be reviewed by 2020 as it is a novel concept, and we agreed with the review to see what is the experience, how does it work in practice, what issues arise, what are the exceptions that have been foreseen when you don't apply the approach and if they are reasonable?

**RH: In light of the recent non-consensus views by many tax authorities on the discussion draft on financial transactions, how is the OECD addressing the potential risk of inconsistent unilateral implementations of the BEPS initiatives and increased risks of transfer pricing controversies?**

**TB:** A couple of points in which the secretariat can do things: assistance with the implementation of BEPS, review the implementation, we can bring the OECD perspective and make sure laws are drafted and implemented in a way that complies with the agreed principles. That is where we can be actively involved. When countries take their own initiative and implement BEPS, it is the countries own domain and sovereignty. The area of transfer pricing, is unique, because each country can have a different approach to transfer pricing and can even only refer to the guidelines; others may take legislative steps and detail the implementation of such guidelines. There is a divergence happening in a legislative level. We do not have a peer review system foreseen for Actions 8-10 of BEPS, because there is no minimum standard for the application of the transfer pricing guidelines. There is mandate of monitoring of application of transfer pricing and we can bring divergences between countries to the table, have discussion with countries to determine where the divergence takes place and how it can be eliminated. The guidance on transfer pricing is common

approach to interpretation, and if we do not have a common approach that is where the divergence may arise. However, some areas are deliberately weak or broad because there is where the consensus is difficult to reach. There could be some legislative or administrative outcomes and these are difficult to police because they are not necessarily spelled out in the law. It is the approach of the administration in the field. In addition, it is close to impossible to know what is happening in the field. We are trying to monitor application of transfer pricing guidelines, we have established a concept that is country profile—which summarizes the concepts implemented by the countries in terms of transfer pricing. In our website, we have TP country profiles for all OECD members and for the inclusive framework countries as well. We constantly want to bring more countries into that overview, it is an opportunity to us to hear from the business if is not correctly reflected the reality we have seen some unilateral measures of transfer pricing adopted by countries, and can create issues with the transfer pricing rules (i.e. double taxation cases).

**RH: Over the last decade, we have seen substantial changes to the FS sector and its operating models, the learnings from the financial crisis as well as an increasing importance of digitalization in the FS sector with broader impact on business models. Another key impact of this has been an increased commoditization of certain businesses and products which leads in practice to**

**questions surrounding the definition of KERT functions in today`s world.**

**How does the OECD view these developments? Is the OECD considering addressing these challenges and changes as part of the existing or future guidance on profit attribution?**

**TB:** Part of the challenge is the 2010 report is not followed by all countries of the OECD, which can make the situation already more challenging for the financial sector industry. In fact, the existence guidance on different bilateral tax treaties may create situations when in some bilateral situation we have the known AOA approach or the previous version rules on attribution of profits to permanent establishments, which did not even contemplate the concepts in the 2010 report. In addition, you may have countries with a slight nuance with the interpretation of 2010 report. That report does not help too much by having options of approaches, there creates opportunity for mismatches, different approaches and situations of double taxation or double non-taxation. I could imagine many practical issues that the financial sector may encounter on the ground by difference of bilateral treaties. We need to have the input from the field to know where the tensions arise to initiate a dialogue on which one is the better approach. New trends and technologies, new layer of concerns, how the tax authorities will apply the historical concepts to the new changing environment is a good basis for dialogue on what the

right approach could be. There are a few opportunities for that dialogue such as being proactive with the upcoming project of digitalization. The most challenging part is to decide what to do with different approaches to attribution of profits to permanent establishments. There are three different approaches in bilateral situations that can create divergences, which means that one head office may have to deal with these different approaches in respect to bilateral relations. The reason is embedded in the bilateral treaties law, and if the bilateral treaty law differ, it will be difficult to justify what approach to take. The question is whether to renegotiate those treaties or find ways to align different approaches, how to come to more coherent outcomes. Some challenges will be addressed in the upcoming project, others will have to wait.

**RH: In addition to the guidance on profit attribution released in 2017, what additional actions can we expect to more closely align the current concepts of attribution of profits to permanent establishments to the outcome of the BEPS initiative?**

**TB:** There have been efforts to discuss how Actions 8-10 have an impact on the attribution of profits to permanent establishments in the 2010 report. This is going to be a challenge because of the different approaches, because of the inclusive framework countries, which are brought to the table not only the old vs. new OECD approaches to allocation

of profits, but also the UN approach to allocation of profits. Moreover, it has become difficult to make people commit to follow the 2010 guidance.

Some countries are strongly against making more alignment between Actions 8-10 and rules on the attribution of profits to permanent establishments, they would argue there are different outcomes, as in one side you are part of separate legal entities while on the other side you are part of the same legal entity. Some would argue that KERT functions are not necessarily the same like significant peoples functions. The outcome is much compromised result, some people may not be necessarily happy as it reiterates that the attribution of profits will take place based on the actual text of the treaty. The context of this report was resulting of Action 7, which established the new definition of permanent establishments; the task was to clarify how attribution of profits should happen in respect of newly created permanent establishments. It did not try to do more because it did not have a mandate to do more and countries are not necessarily prepared to have a broader discussion on that. The guidance is still useful by reiterating that countries should make sure to prevent double taxation, which could arise if you allocate profits wise to two different taxpayers, and providing simplification measures and mechanisms. Any elements of attribution of profits will be subject to discussion, especially regarding digitalization, to the extent we will operate with the concepts,

i.e. digital permanent establishment. If the Article 7 is not open, if it will be other type of solutions, it will not necessarily be discussed in a near future.

**RH: Does the OECD in the future plan any additional work or guidance on such PE-specific topics relevant to the FS sector?**

**TB:** There is nothing eminent planned, it will be interesting to see what are the problems arising, is it double taxation situations or is it just the difficulty in practice? We need to get more inputs, unless countries bring to the table the need for guidance or unless the taxpayers bring to the table the need for guidance, we do not have material to work with. The 2010 report leaves many approaches open, immediately creating the possibility of uncertainty, because if the two countries will take different approaches or if one country can take two different approaches depending on inbound and outbound clearly creates potential tensions. Unlike the financial transactions project, where we experience many challenges and difficulties of Article 9, tensions of debt to equity, capital structure. In a permanent establishment environment, the things are given in terms of capital structure of the head office; how do you allocate those elements/attributes within the relevant parts of the enterprise? The challenges of Article 9 are of a different nature because this is where you can be creating capital structures almost in each bilateral situation. There are concerns about a thickly capitalized entities, I heard

interest to have a closer look at those situations.

**RH: Is the OECD concerned about an increasing complex regulatory environment (at least in Europe) and potential disparity between the regulatory and tax dimension? If so, what additional guidance/actions are being considered, both as part of the OECD TP Guidelines and the Profit Attribution Report?**

**TB:** There are different regulations. The regulations that focus on appropriate capital cover in different financial service providers and banks and so on. Those regulations have their purpose and one can have that discussion within that body of regulation about the critical objectives and how to achieve it in the least burdensome way. These type of regulatory requirements create the reality to which businesses have to accommodate. The transfer pricing analysis will take into account these regulatory framework because business have to structure them accordingly. You must sometimes do something as a mandatory measure, all of that will have impact on the actual way the business will be organized, where functions are performed, how risks are borne and eventually the secondary effect on allocation of income. I do not think there is enough done from a policy perspective. The rules or allocation of income takes into account what needs to happen in the regulatory framework and it will have implication on transfer pricing rules.

Perhaps there is a question of whether there is a need for a policy discussion. What will be the impact of these rules on the end-result where the income will be allocated? I do not see enough interaction, and it will be interesting for policy makers to look at it. What are the drivers of the bus? In this case, the capital requirement regulations will have impact for passengers and countries and their revenues. The result of regulatory framework, will have implication of income allocated to entities in different jurisdictions in terms of revenues. There could be opportunities for closer coordination/alignment. It is useful as we are in the mirroring stage, we understand the tax laws, and it will have to mirror how businesses operate.

**RH: Specific to FinTechs, should they expect to face additional challenges regarding their global tax liability in jurisdictions where they did not have a taxable presence before?**

**TB:** I think Pascal's proposals should be studied and identify what businesses could be affected. Just running over those proposals and what the implications could be:

a)The user contribution proposal. I am not sure what impact this will have in the financial sector industry because there could be some areas where user contribution implication on reallocation of income. I would see very limited impact perhaps.

b) The marketing intangible proposal will affect areas that will come down to retail relationships. To the extent that the enterprises will be structured in a way that the marketing intangibles, being one of the drivers will be in a specific entity, but rather those marketing intangibles are in the relevant entities and jurisdictions. The problem should not arise, but could. You will have customers signing up for financial services i.e. insurance, or others. The proposal could be relevant in this context.

c) The significant digital presence proposal could be rather relevant because there could be activities that would follow in the scope, especially if it were a business model, and the enterprise otherwise would have no taxable presence.

On pillar two, perhaps there is even more implications for inclusion of income for financial industry sector—denial of deductions of income of payments made, not being taxed sufficiently, including subject to tax rule. That will have a more drastic impact for financial sector for structuring business model, but is difficult to contemplate at this point if you do not know the rules.

**RH: How do you see the concepts outlined in the consultation document on digital taxation applied to the FS sector and to FinTechs in general?**

**TB:** Losses are not forgotten. Even though there are, some that would argue that the new rules should only focus on profit. And

profit sometimes is also a negative figure, and the secretariat we are keeping this in mind. There are two considerations: You can start reallocating profits, part of the symmetry. It is a good idea if you can recover the loss. You can also have different approaches to the losses; some of the proposals may not apply unless the losses are recoverable. One way is to start allocating profits when you do have profits to be allocated, to make sure you do not lose those profits. You can take a mechanism that takes into account the losses before any losses take place.

**RH: What are your priorities on transfer pricing for the next few years and where do you see the OECD dedicating resources to with respect to the BEPS Actions or other areas specific to transfer pricing?**

**TB:** It is going to be greatly focused; the top priority is the digital and there is political demand for that. I would hope to finish the financial transactions area, and the issues still remaining exist for the different views countries are taking. I would hope to manage those differences, and have a guidance published in the end of 2019. Hopefully, having a new chapter on the financial transactions, there is my hope for this year. We have done some scoping work for Chapter 4, dealing with prevention and elimination of double taxation and effectively dispute resolution in the transfer pricing area. We have scoped Chapter 7, intragroup services, to take into account outcome and changes in other chapters resulting from Actions 8-10.

We want to continue the monitoring work; we want to see how countries are implementing BEPS recommendations of Actions 8-10. We have been starting a work stream dedicated to tax certainty and there is another space to involve the business community where they feel there is divergence in interpretation of transfer pricing guidance. We will continue to assist developing countries or countries, which ask for assistance. We will continue working with our global relations division, we organize training courses around the world, in different parts of the world where there is need to build capacities and help tax administrations. Elements of attribution of profits is part of the to-do list and we can perhaps scope more work when we are done with the digital.

**RH: Thank you very much for your time, on behalf of Deloitte.**

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