Tax Alert

A focus on topical tax issues – November 2014

Increased Inland Revenue scrutiny of financing transactions

By Bart de Gouw and Melanie Meyer

It's been a hot issue with Inland Revenue for some time, but recently we have seen a significant increase in the attention given to cross-border associated party financing transactions from Inland Revenue, in some cases regardless of size. Inland Revenue's review and audit activity is increasingly focussing on the arm's length nature of the underlying terms of the arrangements (per legal agreements as well as in practice), how these have been factored into the calculation of the interest rate applied as well as in some cases querying the commerciality of such terms. This is quite different from Inland Revenue's approach to reviewing other types of transactions (e.g. services, product, etc).

Given the increase in Inland Revenue scrutiny in relation to these arrangements, it is important to ensure that documentation (and in particular an appropriate level of documentation) is in place to support the pricing of these transactions.

Small value loans guidance

Inland Revenue has recently updated its guidance in relation to the safe harbour which may be applied to small-value loans. The safe harbour now applies to loans up to $10m principal (previously $2m) and is aimed at reducing compliance costs for taxpayers. This has resulted in increased Inland Revenue focus on high >>

Continued on page 2...

In this issue

Increased Inland Revenue scrutiny of financing transactions

A conceptual challenge: the "common voting interests" and "control by any other means" tests for associated persons

Inland Revenue releases final guidance on three avoidance scenarios

New Zealand to join global crackdown on tax evasion

BEPS update – discussion drafts on actions 7 and 10 released for comment

Update on status of double tax agreement between New Zealand and Canada

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value loans in excess of $10m. However while some taxpayers may be able to rely on the small value loan guidance in the absence of more robust analysis, it is important to note that the issues Inland Revenue has started to raise are relevant for both large and small loans alike.

To illustrate, both the following loans fall within the small value loan threshold and could be priced using Inland Revenue's guidance (currently base rate plus 200 basis points). However given the terms of the loans it is unlikely that the same base rate would be appropriate, and therefore each loan would have a different arm's length interest rate.

1. A $5m AUD denominated loan which is repayable on demand
2. A $5m NZD denominated loan with a five year term

For the first loan an appropriate base rate would likely be an AUD overnight rate, however for the second loan a five year NZD government bond rate (at commencement date) would be more appropriate. As such, to determine an appropriate base rate, key terms such as currency, maturity, prepayment / repayment, and interest reset clauses must be taken into consideration.

For completeness the Australian Taxation Office is also looking to implement similar small value loan guidance; however this is a work in progress and is likely to be released at a later date.

Inland Revenue activity

In its financing guidance, Inland Revenue has noted that its focus is on:

- All inbound loans over $10m,
- Outbound loans of all sizes; and
- The use of low credit ratings to determine interest rates, specifically non-investment grade ratings (S&P's BB or lower).

Based on recent experience, Inland Revenue's reviews in this area are incorporating attempts to re-price loans to determine whether the interest rate applied is arm's length by also considering the effect of certain elements of the arrangement that may have been previously glossed over. For example:

- Prepayment clauses;
- Repayable on demand clauses;
- Interest rate re-set provisions;
- Maturity of loan;
- Break costs to terminate / renegotiate the financing (or more specifically, the absence of break costs clauses)
- Implied guarantees.

Previously Inland Revenue accepted many of these clauses at face value as they were legally enforceable by loan agreements in place; however there is now more scrutiny of the actual terms themselves on review, including whether they are commercially acceptable, and whether "comparable loans" being used to support the interest rate applied are truly comparable.

Terms such as interest rate resets and repayment / prepayment clauses, which provide flexibility in the length or price of intercompany loans, present difficulties when Inland Revenue attempts to re-price the loan for comparability / review purposes. Other issues are becoming increasingly common, for example, for Australian tax purposes loan agreements often include a clause which states that the arrangement is for a maximum of 10 years - this is to ensure that the financing is not recharacterised as equity from an Australian perspective. The actual maturity of the loan is often different and conflicts with the 10-year clause (e.g. on demand, 3 year term), and this presents difficulties for Inland Revenue which may attempt to re-price the loan as a 10-year loan with a 10-year base rate, when an overnight rate may be more appropriate.

We recommend that taxpayers review the terms of existing arrangements carefully.

It is therefore important to ensure that documentation is in place (which can be provided to Inland Revenue) which sets out how the terms of the loan interact and how these terms have been factored into determining the interest rate. In the absence of adequate documentation and comparability, the Inland Revenue has, in some cases, ignored the effect of certain terms, and in exceptional circumstances, recharacterised the term(s) when attempting to re-price the loan.

We recommend that taxpayers review the terms of existing arrangements carefully, giving particular consideration to the terms mentioned above. Any new financing arrangements entered into should be documented and the terms in agreements drafted to ensure they align with the intention of the parties.

OECD developments

With the BEPS agenda currently front and centre, debt pricing is not the current focus of the OECD, however guidance in relation to debt pricing is on the agenda and is a work in progress.

The recently released *Action 8: Guidance on Transfer Pricing Aspects of Intangibles* specifically excludes group synergies as intangibles for transfer pricing purposes, however these group synergies are considered in some detail with respect to how they impact on the comparability of transactions, specifically intragroup loan transactions. The main comparability issue presented by such group synergies in relation to an intercompany loan is the implied guarantee which can arise as a result of the lender's association with a parent company of a higher credit rating than that of the subsidiary (i.e. the lender) on a standalone basis. As such the OECD guidance in relation to intangibles now provides some guidance on the effect of implied guarantees on the pricing of such transactions, and sets out specific examples relating to implied guarantees.

Based on our experience, implied guarantees and parental support can have a significant impact on interest rate analyses during Inland Revenue review. The additional OECD guidance is likely to raise the profile of these matters and the number of instances where Revenue Authorities may consider the need for comparability adjustments.

All taxpayers with cross-border associated party financing transactions should therefore consider their intercompany financing transactions in light of the developments above and whether further work is required to ensure the appropriate level of support is in place to provide to Inland Revenue in the event of review.

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A conceptual challenge: the "common voting interests" and "control by any other means" tests for associated persons

By Emma Marr and Matthew Scoltock

Concepts 124 Ltd v Commissioner of Inland Revenue[1] is a curious judgment that potentially has alarming implications for entities owned by the same corporate trustee. The High Court has effectively found that two companies owned by the same corporate shareholder – acting as the trustee of two different and wholly unrelated trusts – can be "associated persons" for GST purposes on the basis of common voting interests. Given the long reach of the land taxing provisions to associated ("tainted") entities, without remedial legislative intervention the judgment could radically impact on the tax treatment of entities currently holding land on capital account.

The Court also found association on the alternative ground of "control by any other means whatsoever", but in doing so does not appear to have considered a line of relevant case law authority, and has not provided clear guidance on precisely what that test encompasses.

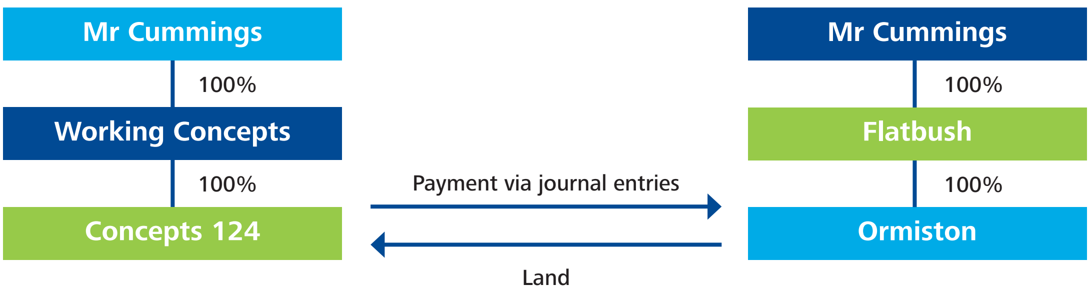
The facts

The facts involved a Mr Cummings who, through his company Concepts 124 Ltd (Concepts 124), purchased a block of land from Ormiston Residential Ltd (Ormiston) in 2008. The purchase price of $8,034,750, which was nearly 10-fold more than Ormiston had paid for the same land four years earlier, was payable in 18 instalments. Between July 2008 and October 2009, 17 instalments of the purchase price were paid by Concepts 124 via journal entries, amounting to $7,191,000. As Ormiston was not GST registered, it had no liability to account for GST in respect of the instalments paid by Concepts 124. Concepts 124, however, was GST registered. An asymmetry therefore arose, as Concepts 124 was entitled to claim GST input credits equal to one-ninth of the purchase price paid at that point, or $799,000.

A diagram depicting the ownership structure in respect of Concepts 124 and Ormiston is set out below. On the face of it, Mr Cummings owned 100% of both Concepts 124 and Ormiston via intermediate holdings companies, Working Concepts Ltd and Flatbush Holdings Ltd (Flatbush). Mr Cummings was the sole director of all of the corporate entities.

Flatbush held the shares in Ormiston as to 75% on trust for the Flatbush Holdings Trust – of which Mr Cummings had the sole power of appointment and removal of all trustees – and 25% for Mr Cummings personally.

[1] [2014] NZHC 2140.



The issue and applicable legislative framework

The key question was whether Concepts 124 and Ormiston were associated persons, which would have limited the GST input credit claimable by Concepts 124 to the lowest of:

a. The GST component of the original cost of the block of land to Ormiston (which was $94,111.12);

b. One-ninth of the purchase price payable by Concepts 124 to Ormiston; or

c. One-ninth of the open market value of the block of land.

Based on the facts of the case, Justice Clifford considered that Concepts 124 and Ormiston could only have been associated if a person or group of people:

a. held at least 50% of the voting interests in both companies (the voting interests test); or

b. had control of both companies "by any other means whatsoever".

The voting interests test

The Commissioner of Inland Revenue (Commissioner) and Concepts 124 agreed that – as had been widely accepted up to that point in time – there was no commonality of voting interests where shares in different companies were held by the same person but in separate capacities. While ultimate ownership of both Concepts 124 and Ormiston vested in Mr Cummings as a matter of legal title, the shares in Ormiston were held by Flatbush in a trustee capacity. As ownership for tax purposes of Ormiston could only be traced through to Mr Cummings as to 25% given the distinct personal and trustee capacities in which Flatbush held the shares in Ormiston, the Commissioner and Concepts 124 had agreed that the voting interests test was not satisfied. This is consistent with the Commissioner's published view on whether, in the context of the "associated persons" test in the GST legislation, a person acting in their capacity as a trustee of a trust is acting in a different capacity from when they are acting in their personal capacity[2].

Interestingly, Justice Clifford disagreed, and took an approach at odds with this. After traversing the legislative history in some detail, Justice Clifford concluded that common legal ownership of different companies is sufficient on its own to establish association on the basis of common voting interests. His Honour concluded that "where…control is being determined, there is no reason not to attribute control to the (personal) shareholders of a company that holds shares in another company on trust". Justice Clifford was ultimately of the view that a distinction based on separate personal and trustee capacities was neither rational nor grounded in the legislative history. >>

[2] Refer to "QB 07/03 Trustees in the context of the Goods and Services Tax Act 1985: does a separate trustee capacity and personal capacity exist and do separate trustee capacities exist for trustees of multiple trusts?", in which the Commissioner states that: "Case law also recognises that a person's capacity as a trustee of a particular trust is separate from their capacity as a trustee of any other trust (*Fraser v Murdoch* (1880-81) LR 6 App Cas 855; *Commissioner of Taxes v Trustees of Joseph (deceased)* (1908) 2 NZLR 1085; 10 GLR 556; Case 98 (1951) 1 CTBR (NS) 423)."

Accordingly, Justice Clifford found that Concepts 124 and Ormiston were associated persons for GST purposes, meaning that Concepts 124's GST input credit was limited as described above.

Our thoughts

It is questionable whether this outcome was driven by the fact that, in reality, Mr Cummings was "running the show". When viewed in that light, a conclusion that Concepts 124 could nevertheless claim GST input credits based on a purchase price that was significantly higher than Ormiston's original acquisition cost, and that was effected via journal entries, perhaps did not seem appropriate. In addition, a finding that Concepts 124 and Ormiston were not associated due to an ownership structure involving distinct personal and trustee shareholder capacities may have set a precedent for similar claims by other taxpayers, with equally (or more) material fiscal consequences.

But here's the problem. Disregarding personal and trustee capacities – that is, effectively saying that the only question is what name is on the share register – would mean that every company whose shares are held by the same corporate trustee would, strictly speaking, be associated. So two companies beneficially owned by people who have never met, have nothing to do with each other and who are linked solely because of the identity of a common corporate trustee (which will clearly hold both companies in distinct, wholly unrelated capacities) would be associated on that basis. What if, for example, one of those companies happens to be a property developer, while the other invests in property on capital account for long-term rental yield? Any gains derived by the property investor could, by virtue of its association with the property developer, be treated as taxable due to the tainting rules.

So, what's the fix? *Concepts 124* is, after all, the law. What's more, we understand that no appeal from the High Court's judgment has been filed. So the only real way to correct what must be viewed as an anomalous outcome is through a carefully drafted remedial legislative amendment that draws an appropriate distinction between personal and trustee capacities when ascertaining association. Given the potential outcome where no association is established on black letter law grounds (refer above, in a GST input credit context), perhaps consideration will need to be given to a targeted specific anti-avoidance rule or appropriate published guidance regarding the application of the general anti-avoidance rule in an associated persons context (although it is noted that the Commissioner's Interpretation Statement on section BG 1 of the Income Tax Act 2007 already addresses this to some extent).

Little guidance on the meaning of "control by any other means whatsoever" can be gleaned from the section of Justice Clifford's judgment dealing with this test.

The outcome certainly warrants urgent attention from policy officials to re-establish certainty in this area and identify an appropriate remedial solution.

Control by any other means whatsoever

Perhaps in case an appeal eventuated, Justice Clifford also found that Mr Cummings had control of both Concepts 124 and Ormiston by "any other means whatsoever". Unfortunately, his Honour offered little reasoning to support his conclusion. Justice Clifford stated that:

"I do not think that the section requires the "any other means whatsoever" to be the same means for each of the two companies in question. By my assessment, that would be an overly strained interpretation of the provision, and one not required to give it efficacy. The "any other means whatsoever" by which Mr Cummings controlled each of Concepts 124 and Ormiston is, in this context, the combination of Mr Cummings' voting interests in Concepts 124 and of his ownership and control of Flatbush, and his power of appointment and removal of trustees under the FBH [Flatbush Holdings] Trust Deed."

Our thoughts

Little guidance on the meaning of "control by any other means whatsoever" can be gleaned from the section of Justice Clifford's judgment dealing with this test. As an initial observation, his Honour's conclusion appears to be contrary to his statement earlier in the judgment, where he found that:

"…if I had agreed with the approach taken by the Commissioner, I would also have agreed with Concepts 124 that, here, the control the Commissioner pointed to, based on share ownership, would not be a means of control "by any other means whatsoever".

If control based on share ownership should not properly be regarded as "any other means" for the purposes of the test, then it is hard to understand why a combination of factors including voting interests could have been relevant to Justice Clifford's finding that Mr Cummings controlled both Concepts 124 and Ormiston by any "other" means whatsoever.

Unfortunately, Justice Clifford's reasoning is unlikely to provide meaningful guidance in relation to this test of association. Perhaps given the context in which this alternative finding was made, his Honour's judgment does not set out any clear "test" or "rule" as to how "control by any other means whatsoever" should ordinarily be ascertained. His analysis does appear limited to *Concepts 124's* particular facts, and does not clearly articulate the exact "combination" of factors that would necessarily constitute "any other means".

His Honour's approach is also inconsistent with – and does not appear to appropriately take into account – well-established and significantly persuasive case law authority that had settled the meaning of control by any other means in this context, such as *British American Tobacco Company Ltd v IRC* [1943] AC 335 (HL). That meaning has been accepted by the Commissioner (*Tax Information Bulletin* Vol. 2 No. 3, Appendix D (October 1990)), and the Commissioner's policy officials have stated that that case law provides the appropriate guidance (Officials' Report on the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill).

The "control by any other means whatsoever" test arguably therefore remains somewhat elusive in terms of how it should be considered or applied on a more generic basis, and where facts are not identical to those in *Concepts 124*.

Inland Revenue releases final guidance on three avoidance scenarios

Last month, Inland Revenue released the finalised Question We've Been Asked (QWBA), QB 14/11: Income tax - Scenarios on tax avoidance. This QWBA applies section BG 1 (the tax avoidance provision in the Income Tax Act 2007) to three scenarios concerning interest deductions, look-through companies and substituting debentures.

A fourth scenario about debt capitalisation was included in the earlier draft of this item issued in May of this year. At this time, the Commissioner is still considering the issues raised by that scenario. The Commissioner has revised her opinion on the substituting debenture scenario, concluding that tax avoidance does not arise. The Commissioner has also commented further on the alternative facts of scenario 2 where it is contemplated that a company be wound up at the time of election into the look-through company regime. The scenarios and final outcomes are summarised as follows:

Scenario 1 - Interest deductions where shareholder loans replaced

Company A is wholly owned by a family trust. The trust has advanced $1m in shareholder loans to Company A. Company A borrows funds from a third party lender to repay the shareholder loans. Trust assets are used as security for the third party loan.

The Commissioner's view is that without more, s BG 1 would not apply to this arrangement.

Scenario 2 - Look through company (LTC) election

Company B is owned equally by two family trusts. One of the trusts operates a farming business that is expected to incur losses for tax purposes in the future. Company B is operating a profitable business and has built up significant reserves (both tax paid and untaxed). The Directors of company B elect look-through company status for the company and resolve to distribute all reserves as dividends once the LTC election takes effect. The existing reserves of Company B are distributed to the shareholders in the first year after attaining LTC status. This arrangement means that the company's existing fully imputed reserves are not taxed at any more than the company tax rate where distributed to shareholders on a higher marginal tax rate.

The Commissioner's view is that s BG 1 would not apply to this arrangement.

However, the Commissioner considers section BG 1 would potentially apply if at the time of electing LTC status, Company B's directors had contracted to sell the company's business and resolved to liquidate the company and distribute the surplus assets to shareholders. Whilst the outcome is the same as the draft version of the QWBA, the commentary and reasoning has been updated with the Commissioner concluding that Parliament intended that the election into the LTC regime and effects of the regime are to apply over time as LTCs continue to operate and carry out transactions with tax impacts. The Commissioner considers that it is strongly arguable that this arrangement is outside Parliament's contemplation for the dividend rules, the LTC regime and how the Act should apply to a company that is winding up.

Scenario 3 - Substituting debentures

Company C is jointly owned by a New Zealand shareholder and unassociated foreign shareholder. Company C is funded by a combination of ordinary shares, non-participating redeemable shares and interest bearing shareholder debt (issued in proportion to the ordinary shares). On the occurrence of an insolvency type event Company C can convert the shareholder debt to shares having a net asset value equal to the face value of the loan. >>

The CIR now accepts that section BG 1 would not apply to this arrangement noting that the analysis solely focuses on the potential circumvention of the substitution debenture rule and does not consider BG 1 in relation to the financial arrangement rules or other tax implications of the arrangement.

It should be noted that the substituting debenture rule has been repealed with effect from 1 April 2015.

Nonetheless this example illustrates the application of section BG 1 where a provision's purpose has become less clear over time.

For further information about these scenarios please contact your usual Deloitte advisor.

New Zealand to join global crackdown on tax evasion

On 29 October 2014, Revenue Minister Todd McClay announced New Zealand's timetable for participation in the global automatic exchange of information aimed at cracking down on tax evasion. The measure is part of the base erosion and profit shifting project and follows an endorsement by the G20 Finance Ministers of a standard automatic exchange agreement. Earlier, New Zealand, along with all OECD countries, had joined in the general declaration of support for the move.

Automatic exchange of information involves the systematic and periodic transmission of "bulk" taxpayer information between countries. It can provide timely information on non-compliance where tax has been evaded either on an investment return or the underlying capital sum, even where tax administrations have had no previous indications of non-compliance.

The **Standard for Automatic Exchange of Financial Account Information in Tax Matters** calls on governments to obtain detailed account information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. The Standard provides for annual automatic exchange between governments of financial account information, including balances, interest, dividends, and sales proceeds from financial assets, reported to governments by financial institutions and covering accounts held by individuals and entities, including trusts and foundations. It sets out the financial account information to be exchanged, the financial institutions that need to report, the types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

Australia, holding the G20 Presidency this year, announced their implementation timetable in September 2014. New Zealand intends to align its timetable with Australia's. This means compliance by financial institutions will be voluntary from 1 January 2017 but mandatory from 1 January 2018. The first reporting of financial information to Inland Revenue would begin on 1 January 2019, and that information would first start to be exchanged with tax treaty partners from September 2019.

Mr McClay says New Zealand is firmly supportive of this global move to counter evasion. "Tax evasion respects no borders so global co-operation is the way to combat it. Sharing information is a powerful weapon in that fight".

BEPS update – discussion drafts on actions 7 and 10 released for comment

In the past week the OECD has released two further discussion drafts for public comment.

BEPS Action 7: Preventing the Artificial Avoidance of PE Status

On 31 October 2014 the OECD released a **discussion draft** on Action 7 of the BEPS Action Plan. Comments on this draft close on 9 January 2015.

This action plan stresses the need to update the treaty definition of permanent establishment (PE) in order to prevent abuse of the threshold.

This document includes the preliminary results of the work carried out with respect to the strategies identified and options for dealing with this issue. It also includes proposals for changes to the definition of a PE found in the OECD Model Tax Convention. Issues identified include:

- Artificial avoidance of PE status through commissionaire arrangements and similar strategies
- Artificial avoidance of PE status through the specific activity exemptions
- Splitting-up of contracts
- Insurance
- Profit attribution to PEs and interaction with action points on transfer pricing.

For further information, a Deloitte Global Tax Alert with our thoughts on this document can be found **here**.

BEPS Action 10: Proposed Modifications to Chapter VII of the Transfer Pricing Guidelines Relating to Low Value-Adding Intra-Group Services

On 3 November 2014 the OECD released a **discussion draft** in relation to Action 10 – Transfer pricing and other high-risk transactions. Comments on this draft close on 9 January 2015.

The document proposes modifications to Chapter VII of the Transfer Pricing Guidelines relating to low value-adding intra-group services. It reduces the scope for erosion of the tax base through excessive management fees and head office expenses.

The proposed approach to reducing the scope for erosion of the tax base through excessive management fees and head office expenses:

- Identifies a wide category of common intra-group services fees which command a very limited profit mark-up on costs;

- Applies a consistent allocation key for all recipients; and

- Provides greater transparency through specific reporting requirements including documentation showing the determination of the specific cost pool.

In particular, the main aspects of this discussion document include:

A standard definition of low value-adding intra-group services;

- Clarifications of the meaning of shareholder activities and duplicative costs, specifically in the context of low value-adding intra-group services;

- Guidance on appropriate mark-ups for low value-adding intra-group services;

- Guidance on appropriate cost allocation methodologies to be applied in the context of low value-adding intra-group services;

- Guidance on the satisfaction of a simplified benefit test with regard to low value-adding services; and

- Guidance on documentation that taxpayers should prepare and submit in order to qualify for the simplified approach.

The document proposes modifications relating to low value-adding intra-group services. It reduces the scope for erosion of the tax base through excessive management fees and head office expenses.

This draft seeks to achieve the necessary balance between appropriate charges for low value-added services and head office expenses and the need to protect the tax base of the payor countries.

For more information, please contact your usual Deloitte advisor.

Update on status of double tax agreement between New Zealand and Canada

On 12 September 2014, New Zealand and Canada signed a **Second Protocol** which updates Article 17 of the new double tax **agreement** between New Zealand and Canada which was signed in May 2012 but which is not yet in force. The second protocol was required to address a drafting error in the new double tax agreement regarding article 17 on pensions.

The second protocol provides that pensions paid by or funds created by the New Zealand Government for individuals in respect of services rendered to the New Zealand Government will only be taxable in New Zealand. This applies to pensions paid as part of a government superannuation fund or national provident fund that was entered into prior to 1996.

Both governments will inform the other of the completion of their respective domestic procedures necessary to give the force of law to the new double tax agreement and protocol.

Once the diplomatic processes and exchange of notes occurs, from a New Zealand point of view, the double tax agreement will apply as follows:

- in respect of withholding tax on income, profits or gains derived by a non-resident, for amounts paid or credited on or after the first day of the second month following the date on which this Convention enters into force, and
- in respect of other New Zealand tax, for any income year beginning on or after 1 April following the date on which this Convention enters into force.

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