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AFRICA TAX TALK

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EDITOR'S COMMENT

South Africa is looking for new ways to increase tax compliance in both South Africa and other African nations, including targeting 'aggressive tax schemes' by multinational companies, hiring 'tax soldiers', and investigating the possibility of harmonious tax policies across Africa.

It is a known fact that the world as we know it and more so the continent of Africa is changing drastically and is becoming more and more complex not only from a business perspective but also from a taxation point of view.

The formation of the African Tax Administration Forum (ATAF) in 2009 is a testimony how serious the various Tax Authorities are taking this issue. Combined with the fact that the Commissioner of the South African Revenue Service has recently been elected as the chairperson who in turn has set the following goals:

- Enhance tax administration in Africa
- Information sharing
- Audit tools sharing between Tax Authorities – especially multinational companies
- Fighting corruption
- Transfer pricing work group
- Cross border transactions
- Expatriates

Also looking at the member countries shows that they mean business – Benin, Eritrea, Gabon, Ghana, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Seychelles, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, The Gambia, Uganda, Zambia & Zimbabwe.

Businesses operating into Africa should therefore manage their tax component of their day to day activities with the upmost importance and vigilance. More and more African Tax Authorities are implementing tax audits as part of their fight against cross border tax liability manipulation and unscrupulous tax practises by foreign businesses.

QUICK LINKS

- Transfer Pricing newsletter
- Africa Desk services
- Just VAT newsletter

TRAINING

- PAYE workshops
- Transfer Pricing workshops
- Expatriate Tax workshops
- VAT school

EDITORS COMMENT (CONT)

Therefore it is of paramount importance that the specific role-players in organisations tasked with the management of the various tax accounts in respect of their Africa operations to be on top of the latest changes in legislation in these countries. Also to take note of any new Tax Treaties and Information Sharing Agreements signed and put into force and what impact it would have on their current operations.

Transfer Pricing Policies have to be constantly updated to be aligned with these changes introduced by various Tax Authorities. Documenting of any decisions made are crucial.

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LATEST TAXATION CHANGES IN AFRICA

GAMBIA

VAT will be introduced to replace the current sales tax with effect from 2013. The measure, announced in the Budget for 2012, is intended to help broaden the tax base and increase tax collection.

MOROCCO

The Finance Law for 2012 was published in the Official Gazette No. 6048 of 17 May 2012. Unless the law specifically provides otherwise, the new provisions apply to income derived on or after 17 May 2012.

Profits derived by enterprises established in Economic Free Zones (EFZ) from operations realised with other enterprises established in the same EFZ or in other EFZs are exempt from income tax during the first 5 years of activities. As from the 6th year, a reduced 8.75% tax rate applies for a period of 20 years for corporate taxpayers whereas individuals are entitled to an 80% tax reduction for the same period.

Sports companies are subject to a 17.5% reduced corporate tax during the first 5 years of operations. In order to benefit from this rate, sports companies must be incorporated according to Law No. 30-09 which regulates physical education and sports (loi relative à l'éducation physique et aux sports). With respect to professional individual sportsmen (sportifs professionnels), a 40% deduction from gross taxable income is available for the purpose of determining the net taxable income. Professional individual sportsmen are subject to the progressive income tax rates instead of the 30% final withholding tax introduced by Decree No. 2-11-746 of 31 December 2011.

Profits derived from the disposal of real property by individuals are exempt from income tax if the gross proceeds from such disposal do not exceed MAD 140,000 (previously, MAD 60,000) during the calendar year.

Products delivered and services rendered to enterprises established in EFZs are zero-rated provided the place of supply is outside the EFZ. Operations carried out inside the same EFZ and among EFZs are outside the VAT scope.

VAT levied on gasoil and fuel is deductible provided that such products are used for air transport purposes.

Taxpayers are required to attach to their annual tax return a statement explaining the origin of their losses. A fine of MAD 2,000 applies in case of failure to submit such statement. This provision applies as of 1 January 2013.

The requirement for enterprises established in EFZs to keep plots of land acquired for business purposes for a 10-year period in their assets is abolished. Such requirement applied in order to enjoy an exemption from registration duties on the acquisition of such land.

ANGOLA

Procedures for granting incentives to investment projects published

According to these new procedures, all investment projects must be submitted to the ANIP for assessment and approval. Upon submission, the ANIP has 48 hours to confirm the receipt of the investment project or to request the improvement of the project in case formal requirements foreseen in the Private Investment Law are not met.

Investment projects over USD 10 million are immediately sent to the President for assessment. Upon receipt, the President may:

- return the project to ANIP with recommendations to be followed by the Incentives Negotiation Commission (Comissão de Negociação de Facilidades e Incentivos);
- create an ad hoc Incentives Negotiation Commission in case of investments over USD 50 million;
- set the boundaries to be followed regarding the tax and customs incentives to be granted to the investment project and issue a final decision on such tax and customs incentives; and
- determine special benefits granted under contract, after classification of the investment as of high relevance for the strategic development of the national economy.

The ANIP has a deadline of 45 days to issue a decision on the incentives to be granted to investment projects. However, for investment projects over USD 10 million, the decision on tax and customs incentives is always under the competence of the President.

The new rules brought by Law 20/11 had an impact over tax and customs duties to the extent that, under such new regime, national and foreign investors could become eligible for certain tax incentives in different terms from those established in the regular tax and customs duties legislation.

According to Law 20/11, only investments above USD 1 million per shareholder are eligible for the granting of tax and customs duties exemptions.

It is also clarified that the preliminary assessment of the investment projects shall be carried out by the national investment agency ANIP and that a specific committee shall be appointed by the government for the negotiation of tax incentives.

Presidential Decree 84/12 also clarifies that, after the conclusion of all steps of the administrative procedure, the President may approve not only the intended private investment, but also the tax incentives to be granted.

Law 15/12, published in the Republic Gazette of 8 May 2012 and in force as of that date, authorised the executive power to adjust the liquefied natural gas tax regime (LNG tax regime), previously introduced by Decree-Law 10/07, in order to adapt the Angolan LNG trading to a new commercial strategy of the country.

As a result, Presidential Legislative Decree 4/12, enacted and published in the Republic Gazette of 10 May 2012 and in force as of that date, introduced adjustments to the LNG tax regime in regard to:

- legal concepts;
- receipts for tax reference;
- deductible costs;
- corporate income tax, withholding tax, other taxes and duties exemptions;
- criteria for the determination of the so-called 'Gas Tax'; and
- assessment and payment of taxes.

On 25 April 2012, the Angolan Central Bank (Banco Nacional de Angola – BNA) enacted Warning 19/12 (Aviso 19/12) introducing new rules and procedures applicable to the import and export of goods, including provisions on the contents of documents relevant for tax purposes.

According to Warning 19/12, currency transactions for the payment of imports and exports of goods may only be performed with the intervention of a duly authorised bank. In addition, certain currency transactions specified in the Warning require a pre-approval by the BNA.

Procedures operate on the basis of the filing of documentation evidencing compliance with certain tax and customs duties obligations, such as invoices, pro-forma invoices and the so-called D.U.S (i.e. documents issued in the context of the assessment and payment of customs duties).

The BNA confirmed that these measures were adopted not only for the control of currency transactions, but also to prevent white-collar crimes.

KENYA

Treaty between Kenya and South Africa – details

Details of the Kenya - South Africa Income Tax Treaty (2010), signed on 26 November 2010, have become available. The treaty was concluded in the English language. The treaty generally follows the UN Model (2001).

The maximum rates of withholding tax are:

- 10% on dividends;
- 10% on interest; and
- 10% on royalties.

Deviations from the UN Model (2001) include that:

- a services permanent establishment(PE) exists only if the activities are carried out for a period exceeding in the aggregate 183 days in any 12-month period (article 5(3)(b));
- a force of attraction clause applies subject to the fact that the enterprise demonstrates that sales or activities carried out through the PE have been carried out for reasons other than obtaining a benefit under the treaty (article 7(1));
- profits from the operation of ships or aircrafts in international traffic shall include profits derived from the rental on a bare boat basis of ships or aircraft used in international traffic, if such profits are incidental to those taxable under article 8 (article 8(3));
- the definition of 'royalties' under article 12(3) follows the OECD Model;
- article 13 (capital gains) and article 26 (Exchange of information) follow the OECD Model;
- pensions and other similar remuneration and other annuities may be taxed in the state in which they arise subject to an exception (article 18(1));
- the article on non-discrimination allows South Africa to impose tax on the profits attributable to a PE in South Africa of a company, which is a resident of Kenya, at a rate which does not exceed the normal tax rate on companies by more than five percentage points (article 24 (5)); and
- the treaty includes an article on assistance in the collection of taxes, which follows the OECD Model (article 27).

Both states generally provide for the credit method to avoid double taxation.

TANZANIA

The Budget for 2012-13 was presented to the National Assembly by the Minister of Finance on 14 June 2012. Details of the Budget regarding direct taxation, which will apply from 1 July 2012, are summarised below.

Corporate taxation

The proposed changes include

- gross interest payable by Tanzanian banks to non-residents will be subject to a 10% withholding tax;
- the exemption from withholding tax on dividends paid by resident companies to resident corporate shareholders will be abolished. The dividends will be taxed at a reduced rate of 5%;
- the withholding tax on interest payable on loans from foreign banks to strategic investors will be abolished; and
- the Dar es Salaam Stock Exchange (DSE) will be exempt from income tax.

Personal taxation

The proposed changes include:

- the presumptive income tax rates and bands applicable to business income derived by individuals will be adjusted to provide for a tax-exempt lower band not exceeding TZS 3 million of turnover; and
- the income tax-free threshold for PAYE will be increased from TZS 135,000 to TZS 170,000 per month.

Capital gains tax

The sale of shares of a Tanzanian company by its parent or by an offshore holding company will be subject to capital gains tax.

VAT

The proposed changes include:

- certain beneficiaries of VAT exemptions under the Third Schedule to the VAT Act, including private companies, individuals, non-governmental organisations and holders of Tanzania Investment Centre Certificates, will be subject to VAT at a reduced 10% rate instead of the current standard 18% rate; and
- the list of VAT exemptions will be broadened to include electronic fiscal devices and various types of equipment used for storing, transporting and distributing natural gas.

Customs duties

The proposed changes include:

- the import duty exemption for 'deemed capital goods' will be reduced from 100% to 90%, and investors will be required to pay 10% of the tax due;
- the import duty exemption on the importation of all non-utility motor vehicles with a capacity of 3,000 cubic centimetres and above will be abolished, with the exception of imports covered by donor-funded projects under current agreements with the government and imports by diplomats and diplomatic missions; and
- a broad range of changes will be made to the customs duty regime, in coordination with the other member states of the East African Community, involving import duty rate reductions, remissions and exemptions. The items covered include machinery and spare parts used by the mining industry, refrigerated trailers, inputs for use in the manufacture of medical diagnostic kits, bee-keeping equipment, galvanised wire, set top boxes, electricity, software, food supplements and wheat.

Other measures

The airport departure service charge will be increased from USD 30 to USD 40 for passengers travelling outside Tanzania and from TZS 5,000 to TZS 10,000 for domestic air travellers.

UGANDA

The Budget for 2012-13 was presented to the Parliament by the Minister of Finance, Planning and Economic Development on 14 June 2012. Details of the Budget, which will generally apply from 1 July 2012, are summarised below.

The proposed changes include:

- the withholding tax on income derived from treasury bills and bonds will be increased from 15% to 20% and will constitute a final tax;
- the tax-exempt PAYE threshold will be increased from UGS 130,000 to UGS 235,000 per month and the tax bands will be adjusted commensurately; and
- taxable income in excess of UGS 120 million per year derived by individuals will be subject to an additional tax at the rate of 10%.

VAT

The proposed changes include:

- the VAT on the supply of water and biodegradable packaging materials, both of which are currently exempt, will be subject to the standard rate; and
- the exemption for the supply of gambling and lottery services will be reinstated.

Customs duties

A number of changes will be made to the customs duty regime in coordination with other member states of the East African Community, covering duty remission, exemptions and reductions. The items affected include vacuum packing bags used by manufacturers, set top boxes and food supplements.

Tax management

The government will reform the tax laws governing excise duty, stamp duty, lotteries and gaming, and will also introduce a Tax Procedure Code to improve tax compliance and ease tax administration.

MALAWI

2012/13 Budget pronouncements

Income Tax Measures

- Minimum tax on turnover has been abolished.
- Capital gains realised from disposal of shares traded on the Malawi Stock Exchange (MSE) will not be subjected to tax if they have been kept for more than one year.
- Investment allowance rate has been increased from 15% to 25% of the taxable export sales.
- 50% of all social contributions to schools, youth sports development, health and similar institutions will be deductible for income tax.
- PAYE rates have been changes as follows:
  First MWK15,000 taxable at 0% (annually MWK188,000)
  Next MWK5,000 taxable at 15% (annually MWK60,000)
  Excess of MWK20,000 taxable at 30%
- Income of pensioners is tax exempt.
- Withholding tax threshold for casual labourers increased from MWK12,000 to MWK15,000.
- Employees' pension contribution is still not deductible for income tax. The employer's contribution will be deductible only to the extent of 15% of the employee's annual salary. Pension investments are taxable at 15%.
- Corporate tax rate for cell phone operators has been increased from 30% to 33%.

Value Added Tax (VAT) Measures

VAT has been removed on the following items which were previously VAT-able:-

- Plant and machinery for manufacturers.
- Financial services.
- Newspapers and Internet services.
- Ordinary bread.

Customs and Excise Measures

- Returning Residents: Motor vehicle for returning residents (not more than two for each family) can be cleared duty free even if it has been used for less than one year. Previously, only motor vehicles that had been owned for not less than one year would be imported duty-free.
- Import VAT removed on goods imported for use in water supply by the Water Boards. A new CPC introduced to cater for duty free importation of electronic fiscal devices.
- Privileged persons and organisations will need to import directly or from suppliers ex-bond since the duty suffered

MALAWI (cont)

while purchasing from open stock will not be refundable.

- Import duties have been removed on buses of capacity of more than 45, including the driver. No duty is now applicable on importation of raw materials under the Industrial Rebate Scheme. This essentially removes restrictions on the same introduced in the 2011/12 fiscal year.
- Duty free travel allowance for non-commercial goods bought by residents when they travel outside the country has been increased from MWK50,000 to MWK150,000.
- More harmonisation of the tariff structure with COMESA and SADC.
- The threshold for Simplified Trade Regime (STR) increased from US$500 to US$1,000 in order to promote small cross-border trade among countries in COMESA.

Tax Administration Measures

Proposed changes tax provisions in laws other than the Taxation Act, VAT Act and Customs and Excise Act will be incorporated into these Acts to remove the existing contradictions in the provisions and to facilitate their implementation.

The Malawi Revenue Authority will undertake various measures to enhance its operations, including an automated self-assessment system to manage tax returns and a mechanism to improve the management of tax refunds.

Enhanced use of ICT by MRA:

- ASYCUDA,
- Electronic VAT systems,
- Automated income tax self-assessment system,
- Customs data processing centre.

Non-Tax Measures

Motor vehicles license fees will now be collected through the fuel pump price.

RWANDA

The Government introduced facilities for small and medium-sized enterprises (SMEs) regarding the filing of their pay as you earn (PAYE) returns.

As from 1 April 2012, SMEs whose annual turnover is equal or less than RWF 200 million may file and pay their PAYE returns on a quarterly basis instead of the monthly payments required previously. This facility is not mandatory and is available on request for SMEs fulfilling the condition relating to the annual turnover.

SMEs applying for this option are required to submit their first quarterly PAYE return on July 2012.

BURUNDI

On 14 May 2012, the President enacted Laws 1/10, 1/11 and 1/12 exempting imported basic food products from administrative fees (redevance administrative), VAT and customs duties. The exemptions apply from 15 May 2012 until 31 December 2012 to products listed by the Government in a special regulation act which has not yet been published. Therefore, Law 1/11 amends article 28 of Finance Law 2012 which subjected to VAT imported products at a rate of 5%, except where an exemption was granted by an international agreement.

MAURITIUS

The Indian Income Tax Appellate Tribunal (ITAT) delivered a ruling dated 28 May 2012 in the case of DDIT v. B4U International Holdings Limited (ITA No. 880/Mum/2005) wherein it held that the Indian agent of a Mauritius company does not create a dependent agent permanent establishment (DAPE) under the India - Mauritius Income Tax Treaty (1982)(the Treaty).

The Tax Authorities argued that B4U India constituted a DAPE of the Taxpayer in India and attributed a profit margin of 10% after deducting advertisement commission and payments to other parties.

The Taxpayer argued that it had no PE in India, and hence was not liable under the Treaty. Further, the Taxpayer argued that if the agent is remunerated at arm's length no further attribution needs to be made in the hands of the non-resident. In the present case, since B4UIndia was being paid a commission of 15%, no further attribution needs to be made in the hands of the Taxpayer.

It was held that:

1. The issue whether the foreign enterprise has an agency PE in India would depend on the agreement entered into between the parties and the functions performed by them. To determine as to whether the agent has the authority to conclude contracts, one would need to see the legal existence of such authority in terms of the contract between the principal and agent. Further, article 5(5) of the Treaty refers to the activities of an agent and its devotion to the non-resident and not the other way around (not to be seen from principal's perspective).
2. The agreement between the Taxpayer and B4U India specifies that B4U India cannot directly or indirectly bind the principal. All the activities of the agent are subject to the control and direction of the principal. This indicates that the agents are not decision makers and it did not have the authority to conclude contracts. The agents have no authority to fix the rate or to accept the advertisement. It can merely forward the advertisement and the taxpayer has the right to reject it. The Tax Authority has not brought anything on record to show that the agents have power to conclude contracts. Further, income of B4U India from the Taxpayer was only 4.69% of its total income. Thus, articles 5(4) and 5(5)of the Treaty are not applied in the present case.
3. The rate of commission of 15% was accepted by the Tax Authorities for the financial years 2001-02 to 2003-04. The rate is also mentioned in the CBDT circular and is accepted by Bombay High Court in the case of Set Satellite (Singapore) Pte Ltd v. DDIT (307 ITR 205). Thus, relying on the Supreme Court decision of DIT v. Morgan Stanley & Co (292 ITR 416), Set Satellite (supra) and DIT v. BBC Worldwide Ltd (203 Taxman 554) (Del), when the payment is at arm's length, there is no further need to attribute profits to the PE.

TREATIES

Signed

- Botswana & People's Republic of China
- Seychelles & Luxembourg
- Seychelles & Qatar
- Seychelles & Pakistan
- Mauritius & France (Protocol)
- Mauritius & Germany
- Mauritius & Kenya
- South Africa & Kenya
- South Africa & Saudi Arabia
- South Africa & Seychelles (Protocol)
- South Africa & Sweden (Protocol)
- South Africa & Gabon
- Senegal & Iran
- Burkina Faso & Morocco
- Chad & Tunisia
- Morocco & Indonesia
- Morocco & Oman
- Morocco & Gabon
- Zimbabwe & Kuwait
- Egypt & Ireland
- Tunisia & Serbia

Ratified

- Ethiopia & People's Republic of China
- Ethiopia & India
- Ethiopia & Sudan

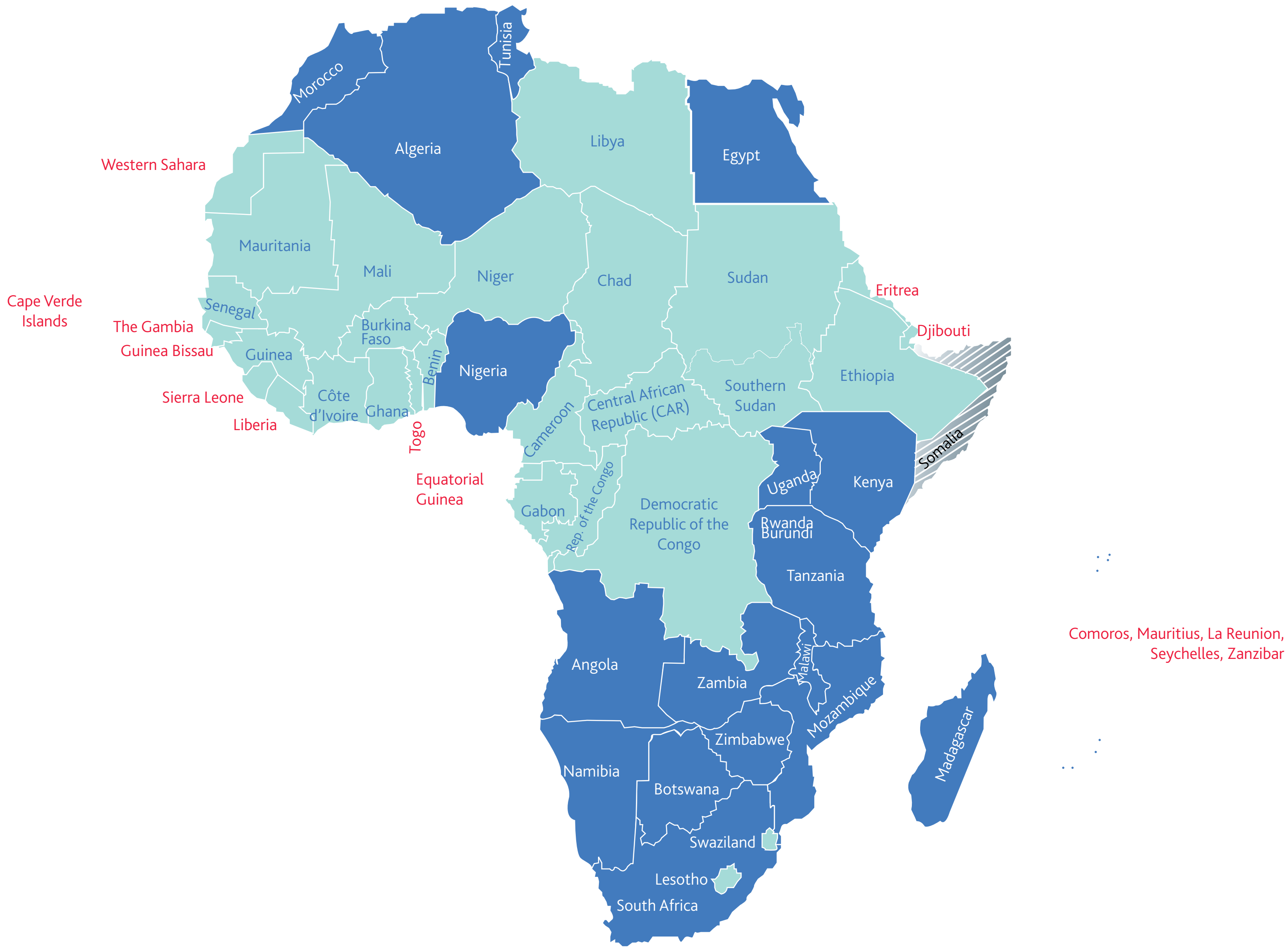
Negotiated

- Egypt & Luxembourg
- Morocco & Luxembourg
- Morocco & Lithuania
- Zambia & UK
- Gabon & Mauritius
- Ethiopia & Portugal
- Ethiopia & Seychelles
- Tunisia & Ireland
- Mauritius & Luxenbourg

Exchange of information agreements

- Egypt & Luxembourg
- Morocco & Luxembourg
- Morocco & Lithuania
- Zambia & UK
- Gabon & Mauritius
- Ethiopia & Portugal
- Ethiopia & Seychelles
- Tunisia & Ireland
- Mauritius & Luxenbourg

BDO Africa Desk footprint



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Independant Referral Firms

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