

OECD/G20 Base Erosion and Profit Shifting Project

# Progress Report on the Administration and Tax Certainty Aspects of Pillar One

TWO-PILLAR SOLUTION TO THE TAX CHALLENGES  
OF THE DIGITALISATION OF THE ECONOMY

**Public consultation**

6 October – 11 November 2022



OECD/G20 Base Erosion and Profit Shifting Project

# **Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One**

Two-Pillar Solution to the Tax Challenges of the Digitalisation  
of the Economy

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## **Background**

Following years of intensive negotiations to update and fundamentally reform international tax rules, 137 members of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) joined the Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (the Statement) released in October 2021. The Statement sets out the political agreement on the key components of Pillar One and Pillar Two, and mandates the Task Force on the Digital Economy (TFDE) – a subsidiary body – to advance the work needed to implement Amount A. In particular, the TFDE has been charged with developing the Multilateral Convention (MLC) and its Explanatory Statement as well as the Model Rules for Domestic Legislation (Model Rules) and related Commentary through which Amount A will be implemented.

Since this historic agreement, significant work and progress has been achieved on the development of the technical rules of the new taxing right (Amount A), including through the valuable inputs received during the rolling public consultation held on various building blocks of Amount A. In July 2022, the Inclusive Framework approved the release of the *Progress Report on Amount A of Pillar One*, which contained the core elements of the operative provisions that will guide the functioning of Amount A, for the purpose of obtaining further input from stakeholders on the technical design of Amount A. It was noted that rules on the administration of the new taxing right, including the tax certainty related provisions, would also be released in due course for public consultation, as more time and work in the TFDE was required to enable a meaningful engagement with stakeholders. These rules and procedures are now released through this document, with the purpose of seeking further feedback from stakeholders.

## **Public consultation**

This Progress Report is a consultation document released by the OECD Secretariat for the purposes of obtaining further input from stakeholders on the administration and tax certainty aspects of Amount A.

The comments provided will assist members of the Inclusive Framework in completing the work on these components of Amount A. Comments are sought with respect to the processes and rules contained in this document. Where relevant, input should refer to the relevant section of the rules. While comments are invited on any aspect of the rules and procedures, input will be most helpful where it explains the additional guidance that would be needed to improve the application of the rules and procedures, as well as input on whether anything is missing or incomplete.

Interested parties are invited to send their comments on this discussion draft no later than **Friday 11 November 2022**. They should be sent electronically (in Word format) by email to [tfde@oecd.org](mailto:tfde@oecd.org) and may be addressed to: Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA.

Please note that all written comments received will be made publicly available on the OECD website. Comments submitted in the name of a collective “grouping” or “coalition”, or by any person submitting comments on behalf of another person or group of persons, should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting.

**The proposals included in this consultation document have been prepared by the OECD Secretariat, and do not represent the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs (CFA) or their subsidiary bodies.**

# 1. Introduction

1. Many building blocks of Amount A were released in July 2022 as part of the *Progress Report on Amount A of Pillar One* (July Progress Report)<sup>1</sup>, for the purpose of gathering stakeholder input. The Secretariat received 72 submissions, representing 700 pages of detailed and constructive comments from a wide variety of stakeholders. A public consultation event was held on September 12 in order to give stakeholders an opportunity to discuss their comments further.

2. As announced in the July Progress Report, the present document contains draft rules on the administration of the new taxing right as well as provisions on tax certainty that have been developed by the Task Force on the Digital Economy (TFDE). These rules and procedures are described in the three parts of this report:

- Part I covers the **administration process for Amount A**: The detailed procedures of how in-scope Groups will comply with the Amount A rules, from the filing of the relevant information to payment of tax and access to timely relief from double taxation.
- Part II covers the **tax certainty framework for Amount A**: A central element of Amount A is an innovative Tax Certainty Framework which guarantees certainty for in-scope Groups over all aspects of the new rules, including the elimination of double taxation.
- Part III covers **tax certainty for issues related to Amount A**: In-scope Groups will also benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and binding manner.

3. Unlike the rules for the Amount A Tax Certainty Framework or on tax certainty for issues related to Amount A, the rules on administration are being released for a public consultation for the first time. Therefore, the draft rules on administration are supplemented with an explanatory note, providing in particular information on the interactions with domestic administrative procedures.

4. The rules and procedures contained in this report do not reflect the final agreement of the Inclusive Framework. They reflect the technical work conducted thus far in developing these building blocks of Amount A and have been approved for the purposes of a public consultation on the tax certainty and administration processes.

5. Meanwhile, the work on the other building blocks of Amount A and on the development of Amount B has continued and two other public consultation documents will be released by the end of 2022: one dealing with the Withdrawal and Standstill of Digital Services Taxes and Other Relevant Similar Measures, and the other one dealing with Amount B.

6. The work on Amount B will proceed with a view to completing it in the first half of 2023.

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<sup>1</sup> OECD (2022), Progress Report on Amount A of Pillar One, Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, <https://www.oecd.org/tax/beps/progress-report-on-amount-a-of-pillar-one-july-2022.pdf>.

# Part I. Administration of Amount A

# 1. Overview

1. Building an Administration Framework for Amount A that minimises compliance costs for taxpayers and keeps the administration of the new rules manageable for tax administrations is one of the key objectives of the Pillar One agreement.

The Administration Framework for Amount A will be provided through a detailed framework partially developed in this document based on the Inclusive Framework October Statement: *“The tax compliance will be streamlined (including filing obligations) and allow in-scope MNEs to manage the process through a single entity.”*<sup>2</sup>

2. An Administration Framework that minimises the compliance burden on taxpayers and administrative burden on jurisdictions is essential to make the new regime effective, efficient and administrable both for Covered Groups and tax administrations. As such, the development of the Administration Framework for Amount A is based on the following principles:

- The administration and compliance related to Amount A should be streamlined and coordinated to minimise the impact on tax administrations and taxpayers. This includes removing any unnecessary duplication.
- Where possible, the Administration Framework should allow for tax administrations to deal with Amount A without significant modification to their current tax administration and systems infrastructure.
- The Administration Framework should adequately ensure that Amount A liabilities can be enforced on a Covered Group and ensure effective and timely relief from double taxation for taxpayers.

3. As described in the Progress Report on Amount A of Pillar One (“the Progress Report”), Amount A operates as an overlay to the existing profit allocation rules, reallocating taxing rights over a portion of an in-scope Group’s residual profits, determined based on the consolidated financial statements of the Group, to market jurisdictions. The obligation to eliminate double taxation arising from Amount A will be allocated on a quantitative and jurisdictional basis. In contrast with the approaches taken to determining and allocating Amount A, and to eliminating double taxation, the existing corporate tax regime generally follows an entity-based approach. The Inclusive Framework has therefore been considering approaches with respect to the interaction of Amount A with existing entity-based corporate tax regimes.

4. Therefore, based on the existing entity-based corporate tax regime and legal framework, for the purposes of Amount A:

- Amount A income is to be included in the income tax base of market jurisdictions. The current administrative rules in each jurisdiction will apply to Amount A income and double taxation relief, including in relation to income tax filings, assessments and penalties, unless concessional or harmonised treatment in certain circumstances is provided for by the Model Rules. Jurisdictions will be able to self-determine how to tax Amount A income and implement double taxation relief, subject to guardrails outlined in the Model Rules and Multilateral Convention.

<sup>2</sup> *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, Pillar One, Administration.

- An entity liable for tax on Amount A income or eligible for double taxation relief in a jurisdiction will be required to submit documentation to tax administrations that outlines the relevant calculations and additional information in relation to Amount A (this is referred to as the “Amount A Tax Return” and “Common Documentation Package”).<sup>3</sup>
- An entity that is required to include Amount A income in its taxable income in a market jurisdiction will be legally liable to tax in that market jurisdiction on that Amount A income. Unless specifically modified under the Model Rules, the entity will have the same domestic tax obligations as any other taxpayer with taxable income in the market jurisdiction. Streamlined and harmonised tax filing rules are provided in the Model Rules for entities liable to tax on Amount A income in a market jurisdiction to allow for entities to meet their income tax obligations through the centrally filed Amount A Tax Return and Common Documentation Package. It is expected that most Amount A liabilities will be eligible for streamlined filing in market jurisdictions and the circumstances where it does not apply should benefit taxpayers.
- Double taxation relief in relation to Amount A shall be given through the income tax base of relieving jurisdictions and therefore will need to interact with current domestic income tax rules, such as through the extension of current foreign source income exemptions or foreign tax credit regimes in the domestic income tax rules of a relieving jurisdiction.<sup>4</sup>

5. Discussions within the Inclusive Framework are continuing regarding the process of identifying the taxpayer/s in market jurisdictions and relief entities in relieving jurisdictions. Regarding this, two approaches have been identified to integrate Amount A and the entity-based income tax system: (1) the “single taxpayer” approach, in which a single entity in each Covered Group is liable for the Amount A tax in all market jurisdictions, and that entity may be a different entity than the entity or entities entitled to relief from double taxation; and (2) the “multiple taxpayer” approach, in which one or more entities from each jurisdiction that is required to eliminate double taxation (“relieving jurisdictions”) are liable for the Amount A tax, and a single Group Entity coordinates payment and compliance as an agent on their behalf.

6. While a majority of the members of Inclusive Framework have indicated provisional support for the single taxpayer approach, at this stage no decision has been made by the Inclusive Framework. Given this, the Model Rules for the Administration Framework for Amount A have been drafted to accommodate both approaches. References in this Chapter and the Model Rules to a “liable entity under the Act” or “entity subject to tax on Amount A income”, may refer to a single entity or multiple entities within a Covered

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<sup>3</sup> The Amount A Tax Return and the Common Documentation Package refers to the information that Covered Groups are required to provide to Tax Administrations in relation to Amount A. While the particulars are yet to be developed, broadly, the Amount A Tax Return provides the relevant Group (and individual entity) identifying information and outlines the Amount A income and the amount of double taxation relief available for each Group entity to assist market jurisdictions with raising their income tax assessments and relieving jurisdictions with verifying double taxation relief. The Common Documentation Package refers to the further particulars in relation to Amount A, including the underlying calculations and other information required by tax administrations to verify the amounts included in the Amount A Tax Return (including information required as part of Tax Certainty processes).

<sup>4</sup> It is noted that the Multilateral Convention will need to include a provision that requires jurisdictions to give double taxation relief in relation to Amount A. At this stage, neither the Multilateral Convention nor the Model Rules will specify how a jurisdiction will give double taxation relief. Article 10 of Title 5 addresses the methods by which relief will be provided for Amount A to Group Entities in Relieving Jurisdictions. In conformity with the October Statement, paragraph 1 of Article 10 of Title 5 provides that such relief will be given using one of the existing methods employed to address double taxation – customarily, the exemption method or the credit method – with the choice of which method to apply being left to the Relieving Jurisdiction. However, under either method, domestic modifications are likely to be required to ensure double taxation relief is effective. Work on the methods for elimination of double taxation with respect to Amount A will also include discussion of how elimination of double taxation could be provided in jurisdictions that have traditionally used methods other than the credit or exemption methods.

Group. Under the multiple taxpayer approach, certain administration obligations that are legally required of the liable entities will in practice be coordinated and undertaken by an agent.<sup>5</sup> The Model Rules will be adjusted accordingly once a decision has been made. An overview of how both approaches will work from an administration perspective (including the merits and drawbacks of each approach) is discussed in the section below titled “The Administration Framework for Amount A under the Single Taxpayer and Multiple Taxpayer Approaches”.

7. This Chapter does not cover all the relevant issues related to the Administration Framework for Amount A and represents the direction of discussions to date undertaken by members of the Inclusive Framework. Further issues related to the Administration Framework for Amount A will be discussed in their relevant context as part of discussions in relation to the development of the Multilateral Convention, the finalisation of the Model Rules or developed as part of the Pillar One Implementation Framework. To the extent that the outcome of those discussions results in the need for further Model Rules to be developed to assist in domestic implementation of Pillar One, such rules will be added to the current rules accordingly. An outline of some of the issues already flagged for later discussion is at paragraphs 105 to 111.

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<sup>5</sup> For example tax registrations and payment of Amount A liabilities to tax administrations. However, the agent will not be legally liable for tax levied by market jurisdictions on Amount A income on the underlying principal entities.

## 2. Administration Framework for Amount A

## 2.1. Amount A income is to be included in the income tax base of market jurisdictions and subject to general administrative procedures

1. Given Pillar One seeks to expand the current taxing rights of market jurisdictions through adapting the current international income tax regime, it is important to recognise that the taxation of Amount A in market jurisdictions must be through an income tax regime. In order for double taxation relief for Amount A to be effective, without substantial changes to the current double taxation relief mechanisms in jurisdictions, Amount A income must be recognised to be subject to an income tax or the equivalent to an income tax.

2. However, like any other income taxing right afforded to jurisdictions under the current international income tax regime, jurisdictions will be free to tax Amount A income in any manner they deem appropriate. Jurisdictions will be free to self-determine to either tax Amount A income under their current income tax regimes or through a separately levied income tax, taking into account their own specific circumstances, including any other domestic or international obligations that may affect the taxation of income, or domestic policy choices.<sup>6</sup> The Model Rules, in particular Article 14 (which outlines the requirements for streamlined compliance in market jurisdictions), have been drafted to provide jurisdictions flexibility in determining how Amount A will be incorporated into their domestic income tax base.<sup>7</sup> However, guardrails on how Amount A will be taxed will be further discussed in the development of the Model Rules and the Multilateral Convention.

3. However, several areas have been identified where a harmonised administrative approach is warranted. In such cases, these measures will significantly reduce the compliance and administration burden for taxpayers and tax administrations or a harmonised approach is required to ensure the correct application of the Model Rules. The areas identified that require Articles in the Model Rules are as follows:

- Information filing requirements in relation to Amount A (Articles 12 and 13);
- Streamlined income tax filing and reporting requirements in market jurisdictions for eligible entities (Article 14);
- Secondary liability for the non-payment of Amount A related income tax liabilities (Article 15);
- Amount A Transition Periods (Article 16);
- Uniform currency conversion rules for the purposes of Amount A (Article 17);
- Amendments due to the Tax Certainty Framework (Article 18); and
- Back-stop rule for timely double taxation relief (Article 19).

4. Each Article is outlined in this Chapter with a detailed discussion on the application of each in the section titled "Model Articles and Commentary for the Administration of Amount A".

## 2.2. Information filing requirements for Amount A

5. In order for tax administrations to adequately assess an entity's tax liability in relation to Amount A or the double taxation relief to be granted to an entity, each tax administration will need to be able to access

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<sup>6</sup> For instance, jurisdictions may choose to allow access to domestic loss relief for Amount A income

<sup>7</sup> For example, Article 14 takes into consideration whether a jurisdiction has chosen to allow Amount A liabilities to be offset by domestically derived tax losses of other Group members. While the Model Rules do not require a jurisdiction to provide such relief, it does leave the option available to jurisdictions if they are so inclined to make a domestic policy decision to allow such relief to be provided.

the relevant Covered Group's information and calculations used in determining the relevant amounts under Amount A.

6. Given Amount A is calculated on a group basis, an entity liable to tax on Amount A or eligible for double taxation relief will be required to submit an Amount A Tax Return and Common Documentation Package, to each relevant Affected Party<sup>8</sup> (see Article 12). The Amount A Tax Return and Common Documentation Package will be a single set of standardised documents that will include all the relevant information necessary for each jurisdiction to determine whether Amount A has been calculated correctly (see Article 13). A Covered Group's Amount A Tax Return and Common Documentation Package submitted to each Affected Party will be the same.

7. Broadly, the Amount A Tax Return, is a Covered Group's documentation outlining the relevant income tax obligations, including the amount of double taxation relief available, of each entity in a Covered Group relevant to each jurisdiction, as well as the underlying calculations based on the application of the Model Rules and the relevant information supporting those calculations. The Common Documentation Package will include further information relevant to the Tax Certainty Framework. The Common Documentation Package will be required to be submitted regardless of whether a Covered Group elects to engage with the Tax Certainty Framework.

8. The submission of these documents as part of the income tax filings of the relevant entities should prevent the need for tax administrations specifically requesting information from the Coordinating Entity, a taxpayer or another member of a Covered Group as part of the income tax return filing process. This should prevent duplication for entities and Covered Groups and it should prevent information asymmetries between jurisdictions as all Affected Parties will have access to the same information in the same form. The Inclusive Framework does recognise the concerns previously raised by stakeholders with regards to the full contents of the Amount A Tax Return and Common Documentation Package going to all Affected Parties, rather than only the information relevant to the Amount A tax, or relief of double taxation, applicable

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<sup>8</sup> "Affected Party", with respect to a Group for a Period, means:

- a. a Party whose tax administration is the Lead Tax Administration;
- b. a Party
  - i. in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test, or
  - ii. that is required to provide relief for the Elimination of Double Taxation, for the Period on the basis of information contained in the Common Documentation Package;
- c. a Party that has notified the Lead Tax Administration asserting that it considers itself to be a Party in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test accompanied by relevant supporting documentation sufficient to demonstrate a reasonable basis for this view, or
- [d. a Party in which a Group Entity of the Group is resident for tax purposes or a permanent establishment of a Group Entity is located, or]
- d. a Party not in (b), (c) or (d),
  - i. in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test, or
  - ii. that is required to provide relief for the Elimination of Double Taxation, for the Period under an agreed Comprehensive Certainty Outcome.

The status of an Affected Party as such shall not by itself be relevant to the determination of whether that Party may tax profits of a Group pursuant to the Convention.

in that jurisdiction. However, given the group-basis nature of the calculations in Amount A and the Tax Certainty Framework, it will be impossible to separate out this information and efficiently and effectively implement Amount A. However, secrecy and use of the Amount A Tax Return and Common Documentation Package will be discussed as part of the development of the Exchange of Information articles in the Multilateral Convention.

9. The filing of the Amount A Tax Return and the Common Documentation Package will not affect a jurisdiction's right or ability to request further information or clarification from a liable entity (or other members of a Covered Group) in relation to Amount A as part of a review or audit. Such rights and obligations remain unaffected. Although it is noted that where a Covered Group has requested a Comprehensive Certainty Review, this ability will be limited because compliance activity will be suspended while the review is underway.<sup>9</sup>

10. Further, to reduce the administrative burden on taxpayers and tax administrations, a centralised filing will be provided in each jurisdiction (see Article 12) whereby the filing obligation in relation to the Amount A Tax Return and Common Documentation Package will be met in all jurisdictions if the documents are filed centrally with the Lead Tax Administration by the Group's Coordinating Entity.<sup>10</sup> This aligns with the proposed practices under the Tax Certainty Framework. The Lead Tax Administration will then distribute it to all Affected Parties (i.e. market and relieving jurisdictions) through Exchange of Information (see paragraphs 105 to 107). However, it should be noted that the filing obligations under Article 12 are separate to the streamlined compliance under Article 14. While Article 12 applies to all liable entities and relief entities in a Covered Group, Article 14 only applies to eligible liable entities (see discussion below).

### 2.3. Amount A income liabilities in market jurisdictions

11. Under the Pillar One Model Rules, Covered Groups will undertake the required calculations to determine the relevant amounts of profits allocated to each market jurisdiction. As noted above, the preferred approach for identifying the entity/entities liable to tax on Amount A income has yet to be decided. How the Administration Framework for Amount A will apply under either of the two approaches under consideration, and the relevant considerations, is outlined at paragraphs 42 to 95.

12. Regardless of the approach adopted, a liable entity will be required to comply with the income tax requirements of each market jurisdiction in relation to its Amount A related income tax obligation for the Period, including the filing of tax returns and any other obligation a jurisdiction applies to taxpayers.<sup>11</sup>

13. Where there are currently no income tax obligations in a market jurisdiction for an entity liable to tax on Amount A income, the amount of information specific only to the liable entity that should be required by a market jurisdiction to assess compliance with Amount A should be minimal (i.e. Amount A is focused on group-based and jurisdiction-based calculations). As an entity may have a liability to tax on Amount A income in numerous market jurisdictions, each with different administrative requirements (for example, different tax registration requirements), the Administration Framework seeks to minimise the associated income tax compliance burden for Covered Groups and tax administrations, where appropriate.

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<sup>9</sup> Paragraph 4 of section 2.3.1 of the Tax Certainty Framework for Amount A Chapter.

<sup>10</sup> There is a proposal put forth by a member of the Inclusive Framework for having an option of filing the Amount A Tax Return and Common Documentation Package directly with the Affected Party simultaneously with the Lead Tax Administration, where the Affected Party provides for automated remote filing / online filing. Such an approach will eliminate the delay in market jurisdictions receiving the Amount A Tax Return and Common Documentation Package.

<sup>11</sup> Under the multiple taxpayer approach, the agent for the Covered Group will undertake these activities on behalf of the liable (principal) entities. However, by law, these obligations still legally fall on the liable entity, regardless of the fact the obligations may be satisfied by the agent on behalf of the liable entity.

14. The operational infrastructure and IT systems of the vast majority of tax administrations rely on a Tax Identification Number (or equivalent) for a jurisdiction to identify the relevant liable taxpayer and process that taxpayer's information. Allowing taxpayers to lodge information and make payments without such identifiers is not considered feasible given the necessary legislative and infrastructure changes required in most jurisdictions to accommodate such a significant change. Therefore, an entity liable for tax on Amount A income in a market jurisdiction will be required to register in every market jurisdiction for which it has a filing requirement. However, jurisdictions have agreed to consider this issue and other registration related issues, such as the requirements for resident representatives and local bank accounts, further as part of the Pillar One Implementation Framework.

15. The Administration Framework for Amount A includes the provision of specific streamlined compliance for an entity liable to tax on Amount A income in a market jurisdiction ('streamlined compliance' refers to compliance under Article 14). A liable entity will use the streamlined compliance where it is not a resident of the market jurisdiction, has no other income tax obligations in the market jurisdiction and is not utilising group loss relief / tax consolidation in the market jurisdiction. It is expected that most Amount A liabilities in market jurisdictions shall be eligible for streamlined compliance and where this is not the case will only benefit taxpayers.

16. Where streamlined compliance applies to a liable entity, that entity will satisfy its income tax filing obligations in a market jurisdiction (or multiple market jurisdictions) through the lodgement of an Amount A Tax Return and Common Documentation Package, rather than through a specific local income tax filing. That is, the Amount A Tax Return and Common Documentation Package will replace the local income tax return in the relevant market jurisdictions. Further, such entities will have harmonised filing and payment dates in the market jurisdictions to which streamlining is applied based on the end of the UPE's fiscal year.

17. The policy rationale for the use of streamlined compliance in relation to Amount A is to remove the requirements for Covered Groups (and the relevant entities liable for tax on Amount A income) to deal with different income tax returns, filing requirements and payment dates in many market jurisdictions. The determination of eligibility for streamlined compliance is to be undertaken on a jurisdiction-by-jurisdiction basis.<sup>12</sup> That is, if a liable entity is not eligible for streamlined compliance in one market jurisdiction, it will still be able to use streamlined compliance in other market jurisdictions. However, the use of streamlined compliance is mandatory if the relevant entity is eligible to use it in relation to its Amount A liability in a market jurisdiction. However, entities entitled to relief from double taxation in a relieving jurisdiction (the "relief" entities) will still be required to claim double taxation relief through their local income tax return in the relieving jurisdiction.

18. Where streamlined compliance is used, the intended interaction of the Amount A Tax Return with domestic income tax regimes is to merely replace the domestic tax return for that liable entity.

- For self-assessment income tax regimes, the Amount A liability should still arise through self-assessment under domestic legislation (as the Model Rules will be adopted in domestic legislation) and the Amount A Tax Return is merely a substitute for the general domestic income tax return filing obligation (i.e. no change to domestic tax charging provisions should be required).
- For income tax regimes that do not operate on a self-assessment basis, the Amount A liability can be raised based on the information in the Amount A Tax Return and that return should be considered to meet the domestic income tax return filing obligations of the entity.

19. In the limited circumstances where a liable entity is not eligible to use the streamlined compliance in a market jurisdiction, the entity will already have an income tax filing obligation in the relevant market jurisdiction or will be utilising domestic loss relief/tax consolidation rules. For this entity, it will need to

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<sup>12</sup> Where the multiple taxpayer approach is adopted, eligibility will also be on an entity-by-entity basis.

include Amount A income in the income tax return for the relevant market jurisdiction (rather than through the Amount A Tax Return) and be subject to the general income tax filing obligations of the relevant market jurisdiction.<sup>13</sup> In these circumstances, not being eligible for streamlined compliance should generally only benefit such taxpayers (for instance, if the jurisdiction allows, the taxpayer can access group loss relief). Further, for these situations, there is a potentially significant interaction between Amount A income and other domestic tax attributes. Therefore, it is not considered feasible to allow for streamlined compliance in these circumstances, especially given the amount of additional non-Amount A information tax administrations may require to verify non-Amount A related calculations.

## 2.4. Double taxation relief for Amount A in relieving jurisdictions

20. Article 11 of the Model Rules will provide the approach to identifying the relief entities. As noted in the Progress Report, how jurisdictions determine which entities are eligible for double taxation relief is still under consideration.

21. Amount A liabilities are unique as the amounts are calculated on a group basis and the Amount A income an entity has in a market jurisdiction is a deemed amount of income in a market jurisdiction rather than being directly identifiable through a transaction (or series of transactions). Therefore, an entity liable for Amount A income will not know, or have any way of knowing, its Amount A income in the Period for which the income is calculated. Amount A income can only be assessed after the Period ends and the relevant global calculations have been undertaken.

22. Due to this and the time it will take Covered Groups to calculate and pay the respective Amount A tax liabilities in market jurisdictions, it may be the case that the tax is paid in relation to Amount A income in a market jurisdiction after the lodgement of the income tax return for the relevant Period for relief entities in relieving jurisdictions. This issue may be further exacerbated where the Period in which Amount A is calculated (i.e. the UPE's fiscal year) and the tax year of the relief entity are not aligned, as the relief entity will have Amount A income for the Period that straddles two income tax years in the relieving jurisdiction. In some situations, relief entities may not have enough taxable income in the relieving jurisdiction for the relevant tax year to be fully refunded for Amount A liabilities in market jurisdictions.

23. However, given the complexities involved in many jurisdictions' foreign tax credit or exemption regimes and their potential interaction with other domestic tax rules, it will be left to individual jurisdictions to determine how double taxation relief is given to ensure compliance with a jurisdiction's obligations outlined in Article 10 of the Model Rules and the relevant obligations to be outlined in the Multilateral Convention.

24. This should allow jurisdictions to give effect to double taxation relief through their current double taxation relief mechanisms, without having to undertake wholesale changes to their current regimes or develop new double taxation relief mechanisms specific to Amount A (including having to consider the potential interaction with other elements of the domestic tax system). Although this results in a non-harmonised double taxation relief system for Amount A, relief entities will already have a taxable presence in relieving jurisdictions and income tax obligations in relation to the activities undertaken. Therefore, Covered Groups should be familiar with the relevant double taxation mechanics and required processes

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<sup>13</sup> This applies regardless of whether Amount A is taxed in a market jurisdiction through incorporation into the current income tax regime or is taxed separately. For instance, where Amount A is separately taxed in a market jurisdiction, and the liable entity is not eligible for streamlined compliance under Article 14, that entity will be required to include Amount A income in a domestic income tax filing relevant to Amount A (which is taxed separately) as specified by the relevant market jurisdiction.

of relieving jurisdictions. However, this does not preclude jurisdictions from adopting new mechanisms to give effect to double taxation relief if they choose to do so.

25. However, relieving jurisdictions will be required to provide effective and timely double taxation relief to relief entities under the Articles incorporated in the Multilateral Convention and under a specific Model Rule (Article 19). These are intended to mitigate the concerns of Covered Groups and the Inclusive Framework of the potential cash-flow impact of Amount A, especially if there is an undue delay in double taxation relief being given. While it is not considered practical for tax administrations to give effect to double taxation relief in relation to tax paid on Amount A prior to, or simultaneous with payments to market jurisdictions, the Inclusive Framework is committed to limiting the potential cash-flow costs to Covered Groups while having to consider each jurisdiction's different double taxation relief mechanisms and the associated administrative requirements.

26. Therefore, under Article 19, where a relief entity meets certain requirements, relieving jurisdictions will be required to give the "benefit of double taxation relief"<sup>14</sup> within a certain timeframe based on the streamlined payment date in Article 14 (that is, within [x] days/months after 18 months after the relevant period – the "back-stop date"). Anchoring the back-stop date to the streamlined payment date in Article 14 has been done as it is expected that most payments to market jurisdictions in relation to Amount A will occur prior to or on this date. Article 19 does not restrict the benefit of double taxation relief to be provided early, rather it imposes a requirement on relieving jurisdictions to provide the benefit of double taxation relief no later than the "back-stop date".

27. Relief entities will be required to commence the relevant "domestic procedures" of the relevant relieving jurisdiction at the same time the Amount A Tax Return and Common Documentation Package are required to be lodged.<sup>15</sup> This recognises that each relieving jurisdiction's way of giving effect to double taxation relief may be different and that double taxation relief for tax paid to market jurisdictions in relation to Amount A income will need to be provided through the income tax system of a relieving jurisdiction. This requirement ensures that relieving jurisdictions may have at least 6 months with the relevant information before they are required to provide double taxation relief and in advance of most payments being made to market jurisdictions.

28. Relief entities seeking to rely on Article 19 will be required to provide evidence of the payment of foreign tax in relation to Amount A within a specific period.<sup>16</sup> This is to ensure that relief jurisdictions are provided proof of payments without having to undertake specific audit procedures. This evidence could be provided after the back-stop date, rather than the provision of double taxation relief being contingent on the provision of the evidence of payment. The Inclusive Framework is considering the merits of when the evidence of payment needs to be provided based on striking the right balance of ensuring the timely provision of the benefit of double taxation relief and the risks to revenue in circumstances where all or part of the tax in relation to Amount A is unpaid.

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<sup>14</sup> The "benefit of double taxation relief" is a defined term in Article 19 that seeks to encompass the different mechanics of how jurisdictions give the benefit of double taxation relief.

<sup>15</sup> This requirement does not represent the views of all Inclusive Framework members. Some members of the Inclusive Framework have suggested that this requirement should be deleted from Article 19. This issue will be revisited after the public consultation.

<sup>16</sup> This requirement does not represent the views of all Inclusive Framework members. Some members of the Inclusive Framework have suggested that relief entities should not be required to have to provide evidence of payment to comply with Article 19. This issue will be revisited after the public consultation.

29. For entities that are not eligible for streamlined compliance under Article 14, Amount A income should have already been subject to tax in the market jurisdiction through the domestic tax return<sup>17</sup> or through inclusion in instalment tax or advance tax payments in the 18 months since the Period ended. However, it is noted that specific deeming rules may need to be included in the Model Rules, similar in nature to Article 14(1)(c), for the derivation and inclusion of Amount A income where streamlined compliance is not available.<sup>18</sup>

30. Further work is still being undertaken by the Inclusive Framework to determine how long relieving jurisdictions need before the back-stop date and the date of provision of the evidence of payments in providing the benefit of double taxation relief. This continuing work is to take stock of the myriad of ways individual jurisdictions give effect to double taxation relief, including the operational and administrative capacity of the members of the Inclusive Framework to ensure that the back-stop date is as practically early as feasible for all jurisdictions to limit the potential cash-flow costs to Covered Groups.

31. Article 19 may also need significant revisions once the rules in relation to how relief is allocated to entities within a relieving jurisdiction are agreed. Jurisdictions will then need to examine how double taxation relief will be given and the impact of the requirements of Article 19 may have on any existing or proposed double taxation relief mechanisms for Amount A.

## 2.5. Administration Compliance Process for Amount A and timing

32. Below is a high-level depiction of the administrative process that may be undertaken by Covered Groups and Group entities in relation to complying with Amount A based on the Model Articles.<sup>19</sup>

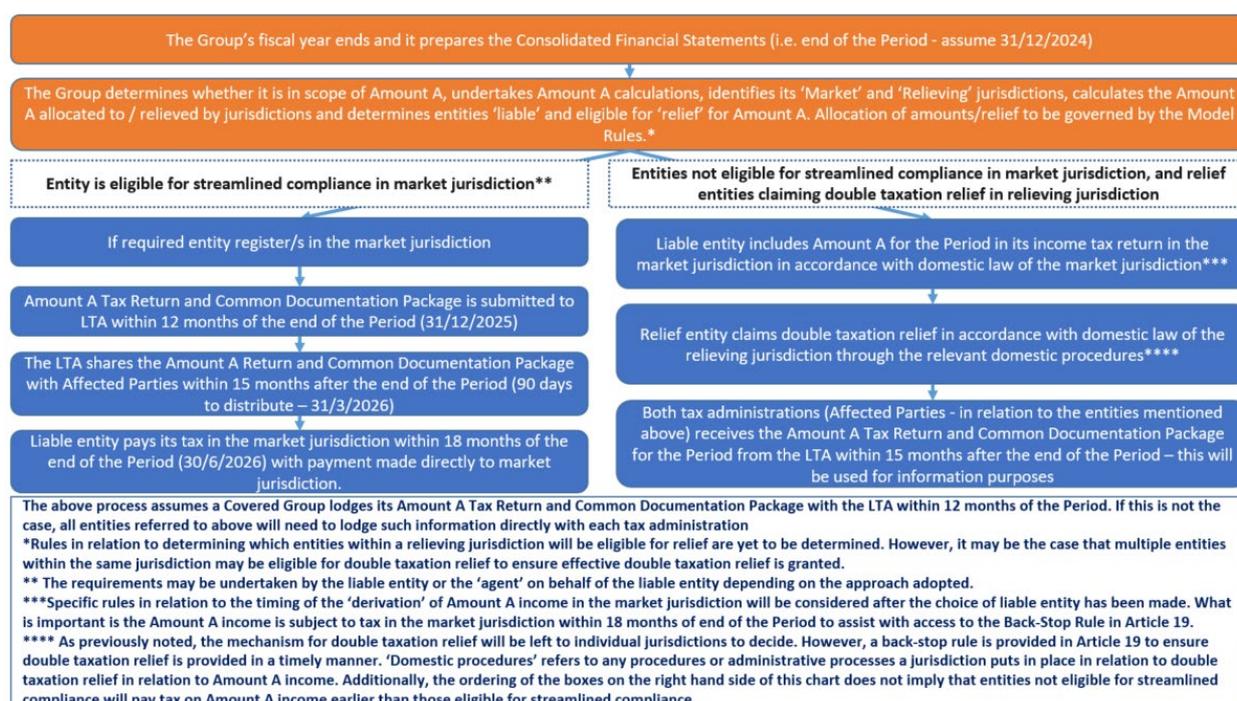
33. The process expresses the Administration Framework of Amount A largely on an entity-by-entity basis. This is because, notwithstanding that the Model Rules determine the amounts of Amount A income and required double taxation relief on the Covered Group on a group basis, once those amounts have been determined, liabilities for Amount A income and double taxation relief will be dealt with by individual Group entities. From a tax administration perspective in market jurisdictions, the filing obligations of a taxpayer will be dependent on whether the entity is eligible for streamlined compliance under Article 14 or not. As noted above, where an entity is eligible for streamlined compliance in a market jurisdiction, its income tax filing obligations in the relevant market jurisdiction shall be met through the submission of the Amount A Tax Return and Common Documentation Package and the relevant compliance deadlines harmonised based on the end of the UPE's fiscal year (Article 14).

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<sup>17</sup> This applies regardless of whether Amount A is taxed in a market jurisdiction through incorporation into the current income tax regime or is taxed separately. For instance, where Amount A is separately taxed in a market jurisdiction, and the liable entity is not eligible for streamlined compliance under Article 14, that entity will be required to include Amount A income in a domestic income tax filing relevant to Amount A (which is taxed separately) as specified by the relevant market jurisdiction.

<sup>18</sup> While this is still under consideration, Amount A income for a Period could be deemed to be derived on the day the Amount A Tax Return is required to be submitted. As such this would avoid the potential need to reopen the relevant income tax return in the Market Jurisdiction that covers the Period. However, any deeming rules would need to ensure that tax on the relevant amount is paid – either through income tax or through instalment tax or advance tax - before double taxation relief can be given.

<sup>19</sup> These are outlined in detail in the Model Articles and Commentary for the Administration of Amount A section.



34. After the end of the relevant Period, a Group will determine whether it is in scope of Amount A. Where a Group is in scope of the Pillar One rules, it will then undertake the relevant calculations to identify its market and relieving jurisdictions, the amount of Amount A income liable to tax in each market jurisdiction and the amount of double taxation relief to be claimed in each relieving jurisdiction and the relief to be claimed by the relevant entities.

35. In undertaking the relevant calculations, a Group may be required to translate amounts from a foreign currency. To ensure consistency across all jurisdictions, specific currency translation rules are provided in Article 17. Broadly, these rules ensure that all the relevant calculations are undertaken in the presentation currency of the UPE's consolidated financial statements. Where amounts have not already been translated to the presentation currency of the UPE's consolidated financial statements under the relevant accounting standards, the amount will be translated based on the average exchange rate as published in the International Financial Statistics of the International Monetary Fund for the relevant period. Where a foreign exchange rate is not published by the International Monetary Fund for the relevant period, the Central Bank exchange rate may be used. Where the presentation currency of the UPE's consolidated financial statements is not denominated in USD, two-step translation may also be required based on average rates, as the exchange rate as published in the International Financial Statistics of the International Monetary Fund are benchmarked in USD. Further, once the Amount A income and relief amounts have been calculated, those amounts will need to be translated into the payment currency of the market jurisdiction based on the average exchange rate.

36. Once the relevant income and relief amounts have been determined, the compliance requirements for the relevant entities in a Covered Group will depend on whether the relevant filing is eligible for streamlined compliance under Article 14. Regardless, all entities with Amount A income or eligible for double taxation relief will be required to submit to Affected Parties the Amount A Tax Return and Common Documentation Package within 12 months of the end of the UPE's fiscal year. This obligation will be satisfied for all entities if the Coordinating Entity of the Group submits the documents to the Lead Tax Administration.

## 2.6. Where streamlined compliance applies

37. Where streamlined compliance is available to a liable entity, the Amount A Tax Return and Common Documentation Package will satisfy the income tax filing requirements in the market jurisdiction of which the relevant entity is liable to tax on Amount A income. The relevant entity should then have no other income tax filing obligations in the market jurisdiction, apart from the payment of the resulting income tax liability. For all market jurisdictions where an entity is eligible for streamlined compliance, the filing date in each market jurisdiction will be the date the documents are filed with the Lead Tax Administration. This should ensure taxpayers are not adversely subject to penalties if there is a delay by the Lead Tax Administration in the distribution of the Amount A Tax Return and Common Documentation Package to Affected Parties.

38. The Lead Tax Administration will then distribute the Amount A Tax Return and Common Documentation Package to Affected Parties within 90 days (15 months after the Period has ended). Payments by liable entities to market jurisdictions will be required within 18 months after the Period has ended. Payment will be required to be made by the liable entity (or its agent) to each relevant tax administration directly, and in the currency required by the relevant jurisdiction within 18 months of the end of the Period. This will give market jurisdictions at least three months from receiving the Amount A Tax Return and Common Documentation Package, to undertake the necessary procedures (if applicable) to collect any tax in relation to Amount A.

## 2.7. Where streamlined compliance is not applicable

39. Where streamlined compliance is not available to an entity, the entity will be required to include in its domestic income tax return in the relevant jurisdiction its Amount A income and/or the amount of double taxation relief it is claiming.<sup>20</sup> These entities will already have a taxable presence in the relevant jurisdiction or a related Group entity with taxable presence in the relevant jurisdiction (in the case where Group tax loss relief or tax consolidation applies).

40. As noted above, jurisdictions will self-determine as to how double taxation relief is given. Similarly, this will also be the case in relation to the inclusion of Amount A income where streamlined compliance is not available. However, whether harmonised Model Rules are required in relation to certain elements of Amount A compliance where streamlined compliance is not available, will be reconsidered once the preferred liability approach is selected and the legal mechanics of those rules have been considered in detail.<sup>21</sup>

41. Affected Parties will receive the Amount A Tax Return and Common Documentation Package for information purposes in relation the Period through Exchange of Information within 15 months of the end

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<sup>20</sup> This applies regardless of whether Amount A is taxed in a market jurisdiction through incorporation into the current income tax regime or is taxed separately. For instance, where Amount A is separately taxed in a market jurisdiction, and the liable entity is not eligible for streamlined compliance under Article 14, that entity will be required to include Amount A income in a domestic income tax filing relevant to Amount A (which is taxed separately) as specified by the relevant market jurisdiction.

<sup>21</sup> It is noted that specific deeming rules may need to be included in the Model Rules, similar in nature to Article 14(1)(c), for the derivation and inclusion of Amount A income where streamlined compliance is not available. While this is still under consideration, Amount A income for a Period could be deemed to be derived on the day the Amount A Tax Return is required to be submitted. As such this would avoid the potential need to reopen the relevant income tax return in the Market Jurisdiction that covers the Period. However, any deeming rules would need to ensure that tax on the relevant amount is paid – either through income tax or through instalment tax or advance tax - before double taxation relief can be given.

of the Period. Therefore, other than the inclusion of the relevant Amount A income or amount claimed for double taxation relief, no other additional information should be required to be provided to the Tax Administration in relation to Amount A.

### **2.7.1. The Administration Framework for Amount A under the Single Taxpayer and Multiple Taxpayer Approaches**

42. As described in the Progress Report, Amount A operates as an overlay to the existing profit allocation rules, reallocating taxing rights over a portion of an in-scope Group’s residual profits to market jurisdictions, determined on the basis of the consolidated financial statements of the Group. The obligation to eliminate double taxation arising from Amount A will be allocated on a quantitative and jurisdictional basis. In contrast with the approaches taken to determining and allocating Amount A, and to eliminating double taxation, the existing corporate tax system generally follows an entity-based approach.

43. Several criteria should be considered in the process of identifying the taxpayer in market jurisdictions. First, market jurisdictions must be able to identify the taxpayer with sufficient certainty; it must be clear to tax administrations and to Covered Groups which Group Entity or Group Entities are liable to tax. Second, a Group Entity identified must have (or be able to obtain) sufficient funds to meet its tax liability. Third, if the Group Entity or Group Entities that are liable to tax are not the Group Entities that are entitled to the double taxation relief that correlates to that liability (i.e. in the case of the “single taxpayer” approach discussed below), then a mechanism is needed to allocate double taxation relief to other Group Entities.

44. Two possible approaches have been identified to co-ordinate Amount A and the existing entity-based system<sup>22</sup>: (1) the “single taxpayer” approach according to which a single Group Entity in each Covered Group is liable for the Amount A tax in all market jurisdictions, and that Group Entity could be separate from the Group Entity or Group Entities entitled to relief from double taxation; and (2) the “multiple taxpayer” approach according to which one or more Group Entities from each jurisdiction that is required to eliminate double taxation (“relieving jurisdictions”) are liable for the Amount A tax, combined with a multiple taxpayer approach in which a single Group Entity (“the agent”) coordinates payment and compliance as an agent on their behalf.

45. The discussion below describes the two approaches, giving a broad overview of how each would work, the possible administrative impacts and the relevant advantages and disadvantages, including the potential tax, legislative, and other challenges of both approaches. It should be noted that centralised and harmonised filing (i.e. Article 14 of the Model Rules) and payments will be available under both approaches. Further, the application of some of the Model Rules may need to be reconsidered and appropriately adjusted based on final approach adopted.

## **2.8. The multiple taxpayer approach (in combination with an “agency” model)**

46. The multiple taxpayer approach would identify at least one Group Entity in each relieving jurisdiction that is entitled to relief. This Group Entity, or Group Entities, would also be liable to tax on Amount A income in each market jurisdiction. This approach is therefore in line with existing tax principles

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<sup>22</sup> Some members of the Inclusive Framework have proposed variations of the single taxpayer and multiple taxpayer approaches as possible solutions. The key features of these alternatives are generally consistent with the two approaches outlined in this document. One such proposal would make the resident group entity in a market jurisdiction, if there is one, liable for payment. The Inclusive Framework will reflect on the comments received in response to this consultation document and consider whether variations or combinations of the approaches presented offer a viable alternative.

according to which the Group Entity liable to tax is also the Group Entity entitled to double taxation relief. The method used to identify the Group Entities entitled to relief, and liable to tax, is discussed further in the section “Identifying relief entities in relieving jurisdictions”.

47. Each Group Entity entitled to double taxation relief would be liable to tax on Amount A income in every market jurisdiction in proportion to its entitlement to double taxation relief. It will not be the case that some liable Group Entities will only have Amount A exposure in some market jurisdictions.

48. This would present administrative and compliance challenges. Consider a simplified example in which a Covered Group has a liability to tax on Amount A income sourced to 10 market jurisdictions. There are 5 relieving jurisdictions, each with two relief entities. In this simple example, each market jurisdiction would have 10 Group Entities with a liability to tax and the Covered Group would have 100 contact points to manage (10 liable entities in 10 market jurisdictions). It is likely that each of these entities will be required to register a Tax Identification Number in every applicable market jurisdiction to enable the processing of payments of tax. Additionally, it may be the case that relieving jurisdictions change year-to-year, or that the relief entities within a relieving jurisdiction change year-to-year. In the case of the multiple taxpayer approach, this would mean that the liable entities would also change year-to-year.

49. To help mitigate the challenge of multiple taxpayers, a single Group Entity could act as an agent on behalf of the Group Entities with a liability to tax on Amount A income. The agent would not have any filing obligation or liability to tax in relation to Amount A income (this would remain with the liable entities), but would act as a single point of contact for the Group with each tax administration and would coordinate the Covered Group’s tax registrations, payment and filing obligations on behalf of the liable Group Entities (except to the extent that the agent is a liable entity or relief entity, is the Coordinating Entity, or files the Amount A Tax Return and Common Documentation Package on behalf of the Covered Group).<sup>23</sup> Because the liability to tax would remain with the Group Entities in each relieving jurisdiction, market jurisdictions would need to pursue those entities and not the agent in the case of non-payment. However, as per Article 15, secondary liability provisions would apply to ensure the UPE could be pursued in cases of non-payment, underpayment or non-filing of any of the liable entities in relation to Amount A.

50. The agent would make payments to each market jurisdiction on behalf of each liable Group Entity and would be reimbursed by each liable entity for their share of the overall liability. These reimbursements of agents should not, as a policy matter, result in additional taxation, and in many cases that will be the case. However, the tax consequences of payments between the liable entities and the agent would need to be considered, including the application of withholding taxes and the potential implications for Pillar Two calculations.

51. Determination of the relevant Group Entity that is the “agent” for the Covered Group could be prescriptive (for instance, the UPE or the Coordinating Entity (if different) of the Covered Group could be the agent in all circumstances), or the option could be left to Covered Groups to decide. The latter option would afford Covered Groups the flexibility to choose an entity that is equipped to deal with cross-border payments in differing currencies, such as a group treasury company. This election could also be subject to certain requirements. For example, it could be limited to Group Entities that are tax resident in the same jurisdiction as the UPE, or to residents of the jurisdiction of the Lead Tax Administration.

52. As stated above, although this approach would encompass multiple taxpayers, a Covered Group could still use the streamlined compliance process as described in Article 14, based on the underlying characteristics of each liable Group Entity (and not the agent). However, where a liable Group Entity was not eligible for streamlined compliance in a market jurisdiction (for example, it had a permanent

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<sup>23</sup> The agent could also coordinate the “relief” process for relieving entities. However, given the potential interaction of other domestic attributes and domestic foreign tax relief for relieving entities, claiming this relief would require input from the relevant relief entities.

establishment in the market jurisdiction), the agent would not be responsible for any Amount A payment obligations as those would be met by the individual entity through the local domestic tax filing.

### **2.8.1. Funding of Amount A payments to market jurisdictions**

53. The multiple taxpayer approach means that the legal liability to make Amount A payments to market jurisdictions sits with the Group Entities that are most likely to have the resources to be able to fund those payments. That is because the approach to identifying the relief entities (discussed below) will also determine the Group Entities liable to tax in market jurisdictions and whichever approach is taken will identify a Group Entity or Group Entities that generate profits. As such, these Group Entities should generally have sufficient resources to make such payments without the need to access internal or external funding to make the cash payments (to the agent who then on-pays each market jurisdiction).

54. There may be circumstances where this advantage does not materialise. For example, the accounting or taxable profit may not accurately reflect the cash position of each entity.<sup>24</sup> This is further exacerbated by the fact that payments to market jurisdictions in relation to a Period only occur 18 months after the Period. Covered Groups may redirect surplus cash to other group funding requirements rather than maintain such balances in relief entities, especially given the Amount A liabilities of a Covered Group and the relevant individual Group Entities is calculated after the Period on which the liability is calculated. Therefore, in some circumstances Covered Groups may need to directly fund relief entities to be able to meet their relevant Amount A liabilities even where that entity had residual profits during the relevant Period.

### **2.8.2. Consistency with current tax principles**

55. The multiple taxpayer approach is consistent with existing international income tax principles for the purpose of double taxation relief. Group entities that are liable to tax on Amount A income in market jurisdictions will be entitled to relief on that income in their jurisdiction of tax residence. Further, the concept of agency and its use in the context of tax administration are also well established in many jurisdictions.

56. The multiple taxpayer approach may offer advantages where a relieving jurisdiction provides double taxation relief through a foreign tax credit regime. While under most exemption systems, the Amount A income of a liable Group Entity would be exempt regardless of whether the foreign tax liability was borne by the entity, foreign tax credit regimes generally limit the foreign tax credit based on the amount of foreign income tax paid by the taxpaying entity on the relevant amount. The multiple taxpayer approach, by ensuring that the liable Group Entity and the Group Entity entitled to relief are the same entity, is in line with that underlying principle. It is likely, however, that modifications will be required to the domestic legislation giving effect to double taxation relief for foreign tax paid on Amount A income to ensure appropriate outcomes.

57. Ensuring the liable entities are also those that are entitled to relief may also have disadvantages. Under the multiple taxpayer approach, tax administrations of market jurisdictions will need to deal with multiple taxpayers for each Covered Group. While most interactions between Groups and tax administrations will be dealt with by the Group's agent, the agent is not legally liable for tax on Amount A, and therefore each Group Entity will need to be dealt with independently for the purposes of processing income tax assessments. As Group Entities liable to tax in a jurisdiction are typically required to have a unique tax identification number in order for tax administrations to identify the relevant Group Entity within

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<sup>24</sup> For instance, dividends or equity-based distributions within a Period are not reflected in the Profit and Loss Statement of the relevant entity or the jurisdiction. As such, a jurisdiction or entity may be highly profitable in a Period but not necessarily have significant cash reserves at the end of the Period. This could be due to the payment of dividends or the acquisition of significant depreciable assets.

its systems for liability and processing purposes, this will also be required for each liable entity for Amount A. Further, such registration may also include additional requirements, such as resident representatives, in-country bank accounts and identification verification requirements. This is further exacerbated where the liable (relief) entities change from year-to-year, which may require new registrations to be issued and cancelled each year, given that there may be changes in both the relieving jurisdictions and the relevant liable entities within those jurisdictions.

58. In the context of the Pillar One Implementation Framework, jurisdictions agreed to consider providing rationalised processes for registering Group Entities for tax purposes in market jurisdictions. Given the difference in requirements across jurisdictions, streamlining may not be able to significantly reduce the compliance burden on a Covered Group for all potential issues. In any event, such processes may require active updating for Covered Groups from year-to-year as liable entities change.

59. The multiple taxpayer approach may also affect the policy options in relation to how double taxation relief is allocated to Group Entities within a relieving jurisdiction. Flexibility in the identification of relief entities in the domestic law of relieving jurisdictions may create uncertainty and associated legal difficulties for market jurisdictions in developing legislative provisions giving rise to the charge to tax. From a market jurisdiction perspective, relying on the application of foreign income tax laws for the purposes of charge to tax provisions (determining which entity is liable to tax) would be a departure from the current tax principles and may create implementation issues, including potential constitutional issues for some jurisdictions primarily arising from the need to identify taxpayers in domestic law in a way that is sufficiently certain. Further, this could reduce the certainty for tax administrations as determining the relevant liable entities would involve an assessment of a foreign jurisdiction's income tax rules, which could potentially lead to disputes.

60. One option raised by delegates to address this issue would be to identify all Group Entities of a Covered Group in each relieving jurisdiction as joint taxpayers. This approach would enable market jurisdictions to determine which Group Entities are liable to tax without relying on the application of foreign income tax laws. It could also give relieving jurisdictions flexibility in developing legislative provisions for elimination of double taxation.<sup>25</sup>

### **2.8.3. Commercial and practical issues**

61. It is recognised that dealing with Amount A liabilities may create accounting and commercial complexity for Covered Groups under either the single entity or multiple entity approaches. In the case of the multiple entity approach, however, such challenges may be exacerbated by the number of liable Group Entities within a Covered Group and the fact that these entities may change from year-to-year. This also means the potential accounting and commercial issues (including the domestic corporate law implications) may be different each year, as different entities in different jurisdictions become liable for Amount A on a year-to-year basis.

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<sup>25</sup> However, consideration needs to be given to the potential commercial implications and unintended consequences of joint and several liability. For example:

- Not all Group entities in a Covered Group are 100% owned. Allowing a market jurisdiction/s to enforce an Amount A liability on another Group member, for instance a 51% owned joint venture, merely because it consolidates for accounting purposes, may be inappropriate in some circumstances and have broader commercial implications.
- Not all entities in a Covered Group may legally or commercially be allowed to be joint and severally liable. This may include certain special purpose entities, insolvency remote entities, or entities that are subject to specific debt covenants.
- Market jurisdictions could raise liabilities against Group entities (or a single Group entity) regardless of the direct or indirect capacity of the relevant entity to meet those liabilities.

62. With regard to accounting complexity, liable entities will be required to pay tax on Amount A profits in market jurisdictions within 18 months of the end of the Period (see Article 14 below). At the end of the Period, liable Group Entities may need to recognise the tax expense in relation to Amount A in their individual entity accounts. In some instances, these individual entity financial accounts may be required to be audited in their relevant jurisdiction of incorporation for corporate law purposes. Auditing the amounts calculated at a Group level using Group level information may present a challenge at a local level. As with the issues discussed above, this issue may be exacerbated if liable entities change year-to-year.

63. Having multiple liable entities within a Covered Group may have an effect on a Group's capital management strategy and present challenges for cash management planning. Amount A liabilities may indirectly affect the ability of liable entities to undertake the issuance of dividends (or interim dividends), reduce share capital, or sign-off on local accounts. In many jurisdictions, under domestic corporate law, in order to undertake such activities, directors of the relevant entity are required to sign statements declaring the entity is solvent. In determining solvency, directors may need to consider future Amount A tax liabilities and whether the entity has capacity to meet such liabilities. This is an issue that Covered Groups will need to bear in mind. As the multiple taxpayer approach would result in multiple liable Group Entities, there may be a number of entities for which this will need to be a consideration.

64. Amount A liabilities will also need to be converted and paid to each market jurisdiction in the designated local currency on behalf of each liable Group Entity. Therefore, Groups will be required to purchase multiple local currencies. As such, the Group and the individual liable Group Entities may be exposed to foreign currency movements on Amount A liabilities for tax and accounting purposes. The tax and/or accounting functional currency of each liable Group Entity may be different from each other and different from the Group's functional currency. While Group level foreign exchange management strategies may be put in place, executing effective strategies in multiple liable Group Entities may be challenging, especially given each liable entity will be exposed to the currency of each relevant market jurisdiction. Further, given payments will need to be made in the local currency of each market jurisdiction.

65. From a practical perspective, the multiple taxpayer approach may require the Model Rules to cater to a broader range of circumstances to prevent unintended consequences. Because any Group Entity could potentially become liable under the Model Rules regardless of its non-Amount A related attributes and these entities may change year-to-year, the variety of scenarios that could hypothetically arise are greater than those under the single taxpayer approach. Further, it may be difficult for Covered Groups to effectively plan to ensure the compliance burden and non-tax commercial consequences of Amount A are minimised.<sup>26</sup>

## 2.9. The single taxpayer approach

66. An alternative approach to the above is the single taxpayer approach. This would result in one Group Entity bearing the liability to tax on the Amount A profits of the whole Covered Group. This single Group Entity would be the taxpayer in all market jurisdictions, and would thus be responsible for filing and paying tax on Amount A on its own behalf. The total Amount A tax liability of the single liable entity would thus be equal to the sum of its tax liability in each market jurisdiction. The single taxpayer approach is consistent with the broad approach of calculating the Amount A liability on a group basis and shares some characteristics with consolidation regimes that exist in some jurisdictions.

67. The UPE of the Covered Group is the most obvious candidate for designation as the Amount A taxpayer. Model Rules for identifying the UPE are already required for the operation of Amount A, meaning

<sup>26</sup> For example, some entities allocated rights to double taxation relief may have permanent establishments in market jurisdictions and therefore not be able to access streamlined compliance under Article 14. This may change year-to-year as relieving jurisdictions, or the entities allocated relief in relieving jurisdictions change.

that no new provision would be required to identify the UPE. In addition, because the UPE has ultimate control over the assets of the group, it appears to be best-placed to access funding and manage the liability. One question being considered is whether it could be appropriate under some circumstances to designate the Group's treasury entity as the Amount A taxpayer. This Group Entity may have access to some of the various currencies needed to meet obligations in market jurisdictions. Designating an entity other than the UPE, however, may raise additional legal challenges because that entity will not have control over all of the Group Entities.

68. It could also be left to Covered Groups to assign a single taxpayer, noting that the UPE will always be liable in the event of any non-payment of Amount A liabilities under Article 15. However, the ability to elect which entity is liable suffers from the same shortcomings mentioned above in relation to market jurisdictions being able to develop adequate charge to tax provisions. If this option was undertaken, guardrails would likely need to be developed.

69. In the single taxpayer model, the single taxpayer would be liable for the entire Amount A tax to each market jurisdiction. The tax consequences of payments between the liable entity and other Group Entities, including the relief entities, in connection with meeting the single taxpayer's liability would need to be considered, including the application of withholding taxes and the potential implications for Pillar Two calculations.

### ***2.9.1. Funding of Amount A payments to market jurisdictions***

70. The single taxpayer will need to meet the Amount A payment requirements of the entire Group to market jurisdictions, which may raise funding challenges. As previously noted, the UPE is the obvious candidate as it ultimately controls the assets of the Group. Because the choice of the liable Group Entity (e.g. the UPE) is not tied to its underlying profitability, the taxpayer may need to fund the payments to market jurisdictions either through existing cash reserves, repatriation of profits or through intra-group funding arrangements. Intra-group funding arrangements could include Group cash-pooling facilities or the establishment of tax sharing/funding arrangements between Group entities and the single liable entity.

71. Groups would need to consider how the single liable entity is funded, including the potential commercial, regulatory and tax implications. For example, corporate law may affect the ability of group entities to enter into intra-group funding arrangements. That commercial issue might be avoided if the payments is made via dividends (which could typically be done if the liable entity is the UPE). In some cases, dividends may give rise to withholding tax; as noted above such tax consequences would need to be considered if a single taxpayer approach were to be adopted.

72. These funding challenges may be mitigated by the fact that under the single taxpayer approach the liable entity will always be the same entity. As a result, Covered Groups should be able to effectively plan how the relevant entity is funded on a continuing basis.

### ***2.9.2. Consistency with current tax principles***

73. The single taxpayer approach would require a novel approach to the elimination of double taxation that would deem an entitlement to relief for Group Entities that have no corresponding tax liability. This is because the Group Entity with a liability to tax in market jurisdictions – the single taxpayer – is not the entity that is entitled to double taxation relief in relieving jurisdictions (except to the extent that the jurisdiction of which the single taxpayer is a resident is required to eliminate double taxation, and the single taxpayer was identified as an entity entitled to relief). The single taxpayer approach would therefore require rules deeming relief entities eligible for double taxation relief, even though those entities do not themselves have a liability to tax (with the exception of the single taxpayer). Further work will be needed to examine whether such departure could be adaptable to the legal systems of all jurisdictions. The amount of double taxation relief given to each relief entity would be the same as under the multiple taxpayer approach.

74. While some jurisdictions may already have deeming rules for foreign tax credit purposes<sup>27</sup>, this approach would depart from existing principles for the provision of double taxation relief.

75. The single taxpayer approach resolves some of the compliance and administrative difficulties associated with the multiple taxpayer approach because there is a single Group Entity with a liability to tax. While a single taxpayer will have to register for tax (and apply for a Tax Identification Number) in each market jurisdiction, this would only be needed once (unless there is a change in single liable entity). This contrasts with the multiple taxpayer approach where relief entities may change year-to-year. As the relief entities may change from year-to-year, it may still be the case that the accounting and compliance challenges identified in paragraph 61 (in the context of the multiple taxpayer approach) remain relevant.

76. From a practical perspective, market jurisdictions would be able to implement clearly defined charge to tax rules without reliance on the application of a foreign jurisdiction's law. This provides market jurisdictions and Covered Groups to identify the taxpayer with certainty both from a legal and administrative perspective.

### **2.9.3. Commercial and practical issues**

77. The single taxpayer approach shares some of the accounting and commercial issues of the multiple taxpayer approach. However, issues related to the liability for Amount A are restricted to a single liable entity within a Covered Group.

78. Where material, Groups may be able to mitigate such issues through commercial planning, which may be simpler to implement than under the multiple taxpayer approach given the issues are restricted to a single entity within the Group. This includes managing the potential foreign exchange exposures in relation to liabilities and payments made in foreign currencies on a Group consolidated basis. Further, having a single liable entity will negate potential commercial issues that could arise for Groups if certain entities are commercially restricted from becoming liable for Amount A. For instance, certain special purpose entities, insolvency remote entities, or entities that are subject to specific debt covenants.

79. Also of note is that the use of the UPE (or another entity) will reduce the scope for unintended consequences because, for example, compared to the multiple taxpayer approach, the rules will not have to positively identify Group Entities that cannot be liable to tax.

## **2.10. Identifying relief entities in relieving jurisdictions**

80. As noted in the Progress Report, the Model Rules currently determine how much double taxation relief a relieving jurisdiction is obligated to provide in relation to Amount A. However, how Group Entities within the relevant relieving jurisdiction are allocated double taxation relief is still under consideration. Importantly, under both the single taxpayer and multiple taxpayer approaches to identifying the Group Entity or Group Entities that are liable to tax on Amount A in market jurisdictions, the relief entities in each relieving jurisdiction will be the same. The difference between the approaches is that relief entities are also the liable entities under the multiple taxpayer approach, whereas the liable entity and the relief entities are not the same under the single taxpayer approach. The result is that the approach to identifying the relief entities as discussed in this section would apply in both approaches.

81. The approach taken needs to balance a number of considerations. First, the extent to which the approach taken should be consistent across all jurisdictions. A uniform approach would provide a degree of certainty to the system because there would only be one set of rules to follow in all jurisdictions. Such a

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<sup>27</sup> For instance, rules deeming payments made by a trust are considered made by the beneficiaries for foreign tax credit purposes.

prescriptive approach to identifying the relief entity or entities would describe the characteristics of the entities entitled to relief and the amount of relief to which they are entitled. This approach might also help ensure the full relief of double taxation relief by identifying the entities that have sufficient taxable income against which to offset relief and by limiting the scope for provisions in domestic law that might cause disputes about whether there are inappropriate limitations on the amount of relief provided.

82. However, domestic tax systems across the world contain a wide range of characteristics. It follows that designing a set of prescriptive rules that are appropriate in the context of these differing tax regimes will be challenging and gives rise to the scope for inappropriate outcomes. For example, there is scope for such an approach to identify Group Entities that do not have sufficient taxable profit against which to offset relief (or, if the multiple taxpayer approach is followed, resources to meet the liability). From a practical perspective, identifying relieving jurisdictions, the Group Entities resident in those jurisdictions and their share of the liability to tax with sufficient detail make drafting a provision that delivers a prescriptive approach challenging.

83. These challenges have led the Inclusive Framework to conclude that the approach to identifying the relief entities will need to incorporate a degree of flexibility for relieving jurisdictions to identify the appropriate relief entities (which also become the liable entities under the multiple taxpayer approach). However, the Inclusive Framework recognised the need for consistency and certainty and so concluded that there should be constraints upon the flexibility of relieving jurisdictions to identify those Group Entities. In addition, the elimination tax base reflects the most common book-to-tax adjustments, which suggests that any further need for flexibility to cater for differing tax regimes may be limited. The degree of flexibility, and the nature of the guardrails limiting that flexibility, need further development. For example, Extractives Entities or an entity that is a Regulated Financial Institution should not be identified as a relief entity, and the rules will need to cater for consolidation regimes. The considerations in arriving at the approach are discussed further below.

84. In this context, there are two separate questions to be addressed. The first is the metric used to identify the pool of Group Entities that might be entitled to double taxation relief. The second is the allocation of the amount of relief to which entities within that group are entitled.

### **2.10.1. The metric**

85. One option for identifying the group of entities that may be entitled to relief is to use Return on Depreciation and Payroll (RoDP). The Group Entities with the highest RoDP would be entitled to the highest amount of relief. This has the benefit of remaining consistent with the approach to the determination of which jurisdictions should provide relief from double taxation with respect to Amount A contained in Title 5 of the Model Rules.

86. This approach would require Groups to identify profit, depreciation and payroll figures for each Group Entity in the relieving jurisdiction, though in many cases these will have been collected and aggregated to determine the jurisdictional totals. However, it is not necessary that there be consistency between the metric used in Title 5 and the identification of particular entities.

87. An alternative approach is to identify Group Entities by reference to their accounting profit, with the most profitable entities entitled to the highest amount of relief. If the multiple taxpayer approach is followed, this approach would likely identify the Group Entities with sufficient resources to meet the liability to tax on Amount A. Relying upon information contained within the financial statements (and not the tax position, see below) would also remove the dependency upon the tax law in relieving jurisdictions for the liability to tax in a market jurisdiction. This advantage is less relevant in the context of the single taxpayer approach.

88. However, the financial statements of Group Entities are not always audited. Determining the accounting standard to be followed also presents a difficult question. Consideration must also be given to

the likely capacity for Group Entities that have higher levels of accounting profit also being those that have the highest taxable profit (and therefore capacity to provide double taxation relief).

89. A further option is to identify Group Entities by reference to their taxable profit. The measure of taxable profit used might be the taxable profit of each Group Entity adjusted for reliefs or allowances (such as carried forward losses). This approach would likely identify the Group Entities with sufficient taxable profits to provide double taxation relief. In the context of the multiple taxpayer approach, some members of the Inclusive Framework have noted that they would need to consider constitutional implications of determining a taxpayer by reference to the legislative provisions of another jurisdiction. This may also be a consideration for an approach based upon accounting profit.

90. A final option is to use the Elimination Profit of Group Entities to identify the entities entitled to relief from double taxation. This approach comes with the same considerations as an approach based on RoDP, but is perhaps more likely to identify the entities with sufficient taxable profit to provide double taxation relief. It is also the case that the determination of Group Entities that will provide double taxation relief would be consistent across all jurisdictions.

### **2.10.2. Allocating relief to the identified group of entities**

91. Once the Group Entities potentially entitled to relief have been identified, the next step is to allocate an amount of relief to those entities. Two possible options have been identified, both of which are derived from the elimination of double taxation rules found in Title 5 of the Model Rules.

92. The first is to follow a ‘waterfall’ approach<sup>28</sup>. According to this approach, the entity within the jurisdiction with the highest measure of the metric used (e.g. Elimination Profit) would be provide relief first and would provide relief until that metric was reduced to the same level as the next highest entity in the jurisdiction (and so on). This would limit the number of Group Entities entitled to relief (and, under the multiple taxpayer approach, the number of entities liable to tax) and would ensure that relief is provided first to those entities with the highest profit according to whichever metric is used.

93. The second approach is to follow a ‘pro rata’ approach<sup>29</sup>. This approach would allocate relief among all Group Entities in a relieving jurisdiction, with the amount of relief being allocated on the basis of each entities’ share of profit according to whichever metric is used (this might be more challenging if RoDP is used as the relevant metric). This approach would likely identify a larger number of entities entitled to relief and would mean relief is less concentrated than under the waterfall approach. This may present compliance challenges, especially if the multiple taxpayer approach is followed (see paragraph 46). The pro rata approach might also be considered more consistent with the jurisdictional approach to the elimination of double taxation. It may also cater for circumstances in which different Group Entities are liable to tax at different rates within a single relieving jurisdictions in an equitable way.

94. It should be noted that under any approach, relief entities may change year-to-year, based on the specific economic circumstances of a Covered Group. For instance, a jurisdiction may be considered a relieving jurisdiction in one year, but not the next year, or vice versa. Further, the economic or commercial circumstances of entities will fluctuate over time. A highly profitable Group Entity in one year may be loss making in the next (i.e. an entity of the Group with full market risk). As such new Group Entities will become eligible for double taxation relief in relation to Amount A income as circumstances change. Further, more

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<sup>28</sup> This is analogous to the approach used to allocate the obligation to relieve double taxation between relieving jurisdictions in Tier 1 (see Article 9 of the Model Rules found in the Progress Report).

<sup>29</sup> This type of approach is used to allocate the obligation to relieve double taxation between relieving jurisdictions in Tiers 2, 3A and 3B.

than one Group Entity (and potentially many Group Entities) may need to be eligible for double taxation relief in each relieving jurisdiction to ensure full double taxation relief is able to be claimed.

95. Regardless of how relief entities are determined, the claiming of double taxation relief in relation to Amount A income will need to be undertaken through the domestic tax return of each relief entity (i.e. there is no streamlined centralised compliance for double taxation relief, only Amount A liabilities).

## 2.11. Interaction with the Tax Certainty Framework for Amount A

96. The Administration Framework for Amount A will provide the mechanism for accessing the various Tax Certainty reviews outlined in the Tax Certainty Framework for Amount A Chapter. A Covered Group will indicate its intention to participate in either an Advance Certainty Review or a Comprehensive Certainty Review as part of its lodgement of the Amount A Tax Return and Common Documentation Package. Even where a Certainty Review is not requested, the Amount A Tax Return and Common Documentation Package are required to be filed within 12 months of the end of Period. The format of the Amount A Tax Return and Common Documentation Package will include a built-in notification of intention to participate in either an Advance Certainty Review or a Comprehensive Certainty Review. As such, no separate notification by the taxpayer will be required.

97. For a Scope Certainty Review (where a Group seeks certainty to confirm it is out of scope of Amount A), a Common Documentation Package is not required. As such, a separate notification, filing procedure and Scope Documentation Package will be developed for Scope Certainty Reviews as part of the Pillar One Implementation Framework.

98. Where a Comprehensive Certainty Outcome differs from the positions filed by the Covered Group in its Amount A Tax Return and Common Documentation Package, the Model Rules outline the relevant requirements for Covered Groups and tax administrations to give effect to the Comprehensive Certainty Outcome. Where payments have been made to market jurisdictions and double taxation relief has been claimed, and the Comprehensive Certainty Outcome differs from the filing position of the Covered Group, this may result in payments of additional amounts by taxpayers or repayments of over-paid amounts by tax administrations.

99. As part of discussions between the interaction of the Tax Administration Framework for Amount A and the Tax Certainty Framework for Amount A, the Inclusive Framework has been considering whether payments to market jurisdictions should be suspended for the relevant Periods for which a Covered Group requests to participate in a Comprehensive Certainty Review. This work is currently on-going.

100. It is recognised that not suspending payments to market jurisdictions may lead to administrative difficulties for tax administrations in having to refund previously overpaid amounts and potential cash-flow issues for Covered Groups in the event of any adjustment made because of a Comprehensive Certainty Outcome. The latter issue being there is risk that Covered Groups will have to pay additional tax on Amount A to some jurisdictions and wait for a longer period for refunds or repayments from other jurisdictions.

101. However, it is also recognised that:

- Suspension of payments will significantly delay payments to market jurisdictions.
- The Model Rules contain the Amount A Transition Provisions (Article 16) which reduce the potential for adjustments in key areas in the initial years (for most, this applies to the first six Periods) of a Covered Group being in-scope of the rules. Further, absent any significant change to its structure and business lines, the likelihood of significant adjustments for a Covered Group during a Comprehensive Certainty Review should reduce over time.
- Potential adjustments made during a Comprehensive Certainty Review are likely to result in significantly less additional double taxation relief or repayments of overpaid tax (i.e. cash-flow

carrying cost to a Covered Group) than the gross (suspended) payment amount to market jurisdictions. Further, there is no guarantee that all Comprehensive Certainty Outcomes will result in an adjustment or that all adjustments will be material.

- The Comprehensive Certainty Process requires jurisdictions to give effect to a Comprehensive Certainty Outcome within [180] days.
- If payments were to be suspended, market jurisdictions should be compensated for the delay in the receipt of the relevant revenues. Given that commercial rates of interest relevant to some market jurisdictions may exceed interest rates available to Covered Groups, this could result in a significant cost to Covered Groups.

102. It is understandable that for Covered Groups and some tax administrations it would be simpler to suspend payments for a Period. However, given the reasons above, most jurisdictions have expressed a preference to not suspend payments to market jurisdictions where a Comprehensive Certainty Review is sought. However, the Inclusive Framework will consider the issue further based on the comments received from public consultation.

103. In any case, where a Comprehensive Certainty Outcome differs from the position filed by the Covered Group in its Amount A Tax Return and Common Documentation Package, Article 18 and paragraphs 40 to 44 of 2.3.2 of the Tax Certainty Framework for Amount A Chapter outline the relevant requirements for Covered Groups and tax administrations to give effect to the Comprehensive Certainty Outcome. This includes the amendment of income tax returns in the relevant jurisdictions and re-filing of the Amount A Tax Return and the Common Documentation Package for the Period.

## 2.12. Other Administration Issues in relation to Amount A of Pillar One

104. As previously noted, this Chapter does not cover all the relevant issues related to the Administration Framework for Amount A and represents the direction of discussions to date undertaken by members of the Inclusive Framework. Further issues related to the Administration Framework for Amount A will be discussed in their relevant context as part of discussions in relation to the development of the Multilateral Convention, the finalisation of the Model Rules or developed as part of the Pillar One Implementation Framework. In addition, further Model Rules may need to be developed to streamline and harmonise the administration of Amount A. Some of these issues have been previously flagged, such as the development of guardrails in the Multilateral Convention in relation to the rate of taxation of Amount A or ensuring penalties in relation to Amount A are non-discriminatory compared to penalties applied to other types of income.

105. The use of Exchange of Information in the Administration Framework for Amount A and the Tax Certainty Framework for Amount A is of particular interest to taxpayers and tax administrations. The use of Exchange of Information is fundamental to the effective administration of Amount A. It has been acknowledged by jurisdictions that an Exchange of Information and Cooperation provision in the Multilateral Convention would be required in order to distribute the Common Documentation Package and the Amount A Tax Return and to facilitate exchanges and cooperation for the administration of Amount A and the Tax Certainty Framework.

106. Any Exchange of Information and Cooperation provision in the Multilateral Convention and in the context of competent authority agreements concluded thereunder will need to consider the following:

- The automatic exchange of the Common Documentation Package and Amount A Tax Return and other documentation filed with the Lead Tax Administration;

- Cooperation between tax administrations and with [independent experts<sup>30</sup>] as part of the Tax Certainty Framework, including as part of discussions with the Review Panel, the Determination Panel and Affected Parties;
- Other forms of cooperation, i.e. spontaneous exchanges and exchanges on request, as well as simultaneous tax examinations and tax examinations abroad, including in relation to Groups that do not request certainty;
- Timing and form of exchanges;
- On-sharing of information with the other tax administrations [and with independent experts];
- On-sharing of information with other affected Covered Group entities;
- How information should be made available to Parties that the Group has not identified as Affected Parties but that consider themselves to be Affected Parties for the Period;
- The appropriate use of the information included in the Amount A Tax Return, Common Documentation Package and information provided as part of the Tax Certainty Framework;
- Confidentiality and data safeguards;
- Common encryption and transmission methods; and
- Ensuring flexibility for changes in practice or technology in future.

107. Given the substantive nature of the issues to be considered, Exchange of Information and Cooperation and confidentiality will be a priority matter for discussion as part of the development of the Multilateral Convention.

108. The Model Rules provide for the development of a Pillar One Implementation Framework to facilitate the consistent and coordinated implementation of the Pillar One Rules. The development of the specifics of the Pillar One Implementation Framework will commence once the substantive work in relation to the Model Rules and the Multilateral Convention has been completed. Further consultation will inform the development of parts of the Pillar One Implementation Framework and input will be sought on the issues that should be addressed as part of this work.

109. However, it is envisaged that the Pillar One Implementation Framework will consist of at least the following work streams:

- Administration coordination: The work stream on administration coordination will develop a standardised Amount A Tax Return and Common Documentation Package and develop a framework for the Exchange of Information as a matter of priority. It will also address ancillary issues, such as filing procedures (including streamlined registration processes), elections, notifications and recordkeeping requirements.
- Tax Certainty: The work stream on Tax Certainty will develop a standardised approach to the relevant Tax Certainty processes to assist with the efficient coordination of Tax Certainty for Amount A.
- Administrative Guidance: The Model Rules anticipate the need for interpretive guidance that clarifies the interpretation and operation of the language in the Model Rules to provide confirmation to tax administrations and taxpayers that the implementation or application of domestic law is considered to be in line with the outcomes intended under the Model Rules.

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<sup>30</sup> The Secretariat recognises that there are divergent views among jurisdictions as regards the composition of the Determination Panel, particularly as to whether the composition should include independent experts only or Government officials only. Independent experts are included in parentheses here as the MLC provision would need to allow for on-sharing of information with them should the Determination Panel include independent experts. Commentators on this part of the document should note that none of these options represent final or consensus views of the Inclusive Framework at present.

- Capacity Building and technical assistance: This work stream aims to increase the capacity of all tax administrations so that the officials responsible for implementing and administering the Pillar One Rules have both a good understanding of the underlying policy and technical detail of the rules as well as how these rules are expected to operate in practice. This capacity building is essential to support a transparent and comprehensive system of taxation that provides predictable outcomes for Covered Groups.

110. The specifics of each work stream and potentially other work streams and a work plan to formalise these work streams and prioritise key issues will be developed in due course.

111. Lastly, the Model Rules will need to consider their interaction of Amount A with the Pillar Two calculations. This will be reviewed once the Model Rules in relation to liable entities (i.e. either the single taxpayer approach or multiple taxpayer approach is adopted) and jurisdictional relief (i.e. allocation of double taxation relief to relief entities within a relieving jurisdiction) have been drafted. However, the intention is that the policy outcomes decided under Pillar Two are not disturbed by the application of Pillar One. For example, payments from relief entities to the agent or the single liable entity for tax paid on Amount A income should (for Pillar Two purposes) be equivalent to the tax being paid by the relief entity regardless of the actual paying entity.

## 3. Model Articles and Commentary for the Administration of Amount A

### Title 6: Administration

#### 3.1. Amount A Filing Requirements

##### Article 12 - Amount A Filing Requirements

1. An entity liable to tax or eligible for double taxation relief under [the Act] for a Period in [insert jurisdiction] will be required to file with the tax administration of [insert implementing jurisdiction] the Amount A Tax Return and Common Documentation Package of the Covered Group.
2. The obligation in paragraph 1 will be met if the Amount A Tax Return and Common Documentation Package of the Covered Group for the Period is filed with the Lead Tax Administration by the Group's Coordinating Entity.
3. The Amount A Tax Return/Common Documentation Package for the Period shall be filed within 12 months of the end of the Period.
4. Where paragraph 2 applies, for all purposes in [insert implementing jurisdiction], the date the Amount A Tax Return and Common Documentation Package of the Covered Group for the Period is filed is the date it was filed with the Lead Tax Administration.

1. Article 12 provides a uniform and harmonised approach to the filing of the relevant information in relation to the calculation of Amount A income and the amount of double taxation relief available for a Covered Group and the relevant Group Entities.

2. In order for tax administrations to assess the tax due by or relief to be granted in relation to Amount A, the entity will be required to submit the Amount A Tax Return and Common Documentation Package, which will include the Amount A Tax Return, to the relevant tax administration. The Amount A Tax Return will include the Covered Group's relevant calculations and supplementary information in determining the Amount A liabilities as well as provide the necessary information to commence the Tax Certainty Framework.

3. The intent of the Amount A Tax Return and Common Documentation Package is:

- To ensure all tax administrations have access to a Covered Group's information in relation to Amount A. A standardised Common Documentation Package will ensure that tax administrations receive the same information in the same form.

- To reduce compliance costs for Covered Groups by preventing the need to provide the relevant information in relation to Amount A to each jurisdiction, potentially in differing formats or at different times. Therefore, as part of the tax filing process in each jurisdiction, no further information should be required by each tax administration in relation to Amount A. However, this does not prevent tax administrations from requesting further information as part of any audit or compliance activities, or as part of the Tax Certainty Framework.

4. Paragraph 1 establishes that the primary obligation to provide the Amount A Tax Return and Common Documentation Package to a tax administration falls on entities that are subject to the Act (i.e. liable for tax on Amount A or eligible for double taxation relief).

5. To reduce the administrative burden on taxpayers and tax administrations, paragraph 2 outlines that the obligation in paragraph 1 will be met where the Coordinating Entity of a Covered Group files the Amount A Tax Return and Common Documentation Package centrally with the Lead Tax Administration. Where this occurs, the Lead Tax Administration will then distribute the Common Documentation Package to all Affected Parties (i.e. market and relieving jurisdictions) through Automatic Exchange of Information. Coordinating Entity and the Lead Tax Administration have the same meaning as that for Tax Certainty purposes.

6. Paragraph 3 requires submission of the Amount A Tax Return and Common Documentation Package to the relevant tax administration or the Lead Tax Administration within 12 months of the end of the Period. This means that entities liable to tax or eligible for double taxation relief will have 12 months after the Period to undertake the required calculations and complete the Amount A Tax Return and Common Documentation Package. This obligation applies regardless of any other income tax filing obligation in the relevant jurisdiction, including the lodgement of any entity's income tax return (for instance, relief entities). "Within 12 months" should be interpreted as requiring entities to file the Amount A Tax return and Common Documentation Package no later than 12 months after the Period. It is not intended to allow jurisdictions to require filing of the Amount A Tax Return and Common Documentation Package earlier than 12 months after the Period has ended.<sup>31</sup>

7. Where centralised filing in paragraph 2 is utilised by a Covered Group, paragraph 4 states that the filing date for domestic purposes will be the date on which the Amount A Tax Return and Common Documentation Package is filed with the Lead Tax Administration. The relevant date of filing will be included in the contents of the Amount A Tax Return so that it will be known to all Affected Parties. The purpose of paragraph 4 is to ensure that there are no adverse consequences for taxpayers in situations where there is a delay in the circulation of the Amount A Tax Return and Common Documentation Package by the Lead Tax Administration to the Affected Parties. The relevant obligations on the Lead Tax Administration, including timeliness of distribution of the relevant documents to Affected Parties, will be included in the Multilateral Convention and/or through a Multilateral Competent Authority Agreement. The Lead Tax Administration will have no obligation to verify that the Amount A Tax Return and Common Documentation Package is complete or that the information provided is correct, before distributing the information to Affected Parties. The Lead Tax Administration will only need to verify the date the information was filed. As mentioned in the previous section, Lead Tax Administrations will have 90 days to exchange the information with Affected Parties.

8. Where the requirements of Article 12 are not satisfied, the relevant entities (i.e. those liable to tax on Amount A or eligible for double taxation relief) will be liable for non-filing or late filing penalties in each relevant jurisdiction, in accordance with the domestic rules of that jurisdiction. The Multilateral Convention will contain provisions to ensure that such penalties applied are not discriminatory in comparison to

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<sup>31</sup> This does not represent the views of all Inclusive Framework members. For instance, one member of the Inclusive Framework has noted that they reserve the right to require Groups who are headquartered in their jurisdiction to file at an earlier date.

domestic penalties in relation to other income items. This is without prejudice to the ability of the tax administrations to assess a reasonable basis available to calculate the Amount A liability in accordance with their current domestic tax law, similar to the current situation where a taxpayer refuses to provide adequate information in relation to an income tax assessment.

### 3.2. Content of the Amount A Tax Return and the Common Documentation Package

#### Article 13 – Content of the Amount A Tax Return and the Common Documentation Package

1. The Amount A Tax Return and Common Documentation Package shall be filed in a standard template that is developed in accordance with the Pillar One Implementation Framework and shall include the following information concerning the Covered Group:
  - a. identification of the Covered Group and the UPE;
  - b. identification of the Group [entity/entities] liable to tax under [this Act and corresponding provisions of other Jurisdictions similar to this Act];
  - c. the amounts and information necessary to compute:
    - i. the amount of income liable to tax under [this Act and corresponding provisions of other Jurisdictions similar to this Act] and tax liability in relation to that income for [the entity/each Group entity] in each jurisdiction; and
    - ii. the amount of income eligible for double taxation relief for each Group entity in each jurisdiction under [this Act and corresponding provisions of other Jurisdictions similar to this Act];
  - d. other information that is agreed as part of the Pillar One Implementation Framework and is necessary to carry out the administration of the Pillar One rules; and
  - e. the Covered Group's request for an Advance Certainty Review or a Comprehensive Certainty Review.<sup>32</sup>

1. Article 13 sets out the content of the Amount A Tax Return and the Common Documentation Package. The Amount A Tax Return and the Common Documentation Package will enable tax administrations to assess the tax due by or relief to be granted to the relevant entities of the Covered Group. To assist tax administrations, the Amount A Tax Return and Common Documentation Package will need to include all the relevant information to explain how Amount A liabilities have been calculated. As such, tax administrations should not require any further information from Covered Groups as part of the filing of tax returns for Amount A purposes. That is, jurisdictions should not put in place unilateral information requirements in relation to Amount A as part of the general tax filing procedures. However, the filing of the Amount A Tax Return and the Common Documentation Package will not affect a jurisdiction's right or ability to request further information or clarification from a liable entity (or other members of a

<sup>32</sup> Note the Inclusive Framework are still considering how previous year adjustments are being considered. It is likely the Amount A Tax Return will need to accommodate those. A specific item will be developed depending on where members of the Inclusive Framework land.

Covered Group) in relation to Amount A as part of a review or audit. Such rights and obligations remain unaffected.

2. This information will include revenue and profit numbers as well as relevant adjustments, on a Group level and if applicable, on a segmented level. In addition, taxpayers will need to provide revenue sourcing figures for each jurisdiction, support their application of losses and the Marketing and Distribution Profits Safe Harbour and provide the calculations underpinning the application of the elimination of double taxation relief rules (including adjustments), as well as for the application of the exclusions for Extractives and Regulated Financial Services. In short, it will need to contain the relevant information to show how the liability and amount to be relieved in each jurisdiction is determined. It will also be used to provide the Covered Group's request for Tax Certainty for the Period.

3. In addition to support for liabilities and amounts to be relieved, to allow tax administrations to process payments of tax, it is envisaged that the Amount A Tax Return and Common Documentation Package will include the Tax Identification Numbers for each entity liable to tax or eligible for relief in relation to Amount A. This is required to allow for the Amount A Tax Return to substitute the income tax return of the relevant entities (under Article 14) in market jurisdictions and to allow for matching of information by tax administrations.

4. The precise contents of the Amount A Tax Return and Common Documentation Package will be finalised as part of the Pillar One Implementation Framework as a matter of priority and well in advance of any domestic implementation of the Model Rules. Where possible, it is intended that the Amount A Tax Return and Common Documentation Package will be in a machine-readable format to assist tax administrations with automating integration into domestic tax operational systems.

### 3.3. Streamlined Compliance for Entities where the [Amount A Tax Return] is used

#### **3.3.1. Article 14 - Streamlined Compliance for Entities where the [Amount A Tax Return] is used**

1. The following applies to the entity with income liable to tax under [this Act] in [insert implementation jurisdiction] for the Period:
  - a. Where the Amount A Tax Return is filed in accordance with Article 12, the entity shall be deemed to have met its income tax filing obligations [as a result of a tax liability under this Act]<sup>33</sup> in [insert implementing jurisdiction] for the purposes of [insert relevant provisions in implementing country's domestic tax rule in relation to income tax return filings in respect of amounts liable to tax under this Act].
  - b. The end of the income tax year in [insert implementing jurisdiction] for the entity shall be the same as the end of the Period.
  - c. Income liable to tax in [insert implementing jurisdiction] under [this Act] for the Period shall be deemed to be derived for income tax purposes on the last day of the Period.
  - d. Income liable to tax under [this Act] shall not be included in the calculations in relation to any income tax instalment regime in [insert implementing jurisdiction].<sup>34</sup>
  - e. Payment of tax in relation to the Period is required no later than 18 months after the end of the Period.
2. This Article applies to an entity liable to tax under [this Act] for the Period only if the entity:
  - a. is not a tax resident under the laws of the [insert implementing jurisdiction]; and
  - b. has no income liable to tax in [insert implementing jurisdiction] other than income under [this Act], excluding income subject to a final withholding tax; and
  - c. has not benefitted from group relief or is part of a tax consolidated group in the [insert implementing jurisdiction] in the Period.

#### Definitions:

“Group relief or is part of a tax consolidated group” means any regime in which a group entity of a Covered Group can transfer or utilise income tax attributes (for instance, tax losses) of another group entity.

“Income tax filing obligations” means any obligation of the entity to file documentation with the relevant tax administration on a periodic basis due to having income liable to tax on Amount A in the jurisdiction (including local Country-by-Country Reporting obligations and instalment income tax obligations).

“Income tax instalment regime” means any regime that requires the paying of instalments during the tax year towards an entity's expected tax liability. This includes advance tax.

1. Article 14 provides entities that are liable to tax on Amount A income, with streamlined compliance requirements. The intention of the Article is that, where such an entity has filed an Amount A Tax Return (locally or centrally with the Lead Tax Administration), it should not be subject to further income tax filing obligations. The aim of the streamlined compliance for Amount A is to enable Covered Groups to meet the relevant tax filing obligations in market jurisdictions through the Amount A Tax return and align the timing of payment obligations.

2. The Model Rule has been constructed to consider the flexibility afforded to jurisdictions as to self-determine whether Amount A forms part of the current income tax regime or is taxed under a separate income tax regime. Broadly, any entity will be eligible for streamlined compliance under Article 14 where its Amount A obligations in a jurisdiction have no practical interaction with other domestic income tax items (either of its own or another Group member). For instance, where the liable entity has no other income tax obligation in a jurisdiction. The reason for restricting streamlined compliance to entities outlined in paragraph 2, is that in circumstances where the entity has any other relevant interaction with income tax regime in a jurisdiction (i.e. other taxable income or the ability to use domestic losses) the relevant entity would already have a current filing obligation in the jurisdiction. Further, those jurisdictions would need significantly more information than can be achieved through a harmonised Amount A Tax Return, which only covered the calculation and information in relation to Amount A, not any other income tax obligation. Therefore, those entities will need to comply with their income tax obligations, including the inclusion of Amount A income, through the general income tax procedures of a jurisdiction, not through streamlined compliance. However, this is expected to only apply in very limited circumstances and in many instances will be of benefit to the taxpayer (i.e. the taxpayer is using Group loss relief).

3. Paragraph 2 establishes which entities may qualify for the streamlined treatment outlined in Paragraph 1. For an entity to qualify for the streamlined compliance in a jurisdiction, it must be non-resident in that jurisdiction, have no income liable to tax in that jurisdiction (other than Amount A income, and excluding income subject to a final withholding tax), and must not be claiming group relief or be part of a tax consolidated group in the jurisdiction for the Period. The intent of paragraph 2 is to only limit streamlined compliance to where there is an interaction between Amount A income and the current income tax regime of the market jurisdiction for the liable entity. Therefore, the requirements outlined in paragraph 2 may be different based how a market jurisdiction chooses to implement Amount A. In some circumstances no requirements may be needed.

4. Further, streamlined compliance only relates to the “liability” side of Amount A. Entities that are eligible for double taxation relief in relation to Amount A will not be eligible for streamlined compliance in relation to the claiming of double taxation relief as double taxation relief is required to be claimed under the general income tax regime of a relieving jurisdiction. Consequently, where a relieving entity also has an Amount A liability in its jurisdiction of tax residence (i.e. relieving jurisdictions can also be market jurisdictions) and a jurisdiction chooses to tax Amount A under a separate income tax, streamlined compliance under Article 14 may be available in relation to the Amount A income to meet the liability under the separate income tax. However, double taxation relief will still need to be accessed through the general income tax regime within the jurisdiction.

5. Paragraph 1 outlines the streamlined compliance treatment that will apply to an eligible entity in relation to Amount A liabilities in the jurisdiction of which that liability is applied. It should be noted that the concessions outlined in paragraph 1 have no effect on the obligations of any other Group entity subject to tax in the jurisdiction.

6. Subparagraph 1(a) details that where a Covered Group’s Amount A Tax Return has been filed, either in the market jurisdiction or with the Lead Tax Administration, the entity shall be deemed to have met its income tax filing obligations (or if Amount A is separated taxed, filing obligations in relation to Amount A) in that jurisdiction for the Period. This provision effectively turns off the requirements for the lodgement of a local tax return and any other income tax filing requirements triggered by having income liable to tax in a jurisdiction (for instance, CbCR obligations, lodgement of financial reports etc.).

7. Subparagraph 1(b) aligns the income tax year of the entity with income liable to tax with that of the UPE.

8. Subparagraph 1(c) provides that any Amount A income liable to tax in a market jurisdiction is deemed to be derived for income tax purposes on the last day of the Period (which is aligned with the UPE’s accounting period per subparagraph 1(b)). Similar to subparagraph 1(b), the intent of this

subparagraph is to reduce the need for Covered Groups to have different filing and payment dates in multiple jurisdictions in which they have no activities. The subparagraph also intends to align the dates from which any penalties would apply from.

9. Subparagraph 1(d) ensures that an entity subject to streamlined compliance will not be subject to any income tax instalment regime (or advance tax) regarding its income liable to tax under the Amount A Model Rules. The reason for excluding Amount A income subject to tax from any instalment tax payment is because unlike other income, the calculation of Amount A income only happens after the end of the fiscal year of the UPE. This and the fact that Amount A income subject to tax in a jurisdiction could fluctuate year-on-year makes it impractical for Amount A to be included in instalment income, especially given it is deemed to be derived on the last day of the Period.

10. Subparagraph 1(e) provides the deadline by which tax due on Amount A income in a jurisdiction must be paid is no later than 18 months after the Period. This reduces the number of different payment dates in multiple jurisdictions in which a Covered Group has no taxable activities.

### 3.4. Secondary Liability In Relation to Amount A Income

#### **3.4.1. Article 15 - Secondary Liability In Relation to Amount A Income**

1. This Article applies if:
  - a. an entity liable to tax or claiming double taxation relief under this Act fails to pay the whole or part of an amount of a tax liability, interest, penalty or other amounts in relation to amounts under this Act for a Period within three months of that amount becoming due and payable; or
  - b. an entity liable to tax under this Act for a Period cannot be identified due to a failure of a Covered Group to file an Amount A Tax Return and Common Documentation Package for a Period in accordance with Article 12.
2. Where subparagraph 1(b) applies, the relevant amount is the whole or part of an amount of a tax liability, interest, penalty or other amount in relation to amounts liable to tax under this Act<sup>35</sup> for the Period.
3. Where paragraph 1 applies, the tax administration of [insert implementing jurisdiction] may issue a notice to the UPE requiring it, within 30 days of the giving of the notice, to pay any unpaid amount referred to in subparagraph 1(a) or paragraph 2.
4. Where subparagraph 1(b) applies, the notice issued under paragraph 3, can only be issued after 18 months from the end of Period.
5. The notice must state—
  - a. the amounts that remain unpaid;
  - b. the date when the amounts first became payable; and
  - c. any rights of appeal.

<sup>35</sup> This reference will be updated once the liability provisions have been settled. However, it is intended to cover all Amount A liabilities allocated to the relevant market jurisdiction.

6. For the purposes of the recovery from the entity of any unpaid amounts referred to in subparagraph 1(a) or paragraph 2, upon issuance of the notice referred to in paragraph 3, the UPE is deemed as if:
  - a. the amounts referred to in subparagraph 1(a) or paragraph 2 had been assessed on the UPE under this Act.
  - b. the amounts became due and payable by the UPE when the amounts referred to in:
    - i. subparagraph 1(a) became due and payable; or
    - ii. paragraph 2 would have become due and payable if the amount of the tax liability under this Act for the Period was required to be paid in accordance with subparagraph 1(e) of Article 14.
  - c. to be liable for any further liability (including interest and penalties) for the Period in relation to the amounts referred to in subparagraph 1(a) or paragraph 2 incurred after the date of the issuance of the notice.
  - d. any payments made in respect of the amounts mentioned in subparagraph 1(a) or paragraph 2 had been made in respect of the amount treated as assessed by virtue of subparagraph 6(a).
7. An amount of income tax or foreign income tax paid by the UPE, due to the application of subparagraph 6(a) of this Act or the corresponding provisions of other Jurisdictions similar to this Act, will be deemed to be paid by the entity claiming double taxation relief in accordance with Article 10 of this Act.

1. To ensure the successful implementation of Amount A, it is important that market jurisdictions can enforce Amount A liabilities on a Covered Group. Article 15 is intended to be a mechanism that allows a market jurisdiction to enforce a liability on the UPE of a Covered Group.

2. Paragraph 1 describes the scenarios whereby the provisions of Article 15 apply. There are two instances where market jurisdictions may have difficulty enforcing an Amount A liability. These are:

- where an entity liable or claiming double taxation relief in relation to Amount A fails to pay an amount due in relation to Amount A; and
- where no entity liable for tax on Amount A income can be identified as no Amount A Tax Return has been filed by the Covered Group.

3. Subparagraph 1(a) is intended to extend liability for Amount A related debts to the UPE, where the relevant liable entity fails to pay such amounts. This should assist tax administrations in recovering Amount A related debts and the amounts can be enforced on the UPE of the Group in instances of non-payment. This also includes amounts that arise due to a Comprehensive Certainty Outcome under Article 18. Further, subparagraph 1(a) also includes situations where a relief entity has overclaimed double taxation relief in relation to Amount A. "Other amounts" under this Act is intended to include repayments in relation to over claiming of double taxation relief by relief entities. However, it is not intended to include amounts that are not directly related Amount A income. For instance, non-payment of tax for other items of income or other taxes.

4. Subparagraph 1(b) is intended to apply in circumstances where no Group entity can be identified as a liable entity due to the Amount A Tax Return and Common Documentation Package not being provided by a Covered Group. In such instances, the liability can be enforced on the UPE. This will apply even in circumstances where the Amount A Tax Return is filed after 12 months of the end of the Period.

However, because of paragraph 4, a liability cannot be raised on the UPE until 18 months after the end of the Period, which aligns with the date on which payment for Amount A would have been required under the paragraph 14(1)(e).

5. Paragraph 2 specifies that where subparagraph (1)(b) applies, the amount due by the Covered Group to the market jurisdiction is the amount that would have been due under the substantive rules on Amount A, including any domestically applied interest and penalties.

6. Paragraph 3 enables a tax administration to issue a notice to the UPE of the Covered Group requiring it, within 30 days of the giving of the notice, to pay any unpaid amount referred to in subparagraph (1)(a) or paragraph 2.

7. Paragraph 4 ensures that a tax administration can only enforce a liability on the UPE in circumstances where the liability for Amount A has become due and payable and payment has not been made by the relevant liable entities. Therefore, as the payment obligation of the UPE is triggered by the giving of a notice under paragraph 3, that notice can only be given after the relevant liabilities have become payable – in this case no earlier than 18 months after the Period. As such, where secondary liability applies, the obligations and dates will be same regardless of whether the liability was triggered by either subparagraph (1)(a) or (1)(b).

8. Paragraph 5 describes the information that must be included in the notice sent to the UPE of the Covered Group. Under this paragraph the notice should contain sufficient information in order to inform the UPE of the amounts due, the date since the amounts have been owed, and any grounds of appeal available to it.

9. Subparagraph (6)(a) specifies that where a notice is issued, the UPE is deemed as if the amounts due to the market jurisdiction (those referred to in subparagraph (1)(a) or paragraph 2) had been assessed on the UPE. This effectively deems the relevant liability to be that of the UPE. However, it is noted that this does not disturb the legal liability of the primary liable entity.

10. Subparagraph (6)(b) ensures that the dates in relation to amounts that are due and payable by the UPE align with that of the primary entity. As such interest and penalties to be applied, because of the application of subparagraph 5(a), to the relevant amounts should be the same as if the UPE incurred the initial liability for Amount A.

11. Subparagraph (6)(c) clarifies that the UPE is deemed liable for any further liability (including interest and penalties) for the Period in relation to the amounts stated in the notice that are incurred after the date of the issuance of the notice.

12. In subparagraph (6)(d), it is noted that any payments made in respect of the amounts mentioned in subparagraph (1)(a) or paragraph 2 had been made in respect of the amount treated as assessed by virtue of subparagraph (6)(a). This subparagraph intends to remove any payments already made from the amounts assessed on the UPE. Regardless of whether the primary entity or the UPE pays the relevant amount, the legal liability for each entity will be reduced by the payment amount.

13. Paragraph 7 ensures that where Article 15 applies, payments made by the UPE will be respected for the purposes of double taxation relief in relieving jurisdictions. That is, relief entities will still be entitled to double taxation relief for Amount A, even in circumstances where the relevant payment of the tax is made by the UPE under Article 15. However, only applies to payments in relation to income tax on Amount A and does not apply to amounts attributable to interest and penalties.

14. The inclusion of “interest and penalties” in this Article is intended to refer to domestically applied interest and penalties.

15. This article will be revisited once the liability model has been agreed.<sup>36</sup>

### 3.5. Amount A Transition Periods

#### **3.5.1. Article 16 – Amount A Transition Periods**

1. Where a Group Entity of a Covered Group or a Segment Entity of a Covered Segment [files/submits] an Amount A Tax Return/Common Documentation Package with respect to a Revenue Sourcing Transitional Period, and has taken Reasonable Measures to ensure its Amount A Tax Return/Common Documentation Package reflects a correct application of the rules under Title 3, Article 4, and Schedule E, no adjustment shall be made with respect to the application of the rules under Title 3, Article 4, and Schedule E.
2. Where a Group Entity of a Covered Group or a Segment Entity of a Covered Segment, who is a member of a Qualifying Extractives Group, with respect to an Extractives Transitional Period, has taken Reasonable Measures to reflect a correct application of the rules under Schedule B, no adjustment shall be made with respect to the application of the rules under Schedule B.
3. Where a Group Entity of a Covered Group or a Segment Entity of a Covered Segment, who is a member of a Group which conducts Regulated Financial Services, with respect to an RFS Transitional Period, has taken Reasonable Measures to reflect a correct application of the rules under Schedule C, no adjustment shall be made with respect to the application of the rules under Schedule C.

Definitions:

“Revenue Sourcing Transitional Period” means the Initial Revenue Sourcing Transition Phase and the three consecutive Periods that immediately follow, or where a Covered Group was not a Covered Group or a Group did not have a Disclosed Segment that was a Covered Segment during the Initial Revenue Sourcing Transition Phase, the three consecutive Periods from the beginning date of the Period in which a Group was first a Covered Group or a Group’s Disclosed Segment was first a Covered Segment.

“Extractives Transitional Period” means the Initial Extractives Transition Phase, and the three consecutive Periods that immediately follow, or where a Qualifying Extractives Group did not meet either the revenue test and profitability test or the segment revenue test and segment profitability test for any Period during the Initial Extractives Transition Phase, the three consecutive Periods from the beginning date of the Period in which it was first a Qualifying Extractives Group which met either the revenue test and profitability test or the segment revenue test and segment profitability test.

“RFS Transitional Period” means the first three consecutive Periods from the beginning date of the Period on which the Group or Disclosed Segment first met either the revenue test and profitability test

<sup>36</sup> For example, in the case of the single taxpayer approach, further work will be needed to determine who, other than the UPE, should bear the secondary liability where the UPE as a single taxpayer does not pay tax due on Amount A income. Some members of the Inclusive Framework have suggested that one possibility may be to impose the secondary liability on the relief entities of the Group because the UPE could be considered to bear the liability in respect of profits earned by those relief entities. Additionally, as part of this revision, some members of the Inclusive Framework have requested that it be considered whether it is appropriate for a local resident entity in the market jurisdiction to be subject to potential secondary liability for non-payment of Amount A related amounts liable to that market jurisdiction.

or the segment revenue test and segment profitability test.

“Reasonable Measures” means efforts that are consistent with the guidance provided by the Scope Review Panel, by the Review Panel, by the Determination Panel, by the Lead Tax Administration, or by the Conference of the Parties.

1. In order to aid newly in-scope Covered Groups and Covered Segments, a more accommodating application of the revenue sourcing rules will apply, recognising the challenges Groups and Disclosed Segments are likely to face in building new systems to comply with Amount A, in particular with respect to revenue sourcing, and the inevitable learning and refinements that will be needed. There are two aspects to this accommodation. One aspect of this transitional approach is to provide the ability for a Covered Group / Covered Segment to have access to Allocation Keys in the short-term, which is provided for in the revenue sourcing rules. The second aspect is the “soft landing” which provides a Group / Disclosed Segment with a period of learning and refinement once it starts applying the ordinary revenue sourcing rules. It is this soft landing which is contained in Article 16; the ability to use Allocation Keys is provided in Schedule E of the revenue sourcing rules themselves.
2. The purpose of the transitional rules is to allow sufficient time to enable Covered Groups to develop the systems required for complying with the revenue sourcing rules, while also ensuring that revenue can be sourced in the period until such systems are operational. Paragraph 1 provides that for Covered Groups and Covered Segments during the Revenue Sourcing Transitional Period, no adjustment to their revenue sourcing will apply provided Reasonable Measures to apply the rules have been taken.
3. A Revenue Sourcing Transitional Period refers to a Period during the Initial Revenue Sourcing Transition Phase (during which the first element of transition rules, regarding the use of Allocation Keys will also be available for all or any part of a Group’s / Disclosed Segment’s revenues), or the three consecutive Periods immediately after the Initial Revenue Sourcing Transition Phase, or, where a Group was not a Covered Group or a Group did not have a Disclosed Segment that was a Covered Segment during the Initial Revenue Sourcing Transition Phase, the three consecutive Periods from the beginning date of the Period in which a Group was first a Covered Group or a Group’s Disclosed Segment was first a Covered Segment. This essentially allows Covered Groups and Covered Segments who are in scope of Amount A in the first Period after the Multilateral Convention comes into force, six Periods to refine and finalise the development of their systems to comply with the revenue sourcing rules, and three Periods for Covered Groups and Covered Segments who come into scope after the Initial Revenue Sourcing Transition Phase. However, it is intended where a Group or Disclosed Segment has previously been a Covered Group or Covered Segment, but has fallen outside of the scope of the Amount A rules, the transition period does not reset.
4. In addition, paragraph 2 provides a transition for Qualifying Extractives Groups and for Disclosed Segments of Qualifying Extractives Groups. As with revenue sourcing, the purpose of the transitional approach to the application of the rules for Qualifying Extractives Groups is to allow sufficient time to enable Groups to develop the systems required for complying with the rules, while also ensuring that Qualifying Extractives Groups can determine whether they are in scope of the rules for Periods until such systems are operational. It is also recognised that this transition period will provide additional time for tax administrations, particularly those from developing countries, to prepare to engage in the more detailed compliance review process.
5. As is the case for revenue sourcing, there are two aspects to the transitional period. The first element is that the substantive rules on Amount A include an Initial Extractives Transition Phase for Qualifying Extractives Groups. In the Initial Extractives Transition Phase, a Qualifying Extractives Group may use the steps outlined in section 21 of Schedule B of the Model Rules instead of following the steps outlined in section 6 and section 15 of Schedule B (the Model Rule for this is outlined in section 21 of

Schedule B). The second element, contained in Article 16, is that for the Initial Extractives Transition Phase (to the extent it is needed) and the three consecutive Periods that immediately follow, provided a Qualifying Extractives Group has taken reasonable measures in the application of the rules in Schedule B, its application of the rules of Schedule B will be accepted.

6. Groups or Disclosed Segments will only be eligible for the transition under paragraph 1, paragraph 2, and paragraph 3 where Reasonable Measures have been taken. Reasonable Measures is defined as efforts that are consistent with the guidance provided by the Scope Review Panel, Review Panel, Determination Panel, by the Lead Tax Administration or by the Conference of the Parties. In taking Reasonable Measures, the steps taken by the Group or Disclosed Segment to implement guidance issued to it by a Review Panel, Scope Review Panel, Determination Panel, or Lead Tax Administration, will be relevant. Where a Group or Disclosed Segment submits a request for a Comprehensive Certainty Review or a Scope Certainty Review for a Period (during a Revenue Sourcing Transitional Period, an Extractives Transitional Period, or an RFS Transitional Period, as relevant) that commenced before such guidance (i.e. the guidance provided by the relevant Panel or Lead Tax Administration) was given, the Group or Disclosed Segment may apply the same approach as was accepted previously and that approach shall be accepted. Where a Group or Disclosed Segment submits a request for a Comprehensive Certainty Review or a Scope Certainty Review for a relevant Period that commenced after such guidance was given, steps taken by the Group or Disclosed Segment to implement this guidance will be considered in determining whether the Group or Disclosed Segment has taken Reasonable Measures. This consideration will also take into account the time elapsed since such guidance was given.

7. Unlike for the exclusion of revenues and profits of a Qualifying Extractives Group, no initial transition period providing for simplified reliance on financial statements has been proposed for the exclusion of revenues and profits from Regulated Financial Services. This is because the Regulated Financial Services exclusion will not be associated with as significant IT system build requirements and is therefore considered simpler to apply. However, it is recognised that there may be certain factual determinations and matters of judgement for such Groups in applying the rules. For this reason, an Advance Certainty Review process is also provided for Groups and Disclosed Segments conducting Regulated Financial Services. As such, a three Period soft landing phase is provided in Article 16 to provide for a limited period of learning and refinement in the context of that certainty process.

### 3.6. Uniform Currency Conversion Rules for Amount A Calculations and Liabilities

#### **3.6.1. Article 17 - Uniform currency conversion rules for Amount A calculations and liabilities**

1. For the purposes of this Act, unless specifically outlined otherwise, any amount relevant to the application of the Articles of this Act must be translated to the presentation currency of the Consolidated Financial Statements of the Covered Group based on the Average Exchange Rate during the relevant Period.
2. For the purposes of this Act, where a provision expressly determines an amount in EUR, any required translation of an amount from a foreign currency to EUR notwithstanding paragraph 1 as a result of that express provision must be based on the Average Exchange Rate during the relevant Period.

3. Paragraph 1 does not apply in circumstances where the relevant amount has been translated to the presentation currency of Consolidated Financial Statements under an Acceptable Financial Accounting Standard.
4. Paragraph 2 does not apply in circumstances where the relevant amount has been translated to the presentation currency of Consolidated Financial Statements under an Acceptable Financial Accounting Standard and the presentation currency of the Covered Group is EUR.
5. The income liable to tax and amounts eligible for relief under this Act for a Period must also be translated from the presentation currency of the Consolidated Financial Statements of the Covered Group to [insert currency of implementing jurisdiction] based on the Average Exchange Rate during the relevant Period.

“Average Exchange Rate” means the average exchange rate over the relevant period based on the exchange rates published in the International Financial Statistics of the International Monetary Fund for the relevant period. Where an exchange rate is not published by the International Monetary Fund for the relevant period the Central Bank exchange rate of market or relieving jurisdiction may be used.

1. In undertaking the relevant calculations required under the Model Rules there are instances where amounts may be required to be translated into a common currency. To ensure consistency in the application of these translations between jurisdictions, it may be required that all amounts are translated to a single currency before any of the relevant calculations for Amount A have been undertaken. It is important that any foreign currency translation be uniform across jurisdictions so that amounts are translated at the same foreign exchange rate.

2. Paragraph 1 requires that the any amounts used in calculations when applying the substantive rules on Amount A, are translated to the presentation currency of the Consolidated Financial Statements of the Covered Group. This establishes that all the relevant calculations for Amount A purposes should be undertaken in the presentation currency of the Consolidated Financial Statements of the Covered Group.

3. Paragraph 2 provides that where the substantive rules on Amount A determine an amount in EUR (for example, the revenue threshold of EUR 20 billion), any translation of an amount from a foreign currency to EUR must be based on the Average Exchange Rate during the relevant Period.

4. However, paragraphs 1 and 2 are not intended to apply where the amounts have already been translated to the presentation currency the consolidated financial accounts of the Group for the purposes of accounting consolidation, provided the translation has been undertaken in accordance with the relevant accounting standard. The intention of Article 17 is to provide a consistent basis of translation to avoid potential disputes. of these paragraphs is to not duplicate translation exercises and therefore ensure that the compliance burden on Covered Groups is not increased unnecessarily. That is, paragraphs 1 and 2 do not require amounts to be retranslated again if they have already been translated into the presentation currency of the Group accounts under the relevant accounting standard. It is recognised that translation under the relevant accounting standard will, generally, be undertaken at spot rate, and translation under paragraphs 1 and 2 under an average rate. However, the purpose of Article 17 is to ensure consistency in the foreign exchange translation between jurisdictions to avoid differences in outcomes due to jurisdictions taking a different approach to foreign exchange translation.

5. Paragraph 5 requires Covered Groups to translate the Amount A income liable to tax and amounts eligible for relief under the Model Rules from the presentation currency of the Consolidated Financial Statements to the relevant local currency of the jurisdiction using the Average Exchange Rate. However, it is noted that jurisdictions are free to choose the currency of payment for Amount A. Paragraph 5 should not be considered to restrict a jurisdiction, it allows for the payment of taxes to be undertaken in a currency

other than local currency. But it does require that the liability be translated into the payment currency based on the average rate.

6. Paragraphs 1, 2 and 5 all require the use of the Average Exchange Rate during the relevant Period. In calculating the Average Exchange Rate for the Period, the exchange rates to be used are those published in the International Financial Statistics of the International Monetary Fund. Where an exchange rate is not published by the International Monetary Fund for the relevant period the Central Bank exchange rate of market jurisdiction or relieving jurisdiction may be used.

7. In determining the Average Exchange Rate, the International Financial Statistics of the International Monetary Fund typically publishes the rate for each weekday. As such the Average Exchange Rate will be the average of foreign exchange rates published on a daily basis. As the exchange rates published by International Financial Statistics of the International Monetary Fund are based on USD, two-step translation may be required where the presentation currency of the Consolidated Financial Statements of the Covered Group is not USD. Similarly, this conversion, where possible should be undertaken as the average of foreign exchange rates published on a daily basis.

8. However, not all currencies are published by International Financial Statistics of the International Monetary Fund. Where this occurs, taxpayers and jurisdictions should use the exchange rates quoted by the central bank of the relevant jurisdiction. Further, if daily exchange rates are not published, the relevant calculations should be undertaken based on average of the most frequent basis of external reporting. Where this is the case, jurisdictions should be willing to accept the taxpayer's exchange rate translation basis, provided the taxpayer has made reasonable efforts. Where a central bank rate is used, Groups should apply the same rate consistently to both sides of the relevant transaction.

### 3.7. Amendments due to the Tax Certainty Framework

#### **3.7.1. Article 18 – Amendments due to the Tax Certainty Framework**

1. Whereas part of the process to conclude a Comprehensive Certainty Review for a Period the Coordinating Entity is required to refile the Covered Group's Amount A Tax Return and Common Documentation Package<sup>37</sup>, the following applies:
  - a. The Amount A Tax Return and Common Documentation Package of the Covered Group for the Period shall be refiled by the Coordinating Entity with the Lead Tax Administration in accordance with the specific changes required within [90] days<sup>38</sup>; and
  - b. Where Article 14 applies to an entity, the refiling in subparagraph 1(a) will constitute an [amendment request or amended return] under [insert domestic provisions in relation to amending previously filed tax returns] to the previously filed Amount A Tax Return [and Common Documentation Package] for the Period, notwithstanding time limits in domestic law.
2. Where subparagraph 1(b) does not apply to an entity that is part of a Covered Group to which paragraph 1 applies, and that entity is subject to Article 12, the entity will be required to amend

<sup>37</sup> See Paragraphs 40 to 44 of 2.3.2 and paragraph 17 of 2.4.1 of the Tax Certainty Framework for Amount A Chapter.

<sup>38</sup> The wording of this Article will be reviewed once the administrative mechanics and Model Rules for the process to conclude a Comprehensive Certainty Review have been developed. This will include the relevant obligations of all parties (both jurisdictions and Covered Groups), notification requirements and other administrative processes.

its income tax return covering the Period in [insert implementing jurisdiction] within [90] days notwithstanding time limits in domestic law.

3. Where paragraph 1 or paragraph 2 applies, any additional payment to [insert jurisdiction] in relation to income liable to tax under this Act will be required to be made by the entity within [120 days].

1. To implement the Tax Certainty Framework for Amount A it is necessary to develop a Model Rule to allow for the Amount A Tax Return and Common Documentation Package to be refiled to reflect Comprehensive Certainty Outcome for the Period. This Model Rule is still in development and will be considered further once the administrative mechanics and Model Rules for the process to conclude a Comprehensive Certainty Review have been developed.

2. Whereas part of the conclusion of a Comprehensive Certainty Review, the Review Panel and Affected Parties agree (or where there is disagreement and a decision has been taken by a Determination Panel) that specified changes to issues reflected in the Amount A Tax Return and Common Documentation Package of a Covered Group for the Period are required, then the Covered Group will be required to make the necessary amendments. Subparagraph 1(a) requires the Covered Group to make the required amendments within [90] days.<sup>39</sup>

3. Subparagraph 1(b) provides that where an entity in a Covered Group uses the streamlined compliance in Article 14, that the refiling of the Amount A Tax Return and Common Documentation Package constitutes an amendment request to the income tax return (or equivalent depending on how a jurisdiction's administrative processes deal with amending tax returns) of the entity in the relevant jurisdiction, regardless of whether the date of the refiling is after the date allowed by domestic time limits. This is to ensure that where there are delays to the Comprehensive Certainty Process or short domestic time limits for making amendments, the Covered Group is able to amend their income tax return.

4. Similarly, paragraph 2 applies the same obligation on entities that cannot use streamlined compliance under Article 14. These entities will be required to amend their domestic income tax returns in line with the Comprehensive Certainty Outcome within the same timeframe. Jurisdictions will be required to accept such amendment requests regardless of domestic time limits.

5. Paragraph 3 provides a unified timeframe by which an entity liable to tax must make payments of tax to market jurisdictions. This timeframe is standardised across the market jurisdictions to minimise the administrative burden on Covered Groups. It is also noted that the timeframe outlined in subparagraph 2(b) of 2.5.2 of the Tax Certainty Framework for Amount A Chapter, of within [180] days.

### 3.8. Back-stop rule for timely double taxation relief

#### **3.8.1. Article 19 – Back-stop rule for timely double taxation relief**

<sup>39</sup> The administrative requirements in relation to a Comprehensive Certainty Review are still being considered. The commencement of the [90] days will be decided as part of those discussions. By way of example, it may be that case that the Lead Tax Administration will issue the Covered Group with a notice to refile an amended Amount A Tax Return and Common Documentation Package for the Period. The [90] days could commence from the date of the issuance of that notice.

1. [Insert implementing jurisdiction] will be required to provide the benefit of double taxation relief to an entity eligible for such relief under Article 7 of this Act no later than [x] days/months after 18 months after the Period provided the following requirements are met:<sup>40</sup>
  - a. The entity has satisfied its obligations under Article 12; and
  - b. the entity complies with the domestic procedures of [insert implementing jurisdiction] required to claim double taxation relief within 12 months after the Period.<sup>41</sup>
2. Where paragraph 1 applies, the entity shall provide to the tax administration evidence of the payment of tax in relation to Amount A income for the Period within [z] days/months after 18 months after the Period.

'Provide the benefit of double taxation relief' is defined as the provision of the economic benefit of double taxation being realised by the taxpayer. The benefit may be given in the relieving jurisdiction through amending an income tax return for the taxable period in which Amount A income arises ("previous" year) or filing an income tax return for the taxable period in which the tax in relation to Amount A is paid ("current" year). Further work will be undertaken to determine how the deadline for giving the benefit of double taxation relief should be set.

1. Paragraph 1 imposes a requirement on relieving jurisdiction to ensure where the requirements of subparagraphs 1(a) and 1(b) are met, the jurisdiction must provide the benefit of double taxation relief in which the entity is entitled to no later than [x] days/months after 18 months after the Period (the "back-stop date").

2. "Provide the benefit of double taxation relief" is intended to ensure that relief entities have realised the benefit of double taxation relief prior to back-stop date. This is intended to cover the myriad of ways relief jurisdictions may give effect to double taxation relief for foreign tax paid in relation to Amount A. It is noted that under the Administrative Framework for Amount A jurisdictions will be able to self-determine how double taxation relief is given. For example, this may be a cash payment from a relief jurisdiction to the relief entity due to the overpayment of tax in a previous year (the year the income was included – if that is how the rules of that jurisdiction work). In other instances, this may be that the foreign tax credit has been given through an 'open' tax year in the relief jurisdiction (as opposed to amending a previous year tax return of which all the filing obligations have finished) which has then been used to offset potential income tax on the relief entity's income (this includes where the credit has been given through the instalment/advance tax regime). Provided the benefit of any exemption or foreign tax credit has been realised, either through a direct payment to the relief entity or through the offsetting of another amount payable to the relieving jurisdiction, the requirements of Article 19 will be met from the perspective of the relieving jurisdictions.

3. An example of when the benefit of double taxation relief has not been immediately realised by a relief entity would be where:

<sup>40</sup> A member of the Inclusive Framework has proposed to that paragraph 19(1) apply "no later than [x] days after the later of (1) the filing of the income tax return claiming such relief and (2) the payment of the Amount A tax liability" rather than "no later than [x] days/months after 18 months after the Period." This will be considered further after public consultation.

<sup>41</sup> Members of the Inclusive Framework continue to have diverging views on whether paragraph 1 includes all the necessary requirements for the applicability of the back-stop rule for timely double taxation relief. For example, some members would like to restrict the application of the back-stop rule to only Periods for which the Covered Group has requested Comprehensive Certainty, while others are of the view that such a requirement is unnecessary.

- a relieving jurisdiction requires double taxation relief to a relief entity to be provided in the current income tax year, rather than the income tax year which includes the Period;
- the relief entity does not have enough income in the current income tax year to give effect to double taxation relief, compared to the income tax year which relates to the Period; and
- the relieving jurisdiction does not provide for carry-back claiming of double taxation relief.

4. In this circumstance, a jurisdiction may allow for the foreign tax credits to be carried forward. Further work will be needed to determine whether tax refunds should be required instead of providing carry-forward of the non-creditable amounts when all or part of foreign tax is not creditable at the back-stop date while having to consider each jurisdiction's different double taxation relief mechanisms and the associated administrative requirements.

5. The requirement in paragraph 1 is not intended to override domestic legislation in relation to the access of double tax relief (i.e. modify the requirements of current foreign tax credit regimes, other than to ensure relief is given within a certain timeframe). That is, it will not require jurisdictions to make payments in relation to double taxation relief before the tax is paid, if the domestic provisions of that jurisdiction require payment before relief is given. But it is intended to allow tax administrations to undertake any required administrative procedures in advance of the streamlined payment date for the Period to reduce the administrative timing lag to give timely double taxation relief. Further, it does not restrict relieving jurisdictions from limiting any foreign tax credit to the amount of tax paid in the relieving jurisdiction on the same income in the Period of which that income is calculated. That is, if no tax was paid in the relieving jurisdiction in the Period (for example, carry-forward tax losses were used to offset income tax in the relieving jurisdiction for the Period) or the tax rate of the relieving jurisdiction is lower than that in the market jurisdiction, relieving jurisdictions will only be required to provide a foreign income tax credit up to the tax applied by the relieving jurisdiction.

6. Paragraph 1 has no application if a relieving jurisdiction has already provided the benefit of double taxation relief prior to the back-stop date. This would include instances where double taxation relief can be claimed prior to the payment of the tax (i.e. when the jurisdiction gives relief for taxes accrued rather than taxes paid), provided the benefit double taxation relief is provided.

7. A relief entity will be eligible for Article 19 where it meets two requirements:

- where the Covered Group has provided its Amount A Tax Return and Common Documentation Package to the LTA within 12 months of the end of the Period, or the entity has provided the same materials to the tax administration of the relieving jurisdictions by the same date; and
- the relief entity has commenced the relevant domestic procedures of the relieving jurisdiction for the provision of double taxation relief by the same date.<sup>42</sup>

8. Where a relief entity fails to meet the requirements of subparagraph 1(a) and 1(b), jurisdictions are not required to provide double taxation relief by the back-stop date. However, jurisdictions will still be

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<sup>42</sup> These requirements do not represent the views of all Inclusive Framework members. Some members of the Inclusive Framework have suggested that:

- relief entities should not be required to have to provide evidence of payment. This issue will be revisited after the public consultation.
- the requirement to have commenced domestic procedures within 12 months after the Period should be deleted from Article 19.
- in order to be eligible for Article 19, the Covered Group should have requested the relevant Period be subject to a Comprehensive Certainty Review.

required by the provisions of the Multilateral Convention and the Model Rules (Article 7) in relation to the double taxation relief.

9. Paragraph 1(b) requires relief entities to have commenced the domestic procedures of the relieving jurisdiction by the date of lodgement of the Amount A Tax Return and the Common Documentation package. ‘Domestic procedures’ refers to any procedures or administrative processes a jurisdiction puts in place in relation to the double taxation relief in relation to Amount A income. These procedures will be unique to each jurisdiction based on how the relevant domestic mechanisms for double taxation relief operate. For example, ‘domestic procedures’ may include certain income tax filings to be reopened or to amend previous year income tax returns to claim double taxation relief. In determining the relevant domestic procedures, jurisdictions may also ask for the relief entity to provide the Amount A Tax Return and Common Documentation Package to assist with verification to the amounts.<sup>43</sup> That is also provide it directly to the Tax Administration, notwithstanding it may be provided to the jurisdiction through Exchange of Information later. This requirement should not increase the compliance burden for Covered Group’s as they may need to file documents to the relieving jurisdiction to avail themselves of double taxation relief and the Amount A Tax Return and Common Documentation Package should be available at that time. Administrative solutions could be put in place in relieving jurisdictions to deal with the situation of multiple relief entities (in the same jurisdiction) at the same time. Further, paragraph 1(b) requires the taxpayer to comply with any domestic requirements, which may include a requirement to act in a cooperative manner to give effect to the relevant domestic procedures. For example, this could include the requirement to give timely responses to the enquiries for additional information that the relieving jurisdiction may need to process and review the double tax relief claim

10. However, Article 19 does not require a relieving jurisdiction to put any specific procedures in place, if that jurisdiction chooses to not require any specific procedures. For example, a relief jurisdiction may allow for foreign tax credits to be claimed in the current income tax year and therefore not require any further processes. The act of including the foreign tax credit in the current income tax year (and included in instalment or advance tax) would be considered the relevant domestic procedure.<sup>44</sup>

11. Under paragraph 2, relief entities will be required to provide evidence of payments before a specified date [y]. Jurisdictions may use this information to confirm the credit has been correctly claimed, if necessary. Where the amount claimed is incorrect or paragraph 2 is not complied with, domestic penalties may apply, including in relation to false declarations and interest. The appropriate date is currently under consideration.

12. It is recognised that Article 19 may need significant revisions once the Model Rules in relation to how relief is allocated to entities within a relieving jurisdiction are agreed. Further, jurisdictions will then need to examine how double taxation relief will be given and the impact of that the requirements of Article 19 may have on any existing or proposed double taxation relief mechanisms for Amount A.

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<sup>43</sup> This does not represent the views of all Inclusive Framework members. Some members of the Inclusive Framework do not agree that the Amount A Tax Return and Common Documentation Package should be filed locally.

<sup>44</sup> Given that such act would normally come after the date of Amount A tax payment, relief entities may not be able to meet the due date provided for in paragraph 1(b). Further work will be undertaken to examine how paragraph 1(b) operates under different domestic tax systems.

# Part II. Tax Certainty Framework for Amount A

# 1. Overview

## 1.1. Introduction<sup>45</sup>

1. Restoring the stability of the international tax system is one of the key objectives of the Pillar One agreement. Ensuring tax certainty on the new taxing right, referred to as Amount A, is core to this effort of stabilisation. It will come together with ensuring tax certainty for issues relating to Amount A, such as transfer pricing adjustments. Tax certainty will be provided through a detailed framework developed in this document, based on the Inclusive Framework October Statement:

*“In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A ... in a mandatory and binding manner.”*

2. A comprehensive solution to provide certainty to a Group over all aspects of Amount A, including whether it is in-scope, is essential to make the new regime effective, efficient and administrable both for the Groups themselves and for tax administrations. Amount A operates by applying a single set of rules to the global revenues and profits of a Group, subject to limited exclusions. Having these rules enforced unilaterally in each jurisdiction through domestic risk assessment and tax audit would be costly and time consuming for Groups and tax administrations, involving massive duplication of work undertaken in each jurisdiction, even in cases where no adjustments arose. In the event tax administrations did reach different views and proposed adjustments to a Group’s tax returns, double taxation could arise involving not just two jurisdictions but potentially every jurisdiction in which a Group sources revenue. To resolve the resulting disputes through traditional tools such as the mutual agreement procedure (MAP) would be unimaginably complex, even if ultimately certainty was assured through mandatory binding dispute resolution. Therefore a new, innovative approach is needed, which combines elements of dispute prevention and dispute resolution in a structured, binding process that provides certainty to Groups in a timely manner which is also resource-efficient for tax administrations.

3. The Tax Certainty Framework described in this Part contains three mechanisms to provide certainty over aspects of Amount A, each of which is voluntary on the part of Groups. In each of these, the Lead Tax Administration, typically the tax administration of the Group’s Ultimate Parent Entity, plays a key role in coordinating the process and engaging with the Group. These mechanisms are:

- **A Scope Certainty Review.** A process to provide an out-of-scope Group with certainty that it is not in-scope of rules for Amount A for a Period, removing the risk of unilateral compliance action in jurisdictions where it sources revenues.
- **An Advance Certainty Review.** A process to provide certainty over an in-scope Group’s methodology for applying aspects of the new rules that are specific to Amount A, and relevant

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<sup>45</sup> Throughout Part II, unless the context requires otherwise, references to a review of whether a Group is a Covered Group and to whether the application of the Convention to a Covered Group is correct should be taken as also referring to whether a Disclosed Segment is a Covered Segment and whether the application of the Convention to a Covered Segment is correct.

aspects of its internal control framework, which will apply for a number of future Periods. This would be available for:

- a Group’s methodology for revenue sourcing, including its categorisation of revenues and choice of reliable method,
  - a Group’s categorisation of revenues and costs for the purposes of applying rules on the exclusion of revenues and profits of Qualifying Extractives Groups, and its methodology for determining non-Extractives Adjusted Profit Before Tax or non-Extractives Segment Adjusted Profit Before Tax (as applicable), and
  - a Group’s categorisation of revenues and costs for the purposes of applying rules on the exclusion of revenues and profits of Groups conducting Regulated Financial Services, and its methodology for determining non-RFS Adjusted Profit Before Tax or non-RFS Segment Adjusted Profit Before Tax (as applicable).
- **A Comprehensive Certainty Review.** A process to provide an in-scope Group with binding multilateral certainty over its application of all aspects of the new rules for a Period that has ended, based on a standardised Common Documentation Package and building on the outcomes of any advance certainty applicable for the Period. This will guarantee a consistent treatment of the Group and the full elimination of double taxation in all Parties to the Convention for Groups who cooperate in the process and accept the outcomes of a review.

4. All three of these mechanisms are supported by a binding Determination Panel process to resolve any disagreements that arise. In each case this guarantees certainty to Groups which act in a cooperative and transparent manner. In addition, the Inclusive Framework is considering a transitional process to apply for a specific limited period, described below, to support Groups in applying the new rules and ensure a soft-landing where a Group has taken reasonable measures in its approach to specific topics.

5. Even in the unlikely case that a Group does not request certainty over its application of Amount A, there is still a benefit if compliance activity by tax administrations is coordinated, reducing the risk of unrelieved double taxation and disputes. Therefore, the Tax Certainty Framework also includes a possibility for tax administrations to agree to work multilaterally and agree a common approach through a coordinated review in the absence of a request.

## 1.2. Tax Certainty in the first years of applying rules on Amount A

6. As rules for Amount A are introduced, a transitional approach shall apply, recognising the challenges Groups are likely to face in building new systems to comply with Amount A, in particular with respect to revenue sourcing and the exclusion for profits from Extractives activities and Regulated Financial Services, and the inevitable learning and refinements that will be needed. This could include several aspects, which would apply for a defined, limited period, after which Groups will be expected to apply all aspects of rules for Amount A correctly and in full.

- First, as described in the Progress Report released in July 2022, special rules could apply for a defined number of years that would simplify the application of rule on Amount A, whereby:
  - Groups would have greater flexibility to apply allocation keys in place of Reliable Indicators for the purposes of sourcing revenues for the first three years after the Convention comes into effect, and
  - Groups would have greater flexibility to rely on information reported for their Disclosed Segments for the purposes of demonstrating that they do not meet the non-Extractives profitability test or the Non-Extractives Segment profitability test, for the first six years after the Convention comes into effect.

- Second, for the periods covered by the first bullet and the following three years, a “soft landing” could be provided under the process for Comprehensive Certainty. This would mean that, provided the Group took reasonable measures to reflect a correct application of the revenue sourcing or Extractives revenues rules, a request for certainty would be accepted with no changes required. Instead, during this transitional period the Group would be provided with guidance as to how it could more accurately apply the revenue sourcing or Extractives revenues rules in future. This would also apply to Groups applying RFS revenues rules, for the first three years after the Convention comes into effect. Going forward, a “soft landing” would also be available to Groups that first come within the scope of the new rules, or which need to rely on the exclusions for Qualifying Extractives Groups or Groups conducting Regulated Financial Services in order to be out of scope, in the future, for three years from the date this first applies.
- Third, a “soft landing” would also apply to Groups requesting Advance Certainty over their revenue sourcing rules for the first six years after the Convention comes into effect. Provided a Group took reasonable measures in the development of its approach to applying rules on revenue sourcing, Advance Certainty would be provided with no changes required. Again, a Group would be provided with guidance as to how it could more accurately apply the revenue sourcing rules in future.

7. More broadly, it is recognised that there are other ways to support Groups in complying with the new rules, beginning potentially even in advance of the Convention coming into effect and continuing until the first filing of Amount A documentation, or possibly later. This could include ongoing engagement and consultation with stakeholders to identify areas of uncertainty or where support is needed, which could be addressed through the development of guidance, FAQs, model templates and other practical tools. Guidance for tax administrations on how to undertake an effective and efficient review of a Group’s application of the new rules will also be needed, and could benefit from input from business. Before the Convention is in effect, any guidance or other tools would be advisory in nature. Once the Convention is in effect it would be considered which, if any, guidance requires greater authority than this, and the way to achieve this through adoption by the Parties.

### 1.3. Certainty over whether a Group is in-scope of rules on Amount A

8. In particular in the first years of applying rules on Amount A, there is a risk that Groups which are not in fact in-scope are nevertheless subject to enquiries in multiple jurisdictions by tax administrations that believe they may be in-scope (e.g. because the Group has total annual revenues above the threshold in its published financial statements, before application of rules on excluded revenues). The certainty process for a Scope Certainty Review will provide these Groups with the possibility to ask for binding certainty that they are out-of-scope, removing this risk.

9. A Group would submit a request for a Scope Certainty Review to its Lead Tax Administration as soon as it has sufficient information to support its case, which may be shortly after the release of its financial statements for the year or, in limited cases, even before the end of the year in question. This would include a list of Parties to the multilateral Convention (the Listed Parties) from which the Group is seeking certainty and which will be asked to agree whether the Group is in scope, with an explanation as to its basis for identifying Parties on this list. Where a particular Party is not included on this list it may submit a proposal to the Lead Tax Administration for it to be added to the list, together with an explanation as to why it would be affected by the outcomes of the review (for example, if it has evidence that the Group has revenues in its jurisdiction and is concerned that the Group may in fact be in-scope). The Lead Tax Administration may consult with the Group to understand its position. If the Group does not agree to adding the Party, it is expected to explain its reason for this. Notwithstanding this disagreement, the Lead Tax Administration may nevertheless require the Party to be added to the list of Listed Parties if it considers that the Party has

a reasonable basis for being included. The Group's request for a Scope Certainty Review should be accompanied by a Scope Certainty Documentation Package, containing information on the application of rules on Amount A relevant to determining whether a Group is within scope, and an explanation as to the Coordinating Entity's approach as to the application of key aspects of these rules, but would not need to include any information needed to apply other aspects of Amount A, such as rules on revenue sourcing or the elimination of double taxation.

10. If the Group considers it is outside the scope of Amount A rules, but in determining this it is required to apply aspects of these rules on excluded revenues, [segmentation] or fragmented groups, a review would be undertaken by a Scope Review Panel of tax administrations, coordinated by the Lead Tax Administration. On the other hand, if a Group is out-of-scope because its total revenues and profitability are below the relevant thresholds and specified rules do not apply, the review would be undertaken by the Lead Tax Administration. In each case, the outcomes of the review are shared with tax administrations in all Listed Parties, which have the opportunity to raise concerns and suggest alternative outcomes. Any disagreements between members of a Scope Review Panel or between Listed Parties would be sent to a Determination Panel for a final outcome. Thus, in all cases, the process concludes with certainty for the Group. If this certainty is a decision that the Group is not in-scope, this is binding on all Listed Parties. If, on the other hand, the outcome is a decision that the Group is in-scope, the Group should file a complete Amount A Common Documentation Package and may then pursue the Comprehensive Certainty Review Process described below.

11. If a Scope Certainty Review of a Qualifying Extractives Group or Group conducting Regulated Financial Services was undertaken by a Scope Review Panel and, in a subsequent year, a Group wishes to obtain certainty that it remains out-of-scope, a high level follow-up review based on simplified documentation would be available, which will focus on whether any changes have occurred which could mean that the Group is no longer a Qualifying Extractives Group, is no longer conducting Regulated Financial Services, or that the Group or a segment of the Group could now be in-scope with respect to its non-Extractives or non-Regulated Financial Services activity. Where this process concludes that the Group does remain out-of-scope, the Group will not be required to take any further steps and this outcome will be binding on all Listed Parties. Where the process cannot conclude that the Group remains out-of-scope on the basis of simplified documentation, the Group may still demonstrate that it is in fact out-of-scope by providing the full Scope Certainty Documentation Package for review.

#### 1.4. Advance Certainty over revenue sourcing and excluded revenues

12. Practical and reliable mechanisms for sourcing revenues to market jurisdictions, and identifying revenues excluded from the scope of Amount A, are critical features of the new rules, both in terms of identifying which jurisdictions have a taxing right (based on a revenue threshold) and determining the amount of profit before tax to be allocated to those jurisdictions (using a formula based on the source of its in-scope revenues). Ensuring that a Group's methodologies for determining the quantum of its excluded revenues and the source of its in-scope revenues are reliable, and doing so early, is therefore essential both for the Group and for coherent tax administration as,

- from the perspective of a Group, implementing a system based on the new rules may be a time consuming and possibly costly process – any requirement to introduce changes to such a system later if tax administrations do not agree the Group's chosen methodology is correct will take more time and involve more cost, and
- from the perspective of a tax administration, if it is found that a Group's methodology is not correct as part of a review undertaken after the filing of a tax return, it may be too late for the Group to obtain and provide data for the same year using a different approach, and this issue may continue for at least the next year, which is likely to have already ended.

13. Reviewing a Group's proposed methodologies for sourcing revenues and calculating excluded revenues (where relevant), and agreeing these approaches or identifying and agreeing any changes that are needed, will reduce both of these risks.

14. A Group's first request for Advance Certainty could be made when it files its Common Documentation Package for the first year of Amount A. The Advance Certainty Review Process involves a review of a Group's proposed methods and controls undertaken by a Review Panel including the Lead Tax Administration and a number of tax administrations from Parties in which a Group has in-scope revenues or which provide relief for double taxation, selected at random from those that expressed interest. Given the particular nature of this review, which will require analysis of relevant aspects of a Group's internal control framework, the Review Panel will also rely on the recommendations of an Expert Advisory Group of tax officials, who meet agreed criteria in terms of their training and experience in undertaking systems reviews and audits.

15. Where a Group's proposed approach is accepted, certainty will apply for a set number of future years, so long as agreed critical assumptions continue to apply. Where necessary improvements to a Group's existing internal control framework are identified as part of the review, this certainty will apply once these improvements have been implemented and confirmed. Where the Review Panel does not reach agreement, or where an agreement proposed by the panel is not accepted by tax administrations in parties affected by the Group's application of rules on Amount A, disagreements will be referred to a Determination Panel for a final outcome.

### **1.5. Comprehensive Certainty over the calculation and allocation of profit before tax and the elimination of double taxation**

16. A key element of the Tax Certainty Framework for Amount A is a structured, comprehensive, review of each relevant aspect of an in-scope Group's application of rules on Amount A, resulting in an outcome which is binding on all Parties to the Convention. This ensures that tax administrations in all jurisdictions will accept the same approach by a Group to the calculation and allocation of Amount A and the elimination of double taxation, with no need for domestic audits and no risk of unrelieved double taxation.

17. The first time a Group makes a request for Comprehensive Certainty, the review would be conducted by a Review Panel of tax administrations, including the Lead Tax Administration and those from Parties in which a Group has in-scope revenues or which provide relief for double taxation, selected at random from those that expressed interest. To reduce the resource burden on tax administrations, subsequent reviews would be conducted by the Lead Tax Administration, with a Review Panel being established to undertake a review after [five] years or in specific circumstances. Where Advance Certainty does not apply for the year in question, a Review Panel will be supported by an Expert Advisory Group of systems specialists that will provide advice as to the reliability of relevant aspects of the Group's internal control framework. While a review is undertaken by a Review Panel or the Lead Tax Administration, these act on behalf of all Parties to the Convention, which are kept informed and can provide input, raise concerns, and suggest alternative outcomes to address disagreements.

18. A Comprehensive Certainty Review of an in-scope Group involves two phases, recognising that certain steps in the Amount A process build on other steps. For example, the quantum of a Group's profit before tax needs to be established before the allocation formula can be applied to determine how much of that profit before tax should be allocated to a particular market jurisdiction. As such, a Review Panel or Lead Tax Administration will first consider issues assigned to the first phase of a review. It may then move directly to the second phase, and seek comments and the resolution of disagreements on both phases at the end of its review. Alternatively, a Review Panel or Lead Tax Administration may seek comments and agreement from Affected Parties, and resolve any disagreements, before progressing to a

second phase. This allows flexibility for relatively simple cases to be resolved more quickly, while more complex cases benefit from a phased process.

19. At the end of its review, or at the end of each phase, a Review Panel or Lead Tax Administration will share the outcomes of its review and a recommendation that the Group's application of rules on Amount A be accepted or that changes be required. Where all Affected Parties agree with this recommendation, the review progresses to the second phase or ends with certainty for the Group, as relevant. Where one or more Affected Parties do not agree, or if the Review Panel itself did not reach agreement, specific issues where there is disagreement are referred to a Determination Panel for resolution.

### **1.6. A Determination Panel to resolve disagreements arising during the tax certainty process**

20. It is fundamental to the Tax Certainty Framework that certainty is offered to all Groups that request it, without time-consuming and duplicative separate audits and MAP. This means that any disagreements that arise between tax administrations must be resolved within the framework. This is achieved by referring issues where there is disagreement to a Determination Panel which is required to reach a resolution by choosing from among the alternative outcomes put to it by the Lead Tax Administration, Scope Review Panel Members, Review Panel Members and Affected Parties. The composition of a Determination Panel is under consideration and could include independent experts, government officials or a combination of independent experts and government officials.

21. The fact a Determination Panel can only choose among options proposed to it ensures that, while the Determination Panel will settle a disagreement, the approach chosen must be one that was proposed by a tax administration. The Determination Panel shall endeavour to reach agreement on each issue by consensus including all members but, where this is not possible, it shall choose the outcome that is supported by an overall majority.

### **1.7. Outcomes of the tax certainty process**

22. Where a Group makes a request for certainty as to whether it is in-scope or over the calculation and allocation of profit before tax and the elimination of double taxation, and acts in a cooperative and transparent manner, it is guaranteed to be offered certainty. Parties to the Convention shall implement the outcomes of the certainty process and shall not undertake any compliance activity inconsistent with these outcomes. This certainty shall continue to apply so long as a Group does not withdraw its request or undertake steps outside of the multilateral process to reduce the profit before tax allocated to a Party, or increase the amount of relief to be provided for the elimination of double taxation, under the Convention.

### **1.8. A multilateral review in circumstances where a Group has not made a request for certainty**

23. In general, it is expected that Groups will take advantage of the proposed framework for certainty over Amount A. However, as all elements of the certainty process remain voluntary on the part of Groups, there may be cases where a Group chooses not to request certainty for a particular Period.

24. In these cases, tax administrations could undertake separate enquiries under domestic law to determine whether the Group's application of the new rules is correct. However, this may involve significant

duplication of work on the part of tax administrations, and could result in an inconsistent application of rules on Amount A and consequent double or multiple taxation.

25. To reduce these risks, the Tax Certainty Framework contains an option for any number of tax administrations to cooperate and undertake a review of a Group's Amount A Common Documentation Package on a coordinated basis, though the process for this cooperation is deliberately left flexible and tax administrations may choose not to participate. Where this process is used, a Group is given a window of opportunity to make a late application for comprehensive certainty, which will allow the Group to benefit from a binding certainty outcome including all Parties to the Convention rather than just those that agree to participate.

## 2. Provisions for a Tax Certainty Framework for Amount A

### 2.1. Tax Certainty in the first years of applying rules on Amount A

1. In advance of the Convention coming into effect and during the first years of applying rules for Amount A, specific tax certainty tools may be developed to provide greater certainty to Groups and tax administrations. These could include adaptations to how the general tax certainty processes described in this Part shall apply during a defined transitional period.
2. During an initial phase, commencing even before the Convention comes into effect, work could focus on supporting a consistent understanding of the new rules between tax administrations and Groups. This could include the development of guidance, model templates, responses to frequently asked questions and other tools as needed. Groups and other stakeholders will be able to raise generic questions of interpretation and application of the Convention and model rules, which will be taken into account in identifying areas where guidance or other tools are needed. Guidance may also be developed to tax administrations as to how a Scope Certainty Review, Advance Certainty Review and Comprehensive Certainty Review should be undertaken. This coordinated approach, with feedback from Groups, would ensure consistency in the guidance given to Groups as to how rules on Amount A should be applied, and the guidance given to tax administrations as to how a Group's application of these rules should be reviewed. Prior to the Convention coming into effect, any guidance developed by the Inclusive Framework could only be advisory in nature. Once the Convention is in effect, consideration would be given as to the extent interpretative or other guidance should have greater authority, for example in order for it to be taken into account under the Tax Certainty Framework, including by a Determination Panel in choosing between the alternative outcomes to a disagreement put to it for resolution, and how this could be achieved within the legal framework of the Convention (e.g. through adoption by the Parties).
3. This initial phase may continue after the Convention comes into effect, to the extent a further need for guidance and other tools is identified.
4. As the Convention comes into effect, Groups will benefit from specific features included within the Model Rules for Amount A, including the Tax Certainty Framework, to simplify their application, for a defined period. These will focus on areas where Groups are likely to need time to introduce new methodologies, to prepare information on a basis required under the Model Rules but that is not needed for any other purpose. These features, which take different forms, will provide certainty to Groups as these methodologies are developed and introduced, while supporting Groups in progressing towards a correct application of the full rules within a reasonable timeframe.
5. First, as explained in the Progress Report released in July 2022, flexibility will be provided with respect to the need to apply certain rules, for a limited period. Specifically:

- a. all Covered Groups shall be permitted to use specified allocation keys in place of Reliable Indicators for the purposes of revenue sourcing for the first three Periods after the Convention comes into effect, and
- b. Qualifying Extractives Groups shall be permitted to use simplified rules to demonstrate that they do not meet the non-Extractives profitability test or the non-Extractives Segment profitability test, including the use of information prepared for the purposes of a Group's Disclosed Segments, for the first six Periods after the Convention comes into effect.

Groups within sub-paragraphs (a) or (b) are not required to use allocation keys or Disclosed Segments as described in those sub-paragraphs, and any Group that wishes to use Reliable Indicators or the full rules on Extractives Segments, non-Extractives Segments and Mixed Segments is permitted to do so.

6. Second,

- a. where a Covered Group takes reasonable measures to reflect a correct application of the rules under Title 3, Article 4, and Schedule E, in the first six Periods after the Convention coming into effect (i.e. the period in paragraph 5(a) plus the next three Periods), the Covered Group's application of the rules under Title 3, Article 4, and Schedule E shall be accepted,<sup>46 47</sup>
- b. where a Qualifying Extractives Group takes reasonable measures to reflect a correct application of the rules under Schedule B, in the first nine Periods after the Convention comes into effect (i.e. the period in paragraph 5(b) plus the next three Periods), the Group's application of the rules under Schedule B shall be accepted,<sup>48</sup> and
- c. where a Group conducting Regulated Financial Services takes reasonable measures to reflect a correct application of the rules under Schedule C, in the first three Periods after the Convention comes into effect, the Group's application of the rules under Schedule C shall be accepted.<sup>49</sup>

7. Where,

- a. paragraph 6(a) applies and the Coordinating Entity of a Group has submitted a request for Comprehensive Certainty, or
- b. paragraph 6(b) or paragraph (6)(c) applies and the Coordinating Entity of a Group has submitted a request for Scope Certainty,

<sup>46</sup> Where a Covered Group was not a Covered Group and did not have a Covered Segment during the Periods covered by paragraph 5(a), this sub-paragraph shall apply for the three consecutive Periods commencing from the date on which a Group was first a Covered Group or a Group's Disclosed Segment was first a Covered Segment.

<sup>47</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and members hold different views as to whether this provision should apply for the period described in sub-paragraph (a) or for a shorter period.

<sup>48</sup> Where a Qualifying Extractives Group did not meet either the revenue test and profitability test or the segment revenue test and segment profitability test for any Period covered by paragraph 5(b), this sub-paragraph shall apply for the three consecutive Periods commencing on the date on which it was first a Qualifying Extractives Group which met either the revenue test and profitability test or the segment revenue test and segment profitability test.

<sup>49</sup> Where a Group that conducts Regulated Financial Services did not meet either the revenue test and profitability test or the segment revenue test and segment profitability test for any of the first three Periods after the Convention comes into effect, this sub-paragraph shall apply for the first three consecutive Periods commencing on the date on which it was first a Group that conducts Regulated Financial Services which met either the revenue test and profitability test or the segment revenue test and segment profitability test.

the Review Panel, Scope Review Panel or Lead Tax Administration as relevant may provide the Coordinating Entity with guidance as to how its application of Reliable Indicators, the non-Extractives profitability test, the non-Extractives Segment profitability test, the non-RFS profitability test or the non-RFS Segment profitability test, may be improved to reflect a more correct application of the Convention. A Group will be expected to take this guidance into account for any Period commencing from the date the guidance is given. Where a Group submits a request for Comprehensive Certainty or Scope Certainty for a Period covered by paragraph 6 that commenced before such guidance was given, the Group may apply the same approach as was accepted in paragraph 6(a), paragraph 6(b) or paragraph 6(c) and that approach shall be accepted. Where a Group submits a request for Comprehensive Certainty or Scope Certainty for a Period covered by paragraph 6 that commenced after such guidance was given, steps taken by the Group to implement this guidance will be considered in determining whether the Group has taken reasonable measures. This consideration will also take into account the time elapsed since such guidance was given.

8. Third, where a Coordinating Entity submits a request for Advance Certainty over its Revenue Sourcing Approach to apply from one of the first six Periods after the Convention comes into effect, and the Group has taken reasonable measures to reflect a correct application of Reliable Indicators in the proposed approach contained in its Advance Certainty Documentation Package, this approach shall be accepted.<sup>50</sup> The Review Panel may provide the Coordinating Entity with guidance as to how its application of Reliable Indicators may be improved to reflect a more correct application of the Convention. Where a Group submits a subsequent request for Advance Certainty to apply from a Period covered by this paragraph, steps taken by the Group to implement this guidance will be considered in determining whether the Group has taken reasonable measures. This consideration will also take into account the time elapsed since such guidance was given. An Advance Certainty Outcome agreed on the basis described in this paragraph shall only apply to Periods within the first six Periods after the Convention comes into effect.

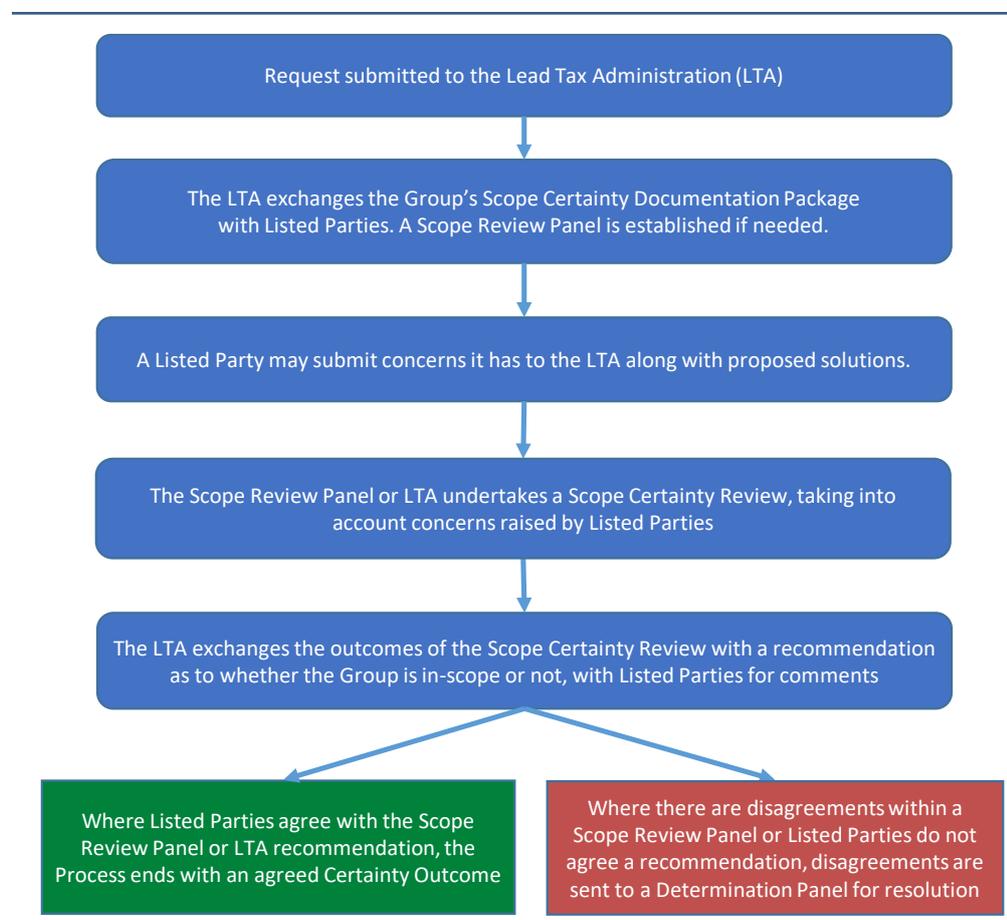
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<sup>50</sup> Where a Covered Group was not a Covered Group and did not have a Covered Segment for the first three Periods after the Convention comes into effect, paragraph 8 shall apply for the first three Consecutive Periods commencing from the date on which the Group was first a Covered Group or a Group's Disclosed Segment was first a Covered Segment.

## 2.2. Certainty over whether a Group is a Covered Group

### 2.2.1. A Scope Certainty Process to determine whether a Group is a Covered Group

#### *A Scope Certainty Review*



#### *Submitting a request for a Scope Certainty Review*

1. The Coordinating Entity of a Group may submit a request for multilateral certainty that it is not a Covered Group for a Period specified in the request, filed with the Lead Tax Administration within [42 months]<sup>51</sup> of the end of that Period (Scope Certainty), except where paragraph 8 or paragraph 14 of Section 2.2.2, paragraph 15 of Section 2.4.1 or paragraph 2 of Section 2.6.1 apply, in which case the deadline for a request shall be in accordance with those paragraphs. A request for Scope Certainty may be submitted:
  - a. after the last day of the Period to which the request relates, or

<sup>51</sup> This timeframe assumes a [36 month] limit after the end of a Period for the tax administration of a Party to issue a notice to a Group Entity that it intends, or is considering, opening enquiries to determine whether the Group is a Covered Group for the Period. However, it is noted that not all members of the Inclusive Framework agree that such a limit should be imposed on Parties to the Convention.

- b. where a Group was not a Covered Group in the two consecutive Periods preceding the Period to which the request relates, and, in the view of the Group, it does not meet the prior period test contained in Article 1 of Title 1,
    - i. at any time once the Group has information to demonstrate this is the case, and
    - ii. once the Convention is in effect [for 180 days]<sup>52</sup>.
2. A request must be in the format and with the content specified in [to be agreed] and be accompanied by a complete Scope Certainty Documentation Package, including an explanation of the approach taken by the Coordinating Entity with respect to applying [key aspects of the Convention to be agreed] and other aspects of the Convention at the option of the Coordinating Entity. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The request shall include a list of Listed Parties from which Scope Certainty is sought, prepared by the Coordinating Entity, together with an explanation as to the approach used to identify the Parties on this List. In preparing this list, the Coordinating Entity is not required to apply the rules in Article 4 of Title 3. Alternatively, the Coordinating Entity may indicate simply that Scope Certainty is sought from all Parties, in which case all Parties shall be Listed Parties for the purposes of the Scope Certainty Process. The request shall also include [confirmation in a form to be agreed] that all Group Entities agree to the content of the Scope Certainty Documentation Package and to any changes agreed by the Coordinating Entity.
  3. A request under paragraph 1 shall also include agreement by the Coordinating Entity,
    - a. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Listed Parties:
      - i. the request and Scope Certainty Documentation Package filed by the Coordinating Entity,
      - ii. any other information or documentation provided by the Coordinating Entity for the purposes of the Scope Certainty Review,
      - iii. in the event the Coordinating Entity withdraws its request for Scope Certainty or is deemed to do so, notification that this has occurred, and
      - iv. in the event that a Scope Certainty Review concludes with an agreed Scope Certainty Outcome, notification that this has occurred including the details of that Scope Certainty Outcome,
    - b. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Parties that are not Listed Parties:
      - i. the identification of the requesting Group and Coordinating Entity, the request, and notification the request has been accepted,
      - ii. in the event the Coordinating Entity withdraws its request for Scope Certainty or is deemed to do so, notification that this has occurred, and
      - iii. in the event that a Scope Certainty Review concludes with an agreed Scope Certainty Outcome, notification that this has occurred including whether if it was agreed that the Group is not a Covered Group, and

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<sup>52</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and some members consider that a request for Scope Certainty should only be submitted once the Convention is in effect for 365 days.

- c. to other exchanges of information between the Competent Authority of the Lead Tax Administration and the Competent Authority of a Listed Party for the purposes of the Scope Certainty Review.

All exchanges of information within the Tax Certainty Framework described in this Part shall take place under exchange of information provisions within the Convention and the information exchanged will be subject to confidentiality requirements.

4. If the request satisfies the conditions in paragraph 1, paragraph 2 and paragraph 3, the Lead Tax Administration shall accept the request on behalf of Listed Parties. The Competent Authority of the Lead Tax Administration shall, within [30 days] of receiving the request, exchange the request and Scope Certainty Documentation Package with the Competent Authorities of the Listed Parties. By the same deadline the Lead Tax Administration shall also notify the Coordinating Entity that the request is accepted. Where the request does not satisfy all of the conditions in paragraph 1, paragraph 2 and paragraph 3, the Lead Tax Administration shall notify the Coordinating Entity of the reasons for this within [30 days] of receiving the request. Once the Coordinating Entity has addressed these issues, the Competent Authority of the Lead Tax Administration shall within [30 days] exchange the request and Scope Certainty Documentation Package with the Competent Authorities of the Listed Parties. If the Coordinating Entity has not addressed these issues within [60] days of being notified by the Lead Tax Administration, the Coordinating Entity shall be deemed to have withdrawn its request for Scope Certainty.
5. Unless the Coordinating Entity has indicated that Scope Certainty is requested from all Parties, the Competent Authority of the Lead Tax Administration shall, by the deadline for exchange in paragraph 4, notify the Competent Authorities of all Parties that are not included as Listed Parties, that a request has been submitted, together with the list of Listed Parties prepared by the Coordinating Entity and the explanation provided as to the approach used to identify the Parties on this list. The Competent Authority of any Party may notify the Competent Authority of the Lead Tax Administration within [60 days] that it considers that it should be included on the list of Listed Parties and the reason for this, together with any documents or other evidence to support this reason. The Lead Tax Administration may consult with the Coordinating Entity as to whether the Party be included as a Listed Party. Where the Coordinating Entity agrees with the Party's reason, the Party should be included as a Listed Party. Where the Coordinating Entity does not agree with the Party's reason, it shall provide an explanation why this is the case. If, in light of the evidence and explanations provided by the Party and Coordinating Entity (or in the absence of any explanation by the Coordinating Entity), the Lead Tax Administration considers that the Party has a reasonable basis for being included as a Listed Party (e.g. because it has provided evidence of revenues that may be in-scope revenues above the Nexus threshold in its jurisdiction for the Period), the Lead Tax Administration shall inform the Coordinating Entity that the Party shall be included as a Listed Party notwithstanding the Coordinating Entity's disagreement or lack of response.<sup>53</sup> The Competent Authority of the Lead Tax Administration shall inform the Competent Authority of the Party of the outcome of this process. This consultation between the Lead Tax Administration and Coordinating Entity shall be completed within [60] days of the deadline for notifications in this paragraph. Where a Party is included as a Listed Party under this paragraph, within [15 days] of informing the Party of this outcome the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authority of the Party any information previously exchanged with Listed Parties under paragraph 4. At the end of the process described in this paragraph, the list of Listed Parties for the Period covered by the request for Scope Certainty shall be considered final.

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<sup>53</sup> Work shall be undertaken by members of the Inclusive Framework to provide guidance as to what may be considered a reasonable basis for the purposes of this paragraph.

6. The tax administrations of all Listed Parties shall suspend all domestic compliance activities with respect to the application of Titles 2 to 5 and Articles [to be agreed] of Title 6 of the Convention to the Group for the Period specified in the request, for the duration of the Scope Certainty Process. While the Scope Certainty Process is underway, a tax administration may take the minimum procedural steps required to protect its ability to undertake compliance activity, such as opening an enquiry on a protective basis, but may not take substantive action such as requesting information from a taxpayer or issuing a tax assessment. Nothing in this paragraph requires a Listed Party to suspend compliance activity:
- a. after a request for Scope Certainty is withdrawn or is deemed to be withdrawn,
  - b. after a Scope Certainty Review was concluded without an agreed Scope Certainty Outcome as the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner,
  - c. with respect to any matters not covered by the Convention, or
  - d. with respect to Related Issues.

*A review by a Scope Review Panel or Lead Tax Administration*

7. To improve the efficiency of the Tax Certainty Framework and reduce the need for a Scope Certainty Review to be undertaken by a panel of tax administrations of Listed Parties (a Scope Review Panel) in cases that are likely to be reasonably straightforward, a Scope Review Panel shall be established to undertake a Scope Certainty Review or Follow-Up Scope Certainty Review where:
- a. a request for Scope Certainty is accepted in accordance with the process in paragraph 4,
  - b. any of the criteria in paragraph 8 are met, and
  - c. any of the criteria in paragraph 9 are met.

Where a Scope Review Panel is not established because the criteria in paragraph 8 or paragraph 9 are not met, a Scope Certainty Review or Follow-Up Scope Certainty Review shall be undertaken by the Lead Tax Administration.

8. The criteria referred to in paragraph 7(b) are:<sup>54</sup>
- a. the Group has Excluded Revenues for the Period, based on information contained in the Scope Certainty Documentation Package or Follow-Up Scope Certainty Documentation Package filed by the Coordinating Entity,
  - b. [the Group has:
    - i. either,
      - (a) total reported revenues for a Disclosed Segment in excess of EUR 20 billion in its consolidated financial statements or the Period, or
      - (b) Revenues for a Disclosed Segment in excess of EUR 20 billion, based on information contained in the Scope Certainty Documentation Package or Follow-Up Scope Certainty Documentation Package filed by the Coordinating Entity,] or
    - c. the Group resulted from an Internal Fragmentation.
9. The criteria referred to in paragraph 7(c) are:

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<sup>54</sup> The list of criteria in paragraph 8 will be re-considered and may be amended as the overall design of rules is finalised.

- a. it is the first time the Group has made a request for certainty, either under this Section or Section 2.3, for a Period in which a particular circumstance in paragraph 8 is met,
- b. all previous reviews undertaken by a Scope Review Panel under this Section, or by a Review Panel under Section 2.3, for Periods of the Group in which a particular circumstance in paragraph 8 was met ended without an agreed Scope Certainty Outcome or Certainty Outcome, because either:
  - i. the Coordinating Entity was persistently late in providing information without explanation, or acted in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, or
  - ii. the Coordinating Entity withdrew its request for certainty before a Scope Certainty Outcome or Certainty Outcome was agreed,<sup>55</sup>
- c. in cases where (b) does not apply, the review by a Scope Review Panel or Lead Tax Administration for the most recent Period for which the Group submitted a request for Scope Certainty concluded without an agreed Scope Certainty Outcome as the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, or
- d. there is a period of at least seven years between the first day of the last Period for which a review was undertaken by a Scope Review Panel and the first day of the Period for which Scope Certainty is requested in one of the circumstances in paragraph 8.

#### *Scope Review Panel composition*

10. Where the criteria in paragraph 9(a), paragraph 9(b) or paragraph 9(c) and any of the criteria in paragraph 8 are met, the exchange in paragraph 4 shall also include notification that the review shall be undertaken by a Scope Review Panel and an invitation for the Competent Authorities of Listed Parties to submit within [60 days] of that exchange an expression of interest for the tax administration of that Listed Party to participate on the Scope Review Panel. Where under paragraph 5, a Party is added to the list of Listed Parties, the deadline for that Party to submit an expression of interest shall be [15 days] after the exchange under that paragraph of information previously exchanged with Listed Parties under paragraph 4.
11. Where the criteria in paragraph 9(d) and any of the criteria in paragraph 8 are met, the exchange in paragraph 4 shall also include a notification that a proposal by a Listed Party that the review be undertaken by a Scope Review Panel together with an expression of interest to participate on that Panel should be submitted to the Lead Tax Administration within [30 days]. Where under paragraph 5, a Party is added to the list of Listed Parties, the deadline for that Party to submit a proposal that the review be undertaken by a Scope Review Panel together with an expression of interest to participate on that Panel shall be [15 days] after the exchange under that paragraph of information previously exchanged with Listed Parties under paragraph 4.
12. Where by the applicable deadline in paragraph 11 a proposal that a review be undertaken by a Scope Review Panel is submitted by the Competent Authority of a Listed Party, the Competent Authority of the Lead Tax Administration shall within [30 days] of that deadline exchange with the Competent Authorities of Listed Parties a notification that the review shall be undertaken by a Scope Review Panel and an invitation to submit within [60 days] of that exchange an expression of interest for the tax administration of that Listed Party to participate on the Scope Review Panel. Where a Party is added

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<sup>55</sup> For example, where a Scope Review Panel includes seven tax administrations, five of these tax administrations should agree that a Scope Review Outcome cannot be provided.

to the list of Listed Parties under paragraph 5 after this notification is given, the exchange with the Competent Authority of the Party in that paragraph of any information previously exchanged with Listed Parties shall also include notification that the review shall be undertaken by a Scope Review Panel and an invitation to submit an expression of interest for the tax administration of that Party to participate on the Scope Review Panel by the later of:

- a. [15 days] after this exchange, and
  - b. the deadline for expressions of interest under this paragraph generally.
13. Members of the Scope Review Panel shall be the tax administrations of Listed Parties selected from those that submit expressions of interest.<sup>56</sup> A Listed Party should only express interest in participating on a Scope Review Panel if its tax administration is committed to taking an active role on the Scope Review Panel and applying sufficient resources to ensure this is possible.
14. For the purposes of undertaking a Scope Certainty Review under this Section, a Scope Review Panel shall comprise:
- a. the Lead Tax Administration, and
  - b. [six] tax administrations other than the Lead Tax Administration selected at random from the Listed Parties that submitted an expression of interest.

Where the total number of Listed Parties that expressed interest in participating on the panel is equal to or lower than [six], places on the Panel shall be allocated to those that expressed interest. To fill the remaining places on the Panel, the Competent Authority of the Lead Tax Administration shall, within [15 days] of the latest deadline for expressions of interest under paragraph 10 or paragraph 12 as applicable, notify the Competent Authorities of all Listed Parties that did not already express interest of the remaining places and seek a second round of expressions of interest, to be made within [15 days] of this notification. Unfilled places on the Panel shall be filled with tax administrations of Listed Parties that expressed interest during this second round, selected at random. Where after this second round of expressions of interest the total number of Listed Parties that expressed interest is still lower than [six], the remaining places shall remain unfilled. The Scope Review Panel is established at the end of this process.

15. Where paragraph 8(a) applies, paragraph 14 shall not apply but a Scope Review Panel shall comprise:
- a. the Lead Tax Administration,
  - b. [three] tax administrations not in (a) from Listed Parties where, based on information provided by the Group,
    - i. for a Qualifying Extractives Group, the Group has a license in effect to explore for or exploit Minerals, Mineraloids and Hydrocarbons, or
    - ii. for a Group conducting Regulated Financial Services, the Group has employee headcount in Regulated Financial Institutions which amounts to at least [five percent] of total headcount in all the Group's Regulated Financial Institutions, and
  - c. [three] tax administrations from Listed Parties not in (a) or (b).

The tax administrations in (b) and (c) shall be selected at random from the Listed Parties that submitted an expression of interest. Where the number of Listed Parties from either of these categories that expressed interest in participating on the panel is equal to or lower than [three], places on the Panel within that category shall be allocated to Listed Parties from that category that expressed interest. To

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<sup>56</sup> Further work will be undertaken by the Inclusive Framework on ways to facilitate participation by all interested Inclusive Framework members in the Tax Certainty Framework.

fill the remaining places, the Competent Authority of the Lead Tax Administration shall, within [15 days] of the latest deadline for expressions of interest in paragraph 10 or paragraph 12 as applicable, notify the Competent Authorities of Listed Parties within the relevant category that did not already express interest of the unfilled places and seek a second round of expressions of interest, to be made within [15 days] of this notification. Unfilled places on the Panel shall be filled with tax administrations of Listed Parties of the relevant category that expressed interest during this second round, selected at random. Where after this second round of expressions, places on the Scope Review Panel remain unfilled, the remaining places shall be filled by tax administrations from other Listed Parties that submitted an expression of interest, selected at random. Where the total number of Listed Parties that expressed interest in participating on the panel after the second round of expressions of interest is lower than [six], the remaining places shall remain unfilled. The Scope Review Panel is established at the end of this process.

#### *Undertaking a Scope Certainty Review*

16. The Scope Review Panel or Lead Tax Administration shall conduct a Scope Certainty Review on behalf of all Listed Parties, to determine whether the Scope Certainty Documentation Package contains a correct application of the Convention to the Group. This shall consider issues with respect to:
  - a. the identification of the Ultimate Parent Entity and the definition of a Group,
  - b. the calculation of Revenues and application of the Revenue test,
  - c. the calculation of the Pre-Tax Profit Margin and application of the Profitability test,
  - d. where paragraph 8(a) applies, issues with respect to the application of rules on Qualifying Extractives Groups and Groups that conduct Regulated Financial Services, including:
    - i. whether the Group meets the definition of a Qualifying Extractives Group or Group that conducts Regulated Financial Services,
    - ii. the Group's methodology for demonstrating that it does not meet, as applicable,
      - (a) the non-Extractives revenue test,
      - (b) the non-Extractives segment revenue test,
      - (c) the non-RFS revenue test, or
      - (d) the non-RFS segment revenue test,
 and the application of the applicable test, if relevant, and
    - iii. the Group's methodology for determining, as applicable,
      - (a) non-Extractives Adjusted Profit Before Tax,
      - (b) non-Extractives Segment Adjusted Profit Before Tax,
      - (c) non-RFS Adjusted Profit Before Tax, or
      - (d) non-RFS Segment Adjusted Profit Before Tax,
 and the application of the non-Extractives profitability test, non-Extractives Segment profitability test, non-RFS profitability test, or non-RFS Segment profitability test, if relevant,
  - e. [where paragraph 8(b) applies, issues with respect to the application of rules on Segmentation, including:
    - i. the identification of one or more Disclosed Segments of the Group,

- ii. the Group's methodology for calculating Segment Revenues and application of the Segment Revenue test,
  - iii. the Group's methodology for calculating Segment Pre-Tax Profit Margin and application of the Segment Profitability test, and
  - iv. if the Group is a Qualifying Extractives Group or a Group that conducts Regulated Financial Services, the issues mentioned in sub-paragraph (d) as they relate to the Disclosed Segments,]
- f. Where paragraph 8(c) applies, issues with respect to the application of rules on Internal Fragmentations, including:
- i. the ownership structure of the Group,
  - ii. whether an Internal Fragmentation has occurred,
  - iii. whether the Group's Total Revenues and those of other Fragmented Groups resulting from the same Internal Fragmentation meet the revenue test, and
  - iv. whether failing the revenue test in Article 1(2)(a) of Title 1 of the Convention is one of the principal purposes of the Internal Fragmentation, and
- g. any other issues relevant to whether the Group is a Covered Group or a Disclosed Segment is a Covered Segment for the Period.
17. A Scope Review Panel or Lead Tax Administration should begin a Scope Certainty Review by the later of:
- a. [30 days] after the Competent Authority of the Lead Tax Administration exchanged the request for Scope Certainty with the Competent Authorities of Listed Parties, as described in paragraph 4,
  - b. [75 days] after the Competent Authority of the Lead Tax Administration notified the Competent Authorities of Parties that are not Listed Parties of the request for Scope Certainty, as described in paragraph 5,
  - c. where under paragraph 5 the Competent Authority of any Party notifies the Competent Authority of the Lead Tax Administration that it considers that it should be included on the list of Listed Parties, [30 days] after the end of the process in that paragraph, and
  - d. [30 days] after the establishment of a Scope Review Panel.

This deadline may be extended by up to [180 days] where the Coordinating Entity indicated in its request for Scope Certainty that financial statements or other documents relied upon in the Scope Certainty Documentation Package are likely to be amended and this would impact the application of the Convention for the Period. The Competent Authority of the Lead Tax Administration shall inform the Competent Authorities of all Listed Parties of the planned start date for this review, before the review is due to commence.

18. The Scope Review Panel or Lead Tax Administration may review and undertake enquiries concerning factual information contained in the Scope Certainty Documentation Package, or provided by the Coordinating Entity, to verify its accuracy. Unless otherwise agreed, all engagement with the Group throughout the Scope Certainty Process shall be conducted by the Lead Tax Administration through the Coordinating Entity. Where a need for additional relevant information or clarification is identified for the purposes of this Scope Certainty Review, including an explanation of the approach taken by the Group with respect to a particular aspect of its application of the Convention that was not included in the Scope Documentation Package, it shall be required from the Coordinating Entity by the Lead Tax Administration. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The

Coordinating Entity should be required to provide this information or clarification within [30 days], unless the Coordinating Entity provides a reasonable explanation as to why more time is needed and more time is agreed with the Lead Tax Administration.<sup>57</sup> In general, where provisions of the Convention require a Group to use information from its financial statements, and this information has been subject to independent audit, a Scope Review Panel or Lead Tax Administration shall not require changes to this information. Where a Group uses audited information in its Scope Certainty Documentation Package, and this information is subject to one or more adjustments for the purposes of the correct application of the Convention, whether these adjustments have been made and are correct may be subject to review, together with how the information is otherwise used for the purposes of applying the Convention.<sup>58</sup>

19. In several places, Articles of the Convention require that the price or other terms of transactions between Group Entities are consistent with the Arm's Length Principle. In undertaking a review under this Section, a Scope Review Panel or Lead Tax Administration shall not consider whether any particular transaction has been undertaken at arm's length or what the correct arm's length price would be, which are questions to be determined under the domestic law of tax jurisdictions, reflecting obligations under international agreements. Where it is determined under the domestic law of a Party, or in accordance with a process contained in an international agreement of a Party, that an adjustment to the price or other terms of a transaction is necessary for consistency with the Arm's Length Principle, the Scope Review Panel or Lead Tax Administration shall confirm that these adjustments have been correctly reflected to the extent and in the manner required under the Convention. Where such an adjustment is made after the end of the Period to which it relates, the effect of that adjustment shall be taken into account for the purposes of applying the Convention in the Period during which the adjustment is made and not that to which it relates.<sup>59</sup>
20. A Scope Certainty Review may include one or more multilateral meetings or calls between the Coordinating Entity and Scope Review Panel (where a review is undertaken by a Scope Review Panel) or Lead Tax Administration, where proposed by the Lead Tax Administration or any member of a Scope Review Panel. These meetings or calls provide an opportunity for the Coordinating Entity to explain the approach it took in applying the Convention in its Scope Certainty Documentation Package, respond to questions from Scope Review Panel members or the Lead Tax Administration, and provide additional information as required. To ensure transparency within the Scope Certainty Process, the Lead Tax Administration shall also provide the Coordinating Entity with high level updates as to the progress of the review. The timing and format of these updates may be agreed by the Lead Tax Administration, Scope Review Panel and Coordinating Entity. These updates shall not include any information as to the position of a particular Party, including members of the Scope Review Panel, without the agreement of that Party. Where members of the Scope Review Panel do not agree as to whether an aspect of the Group's application of the Convention is correct, or the Scope Review Panel or Lead Tax Administration proposes to recommend specified changes to the Scope Certainty Documentation Package, a multilateral meeting or call shall be held with the Coordinating Entity, to give the Coordinating Entity an opportunity to provide an explanation as to its approach. Wherever any

<sup>57</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and members hold different views as to whether a limit should be imposed on any extension that may be agreed to this deadline by the Lead Tax Administration.

<sup>58</sup> Further work will be undertaken by members of the Inclusive Framework to agree the precise scope of a review by a Scope Review Panel or Lead Tax Administration.

<sup>59</sup> Further work will be undertaken by members of the Inclusive Framework to consider how the effect of such an adjustment should be taken into account in the Period in which it is made, and whether there are any cases where an earlier Period should be re-opened and an adjustment taken into account in the Period to which the adjustment relates.

explanation is provided by the Coordinating Entity as to its approach to applying aspects of the Convention during a meeting or call with the Scope Review Panel or Lead Tax Administration, the explanation shall also be provided in writing within [30 days] after the meeting or call, using a standard template which includes a limit as to length, unless the Coordinating Entity provides a reasonable explanation as to why more time is needed and more time is agreed with the Lead Tax Administration.<sup>60</sup> The Lead Tax Administration and each member of a Scope Review Panel may take this explanation into account in reaching its own conclusion as to whether a change should be recommended.

21. At any point before the Scope Certainty Review is completed, the Competent Authority of any Listed Party may submit to the Competent Authority of the Lead Tax Administration details of any concerns it has with respect to the application of the Convention to the Group contained in the Scope Certainty Documentation Package and, if possible, propose resolutions to address these concerns. The Competent Authority of the Lead Tax Administration shall exchange these concerns and proposed resolutions with the Competent Authorities of all Listed Parties. The Scope Review Panel or Lead Tax Administration shall take these concerns and proposed resolutions into account in conducting its Scope Certainty Review and shall endeavour to resolve them as appropriate. Where appropriate, the Lead Tax Administration should request any relevant explanation from the Coordinating Entity under the process in paragraph 18, if this was not already provided as part of the Scope Certainty Documentation Package. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. To facilitate this process, Competent Authorities of Listed Parties should aim to provide details of these concerns as early as possible, even before the Scope Certainty Review is commenced. Early submission of such information, when possible, will be to the advantage of the Scope Certainty Review Process and all Listed Parties.
22. In conducting a Scope Certainty Review, the Scope Review Panel or Lead Tax Administration shall wherever appropriate take into account any Scope Certainty Outcomes or Comprehensive Certainty Outcomes agreed with respect to the Group for earlier Periods when the Group was found to be out of scope or within scope of the Convention. To facilitate this, the Lead Tax Administration should, to the extent possible, make available to the Scope Review Panel any information pertaining to a review for an earlier Period of the Group that is relevant to the current review. Where the Scope Review Panel or Lead Tax Administration proposes an amendment to a Scope Certainty Documentation Package that is inconsistent with an earlier agreed Scope Certainty Outcome or Comprehensive Certainty Outcome for the same Group, an explanation as to the reason why such an amendment is necessary for a correct application of the Convention, shall be included in the summary of outcomes of the Scope Certainty Review.
23. If, in the view of the Scope Review Panel or Lead Tax Administration, the Coordinating Entity is persistently late in providing information without explanation, or is acting in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, this issue shall be raised with the Coordinating Entity. A Coordinating Entity shall not be considered to have acted in an uncooperative or non-transparent manner where requested information or clarification is provided after the deadline in paragraph 18 or paragraph 20, if the Coordinating Entity informed the Lead Tax Administration of the reason for the delay before that deadline and the requested information or clarification is provided within the period agreed with the Lead Tax Administration. Where this issue is not resolved to the satisfaction of the Scope Review Panel members or Lead Tax Administration within

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<sup>60</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and members hold different views as to whether a limit should be imposed on any extension that may be agreed to this deadline by the Lead Tax Administration.

a reasonable period of being raised with the Coordinating Entity, a [two-thirds majority]<sup>61</sup> of Scope Review Panel members,<sup>62</sup> or the Lead Tax Administration where no Scope Review Panel was established, may conclude that a Scope Certainty Outcome cannot be provided. The Coordinating Entity shall be informed of this outcome by the Lead Tax Administration and the Scope Certainty Review Process shall come to an end without an agreed Scope Certainty Outcome. The Coordinating Entity or any other Group Entity shall not be permitted to submit a further request for certainty under this Section with respect to the same Period. The Competent Authorities of all Parties shall be informed of this outcome by the Competent Authority of the Lead Tax Administration and any restriction with respect to domestic compliance actions by Listed Parties for the Period under paragraph 6 shall cease to apply. The next time the Coordinating Entity submits a request for Scope Certainty it should provide written confirmation that the issues which resulted in the late provision of information or in it acting in an uncooperative or non-transparent manner have been addressed and will not recur.

24. A Scope Review Panel or Lead Tax Administration may develop further processes for the purposes of undertaking a Scope Certainty Review, so long as these are not inconsistent with any provisions of this Section.

*Agreeing the outcomes of a Scope Certainty Review*

25. A Scope Certainty Review shall be completed within [180 days] of it commencing pursuant to paragraph 17, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20 or for the resolution of issues under paragraph 23, in which case this deadline shall be extended by the same number of days as the delay under those paragraphs. This period is increased to [270 days] where any of the criteria in paragraph 8 apply. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which the Lead Tax Administration or any member of the Scope Review Panel has not reached a decision by this deadline,
- a. where a review is undertaken by a Scope Review Panel, the relevant member of the Panel shall be disregarded for the purposes of determining the outcomes of the review with respect to that aspect and, if all other members of the Scope Review Panel agree that the approach taken by the Coordinating Entity to that aspect is correct, or agree the change or changes that should be required to that aspect of the approach, the Scope Review Panel is treated as if it has reached agreement on this matter, and
  - b. where a review is undertaken by the Lead Tax Administration, the Lead Tax Administration shall be deemed to support the approach to that aspect taken by the Coordinating Entity in the Group's Scope Certainty Documentation Package.

The Lead Tax Administration will ensure that all members of a Panel are aware of this deadline, and are reminded as it approaches, to minimise the risk of a decision not being reached. The first time the Coordinating Entity of a Group submits a request for Scope Certainty under this Section, a review shall be completed within [270 days] after it commences, or within [360 days] after it commences if any of the criteria in paragraph 8 apply, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20 or for the resolution of issues under paragraph 23.

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<sup>61</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework. A number of members of the Inclusive Framework do not agree that a two-thirds majority should be required for such a conclusion to be reached, and consider that a simple majority should be sufficient.

26. Within [30 days] of this review ending, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Listed Parties a summary of the outcomes of the Scope Certainty Review, using the standard format contained in [to be agreed]. The summary of outcomes shall be accompanied by:
- a. a recommendation that Listed Parties agree a Scope Certainty Outcome reflecting the application of the Convention in the Scope Certainty Documentation Package as filed by the Coordinating Entity, that the Group is not a Covered Group for the Period,
  - b. a recommendation that Listed Parties agree a Scope Certainty Outcome reflecting specified changes to the approach in the Scope Certainty Documentation Package as filed by the Coordinating Entity, such that the Group is not a Covered Group for the Period,
  - c. a recommendation that Listed Parties agree a Scope Certainty Outcome reflecting specified changes to the approach in the Scope Certainty Documentation Package as filed by the Coordinating Entity, such that the Group is a Covered Group for the Period, or
  - d. a statement that the Scope Review Panel has been unable to reach agreement including all members on one or more matters with respect to the application of the Convention reflected in the Scope Certainty Documentation Package, identifying the aspects where:
    - i. the Scope Review Panel agrees that the application of the Convention reflected in the Scope Certainty Documentation Package is correct,
    - ii. the Scope Review Panel agrees specific changes that should be made to the Scope Certainty Documentation Package, and
    - iii. the Scope Review Panel has been unable to reach agreement, together with
      - (a) a description of the specific item or items in the Scope Certainty Documentation Package with respect to which the Scope Review Panel has been unable to reach agreement,
      - (b) a compilation of the different positions of the members of the Scope Review Panel, and
      - (c) the change to a numeric item or other outcome proposed by any member or members of the Scope Review Panel to address this issue or each of these issues.

Where there is any aspect of the approach taken by the Coordinating Entity with respect to which the Lead Tax Administration or any member of the Scope Review Panel was not able to reach a decision by the deadline in paragraph 25, the summary of outcomes shall include an explanation of this and the reasons given by the Lead Tax Administration or relevant member of the Panel as to why it was unable to reach a decision. The summary of outcomes shall be accompanied by any information or explanations not contained in the Group's Scope Certainty Documentation Package, provided by the Coordinating Entity which was relevant to the Scope Review Panel or Lead Tax Administration's recommendation or statement above.

27. Within [90 days] of the exchange in paragraph 26, the Competent Authority of a Listed Party may submit to the Competent Authority of the Lead Tax Administration written comments:
- a. agreeing with the recommendation of the Scope Review Panel or Lead Tax Administration,
  - b. disagreeing with the recommendation, together with
    - i. a description of the specific item or items in the Group's Scope Certainty Documentation Package, as filed or reflecting changes recommended by the Scope Review Panel or Lead Tax Administration, that the Competent Authority disagrees with,
    - ii. a paper explaining the Competent Authority's position as to why this item or each of these items reflects an incorrect application of the Convention, and

- iii. the change to a numeric item or other outcome proposed by the Competent Authority to address the issue or each of the issues raised by the Competent Authority, or
    - c. in cases where the Scope Review Panel has been unable to reach agreement including all members with respect to the application of the Convention reflected in the Scope Certainty Documentation Package,
      - i. agreeing with the position of the Scope Review Panel with respect to aspects where the panel did reach agreement,
      - ii. disagreeing with the position of the Scope Review Panel with respect to aspects where the panel did reach agreement, together with
        - (a) a description of the specific item or items in the Group's Scope Certainty Documentation Package, as filed or reflecting changes recommended by the Scope Review Panel, that the Competent Authority disagrees with,
        - (b) a paper explaining the Competent Authority's position as to why this item or each of these items reflects an incorrect application of the Convention, and
        - (c) the change to a numeric item or other outcome proposed by the Competent Authority to address this issue or each of these issues, and
      - iii. commenting on the positions of members of the Scope Review Panel with respect to aspects where the panel did not reach agreement, which may include a proposal for an alternative approach to resolve the disagreement, accompanied by an explanation of the Competent Authority's position as to why this approach reflects the correct application of the Convention.
28. Where a Competent Authority of a Listed Party submits written comments that are inconsistent with an earlier agreed Scope Certainty Outcome or Comprehensive Certainty Outcome for the same Group for a Period in which it was a Listed Party or an Affected Party, an explanation as to the reason why such comments are necessary for a correct application of the Convention must be provided.
29. Where the Competent Authority of a Listed Party does not submit any comments on a recommendation of the Scope Review Panel or Lead Tax Administration in accordance with paragraph 27, this shall be taken for the purposes of this Section as agreement with that recommendation.
30. Where the Competent Authority of a Listed Party has submitted written comments that disagree with the recommendation of the Scope Review Panel or Lead Tax Administration, or which propose an alternative approach to resolve disagreement between Scope Review Panel members, the Panel or Lead Tax Administration shall determine within [60 days] of the deadline for comments whether to adopt the Listed Party's proposal. If the Coordinating Entity has not previously provided a written explanation of its approach to the relevant issue, it shall be requested to provide such explanation within [30 days] following the start of this period. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The Scope Review Panel or Lead Tax Administration should only determine to adopt the Listed Party's proposal if in the view of the Panel or Lead Tax Administration this reflects a more correct application of the Convention. Even where this is the case, if the Scope Review Panel or Lead Tax Administration considers it likely that other Listed Parties will not agree the Listed Party's proposal, it should consider allowing the disagreement to progress directly to a Determination Panel for resolution. If a Scope Review Panel or Lead Tax Administration has not determined to accept the Listed Party's proposal at the end of [60 days], it shall be deemed not to accept this proposal.
- a. If the Scope Review Panel or Lead Tax Administration does adopt the Listed Party's proposal, the Competent Authority of the Lead Tax Administration shall within [30 days] of this decision being reached exchange with the Competent Authorities of all Listed Parties a revised recommendation

in accordance with paragraph 26, accompanied by any written explanation provided by the Coordinating Entity. Other Listed Parties may submit written comments in accordance with paragraph 27, which shall be limited to elements of the recommendation that have been revised. This is not a further opportunity to provide comments on elements that were included in the original recommendation. If the Competent Authority of one or more Listed Parties submit written comments disagreeing with the revised recommendation of the Scope Review Panel or Lead Tax Administration, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 2.4.

- b. If the Scope Review Panel or Lead Tax Administration does not accept the Listed Party's proposal, it shall consult with the Competent Authority of that Listed Party to explore whether, in light of the explanation provided by the Coordinating Entity and other information it can provide, the Listed Party is still of the opinion that changes are needed or wishes to withdraw its disagreement with the recommendation. This consultation may extend up to [30 days] following the decision not to adopt the Listed Party's proposal.

#### *Concluding a Scope Certainty Review Process*

31. If a Scope Review Panel reached agreement including all members and no Competent Authorities submitted written comments that disagreed with the recommendation of the Scope Review Panel or Lead Tax Administration by the deadline for comments, or if all such written comments are withdrawn following consultation, the Scope Certainty Process concludes with an agreed Scope Certainty Outcome in accordance with the recommendation of the Scope Review Panel or Lead Tax Administration. The Lead Tax Administration shall inform the Coordinating Entity of the agreed Scope Certainty Outcome within [30 days] of the conclusion of the Scope Certainty Review Process.
32. If this Scope Certainty Outcome includes a decision that the Group is a Covered Group for the Period, the Coordinating Entity shall be required to prepare a Common Documentation Package on the basis that the Group is a Covered Group and file this with the Lead Tax Administration by the later of:
  - a. the applicable filing deadline, or
  - b. [180 days] after the date the Coordinating Entity is informed of the Scope Certainty Outcome.

The requirement under paragraph 6 that Listed Parties suspend domestic compliance activities shall continue to apply until this deadline, at which time this requirement shall cease to apply. Where the Coordinating Entity submits a request for Comprehensive Certainty for the Period under Section 2.3.1, a requirement for all Parties to suspend domestic compliance activities under paragraph 4 of that Section shall apply.

33. If the Scope Review Panel did not reach agreement including all members, or if the Competent Authority of one or more Listed Parties submitted written comments disagreeing with the recommendation of the Scope Review Panel or Lead Tax Administration that were not subsequently withdrawn, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 2.4.

### **2.2.2. A Follow-Up Scope Certainty Review**

#### *Submitting a request for a Follow-Up Scope Certainty Review*

1. Where a Group is not a Covered Group, there may be a significant cost in collecting and presenting information to demonstrate that this is the case on an ongoing basis. Once a Group has requested and received an agreed Scope Certainty Outcome that it is not a Covered Group, there are therefore benefits in a Follow-Up Scope Certainty Review Process based on simplified documentation to provide

some Groups with certainty that they continue not to be a Covered Group without the need to file a full Scope Certainty Documentation Package, if this is not needed. As such, the Coordinating Entity of a Group may submit a request, filed with the Lead Tax Administration, for a Follow-Up Scope Certainty Review for a Period where:

- a. the Group considers that it is a Qualifying Extractives Group or a Group conducting Regulated Financial Services,
  - b. the Group has previously been subject to a Scope Certainty Review by a Scope Review Panel under Section 2.2.1 on the basis that paragraph 8(a) of that Section applies, which concluded with an agreed Scope Certainty Outcome that the Group was not a Covered Group for a Period, and
  - c. the Group has not been a Covered Group in any Period since the Period mentioned in subparagraph (b).
2. A request under paragraph 1 shall be made by the deadline in paragraph 1 of Section 2.2.1, and shall include a list of Listed Parties from which Scope Certainty is sought, prepared by the Coordinating Entity. The process for a Party to be added to this List described in paragraph 5 of Section 2.2.1 shall apply.
3. A request must be in the format and with the content specified in [to be agreed] and be accompanied by a complete Follow-Up Scope Certainty Documentation Package. The request shall include agreement by the Coordinating Entity,
- a. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Listed Parties:
    - i. the request and Follow-Up Scope Certainty Documentation Package filed by the Coordinating Entity,
    - ii. any other information or documentation provided by the Coordinating Entity for the purposes of the Follow-Up Scope Certainty Review,
    - iii. in the event the Coordinating Entity withdraws its request for Follow-Up Scope Certainty or is deemed to do so, notification that this has occurred, and
    - iv. in the event that a Follow-Up Scope Certainty Review concludes with an agreed Scope Certainty Outcome, notification that this has occurred including the details of that Scope Certainty Outcome,
  - b. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Parties that are not Listed Parties:
    - i. the identification of the requesting Group and Coordinating Entity, the request, and notification the request has been accepted, and
    - ii. in the event the Coordinating Entity withdraws its request for Follow-Up Scope Certainty or is deemed to do so, notification that this has occurred, and
    - iii. in the event that a Follow-Up Scope Certainty Review concludes with an agreed Scope Certainty Outcome, notification that this has occurred including whether if it was agreed that the Group is not a Covered Group, and
  - c. to other exchanges of information between the Competent Authority of the Lead Tax Administration and the Competent Authority of a Listed Party for the purposes of the Follow-Up Scope Certainty Review.

Otherwise, the conditions and consequences of a request described in paragraphs 1 to 6 of Section 2.2.1 shall apply to a request under paragraph 1 of this Section. All exchanges of information

within the Tax Certainty Framework described in this Part shall take place under exchange of information provisions under the Convention and the information exchanged will be subject to confidentiality requirements.

*Undertaking a Follow-Up Scope Certainty Review*

4. The Lead Tax Administration or Scope Review Panel shall conduct a Follow-Up Scope Certainty Review on behalf of all Listed Parties to determine whether, based on information in the Follow-Up Scope Certainty Documentation Package the Group continues not to be a Covered Group and a Scope Certainty Outcome should be agreed on this basis. Where there is a period of at least seven years between the first day of the last Period for which a review was undertaken by a Scope Review Panel and the first day of the Period to which the request under paragraph 1 relates, and a review is proposed by any Listed Party under the process described in paragraph 11 of Section 2.2.1, a review shall be undertaken by a Scope Review Panel. Otherwise the review shall be undertaken by the Lead Tax Administration.
5. Issues considered as part of a Follow-Up Scope Certainty Review include:
  - a. changes to the Group's entities or activities that mean the Group may no longer be a Qualifying Extractives Group or Group conducting Regulated Financial Services,
  - b. [changes to the Group's Disclosed Segments, including whether a new Disclosed Segment is likely to be a Covered Segment,]
  - c. where the Group previously did not meet the non-Extractives revenue test or non-RFS revenue test, any increase in non-Extractives revenues or non-RFS revenues and whether this increase is likely to be sufficient to suggest the Group may now meet the applicable revenue test,
  - d. where the Group previously did not meet the non-Extractives Segment revenue test or non-RFS segment revenue test, any increase in non-Extractives Segment revenues or non-RFS Segment revenues of a Disclosed Segment and whether this increase is likely to be sufficient to suggest the Disclosed Segment may now meet the applicable revenue test,
  - e. where the Group previously met, or is now likely to meet, the non-Extractives revenue test or non-RFS revenue test, but previously did not meet the non-Extractives profitability test or non-RFS profitability test, any increase in non-Extractives or non-RFS revenues or reduction in non-Extractives or non-RFS costs, including those of any Disclosed Segment, and whether taken together these changes are likely to be sufficient to suggest the Group may now meet the applicable profitability test,
  - f. where the Group previously met, or is now likely to meet, the non-Extractives segment revenue test or non-RFS Segment revenue test, but previously did not meet the non-Extractives Segment profitability test or non-RFS Segment profitability test, any increase in non-Extractives Segment revenues or non-RFS Segment revenues, or reduction in non-Extractives segment costs or non-RFS Segment costs, of the Covered Segment, and whether taken together these changes are likely to be sufficient to suggest the Covered Segment may now meet the applicable profitability test, and
  - g. any other changes in the Group's entities, activities or revenues that could be relevant to the application of rules for the exclusion of revenues and profits of a Qualifying Extractives Group or Group conducting Regulated Financial Services.
6. A Scope Review Panel or Lead Tax Administration should begin a Follow-Up Scope Certainty Review by the later of:

- a. [30 days] after the Competent Authority of the Lead Tax Administration exchanged the request for Follow-Up Scope Certainty with the Competent Authorities of Listed Parties as described in paragraph 4 of Section 2.2.1,
- b. [75 days] after the Competent Authority of the Lead Tax Administration notified the Competent Authorities of Parties that are not Listed Parties of the request for Scope Certainty, as described in paragraph 5 of Section 2.2.1,
- c. where under paragraph 5 of Section 2.2.1 the Competent Authority of any Party notifies the Competent Authority of the Lead Tax Administration that it considers that it should be included on the list of Listed Parties, [30 days] after the end of the process in that paragraph, and
- d. [30 days] after the establishment of a Scope Review Panel.

The Competent Authority of the Lead Tax Administration shall inform the Competent Authorities of all Listed Parties of the planned start date for this review, before the review is due to commence.

7. If, in the view of the Scope Review Panel or Lead Tax Administration at any point during its review, it is likely that:
  - a. it will not recommend to Listed Parties that the Group is not a Covered Group, or
  - b. Listed Parties will not agree that the Group is not a Covered Group,
 the Lead Tax Administration shall inform the Coordinating Entity.
8. Where paragraph 7 applies, the Coordinating Entity:
  - a. may take no action and allow the Follow-Up Scope Certainty Review to continue, or
  - b. may withdraw its request for a Follow-Up Scope Certainty review and,
    - i. prepare a complete Scope Certainty Documentation Package and file this with the Lead Tax Administration within [90 days] together with a request for Scope Certainty, or
    - ii. prepare a Common Documentation Package on the basis that the Group is a Covered Group and file this with the Lead Tax Administration within [180 days].

Where the Coordinating Entity plans to take the action in (b) it should inform the Lead Tax Administration as early as possible. Where this is the case, the Follow-Up Scope Certainty Review shall end with no agreed Scope Certainty Outcome and the Competent Authority of the Lead Tax Administration shall inform the Competent Authorities of all Parties. If the Coordinating Entity subsequently submits a request for Scope Certainty for the same Period, that Scope Certainty Review may in some cases be completed more quickly in light of work that has already been undertaken as part of the Follow-Up Scope Certainty Review process.

9. Paragraphs 18 to 24 of the process for undertaking a Scope Certainty Review in Section 2.2.1 also apply to a Follow-Up Scope Certainty Review, with necessary modifications.

#### *Agreeing the outcomes of a Follow-Up Scope Certainty Review*

10. A Follow-Up Scope Certainty Review shall be completed within [270 days] of it commencing, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20 of Section 2.2.1 or for the resolution of issues under paragraph 23 of that Section, in which case this deadline shall be extended by the same number of days as the delay under those paragraphs. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which the Lead Tax Administration or any member of the Scope Review Panel has not reached a decision by this deadline,

- a. where a review is undertaken by a Scope Review Panel, the relevant member of the Panel shall be disregarded for the purposes of determining the outcomes of the review with respect to that aspect and, if all other members of the Scope Review Panel agree that the approach taken by the Coordinating Entity to that aspect is correct, or agree the change or changes that should be required to that aspect of the approach, the Scope Review Panel is treated as if it has reached agreement on this matter, and
- b. where a review is undertaken by the Lead Tax Administration, the Lead Tax Administration shall be deemed to support the approach to that aspect taken by the Coordinating Entity in the Group's Follow-Up Scope Certainty Documentation Package.

The Lead Tax Administration will ensure that all members of a Panel are aware of this deadline, and are reminded as it approaches, to minimise the risk of a decision not being reached.

11. Within [30 days] of this review ending, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Listed Parties a summary of the outcomes of the Follow-Up Scope Certainty Review, using the standard format contained in [to be agreed]. The summary of outcomes shall be accompanied by:
  - a. a recommendation that Listed Parties agree with the conclusion in the Group's Follow-Up Scope Certainty Documentation Panel that the Group continues not to be a Covered Group and that no further action shall be taken,
  - b. a recommendation that the conclusion in the Group's Follow-Up Scope Certainty Documentation Package cannot be agreed on the basis of the information available, or
  - c. where the review is undertaken by a Scope Review Panel, a statement that the Scope Review Panel has been unable to reach agreement including all members, identifying the aspects of the Group's Follow-Up Scope Certainty Document Package with respect to which agreement could not be reached, together with a compilation of the different positions of the members of the Scope Review Panel.

Where there is any aspect of the approach taken by the Coordinating Entity with respect to which the Lead Tax Administration or any member of the Scope Review Panel was not able to reach a decision by the deadline in paragraph 10, the summary of outcomes shall include an explanation of this and the reasons given by the Lead Tax Administration or relevant member of the Panel as to why it was unable to reach a decision. The summary of outcomes shall be accompanied by any information or explanations not contained in the Group's Follow-Up Scope Certainty Documentation Package, provided by the Coordinating Entity which was relevant to the Lead Tax Administration's recommendation above.

12. Paragraphs 27 to 30 of Section 2.2.1 on the process for agreeing the outcomes of a Scope Certainty Review also apply to a Follow-Up Certainty Review, with necessary modifications.

#### *Concluding a Follow-Up Scope Certainty Review Process*

13. If no Competent Authorities of Listed Parties submitted written comments that disagreed with the recommendation of the Scope Review Panel or Lead Tax Administration by the deadline for comments, or if all such written comments are withdrawn following consultation, the Follow-Up Scope Certainty Process concludes with an agreed Scope Certainty Outcome in accordance with the recommendation of the Scope Review Panel or Lead Tax Administration. The Lead Tax Administration shall inform the Coordinating Entity of the agreed Scope Certainty Outcome within [30 days] of the conclusion of the Follow-Up Scope Certainty Review Process.

14. Where paragraph 13 applies, if the Scope Review Panel or Lead Tax Administration recommended that the conclusion in the Group's Follow-Up Scope Certainty Documentation Package cannot be agreed on the basis of the information available, the Coordinating Entity shall:
- a. prepare a complete Scope Certainty Documentation Package and file this with the Lead Tax Administration within [90 days] together with a request for Scope Certainty, or
  - b. prepare a Common Documentation Package on the basis that the Group is a Covered Group and file this with the Lead Tax Administration by the later of:
    - i. the applicable filing deadline, or
    - ii. [180 days] after the date the Coordinating Entity is informed of the Scope Certainty Outcome.

If the Coordinating Entity subsequently submits a request for Scope Certainty for the same Period, this Scope Certainty Review may in some cases be completed more quickly in light of work that has already been undertaken as part of the Follow-Up Scope Certainty Review process.

15. The requirement under paragraph 6 of Section 2.2.1 that Listed Parties suspend domestic compliance activities shall continue to apply until:
- a. the Coordinating Entity files a Scope Certainty Documentation Package and request for Scope Certainty in accordance with paragraph 14(a), or
  - b. if (a) does not apply, the deadline in paragraph 14(b).
16. Where the Coordinating Entity submits a request for Scope Certainty under Section 2.2.1, a new requirement under paragraph 6 of that Section for Listed Parties to suspend domestic compliance activities shall apply. Where the Coordinating Entity submits a request for Comprehensive Certainty under Section 2.3.1, a requirement under paragraph 4 of that Section for all Parties to suspend domestic compliance activities shall apply. If the Competent Authority of one or more Listed Parties submitted written comments disagreeing with the recommendation of the Scope Review Panel or Lead Tax Administration that were not subsequently withdrawn, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 2.4.

## 2.3. Certainty over a Covered Group's application of the Convention

### 2.3.1. Requests for Certainty by a Covered Group

#### *Submitting a request for a Comprehensive Certainty Review*

1. A Coordinating Entity of a Covered Group may submit a request to the Parties, filed with the Lead Tax Administration, for multilateral certainty with respect to the application of the Convention to its Group for a Period specified in the request (Comprehensive Certainty). The request shall be in a format set out in [to be agreed] and shall include agreement by the Coordinating Entity,
  - a. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Affected Parties:<sup>63</sup>
    - i. the request and Common Documentation Package filed by the Coordinating Entity,
    - ii. any other information or documentation provided by the Coordinating Entity for the purposes of the Comprehensive Certainty Review,
    - iii. in the event the Coordinating Entity withdraws its request for Comprehensive Certainty or is deemed to do so, notification that this has occurred,
    - iv. in the event that a Comprehensive Certainty Process concludes with an agreed Comprehensive Certainty Outcome, notification that this has occurred including the details of that Comprehensive Certainty Outcome, and
    - v. in the event the agreed Comprehensive Certainty Outcome ceases to apply, notification that this has occurred,
  - b. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Parties that are not Affected Parties:
    - i. the identification of the requesting Covered Group and Coordinating Entity, the request, and notification the request has been accepted,
    - ii. in the event the Coordinating Entity withdraws its request for Comprehensive Certainty or is deemed to do so, notification that this has occurred,
    - iii. in the event that a Comprehensive Certainty Process concludes with an agreed Comprehensive Certainty Outcome, notification that this has occurred, but not the details of that Comprehensive Certainty Outcome, and
    - iv. in the event the agreed Comprehensive Certainty Outcome ceases to apply, notification that this has occurred, and
  - c. to other exchanges of information between the Competent Authority of the Lead Tax Administration and the Competent Authority of an Affected Party for the purposes of the Comprehensive Certainty Review.

All exchanges of information within the Tax Certainty Framework described in this Part shall take place under exchange of information provisions within the Convention and the information exchanged will be subject to confidentiality requirements.

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<sup>63</sup> Final rules will include a process for a Party to notify the Lead Tax Administration that it considers itself to be an Affected Party for the Period. Once developed, this will be included under Administration rather than the Tax Certainty Framework as it is also applicable in cases where Comprehensive Certainty is not requested.

2. A request for Comprehensive Certainty shall be filed along with the Group's Common Documentation Package for the Period, including an explanation of the approach taken by the Coordinating Entity with respect to applying [key aspects of the Convention to be agreed] and other aspects of the Convention at the option of the Coordinating Entity, together with [confirmation in a form to be agreed] that all Group Entities agree to the content of the Common Documentation Package and to any changes agreed by the Coordinating Entity. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The Common Documentation Package shall include further content set out in [to be agreed]. The Common Documentation Package shall also include confirmation that any Critical Assumptions with respect to an Advance Certainty Outcome that applies for the Period continue to be met, with supporting documentation [to be agreed] to evidence this, or a description of any changes as to these Critical Assumptions.
3. A request for Comprehensive Certainty that meets the conditions in paragraph 1 and paragraph 2 shall be accepted by the Lead Tax Administration on behalf of all Parties, and the Lead Tax Administration shall notify the Coordinating Entity of this acceptance. Where the Coordinating Entity has not provided some of the content agreed by the Parties, the Lead Tax Administration shall notify the Coordinating Entity within [30 days] of the request being filed, and require the missing content be provided within [60 days] following this notification. Where the missing content is not received by this deadline the Coordinating Entity shall be deemed to have withdrawn its request for Comprehensive Certainty. This deadline may be extended by a further [90 days] with the agreement of the Lead Tax Administration.
4. The tax administrations of all Parties shall suspend all domestic compliance activities with respect to the application of Titles 2 to 5 and paragraphs [to be agreed] of Title 6 of the Convention<sup>64</sup> to the Group for the Period specified in a request under paragraph 1, for the duration of the Comprehensive Certainty Process. While a Comprehensive Certainty Process is underway, a tax administration may take the minimum procedural steps required to protect its ability to undertake compliance activity, such as opening an enquiry on a protective basis, but may not take substantive action such as requesting information from a taxpayer or issuing a tax assessment. Nothing in this paragraph requires a Party to suspend compliance activity:
  - a. after a request for Comprehensive Certainty is withdrawn or is deemed to be withdrawn,
  - b. after a Comprehensive Certainty Review was concluded without an agreed Comprehensive Certainty Outcome as the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner,
  - c. with respect to any matters not covered by the Convention, or
  - d. with respect to Related Issues.
5. The request and Common Documentation Package filed by the Coordinating Entity shall be exchanged by the Competent Authority of the Lead Tax Administration with the Competent Authorities of Affected Parties by the later of [standard exchange deadline to be agreed] or [30 days] after the Common Documentation Package is filed with the Lead Tax Administration.
6. Where a request for Comprehensive Certainty is accepted before the Common Documentation Package is exchanged, the Competent Authority of the Lead Tax Administration shall include with that exchange:
  - a. notification that the request is accepted and a review shall be undertaken, and

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<sup>64</sup> These references shall be updated once the Convention is agreed and will refer to all Parts of the Convention containing the substantive rules concerning the calculation and allocation of Amount A and the elimination of double taxation, as well as the administration of Amount A.

- b. one of the following:
  - i. if any of the circumstances described in sub-paragraphs (a) to (d)(i) of paragraph 1 of Section 2.3.2 applies, notification that the review shall be undertaken by a Review Panel,
  - ii. if there is a period of at least [five] years between the first day of the last Period for which a review was undertaken by a Review Panel and the first day of the Period for which Comprehensive Certainty is requested, notification that a proposal by an Affected Party that the review be undertaken by a Review Panel should be submitted to the Lead Tax Administration within [30 days], or
  - iii. notification that the review shall be undertaken by the Lead Tax Administration.
- 7. Where a request for Comprehensive Certainty has not been accepted by the deadline for the exchange of the Common Documentation Package in paragraph 5, the Competent Authority of the Lead Tax Administration shall include with that exchange an explanation that the request has not yet been accepted and a description of the content that was missing from the application. Within [30 days] after the deadline in paragraph 3, the Competent Authority of the Lead Tax Administration shall:
  - a. if the Coordinating Entity provides the missing content to the Lead Tax Administration by the deadline in paragraph 3, notify the Coordinating Entity that the request is accepted and exchange this content with the Competent Authorities of Affected Parties, together with the information mentioned paragraph 6, or
  - b. notify the Competent Authorities of Affected Parties that the Coordinating Entity is deemed to withdraw its request for Comprehensive Certainty.
- 8. Where the Competent Authority of the Lead Tax Administration informs the Competent Authorities of Affected Parties as described in paragraph 6 or paragraph 7(a) that a request for Comprehensive Certainty has been accepted, the Competent Authority of the Lead Tax Administration shall exchange the request with the Competent Authorities of Parties that are not Affected Parties and notify them that the request has been accepted and that the provisions of paragraph 4 concerning the suspension of domestic compliance activities with respect to the application of the Convention apply. This ensures that a Group that has requested Comprehensive Certainty under this Section is not subject to any domestic compliance activity with respect to its application of the Convention for the Period covered by the request.

*Submitting a request for an Advance Certainty Review*

- 9. When a Coordinating Entity submits a Group's Common Documentation Package for a Period, this may be accompanied by a request for multilateral certainty with respect to one or more of its approaches listed in paragraph 10, to commence from a future Period specified in the request (Advance Certainty). The request shall be in a format set out in [to be agreed] and shall include agreement by the Coordinating Entity,
  - a. to the exchange of the following information by the Competent Authority of the Lead Tax Administration with Competent Authorities of Affected Parties:
    - i. the request and Advance Certainty Documentation Package filed by the Coordinating Entity,
    - ii. any other information or documentation provided by the Coordinating Entity for the purposes of the Advance Certainty Review,
    - iii. in the event the Coordinating Entity withdraws its request for Advance Certainty or is deemed to do so, notification that this has occurred,

- iv. in the event that an Advance Certainty Process concludes with an agreed Advance Certainty Outcome, notification that this has occurred including the details of that Advance Certainty Outcome, and
  - v. in the event the agreed Advance Certainty Outcome ceases to apply, notification that this has occurred, and
- b. to other exchanges of information between the Competent Authority of the Lead Tax Administration and the Competent Authority of an Affected Party for the purposes of the Advance Certainty Review.

All exchanges of information within the Tax Certainty Framework described in this Part shall take place under exchange of information provisions in the Convention and the information exchanged will be subject to confidentiality requirements.

10. A request for Advance Certainty under paragraph 9 may be with respect to one or more of the following proposed approaches of the Group:<sup>65</sup>
- a. the Group's proposed Revenue Sourcing approach, comprising:
    - i. its categorisation of revenues for the purposes of applying rules on revenue sourcing, and
    - ii. its choice of reliable method for sourcing revenue from each category to jurisdictions,
  - b. the Group's proposed Extractives Revenues and Profits Approach, comprising:
    - i. its categorisation of revenues and costs for the purposes of applying rules on the exclusion of revenues and profits of Qualifying Extractives Groups, and
    - ii. its methodology for determining non-Extractives Adjusted Profit Before Tax or non-Extractives Segment Adjusted Profit Before Tax (as applicable), or
  - c. the Group's proposed RFS Revenues and Profits Approach, comprising:
    - i. its categorisation of revenues and costs for the purposes of applying rules on the exclusion of revenues and profits of Groups conducting Regulated Financial Services, and
    - ii. its methodology for determining non-RFS Adjusted Profit Before Tax or non-RFS Segment Adjusted Profit Before Tax (as applicable).

Parties may agree to add further approaches to those in this paragraph, to enable Advance Certainty to be requested across more aspects of the Convention and related controls.

11. A request shall be accompanied by an Advance Certainty Documentation Package with content set out in [to be agreed], including an explanation of the proposed approach by the Coordinating Entity with respect to applying [key aspects of the Convention to be agreed] and other aspects of the Convention at the option of the Coordinating Entity. A Coordinating Entity's explanation of its proposed approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The Advance Certainty Documentation package shall include a list of Proposed Critical Assumptions for each of the proposed approaches included in the request for Advance Certainty. These Proposed Critical Assumptions shall in any event include<sup>66</sup>:
- a. with respect to a Group's proposed Revenue Sourcing Approach, a statement that no material changes from the Group's Advance Certainty Documentation Package will be made to:

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<sup>65</sup> The specific aspects of rules on Amount A to which Advance Certainty may apply shall be reviewed as these rules are finalised.

<sup>66</sup> The specific items to be included in the Proposed Critical Assumptions will be reviewed as rules are finalised.

- i. the Group's main business activities,
  - ii. the Group's transactions giving rise to Revenues that are not Excluded Revenues, including
    - (a) the nature of the goods or services provided,
    - (b) the profile of customers, where relevant to the categorisation of transactions, and
    - (c) the approach used to distribute goods or services to customers, and
  - iii. the design and operation relevant elements of the Group's internal control framework to ensure the correct application of the proposed Revenue Sourcing Approach and the reliability of information reported.
- b. with respect to a Group's proposed Extractives Revenues and Profits Approach, a statement that no material changes from the Group's Advance Certainty Documentation Package will be made to:
- i. the Group's business activities giving rise to non-Extractives revenues, and the entities carrying out those activities,
  - ii. the Group's Disclosed Segments and accounting policies relevant to the treatment of these Disclosed Segments, and
  - iii. the design and operation of relevant elements of the Group's internal control framework to ensure the correct application of the proposed Extractives Revenues and Profits Approach and the reliability of information reported.
- c. with respect to a Group's proposed RFS Revenues and Profits Approach, a statement that no material changes from the Group's Advance Certainty Documentation Package will be made to:
- i. the Group's business activities giving rise to non-RFS revenues, and the entities carrying out those activities,
  - ii. the Group's Disclosed Segments and accounting policies relevant to the treatment of these Disclosed Segments, and
  - iii. the design and operation of relevant elements of the Group's internal control framework to ensure the correct application of the proposed RFS Revenues and Profits Approach and the reliability of information reported.

For each Proposed Critical Assumption, the Advance Certainty Documentation Package shall include a description of the Group's existing or proposed position which, once agreed, will be used to benchmark whether a Critical Assumption continues to be met.

12. The Competent Authority of the Lead Tax Administration shall exchange the request under paragraph 9 and Advance Certainty Documentation Package with the Competent Authorities of Affected Parties by the later of [standard deadline for the exchange of the Common Documentation Package to be agreed] or [30 days] after the Advance Certainty Documentation Package is filed with the Lead Tax Administration.

### **2.3.2. Certainty Reviews by a Review Panel on behalf of the Parties**

#### *General provisions*

##### **Conditions for a review by a Review Panel**

1. A panel of tax administrations of Affected Parties (the Review Panel) shall be established to undertake a Comprehensive Certainty Review, where a request for Comprehensive Certainty is accepted in accordance with the process in this Section, and
  - a. this is the first time the Group has made a request for Comprehensive Certainty that has been accepted,
  - b. all previous reviews undertaken by a Review Panel for earlier Periods of the Group ended without an agreed Comprehensive Certainty Outcome, because either:
    - i. the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, or
    - ii. the Coordinating Entity withdrew its request for tax certainty before a Comprehensive Certainty Outcome was agreed,
  - c. in cases where (b) does not apply, the review by a Review Panel or Lead Tax Administration for the most recent Period for which the Group submitted a request for Comprehensive Certainty concluded without an agreed Comprehensive Certainty Outcome as the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, or
  - d. the first day of the Period to which the request for Comprehensive Certainty relates is at least [five] years<sup>67</sup> after the first day of the most recent Period for which a review was undertaken by a Review Panel,<sup>68</sup> and
    - i. the Competent Authority of the Lead Tax Administration notified the Competent Authorities as described in paragraph 6 or paragraph 7 of Section 2.3.1 that a review by a Review Panel is proposed by the Lead Tax Administration, or
    - ii. within [30 days] of the exchange mentioned in paragraph 6 or paragraph 7 of Section 2.3.1, the Competent Authority of an Affected Party submits to the Competent Authority of the Lead Tax Administration a proposal that a review by a Review Panel be undertaken.

Where none of these conditions are met, a Comprehensive Certainty Review for a Period shall be undertaken by the Lead Tax Administration under Section 2.3.3.

2. Where the Competent Authority of an Affected Party submits comments under the process in paragraph 1(d)(ii) proposing a review by a Review Panel, the Competent Authority of the Lead Tax

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<sup>67</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and that some members hold the view that a Comprehensive Certainty Review should be undertaken by a Review Panel of Affected Parties also upon trigger events. Work will be undertaken by members of the Inclusive Framework on the possible design of such trigger events.

<sup>68</sup> During a transitional period, an objective process shall apply to spread the second Review Panel reviews of Covered Groups between two years and five years after the first Review Panel review. Thereafter, the [five] year period specified in paragraph 1(d) shall apply. This will reduce the risk of a bunching of Review Panels every [five] years, which should improve the efficiency and effectiveness of the Comprehensive Certainty Review Process as a whole.

Administration shall, within [30 days] after the deadline for comments in that sub-paragraph, notify the Competent Authorities of all Affected Parties that such a review shall be undertaken.

3. A Review Panel shall also be established to undertake an Advance Certainty Review, where a request for Advance Certainty is accepted under Section 2.3.1. Where a Coordinating Entity files a Common Documentation Package for a Period and submits both a request for Comprehensive Certainty for that Period and a request for Advance Certainty for a future Period, the same Review Panel shall undertake both reviews. In these circumstances, while both reviews shall be undertaken within the timeframes in this Part, the Review Panel may determine to prioritise work on an Advance Certainty Review, which will provide a Group with certainty for a number of future Periods.

#### **Review panel composition**

4. Where a Review Panel is to be established under this Section, the Competent Authority of the Lead Tax Administration shall invite Competent Authorities of Affected Parties to submit within [60 days] an expression of interest for the tax administration of that Affected Party to participate on the Review Panel. An Affected Party should only express interest in participating on a Review Panel if its tax administration is committed to taking an active role on the Review Panel and applying sufficient resources to ensure this is possible.
5. For the purposes of undertaking a review or reviews under this Section, a Review Panel shall comprise:
  - a. the Lead Tax Administration,
  - b. the tax administrations of [three] Affected Parties not in (a) that, based on information in the Common Documentation Package, are required to provide relief for the elimination of double taxation, and
  - c. the tax administrations of [three] Affected Parties not in (a) or (b).
6. The tax administrations in (b) and (c) shall be selected at random from the Affected Parties that submitted an expression of interest.<sup>69</sup> Where the number of Affected Parties from either of these categories that expressed interest in participating on the panel is equal to or lower than [three], places on the Panel within that category shall be allocated to Affected Parties from that category that expressed interest. To fill the remaining places, the Competent Authority of the Lead Tax Administration shall, within [15 days] of the deadline for expressions of interest notify the Competent Authorities of Affected Parties within the relevant category that did not already express interest of the unfilled places and seek a second round of expressions of interest, to be made within [15 days] of this notification. Unfilled places on the Panel shall be filled with tax administrations of Affected Parties of the relevant category that expressed interest during this second round, selected at random. Where after this second round of expressions, places on the Review Panel remain unfilled, the remaining places on the Panel shall be filled by tax administrations from other Affected Parties that submitted an expression of interest, selected at random. Where the total number of Affected Parties that expressed interest in participating on the panel after the second round of expressions of interest is lower than [six], the remaining places shall remain unfilled. A Review Panel shall be established within [30 days] after the latest deadline for expressions of interest.

#### **Establishing an Expert Advisory Group of systems specialists**

7. Whenever a Review Panel is established under this Section to undertake:

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<sup>69</sup> Further work will be undertaken by the Inclusive Framework on ways to facilitate participation by all interested Inclusive Framework members in the Tax Certainty Framework.

- a. an Advance Certainty Review, or
- b. a Comprehensive Certainty Review for a Period for which,
  - i. an agreed Advance Certainty Outcome over a Group's Revenue Sourcing Approach does not apply,
  - ii. a Group is a Qualifying Extractives Group and an agreed Advance Certainty Outcome over the Group's Extractives Revenues and Profits Approach does not apply, or
  - iii. a Group undertakes Regulated Financial Services and an agreed Advance Certainty Outcome over the Group's RFS Revenues and Profits Approach does not apply,

an Expert Advisory Group of systems specialists shall be established to undertake a review of aspects of a Group's internal control framework described in paragraph 13 or paragraph 47, as relevant, and provide advice to the Review Panel as to whether this framework is reliable or if any improvements are needed in order it be considered reliable. An Expert Advisory Group shall be established by the deadline for the establishment of a Review Panel under paragraph 6. Where none of the conditions in (i), (ii) or (iii) are met but, during the course of a Comprehensive Certainty Review, the Review Panel decides under paragraph 26 that an agreed approach has not been implemented or has not been correctly applied, or Critical Assumptions are no longer met, an Expert Advisory Group shall be established at that time. In such a case the work of the Expert Advisory Group shall be limited to aspects of a Group's internal control framework relevant to elements of an Advance Certainty Outcome affected by that decision.

8. An Expert Advisory Group shall comprise:
- a. one systems specialist selected by the Lead Tax Administration from the Main Systems Specialist Pool, who will act as Chair of the Expert Advisory Group, and
  - b. [two] further systems specialists from different Affected Parties, selected from the Main Systems Specialist Pool at random.<sup>70</sup>

#### **Establishing a pool of systems specialists for an Expert Advisory Group**

A review of relevant aspects of a Group's internal control framework will require an analysis of elements of the Group's controls, its business and financial management systems and its enterprise resource planning software. As such, it is essential that a review is undertaken by tax officials with specific training and expertise in this area, which will provide advice to the Review Panel.

Such a review should be undertaken by a Group of systems specialists drawn from a pool of tax officials with experience in undertaking systems reviews of Groups, nominated by Parties to the Convention. Criteria that nominated specialists are expected to meet shall be agreed by the Parties, but it is for each Party to determine whether its nominated specialists meet these criteria.

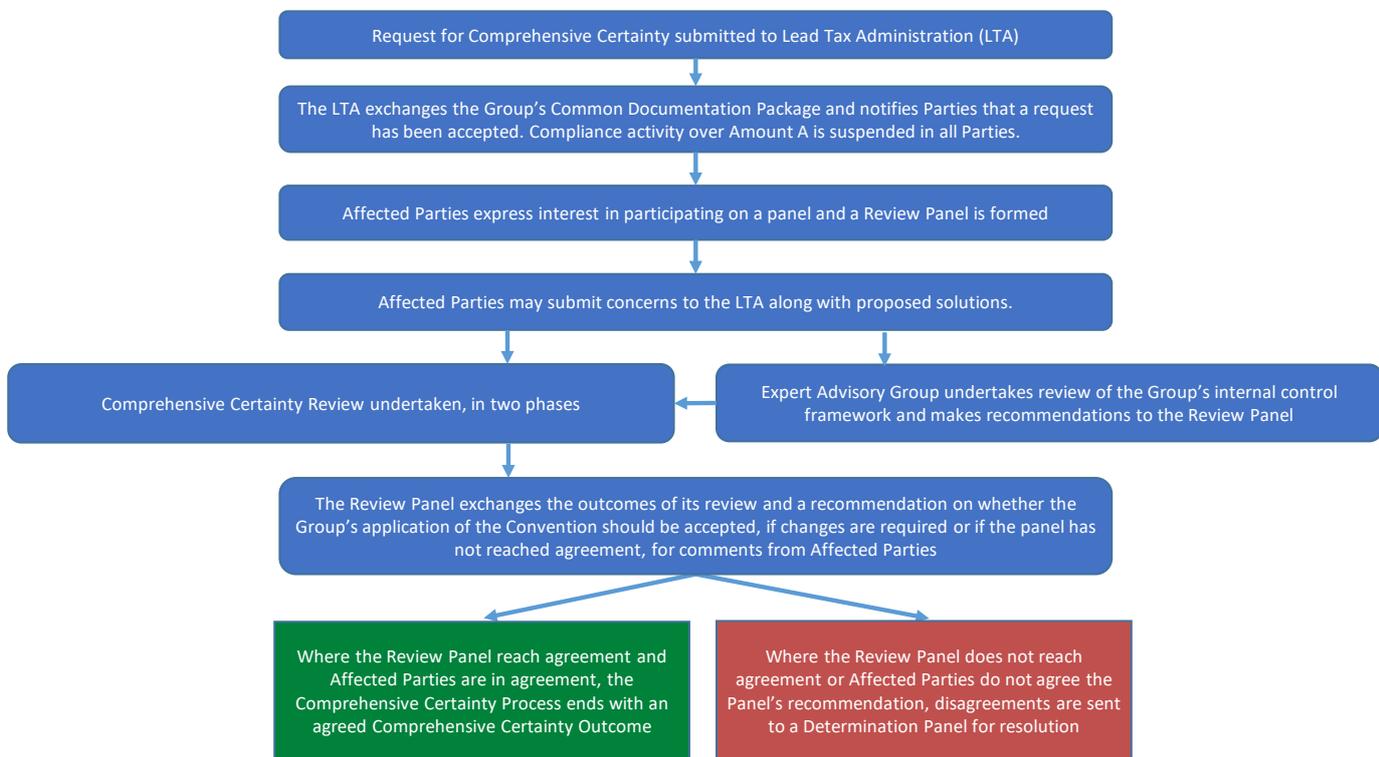
There is no limit to the number of nominations a Party may make, but only one specialist from a particular tax administration, shall be added to the Main Systems Specialist Pool. Other specialists from the same tax administration shall be added to the Substitute Systems Specialist Pool. Members of the Substitute Pool shall participate on Advisory Groups where the member of the Main Pool from the selected Party is not available. This ensures that the likelihood of a specialist from a particular tax administration being selected at random is balanced, without limiting the total number of eligible specialists available. The

<sup>70</sup> As noted in the Background, commentators should note that this does not reflect the final or consensus views of the Inclusive Framework with different views held by members with respect to the composition and number of experts in the Expert Advisory Group, as well as criteria for the nomination of systems specialists to the Main Systems Specialist Pool and the Substitute Systems Specialist Pool.

tax administration of an eligible specialist must agree to give the official delegated competent authority status for the purposes of undertaking duties connected to a review, including the exchange of information under the Convention.

It is recognised that in the first years of applying rules for Amount A not all Parties may feel they have tax officials with the training and experience needed to meet the agreed criteria. Specific capacity building may be put in place to provide training to tax officials in conducting a review of a Group’s internal control framework. Tax officials from Affected Parties participating on a Review Panel may also be permitted to act as observers to work of an Expert Advisory Group for that particular review, to gain experience. In such a case, an observer would be subject to the same confidentiality requirements as tax officials participating on the Review Panel, including with respect to information obtained by its tax administration under exchange of information provisions in the Convention. Once the Party feels that the observer has gained sufficient experience, it could nominate the official to the Main Systems Specialist Pool or Substitute Systems Specialist Pool as appropriate. This should help to ensure that the number of eligible systems specialists in the pool, and participation by different tax administrations, will increase over time.

*A Comprehensive Certainty Review by a Review Panel*



**Undertaking a Comprehensive Certainty Review**

9. A Comprehensive Certainty Review shall commence on a date agreed by the Review Panel. The Competent Authority of the Lead Tax Administration shall inform the Competent Authorities of all Affected Parties not on the Review Panel of the agreed start date for its review before the review is due to commence. In general, a review should commence within [90 days] of the Competent Authority of the Lead Tax Administration notifying the Competent Authorities of Parties that a request for

certainty was accepted, as described in paragraph 6 or paragraph 7 of Section 2.3.1, though this deadline may be extended by up to [180 days] with the agreement of the Review Panel where the Coordinating Entity included in its request for Comprehensive Certainty a statement that financial statements or other documents relied upon in the Common Documentation Package are likely to be amended and this would impact the application of the Convention for the Period. In any case, a review should not commence until any review by a Review Panel or Lead Tax Administration that has already commenced under this Section or Section 2.3.3 for an earlier Period of the Group is completed.<sup>71</sup>

10. Where a request for Comprehensive Certainty is accepted in circumstances where:

- a. a request for Comprehensive Certainty has been accepted with respect to one or more earlier Periods of the Group for which a review has not commenced, or
- b. a request for Comprehensive Certainty is accepted with respect to one or more later Periods of the Group before the review by the Review Panel has commenced,

all members of the Review Panel may agree by consensus that the Review Panel shall undertake the reviews for up to [four] additional Periods, from those most closely preceding or most closely following the Period for which the Review Panel was established, simultaneously with the review for that Period. Where there are more than [four] earlier Periods of the Group for which a review has not yet Commenced, the review by the Review Panel shall not commence until the reviews for the additional earlier Periods are completed.

11. The Review Panel shall undertake a review on behalf of all Parties, coordinated by the Lead Tax Administration, to determine whether the Common Documentation Package filed by the Coordinating Entity reflects a correct application of all relevant aspects of the Convention to the Group in all Parties. Where a Scope Certainty Review or Follow-Up Scope Certainty Review for the same Period concluded with an agreed Scope Certainty Outcome, an Affected Party, including a member of the Review Panel, that was a Listed Party for that Scope Certainty Review, should not propose changes that are inconsistent with that Scope Certainty Outcome unless this is necessary for a correct application of the Convention, in which case this shall be explained.

12. A review by a Review Panel shall begin with a first phase considering issues with respect to whether a Group is a Covered Group, and those concerning elements of the Group's application of the Convention that form the basis upon which revenues will be sourced to Affected Parties and an allocation of Profit Before Tax and Elimination of Double Taxation will be made. These include:<sup>72</sup>

- a. the definition of a Group,
- b. the application of the Global Revenue threshold and Profitability threshold,
- c. the treatment of Disclosed Segments,
- d. the determination and treatment of Excluded Revenues,
- e. the calculation of Profit Before Tax,
- f. the categorisation of transactions and choice of Reliable Method for the purposes of Revenue Sourcing, and

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<sup>71</sup> Nothing in this paragraph shall prevent or delay the exchange of a Group's Common Documentation Package for the Period with Affected Parties.

<sup>72</sup> The matters to be included in the first phase of a review shall be reconsidered as the structure and content of rules is agreed.

- g. jurisdiction-level financial statements for the purposes of applying rules on [the Marketing and Distribution Profits Safe Harbour and the Elimination of Double Taxation].
13. In parallel with the first phase of a Review Panel review in paragraph 12, the Expert Advisory Group shall undertake a review of aspects of the Group's internal control framework relevant to matters listed in paragraph 10 of Section 2.3.1, if applicable, with respect to which an agreed Advance Certainty Outcome does not apply, to determine whether in the view of the Expert Advisory Group members it is robust and can be relied upon to ensure the accuracy of information reported. This review shall not include any other aspects of a Group's internal control framework. To the extent matters listed in paragraph 10 of Section 2.3.1 require the use of information taken from a Group's financial statements, and this information has been subject to independent audit, no changes shall be required to aspects of an internal control framework responsible for ensuring the accuracy of this information. Where matters listed in paragraph 10 of Section 2.3.1 require information that is not taken from a Group's financial statements, where information has not been audited, or where information taken from a Group's audited financial statements is subject to adjustment or is used in undertaking calculations for the purposes of applying the Convention, the Expert Advisory Group shall review aspects of a Group's internal control framework responsible for ensuring the accuracy of this information, these adjustments and these calculations, to determine whether they can be relied upon or whether different or additional controls are needed. The fact that the same controls are used by a Group to ensure the accuracy of information prepared for a different purpose may provide the Expert Advisory Group with some level of comfort but does not necessarily mean those controls are appropriate for the purposes of Amount A. As part of this review, the Expert Advisory Group shall consider any opinion provided by the Group's auditors or advisers, but is not bound by such an opinion. A review may also include multilateral meetings or calls involving relevant experts from the Group, its auditors or advisers, members of the Expert Advisory Group and the Lead Tax Administration to discuss the design and operation of relevant aspects of the Group's internal control framework, and to obtain evidence that these aspects can be relied upon to ensure the accurate reporting of information on the relevant matters covered by paragraph 10 of Section 2.3.1. Where the Expert Advisory Group identifies aspects of this internal control framework relevant to matters within the scope of its review that may not be robust or reliable it shall discuss its findings with the Review Panel to obtain evidence from the Coordinating Entity to determine whether the framework is in fact robust and can be relied upon.<sup>73</sup>
14. The Lead Tax Administration and Chair of the Expert Advisory Group shall cooperate to ensure that the reviews in paragraph 12 and paragraph 13 are coordinated, so that progress on one review can be taken into account in ongoing work on the other review. At the end of the review of the Group's internal control framework, the Chair of the Expert Advisory Group shall provide a report to the Review Panel setting out the work the Expert Advisory Group has undertaken and, as a result of this work, whether in the view of the Expert Advisory Group relevant aspects of the internal control framework are robust or reliable and whether it recommends changes or additional controls to be introduced for future Periods. These recommended improvements should not require any changes to the Group's existing framework beyond those which are needed for the relevant aspect to be considered robust and reliable. The report will also highlight any differences in opinion between members of the Expert Advisory Group. The Competent Authority of the Lead Tax Administration shall share the Advisory Group's conclusions and any recommendations with the Competent Authorities of all Affected Parties. Where the Review Panel does not accept the recommendations of the Expert Advisory Group this will be explained by the Review Panel in the summary of outcomes of its review. Future Comprehensive

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<sup>73</sup> Further work will be undertaken by members of the Inclusive Framework to agree the precise scope of a review by an Expert Advisory Group.

Certainty Reviews will consider whether changes or additional controls recommended by the Expert Advisory Group and accepted by the Review Panel have been introduced.

15. The first phase of a review by a Review Panel described in paragraph 12 shall be followed by a second phase, considering all other elements of the Group's application of the Convention for the Period, including:<sup>74</sup>
  - a. the identification of Parties in which the Group meets the applicable Nexus threshold,
  - b. the allocation of Profit Before Tax to Affected Parties,
  - c. [the application of rules on the impact of withholding taxes,]<sup>75</sup> and
  - d. the Elimination of Double Taxation.
16. At the end of the first phase of a review under paragraph 12, members of the Review Panel shall agree among themselves whether to progress directly to the second phase under paragraph 15, or to seek comments from Affected Parties on the outcomes of the first phase and resolution of any disagreements before progressing to the second phase. Factors the Review Panel should take into account in reaching this decision include:
  - a. whether the Review Panel agrees the approach taken by the Group in its Common Documentation Package with respect to the elements covered in the first phase of its review,
  - b. where there is disagreement between members of the Review Panel as to one or more of the elements covered in the first phase, the nature of these disagreements and the likely impact on the Panel's ability to undertake the second phase of its review without these disagreements having been resolved,
  - c. where concerns have been raised by Affected Parties with respect to elements covered in the first phase which the Review Panel has not been able to address, the nature of these concerns and the likely impact on the Panel's ability to undertake the second phase of its review without any potential disagreements having been identified and resolved, and
  - d. the impact of the extension of the Comprehensive Certainty Review process and the delay to an agreed Comprehensive Certainty Outcome for the Group if comments are sought from Affected Parties and disagreements resolved before progressing to the second phase.

In general, a review should progress directly to a second phase unless, in the view of the Review Panel, the delay in sub-paragraph (d) can be justified in light of the other factors above and any other factors the Review Panel considers relevant.

17. Where a Review Panel agrees to progress directly to the second phase, it shall ensure that its review of the matters described in paragraph 15 includes the computations undertaken by the Group in its Common Documentation Package. This will ensure that, where numerical changes are subsequently required to the Group's Common Documentation Package as a result of disagreements over matters considered in the first phase of the review, the impact of these changes on matters considered in the second phase can be agreed quickly.

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<sup>74</sup> The matters to be included in the second phase of a review shall be reconsidered as the structure and content of rules is agreed.

<sup>75</sup> As explained at paragraph 5 of the Overview to the July Progress Report, that progress report does not deal with the implications of withholding taxes and further consideration will be given to this question. The inclusion of the application of rules on the impact of withholding taxes within a Comprehensive Certainty Review will also depend upon the outcome of those considerations.

18. The Review Panel and Expert Advisory Group may review and undertake enquiries concerning factual information contained in the Common Documentation Package or provided by the Coordinating Entity, to verify its accuracy. Unless otherwise agreed, all engagement with the Group throughout the Comprehensive Certainty Process shall be conducted by the Lead Tax Administration through the Coordinating Entity. Where a need for additional information or clarification is identified for the purposes of this review, including an explanation of the approach taken by the Group with respect to a particular aspect of its application of the Convention that was not included in the Common Documentation Package, it shall be required from the Coordinating Entity by the Lead Tax Administration. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. In general the Coordinating Entity should be required to provide this information or clarification within [30 days], unless the Coordinating Entity provides a reasonable explanation as to why more time is needed and more time is agreed with the Lead Tax Administration.<sup>76</sup> In general, where provisions of the Convention require a Group to use information from its financial statements, and this information has been subject to independent audit, a Review Panel or Lead Tax Administration shall not require changes to this information. Where a Group uses audited information in its Common Documentation Package, and this information is subject to one or more adjustments for the purposes of the correct application of the Convention, whether these adjustments have been made and are correct may be subject to review, together with how the information is otherwise used for the purposes of applying the Convention.<sup>77</sup>
19. In several places, Articles of the Convention require that the price or other terms of transactions between Group Entities are consistent with the Arm's Length Principle. In undertaking a review under this Section, a Review Panel shall not consider whether any particular transaction has been undertaken at arm's length or what the correct arm's length price would be, which are questions to be determined under the domestic law of tax jurisdictions, reflecting obligations under international agreements. Where it is determined under the domestic law of a Party, or in accordance with a process contained in an international agreement of a Party, that an adjustment to the price or other terms of a transaction is necessary for consistency with the Arm's Length Principle, the Review Panel shall confirm that these adjustments have been correctly reflected to the extent and in the manner required under the Convention. Where such an adjustment is made after the end of the Period to which it relates, the effect of that adjustment shall be taken into account for the purposes of applying the Convention in the Period during which the adjustment is made and not that to which it relates.<sup>78</sup>
20. A Comprehensive Certainty Review may include one or more multilateral meetings or calls between the Coordinating Entity and Review Panel or Lead Tax Administration, where proposed by the Lead Tax Administration or any member of the Review Panel. These meetings or calls would provide an opportunity for the Coordinating Entity to explain the approach it took in applying the Convention in its Common Documentation Package, respond to questions from Review Panel members or the Lead Tax Administration, and provide additional information as required. Where an Expert Advisory Group has been established to review aspects of a Group's internal control framework, these multilateral meetings or calls, if undertaken, shall include opportunities for discussion between members of the Review Panel, Expert Advisory Group and relevant technical experts within the Group. To ensure

<sup>76</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and members hold different views as to whether a limit should be imposed on any extension that may be agreed to this deadline by the Lead Tax Administration.

<sup>77</sup> Further work will be undertaken by members of the Inclusive Framework to agree the precise scope of a review by a Review Panel, Expert Advisory Group or Lead Tax Administration.

<sup>78</sup> Further work will be undertaken by members of the Inclusive Framework to consider how the effect of such an adjustment should be taken into account in the Period in which it is made, and whether there are any cases where an earlier Period should be re-opened and an adjustment taken into account in the Period to which the adjustment relates.

transparency within the Comprehensive Certainty Process, the Lead Tax Administration shall also provide the Coordinating Entity with high level updates as to the progress of the review. The timing and format of these updates may be agreed by the Lead Tax Administration, Review Panel and Coordinating Entity. These updates shall not include any information as to the position of a particular Party, including members of the Review Panel, without the agreement of that Party. Where members of the Review Panel do not agree as to whether an aspect of the Group's application of the Convention is correct, or the Review Panel proposes to recommend specified changes to the Common Documentation Package, a multilateral meeting or call shall be held with the Coordinating Entity, to give the Coordinating Entity an opportunity to provide an explanation as to its approach. Wherever any explanation is provided by the Coordinating Entity as to its approach to applying aspects of the Convention during a meeting or call with the Review Panel, the explanation shall also be provided in writing within [30 days] after the meeting or call, using a standard template which includes a limit as to length, unless the Coordinating Entity provides a reasonable explanation as to why more time is needed and more time is agreed with the Lead Tax Administration.<sup>79</sup> The Lead Tax Administration and each member of a Review Panel may take this explanation into account in reaching its own conclusion as to whether a change should be recommended.

21. At any point before a review by the Review Panel and Expert Advisory Group is completed, the Competent Authority of any Affected Party not participating on the Review Panel may submit to the Competent Authority of the Lead Tax Administration details of any concerns it has with respect to the application of the Convention to the Group reflected in the Common Documentation Package and, if possible, propose resolutions to address these concerns. The Competent Authority of the Lead Tax Administration shall exchange these concerns and proposed resolutions with the Competent Authorities of all Affected Parties. The Review Panel and Expert Advisory Group shall take these concerns and proposed resolutions into account in conducting the review and shall endeavour to resolve them as appropriate. Where appropriate, the Lead Tax Administration should request any relevant explanation from the Coordinating Entity under the process in paragraph 18, if this was not already provided as part of the Common Documentation Package. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. To facilitate this process within the applicable timeframe, Competent Authorities of Affected Parties should aim to provide details of these concerns as early as possible, even before the Review Panel and Expert Advisory Group commence their reviews. Early submission of such information, when possible, will be to the advantage of the Comprehensive Certainty Review Process and all Affected Parties.
22. The Review Panel shall endeavour to reach agreement including all members as to whether each aspect of the Common Documentation Package reflects a correct application of the Convention or if amendments should be required. Where it becomes clear to the Review Panel that, despite its endeavours, the panel is unlikely to reach such agreement on a particular aspect of a Common Documentation Package, discussions on that aspect should cease without agreement having been reached. The Review Panel shall endeavour to reach agreement including all members on other aspects of the Common Documentation Package, even if the consequence of this lack of agreement on one particular aspect is that the Review Panel is unable to agree numerical elements.
23. In conducting a review, the Review Panel and Expert Advisory Group shall wherever appropriate take into account any Comprehensive Certainty Outcomes agreed with respect to the Group for earlier Periods. To facilitate this, the Lead Tax Administration should, to the extent possible, make available to the Review Panel and Expert Advisory Group any information pertaining to a review for an earlier

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<sup>79</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and members hold different views as to whether a limit should be imposed on any extension that may be agreed to this deadline by the Lead Tax Administration.

Period of the Group that is relevant to the current review. Where the Review Panel proposes a recommendation that is inconsistent with earlier agreed Comprehensive Certainty Outcomes for the same Group, an explanation as to the reason why this is necessary for a correct application of the Convention shall be included in the summary of outcomes of the review.

24. The Review Panel shall not propose a change to an amount in a Group's Common Documentation package which does not meet any of the following conditions, which apply separately, unless all members of the Review Panel agree that such a change is necessary for a correct application of the Convention.<sup>80</sup>
- a. If the change is to the calculation of a Group's Revenues under Title 7,
    - i. it would alter Revenues or Adjusted Profit Before Tax by at least [one percent],
    - ii. it would alter the allocation of a Group's Adjusted Profit Before Tax under Article 6 of Title 4, to any Affected Party by at least [five percent], or
    - iii. it would alter the relief for the elimination of double taxation to be provided by any Affected Party under Title 5 by at least the lower of:
      - (a) [five percent] of the amount of relief to be provided by that Affected Party, and
      - (b) [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period.
  - b. If the change is to the calculation of a Group's Adjusted Profit Before Tax under Article 5 of Title 4,
    - i. it would alter Adjusted Profit Before Tax by at least [one percent],
    - ii. it would alter the allocation of a Group's Adjusted Profit Before Tax under Article 6 of Title 4, to any Affected Party by at least [five percent], or
    - iii. it would alter the relief for the elimination of double taxation to be provided by any Affected Party under Title 5 by at least the lower of:
      - (a) [five percent] of the amount of relief to be provided by that Affected Party, and
      - (b) [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period.
  - c. If the change is to the allocation of a Group's Adjusted Profit Before Tax under Article 6 of Title 4, it would alter the allocation to any Affected Party by at least [five percent].
  - d. If the change is to the allocation of the obligation to provide relief for the elimination of double taxation under Title 5, it would alter the relief to be provided by any Affected Party by at least the lower of:
    - i. [five percent] of the amount of relief to be provided by the Affected Party, and
    - ii. [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period.
25. Where an Advance Certainty Outcome agreed following a previous review applies for the Period, the Review Panel may review the confirmation and supporting evidence provided by the Coordinating Entity in the Group's Common Documentation Package, to confirm that an agreed approach has been

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<sup>80</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and that members hold different views as to the design of a *de minimis* threshold and whether such a threshold should apply to any adjustments proposed by a Review Panel when undertaking a Comprehensive Certainty Review under this Section.

implemented by the Group and has been correctly applied, and that Critical Assumptions agreed as part of that Advance Certainty Outcome continue to be met. The Review Panel shall not otherwise consider issues covered by the Advance Certainty Outcome unless the Coordinating Entity, the Lead Tax Administration or any Affected Party provides information that indicates an agreed approach may not have been implemented or may not have been correctly applied, or that agreed Critical Assumptions may no longer be met, based on:

- a. information contained in the Group's Common Documentation Package,
  - b. information provided by the Coordinating Entity following a request under paragraph 18 or during a multilateral meeting or call under paragraph 20, or
  - c. other information held by the Lead Tax Administration or Affected Party.
26. Where in the view of the Review Panel, an agreed approach has not been implemented or has not been correctly applied, or Critical Assumptions are no longer met, the review by the Review Panel under paragraph 12 and paragraph 15 shall be undertaken on the basis that affected elements of the Advance Certainty Outcome do not apply. This does not mean that the approach applied in the Group's Common Documentation Package is incorrect, but that it should be considered as part of the review. Other elements of the Advance Certainty Outcome that are not affected continue to apply as agreed.
27. Where an Advance Certainty Outcome does not apply, if the Review Panel concludes:
- a. that one or more of the Group's approaches to the categorisation of revenues is incorrect,
  - b. that one or more of the indicators used by the Group to source revenues to tax jurisdictions is not a Reliable Indicator, or
  - c. that an indicator is a Reliable Indicator but that, based on the conclusions of the Expert Group, the Group's internal control framework is not sufficiently robust and reliable to ensure a correct application of the indicator,

the Review Panel may propose that the relevant category or categories of revenues be sourced using a different Reliable Method. Notwithstanding this, the Review Panel shall not recommend the use of a different Reliable Indicator for a Period that has already ended unless the Coordinating Entity first confirms that the Group has access to information for this indicator to be a Reliable Indicator for the Period. Where the Group does not have access to this information the Review Panel may recommend that the Reliable Method used by the Group is accepted or that an alternative approach is taken for the Period under review. The summary of outcomes of the review should include an explanation of this and a statement that, in the view of the Review Panel, the different Reliable Indicator should be used by the Group in future Periods. If this approach is agreed by Affected Parties or by a decision of a Determination Panel under Section 2.4, the view that the different Reliable Indicator should be used by the Group in future Periods shall be included in the agreed Comprehensive Certainty Outcome for the Period.

28. Where a request for Comprehensive Certainty is accompanied by a request for Advance Certainty, the outcomes of the Comprehensive Certainty Review and Advance Certainty Review with respect to the same provisions of the Convention or the same elements of a Group's internal control framework, for example with respect to the correct categorisation of revenues, should be consistent unless there is a specific reason for reaching a different conclusion. Where such a reason exists, this should be explained in the outcomes of the reviews.
29. If, in the view of the Review Panel, the Coordinating Entity is persistently late in providing information to the Lead Tax Administration without explanation, or is acting in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, this issue shall be raised with the Coordinating Entity. A Coordinating Entity shall not be considered to have acted in an uncooperative

or non-transparent manner where requested information or clarification is provided after the deadline in paragraph 18 or paragraph 20, if the Coordinating Entity informed the Lead Tax Administration of the reason for the delay before that deadline and the requested information or clarification is provided within the period agreed with the Lead Tax Administration. Where this issue is not resolved to the satisfaction of the Review Panel members within a reasonable period of being raised with the Coordinating Entity, a [two-thirds majority]<sup>81</sup> of Review Panel members may conclude that a Comprehensive Certainty Outcome cannot be provided.<sup>82</sup> The Coordinating Entity shall be informed of this outcome by the Lead Tax Administration and the Comprehensive Certainty Process shall be brought to an end without an agreed Comprehensive Certainty Outcome. The Coordinating Entity or any other Group Entity shall not be permitted to submit a further request for Comprehensive Certainty with respect to the Period for which a Comprehensive Certainty Outcome was not provided pursuant to this paragraph. The Competent Authorities of all Parties shall be informed of this outcome by the Competent Authority of the Lead Tax Administration and any restriction with respect to domestic compliance activities for the Period under Section 2.3.1 shall cease to apply. The next time the Coordinating Entity submits a request for Comprehensive Certainty it should provide written confirmation that the issues which resulted in the late provision of information or in it acting in an uncooperative or non-transparent manner have been addressed and will not recur.

30. A Review Panel may develop and agree further processes for the purposes of undertaking a review, so long as these are not inconsistent with any provisions of this Section.

#### **Agreeing the outcomes of a Comprehensive Certainty Review**

31. The first phase of a Comprehensive Certainty Review shall be completed within [240 days] of the review commencing, the second phase shall be completed within [120 days] and an entire review including both phases within [360 days] after it commences, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20, for the resolution of issues under paragraph 29, in which case this deadline shall be extended by the same number of days as the delay under those paragraphs. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which any member of the Review Panel has not reached a decision by this deadline, the relevant member shall be disregarded for the purposes of determining the outcomes of the review with respect to that aspect and, if all other members of the Review Panel agree that the approach taken by the Coordinating Entity to that aspect is correct, or agree the change or changes that should be required to that aspect of the approach, the Review Panel is treated as if it has reached agreement on this matter. The Lead Tax Administration will ensure that all members of a Panel are aware of this deadline, and are reminded as it approaches, to minimise the risk of a decision not being reached. The first time the Coordinating Entity of a Group submits a request for Comprehensive Certainty under Section 2.3.1, the first phase of a review under this Section shall be completed within [300 days], the second phase shall be completed within [180 days] and an entire review including both phases within [480 days] after it commences, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20, or for the resolution of issues under paragraph 29.
32. Within [30 days] of the review ending, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Affected Parties a summary of the outcomes of the

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<sup>81</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework. A number of members of the Inclusive Framework do not agree that a two-thirds majority should be required for such a conclusion to be reached, and consider that a simple majority should be sufficient.

<sup>82</sup> For example, where a Review Panel includes seven tax administrations, five of these tax administrations should agree that a Comprehensive Certainty Outcome cannot be provided.

Review Panel's review, with the content and prepared using the standard format in [to be agreed] and agreed with all members of the Review Panel, together with the report prepared by the Chair of the Expert Advisory Group containing the outcomes of the review of the Group's internal control framework. This may be done,

- a. within [30 days] following the end of the second phase of a review, covering the outcomes of both phases, or
- b. separately, within [30 days] following the end of the first phase of a review covering the outcomes of the first phase, and within [30 days] following the end of the second phase of a review covering the outcomes of the second phase.

33. The summary of outcomes shall be accompanied by:

- a. a recommendation that Affected Parties agree the application of the Convention reflected in the Common Documentation Package as filed by the Coordinating Entity,
- b. a recommendation that Affected Parties agree specified changes to the application of the Convention reflected in the Common Documentation Package, which the Coordinating Entity should be required to reflect in an amended Common Documentation Package, or
- c. a statement that the Review Panel has been unable to reach agreement including all members on one or more matters with respect to the application of the Convention reflected in the Common Documentation Package.

Where there is any aspect of the approach taken by the Coordinating Entity with respect to which any member of the Review Panel was not able to reach a decision by the deadline in paragraph 31, the summary of outcomes shall include an explanation of this and the reasons given by the relevant member of the Panel as to why it was unable to reach a decision. The summary of outcomes shall also be accompanied by any information or explanations provided by the Coordinating Entity that were not contained in the Group's Common Documentation Package and were relevant to the Review Panel's recommendation, the Expert Advisory Group's recommendation to the Review Panel, or to the positions of Panel members where no agreement was reached.

34. Where the Review Panel has been unable to reach agreement including all members over one or more matters with respect to the application of the Convention reflected in the Common Documentation Package, the summary of outcomes of the review should clearly identify the aspects where:

- a. the Review Panel agrees that the application of the Convention reflected in the Common Documentation Package is correct,
- b. the Review Panel agrees specific changes that should be made to the Common Documentation Package, and
- c. the Review Panel has been unable to reach agreement including all members, together with
  - i. a description of the specific item or items in the Group's Common Documentation Package with respect to which the Review Panel has been unable to reach agreement,
  - ii. a compilation of the different positions of the members of the Review Panel, and
  - iii. the change to a numeric item or other outcome proposed by any member or members of the Review Panel to address this issue or each of these issues.

35. Within [90 days] of the exchange of the summary of outcomes of the review by the Review Panel, the Competent Authority of an Affected Party may submit to the Competent Authority of the Lead Tax Administration written comments:

- a. agreeing with the recommendation of the Review Panel,

- b. disagreeing with the recommendation of the Review Panel, together with
  - i. a description of the specific item or items in the Group's Common Documentation Package, as filed or reflecting changes recommended by the Review Panel, that the Competent Authority disagrees with,
  - ii. a paper explaining the Competent Authority's position as to why this item or each of these items reflects an incorrect application of the Convention, along with the financial impact or description of the potential financial impact of the item on its jurisdiction and
  - iii. the change to a numeric item or other outcome proposed by the Competent Authority to address this issue or each of these issues, or
- c. in cases where the Review Panel has been unable to reach agreement including all members with respect to the application of one or more provisions of the Convention reflected in the Common Documentation Package,
  - i. agreeing with the position of the Review Panel with respect to aspects where the panel did reach agreement,
  - ii. disagreeing with the position of the Review Panel with respect to aspects where the panel did reach agreement, together with
    - (a) a description of the specific item or items in the Group's Common Documentation Package, as filed or reflecting changes recommended by the Review Panel, that the Competent Authority disagrees with,
    - (b) a paper explaining the Competent Authority's position as to why this item or each of these items reflects an incorrect application of the Convention along with the financial impact or description of the potential financial impact of the item on its jurisdiction, and
    - (c) the change or adjustment to a numeric item or other outcome proposed by the Competent Authority to address this issue or each of these issues, and
  - iii. commenting on the positions of members of the Review Panel with respect to aspects where the panel did not reach agreement, which may include a proposal for an alternative approach to resolve the disagreement, accompanied by an explanation of the Competent Authority's position as to why this item or each of these items reflects the correct application of the Convention, along with the financial impact or description of the potential financial impact on its jurisdiction.

36. A Competent Authority of an Affected Party shall not submit written comments:

- a. that disagree with the recommendation or the position of the Review Panel unless it is able:
  - i. to identify a financial impact in its tax jurisdiction or,
  - ii. if it is not possible to identify a specific financial impact, for example where comments concern the categorisation of revenues or choice of Reliable Method, to describe a potential financial impact in its tax jurisdiction,
- b. that propose a change to an amount in a Group's Common Documentation package unless this meets any of the following conditions, which apply separately: <sup>83</sup>
  - i. if the change is to the calculation of a Group's Revenues under Title 7,

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<sup>83</sup> Commentators should note that this Progress Report does not reflect the final or consensus views of the Inclusive Framework and that members hold different views as to the design of a *de minimis* threshold.

- (a) it would alter Revenues or Adjusted Profit Before Tax by at least [one percent],
  - (b) it would alter the allocation of a Group's Adjusted Profit Before Tax to that Affected Party under Article 6 of Title 4 by at least [five percent], or
  - (c) it would alter the relief for the elimination of double taxation to be provided by that Affected Party under Title 5 by at least the lower of:
    - (1) [five percent] of the amount of relief to be provided by that Affected Party, and
    - (2) [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period,
- ii. if the change is to the calculation of a Group's Adjusted Profit Before Tax under Article 5 of Title 4,
- (a) it would alter Adjusted Profit Before Tax by at least [one percent],
  - (b) it would alter the allocation of a Group's Adjusted Profit Before Tax to that Affected Party under Article 6 of Title 4 by at least [five percent], or
  - (c) it would alter the relief for the elimination of double taxation to be provided by that Affected Party under Title 5 by at least the lower of:
    - (1) [five percent] of the amount of relief to be provided by that Affected Party, and
    - (2) [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period,
- iii. if the change is to the allocation of a Group's Adjusted Profit Before Tax under Article 6 of Title 4, it would alter the allocation to that Affected Party by at least [five percent], and
- iv. if the change is to the allocation of the obligation to provide relief for the elimination of double taxation under Title 5, it would alter the relief to be provided by that Affected Party by at least the lower of:
- (a) [five percent] of the amount of relief to be provided by that Affected Party, and
  - (b) [one percent] of the total amount of relief to be provided by all Affected Parties for the elimination of double taxation for the Period,

with the exception that nothing in this sub-paragraph shall prevent the Competent Authority of an Affected Party submitting written comments that disagree with a change to an amount in a Group's Common Documentation Package proposed by the Review Panel or Lead Tax Administration, if the proposal of the Competent Authority is to reinstate the amount included by the Group,

- c. that propose changes that are inconsistent with an earlier agreed Comprehensive Certainty Outcome for the same Group for a Period in which it was an Affected Party, unless an explanation is provided as to the reason for why such change is necessary for a correct application of the Convention, or
  - d. that are inconsistent with any agreed Advance Certainty Outcome that applies for the Period, unless the Affected Party was not an Affected Party when the Advance Certainty Outcome was agreed, or it previously provided evidence that one or more Critical Assumptions were no longer met, for consideration by the Review Panel under paragraph 21.
37. Where the Competent Authority of an Affected Party does not submit any comments on a recommendation of the Review Panel by the deadline for comments, this shall be taken for the purposes of this Section as agreement with that recommendation.

38. Where the Competent Authority of an Affected Party has submitted written comments that disagree with the recommendation or the position of the Review Panel, or which propose an alternative approach to resolve disagreement between Review Panel members, the Review Panel shall determine within [60 days] following the deadline for comments whether to adopt the Affected Party's proposal. If the Coordinating Entity has not previously provided a written explanation of its approach to the relevant issue, it shall be requested to provide such explanation within [30 days] following the start of this period. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The Review Panel should only determine to adopt the Affected Party's proposal if in the view of the Panel this reflects a more correct application of the Convention. Even where this is the case, if the Review Panel considers it likely that other Affected Parties will not agree the Affected Party's proposal, it should consider allowing the disagreement to progress directly to a Determination Panel for resolution. If the Review Panel has not determined to accept the Affected Party's proposal at the end of [60 days], it shall be deemed not to accept this proposal.
- a. If the Review Panel does accept the Affected Party's proposal, the Competent Authority of the Lead Tax Administration shall within [30 days] of this decision being reached exchange with the Competent Authorities of all Affected Parties a revised recommendation in accordance with paragraph 33, accompanied by any written explanation provided by the Coordinating Entity. Other Affected Parties may submit written comments in accordance with paragraph 35, which shall be limited to elements of the recommendation that have been revised. This is not a further opportunity to provide comments on elements that were included in the original recommendation. If the Competent Authority of one or more Affected Parties submit written comments disagreeing with the revised recommendation of the Review Panel, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 2.4.
  - b. If the Review Panel does not accept the Affected Party's proposal, it shall consult with the Competent Authority of that Affected Party to explore whether, in light of the explanation provided by the Coordinating Entity and other information it can provide, the Affected Party is still of the opinion that changes are needed or wishes to withdraw its disagreement with the recommendation. This consultation may extend up to [30 days] following the decision not to adopt the Affected Party's proposal.

### **Concluding a Comprehensive Certainty Review**

39. If the Review Panel recommended that Affected Parties agree the application of the Convention to issues reflected in the Common Documentation Package as filed by the Coordinating Entity, and no Competent Authorities submitted written comments that disagreed with this recommendation by the deadline for comments, or if all such written comments are withdrawn following consultation, the review shall move to a second phase in accordance with paragraph 15 or conclude with an agreed Comprehensive Certainty Outcome in accordance with the recommendation of the Review Panel, as relevant.
40. If the Review Panel recommended that Affected Parties agree specified changes to the application of the Convention to issues reflected in the Common Documentation Package, and no Competent Authorities submitted written comments that disagreed with the recommendation of the Review Panel by the deadline for comments, or if all such written comments are withdrawn following consultation, the Lead Tax Administration shall require the Coordinating Entity to prepare and file an amended Common Documentation Package within [90 days] reflecting these changes.
41. Where paragraph 40 applies and an amended Common Documentation Package is filed by the Coordinating Entity, this shall be reviewed by the Review Panel to ensure the required changes to the application of the Convention have been correctly reflected. No new changes shall be proposed by the

Review Panel. If the Review Panel concludes that all required changes to the Common Documentation Package have been made, the Competent Authority of the Lead Tax Administration shall exchange the amended Common Documentation Package with the Competent Authorities of the Affected Parties, and the review shall move to a second phase or conclude with an agreed Comprehensive Certainty Outcome, as relevant. If the Review Panel concludes that certain required changes to the amended Common Documentation Package have not been made, the Lead Tax Administration shall inform the Coordinating Entity, and the Coordinating Entity shall be required to further revise the Common Documentation Package. Once the Review Panel is satisfied that all required changes have been made, the Competent Authority of the Lead Tax Administration shall exchange the amended Common Documentation Package with the Competent Authorities of the Affected Parties, and the review shall move to a second phase or conclude with an agreed Comprehensive Certainty Outcome, as relevant. If the Coordinating Entity does not agree to prepare an amended Common Documentation Package it shall be deemed to have withdrawn its request for Comprehensive Certainty after a Comprehensive Certainty Outcome had been agreed:

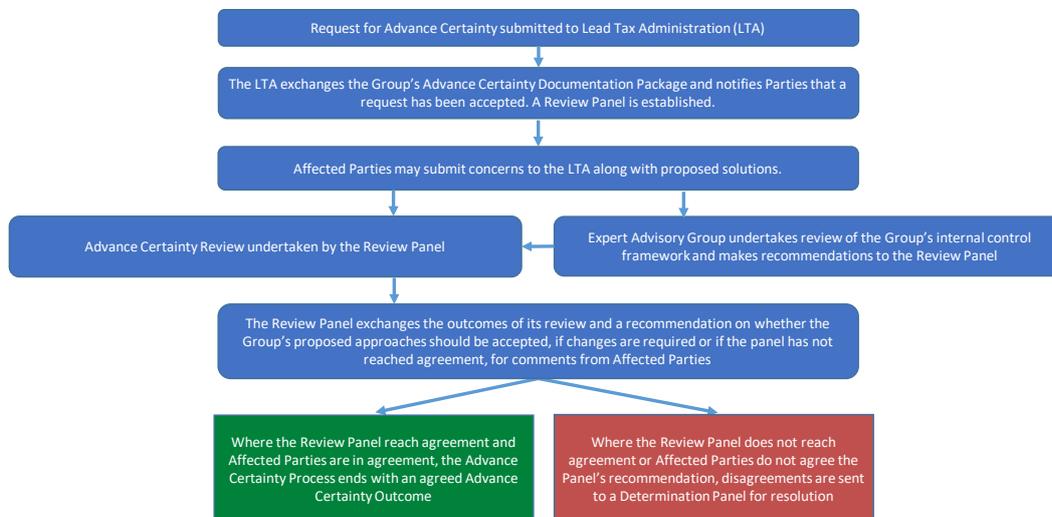
- a. with respect to issues covered in the first phase of the review, or
  - b. with respect to issues covered in both phases of the review,
- as relevant.
42. Where the Review Panel did not reach agreement including all members with respect to the application of the Convention to issues reflected in the Common Documentation Package, or if the Competent Authority of one or more Affected Parties submitted written comments disagreeing with a recommendation of the Review Panel by the deadline for comments that were not subsequently withdrawn, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under the process described in Section 2.4.
43. Where the Review Panel sought comments from Affected Parties separately at the end of the first phase and at the end of the second phase of its review,
- a. where there is disagreement over matters considered in the first phase, these shall be referred to the Determination Panel for resolution before the review progresses to the second phase, and
  - b. where there is disagreement over matters considered in the second phase, these shall be referred to the Determination Panel for resolution before the review progresses to an agreed Comprehensive Certainty Outcome.

In these cases, and to the extent possible, the same Determination Panel should resolve disagreements with respect to each phase of the Review Panel's review. Where one or more members of the Determination Panel that resolved disagreements with respect to the first phase is not available to join the Determination Panel to resolve disagreements with respect to the second phase, their places should be filled using the process in Section 2.4.2

44. Where the Review Panel sought comments from Affected Parties only at the end of the second phase of its review, and there are disagreements over matters considered in both phases, the Review Panel may consider referring disagreements over matters considered in the first phase to the Determination Panel first. If this Determination Panel process requires any changes to the Group's Common Documentation Package which have a corresponding impact on matters considered in the second phase of the review, Affected Parties which submitted written comments on these matters that were not subsequently withdrawn shall be given [30 days] to update their written comments and in particular the specific changes they propose to deal with their concerns. This is not an opportunity to raise new issues, but is to ensure that the alternative outcomes presented to the Determination Panel concerning matters in the second phase of the review reflect the impact of the Determination Panel's decisions on

the first phase. Disagreements over matters considered in the second phase shall then be referred to the Determination Panel under the process in Section 2.4.

### *An Advance Certainty Review by a Review Panel*



### **Undertaking an Advance Certainty Review**

45. An Advance Certainty Review shall commence on a date agreed by the Review Panel. The Competent Authority of the Lead Tax Administration shall inform the Competent Authorities of all Affected Parties not on the Review Panel of the agreed start date for its review before the review is due to commence. Where a Coordinating Entity submits both a request for Comprehensive Certainty for a Period and a request for Advance Certainty with respect to a future Period, the Review Panel may determine to prioritise work on an Advance Certainty Review, which will provide a Group with certainty for a number of future Periods. Where a Comprehensive Certainty Review is delayed, for example where a review for a previous Period of the Group is not yet complete, this shall not delay commencement of an Advance Certainty Review.
46. The Review Panel shall undertake a review on behalf of all Parties, coordinated by the Lead Tax Administration, to determine whether the approach or approaches proposed in the Advance Certainty Documentation Package filed by the Coordinating Entity reflect a correct application of the aspects of the Convention covered by the request for Advance Certainty. The Review Panel shall also develop a list of Critical Assumptions which an agreed Advance Certainty Outcome shall be subject to, including the Group's Proposed Critical Assumptions, as revised or expanded as appropriate and any additional general or targeted Critical Assumptions that may be relevant to the Advance Certainty Outcome. Typically, a list of Critical Assumptions for the purposes of an Advance Certainty Outcome should not include an assumption that there has been no material change in a Group's financial results. The Review Panel shall endeavour to reach agreement including all members. Where the Review Panel does not agree that one or more of the proposed approaches reflects a correct application of the Convention, but is able to identify changes which, if agreed by the Group, would address this, the review of that approach should cease with a recommendation that these changes be required.
47. In parallel with the review by the Review Panel in paragraph 46, the Expert Advisory Group shall undertake a review of aspects the Group's internal control framework relevant to matters covered by the request for Advance Certainty. This review shall not include any aspects of a Group's internal

control framework that are not relevant to the Group's approaches with respect to which Advance Certainty is sought. To the extent a matter covered by a request for Advance Certainty requires the use of information taken from a Group's financial statements and this information has been subject to independent audit, no changes shall be required to aspects of an internal control framework responsible for ensuring the accuracy of this information. Where the Convention requires information that is not taken from a Group's financial statements, where information has not been audited, or where information taken from a Group's audited financial statements is subject to adjustment or is used in undertaking calculations for the purposes of applying the Convention, the Expert Advisory Group shall review aspects of a Group's internal control framework responsible for ensuring the accuracy of this information, these adjustments and these calculations to determine whether they can be relied upon or whether different or additional controls are needed. The fact that the same controls are used by a Group to ensure the accuracy of information prepared for a different purpose may provide some level of comfort to an Expert Advisory Group but does not necessarily mean those controls are appropriate for the purposes of Amount A. As part of this review, the Expert Advisory Group shall consider any opinion provided by the Group's auditors or advisers, but is not bound by such an opinion. A review may also include multilateral meetings or calls involving relevant experts from the Group, its auditors or advisers, members of the Expert Advisory Group and the Lead Tax Administration to discuss the design and operation of relevant aspects of the Group's internal control framework, and to obtain evidence that these aspects can be relied upon to ensure the accurate reporting of information on the relevant matters covered by a request for Advance Certainty. Where the Expert Advisory Group identifies aspects of a Group's internal control framework relevant to matters covered by the request for Advance Certainty that may not be robust or reliable it shall discuss its findings with the Review Panel to obtain evidence from the Coordinating Entity to determine whether the framework is in fact robust and can be relied upon. The Expert Advisory Group shall endeavour to reach agreement including all members on each relevant aspect of the Group's internal control framework.<sup>84</sup>

48. Where under paragraph 47 the Expert Advisory Group does not agree that an element of the Group's internal control framework relevant to the matters covered by the request for Advance Certainty is currently robust and reliable, it shall identify a combination of improvements to that framework which, if implemented by the Group, would address this, and the review of that element should cease with a recommendation that these improvements be required. These required improvements should not require any changes to the Group's existing framework beyond those which are needed for the relevant aspect to be considered robust and reliable. Where an element of the Group's internal control framework is not robust and reliable and no combination of improvements can be identified to address the Expert Advisory Group's concerns, the Review Panel shall be informed of this and the review of that element should cease.
49. The Lead Tax Administration and Chair of the Expert Advisory Group shall cooperate to ensure that the reviews in paragraph 46 and paragraph 47 are coordinated, so that progress on one review can be taken into account in ongoing work on the other review. At the end of the review of the Group's internal control framework, the Chair of the Expert Advisory Group shall provide a report to the Review Panel setting out the work the Expert Advisory Group has undertaken and, as a result of this work, whether in the view of the Expert Group the internal control framework is robust and reliable or, where an element is not considered robust and reliable a description of that element and what improvements have been identified and should be required. Where the Expert Advisory Group has been unable to reach agreement, the report will also include a description of the specific elements with respect to which agreement was not reached and the differences in opinion between members of the Expert Advisory Group.

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<sup>84</sup> Further work will be undertaken by members of the Inclusive Framework to agree the precise scope of a review by an Expert Advisory Group.

50. Paragraphs 18, 20 to 22 and 28 to 30 also apply for the purposes of an Advance Certainty Review, with necessary modifications.

### **Agreeing the outcomes of an Advance Certainty Review**

51. An Advance Certainty Review shall be completed within [270 days] of it commencing, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20, or for the resolution of issues under paragraph 29, in which case this deadline shall be extended by the same number of days as the delay under those paragraphs. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which any member of the Review Panel has not reached a decision by this deadline, the relevant member shall be disregarded for the purposes of determining the outcomes of the review with respect to that aspect and, if all other members of the Review Panel agree that the approach taken by the Coordinating Entity to that aspect is correct, or agree the change or changes that should be required to that aspect of the approach, the Review Panel is treated as if it has reached agreement on this matter. The Lead Tax Administration will ensure that all members of a Panel are aware of this deadline, and are reminded as it approaches, to minimise the risk of a decision not being reached. The first time the Coordinating Entity of a Group submits a request for Advance Certainty under Section 2.3.1, a review under this Section shall be completed within [360 days] after it commences, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20, or for the resolution of issues under paragraph 29.
52. Within [30 days] following the end of an Advance Certainty Review, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Affected Parties a summary of the outcomes of the Review Panel's review, prepared using the standard format in [to be agreed] and agreed with all members of the Review Panel, together with the report prepared by the Chair of the Expert Advisory Group containing the outcomes of the review of the Group's internal control framework.
53. With respect to each of the proposed approaches in the Advance Certainty Documentation Package, the summary of outcomes shall be accompanied by:
- a. a recommendation that Affected Parties agree the proposed approach as filed by the Coordinating Entity,
  - b. a recommendation that Affected Parties agree specified changes to the proposed approach, which the Coordinating Entity should be required to reflect in an amended Advance Certainty Documentation Package in order for Advance Certainty to be granted, or
  - c. a statement that the Review Panel has been unable to reach agreement including all members on the proposed approach.
54. The summary of outcomes shall also be accompanied by:
- a. a recommendation that Affected Parties agree that the Group's internal control framework is robust and reliable with respect to one or more of the proposed approaches as filed by the Coordinating Entity or reflecting required changes, as applicable,
  - b. a recommendation that Affected Parties agree that specified improvements to the Group's internal control framework with respect to one or more of these approaches be required in order for Advance Certainty to apply,
  - c. a statement that the Group's internal control framework with respect to one or more of these approaches does not appear to be robust or reliable, and it has not been possible to identify specific improvements to address this, or

- d. a statement that the Review Panel has been unable to reach agreement including all members.
55. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which any member of the Review Panel was not able to reach a decision by the deadline in paragraph 51, the summary of outcomes shall include an explanation of this and the reasons given by the relevant member of the Panel as to why it was unable to reach a decision. The summary of outcomes shall further be accompanied by any information or explanation provided by the Coordinating Entity that was not contained in the Group's Advance Certainty Documentation Package and was relevant to the Review Panel's recommendation, the Expert Advisory Group's recommendation to the Review Panel or to the positions of Panel members where no agreement was reached.
56. Where the Review Panel has been unable to reach agreement including all members on one or more matters with respect to the proposed approaches reflected in the Advance Certainty Documentation Package, or the Group's internal control framework, the summary of outcomes of the review should clearly identify the aspects where:
- a. the Review Panel agrees that a proposed approach reflected in the Advance Certainty Documentation Package is correct or the Group's internal control framework with respect to a proposed approach is robust and reliable,
  - b. the Review Panel agrees specific changes that should be required to a proposed approach or specific improvements that should be required to the Group's internal control framework with respect to a proposed approach, and
  - c. the Review Panel has been unable to reach agreement including all members, together with
    - i. a description of the specific aspects of a proposed approach or internal control framework with respect to which the Review Panel has been unable to reach agreement,
    - ii. a compilation of the different positions of the members of the Review Panel, and
    - iii. the change to a proposed approach or improvements to the internal control framework suggested by any member or members of the Review Panel to address this issue or each of these issues.
57. Within [90 days] of the exchange of the summary of outcomes of the review by the Review Panel, the Competent Authority of an Affected Party may submit to the Competent Authority of the Lead Tax Administration written comments:
- a. agreeing with a recommendation of the Review Panel,
  - b. disagreeing with a recommendation of the Review Panel with respect to one or more of the proposed approaches in the Group's Advance Certainty Documentation Package, together with a paper explaining the Competent Authority's position as to:
    - i. why a proposed approach, as filed or reflecting changes recommended by the Review Panel, does not reflect a correct application of the Convention, and
    - ii. the alternative approach proposed by the Competent Authority with an explanation as to why in the view of the Competent Authority this reflects a more correct application of the Convention,
  - c. in cases where the Review Panel has been unable to reach agreement including all members with respect to one or more proposed approaches reflected in the Advance Certainty Documentation Package,
    - i. agreeing with the position of the Review Panel with respect to aspects where the panel did reach agreement,

- ii. disagreeing with the position of the Review Panel with respect to aspects where the panel did reach agreement, together with a paper explaining the Competent Authority's position as to:
    - (a) why a proposed approach, as filed or reflecting changes recommended by the Review Panel, does not reflect a correct application of the Convention, and
    - (b) the alternative approach proposed by the Competent Authority with an explanation as to why in the view of the Competent Authority this reflects a more correct application of the Convention,
  - iii. commenting on the positions of members of the Review Panel with respect to aspects where the panel did not reach agreement, which may include a proposal for an alternative approach to resolve the disagreement, accompanied by an explanation of the Competent Authority's position as to why this reflects the correct application of the Convention, or
  - d. disagreeing with a recommendation or conclusion with respect to the Group's internal control framework, together with a paper explaining the Competent Authority's position as to:
    - i. why in the view of the Competent Authority the Group's internal control framework with respect to one or more proposed approaches seems robust and reliable, or
    - ii. why in the view of the Competent Authority this internal control framework does not seem robust and reliable, together with specific improvements proposed by the Competent Authority to address this.
58. Where a Competent Authority of an Affected Party submits written comments that propose a change that is inconsistent with an earlier agreed Comprehensive Certainty Outcome or Advance Certainty Outcome for the same Group for a Period in which it was an Affected Party, an explanation as to the reason why such a change is necessary for a correct application of the Convention should be provided.,
59. Where the Competent Authority of an Affected Party does not submit any comments on a recommendation or conclusions of the Review Panel by the deadline for comments, this shall be taken for the purposes of this Section as agreement with that recommendation and conclusions.
60. Where the Competent Authority of an Affected Party has submitted written comments that disagree with the recommendation or the position of the Review Panel, or which propose an alternative approach to resolve disagreement between Review Panel members, the Review Panel, in consultation with the Expert Advisory Group, shall determine within [60 days] following the deadline for comments whether to adopt the Affected Party's proposal. If the Coordinating Entity has not previously provided a written explanation of its approach to the relevant issue, it shall be requested to provide such explanation within [30 days] following the start of this period. A Coordinating Entity's explanation of its approach to applying an aspect of the Convention shall be prepared using a standard template which includes a limit as to length. The Review Panel should only determine to adopt the Affected Party's proposal if in the view of the Panel this reflects a more correct application of the Convention. Even where this is the case, if the Review Panel considers it likely that other Affected Parties will not agree the Affected Party's proposal, it should consider allowing the disagreement to progress directly to a Determination Panel for resolution. If the Review Panel has not determined to accept the Affected Party's proposal at the end of [60 days], it shall be deemed not to accept this proposal.
- a. If the Review Panel does accept the Affected Party's proposal the Competent Authority of the Lead Tax Administration shall within [30 days] of this decision being reached exchange with the Competent Authorities of all Affected Parties a revised recommendation in accordance with paragraph 53 or paragraph 54, accompanied by any written explanation provided by the Coordinating Entity. Other Affected Parties may submit written comments in accordance with paragraph 57, which shall be limited to elements of the recommendation that have been revised.

This is not a further opportunity to provide comments on elements that were included in the original recommendation. If the Competent Authority of one or more Affected Parties submit written comments disagreeing with the revised recommendation of the Review Panel, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under Section 2.4.

- b. If the Review Panel does not accept the Affected Party's proposal, it shall consult with the Competent Authority of that Affected Party to explore whether, in light of the explanation provided by the Coordinating Entity other information it can provide, the Affected Party is still of the opinion that changes are needed or wishes to withdraw its disagreement with the recommendation. This consultation may extend up to [30 days] following the decision not to adopt the Affected Party's proposal.

### **Concluding an Advance Certainty Review**

- 61. If under paragraph 53 the Review Panel recommended that that Affected Parties agree one or more of the proposed approaches reflected in the Advance Certainty Documentation Package as filed by the Coordinating Entity and no Competent Authorities submitted written comments that disagreed with this recommendation by the deadline for comments, or if all such written comments are withdrawn following consultation, the review shall conclude with an agreed Advance Certainty Outcome in accordance with the recommendation of the Review Panel.
- 62. If under paragraph 53 the Review Panel recommended that Affected Parties agree specified changes to one or more of the proposed approaches reflected in the Advance Certainty Documentation Package, and no Competent Authorities submitted written comments that disagreed with the recommendation of the Review Panel by the deadline for comments, or if all such written comments are withdrawn following consultation, the Lead Tax Administration shall require the Coordinating Entity to prepare and file an amended Advance Certainty Documentation Package within [90 days] reflecting these changes.
- 63. Where paragraph 62 applies and an amended Advance Certainty Documentation Package is filed by the Coordinating Entity, this shall be reviewed by the Review Panel to ensure the required changes to the proposed approaches have been correctly reflected. No new changes shall be proposed by the Review Panel. If the Review Panel concludes that all required changes to the Advance Certainty Documentation Package have been made, the Competent Authority of the Lead Tax Administration shall exchange the amended Advance Certainty Documentation Package with the Competent Authorities of the Affected Parties, and the review shall conclude with an agreed Advance Certainty Outcome. If the Review Panel concludes that certain required changes to the amended Advance Certainty Documentation Package have not been made, the Lead Tax Administration shall inform the Coordinating Entity, and the Coordinating Entity shall be required to further revise the Advance Certainty Documentation Package. Once the Review Panel is satisfied that all required changes have been made, the Competent Authority of the Lead Tax Administration shall exchange the amended Advance Documentation Package with the Competent Authorities of the Affected Parties, and the review shall conclude with an agreed Advance Certainty Outcome. If the Coordinating Entity does not agree to prepare an amended Advance Certainty Documentation Package it shall be deemed to have withdrawn its request for Advance Certainty.
- 64. Where:
  - a. an Advance Certainty Outcome is agreed under paragraph 61 or paragraph 63,
  - b. under paragraph 54 the Review Panel recommended that that Affected Parties agree that the Group's internal control framework with respect to the relevant proposed approach is robust and reliable, and

- c. no Competent Authorities submitted written comments that disagreed with this recommendation by the deadline for comments, or if all such written comments are withdrawn following consultation, the Advance Certainty Outcome shall apply for the Period specified in the request for Advance Certainty and other Periods set out in paragraph 66.
65. Where:
- a. an Advance Certainty Outcome is agreed under paragraph 61 or paragraph 63,
  - b. under paragraph 54 the Review Panel recommended that that Affected Parties agree that specified improvements be required to the Group's internal control framework with respect to the relevant proposed approach in order for an Advance Certainty Outcome to apply, and
  - c. no Competent Authorities submitted written comments that disagreed with this recommendation by the deadline for comments, or if all such written comments are withdrawn following consultation, the Advance Certainty Outcome shall apply for the Period specified in the request for Advance Certainty and other Periods set out in paragraph 66, on condition that the Coordinating Entity demonstrates that the specified improvements have been made and this is confirmed by an Expert Advisory Group as part of a Comprehensive Certainty Review process.
66. The first time a Group makes a request for Advance Certainty over a particular aspect of the Convention, an Advance Certainty Outcome will be granted for all Periods of the Group ending within [36 months] of the start of the Period specified in the request. For the subsequent requests, the Review Panel may agree to extend this period to [60 months].<sup>85</sup> Where paragraph 65 applies and the time taken by a Group to introduce required improvements to its internal control framework mean that an Advance Certainty Outcome does not start to apply until a Period later than that specified in the request for Advance Certainty, the maximum period that can be covered by an Advance Certainty Outcome continues to be calculated from the Period specified in the request.
67. Where paragraph 64 applies and the Review Panel accepts that the Group does not have or will not have data available for it to apply the agreed approach for the first Period covered by Advance Certainty, the Advance Certainty Outcome may agree that the Group can use a different Reliable Indicator for this Period. The Group shall be required to collect the information necessary to use the agreed approach for future Periods.
68. Where under paragraph 54 the Review Panel concludes that the Group's internal control framework with respect to one or more of these approaches does not appear to be robust or reliable, and it has not been possible to identify specific improvements to address this, the Coordinating Entity shall be provided with an explanation as to why this conclusion was reached, and the areas in which improvements are needed. Once these concerns have been addressed, the Coordinating Entity may submit a new request for Advance Certainty to apply from a future Period under Section 2.3.1. For Periods where Advance Certainty does not apply, a Group may submit a request for Comprehensive Certainty that will include certainty over all aspects of the Group's application of the Convention.
69. Where the Review Panel did not reach agreement including all members with respect to one or more of the proposed approaches in the Group's Advance Certainty Documentation Package, or if the Competent Authority of one or more Affected Parties submitted written comments disagreeing with a recommendation of the Review Panel by the deadline for comments that were not subsequently withdrawn, issues where there is disagreement shall be submitted to a Determination Panel for a final outcome, under the process described in Section 2.4.

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<sup>85</sup> The number of years for which Advance Certainty will be provided remains to be agreed.

### **Circumstances where an Advance Certainty Outcome ceases to apply**

70. An agreed Advance Certainty Outcome shall cease to apply:

- a. at the end of the last Period specified in paragraph 66, or
- b. where one or more agreed Critical Assumptions are no longer met.

Notwithstanding (b), circumstances where one or more agreed Critical Assumptions are no longer met shall not mean that the approach proposed by the Group no longer reflects a correct application of the Convention, but that this should be considered as part of a Comprehensive Certainty Review.

71. Where a Group anticipates or becomes aware that one or more agreed Critical Assumptions are no longer met, the Coordinating Entity should inform the Lead Tax Administration of this fact. The Competent Authority of the Lead Tax Administration shall then share this information with the Competent Authorities of Affected Parties. When the Coordinating Entity next submits the Group's Common Documentation Package for a Period that has ended, it may also submit a new request for Advance Certainty under Section 2.3.1.

### **2.3.3. Review by a Lead Tax Administration on behalf of the Parties**

1. Where a request for Comprehensive Certainty is accepted in accordance with the process in Section 2.3.1 for a Period which is not governed by the provisions of Section 2.3.2, a review of the Group's application of the Convention reflected in its Common Documentation Package shall be undertaken by the Lead Tax Administration under this Section. The steps for a Lead Tax Administration review are the same as those for a Review Panel review, with the modifications described below.
2. A review by a Lead Tax Administration should not commence until any review that has already commenced under Section 2.3.2 or this Section for an earlier Period of the Group is completed.<sup>86</sup> Where a request for Comprehensive Certainty is accepted under Section 2.3.1 in circumstances where:
  - a. a request for Comprehensive Certainty has been accepted with respect to one or more earlier Periods of the Group for which a review pursuant to this Section will be undertaken, but the review by the Lead Tax Administration for those Periods has not yet commenced, and/or
  - b. a request for Comprehensive Certainty is accepted with respect to one or more later Periods of the Group for which a review pursuant to this Section will be undertaken, before the review by the Lead Tax Administration has commenced,

the Lead Tax Administration may undertake the reviews for up to [four] Periods most closely preceding or most closely following the Period specified in the request for Comprehensive Certainty, simultaneously with the review for that Period. Where there are more than [four] earlier Periods of the Group for which a review has not yet Commenced, the review by the Lead Tax Administration shall not commence until the reviews for the additional earlier Periods are completed.

3. If, in the view of the Lead Tax Administration, the Coordinating Entity is persistently late in providing information without explanation, is acting in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information, or where information provided proves to be unreliable, this issue shall be raised with the Coordinating Entity. Where this issue is not resolved within a reasonable period, the Lead Tax Administration may conclude that a Comprehensive Certainty Outcome cannot be provided. The Coordinating Entity shall be informed of this outcome by the Lead Tax Administration and the Comprehensive Certainty Process shall be brought to an end without an

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<sup>86</sup> Nothing in this paragraph shall prevent or delay the exchange of a Group's Common Documentation Package for the Period with Affected Parties.

agreed Comprehensive Certainty Outcome. The next review for any subsequent Period of the Group shall be undertaken by a Review Panel under Section 2.3.2 and the Coordinating Entity may request that the Review Panel simultaneously undertakes a review with respect to the Period for which a Comprehensive Certainty Outcome was not provided pursuant to this paragraph. The Competent Authorities of all Parties shall be informed of this outcome by the Competent Authority of the Lead Tax Administration and any restriction with respect to domestic compliance actions for the Period under Section 2.3.1 shall cease to apply. The next time the Coordinating Entity submits a request for Comprehensive Certainty under Section 2.3.1 it should provide written confirmation that the issues which resulted in the late provision of information or in it acting in an uncooperative or non-transparent manner have been addressed and will not recur.

4. The first phase of a Comprehensive Certainty Review shall be completed within [240 days] of the review commencing, the second phase shall be completed within [120 days] and an entire review including both phases within [360 days] after it commences, unless additional time is needed to compensate for delays in the provision of information by the Coordinating Entity under paragraph 18 or paragraph 20 of Section 2.3.2 or for the resolution of issues under paragraph 3 of this Section, in which case this deadline shall be extended by the same number of days as the delay under those paragraphs. Where there is any aspect of the approach taken by the Coordinating Entity with respect to which the Lead Tax Administration has not reached a decision by this deadline, the Lead Tax Administration shall be deemed to support the approach to that aspect taken by the Coordinating Entity in the Group's Common Documentation Package. The summary of outcomes prepared by the Lead Tax Administration shall include an explanation of this and the reasons of the Lead Tax Administration as to why it was unable to reach a decision.
5. Paragraphs of Section 2.3.2 that concern processes for discussions and agreement by members of a Review Panel, and the consequences of this agreement not being reached, are not applicable to a review by a Lead Tax Administration.

## 2.4. A Determination Panel to resolve disagreements

### 2.4.1. Resolution of disagreements by a Determination Panel

#### *Compiling alternative outcomes and comments for a Determination Panel*

1. Where a review of the application of the Convention by a Group for a Period has been conducted under the approaches described in Section 2.2 or Section 2.3, and issues remain with respect to which agreement has not been possible, these issues shall be resolved by a Determination Panel.
2. Within [30 days] of a determination under Section 2.2 that one or more issues considered as part of a Scope Certainty Review or Follow-Up Scope Certainty Review will be submitted to a Determination Panel for a final outcome, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Listed Parties:
  - a. with respect to issues that had been agreed by the Scope Review Panel or in cases where a review was undertaken by a Lead Tax Administration,
    - i. a list of the specific items in a Group's Scope Certainty Documentation Package or Follow-Up Scope Certainty Documentation Package with respect to which written comments were submitted and not withdrawn, and,
    - ii. for each of these items, alternative outcomes comprising:
      - (a) the outcome recommended by the Scope Review Panel or Lead Tax Administration to Listed Parties, with an explanation of its basis for this recommendation, and
      - (b) each alternative specific outcome proposed by a Competent Authority of a Listed Party together with the papers prepared under Section 2.2 by each Competent Authority explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.
  - b. with respect to issues that had not been agreed by the Scope Review Panel,
    - i. a list of the specific items in a Group's Scope Certainty Documentation Package or Follow-Up Scope Certainty Documentation Package with respect to which the Review Panel did not reach agreement,
    - ii. for each of these items, alternative outcomes comprising:
      - (a) if the outcome in the Group's Scope Certainty Documentation Package or Follow-Up Scope Certainty Documentation Package is supported by one or more members of the Scope Review Panel, this outcome with an explanation of their basis for supporting this approach,
      - (b) each alternative specific outcome not covered by paragraph (b) ii) (a). proposed by one or more members of the Scope Review Panel, together with papers prepared by Panel members under Section 2.2 explaining their position as to why in their view this would reflect a more correct application of the Convention, and
      - (c) each alternative specific outcome proposed by a Competent Authority of a Listed Party together with the papers prepared by each Competent Authority under Section 2.2 explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.

3. Within [30 days] of a determination under Section 2.3.2 that one or more issues considered as part of a Comprehensive Certainty Review by a Review Panel will be submitted to a Determination Panel for a final outcome, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Affected Parties:
  - a. with respect to issues that had been agreed by the Review Panel,
    - i. a list of the specific items in a Group's Common Documentation Package with respect to which written comments were submitted and not withdrawn, and,
    - ii. for each of these items, alternative outcomes comprising:
      - (a) the outcome recommended by the Review Panel to Affected Parties, with an explanation of its basis for this recommendation, and
      - (b) each alternative specific outcome proposed by a Competent Authority of an Affected Party together with the papers prepared under Section 2.3.2 by each Competent Authority explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.
  - b. with respect to issues that had not been agreed by the Review Panel,
    - i. a list of the specific items in a Group's Common Documentation Package with respect to which the Review Panel did not reach agreement, and
    - ii. for each of these items, alternative outcomes comprising:
      - (a) if the outcome in the Group's Common Documentation Package is supported by one or more members of the Review Panel, this outcome with an explanation of their basis for supporting this approach,
      - (b) each alternative specific outcome not covered by paragraph (b) ii) (a). proposed by one or more members of the Review Panel, together with papers prepared by Panel members under Section 2.3.2 explaining their position as to why in their view this would reflect a more correct application of the Convention, and
      - (c) each alternative specific outcome proposed by a Competent Authority of an Affected Party together with the papers prepared by each Competent Authority under Section 2.3.2 explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.
4. Within [30 days] of a determination under Section 2.3.2 that one or more issues considered as part of an Advance Certainty Review by a Review Panel will be submitted to a Determination Panel for a final outcome, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Affected Parties:
  - a. with respect to issues that had been agreed by the Review Panel,
    - i. a list of the specific items in a Group's Advance Certainty Documentation Package with respect to which written comments were submitted and not withdrawn, and,
    - ii. for each of these items, alternative outcomes comprising:
      - (a) the approach recommended by the Review Panel to Affected Parties, with an explanation of its basis for this recommendation, and

- (b) each alternative approach proposed by a Competent Authority of an Affected Party together with the papers prepared under Section 2.3.2 by each Competent Authority explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.
  - b. with respect to issues that had not been agreed by the Review Panel,
    - i. a list of the specific items in a Group's Advance Certainty Documentation Package with respect to which the Review Panel did not reach agreement, and
    - ii. for each of these items, alternative outcomes comprising:
      - (a) if the proposed approach in the Group's Advance Certainty Documentation Package is supported by one or more members of the Review Panel, this approach with an explanation of their basis for supporting the approach,
      - (b) each alternative approach not covered by paragraph (b) ii) (a). proposed by one or more members of the Review Panel, together with papers prepared by Panel members under Section 2.3.2 explaining their position as to why in their view this would reflect a more correct application of the Convention, and
      - (c) each alternative approach proposed by a Competent Authority of an Affected Party together with the papers prepared by each Competent Authority under Section 2.3.2 explaining its position as to why this would reflect a more correct application of the Convention, and
    - iii. any written explanation provided by the Coordinating Entity with respect to these issues.
5. Within [30 days] of it being determined under Section 2.3.3 that one or more issues considered by the Lead Tax Administration will be submitted to a Determination Panel for a final outcome, the Competent Authority of the Lead Tax Administration shall exchange with the Competent Authorities of all Affected Parties:
- a. a list of the specific items in a Group's Common Documentation Package with respect to which written comments were submitted and not withdrawn, and,
  - b. for each of these items, alternative outcomes comprising:
    - i. the outcome recommended by the Lead Tax Administration to Affected Parties, with an explanation of its basis for this recommendation, and
    - ii. each alternative specific outcome proposed by a Competent Authority of an Affected Party together with the papers prepared by each Competent Authority under Section 2.3.3 explaining its position as to why this would reflect a more correct application of the Convention, and
  - c. any written explanation provided by the Coordinating Entity with respect to these issues.
6. Within [90 days] of an exchange under paragraphs 2 to 5, Competent Authorities of Listed Parties or Affected Parties may submit written comments to the Competent Authority of the Lead Tax Administration supporting or disagreeing with any of the alternative outcomes for each issue, which may be accompanied by a paper explaining the Competent Authority's position:
- a. as to why in its view an alternative outcome reflects a correct or incorrect application of the Convention, and
  - b. with respect to any written explanation as to its approach provided by the Coordinating Entity of a Group.

Within [30 days] of this deadline the Competent Authority of the Lead Tax Administration shall exchange these comments and papers with the Competent Authorities of all Listed Parties or Affected Parties.

7. Within [30 days] of the deadline for written comments in paragraph 6, the Lead Tax Administration shall provide members of the Determination Panel with the following information, which has already been exchanged with the Competent Authorities of all Listed Parties or Affected Parties:
  - a. a list of specific items in a Group's Scope Documentation Package, Follow-Up Scope Documentation Package, Common Documentation Package or Advance Certainty Documentation Package with respect to which a Scope Review Panel or Review Panel did not reach agreement, or where written comments were submitted and not withdrawn, for resolution by the Panel,
  - b. for each item, the alternative outcomes referred to under paragraphs 2 to 5, together with the papers prepared by each Competent Authority explaining its position as to why these outcomes would reflect a more correct application of the Convention,
  - c. the written comments and any papers submitted under paragraph 6 setting out the positions of Competent Authorities of Listed Parties or Affected Parties, agreeing or disagreeing with these alternative outcomes, and
  - d. the Scope Documentation Package, Follow-Up Scope Documentation Package, Common Documentation Package or Advance Certainty Documentation Package filed by the Coordinating Entity and any changes to these agreed by Affected Parties or Listed Parties, together with any written explanation provided by the Coordinating Entity during the relevant Certainty Process described in Section 2.2 or 2.3 as to the position it took with respect to any item on which the Listed Parties or Affected Parties have not reached agreement. Where the position taken by the Coordinating Entity is not one of the alternative outcomes supported by the Scope Review Panel, Review Panel, Lead Tax Administration, or one or more Listed Parties or Affected Parties, the written explanation is provided to the Determination Panel but this position is not one of the alternative outcomes presented to the Determination Panel for it to choose between.

#### *Undertaking a Determination Panel process*

8. The Determination Panel, coordinated by the Chair, shall resolve the specific issues submitted for resolution by choosing between the two or more alternative outcomes supported by the Scope Review Panel, Review Panel, Lead Tax Administration, or one or more Listed Parties or Affected Parties and put to it to choose from. The Determination Panel may request clarification of these issues and alternative outcomes from Affected Parties or Listed Parties via the Lead Tax Administration, but this is not an opportunity for new arguments to be raised. Any clarification provided to the Determination Panel shall also be made available by the Competent Authority of the Lead Tax Administration to the Competent Authorities of Listed Parties or Affected Parties. The Determination Panel may not request additional information from the Coordinating Entity or Group Entities. The Determination Panel does not have any discretion to develop and choose an alternative outcome that is not presented to it, or to comment on issues other than the specific issues submitted to it for resolution.
9. The Determination Panel shall endeavour to reach agreement on each issue by consensus including all members but, where this is not possible, the Determination Panel shall choose the outcome which is supported by an overall majority comprising more than one half of the panel. Where there are more than two alternative outcomes for a particular issue and no outcome is supported by an overall majority on the panel, the Chair shall invite Panel Members to rank all alternative outcomes in order of preference in order to identify the alternative outcome chosen.

### Selecting an alternative outcome by ranked voting<sup>87 88</sup>

In cases where a Scope Review Panel or Review Panel does not reach agreement, or where a Listed Party or Affected Party disagrees with a recommendation of the Lead Tax Administration, Scope Review Panel or Review Panel, disagreements are referred to a Determination Panel for a decisive outcome. The Determination Panel will be required to choose between the alternative outcomes put to it. Where a disagreement has two alternative outcomes supported by Listed Parties or Affected Parties, the Determination Panel will choose the outcome supported by a majority of its members. Where three or more alternative outcomes are supported by Listed Parties or Affected Parties, ranked voting shall be used to identify the alternative outcome chosen by the Panel. To ensure consistency in outcomes between Determination Panels considering disagreements with respect to different Groups, a single approach to ranked voting will be adopted, that will be applied consistently across panels.

Further work will be undertaken to identify the approach to ranked voting that will be applied by Determination Panels. This box includes a high level overview that considers some of the attributes that may be considered desirable in an approach. It also describes a sample number of possible approaches that could be adopted and, in each case, whether any of these attributes are achieved. This overview is not a comprehensive list of possible approaches that could be taken, or of the advantages and disadvantages of each approach. The fact that a particular approach is included or is not included in this overview does not mean that it is supported or is not supported by one or more members of the Inclusive Framework. Similarly, while the attributes described below may be considered desirable in an approach to ranked voting, this list does not imply that this is agreed by all members of the Inclusive Framework. Approaches and attributes not described here may also be included or taken into account in further work.

#### Potentially desirable attributes in an approach to ranked voting

- **The majority winner principle.**<sup>89</sup> An alternative outcome ranked first by a majority of Panel members should always be chosen by the Panel. Where a Determination Panel is able to choose an alternative outcome by overall majority, this outcome should be chosen.
- **The Condorcet winner principle.**<sup>90</sup> An alternative outcome that would beat all other alternative outcomes in a one-on-one contest should always be chosen by the Panel.
- **The Smith set principle.**<sup>91</sup> Where there is no Condorcet winner, an alternative outcome should be chosen from the smallest set of alternative outcomes that would beat all alternative outcomes not in that set in a one-on-one contest.
- **Monotonicity.**<sup>92</sup> The likelihood of a particular alternative outcome being chosen by a Panel should not be reduced by a Panel member increasing its support for that outcome.

<sup>87</sup> The approach to be used by a Determination Panel to choose between more than two alternative outcomes where there is no overall majority support for one outcome is to be agreed. The examples included here are illustrative only and their inclusion does not suggest that one of these approaches will be adopted nor that an alternative approach will not be adopted.

<sup>88</sup> [https://en.wikipedia.org/wiki/Ranked\\_voting](https://en.wikipedia.org/wiki/Ranked_voting)

<sup>89</sup> [https://en.wikipedia.org/wiki/Majority\\_criterion](https://en.wikipedia.org/wiki/Majority_criterion)

<sup>90</sup> [https://en.wikipedia.org/wiki/Condorcet\\_winner\\_criterion](https://en.wikipedia.org/wiki/Condorcet_winner_criterion)

<sup>91</sup> [https://en.wikipedia.org/wiki/Smith\\_set](https://en.wikipedia.org/wiki/Smith_set)

<sup>92</sup> [https://en.wikipedia.org/wiki/Monotonicity\\_criterion](https://en.wikipedia.org/wiki/Monotonicity_criterion)

- **Independence of clones.**<sup>93</sup> The likelihood of an alternative (non-winning) outcome being chosen by a Panel should not be changed by whether or not another alternative outcome that is similarly preferred by voters is available.

### A sample of alternative approaches

#### *Consensus based approaches*

- **Borda count**<sup>94</sup>

Each Panel member ranks all alternative outcomes in order of preference. The outcome ranked lowest by a Panel member gets 0 points, the next-lowest gets 1 point, etc. The alternative outcome with the most points is the winner. This approach is intended to select the alternative outcome that is broadly acceptable to all Panel members rather than that which is the first preference of particular members. Borda count does satisfy monotonicity, but fails to satisfy the majority winner principle, Condorcet winner principle, Smith set principle and independence of clones.

- **Baldwin**<sup>95</sup>

Each Panel member ranks all alternative outcomes in order of preference. The outcome ranked lowest by a Panel member gets 0 points, the next-lowest gets 1 point, etc. The alternative outcome with the lowest points is eliminated. Points are recalculated for the remaining alternative outcomes as if they were the only possible outcomes, and further outcomes are eliminated until a single alternative outcome remains, which is chosen by the Panel. Baldwin does satisfy the Condorcet winner, majority winner and Smith set principles, but fails to satisfy the monotonicity and independence of clones.

- **Black**<sup>96</sup>

Each Panel member ranks all alternative outcomes in order of preference. If any alternative outcome would defeat all other alternative outcomes in a one-on-one competition, that outcome is chosen. Otherwise, Borda count is used to identify the chosen alternative outcome. Black does satisfy Condorcet winner, majority winner principles and monotonicity, but fails to satisfy the Smith set principle and independence of clones.

- **Nanson**<sup>97</sup>

Each Panel member ranks all alternative outcomes in order of preference. The outcome ranked lowest by a Panel member gets 0 points, the next-lowest gets 1 point, etc. An alternative outcome with average or below Borda count is eliminated. Nanson satisfies the Condorcet winner principle, majority winner principle, and Smith set principle, but not monotonicity and independence of clones.

<sup>93</sup> [https://en.wikipedia.org/wiki/Independence\\_of\\_clones\\_criterion](https://en.wikipedia.org/wiki/Independence_of_clones_criterion)

<sup>94</sup> [https://en.wikipedia.org/wiki/Borda\\_count](https://en.wikipedia.org/wiki/Borda_count)

<sup>95</sup> [https://en.wikipedia.org/wiki/Nanson%27s\\_method](https://en.wikipedia.org/wiki/Nanson%27s_method)

<sup>96</sup> [https://en.wikipedia.org/wiki/Black%27s\\_method](https://en.wikipedia.org/wiki/Black%27s_method)

<sup>97</sup> [https://en.wikipedia.org/wiki/Nanson%27s\\_method](https://en.wikipedia.org/wiki/Nanson%27s_method)

### *Majority based approaches*

- **Instant Runoff Voting<sup>98</sup>**

Each Panel member ranks all alternative outcomes in order of preference. If any one alternative outcome is ranked first by an absolute majority of members, that outcome is chosen. Otherwise, the alternative outcome ranked first by the fewest number of members is eliminated. Votes are reallocated among remaining alternative outcomes, and outcomes are eliminated until one is ranked first by an absolute majority or a single alternative outcome remains, which is chosen by the Panel. Instant Runoff Voting does satisfy the majority winner principle and independence of clones, but fails to satisfy the Smith set principle, Condorcet winner principle and monotonicity.

- **Coombs<sup>99</sup>**

Each Panel member ranks all alternative outcomes in order of preference. If any one alternative outcome is ranked first by an absolute majority of members, that outcome is chosen. Otherwise, the alternative outcome ranked last by the largest number of members is eliminated. Votes are reallocated among remaining alternative outcomes, and outcomes are eliminated until one is ranked first by an absolute majority or a single alternative outcome remains, which is chosen by the Panel. Coombs does satisfy the majority winner principle, but fails to satisfy the Smith set principle, Condorcet winner principle, monotonicity and independence of clones.

### *Approaches based on a comparison of pairs of alternative outcomes*

- **Smith set (plus Instant Runoff Voting)<sup>100</sup>**

Each Panel member ranks all alternative outcomes in order of preference. A set of one or more alternative outcomes is identified including those outcomes which, in a one-on-one competition, would defeat all alternative outcomes not included in that set. If this set includes just one alternative outcome, that outcome is chosen by the Panel. Otherwise, an outcome from within this set is chosen using another method (such as Instant Runoff Voting). The Smith set, combined with Instant Runoff Voting, does satisfy the Smith set principle, Condorcet winner principle, majority winner principle and independence of clones, but fails to satisfy monotonicity.

- **Copeland<sup>101</sup>**

Each Panel member ranks all alternative outcomes in order of preference. Each pair of alternative outcomes is compared separately in a one-on-one competition. Where an alternative outcome is preferred by a majority of Panel members it is allocated one point. Where neither alternative outcome is preferred by a majority, each is allocated half a point. If one alternative outcome has a majority of points based on this allocation, that outcome is chosen by the Panel. Otherwise, an alternative outcome from this set with an equal score is chosen using another method (such as Borda count). Copeland, combined with Borda count, does satisfy the Smith set principle, Condorcet winner and majority winner principles, as well as monotonicity, but fails to satisfy independence of clones.

- **Tideman's Alternative<sup>102</sup>**

The alternative outcomes in the Smith set are identified, using the process described above, and any alternative outcomes not in the set are eliminated. If more than one alternative outcome remains, the outcome with the least first choice preferences is also eliminated. This process is repeated until only one alternative outcome remains, which is chosen by the Panel. Tideman's Alternative satisfies the Smith set, Condorcet winner and majority winner principles, and independence of clones but not monotonicity.

### **Examples**

The examples below illustrate a number of the above approaches. These assume a seven member Determination Panel and an issue to be resolved with four alternative outcomes. Panel members have been asked to rank the alternative outcomes in order of preference, with a number 1 being used to indicate their preferred alternative outcome and a number 4 being used to indicate their least preferred alternative outcome. Tied preferences for a particular Panel member and abstentions are not permitted. Inclusion of a particular approach within these examples does not indicate a preference for that approach by members of the Inclusive Framework, and there is no limit on the approaches that will be considered by the Inclusive Framework within its future work.

*Example 1: Black (cases with a Condorcet winner)*

In Example 1, the results of the Panel members' votes are shown below.

	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	3	2	4	4	1	2
Alt. Outcome 2	2	2	4	1	3	4	1
Alt. Outcome 3	3	1	1	3	2	2	4
Alt. Outcome 4	4	4	3	2	1	3	3

The results for each possible pair of alternative outcomes is shown below. Where in a one-on-one contest the alternative outcome in the row header would defeat the alternative outcome in the column header (based on the results in the above table, with no reallocation of votes), this is shown as a W. Where that alternative outcome would lose, this is shown as an L. Where the result is inconclusive (a draw) this is shown as a D.

	Alternative Outcome 1	Alternative Outcome 2	Alternative Outcome 3	Alternative Outcome 4
Alt. Outcome 1	-	L	L	W
Alt. Outcome 2	W	-	L	W
Alt. Outcome 3	<b>W</b>	<b>W</b>	-	<b>W</b>
Alt. Outcome 4	L	L	L	-

<sup>98</sup> [https://en.wikipedia.org/wiki/Instant-runoff\\_voting](https://en.wikipedia.org/wiki/Instant-runoff_voting)

<sup>99</sup> [https://en.wikipedia.org/wiki/Coombs%27\\_method](https://en.wikipedia.org/wiki/Coombs%27_method)

<sup>100</sup> [https://en.wikipedia.org/wiki/Smith\\_set](https://en.wikipedia.org/wiki/Smith_set)

<sup>101</sup> [https://en.wikipedia.org/wiki/Copeland%27s\\_method](https://en.wikipedia.org/wiki/Copeland%27s_method)

<sup>102</sup> [https://en.wikipedia.org/wiki/Tideman\\_alternative\\_method](https://en.wikipedia.org/wiki/Tideman_alternative_method)

In this example, Alternative Outcome 3 would be selected by the Panel in a one-on-one context with all other alternative outcomes. Therefore, Alternative Outcome 3 is chosen by the Determination Panel.

*Example 2: Black (cases with no Condorcet winner)*

In Example 2, the results of the Panel members' votes are shown below.

	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	2	1	1	3	2	2	4
Alt. Outcome 2	1	4	3	2	1	3	3
Alt. Outcome 3	4	3	2	4	4	1	2
Alt. Outcome 4	3	2	4	1	3	4	1

The results for each possible pair of alternative outcomes is shown below. Where in a one-on-one contest the alternative outcome in the row header would defeat the alternative outcome in the column header (based on the results in the above table, with no reallocation of votes), this is shown as a W. Where that alternative outcome would lose, this is shown as an L. Where the result is inconclusive (a draw) this is shown as a D.

	Alternative Outcome 1	Alternative Outcome 2	Alternative Outcome 3	Alternative Outcome 4
Alt. Outcome 1	-	L	W	W
Alt. Outcome 2	W	-	L	W
Alt. Outcome 3	L	W	-	L
Alt. Outcome 4	L	L	W	-

In this example, no alternative outcome would be selected by the Panel in a one-on-one contest against all other alternative outcomes. As there is no outright preferred outcome at this stage, Borda count is used to choose an alternative outcome. Points are allocated to each alternative outcome based on its ranking by each Panel member. As there are four alternative outcomes available, three points are allocated for a first choice preference, two points for a second choice preference and one point for a third choice preference. No points are allocated to the alternative outcome least preferred by a Panel member.

	Determination Panel Members							Total points
	A	B	C	D	E	F	G	
Alt. Outcome 1	2	3	3	1	2	2	0	13
Alt. Outcome 2	3	0	1	2	3	1	1	11
Alt. Outcome 3	0	1	2	0	0	3	2	8

Alt. Outcome 4	1	2	0	3	1	0	3	10
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Of the four alternative outcomes, Alternative Outcome 1 is allocated 13 points, compared with 11 points, eight points and ten points for the other alternative outcomes. As such, Alternative Outcome 1 is chosen by the Determination Panel.

*Example 3: Instant Runoff Voting*

In Example 3, the results of the Panel members' votes are shown below.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	1	1	4	4	4	4
Alt. Outcome 2	2	2	2	2	2	2	2
Alt. Outcome 3	4	4	3	1	1	3	3
Alt. Outcome 4	3	3	4	3	3	1	1

Alternative Outcome 2 is the only outcome that is not the first choice of any Panel member. This alternative outcome is eliminated and the remaining three alternative outcomes are ranked in their order of preference for each Panel member.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	1	1	3	3	3	3
Alt. Outcome 3	3	3	2	1	1	2	2
Alt. Outcome 4	2	2	3	2	2	1	1

Of the three remaining alternative outcomes, Alternative Outcome 1 is the first choice of three Panel members whereas Alternative Outcome 3 and alternative Outcome 4 are both the first choice of two Panel members. As there is no single alternative outcome with the lowest number of first choice votes, second preferences are taken into account. Alternative Outcome 3 is the second choice outcome of three Panel members while Alternative Outcome 4 is the second choice of four Panel members. Therefore Alternative Outcome 3 is eliminated and the remaining two outcomes are ranked in order of preference for each Panel member.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	1	1	2	2	2	2
Alt. Outcome 4	2	2	2	1	1	1	1

Of the two remaining outcomes, Alternative Outcome 1 is the first choice of three Panel members, while Alternative Outcome 4 is now the first choice of four Panel members. As

Alternative Outcome 4 is the preferred outcome by an overall majority on the Determination Panel, this is the alternative outcome chosen by the Panel.

*Example 4: Coombs*

In Example 4, the results of the Panel members' votes are the same as in Example 3.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	1	1	4	4	4	4
Alt. Outcome 2	2	2	2	2	2	2	2
Alt. Outcome 3	4	4	3	1	1	3	3
Alt. Outcome 4	3	3	4	3	3	1	1

Alternative Outcome 1 is the last choice preference of four out of seven Panel members, which is more than any other alternative outcome. As such, this alternative outcome is eliminated and the remaining three alternative outcomes are ranked by the Chair in their order of preference for each Panel member.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 2	1	1	1	2	2	2	2
Alt. Outcome 3	3	3	2	1	1	3	3
Alt. Outcome 4	2	2	3	3	3	1	1

Of the three remaining alternative outcomes, Alternative Outcome 3 is the last choice of four Panel members whereas Alternative Outcome 4 is the last choice of three Panel members and Alternative Outcome 2 is not the last choice of any Panel member. Therefore Alternative Outcome 3 is eliminated and the remaining two outcomes are ranked in order of preference for each Panel member.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 2	1	1	1	1	1	2	2
Alt. Outcome 4	2	2	2	2	2	1	1

Of the two remaining outcomes, Alternative Outcome 2 is the first choice of five Panel members, while Alternative Outcome 4 is now the first choice of two Panel members. Alternative Outcome 2 is therefore chosen by the Determination Panel.

*Example 5: Smith set (cases with a Condorcet winner)*

In Example 5, the results of the Panel members' votes is shown below.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	2	2	2	4	3	1	1
Alt. Outcome 2	1	4	4	2	4	3	2
Alt. Outcome 3	4	3	3	1	1	4	3
Alt. Outcome 4	3	1	1	3	2	2	4

The results for each possible pair of alternative outcomes is shown below. Where in a one-on-one contest the alternative outcome in the row header would defeat the alternative outcome in the column header (based on the results in the above table, with no reallocation of votes), the outcome in the row header is allocated 1 point. Where that alternative outcome would lose the one-one-one contest it is allocated no points. Where the result is inconclusive (a draw) the alternative outcome is allocated  $\frac{1}{2}$  point.

	Alternative Outcome 1	Alternative Outcome 2	Alternative Outcome 3	Alternative Outcome 4	Total points
Alt. Outcome 1	-	1	1	0	2
Alt. Outcome 2	0	-	0	0	0
Alt. Outcome 3	0	1	-	0	1
Alt. Outcome 4	1	1	1	-	3

The table is now reorganised, so that the alternative outcomes are listed from top to bottom, and from left to right, beginning with that with the highest score. The cells containing the one or more alternative outcomes with the highest total points are highlighted.

	Alternative Outcome 4	Alternative Outcome 1	Alternative Outcome 3	Alternative Outcome 2	Total points
Alt. Outcome 4	-	1	1	1	3
Alt. Outcome 1	0	-	1	1	2
Alt. Outcome 3	0	0	-	1	1
Alt. Outcome 2	0	0	0	-	0

The alternative outcomes in the shaded cells are included in the "Smith set" of dominant outcomes that defeat all outcomes not in that set. To check if any other outcomes need to be added to this set, the Panel checks if any of the cells directly below the shaded cells contain a  $\frac{1}{2}$  or a 1 (which would indicate that another alternative outcome was not defeated by a member of the Smith Set). In this example, because this is not the case, and the Smith Set

contains only one alternative outcome, Alternative Outcome 4 is chosen by the Determination Panel.

*Example 6: Smith set (cases with no Condorcet winner)*

In Example 6, the results of the Panel members' votes is shown below.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 1	1	4	4	2	4	3	2
Alt. Outcome 2	4	1	3	3	2	1	4
Alt. Outcome 3	2	2	2	4	3	2	1
Alt. Outcome 4	3	3	1	1	1	4	3

The results for each possible pair of alternative outcomes is shown below. Where in a one-on-one contest the alternative outcome in the row header would defeat the alternative outcome in the column header (based on the results in the above table, with no reallocation of votes), the outcome in the row header is allocated 1 point. Where that alternative outcome would lose the one-on-one contest it is allocated no points. Where the result is inconclusive (a draw) the alternative outcome is allocated  $\frac{1}{2}$  point.

	Alternative Outcome 1	Alternative Outcome 2	Alternative Outcome 3	Alternative Outcome 4	Total points
Alt. Outcome 1	-	0	0	0	0
Alt. Outcome 2	1	-	1	0	2
Alt. Outcome 3	1	0	-	1	2
Alt. Outcome 4	1	1	0	-	2

The table is now reorganised, so that the alternative outcomes are listed from top to bottom, and from left to right, beginning with that with the highest score. The cells containing the one more alternative outcomes with the highest total points are highlighted.

	Alternative Outcome 2	Alternative Outcome 3	Alternative Outcome 4	Alternative Outcome 1	Total points
Alt. Outcome 2	-	1	0	1	2
Alt. Outcome 3	0	-	1	1	2
Alt. Outcome 4	1	0	-	1	2
Alt. Outcome 1	0	0	0	-	0

The alternative outcomes in the shaded cells are included in the "Smith set" of dominant outcomes that defeat all outcomes not in that set. To check if any other outcomes need to be added to this set, the Panel checks if any of the cells directly below the shaded cells contain

a  $\frac{1}{2}$  or a 1 (which would indicate that another alternative outcome was not defeated by a member of the Smith set). As this is not the case, there are no outcomes to add to the Smith set. However, the Smith set of dominant outcomes still contains three alternative outcomes. Alternative Outcome 1 is therefore eliminated, and Instant Runoff Voting is used to determine which alternative outcome is chosen by the Panel.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 2	3	1	3	2	2	1	3
Alt. Outcome 3	1	2	2	3	3	2	1
Alt. Outcome 4	2	3	1	1	1	3	2

The votes for Alternative Outcome 1 are reallocated among the remaining alternative outcomes.

Alternative Outcome 4 is the first choice preference of three Panel members, while Alternative Outcomes 2 and 3 are each the first choice preference of two Panel members. As such, second preference votes are taken into account. Alternative Outcome 2 is the second preference of two Panel members while Alternative Outcome 3 is the second choice outcome of three Panel members. Alternative Outcome two is therefore removed and its votes allocated among the remaining two alternative outcomes.

Alternative Outcomes	Determination Panel Members						
	A	B	C	D	E	F	G
Alt. Outcome 3	1	1	2	2	2	1	1
Alt. Outcome 4	2	2	1	1	1	2	2

Alternative Outcome 3 is now the first choice preference of four Panel members, compared with Alternative Outcome 4 which is the first choice preference of three Panel members. Alternative Outcome 3 is therefore the alternative outcome chosen by the Panel.

10. The Determination Panel shall resolve all of the issues submitted to it at a particular time and deliver its decisions as a single compilation, within [90 days] of these issues being submitted. Where issues are submitted to the same Determination Panel which relate to reviews of a Group for different Periods, or different phases of a review, the Panel's decisions shall be delivered in separate compilations corresponding to these reviews or phases.
11. As described in Section 2.4.2, the composition of a Determination Panel is not yet agreed. To the extent necessary, measures would be put in place to ensure the confidentiality of information provided by Groups and exchanged by the Lead Tax Administration with members of the Determination Panel for the purposes of this Section.
12. A Determination Panel may develop and agree further administrative processes for undertaking the steps described in this Section, so long as these are not inconsistent with any provisions of this Section.

A Determination Panel is not free to vary from the basis for reaching agreement in paragraph 9 nor the timeframe for delivering its decisions in paragraph 10.

*Outcomes of a Determination Panel process*

13. Where the decisions of the Determination Panel require no further changes to the Scope Certainty Documentation Package, Follow-Up Scope Certainty Documentation Package, Common Documentation Package or Advance Certainty Documentation Package, then, as applicable,
  - a. a review under Section 2.3.2 or Section 2.3.3 shall progress to a second phase, or
  - b. a review under Section 2.2, Section 2.3.2 or Section 2.3.3 shall conclude with an agreed Scope Certainty Outcome, Comprehensive Certainty Outcome or Advance Certainty Outcome in accordance with that Scope Certainty Documentation Package, Follow-Up Scope Certainty Documentation Package, Common Documentation Package or Advance Certainty Documentation Package, including any changes previously agreed by Listed Parties or Affected Parties.
14. Where the Coordinating Entity submitted a Scope Certainty Documentation Package under Section 2.2 on the basis that the Group is not a Covered Group, but this conclusion is not supported by a decision of the Determination Panel, the Scope Certainty Process concludes with a Scope Certainty Outcome that the Group is a Covered Group. The Coordinating Entity shall be given [180 days] to prepare a Common Documentation Package on the basis the Group is a Covered Group and file this with the Lead Tax Administration. The requirement to suspend domestic compliance activities under paragraph 6 of Section 2.2.1 shall cease to apply at this deadline. If the Coordinating Entity submits a request for Comprehensive Certainty under Section 2.3.1, domestic compliance activities in all Parties shall be suspended under paragraph 4 of that Section.
15. Where the Coordinating Entity submitted a Follow-Up Scope Certainty Documentation Package under Section 2.2 on the basis that the Group is not a Covered Group, but this conclusion is not supported by a decision of the Determination Panel, the Coordinating Entity:
  - a. may prepare a complete Scope Certainty Review Documentation Package and file this with the Lead Tax Administration within [90 days] together with a request for Scope Certainty, or
  - b. may prepare a Common Documentation Package on the basis that the Group is a Covered Group and file this with the Lead Tax Administration within [180 days].
16. The requirement under paragraph 6 of Section 2.2.1 that Listed Parties suspend domestic compliance activities shall continue to apply until:
  - a. the Coordinating Entity files a Scope Certainty Review Documentation Package and request for Scope Certainty in accordance with paragraph 15(a), or
  - b. if (a) does not apply, the deadline in paragraph 15(b).

Where the Coordinating Entity submits a request for Scope Certainty under Section 2.2.1, a new requirement under paragraph 6 of that Section for Listed Parties to suspend domestic compliance activities shall apply. Where the Coordinating Entity submits a request for Comprehensive Certainty under Section 2.3.1, a requirement under paragraph 4 of that Section for all Parties to suspend domestic compliance activities shall apply.

17. Where the Coordinating Entity submitted a request for Comprehensive Certainty under Section 2.3.1, and the decisions of the Determination Panel with respect to issues referred to it following a review under Section 2.3.2 or Section 2.3.3 require changes to the Group's Common Documentation Package, the Coordinating Entity shall be given [90 days] to prepare an amended Common Documentation Package reflecting these decisions as well as changes previously agreed by Affected Parties, and to file this with the Lead Tax Administration. If the Coordinating Entity does not agree to

make the changes described in this paragraph, it is deemed to have withdrawn its request for Comprehensive Certainty after a Comprehensive Certainty Outcome had been agreed

- a. with respect to issues covered in the first phase of the review, or
  - b. with respect to issues covered in both phases of the review,
- as relevant.

18. Where:

- a. paragraph 17 applies,
- b. the Group is required by a decision of the Determination Panel to source one or more categories of revenue using a different Reliable Indicator to that used in the Common Documentation Package, and
- c. the Group does not have access to information for the different Reliable Indicator to be a Reliable Indicator for the Period, confirmed by the Lead Tax Administration with the Coordinating Entity,

the Group may use the applicable default allocation key for the purposes of sourcing this or these categories of revenues for the Period. The agreed Comprehensive Certainty Outcome shall include an explanation of this and a statement that, in the view of the Determination Panel, the Different Reliable Indicator should have been used by the Group for the Period.

19. Where the Coordinating Entity submitted a request for Advance Certainty under Section 2.3.1, and the decisions of the Determination Panel with respect to issues referred to it following a review under Section 2.3.2 require changes to the Group's Advance Certainty Documentation Package, the Coordinating Entity shall be given [90 days] to prepare an amended Advance Certainty Documentation Package reflecting these decisions as well as changes previously agreed by Affected Parties, and to file this with the Lead Tax Administration. If the Coordinating Entity does not agree to make the changes described in this paragraph, it is deemed to have withdrawn its request for Advance Certainty.

20. Where paragraph 17 or paragraph 19 applies and an amended Common Documentation Package or Advance Certainty Documentation Package is filed by the Coordinating Entity with the Lead Tax Administration, the Competent Authority of the Lead Tax Administration shall within [30 days] exchange this amended Documentation Package with the Competent Authorities of all Affected Parties. Within [30 days] of this exchange the Competent Authority of an Affected Party may submit written comments to the Competent Authority of the Lead Tax Administration that it disagrees with how the Determination Panel's decisions have been taken into account by the Coordinating Entity in the amended Documentation Package. This is not an opportunity for a Competent Authority to question any decision of the Determination Panel, but only how those decisions has been taken into account. Where the Competent Authority of an Affected Party does not submit written comments by this deadline it shall be taken for the purposes of this paragraph as agreeing to how the Determination Panel's decisions have been taken into account in the amended Documentation Package. Where no written comments are submitted, the Advance Certainty Process or Comprehensive Certainty Process concludes on this deadline. Any disagreements as to whether or not the Determination Panel's decisions have been correctly taken into account shall be exchanged with the Competent Authorities of all Affected Parties for information. The Lead Tax Administration may discuss these issues with the Coordinating Entity and the Competent Authorities of Affected Parties to resolve any disagreement. Where a disagreement is not resolved it shall be referred to the Determination Panel for a final decision. Where possible, this panel should include the same members that considered the issues originally. Where one or more of these members is not available, their places should be filled using the process in Section 2.4.2. The Advance Certainty Process or Comprehensive Certainty Process concludes when it is agreed that the Determination Panel's decisions have been correctly taken into account.

*Confidentiality and the Determination Panel process*

21. Provisions equivalent to those of [Article 19] on communication of information and confidentiality of dispute resolution panel proceedings contained in Section 2.6.9 of Part III (Tax Certainty for Issues Related to Amount A) shall also apply for the purposes of the Determination Panel process under this Section.

**2.4.2. Composition of a Determination Panel<sup>103</sup>**

*Option A: Independent Expert only Panel*

1. The Determination Panel referred to in Section 2.4.1 shall consist of [five] individual members, comprising:
  - a. [One] Independent Expert nominated to the UPE Pool referred to in paragraph [5] by the Party in which the Ultimate Parent Entity of the Relevant Group is resident for tax purposes, chosen by random selection from all Independent Experts nominated by such Party to the UPE Pool, who is not conflicted to act in such capacity under paragraph [3(b)]; and
  - b. [Four] Independent Experts nominated to the Standing Pool referred to in paragraph [4] by the remaining Parties, chosen by random selection from all Independent Experts in the Standing Pool, who are not conflicted to act in such capacity under paragraph [3(b)].
2. The [five] members of a Determination Panel shall agree by consensus to appoint a Chair from among themselves. Failing consensus within [15] days from the establishment of the Determination Panel, a Chair shall be chosen by random selection from the members of the Determination Panel.
3. For the purposes of this Section:
  - a. a “Relevant Group” is the Group that made the application in respect of which the determination was made that one or more issues would be submitted to a Determination Panel following a review conducted under the approaches described in Section 2.2 or Section 2.3.
  - b. an individual is conflicted to act in a Determination Panel involving a Relevant Group where, at the time of appointment:
    - i. they or a Family Member are or were an employee, contractor, partner or member of the Relevant Group or any of its entities, in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period;
    - ii. they or a Family Member are or were a Significant Investor in the Relevant Group or any of its entities, in the previous [two] years, or continue to derive benefits of any kind from such investments that existed in any prior period;
    - iii. they or a Family Member have or had Significant Business Dealings with the Relevant Group or any of its entities, in the previous [five] years, or continue to derive benefits of any kind from such relationships that existed in any prior period;

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<sup>103</sup> Recognising that there are divergent views among jurisdictions as regards the composition of the Determination Panel, particularly as to whether the composition should include independent experts only or Government officials only, three options are presented for the purpose of receiving input from stakeholders. Commentators on this part of the document should note that none of these options represent final or consensus views of the Inclusive Framework at present.

- iv. they, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Relevant Group or any of its entities in the previous [five] years;
  - v. they, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Relevant Group or any of its entities with respect to an arrangement or transaction being considered by the Determination Panel; or
  - vi. they or a Family Member hold or held a Funded Academic Position in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period.
4. A Standing Pool comprising Independent Experts shall be established for the purposes of the Determination Panel as follows<sup>104</sup>:
- a. The Standing Pool shall, from its time of establishment, include at least [200] individual Independent Experts, which shall be the Minimum Pool Size. However, the Standing Pool may from time to time also include individual Independent Experts nominated by new Parties to this Convention, without limitation as to the maximum size.
  - b. Each Party may nominate [two] individuals who are willing to participate in the Determination Panel for consideration as an Independent Expert in the Standing Pool by submitting to the Tax Certainty Secretariat those individuals' names and detailed curriculum vitae together with a statement explaining how they fulfil the requirements of an Independent Expert under paragraph [6]. There shall be no requirement that nominated individuals are residents or citizens of or have any connection with a nominating Party.
  - c. A Party shall submit nominations to the Tax Certainty Secretariat within [60] days of the entry into effect of this Convention for such Party. The Tax Certainty Secretariat shall then communicate such nominations and accompanying documentation to the Screening Committee as soon as possible.
  - d. The Tax Certainty Secretariat shall add a nominated individual to the draft roster of the Standing Pool if the Screening Committee agrees by consensus, or failing consensus within [30] days from reference to the Screening Committee, by consensus-minus-one, that a nominated individual is an Independent Expert as defined under paragraph [6] and that the nominated individual is suitable for such role.
  - e. The decision of the Screening Committee with respect to each nominated individual shall be communicated to the Party nominating such individual by the Tax Certainty Secretariat within [60] days from the date of such nomination.
  - f. Within [30] days of the Screening Committee communication of its decision to not add a nominated individual to the Standing Pool, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
  - g. The Tax Certainty Secretariat shall invite each Party to nominate one additional Independent Expert if the total number of nominations received under paragraph [4(b)] are fewer than the Minimum Pool Size or if the total number of Independent Experts in the Standing Pool drops below the Minimum Pool Size for any other reason. The Screening Committee may add such nominated

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<sup>104</sup> The mechanism for the establishment of the Standing Pool and for nominations made and approved by Parties is subject to a final decision on the critical mass of jurisdictions required to ratify the Convention for it to come into force and effect for each Party, since the aim is to ensure that enough Independent Experts are in the Standing Pool to participate in Determination Panels for all relevant Covered Groups.

individuals to the draft roster of the Standing Pool under paragraph [4(d)] to the extent required to meet the Minimum Pool Size. However, each nominating jurisdiction shall have a maximum of [four] individuals nominated by it included in total to the draft roster of the Standing Pool.

- h. Once a nominated candidate is added to the draft roster of the Standing Pool, the details of such candidate shall be shared by the Tax Certainty Secretariat with all Parties as soon as possible. All Parties shall be allowed to object to the addition of a candidate in the draft roster of the Standing Pool solely on the grounds that they fail to meet one or more of the requirements in paragraph [6] to qualify as an Independent Expert. If more than [two-thirds] of the Parties do not object to the addition of a candidate to the Standing Pool within [30] days, the candidate shall be added to the Standing Pool for a period of [five years] and the Tax Certainty Secretariat shall communicate such addition to the Parties as soon as possible thereafter. Within [30] days of the communication by the Tax Certainty Secretariat of a candidate not being added to the Standing Pool due to objections made under this paragraph, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
  - i. If a Party establishes to the satisfaction of the Screening Committee that an individual in the Standing Pool fails to remain an Independent Expert under paragraph 6 at any time following their addition to the Standing Pool or did not act in line with their obligations under this Section and with respect to confidentiality of information shared by such Relevant Group under this Convention, the Screening Committee may recommend removal of such individual from the Pool. All Parties shall be allowed to object to the removal of a candidate from the Standing Pool. If a majority of the Parties do not object to the removal of a candidate from the Standing Pool within [30] days, the candidate shall be removed from the Standing Pool. Within [30] days of the Screening Committee communicating its decision to remove a nominated individual from the Standing Pool, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
5. A UPE Pool comprising Independent Experts shall be established for the purposes of the Determination Panel following the same rules as applicable to the Standing Pool under paragraph [4], except that:
    - a. Nominations shall only be made to the UPE Pool by Parties in which the Ultimate Parent Entity of any Group is resident for tax purposes.
    - b. Each nominating Party shall nominate a minimum of [one] individual to the UPE Pool for every Group with an Ultimate Parent Entity resident for tax purposes in that Party, without any limitation as to the maximum number of individuals that may be nominated by each Party to the UPE Pool.
  6. An individual shall be considered an Independent Expert for the purposes of this Section where such individual:
    - a. is a person of standing<sup>105</sup> and may be relied upon to exercise independent judgment and conduct themselves in a professional manner;
    - b. has at least [six] years of relevant experience in dealing with corporate income tax matters;
    - c. has sufficient expertise in international taxation and/or financial accounting matters;
    - d. does not work for or on behalf of any Government and was not in such a situation at any time during the previous [12 months], irrespective of whether the individual is/was on secondment to a

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<sup>105</sup> Subjective criteria such as ‘person of standing’, ‘relevant experience’ and ‘sufficient expertise’ have been added to allow the Screening Committee a level of discretion while deciding whether an Independent Expert should be part of the Standing Pool. However, in the interest of certainty, the Commentary will explain factors that the Screening Committee should take into account while making evaluations under such criteria.

regional tax organisation or an international organisation during this time (for the purposes of this subparagraph, a person who has accepted an appointment as a member of a Determination Panel or Dispute Resolution Panel provided for under this Convention, as an arbitrator in a proceeding pursuant to Part VI of the BEPS Multilateral Instrument, or pursuant to the provisions of any other bilateral or multilateral agreement or domestic law provision providing for the arbitration or resolution of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to work for or on behalf of any Government);

- e. does not provide tax advisory services that are not Limited Tax Advisory Services or provide such services on behalf of any enterprise or firm, and did not provide such services at any time during the previous [12 months]; and
- f. does not work for or on behalf of a regional tax organisation or international organisation that is not specified in [list of international organisations to be added to the Convention].

Explanation: For the purposes of this paragraph, “Limited Tax Advisory Services” refers to tax advisory services where the annual income earned by an individual from such services provided during the current year is less than [30 percent] of the individual’s total annual income, including income from employment, contractual services, pensions or other retirement benefits.

7. A Screening Committee shall be established for the purposes of the Determination Panel as follows:
  - a. Each Party may nominate one individual for consideration as a member of the Screening Committee. Each nominated individual shall be a senior member of the delegation representing that Party in the Inclusive Framework and shall provide a written statement indicating that individual’s willingness to participate in such process and undertaking to act in an independent, impartial and transparent manner if selected to the Screening Committee.
  - b. A Party shall submit a nomination for consideration as a member of the Screening Committee to the Tax Certainty Secretariat within [30] days of the entry into effect of this Convention for such Party. The Tax Certainty Secretariat shall then communicate such nominations to the Chair(s) of the Conference of the Parties as soon as possible thereafter.
  - c. The Chair(s) of the Conference of the Parties shall, following consultation with the Parties, make a proposal to all Parties for the composition of the Screening Committee, ensuring that:
    - i. the selected members have adequate seniority and objectivity,
    - ii. all geographical regions are adequately represented,
    - iii. jurisdictions most likely to be affected by the outcomes in Determination Panels are adequately represented.
  - d. Based on the proposal made by the Chair(s) of the Conference of the Parties, the composition of the Screening Committee shall be decided by the Parties by consensus. Where consensus is not possible within [30] days from the reference of the proposal to the Parties, the composition shall be decided by a [two-thirds] majority of the Parties.
8. The Tax Certainty Secretariat shall coordinate the random selection of the individual members of the Determination Panel and/or the Chair under this Section, with no reference to the jurisdiction that nominated them, either by drawing lots or by using a recognised algorithm, and shall ensure that pure randomisation is maintained in this process to ensure neutrality. The Tax Certainty Secretariat shall inform all selected Independent Experts of their selection as soon as possible thereafter.
9. Within [15] days from being informed by the Tax Certainty Secretariat of their selection pursuant to paragraph [8], the selected Independent Experts shall inform the Tax Certainty Secretariat whether

they are willing to participate in the Panel and conflicted to act in a Panel under paragraph [3(b)].<sup>106</sup> Where Independent Experts are willing to participate in the Panel and not conflicted to act in a Panel under paragraph [3(b)], they shall provide to the Tax Certainty Secretariat a signed statement attesting that they are not conflicted under paragraph [3(b)] at the time of accepting appointment, that they undertake to remain not conflicted under paragraph [3(b)] throughout the proceeding as well as for a reasonable period of time following the relevant proceeding and that they will act with objectivity, independence and impartiality. The Tax Certainty Secretariat shall share this signed statement with all Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) as soon as possible following receipt.

10. An individual selected at random from the Standing Pool or the UPE Pool pursuant to paragraph [8] shall be replaced at random from the Standing Pool or the UPE Pool, respectively, where:
  - a. such individual is not willing to act in a Determination Panel as communicated to the Tax Certainty Secretariat under paragraph [9].
  - b. such individual is conflicted to act in a Determination Panel under paragraph [3(b)] as communicated to the Tax Certainty Secretariat under paragraph [9] or where a Listed Party (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or an Affected Party (for all other Determination Panels) can establish that such individual is conflicted to act in a Determination Panel under paragraph [3(b)] to the satisfaction of the Screening Committee within [30] days of the communication of the signed statement provided for under paragraph [9] to that Listed Party or Affected Party.
  - c. such individual was nominated to the Standing Pool by a Party that nominated another individual who has already been randomly selected to the same Determination Panel.
  - d. such individual is, at the time of selection, actively participating in [three] other Determination Panels.
11. The Tax Certainty Secretariat shall provide written confirmation to each selected Independent Expert of their selection as soon as possible after the receipt of the signed statement provided for under paragraph [9] from that Independent Expert, subject to replacement if required under paragraph [10]. Each Independent Expert shall return a signed copy of that confirmation to the Tax Certainty Secretariat within [15] days of its receipt. The Determination Panel shall be considered established on the date when the last of these signed copies is received by the Tax Certainty Secretariat.
12. The fees payable to the Independent Experts in a Determination Panel shall be addressed as follows:
  - a. The fees payable to the Independent Experts appointed to the Determination Panel under this Section shall be [EUR 1000] per person per day. The expenses of the Independent Experts appointed to the Determination Panel under this Section shall be reimbursed in accordance with the average of the usual amount reimbursed to members of the staff of the Competent Authorities of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels).
  - b. Each Independent Expert appointed to the Determination Panel under this Section shall be compensated for no more than [X] days of work in total.
  - c. If the Relevant Group is of the view that an Independent Expert concerned by a Determination Panel did not act in line with their obligations under this Section and with respect to confidentiality

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<sup>106</sup> The Commentary will clarify that this is also intended to signify an Independent Expert's consent for personal information such as their profile and annual income relevant to this mechanism being disclosed to the Tax Certainty Secretariat and all Parties in both Option A and Option C.

of information shared by such Relevant Group under this Convention in such Determination Panel, the Coordinating Entity of the Relevant Group may file a complaint to the Lead Tax Administration within [60] days of a Determination Panel decision. If more than [two-thirds] majority of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) are of the view that the complaint has merit following consideration, no fee shall be payable and no expenses shall be reimbursed to such Independent Expert under this Section.

13. Independent Experts chosen for a Determination Panel under this Section shall agree in writing, prior to the disclosure to them of any information relating to the Determination Panel proceeding, to treat such information consistently with the confidentiality and nondisclosure obligations described in the provisions of this Convention related to exchange of information and administrative assistance and under the applicable laws of all Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels). In the event that an Independent Expert breaches this agreement, the Screening Committee shall determine the consequences of that breach, which shall apply in addition to the any process or consequence provided under the applicable domestic laws of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels).
14. If a Listed Party (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or an Affected Party (for all other Determination Panels) is of the view that an Independent Expert concerned by a Determination Panel did not act in line with their obligations under this Section and with respect to confidentiality of information shared by such Relevant Group under this Convention in such Determination Panel prior to conclusion of proceedings, they may file a complaint to the Lead Tax Administration at any time during the process. If more than a majority of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) do not object within [30] days of such complaint, the Independent Expert in question selected from the Standing Pool or the UPE Pool shall be replaced with another Independent Expert selected at random from the Standing Pool or the UPE Pool, respectively.

*Option B: Government Official only Panel*

1. The Determination Panel referred to in Section 2.4.1 shall consist of individual members, comprising:
  - a. in the case of Determination Panels to resolve disagreements arising in a Scope Certainty Review or Follow-up Scope Certainty Review, [seven] Government Officials as follows:
    - i. [One] Government Official nominated by the jurisdiction of the Lead Tax Administration.
    - ii. [Three] Government Officials nominated by jurisdictions chosen by random selection from Listed Parties excluding the jurisdiction of the Lead Tax Administration where, based on information provided by the Group,
      - (a) for a Group seeking to apply the exclusion for revenues derived from the sale of Extractive Products, the Group has a license in effect to explore for or exploit Minerals, Mineraloids and Hydrocarbons; or
      - (b) for a Group seeking to apply the exclusion for revenues derived from the provision of Regulated Financial Services, the Group has an employee headcount in Regulated Financial Institutions which amounts to at least [five percent] of total headcount in all the Group's Regulated Financial Institutions

- iii. [Three] Government Officials nominated by jurisdictions chosen by random selection from the Listed Parties excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(a)(ii).
  - b. in the case of all other Determination Panels, [seven] Government Officials as follows:
    - i. [One] Government Official nominated by the jurisdiction of the Lead Tax Administration.
    - ii. [Three] Government Officials nominated by jurisdictions chosen by random selection from the Affected Parties required to provide relief for the Elimination of Double Taxation with respect to the Relevant Group for the Period based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration.
    - iii. [Three] Government Officials nominated by jurisdictions chosen by random selection from the Affected Parties in which the Relevant Group meets the Nexus threshold for the Period, based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(b)(ii).
- 2. The Tax Certainty Secretariat shall invite Listed Parties or Affected Parties covered by paragraph 1 to submit an expression of interest for a Government Official nominated by a Listed Party or an Affected Party to participate in the Determination Panel within [30 days] of the invocation of a Determination Panel as under Section 2.4.1. A Listed Party or an Affected Party should only express interest in participating in a Determination Panel if the person nominated by it is committed to taking an active role on the Determination Panel and the Listed Party or Affected Party concerned would apply sufficient resources to ensure this is possible.
- 3. The [seven] members of a Determination Panel shall agree by consensus to appoint a Chair from among themselves. Failing consensus within [15] days from the establishment of the Determination Panel, a Chair shall be chosen by random selection from the members of the Determination Panel.
- 4. For the purposes of this Section, a “Relevant Group” is the Group that made the application in respect of which the determination was made that one or more issues would be submitted to a Determination Panel following a review conducted under the approaches described in Section 2.2 or Section 2.3.
- 5. An individual shall be considered a Government Official for the purposes of this Section where such individual:
  - a. is a person of standing and may be relied upon to conduct themselves in a professional manner;
  - b. presently works for or on behalf of a function in the Government of a jurisdiction, not being the tax audit and examination function in its tax administration, has at least [three] years of relevant experience working in the field of international business taxation or transfer pricing and has at least one year of such relevant experience working for the Government of such jurisdiction;
  - c. has sufficient expertise in international taxation and/or financial accounting matters.
- 6. The Tax Certainty Secretariat shall coordinate the random selection of the individual members of the Determination Panel and/or the Chair either by drawing lots or by using a recognised algorithm and shall ensure that pure randomisation is maintained in this process to ensure neutrality.
- 7. The Tax Certainty Secretariat shall provide written confirmation to each selected Government Official of their selection as soon as possible thereafter. Each Government Official shall return a signed copy of that confirmation to the Tax Certainty Secretariat within [15] days of its receipt. The Determination Panel shall be considered established on the date when the last of these signed copies is received by the Tax Certainty Secretariat.

8. Where there are less than [three]:
  - a. Listed Parties in which the Group has a license in effect to explore for or exploit Minerals, Mineraloids and Hydrocarbons, any reference to “[three]” in paragraph 1(a)(ii)i shall be replaced by “[one]”.
  - b. Listed Parties in which the Group has an employee headcount which amounts to at least [five percent] of total group headcount, any reference to “[three]” in paragraph 1(a)(ii)ii shall be replaced by “[one]”.
  - c. Listed Parties excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(a)(ii), any reference to “[three]” in paragraph 1(a)(iii) shall be replaced by “[one]”.
  - d. Affected Parties required to provide relief for the Elimination of Double Taxation with respect to the Relevant Group for the Period based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration, any reference to “[three]” in paragraph 1(b)(ii) shall be replaced by “[one]”. Where there are no Affected Parties covered in paragraph 1(b)(ii), the Tax Certainty Secretariat shall invite Parties other than Affected Parties to submit an expression of interest for a Government Official nominated by such Party to participate in the Determination Panel within [30 days]. This unfilled seat shall be filled by random selection from among Parties expressing interest. Where no other Parties have expressed interest, such seat would be filled by random selection from Affected Parties covered in paragraph 1(b)(iii) that are not already represented in the Determination Panel.
  - e. Affected Parties in which the Relevant Group meets the Nexus threshold for the Period, based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(b)(ii), any reference to “[three]” in paragraph 1(b)(iii) shall be replaced by “[one]”.
9. Where there are no Listed Parties covered in paragraph 1(a)(ii), any reference to “[three]” in paragraph 1(a)(iii) shall be replaced by “[six]”.
10. Government Officials in the Determination Panel shall serve in their official capacity and shall not be entitled to fees in addition to the remuneration they receive from their Governments and shall be reimbursed only for expenses in accordance with the rules generally applicable to a member of the staff of the relevant Competent Authority.

*Option C: Mixed Panel*

1. The Determination Panel referred to in Section 2.4.1 shall consist of [seven] individual members, comprising:
  - a. [Three] Independent Experts nominated to the Standing Pool referred to in paragraph [4], chosen by random selection from all Independent Experts in the Standing Pool, who are not conflicted to act in such capacity under paragraph [3(b)]
  - b. [Three] Government Officials as follows:
    - i. in the case of Determination Panels to resolve disagreements arising in a Scope Certainty Review or Follow-up Scope Certainty Review:
      - (a) [One] Government Official nominated by the jurisdiction of the Lead Tax Administration.

- (b) [One] Government Official nominated by a jurisdiction chosen by random selection from Listed Parties excluding the jurisdiction of the Lead Tax Administration where, based on information provided by the Group,
  - (1) for a Group seeking to apply the exclusion for revenues derived from the sale of Extractive Products, the Group has a license in effect to explore for or exploit Minerals, Mineraloids and Hydrocarbons; or
  - (2) for a Group seeking to apply the exclusion for revenues derived from the provision of Regulated Financial Services, the Group has an employee headcount in Regulated Financial Institutions which amounts to at least [five percent] of total headcount in all the Group's Regulated Financial Institutions
- (c) [One] Government Official nominated by a jurisdiction chosen by random selection from the Listed Parties, excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(b)(i)(b).

Where there are no Listed Parties covered in paragraph 1(b)(i)(b), any reference to “[one]” in paragraph 1(b)(i)(c) shall be replaced by “[two]”.

ii. in the case of all other Determination Panels:

- (a) [One] Government Official nominated by the jurisdiction of the Lead Tax Administration.
- (b) [One] Government Official nominated by a jurisdiction chosen by random selection from the Affected Parties required to provide relief for the Elimination of Double Taxation with respect to the Relevant Group for the Period based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration,
- (c) [One] Government Official nominated by a jurisdiction chosen by random selection from the Affected Parties in which the Relevant Group meets the Nexus threshold for the Period, based on the information contained in the Common Documentation Package, which expressed interest to participate in the Determination Panel, excluding the jurisdiction of the Lead Tax Administration or jurisdictions included in paragraph 1(b)(ii)(b).

Where there are no Affected Parties covered in paragraph 1(b)(ii)(b), the Tax Certainty Secretariat shall invite Parties other than Affected Parties to submit an expression of interest for a Government Official nominated by such Party to participate in the Determination Panel within [30 days]. This unfilled seat shall be filled by random selection from among Parties expressing interest. Where no other Parties have expressed interest, any reference to “[one]” in paragraph 1(b)(ii)(c) shall be replaced by “[two]”.

- c. [One] Independent Expert, who is not conflicted to act in such capacity under paragraph [3(b)], chosen as Chair from the Independent Experts in the Standing Pool by consensus among the [six] previously selected Independent Experts and Government Officials. Failing consensus within [30] days from the last selected member of the [six] previously selected Panellists, a Chair shall be chosen by random selection from among the Independent Experts in the Standing Pool who are not conflicted to act in such capacity under paragraph [3(b)].
2. The Tax Certainty Secretariat shall invite Listed Parties or Affected Parties covered by paragraph 1 to submit an expression of interest for a Government Official nominated by a Listed Party or an Affected Party to participate in the Determination Panel within [30 days] of the invocation of a Determination Panel as under Section 2.4.1. A Listed Party or an Affected Party should only express interest in participating in a Determination Panel if the person nominated by it is committed to taking an active

role on the Determination Panel and the Listed Party or Affected Party concerned would apply sufficient resources to ensure this is possible.

3. For the purposes of this Section:
  - a. a “Relevant Group” is the Group that made the application in respect of which the determination was made that one or more issues would be submitted to a Determination Panel following a review conducted under the approaches described in Section 2.2 or Section 2.3.
  - b. an individual is conflicted to act in a Determination Panel involving a Relevant Group where, at the time of appointment:
    - i. they or a Family Member were an employee, contractor, partner or member of the Relevant Group or any of its entities, in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period;
    - ii. they or a Family Member were a Significant Investor in the Relevant Group or any of its entities, in the previous [two] years, or continue to derive benefits of any kind from such investments that existed in any prior period;
    - iii. they or a Family Member had Significant Business Dealings with the Relevant Group or any of its entities, in the previous [five] years, or continue to derive benefits of any kind from such relationships that existed in any prior period;
    - iv. they, directly or as part of or on behalf of an enterprise or firm, were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Relevant Group or any of its entities in the previous [five] years;
    - v. they, directly or as part of or on behalf of an enterprise or firm, were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Relevant Group or any of its entities with respect to an arrangement or transaction being considered by the Determination Panel; or
    - vi. they or a Family Member held a Funded Academic Position in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period.
4. A Standing Pool comprising Independent Experts shall be established for the purposes of the Determination Panel as follows:
  - a. The Standing Pool shall, from its time of establishment, include at least [150] individual Independent Experts, which shall be the Minimum Pool Size. However, the Standing Pool may from time to time also include individual Independent Experts nominated by new Parties to this Convention, without limitation as to the maximum size.
  - b. Each Party may nominate [two] individuals who are willing to participate in the Determination Panel for consideration as an Independent Expert in the Standing Pool by submitting to the Tax Certainty Secretariat those individuals’ names and detailed curriculum vitae together with a statement explaining how they fulfil the requirements of an Independent Expert under paragraph [5]. There shall be no requirement that nominated individuals are residents or citizens of or have any connection with a nominating Party.
  - c. A Party shall submit nominations to the Tax Certainty Secretariat within [60] days of the entry into effect of this Convention for such Party. The Tax Certainty Secretariat shall then communicate such nominations and accompanying documentation to the Screening Committee as soon as possible.

- d. The Tax Certainty Secretariat shall add a nominated individual to the draft roster of the Standing Pool if the Screening Committee agrees by consensus, or failing consensus within [30] days from reference to the Screening Committee, by consensus-minus-one, that a nominated individual is an Independent Expert as defined under paragraph [5] and that the nominated individual is suitable for such role.
  - e. The decision of the Screening Committee with respect to each nominated individual shall be communicated to the Party nominating such individual by the Tax Certainty Secretariat within [60] days from the date of such nomination.
  - f. Within [30] days of the Screening Committee communication of its decision to not add a nominated individual to the Standing Pool, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
  - g. The Tax Certainty Secretariat shall invite each Party to nominate one additional Independent Expert each if the total number of nominations received under paragraph [4(b)] are fewer than the Minimum Pool Size or if the total number of Independent Experts in the Standing Pool drops below the Minimum Pool Size for any other reason. The Screening Committee may add such nominated individuals to the draft roster of the Standing Pool under paragraph [4(d)] to the extent required to meet the Minimum Pool Size. However, each nominating Party shall have a maximum of [four] individuals nominated by it included in total to the draft roster of the Standing Pool.
  - h. Once a nominated candidate is added to the draft roster of the Standing Pool, the details of such candidate shall be shared by the Tax Certainty Secretariat with all Parties as soon as possible. All Parties shall be allowed to object to the addition of a candidate in the draft roster of the Standing Pool solely on the grounds that they fail to meet one or more of the requirements in paragraph [5] to qualify as an Independent Expert. If more than [two-thirds] of the Parties do not object to the addition of a candidate to the Standing Pool within [30] days, the candidate shall be added to the Standing Pool for a period of [five years] and the Tax Certainty Secretariat shall communicate such addition to the Parties as soon as possible thereafter. Within [30] days of the communication by the Tax Certainty Secretariat of a candidate not being added to the Standing Pool due to objections made under this paragraph, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
  - i. If a Party establishes to the satisfaction of the Screening Committee that an individual in the Standing Pool fails to remain an Independent Expert under paragraph 5 at any time following their addition to the Standing Pool, the Screening Committee may recommend removal of such individual from the Pool. All Parties shall be allowed to object to the removal of a candidate from the Standing Pool. If a majority of the Parties do not object to the removal of a candidate from the Standing Pool within [30] days, the candidate shall be removed from the Standing Pool. Within [30] days of the Screening Committee communicating its decision to remove a nominated individual from the Standing Pool, the Party nominating such individual may nominate one alternative individual for consideration as an Independent Expert in the Standing Pool.
5. An individual shall be considered an Independent Expert for the purposes of this Section where such individual:
    - a. is a person of standing and may be relied upon to exercise independent judgment and conduct themselves in a professional manner;
    - b. has at least [six] years of relevant experience in dealing with corporate income tax matters;
    - c. has sufficient expertise in international taxation and/or financial accounting matters;
    - d. does not work for or on behalf of any Government and was not in such a situation at any time during the previous [12 months], irrespective of whether the individual is/was on secondment to a

regional tax organisation or an international organisation during this time (for the purposes of this subparagraph, a person who has accepted an appointment as a member of a Determination Panel or Dispute Resolution Panel provided for under this Convention, as an arbitrator in a proceeding pursuant to Part VI of the BEPS Multilateral Instrument, or pursuant to the provisions of any other bilateral or multilateral agreement or domestic law provision providing for the arbitration or resolution of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to work or have worked for or on behalf of any Government);

- e. does not provide tax advisory services that are not Limited Tax Advisory Services or provide such services on behalf of any enterprise or firm and did not provide such services at any time during the previous [12 months]; and
- f. does not work for or on behalf of a regional tax organisation or international organisation that is not specified in [list of international organisations to be added to the Convention].

Explanation: For the purposes of this paragraph, “Limited Tax Advisory Services” refers to tax advisory services where the annual income earned by an individual from such services provided during the current year is less than [30 percent] of the individual’s total annual income, including income from employment, contractual services, pensions or other retirement benefits.

- 6. An individual shall be considered a Government Official for the purposes of this Section where such individual:
  - a. is a person of standing and may be relied upon to conduct themselves in a professional manner;
  - b. presently works for or on behalf of a function in the Government of a jurisdiction, not being the tax audit and examination function in its tax administration, has at least [three] years of relevant experience working in the field of international taxation or transfer pricing and has at least one year of such relevant experience working for the Government of such jurisdiction;
  - c. has sufficient expertise in international taxation and/or financial accounting matters.
- 7. A Screening Committee shall be established for the purposes of the Determination Panel as follows:
  - a. Each Party may nominate one individual for consideration as a member of the Screening Committee. Each nominated individual shall be a senior member of the delegation representing that Party in the Inclusive Framework and shall provide a written statement indicating that individual’s willingness to participate in such process and undertaking to act in an independent, impartial and transparent manner if selected to the Screening Committee.
  - b. A Party shall submit a nomination for consideration as a member of the Screening Committee to the Tax Certainty Secretariat within [30] days of the entry into effect of this Convention for such Party. The Tax Certainty Secretariat shall then communicate such nominations to the Chair(s) of the Conference of the Parties as soon as possible thereafter.
  - c. The Chair(s) of the Conference of the Parties shall, following consultation with the Parties, make a proposal to all Parties for the composition of the Screening Committee, ensuring that:
    - i. the selected members have adequate seniority and objectivity,
    - ii. all geographical regions are adequately represented,
    - iii. jurisdictions most likely to be affected by the outcomes in Determination Panels are adequately represented.
  - d. Based on the proposal made by the Chair(s) of the Conference of the Parties, the composition of the Screening Committee shall be decided by the Parties by consensus. Where consensus is not possible within [30] days from the reference of the proposal to the Parties, the composition shall be decided by a [two-thirds] majority of the Parties.

8. The Tax Certainty Secretariat shall coordinate the random selection of the individual members of the Determination Panel and/or the Chair under this Section either by drawing lots or by using a recognised algorithm and shall ensure that pure randomisation is maintained in this process to ensure neutrality. The Tax Certainty Secretariat shall inform all selected Independent Experts and Government Officials of their selection as soon as possible thereafter.
9. Within [15] days from being informed by the Tax Certainty Secretariat of their selection, the selected Independent Experts shall inform the Tax Certainty Secretariat whether they are willing to participate in the Panel and conflicted to act in a Panel under paragraph [3(b)]. Where Independent Experts are willing to participate in the Panel and not conflicted to act in a Panel under paragraph [3(b)], they shall along with such intimation provide to the Tax Certainty Secretariat a signed statement attesting that they are not conflicted under paragraph [3(b)] at the time of accepting appointment, that they undertake to remain not conflicted under paragraph [3(b)] throughout the proceeding as well as for a reasonable period of time following the relevant proceeding and that they will act with objectivity, independence and impartiality. The Tax Certainty Secretariat shall share this signed statement with all Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) as soon as possible following receipt.
10. An Independent Expert selected at random from the Standing Pool pursuant to paragraph [8] shall be replaced at random from the Standing Pool where:
  - a. such individual is not willing to act in a Determination Panel as communicated to the Tax Certainty Secretariat under paragraph [9].
  - b. such individual is conflicted to act in a Determination Panel under paragraph [3(b)] as communicated to the Tax Certainty Secretariat under paragraph [9] or where a Listed Party (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or an Affected Party (for all other Determination Panels) can establish that such individual is conflicted to act in a Determination Panel under paragraph [3(b)] to the satisfaction of the Screening Committee within [30] days of the the communication of the signed statement provided for under paragraph [9] to that Listed Party or Affected Party.
  - c. such individual was nominated to the Standing Pool by a Party that nominated another individual who has already been randomly selected to the same Determination Panel.
  - d. such individual is, at the time of selection, actively participating in [three] other Determination Panels.
11. The Tax Certainty Secretariat shall provide written confirmation to each selected Independent Expert and Government Official of their selection as soon as possible after the receipt of the signed statement provided for under paragraph [9], and subject to replacement if required as under paragraph [10]. Each Independent Expert and Government Official shall return a signed copy of that confirmation to the Tax Certainty Secretariat within [15] days of its receipt. The Determination Panel shall be considered established on the date when the last of these signed copies is received by the Tax Certainty Secretariat.
12. The fees payable to the Independent Experts in a Determination Panel shall be addressed as follows:
  - a. The fees payable to the Independent Experts appointed to the Determination Panel under this Section shall be [EUR 1000] per person per day. The expenses of the Independent Experts appointed to the Determination Panel under this Section shall be reimbursed in accordance with the average of the usual amount reimbursed to members of the staff of the Competent Authorities of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels).

- b. Each Independent Expert appointed to the Determination Panel under this Section shall be compensated for no more than [X] days of work in total.
  - c. If the Relevant Group concerned by a Determination Panel is of the view that an Independent Expert did not act in line with their obligations under this Section and with respect to confidentiality of information shared by such Relevant Group under this Convention in such Determination Panel, the Coordinating Entity of the Relevant Group may file a complaint to the Lead Tax Administration within [60] days of a Determination Panel decision. If more than [two-thirds] majority of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) are of the view that the complaint has merit following consideration, no fee shall be payable and no expenses shall be reimbursed to such Independent Expert under this Section.
  - d. Government Officials in the Determination Panel shall serve in their official capacity and shall not be entitled to fees in addition to the remuneration they receive from their Governments and shall be reimbursed only for expenses in accordance with the rules generally applicable to a member of the staff of the relevant Competent Authority.
13. Independent Experts chosen for a Determination Panel under this Section shall agree in writing, prior to the disclosure to them of any information relating to the Determination Panel proceeding, to treat such information consistently with the confidentiality and nondisclosure obligations described in the provisions of this Convention related to exchange of information and administrative assistance and under the applicable laws of all Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels). In the event that an Independent Expert breaches this agreement, the Screening Committee shall determine the consequences of that breach, which shall apply in addition to any process or consequence provided under the applicable domestic laws of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels).
14. If a Listed Party (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or an Affected Party (for all other Determination Panels) is of the view that an Independent Expert concerned by a Determination Panel did not act in line with their obligations under this Section and with respect to confidentiality of information shared by such Relevant Group under this Convention in such Determination Panel prior to conclusion of proceedings, they may file a complaint to the Lead Tax Administration at any time during the process. If more than a majority of the Listed Parties (for Determination Panels arising from Scope Certainty Reviews or Follow-up Scope Certainty Reviews) or Affected Parties (for all other Determination Panels) do not object within [30] days of such complaint, the Independent Expert in question selected from the Standing Pool shall be replaced with another Independent Expert selected at random from the Standing Pool, respectively.

## 2.5. The withdrawal of a request for certainty and Certainty Outcomes

### 2.5.1. Withdrawal of a request for certainty

1. A Coordinating Entity may withdraw a request for Scope Certainty, Comprehensive Certainty or Advance Certainty at any time, including after a Scope Certainty Outcome, Comprehensive Certainty Outcome or Advance Certainty Outcome is agreed, through a written notification to the Lead Tax Administration. Where this occurs, within [30 days] of it being received from the Coordinating Entity the Competent Authority of the Lead Tax Administration shall exchange this written notification with:
  - a. the Competent Authorities of all Parties, where a request for Scope Certainty or Comprehensive Certainty was submitted under Section 2.2 or Section 2.3.1, or
  - b. the Competent Authorities of Affected Parties, where a request for Advance Certainty was submitted under Section 2.3.1.
2. Where a Coordinating Entity withdraws a request for Scope Certainty or Comprehensive Certainty, or is deemed to do so where the Coordinating Entity did not provide material missing from its request for Scope Certainty or Comprehensive Certainty by the relevant deadline or does not agree to required changes to its Scope Certainty Documentation Package or Common Documentation Package, nothing in this Convention shall prevent:
  - a. a Listed Party or Affected Party from relying upon any work conducted by the Scope Review Panel, Review Panel or Lead Tax Administration, or information exchanged by the Competent Authority of the Lead Tax Administration, in the course of a review under Section 2.2, Section 2.3.2 or Section 2.3.3,
  - b. a Party from undertaking any domestic compliance activity permitted under its domestic law,
  - c. a Party from allowing a Group Entity to rely on the domestic procedure of that Party, or
  - d. the Coordinating Entity submitting a request for Scope Certainty, Comprehensive Certainty or Advance Certainty with respect to the application of the Convention to the Group for a subsequent Period.

### 2.5.2. Certainty Outcomes

1. Where a Scope Certainty Process or Follow-Up Scope Certainty Process requested under Section 2.2 concludes with an agreed Scope Certainty Outcome, within [30 days] of the Scope Certainty Process or Follow-Up Scope Certainty Process concluding, the Competent Authority of the Lead Tax Administration shall exchange with Competent Authorities of Listed Parties, details of the agreed Scope Certainty Outcome, in the format contained in [to be agreed]. By the same deadline, the Competent Authority of the Lead Tax Administration shall also exchange with Competent Authorities of Parties that are not Listed Parties a notification that the Scope Certainty Process or Follow-Up Scope Certainty Process has concluded and whether this process determined that the Group was a Covered Group for the Period. If the agreed Scope Certainty Outcome included a conclusion that the Group is not a Covered Group, or that the Group continues not to be a Covered Group and that no further action shall be taken, no Listed Party shall undertake any compliance activity related to the application of Titles 2 to 5 or paragraphs [to be agreed] of Title 6 of the Convention to the Group for the Period. Nothing in this paragraph restricts any Party from undertaking compliance activity with respect to any matters not covered by the Convention or with respect to Related Issues.
2. Where a Comprehensive Certainty Process requested under Section 2.3.1 concludes with an agreed Comprehensive Certainty Outcome:

- a. within [30 days] of the Comprehensive Certainty Process concluding, the Competent Authority of the Lead Tax Administration shall exchange:
    - i. with Competent Authorities of Affected Parties, details of the agreed Comprehensive Certainty Outcome, in the format contained in [to be agreed], and
    - ii. with Competent Authorities of Parties that are not Affected Parties, a notification that the Comprehensive Certainty Process has concluded with an agreed Comprehensive Certainty Outcome,
  - b. all Affected Parties shall take any steps necessary to implement that outcome within [180 days]<sup>107</sup> of the notification in sub-paragraph (a), notwithstanding time limits in domestic law, and
  - c. no Party shall undertake any compliance activity related to the application of Titles 2 to 5 or paragraphs [to be agreed] of Title 6 of the Convention to the Group for the Period which is not consistent with the agreed Comprehensive Certainty Outcome. Nothing in this paragraph restricts any Party from undertaking compliance activity with respect to any matters not covered by the Comprehensive Certainty Outcome or by the Convention, or with respect to Related Issues.
3. Where an Advance Certainty Process requested under Section 2.3.1 concludes with an agreed Advance Certainty Outcome:
- a. within [30 days] of the Advance Certainty Process concluding, the Competent Authority of the Lead Tax Administration shall exchange with Competent Authorities of Affected Parties, details of the agreed Advance Certainty Outcome, in the format contained in [to be agreed], and
  - b. subject to the provisions of Section 2.3.2, no Affected Party shall propose any changes to a Group's application of the Convention that are inconsistent with that Advance Certainty Outcome for a Period to which the Advance Certainty Outcome applies.
4. The provisions of paragraph 2 shall not apply or shall cease to apply where:
- a. the Coordinating Entity withdraws its request for Comprehensive Certainty under Section 2.5.1 or is deemed to do so under Section 2.3.2 where it does not agree to required changes to its Common Documentation Package, or
  - b. a Group Entity submits an amended tax return other than in accordance with Title 6 of the Convention or takes other steps:
    - i. to reduce the Profit Before Tax allocated to any Affected Party under the Convention, or
    - ii. to increase the relief for the elimination of double taxation required under the Convention to be provided by an Affected Party,

for a Period with respect to which a Comprehensive Certainty Outcome has been agreed. Where the Competent Authority of an Affected Party is aware that such an amended tax return has been submitted, or other steps taken, it may contact the Group Entity, directly or via the Lead Tax Administration, to explain the consequences of these steps for the Comprehensive Certainty Outcome, and give the Group Entity an opportunity to withdraw the steps it has taken. Otherwise, or if the Group Entity declines to withdraw these steps, the Competent Authority shall promptly notify the Competent Authority of the Lead Tax Administration, which shall exchange the notification with the Competent Authorities of all Parties. Alternatively, the Competent Authority may notify the Competent Authorities of the Lead Tax Administration and all Parties directly.

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<sup>107</sup> This timeframe shall be reviewed as the Administration Framework of Amount A is agreed.

5. Noting the benefits to Parties and Groups of a consistent application of the Convention, where paragraph 4 applies, nothing in this Convention prevents any Affected Party from continuing to apply the agreed Comprehensive Certainty Outcome for the Period.
6. No paragraph of this Section has effect for any purpose other than the taxation of profits in accordance with Titles 2 to 5 of the Convention. Specifically, the presence or content of a Scope Certainty Outcome, Advance Certainty Outcome or Comprehensive Certainty Outcome shall not be taken into account when considering the position or treatment of any Group Entity for any other purpose.

## 2.6. Other provisions

### 2.6.1. Process for a review where a request for certainty is not made

1. Where the Coordinating Entity of a Covered Group:
  - a. did not submit a request for Scope Certainty under Section 2.2 by the deadline in paragraph 1 of that Section, or has filed a Common Documentation Package for the Period but did not make a request for Comprehensive Certainty under Section 2.3.1, or
  - b. did submit a request for Scope Certainty or Comprehensive Certainty, but
    - i. subsequently withdrew this request under Section 2.5.1,
    - ii. was deemed to withdraw the request where the Coordinating Entity did not agree to required changes to the Common Documentation Package,
    - iii. the Scope Certainty Process, Follow-Up Scope Certainty Process or Comprehensive Certainty Process came to an end without an agreed Scope Certainty Outcome or Comprehensive Certainty Outcome because the Coordinating Entity was persistently late in providing information without explanation or acted in an uncooperative or non-transparent manner, including by providing inaccurate or incomplete information,
    - iv. the Scope Certainty Process ended with a conclusion that the Group is a Covered Group, and the Group did not submit a Common Documentation Package and a request for Comprehensive Certainty for the same Period by the deadline in this note, or
    - v. a Follow-Up Scope Certainty Process ended with a conclusion that it could not be decided that a Group continues not to be a Covered Group on the basis of available information, and a Group does not submit a request for Scope Certainty or Comprehensive Certainty for the same Period by the deadline in this note,

the Competent Authorities of two or more Parties may agree to undertake or continue a review of the application of provisions of the Convention to the Covered Group for the Period. Where a Group has not submitted a Common Documentation Package for a Period, a Party should only participate in a review under this Section if it notified the Group that that it intends, or is considering, opening enquiries to determine whether the Group is a Covered Group for the Period within [36 months] after the end of the Period. Nothing in this paragraph prevents a Party that does not participate in such a review from undertaking any domestic compliance activity permitted under its domestic law.

2. Where paragraph 1(a) applies, before commencing a review under this Section, the tax administration coordinating the review shall inform the Coordinating Entity that a review shall be undertaken. This shall include a description of the benefits of a review under Section 2.3.2 or Section 2.3.3, the outcomes of which would be binding on all Parties. The Coordinating Entity may submit a request that meets the requirements in Section 2.2 or Section 2.3.1 to the Lead Tax Administration within [30 days] of being informed of the review. In the event such a request is submitted, a review shall then be undertaken in accordance with Section 2.2, Section 2.3.2 or Section 2.3.3 as applicable, and the review under this Section shall cease.

#### Undertaking a review where a request for certainty is not made

The examples below illustrate how a coordinated review may be undertaken in cases where a request for certainty was not made by a Group. These examples are not exhaustive and the process in each case will depend upon choices made by the participating Parties and the issues under review. In all cases where a Group did not request certainty for a Period, the Group will be notified before a

coordinated review begins and given the opportunity to submit a request for certainty under Section 1 or Section 2.

### **Example 1**

The Coordinating Entity of Group A, a Covered Group, submits its Common Documentation Package for the Period 20X1 with its Lead Tax Administration, which is exchanged with the Competent Authorities of Affected Parties. The Coordinating Entity does not make a request for Comprehensive Certainty.

Group A's Common Documentation Package includes two jurisdictions, Party M and Party N, in which the Group claims entitlement to relief for the elimination of double taxation. However, the tax administration in Party M has identified some possible errors in the Group's application of rules to allocate the obligation to provide relief between Affected Parties. The Competent Authority of Party M contacts the Competent Authority of Party N, who agrees to participate in a coordinated review. The Parties inform the Coordinating Entity via the Lead Tax Administration that a coordinated review will be undertaken and invites it to submit a request for a Comprehensive Certainty Review within [30 days]. The Coordinating Entity confirms that it does not intend to request such certainty.

Party M and Party N undertake a review of Group A's Common Documentation Package and agree a number of changes to correct the allocation of the elimination of double taxation, which reduce the relief due in Party N, slightly increase the relief due in Party M and also introduce a small amount of relief due in another Affected Party, Party O. The Competent Authority of Party M contacts the Competent Authority of Party O, which reviews the amended calculations and agrees they are correct. Party M, Party N and Party O inform the Coordinating Entity of this outcome, via the Lead Tax Administration.

### **Example 2**

The Coordinating Entity of Group B, a Covered Group, submits its Common Documentation Package for the Period 20X1 with its Lead Tax Administration, which is exchanged with the Competent Authorities of Affected Parties. The Coordinating Entity does not make a request for Comprehensive Certainty.

The tax administration of Party P, an Affected Party, identifies a number of possible errors in the application of the Convention contained in the Common Documentation Package and exchanges this information with the Lead Tax Administration, proposing a coordinated review by Affected Parties. The Lead Tax Administration agrees that the Common Documentation Package appears to contain a number of errors and that a coordinated review should be undertaken.<sup>108</sup> The Lead Tax Administration informs the Coordinating Entity that a coordinated review will be undertaken by Affected Parties and invites it to submit a request for a Comprehensive Certainty Review within [30 days]. The Coordinating Entity confirms that it does not intend to request such certainty. The Lead Tax Administration notifies Affected Parties of the review. Of these Affected Parties, 75% confirm that they would participate in a coordinated review of the Group's Common Documentation Package, whereas 25% do not wish to participate as they either do not agree that there are errors, or any adjustment would not be material in their jurisdiction.

The Lead Tax Administration and participating Affected Parties agree that in this case the review shall be undertaken by a panel comprising the Lead Tax Administration and six tax administrations of participating Affected Parties chosen at random. This panel undertakes a review of the Group's Common Documentation Package, taking into account comments submitted by other participating Affected Parties. As a result of this review the panel agrees that much of the Group's application of the Convention should be agreed as filed, but identifies a small number of changes that should be required.

<sup>108</sup> Note, that, as in Example 1, the agreement of the Lead Tax Administration that the Common Documentation Package appears to contain a number of errors and that a coordinated review should be undertaken is not needed in order for Affected Parties to undertake such a review.

The outcomes of this review are shared with participating Affected Parties. Where there are disagreements, further discussion is undertaken to seek to resolve these. To the extent participating Affected Parties reach agreement, this outcome will be implemented consistently. The final outcome, including any unresolved disagreements are shared with other Affected Parties for information. The Lead Tax Administration also shares details of the outcome with the Coordinating Entity of Group B.

### **2.6.2. A support function for the Tax Certainty Framework**

1. A dedicated Tax Certainty Secretariat shall be established to provide administrative and clerical support to the Parties during the various aspects of the Tax Certainty Framework described in this Part, and other related functions. The Tax Certainty Secretariat shall initially be located in [to be agreed] and may comprise Officials that are [status to be agreed].
2. Activities to be undertaken by a Tax Certainty Secretariat shall be agreed by the Parties, but may include:
  - a. coordinating the establishment of structural aspects of the Tax Certainty Framework, including Screening Committees,
  - b. coordinating processes for the approval of eligible pool members to serve on Determination Panels,
  - c. supporting a Lead Tax Administration in establishing a Review Panel and Advisory Group as needed,
  - d. coordinating the establishment of Determination Panels as needed, including the identification of a Chair, and
  - e. supporting a Lead Tax Administration, Chair of an Advisory Group and Chair of a Determination Panel in organising meetings as needed.
3. As the Tax Certainty Secretariat is not Party to the Convention, general measures shall be put in place to ensure the confidentiality of information provided by Groups and exchanged by Parties for the purposes of the Tax Certainty Framework. This may include, for example, the use of standardised Group Identifiers to ensure the identity of a Group requesting certainty is not disclosed.
4. If required, an Official of the Secretariat may be contracted by the Affected Parties or Listed Parties to act as Clerk to the Chair of a Determination Panel, to provide support including:
  - a. coordinating discussions with members of the Determination Panel,
  - b. organising requests for clarifications via the Lead Tax Administration,
  - c. applying the mechanical approach on behalf of the Chair to identify the chosen alternative outcome in cases where ranked voting is used to choose between multiple alternative outcomes and the Chair has invited Panel Members to rank their preferences, and
  - d. recording the outcomes of discussions in order to facilitate the Determination Panel's work.

In this case, specific confidentiality arrangements would apply in place of the general measures described in paragraph 3.

5. The Tax Certainty Framework, including the Tax Certainty Secretariat, shall be funded by [annual fees payable by Parties / fees payable by Groups making a request for certainty [to be agreed]].

### 2.6.3. Definitions

1. For the purposes of this Part, the definitions in the paragraphs below apply.
2. “Advance Certainty” means certainty provided by Affected Parties to a Covered Group with respect to aspects of the Convention listed in Section 2.3.1, requested before the start of the Period to which the certainty relates;
3. “Advance Certainty Documentation Package” means a package of documents and information to reflect a Covered Group’s proposed approach to one or more of the aspects of the Convention listed in Section 2.3.1, which corresponds with the format and content in [to be agreed]; ;
4. “Advance Certainty Outcome” means an agreed outcome of an Advance Certainty Review which is binding on Affected Parties for a specified period subject to all Critical Assumptions continuing to be met;
5. “Advance Certainty Review” means a review undertaken by a Review Panel on behalf of Affected Parties to determine whether one or more proposed approaches contained in a Group’s Advance Certainty Documentation Package reflect a correct application of the Convention;
6. “Affected Party”, with respect to a Group for a Period, means:
  - a. a Party whose tax administration is the Lead Tax Administration;
  - b. a Party
    - i. in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test, or
    - ii. that is required to provide relief for the Elimination of Double Taxation, for the Period on the basis of information contained in the Common Documentation Package;
  - c. a Party that has notified the Lead Tax Administration asserting that it considers itself to be a Party in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test accompanied by relevant supporting documentation sufficient to demonstrate a reasonable basis for this view,
  - d. [a Party in which a Group Entity of the Group is resident for tax purposes or a permanent establishment of a Group Entity is located,] or
  - e. a Party not in (b), (c) or (d),
    - i. in which the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test, or
    - ii. that is required to provide relief for the Elimination of Double Taxation, for the Period under an agreed Comprehensive Certainty Outcome.

The status of an Affected Party as such shall not by itself be relevant to the determination of whether that Party may tax profits of a Group pursuant to the Convention.

7. For the purposes of paragraph 6(c), relevant supporting documentation includes:
  - a. documentation confirming that the Group has a Group Entity resident in or located in the Party, or
  - b. documentation confirming that the Group has or is likely to have Revenues that are not Excluded Revenues in the Party above the applicable Nexus threshold, which may include but is not limited to:

- i. in cases where the assertion relates to revenues from finished goods, online intermediation of tangible goods, or intangible property related to finished goods: evidence of expenditure on finished goods delivered in the location of the Party, customs documentation, Value Added Tax or Sales Tax documentation demonstrating the delivery of the goods in the location of the Party, or tax documentation relating to the activities and revenue of the Group's independent distributor earned in the location of the Party;
  - ii. in cases where the assertion relates to revenues from resellers of services: evidence of expenditure on the service used in or by a user located in the location of the Party, or projected revenue based on the relevant allocation key, though this shall only be taken as sufficient to demonstrate a reasonable basis that the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test in a Party if, based on information contained in its Common Documentation Package, the Group is using the allocation key for the purposes of sourcing revenues;
  - iii. in cases where the assertion relates to revenues from components, B2B services, or intangible property: projected revenue based on the relevant allocation key, though this shall only be taken as sufficient to demonstrate a reasonable basis that the Group has Revenues, not including Excluded Revenues, that meet the Nexus threshold test in a Party if, based on information contained in its Common Documentation Package, the Group is using the allocation key for the purposes of sourcing revenues;
  - iv. in cases where the assertion relates to revenues from physical services (location-specific services, non-online advertising services, online intermediation of offline services, transport services, intangible property supporting such physical services): tax documentation, or business licensing information or regulatory information demonstrating the performance of the physical service in the jurisdiction of the Party;
  - v. in cases where the assertion relates to revenues from digital businesses (online advertising services, user data, digital goods, online intermediation of digital goods or digital services, digital business to consumer services): evidence of expenditure by business customers on advertising or purchase of user data targeted at end users located in the Party, or quantitative evidence of consumer purchasing habits of consumers located in the Party related to the digital business;
  - vi. in cases where the assertion relates to revenues from B2B services: evidence of expenditure or transactions monitored through foreign exchange controls made by business customers in the location of the Party;
  - vii. in cases where the assertion relates to revenues from real property: legal, regulatory or physical evidence of the location of the real property in the Party;
  - viii. in cases where the assertion relates to revenues from government grants: evidence of the contribution of the Party to government grants;
  - ix. [in cases relating to a Transitional Period: [to be agreed]]; or
  - x. [additional text to be added]
8. "Authorised Representative" means an individual authorised to represent a Group Entity for purposes of its tax matters;
  9. "Common Documentation Package" means a package of documents and information to reflect in detail the application of the Convention to a Group for a Period, which corresponds with the format and content in [to be agreed];

10. “Competent Authority” means the ministry or governmental agency or institution designated by a Contracting Jurisdiction as responsible for the administration of the provisions of the Convention;
11. “Comprehensive Certainty” means certainty provided by Affected Parties to a Covered Group with respect to all aspects of the Convention for a Period that is ended, other than those covered by an Advance Certainty Outcome;
12. “Comprehensive Certainty Outcome” means an agreed outcome of a Comprehensive Certainty Review which shall be implemented by Affected Parties subject to the provisions of Section 2.5.2;
13. “Comprehensive Certainty Review” means a certainty review undertaken by a Review Panel or Lead Tax Administration on behalf of Affected Parties to determine whether the Common Documentation Package filed by the Coordinating Entity reflects a correct application of all relevant aspects of the Convention to the Group in all Parties;
14. “Coordinating Entity” means:
  - a. the Group Entity that is designated by the Group to file the Group’s Scope Certainty Documentation Package, Follow-Up Scope Certainty Documentation Package, Common Documentation Package or Advance Certainty Documentation Package and undertake activities described in this note on behalf of Group Entities, or
  - b. where no designation is made, the Ultimate Parent Entity of the Group;
15. “Critical Assumption” means any fact (whether or not within control of the Group) related to the Group, a third party, an industry, or business and economic conditions, the continued existence of which is material to the granting of an Advance Certainty Outcome.
16. “Determination Panel” means a panel created to resolve disagreements arising from a review of the application of the Convention by a Group for a Period under the approaches described in Section 2.2, Section 2.3.2 or Section 2.3.3, as under Section 2.4;
17. “Excluded Revenues” means revenues from Extractives Activities and Regulated Financial Services.
18. “Family Member” means any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, uncle, aunt, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law (including adoptive relationships) of an individual or any person sharing an individual’s household (other than a tenant or employee).
19. “Lead Tax Administration” means the tax administration of a Party determined by the sub-paragraphs below.
  - a. Subject to the provisions of this paragraph, the Lead Tax Administration is the tax administration of the Party in which the Ultimate Parent Entity of a Group is resident for tax purposes. If the Ultimate Parent Entity of a Group is transparent for tax purposes in the Party where it is organised, it shall be treated for the purposes of this Section as resident in that Party.
  - b. Notwithstanding sub-paragraph (a), where a Group has a significant connection to another Party, the Group, the tax administration mentioned in sub-paragraph (a) and the tax administration of the other Party may agree that the tax administration of the other Party is the Lead Tax Administration. Typically, such a discussion shall be initiated by either the Group or the tax administration mentioned in sub-paragraph (a). If no such agreement is reached, the Lead Tax Administration shall be that identified in sub-paragraph (a). For the purposes of this Section, a Group has a significant connection to:
    - i. the Party in which the Group had the highest average unrelated party revenue in the Period and the [to be added] preceding Periods,

- ii. the Party in which the Group had the highest average tangible fixed assets in the Period and the [to be added] preceding Periods,
  - iii. the Party in which the Group had the highest average number of employees located in the Period and the [to be added] preceding Periods, or
  - iv. the Party whose tax administration was most recently the Lead Tax Administration of the Group.
- c. If the Ultimate Parent Entity of a Group is resident for tax purposes in a tax jurisdiction that is not a Party, which has not introduced rules in accordance with the Convention, or which does not have a tax administration, the Lead Tax Administration is the tax administration in the Party in which the Group had the highest combined average of:
- i. the average percentage of the Group's total number of employees, and
  - ii. the average percentage of the Group's unrelated party revenue,
- in the Period and the [four] immediately preceding Periods.<sup>109</sup> Notwithstanding this, where a Group has a significant connection to another Party, the Group, this tax administration, and the tax administration of the other Party may agree that the tax administration in the other Party is the Lead Tax Administration. Typically, such a discussion shall be initiated by either the Group or the tax administration mentioned first in this sub-paragraph.
- d. If the Ultimate Parent Entity of a Group is resident for tax purposes in two tax jurisdictions, the tax jurisdiction of residence shall be determined in accordance with the applicable tax treaty. Where the applicable tax treaty provides that the determination of residence is based on a determination by the Competent Authorities of the relevant tax jurisdictions, and no such determination has been made, where the applicable tax treaty does not provide that such a Group shall be treated as resident in just one of the Contracting State for purpose of its claiming benefits provided by the Convention, or where no applicable tax treaty exists:
- i. if both tax jurisdictions are Parties and have rules for taxation in accordance the Convention, the Competent Authorities of the two Parties shall mutually agree which should be treated as the tax jurisdiction of residence for the purposes of applying sub-paragraph (a),
  - ii. if only one of the two tax jurisdictions is a Party that has rules for taxation in accordance with the Convention, sub-paragraph (a) applies as if the Ultimate Parent Entity of the Group is resident in that tax jurisdiction only, and
  - iii. if neither of the two tax jurisdictions is a Party that has rules for taxation in accordance with the Convention, sub-paragraph (c) applies.
- e. Parties to the Convention may agree circumstances in which other tax administrations may be the Lead Tax Administration.

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<sup>109</sup> As noted in the Background, commentators should note that this does not reflect the final or consensus views of the Inclusive Framework and that some members hold the view that, in the circumstances covered by this sub-paragraph, the Lead Tax Administration should be the tax administration in the Party in which the Group had the highest combined average of:

- i. the average percentage of the Group's total depreciation, and
- ii. the average percentage of the Group's total payroll,

in the Period and the [four] immediately preceding Periods.

20. “Follow-Up Scope Certainty” means certainty provided by Listed Parties to a Group which has been found not to be a Covered Group for an earlier Period, that the likelihood it is a Covered Group for a later Period is low and no further action shall be taken;
21. “Follow-Up Scope Certainty Review” means a certainty review undertaken by a Scope Review Panel or by the Lead Tax Administration;
22. “Follow-Up Scope Certainty Documentation Package” means a package of documents and information to reflect changes relevant to whether a Group is a Covered Group since the Group was subject to a Scope Certainty Review, which corresponds with the format and content in [to be agreed] ;
23. “Funded Academic Position” means an academic position directly funded by a Covered Group or a Covered Group’s authorised representative or advisor, except for an academic position that is indirectly funded through amounts provided to an educational institution by a Covered Group or its authorised representatives or advisors but not intended to fund the specific position, or with income generated by a shareholding or another equity interest in the Covered Group held by an educational institution.
24. “Listed Parties” means Parties:
  - a. included on a list provided by the Coordinating Entity of a Group and from which Scope Certainty or Follow-Up Scope Certainty is requested under Section 2.2, including a Party added to the list following a proposal from that Party under the process in paragraph 5 of that Section, and
  - b. Parties required to be included on the list in (i) by the Lead Tax Administration;
25. “Proposed Critical Assumption” means any Critical Assumption proposed by the Group as part of its Advance Certainty Documentation Package”
26. “Related Issue” means any issue which meets the definition in Section 2.4.1 of Part III (Tax Certainty for Issues Related to Amount A).
27. “Review Panel” means the panel constituted to review a Covered Group’s request for Comprehensive Certainty or Advance Certainty as described in Section 2.3.2;
28. “Scope Certainty” means certainty provided by Listed Parties to a Group that it is not a Covered Group for a particular Period;
29. “Scope Certainty Documentation Package” means a package of documents and information to reflect the application of provisions of the Convention concerning whether a Group is a Covered Group for a Period, which corresponds with the format and content in [to be agreed];
30. “Scope Certainty Outcome” means an agreed outcome of a Scope Certainty Review;
31. “Scope Certainty Review” means a certainty review undertaken by a Scope Review Panel or Lead Tax Administration on behalf of Listed Parties to determine whether a Group is a Covered Group for a particular Period;
32. “Scope Review Panel” means the panel constituted to review a Group’s request for Scope Certainty as to whether it is a Covered Group, described in Section 2.2.
33. “Significant Investor” means an individual who, individually or through an entity owned or controlled by the individual, owns rights to more than five per cent of the profits, capital, reserves, or voting rights of any entity that is part of the Relevant Group or holds capital having present value, determined on the basis of assets or cash flow, in excess of EUR [15,000] in the entities that are part of the Relevant Group individually or in aggregate.
34. “Significant Business Dealings” means a business transaction or a series of transactions that, during any one fiscal year, exceed the lesser of EUR [X] or [X] percent of a Group’s total operating expenses.

# Part III. Tax Certainty for Issues Related to Amount A

# 1. Overview

1. Tax certainty is a central element of Amount A and an integral part of establishing a new, stable framework for taxing international business income. As reflected in the Statement, Pillar One will include the following components to provide tax certainty:

- In-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and binding manner. Disputes on whether issues may relate to Amount A will be solved in a mandatory and binding manner, without delaying the substantive dispute prevention and resolution mechanism.
- An elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.

2. This Part contains draft provisions on tax certainty for issues “related to Amount A”. These provisions set out a mandatory and binding mechanism that will be used to resolve transfer pricing and permanent establishment profit attribution disputes that Competent Authorities are unable to resolve through the mutual agreement procedure (MAP) within two years of the presentation of the MAP case to the Competent Authorities. The provisions build on the main features of the dispute resolution mechanism described in the Report on Pillar One Blueprint and Inclusive Framework jurisdictions’ experience with mandatory binding dispute resolution mechanisms, notably Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the BEPS MLI).

3. While drafted in the form of MLC provisions, the operative text in this document does not constitute draft Model Rules as is the case for other public consultations on aspects of Amount A. Instead, once the structure and operation of the different elements of these provisions have been consulted on and agreed, work will begin to translate parts of the text in this document into Model Rules, into language for the MLC, or into other agreements and tools as needed. Explanatory footnotes are included in the document to assist public commentators in reviewing the substantive proposal, and to note where differing views continue to be held.

## 2. Provisions for Tax Certainty for Issues Related to Amount A

### 2.1. Article [X] (Mutual Agreement Procedure – Existing Tax Agreement)

1. Where a member of a Covered Group considers that the actions of one or both of the Contracting Jurisdictions to an Existing Tax Agreement result or will result for that member of a Covered Group in taxation connected with a Related Issue not in accordance with the provisions of that Existing Tax Agreement, that member of a Covered Group may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present its case to the Competent Authorities of both Contracting Jurisdictions. The case must be presented with a written statement that the member of a Covered Group considers that the case involves taxation connected with a Related Issue. The case must be presented within three years from the first notification of the action resulting in taxation connected with a Related Issue not in accordance with the provisions of the Existing Tax Agreement.
2. A Competent Authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arise at a satisfactory solution, to resolve the case by mutual agreement with the Competent Authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Existing Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.<sup>110</sup>
3. The Competent Authorities may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.
4. Notwithstanding paragraphs 1 to 3, where a member of a Covered Group may present a case pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement, that member of a Covered Group may, at its option, present a case pursuant to paragraphs 1 to 3 or the mutual agreement procedure provisions of the Existing Tax Agreement. Where a member of a Covered Group has not presented a mutual agreement procedure case pursuant to paragraph 1, and instead has presented a mutual agreement procedure case pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement, the provisions of paragraphs 1 to 3 shall not affect the application of the mutual agreement procedure provisions of the Existing Tax Agreement.<sup>111</sup>

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<sup>110</sup> Further work is ongoing to develop the approach to provisions of Existing Tax Agreements that limit certain adjustments, such as the alternative provision in paragraph 10 of the Commentary on Article 9 of the OECD Model that provides a time limit for Article 9(1) adjustments.

<sup>111</sup> Further work is ongoing on clarifying the relationship between MAP under this provision and Existing Tax Agreements, including in particular the treatment of circumstances in which it is determined that a mutual agreement procedure case initiated pursuant to Article [X] does not involve Related Issues, so as to ensure access for that case to the mutual agreement procedure under the provisions of an Existing Tax Agreement in appropriate cases.

5. a) The provisions of paragraphs 1 to 4 shall not apply with respect to the presentation of a mutual agreement procedure case that was previously presented to a Competent Authority pursuant to the mechanism (or their implementing domestic legislation) provided for by Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), or any of their amending or succeeding instruments or acts of European Union law.
- b) The submission of a complaint as provided under Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), or any of their amending or succeeding instruments or acts of European Union law, shall put an end to any ongoing mutual agreement procedure with respect to the same case that was initiated pursuant to paragraph 1.
- c) Except to the extent that the Competent Authorities of the Contracting Jurisdictions mutually agree, the provisions of paragraphs 1 to 4 shall not apply with respect to the presentation of a mutual agreement procedure case concerning the interpretation or application of an Existing Tax Agreement where that Existing Tax Agreement provides that a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period to resolve unresolved issues arising from a mutual agreement procedure case.<sup>112</sup>
- d) Except to the extent that the Competent Authorities of the Contracting Jurisdictions mutually agree, the presentation of a case pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement shall put an end to any ongoing mutual agreement procedure with respect to the same case that was initiated pursuant to paragraph 1.

## 2.2. Commentary on Article [X]

### 2.2.1. Paragraphs 1 to 3

1. Article [X] provides that a member of a Covered Group may make a request for a mutual agreement procedure to the Competent Authorities of both Contracting Jurisdictions where that member of a Covered Group considers that the actions of one or both of the Contracting Jurisdictions to an Existing Tax Agreement result or will result for that member of a Covered Group in taxation connected with a Related Issue not in accordance with the provisions of that Existing Tax Agreement. Such a request must be presented with a written statement that the member of a Covered Group considers that the case involves taxation connected with a Related Issue. The case must be presented within three years from the first notification of the action resulting in taxation connected with a Related Issue not in accordance with the provisions of the Existing Tax Agreement.

2. The presentation of a case to both Competent Authorities pursuant to paragraph 1 of Article [X] is intended to reinforce the general principle that access to the mutual agreement procedure for taxation connected with Related Issues should be as widely available as possible. Article [X] does so by providing

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<sup>112</sup> Further technical work is ongoing to clarify how this provision should apply where a matter would be excluded from the scope of a mandatory binding dispute resolution mechanism provided by an Existing Tax Agreement.

Covered Groups with the possibility to ensure that decisions as to whether a case should proceed to the second stage of the mutual agreement procedure (i.e. be discussed by the Competent Authorities of both Contracting Jurisdictions) are open to consideration by both Competent Authorities. Article [X] functions as a backstop to the MAP provisions of Existing Tax Agreements, helping to ensure that both Competent Authorities are made aware of MAP requests and have the opportunity to provide their views on whether a MAP request should be accepted or rejected and on whether the taxpayer's objection is considered to be justified.

3. The general principle underlying Article [X] is best served where the member of the Covered Group presents its MAP request to both Competent Authorities at approximately the same time, recognising that there may be practical or other difficulties with a simultaneous presentation of a MAP request to both Competent Authorities. Although paragraph 1 does not provide a time period within which the MAP request must be submitted to both Competent Authorities, the member of a Covered Group should submit both requests as close in time as possible.

4. In some circumstances, different members of the Covered Group affected by the same transfer pricing adjustment may wish to submit separate MAP requests with respect to the same adjustment to the Competent Authorities of their respective jurisdictions of residence. Where this occurs, both Competent Authorities are made aware of the MAP case at an early stage even though the same member of the Covered Group did not submit both MAP requests. Each member of a Covered Group affected by an adjustment should coordinate with the other relevant members of a Covered Group before the filing of any MAP requests, including regarding the choice to present a MAP request pursuant to Article [X] or the MAP provisions of an Existing Tax Agreement. Where a MAP request with respect to the same Related Issue is presented by one member of a Covered Group under Article [X] and by another member of a Covered Group under the MAP provisions of an Existing Tax Agreement, the Competent Authorities will have to consult with the members of the Covered Group to determine under which instrument the case should be considered submitted. Coordination by the members of a Covered Group can avoid duplicative MAP requests and promote a more effective and efficient MAP from the perspectives of both the Covered Group and the Competent Authorities. In any case, a MAP request should indicate whether a MAP request with respect to the same adjustment was submitted to the Competent Authority of the other Contracting Jurisdiction. For purposes of Article 19, this information is expressly included as part of the "information necessary to undertake substantive consideration of the case" (see Article [Z](7)).

5. Where both Competent Authorities have received a MAP request, the case should proceed to the bilateral stage of the mutual agreement procedure (potentially allowing access to the dispute resolution panel procedure) if either Competent Authority accepts the case in MAP and considers that the objection raised in the request is justified.

6. In circumstances where a member of a Covered Group presents its case to the Competent Authorities of both Contracting Jurisdictions pursuant to Article [X], Competent Authorities may follow their established case-handling practices and their published MAP programme guidance, including on aspects of filing MAP requests and their processing. These case-handling practices and MAP programme guidance would be subject to the different milestones and deadlines provided in Article 19 with respect to determining the "start date" of the MAP case. Depending on Competent Authority practice, the Competent Authority of the Contracting Jurisdiction of residence of the taxpayer that made the MAP request, or of the Contracting Jurisdiction that made the adjustment at issue in the MAP case, would generally take the lead in the unilateral phase of the MAP case. Although the procedures used in the context of a particular MAP case or bilateral relationship will vary, the Competent Authority of the Contracting Jurisdiction that took the action that led to the taxation which is alleged to be contrary to the Existing Tax Agreement would then in the bilateral phase of the MAP case routinely provide a position paper to the other Competent Authority to explain the basis for the adjustment. In all cases, the Competent Authorities are encouraged to communicate at the beginning of the MAP process to facilitate a coordinated approach to the case and a shared understanding of the steps each will take in the process of endeavouring to agree a resolution.

7. A member of a Covered Group that presents its case pursuant to Article [X] must also provide a written statement that the case may involve taxation connected with a Related Issue. The term “Related Issue” is defined for purposes of Section 3 in Article [Z](1). This written statement is intended to inform Competent Authorities at the beginning of the MAP case that unresolved Related Issues arising from the MAP case could potentially be submitted to a dispute resolution panel.

8. Paragraph 2 of Article [X] includes the second sentence of Article 25(2) of the OECD and UN Models to ensure that resolutions of MAP cases that are agreed by the Competent Authorities are implemented notwithstanding domestic law time limits. This language addresses obstacles to the implementation of Competent Authority mutual agreements that may arise in practice where a MAP article does not include the second sentence of Article 25(2). A member of a Covered Group would have no access to the dispute resolution panel mechanism where a Competent Authority mutual agreement had resolved Related Issues but was not implemented, even though the Related Issues would in substance remain unresolved in such cases.

9. The remaining language of paragraphs 1 to 3 of Article [X] is based on the language of paragraphs 1, 2 and 4 of Article 25 of the OECD and UN Models. Article [X] does not include an equivalent to paragraph 3 of Article 25 the OECD and UN Models. Competent Authorities would continue to rely on the corresponding provisions of Existing Tax Agreements to resolve difficulties or doubts as to the interpretation or application of the Existing Tax Agreement, or to consult together for the elimination of double taxation in cases not provided for in the Existing Tax Agreement.

10. For the avoidance of doubt, where both Competent Authorities agree, they may, where appropriate, extend the outcome of a MAP case to cover subsequent taxable periods, in particular where the facts and circumstances of the relevant transactions or activities remain unchanged. This may facilitate the resolution of recurring issues that could otherwise give rise to multiple, duplicative MAP cases. Depending on the Competent Authorities’ MAP practices and procedures, a MAP outcome could potentially be extended by mutual agreement to subsequent taxable periods for which the member of a Covered Group has filed tax returns (but with respect to which it has not filed MAP requests) or reflected in a bilateral advance pricing arrangement for future years. Any decision to extend a MAP outcome to subsequent taxable periods would in all cases remain subject to the discretion of the Competent Authorities, based on the facts and circumstances of those subsequent taxable periods.

#### 2.2.2. *Paragraph 4*

11. Paragraph 4 of Article [X] addresses the interactions of Article [X] with the mutual agreement procedure provisions of Existing Tax Agreements.

12. Paragraph 4 provides that paragraphs 1 to 3 of Article [X] apply at the option of a member of a Covered Group. This means that a member of a Covered Group will have the option to present its MAP case pursuant to Article [X](1) or pursuant to the relevant provision of the Existing Tax Agreement’s mutual agreement procedure article.

13. Paragraph 4 also provides that where a member of a Covered Group has not opted to present a MAP case pursuant to paragraph 1 of Article [X], but has presented a mutual agreement procedure case pursuant to the MAP provisions of an Existing Tax Agreement, the provisions of paragraphs 1 to 3 shall not affect the application of the MAP provisions of the Existing Tax Agreement. Given the definition of the term “Existing Tax Agreement” in Article [Z](8), the reference in paragraph 4 to “the MAP provisions of the Existing Tax Agreement” refers to such provisions as they may have been modified or amended by any subsequent protocol or another agreement, or as their application may have been modified by the BEPS MLI.

14. Based on the definition of the term “Existing Tax Agreement” in Article [Z](8), paragraph 4 of Article [X] does not address interactions with the provisions on the presentation of a mutual agreement

procedure case in Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (the “EU tax dispute resolution Directive”) or in the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC) (the “EU Arbitration Convention”). The definition of the term “Existing Tax Agreement” expressly excludes from its scope the EU tax dispute resolution Directive and the EU Arbitration Convention. These interactions are addressed in paragraph 5.

15. Provisions of a mutual agreement procedure article based on Article 25(5) of the OECD Model or Article 25(5) (Alternative B) of the UN Model would not apply with respect to a mutual agreement procedure case presented pursuant to Article [X]. This is because these MAP arbitration provisions apply with respect to MAP cases presented pursuant to paragraph 1 of the MAP article of the relevant Existing Tax Agreement. For MAP cases presented pursuant to the MAP article of an Existing Tax Agreement (rather than Article [X]), paragraphs 32 and 33 of Article 19 address the relationship between the dispute resolution panel mechanism and other mechanisms provided in the MAP article of that Existing Tax Agreement for the mandatory and binding resolution of unresolved issues arising from a MAP case.

### 2.2.3. *Paragraph 5*

16. Paragraph 5 contains two provisions intended to clarify the interactions of Article [X] with the EU tax dispute resolution Directive, the EU Arbitration Convention, and any of their amending or succeeding instruments or acts of European Union law. In particular, these provisions reflect the circumstance that the EU tax dispute resolution Directive already includes a requirement to submit a complaint simultaneously to each of the Competent Authorities involved (see Article 3(1) of the EU tax dispute resolution Directive). The EU Arbitration Convention similarly requires an enterprise to notify the Competent Authorities of the other Contracting States concerned by a case at the same time as it presents its case to the Competent Authority of its Contracting State of residence (or to the Competent Authority of the Contracting State in which its permanent establishment is situated).

17. Paragraph 5(a) provides that the provisions of paragraphs 1 to 4 shall not apply with respect to the presentation of a mutual agreement procedure case that was previously presented to a Competent Authority pursuant to the EU tax dispute resolution Directive or the EU Arbitration Convention (or any of their amending or succeeding instruments or acts of European Union law).

18. Paragraph 5(b) provides that the submission of a complaint as provided under the EU tax dispute resolution Directive or the EU Arbitration Convention (or any of their amending or succeeding instruments or acts of European Union law) shall put an end to any ongoing mutual agreement procedure with respect to the same case that was initiated pursuant to paragraph 1. This would be a consequence of Article 16(5) of the EU tax dispute resolution Directive in any case, but paragraph 5(b) serves to confirm this result.

19. Paragraph 5(c) addresses the interactions of paragraphs 1 to 4 with the MAP provisions of Existing Tax Agreements that provide for the resolution of unresolved MAP disputes by a mandatory binding dispute resolution mechanism. Paragraph 5(c) provides that, except to the extent that the Competent Authorities of the Contracting Jurisdictions mutually agree, the provisions of paragraphs 1 to 4 shall not apply with respect to the presentation of a mutual agreement procedure case concerning the interpretation or application of an Existing Tax Agreement where that Existing Tax Agreement provides that a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period to resolve unresolved issues arising from a mutual agreement procedure case.<sup>113</sup>

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<sup>113</sup> Further technical work is ongoing to clarify how this provision should apply where a matter would be excluded from the scope of a mandatory binding dispute resolution mechanism provided by an Existing Tax Agreement.

20. Paragraph 5(d) is intended to avoid parallel MAP processes with respect to the same case. Under this provision, the presentation of a case pursuant to the MAP provisions of an Existing Tax Agreement shall put an end to any ongoing mutual agreement procedure with respect to the same case that was initiated pursuant to paragraph 1. Paragraph 5(d) also allows Competent Authorities the flexibility to take a different approach where they mutually agree.

### 2.3. Article [Y] (Mutual Agreement Procedure – No Existing Tax Agreement)<sup>114</sup>

1. Where a member of a Covered Group considers that the actions of one or both of the Contracting Jurisdictions result or will result for that member of a Covered Group in taxation connected with a Related Issue not in accordance with the provisions of *[reference to the provisions of the Convention that provide the applicable substantive transfer pricing and PE profit attribution rules]*, that member of a Covered Group may, irrespective of the remedies provided by the domestic law of the Relevant Contracting Jurisdictions, present its case simultaneously to the Competent Authorities of both Relevant Contracting Jurisdictions, indicating that the case involves taxation connected with a Related Issue. The case must be presented within three years from the first notification of the action resulting in taxation connected with a Related Issue not in accordance with the provisions of *[reference to the provisions of the Convention that provide the applicable substantive transfer pricing and PE profit attribution rules]*.
2. A Competent Authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the Competent Authority of the other Relevant Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Relevant Contracting Jurisdictions.
3. The Competent Authorities of the Relevant Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of *[reference to the provisions of the Convention that provide the applicable substantive transfer pricing and PE profit attribution rules]*. They may also consult together for the elimination of double taxation in cases that concern taxation connected with a Related Issue not provided for in the Convention.
4. The Competent Authorities of the Relevant Contracting Jurisdictions may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.
5. This Article shall apply as between two Contracting Jurisdictions for which there is no Existing Tax Agreement in force.
6. For the purposes of this Article, the term “Relevant Contracting Jurisdictions” means –
  - a) the Contracting Jurisdiction that has taken an action that a member of a Covered Group considers results or will result for that member of a Covered Group in taxation connected with a Related Issue not in accordance with the provisions of *[reference to the provisions of the Convention that provide the applicable substantive transfer pricing and PE profit attribution rules]*; and
  - b) the other Contracting Jurisdiction in which the taxation connected with a Related Issue of that member of a Covered Group, or of another member of the Covered Group, is or will be directly affected by the resolution of the Related Issue.

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<sup>114</sup> Article [Y] does not reflect the final or consensus views of the Inclusive Framework.

## 2.4. Article [Z] (Definitions)

For the purposes of Section 3:

### 2.4.1. Definition of “Related Issue”<sup>115</sup>

1. The term “Related Issues” means issues that have a current or potential impact<sup>116</sup> on the application of Amount A by the Covered Group and are covered under the provisions of an Existing Tax Agreement [based on Articles 5, 7 or 9 of the OECD Model or the UN Model or (*reference to the provisions of the Convention that provide the applicable substantive transfer pricing and PE profit attribution rules*).]<sup>117</sup>
2. The term “Related Issue” shall not, however, include –
  - a) an issue that concerns an adjustment to the profits of a transaction –
    - i) between members of a Group that are Regulated Financial Institutions;
    - ii) between members of a Group that are Extractives Entities;
    - iii) that only involves an Extractives Segment;
    - iv) where the Covered Segment rules apply, that is a transaction between an Extractives Segment and a non-Extractives Segment that is not a Covered Segment;
    - v) where the Covered Segment rules apply, that is a transaction between a Segment that only contains Regulated Financial Institutions and a non-RFS Segment that is not a Covered Segment; or
  - b) an issue that concerns an adjustment to the profits attributed to a permanent establishment of a member of a Group (including the question of whether such a permanent establishment exists) –
    - i) that is a Regulated Financial Institution;
    - ii) that is an Extractives Entity;

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<sup>115</sup> Paragraph 1 does not reflect the final or consensus views of the Inclusive Framework. Members of the Inclusive Framework have different views on issues connected with the scope definition, including whether the definition should include a quantitative materiality threshold and whether reservations with respect to scope should be permitted. The “Related Issue” definition will be revisited as appropriate once the design of other Pillar One building blocks is finalised; in particular, some elements of elimination of double taxation and the marketing and distribution profits safe harbour are still under discussion and could have impacts on the scope of Related Issues.

<sup>116</sup> There is no agreement among Inclusive Framework members as to if and to what extent a potential impact on Amount A can be within the scope of “Related Issues”. Further work is ongoing on the meaning of the reference to “potential impact”. This would need, for example, to identify situations where a Covered Group might not be able to demonstrate a current impact with respect to an adjustment on the application of Amount A, for instance where a single adjustment may only impact Amount A in tandem with other adjustments or where adjustments in one year may cause an impact in following years that cannot be determined as yet.

<sup>117</sup> Consistent with the October Statement, “all issues related to Amount A (e.g. transfer pricing and business profits disputes)” will benefit from dispute prevention and resolution mechanisms. At this stage in the discussion on Amount A, some issues that may have an impact on Amount A have not been agreed (for example, the consideration of withholding taxes) and, when those issues are agreed, the Inclusive Framework will discuss whether those issues will be covered in this definition.

- iii) that only affects revenue reported in an Extractives Segment; or
- iv) where the Covered Segment rules apply, that is an adjustment to the profits attributed to a permanent establishment of an entity that is not a member of a Covered Segment.<sup>118</sup>

#### **2.4.2. Definition of “Covered Group”**

3. The term “Covered Group” has the meaning provided in [cross-reference to the provisions of the Convention defining the term “Covered Group” for purposes of Amount A].
4. The term “Covered Group” shall be understood to refer also to a “Covered Segment”, as that term is defined in [cross-reference to the provisions of the Convention defining the term “Covered Segment” for purposes of Amount A].

#### **2.4.3. Definition of “member of the Covered Group directly affected by the case”**

5. The term “member of the Covered Group directly affected by the case” means the member of a Covered Group that presented the case and any other member of the Covered Group whose tax liability to either Contracting Jurisdiction may be directly affected by the mutual agreement arising from that case.

#### **2.4.4. Definition of “legally bound”**

6. The term “legally bound” includes within its scope all circumstances in which a Competent Authority must adhere to a court or administrative tribunal decision, regardless of whether the Competent Authority was itself a party to the court or administrative tribunal procedure that resulted in the decision.<sup>119</sup>

#### **2.4.5. Definition of the “information necessary to undertake substantive consideration of the case”**

7. The “information necessary to undertake substantive consideration of the case” is as follows:
  - a) The identity of the taxpayer(s) covered by the mutual agreement procedure request.
  - b) The basis for the mutual agreement procedure request, identifying the specific tax treaty, the specific treaty article or articles the taxpayer considers are not being correctly applied by one or both Contracting Jurisdictions (indicating which Contracting Jurisdiction and the contact details of the relevant person(s) in that Contracting Jurisdiction), and the mutual agreement procedure provision pursuant to which the request is made.

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<sup>118</sup> Further work is ongoing to refine the technical drafting of these exclusions from the definition of “Related Issue”, including their application where the segmentation rules would apply to bring part of a Group (a “Covered Segment”) into scope of Amount A. This work will also consider the effects of a dispute resolution panel outcome in the Contracting Jurisdiction of residence of an Extractives Entity where the MAP case in which the Related Issue arises involves an Extractives Entity (or in the Contracting Jurisdiction in which the permanent establishment of an Extractives Entity is located where the MAP case in which the Related Issue arises involves the permanent establishment of an Extractives Entity).

<sup>119</sup> Further work is ongoing to develop the guidance on the meaning of this term.

- c) The facts of the case, including any documentation to support these facts, the taxation years or periods involved and the amounts involved (in all relevant currencies).
- d) An analysis of the issue(s) requested to be resolved through the mutual agreement procedure, including the taxpayer's interpretation of the application of the specific treaty provision(s), to support its basis for making a claim that the provision of the specific tax treaty was not correctly applied by one or both Contracting Jurisdictions. This analysis shall be supported by relevant documentation.
- e) Where the mutual agreement procedure request was also submitted to the Competent Authority of the other Contracting Jurisdiction, a statement to this effect that identifies the taxpayer that made the request to the Competent Authority of the other Contracting Jurisdiction and that includes the date of that request, the Competent Authority to which it was submitted, and a copy of the submission and all supporting documentation.
- f) Whether the mutual agreement procedure request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes, including the date of any such submission, the name and designation of the authority to which it was submitted, and a copy of the submission and all supporting documentation.
- g) Whether any issue in the mutual agreement procedure case was previously dealt with (such as in an advance ruling, advance pricing arrangement, settlement agreement or by any court or administrative tribunal), including a copy of any such rulings, agreements or decisions.
- h) A statement confirming that all information and documentation provided in the mutual agreement procedure request is accurate and that the taxpayer will assist the Competent Authority in its resolution of the issue(s) presented in the mutual agreement procedure request by furnishing any other information or documentation required by the Competent Authority in a timely manner.
- i) A written statement that the mutual agreement procedure case may involve taxation connected with a Related Issue.
- j) Any other information or documentation required by either Competent Authority in accordance with its published MAP guidance.<sup>120</sup>

#### 2.4.6. **Definition of "same Related Issue"**

8. The term "same Related Issue" means a Related Issue, as that term is defined in paragraph 1 of Article [Z], that is identical to the Related Issue to be resolved through the mutual agreement procedure case referred to in Article 19(a)(1)(i) and that concerns the same taxable period or periods as those concerned by the mutual agreement procedure case. The term also includes within its scope –

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<sup>120</sup> Additional technical work is ongoing on the appropriate treatment of Competent Authority requests for additional information not specifically listed in a Contracting Jurisdiction's MAP programme guidance. That work will evaluate how to ensure the ability of Competent Authorities to obtain additional information relevant to the resolution of a MAP case while protecting against repeated or unreasonable Competent Authority requests for additional information intended to delay the "start date" of the MAP case for purposes of the dispute resolution panel mechanism.

- a) similar but not identical Related Issues; and
- b) identical or similar Related Issues that concern a different taxable period or periods as those concerned by the mutual agreement procedure case

where a decision on such issues by a court or administrative tribunal of a Contracting Jurisdiction, or the outcome of a separate administrative process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process, has resolved or would resolve the Related Issues in the mutual agreement procedure case in that Contracting Jurisdiction and the Competent Authority of that Contracting Jurisdiction is or would be legally bound by that decision or outcome in resolving the mutual agreement procedure case.

#### 2.4.7. **Definition of “Existing Tax Agreement”**

9. The term “Existing Tax Agreement” means an agreement, as that agreement or its application may have been modified or amended by any subsequent protocol or another agreement, of which one of the purposes is the avoidance of double taxation (including agreements where the scope is broader than taxation) with respect to taxes on income (whether or not other taxes are also covered) that is in force between two or more:
- a) Parties; and/or
  - b) jurisdictions or territories that are parties to an agreement described above and for whose international relations a Party is responsible.

The term “Existing Tax Agreement” does not include Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC), or any of their amending or succeeding instruments or acts of European Union law.

#### 2.4.8. **Definition of “Party”**

10. The term “Party” means [...]

#### 2.4.9. **Definition of “Contracting Jurisdiction”**

11. The term “Contracting Jurisdiction” means a party to an Existing Tax Agreement.

## 2.5. Commentary on Article [Z]

### 2.5.1. **Paragraphs 1 to 4**<sup>121</sup>

1. Paragraph 1 defines the scope of application of the dispute resolution mechanism provided for in Section 3 through the definition of “Related Issue”.<sup>122</sup> Groups may file MAP requests concerning “Related

<sup>121</sup> Article [Z](1) and [Z](2) do not reflect the final or consensus views of the Inclusive Framework. The explanation of Article [Z](1) and [Z](2) will accordingly be amended as appropriate based on the final formulation of these provisions.

<sup>122</sup> The commentary in this paragraph would be further developed in line with the ongoing technical work on paragraph 1 of Article [Z].

Issues” under Article [X] or [dispute resolution requests under Article 19]<sup>123</sup> where they consider that actions, including those made under domestic anti-avoidance rules, are not in line with the tax treaty. This does not create any implication that domestic anti-avoidance rules that are not meant to be covered by tax treaties should now be considered covered.

2. Paragraph 1 makes clear that the dispute resolution panel mechanism applies only to MAP disputes involving a member of a “Covered Group” (i.e. a Group whose profit may be subject to a tax charge under the new Amount A taxing right). For this purpose, paragraph 3 defines “Covered Group” through a direct reference to [*cross-reference to the provisions of the Convention defining the term “Covered Group” for purposes of Amount A*].

3. Paragraph 4 specifies that the references in Section 3 to “Covered Group” shall be understood to refer also to a “Covered Segment”, as that term is defined in [*cross-reference to the provisions of the Convention defining the term “Covered Group” for purposes of Amount A*]. As a consequence, the dispute resolution panel mechanism will apply also to MAP disputes involving a member of a “Covered Segment”, which by definition will not be a member of a Covered Group. Such a result is appropriate because the resolution of transfer pricing and profit attribution disputes involving a member of a Covered Segment will have an impact on the application of Amount A to the Covered Segment just as they would in the case of a dispute involving a member of a Covered Group.

4. In some circumstances, however, a Qualifying Extractives Group or a Group that conducts Regulated Financial Services will be a Covered Group. In these circumstances, paragraph 2(a) provides that the following transfer pricing issues are not “Related Issues”:

- an issue that concerns an adjustment to the profits of a transaction between members of a Group that are Regulated Financial Institutions;
- an issue that concerns an adjustment to the profits of a transaction between members of a Group that are Extractives Entities;
- an issue that concerns an adjustment to the profits of a transaction that only involves an Extractives Segment;
- where the Covered Segment rules apply, an issue that concerns an adjustment to the profits of a transaction between an Extractives Segment and a non-Extractives Segment that is not a Covered Segment; or
- where the Covered Segment rules apply, that is a transaction between a Segment that only contains Regulated Financial Institutions and a non-RFS Segment that is not a Covered Segment.

5. Paragraph 2(b) then provides in addition that the following profit attribution issues are not “Related Issues”:

- an issue that concerns an adjustment to the profits attributed to a permanent establishment of a member of a Group (including the question of whether such a permanent establishment exists) that is a Regulated Financial Institution;
- an issue that concerns an adjustment to the profits attributed to a permanent establishment of a member of a Group (including the question of whether such a permanent establishment exists) that is an Extractives Entity;

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<sup>123</sup> There are differing views among members of Inclusive Framework on whether domestic anti-avoidance rules should be subject to mandatory and binding dispute resolution as “Related Issues”. Discussions are ongoing in this regard. See also note 115 in connection with this.

- an issue that concerns an adjustment to the profits attributed to a permanent establishment of a member of a Group (including the question of whether such a permanent establishment exists) that only affects revenue reported in an Extractives Segment; or
- where the Covered Segment rules apply, that is an adjustment to the profits attributed to a permanent establishment of an entity that is not a member of a Covered Segment.

6. These exclusions do not go further to exclude from the definition of “Related Issue” issues that concern any transaction that involves an entity that derives Extractives Revenue or that is a Regulated Financial Institution. That is because, in applying these exclusions, the logic is to isolate the excluded revenues and profits; and treat the remaining part of the Group (or any Covered Segments) as if they were standalone groups, including by recognising transactions between the excluded part and the in-scope part. This means that a transaction involving the in-scope part, even if the counterparty to that transaction is itself excluded (such as where the upstream part of an extractives group sells oil to a downstream part of the group which is in scope), can affect the calculation of revenues and profits of that in-scope part and therefore affect Amount A.

### 2.5.2. *Paragraph 5*

7. For the purposes of Section 3, “member of the Covered Group directly affected by the case” is defined in paragraph 5 to mean the member of a Covered Group that presented the case and any other member of the Covered Group whose tax liability to either Contracting Jurisdiction may be directly affected by the mutual agreement arising from that case.

### 2.5.3. *Paragraph 6*

8. Paragraph 6 clarifies that, for the purposes of Section 3, the term “legally bound” includes within its scope all circumstances in which a Competent Authority must adhere to the decision of a court or administrative tribunal, regardless of whether the Competent Authority was itself a party to the court or administrative tribunal procedure that resulted in the decision. Paragraph 6 is not exhaustive and would encompass other circumstances in which a Competent Authority must adhere to the outcomes of other processes related to a court or administrative tribunal procedure, such as a separate process required to be completed in connection with a court or administrative tribunal procedure in advance of that court or administrative tribunal procedure. The term does not include within its scope circumstances where a Competent Authority would follow a decision as a matter of administrative policy or practice but would not be obliged to adhere to the decision as a matter of law.

### 2.5.4. *Paragraph 7*

9. For the purposes of Section 3, paragraph 7 identifies “the information necessary to undertake substantive consideration of a case” as the following items of specific information and documentation:

- i) The identity of the taxpayer(s) covered by the mutual agreement procedure request.
- ii) The basis for the mutual agreement procedure request, identifying the specific tax treaty, the specific treaty article or articles the taxpayer considers are not being correctly applied by one or both Contracting Jurisdictions (indicating which Contracting Jurisdiction and the contact details of the relevant person(s) in that Contracting Jurisdiction) and the mutual agreement procedure provision pursuant to which the request is made (i.e. Article [X] or Article [Y], or the MAP provisions of an Existing Tax Agreement or some other legal instrument).
- iii) The facts of the case, including any documentation to support these facts (e.g. a copy of the final tax assessment, tax audit reports and any other documents issued by the tax

authorities with regard to the Related Issue(s) in dispute), the taxation years or periods involved and the amounts involved (in all relevant currencies).

- iv) An analysis of the issue(s) requested to be resolved through the mutual agreement procedure, including the taxpayer's interpretation of the application of the specific treaty provision(s), to support its basis for making a claim that the provision of the specific tax treaty was not correctly applied by one or both Contracting Jurisdictions. This analysis shall be supported by relevant documentation.
- v) Where the mutual agreement procedure request was also submitted to the Competent Authority of the other Contracting Jurisdiction, a statement to this effect that identifies the taxpayer that made the request to the Competent Authority of the other Contracting Jurisdiction and that includes the date of that request, the Competent Authority to which it was submitted, and a copy of the submission and all supporting documentation.
- vi) Whether the mutual agreement procedure request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes, including the date of any such submission, the name and designation of the authority to which it was submitted, and a copy of the submission and all supporting documentation.
- vii) Whether any issue in the mutual agreement procedure case was previously dealt with (such as in an advance ruling, advance pricing arrangement, settlement agreement or by any court or administrative tribunal), including a copy of any such rulings, agreements or decisions.
- viii) A statement confirming that all information and documentation provided in the mutual agreement procedure request is accurate and that the taxpayer will assist the Competent Authority in its resolution of the issue(s) presented in the mutual agreement procedure request by furnishing any other information or documentation required by the Competent Authority in a timely manner.
- ix) A statement that the mutual agreement procedure case may involve taxation connected with a Related Issue.<sup>124</sup>
- x) Any other information or documentation required by either Competent Authority in accordance with its published MAP guidance.

10. In transfer pricing cases that give rise to Related Issues, it is important for both Competent Authorities to have a comprehensive view of the facts and circumstances of both parties to the intra-Group transaction. In a transfer pricing case, the facts of the case referenced in paragraph 7(c) should accordingly identify all relevant commercial or financial relations between the associated enterprises involved in the transaction as described in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the Transfer Pricing Guidelines), including the accurate delineation of the actual transaction described in Section D.1 of Chapter I of the Transfer Pricing Guidelines.<sup>125</sup>

### 2.5.5. **Paragraph 8**

11. Paragraph 8 defines the term "same Related Issue", which is used in different provisions throughout Article 19. The term "Related Issue" 9 as that term is defined in paragraph 1 of Article [Z] that is identical to the Related Issue to be resolved through the mutual agreement procedure case referred to

<sup>124</sup> A member of a Covered Group would already be required to provide such a written statement with a MAP request pursuant to Article [X] or [Y]. The mutual agreement procedure provisions of Existing Tax Agreements and existing MAP guidance do not currently provide for such a statement regarding the case.

<sup>125</sup> While it is recognised that some developing country Inclusive Framework members may also follow the United Nations Practical Manual on Transfer Pricing for Developing Countries (2017), this information should be helpful in such circumstances where the UN Manual follows a similar analytical framework and allows for similar conclusions as the OECD Transfer Pricing Guidelines.

in Article 19(a)(1)(i) and that concerns the same taxable period or periods as those concerned by the mutual agreement procedure case. The term also includes within its scope –

- similar but not identical Related Issues; and
- identical or similar Related Issues that concern a different taxable period or periods as those concerned by the mutual agreement procedure case

where a decision on such issues by a court or administrative tribunal of a Contracting Jurisdiction, or the outcome of a separate administrative process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process, has resolved or would resolve the Related Issues in the mutual agreement procedure case in that Contracting Jurisdiction and the Competent Authority of that Contracting Jurisdiction is or would be legally bound by that decision or outcome in resolving the mutual agreement procedure case.

#### 2.5.6. **Paragraphs 9 to 11**

12. [Commentary explaining paragraphs 9 to 11 of Article [Z] will be developed as work on these definitions progresses in the context of the technical work on the drafting of the MLC.]

## 2.6. Article 19 (Resolution of disputes with respect to Related Issues)

### 2.6.1. **Request for a dispute resolution panel**

1. a) Where,
  - i) a member of a Covered Group has presented a case to the Competent Authority of a Contracting Jurisdiction pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement, or the provisions of Article [X] or Article [Y] of this Convention, on the basis that the actions of one or both of the Contracting Jurisdictions have resulted for that member of a Covered Group in taxation not in accordance with the provisions of that Existing Tax Agreement, or taxation not in accordance with *[reference to the provisions of this Convention that provide the applicable substantive transfer pricing and PE profit attribution rules]*<sup>126</sup> of this Convention in cases in which there is not an Existing Tax Agreement between the Contracting Jurisdictions, and
  - ii) the Competent Authorities of the Contracting Jurisdictions are unable to reach an agreement to resolve that case pursuant to the mutual agreement procedure within a period of two years beginning on the start date referred to in paragraph 6 or 7, as the case may be (unless, prior to the expiration of that period the Competent Authorities of the Contracting Jurisdictions have agreed to a different time period with respect to that case and have notified the member of a Covered Group that presented the case of such agreement),

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<sup>126</sup> Members of the Inclusive Framework have different views on whether the dispute resolution mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions. The language of paragraph 1(a)(i) in square brackets is thus a placeholder for a reference that may be required for the technical operation of the provision.

any unresolved Related Issues arising from the mutual agreement procedure case shall, if the member of a Covered Group requests, be submitted to a dispute resolution panel in the manner described in this Article (as supplemented by any rules or procedures agreed upon by the Competent Authorities of the Contracting Jurisdictions pursuant to the provisions of paragraph 12).

- b) The dispute resolution panel mechanism provided in this Article shall also apply to resolve any disagreement between Contracting Jurisdictions regarding whether an issue is a Related Issue.
- c) A request that unresolved Related Issues arising from a mutual agreement case be submitted to a dispute resolution panel must be made in writing by the member of a Covered Group that presented the case to the Competent Authority of its Contracting Jurisdiction of residence. The member of a Covered Group that makes a request for a dispute resolution panel must at the same time send a copy of the request and all supporting documentation to the Competent Authority of the other Contracting Jurisdiction. The request should contain sufficient information to identify the case and must be accompanied by –
  - i) a written statement by the members of the Covered Group directly affected by the case that no decision on the same Related Issues has already been rendered by a court or administrative tribunal of the Contracting Jurisdictions;
  - ii) a written statement by the members of the Covered Group directly affected by the case indicating whether one or more of the same Related Issues is pending before a court or administrative tribunal of either Contracting Jurisdiction;
  - iii) a written undertaking to notify the Competent Authorities immediately upon the initiation by a member of the Covered Group directly affected by the case, following the request for a dispute resolution panel, of proceedings before a court or administrative tribunal of either Contracting Jurisdiction with respect to one or more of the same Related Issues;
  - iv) a written statement regarding confidentiality, as required in paragraph 18, from the members of the Covered Group directly affected by the case and their authorised representatives or advisors;
  - v) a written statement by the member of a Covered Group that provides a non-quantitative description<sup>127</sup> of the types of adjustments to the application of Amount A that could be required to reflect the resolution of the Related Issues in the case<sup>128</sup>; and

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<sup>127</sup> Some members of the Inclusive Framework consider that a member of a Covered Group should be required to demonstrate the specific quantitative impact that the resolution of the Related Issue would have on the application of Amount A with a request for a dispute resolution panel, but not all members consider that such a requirement would be appropriate.

<sup>128</sup> The example of the written statement contemplated by Article 19(1)(c)(v) provided in paragraph 9 of the commentary on Article 19 will be further developed as the work on tax certainty for issues related to Amount A progresses.

- vi) a written confirmation that the member of a Covered Group sent the request and all accompanying documentation (or a copy thereof) to the Competent Authorities of both Contracting Jurisdictions.
- d) Within 10 days after the receipt of the request that unresolved Related Issues be submitted to a dispute resolution panel, a Competent Authority that receives a request without a confirmation that it was also sent to the other Competent Authority shall send a copy of that request and the accompanying documentation to the other Competent Authority.

### 2.6.2. **Binding effect of the dispute resolution panel decision**

- 2. a) Within 90 days after the communication of the dispute resolution panel decision with respect to the Related Issues to the Competent Authorities, the Competent Authorities shall reach a proposed Competent Authority mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision and all other matters previously agreed by the Competent Authorities.
- b) The dispute resolution panel decision shall be final and binding on both Contracting Jurisdictions referred to in paragraph 1(a), and the Competent Authority mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision shall be implemented notwithstanding any time limits in the domestic laws of the Contracting Jurisdictions or an Existing Tax Agreement, except in the following cases:
  - i) if the member of a Covered Group that presented the request for a dispute resolution panel proceeding does not provide written confirmation that it and all other members of the Covered Group directly affected by the case accept the proposed Competent Authority resolution concerning the case that reflects the outcome of the dispute resolution panel decision within 30 days after the notification of the proposed Competent Authority resolution to it pursuant to paragraph 27(i). In such a case, the case shall not be eligible for any further consideration by the Competent Authorities. The proposed Competent Authority resolution concerning the case that reflects the outcome of the dispute resolution panel decision shall be considered not to be accepted by a member of a Covered Group directly affected by the case if any member of a Covered Group directly affected by the case does not, within 30 days after the notification pursuant to paragraph 27(i),
    - A) withdraw all Related Issues resolved by the dispute resolution panel decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such Related Issues, and
    - B) where the domestic law of the Contracting Jurisdiction so allows, file a waiver or otherwise formally forgo any right to bring the Related Issues resolved by the dispute resolution panel decision before a court or administrative tribunal.
  - ii) if a final decision of the courts of one of the Contracting Jurisdictions referred to in paragraph 1(a) holds that the dispute resolution panel decision is invalid. In such a case, the request for a dispute resolution panel under paragraph 1 shall be considered not to have been made, and the dispute resolution panel process shall be considered not to have

taken place (except for the purposes of paragraphs 16, 17, 18 and 29). In such a case, a new request for a dispute resolution panel may be made unless the Competent Authorities agree that such a new request should not be permitted. This paragraph 2(b)(ii) shall apply where, under the domestic laws of a Contracting Jurisdiction, a court has invalidated the dispute resolution panel decision based on a procedural or other failure or other conduct inconsistent with the provisions of this Section that has materially affected the outcome of the dispute resolution panel proceeding. This paragraph 2(b)(ii) shall not itself provide a basis for a review of the substance of a dispute resolution panel decision by the courts of the Contracting Jurisdictions.

- iii) if a member of a Covered Group directly affected by the case pursues litigation on the Related Issues that were resolved by the dispute resolution panel proceeding in any court or administrative tribunal.
  - iv) if a court of one of the Contracting Jurisdictions delivers a decision legally binding on the Competent Authority of that Contracting Jurisdiction in the period between the finalisation of the Competent Authority mutual agreement (following the acceptance of the proposed Competent Authority resolution concerning the case by the members of the Covered Group directly affected by the case) and the implementation of the mutual agreement by the Competent Authorities.
- c) A dispute resolution panel decision that an issue is not a Related Issue shall have no effect on the Competent Authorities' obligation to endeavour to resolve the case in which that issue arises by mutual agreement, nor on the application of any other mandatory binding dispute resolution mechanism with respect to that issue.

### **2.6.3. Determination of the “start date”**

3. The Competent Authority of a Contracting Jurisdiction that receives a request for a mutual agreement procedure as described in paragraph 1(a)(i) shall, within 60 days of receiving the request:
  - a) send a notification to the member of a Covered Group that presented the case that it has received the request; and
  - b) send a notification of that request to the Competent Authority of the other Contracting Jurisdiction. Where the mutual agreement procedure request does not include a statement confirming that the mutual agreement procedure request was also submitted to the Competent Authority of the other Contracting Jurisdiction, this notification shall be accompanied by a copy of the request and all supporting documentation.
4. Within 90 days after a Competent Authority receives the request for a mutual agreement procedure as described in paragraph 1(a)(i) (or within 90 days after receiving a copy thereof from the Competent Authority of the other Contracting Jurisdiction in accordance with paragraph 3(b)), it shall either:
  - a) notify the member of a Covered Group who presented the case and the other Competent Authority that it has received the information necessary to undertake substantive consideration of the case; or
  - b) request additional information from that member of a Covered Group for that purpose and at the same time notify the other Competent Authority that it has made such a request.
5. Where pursuant to paragraph 4(b), one or both of the Competent Authorities have requested from the member of a Covered Group who presented the case additional information necessary to undertake

substantive consideration of the case, the Competent Authority that requested the additional information shall provide the other Competent Authority with a copy of all such additional information as soon as possible following the receipt of that information. Within 90 days of receiving the additional information, the Competent Authority that requested the additional information shall notify that member of a Covered Group and the other Competent Authority either:

- a) that it has received the requested information; or
- b) that some of the requested information is still missing. Such a notification shall only be sent if the missing information is information necessary to undertake substantive consideration of the case. The Competent Authority sending such a notification shall also send the other Competent Authority an explanation to this effect. Where, however,
  - i) the notification provided under paragraph 5(a) has not been sent within six months following a notification pursuant to this paragraph 5(b); and
  - ii) the missing information identified in the notification pursuant to this paragraph 5(b) is not information specifically listed in a Contracting Jurisdiction's published MAP guidance,

the Competent Authority that sent the notification pursuant to this paragraph 5(b) shall be treated as if it had made the notification referred to in paragraph 5(a) unless the Competent Authorities mutually agree that the missing information is information necessary to undertake substantive consideration of the case.<sup>129</sup>

6. Where neither Competent Authority has requested additional information pursuant to paragraph 4(b), the start date referred to in paragraph 1(a)(ii) shall be the earlier of:
  - a) the date on which both Competent Authorities have notified the member of a Covered Group who presented the case pursuant to paragraph 4(a); and
  - b) the date that is 90 days after the earliest of any notifications sent to the Competent Authority of the other Contracting Jurisdiction pursuant to paragraph 3(b).
7. Where additional information has been requested pursuant to paragraph 4(b), the start date referred to in paragraph 1(a)(ii) shall be the latest date on which a Competent Authority that requested additional information has notified the member of a Covered Group who presented the case and the other Competent Authority pursuant to paragraph 5(a). For such purposes, if one or both of the Competent Authorities send the notification referred to in paragraph 5(b), such notification shall be treated as a request for additional information pursuant to paragraph 4(b). If a Competent Authority that requested additional information fails to notify the member of a Covered Group who presented the case and the other Competent Authority pursuant to paragraph 5, that Competent Authority shall be treated as if it had not made a request for additional information for purposes of paragraphs 4 to 7 and as if it had made the notification referred to in paragraph 5(a).

#### **2.6.4. *Stopping or suspending the period provided in paragraph 1(a)(ii)***

8. Where a Competent Authority has suspended the mutual agreement procedure referred to in paragraph 1(a) because a case with respect to one or more of the same Related Issues is pending

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<sup>129</sup> Additional technical work is ongoing on the appropriate treatment of Competent Authority requests for additional information not specifically listed in a Contracting Jurisdiction's MAP programme guidance. That work will evaluate how to ensure the ability of Competent Authorities to obtain additional information relevant to the resolution of a MAP case while protecting against repeated or unreasonable Competent Authority requests for additional information intended to delay the "start date" of the MAP case for purposes of the dispute resolution panel mechanism.

before a court or administrative tribunal or is in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process, the period provided in paragraph 1(a)(ii) will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In these circumstances, the Competent Authority that has suspended the mutual agreement procedure shall notify the other Competent Authority as soon as possible of the suspension and its basis. In addition, where the member of a Covered Group that presented a case and the *Competent Authorities* have agreed to suspend the mutual agreement procedure for other reasons, the period provided in paragraph 1(a)(ii) will stop running until the suspension has been lifted.

9. After the start of the period provided in paragraph 1(a)(ii) –
  - a) Where both Competent Authorities agree that a member of a Covered Group directly affected by the case has failed to provide in a timely manner any additional material information requested by either Competent Authority, the period provided in paragraph 1(a)(ii) shall be extended for an amount of time equal to the period beginning on the date on which the information was requested and ending on the date on which that information was provided.
  - b) For circumstances not covered by paragraph 9(a), where uncooperative conduct by any member of the Covered Group before or after filing the mutual agreement procedure request has undermined or impeded a tax administration's examination of the taxable periods concerned by the case or the Competent Authorities' substantive consideration and resolution of the case, the Competent Authorities may mutually agree to extend (including the period of such extension) or suspend the period provided in paragraph 1(a)(ii). The Competent Authorities shall notify the member of the Covered Group at the time that they intend to apply this provision.

#### 2.6.5. **Statement of information and Terms of Reference**

10. Within 30 days of a request for a dispute resolution panel pursuant to paragraph 1, both Competent Authorities shall agree a brief statement of information to be used to evaluate whether a candidate to be a dispute resolution panel member satisfies the eligibility requirements identified in paragraph 15. The statement of information will identify the members of the Covered Group directly affected by the case and contain a general description of the Related Issues to be resolved in the case. The Competent Authority, or a dispute resolution panel member selected by the Competent Authority, may disclose the statement of information, if the confidentiality of the information is protected and such disclosure is permitted by the law of the relevant Contracting Jurisdiction, to a candidate to be a dispute resolution panel member to check whether that candidate satisfies the eligibility requirements identified in paragraph 15.
11. a) The Competent Authorities shall agree Terms of Reference for the case within 60 days of a request for a dispute resolution panel pursuant to paragraph 1. The Terms of Reference shall include:
  - i) a description of the relevant business activities of the Covered Group;
  - ii) a description of the Related Issues in dispute in the case;
  - iii) a description of the matters to be considered for the resolution of the case, including identification of all matters in the case previously agreed between the Competent Authorities; and

- iv) a description of the final position taken by each Competent Authority in the discussion of the unresolved matters that prevent mutual agreement by the Competent Authorities.

The Competent Authorities may also provide logistical or procedural information in the Terms of Reference.

- b) The Terms of Reference shall be communicated to the Chair on the date of his or her appointment, or as soon thereafter as possible.
- c) If the Terms of Reference have not been agreed by the date for submission of the proposed resolutions and supporting position papers provided in paragraph 27, both Competent Authorities shall send to each other and to the Chair their most recent written proposals for the Terms of Reference at the same time they submit their proposed resolutions and position papers to the Chair. All the matters identified as unresolved in each of these proposals for the Terms of Reference shall be treated as unresolved for the purposes of the subsequent proceedings. Where these written proposals reflect a disagreement regarding whether an unresolved issue is a Related Issue, the dispute resolution panel shall resolve that disagreement, as provided in paragraph 1(b).

#### **2.6.6. Competent Authority agreement on mode of application**

12. The Competent Authorities of the Contracting Jurisdictions may by mutual agreement settle the mode of application of the provisions contained in this Section.

#### **2.6.7. Relationship with decisions rendered by a court or administrative tribunal**

13. Any unresolved Related Issue arising from a mutual agreement procedure case otherwise within the scope of the dispute resolution panel process provided for by this Convention shall not be submitted to a dispute resolution panel if –
  - a) a decision on this Related Issue has already been rendered by a court or administrative tribunal or in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process of either of the Contracting Jurisdictions and
  - b) the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal or of the separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process is legally bound by the decision.
14. If, at any time after a request for a dispute resolution panel has been made a decision concerning the Related Issue is rendered by a court or administrative tribunal or in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process of one of the Contracting Jurisdictions and the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision –
  - a) the dispute resolution panel process shall terminate if the court or administrative tribunal decision is rendered before the dispute resolution panel has delivered its decision to the Competent Authorities; or
  - b) notwithstanding paragraph 2(b), the dispute resolution panel decision shall not be final and binding on both Contracting Jurisdictions, and any mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision shall not be implemented,

if that court or administrative tribunal decision is rendered after the dispute resolution panel has delivered its decision to the Competent Authorities.

#### 2.6.8. **Appointment of dispute resolution panel members**<sup>130</sup>

15. Except to the extent that the Competent Authorities of the Contracting Jurisdictions to an Existing Tax Agreement mutually agree on different rules, paragraphs 15(a) to 15(k) shall apply for the purposes of Section 3:

- a) The dispute resolution panel shall consist of five individual panel members.
- b) Within 60 days of the request for a dispute resolution panel pursuant to paragraph 1, each Competent Authority shall appoint:
  - i) one panel member from the staff of that Competent Authority; and
  - ii) one panel member chosen from the list of independent experts nominated by it under paragraph 15(g).

The two dispute resolution panel members appointed pursuant to paragraph 15(b)(ii) shall, within 60 days of the latest of their appointments, appoint a Chair from the persons on the lists of independent experts nominated by both Competent Authorities under paragraph 15(g) who have indicated their willingness to serve as Chair. The Chair shall not be a national or resident of either Contracting Jurisdiction.

- c) A member of the dispute resolution panel will be considered to have been appointed when a letter confirming that appointment and signed by both the panel member and the person or persons who have the power to appoint that panel member has been communicated to both Competent Authorities.
- d) In the event that the Competent Authority of a Contracting Jurisdiction fails to appoint any member of the dispute resolution panel within the time period specified in paragraph 15(b)
  - i) in the case of an appointment pursuant to paragraph 15(b)(i), the dispute resolution panel shall proceed without a panel member from the staff of that Competent Authority; and
  - ii) in the case of an appointment pursuant to paragraph 15(b)(ii), the Competent Authority of the other Contracting Jurisdiction shall appoint a panel member at random from individuals on the list of independent experts nominated by the first-mentioned Competent Authority under paragraph 15(g). The Competent Authority of the other Contracting

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<sup>130</sup> There are divergent views among members as regards the composition of the dispute resolution panel. One group of members are of the view that the panel should comprise of independent experts only to allow an independent decision on issues that remained unresolved between the governments in MAP. Another group of members feel that the panel should comprise of government experts only on the basis that mandatory, binding dispute resolution through independent experts would raise sovereignty concerns for them. Further, given the fact that disputes are between governments, the same should be resolved by government representatives. This group has also concerns about impartiality of independent experts who have, in the past, offered their services to private corporations. A mixed panel was presented in the previous public consultation document as a compromise but some members continue to retain their original positions. The drafting of paragraph 15 is thus intended to illustrate the technical aspects of the work and does not represent final or consensus views of the Inclusive Framework with regard to the composition of the dispute resolution panel.

Jurisdiction shall make that appointment within 30 days of the deadline provided in paragraph 15(b)(ii).

- e) If the two panel members appointed pursuant to paragraph 15(b)(ii) fail to appoint the Chair within the time period specified in paragraph 15(b), the Competent Authorities shall appoint the Chair at random from the persons on the lists of independent experts nominated by both Competent Authorities under paragraph 15(g) who have indicated their willingness to serve as the Chair of a dispute resolution panel and who are not nationals or residents of either Contracting Jurisdiction. The Competent Authorities shall make that appointment within 30 days of the deadline provided in paragraph 15(b) for the appointment of the Chair.
- f) Each independent expert appointed to the dispute resolution panel pursuant to paragraph 15(b)(ii) and the Chair must meet all of the following conditions at the time of appointment –
  - i) They must fulfil the requirements provided in paragraph 15(g).
  - ii) They must not be conflicted to act on a dispute resolution panel involving the Covered Group. For these purposes, an individual is conflicted to act on a dispute resolution panel involving the Covered Group where, at the time of appointment –
    - A) They or a Family Member are or were an employee, contractor partner or member of any member of the Covered Group, in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period;
    - B) They or a Family Member are or were a Significant Investor in the Relevant Group or any of its entities, in the previous [two] years, or continue to derive benefits of any kind from such investments that existed in any prior period;
    - C) They or a Family Member have or had Significant Business Dealings with any member of the Covered Group in the previous [five] years or continue to derive benefits of any kind from such transactions or activities in any prior period;
    - D) They, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Covered Group in the previous [five] years; or
    - E) They, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services with respect to an arrangement or transaction at issue in the mutual agreement procedure case concerned by the request made under paragraph 1.
    - F) They or a Family Member hold or held a Funded Academic Position in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period.

- iii) They undertake to maintain impartiality and independence throughout the proceedings, and to avoid any conduct for a reasonable time thereafter that may damage the appearance of impartiality and independence of the dispute resolution panel with respect to the proceedings.

Each panel member will execute a written certification to the effect of the provisions of this paragraph 15(f). The panel members will undertake promptly to disclose to both Competent Authorities, in writing, any new facts or circumstances that arise during or subsequent to the panel proceedings that might give rise to doubts with respect to their impartiality or independence.

- g) Before the date on which a request pursuant to paragraph 1 may first be made, the Competent Authorities of the two Contracting Jurisdictions to an Existing Tax Agreement shall each nominate five individuals to separate lists of independent experts used to constitute dispute resolution panels pursuant to this paragraph 15 with respect to that Existing Tax Agreement. Except to the extent that the Competent Authorities of the Contracting Jurisdictions to an Existing Tax Agreement have mutually agreed on different eligibility criteria concerning independent experts to be nominated under this paragraph, these independent experts shall be individuals who:
  - i) may be relied upon to exercise independent judgment and conduct themselves in a professional manner;
  - ii) have at least [six] years of experience in dealing with international corporate income tax matters and/or transfer pricing; and
  - iii) do not work for or on behalf of any Government and were not in such a situation at any time during the previous [12 months], irrespective of whether the individual is/was on secondment to a regional tax organisation or an international organisation during this time (for the purposes of Section 3, an individual who has accepted an appointment as a member of any other panel provided for under this Convention, or as an arbitrator in a proceeding pursuant to Part VI of the BEPS Multilateral Instrument, or pursuant to the provisions of any other bilateral or multilateral agreement or domestic law provision providing for the arbitration or resolution of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to work or have worked for or on behalf of any Government);
- h) Each Competent Authority shall confirm with each person it nominates pursuant to paragraph 15(g) that person's willingness to serve as a member of a dispute resolution panel, including (in cases where the independent expert is neither a national nor resident of either Contracting Jurisdiction) whether that person would be willing to serve as Chair. At least [one] independent expert nominated by each Competent Authority shall not be a national or resident of either Contracting Jurisdiction and shall be willing to serve as Chair. Each Competent Authority shall inform the other Competent Authority of the independent experts so nominated. A Competent Authority shall be entitled to object to a person so nominated by the other Competent Authority only where that person does not meet the requirements provided in paragraph 15(g) and shall provide a justification with any such objection. Each Competent Authority may change the persons so nominated and shall notify the other Competent Authority without delay when it wishes to do so.
- i) In the event that the Competent Authority of a Contracting Jurisdiction has failed to nominate any individuals to that Competent Authority's list of independent experts under

paragraph 15(g) by the deadline provided in that paragraph, or where none of the individuals nominated by a Competent Authority to its list of independent experts meets the requirements of paragraph 15(f) or is otherwise available to act as a member of a dispute resolution panel in a particular case, the group of individuals nominated by the Contracting Jurisdiction of that Competent Authority to the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels shall be deemed to have been nominated by that Competent Authority under paragraph 15(g). In circumstances where this paragraph 15(i) applies, the references in Article 19 to the lists of independent experts provided in paragraph 15(g) shall, where relevant, be understood as references to the group of individuals nominated by the Contracting Jurisdiction of a Competent Authority to the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels.

- j) The procedures provided in paragraph 15 shall apply with the necessary adaptations if for any reason it is necessary to replace a dispute resolution panel member after the dispute resolution panel process has begun. In such circumstances, the Competent Authorities shall also agree on necessary adaptations, as appropriate, to the deadlines provided in paragraph 27.
- k) For the purposes of this Section:
  - i) the term “Family Member” means any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, uncle, aunt, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law (including adoptive relationships) of an individual or any person sharing an individual’s household (other than a tenant or employee);
  - ii) the term “Significant Investor” means an individual who, individually or through an entity owned or controlled by the individual, owns rights to more than five per cent of the profits, capital, reserves, or voting rights of any entity that is part of the Covered Group, or who holds capital having present value, determined on the basis of assets or cash flow, in excess of EUR [15,000] in the entities that are part of the Covered Group individually or in aggregate;
  - iii) the term “Significant Business Dealings” means a business transaction or a series of transactions that, during any one fiscal year, exceed the lesser of EUR [X] or [X] per cent of a Covered Group’s total operating expenses;
  - iv) the term “Funded Academic Position” means academic position directly funded by a Covered Group or a Covered Group’s authorised representatives or advisors. This term shall not include an academic position that is indirectly funded through amounts provided to an educational institution by a Covered Group or its authorised representatives or advisors but not intended to fund the specific position, nor academic positions funded with income generated by a shareholding or another equity interest in the Covered Group held by an educational institution.

### **2.6.9. Communication of information and confidentiality of dispute resolution panel proceedings**

16. Solely for the purposes of the application –

- a) of the provisions of this Article; and
- b) of the provisions of Existing Tax Agreements, this Convention, and the domestic laws of the Contracting Jurisdictions related to the exchange of information, confidentiality, and administrative assistance,

members of the dispute resolution panel and a maximum of three staff per member (and prospective dispute resolution panel members to be appointed pursuant to paragraph 15(b)(ii) solely to the extent necessary to verify their ability to fulfil the requirements of dispute resolution panel members) shall be considered to be persons or authorities to whom information may be disclosed under the aforementioned provisions related to the exchange of information, confidentiality and administrative assistance. Information received by the dispute resolution panel or prospective dispute resolution panel members and information that the Competent Authorities receive from the dispute resolution panel shall be considered information that is exchanged under the provisions of the relevant agreement related to the exchange of information and administrative assistance.

17. The Competent Authorities of the Contracting Jurisdictions shall ensure that prospective dispute resolution panel members from the list of independent experts nominated under paragraph 15(g) agree in writing, prior to the disclosure to them of any information relating to the dispute resolution panel proceeding, to treat such information consistently with the confidentiality and nondisclosure obligations described in the provisions of the relevant agreement related to exchange of information and administrative assistance and under the applicable laws of the Contracting Jurisdictions. The Competent Authorities of the Contracting Jurisdictions shall ensure that members of the dispute resolution panel from the list of independent experts nominated under paragraph 15(g) and their staff agree in writing, prior to their acting in a dispute resolution panel proceeding, to treat any information relating to the dispute resolution panel proceeding consistently with the confidentiality and nondisclosure obligations described in the provisions of the relevant agreement related to exchange of information and administrative assistance and under the applicable laws of the Contracting Jurisdictions. In the event that a member of a dispute resolution panel or a prospective dispute resolution panel member breaches this agreement, the Competent Authorities shall by mutual agreement determine the consequences of that breach on the dispute resolution panel proceeding, which shall apply in addition to the consequences with respect to the dispute resolution panel member (or prospective dispute resolution panel member) provided under the applicable domestic laws of the Contracting Jurisdictions.
18. Prior to the beginning of a dispute resolution panel proceeding, the Competent Authorities of the Contracting Jurisdictions shall ensure that the member of a Covered Group that presented the case, any other member of the Covered Group directly affected by the case, and their authorised representatives or advisors agree in writing not to disclose to any other person any information received during the course of the dispute resolution panel proceeding from either Competent Authority or the dispute resolution panel other than the determination of the panel where that disclosure is required under the laws of any jurisdiction. The mutual agreement procedure under the Existing Tax Agreement, or under Article [X] or Article [Y] of this Convention, as well as the dispute resolution panel proceeding under this Article, with respect to the case shall terminate if, at any time after a request for a dispute resolution panel has been made and before the dispute resolution panel has delivered its decision to the Competent Authorities of the Contracting Jurisdictions, the member of a Covered Group that presented the case, any other member of the Covered Group directly affected by the case, or one of its authorised representatives or advisors breaches that agreement. Where such a breach occurs subsequent to the dispute resolution panel's delivery of its decision to the Competent Authorities of the Contracting Jurisdictions, the Competent Authorities shall by mutual agreement determine the consequences of the breach with respect to the dispute resolution panel proceeding.

19. Before the Chair is appointed, a Competent Authority shall send any correspondence concurrently to all dispute resolution panel members and the other Competent Authority. After the Chair is appointed, unless agreed otherwise by the Competent Authorities and the Chair, the Competent Authorities shall send any correspondence to the Chair. Subject to the special rules for proposed resolutions, supporting position papers and reply submissions in paragraph 27, the Competent Authorities shall send a copy of any correspondence to the Chair concurrently to the other Competent Authority. The Chair shall send any correspondence from the dispute resolution panel to the Competent Authorities concurrently to both Competent Authorities.
20. As far as possible, the dispute resolution panel shall use tele- and videoconferencing to communicate between themselves and with both Competent Authorities, using appropriate measures and facilities (such as encryption) to ensure the security and confidentiality of their communications. If the dispute resolution panel considers that a face-to-face meeting is necessary, the Chair shall contact the Competent Authorities, who shall mutually agree whether such a meeting is necessary and, if so, when and where the meeting shall be held, and shall communicate that information to the dispute resolution panel through the Chair.
21. No Competent Authority shall have any *ex parte* communications with any member of the dispute resolution panel appointed from the lists of independent experts nominated under paragraph 15(g) with respect to the mutual agreement procedure case that resulted in the dispute resolution panel proceeding.
22. Subject to the provisions of paragraph 27(k), all communication between the Competent Authorities and the dispute resolution panel related to the panel proceeding shall be in writing. Unless otherwise agreed by the Competent Authorities, written communication by facsimile or email shall be permitted to the extent that appropriate measures are taken to ensure the confidentiality of any information that may identify the members of a Covered Group. Express or priority mail or a courier service shall be used for all correspondence other than that sent via facsimile or email.
23. No substantive discussions between any members of the dispute resolution panel shall take place without all members of the dispute resolution panel present. This paragraph shall not apply to substantive discussions solely between the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(i) from the staff of the Competent Authorities.
24.
  - a) During a dispute resolution panel proceeding, no member of a dispute resolution panel shall have communications regarding the dispute resolution panel proceeding or the Related Issues considered by the dispute resolution panel with –
    - i) the member of a Covered Group who presented the MAP case;
    - ii) any other member of that Covered Group; or
    - iii) their representatives, agents, or advisors.
  - b) Following a dispute resolution panel proceeding –
    - i) No member of a dispute resolution panel appointed from the lists of independent experts nominated under paragraph 15(g) shall have communications regarding the dispute resolution panel proceeding or the Related Issues considered by the dispute resolution panel with any member of the Covered Group or its representatives, agents or advisors.
    - ii) Members of a dispute resolution panel appointed from the lists of independent experts nominated under paragraph 15(g) shall also refrain from any conduct that would give rise to reasonable doubts as to their impartiality or independence.

- iii) Members of a dispute resolution panel appointed from the staff of a Competent Authority pursuant to paragraph 15(b)(i) shall not have communications regarding the dispute resolution panel proceeding with any member of the Covered Group or its representatives, agents or advisors; notwithstanding the preceding clause of this paragraph 24(b)(iii), such members of a dispute resolution panel may communicate with the Covered Group and its representatives, agents and advisors regarding Related Issues or other matters to the extent required by their function as a member of the Competent Authority staff.

25. At the termination of the dispute resolution panel proceedings, each member of the dispute resolution panel from the lists of independent experts nominated under paragraph 15(g) shall immediately destroy all documents or other information received in connection with the proceedings.

**2.6.10. Termination of the dispute resolution panel proceeding and further consideration of the case by the Competent Authorities**

26. For the purposes of this Article and the mutual agreement procedure provisions of the relevant Existing Tax Agreement and of Article [X] and Article [Y] of this Convention –

- a) The dispute resolution panel proceeding with respect to a mutual agreement procedure case shall terminate if, at any time after a request for a dispute resolution panel has been made and before the dispute resolution panel has delivered its decision to the Competent Authorities of the Contracting Jurisdictions:
  - i) the Competent Authorities of the Contracting Jurisdictions reach a mutual agreement to resolve the case;
  - ii) the member of a Covered Group who presented the case withdraws the request for a dispute resolution panel or the request for a mutual agreement procedure;
  - iii) a decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions and the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision, as provided in paragraph 14(a); or
  - iv) any member of the Covered Group or any of its authorised representatives or advisors breaches the written confidentiality agreement required by paragraph 18.
- b) Where the dispute resolution panel proceeding with respect to a case has been terminated pursuant to paragraph 26(a), the case shall not be eligible for any further consideration by the Competent Authorities, except to the extent mutually agreed by the Competent Authorities in the cases described in paragraph 26(a)(ii) (but only where the member of a Covered Group has not also withdrawn the request for a mutual agreement procedure) and in paragraph 26(a)(iii) (to permit the Competent Authority of the Contracting Jurisdiction not legally bound by the decision to evaluate whether it would agree to provide relief consistent with that decision, such as by providing a corresponding adjustment).

### 2.6.11. *Dispute resolution panel process*

27. Except to the extent that the Competent Authorities of the Contracting Jurisdictions mutually agree on different rules, the following rules shall apply with respect to a dispute resolution panel proceeding pursuant to this Article:

- a) After a case is submitted to a dispute resolution panel, the Competent Authority of each Contracting Jurisdiction shall submit to the Chair, within 60 days of the appointment of the Chair, a proposed resolution, not to exceed 5 pages in total, which addresses all unresolved Related Issue(s) in the case (taking into account all agreements previously reached in that case between the Competent Authorities of the Contracting Jurisdictions). The Competent Authorities shall at the same time submit to the Chair portions of the request for mutual agreement procedure submitted by the Covered Group that are relevant to the unresolved Related Issues. The proposed resolution shall be limited to a disposition of specific monetary amounts for each adjustment or similar issue in the case. In a case in which the Competent Authorities of the Contracting Jurisdictions have been unable to reach agreement on –
  - i) whether an issue with respect to which the member of a Covered Group presented a case to the Competent Authorities of the Contracting Jurisdictions pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement, or Article [X] or Article [Y] of this Convention is a Related Issue; or
  - ii) an issue regarding the conditions for application of a provision of an Existing Tax Agreement, such as whether a permanent establishment exists,

(hereinafter referred to as “threshold questions”), the Competent Authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions. The Chair shall provide a copy of the proposed resolutions to both Competent Authorities as soon as possible following the date of receipt of the latest of the proposed resolutions. Where the provisions of paragraph 27(h) apply, however, the Chair shall provide copies of the proposed resolutions to both Competent Authorities at the end of the seven-day period provided in paragraph 27(h), or inform both Competent Authorities at that time if the Competent Authority that was provided additional time to submit a proposed resolution did not do so.

- b) The Competent Authority of each Contracting Jurisdiction may also submit to the Chair, by the date on which the proposed resolution is due, a supporting position paper, not to exceed 30 pages plus annexes, for consideration by the dispute resolution panel. The Chair shall provide a copy of the supporting position papers to both Competent Authorities as soon as possible following the date of receipt of the latest of the supporting position papers. Where the provisions of paragraph 27(h) apply, however, the Chair shall provide copies of the supporting position papers to both Competent Authorities at the end of the seven-day period provided in paragraph 27(h), or inform both Competent Authorities at that time if the Competent Authority that was provided additional time to submit a supporting position paper did not do so.
- c) Each Competent Authority may also submit to the Chair, within 60 days of the date on which the proposed resolution and supporting position paper were due, a reply submission, not to exceed 10 pages plus annexes, with respect to the proposed resolution and supporting position paper submitted by the other Competent Authority. The Chair shall provide a copy of any reply submissions to both Competent Authorities as soon as possible

following the earlier of the date on which the reply submissions were due and the date of receipt of the latest of the reply submissions. In circumstances where a Competent Authority has not submitted a proposed resolution within the additional seven-day period provided in paragraph 27(h), the other Competent Authority shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 11(a)(iv) as that Competent Authority's proposed resolution for purposes of any reply submission.

- d) Any annex to a supporting position paper or reply submission which does not reflect publicly available information must be a document previously made available for the Competent Authorities of both Contracting Jurisdictions to use in discussion of the mutual agreement procedure case. Any factual information used in a supporting position paper or reply submission which does not reflect publicly available information must be contained in a document previously made available for both Competent Authorities to use in discussion of the mutual agreement case.
- e) In the materials submitted by the Competent Authority of a Contracting Jurisdiction to a dispute resolution panel, a Competent Authority shall only be permitted to refer to a proposal for resolution previously made by either Competent Authority during discussion of the mutual agreement procedure case if that proposal is submitted to the dispute resolution panel for consideration as a proposed resolution or if that position is described in the Terms of Reference pursuant to paragraph 11(a)(iv).
- f) Within 60 days after the deadline for the receipt of the proposed resolutions from both Competent Authorities, the dispute resolution panel may ask the Competent Authorities in writing for additional factual information. Any request for additional information shall be addressed by the Chair to both Competent Authorities. Such additional information may be submitted to the dispute resolution panel only at its request. The dispute resolution panel shall establish a deadline for responding to the request. The dispute resolution panel shall not request additional information from the member of a Covered Group that presented the case or any other member of that Covered Group.
  - i) The dispute resolution panel may only request information that consists of, or is reflected in, existing documentation and may not request additional information not previously available or considered for purposes of the Competent Authority discussion of the mutual agreement procedure case. The dispute resolution panel may not request new or additional analyses from the Competent Authorities. The Competent Authorities shall consult with each other to determine how to respond to the dispute resolution panel's request and shall mutually agree on the form and content of the response.
  - ii) Where the Competent Authorities disagree with respect to the form or content of the response, the Competent Authorities shall, by the deadline established by the dispute resolution panel, provide the Chair with a joint response that reflects items with respect to which the Competent Authorities agree and that identifies those items with respect to which the Competent Authorities disagree. By that deadline, each Competent Authority shall also provide the Chair and the other Competent Authority with a supplementary response that addresses only those items with respect to which the Competent Authorities disagree. These supplementary responses shall not contain any new or additional analyses in support of a Competent Authority's proposed resolution.

- g) The dispute resolution panel shall select as its decision one of the proposed resolutions for the case submitted by the Competent Authorities with respect to each Related Issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The dispute resolution panel decision shall be adopted by a simple majority of the panel members.
- h) In the event that the Competent Authority of a Contracting Jurisdiction does not submit a proposed resolution and/or a supporting position paper to the Chair within the time periods provided in paragraph 27(a) or 27(b), the Chair shall notify both Competent Authorities. The Competent Authority that did not submit a proposed resolution and/or a supporting position paper shall be provided seven additional days to submit a proposed resolution and/or a supporting position paper to the Chair. Where the relevant Competent Authority does not submit a proposed resolution within this seven-day period, the dispute resolution panel shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 11(a)(iv) as that Competent Authority's proposed resolution.
- i) The Chair of the dispute resolution panel shall deliver the dispute resolution panel decision in writing to the Competent Authorities of the Contracting Jurisdictions within 180 days of the appointment of the Chair. Within 100 days after the receipt of the decision, the Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group that requested the dispute resolution panel proceeding shall communicate in writing to that member of a Covered Group the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision. That member of a Covered Group shall provide written confirmation that it and all other members of the Covered Group directly affected by the case accept the proposed Competent Authority resolution within 30 days of such communication. The failure of the member of a Covered Group that requested the dispute resolution panel proceeding to indicate the acceptance of the proposed Competent Authority resolution by all members of the Covered Group directly affected by the case within 30 days shall be considered a rejection of the proposed Competent Authority resolution.
- j) The dispute resolution panel decision shall have no precedential value. This paragraph 27(j) shall apply notwithstanding any Competent Authority agreement that a dispute resolution panel will use an alternative form of decision-making.
- k) In the event that the Chair considers that the dispute resolution panel will be unable to deliver its decision to the Competent Authorities of the Contracting Jurisdictions by the deadline provided in paragraph 27(i), the Chair shall notify both Competent Authorities as soon as possible, informing them of the reasons for delay. The Competent Authorities may mutually agree to provide the dispute resolution panel with additional time to reach a decision or to any other appropriate measures to facilitate the panel's decision.
- l) To the extent needed, the dispute resolution panel may propose any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with this Article or any other procedural rules agreed between both Competent Authorities. Any such additional procedures shall remain subject to the approval, by mutual agreement, of the Competent Authorities. The Chair shall provide a written copy of any proposed additional procedures to the Competent Authorities.

### 2.6.12. *Agreement on a different resolution*

28. Notwithstanding paragraph 2, a dispute resolution panel decision pursuant to this Article shall not be binding on the Contracting Jurisdictions and shall not be implemented if the Competent Authorities of the Contracting Jurisdictions agree on a different resolution of all unresolved Related Issues in the mutual agreement procedure case within 90 days after the dispute resolution panel decision has been delivered to them.

### 2.6.13. *Costs of dispute resolution panel proceedings*

29. a) In a dispute resolution panel proceeding under this Article, except to the extent that the Competent Authorities of the Contracting Jurisdictions mutually agree on different rules,
- i) each Contracting Jurisdiction shall bear the costs related to its own participation in the dispute resolution panel proceedings (including any costs related to the presentation and preparation of its position and any travel costs);
  - ii) each Contracting Jurisdiction shall bear the fees and expenses of the members of the dispute resolution panel appointed by that Contracting Jurisdiction's Competent Authority, or appointed at random on behalf of that Competent Authority as a result of that Competent Authority's failure to appoint those dispute resolution panel members, together with those dispute resolution panel members' travel, telecommunication and secretarial costs;
  - iii) the remuneration of the Chair of the dispute resolution panel and the Chair's travel, telecommunication and secretarial costs shall be borne by the Contracting Jurisdictions in equal shares;
  - iv) other costs related to any meeting of the dispute resolution panel shall be borne by the Contracting Jurisdiction that hosts that meeting or, where that meeting takes place in a third jurisdiction, shall be borne by the Contracting Jurisdictions in equal shares; and
  - v) any other costs related to expenses that both Competent Authorities have agreed to incur shall be borne by the Contracting Jurisdictions in equal shares.
- b) The Competent Authorities of the Contracting Jurisdictions may in particular mutually agree that the member of a Covered Group that requested the dispute resolution panel shall bear the costs related to a dispute resolution panel proceeding in appropriate circumstances, including where:
- i) a final decision of the courts of one of the Contracting Jurisdictions holds that the dispute resolution panel decision is invalid in the circumstances described in paragraph 2(b)(ii) and that decision is motivated, in whole or in part, by the conduct of a member of the Covered Group directly affected by the case; or

- ii) a member of the Covered Group directly affected by the case or one of its authorised representatives or advisors breaches the confidentiality agreement provided in paragraph 18.<sup>131</sup>

30. Unless the Competent Authorities of the Contracting Jurisdictions mutually agree on different rules,
- a) The fees of the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair shall be set with reference to a schedule of fees to be mutually agreed and periodically updated, as appropriate, by the Competent Authorities of the Contracting Jurisdictions. In the absence of such a Competent Authority mutual agreement, such fees shall be set at [EUR 1000] per person per day. Members of the dispute resolution panel appointed pursuant to paragraph 15(b)(i) shall serve in their official capacity and shall not be entitled to fees in addition to the remuneration they receive as a member of the staff of the relevant Competent Authority.
  - b) The expenses of the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair shall be reimbursed in accordance with the average of the usual amount reimbursed to members of the staff of the Competent Authorities of the Contracting Jurisdictions concerned. Members of the dispute resolution panel appointed pursuant to paragraph 15(b)(i) shall serve in their official capacity and shall be reimbursed for expenses in accordance with the rules generally applicable to a member of the staff of the relevant Competent Authority.
  - c) Each member of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair shall be compensated for no more than [three] days of preparation, for [two] meeting days and, if an in-person meeting of the dispute resolution panel is required, for travel days. If the dispute resolution panel considers that it requires additional time to properly consider the case, the Chair will contact the Competent Authorities to request additional time. The Competent Authorities shall by mutual agreement determine the response to such a request.
31. The Competent Authorities of all Contracting Jurisdictions shall mutually agree on an appropriate multilateral framework to fund the costs of low-capacity developing countries related to dispute resolution panel proceedings, including under the elective binding dispute resolution mechanism provided by Article 20. Such an agreement shall be concluded before the date on which unresolved Related Issues in a mutual agreement procedure case are first eligible to be submitted to a dispute resolution panel under this Article or Article 20 and may be modified from time to time thereafter.

#### **2.6.14. Compatibility with existing mandatory binding dispute resolution mechanisms<sup>132</sup>**

32. a) Any unresolved Related Issue arising from a case presented pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement and otherwise within the scope of the dispute resolution panel process provided for in this Article shall not be submitted to a dispute resolution panel if the issue falls within the scope of a case with

<sup>131</sup> There are divergent views among members as regards the circumstances in which a Covered Group should bear the costs related to a dispute resolution panel proceeding.

<sup>132</sup> Paragraphs 32 and 33 do not reflect the final or consensus views of the Inclusive Framework. In particular, members of the Inclusive Framework have different views on issues on whether access to the dispute resolution panel mechanism should be provided in contexts where two Contracting Jurisdictions have agreed a mandatory binding dispute resolution mechanism (such as a bilateral MAP arbitration provision) but the Related Issues in a specific MAP case would not be eligible for resolution pursuant to that other mechanism based on reservations to its scope.

respect to which a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period in accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a mutual agreement procedure case.

- b) Any unresolved Related Issue arising from a case presented pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement and otherwise within the scope of the dispute resolution panel process provided for in this Article shall not be submitted to a dispute resolution panel if that unresolved Related Issue has been submitted to another mandatory binding dispute resolution mechanism in accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a mutual agreement procedure case.
33. a) Notwithstanding the provisions of paragraph 32, the Contracting Jurisdictions may mutually agree that the dispute resolution panel process provided for in this Article shall apply to unresolved Related Issues arising from a case presented pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement and otherwise within the scope of a case with respect to which a mandatory binding dispute resolution mechanism, such as an arbitration panel or other similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period in accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a mutual agreement procedure case. Any such agreement shall specify the date from which it is effective and whether the mechanism provided under the other instrument shall remain applicable to unresolved Related Issues.
- b) The provisions of paragraph 33(a) shall not apply to unresolved Related Issues arising from a mutual agreement procedure case within the scope of a case with respect to which a dispute resolution body is required to be set up under the mechanisms (or their implementing domestic legislation) provided for by –
    - i) Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union;
    - ii) the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC); or
    - iii) any of their amending or succeeding instruments or acts of European Union law.

## 2.7. Commentary on Article 19

### 2.7.1. Paragraph 1

1. Paragraph 1 contains the core dispute resolution provision in this Section. It provides that, where the Competent Authorities are unable to reach an agreement on a case in the mutual agreement procedure within a period of two years, unresolved Related Issues arising from the case will, at the request of the member of a Covered Group who presented the case, be submitted to a dispute resolution panel in the manner described in Section 3. This dispute resolution process is available where, under the provisions of an Existing Tax Agreement relating to the mutual agreement procedure, or under the provisions of Article [X] or Article [Y] of the Convention, a member of a Covered Group has presented a case to the Competent Authority of a Contracting Jurisdiction on the basis that the actions of one or both of the

Contracting Jurisdictions have resulted for that member of a Covered Group in taxation not in accordance with the provisions of that Existing Tax Agreement, or taxation not in accordance with the relevant provisions of the Convention that establish the applicable substantive transfer pricing or profit allocation rules in cases in which there is not an Existing Tax Agreement between the Contracting Jurisdictions, and the Competent Authorities are unable to resolve the case within a two-year period.

2. The start date for this two-year period is determined pursuant to paragraph 6 or 7, as the case may be. The Competent Authorities may, however, agree to a different time period with respect to a particular case, provided that they notify the member of a Covered Group who presented the case of such agreement prior to the expiration of the two-year period referred to paragraph 1(a)(ii). This could be the case if, for example, the discussion of a case between the Competent Authorities was nearing a resolution that could be expected to be achieved in an additional short period of time, thus avoiding the need for a dispute resolution panel process. This different time period with respect to a particular case could be longer or shorter than the two-year period referred to in paragraph 1(a)(ii), depending, for example, on the nature and complexity of the particular case. In cases in which the Competent Authorities would mutually agree to extend the two-year period, the Competent Authorities should keep in mind the objective of the dispute resolution mechanism to provide a timely resolution of Related Issues, and that any such extension should accordingly not unreasonably delay such a resolution.

3. Paragraph 1(b) then provides that dispute resolution panel mechanism provided in Article 19 shall also apply to resolve any disagreement between Contracting Jurisdictions regarding whether an issue is a Related Issue. The mandatory and binding resolution of such disagreements is essential to the proper functioning of the dispute resolution panel mechanism.

4. The provision in paragraph 1(a)(ii) of a two-year period before the member of the Covered Group may trigger the dispute resolution panel process does not preclude the Competent Authorities from mutually agreeing that a member of a Covered Group may request the submission of unresolved Related Issues to a dispute resolution panel before the expiration of the two-year period. The choice to submit unresolved Related Issues to a dispute resolution panel would in all cases remain that of the member of a Covered Group.

5. Pursuant to paragraph 1(c), a request by a member of a Covered Group to submit unresolved Related Issues in a MAP case to a dispute resolution panel must be made in writing to the Competent Authority of the Contracting Jurisdiction of residence of that member of a Covered Group presented the MAP case. At the same time, the member of a Covered Group must send a copy of the request and all supporting documentation to the Competent Authority of the other Contracting Jurisdiction. Such a request should contain sufficient information to identify the case and must be accompanied by a number of different written statements identified in paragraph 1(c).

6. Paragraphs 1(c)(i) to 1(c)(iii) identify the following first group of three written statements:

- a written statement by the members of the Covered Group directly affected by the case that no decision on the same Related Issues has already been rendered by a court or administrative tribunal of the Contracting Jurisdictions;
- a written statement by the members of the Covered Group directly affected by the case indicating whether one or more of the same Related Issues is pending before a court or administrative tribunal of either Contracting Jurisdiction; and
- a written undertaking to notify the Competent Authorities immediately upon the initiation by a member of the Covered Group directly affected by the case, following the request for a dispute resolution panel, of proceedings before a court or administrative tribunal of either Contracting Jurisdiction with respect to one or more of the same Related Issues.

7. These written statements will aid the Competent Authorities in applying paragraph 13 (which provides that any unresolved Related Issue arising from a MAP case otherwise within the scope of the

dispute resolution panel process shall not be submitted to a dispute resolution panel if a decision on the Related Issue has already been rendered by a court or administrative tribunal of either of the Contracting Jurisdictions and the Competent Authority of the relevant Contracting Jurisdiction is legally bound by that decision) and paragraph 14 (which provides that the dispute resolution panel process shall terminate if a decision on the Related Issue is rendered by a court or administrative tribunal of either of the Contracting Jurisdictions while the dispute resolution panel process is in course and the Competent Authority of the relevant Contracting Jurisdiction is legally bound by that decision). They will also facilitate the application of other provisions governing the interrelationship of the dispute resolution panel process and litigation in a court or administrative tribunal (such as paragraphs 2 and 26). The undertaking to notify the Competent Authorities immediately upon the initiation of proceedings before a court or administrative tribunal of either Contracting Jurisdiction with respect to one or more of the same Related Issues is intended to ensure that the Covered Group promptly informs both Competent Authorities of any proceeding initiated after the request for a dispute resolution panel, with a view to facilitating the Competent Authorities' effective overall management of the MAP process.

8. Paragraph 1(c)(iv) next provides that the request should also include a written statement regarding confidentiality as provided in paragraph 18 from the members of the Covered Group directly affected by the case and their authorised representatives or advisors.

9. Pursuant to paragraph 1(c)(v), the request should in addition include a written statement by the member of a Covered Group that provides a brief, non-quantitative explanation of the interactions of the adjustment with the application of the provisions of the Convention on the application of Amount A (e.g. the Pillar One Elimination Tax Base). Such a description would not require any recalculation of amounts relevant to the application of Amount A but rather the identification by the member of a Covered Group of the methodological approach the Covered Group would take to reflecting the resolution of the Related Issues, in accordance with the applicable Amount A rules for book-to-tax adjustments. An example<sup>133</sup> of such a written statement is as follows:

The resolution of the Related Issues in the mutual agreement case submitted to the dispute resolution panel may require adjustments to the Entity Financial Accounting Profit Elimination Profit of one or more Group Entities.

In the event that a Group Entity is subject to upward adjustment of its Elimination Profit in the period of MAP resolution, and that Group Entity is identified as a relieving entity after taking that adjustment to its Elimination Profit in to account, the Amount A relief entitlement of that Group Entity will be increased as a result of the Elimination Profit adjustment. As a result, other entities in the Group will be subject to an equivalent decrease in relief entitlement.

10. Finally, pursuant to paragraph 1(c)(vi), the request should include a written confirmation that the member of a Covered Group sent the request and all accompanying documentation (or a copy thereof) to the Competent Authorities of both Contracting Jurisdictions. This requirement is intended to ensure that both Competent Authorities are promptly informed of the request for a dispute resolution panel.

11. For the purposes of this Section, "member of the Covered Group directly affected by the case" is defined in Article [Z](5) to mean the member of a Covered Group that presented the case and any other member of the Covered Group whose tax liability to either Contracting Jurisdiction may be directly affected by the mutual agreement arising from that case.

12. To ensure the timely initiation of the dispute resolution panel process, paragraph 1(d) requires a Competent Authority that receives a request to submit unresolved Related Issues to a dispute resolution panel without a confirmation that the member of a Covered Group also sent the request to the other

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<sup>133</sup> This example of the written statement contemplated by Article 19(1)(c)(v) will be further developed as the work on tax certainty related to Amount A progresses.

Competent Authority to send the other Competent Authority a copy of the request and the accompanying documentation within a period of 10 days after the receipt of the request.

### 2.7.2. *Paragraph 2*

13. The dispute resolution mechanism provided for by in this Section is intended to provide a mechanism for the Competent Authorities to resolve Related Issues that may otherwise prevent agreement in mutual agreement procedure cases. Given that this mechanism is an extension of the mutual agreement procedure that serves to enhance the effectiveness of the procedure, paragraph 2(a) provides that the dispute resolution panel decision with respect to a Related Issue shall be implemented through the Competent Authority mutual agreement concerning a particular MAP case. This means that following the decision of the dispute resolution panel, the Competent Authorities shall reach a proposed Competent Authority agreement that (except to the extent that paragraph 28 applies) reflects the outcome of the dispute resolution panel decision within 90 days of the communication of that decision to them. Pursuant to paragraph 27(i), the Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group that submitted the MAP request shall then have 10 days (i.e. 100 days from the communication of the dispute resolution panel decision) to communicate to the member of a Covered Group that requested the dispute resolution panel proceeding the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision and request that member of a Covered Group confirm in writing that it and all members of the Covered Group directly affected by the case accept the proposed Competent Authority resolution within 30 days.

14. Paragraph 2(b) provides for the final and binding effect of the dispute resolution panel decision, subject to four specific exceptions. The dispute resolution panel decision is final, meaning that, subject to paragraph 2(b)(ii), the dispute resolution panel decision cannot be changed, either by the Competent Authorities or by the dispute resolution panel, unless the provisions of paragraph 28 apply to permit agreement on a different resolution. The dispute resolution panel decision is binding and the Competent Authorities of the Contracting Jurisdictions shall implement the mutual agreement concerning the MAP case that reflects the outcome of the dispute resolution panel decision notwithstanding any time limits in the domestic laws of the Contracting Jurisdictions (pursuant to the MAP provisions of the Existing Tax Agreement, or of Article [X] or Article [Y]).

15. In some cases, the MAP article of an Existing Tax Agreement will provide time limits with respect to the implementation of any agreement reached through the mutual agreement procedure (for example, such a provision may provide that an agreement reached through the MAP shall be implemented notwithstanding domestic law time limits but only if the other Competent Authority has been notified of the MAP case within a defined period from the end of the taxable year to which the case relates). The implementation of the mutual agreement that reflects the outcome of the dispute resolution panel decision pursuant to paragraph 2(b) would remain subject to any such provisions contained in an Existing Tax Agreement where the member of a Covered Group elected to present its MAP case pursuant to the MAP provisions of the Existing Tax Agreement rather than Article [X].

16. The four exceptions to the final and binding effect of the dispute resolution panel decision provided in paragraph 2(b) are as follows:

- (i) if the member of a Covered Group that presented the case does not confirm that all members of the Covered Group directly affected by the case accept the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision within 30 days after the notification of the proposed Competent Authority resolution pursuant to paragraph 27(i);
- (ii) if the dispute resolution panel decision is held to be invalid by a final decision of the courts of one of the Contracting Jurisdictions;

- (iii) if a member of the Covered Group directly affected by the case pursues litigation in any court or administrative tribunal on the Related Issues that were resolved in the mutual agreement implementing the dispute resolution panel decision; and
- (iv) if a court of one of the Contracting Jurisdictions delivers a decision legally binding on the Competent Authority of that Contracting Jurisdiction in the period between the finalisation of the Competent Authority mutual agreement (following confirmation of the acceptance of the proposed Competent Authority resolution concerning the case by the members of the Covered Group directly affected by the case) and the implementation of the mutual agreement by the Competent Authorities.

17. The exception in paragraph 2(b)(i) addresses the situation in which a member of the Covered Group directly affected by the case does not accept the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision. In general, where a mutual agreement is reached before domestic remedies have been exhausted, Competent Authorities may require, as a condition for the finalisation or conclusion of the agreement, that the person who presented the MAP case renounce the exercise of rights to domestic legal remedies with respect to the issues resolved through the mutual agreement on the case. Without such a renunciation, a subsequent court decision could prevent the tax authorities from implementing the agreement. Paragraph 2(b)(i) accordingly provides that a member of the Covered Group directly affected by the case will be considered not to accept the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision if that member does not withdraw from any domestic legal procedures or otherwise terminate any pending court or administrative proceedings in a manner consistent with the proposed Competent Authority resolution within 30 days after notification of the proposed Competent Authority resolution to the member of a Covered Group that requested the dispute resolution panel proceeding. A member of the Covered Group will also be considered not to accept the proposed Competent Authority resolution where – to the extent allowed under the domestic law of the relevant Contracting Jurisdiction – the member of the Covered Group does not file a waiver or otherwise formally forgo any right to bring the Related Issues resolved by the dispute resolution panel decision before a court or administrative tribunal. Where the proposed Competent Authority resolution is not accepted, or is considered not to have been accepted, the case shall not be eligible for any further consideration by the Competent Authorities.

18. Paragraph 2(b)(ii) provides that if a final decision of the courts of one of the Contracting Jurisdictions holds that the dispute resolution panel decision is invalid, the request for a dispute resolution panel shall be considered not to have been made and the dispute resolution panel process shall be considered not to have taken place (except for the purposes of paragraphs 16 to 18, related to confidentiality, and paragraph 29, related to the costs of dispute resolution panel proceedings). The term “final decision”, used in paragraphs 2(b)(ii), 8 and 29(b)(i) describes a decision that is not merely an interim order or decision and that resolves definitively the substantive matters adjudicated by the court or administrative tribunal. The decision can be at any level of court in one of the Contracting Jurisdictions so long as the decision is not subject to further appeal or other judicial or administrative recourse or is otherwise of binding nature.

19. Paragraph 2(b)(ii) does not provide independent grounds for the invalidation of a dispute resolution panel decision nor for the review of the substance of the dispute resolution panel decision. Instead, this provision recognises that under the domestic laws of some jurisdictions an administrative process like a dispute resolution panel proceeding may be subject to challenge, for example, where there has been a procedural or other failure that has materially affected the outcome of the dispute resolution panel proceeding. Paragraph 2(b)(ii) thus ensures that where a court of one of the Contracting Jurisdictions invalidates a dispute resolution panel decision based on such existing domestic law rules, neither Contracting Jurisdiction is bound to implement the decision. Based on the relevant Contracting Jurisdiction’s domestic law rules, grounds for a legal challenge to a dispute resolution panel decision may exist, for example, where such a failure is a result of the misconduct of a Competent Authority, or of

intentional conduct by members of the dispute resolution panel and/or members of a Covered Group and their advisors. These domestic law rules would determine the legal basis for the challenge, the parties with standing to make such a challenge and the court competent to adjudicate the challenge.

20. It is understood that paragraph 2(b)(ii) would apply only in exceptional circumstances. Depending on the relevant Contracting Jurisdiction's domestic law rules, the procedural or other failures or other conduct to which paragraph 2(b)(ii) would apply could include:

1. A Competent Authority's failure to take appropriate steps to apply and monitor the impartiality or independence requirements applicable to members of a dispute resolution panel pursuant to paragraph 15;
2. Any other failure by a Competent Authority to adhere to the procedural requirements provided in Article 19, or other procedures agreed by the Competent Authorities, if any; or
3. Collusion between the member of the Covered Group and a Contracting Jurisdiction, or between a member of the Covered Group or a Contracting Jurisdiction and one or more members of the dispute resolution panel.

21. The final sentence of paragraph 2(b)(ii) confirms that the provision shall not itself provide a basis for a review of the substance of a dispute resolution panel decision by the courts of the Contracting Jurisdictions. Paragraph 2(b)(ii) must be read together with paragraphs 2(b)(i) and 2(b)(iii), pursuant to which a dispute resolution panel decision shall no longer be final or binding on the Contracting Jurisdictions where a member of the Covered Group does not terminate all pending court proceedings with respect to Related Issues and (where possible under the domestic law of a Contracting Jurisdiction) formally waive the right to bring the Related Issues before a court or administrative tribunal, or where a member of the Covered Group pursues litigation on the Related Issues.

22. Paragraph 2(b)(ii) also provides that, in the circumstances where it applies, the member of the Covered Group can make a new request for a dispute resolution panel process unless the Competent Authorities agree that such a new request should not be permitted. Such a new request may be made without waiting for the passing of the period provided in paragraph 1(a)(ii), since that period will have already passed. It is expected that the Competent Authorities would agree that such a request should not be permitted where the actions of the member of a Covered Group were the main reason for the invalidation of the dispute resolution panel decision.

23. Paragraph 2(b)(iii) provides that the dispute resolution panel decision shall not be final and binding on either Contracting Jurisdiction if a member of the Covered Group pursues litigation in a court or administrative tribunal on Related Issues that were resolved in the mutual agreement implementing the dispute resolution panel decision. Paragraph 2(b)(iii) ensures that where a Contracting Jurisdiction is not permitted under its domestic law to require a taxpayer to agree to forgo litigation as part of accepting a decision under the mutual agreement procedure, litigation cannot be used to achieve non-taxation or reduced taxation, for example by asserting that the dispute resolution panel decision binds one Contracting Jurisdiction while the outcome of the litigation binds the other.

24. In the circumstances where paragraph 2(b)(ii) or (iii) would apply, the Competent Authorities may have already taken steps to implement the mutual agreement reflecting the dispute resolution panel decision. In such cases, it is expected that Competent Authorities would take the same steps to suspend or disapply the mutual agreement as they would in any other case in which a mutual agreement concluded by the Competent Authorities was subsequently challenged in a court or administrative tribunal of the Contracting Jurisdictions.

25. Paragraph 2(b)(iv) provides a last exception in cases where a court of one of the Contracting Jurisdictions delivers a decision legally binding on the Competent Authority of that Contracting Jurisdiction in the period between the finalisation of the Competent Authority mutual agreement (following the

acceptance of the proposed Competent Authority resolution by the members of the Covered Group directly affected by the case) and the implementation of the mutual agreement by the Competent Authorities. Many Competent Authorities, however, will not litigate an issue in court at the same time as the issue is being considered in the mutual agreement procedure, thus reducing the likelihood that such cases will arise. As provided in paragraph 6 of Article [Z], the concept of “legally bound” includes within its scope all circumstances in which a Competent Authority must adhere to a court decision, regardless of whether the Competent Authority was itself a party to the court or administrative tribunal procedure that resulted in the decision.

26. Under paragraph 1(b), the dispute resolution panel mechanism will also apply to resolve any disagreement between Contracting Jurisdictions regarding whether an issue that arises in a mutual agreement procedure case is a Related Issue. Paragraph 2(c) confirms that where a dispute resolution panel decides that an issue is not a Related Issue, this shall have no effect on the Competent Authorities’ obligation to endeavour to resolve the case in which that issue arises by mutual agreement, nor on the application of any other mandatory binding dispute resolution mechanism with respect to that issue.

### 2.7.3. *Paragraphs 3 through 7*

27. Paragraphs 3 through 7 provide detailed rules to establish the start date of the period before a case becomes eligible for the dispute resolution panel mechanism. These provisions use a single point of reference (the member of the Covered Group who presented the MAP case) for purposes of determining the different milestones and deadlines provided in these paragraphs, with a view to promoting clarity and an efficient process.

28. The use of a single point of reference for purposes of these paragraphs does not, however, preclude a Competent Authority from making requests for information to other members of the Covered Group directly affected by the case (for example, to other members of the Covered Group resident in the jurisdiction of that Competent Authority). To ensure an effective MAP process, a Competent Authority making such requests should inform the other Competent Authority of those requests and promptly provide the other Competent Authority with a copy of all responsive information it receives.

29. Paragraph 3 provides that the Competent Authority of a Contracting Jurisdiction that receives a request for a mutual agreement procedure as described in paragraph 1(a)(i) must, within 60 days of receiving the request, notify the member of a Covered Group who presented the case that the request has been received, and send a notification of the request to the other Competent Authority. Where the MAP request does not include a statement confirming that the MAP request was also submitted to the other Competent Authority, the notification must be accompanied by a copy of the request and all supporting documentation.

30. Under paragraph 4, each Competent Authority must notify the member of a Covered Group that presented the case and the other Competent Authority that it has received all information necessary to undertake substantive consideration of the case, or request additional information for that purpose from the member of a Covered Group that presented the case, within 90 days from the date on which it received the request.

31. Paragraph 7 of Article [Z] identifies, for the purposes of Section 3, the specific items considered “the information necessary to undertake substantive consideration of a case”.

32. A Competent Authority that requests additional information pursuant to paragraph 4(a) shall at the same time as that request notify the other Competent Authority of the request. Where a Competent Authority requests additional information pursuant to paragraph 4(b), paragraph 5 provides that after receiving such information, the Competent Authority that requested the information shall provide the other Competent Authority with a copy of all the additional information as soon as possible following its receipt. Then, within 90 days, the Competent Authority that requested the information must notify the member of

the Covered Group that presented the case and the other Competent Authority either that it has received the requested information or that some of the requested information was not provided. Pursuant to paragraph 5(b), a notification that some of the requested information is missing shall only be sent, however, if the missing information is information necessary to undertake substantive consideration of the case. The Competent Authority sending such a notification must also send the other Competent Authority an explanation to this effect. Where, however, the notification provided under paragraph 5(a) has not been sent within six months following the notification sent pursuant to paragraph 5(b) and the missing information identified in the paragraph 5(b) notification is not information specifically listed in a Contracting Jurisdiction's published MAP guidance, the Competent Authority that sent the paragraph 5(b) notification shall be treated as if it had made the notification referred to in paragraph 5(a) unless the Competent Authorities mutually agree that the missing information is information necessary to undertake substantive consideration of the case.

33. The start date of the period referred to in paragraph 1(a)(ii) depends on whether additional information is requested pursuant to paragraph 4(b).

34. Where neither Competent Authority requests additional information, paragraph 6 provides that the start date is the earlier of:

- (a) the date on which both Competent Authorities have notified the member of a Covered Group who presented the case that all information necessary to undertake substantive consideration of the case was received (i.e. the date on which the second of the two Competent Authorities has made that notification); and
- (b) the date 90 days after the date of the earliest notification sent by one Competent Authority to the Competent Authority of the other Contracting Jurisdiction pursuant to paragraph 3(b).

The date provided in paragraph 6(b) is intended to avoid blockages and ensures that there is a default start date in circumstances where either Competent Authority fails to take one of the two actions required by paragraph 4 within 90 days of receipt of the request for a mutual agreement procedure (i.e. by the deadline for such action provided in paragraph 4).

35. Where additional information is requested, paragraph 7 provides that the start date is the latest date on which a Competent Authority that requested additional information has notified the member of the Covered Group and the other Competent Authority that the information has been received pursuant to paragraph 5(a). For these purposes, in circumstances where one or both Competent Authorities send the notification referred to in paragraph 5(b), that notification shall be treated as a request for additional information pursuant to paragraph 4(b). If a Competent Authority that requested additional information fails to notify the member of the Covered Group and the other Competent Authority pursuant to paragraph 5 within 90 days of receiving the additional information, that Competent Authority shall be treated as if it had not made a request for additional information for purposes of paragraphs 4 to 7. The date provided in paragraph 7 serves a similar purpose to the date provided in paragraph 6(b). It is intended to avoid blockages and ensures that there is a default start date in circumstances where a Competent Authority does not send the notification provided in paragraph 5(a) or paragraph 5(b) within 90 days of the receipt of the additional information requested pursuant to paragraph 4(b).

36. Once the start date has been determined pursuant to paragraph 6 or paragraph 7, Competent Authorities will not be precluded from making further requests for additional information during the MAP case development and discussion process, but any such further requests will have no effect on the running of the two-year period, except to the extent that the Competent Authorities mutually agree, pursuant to paragraph 9, to extend the two-year period based on the failure by a member of a Covered Group directly affected by the case to provide in a timely manner any additional material information requested by either Competent Authority after the start of that period.

37. The provisions defining the “start date” for purposes of the dispute resolution panel mechanism have no effect on the definition of “start date” for purposes of the BEPS Action 14 “MAP Statistics Reporting Framework”. These two definitions are intended to remain independent as they serve different purposes.

#### 2.7.4. *Paragraph 8*

38. The mutual agreement procedure provided by tax treaty provisions based on paragraph 1 of Article 25 of the OECD and UN Models is available to taxpayers irrespective of the judicial and administrative remedies provided by the domestic law of the Contracting Jurisdictions. Most tax administrations, however, will require that one process take place before the other, to ensure that a taxpayer’s case will not proceed through both the mutual agreement procedure and a domestic court or administrative proceeding at the same time. To accommodate this approach, paragraph 8 provides that the period provided in paragraph 1(a)(ii) will stop running where a Competent Authority decides to suspend the MAP referred to in paragraph 1(a)(i) because a case with respect to one or more of the same Related Issues is pending before a court or administrative tribunal, or is in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process. The period will start running again when a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. It should also be noted that, pursuant to paragraph 14, the dispute resolution process provided by Section 3 will terminate if a decision is rendered by the court or administrative tribunal during the period in which the dispute resolution process is suspended.

39. Paragraph 8 refers to “a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process” to ensure that the paragraph will appropriately apply in light of the different processes required in some jurisdictions’ legal systems in advance of a court or administrative tribunal process. In some jurisdictions, for example, a distinct administrative or other process, formally separate from the court or administrative tribunal process, may be required before the court or administrative tribunal process can begin. Such administrative or other processes are understood for these purposes to be processes that must take place before a court or administrative tribunal process can begin but that do not, by themselves, result in a final or binding resolution of the issues that will be decided by the court or administrative tribunal. These administrative or other processes would thus only be undertaken with the expectation that they will be followed by a court or administrative tribunal process. The Competent Authorities of jurisdictions where such separate processes are required may wish to provide additional relevant information and clarification to treaty partner Competent Authorities in bilateral discussions.

40. Paragraph 8 also requires that, in the circumstances described in the first sentence of the paragraph, the Competent Authority that has suspended the mutual agreement procedure shall notify the other Competent Authority as soon as possible of the suspension and its basis. Such notification is intended to ensure that the other Competent Authority is promptly informed when the bilateral consideration of a MAP case will be suspended.

41. Paragraph 8 additionally provides that the period provided in paragraph 1(a)(ii) will stop running where the member of a Covered Group that presented the MAP case and both Competent Authorities have agreed to suspend the mutual agreement procedure for reasons other than those described in the first sentence of paragraph 8. The period will start running again once that suspension has been lifted. This could apply, for example, where the member of a Covered Group and the Competent Authorities have agreed to suspend the mutual agreement procedure because the outcome of another pending MAP or court case involving other members of the Covered Group, or of an audit of another member of the Covered Group, will be relevant to the analysis and resolution of the MAP case in which the Related Issues arise. Such circumstances could arise where different members of the Covered Group are involved in a series of integrated controlled transactions.

### 2.7.5. Paragraph 9

42. In some cases, after the member of a Covered Group has provided the information needed to undertake substantive consideration of the MAP case, the Competent Authorities may need to request additional information from the member of a Covered Group. For example, after the period provided in paragraph 1(a)(ii) has begun and after further analysis based on working the case, a Competent Authority may determine that it needs additional information in respect of a particular structure or transaction in order to reach agreement on how to resolve an issue. In such cases, a failure by a member of the Covered Group directly affected by the case (i.e. the member of a Covered Group who made the initial request for a mutual agreement procedure or another member of the Covered Group whose tax liability is directly affected by the case) to provide such additional information in a timely manner may delay or prevent the Competent Authorities from being able to resolve the case. To address this, paragraph 9(a) provides that the period provided in paragraph 1(a)(ii) shall be extended where both Competent Authorities agree that a member of the Covered Group directly affected by the case has failed to provide in a timely manner any additional material information requested by either Competent Authority.

43. Where a request for additional information is made **before** the period provided in paragraph 1(a)(ii) has begun, it is expected that the Competent Authority making that request would only notify the member of the Covered Group and the other Competent Authority pursuant to paragraph 5(a) – thereby triggering the start of the two-year period provided in paragraph 1(a)(ii) – when it had received a complete response to its request for additional information. Paragraph 9 thus does not provide for the extension of the two-year period in these circumstances.

44. Where a request for additional information is made **after** the start of the period provided in paragraph 1(a)(ii), a late response to such a request shall extend the two-year period for an amount of time equal to the period beginning on the date on which the information was requested and ending on the date on which that information was ultimately provided.

45. Under paragraph 4, a Competent Authority may request additional information necessary to undertake substantive consideration of the case within 90 days after it receives the request for a mutual agreement procedure. Where such additional requests for information are made, paragraph 7 then provides that the start date of the case for purposes of paragraph 1 will be the latest date on which a Competent Authority that requested additional information has notified the member of a Covered Group who presented the case and the other Competent Authority that it has received the information pursuant to paragraph 5(a). Paragraph 9(a) applies with respect to requests for additional information made after the period provided in paragraph 1(a)(ii) has already started. Paragraph 9(a) permits the period provided in paragraph 1(a)(ii) to be extended where the Competent Authorities mutually agree that an incomplete response to a request for additional information made after the start of that period constitutes a failure to timely provide additional material information. In circumstances where the member of a Covered Group fails altogether to respond to such a request for additional material information after a reasonable period, the Competent Authorities should mutually agree on an appropriate response, which could include suspending the two-year period or deeming the member of a Covered Group to have withdrawn its mutual agreement procedure request.

46. Paragraph 9(a) is relevant only for purposes of determining whether the period provided in paragraph 1(a)(i) should be extended in cases where a member of a Covered Group fails to provide additional information in a timely manner. It does not change the requirements under Article 25(1) and a Contracting Jurisdiction's MAP guidance for the acceptance of a MAP case or the Article 25(2) obligation to seek to resolve the MAP case where Competent Authorities have sufficient information to determine that the objection raised in the MAP request is justified.

47. In some circumstances, uncooperative conduct by a member of the Covered Group before or after filing a mutual agreement procedure request may undermine or impede a tax administration's examination

of the taxable periods concerned by the case or the Competent Authorities' substantive consideration and resolution of the case. Such conduct may prevent the start of the two-year period provided in paragraph 1(a)(ii) where it includes a failure to provide the Competent Authorities with information needed to undertake substantive consideration of the MAP case. It is possible, however, that the Competent Authorities become aware of such conduct only after the two-year period provided in paragraph 1(a)(ii) has already started. Paragraph 9(b) provides that the Competent Authorities may in these circumstances mutually agree to extend or suspend the two-year period. Where the Competent Authorities intend to apply paragraph 9(b), they are required to the member of a Covered Group that presented the MAP case.

#### 2.7.6. *Paragraphs 10 and 11*

48. Paragraphs 10 and 11 are intended to facilitate the effective conduct of dispute resolution panel proceedings through the development by the Competent Authorities of documentation to reflect basic information about the case and to frame the issues for decision by the dispute resolution panel.

49. Paragraph 10 provides that, within 30 days of the request for a dispute resolution panel pursuant to paragraph 1, the Competent Authorities shall agree a brief statement of information that identifies the members of the Covered Group directly affected by the case and contains a general description of the Related Issues to be resolved in the case. This statement of information will be used to determine whether prospective dispute resolution panel members satisfy the eligibility requirements identified in paragraph 15 as they relate to independence and impartiality.

50. Paragraph 11 requires the Competent Authorities to agree, within 60 days of a request for a dispute resolution panel pursuant to paragraph 1, Terms of Reference for the case. These Terms of Reference shall include:

- (i) a description of the relevant business activities of the Covered Group;
- (ii) a description of the Related Issues in dispute in the case;
- (iii) a description of the matters to be considered for the resolution of the case, including identification of all matters in the case previously agreed between the Competent Authorities; and
- (iv) a description of the final position taken by each Competent Authority in the discussion of the unresolved matters that prevent mutual agreement by the Competent Authorities.

These Terms of Reference may also include logistical or procedural information.

51. The Terms of Reference are intended to frame the issues for decision by a dispute resolution panel and thereby contribute to an efficient and effective panel process. The purpose of the inclusion in the Terms of Reference of the final position taken by each Competent Authority in the MAP discussion of unresolved Related Issues is to contribute to discipline and transparency in both MAP discussions and the dispute resolution panel process; paragraph 11(a)(iv) also supports the default rule in paragraph 27(h) that applies when a Competent Authority does not submit a proposed resolution to the dispute resolution panel by the deadline provided in paragraph 27(a).

52. The Terms of Reference are to be communicated to the Chair on the date of his or her appointment, or as soon thereafter as possible. If the Terms of Reference have not been agreed by the date for submission of the proposed resolutions and position papers provided in paragraph 27, both Competent Authorities shall send to each other and to the Chair their most recent written proposals for the Terms of Reference at the same time they submit their proposed resolutions and position papers to the Chair. All the matters identified as unresolved in each of these proposals for the Terms of Reference shall be treated as unresolved for the purposes of the subsequent proceedings. Where these proposals for the Terms of Reference reflect a disagreement regarding whether an unresolved issue is a Related Issue, the dispute resolution panel shall resolve that disagreement, as provided in paragraph 1(b).

### 2.7.7. *Paragraph 12*

53. Section 3 sets out the core provisions related to the dispute resolution panel mechanism, as well as default rules to ensure that the key structural elements of the process are in place, and is intended to permit the dispute resolution panel mechanism to function without the requirement of additional bilateral Competent Authority mutual agreements. Paragraph 12 recognises, however, that the Contracting Jurisdictions may wish to settle certain aspects of the mode of application of the provisions of Section 3 by mutual agreement, in light of the wide variety of legal and tax systems, and the fact that each Competent Authority relationship is unique. The smooth functioning of the dispute resolution panel process will require close collaboration by the Competent Authorities. Consultation and agreement on additional procedural and operational details of the process may help to ensure its effective implementation and proper functioning. Where appropriate, Competent Authority mutual agreements concluded pursuant to paragraph 12 could establish agreed guidelines for the conduct of dispute resolution panel proceedings, which could include, for example, provisions on the working language of dispute resolution panels.

54. As recognised by paragraphs 50 to 52 of the Commentary on Article 25 of the OECD Model, treaty provisions based on Article 25(3) provide Competent Authorities with broad authority to resolve difficulties of application of the treaty by means of mutual agreement. Such authority includes the authority to supplement treaty provisions providing for dispute resolution mechanisms such as the Article 19 dispute resolution panel mechanism or the OECD Model Article 25(5) MAP arbitration mechanism. Paragraph 13 expressly confirms in the MLC that the Competent Authorities of the Contracting Jurisdictions may by mutual agreement settle the mode of application of Article 19 – that is, that the Competent Authorities may by mutual agreement supplement the procedural and operational details provided by Article 19, with a view to ensuring that the dispute resolution panel mechanism most effectively achieves its objectives. Where a jurisdiction's domestic law would limit its Competent Authority's exercise of the authority to conclude mutual agreements pursuant to paragraph 12 or to provisions based on Article 25(3) of the OECD or UN Models, it is expected that its Competent Authority would only conclude mutual agreements with treaty partner Competent Authorities pursuant to paragraph 12 to the extent that such mutual agreements were consistent with such domestic law limitations.

### 2.7.8. *Paragraphs 13 and 14*

55. In some jurisdictions a mutual agreement concluded by the Competent Authority cannot override the decision of a court or administrative tribunal of that jurisdiction as a matter of law. In these jurisdictions, the Competent Authority would be unable to implement a mutual agreement reflecting a dispute resolution panel decision to the extent of any conflict or inconsistency between the decision of the court or administrative tribunal and the dispute resolution panel decision. The Competent Authority of the other jurisdiction involved in the MAP case, however, would be bound by the dispute resolution panel decision and would be obliged to implement the mutual agreement reflecting the dispute resolution panel decision. In such circumstances, inconsistent treatment of the contested matters in the two Contracting Jurisdictions would likely result in either double taxation or non-taxation. Paragraph 13 addresses this issue by ensuring that the dispute resolution panel process cannot be pursued with respect to Related Issues that have been resolved through domestic litigation before submission of the Related Issues to a dispute resolution panel in certain circumstances.

56. Paragraph 13 provides that an unresolved Related Issue shall not be submitted to a dispute resolution panel if a decision on that Related Issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction and the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision. Paragraph 13 also applies with respect to decisions reached in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process.

57. Paragraph 6 of Article [Z] clarifies that, for the purposes of Section 3, the term “legally bound” includes within its scope all circumstances in which a Competent Authority must adhere to a court decision, regardless of whether the Competent Authority was itself a party to the court or administrative tribunal procedure that resulted in the decision.

58. Paragraph 14 complements paragraph 13 by providing that the dispute resolution panel process will terminate if a decision concerning an unresolved Related Issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions at any time after a request for a dispute resolution panel has been made. Like paragraph 13, paragraph 14 applies only where the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision. Paragraph 14 provides two distinct rules that apply in different circumstances:

- If the dispute resolution panel **has not yet delivered its decision**, the dispute resolution panel process will terminate. As provided in paragraph 26, the MAP case shall not be eligible for any further consideration by the Competent Authorities, except to the extent mutually agreed by the Competent Authorities.
- If the court or administrative tribunal decision is rendered **after the dispute resolution panel has delivered its decision**, notwithstanding paragraph 2(b), the dispute resolution panel decision shall not be final and binding on both Contracting Jurisdictions, and any mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision shall not be implemented. Paragraph 14(b) would apply both before and after the communication to the member of the Covered Group of the proposed Competent Authority resolution reflecting the dispute resolution panel decision. In this circumstance, the MAP case shall not be eligible for any further consideration by the Competent Authorities.

59. Like paragraph 13, paragraph 14 also applies with respect to decisions reached in a separate process required to be completed in connection with a court or administrative tribunal process in advance of that court or administrative tribunal process.

60. Both paragraphs 13 and 14 are intended to avoid a possible conflict between the results of the dispute resolution panel process and the decision of a court or administrative tribunal, in circumstances where a Competent Authority cannot override the decision of a court or administrative tribunal of that jurisdiction as a matter of law. As explained above, in such circumstances a Competent Authority would be unable to implement the results of the dispute resolution panel process through a mutual agreement if those results conflicted with a court decision in that jurisdiction on the same matter.

61. In those Contracting Jurisdictions where Competent Authorities may conclude mutual agreements deviating from domestic court decisions, these paragraphs will not preclude members of Covered Groups from requesting a dispute resolution panel in the cases described in paragraph 13, nor will they trigger the application of paragraph 14. Competent Authorities may wish to clarify the operation of paragraphs 13 and 14 in bilateral consultations. In particular, in some Contracting Jurisdictions the Competent Authority would be precluded from maintaining taxation that a court had decided was not in accordance with the Convention but would not be prevented from granting relief from taxation notwithstanding a court decision that such taxation was in accordance with the Convention.

### 2.7.9. **Paragraph 15**<sup>134</sup>

62. Paragraph 15 sets out basic rules for the composition of a dispute resolution panel and the appointment and qualifications of dispute resolution panel members. While these rules apply by default,

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<sup>134</sup> Members of the Inclusive Framework have divergent views as regards the composition of the dispute resolution panel and the drafting of paragraph 15 of the operative text is intended solely to illustrate technical aspects of the

paragraph 15 also permits the Competent Authorities of two Contracting Jurisdictions to mutually agree on different rules that will apply with respect to MAP cases that involve those two Contracting Jurisdictions, either generally or with respect to a particular case. The provision will thus allow jurisdictions that, for example, prefer dispute resolution panels comprising only independent experts, or dispute resolution panels comprising only government officials, to agree bilaterally to so adapt these rules.

63. Under paragraph 15(a), the dispute resolution panel is composed of five individual panel members. Paragraph 15(b) provides that each Competent Authority shall, within 60 days of the request for a dispute resolution panel, appoint one panel member from the staff of that Competent Authority and one panel member from the list of independent experts established by that Competent Authority in accordance with paragraph 15(g). The two independent panel members appointed from the lists of independent experts must then, within 60 days of the latter of their appointments, appoint a fifth member from the persons on the lists of independent experts nominated by both Competent Authorities who is not a national or resident of either Contracting Jurisdiction to serve as Chair of the dispute resolution panel. Unless the Competent Authorities agree otherwise, there is no requirement that any member of the dispute resolution panel have experience as a judge or an arbitrator.

64. Paragraph 15(c) establishes when a member of the dispute resolution panel is considered to have been appointed, which is relevant for purposes of certain deadlines provided by Article 19 (such as those in paragraph 15(b) and in paragraph 27).

65. Paragraphs 15(d) and 15(e) describe default rules that apply where either Competent Authority fails, within the prescribed time periods, to appoint a member of the dispute resolution panel, or where the two independent panel members appointed from the lists of independent experts fail to appoint a Chair.

66. Paragraph 15(d) provides for the consequences where a Competent Authority fails to make the appointments provided in paragraph 15(b) by the applicable deadline.

67. In the case of a failure to appoint the member from the staff of the Competent Authority under paragraph 15(b)(i), the dispute resolution panel shall proceed without a panel member from the staff of that Competent Authority.

68. In the case of a failure to appoint the member from the list of independent experts under paragraph 15(b)(ii), the Competent Authority of the other Contracting Jurisdiction shall appoint panel members at random from the individuals on the list of independent experts nominated by the first-mentioned Competent Authority under paragraph 15(g).

69. Paragraph 15(e) then provides that where the independent experts cannot agree a Chair of the panel by the applicable deadline, the Competent Authorities shall appoint the Chair at random from the individuals on the lists of independent experts nominated by both Competent Authorities who have indicated their willingness to serve as the Chair.

70. The default rules in paragraphs 15(d) and 15(e) are intended to ensure that the dispute resolution panel process, and therefore a resolution of Related Issues in a mutual agreement procedure case, cannot be unduly delayed by a failure to constitute a dispute resolution panel. As default rules, these rules will apply only to the extent that the Competent Authorities of the relevant Contracting Jurisdictions have not mutually agreed on different rules.

71. Paragraph 15(f) provides that – except to the extent that the Competent Authorities of the relevant Contracting Jurisdictions have mutually agreed on different rules – each independent expert appointed to the dispute resolution panel pursuant to paragraph 15(b)(ii) and the Chair must, at the time of accepting

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process for the appointment of dispute resolution panel members. The commentary on paragraph 15 should thus be read with the understanding that it is only illustrative and does not represent the final or consensus views of the Inclusive Framework with regard to the composition of the dispute resolution panel.

their appointment, fulfil the requirements set out in paragraph 15(g) and fulfil certain other requirements to ensure their impartiality and independence with respect to the specific MAP case. In particular, an individual is conflicted to act on a dispute resolution panel involving the Covered Group where at the time of appointment:

- They or a Family Member are or were an employee, contractor, partner or member of any member of the Covered Group, in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period.
- They or a Family Member are or were a Significant Investor in the Relevant Group or any of its entities, in the previous [two] years, or continue to derive benefits of any kind from such investment or investments in any prior period.
- They or a Family Member have or had Significant Business Dealings with any member of the Covered Group in the previous [five] years or continue to derive benefits of any kind from such transactions or activities in any prior period.
- They, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services to the Covered Group in the previous [five] years.
- They, directly or as part of or on behalf of an enterprise or firm, are or were personally involved in providing, or supervising the provision of, tax, advisory, consulting, accounting or audit services with respect to an arrangement or transaction at issue in the MAP case. This requirement is not subject to any temporal limitation (i.e. an individual will always be considered to have a conflict with respect to an arrangement or transaction with which they were personally involved).
- They or a Family Member hold or held a Funded Academic Position in the previous [five] years, or continue to derive benefits of any kind from such engagements or relationships that existed in any prior period.

72. Each of these panel members must also maintain their impartiality and independence throughout the proceedings, and must for a reasonable period of time thereafter avoid conduct that may damage the appearance of impartiality and independence of the members of the dispute resolution panel with respect to the proceedings. Such conduct would include, for example, accepting employment with a member of the Covered Group, or its advisors, soon after delivering the dispute resolution panel decision. Prospective dispute resolution panel members will undertake to disclose to both Competent Authorities, in writing, any facts or circumstances that arise during or subsequent to the panel proceedings that might call into question their impartiality or independence.

73. Each panel member will execute a written certification to the effect of the provisions of paragraph 15(f).

74. Paragraph 15(g) provides rules for the establishment of the lists of independent experts from which (pursuant to paragraph 15(b)) certain members of dispute resolution panels will be appointed. For purposes of constituting these lists of independent experts, the Competent Authority of each Contracting Jurisdiction to an Existing Tax Agreement shall nominate five individuals who –

- (i) may be relied upon to exercise independent judgment and conduct themselves in a professional manner;
- (ii) have at least [six] years of experience in dealing with international corporate income tax and/or transfer pricing; and
- (iii) do not work for or on behalf of any Government and were not in such a situation at any time during the previous [12 months], irrespective of whether the individual is/was on secondment to a regional tax organisation or an international organisation during this time

(for the purposes of Section 3, an individual who has accepted an appointment as a member of any other panel provided for under this Convention, or as an arbitrator in a proceeding pursuant to Part VI of the BEPS Multilateral Instrument or pursuant to the provisions of any other bilateral or multilateral agreement or domestic law provision providing for the arbitration or resolution of unresolved issues in a MAP case, will not be considered based on such appointment to work for or on behalf of, or to have worked for or on behalf of, the Government of a Contracting Jurisdiction).

75. The establishment of the lists of independent experts is intended to provide transparency with respect to the individuals that a Competent Authority would appoint to a dispute resolution panel pursuant to paragraph 15(b)(ii) and to facilitate the choice of a Chair. It is expected that each Competent Authority will screen the individuals it nominates as that Competent Authority will have already familiarised itself with those individuals' background and other relevant facts as part of the process of identifying suitable nominees. There is no requirement under paragraph 15(g) that a Competent Authority nominate five different individuals for purposes of each of its bilateral treaty relationships, nor does paragraph 15(g) include requirements to update or change these individuals at specific intervals. A Competent Authority may, for example, prefer to maintain a single standing list of independent experts for all of a Contracting Jurisdiction's bilateral relationships. Competent Authorities should, however, keep in mind that the Chair of a particular dispute resolution panel shall be appointed from among the individuals on the list of independent experts who are not nationals or residents of either of the relevant Contracting Jurisdictions. In addition, Competent Authorities should periodically verify that the nominated individuals remain eligible to serve as independent experts and are not deceased or otherwise incapable of serving on a dispute resolution panel.

76. Pursuant to paragraph 15(h), each Competent Authority shall confirm with each person it nominates that person's willingness to serve as a member of a dispute resolution panel, including (in cases where the independent expert is neither a national or resident of either Contracting Jurisdiction) whether that person would be willing to serve as Chair. In all cases, at least [one] independent expert nominated by each Contracting Jurisdiction shall not be a national or resident of either relevant Contracting Jurisdiction and shall be willing to serve as Chair (for purposes of the appointment of a Chair of the dispute resolution panel pursuant to paragraph 15(b) or 15(e)). Each Competent Authority shall inform the other Competent Authority of the independent experts so nominated. A Competent Authority shall be entitled to object to a person nominated by the other Competent Authority only where that person does not meet the requirements provided in paragraph 15(g) and shall provide a justification with any such objection. Each Contracting Jurisdiction may change the persons so nominated and shall notify the other Competent Authority without delay when it wishes to do so.

77. Paragraph 15(i) provides a default rule that is designed to prevent blockages of the dispute resolution panel mechanism in two specific circumstances: (i) where one or both Competent Authorities fail to nominate any individuals to a list of independent experts used to select dispute resolution panel members appointed pursuant to paragraph 15(b)(ii) and the Chair; or (ii) where none of the individuals nominated by a Competent Authority to a list of independent experts meets the requirements of paragraph 15(f) or is otherwise available to act as a member of a dispute resolution panel in a particular case. In these circumstances, the group of individuals nominated by the relevant Competent Authority to the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels shall be used for purposes of the appointment on behalf of that Competent Authority of a dispute resolution panel member pursuant to paragraph 15(b)(ii) and for purposes of the appointment of the Chair (with the two panel members appointed pursuant to paragraph 15(b)(ii) taking into account that the Chair shall not be a national or resident of either Contracting Jurisdiction).

78. Paragraph 15(j) addresses situations in which a dispute resolution panel member is unable to perform his or her duties, as a result of illness or incapacity, failing to meet standards for impartiality and independence, or for any other reason. It provides that the procedures in paragraph 15 shall apply with the

necessary adaptations if for any reason it is necessary to replace a dispute resolution panel member after the dispute resolution panel process has begun. In such circumstances, the Competent Authorities shall also agree on necessary adaptations, as appropriate, to the deadlines provided in paragraph 27. Competent Authorities may mutually agree on alternative arrangements to replace dispute resolution panel members, bearing in mind the overall objective of timely resolution of Related Issues.

79. Finally, paragraph 15(k) provides definitions of certain terms used in paragraph 15(f) to establish when a person from the list of independent experts provided in paragraph 15(g) is considered to have a conflict that would prevent that person from serving on a dispute resolution panel in a particular case.

#### 2.7.10. **Paragraph 16**

80. To ensure that the dispute resolution panel process can accomplish its purpose without undermining the confidentiality of the mutual agreement procedure, it is important that the Competent Authorities be permitted to provide the members of the dispute resolution panel with relevant information, subject to the same strict confidentiality requirements that would apply to the Competent Authorities themselves. To accomplish this, paragraph 16 provides that, solely for the purposes of Article 19, and of the provisions of Existing Tax Agreements, the Convention, and the domestic laws of the Contracting Jurisdictions related to the exchange of information, confidentiality, and administrative assistance, the members of the dispute resolution panel shall be considered persons or authorities to whom information may be disclosed.

81. Pursuant to paragraph 16, such information may also be disclosed to prospective dispute resolution panel members, but solely to the extent necessary to verify their ability to fulfil the requirements of dispute resolution panel members, including, for example, their independence and impartiality. Paragraph 16 additionally provides that information received by the dispute resolution panel or by prospective dispute resolution panel members, as well as any information that the Competent Authorities may receive from the dispute resolution panel, shall be considered information exchanged under the exchange of information and administrative assistance provisions of the relevant agreement. Recognising the need to balance the goal of minimising the number of people to whom information may be disclosed against dispute resolution panel members' need for staff support, this paragraph also provides for disclosure under the same conditions to a maximum of three staff per panel member.

#### 2.7.11. **Paragraphs 17 and 18**

82. Paragraph 17 requires the Competent Authorities to ensure that prospective dispute resolution panel members from the lists of independent experts provided in paragraph 15(g) agree in writing, prior to the disclosure to them of any information relating to the dispute resolution panel proceeding, to treat such information consistently with the confidentiality and nondisclosure obligations described in the provisions of the relevant agreement related to exchange of information and administrative assistance and under the applicable laws of the Contracting Jurisdictions. Competent Authorities must also ensure that members of the dispute resolution panel from the lists of independent experts provided in paragraph 15(g) and their staff agree in writing, prior to their acting in an dispute resolution panel proceeding, to treat any information relating to the proceeding consistently with the confidentiality and nondisclosure requirements under the provisions of the relevant agreement related to the exchange of information and administrative assistance and under the applicable laws of the Contracting Jurisdictions. Paragraph 17 includes a mechanism for the Competent Authority that appointed the dispute resolution panel member to obtain such a written agreement from the dispute resolution panel member and their staff. Either Competent Authority may obtain the written agreement from the Chair and their staff.

83. The consequences for a member of a dispute resolution panel or a prospective dispute resolution panel member who breaches such a written agreement would be determined under the applicable

domestic laws of the Contracting Jurisdictions and under the terms of the agreement itself (for example, the agreement may provide that a dispute resolution panel member shall be dismissed and shall forfeit any remuneration to which that member would otherwise be entitled in the event of a breach of the agreement's confidentiality provisions). The consequences for a member of a dispute resolution panel or a prospective dispute resolution panel member under the applicable domestic law may be determined by courts or other bodies, besides or in addition to the Competent Authorities. In the event that a member of a dispute resolution panel or a prospective dispute resolution panel member breaches this agreement, the Competent Authorities shall by mutual agreement determine the consequences of that breach on the dispute resolution panel proceeding itself, which could, for example, include the replacement of one or more members of the dispute resolution panel in circumstances where the dispute resolution panel proceeding is still ongoing.

84. Paragraph 18 requires the Competent Authorities, prior to the start of a dispute resolution panel proceeding, to ensure that each member of a Covered Group involved in the case and their authorised representatives or advisors agree in writing not to disclose any of the information received during the course of the dispute resolution panel proceeding from either Competent Authority or from the dispute resolution panel, other than the determination of the panel where that disclosure is required under the laws of any jurisdiction. Such a disclosure could be required, for example, for purposes of financial reporting by the Covered Group or by securities regulations, and may be required in a jurisdiction other than one of the two Contracting Jurisdictions involved in the MAP case (for example, in a third jurisdiction in which the Covered Group's parent entity is resident).

85. A breach of the agreement provided in paragraph 18 between the time at which the request for a dispute resolution panel was made and before the dispute resolution panel has delivered its decision will result in the termination of the mutual agreement procedure and the dispute resolution panel proceeding with respect to the case. Where such a breach occurs subsequent to the dispute resolution panel's delivery of its decision, the Competent Authorities shall by mutual agreement determine the consequences of the breach with respect to the dispute resolution panel proceeding and its outcomes.

86. It is expected that Competent Authorities would take a practical approach in determining the consequences of a breach of paragraph 17 or 18 on the dispute resolution panel proceeding (which would apply in addition to the consequences for dispute resolution panel members under the applicable domestic laws of the Contracting Jurisdictions). Such an approach should balance the need to maintain the integrity of the dispute resolution panel process and the objective of achieving timely resolution of Related Issues.

#### **2.7.12. Paragraphs 19 and 20**

87. Paragraphs 19 and 20 establish a process for communications between the Competent Authorities and the members of the dispute resolution panel, with a view to ensuring clarity in how information is communicated and by whom. In general, all correspondence from a Competent Authority to the dispute resolution panel should be communicated concurrently to the other Competent Authority. Paragraph 27, however, provides special rules with respect to Competent Authorities' proposed resolutions, supporting position papers, and reply submissions that are intended to ensure a level playing field as between the Competent Authorities. Correspondence from the dispute resolution panel to the Competent Authorities is to be communicated by the Chair concurrently to both Competent Authorities.

88. It is contemplated that the dispute resolution panel process itself will, as far as possible, be conducted via tele- and/or videoconferencing, without the need for in-person meetings. Such teleconferencing or videoconferencing must make use of appropriate measures and facilities (such as encryption) to ensure the security and confidentiality of dispute resolution panel communications. In the event that the dispute resolution panel considers that a face-to-face meeting is necessary, the Chair will contact the Competent Authorities, who will mutually agree whether such a meeting is necessary and, if

so, when and where the meeting should be held. The Competent Authorities would then communicate that information to the dispute resolution panel through the Chair.

### 2.7.13. **Paragraphs 21 to 24**

89. Paragraphs 21 to 24 provide rules to ensure the integrity of the dispute resolution panel process.

90. Paragraph 21 bars any *ex parte* communications between the Competent Authorities and the members of the dispute resolution panel appointed from the lists of independent experts provided in paragraph 15(g) related to the MAP case that resulted in the dispute resolution panel proceeding or to the panel proceeding itself. Because paragraph 22 generally requires all communications between the Competent Authorities and the dispute resolution panel to be in writing, the Competent Authority making a communication to dispute resolution panel members should always copy the other Competent Authority. A panel member from a Contracting Jurisdiction's Competent Authority will not be prevented from continuing to communicate normally with the rest of the Competent Authority staff, including about matters related to the MAP case or the panel proceeding. Panel members from a Competent Authority could thus, for example, contribute to Competent Authority discussions of an agreed resolution of the MAP case, which would not involve the independent panel members. The reference in paragraph 22 to paragraph 27(k) recognises that the Competent Authorities may agree pursuant to paragraph 27(k) to an oral presentation to the dispute resolution panel.

91. Pursuant to paragraph 23, no members of a dispute resolution panel shall have substantive discussions of the Related Issues without all members of the dispute resolution panel present. This prohibition shall not apply, however, to substantive discussions solely between the members of the dispute resolution panel appointed from the staff of the Competent Authorities of the Contracting Jurisdictions. Such discussions may facilitate an agreed resolution of the MAP case by the Competent Authorities.

92. Paragraph 24 contains rules on communications between a member of the dispute resolution panel and the member of a Covered Group who presented the MAP case, any other member of the Covered Group, or their representatives, agents or advisors. The provision includes two subparagraphs. Paragraph 24(a) applies with respect to the period during which the dispute resolution panel proceeding is ongoing, and paragraph 24(b) applies with respect to the period subsequent to the dispute resolution panel proceeding.

93. During a dispute resolution panel proceeding, paragraph 24(a) prohibits any communication by members of the dispute resolution panel with the Covered Group or its representatives, agents or advisors. While a dispute resolution panel proceeding is ongoing, all communication with the Covered Group should occur through the Competent Authorities to ensure a transparent process.

94. Following a dispute resolution panel proceeding, different rules apply to (i) dispute resolution panel members appointed from the paragraph 15(g) lists of independent experts and (ii) dispute resolution panel members appointed from the staff of a Competent Authority.

95. Pursuant to paragraph 24(b)(i), members of a dispute resolution panel appointed from the paragraph 15(g) lists of independent experts should never have communications regarding the dispute resolution panel proceeding or the Related Issues considered by the dispute resolution panel with any member of the Covered Group or its representatives, agents or advisors. This obligation should not exist solely for a fixed time period as it relates to the overall integrity of the dispute resolution panel mechanism.

96. Paragraph 24(b)(i) is not, however, intended as a perpetual ban on any communication with the Covered Group or its representatives, agents or advisors and does not restrict communications concerning matters other than the dispute resolution panel proceeding or the Related Issues considered by the panel. Under paragraph 24(b)(ii), members of a dispute resolution panel appointed from the lists of independent experts provided in paragraph 15(g) are subject to a general requirement that they refrain from any conduct

that would give rise to reasonable doubts as to their impartiality or independence. This requirement is similarly not time-bound as evaluating whether panel members' conduct creates doubts as to their impartiality or independence requires a consideration of all the facts and circumstances.

97. Paragraph 24(b)(iii) subjects members of the dispute resolution panel appointed from the staff of a Competent Authority to the same bar on communications regarding the dispute resolution panel proceeding as applies to other panel members. Following the dispute resolution panel proceeding, these members of a dispute resolution panel may, however, communicate with the Covered Group and its representatives, agents and advisors regarding Related Issues or other matters to the extent required by their function as a member of the Competent Authority staff (for example, in connection with the implementation of the Competent Authority mutual agreement or other MAP cases).

98. All of the requirements in paragraphs 21 to 24 are intended to provide a transparent process as between both Competent Authorities and the members of the dispute resolution panel.

#### 2.7.14. **Paragraph 25**

99. Paragraph 25 requires the members of a dispute resolution panel from the lists of independent experts provided in paragraph 15(g) to immediately destroy all documents or other information received in connection with the dispute resolution panel proceedings at the termination of the proceedings. This requirement is designed to protect the confidentiality of the taxpayer information that is provided to the members of the dispute resolution panel. Panel members from Competent Authorities would be expected to follow existing domestic law provisions and tax administration procedures on the retention, storage and disposal of taxpayer information and Competent Authority documentation and records.

#### 2.7.15. **Paragraph 26**

100. Recognising that the purpose of a dispute resolution panel under Article 19 is to resolve disputes between the Competent Authorities with respect to Related Issues that arise from mutual agreement procedure cases, paragraph 26 provides for the consequences of certain events relevant to the resolution of these disputes but external to the dispute resolution panel proceeding itself. The two subparagraphs of paragraph 26 deal separately with the consequences for the dispute resolution panel and for the Competent Authorities' consideration of the underlying mutual agreement procedure case, which may not be the same in all circumstances.

101. Paragraph 26(a) first provides that the dispute resolution panel proceeding will terminate if, during the dispute resolution panel process (at any time after a request for a dispute resolution panel has been made and before the dispute resolution panel has delivered its decision) any one of the following events occurs:

- (i) the Competent Authorities come to a mutual agreement to resolve the case;
- (ii) the member of a Covered Group who presented the case withdraws either its request for a dispute resolution panel or its request for a mutual agreement procedure;
- (iii) a decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions before the dispute resolution panel has delivered its decision to the Competent Authorities and the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision, as provided in paragraph 14(a); or
- (iv) any member of the Covered Group or any of its authorised representatives or advisors breaches the written confidentiality agreement required by paragraph 18.

102. Paragraph 26(b) then provides that, where the dispute resolution panel proceeding with respect to a case has been terminated pursuant to paragraph 26(a), the case shall not be eligible for any further consideration by the Competent Authorities, except to the extent mutually agreed by the Competent Authorities in specifically identified circumstances. Whilst the mutual agreement procedure with respect to a case would be terminated in the event of a taxpayer's withdrawal of its MAP request, the Competent Authorities may consider that further consideration of the case is appropriate in certain other circumstances.

103. A first circumstance where further Competent Authority consideration of the MAP case may be appropriate is where the member of the Covered Group withdraws its request for a dispute resolution panel but not the underlying MAP request. Such a withdrawal could occur, for example, if a member of a Covered Group requested a dispute resolution panel but soon thereafter was informed by the Competent Authorities that they would reach an agreed resolution of the MAP case shortly. Although the dispute resolution panel proceeding would terminate pursuant to paragraph 26(a)(i) upon a Competent Authority mutual agreement, the Competent Authorities would continue to be bound by the provisions of Article 19 to take certain actions by fixed deadlines until that mutual agreement was concluded. Competent Authorities may thus prefer to ask the member of the Covered Group to withdraw the request for a dispute resolution panel in view of an imminent mutual agreement, the date of which they will not know with absolute certainty, in order to avoid being obliged to set up a dispute resolution panel that will likely not be used. Further Competent Authority consideration of the MAP case would only occur in these circumstances where both Competent Authorities agreed it was appropriate.

104. A second circumstance where further Competent Authority consideration of the MAP case may be appropriate is where the dispute resolution panel proceeding is terminated as a result of a court decision legally binding the Competent Authority of one Contracting Jurisdiction. Such further Competent Authority consideration would permit the Competent Authority of the other Contracting Jurisdiction to evaluate whether it would agree to provide relief consistent with that court decision (such as by providing a corresponding adjustment) in the context of the mutual agreement procedure.

#### 2.7.16. **Paragraph 27**

105. Paragraph 27 provides default rules for the decision-making process that will be used in dispute panel proceedings pursuant to Article 19. The provision also permits the Competent Authorities of the Contracting Jurisdictions to mutually agree on different rules for the decision-making process, which may apply to all cases or to a particular case. In the absence of such an agreement, however, the decision-making process described in paragraph 27 will apply.

106. Dispute resolution panels will, by default, apply a last-best offer (also known as final offer) approach to decision-making. Under this approach, the Competent Authorities will each submit to the dispute resolution panel a proposed resolution that addresses all of the unresolved Related Issues in the case in a manner consistent with any previous agreements that have been reached in that case by the Competent Authorities. For each adjustment or similar issue in the case, the proposed resolution will generally include only the disposition of specific monetary amounts (for example, of income or expense). In some cases, however, unresolved Related Issues will include questions regarding whether the conditions for applying a provision of an Existing Tax Agreement have been met. Where the unresolved Related Issues in a case include such a "threshold question", such as whether an enterprise of one of the Contracting Jurisdictions has a permanent establishment in the other Contracting Jurisdiction, the Competent Authorities may submit their proposed answers to the threshold question (i.e. yes or no). If there are other unresolved Related Issues the disposition of which is contingent on the answer reached with respect to the threshold question, it is expected that the Competent Authorities would also submit alternative proposed resolutions of those remaining Related Issues.

107. Pursuant to the introductory language of paragraph 27, the Competent Authorities of two Contracting Jurisdictions may mutually agree to use an alternative form of decision-making, such as an independent opinion approach, whether in a specific case or in general. As noted above, however, last-best offer decision-making will apply in all circumstances in the absence of such a mutual agreement. Competent Authorities that come to such a mutual agreement should keep in mind that certain alternative forms of decision-making (such as an independent-opinion approach) may be expected to lengthen the period of time required by a dispute resolution panel to deliver its decision. Those Competent Authorities should thus also consider the interactions with the time periods provided for different steps in the dispute resolution panel process, or with respect to the Terms of Reference, keeping in mind the overall objective of the mechanism to provide a timely resolution of Related Issues. As provided in paragraph 27(j), the dispute resolution panel decision shall have no precedential value notwithstanding a Competent Authority mutual agreement to use an alternative form of decision-making, and any rationale or explanation provided in connection with such decision-making would not create precedent for the resolution or decision of other cases.

108. The proposed resolutions submitted by the Competent Authorities of each Contracting Jurisdiction may be supported by a position paper. Each proposed resolution and any supporting position paper must be submitted for consideration by the dispute resolution panel by the date on which the proposed resolution is due (i.e. within 60 days of the appointment of the Chair of the dispute resolution panel, as provided in paragraph 27(a)).

109. The proposed resolution shall not exceed five pages. The supporting position paper shall not itself exceed 30 pages but may be supported by annexes. The supporting position paper should contain a complete and concise explanation of the Competent Authority's proposed resolution. Annexes to the supporting position paper should provide factual information as background to supplement the proposed resolution and should not contain additional arguments not set out in the supporting position paper.

110. Each Competent Authority submits its proposed resolution solely to the Chair. The Chair will then provide copies of both proposed resolutions to the two Competent Authorities concurrently, as soon as possible following the date of receipt of the latest of the proposed resolutions. This process for the communication of proposed resolutions is intended to ensure a level playing field as between the Competent Authorities by informing each Competent Authority of the other's position and arguments at the same time. Supporting position papers and reply submissions are similarly communicated by the Competent Authorities solely to the Chair, who then provides copies of these documents concurrently to both Competent Authorities. Where, however, the provisions of paragraph 27(h) apply, paragraph 27(a) provides that the Chair will provide copies of the proposed resolutions and supporting position papers to both Competent Authorities only at the end of the seven-day period provided in paragraph 27(h). At that time, the Chair will inform both Competent Authorities if the Competent Authority that was provided additional time to submit a proposed resolution and/or a supporting position paper did not do so.

111. The Competent Authorities must at the same time provide the Chair with portions of the request for a mutual agreement procedure submitted by the Covered Group that are relevant to the unresolved Related Issues. The Covered Group should ensure that the different issues raised in its MAP request are clearly demarcated in order to allow the Competent Authorities to extract such relevant portions. The Covered Group should also ensure that MAP requests are concise and succinct, in order to allow such portions to inform the dispute resolution panel of the original position of the member of a Covered Group. The Competent Authorities should clearly indicate in a covering letter along with this submission that the portions of the MAP request shared with the Chair should not be considered an alternative position or proposed resolution that is submitted for consideration by the dispute resolution panel.

112. Each Competent Authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other Competent Authority. A reply submission must be submitted for consideration by the dispute resolution panel within 60 days of the date on which

the proposed resolution and supporting position paper were due. The reply submission is meant to address only the positions and arguments of the other Competent Authority, and a Competent Authority should not advance additional arguments in favour of its own position in a reply submission. In circumstances where a Competent Authority has not submitted a proposed resolution within the additional seven-day period provided in paragraph 27(h), the other Competent Authority shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 11(a)(iv) as that Competent Authority's proposed resolution for purposes of any reply submission. A Competent Authority that has not submitted a proposed resolution may submit a reply submission but, as noted above, should not use a reply submission to advance its own arguments or position.

113. The reply submission shall not exceed 10 pages but may be supported by annexes. The reply submission should contain a complete and concise response to the positions and arguments set out in the other Competent Authority's proposed resolution and supporting position paper. Like the annexes to the supporting position paper, annexes to the reply submission should only provide factual information as background to supplement the reply submission.

114. Paragraph 27(d) further provides that any annex to a supporting position paper or reply submission which does not reflect publicly available information must be a document previously made available for the Competent Authorities of both Contracting Jurisdictions to use in discussion of the mutual agreement procedure case. Moreover, any factual information used in a supporting position paper or reply submission which does not reflect publicly available information must be contained in a document previously made available for both Competent Authorities to use in discussion of the mutual agreement case.

115. Under paragraph 27(e), the Competent Authority of a Contracting Jurisdiction is permitted to refer in materials submitted to a dispute resolution panel to a proposal for resolution previously made by either Competent Authority during discussion of the MAP case only if that proposal is submitted to the dispute resolution panel for consideration as a proposed resolution or if that position is described in the Terms of Reference pursuant to paragraph 11(a)(iv). A reply submission prepared pursuant to paragraph 27(c) will necessarily refer to the proposed resolution submitted by the other Competent Authority. The final position taken by each Competent Authority in the MAP discussion of the Related Issues will be provided to the dispute resolution panel as part of the Terms of Reference, and it may accordingly be appropriate for a Competent Authority to refer to that final position in its submissions to a dispute resolution panel. In the context of the dispute resolution panel process, reference to other positions taken by a Competent Authority may create uncertainty or confusion, given the binary nature of a dispute resolution panel's decision. The restrictions provided by paragraph 27(e) would not apply to the Competent Authorities, however, in the context of their bilateral MAP discussions of the case, which may continue at the same time as a dispute resolution panel proceeding.

116. The Competent Authorities may mutually agree on different rules with respect to the proposed resolutions, position papers, and reply submissions, including their maximum length and their content, in any agreement on the mode of application of the dispute resolution panel procedure entered into pursuant to paragraph 12.

117. Paragraph 27(f) permits the dispute resolution panel to request additional factual information from the Competent Authorities within 60 days after the deadline for receipt of the proposed resolutions from both Competent Authorities. Such additional information may be submitted to the panel only at its request, and the panel will establish a deadline for responding to the request. Such requests for additional information may only concern information that consists of, or is reflected in, existing documentation; the dispute resolution panel may not request additional information not previously available or considered for purposes of the discussion of the mutual agreement procedure case. The dispute resolution panel may not request new or additional analyses from the Competent Authorities. The panel is not permitted to request additional information from any member of the Covered Group that presented the case. The Competent Authorities shall consult with each other to determine how to respond to any request from the

panel for additional information and, prior to providing the additional information to the panel, shall mutually agree on the form and content of the response.

118. Although Competent Authorities should generally not encounter difficulties in agreeing a response that reflects solely factual information reflected in existing documentation, there may be circumstances in which they disagree with respect to specific aspects of the form or content of the response. In these circumstances, paragraph 27(f)(ii) provides that, by the deadline established by the panel, the Competent Authorities shall provide the Chair with a joint (i.e. agreed) response that reflects items with respect to which the Competent Authorities agree and that identifies those items with respect to which the Competent Authorities disagree. By that deadline, each Competent Authority shall also provide the Chair and the other Competent Authority with a supplementary response that addresses only those items with respect to which the Competent Authorities disagree. These supplementary responses shall not contain any new or additional analyses in support of a Competent Authority's proposed resolution.

119. Pursuant to the last-best offer approach to decision-making, the dispute resolution panel will select as its decision one of the proposed resolutions submitted by the Competent Authorities. In a case involving one or more threshold questions, the dispute resolution panel will decide the threshold question(s), and then adopt one of the alternative proposed resolutions submitted by the Competent Authorities. The dispute resolution panel will deliver its decision to the Competent Authorities of the Contracting Jurisdictions within 180 days of the appointment of the Chair of the dispute resolution panel. The decision will be adopted by a simple majority of the dispute resolution panel members. The decision of the dispute resolution panel will be delivered in writing by the Chair to the Competent Authorities of the Contracting Jurisdictions.

120. In the event that the Competent Authority of one of the Contracting Jurisdictions fails to submit a proposed resolution and/or a supporting position paper to the Chair of the dispute resolution panel within the time period provided in paragraph 27(a), the Chair shall notify both Competent Authorities. The Competent Authority that did not submit a proposed resolution and/or a supporting position paper shall be provided 7 additional days to submit a proposed resolution and/or a supporting position paper to the Chair. Where the relevant Competent Authority does not submit a proposed resolution within this seven-day period, the dispute resolution panel shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 11(a)(iv) as that Competent Authority's proposed resolution. This rule is intended to avoid the possibility that one Competent Authority could block the dispute resolution panel process by not submitting a proposed resolution to the dispute resolution panel.

121. Within 100 days after the receipt of the dispute resolution panel decision, the Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group that requested the dispute resolution panel proceeding shall communicate to that member of the Covered Group in writing the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision. That member of a Covered Group shall confirm in writing within 30 days that it and all other members of the Covered Group directly affected by the case accept the proposed Competent Authority resolution. The failure of the member of a Covered Group that requested the dispute resolution panel proceeding to indicate the acceptance of the proposed Competent Authority resolution by all members of the Covered Group directly affected by the case within 30 days shall be considered a rejection of the proposed Competent Authority resolution.

122. The requirement that the member of a Covered Group accept the proposed Competent Authority resolution reflects the circumstance that MAP cases in which Related Issues arise are as a formal matter resolved through a Competent Authority mutual agreement. In general, if the terms and conditions of any

MAP resolution are not satisfactory to the taxpayer<sup>135</sup>, the taxpayer may be entitled to withdraw from the MAP process and pursue other domestic remedies that are still available. The requirement that the member of a Covered Group accept the proposed Competent Authority resolution is thus a recognition that the dispute resolution panel process is not an alternative or additional recourse but an extension of the mutual agreement procedure that serves to ensure the timely resolution of MAP cases. The resolution of the case continues to be reached through the mutual agreement procedure, whilst the resolution of the Related Issues that are preventing agreement in the case are handled through the dispute resolution panel process. This distinguishes the dispute resolution panel process from other forms of commercial or government-private party arbitration where the jurisdiction of the panel extends to resolving the whole case. In practice, it is expected that the member of a Covered Group will typically accept the proposed Competent Authority resolution because, once implemented, it will ensure taxation in accordance with the Convention, including appropriate relief from double taxation, in both Contracting Jurisdictions.

123. In light of the limited purpose of dispute resolution panels to provide a streamlined method for resolving disputes between the Competent Authorities with respect to Related Issues, the decision of the dispute resolution panel will not have precedential value (i.e. the decision of the dispute resolution panel shall not establish a precedent with respect to Related Issues for any other case or taxable years). Whilst the decisions of the dispute resolution panel will not have precedential value, Competent Authorities may wish to consider whether it is appropriate to extend the terms of the resolution of the case to cover subsequent taxable periods, in particular where the facts and circumstances of the relevant transactions or activities remain unchanged. This may facilitate the resolution of recurring issues that could otherwise give rise to multiple, duplicative MAP cases. Depending on the Competent Authorities' MAP practices and procedures, the terms of the resolution could potentially be extended by mutual agreement to subsequent taxable periods for which the member of a Covered Group has filed tax returns (but with respect to which it has not filed MAP requests) or reflected in a bilateral advance pricing arrangement for future years. Any decision to extend the terms of the resolution to subsequent taxable periods would in all cases remain subject to the discretion of the Competent Authorities, based on the facts and circumstances of those subsequent taxable periods.

124. Paragraph 27(k) provides that when the Chair determines that the dispute resolution panel will be unable to deliver its decision to the Competent Authorities of the Contracting Jurisdictions by the deadline provided in paragraph 27(i), the Chair is required to notify both Competent Authorities as soon as possible, informing them of the reasons for delay. In most cases, it is expected that providing the dispute resolution panel with additional time will permit the dispute resolution panel to reach a decision, and paragraph 27(k) expressly recognises that the Competent Authorities may mutually agree to do so. The Competent Authorities may also mutually agree to take any other appropriate measures to facilitate the panel's decision, which could include, for example, an oral explanation by one Competent Authority of points in its proposed resolution that were unclear or raised questions. In agreeing to provide the dispute resolution panel with additional time, or to any other measures they consider appropriate, the Competent Authorities should keep in mind the binary nature of the last-best offer decision-making process and the overall objective of timely resolution of Related Issues.

125. Finally, paragraph 27(l) is a catch-all provision that permits the dispute resolution panel, to the extent needed, to propose any additional procedures necessary for the conduct of its business, provided that these procedures are not inconsistent with the Article or any other procedural rules agreed by the

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<sup>135</sup> In most cases, a taxpayer cannot accept the terms of an agreement reached through the MAP for only some issues or taxation years involved, unless both Competent Authorities agree. This is due to the fact that the Competent Authorities commonly consider the original request by the taxpayer, which is usually multifaceted, in its entirety and often consider all aspects (issues and taxation years) involved at one time and as one case, and ultimately one outcome. The resolution of contentious MAP cases may be the result of compromise and concessions and, therefore, Competent Authorities routinely use a holistic approach.

Competent Authorities. Any such additional procedures remain subject to the approval, by mutual agreement, of the Competent Authorities. The Chair shall provide a written copy of any proposed additional procedures to the Competent Authorities.

#### 2.7.17. **Paragraph 28**

126. Notwithstanding paragraph 2, paragraph 28 allows the Competent Authorities to depart from the dispute resolution panel decision and to agree on a different resolution within 90 days after the decision has been delivered to them. The 90-day time period is aligned with the period provided in paragraph 2(a) for Competent Authorities to reach a mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision. Some jurisdictions consider that paragraph 28 would be unlikely to be applied where a last-best offer approach to decision-making is used by dispute resolution panels, given that the decision of the dispute resolution panel will be the position of one of the two Competent Authorities. Other jurisdictions, however, consider that it is useful to provide Competent Authorities with the flexibility afforded by the paragraph.

#### 2.7.18. **Paragraph 29**

127. Paragraph 29 addresses the distribution of the costs of dispute resolution panel proceedings and reflects the following general principles:

- Each Contracting Jurisdiction bears the costs related to its own participation in the dispute resolution panel proceedings. These costs would generally relate to the Competent Authority resources needed to prepare the Competent Authority position and any reply submissions, which it is expected would be based on work that the Competent Authorities had already carried out for purposes of their discussion of the mutual agreement procedure case in the period before the request for a dispute resolution panel. Because the dispute resolution panel process must use tele- and videoconferencing facilities to the extent possible (pursuant to paragraph 20), a typical dispute resolution panel process will not involve any travel costs. Where, however, the Competent Authorities mutually agree that a face-to-face meeting is necessary, each Competent Authority will bear the travel costs related to its participation in such a meeting.
- Each Contracting Jurisdiction bears the fees and expenses of the members of the dispute resolution panel appointed by that Contracting Jurisdiction's Competent Authority, or appointed on behalf of that Competent Authority as a result of that Competent Authority's failure to appoint those dispute resolution panel members, together with those dispute resolution panel members' travel, telecommunication and secretarial<sup>136</sup> costs. As noted above, a typical dispute resolution panel process will not involve any travel costs, but each Competent Authority would bear the travel costs of the members of the dispute resolution panel it appointed (or appointed on its behalf) in the event that the Competent Authorities mutually agree an in-person meeting of the panel is necessary.
- The remuneration of the Chair of the dispute resolution panel and the Chair's travel, telecommunication and secretarial costs are borne by the Contracting Jurisdictions in equal shares. As noted above, a typical dispute resolution panel process will not involve any travel costs, but the Competent Authorities would bear equally the travel costs of the Chair of the

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<sup>136</sup> The "secretarial costs" referred to here are costs related to secretarial or administrative activities to support members of the panel in performing their duties (for example, routine document preparation). Where the panel members do not themselves perform these activities, they would typically be performed by member of the panel member's staff, such as an administrative assistant. It is anticipated that any secretarial costs would be *de minimis*.

dispute resolution panel in the event that the Competent Authorities mutually agree an in-person meeting of the panel is necessary.

- Other costs related to any meeting of the dispute resolution panel are borne by the Contracting Jurisdiction that hosts that meeting. Such other costs would generally be understood to include internal costs associated with the logistical arrangements for the meetings of the dispute resolution panel, such as the use of meeting facilities maintained by a Contracting Jurisdiction, related resources, financial management, other logistical support provided by the Competent Authority of a Contracting Jurisdiction, and general administrative coordination of the proceedings. These other costs would not include travel costs, as those costs are dealt with in the preceding provisions.
- Any other costs related to expenses that both Contracting Jurisdictions have agreed to incur are borne in equal shares by the two Competent Authorities. Such costs could include, for example, costs to translate documentation for members of the dispute resolution panel or for interpretation during dispute resolution panel proceedings. In many cases, however, Contracting Jurisdictions may already require the taxpayer to provide, at its expense, translations of documentation related to a MAP request that was not prepared in the working language(s) of the tax administration. The provisions of paragraph 29(a)(v) would not preclude a Competent Authority from charging back to the member of a Covered Group costs such as translation costs allocated to that Competent Authority under paragraph 29(a)(v) in a manner consistent with its established practices and procedures. A Competent Authority should, however, seek to clearly provide in its MAP programme guidance any general requirements related to a taxpayer's translation of documentation related to a MAP request.

128. The introductory language of paragraph 29 expressly recognises that the Competent Authorities of two Contracting Jurisdictions may agree to different rules for the distribution of the costs of dispute resolution panel proceedings. Such different rules may be particularly appropriate in circumstances where the two Contracting Jurisdictions are at significantly different stages of development, or where one Contracting Jurisdiction is a low-capacity jurisdiction.

129. Paragraph 29 also provides that the Competent Authorities of the Contracting Jurisdictions may mutually agree that the member of the Covered Group that requested the dispute resolution panel shall bear the costs related to a dispute resolution panel proceeding in appropriate circumstances. Paragraph 29(b) sets out an illustrative list of circumstances in which Competent Authorities may mutually agree that the member of the Covered Group will bear these costs, which might generally include cases in which the dispute resolution panel has reached a decision but that decision is not binding, or where a member of the Covered Group has not respected obligations it has undertaken as part of the dispute resolution panel process. This list identifies in particular:

- where a court of one of the Contracting Jurisdictions holds that the dispute resolution panel decision is invalid in the circumstances described in paragraph 2(b)(ii) and that holding is motivated, in whole or in part, by the conduct of a member of the Covered Group directly affected by the case; or
- where a member of the Covered Group directly affected by the case or one of its authorised representatives or advisors breaches the confidentiality agreement provided in paragraph 18.<sup>137</sup>

130. It would generally not be appropriate for a member of a Covered Group to bear costs related to a dispute resolution panel proceeding if that member of a Covered Group withdraws its request for a dispute resolution panel at the request of both Competent Authorities. The explanation of paragraph 26 describes

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<sup>137</sup> There are divergent views among members as regards the circumstances in which a Covered Group should bear the costs related to a dispute resolution panel proceeding.

a situation in which a member of a Covered Group requests a dispute resolution panel but soon thereafter is informed by the Competent Authorities that they expect to reach an agreed resolution of the MAP case shortly. Although the dispute resolution panel proceeding would terminate pursuant to paragraph 26(a)(i) upon a Competent Authority mutual agreement, the Competent Authorities would continue to be bound by the provisions of Article 19 to take certain actions by fixed deadlines until that mutual agreement was concluded. Competent Authorities may thus prefer to ask the member of the Covered Group to withdraw the request for a dispute resolution panel in view of an imminent mutual agreement, the date of which they will not know with absolute certainty, in order to avoid being obliged to set up a dispute resolution panel that would likely not be used. In such circumstances, it would generally not be appropriate for the member of the Covered Group to bear the costs (if any) of the dispute resolution panel.

### 2.7.19. *Paragraph 30*

131. Paragraph 30 provides that the fees of the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair shall be set with reference to a schedule of fees to be mutually agreed and periodically updated, as appropriate, by the Competent Authorities of the Contracting Jurisdictions. In light of the importance of clear rules for this purpose to avoid obstacles to the dispute resolution panel process that may arise as a result of disagreements related to dispute resolution panel member compensation or expenses, paragraph 30 includes a default rule that applies in the absence of a Competent Authority mutual agreement. Pursuant to paragraph 30(a), that default rule provides that such fees shall be set at [EUR 1000] per day.

132. Different points of reference may be used to establish the fees of the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair. One alternative is the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators<sup>138</sup>. Contracting Jurisdictions may also wish to explore alternative arrangements to reflect the particular circumstances of the Contracting Jurisdictions and their bilateral relationship.

133. Paragraph 30(b) limits the reimbursement of expenses of the members of the dispute resolution panel appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair to the average of the usual amount reimbursed to members of the staff of the Competent Authorities of the Contracting Jurisdictions concerned. As under paragraph 30(a), the introductory language of paragraph 30 expressly recognises that the Competent Authorities of two Contracting Jurisdictions may mutually agree to some other method or scale to determine the reimbursement of expenses to members of the dispute resolution panel.

134. Because members of the dispute resolution panel appointed pursuant to paragraph 15(b)(i) serve in their official capacity, they are not entitled to fees in addition to the remuneration they receive as a member of the staff of the Competent Authority of the relevant Contracting Jurisdiction and are reimbursed for expenses in accordance with the rules generally applicable to a member of the staff of the relevant Competent Authority.

135. Paragraph 30 seeks to limit the costs of dispute resolution panel proceedings in a manner consistent with the objective of providing timely resolution of Related Issues and the use of a last-best offer form of decision-making. Recognising that such a form of decision-making requires dispute resolution panel members only to choose between two proposed resolutions, the paragraph provides that dispute resolution panel members appointed pursuant to paragraph 15(b)(ii) or 15(d) and the Chair will only be compensated for a total of [five] days ([three] days of preparation and [two] meeting days).

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<sup>138</sup> The ICSID Schedule of Fees is available at: <https://icsid.worldbank.org/services/content/schedule-fees>. See also the Memorandum on the Fees and Expenses of ICSID Arbitrators (available at <https://icsid.worldbank.org/services/content/memorandum-fees-expenses>) for a detailed explanation of how the fees and expenses ICSID arbitrators are calculated.

136. If the dispute resolution panel considers that it requires additional time to properly consider the case, paragraph 30 provides that the Chair will contact the Competent Authorities to request additional time. The Competent Authorities shall then by mutual agreement determine how to respond to such a request.

#### 2.7.20. *Paragraph 31*

137. In recognition of the additional costs involved with the dispute resolution panel mechanism, paragraph 31 contains a commitment by the Contracting Jurisdictions that their Competent Authorities shall mutually agree on an appropriate multilateral framework to fund the costs of low-capacity developing countries related to dispute resolution panel proceedings, including under the elective binding dispute resolution mechanism provided by Article 20. Paragraph 31 provides that such a multilateral Competent Authority agreement shall be concluded before the date on which unresolved Related Issues in a mutual agreement procedure case are first eligible to be submitted to a dispute resolution panel under Article 19 or Article 20, and may be modified from time to time thereafter.

#### 2.7.21. *Paragraph 32*<sup>139</sup>

138. Paragraph 32 describes interactions between the provisions of Article 19 and the provisions of a bilateral or multilateral convention that provides for a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, with respect to unresolved issues that arise from a case presented pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement. The purpose of such provisions of a bilateral or multilateral conventions, like the purpose of Article 19, is to resolve disputes efficiently and effectively. Paragraph 32 thus avoids duplication of efforts in two specific circumstances.

139. Paragraph 32(a) first provides that an unresolved Related Issue arising from a case presented in accordance with the MAP provisions of an Existing Tax Agreement shall not be submitted to a dispute resolution panel under Article 19 if an arbitration panel or similar body is required to be set up with respect to the issue, upon the request of the member of the Covered Group, after a set time period under another bilateral or multilateral convention or other legal instrument that provides a mandatory binding dispute resolution mechanism for unresolved issues arising from a mutual agreement procedure case. Paragraph 32(a) also reflects a recognition that, in implementing the mandatory binding dispute resolution mechanisms provided by other bilateral or multilateral conventions or legal instruments, the Competent Authorities of the relevant jurisdictions will have generally already adopted administrative, procedural and other rules as part of such implementation that reflect the particular circumstances of their bilateral or multilateral relationship.

140. Paragraph 32(a) defines the circumstances under which the Section 3 dispute resolution panel mechanism will not apply with reference to the following objective criteria:

- The case was presented pursuant to the MAP provisions of an Existing Tax Agreement.
- The dispute is within the scope of another mandatory binding mechanism for the resolution of unresolved issues in a MAP case – i.e. the unresolved Related Issue is eligible for submission to a mechanism for the mandatory binding resolution of MAP disputes provided under another instrument.

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<sup>139</sup> As noted above, paragraphs 32 and 33 do not reflect the final or consensus views of the Inclusive Framework. In particular, members of the Inclusive Framework have different views on whether access to the dispute resolution panel mechanism should be provided in contexts where two Contracting Jurisdictions have agreed a mandatory binding dispute resolution mechanism (such as a bilateral MAP arbitration provision) but the Related Issues in a specific MAP case would not be eligible for resolution pursuant to that other mechanism based on reservations to its scope.

- The mechanism is required to be set up upon the request of the Covered Group – i.e. the mechanism provided by the other instrument is mandatory once a request has been made by the member of the Covered Group.
- The mechanism is required to be set up after a set time period – i.e. the other instrument provides a fixed time period after which the mechanism is required to be set up, upon the request of the member of the Covered Group.

141. These criteria apply independently from the existence of a request for mandatory binding dispute resolution under another instrument. Where they apply, a request to apply the Section 3 dispute resolution panel mechanism shall not be accepted, regardless of whether the member of the Covered Group has also requested to apply the mechanism provided by the other instrument. The objective nature of these criteria should, however, make clear to Covered Groups the circumstances under which the Section 3 dispute resolution panel mechanism applies, thus avoiding requests for its application in circumstances where it does not apply. To promote greater certainty, Competent Authorities may wish to consider providing additional guidance on this issue.

142. The reference to a “bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a mutual agreement procedure case” in paragraphs 32 and 33 is understood to include bilateral tax treaties containing a MAP arbitration provision based on Article 25(5) of the OECD Model, the BEPS MLI (in circumstances where Part VI of the MLI would apply), EU Directive 2017/1852, and any other international legal instrument that provides a mandatory and binding mechanism to resolve unresolved issues that arise from a mutual agreement procedure case and that include Related Issues.

143. Paragraph 32(b) then provides that any unresolved Related Issue arising from a case presented pursuant to the MAP provisions of an Existing Tax Agreement and otherwise within the scope of the dispute resolution panel process provided for in Article 19 shall not be submitted to a dispute resolution panel if that unresolved Related Issue has been submitted to another mandatory binding dispute resolution mechanism in accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a MAP case. Paragraph 32(b) is intended to avoid the duplication of efforts and waste of resources that would result from a dispute resolution panel proceeding in circumstances where a member of a Covered Group has already requested the submission of the same unresolved issues to another mandatory binding dispute resolution mechanism.

144. Article 19 does not address the application of MAP arbitration provisions of based on Article 25(5) of the OECD Model or Article 25(5) (Alternative B) of the UN Model in the context of a MAP case presented pursuant to Article [X]. This is because, by their terms, such MAP arbitration provisions apply only with respect to MAP cases presented pursuant to paragraph 1 of the MAP article of the relevant tax treaty. A MAP case presented pursuant to Article [X] would thus fall outside the scope of these MAP arbitration provisions.

### 2.7.22. *Paragraph 33*<sup>140</sup>

145. Paragraph 33(a) provides that, notwithstanding paragraph 32, the Contracting Jurisdictions to an Existing Tax Agreement may mutually agree that the dispute resolution panel process provided in Article 19 will apply to resolve Related Issues arising from a case presented pursuant to the MAP provisions of an Existing Tax Agreement otherwise within the scope of a case with respect to which a mandatory binding dispute resolution mechanism, such as an arbitration panel or other similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period in

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<sup>140</sup> See footnote 139 above.

accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a MAP case.

146. To provide clarity with respect to the relationship between the Section 3 mechanism and the mechanism provided under the other instrument, such an agreement must specify the date from which it is effective. This would generally be the case with any international agreement. The agreement must also specify whether the other instrument shall remain applicable to unresolved Related Issues (it is expected that Contracting Jurisdictions would generally choose to apply only one dispute resolution mechanism with respect to Related Issues). To promote greater certainty, the Competent Authorities of the relevant Contracting Jurisdictions may wish to consider providing additional guidance to specify the MAP disputes with respect to which any agreement pursuant to paragraph 33(a) shall apply.

147. Some Contracting Jurisdictions may prefer to apply the dispute resolution panel process provided in Article 19 in light of the design features of this process that ensure the timely resolution of disputes with respect to Related Issues. An agreement concluded pursuant to paragraph 33(a) may apply to all MAP cases that involve a Related Issue arising under an Existing Tax Agreement or to a particular MAP case. It is expected, however, that a paragraph 33(a) agreement to apply the Section 3 mechanism to unresolved Related Issues in a single MAP case would be rare.

148. Paragraph 33(b) confirms, however, that the Contracting Jurisdictions may not agree to apply the dispute resolution panel process provided in Article 19 with respect to Related Issues that arise in the context of MAP cases in which a taxpayer has chosen to make use of certain European Union tax dispute resolution mechanisms or their implementing domestic legislation. These mechanisms are those provided by (i) Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union; (ii) the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/436/EEC) as amended; and (iii) any of their amending or succeeding instruments or acts of European Union law. Paragraph 33(b) reflects the intention of European Union Member States to make clear in the Convention that the dispute resolution panel process provided for in the Convention will not apply where a member of a Covered Group has chosen to use these European Union tax dispute resolution mechanisms. Under Article 16(5) of the EU tax dispute resolution Directive, the submission of a complaint pursuant to the Directive would in any case put an end to any other ongoing proceedings under the MAP article of an Existing Tax Agreement or under Article [X].

## 2.8. Article 20 (Elective binding dispute resolution panel mechanism)

1. The elective binding dispute resolution panel mechanism described in this Article shall apply to Related Issues in the place of the dispute resolution panel mechanism provided in Article 19 for disputes involving a Contracting Jurisdiction that:
  - a) is classified by the World Bank as a low-income, lower-middle-income or upper-middle-income jurisdiction by reference to GNI per capita, calculated using the World Bank Atlas method, as determined for the most recent period for which such data is published that precedes the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction, or that precedes the date of the most recent review provided for in paragraph 4, whichever is later;
  - b) is not a member of the Organisation for Economic Cooperation and Development nor a member country of the G20 on the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction, or on the date of the most recent review provided for in paragraph 4, whichever is later;
  - c) has not received from other members of the FTA MAP Forum feedback that its policies or practices concerning MAP require improvement in any period following the most recent

deferral of that Contracting Jurisdiction's BEPS Action 14 peer review that precedes the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction or, where that Contracting Jurisdiction's BEPS Action 14 peer review has not been deferred, in the period covered by that Contracting Jurisdiction's [most recent] BEPS Action 14 peer review preceding the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction or any subsequent period; and

- d) has had no or low levels of MAP disputes.
2. A Contracting Jurisdiction shall be considered to have "had no or low levels of MAP disputes" only if the three-year average number of attribution/allocation MAP cases in its inventory at the end of the year, as determined by the MAP Statistics submitted by it annually, is below 10 cases. For such purposes,
- a) the three-year average shall initially be computed using the MAP Statistics for the [three years] that immediately precede the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction; and
- b) the three-year average shall be computed during the review provided for in paragraph 4 using the MAP Statistics for the three years that immediately precede the date of that review.

Jurisdictions that have not submitted MAP Statistics for any of the years in question shall not be considered eligible for the process under paragraph 1.

3. The provisions of paragraph 1 shall apply to determine the eligibility of a Contracting Jurisdiction for the elective binding dispute resolution panel mechanism notwithstanding the deferral, or non-deferral, of that Contracting Jurisdiction's BEPS Action 14 peer review.
4. The eligibility of a Contracting Jurisdiction for the elective binding mechanism under the criteria in paragraph 1 shall be reviewed every three years by the FTA MAP Forum. Any jurisdiction that is found to not meet the criteria in paragraphs 1 and 2 during such review shall be ineligible for the elective binding mechanism provided in this Article in all subsequent years.
5. The elective binding dispute resolution mechanism shall apply *mutatis mutandis* the process provided in Article 19, with the following paragraphs 5(a), 5(b) 5(c) and 5(d) substituted in place of paragraphs 1(a), 1(d), 2(c), 32 and 33 of Article 19, respectively (changes with respect to the text of Article 19(1)(a), 19(1)(d) and 19(2)(c) are indicated in ~~strike through~~ for deletions and ***bold italics*** for additions):

*Provision substituted in the place of Article 19(1)(a)*

- a) Where,
- i) a member of a Covered Group has presented a case to the Competent Authority of a Contracting Jurisdiction pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement, or the provisions of Article [X] or Article [Y] of this Convention, on the basis that the actions of one or both of the Contracting Jurisdictions have resulted for that member of a Covered Group in taxation not in accordance with the provisions of that Existing Tax Agreement, or taxation not in accordance with [*reference to the provisions of this Convention that provide the applicable substantive transfer pricing/profit allocation rules*] of this Convention in cases in which there is not an Existing Tax Agreement between the Contracting Jurisdictions, and
- ii) the Competent Authorities of the Contracting Jurisdictions are unable to reach an agreement to resolve the case pursuant to the mutual

agreement procedure within a period of two years beginning on the start date referred to in paragraph 6 or 7, as the case may be (unless, prior to the expiration of that period the Competent Authorities of the Contracting Jurisdictions have agreed to a different time period with respect to that case and have notified the member of a Covered Group that presented the case of such agreement),

any unresolved Related Issues arising from the mutual agreement procedure case shall, if the member of a Covered Group requests **and the Competent Authorities mutually agree**, be submitted to a dispute resolution panel in the manner described in **Section 3** ~~this Article~~ (as supplemented by any rules or procedures agreed upon by the Competent Authorities of the Contracting Jurisdictions pursuant to the provisions of **Article 19(12)** ~~paragraph 12~~).

*Provision substituted in the place of Article 19(1)(d)*

- b) Within 10 days after the receipt of the request that unresolved Related Issues be submitted to a dispute resolution panel, a Competent Authority that receives a request without a confirmation that it was also sent to the other Competent Authority shall send a copy of that request and the accompanying documentation to the other Competent Authority. **Within [30 days] after the receipt of the request, the Competent Authorities shall determine by mutual agreement whether the unresolved Related Issues in the case will be resolved by a dispute resolution panel. The Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group shall notify the member of a Covered Group as soon as possible following that mutual agreement whether the unresolved Related Issues in the case will be submitted to a dispute resolution panel. For purposes of applying Article 20, the references in paragraphs 19(10), 19(11) and 19(15) to a “request for a dispute resolution panel pursuant to paragraph 1” shall be replaced by references to “notification of the member of a Covered Group pursuant to Article 20(5)(b)”.**

*Provision substituted in the place of Article 19(2)(c)*

- c) **The absence of a Competent Authority mutual agreement to submit an issue to a dispute resolution panel** ~~A dispute resolution panel decision that an issue is not a Related Issue~~ shall have no effect on the Competent Authorities' obligation to endeavour to resolve the case in which that issue arises by mutual agreement, nor on the application of any other mandatory binding dispute resolution mechanism.

*Provision substituted in the place of Article 19(32) and (33)*

- d) Paragraphs 32 and 33 of Article 19 shall be replaced in their entirety by the following paragraph:

**The Competent Authorities of the Contracting Jurisdictions shall by mutual agreement determine how the mechanism provided by Article 20 shall apply with respect to any unresolved Related Issue arising from a mutual agreement procedure case otherwise within the scope of the dispute resolution panel process provided for in Article 20 that also falls within the scope of a case with respect to which a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, is required to be set up, upon the request of the member of the Covered Group, after a set time period in accordance with a bilateral or multilateral convention or other legal instrument that provides for mandatory binding resolution of unresolved issues arising from a mutual agreement procedure case.**

## 2.9. Commentary on Article 20

1. Article 20 provides for an elective binding dispute resolution panel mechanism that reflects the Pillar One tax certainty component of the October Statement, which provides in relevant part:

*“An elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review<sup>1</sup> and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years.”*

*“Footnote 1: The conditions for being eligible for deferral of the BEPS Action 14 peer review are provided in paragraph 7 of the current Action 14 Assessment Methodology published as part of the Action 14 peer review documents.”*

2. At the time of the October Statement, paragraph 7 of the Action 14 Assessment Methodology<sup>141</sup> provided that the deferral of a jurisdiction’s Action 14 peer review was available as follows: “...the MAP Forum should defer the review of any such member that is a developing country and is not an OECD or G20 country if that member has not yet encountered meaningful levels of MAP requests and there is no feedback from other members of the FTA MAP Forum indicating that the jurisdiction’s MAP regime requires improvement...”

3. Article 20 reflects the language of the October Statement and establishes a set of four objective criteria that define the Contracting Jurisdictions eligible to use an elective binding dispute resolution mechanism in the place of the mandatory binding dispute resolution mechanism provided in Article 19. Only where a Contracting Jurisdiction satisfies all four of these criteria is it be eligible to use the elective binding dispute resolution mechanism.

4. The first criterion in paragraph 1(a) of Article 20 identifies the “developing economies” eligible to use the elective mechanism as those Contracting Jurisdictions classified by the World Bank as a low- or middle-income jurisdiction by reference to GNI per capita, calculated using the World Bank Atlas method, as determined for the relevant period. For these purposes, paragraph 1(a) specifies that the relevant GNI per capita ratio is that determined for the most recent period for which such data is published that precedes the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction, or that precedes the date of the most recent review provided for in paragraph 4, whichever is later.

5. The second criterion in paragraph 1(b) of Article 20 is that the Contracting Jurisdiction is not a member of the Organisation for Economic Cooperation and Development nor a member country of the G20. This criterion is evaluated on the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction, or on the date of the most recent review provided for in paragraph 4, whichever is later.

6. The third criterion in paragraph 1(c) of Article 20 is that the Contracting Jurisdiction has not received from other members of the FTA MAP Forum feedback that its policies or practices concerning MAP require improvement. For a Contracting Jurisdiction that has had its BEPS Action 14 peer review deferred, the relevant periods for such feedback are any period following the most recent deferral of that Contracting Jurisdiction’s BEPS Action 14 peer review. Where a Contracting Jurisdiction’s BEPS Action 14 peer review has not been deferred, the relevant periods for such feedback are the period covered by that Contracting Jurisdiction’s most recent BEPS Action 14 peer review and any subsequent periods.

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<sup>141</sup> The October 2016 Peer Review Documents are available at: <https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf>.

7. The last criterion in paragraph 1(d) is that the Contracting Jurisdiction has had no or low levels of MAP disputes. Paragraph 2 then defines expressly when a Contracting Jurisdiction shall be considered to have “had no or low levels of MAP disputes”: where the three-year average number of attribution/allocation MAP cases in its inventory at the end of the year, as determined by the MAP Statistics submitted by it annually, is below 10 cases. For purposes of computing this average,

- (a) the three-year average shall initially be computed using the MAP Statistics for the three years that immediately precede the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction; and
- (b) the three-year average shall be computed during the review provided for in paragraph 4 using the MAP Statistics for the three years that immediately precede the date of that review.

These rules related to the computation of the three-year average are tied to the review of the eligibility of a Contracting Jurisdiction for the elective binding mechanism every three years by the FTA MAP Forum pursuant to paragraph 4.

8. This quantitative criterion refers to “attribution/allocation cases”, a defined category of MAP cases used for purposes of the Action 14 MAP Statistics Reporting Framework. It does so to provide an objective standard that reflects a Contracting Jurisdiction’s experience with MAP cases of the type in which Related Issues will arise (i.e. transfer pricing and business profits disputes). The quantitative criterion also uses an averaging mechanism to mitigate the impact of significant fluctuations in a Contracting Jurisdiction’s MAP case inventory.

9. Paragraph 3 then establishes the relationship between the deferral of a Contracting Jurisdiction’s BEPS Action 14 peer review and its eligibility to use the elective binding dispute resolution mechanism provided by Article 20. Paragraph 3 provides that the determination pursuant to paragraphs 1 and 2 is intended to be self-standing and reflect the criteria referred to in the October Statement, without reference to the BEPS Action 14 Peer Review Documents themselves. Paragraph 3 also makes clear that there is no link between the eligibility for the elective mechanism and any possible future changes to the criteria for deferral of a jurisdiction’s Action 14 peer review.

10. Paragraph 4 next provides for the periodic review of Contracting Jurisdictions’ eligibility for the elective binding mechanism under the criteria in paragraphs 1 and 2, with a view to ensuring that a determination of eligibility continues to reflect a Contracting Jurisdiction’s circumstances. This review will be carried out every three years by the FTA MAP Forum. As provided in the October Statement, any Contracting Jurisdiction that is found to not meet the criteria in paragraphs 1 and 2 during a periodic review shall be ineligible for the elective binding mechanism provided in Article 20 in all subsequent years.

11. Paragraph 5 implements the elective binding dispute resolution mechanism by providing that this mechanism shall apply *mutatis mutandis* the process provided in Article 19, with the substitution of alternative language in the place of paragraphs 1(a), 1(d) and 2(c) of Article 19 to reflect the elective nature of the mechanism. In particular, the dispute resolution panel is elective in that both Competent Authorities must mutually agree to use the dispute resolution panel before such a panel will be used to resolve a Related Issue. Once the Competent Authorities have so mutually agreed, the dispute resolution panel will proceed as provided under Article 19, with any necessary changes to the provisions of Article 19 to reflect the circumstance that the process has been triggered by a Competent Authority mutual agreement, rather than a request from a member of a Covered Group.

12. In particular, paragraph 5 reflects the following differences as compared to Article 19(1) and 19(2):
- The flush language at the end of paragraph 5(a) provides for the initiation of a dispute resolution panel proceeding “if the member of a Covered Group requests **and the Competent Authorities mutually agree**”. The corresponding language in Article 19(1)(a) provides for the

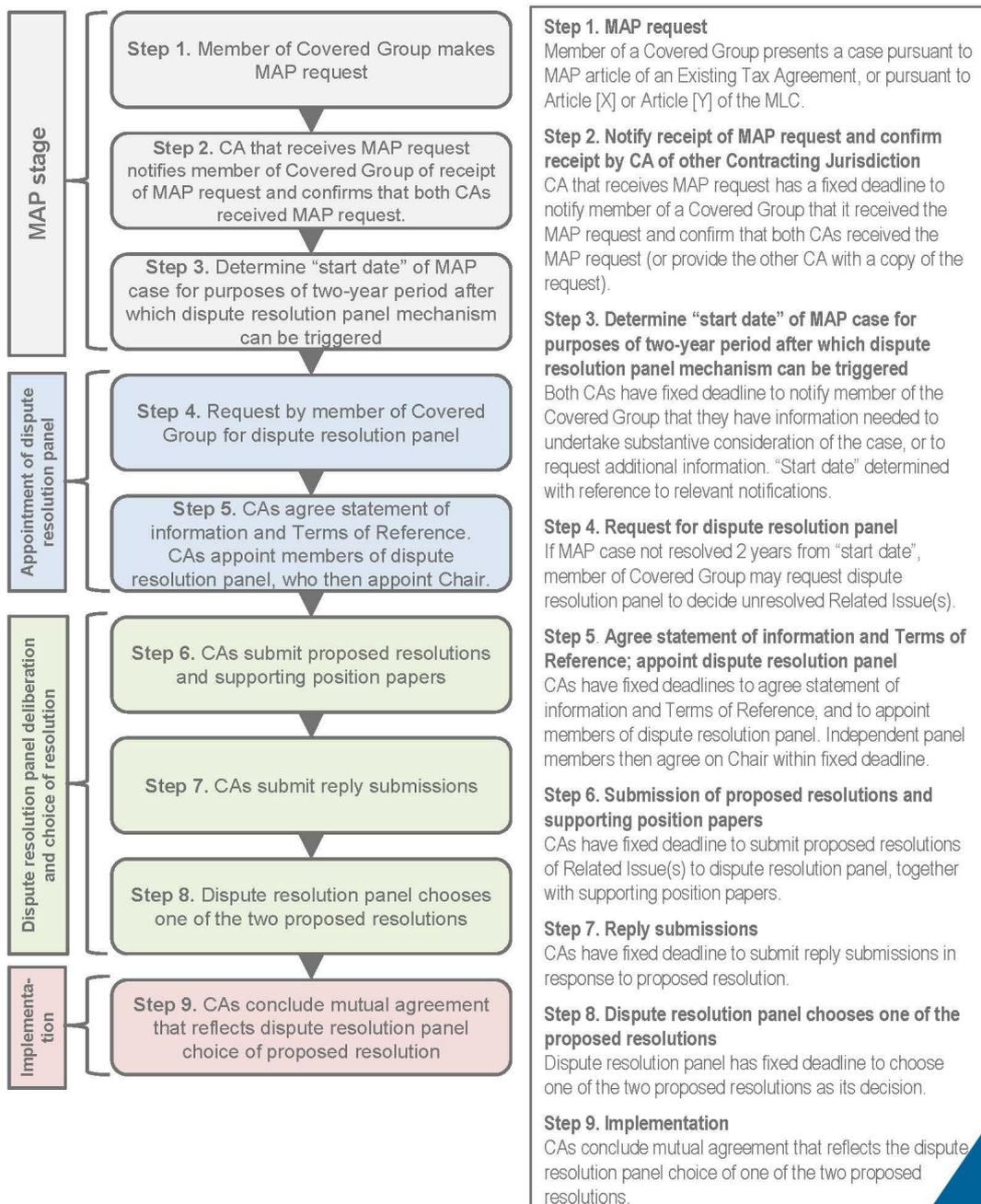
initiation of a dispute resolution panel proceeding “if the member of a Covered Group requests”.

- The flush language at the end of paragraph 5(a) refers to “Section 3” and “Article 19(12)”; the corresponding references in Article 19(1)(a) are to “this Article” and “paragraph 12”.
- Paragraph 5(b) contains an additional language not included in Article 19(1)(d) and that is required for the operation of the elective binding mechanism.
- Paragraph 5(c) refers to “[~~t~~]***he absence of a Competent Authority mutual agreement to submit an issue to a dispute resolution panel***”, rather than to “[a] dispute resolution panel decision that an issue is not a Related Issue” because a Contracting Jurisdiction eligible to use the elective mechanism would generally be expected not to agree to submit a MAP issue to a dispute resolution panel pursuant to the rule in Article 20(5)(a) if it did not agree that the issue was a Related Issue.
- Paragraph 5(d) replaces the provisions of paragraphs 32 and 33 of Article 19 with an alternative rule to govern the interaction between the provisions of Article 20 and the provisions of a bilateral or multilateral convention that provides for a mandatory binding dispute resolution mechanism, such as an arbitration panel or similar body, with respect to unresolved issues that arise from a mutual agreement procedure case. This rule reflects the elective nature of the mechanism provided by Article 20, which makes it appropriate that the interactions of the elective binding mechanism with a mandatory binding dispute resolution mechanism that could apply to unresolved Related Issues should be determined by the Competent Authorities of the relevant Contracting Jurisdictions by mutual agreement.

## Annex III.A. Annex – Process Map

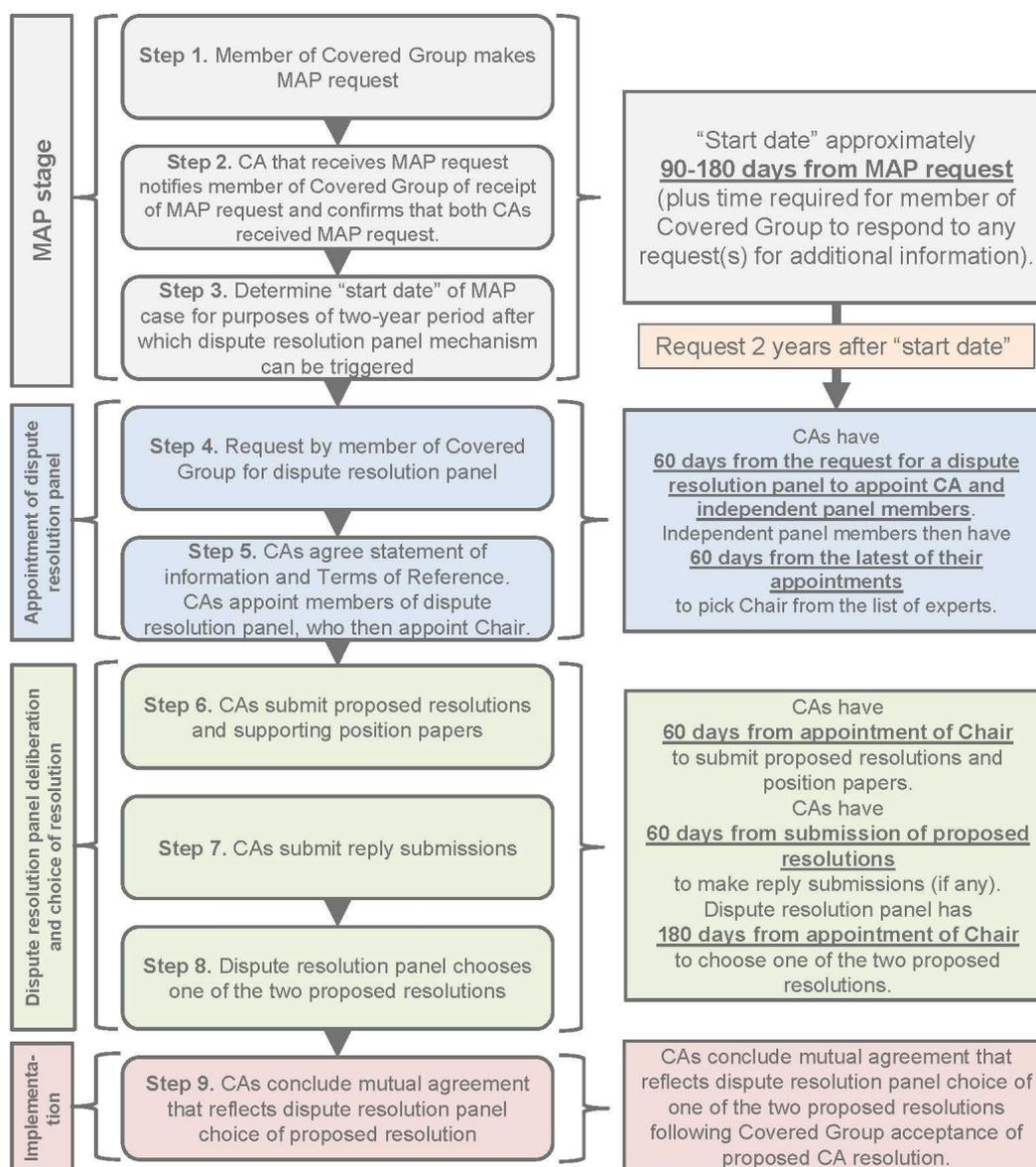


# Dispute resolution panel process Overview

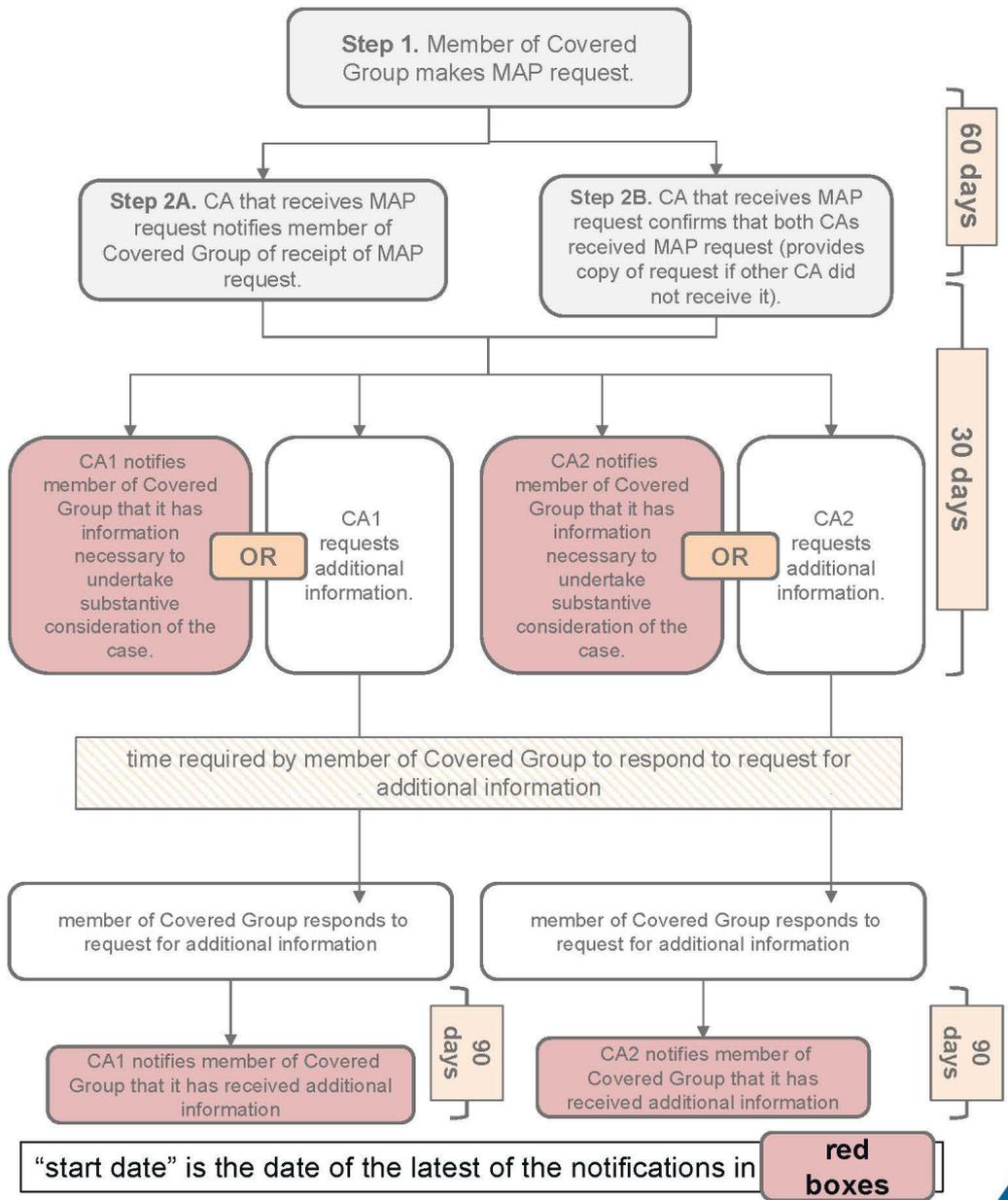


## Dispute resolution panel process

Overview with indicative timeline



## Determining “start date”



## Appointment of dispute resolution panel Panel deliberation and decision

Steps 4-9

