



MODEL PROTOCOL FOR THE PURPOSE OF ALLOWING THE AUTOMATIC AND SPONTANEOUS EXCHANGE OF INFORMATION UNDER A TIEA

INTRODUCTION TO THE MODEL PROTOCOL FOR THE PURPOSE OF ALLOWING THE AUTOMATIC AND SPONTANEOUS EXCHANGE OF INFORMATION UNDER A TIEA

Background

At present, both Article 6 and 7 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the “Multilateral Convention”), as well as Article 26 of the OECD Model Tax Convention foresee the possibility of automatically and spontaneously exchanging information between Contracting Parties. However, the current Model TIEA, which was published in April 2002, does not provide for such forms of exchange.

As the Multilateral Convention is now the most comprehensive and wide-ranging legal instrument for internationally exchanging information, it is expected that jurisdictions would in most cases choose to put in place the exchange of information, including under the Standard for Automatic Exchange of Financial Account Information in Tax Matters (the “Standard”), on the basis of the Multilateral Convention. There may, however, be instances where jurisdictions wish to implement the automatic and the spontaneous exchange of information on the basis of a TIEA (e.g. the exchange of information with dependent and associated territories or where a developing jurisdiction and a developed jurisdiction wish to put in place the automatic exchange of information). As the current Model TIEA does not provide for such forms of exchange, and most of the TIEAs currently in place reflect this approach, appropriate model wording for allowing the automatic and/or spontaneous exchange of information under a TIEA in these instances is herewith made available.

Content of the Model Protocol

In that light, the Model Protocol can be used by jurisdictions which have a TIEA in place between them and wish to rely on their TIEA for the purpose of establishing the legal basis for the automatic and/or spontaneous exchange of information.

The inclusion of the automatic exchange of information provision (Article 5A) in a TIEA by means of a protocol on the basis of the below Model Protocol would only create the legal basis for the Contracting Parties to the TIEA to exchange information on an automatic basis. In order to activate this provision, the Contracting Parties would need to agree on the items of information to be exchanged automatically, as well as on the procedures that govern the automatic exchange, such as the transmission methods, the timing of the exchange of information and technical aspects surrounding the automatic exchange of information. In this respect, it is understood that the actual automatic exchange of information takes place between the competent authorities of the Contracting Parties.

On the basis of Article 5A, the Contracting Parties may for example agree to implement the Standard or Country-by-Country Reporting for Multinational Enterprise Groups on the basis of a TIEA. In case the Contracting Parties wish to specify that their competent authorities have the power to conclude a competent authority agreement under Article 5A, the Contracting Parties may change the wording of Article 5A accordingly.

The Model Protocol also contains an Article 5B allowing for the spontaneous exchange of information, with a view to bringing the forms for exchanging information under a TIEA in line with forms foreseen by the Multilateral Convention, as well as Article 26 of the OECD Model Tax Convention.

[*Alternative 1* of Article 5B corresponds to the language of Article 7 of the Multilateral Convention and, as such, introduces the mandatory spontaneous exchange of information in the instances of paragraph 1.

These instances crystallise the general principle of foreseeable relevance of Article 4 that governs the exchange of information under the Multilateral Convention.

In case jurisdictions would wish to further clarify the scope of the spontaneous exchange of information under this provision, they could consider concluding a competent authority agreement on the basis of Article 13 of the TIEA.

As Article 5A mirrors the content of Article 6 of the Multilateral Convention and as paragraphs 1 and 2 of Article 5B correspond to Article 7 of the Multilateral Convention, the commentaries to Article 6 and 7 of the Multilateral Convention may be relied upon for the purpose of interpreting Articles 5A and paragraphs 1 and 2 of Article 5B, respectively.

The Contracting Parties may opt to extend the scope of the spontaneous exchange of information under Article 5B to cases beyond those mentioned in paragraph 1 by inserting the following text as paragraph 2 of Article 5B: “The competent authority of a Contracting Party may further spontaneously transmit to the competent authority of the other Contracting Party information that has come to the attention of the first-mentioned competent authority and that the first-mentioned competent authority considers foreseeably relevant to the accomplishment of the purposes referred to in Article 1 (Object and Scope of the Agreement). In addition, the language of the existing paragraph 2 (then paragraph 3) would need to be altered to also cover the new paragraph 2.”]

[*Alternative 2* of Article 5B provides the legal gateway to the spontaneous exchange of information and allows a competent authority to spontaneously exchange information which it considers foreseeably relevant for the other competent authority. The competent authorities may further specify the scope, in particular against the background of the foreseeable relevance standard, and the procedures for the spontaneous exchange of information by mutual agreement.

As Article 5A mirrors the content of Article 6 of the Multilateral Convention, the commentaries to Article 6 of the Multilateral Convention may be relied upon for the purpose of interpreting Article 5A.]

In case Contracting Parties would wish to only insert only the Article on the automatic or only the Article on the spontaneous exchange of information into their TIEA, each Article may be used separately. Jurisdictions may also wish to allow the automatic and spontaneous exchange of information under a newly negotiated TIEA. In that case, jurisdictions may wish to rely on the wording of the Articles proposed in the Model Protocol for the purpose of including these exchange of information forms in their new TIEA.

Jurisdictions wishing to introduce Articles 5A and/or 5B, would further need to amend a number of other provisions of the Model TIEA in order to ensure the overall coherence of the text of the Model TIEA following the adoption of the Model Protocol. These changes are reflected in Article II of the Model Protocol. [*Alternative 1*: In particular, the proposed change to Article 13 (2) of the Model TIEA clarifies that the competent authorities of the Contracting Parties may mutually agree on further procedural aspects surrounding the spontaneous exchange of information.]

With a view to allowing the Contracting Parties to specifically agree on the applicability of the automatic and spontaneous exchange of information provisions of Articles 5A and 5B, the Model Protocol that Article 15 (3) of the Model TIEA may be complemented with two additional subparagraphs. The subparagraphs allow the Contracting Parties to specify as from which date and with respect to which reporting periods the automatic and spontaneous exchange of information provisions will come into effect.

Finally, Article IV sets out the mechanism according to which the Model Protocol is put into effect between the Contracting Parties, depending on the domestic requirements of each of the Contracting Parties.

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF [JURISDICTION A] AND THE GOVERNMENT OF [JURISDICTION B] ON EXCHANGE OF INFORMATION ON TAX MATTERS, SIGNED AT [PLACE OF SIGNATURE] ON [DATE OF SIGNATURE].

The Government of [jurisdiction A] and the Government of [jurisdiction B] (hereinafter “the Contracting Parties”), desiring to amend the Agreement between the Government of [jurisdiction A] and the Government of [jurisdiction B] on Exchange of Information on Tax Matters, signed at [place of signature], on [date of signature] with a view to enabling their competent authorities to automatically and spontaneously transmit information to each other within the object and scope of this Agreement;

Have agreed as follows:

ARTICLE I

The following shall be added after Article 5 (Exchange of Information Upon Request):

“[Article 5A Automatic Exchange of Information

With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, the Contracting Parties shall automatically exchange information for the purposes referred to in Article 1 (Object and Scope of the Agreement).]

[Article 5B Spontaneous Exchange of Information

1. The competent authority of a Contracting Party shall, without prior request, forward to the competent authority of the other Contracting Party the information specified in Article 1 of which it has knowledge in the following circumstances:
 - a. the first-mentioned Contracting Party has grounds for supposing that there may be a loss of tax in the other Contracting Party;
 - b. a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Contracting Party which would give rise to an increase in tax or to liability to tax in the other Contracting Party;
 - c. business dealings between a person liable to tax in a Contracting Party and a person liable to tax in the other Contracting Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other or in both Contracting Parties;
 - d. a Contracting Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
 - e. information forwarded to the competent authority of the first-mentioned Contracting Party by the competent authority of the other Contracting Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Contracting Party.

2. Each Contracting Party shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to the other Contracting Party.]

OR

[Article 5B

Spontaneous Exchange of Information

The competent authority of a Contracting Party may spontaneously transmit to the competent authority of the other Contracting Party information that has come to the attention of the first-mentioned competent authority and that the first-mentioned competent authority considers foreseeably relevant to the accomplishment of the purposes referred to in Article 1 (Object and Scope of the Agreement). The competent authorities of the Contracting Parties may determine the procedures to be used to exchange such information.]”

ARTICLE II

1. Article 2 shall be replaced by the following:

“A Contracting Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.”

2. Paragraph 1 of Article 7 shall be replaced by the following:

“A Contracting Party shall not be required to obtain or provide information that the other Contracting Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of a Contracting Party may decline to assist where the request is not made in conformity with this Agreement.”

3. Paragraph 4 of Article 7 shall be replaced by the following:

“A Contracting Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).”

4. Paragraph 6 of Article 7 shall be replaced by the following:

“A Contracting Party may decline a request for information if the information is requested by the other Contracting Party to administer or enforce a provision of the tax law of that other Contracting Party, or any requirement connected therewith, which discriminates against a national of the first-mentioned Contracting Party as compared with a national of the other Contracting Party in the same circumstances.”

5. The last sentence of Article 8 is changed as follows:

“The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the Contracting Party providing the information.”

6. Paragraph 2 of Article 13 shall be replaced by the following:

“In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5, 5A[, 5B] and 6.”

[ARTICLE III

The following shall be added at the end of Paragraph 3 of Article 15:

“- with respect to the automatic exchange of information foreseen in Article 5A for taxable periods beginning on or after 1 January [...], where there is no taxable period, for all charges to tax arising on or after 1 January [...];

- with respect to the spontaneous exchange of information foreseen in Article 5B for taxable periods beginning on or after 1 January [...], where there is no taxable period, for all charges to tax arising on or after 1 January [...].”]

ARTICLE IV

[This Protocol is subject to ratification, acceptance or approval by the Contracting Parties, in accordance with their respective laws. Instruments of ratification, acceptance or approval shall be exchanged as soon as possible.]

OR

[The Contracting Parties shall notify each other in writing when their necessary internal procedures for entry into force of this Protocol have been completed. This Protocol shall enter into force on the date of the later of such written notifications.]

In witness whereof the undersigned, being duly authorised thereto by the respective Contracting Parties, have signed this Protocol.

Done at [place of signature of the Protocol] in duplicate, this [date of signature of the Protocol] [, in [official language of jurisdiction A] and [official language of jurisdiction B], both texts being equally authentic].

FOR THE GOVERNMENT OF
[JURISDICTION A]:

FOR THE GOVERNMENT OF
[JURISDICTION B]: