

PUBLIC CONSULTATION DOCUMENT

Pillar One – Tax certainty for issues related to Amount A

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Background

Introduction

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 a 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.

Amount A of Pillar One has been developed as part of the solution for addressing the tax challenges arising from the digitalisation of the economy. It introduces a new taxing right over a portion of the profit of large and highly profitable enterprises for jurisdictions in which goods or services are supplied or consumers are located.

The Inclusive Framework has mandated 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.

Model Rules

The Model Rules, once finalised, will reflect the substantive agreement of the members of the Inclusive Framework on the functioning of Amount A and will serve as the basis for the substantive provisions that will be included in the MLC. The Model Rules are also being developed to provide a template that jurisdictions could use as the basis to give effect to the new taxing rights over Amount A in their domestic legislation. They will be supported by a commentary. Jurisdictions will be free to adapt these Model Rules to reflect their own constitutional law, legal systems, and domestic considerations and practices for structure and wording of legislation as required, whilst ensuring implementation is consistent in substance with the agreed technical provisions governing the application of the new taxing rights.

Tax Certainty for Issues Related to Amount A

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.

In addition, in-scope Groups will also benefit from an innovative Tax Certainty Framework which guarantees certainty with respect to all aspects of the new Pillar One rules on Amount A. This framework has been included in a separate consultation document ([A Tax Certainty Framework for Amount A](#)) released concurrently with this document.

This document 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).

The draft MLC provisions contained in this note can be summarised as follows:

- Article [X] is included in the operative text to ensure that Covered Groups have access to the mutual agreement procedure and that the tax certainty mechanism for issues related to Amount A secures its objective of avoiding the double taxation of Amount A that would otherwise result from unresolved transfer pricing and PE profit attribution disputes.
- Paragraph 1 of Article 19 sets out the scope of the mandatory and binding dispute resolution mechanism. The approach to scope is based on a broad understanding of the potential impact of transfer pricing and PE profit MAP case resolutions on different profit measures used for purposes of Pillar One (i.e. in applying the Pillar One mechanism for the elimination of double taxation or the marketing and distribution profits safe harbour). Paragraph 1 does not reflect the final or consensus views of Inclusive Framework members. There are different views, for example, on whether other types of disputes should be considered “Related Issues”, whether the scope definition should include a quantitative materiality threshold, whether reservations with respect to scope should be permitted and whether the mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions.
- Paragraphs 2 to 15 of Article 19 provide the basic structure of the mandatory binding dispute resolution mechanism and the timing for different steps in the dispute resolution panel process related to requests for a dispute resolution panel and decision by the dispute resolution panel.
- Paragraph 16 of Article 19 addresses the appointment of dispute resolution panel members. This provision is intended solely to illustrate, from a technical perspective, an approach to the appointment of dispute resolution panel members and interactions with other elements of the dispute resolution panel mechanism. Paragraph 16 does not reflect the final or consensus views of Inclusive Framework members; in particular, there are different views on dispute resolution panel composition, with some jurisdictions preferring a dispute resolution panel comprising solely Competent Authorities and other jurisdictions preferring a dispute resolution panel comprising solely independent experts.
- Paragraphs 17 to 26 of Article 19 relate to the confidentiality of, and communication of information with respect to, the dispute resolution panel process.
- Paragraph 27 of Article 19 provides that the dispute resolution panel process will terminate in specific circumstances.

- Paragraph 28 of Article 19 describes the last-best offer decision-making model used by dispute resolution panels, including the timing of its different steps.
- Paragraph 29 of Article 19 provides Competent Authorities with the possibility to agree on a different resolution within a defined time period after a dispute resolution panel decision.
- Paragraphs 30 to 32 of Article 19 address the costs of the dispute resolution panel process.
- Paragraphs 33 and 34 of Article 19 describe rules on the interactions with existing mandatory binding dispute resolution mechanisms.
- Article 20 provides an elective binding dispute resolution panel mechanism for certain developing countries that reflects the relevant language of the Statement. Article 20 does not reflect the final or consensus views of Inclusive Framework members; in particular, there are different views on the quantitative MAP case threshold used to determine eligibility to use the elective mechanism, on whether the quantitative threshold should include a materiality element, on the period over which average MAP case inventories will be calculated and on the frequency with which a jurisdiction's eligibility to use the mechanism will be reviewed.

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.

The full Amount A package, including certain key building blocks associated with tax certainty (e.g. revised revenue sourcing rules, segmentation, elimination, and the marketing and distribution profits safe harbour) have not been released for consultation yet, and it is recognised that this public consultation document cannot on its own provide a full picture on the topics for which certainty will be provided. The relevant building block consultations are forthcoming, recognising the interactions between those building blocks and tax certainty and the value of comments on those interactions.

Public consultation instructions

This is a working document released by the OECD Secretariat for the purposes of obtaining input from stakeholders. It does not reflect the final views of the Inclusive Framework members. It presents the work undertaken to date, which has reached a sufficient level of detail and stability allowing it to be suitable for consultation. The TFDE has agreed that this working version can be released on the basis that it is without prejudice to the final agreement. As such, while the document is intended to illustrate the structure and operation of the tax certainty mechanism for issues related to Amount A, further changes may be made to the conceptual framework, as well as then being translated into Model Rules format. Thus, the release of this document reflects consensus within the TFDE as a procedural matter that public comments should be sought at this time, but does not reflect consensus within the TFDE regarding the substance of the document.

Comments are sought with respect to the rules described in this document. While comments are invited on any aspect of the rules, input will be most helpful where it explains the additional guidance that would be needed to apply the rules, as well as input on areas where the rules are incomplete or unclear.

Interested parties are invited to send their comments on this discussion draft no later than **10 June 2022**. These comments will be examined at the following meeting of the TFDE.

Comments on this discussion draft should be sent electronically (in Word format) by email to tfde@oecd.org and may be addressed to: Tax Treaties, Transfer Pricing and Financial Transactions Division OECD/CTPA.

While this consultation document has been released concurrently with the consultation document on [A Tax Certainty Framework for Amount A](#), commentators are asked to submit comments on each consultation document separately, and not to combine comments in a single submission.

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.

Draft provisions on tax certainty related to Amount A

PART VI – ADMINISTRATION AND CERTAINTY

[...]

SECTION 3 – CERTAINTY FOR ISSUES RELATED TO AMOUNT A

Article [X] (Mutual Agreement Procedure)¹

1. Notwithstanding the mutual agreement procedure provisions of any Existing Tax Agreement, where a member of a Covered Group considers that the actions of one or both of the Contracting Jurisdictions to that 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 Authority of either Contracting Jurisdiction. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Existing Tax Agreement.²
2. The 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 Contracting Jurisdiction, with

¹ Article [X] is included in the operative text to ensure that Covered Groups have access to the mutual agreement procedure and that the tax certainty mechanism provided in Section 3 accordingly secures the objective of avoiding the double taxation of Amount A that would otherwise result from unresolved transfer pricing and PE profit attribution disputes (see the discussion of the definition of “Related Issues” below). Article [X] is based on paragraphs 1 and 2 of Article 25 of the 2017 OECD Model Tax Convention (the OECD Model), with certain amendments to adapt its text to the MLC context. In its final form, Article [X] will be accompanied by a compatibility provision and explanatory commentary that clarify the relationship of Article [X] with the MAP provisions of Existing Tax Agreements, including provisions that already reflect paragraphs 1 and 2 of Article 25 of the 2017 OECD Model, as well as with the provisions of paragraphs 33 and 34 of Article 19. Provisions accompanying Article [X] will also make clear which members of a Covered Group are entitled to make requests pursuant to Article [X].

² The formulation of paragraph 1 of Article [X] does not reflect the final or consensus views of the Inclusive Framework. Some members of the Inclusive Framework hold the view that a Covered Group should be required to submit a MAP request to the Competent Authority of its jurisdiction of residence. Members of the Inclusive Framework also have different views on the meaning of the text “result or will result for that member of covered MNE group in taxation connected with a Related Issue not in accordance with the treaty” in this provision.

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.

Article 19 (Resolution of disputes with respect to Related Issues)

Scope³

1. The dispute resolution panel mechanism provided in this Article shall apply pursuant to paragraph 2 to Related Issues. For the purposes of Section 3, “Related Issue” means an issue that concerns an adjustment to the profits of a transaction between members of the Covered Group, or to the profits attributed to a permanent establishment of a member of the Covered Group (including the question of whether such a permanent establishment exists). 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.

Request for a dispute resolution panel

2. 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 of Article [X] 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 profit allocation rules]*⁴ of this Convention in cases in which there is not an Existing Tax Agreement between the Contracting Jurisdictions, and

³ As noted in the *Background* section at the beginning of this document, 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. These issues include: whether other types of disputes should be considered “Related Issues”; whether the definition should require a direct or indirect connection with Amount A; whether the definition should include a quantitative materiality threshold; whether reservations with respect to scope should be permitted; and whether the mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions. In particular, some jurisdictions have expressed the view that in light of this procedure being part of the broader architecture of redistribution under Pillar One, the envisaged mandatory, binding dispute resolution procedure should be reserved for issues that directly impact the way Amount A operates and for cases where the amount in dispute is material enough to warrant such procedure. The technical drafting of the scope definition is expected to be refined following the public consultation.

⁴ As noted above, 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 2(b)(i) in square brackets is thus a placeholder for a reference that may be required for the technical operation of the provision.

- 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 9 or 10, as the case may be (unless, prior to the expiration of that period the Competent Authorities 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 case shall, if the member of a Covered Group requests, be resolved by 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 13).

- b) 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 the Covered Group that presented the case to the Competent Authority to which it presented the case. 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 19, from the members of the Covered Group directly affected by the case and their authorised representatives or advisors;
 - v) a written statement by the members of the Covered Group directly affected by the case attesting that the unresolved issues in the case are Related Issues within the meaning of paragraph 1; and
 - vi) a written confirmation that the member of the Covered Group sent a copy of the request and all accompanying documentation to the Competent Authority of the other Contracting Jurisdiction, as required by paragraph 2(d).
- c) For the purposes of this Section, “member of the Covered Group directly affected by the case” means the member of the 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.

- d) The member of the Covered Group that submits a request that unresolved Related Issues arising from a mutual agreement procedure case be submitted to a dispute resolution panel shall at the same time submit a copy of the request and all accompanying documentation to the other Competent Authority. Within 10 days after the receipt of the request that unresolved Related Issues be submitted to a dispute resolution panel, the Competent Authority that received the 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.

3. Where a Competent Authority has suspended the mutual agreement procedure referred to in paragraph 2(a) because a case with respect to one or more of the same 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 provided in paragraph 2(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 2(a)(ii) will stop running until the suspension has been lifted.

4. 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 after the start of the period provided in paragraph 2(a)(ii), the period provided in paragraph 2(a)(ii) shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

- 5. 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 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 2(a), and the Competent Authority 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 a member of the Covered Group directly affected by the case does not 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 the member of the Covered Group that requested the dispute resolution panel proceeding pursuant to paragraph 28(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 notification pursuant to paragraph 28(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 2(a) holds that the dispute resolution panel decision is invalid. In such a case, the request for a dispute resolution panel under paragraph 2 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 17, 18, 19 and 30). 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 5(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 5(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 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.

Determination of the “start date”

6. The Competent Authority that received the initial request for a mutual agreement procedure as described in paragraph 2(a)(i) shall, within 60 days of receiving the request:

- a) send a notification to the member of a Covered Group who presented the case that it has received the request; and
- b) send a notification of that request, along with a copy of the request, to the Competent Authority of the other Contracting Jurisdiction.

7. Within 90 days after a Competent Authority receives the initial request for a mutual agreement procedure as described in paragraph 2(a)(i) (or within 90 days after receiving a copy thereof from the Competent Authority of the other Contracting Jurisdiction in accordance with paragraph 6(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.

For these purposes, “the information necessary to undertake substantive consideration of the case” means the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance according to each Contracting Jurisdiction’s published MAP guidance, or as mutually agreed by the Competent Authorities.⁵

8. Where pursuant to paragraph 7(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 both Competent Authorities mutually agree that the

⁵ The paragraph 7 definition of “the information necessary to undertake substantive consideration of the case” does not reflect the final or consensus views of the Inclusive Framework. Some members of the Inclusive Framework consider that the provision should include an express definition of specific items of information (such as the list of information and documentation contained in the [BEPS Action 14 Peer Review Documents](#)), with a view to avoiding possible blockages in circumstances where a jurisdiction’s published MAP guidance does not address this issue.

missing information is necessary to undertake substantive consideration of the case.

9. Where neither Competent Authority has requested additional information pursuant to paragraph 7(b), the start date referred to in paragraph 2(a) 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 7(a); and
- b) the date that is 90 days after the notification to the Competent Authority of the other Contracting Jurisdiction pursuant to paragraph 6(b).

10. Where additional information has been requested pursuant to paragraph 7(b), the start date referred to in paragraph 2(a) shall be the earlier of:

- a) the latest date on which the Competent Authorities that requested additional information have notified the member of a Covered Group who presented the case and the other Competent Authority pursuant to paragraph 8(a); and
- b) the date that is 90 days after both Competent Authorities have received all information requested by either Competent Authority from the member of a Covered Group.

If, however, one or both of the Competent Authorities send the notification referred to in paragraph 8(b), such notification shall be treated as a request for additional information pursuant to paragraph 7(b).

Statement of information and Terms of Reference

11. Within 30 days of a request for a dispute resolution panel pursuant to paragraph 2, 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 16. 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 16.

12. 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 2. 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 28, 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 as their proposed resolutions and position papers. 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 28(a).

Competent Authority agreement on mode of application

13. The Competent Authorities of the Contracting Jurisdictions may by mutual agreement settle the mode of application of the provisions contained in this Section.

Relationship with decisions rendered by a court or administrative tribunal⁶

14. 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 of either of the Contracting Jurisdictions and
- b) the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision.

15. 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 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 5(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

⁶ Paragraphs 14 and 15 do not reflect the final or consensus views of the Inclusive Framework. Some members of the Inclusive Framework consider that these provisions should not use a “legally bound” standard but should also apply where a Competent Authority will not depart from the court decision as a matter of administrative policy or practice.

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.

Appointment of dispute resolution panel members⁷

16. Except to the extent that the Competent Authorities of the Contracting Jurisdictions to an Existing Tax Agreement mutually agree on different rules, paragraphs 16(a) to 16(h) 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 under paragraph 2, 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 experts referred to in paragraph 16(g).

The two dispute resolution panel members appointed pursuant to paragraph 16(b)(ii) shall, within 60 days of the latest of their appointments, appoint a Chair from the persons on the list of experts referred to in paragraph 16(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. Upon the expiration of the periods provided in paragraph 16(b), the Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group that requested a dispute resolution panel shall inform that member of a Covered Group if either Competent Authority has not appointed one or both dispute resolution panel members in accordance with paragraph 16(b), or if the two panel members appointed pursuant to paragraph 16(b)(ii) have not appointed a Chair.
- 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

⁷ As noted in the Background section at the beginning of this document, there are divergent views among jurisdictions as regards the composition of the dispute resolution panel. One group of jurisdictions 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 jurisdictions 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. Although several of these jurisdictions may be able to accept a mixed panel as in the public consultation document as a compromise, some jurisdictions continue to retain their original positions. Accordingly, commentators on this part of the document should note that the drafting is intended to indicate the technical aspects of the work and should not be seen as final or consensus views of the Inclusive Framework with regard to the composition of the dispute resolution panel at present.

period specified in paragraph 16(b), a panel member shall be appointed at random from the list of independent experts referred to in paragraph 16(g). The relevant appointment shall be made within 30 days after receiving a request to that effect from the member of the Covered Group that requested a dispute resolution panel.

- e) If the two panel members appointed pursuant to paragraph 16(b)(ii) fail to appoint the Chair within the time period specified in paragraph 16(b), the Chair shall be appointed at random from the persons on the list of independent experts referred to in paragraph 16(g) who have indicated the willingness to serve as the Chair of a dispute resolution panel and who are not nationals or residents of either Contracting Jurisdiction. The relevant appointment shall be made within 30 days after receiving a request to that effect from the member of the Covered Group that requested a dispute resolution panel.
- f) Except to the extent that the Competent Authorities of the Contracting Jurisdictions to an Existing Tax Agreement have mutually agreed on different rules for the composition of the list of experts provided for in paragraph 16(g), each expert appointed to the dispute resolution panel pursuant to paragraph 16(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 16(g).
 - ii) Neither they nor a Family Member –
 - A) were an employee or contractor of any member of the Covered Group, in the previous [five] years, or continues to derive benefits of any kind from such engagements that existed in any prior period; or
 - B) were a Significant Investor in, or had Significant Business Dealings with, any member of the Covered Group, in the previous [five] years, or continues to derive benefits of any kind from such investments or relationships that existed in any prior period.
 - iii) They, or an enterprise or firm with which they were associated at a regional or global level at any time in the previous [five] years, were involved in providing tax services or accounting/audit services to the Covered Group during the previous [five] years.
 - iv) 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 16(f). The panel members will undertake promptly to disclose to both Competent Authorities, in writing, any new facts or circumstances that arise during 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 2(a) may first be made, the Competent Authorities of the two Contracting Jurisdictions to an Existing Tax Agreement shall each nominate five individuals to a list of experts used to constitute dispute resolution panels pursuant to this paragraph 16 with respect to that Existing Tax Agreement. These experts shall be individuals who:
- i) are persons of high moral character who may be relied upon to exercise independent judgment and conduct themselves in a professional manner;
 - ii) have at least [six] years of relevant experience in dealing with corporate income tax matters; and
 - iii) do not belong to or work on behalf of any Competent Authority, tax administration or Ministry of Finance 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 an arbitration proceeding pursuant to Part VI of the BEPS Multilateral Instrument or any other bilateral or multilateral agreement or instrument providing for the arbitration of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to belong to or work on behalf of, or to have belonged to or worked on behalf of, the Competent Authority, tax administration or Ministry of Finance of a Contracting Jurisdiction);

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 expert is neither a national nor resident of either Contracting Jurisdiction) whether that person would be willing to serve as Chair. At least [one] expert nominated by each Contracting Jurisdiction 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 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 this paragraph 16(g). Each Competent Authority may change the persons so nominated and shall notify the other Competent Authority without delay when it wishes to do so.

- h) In the event that the Competent Authority of a Contracting Jurisdiction to an Existing Tax Agreement has failed to nominate any individuals to the list of experts provided in paragraph 16(g) by the deadline provided in that paragraph, or where none of the individuals nominated by a Competent Authority to the list of experts meets the requirements of paragraph 16(f) or is otherwise available to act as a member of a dispute resolution panel in a particular case, the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels shall be used

for purposes of the appointment by that Competent Authority of a dispute resolution panel member pursuant to paragraph 16(b)(ii) and for purposes of the appointment of the Chair (with the two panel members appointed pursuant to paragraph 16(b)(ii) taking into account that the Chair shall not be a national or resident of either Contracting Jurisdiction). In circumstances where this paragraph 16(h) applies, the references in Article 19 to the list of experts provided in paragraph 16(g) shall, where relevant, be understood as references to the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels.

- i) The procedures provided in paragraph 16 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 28.
- j) For the purposes of Section 3:
 - A) 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);
 - B) the term “Significant Investor” means an individual who, individually or through an entity owned or controlled by the individual, holds capital having present value in excess of EUR [X];
 - C) 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] percent of a Covered Group’s total operating expenses.

Communication of information and confidentiality of dispute resolution panel proceedings

- 17. Solely for the purposes of the application –
 - a) of the provisions of this Article; and
 - b) of the provisions of Existing Tax Agreements, [bilateral and multilateral agreements for the exchange of tax information,] 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 16(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.

18. The Competent Authorities of the Contracting Jurisdictions shall ensure that prospective dispute resolution panel members from the list of experts provided in paragraph 16(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 experts provided in paragraph 16(g) and their staff agree in writing, prior to their acting in an 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.

19. 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 Article [X] 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.

20. 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 28, 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.

21. 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.

22. No Competent Authority shall have any *ex parte* communications with any member of the dispute resolution panel appointed from the list of experts provided in paragraph 16(g) with respect to the mutual agreement procedure case that resulted in the dispute resolution panel proceeding.

23. 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 member of the Covered Group. Express or priority mail or a courier service shall be used for all correspondence other than that sent via facsimile or email.

24. No substantive discussions between any two 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 16(b)(i) from the staff of the Competent Authorities.

25. No member of a dispute resolution panel shall have communications regarding Related Issues considered by the dispute resolution panel with –

- a) the member of the Covered Group who presented the MAP case;
- b) any other member of that Covered Group; or
- c) their representatives, agents, or advisers

during or for a reasonable period subsequent to the dispute resolution panel proceedings.

26. At the termination of the dispute resolution panel proceedings, each member of the dispute resolution panel from the list of experts provided in paragraph 16(g) shall immediately destroy all documents or other information received in connection with the proceedings.

Termination of the dispute resolution panel proceeding and further consideration of the case by the Competent Authorities

27. For the purposes of this Article and the mutual agreement procedure provisions of the relevant Existing Tax Agreement and of Article [X] of this Convention –

- a) The dispute resolution panel proceeding with respect to a 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 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 bound by the decision, as provided in paragraph 15(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 19.
- b) Where the dispute resolution panel proceeding with respect to a case has been terminated pursuant to paragraph 27(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 27(a)(ii) (but only where the member of the Covered Group has not also withdrawn the request for a mutual agreement procedure) and in paragraph 27(a)(iii) (to permit the Competent Authority of the Contracting Jurisdiction not bound by the decision to evaluate whether it would agree to provide relief consistent with that decision, such as by providing a corresponding adjustment).

Dispute resolution panel process

28. 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 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 Authority of a Contracting Jurisdiction pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement or of Article [X] 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 earlier of the date on which the proposed resolutions were due and the date of receipt of the latest of the proposed resolutions. Where the provisions of paragraph 28(h) apply, however, the Chair shall provide copies of the proposed resolutions to both Competent Authorities at the end of the 7-day period provided in paragraph 28(h), and 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 earlier of the date on which the supporting position papers were due and the date of receipt of the latest of the supporting position papers.
- 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 7-day period provided in paragraph 28(h), the other Competent Authority shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 12(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 12(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 Covered Group that presented the case.
 - 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 to the dispute resolution panel within the time period provided in paragraph 28(a), the Chair shall contact both Competent Authorities and the Competent Authority that did not submit a proposed resolution shall be provided seven additional days to submit a proposed resolution to the Chair and the other Competent Authority. 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 12(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 to which the request for the dispute resolution panel proceeding was submitted shall communicate in writing to the member of the Covered Group that requested the dispute resolution panel proceeding and the other members of the Covered Group directly affected by the case the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision and request that all members of the Covered Group directly affected by the case indicate in writing whether they accept the proposed Competent Authority resolution within 30 days. The failure of any member of the Covered Group directly affected by the case to indicate its acceptance of the proposed Competent Authority resolution 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 28(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 28(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.

Agreement on a different resolution

29. Notwithstanding paragraph 5, 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 within 90 days after the dispute resolution panel decision has been delivered to them.

Costs of dispute resolution panel proceedings

30. 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 the Covered Group that requested the dispute resolution panel shall bear the costs related to a dispute resolution panel proceeding in appropriate circumstances⁸, including where:
 - i) a member of the Covered Group directly affected by the case does not accept, or is considered not to accept, the proposed Competent Authority resolution concerning the case that reflects the outcome of the dispute resolution panel decision;
 - ii) 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 5(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

⁸ Members of the Inclusive Framework have divergent views on when it would be appropriate for a Covered Group to bear the costs related to a dispute resolution panel proceeding. Some jurisdictions consider that an obligation for the Covered Group to bear these costs in the circumstances described in paragraphs 30(b)(i) and 30(b)(iv) would compromise the voluntary nature of both the dispute resolution panel mechanism and the mutual agreement procedure. Other jurisdictions consider that it is appropriate for a Covered Group to bear the costs in these circumstances, in light of the potential resource demands of the dispute resolution panel process.

- iii) 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 19.
- iv) the member of the Covered Group that requested the dispute resolution panel withdraws its request for a dispute resolution panel (unless that withdrawal was made at the request of both Competent Authorities) or its request for a mutual agreement procedure with respect to the case in which the Related Issues arise.

31. 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 16(b)(ii) 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 with reference to [the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators]⁹. Members of the dispute resolution panel appointed pursuant to paragraph 16(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 16(b)(ii) 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 16(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 16(b)(ii) 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.

32. 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

⁹ The reference to the ICSID Schedule of Fees for arbitrators in paragraph 31(a) does not reflect the final or consensus views of the Inclusive Framework. Members of the Inclusive Framework have different views on an appropriate fee schedule, with some considering a schedule providing more flexibility and lower fees (such as that in Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union) more appropriate for these purposes.

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.

Compatibility with existing mandatory binding dispute resolution mechanisms

33. Any unresolved Related Issue arising from a mutual agreement procedure case 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 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.

34. a) Notwithstanding the provisions of paragraph 33, 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 mutual agreement procedure case 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 34(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.

Commentary on Article 19

Paragraph 1

1. [Paragraph 1 of the operative text defines the scope of application of the dispute resolution mechanism provided for in Section 3 through the definition of “Related Issue”. Pursuant to this definition, the dispute resolution panel mechanism is available with respect to any MAP case that concerns a transfer pricing adjustment to a transaction between members of a Covered Group, or to the profits attributed to a permanent establishment of a member of a Covered Group. The commentary on

paragraph 1 will explain why the timely mandatory and binding resolution of certain transfer pricing and profit allocation disputes is necessary to avoid double taxation for Amount A. This commentary will address, at a conceptual level, the impact of transfer pricing and profit attribution adjustments on the application of the mechanism for the elimination of double taxation of Amount A and of the marketing and distribution profits safe harbour. The commentary will also clarify the relation between the “Related Issue” definition and exclusions from the scope of Pillar One.]

Paragraph 2

2. Paragraph 2 contains the core dispute resolution provision. It provides that, where the Competent Authorities are unable to reach an agreement on a case pursuant to the mutual agreement procedure provisions of an Existing Tax Agreement or of Article [X] of the Convention within a period of two years, unresolved Related Issues 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 of Part VI. This dispute resolution process is available where, under the provisions of an Existing Tax Agreement relating to the mutual agreement procedure or of Article [X] 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 MLC 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.

3. The start date for this two-year period is determined pursuant to paragraph 9 or 10, 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 in paragraph 2(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 2(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 Section 3 dispute resolution mechanism to provide a timely resolution of Related Issues, and that any such extension should accordingly not unreasonably delay such a resolution.

4. The provision in paragraph 2(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 the Covered Group.

5. 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 to which that member of the Covered Group presented the MAP case. Such a request should contain sufficient information to identify the case and must be accompanied by –

- 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
- an 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.

For the purposes of this Section, “member of the Covered Group directly affected by the case” is defined in paragraph 2(c) to mean the member of the 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.

6. These written statements will aid the Competent Authorities in applying paragraph 14 (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 15 (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). These written statements 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 3 and 27). 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.

7. The request should also include a written statement regarding confidentiality as provided in paragraph 19 from the members of the Covered Group directly affected by the case and their authorised representatives or advisors.

8. The request should in addition include a written statement by the members of the Covered Group directly affected by the case attesting that the unresolved issues in the case are Related Issues within the meaning of paragraph 1. Such an attestation should provide a brief, non-quantitative explanation of the interactions of the adjustment with the application of the provisions of the Convention on elimination of double taxation or the marketing and distribution profits safe harbour.¹⁰

9. Finally, the request should include a written confirmation that the member of the Covered Group sent a copy of the request and all accompanying documentation to the Competent Authority of the other Contracting Jurisdiction, as required by paragraph 2(d). To ensure the timely initiation of the determination panel process, paragraph 2(d) also requires the Competent Authority that receives a request to submit unresolved Related Issues to a determination panel to send a copy of that request and the accompanying documentation to the other Competent Authority, in the absence of any indication

¹⁰ Paragraph 8 of the commentary does not reflect the final or consensus views of the Inclusive Framework. Members of the Inclusive Framework have different views on the standard that would apply to the written statement by the members of the Covered Group directly affected by the case attesting that the unresolved issues in the case are Related Issues within the meaning of paragraph 1.

that the member of the Covered Group also sent the request to the other Competent Authority, within a period of 10 days after the receipt of the request.

Paragraph 3

10. 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 3 provides that the period provided in paragraph 2(a)(ii) will stop running where a Competent Authority decides to suspend the mutual agreement process referred to in paragraph 2(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 15, the dispute resolution process provided by Chapter 4 will terminate if a decision is rendered by the court or administrative tribunal during the period in which the dispute resolution process is suspended.

11. Paragraph 3 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.

12. Paragraph 3 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.

13. Paragraph 3 also provides that the period provided in paragraph 2(a)(ii) will stop running where the member of the 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 3. The period would start running again once that suspension has been lifted. This could apply, for example, where the member of the 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.

Paragraph 4

14. In some cases, after the member of the Covered Group has provided the initial information needed to undertake substantive consideration of the MAP case, the Competent Authorities may need to request additional information from the member of the Covered Group. For example, after the period provided in paragraph 2(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 a Covered Group directly affected by the case (i.e. the member of the 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 4 provides that the period provided in paragraph 2(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.

15. Where a request for additional information is made **before** the period provided in paragraph 2(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 8(a) – thereby triggering the start of the two-year period provided in paragraph 2(a)(ii) – when it had received a complete response to its request for additional information. Paragraph 4 thus does not provide for the extension of the two-year period in these circumstances.

16. Where a request for additional information is made **after** the start of the period provided in paragraph 2(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 deadline date and ending on the date on which that information was ultimately provided.

17. Under paragraph 7, a Competent Authority may request additional information necessary to undertake substantive consideration of the case within 90 days after it receives the initial request for a mutual agreement procedure. Where such additional requests for information are made, paragraph 10 then provides that the start date of the case for purposes of paragraph 2 will be the earlier of –

- (i) 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 and
- (ii) the date 90 days after both Competent Authorities have received all information requested by either Competent Authority from the member of the Covered Group.

Notwithstanding the start date provided in such cases by paragraph 10, paragraph 4 permits the period provided in paragraph 2(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.

18. Paragraph 4 is relevant only for purposes of determining whether the period provided in paragraph 2(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.

Paragraph 5

19. The dispute resolution mechanism provided for by Chapter 4 is intended to provide a mechanism for the Competent Authorities to resolve Related Issues that may otherwise prevent agreement with respect to 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 5(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 29 applies) reflects the outcome of the dispute resolution panel decision within 90 days of the communication of that decision to them. Pursuant to paragraph 28(i), the Competent Authority to which the request for the dispute resolution panel proceeding was submitted shall then have 10 days (i.e. 100 days from the communication of the dispute resolution panel decision) to communicate to the member of the Covered Group that requested the dispute resolution panel proceeding and the other members of the Covered Group directly affected by the case the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision and request that all members of the Covered Group directly affected by the case indicate whether they accept the proposed Competent Authority resolution within 30 days.

20. Paragraph 5(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 5(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 29 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 or in the Existing Tax Agreement.

21. 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). Paragraph 5(b), however, provides that the Competent Authority mutual agreement concerning the case that reflects the outcome of the dispute resolution panel decision shall be implemented and any such provisions contained in the Existing Tax Agreement related to the implementation of Competent Authority mutual agreements would not apply in this context.

22. The four exceptions to the final and binding effect of the dispute resolution panel decision provided in paragraph 5(b) are as follows:

- (i) if 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 within 30 days after the notification of the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision to the member of the Covered Group that requested the dispute resolution panel proceeding pursuant to paragraph 28(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 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.

The term “final decision of the courts” in paragraph 5(b)(ii) describes a decision that is not merely an interim order or decision. The decision can be at any level of court in one of the Contracting Jurisdictions.

23. The exception in paragraph 5(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 5(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 the 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.

24. Paragraph 5(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 17 to 19, related to confidentiality, and paragraph 30, related to the costs of dispute resolution panel proceedings).

25. Paragraph 5(b)(ii) does not provide independent grounds for the invalidation of a dispute resolution panel decision where such grounds do not otherwise exist under the domestic laws of the Contracting Jurisdictions. Instead, it is meant to ensure that where a court of one of the Contracting Jurisdictions invalidates a dispute resolution panel decision based on such existing domestic law rules, the other Contracting Jurisdiction is not bound to implement the decision. This may occur under the domestic laws of some jurisdictions, for example, where there has been a procedural or other failure that has materially affected the outcome of the dispute resolution panel process. 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.

26. It is understood that paragraph 5(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 5(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 16;
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.

The final sentence of paragraph 5(b)(ii) makes clear 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.

27. Paragraph 5(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 2(a)(ii), since such 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 the Covered Group were the main reason for the invalidation of the dispute resolution panel decision.

28. Paragraph 5(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 5(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, that 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.

29. In the circumstances where paragraph 5(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.

30. Paragraph 5(b)(iv) provides a last exception in cases where a court of one of the Contracting Jurisdictions delivers a decision 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 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.

31. Under paragraph 1, 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 5(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.

Paragraphs 6 through 10

32. Paragraphs 6 through 10 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.

33. 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.

34. Paragraph 6 provides that the Competent Authority that received the initial request for a mutual agreement procedure must, within 60 days of receiving the request, notify the member of the Covered Group who presented the case that the request has been received, and send a notification of the request, along with a copy of the request, to the other Competent Authority.

35. Under paragraph 7, a Competent Authority must notify the member of the 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 the Covered Group that presented the case, within 90 days from the date on which it received the initial request or was notified of the request, as the case may be. For these purposes, "the information necessary to undertake substantive consideration of the case" means the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance according to each Contracting Jurisdiction's published MAP guidance.

36. Jurisdictions are required to publish MAP guidance as part of their implementation of the BEPS Action 14 minimum standard, and all Contracting Jurisdictions should have accordingly produced such guidance. Where a Contracting Jurisdiction has not published MAP guidance, or its published MAP guidance does not define the information and documentation that a taxpayer is required to submit with a request for MAP assistance, the Competent Authority mutual agreement operationalising Section 3 should define "the information necessary to undertake substantive consideration of the case" for that Contracting Jurisdiction. For purposes of that agreed definition, Competent Authorities may make reference to the information identified in the "Guidance on Specific Information Required to be Submitted with a Request for MAP Assistance" included in the 2017 BEPS Action 14 Peer Review Documents.

37. A Competent Authority that requests additional information 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 7(b), paragraph 8 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 information necessary to undertake substantive consideration of the case or that some of the requested information was not provided. Pursuant to paragraph 8(b), a notification that some of the requested information is

missing shall only be sent, however, if both Competent Authorities mutually agree that the missing information is necessary to undertake substantive consideration of the case.

38. The start date of the period referred to in paragraph 2(a)(ii) depends on whether additional information is requested pursuant to paragraph 7(b). Where neither Competent Authority requests additional information, paragraph 9 provides that the start date is the earlier of: a) the date on which both Competent Authorities have notified the member of the 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 on which the Competent Authority to which the request for a mutual agreement procedure was initially made notified the other Competent Authority of the request pursuant to paragraph 6(b). The date provided in paragraph 9(b) is intended to avoid blockages and ensures that there is a default start date in circumstances where a Competent Authority fails to take either of the actions required by paragraph 7 within 90 days of that Competent Authority's receipt of the request for a mutual agreement procedure (i.e. by the deadline for such action provided in paragraph 7).

39. Where additional information is requested, paragraph 10 provides that the start date is the earlier of: (a) 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 8(a); and (b) the date that is 90 days after both Competent Authorities have received all additional information requested by either Competent Authority from the member of the Covered Group that presented the case. The date provided in paragraph 10(b) serves a similar purpose to the date provided in paragraph 9(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 8(a) and the Competent Authorities do not agree to send the notification provided in paragraph 8(b) within 90 days of the receipt of the additional information requested pursuant to paragraph 7(b).

40. Once the start date has been determined pursuant to paragraph 10, Competent Authorities will not be precluded from making further requests for additional information during the 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 4, 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.

41. 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.

Paragraphs 11 and 12

42. Paragraphs 11 and 12 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.

43. Paragraph 11 provides that, within 30 days of the request for a dispute resolution panel pursuant to paragraph 2, 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 16 as they relate to independence and impartiality.

44. Paragraph 12 requires the Competent Authorities to agree, within 60 days of a request for a dispute resolution panel pursuant to paragraph 2, 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.

45. 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 12(a)(iv) also supports the default rule in paragraph 28(h) that applies when a Competent Authority does not submit a proposed resolution to the dispute resolution panel by the deadline provided in paragraph 28(a).

46. 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 28, 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 as their proposed resolutions and position papers. 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 28(a).

Paragraph 13

47. Section 3 of Part VI 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 13 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 13 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.

48. 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 State's domestic law would limit its Competent Authority's exercise of the authority to conclude mutual agreements pursuant to paragraph 19 or to provisions based on OECD Model Article 25(3), it is expected that its Competent Authority would only conclude mutual agreements with treaty partner Competent Authorities pursuant to paragraph 13 to the extent that such mutual agreements were consistent with such domestic law limitations.

Paragraphs 14 and 15

49. 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 14 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.

50. Paragraph 14 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.

51. Paragraph 15 complements paragraph 14 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 14, paragraph 15 applies only where the Competent Authority of the Contracting Jurisdiction of that court or administrative tribunal is legally bound by the decision. Paragraph 15 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 27, the MAP case shall not be eligible for any further consideration by the Competent Authorities.
- If the court or administrative tribunal decision is rendered **after the dispute resolution panel has delivered its decision**, notwithstanding paragraph 5(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 15(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. As provided in paragraph 27, 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.

52. Both paragraphs 14 and 15 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.

53. 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 14, nor will they trigger the application of paragraph 15. Competent Authorities may wish to clarify the operation of paragraphs 14 and 15 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.

Paragraph 16¹¹

54. Paragraph 16 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, paragraph 16 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.

55. Under paragraph 16(a), the dispute resolution panel is composed of five individual panel members. Paragraph 16(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 experts established bilaterally in accordance with paragraph 16(g). The two independent panel members appointed from the list of experts must then, within 60 days of the latter of their appointments, appoint a fifth member from the list of experts 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.

56. Paragraph 16(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 16(b) and in paragraph 28). Paragraph 16(c) additionally provides that, upon the expiration of the periods provided in paragraph 16(b), the Competent Authority of the Contracting Jurisdiction of residence of the member of a Covered Group that requested a dispute resolution panel shall inform that member of a Covered Group if either Competent Authority has not appointed one or more dispute resolution panel members in accordance with paragraph 16(b), or if the two panel members appointed pursuant to paragraph 16(b)(ii) have not appointed a Chair. Such notification is intended to permit the member of the Covered Group to request that these appointments be made pursuant to the default rules in paragraphs 16(d) and 16(e) and thereby prevent the blockage of the dispute resolution panel process by non-appointment of one or more panel members or non-appointment of the Chair.

¹¹ As noted above, members of the Inclusive Framework have divergent views as regards the composition of the dispute resolution panel and the drafting of paragraph 16 is intended solely to illustrate technical aspects of the process for the appointment of dispute resolution panel members. Commentators should accordingly read the commentary on paragraph 16 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.

57. Paragraphs 16(d) and 16(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 list of experts fail to appoint a Chair.

58. Paragraph 16(d) provides that where a Competent Authority fails to make the appointments provided in paragraph 16(b) by the applicable deadline, that appointment will be made for the Competent Authority. In the case of both a failure to appoint the member from the staff of the Competent Authority (under paragraph 16(b)(i)) and a failure to appoint the member from the list of independent experts (under paragraph 16(b)(ii)), a panel member shall be appointed at random from the list of independent experts. In the circumstances where this rule would apply with respect to the appointment of a dispute resolution panel member pursuant to paragraph 16(b)(i), the relevant Competent Authority would not be represented on the dispute resolution panel. Paragraph 16(e) then provides that where the independent experts cannot agree a Chair of the panel by the deadline, the Chair shall be appointed at random from the list of independent experts. These default rules 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, the rules in paragraphs 16(d) and 16(e) will apply only to the extent that the Competent Authorities of the relevant Contracting Jurisdictions have not mutually agreed on different rules.

59. Paragraph 16(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 16(b)(ii) and the Chair must, at the time of accepting their appointment, fulfil the requirements set out in paragraph 16(g) and fulfil certain other requirements to ensure their impartiality and independence with respect to the specific MAP case. In particular:

- Neither they nor a Family Member were an employee or contractor of any member of the Covered Group, in the previous [five] years, or continues to derive benefits of any kind from such engagements that existed in any prior period.
- Neither they nor a Family Member were a Significant Investor in, or had Significant Business Dealings with, any member of the Covered Group, in the previous [five] years, or continues to derive benefits of any kind from such investments or relationships that existed in any prior period.
- They, or an enterprise or firm with which they were associated at a global or regional level in the past [five] years, must not have been involved in providing tax services or accounting/audit services to the Covered Group in the previous [five] years.

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 the panel proceedings that might call into question their impartiality or independence. Each panel member will execute a written certification to the effect of the provisions of paragraph 16(f).

60. Paragraph 16(g) provides rules for the establishment of the bilateral list of experts from which (pursuant to paragraph 16(b)) certain members of dispute resolution panels will be appointed. For purposes of constituting this list of experts, the Competent Authority of each Contracting Jurisdiction to an Existing Tax Agreement shall nominate five individuals who –

- (i) are persons of high moral character who may be relied upon to exercise independent judgment and conduct themselves in a professional manner;

- (ii) have at least [six] years of relevant experience in dealing with corporate income tax matters; and
- (iii) do not belong to or work on behalf of any Competent Authority, tax administration or Ministry of Finance 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 an arbitration proceeding pursuant to Part VI of the BEPS Multilateral Instrument or any other bilateral or multilateral agreement or instrument providing for the arbitration of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to belong to or work on behalf of, or to have belonged to or worked on behalf of, the Competent Authority, tax administration or Ministry of Finance of a Contracting Jurisdiction).

61. There is no requirement that a Competent Authority nominate five different individuals for purposes of each of its bilateral treaty relationships. Competent Authorities should, however, keep in mind that the Chair of a dispute resolution panel shall be appointed from among the individuals on the list of experts who are not nationals or residents of either of the relevant Contracting Jurisdictions.

62. Pursuant to paragraph 16(g), each Contracting Jurisdiction 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 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] 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 16(b)). Each Competent Authority shall inform the other Competent Authority of the 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 16(g). Each Contracting Jurisdiction may change the persons so nominated and shall notify the other Competent Authority without delay when it wishes to do so.

63. Paragraph 16(h) provides a default rule that is designed to prevent blockages of the dispute resolution panel mechanism in two specific circumstances: where one or both Competent Authorities to an Existing Tax Agreement fail to nominate any individuals to the list of experts used to select dispute resolution panel members appointed pursuant to paragraph 16(b)(ii) and the Chair; or where none of the individuals nominated by a Competent Authority to the list of experts meets the requirements of paragraph 16(f) or is otherwise available to act as a member of a dispute resolution panel in a particular case. In these circumstances, the Standing Pool comprising Independent Experts established for purposes of Amount A Determination Panels shall be used for purposes of the appointment by that Competent Authority of a dispute resolution panel member pursuant to paragraph 16(b)(ii) and for purposes of the appointment of the Chair (with the two panel members appointed pursuant to paragraph 16(b)(ii) taking into account that the Chair shall not be a national or resident of either Contracting Jurisdiction).

64. Paragraph 16(i) 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 16 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 28.

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.

65. Finally, paragraph 16(j) provides definitions of certain terms used in paragraph 16(f) to establish when a person from the list of experts provided in paragraph 16(g) is considered to have a conflict that would prevent that panel member from serving on a dispute resolution panel in a particular case.

Paragraph 17

66. 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 17 provides that, solely for the purposes of Article 19, and of the provisions of Existing Tax Agreements, [bilateral and multilateral agreements for the exchange of tax information,] this 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. [The reference to “bilateral and multilateral agreements for the exchange of tax information” is intended to clarify that paragraph 17 also applies with respect to the disclosure of tax information exchanged pursuant to bilateral tax information exchange agreements (TIEAs) and multilateral agreements such as the Convention on Mutual Administrative Assistance in Tax Matters.]

67. Pursuant to paragraph 17, 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 17 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.

Paragraphs 18 and 19

68. Paragraph 18 requires the Competent Authorities to ensure that prospective dispute resolution panel members from the list of experts provided in paragraph 16(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 list of experts provided in paragraph 16(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. The provisions on the appointment of dispute resolution panel members include 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.

69. 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.

70. Paragraph 19 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).

71. A breach of this agreement 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.

72. It is expected that Competent Authorities would take a practical approach in determining the consequences of a breach 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.

Paragraphs 20 and 21

73. Paragraphs 20 and 21 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 28, 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.

74. 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.

Paragraphs 22 to 25

75. Paragraphs 22 to 25 provide rules to ensure the integrity of the dispute resolution panel process by –

- Barring any *ex parte* communications between the Competent Authorities and the members of the dispute resolution panel appointed from the list of experts provided in paragraph 16(g) related to the MAP case that result in the dispute resolution panel proceeding or to the panel proceeding itself. Because all communications between the Competent Authorities and the dispute resolution panel are required 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.
- Prohibiting any communications regarding Related Issues before a dispute resolution panel between a member of the dispute resolution panel and the member of the Covered Group who presented the MAP case, any other member of the Covered Group, or their representatives, agents or advisers, during or for a reasonable period subsequent to the dispute resolution panel proceedings. The Competent Authorities should by mutual agreement determine a reasonable period subsequent to the panel proceedings during which this prohibition will apply. As this prohibition applies to all dispute resolution panel members, including those appointed from the staff of the Competent Authorities, the Competent Authorities should consider their ongoing need for engagement with the relevant Covered Group when making appointments pursuant to paragraph 16(b)(i).

76. In addition, no two 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.

77. All of the requirements in paragraphs 22 to 25 are intended to provide a transparent process as between both Competent Authorities and the members of the dispute resolution panel.

Paragraph 26

78. Paragraph 26 requires the members of a dispute resolution panel from the list of experts provided in paragraph 16(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 the document retention and destruction policies ordinarily applicable to their functions.

Paragraph 27

79. 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 27 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 27 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.

80. Paragraph 27(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 bound by the decision, as provided in paragraph 15(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 19.

81. Paragraph 27(b) then provides that, where the dispute resolution panel proceeding with respect to a case has been terminated pursuant to paragraph 27(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 close or be terminated in the event of a Competent Authority mutual agreement to resolve the case or 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.

82. 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 27(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.

83. 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 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.

Paragraph 28

84. Paragraph 28 provides a default rule 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 28 will apply.

85. 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 which addresses all of the unresolved Related Issues in the case in a manner that is 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.

86. Pursuant to the introductory language of paragraph 28, 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 28(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.

87. 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 28(a)).

88. 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.

89. 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 after the earlier of the date on which the proposed resolutions were due and 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 28(h) apply, paragraph 28(a) provides that the Chair will provide copies of the proposed resolutions to both Competent Authorities only at the end of the 7-day period provided in paragraph 28(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 did not do so.

90. 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 7-day period provided in paragraph 28(h), the other Competent Authority shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 12(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.

91. 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.

92. Paragraph 28(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.

93. Under paragraph 28(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 12(a)(iv). A reply submission prepared pursuant to paragraph 28(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 28(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.

94. 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 13.

[95. In some circumstances, Contracting Jurisdictions may consider that it would be useful for the dispute resolution panel also to receive a paper from the member of the Covered Group that presented the case, which could, for example, clarify certain issues. Where both relevant Contracting Jurisdictions share this view, their Competent Authorities may mutually agree, in general or with respect to a specific case, to allow the member of the Covered Group to submit a paper to the Competent Authorities, who would then communicate it to the Chair of the panel. Competent Authorities who wished to provide generally for a Covered Group paper as part of the dispute resolution panel process could do so by including the following provision in a mutual agreement to implement the dispute resolution panel process:

Within 60 days of the appointment of the Chair of the panel, the member of the Covered Group that presented the case may submit a paper (Covered Group paper), not to exceed 30 pages plus annexes, setting forth the Covered Group's analysis and views of the case. The analyses and views raised in the Covered Group paper must be analyses and views previously provided to the Competent Authorities for their consideration in discussion of the mutual agreement procedure case prior to the start of the dispute resolution panel proceedings. Any annex to the Covered Group paper that does not reflect publicly available information must be a document previously made available to the Competent Authorities for their consideration prior to the start date. The member of the Covered Group that presented the case must send the Covered Group paper simultaneously to both Competent Authorities, who shall then send a copy of it to the Chair of the dispute resolution panel as soon as possible thereafter.]¹²

96. Paragraph 28(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, however, permitted to request additional information from the Covered Group that presented the case.

97. 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.

98. 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 28(f)(ii) provides that, by the deadline established by the

¹² Paragraph 95 of the commentary does not represent the final or consensus views of the Inclusive Framework. Members of the Inclusive Framework have divergent views as regards the usefulness of a presentation of the Covered Group's analysis and views of the case to the dispute resolution panel process. Some jurisdictions are of the view that such a presentation would provide a dispute resolution panel with a more informed basis to choose between the Competent Authorities' proposed resolutions and that the operative text should directly provide this possibility to Covered Groups. Other jurisdictions oppose such a presentation of a Covered Group's position, which they consider to be inappropriate in the context of a government-to-government dispute resolution mechanism that uses last-best offer decision-making.

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.

99. 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 to the Competent Authorities of the Contracting Jurisdictions.

100. In the event that the Competent Authority of one of the Contracting Jurisdictions fails to submit a proposed resolution to the dispute resolution panel within the time period provided in paragraph 28(a), the Chair shall contact both Competent Authorities and the Competent Authority that did not submit a proposed resolution shall be provided 7 additional days to submit a proposed resolution to the Chair and the other Competent Authority. Where the relevant Competent Authority does not submit a proposed resolution within this 7-day period, the dispute resolution panel shall consider the relevant Competent Authority position described in the Terms of Reference pursuant to paragraph 12(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.

101. Within 100 days after the receipt of the dispute resolution panel decision, the Competent Authority to which the request for the dispute resolution panel was submitted shall communicate to the member of the Covered Group that requested the dispute resolution panel proceeding and the other members of the Covered Group directly affected by the case the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision and request that the members of the Covered Group directly affected by the case indicate whether they accept the proposed Competent Authority resolution within 30 days. The failure of any member of the Covered Group directly affected by the case to indicate its acceptance of the proposed Competent Authority resolution within 30 days shall be considered a rejection of the proposed Competent Authority resolution.

102. The requirement that the member of the 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 taxpayer¹³, 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 the 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

¹³ 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.

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 the 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.

103. 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).

[104. 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 the 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.]¹⁴

105. Paragraph 28(j) 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 28(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 28(j) 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, as provided in paragraph 23. 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.

106. Finally, paragraph 28(k) 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 Competent Authorities. Any such additional procedures remain subject to the approval, by mutual

¹⁴ Paragraph 104 of the commentary does not represent the final or consensus views of the Inclusive Framework. Members of the Inclusive Framework have divergent views as regards the potential roll-forward of dispute resolution panel outcomes to future years. Some jurisdictions are of the view that roll-forward would facilitate the resolution of recurring issues and that it should be expressly authorised in the operative text. Other jurisdictions are opposed to the roll-forward of dispute resolution panel outcomes, which they consider inconsistent with a mechanism that is not intended to establish precedents for other cases.

agreement, of the Competent Authorities. The Chair shall provide a written copy of any proposed additional procedures to the Competent Authorities.

Paragraph 29

107. Notwithstanding paragraph 5, paragraph 29 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 5(a) of paragraph 5 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 29 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.

Paragraph 30

108. Paragraph 30 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 21), 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 at random 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 secretarial¹⁵ 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 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 dispute resolution panel in the event that the Competent Authorities 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

¹⁵ 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*.

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 30(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 30(a)(v) in a manner consistent with its established practice and procedure. 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.

109. The introductory language of paragraph 30 expressly recognises that the Competent Authorities of two 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.

110. Paragraph 30 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. The paragraph 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:

- circumstances where a member of the Covered Group directly affected by the case does not accept, or is considered not to accept, the proposed Competent Authority resolution of the case that reflects the outcome of the dispute resolution panel decision (see paragraph 5(b)(i));
- circumstances where 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 referred to in paragraph 5(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;
- circumstances 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 19; or
- circumstances where the member of the Covered Group that requested the dispute resolution panel withdraws its request for a dispute resolution panel or its request for a mutual agreement procedure with respect to the case in which the Related Issues arise.

111. Paragraph 30(b)(iv) recognises, however, that 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 27 describes 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 27(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.

Paragraph 31

112. Paragraph 31 provides that the fees of the members of the dispute resolution panel appointed pursuant to paragraph 16(b)(ii) and the Chair shall be set with reference to a schedule of fees to be mutually agreed and periodically updated, as appropriate, by 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 31 includes a default rule that applies in the absence of a Competent Authority mutual agreement. Pursuant to paragraph 31(a), that default rule provides that such fees shall be set with reference to [the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators¹⁶].

113. Different points of reference may be used to establish the fees of the members of the dispute resolution panel appointed pursuant to paragraph 16(b)(ii) and the Chair. One alternative to the ICSID Schedule of Fees is the standard agreed in the context of European Union tax dispute resolution mechanisms for the compensation of experts performing a decision-making function similar to that of dispute resolution panel members. Contracting Jurisdictions may also wish to explore alternative arrangements to reflect the particular circumstances of the Contracting Jurisdictions and their bilateral relationship.

114. Paragraph 31(b) limits the reimbursement of expenses of the members of the dispute resolution panel appointed pursuant to paragraph 16(b)(ii) 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 31(a), the introductory language of paragraph 31 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.

115. Because members of the dispute resolution panel appointed pursuant to paragraph 16(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.

116. Paragraph 31 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

¹⁶ 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.

resolution panel members only to choose between two proposed resolutions, the paragraph provides that dispute resolution panel members appointed pursuant to paragraph 16(b)(ii) and the Chair will only be compensated for a total of [five] days ([three] days of preparation and [two] meeting days).

117. If the dispute resolution panel considers that it requires additional time to properly consider the case, paragraph 31 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.

Paragraph 32

118. In recognition of the additional costs involved with the dispute resolution panel mechanism, paragraph 32 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 32 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.

Paragraph 33

119. Paragraph 33 describes the interaction 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 mutual agreement procedure case. Given that a purpose of such conventions, like the purpose of Article 19, is to resolve disputes efficiently and effectively, paragraph 33 avoids duplication of efforts by providing that an unresolved Related Issue arising from a mutual agreement procedure case 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 33 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.

120. Paragraph 33 defines the circumstances under which the Section 3 dispute resolution panel mechanism will not apply with reference to the following objective criteria:

- 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.
- 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.

121. 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.

122. 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 33 and 34 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.

Paragraph 34

123. Paragraph 34(a) provides that, notwithstanding paragraph 33, 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 mutual agreement procedure case 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.

124. 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 only to apply 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 34(a) shall apply.

125. 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 34(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 34(a) agreement to apply the Section 3 to unresolved Related Issues in a single MAP case would be rare.

126. Paragraph 34(b) then provides, 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 mutual agreement procedure cases within the scope 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 34(b) reflects the intention of European Union Member States to make clear in the Convention the primacy of these European Union tax dispute resolution mechanisms with respect to the dispute resolution panel process provided for in the Convention.

Article 20 (Elective binding dispute resolution panel mechanism)¹⁷

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 [two-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 [two-year] average shall initially be computed using the MAP Statistics for the [two years] that immediately precede the date of entry into effect of Part VI of the Convention for that Contracting Jurisdiction; and
- b) the [two-year] average shall be computed during the review provided for in paragraph 4 using the MAP Statistics for the [two 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.

¹⁷ As noted in the Background section at the beginning of this document, Article 20 does not represent the final or consensus views of the Inclusive Framework members. In particular, members have divergent views on the quantitative MAP case threshold used to determine eligibility to use the elective mechanism, on whether the quantitative threshold should include a materiality element, on the period over which average MAP case inventories will be calculated and on the frequency with which a jurisdiction's eligibility to use the mechanism will be reviewed.

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 [two 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.

Competent Authorities must mutually agree to submit an issue to the dispute resolution panel

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) and 5(c) substituted in place of paragraphs 2(a), 2(b) and 5(c) of Article 19, respectively (changes with respect to the text of Article 19(2)(a), 19(2)(b) and 19(5)(c) are indicated in ~~strikethrough~~ for deletions and ***bold italics*** for additions):

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 of Article [X] 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 9 or 10, as the case may be (unless, prior to the expiration of that period the Competent Authorities 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 case shall, if the member of a Covered Group requests ***and the Competent Authorities mutually agree***, be resolved by 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(13)*** ~~paragraph 13~~).

b) 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 the Covered Group that presented the case to the

Competent Authority to which it presented the case. 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 Related Issues;
 - iv) a written statement regarding confidentiality as provided in **Article 19(19)** ~~paragraph 19~~ from the members of the Covered Group directly affected by the case and their authorised representatives or advisors;
 - v) a written statement by the members of the Covered Group directly affected by the case describing how the unresolved issues in the case are Related Issues within the meaning of **Article 19(1)** ~~paragraph 1~~; and
 - vi) a written confirmation that the member of the Covered Group sent a copy of the request and all accompanying documentation to the Competent Authority of the other Contracting Jurisdiction, as required by **Article 19(2)(d)** ~~paragraph 2(d)~~.
- 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.~~

Commentary on Article 20

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 review¹ 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 Methodology¹⁸ 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 Chapter 4 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 Chapter 4 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.
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 two-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,

¹⁸ 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>.

- (a) the [two-year] average shall initially be computed using the MAP Statistics for the [two years] that immediately precede the date of entry into effect of Chapter 4 of the Convention for that Contracting Jurisdiction; and
- (b) the [two-year] average shall be computed during the review provided for in paragraph 4 using the MAP Statistics for the [two years] that immediately precede the date of that review.

These rules related to the computation of the [two-year] average are tied to the review of the eligibility of a Contracting Jurisdiction for the elective binding mechanism every two 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 [two 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 2(a), 2(b) and 5(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(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(2)(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(13)”; the corresponding references in Article 19(2)(a) are to “this Article” and “paragraph 13”.

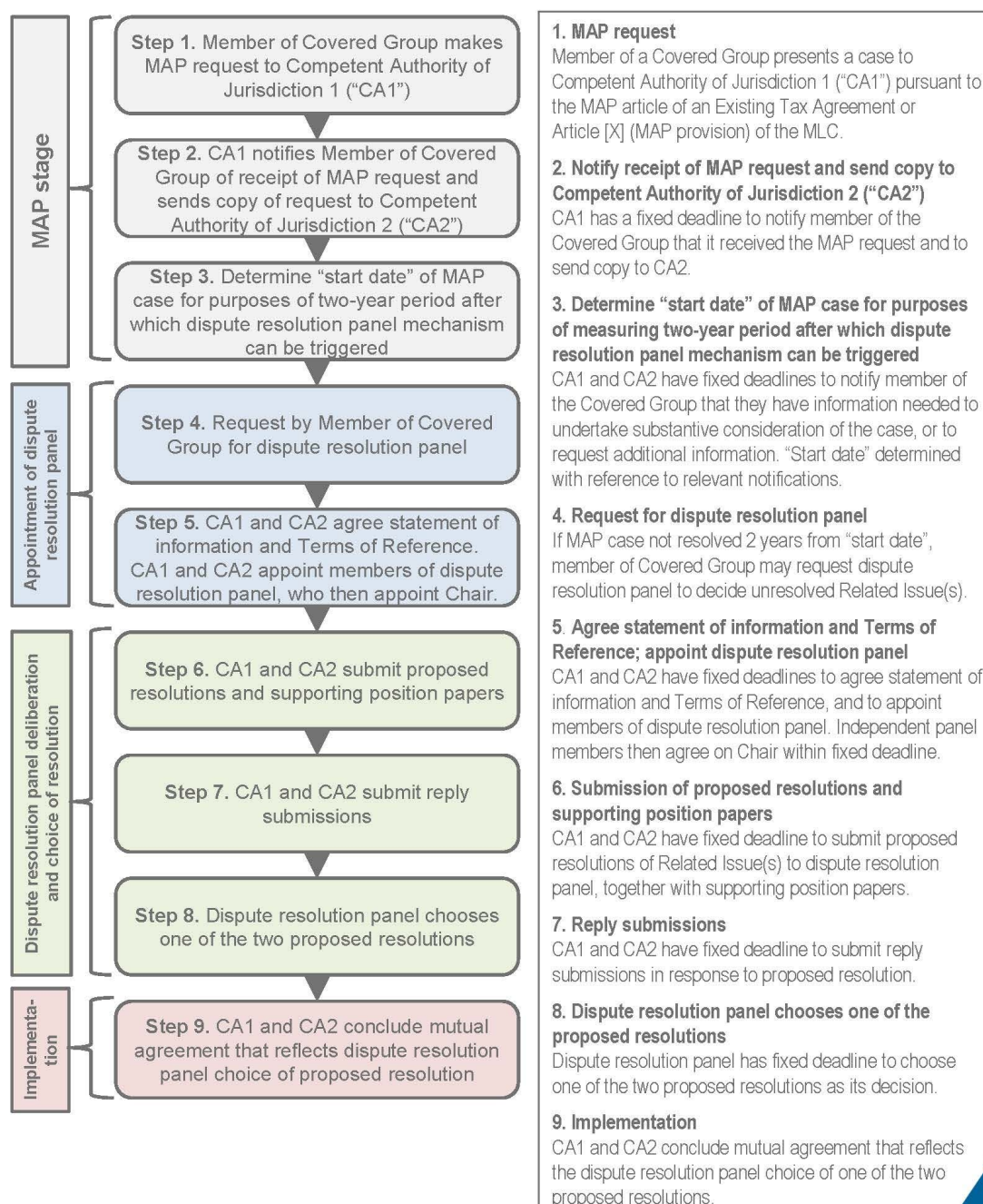
- Paragraph 5(b)(iv) refers to “Article 19(19)”; the corresponding reference in Article 19(2)(b)(iv) is to “paragraph 19”.
- Paragraph 5(b)(v) refers to “Article 19(1)”; the corresponding reference in Article 19(2)(b)(v) is to “paragraph 1”.
- Paragraph 5(b)(vi) refers to “Article 19(2)(d)”; the corresponding reference in Article 19(2)(b)(vi) is to “paragraph 2(d)”.
- 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 paragraph 5(a) if it disagreed that the issue was a Related Issue.

Annex – Process Map



Dispute resolution panel process

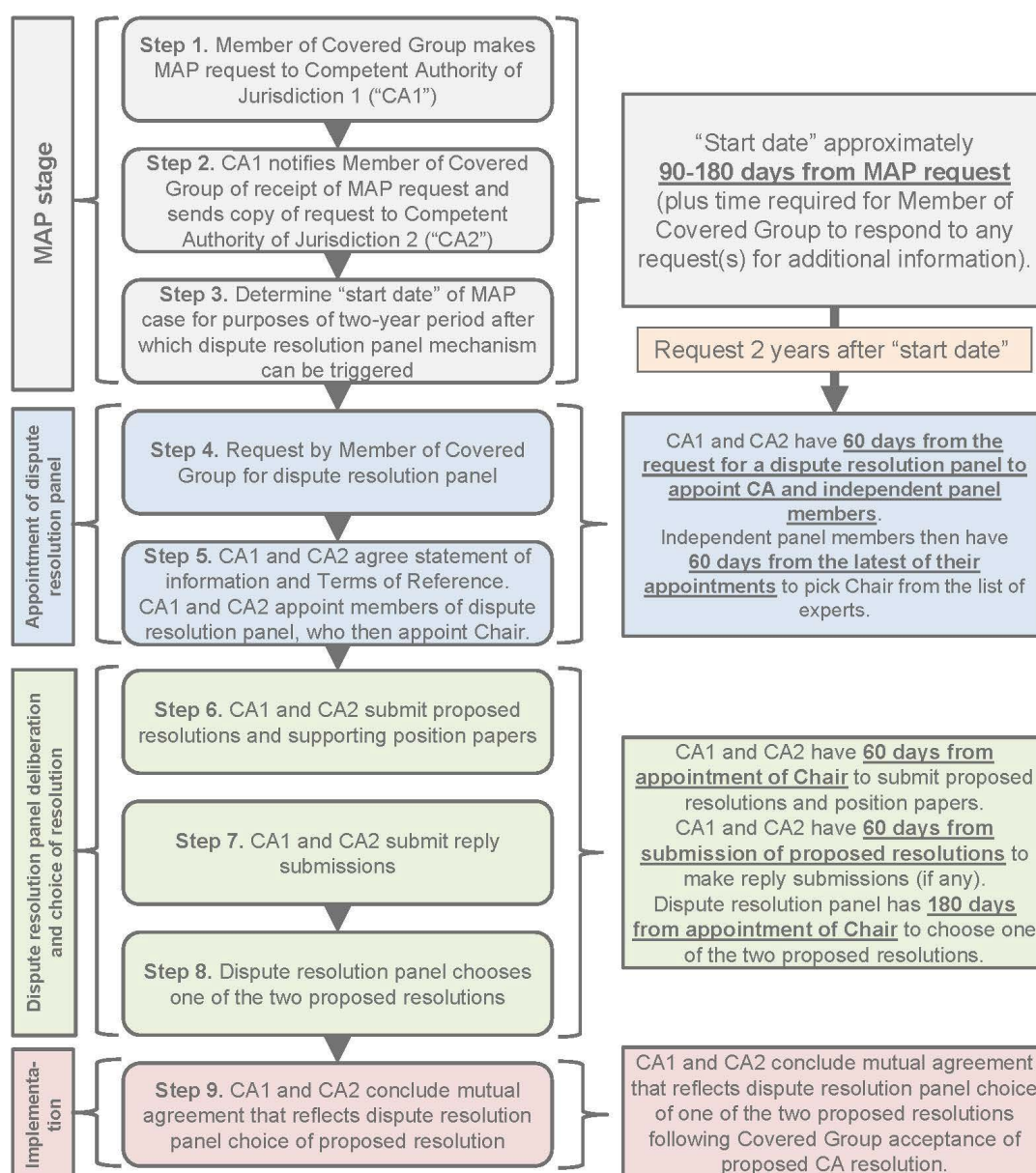
Overview





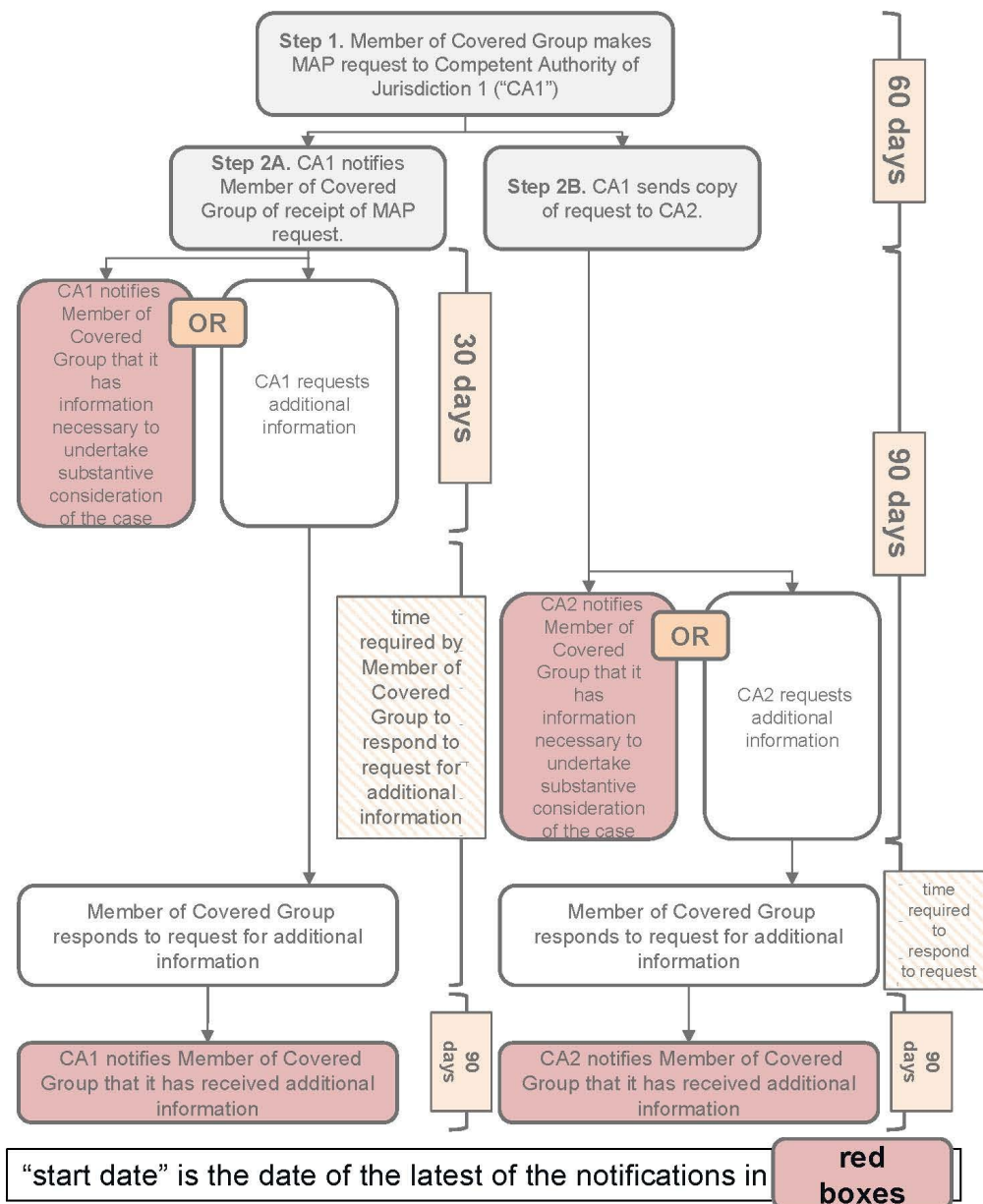
Dispute resolution panel process

Overview with indicative timeline





Determining “start date”



Appointment of dispute resolution panel **Panel deliberation and decision** Steps 4-9

