

## **Mutual agreement on the implementation of the arbitration process pursuant to paragraph 5 of Article 25**

The competent authorities of the Swiss Confederation and the Kingdom of the Netherlands have entered into the following mutual agreement pursuant to paragraph 5 of Article 25 of the Convention of 26 February 2010 between the Swiss Confederation and the Kingdom of the Netherlands for the avoidance of double taxation with respect to taxes on income (the “Convention”) to establish the mode of application of the arbitration process. The competent authorities may modify or supplement this agreement by an exchange of letters between them.

### **I. Request for submission of the case to arbitration**

1. A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 5 of Article 25 of the Convention (the “request for arbitration”) shall be made in writing and sent to one or both of the competent authorities. The request shall contain sufficient information to identify the case. The request shall also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Contracting States. Within 30 days after the receipt of the request, a competent authority who received it without any indication that it was also sent to the other competent authority shall send a copy of that request and the accompanying statements to the other competent authority.

### **II. Start date of the three-year period**

2. A request for arbitration may only be made after three years from the date on which a case presented to the competent authority of one Contracting State under paragraph 1 of Article 25 has also been presented to the competent authority of the other Contracting State (the “arbitration start date”). For this purpose, the information required by the competent authorities in order to address the case will include:

- a) for Switzerland, the information set out in section 6 of the State Secretary for International Finance’s Factsheet on the Mutual Agreement Procedure (May 2018), as such guidance may be amended from time to time;
- b) for the Netherlands, the information set out in Annex B of the Decree of 11 June 2020, no. 2020-0000101607, Government Gazette 2020, 32689, regarding Mutual Agreement Procedures, as such guidance may be amended from time to time; and
- c) any other specific additional information requested by the competent authority of a Con-

tracting State within 90 days of the receipt of the request for a mutual agreement procedure.

3. The following rules shall apply in order to determine the arbitration start date:
  - a) The competent authority that received the initial request for a mutual agreement procedure under paragraph 1 of Article 25 of the Convention shall, within 60 days after receiving the request, send:
    - (i) a notification to the person who presented the case that it has received the request; and
    - (ii) a notification of that request, along with a copy of the request, to the competent authority of the other Contracting State.
  - b) Within 90 days after receiving the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting State), each competent authority shall, if necessary, request additional information necessary to undertake substantive consideration of the case from the person who presented the case.
  - c) Where, pursuant to subparagraph b) above, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within 90 days after receiving the additional information from that person, notify that person and the other competent authority either:
    - (i) that it has received the requested information; or
    - (ii) that some of the requested information is still missing.
  - d) Where neither competent authority has requested additional information pursuant to subparagraph b) above, the arbitration start date shall be the date that is 90 days after the notification to the competent authority of the other Contracting State pursuant to subdivision (ii) of subparagraph a) above.
  - e) Where additional information has been requested pursuant to subparagraph b) above, the arbitration start date shall be the earlier of:
    - (i) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subdivision (i) of subparagraph c) above; and
    - (ii) the date that is 90 days after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subdivision (ii) of subparagraph c) above, such notification shall be treated as a request for additional information under subparagraph b).

4. The competent authority of the Contracting State to whom the case was presented according to paragraph 1 of Article 25 of the Convention shall inform the person who made the request for arbitration of the arbitration start date determined pursuant to subparagraph d) or e) of paragraph 3, before the expiration of the three year period from the start date of the mutual agreement procedure at hand.

5. If the competent authorities of both Contracting States agree, the request for arbitration may be made before the three year period after the arbitration start date pursuant subparagraphs d) or e) of paragraph 3 has expired. The competent authority to whom the case was presented will as soon as possible inform the person who made the request for arbitration of the determination.

6. Where a person who presented the case and a competent authority have agreed to suspend the mutual agreement procedure, the three-year period referred to in paragraph 2 will stop running until the suspension has been lifted.

7. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the arbitration start date referred to in paragraph 2, the period provided in that paragraph 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.

### **III. Selection and appointment of arbitrators**

8. The arbitration panel shall consist of three individual arbitrators with expertise and experience in international tax matters. Each arbitrator appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

9. Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities shall each appoint one arbitrator. Within 60 days after the latter appointment, the arbitrators so appointed will appoint a third arbitrator among the list established between the competent authorities who will function as Chair. The

Chair shall not be a national or resident of either Contracting State.

10. If any appointment is not made within the required time period, the arbitrator(s) not yet appointed will be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting State within 10 days after receiving a request to that effect from the person who made the request for arbitration.

11. The same procedure will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun.

12. An arbitrator will be considered to have been appointed when a letter confirming that appointment and signed by both the arbitrator and the person or persons who have the power to appoint that arbitrator has been communicated to both competent authorities.

#### **IV. Arbitration process**

Except to the extent that the competent authorities of the Contracting States mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to paragraph 5 of Article 25 of the Convention:

13. Within 60 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities agree on a different period or agree to use a different approach), the competent authority of each Contracting State shall submit to the Chair of the arbitration panel a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities). The proposed resolution shall be submitted by courier in 4 copies or by an appropriate electronic system for secure transfer of documents. The Chair will forward the proposed resolutions to the other members of the arbitration panel and the respective other competent authority only after having received both proposed resolutions or after the 60 day period has expired, whichever is the earlier. The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income) or, where specified, the maximum amount of tax that may be charged pursuant to the provisions of the Convention, for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting States have been unable to reach agreement on an issue regarding the conditions for application of a provision of the Convention (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

14. The competent authority of each Contracting State may also submit to the Chair of the arbitration panel, within the period of time provided for in paragraph 13, a supporting position

paper for consideration by the arbitrators. The position paper shall be submitted together with the proposed resolution by courier in 4 copies or by an appropriate electronic system for secure transfer of documents. The Chair will submit the supporting position papers to the other members of the arbitration panel and the respective other competent authority only after having received both supporting position papers or after the 60 day period has expired, whichever is the earlier. Any annex to a supporting position paper must, as far as it is related to the case at hand, be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure in the case for which the arbitration procedure is initiated.

15. Each competent authority may also submit to the arbitrators and to the other competent authority, within 120 days after the appointment of the Chair of the arbitration panel, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. The reply shall be submitted in 4 copies or by an appropriate electronic system for secure transfer of documents. The Chair will submit the replies to the other members of the arbitration panel and the respective other competent authority only after having received both replies or after the 120 day period has expired, whichever is the earlier.

16. The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the arbitrators. Unless the competent authorities agree otherwise, the arbitration decision shall be delivered to the competent authorities of the Contracting States in writing within 60 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 150 days after the appointment of the Chair of the arbitration panel. The arbitration decision shall not be published and shall have no precedential value.

17. In the event that the competent authority of one Contracting State fails to submit a proposed resolution within the period of time provided for in paragraph 13, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

18. The arbitrators will make their decisions in accordance with the applicable provisions of the Convention, of its related competent authority agreements and, subject to these provisions, of those of the domestic laws of the Contracting States. Issues of treaty interpretation will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, having regard to the Commentaries of the OECD Model Tax Convention as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction to the OECD Model Tax Convention. Issues related to the application of the arm's length principle should similarly be decided having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as periodically amended.

## **V. Streamlined arbitration process**

19. Notwithstanding section IV, the two competent authorities can chose, by common consent, a streamlined arbitration process. If so, the two competent authorities shall, by common consent, jointly appoint one arbitrator, within 60 days of the date of the request for arbitration under section I. Paragraphs 13 to 18 will be applicable to the streamlined arbitration process, with the exception that instead of the timelines of paragraph 15 and 16, the following timelines apply:

- A time-limit of 100 days after the appointment of the arbitrator for the submission of a reply pursuant to paragraph 15,
- A time limit of 130 days after the appointment of arbitrator to render a decision pursuant to paragraph 16.

## **VI. Communication of information and confidentiality**

20. For the sole purposes of the application of the provisions of Articles 25 and 26 of the Convention and of the domestic laws of the Contracting States, concerning the communication and the confidentiality of the information related to the case that results in the arbitration process, each arbitrator and a maximum of three staff per arbitrator (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be designated as authorised representatives of the competent authority that has appointed that arbitrator or, if that arbitrator has not been appointed by a competent authority, of both competent authorities.

21. In designating a person as its authorised representative pursuant to paragraph 20, the competent authority of a Contracting State shall ensure that the person agrees in writing to treat any information relating to the arbitration proceeding consistently with the confidentiality requirements of the Convention and of the applicable laws of that Contracting State.

22. Communication amongst the arbitrators and between the arbitrators and the competent authorities shall take place through appropriate tele-and videoconferencing and/or an appropriate electronic system for secure transfer of documents.

23. At the termination of the arbitration proceedings each arbitrator and their staff shall immediately destroy all documents or other information received in the connection with the proceedings, either in physical or electronic form.

## **VII. Costs**

24. Unless agreed otherwise by the competent authorities:

- a) each competent authority, the person who requested the arbitration and other persons affected by the case will bear the costs related to their own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of his views);
- b) other costs related to the arbitration proceedings will be borne in equal shares by the two competent authorities.
- c) The fees of the arbitrators will be fixed at EUR 1,000 per person per day of meetings, preparations or travel, with a maximum of seven days. The fees of the Chair will be increased by 10 per cent. The reimbursement of the expenses of the arbitrators will be limited to the reimbursement usual to civil servants of the Contracting State that first received the request for submission of the unresolved issue(s) in the case to arbitration.

## **VIII. Failure to communicate the decision within the required period**

25. In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 16, or paragraph 19, as the case may be, or within any other period agreed to by the competent authorities, the competent authorities may agree to appoint new arbitrators in accordance with section III. The date of such agreement shall, for the purposes of the subsequent application of section III, be deemed to be the date when the request for arbitration has been received by both competent authorities.

## **IX. Where no arbitration decision will be provided**

26. Where, at any time after a request for arbitration has been made and before the arbitrators have delivered a decision to the competent authorities, the competent authorities notify in writing the arbitrators:

- a) that they have solved all the unresolved issues that were subject to arbitration, or
- b) that the person who presented the case has withdrawn the request for arbitration or the request for a mutual agreement procedure, or
- c) a decision concerning the issue is rendered by a court or administrative tribunal of either State

no arbitration decision shall be provided and the mutual agreement procedure shall be considered to have been completed.

## **X. Final decision and implementation**

27. The arbitration decision with respect to the issues submitted to arbitration shall be implemented through a mutual agreement between the competent authorities within 180 days after the communication of the decision to them. The arbitration decision shall be final and be binding on both Contracting States except in the following cases:

- a) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement; or
- b) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal; or
- c) the arbitration decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 25 or for any other reasons. In such a case, the request for arbitration under paragraph 1 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of paragraphs 20, 21, 22, 23 and 24). In such a case, a new request for arbitration may be made, unless the competent authorities agree that such a new request should not be permitted, within 90 days after the decision of the court.

## **XI. Application**

28. This agreement applies to any request for arbitration made pursuant to paragraph 5 of Article 25 of the Convention concerning assessments for taxable years and periods beginning on or after 1 January 2012, with the exception of paragraphs 2 and 3 that will apply only to cases where the request for the initiation of the mutual agreement procedure made pursuant to paragraph 1 of Article 25 of the Convention was submitted after the time of signature of this agreement.

29. For mutual agreement procedures pending at the time of signature of this agreement, the arbitration start date according to paragraph 2 will be determined by mutual agreement between the competent authorities.



Signed at ..... on .....

Signed at ..... on .....

For the Competent Authority of Switzerland:  
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For the Competent Authority of the Netherlands:  
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