

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 Belgium have entered into the following mutual agreement pursuant to paragraph 5 of Article 25 of the Convention of 28 August 1978 between the Swiss Confederation and the Kingdom of Belgium for the avoidance of double taxation with respect to taxes on income and on capital, as modified by the Amendment of 10 April of 2014 (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 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 two/three-year period

2. A request for arbitration may only be made after expiration of the time period applicable pursuant paragraph 5 of Article 25 of the Convention 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.

For this purpose, a case shall be considered to have been presented to the competent authorities of both Contracting States (the arbitration start date) when the information required in order to address the case as specified in each of the respective Contracting States MAP guidance have been submitted to both of the Contracting States competent authorities.

The determination of the arbitration start date will follow the procedure described in paragraph 3.

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:

- (i) send a notification to the person who presented the case that it has received the request; and
- (ii) send 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 taxpayer of the arbitration start date determined pursuant to subparagraph d) or e) of paragraph 2, before the expiration of a two/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 two/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 immediately inform the applicant of the determination.

6. Where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the two/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. Terms of Reference

8. Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities jointly determine on the questions regarding the application of the Convention to the concerned case to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the “Terms of Reference” for the case.

Notwithstanding the following sections of this agreement, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these sections and deal with such other matters as are deemed appropriate.

9. If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 8, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period will constitute the tentative Terms of Reference.

Within 30 days after all the arbitrators have been appointed as provided in the following paragraphs of this mutual agreement, the Chair will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of

Reference based on the lists so communicated.

Within 30 days after the revised version has been received by both of them, the competent authorities may jointly determine different Terms of Reference and communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will constitute the Terms of Reference for the case.

If no different Terms of Reference have been jointly determined by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

IV. Selection and appointment of arbitrators

10. 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, nor have dealt with the case in respect of which the request for arbitration has been made in any capacity, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a period of 12 months after the decision of the arbitration panel was delivered of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

11. Within 60 days after the Terms of Reference have been agreed upon or at the latest within 120 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, nor have had his usual place of residence in either Contracting State, nor have been employed by either Contracting State.

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.

V. Arbitration process

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 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 reception of 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. The proposed solution will not exceed five pages.

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 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 reception of both supporting position papers or after the 60 day period has expired, whichever is the earlier.

A supporting position paper shall not exceed 30 pages, plus annexes. 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 procedure case.

15. Each competent authority may also submit to the Chair of the arbitration panel, 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 submission shall be submitted by courier in 4 copies or by appropriate electronic system for secure transfer of documents. The Chair will submit the reply submission to the other members of the arbitration panel and the respective other competent authority only after

reception of both replies submissions or after the 120 day period has expired, whichever is the earlier.

A reply submission shall not exceed 10 pages, plus annexes.

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. The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

VI. Streamlined arbitration process

19. Notwithstanding section IV, the two competent authorities can choose, by common consent, a streamlined arbitration process. If such is the case, the two competent authorities shall, by common consent, agree on the Terms of Reference and 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 of a time-limit of 100 days after the appointment of the Chair of the arbitration panel for the submission of a reply pursuant to paragraph 15, and a time limit of 130 days after the appointment of the Chair of the arbitration panel for the arbitration panel to render a decision pursuant to paragraph 16.

VII. Communication of information and confidentiality

20. For the sole purposes of the application of the provisions of Articles 25 and 26 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. As far as possible, the arbitrators will use tele- and videoconferencing to communicate between themselves and with both competent authorities. If a face-to-face meeting involving additional costs is necessary, the Chair will contact the competent authorities who will decide when and where the meeting should be held and will communicate that information to the arbitrators.

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.

VIII. 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) costs related to any meeting of the arbitration panel will be borne by the competent authority that hosts that meeting; and

c) costs related to the arbitration proceedings will be borne in equal shares by the two competent authorities.

d) The fees of the arbitrators will be fixed at EUR 1000 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.

IX. 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 IV. The date of such agreement shall, for the purposes of the subsequent application of section IV, be deemed to be the date when the request for arbitration has been received by both competent authorities.

X. 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) that 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 as well as the arbitration proceedings shall be considered to have been completed.

XI. Final decision and implementation

27. The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1 of Article 25 of the Convention within 180 days after the communication of the decision to them. The arbitration decision shall be final.

28. The arbitration decision shall be binding on both Contracting States except in the following cases pursuant to paragraph 5 of Article 25 of the Convention :

- 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.

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.

c) A 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 to 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.

d) if the competent authorities agree on a different solution within six months after the decision has been communicated to them.

XII. Application

29. 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 2018, 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.

30. For 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 Berne on 3 July 2023

Signed at Brussels on 3 July 2023

For the Competent Authority of the Swiss
Confederation:

For the Competent Authority of the King-
dom of Belgium: