

Mutual agreement on the implementation of paragraph 5 of Article 24 of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income

The competent authorities of Switzerland and the United Kingdom have entered into the following mutual agreement to establish the mode of application of the arbitration process provided for in paragraph 5 of Article 24 of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at London on 8 December 1977, as amended by the protocols signed at London on 5 March 1981, at Berne on 17 December 1993, at London on 26 June 2007, at London on 7 September 2009 and at London on 30 November 2017 (hereinafter “the Convention”). The competent authorities may modify or supplement this mutual 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 24 of the Convention (the “request for arbitration”) will be made in writing and sent to one or both of the competent authorities. The request will contain sufficient information to identify the case. The request will 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 will send a copy of that request and the accompanying statements to the other competent authority.

II. Start date of the three-year period for arbitration

2. A request for arbitration may only be made after three years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities (hereinafter referred to as 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 United Kingdom, the information set out in page 423130 of HM Revenue

and Customs' International Manual, as such guidance may be amended from time to time; and

- c) any other specific additional information requested by the competent authority of a Contracting State within 90 days of the receipt of the request for a mutual agreement procedure.

The competent authorities of the Contracting States will notify each other of any significant changes that are made with respect to the information requirements provided in their domestic guidance relevant to a request for a mutual agreement procedure.

3. The following rules will 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 24 of the Convention will, 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 within 90 days of receiving a copy thereof from the competent authority of the other Contracting State), each competent authority will either:
 - (i) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or
 - (ii) request additional information from that person for that purpose.
- c) Where, pursuant to subdivision (ii) of 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 will, 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 subdivision (ii) of subparagraph b) above, the arbitration start date will be the earlier of:
 - (i) the date on which both competent authorities have notified the person

who presented the case pursuant to subdivision (i) of subparagraph b) above; and

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

III. Requests prior to the end of the three-year period for arbitration

4. If the competent authorities of both Contracting States agree, a request for arbitration may be made before the three year period provided for in Article 24(5)(b) of the Convention has expired. The competent authority to whom the case was presented will immediately inform the applicant of the determination.

IV. Suspension and extension of the three-year period for arbitration

5. Where:

- a) a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because the case is pending before a court or administrative tribunal, or
- b) the competent authorities have agreed to suspend the mutual agreement procedure referred to in paragraph 1 because another case concerning the same issue of principle where the decision would apply to the person that has made the request for arbitration is pending before a court or administrative tribunal,

the period provided in paragraph 2 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case before the court or administrative

tribunal has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have approved the suspension of the mutual agreement procedure, the period provided in paragraph 2 will stop running until the suspension has been lifted.

6. Where both competent authorities accept that a person directly affected by the case has failed to provide in a timely manner any additional information requested by either competent authority after the start date of the three-year period referred to in paragraph 2, the period provided in that paragraph will be extended by a period of time equal to the period beginning on the date by which the information was requested and ending on the date by which that information was provided.

V. Terms of reference

7. Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities will decide on the questions 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 paragraphs of this mutual agreement, the competent authorities may also, in the Terms of Reference, provide for procedural rules that are additional to, or different from, those included in these paragraphs and deal with such other matters as are deemed appropriate.

8. 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 7, 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 will have the possibility to decide on different Terms of Reference and to 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 decided on between 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.

VI. Selection and appointment of arbitrators

9. The arbitration panel will consist of three individual arbitrators with expertise or

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.

10. Within 60 days after the Terms of Reference have been received by the person who made the request for arbitration, or, where paragraph 8 applies, within 120 days after the request for arbitration has been received by both competent authorities, the competent authorities will each appoint one arbitrator. Within 60 days after the latter appointment, the arbitrators so appointed will appoint a third arbitrator who will function as Chair. The Chair will not be a national or resident of either Contracting State.

11. 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.

12. 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.

13. 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.

VII. Arbitration process

14. Within 60 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities decide on a different period or decide to use a different approach with respect to that case), the competent authority of each Contracting State will 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 will 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 will 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.

15. 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 14, a supporting position paper for consideration by the arbitrators. The position paper will 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 will not exceed 30 pages per issue, plus annexes.

16. 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. A reply submission will not exceed 10 pages per issue, plus annexes.

17. If the Panel considers that it should meet physically to handle the case, the Chair shall make a proposal with regard to the date and location of the meeting, having in mind the principle of efficiency, and submit it to both competent authorities. If the competent authorities do not object to the proposal within 30 days after its reception, the proposal is considered approved.

18. Subject to the provisions of the Convention and of this agreement, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.

19. The arbitration panel will 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 will 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 decide otherwise, the arbitration decision will 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 will have no precedential value.

20. 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 14, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

VIII. Optional arbitration process

21. If the competent authorities in the Terms of Reference elect to use the approach described in this Part with respect to a given case, each competent authority must provide to the arbitration panel and to the other competent authority, within 120 days after the appointment of the Chair of the arbitration panel, any information that it considers necessary for the panel to reach its decision. That information should include a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Unless the competent authorities agree otherwise, the arbitration panel may not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof). For the avoidance of doubt, information that is publicly available is considered to be available to both competent authorities.

22. The person who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedure. In addition, if the competent authorities and arbitrators all agree, the person may present his position orally during the arbitration proceedings.

23. If the Panel considers that it should meet physically to handle the case, the Chair shall make a proposal with regard to the date and location of the meeting, having in mind the principle of efficiency, and submit it to both competent authorities. If the competent authorities do not object to the proposal within 30 days after its reception, the proposal is considered approved.

24. Subject to the provisions of the Convention and of this agreement, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.

25. Unless the competent authorities agree otherwise, the arbitration decision shall be delivered to the competent authorities of the Contracting States in writing within 365 days after the date of the appointment of the Chair and shall indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision shall be adopted by a simple majority of the arbitrators. The arbitration decision shall have no precedential value. With the permission of the person who made the request for arbitration and both competent authorities, the decision of the arbitration panel will be made public in redacted form without mentioning the names of the parties involved or any details that might disclose their identity and with the mention that the decision has no formal precedential value.

IX. Streamlined arbitration process

26. If the competent authorities in the Terms of Reference elect to use the approach described in this Part with respect to a given case they will, by common consent and notwithstanding paragraphs 9 to 11, appoint one arbitrator within 60 days after the Terms of Reference have been received by the person who made the request for arbitration.

27. Within 60 days after the appointment of the arbitrator, the competent authority of each Contracting State will submit to the arbitrator 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 will be submitted by courier in 2 copies or by appropriate electronic system for secure transfer of documents. The arbitrator will forward the proposed resolutions to 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 will 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.

28. The competent authority of each Contracting State may also submit to the arbitrator, within the period of time provided for in paragraph 27, a supporting position paper for consideration by the arbitrator. The position paper will be submitted together with the proposed resolution by courier in 2 copies or by appropriate electronic system for secure transfer of documents. The arbitrator will submit the supporting position papers to 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 will not exceed 30 pages per issue, plus annexes.

29. The arbitrator will 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 will not include a rationale or any other explanation of the decision. Unless the competent authorities decide otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting States in writing within 30 days after the reception by the arbitrator of the last reply submission. The arbitration decision will have no precedential value.

30. 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 27, the arbitrator will select as its decision the proposed resolution submitted by the other competent authority.

X. Communication of information and confidentiality

31. For the sole purposes of the application of the provisions of Articles 24 and 25 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) will 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.

32. In designating a person as its authorised representative pursuant to paragraph 31, the competent authority of a Contracting State will ensure that the person accepts 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.

XI. Costs

33. Unless decided 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 his 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.

XII. Applicable legal principles

34. The arbitrators shall decide the issues submitted to arbitration in accordance with the applicable provisions of the Convention and, subject to these provisions, of those of the domestic laws of the Contracting States. Decisions related to treaty interpretation will be made 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. Decisions related to the application of the arm's length principle should similarly be made having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

XIII. Failure to communicate the decision within the required period

35. In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 19 or 25, as the case may be, or within any other period approved by the competent authorities, the competent authorities may decide to appoint new arbitrators in accordance with Part VI. The date of the decision to appoint new arbitrators will, for the purposes of the subsequent application of Part VI, be deemed to be the date when the request for arbitration has been received by both competent authorities.

36. In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 29, or within any other period approved by the competent authorities, the competent authorities may decide to appoint a new arbitrator in accordance with Part IX. The date of the decision to appoint a new arbitrator will, for the purposes of the subsequent application of Part IX, be deemed to be the date when the request for arbitration has been received by both competent authorities.

XIV. Where no arbitration decision will be provided

36. 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

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

XV. Final decision and implementation

37. The arbitration decision will be final, unless that decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 24

of the Convention or for any other reasons. If a decision is found to be unenforceable, the request for arbitration will be considered not to have been made and the arbitration process will be considered not to have taken place (except for the purposes of Parts X and XI).

38. The competent authorities will implement the arbitration decision within 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

XVI. Application

39. This mutual agreement applies to any request for arbitration made pursuant to paragraph 5 of Article 24 of the Convention after that provision has become effective.

40. However, in respect of cases presented to the competent authorities before the date of signature of this mutual agreement, the time-limit for the competent authorities to request further information from the taxpayer under the provisions of subparagraph b) of paragraph 3 will be 90 days from the date of signature of this agreement.

Signed at Bern on 16 June 2021

Signed at London on 16 June 2021

For the Competent Authority of
Switzerland:

For the Competent Authority of the United
Kingdom:

Pascal Duss
State Secretariat for International
Finance

Tom Matthews
Business, Assets and International
HM Revenue and Customs