

## **COMPETENT AUTHORITY MUTUAL AGREEMENT ON THE IMPLEMENTATION OF PART VI OF THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING**

The competent authorities of the Netherlands and of Luxembourg (hereinafter referred to as the "Contracting Jurisdictions") hereby enter into the following mutual agreement (hereinafter referred to as the "Agreement") to establish the mode of application of the arbitration process provided for in Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as "the Convention"). This Agreement is entered into pursuant to Article 25 of the Convention between the Kingdom of the Netherlands and the Grand Duchy of Luxembourg for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital (hereinafter referred to as "the Covered Tax Agreement"), as modified by Article 16 of the Convention, and paragraph 10 of Article 19 of the Convention. The competent authorities may modify or supplement this Agreement by an exchange of letters between them.

### **1. Request for submission of case to arbitration**

A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 1 of Article 19 of the Convention (hereinafter referred to as the "request for arbitration") must be made in writing and sent to one or both of the competent authorities. The request must contain sufficient information to identify the case. The request must 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 Jurisdictions. Within 10 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.

### **2. Minimum information necessary to undertake substantive consideration of the case**

For purposes of Article 19 of the Convention, references to "the information necessary to undertake substantive consideration of the case" and "the minimum information necessary for each competent authority to undertake substantive consideration of the case" will be understood as follows:

- a) Identity of the person(s) covered in the request for a mutual agreement procedure - the name, address, taxpayer identification number (if any) and/or birth date of the person who presented the case (hereinafter referred to as the "taxpayer"), contact details and the relationship(s) between the taxpayer and other persons covered in the request for a mutual agreement procedure.
- b) The basis for the request - the applicable tax treaty and the specific provision(s) which the taxpayer considers is not being correctly applied by either one or both of the Contracting Jurisdictions (indicating which Contracting Jurisdiction, the regional or local tax administration office that has made, or is proposing to make, the adjustment (if relevant), and contact information for the relevant person(s) in that Contracting Jurisdiction responsible for the adjustment).
- c) Facts of the case - a summary of all relevant facts of the case, including documentation to support these facts, the taxation year(s) or period(s) involved and the related amounts (in all relevant currencies and supported by calculations, if applicable).
- d) Analysis of the issue(s) to be resolved through the mutual agreement procedure - an analysis of the issues with respect to which a mutual agreement procedure is requested, including the taxpayer's interpretation of the application of the relevant treaty provision(s), to support the taxpayer's basis for its claim that the tax treaty provision(s) has not been correctly applied by either one or both of the Contracting Jurisdictions. The taxpayer's analysis should be supported with relevant documentation, which may include, but is not limited to

- transfer pricing documentation required by domestic legislation or other published guidance in the taxpayer's Contracting Jurisdiction of residence;
  - copies of tax assessments and audit or other tax administration documentation and correspondence reflecting what the taxpayer considers to be the incorrect application of the relevant treaty provision(s); and
  - copies of briefs, objections, etc., submitted by the taxpayer in response to the action or proposed action of a tax administration.
- e) Whether the request for a mutual agreement procedure was also submitted to the competent authority of the other Contracting Jurisdiction - a copy of any other relevant mutual agreement procedure request(s) and associated documents filed, or to be filed, with the competent authority of the other Contracting Jurisdiction, including copies of correspondence from the other tax administration. The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.
- f) Whether the request for a mutual agreement procedure was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes - a copy of any other request for a mutual agreement procedure under another instrument that provides for a mechanism to resolve treaty-related disputes (including all documentation filed with that submission). The taxpayer should indicate the date of any such submission and the person or the office to which the request was submitted.
- g) Whether the issues involved were previously dealt with - the request should state whether the request for a mutual agreement procedure involves issues that are currently being considered or were previously considered:
- by the tax authorities of either Contracting Jurisdiction as part of an advance ruling, advance pricing arrangement, settlement agreement or similar proceedings;
  - as part of any other administrative proceedings;
  - or by any tax tribunal or court.
- Copies of any relevant rulings, agreements or decisions should be provided.
- h) Any other specific additional information requested by the competent authority of a Contracting Jurisdiction within three calendar months after the receipt of the request for a mutual agreement procedure.

### **3. Appointment of arbitrators**

1. In the circumstances described in paragraph 3 or paragraph 4 of Article 20 of the Convention, 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 Jurisdiction will make the relevant appointment within 60 days after receiving a request to that effect from the person who made the request for arbitration. In the circumstances described in paragraph 4 of Article 20 of the Convention, the Chair of the arbitration panel will be appointed from the list that has been mutually agreed by the competent authorities pursuant to paragraph 5 of this Article.
2. Except to the extent that the competent authorities mutually agree on different rules, the procedures provided in Article 20 of the Convention and Article 3 of this Agreement will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun. In such circumstances, the competent authorities will also agree on necessary adaptations, as appropriate, to the deadlines provided in Article 4 of this Agreement.
3. 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.
4. The competent authorities will appoint arbitrators who have 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 Jurisdictions and of all persons directly affected by the case (as well as their advisors

and any related persons) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for 12 months after the date the panel delivers its decision which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings. Each arbitrator appointed to the arbitration panel will execute a written certification to this effect. The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.

5. The competent authorities will identify and mutually agree on a list of at least 5 persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary. The persons to be identified for purposes of this list must meet the requirements of paragraph 4 of this Article.

#### **4. Arbitration process**

1. 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 the approach described in paragraph 7 below with respect to the relevant case), the competent authority of each Contracting Jurisdiction will submit to each arbitrator and to the other competent authority 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 limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged pursuant to the provisions of the Covered Tax Agreement (as it may be modified by the Convention), 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 an issue regarding the conditions for application of a provision of the Covered Tax Agreement (as it may be modified by 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.

2. The competent authority of each Contracting Jurisdiction may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper must be submitted to the arbitrators and to the other competent authority within the period of time provided for in paragraph 1. Any annex to a supporting position paper must 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 case.

3. In the event that the competent authority of one Contracting Jurisdiction fails to submit a proposed resolution within the period of time provided for in paragraph 1, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

4. 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. Any such reply submission must be submitted to the arbitrators and to the other competent authority within 120 days after the appointment of the Chair of the arbitration panel.

5. 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.

6. 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. The arbitration decision will be delivered to the competent authorities of the Contracting Jurisdictions 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.

7. a) If, within 60 days after the appointment of the Chair of the arbitration panel, the competent authorities agree to use the approach described in this paragraph 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 that agreement, 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).

b) In the event that the competent authority of one Contracting Jurisdiction fails to submit the information described in subparagraph a) within the period of time provided for in that subparagraph, the arbitration panel will select as its decision the position submitted by the other competent authority.

c) The competent authority who received the written request for arbitration will notify the person who made the request for arbitration of a competent authority agreement to use the approach described in this paragraph within 7 days of such an agreement (if the written request for arbitration indicates that it was also sent to the other competent authority, such notification will be provided by the competent authority of the jurisdiction of residence of the person who made the request for arbitration). 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. Any written materials prepared by the person who made the request for arbitration or his representatives will be submitted to the arbitrators by the competent authorities. Such materials will only be presented to the arbitrators if they are provided to both competent authorities within 120 days after the notification referred to in first sentence of this subparagraph.

d) Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel should be held, the competent authorities will decide when and where the meeting will be held and will communicate that information to the arbitrators.

e) The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Covered Tax Agreement, as modified by the Convention, and, subject to these provisions, of those of the domestic laws of the Contracting Jurisdictions. The arbitrators will also consider any other sources which the competent authorities of the Contracting Jurisdictions may by mutual agreement expressly identify.

f) Subject to the provisions of the Covered Tax Agreement, as modified by the Convention, and of this Agreement, the arbitrators may adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.

g) Unless the competent authorities agree otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting Jurisdictions in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.

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

1. Each arbitrator must agree in writing, prior to acting in an arbitration proceeding, to abide by and be subject to the confidentiality and non-disclosure provisions of Article 26 of the Covered Tax Agreement and of the applicable domestic laws of the Contracting Jurisdictions. If an arbitrator will use staff in connection with the performance of his or her duties, each staff member must execute a similar written agreement.

2. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both arbitrators.

3. After the Chair is appointed, unless agreed otherwise by the competent authorities and the Chair, the competent authorities will send any correspondence to the Chair (with a copy sent to the other competent authority). The Chair will send any correspondence from the arbitrators to the competent authorities concurrently to both competent authorities.

4. Except with regard to administrative or logistical matters, no arbitrator will have any ex parte communications with one competent authority with respect to the mutual agreement case that resulted in the arbitration proceeding.

5. All communication, except with regard to administrative or logistical matters, between the arbitrators and the competent authorities must be in writing. Unless otherwise agreed by the competent authorities, written communication by facsimile or email is allowed to the extent that appropriate measures are taken to preserve the confidentiality of any information that may identify the taxpayer. Express or priority mail or a courier service will be used for all correspondence other than that sent via facsimile or email.

6. No substantive discussions may take place without all three arbitrators present.

7. Except as permitted pursuant to subparagraph c) of paragraph 7 of Article 4, no arbitrator will have communications regarding the issues or matters before the arbitration panel with

- i) the person who presented the case;
- ii) any other person whose tax liability to either Contracting Jurisdiction may be directly affected by a mutual agreement reached as a result of the case; or
- iii) their representatives or agents

during or subsequent to the arbitration proceedings.

8. At the termination of the arbitration proceedings each arbitrator will immediately destroy all documents or other information received in connection with the proceedings.

## **6. Operating procedures**

1. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Part VI of the Convention or Article 25 of the Covered Tax Agreement, as modified by Article 16 of the Convention.

2. If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities. These procedures will have effect only if both competent authorities agree.

## **7. Costs**

1. Unless otherwise agreed by the competent authorities:

- a) each competent authority and the person who requested the arbitration will bear the costs related to its own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of its views);
- b) costs related to any meeting of the arbitration panel will be borne by the competent authority that hosts that meeting;
- c) all other costs related to the arbitration proceedings will be borne in equal shares by the two competent authorities.

2. Unless agreed otherwise by the competent authorities, compensation of the arbitrators will be determined as follows:

- a) The fees of the arbitrators will be fixed at EUR 1 000 per person per meeting, preparation or travel day. The reimbursement of the expenses of the arbitrators will be limited to the reimbursement usual for high ranking civil servants of the Contracting Jurisdiction that first received the request for submission of the unresolved issue(s) in the case to arbitration;

- b) The fees of the arbitrators will in no case exceed EUR 5 000 per person. The expenses reimbursed to the arbitrators will in no case exceed EUR 2 500. If the arbitration panel considers that the proper consideration of the case would cause the fees or expenses of the arbitration panel to exceed these amounts, the Chair will contact the competent authorities to request their guidance.

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

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 6 or subparagraph g of paragraph 7 of Article 4, as the case may be, or within any other period agreed to by the competent authorities, the fees of each arbitrator will be limited to EUR 1000. In such a case, the competent authorities may agree to appoint new arbitrators in accordance with Article 20 of the Convention and Article 3 of this Agreement. The date of such agreement to appoint new arbitrators will, for the purposes of the subsequent application of Article 20 of the Convention and Article 3 of this Agreement, be deemed to be the date when the request for arbitration has been received by both competent authorities.

#### **9. Final Decision**

1. If a final decision by a court of one of the Contracting Jurisdictions holds that the arbitration decision is invalid, the arbitration decision will not be binding on the Contracting Jurisdictions. In such a case, the request for arbitration under paragraph 1 of Article 19 of the Convention 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 Article 21 (Confidentiality of Arbitration Proceedings) and Article 25 (Costs of Arbitration Proceedings) of the Convention and Articles 5 and 7 of this Agreement). In such a case the person who made the request for arbitration may make a new request for arbitration, which will be accepted unless the competent authorities mutually agree that the actions of that person or its representatives were the main reason for the invalidation of the arbitration decision.

2. It is understood that subdivision ii) of subparagraph b) of paragraph 4 of Article 19 of the Convention is intended to apply where, under the domestic laws of a Contracting Jurisdiction, a court has invalidated the arbitration decision based on a procedural or other failure or other conduct that has materially affected the outcome of the arbitration proceeding, which may include –

- i) a violation of the impartiality or independence requirements applicable to arbitrators pursuant to Article 20 of the Convention and Article 3 of this Agreement;
- ii) a breach of the confidentiality requirements applicable to arbitrators pursuant to Article 21 of the Convention and Article 5 of this Agreement;
- iii) any other failure to adhere to the procedural requirements provided in Part VI of the Convention and this Agreement; or
- iv) collusion between the person who presented the mutual agreement procedure request and one of the Contracting Jurisdictions.

3. It is understood that Article 9 of this Agreement does not provide independent grounds for the invalidation of an arbitration decision where such grounds do not exist under the domestic laws of the Contracting Jurisdictions

#### **10. Implementing the arbitration decision**


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.

#### **11. Entry into effect of Part VI of the Convention**

1. As provided by Article 36 (Entry into Effect of Part VI) of the Convention the provisions of Part VI (Arbitration) of the Convention will have effect with respect to cases presented to the competent authority of a Contracting Jurisdiction on or after 1 August 2019.


2. Pursuant to the reservation provided in paragraph 2 of Article 36 of the Convention, Part VI of the Convention will apply to a mutual agreement procedure case presented to the competent authority of a Contracting Jurisdiction prior to 1 August 2019, only to the extent that the competent authorities mutually agree that it will apply to that specific case. Within 10 days after such a mutual agreement, the competent authorities will provide written notification to the person who presented the case of (i) the mutual agreement and (ii) the start date of the two-year period (the mutual agreement will specify which of the two competent authorities will provide this notification).

For the Competent Authority  
of the Grand Duchy of Luxembourg



Ms. Pascale Toussing  
Director  
Direct Tax Administration

For the Competent Authority  
of the Kingdom of the Netherlands



Mr. Reijer Janssen  
Director Consumer Tax, Customs  
Policy and International Tax  
Ministry of Finance

