

Mapping the numbers

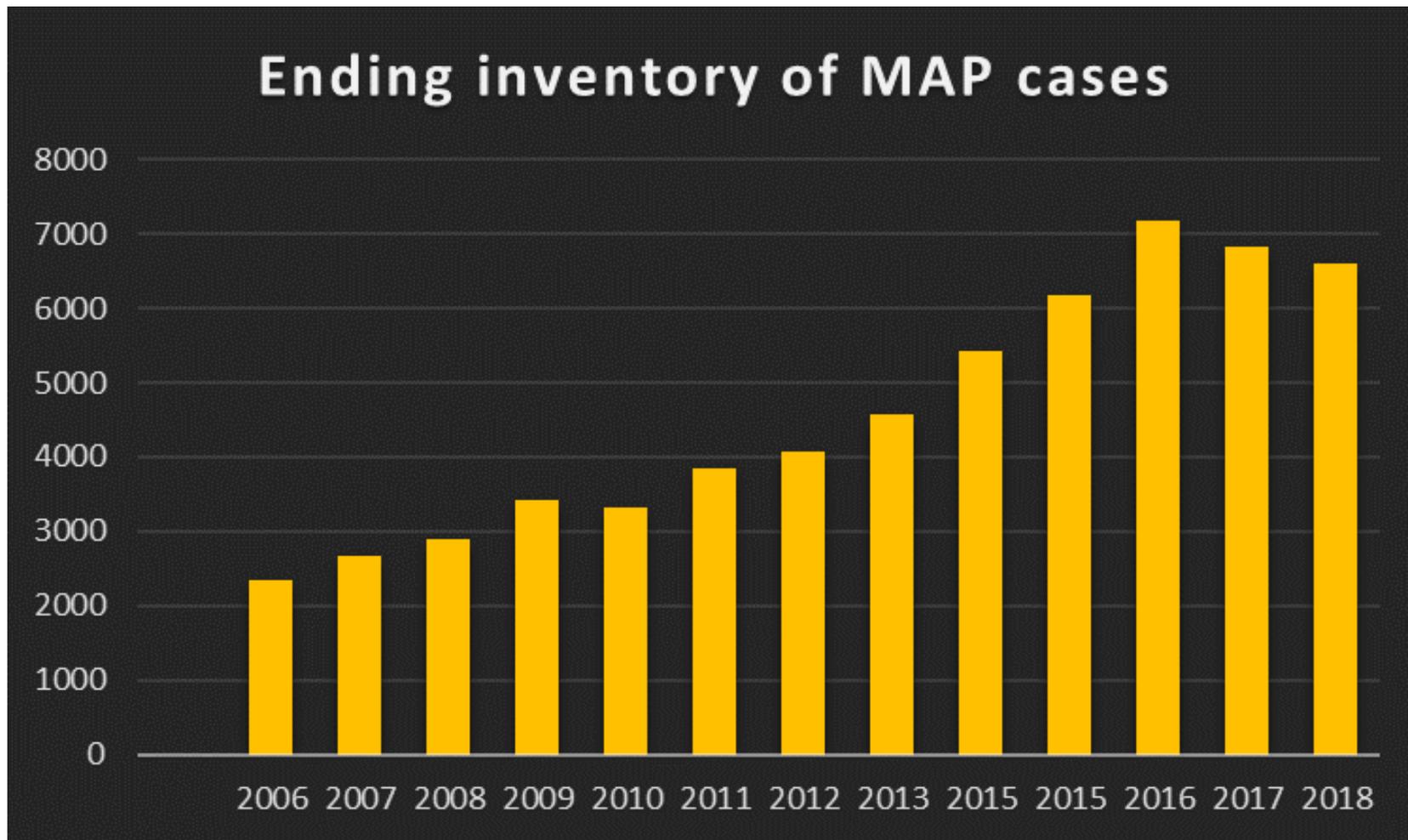
Insights and takeaways from the
OECD's 2018 MAP statistics

December 2019

Tax disputes — and the sub-optimal execution of MAP

- ▶ Can drain of scarce resources: a single dispute can wrap up both tax function and tax authority resources for several years
- ▶ Can tie up capital for multiple years
- ▶ Can be a cause of erosion in the trust in the effective operation of tax administration — sometimes to the point where it harms FDI

Ending inventory of MAP cases: 2006-2018



Key numbers

- ▶ The starting inventory of **all** (i.e., Transfer pricing and “other”) MAP cases fell by nearly 8% between 2017 and 2018, from 7,500 to 6,924 cases.
- ▶ The ending inventory of all cases also fell 3.3% during this period, from 6,831 to 6,605.
- ▶ BUT:
 - ▶ Looking just at new post-2016 (or the period on or after 1 January of the year of joining the Inclusive Framework) cases:
 - ▶ The starting inventory nearly doubled between 2017 and 2018, from 1187 to 2338 cases. and;
 - ▶ The number of all cases closed fell slightly between 2017 and 2018, from 2,745 to 2,704. (a 1.5% decrease relative to 2017 figures)
 - ▶ Looking just at pre-2016 (or the period prior to 1 January of the year of joining the Inclusive Framework) cases, there has been a reduction in both the starting inventory and cases closed:
 - ▶ The starting inventory of both transfer pricing and other MAP cases fell by around 27% between 2017 and 2018.
 - ▶ The number of cases closed fell by more than 30% between 2017 and 2018, from 1764 to 1231.

Key numbers and types of cases

- ▶ Types of cases (starting inventories)
 - ▶ Transfer pricing: 3,731 (54%)
 - ▶ “Other”: 3,193 (46%)
- ▶ Cycle times
 - ▶ For transfer pricing cases only, the average cycle time increased by 3 months between 2017 and 2018, from 30 months to 33 months.
 - ▶ For other non-transfer pricing cases, the average cycle time decreased by 3 months between 2017 and 2018, from 17 months to 14 months.
 - ▶ Average times for resolution of MAP cases (both transfer pricing and other cases) vary significantly by jurisdiction, ranging from 2 months (Malta) to 66 months (Slovak Republic). For transfer pricing cases, the average time for resolution ranges from around 60 months (Mexico) to less than 2 months (Slovak Republic). For other cases, the average time for resolution ranges from around 98 months (Slovak Republic) to less than 2 months (Indonesia).

Key numbers

Concentration of geographic incidence

All cases		Transfer pricing cases		Other cases	
Jurisdiction	Cases	Jurisdiction	Cases	Jurisdiction	Cases
Germany	615	France	222	Belgium	546
Belgium	581	Italy	196	Germany	437
France	449	Germany	178	Netherlands	293
Netherlands	357	United States	157	France	227
Italy	256	India	133	Luxembourg	227

Conclusions drawn

- ▶ The OECD's MAP statistics show that while starting and ending inventories of MAP cases continue to fall, the number of new cases started continues to exceed the cases closed in the majority of jurisdictions tracked.
- ▶ While MAP can be an effective tool to reduce double taxation, multinational businesses may want to also consider alternative controversy strategies, such as use of bilateral and multilateral Advance Pricing Agreements.

The MAP peer review process

Generalized findings

Positive findings

- ▶ Roll-back of bilateral APAs is available
- ▶ Access to MAP is granted in eligible cases
- ▶ MAP guidance is generally clear and available
- ▶ Some competent authorities have adequate resources, and take a pragmatic and principled approach
- ▶ MAP agreements are generally being implemented on time

Negative findings

- ▶ A considerable number of existing tax treaties need to be amended (while also noting that some will be modified by the MLI)
- ▶ Some improvements in MAP guidance are necessary for some jurisdictions – where sometimes such guidance was not available at all
- ▶ Resolution of cases within 24 months on average is a challenge for some jurisdictions, especially for transfer pricing cases
- ▶ Implementation of MAP agreements after a given period of time may be an issue in several jurisdictions

An informal EY survey of Tax Controversy leaders in 22 jurisdictions (Jan. 2018)

- ▶ All 22 jurisdictions forecast that the demand for MAP will increase as a result of the BEPS recommendations
- ▶ 18 of the 22 jurisdictions (82%) say that transfer pricing (in some form) will be the leading issue driving demand for new MAP cases in the coming three years (that far outstrips the 2016 reporting of the OECD that 56% of total MAP inventory relates to transfer pricing).
- ▶ Very few jurisdictions report that indirect or personal tax issues feature highly in terms of incidence, the sole exception being the bordering nations of Belgium, France and Luxembourg, where cross-border working drives a number of MAP cases.
- ▶ Permanent establishment issues, business restructuring and beneficial ownership issues (in that order) are the second, third and fourth largest drivers of new MAP cases among these jurisdictions – but overshadowed by transfer pricing by a factor of at least six.

Common challenges experienced by taxpayers

- ▶ There is often a lack of technical competency by tax administrations when making cross-border adjustments
- ▶ Many disputes do not reach MAP to begin with:
 - ▶ Extending, prolonging or starting audits in relation to the same or other issues when MAP requests are made
 - ▶ Prolonging or making more difficult VAT, withholding or other tax returns when MAP is requested
 - ▶ Offering reduced settlements at a very early stage of an audit
 - ▶ “Suggesting” that a full audit will take a long time and may lead to a bigger adjustment
 - ▶ Offering a settlement, and if not accepted; collecting the full tax immediately, at a much higher level and
 - ▶ Flat out rejection of access to MAP
- ▶ MNC’s tax issues may be made up of multiple cases representing lesser amounts

Common challenges experienced by taxpayers

- ▶ There has been a reduction in the use of pre-filing tools and processes that may prevent disputes
- ▶ Many jurisdictions still have no (or no relevant) experience in MAPs
- ▶ Businesses do not like to include uncertain positions on their books

Taken in isolation, the number of cases in MAP ending inventory and/or the number of new MAP cases does not necessarily indicate whether MAPs in a jurisdiction are working effectively.

Advice from the OECD: Get vocal



“Tax audits probably have increased. We don’t have global data, but I firmly believe that there has been an increase. Is it a consequence of the BEPS project, or is it just reflection which has just defined the BEPS project? I think it’s probably a mixture of both.”

On MAP:

“So how can tax payers contribute? By letting us know what they think.

If they don’t, they should not complain.”

The interview: Pascal Saint-Amans – Director, OECD Centre for Tax Policy and Administration, EY, 2017.

MAP: Advice to taxpayers

- ▶ Download and read the OECD's *Manual on Effective Mutual Agreement Procedures* (MEMAP).
- ▶ Look at every new opportunity to strike bilateral and multilateral APA's – including “memorializing” an audit
- ▶ Proactively file a MAP protective claim within the MAP notification period to keep that option available
- ▶ consider either requesting Accelerated Competent Authority Procedure (ACAP) where available, or engage in a MAP/APA combination to gain certainty
- ▶ If the country making an adjustment has little experience with MAP, it is worthwhile assessing whether they want to learn, and if they do, to be supportive and pro-active
- ▶ Carefully weigh whether to use domestic appeals procedures or MAP
- ▶ Be fully aware and educated of the increasing number of new arbitration possibilities

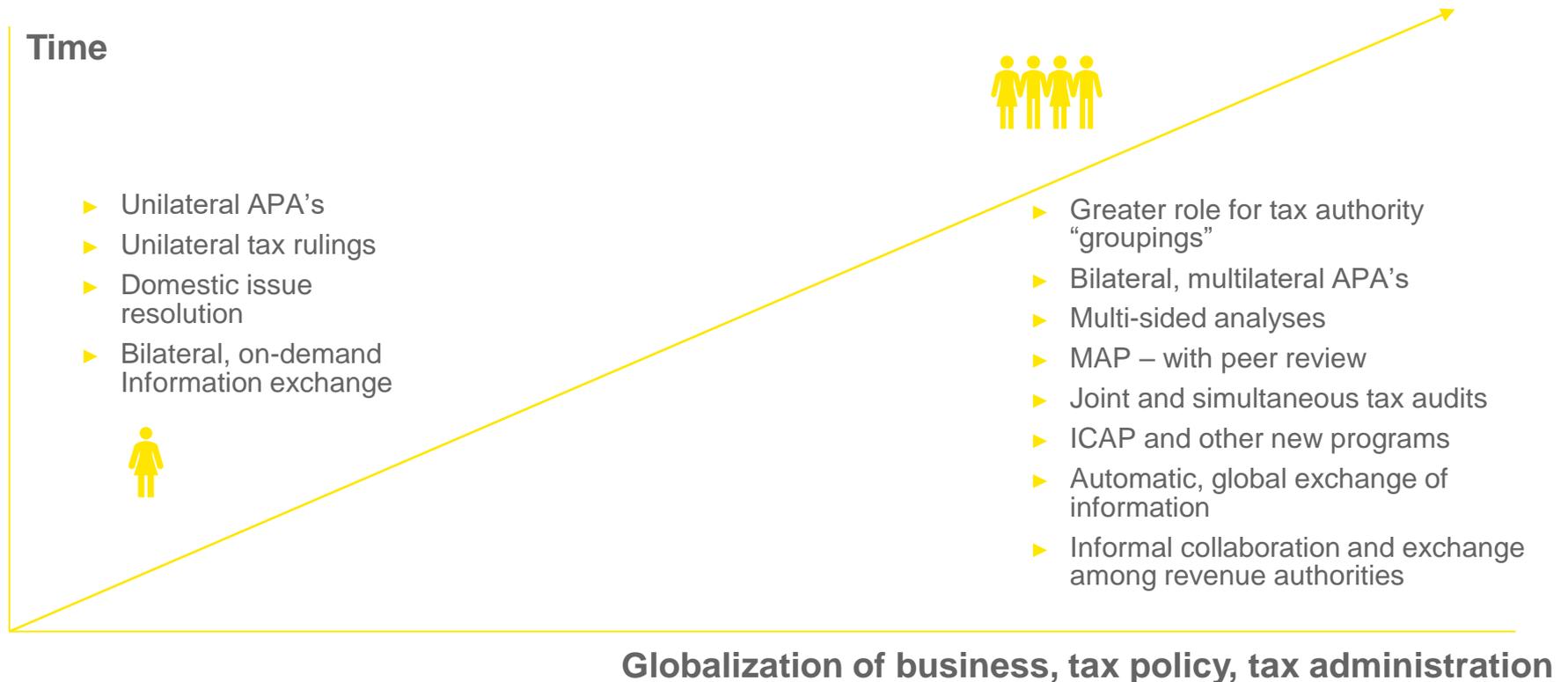
Advice to taxpayers

- ▶ Consider alternative routes to influencers
- ▶ Share experiences directly with the OECD – including anonymously
- ▶ Ensure that the approach in all relevant countries is fully coordinated

Part 2 – Trends in dispute resolution



Tax enforcement goes multilateral



Trends in dispute resolution (ADR)

- ▶ Advance Pricing Agreements (APAs)
- ▶ Mutual Agreement Procedure (MAP)
- ▶ International Compliance Assurance Programme (ICAP)

APA: EY 2019 Transfer pricing survey

37% of companies are currently using an APA

57% are either very satisfied (18%) or satisfied (39%) with APA process

43% say they will be significantly more likely to use an APA

MAP

Only one in five (20%) of companies have requested competent authority assistance

Only 15% of these say they have confidence in the MAP process

New MAP case growth continues to outstrip case closures by more than 100%

ICAP

ICAP 1.0 pilot in 2018 was unique and innovative

New ICAP 2.0 phase in 2019

Number of pilot countries more than doubled

Significant changes have been made to the program

But questions remain as to its overall ability to reduce

MAP case flow

Significant changes to ICAP 2.0 program

Joint and simultaneous tax audits

What they are

- ▶ Two or more tax administrations joining together to:
 - ▶ Examine an issue with cross-border business activities
 - ▶ Proceed in pre-agreed, coordinated manner
 - ▶ Engage jointly with taxpayer
 - ▶ Include Competent Authority representatives from each administration

Where they came from

- ▶ Joint audits first gained attention in a 2010 OECD report
- ▶ March 2019 OECD FTA report is a new push for tax certainty by OECD
- ▶ Almost 500 have occurred, across approx. 20 countries – some pairings more active
- ▶ Only a limited number were fully coordinated, jointly-conducted audits
- ▶ OECD would like more joint audits to stem flow of MAP cases