

Which 'disputes' does a MAP resolve?

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What is a MAP?

- Cross-border tax dispute resolution mechanism concerning the interpretation and application of DTCs, premised on a dialogue between the competent authorities involved.
- Commonly reported problems that may reduce MAP's effectiveness:
 - Lack of transparency;
 - No obligation to reach solution;
 - Not many countries have opted for mandatory arbitration clause;
 - No effective legal remedy (but recourse to national remedies).
- Action 14 BEPS: Making Dispute Resolution mechanisms more Effective, establishing minimum standard to ensure the timely, effective and efficient resolution of treaty-related disputes.
- Multiple legal sources: DTCs, DTCs covered by the MLI, the EU Arbitration Convention, the EU Tax Dispute Resolution Directive and bilateral investment protection treaties.

Art. 25 OECD MC

- Art. 25 (1) OECD MC: Where a person considers that the actions of one or both of the Contracting States **result or will result** for him **in taxation not in accordance with the provisions of this Convention**, he may, **irrespective of the remedies provided by the domestic law of those States**, present his case to the competent authority of either Contracting State. The case must be presented within *three years* from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.
- Art. 25 (2) : The competent authority shall *endeavour*, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case **by mutual agreement** with the competent authority of the other Contracting State, **with a view to the avoidance of taxation which is not in accordance with the Convention**.
[...]
- Art. 25 (3): The competent authorities of the Contracting States shall *endeavour* to resolve by mutual agreement **any difficulties or doubts arising as to the interpretation or application of the Convention**. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

MAP trigger

- Applicability of the MAP → once the taxation in dispute is **not in accordance with a rule in the Convention** (double taxation not necessary).
- MAP can be set in motion by a taxpayer if he establishes that the actions of one or both of the Contracting States will result in such taxation, and that this taxation appears **as a risk** which is not merely possible **but probable**.
 - No need for the tax at issue to have been actually charged or notified.
- Eg. Change in the tax law of one contracting state leading to taxation 'not in accordance with the Convention', MAP could be set in motion from the moment of the adoption/ amendment of the law.
- When issue of domestic tax law **only** → **denial of access to MAP**.

Taxation not in accordance with a DTC

- cases where tax has been charged, or is going to be charged, in disregard of the provisions of the Convention < most commonly, where the measure in question leads to **double taxation** (juridical or economic or virtual)
 - Eg. questions relating **to the attribution of profits to a PE** (art. 7 (2)).
 - the taxation in the State of the payer – in case of a special relationship between the payer and the beneficial owner - of the excess part of interest and royalties, under the provisions of Article 9, Article 11(6) Article 12 (4).
 - application of ThinCap rules.
 - Misapplication of the DTC due to lack of information, eg. determination of residence (Art. 4 (2)), the existence of a PE (Article 5), or the temporary nature of the services performed by an employee (paragraph 2 of Article 15).
 - Excess WHT.

TP cases

- MAP used to resolve problems of double taxation, in the context of TP problems, in particular those resulting from the inclusion of profits under art. 9 (1) & corresponding adjustments made under 9 (2).
- In case of absence of Art. 9(2) → presence of 9(1) → intention was to have economic double taxation covered by the DTC < if double taxation arises = not in accordance with the DTC < covered by MAP.
 - Article 17(3) MLI → access to the MAP is granted for TP cases even when the treaty does not contain Article 9(2) of the OECD MC (especially in those jurisdictions that did not provide access to MAP in such cases in the past).

Cases where no double taxation arises but still covered by MAP

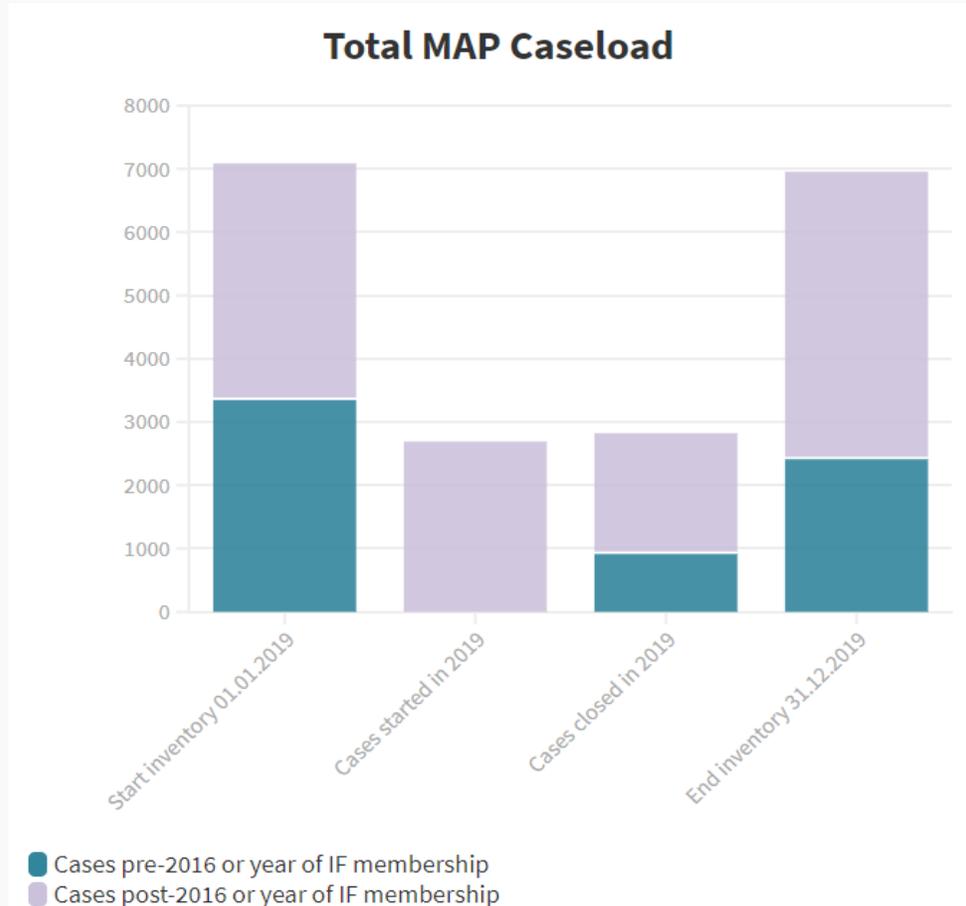
- MAP applicable even in the absence of double taxation contrary to the Convention, as long as the taxation in dispute is in direct contravention of a rule in the Convention.
 - Eg. Taxation by one state of a particular class of income, in respect of which the DTC gives exclusive taxing right to the other state, although the latter cannot exercise it due to domestic law.
 - Eg. 2: National of one state but resident of the other state, subject in that other state to taxation treatment that is discriminatory under Art. 24 (1).

‘difficulties or doubts as to the interpretation and application’

- Eg: definition of a term not defined in the Convention → recourse to MAP;
- Clarification of such a term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention;
- Art. 3 (2) OECD: [...] any term not defined therein shall, unless the context otherwise requires **or the competent authorities agree to a different meaning pursuant to the provisions of Article 25**, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies.
 - an agreement reached under 25(3) concerning the meaning of a term used in the Convention prevails over each State’s domestic law meaning of that term.

OECD Statistics (2019)

2019 MAP STATISTICS AT A GLANCE

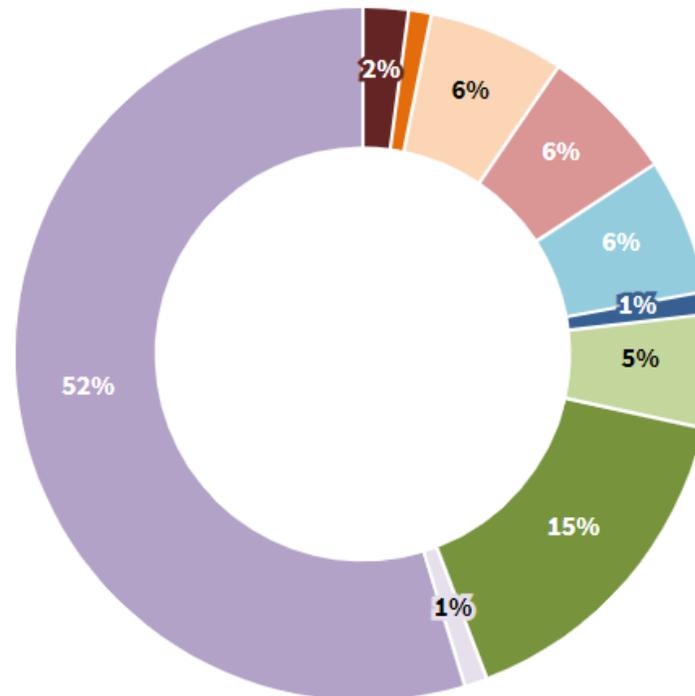


Type of case	Average time
Transfer pricing cases	30.5 months
Other cases	22 months

Source:
OECD

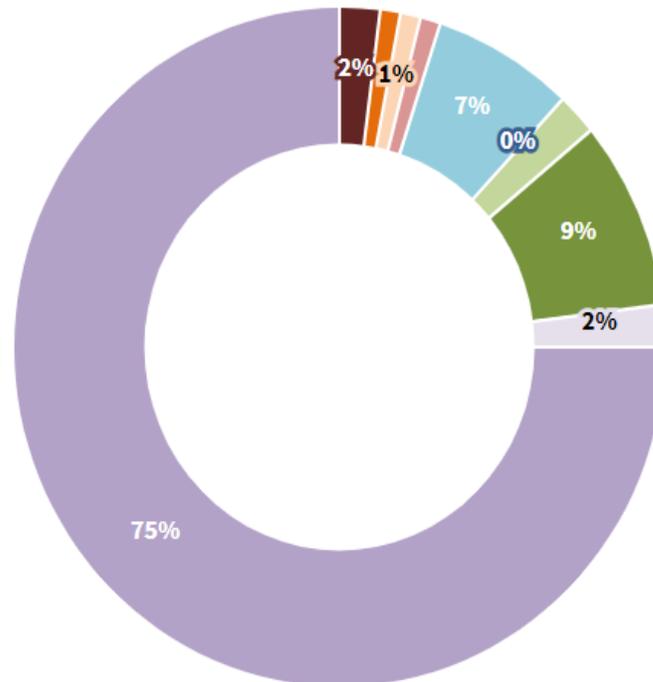
OECD Statistics (2019): All cases

- no agreement including agreement to disagree
- any other outcome
- denied MAP access
- objection is not justified
- withdrawn by taxpayer
- agreement that there is no taxation not in accordance with tax treaty
- resolved via domestic remedy
- unilateral relief granted
- agreement partially eliminating double taxation / partially resolving taxation not in accordance with tax
- agreement fully eliminating double taxation / fully resolving taxation not in accordance with tax treaty



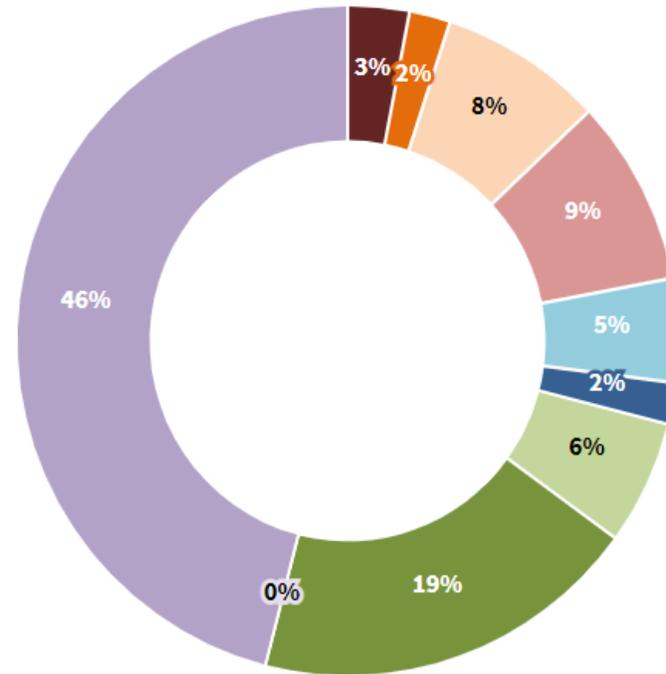
OECD Statistics (2019): TP cases

- no agreement including agreement to disagree
- any other outcome
- denied MAP access
- objection is not justified
- withdrawn by taxpayer
- agreement that there is no taxation not in accordance with tax treaty
- resolved via domestic remedy
- unilateral relief granted
- agreement partially eliminating double taxation / partially resolving taxation not in accordance with tax
- agreement fully eliminating double taxation / fully resolving taxation not in accordance with tax treaty



OECD Statistics (2019): Other cases

- no agreement including agreement to disagree
- any other outcome
- denied MAP access
- objection is not justified
- withdrawn by taxpayer
- agreement that there is no taxation not in accordance with tax treaty
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BEPS Action 14: Minimum standard & abuse

- Countries should provide **MAP access** in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a **treaty anti abuse provision** have been met or as to whether the application of a **domestic law anti-abuse provision** is in conflict with the provisions of a treaty.
- in the absence of a special provision, there is no general rule denying MAP access in cases of perceived abuse < **The interpretation and/or application of a general anti-abuse rule would clearly fall within the scope of the MAP.**
- What if transaction considered to be abusive but still resulting in double taxation?
Access to MAP? → in case of doubt, access to MAP.
- Access to MAP ≠ obligation to endeavour to resolve the case ≠ obligation to submit an issue to arbitration (if applicable).

Denial of access to the MAP

- Denial of access to MAP when the ‘relevant taxpayer has engaged **in fraud** or **certain kinds of tax avoidance** in relation to the case for which MAP is sought.’
- ‘Some States may deny the taxpayer the ability to initiate the MAP in cases where the transactions to which the request relates **are regarded as abusive**. This issue is closely related to the issue of “improper use of the Convention” [...] In the absence of a special provision, **there is no general rule denying perceived abusive situations going to the MAP**, however. The simple fact **that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to MAP**. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure must be made clear in the Convention.’
- Possibility of stay of MAP under Arbitration Convention in case of liability to serious penalty.

EU Dispute Resolution Directive and MAP

- Art. 1 (scope): This Directive lays down rules on a mechanism to resolve **disputes** between MS **when those disputes arise** from the **interpretation and application** of agreements and conventions that provide for the elimination **of double taxation of income and, where applicable, capital**. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a *'question in dispute'*.
- Art. 2(c): 'double taxation' means the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits.

EU Dispute Resolution Directive and MAP

- Directive 2017/1852 (Art. 4 (1)): Where the competent authorities of the Member States concerned accept a complaint, they shall endeavour to resolve *the question in dispute by mutual agreement* within 2 years, starting from the last notification of a decision of one of the Member States on the acceptance of the complaint.’
- The resolution of **disputes** should apply to different interpretation and application of bilateral tax treaties and of the Union Arbitration Convention — *in particular to different interpretation and application leading to double taxation.*
- 1st step: the case is submitted to the tax authorities of the MS concerned, with a view to settling the dispute by using a MAP.
- The scope of the Directive is wider than that of the Arbitration Convention < the Dir. should apply to all taxpayers that are subject to taxes on income and capital covered by DTCs and the Union Arbitration Convention

EU Dispute Resolution Directive and MAP

- Art. 16 (6): By way of derogation **from Article 6**, a MS concerned **may deny access** to the dispute resolution procedure **under that Article** in cases where penalties were imposed in that Member State in relation to the adjusted income or capital for tax fraud, wilful default and gross negligence. [...]
- 7. A Member State may deny access to the dispute resolution procedure under **Article 6 on a case-by-case basis where a question in dispute does not involve double taxation**. In such a case, the competent authority of the said Member State shall inform the affected person and the competent authorities of the other Member States concerned without delay

→ Not applicable to the MAP < grounds for denial to the MAP?

Thank you!

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