



**MITIGATION OF  
DOUBLE TAXATION IN  
TRANSFER PRICING:  
EFFECTIVE APA &  
MAP PROCEDURES**

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# INTRODUCTIONS

# SPEAKERS



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THE MLI

# MLI SNAPSHOT

## Purpose & Scope

- ❖ A Single instrument to address treaty related BEPS measures
- ❖ Avoid renegotiation of bi-lateral tax treaties
- ❖ Arbitration provision developed as part of MLI negotiation
- ❖ Enforce the minimum standards

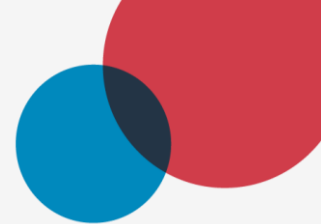
## Key features

- ❖ Selectivity with respect to covered tax agreements
- ❖ Applies alongside existing treaties and modifies their application
- ❖ Swift, effective and flexible : reservations and options

## Status

- ❖ 71 jurisdictions have now signed + 6 intention to sign
- ❖ Only Austria and Isle of Man has deposited its instrument for ratification
- ❖ Non-signing countries : Unites states, Brazil, Qatar ...

# MLI : APPLICATION



	<b>Verify entry into force of the MLI</b>	<ul style="list-style-type: none"><li>❖ Check if your MLI entered into force (i.e. 5 countries including your jurisdiction should have notified the ratification to the OECD)</li><li>❖ Check if MLI is in force in the other jurisdiction</li></ul>
	<b>Verify if the tax agreement is covered</b>	<ul style="list-style-type: none"><li>❖ Check if both contracting states list the tax agreement in their MLI position</li><li>❖ Check if the Tax agreement is in force - three months after MLI ratification</li></ul>
	<b>Identify the position taken in the MLI for a the specific provision</b>	<ul style="list-style-type: none"><li>❖ Check if a Reservation has been made by one of the contracting state on specific provision</li><li>❖ Check if both contracting jurisdictions to the covered tax agreement choose to apply an optional provision of the MLI</li></ul>
	<b>Identify if the existing provision is effectively modified → does the notifications match or not?</b>	<ul style="list-style-type: none"><li>❖ Check if the notification matches : “in place of”, “in the absence of”, in place of or in absence of”, or “to or in modification to” an existing tax treaty provision.</li></ul>

# MLI : TIMELINE



## ❖ MLI Entry into effect:

- **Withholding tax:** takes effect for the first day of the year after both parties to a covered tax agreement have MLI enter into force
- **All other taxes:** taxes levied with respect to taxable periods beginning on or after six months after the MLI enters into force for the two parties

Example:



# MLI : IMPLEMENTATION OF BEPS ACTION 14



- ❖ Mutual Agreement Procedure (Part V, Art 16) – OECD Minimum standard
- ❖ Arbitration (Part VI, Articles 18-26)

## Mutual Agreement Procedure

### Present

- ❖ No mandatory access
- ❖ Strict complaints process
- ❖ No guarantee for solution

### Post MLI

- ❖ Access is a minimum standard
- ❖ Complaints submitted to either tax authorities
- ❖ MAP can be extended indefinitely
- ❖ No guarantee for solution

## Arbitration

### Present

- ❖ No mandatory arbitration clause in double tax treaties


### Post MLI

- ❖ Optional provision
- ❖ Supplement to MAP in a second phase
- ❖ If opted, no time limit defined for making a decision
- ❖ Strengthen guidance for arbitration





**OVERVIEW OF  
MAP/APA**



**STATISTICS &  
COMPARATIVE  
ANALYSIS**

# Advance Pricing Agreements Statistics



## Statistics in the EU

	Total Number of APAs in force at the end of 2015		Number of APAs granted in 2015		Number of APA applications rejected in 2015		Number of APA applications withdrawn in 2015		Average time in months to negotiate bi-or multilateral APAs	
	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU
<b>Total EU Countries</b>	<b>1 190</b>	<b>254</b>	<b>978</b>	<b>200</b>	<b>60</b>	<b>4</b>	<b>102</b>	<b>15</b>		
France	22	33	7	11	2	1	1	-	25	28
Spain	45	15	12	4	3		4	1	32	69

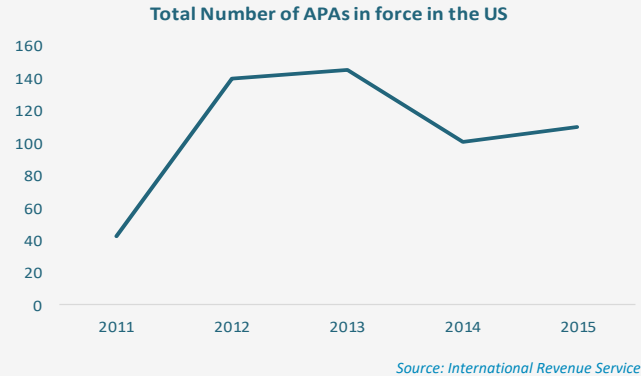
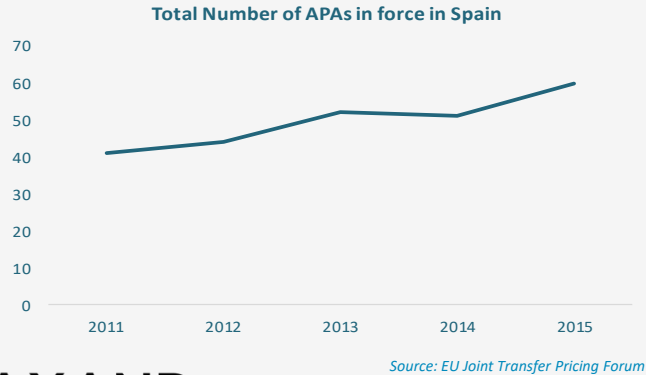
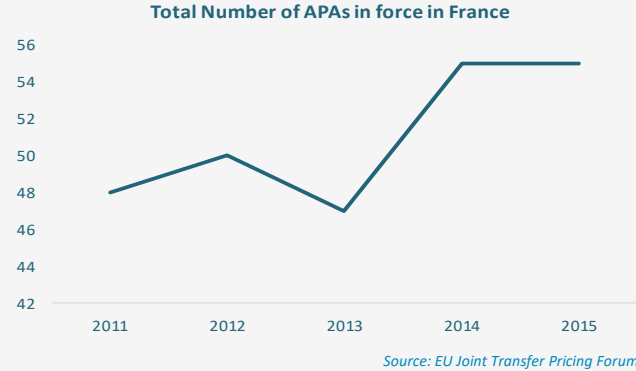
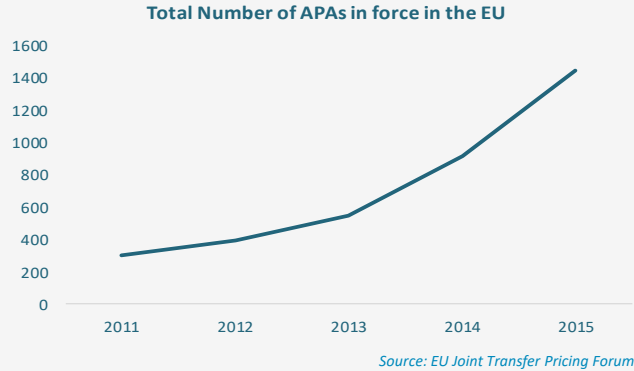
Source: EU Joint Transfer Pricing Forum

## Statistics in the US

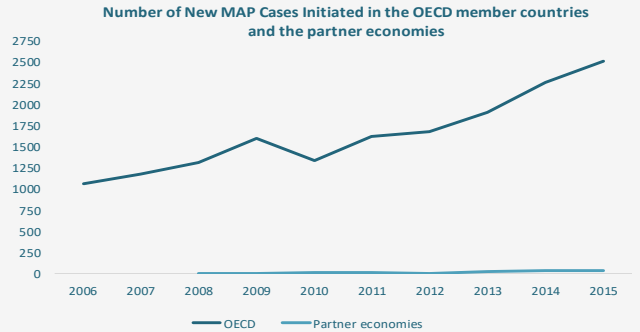
	Total Filed in 2015	Total Executed in 2015	Revoked or Cancelled in 2015	Application withdrawn in 2015	Average months to complete new and renewal APAs executed in 2015
United States	183	110	11	10	36.7

Source: International Revenue Service

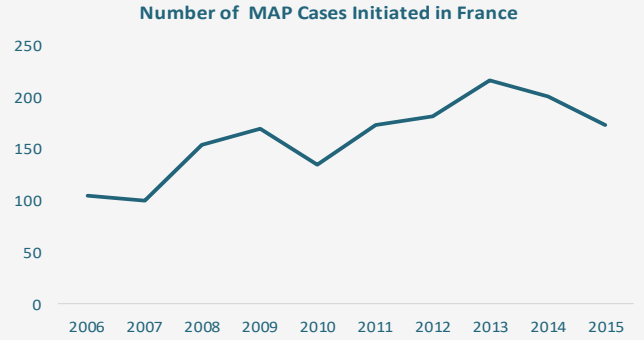
# Advance Pricing Agreements Statistics



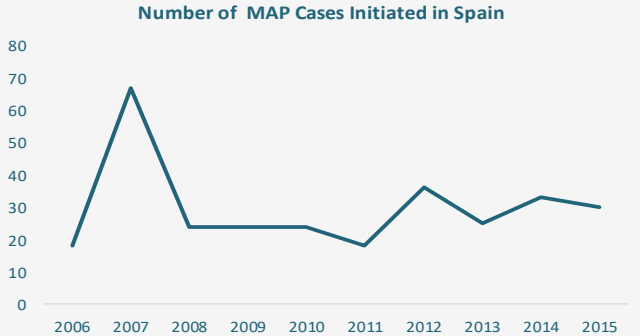
# Mutual Agreement Procedure Statistics



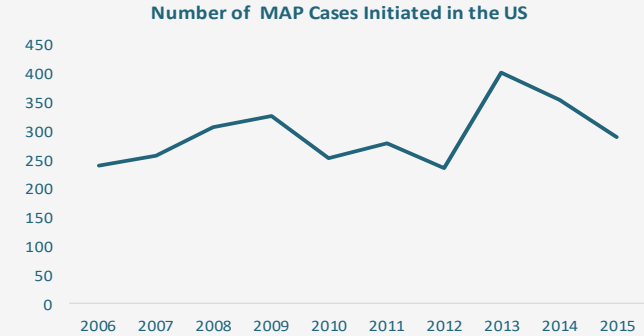
Source: OECD



Source: OECD



Source: OECD



Source: OECD



SPAIN

# SPANISH EXPERIENCE: APAS



- ❖ Post – BEPS situation:
  - Increased interest to provide tax certainty
  - Focus on transparency raised concerns on its use
  
- ❖ STA: specialised team dealing with APAs
  - Limited resources, lengthy process
  - Very BEPS-oriented: value chain and value creation analysis rather than traditional approaches for one-sided methods
  
- ❖ Preference for bilateral APAs: length and complexity
- ❖ Interaction with tax audits
  - APA vs. audit: which prevails?
  - Joint requests after tax assessments: MAP to eliminate double taxation and “preventive” bilateral APA

## ❖ TAXAND

# SPANISH MAP PROCEDURES



- ❖ Main concerns so far
  - Denied access / effect of assessments signed on agreement
  - Time limits / length of procedure
  - Limited role of the taxpayer
  - Interaction with domestic procedures: suspension
  - No guarantee for solution: difficulties to reach arbitration phase



 TAXAND



U.S.A.

# U.S. OVERVIEW



- ❖ The Advance Pricing and Mutual agreement program (“APMA”) was formed through the combination of the APA program and the U.S. Competent Authority staff.
- ❖ The APMA program is made of team leaders, economists, and senior managers which are organised into 10 groups (7 team leader groups and 3 economist groups).
  - Each group will typically be responsible for a cases with a certain number of countries (depending on the volume of cases).
- ❖ The guidance on the process of requesting and obtaining an APA from the APMA is set out in Rev. Proc. 2015-41.
- ❖ The process for MAP cases is set in Rev. Proc. 2015-40.

## ❖ TAXAND

# TRANSFER PRICING METHODS USED IN APMA & LENGTH OF TIME FOR COMPLETION



- ❖ Transfer Pricing Method (“TPM”) used for sale of tangible property and use of intangible property:
  - Comparable Profits Method (“CPM”) : 89%
  - All other methods combined : 11%
  
- ❖ When the CPM is used for transfers of tangible and intangible property, the most common Profit Level Indicators (“PLI”) used to benchmark results were:
  - Operating Margin : 67%
  - Other PLIs (Berry Ratio and Return on Assets or Capital Employed) : 33%
  
- ❖ TPM used for service transactions:
  - CPM : 76%
  - All other methods combined : 24%
  
- ❖ When the CPM is used for services transactions, the most common Profit Level Indicators (“PLI”) used to benchmark results were:
  - Operating Margin : 43%
  - All other PLIs combined : 57%

Months to Complete New and Renewal APAs Executed: 2016						
	Unilateral		Bilateral		Unilateral and Bilateral	
	Average	Median	Average	Median	Average	Median
New	33.9	23.4	50.5	48.8	48.7	46.7
Renewal	21.8	12.0	34.2	32.1	29.9	23.2
New & Renewal	24.1	15.4	42.4	35.6	37.9	32.8



FRANCE

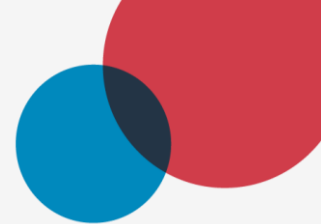
# FRENCH EXPERIENCE: APAS



- ❖ APAs remain an “extra-ordinary” option
  - Number of APAs in France remain limited as compared to tax audits volume
  - Lack of dedicated resources
  - Case law culture – resilience to commit in advance
  - Implementation of the method often challenged during tax audits
- ❖ APAs procedures raise multiple constraints and difficulties
  - The delay to obtain a decision is prohibitive
  - Competent authorities are not proactive
  - Not possible to apply for unilateral APA – only renewal
- ❖ Best practice
  - Analysis of opportunity on a case-by-case basis
  - Potentially after a tax audit or MAP
  - To secure unilateral APA concluded in another jurisdiction
  - In any case, consult first the tax authorities on an anonymous basis

**Conclusion = APAs cannot be considered as an efficient day-to-day tax-management tool in France**

# FRENCH EXPERIENCE: MAPS



- ❖ More efficient procedure
  - Tax authorities are very proactive to help the taxpayer
  - Positive behavior
  - Involvement of taxpayer in the procedure
  - Double taxation resolved in most cases even if the delay is still very long
  - Limited utilization of the arbitration process
  - Independence
- ❖ Best practice
  - Working very well in the EU
  - Successful cases with Canada and Australia
  - Frequently used in the negotiation with the tax authorities during a tax audit
  - Enforcing transparency : BEPS – opted for arbitration
  - It is advised to support the tax authorities during the procedure

**Conclusion = MAPs can be considered an efficient dispute resolution tool in France**



**LATEST EU  
DEVELOPMENTS**

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS

## INTRODUCTION



- ❖ DTT and EU Arbitration Convention MAPs do not resolve in some cases tax disputes effectively and/or in a reasonable period of time.
- ❖ This new Directive extends the required and binding arbitration to areas not currently covered by the EU Arbitration Convention → application to all cross-border situations subject to double taxation of business profits and, as the case may be, of wealth.
- ❖ Not applicable to income or capital that qualify for a tax exemption or to those subject to a zero tax rate.
- ❖ Transposition period: until 30 June 2019.



# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS

## COMPLAINT PHASE



- ❖ Submission period = 3 years following the first notification of the action resulting in double taxation.
- ❖ Submission to the tax authorities of both States affected.
- ❖ Acknowledgement of receipt → 2 months following receipt of the complaint.
- ❖ The complaint must be accepted or rejected within 6 months following the receipt thereof.
- ❖ Administrative silence = acceptance.
- ❖ Appeal against rejection available in cases where the complaint is rejected by both States.
- ❖ If the complaint is rejected only by one MS, the taxpayer may request the creation of an Advisory Commission.

❖ TAXAND

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS

## MUTUAL AGREEMENT PROCEDURE PHASE



- ❖ Starts if:
  - Both MSs have accepted the complaint.
  - At least one of the MS requests it after the Advisory Commission has decided to accept the complaint.
- ❖ 2-year period to reach an agreement, with the possibility of 1-year extension.
- ❖ Agreement is binding on the Authorities and enforceable by the taxpayer, provided acceptance by the latter and refusal to any other remedy.

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS THE ADVISORY COMMISSION



- ❖ Set up at the request of the interested party when:
  - The complaint is rejected by just one or some of the MSs.
  - No agreement is reached through the MAP.
  - And provided that:
    - No possibility of domestic appealing exists.
    - There is no appeal pending resolution.
    - Rights of appeal have been waived.
- ❖ 50 days as of notification of complaint's rejection or failure to reach an agreement through the MAP to file application.
- ❖ 120 days to set up the AC, otherwise taxpayer may apply to national courts asking them to set it up.

❖ **TAXAND**

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS THE ADVISORY COMMISSION



- ❖ 6 months period to reach a decision on the acceptance or rejection of the complaint.
- ❖ If accepted by the AC, the mutual agreement procedure shall commence at the request of any of the competent authorities of the Member States
  - 60 days to present the application to the AC and the other MSs affected.
  - Where such a request is not made, the AC shall issue an opinion on how to resolve the question in dispute.

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS THE ADVISORY COMMISSION AND THE FINAL DECISION



- ❖ If AC set up because no agreement was reached through the MAP => 6 months (plus further 3 if complex nature of the matter) to deliver opinion on the resolution mechanism.
- ❖ Once the opinion of the AC has been notified, the competent authorities of the MSs have a period of 6 months to reach an agreement regarding the mechanism to resolve the dispute.
  - Such agreement may deviate from the AC opinion.
- ❖ If no agreement is reached, however, the opinion of the Commission becomes binding.

❖ TAXAND

# MAP: EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS INTERACTION WITH DOMESTIC PROCEEDINGS



- ❖ Action of a MS becoming final under national law does not prevent the affected persons from having recourse to the Directive procedures (Domestic conflict?)
- ❖ Submission to the MAP or the dispute resolution procedure does not prevent a MS from initiating or continuing proceedings for administrative and criminal penalties in relation to the same matters.
- ❖ Affected persons have recourse to the judicial remedies available to them under domestic law of the MSs concerned.
- ❖ MSs may deny access to dispute resolution procedure where penalties were imposed in relation to the adjusted income or capital for tax fraud, willful default or gross negligence.
- ❖ Where judicial or administrative proceedings have been commenced in respect of such cases, a competent authority may suspend the proceedings under the Directive.

# APA: DIRECTIVE 2015/2376/EU, ON MANDATORY AUTOMATIC EXCHANGE OF INFORMATION IN THE FIELD OF TAXATION



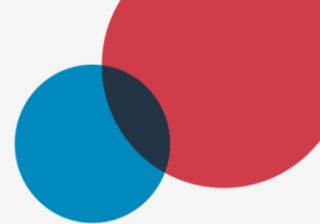
- ❖ Automatic exchange between MSs of information related to issuing, amending and renewing of advance cross-border rulings or advance pricing agreements.
  - Starting on 31 Dec 2016 and the precedent 5 years.
- ❖ No obligation to communicate agreements made in 2012 or 2013 if they were no longer valid on 1 Jan 2014.
- ❖ Possible exclusion of agreements prior to 1 Apr 2016 for non financial or investment-related entities if annual net turnover does not exceed 40 million euros.
- ❖ Bilateral or multilateral TP agreements with third countries will only be communicated if treaty permits their disclosure.
- ❖ Period for the exchange of information:
  - If dated after 31 Dec 2016: 3 months following the quarter of the calendar year in which it took place.
  - If prior 1 Jan 2017: before 1 Jan 2018.



**SPEAKER  
PROFILES**



# SPEAKER PROFILE



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Mario Ortega is based in Taxand Spain where he is a partner in the transfer pricing department at Taxand Spain, where he has spent his entire professional career.

He specialises in tax law, mainly in the area of transfer pricing and international taxation. Mario is an expert in the design and implementation of transfer pricing policies, above all at an international level: reorganisation and value chain analysis, business restructuring, the valuation of related party transactions, mutual agreement procedures, advance pricing agreements, tax inspections and the performance of global documentation projects relating to multinationals operating in various economic sectors.

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Marc Alms is based in Taxand USA where he is a managing director with Alvarez & Marsal Taxand in New York, focusing on transfer pricing. He has over 16 years of experience as a transfer pricing specialist.

Marc works with clients on complex IP and tax efficient supply chain planning & support and has assisted clients on obtaining several dozen APAs between the IRS and various foreign tax authorities.

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Loubna is a manager with Arsene Taxand in France, specialised in Transfer Pricing.

Loubna has acquired a strong professional experience in structuring, implementation and securing of transfer pricing policies for various international groups. She has been recently involved in business restructuring issues, value chain analysis, transfer and valuation of intangible assets as well as intra-group financing. Loubna has also assisted corporate groups during tax audits, Advance Pricing Agreements and negotiation with tax authorities in many countries in Europe, Asia and Africa.

She fluently speaks English, Arabic and French.