

GLOBAL IFA TRAVELLING LECTURESHIP PROGRAMME 2024

INTERNATIONAL TAX DISPUTE RESOLUTION



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Opening remarks on the scientific program

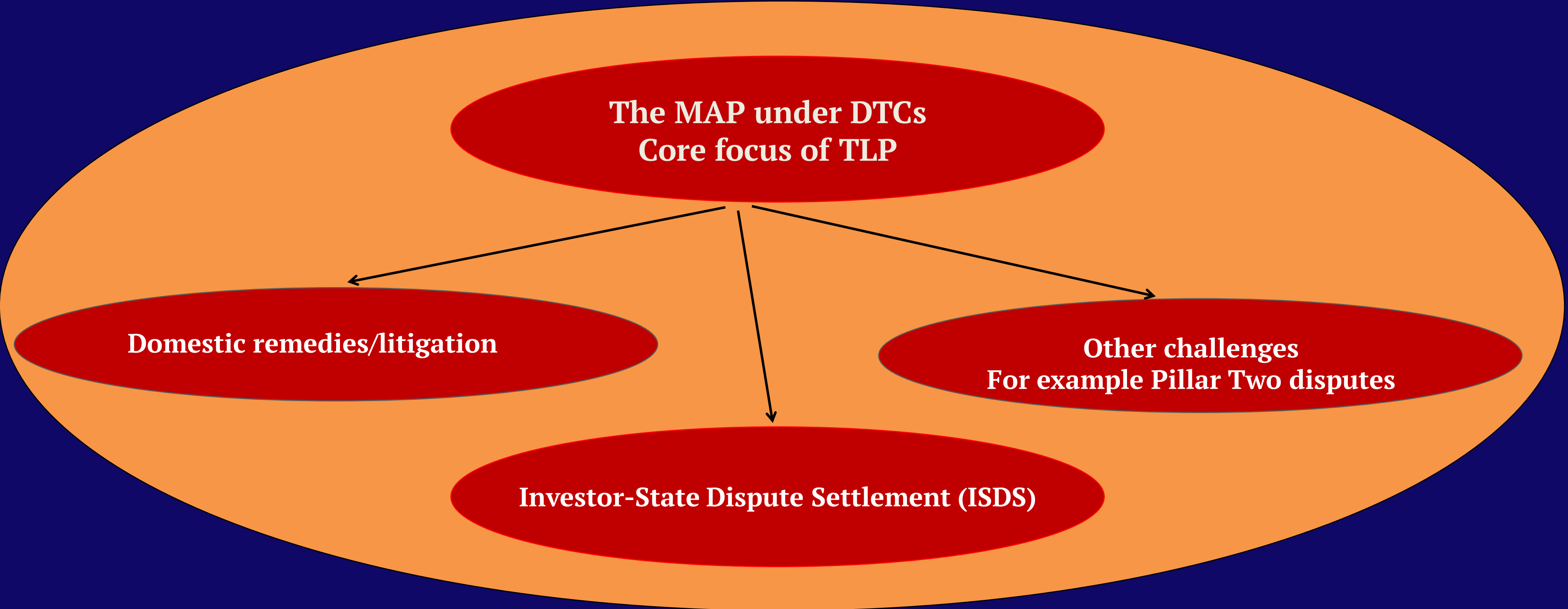
Prof. Robert Danon

Objectives of Global IFA's 2024 TLP

- Revisit the **current and future practical challenges posed by MAP as a state-to-state dispute settlement procedure inspired from diplomatic protection** (both at the level of access and operation of the MAP) and explore **broader ramifications** (for example penalties, criminal law ramifications, relation between TP and custom duties, etc.). Does it work? What can (should) be improved?
- Explore **possible improvements to the OECD Commentary on Art. 25 as well as to minimum standards and best practices on BEPS Action 14.**
- Scientific agenda reflects the strong emphasis put by Global IFA **on International Tax Dispute Resolution from a holistic perspective.**
- Main topic of the Cape Town Congress ***“Practical approaches to International Tax Dispute Prevention and Resolution”*** is the first important milestone.



Global IFA's 2024 TLP in the global tax controversy context



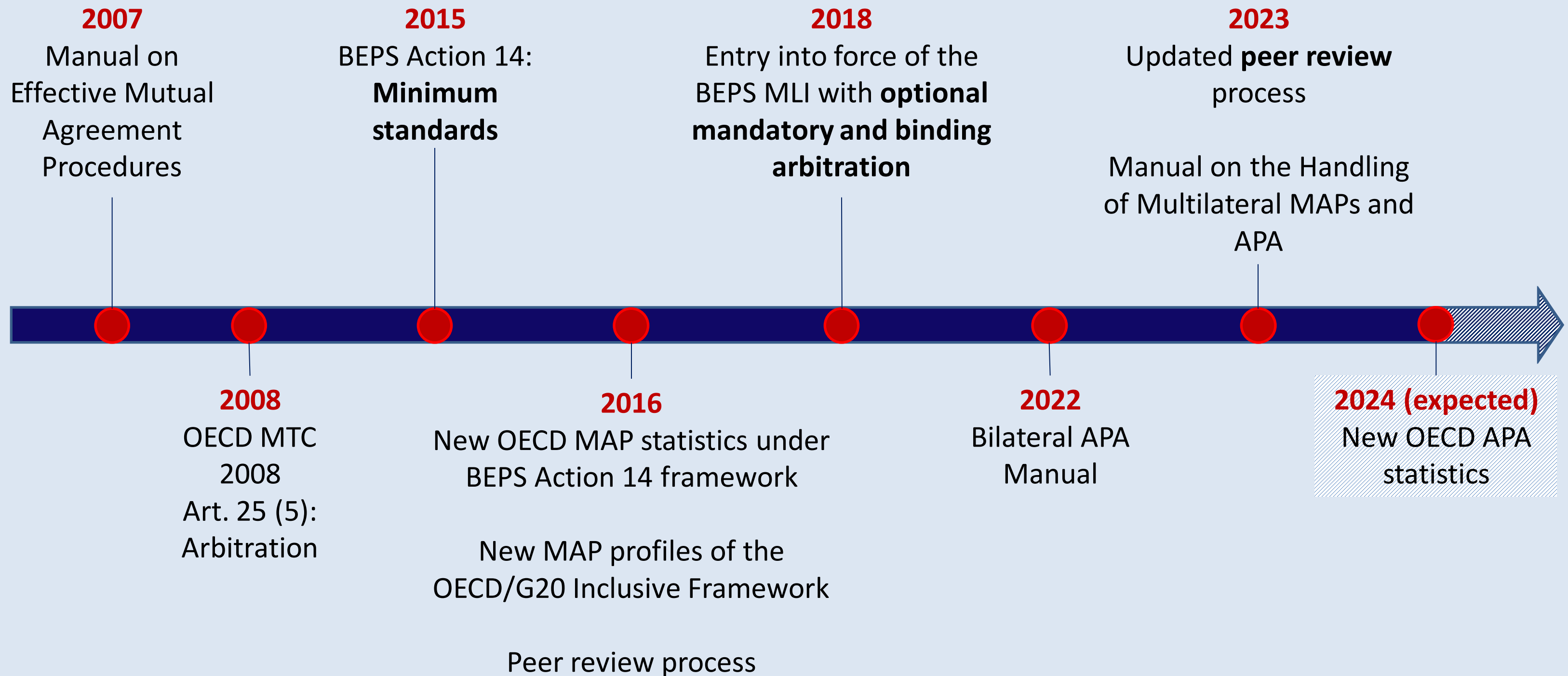
TOPIC: INTERNATIONAL TAX DISPUTE RESOLUTION

Making dispute resolution mechanisms more effective in the aftermath of OECD Action 14

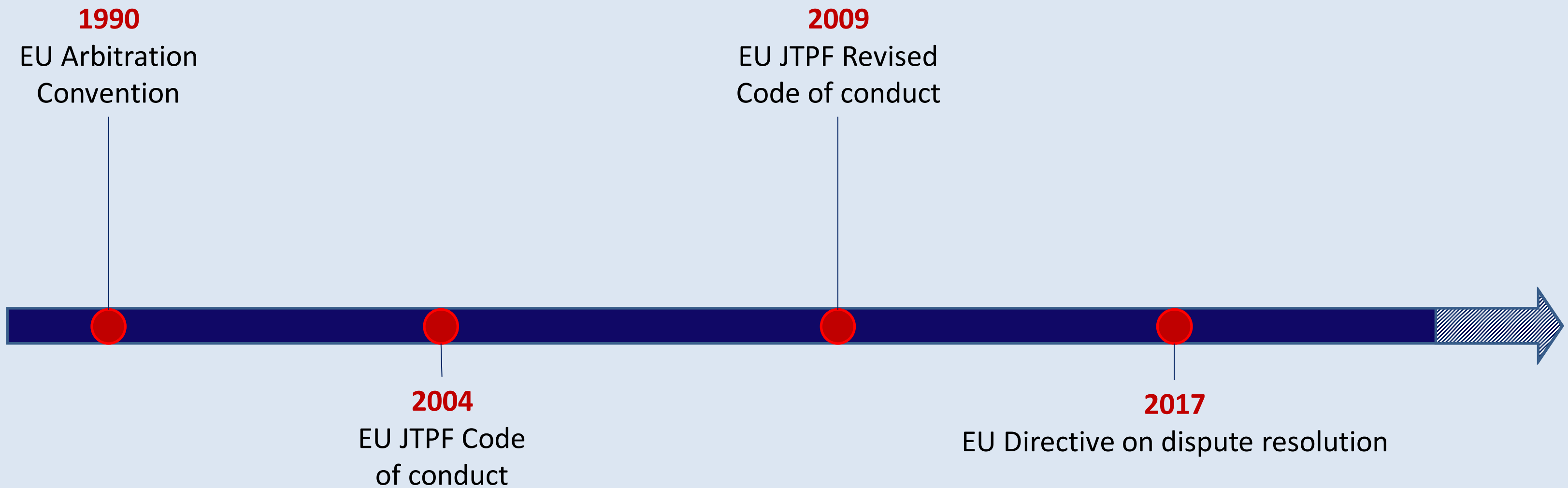
Madrid – 15 April 2024

1. Evolution and state of play of the dispute resolution mechanism

OECD: Making dispute resolution mechanisms more effective



EU: : Making dispute resolution mechanisms more effective



OECD Action 14: minimum standards

1

Full implementation in good faith of MAPs and timely resolution, incl.:

- 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.
- Commit to a **timely resolution** of MAP cases (within an average 24 months).
- Having the compliance with the minimum standard **reviewed by their peers**.

2

Administrative processes, incl.:

- Allocating sufficient **resources** to MAP functions.
- Clarifying in their MAP guidance that **audit settlements do not preclude access to MAP**.
If countries have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, countries **may limit access to the MAP with respect to the matters resolved through that process**.

3

Taxpayers' access to MAP, incl.:

- Implementation of any agreement reached **notwithstanding any domestic time limits**.

OECD Optional mandatory and binding arbitration: implementation through MLI (Art. 18 to 26)



The MLI remains optional, so that not all jurisdictions have ratified the MLI and the option for arbitration. The MLI is thus less effective than the Arbitration Convention which is binding on all EU countries.



2. A global view on some current and future issues

Access/denial to MAP requests



- Timing/application:
 - Deadline to apply for MAP
 - Deadline to move to arbitration phase where applicable
- Scope:
 - For recharacterization cases
 - For other domestic law provisions (e.g., documentation of management fees, limitation in deductible royalties or interest)
- Serious penalties:
 - Definition
 - Application
 - Available data
 - EU data (Arbitration Convention): No case rejected for serious penalty in 2020, 2021 and 2022
 - As a result, no issue?

MAP and other recourses




- Interaction between MAPs and audit settlements:
 - The Manual on Effective MAP published by the OECD (2007) recommends avoiding blocking MAP access via audit settlements (Best practice n°19)
 - How is this implemented in practice?
- Combination with litigation
 - OECD MAP: yes
 - MLI: restrictions
 - EU arbitration convention: restrictions
 - EU Directive: restrictions
- Interaction between MAPs / arbitration and domestic remedies / litigation
- Different types of arbitration (OECD Multilateral Instrument, CAN/USA, EU):
 - Baseball or last best offer
 - Independent opinion
- Interaction transfer pricing / customs valuation
- Improvements to the Commentary on Art. 25 ?
- What about P2 disputes? Art 25(3) ? Ad hoc Multilateral Convention ? Domestic reciprocal dispute resolution model ?

Multilateral MAP

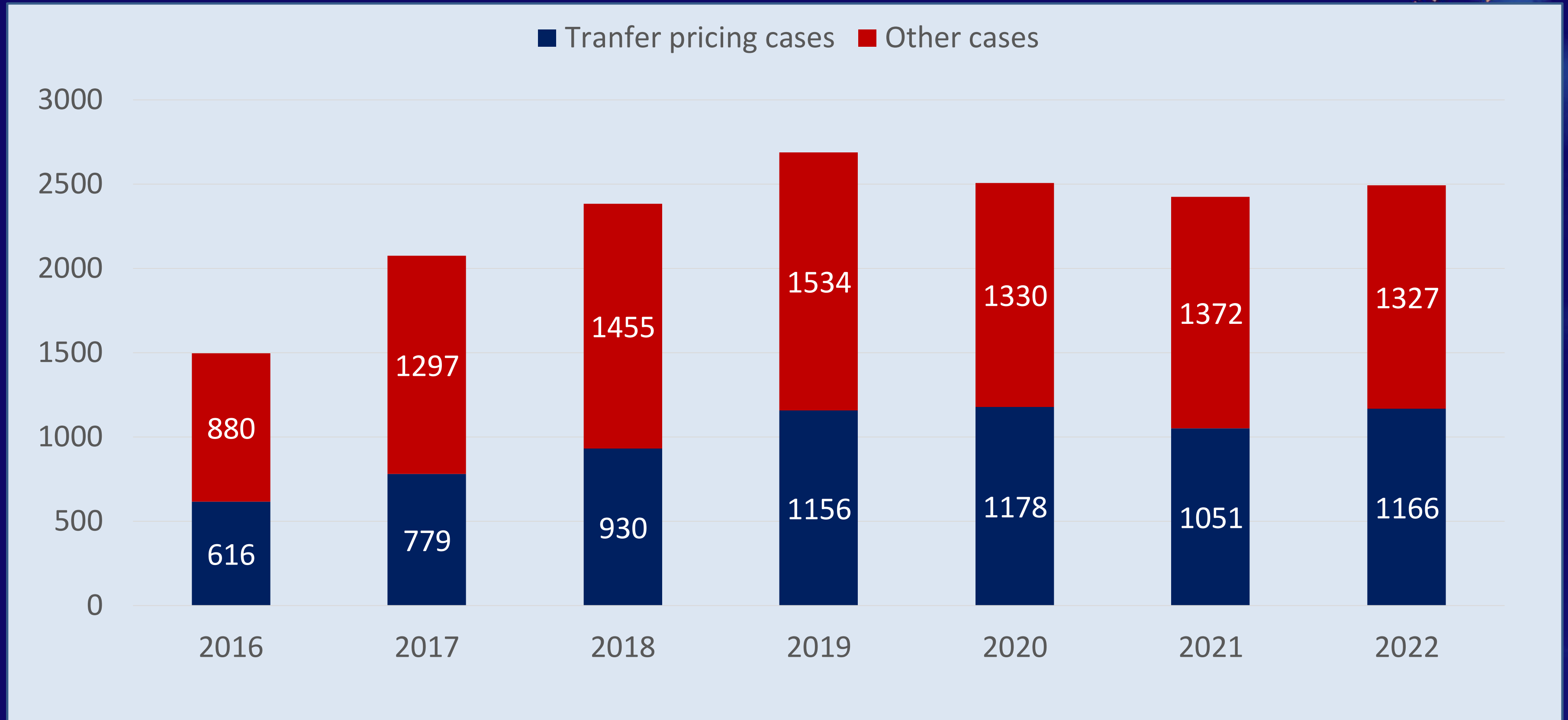
- For what kind of cases ?
- Practical experience, feasibility and timelines
- Key takeaways from the 2023 OECD Manual on the handling of Multilateral MAP and APA



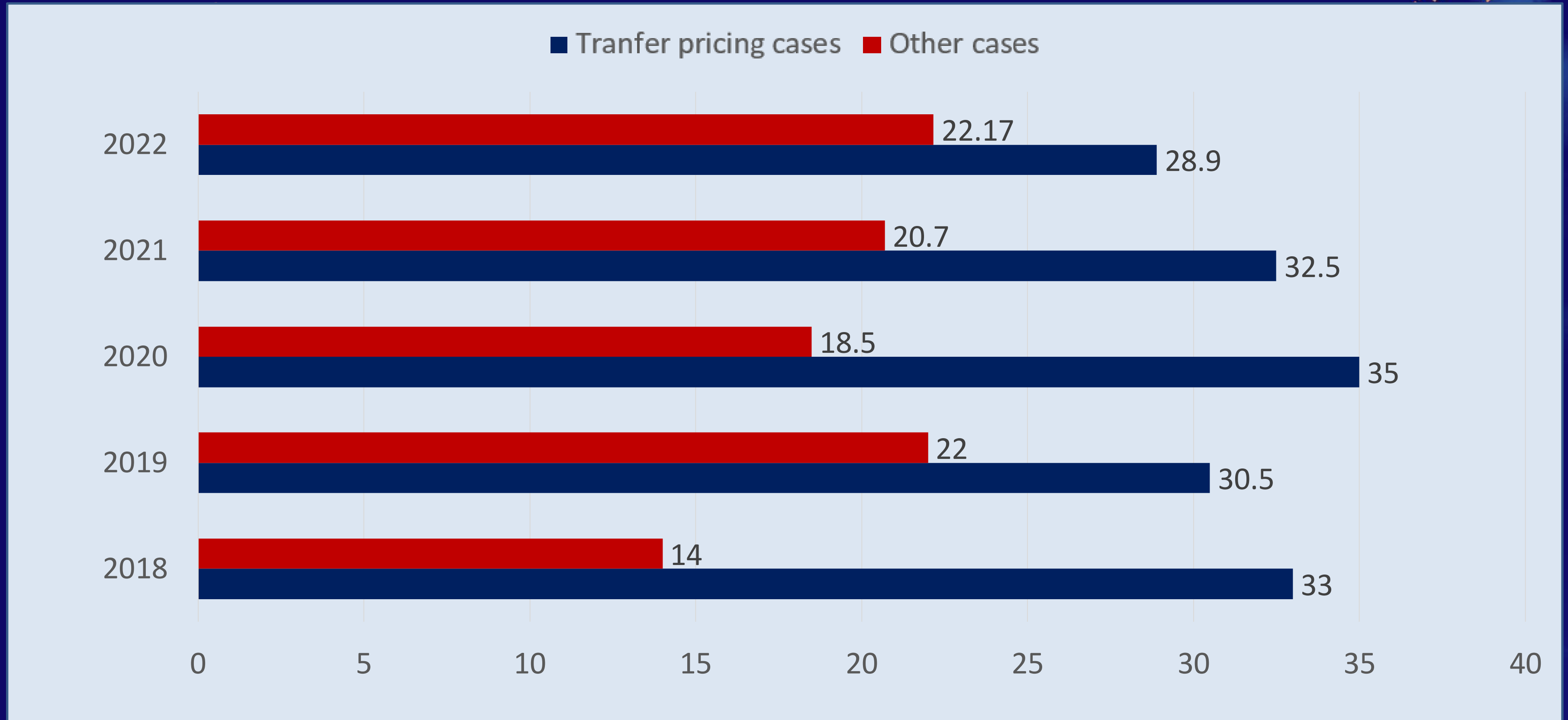


3. What do the numbers and peer review process tell us ?

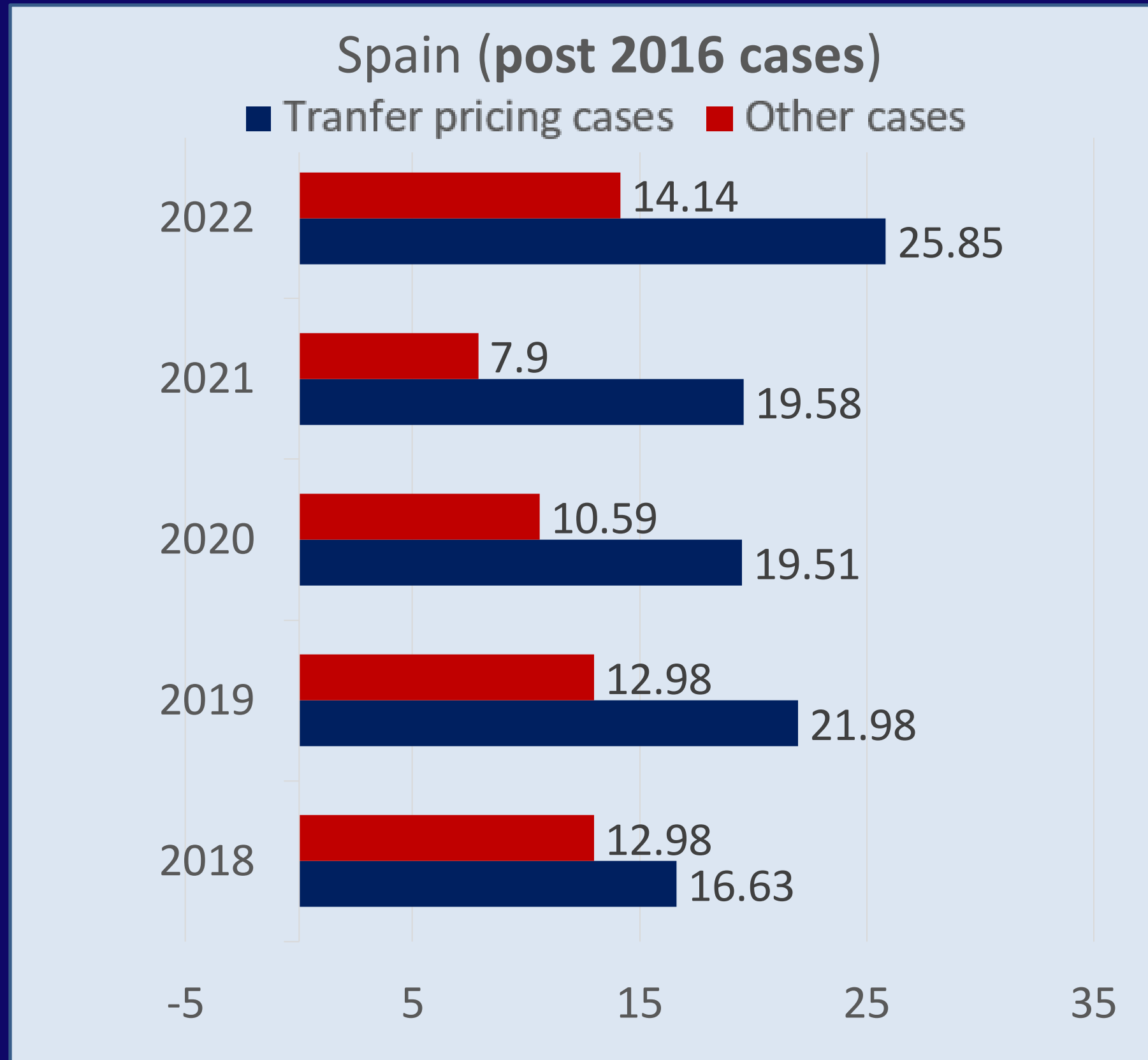
OECD Inclusive Framework MAP cases started



OECD Inclusive Framework: average time to close MAP

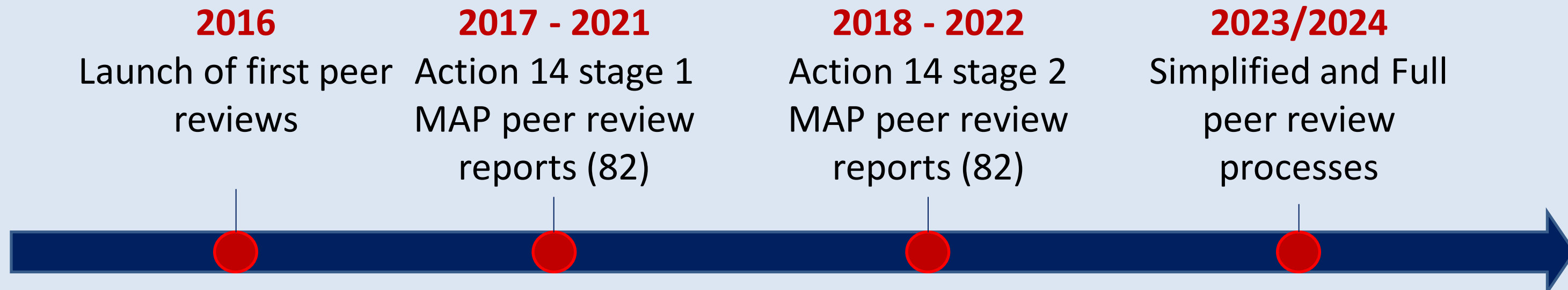


OECD Inclusive Framework: average time to close MAP (in months)

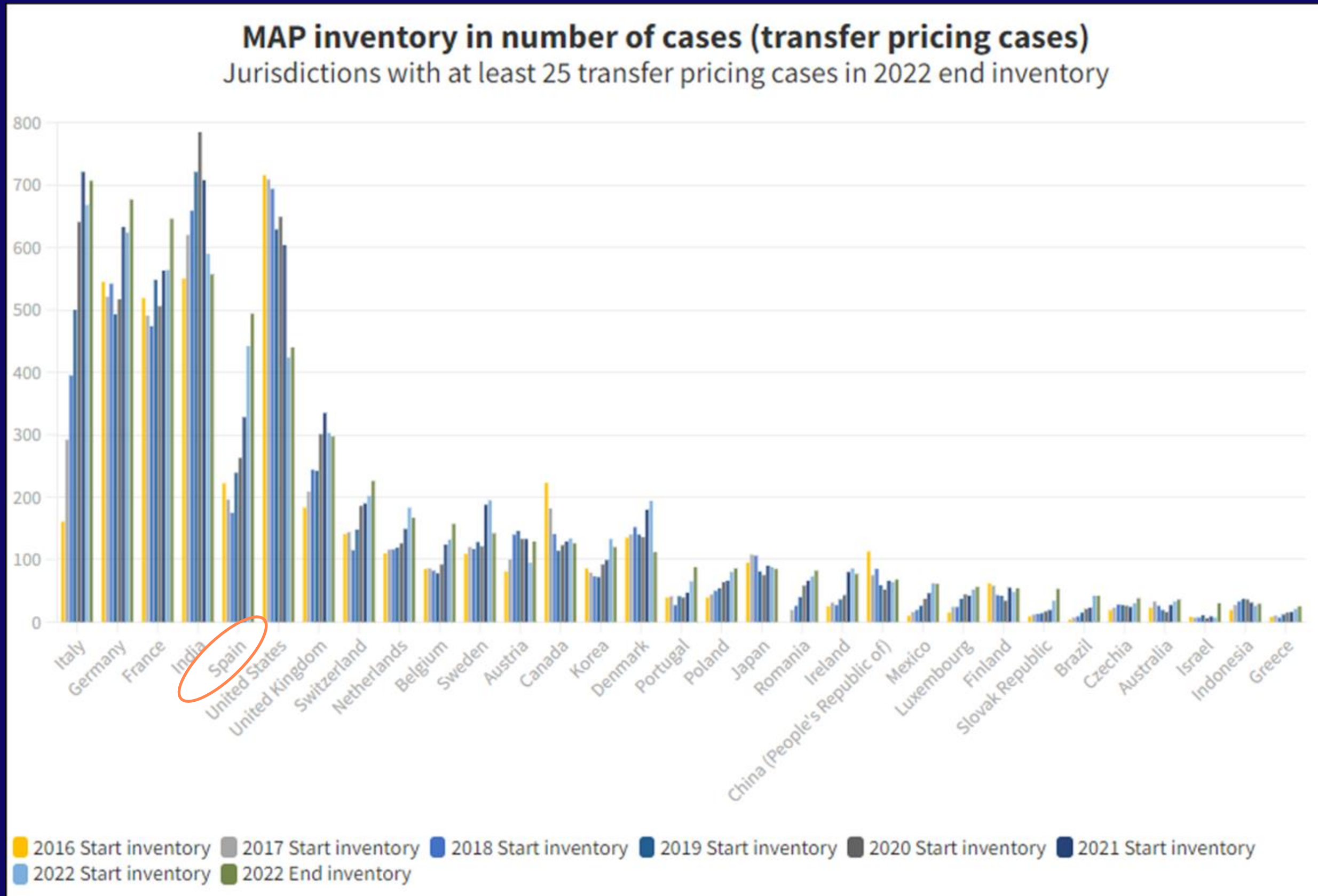


Source: OECD Mutual Agreement Procedure Statistics Spain for 2018, 2019, 2020, 2021, 2022

OECD Peer review process



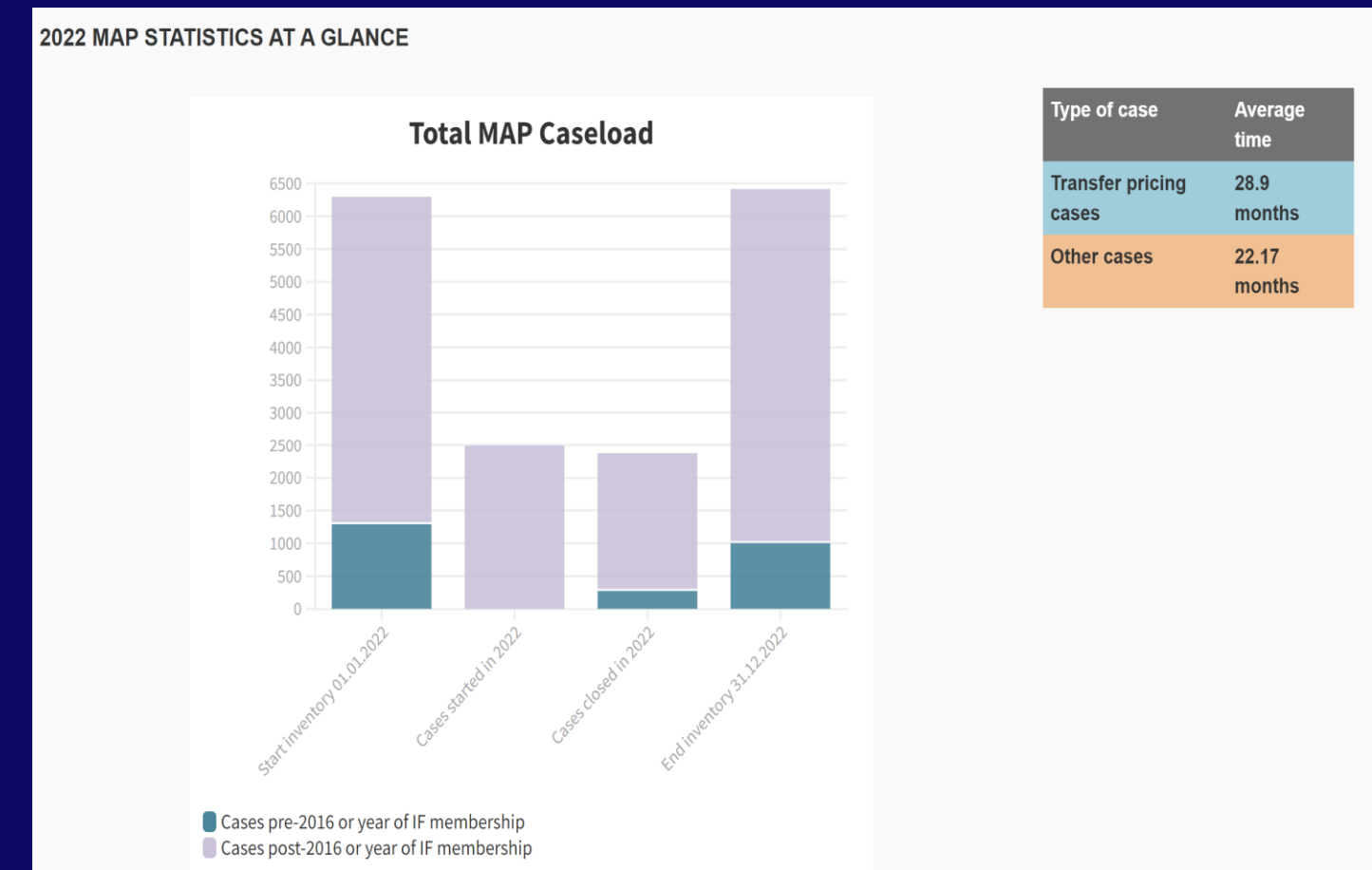
OECD MAP Cases by Jurisdiction



OECD MAP 2022 Main statistics



- MAP mechanism still concentrated in certain jurisdictions:
 - 90% of new proceedings initiated in 25 jurisdictions
 - Top 5 jurisdictions alone account for 44% of the new proceedings
- Approximately **4% less MAP cases were closed in 2022** than in 2021:
 - Transfer pricing cases: -0.5%
 - Other cases: almost -6.5%
- Around **73% of the MAPs concluded in 2022** fully resolved the issue both for transfer pricing and other cases. Approximately 2% of MAP cases were closed with no agreement. Both of these numbers remain similar to 2021
- On average, MAP cases closed in 2022 took **25.3 months** (i.e., 26 months in 2021):
 - Transfer pricing: 29 months (i.e., 32 months in 2021 and 35 months in 2020)
 - Other cases: 22 months (i.e., 20 months in 2021 and 18 months in 2020)



UE MAP 2022 Main statistics under the Arbitration Convention



- New cases initiated in 2022: 829 (i.e., 803 in 2021 and 961 in 2020)
- Cases completed in 2022: 867 (i.e., 746 in 2021 and 637 in 2020)
- Ending inventory in 2022: 2233 (i.e., 2303 in 2021 and 2213 in 2020)
- Average months for cases completed in 2022: 23 months (i.e., 25 in 2021 and 32,5 in 2020)

4. Focus on Spain

Spain - Structure of the Competent Authority Services Division (CASD)



Transfer pricing and the attribution of profits to permanent establishments

Spanish Tax Agency
(Agencia Estatal de
Administración Tributaria: AEAT)

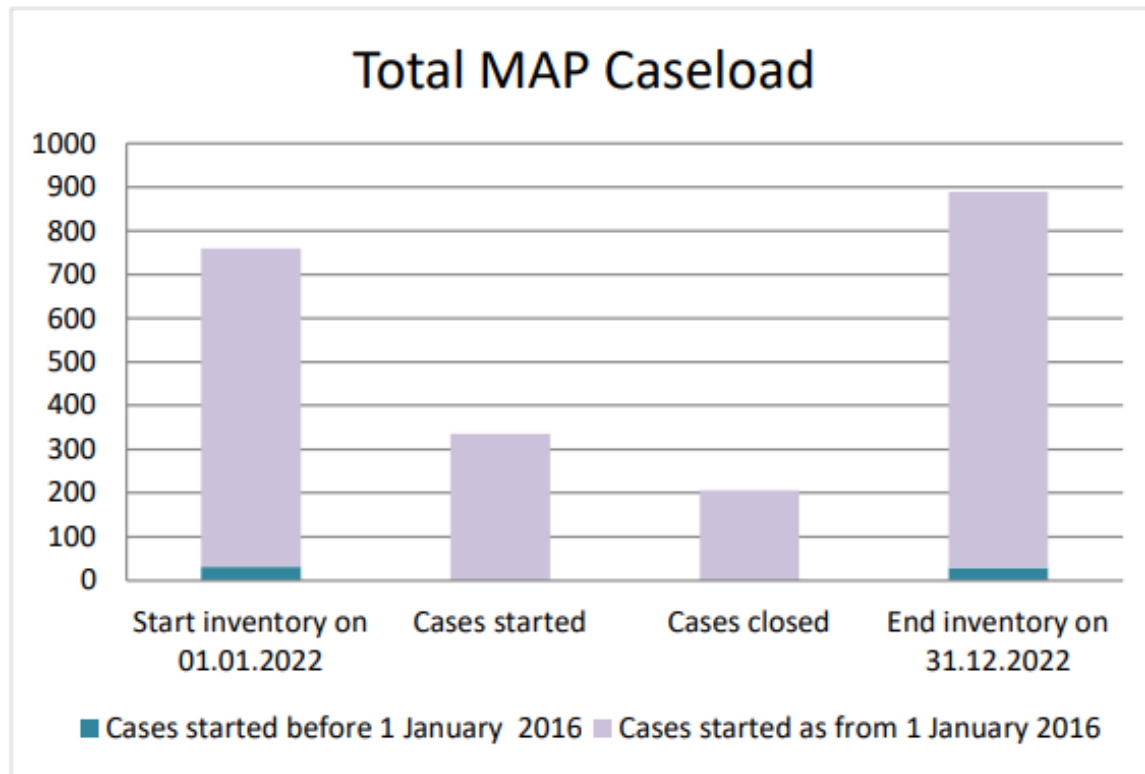
International Taxation Office
(Oficina Nacional de Fiscalidad
Internacional: ONFI)

All other cases

General Directorate for Taxation
(Dirección General de Tributos:
DGT)

Deputy General Directorate for
International Taxation

Spain - MAP Caseload - 2022



Cases started before 1 January 2016	2022 Start inventory	Cases started	Cases closed	2022 End inventory
Transfer pricing cases	12	0	0	12
Other cases	19	0	2	17

Cases started as from 1 January 2016	2022 Start inventory	Cases started	Cases closed	2022 End inventory
Transfer pricing cases	430	201	149	482
Other cases	299	134	55	378

Average time needed to close MAP cases

Cases started before 1 January 2016	Average time
Transfer pricing cases	n.a.
Other cases	102.43

Note: the average time taken to close MAP cases that started before 1 January 2016 was computed by applying the following rules:
 (i) start date: the date when the MAP request was received; and
 (ii) end date: either the date of the closing letter sent to the taxpayer or the date of final closure of the case if no agreement was reached.

Cases started as from 1 January 2016	Start to End	Receipt to Start	Start to Milestone 1	Milestone 1 to End
Transfer pricing cases	25.85	1.56	8.67	36.61
Other cases	14.14	2.13	10.23	10.60

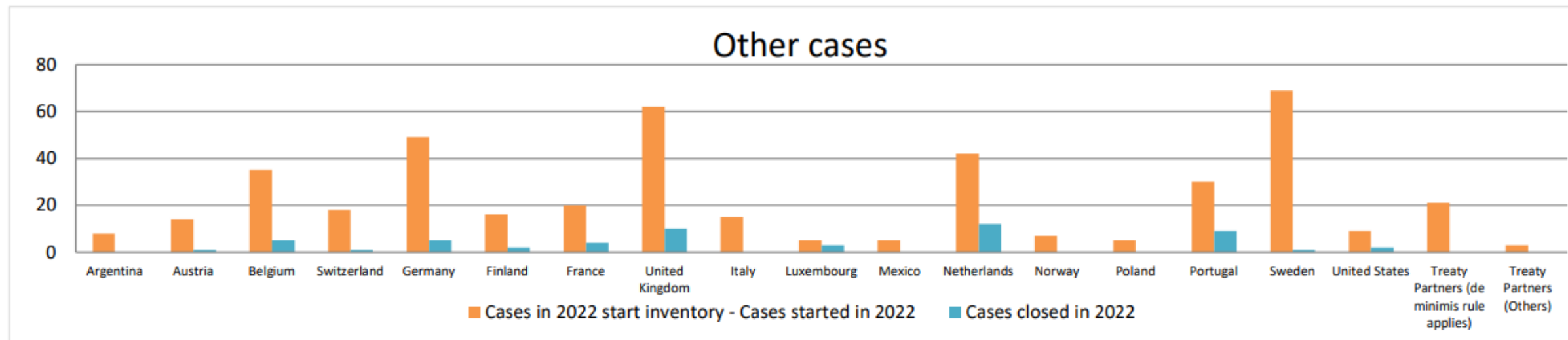
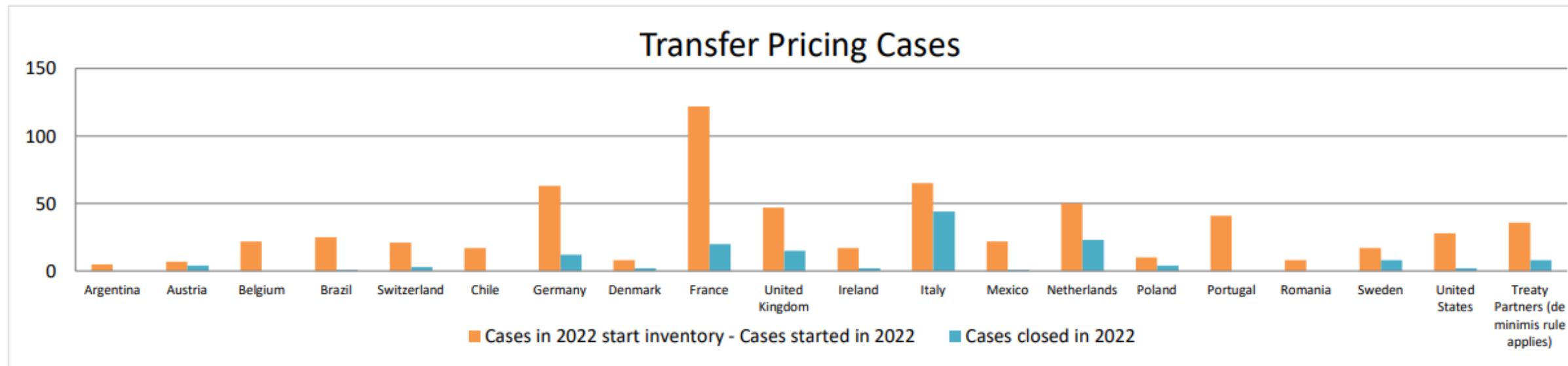
Note: the average times to close MAP cases that started as from 1 January 2016 were computed according to the MAP statistics reporting framework available at <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-reporting-framework.pdf>

Spain Post-2016 MAP Cases by Country 2022



Overview of MAP partners (only for cases started as from 1 January 2016)

Note: the MAP cases started before 1 January 2016 and closed in 2022 are not shown in these graphs



The label "Treaty Partners (de minimis rule applies)" applies to treaty partners with which the number of cases in start inventory plus the number of cases started is at least 5. The relevant MAP statistics are aggregated under this category.

The label "Treaty Partners (Others)" applies to treaty partners that are not reporting MAP statistics for the reporting period. The relevant MAP statistics are aggregated under this category.

Spain MAP Cases by Outcome – 2022

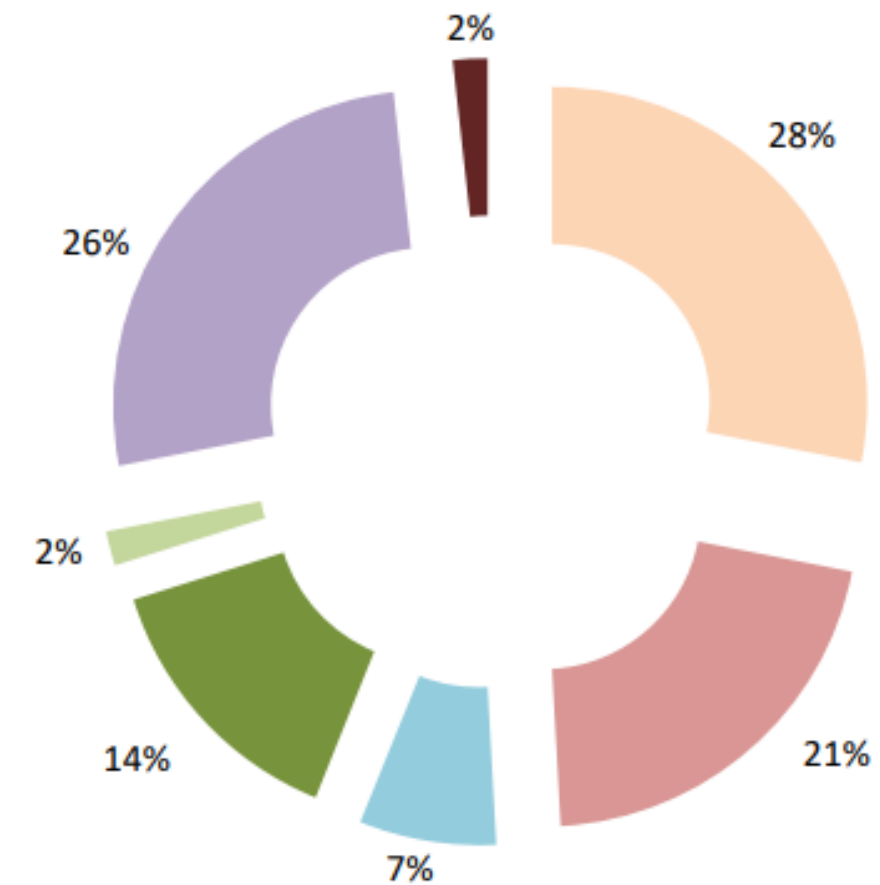


MAP Outcomes - TP cases



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

MAP Outcomes - other cases



Spain TP MAP Experience: policy and practice

- Legal basis:
 - EU Arbitration Convention
 - EU Directive
 - Tax treaties: arbitration clause
- Access/denial to MAP requests:
 - Audit settlement
 - Anti-abuse clauses
 - Serious penalties
- Handling of MAP:
 - 1 team leader + 5 case handlers+ 3 acceptance stage + 2 clerical issues= 11
 - Capacity building



Spain TP MAP Experience: policy and practice

- Objective oriented
- 360° Strategy: all procedures related to TP policy of a MNE: MAPs, domestic litigation, audits, APAs...
- Challenges for TP CA:
 - More cases, more complex
 - Amount A: Dispute prevention and resolution
 - Pilar II: Dispute resolution

5. The views of business

Q&A from the floor & Conclusion