

“Mutual agreement procedures and arbitration”

The situation between Italy and Germany

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Mutual Agreement Procedure - MAP Art. 25 OECD Model Tax Convention

Mutual agreement procedure as a specific tool for direct consultation among tax authorities aimed at:

- **settling cases of double taxation not in accordance with the Convention;**
- **solving interpretation or application issues;**
- **avoiding double taxation in cases not provided for in the Convention**

Mutual Agreement Procedure: main issues

- **mutual agreement procedure may be time-consuming;**
- **due diligence requirement, but no obligation as to the result**
- **lack of an independent body in the absence of agreement between States**
- **time-limits provided for by domestic legislation may preclude the corresponding adjustment or the refund, where such limits are not departed from in the Convention**

Arbitration provisions in the tax treaties concluded by Italy

- **Arbitration may be initiated only after both the Contracting States and the taxpayer have so agreed;**
- **the taxpayer must agree in writing to be bound by the decision of the arbitration board;**
- **in some treaties, the above-mentioned provision is completed by a sentence clarifying that the arbitration board may be established only if the parties concerned previously waive – without any reservations or conditions – the pending legal proceedings before domestic courts**

ARBITRATION CLAUSE IN TAX TREATIES CONCLUDED BY ITALY

- **Tax Treaties in force:**
Armenia (signed on 14.06.2002), **Canada** (signed on 03.06.2002), **Croatia** (signed on 29.10.1999), **Ghana** (signed on 19.02.2004), **Georgia** (signed on 31.10.2000), **Giordania** (signed on 16.03.2004), **Kazakhstan** (signed on 22.09.1994), **Lebanon** (signed on 22.11.2000), **Moldova** (signed on 03.07.2002), **Slovenia** (signed on 11.09.2001), **Uganda** (signed on 06.10.2000) **United States** (signed on 25.08.1999) and **Uzbekistan** (signed on 21.11.2000).
- **Tax Treaties signed and pending ratification:**
San Marino (signed on 21.03.2002) - **Hong Kong** (signed on 14.01.2013)

Arbitration provision in the OECD Model

- **Adoption of the provision left to the Contracting States;**
- **If the provision is included in the bilateral treaty, States are obliged to initiate arbitration if the taxpayer so requests;**
- **Arbitration starts after 2 years;**
- **Scope: subject to negotiation;**
- **Arbitration decision implemented notwithstanding the time limits provided for by domestic legislation.**

Article 26 Tax Treaty Italy-Germany Mutual Agreement procedure

1. 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 the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 25, to that of the Contracting State of which he is a national. The case must be presented within *two years* from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

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.

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.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the Contracting States.

Protocol With reference to Article 26

The term "*irrespective of the remedies provided by the domestic law*" in paragraph 1 of Article 26 means that invoking a mutual agreement procedure cannot replace the domestic remedies

European Arbitration Convention

- **Adjustments of profits of associated companies (also refers to the attribution of profits to the p.e.)**
- **Transactions among enterprises of EU member States**
- **Two stages: mutual agreement procedure and arbitration procedure**
- **Arbitration stage initiated after two years following the submission of the case to a competent Authority**
- **Competent Authority decision within 6 months after the opinion delivered by the Advisory Commission**
- **The mutual agreement procedure applies notwithstanding any time limits provided for in the domestic legislation of the Contracting States concerned**

European Arbitration Convention

Mutual Agreement Procedure

Arbitration Convention (ACMAP)

Interaction between arbitration procedure and judicial proceedings

- **Italy initiates the arbitration procedure (2nd stage) only if the taxpayer waives the appeal or permits the deadline for filing the appeal to expire (cf. art. 7, para 3);**
- **If a decision has already been rendered before the appeal waiver, double taxation can be avoided only by mutual agreement between the two competent Authorities. Such agreement must be in accordance with the decision of the domestic Court.**

Suspension of tax collection

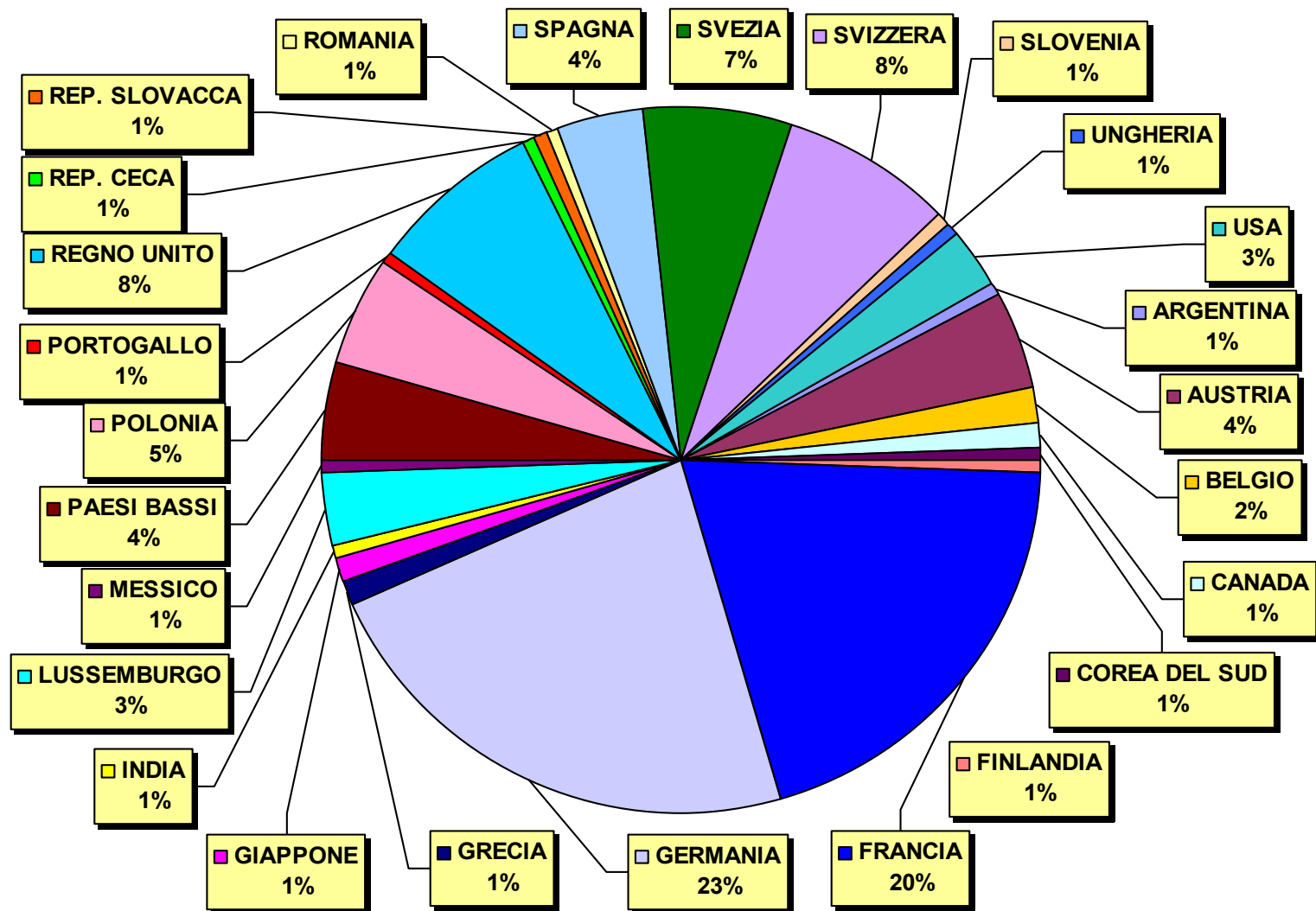
- **(Art. 3, paragraph 2, Law No. 99 of 22 March 1993, ratifying the Arbitration Convention);**
- **The Director of *Agenzia delle Entrate* may issue a measure granting the suspension of tax collection or enforcement measures until the conclusion of the proceedings (mutual agreement stage + arbitration stage);**
- **For this purpose the taxpayer must file a claim to the competent local tax office based on its tax domicile;**
- **The local tax office may request a proper security for the tax credit owed to the Inland Revenue.**

The Italian experience

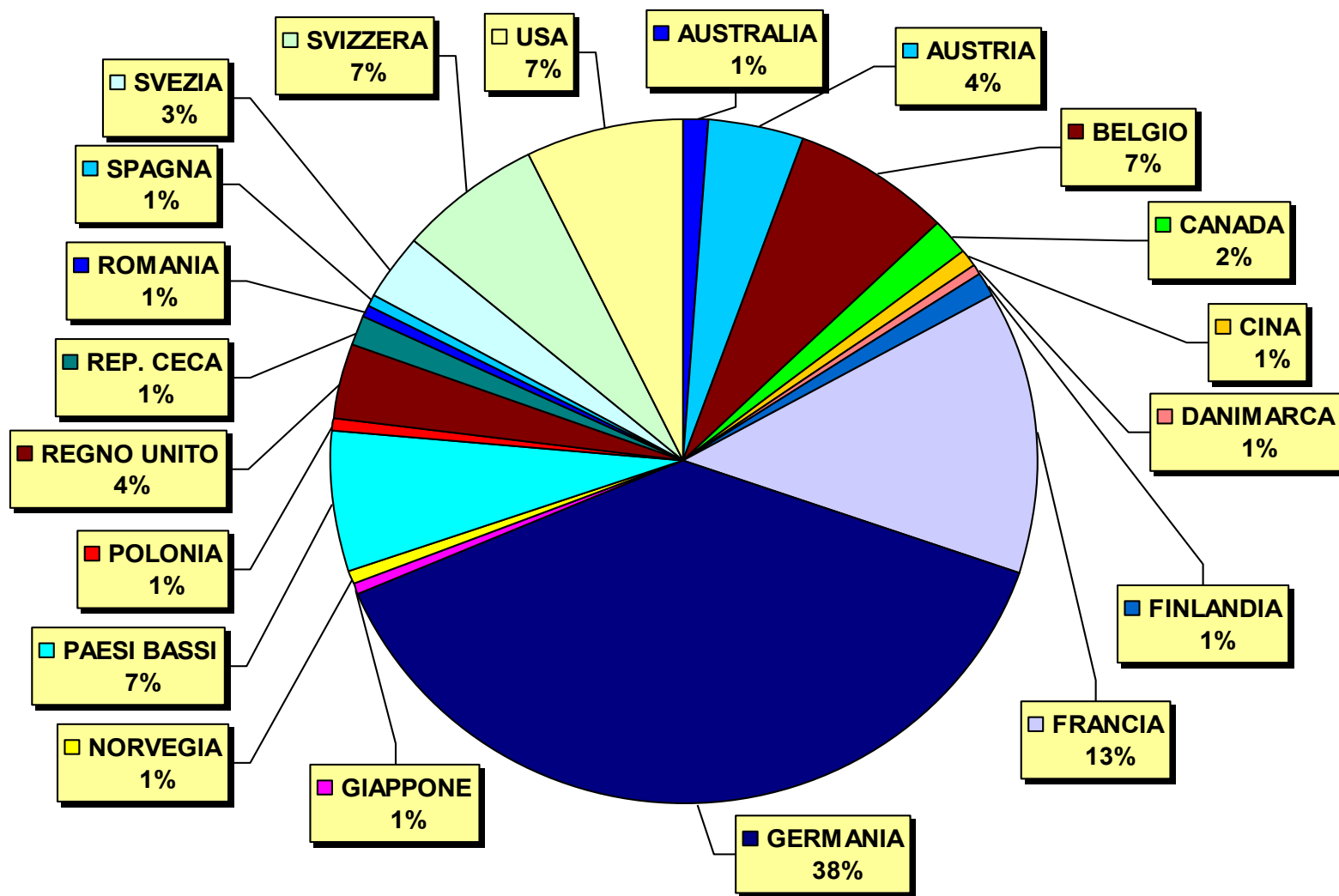
**Pending mutual agreement procedures:
art. 25 bilateral Treaty (MAP) +
art. 6 Arbitration Convention (ACMAP)**

- **Transfer pricing (art. 9 and art. 7 of bilateral Treaty; Arbitration Convention).**
- **Other articles (especially Articles 5, 14, 15, 17, 18, 19, etc.) + interpretation MAPs (a few).**

PENDING MUTUAL AGREEMENT PROCEDURES (PERCENTAGE BREAKDOWN BY COUNTRY)



CLOSED MUTUAL AGREEMENT PROCEDURES (PERCENTAGE BREAKDOWN BY COUNTRY)

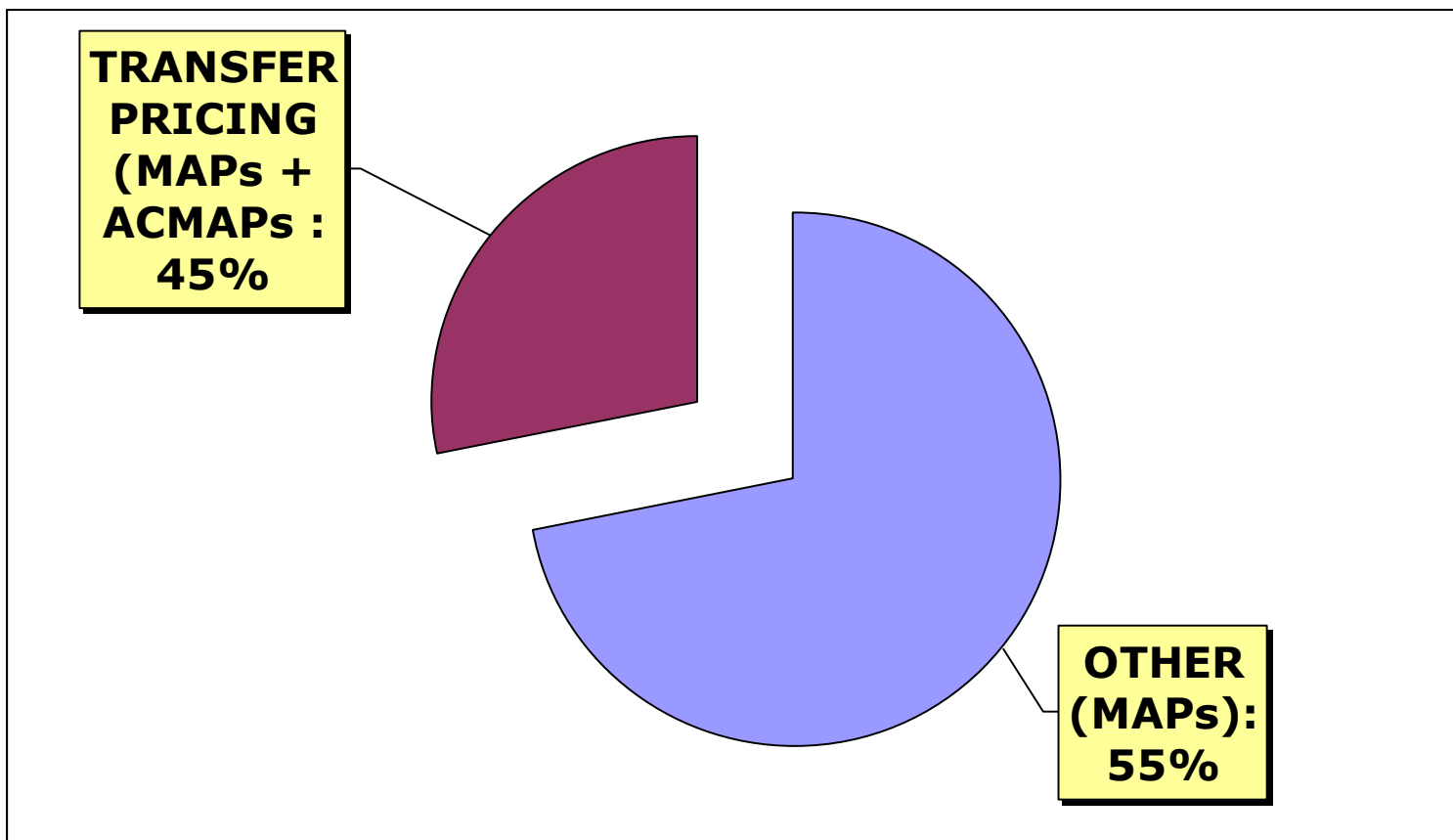


The Italian experience

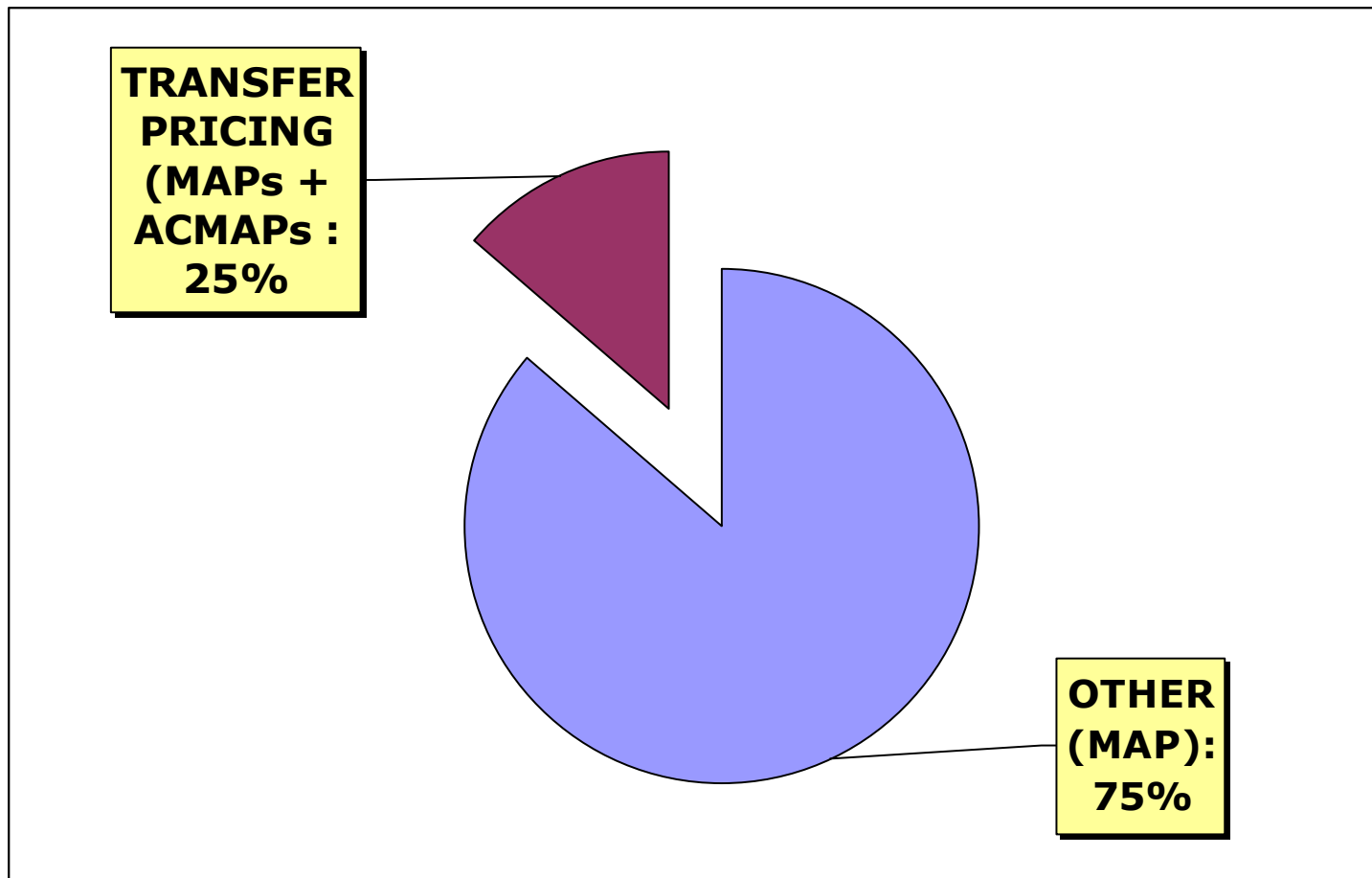
Percentage breakdown (MAP + ACMAP) according to foreign country of reference:

- **23% Germany (approx. 50% thereof relates to TP)**
- **20% France (approx. 70% thereof relates to TP)**
- **8% Switzerland (none relates to TP)**
- **8% United Kingdom (approx. 71% thereof relates to TP)**
- **4% The Netherlands (approx. 20% thereof relates to TP)**
- **2% Belgium (approx. 20% thereof relates to TP)**
- **3% United States (approx. 25% thereof relates to TP)**

PENDING PROCEDURES



CLOSED PROCEDURES



Developments

Since 1 November 2004 (date of entry into force of the Prolongation Protocol to the Arbitration Convention):

- **increase in the number of mutual agreement procedures concerning TP (almost exclusively ACMAPs);**
- **increase in the number of bilateral meetings with competent Authorities of other States;**
- **true achievement of arbitration: reaching mutual agreement without resorting to arbitration**

JTPF

Monitoring of the Arbitration Convention

**Next issues include audit settlements
and ACMAPs**

**These points should be on the agenda
of the next meeting of the Forum
(June 2013)**

Audit settlement in Italy

- **Act of audit settlement: not dependent on the signing of a clause by the taxpayer that preventively waives the filing of a MAP/ACMAP request**
- **Effect of audit settlement: Italian position is closed and cannot be modified**
- **Access to MAP under bilateral Treaty**
(the other State may make a corresponding adjustment where such State agrees with Italian tax authorities that the transfer pricing adopted is the arm's length TP)
- **Access to ACPMAP denied (*Agenzia delle Entrate* Circular No. 21/2012)**

Acquiescence (article 15 of Legislative Decree No. 218/1997)

- **included in the domestic tax settlements with absolutely similar effects as '*accertamento con adesione*' (voluntary tax conciliation) and judicial conciliation**
- **If legal proceedings are waived, the taxpayer is granted benefits and bonuses:**
 - ✓ **reduction of penalties;**
 - ✓ **exclusion of criminal liability;**
 - ✓ **restrictions to subsequent assessment activities.**

Acquiescence

- **Implicit recognition of the proper conduct by the tax authorities, even in the absence of an explicit statement of the taxpayer's willingness to settle the case, which characterizes the remedies provided for by voluntary tax conciliation, tax mediation and judicial conciliation**
- **Not explicitly mentioned in the Circular No. 21/2012**
- **Access to MAP under bilateral Treaty**
- **Access to ACMAP denied**