

BORENIUS

DISPUTE RESOLUTION IN INTERNATIONAL TAX MATTERS

Partner Einari Karhu

#12535896v1

Borenium Attorneys

BORENIUS ATTORNEYS



Good transaction services
get the deal done



GREAT
**TRANSACTION
SERVICE**
DELIVERS THE DEAL

Good advisory services put
your issue in legal context



GREAT
**ADVISORY
SERVICE**
CHANGES
YOUR WHOLE
PERSPECTIVE

Good dispute resolution services
focus on wins and losses



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VIGOROUSLY
PURSUES THE MOST
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TRANSACTIONS



- BANKING & FINANCE
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- M&A & PRIVATE EQUITY
- RESTRUCTURING & INSOLVENCY

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- ASSOCIATIONS & FOUNDATIONS
- COMMERCIAL CONTRACTS
- COMPETITION & PUBLIC PROCUREMENT
- CORPORATE ADVISORY
- EMPLOYMENT
- ENERGY & INFRASTRUCTURE
- ENVIRONMENT & NATURAL RESOURCES
- INTELLECTUAL PROPERTY
- REAL ESTATE & CONSTRUCTION
- SHIPPING, TRANSPORT & INSURANCE
- TAX
- TECHNOLOGY, MEDIA & TELECOMMUNICATION

DISPUTE RESOLUTION



- CORPORATE CRIME
- LITIGATION & ARBITRATION

TAX

Our highly ranked tax team is currently one of the largest among Finnish law firms with 11 full-time tax advisors. The structure of our tax team reflects our core strategy of providing a senior-oriented tax advice that ensures value-add to clients and distinguishes us from our key competitors.

We focus on delivering high-quality, integrated tax advice independent from audit work. Our team has regularly

- assisted clients in most important tax disputes. Our track record has been exceptional in several landmark cases including major transfer pricing audits and litigations.
- advised Finnish and foreign listed companies and private equity houses in M&A structuring and tax due diligence with great success.
- advised Finnish and international clients in e.g. compensation schemes, indirect tax planning, transfer pricing, advance rulings and with other day-to-day tax challenges.

Our transactional tax, tax advisory and tax litigation services cover all domestic and international tax areas including e.g.

- Corporate taxation
- M&A structuring and tax due diligence
- Value-added taxation
- Other indirect taxation and customs issues
- Withholding taxes
- Transfer pricing
- Taxation of non-profit organisations
- Personal taxation
- Incentive schemes
- Real estate and transfer taxation

SELECTED TAX REFERENCES

We have provided tax advice

- continuously to several **private equity funds**, such as **CapMan**, **Sentica Partners**, **Intera**, **Vaaka Partners** and **Vitruvian Partners** in their transactions.
- in several high profile transfer pricing disputes for e.g. **Paroc**, **Nokian Renkaat** and **Fortum**.
- in connection with the largest IPOs in the Finnish market e.g. **Terveystalo**, **DNA** and **Harvia**.
- to **Nordea** in selected tax issues and to **Handelsbanken** in incentive scheme taxation and VAT questions.
- in selected VAT issues for **Areva**.
- in real estate transactions for **Morgan Stanley** and **Aberdeen**.
- to **Agnico Eagle** in real estate tax litigation related to Europe's largest gold mine in Kittilä.



Morgan Stanley



AGNICO EAGLE



BORENIUS

BIG TICKET TAX LITIGATION



Source: Kauppalehti, 13 March 2019

- Involved in major tax disputes
- Assisted in several big ticket tax audits solved during the tax audit (not shown in the table)
- Assisted several multinationals in mitigating tax risks and tax litigation strategy

About Tax Litigation Strategies

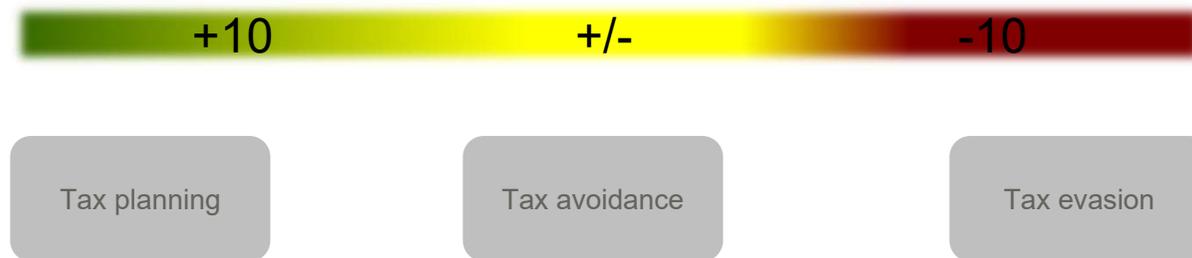
WHY WOULD A CORPORATION NEED A TAX LITIGATION STRATEGY?

- **International cooperation to enhance monitoring taxation and reduce aggressive tax planning (EU, OECD, G20)**
 - Has gained ground since financial crisis in 2008
 - Consequence of budget deficits and need for increased transparency and exchange of information
- **Global discussion about tax planning and use of tax havens**
 - Media, politicians, NGOs...
 - Starbucks, Google, Amazon, Apple...
- **Domestic discussion about tax planning and use of tax havens**
 - Media, politicians, NGOs...
 - Mehiläinen, Asiakastiето, Stora Enso, pension institutions...



INCREASE OF RISK
OF TAX DISPUTE

WHAT IS TAX PLANNING? (1/2)



WHAT IS TAX PLANNING? (2/2)

▪ Tax evasion

- False tax reporting and hiding income
- Illegal behaviour → Criminal liability for the management

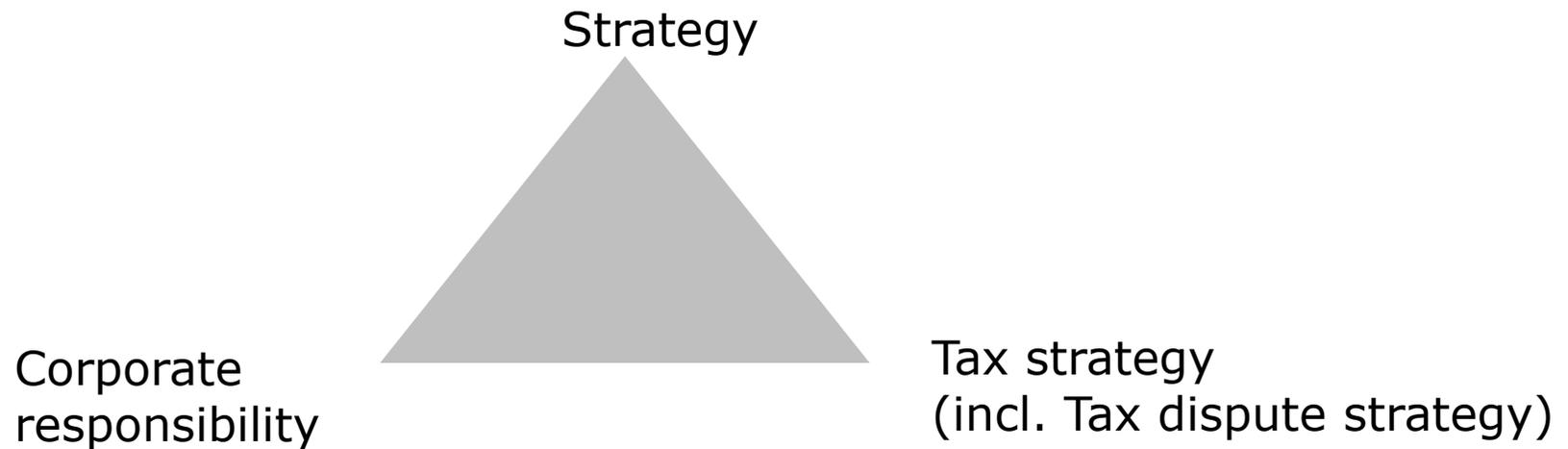
▪ Tax avoidance

- Complying with legislation → no criminal liability
- However, legal form is not accepted for tax purposes on the grounds of general anti-avoidance rules

▪ Tax planning

- Complying with legislation → no criminal liability
- Measures cannot be challenged on the grounds of general anti-avoidance rules

CORPORATE TAX STRATEGY



- Management – Board - Owners
- Positioning in the scale: tax planning < > tax avoidance

EXAMPLE I: CAUTIOUS TAX PLANNING STRATEGY

- Objective: Moderate effective tax rate (in comparison to e.g. parent company's or relevant group countries average corporate tax rate)
- Choice of not to maximize the utilization of tax planning opportunities
 - Fair and reasonable tax burden
 - No opportunistic measures to stretch the tax legislation, no utilization of asymmetries in legislations
- Confirmation of all tax choices with tax authorities
- Focus of international tax planning in mitigating double taxation

EXAMPLE II: ACTIVE TAX PLANNING STRATEGY

- Objective is to minimize tax burden with help of tax planning
 - Effective tax rate as low as possible – even 0%
- Tax consequences are not always confirmed in advance with tax authorities
 - Willingness to take risks
- Readiness to test the limits of tax legislation and utilize the tax planning opportunities (e.g. asymmetries)
 - E.g. Incentive schemes, exit-structures, utilization of tax losses
- Active international tax planning
 - E.g. centralized IPR, financing structures, hybrid instruments, tax havens

Proactive or reactive approach to uncertainties

BEFORE OR AFTER THE TAX REASSESSMENT DECISION?



PRE-EMPTIVE ALTERNATIVES

- Internal / external tax analyses
- Informal/formalized questions to tax authorities
 - On a no name or name basis
- Dialogue procedure of ongoing tax matters
 - Tax authorities want to be close to the tax payers
- Formal advance tax rulings
- Advanced Pricing Agreements (APA) in Transfer Pricing

→ Pre-emptive alternatives aim to find an amicable solution / compromise and mitigate a tax dispute

ROAD TO A TAX DISPUTE

- Tax dispute follows from a disagreement between taxpayer and tax authorities related to prior actions carried out by the taxpayer
 - Typically it follows a tax audit
 - ...but may also result from disagreement in annual tax assessment
- However, appeal procedure following an advance ruling should typically be kept separate from actual tax disputes (although similarities exist)
 - Advance rulings relate purely to interpretation of substantive tax rules while tax disputes typically involve tax procedural aspects

TAX DISPUTE STARTS WITH A TAX AUDIT

- Tax audit is the most thorough tax control measure that Verotarkastus on perusteellisin yksittäiseen asiakkaaseen kohdistuva verovalvonnan muoto



- *Tax audits cover*
 - *the type and extent of the activity in question, as applicable,*
 - *the way in which it has been entered in the accounts, and*
 - *whether the information in the accounting records has been reported correctly to the Tax Administration*

UNDERSTANDING THE RIGHTS OF TAXPAYER

- Tax audit measures must be based on law
 - Taxpayers' and third parties' duty to disclose information for purposes of tax audit
 - Publicity and availability of official documents
 - E.g. interviews
 - Obligation to seek clarification (burden of proof)

Tax dispute resolution

TAX REASSESSMENT DECISION

- Tax dispute phase starts with a tax reassessment decision
- Analysis of the decision
 - Legal grounds for decision
 - Financial consequences (additional tax, late interest, penalty surcharge)
 - Payment obligation irrespective of potential appeal
 - Possibility to apply for interdiction of enforcement (subject to interest)
 - Effect on the financial position of the taxpayer?
- No more negotiations (or plea bargain)!

COMPARISON OF ALTERNATIVES

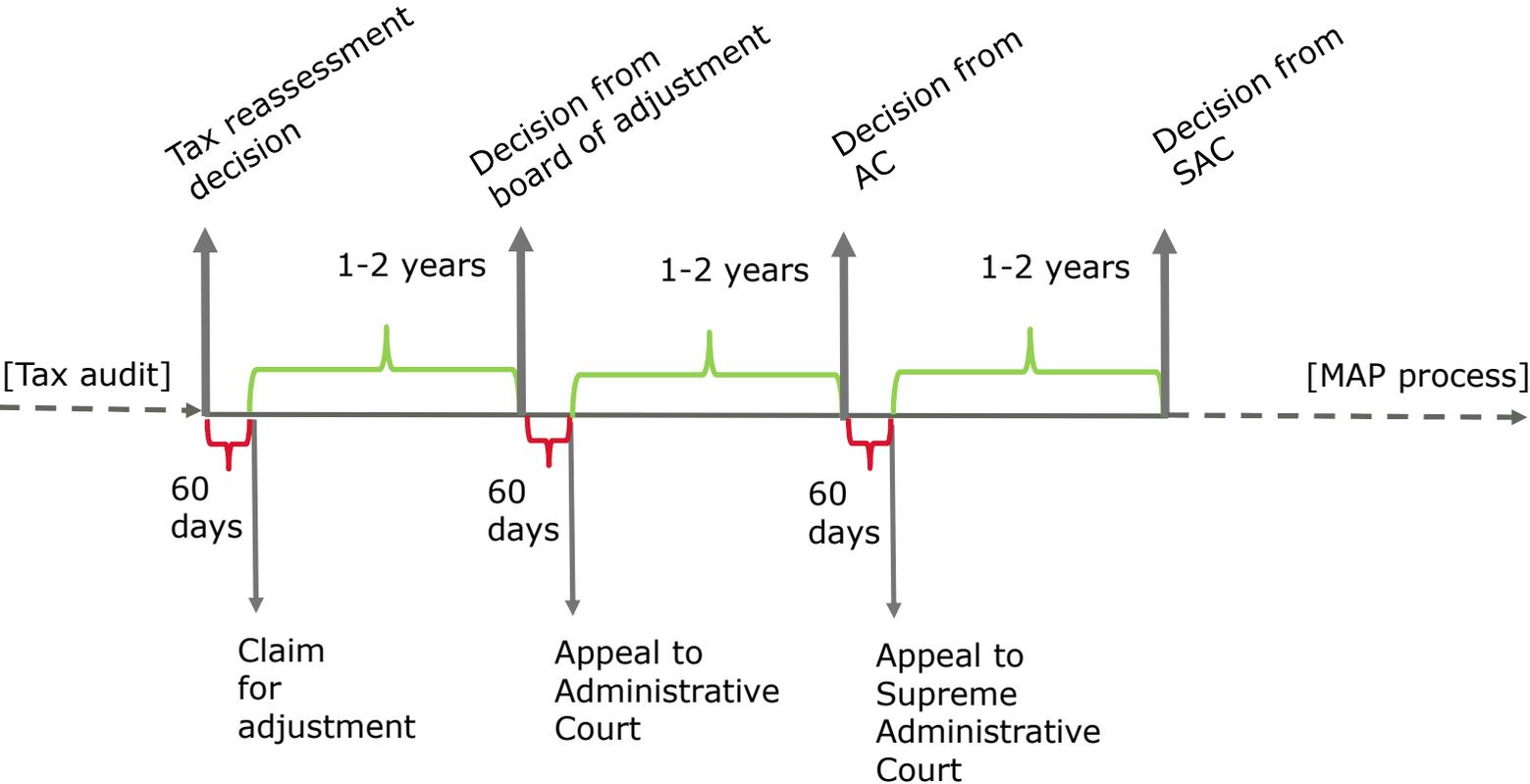
1. Accepting the reassessment decision based on
 - Legal grounds (e.g. uncertainty on outcome of appeal)
 - Insignificant amounts (even if taxpayer disagrees, appealing may not be attractive due to legal fees, administrative burden, etc.)
 - Other reason (e.g. board/shareholder decision, public perception, etc.)

2. Challenging the reassessment decision (mitigating its consequences)
 - Domestic appeal procedure
 - Cross-border mutual agreement procedure

CHARACTERISTICS OF DOMESTIC APPEAL PROCEDURE

- Written procedure with practically no possibility for oral hearings
- Long-lasting procedures with short response times
- Administratively burdensome and time-consuming for companies
 - Poor predictability on the timing
 - Typically handled ad hoc (i.e. in addition to the daily work of CFO / tax director)
 - Therefore external advisors are typically used
 - Large case can require several teams of advisors

TIMELINE FOR DOMESTIC APPEAL



IMPORTANCE OF THE REASSESSMENT DECISION

- Tax reassessment decision sets the scope and the quantity of the case
 - Appellate instances cannot increase the amounts or decide on anything else (*reformatio in peius*)
 - However, arguments and reasoning can develop
- Taxpayer can focus on arguments presented in the decision without fearing that the case would end worse
 - NB. Tax recipients' legal services unit's right to appeal
- Taxpayer has to decide on how to handle the tax consequences

CLAIM FOR ADJUSTMENT

- First instance of appeal is the Board of Adjustment
 - An independent body within Tax Administration
 - Composed of both tax recipients' and taxpayers' representations (i.e. no independent judges)
 - Decisions made on the proposals of a tax officer preparing the case
- Taxpayer's appeal period 60 days (or 3 years from the relevant tax year)
 - Written claim for adjustment specifying what should be corrected and why
- BoA may ask for rejoinders from taxrecipients and from taxpayer
- Decision in 1-2 years from the filing
 - Decision is typically more tax substantive and procedural aspects are less relevant
 - Act on tax assessment procedure

PRECEDENT APPEAL – FAST TRACK TO SAC

- Fast track from Board of Adjustment to SAC for precedent type of tax issues
 - Requires that the case involves a clear question on interpretation of law that may have precedent value for other cases as well
 - Requires that both parties (taxpayer and TRLSU) support the process
 - Application to be filed within 60 days
 - If rejected by SAC, case continues as normal appeal procedure (cf. KHO:2017:197)
- Possibility for precedent appeal procedure to be considered already in the claim for adjustment
 - Requires that TRLSU has been heard in the BoA, i.e. that TRLSU has been requested for rejoinder on the matter before BoA makes the decision

APPEAL TO ADMINISTRATIVE COURT

- BoA decision can be appealed to Administrative Court in 60 days
 - First (and often the only) judicial instance for tax matters
 - Three judges with varying competence in tax legislation
- Appeal should specify what should be corrected and why
 - Reasoning cannot be appealed against
- Almost exclusively written procedure with mandatory round of rejoinders
 - May consist of several rounds if necessary
- Oral hearing may be organized if required and is not considered unnecessary
 - However, in majority of cases, oral hearing is not granted
- Legal costs are not reimbursed even if case is won

CHARACTERISTICS OF AC PROCEEDINGS

- In comparison with BoA, additional focus on legal argumentation
 - Burden of proof
 - Time limits
 - Threshold for reassessment
 - Protection of trust
- Rather long process times and short response times
- TRLSU more active

APPEAL TO SUPREME ADMINISTRATIVE COURT

- AC decision may be appealed to SAC in 60 days
 - Subject to leave to appeal
 - Precedent matter
 - Obvious mistake
 - Other significant (such as economic reason)
- In practice only a small number of cases are granted a leave to appeal
 - Particular focus on the application for leave to appeal
 - However, no separate decision on leave to appeal but decided together with the appeal
- Tax matters are typically dealt in the tax unit
 - More competent judges for tax matters than in AC
 - Decisions made on proposal from referendary

CHARACTERISTICS OF SAC PROCEEDINGS

- SAC aims to consider cases with legal questions subject to interpretation
 - No cases that require assessment of proofs
- Oral hearings are even more rare
 - Typically relate only to matters involving individuals
- Rather long process times and short response times
 - SAC may refer cases to European Court of Justice that postpone the decisions even further
- Legal expenses are not typically covered

REQUIREMENTS FOR SUCCESSFUL DOMESTIC DISPUTE RESOLUTION

- Active conduct of the proceedings and processes from the advisor
 - Continuous monitoring of the case and development of the praxis
 - Case can last for several years and legal environment usually develops
 - Liaison with taxpayer, court, opponent (TRLSU)
 - Be aware of the status and timeline, be available
- Anticipation
 - Consider appeal strategy alternatives (60 days run fast)

CHALLENGES IN TAX DISPUTE PROCEEDINGS

- Lack of information / uneven information split
- Bad documentation / faulty tax reporting in the past
- Time constraints
- Impatience

Dispute resolution in international tax matters

BACKGROUND

- In cases where taxpayers encounter either juridical or economic double taxation, they may seek applying to international tax dispute resolution mechanisms instead of domestic remedies in order to have the double taxation eliminated.
- The key idea is that the states find a solution that eliminates the double taxation, either by negotiations between authorities or by an arbitration procedure.
- Until 2019, there have been two alternative mechanisms in international tax dispute resolution:
 - Mutual Agreement Procedure (MAP) article provided in the bilateral double tax treaties (DTTs)
 - Art. 25 of OECD Model Tax Convention
 - EU Arbitration Convention (90/436/EEC)

BACKGROUND AND RECENT DEVELOPMENTS

- As a part of OECD BEPS it was recognized that more focus should be put on how international tax disputes arising from e.g. more strict rules implemented through BEPS Actions could be resolved in a manner ensuring certainty and predictability for businesses.
 - BEPS Action 14: Making Dispute Resolution Mechanisms More Effective
 - BEPS Action 15: Multilateral Instrument (MLI)
 - Minimum standard for MAP and option to choose mandatory binding arbitration (MLI Part VI)
- At EU level it was determined that harmonized rules should be implemented to provide taxpayers with an effective tax dispute resolution mechanism within EU.
 - EU directive on tax dispute resolution mechanisms in European Union (2017/1852, "Dispute resolution Directive"). Shall be implemented in member states by 30 June 2019.

INTERNATIONAL TAX DISPUTE RESOLUTION AS OF 2019

- The Dispute Resolution Directive is implemented in Finland by enacting Act on international tax dispute resolution procedures (hereinafter "Tax Dispute Act", Laki kansainvälisten veroriitojen ratkaisumenettelystä, HE 308/2018 vp) that will enter into force as of 30 June 2019.
 - Recognizes three different tax dispute resolution procedures:
 - EU Tax Dispute Resolution Procedure (*EU-riitojenratkaisumenettely*)
 - EU Arbitration Convention procedure (*Arbitraatioyleissopimusmenettely*)
 - Tax Treaty Procedure (*verosopimusmenettely*)
- Tax Dispute Act will, however, regulate the procedures applicable under Dispute Resolution Directive, whereas EU Arbitration Convention Procedure and Tax Treaty Procedure will follow the rules provided in respective convention or treaty.
- Furthermore, MLI Part VI will provide a tax dispute resolution procedure which has its own specific rules.

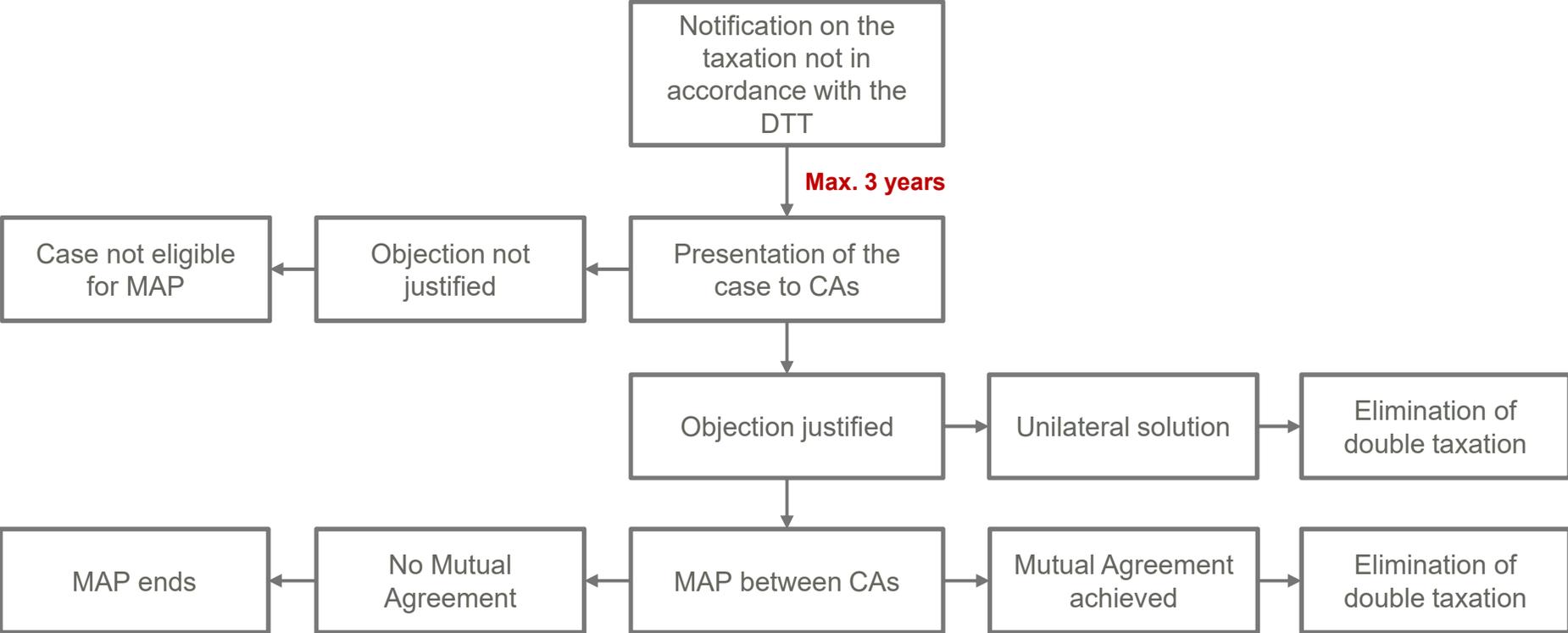
INTERNATIONAL TAX DISPUTE RESOLUTION AS OF 2019

- Starting from 2019, there are in principle four different procedures that may apply:
 1. EU Tax Dispute Resolution Procedure pursuant to Tax Dispute Act and Dispute Resolution Directive
 2. EU Arbitration Convention Procedure pursuant to the EU Arbitration Convention
 3. Mutual Agreement Procedure pursuant to bilateral DTTs
 4. MAP pursuant to bilateral DTTs supplemented by arbitration procedure pursuant to MLI Part VI

MUTUAL AGREEMENT PROCEDURE UNDER BILATERAL TAX TREATIES (ART. 25 OF OECD MTC)

- MAP is a procedure where Competent Authorities (CA) of the Contracting States try to reach an agreement by negotiations on how to resolve a tax dispute in a way that eliminates taxation not in accordance with the DTT.
- Prerequisite: "Actions of the Contracting State(s) result or will result for a person in taxation not in accordance with the provisions of the DTT".
- Application should be made within 3 years from the notification of such action.
- The competent authority (CA) may solve the issue unilaterally, but if this is not possible, the CAs "shall endeavor" to resolve the case by MAP.
- Art. 25.5 of OECD MTC includes an arbitration procedure as well. The arbitration procedure under OECD MTC is not covered in this presentation as it does not apply to Finland.

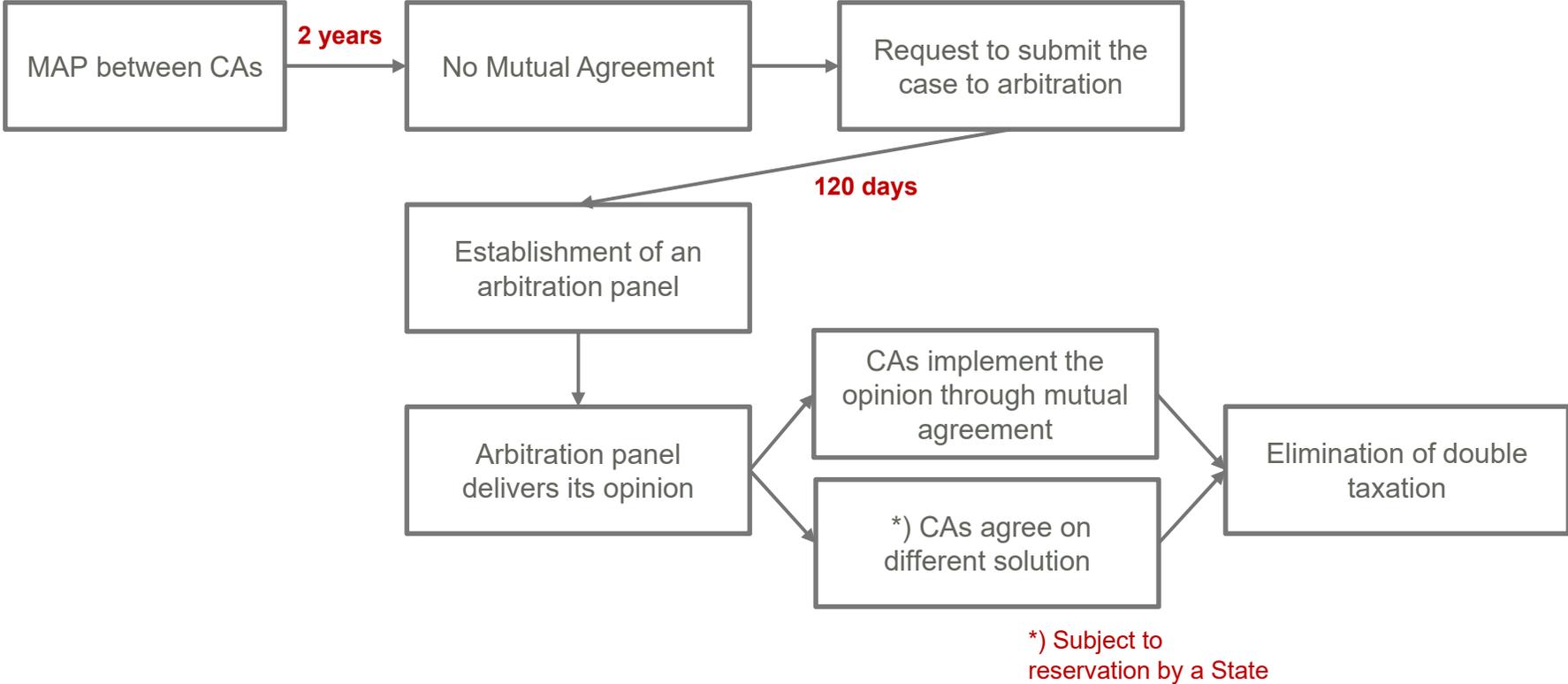
MAP AS A PROCEDURE



MANDATORY BINDING ARBITRATION IN MLI PART VI

- States that implement the MLI may opt to apply the arbitration procedure provided in MLI Part VI to its bilateral DTTs. Part VI will only apply if both of the Contracting States has opted for it.
- The Arbitration Procedure under MLI supplements the MAP under Art. 25.1-2 of OECD MTC.
 - It provides taxpayers with an option to apply for a mandatory binding arbitration where the CAs are unable to resolve the case in MAP within 2 years deadline.
 - An arbitration panel will be established to give an opinion on how the case should be resolved.
 - In general, MLI Part VI will apply to the same scope of cases as the tax treaty MAP.
- MLI leaves states a broad freedom to make reservations and to "custom" the procedure.
- Finland ratified the MLI in February 2019. The MLI will enter into force as of 1 June 2019 in Finland.

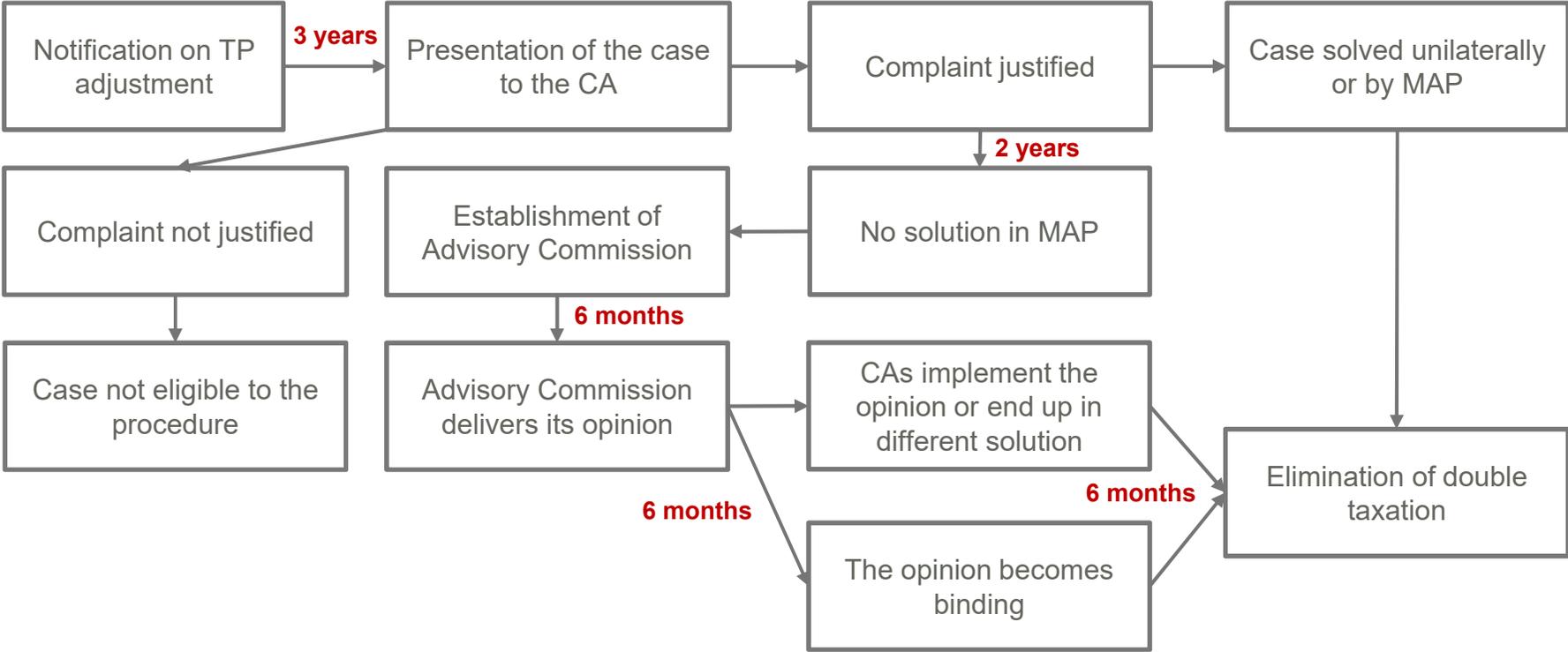
MANDATORY BINDING ARBITRATION UNDER MLI PART VI



EU ARBITRATION CONVENTION

- An inter-governmental treaty between EU Member States that establishes a dispute resolution mechanism in cases where double taxation occurs as a result of transfer pricing and PE allocation adjustments.
- The procedure comprises of a MAP between competent authorities and an arbitration procedure (Advisory Commission).
 - The CAs have two years time limit for reaching a mutual agreement eliminating double taxation.
 - If the CAs fail to reach an agreement, they must submit the case to arbitration procedure where an advisory commission comprising of independent persons and representatives of the states give an opinion on how the case should be resolved.

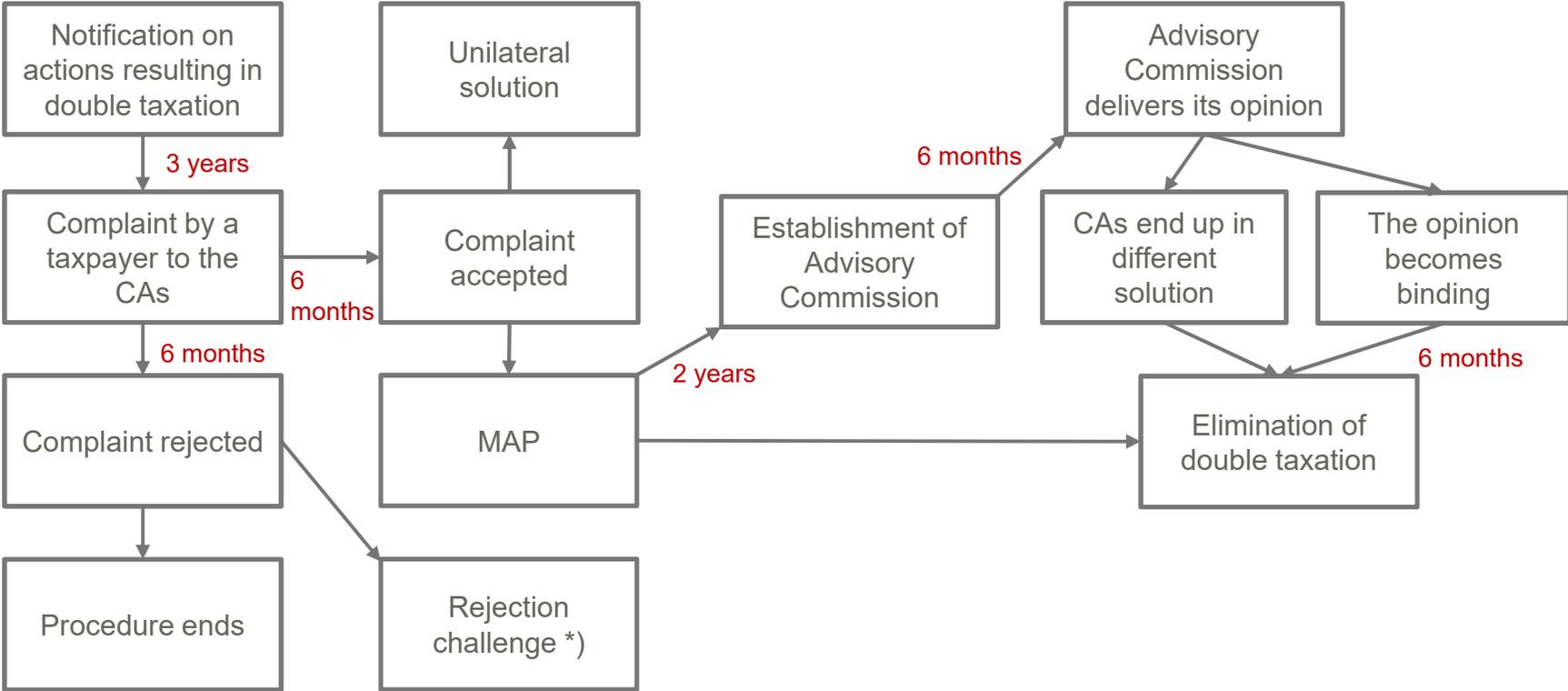
PROCEDURE UNDER EU ARBITRATION CONVENTION



EU TAX DISPUTE PROCEDURE UNDER TAX DISPUTE ACT AND DISPUTE RESOLUTION DIRECTIVE

- The Procedure under the Directive is similar to the EU Arbitration Convention, but covers a wider scope of cases, has more detailed procedural rules and provides some new remedies for taxpayers.
- Material scope: All disputes arising from the interpretation and application of DTTs and EU Arbitration Convention.
- Personal scope: No limitations, both legal and natural persons are eligible.
- Comprises of MAP between CAs and an arbitration in Advisory Commission or in an alternative dispute resolution commission.
- Provides remedy to a taxpayer whose complaint has been rejected by CAs (so called rejection challenge).

EU TAX DISPUTE PROCEDURE



*) Rejection challenge may lead to either 1) MAP, 2) arbitration, or 3) termination of the procedure.

MAIN ASPECTS TO BE CONSIDERED WHEN CHOOSING THE PROCEDURE

- Geographical scope
- Material scope of the eligible cases
- Procedural rules and the binding force

MAP STATISTICS: OECD

- Caseload and average time taken to close MAP cases



Source: OECD,
<http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>

EU ARBITRATION CONVENTION STATISTICS

Country	Opening inventory 1 Jan 2017	Cases initiated 2017	Cases completed 2017	Ending inventory 31 Dec 2017	Average cycle time for cases completed in 2017
Finland	58	12	26	44	32
All member states	1899	547	534	1907	

Source: EU Joint Transfer Pricing Forum

https://ec.europa.eu/taxation_customs/sites/taxation/files/statistics_on_pending_maps_under_the_arbitration_convention_2017_en.pdf

CONTACT INFORMATION



Einari Karhu

Partner

Direct 020 713 3488

Mobile 050 377 1036

einari.karhu@borenius.com

CONTACT INFORMATION

BORENIUS ATTORNEYS LTD

Eteläesplanadi 2, FI-00130 HELSINKI, FINLAND

Office: +358 20 713 33

Email: info@borenius.com

Fax: +358 20 713 3499

Web: www.borenius.com

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