

International Bar Association Trends in Transfer Pricing

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Agenda

- APA and MAP Practice Trends and Experience
- COVID and Extraordinary Events
- Transfer of Functions Across Borders
- ICAP, ETACA, and Tax Rulings
- Intercompany Financing: HMRC v. Blackrock and Singtel Cases
- Data Collection and Sale by Related Companies

APA and MAP Practice Trends and Experience

APA and MAP Practice Trends and Experience

- Recent years have shown different trends in the context of OECD Base Erosion and Profit Shifting (“BEPS”) project and the fight against tax avoidance and evasion:
 - Strengthening of tax audits by tax administrations
 - Increased transparency requested from the taxpayers
 - Search for increased tax certainty by the taxpayers
- A major concern for taxpayers is, while complying with tax laws and regulations, to avoid any double taxation, especially in transfer pricing matters
- Traditional dispute prevention and resolution instruments, such as respectively Advance Pricing Agreements (“APA”) and Mutual Agreement Procedures (“MAP”) / Arbitration, have proved to be useful tools at the disposal of tax administrations and taxpayers
- Alternative tools have also been developed by some tax administrations to ensure more efficient procedures while addressing double taxation issues before or during a tax audit
 - Domestic or international tax compliance programs consisting in collaborative processes between tax administrations and taxpayers to address contemporaneous tax issues
 - Simultaneous and joint tax audits

MAP Practice Trends and Experience

2021 MAP Statistics of the OECD (1/2)

- The 2021 MAP Statistics of the OECD show the following trends:

1. Significantly more MAP cases were closed in 2021.

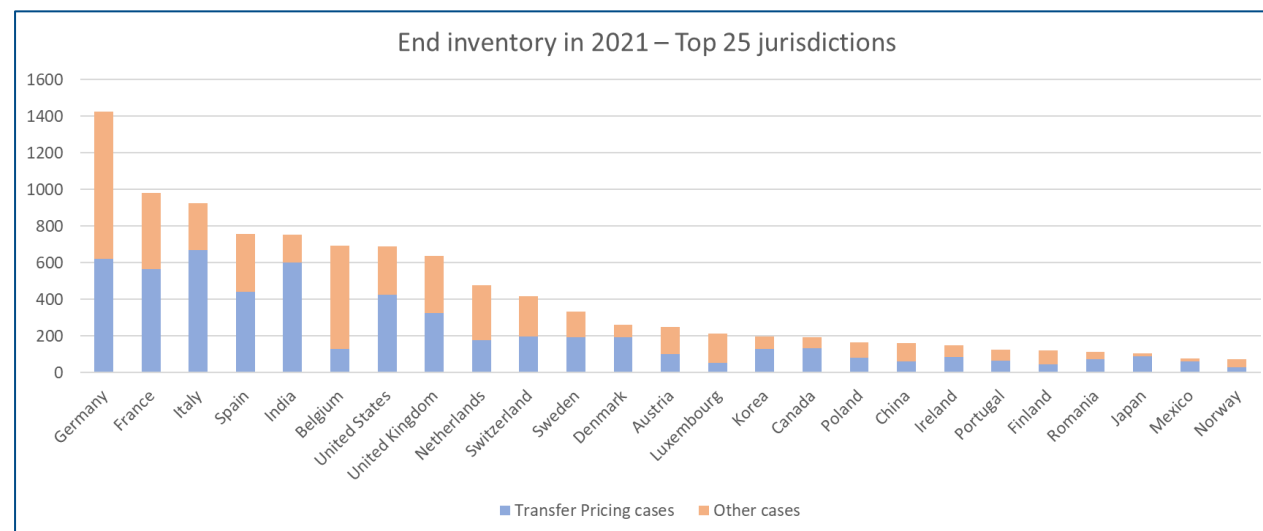
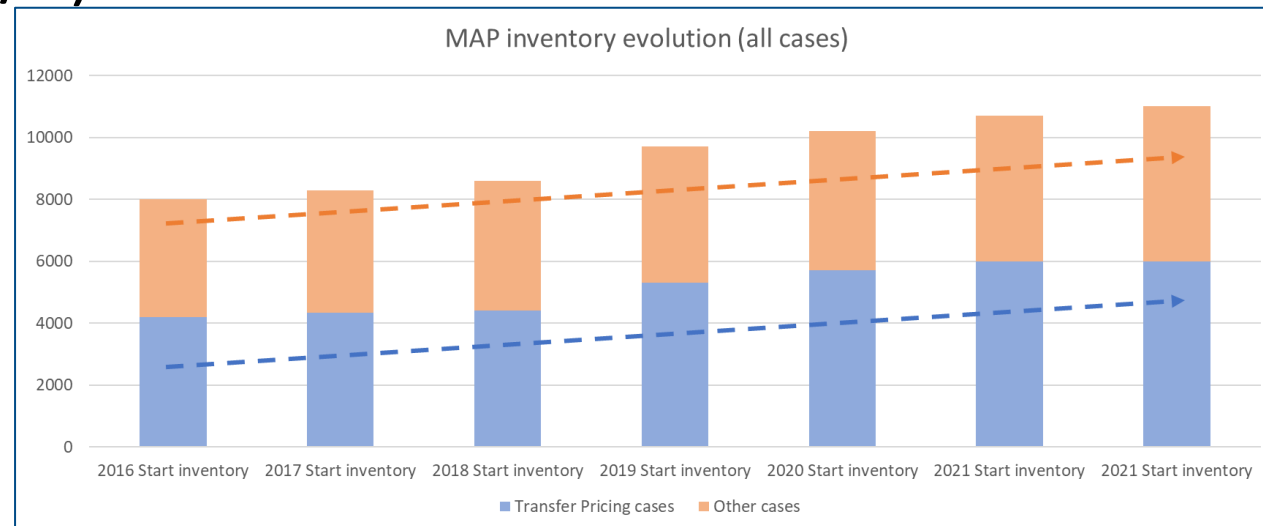
- Approximately 13% more MAP cases were closed in 2021 than in 2020, with both transfer pricing cases (+22%) and other cases (+7%) closed being more than in 2020.

2. Fewer new cases in 2021.

- The number of new MAP cases opened in 2021 decreased (-3%) compared to 2020. This is attributed to a significant decrease in new transfer pricing cases being opened (-10.5%), while the number of other cases opened increased (+4%) compared to 2020.

3. Outcomes remain generally positive.

- Around 75% of the MAPs concluded in 2021 fully resolved the issue both for transfer pricing and other cases (similar to 2020).
- Approximately 2% of MAP cases were closed with no agreement compared to 3% in 2020.



MAP Practice Trends and Experience

2021 MAP Statistics of the OECD (2/2)

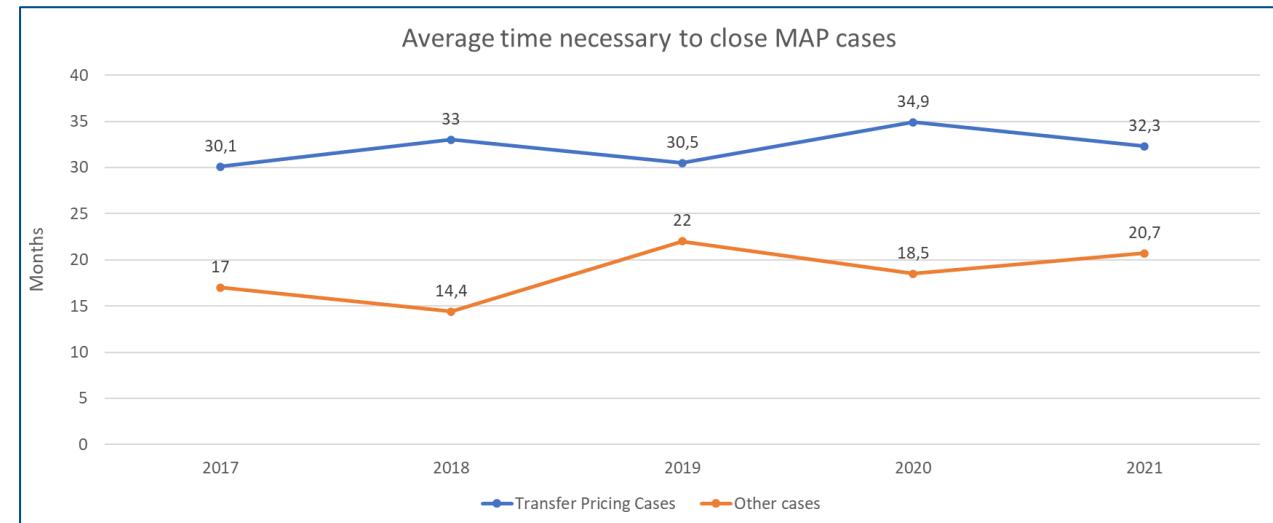
- The 2021 MAP Statistics of the OECD show the following trends (cont'd):

4. Cases still take a long time.

- On average, MAP cases closed in 2021 took 32 months for transfer pricing cases (35 months in 2020).
- Some jurisdictions experienced delays, especially for more complex cases, and the COVID-19 crisis affected the quality of their communication.

5. Competent authorities have continued to adapt.

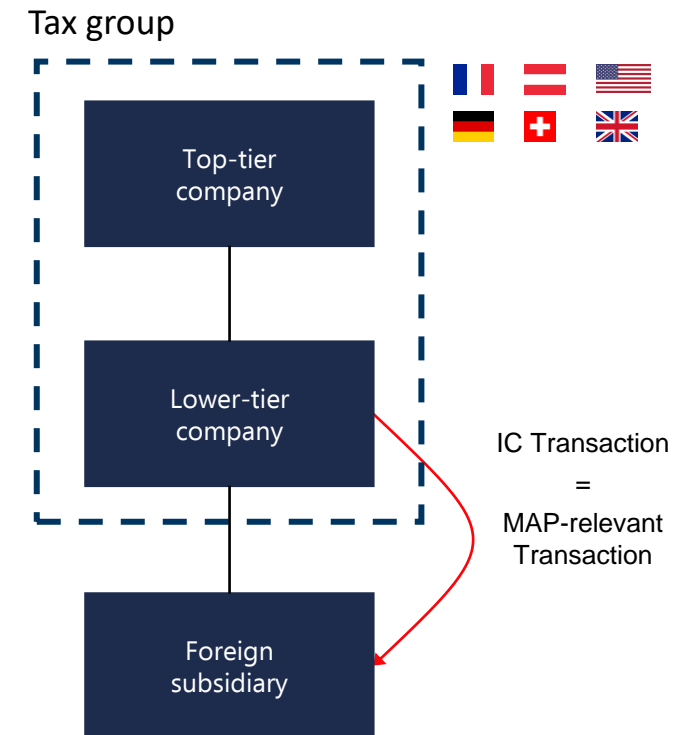
- MAP continued to be available throughout the COVID-19 crisis with several actions taken by competent authorities. While jurisdictions welcomed the resumption of face-to-face meetings, the continued use of virtual meetings has allowed for opportunities to progress individual cases in between face-to-face meetings.



MAP Practice Trends and Experience

Practical Challenges

- Recent years have shown different experiences of **practical challenges for MAP**, among others:
 - Challenges that taxpayers are eligible to access the MAP (e.g. complete MAP request in due time and form)
 - Challenges that taxpayers can implement MAP outcomes (e.g. in case of liquidation or a relocation to another jurisdiction)
- **Example:** In practice, it is questionable whether a member of a **tax group** (here: the lower-tier company) is eligible to access the MAP or whether the parent of the tax group (here: the top-tier company) additionally has to request the initiation of MAP.
- Moreover, it is questionable whether the MAP outcome can be implemented if the parent of the tax group (here: the top-tier company) did not the initiate MAP.



MAP Practice Trends and Experience

“Popular” transfer pricing MAP cases

- Linked to “Classical” TP audit subjects
 - Services: reality of the services provided, cost basis used
 - Royalty rates invoiced
 - Relevance of comparables (same industry, same function, independent companies and enough information)?
 - Applicable arm’s length range (interquartile range or full range)
 - Interest rates applied
 - Business restructurings, transfer of customers or of IP
 - Companies in a recurring / long term loss position

APA Practice Trends and Experience

General background

- APAs are becoming more and more popular with growing complexity of global tax environment and rapid increase in TP controversy :
 - According to EU Commission statistics on APAs in the EU, total number of APAs in force increased from 1,041 intra EU and 593 EU/non EU in 2019 to 1,312 intra EU and 839 EU/non EU in 2020 (i.e. growth rates of 26 and 41% respectively)
 - In the US: APA applications increased by about 20% from 2020 to 2021
- Tax administrations and OECD continue to invest in APA programs increasing staff and resources
- Enhancement of bilateral APAs by the OECD as provide greater certainty / more balanced outcome and lessen potential double taxation, with issuance of Bilateral advance pricing arrangement manual on 28 September 2022 as a guide for streamlining the bilateral APA process
- In the US about 83% of 2021 APA applications were for bilateral APAs

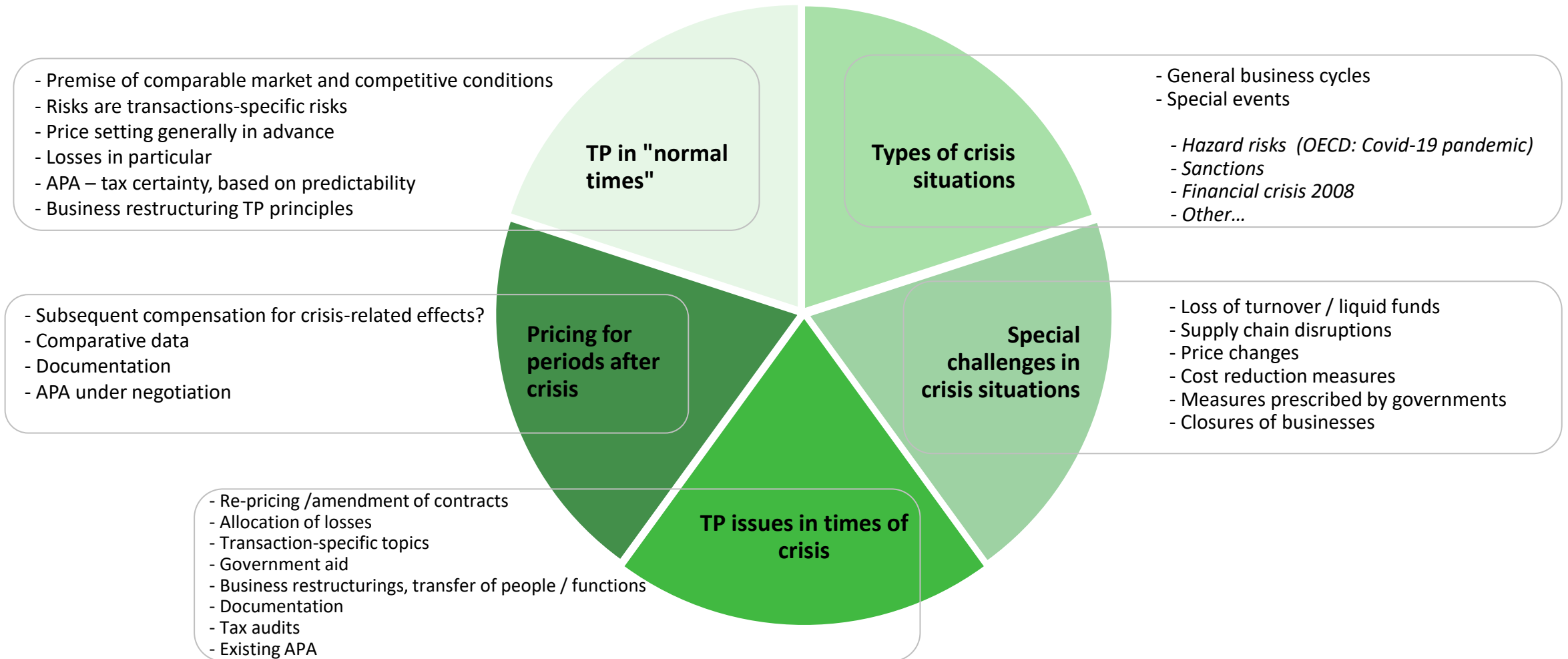
APA Practice Trends and Experience

Bilateral APAs

- **Types of transactions**
 - Relatively common transactions: manufacturing, distribution, licensing, services, financing
 - More unique transactions: sale of IP, IP development, joint ventures
 - Possibility to conclude APAs further to business restructuring?
- **Types of TPMs**
 - Transaction-based TPMs
 - Profit-based TPMs
 - Profit split TPMs
- **Unique issues**
 - Emerging industries
 - Start up operations
 - Shut down situations
 - COVID-19, supply chain disruptions (e.g., semiconductor chips, Ukraine war)
 - Guarantees

COVID and Extraordinary Events

Transfer Pricing in Times of Crisis



Transfer Pricing in Times of Crisis

In particular: documentation, tax audits, APAs

Documentation

Tax Audits

APAs

Transfer Pricing in Times of Crisis: Documentation

Documentation	
Overarching	<ul style="list-style-type: none"> • <i>Demonstrate reasonable efforts to comply with the arm's length principle</i>
Economic impact of the Covid-19 pandemic	<ul style="list-style-type: none"> • Cause: link to pandemic • Nature: how / why is business impacted (facts relevant for / effects on agreed transfer pricing) • What impact in the key figures of the business • Functions: risk management decision taking; risk profiles - LREs in particular ("normal" times vs. pandemic / crisis situation) • Any mitigation of impact: e.g. government aid, insurance
Comparables / other direct evidence	<ul style="list-style-type: none"> • Impact of Covid-19 pandemic / crisis on taxpayer's industry & market • Information about third party behaviour • Lack of contemporaneous information: address issue • Testing of several TP methods at the same time • Information that becomes available after the close of the tax year
Price adjustments	<ul style="list-style-type: none"> • Explain reason • Explain pricing mechanism / why adequate
APA (see separate slide)	<ul style="list-style-type: none"> • Existing: Breach of critical assumptions in particular • Under negotiation: Relevant information concerning the economic impact of Covid-19 pandemic (cf. above)

Transfer Pricing in Times of Crisis: Audit

Tax Audits

*"The difficulty posed by the delayed availability of contemporaneous data on comparable companies or transactions may have been exacerbated by the COVID-19 pandemic. Taxpayers and tax administrations should be mindful that determining a reliable arm's length outcome requires **flexibility and the exercise of good judgment.**"*

*Difficult transfer pricing **issues that arise as a result of the COVID-19 pandemic** could give rise to a large number of mutual agreement procedure ("MAP") **disputes that could severely strain the resources of tax administrations.***

*As such, **tax administrations are encouraged to keep these complexities in mind** when performing risk assessments, evaluating transfer pricing positions **on audits** and considering the support and documentation taxpayers provide that might **demonstrate reasonable efforts and care when trying to comply with the arm's length principle.**"*

OECD Guidance on the transfer pricing implications of the COVID-19 pandemic, para. 21.

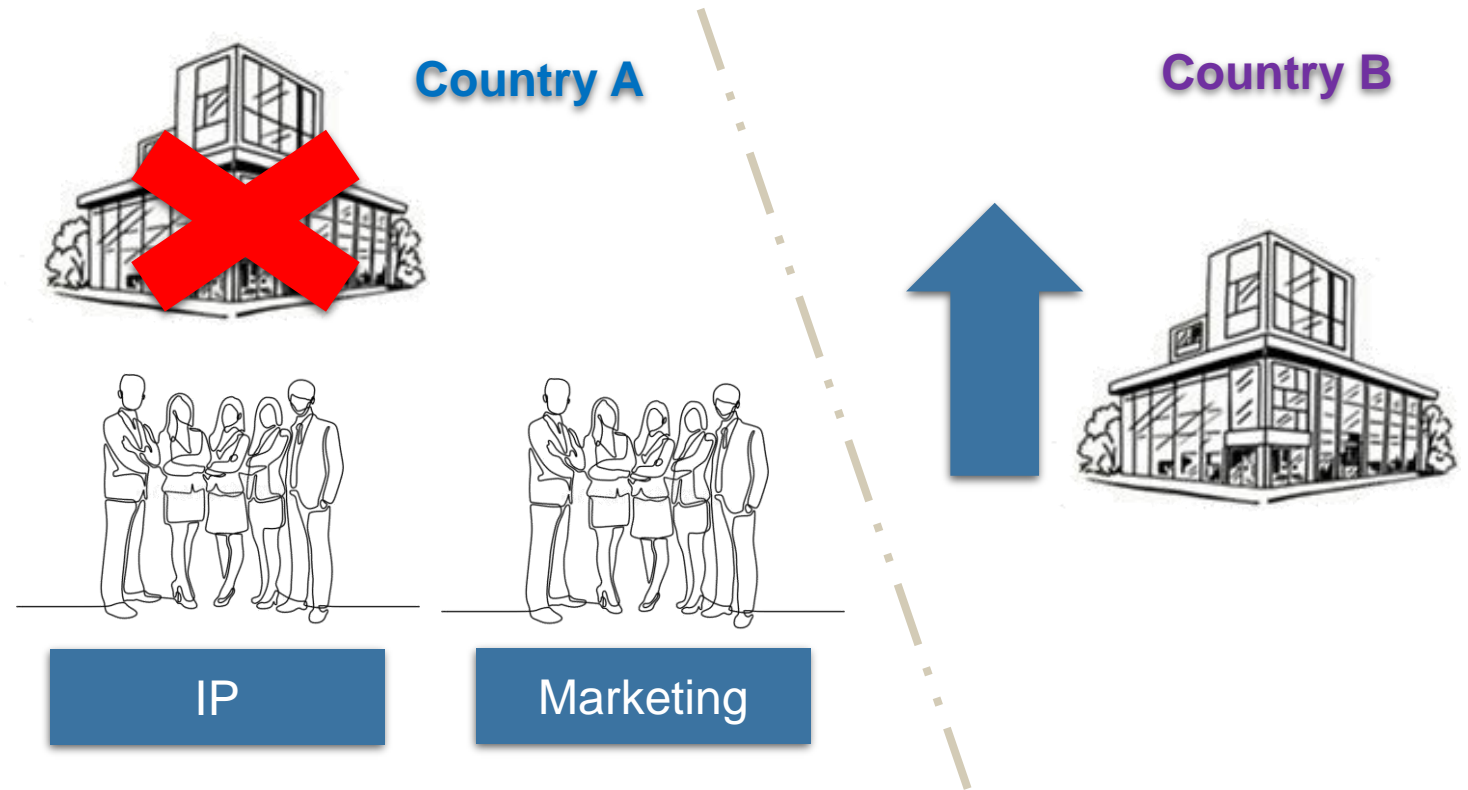
Transfer Pricing in Times of Crisis: APAs

APAs	
Issue	<ul style="list-style-type: none">• <i>Tax certainty as primary benefit of APAs; taxpayer / tax administrations</i>• Predictability overarching principle and assumption alike• Collaborative approach• Impact of unforeseen Covid-19 pandemic / crisis on APAs?• Existing APA vs. APA under negotiation
Existing APA	<ul style="list-style-type: none">• APA terms, domestic rules• OECD: APA upheld - unless condition triggered; materiality• "Critical assumptions" in particular (economic conditions vs. mere change of business results)• OECD: no "unilateral" fixing by taxpayer; consultation among tax administrations• Revision / cancellation / revocation• Taxpayer documentation
APA under negotiation	<ul style="list-style-type: none">• Economic uncertainty vs. preventing future tax disputes• APA period – short term vs. extended• Cumulative or term test• Reservation of retrospective changes for specific areas (APA condition)?• Over-reliance on “critical assumptions” by tax authorities and taxpayers?

Transfer of Functions

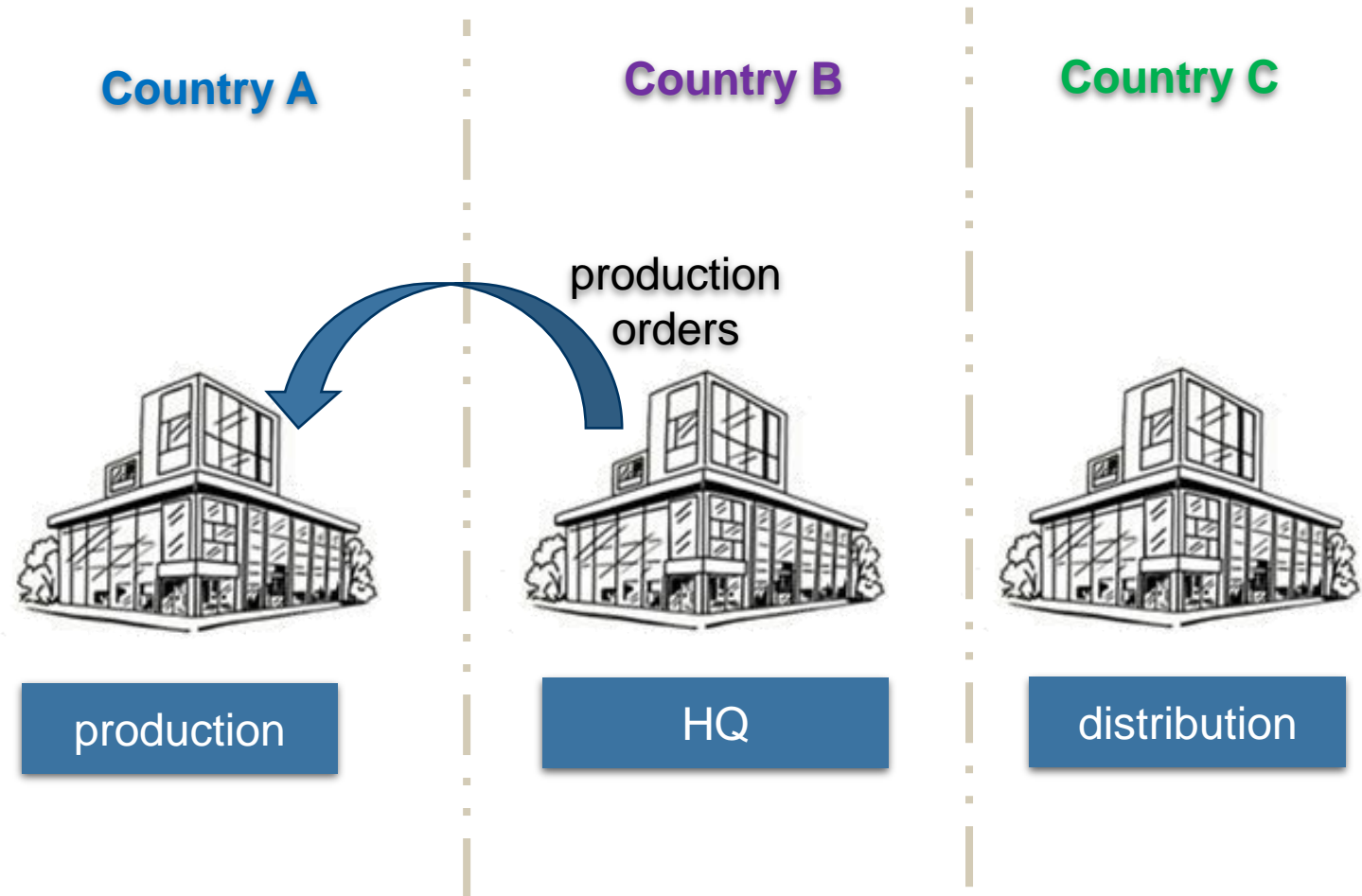
Transfer of Functions

- The production site in Country A shall be closed down
- The production site in Country B shall increase its production accordingly; even machine and staff is transferred to Country B
- Personnel in the areas of IP and marketing remain in Country A



Transfer of Functions

- The production site in Country A shall take over production capacity of foreign sites, but it shall no longer decide on its own about amount of production and no longer bear any risks related thereto
- Production orders come from the HQ or from other group companies
- Distribution shall, in the future, only be managed from one location outside Austria



Transfer of Functions

- One out of three managing directors (the CEO) of a fin-tech company regularly works from her home office abroad even after the pandemic
- Variation: a software developer works from his home office



ICAP, ETACA, and Rulings

ICAP, ETACA and Rulings

Procedures to Avoid Tax Disputes between States

Before the Facts

During an Audit

After an Audit

Exchange of Information

APA

Simultaneous
Audits

MAP

ICAP, ETACA

Joint Audits

Arbitration

ICAP, ETACA and Rulings

ICAP

International Compliance Assurance Program

Participants

- Tax administrations of MS
- Multinational Entities (MNE) with group revenues beyond € 750 million

Scope

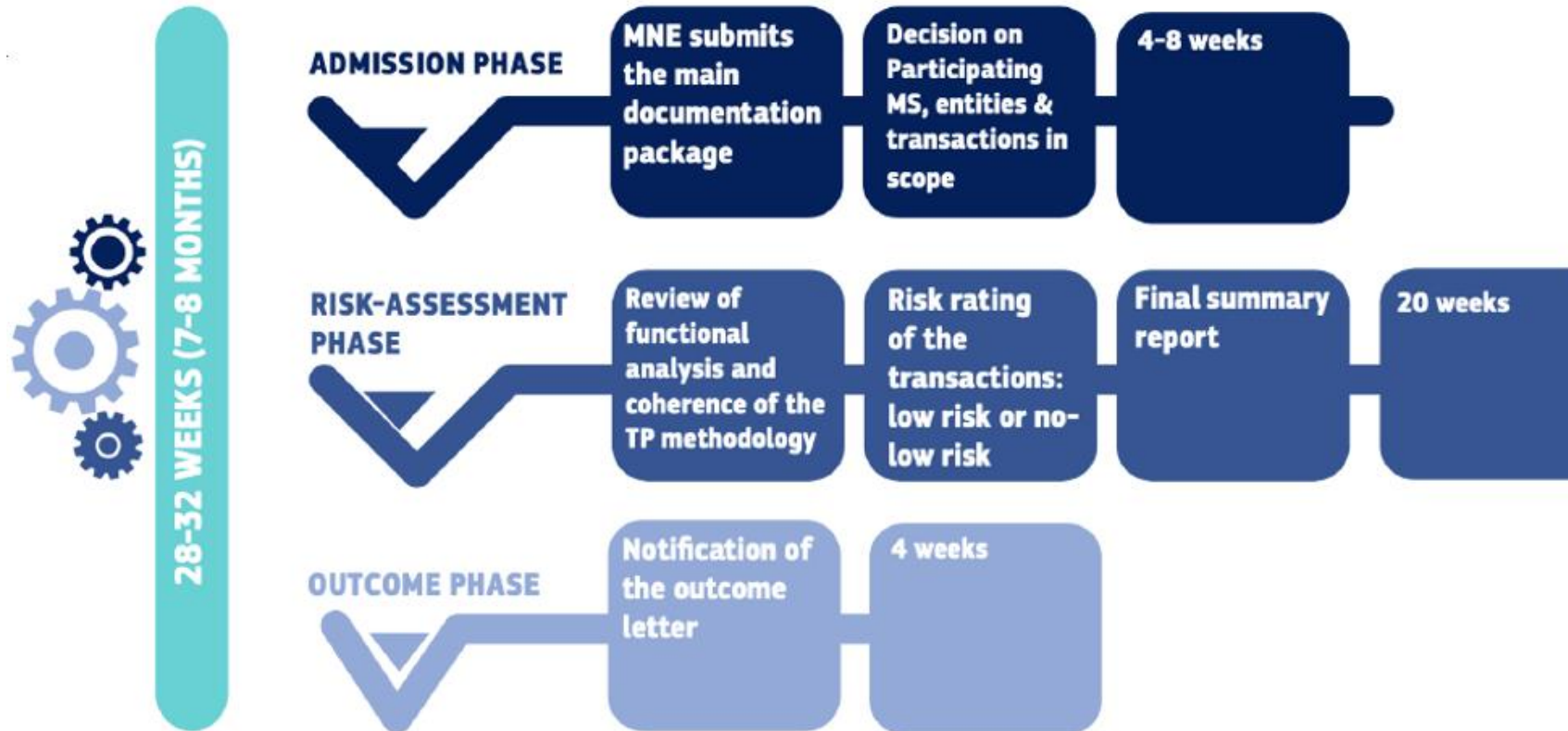
- Transfer Pricing risks
- PE related risks
- miscellaneous cross-border income tax matters (e.g., hybrid mismatches, Withholding Taxes, Tax treaties, ...)
- Assessment years as agreed on

Objective

- Improvement of international tax certainty for MNE groups
- More effective dispute resolution → less MAPs (Mutual Agreement Procedure)
- Improvement of risk assessment in general, e.g., Exclusion of low-risk cases as audit matters
- Participation is voluntarily
- Increased transparency between tax administrations

ICAP, ETACA and Rulings

ICAP – procedure



ICAP, ETACA and Rulings

ICAP

Stage I – Selection (4 weeks):

- Which MNE is suitable for an ICAP risk assessment?
- Determination of Scope:
 - identifying Lead Tax Administration
 - covered tax administrations
 - covered risks
 - covered transactions
 - covered periods
- Which tax administrations would participate in an ICAP risk assessment?
- Submission of selection document package of MNE (Cbcr, master and local file, etc.)
 - high level overview of all tax matters and transactions of an MNE

Stage II – Risk assessment and dispute or issue resolution (less than 20 weeks):

- Review of the document package
- Multilateral Calls/meetings between covered tax administrations and MNE
- Risk assessment / tax assurance
- Issue resolution process in case tax administrations won't be able to preclude tax risk within their jurisdiction

Stage III – Outcomes (4-8 weeks):

- Completion letter of all tax administrations (see next slide)

ICAP, ETACA and Rulings

ICAP: Here is the information from the OCED about the completion letter:

The design, content and wording of an outcome letter is determined separately by each covered tax administration, depending upon domestic practices and processes, but will typically address the following:

- risk ratings, where these are assigned by a tax administration as part of its usual domestic processes, or otherwise a description of key findings from the ICAP risk assessment*
- any agreement reached as part of an issue resolution process, if included in the ICAP risk assessment*
- confirmation of the covered risks that are considered to be low risk, with a statement that it is not anticipated that compliance resources will be dedicated to a further review of these risks for a defined period (generally the covered period/s, plus the following two tax filing periods, provided there are no material changes)*
- appropriate caveats or limitations, including any requirements to notify the relevant covered tax administration as soon as possible of any material changes that impact the covered risks (or, if required by a covered tax administration, to provide an annual confirmation that no such changes are expected or have taken place and/or updated information concerning covered transactions).*

ICAP, ETACA and Rulings

ICAP

Participating Countries

- Argentina
- Australia
- Austria
- Belgium
- Canada
- Chile
- Colombia
- Denmark
- Finland
- France
- Germany
- Ireland
- Italy
- Japan
- Luxembourg
- Netherlands
- Norway
- Poland
- Singapore
- Spain
- United Kingdom
- United States

ICAP, ETACA and Rulings

ETACA

European Trust Cooperation Approach

- EU-wide Implementation of ICAP
- Risk assessment procedure (i.e., tax assurance)

Objective

- Material scope is primarily transfer pricing matters → less than ICAP
- identification of low/high risk transfer pricing cases
- exclusion as tax audit matter

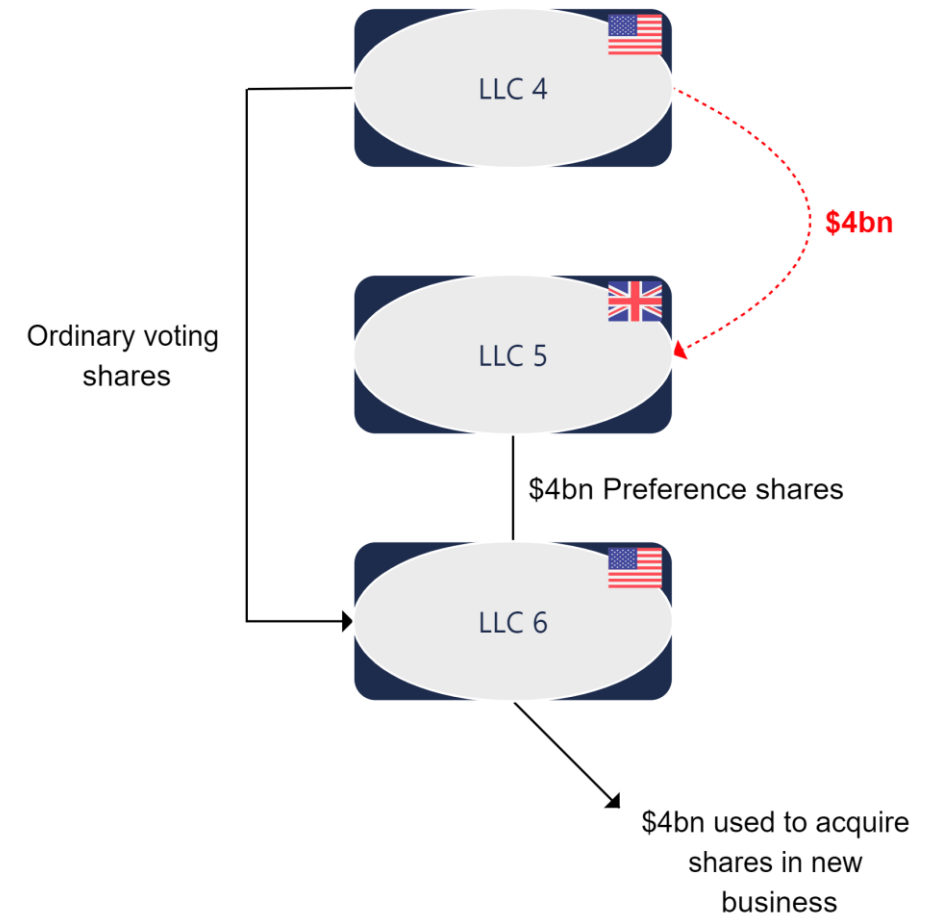
Applicable to MNE, which cumulatively meet the following criteria:

- Group revenues beyond € 750 million
- MNE leadership resident in EU-MS
- Performance relationships with companies resident in EU-MS

Intercompany Financing

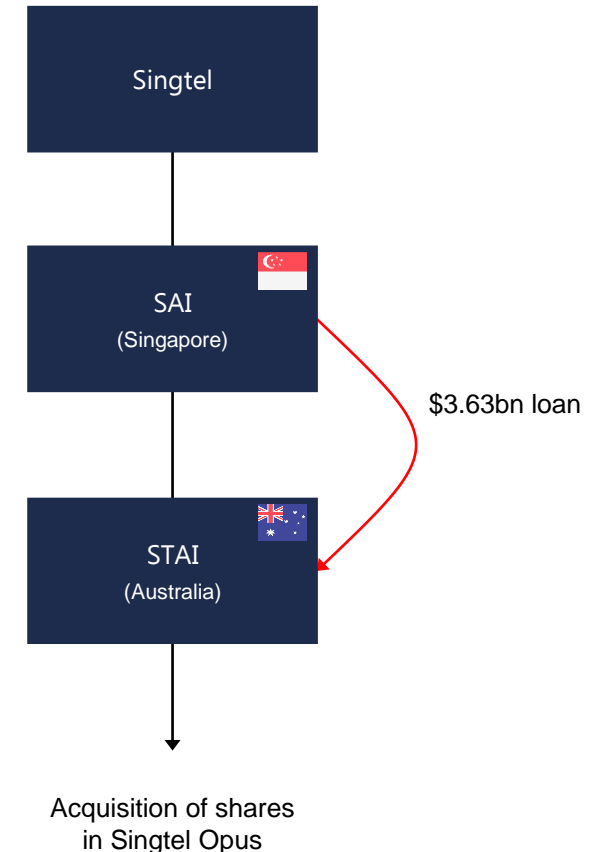
Intercompany Financing: *BlackRock*

- Found that:
 - independent lender would only lend if covenants provided to support dividends on preference shares
 - these were typical covenants and would not have been costly to obtain
- Existence (or not) of covenants formed part of economically relevant characteristics of transaction
- No practical need for covenants in intra-group situation (lender could control dividend flows on preference shares)
- But held loan would not have been made at arm's length because the relevant covenants were not in place
- Under appeal – but unclear what taxpayers should do in the meantime



Intercompany Financing: *Singtel*

- Loan note issuance agreement amended to:
 - Limit maturity date
 - Increase interest rate / cease accrual of interest
 - Change interest rate from fixed to variable
- Necessary to test arm's length analysis on issuance of debt and on each occasion the debt was amended
- There was no commercial rationale for second and third amendments (even though the interest rate, as amended, was within arm's length range) so independent parties would not have entered into those changes and they should be ignored
- An arm's length comparator can extend to terms beyond those directly relating to consideration – here, that a parental guarantee would have been given in an arm's length scenario, with an impact on STAI's hypothetical credit rating



Intercompany Financing: Options for Certainty

- Is *BlackRock* limited to its facts?
- Mitigating the risk
 - Transfer pricing reports
 - Specifically consider whether covenants are required to support the debt
 - Re-testing transfer pricing analysis of significant amendments to debt
- Obtaining certainty
 - ? Enhanced relationship program / horizontal monitoring (or similar)
 - ? APAs
 - ? ICAP
 - ? Tax insurance

Data Collection and Sale by Related Company

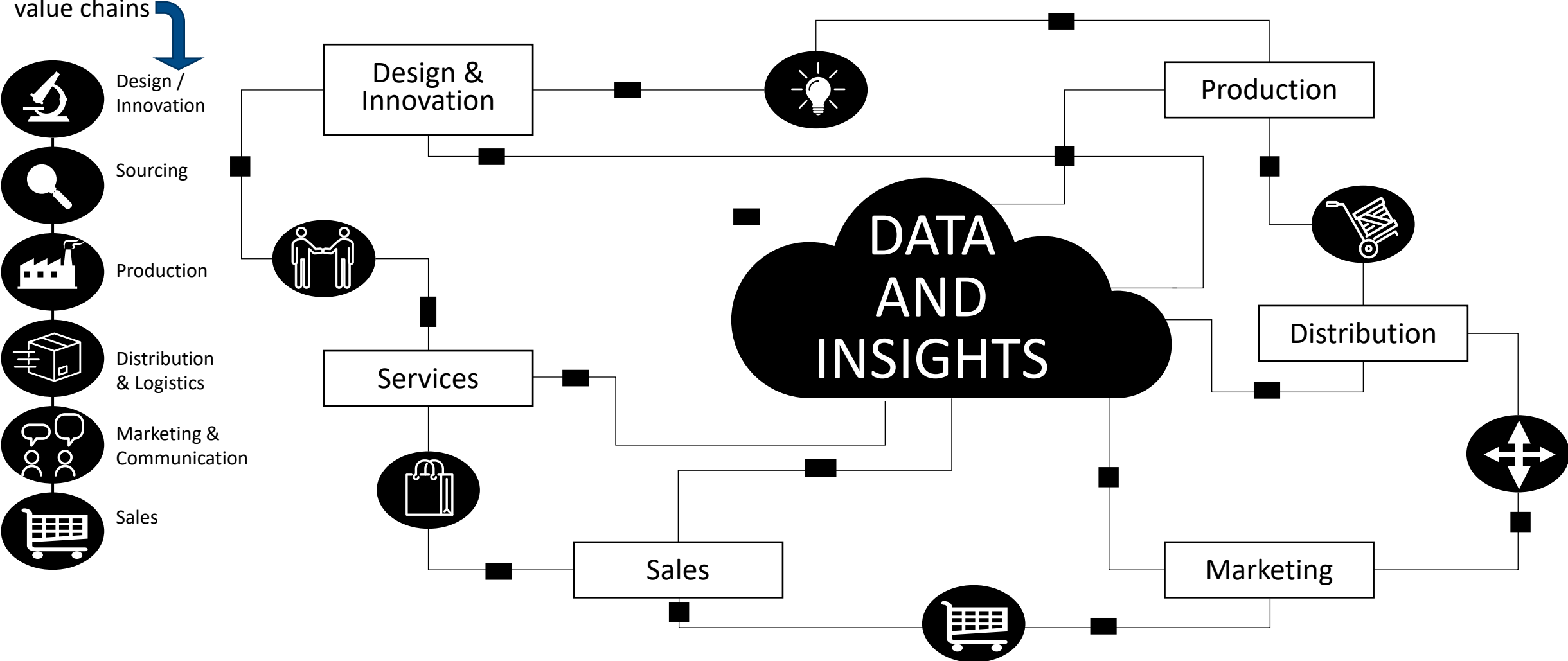
Data Collection and Sale

- Fundamental issues for analysis
- Business model examples of data collection and monetization

Data Collection: Data & Digitalization

We are used to linear, sequential, segmented value chains

Data and technology have started to move supply chains towards an integrated network. Current rules may not be sufficient to address data-driven business models and digitalization



Data Collection and Sale

- Fundamental issues for analysis
 - What is data?
 - Types of data
 - Role of data in the business model
 - Data value drivers
 - Characterization of intercompany transactions
 - Arm's length pricing
- Business model examples of data collection and monetization

Data Collection and Sale

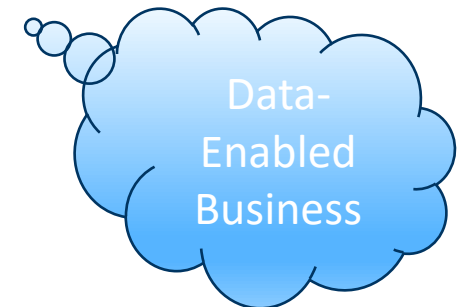
- What is data?
 - Is data “the new oil” as coined by Clive Humby, British mathematician?
 - Power source for AI, analytics, etc.
 - Infinite resource
 - Reusable
 - Needs to be refined
 - Highly mobile
 - Commodity
 - Or, is it something else?
- Types of data and ownership: consumer, employee, inventory, product, marketing, etc.

Data Collection and Sale

- Role of data in business models
 - Data-driven businesses: data-enabled vs. data-enhanced



- Data value driver examples
 - Uniqueness of data sets
 - Data purity
 - Data analytical tools (e.g., algorithms)



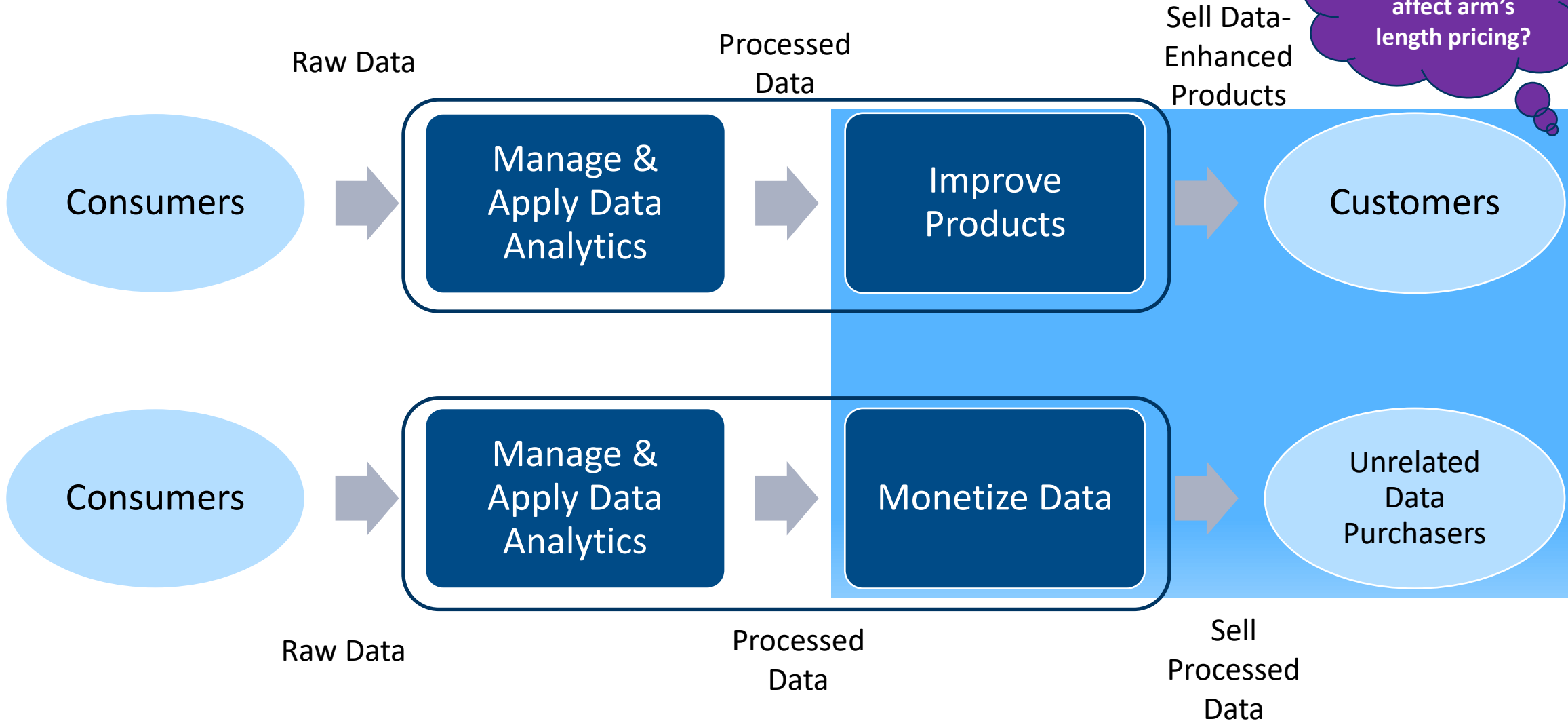
Data Collection and Sale

- Characterization of intercompany transactions
 - Are the transactions akin to services?
Purchase and sale of data? Licensing of rights? Rent?
 - Data retrieval
 - Data processing, access and analytics
 - Monetization
- Arm's length pricing
 - Routine vs. non-routine functions
 - Aggregation vs. transaction-by-transaction
 - Availability of comparable uncontrolled pricing methods
 - Use of profit-based methods
 - Applicability of profit-split methods

Data Collection and Sale

- Ancillary issues
 - Ownership and control of raw and processed data
 - Data anonymization
 - Data privacy
 - Cyber security

Data Collection and Sale



Q&A

Thank you!