Joint Audits in a Digitised Society and Taxpayers’ Rights

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Overview

- Concept of JA and impact of digitalization
- Reform of JA under DAC 7
- Legal bases for TP rights in JAs
- Selected issues of key TP rights
1. Concept of joint audits

**OECD 2019 definition** - Joint Audit is when 2 or more TA joining together to examine an issue(s)/transaction(s) of one or more related TP [...] with cross-border business activities, [...] and in which the TA have a common or complementary interest; proceeding in a pre-agreed and co-ordinated manner guaranteeing a high level of integration in the process and including the presence of officials from the other TA where the TA jointly engage with the taxpayer [...] and the teams include Competent Authority representatives from each TA for the exchange of information.

**Joint audits** are a preventive tool for solving complex cross-border situations, particularly for TP and PE existence. Their worth is that they work *ex ante* as opposed to MAP and arbitration which work *ex post.*

JA enable the taxpayer(s) to present the facts and explain their position to all TA included – improves the legal certainty.
1. How are JAs affected by Digitalization?

**Digitalization of the Economy**
- Centralization; innovation & IP as key value drivers
- Limitations of PE concept & hard-to-value IP
- Increased risk of double taxation & disputes

**Digitalization of Audits**
- Big data analytics reveals sensitive information
- Higher risks of sensitive „by-catch“
- Higher risk of external breaches of tax secrecy
- Joint audits increase risks of EoI & data leaks

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Facilitate JAs!

increase potential

Strengthen TP rights!
2. Reform of Joint audits under DAC 7

DAC 7


Article 12 a
- an ambitious step forwards:
- first hard law definition of joint audits
- many innovations

Technical compromise in Council
- significantly toned down

Opinion of the EU Parliament
Forecast:
08/03/2021 Indicative plenary sitting date, 1st reading/single reading

Opinion of the European Economic and Social Committee
Plenary session: 558 – 24 – 25/02/2021

Applicable from 01. 01. 2024.
2. What are key changes to JAs under DAC 7?

Currently Art. 11 (2) DAC: “active” participation of foreign officials in local audit
- Possibly combined with Art 12 DAC: simultaneous controls in more than one MS
- Significant legal uncertainty (Still EoI? Role of foreign inspectors? Applicable law?)

Art. 12a DAC 7: admin. enquiry is “jointly conducted”, possibly in 2 or more MS
- Clearly no longer conceived as mere EoI; foreign officials directly access information
- More details on initiation, procedures & applicable law

BUT
- Still not a fully harmonized instrument (national law prevails)
- Unclear, “watered-down” compromise text raises new issues

Art. 11 (2) is “digitized” and overhauled by DAC 7, but will likely become irrelevant

COM: only a first step!
### 3. Legal framework for taxpayer rights under Art. 12a DAC 7

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<th>Primary Union Law</th>
<th>DAC 7 / GDPR</th>
<th>National law</th>
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<td>• How / where to enforce by TP? → still unclear</td>
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*Primary Union Law* includes:

- JA based on Art 12a = implementation of EU law (Art 51 EUCh)
- JA must thus respect EU fundamental rights & general principles
- Limitations must be justified, Art 52 EUCh
- To be specified in DAC and national law

*DAC 7 / GDPR* includes:

- Only rudimentary protection in DAC itself
- Esp.: initiation, scope, data protection
- No TP rights vis-à-vis inspection powers → national law
- Room for future harmonization

*National law* includes:

- *All* inspectors are bound by host State law, 12a(3)
- *Foreign* inspectors are also bound by their home State law! 12a (3) → stricter rules prevail!
- De facto duplication also for local officials?
- How / where to enforce by TP? → still unclear
4. Specific taxpayer’s rights

Preventive measure

**Request of the taxpayer**

- **COM Proposal** went a step forward and proposed the possibility for the TP to formally request a JA

- Not a binding request no list of justified reasons to deny; only 30 day deadline to respond

- Unfortunately dropped from the compromise text in **Council**

- **Is this hesitance justified?** Multilateral APAs, ICAP, cross-border dialogue procedures...
4. Specific taxpayer’s rights

Tax secrecy and data protection

In principle, no taxpayer consent needed for JA / information access

• Only exceptionally a possibility where trade secret could be disclosed

Generally: Tax secrecy, Art. 16 DAC

• Limited use of data for taxation purposes only; but opening clause (e.g. publication)
• Other use depends on requested MS’ permission: Can TP demand refusal?

Additional GDPR guarantees, Art. 25: in most cases irrelevant for JAs (legal persons!)

• But some additional safeguards in Art. 25, esp. standardised data breach protocols
4. Specific taxpayer’s rights

Effective judicial protection in the host State

**Minimum requirements: Art. 47 EUCh**

CJEU: Broad construction of “rights guaranteed by EU law”; *but*, in general,

1) No host State jurisdiction over actions of foreign officials (State immunity)

2) MS can justify denial of *ius standi* to foreign taxpayers (CJEU *Sabou; Berlioz I + II*)

**Does DAC 7 expand TP rights beyond the minimum?**

Ad 1): *Potentially yes* (see also preamble, recital [22a])

- Art. 12a (4) (c): Persons subject to JA must have same rights as in unilateral audit
- Implications vis-à-vis foreign inspectors: TP right to have their actions reviewed

→ 2 options for MS: hold local coordinator accountable OR admit foreign officials as respondents  (DAC = immunity waiver)

Ad 2): *Debatable* (see next slide)
4. Specific taxpayer’s rights

Collection of evidence and disputing of such measures

• **Art. 12a.(4) b) and c)** - **Member State where the activities of the joint audit take place shall** take the necessary measures to ensure that **evidence collected** is assessed incl. admissibility as in a unilateral audit (incl. complaint, review, appeal) (b).

• **The persons subject to a joint audit or affected by it** (domestic and foreign) have the **same rights and obligations** (incl. complaint, review, appeal) as if it were a **unilateral audit** in MS where activities of JA take place (c).

• Duplication of complaint, review, appeal procedures for the **foreign taxpayer/ person affected by it**?
4. Specific taxpayer’s rights

Final report

- **Final report** should reflect the findings on which the competent authorities agreed and, moreover, the competent authorities concerned could also agree that the report includes any issues where an agreement could not be reached (starting point for MAP?).

- Important step towards legal certainty and efficiency of JA.

- **Mutually agreed findings** of the final report *should* be taken into account in the relevant instruments issued by the competent authorities of the participating Member States following that joint audit.

- National reports still needed.

- Can the taxpayer invoke these findings if they are not included?
Thank you very much for your attention!

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