

# DigiTax Lecture Series 2021

Taxpayers' Fundamental Rights in a Digitised Society

## 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***

## 2. Reform of Joint audits under DAC 7

DAC 7

**COM Proposal 2020(314)  
final – 15. 07. 2020. for  
DAC 7**

### **Article 12 a**

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

**Technical compromise  
in Council**

- **25. 11. 2020.**
- significantly toned down
- endorsed by Council on 01.12.2020.

**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



COM: only  
a first step!

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

### 3. Legal framework for taxpayer rights under Art. 12a DAC 7

#### Primary Union Law

- 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

- 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

x

#### National law

- 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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