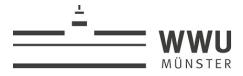
DigiTax Lecture Series 2021

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
- Incresed *risk of double taxation & disputes*

Digitalization of Audits

- Big data analytics reveals sensitive information
- Higher riks 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 defintion 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 <u>legal uncertainty</u> (Still Eol? 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

National law

- <u>All</u> 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

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...

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

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)

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?

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 <u>should</u> be taken into account in the relevant instruments issued by the competent authorities of the participating Member States following that joint audit.
- National repots still needed.
- Can the taxpayer invoke these findings if they are not included?

Thank you very much for your attention!

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