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EU JOINT TRANSFER PRICING FORUM
A COOPERATIVE APPROACH TO TRANSFER PRICING
CONTROLS WITHIN THE EU

Meeting of 26 June 2018

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A COOPERATIVE APPROACH TO TRANSFER PRICING CONTROLS WITHIN THE EU

INTRODUCTION

"Think international – act international – audit international".

Multinational enterprises (MNEs) primarily engage in cross-border activities and invest internationally while the competences of national tax jurisdictions remain limited to the national territory as a matter of principle. To face up to the challenges of globalisation and address the business models that have been developed to match the new economic realities, tax administrations need to strengthen their cooperation and be open to experiment with new forms of collaboration that deepen the exchange of information.

In this context, a common cooperative approach to transfer pricing audits would contribute to a better functioning of the internal market on two fronts: it would offer tax administrations a tool in the fight against tax evasion and avoidance and also prevent the occurrence of double taxation.

In the EU legal order, there is a framework that provides Member States' tax administrations with the tools for cross-border/administrative cooperation.

It is important to use all available tools for administrative cooperation in the best possible way, including bi- and multilateral transfer pricing controls and consider their improvement where necessary¹.

In the Report on Transfer Pricing Risk Management of the Joint Transfer Pricing Forum (JTPF), it is recommended to take simultaneous controls or joint audits into consideration in appropriate cases while it is recognized that especially at the beginning of this practice, the capacity and experience of one or both tax administrations involved may be limited.²

Therefore, the development and improvement of the existing legal frameworks and practical guidance on how to cooperate bi- or multilaterally in transfer pricing controls is included in the current work programme of the JTPF³.

OBJECTIVE

The objective of this paper is to establish a cooperative approach to transfer pricing controls within the EU, in order to facilitate the appropriate allocation of the tax base to the eligible Member States and avoid double taxation or non-taxation.

¹ Section 19 of the *Action Plan to strengthen the fight against tax fraud and tax evasion*, of 2012 (COM (2012)722) stated that to facilitate tax audits and pave the way towards possible future joint audits in the short term, it is essential that Member States make the widest possible use of the existing legal framework, in order to organise simultaneous controls and facilitate the presence of foreign officials in the offices of tax administrations and during administrative enquiries.

² See Recommendations 9a and 9b of the JTPF report on TPO Risk management, endorsed by the Council on 10 March 2015

³ DOC: JTPF/005/FINAL/2015/EN (point 3.3.1).

PART 1

THE FRAMEWORK FOR A COOPERATIVE APPROACH TO TRANSFER PRICING CONTROLS IN THE EU

1.1 PRINCIPLES

A fair corporate tax system ensures that profits are allocated where the value is generated and that these profits are not taxed twice. Transfer pricing rules based on the arm's length principles serve to allocate income earned by a multinational enterprise among those countries in which the company does business. Transfer pricing is highly fact-specific as, generally, the price of each transaction needs to be determined by reference to a comparable transaction. This determination involves a degree of discretion or requires "judgement" or a review of the transfer pricing methods at several points in the process.

Therefore, transfer pricing is potentially more subjective than other areas of direct and indirect taxation and, for this reason, sensitive to disputes.

Given this nature of transfer pricing, it is key to develop administrative cooperation at two levels: (i) between the relevant tax administrations; and (ii) between tax administrations and taxpayers.

Cooperation between tax administrations

When the competent tax authorities of a Member State decide to audit an MNE with taxable activity that extends beyond their taxing jurisdiction (and possibly, beyond the EU), close and transparent cooperation between the relevant Member States' tax authorities throughout the auditing process could decisively contribute to a successful audit, i.e. an audit that is effective (concluding the review of a case without the need for further procedural steps e.g. a MAP) and efficient (achieving this aim with a minimum of resources and time).

To this end, the tax administrations should commit to exchange all foreseeably relevant information in a timely manner and additionally they should cooperate to build a common analysis and understanding of the same facts and circumstances of a specific case.

In fact, even a common risk assessment and analysis of the functions, risks and assets related to the cross-border transactions under scrutiny should facilitate a common interpretation of the arm's length principle.

Recommendation 1:

Exchange of information and cooperation between tax administrations are not an end by itself but rather tools that should be used where they are expected to contribute to a conclusive audit.

Cooperation between tax administrations and taxpayers

Taking into consideration the recommendations that feature in the JTPF report on transfer pricing risk management, the taxpayer, without prejudice to national provisions, should have the right to be kept up-to-date with the milestone developments of the audit. At the same time, the taxpayer should bear the obligation to fully disclose the same information to all tax administrations that participate in the control and in this way, remain transparent.

Recommendation 2:

It is preferable to take a cooperative approach based on dialogue and trust. A cooperative approach is inter alia characterised by communication between tax administrations and taxpayers. The taxpayer should be actively involved in the actual auditing activities and have the right to be heard and be timely informed of the decisions taken by the tax administrations during the audit. It should, however, be stressed that such cooperative approach is only valid when dealing with a cooperative taxpayer.⁴

1.2 CURRENT EU LEGAL FRAMEWORK FOR COORDINATED TRANSFER PRICING CONTROLS

The transfer pricing analysis of cross-border operations in a coordinated transfer pricing control will need to be based on the available domestic and international legal framework (e.g. treaties, conventions, directives, regulations and domestic law); for example, the presence of officials and international agreements on the execution of coordinated tax audits. Furthermore and in the absence of harmonised procedural rules within the EU, tax administrations are bound by the domestic legal framework for tax auditing, such as the statutory review period, audit time limits and confidentiality of data.

Within the EU framework, the Directive on administrative cooperation (2011/16/EU) refers to forms of administrative cooperation relevant to cross-border (intra-EU) transfer pricing audits.

Art. 11 of the Directive 2011/16/EU allows tax administrations to agree that foreign officials be present in administrative offices and participate in administrative enquires, interviewing individuals and examining records.

Art. 12 of the Directive 2011/16/EU allows Member States to agree to conduct simultaneous controls, in their own territory, of one or more entities within an MNE with economic activities in different Member States. The aim of such controls is to exchange obtained information.

Annex 1 to this report contains a list of Member States' national provisions that implement Directive 2011/16/EU, including whether national law currently allows the presence of visiting foreign officials.

1.3 CURRENT CONCEPTS AND TERMS

Various terms are used in the practice of tax administrations and in tax literature to refer to tax-related 'examinations' with a cross-border operational dimension.

⁴ Recommendation 1 of TP Risk Management Report

Simultaneous Controls

According to article 12 of Directive 2011/16/EU, simultaneous controls consist in two or more Member States agreeing to audit, in parallel and each in their own territory, one or more related taxpayers which are of common or complementary interest to their respective tax administrations. The main aim is to exchange the obtained information.

Joint Audits

The term Joint Audit is created by the OECD⁵. A joint audit involves two or more tax administrations that come together and form a single audit team, in order to examine an issue/set of transactions which pertain to one or more related taxpayers (with cross-border economic activities). Both tax administrations will have a common or complementary interest in the taxpayer(s). The aim of this exercise is to agree on a single audit report at the end and assess the related taxpayers to tax on this basis. Through this process, the tax authorities are expected to form a more comprehensive understanding of the audited taxpayers' affairs and conclude with an assessment that does not result in double taxation or non-taxation.

Multilateral Controls

Within the framework of the EU Fiscalis Programme, a multilateral control⁶ is an arrangement where national tax administrations agree to carry out co-ordinated controls of one or more related taxpayers where the control is linked to a common or complementary interest.

The Programme Fiscalis 2020 provides no legal basis itself for the execution of multilateral transfer pricing controls but finances the meetings of tax officials as well as their participation in administrative enquiries carried out abroad.

For an overview on the needs/aspects of simultaneous controls and joint audits, reference is made to Annex 2 to this report.

1.4 STATE OF PLAY WITHIN THE EU⁷

As far as simultaneous controls under article 12 are concerned, the Commission assessed that, since the entry into force of the Directive, almost all Member States have either initiated or taken part in simultaneous controls. Overall, a total number of 119 simultaneous controls have been initiated by Member States. The controls mainly relate to transfer pricing issues. Yet, to put this number in the correct context, one should consider that more than two Member States may be involved in a simultaneous control. The meetings of tax officials involved in simultaneous controls are financed by the Fiscalis 2020 Programme.

⁵ OECD Joint Audit Report (September 2010)

⁶ Article 7 of Regulation (EU) No 1286/2013 of the European Parliament and the Council of 11TH December 2013, establishing an action programme to improve the operation of taxation systems in the European Union for the period 2014-2020 (Fiscalis 2020) and repealing Decision No 1482/2007/EC

⁷ The Commission Staff Working Document⁷ on the application of Council Directive (EU) 2011/16/EU provides an overview on the administrative cooperation tools in the field of direct taxation within the EU.

Simultaneous controls have proved a useful tool, especially in tackling tax fraud, considering that tax administrations would be expected to have a common interest in fighting against fraud and therefore be willing to collaborate in exchanging information.

Regarding article 11 of the Directive, which allows, under certain circumstances, the presence of visiting foreign officials during administrative enquiries; it is evident that it has not been implemented in a uniform fashion at the national level. Since the entry into force of the Directive, only just over half of Member States have used this provision mainly with neighbouring countries. The provision has been exploited mainly in relation to tax residence, the existence of a permanent establishment, transfer pricing, and letterbox companies. The EU Fiscalis 2020 Programme finances the presence of officials in other countries' offices and their participation in administrative enquiries.

Recommendation 3:

It is fundamental that Member States have national legislation in place that permits presences of visiting foreign officials.

1.5 CLOSER COOPERATION IN TRANSFER PRICING CONTROLS WITHIN THE EU

It should yet be recognized that in the transfer pricing field, tax administrations do not always share a common interest. This is because, to prevent double taxation, a well-founded primary (upward) adjustment by one tax administration should (ideally) be followed by a corresponding (downward) adjustment by the other. This implies that the second tax administration would have to reduce its tax base accordingly, which is most probably an option that a tax administration would preferably avoid taking, especially if they have not been directly involved since the beginning of the process.

This said, it is clear that in the transfer pricing field, a form of collaboration that goes beyond the mere exchange of information and the simultaneous performance of a control is critical for achieving a successful outcome, i.e. eliminate double taxation. Therefore, it would be useful to explore how tax administrations may work together in carrying out coordinated transfer pricing controls based on the assumption that it is in everyone's interest to apply the arm's length principle.

A form of enhanced cooperation in this context would refer to a joint audit in the form described by the OECD but such "joint audit" does not feature in Directive 2011/16/EU.

Despite the absence of an explicit reference to joint audits in the Directive, it would be possible for tax administrations to carry out transfer pricing controls in a way that, *in essence*, these controls came close to the concept of a joint audit.

Based on the right to perform simultaneous controls (art. 12) and be present in administrative enquires of other countries (art. 11), officials of one Member State can be sent to another Member State, to form a joint audit team with domestic officials and examine the facts and the circumstances of a case.

Under the Directive, only competent authorities are liable to exchange information. Therefore, from a legal perspective, it would generally be the domestic official who would carry out all activities: gathers information and exchanges this information with the foreign official(s). Legally, the foreign

official may just be present and receive information. Having the competent authorities of both Member States present during the activities or assigning the status of a competent authority to a coordinator or auditor directly would allow having the exchange of information in real time. In practice, questions may be asked directly, to shorten the time required for the exchange of information. Namely, information would otherwise only reach the taxpayer via the domestic official.

It is also possible that foreign officials be granted the right of active participation via national law, in which case they may even interview individuals and examine records. This seems to be the practice in at least one Member State where domestic legislation allows for the active participation of foreign auditors by granting them the same powers as to domestic ones. In this case, foreign auditors may officially ask questions during the audit process.

To sum up, the current EU legal framework provides for the exchange of information, which can be done directly in the host country taking features similar to joint audits. However, this is not sufficient for carrying out fully-fledged audits in the territory of another Member State. The foreign auditor does not have any legal power vis-à-vis the domestic taxpayer. Equally, the domestic taxpayer does not possess any special rights vis-à-vis the foreign auditor unless those derive from national procedural law.

Currently, there are only two programmes that run controls similar to joint audits in the EU: (i) the Netherlands and Germany⁸; and (ii) Italy and Germany⁹.

Recommendation 4:

Member States should use in appropriate cases the possibilities provided under Directive 2011/16/EU on a real time basis for achieving a high degree of cooperation and communication during a transfer pricing control.

PART 2

GUIDELINES ON COOPERATION IN TRANSFER PRICING AUDITS WITHIN THE EU

The analysis establishes a set of guidelines for taking a cooperative approach to transfer pricing controls in the EU despite the different form that they can take. The text also sheds light on to some of the differences between the two main procedures, i.e. simultaneous controls and joint audits.

2.1 ORGANIZATIONAL MATTERS

- **Channels for communication**

Cooperation requires the establishment of clear channels for communication.

Recommendation 5:

⁸ The Joint Audit pilot project Germany/The Netherlands has been presented during the JTPF meeting of 18 February 2016

⁹ The Joint Audit programme Germany/Italy has been presented during the JTPF meeting of 26 June 2018

In order to facilitate the contacts between tax administrations and the communication with the local auditors, every tax administration should publish details of the competent authority for the multilateral transfer pricing controls.

A contact point should be appointed with the responsibility to coordinate and manage the audits process.

- **Raising Awareness**

As stated above, taking a cooperative approach in transfer pricing controls is not an end in itself but rather a tool that may be used to improve effectiveness and efficiency of these controls. A key aspect is that stakeholders are aware of the available tools, their advantages and obstacles and of whether and how they should be used in the case at hand.

Recommendation 6:

Member States should ensure that auditors are aware of the possibilities and functioning of the available tools for taking a cooperative approach to transfer pricing audits.

The following sequence of sections is aligned with the structure of the JTPF report on Transfer Pricing Risk Management¹⁰

2.2 INITIAL PHASE

- **Cases where a cooperative approach to transfer pricing controls should be considered**

Not all transfer pricing audits can be performed through cooperation with other Member States. Despite its advantages, cooperation and communication between Member States involves a certain degree of administrative burden.

Tax administrations need to balance the advantages of a cooperative approach with the cost of the procedure and their internal capability.

Member States should choose the most appropriate tool for administrative cooperation in the light of the facts and circumstances of a case. In the assessment of whether and if so, which tool of administrative cooperation may be used, the following criteria may be helpful:

- There is an added value compared to the other available means of administrative cooperation.
- A domestic audit is not sufficient for obtaining the complete picture of a taxpayer's tax liability in reference to some part of its operations or to a specific transaction.
- There are complex transfer pricing issues that pertain to high amounts of corporate income taxes at stake.
- The involved tax administrations have a common or complementary interest in the fiscal affairs of one or more related taxpayers.
- The involved tax administrations have different views on the nature of a transaction and there is a need to analyse facts and circumstances in order to prevent double taxation.

¹⁰ Doc. JTPF/007/FINAL/2013/EN

- **Taxpayer selection process**

Every tax administration has its own tools and risk management programme for the selection of risks and audit targets. However, to perform successful multilateral transfer pricing controls, it is desirable that there is a strict and fair collaboration between tax administrations since the phase of the risk assessment.

A joint selection process, including a joint risk assessment, would be preferable especially when tax administrations want to perform a joint audit and their collaboration is still in a pilot phase. This said, it is necessary to take into consideration that the need to perform a multilateral transfer pricing control could arise as a consequence of an internal risk assessment or in the course of a national audit. In this case, it is important that the proposing tax administration share all information that justifies the request. All the information related to the taxpayer selection process should be treated confidentially and remain within the relevant tax administrations.

As it is already recommended in the Transfer Pricing Risk Management Report, tax administrations should consider the possibility for the taxpayers to trigger multilateral transfer pricing controls.

- **How to initiate bi- or multilateral transfer pricing controls**

Tax administrations which are willing to initiate multilateral transfer pricing controls should send a formal letter to justify their request and the type of control that they are looking for.

A preliminary discussion between tax administrations may occur in order to establish the feasibility of the request taking into consideration all possible obstacles such as the different audit period and statute limitations.

The tax administrations are not obliged to initiate any multilateral transfer pricing controls but when they receive a request, they should answer as soon as possible and at the latest within [term to be agreed] from the request. In case of refusal, tax administrations should justify their position

Recommendation 7:

It is recommended that Member States participate in bi- or multilateral controls unless their refusal is based on a comprehensive justification (taking into account recommendation 3).

- **Audit preparation**

When tax administrations agree on a cooperative approach to the audit, it is crucial to prepare the audit process.

The audit preparation should consider and include at least the following points:

- Scope of the audit (i.e. taxpayers and tax periods to audit);
- Transactions/dealings to analyse and audit information to be collected from the taxpayer for exchange;
- Time milestones (i.e. when the audit will begin in each Member State and when it will be finalized);
- Documents to be prepared;

- Agreement on communication and working language (the solution of art. 3(1) Directive 2017/1852 could be taken into account);
- Rules for carrying out “auditors-in-presence” activity.

When a tax administration wishes to promote a programme of administrative cooperation with one or more tax administration aiming at carrying out joint audits, it is useful that the respective competent tax authorities sign a Memorandum of Understanding (MoU). The MoU should be the framework that lays down all the main principles governing future tax audits.

Recommendation 9:

It is recommended that Member States prepare and sign a Memorandum of Understanding (MoU), in case they wish to establish a joint audit programme.

Annex 3 to this report contains a non-binding template for concluding such a MoU.

2.3. AUDIT PHASE

- **Preparation**

It is useful to have an opening meeting between tax auditors in order to agree in advance the audit technique, the questions to ask and the documents to be collected.

- **Audit performance**

In a simultaneous control, each tax administration performs the audit in its own territory with the aim to exchange information through their competent authorities.

In a joint audit, the audit teams perform a joint examination of the facts and the circumstances. In this case, the exchange of information is instantaneous. This is why it is important to delegate the authority to exchange information to the tax auditors and attribute them a status that empowers them to directly exchange such information with each other.

While in a joint audit the communication is facilitated due to the contemporaneous presence of the auditors, it is essential to keep an open channel of communication during the audit progress in simultaneous controls, in order to ensure that the time scheduled be respected.

For all controls that take a cooperative approach, it is good practice to have a regular "checkpoint" meeting in order to discuss and resolve issues in a timely manner as soon as they arise.

- **Taxpayer rights and obligations**

The taxpayer should be actively involved in the audit and have the right to be heard and informed on progress. At the same time, it should be transparent and fully disclose the same information to all tax administrations which are involved in the audit. Tax administrations should guarantee the due respect of taxpayers' rights derived from national law (including the Constitution) as well as the EU Charter of Fundamental Rights.

- **Final Phase**

The transfer pricing bi- or multilateral controls finish when all the activities planned in the audit plan have been completed.

Tax administrations should compare the audit findings during a closing meeting and endeavour to agree their interpretation for tax purposes.

The final findings should be presented by each participating tax administration to the relevant taxpayers whose comments should be taken due account in drafting the final report.

- **Final Report**

The findings of an audit have to be incorporated in a final report signed by all revenue bodies involved.

To the extent possible, tax administrations should endeavour to arrive at a common interpretation of how the arm's length principle applies to the findings of a specific audit based on an analysis of the facts and circumstances. Such an agreed outcome would give the highest guarantee that the audit does not result in double taxation.

If the tax authorities reach a common understanding of how the arm's length principle should be applied to the case under scrutiny, they should be bound by the agreed conclusions in their respective domestic tax assessments.

If the tax authorities cannot reach a common understanding of how the arm's length principle should be applied to the case under scrutiny, the final report should include at least all relevant facts and circumstances with a clear reference to the points on which the tax administrations managed to agree. In this regard, it would also be useful to explain the reasons why the parties failed to strike a final compromise. In view of a possible MAP process, the audit teams should clearly describe the questions in dispute with the aim of facilitating subsequent procedures for dispute resolution¹¹.

As a result, the final report on a cooperative transfer pricing control does not have a legal value *per se* unless it is specifically empowered via national legislation. This is why such final report is commonly attached to a document of national origin which is notified to the taxpayer in accordance with domestic rules.

In case the facts and circumstances subject to the audit and their assessment under the arm's length principle are the same in tax periods before and after the respective audit period, it should be ensured that the result of the audit is taken into account in case the taxpayer applies for ex ante certainty by way of an APA or requests a MAP for solving a dispute that already occurred.

Recommendation 9:

It is recommended that each bi- or multilateral control finishes with a final report.

Annex 4 to this report contains a non-binding template for a final report

2.4. RESOLUTION PHASE

¹¹ DRM Directive

A disagreement on the outcome of the audit may arise between the tax administrations or between one or more tax administration and the taxpayer.

- **Disagreement between tax administrations**

In case of disagreement between tax administrations, i.e. where no common agreement on the interpretation of the arm's length principle could be reached in the final report, every tax administration retains, under the current EU legal framework, its own power to tax in accordance with its own law and judgment.

Yet, it would be useful that the MAP competent authority makes use of the agreed facts and circumstances in the final report if a MAP procedure is open.

- **Disagreement between tax administrations and taxpayers**

In case of disagreement between the taxpayer and one or more tax administration, i.e. where the taxpayer did not agree with the interpretation of the arm's length of one or more tax administration, the taxpayer should maintain the right to appeal under the domestic law and require a MAP procedure.

2.5 FOLLOW UP PHASE

It is important to grant tax certainty to the taxpayer.

Where tax administrations have reached a common conclusion on bi- or multilateral controls, they should refrain from taking a different position in future unilateral audit unless the facts and circumstances have changed.

The outcome of bi- or multilateral controls could pave the way towards a fast track procedure of bilateral APAs.

CLOSING REMARKS

A cooperative approach to transfer pricing controls presents some definite advantages in overcoming the risk of diverging opinions between stakeholders when applying transfer pricing in accordance with the arm's length principle.

Provided that the requisite legal framework exists, procedures with a legal base in the Directive which present features similar to joint audits should be feasible to engage in.

Nevertheless, the current legal framework may not support cooperation in the form of a full joint audit, as described by the OECD¹².

It would be useful to collect data on the cooperative approaches to transfer pricing controls taken by the Member States in order to evaluate whether the current legal framework creates obstacles to efficient and effective transfer pricing controls.

¹² OECD Joint Audit Report (September 2010)

The JTPF should consider working in the future to develop a common methodology for transfer pricing audits.

Annex 1: List of national provisions implementing Directive 2011/16/EU

MS	Article of the Directive 2011/16/EU	Aspect addressed	Provision in national law	Description

Note to JTPF Members: Do you think the information in Annex 1 should become part of MS TP profiles on the JTPF website?

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Annex 2: table of comparisons between the features of Simultaneous Controls and Joint Audits.

NEEDS/SUBJECT	SIMULTANEOUS AUDITS	JOINT AUDITS
Avoid disputes to arise or make them arise at an early stage of the process so that dispute resolution can be prepared in an optimal way	Limited because of no element of cooperation. Have a component of exchange of information but limited to (i) listing issues for audit, (ii) sharing some information in a more or less formal manner, (iii) sharing outcome which can still be notified in different manners and based on a different legal base	Advantage is <ul style="list-style-type: none"> • Transparency, management of time and fully-fledged access to information and processed data; • Agreement on legal base and techniques; • Limited risk of arbitrage; • Dispute prevention by common agreement (no dispute) or possibility of agreeing to disagree but to elaborate the issue(s) for preparing dispute resolution; • More efficient time management of procedures, multilateral and pilot approaches.
Identifying common transfer pricing risks	Issues may be listed	It could allow a more detailed analysis and makes a revision of the approach or the adjustment of scenarios possible.
Time management of the tax audits	Timeframe may be agreed	Having one team involved and processing the information in real time should avoid losing time – also the ‘one single team’ approach will prevent situations whereby the process is lagging behind in one country compared to the other.
Management of data and information	Limited	Full-fledged and coordinated treatment/interpretation of data with a joint approach on both sides of the border (e.g. use of tools, IT processing, economic valuation); this is key to transfer pricing.
Risk of arbitrage and profit shifting by taxpayers – Increased reassessed tax basis and effective collection of tax revenues	Arbitrage is possible	Due to parallelism and unique procedure, arbitrage seems impossible. It gives a clear incentive for taxpayers who are willing to cooperate.
Legal certainty/clarity	No	Legal certainty is normally ensured as a result of the one single audit procedure
Anticipation of tax collection and risks of bankruptcy	Not possible (outcome of audits are shared and no possible strategy)	Anticipation possible
More efficient, less costly and feasible management of multilateral tax audits (advantage of one single team) – eg cases of	Not effective	Clearly an advantage as, for instance, one country could be chosen as a model with duplication

multilateral management fees issues, low value adding services		
Tax administration knowledge, sharing of practices and creation of “niches” in transfer pricing// pilot tests	Not systematic	Optimal (on the field)

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Annex 3: Template of a Memorandum of Understanding (MoU).

Title

Memorandum of Understanding between Tax administration 1 and Tax administration 2 regarding the cooperation in the field of tax audits in the EU (presence of officials, simultaneous audits and direct cooperation) in the field of direct taxes

Preamble

Tax administration 1 and Tax administration 2, hereinafter: the "Parties", considering the desire

- a) to intensify mutual cooperation in tax matters
- b) to improve audit effectiveness on cross border transactions
- c) to reduce administrative burdens for tax administrations and tax payers
- d) to reduce number of MAPs and litigations on cross border matters

have agreed the following.

General Provisions

Article 1 Legal basis

Pursuant to the provisions of

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation

the competent authorities referred to in article 2 of this Memorandum will exchange information in the field of coordinated EU tax audits in the field of direct taxes.

Article 2 Competent authorities

1. For the application of this Memorandum of Understanding the competent authorities are:
in Tax administration 1:
xxxx
in Tax administration 2:
xxxx

2. The Parties will inform each other by exchange of letters about the names and addresses of the authorized representatives concerned and about any subsequent changes in these representatives.

Exchange of information

Article 3 The presence of tax officials in administrative offices and participation in administrative enquiries (PAOE)

1. At the request of the competent authority of one of the States, the competent authority of the other State can allow tax officials of the former State
 - a) to be present in the offices where the administrative authorities of the requested State carry out their duties
 - b) to be present during administrative enquiries carried out in the territory of the requested State, that are important to them.
2. Requests to allow such presence of tax officials are made in special cases.
It particularly concerns:
 - a) the explanation of a formal spontaneous exchange of information in complex cases
 - b) the explanation of a formal information request in complex cases.

Article 4 Simultaneous audits

1. At the request of the competent authority of one of the States, the competent authority of the other State can agree to conduct simultaneous audits.
2. A simultaneous audit is an arrangement between two (or more) parties to examine simultaneously each in its own territory the tax affairs of one (or more) taxpayer(s) in which they have a common or complementary interest, with a view to exchanging the information thus obtained.
3. Simultaneous audits are an appropriate means for multilateral cases with a cross-border dimension, especially transfer pricing issues, questions regarding permanent establishments, investigations of tax planning and tax avoidance schemes, and investigations of complex business-restructuring schemes.

Article 5 Joint audits

1. At the request of the competent authority of one of the States, the competent authority of the other State can agree to conduct Coordinated Tax Controls.
2. A Coordinated Tax Control is an arrangement between two (or more) parties to examine the tax affairs of one (or more) taxpayer(s) in which they have a common or complementary interest in a cooperative manner.
A Coordinated Tax Control allows for the possibility to obtain information through the mutual presence of officials.
To the extent allowed by its domestic law, i.e. depending on the implementation of Directive 2011/16/EU into national law, the competent authority of one of the States may permit authorized representatives of the other State
 - a) to be present in the offices where the administrative authorities carry out their duties
 - b) to be present during administrative enquiries carried out in their territory, that are important to them
 - c) to enter their territory to interview individuals and to examine books and records.
3. Coordinated Tax Controls are an appropriate means for bilateral cases with a cross-border dimension, especially transfer pricing issues, questions regarding permanent establishments, investigations of tax planning and tax avoidance schemes, and investigations of complex business-restructuring schemes.

Various Provisions

Article 6 Various Provisions

1. A request for the presence of tax officials, for a simultaneous or a Coordinated Tax Control is submitted in writing by the competent authority of the requesting State.
The request is provided electronically by CCN Mail or otherwise electronically secured.
The request substantiates the desirability and provides a short description of the case. The competent authority of the requested State decides on the request as soon as possible, however within two months (at the most) after receipt of the request.
2. The competent authority of the requested State can refuse the request, giving the grounds for this decision.
3. If necessary, the competent authorities confer on the way in which the obligations resulting from this Memorandum are executed

Article .. Issue(s) and/or transaction(s) to focus on

Article .. Communication during the audit and working

Article .. Rules for conducting auditors in presence activities

Article .. Documents to prepare

Final Provisions

Article 7 Commencements, Amendments, Termination

1. This Memorandum shall stay in force on the date of signature and can be amended at any time after written agreement between the Parties.
2. It may be terminated by means of a written notification by one of the Parties and ends six months after receipt of such a notification.

Annex 4: Template of the Final Report

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