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**EU JOINT TRANSFER PRICING FORUM**

**A COORDINATED APPROACH TO TRANSFER PRICING**

**CONTROLS WITHIN THE EU**

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## **A COORDINATED 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 coordinated approach to transfer pricing controls would contribute to a better functioning of the internal market on two fronts: it would offer tax administrations a transparent and efficient tool to facilitate the allocation of taxing rights and also prevent the occurrence of double taxation and double non 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 to consider their improvement where necessary<sup>1</sup>.

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.<sup>2</sup>

For this reason the current work programme of the JTPF<sup>3</sup> includes the assignment of summarizing Member States' practices and experiences in the context of simultaneous controls and joint audits as well as providing practical guidance on how to cooperate bi- or multilaterally in transfer pricing controls.

### **OBJECTIVE**

The objective of this paper is to establish a coordinated approach to transfer pricing controls within the EU, in order to avoid double taxation or non-taxation.

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<sup>1</sup> 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. A similar point was reiterated more recently in the Commission Report on the application of the Directive on administrative cooperation in direct taxation (COM(2017) 781 final).

<sup>2</sup> See Recommendations 9a and 9b of the JTPF report on Transfer Pricing Risk Management (DOC: JTPF/007/FINAL/2013/EN), endorsed by the Council on 10 March 2015.

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

Furthermore, it serves as a starting point for analysing which tools, and how, can be improved based on the current EU legal framework.

## 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 principle 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 requires the exercise of judgement on the part of both the tax administration and the taxpayer and a review of the transfer pricing methods at several points in the process of a comparability analysis<sup>4</sup>. 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 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, tax administrations are encouraged to exchange all foreseeably relevant information in a timely manner and to cooperate for building 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 should be used where they are expected to assist in the identification of transfer pricing risks and to contribute to an efficient audit.*

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<sup>4</sup> Par 1.13 and 2.74 OECD TPG.

### **Cooperation between tax administrations and taxpayers**

Taking into consideration the recommendations that feature in the JTPF report on transfer pricing risk management and the principles laid out in the Guidelines for a Model European Taxpayers' Code<sup>5</sup>, 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 be transparent and share - in a timely manner - the relevant information with each of the tax administrations involved in the bi-or multilateral control.

#### **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 communicate and be heard in accordance with the national provisions. The taxpayer should be timely informed of the steps taken by the tax administrations during the audit.<sup>6</sup>*

*At the same time, the taxpayer should be transparent and share in a timely manner the relevant information with each of the tax administrations involved.*

## **1.2 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.

### **Presences in administrative offices and participation in administrative enquiries (PAOE)**

According to article 11 of Directive 2011/16/EU (the DAC), PAOEs consist in one Member State requesting to be present in another Member States' offices and/or during administrative enquiries carried out in the territory of the requested Member State. In addition to being present, Member States' officials may interview individuals and examine records during administrative enquiries – but under the condition that this is permitted under the legislation of the requested Member State.

### **Simultaneous Controls**

According to article 12 of Directive 2011/16/EU (the DAC), 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.

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<sup>5</sup> Document of the Commission services, DG TAXUD, online at: [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/guidelines-model-european-taxpayers-code\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/guidelines-model-european-taxpayers-code_en)

<sup>6</sup> It should however be stressed that, according to Recommendation 1 of TP Risk Management Report, such cooperative approach is only recommended when dealing with a cooperative taxpayer.

## ***Joint Audits***

The term Joint Audit is created by the OECD<sup>7</sup>. Under the OECD definition 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 control<sup>8</sup> 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.

It is not the aim of this report to confine the various kinds of administrative cooperation to certain pre-defined concepts; rather administrative cooperation should be designed in a way that best fits to the facts and circumstances of each case. On this premise, the term “**coordinated transfer pricing controls**”, as used in this Report, refers to transfer pricing audits of two or more related entities of the same MNE group which are tax resident in different Member States. The controls are carried out by the tax administration of the Member State where each entity is tax resident in a coordinated manner and within the applicable legal framework (i.e. national rules and EU law).

## **1.3 LEGAL FRAMEWORK**

### ***1.3.1 State of Play***

The transfer pricing analysis of cross-border operations in a coordinated transfer pricing control will be based on the available domestic and international legal framework (e.g. treaties, conventions, directives, regulations and domestic law). In the absence of harmonised procedural rules within the EU, tax administrations are therefore 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, Directive 2011/16/EU refers to forms of administrative cooperation relevant to cross-border (intra-EU) transfer pricing audits.

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<sup>7</sup> OECD Joint Audit Report (September 2010).

<sup>8</sup> Article 7 of Regulation (EU) No 1286/2013 of the European Parliament and the Council of 11<sup>TH</sup> 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.

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.

According to the Commission Staff Working Document<sup>9</sup> on the application of the DAC, this article 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 mainly used in relation to tax residence, the existence of a permanent establishment, transfer pricing, and letterbox companies.

**Recommendation 3:**

Member States are encouraged to implement legislation that permits the active presence of visiting foreign officials in accordance with Article 11 of the Directive.

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

According to the Commission Staff Working Document<sup>10</sup> on the application of Directive 2011/16/EU, almost all Member States have either initiated or taken part in simultaneous controls since the entry into force of the Directive. Overall, a total number of 119 simultaneous controls seem to 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.

Although there is no such explicit reference in the Directive, it is extremely important that Member States have the legal framework which allows them to perform corresponding downward adjustments during the coordinated controls as a result of a common understanding of the facts and circumstances and of the application of the arm's length principle.

**Recommendation 4:**

Member States are encouraged to swiftly lay down the legal framework which would allow them to perform corresponding downward adjustments as a result of a common understanding of the facts and circumstances and of the application of the arm's length principle.

*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 active and/or passive presence of*

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<sup>9</sup> Commission staff working document accompanying the Report from the Commission to the EU Parliament and Council on the application of Council Directive (EU) no. 2011/16/EU on administrative cooperation in the field of direct taxation SWD/2017/0462 final

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=SWD:2017:462:FIN&from=EN>

<sup>10</sup> see note 9.

*visiting foreign officials and the possibility of performing downward adjustments as the result of a coordinated transfer pricing control.*

### **1.3.2 Prospects for closer cooperation in transfer pricing controls**

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 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 field of transfer pricing, 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 avoid double taxation and double non taxation when applying the arm's length principle. This is particular important since the Dispute Resolution Directive (2017/1852) introduces a formal duty for Member States to remove double taxation.

A form of enhanced cooperation in this context could take the form of a joint audit as described by the OECD. Yet, the term "joint audit" as such does not feature in Directive 2011/16/EU.

This said, it would still be feasible for tax administrations to carry out transfer pricing controls in a way that, *in essence*, comes 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.

By agreement between the tax administrations involved foreign officials may be present in the offices where tax administrative authorities of the other Member State(s) carry out their duties and/or during administrative enquires (passive participation). It is also possible that foreign officials be granted the right of active participation via national law in which case, by agreement between the tax administrations involved, they may even interview individuals and examine records.

According to Directive 2011/16/EU, the exchange of information is only required between certain authorities designated specifically for this purpose (EoI competent authorities). To facilitate the exchange of information in real time, the competent authorities may empower the project coordinators or one or more of the auditors of each Member State to exchange information on the findings of the audit directly.

To sum up, if the current EU legal framework was duly and fully implemented in each Member State and accompanied by an appropriate agreement between the respective tax administrations to supply for the presence of foreign officers and the immediate exchange of information, it would create a

kind of administrative cooperation which, in *essence*, would not be less effective than a joint audit, as defined by the OECD Joint Audit Report<sup>11</sup>.

The joint audit programme which is already in place between some Member States<sup>12</sup> demonstrates the far-reaching boundaries of administrative cooperation within the current EU legal framework.

Member States are also free to introduce national measures which facilitate cooperation that go further than the current EU legal framework.

**Recommendation 5:**

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

## **PART 2**

### **GUIDELINES ON COORDINATION IN TRANSFER PRICING CONTROLS WITHIN THE EU**

The second part of this document provides a set of best practices for a coordinated approach to transfer pricing controls. The structure of the chapters is aligned to the JTPF Report on TP Risk Management.

#### **2.1 ORGANIZATIONAL MATTERS**

- **Raising Awareness**

Stakeholders should be aware of the available tools, their advantages and obstacles and whether and how these tools should be used in the case at hand.

- **Channels for communication**

Administrative cooperation requires the establishment of clear channels for communication. Secure channels of modern communication like video/internet conferences etc. should be made available to tax administrations for administrative cooperation.

- **Flexibility**

Due to the absence of harmonized procedural rules for audits in Member States, the time when an audit is performed, the way such an audit is conducted and the rights and obligations of auditors differ within the EU. Thus, a coordinated approach in transfer pricing controls requires flexibility and alignment of the procedural rules as far as possible.

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<sup>11</sup> See footnote 7.

<sup>12</sup> The Joint Audit pilot project Germany/The Netherlands has been presented during the JTPF meeting of 18 February 2016. The Joint Audit programme Germany/Italy has been presented during the JTPF meeting of 26 June 2018.

**Recommendation 6:**

*Member States should ensure that stakeholders are aware of the possibilities and functioning of the available tools for taking a coordinated approach to transfer pricing controls.*

*In order to facilitate the communication between stakeholders, tax administrations are encouraged to establish a contact point(s) and publish a functional e-mail box to contact in matters related to coordinated transfer pricing controls.*

*To enable a cooperative approach, Member States are encouraged, to the extent possible, to be flexible as regards the choice of the audit periods, the timing and the way the audit is performed.*

## 2.2 TAXPAYER RIGHTS AND OBLIGATIONS

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.

Taxpayers should be transparent and, in a timely manner, share all relevant information with the tax administrations involved in the coordinated transfer pricing control. Such cooperative taxpayers should to be heard and be informed on milestones.

As already recommended in the Transfer Pricing Risk Management Report, tax administrations should consider giving taxpayers the right to propose a coordinated transfer pricing control. However, it should be clarified that the taxpayer cannot invoke any such right, unless this is laid down in national law. Nevertheless where tax administrations decide not to pursue a taxpayer's application, they should endeavour to give an explanation outlining the reasons for this decision.

## 2.3 INITIAL PHASE

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

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

Therefore tax administrations need to balance the advantages of a coordinated approach with the cost and administrative burden of the procedure and their internal capability. It should be noted, however, that although a coordinated approach may involve more complex administration and costs than a unilateral audit, one should consider the administrative burden and costs of unilateral audits that lead to court procedures, Multilateral Agreement Procedures (MAPs) and other dispute settlement mechanisms.

It follows that Member States should choose the most appropriate tool for administrative cooperation in the light of the facts and circumstances of a case and the expected costs and benefits. 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 or despite not involving high amounts, the issue is sufficiently important to be examined jointly (e.g. it may affect more taxpayers, future tax years, etc.) .
- 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 and double non taxation.

- **Taxpayer selection process**

Every tax administration has its own tools and risk assessment programmes for the selection of risks and audit targets. Therefore, the need to perform a coordinated transfer pricing control could arise as a consequence of an internal risk assessment or in the course of a national audit (bottom-up approach). In this case, it is important that the requesting tax administration share all information that justifies the request. Successfully coordinated transfer pricing controls would benefit from strict and fair collaboration between tax administrations already in the phase of risk assessment<sup>13</sup>.

When a tax administration wishes to embark on a joint audit programme with one or more tax administrations, a joint selection process, including a joint risk assessment, would be desirable (top-down approach)<sup>14</sup>.

In any case all the information related to the taxpayer selection process should be treated confidentially and remain within the relevant tax administrations.

- **How to initiate a coordinated transfer pricing control**

If the need to perform a coordinated transfer pricing control arises as a consequence of an internal risk assessment or in the course of a national audit (bottom-up approach), the tax administration which is willing to initiate such a control should send a formal request and justify the type of control that it is looking for.

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

If a selection process, including a risk assessment, is carried out jointly by two or more tax administrations (top-down approach), they should agree on how to initiate the control and who has to send the formal request.

Tax administrations are not obliged to participate in a coordinated transfer pricing control but when they receive a request to this end, they should answer as soon as possible and at the latest, within 2 months from the date of receipt of the request. In case of refusal, tax administrations should explain their position.

***Recommendation 7:***

*It is recommended that Member States participate in coordinated transfer pricing controls unless their refusal is based on a reasonable explanation (taking into account recommendation 3).*

- **Audit preparation**

When tax administrations agree on a coordinated approach to the audit, it is crucial to prepare the audit process. For ensuring an efficient audit, it is important to jointly agree an audit plan for each coordinated transfer pricing control<sup>15</sup>.

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<sup>13</sup> EU JTPF Report on TP Risk Management R. 5.

<sup>14</sup> See Recommendation 10.

The audit plan should be tailored to the facts and circumstances of the case taking into consideration the domestic law, rules and procedures of the participating tax administrations. Normally, it will identify 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 ( e.g. when the audit will begin in each Member State and when it will be finalized, agreed time schedule and eventually when and how to exchange information);
- Documents to be prepared;
- Agreement on communication and working language (the solution of art. 3(1) of Dispute Resolution Directive (2017/1852) could be taken into account);
- Rules for carrying out “auditors-in-presence” activity;
- Clear identification of the rights and obligations of tax auditors acting abroad.

***Recommendation 8:***

It is recommended to agree and sign an audit plan for each coordinated transfer pricing control.

When a tax administration wishes to promote a sustained programme of administrative cooperation in the form of coordinated transfer pricing controls with one or more tax administrations, it is useful that the respective competent tax authorities sign a Memorandum of Understanding (MoU). Such a MoU should be the framework that lays down all the main principles and practicalities that govern future cooperation in such tax audits.

***Recommendation 9:***

It is recommended that Member States agree a Memorandum of Understanding (MoU), in case they wish to establish sustained coordinated transfer pricing controls programme.

*Annex 2 to this report contains a non-binding template for concluding such a MoU.*

## **2.4 AUDIT PHASE**

- **Preparation**

It is recommended 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 coordinated transfer pricing control it is essential to keep an open channel of communication during the audit progress. The aim should be to ensure that the time scheduled be respected. The participating tax administrations should always exchange information without undue delay if the tax administration of the other Member State asks for it.

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<sup>15</sup> Annex 1 of the JTPF report on Risk management JTPF/007/FINAL/2013 contains an example of a TP audit work plan that may be used as a starting point.

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.

- **Final Phase**

The coordinated transfer pricing controls finish when all the planned activities of the audit plan have been completed.

Tax administrations should evaluate the audit findings during a closing meeting and summarize the aspects where they reached a common understanding and those where differences may still remain.

Depending on the kind of administrative cooperation chosen, the final findings may be presented separately or jointly by the participating tax administration to the relevant taxpayers. Any comments by the taxpayers should be taken in due account in the compilation of the concluding report.

- **Concluding report of the coordinated transfer pricing control**

The findings of an audit should be incorporated in a concluding report. 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 follow such understanding in their respective domestic tax assessments.

If the tax authorities cannot reach a common understanding, the concluding 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 for the differences. In view of the possibility of initiating a MAP procedure later, the audit teams should clearly describe the questions in dispute with the aim of facilitating subsequent procedures for dispute resolution<sup>16</sup>.

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

It may be the case that the facts and circumstances subject to the audit and their assessment under the arm's length principle remain unaltered during the tax periods before or after the respective audit period. It should then be ensured that the result of the audit be taken into consideration if the taxpayer applies for *ex ante* certainty by way of an APA or requests an MAP for solving a dispute that already occurred.

**Recommendation 10:**

It is recommended that each coordinated transfer pricing control finishes with a concluding report.

*Annex 3 to this report contains a non-binding list of content for the concluding report of the coordinated transfer pricing control.*

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<sup>16</sup> DRM Directive

## 2.5 RESOLUTION PHASE

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, e.g. where no common agreement on the interpretation of the arm's length principle can be reached in the concluding report, each tax administration retains, under the current EU legal framework, its own power to tax in accordance with its own law and judgment.

If the disagreement between tax authorities result in a question of dispute that is eligible for a MAP, and a MAP procedure is opened, it would be useful that the MAP competent authority takes the facts and circumstances that were already agreed in the concluding report into consideration.

Furthermore, a comprehensively elaborated question of dispute could help speed up the Mutual Agreement Procedure and/or the submission to arbitration, if appropriate. However, it is important to underline that the MAP competent authority, although competent authorities and audit functions may belong to the same tax administration, should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the MAP competent authority<sup>17</sup>. Yet, this should not mean that it has to act in isolation.

- **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 principle by one or more tax administration, the taxpayer maintains the right to appeal under domestic law and require a MAP procedure.

In this case, the tax administrations can suspend making the agreed downward adjustment until a definitive decision be reached by the MAP competent authority or the judicial authority.

## 2.6 FOLLOW UP PHASE

It is important to grant tax certainty to the taxpayer.

Where tax administrations have reached a common conclusion in a coordinated transfer pricing control, they should refrain from taking different position in future unilateral audits unless the facts and circumstances have changed.

The outcome of coordinated transfer pricing controls could facilitate the procedure of bilateral APAs or MAPs.

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<sup>17</sup> Point c of the revised Code of Conduct for the effective implementation of the Arbitration Convention

## CLOSING REMARKS

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

Provided that the requisite legal framework is implemented by the Member States<sup>18</sup> it is feasible to engage in procedures with a legal base in the Directive which present features similar to joint audits. To this end, Member States have the option to introduce domestic legislation that can support such administrative cooperation on a bilateral or multilateral basis.

This said it would be useful to collect data on the cooperative Member States' approaches to transfer pricing controls in order to evaluate whether the current legal framework needs to be improved.

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

In addition further elaboration regarding cooperative compliance initiatives within the EU framework, such as a high-level risk assessment in the field of transfer pricing should also be considered by the JTPF as a future field of work.

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<sup>18</sup> See recommendation 3.

**Annex 1: List of Member States' national provisions that implement Directive 2011/16/EU, including whether national law currently allows the active and/or passive presence of visiting foreign officials and the possibility to perform downward adjustment as result of a coordinated transfer pricing control.**

ANSWERS						
↓ Member States Questions →		Passive participation		Active participation		Downward adjustments
		Legal provision allowing the presence in administrative offices	Legal provision allowing the presence in administrative enquires	Legal provisions allowing the interview of individuals	Legal provisions allowing the examination of records	Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control
AT	Austria	YES	YES	YES	YES	YES
BE	Belgium	YES	YES	NO	NO	YES
BG	Bulgaria	YES	YES	YES	YES	YES
CY	Cyprus	YES	YES	NO	NO	NO
CZ	Czechia	YES	YES	YES	YES	NO
DE	Germany	YES	YES	YES	YES	UNDER CERTAIN CIRCUMSTANCES
DK	Denmark	YES	YES	NO	NO	YES
EE	Estonia	YES	YES	YES	YES	YES
ES	Spain	YES	YES	NO	NO	UNDER CERTAIN CIRCUMSTANCES
FI	Finland	YES	YES	YES	YES	NO
FR	France	YES	YES	YES	YES	NO
GB	United Kingdom	YES	YES	NO	NO	NO
GR	Greece	YES	YES	NO	NO	NO
HR	Croatia	YES	YES	NO	NO	YES
HU	Hungary*	n.a.	n.a.	n.a.	n.a.	n.a.
IE	Ireland	YES	YES	NO	NO	NO
IT	Italy	YES	YES	YES	YES	YES
LT	Lithuania	YES	YES	YES	YES	YES
LU	Luxembourg	NO	NO	NO	NO	YES
LV	Latvia	YES	YES	NO	NO	NO
MT	Malta	YES	YES	YES	YES	YES
NL	Netherlands	YES	YES	YES	YES	YES
PL	Poland	YES	YES	NO	NO	NO
PT	Portugal	YES	YES	YES	YES	YES
RO	Romania	YES	NO	NO	YES	YES
SE	Sweden	YES	YES	NO	NO	NO
SI	Slovenia	YES	YES	NO	NO	YES
SK	Slovakia	YES	YES	YES	YES	NO

\*Hungary did not reply to the questionnaire.

<b>MEMBER STATE:</b>	<b>AUSTRIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Sec 10 Para. 1 EU-AHG
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Sec 10 Para.1 EU-AHG
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Sec 10 Para. 3 EU-AHG
Comment:	upon written confirmation of the individuals; under guidance and control of an Austrian tax official/CLO
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Sec 10 Para. 3 EU-AHG
Comment:	upon written confirmation of the individuals; under guidance and control of an Austrian tax official/CLO
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Several options in the Austrian procedural law, e.g. Sec 303 procedural tax law
Comment:	0
<b>MEMBER STATE:</b>	<b>BELGIUM</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Art. 338, § 10, first subsection, 1° BITC
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Art. 338, § 10, first subsection, 1° BITC
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	Art. 338, § 10, third subsection BITC
Comment:	The article explicitly prohibits the visiting foreign officials to interview individuals or to examine records.
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Art. 185, § 2, b) BITC
Comment:	The taxpayer can demand a downward adjustment based on either the internal law (through administrative procedure) or through a the provisions in the DTA (mutual

	agreement procedure)
Legal Reference:	Art. 25 of the corresponding DTA
<b>Member State:</b>	<b>BULGARIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Art. 143k, para. 1 of the Tax and Social Security Procedure Code (TSSPC)
Comment:	By the cited domestic provision Art. 11, para. 1 of Council Directive 2011/16/EU has been transposed
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Art. 143k, para. 1 of the Tax and Social Security Procedure Code (TSSPC)
Comment:	By the cited domestic provision Art. 11, para. 1 of Council Directive 2011/16/EU has been transposed
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Art. 143k, para. 2 of the Tax and Social Security Procedure Code (TSSPC)
Comment:	By the cited domestic provision Art. 11, para. 2 of Council Directive 2011/16/EU has been transposed
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Art. 143k, para. 2 of the Tax and Social Security Procedure Code (TSSPC)
Comment:	By the cited domestic provision Art. 11, para. 2 of Council Directive 2011/16/EU has been transposed
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Art. 15 of the Corporate Income Tax Act
Comment:	Art. 15 of the Corporate Income Tax Act is not directly linked to a tax audit resulting from any form of administrative cooperation between Member States. Art. 15 is a general provision which sets out that taxable profits originating from transactions between related enterprises should be determined on the basis of the arm's length principle. Downward adjustments are not explicitly mentioned in the Bulgarian domestic legislation but there is not an explicit restriction to make such adjustments either. Our interpretation is that Art. 15 allows to perform both upwards and downwards adjustments to taxable profits.
<b>Member State:</b>	<b>CYPRUS</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Art.9(1a)Law205(I)/2012
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Art.9(1b)Law205(I)/2012
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0

Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	Only corresponding adjustments under a MAP.
<b>Member State:</b>	<b>THE CZECH REPUBLIC</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Act No. 164/2013
Comment:	It is implementation of UE Directive No. 2011/16/EU
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Act No. 164/2013
Comment:	It is implementation of UE Directive No. 2011/16/EU
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Act No. 164/2013
Comment:	It is implementation of UE Directive No. 2011/16/EU
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Act No. 164/2013
Comment:	It is implementation of UE Directive No. 2011/16/EU
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	In all cases we have two separate tax audits (one in the Czech Rep. and one in the other country), so we always use the same process as in other TP cases.
<b>MEMBER STATE:</b>	<b>GERMANY</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	§ 10 para. 1 EUAHiG
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	§ 10 para. 1 EUAHiG
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	§ 10 para. 3 EUAHiG
Comment:	the consent of tax payer is mandatory for active presence of foreign tax officers
Q4. Legal provisions allowing the examination of records	
Answer:	YES

Legal Reference:	§ 10 para. 3 EUAHiG
Comment:	the consent of tax payer is mandatory for active presence of foreign tax officers
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	UNDER CERTAIN CIRCUMSTANCES
Legal Reference:	§ 1 para 1 Foreign Tax Act
Comment:	The legal provision for TP adjustments only allows upward adjustments (paragraph 1 (1) Foreign Tax Act)
Legal Reference:	§ 164 Fiscal Code of Germany (Tax assessment subject to review)
Comment:	Downward adjustments are possible if an assessment is preliminary/subject to review
Legal Reference:	§ 175a Fiscal Code of Germany (The implementation of mutual agreement understandings)
Comment:	Otherwise a downward adjustment can only be made as a result of a MAP (paragraph 175a Fiscal Code of Germany: A tax assessment notice shall be issued, cancelled or amended where this is required in order to implement a mutual agreement understanding or an arbitral award pursuant to an agreement within the meaning of section 2. The period for assessment shall not end before expiration of one year after the mutual agreement understanding or arbitral award has come into effect.)
<b>MEMBER STATE:</b>	<b>DENMARK</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	0
Comment:	we have a provision stipulating that when a foreign national is in Denmark and receives information in accordance with Denmarks international obligations then he is protected and also subject to the same rules in the Danish criminal code as a Danish civil servant.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	0
Comment:	we have a provision stipulating that when a foreign national is in Denmark and receives information in accordance with Denmarks international obligations then he is protected and also subject to the same rules in the Danish criminal code as a Danish civil servant.
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Ligningslovens § 2, stk. 6
Comment:	It is a pre-condition for a downwards transfer pricing adjustment that the other party has received a corresponding upwards adjustment that is taxed in Denmark or another country.
<b>MEMBER STATE:</b>	<b>ESTONIA</b>
Q1. Legal provisions allowing the presence in administrative offices	

Answer:	YES
Legal Reference:	Taxation Act Chapter 3.1
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Taxation Act Chapter 3.1
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Taxation Act § 51.5
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Taxation Act § 51.5
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Taxation Act Chapter 7
Comment:	0
<b>MEMBER STATE:</b>	<b>SPAIN</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Article 177 quinquies Ley 58/2003, de 17 de diciembre, General Tributaria
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Article 177 quinquies Ley 58/2003, de 17 de diciembre, General Tributaria
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	Article 177 quinquies Ley 58/2003, de 17 de diciembre, General Tributaria
Comment:	The legal provision allow the presence in administrative enquiries, but these activities are performed by local officials
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	Article 177 quinquies Ley 58/2003, de 17 de diciembre, General Tributaria
Comment:	The legal provision allow the presence in administrative enquiries, but these activities are performed by local officials
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	UNDER CERTAIN CIRCUMSTANCES
Legal Reference:	0

Comment:	There is no legal reference to the consequences of a cooperative action. According with our Law, adjustments can only be made after a local audit or MAP, not directly as a consequence of a coordinated transfer pricing control. In any case, in almost all cases, a coordinated transfer pricing control gives rise to an internal audit, so there would be the possibility of adjustment within the latter, although derived from the common approach.
<b>MEMBER STATE:</b>	<b>FINLAND</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	0
Comment:	At least one of the officials present from the visiting country must be competent for exchanging information with the host country's competent official during the visit. As proof of this competence, the competent official from the visiting country must have certificate of competence and an identity document.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	0
Comment:	Same as above.
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	0
Comment:	Same as above
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	0
Comment:	Same as above
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	0
<b>MEMBER STATE:</b>	<b>FRANCE</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Art. L45 3.a du LPF
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Art. L45 3.b du LPF
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Art. L45 3.c du LPF
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	0
Legal Reference:	Art. L45 3.d du LPF
Comment:	0

Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	0
<b>MEMBER STATE:</b>	<b>UNITED KINGDOM</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Article 11 2011/16/EU CD
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Article 11 2011/16/EU CD
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	n/a
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	n/a
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	Please note - Downwards adjustments can't be performed within the UK's domestic rules other than those that relate to our MAP and APA provisions within Part 4 TIOPA 2010
<b>MEMBER STATE:</b>	<b>GREEK</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Art.12 Law4170/2013
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Art.12 Law4170/2013
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	

Answer:	NO
Legal Reference:	0
Comment:	0
<b>MEMBER STATE:</b>	<b>CROATIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Administrative cooperation Law in the field of taxation
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	0
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	It is not described by the law but is possible if there is bilateral agreement. For example: Agreement between the Tax Administration of the Republic of Croatia and the Tax Administration of the Free State of Bavaria on enhanced cooperation on taxation
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	General Tax Act
Comment:	0
<b>MEMBER STATE:</b>	<b>HUNGARY</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	n.a.
Legal Reference:	n.a.
Comment:	n.a.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	n.a.
Legal Reference:	n.a.
Comment:	n.a.
Q3. Legal provisions allowing the interview of individuals	
Answer:	n.a.
Legal Reference:	n.a.
Comment:	n.a.
Q4. Legal provisions allowing the examination of records	
Answer:	n.a.
Legal Reference:	n.a.
Comment:	n.a.
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	

Answer:	n.a.
Legal Reference:	n.a.
Comment:	n.a.
<b>MEMBER STATE:</b>	<b>IRELAND</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Regulation 9 of S.I. No 549 of 2012, European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Regulation 9 of S.I. No 549 of 2012, European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	0
<b>MEMBER STATE:</b>	<b>ITALY</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Presidential Decree No. 600/1973, Article 31 bis
Comment:	Article 31 bis was modified by the Legislative Decree 4 March 2014 no.29
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Presidential Decree No. 600/1973, Article 31 bis
Comment:	Article 31 bis was modified by the Legislative Decree 4 March 2014 no.29
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Presidential Decree No. 600/1973, Article 31 bis
Comment:	Article 31 bis was modified by the Legislative Decree 4 March 2014 no.29
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Presidential Decree No. 600/1973, Article 31 bis
Comment:	Article 31 bis was modified by the Legislative Decree 4 March 2014 no.29
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES

Legal Reference:	Presidential Decree No. 600/1973, Article 31 quater
Comment:	Article 31 quater was introduced by Decree-Law No 50 of 24 April 2017
<b>MEMBER STATE:</b>	<b>LITHUANIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Law on tax administration, Rules for conducting control procedures
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Law on Tax Administration, Rules for conducting control procedures
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Law on tax administration , Rules for conducting control procedures
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Law on tax administration , Rules for conducting control procedures
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Law on Corporate Income Tax
Comment:	0
<b>MEMBER STATE:</b>	<b>LUXEMBOURG</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	NO
Legal Reference:	1. law as of march 29, 2013 2. law as of may 26, 2014
Comment:	1. This law implements the directive 2011/16/UE (DAC1) into domestic law 2. Implementation into domestic law of the Convention on mutual administrative assistance in tax matters
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	NO
Legal Reference:	2. law as of march 29, 2013 2. law as of may 26, 2014
Comment:	1. This law implements the directive 2011/16/UE (DAC1) into domestic law 2. Implementation into domestic law of the Convention on mutual administrative assistance in tax matters
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	1. law as of march 29, 2013 2. law as of may 26, 2014
Comment:	1. This law implements the directive 2011/16/UE (DAC1) into domestic law 2. Implementation into domestic law of the Convention on mutual administrative assistance in tax matters
Q4. Legal provisions allowing the examination of records	
Answer:	NO

Legal Reference:	1. law as of march 29, 2013 2. law as of may 26, 2014
Comment:	1. This law implements the directive 2011/16/UE (DAC1) into domestic law 2. Implementation into domestic law of the Convention on mutual administrative assistance in tax matters
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Article 56 and 56bis of domestic income tax law
Comment:	These legal provisions implement into domestic law the arms length principle and describe the methods to be used to determine the arm's length price based on the OECD TP guidelines. The arm's length price being a general provision, upward and downward adjustments may be applicable in order to determine the arms length conditions.
<b>MEMBER STATE:</b>	<b>LATVIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Section 18.1 paragraph 1, point 5 of the Law On Taxes and Fees
Comment:	Section 18.1 Duties of the Tax Administration in Relation to Taxes, Duties and Other Mandatory Payments, which are Levied in Accordance with the Legal Acts of the European Union and its Member States  The tax administration shall have the following duties: 5) to co-operate with the competent authority of the Member State of the European Union, by taking part in the tax reviews performed by another Member State of the European Union or by engaging, upon request of the Member State of the European Union, a representative of the tax administration of the relevant Member State in the performance of a tax reviews (audits) in Latvia;
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Section 18.1 paragraph 1, point 5 of the Law On Taxes and Fees
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	Section 18.1 paragraph 1, point 5 of the Law On Taxes and Fees
Comment:	in the rule the text "by engaging [...] a representative of the tax administration of the relevant MS" is not interpreted as a right to interview of individuals
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	Section 18.1 paragraph 1, point 5 of the Law On Taxes and Fees
Comment:	in the rule the text "by engaging [...] a representative of the tax administration of the relevant MS" is not interpreted as a right to examine records
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	Section 15, paragraph 1, point 6 of the Law on Taxes and Fees
Comment:	No specific provisions, taking into account general legal provisions a taxpayer has the right to adjusted tax declarations within three years from the statutory due term for payment laid down in the specific tax law

<b>MEMBER STATE:</b>	<b>MALTA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Regulation 15(1)(a) of the Cooperation with Other Jurisdictions on Tax Matters Regulations (S.L. 123.127)
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Regulation 15(1)(a) of the Cooperation with Other Jurisdictions on Tax Matters Regulations (S.L. 123.127)
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Regulation 15(2) of the Cooperation with Other Jurisdictions on Tax Matters Regulations (S.L. 123.127)
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Regulation 15(2) of the Cooperation with Other Jurisdictions on Tax Matters Regulations (S.L. 123.127)
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Article 13(3) and (7) and 31(4) of the Income Tax Management Act
Comment:	Malta operates a self-assessment system whereby the tax return submitted by the taxpayer includes such a self-assessment. This self-assessment may be challenged by the Commissioner by launching an enquiry (for example as a result of a coordinated transfer pricing control) into the tax affairs of the taxpayer. The taxpayer may adjust the self-assessment voluntarily (Article 13(3) ITMA).
<b>MEMBER STATE:</b>	<b>THE NETHERLANDS</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	National translation of Directive 2011/16/EU art. 11 and 12 => WIB art.8a and 9 ;
Comment:	to be requested via MLC and/or CLO office; if PE of entity in play then common practice to also inform via CLO office;
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	National translation of Directive 2011/16/EU art. 11 and 12 => WIB art.8a and 9 ;
Comment:	to be requested via MLC and/or CLO office; if PE of entity in play then common practice to also inform via CLO office;
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	National translation of Directive 2011/16/EU art. 11 and 12 => WIB art.8a and 9 ;
Comment:	to be requested via MLC and/or CLO office; principle of reciprocity as well;
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	National translation of Directive 2011/16/EU art. 11 and 12 => WIB art.8a and 9 ;
Comment:	to be requested via MLC and/or CLO office; principle of reciprocity as well;

Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Art.9 DTC ; Art.8b Tax Code; MAP Decree par.2.4.1 and Ch.9; CGTP Decree par.2 ;
Comment:	0
<b>MEMBER STATE:</b>	<b>POLAND</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Ar. 19 par. 1 of Act of 9 March 2017 on exchange of tax information with other countries (Polish Journal of Laws [Dziennik Ustaw] number 2017/648)
Comment:	Art. 19 par. 1 allows presence of foreign officials in administrative offices and enquiries if the relevant agreement between CAs is reached (CA for Poland in this respect is Chief of National Fiscal Administration). The scope of the presence (passive or active) is to be set in the agreement.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Ar. 19 par. 1 of Act of 9 March 2017 on exchange of tax information with other countries (Polish Journal of Laws [Dziennik Ustaw] number 2017/648)
Comment:	Art. 19 par. 1 allows presence of foreign officials in administrative offices and enquiries if the relevant agreement between CAs is reached (CA for Poland in this respect is Chief Head of National Revenue Administration). The scope of the presence (passive or active) is to be set in the agreement.
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	0
<b>MEMBER STATE:</b>	<b>PORTUGAL</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Article 19 (2) of the Regime for Tax Inspection Procedure and Decree-Law 61/2013 - Article 8 (1) (a)
Comment:	It requires a prior agreement between the involved competent authorities, and the involved foreign officials need to be personally authorized by the Director General of the Portuguese Tax and Customs Authority
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Article 19 (2) of the Regime for Tax Inspection Procedure and Decree-Law 61/2013 - Article 8 (1) (b)
Comment:	It requires a prior agreement between the involved competent authorities, and the involved foreign officials need to be personally authorized by the Director General of the Portuguese Tax and Customs Authority

Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Article 19 (2) of the Regime for Tax Inspection Procedure and Decree-Law 61/2013 - Article 8 (4)
Comment:	It requires a prior agreement between the involved competent authorities, and the involved foreign officials need to be personally authorized by the Director General of the Portuguese Tax and Customs Authority
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Article 19 (2) of the Regime for Tax Inspection Procedure and Decree-Law 61/2013 - Article 8 (4)
Comment:	It requires a prior agreement between the involved competent authorities, and the involved foreign officials need to be personally authorized by the Director General of the Portuguese Tax and Customs Authority
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Article 3 and 17 of Ministerial Order 1446-C/2001
Comment:	-
<b>MEMBER STATE:</b>	<b>ROMANIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Article 295 of Law 207/2015 Fiscal Procedure Code Romania implemented in the national legislation article 12 of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
Comment:	There is the possibility of arranging meetings between the competent authorities in order to enhance the coordination of the simultaneous control and to better facilitate the exchange of information
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	NO
Legal Reference:	-
Comment:	Only exchange the information thus obtained in the simultaneous controls made by the competent authority in their own territory, as specified in article 12 of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	-
Comment:	Only exchange the information thus obtained in the simultaneous controls made by the competent authority in their own territory.
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Article 295 of Law 207/2015 Fiscal Procedure Code Romania implemented in the national legislation article 12 of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
Comment:	It is possible the exchange of information regarding the outcome of the tax audit under article 12 of the Council Directive, implemented under article 295 of Law 207/2015 Fiscal Procedure Code

Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	YES
Legal Reference:	Article 11 paragraf 4 of Law 227/2015 Fiscal Code(4) Transactions between affiliated persons shall be made in accordance with the market value principle. In the case of a transaction between a group of transactions between affiliated persons, the tax authorities may adjust, if the market value principle is not respected, or if the taxpayer does not provide the competent tax authority with the necessary data to determine whether transfer pricing in the analysed situation complies with the market value principle, the amount of revenue or expense related to the tax outcome of any of the related parties based on the level of the central market trend.National Agency for Fiscal Administration President Order number 442 / 2016 on the amount of transactions, deadlines for preparation, content and terms of the request of the transfer pricing file and the transfer pricing adjustment / estimation procedure
Comment:	<p>Romania follows both the recommendation of the EU Directive - Code of Conduct on Transfer Pricing Documentation but also the OECD Guidelines on Transfer Pricing. Regarding the transfer pricing adjustments, as long as there is proof that the transfer price used is not at arm's length, the adjustment necessary will be made at medial level.</p> <p>Simultaneous controls: Will be carried out in the form of tax inspections with the object at least of the profit tax verification in order to comply with the legal framework regarding the adjustment. The adjustment will be made at the level of the median, if the arm's length principle is respected, and at the end of the tax inspection the value of the adjustment will be included in the tax decision according to art. 95 of the Tax Procedure Code Law 207/2015.</p> <p>Article 295 Simultaneous controls</p> <ol style="list-style-type: none"> <li>1. Where Romania agrees with one or more Member States to carry out simultaneous controls, each in its own territory, one or more persons having a common or complementary interest in order to exchange with the information thus obtained, shall be applicable provisions of paragraph (2) - (4).</li> <li>2. The competent authority in Romania shall independently identify the persons for whom it intends to propose a simultaneous control. It shall notify the competent authorities of the other Member States concerned of any cases for which it proposes simultaneous control, indicating the reasons for that choice and the period during which such controls are to be carried out.</li> <li>3. The competent authority of Romania shall decide whether it wishes to participate in simultaneous controls and shall confirm to the competent authority that proposed the simultaneous control of its agreement or communicate its reasoned refusal.</li> <li>4. The competent authority of Romania shall designate a representative responsible for supervising and coordinating the control operation.</li> </ol>
<b>MEMBER STATE:</b>	<b>SWEDEN</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	The Swedish law that implements directive 2011/16/EU on administrative cooperation in the field of taxation is the law (2012:843) on administrative cooperation in the EU in the field of taxation <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2012843-om-administrativt-samarbete-inom_sfs-2012-843">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2012843-om-administrativt-samarbete-inom_sfs-2012-843</a> and the regulation (2012:848) on administrative cooperation within the EU in the field of taxation <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2012848-om-administrativt-samarbete_sfs-2012-848">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2012848-om-administrativt-samarbete_sfs-2012-848</a>

Comment:	The more specific legal provisions allowing the presence of foreign officials is § 17 in the law on administrative cooperation in the EU in the field of taxation and according to § 21 in the regulation on administrative cooperation within the EU in the field of taxation, the foreign official shall receive copies of the documentation of the requested information.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Se above
Comment:	Se above
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	Section 14 para 19 of the Swedish Income Tax Act (1999:1229). <a href="https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/inkomstskattelag-19991229_sfs-1999-1229">https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/inkomstskattelag-19991229_sfs-1999-1229</a>
Comment:	Under domestic legislation only upward adjustments are allowed. Downward adjustments are available if applicable tax treaty include a provision similar to Article 9.2 of the OECD MTC
<b>MEMBER STATE:</b>	<b>SLOVENIA</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Article 223.b of the Tax Procedure Act
Comment:	The Financial Administration in the Republic of Slovenia - FURS may on the basis of the written request of the authority of the requesting State allow the presence of an official of the requesting State in procedures related to tasks of the FURS (tax authority) in Slovenia.
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Article 44 of the Financial Administration Act
Comment:	Representatives of foreign financial administrations, international organizations or EU bodies may on the basis of bilateral agreements or EU law participate in the exercise of the powers of the Financial Administration in the Republic of Slovenia under the programme for the exchange of officials or education and training of officials.
Q3. Legal provisions allowing the interview of individuals	
Answer:	NO
Legal Reference:	0
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	NO
Legal Reference:	0
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing	

control	
Answer:	YES
Legal Reference:	Article 128 of the Tax Procedure Act
Comment:	The tax inspection is carried out for the benefit and burden of the taxpayer.
<b>MEMBER STATE:</b>	<b>SLOVAK REPUBLIC</b>
Q1. Legal provisions allowing the presence in administrative offices	
Answer:	YES
Legal Reference:	Section 11 of Act No. 442/2012 Coll. on international assistance and cooperation in tax administration, as amended
Comment:	0
Q2. Legal provisions allowing the presence in administrative enquiries	
Answer:	YES
Legal Reference:	Section 11 of Act No. 442/2012 Coll. on international assistance and cooperation in tax administration, as amended
Comment:	0
Q3. Legal provisions allowing the interview of individuals	
Answer:	YES
Legal Reference:	Section 11 of Act No. 442/2012 Coll. on international assistance and cooperation in tax administration, as amended
Comment:	0
Q4. Legal provisions allowing the examination of records	
Answer:	YES
Legal Reference:	Section 11 of Act No. 442/2012 Coll. on international assistance and cooperation in tax administration, as amended
Comment:	0
Q5. Legal provisions allowing to perform downward adjustments as a result of a coordinated transfer pricing control	
Answer:	NO
Legal Reference:	0
Comment:	It is not possible to conclude the coordinated control with a downward adjustment in the Slovak Republic. However, it is possible to perform corresponding downward adjustment after the control if there is an upward adjustment in the other jurisdiction. The condition for such downward adjustment is that a Double Tax Treaty is in place with that other jurisdiction. For such adjustment the respective Double Tax Treaty does not need to include the equivalent of Article 9 (2) of the OECD Model Tax Convention. The legislative basis for such corresponding adjustment is Section 17 (6) of Act No. 595/2003 Coll. on Income Tax, as amended.

## **Annex 2: 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 Joint audits.
2. A Joint audit I 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 Joint audit 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. Joint audits 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

*Other possible Provisions*

**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 3: Non-binding list of content for the concluding report of the coordinated transfer pricing control**

The concluding report should contain at least the following items:

- Identification of the taxpayers
- Identification of the involved tax administrations
- Summary of the procedure of the coordinated transfer pricing control performed
- Case description and objectives of the control:
  - Overview of the situation that has been subject of the control
- Representation of the transfer pricing analysis with a clear reference to the points on which the tax administrations managed to agree and an explanation of the reasons for any differences in particular with a reference to the following points:
  - Functional analysis of the facts and circumstances of the case
  - Choice of the Method and Profit level Indicator
  - Benchmark analysis and comparable
- Final results of the audit
- Contacts point for further detailed information