Volume 10 – Issue 4 – November 2018

World Tax Journal

IBFD

World Tax Journal

The World Tax Journal (WTJ) is a multidisciplinary platform for premium and ground-breaking academic research specialized in international, comparative and regional taxation. It is fully peer-reviewed and published four times a year.

ISSN 1878-4917 / © 2018 IBFD

P.O.Box 20237
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Tel.: 31-20- 554 0100
Fax: 31-20-622 8658
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Table of Contents

Volume 10 – Issue 4 – November 2018

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Joint Audits: Applicable Law and Taxpayer Rights

This article first provides an overview of the concept, categories and objectives of joint audits, defined as all forms of international cooperation between tax authorities where officials from one country take part in a tax audit carried out by officials of another country. Subsequently, questions of applicable law, taxpayer rights standards in particular, are discussed. On this basis, an in-depth analysis of the relevant constitutional and legal guarantees of taxpayer rights is carried out from the specific perspective of EU law. The article concludes with a plea for further harmonization of joint audit procedure at EU level, in order to provide legal certainty and as a prerequisite for a more prominent role of this legal instrument.

Contents

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The authors wish to thank the assistants at the Institute for Financial and Tax Law, Karl-Franzens Universität, Graz, as well as the Institute for Tax Law, Münster for footnote editing and research assistance. They would also like to thank colleagues and members of the tax administrations at the German-Italian workshops on joint audits for their insightful discussions, from which they benefited greatly.

1. Introduction

Taxpayers' activities are far from limited to the territory of one nation. In the age of globalization, multinational businesses and cross-border business activities are common phenomena. As a consequence, the international dimension of both direct and indirect taxes has become increasingly relevant. In line with internationally accepted principles of the allocation of taxing rights, national tax claims often extend to taxpayers that operate beyond national borders or to transactions and activities that occur abroad, or at least involve some cross-border elements. A correct tax assessment therefore often requires information that is most readily available in a foreign country because it is held by a foreign taxpayer or in the foreign establishment of a domestic taxpayer.

However, under the public international law principle of strict territoriality of the jurisdiction to enforce,[1] the investigation powers of each national tax administration are normally

1. *See* PCIJ, 7 Sept. 1927, *The Case of the S.S. "Lotus"* (*France v. Turkey*), PCIJ Series A, No. 10, pp. 18-19. *See also* ICJ, 9 Apr. 1949, *Corfu Channel Case* (*Great Britain v. Albania*), ICJ Reports 1949, at p. 35: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations". *See also* G. Dahm, J. Delbrück & R. Wolfrum, *Völkerrecht*, vol. I/1, p. 318 (2nd ed., de Gruyter 1989); C. Ryngaert, *Jurisdiction in International Law* pp. 23-24 (Oxford 2008); A. Mills, *Rethinking Jurisdiction in International Law*, 84 British Yearbook of International Law 1, p. 195 (2014); and F.A. Mann, *The doctrine of jurisdiction in international law*, 111 RdC 1, p. 127 et seq. (1964). *See also* J. Crawford, *Brownlie's Principles of Public International Law*, p. 479 (8th ed., Oxford 2012): "The govern-

confined to its respective national territory. In order to obtain the relevant information or to verify any information provided by the taxpayer himself, tax authorities therefore need to cooperate internationally.[2] The preferred instruments for this purpose are exchange of information (EoI) procedures, whereby foreign tax authorities provide information to the domestic authorities either upon request, automatically or spontaneously.[3] When two tax administrations engage in such cooperation, each state would traditionally collect relevant information only on its own territory. The taxpayer-related facts would subsequently be transmitted to the other state, and that state would then analyse and utilize the information so received in conformity with its own domestic laws.

In practice, however, the aforementioned traditional EoI has certain deficiencies, in particular, regarding the length and formalities of the procedures and the quality of the information obtained. Especially in large or complex tax assessments, this can impair the efficiency of international cooperation and, ultimately, the correct and internationally coordinated taxation of businesses. To remedy those shortcomings, several international and supranational instruments of administrative cooperation in tax matters allow the tax authorities from one state to be directly involved in a tax audit carried out in another state. This relatively new form of international administrative cooperation is commonly referred to as a "joint audit", in a broad sense.

Currently, national tax administrations are still reluctant to make use of the relevant instruments.[4] Partially, this restraint is due to capacity problems and technical issues; inspectors with the necessary linguistic skills, tax expertise and openness for foreign (auditing) cultures are often in short supply. Furthermore, a common agreement must be reached on the cases to be investigated. Complications arise, and upfront investments of time and resources are relatively high because no established procedures exist yet for the execution of joint audits.[5] Yet another problem consists of a considerable degree of uncertainty regarding the relevant legal framework for the initiation and implementation of joint audits, especially

ing principle of enforcement jurisdiction is that a state cannot take measures on the territory of another state by way of enforcement of its laws without the consent of the latter … [T]ax investigations may not be mounted … on the territory of another state, except under the terms of a treaty or other consent given". As regards tax audits in particular, *see also* M. Hendricks, *Internationale Informationshilfe im Steuerverfahren* pp. 175-176 (Otto Schmidt 2004); and H. Schaumburg, *Internationales Steuerrecht*, para. 22.3 (4th ed., Otto Schmidt 2017).

2. So-called "horizontal administrative coordination" (*see* E.G. Heidbreder, *Multilevel Policy Enforcement: Innovations in how to Administer Liberalized Global Markets, public administration*, 93 Public Administration 4, p. 951 (2015); and A. Benz, *European Public Administration as a Multilevel Administration: A Conceptual Framework*, in *The Palgrave Handbook of the European Administrative System* p. 37 (M.W. Bauer & J. Trondal eds., Palgrave Macmillan 2015)).

3. *See* OECD, *CFA Manual on Information Exchange* (OECD 2006); OECD, *Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains To Be Done* (OECD 2012); and X. Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (Edward Elgar 2015).

4. *See* D. Ring, *Art. 26: Exchange of information* sec. 5.3.3., Global Tax Treaty Commentaries IBFD (accessed 28 Aug. 2018): "Perhaps reflecting some of the implementation barriers, joint audits are being underutilized at present". Regarding EU Member States and direct taxes in particular, *see also* the Report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) 2011/16/EU of 18 December 2017 on administrative cooperation in the field of direct taxation, COM(2017)781 final, p. 4; and the statistics in the accompanying Commission Staff Working Document, SWD(2017)462 final, p. 10.

5. *See also* E.C.J.M. Van der Hel-van Dijk, *Joint Audits: Next Level Cooperation between Germany and The Netherlands?*, 43 Intertax 8/9, pp. 497-498 (2015). Van der Hel-van Dijk was responsible for the evaluation of a joint audit pilot project between Germany and the Netherlands, concluded in 2014.

when determining the applicable law, and the limits on the extraterritorial exercise of inspection powers.[6]

Nevertheless, a still nascent trend can be observed among tax administrations worldwide – especially in Europe – to overcome those difficulties, develop routines for the conducting of joint audits and establish them as a reliable instrument in the administrative toolbox for international tax law cases. In particular, some successful pilot projects have been initiated among cooperating tax administrations with a view towards achieving those aims.[7] These efforts have now been acknowledged and endorsed by the OECD, the G20 and the European Union as key measures for enhancing taxpayer certainty in international tax affairs, and countries have been encouraged to resort to joint audits more frequently for this purpose.[8] Consequently, the OECD Forum on Tax Administration (FTA) declared, in 2017, that one of its priority projects consists of facilitating greater use of joint audits across jurisdictions.[9] They can therefore be expected to proliferate further in the near future. The recently launched pilot on the International Compliance Assurance Programme (ICAP) – essentially, a multilateral joint risk assessment carried out by an international team of tax inspectors from participating countries based on country-by-country (CbC) reports[10] – might further accelerate this trend.

This development brings another issue to the fore that so far has hardly received any attention in official statements or in scholarly writings: What are the rights of the taxpayers who are affected by a joint audit and confronted with an international group of tax inspectors? Which statutory rights can they rely on, and which constitutional guarantees apply at the national and European levels? This article endeavours to address these concerns primarily from the perspective of taxpayers situated in the European Union.

To this effect, the authors first analyse the concept, categories and objectives of joint audits, as well as their relationship with traditional forms of EoI, and they identify the relevant international treaties and European legislation that authorize their implementation. Upon this foundation, they examine which taxpayer rights apply, depending on the characteristics and the legal basis of the different types of joint audits. They begin this analysis with an overview of the legal position of the taxpayer, the relevant statutory and constitutional guarantees and the factors that generally determine the applicable legal framework. In section 6, specific minimum standards are discussed from the perspective of EU law. The article ends with some policy recommendations.

2. Concept of Joint Audits

2.1. Defining characteristics

The 2010 OECD Joint Audit Report (2010 OECD Report) defines a joint audit as follows:

6. *See* OECD, *The Changing Tax Compliance Environment and the Role of Audit* p. 85 (OECD 2017).
7. *See* Van Hel-van Dijk, *supra* n. 5, at p. 495; and T. Eisgruber, *Praxiserfahrungen zu Joint Audits*, Beihefter zu DStR 41, p. 89 (2013).
8. *See* IMF/OECD, *Tax Certainty, Report for the G20 Finance Ministers* p. 54 (OECD/IMF 2017); and Bulgarian Presidency of the Council of the European Union, *Working Session II: Towards a common agenda for modern tax administrations* p. 3. (Issue Note, Informal ECOFIN Meeting, 27-28 Apr. 2018).
9. *See* OECD Forum on Tax Administration, *Communiqué of the 11th Meeting of the OECD Forum on Tax Administration (FTA) Oslo, Norway, 29 Sept. 2017*, p. 5 (OECD 2017).
10. *See* OECD, *International Compliance Assurance Program* (OECD 2018).

> two or more countries joining together a single audit team to examine issues or transactions of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organized in participating countries, and in which the countries have a common or a complementary interest; where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country.[11]

Joint audits thus represent a high degree of international administrative cooperation in which tax inspectors from participating countries come together in order to jointly perform the tax audit. Up until now, though, neither the OECD model agreements on EoI nor the relevant multilateral agreements or supranational EU legislation provide for the kind of intense cooperation envisaged in the 2010 OECD Report.[12] It is currently not foreseen that inspectors from different countries will form one single audit team. In particular, this would clearly go beyond the cooperation authorized under article 11 of Directive 2011/16/EU on administrative cooperation in the field of direct taxation (DAC). This provision serves as a legal basis for the presence of tax inspectors of one Member State in an administrative enquiry carried out by the authorities of another Member State for the purpose of assessing direct taxes. Article 11 of the DAC furthermore provides that, under certain conditions, the dispatched officials may also participate in this investigation in foreign territory. However, this form of cooperation does not require a joint aim of the tax administrations involved, nor is there any reference – at least not explicitly – to the formation of a "joint team" of tax auditors. It merely allows officials from one tax administration to become involved in the tax audit organized by the officials of another Member State and to benefit from the on-site support of this other Member State's tax administration. With some modifications regarding the scope and conditions of the cooperation, the situation is similar under the other EU law instruments on administrative cooperation in tax matters. Only very recently has the EU Commission proposed legislation that would allow Member States, for the first time, in the field of VAT, to set up a single joint team of auditors.[13]

For the purposes of this article, the definition of joint audits is therefore broader than the definition of the 2010 OECD Report. It is understood here that the concept encompasses all forms of international cooperation between tax authorities in which officials from one country exercise inspection powers outside of their home state's territory by taking part in a tax audit carried out by the officials of another state, with varying degrees of involvement. From the taxpayer's perspective, the main characteristic of a joint audit is thus that he will be confronted by tax inspectors from different jurisdictions in a single fact-finding exercise. Moreover, the authors do not limit their analysis to joint audits that seek to resolve issues of intra-company transfer pricing, which was apparently the premise of the 2010 OECD Report. As is evident from the European Regulations on administrative assistance regarding VAT and excise taxes, joint audits have a much broader field of application, and this is actually also the case with respect to direct taxes.

Joint audits need to be distinguished from simultaneous tax audits. These represent audits in which two or more countries perform a tax audit, each in their own territory, of one or more persons of common or complementary interest to them, with a view to exchange

11. OECD, *Sixth meeting of the OECD Forum on Tax Administration*: *Joint Audit Report* point 7 (OECD 2010).
12. *See also* European Commission, *EU Joint Transfer Pricing Forum, Multilateral Approach to Transfer Pricing Audits within the EU* (2018).
13. *See* sec. 3.2.

information thus obtained between them.[14] As is clearly visible from the definition, audit teams perform individual tax audits of a single or of multiple taxpayers whilst remaining in their own respective states. Even though these actions are coordinated, they remain separate processes performed for the sake of a subsequent EoI gathered in each one of these states. By contrast, joint audits are characterized by the fact that tax officials from one state participate in a tax audit carried out by the officials of another state in the territory of that other state.

Since the officials of the state that is requesting the joint audit are present during the administrative enquiry carried out in the requested state, there is normally no need for a subsequent EoI after the audit procedure. Instead, the information is either directly gathered by the officials of the requesting state or exchanged instantly during the audit.

2.2. Possible objectives

In its 2010 Report, the OECD mentioned almost a dozen "main objectives" of joint audits, as well as several additional positive effects that they might have.[15] As the OECD admitted, though, at the time that the 2010 Report was drafted, that "no countries had any experiences with joint audits".[16] The conclusions were thus somewhat hypothetical. Judging from the discussions with officials and taxpayers who have meanwhile participated in real joint audits, especially within the framework of a Bavarian pilot project that has taken the lead globally in promoting and implementing joint audits, it seems to the authors that the main objectives of joint audits are actually the following.

First and foremost, joint audits can constitute a highly efficient instrument for national tax authorities that seek to gather or verify information, for the purposes of domestic tax assessment, that is presumably held by another taxpayer who is established in a cooperating foreign tax jurisdiction. Joint audits have the potential for quicker, more accurate, more comprehensive and more targeted fact finding.[17]

Closely related to this first objective is a second one: especially when implemented on a continuous basis, joint audits can serve to provide tax authorities with a better understanding of the legal implications that cross-border activities have in the other jurisdiction. Such insights will often be relevant for a correct and more streamlined domestic tax assessment. A factor that can contribute significantly to the attainment of this objective is the constant dialogue between the officials of the different national competent tax authorities that carry out the joint audit. One of the desired effects of implementing joint audits is therefore also to foster a climate of cooperation and trust between the tax administrations involved. This can even be a political goal, e.g. in the field of European VAT, where the Commission is

14. *See* OECD, *supra* n. 11, at point 7. *See also* Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, arts. 29-30, OJ L 268/1 (2010) [hereinafter RAC VAT]; Council Regulation (EU) No. 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No. 2073/2004, art. 13, OJ L 121/1 (2012) [hereinafter RAC Excises]; and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, art. 12, OJ L 64/1 [hereinafter DAC].
15. OECD, *supra* n. 11, at points 10 and 11.
16. Id., at p. 5.
17. OECD, *supra* n. 6, at p. 84.

pushing for a more effective legal framework for joint audits[18] in order to strengthen the confidence of Member States in the effectiveness and robustness of the "one-stop shop" approach[19] towards taxing cross-border transactions.

In practice, the international coordination of tax claims and the avoidance of international double (non-) taxation is not a primary objective for national tax administrations that conduct joint audits. However, it can usually be expected that the on-site dialogue between the competent officials from all national tax administrations that are affected by the cross-border business activities at issue contributes significantly to a seamless international allocation of taxing rights.

One further objective of joint audits is the identification of tax evasion and avoidance schemes and raising awareness of tax administrations about "aggressive" tax-planning strategies of multinational companies. This can lead to an improved selection of cases for future (joint) audits.

Finally, joint audits allow the officials involved to observe and exchange the best auditing and risk-assessment practices. Such close cooperation and constant dialogue facilitate reaching mutual agreement on the relevant facts, and also on the interpretation of the relevant provisions of international tax law.[20] This is indeed confirmed by anecdotal evidence from many of the joint audits carried out so far. Certainly, the potential for such a consensual outcome is the main motivation for taxpayers to give their consent to be subject to a joint audit when such consent is required for the lawfulness of the audit. As a corollary, joint audits therefore also serve to reduce the need for international dispute resolution, especially for the mutual agreement procedure (MAP) and arbitration.[21] As the OECD has recently stressed, joint audits therefore also comprise an important building block for enhancing tax certainty.[22]

3. Legal Bases for Joint Audits

While joint audits are still in their infancy from a practical point of view, there are already manifold (albeit imperfect) legal bases for their execution. In the following subsections, the authors will briefly outline the most relevant instruments in international public law and in EU law. They do not cover domestic law provisions that unilaterally authorize joint audits because they are not aware of any such rules within the European Union.

18. *See* the amended Commission proposal for a Council Regulation amending Regulation (EU) No. 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017)706 final (30 Nov. 2017). For more details, *see* sec. 3.2.
19. The "one-stop shop" approach aims at extending the existing "mini one-stop shop" (MOSS) to intra-community supplies of goods. It allows taxable persons to file their VAT returns and pay their VAT in one Member State for supplies that are taxable in other Member States (*see* European Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT – Towards a single EU VAT area – Time to decide, COM(2016)148 final (21 Oct. 2016)).
20. *See also* J.J. Burgers & D. Criclivaia, *Joint Tax Audits: Which Countries May Benefit Most?*, 8 World Tax J. 3, p. 310 (2016), Journals IBFD.
21. *See* OECD, *supra* n. 6, at p. 86.
22. *See* IMF/OECD, *supra* n. 8, at p. 54.

3.1. International public law

Joint audits are specifically addressed as a category of "tax administrations abroad" in article 6 (2) of the OECD Model Tax Information Exchange Agreement (OECD Model TIEA)[23] and in treaties that are inspired by this model, as well as in article 9 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC).[24] Moreover, there are some bilateral and regional multilateral agreements on the exchange of tax information and administrative assistance that predate the recommendation of the OECD Model TIEA that also allow for joint audits.[25] All of those instruments are usually limited in scope to direct taxes.

Beyond that, article 26 of the OECD Model Convention (OECD MC)[26] and treaties following this model are generally assumed to provide a public international law basis for the execution of joint audits as well. According to the Commentary on Article 26 of the OECD MC, the provision allows the contracting parties to use techniques "such as tax examinations abroad", which imply "the presence of representatives of the competent authority of the requesting Contracting State".[27] This legal basis has a potentially broad scope of application because, different from the aforementioned instruments, article 26 of the OECD MC and most of the treaties that have implemented this EoI standard are applicable to all types of taxes, including indirect taxes such as VAT and excise duties.[28] As a caveat, though, it is necessary to point out that treaty provisions that reflect article 26 of the OECD MC might be considered in some jurisdictions to be too broadly worded to serve as a legal basis for a joint audit in light of the constitutional requirements of legal certainty.[29]

3.2. EU law

There are currently three acts in EU legislation that provide a legal basis for joint audits, namely (i) the DAC; (ii) Regulation 2010/904/EU on administrative cooperation in the field of VAT (RAC VAT); and (iii) Regulation 2012/389/EU on administrative cooperation in the field of excise duties (RAC Excises). These three EU law acts do not follow a uniform approach. Article 11 of the DAC, as well as article 12 of the RAC Excises, allow for both passive and active engagement of foreign officials. But they stipulate different prerequisites, and

23. *OECD Model Agreement on Exchange of Information on Tax Matters* (OECD 2002), Models IBFD. Most treaties that have been concluded on the basis of this model can be accessed at http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (accessed 2 Jan. 2018).
24. OECD, *Multilateral Convention on Mutual Assistance in Tax Matters* (OECD 2010).
25. *See*, e.g., *Convention between the Federal Republic of Germany and Austrian Republic on Legal Protection and Administrative Assistance* [unofficial translation] art. 5(3) (4 Oct. 1954); and *Nordic Convention for Mutual Administrative Assistance* [unofficial translation] art. 13 (7 Dec. 1989).
26. *OECD Model Tax Convention on Income and on Capital* (OECD 2017) [hereinafter *OECD Model* (2017)], Models IBFD.
27. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 26* para. 9.1 (OECD 2017) [hereinafter *OECD Model: Commentary on Article 26* (2017)].
28. Id., at para. 1.2.
29. *See*, e.g., for Germany, T. Meickmann, *The German-Dutch Joint Tax Audit Pilot Project from a Legal Perspective in Germany*, in *Taxing German-Dutch Cross-Border Business Activities* p. 400 (H. Jochum, P. Esser & J. Englisch eds., Institut für Finanz- und Steuerrecht, Universität Osnabrück 2015); M. Hendricks, *Joint Audits und Abkommensrecht*, in *Festgabe Wassermeyer Doppelbesteuerung* p. 568 (C.H. Beck 2015); and C. Beckmann, *Joint Audits*, 25 IStR 15, p. 629 (2016). However, for a different opinion, *see* E. Czakert, *Generalthema 2 und Seminar D: Der internationale Informationsaustausch und die grenzüberschreitende Kooperation der Steuerverwaltungen*, 22 IStR 16, p. 602 (2013); and, seemingly, also K.-D. Drüen, *Rechtsrahmen und Rechtsfragen der multilateralen Betriebsprüfung*, 82 Beihefter zu DStR 41, p. 87 (2013).

also differ regarding the degree of autonomy that the foreign officials can potentially enjoy. Notwithstanding those divergences, they both have in common that even when the officials of the requesting state may play an "active" role vis-à-vis the taxpayer, they may not extra-territorially enforce any enquiries or instructions if the latter is unwilling to cooperate. By contrast, article 28(2) of the RAC VAT permits only the passive presence of foreign officials.

There is no rational explanation for this diversity regarding either the conditions for a joint audit or the possible role of the foreign officials that are involved in them. Instead, this heterogeneity is probably a manifestation of overly rigid departmentalization within the EU Commission when drafting the proposals, as well as within national tax administrations when advising their governments on the adoption of those acts. This situation should be overcome upon an overhaul of the entire system of EU legislation on administrative cooperation in tax matters, aimed at codifying taxpayer rights at the EU level.[30]

Yet another category of joint audits would be introduced if the Council were to adopt the recent Commission proposal to amend RAC VAT with a new article 28(2a).[31] Under this draft provision, Member States could agree to truly "join" forces to carry out audits in the field of VAT. The officials of the requesting state would then be authorized to exercise "the same powers of inspection as those conferred on officials of the requested authority". They would also have access to the same premises and documents as the officials of the requested authority. They would thus apparently no longer rely on any intermediation by the officials of the requested state in order to go through with their investigations. In line with the genuinely "joint" character of this type of audit, the competent authorities involved could also agree to draft a joint audit report. If enacted, this form of international cooperation would come very close to the concept envisaged in the 2010 OECD Report.[32] Under the Commission's ambitious plan, a Member State might even have to agree to carry out this type of joint audit on its territory, under certain conditions and for the purpose of monitoring taxpayer compliance with the EU system of simplified vendor collection for business-to-consumer cross-border trade (the so-called "one-stop shop", or OSS). It remains to be seen whether the Council will agree to such sweeping changes.[33] In any event, it is difficult to predict how effective an instrument of such "mandatory" requests would prove to be, considering that one of the objectives of joint audits is fostering mutual trust and direct dialogue between the representatives of the tax administrations involved, in the spirit of cooperation. Certainly, a common set of clearly defined rules of procedure would become an even more important factor for the success of such joint audits.

30. *See* sec. 5.
31. *See* the amended Commission proposal for a Council Regulation amending Regulation (EU) No. 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017)706 final (30 Nov. 2017).
32. *See* sec. 3.1.
33. Earlier efforts of the European Commission did not find the support of the Council. *See* the Commission's proposal to amend Regulation 2010/904/EU with a new art. 47j (Commission proposal for a Council Regulation amending Regulation (EU) No. 904/2010 on administrative cooperation and combating fraud in the field of value added tax, COM(2016)755 (1 Dec. 2016)), on the one hand, and the version of art. 47j as adopted in Council Regulation 2017/2454/EU, on the other hand.

3.3. The United States as a model for joint audits in federal systems

In the federal tax system of the United States, joint audits already comprise an established instrument of interstate cooperation for tax enforcement purposes. They provide some insight into the challenges and features of structuring an international joint audit process.

Joint audits are primarily organized by the Multistate Tax Commission (MTC).[34] In essence, the MTC is a tax agency that works with enterprises that conduct their business in multiple states and/or nations, answering any kind of tax-related questions or concerns in order to make sure that taxes are being paid properly to the appropriate entities. The MTC's Joint Audit Program is authorized under article VIII of the Multistate Tax Compact. Interestingly enough, being a member of the MTC does not imply, nor is a prerequisite for, participation in the Joint Audit Program.[35] The US joint audit model is a rather intricate combination of both cooperation and a separation of powers between the Commission and the Member States. The Commission itself claims to be "serving as an operating arm of member states"[36] regarding corporate income, sales and use, franchise and gross receipts tax audits.[37]

The primary selection process of the taxpayers to be audited is the one in which the Member States propose and ultimately vote for a list of candidates to be audited.[38] In the secondary audit selection process, the candidates are referred to the MTC Audit Committee via the MTC National Nexus programme. Also, the US model offers the taxpayers the chance to request an MTC audit themselves through the Committee.

The MTC Audit Director assigns an auditor from the audit inventory to a specific audit. This auditor is part of the Commission's own staff; however, when performing a tax audit, he acts as if he were a part of the state's own staff. States decide whether to participate in the audit and return signed audit authorization. It is the auditor himself who contacts the taxpayer and arranges an audit appointment. He also conducts field audit work at the taxpayer's

34. In the late 1960s, the US federal government attempted to curtail the state's jurisdictions to tax revenues made by multistate businesses in the name of uniformity and simplification. Several states saw this as a threat to their sovereignty and responded by forming a Multistate Tax Commission (MTC) in 1967, the mission of which was, in essence, twofold: it was supposed to (i) provide businesses with a single point of contact for their multistate tax problems; and (ii) adopt and put into operation statutes and rules establishing uniformity and protecting the fiscal and political integrity of the states from federal confiscation. For more information, *see The Multistate Tax Compact 1968 Brochure*, available at https://www.pwc.com/us/en/state-local-tax/multistate-tax-compact/pdfs/ibm-corrigan-affidavit-and-mtc-brochure.pdf (accessed 28 Aug. 2018).
35. *See* J.A. Friedman, T.A. Lard & C.C. Kearns, *Demystifying the MTC Joint Audit Program*, Tax Analyst – State Tax Notes, p. 599 (2013): "The Joint Audit Program includes compact member states that have adopted the compact's Article VIII, other states that have authorized their participation in the Joint Audit Program by statute, and states that have entered into what amounts to a third-party auditor contract".
36. Compact members are states that have enacted the MTC in their state laws. These states govern the MTC and participate in a wide range of projects and programmes. Sovereign members are states that support the purposes of the MTC through regular participation in and financial support for its general activities. Associate members are states that participate in MTC meetings and otherwise consult and cooperate with the MTC and its other member states, or, as project members, participate in MTC programmes or projects; *see Multistate Tax Commission – List of Member States*, available at http://www.mtc.gov/The-Commission/Member-States (accessed 28 Aug. 2018).
37. *See Multistate Tax Commission – Audit*, available at http://www.mtc.gov/Audit-Program (accessed 28 Aug. 2018).
38. The procedure is as follows: In July of every tax year, the Audit Director (of the MTC) sends out Audit Nomination Forms to member states, which then return audit nomination candidates until September. In November, the Audit Director distributes a summary of audit candidates. By February, the states supply information on all audit candidates, and finally, in March, states finalize the MTC audit inventory by voting on the final candidates.

location. Once he finishes the field work, he discusses any proposed audit adjustments with the taxpayer. The taxpayer may request a meeting with the MTC Audit Supervisor, MTC Audit Director or MTC Audit Committee at any point during the audit process. The audit schedules and reports are reviewed by an audit supervisor.

It is interesting to see that the individual state audit report sent to the corresponding state is only a recommended audit finding. Each state reserves its right to review the audits that were completed on its behalf, and each state also determines what further action it will take, based on the findings from the audit. Thus, each state may accept or change the proposed tax assessment. The Notice of Assessment is sent to the taxpayers by each state. If the taxpayers want to protest the audit results, they can do so either directly to states or through a request for Multistate Alternative Dispute Resolution.

At present, the US model seems to be rather divergent from the joint audit model that the European Union is envisioning. Namely, in the US model, the joint audits are performed by a commission that, even though working under the influence of the states,[39] operates autonomously. The commission works on behalf of a certain state[40] and collects a certain fee for its services.[41] It even has the right to decline the performance of a certain audit procedure if it finds its available personnel or resources insufficient (*see* article VIII of the Multistate Tax Compact).

In connection to this, in the US model, audits are performed by a single auditor, coming from one state, on behalf of all of the states included in the process. This is the consequence of the "pooling together" of resources from various Member States and forming a singular, autonomous commission of which the tax inspector acts as a staff member, which has the authorization to perform the audits on behalf of one or more involved states.

Finally, according to the US model, the findings from the audits performed by the commission represent only a recommendation for the state's tax administration. The latter can always discard it and perform its own audit. This was, for example, the case in *Microsoft Corp., Inc. v. Office of Tax and Revenue*[42] regarding a transfer pricing audit, in which the District of Columbia opened its own tax audit results in a burdensome double tax audit performed at the same time.[43]

Even though the US model seems to be rather different from the joint audit model that the European Union is discussing, one must still keep this model in mind if there would ever

39. The ways that states maintain control of the programme are first through the selection of the audit candidates, and second by reserving the right to decide whether or not to participate in a given audit and how to act upon the audit results. The Audit Committee as well as its oversight subcommittee, consisting of the audit and compliance directors of member states' tax agencies, oversee and guide the programme and ensure that it is responsive to member states' needs. http://www.mtc.gov/Audit-Program.
40. In the seminal case on the authority of the MTC, the US Supreme Court claimed that the MTC is the "state's auditing agent"; *see* US: SC, 21 Feb. 1978, *United States Steel Corp. v. Multistate Tax Commission*.
41. M. Herbert et al., *The MTC and Its Joint Audit Program State Not the Obvious*, Tax Analyst – State Tax Notes, p. 284 (2014).
42. US: Court of Appeal District of Columbia, 1 May 2012, *Microsoft Corp., Inc. v. Office of Tax and Revenue*.
43. *See* M. Herbert & B. Mayster, *The Journey of the MTC's Joint Audit Program*, Tax Analyst – State Tax Notes, p. 848 (2013): "Adhering to historical commission policy emphasizing uniformity and simplification, one would expect this standardized report to serve as the basis upon which the assessment will be issued. Current practice, however, is not in line with this approach. Rather, states may use the MTC's audit results as a starting point for further examination, even to the point of adding issues not addressed by the commission auditor. These 're-audits' add to the already burdensome task of complying with the MTC audit of what could be a dozen or more states with disparate tax rules".

be sufficient political will within the European Union to form European audit teams for the purpose of examining specific cross-border issues. This idea has already been mentioned in literature.[44]

4. A Mere Variation of EoI versus Original Powers of Investigation

Under traditional forms of EoI, each tax administration would confine the exercise of its own public authority to investigations that are confined within its national borders, in conformity with the public international law principle of strict territoriality of the jurisdiction to enforce. It is therefore also clear that taxpayers' rights are determined by the national legal and constitutional framework of each state, to the extent that this state exercises its own powers of tax inspection, tax assessment and tax controls. This remains so even when audits are internationally coordinated in the form of simultaneous controls.[45]

However, the situation could arguably be different when the officials of one state enter the territory of another state in order to participate in a joint audit carried out on the territory of the latter state. To the extent that the role of the foreign officials goes beyond that of mere recipients of information exchanged with them, they actually exercise their own powers of investigation vis-à-vis the taxpayer in foreign territory. This, in turn, could have an impact on taxpayers' rights both before and during the joint audit, as compared to ordinary unilateral audits. For the purpose of this article, it is therefore necessary to examine whether joint audits are merely a special form of EoI or whether they constitute international administrative cooperation that implies the parallel exercise of foreign and domestic public authority in the collection of information, albeit within the organizational framework of one and the same tax inspection.

4.1. Distinction between active and passive joint audits

The answer to this question is rather straightforward when it comes to the passive versions of joint audits, in which the foreign inspectors are merely entitled to be present during the investigation carried out by the local tax authorities. From a legal perspective, this category of joint audit does not go beyond the concept of EoI,[46] since all of the relevant information is still formally collected by local tax authorities and then – instantly – shared with the foreign tax inspectors. In the European legislation on joint audits, this characterization is also explicitly acknowledged by stating that such administrative cooperation will be carried out "with a view to exchanging … information".[47] This type of joint audit already offers significant advantages to the foreign tax administration by ensuring an immediate flow of information and the direct dialogue between its own competent authorities and those of the host state. Nevertheless, the foreign tax officials do not directly communicate or interfere with the taxpayer in an out-of-area exercise of public authority. Consequently, as it is expressly stated in the commentary on "tax examinations abroad" in MAC,[48] "there should not be any

44. E.C.J.M. Van der Hel-van Dijk, *Intra-Community Tax Audit* p. 9 (IBFD 2011), Online Books IBFD.
45. *See*, by analogy, IT: ECtHR, 11 Jan. 2001, *Xhavara & others v. Italy & Albania*, Application No. 39473/98.
46. For a different opinion, *see* Van der Hel-van Dijk, *supra* n. 44, at p. 7.
47. *See* art. 11 DAC; art. 28(2) RAC VAT; and art. 12(2)(1) RAC Excises.
48. OECD/Council of Europe, *Convention on Mutual Administrative Assistance in Tax Matters* (OECD/Council of Europe 1988, as amended by the 2010 Protocol) [hereinafter MAC].

question of exercise of authority in its strict sense by the foreign official".[49] All inspection measures must instead be attributed to the host state officials.[50] As a caveat, it should be pointed out that a need for additional protection of taxpayers' rights as compared to more traditional forms of EoI might nevertheless exist, due to the reduced possibilities of local authorities to filter the information before it is passed on to the foreign tax authorities.[51]

4.2. Rejection of the agency theory

In literature, it has been argued that the same qualification as a mere subset of EoI applies also to joint audits in which the foreign officials are authorized to carry out their own enquiries in the host country by interviewing the taxpayer or other individuals, examining records, accessing data bases, etc.[52] According to this position, the foreign inspectors exercise their own public authority only during the bilateral or multilateral administrative pre-meeting, when they deliberate together with local officials on the questions to be asked, the documents to be requested and other inspection measures. However, the inspection itself is assumed to always be carried out by the host state's tax administration, either by direct requests and actions of local officials or by assuming that the foreign officials act in the capacity of "agents" in the name and on behalf of the local authorities. In the latter case, the inspection activities of the foreign inspectors should be attributed to the local officials who are also present in the audit, and those officials should then be considered to have simultaneously passed this information "back" to the foreign officials relying on EoI procedures.[53]

It is respectfully submitted that this "agency theory" is not fully convincing. It ignores the fact that the foreign inspectors continue to act with the official mandate, and therefore as organs of their sending states, as well as in the fiscal interest of the latter throughout the joint audit. Their actions in official capacity during the inspection are therefore attributable to their sending state, in accordance with customary international law,[54] even if the effects of their actions materialize extraterritorially.[55] They must normally comply – at least in

49. *See OECD Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters* art. 9, para. 94 (OECD 2010). This provision provides a legal basis for the passive presence of foreign inspectors in the requested state during the audit, but it does not authorize active extraterritorial exercise of inspection powers. The only active role that the foreign officials may play, based on art. 9 of the MAC, consists of its interaction with local officials from the host country who actually carry out the audit, as suggested in para. 94 of the Explanatory Report (e.g. by "suggesting questions that the latter officials should confront the taxpayer with").
50. *See*, in general terms, A. David, *Inspektionen im Europäischen Verwaltungsrecht* pp. 343-344 (Duncker & Humblot 2003); and C. Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* p. 247 (Mohr Siebeck 2005).
51. *See* C. Beckmann, *supra* n. 29, at p. 630. *See also*, regarding immediate exchange of information (EoI) and a possible pre-screening by host-state officials, M. Hendricks, *supra* n. 1, at pp. 174 and 237-238.
52. *See* T. Eisgruber, *Grenzüberschreitende Betriebsprüfungen*, 60 Betriebs Berater 50, p. 6 (2016).
53. Id., at p. 7.
54. Regarding the relevant principle of customary international law, *see* A. van Arnauld, *Völkerrecht* sec. 5, para. 397 (C.F. Müller 2016); K. Ipsen, *Völkerrecht*, sec. 29, para. 10 (6th ed., C.H. Beck 2014); J. Crawford, *supra* n. 1, at p. 543; and M.N. Shaw, *International Law*, p. 572 (7th ed., Cambridge U. Press 2014), with further references. *See also* International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts* art. 4 (ILC 2001).
55. *See* G. Dahm, J. Delbrück & R. Wolfrum, *supra* n. 1, at p. 917, sec. 17; and Ipsen, id., at sec. 29, para. 38. *See also*, by analogy, CH: ECtHR, 14 July 1977, *X and Y v. Switzerland*, Joined Applications 7289/75 and 7349/76, 9 D.R. 57; and ECtHR, 20 Yearbook E.C.H.R., 372, at pp. 402-406 (1977).

principle and absent of European harmonization of tax procedures[56] – with the constitutional requirements of their home state regarding the exercise of public power.[57] It is therefore inadmissible, both from the perspective of public international law and, typically, the perspective of the sending state's internal law, to treat the foreign inspectors as mere agents or representatives of the host state regarding the accountability for their exercise of public authority vis-à-vis the taxpayer.

4.3. Collection of information directly attributable to foreign inspectors

As a consequence, the default assumption for the attribution of any conduct and activity of national officials that collaborate in a joint audit and exercise public authority directly vis-à-vis the taxpayer is that the actions of each individual audit team member will be attributed to the state that has vested this inspector with investigation powers and dispatched him to the joint audit.[58] To the extent that the foreign inspectors on the joint audit team are authorized to directly interact with the taxpayer or third parties, they are therefore acting in the capacity of officials of their home state and collecting information directly for the latter, rather than gathering the information as agents of the host state. Consequently, they do not receive the relevant taxpayer information by way of EoI, but rather as a result of their own investigations.

In the specific context of the DAC, the position that the authors are advocating here is supported by legal history. While the Commission originally proposed to formulate that the "officials of the requesting authority … may exercise the powers of inspection conferred on officials of the requested authority",[59] any such reference to the exercise of host state powers by foreign inspectors was deleted in the version adopted by the Council. The RAC VAT and Excises are even more explicit. Article 28(2) of the RAC VAT and article 12(2) of the RAC Excises state that the officials of the sending state "shall not exercise the powers of inspection conferred on officials of the requested authority". Moreover, the EU legislator was obviously aware that some forms of joint audits – in the authors' opinion, precisely the ones in which foreign officials actively exercise their own public authority – may go beyond mere EoI. In the DAC, joint audits are not included in chapter II on EoI, but instead. they are dealt with in chapter III on "other forms of administrative cooperation". In a similar vein, the RAC Excises subtly distinguishes between "*cooperation* on request" (chapter II,

56. As regards the relationship between constitutional and European fundamental rights standards in the context of harmonized procedures, *see* sec. 5.2.
57. Admittedly, there is no strict requirement that national constitutional standards on the allowance of an extraterritorial exercise of public authority correspond with public international law standards to that effect. However, at least among EU Member States, this will tend to be the case. *See*, e.g., from a German constitutional perspective J. Isensee, *Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung*, in *Handbuch des Staatsrechts*, vol. V, *Allgemeine Grundrechtslehren*, sec. 115, para. 90 (2nd ed., J. Isensee & P. Kirchhof, C.F. Müller 2000); W. Höfling, *Art. 1 Schutz der Menschenwürde, Menschenrechte, Grundrechtsbindung*, in *Grundgesetz Kommentar*, para. 88 (7th ed., M. Sachs ed., C.H. Beck 2014); H.D. Jarass, *Würde des Menschen, Grundrechtsbindung*, in *Grundgesetz*, art. 1(43) (515th ed., H. D. Jarass & B. Pieroth eds., C.H. Beck 2018); and C. Enders, *Grundrechte-Kommentar*, art. 1(107) (2nd ed., K. Stern & F. Becker eds., Heymanns 2015). *See also* DE: *Bundesverfassungsgericht* (German Constitutional Court), 14 July 1999, Cases 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95, BVerfGE 100, p. 356.
58. *See* David, *supra* n. 50, at p. 370; and Ohler, *supra* n. 50, at p. 247.
59. European Commission, Proposal for a Council Directive on administrative cooperation in the field of taxation, COM(2009)29 (2 Feb. 2009).

emphasis added) and "*exchange of information* without prior request" (chapter III, emphasis added), assumingly because chapter II on requested measures also includes joint audits.

In the light of general principles of public international law,[60] the situation could only exceptionally be different if the arrangements of the joint audit were such that the foreign inspectors would be placed entirely at the disposal of the host state. According to the UN International Law Commission (ILC), this presupposes that the foreign officials act "exclusively for the purposes of and on behalf of" the beneficiary state, i.e. "perform functions appertaining to [this] state". Moreover, they must act "under its exclusive direction and control, rather than on instructions from the sending state".[61] Scholars of public international law have stressed, in this context, that the foreign officials must act in the name of the other (beneficiary) state, follow its orders and be effectively controlled by it.[62] Evidently, however, the concept of joint audits does not meet those requirements. The foreign inspectors participate in the fiscal interest of their sending state, and thus do not perform their functions exclusively (not even primarily) on behalf of the host state. While their exercise of public authority may be controlled – to a greater or lesser degree and depending on the statutory and administrative framework of the joint audit – by their host state counterparts, the foreign officials are not placed under the command of the host state's tax administration. Joint audits are characterized by a spirit of cooperation, not subordination.

It should be mentioned that some German scholars have advocated a more generous concept of attribution of extraterritorial activities in the case of transnational administrative cooperation from the perspective of national constitutional law. They put more emphasis on the criterion of effective control and argue that foreign officials exercise host-state public authority, rather than the original public authority of their home state, if their activities on host-state territory require prior approval for each individual measure. The fact that the measure is chosen at the discretion of the foreign officials and is applied in the interest of their home state is considered to be of lesser importance and assumed not to hinder the imputation of their activities to the host state if the control exercised by the latter is tight enough.[63] Against this background, it has been assumed that the enquiries conducted and

60. *See also* ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* art. 6 (ILC 2001). It is not entirely clear whether art. 6 has already attained the status of customary international law; *see* van Arnauld, *supra* n. 54, at sec. 5, para. 402. However, it codifies a general principle of attribution; *see* G. Dahm, J. Delbrück & R. Wolfrum, *supra* n. 1, at p. 917. *See also* World Trade Organization (WTO), *Turkey – Restrictions on Imports of Textile and Clothing Products, Panel Report* para. 9.43, WT/DS34/R (WTO 1999). Moreover, art. 6 is not directly relevant because it concerns state responsibility for conduct that is incompatible with its international obligations (*see* ILC, *Commentaries to Articles on Responsibility of States for Internationally Wrongful Acts* p. 82 (ILC 2001)). Nevertheless, arts. 4 and 6 reflect general principles of international law regarding the allowance of the extraterritorial exercise of public authority of a particular state.

61. ILC, *supra* n. 54, at p. 95.

62. *See* van Arnauld, *supra* n. 54, at sec. 5, para. 402; Ipsen, *supra* n. 54, at sec. 29, para. 22; and A. Hofsommer, *Die Anfänge der völkerrechtlichen Organleihe*, 49 Archiv des Völkerrechts 3, pp. 313-314 (2011).

63. *See* C. Gramm, *Verfassungsrechtliche Grenzen der Zusammenarbeit mit auswärtigen Staaten im Hoheitsbereich*, 114 Deutsches Verwaltungsblatt 2, p. 1243 (1999); and C. Ohler, *Hoheitsrechtsbeschränkungen im Rahmen grenzüberschreitender Verwaltungszusammenarbeit*, 117 Deutsches Verwaltungsblatt 13, pp. 884-885 (2002). *See also* Ohler, *supra* n. 50, at pp. 219-220. "Exclusive direction" over the foreign officials is not considered a relevant criterion. Yet another position is defended by J. Hecker, *Grundgesetz und horizontale Öffnungen des Staates*, Archiv des öffentlichen Rechts 127, pp. 302-303 (2002), who argues that, rather than effective control, the only criterion that matters for the attribution of public authority that is exercised extraterritorially under a framework of transnational administrative cooperation is whether the foreign officials act in the interest and on behalf of their sending state or the host state. There is no

the questions asked by foreign inspectors in the course of their active participation in a joint audit on the basis of article 12(2) of the RAC Excises and the corresponding exercise of public authority must be attributed exclusively to the host state.[64] The reason for this is that the foreign inspectors can only access premises and documents "through the intermediary" of the officials of the requested authority and interview the taxpayer "only with the[ir] agreement and under the[ir] supervision".

However, such a position is not in line with established principles of international public law, and it is arguably not convincing from a national constitutional law viewpoint, either. This doctrine essentially ignores the fact that the autonomous initiative for any such enquiry and questioning still originates from the public authority that the foreign officials are vested with by their *home* state, and the officials accordingly act on the instructions of the tax administration of this state and in its interest. It would therefore be inappropriate to assume that they are integrated "into the machinery"[65] of the host state's administration; rather, they continue to exercise governmental authority of the sending state and act as organs of the latter.[66]

Admittedly, in joint audits in which the local members of the audit team exercise comprehensive veto and supervisory powers regarding the inspection activities of their foreign colleagues, it is conceivable that the host state becomes internationally responsible for any eventual wrongdoing of the foreign inspectors as well. However, this is then due to inadequate oversight by its own officials[67] rather than by virtue of direct attribution of the actions of the foreign officials.[68] A possibly shared responsibility therefore has no bearing for the characterization of this category of active joint audits: to the extent that they carry out enquiries and interviews themselves, the information is still collected directly by the inspectors of the sending state and not received from the host-state tax administration via EoI.

Contrary to concerns raised in literature,[69] the principle of strict territoriality regarding the jurisdiction to enforce does not warrant a different position. It is generally acknowledged in international public law that the extraterritorial exercise of public authority is permissible if the other state has given its consent.[70] In other words, there is no absolute prohibition of an out-of-area assessment and enforcement of national tax liabilities.

Finally, the authors acknowledge that the dividing line between passive and active joint audits can sometimes be rather fine in practice when the joint audit is carefully orchestrated between the foreign and the local officials and subsequently executed as planned. Whether local or foreign officials exercise inspection powers vis-à-vis the taxpayer could then seemingly be a matter merely of expediency, e.g. depending on the local language proficiency of the foreign officials. However, once joint audits no longer have the character of a meticu-

need to discuss this theory in depth, however, because the foreign inspectors participating in joint audits always act in the primary interests of their home states.

64. *See* Ohler, *supra* n. 50, at p. 247.
65. ILC, *supra* n. 54, at p. 95.
66. Likewise, *see* David, *supra* n. 50, at pp. 362-363.
67. *See* Ipsen, *supra* n. 54, at sec. 29, para. 39.
68. For a different opinion that relies on the attribution doctrine to establish joint responsibility, *see* Ohler, *supra* n. 50, at p. 248.
69. *See* Eisgruber, *supra* n. 52, at p. 6.
70. *See*, e.g., *Lotus* (1927), pp. 18-19; Crawford, *supra* n. 1, at p. 479, with further references; and T. Stein, C. van Buttlar & M. Kotzur, *Völkerrecht*, paras. 601-602 (14th ed., Vahlen 2017).

lously planned pilot project and become more common, so will the spontaneous exercise of inspection powers by foreign inspectors. Moreover, even when the auditing measures are fully coordinated, it may still make a difference for the taxpayer and third persons whose state officials actually confront them. For example, if legal constraints of the foreign officials' powers do not allow them to obtain certain information themselves (e.g. client-attorney privilege), the taxpayer can refuse to provide this information, and he must disclose it to the local officials only if this information can be lawfully passed on to the foreign inspectors under the relevant EoI provisions.

5. Taxpayer Rights

5.1. Constitutional dimension

The purpose of any international or supranational regulatory instrument on cooperation between tax administrations is to give the states concerned the power to efficiently cooperate at the international level in order to address the administrative challenges of the ever-increasing globalization of business activities.[71] The European instruments in particular shall create confidence between the Member States "by setting up the same rules, obligations and rights for all Member States".[72] Moreover, they aim at ensuring that cooperation between Member States is efficient and fast.[73]

The main purpose of tax inspections is to control taxpayer's compliance with the relevant statutory obligations. At the outset, tax inspections rely on the cooperation of the taxpayer. If the taxpayer refuses to cooperate, the tax administration is provided with specific enforcement tools or alternative investigation powers. Among the latter, the most relevant are the request of information from (i) third persons; (ii) other state institutions; or (iii) the tax authorities of other states.

Since taxation itself is necessary in a democratic society, the efficient collection of taxes and sufficient executive powers of investigation and control of taxpayer compliance are necessary as well.[74] However, the exercise of such public authority may interfere with the fundamental rights of the taxpayer. A fair balance must therefore be struck between the general interest of society in having everyone paying their fair share of taxes and the corresponding investigation powers; and the individual interest of privacy, individual freedom and the right to an effective remedy against public intervention.[75] This applies to any kind of state activity and, consequently, to joints audits as well. The legal framework for joint audits must therefore

71. *See*, e.g., recital 3 of the preamble to the DAC.
72. Id. *See also* UK: ECJ, 16 May 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, EU:C:2017:2, para. 77, ECJ Case Law IBFD.
73. *See Berlioz Investment Fund* (C-682/15), para. 76.
74. *See* European Commission, Communication to the European Parliament and the Council on concrete ways to reinforce the fight against fraud and tax evasion including in relation to third countries, COM(2012)351 final (27 June 2012), p. 3.; European Commission, Guidelines for a Modal for a European Taxpayers' Code (2016), p. 5, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf (accessed 28 Aug. 2018); and OECD, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2015 Final Report* p. 20 (OECD 2015), International Organizations' Documentation IBFD.
75. On this topic, *see* B. Peeters, *Towards a More Coordinated Approach of the Relation Between the Taxpayer and Tax Administrations: The European Taxpayers' Code*, 26 EC Tax Review 4, p. 178 (2017); M.G. De Flora, *Protection of the Taxpayer in the Information Exchange Procedure*, 45 Intertax 6/7, p. 448 (2017); and P. Baker & P. Pistone, *General Report*, in*The Practical Protection of Taxpayers' Fundamental Rights*, pp. 17-68 (IFA Cahiers vol. 100B, 2015).

be based on determinate rules (rules that are foreseeable for the persons concerned), and their implementation must be proportionate. Moreover, there must be sufficient safeguards to prevent abuse. These guarantees are laid down in all constitutions that uphold the rule of law, and they are enshrined in the European Charter of Fundamental Rights (the Charter), as well as in the European Convention of Human Rights (the Convention).

Neither the European nor the international standards for joint audits explicitly confer any rights to the taxpayer who is under (joint) investigation.[76] They address the powers of the tax administrations rather than the position of the taxpayer. However, relying on both constitutional requirements (including European fundamental rights) and domestic safeguards, it is possible to construe a rather complex set of taxpayer rights to be observed in the context of a joint audit.

5.2. Applicable law

Within Europe, taxpayer rights regarding the collection and use of information by tax authorities can be derived from national constitutional law and from European fundamental rights guarantees. The latter are enshrined in the Charter and in the Convention, or can be derived from the common traditions of the EU Member States. Most of these rights are usually specified, as well as balanced with conflicting objectives, in detailed statutory provisions of the respective national tax systems. In accordance with the principle of procedural autonomy of the Member States, the detailed procedural rules to ensure the protection of the Charter rights are a matter for the Member States.[77]

Thus, taxpayers might have different kinds of rights, depending on which national legal framework applies.[78] The most important differences apparently lie in the concept of official secrecy and confidentiality.[79] Moreover, there might be significant differences in the consequences of an infringement of procedural rules in the Member States. In some states, it directly leads into the annulment of the administrative act, and in other Member States, administrative decisions are only annulled if it is not unlikely that the compliance with the respective procedural rule would have altered the administrative act in substance. Additionally, there might be differences in the right to use illegally acquired evidence for the purposes of adjusting the tax liability.

Apart from national standards of taxpayer protection, the international or supranational instrument authorizing the joint audit might also provide some rights for the taxpayer who is audited. Moreover, European or national framework legislation on data protection may be applicable as well, establishing taxpayer rights regarding tax data collection, processing and storage, as well as taxpayers' access to that data. This plurality of rights and standards

76. De Flora, id., at p. 448; L. Del Federico, *Scambio di Informazioni tra autorità fiscali e tutela del contribuente: profili internazionalistici, comunitari ed interni*, Rivista di diritto tributario internazionale, vol. 1, p. 222 et seq. (2010).
77. *See* RO: ECJ, 9 Nov. 2017, Case C-298/16, *Teodor Ispas and Anduța Ispas v. Direcția Generală a Finanțelor Publice Cluj*, EU:C:2017:843, para. 29, ECJ Case Law IBFD; IT: ECJ, 15 Mar. 2007, Case C-35/05, *Reemtsma Cigarettenfabriken GmbH v. Ministero delle Finanze*, EU:C: 2007:167, para. 37, ECJ Case Law IBFD; and IT: ECJ, 15 Dec. 2011, Case C-427/10, *Banca Antoniana Popolare Veneta SpA v. Ministero dell'Economia e delle Finanze and Agenzia delle Entrate*, EU:C:2011:844, para. 22, ECJ Case Law IBFD.
78. *See also* Van der Hel-van Dijk, *supra* n. 44, at p. 325 et seq.
79. P. Baker & P. Pistone, *2015 – 2017 General Report on the Protection of Taxpayers' Rights*, in *Observatory on Taxpayers' Rights*, Online Report, p. 27 et seq. (IBFD 2018), available at https://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf.

poses specific challenges in the context of joint audits, due to the fact that public authorities from more than one jurisdiction are involved in the collection and use of the relevant taxpayer-related information.

In the following, the authors will analyse the applicable legal framework at the level of both statutory law and constitutional law, from a European and from a national perspective. The implications for specific taxpayer rights will subsequently be dealt with in section 5.3.

5.2.1. European fundamental rights and guarantees

The exercise of public authority in the course of a joint audit that derives its justification (as required in the light of the public international law principle of strict territoriality of the enforcement jurisdiction) from European law or national legislation implementing EU Directives must be regarded as a legal situation that falls within the scope of EU law. According to the settled case law of the Court of Justice of the European Union (ECJ), any national measure that ensures fulfilment of the obligations arising out of European legislative acts, as required by article 4(3) of the Treaty on European Union (TEU), constitutes an implementation of EU law for the purposes of article 51(1) of the Charter.[80] Such a measure thus triggers EU fundamental rights protection.[81] As the ECJ has clarified, the Charter applies regardless of whether the relevant national provisions on inspection powers have been specifically designed in order to transpose EU law obligations or are of a more general nature.[82]

When Member States carry out a joint audit based on the European legislation on administrative assistance, they must therefore avoid any disproportionate interference with EU fundamental rights and general principles of EU law.[83] As a further consequence, even when a Member State carries out a joint audit with officials from a third country based on international treaty law (e.g. article 26 of the relevant double tax convention), they might nevertheless have to respect EU fundamental rights requirements when doing so. This is the case to the extent that the joint audit serves to assess a national tax liability that arises from statutory law implementing EU tax legislation (e.g. on hybrid mismatches implement-

80. *See* SE: ECJ, 26 Feb. 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, para. 25 et seq., ECJ Case Law IBFD; IT: ECJ, 8 Sept. 2015, Case C-105/14, *Criminal proceedings against Ivo Taricco and Others*, EU:C:2015:555, para. 36 et seq., ECJ Case Law IBFD; SR: ECJ, 26 Oct. 2017, Case C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s.r.o.*, EU:C:2017:8205, ECJ Case Law IBFD; and IT: ECJ, 5 Dec. 2017, Case C-42/17, *Criminal proceedings against M.A.S. and M.B.*, EU:C:2018:936, para. 53 et seq., ECJ Case Law IBFD. On the legal foundations of the Charter of Fundamental Rights of the European Union [hereinafter EUChFR], *see* M. Richardson, *The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Surcharges and Prosecution of Tax Offences*, 26 EC Tax Review 6, p. 323 et seq. (2017).

81. *See*, by analogy, UK: Opinion of General Wathelet, 10 Jan. 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, EU:C:2017:2, paras. 46-48, ECJ Case Law IBFD.

82. *See Åkerberg Fransson* (C-617/10), para. 28; and, similarly, id., at para. 44.

83. *See*, e.g., GR: ECJ, 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254, para. 42; ES: ECJ, 10 Dec. 2009, Case C-323/08, *Ovido Rodríguez Mayor and Others v. Herencia yacente de Rafael de las Heras Dávila and Others*, EU:C:2009:770, paras. 58-59; LV: ECJ, 19 July 2012, Case C-263/11, *Ainārs Rēdlihs v. Valsts ieņēmumu dienests*, EU:C:2012:497, para. 44, ECJ Case Law IBFD; and J. Englisch, *Einwirkung allgemeiner Rechtsgrundsätze des EU-Rechts*, in *Europäisches Steuerrecht* para. 12.8 (H. Schaumburg & J. Englisch eds., Otto Schmidt 2015), with further references.

ing article 9 of the Anti-Tax Avoidance Directive[84]), because the officials representing this Member State have to respect the fundamental rights of the Charter when exercising their inspection powers. The same applies when two or more EU Member States do not rely on an EU-law basis for joint audits, but instead on further-reaching international agreements in order to carry out a joint audit concerning taxes or tax law provisions that are harmonized by EU legislation (e.g. to avoid the limitations on the exercise of foreign inspection powers stipulated in article 28(2) of the RAC VAT). They act within the ambit of EU law, and therefore, all measures must comply with EU fundamental rights guarantees.

In the context of joint audits, the most important guarantees are (i) the right to respect for private and family life, home and communications (article 7 of the Charter); (ii) the right to the protection of personal data (article 8 of the Charter); (iii) the right to good administration (article 41(2) of the Charter); and (iv) the right to effective judicial protection (article 47 of the Charter). Moreover, Member States are bound by the general principles of equivalence and effectiveness (article 4(3) of the Treaty on the Functioning of the European Union).[85] The Charter guarantees a common standard to be observed by all Member States. The aforementioned fundamental rights need to be respected and, where necessary, implemented and further specified by the competent national authorities. However, the fundamental rights enshrined in the Charter may be limited, "provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question and that they do not constitute, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed".[86] According to article 52(1) of the Charter, any restriction of the fundamental rights and freedoms must be provided for by law and must respect the essence of those rights and freedoms. Limitations are only admissible if they are necessary and genuinely meet the objectives of general interest recognized by the European Union or the need to protect the rights and freedoms of others (the principle of proportionality).[87]

If the national legislation restricts the Charter rights without sufficient justification, individual taxpayers may invoke them directly before their national courts.[88] The same applies to the general principles of EU law that have a character similar to the fundamental rights.[89]

Parallel to EU law guarantees, and even beyond their territorial scope, European Convention on Human Rights (the Convention) standards may be binding on one or all

84. *See* Council Directive (EU) 2017/952 of 29 May 2017, amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144/1.
85. *See*, e.g., *Ispas* (C-298/16), para. 29; and FR: ECJ, 8 Mar. 2017, Case C-14/16, *Euro Park Service v. Ministre des finances et des comptes publics*, EU:C:2017:177, para. 36, ECJ Case Law IBFD.
86. NL: ECJ, 10 Sept. 2013, Case C-383/13, *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533, para. 33; AT: ECJ, 26 Sept. 2013, Case C-418/11, *Texdata Software GmbH*, EU:C:2013:588, para. 84; and NL: ECJ, 3 July 2014, Case C-129/13 (Joined Cases C-129/13 and C-130/13), *Kamino International Logistics BV und Datema Hellmann Worldwide Logistics BV gegen Staatssecretaris van Financiën*, EU:C:2014:20141, para. 42, ECJ Case Law IBFD.
87. *See* HU: ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses kft v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, EU:C:2015:832, para. 69, ECJ Case Law IBFD. *See also* I. Lejeune & L. Vermeire, *European Union – The Influence of the EU Charter of Fundamental Rights on ECJ Case Law on the International Exchange of Information*, 57 Eur. Taxn. 4, p. 161 (2017), Journals IBFD.
88. *See* BE: ECJ, 6 Nov. 2012, Case C-199/11, *Europese Gemeenschap gegen Otis NV u.a.*, EU:C:2012:684, para. 45; PO: ECJ, 18 Dec. 2008, Case C-349/07, *Sopropé-Organizações de Calçado Lda v. Fazenda Pública 2008*, EU:C:2008:746, para. 41, ECJ Case Law IBFD; and *Kamino* (C-129/13 and C-130/13), para. 54.
89. *See* B. Gunacker-Slawitsch, *Das Grundrecht auf eine "gute Verwaltung" im Abgabenverfahren (Teil 1)*, vol.9, Österreichische Steuer-Zeitung 10, p. 256 (2015).

of the states involved in a joint audit. Altogether, 47 European countries have ratified the Convention and must respect its human rights guarantees when exercising their public authority.[90] In addition, the European Court of Human Rights clarified, in its 2012 *El Masri* judgment[91] and in subsequent case law,[92] that a state that is a party to the Convention can be held accountable for a lack of respect for the rights enshrined in the Convention by a third country if the officials of the first state are assisting the officials of the third state in their activities that contravene the Convention. This would typically be the case in a joint audit, since its very essence is the close cooperation between the officials from all participating jurisdictions. However, different from the Charter, the Convention does not contain a right to good administration. Arguably, the most relevant Convention guarantee in the context of joint audits is therefore its article 8, providing for the respect of private and family life, home and correspondence.

5.2.2. Only rudimentary provisions in the relevant EU legislation

Currently, and as a general rule, the international treaties and supranational legislation that authorize joint audits do not specify any taxpayer rights regarding the initiation of the audit. Besides, no explicit limits of inspection powers and corresponding taxpayer rights during the audit can be found in the specific legislation on joint audits. Admittedly, some taxpayer rights might implicitly be derived from the prerequisites for a joint audit and the limits of administrative cooperation, as stated in the relevant legislation or treaty.[93] However, this layer of protection is rudimentary at best. In general, the corresponding provisions only determine *whether* and *what kind of* information may be collected in the requested state. They do not regulate in detail how inspection powers must be exercised and what formalities must be observed when carrying out a joint audit.

This is thus a matter to be determined at the outset by the domestic law provisions of the states involved in the joint audit. This raises the question of which national legislation is actually applicable for the exercise of public authority by the officials of the requesting state: only the host state standards, or also home-state laws and European standards? This is normally also not specified in the international or European instrument that provides the legal basis for the joint audit.

The situation is different only with respect to data protection standards regarding the subsequent use and processing of the taxpayer-related information obtained on the basis of a joint audit. In this regard, the aforementioned instruments usually feature general confidentiality or tax secrecy clauses.[94] The relevant articles typically provide for both certain minimum standards and complementary references to the data protection standards of the

90. *See* Council of Europe, *List of Member States*, available at https://www.coe.int/en/web/portal/47-members-states (accessed 28 Aug. 2018).
91. *See* MK: ECtHR, 13 Dec. 2012, *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application No. 39630/09, para. 206.
92. *See* PL: ECtHR, 24 July 2014, *Al Nashiri v. Poland*, Application No. 28761/11, para. 517; and IT: ECtHR, 23 Feb. 2016, *Nasr and Ghali v. Italy*, Application No. 44883/09, para. 240 et seq.
93. *See Berlioz Investment Fund* (C-682/15), para. 44 et seq.
94. *See*, in particular, art. 26(2) *OECD Model* (2017); and *United Nations Model Double Taxation Convention between Developed and Developing Countries* art. 26(2) (UN 2017), Models IBFD, read together with the relevant parts of the respective Model Commentaries. The Commentaries on the articles are regarded as part of the United Nations Model Convention, along with the articles themselves. *OECD Model Agreement on Exchange of Information in Tax Matters* art. 8 (OECD 2002) [hereinafter OECD Model TIEA]; art. 22(1) MAC, read together with the Commentary on this article. The Commentaries on the

contracting state or Member State that has received and processed the data.[95] In any event, to the extent that a joint audit is based on a European law instrument, Regulation 2016/679/EU on data protection[96] applies, as can be inferred from its article 2(2). The regulation in turn specifies directly applicable data protection standards, and in its article 12 et seq., it even stipulates certain notification requirements to be observed when collecting the data. It should be noted, however, that the regulation is limited in its personal and substantive scope (for more details, *see* section 5.3.3.). Even when applicable, the scope of the European provisions on data protection are themselves not entirely clear and definite. This leaves significant margins of interpretation to the Member States. Thus, it cannot be argued that there are clear common rules with regard to data protection in the European Union.[97]

Regarding all other aspects of taxpayer rights, the DAC, RAC VAT and RAC Excises are seemingly even entirely silent as to which standards must be respected by the officials of the requesting state exercising its public authority extraterritorially, and so are the relevant international treaties. International guidelines on taxpayer rights, such as the OECD Privacy Guidelines 2013[98] or the APEC Privacy Framework 2005,[99] do not answer this question, either. First, the scope of these and other guidelines is usually limited to personal data concerning individuals and they are not concerned with the protection of data relating to companies, which would be the most relevant field of application in the context of joint audits. Second, this type of soft-law guidance is not designed to be implemented through international agreements, but rather through domestic legislation, and hence, it leads back to the question of which national legislation is actually applicable.

5.2.3. Determinants of the applicable national rights and safeguards

An answer as to which national legislation should be applied in a joint audit can thus only be found in the overall legal and constitutional framework for the exercise of public authority.

Theoretically, the implementation of a joint audit could be governed by (i) host-state law; (ii) the respective home-state law of the officials that are exercising public authority; or (iii) a combination of both. However, the exclusive application of host-state law is usually not an acceptable option for any inspection measures that qualify as an extraterritorial exercise of public authority by foreign officials. Since these foreign officials cannot be regarded as mere agents of their host-state counterparts during the joint audit,[100] they remain bound by their

articles are regarded as part of the *OECD Model Agreement on Exchange of Information in Tax Matters*, along with the articles themselves. Arts. 16 and 25 DAC; art. 55(1) RAC VAT; and art. 28(1) RAC Excises.

95. *See*, e.g., art. 22 MAC; and Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, art. 55, OJ L 268/1. The notable exception is art. 8 of the OECD Model TIEA and treaties that follow this model. This provision establishes some minimum standards, but makes no references to the internal legislation of any of the contracting states.

96. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), OJ L 119/1.

97. On the inadequacy of the protection of data protection of taxpayers, *see* F. Debelva & I. Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions*, 45 Intertax 5, p. 367 (2017).

98. Regarding collection limits in particular, *see OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* para. 7 (OECD 2013).

99. Regarding collection limits in particular, *see APEC Privacy Framework* para. 18 (APEC 2005).

100. *See* sec. 4.

domestic constitutions and domestic legislation.[101] For this reason, not even their home state can absolve the foreign officials from the application of this (home) state's statutory provisions on taxpayer rights and limitations of inspection powers, to the extent that this legislation reflects domestic constitutional values.[102] On the contrary, the laws of the home state will still fully apply, absent of explicit provisions stating otherwise.[103] This can even become relevant in scenarios in which the foreign officials are merely allowed to be "present" in the joint audit carried out by tax inspectors of the host state. For instance, if foreign officials inadvertently, but negligently, damage the property of the taxpayer, they can be held accountable under the laws of the sending state. In a similar vein, the local tax inspectors of the host country will always have to respect their domestic legislation concerning any limits of their inspection powers and corresponding taxpayer rights.[104]

Nevertheless, it is possible to have additional safeguards in place, which ensure that the foreign inspectors who are members of the joint audit team and actively exercise their public authority must respect not only their home state's standards, but also the taxpayer rights guaranteed by the host state's legislation and case law. The rationale for such an approach is manifold, but in essence, it serves to enhance taxpayer rights. First, the taxpayer who is subject to the audit will often be unfamiliar with the auditing competences and rules of the home state of the foreign officials on the audit team, as well as his corresponding rights under those laws. Obtaining reliable and timely advice in this regard, if possible at all, may imply significant and potentially disproportionate costs for the taxpayer. Admittedly, foreign inspectors will conversely often not be familiar with local procedures of the host state, and thus will have to adapt to it, but different from the situation of the taxpayer, they can seek advice from the local colleagues of the joint audit team without additional costs or efforts. Second, local tax authorities might abusively avoid national constitutional and statutory limits on their data collection powers if they could simply ask their foreign counterparts in the joint audit team to make use of their own, further-reaching powers and then receive the information thus obtained from the taxpayer by way of immediate EoI during the joint audit. Finally, observance of host-state standards should implicitly guarantee that the fundamental rights standards of the host state are respected as well.[105]

It therefore comes as no surprise that double standards for foreign officials comprise the predominant approach underlying all relevant legal instruments, at least when those officials may actively use their own inspection powers extraterritorially. A variety of technical arrangements exist to attain this effect, as is evidenced by a multitude of corresponding provisions in the relevant international treaties and EU legislation on administrative assis-

101. *See* Hendricks, *supra* n. 29, at p. 570. *See also* Ohler, *supra* n. 50, at p. 248. As the authors pointed out in *supra* n. 57, national constitutional standards of the attribution of the extraterritorial exercise of public authority will tend to correspond, at least in EU Member States, with public international law standards to that effect. Hence, the rejection of the "agency doctrine", from a public international law viewpoint, can be assumed to have repercussions also for assessments based on municipal law. Moreover, some specific arguments in German constitutional law scholarship that deviate from international law principles have been dismissed; *see* sec. 4.

102. As mentioned in sec. 4, this could be different only in the case of full harmonization of the inspection powers or of taxpayer rights by way of secondary EU law to this effect.

103. For a different opinion based on a contrary view of the foreign officials' role during a joint audit, *see* T. Eisgruber, *supra* n. 52, at p. 7.

104. *See*, e.g., Hendricks, *supra* n. 29, at p. 569; Beckmann, *supra* n. 29, at p. 628; and Ohler, *supra* n. 50, at p. 171.

105. *See also* sec. 4.

tance, as well as in related agreements and national statutory law. More specifically, the observation of host-state limitations of inspection powers can be stipulated as a condition in the very treaty or EU act that authorizes the joint audit[106] (which is not normally the case, however, as pointed out above) by (i) mutually agreed reference to national legislation of the host state, which then spells out such an obligation;[107] or (ii) unilaterally in the laws of the sending state.[108] Alternatively, the legal basis for the joint audit could authorize the competent authorities of each state to conclude an international administrative agreement that commits the foreign officials involved in the audit to comply with host-state standards, or this may be required by internal administrative regulations of the sending state.[109] Finally, the obligation to abide by host-state standards may be imposed explicitly, or similar results can be achieved by, for example, leaving the enforcement of any orders not voluntarily complied with to local officials[110] or allowing the foreign officials to act only with the agreement and under the constant supervision of local officials,[111] who, in turn, will have to check for the observation of their domestic procedural rules. As can be inferred from earlier deliberations, neither of those measures leads to a direct attribution of inspection powers exercised by the foreign officials to the host state.[112]

The effect of all of these different types of measures is broadly the same from the perspective of the sending state's officials, in that they must at least potentially observe both home-state and host-state limitations on inspection powers and taxpayer rights.[113] However, the position of the taxpayer may be strengthened to a different degree by different kinds of references to host-state law. Taxpayers will usually have legal standing regarding rights laid down in legislation that was enacted (also) in their interest, while this may be the case to a lesser degree (or even not at all) if host-state standards are merely signed off in administrative agreements or committed to unilaterally by the sending state's tax administration. Moreover, if the foreign officials are directly bound by host-state standards, the latter may be invoked by the taxpayer vis-à-vis any exercise of public authority by those officials. The taxpayer may then eventually also be entitled to seek judicial protection in their home-state

106. For a similar requirement in the context of extraterritorial so-called "on-the-spot checks" of foreign branches of financial institutions that benefit from EU "passporting" by the supervisory authorities of their home states, *see* Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC text with EEA relevance, art. 52(4), OJ L 176/338. *See further* Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC, art. 40, OJ L 251/1 [hereinafter Frontex Regulation].
107. *See*, e.g., art. 11(2) DAC.
108. Art. 11(1) DAC.
109. As regards the latter alternative, *see*, e.g. *Bundesfinanzministerium* (German Federal Ministry of Finance), Circular of 9 Jan. 2017 on internationally coordinated tax audits, Bundessteuerblatt 1, p. 89, para. 2.2.4.
110. *See*, e.g., art. 11(2) DAC.
111. *See*, e.g., Council Regulation (EU) No. 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No. 2073/2004, art. 12(2), OJ L 121/1.
112. *See* section 4. As regards the direct imposition upon foreign tax inspectors of an obligation to observe host-state standards, *see also* Ohler, *supra* n. 50, at p. 217.
113. It should be pointed out that this applies also in the case of multilateral audits involving officials from more than two jurisdictions. Each foreign member of the audit team would still only have to know his home state's legislation and that of the host state. It would not be necessary to observe the limitations of inspection powers under the law of the other states.

jurisdiction, i.e. before the courts of the sending state, relying on the aforementioned host-state standards. By contrast, if the observation of host-state rules is merely ensured through supervisory or enforcement powers of the local officials, only the local officials can be held accountable for deviation from those rules if they do not assert their authority or neglect their supervisory duties (*see* article 11(2) of the DAC, article 12(2) of the RAC Excises and article 28(2) of the RAC VAT). The actions of the foreign officials remain lawful in such cases as long as they comply with their home state's standards.

It should be pointed out that the requirement for foreign officials to observe host-state procedures in addition to their home-state law effectively means that each single exercise of their inspection powers will be limited by the relatively stricter national standards. In exceptional circumstances, this may lead to contradictory requirements when the laws of one jurisdiction establish mandatory procedures that are unlawful under the laws of the other jurisdiction. While such a dilemma would eventually have to be resolved by the rules concerning conflicts of norms, this is merely an extreme example for the complications that double standards may imply for all parties involved. This problem could be remedied by an international or supranational layer of uniform statutory taxpayer rights that would harmonize both the sending state's and the host state's legal frameworks. If this would be considered too ambitious, discrepancies could at least be mitigated by common and coordinated minimum standards enshrined in the relevant European legislation or international treaty.

5.3. Specific rights

Considering that only European secondary law currently provides for active joint audits,[114] subsections 5.3.1. to 5.3.4. will primarily analyse the implications of European fundamental rights guarantees for taxpayers in joint audits. The authors will furthermore take into account any more specific rights to be eventually derived from EU secondary law. Although the DAC and the RAC regarding VAT and excise duties do not explicitly confer any rights on the taxpayer,[115] enquiries and controls carried out based on them need to respect the guarantees of the European Charter of Fundamental Rights. The authors will show that where secondary law sets up specific procedural provisions of cooperation that affect the taxpayers subject to a joint audit, these provisions must be interpreted as conferring certain subjective rights on the taxpayer. However, for most of the procedure, there are no specific secondary law provisions. As a consequence, Member States are free – within the limitations set up by the Charter and the principle of EU loyalty – to draft their own procedural rules. The authors will highlight possible distortions that can arise as a consequence of this lack of harmonization.

After giving an overview on the Charter rights particularly relevant for joint audits, the authors will distinguish three phases of the procedure of joint audits. The first phase is the decision of two or more tax administrations to conduct a joint audit, the second phase is the collection of information during the joint audit itself and the third phase is the moment at which the tax administrations involved consider to have collected all of the relevant information in order to take a binding decision.

114. *See* X. Oberson, *General Report*, p. 43 (IFA Cahiers vol. 98b, 2013).
115. *See* NL: ECJ, 27 Sept. 2007, Case C-184/05, *Twoh International BV v. Staatssecretaris van Financiën*, EU:C:2007:550, para. 31; and CZ: ECJ, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, EU:C:2013:678, para. 36.

5.3.1. Overview of specific guarantees derived from European constitutional law

5.3.1.1. Rights of defence

Clearly defined rights of defence provide for the fair balance between the public interest of effective taxation and the individual right to privacy (including the right to private property and the freedom to perform commercial and occupational activities). The rights of defence include the right to good administration and the right to a fair judicial review. In the Charter, the rights of defence are laid down in article 41, article 47 and article 48.

5.3.1.1.1. *Right to good administration*

Article 41 of the Charter sets up the right to good administration. Accordingly, every person has the right to have his affairs handled impartially, fairly and within reasonable time by the institutions and bodies of the European Union. However, article 41 addresses EU officials and does not cover the "indirect execution" of EU law by national public authorities.[116] Joint audits conducted by Member States are thus not covered by article 41. However, the ECJ has consistently held the right to good administration to constitute a general principle of EU law, to be derived from the fundamental rights "that form an integral part of the European Union legal order".[117] Consequently, the case law of the ECJ with regard to article 41 applies to the right to good administration as a general fundamental right and vice versa.[118]

Member States must therefore respect this principle when applying and implementing EU law, even when the relevant EU legislation does not explicitly provide for such a procedural requirement.[119] For joint audits carried out on the basis of secondary EU law, taxpayers may thus invoke the European right to good administration vis-à-vis their national tax authorities.

The right to good administration implies, in principle, the same guarantees as the rights enshrined in article 47 of the Charter. More precisely, this article includes (i) the right to be heard before any individual measure or decision that could adversely affect the person concerned is taken;[120] (ii) the right of every person to have access to his file, while respecting

116. *See* NL: ECJ, 17 July 2014, Joined cases C-141/12, Y.*S v. Minister voor Immigratie, Integratie en Asiel* and C-372/12, *Minister voor Immigratie, Integratie en Asiel v. M. and S.*, EU:C:2014:2081, para. 67.

117. *Sopropé* (C-349/07), paras. 33 and 36; *Kamino* (C-129/13 & C-130/13), para. 28; and *Sabou* (C-276/12), para. 28. The fundamental rights form an integral part of the general principles of law, the observance of which the ECJ ensures in accordance with constitutional traditions of the Member States and the international treaties on which the Member States have collaborated or of which they are signatories; *see* DE: ECJ, 14 May 1974, Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, EU:C:1974:51; and DE: ECJ, 21 Sept. 1989, Joined Cases C-46/87 and 227/88, *Hoechst AG v. Commission of the European Communities*, EU:C:1989:337, para. 13.

118. For more details on the development of the right to good administration by the ECJ, *see* Gunacker-Slawitsch, *supra* n. 89, at p. 257.

119. *See* IE: ECJ, 8 May 2014, Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2014:302, para. 49 et seq.; IE: ECJ, 22 Nov. 2012, Case C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2012:744, para. 81 et seq.; NL: ECJ, 10 Sept. 2013, Case C-383/13, *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533, para. 35; *WebMindLicenses* (C-419/14), para. 84; *Sabou* (C-276/12), para. 38; and *Ispas* (C-298/16), para. 26.

120. Art. 41(2) (lit. a) EUChFR; UK:ECJ, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Europäische Kommission u. a. gegen Yassin Abdullah Kadi*, EU:C:2013:518, para. 97; *Sopropé* (C-349/07), para. 36; *Kamino* (C-129/13 and C-130/13), para. 29; FR: ECJ, 5 Nov. 2014, Case C-166/13, *Sophie Mukarubega gegen Préfet de police und Préfet de la Seine-Saint-Denis*, EU:C:2014:2336, para. 43; *Ispas* (C-298/16), para. 26; SE: ECJ, 29 June 1994, Case C-135/92, *Fiskano AB v. Commission of the European Communities*, EU:C:1994:267, para. 39; PO: ECJ, 28 Oct. 1996, Case C-32/95P, *Commission of the European Communities v. Lisrestal – Organização Gestão de Restaurantes Colectivos Ld[a], Gabinete*

the legitimate interests of confidentiality and professional and business secrecy;[121] and (iii) the obligation of the administration to give reasons for its decision.[122] Although the right to good administration is similar to the right to effective judicial protection, these rights are relevant at different stages of a procedure. The latter applies after an administrative decision was taken (the so-called "contentious stage"), and the former applies before it is taken (the so-called "investigation stage"). Consequently, the right to good administration and the right to judicial review concern different stages of procedure.[123]

The right to be heard serves the objective to allow for an informed administrative decision and to protect the person concerned.[124] Its purpose is to enable the person concerned to correct an error or submit information relating to his personal circumstances that will argue in favour of the adoption or non-adoption of the decision, or in favour of it having specific content.[125] The person concerned must be placed in a position in which he can effectively make his own views known as regards the information on which the authorities intend to base their decision.[126] Since joint audits investigate taxpayers' situations with the aim of preparing an administrative decision, the right to be heard and the right to have access to the file are of particular importance.

5.3.1.1.2. *Right to effective judicial protection*

The principle of effective judicial protection is a general principle of EU law set out in article 47 of the Charter. This provision secures the protection afforded by article 6(1) and article 13 of the Convention at EU level.[127] The principle laid down in article 47 of the Charter is comprised of (i) the right to the defence, including the right to be heard by an independent and impartial tribunal in court proceedings; (ii) the principle of equality of arms; (iii) the right to access to a tribunal; and (iv) the right to be advised, defended and represented.[128] In accordance with article 52(2) of the Charter, article 47 of the Charter is to be given the same meaning and the same scope as article 6 of the Convention, as interpreted by the case law of the European Court of Human Rights.[129] Article 47 of the Charter indeed guarantees similar rights as article 41 of the same document. However, the guarantees of article 47

Técnico de Informática Ldª (GTI), Lisnico – Serviço Marítimo Internacional Ldª, Rebocalis – Rebocagem e Assistência Marítima Ldª and Gaslimpo – Sociedade de Desgasificação de Navios SA, EU:C:1996:402, para. 21; and IT: ECJ, 12 Dec. 2002, Case C-395/00, *Distillerie Fratelli Cipriani SpA v. Ministero delle Finanze*, EU:C:2002:751, paras. 51 and 97, ECJ Case Law IBFD.

121. Art. 41(2), second indent EUChFR.
122. Art. 41(2), third indent EUChFR. For an overview of the development of the right to be heard in the case law of the ECJ, *see* Richardson, *supra* n. 80, at p. 325.
123. In a similar sense, *see* Richardson, *supra* n. 80, at p. 326.
124. *See* CZ: Opinion of Advocate General Kokott, 6 June 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, EU:C:2013:370, para. 55, ECJ Case Law IBFD.
125. *See Kamino* (C-129/13 and C-130/13), para. 38.
126. *See Lisrestal* (C-32/95P), para. 21; *Sopropé* (C-349/07), para. 37; *Kamino* (C-129/13 and C-130/13), para. 30 and AG Opinion in *Sabou* (C-276/12), para. 48.
127. *See Berlioz Investment Fund* (C-682/15), para. 55.
128. *See Otis NV* (C-199/11), para. 48; *Berlioz Investment Fund* (C-682/15), paras. 55, 84 and 91; UK: ECJ, 4 June 2013, Case C-300/11, *ZZ v. Secretary of State for the Home Department*, EU:C:2013:363, para. 53; and NL: ECJ, 23 Oct. 2014, Case C-437/13, *Unitrading Ltd v. Staatssecretaris van Financiën*, EU:C:2014:2318, para. 20, ECJ Case Law IBFD. *See also* NL: ECtHR, 14 Apr. 1994, *Van de Hurk v. The Netherlands*, Application No. 288, para. 45; and UK: ECtHR, 25 Feb. 1997, *Findlay v. United Kingdom*, Application No. 22107/93, para. 77.
129. *See WebMindLicenses* (C-419/14), para. 70, with reference to IE: ECJ, 5 Oct. 2010, Case C-400/10, *J. McB. v. L. E.*, EU:C:2010:582, para. 53; and AT: ECJ, 15 Nov. 2011, Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, EU:C:2011:734, para. 70.

are stronger than those of article 41 because they apply during the contentious stage.[130] In essence, the right to be heard and the right to access to the file must be fully granted in the contentious stage. Different from the right to good administration, restrictions on the right to effective judicial protection are only considered lawful in exceptional circumstances.

5.3.1.2. Protection of private and family life

During a joint audit, the tax administration collects information related to the taxpayers, which contains personal data. Moreover, when conducting an audit, the tax administration generally accesses the business premises (and sometimes also the private homes) of the taxpayers. These actions interfere with the taxpayers' right to respect for private and family life, guaranteed by article 7 of the Charter and article 8 of the Convention.

The guarantees are similar at the Charter and Convention levels. Article 7 of the Charter is thus to be given the same meaning and scope as article 8 of the Convention as interpreted by the case law of the European Court of Human Rights (*see* article 52(2) of the Charter).[131] Moreover, nothing in the Charter is to be interpreted as restricting or adversely affecting the rights recognized by the Convention (*see* article 53 of the Charter).

The principle underlying the right to respect for private and family life is the notion of personal autonomy.[132] This may include business or professional activities.[133] Accordingly, the word "home" in article 8 of the Charter covers residential premises and may even be extended to business activities and premises.[134]

Any interference with the right to respect for private and family life is legitimate if it is in accordance with domestic law[135] and pursues a legitimate aim in the public interest that is necessary in a democratic society. A measure is necessary in a democratic society if the reasons to justify it are relevant and sufficient and if it is proportionate to the legitimate aim pursued.[136] Moreover, a limitation of these rights needs to be accompanied by effective safeguards against abuse by state officials, such as confidentiality rules.[137] Consequently, both

130. *See Berlioz Investment Fund* (C-682/15), para. 96, with reference to *Otis NV* (C-199/11), para. 71.
131. *See WebMindLicenses* (C-419/14), para. 70, with reference to *McB* (C-400/10), para. 53; and *Dereci* (C-256/11), para. 70.
132. *See* UK: ECtHR, 27 July 2002, *Pretty v. UK*, Application No. 2346/02, para. 61; and UK: ECtHR, 12 Jan. 2010, *Gillan and Quinton v. The United Kingdom*, Application No. 4158/05, para. 61.
133. *See Gillan and Quinton* (2010), at para. 65; RO: ECtHR, 4 May 2000, *Rotaruc v. Romania*, Application No. 28341/95, para. 43; and AT: ECJ, 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof (C-465/00) v. Österreichischer Rundfunk and Others and Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v. Österreichischer Rundfunk*, EU:C:2003:294, para. 73.
134. *See* NO: ECtHR, 14 Mar. 2013, *Bernh Larsen Holding AS and Others v. Norway*, Application No. 24117/08, para. 104; RS: ECtHR, 21 June 2011, *Shimovolos v. Russia*, Application No. 30194/09, para. 64; and DE: ECtHR 16 Dec. 1992, *Nimietz v. Germany*, Application No. 13710/88, para. 29.
135. *See* NO: ECtHR, 14 Mar. 2013, *Bernh Larsen Holding AS and Others v. Norway*, Application No. 24117/08, para. 123; UK: ECtHR, 4 Dec. 2008, *S. and Marper v. The United Kingdom (GC)*, Application Nos. 30562/04 and 30566/04, para. 95; and CH: ECtHR, 22 Dec. 2015, *G.S.B. v. Switzerland*, Application No. 28601/11, para. 68.
136. *See Bernh Larsen Holding* (2013), at para. 158.
137. *See* id., para. 163 (2013).

national tax codes[138] and supranational provisions on administrative cooperation[139] ensure official secrecy of taxpayer information in the Member States.

5.3.1.3. Data protection

At Convention level, the protection of personal data is guaranteed by the general right to respect for private and family life laid down in its article 8.[140] With regard to the personal scope of this right, it can be derived from the Strasbourg Court that article 8 of the Convention also applies to the processing of company data and "personal" data of legal persons.[141] Nevertheless, the Strasbourg Court stressed that limitations to this right may be more far-reaching when professional or business activities or premises are involved than would be acceptable in the case of the personal data of individuals.[142]

As for the Charter, the protection of personal data is enshrined in article 8 of the Charter. According to article 8(2), personal data must be processed fairly for specified purposes and on the basis of the consent of the person concerned, or on some other legitimate basis laid down by law. Everyone is entitled to access data concerning themselves that has been collected and has the right to have it rectified. However, in 2010, the ECJ restricted the protection under article 7 and article 8 of the Charter to legal persons that identified one or more natural persons in their title.[143] Despite the aforementioned case law of the Strasbourg Court, the ECJ still seems to maintain that position regarding the scope of article 8 of the Charter.[144] The Luxembourg Court has, however, applied article 7 of the Charter with respect to the seizure of telecommunications data and the seizure of e-mails to a company with a name not relating to its shareholder.[145] Since Charter rights must be given the same understanding as similar Convention rights (*see* article 52(3) of the Charter), it must be assumed that the ECJ adjusted to the line of the Strasbourg Court with this decision. As a consequence, information collected in a joint audit that relates to identified or identifiable

138. *See*, e.g., AT: Austrian Federal Tax Code (*Österreichischen Bundesabgabenordnung*), art. 48a; HR: Croatian General Tax Act, art. 8 (*Opći porezni zakon*); DE: German General Tax Code (*Deutsche Abgabenordnung*), art. 30; IT: Italian Income Tax Assessment Act (D.P.R 29/09/1973, n. 600), art. 32 co.1 n.6-*bis*, art. 33 co. 6 and art. 68.

139. *See* art. 28 RAC Excises; art. 55(2) RAC VAT; art. 16 DAC; and art. 26(1) *OECD Model* (2017). *See also* sec. 5.3.3.4.

140. *See* CH: ECtHR, 16 Feb. 2000, *Amann v. Switzerland*, Application No. 27052/95, paras. 65 and 70; and RO: ECtHR, 4 May 2000, *Rotaruc v. Romania*, Recueil des arrêts et décisions Application No. 28341/95, para. 43 (2000).

141. *See* H.-P. Folz, *Art. 7 EUChFR, point 9, Art. 8 EUChFR, point 4*, in *Europäisches Unionsrecht* (2nd ed., Vedder & Heintschel von Heinegg eds., Nomos 2018).

142. *See* NO: ECtHR, 14 Mar. 2013, *Bernh Larsen Holding AS and Others v. Norway*, Application No. 24117/08, para. 104, with reference to DE: ECtHR, 16 Dec. 1992, *Nimietz v. Germany*, Application No. 13710/88, para. 31.

143. *See* DE: EJC, 9 Nov. 2001, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen*, EU:C:2010:662, para. 53.

144. *See WebMindLicenses*, (C-419/14) para. 79; J. Kokott & C. Sobotta, *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, 3 *International Data Privacy Law* 4, p. 222 (2013); B. van der Sloot, *Do privacy and data protection rules apply to legal persons and should they? A proposal for a two-tiered system*, 31 Computer Law & Security Review 1, p. 26 (2015).

145. *WebMindLicenses* (C-419/14), para. 79 et seq.

individuals[146] is protected under article 8 of the Charter.[147] By contrast, company data might only enjoy protection under article 7 of the Charter.

As a consequence, when implementing secondary EU law, and thus when conducting a joint audit based on the DAC or one of the relevant regulations, Member States have to comply with the relevant provisions of the Charter and the Convention. Furthermore, the processing of information collected during a joint audit is potentially covered by the Data Protection Regulation.[148] Joint audits that are based on EU secondary law execute EU law and can thus trigger the protection under the Data Protection Regulation. However, as the authors will illustrate in section 5.3.3., the relevance of the General Data Protection Regulation 2016/679 (GDPR) may be limited for joint audits. When it does not apply, Member States have a greater margin of discretion when restricting this dimension of taxpayers' privacy. For data protection issues outside the scope of the GDPR, national data processing rules must only respect the concept of lawful limitations to the right to privacy.

5.3.1.4. Interim conclusion

The fundamental rights discussed in section 5.3. guarantee the observation of certain minimum standards of taxpayer rights when carrying out joint audits within the ambit of EU law. As a consequence, fundamental rights need to be respected when drafting specific procedural rules, but may be limited to varying degrees. Within this framework, the actual type, scale and scope of taxpayer rights thus depend on the relevant provisions of international treaties, EU secondary law or domestic legislation.

5.3.2. Initiation of a joint audit: Need for approval by the taxpayer?

5.3.2.1. Status quo

As a general rule, neither public international law instruments nor European legislation that establish the possibility of joint audits provide explicitly that joint audits can only be carried out with the consent of the taxpayer. The only notable exception is seemingly article 6(1) of the OECD Model TIEA and the treaties following this model. However, the version of "tax examinations abroad" that the first paragraph of article 6 of the OECD Model TIEA authorizes is not a joint audit in a strict sense. Instead, it allows foreign officials to carry out examinations on their own initiative in the territory of the requested host state without any involvement of local officials.

However, national legislation may establish taxpayer consent requirements.[149] In particular, article 11(2) of the DAC, which is currently the most relevant legal basis for joint audits within the European Union, stipulates that a joint audit with active powers of inspection

146. *See* art. 4(1) GDPR; *Volker und Markus Schecke and Eifert* (Joined Cases C-92/09 and C-93/09), para. 52; SL: ECJ, 27 Sept. 2017, Case C-73/16, *Peter Puškár v. Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, EU:C:2017:725, para. 33; RO: ECJ, 1 Oct. 2015, Case C-201/14, *Smaranda Bara u. a. v. Președintele Casei Naționale de Asigurări de Sănătate u. a.*, EU:C:2015:638, para. 29; *Amann* (2000), para. 65; and RO: ECtHR, 4 May 2000, *Rotaruc v. Romania*, Application No. 28341/95, para. 43.

147. SK: ECJ, 27 Sept. 2017, Case C-73/16, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy*, EU:C:2017:725, para. 33; at para. 34; *Rundfunk and Others* (Joined Cases C-465/00, C-138/01 and C-139/01), para. 64; DE: ECJ, 16 Dec. 2008, Case C-524/06, *Heinz Huber v. Bundesrepublik Deutschland*, EU:C:2008:724, para. 43; and *Smaranda Bara* (C-201/14), para. 29.

148. *See* the GDPR.

149. *See* para. 85, *OECD Model: Commentary on Article 26* (2017).

for all members of the audit team may be arranged only "in so far as this is permitted under the legislation of the requested Member State". This concession to the principle of national administrative autonomy[150] has been relied on by a few Member States in order to enact explicit taxpayer consent requirements. The most prominent example is Germany, where the Law Implementing DAC[151] states, in its article 10(3), that foreign inspectors may only question individuals or scrutinize records with the consent of the affected individual. The same applies in Austria: according to article 10(3) of the Austrian Law Implementing DAC,[152] foreign tax inspectors need the written consent of the "individual person concerned". This requirement may even have repercussions for the realization of joint audits in other Member States that have not introduced such a taxpayer consent condition. For example, Italy requires taxpayer consent for joint Italian-German audits in Italian territory due to a reciprocity clause in Italian law,[153] which permits joint audits under article 11(2) of the DAC only to the extent that the other Member State involved admits them as well.

Upon a closer look, however, the situation is essentially the same in all Member States, also where no explicit taxpayer consent clauses (or reciprocity requirements mirroring those clauses) have been enacted. This is because article 11(2) of the DAC already establishes, in itself, an implicit or de facto requirement of taxpayer consent to any extraterritorial exercise of inspection powers by foreign officials. According to said provision, "any refusal by the person under investigation to respect the inspection measures of the officials of the requesting authority shall be treated by the requested authority as if that refusal was committed against officials of the latter authority". This implies that the foreign officials cannot enforce their own orders themselves, at least not through coercive measures, in the territory of the requested state. On the contrary, their interrogation requests, requests for documents and other orders can only be enforced by local authorities based on their domestic laws, i.e. using their own powers of inspection. This means that the exercise of the foreign officials' original public authority will only produce the desired result if the taxpayer is willing to collaborate. It should be noted, however, that no equivalent safeguard exists for the taxpayer in the context of article 12(2) of the RAC Excises, even though this provision authorizes joint audits with active powers of inspection for foreign officials as well.[154] Contrary to the DAC, article 12(2) of the RAC Excises clearly states that the officials of the sending state "shall not exercise the powers of inspection conferred on officials of the requested authorities". This clause can be understood as making clear that the officials of the sending state

150. *See*, e.g., FR: ECJ, 17 Mar. 2016, Case C-161/15, *Abdelhafid Bensada Benallal v. État belge*, EU:C:2016:175, paras. 23-24; and *Euro Park Service* (C-14/16), para. 36.

151. German law on the implementation of mutual administrative assistance in tax matters between the Member States of the European Union (EU assistance Act EUAHiG) (DE: *Gesetz über die Durchführung der gegenseitigen Amtshilfe in Steuersachen zwischen den Mitgliedstaaten der Europäischen Union* (EU-*Amtshilfegesetz*, EUAHiG)), Bundesgesetzblatt I, no. 32/2013, p. 1809.

152. German Federal Act transposing Directive 2011/15/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (EU Mutual Assistance Act, EU-AHG) (DE: *Bundesgesetz zur Umsetzung der Richtlinie 2011/15/EU über die Zusammenarbeit der Verwaltungsbehörden im Bereich der Besteuerung und zur Aufhebung der Richtlinie 77/799/EWG* (EU-*Amtshilfegesetz*, EUAHiG)), Bundesgesetzblatt I, no. 112/2012 as amended by EU-AbgÄG, Bundesgesetzblatt I, no. 77/2016.

153. *See* IT: Presidential Decree No. 600/1973 (Italian Income Tax), art. 31bis(5); M. Gabelli & D.A. Rossetti, *Verifiche transfrontaliere simultanee e/o congiunte tra Italia e Germania*, Fiscalità & Commercio Internazionale vol. 3, p. 45 (2015); P. Valente & L. Vinciguerra, *Stabile organizzazione occulta*, p. 249 (IPSOA 2013); M. Faggion, *Verifiche congiunte Italia-Baviera: i risultati della fase sperimentale*, Fiscooggi – Agenzia delle Entrate (2016), available at http://www.fiscooggi.it/attualita/articolo/verifiche-congiunte-italia-bavierai-risultati-della-fase-sperimentale (accessed 28 Aug. 2018).

154. As regards this and other discrepancies, *see also* sec. 3.2.

can never enforce their own orders by themselves. As a consequence, the taxpayer's consent clause is not necessary in this context.

5.3.2.2. A necessary safeguard?

Considering this divergence of approaches both at the EU and national levels, it is worth discussing whether the requirement of taxpayer consent is left entirely to the political discretion of the EU or national legislator, or whether it can be derived from higher-ranking law, and if so, under which circumstances.

It is first quite clear that there is no such requirement in public international law. In fact, the principle of strict territoriality of the jurisdiction to enforce, first formulated in *PCIJ Lotus*,[155] can be overcome by mere consent of the state where the extraterritorial exercise of public power is meant to occur.[156] There is no need for eventually affected individuals or firms to also give prior consent.[157] There are indeed many examples to the contrary in the practice of international administrative collaboration, e.g. regarding international cooperation and the extraterritorial exercise of public authority in the fields of customs[158] and law enforcement.[159]

Second, a taxpayer consent requirement cannot be derived from primary EU law, at least not as an original requirement. In particular, EU legislation that allows joint audits without taxpayer consent does not violate any fundamental rights enshrined in the European Charter of Fundamental Rights. The right to respect for private life, home and communications (article 7 of the Charter), the right to the protection of personal data (article 8 of the Charter) and the right to good administration (article 41 of the Charter) may all be limited in order to meet the objectives of general interest as laid down in article 51(1) of the Charter. Joint audits carried out in order to ensure tax compliance and tax fairness and to combat tax fraud, do not, in themselves, constitute a disproportionate interference with those rights that can only be overcome by taxpayer consent.

What needs to be discussed, however, is whether the national constitutional laws of some Member States could require taxpayer consent in the case of joint audits, at least under certain circumstances. This might be the case in particular when it cannot be guaranteed that the constitutionally required level of protection of taxpayer rights will be observed by the tax authorities of the other (sending) state. This is when, from a national constitutional law perspective, a taxpayer consent requirement could come into play. In German constitutional doctrine, for example, it is generally accepted that the legislator does not need to protect the affected individual or firm from any interference with their fundamental rights by third

155. *See* sec. 4.
156. Id.
157. *See* Hendricks, *supra* n. 29, at p. 570.
158. *See*, e.g., the Convention drawn up on the basis of Art. K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations of 18 December 1997, arts. 20-24, OJ C 24.
159. *See*, e.g., The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, arts. 41-42, OJ L 239; art. 40 Frontex Regulation; and Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Prüm Treaty), art. 24 (2006).

parties (in this case, foreign authorities) if the person willingly accepts this treatment.[160] Therefore, the consent of the taxpayer is needed *only* when no other safeguards to uphold national constitutional standards are put in place. However, this also means that non-consensual joint audits are admissible, also from the point of view of constitutional law, if those concerns are already addressed by the relevant legal framework that governs the joint audit. This can essentially be achieved in three different ways.

The first of these is by requiring foreign tax authorities to observe host-state law standards regarding the collection and processing of taxpayer-related information. As shown in section 5.3.2.1., this is effectively the case regarding the collection (but not necessarily the processing) of taxpayer data under the current European instruments because any non-voluntary extraction of information requires the intermediation of the host-state officials, who are naturally bound to host-state standards.

The second way is by establishing binding (minimum) standards through international agreements that fulfil host-state constitutional requirements, even if they do not fully reflect higher levels of protection offered by host-state statutory law that goes beyond minimum constitutional requirements.[161]

Finally, it should also be accepted, either alternatively or in combination[162] with the former two possibilities, as a sufficient safeguard that each jurisdiction qualifying for participation in a joint audit based on a certain instrument of international or EU law offers a level of constitutional protection that is de jure and de facto roughly equivalent to the domestic constitutional guarantees.[163] This third alternative rests on the assumption that the constitutional duty to protect the citizens' fundamental rights against interference from third parties who are not directly bound by those rights does not necessarily imply that the level of protection to be guaranteed must be identical to that which would apply for acts of domestic public authorities.[164] As will be discussed in more detail in section 5.3.3., this equivalent level of constitutional protection is afforded between EU Member States by the Charter. As a con-

160. *See* N. Bethge, *Die verfassungsrechtliche Zulässigkeit des Grundrechtsverzichts*, p. 339 et seq. (Verlag Dr. Kovač 2014), with further references.

161. *See*, in this regard, Hecker, *supra* n. 63, at p. 318.

162. K.T. Rauser, *Die Übertragung von Hoheitsrechten auf ausländische Staaten*, p. 281 et seq. (C.H. Beck 1991) considers the bi- or multilateral agreement on certain minimum standards to be indispensable for reasons of democratic accountability of the exercise of foreign public authority in domestic territory. However, in the authors' view, only the waiver of the principle of territorial sovereignty must be democratically legitimized with sufficient detail regarding its scope and purpose, but not the subsequent exercise of public authority by the beneficiary state. *See also*, with similar inclination, Hecker, *supra* n. 63, at pp. 319-321.

163. This can be inferred from the decision of the *Bundesverfassungsgericht* in DE: BverfGE, 22 Mar. 1983, Case 2 BvR 475/78, BVerfGE 63, p. 378, concerning the Austria-Germany Treaty on legal protection and administrative assistance from 11.09.1970, Bundesgesetzblatt II, no. 38/1971, p. 1001; *see* Rauser, id., at pp. 278-281; and R. Hofmann, *Grundrechte und grenzüberschreitende Sachverhalte*, p. 100 (Springer 1994). *See also* Hecker, *supra* n. 63, at p. 318; and, by analogy, DE: BVerfGE, 22 Oct. 1986, Case 2 BvR 197/83, BVerfGE 73, p. 378, regarding the waiver of constitutional control vis-à-vis community acts.

164. For an in-depth discussion, *see* Rauser, *supra* n. 162, at p. 293 et seq. To the extent that this view is not supported, different conclusions therefore apply; *see*, e.g. Ohler, *supra* n. 63, at p. 889, who argued that constitutional standards may only be somewhat relaxed vis-à-vis acts of other EU Member States that seek to enforce harmonized national law because he assumed that the German Constitution calls for identical standards of fundamental rights protection, with the exception only of EU law and its enforcement. In the context of joint audits, this would imply that the mere reference to roughly equivalent standards of protection in the foreign constitutional order would be sufficient only to the extent that the procedures for joint audits would be harmonized at EU level. However, Ohler subsequently became supportive of the position advocated here; *see* Ohler, *supra* n. 50, at p. 162 et seq. and p. 190.

sequence, there is arguably no constitutional need for a taxpayer consent requirement when the joint audit is carried out within the ambit of the DAC or one of the RACs. This might be different, however, regarding joint audits that involve third countries and are carried out by virtue of international treaties.

5.3.2.3. Prior notification needed?

The European rules on joint audits also do not contain any prerogative of prior notification of the taxpayer. All of the European rules leave the procedure of initiating investigations in the form of a joint audit to the relevant national rules: if two tax administrations agree on conducting a joint audit, they are entitled to do so according to their respective national rules. Consequently, Member States are free to decide on a notification requirement as long as they comply with the EU principles of equality and effectiveness.

5.3.3. Taxpayer rights during the joint audit

5.3.3.1. The right to be heard in general

During the joint audit, the right to be heard has a different impact than at its initiation stage. The audit of a taxpayer in itself constitutes – regardless of whether it is a joint audit or any other audit conducted by a single state – a form of interaction with the taxpayer.[165] As a consequence, the taxpayer can, in general, present his views and observations during the audit. The audit itself can be seen as a way to grant the right to be heard to the taxpayer. However, in order to comply with this fundamental right, the authorities must pay due attention to the observations submitted by the person concerned. Thus, the tax administration must carefully and impartially examine all of the relevant aspects of the individual case. When it decides to disregard the taxpayer's views or to draw certain conclusions from his observations, it needs to give a detailed statement of reasons for its decision.[166] The statement must be sufficiently specific and concrete to allow the person concerned to understand why his point has been rejected.[167]

In order to be able to present his views, the taxpayer must be informed of the tax administration's points. In a joint audit, tax officers are likely to share different views and to exchange information with each other that might not always be collected during the joint audit itself. However, this information is likely to guide the course of the investigations during the joint audit and to influence the conclusions that the tax officers draw from their inspection. It can be derived from the *Sabou* case of the ECJ that, at this stage of the tax procedure, the right to be heard in general does not oblige the tax administration to inform the taxpayer about the views exchanged between the tax administrations involved as long as the joint audit is still being carried on.[168] In some specific cases, however, the denial of the right to be heard at the investigation stage might irremediably impair the taxpayer's rights. In such cases, the right to be heard needs to be granted already in the pre-contentious stage.[169] This

165. *See* T. Ehrke-Rabel, *Das Abgabenverfahren*, in *Steuerrecht II*, point 1272 (7th ed., W. Doralt & H.G. Ruppe eds., Manz 2014); R. Seer, *Recht auf Informaionsteilhabe, Grundsatz rechtlichen Gehörs*, in *Steuerrecht*, sec. 21, para. 9 (22nd ed., K. Tipke & J. Lang eds., Otto Schmidt 2015); and OECD, *Co-operative Tax Compliance*, p. 13 et seq. (OECD 2013).
166. *See* DE: ECJ, 21 Nov. 1991, Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, EU:C:1991:438, para. 14; *Sopropé* (C-349/07), para. 50; and *Sophie Mukarubega* (C-166/13), para. 48.
167. *See Sophie Mukarubega* (C-166/13), para. 48.
168. *See Sabou* (C-276/12), para. 46.
169. *See Hoechst v. Commission* (C-46/87 and C-227/88), para. 16.

might specifically hold true for cases in which one state's national (constitutional) rights restrict the collection of a certain type of information whereas this is not the case in the other state (e.g. with regard to client-attorney privilege). If such a piece of information was collected during a joint audit without giving the taxpayer a prior hearing, there could be an irremediable impediment to the fundamental rights,[170] which would be contrary to the right to good administration.[171]

Before drafting their audit reports and before taking a decision, the tax administrations involved in the joint audit need to evaluate the information and documents gathered during the audit. Consequently, tax administrations process information and documents obtained during the joint audit in order to set up the facts upon which they will base their legal reasoning. The most important question here seems to be whether the EU understanding of the right to good administration obliges the tax authorities to hear the taxpayer on this outcome, i.e. on the assessment of the facts based on the information and documents gathered during a joint audit. According to the settled case law of the ECJ, the rights to defence – of which the right to be heard is part – apply where authorities *intend* to adopt a measure that will adversely affect an individual. The aim of the right to be heard, i.e. to allow the taxpayer to make his own views effectively known, can only be achieved if this right is granted before the tax procedure moves on to the contentious stage. At this point, the taxpayer is to be granted the right to be heard.[172]

Thus, the right to be heard and the right to access the file must be granted at the latest before the tax administration proceeds to adjust a prior tax assessment to the detriment of the taxpayer as a result of the joint audit (or takes the decision to formally refrain from an adjustment in favour of the taxpayer).[173] The need to hear the taxpayer before the adoption of the audit report will therefore vary according to its impact on tax adjustments. This depends on national procedural law; if the report automatically triggers a tax adjustment, it already marks the end of the investigation stage. Consequently, the taxpayer needs to be heard before the report is issued. If the audit report merely constitutes an instrument for the tax administration to make an informed decision about an adjustment (as will usually be the case in Member States where two different departments are responsible for (i) carrying out the audit; and (ii) tax assessments), it is sufficient that the taxpayer is heard after the report has been issued.

5.3.3.2. Rights with regard to the rules on evidence

All of the EU legal sources for joint audits state that "reports, statements and any other documents, or certified documents thereof, obtained by the staff of the requested authority and communicated to the requesting authority under the assistance provided by that RAC/DAC may be invoked as evidence by the competent bodies of the member states of the requesting authority on the same basis as similar documents provided by another authority of that country".[174] Taking into account that the question of whether illegally acquired

170. In the case of the client-attorney privilege, it would be the right to privacy.
171. In this sense, *see Berlioz Investment Fund* (C-682/15), para. 93 et seq. In a similar vein, *see* the AG Opinion in *Sabou* (C-276/12), paras. 58 and 62; and Gunacker-Slawitsch, *supra* n. 89, at p. 259.
172. *See Sabou* (C-276/12), para. 40.
173. S. Grill, *Amtshilfe: Abschaffung des Notifikationsverfahrens im Einklang mit EuGH*, 32 Recht der Wirtschaft 11, p. 684 (2014).
174. *See* art. 16(5) DAC; art. 30 RAC Excises; and art. 56 RAC VAT.

information can be used as evidence in the tax procedure is answered in very different ways in the Member States, and this provision makes clear that if information that was acquired illegally[175] in the host state gets into the hands of the sending state's tax administration by way of a joint audit, this information can be used as evidence by the sending Member State if allowed under its own domestic law, regardless of an eventual prohibition in the host Member State. A piece of information illegally acquired in the host Member State that could not be used as evidence in a tax procedure in that state could thus be used in the national tax procedure of the sending state, if allowed under its national rules.

Admittedly, during a joint audit, host-state procedural rules shall also apply (*see* section 5.2.3.). Consequently, the taxpayer could hold both the host state officials and the host state responsible for the illegal collection of information. However, he could in no way hinder the sending state from using this information if allowed under its legal rules. The collection of such an information without prior hearing of the taxpayer would thus irremediably impair his right to good administration and is likely to cause irreparable damage (from the perspective of the host state). It is therefore necessary to grant the taxpayer a fair hearing before the collection of any piece of information that is not directly held by the taxpayer (for example, before the joint audit team tries to collect information concerning the taxpayer from a third party without any legal basis for such a third-party request). This right to be heard does not explicitly appear in the DAC and the RACs, but in order to place the provisions on the use of information collected in the host state as evidence in the sending state in line with the prerequisites of the Charter, this right needs to be granted.

5.3.3.3. The right to access the file

Another constituent element of the right to good administration is the right to access the file.[176] This right allows the addressee of an administrative decision to become aware of the facts on which the authorities intend to base their decision.[177] However, EU law does not oblige national tax authorities to generally provide full access to the file or to communicate the documents and information supporting the intended decision by their own motion.[178] Nevertheless, there must be a real possibility to access those documents and information, unless objectives in the public interest justify a restriction.[179] In a procedure of tax inspection and assessment, the ECJ acknowledges restrictions to the right to access the file on grounds of confidentiality or professional secrecy, which could be infringed by granting access to certain information and certain documents.[180] Consequently, during a joint audit, a taxpayer has to be granted access to the file upon his request. It only can be refused with

175. According to the authors' view (that the sending state's officials are bound by both the host state's and their home state's procedural rules), the illegality of the information collection can result from a violation the host state's rules, the sending state's rules or both.
176. In this sense, *see Ispas* (C-298/16), para. 31 et seq.
177. Id., at para. 31.
178. Id. and RO: Opinion of Advocate General Bobek, 7 Sept. 2017, Case C-298/16 *Teodor Ispas, Anduța Ispas v. Direcția Generală a Finanțelor Publice Cluj*, EU:C:2017:650, paras. 121 and 222.
179. *Ispas* (C-298/16), para. 34.
180. Id., at para. 36.

regard to an overriding interest of secrecy or confidentiality, which needs to be set up either in secondary EU law or at national level.

5.3.3.4. Protection of private and family life in general

As regards the protection of private and family life, the right is not explicitly covered by the supranational rules on joint audits. However, the DAC, the RAC Excises and the RAC VAT allow the requested authority to refuse investigations or EoI for certain specified reasons. Two of those reasons reflect the intention of the EU legislator to respect Member States' concepts of the balance between privacy and tax transparency.

A Member State may refuse to carry out investigations or provide information if it would be contrary to its legislation to conduct such enquiries or to collect the information requested for its own purposes.[181] As a consequence, the extent to which taxpayer privacy is protected relies on national rules, with the exception of the irrelevance of national bank secrecy provisions. In practice, this is particularly relevant for client-attorney privilege and other rights to refuse cooperation due to specific (protected) relationships, which exist in different forms and with different scopes in national procedural laws. Additionally, the requested authority may decline to provide information when this would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information of which the disclosure would be contrary to public policy.[182]

Member States are free to transpose the provisions of article 17 of the DAC with regard to the limitations to cooperation. In the case that they transpose them, it is again a matter of national legislation to determine whether this merely remains an option for the national tax administration or becomes an obligation for them if the conditions for refusing cooperation are met. However, when this provision is transformed into an obligation, it must not render the execution of EU law on cross-border administrative cooperation ineffective.

Some Member States (e.g. Austria) have transposed all of the options to refuse a request for cooperation into obligations for their national tax authorities. However, the rights to refuse EoI are limited with regard to information held by a financial institution. The relevant provisions of secondary law do not permit the requested authority to refuse supplying information solely because this information is held by a bank or other financial institution, nominee or person acting in an agency or fiduciary capacity or because it relates to ownership interests of a person.[183] Consequently, if a Member State (e.g. Austria, until 2009) does not allow the tax authorities to collect information on taxpayers from banks unless this taxpayer is prosecuted for major tax offences, this limitation must not apply in cases covered by the DAC. For joint audits, this would imply the right of the foreign tax officers acting in that Member State's territory to gain access to information that the host state itself could not gather in a purely internal situation.

Notwithstanding this qualification, the abovementioned provisions generally put Member States in a position to provide for the protection of taxpayer privacy. For the purpose of this article, it therefore has to be clarified as to (i) whether these provisions also apply to joint

181. Art. 17(2) DAC; art. 54(2) RAC VAT(904/2010); and art. 26(3)(a) *OECD Model* (2017).
182. Art. 17(4) DAC; art. 54(4) RAC VAT; art. 26(3)(a) *OECD Model* (2017).
183. Art. 18(2) DAC; art. 54(5) RAC VAT; art. 25(6) RAC Excises; art. 5(4)(a) OECD Model TIEA (2002); art. 26(5) *OECD Model* (2017); and art. 21(4) MAC.

audits; and (ii) whether they can be interpreted as conferring upon the taxpayers a subjective right vis-à-vis national tax authorities to refuse a request for collaboration, even though the relevant provisions formally address only the Member States.

With regard to the first question, the wording of the relevant provisions seems to suggest that they are applicable only to international forms of cooperation that can be characterized as EoI. Article 17 of the DAC and the corresponding provisions in the RACs refer to the transmission of information and enquiries to be carried out by the requesting state, and thus focus on EoI. Based on the premise that active joint audits are not merely a variation of EoI, this could mean that the requested state is not entitled to deny inquiry rights to the foreign tax officers acting in its territory during a joint audit based on article 17 of the DAC, article 25 of the RAC Excises or article 54 of the RAC VAT. This was, for example, clearly the understanding of Austria when implementing article 17 of the DAC. This provision was included only in the EoI section of the implementing law and not as a general provision also applying to simultaneous controls and the presence of tax officers abroad.[184] Interpreting the aforementioned provisions literally, it could thus prima facie be assumed that the limitations of cooperation contained in secondary EU law are of no relevance for joint audits that do not imply an EoI because officials of the requesting state directly gather the information themselves. Based on systematic interpretation and purposive construction, however, the aforementioned provisions should be relevant for joint audits as well. First, their placement in a separate chapter within the overall framework of the respective piece of secondary legislation indicates that the rights to refuse cooperation apply to all forms of cooperation, including joint audits. This conclusion is furthermore reinforced by the similarities with the safeguards to be found in the respective core provisions on joint audits. Regarding the DAC as the most relevant legal basis, its article 11 permits the presence of foreign officials only "in accordance with the arrangements laid down" by the requested authorities. Furthermore, the right to be present during administrative enquiries, the right to interview individuals and the right to examine records are only conferred on the foreign officials "in so far as this is permitted under the legislation of the requested Member State" (article 11(2) of the DAC). The RACs contain similar provisions (article 12 of the RAC Excises and article 28 of the RAC VAT). These provisions indicate that the requested state may deny foreign officials the exercise of any powers during the joint audit whenever the requested state lacks such powers in its own affairs. As article 17 of the DAC and the corresponding provisions in the RACs reflect the same kind of limits, they should be interpreted as applying to joint audit cases as well.

As emphasized in section 5.2.2., neither the DAC nor the RACs grant the taxpayer himself a subjective right that he could directly invoke. Depending on the way in which the relevant provisions are transposed or, in case of the RACs, enhanced in the respective Member State's domestic legislation, a taxpayer may nevertheless be entitled to demand that its home state, i.e. the requested state, refuse EoI on the grounds listed in the relevant European instrument. In *Berlioz*, the ECJ had to decide whether an information holder could rely on article 5 of the DAC, which only addresses the tax administration by forbidding EoI if the requested information was not foreseeably relevant. The ECJ decided that article 5 conferred a subjective right on the information holder. The same should apply for article 17 of the DAC

184. Art. 17 of the DAC has been implemented through AT: *Amtshilfedurchführungsgesetz* (Act on Mutual Administrative Assistance), art. 4(3), which is the national legal basis for EoI.

in the context of joint audits. The cooperation in joint audits aims at collecting information concerning the audited taxpayer. Thus, in most cases, he is the information holder and is thus protected by the provisions of article 17 of the DAC and the respective provisions of the RACs. If implemented by the Member States as an obligation, the audited taxpayer is entitled to invoke the right to refusal under the conditions of article 17 of the DAC. If implemented as an option, the *Berlioz* case confers on the taxpayer the right that his (private) interest be duly taken into account. Consequently, any disproportionate interference with his right to professional secrecy must not occur.

With regard to the right to enter the taxpayer's premises during a joint audit, secondary EU law does not contain any provisions. To define the corresponding rights and limitations thus remains the responsibility of the national legislator. For a joint audit, this again implies a potential for double standards: the tax officers of the sending state must respect both their own national rules and the rules of the host state with regard to the right to access the taxpayer's premises.

5.3.3.5. Rights with regard to tax secrecy

The exchange of tax information between Member States interferes with national official secrecy. It is settled case law of the European Court of Human Rights that confidentiality rules constitute appropriate safeguards to prevent abuse of the states' opportunities to limit fundamental rights for overriding reasons in the public interest.

All supra and international rules on cross-border cooperation of tax administrations refer to official secrecy: any information exchanged shall enjoy the protection extended to similar information under the national laws of the Member State that received it.[185] In the absence of explicit provisions in EU law or international law, the understanding and limitations of official secrecy are, once again, derived from national law.

In order to define a minimum standard of the scope of official secrecy, secondary law states that information acquired on its grounds may be used for specific purposes. As an example, article 16 of the DAC allows the use of the information for (i) the administration and enforcement of the domestic laws with regard to taxes covered by the DAC (paragraph 1); (ii) for the assessment and enforcement of other taxes and duties covered by Directive 2010/24/EU;[186] and (iii) for the assessment and enforcement of other compulsory social security contributions (article 16(1)(2) of the DAC). Additionally, the information may be used in connection with judicial and administrative proceedings that may involve penalties, initiated as a consequence of infringements of tax law (without prejudice towards the rights of defendants and witnesses in such proceedings; *see* article 16(1)(3) of the DAC). Moreover, the information obtained may be used for other purposes than those mentioned in the DAC if this information may be used for these purposes in the requested state and if similar information may be used for these purposes in the requested state (*see* article 16(2) of the DAC).[187] However, in the EU context, national autonomy when drafting confidentiality rules is limited by the principle of effectiveness; confidentiality rules must not undermine the very concept of mutual assistance.

185. Art. 28 RAC Excises; art. 55(2) RAC VAT; art. 16 DAC; and art. 26(3) *OECD Model* (2017).
186. Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84/1 (2010), EU Law IBFD.
187. Similarly, *see* art. 28 RAC Excises; and art. 55 RAC VAT.

Inter and supranational foundations for joint audits thus recognize official secrecy as a right to be granted to the taxpayer, while making clear that the official secrecy needs to be homogeneously limited with regard to EoI between tax authorities and certain other public institutional bodies. These foundations are silent on the extent to which official secrecy applies with regard to the general public or media. As consequence, this again needs to be decided autonomously by the Member States. They are again bound by article 52 of the Charter and article 8(2) of the Convention. As described with regard to the limitations on the right to data protection, Member States might have very different approaches without contravening the fundamental rights. In accordance with the rejection of the so-called "agency theory" (*see* section 5.2.), the confidentiality rules governing joint audits constitute an important example of the above-mentioned double standards of taxpayer rights (*see* section 5.2.3.): the tax administration of the requesting state acting in the territory of the requested state is bound by its own national rules, on the one hand, and by those of the requested state, on the other hand.

5.3.3.6. Data protection

With regard to data protection, EU legislation on administrative cooperation[188] refers to the relevant European legislation. These provisions mention EoI only, so one may (again) assume that they shall not apply to joint audit measures. However, it is clear from the scope of the GDPR (as laid down in its article 2) that Member States have to comply with the GDPR when conducting a joint audit. Again, the relevant provisions in the DAC and in the RACs only oblige the Member States to comply with EU data protection rules and do not directly grant any rights to the taxpayer. However, by complying with the European rules on data protection, tax administrations confer rights on the taxpayers that they can rely on.

In order to assess the interplay between national and EU rules on data protection, there is a clear distinction to be made between individual taxpayers and companies. The GDPR is limited in its personal and material scope. First, it addresses only the rights of natural persons (article 1). Second, the GDPR is limited to the processing of data by automated means and to data forming (or intended to form) part of a filing system (article 2(1)). According to article 4(6) of the GDPR, a "filing system" means any structured set of personal data that are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis. Contrary to the data-processing requirement, the filing requirements are neutral with regard to the technology used. A structured set of data is any filing system that stores data in a coherent and connected way.[189] In order to fall within the scope of the GDPR, the filing system must further be accessible, following certain criteria related to a natural person.[190] Although joint audits mainly concern companies, it has to be kept in mind that companies act through individuals and that a lot of company data are connected to individuals. Consequently, depending on the joint audit, the GDPR might already sometimes become relevant, and likely more so in the future when the instrument becomes more popular beyond the realm of transfer pricing and (other) intra-company transactions.

188. Art. 25 DAC; art. 55 RAC VAT; and art. 28 RAC Excises.
189. *See* J. Kühling & B.Buchner, *DS-GVO, Datenschutz-Grundverordnung Kommentar*, art. 4, no. 6, point 3 (C.H. Beck 2017).
190. *See* id., at art. 4, no. 6, point 4.

Moreover, some Member States have extended the application of the GDPR to companies.[191] If a Member State has decided to extend the scope of EU legislation to situations not covered by EU competences, EU law and principles apply to non-harmonized situations as well. The ECJ feels competent to rule on requests in these cases.[192] Consequently, the collection, processing and storage of company data by automatic means or their collection with the intention to install files in the ambit of joint audits is also limited by the guarantees enshrined in the GDPR. The latter confers specific rights to (i) transparency and communication (article 12); (ii) information and access to the data (article 15); (iii) rectification and erasure (article 16 et seq.); and (iv) objection (article 21). However, article 23 allows Member States to restrict the scope of these rights and obligations in order to safeguard important objectives of general public interest, such as taxation matters (article 23(1)(e)). Such a restriction must be based on a legislative measure, respect the essence of the fundamental rights and freedoms and be necessary and proportionate in a democratic society to safeguard the objective pursued.

If some of the Member States involved in the joint audit have extended the scope of the GDPR whereas others have not, there might be discrepancies regarding taxpayers' rights. This may result in the aforementioned double-standard effect and the de facto extension of the broader scope of taxpayers' rights to a Member State that has not extended the scope of the GDPR.

5.3.3.7. Consequences of infringement

The violation of the right to good administration during the investigation stage of tax procedures does not necessarily lead to the nullification of the administrative decisions that are based on the affected information and documents.[193] The right to good administration is sufficiently observed if the addressee can appeal against the administrative decision. In order to avoid irreparable damage to the taxpayer's rights and interests, the appeal may need to be accompanied by suspension of the contested decision.[194]

191. For example, the Austrian *Bundesabgabenordnung* [General Tax Code] does not distinguish between legal and natural persons with regard to data protection.

192. *See* NL: ECJ, 17 July 1997, Case C-28/95, *A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, EU:C:1997:369, para. 32, ECJ Case Law IBFD.

193. *See* FR: ECJ, 14 Feb. 1990, Case C-301/87, *French Republic v. Commission of the European Communities*, EU:C:1990:67, para. 31; DE: ECJ, 5 Oct. 2000, Case C-288/96, *Federal Republic of Germany v. Commission of the European Communities*, EU:C:2000:537, para. 101; PRC: ECJ, 1 Oct. 2009, Case C-141/08, *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd v. Council of the European Union*, EU:C:2009:598, para. 94; DE: ECJ, 6 Sept. 2012, Case C-96/11, *August Storck KG v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)*, EU:C:2012:537, para. 80; NL: ECJ, 10 Sept. 2013, Case C-383/13, *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533, para. 38; and *Kamino* (C-129/13 and C-130/13), para. 78.

194. *See* UK: ECJ, 10 July 1980, Case C-30/78, *Distillers Company Limited v. Commission of the European Communities*, EU:C:1980:186, para. 26; *French Republic v. Commission* (C-301/87), para. 21; *Germany v. Commission of the European Communities* (C-288/96), para. 101; *Storck* (C-96/11), para. 80; *M.G. and N.R.* (C-383/13), para. 38; and *Kamino* (C-129/13 and C-130/13), para. 73. For a detailed study, *see* Gunacker-Slawitsch, *supra* n. 89, at p. 335; and Gunacker-Slawitsch, *Das Grundrecht auf "gute Verwaltung" im Abgabenverfahren (part II)*, Österreichische Steuer-Zeitung vol.10, p. 384 (2015).

5.3.4. Taxpayer rights after the joint audit: The right to effective judicial protection

The principle of effective judicial protection is set out in article 47 of the Charter, and it secures in EU law the protection afforded by article 6(1) and article 13 of the Convention.[195] Everyone whose rights and freedoms guaranteed by EU law are violated is entitled to an effective remedy before a tribunal. This includes the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Moreover, it entails the right of the person concerned to be advised, defended and represented. Contrary to article 6 of the Convention, article 47 applies to administrative matters as well.[196]

Even though the material scope of the right to judicial review can be clearly defined for joint audits, it still needs to be decided as to which of the jurisdictions involved in the joint audit has to grant judicial protection. According to customary international law, as it is also embodied in a 2004 UN Convention[197] and other international treaties, states and their officials enjoy immunity from adjudication by foreign courts when exercising public authority. In principle, the orders and measures of tax inspectors during a joint audit must therefore be challenged before the domestic courts of the state that they represent. The principle of state immunity could be waived, either in an international treaty or in European legislation. However, it is unlikely that a state would agree to have its actions litigated in a foreign court, where it is possibly unfamiliar with the procedures, language, etc.

A different avenue might exist, however. To the extent that the host state has either supervisory or enforcement powers with regard to the measures taken or the orders given by the foreign officials present in a joint audit, the host state could be held responsible before the local courts, and litigation in the jurisdiction of the home state of those officials would still be possible as well.

6. A Plea for Harmonization within the European Union

6.1. A need for harmonization

European tax harmonization occurs predominantly in the field of substantive (tax) law, whereas tax procedure remains essentially in the domain of the Member States.[198] This is a mere consequence of the principle of subsidiarity and the principle of procedural autonomy and chimes in with harmonization by way of directives. Procedural rules remain at the discretion of Member States as long as they achieve the objectives pursued by the European

195. *See Berlioz Investment Fund* (C-682/15), para. 55.

196. Art. 41 of the EuChFR explicitly addresses the administration. For an overview of the matter from an European Convention on Human Rights perspective, *see* C. Endresen, *Taxation and the European Convention for the Protection of Human Rights*, 45 Intertax 8/9, p. 512 et seq. (2017); and G. Kofler & P. Pistone, *General Issues on Taxation and Human Rights*, in *Human Rights and Taxation in Europe and the World* p. 27 et seq. (G. Kofler, M.P. Maduro & P. Pistone eds., IBFD 2011), Online Books IBFD.

197. United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 5938, Annex (2 Dec 2004), available at http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf; for further details, *see* D.P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 Vanderbilt Journal of Transnational Law 4, p. 1047 (2012).

198. *See* M. Lang et al., *Procedural Rules in Tax Law in the Context of European Union and Domestic Law*, p. 158 (Kluwer 2010).

Union.[199] The principle of procedural autonomy of the Member States has its limits only when the implementation of EU law might be impaired. When there is an obvious need for harmonization of procedures, EU tax legislation does indeed provide for procedural rules as well (e.g. reimbursement of input VAT for non-resident taxpayers).

The current myriad of statutory rules and their interaction with fundamental rights guarantees and EU secondary law instruments provoke uncertainty for both tax administrations and taxpayers when conducting joint audits. The current statutory framework of cooperation between European tax administrations is guided by the principle of mutual respect for the respective national procedures, but fails to establish explicit rights and obligations for taxpayers and tax administrations.[200] This approach seems to have proven appropriate for the traditional EoI, be it automatically, spontaneously or upon request. However, for other instruments of cooperation, and more specifically, for the presence of tax authorities in another Member State, it leads to a doubling of relevant rules, on the one hand, and uncertainties with regard to taxpayer rights, on the other hand. Admittedly, the RACs and the DAC do implicitly confer specific rights on taxpayers when read in conjunction with the Charter. However, the current legal framework leaves taxpayer rights during joint audits sketchy and vague.

Legal certainty and clarity of the rules are crucial for effective procedural instruments, which in turn are crucial for the effective implementation of substantive law. As long as national tax inspectors need to be aware of a multitude of foreign procedural standards in order to carry out joint audits in a range of other Member States and align them each time with their own domestic procedural laws, joint audits will remain a very complex instrument with a de facto very limited scope of application. The lack of clarity regarding taxpayer rights provokes overreaction of some legislators, such as a requirement for taxpayer consent to carry out joint audits, and in any event, it may give rise to unnecessary disputes and litigation. Against this background, the authors consider further harmonization of procedural aspects of joint audit rules a necessity to ensure the effective and efficient implementation of EU law. The need for a uniform set of procedural rules and a common "taxpayer rights charta" is particularly pressing when the collection of harmonized taxes is at stake, but it is also needed to ensure the effectiveness and practical efficiency of joint audits carried out by virtue of article 11 of the DAC with a view towards non-harmonized direct taxes.[201] Such EU legislation on procedural aspects of harmonized international cooperation between Member States, including the rights of the affected persons, would indeed not be unprecedented.[202] It should be coordinated as closely as possible with eventual future OECD efforts to develop a Code of Conduct for the management of joint audits[203] and could ideally serve as a model for it.

199. *See* T. Ehrke-Rabel, *Gemeinschaftsrecht und Abgabenverfahren*, p. 25 et seq. (Manz 2005); and E.G. Heidbreder, *Multilevel Policy Enforcement: Innovations in how to Administer Liberalized Global Markets*, 93 Public Administration 4, p. 944 (2015).
200. In a similar vein, *see* De Flora, *supra* n. 75, at p. 460.
201. As Gutmann stressed in 2011, human rights could play a significant role in international procedures of EoI; *see* D. Gutmann, *Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU*, in *Human Rights and Taxation in Europe and the World* p. 110 (G. Kofler, M.P. Maduro & P. Pistone eds., IBFD 2011), Online Books.
202. *See*, for example, arts. 34-36 of the Frontex Regulation (2016/1624).
203. *See* OECD, *The Changing Tax Compliance Environment and the Role of Audit*, p. 87 (OECD 2017).

6.2. Competence of the European Union to harmonize

In order to harmonize procedural rules and taxpayer rights as suggested in section 6.1., the European Union must be competent to legislate.

Since a potential directive or regulation regarding joint tax audits would definitely fall within the ambit of procedural tax law, the relevant legal bases for legislative activity of the European Union on this matter should be the same as those provided in other legislative acts regarding tax procedures. For example, the DAC invokes both articles 113 and 115 of the TFEU, and the RACs both invoke article 113 of the TFEU.

Apart from using appropriate legal bases for harmonization of the joint audit procedures, the European legislator must abide by the principles of subsidiarity and proportionality.[204] The principle of subsidiarity, enshrined in article 5(3) of the TEU and Protocol No. 2 on the application of the principles of subsidiarity and proportionality, requires that, "in areas which do not fall within its exclusive competence, the Union shall act only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States... but can be better achieved at Union level". As the authors have tried to demonstrate, there are compelling arguments for the harmonization of procedural and taxpayer right aspects of joint audits at the EU level in order to render joint audits a more efficient tool for both tax administrations and taxpayers. A harmonized approach could also improve the fight against tax avoidance by enticing tax inspectors to perform joint audits and giving them a codified piece of legislation regulating the matter, as opposed to the status quo, in which they face multiple regulations complicating the joint audit procedure.

Furthermore, any measure that is adopted should also respect the principle of proportionality.[205] This principle requires that the content and form of the action do not exceed what is necessary to achieve the objectives set by the EU treaties. The authors believe that EU intervention in the Member States' procedural tax laws is necessary only with regard to joint audits and not regarding tax procedure in general. Such an intervention would thus respect both the principle of proportionality and the principle of subsidiarity.

6.3. The extent of harmonization

The harmonization that would be required to render joint audits more effective within the European Union and make them a more attractive instrument for tax administrations and taxpayers alike consists of providing greater legal certainty about the applicable legal framework and minimum legal standards for taxpayer rights. To that effect, the relevant EU law instruments, i.e. the DAC and the RACs, should be amended and streamlined. They should clarify the relevance of home-state law for the officials from the sending Member State, and they should specify the basic guarantees that are indispensable for protecting the fundamental rights accorded to taxpayers by virtue of EU law. In particular, the substantive and temporal scope of the right of the taxpayer to be heard should be determined at EU level. Moreover, the protection of privacy and, more specifically, the guarantees related to personal data should be streamlined in order to encourage taxpayers to properly collaborate in a joint audit. This would not exclude flexible standards that still allow one to take into

204. *See* P. Craig & G. de Burca, *The Evolution of EU Law*, p. 59 (2nd ed., Oxford 2011).
205. *See* C. Barnard, *The substantive Law of the EU, The four freedoms*, p. 573 (5th ed., Oxford 2016).

account national differences in the overall tax procedural context in which a joint audit is embedded, e.g. regarding the different legal status of audit reports.

For the sake of the proliferation and efficiency of joint audits, it would ultimately be desirable that the European Union eventually adopt legislative measures beyond mere partial harmonization in order to avoid any doubling of procedural standards for the initiation and realization of joint audits, as well as to provide the tax authorities of Member States with only one uniform set of auditing procedures and taxpayer rights. Additionally, there should be common standards regarding the consequences of an infringement of taxpayer rights.

A particular strong case for such further-reaching harmonization can be made for joint audits in the field of VAT. Recent legislative developments[206] and Commission proposals for future VAT legislation seek to establish the so-called OSS concept as an integral part of the VAT system. Essentially, the OSS constitutes a simplified regime for the declaration and payment obligations concerning cross-border transactions in situations in which the vendor is not established in the Member State of destination in which the VAT is levied. It allows the taxable person to file returns and make payments in his home state, i.e. the collection of the taxes belonging to all of the Member States takes place in a single Member State. As a consequence, all Member States have an interest that traders who operate under the OSS scheme can be subject to a proper audit in their home state. Active joint audits would be an ideal instrument to facilitate trust among Member States in effective controls and to provide expertise on the relevant national VAT legislation during the audit. The Commission is aware of this and has recently proposed to amend the RAC VAT with regard to joint audits and EoI in OSS matters.[207] What the Commission has so far failed to include in its proposal, however, are rules on the issues covered in this article. Without provisions on the applicable laws and taxpayer rights, joint audits will hardly be successful in achieving effective taxpayer controls that Member States can rely on, putting the success of the OSS concept itself in jeopardy.

6.4. The US model of joint audits as inspiration for the European Union?

If the European legislator were willing to fully harmonize the procedural aspects of joint audits, an even more ambitious step could consist of the creation of a single auditing authority. This would not necessarily have to be an EU institution; it could also be created on the basis of intergovernmental agreement. The legislator could then find some source of inspiration, as well as insights into the challenges of such an approach, in the US model for joint audits, namely the MTC.[208]

In the US model, joint audits are performed by a commission that operates autonomously, notwithstanding the strategic influence exercised by the participating states. When performing an audit, the commission works on behalf of a certain state, and audits are carried out by a single auditor, coming from one state, on behalf of all of the states included in the process. This is the consequence of the "pooling together" of resources from various

206. Council Directive 2017/2455/EU amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ L 348/7 (2017).
207. European Commission, Amended proposal for a Council Regulation amending Regulation (EU) No. 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017)706 (30 Nov. 2017).
208. *See* sec. 3.3.

Member States and forming a single, autonomous commission of which tax inspectors act as staff members.

It has been argued in US literature that this might not be the most efficient approach:

> As a result of the lack of uniformity, the commission is in reality auditing taxpayers one state at a time because the auditors need to apply a different set of rules for each state that is part of an overall audit […]. The lack of uniformity in state rules requires significant taxpayer efforts to educate the auditor on the return method in each state. Since the auditor typically comes from one state but is auditing on behalf of many, the completion of the audit is inefficient.[209]

However, this would not necessarily be a problem for European joint tax audits of VAT. Due to the rather high level of harmonization of substantive VAT law in the European Union, a tax inspector from another Member State would have the knowledge of the relevant substantive law.

At present, the US model seems to be a rather "visionary" model of joint tax audits in the European Union. However, if there might be sufficient political will within the European Union to form European audit teams for the purpose of examining specific cross-border issues, at least regarding VAT,[210] this might be a model that can prove to be worthy inspiration.

7. Conclusions

As has been shown, there are several different categories and forms of joint audits, in a broad sense, with a variety of legal bases in public international law and European law. Remarkably, though, none of those legal bases provides a comprehensive set of procedural rules for the initiation and the execution of a joint audit. If any standards are established at all, they predominantly address the powers of the tax administration rather than the position of the taxpayer. Furthermore, international and EU instruments that authorize joint audits tend to refer to the respective national provisions in line with the general international principle of mutual recognition and respect of national procedural rules.

Two main questions arise from this rudimentary legal framework for joint audits. Firstly, it is not clear as to which extent tax officers acting "out of area" in the course of a joint audit remain bound by their home state's laws, as well as to what extent they need to respect the host state's procedural standards. Secondly, the relevant taxpayer rights before, during and after a joint audit vis-à-vis those of foreign and local authorities are far from obvious. Furthermore, both issues are intrinsically linked to the qualification of joint audits as either a mere variation of EoI on request or a distinct form of sui generis international administrative cooperation.

In the authors' view, passive joint audits that do not directly confer any investigation powers on the foreign tax inspectors can still be adequately qualified as a form of EoI. However, active joint audits, in which the foreign inspectors directly interfere with the taxpayer, require an analysis beyond the traditional EoI concepts. Here, the foreign tax officials remain bound by their home state's laws and are additionally bound by the laws of the host state. In the case of divergent procedural standards, this leads to a double standard of rules

209. Herbert & Mayster, *supra* n. 43, at p. 848.
210. *See also* E.C.J.M. Van der Hel-van Dijk, *Intra-Community Tax Audit* p. 9 (IBFD 2011), Online Books IBFD.

to observe, and in the case of taxpayers' rights, it leads to the obligation to observe the rules of the state that provides the highest level of protection for the taxpayer.

Moreover, in the specific context of joint audits that involve an EU Member State, additional standards for taxpayer rights need to be observed. They can be partly derived directly from the relevant European legislation (e.g. with regard to data collection, processing, storage and taxpayer access to the data). Most of these standards have to be construed on the basis of the relevant national rules and European or international legal bases for the joint audit, interpreted in conformity with the requirements of European fundamental rights. Among the latter, the most important for joint audits are the rights to the defence, which include the right to good administration, the right to a fair judicial review, the protection of private and family life and data protection.

The authors' findings show that a myriad of statutory rules interact with fundamental rights guarantees and EU secondary law instruments. As a consequence, considerable uncertainty exists for tax administrations and taxpayers alike. This constitutes a serious obstacle for the proliferation of joint audits and significantly diminishes their potential as an effective instrument against both tax avoidance and evasion, but also international double taxation. The authors therefore conclude that there is a strong case for a greater degree of harmonization regarding joint audit procedures. At least minimum standards for taxpayers that are indispensable for protecting their fundamental rights should be explicitly stated, and it should be clarified as to what extent tax inspectors are bound by home and host-state regulations. Ultimately, it would be desirable for the European Union to adopt legislative measures that avoid any procedural double standards for the initiation and realization of joint audits by providing the tax authorities with a single and uniform set of auditing procedures and taxpayer rights. Additionally, there should be common standards regarding the consequences of infringement of taxpayer rights. In the authors' view, the planned extension of the OSS concept in VAT and the Commission's proposal to make joint audits mandatory for the host state under certain conditions provide particularly strong arguments for such further-reaching harmonization. To this effect, certain core aspects of the US model on intra-state joint audits could provide some inspiration.