

DECISIONS

COMMISSION IMPLEMENTING DECISION

of 11 June 2013

on the adequacy of the competent authorities of the United States of America pursuant to Directive 2006/43/EC of the European Parliament and of the Council*(notified under document C(2013) 3402)***(Text with EEA relevance)**

(2013/280/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC ⁽¹⁾, and in particular the first subparagraph of Article 47(3) thereof,

After consulting the European Data Protection Supervisor,

Whereas:

- (1) In accordance with Article 47(1) and Article 53 of Directive 2006/43/EC, in case of inspections or investigations of statutory auditors or audit firms, competent authorities of Member States may allow the transfer of audit working papers or other documents held by statutory auditors or audit firms to the competent authorities of a third country only if those authorities have been declared adequate by the Commission and there are reciprocal working arrangements between them and the competent authorities of the Member States concerned. It therefore needs to be determined which competent authorities of third countries are adequate for the purpose of the transfer of audit working papers or other documents held by statutory auditors or audit firms to the competent authorities of a third country.
- (2) A transfer of audit working papers or other documents held by statutory auditors or audit firms to the competent authorities of a third country reflects a substantial public interest related to carrying out independent public oversight. Accordingly, any such transfer by the competent authorities of Member States should be made solely for the purpose of the exercise of the competences of public oversight, external quality assurance and investigations of auditors and audit firms

by the competent authorities of the third country concerned. Member States should ensure that the bilateral working arrangements which allow the transfer of audit working papers or other documents held by statutory auditors or audit firms between their competent authorities and the competent authorities of the United States of America contain appropriate safeguards with regard to the protection of personal data as well as the protection of professional secrets and sensitive commercial information related to the companies whose financial statements are audited as well as the auditors of such companies comprised in such papers. The persons employed or formerly employed by the competent authorities of the third country that receive the information should be subject to obligations of professional secrecy.

- (3) Without prejudice to Article 47(4) of Directive 2006/43/EC, Member States should ensure that, for the purpose of public oversight, quality assurance and investigations of auditors and audit firms, contacts between the auditors or audit firms of the Member States and the competent authorities of the United States of America take place via the competent authorities of the Member State concerned.
- (4) Member States may decide to accept joint inspections in exceptional circumstances where this is necessary to ensure effective supervision. Member States may allow that cooperation with the competent authorities of the United States of America takes place under the form of joint inspections or through observers without inspection or investigation powers and without access to the confidential audit working papers or to other documents held by statutory auditors or audit firms. Such cooperation should always take place under the conditions set out in Article 47(2) of Directive 2006/43/EC and in this Decision, in particular as regards the need to respect sovereignty, confidentiality and reciprocity. Member States should ensure that any joint inspections carried out in the Union by their competent authorities and the competent authorities of the United States of America under Article 47 of Directive 2006/43/EC should be under the leadership of the competent authority of the Member State concerned.

⁽¹⁾ OJ L 157, 9.6.2006, p. 87.

- (5) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾ applies to the processing of personal data carried out pursuant to that Directive. Accordingly, where a transfer of audit working papers or other documents held by statutory auditors or audit firms to the competent authorities of the United States of America involves the disclosure of personal data, it should always be carried out in accordance with Directive 95/46/EC. Member States should ensure appropriate safeguards with regard to the protection of personal data transferred, in particular through binding agreements in accordance with Chapter IV of Directive 95/46/EC between their competent authorities and the competent authorities of the United States, and that the competent authorities of the United States would not further disclose personal data comprised in transferred audit working papers or other documents held by statutory auditors or audit firms without the prior agreement of the competent authorities of the Member States concerned.
- (6) The adequacy of competent authorities of a third country should be assessed in the light of the cooperation requirements set out in Article 36 of Directive 2006/43/EC or essentially equivalent functional results. In particular, the adequacy should be assessed in the light of the competences exercised by the competent authorities of the United States of America, the safeguards against breaching professional secrecy and confidentiality rules implemented by them and their ability under their laws and regulations to cooperate with the competent authorities of Member States.
- (7) As auditors and audit firms of companies of the Union which have issued securities in the United States of America, or which form part of a group issuing statutory consolidated accounts in that country are regulated by the laws of the United States of America, it should be decided whether the competent authorities of Member States may transfer audit working papers or other documents held by statutory auditors or audit firms to the competent authorities of the United States of America solely for the purposes of the exercise of their competences of public oversight, external quality assurance and investigations of auditors and audit firms.
- (8) Adequacy assessments for the purposes of Article 47 of Directive 2006/43/EC have been carried out with respect to the competent authorities of the United States of America. Adequacy decisions in respect of the authorities of the United States of America should be taken on the basis of those assessments.
- (9) The Securities and Exchange Commission of the United States of America has competence in investigating auditors and audit firms; this Decision should only cover the competences of the Securities and Exchange Commission of the United States of America to investigate auditors and audit firms. The Securities and Exchange Commission of the United States of America implements adequate safeguards banning and sanctioning disclosure by its current and former employees of confidential information to any third person or authority. It would use the transferred audit working or other documents held by statutory auditors or audit firms papers solely for purposes related to investigations of auditors and audit firms. Under the laws and regulations of the United States of America, the Securities and Exchange Commission has the ability to transfer audit working papers or other documents held by United States auditors or audit firms which relate to investigations it may perform on such auditors and audit firms to the competent authorities of any Member State. On this basis, the Securities and Exchange Commission of the United States of America should be declared adequate for the purpose of Article 47(1) of Directive 2006/43/EC.
- (10) The Public Company Accounting Oversight Board of the United States of America has competence in the public oversight, external quality assurance and investigation of auditors and audit firms. It implements adequate safeguards banning and sanctioning disclosure by its current and former employees of confidential information to any third person or authority. It would use transferred audit working papers or other documents held by statutory auditors or audit firms solely for purposes related to the public oversight, external quality assurance and investigation of auditors and audit firms. Under the laws and regulations of the United States of America, it may transfer audit working papers or other documents held by United States auditors or audit firms to the competent authorities of any Member State. On this basis, the Public Company Accounting Oversight Board of the United States of America should be declared adequate for the purpose of Article 47(1) of Directive 2006/43/EC.
- (11) Transfer of audit working papers or other documents held by statutory auditors or audit firms should include access to or transmission to the authorities declared adequate under this Decision of audit working papers or other documents held by statutory auditors or audit firms, upon prior agreement of the competent authorities of Member States, and access to or transmission of such papers by the competent authorities of Member States to those authorities. As a consequence, in case of inspections or investigations, statutory auditors and audit firms should not be allowed to grant access, nor to transmit audit working papers or other documents held by statutory auditors or audit firms to those authorities under other conditions than the ones set out in

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

this Decision and in Article 47 of Directive 2006/43/EC, for example on the basis of consent of the statutory auditor, the audit firms or the client company.

- (12) This Decision should be without prejudice to the cooperation arrangements referred to in Article 25(4) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC ⁽¹⁾.
- (13) As this Decision is taken in the context of Commission Implementing Decision 2013/281/EU ⁽²⁾ on the equivalence of the public oversight, quality assurance, investigation and penalty system for auditors and audit entities of the United States of America, it should not pre-empt any final equivalence decisions that the Commission may adopt pursuant to Article 46(2) of Directive 2006/43/EC.
- (14) The ultimate objective of cooperation with the United States of America in audit oversight is to reach mutual reliance on each other's oversight systems where transfers of audit working papers or other documents held by statutory auditors or audit firms would be exceptional. The mutual reliance would be based on the equivalence of the Union and the United States' auditor oversight systems.
- (15) The Public Company Accounting Oversight Board of the United States of America intends to evaluate further the auditor oversight systems of the Member States before deciding to rely on the oversight performed by their competent authorities. Therefore, the mechanism of cooperation between the competent authorities of the Member States and the Public Company Accounting Oversight Board of the United States of America and the Securities and Exchange Commission of the United States of America should be reviewed to assess the progress made towards reaching mutual reliance on each other's oversight systems. For those reasons, this Decision should be applicable for a limited period of time.
- (16) The measures provided for in this Decision are in accordance with the opinion of the Committee established by Article 48(1) of Directive 2006/43/EC,

HAS ADOPTED THIS DECISION:

Article 1

The Public Company Accounting Oversight Board of the United States of America and the Securities and Exchange Commission

of the United States of America shall be considered adequate for the purpose of Article 47(1) of Directive 2006/43/EC.

Article 2

1. In case of inspections or investigations of statutory auditors or audit firms any transfer of audit working papers or other documents held by statutory auditors or audit firms shall be either subject to prior approval by the competent authority of the Member State concerned, or it shall be carried out by the competent authority of the Member State concerned.

2. The transfer of audit working papers or other documents held by statutory auditors or audit firms shall not serve any other purpose than the public oversight, external quality assurance or investigations of auditors and audit firms.

3. Where audit working papers or other documents held by statutory auditors or audit firms are exclusively held by a statutory auditor or audit firm registered in a Member State other than the Member State where the group auditor is registered and whose competent authority has received a request from any of the authorities referred to in Article 1, such papers or documents shall be transferred to the competent authority of the third country concerned only if the competent authority of the first Member State has given its express agreement to the transfer.

4. Member States shall ensure that the bilateral working arrangements which allow the transfer of audit working papers or other documents held by statutory auditors or audit firms between their competent authorities and the competent authorities of the United States of America contain appropriate safeguards with regard to the protection of personal data as well as the protection of professional secrets and sensitive commercial information related to the companies whose financial statements are audited as well as the auditors of such companies comprised in such papers.

5. Without prejudice to Article 47(4) of Directive 2006/43/EC, Member States shall ensure that, for the purpose of public oversight, quality assurance and investigations of auditors and audit firms, the bilateral working arrangements which allow the transfer of audit working papers or other documents held by statutory auditors or audit firms between their competent authorities and the competent authorities of the United States of America provide that contacts between the auditors or audit firms of the Member States and the competent authorities of the United States of America take place via the competent authorities of the Member State concerned.

⁽¹⁾ OJ L 390, 31.12.2004, p. 38.

⁽²⁾ See page 8 of this Official Journal.

6. Member States may agree to joint inspections only where necessary. They shall ensure that any joint inspections carried out by their competent authorities and the competent authorities of the United States of America on the territory of Member States in accordance with Article 47 of Directive 2006/43/EC shall, as a general rule, be under the leadership of the competent authority of the Member State concerned.

7. Member States shall ensure that any bilateral working arrangements between their competent authorities and the competent authorities of the United States of America comply with the conditions for cooperation set out in this Article.

Article 3

This Decision shall apply from 1 August 2013 to 31 July 2016.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 11 June 2013.

For the Commission
Michel BARNIER
Member of the Commission
