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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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⁽¹⁾ Text with EEA relevance.

I

(Legislative acts)

DIRECTIVES

COUNCIL DIRECTIVE (EU) 2017/1852

of 10 October 2017

on tax dispute resolution mechanisms in the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Situations in which different Member States differently interpret or apply the provisions of bilateral tax agreements and conventions or the Convention on the elimination of double taxation in connection with the adjustments of profits of associated enterprises (90/436/EEC) ⁽³⁾ ('the Union Arbitration Convention'), can create serious tax obstacles for businesses operating across borders. They create an excessive tax burden for businesses, and are likely to cause economic distortions and inefficiencies and to have a negative impact on cross-border investment and growth.
- (2) For this reason, it is necessary that there are mechanisms in the Union that ensure the effective resolution of disputes concerning the interpretation and application of such bilateral tax treaties and the Union Arbitration Convention, in particular disputes leading to double taxation.
- (3) The mechanisms currently provided for in bilateral tax treaties and in the Union Arbitration Convention might not achieve the effective resolution of such disputes in all cases in a timely manner. The monitoring exercise carried out as part of the implementation of the Union Arbitration Convention has revealed some important shortcomings, in particular as regards access to the procedure and as regards the length and the effective conclusion of the procedure.
- (4) With a view to creating a fairer tax environment, rules on transparency need to be enhanced and anti-avoidance measures need to be strengthened. At the same time, in the spirit of a fair taxation system, it is necessary to ensure that mechanisms for dispute resolution are comprehensive, effective and sustainable. Improvements to

⁽¹⁾ Opinion of 6 July 2017 (not yet published in the Official Journal).

⁽²⁾ Opinion of 22 February 2017 (not yet published in the Official Journal).

⁽³⁾ OJ L 225, 20.8.1990, p. 10.

dispute resolution mechanisms are also necessary to respond to the risk that the number of double or multiple taxation disputes will increase, with potentially high amounts being at stake, because tax administrations have established more regular and focused audit practices.

- (5) It is crucial to introduce an effective and efficient framework for the resolution of tax disputes which ensures legal certainty and a business-friendly environment for investments in order to achieve fair and efficient tax systems in the Union. The dispute resolution mechanisms should also create a harmonised and transparent framework for solving disputes and thereby provide benefits to all taxpayers.
- (6) The resolution of disputes should apply to different interpretation and application of bilateral tax treaties and of the Union Arbitration Convention — in particular to different interpretation and application leading to double taxation. This should be achieved through a procedure under which, as a first step, the case is submitted to the tax authorities of the Member States concerned, with a view to settling the dispute by using a mutual agreement procedure. Member States should be encouraged to use non-binding alternative dispute resolution forms, such as mediation or conciliation, during the final stages of the mutual agreement procedure period. In the absence of an agreement within a certain time frame, the case should be submitted to a dispute resolution procedure. The choice of the method for dispute resolution should be flexible, which could be either through ad hoc structures or through more permanent structures. Dispute resolution procedures could take the form of an Advisory Commission, consisting of both representatives of the tax authorities concerned and independent persons of standing, or could take the form of an Alternative Dispute Resolution Commission (the latter providing for flexibility in the choice of dispute resolution methods). Also, where appropriate, Member States could choose, through bilateral agreement, to use any other dispute resolution process, such as the 'final offer' arbitration process (otherwise known as 'last best offer' arbitration) to solve the dispute in a binding manner. The tax authorities should take a final binding decision by reference to the opinion of an Advisory Commission or Alternative Dispute Resolution Commission.
- (7) The improved dispute resolution mechanism should build on existing systems in the Union, including the Union Arbitration Convention. However, the scope of this Directive should be wider than that of the Union Arbitration Convention, which is limited to disputes over transfer pricing and the attribution of profits to permanent establishments. This Directive should apply to all taxpayers that are subject to taxes on income and capital covered by bilateral tax treaties and the Union Arbitration Convention. At the same time, individuals, micro, small and medium-sized enterprises should have less of an administrative burden when using the dispute resolution procedure. In addition, the dispute resolution phase should be strengthened. In particular, it is necessary to provide for a time limit for the duration of the procedures to resolve double taxation disputes and to establish the terms and conditions of the dispute resolution procedure for the taxpayers.
- (8) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁽¹⁾.
- (9) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to a fair trial and the freedom to conduct a business.
- (10) Since the objective of this Directive, to establish an effective and efficient procedure to resolve disputes in the context of the proper functioning of the internal market, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (11) The Commission should review the application of this Directive after a period of 5 years, and Member States should provide the Commission with appropriate input to support this review,

⁽¹⁾ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

HAS ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

This Directive lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a 'question in dispute'.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions apply:
 - (a) 'competent authority' means the authority of a Member State which has been designated as such by the Member State concerned;
 - (b) 'competent court' means the court, tribunal or other body of a Member State which has been designated as such by the Member State concerned;
 - (c) 'double taxation' means the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits;
 - (d) 'affected person' means any person, including an individual, that is a resident of a Member State for tax purposes, and whose taxation is directly affected by a question in dispute.
2. Any term not defined in this Directive shall, unless the context requires otherwise, have the meaning that it has at that time under the relevant agreement or convention referred to in Article 1 that applies on the date of receipt of the first notification of the action that resulted in, or that will result in, a question in dispute. In the absence of a definition under such agreement or convention, an undefined term shall have the meaning that it had at that time under the law of the Member State concerned for the purposes of the taxes to which the said agreement or convention applies, any meaning under the applicable tax laws of that Member State prevailing over a meaning given to the term under other laws of that Member State.

Article 3

Complaint

1. Any affected person shall be entitled to submit a complaint on a question in dispute to each of the competent authorities of each of the Member States concerned, requesting the resolution thereof. The complaint shall be submitted within 3 years from the receipt of the first notification of the action resulting in, or that will result in, the question in dispute, regardless of whether the affected person has recourse to the remedies available under the national law of any of the Member States concerned. The affected person shall simultaneously submit the complaint with the same information to each competent authority, and shall indicate in the complaint which other Member States are concerned. The affected person shall ensure that each Member State concerned receives the complaint in at least one of the following languages:
 - (a) one of that Member State's official languages in accordance with national law; or
 - (b) any other language that such a Member State accepts for this purpose.
2. Each competent authority shall acknowledge receipt of the complaint within 2 months from the receipt of the complaint. Each competent authority shall also inform the competent authorities of the other Member States concerned of the receipt of the complaint within 2 months of such receipt. The competent authorities shall inform each other at that time also about the language or languages they intend to use for their communications during the relevant proceedings.

3. The complaint shall only be accepted if, as a first step, the affected person making the complaint provides the competent authorities of each of the Member States concerned with the following information:

- (a) the name(s), address(es), tax identification number(s) and any other information necessary for identification of the affected person(s) who presented the complaint to the competent authorities and of any other person concerned;
- (b) the tax periods concerned;
- (c) details of the relevant facts and circumstances of the case (including details of structure of the transaction and of the relationship between the affected person and the other parties to the relevant transactions, as well as any facts determined in good faith in a mutual binding agreement between the affected person and the tax administration, where applicable) and more specifically, the nature and the date of the actions giving rise to the question in dispute (including, where applicable, details of same income received in the other Member State and of inclusion of such income in the taxable income in the other Member State, and details of the tax charged or that will be charged in relation to such income in the other Member State), as well as the related amounts in the currencies of the Member States concerned, with a copy of any supporting documents;
- (d) reference to the applicable national rules and to the agreement or convention referred to in Article 1; where more than one agreement or convention is applicable, the affected person making the complaint shall specify which agreement or convention is being interpreted in relation to the relevant question in dispute. Such agreement or convention shall be the applicable agreement or convention for the purposes of this Directive;
- (e) the following information provided by the affected person who presented the complaint to the competent authorities, together with copies of any supporting documents:
 - (i) an explanation of why the affected person considers that there is a question in dispute;
 - (ii) the details of any appeals and litigation initiated by the affected person regarding the relevant transactions and of any court decisions concerning the question in dispute;
 - (iii) a commitment by the affected person to respond as completely and quickly as possible to all appropriate requests made by a competent authority and to provide any documentation at the request of the competent authorities;
 - (iv) a copy of the final tax assessment decision in the form of a final tax assessment notice, tax audit report or other equivalent document leading to the question in dispute and a copy of any other documents issued by the tax authorities with regard to the question in dispute where relevant;
 - (v) information on any complaint submitted by the affected person under another mutual agreement procedure or under another dispute resolution procedure as defined in Article 16(5) and an express commitment by the affected person that he will abide by the provisions of Article 16(5), if applicable;
- (f) any specific additional information requested by the competent authorities that is considered necessary to undertake the substantive consideration of the particular case.

4. The competent authorities of each of the Member States concerned may request the information referred to in point (f) of paragraph 3 within 3 months from the receipt of the complaint. Further requests for information may be made during the mutual agreement procedure under Article 4 if the competent authorities consider this to be necessary. National laws regarding the protection of information and the protection of trade, business, industrial or professional secret or trade processes shall apply.

An affected person that receives a request in accordance with point (f) of paragraph 3 shall reply within 3 months of receiving the request. A copy of this reply shall also be sent simultaneously to the competent authorities of the other Member States concerned.

5. The competent authorities of each of the Member States concerned shall take a decision on the acceptance or rejection of the complaint within 6 months of the receipt thereof or within 6 months of the receipt of the information referred to in point (f) of paragraph 3, whichever is later. The competent authorities shall inform the affected person and the competent authorities of the other Member States of their decision without delay.

Within the period of 6 months from the receipt of a complaint, or within 6 months of the receipt of the information referred to in point (f) of paragraph 3, whichever is later, a competent authority may decide to resolve the question in dispute on a unilateral basis, without involving the other competent authorities of the Member States concerned. In such case, the relevant competent authority shall notify the affected person and the other competent authorities of the Member States concerned without delay, following which the proceedings under this Directive shall be terminated.

6. An affected person that wishes to withdraw a complaint shall simultaneously submit a written notification of withdrawal to each of the competent authorities of the Member States concerned. Such notification shall terminate all proceedings under this Directive with immediate effect. Competent authorities of the Member States who receive such a notification shall inform the other competent authorities of the Member States concerned of the termination of proceedings without delay.

If for any reason a question in dispute ceases to exist, all proceedings under this Directive shall terminate with immediate effect, and the competent authorities of the Member States concerned shall inform the affected person of this state of affairs and of the general reasons therefore without delay.

Article 4

Mutual agreement procedure

1. Where the competent authorities of the Member States concerned accept a complaint, they shall endeavour to resolve the question in dispute by mutual agreement within 2 years, starting from the last notification of a decision of one of the Member States on the acceptance of the complaint.

The period of 2 years referred to in the first subparagraph may be extended by up to 1 year at the request of a competent authority of a Member State concerned to all of the other competent authorities of the Member States concerned, if the requesting competent authority provides written justification.

2. Once the competent authorities of the Member States have reached an agreement as to how to resolve the question in dispute within the period provided for in paragraph 1, the competent authority of each of the Member States concerned shall, without delay, notify this agreement to the affected person, as a decision that is binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable. Where proceedings regarding such other remedies have already commenced, the decision shall only become binding and enforceable once the affected person has provided evidence to the competent authorities of the Member States concerned that action has been taken to terminate those proceedings. Such evidence shall be provided not later than 60 days from the date on which such decision was notified to the affected person. The decision shall then be implemented without delay, irrespective of any time limits prescribed by the national law of the Member States concerned.

3. Where the competent authorities of the Member States concerned have not reached an agreement on how to resolve the question in dispute within the period provided for in paragraph 1, the competent authority of each of the Member States concerned shall inform the affected person indicating the general reasons for the failure to reach agreement.

Article 5

Competent authority decision concerning the complaint

1. The competent authority of a Member State concerned may decide to reject a complaint within the period provided for in Article 3(5) if:

- (a) the complaint lacks information required under Article 3(3) (including any information requested under Article 3(3)(f) that was not submitted within the deadline specified in Article 3(4));
- (b) there is no question in dispute; or
- (c) the complaint was not submitted within the 3-year period set out in Article 3(1).

When informing the affected person in accordance with the provisions of Article 3(5), the competent authority shall provide the general reasons for its rejection.

2. Where a competent authority of a Member State concerned has not taken a decision on the complaint within the time provided for in Article 3(5), the complaint shall be deemed to be accepted by that competent authority.

3. The affected person shall be entitled to appeal against the decision of the competent authorities of the Member States concerned in accordance with national rules where all competent authorities of the Member States concerned have rejected the complaint. An affected person who exercises this appeal right shall be barred from making a request under Article 6(1)(a):

- (a) while the decision is still under appeal according to the laws of the Member State concerned;
- (b) where the rejection decision can still be further appealed under the appeal procedure of the Member States concerned; or
- (c) when a rejection decision has been confirmed under the appeal procedure in point (a) but it is not possible to derogate from the decision of the relevant court or other judicial bodies in any of the Member States concerned.

Where the appeal right has been exercised, the decision of the relevant court or other judicial body shall be considered for the purposes of Article 6(1)(a).

Article 6

Dispute resolution by the Advisory Commission

1. Upon a request made by the affected person to the competent authorities of the Member States concerned, an advisory commission (an 'Advisory Commission') shall be set up by such competent authorities in accordance with Article 8 where:

- (a) the complaint submitted by such affected person was rejected under Article 5(1) by at least one, but not all of the competent authorities of Member States concerned; or
- (b) the competent authorities of the Member States concerned had accepted the complaint that was submitted by the affected person but failed to reach an agreement on how to resolve the question in dispute by mutual agreement within the time limit provided for in Article 4(1).

The affected person may only make such a request if, in accordance with any applicable national rules against a rejection referred to in Article 5(1): no appeal can be made; no appeal is pending; or the affected person has formally renounced his right of appeal. The request shall include a declaration to this effect.

The affected person shall make the request to set up an Advisory Commission in writing, not later than 50 days from the date of receipt of the notification under Articles 3(5) or 4(3) or 50 days from the date of delivery of the decision by the relevant court or judicial body under Article 5(3), as the case may be. The Advisory Commission shall be set up not later than 120 days from the receipt of such request, and once set up, its chair shall inform the affected person thereof without delay.

2. The Advisory Commission set up in the case of point (a) of paragraph 1 shall adopt a decision on the acceptance of the complaint within 6 months from the date of its establishment. It shall notify the competent authorities of its decision within 30 days of the adoption thereof.

Where the Advisory Commission has confirmed that all of the requirements under Article 3 have been satisfied, the mutual agreement procedure provided for in Article 4 shall be initiated at the request of one of the competent authorities. The competent authority concerned shall notify the Advisory Commission, the other competent authorities concerned and the affected person of that request. The period provided for in Article 4(1) shall start from the date of the notification of the decision taken by the Advisory Commission of the acceptance of the complaint.

Where none of the competent authorities has requested initiation of the mutual agreement procedure within 60 days of the date of the notification of the decision of the Advisory Commission, the Advisory Commission shall provide an opinion on how to resolve the question in dispute as provided for in Article 14(1). In such a case, for the purposes of Article 14(1), the Advisory Commission shall be deemed to have been set up on the date on which that 60-day period expired.

3. In the case of point (b) of the first subparagraph of paragraph (1) of this Article, the Advisory Commission shall deliver an opinion on how to resolve the question in dispute in accordance with Article 14(1).

*Article 7***Appointments by competent courts or national appointing body**

1. If an Advisory Commission is not set up within the period provided for in Article 6(1), Member States shall provide that the relevant affected person may apply to a competent court or to any other body or person designated in their national law for the carrying out of such function (national appointing body) to set up the Advisory Commission.

Where the competent authority of a Member State has failed to appoint at least one independent person of standing and a substitute, the affected person may request the competent court or national appointing body in that Member State to appoint an independent person of standing and a substitute from the list referred to in Article 9.

If the competent authorities of all Member States concerned have failed to do so, the affected person may request the competent courts or national appointing body of each Member State to appoint the two independent persons of standing from the list referred to in Article 9. Those independent persons of standing shall appoint the chair by drawing lots from the list of independent persons according to Article 8(3).

Affected persons shall submit their referral to appoint the independent persons of standing and their substitutes to each of their respective states of residence, if more than one affected person is involved in the proceedings, or to the Member States whose competent authorities have failed to appoint at least one independent person of standing and a substitute if only one affected person is involved.

2. The appointment of the independent persons and their substitutes under paragraph 1 of this Article shall be referred to a competent court of a Member State or national appointing body only after the end of the 120-day period referred to in Article 6(1), and within 30 days after the end of that period.

3. The competent court or national appointing body shall adopt a decision under paragraph 1 and notify it to the applicant. The applicable procedure for the competent court to appoint the independent persons, when the Member States fail to appoint them, shall be the same as the procedure under national rules in matters of civil and commercial arbitration that applies when courts or national appointing bodies appoint arbitrators because parties have failed to agree in this respect. The competent court or national appointing body of the Member State shall inform the competent authority of that Member State, which shall in turn inform the competent authority of the other Member States concerned without delay. The competent authority of the Member State that initially failed to appoint the independent person of standing and the substitute shall be entitled to appeal the decision of the court, or national appointing body in that Member State, provided that the competent authority has the right to do so under national law. In case of rejection, the applicant shall be entitled to appeal against the decision of the court in accordance with national procedural rules.

*Article 8***The Advisory Commission**

1. The Advisory Commission referred to in Article 6 shall have the following composition:

- (a) one chair;
- (b) one representative of each competent authority concerned. If the competent authorities agree, the number of such representatives may be increased to two for each competent authority;
- (c) one independent person of standing, who shall be appointed by each competent authority of the Member States concerned from the list referred to in Article 9. If the competent authorities agree, the number of such persons appointed may be increased to two for each competent authority.

2. The rules for the appointment of the independent persons of standing shall be agreed between the competent authorities of the Member States concerned. Following the appointment of the independent persons of standing, a substitute shall be appointed for each of them according to the rules for the appointment of the independent persons in cases where the independent persons are prevented from carrying out their duties.

3. Where the rules for the appointment of independent persons of standing have not been agreed in accordance with paragraph 2, the appointment of such persons shall be carried out by drawing lots.
4. Except where the independent persons of standing have been appointed by the competent court or national appointing body as provided in Article 7(1), the competent authority of any of the Member States concerned may object to the appointment of any particular independent person of standing for any reason agreed in advance between the competent authorities concerned or for any of the following reasons:
 - (a) that person belongs to or is working on behalf of one of the tax administrations concerned or was in such a situation at any time during the previous 3 years;
 - (b) that person has, or has had, a material holding in or voting right in or is or has been an employee of or adviser, at any time during the last 5 years prior to the date of his appointment, to any affected person concerned;
 - (c) that person does not offer a sufficient guarantee of objectivity for the settlement of the dispute or disputes to be decided;
 - (d) that person is an employee with an enterprise that provides tax advice or otherwise gives tax advice on a professional basis, or was in such a situation at any time during a period of at least 3 years prior to the date of his appointment.
5. Any competent authority of a Member State concerned may request that a person of standing who has been appointed in accordance with paragraph 2 or 3, or his substitute, shall disclose any interest, relationship or any other matter that is likely to affect that person's independence or impartiality or that might reasonably create an appearance of bias in the proceedings.

For a period of 12 months after the decision of the Advisory Commission was delivered, an independent person of standing who is part of the Advisory Commission shall not be in a situation that would have given cause to a competent authority to object to his appointment as provided for in this paragraph had he been in that situation at the time of appointment to that Advisory Commission.

6. The representatives of the competent authorities and the independent persons of standing appointed in accordance with paragraph 1 of this Article shall elect a chair from the list of persons referred to in Article 9. Unless the representatives of each competent authority and independent persons of standing agree otherwise, the chair shall be a judge.

Article 9

The list of independent persons of standing

1. The list of independent persons of standing shall consist of all the independent persons of standing nominated by the Member States. For this purpose, each Member State shall nominate at least three individuals who are competent and independent, and who can act with impartiality and integrity.
2. Each Member State shall notify the Commission of the names of the independent persons of standing who it has nominated. Each Member State shall also provide the Commission with complete and up-to-date information regarding those persons' professional and academic background, their competence, their expertise and any conflicts of interest that they may have. Member States may specify in the notification which of those persons may be appointed as a chair.
3. Member States shall inform the Commission of any changes to the list of independent persons without delay.

Each Member State shall put in place procedures for removing any person whom it has appointed from the list of independent persons of standing if that person ceases to be independent.

Where, taking into consideration the relevant provisions of this Article, a Member State has reasonable cause to object to an independent person of standing remaining in the abovementioned list for reasons of lack of independence, it shall inform the Commission and provide appropriate evidence to support its concern. The Commission shall in turn inform the Member State that nominated such person of the objection and supporting evidence. On the basis of such objection and supporting evidence, the latter Member State shall within 6 months take the necessary steps to investigate the complaint, and shall decide whether to retain or remove that person from the list. The Member State shall then notify the Commission accordingly without delay.

*Article 10***The Alternative Dispute Resolution Commission**

1. The competent authorities of the Member States concerned may agree to set up an alternative dispute resolution commission (an 'Alternative Dispute Resolution Commission') instead of an Advisory Commission to deliver an opinion on how to resolve the question in dispute in accordance with Article 14. The competent authorities of the Member States may also agree to set up an Alternative Dispute Resolution Commission in the form of a committee that is of a permanent nature (a 'Standing Committee').
2. Except for the rules regarding the independence of its members set out in Article 8(4) and 8(5), the Alternative Dispute Resolution Commission may differ regarding its composition and form from the Advisory Commission.

An Alternative Dispute Resolution Commission may apply, where appropriate, any dispute resolution processes or technique to solve the question in dispute in a binding manner. As an alternative to the type of dispute resolution process applied by the Advisory Commission under Article 8, i.e. the independent opinion process, any other type of dispute resolution process, including the 'final offer' arbitration process (otherwise known as 'last best offer' arbitration), can be agreed by the competent authorities of the Member States concerned under this Article and applied by the Alternative Dispute Resolution Commission.

3. The competent authorities of the Member States concerned shall agree on the Rules of Functioning in accordance with Article 11.
4. Articles 12 and 13 shall apply to the Alternative Dispute Resolution Commission unless otherwise agreed to in the Rules of Functioning referred to in Article 11.

*Article 11***Rules of Functioning**

1. Member States shall provide that, within the 120-day period provided for in Article 6(1), the competent authority of each of the Member States concerned shall notify the affected person with the following:
 - (a) the Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission;
 - (b) the date by which the opinion on the resolution of the question in dispute shall be adopted;
 - (c) references to any applicable legal provisions in national law of the Member States and to any applicable agreements or conventions.
2. The Rules of Functioning shall be signed between the competent authorities of the Member States involved in the dispute.

The Rules of Functioning shall provide in particular:

- (a) the description and the characteristics of the question in dispute;
- (b) the terms of reference on which the competent authorities of the Member States agree as regards the legal and factual questions to be resolved;
- (c) the form of the dispute resolution body, which shall be either an Advisory Commission or an Alternative Dispute Resolution Commission, as well as the type of process for any Alternative Dispute Resolution, if the process differs from the independent opinion process applied by an Advisory Commission;
- (d) the time frame for the dispute resolution procedure;
- (e) the composition of the Advisory Commission or Alternative Dispute Resolution Commission (including the number and names of the members, details of their competence and qualifications, and disclosing any conflicts of interest of the members);
- (f) the rules governing the participation of the affected person(s) and third parties in the proceedings, exchanges of memoranda, information and evidence, the costs, the type of dispute resolution process to be used, and any other relevant procedural or organisational matters;
- (g) the logistical arrangements for the Advisory Commission's proceedings and delivery of its opinion.

If an Advisory Commission is set up to deliver an opinion under point (a) of the first subparagraph of Article 6(1), only the information referred to points (a), (d), (e) and (f) of the second subparagraph of Article 11(2) shall be set out in the Rules of Functioning.

3. The Commission shall establish standard Rules of Functioning on the basis of the provisions of the second subparagraph of paragraph 2 of this Article by means of implementing acts. Such standard Rules of Functioning shall apply in cases where the Rules of Functioning are incomplete or were not notified to the affected person. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 20(2).

4. Where the competent authorities have not notified the Rules of Functioning to the affected person in accordance with paragraphs 1 and 2, the independent persons of standing and the chair shall complete the Rules of Functioning on the basis of the standard form provided for under paragraph 3 and shall send them to the affected person within two weeks from the date that the Advisory Commission or Alternative Dispute Resolution Commission was set up. Where the independent persons and the Chair have not agreed on the Rules of Functioning or have not notified them to the affected person, the affected person or affected persons may apply to a competent court in one of the Member States concerned in order to obtain an order for the implementation of the Rules of Functioning.

Article 12

Costs of proceedings

1. Except as provided in paragraph 2, and unless the competent authorities of the Member States concerned have agreed otherwise, the following costs shall be shared equally among the Member States:

- (a) the expenses of the independent persons of standing, which are to be an amount equivalent to the average of the usual amount reimbursed to high ranking civil servants of the Member States concerned; and
- (b) the fees of the independent persons, where applicable, which are to be limited to EUR 1 000 per person per day for every day on which the Advisory Commission or Alternative Dispute Resolution Commission meets.

Costs that are incurred by the affected person shall not be borne by Member States.

2. Where the affected person has made:

- (a) a notification of withdrawal of complaint under Article 3(6); or
- (b) a request under the provisions of Article 6(1) following a rejection made under Article 5(1) and the Advisory Commission has decided that the relevant competent authorities were correct in rejecting the complaint;

and, where the competent authorities of the Member States concerned agree, all the costs referred to in paragraphs 1(a) and (b) shall be borne by the affected person.

Article 13

Information, evidence and hearings

1. For the purposes of the procedure referred to in Article 6, where the competent authorities of the Member States concerned agree, the affected person(s) concerned may provide the Advisory Commission or Alternative Dispute Resolution Commission with any information, evidence or documents that may be relevant for the decision. The affected person(s) and the competent authorities of the Member States concerned shall provide any information, evidence or documents upon request by the Advisory Commission or Alternative Dispute Resolution Commission. However, those competent authorities may refuse to provide information to the Advisory Commission in any of the following cases:

- (a) obtaining the information requires carrying out administrative measures that are against national law;
- (b) the information cannot be obtained under the national law of the of the Member State concerned;
- (c) the information concerns trade secrets, business secrets, industrial secrets, professional secrets or trade processes;
- (d) the disclosure of the information is contrary to public policy.

2. Affected persons may, at their request and with the consent of the competent authorities of the Member States concerned, appear or be represented before an Advisory Commission or Alternative Dispute Resolution Commission. Affected persons shall appear or be represented before it upon request by the Advisory Commission or Alternative Dispute Resolution Commission.

3. The independent persons of standing or any other member shall be subject to obligations of professional secrecy under the national legislation of each of the Member States concerned in relation to information they receive in their capacity as members an Advisory Commission or Alternative Dispute Resolution Commission. Affected persons, and where applicable, their representatives, shall undertake to treat any information (including knowledge of documents) that they receive during such proceedings as secret. The affected person and his representatives shall make a declaration to this effect to the competent authorities of the Member States concerned when so requested during the proceedings. The Member States shall adopt appropriate sanctions for any breach of secrecy obligations.

Article 14

The opinion of the Advisory Commission or Alternative Dispute Resolution Commission

1. An Advisory Commission or Alternative Dispute Resolution Commission shall deliver its opinion to the competent authorities of the Member States concerned no later than 6 months after the date on which it was set up. Where the Advisory Commission or Alternative Dispute Resolution Commission considers that the question in dispute is such that it would need more than 6 months to deliver an opinion, this period may be extended by 3 months. The Advisory Commission or Alternative Dispute Resolution Commission shall inform the competent authorities of the Member States concerned and the affected persons of any such extension.

2. The Advisory Commission or Alternative Dispute Resolution Commission shall base its opinion on the provisions of the applicable agreement or convention referred to in Article 1 as well as on any applicable national rules.

3. The Advisory Commission or Alternative Dispute Resolution Commission shall adopt its opinion by a simple majority of its members. Where a majority cannot be reached, the vote of the chair shall determine the final opinion. The chair shall communicate the opinion of the Advisory Commission or Alternative Dispute Resolution Commission to the competent authorities.

Article 15

Final decision

1. The competent authorities concerned shall agree on how to resolve the question in dispute within 6 months of the notification of the opinion of the Advisory Commission or Alternative Dispute Resolution Commission.

2. The competent authorities may take a decision which deviates from the opinion of the Advisory Commission or Alternative Dispute Resolution Commission. However, if they fail to reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion.

3. Each Member State shall provide that its competent authority shall notify the final decision on the resolution of the question in dispute to the affected person without delay. In the absence of such notification within 30 days of the decision having been taken, the affected person may appeal in its Member State of residence in accordance with the applicable national rules in order to obtain the final decision.

4. The final decision shall be binding on the Member States concerned and shall not constitute a precedent. The final decision shall be implemented subject to the affected person(s) accepting the final decision and renouncing the right to any domestic remedy within 60 days from the date when the final decision was notified, where applicable.

Except where the relevant court or other judicial body of a Member State concerned decides according to its applicable national rules on remedies and applying the criteria under Article 8 that there was lack of independence, the final decision shall be implemented under the national law of the Member States concerned which as a result of the final

decision shall amend their taxation, irrespective of any time limits prescribed by the national law. Where the final decision has not been implemented, the affected person may apply to the competent court of the Member State that failed to implement the final decision, in order to enforce implementation thereof.

Article 16

Interaction with national proceedings and derogations

1. The fact that the action of a Member State that gave rise to a question in dispute has become final under national law shall not prevent the affected persons from having recourse to the procedures provided for in this Directive.
2. The submission of the question in dispute to the mutual agreement procedure or to the dispute resolution procedure under Articles 4 and 6 respectively shall not prevent a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal penalties in relation to the same matters.
3. Affected persons may have recourse to the remedies available to them under the national law of the Member States concerned. However, where the affected person has commenced proceedings to seek such a remedy, the terms of periods referred to in Articles 3(5) and 4(1) respectively shall commence from the date on which a judgement delivered in those proceedings has become final or on which those proceedings have otherwise been definitively concluded or where the proceedings have been suspended.
4. Where a decision on a question in dispute has been rendered by the relevant court or other judicial body of a Member State, and the national law of that Member State does not allow it to derogate from the decision, that Member State may provide that:
 - (a) before an agreement has been reached by the competent authorities of the Member States concerned under the mutual agreement procedure under Article 4 on that question in dispute, the competent authority of such Member State is to notify the other competent authorities of the Member States concerned of the decision of the relevant court or other judicial body and that that procedure is to be terminated as from the date of such notification;
 - (b) before the affected person has made a request under Article 6(1), the provisions of Article 6(1) do not apply if the question in dispute had remained unresolved during the whole of the mutual agreement procedure under Article 4, in which case the competent authority of that Member State is to inform the other competent authorities of the Member States concerned of the effect of the decision of the relevant court or other judicial body;
 - (c) the dispute resolution process under Article 6 is to be terminated if the decision of the relevant court or other judicial body was rendered at any time after an affected person has made a request under Article 6(1) but before the Advisory Commission or the Alternative Dispute Resolution Commission has delivered its opinion to the competent authorities of the Member States concerned in accordance with Article 14, in which case the competent authority of the relevant Member State concerned is to inform the other competent authorities of the Member States concerned and the Advisory Commission or the Alternative Dispute Resolution Commission of the effect of the decision of the relevant court or other judicial body.
5. The submission of a complaint as provided under Article 3 shall put an end to any other ongoing proceedings under the mutual agreement procedure or dispute resolution procedure under an agreement or convention that is being interpreted or applied in relation to the relevant question in dispute. Such other ongoing proceedings concerning the relevant question in dispute shall come to an end with effect from the date of the first receipt of the complaint by any of the competent authorities of the Member States concerned.
6. By way of derogation from Article 6, a Member State concerned may deny access to the dispute resolution procedure under that Article in cases where penalties were imposed in that Member State in relation to the adjusted income or capital for tax fraud, wilful default and gross negligence. Where judicial or administrative proceedings were commenced that could potentially lead to such penalties, and these proceedings are being conducted simultaneously with any of the proceedings referred to in this Directive, a competent authority may stay the proceedings under this Directive as from the date of acceptance of the complaint until the date of the final outcome of those proceedings.
7. A Member State may deny access to the dispute resolution procedure under Article 6 on a case-by-case basis where a question in dispute does not involve double taxation. In such a case, the competent authority of the said Member State shall inform the affected person and the competent authorities of the other Member States concerned without delay.

*Article 17***Special provisions for individuals and smaller undertakings**

Where the affected person is either:

- (a) an individual; or
- (b) not a large undertaking and does not form part of a large group (both as defined in Directive 2013/34/EU of the European Parliament and of the Council ⁽¹⁾),

the affected person may submit the complaints, replies to a request for additional information, withdrawals and requests specified in Articles 3(1), 3(4), 3(6) and 6(1), respectively ('communications'), by way of derogation from those provisions, only to the competent authority of the Member State in which the affected person is resident. The competent authority of that Member State shall notify the competent authorities of all the other Member States concerned at the same time and within 2 months of receipt of such communications. Once such a notification has been made, the affected person shall be deemed to have submitted the communication to all the Member States concerned as of the date of such notification.

In the case of additional information received under Article 3(4), the competent authority of the Member State that received the additional information shall transmit a copy to the competent authorities of all the other Member States concerned at the same time. Once this submission has been made, it shall be deemed that additional information has been received by all Member States concerned as at the date of such receipt of information.

*Article 18***Publicity**

1. Advisory Commissions and Alternative Dispute Resolution Commissions shall issue their opinions in writing.
2. The competent authorities may agree to publish the final decisions referred to in Article 15 in their entirety, subject to consent of each of the affected person concerned.
3. Where the competent authorities or affected person concerned do not consent to publishing the final decision in its entirety, the competent authorities shall publish an abstract of the final decision. That abstract shall contain a description of the issue and the subject matter, the date, the tax periods involved, the legal basis, the industry sector, and a short description of the final outcome. It shall also include a description of the method of arbitration used.

The competent authorities shall send the information to be published in accordance with the first subparagraph to the affected person before its publication. No later than 60 days from the receipt of such information, the affected person may request the competent authorities not to publish information that concerns any trade, business, industrial or professional secret or trade process, or that is contrary to public policy.

4. The Commission shall establish standard forms for the communication of the information referred to in paragraphs 2 and 3 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 20(2).
5. The competent authorities shall notify the information to be published in accordance with paragraph 3 to the Commission without delay.

*Article 19***Role of the Commission and administrative support**

1. The Commission shall keep the list of the competent authorities and the list of the independent persons of standing referred to in Article 8(4) up to date and shall make them available online. That list shall contain only the names of those persons.
2. Member States shall inform the Commission of the measures they have taken in order to penalise any breach of secrecy obligation provided for in Article 13. The Commission shall inform the other Member States thereof.
3. The Commission shall maintain a central repository in which the information that is published in accordance with Articles 18(2) and (3) is archived and made available online.

⁽¹⁾ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

*Article 20***Committee procedure**

1. The Commission shall be assisted by the Committee on Dispute Resolution. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

*Article 21***Review**

By 30 June 2024, the Commission shall evaluate the implementation of this Directive and shall present a report to the Council. That report shall, if appropriate, be accompanied by a legislative proposal.

*Article 22***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2019 at the latest. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 23***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply to any complaint submitted from 1 July 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after 1 January 2018. Competent authorities of Member States concerned may however agree to apply this Directive with regard to any complaint that was submitted prior to that day or to earlier tax years.

*Article 24***Addressees**

This Directive is addressed to the Member States.

Done at Luxembourg, 10 October 2017.

For the Council
The President
T. TÕNISTE

II

(Non-legislative acts)

DECISIONS

COUNCIL IMPLEMENTING DECISION (EU) 2017/1853

of 10 October 2017

amending Implementing Decision 2011/335/EU authorising the Republic of Lithuania to apply a measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ⁽¹⁾, and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) By a letter registered with the Commission on 26 April 2017, Lithuania requested authorisation for a measure derogating from point 11 of Article 287 of Directive 2006/112/EC in order to continue to exempt certain taxable persons whose annual turnover is no higher than EUR 45 000. Through that measure, those taxable persons would be exempt from certain or all of the obligations in relation to value added tax (VAT) referred to in Chapters 2 to 6 of Title XI of Directive 2006/112/EC.
- (2) The Commission informed the other Member States by letters dated 8 May 2017 and 10 May 2017 of the request made by Lithuania. By letter dated 11 May 2017, the Commission notified Lithuania that it had all the information necessary to consider the request.
- (3) A special scheme for small enterprises is already available to Member States under Title XII of Directive 2006/112/EC. The extended measure derogates from Title XII of Directive 2006/112/EC only in so far as the taxable person's annual turnover threshold for the special scheme is higher than that allowed for Lithuania under point 11 of Article 287 of Directive 2006/112/EC, which is EUR 29 000.
- (4) By Council Implementing Decision 2011/335/EU ⁽²⁾, Lithuania was authorised, as a derogating measure, to exempt taxable persons whose annual turnover is no higher than EUR 45 000 until 31 December 2014. By Council Implementing Decision 2014/795/EU ⁽³⁾ the derogating measure was extended until 31 December 2017.
- (5) Given that the fixed threshold resulted in reduced VAT obligations and thus reduction of administrative costs for small enterprises, Lithuania should be authorised to apply the measure for a further limited period, until 31 December 2020. Taxable persons may still opt for normal VAT arrangements.

⁽¹⁾ OJ L 347, 11.12.2006, p. 1.

⁽²⁾ Council Implementing Decision 2011/335/EU of 30 May 2011 authorising the Republic of Lithuania to apply a measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax (OJ L 150, 9.6.2011, p. 6).

⁽³⁾ Council Implementing Decision 2014/795/EU of 7 November 2014 extending the application of Implementing Decision 2011/335/EU authorising the Republic of Lithuania to apply a measure derogating from Article 287 of Directive 2006/112/EC (OJ L 330, 15.11.2014, p. 44).

- (6) The provisions of Articles 281 to 294 of Directive 2006/112/EC on a special scheme for small enterprises are subject to review and a Directive, amending these provisions of Directive 2006/112/EC, might therefore enter into force before 31 December 2020.
- (7) From information provided by Lithuania, the extension of the derogation will only have a negligible impact on the overall amount of tax revenue collected at the final stage of consumption.
- (8) The derogation has no impact on the Union's own resources accruing from value added tax because Lithuania will carry out a compensation calculation in accordance with Article 6 of Council Regulation (EEC, EURATOM) No 1553/89 ⁽¹⁾,

HAS ADOPTED THIS DECISION:

Article 1

The second paragraph of Article 2 of Implementing Decision 2011/335/EU is replaced by the following:

'It shall apply from 1 January 2012 until 31 December 2020 or until the entry into force of a directive amending the provisions of Articles 281 to 294 of Directive 2006/112/EC, whichever date is earlier.'

Article 2

This Decision shall take effect on the date of its notification.

It shall apply from 1 January 2018.

Article 3

This Decision is addressed to the Republic of Lithuania.

Done at Luxembourg, 10 October 2017.

For the Council
The President
T. TÕNISTE

⁽¹⁾ Council Regulation (EEC, Euratom) No 1553/1989 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ L 155, 7.6.1989, p. 9).

COUNCIL IMPLEMENTING DECISION (EU) 2017/1854**of 10 October 2017****amending Implementing Decision 2014/797/EU authorising the Republic of Estonia to apply a measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ⁽¹⁾, and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Articles 168 and 168a of Directive 2006/112/EC establish a taxable person's right to deduct value added tax (VAT) charged on supplies of goods and services received by him for the purposes of his taxed transactions. Point (a) of Article 26(1) of that Directive contains a requirement to account for VAT when a business asset is put to use for private purposes of the taxable person or his staff or, more generally, for purposes other than those of his business.
- (2) Council Implementing Decision 2014/797/EU ⁽²⁾ authorised Estonia to restrict the right to deduct VAT on the purchase, leasing, intra-Community acquisition and importation of certain passenger cars and to relieve the taxable person from accounting for VAT on the non-business use of vehicles covered by the restriction.
- (3) By letter registered with the Commission on 18 April 2017, Estonia requested an authorisation to continue to apply special measures concerning the purchase, leasing, intra-Community acquisition, and importation of certain passenger cars, derogating from the provisions laid down in Directive 2006/112/EC which govern a taxable person's right to deduct VAT paid on the purchase of goods and services and those which require tax to be accounted for on business assets used for non-business purposes.
- (4) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 14 June 2017 of the request made by Estonia. By letter dated 15 June 2017, the Commission notified Estonia that it had all the information it considered necessary for appraisal of the request.
- (5) In accordance with Article 6(2) of Implementing Decision 2014/797/EU Estonia submitted, together with the extension request, a report to the Commission on the application of that Implementing Decision, including a review of the percentage restriction applied on the right of deduction. Based on currently available information, Estonia submits that a rate of 50 % is still justifiable and remains appropriate.
- (6) The extension of these derogating measures should be limited in time to allow for an evaluation of their effectiveness and of the appropriate percentage. Estonia should therefore be authorised to continue to apply the measure for a limited period, until 31 December 2020.
- (7) Where Estonia considers that an extension of the authorisation beyond 2020 is necessary, it should submit to the Commission a report which includes a review of the percentage limit applied together with the request for an extension no later than 31 March 2020.
- (8) The derogation will only have a negligible effect on the overall amount of tax revenue collected at the stage of final consumption and will have no adverse impact on the Union's own resources accruing from VAT.
- (9) Implementing Decision 2014/797/EU should therefore be amended accordingly,

⁽¹⁾ OJ L 347, 11.12.2006, p. 1.

⁽²⁾ Council Implementing Decision 2014/797/EU of 7 November 2014 authorising the Republic of Estonia to apply a measure derogating from point (a) of Article 26(1) and Articles 168 and 168a of Directive 2006/112/EC on the common system of value added tax (OJ L 330, 15.11.2014, p. 48).

HAS ADOPTED THIS DECISION:

Article 1

Article 6 of Implementing Decision 2014/797/EU is replaced by the following:

'Article 6

1. This Decision shall take effect on the day of its notification.

It shall expire on 31 December 2020.

2. Any request for the extension of the authorisation provided for in this Decision shall be submitted to the Commission by 31 March 2020 and accompanied by a report which includes a review of the percentage set out in Article 1.'

Article 2

This Decision shall take effect on the date of its notification.

It shall apply from 1 January 2018.

Article 3

This Decision is addressed to the Republic of Estonia.

Done at Luxembourg, 10 October 2017.

For the Council
The President
T. TÕNISTE

COUNCIL IMPLEMENTING DECISION (EU) 2017/1855**of 10 October 2017****authorising Romania to apply a special measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ⁽¹⁾, and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Under point 18 of Article 287 of Directive 2006/112/EC, Romania may exempt from value added tax (VAT) taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 35 000 at the conversion rate on the day of its accession.
- (2) By virtue of Council Implementing Decision 2012/181/EU ⁽²⁾ Romania is authorised to apply a higher threshold and to exempt from VAT taxable persons with annual turnover not exceeding EUR 65 000. This measure was extended by Council Implementing Decision 2014/931/EU ⁽³⁾ which expires on 31 December 2017.
- (3) By letter registered with the Commission on 26 April 2017 Romania requested the authorisation to continue derogating from point 18 of Article 287 of Directive 2006/112/EC and at the same time to increase the exemption threshold to the equivalent in national currency of EUR 88 500.
- (4) A higher threshold for the special scheme for small enterprises is a simplification measure, as it may significantly reduce the VAT obligations of small enterprises.
- (5) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letter dated 9 June 2017 of the request made by Romania. The Commission notified Romania by letter dated 12 June 2017 that it had all the information necessary to consider the request.
- (6) Romania expects that the measure reduces VAT-related obligations for a number of small enterprises. It should also reduce the burden on the tax authorities by removing the need to monitor the collection of a small volume of revenues from larger number of small enterprises.
- (7) Given that this derogating measure is to result in reduced VAT obligations for small enterprises, Romania should be authorised to apply the measure for a limited period. Taxable persons should still be able to opt for the normal VAT arrangements.
- (8) As Articles 281 to 294 of Directive 2006/112/EC governing the special scheme for small enterprises are subject to review, it is possible that a directive amending those provisions of Directive 2006/112/EC will enter into force before the period of validity of the derogation expires on 31 December 2020.
- (9) Based on information provided by Romania, the increased threshold will have a negligible impact on the overall amount of tax revenue collected at the stage of final consumption.

⁽¹⁾ OJ L 347, 11.12.2006, p. 1.

⁽²⁾ Council Implementing Decision 2012/181/EU of 26 March 2012 authorising Romania to introduce a special measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax (OJ L 92, 30.3.2012, p. 26).

⁽³⁾ Council Implementing Decision 2014/931/EU of 16 December 2014 extending the application of Implementing Decision 2012/181/EU authorising Romania to introduce a special measure derogating from Article 287 of Directive 2006/112/EC on the common system of value added tax (OJ L 365, 19.12.2014, p. 145).

- (10) The derogation has no impact on the Union's own resources accruing from VAT, because Romania will carry out a compensation calculation in accordance with Article 6 of Council Regulation (EEC, Euratom) No 1553/89 ⁽¹⁾,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from point 18 of Article 287 of Directive 2006/112/EC, Romania is authorised to exempt from VAT taxable persons whose annual turnover is no higher than the equivalent in national currency of EUR 88 500 at the conversion rate on the day of its accession.

Article 2

This Decision shall take effect on the date of its notification.

This Decision shall apply from 1 January 2018 until 31 December 2020, or until the entry into force of a directive amending the provisions of Articles 281 to 294 of Directive 2006/112/EC, whichever date is the earlier.

Article 3

This Decision is addressed to Romania.

Done at Luxembourg, 10 October 2017.

For the Council
The President
T. TÔNISTE

⁽¹⁾ Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ L 155, 7.6.1989, p. 9).

COUNCIL IMPLEMENTING DECISION (EU) 2017/1856**of 10 October 2017****authorising the Republic of Poland to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ⁽¹⁾, and in particular Article 395 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Article 193 of Directive 2006/112/EC provides that the taxable person supplying the goods or services is, as a general rule, liable for the payment of value added tax (VAT) to the tax authorities.
- (2) By letter registered with the Commission on 7 October 2016, Poland has requested a derogation from Article 193 of Directive 2006/112/EC in order to apply the reverse charge mechanism to supplies of hard drives such as solid-state drives and hard disk drives.
- (3) In accordance with Article 395(2) of Directive 2006/112/EC, the Commission informed the other Member States by letters dated 12 and 13 July 2017 of the request made by Poland. By letter dated 13 July 2017, the Commission notified Poland that it had all the information necessary to consider the request.
- (4) Hard drives, which are not covered by Article 199a of Directive 2006/112/EC, became another commodity in the category of electronic products used for VAT fraud in Poland. According to Poland, an increase of VAT fraud appeared on the hard drive market through the use of the 'missing trader' mechanism. The scale and scope of this practice has a direct, very negative impact on distributors not participating in the fraud and it leads to the decrease of VAT revenues.
- (5) Poland undertook a number of measures to tackle and prevent VAT fraud. However, until the measures bring effective results, Poland considers that additional support, in the form of a temporary measure such as the introduction of the reverse charge mechanism, is necessary.
- (6) Poland should therefore be authorised to apply the reverse charge mechanism to supplies of hard drives such as solid-state drives and hard disk drives from 1 January 2018. The derogation should be limited in time until 31 December 2020.
- (7) Until the expiry of the derogation the measures undertaken by Poland are expected to prevent further spreading of the VAT fraud in the sector of hard drives and thus Poland will not need to derogate any more from Article 193 of Directive 2006/112/EC with regards to these supplies. Poland should therefore not seek the renewal of the derogation.
- (8) The derogation has no impact on the Union's own resources accruing from VAT,

HAS ADOPTED THIS DECISION:

Article 1

By way of derogation from Article 193 of Directive 2006/112/EC, Poland is authorised to designate the recipient as the person liable to pay VAT in the case of supplies of hard drives such as solid-state drives and hard disk drives.

Article 2

This Decision shall take effect on the date of its notification.

This Decision shall apply from 1 January 2018 and shall expire on 31 December 2020.

⁽¹⁾ OJ L 347, 11.12.2006, p. 1.

Article 3

This Decision is addressed to the Republic of Poland.

Done at Luxembourg, 10 October 2017.

For the Council
The President
T. TÕNISTE

COMMISSION IMPLEMENTING DECISION (EU) 2017/1857**of 13 October 2017****on the recognition of the legal, supervisory and enforcement arrangements of the United States of America for derivatives transactions supervised by the Commodity Futures Trading Commission as equivalent to certain requirements of Article 11 of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ⁽¹⁾, and in particular Article 13(2) thereof,

Whereas:

- (1) Article 13 of Regulation (EU) No 648/2012 provides for a mechanism intended to establish solutions that ensure consistency between the legal requirements established by the Union and those of third countries in the field covered by that Regulation. Amongst those solutions, the Commission is empowered to adopt decisions declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the requirements laid down in Articles 4, 9, 10 and 11 of Regulation (EU) No 648/2012 so that counterparties entering into a transaction within the scope of that Regulation, where at least one of the counterparties is established in that third country, are deemed to have fulfilled those requirements by complying with the requirements set out in that third country's legal regime. That declaration of equivalence allows avoiding the application of duplicative or conflicting rules and therefore contributes to the achievement of the overarching aim of Regulation (EU) No 648/2012 to reduce systemic risk and increase the transparency of derivatives markets by ensuring an internationally consistent application of the principles agreed with the Union's international partners and laid down in that Regulation.
- (2) Paragraphs 1, 2 and 3 of Article 11 of Regulation (EU) No 648/2012, as specified by the technical standards adopted pursuant to Article 11(14)(a) and (b) and Article 11(15) of that Regulation, establish the Union's legal requirements concerning the timely confirmation, portfolio compression and reconciliation applicable to OTC derivative contracts not cleared by a CCP, the valuation and dispute resolution obligations applicable to those contracts ('operational risk mitigation techniques') as well as the obligations on the exchange of collateral ('margins') between counterparties.
- (3) In order for a third country legal regime to be considered equivalent to the legal regime of the Union in respect of operational risk mitigation techniques and margins requirements, the substantive outcome of the applicable legal, supervisory and enforcement arrangements should be equivalent to Union requirements in respect of the regulatory objectives they achieve. The purpose of this equivalence assessment is therefore to verify that the legal, supervisory and enforcement arrangements of the United States of America (USA) ensure that OTC derivative contracts not cleared by a CCP and entered into by at least one counterparty established in that third country do not expose financial markets in the Union to a higher level of risk than those markets could be exposed to by that type of derivative contracts entered into by counterparties established in the Union and, consequently, do not pose unacceptable levels of systemic risk in the Union.
- (4) On 1 September 2013, the Commission received the technical advice of the European Markets Supervisory Authority (ESMA) on the legal, supervisory and enforcement arrangements in the USA ⁽²⁾ regarding, among

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.⁽²⁾ ESMA/2013/BS/1157, Technical advice on third country regulatory equivalence under EMIR — US, Final report, European Securities and Markets Authority, 1 September 2013.

others, the operational risk mitigation techniques applicable to OTC derivative contracts not cleared by a CCP. In its technical advice, ESMA found that the legally binding requirements on timely confirmation, portfolio reconciliation and portfolio compression in the USA were equivalent to the legally binding requirements applicable under Regulation (EU) No 648/2012. ESMA considered that at the moment of its assessment, however, the USA regime for dispute resolution was not equivalent with that of Article 11(1) of Regulation (EU) No 648/2012. ESMA also observed that the equivalence between regimes for bilateral margins could not be assessed at the time, as the technical standards specifying the rules on bilateral margins in the Union had not yet been developed.

- (5) The Commission has considered ESMA's advice in carrying out its assessment, together with the regulatory developments that have taken place since then. This Decision is not only based, however, on a comparative analysis of the legal, supervisory and enforcement requirements applicable in the USA, but also on an assessment of the outcome of those requirements, and their adequacy to mitigate the risks arising from those contracts in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012.
- (6) The legal, supervisory and enforcement arrangements applicable in the USA for OTC derivative contracts are laid down in title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ('Dodd-Frank Act') and in the specific implementing rules adopted by the Commodity Futures Trading Commission ('CFTC Regulations'). The Dodd-Frank Act, which entered into force in July 2010, established a new regulatory framework for certain OTC derivatives defined as swaps in section 1a(47) of the Commodity Exchange Act ('CEA'), aiming at reducing systemic risk, increasing transparency and promoting market integrity within the financial system. The CFTC has jurisdiction over swaps and most of the operative provisions of title VII of the Dodd-Frank Act became applicable in 2011.
- (7) The operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP, as added in a new section 4s(i) to the CEA by section 731 of the Dodd-Frank Act, apply to swap dealers and major swap participants, as defined in the CEA. This Decision should therefore cover the legal, supervisory and enforcement arrangements regarding timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations, as well as margin requirements applicable to swap dealers and major swap participants established in the USA that are authorised and supervised in accordance with the CFTC Regulations. This Decision should however not cover USA legal, supervisory and enforcement arrangements applicable to persons that are registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).
- (8) CFTC Regulations on operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP contain similar obligations to those provided for in paragraphs 1 and 2 of Article 11 of Regulation (EU) No 648/2012. In particular, Subpart I of Part 23 of the CFTC Regulations contains specific detailed requirements regarding timely confirmation, portfolio compression, portfolio reconciliation, transaction valuation and dispute resolution applicable to OTC derivative contracts not cleared by a CCP. In all following respects, the requirements set out in the CFTC Regulations are equivalent to the relevant requirements of Regulation (EU) No 648/2012: (i) the frequency and thresholds for portfolio reconciliation match; (ii) the deadlines for timely confirmation match; (iii) requirements for portfolio compression on a 'comply or explain' basis; (iv) requirements for daily valuation of non-cleared transactions. Taking into account the limited impact due to the difference in scope of the requirements for agreements on how disputes are resolved, those requirements should also be considered equivalent to the requirements of Regulation (EU) No 648/2012 on dispute resolution.
- (9) On the basis of the above, in relation to swaps that are under the jurisdiction of the CFTC, as defined in section 1a(47) of the CEA, the CFTC's legal, supervisory and enforcement arrangements applicable to swap dealers and major swap participants should be considered as equivalent to the requirements set out in Regulation (EU) No 648/2012 in respect of the timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations applicable to OTC derivative contracts not cleared by a CCP, as laid down in Article 11(1) and Article 11(2) of that Regulation.

- (10) Concerning the margins for OTC derivative contracts not cleared by a CCP, the legally binding requirements of the CFTC consist of the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants published in January 2016 ('final margin rule') and the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross Border Application of the Margin Requirements ('cross-border margin rule') published in August 2016.
- (11) While the CFTC Regulations on operational risk mitigation techniques for OTC derivative contracts not cleared by a CCP apply to all swap dealers and major swap participants, the CFTC Regulations on margins for those OTC derivative contracts only apply to swap dealers and major swap participants that are not subject to a prudential regulator. The CEA definition of 'prudential regulator' includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency.
- (12) CFTC Regulations applicable to margins for OTC derivative contracts not cleared by a CCP only require the exchange of initial margin with a 'covered counterparty' as defined in section 23.151 of the CFTC Regulations. A covered counterparty is a counterparty that is a financial end user with material swaps exposure or a swap entity that enters into a swap with a covered swap entity. According to section 23.150 of the CFTC Regulations, the material swaps exposure is an average daily notional value of non-cleared OTC derivatives that exceeds USD 8 billion (8 000 million), whereas the analogous threshold set out in Article 28 of Commission Delegated Regulation (EU) 2016/2251⁽¹⁾ is EUR 8 billion (8 000 million). In the Union, the requirement to exchange variation margin does not have a materiality threshold, and applies to all counterparties subject to Article 11(3) of Regulation (EU) No 648/2012. The CFTC Regulations for combined minimum transfer amount of initial and variation margin in the final margin rule is USD 500 000, whereas the related requirement set out in Article 25 of Delegated Regulation (EU) 2016/2251 is EUR 500 000. Taking into account the limited impact due to the difference in currencies, these amounts should be considered equivalent.
- (13) The requirements of the final margin rule apply to swaps, which encompass almost all contracts defined as OTC derivatives in Regulation (EU) No 648/2012 with the exception of foreign exchange forwards and foreign exchange swaps, for which the final margin rule sets no requirements. In addition, CFTC Regulations do not contain any specific treatment for structured products including covered bonds and securitisations. In the Union, foreign exchange swaps and foreign exchange forwards are exempted from the initial margins requirements, and derivatives associated with covered bonds for hedging purposes may also be exempted from initial margin requirements. This Decision should therefore only apply to OTC derivatives that are subject to margins under both the Union law and the CFTC Regulations.
- (14) The requirements in the CFTC Regulations for the calculation of initial margin are equivalent to the requirements set out in Regulation (EU) No 648/2012. Like Annex IV to Delegated Regulation (EU) 2016/2251, the CFTC Regulations allow the use of a standardised model. Alternatively, internal or third party models may be used for that calculation where those models contain certain specific parameters, including minimum confidence intervals and margin periods of risk, and certain historical data, including stressed periods. Those models must be approved by the CFTC or a registered futures association.
- (15) The requirements in the CFTC Regulations on eligible collateral and on how that collateral is held and segregated are equivalent to those set out in Article 4 of Delegated Regulation (EU) 2016/2251. The CFTC Regulations contain an equivalent list of eligible collateral, and the preamble to the final margin rule states that swap dealers

⁽¹⁾ Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

and major swap participants that are not subject to a prudential regulator should take collateral concentration into account. The CFTC requirements on margins for OTC derivative contracts not cleared by a CCP should therefore be considered equivalent to those provided for under Article 11(3) of Regulation (EU) No 648/2012.

- (16) With regard to the equivalent level of protection of professional secrecy, in the USA, information held by the CFTC, as well as other federal regulators, is subject to the Privacy Act and the Freedom of Information Act (FOIA). Under the FOIA, in many cases, steps must be taken by an individual or an organization to secure confidential treatment of submitted information. Therefore, the Privacy Act and the FOIA provide guarantees of professional secrecy, including the protection of business secrets shared by the authorities with third parties, equivalent to those set out in Title VIII of Regulation (EU) No 648/2012. The USA requirements should be considered to provide an equivalent level of protection of professional secrecy as guaranteed in Regulation (EU) No 648/2012.
- (17) Finally, with regard to the effective supervision and enforcement of the legal arrangements in the USA, the CFTC has broad investigative and surveillance powers to assess compliance with the timely confirmation, portfolio compression and reconciliation, valuation and dispute resolution obligations applicable to OTC derivative contracts not cleared by a CCP. The CFTC can take a wide range of supervisory measures to stop any breach of the applicable requirements. Moreover, the USA legal framework provides for civil penalties, including temporary or permanent restraining orders or injunctions, and fines, as well as criminal penalties, for breaches of the applicable requirements. Those measures should therefore be considered to provide for the effective application of the relevant legal, regulatory and enforcement arrangements under the Dodd-Frank Act, CEA and CFTC Regulations in an equitable and non-distortive manner so as to ensure effective supervision and enforcement.
- (18) The Commission, in cooperation with ESMA, should continue monitoring on a regular basis the evolution and the effective implementation of the legal, supervisory and enforcement arrangements in the USA for OTC derivative contracts regarding the timely confirmation, portfolio compression and reconciliation, valuation, dispute resolution and margin requirements applicable to OTC derivative contracts not cleared by a CCP on the basis of which this Decision has been taken. This should be without prejudice to the possibility of the Commission to undertake a specific review at any time, where relevant developments make it necessary for the Commission to re-assess the equivalence granted by this Decision. Such re-assessment could lead to the repeal of this Decision.
- (19) The measures provided for in this Decision are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DECISION:

Article 1

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of the United States of America (USA) for operational risk-mitigation techniques that are applied to transactions regulated as 'swaps' by the Commodity Futures Trading Commission (CFTC) in accordance with section 721(a)(21) of the Dodd-Frank Act and that are not cleared by a CCP shall be considered as equivalent to the requirements set out in paragraphs 1 and 2 of Article 11 of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in the USA and registered with the CFTC as a swap dealer or major swap participant.

Article 2

For the purposes of Article 13(3) of Regulation (EU) No 648/2012, the legal, supervisory and enforcement arrangements of the USA for the exchange of collateral that are applied to transactions regulated as 'swaps' by the Commodity Futures Trading Commission (CFTC) in accordance with section 721(a)(21) of the Dodd-Frank Act and that

are not cleared by a CCP shall be considered as equivalent to the requirements of Article 11(3) of Regulation (EU) No 648/2012, where at least one of the counterparties to those transactions is established in the USA and registered with the CFTC as a swap dealer or major swap participant, and that counterparty is subject to the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants and the Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross Border Application of the Margin Requirements.

Article 3

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 13 October 2017.

For the Commission

The President

Jean-Claude JUNCKER

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