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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 1 March 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: COMMUNICATION FROM THE COMMISSION TO THE COUNCIL in
accordance with Article 395 of Council Directive 2006/112/EC

Delegations will find attached Commission document COM(2013) 105 final.

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

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1. BACKGROUND

In accordance with Article 395 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to apply special measures for derogation from that Directive in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. As this procedure provides for derogations from the general principles of VAT, in accordance with the consistent rulings from the European Court of Justice, such derogations should be limited in scope and proportionate.

By letter registered with the Commission on 23 October 2012, Romania has requested to be authorised to continue a measure derogating from Article 193 of the VAT Directive. In accordance with Article 395(2) of that Directive, the Commission informed the other Member States by letter dated 18 January 2013 of the request made by Romania. By letter dated 22 January 2013, the Commission notified Romania that it had all the information it considered necessary for appraisal of the request.

Romania requests to be authorised to continue to apply the reverse charge mechanism in relation to certain cereals and oilseeds for which it previously obtained a derogation¹.

This derogation was granted by the Council under very specific circumstances, under which Romania committed itself to implement, during the application period of the said derogation, a series of reforms which would make it possible to revert to the normal system after this transitional period of time.

This approach was notably justified by the risk of fraud moving to other Member States in a sector whose economic importance is quite substantial in several Member States.

It should be recalled that, during Council negotiations on the aforesaid derogation, a number of Member States expressed their concerns that any derogation from the system of fractionated payment cannot be more than a last resort and an emergency measure in proven cases of fraud, and must offer guarantees as to the necessity and exceptional nature of the derogation granted, the duration of the measure and the specific nature of the products concerned. Those Member States furthermore pointed out that the reverse charge mechanism always entails a risk of the fraud being transferred to other Member States and recalled that the reverse charge procedure should not be used systematically to compensate for inadequate surveillance by a

¹ Council implementing Decision 2011/363/EU of 20 June 2011 authorising Romania to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 163, 23.6.2011, p. 26)

Member State's tax authorities. In the specific case of Romania, they understood that the sector concerned was upstream in the chain of production and noted that the Romanian authorities had undertaken not to request a renewal of the derogation and above all to implement structural measures to remedy the situation before the end of the two-year application period of the derogation.

Romania explicitly and unequivocally confirmed its acceptance of these conditions.

This engagement was in particular mentioned in the first recital of the Council implementing Decision 2011/363/EU of 20 June 2011 where it is stated that Romania *"has said that it will not seek renewal of this authorisation"*.

Although Romania accepted this non-renewable application period of 2 years, a request for extension was sent.

2. REVERSE CHARGE

The person liable for the payment of VAT pursuant to Article 193 of the VAT Directive is the taxable person supplying the goods or services. The purpose of the reverse charge mechanism is to shift that liability onto the taxable person to whom the supplies are made.

Missing trader fraud occurs when traders evade paying VAT to the tax authorities after selling their products. Their customers, however, are entitled to a tax deduction as they are in possession of a valid invoice. In the most aggressive cases of such tax evasion the same goods or services are, via a "carousel" scheme (which involves the goods or services being traded between Member States) supplied several times without payment of VAT to the tax authorities. By designating the person to whom the goods or services are supplied as the person liable for the payment of VAT in such cases, the reverse charge mechanism has been found to eliminate the opportunity to engage in that form of tax evasion.

3. THE REQUEST

Romania requests, under Article 395 of the VAT Directive, that the Council, acting upon a proposal of the Commission, authorises Romania to continue the special measure derogating from Article 193 of the VAT Directive as regards the application of the reverse charge mechanism in relation to wheat, spelt, rye, barley, maize, soya, beans, rape or colza seeds, sunflower seeds and sugar beet.

The reason for the request is essentially based on the fact that Hungary obtained a similar derogation for agricultural products for also exactly 2 years² (and under the same condition, explicitly accepted by Hungary, that a renewal would not be sought). However, the start and end date of the two derogations are different: from 1 June 2011 until 31 May 2013 for Romania and from 1 July 2012 until 30 June 2014 for Hungary. According to Romania, there will be a risk of fraud moving to Romania, in

² Council implementing Decision 2012/624/EU of 4 October 2012 authorising Hungary to introduce a special measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax (OJ L 274, 9.10.2012, p. 26)

particular because the Hungarian derogation will continue to be applied after the Romanian one has come to an end. Anti-fraud measures which have been put in place in this context would, in their view, not be sufficient to counter fraud after 31 May 2013.

4. THE COMMISSION'S VIEW

When the Commission receives requests in accordance with Article 395, these are examined to ensure that the basic conditions for their granting are fulfilled i.e. whether the proposed specific measure simplifies procedures for taxable persons and/or the tax administration or whether the proposal prevents certain types of tax evasion or avoidance. In this context, the Commission has always taken a limited, cautious approach to ensure that derogations do not undermine the operation of the general VAT system, are limited in scope, necessary and proportionate.

In the first place, it is the Commission's view that the type of goods in question – cereals and oilseeds – are of a nature which should make auditing possible through conventional control means without the need to implement the reverse charge mechanism. Therefore, the derogation granted to Romania was granted in exceptional circumstances in order to give time to Romania to implement certain reforms to combat the fraud.

Secondly, the measure was never intended to be a long term solution or to compensate for inadequate surveillance of taxable persons in these extremely valuable markets. The derogation was justified as part of a package of measures to be undertaken by Romania while, at the same time, being restricted to a limited period in time, and with the agreed condition not to seek renewal of the derogation. The very same conditions were included in the derogation granted to Hungary.

In addition, indications are that fraud in these sectors has shifted to, in particular, other Member States in South–East Europe. Against this background, applying the reverse charge for a longer period of time would represent a fraud risk for these Member States, a risk which cannot be underestimated given the importance of these sectors in the region.

5. CONCLUSION

On the basis of above-mentioned elements, the Commission objects to the request made by Romania.