Council of the
European Union

Brussels, 28 February 2019
(OR. en)

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NOTE

From:	General Secretariat of the Council
To:	Working Party on Information
Subject:	Public access to documents - Confirmatory application No 05/c/01/19

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 24 January 2019 and registered on the same day (Annex 1);
- reply from the General Secretariat of the Council dated 14 February 2019 (Annex 2);
- confirmatory application dated 27 February and registered on 28 February 2019 (Annex 3).

ANNEX 1

[E-mail message sent to access@consilium.europa.eu on 24 January 2019 - 10:19 using the electronic form available in the Register application]

Title/Gender: **DELETED**

Family Name: **DELETED**

First Name: **DELETED**

E-Mail: **DELETED**

Occupation: **DELETED**

On behalf of:

Address: **DELETED**

Telephone:

Mobile:

Fax:

Requested document(s): Document Number: ST 9155 2017 INIT
Title: Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold Compatibility with the EU Treaties
Subject Matter: JUR 239 FISC 106 ECOFIN 356
Document type: OPINION OF THE LEGAL SERVICE
Document Date: 12-05-2017

1st preferred linguistic version: EN - English

2nd preferred linguistic version: NL - Dutch

Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 14 February 2018

DELETED
Email: **DELETED**

Ref. 19/0242-mw/dm

Request made on: 24.01.2019

Dear **DELETED**,

Thank you for your request for access to documents of the Council of the European Union.[1]

Document **9155/2017**, dated 12th May 2017, comprises an opinion of the Council Legal Service on the compatibility with the EU Treaties of the proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold.

The requested opinion contains legal advice, except for its paragraphs 1-7.

[1] The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

The decision-making procedure to which the requested document refers has been finalised with the adoption of the Council Directive 2018/2057/EU of 20 December 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold.

However, the legal advice contained in the requested opinion is relevant for the upcoming decision-making procedures for authorising a requesting Member State to apply the "Generalised Reverse Charge Mechanism" (hereinafter the “GRCM”) provided by Council Directive 2018/2057/EU. Full disclosure of the requested document would carry the real risk of compromising the capacity of the Council to reach an agreement in that context. In addition, should the opinion be released, third parties may attempt to influence or exert pressure on the specific decision-making procedures in question. Disclosure of the requested document would thus undermine the decision-making process pursuant to Article 4(3) second indent of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

Furthermore, the legal advice covered by the requested opinion deals with issues which are complex, particularly contentious and relevant each time Members States shall request recourse to the GRCM mechanism. The legal advice is therefore particularly sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over the above indicated interests so as to justify disclosure of the documents.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you full access to the requested document. However, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, you may have access to paragraphs 1 to 7 of doc. 9155/2017.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).[2]

Yours sincerely,

Paulo VIDAL

Enclosure

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[2] Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

ANNEX 3

From: DELETED

Sent: Wednesday, February 27, 2019 7:06 PM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: RE: Ref. 19/0242-mw/dm

Dear sir, madam,

With this attached letter, I hereby request the Council to review the Decision given in this matter.

Met vriendelijke groeten / Kind regards

DELETED

[redacted]

[redacted]

Council of the European Union
General Secretariat
Rue de la Loi/Wetstraat 175
B-1048 Bruxelles/Brussel
Belgique/België

Reference: 19/0242-mw/dm

Dear sir, madam,

With this letter, I respectfully request the Council to review the decision communicated by letter dated 14 February 2019 regarding the publication of Document 9155/2017 dated 12 May 2017. I believe there is an overriding public interest under *Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents* in the publication of specific excerpts of this document. I also believe that limiting disclosure to these excerpts would avoid undermining the decision-making process pursuant to Article 4(3) second indent of said Regulation.

Council Directive 2018/2057/EU of 20 December 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold contains a particular legal term -- "non-cross-border" -- that was introduced to the draft legislation subsequent to the legal advice provided to the Council on 12 May 2017. The precise definition of this term is essential to understanding the impact that the "generalised reverse charge mechanism (GRCM)" would have on a large sector of taxpayers whose economic activities are essential to the strength of the European economy. Considering the exceptional shift in procedures that compliance with the GRCM would require, it is not possible for the affected taxpayers to delay considering the impact these new compliance obligations would have until after implementation of the GRCM by a Member State has been approved by the Council.

There is a profound lack of information on how the GRCM would be applied in the context that I shall outline below. There is no analysis of this issue in any publications from legal experts, trade

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associations, or any EU-level institutions. As such, the legal advice contained in Document 9155/2017 is the only authoritative source in this matter. I therefore ask the Council to consider the following facts when reviewing the decision to disclose (a portion of) the legal advice given to the Council on 12 May 2017 that was the grounds for adding the term "non-cross-border" to Council Directive 201/82057/EU.

Our organization, [redacted] supports businesses that carry out international road freight transportation activities. Together with our sister company, [redacted] we have over 160,000 customers. These customers use their [redacted] Cards to purchase fuel throughout Europe, and can request [redacted] to process the refund claims for the VAT on these purchases under the procedure defined in *Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State*. [redacted] processes over 100,000 refund claims -- involving a total of over one million invoices -- annually, and can state authoritatively that invoices issued to international road freight transportation companies exceed the EUR 17,500 threshold of the GRCM with high frequency.

It is common knowledge that international freight transportation is crucial to a thriving European economy, yet the unique characteristics of this sector are often overlooked by legislators. While much attention is currently being paid to the "novel" regulatory challenges of the digital economy (such as "virtual" permanent establishments and the freedom to provide services throughout the Single Market), international freight transportation enterprises have been coping with similar gaps in European law and inconsistent national provisions for decades. In this regard, Council Directive 2018/2057/EU is only the most recent piece of legislation that, due to a lack of clarity, has introduced a high degree of uncertainty among this vital industry.

The introduction of the term "non-cross-border" as a qualifier for the type of supplies subject to the GRCM is a deviation from the terminology used throughout *Council Directive 2006/112/EC EC on the common system of value added tax* (the "VAT Directive"). Nowhere in the VAT Directive are supplies of goods ("the transfer of the right to dispose of tangible property as owner," Article 14) qualified as either "cross-border" or "non-cross-border". Rather, supplies of goods are distinguished between supplies of goods without transport (Title V, Chapter 1, Section 1) and supplies of goods with transport (Title V, Chapter 1, Section 2). Supplies of goods transported to

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a Member State other than that from which the transportation began (which could be considered "cross-border" supplies) are split into two "intra-Community" transactions, with the supply being exempt under Article 138(1), and the acquisition being taxed in the Member State where the transportation of the goods terminates (Article 40).

Supplies of goods transported across a border are therefore already subject to a reverse charge, regardless of the amount of the transaction ("VAT shall be payable by any person making a taxable intra-Community acquisition of goods," Article 200). In this context, it is redundant to emphasize that the GRCM applies only to "non-cross-border" supplies of goods. The question then arises as to why the effort was taken to insert this qualifier, and for what purpose. Does "cross-border" refer not to the goods themselves crossing a border, but rather to the "right to dispose of tangible property as owner" being transferred "cross-border"? If this were *not* the case, then the GRCM would be a de facto expansion of the mechanism of the "intra-Community" supply to so-called "point-of-sale" purchases (supplies of goods without transport) made by taxable persons in Member States where they are not currently identified as VAT payers under Article 214. This is a consequence of the fact that the transfer of ownership would "cross a border" even if the physical goods did not. In regards to the international road freight transportation sector, this would apply to fuel purchases made in any Member State where an enterprise was not established. It is therefore not clear if a "non-cross-border supply" refers to a situation where the goods themselves do not cross a border (which is redundant, as the GRCM could only apply to such supplies) or if the term refers to a transfer of property rights across a border (which would seek to exclude the application of the GRCM in a Member State to taxpayers not established there).

On the other hand, if the term "cross-border" does not apply to the transfer of ownership rights – and there are no indications within the greater context of the VAT Directive that it does – then this would trigger a requirement for each transportation company to register as a VAT payer under Article 214 if they were to receive a large fuel invoice from a supplier in that Member State. The resulting administrative requirements (either submission of periodic VAT returns under Article 250, or the subsequent de-registration as a VAT payer under varying national provisions) would then be triggered not from a novel and predictable event, such as expansion into a new market, but rather as the result of a common occurrence, e.g. the purchase of fuel in volumes that exceed the GRCM threshold. It may seem counter-intuitive, but international road freight transportation enterprises have, by nature of their operations, very limited exposure to the complex requirements of foreign tax obligations. As meeting these new obligations will invariably be costly and time-

consuming, the affected taxpayers need as much advance notice as possible to begin assessing their risk and considering which new measures need to be taken.

Furthermore, it is important to note that, while the phrase "reverse charge" is commonly understood to mean a transfer of the liability to pay VAT from a supplier to a recipient, this term appears only once in the VAT Directive itself. This singular reference is found in Article 226(11a), where the term is not given a formal definition, but is instead mentioned as a simple requirement for the exact text that is to appear on an invoice for any transaction where a "customer is liable for the payment of the VAT." Under the general framework of the VAT Directive, a customer is liable for payment of VAT -- either as a result of an intra-community Acquisition of a good (Article 200) or any supplies of services (Article 44) -- in the Member State where that taxable person is *established*. If the GRCM is a "reverse charge" in the sense that not only the liability to pay the tax to the recipient of a good or service is transferred, but also the place of the taxable transaction is shifted, then a supplier that carries out exclusively "point-of-sale" transactions (such as a local fuelling station) would suddenly face the complex compliance burdens normally reserved for internationally operating enterprises.

Considering the above, it is not clear if a) the GRCM would have no effect on the recipients of supplies of goods in Member States where they are not identified for VAT purposes, b) the GRCM would introduce a registration requirement for non-established businesses, or c) the GRCM would shift the place of the taxable transaction to the Member State where the recipient is established. Clarity on this matter should therefore be considered to be in the public interest, especially considering the impact it would have on the vital international road freight transportation industry.

On balance, this public interest should weigh heavily against the need to protect the Council's decision making process. As suggested above, the interests served by non-disclosure, as listed in the Council's decision, could be mitigated by limiting the sections that were disclosed to the public. The public interest in this matter is not directed at future decisions regarding when a Member State may be granted the ability to apply the GRCM, but rather what the consequences would be after the decision was made. To reiterate the point stated earlier, the affected taxpayers must be granted the opportunity to assess their compliance obligations prior to the GRCM being implemented. As the criteria a Member State must meet in order to be considered for approval for use of the GRCM are listed in Article 199c(1) from the second indent, and the provision that

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concerns the public interest is contained wholly within the first indent of Article 199c(1), it should be possible to restrict publication to only the sections that are of the public interest.

Should partial publication of the legal advice not be possible for practical purposes, my final request to the Council would be to consider the publication of the legal advice in its entirety as introducing only a minimal risk to the decision making process of the Council in this particular instance. As Article 199c contains six individual requirements to be met by a Member State wishing to implement the GRCM, it is exceptionally specific in the standard that would be applied by the Council. If the legal advice in Document 9155/2017 is limited to an analysis of the compatibility of Article 199c with the EU Treaties, then the opinions contained within this legal advice would be of primary importance to a challenge to the legality of the application of the GRCM, not to the decision-making process. Opinions of the Council Legal Service that would be used in a legal challenge would ultimately come forward during a court proceeding, and the information would therefore be disclosed to parties outside of the Council. Whereas a legal proceeding is a hypothetical scenario at this time, there is a real possibility, at the time of this writing, that the Czech Republic will implement the GRCM as early as 1 July 2020. This will trigger new obligations for a great number of taxpayers who will need legal certainty regarding their tax liability.

It is without question that this matter is complex and contentious. As such, it would be impossible to exclude external pressure from either the decision making process of the Council or from the advisory process of the Council Legal Service in this matter. As a legal advisor, I am acutely aware of the need for confidentiality when providing legal advice. However, I am also acutely aware of the necessity for clear and precise terminology within complex legal provisions. In this specific instance, the general public has a definite need to know what their ongoing obligations under the GRCM will be, whereas the interests of the Council essentially expire once Article 199c can no longer be applied after 30 June 2022. I sincerely hope the Council will take the above-stated facts into consideration and reconsider the necessity of publishing this document.

Kind regards,

[redacted]