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NOTE

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| From: | General Secretariat of the Council |
| To: | Permanent Representatives Committee/Council |
| No. prev. doc.: | 7120/17 FISC 62 ECOFIN 188 + COR 1 |
| No. Cion doc.: | 15817/16 FISC 241 IA 145 |
| Subject: | 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 – General approach |

I. INTRODUCTION

1. At the ECOFIN meeting of 17 June 2016, the Commission made the following statement to be inserted in the minutes: "*The Commission commits to present, before the end of the year, a legislative proposal allowing individual Member States to derogate from the common system of value added tax so as to apply a generalised reverse charge mechanism to domestic supplies above a defined threshold and preserving the Internal Market.*".
2. On 21 December 2016, the Commission therefore adopted a 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 (GRCM) in relation to supplies of goods and services above a certain threshold (doc. 15817/16 FISC 241).

3. This Proposal was first discussed under the Maltese Presidency at the meeting of the Working Party on Tax Questions (WPTQ) of 26 January 2017. A first compromise text was prepared by the Presidency and discussed at the WPTQ of 22 February 2017. A second compromise text was presented and discussed at the WPTQ of 8 March 2017. It was then updated with a view to Coreper meeting on 15 March 2017 and Council meeting on 21 March 2017 (doc. 7118/17 FISC 61).
4. The Presidency noted the orientations given by Ministers as well as open issues which would serve as a basis for further work on this issue in the Council.
5. Further work was undertaken at the meetings of the WPTQ on 4 April and 19 May 2017. At the meeting on 4 April, a new compromise presented by the Presidency was discussed by Member States. Upon request, the Council Legal Service (CLS) issued, on 12 May 2017, a legal opinion on the compatibility of the proposal with the Treaties.
6. On that basis, a new compromise was prepared and a discussion followed at the High Level Working Party (HLWP) of 6 June 2017.

II. STATE OF PLAY

7. During the first discussions, some Member States supported the principle of a GRCM while others showed scepticism, but were open for further discussions. Another group of Member States had general and/or political scrutiny reservations.
8. In its compromise texts, the Presidency has addressed certain concerns mentioned by Member States. Following the legal opinion issued by CLS, further safeguards and restrictions were introduced, and it is therefore of the opinion that the latest compromise set out in doc. 10041/17 is fair and balanced.
- . In this context, the Presidency would like to underline the four main elements of the compromise:

(1) Scope of the future directive

9. A few Member States were of the opinion that the scope of the proposal should cover all services and goods. Other Member States supported the scope as it stands in the Proposal from the Commission, meaning that the derogation would be applicable only to goods and services above a threshold of 10 000 euros.
10. Taking into account the derogative nature of the proposal, the Presidency proposes to maintain the threshold of 10 000 euros (Article 199c, paragraph 1).

(2) Conditions for obtaining a derogation

11. The discussion showed that some Member States were in favour of restrictive conditions in the Directive while others wanted more flexibility or even no conditions at all.
12. In order to find a balanced compromise, the Presidency proposes to maintain the figures of the Commission proposal i.e. at least 5 percentage points above the Community median VAT gap (Article 199c, paragraph 1, letter (a)) and 25% of carousel fraud within the total VAT gap (Article 199c, paragraph 1, letter (b)). Furthermore, the condition that the Member State has to establish that other control measures than the derogation are not sufficient to combat carousel fraud on its territory has been as well maintained (Article 199c, paragraph 1, letter (c)).
13. However, the Presidency has added further safeguards to the derogation by way of clarifications and additional requirements in order to limit the derogation to what is proportionate regarding the objective pursued.

14. The clarifications relate to control measures in Article 199c, paragraph 1, letter (c), and the additional conditions are that the Member State concerned must establish that the estimated gains in tax compliance and collection expected as a result of the introduction of the GRCM outweigh the expected overall additional burdens on businesses and tax administrations by at least 25% (Article 199c, paragraph 1, letter (d)) and that businesses and tax administrations will not incur, as a result of the introduction of the GRCM, costs that are higher than those incurred as a result of the application of other control measures (Article 199c, paragraph 1, letter (e)).
15. It is worth recalling that all these conditions must be met for a Member State to be in a position to submit a request to the Commission, before this could be considered eligible to apply the GRCM derogation.

(3) Repealing of the derogation: role of the Council and the Commission

16. The proposal of the Commission provided that, in case of considerable negative impact on the internal market, the Commission can repeal all the derogations previously granted. Giving this possibility to the Commission raised concerns in some Member States. The question of the involvement of the Council instead of the Commission in the process of repealing the derogation was therefore discussed. A majority of Member States was of the opinion that the powers to adopt and to repeal the derogations should remain with the Council.
17. If the Council would be deciding on the repealing of the derogation in the usual manner, in conformity with the principle of unanimity, all Member States, including the Member States applying the derogation, would have to support the repealing. This could result in a situation where it would be very difficult to obtain, in practice, the consent of the Member States benefiting from the derogation.

18. In order to make the system workable, a reverse unanimity procedure is proposed by the Presidency. This procedure would entail that, if a set of criteria are met, the Commission would present a proposal aiming at repealing a derogation given to one Member State. This proposal would be adopted – and thus the derogation repealed – unless the Council unanimously agrees to reject the Commission's proposal of repeal within 30 days ("reversed unanimity") (Article 199 c), paragraph 5).
19. Unanimous support could not be reached on this issue at technical level as some Member States which are in favour of a GRCM argued that, although the derogation would be given for five years, the use of the repealing procedure might de facto lead to shortening the duration period of the derogation. Against this background, they do not support the "reversed unanimity" vote procedure as such. However, the Presidency is of the opinion that such a solution is the most appropriate to ensure a legally sound and practical functioning of the derogation.

(4) Duration of the derogation

20. The proposal provides that the duration of the derogation shall be of five years (i.e. 30 June 2022). Some Member States voiced concerns that, due to the administrative changes to be introduced in the national legislations and the burden on businesses to implement the system, this period of time is too short. Other Delegations thought that, due to its experimental nature, the derogation should be limited to two or three years or, at least, not last more than five years.
21. At technical level there seemed to be some convergence towards the five year duration period of the derogation. However, there has been no agreement on the start and end date, thus the Presidency put the dates into brackets in Article 199c, paragraph 7 and Article 2 in order that Ministers discuss this issue.

III. WAY FORWARD

22. Against this background, the Committee of Permanent Representatives is invited to suggest that the Council, on the basis of this note, at its forthcoming meeting:

- discuss the issues set out in Part II of this note and
 - reach a general approach on the compromise text as set out in doc. 10041/17 FISC 128.
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