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European Union

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#### 'I/A' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
No. prev. doc.:	6977/19; 6978/19
Subject:	Public access to documents - Confirmatory application No 05/c/01/19

Delegations will find enclosed a draft reply from the Council to confirmatory application No 05/c/01/19, approved by the Working Party on Information by written consultation which ended on 25 March 2019 with Finland and Sweden voting against.

The following statements were made:

*FI & SE:* “We do not fully agree with the draft reply, in particular we are not convinced that the requirements of the Turco judgement para 69, first sentence, are fully met.”

*NL:* “The Netherlands can concur in the given situation with the draft reply but is, on a more general note, of the opinion that the requirements of the Turco judgement (case C 39/05 P & C 52/05 P, Sweden and Turco/Council, paragraph 69, first sentence), demand for a more detailed statement of reasons for the (partial) refusal in the draft reply.”

Delegations agreed to publish the result of the vote.

The Permanent Representatives Committee is accordingly asked to suggest that the Council, at its next meeting:

- record its agreement to the draft reply annexed to this document, as an "A" item
- decide to publish the result of the vote.

The annex is available in English only.

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**DRAFT REPLY ADOPTED BY THE COUNCIL ON xxxx  
TO CONFIRMATORY APPLICATION No 05/c/01/19,  
made on 27 February 2019,  
pursuant to Article 7(2) of Regulation (EC) No 1049/2001,  
for public access to document 9155/17**

The Council has considered this confirmatory application under 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 (OJ L 145, 31.5.2001, p. 43) (hereafter "Regulation 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, OJL 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. On 24 January 2019, the applicant introduced an initial application for access to document 9155/17 dated 12 May 2017. The requested document is an opinion of the Council Legal Service (CLS) on 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.
2. On 14 February 2019, the General Secretariat of the Council (GSC) replied to this application granting partial access to paragraphs 1 to 7 of the requested document. Full access has been refused pursuant to the exceptions laid down in Article 4(3), second subparagraph (protection of the decision-making process), and Article 4(2), second indent (protection of legal advice) of Regulation 1049/2001.

3. On 27 February 2019, the applicant introduced a confirmatory application, registered on 28 February 2019, claiming that at least wider partial access should be granted to the requested document.

The applicant considers that the legal advice contained in document 9155/17 *"was the grounds for adding the term "non-cross boarder" to Council directive 2018/2057/EU"*; that *"the precise definition of this term is essential to understanding the impact that the generalised reverse charge mechanism (GRCM) would have on a large sectors of taxpayers"* and that the *"legal advice contained in Document 9155/2017 is the only authoritative source in this matter"*. More specifically, according to the applicant *"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 the non-established businesses, or c) the GRCM would shift the place of the taxable transaction to the Member State where the recipient is established"*.

In view of the *"necessity for clear and precise terminology within complex legal provisions"* and the need of *"legal certainty regarding tax liability"* the applicant contends that clarity on those issues *"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"*.

Therefore, even if the applicant accepts that *"it is impossible to exclude external pressure from either the decision making of the Council or from advisory process of the Council Legal Service in this matter"*, he concludes that there is an *"overriding public interest under Article 4(2) of Regulation (EC) No 1049/2001 (...) in the publication of specific excerpts of this document"*, that *"limiting disclosure to these excerpts would avoid undermining the decision-making process pursuant to Article 4(3), second indent of said Regulation"* and that *"on balance, the public interest should weigh heavily against the need to protect the Council's decision-making process"*. He also underlines that *"as the criteria a Member State must meet in order to be considered for the approval of the use of the GRCM are listed"* in a specific Article of the concerned directive *"and the provision that concerns the public interest is contained wholly within the first indent" of this Article, "it should be possible to restrict publication to only the sections that are of public interest"*.

4. The Council has carefully considered the confirmatory application. It has re-assessed, in full consideration of the principle of transparency underlying Regulation 1049/2001 and in light of the applicant's arguments, whether public access can be provided to the requested document.

## **I. THE REQUESTED DOCUMENT**

5. Document **9155/17** is an opinion of the Council Legal Service which analyses 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 (GRCM) in relation to supplies of goods and services above a certain threshold.

6. More specifically, the requested opinion examines the compatibility of the GRCM with the criteria laid down in Article 27 TFUE. It analyses : whether the proposal takes into account the extent of the efforts that certain economies showing differences in development will have to sustain for the establishment of the internal market; whether the GRCM is of a temporary nature ; whether the GRCM complies with the principle of proportionality, meaning that it is a measure that is adequate and necessary to its declared aim and that it would cause the less possible disturbance to the internal market.
7. The subject legal act, namely Council Directive (EU) 2018/2057, adopted on 20 December 2018, has inserted a new Article 199c in Directive 2006/112/EC, allowing individual Member States to derogate, under certain conditions and for a limited period of time (until 30 June 2022), from the common VAT system and apply the GRCM instead, with the view to better tackling VAT and, in particular, carousel fraud. Under this new mechanism, the taxable person in a Member State that applies the GRCM is not the person carrying out a taxable supply of goods and services, but the taxable person to whom the supplies are made. According to the procedure provided by aforementioned Article 199c, a Member State wishing to apply the GRCM may introduce a request to the Commission which shall control whether a list of criteria enumerated in this provision are met and, in case of compliance, shall submit a proposal to the Council, which acting unanimously may authorize the requesting Member State to apply the GRCM.

## **II. ASSESSMENT OF REQUEST UNDER REGULATION (EC) NO 1049/2001 AND APPLICABLE CASE LAW**

8. As a preliminary remark, it shall be noted that even if the request is explicitly directed towards granting access to document 9155/17, it results from the confirmatory application that the applicant seeks specific legal advice on a number of issues related to the implementation of the GRCM, notably the precise definition of the term "non-cross boarder" – which figures in Article 199c introduced by Council directive 2018/2057/EU – and its implications.

9. In view of its content and contrary to what is assumed by the applicant, document 9155/17 does not clarify this term but rather provides detailed analysis on the compatibility of the GRCM with Article 27 TFUE, as above indicated.
10. Thus, the requested opinion does not address the specific legal questions raised by the applicant, which according to the confirmatory application have been the reason justifying the need of disclosure of the requested opinion. The Council has therefore doubts that document 9155/17 fully corresponds to the request of the applicant.
11. In any case, the Council recalls that according to the case law the right of access to documents under Regulation (EC) No 1049/2001 only applies to existing documents in the possession of the institution concerned and Regulation (EC) No 1049/2001 may not be relied upon to oblige an institution to create a document (for which it has been asked to grant access but) which does not exist.<sup>1</sup>

**Exception relating to the institution's decision-making process**

12. The requested document 9155/17 has been drawn up by the Council's Legal Service for the internal use of the Council in the sense of Article 4(3) second subparagraph of Regulation 1049/2001.
13. It relates to a decision-making procedure that has been finalised with the adoption of the Council Directive (EU) 2018/2057 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.

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<sup>1</sup> CJUE, 2 October 2014, C-127/13 P, Strack v Commission, par. 46, CJUE, 11 January 2017, C-491/15 P, Typke v Commission, par. 31

14. However, the legal analysis provided in the requested opinion covers matters which have implications going beyond the closed legislative procedure in question. This is because, as abovementioned, Council Directive (EU) 2018/2057 introduces a procedure according to which the recourse by a Member State to the GRCM is authorised at its request by the Council following a Commission's proposal to that end. As was already stated in the initial reply to the applicant, the legal advice contained in document 9155/17 is thus relevant for the upcoming decision-making procedures for authorising a requesting Member State to apply the GRCM. Indeed, such decision-making procedures shall raise similar legal issues as the ones explored in the subject legal advice. It could be added that for the time being at least one Member State has expressed its interest to apply the GRCM.
15. As stressed by the applicant in the confirmatory application the legal issues explored by the requested opinion are complex and *"it would be impossible to exclude external pressure (on) the decision-making process of the Council"*. It seems therefore that the applicant recognizes the high sensitivity of the issues to which the legal advice pertains. Indeed, if the analysis carried out by the CLS had to be fully disclosed, certain of the arguments developed therein would be instrumentalised by external stakeholders wishing to influence on the specific decision-making procedures in question. The ensuing pressure would impede the discussions of the Council members when examining a GRCM request and would therefore affect the possibility of reaching an agreement during the Council's internal negotiations. This is all the more so in relation to the fact that the recourse to the GRCM requires unanimous approval by the Member States.
16. Therefore, there is a reasonably foreseeable risk that full disclosure of the requested document could have a substantial negative impact on the decision-making process pursuant to Article 4(3), second subparagraph, of Regulation 1049/2001.



**Exception relating to the protection of legal advice**

17. Under article 4(2), second indent, of Regulation 1049/2001 : "*The institutions shall refuse access to a document where disclosure would undermine the protection of (...) legal advice*".
18. The requested document falls within the scope of this provision as its paragraphs 8 to 43, which have not been disclosed following the initial application, contain legal advice.
19. The legal advice concerns matters that are complex and which are critical for the decision-making procedures authorizing the recourse by individual Member States to the GRCM mechanism. As demonstrated above, its full disclosure would impede the possibility to reach an agreement during the internal negotiations of the Council in that context.
20. In addition, since the proposed instrument could entail administrative burdens and costs for businesses concerned in a Member State that would apply the GRCM, a high risk of litigation can be expected in this domain. In such a case, the legal issues covered by the opinion would be at the core of the court proceedings. There is therefore a concrete and reasonably foreseeable risk that the issues addressed in the CLS opinion will be subject to litigation. Disclosure of legal advice concerning those aspects would negatively affect the ability of the CLS to effectively defend decisions taken by the Council before the Union Courts on an equal footing with the legal representatives of the other parties to legal proceedings.
21. The legal advice contained in document 9155/17 is therefore sensitive. It is to be noted that this is not denied by the applicant, who states in the confirmatory application that "*the opinions contained within this legal advice would be of primary importance to a challenge of the legality of the application of the GRCM*" that "*it is without question that (these) matter(s) are complex and contentious*" and that "*it would be impossible to exclude external pressure from (...) the advisory process of the Council Legal Service on this matter*".

22. In light of the above, in that particular case, full disclosure of the requested opinion would compromise the interest of the institution in seeking legal advice and receiving frank, objective and comprehensive advice, an interest that has been recognised by the Court, in its case law, as legitimate<sup>2</sup>. 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 it could expose to external pressure the CLS, which in turn, could affect the way in which legal advice is drafted and hence prejudice the possibility to express views free from external influences.
23. Under the circumstances, full disclosure of the requested document would undermine the protection of legal advice pursuant to Article 4(2), second indent, of Regulation 1049/2001.

**Partial access pursuant to Article 4(6) of Regulation 1049/2001**

24. In its initial decision, the Council considered that disclosure of certain parts of the requested legal opinion did not represent a risk for the interests protected by the invoked exceptions. As a consequence, it granted partial access to document **9155/17** and in particular to its paragraphs 1 to 7.
25. The Council has now examined whether extended partial access could be granted to the document in question.
26. In light of its examination, the Council considers that some parts of the requested document which have not been disclosed in its first reply – including several paragraphs that contain legal advice which is, however, of a more general nature – are less sensitive and can therefore be disclosed at this stage.
27. Therefore, the Council concludes that additional partial access can be granted to paragraphs 8 to 15 of the requested document.

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<sup>2</sup> Judgment of the Court of Justice of 1 July 2008 in joined Cases C-39/05 P and C-52/05 P, *Turco v. Council*, point 42.

**Assessment of the public interest in disclosure**

28. The Council has thoroughly examined whether there is an overriding public interest justifying further disclosure taking notably into account the arguments provided by the applicant.
29. In that regard, the Council recalls that the applicant has justified the existence of an overriding public interest in disclosure on the need of clarity as regards specific legal issues arising from the implementation of the GRCM and in particular from the definition of the term "non-cross boarder" – that figures in the legal provision introducing that measure – and its implications.
30. However, as stated above, the legal advice contained in the requested document does not provide specific analysis on that issues. Therefore, even if the legal advice contained in the requested document was fully released, it is unlikely that the specific legal questions raised by the applicant would be clarified so as to serve the public interest of "*legal certainty regarding tax liability*" invoked by the applicant.
31. The Council also wishes to underline that it fully recognises the higher standard of transparency which applies as regards legal opinions that relate to legislative proposals. It is in that view that it has decided to grant a wider partial access to the requested document as mentioned above. The Council however also considers that the interest of wider public access on that context cannot automatically override the protection of legal advice and of the decision making process in all cases. Rather, the Council is called upon to carefully balance the public interest in having access to the requested document against the need to protect the interests invoked.
32. In light of its examination, the Council concludes, on account of the particularly sensitive nature of the legal advice as well as of the need of preserving the effectiveness of its decision-making, that in the specific case at hand, the public interests of transparency does not outweigh the need to preserve the interests protected under Article 4(2), second indent, and 4(3), second subparagraph, of Regulation 1049/2001.

### **III. CONCLUSION**

33. For the above-mentioned reasons, the Council concludes that:

- a) Full disclosure of document 9155/17 has to be refused pursuant to the provisions of Article 4(2) second indent (protection of the legal advice) and Article 4(3), second subparagraph (protection of the decision making process even after adoption), of Regulation 1049/2001.
- b) In addition to the parts already disclosed at the initial stage, further partial access shall be granted to those parts of the requested document identified under points 24 to 27 of the present (namely par. 8 to 15 of document 9155/17).

34. This conclusion results from the specific examination of the requested document and does not presume the position of the Council in future cases that shall be subject to a specific analysis.

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