

# DIRECTIVES

## COUNCIL DIRECTIVE 2009/162/EU

of 22 December 2009

### amending various provisions 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, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament <sup>(1)</sup>,

Having regard to the opinion of the European Economic and Social Committee <sup>(2)</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax <sup>(3)</sup> should be amended in order to incorporate various amendments of a primarily technical nature.

(2) Regarding the provisions on imports and the place where the supply of gas and electricity is taxed, the text of Directive 2006/112/EC, taken literally, means that the special scheme set up under Council Directive 2003/92/EC of 7 October 2003 amending Directive 77/388/EEC as regards the rules on the place of supply of gas and electricity <sup>(4)</sup> does not apply to imports or supplies of gas transported through pipelines that are

not part of the distribution system, and in particular, does not apply to the pipelines of the transmission system by which a large number of cross-border transactions through pipelines are nevertheless carried out. However, the purpose of Directive 2003/92/EC was to apply the special scheme also to those cross-border transactions. In order to bring the letter of the text into line with its purpose, it should therefore be specified that the special scheme does apply to imports and supplies of gas through any natural gas system situated within the territory of the Community or any network connected to such system.

(3) Gas imported by vessels is identical in terms of its characteristics to that imported through pipelines and is intended, following re-gasification, for transportation through pipelines. For reasons of neutrality, the exemption should therefore apply to imports by vessels where the gas is fed into a natural gas system or any upstream pipeline network.

(4) The first cross-border heating and cooling networks are already operational. The same issues that apply to the supply and import of gas or electricity also apply to the supply and import of heat or cooling energy. Under the current rules, VAT on natural gas and electricity is levied at the place where they are actually consumed by the customer; the rules thus prevent any distortion of competition between Member States. Consequently, the same scheme that applies to natural gas and electricity should apply to heat and cooling energy.

(5) Regarding the place where VAT is levied on services, the text of Directive 2006/112/EC, taken literally, means that the special scheme set up under Directive 2003/92/EC applies only to the supply of access to the natural gas and electricity distribution systems and thus excludes supplies of the same kind relating to a transmission system, or even an upstream pipeline network. However, the purpose of Directive 2003/92/EC was to apply the special scheme also to those supplies. In order to bring the letter of the text into line with its purpose, it should therefore be specified that the special scheme applies to all services relating to the supply of access to all natural gas and electricity systems or networks and to heating and cooling networks.

<sup>(1)</sup> Opinion of the European Parliament of 8 July 2008 (not yet published in the Official Journal) and Opinion of the European Parliament of 24 November 2009 (not yet published in the Official Journal).

<sup>(2)</sup> OJ C 204, 9.8.2008, p. 119.

<sup>(3)</sup> OJ L 347, 11.12.2006, p. 1.

<sup>(4)</sup> OJ L 260, 11.10.2003, p. 8.

- (6) Experience gained during the recent implementation of the current procedure, whereby the Commission is charged with deciding whether a risk of distortion of competition exists as a result of the application of a reduced VAT rate to natural gas, electricity and district heating, has demonstrated that the procedure is obsolete and superfluous. The rules for determining the place of taxation ensure that VAT is levied at the place where the natural gas, electricity, heat and cooling energy are actually consumed by the customer; the rules thus prevent any distortion of competition between Member States. Nevertheless, it is still important that the Commission and the other Member States be properly informed whenever a Member State introduces a reduced rate in this very sensitive sector. Consequently, a prior consultation procedure involving the VAT Committee is needed.
- (7) The Protocol of 8 April 1965 on the privileges and immunities of the European Communities as a legal basis for the exemption, through remittance or refund of indirect taxes, afforded to the Communities and certain Community agencies and other bodies with respect to certain purchases made for their official use, is specific and should be distinguished from the legal basis for the exemption from VAT on certain transactions benefiting international bodies in general. It is therefore appropriate to further clarify the wording of Directive 2006/112/EC and to include provision for a specific exemption, which may be exercised by means of a refund of the tax, thereby avoiding certain difficulties with respect to the application of the exemption to bodies set up by the Communities, in particular certain joint undertakings established in accordance with Article 187 of the Treaty.
- (8) In the context of their accession, Bulgaria and Romania were authorised to grant an exemption to small enterprises and to continue applying an exemption to the international transport of passengers. For purposes of clarity and consistency, these exemptions should be incorporated into Directive 2006/112/EC.
- (9) Regarding the right of deduction, the basic rule is that this right arises only in so far as the goods and services are used by a taxable person for the purposes of his business activity.
- (10) This rule should be clarified and strengthened with respect to the supply of immovable property and expenditure relating thereto in order to ensure that taxable persons are dealt with in an identical manner whenever immovable goods that they use for their business activity are not used exclusively for purposes related to that activity.
- (11) Whilst immovable property and related expenditure account for the most significant cases where a clarification and strengthening of the rule is appropriate, given the value and economic lifetime of such property and the fact that mixed use of this type of property is a common practice, the issue also arises, though in a less significant and less uniform manner, with respect to movable goods with a durable nature. In accordance with the principle of subsidiarity, Member States should therefore be given the means to take the same measures with respect to such movable goods that form part of the business assets where appropriate.
- (12) With a view to ensuring an equitable deduction system for taxable persons in the context of the new rules, an adjustment system in accordance with the other rules on adjustment of deductions should be provided for which takes into account changes in the business and non-business use of the property concerned.
- (13) Directive 2006/112/EC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 2006/112/EC is hereby amended as follows:

1. Article 2(3) shall be replaced by the following:

‘3. “Products subject to excise duty” shall mean energy products, alcohol and alcoholic beverages and manufactured tobacco, as defined by current Community legislation, but not gas supplied through a natural gas system situated within the territory of the Community or any network connected to such a system.’;

2. Article 13(2) shall be replaced by the following:

‘2. Member States may regard activities, exempt under Articles 132, 135, 136 and 371, Articles 374 to 377, Article 378(2), Article 379(2) or Articles 380 to 390b, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.’;

3. Article 15(1) shall be replaced by the following:

‘1. Electricity, gas, heat or cooling energy and the like shall be treated as tangible property.’;

4. Article 17(2), point (d) shall be replaced by the following:

‘(d) the supply of gas through a natural gas system situated within the territory of the Community or any network connected to such a system, the supply of electricity or the supply of heat or cooling energy through heating or cooling networks, in accordance with the conditions laid down in Articles 38 and 39;’

5. Section 4 of Chapter 1 of Title V shall be replaced by the following:

‘Section 4

**Supplies of gas through a natural gas system, of electricity and of heat or cooling energy through heating and cooling networks**

*Article 38*

1. In the case of the supply of gas through a natural gas system situated within the territory of the Community or any network connected to such a system, the supply of electricity, or the supply of heat or cooling energy through heating or cooling networks to a taxable dealer, the place of supply shall be deemed to be the place where that taxable dealer has established his business or has a fixed establishment for which the goods are supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. For the purposes of paragraph 1, “taxable dealer” shall mean a taxable person whose principal activity in respect of purchases of gas, electricity, heat or cooling energy is reselling those products and whose own consumption of those products is negligible.

*Article 39*

In the case of the supply of gas through a natural gas system situated within the territory of the Community or any network connected to such a system, the supply of electricity or the supply of heat or cooling energy through heating or cooling networks, where such a supply is not covered by Article 38, the place of supply shall be deemed to be the place where the customer effectively uses and consumes the goods.

Where all or part of the gas, electricity or heat or cooling energy is not effectively consumed by the customer, those non-consumed goods shall be deemed to have been used and consumed at the place where the customer has established his business or has a fixed establishment for

which the goods are supplied. In the absence of such a place of business or fixed establishment, the customer shall be deemed to have used and consumed the goods at the place where he has his permanent address or usually resides.’;

6. Article 59, point (h), as established by Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services <sup>(1)</sup>, shall be replaced by the following:

‘(h) the provision of access to a natural gas system situated within the territory of the Community or to any network connected to such a system, to the electricity system or to heating or cooling networks, or the transmission or distribution through these systems or networks, and the provision of other services directly linked thereto;’;

7. in Article 80(1)(b), the words ‘Articles 380 to 390’ shall be replaced by ‘Articles 380 to 390b’;

8. Article 102 shall be replaced by the following:

‘Article 102

After consultation of the VAT Committee, each Member State may apply a reduced rate to the supply of natural gas, electricity or district heating.’;

9. in Article 136(a), the words ‘Articles 380 to 390’ shall be replaced by ‘Articles 380 to 390b’;

10. Article 143(1) shall be amended as follows:

(a) the following point shall be added after point (f):

‘(fa) the importation of goods by the European Community, the European Atomic Energy Community, the European Central Bank or the European Investment Bank, or by the bodies set up by the Communities to which the Protocol of 8 April 1965 on the privileges and immunities of the European Communities applies, within the limits and under the conditions of that Protocol and the agreements for its implementation or the headquarters agreements, in so far as it does not lead to distortion of competition;’;

<sup>(1)</sup> OJ L 44, 20.2.2008, p. 11.

(b) point (g) shall be replaced by the following:

'(g) the importation of goods by international bodies, other than those referred to in point (fa), recognised as such by the public authorities of the host Member State, or by members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;'

(c) point (l) shall be replaced by the following:

'(l) the importation of gas through a natural gas system or any network connected to such a system or fed in from a vessel transporting gas into a natural gas system or any upstream pipeline network, of electricity or of heat or cooling energy through heating or cooling networks;'

11. Article 151(1) shall be amended as follows:

(a) the following point shall be added after point (a):

'(aa) the supply of goods or services to the European Community, the European Atomic Energy Community, the European Central Bank or the European Investment Bank, or to the bodies set up by the Communities to which the Protocol of 8 April 1965 on the privileges and immunities of the European Communities applies, within the limits and under the conditions of that Protocol and the agreements for its implementation or the headquarters agreements, in so far as it does not lead to distortion of competition;'

(b) point (b) shall be replaced by the following:

'(b) the supply of goods or services to international bodies, other than those referred to in point (aa), recognised as such by the public authorities of the host Member States, and to members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;'

12. the following Article shall be inserted in Chapter 1 of Title X:

*'Article 168a*

1. In the case of immovable property forming part of the business assets of a taxable person and used both for purposes of the taxable person's business and for his private use or that of his staff, or, more generally, for purposes other than those of his business, VAT on expenditure related to this property shall be deductible in accordance with the principles set out in Articles 167, 168, 169 and 173 only up to the proportion of the property's use for purposes of the taxable person's business.

By way of derogation from Article 26, changes in the proportion of use of immovable property referred to in the first subparagraph shall be taken into account in accordance with the principles provided for in Articles 184 to 192 as applied in the respective Member State.

2. Member States may also apply paragraph 1 in relation to VAT on expenditure related to other goods forming part of the business assets as they specify;'

13. in Article 221(2), the words 'Articles 380 to 390' shall be replaced by 'Articles 380 to 390b';

14. in Article 287, the following points shall be added:

'(17) Bulgaria: EUR 25 600;

(18) Romania: EUR 35 000;'

15. the following Articles shall be inserted in Section 2 of Chapter 1 of Title XIII:

*'Article 390a*

Bulgaria may, in accordance with the conditions applying in that Member State on the date of its accession, continue to exempt the international transport of passengers as referred to in point 10 of Annex X, Part B, for as long as the same exemption is applied in any of the Member States which were members of the Community on 31 December 2006.

*Article 390b*

Romania may, in accordance with the conditions applying in that Member State on the date of its accession, continue to exempt the international transport of passengers, as referred to in point 10 of Annex X, Part B, for as long as the same exemption is applied in any of the Member States which were members of the Community on 31 December 2006;'

16. in Article 391, the words 'Articles 380 to 390' shall be replaced by 'Articles 380 to 390b';

17. in Annex X, the title shall be replaced by the following:

**'LIST OF TRANSACTIONS COVERED BY THE DEROGATIONS REFERRED TO IN ARTICLES 370 AND 371 AND ARTICLES 375 TO 390b'.**

*Article 2*

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive with effect from 1 January 2011. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, those measures shall contain a reference to this Directive or shall be accompanied by

such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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 3*

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

*Article 4*

This Directive is addressed to the Member States.

Done at Brussels, 22 December 2009.

*For the Council*

*The President*

A. CARLGREN

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