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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 93 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) Increasing liberalisation of the gas and electricity sector, aimed at completing the internal market for electricity and natural gas, has revealed a need to review the current VAT rules on the place of supply of those goods, set out in the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment [4], in order to modernise and simplify the operation of the VAT system within the context of the internal market, a strategy to which the Commission is committed.

(2) Electricity and gas are treated as goods for VAT purposes, and, accordingly, the place of their supply with respect to cross-border transactions has to be determined in accordance with Article 8 of Directive 77/388/EEC. However, since electricity and gas are difficult to track physically it is particularly difficult to determine the place of supply under the current rules.

(3) In order to attain a real internal market for electricity and gas without VAT obstacles, the place of supply of gas through the natural gas distribution system and of electricity, before the goods reach the final stage of consumption, should be determined to be the place where the customer has established his business.

(4) The supply of electricity and gas in the final stage, from traders and distributors to final consumer, should be taxed at the place where the customer has effective use and consumption of the goods, in order to ensure that taxation takes place in the country where actual consumption takes place. This is normally the place where the meter of the customer is located.

(5) Electricity and gas are supplied through distribution networks, to which network operators provide access. In order to avoid double or non-taxation, it is necessary to harmonise the rules governing the place of supply of the transmission and transportation services. Access to and use of the distribution systems and the provision of other services directly linked to these services should therefore be added to the list of specific instances set out in Article 9, paragraph 2(e) of Directive 77/388/EEC.

(6) The import of gas through the natural gas distribution system, or of electricity, should be exempted in order to avoid double taxation.

(7) Those changes in the rules governing the place of supply of gas through the natural gas distribution system, or of electricity, should be combined with a compulsory reverse charge when the customer is a person identified for VAT purposes.

(8) Directive 77/388/EEC should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Directive 77/388/EEC is hereby amended as follows:

1. in Article 8(1), the following points are added:

'(d) in the case of the supply of gas through the natural gas distribution system, or of electricity, to a taxable dealer: 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.

"Taxable dealer" for the purposes of this provision means a taxable person whose principal activity in respect of purchases of gas and electricity is reselling such products and whose own consumption of these products is negligible.

[1] Proposal of 5 December 2002 (not yet published in the Official Journal).
[2] Opinion delivered on 13.5.2003 (not yet published in the Official Journal).
[3] Opinion delivered on 26.3.2003 (not yet published in the Official Journal).
[4] OJ L 145, 13.6.1977, p.1. Directive as last amended by Directive 2002/93/EC (OJ L 331, 7.12.2002, p. 27).

(e) in the case of the supply of gas through the natural gas distribution system, or of electricity, where such a supply is not covered by point (d): the place where the customer has effective use and consumption of the goods. Where all or part of the goods are not in fact consumed by this customer, these non consumed goods are deemed to have been used and consumed at the place where he 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, he is deemed to have used and consumed the goods at the place where he has his permanent address or usually resides.';

2. in Article 9(2)(e), the following indent is inserted after the eighth indent:

'— the provision of access to, and of transport or transmission through, natural gas and electricity distribution systems and the provision of other directly linked services.';

3. in Article 14(1), the following point is added:

'(k) import of gas through the natural gas distribution system, or of electricity.';

4. Article 21(1)(a), in the version set out in Article 28g, is replaced by the following:

'(a) the taxable person carrying out the taxable supply of goods or of services, except for the cases referred to in (b), (c) and (f). Where the taxable supply of goods or of services is effected by a taxable person who is not established within the territory of the country, Member States may, under the conditions determined by them, lay down that the person liable to pay tax is the person for whom the taxable supply of goods or of services is carried out;'

5. in Article 21(1), in the version set out in Article 28g, the following point is added:

'(f) persons who are identified for value added tax purposes within the territory of the country and to whom goods are supplied under the conditions set out in Article 8(1)(d) or (e), if the supplies are carried out by a taxable person not established within the territory of the country.';

6. in Article 22(1)(c), in the version set out in Article 28h, the first intent is replaced by the following:

'— Every taxable person, with the exception of those referred to in Article 28a(4), who, within the territory of the country, effects supplies of goods or of services giving him the right of deduction, other than supplies of goods or of services for which tax is payable solely by the customer or the recipient in accordance with Article 21(1)(a), (b), (c) or (f). However, Member States need not identify certain taxable persons referred to in article 4(3),';

7. in Article 28a(5)(b) the following indent is added:

'— the supply of gas through the natural gas distribution system, or of electricity, under the conditions set out in Article 8(1)(d) or (e).'

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on 1 January 2005. They shall forthwith inform the Commission thereof. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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 Luxembourg, 7 October 2003.

For the Council

The President

G. TREMONTI