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

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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[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

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[(3)] 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[(4)] 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.

(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:

(**1**) 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).

(**2**) OJ C 204, 9.8.2008, p. 119.

(**3**) OJ L 347, 11.12.2006, p. 1.

(**4**) OJ L 260, 11.10.2003, p. 8.