

COUNCIL DIRECTIVE 2002/38/EC

of 7 May 2002

amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services

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 Economic and Social Committee ⁽³⁾,

Whereas:

- (1) The rules currently applicable to VAT on radio and television broadcasting services and on electronically supplied services, under Article 9 of 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⁾, are inadequate for taxing such services consumed within the Community and for preventing distortions of competition in this area.
- (2) In the interests of the proper functioning of the internal market, such distortions should be eliminated and new harmonised rules introduced for this type of activity. Action should be taken to ensure, in particular, that such services where effected for consideration and consumed by customers established in the Community are taxed in the Community and are not taxed if consumed outside the Community.
- (3) To this end, radio and television broadcasting services and electronically supplied services provided from third countries to persons established in the Community or from the Community to recipients established in third countries should be taxed at the place of the recipient of the services.
- (4) To define electronically supplied services, examples of such services should be included in an annex to the Directive.
- (5) To facilitate compliance with fiscal obligations by operators providing electronically supplied services, who are neither established nor required to be identified for tax purposes within the Community, a special scheme

should be established. In applying this scheme any operator supplying such services by electronic means to non-taxable persons within the Community, may, if he is not otherwise identified for tax purposes within the Community, opt for identification in a single Member State.

- (6) The non-established operator wishing to benefit from the special scheme should comply with the requirements laid down therein, and with any relevant existing provision in the Member State where the services are consumed.
- (7) The Member State of identification must under certain conditions be able to exclude a non-established operator from the special scheme.
- (8) Where the non-established operator opts for the special scheme, any input value added tax that he has paid with respect to goods and services used by him for the purpose of his taxed activities falling under the special scheme, should be refunded by the Member State where the input value added tax was paid, in accordance with the arrangements of the thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — arrangements for the refund of value added tax to taxable persons not established in Community territory ⁽⁵⁾. The optional restrictions for refund in Article 2(2) and (3) and Article 4(2) of the same Directive should not be applied.
- (9) Subject to conditions which they lay down, Member States should allow certain statements and returns to be made by electronic means, and may also require that electronic means are used.
- (10) Those provisions pertaining to the introduction of electronic tax returns and statements should be adopted on a permanent basis. It is desirable to adopt all other provisions for a temporary period of three years which may be extended for practical reasons but should, in any event, based on experience, be reviewed within three years from 1 July 2003.
- (11) Directive 77/388/EEC should therefore be amended accordingly,

⁽¹⁾ OJ C 337 E, 28.11.2000, p. 65.

⁽²⁾ OJ C 232, 17.8.2001, p. 202.

⁽³⁾ OJ C 116, 20.4.2001, p. 59.

⁽⁴⁾ OL L 145, 13.6.1977, p. 1. Directive as last amended by Council Directive 2001/115/EC (OJ L 15, 17.1.2002, p. 24).

⁽⁵⁾ OJ L 326, 21.11.1986, p. 40.

HAS ADOPTED THIS DIRECTIVE:

Article 1

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

1. in Article 9:

- (a) in paragraph (2)(e), a comma shall replace the final full stop and the following indents shall be added:

‘— radio and television broadcasting services,
— electronically supplied services, *inter alia*, those described in Annex L.’

- (b) in paragraph 2, the following point shall be added:

‘(f) the place where services referred to in the last indent of subparagraph (e) are supplied when performed for non-taxable persons who are established, have their permanent address or usually reside in a Member State, by a taxable person who has established his business or has a fixed establishment from which the service is supplied outside the Community or, in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community, shall be the place where the non-taxable person is established, has his permanent address or usually resides.’

- (c) in paragraph 3, the introductory phrase shall be replaced by the following:

‘3. In order to avoid double taxation, non-taxation or the distortion of competition, the Member States may, with regard to the supply of services referred to in paragraph 2(e), except for the services referred to in the last indent when supplied to non-taxable persons, and also with regard to the hiring out of forms of transport consider:’

- (d) paragraph 4 shall be amended as follows:

‘4. In the case of telecommunications services and radio and television broadcasting services referred to in paragraph 2(e) when performed for non-taxable persons who are established, have their permanent address or usually reside in a Member State, by a taxable person who has established his business or has a fixed establishment from which the service is supplied outside the Community, or in the absence of such a place of business or fixed establishment, has his permanent address or usually resides outside the Community, Member States shall make use of paragraph 3(b).’

2. in Article 12(3)(a), the following fourth subparagraph shall be added:

‘The third subparagraph shall not apply to the services referred to in the last indent of Article 9(2)(e).’

3. the following Article shall be added:

‘Article 26c

Special scheme for non-established taxable persons supplying electronic services to non-taxable persons

A. Definitions

For the purposes of this Article, the following definitions shall apply without prejudice to other Community provisions:

- (a) “non-established taxable person” means a taxable person who has neither established his business nor has a fixed establishment within the territory of the Community and who is not otherwise required to be identified for tax purposes under Article 22;
- (b) “electronic services” and “electronically supplied services” means those services referred to in the last indent of Article 9(2)(e);
- (c) “Member State of identification” means the Member State which the non-established taxable person chooses to contact to state when his activity as a taxable person within the territory of the Community commences in accordance with the provisions of this Article;
- (d) “Member State of consumption” means the Member State in which the supply of the electronic services is deemed to take place according to Article 9(2)(f);
- (e) “value added tax return” means the statement containing the information necessary to establish the amount of tax that has become chargeable in each Member State.

B. Special scheme for electronically supplied services

1. Member States shall permit a non-established taxable person supplying electronic services to a non-taxable person who is established or has his permanent address or usually resides in a Member State to use a special scheme in accordance with the following provisions. The special scheme shall apply to all those supplies within the Community.

2. The non-established taxable person shall state to the Member State of identification when his activity as a taxable person commences, ceases or changes to the extent that he no longer qualifies for the special scheme. Such a statement shall be made electronically.

The information from the non-established taxable person to the Member State of identification when his taxable activities commence shall contain the following details for the identification: name, postal address, electronic addresses, including websites, national tax number, if any, and a statement that the person is not identified for value added tax purposes within the Community. The non-established taxable person shall notify the Member State of identification of any changes in the submitted information.

3. The Member State of identification shall identify the non-established taxable person by means of an individual number. Based on the information used for this identification, Member States of consumption may keep their own identification systems.

The Member State of identification shall notify the non-established taxable person by electronic means of the identification number allocated to him.

4. The Member State of identification shall exclude the non-established taxable person from the identification register if:

- (a) he notifies that he no longer supplies electronic services, or
- (b) it otherwise can be assumed that his taxable activities have ended, or
- (c) he no longer fulfils the requirements necessary to be allowed to use the special scheme, or
- (d) he persistently fails to comply with the rules concerning the special scheme.

5. The non-established taxable person shall submit by electronic means to the Member State of identification a value added tax return for each calendar quarter whether or not electronic services have been supplied. The return shall be submitted within 20 days following the end of the reporting period to which the return refers.

The value added tax return shall set out the identification number and, for each Member State of consumption where tax has become due, the total value, less value added tax, of supplies of electronic services for the reporting period and total amount of the corresponding tax. The applicable tax rates and the total tax due shall also be indicated.

6. The value added tax return shall be made in euro. Member States which have not adopted the euro may require the tax return to be made in their national currencies. If the supplies have been made in other currencies, the exchange rate valid for the last date of the reporting period shall be used when completing the value added tax return. The exchange shall be done following the exchange rates published by the European Central Bank for that day, or, if there is no publication on that day, on the next day of publication.

7. The non-established taxable person shall pay the value added tax when submitting the return. Payment shall be made to a bank account denominated in euro, designated by the Member State of identification. Member States which have not adopted the euro may require the payment to be made to a bank account denominated in their own currency.

8. Notwithstanding Article 1(1) of Directive 86/560/EEC, the non-established taxable person making use of this special scheme shall, instead of making deductions under Article 17(2) of this Directive, be granted a refund according to Directive 86/560/EEC. Articles 2(2), 2(3) and 4(2) of Directive 86/560/EEC shall not apply to the refund related to electronic supplies covered by this special scheme.

9. The non-established taxable person shall keep records of the transactions covered by this special scheme in sufficient detail to enable the tax administration of the Member State of consumption to determine that the value added tax return referred to in paragraph 5 is correct. These records should be made available electronically on request to the Member State of identification and to the Member State of consumption. These records shall be maintained for a period of 10 years from the end of the year when the transaction was carried out.

10. Article 21(2)(b) shall not apply to a non-established taxable person who has opted for this special scheme.'

Article 2

Article 22, contained in Article 28h of Directive 77/388/EEC, is hereby amended as follows:

1. in paragraph 1, point (a) shall be replaced by the following:

'(a) Every taxable person shall state when his activity as a taxable person commences, changes or ceases. Member States shall, subject to conditions which they lay down, allow the taxable person to make such statements by electronic means, and may also require that electronic means are used.'

2. in paragraph 4, point (a) shall be replaced by the following:

'(a) Every taxable person shall submit a return by a deadline to be determined by Member States. That deadline may not be more than two months later than the end of each tax period. The tax period shall be fixed by each Member State at one month, two months or a quarter. Member States may, however, set different periods provided that they do not exceed one year. Member States shall, subject to conditions which they lay down, allow the taxable person to make such returns by electronic means, and may also require that electronic means are used.'

3. in paragraph 6, point (a) shall be replaced by the following:

'(a) Member States may require a taxable person to submit a statement, including all the particulars specified in paragraph 4, concerning all transactions carried out in the preceding year. That statement shall provide all the information necessary for any adjustments. Member States shall, subject to conditions which they lay down, allow the taxable person to make such statements by electronic means, and may also require that electronic means are used.'

4. in paragraph 6, the second paragraph in point (b) shall be replaced by:

'The recapitulative statement shall be drawn up for each calendar quarter within a period and in accordance with procedures to be determined by the Member States, which shall take the measures necessary to ensure that the provisions concerning administrative cooperation in the field of indirect taxation are in any event complied with. Member States shall, subject to conditions which they lay down, allow the taxable person to make such statements by electronic means, and may also require that electronic means are used.'

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on 1 July 2003. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field covered by this Directive.

Article 4

Article 1 shall apply for a period of three years starting from 1 July 2003.

Article 5

The Council, on the basis of a report from the Commission, shall review the provisions of Article 1 of this Directive before 30 June 2006 and shall either, acting in accordance with Article 93 of the Treaty, adopt measures on an appropriate electronic mechanism on a non-discriminatory basis for charging, declaring, collecting and allocating tax revenue on

electronically supplied services with taxation in the place of consumption or, if considered necessary for practical reasons, acting unanimously on the basis of a proposal from the Commission, extend the period mentioned in Article 4.

Article 6

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

Article 7

This Directive is addressed to the Member States.

Done at Brussels, 7 May 2002.

For the Council

The President

R. DE RATO Y FIGAREDO

ANNEX

*ANNEX L

ILLUSTRATIVE LIST OF ELECTRONICALLY SUPPLIED SERVICES REFERRED TO IN ARTICLE 9(2)(e)

1. Website supply, web-hosting, distance maintenance of programmes and equipment.
2. Supply of software and updating thereof.
3. Supply of images, text and information, and making databases available.
4. Supply of music, films and games, including games of chance and gambling games, and of political, cultural, artistic, sporting, scientific and entertainment broadcasts and events.
5. Supply of distance teaching.

Where the supplier of a service and his customer communicates via electronic mail, this shall not of itself mean that the service performed is an electronic service within the meaning of the last indent of Article 9(2)(e).'
