

Examining the implementation of the EU acquis on value added tax in the Energy Community legal order

(Recommendations of the study commissioned by the Energy Community Secretariat)

Background

The Ministerial Council of the Energy Community¹, on its 13th meeting held on October 16, 2015 adopted the General Policy Guideline which represented the political consensus reached concerning a Roadmap for Reform of the Energy Community. In this document the Energy Community was invited to examine the implementation of the *EU acquis on value added tax (VAT)* in the legal order of the Energy Community.

Relevant EU acquis consists of the Directive 2006/112/EC on common system of value added tax and amendments thereof, in particular Directive 2013/43/EU amending Directive 2006/112/EC on the common system of value added tax as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud, and Directive 2013/42/EU as regards quick reaction mechanism and tax fraud, as well as relevant implementing regulations (Regulation 904/2010 on administrative cooperation and combating fraud in the field of VAT and Regulation 282/2011/EU).

In line with this, the Energy Community Secretariat (ECS) launched the study to examine applicable legislation on VAT in the Energy Community, the need for harmonization of the applicable regimes in order to create a level playing field for integration of electricity and gas market within the Energy Community. The final aim is to examine different aspects of the implementation of the EU acquis on VAT in the Energy Community legal order.

The objective of the study is to obtain competent assessment of the VAT legislation in the Energy Community in order to identify obstacles for market competition and market integration stemming from the rules governing the VAT on goods and services in the network energy businesses (electricity and gas).

Findings and assessments

The study examined the main principles of the Directive 2006/112/EC and its amendments relevant for supply of electricity and gas as goods, and access to electricity and gas infrastructure.

The Consultant's general conclusions are that the Contracting Parties (CPs) apply different approaches in VAT legislation related to export and import of energy, access to network and transit of energy over their territory.

In order to create a well-functioning market, CPs will have to harmonize their respective legislation with EU acquis as to allow for uninterrupted flow of energy and access to their

¹ For more information, visit: http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY

market. The principle that should govern harmonization is that energy related goods and services provided in Energy Community are taxed using the same principles as energy related goods and services in intra Community transactions.

The Consultant defines three possible scenarios regarding the implementation of elements of the VAT Directive into national legislation of the Contracting Parties.

The first scenario implies no changes of national legislation, or rather if none of the provisions of the VAT Directive are implemented into national legislation. In such a scenario, economic operators from different Contracting Parties have considerable difficulties in mutual transactions related to gas and electricity as well as access to gas and electricity interconnection capacity. In addition, non-harmonized VAT framework is more prone to tax fraud.

The second scenario would imply that the CPs implement the minimum requirements in order to enable better functioning of the gas and electricity markets.

The third scenario would be that the Contracting Parties implement the rules and principles of VAT Directive in their entirety. This scenario, although tempting, because of full harmonization with EU Member States, has many challenges. The principles and definitions of the VAT Directive can be implemented in the legislation of the Contracting Parties, but the various reporting mechanisms and reporting institutions shall be aligned with the EU as well.

Recommendations

In order to achieve a minimum level of harmonization of VAT rules on network transactions within the Energy Community and to create a well-functioning market, the recommended best option is to implement a number of rules and definitions derived from the VAT Directive.

The minimum requirements would include:

- Uniform treatment of electricity and gas as goods (tangible asset) in VAT Law;
- Recognizing the subject of a taxable dealer in VAT Law provisions on supply of gas and electricity;
- The reverse charge mechanism for supplies of gas and electricity to a taxable dealer;
- Definition of the place of supply (B2B) of gas through the natural gas distribution system, or of electricity, to a taxable dealer, as the place where that taxable dealer has established his business²;
- Definition that the supply of electricity at the final stage from traders and distributors to the final consumers should be taxed at the place where the customer actually uses and consumes the goods (B2C);
- Definition of supply of services to non-taxable persons outside the CP as the place of supply of the provision of access to a natural gas or to the electricity system situated within the territory of the CP, or the transmission or distribution through these systems

² 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.

or networks, and the provision of other services directly linked thereto to a non-taxable person who is established or has his permanent address or usually resides outside the CP, shall be taxable at the place where that person is established, has his permanent address or usually resides.

- VAT shall be refunded to taxable persons which are not established within the territory of the CP. VAT Law shall define effective institutes and methods for VAT refund – such as the institute of the Fiscal Representative or direct Tax Registration.
- VAT exemption of exportation 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, with the right to VAT deduction.

Finally, the report contains the list of required changes and amendments to the national legislation in order to accommodate the observed shortcomings of current legislative framework in CPs to the recommended optimum solution.

The Secretariat submits this summary report to the PHLG for information and discussion.