



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Indirect Taxation and Tax administration  
**Value added tax**

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**VALUE ADDED TAX COMMITTEE**  
**(ARTICLE 398 OF DIRECTIVE 2006/112/EC)**  
**WORKING PAPER NO 946**

**QUESTION**  
**CONCERNING THE APPLICATION OF EU VAT PROVISIONS**

**ORIGIN:** Commission

**REFERENCES:** Articles 143(1)(g) and 151(1)(b)

**SUBJECT:** Exemption granted to members of an ERIC – follow-up

## **1. INTRODUCTION**

As previously indicated, Council Regulation (EC) No 723/2009 ('the ERIC Regulation')<sup>1</sup> created the legal framework laying down the requirements and procedures for and the effects of setting up a European Research Infrastructure Consortium (ERIC).

Since the adoption of the ERIC Regulation in 2009, 19 ERICs have been established by Commission Implementing Decision. These ERICs have their Statutory Seat in 9 Member States (Germany, Spain, France, Italy, Netherlands, Austria, Finland, Sweden, the United Kingdom) and in one associated country (Norway)<sup>2</sup>. They have more than 20 Member States and associated countries as members and observers.

According to Article 5(1)(d) of that Regulation, to be set up as an ERIC, the proposed ERIC must be recognised by its host Member State as an international body in the sense of Articles 143(1)(g) and 151(1)(b) of the VAT Directive<sup>3</sup>.

Once established as such, the ERIC benefits from exemption under the VAT Directive granted in respect of goods or services supplied to (or imported by) an international body recognised as such by its host Member State, within the limits and under the conditions laid down by the international convention establishing the body or by its headquarters agreement.

Steps have been taken to clarify the scope of this exemption but certain issues are left pending.

## **2. SUBJECT MATTER**

During the 101<sup>st</sup> meeting<sup>4</sup>, the VAT Committee discussed the extent to which the exemption granted to an ERIC could be extended to members of the ERIC and whether the entities designated to represent a member ("representing entities") would have access to this exemption. This resulted in the following guidelines being agreed<sup>5</sup>:

- "1. *The VAT Committee almost unanimously agrees that the supply of goods or services to a member of an ERIC may only benefit from VAT exemption pursuant to Articles 143(1)(g) and 151(1)(b) of the VAT Directive if and when all of the following conditions are fulfilled:*

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<sup>1</sup> Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) (OJ L 206, 8.8.2009, p. 1).

<sup>2</sup> See full list in annex.

<sup>3</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

<sup>4</sup> Based on Working paper No 800.

<sup>5</sup> [Guidelines](#) resulting from the 101<sup>st</sup> meeting of 20 October 2014; Document E – taxud.c.1(2015)615518 – 828 (p. 182).

- (a) *the statutes of the ERIC provide for its members, as defined in Article 9(1) of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC), to benefit from the exemption granted to the ERIC;*
- (b) *the acquisition of goods or services made by the member respects the limits and conditions laid down in the statutes of the ERIC;*
- (c) *the goods or services acquired by the member are necessary for the ERIC to fulfil the objectives assigned to it and intended for the exclusive use in achieving the tasks that constitute the purpose of the ERIC;*
- (d) *those goods or services are not shared in use with other bodies or used for tasks of the ERIC other than those constituting its purpose.*

*Further, the VAT Committee almost unanimously agrees that with a view to ensuring the correct and straightforward application of those exemptions as required under Article 131 of the VAT Directive, only goods or services allocated directly for the exclusive use in achieving the tasks that constitute the purpose of the ERIC, without any further processing, can benefit from exemption.*

2. *The VAT Committee almost unanimously agrees that the public entities or private entities with a public service mission by which any Member State, associated country or third country may be represented ("representing entities") and to which Article 9(4) of Council Regulation (EC) No 723/2009 refers, cannot be regarded as members of the ERIC.*

*The VAT Committee is of the almost unanimous view that goods or services acquired by those representing entities shall not benefit from VAT exemption pursuant to Articles 143(1)(g) and 151(1)(b) of the VAT Directive, not even if the goods or services are acquired with a view to be delivered to the ERIC as an in-kind contribution.*

*According to the almost unanimous view of the VAT Committee, VAT exemption shall only be possible if goods or services supplied to a representing entity are acquired by that entity in the name and on behalf of the ERIC.*

3. *When goods or services are acquired by a member of an ERIC in a Member State other than that in which the ERIC is established, and the transaction fulfils all the conditions for benefiting from VAT exemption under Articles 143(1)(g) or 151(1)(b) of the VAT Directive as provided for under paragraph 1 of these guidelines, the VAT Committee is of the almost unanimous view that the VAT exemption certificate shall specify that the goods or services are acquired by the member but for the sole purpose of the ERIC."*

Prior to that, discussions on the status of the ERIC as an international body<sup>6</sup> had already led to unanimous guidelines<sup>7</sup>, recognising that the ERIC qualifies as an international body for the purposes of Articles 143(1)(g) and 151(1)(b) of the VAT Directive subject to

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<sup>6</sup> During the 87<sup>th</sup> and 90<sup>th</sup> meetings based on Working papers Nos 612, 642 and 642 ADD.

<sup>7</sup> [Guidelines](#) resulting from the 87<sup>th</sup> meeting of 22 April 2009; TAXUD/2423/09 – 615 (p. 122).

certain conditions. One such condition is that its membership must consist of EU Member States and may in addition include third countries and inter-governmental organisations, but not private bodies. That is now reflected by Article 50(1)(c) of the VAT Implementing Regulation<sup>8</sup>.

Article 9(1) of the ERIC Regulation accommodates for this by limiting membership of the ERIC to Member States, associated countries, third countries other than associated countries and intergovernmental organisations. Members may, as set out in Article 9(4) of the same Regulation, be represented by one or more public entities, including regions or private entities with a public service mission, as regards the exercise of specified rights and the discharge of specified obligations as member of the ERIC. Those entities do not, however, qualify as members.

Before an ERIC can be set up, the prospective members need to agree upon a set of Statutes specifying the limits and conditions of the exemption. Such agreement is however, in some instances, hampered as Member States still diverge when it comes to the scope and application of the exemption insofar as purchases made by members of the ERIC and their representing entities are concerned. In that regard, the Council in its conclusions of 5 December 2014 "INVITES the Commission and Member States to take appropriate measures to facilitate the use of the ERIC instrument and to stimulate investment in ERICs and other ESFRI Roadmap Infrastructures, for example as concerns in-kind contributions"<sup>9</sup>.

With the issue of guidelines, some but not all aspects of the exemption have been clarified. Still, it is evident that divergence in terms of application is persisting as between Member States. Experience in fact shows that certain aspects of the exemption can stand in the way of the setting up and the operation of ERICs, necessitating further discussion with Member States.

### **3. THE COMMISSION SERVICES' OPINION**

Once set up, there is no doubt that ERICs could benefit from the exemption laid down in Articles 143(1)(g) and 151(1)(b) of the VAT Directive<sup>10</sup>.

For an ERIC to be set up, the ERIC Regulation requires that the host country declares it will recognise the prospective ERIC as an international body<sup>11</sup>. That, together with membership being limited to Member States, associated countries and other international bodies, opens for access to exemption as it will see the ERIC qualify as an international body.

The scope of that exemption is to be set out in more detail in the Statutes of each individual ERIC. While, following discussions, the VAT Committee has come some way in addressing issues arising in this respect it is clear that questions still remain.

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<sup>8</sup> Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

<sup>9</sup> See [Council conclusions](#) agreed at the Competitiveness Council meeting on 5 December 2014 (point 10).

<sup>10</sup> In the further analysis, any reference to Article 151(1)(b) (that covers supplies of goods and services) should be seen as comprising Article 143(1)(g) (which targets importations of goods).

<sup>11</sup> See Article 5(1)(d) of the ERIC Regulation.

### **3.1. Who may benefit from exemption?**

Other than the eligible international body itself, Article 151(1)(b) of the VAT Directive also allows members of such a body to benefit from the VAT exemption for their acquisitions of goods or services.

As the wording of Article 151(1)(b) of the VAT Directive refers to members without any further precision, attempts have been made to clarify the sense of the term "members" and to establish whether it refers to members of the staff of such an international body or to those entities that have set up the international body<sup>12</sup>. The Commission services continue to be of the view that this must be taken to refer to the entities making up the international body. Previous discussions show that this is not a view necessarily shared by all Member States.

In setting out that the supply of goods and services to members of an ERIC may only be exempted under certain conditions, Member States implicitly acknowledge that such members have access to the exemption<sup>13</sup>. With regard to membership, Article 9(1) of the ERIC Regulation lists the entities which may become members of an ERIC. That does not extend to representing entities nor is any reference made to members of staff.

With that in mind, there can be little doubt that, insofar as ERICs are concerned, the notion of members, as set out in the VAT Directive, is directed at and could only be seen as covering the entities that are or will become part of the ERIC. It could not be taken to mean the members of staff of such an ERIC.

### **3.2. Scope of the exemption**

The exemption granted under Article 151(1)(b) of the VAT Directive only applies within the limits and under the conditions laid down in the convention establishing the international body or by a headquarters agreement.

Before setting up any international body, the issue of limits and conditions clearly must be settled. When it comes to an ERIC, this is dealt with through the Statutes on which prospective members necessarily will have to agree<sup>14</sup>. That includes the matter of members' access to the exemption on which the Statutes should bring clarity.

The exemption will ultimately, in terms of scope, be framed by what is agreed between members and laid down in the Statutes. In setting conditions, the decision could be taken to exclude members of an ERIC from the benefit of the exemption. That would then see only goods and services supplied directly to the ERIC exempted from VAT.

Whilst the scope of the exemption is formed by the agreement reached between members, it is still necessary to ensure that the basic principles of EU law are respected. It is evident, amongst others, that the rules put in place must be compatible with the internal market.

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<sup>12</sup> See Working paper No 897, notably section 3.1.4.

<sup>13</sup> See guidelines as set out under section 2.

<sup>14</sup> Article 10 of the ERIC Regulation sets out what the Statutes of any ERIC must contain. Although VAT is not mentioned, it is evident that limits and conditions of the VAT exemption will also need to be set out.

To facilitate agreement, thought has been given to including a clause in the Statutes which would leave it for Member States to adopt rules for the application of the VAT exemption. Given that no such detailed rules are included in the VAT Directive<sup>15</sup> this is found by some to balance the needs of different Member States.

Such a clause could however also be seen as allowing some Member States to apply exemption for supplies made to members without obliging others to do the same. As such, it carries the real risk that goods and services acquired by members in some Member States would be exempted whilst being taxed in others. That would be incompatible with having a common system of VAT harmonised at EU level and is not consistent with the internal market.

Such a clause, which is not a substitute for an agreement by the founding members, is therefore not acceptable to the Commission.

### **3.3. In-kind contributions**

The ability of a member of an international body to acquire goods or services exempt of VAT is derived from the exemption granted to the international body itself. As such, members are not entitled to exemption no matter what. The exemption is not wide-ranging but only serves to honour certain commitments made<sup>16</sup>. It can therefore not go beyond the objectives behind the setting up of the ERIC.

#### *3.3.1. By members*

Where goods or services are acquired by members to be handed over to an ERIC as in-kind contributions, there should be scope for exemption. The VAT Committee has already clarified that for exemption to apply, the goods or services must however (1) be necessary for the ERIC to fulfil the objectives assigned to it and intended for the exclusive use in achieving the tasks that constitute the purpose of the ERIC and (2) not be shared in use with other bodies or used for tasks of the ERIC other than those constituting its purpose.

Having this in mind, in-kind contributions by members themselves should not, from a VAT point of view, cause particular issues.

#### *3.3.2. By representing entities*

Often members prefer the use of in-kind contributions, at least in part, over cash contributions. Clarity is essential to avoid the VAT treatment of such in-kind contributions from impeding the setting up of an ERIC.

Whilst, by now, there should be clarity on how to deal with in-kind contributions acquired directly by a member and handed over to the ERIC<sup>17</sup>, there are still lingering doubts as to when acquisition is made by the representing entity. Members may want to leave it to their representing entity to acquire the goods and services to be handed over to the ERICs as, in most cases, they cannot themselves do so themselves.

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<sup>15</sup> Some have however been included in the VAT Implementing Regulation.

<sup>16</sup> CJEU, judgment of 26 April 2012, *Able UK Ltd*, C-225/11, EU:C:2012:252.

<sup>17</sup> This was dealt with in detail in Working paper No 800.

Given that representing entities cannot be seen as members, there can be no doubt that they are excluded from exemption, even if goods or services acquired by a representing entity are used for in-kind contributions. For goods or services acquired by that entity acting in the name and on behalf of the ERIC, it is nevertheless agreed that exemption applies as in that case the entity is seen as an intermediary and the goods and services become the property of the ERIC.

By the same token, exemption should be possible where a representing entity is acquiring goods or services in the name and on behalf of a member (unless, that is, decision is taken to exclude members from the exemption). It is not sufficient for the entity, as some sort of economic intermediary, to act in its own name but on behalf of a member as it would then be deemed to have acquired the goods or services itself and supplied them on.

As previously outlined, for goods or services to be said to have been acquired in the name and on behalf of the ERIC, certain conditions must be met:

- the purchase is made in the name of the ERIC, so the invoice must be issued in its name;
- the purchase is administered by the ERIC;
- provision is made for the purchase in the budget of the ERIC.

It is evident that those conditions would need to be adapted to suit the case where goods or services are instead acquired in the name and on behalf of a member. The conditions should obviously reflect in whose name the purchase is made but also who administers the purchase and in whose budget provision for that purchase is made. That would be the member in question.

Where purchases are made by a representing entity in the name and on behalf of a member, there is particular reason for those conditions to be applied stringently. The representing entity has been appointed by the member and it is important to avoid blurring the line between goods or services acquired by the representing entity in the name and on behalf of the member and those *de facto* acquired by the entity itself.

To avoid any such risk, there is a need to spell out each of the above conditions in more detail:

- The purchase is made in the name of the member, so the invoice must be issued in its name:

The representing entity will be acting on behalf of a member in whose name the purchase is made. As the member is the customer of the supply, the invoice must, in accordance with Article 226, point (4) of the VAT Directive, be issued in its name, and not in that of the representing entity. Otherwise, the representing entity could not be said to act merely in the capacity of intermediary.

- The purchase is administered by the member:

Although the representing entity is tasked with acquiring the goods or services, it is still necessary for the purchase to be administered by the member. That entails direct payment

to the contractor by the member itself. Where the representing entity is paying for the goods or services, the purchase cannot be said to have been administered by the member, not even if it subsequently reimburses the cost incurred by the entity.

- Provision is made for the purchase in the budget of the member:

If a member is to be said to be the purchaser of the goods or services acquired on its behalf by the representing entity, it is indispensable that provision is made for the purchase in the budget of the member. This implies that provision must be made for a budget line to cover such expense.

### **3.4. Conclusion**

It must be concluded that the entities making up an ERIC are members and may, as the ERIC itself, benefit from exemption, subject to the limits and conditions laid down in the Statutes of the ERIC. Members may be excluded from the exemption but such exclusion cannot be left in the hands of each individual Member State to decide. Where the exemption extends to members of the ERIC, it should also, subject to certain conditions, cover goods or services acquired by representing entities acting in the name and on behalf of a member with a view to be handed over as in-kind contributions.

## **4. DELEGATIONS' OPINION**

Delegations are invited to express their views on:

- how to understand the notion of members of an ERIC;
- the scope of the exemption, having due regard to the Statutes of the ERIC;
- the extent to which exemption applies where a representing entity acquires goods or services acting in the name and on behalf of a member to be handed over as in-kind contributions.

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### List of ERICs

At this moment in time, 19 ERICs have been set up. These are hosted by:

#### Germany

- SHARE-ERIC (Survey of Health, Aging and Retirement in Europe)
- EU-OPENSREEN ERIC (European Infrastructure of Open Screening Platforms for Chemical Biology)

#### Spain

- LifeWatch ERIC (e-Science and Technology European Infrastructure for Biodiversity and Ecosystem Research)

#### France

- ECRIN-ERIC (European Clinical Research Infrastructure Network)
- Euro-Argo ERIC
- DARIAH-ERIC (Digital Research Infrastructure for the Arts and Humanities)
- EMBRC ERIC (European Marine Biological Research Centre)

#### Italy

- CERIC-ERIC (Central European Research Infrastructure Consortium)
- EMSO-ERIC (European Multidisciplinary Seafloor and Water Column Observatory)

#### The Netherlands

- CLARIN-ERIC (Common Language Resources and Technology Infrastructure)
- EATRIS-ERIC (European Advanced Translational Research Infrastructure in Medicine)
- JIV-ERIC (Joint Institute for Very Long Baseline Interferometry)

#### Austria

- BBMRI-ERIC (Biobanking and Biomolecular Resources Research Infrastructure)

#### Finland

- ICOS-ERIC (Integrated Carbon Observation System)

Sweden

- the European Spallation Source ERIC

The United Kingdom

- ESS-ERIC (European Social Survey)
- INSTRUCT-ERIC (Integrated Structural Biology)

Norway

- CESSDA ERIC (Consortium of European Social Science Data Archives)
- ECCSEL ERIC (European Carbon Dioxide Capture and Storage Laboratory)