



ERIC FORUM Implementation Project

D3.2 Procurement rules, VAT exemptions practises and economic activities

WP3 - Operations, Administration, HR and Finance of ERICs

Task 3.2 Procurement rules, VAT exemption practises and economic activities

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ACKNOWLEDGEMENTS

The present study was carried out by CERIC-ERIC with the support of all the other ERICs involved in the project. The study aims to provide a better understanding how the ERICs have implemented or plan to implement the VAT exemption benefits both in the case of exemption on direct procurement as well as in the case of indirect (in-kind) procurement.

This study has been conducted within the ERIC Forum project (WP 3) and aims at surveying the state of implementation of the Tax exemptions (in particular VAT) provided by the ERIC Regulation for the ERICs, and in particular referring to the in-kind contributions.

The activities performed this WP take into consideration:

- two questionnaires on procurement which included some questions relevant for the tax exemptions or directly on VAT exemption.
- the main outcomes of D.3.1 Guidance document developed within this Project on GAAP for ERICs, and in particular to the content of Paragraph related to – VAT AND EXCISE DUTY: THE LEGAL FRAMEWORK.
- the main outcomes developed within the H2020 Project ACCELERATE, in particular with reference to the Deliverable 1.8 – In kind contribution methodology and Deliverable 1.6 VAT and excise exemption.

The questionnaires have been detailed having in mind the large diversity of cases and implementations already clearly emerging from the procurements issue, highlighting the diversities, the difficulties, but also possible suggestions for best practice approaches.

CERIC-ERIC also wishes to acknowledge the access to ERICs' background information provided by Anne-Charlotte Fauvel (EATRIS),

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1 INTRODUCTION

The present document – D 3.2 Report and recommendations on VAT exemption in the ERIC legislation has been elaborated in line with the project description of Task 3.2. focused on the implementation of the VAT legislation and its consequences in terms of ERICs operation. In the project context an online survey about administrative and operational issues has been conducted in the period from November 2019 to January 2020 and analysed by March 2020. The ERICs survey results and participation demonstrated a high level of interest and engagement with the issues, attracting about 17 responses representing experience of most of the ERICs involved in the project. Through the survey extensive information were collected with the aim to map current issues and best practices when it comes to administrative procedures and processes among which are the procurement and VAT issues.

As for other similar initiatives, the number and the quality of the responses were very useful to finalize this document.

The relevance of the opportunities arising from the possibility to apply also to in kind contributions provided by the Members of an ERIC the VAT/excise exemptions granted by law to the ERICs recognized as international bodies or organizations at European level and to their member are raised in two reports from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No 723/2009 dated 14.07.2014 and 06.07.2018¹ within dedicated chapter titled “pending issues and next steps”.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0523&from=en>

Considering that “any Member State, associated country or third country may be represented by one or more public entities, including regions or private entities with a public service mission (hereinafter Representing Entities), as regards the exercise of specified rights and the discharge of specified obligations as a member of the ERIC”, the VAT exemption issues are most often linked to the management of the In Kind Contributions (IKC) provided by these organizations to the ERIC on behalf of the ERIC members.² Starting from the fact that the ERIC regulation does not contain specific and explicit rules in favour of the representing entities with reference to the right to apply the Tax exemption on behalf of their appointing Members, the definition of clear rules is crucial in order to fully implement the benefits arising from these facilitations, with a positive impact on the degree of integration between ERICs and the entities representing the members, as well as to their scientific and technical planning capacity. The ERIC regulation rather only refers that the Member may be represented as regards the exercise of specified rights and the discharge of specified obligations as a member of the ERIC (Article 9, paragraph 4 – ERIC regulation).

The absence of specific law provisions in this sense, led the TAX Services of the European Commission to provide a (restrictive, not unanimously and not binding according the EU’S highest Court) opinion³, indicating that the exemption to the representing entities can be admitted only when they act “in the name and on behalf of the ERIC”.

The present document is focused on detailing the following aspects:

- a) general information **about procurement and VAT/Excise duty exemption within the ERICs** and structure of the ERICs (single site / distributed);
- b) type of activity performed (institutional/commercial);
- c) support provided by the Members (in kind/ financial contributions);
- d) case studies of VAT/excise exemption implementations

² COUNCIL REGULATION (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC) – Article 9 subparagraph 4 – Requirements for membership

³ VALUE ADDED TAX COMMITTEE - Working paper No 946 - <https://circabc.europa.eu/sd/a/5df38976-458f-44b0-829b-a3548e25c206/946%20-%20COM%20Question%20on%20ERIC%20-%20follow-up.pdf>

2 Procurement in the environment of ERICs and VAT Excise Duty exemptions

2.1 Environment in which ERICs operate

Being an ERIC brings many benefits and allows a flexible organisation but the way to enjoy those benefits is often not very clear or easy. Some benefits come from the fact that ERICs are classified as **international body** in the sense of Articles 143 (1)(g) and 151 (1) (b) of the VAT Directive 2006/112/EC and as **international organization** in the sense of Dir N.2008/118/EC Article 12(1) (b), related to excise duties. According to those Directives ERICs are VAT and Excise Duty exempted under certain conditions.

VAT Directive 2006/112/EC Exemptions relating to certain Transactions treated as exports

Article 143

Member States shall exempt the following transactions:

.....

(g) the importation of goods by international bodies recognized as such by the public authorities of the host Member State, or by members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;

VAT Directive 2008/118/EC concerning the general arrangements for excise duty and repealing Directive 92/12/EEC

Article 151

1. Member States shall exempt the following transactions:

.....

(b) the supply of goods or services to international bodies recognized as such by the public authorities of the host Member State, and to members of such bodies, within the **limits** and under the **conditions** laid down by the international conventions establishing the bodies or by headquarters agreements;

ERICs can also be exempted from applying the directive on public procurement⁴, provided they adopt their own procurement policy respecting the principles of transparency, non-discrimination and competition.

Although established in 2012, the ERICs are still considered as a new type of entities on national level as well as in the eyes of local authorities.

The Survey shows that only 35% of the ERICs participating in the survey are fully recognised as international organisation in their hosting countries, 30% are partially recognised in their hosting countries while for 35% are recognised as something different, depending on the national laws. Considering that 40% of the ERICs in the survey have recurrent and 45% sporadic procurement activities we can see that these activities are of a great relevance for the ERICs.

Although the ERIC regulation is recognised by every Member State, this diversity makes it hard for the ERICs to operate in a standardised way and to learn from each other.

2.2 Complexity of Eric's structure and VAT/excise duty exemption

According to the ERICs Practical guidelines⁵ the legal framework for European Research Infrastructure Consortium can be adopted for establishing new research infrastructures as well as for operating existing research infrastructures which consider it useful to change their legal structure to become an ERIC. Research infrastructures may be single-sited or distributed. ERICs as well can be structured as a single sited institution, however most of the ERICs are distributed and have hubs and nodes⁶ in different EU or also in extra EU countries.

⁴ Point (c) of Article 15 of Directive 2004/18/EC, repealed by Directive 2014/24/EU of 26 February 2014 with effect from 18 April 2016. International organisations such as ERICs are now mentioned in Article 9(2) of Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

⁵<https://op.europa.eu/en/publication-detail/-/publication/c6647f05-874e-4cdd-af70-22ade4759930/language-en>

⁶ With the term “nodes” we mean facilities that are not under the direct control of the ERICs, but could still be completely accounted for within the ERIC remit.

The survey shows that only 8% of the ERICs describe themselves as single sited ERIC. This means that all the others are distributed with facilities owned by them or in most cases contributed by the ERIC Members in-kind to the ERICs operation. All the distributed ERICs participating in the survey are ERICs composed by one or more national nodes in each Member of the ERIC. 83% of the respondent ERICs are characterized by the fact that the statutory seat is established as a separate entity, with own staff and procurement capability. In 50% of the cases, the statutory seat is hosted in an Entity that has been nominated as such by the host member Country.

The overall complexity in theory suggests that the procurement of goods and services for the purpose of ERICs can be done in different ways; a useful distinction can be made, in general, between **direct and indirect purchases**.

Direct purchases are the ones made by the ERIC or the Member while the indirect purchase are made by a specific delegated entity (not to be confused with the Representing Entity) in the name and on behalf of the ERIC or the Member.

The goods and services can be delivered in the same country where the ERIC is located or in a different EU or extra EU country.

The survey shows that only 1 out of 17 participating ERICs has implemented the **indirect procurement** done by a Member through an Entity. 5 ERICs answer that the purchase is made, except by the seat, by the other entities as well. 6 ERICs declared that the purchase is done at ERIC level for the benefit of the member institutions.

Being structurally different leads to different ways of implementing the procurement.

2.3 Implementation of VAT/Excise duty exemptions

In general, for all the organizations whose scopes are not linked to the execution of economic activities, the VAT has to be considered as a major cost and therefore there is a general interest to be able to implement the benefits.

The implementation of these benefits has to be taken with a systematic approach, both for the ERICs and for their Members (and hopefully for the representing entities eventually appointed), also for this reason.

When it comes to VAT/Excise duty exemption they represent a priority for 100% of the ERICs involved in this survey. In limited cases this is the result of a long dialogue between the “national nodes of the ERICs” and the local tax authorities, while in most cases the VAT implementation has been applied without any operational difficulties.

The survey shows that in 77% of the cases the benefits are implemented limited to the VAT exemptions and not to excise duty. This high percentage depends mainly on the following aspects:

- the fact that most respondents apply the exemption only for the central office (not energy/excise intensive) of the respondents ERICs.
- the lack of clear rules to benefit from the excise exemption from the Representing Entities (organizations energy/excise intensive) on behalf of the appointing ERIC Members,

Only in 15% of the cases, these benefits have been applied also to the excise, depending on the structure/activities carried out by the respondents ERICs. This topic is very important for energy intensive research infrastructures and those Countries where excise duties are large.

In a specific case, the benefits arising from the status of “international organization” granted to the ERICs, take the form of other tax breaks agreed by the host Member and the other Members of the ERIC (VAT and turnover tax on imports).

The Survey shows that most of the ERICs (66%) have finalized purchases on national level (with national suppliers), 77% on EU level and 33% on international level (outside of EU). It is clear that purchases have a significant role on the operation of most of the ERICs and having the VAT and Excise duty exemption can bring great savings. The importance of these exemptions is seen even from the fact that 88% of ERICs have enjoyed the exemptions on national level, 50% of the on the EU level and 22% on international level.

2.4 Mapped difficulties in obtaining the VAT/Excise Duty exemptions

Considering the different kinds of recognition of the ERICs in the host counties as well as different legislation and procedures this causes different obstacles when it comes to dealing with the benefits as VAT/Excise duty exemptions.

The survey shows that the main difficulties when it comes to the exemptions are: too long and complicated procedure, long waiting time to get the reimbursement of the VAT paid, difficulties with suppliers or even approvals needed in advance which delays procurement process. Some ERICs haven't challenge yet the whole process.

Shifting our focus to the approach adopted by the ERIC Members to make use of the advantages arising from these benefits, we notice that these exemptions have been applied by the ERICs Members in 46% of the cases.

In these cases, the exemptions are applied by the ERICs in 33% of the cases, while in the remaining percentage the exemptions are applied through their delegated entities (67%).

2.5 Case studies of VAT/excise exemption implementations

The implementation of the VAT exemption in most cases has been achieved without difficulties but limited to the use in the Statutory seat. This means that the benefit can be easily granted for the current expenses related to the coordination activities of the distributed ERICs instead of being extended to the upgrade of the existing facilities in distributed nodes owned by other entities. The reason for this is that the VAT benefits are linked to the concept of "exclusive use" of the resources acquired. In case of distributed ERICs, the "network of resources"⁷ is composed by facilities which are often not fully committed to ERICs scopes.

⁷ Article 2 of the 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) amended by Council Regulation (EU) No

A different and easier context can be represented for ERICs, in which the In-Kind Contributions provided by the Members (through their Representing Entities) are intended to build (or to strengthen) a research facility owned by the ERIC. The contributions to the construction of an infrastructure (as e.g. the case of ESS) based on transferring goods and services from a number of contributing Countries to the Host Country, according to a “cost book and fitting to a pre-defined design, allow to demonstrate the “exclusive use” as necessary to grant the exemption for purchases of goods and services for the ERIC.⁸

The Survey also shows some differences referred to the limits provided by the Statutes for the application of the VAT/duties exemption (e.g. minimum purchase value) as well as to the implementing rules of these benefits (direct exemption or request of reimbursement from the local tax authorities on a periodic basis).

The bureaucratic procedures linked to these benefits take time and effort, especially considering the cases in which the purchases of the ERICs are made within the EU but in a different country than to the one in which the ERIC is established.

In these cases, the national fiscal authorities shall approve in advance the benefits application. Considering the complexity of the procedure, in case of invoices with relatively small amounts of VAT, the ERICs prefer to pay the VAT instead of requiring the authorization through the 15.10 form.

It is very important to define alternative procedures in order to grant to ERICs the possibility to benefit from the VAT exemption involving in the authorization process, for example, the Ministries of Research of the Member countries as well as the supervisory bodies of the ERIC.

In 23% of the cases the VAT exemptions are also linked to purchases made outside the EU. In these cases, the ERICs should provide to the customs authorities the documentation confirming the “exclusive use of the purchase made.

1261/2013 of 2 December 2013 amending Regulation (EC) No 723/2009 concerning the Community legal framework for a European Research Infrastructures Consortium (ERIC) (OJ L 326, 6.12.2013, p. 1)

⁸ 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

The application of these benefits on imports in some cases is the result of interactions between the ERICs, the import-export companies contracted and the customs authorities.

In 80% of the cases, the VAT exemptions are linked to direct purchase by the ERIC exclusively for use in the Statutory seat and procurement are made within the host country. Only in 20% of the cases the exemptions are applied also for delivery and use in different countries for research purposes.

Starting from the fact that the benefits granted to ERICs in terms of VAT/Excise duty exemptions are subject to fulfil subjective /objective requirements⁹, it is necessary to consider that the implementation of the VAT and excise exemption rules is strictly linked to the *concept of integration* of the Members (through their Representing Entities), and more in general of the scientific and technical resources. For this reason, this “restrictive” interpretation should be overcome.

As the Members are unable to themselves deliver directly the in-kind contributions to the ERICs, this task of performing the delivery has to be necessarily carried out by the delegated entities. The terms and scope for each In-Kind Contribution should be set out in a series of contracts (Agreements) entered between the ERIC and the relevant delegated entity, in order to fulfil the legal requirements above mentioned.

These Agreements should define, with reference to a specific time frame, the set of resources (fully) committed to the ERICs as well as the rights and the obligations of the parties.

3 Types of activities performed

⁹ The subjective requirement is related to the eligible individuals/bodies that can benefit from the exemption. In the concrete case, the purchase is made by the ERIC or a Member.

The objective requirement is related to the fact that the acquisition of goods and services by the eligible individuals/bodies could benefit from the VAT /excise exemption when acquisitions are made for certain activities of these individuals/bodies. In the concrete case, the provision has to be intended for the sole/institutional use of the ERIC.

Some questions of the surveys carried out were focused on collecting information referred to the commercial activities implemented by ERICs. Only in 17% of the cases, these activities are regularly carried out.

The low percentage could be justified by the following factors:

- the complexity in defining integrated commercial services to offer on the market;
- the recent implementation of the ERIC regulation, as tool to develop strategical long term collaboration at European level.
- the potential reluctance of some delegated entities in performing business joint based.

The implementation of the (limited) economic activities is an additional key to strengthen the cooperation between Member States in programming and implementing applied and commercial research related activities in a complementary manner, avoiding duplication of efforts as well as rationalizing the possible commercial use of these research infrastructures.

In order to fulfil the obligations arising from the fiscal laws, as well as to respect the provisions stated in the ERIC Regulation¹⁰, in all these cases the adoption of separate accounting has been implemented.

In 64% of the cases, ERICs planned their accounting system in order to manage this separation regardless of the implementation of their economic activities.

83% of the respondent ERICs are recognized by the national fiscal authorities of the hosting countries through the acquisition of the VAT number even if no commercial activities are performed.

The requests for the VAT number in most of the cases is consequently linked to the INTRASTAT obligations for no commercial entities. (INTRA 12 form), rather than the effective carrying out of commercial initiatives. In all probability, the high percentage of ERICs not performing commercial activities depends on the novelty of these organizations.

¹⁰ Art.3 comma 3: an ERIC shall record the costs and revenues of its economic activities separately...(omissis)

Another reason for which the VAT number is acquired from the national tax authorities could be linked to the legal framework attributed to the ERICs. In some countries these organizations are assimilated to foundations or other not for profit organizations.

Only in one case, the ERIC is recognized by the national fiscal authority through 2 different identification codes. This means that the acquisition of the VAT number was done later than the acquisition of the TIN (tax identification number).

In none of the ERICs involved in these surveys additional VAT numbers for their hubs or nodes have been requested. This aspect confirms that the distributed research infrastructures are composed by facilities provided by the delegated entities, rather than by branches owned by the ERICs.

1.1 Support provided by the Members / Observers

1.1.1 Establishment of the ERIC

With reference to the financial model of the ERICs involved in the surveys, the establishment of the individual Statutory Seats have been supported by the Members through financial and in-kind contributions in 67% of the cases. In the remaining percentage the IKCs did not play any role, the contributions being purely financial.

As a general rule, all the members follow the same approach in terms of financial support. In many cases the amount of the resources transferred (annual fees) is calculated taking into consideration the GDP of the individual Member country. In only one case, the financial contributions are exclusively granted by the hosting member, while the other members support the ERICs initiatives through the provision of in-kind contributions.

Another particular case is the fact that there is a distinction between the contributions provided by the members and the ones provided by the observers. In the first case, the amount transferred by the observers correspond to a percentage of the resources transferred in relation

to the (full) membership. This is the consequence of the fact that observers cannot vote in the General Assembly as well as that they are subject to specific conditions listed in the individual Statutes.

2.3.2 Operation of the ERICs

Moving to the operational phase of the ERICs, the funding schemes adopted can be detailed as follows:

In 33% of the cases, the Entities hosting the nodes are specifically funded by the Members in order to support the operation of the ERICs. In the remaining 67% of the cases, the ERICs operations are granted by the ordinary funds of the appointed entities.

In 33% of the cases, there's no formal arrangement between the Members and their appointed entities in order to provide the availability of the use of the facilities for the scopes of the ERICs.

4 How to move forward

In order to overcome the existing limitations in the implementation of the VAT and Excise exemptions it is necessary to act in different directions. It is important to strengthen the collaboration between the ERICs by:

- sharing directly the best practices autonomously developed.(i.e. financial management of the IKCs);
- defining and implementing common practices (i.e content of the Agreements / definition of commercial procedures);
- defining formal and informal groups where issues of common potential interest are discussed.

When it comes to the VAT, the fact that EC renewed the mandate of the EU VAT Forum is a good opportunity for the ERICs to put their difficulties forward and make them more visible in the eyes of the Member States and Commission.

The EU VAT Forum is a working group set by the EC where different kind of stakeholders e.g. Member States' task authorities, non-governmental organizations, universities, research institutes and other meet and discuss practical tax administration issues and good practices in cross border environment.

Considering that from the survey it is clear that there are differences in obtaining the VAT and Excise duty exemptions within different countries, the EU VAT Forum could be the place where ERIC Community should make visible the differences and get insights in good practices.