



**Building a research infrastructure and synergies
for highest scientific impact on ESS**

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Authorship	Written by	<ul style="list-style-type: none">• Allen Weeks, ESS• Ute Gunsenheimer, ESS• Lenka Peťková, ESS
	Reviewers	<ul style="list-style-type: none">• Karin Börjesson, ESS• Johan Brisfors, ESS• Ohad Gruber-Soudry, ESS• Anna Hansson Kallaris, ESS• Gabor Németh, ESS• Agneta Nestenborg, ESS• Meredith Shirey, ESS• Anne-Charlotte Joubert, ESS
	Approved by	BrightnESS Steering Board on 28 March 2018



3 List of Abbreviations

AFC	Administration and Finance Committee
CEC	Committee on Employment Conditions
CERN	European Organisation for Nuclear Research
CFAC	Conventional Facilities Advisory Committee
ECC	Committee on Employment Conditions
ERA	European Research Area
ERIC	European Research Infrastructure Consortium
ESFRI	European Strategy Forum for Research Infrastructures
ESS	European Spallation Source
ES&HC	Environment, Safety & Health Committee
IKC	In-Kind Contributions
IKRC	In-Kind Review Committee
IPR	Intellectual Property Rights
LOU	Swedish Procurement Act
R&D	Research and Development
SAC	Scientific Advisory Committee
TAC	Technical Advisory Committee
VAT	Value Added Tax



4 List of Figures

<i>Figure 1: Overview of procedures and value thresholds</i>	11
<i>Figure 2: Overview of approaches to the VAT issue.....</i>	15
<i>Figure 3: VAT status by country</i>	17



Table of Contents

1	Project Deliverable Information Sheet.....	2
2	Document Control Sheet	2
3	List of Abbreviations.....	3
4	List of Figures	4
5	Executive Summary	6
6	Report on Implementation Process and Status of Deliverable.....	7
6.1	Background on the ERIC Regulation	7
6.2	European Spallation Source Becomes an ERIC.....	8
6.3	Challenges Pertaining to ERIC Regulation	9
6.3.1	Procurement.....	9
6.3.1.1	Problem Background.....	10
6.3.1.1.1	Choice of Procedures	10
6.3.1.1.2	Appeal Process.....	12
6.3.1.1.3	Procedure without Publication of a Call for Tenders.....	12
6.3.1.2	Results	13
6.3.1.3	Review	13
6.3.1.4	Way forward	13
6.3.2	VAT Taxation on In-Kind Contributions.....	14
6.3.2.1	Problem	14
6.3.2.2	Approaches to the Problem.....	14
6.3.2.2.1	Direct Exemption	15
6.3.2.2.2	Representing Entities	16
6.3.2.2.3	Direct Allocation for In-Kind	16
6.3.2.3	Status and Solution	16
6.3.2.4	Lessons Learned.....	17
6.3.3	International Staffing Profile	18
6.3.3.1	Background Information.....	18
6.3.3.2	ERICs vs. International Organisations.....	18
6.3.3.3	Committee on Employment Conditions	19
6.3.3.3.1	Time-Limited Contracts	20
6.3.3.3.2	Taxation and Social Security Related to Secondments and IKC Personnel	22
6.3.3.3.3	Expert Tax Relief	23
6.3.4	Accounting of In-Kind Contributions.....	24
6.3.4.1	Status of In-Kind Contributions.....	24
6.3.4.2	Potential Risk	24
6.3.4.3	Legal Framework.....	25
6.3.4.4	Next Steps.....	27
7	Bibliography	28



5 Executive Summary

The legal framework for a European Research Infrastructure Consortium (ERIC) was introduced by the Council of the EU in 2009 with the aim to help research facilities safeguard scientific excellence on pan-European level, facilitate partnerships, and contribute to the development of the European Research Area. The European Spallation Source (ESS), a multi-disciplinary research facility based on the world's most powerful neutron source, acquired the status of an ERIC on 1 October 2015. The ESS is the largest ERIC in terms of value and the very first brick-and-mortar research facility to assume this legal form. It is also the first ERIC established in Scandinavia. The fact that ESS has been awarded the ERIC status does not mean, however, that in practice all aspects relating to its implementation have been resolved. Uncertainty still remains regarding the full implementation of several provisions of the ERIC legal framework. Key unsettled issues to realise the full potential of the ERIC legal structure highlighted in this report include:

- **Procurement:** The ESS Procurement Rules established in 2015 provide a robust and tailored framework that facilitates an efficient procurement and purchasing activity for the Organisation. As the construction of ESS moves further ahead, the Organisation will closely monitor processes related to the procurement rules and assess whether there is a need for further revisions to better accommodate new challenges. The European Spallation Source will continue to share best practice and lessons learned, so that other ERICs can benefit from its experience.
- **VAT taxation of In-Kind Contributions:** As an ERIC, ESS is exempted from VAT. However, the ERIC Regulation does not provide guidance for in-kind partner institutions. The institutes face uncertainty whether VAT should be included on invoices they receive from suppliers when ordering for IKCs to deliver to ESS. While VAT issues have already affected the ESS schedule, the overall impact on the cost is not yet known. ESS is currently analysing how In-Kind Contributions, and partners, may be assessed for VAT in Sweden and how the status of In-Kind Contributions is viewed by Swedish tax authorities.
- **International staffing profile:** The international character of ESS is not only reflected by the number of countries joined in the partnership, but also by the diversity of its employee base. The European Spallation Source is a fast-growing organisation with staff coming from 50 different countries. Swedish authorities maintain a strict taxation regime for anyone working in Sweden, even for a short period of time. This in combination with the existing constraints on time-limited contracts affects the flexibility of the Organisation to attract highly-qualified personnel, collaborate with in-kind partners, and keep the operational costs at a reasonable level.
- **Accounting of In-Kind Contributions:** In-Kind Contributions are defined as non-cash contributions from Partner Countries to ESS, and may include technical components, R&D work, personnel made available for specific tasks during the construction phase, or other products and services relevant for the completion of the ESS facility. The Organisation still needs to determine what exactly In-Kind Contributions are in accounting terms, i.e. whether or not to treat them as investments/assets, and how to book them. The issues related to accounting of In-Kind Contributions need to be fully assessed in order to determine what accounting standards should be used by ESS.



6 Report on Implementation Process and Status of Deliverable

6.1 Background on the ERIC Regulation

Research conducted at large-scale research infrastructures across Europe contributes to advancing knowledge and driving innovation in the European Research Area (ERA). These facilities play an increasingly important role in European scientific landscape. However, a single country alone often does not have the expertise and funds necessary to build and operate them. Because of their complexity, large-scale research infrastructures could be better facilitated on a European level. A common approach is required to enable stakeholders to effectively support Big Science and execute pan-European research and development (R&D) programs.

The decision to establish an EU legal framework for multinational research facilities was a response to a popular demand of actors in the European research community. The need for a joint undertaking that would support and facilitate scientific and technological development in Europe was also expressed by EU Member States, EU institutions, and the European Strategy Forum for Research Infrastructure (ESFRI) in particular. In its Regulation No 723/2009 of 25 June 2009 (hereinafter referred to as the ERIC Regulation) on the Community legal framework for a European Research Infrastructure Consortium (ERIC), the Council of the European Union defines the requirements and procedures for setting-up and running of an ERIC. The common legal framework aims to help research facilities safeguard the scientific excellence of Community research, accelerating competitiveness of the Community's economy and contribute to the development of the European Research Area. The framework was introduced as a new legal form to support European research infrastructures and represents a complementary element to the traditional support in the form of EU grants.

The purpose of ERICs and the ERIC Regulation is to provide a means to establish and operate research facilities with a joint interest among several EU Member States and countries associated with the Community R&D Framework Programme. They also help to further develop European policy for research infrastructures. ERICs address one of the major difficulties identified in the establishment of new European research infrastructures (apart from scarcity of resources and the complexity of technical and organisational issues), specifically, the lack of an adequate, consensual legal framework to facilitate partnerships with participants from different countries. The ERIC provides a framework, which drastically reduces the time necessary to authorise European research infrastructures, avoids the repetition of project-by-project negotiations on the best legal form for an international research organisation, and expedites discussions in the Members' respective national parliament for approval.

An ERIC is a form of legal entity which gives research infrastructures a legal personality and full legal capacity recognised in all EU Member States. The ERIC Regulation outlines detailed guidelines on the setting-up and running of an ERIC, and provides flexibility for the Members of an ERIC to define their own membership rights and duties, bodies of the ERIC, procurement policy and other relevant policies and processes.

One of the benefits stemming from the ERIC Regulation includes the right to be considered for tax exemptions in all EU Member States. A VAT Committee comprised of representatives of all EU Member States agreed unanimously¹ in 2009 that an ERIC would qualify as an international body within the meaning of the VAT Directive and the Directive on Excise Duties and thus be eligible for tax and excise duties exemptions. This is a common practice worldwide and many international organisations benefit from tax exemptions. One of the reasons why special tax treatment was

¹ See page 33 for more details: https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf



introduced for international organisations is that they are often publicly funded entities and this arrangement is meant to maximise the provisions of aid and sponsorship provided by donors. In addition, because of their international character, these organisations employ staff from a variety of countries. Tax treatment for staff thus directly facilitates mobility of employees.

6.2 European Spallation Source Becomes an ERIC

The ESS Project is one of the largest European research infrastructures under construction. It is a single-point, bricks-and-mortar facility being built in collaboration with stakeholders from 15 countries. The European Commission's establishment of ESS as an ERIC occurred on 31 August 2015 and the transition of ESS from a Swedish limited partnership to an ERIC was completed as of 1 October 2015. It is the largest ERIC in terms of value and the very first brick-and-mortar research facility to assume this legal form. It is also the first ERIC established in Scandinavia. The Founding Members of the European Spallation Source ERIC are the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Norway, Poland, Sweden, Switzerland, and United Kingdom. Founding Observers, who intend to become Members in the near future, are Belgium, the Netherlands, and Spain.

The European Spallation Source is being built in direct collaboration with European nations and more than 40 in-kind partners, who provide non-cash contributions in labour or material to ESS. With a total construction cost of 1.843B EUR, the Founding Members and Founding Observers have committed to providing around 35% of the value as In-Kind Contributions (IKC), in the form of technical development of the accelerator, the target and the instruments.

The European Spallation Source ERIC Council is the governing body of the European Spallation Source ERIC. The Council is made of representatives from the Member Countries. It appoints the Director General and Chairperson, and approves the budget and technical scope of the facility. The Council is bound by the Statutes ratified by the ERIC Member Countries. The constituting European Spallation Source ERIC Council Meeting was held on 2-3 July 2015. At that meeting the leadership was appointed, the Council Rules of Procedure were adopted, and the Terms of Reference for all advisory committees were approved.

The ESS project is also supported by two governance committees, i.e. the Administration and Finance Committee (AFC), and In-kind Review Committee (IKRC), and a number of independent advisory committees such as Scientific Advisory Committee (SAC), Technical Advisory Committee (TAC), Conventional Facilities Advisory Committee (CFAC), Environment, Safety & Health Committee (ES&HC), and Committee on Employment Conditions (ECC). Recommendations by each committee advance ESS along the critical path to completion. The committees consist of delegates representing the Member Countries or experts which evaluate and advise the progress of the ESS.

The European Spallation Source formally complies with the requirements set out in the ERIC Regulation:

- The vision of ESS is to build and operate the world's most powerful neutron source, enabling scientific breakthroughs in research related to materials, energy, health, and the environment, and addressing some of the most important societal challenges of our time;
- The mission of ESS is, among other things, to produce research outputs that are best-in-class both in terms of scientific quality and in terms of socio-economic impact;
- It adds value to ERA as a result of becoming the world's most powerful neutron source for materials research in a variety of scientific and technology fields;



- In line with the European Charter for Access to Research Infrastructures, the ESS Statutes guarantee access to beam time for researchers from any country based on peer reviewed proposals;
- Data generated by ESS are open to the wider scientific community, unless it pertains directly to research requested by an industrial user in which case data will be disclosed to the wider scientific community after a period of five years;
- The European Spallation Source is a true research infrastructure, meaning that during its standard operations phase it will host many diverse research activities carried out by academic as well as industrial researchers;
- The ESS Statutes state that Membership of the research infrastructure is open to anyone. This includes EU Member States, Associated Countries and so-called Third Countries and intergovernmental organisations.

The fact that ESS has been awarded the ERIC status does not mean, however, that in practice all aspects relating to its implementation have been resolved. Especially on topics like taxation and issues related to the international character of the staffing profile of ESS, solutions still need to be found. In this document, we will describe the core remaining issues and perform a gap-analysis to highlight the shortcomings between the current situation and the desired outcome as described in the ERIC Regulation, various intellectual property rights (IPR) policies as well as the ESS Statutes.

6.3 Challenges Pertaining to ERIC Regulation

The European Spallation Source ERIC acquired its legal status on 1 October 2015, but uncertainty still remains regarding the full implementation of several provisions of the ERIC legal framework. This section highlights key unsettled issues, which require special attention and additional work to realise the full potential of the ERIC legal structure. The issues relate to procurement, VAT taxation on In-Kind Contributions, international staffing profile, and accounting of In-Kind Contributions

6.3.1 Procurement

The European Spallation Source is a brick-and-mortar project with demand for niche and high-quality suppliers. The building of ESS is truly complex with thousands of pieces of equipment to be delivered and integrated into the facility. Much of this will come from companies – large and small – who are selected through competitive procurement procedures, which are notified on the ESS website and promoted through the international Industrial Liaison Officers Network of ESS.

Article 7(3) of the ERIC Regulation states that “An ERIC is an international organisation within the meaning of Article 15(c) of Directive 2004/18/EC.” This implies that an ERIC is not required to follow the procurement procedures established by Directive 2004/18/EC on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, which was repealed by Directive 2014/24/EU of the European Parliament and of the Council on public procurement. In other words, an ERIC has the possibility to decide on its own procurement rules, while respecting basic principles of transparency, non-discrimination, and competition. This approach allows ERICs to pull in resources in the most efficient way.

In line with the provisions set out in the ERIC Regulation, ESS has adopted its own procurement rules. The rules were approved by the Council of the European Spallation Source ERIC in July 2015 and have been effective since 1 October 2015. They apply to all contracts for the provision of goods, works and



services, concluded in writing between ESS and third parties and financed by the ESS budget. The procurement rules are public and available on the ESS website:
<https://europeanspallationsource.se/procurement>.

The aim of ESS in procuring goods and services from companies is to achieve best value for money in order to optimise the construction of the facility. The European Spallation Source has a dedicated division for the procurement of goods and services. Flexibility in the procurement rules is of crucial importance for the construction of ESS as they provide indirect support to the Organisation in its quest to build the facility on time and budget, while meeting state-of-the-art performance requirements.

6.3.1.1 Problem Background

The ESS Procurement Rules provide flexibility to the Organisation in addressing the most frequent issues relative to public procurement. They facilitate key challenges in the procurement of goods and services such as time constraints, ability to choose the most appropriate procedure, and need to interact with suppliers at an earlier stage.

6.3.1.1.1 Choice of Procedures

Before the European Spallation Source became an ERIC, its procurement rules were guided by Directive 2004/18/EC implemented through the Swedish Procurement Act (LOU) and Directive 2014/24/EU, which later replaced it. According to the provisions of the Directive, tenders of a value above 207k EUR have to be published in the Official Journal of the European Union: <http://eur-lex.europa.eu/oj/direct-access.html>. The Directive 2014/24/EU defines the following four types of procurement award procedures:

- **Open procedure** outlined in Article 27,
- **Restricted procedure** outlined in Article 28,
- **Competitive dialogue** outlined in Article 30,
- **Negotiated procedure** outlined in Article 29,

The procedures defined by the Directive are rather complex in nature and the period from the publication of a call to the awarding of a contract can take up to 250 days. Time flexibility and possibility to choose the type of procedure used are among fundamental reasons why the European Commission allows ERICs to set up their own procurement rules. The ESS Procurement Rules regulate procurement so as to promote the objectives of value for money, publicity, integrity, innovation and sustainability. The type of procedure used is decided based on the value, scope and objective of the procurement, in consultation between the procurement staff and requestor and technically responsible owners. The principles enshrined in the procurement rules of ESS from 2015 are similar to those outlined in the respective EU Directives, and recognise several different procurement methodologies, which are implemented based on different value thresholds. The flexibility in timing as well as the possibility to choose specific procedures available in the procurement rules are both important factors for realising ESS. A summary of the procedures and value thresholds included in the original version of the Procurement Rules is provided in the table and section below.



Value Threshold	Publication	Procurement methodology	Minimum Timing	Variations in Timing	Standstill Period
>200.000 EUR	Publication on ESS website. Other media depending on subject matter and value.	Open procedure	30 days	(+) 5 days if documents not available by internet (-) 3 days if receipt of tenders electronically	10 days
		Restricted procedure	25 days + 25 days	(-) 10 days if SAN published 30 days - 12 months in advance	
		Competitive procedure with negotiation with or without initial tender	25 days / 30 days		
50.000 - 199.999 EUR	Publication on ESS website. Other media depending on subject matter and value.	Open procedure	20 days	(+) 5 days if documents not available by internet	optional
		Restricted procedure	15 days + 15 days	(-) 3 days if receipt of tenders electronically	
		Competitive procedure with negotiation with or without initial tender	15 days / 20 days		
5.000 - 49.999 EUR	Optional on ESS website.	Request for Quotation on website or directly to minimum 3 suppliers from supplier roster, or seek optimal level of competition	-	-	-
<5.000 EUR	-	Request for Quotation or price comparison with limited competition	-	-	-

Figure 1: Overview of procedures and value thresholds

- **Price comparison (<5 000 EUR):** The requestor directly contacts companies or does a price comparison online, striving for competition (>1 company) and provides information to the Supply, Procurement and Logistics Division for placing the order.
- **Request for Quotation (RFQ, 5 000 – 49 999 EUR):** A simplified procedure to solicit quotations from suppliers. RFQs are sent to suppliers directly, or may be published on the ESS website. RFQs are to be sent to at least three suppliers, but if the number of suppliers available is less than three, then an optimal level of competition shall apply under the circumstances. The number of days the procedure is open should be “reasonable”.
- **Open Procedure (50 000 – 199 999 EUR):** A published procedure in one stage, where an interested supplier may submit a tender. The number of days the tendering period is open depends on the scope of the procurement to allow suppliers sufficient time to respond. The minimum number of days the procedure must be open varies depending on value.
- **Restricted procedure (50 000 – 199 999 EUR):** A published procedure in two stages, where potential tenderers request to participate based on an initial call (Phase 1). Based on an evaluation of the tenderers in Phase 1, only suppliers invited by ESS may submit a tender in Phase 2. The number of days the tendering period is open depends on the scope of the procurement to allow suppliers sufficient time to respond. The minimum number of days the procedure must be open varies depending on value.
- **Competitive procedure with negotiation (with or without an initial tender, 50 000 – 199 999 EUR):** A published procedure conducted in phases. The intention and process for negotiation needs to be stipulated in the initial call for tender documents. The number of days the tendering period is open depends on the scope of the procurement and must allow suppliers sufficient time to respond. The minimum number of days the procedure must be open varies depending on value.
- **Direct award of contract with one or more suppliers without publication of a call for tenders (“Sole Source”, >200 000 EUR):** An exceptional procedure that needs to be justified in line with Article 16 of the ESS Procurement Rules.



6.3.1.1.2 Appeal Process

The law of the European Union stipulates that those who have submitted an unsuccessful tender and believe that the procurement procedure was not conducted in line with relevant laws must be granted the right of appeal. In this respect, two Remedies Directives play an important role: Remedies Directive for the utilities sector (Directive 92/13/EEC), and the Remedies Directive for the public sector (Directive 89/665/EEC). “The Remedies Directives set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries when an economic operator that has an interest in a public procurement procedure believes that it has been run without proper application of the EU Public Procurement Directives.”²

The Remedies Directives have mandatory as well as optional provisions, and thus are not intended to harmonise the remedies system in public procurement in the EU. Member States may choose not to transpose optional provisions into their national laws. One example of such optional provision is the imposition on plaintiffs of the obligation to seek review first with the contracting authority. Until now, “15 EU countries have set up first instance public procurement remedies bodies. In the remaining countries, an existing judicial review body is responsible for the review of procurement procedures. At these bodies, companies can challenge the award of procurement contracts by public authorities.”³

In line with the relevant community laws, ESS has defined provisions related to the process of challenging procurement decisions. Articles 37-39 of the ESS Procurement Rules constitute the basis for the right of appeal, the handling of appeals, and the relevant jurisdiction. All appeals are handled by the Tenders Appeal Board, which is composed of 3-5 competent members of the Organisation’s staff or external parties. Appeals must be submitted in writing. The appeal process as such does not automatically put the procurement process on hold, which is an important element for the time schedule of the project. The Board shall notify the appellant in writing of its final decision within 30 working days following the date of receipt of the appeal.

The legal standing of the ESS Procurement Rules has already been tested. During the first year of their implementation, four appeals were brought by suppliers against ESS. One was accepted by the Tender Appeal Board, two were rejected and one went to court bypassing the Tender Appeal Board. In 2016, the Malmö Administrative Court confirmed that it did not have the standing to review the appeal. Instead, the court decision confirmed the validity and independence of the ESS Procurement Rules and that ESS has the right to apply such rules instead of national procurement law. This was the first time that an ERIC has been challenged in terms of public procurement.

6.3.1.1.3 Procedure without Publication of a Call for Tenders

Article 32 of Directive 2014/24/EU sets the framework for the use of negotiated procedure without prior publication. It implies that in specific cases, contracting authorities may award public contracts by a negotiated procedure without prior publication of the call. This procedure may be used in well-defined circumstances for public works contracts, public supply contracts, public service contracts, and lastly new works and services consisting in the repetition of similar works or services.

In line with the EU provisions, it was decided that in specific cases and circumstances, the European Spallation Source may award contracts by way of direct negotiations with one or more suppliers, without prior publication of a call for tender. One of such circumstances is defined in Article 16(2)c of the ESS Procurement Rules and implies that the Organisation does not have to publish any call for

² For more information see http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en

³ For more information see http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9099



tender “for research and development contracts which are performed by non-commercial entities solely for purpose of research, testing, experimentation, study or development in connection with the construction of the Organisation, provided that the contract does not include quantity production to establish commercial viability or for recovering general research and development costs.” This Article was applied when setting up collaboration agreements with institutes from the ESS Host Countries, Sweden and Denmark. Within the framework of these collaboration agreements, Danish and Swedish partner institutes participate in the development of the instrumentation at ESS. Their contributions are treated in a similar way as In-Kind Contributions of other partners.

6.3.1.2 Results

The ESS Procurement Rules provide a robust and tailored framework that facilitates an efficient procurement and purchasing activity for the Organisation. Since the establishment of the ESS Procurement Rules in 2015, the European Spallation Source has signed a number of contract awards with external suppliers. All contract awards resulting from published procurements with a value higher than 50k EUR are published on the ESS website. The list is updated on a quarterly basis.

6.3.1.3 Review

The ESS Procurement Rules entered into force on 1 October 2015. Following one year of operation, an assessment was carried out to evaluate their efficiency and identify possible shortcomings. During the process, opinions and experience of Industrial Liaison Officers from ESS Partner Countries were taken into consideration. Below is the list of changes that have been integrated to the ESS Procurement Rules:

- Increased transparency in the publication of specific advance notices
- Facilitating the operation of supplier rosters
- Higher thresholds for low value procurement (10 000 EUR)
- Facilitate joint procurement activities with other international organisations (e.g. CERN)
- Increased transparency in information provided to unsuccessful tenderers
- Extending the time limits to bring appeals against procurement decisions
- Other tweaking and fine-tuning of wording of the Rules

The assessment resulted in some non-material changes, which were presented to and acknowledged by Administration and Finance Committee but did not require the approval by the Council of the European Spallation Source ERIC.

6.3.1.4 Way forward

The ESS Procurement Rules are a living document that will be updated based on observations from different stages of the facility’s lifecycle. In March 2016, ESS installed first hardware in the Accelerator tunnel. The occasion marked an important milestone and represented a point when the project moved from the prototyping phase to installations. The installation phase is scheduled to continue until 2025.

As the construction of the facility moves further ahead, the Organisation will closely monitor processes related to the procurement rules and assess whether there is a need for further revisions to better accommodate new challenges. The European Spallation Source will continue to share best practice and lessons learned, so that other ERICs can benefit from its experience.



6.3.2 VAT Taxation on In-Kind Contributions

The European Spallation Source is an international, collaborative effort, with much of the key technology being conceived, designed and produced at the more than 40 national research institutes and universities in its Member Countries. Once completed, the accelerator, target systems, and scientific instruments will be shipped to Lund and assembled. This approach guarantees that during the design and construction phase, ESS can rely on the resources, expertise, and experience, of a very large pool of scientists and engineers from across Europe and build ESS in a collaborative approach.

The technology that will go into the ESS is designed, developed and produced at institutes and facilities in the different Member Countries. They rely on local commercial suppliers to deliver materials to specification so they can process those materials toward the instruments promised by their Member Country as IKC. Regulation 723/2009 does not detail how other Members of the ERIC should deal with such exemptions at their national level. The European Spallation Source is developing guidelines for In-kind Partners with the aim to bring awareness of possible VAT risks in Sweden when In-kind Partners engage suppliers to provide goods or services for the use at ESS premises in Sweden. Possible risks include: Swedish VAT being charged, or In-kind Partner being obliged to register for VAT in Sweden.

6.3.2.1 Problem

The European Commission regulation 723/2009 enables founding Members of ERICs broad flexibility in setting up the legal framework of the ERIC. This includes treatment of taxation and treatment of the Value Added Tax (VAT). As one of the first and largest ‘bricks-and-mortar’ ERICs, this is a relevant topic for ESS and an area where the lack of a common approach in the regulation complicates its core task of constructing the ESS facility on time and on budget.

The origin of the ESS VAT problem relative to in-kind can be traced back to the fact that payment of VAT by national institutes to industrial suppliers was not included in the ESS Cost Book. This was due to the fact that the governing bodies foresaw the future ERIC as being exempt from paying VAT as an international organisation, a commitment validated by the host countries in their bid to locate ESS in Sweden and Denmark, and assumed this exemption would apply to In-Kind Contributions from the Members as well.

The ESS Organisation, established as an ERIC in October 2015, is clearly exempted; however, Regulation 723/2009 does not provide guidance for in-kind partner institutions. The institutes face uncertainty whether VAT should be included on invoices they receive from suppliers when ordering for IKCs to deliver to ESS. For the suppliers of the institutes, who are responsible for the correct application of VAT legislation, not including VAT in their invoices where required by law, means they can become directly liable for the amounts toward their national tax office. Several institutes have notified ESS that the fact that there is no certainty on VAT the result might either be:

- Reduction of the IKC scope to compensate for the VAT costs
- A request by the institutes, via the Council, that ESS pays the VAT

6.3.2.2 Approaches to the Problem

The ESS stakeholders and Organisation have an interest in ensuring that the IKC process is manageable and the differences between the Members' approaches are minimal. A VAT Workshop organised by ESS in June 2016 helped to categorise and evaluate the different approaches to VAT taken by the Members. Altogether, there are approximately nine different approaches for the 15 countries participating in the workshop, which can be classified into roughly four categories:



1. Direct exemption or VAT recovery by national authorities on the basis of delivering in-kind to an exempted international organisation or as a business transaction
2. A representing entity, acting on behalf of a Member of the ERIC for delivering in-kind
3. A representing entity, acting on behalf of a ESS as an ERIC for delivering in-kind
4. Allocating cash resources from Members to in-kind to partners via ESS

The table that follows shows that the first three approaches listed above lead to VAT exemption or reimbursement. However, the precondition is that the respective Partner Country recognises European Spallation Source ERIC as an international organisation. The fourth approach may or may not lead to VAT exemption or reimbursement. A more detailed description of how direct exemption, representing entities and cash contributions work is available in the section below the table.

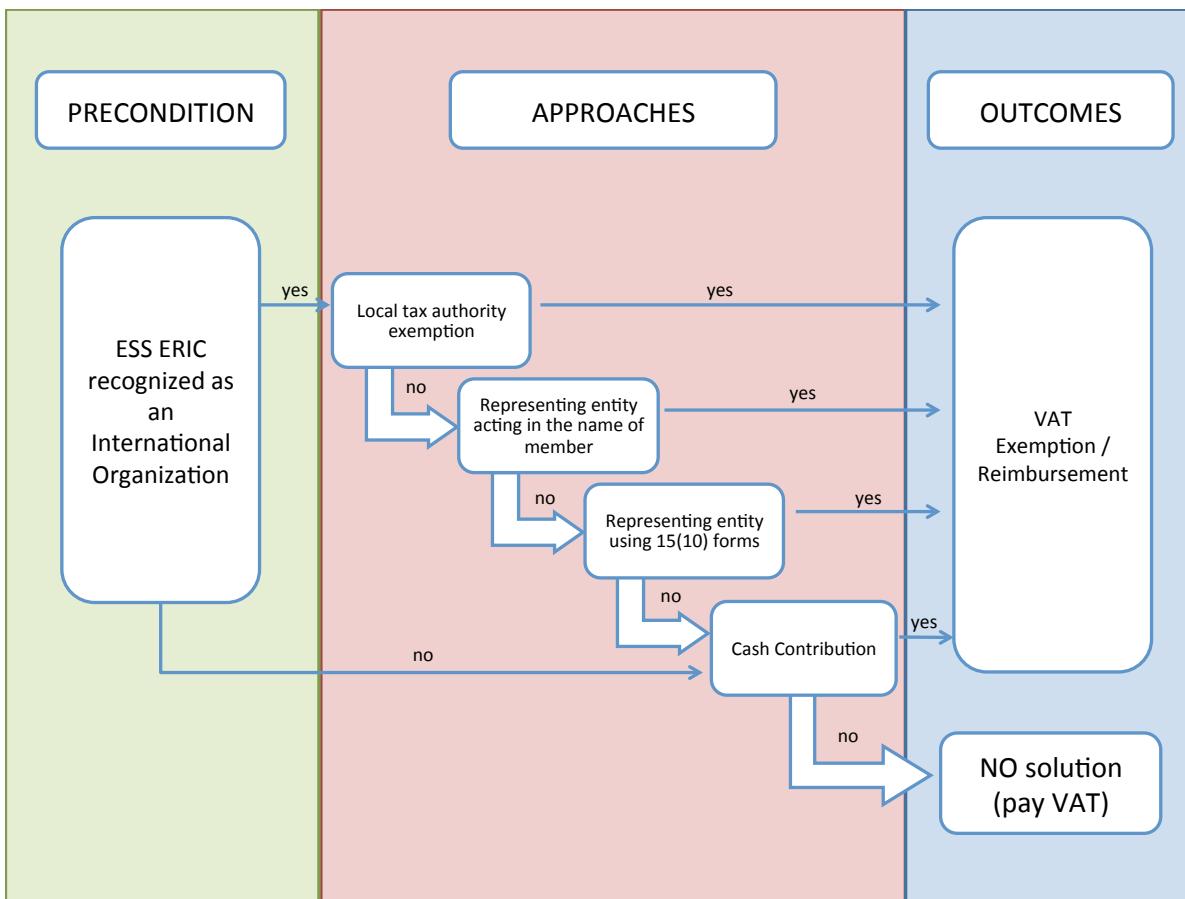


Figure 2: Overview of approaches to the VAT issue

6.3.2.2.1 Direct Exemption

The most direct option for Members is to recognise ESS as an international organisation under the meaning of Directive 2006/112/EC on VAT, with national legislation stipulating that all procured goods and services, which are purchased directly for the purpose of the ERIC, by the Member Country and its representatives, are VAT exempt. This is the case in the Host Members, Sweden and Denmark.

Another approach to direct exemption or recovery of VAT is when the in-kind partner is able to claim back or exempt the VAT on the basis of delivering IKC to ESS as a business activity. This approach requires good coordination and cooperation between ESS and its IKC partners, to avoid contradictions



with ESS In-Kind principles. Unfortunately, this approach, while attempting to optimise the VAT solution, may contribute to other issues relative to in-kind accounting. Strictly speaking, In-Kind Contributions are direct contributions to capital from Members, implemented through national institutions in most cases. This means ESS is not “purchasing” or entering into a commercial, economic transaction with the in-kind partners.

6.3.2.2.2 Representing Entities

The workshop participants also looked closely at the role of ‘Representing Entities’, or agents that act ‘on behalf’ of ESS or its Members for delivery of IKC to the ERIC. In the first case, the appointed partner is implementing the exemption afforded the ERIC Members’ on the basis of Directive 2006/112/EC by respective national authorities. This is the situation for example in Italy, where one of the main delivering bodies is appointed the Representing Entity and will leverage the exemption by the national tax authorities exclusively for the purpose of delivering IKC to ESS on behalf of Italy as a Member of the ERIC.

Another option is that Representing Entities, purchasing and acting directly on behalf of the European Spallation Source ERIC, for the purpose of delivering IKC to the ERIC, are able to demonstrate the exempted status of the international organisation by receiving 15.10 certificates to transfer to suppliers, enabling them to exclude VAT from invoices. This solution remains to be fully tested and has a high administrative price, as each invoice requires a certificate to be issued by the authorities where the ERIC has its statutory seat. Not only is this a time and labour-intensive activity, it could result in inconsistent issuance of certificates, leading to costly delays. Still it seems to be one of the most effective and acceptable approaches for a range of stakeholders, while creating no legal contradictions.

6.3.2.2.3 Direct Allocation for In-Kind

A number of issues sometimes converge to make it difficult for the Members and in-kind partners to take advantage of the above approaches. That has led several Members to decide to directly allocate cash resources to ESS for the purpose of implementing their in-kind commitments. These resources are separate from the cash contributions to ESS and intended specifically for in-kind partners from the Member State and the delivery of IKC.

6.3.2.3 Status and Solution

The table below outlines the current understanding of approaches on a country-by-country basis. The overall progress has been slow, but consistent, and while VAT issues have affected the schedule, the overall impact on the cost is not yet known. More affected has been effort and costs, borne by ESS, the Members and the IKC partners. Funding from BrightnESS has offset some of the costs of administration. The estimate within ESS is 20-50M EUR, or 1-3%.

Despite the slow progress, issues still remain on the horizon, especially related to installations and deliveries in Sweden. Currently ESS is analysing how IK contributions, and partners, may be assessed for VAT in Sweden and how the status of In-Kind Contributions is viewed by Swedish tax authorities. It is too early to assess the impact at this point.



Value Added Tax Status by Country	ESS Recognized as an International Organization			
	Direct Exemption	Representing Entity	Representing Entity with supporting documents	Cash Contribution
Belgium	Being Explored			
Czech Republic	Being Explored	Not possible	Being Explored	
Denmark	Achievable			
France			Achievable	
Germany	Being Explored			Being Explored
Hungary	Achievable	Not possible		
Italy		Achievable		
Netherlands	Being Explored			
Norway	Being Explored	Being Explored		
Poland	Being Explored			
Spain	Achievable			
Sweden	Achievable			
Switzerland	Being Explored			
United Kingdom			Achievable	

Figure 3: VAT status by country

6.3.2.4 Lessons Learned

The ESS Project is one of the largest European research infrastructures under construction and the largest ERIC in terms of value. It is a single-point, bricks-and-mortar facility being built in collaboration with direct stakeholders from 15 countries and the European Commission, which oversees all ERICs and their implementation. The project provides a unique opportunity for lessons-learned for other facilities, ERICs and future projects. From the perspective of approaching the European Spallation Source ERIC as an international facility as indicated in EC ERIC Regulation 723/2009 and directive 2006/112/EC on VAT, there are several key lessons learned.

- **ERICs are Non-Economic Actors:** As ‘research consortiums’ all stakeholders, internal and external, must be clear that the ERICs are not limited-liability or shareholder-based companies. They most closely resemble treaty-based organisations and the mission is not to conduct business or earn a profit; a lack of clarity on this point creates confusion and delays in determining the taxation status of the ERIC.
- **Direct Exemption Is Preferable to Reimbursement:** Value Added Tax relief is a cornerstone of the ERIC Regulation and solves a significant issue facing much of the research community in Europe: to not lose allocated public funds for non-economic activities. Host countries in particular must be clear that the ERIC is “exempt” from paying VAT, in the strictest sense of the meaning; not clarifying this creates the possibility for confusion with VAT “recovery” schemes that apply to economic entities and results in ambiguity, which has a very concrete price in the form of tax consultants and accountants. The host country has options how to



implement exemptions under Directive 2006/112/EC on VAT, but reimbursement schemes create administrative overhead and adversely affect cash flow for the ERIC. This report recommends stakeholders take a clear position and implement the VAT clauses with clear language stating the recognition of ERICs as international organisations for the purpose of VAT exemption and make clear it applies to all Members, of the ERIC.

- **The VAT Treatment Relative to IKC from ERIC Members Must Be Approached Strategically and Globally:** Future ERICs are likely to be built and operated using in-kind based approaches. In-kind partners can contribute in expertise and labour, but will not directly finance the ERICs or cover tax-related costs; that is the responsibility of the Members of the ERIC. The VAT exemption intended for ERICs must be available for partners in order to effectively implement in-kind for ERICs. This report recommends the European Commission revisit and reinforces this point.
- **Representing Entities Play an Important Role in the Establishment and Construction of ERICs:** Related to the above point, the inclusion of representing entities as an actor in EC ERIC Regulation 723/2009, indicates there was intent to enable contributions on behalf of Members. Conflicting legal/tax opinions from courts and advisory bodies has on the other hand, prevented the Members from taking full advantage of this role as intended. Also, there are in some cases statutory limitations on the extent that ‘agency’ can be extended to institutions in the Member Countries. Still it is clear from the limited experience in construction that recognising and strengthening the role of representing entities where possible not only enables a strong approach to the VAT, it is a constructive role in the implementation of the project as well.

6.3.3 International Staffing Profile

6.3.3.1 *Background Information*

The international character of ESS is not only reflected by the number of Member Countries joined in the partnership, but also by the diversity of its employee base and the fact that the project is co-hosted by Sweden and Denmark on two sides of the Oresund Strait. The European Spallation Source is a fast-growing organisation with staff coming from 50 different countries. While ESS only had around 40 employees in 2010, the number has risen to approximately 400 in just seven years.

It is crucial for ESS to attract, recruit, and retain highly skilled, international staff over the life span of the facility, while aiming at a healthy staff turnover. Swedish authorities maintain a strict taxation regime for anyone working in Sweden, even for a short period of time.⁴ This in combination with the existing constraints on time-limited contracts affects the flexibility of the Organisation to attract highly-qualified personnel, collaborate with in-kind partners, and keep the operational costs at a reasonable level.

6.3.3.2 *ERICs vs. International Organisations*

In the EU Member States, the legal framework related to social security provisions is determined by the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on

⁴ For more details see:

<https://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/declaringtaxesforindividuals.4.7be5268414bea064694c5df.html>



the coordination of social security systems, and Council Regulation 987/2009. The ERIC Regulation does not give any special status to ERICs in terms of individual employment contracts. As such, ERICs are governed by the same provisions as other employers and thus it is the employment contract that specifies which national law is applicable. The choice of national law is guided by the rules outlined in the Rome I Regulation of the EU. As of December 2009, the Rome I Regulation has replaced the so called “Rome Convention” on the law applicable to contractual obligations signed in 1980. Denmark, one of the ESS Host Countries, has opted-out from the Regulation, and is thus not bound by it or subject to its application.

Practical Guidelines on the legal framework for ERICs issued by the European Commission explain the principle applicable to individual employment contracts in the following way: “Art 6 of the Rome Convention states: “a contract of employment shall (normally) be governed by the law of the country in which the employee habitually carries out his work, even if he/she is employed in another country”. It should therefore be stressed that the law applicable to an ERIC itself or the place where its statutory seat is located are not directly relevant.

“To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his/her work in performance of the contract”. Thus the relevant connection is that of the contract and not of the employer. The principle is that the employer and the employee have freedom of choice of the applicable law, but as a consequence of this choice the employee cannot be deprived of the protection afforded to him/her by provisions under the law that, in the absence of choice, would have been applicable, i.e. the law of the country to which the contract is more closely connected (i.e. the law of the country in which the employee habitually carries out his/her work).”⁵

It is important to note, that staff working in international organisations such as for example CERN is often exempt from income tax. “CERN levies an internal tax on the financial and family benefits that it pays to the members of the personnel. Members of the personnel are therefore exempt from national taxation on salaries and emoluments paid by CERN.”⁶ In addition, CERN also runs a first-rate pension fund, which is operated by its own legal framework and does not fall under any national legislation. The main purpose of the fund is to provide insurance to its members and beneficiaries as well as the members of their families. In addition to that, the fund also assists in the case of disability, old age or death.

6.3.3.3 Committee on Employment Conditions

When governments agreed that Europe needed a next-generation neutron source, there were three locations competing to host the facility: Debrecen in Hungary, Bilbao in Spain and Lund in Scandinavia. In the joint winning bid placed by Sweden and Denmark in 2009, tax treatment for ESS staff was among one of the unique selling points. The Host Countries have since maintained a strong position in the ESS partnership. This is a natural development given the location of the facility in Lund and of the Data Management and Software Centre in Copenhagen. They also played a key role in securing political and financial commitments to begin the construction of ESS in 2014 and will jointly provide almost half of the projected costs.

Both Host Countries operate strongly regulated labour systems. Together with the Scandinavian working culture, the systems drove the set-up of the European Spallation Source ERIC in 2015. Many

⁵ For more information see p. 27: https://ec.europa.eu/research/infrastructures/pdf/eric_en.pdf

⁶ <http://admin-eguide.web.cern.ch/en/procedure/income-tax-declaration-switzerland>



of the challenges faced by ESS in recruiting personnel worldwide are related to income tax, a waiver of which has not been given priority by the Host Countries. In addition to that, due to the ambiguity of the ERIC Regulation, the potential flexibility of its provisions has not been fully explored. As a result, ESS has to go through the challenging process of pushing the boundaries post-facto.

The discussions during the meeting of the Committee on Employment Conditions at ESS in October 2016 underlined the need for immediate action on issues related to the employment of international staff. The employment conditions at ESS have been shaped to a large extent by the Swedish labour system and common practices observed herein. However, since ESS is an international organisation with a diverse membership base, it is essential for ESS to move from what could be classified as a “national system” towards an ERIC system. The longer the transition takes, the harder it will be for the Organisation to change the current set-up and exploit the full potential of the ERIC framework.

The Committee on Employment Conditions (CEC) was established in 2016 by the Council to explore how the most critical issues in employment conditions could evolve. The Committee has held four meetings so far, on 7 June 2016, 14 October 2016, 8 February 2017, and 30 May 2017. Relative to the legal framework of the ERIC, the Committee asked the ESS Management to take action on the following topics: time-limited contracts, taxation and social security related to secondments and IKC personnel, and expert tax relief.

6.3.3.3.1 Time-Limited Contracts

Problem

The ESS project will go through several stages during its lifecycle, each of which will require different set of employees. While engineers and technicians might be dominating the staffing profile of the Organisation in the construction phase, this will inevitably change as the project moves to operations. Considering the future outlook of the ESS employee base, time-limited contracts represent an important tool to maintain the anticipated staff flow. Fixed-term contracts bring benefits for both the employer and the employee. They allow to conduct an open recruitment process where all conditions are transparent to applicants and their families. They also reflect best how different phases and sub-projects have different needs and thus represent a better option than terminating permanent contracts. They are a standard practice in other European research organisations and help to manage stakeholders’ expectations on staffing and citizenships. Lastly, they maintain a high level of creativity and flow of excellence.

Given the location of the ESS facility, the Organisation has been following common practices of the Swedish labour market, which significantly limits the possibility to sign time-limited contracts with employees. The labour market in Sweden is shaped to a large extent by collective agreements that regulate the relationship between an employer and its employees. The history of collective agreements in Sweden is long and dates back to 1870s when trade unions first began to influence labour conditions. The framework and procedural rules for collective negotiations in Sweden are determined by the Co-Determination Act and Employment Protection Act.

Following the common practice in Sweden, the European Spallation Source is a member of the Almega employers’ confederation and has signed a collective agreement titled Collective Agreement for Development and Services. The Collective Agreement together with the national labour legislation in Sweden put significant restrictions on fixed-term contracts. The Swedish law stipulates that the maximum time for time-limited contracts is 2 years. Time-limited contracts are defined even more narrowly in the Collective Agreement of ESS, which limits it to 1 year. The Collective Agreement gives ESS the possibility to make use of fixed-term contracts only for:



- Specific duty of a particular nature, e.g. staff financed through grants,
- Agreed fixed-term employment as defined in the Collective Agreement (max. 5 employees).

The European Spallation Source requires to establish temporary positions of up to 5 years in duration, particularly within the following job categories: senior scientist and engineer, scientist and engineer, technician, and post-doctoral researcher. The 1 year rule for fixed-term contract puts severe restrictions on the recruitment of post-doctoral researchers at ESS. For a comparison, the standard duration of post-doctoral positions in Europe is 3 years. Under the current conditions, the European Spallation Source can hire only five persons on 1 year contracts. This excludes students, in-kind staff, seconded staff, and staff financed from grants like Marie Skłodowska Curie fellowships. Pursuing a post-doctoral career at ESS with such limitations is not impossible if aiming for high quality and publications. The discussions about these issues at the Committee on Employment Conditions in February 2017 indicated the need to raise political support in Host Country Sweden in order to push for fixed-term contracts.

Action

During the second meeting of CEC, the Committee acknowledged the need for ESS to have a reasonable number of time-limited contracts for e.g. 5 years for specialised personnel such as scientists and expert engineers, and for post-doctoral researchers for up to 3 years. The Committee also tasked the ESS Management to establish a Working Group on time-limited contracts to work out the main relevant arguments for achieving this type of contracts for certain groups of employees and to negotiate with the unions and employer organisations.

Two months later, in December 2016, the Council of the European Spallation Source ERIC endorsed the recommendation of CEC to convince central and local unions in Sweden that flexible and longer temporary employment agreements are an established way of working in Europe. As an ERIC, ESS needs to reflect European practice in order to attract critical competencies and skills needed to successfully and efficiently pursue the project. The European Spallation Source would not set a precedent for time-limited contracts in the country. Due to its legal entity, the European Spallation Source would, as an ERICs, be a special case and would not trigger similar discussions in other sectors.

While it is a common practice and a natural choice in Sweden to join a collective agreement, it is not impossible to work outside such agreements. The CEC currently sees no compelling reasons to leave or alter the current Collective Agreement and will monitor the situation and observe the costs and benefits of the agreement every other year.

Since its establishment by the Human Resources Division in October 2016, the Working Group on time-limited contracts has lead the way forward on the national, regional and local levels and reached results in several areas.

Status and Solution

At the beginning of 2017, the Working Group negotiated with representatives of local union with the aim to reach an agreement. In parallel, central parties have discussed the issue of time-limited contracts as part of the negotiations for a new central Collective Agreement. The parties reached an agreement in February 2017. According to the new arrangement, the European Spallation Source can sign the following types of time-limited contracts:



- Substitute: Max. 36 months during a 5-year period
- "Avtalad visstid": Max. 36 months during a 5-year period. Agreement of at least 7 days. There is no limitation in number of contracts, but the position should have been foreseen to be time-limited in the staff planning
- Students: Without requirement of employment period
- Contract for period after retirement
- Season work: According to the Employment Protection Act
- PhD students: When party or completely done at the company
- Probation period: Maximum 6 months

6.3.3.3.2 Taxation and Social Security Related to Secondments and IKC Personnel

Problem

The European Spallation Source is a greenfield project with high level of In-Kind Contributions. In-Kind Contributions are non-cash contributions in labour or material to ESS. In other words, an IKC may not only cover technical components, but also personnel needed to perform R&D work, testing, installation, and integration. The European Spallation Source relies heavily on the experience and expertise from collaborating partner laboratories across Europe who second their staff to Lund and to the DMSC in order to provide the needed capacity. This form of collaboration is guided by the provisions of IKC Agreements between ESS and the collaborating partners. The staff at ESS can be divided into the following three categories:

- Staff: Personnel employed directly by ESS.
- Seconded staff: Personnel seconded from a partner organisation usually based in one of the Member States of ESS. Partner organisation invoices ESS for the work performed by seconded staff at ESS.
- In-kind personnel: Personnel from a partner organisation usually based in one of the Member States of ESS. The work performed for ESS is not invoiced, but considered as part of Member States' In-Kind Contribution. In-kind personnel either works at ESS or at home institution, but remains employed by home institute and the result of work is delivered to ESS.

There are severe limitations on secondments and in-kind staff from many partner laboratories due to the current Swedish laws governing taxation and social security. Seconded staff can only work in Sweden for up to 183 days per year or per 12 consecutive months before being subject to Swedish income taxation. It is often possible for in-kind staff from governmental institutions to be seconded to ESS while remaining taxable in their home countries and exempted from taxation in Sweden. While many of the collaboration partners of ESS are publicly funded entities, they are not always considered governmental agencies.

Same limitations exist for staff secondment from CERN, as Sweden has not signed the CERN Protocol on Privileges and Immunities. The situation of the seconded and in-kind personnel is very similar in terms of taxation and social security. This creates additional unforeseen costs for in-kind partners because the in-kind personnel remains employed by home institute but might be required to pay higher taxes if working on ESS assignments in Lund. If the in-kind personnel is part of government services in home country, taxation is subject to applicable double-taxation agreements between Sweden, home country and work country.

The limitations on secondments and in-kind staff are clearly a major obstacle for the technical and scientific collaborations of ESS. They also jeopardise in-kind goals and create difficulties for securing the necessary and often rare expertise required to deliver the project.



Action

The Committee on Employment Conditions finds it urgent for the Organisation to adjust or remove limitations related to seconded and in-kind personnel. The Committee suggested to investigate, if this could be done within the framework of the Host State ERIC Agreement. In October 2016, it also recommended to initiate discussions with the Swedish government to find solutions to these limitations. The recommendation of CEC was endorsed by the Council of the European Spallation Source ERIC in December 2016.

In the letter sent by ESS Director General John Womersley to State Secretary Karin Röding on 2 February 2017, he underlined that employment conditions at ESS are one of the key drivers for success of the ESS Organisation, both in constructing and in operating the facility on budget and in time, and in delivering the transformative science that ESS will produce. He proposed a high-level meeting to explain the current situation regarding conditions for personnel seconded to ESS, among other. The meeting took place on 21 February 2017 and was attended by State Secretary, ESS Director General and ESS Director for Administration and Project Support.

After the meeting, a dialogue between Senior Advisor at the Swedish Ministry of Education and Research and an ESS Human Resources Officer has been established. They are working on possible ways forward for a tax exemption for in-kind and seconded personnel.

Status and Solution

Several options on how to find a possible solution for the tax situation for in-kind and seconded staff are being discussed and analysed. The aim is to find a workable model in the near future.

6.3.3.3 Expert Tax Relief

Problem

The legislation in Sweden supports companies which are in need of foreign experts by providing the opportunity for tax relief on key personnel's salaries. "The tax relief legislation in Sweden provides a 25% reduction of taxable income of a foreign key person. This means that a key foreign individual's income tax is based on only 75% of his or her income. The reduced tax applies to all salaries and employers' contributions to housing and living costs. The reduction applies to the first 3 years of the temporary stay in Sweden. [...] Persons who can be considered for tax relief are those who reach a certain level of remuneration. The price base amount for 2017 is 44 800 SEK. Persons who do not reach the requisite level of remuneration can still be considered for tax relief if they are an expert/specialist, researcher, executive or other key personnel. [...] One main criteria for qualifying for the tax relief on these grounds is that Swedes with the foreigner's skills or talents are impossible or extremely difficult to recruit in Sweden."⁷

The Committee on Employment Conditions identified that the expert tax relief for foreign personnel is potentially an important factor in recruitment, particularly for time-limited expert positions. However, there are some important restrictions for it to be fully useful. First of all, the employees that choose to live in Sweden can only apply for tax relief after they have already been residing in Sweden and the outcome of the application is not guaranteed unless they fulfil the income criteria. This means that tax relief cannot be assumed when the person is recruited. Further, it is limited to salaries exceeding a relatively high level, making its applicability limited to only a small number of experts with the highest salaries. It is also limited to a maximum of three years, which for several positions is too

⁷ For more information see:

<https://skatteratsnamnden.se/forskarskattenamnden/summaryinenglish/taxreliefforforeignkeypersonnel.4.383cc9f31134f01c98a800018147.html>



short to be useful. It is also shorter than the corresponding Danish expert tax relief program, which can last for up to 5 years (up to seven years from 2018), making the expert tax relief programs asymmetric over the Swedish-Danish border. These limitations mean significant uncertainties for potential employees and are clear obstacles for ESS in the recruitment process of new employees from the EU and the world.

For time-limited expert recruitments from EU and non-EU countries, and thus for the success for the facility, it is essential to have a tax relief for experts that is predictable, not limited to the highest incomes only, and which can last for up to 5 years.

Action

On 14 October 2016, the Committee on Employment Conditions recommended that ESS initiates discussions with the Swedish government to find solutions for time-limited tax relief for up to 5 years for necessary experts, that is useful for the ESS in terms of predictable process and salary levels. The Council endorsed this recommendation in December 2016. As mentioned in the earlier section, on 2 February 2017, ESS Director General sent a letter to State Secretary Karin Röding to address this issue together with other open questions related to employment conditions.

Status and Solution

Expert tax relief was one of the topics discussed during the high-level meeting between the ESS Director General, ESS Director for Administration and Project Support, and State Secretary Röding took place in Stockholm in February 2017. After the meeting, a dialogue between Senior Advisor at the Ministry of Education and Research Legal Secretariat, and an ESS Human Resources Officer has been established, but expert tax relief has not been given priority in further discussions.

6.3.4 Accounting of In-Kind Contributions

As mentioned in the earlier section, In-Kind Contributions are defined as non-cash contributions from Partner Countries to ESS, and may include technical components, R&D work, personnel made available for specific tasks during the construction phase, or other products and services relevant for the completion of the ESS facility.

6.3.4.1 Status of In-Kind Contributions

During the first years of existence, ESS has identified in-kind partners for the project, specified work, and set up all corresponding In-Kind Agreements. Currently, the Organisation is working together with approximately 40 international in-kind partners and the planned total value of in-kind is at 560M EUR. Up to date, ESS has signed main In-Kind Agreements with 24 partners. This has enabled 78 Technical Annexes (235 M EUR) to be approved by the ESS Council. 40 Technical Annexes (90 M EUR) have been agreed with the partner (but not approved) with a further 74 planned Technical Annexes (235M EUR) are waiting to be signed. Many of the In-Kind Agreements have been set-up with the transition of the project to the installations phase.

6.3.4.2 Potential Risk

According to Annex 3 of the European Spallation Source ERIC Statutes on basic rules and principles for IKC, suitable In-Kind Contributions and their value are identified by the Organisation with reference to the ESS project descriptions included in the Programme Plan. The values of different In-Kind Contributions are described in the Organisation's Cost Book which defines the total value of all In-Kind Contribution. The values in the Organisation's Cost Book are expressed, until otherwise agreed, at the price level stated in the Statutes and Annexes. Each In-Kind Contribution will be subject to



written contract between the Organisation and the delivering body performing the In-Kind Contribution.

The Framework for Handling In-Kind Contributions during the Construction Phase provides a clear structure for the different phases related to the processing of In-Kind Contributions at ESS. According to Article 9.2 of the Framework, the final phase concludes with the transfer of ownership of the In-Kind Contribution to ESS:

“After the approval of the In-Kind Contribution by the Council, the ownership shall be transferred to the Organisation, and the value shall be credited according to milestones to the Member’s share of the contribution at the next annual crediting.”

In accordance with this article, Article 10.1 of the template for In-Kind Contribution Agreements during the construction phase reinstates the rules for the transfer of ownership of IKC. The article specifies that:

“following approval of the In-Kind Contribution by the Council and written notification to the partner thereof, ownership of the Project Results shall be transferred to ESS ERIC. The In-Kind Contribution value shall be credited to the Government of [Country] according to agreed milestones at the next annual crediting.”

According to Article 6.1 of the IKC Framework, “The Member making the In-Kind Contribution and its delivering body bear the full responsibility for any cost overruns”. By the same token, in-kind partners are also the only ones to benefit from cost savings. While In-Kind Contributions are key to deliver the ESS project, it is not clear how to treat them in accounting terms. Their value remains to be decided – is the Cost Book value, the actual cost incurred by the delivering organisation or market value? This has yet to be resolved and is currently discussed within the ESS Organisation and with its auditors. What is clear is that the in-kind deliveries are an integrated part of the ESS facility and as such an asset it is not entirely clear how to evaluate them and if they should be included on the ESS balance sheet. A few questions need to be resolved:

- Is it necessary that the IKC are part of the ESS balance sheet and if so when would it be accounted for?
 - Day of delivery/hand-over?
 - Approval by Council?
- What is the value of an IKC?
 - Due to the above described IKC principles, it is not obvious what their cost and their value for the organisation are; Cost Book value, actual cost for delivering organisation or market value/value to ESS?
- When does an IKC have to be accounted?
 - Day of delivery/hand-over?
 - Approval by Council?

6.3.4.3 Legal Framework

The requirements of budgetary principles, accounts and audits of ERICs are defined in Article 13 of the ERIC Regulation. The Article implies that ERICs are obliged to follow principles of sound financial management and transparency:



- “1. All items of revenue and expenditure of an ERIC shall be included in estimates to be drawn up for each financial year and shall be shown in the budget. The revenue and expenditure shown in the budget shall be in balance.
2. The Members of an ERIC shall ensure that the appropriations are used in accordance with the principles of sound financial management.
3. The budget shall be established and implemented and the accounts presented in compliance with the principle of transparency.
4. The accounts of an ERIC shall be accompanied by a report on budgetary and financial management of the financial year.
5. An ERIC shall be subject to the requirements of the applicable law as regards preparation, filing, auditing and publication of accounts.”

Two key ESS documents defining the legal framework for the accounting of In-Kind Contributions are the Statutes of the Organisation and its Financial Rules. Article 24 of the Statutes defines the general principles of the auditing and financial rules at ESS:

- “1. The Director General shall submit to the Administrative and Finance Committee (AFC) the budget documents as detailed in the Financial Rules which shall be revised and subsequently be submitted to the Council with the AFC’s comments and recommendations.
2. The Council shall appoint external auditors who shall serve for a period of four years and may be reappointed. The auditors shall perform such functions as are laid down in the Financial Rules.
3. The Director General shall provide the auditors with such information and assistance as they may require in order to perform their duties.
4. The accounts of the Organisation shall be accompanied by a report on budgetary and financial management of the financial year.
5. The Financial Rules shall lay down all other arrangements relating to the Organisation’s budget, accounting standards and finances including rules regarding preparation, filing, auditing and publication of accounts.”

In line with the Statutes, the Council of the European Spallation Source ERIC has adopted Financial Rules, which provide a detailed legal framework for all finance-related activities of the Organisation. Article 27 implies that amendments of the Financial Rules can be made if approved by a qualified majority vote in the Council. Qualified majority means at least 67% of the votes of the Members represented at the meeting and not more than half of the Members voting against. According to Article 28, the Financial Rules governing ESS shall be in conformity with Community law and also with the laws of Sweden. However, in case of conflict between the Swedish law and the Financial Rules, the former prevails.

The general principles on accounts are defined in Article 20.1 of the Financial Rules: “The accounts shall be kept in accordance with relevant Swedish legislation, including but not limited to the Swedish Book-keeping Act (Bokforingslagen, SFS 1999:1078), in the SEK currency unit on the basis of the



financial year. They shall be authenticated by supporting documents. Entries shall be classified according to the nomenclature stated in the internal financial Regulations, making a clear distinction between the balance sheet and the profit and loss account on the one hand and the accounts of budgetary expenditure and income on the other hand.” Article 21 stipulates that “The accounts shall be closed at the end of the financial year to enable a balance sheet and the income and expenditure accounts as well as the profit and loss account to be drawn up.”

6.3.4.4 Next Steps

The Organisation still needs to determine what exactly IKC are in accounting terms, i.e. whether or not to treat them as investments/assets, and how to book them. The issues related to accounting of IKC need to be fully assessed in order to determine what accounting standards should be used by ESS. BrightnESS allows the Organisation to allocate resources to focus on this in the second half of the project.



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