

# Procurement & In-Kind

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*ELI-DC*

Workshop on Implementation of ERICs and VAT issues

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# Overview

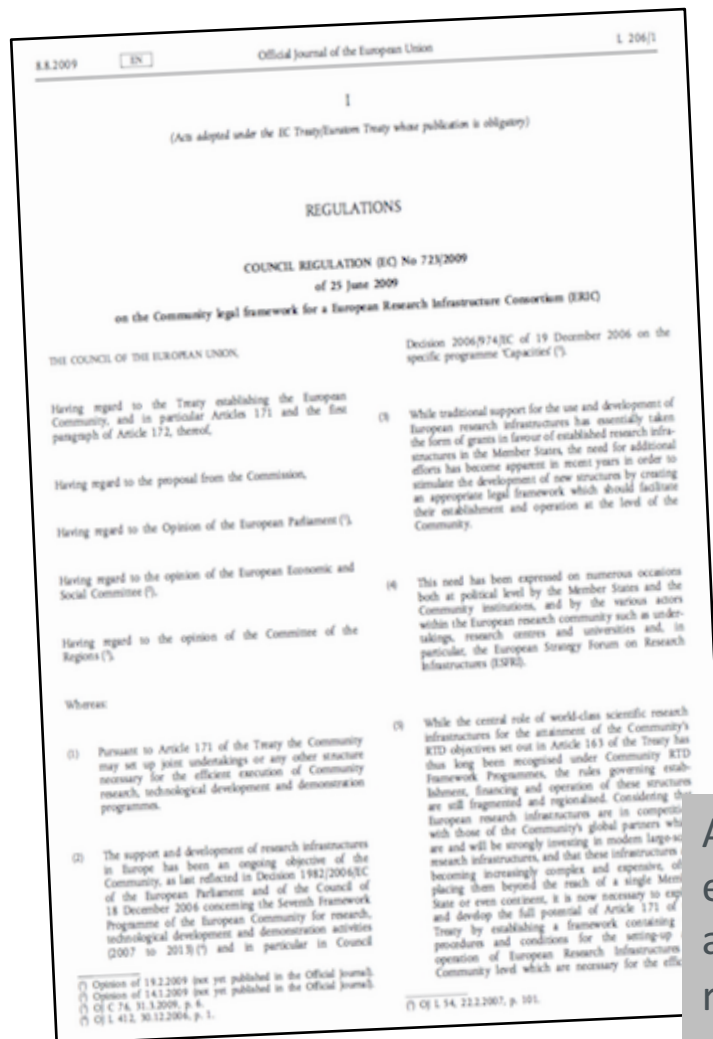
- Procurement Implementation
  - (Using ESS as an example)
- In-Kind Management
- In-Kind and VAT Impacts for ERICs

- Studied these issues under the H2020 project 'BrightnESS'
- Much of this material is sourced from a report for WP 3.1

# The Challenge at ESS

- Develop an effective procurement system to drive a construction project of EUR 1.8B
- Do it in a way that satisfies a broad range of stakeholders (technical, industrial, political) from all over Europe
- Do it in a way that is consistent with European Principles of transparency, competitiveness
  - *See ESS Procurement Policy @ [www.esss.se](http://www.esss.se)*

# Procurement: Legal Framework



Article 7(3) of the **Council Regulation (EC) No 723/2009** of 25 June 2009 on the Community legal framework for ERIC:

*“An **ERIC** is an international organisation within the meaning of Article 15(c) of Directive 2004/18/EC.”*

An ERIC is not required to follow the procurement procedures established by Directive 2004/18/EC and Directive 2014/24/EU, and has the freedom to decide on its own procurement rules, respecting basic principles of transparency, non-discrimination, and competition.

# Defining Procedures



Value Threshold	Publication	Procurement methodology	Minimum Timing	Variations in Timing	Standstill Period
>200.000 EUR	Publication on ESS website. Other media dependng 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 if SAN published 30 days - 12 months in advance	10 days
		Restricted procedure	25 days + 25 days		
		Competitive procedure with negotiation with or without intial tender	25 days / 30 days		
50.000 - 199.999 EUR	Publication on ESS website. Other media dependng on subject matter and value.	Open procedure	20 days	(+ ) 5 days if documents not available by internet (- ) 3 days if receipt of tenders electronically	optional
		Restricted procedure	15 days + 15 days		
		Competitive procedure with negotiation with or without intial 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	-	-	-

<https://europeanspallationsource.se/page/contract-award-notices>

# Updated ERIC Procurement Rules



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 if SAN published 30 days - 12 months in advance	10 days
		Restricted procedure	25 days + 25 days		
		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 (-) 3 days if receipt of tenders electronically	optional
		Restricted procedure	15 days + 15 days		
		Competitive procedure with negotiation with or without initial tender	15 days / 20 days		
10.000 - 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	-	-	-
<10.000 EUR	-	Request for Quotation or price comparison with limited competition	-	-	-
<300 EUR	-	Direct purchase with reimbursement or via ESS established account	-	-	-

<https://europeanspallationsource.se/page/contract-award-notices>

# Appeal Process



## Articles 37-39 of the ERIC Procurement Rules:

- **All appeals are handled by the Tenders Appeal Board composed of 3-5 members of ERIC or external parties appointed by the ERIC Director General**
- **Appeals must be submitted in writing to the Board**
- **If the Board decides that the Organization has infringed its procurement rules, it shall order that the tender procedure or parts of it be rectified**
- **For the purpose of investigating an appeal, the Board may order an audit**
- **The Board may make an order suspending the procurement procedure or the award of contract until it has issued its final decision. The Board shall notify the appellant in writing of its final decision within 30 working days following the date of receipt of the appeal.**

- Remedies Directive for the utilities sector (Directive 92/13/EEC)
- Remedies Directive for the public sector (Directive 89/665/EEC)
- Set minimum national review standards to ensure that rapid and effective means of redress are available in all EU countries. The directives have mandatory and optional provisions => do not intend to harmonize the remedies system in the EU.



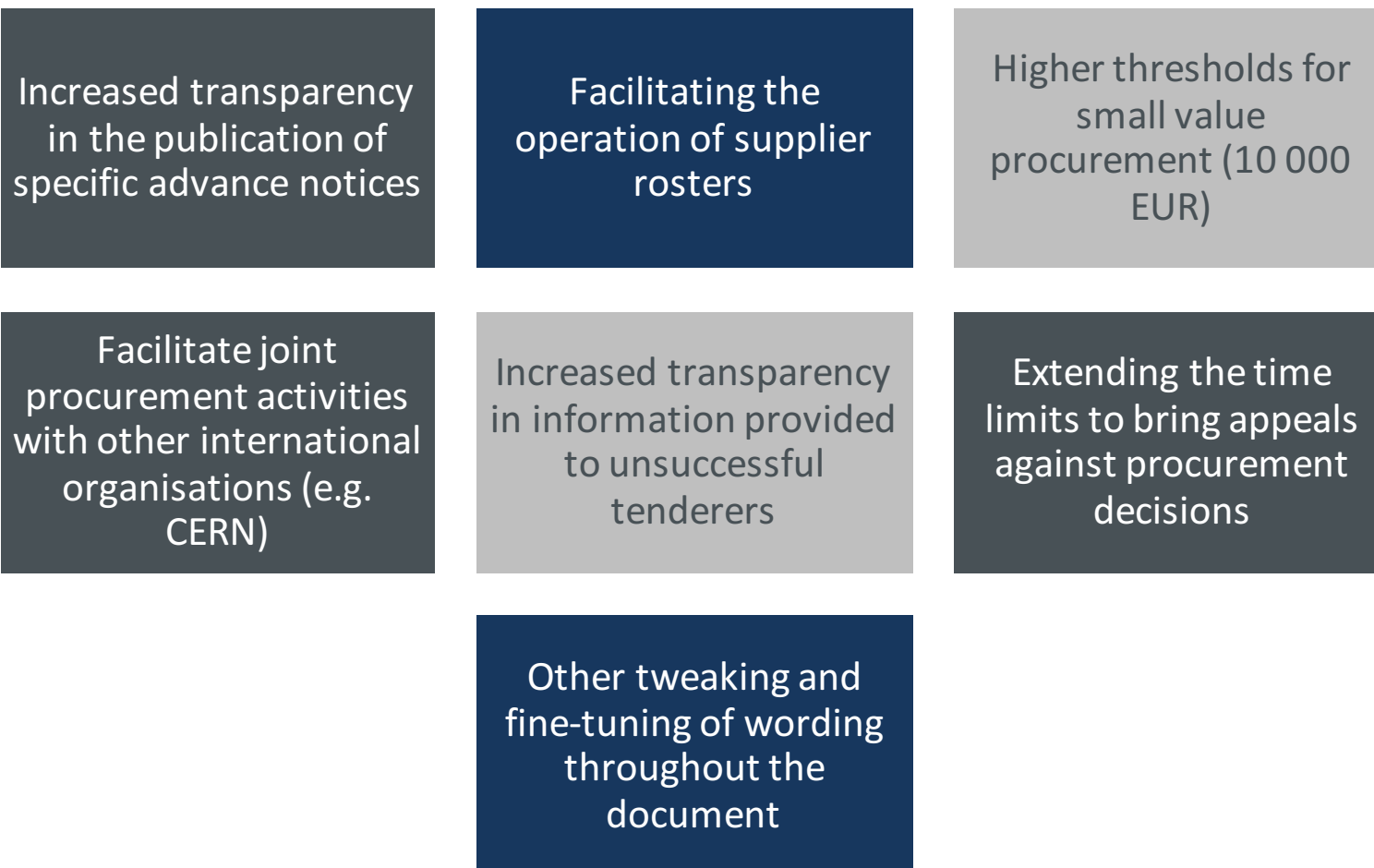
# Appeal Process

- 4 appeals were brought by suppliers against ESS.
- 1 was accepted by Board, 2 were rejected and 1 went to court bypassing the Board.
- The Malmö Court confirmed that the supplier should have appealed to the ERIC Tenders Appeal Board.
- Court also acknowledged the authority of the Tenders Appeal Board and the validity of the appeal procedure outlined in the ERIC Procurement Rules.
- This was the first time I'm aware of that an ERIC has been challenged in terms of public procurement and the court decision from 2016 represents a great success.

# 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.

# Amendments following the Review of Procurement Rules



# In-Kind Management @ ESS

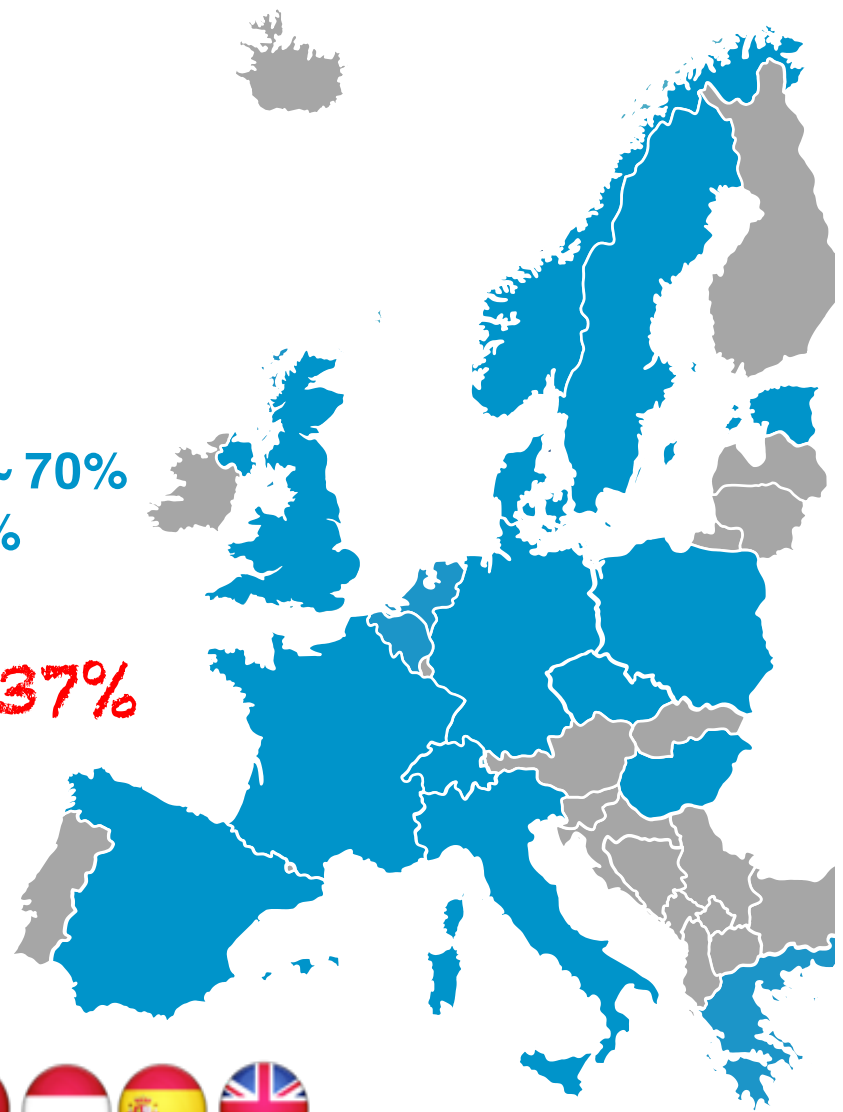
## Host Countries of Host Country and Denmark

Construction	47.5%	<b>Cash</b>	<b>100%</b>
Operations	15%		

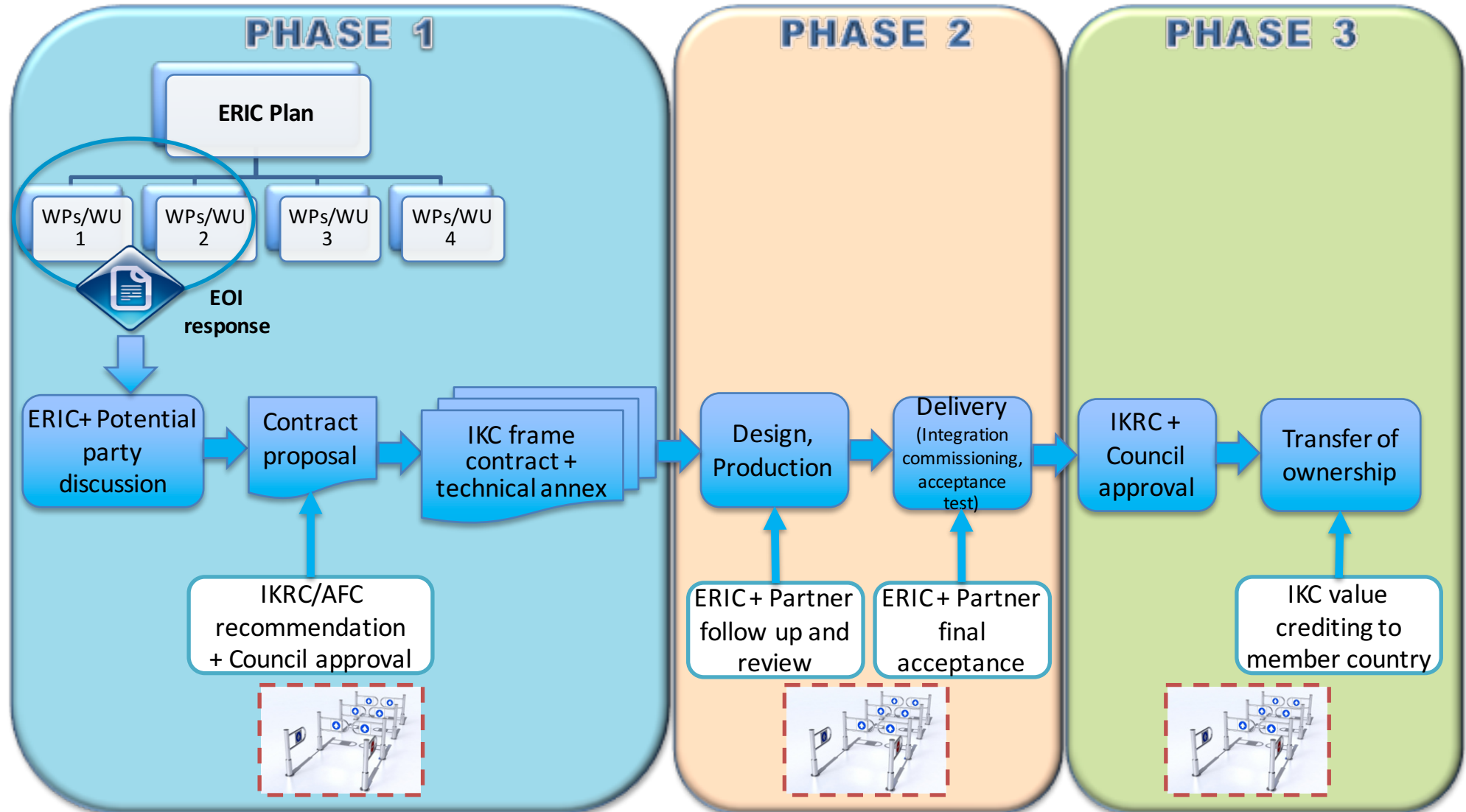
## Non Host Member Countries

Construction	52.5%	<b>In-kind Deliverables</b>	<b>~ 70%</b>
Operations	85%	<b>Cash</b>	<b>~ 30%</b>

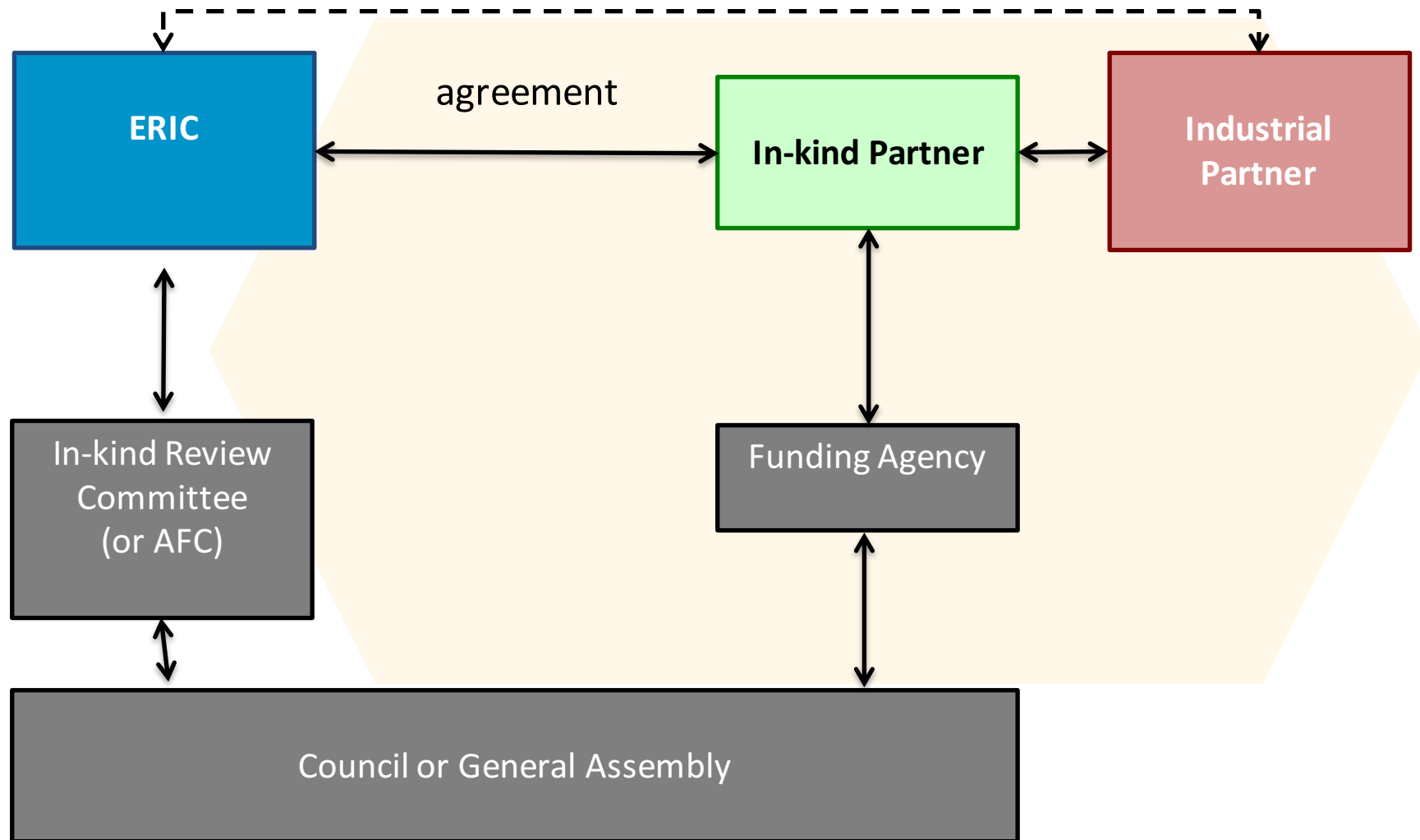
**Members' In-Kind Goals = 37%**  
**€685 million**



# In-Kind process



# The In-Kind Collaboration Landscape



# Accounting of IKC



There is sometimes a lack of clarity how to treat IKC in accounting terms. This leads to a number of questions:

- Are IKC a capital contribution (asset)? Or Income?
- 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;
  - An organisational 'Cost Book' can serve as a valuable tool to get all parties on the same page;
- When does an IKC have to be accounted?
  - Day of delivery/hand-over?
  - Approval by IKRC/AFC/Council?

# Value-Added Tax on IKC

Council Regulation (EC) No 723/2009 gives ERICs broad flexibility in treatment of taxation and VAT, but *does not provide guidance* for IKC partner institutions

Payment of VAT by national institutes to industrial suppliers was not included in the ERIC 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 organization

Several institutes have notified ERIC 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 ERIC pays the VAT

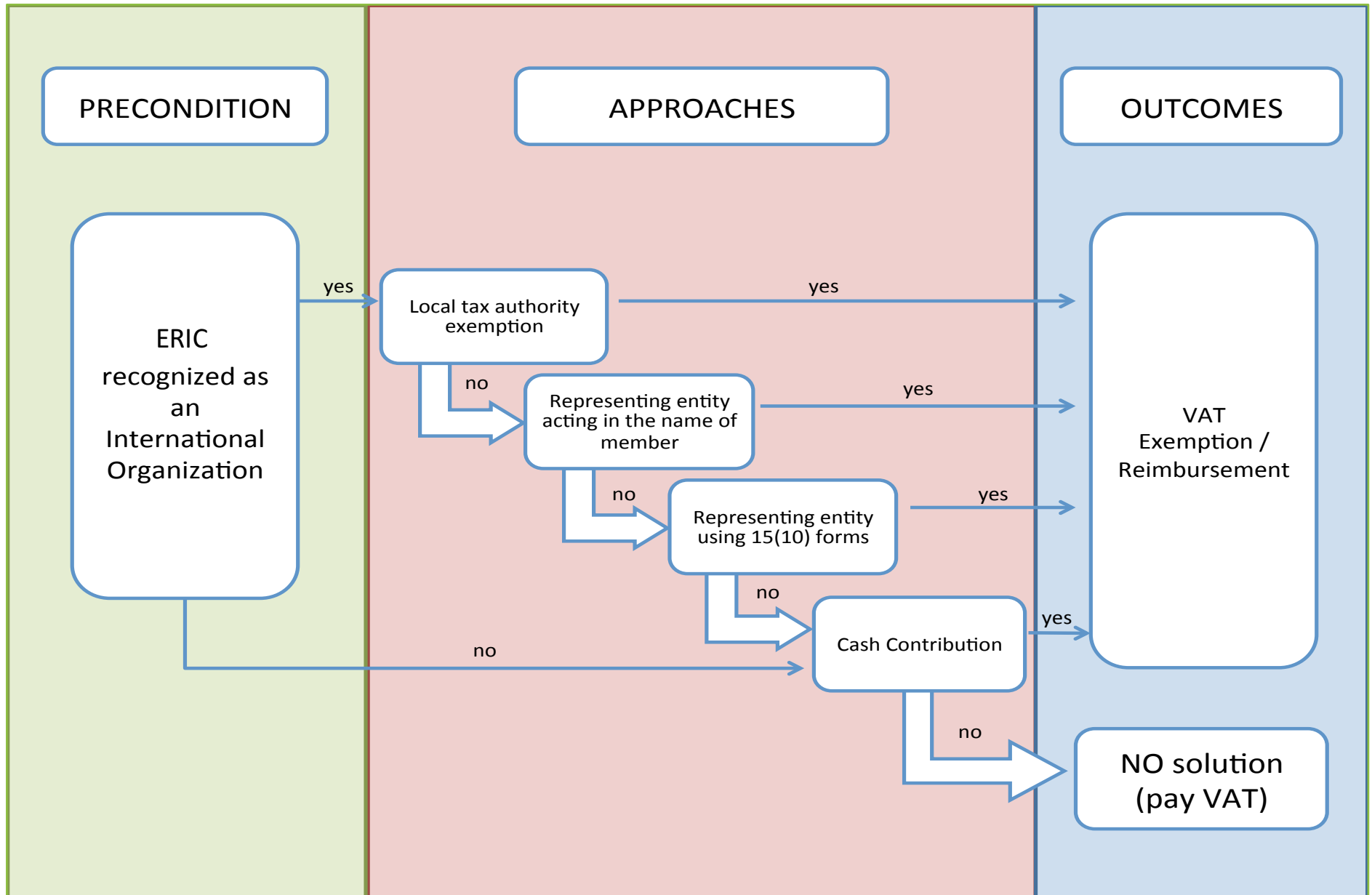


## ‘Working’ Understanding of How VAT Applies for IKC

From previous meetings of the VAT committee, the following guidelines were understood:

- Only *members* (and not *representing entities*) may enjoy the same VAT exemptions as the ERIC itself;
- A *representing entity* may act as an intermediary *in the name and on behalf of the ERIC*;
- *Members* may use a 15.10-certificate, provided that it is specified that it is for the sole purpose of the ERIC.

# VAT on IKC



# Value-Added Tax by Country

## *ERIC Example*



	ERIC Recognized as an International Organisation			
	Direct Exemption	Representing Entity	Representing Entity with supporting documents	Cash Contribution
<b>Belgium</b>	Being Explored			
<b>Czech Republic</b>	Being Explored	Not Possible	Being Explored	
<b>Denmark</b>	Achievable			
<b>France</b>			Achievable	
<b>Germany</b>	Being Explored			Being Explored
<b>Hungary</b>	Achievable	Not Possible		
<b>Italy</b>		Achievable		
<b>Netherlands</b>	Being Explored			
<b>Norway</b>	Being Explored	Being Explored		
<b>Poland</b>	Being Explored			
<b>Spain</b>	Achievable			
<b>Host</b>	Achievable			
<b>Switzerland</b>	Being Explored			
<b>United Kingdom</b>			Achievable	

- Being Explored
- Achievable
- Not Possible

# VAT risks in the Host Country for IKC

Possible risks include:

- Local Host Country VAT being charged or
- In-Kind partner being obliged to register for VAT in Host Country

Various VAT situations and VAT consequences are precisely described in the VAT legislation. Even a minor change in the circumstances and facts may have a significant impact on the conclusion how VAT should be handled.

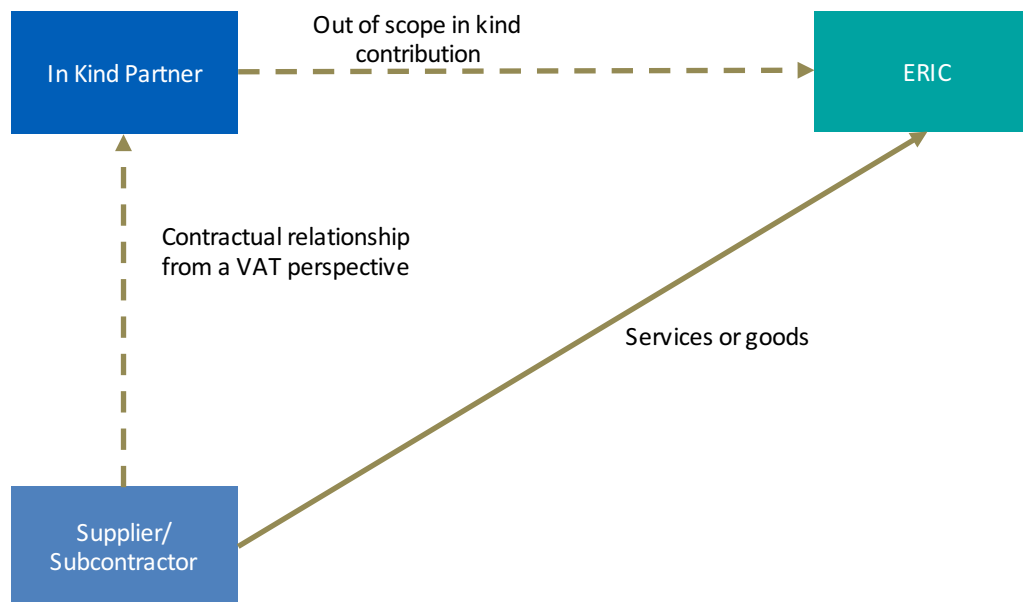
# Background

## Definition

Transaction means the supply of goods or services for the use at ERIC in Host Country. It involves purchases from subcontractors which are invoiced to the In-Kind partner and delivered either to the In-Kind partner or directly to ERIC.

## Assumptions

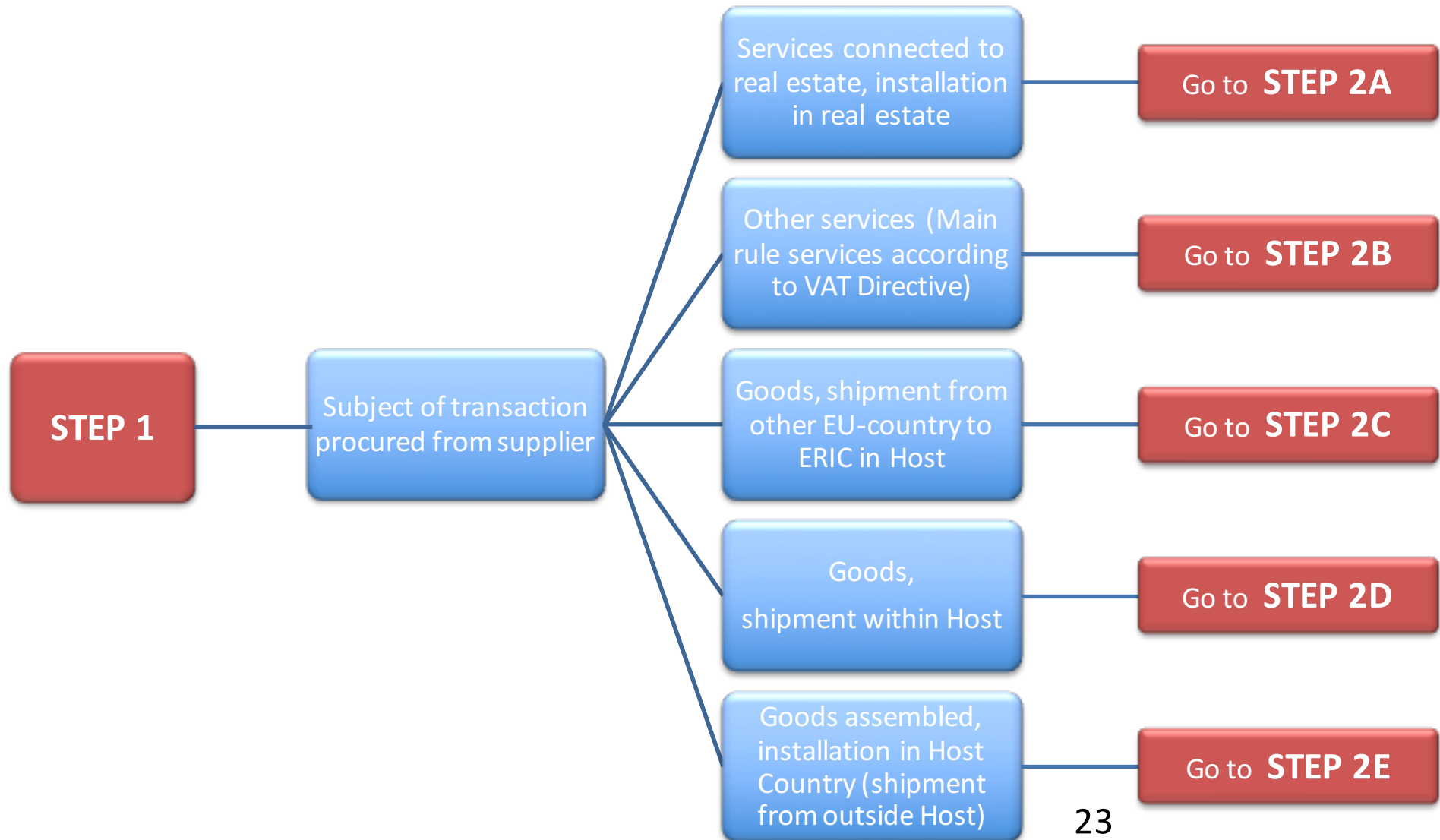
- It is not possible to apply the 15(10) VAT and Excise Duty Exemption Certificate.
- The In-Kind partner does not have a fixed establishment in Host Country. (In case the In-Kind partner has a fixed establishment in Host Country a specific analysis is required in order to assess the VAT consequences.)



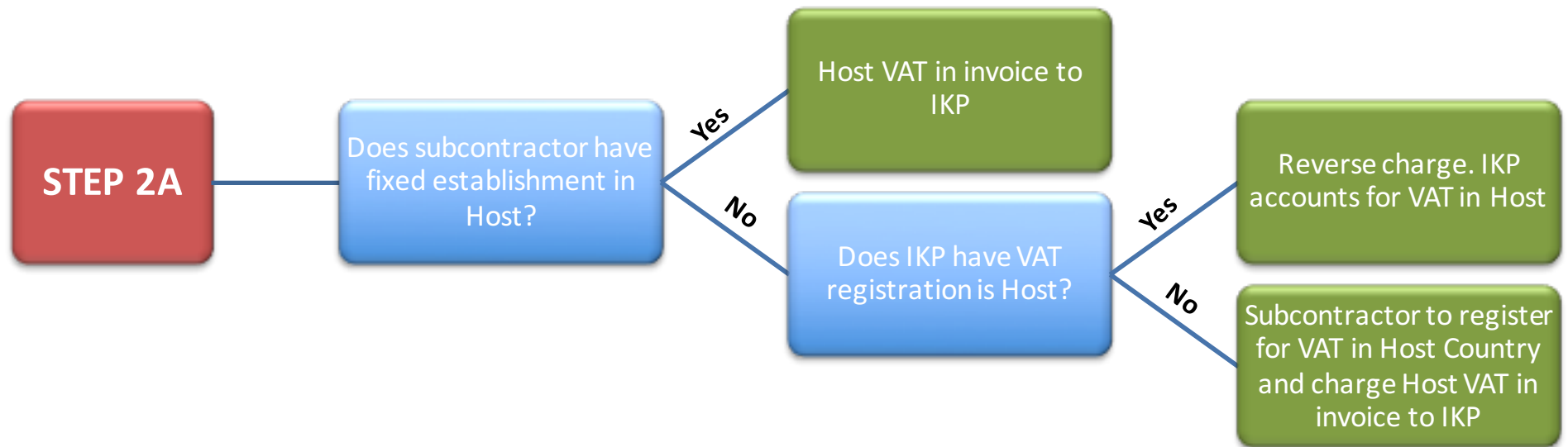
# Facts to investigate:

- 1. In-Kind partner VAT registered in Host Country and/or other EU-country?**
- 2. Supplier VAT registered in Host Country and/or other EU-country?**
- 3. Supplier having fixed establishment in Host Country?**
- 4. What is the transaction object? i.e.**
  - Goods only
  - Goods which are installed or assembled in Host Country
  - Services connected to real estate, installation in real estate in Host Country
  - Other Services

# STEP 1 - Identify subject of transaction procured from supplier



# STEP 2A - Services connected to real estate, installation in real estate

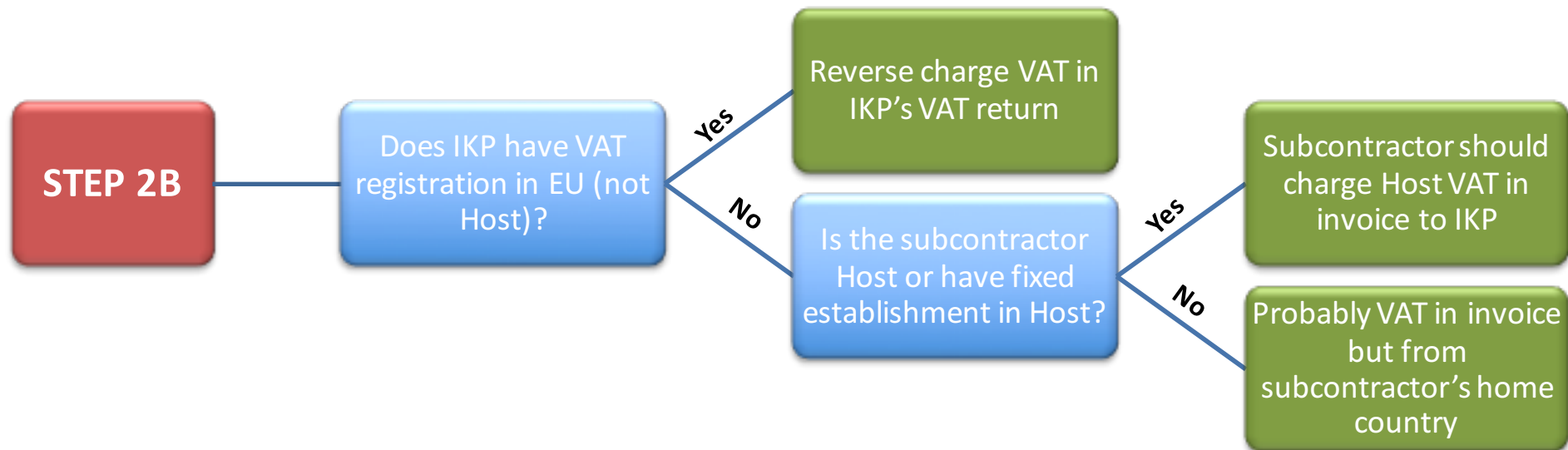


## *Consequences*

- The supply from subcontractor will result in Host VAT. Either charged by supplier or self assessed by IKP in accordance to the reverse charge mechanism.
- Input VAT is recoverable if the cost is related to a VAT taxable activity and consequently it require a VAT taxable activity at the IKP. Obviously, the question of recoverability needs to be investigated by each IKP respectively.
- If recoverable by the IKP, the input VAT may be recovered by the IKP either in Host VAT return (should IKP be VAT registered in Host) or via refund application in IKP's homeland.



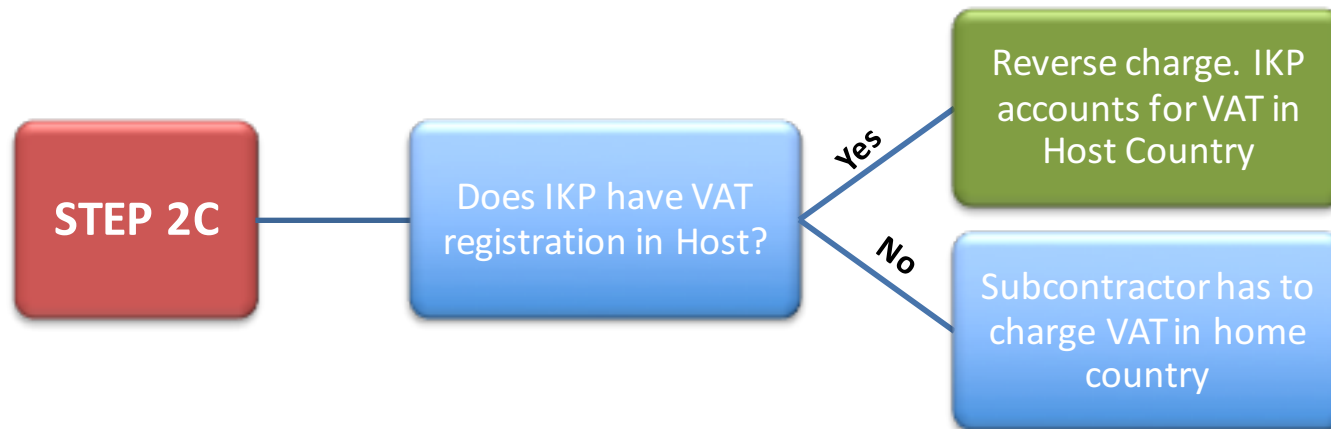
# STEP 2B – Other services (Main rule services according to VAT Directive)



## *Consequences*

- The supply from subcontractor will result in VAT. Either charged by supplier or self assessed by IKP in accordance to the reverse charge mechanism.
- The country of supply is decisive of whether VAT will be Host or foreign
- Input VAT is recoverable if the cost is related to a VAT taxable activity and consequently it require a VAT taxable activity at the IKP. Obviously, the question of recoverability needs to be investigated by each IKP respectively.
- If recoverable by the IKP, the input VAT may be recovered in IKP's VAT return or via refund application in IKP's home country.

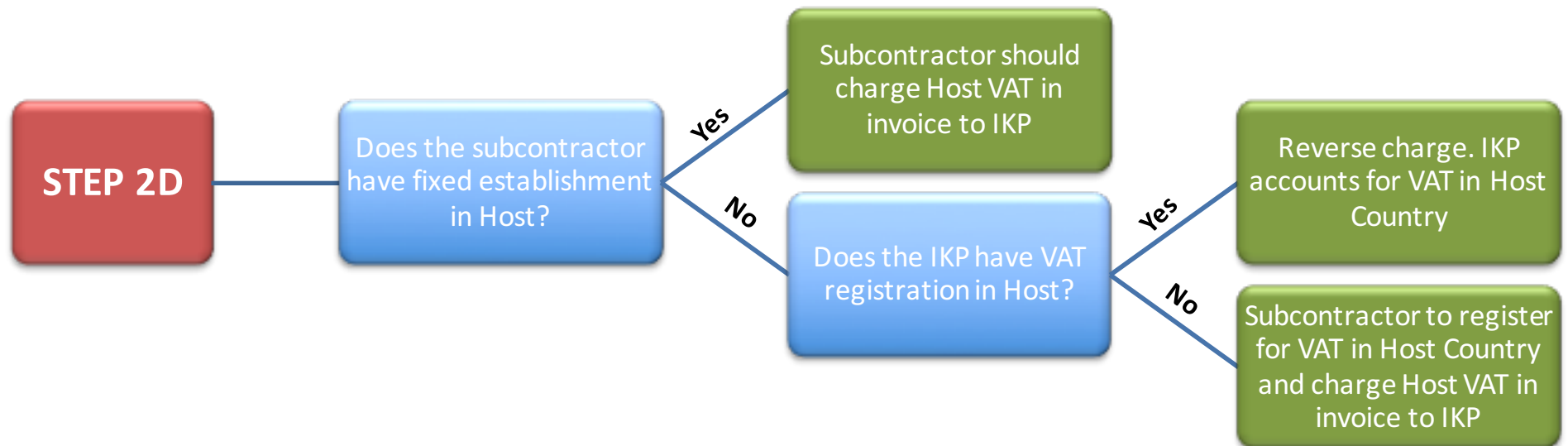
# STEP 2C – Goods, shipment from other EU-country to Host



## *Consequences*

- The supply from subcontractor will result in VAT. Either charged by supplier or self assessed by IKP in accordance to the reverse charge mechanism.
- The country of supply is decisive of whether VAT will be Host or foreign
- Input VAT is recoverable if the cost is related to a VAT taxable activity and consequently it require a VAT taxable activity at the IKP. Obviously, the question of recoverability needs to be investigated by each IKP respectively.
- If recoverable by the IKP, the input VAT may be recovered in IKP's VAT return or via refund application in IKP's homeland.

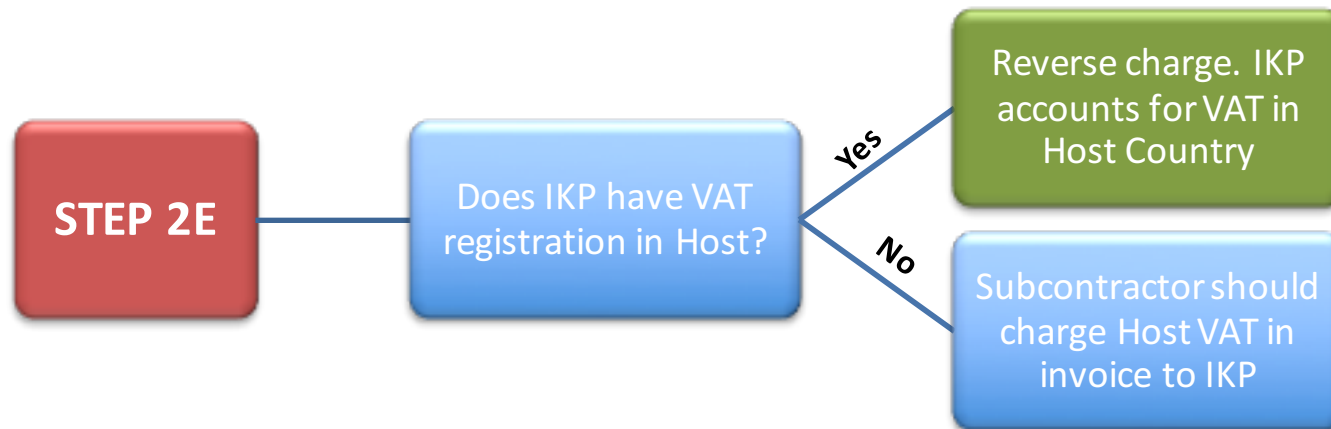
# STEP 2D – Goods, shipment within Host



## *Consequences*

- The supply from subcontractor will result in Host VAT. Either charged by supplier or self assessed by IKP in accordance to the reverse charge mechanism.
- Input VAT is recoverable if the cost is related to a VAT taxable activity and consequently it require a VAT taxable activity at the IKP. Obviously, the question of recoverability needs to be investigated by each IKP respectively.
- If recoverable by the IKP, the input VAT may be recovered by the IKP either in Host VAT return (should IKP be VAT registered in Host) or via refund application in IKP's homeland.

# STEP 2E – Goods assembled, installation in Host Country (shipment from outside Host)



## *Consequences*

- The supply from subcontractor will result in Host VAT. Either charged by supplier or self assessed by IKP in accordance to the reverse charge mechanism.
- Input VAT is recoverable if the cost is related to a VAT taxable activity and consequently it require a VAT taxable activity at the IKP. Obviously, the question of recoverability needs to be investigated by each IKP respectively.
- If recoverable by the IKP, the input VAT may be recovered by the IKP either in Host VAT return (should IKP be VAT registered in Host) or via refund application in IKP's homeland.

# IKC and VAT: Lessons Learned

- ERICs are non-economic actors – do not get engaged with being a ‘taxable person’ more than necessary.
- Direct exemption is preferable to reimbursement
- The VAT treatment relative to IKC from ERIC Members must be approached strategically and globally
- Representing Entities play an important role in the establishment and construction of ERICs



# Thank you

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