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## ***b-solutions***

### **FINAL REPORT BY THE EXPERT**

**Advice Case:** Making EGTCs more powerful: legal certainty for provision of personnel to the EGTC

**Advised Entity:** European Grouping of Territorial Cooperation Eucor - The European Campus EGTC,  
DE-CH-FR

**Expert:** Oliver Stein

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## **I. Description of the Obstacle**

Eucor - The European Campus is an association of five universities from three different countries, including two member states of the European Union and Switzerland, organised in the legal form of the European Grouping of Territorial Cooperation (EGTC) on the basis of Regulation (EC) No 1082/2006 in the version of Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013:

- the University of Basel
- the Albert Ludwigs University Freiburg im Breisgau
- the Université de Haute-Alsace (Mulhouse-Colmar)
- the Karlsruhe Institute of Technology
- the Université de Strasbourg

The objectives and tasks of the EGTC are set out in Art. 6.2 of the Convention, which was unanimously adopted by the member universities, in the area of

- Research: enabling joint, transnational professorships, profiling of the transnational science and research area in the Upper Rhine region
- Teaching and doctoral training: above all, the creation and further development of joint courses, study programmes and degrees and the creation and further development of joint doctoral training as well as the promotion of the internationalisation of students and doctoral candidates
- Structure: in particular, promoting cooperation between university administrations, reducing obstacles to cross-border cooperation between universities, promoting and facilitating student mobility and preparing a common structural and development plan

An EGTC is a creation of European law endowed with legal personality with the aim, in particular, of facilitating cross-border cooperation between public bodies in the border regions of the European Member States. The European legislator had come to the conclusion that the existing vehicles of European law, in particular the European Economic Interest Grouping (EEIG), could not provide the appropriate framework for this (cf. para. 4 of the recitals on the adoption of EGTC Regulation 1082/2006 of 5 July 2006). After the above-mentioned universities had already worked together since 1989 within the framework of a so-called European Confederation of Upper Rhine Universities (Eucor) with the common goal of cooperation in research and teaching in the centre of Europe, they adopted the form of an EGTC on 9 December 2015 by signing the Convention in accordance with Art. 8 of the EGTC Regulation.

In addition to the convention, Art. 9 of the EGTC Regulation requires the adoption of a statute in which the EGTC must determine, inter alia, the manner in which its members are to participate financially and the rules governing the management of its budget.

In addition to the Assembly and the President of the EGTC as the bodies required by law, Eucor - The European Campus has, in accordance with Articles 7 and 8 of its statutes, set up an office in Freiburg, which has the task of implementing the EGTC's requirements, regulating personnel matters and taking care of the budget. In addition, a coordination office based in Strasbourg has been set up, which is responsible for coordinating exchanges and cooperation,



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in particular for planning and supervising the EGTC's tasks and projects, as well as its internal coordination.

Art. 12 of the statutes provides that the EGTC may employ staff directly or use staff seconded to it by the universities. If staff from one or more of the member universities are seconded to the EGTC, they shall remain employed by the seconding university.

At present the EGTC has no staff of its own, in particular it has not concluded any employment contracts in its own name, but uses staff of the member universities made available to it for this purpose in order to fulfil its tasks in the head office and in the coordination office. The EGTC has not hired its own staff so far, in particular because employees are either only temporarily employed by the EGTC or are only needed temporarily there, or because individual staff members only take over EGTC tasks during part of their working time, but devote the remaining part of their working time to the university with which they have concluded their employment contract. Practicability and, last but not least, the employees' sense of security also play a not inconsiderable role in the choice of personnel provision. Employers and employees generally prefer it if the employee's employment relationship, for example if he or she is seconded to the EGTC full-time for a period of two years, remains with his or her original employer. In this case, the existing employment contract with the university does not have to be suspended and a new fixed-term employment contract must not be concluded with the EGTC. In particular, the differences between German and French labour law and, where appropriate, Swiss labour law would act as an obstacle to the attainment of the EGTC's objectives if the EGTC had to sign fixed-term employment contracts with its employees posted by the member universities.

It goes without saying, therefore, that employees who have previously worked part-time or full-time in the EGTC's office and coordination office are seconded or seconded for this purpose by the member universities employing them and continue to be paid. The corresponding proportionate or, in the case of full-time secondment, full personnel costs shall be reimbursed to the respective universities by the EGTC on the basis of agreements concluded accordingly. This is purely a reimbursement of costs, so that the universities do not generate any surplus funds by appointing staff.

With regard to the financing of the EGTC, Art. 13 of the statutes stipulates that the members must pay an annual fee, which depends on the number of students and is recalculated for each financial year. The calculation is based on the annual budget decided and approved by the Assembly.

In addition, the member universities bear the running costs of the offices in Freiburg and Strasbourg in accordance with this allocation key, which is based on the number of students. For the year 2019 (see Annex 2 of the budget for the year 2019) the following picture emerges:

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Tables from annex two to the budget 2019:

**(A) Distribution of costs Coordination office**

	Number of students on 31/01/2018	In %	Total
Universität Freiburg	23.632	20,529%	60.793,29 €
Karlsruher Institut für Technologie	25.020	21,735%	62.601,90 €
Universität Basel	10.052	8,732%	43.098,09 €
Université de Haute-Alsace	8.394	7,292%	40.937,66 €
Université de Strasbourg	48.018	41,713%	92.569,06 €
	<b>115.116</b>	<b>100,00%</b>	<b>300.000,00 €</b>

**(B) Distribution of costs Seed Money**

Universität Freiburg	23.632	20,529%	60.793,29 €
Karlsruher Institut für Technologie	25.020	21,735%	62.601,90 €
Universität Basel	10.052	8,732%	43.098,09 €
Université de Haute-Alsace	8.394	7,292%	40.937,66 €
Université de Strasbourg	48.018	41,713%	92.569,06 €
	<b>115.116</b>	<b>100,00%</b>	<b>300.000,00 €</b>



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The budget for the year 2019 provides for a total income of 600,000 €, which will be raised from the contributions of the member universities to the costs of business and coordination offices (300,000 €) on the one hand and contributions to start-up financing for cooperation in research and teaching on the European Campus (seed money) on the other hand amounting to 300,000 €.

The University of Freiburg, for example, will pay 60,793.29 € for each of the two posts. For the staff provided by it to the EGTC in the second quarter of 2019, it was reimbursed € 17,445.01 by the EGTC.

Staff are currently seconded to the EGTC by the University of Strasbourg and the University of Freiburg. The other member universities do not provide staff.

This cost accounting for the personnel provided by the universities is currently VAT-exempt.

## **II. Indication of the Legal/Administrative Dispositions causing the Obstacle**

For the EGTC, the question arises as to whether the provision of staff by the member universities to it is subject to VAT or not. In the past, no VAT was invoiced by the member universities.

Due to the fact that the University of Strasbourg as well as the University of Freiburg im Breisgau currently provide staff to the EGTC, the EGTC is confronted with a possibly different assessment by two different tax administrations, the German and the French, with regard to one and the same life situation - the provision of staff.

Until now, it could be assumed in Germany that the provision of personnel between the University of Freiburg as a legal entity under public law and the EGTC as a legal entity under public law too was exempt from VAT due to the legal situation existing until at least the end of 2016. On the French side, there is binding information available from the tax office, the resilience of which, however, appears questionable, as the prerequisites from which this information is derived may not be fulfilled.

In Germany, the regulations changed with the introduction of § 2b UStG with effect from 1.1.2017. However, the former provisions will continue to apply to legal entities under public law until 31 December 2020, provided that the persons have submitted a corresponding declaration to the German tax office. If this is the case, which could not be clarified within the framework of this report, the EGTC in Germany would have to prepare for taxation in certain circumstances by 1 January 2021 at the latest - i.e. in just over a year's time.

Against this background, the EGTC has asked for clarification as to whether the provision of personnel by the member universities in France and/or Germany for pure cost reimbursement is or will be subject to VAT in the foreseeable future.

In the field of value-added tax, the legal framework is characterised by the fact that VAT law in the Member States of the European Union is partially harmonised by Council Directive 2006/112/EC on the common system of value-added tax (VAT Directive), which means that the transposition into national law of the Member States required by the nature of the Directive may lead to partly divergent national regulations with regard to the same matter in life. This effect is often intensified

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by a (legally) culturally determined different interpretation or a different understanding of the legal terms used by the Directive by the national tax authorities.

The guiding principle for all of this is the principle of a uniform interpretation of the provisions of the VAT Directive throughout Europe. This uniform interpretation of the Directive with the result that, on the one hand, national law is always to be interpreted in the sense of the Directive and, in the event of a possible contradiction to the Directive, is even declared inapplicable, is regularly provided by the European Court of Justice (ECJ). Its case law is therefore also decisive for the answer to the question raised by Eucor - The European Campus as to whether the provision of personnel from member universities to the EGTC is subject to VAT or not.

The VAT liability of the member universities of the EGTC as a legal entity under public law in European law results from an examination of Article 2(1)(c), 9(1) and 13(1) of the Directive. As can be seen from the following overview, these provisions have essentially been transposed into German and French tax law with nearly the same wording:

Council Directive 2006/112/EC	Umsatzsteuergesetz (UStG)	Code général des impôts (CGI)
<p>Article 2(1)(c) :</p> <p>1. The following transactions shall be subject to VAT: [...] (c) the supply of Services for consideration within the territory of a Member State by a taxable person acting as such; [...]</p> <p>Article 9(1):</p> <p>1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.</p> <p>Article 13(1):</p> <p>1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, when they engage in such</p>	<p>§ 1 Abs. 1 Nr. 1:</p> <p>(1) Der Umsatzsteuer unterliegen die folgenden Umsätze:</p> <p>1. die Lieferungen und sonstigen Leistungen, die ein Unternehmer im Inland gegen Entgelt im Rahmen seines Unternehmens ausführt. [...]</p> <p>§ 2 Abs. 1:</p> <p>(1) Unternehmer ist, wer eine gewerbliche oder berufliche Tätigkeit selbständig ausübt. Das Unternehmen umfasst die gesamte gewerbliche oder berufliche Tätigkeit des Unternehmers. Gewerblich oder beruflich ist jede nachhaltige Tätigkeit zur Erzielung von Einnahmen, auch wenn die Absicht, Gewinn zu erzielen, fehlt oder eine Personenvereinigung nur gegenüber ihren Mitgliedern tätig wird. [...]</p> <p>§ 2b Abs. 1:</p> <p>(1) Vorbehaltlich des Absatzes 4 gelten juristische Personen des öffentlichen Rechts nicht als Unternehmer im Sinne des § 2, soweit sie Tätigkeiten ausüben, die ihnen im Rahmen der öffentlichen Gewalt obliegen, auch wenn sie im Zusammenhang mit diesen Tätigkeiten Zölle, Gebühren, Beiträge oder sonstige Abgaben erheben. Satz 1 gilt nicht, sofern eine</p>	<p>Article 206-I:</p> <p>I. Sont soumises à la taxe sur la valeur ajoutée les livraisons de biens et les prestations de services effectuées à titre onéreux par un assujetti agissant en tant que tel. [...]</p> <p>Article 256 A :</p> <p>Sont assujetties à la taxe sur la valeur ajoutée les personnes qui effectuent de manière indépendante une des activités économiques mentionnées au cinquième alinéa, quels que soient le statut juridique de ces personnes, leur situation au regard des autres impôts et la forme ou la nature de leur intervention. [...]</p> <p>Les activités économiques visées au premier alinéa se définissent comme toutes les activités de producteur, de commerçant ou de prestataire de services, y compris les activités extractives, agricoles et celles des professions libérales ou assimilées. Est notamment considérée comme activité économique une opération comportant l'exploitation d'un bien meuble corporel ou incorporel en vue d'en retirer des recettes ayant un caractère de permanence.</p> <p>Article 256 B :</p> <p>Les personnes morales de droit public ne sont pas assujetties à la taxe sur la</p>

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<p>activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. [...]</p> <p>Art. 132(1): 1. Member States shall exempt the following transactions: [...]</p> <p>(i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects; [...]</p> <p>Article 134: The supply of goods or Services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (1), (m) and (n) of Article 132(1), in the following cases: (a) where the supply is not essential to the transactions exempted; (b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.</p>	<p>Behandlung als Nichtunternehmer zu größeren Wettbewerbsverzerrungen führen würde. [...]¹</p> <p>§ 4Nr. 22 Buchst. a : Von den unter § 1 Abs. 1 Nr. 1 fallenden Umsätzen sind steuerfrei: [...]</p> <p>a) die Vorträge, Kurse und anderen Veranstaltungen wissenschaftlicher oder beherrschender Art, die von juristischen Personen des öffentlichen Rechts, von Verwaltungs- und Wirtschaftsakademien, von Volkshochschulen [...] durchgeführt werden, wenn die Einnahmen überwiegend zur Deckung der Kosten verwendet werden [...]²</p>	<p>valeur ajoutée pour l'activité de leurs services administratifs, sociaux, éducatifs, culturels et sportifs lorsque leur non-assujettissement n'entraîne pas de distorsions dans les conditions de la concurrence. [...]</p> <p>Article 261-4-4<sup>a</sup> : Sont exonérés de la taxe sur la valeur ajoutée : [...] les prestations de services et les livraisons de biens qui leur sont étroitement liées, effectuées dans le cadre : [...] de l'enseignement universitaire dispensé dans les établissements publics [...]</p>
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Since the provisions are identical on the essential points which are essential for the legal assessment, reference will be made below only to the Articles of the VAT Directive, unless national law expressly mentions derogations.

### III. Description of a Possible Solution

In accordance with the case-law of the European Court of Justice, it must be examined successively whether the provision of personnel by a member university to the EGTC is to be classified as a **supply of services for consideration** (2), whether the university is economically active in this way, whether

<sup>1</sup> A reproduction as well as the discussion with the regulation of § 2b Abs. 3 UStG, which deals with the taxability of services provided by public law institutions to each other, which is actually our topic, is omitted at this point, since - as will still be shown - for lack of sovereign action of the member universities the regulation is not applied.

<sup>2</sup> It is noticeable that the German text does not mention the exemption of services and goods closely related to university education. In so far as the Directive has not been transposed into German law on this point, the taxable person may rely on the Directive vis-à-vis the German tax office.





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this **economic activity** (3) is also a **sovereign** one (1), and lastly whether the exercise of this activity leads to significant distortions of competition.

Reference is made in this connection to the particular system laid down in Article 13 of the VAT Directive. Only if the existence of an economic activity of the legal person under public law has been affirmed will the requirements of Article 13 of the Directive be examined. Article 13(1) exempts bodies governed by public law from VAT in so far as they carry out activities which are incumbent on them within the framework of public authority. The second subparagraph of Article 13(1) of the Directive, however, restricts that exemption again immediately where treatment as a non-taxable person would lead to significant distortions of competition. If the latter is the case, the obligation to pay VAT remains with the body governed by public law.

If the above-mentioned steps have been completed and the result is that the VAT liability has been affirmed, it remains to be examined whether one of the exemptions contained in Article 132 of the Directive has not been fulfilled.

At this point it should be mentioned that in the following the examination of the VAT liability of the provision of personnel by one of the member universities to the EGTC will concentrate on determining whether this is a service provided for consideration and also an economic activity. In addition, for the sake of completeness, the existence of an exemption will have to be examined. In any case, there will be no examination of a distortion of competition, since the provision of personnel in question does not constitute a sovereign activity, as will be shown in advance below.

#### 1. Absence of a sovereign activity

Article 13 of the VAT Directive refers to the exercise of **activities** by bodies governed by public law **in which they engage as public authorities**. The linguistic transposition into German as well as into French law, which, however, are based, in the case of Germany, on the equally unfortunate language version of the Directive, appear to have been somewhat unsuccessful. The English and the French version of the Directive refer to activities in which the persons in question appear as public authorities/ *autorités publiques*.

Be that as it may, the provision of university education does not fall within the scope of Article 13 of the Directive, which refers to the exercise of public authority or the exercise or trade of a state monopoly on the use of force, such as that exercised by the state, for example, when granting mobile radio licences to telephone providers (see ECJ, C-284/04 and C-369/04).

This follows systematically from the fact that the provision of university education in Article 132(1)(i) of the Directive is exempt from VAT, which logically presupposes that this activity must first be subject to VAT at all.

This finding is particularly interesting because the University of Strasbourg has a binding statement from the French tax office dated 1 March 2017, according to which the provision of staff by the University of Strasbourg to the EGTC may lie outside the scope of application of VAT on the basis of





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Article 256B of the French Tax Code, subject, inter alia, to the condition that the University of Strasbourg is acting as a public authority.

This statement is particularly surprising in the light of the fact that, in BOI-TVA-CHAMP-10-20-10-10, paragraph 150, the French tax authorities, in contrast to those bodies governed by public law which are not to be regarded as subject to VAT by virtue of their activities as public authorities (see Article 13 of the Directive), refer to public teaching establishments as subject to VAT. This, of course, with reference to possible tax exemptions on the basis of Art. 261 of the French Tax Code (cf. Art. 132 of the VAT Directive).

If, however, the provision of university education is not to be understood as an exercise of public authority within the meaning of Article 13 of the Directive or the provisions transposed into national law, even less the provision of university staff to EGTCs does not constitute a sovereign activity within the meaning of Article 13 of the Directive.

As a result, neither the requirements of § 2b UStG on the German side nor those of Art. 256 B CGI on the French side need to be examined.

The German tax authorities, however, seem to take a different view. In its letter of 16 December 2016, issued in application of § 2b UStG, the answer to the question whether - transferred to the present case - the University of Freiburg makes staff available to the EGTC within the framework of public authority or not should depend on whether the university concludes an administrative agreement under public law or a contract under private law with the EGTC. This is not convincing, especially as the German tax authorities state in the same letter that a legally prescribed form of action under public law cannot be replaced by a form under private law with tax effect and vice versa. In particular, in the event that the form of a public law contract is chosen without a legal basis, there is no action within the framework of public authority (BMF letter of 16 December 2016, para. 16).

## 2. Consideration for the provision of personnel

The actual first step in the above sequence of checks concerns the question of the existence of a supply of services for consideration by a taxable person acting as such (see Article 2(1)(c) of the VAT Directive).

The member universities of Freiburg and Strasbourg make employees available to the EGTC against reimbursement of personnel costs. There can be no doubt that the provision of personnel is a supply of service. Its remuneration is quite questionable.

Since the provision of a service is already considered to be remunerated if a price below the cost price of the service provider is charged (see the Advocate General's opinion in Case C-520/14, para. 45), the provision of personnel in return for reimbursement of personnel costs generally fulfils the criterion of remuneration.



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In my view, this would not be any different if, for example, the University of Strasbourg were to pay a membership or cost contribution reduced by the amount of the personnel costs for the provision of its staff to the EGTC. In this case, the reduction of the contribution would be the consideration for the provision of personnel.

Nevertheless the remuneration of the personnel provision in the present case is to be provided with a question mark. This is due to the fact that the member universities of the EGTC finance its financial requirements entirely with their own financial contributions. The universities of Strasbourg and Freiburg initially provide the EGTC with the funds by means of their contributions which enable the EGTC in the first place to reimburse the costs of the personnel made available to it. Under this scheme, it is conceivable, for example, that the University of Strasbourg would pay the EGTC an annual contribution of 90,000 € and the EGTC would reimburse it 80,000 € for the staff provided during the same period. In the event of such a payment cycle, the University of Strasbourg would have borne its full staff costs itself and would ultimately have made them available to the EGTC free of charge, since the University providing the staff would have fully covered its funding needs for the staff made available to the EGTC.

To put it simply: a service is no longer rendered against payment if the person rendering the service pays the consideration himself from an economic point of view.

This should also be the case if - as in the case of the University of Freiburg, which, according to the EGTC's budget, contributes about 60,000 € in cost contributions in 2019 - a higher amount is reimbursed for the provision of personnel. On the one hand, this means that the member university will essentially still pay the consideration paid to it for the provision of personnel out of its own pocket. On the other hand, it should not be overlooked that the University of Freiburg contributes a further 60,000 € as a membership fee for the funding of research projects by the EGTC. On balance, the University of Freiburg always pays more in contributions to the EGTC than it is reimbursed for the costs of providing personnel.

Since this can probably be said for all the universities participating in the EGTC Eucor - The European Campus that make staff available to them, in my opinion there is already a lack of consideration for the provision of staff. For this reason, the provision of personnel by member universities to the EGTC is not subject to VAT.

### 3. Economic activity

However, if, contrary to the view taken in the present case, the remuneration of the provision of personnel is affirmed in the case of Eucor, it remains to be examined whether this is an economic activity of the university. The criterion of economic activity is derived from Article 9(1) of the VAT Directive. Accordingly, the term "economic activity" is understood as the exercise of an activity for the sustainable generation of income (cf. ECJ, C-369/04, recitals 32 et seq., and Opinion of Advocate General Kokott in Case C-520/14, recitals 38 et seq.).

In order to understand the characteristic of economic activity, it is important, as Advocate General Kokott points out in paragraphs 50 and 60 of her Opinion in the Borsele case (C-520/14), that, on the



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one hand, it is not sufficient for a taxpayer to demand remuneration in the course of his activity and, on the other hand, it is not necessary for that taxpayer to have the intention of making a profit. The result is that an activity may qualify as economic even if it is permanently uneconomical, namely loss-making. As the judgments of the European Court of Justice in cases C-246/08 (see recitals 34, 35, 37, 38, 40, 44, 45, 46, 51) and C-369/04 (see recitals 31, 32, 36, 37, 38, 40,42) as well as C-520/14 (see recitals 28, 29, 33, 34, 35) show, the European Court of Justice also has some difficulty in dealing with the concept of economic activity. Thus, the range of criteria on the basis of which the ECJ denied the existence of an economic activity in the aforementioned rulings extends from the discrepancy or asymmetry between operating costs on the one hand and paid fees on the other, as in the case of the municipality of Borsele, to a lack of market participation, as in the case of the granting of mobile radio licences (C-369/04, C-284/04).

The criterion of the intention to make a profit cannot play a role in determining whether the activity is an economic activity within the meaning of Article 9(1) of the Directive. This follows systematically from Article 132(1)(l) and (m), which expressly require the exemption from VAT for non-profit-making bodies.

Nevertheless, it cannot be overlooked that in *Commission v Finland* (C-246/08) and most recently in *Borsele* C-520/14 the ECJ had to rule on cases which were clearly characterised by a discrepancy between the amount of the service charge on the one hand and the amount of the operating costs to be incurred for the provision of the service on the other.

Both the school transport organised by the municipality of Borsele and the Finnish legal aid system were subsidised enterprises where the fees paid by the users did not approximately cover the costs of transport or legal aid. Both student transport and legal aid were essentially "uneconomical".

Since the inefficiency of both activities, as these cases clearly show, was the consequence of underestimated fees and not the consequence of submission or non-submission to VAT, an activity can rightly be classified as economic in the sense of VAT law even if it is uneconomical from an economic point of view.

The judgments in the *Borsele* (C-520/14), *United Kingdom v Hutchison 3G and T-Mobile Austria v Republic of Austria* (C-284/04) cases thus also focus on a completely different criterion in the examination of economic activity, namely that of **market participation**.

Accordingly, in the *Borsele* judgment this reads as follows: the municipality itself appears as a final consumer of transport services which it acquires from transport companies with which it has contractual relations and makes available to the parents of pupils within the framework of services of general interest (see ECJ, C-520/14, para. 35). Advocate General Kokott implicitly sees in recital 61 of her Opinion in Case C-520/14 the lack of market participation as already supporting the *Commission v Finland* judgment (C-264/08).

This is to be supported. For if the characteristic of the economic activity, which is indeed to be more than the remunerated supply of services already enshrined in Art. 2 of the Directive, but at the same time it may not play a role as to whether the respective person is acting with or without the intention



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of making a profit, is to have a concrete content, then participation in a market remains in fact as a meaningful delimitation characteristic for or against the obligation to pay VAT.

A body governed by public law which provides services for consideration - whether or not at a loss - is liable to VAT if it participates in a market with these services. If it does not participate in such a market, its activity is not subject to VAT.

The usefulness of the criterion of market participation can be seen precisely in the application to the case of EGTC Eucor - The European Campus.

Eucor currently stipulates in its statutes that member universities must pay a contribution to the EGTC according to the number of students they have. With the funds received in this way, the EGTC reimburses the universities that provide it with staff in the amount of the staff costs they incur. If it is assumed that staffing will be provided against payment in this context, it will not be possible to deny that the member universities concerned will generate sustainable - in the sense of long-term - income from the provision of their staff to the EGTC. If, on the other hand, the overall balance of contributions and reimbursed costs is taken into account, it can be seen that the income is regularly offset by higher expenditure in the form of contributions to the EGTC, so that the bottom line for the universities is that only expenditure and no income remain.

This effect could be aggravated, as the following example shows. The EGTC could decide to amend its statutes by a resolution and stipulate that the costs of those universities which make staff available to the EGTC are to be credited against their (regularly higher) membership fees. In this case, the costs of providing personnel would be offset against membership fees. As a result, the remuneration of the provision of personnel would remain the same, since such an offsetting would not alter the fact that personnel is still provided for consideration. In fact, however, the member universities concerned no longer recorded any income, as there was no reimbursement of costs in the form of a payment flow in this model.

However, can the VAT assessment be based on the way in which contributions are calculated within the EGTC? The question should not and must not be answered here. The only point to be made is

that, if this were the case, the way in which contributions are calculated could decide on the VAT liability of the staff provided. The criterion of market participation, on the other hand, is preferable because it is independent of the respective structure.

In which market does a member university participate which makes staff available to the EGTC for its purpose?

To answer this question, it is probably decisive that the case of the provision of personnel within the framework of the EGTC Eucor - The European Campus is not comparable with the cases in which a municipality makes its sports hall available to another municipality for a fee (cf. BFH, judgment of 10.11.2011, V R 41/10) or a school temporarily lends a teacher to another school (cf. ECJ, judgment of 14.6.2007, C-434/05, Horizon College). In the latter case, the school to which Horizon College lent its teacher could have procured a substitute teacher from other schools or found one, for example



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through a temporary employment agency on the free (labour) market. Conversely, Horizon College, which borrowed its teacher, could have lent him to other schools or, if necessary, had him placed with other institutions through a temporary employment agency. Seen from both directions, i.e. both from the side of the borrowing school and from the side of the lending school, there was therefore a market on which a substitute teacher could be procured or on which a teacher could be placed by a school.

Such a market does not exist for the staff employed at Eucor's coordination and administrative offices. The statutes of the EGTC Eucor - The European Campus, Art. 12, stipulate that the EGTC may employ staff directly. However, this does not mean that the EGTC will look for and find staff on the free labour market. The tasks and objectives of the EGTC Eucor - The European Campus suggest that its administrative tasks should be carried out by personnel who come from the member universities and who are connected to them objectively and in the sense of a sense of belonging. It is to be feared that the interests of the member universities concentrated in the EGTC Eucor could not be fulfilled in a similarly successful way in the implementation of their tasks and goals if the EGTC recruited and hired staff on the free labour market who did not come from the milieu of the respective member universities. Thus, the right of choice contained in Article 12 of the statutes, according to which the EGTC can either employ staff directly or use seconded staff, must be understood in both cases to mean that these staff are those from the member universities, which would, however, also be recruited directly by the EGTC from the ranks of the member universities.

Contrary to the Horizon College case described above, in the case of the EGTC Eucor it is not evident that, on the one hand, the member universities would or could make their staff available to other institutions, nor is it apparent that the EGTC would or even could obtain the staff it needs to fulfil its tasks not from the member universities but from third parties. From this point of view, there is no market for the provision of staff by the member universities to the EGTC. As a result, the provision of staff by the member universities to the EGTC does not therefore constitute an economic activity within the meaning of Article 9(1) of the Directive. For this reason, the provision of personnel by the member universities to the EGTC is not subject to VAT.

#### 4. The existence of an exemption

If, contrary to the view expressed here, one should come to the conclusion that the provision of staff to the EGTC by the member universities is both a supply of services for consideration and an economic activity, one should finally examine whether this activity is not exempt from VAT. Pursuant to Art. 132 of the Directive, the Member States shall (compulsorily) exempt from VAT the individual transactions listed therein - if necessary under the further conditions of Art. 134 of the Directive.

Pursuant to Article 132(1)(i) of the Directive, Member States shall exempt from VAT, inter alia, university teaching and closely related services provided by bodies governed by public law entrusted with such tasks. The exemption of the provision of personnel as a service closely related to university teaching can be considered in this case.

In its Horizon College judgment, the European Court of Justice listed the conditions which must be fulfilled in order to exempt the provision of personnel between two legal entities governed by public



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law - in the case decided by the European Court of Justice where a teacher is transferred to a school by another school - from VAT as a service closely related to school or university education. Accordingly, the following conditions must be fulfilled:

- Both the principal service and the closely related provision of personnel must be provided by bodies governed by public law whose task is to provide school or university education.
- The provision of personnel must be of such a nature or quality that, without recourse to such a service, there could be no assurance that the education provided by the host establishment and, consequently, the education from which its students benefit would have an equivalent value.
- Such a provision of personnel must not essentially be intended to generate additional income through an activity carried out in direct competition with commercial enterprises liable for value added tax (see ECJ, C-434/05, para. 46).

In order to fulfil the first of the above conditions, both the member university providing the staff and the EGTC itself would have to provide the principal service of university education. For member universities, this is beyond question. On the other hand, it is questionable whether the EGTC, which is not itself a university but an association of universities, should also be regarded as providing university education itself.

Within the framework of Eucor - The European Campus, the individual member universities at which the teaching staff (university teachers, professors, etc.) are employed provide the university education. It should not be forgotten, however, that the EGTC has set up its own funding instrument called Seed Money, which receives €300,000 a year from the participating universities in a joint budget. This creates a trinational funding volume for the initiation of joint teaching and research projects. This funding volume serves as start-up financing for new projects, cross-border study programmes and research projects. Funding is provided for projects both in the field of teaching and in the field of research and innovation (source: brochure "Denken ohne Grenzen", p. 12).

Since the EGTC has its own legal personality and, with seed money, its own budget for financing projects in the field of teaching, the question as to whether it is itself the provider of the university education service should be answered in the affirmative.

In addition, from the point of view of students enrolled at one of the five member universities, the EGTC Eucor - The European Campus also appears as a service provider. Thus, the EGTC enables all students enrolled in one of the member universities, even outside the double and triple degree courses offered by member universities in two or three of the participating countries, to participate unconditionally in lectures and courses offered by all universities in the network, to use all university libraries and the online services of the five universities affiliated to the EGTC. In its information brochures, Eucor - The European Campus also appears externally as the institution that grants all these benefits to students. It also speaks for the success of the EGTC Eucor as a university education grouping if no distinction is made between the grouping and its constituent universities in relation to the students.





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In this respect, it seems justified to classify the EGTC Eucor - The European Campus within the framework of Article 132(1)(i) of the Directive in the same way as the individual universities affiliated to it.

In contrast to the Horizon College case, in the case of the EGTC no teacher or university teacher is lent to the EGTC by one of the universities, but administrative staff is made available.

However, this should not be a problem, as every university and therefore every university grouping needs administrative staff. There is no university in the world consisting only of university teachers.

It must therefore be examined within the framework of the second of the above criteria whether the provision of administrative staff is of such a nature that, without recourse to it, there would be no assurance that the university education provided by the EGTC would have an equivalent value. This is the indispensability test under Article 134(a) of the directive.

It is not visible how the EGTC is to be able to fulfil its tasks without the deployment of staff in the business and coordination unit provided by the individual member universities for this purpose. The provision of personnel by the member universities therefore appears indispensable for achieving university education at the EGTC's level.

Finally, the third criterion should undoubtedly also be fulfilled, according to which the provision of personnel must not essentially be intended to generate additional income through an activity carried out in direct competition with commercial enterprises subject to VAT. Since the respective universities are only reimbursed for the costs of their personnel, which they themselves have made available to the EGTC initially through their membership fees, as seen above, there can be no question of generating additional income through the provision of personnel. Direct competition with commercial enterprises subject to value-added tax is to be denied anyway, since, as also explained above, the respective member universities, by provision of personnel to the EGTC, do not participate in a market on which they could compete with commercial enterprises.

Also for this last reason the provision of personnel by the member universities to the EGTC is not subject to VAT.

#### **IV. Pre-Assessment of whether the Case should be solved with the European Cross-border Mechanism**

As a result, there is no VAT liability on the provision of staff by the member universities to the EGTC Eucor - The European Campus under all aspects relevant to the examination - remuneration, economic activity, existence of an exemption.

Based on the results of the present report, there is no reason to use the European Cross-border Mechanism.





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## **V. Other Relevant Aspects to this Case**

All aspects relevant to the question of the VAT liability of the provision of personnel by the member universities to the EGTC should have been taken into account in the present report.

## **VI. References and Appendix/Appendices if any**

### Legal texts

Regulation (EC) No 1082/2006 of 5 July 2006

Regulation (EC) No 1082/2006 in the version of Regulation (EU) No 1302/2013 of the European Parliament and of the Council of 17 December 2013

Council Directive 2006/112/EC on the common system of value-added tax

### Administrative instructions

BOI-TVA-CHAMP-10-20-10-10

BMF-Schreiben, 16.12.2016, Umsatzbesteuerung der Leistungen der öffentlichen Hand;  
Veröffentlichung der Rechtsprechung des BFH zur Anwendung von § 2 Abs. 3 UStG

BMF-Schreiben, 16.12.2016, Umsatzbesteuerung der Leistungen der öffentlichen Hand;  
Anwendungsfragen des § 2b UStG

### Jurisdiction

ECJ, judgment of 26.6.2007, C-284/04, T-Mobile Austria

ECJ, judgment of 26.6.2007, C-369/04, Hutchison 3G UK

ECJ, judgment of 14.6.2007, C-434/05, Horizon College

ECJ, judgment of 29.10.2009, C-246/08, Commission v Republic of Finland

BFH, judgment of 10.11.2011, V R 41/10

ECJ, judgment of 12.5.2016, C-520/14, Gemeente Borsele

Case C-520/14, Opinion of Advocate General Kokott delivered on 23 December 2015

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