E3PO represents, at EU level, private operators of public infrastructures and services, in the following sectors, EU wide or in some MS:

- Highways and access to roads
- Parkings
- Drinking water and sanitation
- Catering
- Public transport of passengers (rail, road)
- Waste treatment
- Energy Efficiency services, district heating networks


These activities are very different, with a high diversity as regards the level of investments, the number of users that benefit from these services, the market share with public authorities, the economic or technical conditions. All the services offered by companies represented by our members are provided within a legal or contractual frame of public-private partnership.

In the sectors covered by E3PO’s members, the annual creation of value is considerable, with, directly (PS covered by our members) or indirectly (the whole sector EU wide), more than 200 billions € turn-over and over 1, 600 millions of jobs, with several thousands of companies.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Turn over - private/outsourced operators (EU)</th>
<th>Market share of private operators</th>
<th>Number of companies</th>
<th>Jobs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Municipal waste</td>
<td>75 b €</td>
<td>EU : 60%</td>
<td>EU : 3000</td>
<td>EU : 320 000</td>
</tr>
<tr>
<td>Drinking water, waste waste</td>
<td>10 b €</td>
<td>EU 33% (22 EM)</td>
<td>300 companies in the world</td>
<td>65 000 ...</td>
</tr>
<tr>
<td>Catering</td>
<td>24 b €</td>
<td>25% of meals served outside households (6 billion meals/year)</td>
<td>The public sector serves directly in 60% to 85% cases</td>
<td>600 000</td>
</tr>
<tr>
<td>Highways</td>
<td>26 b €</td>
<td></td>
<td></td>
<td>37 000</td>
</tr>
<tr>
<td>Parkings</td>
<td>15 b €</td>
<td></td>
<td></td>
<td>280 000</td>
</tr>
<tr>
<td>Public Transport of Passengers</td>
<td>35 b €</td>
<td></td>
<td></td>
<td>200 000</td>
</tr>
<tr>
<td>Energy Efficiency, District heating networks</td>
<td>30 b €</td>
<td>From 0 to 90% (District Heating networks)</td>
<td></td>
<td>130 000</td>
</tr>
</tbody>
</table>

Generally speaking, these services can be provided either under public or private management, each time the
competent authority has the choice between one or the other system. It is crucial to analyse the impact of the submission, or the exemption, of public bodies to all fiscal rules applicable to the economic actors, being public, private, or non-for-profit associations, and to put in question the justification of exemptions, with regard to the distortions of competition they cause again private companies.

**Q1: General evaluation of the current rules on VAT:**

- What is your evaluation of the current VAT regime as regards the public sector (including special rules for public bodies, Article 13, and tax exemptions in the public interest, Article 132-134 of the VAT Directive)?

VAT Directives follow each other, since 1967. One can question the adoption of successive rules and provisions, without concern on how to simplify a construction of abundant texts, that become quickly obsolete and implemented at national level in a very heterogenous way. We can show with many examples that the provisions of article 13 are not correctly implemented. The wording of Article 13 is inadequate since numerous distortions of competition exist in our sectors.

- **Complex rules**, with uncertain implementation, **discriminations** again private companies in several sectors, due to constant or optional differences in VAT regime.

  - **Catering**: public bodies that serve meals in education and health are exempt from VAT, in France, Italy, Luxemburg, Portugal, Romania, Spain, Czech Republic, as far as meals for students or patient are concerned. But meals served to the staff or to visitors should not be exempt from VAT. Thus, in Luxemburg, Portugal the exemption from VAT is extended to this category of meals, if served by a public person but not if outsourced. In the Netherlands the principle of submission to VAT applies, in education and health sectors, to all providers of meals, and to all meals, but with the intervention of a VAT compensation scheme.

  - **Parkings, France**: the counterpart of the right to park is qualified, depending upon the place/equipment, as a fee, subject to VAT, or a tax, exempt from it. Such a case reflects the complexity of the system, whereas the service, consisting in offering a parking place, is the same.

  - **Public transport of passengers**: there are difficulties to offer EU wide transport services, or simply on the territory of another MS. The VAT taxation is based on the distances, and in principle all public transport operators are obliged to register for VAT in each MS where they operates services. Many MS accept a degree of tolerance, with exceptions to this principle, whereas other MS (Spain, Germany) implement strictly this rule. This causes disparities between MS, and administrative difficulties for the operators.

- **Non compliance with the principle of neutrality** of the fiscal rule, particularly important in VAT matters, and non compliance with the principle of non-distortion that Article 13 provides for.

  - Other fiscal discriminations are added to VAT discrimination. In France, the Contribution Economique Territoriale, the Contribution Sociale de Solidarité des Sociétés, the Tax on salaries, the local taxes on goods that are made available by the local authority, are paid by the private companies whereas public bodies are exempted.
• The assessment of the « competition distortion of a certain importance » is fully subjective, uncertain, and discretionnary, as shown by our examples. We consider that the current or potential co-existence, of public and private operators on a given territory is enough for qualifying the potential distortion. The principles laid down by the case « Isle of Wight » C-288/07 should be integrated in the legislation.

• This notion should be regarded as the competition « for the market ». The competition « in the market », cannot address the situation where there is no call for tender for selecting an outsourced contracting partner, in case of choice of « inhouse » service. The new Directives on Public Procurement and Concessions, 2014/23 et 2014/24 have extended the criteria of inhouse provision, including situations where the operating entity is legally distinct from the organising entity. Consequently it is of utmost importance to assess widely the competition conditions with regard to situations where there is no call for tender.

➢ A factor of rigidity, and therefore a major obstacle to outsourcing, which is an obstacle to the optimisation of the service provided to the users, for the best price, and a strong limitation to the development of the private companies that are specialised in these services.

• This is the case, at various degrees, in mostly all the sectors represented by E3PO

Q2 - What are in your opinion the main problems of the current rules?

➢ Any economic activity that generates added value has to be subject to VAT rules, in compliance with the principle laid down by Article 9 of the Directive 2006/112. This article defines a wide principle of application of VAT, for all bodies that have an economic activity. The latter is also defined widely, it covers in particular the exploitation of a tangible or intangible asset, with the objective to benefit from permanent income.

• What is the current justification for exempting public bodies from VAT, as soon as they run an economic activity ?

• The application of VAT rules, in case of « important distortion », remains impossible for activities that are not listed in Annex 1 (waste, waste water). As well, as, for activities thus listed in Annex 1 (public transport): one can see major loopholes in the assessment of the « important » distortion of competition.

➢ There should be a strict neutrality if the VAT rules. Application or exemption should be independent from :

• The type of management (direct public management or other public system, private management, management by non-for-profit associations)

• The type of contract: in case of Public Procurement contract => provision to a public body, => no VAT ; in case of contract of delegation of services => provision to the user => VAT
• The qualification of the counterpart of the service (fee = + VAT; tax = no VAT)
• The description or the qualification of the activity/service
• The qualification of the public contribution: price or subsidies?

- Current rules incentivise the search for solutions of exemption from VAT: the competent public authority can opt for the system of management, or a type of contract, or a qualification of the activity with the view to exempt the service from VAT. The extension of the criteria of « inhouse » bodies in the Directives Public Procurement /Concessions 2014/23 and 2014/24 open the door to a wider scope of « public bodies non subject to VAT » enlarge the scope of the definition of public bodies operating activities non subject to VAT.

- Public bodies often lack guidance and adequate tools for implementing properly complex VAT rules they are not always familiar with (catering: case of meals served to staff or visitors: they should be charged with VAT, which is often « forgotten »; public transport; parkings). In practice, public bodies are not subject to VAT controls, and even less to tax adjustments, nor litigations with the VAT administration.

Are there any distortions of competition (output and input side)? If so, how and in which sector do they occur?

Yes, in some sectors (waste, waste water) and some MS (France, Germany) (UK), depending upon activities. On the contrary, one can see that, in other sectors, (district heating networks, highways), or in some MS, like Poland, there are no discriminations. There is a fragmentation, by sector and by country, throughout EU.

- Catering: one can observe a major impact on outsourcing, depending upon whether or not the activity is organised by a public or a private body, subject to VAT or exempt.

- Waste water sanitation

  - In Germany, several cities have renounced to entrust their waste water services to private companies or to a PPP, having taken into consideration fiscal costs, mainly VAT, in comparison with a solution with public management that was finally chosen: in 2003 Mainz, (198 000 inhabitants), in 2006, Fürth (114 000 inhabitants), in 2009 Hildesheim (103 000 inhabitants).

  - In France, public operators can choose whether or not they are subject to VAT.

- Treatment and distribution of drinking water

  - The choice of being VAT subject or exempt is left to public drinking operators acting in communes of less than 3 000 inhabitants

- Public transport of passengers
In France, in the case of a contract of “Delegation of Public Service”, the subsidies that are paid by the public authorities to the operator, for balancing the costs and the revenues of the service, are outside the scope of the VAT if they are based on provisional income accounts, without further adjustment based on real data (traffic and passengers). Otherwise they are qualified as compensations, and, as such, are subject to VAT. It depends upon the terms of the contract.

- **Parkings**

In France, if the contract of “Delegation of Public Services” foresees that income from on-street parking, are payed back to the private operator by the Public Treasury, this is considered as a remuneration. The part corresponding to the VAT will be withdrawn by the Treasury, which is an obstacle to outsourcing since the revenues are diminished by 20%. That is not the case when the parking service is operated directly by a public body.

Same thing happens for operating grants: if they cover costs, they are subject to VAT, as well as the income they are supplementing. If they compensate public service obligations, they are not VAT subject.

- **Energy efficiency services**

Public hospitals are not subject to VAT, this is a major obstacle to outsourcing of heating and cooling systems.

- **Waste (collection and treatment of municipal waste):**

  - Several cities or communities of cities (in 2005 Bergkammen (52 000 habitants), in 2006 Rhein Hunsrück (103 000 habitants), in Lüneburg (73 000 habitants) have remunicipalised their waste service, which was formally outsourced, or have given up the project to outsource it after having envisaged to do so. In Germany, activities of municipal waste (and waste water) are considered as “sovereign”. The public operators are not subject to VAT, whereas private operators are. Having to pay back the VAT to the fiscal administration, the private operators have more difficulties to make attractive offers to municipalities.
  
  - In UK, municipal operators, exempt from VAT, have developed an aggressive marketing towards the market of industrial waste. Also in France (example of the mall of the city of Evry), there are cases where municipal waste operators that offer “inhouse” collection and treatment services without prior competitive tendering, exempt from VAT and other fiscal charges, participate into competitive calls for tender, on the market of industrial waste.
  
  - In UK, France, Luxemburg, Greece, the difference of VAT regime between private (subject to VAT) and public operators (not VAT subject), is a deterrent against outsourcing. In France, the recent increase of reduced VAT rate (from 7% to 10%) since 2014 raises the impact of this difference.

The table below summarises the overall view of the situation in various sectors/MS. It shows that discriminations are a wide majority… and that situations of non-discrimination are also possible! Possible solutions for avoiding discriminations:

- All operators, public or private, subject to VAT (case of District Heating);
- Implementation of compensation schemes;
Zero rates, or reduced/super-reduced VAT rates, make the discriminations weaker and strongly mitigate the impact of VAT difference, and

<table>
<thead>
<tr>
<th>Service Type</th>
<th>Discrimination pub/private because of VAT?</th>
<th>Remarks – Member States</th>
<th>Other remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drinking Water</td>
<td>No, no discriminations</td>
<td>France, Sweden, UK (zero rate for households), Spain, Poland, Czech Republic</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes, discrimination</td>
<td>France: communes &lt; 3,000 inhabitants, the public operator chooses whether or not subject to VAT</td>
<td></td>
</tr>
<tr>
<td>Waste Water</td>
<td>Yes, discrimination</td>
<td>France: public operator chooses whether or not subject to VAT</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Germany: public operators not VAT subject</td>
<td></td>
</tr>
<tr>
<td>District Heating</td>
<td>No, there are discriminations</td>
<td>All operators, private or public: reduced VAT rates (connexion) or normal vat rate</td>
<td>Few or no direct public operators. Reduced rates in Czech Rep, France, Slovakia, Hungary</td>
</tr>
<tr>
<td>Energy efficiency services</td>
<td>Yes, there are discriminations</td>
<td>In Italy, Belgium, there are public EESCs (Energy Efficiency Services Companies), that are exempt from VAT and compete directly with private EESC for the market of public clients</td>
<td>Output AND input distortion. More than a problem of direct competition between public and private operators, the VAT difference is a major obstacle to outsourcing</td>
</tr>
<tr>
<td>Waste</td>
<td>Yes, there are discriminations : direct competition and obstacle to</td>
<td>Germany, France, Luxembourg, Greece, Belgium, UK</td>
<td>Municipal public operators that provide waste collection services</td>
</tr>
</tbody>
</table>
outsourcing, negative image of higher prices for private management  

with direct public management, and are thus exempted from VAT, have started to use this advantage as a marketing tool to advertise «aggressively » towards the market of industrial waste, with the mention « VAT-free ». Whereas the VAT exemption is no longer justified by the “service of general interest”!

| Public Transport | Yes, there are discriminations | - Public Transport operators have to be VAT registered, but this is not always the case (“tolerance”), with an advantage given to public operators |
| | | - Public subsidies are subject to VAT if the operator is a private one, not if it’s a public one |
| | | Lack of clarity of the rules for qualification of the subsidies |

| Parkings | Yes, there are discriminations | France : the service is subject to VAT (or not) depending upon the terms of the contract |
| | | Obstacle to outsourcing |

| Highways | No, there are no discriminations | France, Italy : private tolls charge VAT, but not public tolls ; no VAT deductibility for the works, services and goods provided to public persons |
| | | Rules established by Case law CJEU (12 March 2010 ) |

| Catering | Yes, there are discriminations | Numerous MS. Complexity |
| | Some MS avoid VAT discrimination | The NL : compensation |
- Are there any distortions of competition (output and input side)? If so, how and in which sector do they occur?

Yes, see the table above. Generally speaking, our sectors are affected by 2 types of discriminations: direct competition between public and private (output), and obstacles to externalisation (input), since the contracting authority cannot deduct VAT that is charged on the services cover staff costs, goods and services.

This obstacle to outsourcing is a major economic harm, in terms of non-development of the business, in the MS of origin of each company as well as towards all national EU markets where one can meet this obstacle. Its impact is certain and important, but difficult to quantify with precision.

- Is the complexity of the current rules and the lack of harmonisation causing problems? Please give specific examples.

Yes.

- More expensive internal administrative costs (catering, public transport, parkings), administrative burden for MS
- Inadequate implementation of the VAT rules by contracting authorities that, in some cases, wrongly exempt themselves from VAT
- Fragmentation of the internal market

- What is their impact on compliance costs?

They raise the compliance costs: different rules, depending upon the nature of the contracting authorities, or the choice they make to be subject or not to VAT (optional regime in France for drinking water/waste water: in the communes < 3000 inhabitants), or depending upon the regime applicable to public subsidies (parkings, public transport)

- Are the problems identified only of a national nature or do they constitute an obstacle to the smooth functioning of the Internal Market?

No, our services are mainly provided on a local basis, with no or few cross-border provision of services. But their export towards other MS, through the creation of new establishments, is limited by the complexity and the heterogeneity of each national situation with regard to VAT, as well as the lack of openness to the private sector, due to VAT distortions in many MS. Our companies lose the advantages of their potential for development on both national and EU markets.
- If you are an entrepreneur how do the current rules affect your business?

- Obstacle to outsourcing, to export of know-how and services to EU countries, to the development of PPPs.
- Distorsion of competition for the benefice of operators with public capital, in competition on the same markets than those where private operators compete for.
- Enterprises of the private sector are generally more competitive, with lower prices excluding VAT, but they appear as more expensive with prices including VAT !
- Negative image linked to the perception, by the consumers, or more generally by the public, of higher prices (profits).
- Loss of income/turnover by the private operator if the latter reduces its price in order to align with the public operators’ prices, which are exempted from VAT, or to match the prices asked by public purchasers.

Q2: Distortion of competition clause:

- Do you think the distortion of competition clause pursuant to the second subparagraph of Article 13 (1) of the VAT Directive and the existing case law from the Court of Justice of the European Union in this respect have been efficient enough in preventing distortions of competition between public and private providers on the output side?

  ➢ The problem

- The differentiated application of VAT, based on the fact that the operator is public or private, and based on the fact that the contracting authority is exempt or not from VAT, causes a general problem of competition, on input and/or output side, as shown by numerous examples.

- Each MS makes its own interpretation of the notion of « important » distortion of competition that would oblige it to apply VAT to public bodies. For instance, in the sector of parkings, CJEU, case C446/98, Fazenda Publica c/ Camara Publica de Porto, full freedom is recognised to MS, whereas there exists a distortion which is not acknowledged. There is no predictability, no objective criteria, derived from the Article 13 .

- In very few sectors we can see a fair implementation of the Article 13 (e.g. district heating networks), leading to uniform implementation of VAT rules to public and to private operators for the same same service across EU. co

- Furthermore, this notion of competition distortion should be assessed with regard to the competition « for the market », as mentionned p.3, and not « in the market ». In case of public management, in the frame of an extended understanding of the concept of « in-house » (Directives on Public Procurement and Concessions) the absence of calls for tenders makes the market disappear, for the advantage to public operators that are nevertheless active on competitive markets against private operators .

- Last, the Annexe 1 of Article 13 has loopholes: services of collection and treatment of municipal waste, waste water sanitation, are not covered. These activities cannot benefit from Article 13, even if it is not perfect. If Article 13 was to be kept, it should be at least revised, in order Annex 1 covers all services.
which can be provided by the private sector.

➢ Court procedures

For a private company a court procedure against a public contracting authority which is a potential client, is in practice unrealistic to envisage for combatting case-by-case discriminations! Court proceedings for challenging the VAT exemption of a public body, based on law, are in any case long, unpredictable and still put private operators in a situation of conflict « of principles » towards the public bodies.

- Does the national legislation of your country provide for a legal mechanism according to which a private entrepreneur who is experiencing unfair competition from a public sector body could formally raise this issue with the tax authorities or the courts?

One of our members informed us about such a « mechanism », other than the common ones, in the sector of catering (France), allowing to question “upstream” decisions of management. More generally, on several MS one can see that the decisions of administrative courts do not tend to sanction the failures to taxation rules by public bodies.

Q3: Reform measures:

- What are your views on the different reform options or reform measures mentioned in this document (including a possible sectoral reform); do you have a preference for any particular option and any particular variant mentioned in relation to the different options and why?

➢ Option 1: full taxation: it would allow a neutral input and output approach, independently of the model of management of services to public bodies and to end-users, as well as simplification. We are aware of the political difficulties of this option, that should nevertheless be seriously examined if accompanied by reduced VAT rates, or even by a general compensation scheme, for first necessity services, in order to avoid more expensive prices in particular in MS where the GDP and the average living standard of the citizens is lower.

➢ Option 3: deletion of article 13 while exemptions of general interest are kept. The crucial question would be how activities of general interest should be defined, consistent with a broad understanding of the economic activity, (even for in case of public financing). Activities of waste treatment, public transport, waste water, drinking water, energy distribution, catering, have to considered as economic activities, and, as such, subject to VAT. The option 3 could be accompanied by zero-VAT rates/ reduced or super-reduced rates, for the end-user, or by a system like a general compensation scheme. If the VAT exemption of public bodies was to be abolished, that would create fiscal income and finance compensation schemes/reduced rates.

- Is there any option which should be excluded and why?
Option 2: however, we do not favour, as a unique solution, VAT compensation schemes, aimed at refunding the non-deductible VAT to public bodies in case they outsourced services. In absence of a design and implementation that would cover all MS and all sectors, such systems are:

- Inefficient, because numerous sectors are not covered,
- Heterogeneous since they are at the discretion of each MS. In addition, they are expensive for the national public finances.
- Expensive for the public budget (administrative and fiscal costs)

In some cases, the compensation schemes bring a significant improvement but the latter varies a lot from one MS to another one, and from a sector to another one..

- Catering: positive impact of the compensation schemes that exist in the Netherlands, UK. The schemes in Denmark, Finland are not sufficient.

- Waste: France, only for TVA on the investments.

On the principle, a compensation scheme resulting from a general obligation, covering all MS and all sectors, would probably meet its objective. But the fiscal costs would be very high for MS. That would be an obstacle for many of them in a negotiation at EU-28 level. That would probably lead to the failure of the discussions, or to bargaining in order to reduce the sectoral coverage. At the end of the day, that would bring no significant improvement to the current situation.

- Do you have any additional ideas or proposals?

  ➢ Clarify the conditions under which the VAT exemption is an authorised State Aid

  ➢ Examine the feasibility of « zero » or very low VAT rates, as an alternative to the compensation schemes, that would have the same effect as options 1 or 3,

  ➢ The Annex 1 should at least be revised and augmented with: services for collection and treatment of municipal waste and waste water treatment.

  ➢ Revise article 13 in order to define a strict framework for granting, as an exception, the exemption of VAT to public bodies, and ensure the automatic implementation of VAT rules for economic activities of the public bodies as soon as there is a private offer.

  ➢ Try the option of taxation (option 5) as a pilot experience

  ➢ Elaborate guidelines for a homogeneous implementation of article 13

  ➢ Precise and guide the notion of important distortion, « for » the market

  ➢ Highlight the numerous contributions, clarifications et confirmations of the jurisprudence of the CJEU

    o Joint cases C394/04 and C395/04, Ygeia: exemption from VAT for meal served to patients or students, but not for the staff or visitors.
    o Joint 231/87 and 129/88 Comune di Carpaneto Piacentino: when a public body
has an economic activity, in the same legal conditions than private operators, it becomes VAT subject too.

- Case C 288/07 Isle of Wight : conditions of the competition distortion (it can be potential)

Q4: Sectoral reform:

In case a sectorial reform would be the way forward, Copenhagen Economics has modelled the sectors postal services, broadcasting, waste management and sewage. Other sectors such as air traffic control, access to roads and parking areas could be potential candidates as well.

- Do you agree with this list?

In case a sectoral reform would be the way forward, we support this list of sectors, but ask that it also includes other sectors where distortions exist because of the VAT exemptions of public bodies: contract catering, public transport of passengers, energy efficiency services.

This approach raises at least three difficulties:

- Why should it be restricted to the listed activities, since discriminations will continue to exist in other sectors?
- Such a list is very difficult to negotiate with the unanimity of 28 MS. There would be a risk that one sector might be held as the hostage of discussions that regard other sectors.
- Such a descriptive approach would rapidly become obsolete and in need to be revised due to a rapid evolution of the economy.

But the essential weakness of the sectoral approach is the following: it does not solve the problem of the « input » distortion, which results in the fact that public bodies cannot deduct VAT. The sectoral approach does not neutralise this major obstacle to outsourcing.

- Which other sectors should in your view be selected for such a review? Why?

See above

Q5: Option to tax:

- Do you think that an option to tax as regards tax exempt activities either by taxable persons or Member States should be considered?
This option could allow exempted bodies, such as hospitals, that make important investments and have huge need for outsourced services, to benefit from the deductibility of VAT on their purchases of goods and services, and other contracts with private operators.

This option would neutralise the effects of VAT and would allow a public purchaser to seriously examine the advantages of competitive outsourcing of some tasks to skilled professionals (this advantage is not offered by option 4).

It might facilitate, later on, this choice, to other MS, or other sectors. But we keep careful in our support to this option, that leaves national and sectoral fragmentation, even if mitigated.

We are not in favour of a system with option to tax left to the choice of each taxable person! That would increase the general complexity of the EU and national VAT “landscape”, and would increase its fragmentation.

Conclusion:

E3PO highlights:

- The negative impact of the current rules exempting public bodies from VAT, in contradiction with the general objectives of the EU Internal Market,

- The need for a reform, probably by a combination of the different options: full taxation, deletion of Article 13, combined with different measures such as the addition of sectors in Annex 1 Article 13, annex 3 Article 132, the “sectoral reform” based on a large consideration of all activities provided by private and public operators, and also Guidelines on the CJEU jurisprudence.

Such a reform should aim at defining and implementing NEUTRAL VAT rules, independently of the nature/the object of the contract, to be uniformly applied, rather than VAT rules based on the nature/legal status of the public contractor/the operator. VAT rules must be based on an identical qualification of the service, whether privately or publicly provided.

The transposition and implementation of such improved VAT rules should be rapid, conform and uniform.

Last, as a complement to an action on VAT, E3PO invites the Commission to launch a study on public/private fiscal distortions other than VAT.