

Explanatory Note on Exclusion Criteria on non-EU controlled entities

IMPORTANT NOTICE:

For the participants involved in security sensitive activities, the participation in the tender is open to economic operators fulfilling the following three cumulative conditions:

- a) legal entities established in a Member State with their executive management structures established in that Member State;
 - Economic operators are considered to be established in the EU when they are formed in accordance with the law of a Member State and have their central administration, registered office and principal place of business in a Member State (if legal persons) or they are nationals of one of the Member States (if natural persons).
 - 'Executive management structure' means the body of the legal entity appointed in accordance with national law and which, where applicable, reports to the chief executive officer or any other person having comparable decisional power, and which is empowered to establish the legal entity's strategy, objectives and overall direction, and oversees and monitors management decision-making.
- b) economic operators committing to carry out all relevant activities in one or more Member States; and
- c) legal entities not being subject to control by a third country or third country entity.
 - For the purpose of this paragraph, 'control' means the ability to exercise a decisive influence over a legal entity directly or indirectly through one or more intermediate legal entities.

GENERAL INSTRUCTIONS

All information, declarations and supporting documents shall refer to circumstances existing at the time of submission. They shall **be signed by a legally appointed representative with powers to represent the company.**

ESTABLISHMENT AND EXECUTIVE MANAGEMENT STRUCTURES IN A MEMBER STATE


Participants will be required, at a later stage of the tender procedure, to provide the following necessary evidence. Please note that participants must be able to provide the documents required for the Ownership Control Assessment (OCA) throughout the entire duration of the tender, in order to prove their status as EU controlled.

- Place of establishment of the 'legal entity':
 - o An extract from the relevant register proving that the registered office of the entity is one of the Member States;
- the 'executive management structures' of the entity to be in a Member State:
 - o An extract from the relevant register proving that the head office or executive management structure is in one of the Member States. In case of the lack of such information disclosed in the register, the proof may encompass: any official document, including the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, a resolution or a decision, or in the case of the lack of thereof, the declaration under oath/sworn statement that the 'executive management structures' are in one of the Member States;

ASSESSMENT OF CONTROL

Legal entities established in Member States can participate in the tender only if they are directly or indirectly controlled by Member States or by nationals of Member States. The ownership control assessment (OCA) will be conducted to determine control. The OCA assessment will be carried out for all the participants (Tenderer, Member of a Consortium, and Subcontractor).

The present document is intended to provide information to the tenderer on how the assessment will be performed. This note may be used to help tenderers, members of the core team and subcontractors to run a self-assessment and to anticipate their potential control by a third country or by a third-country entity and to provide the necessary supporting documents.

-  Please be aware that eligibility conditions indicated in the OCA must be fulfilled throughout the entire duration of the Contract execution. Any changes in the control ownership status that occur during the project must be immediately notified to the contracting authority.

When will an entity be considered to be non-EU controlled?

‘Control’ will be defined as the possibility to exercise decisive influence on the participant, directly or indirectly, through one or more intermediate entities, ‘*de jure*’ or ‘*de facto*’. The fact that no influence is actually exercised is not relevant, as long as the possibility exists.

Public bodies¹ will be automatically considered as controlled by their country of establishment. Any other participant will be considered to be ‘non-EU controlled’ when a third country, third country entity or third country national has the possibility to exercise decisive influence on the entity concerned, notably in relation to its strategic business decisions (such as appointment and removal of senior management, budget, investment business plans, market-specific decisions, etc.).

No guidance can anticipate upon all possible constellations of control of an entity, hence, any assessment has to be done on a case-by-case basis, looking at the legal and factual position in each individual case. As a consequence this document provides only some general considerations for that assessment.

Control will be assessed at the level of the ultimate ownership and control line and all intermediate layers (in case of indirect control).

The following elements will, in particular, be taken into account:

- ownership structure and specific rights;
- corporate governance;
- commercial links conferring control;
- financial links conferring control;
- other sources of control.

Ownership structure and specific rights

The ownership structure will be analysed to establish which countries, entities or natural persons have decisive influence on the participant, notably with regard to the strategic business decisions:

- if the participant is directly owned and controlled by natural persons, the nationality of these natural persons will be the key element of assessment, i.e.:
 - if all the owners are nationals of Member States and there are no commercial or other links that could confer control on other persons or entities, further assessment may not be necessary,
 - if some of the owners are individuals with third country nationality, their ability to exercise control has to be further assessed.
- if several ownership and control layers exist between the participant and its ultimate owners (persons who effectively control it):
 - ownership and control will be identified at each layer, and at each layer the existence of controlling third country nationals/third country entities has to be assessed,

¹ Public entities are considered those entities where the only involved bodies in their decision-making process are the authorities of one or more Member States or one of some their territorial division

- participants will be asked to demonstrate to the extent possible that, all along the chain of control until the ultimate owners, there is no control by an third country/third country entity,
 - if shareholding is widely spread, and one or several third country shareholders are the largest shareholders (even if their participating interest may look insignificant), a detailed control assessment may have to be conducted,
 - ultimate owners with 5% (or more) of the shares/voting rights must be identified (upon request even shareholders with less than 5%).
- if the participant is a company listed in the stock exchange, a subsidiary of a listed company or is controlled by a listed company, control will in principle be assessed in the same way as described above. Where the participant has a substantial number of shares that are floating (shares on regulated stock markets), the emphasis will be on:
- the bodies entrusted with the adoption of strategic decisions,
 - the decisions that are taken at the general meeting of shareholders and the quorum required (participation and majority),
 - the decisions that are taken in other management bodies (such as Executive Board, Supervisory Board, Board of Directors, Advisory Boards, CEO) and the quorum required (participation and majority),
 - the appointment of management bodies and the possibilities for the largest shareholders to appoint them,
 - veto rights or multiple voting shares (*e.g. golden shares*), if any.
- if not all the ultimate owners can be identified (*e.g. listed companies with important floats*), the participant will be asked to demonstrate that under the applicable national law unknown shareholders cannot (alone or in concert) exercise a decisive influence, and must confirm that there is no shareholders agreement to act in coalition.

In this context, the place of residence of owners that are natural persons will be considered irrelevant. Individual owners with dual nationality (Member State and third country) will be considered as Member State nationals.

Concerning specific rights, some examples of owners' rights may deserve closer scrutiny in terms of 'control':

- right to veto a transfer of shares,
- some forms of pre-emption rights (right given to an existing shareholder to be the first option in case other shareholders want to sell their shares),
- specific rights to sell shares, purchase additional shares or conditions imposed by the third country shareholder for its investment in the participant,

if they lead to a situation where a third country, a third country entity or a third country national control the participant.

Corporate governance

The corporate governance will be examined to establish whether strategic decisions may be influenced, actively (through an action) or passively (by not exercising its rights, e.g. abstention), by a third country, a third country entity or a third country national.

The assessment will identify at which level (by which bodies) the strategic business decisions are taken, the decision-making procedures (including majorities and quorum requirements, voting rules

and prerogatives accorded to other bodies, if any) and the nature of decisions taken.

If third countries, third country entities or third country nationals have the possibility to influence the voting rights (or the possibility to veto decisions), this may lead to consider that they exercise decisive influence.

Commercial links conferring control

Commercial links will, where necessary, be analysed, in combination with other factors, to establish whether the participant (or its owners) are dependent on commercial cooperation with a third country/third country entity, in a way that could give them strategic influence (e.g. long-term supply or buy agreements that allow it to decide on the commercial strategy, joint venture or other commercial cooperation).

Financial links conferring control

Financial links will be analysed to establish whether the participant (or its owners) are financially dependent on a third country/third country entity, in a way that could allow the third country/third country entity to obtain the power to adopt or influence strategic decisions.

All modes of financing may be taken into account, such as capital increase, loans, guarantees, debt waivers, bails⁴ and grants.

If the financial link is with a shareholder, the degree of financial dependence will be measured in proportion to the shareholding (i.e., how much more than the value of the shares was financed).

Other sources of control

There might be other sources of control (i.e., other means, processes or links ultimately conferring control to third countries/third country entities).

How will the control condition be checked? — Ownership control assessment

Assessment by the third-party validation services

The assessment will be performed on information provided in Annex IX and on the required supporting documents.

In case of doubt, publicly available information might be used to clarify questions about the data or information provided or contact the participant for clarifications or additional information.

All data and documents will be treated as confidential.

What happens if the ownership control status changes during contract execution?

Eligibility and participation conditions must be fulfilled throughout the entire duration of the Contract execution.

Participants will be contractually obliged to notify any changes in the control/ownership status that occur during the project. In case of a consortium, the consortium leader must immediately notify the contracting authority regarding changes in the status of the consortium members. Similarly, the contractor must immediately notify the contracting authority regarding changes in the status of the subcontractors.

Participants will also be required to provide the necessary evidence regarding the changes in their control/ownership status.

If an entity becomes controlled by a third country/third country entity during the contract execution (e.g., as a result of an acquisition by a foreign entity), its participation may have to be terminated.