Procurement And Grants for European Union external actions - A Practical Guide

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1.1.1. The rules on nationality and origin

For each external financial instrument (including EDF), specific rules on nationality and origin may apply. These rules can be found in the following legal acts:
External financial instruments financed from the Budget: As from 15 March 2014, the rules on nationality and origin laid down in the CIR apply to all calls for proposals and tenders launched under these instruments. This includes also award procedures launched after 15 March 2014 under the previous external financial instruments, with the exception of calls for proposals and tenders under IPA I or procedures launched under financing decisions or financing agreements expressly setting out different rules (ie.: other than the standard reference to the basic act). In the latter case, the different rules can be reconstructed by using the previous versions of the PRAG applicable at the time of adopting the financing decisions or of signing the financing agreement.

[9] Financial procedures under indirect management with partner countries (i.e. payments) are set out in the Practical Guide to procedures for Programme Estimates.

[10] The European Commission's endorsement of the contracts is not necessary in certain cases, which are specified in this Practical Guide or in the Practical Guide to procedures for Programme Estimates.

EDF: As from 20 June 2014, the rules on nationality and origin laid down in Decision No 1/2014 regarding the revision of Annex IV to the Cotonou Agreement apply to all calls for proposals and tenders launched under the EDF.

OCTs: Regarding OCTs, from the entering into force of Decision 2013/755/EU of 25 November 2013, specific rules on nationality and origin apply to grant and procurement procedures.

For each external financing instrument, the countries corresponding to the rules on nationality and origin are listed in Annex A2a to this Practical Guide.

Rule on nationality

[11] In indirect management, this can result in using the eligibility rules of the EU, the entrusted body and the other donor, if the joint co-financing comes from an entity other than the one entrusted with the implementation.

BUDGET-FUNDED PROGRAMMES

Subject to other specific rules set out in the applicable financing decisions or financing agreements, for all EU budget-funded programmes, except IPA I, the CIR applies. This regulation aligned nationality rules to a very large extent for DCI, ENI and PI. The same eligibility rules apply to INSC via reference made by the latter regulation, while IPA II remains more restrictive and EIDHR and IcSP are fully untied. Common core rules and particularities introduced in the CIR are presented in detail below:

Participation in procedures for the awarding of contracts or grants is open to international organisations and to all natural persons who are nationals of, and legal persons which are effectively established in:

a Member State of the European Union;

a Member State of the European Economic Area;

a beneficiary of the Instrument for Pre-Accession Assistance II,

overseas countries and territories covered by Council Decision 2001/822/EC, as amended

Developing countries and territories as included in the OECD-DAC list of ODA recipients, which are not members of the G-20 group;

Developing countries, as included in the OECD-DAC list of ODA recipients, which are members of the G20 group, and any other countries and territories, when they are beneficiaries of the action financed by the Union under the Instruments concerned;

another third country, based on a European Commission decision establishing reciprocal access to external aid.

OECD members in case of activities implemented in the Least Developed Countries (LDC) and in Heavily Indebted Poor Countries (HIPC) . This applies for the entirety of regional or global programmes which include at least one LDC or HIPC.

For each external financing instrument, Annex A2a to this Practical Guide contains the list of countries which correspond to rules on nationality and origin.

The CIR also includes provisions which further extend the rules on nationality in certain cases. Therefore, in addition to entities eligible according to the rules above:

In the context of actions jointly co-financed: whether implemented through direct or indirect management,[11] where actions are co-financed jointly with a partner or other donor, all persons that are eligible under the rules of that partner or other donor are also eligible. (NB: Where actions are co-financed in parallel with a partner or other donor, the respective rules on nationality apply, i.e.

EU rules apply to the part of the action financed by EU instruments (without extension) and the rules of the partner or other donor apply to the part financed by it.)

In the context of actions implemented under shared management with a Member State, all persons that are eligible under the rules of that Member State are also eligible.

In the context of actions implemented through indirect management, all persons that are eligible under the rules of the entrusted body are also eligible, except when the management is entrusted to partner countries (as per article 58 c (i) of the FR). In the latter case, only the rules of the EU instrument apply. In the case of actions implemented through a Union Trust Fund established by the Commission, all persons that are eligible under the rules determined in the trust fund's constitutive act are also eligible.

In the case of actions financed by more than one instrument for external action, including the EDF, the natural persons who are nationals of, and legal persons which are effectively established in countries identified under any of these Instruments are eligible for the purpose of those actions.

In the case of actions of a global, regional or cross-border nature financed by one of the EU Instruments for external action, eligibility can be extended to natural persons who are nationals of, and legal persons which are effectively established in the countries, territories and regions covered by the actions.

EDF-FUNDED PROGRAMMES

The revised Annex IV to the Cotonou Agreement harmonised to the extent possible the rules on nationality and origin with those of the CIR. Participation is open to international organisations and to all natural persons who are nationals of, or legal persons who are established in :

an ACP State.

an EU Member State,

Member States of the European Economic Area

Beneficiaries of the EU Instrument for pre-accession assistance (IPA II),

Overseas countries and territories covered by Council Decision 2013/755/EU of 25 November 2013;

developing countries and territories, as included in the OECD-DAC list of ODA recipients, which are not members of the G-20 group, without prejudice to the status of the Republic of South Africa, as governed by Protocol 3 to the Cotonou Agreement;

another third country, based on a European Commission decision establishing reciprocal access to external aid in agreement with ACP countries;

OECD members in case of activities implemented in the Least Developed Countries (LDC) and in Heavily Indebted Poor Countries (HIPC). This applies for the entirety of regional or global programmes as well which include at least one LDC or HIPC.

For the complete list of eligible countries please refer to Annex A2a to this Practical Guide.
Annex IV to the Cotonou Agreement includes provisions which further extend the rules on nationality in certain cases. Therefore, in addition to entities eligible according to the rules above:

When an operation is implemented as part of a regional initiative, natural and legal persons from a country participating in the relevant initiative are also eligible;

In the context of actions implemented through direct management and where actions are co-financed jointly with a partner or other donor, all persons that are eligible under the rules of that partner or other donor are also eligible. (NB: Where actions are co-financed in parallel with a partner or other donor, the respective rules on nationality apply, ie. EU rules apply to the part of the action financed by EU instruments (without extension) and the rules of the partner or other donor apply to the part financed by it.)

When an operation is implemented through a Trust Fund established by the Commission, participation is also open to all persons eligible under the rules determined in the Trust Fund constitutive act;

In the case of actions implemented in indirect management through entrusted bodies, which are Member States or their agencies, the European Investment Bank and international organisations or their agencies, natural and legal persons who are eligible under the rules of that entrusted body as identified in the agreements concluded with the co-financing or implementing body are also eligible; In addition, where actions are co-financed jointly with a partner or other donor, all persons that are eligible under the rules of that partner or other donor are also eligible.

In the case of projects financed under another EU financial Instrument, participation is also open to all persons eligible under that EU financial Instrument.

Programmes for OCTs

Rules on nationality and origin for public procurement, grants and other award procedures for OCTs are established by Article 89 of Decision 2013/755/EU of 25 November 2013.

Participation in the award of procurement contracts, grants and other award procedures for actions financed under this Decision for the benefit of third parties shall be open to all natural persons who are nationals of, and legal persons which are effectively established in:

Member States,

candidate countries and potential candidates as recognised by the Union, and

members of the European Economic Area;

OCTs;

developing countries and territories, as included in the OECD-DAC list of ODA Recipients, which are not members of the G-20 group;

countries for which reciprocal access to external assistance is established by the Commission;

Member States of the OECD, in the case of contracts implemented in a Least Developed Country;

For the complete list of eligible countries please refer to Annex A2a to this Practical Guide.

The Decisions includes provisions which further extend the rules on nationality in certain cases. Therefore, in addition to entities eligible according to the rules above, the following ones are also eligible:

In the case of actions jointly co-financed with a partner or other donor countries entities which are eligible under the rules of that partner, other donor

In the case of actions implemented through a Member State in shared management, entities which are eligible under the rules of that Member State

In the case of actions implemented through a Trust Fund established by the Commission, entities which are eligible under the constitutive act of the trust fund, shall also be eligible.

In the case of actions implemented through entrusted bodies, which are Member States or their agencies, the European Investment Bank or through International Organisations or their agencies, entities that are eligible under the rules of that entrusted body, as identified in the agreements concluded with the co-financing or implementing body, shall also be eligible.

In the case of actions financed under this Decision and, in addition, under another Instrument for external action, including the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (1), as last amended in Ouagadougou on 22 June 2010 (2), entities identified under any of these Instruments as eligible, shall be so as well for the purpose of that action.

In the case of actions of a global, regional or cross-border nature financed under this Decision, natural and legal persons from countries, territories and regions covered by the action may participate in the procedures implementing such actions.

Rules for experts and international organisations:

Both for the EDF (including OCTs) and BUDGET-funded programmes, the nationality of experts and other natural persons employed or legally contracted does not have to follow the nationality rules. Therefore, unless otherwise provided for in the applicable financing decision/agreement, experts recruited or otherwise legally contracted by an eligible contractor/sub-contractor, may be of any

nationality.

Likewise, the nationality rule does not apply to international organisations participating in a procurement or grant award procedure.

How to verify compliance with the nationality rules?

For the purpose of verifying compliance with the nationality rules, the tender dossier and the guidelines for applicants require the following from tenderers and applicants:

natural persons must state the country of which they are nationals;

legal persons must state the country in which they are established and provide evidence of such establishment by presenting the documents required under that country's law.

If the contracting authority (or evaluation committee) suspects that a candidate, tenderer or applicant does not comply with the nationality rules, it must ask the candidate/tenderer/applicant to provide evidence demonstrating actual compliance with the applicable rules.

To demonstrate their actual compliance with the "establishment" criterion, legal persons have to demonstrate that:

the legal person is formed under the law of an eligible State, and

its real seat is within an eligible State. "Real seat" must be understood as the place where its managing board and central administration are located or its principal place of business.

This is to avoid awarding contracts to firms which have formed “letter box” companies in an eligible country to circumvent the nationality rules.

The decision on whether or not candidates/tenderers/applicants are eligible is taken by the contracting authority (usually on the basis of the information and evidence provided during the evaluation).

Sanctions: When verifying compliance with the nationality rules, careful attention has to be made regarding entities which are nationals of or effectively established in countries against which the EU has adopted restrictive measures[12]. Notably, a case-by-case analysis of the scope of the restrictive measures is necessary in order to establish their exact impact on eligibility rules in a specific procedure.

Origin of goods

Rules of origin:

In principle, products[13] supplied under a procurement contract, or in accordance with a grant contract, financed under the EU budget or the EDF (including OCTs) must originate from an eligible country as designated by the relevant Instrument(s). (See above, 'Rule on nationality', and below, '2.3.2. Derogations from the rule on nationality and origin').

[12] The updated list of sanctions is available at http://eeas.europa.eu/cfsp/sanctions/index_en.htm .

[13] Supplies and materials under Cotonou, Annex IV.

However, these products can originate from any origin (full untying) if their value is below the threshold of the competitive negotiated procedure - EUR 100 000.

The amount of any ancillary works and services is not taken into account.

This provision for full untying below the threshold of the competitive negotiated procedure must be stated in the contract notice.

Where the contract is divided into lots, the rule applies per lot (only applicable to lots of less than EUR 100 000). The division into lots must be legitimate. This rule must not lead to sub-dividing artificially contracts into smaller lots to circumvent the threshold of 100 000 euros.

This rule applies also to procurement done by grant beneficiaries and procurement of works involving the supply of products. In case of works contracts which involve multiple purchases, the 100.000 EUR threshold applies by type of supply. Where the contract has a fixed price, the threshold has to be applied to the unit price of the supply. Rules of origin do not apply to supplies purchased in order to carry out a works contract, where the Contractor keeps the purchased items at the end of the project.

The above rules have to be clearly stated in the instructions for tenderers and applicants.

The scope of the rule:

Subject to derogation (granted on a case by case basis), all goods to be delivered under a supply contract fall under the rules of origin, as do materials, goods and components to be incorporated or to form part of the permanent works under a works contract.

Considering that the rule of origin applies to all items tendered and supplied, it is not enough if only a certain percentage of the goods tendered and supplied or a certain percentage of the total tender and contract value comply with this requirement.

Goods purchased by the contractor for use during the execution of the contract (such as machinery used by a supply contractor for testing and installing the goods supplied, equipment used by a works contractor for building a road[14], computer(s) used by a service contractor to draft a study) are not subject to the rule of origin. It is only if the contract explicitly states that at the end of the contract the ownership of the goods is transferred from the contractor to the contracting authority (in the case of procurement contracts) or transferred by the contractor to the grant beneficiary or another entity/person (in the case of grant contracts), that these goods are subject to the rule of origin.

[14] In a works contract, the option of having equipment vested in the contracting authority, given under Article 43.3 of the General Conditions, only applies while the works are being carried out and therefore does not constitute full transfer of the property.

Definition of "origin":

The term 'origin' is defined in the relevant EU legislation on rules of origin for customs purposes: the Customs Code (Council Regulation (EEC) No 2913/92), and in particular its Articles 22 to 24, and the Code's implementing provisions (Commission Regulation (EEC) No 2454/93).[15]

The country of origin is not necessarily the country from which the goods were shipped and supplied. Two basic concepts are used to determine the origin of goods, namely the concept of “wholly obtained” products and the concept of products having undergone a "last substantial transformation". If only one country is involved in the production, the "wholly obtained" concept will be applied. In practice, these goods wholly obtained in a single country shall be regarded as having their origin in that country. This will be restricted to mostly products obtained in their natural state and products derived from wholly obtained products.

If two or more countries are involved in the production of goods, it is necessary to determine which of those countries confers origin on the finished goods. For this purpose the concept of "last, substantial transformation" is applied. In general the criterion of last substantial transformation is expressed in three ways:

by a rule requiring a change of tariff (sub) heading in the HS nomenclature (ie. the Nomenclature governed by the Convention on the Harmonized Commodity Description and Coding System);

by a list of manufacturing or processing operations that do or do not confer on the goods the origin of the country in which these operations were carried out;

by a value added rule, where the increase of value due to assembly operations and incorporation of originating materials represents a specified level of the ex-works price of the product.

How to verify compliance with the origin rules?

When submitting its tender, if the rules of origin apply, the tenderer must state expressly that all the goods meet the requirements concerning origin and must state the country(ies) of origin. When tendering for systems comprising more than one item, the origin of each item in the system must be specified. The tenderer may be requested to provide documents supporting the stated origin. In this case, the tenderer must provide a certificate of origin or additional information considering that the issuing authority may refuse to issue at tendering stage a certificate of origin without presentation of commercial invoices.

[15] As of May 1st, 2016 these references should be read as reference to Article 60 of Regulation (EU) no. 952/2013 and its implementing act.

The certificates of origin must be submitted at the latest during implementation of the contract when the certificate of provisional acceptance is requested. Failing this, the contracting authority will not make any further payment to the contractor. Exceptionally, other substantiating documents can be accepted by the contracting authority instead of the aforementioned certificates if the contractor justifies that it is impossible to provide certificates of origin.

Certificates of origin must be issued by the competent authorities of the goods' or supplier's country of origin (usually the Chamber of Commerce) and comply with the international agreements to which that country is a signatory.

It is up to the contracting authority to **verify compliance with the rules of origin**. Where there are serious doubts about the authenticity of a certificate of origin or the information it contains (e.g. because of discrepancies in the document, spelling errors, etc.), the contracting authority should contact the issuing authority to have the authenticity of the documents submitted and/or the information it contains confirmed. For EDF procurement, supplies originating in the Overseas Countries and Territories are regarded as originating in the EU.

Sanctions: When verifying compliance with the nationality rules, careful attention has to be made regarding entities which are nationals of or effectively established in countries against which the EU has adopted restrictive measures. Notably, a case-by-case analysis of the scope of the restrictive measures is necessary in order to establish their exact impact on eligibility rules in a specific procedure[16].

1.1.2. Derogations from the rules on nationality and origin

Basic acts provide for the possibility of adopting derogations from the general rules on a case-by-case basis. The derogation can further extend or limit the eligibility of certain entities on grounds foreseen in the basic acts.

The decision on derogations is taken by the European Commission before the procedure is launched. In principle, it is not possible to derogate from the rules on nationality and origin to allow only one or a group of countries to become eligible unless it is duly motivated in the request for derogation. Where actions are implemented in shared management, the relevant Member State to which the Commission has delegated implementation tasks is entitled can also take such decisions.

If a contract notice is published, the derogation must be mentioned.

a.) Extension

In duly substantiated cases, the European Commission may extend eligibility to natural and legal persons from an ineligible country and allow the purchase of goods and materials originating in an ineligible country.

Derogations may be granted on the grounds of

- economic, traditional, trade or geographical links with neighbouring countries,
- unavailability of products and services in the markets of the related countries concerned;
- extreme urgency/crisis situation[17]; or
- extreme difficulties to carry out a project, programme or other action with the general rules on eligibility. The argument that a product of ineligible origin is cheaper than the EU or local product would not alone constitute grounds for awarding a derogation.[18]

Where the EU is a party to an agreement on widening the market for the procurement of supplies, works or services, eligibility can be extended, as required by that agreement.

b.) Limitation

In the context of grants, the basic acts also allow to limit eligibility on certain grounds, notably where this is required by the nature and the objectives of the action and as necessary for its effective implementation.[19].

The limitation can be made with respect to the nationality, localisation or nature of applicants.