



Annex A.2.b

Criteria for assessment of participating conditions



IMPORTANT NOTICE

For prime contractors in tenders presenting security activities or members of the core team (as defined in the tender specifications) and subcontractors (as defined in the tender specifications and in the Financial Regulation) involved in security sensitive activities (mentioned as entity/activities subject to participation conditions in the rest of the document) the participation of the tender XXXX is “open to economic operators fulfilling the following three cumulative conditions”.

a) legal entities established in a EU Member State with their executive management structures established in that EU Member State.

- For the purpose of this tender economic operators are considered to be established in the EU when they are formed in accordance with the law of an EU Member State, and have their central administration, registered office and principal place of business in an EU Member State (if legal persons) or they are nationals of one of the EU 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 EU 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

This document provides the criteria for the assessment of the requirements under a), b) and c) above and the supporting elements to be provided by the Tenderers.

This document is accompanied with an excel template to be filled by each tenderer, member of the core team and/or subcontractor subject to the participating conditions, in accordance with this document.

GENERAL INSTRUCTIONS

The declaration/information/supporting documents the Tenderer shall provide in accordance to this document shall be provided at the time of submission of the tender proposal and shall refer to circumstances existing at the time of submission. Unless otherwise provided in the tender specifications, any declaration established by companies subject to participation conditions in accordance with this document shall **be signed by a legally appointed representative with powers to represent the company**.

Entities not compliant with the participating conditions referred above may issue a request for waiver in accordance with the tender conditions **at the time of submission of the tender proposal**.

All the information provided in application of this document including the information provided in Annex 1 will be treated according to Article 339 of the [TFEU](#)¹.

Any tenderer, member of the core team or subcontractor involved in a tender proposal and subject to the participating condition (hereinafter referred as “entity”) can also submit the information marked “Confidential” or “Business secrets” if it is considered that its interest would be harmed if any of this information is disclosed. In this case, the entity should give reasons as to why this information should be covered by the obligation of professional secrecy. If an entity deems the information provided in or with Annex 1 is too sensitive to be delivered via the prime tenderer or another member of the core team, it can:

- either provide it as a password-protected² zip archive within the global application³ and provide the associated password separately. In such case, it should mention the name of the encrypted zip archive and the name of the tender concerned in the email;
- or contact the European Commission to identify the appropriate way of transmission prior to the deadline for submission of the proposal. The European Commission will acknowledge reception by email and the applicant will communicate this proof to the prime tenderer or member of the core team in charge of the submission, who will need to include it in the submitted proposal.

Nota : Annex 1 is a macro-enabled Excel file. It also allows to attach supporting documents directly in the Excel file in order to ease further exploitation. It is recommended to use .pdf attachments (even though Word attachments are also possible). Do not worry if, once a file is attached, a “strange” icon is displayed: this is “normal”. Once you have completed Annex 1, you will need to press the validation button: this will first perform some completeness and format checks and, if the validation is successful, export the file in various formats (.xlsm, .xlsx and .pdf). **You will need to provide the .xlsx and .pdf files with your application (pdf is needed because of the signature). Please verify that the attachments are properly accessible from the saved .xlsx file before submitting your**

¹ Article 339 of the TFEU: “The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.”

² Use AES-256 encryption method. You can use free and open-source software such as 7-zip to do so.

³ i.e. as a password-protected zip archive inside the single password-protected master zip archive containing Part A sup, Part B, the eight Annexes and all other supporting documents.

application. This export at the end of the process is without prejudice to your ability to save intermediate drafts of the file using the usual “save as” Excel function: just make sure you are saving the file as .xlsm in order to allow further use of the macros. If you encounter any issue with the use of Annex 1, please contact the European Commission.

ESTABLISHMENT AND EXECUTIVE MANAGEMENT STRUCTURE IN AN EU MEMBER STATE (CONDITION A)

Required evidence:

- 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 EU Member States;
- the ‘executive management structures’ of the entity to be in an EU Member State:
 - o An extract from the relevant register proving that the head office or executive management structure is in one of the EU 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’ is in one of the EU Member States ;

ACTIVITIES IN AN EU MEMBER STATE (CONDITION B)

Entities subject to participating conditions shall declare, describe and locate all infrastructure, facilities, assets and resources, which will be used for the implementation of the activities subject to participation conditions. This may for example include location of offices, laboratories, testing facilities, but also the software and human resources required/involved. **In case the usage of space assets or services or the usage of cloud facilities or services is required to carry out the action, they need to be specified**, including the place of establishment of the company(ies) owning and/or operating the related systems.

Attention is drawn to the fact that, in order to be eligible, all the infrastructure, facilities, assets and resources of the entity subject to participation condition needed to carry out the action must be located in one or more Member States (which includes the outermost regions of the Member States) at the moment of submission of the Tender and throughout the entire duration of the resulting contract.

Required evidence: the declaration under oath/sworn statement

ASSESSMENT OF CONTROL (CONDITION C)

Introduction

Tenderers are informed that the notion of control will be assessed with regard to the whole entity and is not limited to the control of the entity as regards the activities which relate to the subject matter of the tender

Any public entity⁴ is automatically considered to be controlled by the state in which it has a registered office. Any other entity subject to participation condition shall fill and sign Annex 1.

With regard to Annex 1 and to the assessment of decisive influence, the macro excel 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 the necessary supporting documents that may be requested.

How is ‘control’ by a ‘third country’ or ‘third-country entity’ assessed?

‘Legal entities’ need to assess the ‘control’ by a third-country element by checking the following issues:

- a) Ownership structure and specific rights (*i.e.* shareholders rights)
- b) Corporate governance
- c) Commercial links conferring control
- d) Financial links conferring control
- e) Other sources of control

- a) Ownership structure and specific rights (*i.e.* shareholders rights)

‘Control’ must be assessed following these indications:

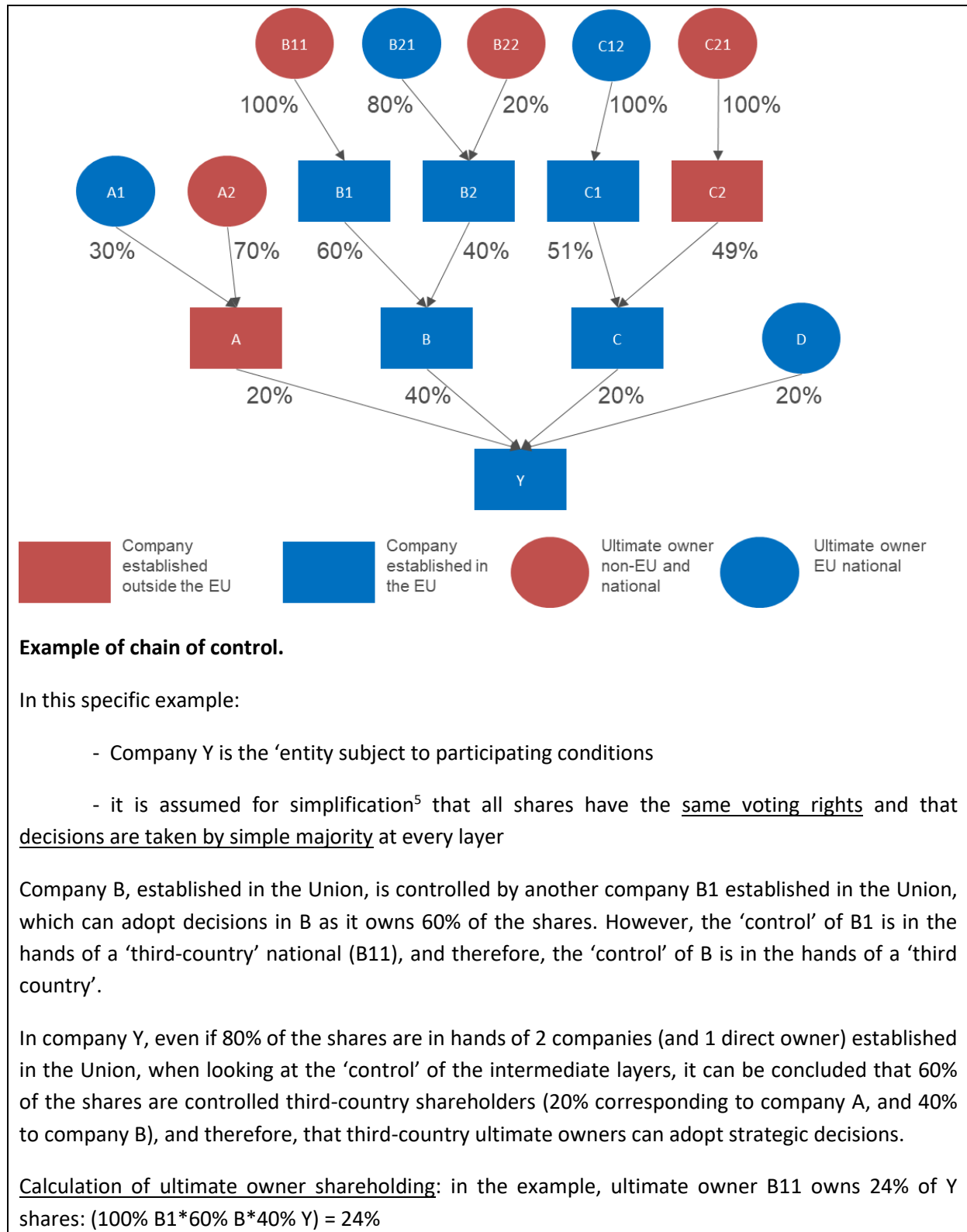
- a) When the ‘legal entity’ shares are **directly owned** by individual shareholders (natural persons that own and control the company, and act under their own name) these are the ultimate owners. Attention needs to be paid to specific individual shareholders which operate under a mandate granted by the “real owner”. In such situation, information may be requested to clarify if the beneficial owner is an EU national.

In these cases, the nationality of the individual shareholders has to be considered as a first element of assessment:

⁴ 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.

- If all the shareholders are EU nationals, it is concluded that the 'legal entity' is not subject to 'control' by a third-country individual;
 - If there are third-country individuals among the shareholders, their ability to exercise 'control' has to be assessed as explained below.
- b) When the 'legal entity' shares are **indirectly "owned"** by the ultimate owners, several ownership layers can exist between the 'legal entity' shareholders and the ultimate owners (the natural persons that own and control the company):
- The identification of the ultimate owners has to be conducted at each layer, and at each layer has to be assessed the existence of third-country individual or 'third-country entity' controlling that intermediate layer, up to the ultimate owners of all the layers involved;
 - 'legal entities' must therefore assess, all along the chain of control of their entity until the ultimate owners, that there is no 'control' of the 'legal entity' by 'third countries' or 'third-country entities' (see graph below);
 - In cases where shareholding is widely spread, and one or several 'third-countries' shareholders are the largest shareholders, even if the shareholding is below 25%, detailed control assessment of all the above-mentioned elements has to be conducted. Indeed, in such a case, even if shareholding may look as not significant, it could be *de facto* that the shareholder becomes the one being able to influence the strategic decisions;
 - Only ultimate owners having more than 5% of the shares or 5% of the voting rights of the 'legal entity' must be identified.
- c) If the 'legal entity' is a company listed in the **stock exchange**, a subsidiary of a listed company or is controlled by a listed company, 'control' has to be assessed in the same way as described above. However, in some cases, as regards the shares that are floating, the 'legal entity' is only in a position of identifying the shareholders that register their attendance for the general meeting and not those that do not register. In these cases, in order to assess 'control', more emphasis should be made on identifying:
- the bodies embodied with the adoption of strategic decisions;
 - the decisions that are taken at the shareholders' general meeting and the quorum (participation and majority) required to adopt such decisions;
 - the decisions that are taken at other management bodies (such as Executive Board, Supervisory Board, Board of Directors, Advisory Boards, CEO) and the quorum (participation and majority) required to adopt such decisions;
 - the appointment of management bodies and the possibilities of the largest shareholders to appoint them;
 - any veto right (or possibility to exercise) or multiple voting shares (*e.g.* golden share), if existing;

Where not all the ultimate owners can be identified (due to the presence in the control chain of listed companies with important float (share of capital on a regulated stock market)), the legal representative of the 'legal entity' must ensure that under the national legislative provisions no unknown shareholder can, alone or in concert, be in a position to exercise a decisive influence on the 'legal entity'.



⁵ when doing the assessment it will be checked which are the majorities needed, the quorums requested, if there are different voting rights attached to the shares, the veto rights that minority shareholder can have, etc.

‘Control’ can be granted to third-country shareholders through extensive rights attached to their shares established in the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, or in shareholders agreements, such as right to veto a transfer of shares, pre-emption rights (right given to an existing shareholder to be the first option in case other shareholders want to sell their shares), right of the third-country shareholder to sell its shares (depending on the applicable conditions), right to purchase additional shares or conditions for the investment in the company imposed by the third-country shareholder. These rights could grant them the ability to obtain concessions on matters, which, on their face, and having regard to the corporate governance agreed upon, appear to be controlled by the EU shareholder(s).

Control can be established through agreements addressing decision making (vote or veto) and investment undertakings in the company with the relevant information contained in the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, or in shareholders agreements,

Evidence to be provided regarding ownership structure and specific rights.

The entity subject to participating conditions needs to provide:

- information on the nationality of the individual ultimate owners⁶ that detain at least 5% of the capital or voting rights in the ‘legal entity’;
- Information on the rights attached to the shares detained;
- the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, shareholders’ agreements, or other relevant documents regarding the taking of decisions within the company
- a graph that includes :
 - the different ownership layers up to their ultimate owners.
 - For each layer, the existence of third-country individual or third-country entity controlling that intermediate layer, up to the ultimate owners of all the layers involved.

⁶ Ultimate owners are always natural persons (except in cases of public entities) who ultimately control the legal entity. Such control can be direct or indirect :

- When ‘legal entity’ shares are directly “owned” by individual shareholders (natural persons that own and control the company, and act under its own name), those shall be considered a ultimate owners.
- When a ‘legal entity’ shares are indirectly owned by ultimate owners, several ownership layers can exist between the ‘legal entity’ shareholders and the ultimate owners (the natural persons that “own” and control the company).

In case of a nominee, fund, trust or any other institutional investment instrument (or arrangement) holding the shares, the requirement of not being subject to ‘control’ by a ‘third country’ or by a ‘third-country entity’ may be satisfied at the level of the nominee, trustee, or other registered owner, provided that the latter is an EU national and that it exercises decisive influence over that instrument or arrangement (*i.e.* takes the investment decisions).

Additional evidence that may be requested during the evaluation process regarding ownership structure and specific rights.

- Evidence on the absence of third-country ‘control’ of each intermediate layer, up to the ultimate owner, according to the graph describing the chain of control of the ‘legal entity’,
- Copy of ID card or passport of the ultimate owner(s).

b) Corporate governance

When a ‘third country’ or ‘third-country entity’ has the possibility to veto decisions proposed by the EU ‘shareholders or members, it exercises decisive influence. The assessment the ‘legal entity’ has to conduct is whether their strategic decisions may be influenced, actively (through an action) or passively (by not exercising its rights – *e.g.* abstention), by a ‘third country’ or by a ‘third-country entity’.

For this purpose, the ‘legal entity’ has to identify at what level (which are the bodies) are the strategic business decisions taken within the ‘legal entity’; which are the majorities of votes (and/or share capital) requested for the adoption of the decisions; what is the nature of the decisions they take, their decision-making procedures, including quorum requirements and voting rules and any prerogative accorded to other bodies. If the majorities requested for the adoption are such that they allow a minority shareholder or member to block strategic decisions, it is considered to have a veto right and therefore, influence the adoption of the strategic decisions and thus ‘control’.

Evidence to be provided regarding corporate governance:

- Description of the decision-making bodies and their composition;
- The relevant rules regarding election, appointment, nomination or tenure of members of the decision-making bodies;
- The decision-making procedures.

c) Commercial links conferring control

Commercial dependence may consist in a cooperation between two ‘legal entities’, or may take the form of a joint venture, or purchase and sale of goods between the third-country shareholder and the ‘legal entity’. To the extent that the ‘legal entity’ is dependent on such cooperation with the third-country shareholders, the latter could gain strategic influence over the former. A third-country customer or supplier might exercise the same dependence, even if it is not a shareholder, in cases of long-term supply or by agreements that allow it to decide on the commercial strategy.

Evidence to be provided regarding commercial dependence:

- Information on companies or individuals of ‘third countries’ that have a contractual relationship with the ‘legal entity’ which can give them ‘control’ over it. If this commercial relationship is with a company or individual of the ‘third country’ that is a shareholder, the relevant information about the shareholder(s) needs to be included

Additional evidence that may be requested regarding commercial dependence.

Cooperation agreements with third-country customers or suppliers (including shareholders if relevant), when they could confer 'control' over the company.

d) Financial links conferring control

'Control' could be exercised when the 'legal entity' is financially dependent on the contribution from the third-country shareholder. Due to this financial dependence, the third-country shareholder is in a position to obtain concessions in strategic areas, even though legally the EU shareholder would have the means to refuse such concession. To assess the degree of financial dependence, it needs to be assessed whether the third-country shareholder contributed to the financing of the 'legal entity' in a proportion higher to its shareholding. All modes of financing should be taken into account, such as capital increase, loans, guarantees, debt waivers bails and grants.

Evidence to be provided regarding financial dependence :

- Information on shareholders providing financing to the company, indicating the type of financing and nature and degree of 'control'.

Additional evidence that may be requested regarding financial dependence:

In case of third-country or third-country entity shareholder that provides financial contribution, any supporting document (loans, instruments of constitution, agreements) that justify the financial contribution.

e) Other sources of control

There might be other sources of 'control' specific to each case.

Evidence needs to be provided regarding other sources of control

All the information about any other means, process or link ultimately conferring 'control' to a 'third country' or 'third-country entity'.