

## **APPLICATION AND IMPLEMENTATION OF ARTICLE 5K OF THE COUNCIL REGULATION (EU) NO: 833/2014**

The Council Regulation (EU) No: 833/2014 of 31 July 2014 concerning ‘Restrictive measures in view of Russia's Actions Destabilising the situation in Ukraine’ (hereinafter: the ‘Sanctions Regulation’) is binding in its entirety and directly applicable in all Member States. Accordingly, the adopted sanctions against Russia, which are deemed to be unprecedented and have broad consequences, shall take immediate effect.

### **Establishing Russian Ownership**

In line with Article 5K (1) of the Council Regulation (EU) No: 833/2014, the Public Procurement/Concession Sanctions prohibit contracts with:

- Russian Nationals<sup>1</sup>, Companies, Entities or Bodies established in Russia;
- Companies and Entities directly or indirectly owned for more than 50% by Russian Nationals, Companies, Entities or Bodies Established in Russia; or
- Persons Bidding or Implementing a Contract on behalf of Russian Nationals, Companies, Entities or Bodies established in Russia; or
- Any person, regardless of their place of establishment or nationality, who implements or intends to implement a contract using Russian or Russian-Owned Sub-contractors, Suppliers or Capacity Providers for participation above 10% of the Procurement/Concession Contract Value.

Therefore, the prohibition of awarding and/or executing Public Procurement/Concession Contracts applies in respect of all companies established in Russia, independently of their ownership structure, as well as to companies that are directly or indirectly owned by a Russian national or company established in Russia for more than 50%. This is regardless of whether these companies are owned by a company that is not established in Russia or in ownership of a Russian company or national.

### **Defining ‘Acting on behalf or at the direction of an Entity’**

Article 5K (1)(c) of the Council Regulation (EU) No: 833/2014 specifies that ‘*a natural or legal person, entity or body acting on behalf or at the direction of an entity*’ which is deemed as a Russian National, Company, Entity or Body established in Russia is also prohibited from being awarded or continue the execution of a Public Procurement/Concession Contract.

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<sup>1</sup> Russian national, or a natural or legal person, entity or body established in Russia.

Contracting Authorities/Entities shall factually assess the above notion. The EU Commission, in its opinion Document (dated 17<sup>th</sup> October 2019<sup>2</sup>) on ‘Article 5(1) of Council Regulation (EU) No: 833/2014’ provides guidance which states that *‘In the absence of a definition and/or criteria that can be used to assess whether an entity acted on behalf or at the direction of a targeted entity, the NCA should take into account all the relevant circumstances in order to establish the situation at hand. These can include, for example, the precise ownership/control structure, including links between natural persons; the nature and purpose of the transaction, coupled with the stated business duties of the entity that is owned or controlled; previous instances of acting on behalf or at the direction of the targeted entity; disclosure made by third parties and/or factual evidence indicating that directions were given by the targeted entity’*.

### Determining and Calculating Ownership

The Public Procurement/Concession Sanctions against Russia exclude any form of Russian Ownership over 50% up to the Ultimate Beneficial Owner<sup>3</sup>. If Russian participation within the Ownership Structure is partial (even if ownership comes from different ownership levels), the relevant proportion shall be calculated<sup>4</sup> to determine the extent of Russian involvement.

*Consortia and Joint Ventures:* The limit of Russian Ownership shall be calculated individually. Henceforth, no member of a Consortium or Joint Venture can be Russian owned for over 50%.

*Sub-contractors, Suppliers or Entities whose capacities are relied on*<sup>5</sup>: The 10% limit of Russian Ownership applies individually to each Sub-Contractor, Supplier or Capacity Provider. Where more than one covered entity is involved, the value of their participation shall reach 10% in at least one (1) case for sanctions to apply.

It is important to note that ‘Sub-contractors, Suppliers or Entities whose capacities are relied on’ refer to all Companies/Entities that execute any part of the contract wherein they

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<sup>2</sup>[https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/191017-opinion-regulation-2014-833-article-5-1\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/191017-opinion-regulation-2014-833-article-5-1_en.pdf)

<sup>3</sup> Ultimate Beneficial Owner (UBO) refers to the person/s or entity/entities that is the ultimate beneficiary of a company, when an institution initiates a transaction. The Financial Action Task Force (FATF) defines a UBO as ‘the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted’.

<sup>4</sup> If for example, a bidder is 30% owned by a Russian Person and 70% owned by an EU Company which in turn is 40% owned by a Russian Entity, the bidder is ultimately 58% Russian-owned.

<sup>5</sup> Sub-contractors, Suppliers or Entities whose capacities are relied on refers to any third parties involved for more than 10% of the contract value.

provide Services or Works or Supplies. Therefore, they comprise the whole Supply Chain (not only Direct Suppliers). Accordingly, the Sanctions Regulation applies also to Public Procurement/Concession Contracts wherein the 10% of Russian Sub-Contracting or Supplying is attained through intermediary Companies/Entities.

Further to the above, the Sanctions Regulation applies to Companies/Entities indicated in the Public Procurement/Concession Bid, even if such Companies/Entities do not execute any part of the contract in practice and its capacity is purely relied on for fulfilling the Selection Criteria.

In addition, the Sanctions Regulation is also applicable to a third party<sup>5</sup> which accounts for over 10% of the Contract Value owned for more than 50% by a Russian Entity or National.

#### Replacing Companies

The Sanctions Regulation forbids the award and/or the execution of the applicable Public Procurement/Concession Contracts. However, replacement is possible only for third party Companies/Entities.

*Consortia and Joint Ventures:* The members jointly submitting a bid assume joint and several liability for the execution of the contract. Hence, the association/partnership to form a Consortium, a Joint Venture or otherwise constitutes together one (1) Contractor/Economic Operator and therefore no individual member may be replaced.

*Sub-contractors, Suppliers or Entities whose capacities are relied on:* A Public Procurement/Concession Call/Contract involving sanctioned Russian participation should in accordance with the principle of non-discrimination and equal treatment request from the Economic Operator/Contractor its replacement in line with Articles 63(2) and 71(6)(b) of Directive 2014/24/EU, Articles 79(1)-(2) and 88(6)(b) of Directive 2014/25/EU and Article 42(4)(b) of the Directive 2014/23/EU as well as by analogy should offer the possibility of its replacement in case of Directive 2009/81/EC.

A replacement proposed by an Economic Operator/Contractor shall be accepted if the new Sub-contractor, Supplier or Capacity Provider is (i) deemed as acceptable (ii) is not in an Exclusion Situation (including the current Russian Sanctions) and (iii) after the replacement, the Selection Criteria remain fully satisfied by the Economic Operator/Contractor.

## **Applicability of Public Procurement/Concession Sanctions against Russia**

The Sanctions Regulation applies to most of the Public Contracts as per the EU Public Procurement/Concession Directives wherein the Contract Value meets or exceeds the relevant EU Thresholds. It shall be noted that the said Regulation also applies to a considerable number of Public Procurement/Concession Contracts which are usually excluded from the scope of the Directives.

The Public Procurement/Concession Sanctions against Russia, applicable from 9th April 2022, include Ongoing and Awarded Contracts as well as any new procedures to be undertaken. Ongoing Contracts shall be terminated by 10th October 2022<sup>6</sup>.

With regard to the establishment of Dynamic Purchasing Systems (DPS) and Framework Agreements (wherein no award takes place), since such aggregate tools do not constitute a Public Procurement Contract, the participation of sanctioned Economic Operators/Companies should be considered as frozen. Accordingly, no invitations to submit an offer should be sent to them.

### Prohibited Contracts

Pursuant to article 5K (1) of the Council Regulation (EU) No: 833/2014, (i) Public Procurement/Concession Contracts falling within the scope of the aforementioned Directives, as well as (ii) Contracts in relation to the below fields/industries which are generally excluded from the scope of the Directives are all deemed as Prohibited Contracts since they form part of the Public Procurement/Concession Sanctions:

- Concessions awarded to public buyers based on Exclusive Right/s
- Concessions to holders of Exclusive Rights
- Concessions for Air and Passenger Transport
- Concessions implemented outside the EU
- Concessions awarded to Affiliated Undertakings and Joint Ventures
- Water Concessions
- Real Estate Transactions
- Radio and Audio-Visual Production Services
- Broadcasting and Electronic Communication Services
- Arbitration, Conciliation and Legal Services
- Financial Instruments, Loans and some Central Banks Services
- Some Civil Protection Services provided by NGOs

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<sup>6</sup> Public Contracts may be suspended indefinitely and unconditionally, in accordance with national law. Contracts covered by the sanctions cannot be awarded, even if the contract execution would finish before 10th October 2022.

- Political Campaigns
- Lotteries
- Passenger Transport Services
- Purchases connected with classified information vis-a-vis National Security Interest
- Contracts for Intelligence Activities
- Purchases for Re-sale by Entities operating in the Water, Energy, Transport and Postal Services Sectors
- Contracts Awarded to Affiliated Undertakings/Joint Ventures by Entities operating in the Water, Energy, Transport and Postal Services Sectors
- Financial, Philatelist and Logistic Services
- Services by Electronic Means
- Government-to-Government Defence and Security Contracts (incl. Concessions)
- Defence and Security Contracts (incl. Concessions) in relation to cooperative programmes
- Defence and Security Contracts (incl. Concessions) for Military Force deployed outside of the EU
- Defence and Security Research and Development Contracts for Contracting authorities

Contracting Authorities are encouraged to review the following articles of the EU Directives, thus, establishing the above Prohibited Contracts in context:

*Directive 2014/23/EU: Award of Concession Contracts*

- Article 10 [paragraphs 1, 3, 6(a) to 6(e), 8, 9 and 10]: Exclusions Applicable to Concessions Awarded by Contracting Authorities and Contracting Entities
- Article 11: Specific Exclusions in the Field of Electronic Communications
- Article 12: Specific Exclusions in the Field of Water
- Article 13: Concessions Awarded to an Affiliated Undertaking
- Article 14: Concessions Awarded to a Joint Venture or to a Contracting Entity forming part of a Joint Venture

*Directive 2014/24/EU: Public Procurement*

- Article 7: Contracts in the Water, Energy, Transport and Postal Services Sectors
- Article 8: Specific Exclusions in the Field of Electronic Communications
- Article 10 [(b) to (f) and (h) to (j)]: Specific Exclusions for Service Contracts

*Directive 2014/25/EU: Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors*

- Article 18: Contracts Awarded for Purposes of Resale or Lease to Third Parties
- Article 21 [(b) to (e) and (g) to (i)]: Specific Exclusions for Service Contract
- Article 29: Contracts Awarded to an Affiliated Undertaking
- Article 30: Contracts Awarded to a Joint Venture or to a Contracting Entity forming part of a Joint Venture

*Directive 2009/81/EC: Coordination of Procedures for the Award of certain Works Contracts, Supply Contracts and Service Contracts by Contracting Authorities or Entities in the Fields of Defence and Security*

- Article 13 [(a) to (d), (f) to (h) and (j)]: Specific Exclusions

**Non-applicability of Public Procurement/Concession Sanctions against Russia**

The Sanctions Regulation does not apply to the Public Procurement/Concession Contracts wherein the Contract Value is below the relevant EU Thresholds. Contracting Authorities/Entities are reminded that artificial narrowing down of the parameters of Contracts with the intention of avoiding the EU Thresholds shall not be permitted. In case a Public Procurement/Concession Contract is artificially split, it shall be considered as one (1) contract and accordingly covered by the Sanctions Regulation.

In addition, any Public Procurement/Concession Contracts not covered by the EU Directives (and not explicitly included in Article 5K (1) of the Council Regulation (EU) No: 833/2014) is accordingly not covered by the Sanctions Regulation.

Furthermore, pursuant to Article 5K (4) of the Council Regulation (EU) No: 833/2014, *‘the prohibitions in paragraph 1 [Article 5K (1)] shall not apply to the execution until 10 October 2022 of contracts concluded before 9 April 2022’*.

Partial and Potential Non-Prohibited Contracts

Pursuant to Article 5K (2) of the Council Regulation (EU) No: 833/2014, the Competent National Authority, being the Department of Contracts *may* authorise the Award and Continued Execution of Contracts intended for:

- Operation, Maintenance, Decommissioning and Radioactive Waste Management, Fuel Supply and Retreatment and Safety of Civil Nuclear Capabilities, and the Continuation of Design, Construction and Commissioning required for the completion of Civil Nuclear Facilities, as well as the Supply of Precursor Material

for the Production of Medical Radioisotopes and similar Medical Applications, Critical Technology for Environmental Radiation Monitoring, as well as Civil Nuclear Cooperation, in Particular in the Field of Research and Development;

- Intergovernmental Cooperation in Space Programmes;
- Provision of strictly necessary Goods and/or Services which cannot be provided in sufficient quantities by providers other than those in article 5K (1) of the Council Regulation (EU) No: 833/2014;
- Functioning of Diplomatic and Consular Representations of the European Union and of the Member States in Russia, including Delegations, Embassies and Missions, or International Organisations in Russia enjoying immunities in accordance with International Law;
- Purchase, Import or Transport of Natural Gas and Oil (including Refined Petroleum Products, as well as Titanium, Aluminium, Copper, Nickel, Palladium, Iron Ore) from or through Russia into the European Union; or
- Purchase, Import or Transport into the European Union of Coal and other Solid Fossil Fuels (as listed in Annex XXII of the Council Regulation (EU) No: 833/2014) until 10 August 2022.

With specific regard to Coal Contracts (and other Solid Fossil Fuels), if authorisation to implement the relevant contract/s for the coming months is/was not granted, such contracts are deemed as prohibited. Thus, Contracting Authorities/Entities shall terminate them immediately. The following table is the List of Coal Products as specified in Annex XXII of the Council Regulation (EU) No: 833/2014.

<b>CN Code</b>	<b>Name of the Good</b>
2701	Coal; briquettes, ovoids and similar solid fuels manufactured from coal
2702	Lignite, whether or not agglomerated excluding jet
2703 00 00	Peat (including peat litter), whether or not agglomerated
2704 00	Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon
2705 00 00	Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons
2706 00 00	Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars
2707	Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents
2708	Pitch and pitch coke, obtained from coal tar or from other mineral tars

In the eventuality that a derogation is/was granted by the Department of Contracts, within two (2) weeks of the authorisation, the other Member States and the European Commission shall be informed accordingly.

### **Public Procurement/Concession Contracts at Different Stages of the Process**

Further to the provisions of Article 5K of the Council Regulation (EU) No: 833/2014, the Department of Contracts is requesting that Contracting Authorities/Entities across the Public Administration analyse if their Public Procurement/Concession Contracts and/or Procedures are subject to the Sanctions Regulation. To assist Contracting Authorities in their analysis, the Department of Contracts is recommending a possible way forward as detailed below.

Moreover, Contracting Authorities/Entities may also request additional information<sup>7</sup> deemed necessary in case of reasonable doubts concerning the information received by the relevant Contractors/Economic Operators/Companies.

#### **Implementation Stage: Termination**

Ongoing Contracts covered by the Public Procurement/Concession Sanctions against Russia shall be terminated. To this end, all Contracting Authorities/Entities across the Public Administration may determine any Public Procurement/Concession Contracts with Russian involvement through the below guided process.

*Step 1:* Identify all ongoing Public Procurement/Concession Contracts wherein the Contract Value meets or exceeds the relevant EU Thresholds.

*Step 2:* Review the possibility of Russian involvement in terms of Article 5K (1) of the Council Regulation (EU) No: 833/2014 for each identified Contract.

*Step 3:* Assess if the Scope of Contracts with Russian involvement is in principle covered by the Public Procurement/Concession Sanctions.

*Step 4:* To ascertain that there is no Russian involvement, one may request a Declaration Statement by the Contractor.

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<sup>7</sup> Contracting Authorities/Entities shall take note that any Request for Information on Ownership is essential to implement the provision of the Sanctions Regulation (EU) No: 833/2014). Contractors/Economic Operators/Companies are obliged to provide exhaustive information on their owners to the extent necessary to establish that it is not Russian owned above the prohibited percentage limit. In addition, there might be instances wherein Contracting Authorities/Entities find it appropriate to ask for comprehensive documentation in relation to the Final Beneficial Ownership as well as Sub-Contractors, Suppliers or Entities whose capacities the Contractors/Economic Operators rely on. It is to be noted that in line with Article 6 (which relates to Lawfulness of Processing) of the Regulation (EU) 2016/679 on the 'Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data' (GDPR), it is lawful to request information on ownership. Nonetheless, the provisions on the Protection of Personal Data still apply and thus the information shall not be shared beyond the purpose for which it was attained. Accordingly, such Personal Data shall be destroyed when no longer required.

*Step 5:* Additional information, explanation or documents may also be requested.

*Step 6:* Terminate any relevant Ongoing Contract/s with Russian Involvement.

#### Publication and Evaluation Stage: Declaration

It is recommended that wherein a Contract Agreement for a Public Procurement/Concession Procedure has not yet been signed, the Awardee shall be requested to submit a Declaration Statement specifying that there is ‘No Russian Involvement’ in line with Article 5K of the Council Regulation (EU) No: 833/2014 of 31 July 2014 concerning ‘Restrictive Measures in view of Russia’s Actions destabilising the Situation in Ukraine’ as amended by Council Regulation (EU) No: 2022/576 of 08 April 2022.

Therefore, to uphold the principle of equal treatment, any Public Procurement/Concession Call at Publication or Evaluation Stage shall proceed without any interruption. However, prior to Contract Signature, it is recommended that the Authority responsible for the Procurement/Concession Process does not sign the Contract Agreement unless the Declaration Statement is presented by the Awardee.

#### Prior Publication Stage: Declaration on ePPS

All Public Procurement/Concession Procedures (wherein the Estimated Value meets or exceeds the relevant EU Thresholds) which are not yet published shall necessitate a Declaration Statement by each Economic Operator submitting a Request to Participate and/or submitting a Bid specifying that there is ‘No Russian Involvement’ in line with Article 5K of the Council Regulation (EU) No: 833/2014 of 31 July 2014 concerning ‘Restrictive Measures in view of Russia’s Actions destabilising the Situation in Ukraine’ as amended by Council Regulation (EU) No: 2022/576 of 08 April 2022.

In this respect, under the Eligibility Section on Government’s e-Procurement Platform<sup>8</sup> (ePPS), specifically in the Tender Response Format (xml. structure), all relevant Public Procurement/Concession Procedures are to include a Confirmation Check Box attesting the above.

#### Declaration Statement Templates

Further to the above, a copy of any relevant Declaration Statement Template in relation to ‘No Russian Involvement in Public Procurement/Concession Contracts and/or Calls’ shall be made available by the Department of Contracts upon request. Accordingly, if

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<sup>8</sup> *Electronic Public Procurement System: ePPS.*

such is required, Contracting Authorities/Entities shall email Customer Care on [info.contracts@gov.mt](mailto:info.contracts@gov.mt) quoting this Contracts Circular Reference Number and specifying which Declaration Statement Template is required.

### **Remedy: Decisions related to the Public Procurement/Concession Sanctions**

Contracting Authorities/Entities are to note that any decisions taken in relation to the Sanctions Regulation are subject to review, in line with any other decision taken in regard of contracts falling within the scope of Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU and Directive 2009/81/EC.

To this end, a tenderer having or having had an interest in obtaining a particular contract and who has been harmed or risks being harmed by a decision of the Contracting Authority/Entity allegedly contrary to the Sanctions Regulation, may lodge a complaint before the First Instance Public Procurement Review Body, namely the Public Contracts Review Board (PCRB).

It is to be noted that any decisions on termination of Ongoing Public Procurement/Concession Contracts based on the Sanctions Regulation are subject to review in line with the relevant National Legislation.

Having said the above, as per Article 11 of the Council Regulation (EU) No: 833/2014, Contracting Authorities/Entities are to note that Economic Operators/Companies cannot claim damages for the termination. According to this article, Russian parties and those acting on their behalf cannot obtain compensation for damages resulting from the latter complying with the obligations under the Sanctions Regulation.