

# Public Procurement sanctions against Russia

## FREQUENTLY ASKED QUESTIONS

applicable as of 9 April 2022

on **Public Procurement** related restrictions pursuant to Article 5k of 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') as amended by Council Regulation (EU) No 2022/578 of 8 April 2022.

*Informative character:*

*These Frequently Asked Questions (FAQ) provide general information and advice. For particular decisions please consult the text of Article 5k of the Regulation and legal provision referred therein:*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0833-20220413>

*Moreover, this document presents the views of the Commission's services and does not commit the European Commission. It is intended to assist natural or legal persons, including competent authorities, in clarifying the application or implementation of the relevant legal provisions. Finally, only the Court of Justice of the EU can give an authoritative interpretation of Union legislation.*

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## 1. What is the purpose of these Questions and Answers?

The adopted sanctions against Russia are unprecedented, have broad consequences and take immediate effect. These Q&A aim at supporting EU public buyers in their implementation, by explaining their logic and advising on application. However, the Q&A themselves are not legally binding and do not replace the relevant legal provisions.

## 2. What is the scope of the sanctions?

The sanctions cover ongoing and future public procurement procedures, as well as awarded public contracts and concessions.

They apply to a majority of public procurement contracts covered by the EU public procurement Directives (Directive 2014/23/EU<sup>1</sup>; 2014/24/EU<sup>2</sup>; 2014/25/EU<sup>3</sup>; 2009/81/EC<sup>4</sup>) and to a big part of the contracts excluded from their scope.

## 3. From when are the sanctions applicable?

The sanctions are applicable from 9 April 2022. From this day, new contracts falling under the prohibition should not be signed and starts the period for termination of existing contracts falling under the prohibition (except for coal contracts falling under the prohibition which should be terminated immediately if execution for further 4 months was not authorised under Article 5k(2)(f) of the Sanctions Regulation).

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<sup>1</sup> [Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1.](#)

<sup>2</sup> [Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.](#)

<sup>3</sup> [Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.](#)

<sup>4</sup> [Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the 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, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216 20.8.2009, p. 76.](#)

#### **4. When shall the sanctioned contracts be terminated?**

Ongoing contracts shall be terminated by 10 October 2022, except for specific cases authorised in accordance with paragraph 2 of article 5k. Alternatively to termination, contracts can be suspended, as explained in reply to question 28.

#### **5. What contracts do the sanctions prohibit?**

The sanctions prohibit contracts with:

- Russian nationals, companies, entities or bodies established in Russia as well as companies and entities directly or indirectly owned for more than 50% by them and persons bidding or implementing a contract on their behalf
- any person, regardless of their place of establishment or nationality, who implements or intends to implement a contract using Russian or Russian owned subcontractors, suppliers or capacity providers for participation above 10% of the contract value

See points (a)-(c) of article 5k(1) of the [Sanctions Regulation](#) for the exact formulation.

#### **6. What procurement excluded from the Directives is covered by the sanctions?**

Additionally to the scope of the Directives, the sanctions cover also procurement concerning:

- concessions awarded to public buyers on the basis of exclusive right(s)
- concessions to holders of exclusive rights
- concessions for air and passenger transport
- concessions implemented outside the EU
- water concessions
- concessions awarded to affiliated undertakings and joint ventures
- real estate transactions
- radio and audio-visual production and broadcasting, electronic communication services
- arbitration, conciliation and legal services
- financial instruments, loans and some central banks services
- some civil protection services provided by NGOs
- political campaigns
- lotteries
- passenger transport services

- purchases connected with classified information due the country's essential national security interest, contracts for intelligence activities
- purchases for resale by entities active in the sectors of water, energy, transport and postal services
- contracts awarded to affiliated undertakings and joint ventures by entities active in the sectors of water, energy, transport and postal services
- posts' financial, philatelist, logistic services and services by electronic means,
- government to government defence and security contracts and concessions
- defence and security contracts and concessions related with cooperative programmes
- defence contracts and concessions for military force deployed outside of the EU
- defence and security research and development contracts for the contracting authority

See the listing of the Directives' exclusion articles in article 5k(1) of the [Sanctions Regulation](#) for the exact formulation.

## 7. What procurement is not covered by the sanctions?

Public procurement not covered by the sanctions is:

- procurement not covered by the Directives and not specifically included in the sanctions (see for an illustrative list of specifically included procurement the question above)
- all procurement below the Directives' thresholds

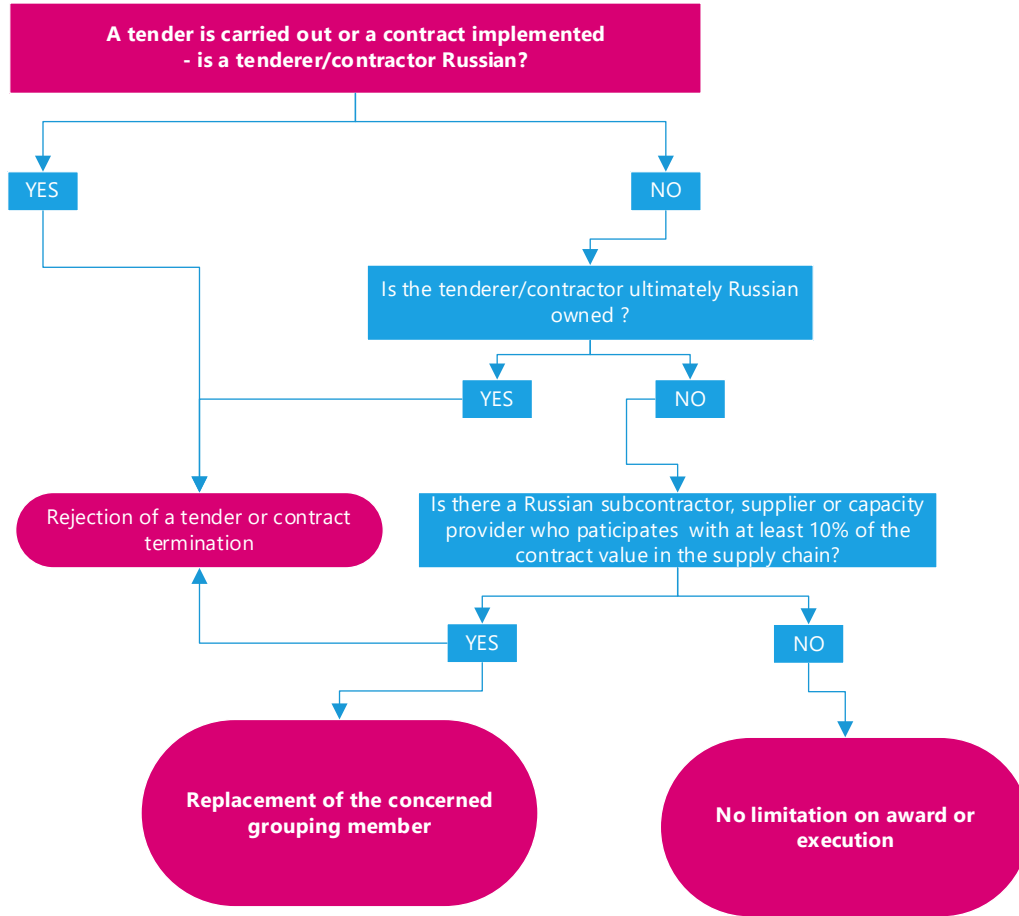
Additionally, the competent national authority may authorise the award and continued execution of contracts related to:

- the continuation of nuclear energy projects, radioisotopes precursors for medical application, radiation monitoring and civil nuclear cooperation
- intergovernmental cooperation in space programmes
- strictly necessary goods and services which cannot be purchased in sufficient quantity elsewhere
- the functioning of diplomatic representations
- natural gas and oil, including refined petroleum products, as well as titanium, aluminium, copper, nickel, palladium, iron ore and coal until 10 August 2022

See article 5k(1) and (2) of the [Sanctions Regulation](#) for the exact formulation.

## 8. What is the general logic of the public procurement sanctions?

Overall, the logic of the public procurement sanctions is:



## 9. Do the public procurement sanctions cover particular sectors?

No, as a principle the sanctions cover all sectors covered by the Directives and additional areas as specified in question 5. Other specific areas excluded from the EU public procurement legislation are also not covered by the sanctions.

## 10. Which public buyers are concerned by the sanctions?

All EU Member States public buyers are bound by the sanctions.

## 11. What should they do concerning ongoing contracts?

Ongoing contracts covered by the sanctions cannot be further implemented. Thus, they have to be terminated. In this regard:

- All public buyers should verify whether they have concluded any public contract above the EU public procurement thresholds.
- For these contracts public buyers should:
  - consider the possibility of Russian involvement in the sense of Article 5k(1)
  - check if the scope of contracts with Russian involvement is in principle covered by the sanctions (probably they are)
- In order to ensure that there is no Russian involvement in the contract, the public buyer may request a statement by the contractor along the following lines:

*I declare under honour that there is no Russian involvement in the contract of the company I represent exceeding the limits set in Article 5k of 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 2022/578 of 8 April 2022. In particular I declare that:*

*(a) the contractor I represent (and none of the companies which are members of our consortium) is not a Russian national, or a natural or legal person, entity or body established in Russia;*

*(b) the contractor I represent (and none of the companies which are members of our consortium) is not a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50 % by an entity referred to in point (a) of this paragraph;*

*(c) neither I nor the company represent is a natural or legal person, entity or body act on behalf or at the direction of an entity referred to in point (a) or (b) above,*

*(d) there is no participation of over 10 % of the contract value of subcontractors, suppliers or entities whose capacities the contractor I represent relies on by entities listed in points (a) to (c).*

- In case of any doubts, public buyers should request additional information, explanation or documents.



## **12. What should public buyers do in regard of future contracts?**

All public buyers are strongly advised to request a declaration as above with the tender documentation. They may find it appropriate to ask tenderers for detailed information or documentation on their final beneficial ownership (all consortium members in case of consortia) and possibly, also subcontractors, suppliers and entities relied on.

The above information may also be requested at a later stage, respecting the principle of equal treatment of tenderers and giving them a reasonable time for reaction.

Public buyers may request additional information in case of reasonable doubts concerning the information received.

## **13. If a contract is terminated due to these sanctions, can a new one be awarded on the basis of a negotiated procedure without publication?**

Ongoing contracts can in principle be still implemented until 10 October 2022. Thus contracting authorities should be able to award a new contract to replace the old one until then, if needed. There could be specific situations, e.g. in case of contracts requiring a particularly long preparation and tendering procedure, where this is not possible.

Every contract award on the basis of a negotiated procedure without prior publication of a contract notice needs to be justified on an individual basis. Termination of a contract due to the sanctions can be considered an unforeseeable event. It should, however, be analysed whether a new contract is necessary and whether its conclusion is extremely urgent. In view of the transition period for terminating contracts, this cannot be presumed. The award of a new contract within the transition period should in general be possible, either by using a normal, or an accelerated procedure.

For details on emergency procedures the Commission's Communications on procurement in Covid-19 crisis situation<sup>5</sup> and the asylum crisis situation<sup>6</sup> can be consulted.

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<sup>5</sup> Communication from the Commission, Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis, C/2020/2078; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.108.01.0001.01.ENG>. See notably point 2.3 thereof.

<sup>6</sup> Communication from the Commission to the European Parliament and the Council on Public Procurement rules in connection with the current asylum crisis, COM/2015/0454 final; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0454>. See notably Section 3.

#### **14. What if a public buyer signed a prohibited contract after the date of application of the sanctions?**

Although such a contract should not have been concluded in the first place, it is valid until terminated or declared invalid by a court decision. Thus, when mistakenly concluded, it should be terminated as soon as possible.

It shall be noted that formally this constitutes a violation of the Sanctions Regulation and should be subject to prosecution and penalties.

#### **15. Can a public buyer still purchase Russian energy or gas?**

Yes, it is still possible to purchase it from Russia, although in some cases it may require an authorisation by the competent national authorities.

Purchases of energy and fuel for production of energy by entities providing gas, heat and electricity to the public are not covered by the sanctions (exceptions from the Directive 2014/25/EU, in its article 23(b), not included in the sanctions Regulation).

Purchase of gas is also in general exempted (Article 5k(2) lit. e), upon authorisation. As explained in the reply to question 9, all public buyers should analyse if their contracts are subjected to sanctions. Thus, if a public buyer purchasing gas for itself discovers or learns from its contractor that it comes from Russian entities (including subcontractors or suppliers), it must seek an authorisation by the competent national authority to maintain the conditions of the current contract beyond 10 October 2022 (listed in Annex I to the Regulation 833/2014).

#### **16. Does the 10% Russian subcontracting, supplying or capacity provision limit apply individually or cumulatively?**

It applies individually to each subcontractor, supplier or capacity provider. Where more than one covered entity is involved, the value of their participation has to reach 10 % in at least one case for sanctions to apply.

**17. Does the 10% Russian subcontracting and supplying limit apply only to the first step or also further in the supply chain?**

The terms “subcontractors” and “suppliers” include the whole supply chain and not only direct suppliers. Thus, contracts are covered even if the 10% of Russian subcontracting or supplying is provided through intermediary entities.

**18. How does the 10% Russian subcontracting and supplying limit apply if the subcontractor or supplier is only partially owned by an entity covered by the sanctions?**

If a subcontractor which accounts for over 10% of the contract value is owned for more than 50% by a Russian entity or national, it is a covered subcontractor.

**19. Does *subcontractors, suppliers or entities whose capacities are being relied on* mean only those that the buyer knows about?**

No, it means any third parties involved for more than 10% of the contract value.

**20. Who is meant by *subcontractors, suppliers or entities whose capacities are being relied on*? What if these entities ultimately do not implement a contract at all?**

These notions cover all entities that perform a part of the contract, i.e. provide services or works or deliver any kind of supply. They cover also any entity indicated in the tender offer, even if it finally does not implement any part of the contract in practice and its capacity is merely relied on for the purpose of fulfilling the selection criteria.

## **21. Can subcontractors, suppliers or capacity providers be replaced?**

Yes, the public buyer receiving a tender or having a contract involving sanctioned Russian participation should in accordance with the principle of non-discrimination and equal treatment require from the tenderer or contractor its replacement in line with article 63(2) and 71(6)(b) Directive 2014/24/EU, articles 79(1)-(2) and 88(6)(b) Directive 2014/25/EU, article 42(4)(b) Directive 2014/23/EU and by analogy should offer the possibility of its replacement in case of Directive 2009/81/EC. A replacement proposed by a tenderer or contractor should be accepted if a proposed new subcontractor, supplier or capacity provider is not in an exclusion situation (including the current sanctions) and after the replacement the selection criteria remain fulfilled by the tenderer or contractor.

In case a replacement was not proposed by the contractor or tenderer, or where the replacement proposed was not acceptable, with account being taken also of the principles of non-discrimination and equal treatment, a tender should be rejected or a contract terminated.

## **22. Can a consortium member be replaced?**

No, all the members of a consortium, a group of natural or legal persons or public entities, when they jointly submit an offer having joint and several responsibility for contract implementation, constitute together one economic operator and therefore they cannot be replaced.

## **23. Does the Russian ownership concern only the immediate owner or up to the ultimate beneficial owner?**

The sanctions exclude any Russian ownership over 50%, up to the ultimate beneficial owner. If the Russian participation is partial, a proportion should be calculated and summarised as needed, even if the partial ownership comes from different ownership levels.

Thus, if a tenderer is owned by 30% by a Russian citizen and 70% by an EU company, which is owned by 40% by a Russian entity, the tenderer is owned for 58% by covered entities and should be excluded.

## **24. How is the owner's nationality proportion established in the case of companies listed on the stock market?**

Any company involved in a public procurement procedure or contract, whether listed on a stock market or not, is obliged to provide detailed information on their owners, to the extent necessary to establish that it is not Russian owned over the forbidden limit.

## **25. Is requesting the information about ownership in line with the rules on the protection of personal data?**

Information on ownership is necessary to implement the Sanctions Regulations. Therefore, public buyers are authorised to request it by Article 6 of the GDPR.<sup>7</sup> Nevertheless, all the rules on the protection of personal data (GDPR)<sup>8</sup> still apply. Thus, the information shall be protected, not shared beyond the purpose for which it was obtained, and destroyed when it is not needed.

## **26. Can excluded tenderers claim violation of the principle of transparency?**

No. The Sanctions Regulation is directly and immediately applicable from its entry into force and the fact that this exclusion was not listed in the procurement documents, or that it is not contained in the applicable Public Procurement Directive, is irrelevant.

## **27. Can contracts subject to sanctions still be awarded if their execution finishes before 10 October 2022?**

No. Contracts covered by the sanctions cannot be awarded, even if the contract execution would finish before 10 October 2022.

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<sup>7</sup> [Regulation \(EU\) 2016/679.](#)

<sup>8</sup> [Regulation \(EU\) 2016/679.](#)

## **28. Can a contract just be suspended and not terminated?**

The Sanctions Regulation prohibits the execution of the contract. Therefore, a contract can be terminated or suspended indefinitely and unconditionally, in accordance with national law.

## **29. Shall the sanctioned companies be excluded from Dynamic Purchasing Systems list?**

Since a Dynamic Purchasing System is not a contract, the participation of covered entities in the list should be considered as frozen and no invitations should be sent to them.

## **30. What does acting on behalf of or at the direction of covered entities mean?**

This is an issue of factual assessment which needs to be made by the buyer. The Commission has provided guidance on how to assess this in its Commission opinion of 17 October 2019 :

[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)

*“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.”*

## **31. How is the 50% ownership calculated in the case of consortia?**

The limit is calculated individually. It applies to each consortium member. None of them can be Russian owned for over 50%.

**32. Do the sanctions prohibit contracts with a Russian company or a Russian owner that itself is owned by a non-Russian company or individual?**

The prohibition applies in respect of all companies established in Russia, independently of their ownership, 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.

Whether or not a Russian company is owned by a non-Russian company or individual is thus not relevant.

**33. Are the contracts below the EU public procurement thresholds covered by the sanctions?**

No, contracts below the EU public procurement thresholds are not covered by the sanctions. However, a contract shall not be artificially split into parts. In case a contract is artificially split with the aim of avoiding the threshold, it is to be considered as one contract and as such covered by the sanctions.

**34. Are the decisions related to sanctions subject to review like other public procurement decisions?**

Yes, the decisions of public buyers related to the Sanctions Regulation are subject to review as any other decision taken in regard of contracts falling within the scope of Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2009/81/EC. Thus, 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 public buyer allegedly contrary to the Sanctions Regulation, may lodge a complaint before the first instance public procurement review body.

The decisions on termination of an ongoing public contract based on the Sanctions Regulation are subject to review based on the national law, as any other aspect of implementation of the public contracts. At the same time, no damages can be claimed for their termination as per Article 11 of the Sanctions Regulation.

**35. Can public buyers be held accountable for terminating ongoing contracts with sanctioned parties? What is the legal basis for excluding claims for damages?**

Claims for damages are excluded by Article 11 of the Sanctions Regulation (“no claim clause”). According to this clause, 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.