Annex 4b on Eligibility and Participation Conditions for the Request to Participate as sub-grantee of grant [EU SST 2023-26](https://webgate.ec.testa.eu/Ares/recentDocuments/show.do)

|  |
| --- |
| **IMPORTANT NOTICE** For the participants involved in critical or security sensitive activities, the participation in EUSST is open to economic operators fulfilling the following three cumulative conditions: 1. legal entities established in a Member State with their executive management structures established in that Member State.
	* Economic operators are considered to be established in the EU when they are formed in accordance with the law of a Member State and have their central administration, registered office and principal place of business in a Member State (if legal persons) or they are nationals of one of the Member States (if natural persons).
	* ‘Executive management structure’ means the body of the legal entity appointed in accordance with national law and which, where applicable, reports to the chief executive officer or any other person having comparable decisional power, and which is empowered to establish the legal entity's strategy, objectives and overall direction, and oversees and monitors management decision-making.

 1. economic operators committing to carry out all relevant activities in one or more Member

States; and 1. 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 appendix provides instructions how to complete the Annex on Participating Conditions (named hereafter *Annex PC* to be filled by each entity subject to the eligibility and participating conditions. For entities not carrying out critical or security sensitive activities, as a minimum Section 1 and Section 2. of Annex PC to be completed. |

# **GENERAL INSTRUCTIONS**

All information, declarations and supporting documents shall be provided prior to (sub)contract signature and shall refer to circumstances existing at the time of submission. They shall **be signed by a legally appointed representative with powers to represent the company (section 4).**

**In case of electronic submission, the template and all the evidence requested shall be delivered in a single dedicated zip archive.**

Entities not compliant with the eligibility and participating conditions may issue a request for waiver **at the time of submission of the annex PC**

All the information provided in the context of completion of *Annex PC* will be treated according to Article 339 of the Treaty on the Functioning of the European Union (TFEU)[[1]](#footnote-1).

# **ESTABLISHMENT AND EXECUTIVE MANAGEMENT STRUCTURES IN A MEMBER STATE**

**Required evidence:** declaration of section 1 and:

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

# **ACTIVITIES IN A MEMBER STATE**

**Required evidence**: the declaration set up in Section 2.3 of *Annex PC* or declaration of annex 2.2 for all infrastructure, facilities, assets, and resources located outside EU territory associated with the requests for waivers (section 5) when not compliant.

**Entities subject to eligibility and participating conditions will are requested prior to the signature of the contract to describe and locate all infrastructure, facilities, assets and resources, which are outside of the EU territory and will be used** **for the implementation of the relevant activities and fill the associated request for waiver (section 5)**. This may for example include location of offices, laboratories, testing facilities, but also the software and human resources required/involved. For SST Sensors the exact location of the sensor and the location of the facility performing the operations must be indicated when outside of the EU territory

**In case the usage of space assets or services or the usage of cloud facilities or services located outside the EU 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 eligibility and participation conditions needed for the relevant activities 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 Request to Participate/Proposal and throughout the entire duration of the resulting contract**, unless a waiver has been accepted by the Commission**

**ASSESSEMENT OF CONTROL**

For activities described in Annex PC, legal entities established in Member States can participate in EUSST only if they are directly or indirectly controlled by Member States or by nationals of Member States. The ownership control assessment will be conducted to determine control. Furthermore, guarantees may be required if control by a third country, a third country entity or a third country national is confirmed.

The present document is intended to provide information to the applicants on how the assessment will be performed. This annex may be used to help the subgrantees and subcontractor candidates to run a self-assessment and to anticipate their potential control by a third country or by a third-country entity and to provide the necessary supporting documents.

The entities candidates to a subgrant or a subcontract who have successfully submitted the information / documents / supporting evidence requested in the Annex PC in the setting of another procedure of the European Commission or EUSPA (notably in the frame of EU Regulations 2018/1092, 2021/697 or 2021/696), or in the setting of a procedure of ESA (in Galileo, EGNOS, Galileo/EGNOS upstream R&D of Horizon Europe, GOVSATCOM) have no obligation to repeat the exercise, provided the time that has elapsed since the issuing of the information / documents / supporting evidence does not exceed one year at the time of submission of the tender and at the condition that the information provided is still valid at the date of submission

 Please be aware that eligibility conditions must be fulfilled not only at signature of the subgrant Contract, but throughout the entire duration of the Contract execution. Any changes in the control ownership status that occur during the project must be immediately notified to the contracting authority.

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

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

Public bodies[[2]](#footnote-2) will be automatically considered as controlled by their country of establishment.

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

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

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

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

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

## Ownership structure and specific rights

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

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

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

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

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

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

## Corporate governance

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

The assessment will identify at which level (by which bodies) the strategic business decisions are taken, the decision-making procedures (including majorities and quorum requirements, voting rules and prerogatives accorded to other bodies, if any) and the nature of decisions taken.

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

## Commercial links conferring control

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

## Financial links conferring control

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

All modes of financing may be taken into account, such as capital increase, loans, guarantees, debt waivers, bails[[3]](#footnote-3) and grants.

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

## Other sources of control

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

They will be assessed on the basis of the information provided in Annex PC. on Eligibility and Participation Conditions, including supporting evidence.

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

## Assessment by the EU services

The assessment will be performed by the European Commission (EC) based on information provided in Annex PC and submitted supporting documents.

In case of doubt, the EC Evaluation Committee may use publicly available information to clarify questions about the data or information provided or contact the participant for clarifications or additional information.

All data and documents will be treated as confidential.

Personal data will be handled in accordance with EU Regulation [2018/1725](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32018R1725&qid=1583218806694)[[4]](#footnote-4) to ensure compliance with the principles of transparency, proportionality, impartiality and legality.

# **Waivers**

Waivers on criteria a) and b) – section 5

Participation may still be possible when an entity is not established in the EU, or a relevant activity is performed outside of the EU. In this case, the entity concerned shall submit a request for waiver (a template is provided in Annex PC) together with guarantees in line with the following requirements:

* The activity is needed for the performance of the grant
* no substitutes are readily available in the Member States.
* such subcontract shall not require generation nor exchange of EU Classified Information with the entity, or with the facility located outside of the EU territory
* assurance is provided regarding to the integrity and resilience of the EU SST operations and services, as confirmed by the competent authority of the member of the Partnership in charge of the subcontract. The required assurance shall be identified in light of the draft General Security requirements and the associated Risk and Threat Analysis.

The request for waiver shall be made before contract signature, and no contract shall be signed without confirmation by the European Commission that the waiver is granted. The outcome of the assessment shall be communicated to the requestor thereafter.

Waivers on criteria c) – section 6

Participation may still be possible when an entity has self-declared or has been assessed as being “non-EU controlled”, including for participants that are subject to control by a third country/third country entity. In this case, the entity concerned shall submit a request for waiver together with guarantees in line with the following requirements:

1. control over the entity is not exercised in a manner that restrains or restricts its ability to:
2. carry out the activities subject to the subcontract.
3. deliver results, in particular through reporting obligations.
4. the controlling third country or third country entity commits to refrain from exercising any controlling rights over or imposing reporting obligations on the entity in relation to the subcontract.
5. the entity in question has taken all the necessary measures to ensure:
6. the security of EU SST in light of the confidentiality of the sensitive information, and in particular, if the subcontract involves classified information, information defined as EU Classified Information
7. the robustness of the mechanisms put in place to comply with points a) and b).

 The guarantees must explain the concrete measures put in place to ensure compliance. The guarantees must be assessed and signed by the competent Member State authorities in which the entity is established. Since the waiver procedure constitutes a derogation, the conditions will be interpreted strictly. Guarantees/approvals which include a disclaimer will be rejected.

If the guarantee/approval is not complete or inadequate, the participant may be contacted for changes or updates.

 The measures set out in the guarantees must be valid and complied with/implemented during the entire Contract execution, otherwise the guarantee will be considered void, and the participation of the relevant entity might be declared ineligible.

## New participants joining during the contract.

New entities, including subcontractors joining the project later on, will have to complete Annex PC on Eligibility and Participation Conditions and submit the relevant supporting documents. The same rules as above apply mutatis mutandis.

Request for waiver signature (section 7 and 8)

The request for waiver shall **be signed by a legally appointed representative with powers to represent the company (section 7), and the relevant competent authority for the waiver requested (section 8)**

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

Eligibility and participation conditions must be fulfilled not only at the submission of Request to Participate/Proposal and Contract signature, but throughout the entire duration of the Contract execution.

Participants will be contractually obliged to notify any changes in the control/ownership status that occur during the project. Such changes must be immediately notified by the Prime Contractor to the contracting authority The same applies to changes affecting the content of guarantees.

If an entity becomes controlled by a third country/third country entity during the contract execution (e.g., as a result of an acquisition by a foreign entity), its participation may have to be terminated, unless the contracting authority accepts a request for waiver including the necessary guarantees, as set out above.

1. Article 339 of the TFEU: “*The members of the institutions of the Union, the members of the Evaluation Committee, 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.”* [↑](#footnote-ref-1)
2. 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. [↑](#footnote-ref-2)
3. E.g., an investor issuing a guarantee to a bank and the bank therefore is willing to grant a loan [↑](#footnote-ref-3)
4. Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39)*.* [↑](#footnote-ref-4)