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Directorate-General for Development and Cooperation — EuropeAid

Neighbourhood
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NOTE TO THE ATTENTION OF THE JOINT MANAGING AUTHORITIES OF THE ENPI CBC PROGRAMMES

Subject: Rule of origin

The purpose of this note is to clarify the application of the rules of nationality and origin to ENPI Cross Border Cooperation. The situation will be addressed differently depending on whether there is co-financing from a Member State. This note updates our Note of 12 May 2011.

1. Procurement rules and rules of nationality and origin

In compliance with article 23 of the ENPI CBC implementing rules¹ where the implementation of an action requires procurement by a Joint Managing Authority or by a grant beneficiary, the PRAG² applies. The relevant provisions for procurement applicable to ENPI-CBC Programmes are those in Annex IV.

This Annex as well as the Financing Agreement signed with Russia states a clearly distinction between:

- Procurement procedures (which includes open procedure, restricted procedure and negotiated procedure according to Annex IV) and
- Rules on participation (i.e. rules of nationality and origin).

In what concerns the procurement procedures, where the Joint Managing Authority or the grant Beneficiary is a public entity from an EU Member State it should apply its own national rules on procurement procedures as set out in article 8.2 of Annex IV: "*Where the Beneficiary or a partner is a contracting authority and/or a contracting entity within the meaning of the Community Directives applicable to procurement procedures, it must apply the relevant provisions of those texts, in preference to the rules set out in 3 to 7*".

¹ Commission Regulation (EC) No 951/2007 of 9 August 2007 laying down implementing rules for cross-border cooperation programmes financed under Regulation (EC) No 1638/2006 of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument.

² Practical guide to contract procedures for EU external actions

Where the Beneficiary is a public entity from Russia it should also apply its national rules on procurement procedures as set out in paragraph 8 of article 4 of the Financing Agreement: *"The procedures of the procurement which is carried out on the territory of the Russian Federation by Russian public entities are regulated by the national legislation of the Russian Federation"*.

In what regards the rules on participation, even though a public Beneficiary from an EU Member State follows its own national rules on procurement procedures according to article 8.2 of Annex IV, the rules on nationality and origin apply: *"In all cases, the general principles and rules on nationality and origin set out in 2³ still apply"*.

Where a Beneficiary is a public entity from Russia which follows its own national rules on procurement procedures according to the first part of the paragraph 8 of article 4 of the Financing Agreement, the EU rules on participation apply: *"The Parties agree that the rules on the award of contracts and grants, on the eligibility and on the rules of origin and nationality to be applied for the implementation of the Agreement are those as established by Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighborhood and Partnership Instrument and the Practical Guide to contract procedures for EC external actions (PRAG)"*

This means that in all cases, including Beneficiaries who are public entities from an EU Member State as well Beneficiaries who are public entities from Russia, the ENPI rules of origin and nationality apply.

2. The rules on participation in the context of ENPI-CBC

2.1. General principle

The rule of nationality

Article 21 of the ENPI states that the participation of procurement contract financed under this regulation shall be open to:

- all natural persons who are nationals of, and legal persons established in, a Member State of the Community, a country that is a beneficiary of this Regulation, a country that is a beneficiary of an Instrument for Pre-Accession Assistance set up by Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) or a Member State of the EEA; (paragraph 1 of article 21);
- natural persons who are nationals of, and legal persons established in, a country having traditional economic, trade or geographical links with neighbouring countries, and the use of supplies and materials of different origin (only in duly substantiated cases, authorized by Commission) (paragraph 2 of article 21);
- to all natural persons who are nationals of, or legal persons established in, any country other than those referred to in paragraph 1, whenever reciprocal access to their external assistance has been established (paragraph 3 of article 21).

³ Section 2 of Annex IV to grant contracts (PRAG)

The rule of origin

According to article 21 paragraph 6, all supplies and materials purchased under contracts financed under this Regulation shall originate in the Community or a country eligible under paragraphs 1, 2 and 3 of the mentioned article 21.

2.2. Application of the rules on participation where there is co-financing from a Member State

According to article 21.8 of the ENPI Regulation⁴ (REGULATION (EC) No 1638/2006): *"Whenever Community funding covers an operation co-financed with a Member State, with a third country, subject to reciprocity as defined in paragraph 3, or with a regional organisation, participation in the appropriate contractual procedures shall be open to all natural or legal persons who are eligible pursuant to paragraphs 1, 2 and 3 as well as to all natural or legal persons who are eligible under the rules of such Member State, third country or regional organisation. The same rules shall apply in respect of supplies, materials and experts."*

On this basis, the national rules of nationality and origin of the co-financing Member State can be applied under the following conditions:

- these national rules do not restrict the conditions of nationality and origin as defined in article 21.6 in connection with articles 21.1, 21.2 and 21.3 of the ENPI Regulation;
- the technical assistance or projects in question are co-financed by a public entity in an EU Member State. Evidence of this co-financing is to be submitted by the JMA to the Commission upon request.

This also applies both to procurement procedures carried out by the Joint Managing Authorities and those carried out by grant beneficiaries. This rule on participation applies regardless of the place of establishment or nationality of the grant beneficiary.

Concerning the procurement procedures carried out in Russia by their public entities, the EU rules of nationality and origin apply as stated in article 4 paragraph 8 of the Financing Agreement. In the case of projects co-financed by a public entity in an EU member State, the extension of eligibility as described above will apply. When the Russian rules of eligibility and origin cover exactly the same extensions as the co-financing Member State, these rules can be acceptable for procurement under grants. This condition must be checked by the Joint Managing Authority in order to confirm the project costs' eligibility. In any case, it should be noted that the supplies and material purchased in Russia are eligible under article 21.1 of the ENPI regulation.

2.3. Application the rules on participation where there is no public co-financing from a Member State

Where there is no public Member State co-financing, the rule of nationality stated in articles 21.1, 21.2 and 21.3 and the rule of origin stated in article 21.6 of the ENPI Regulation apply.

⁴ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument.

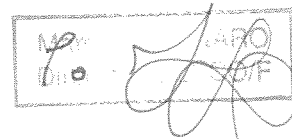
2.4. Application the rules on participation to the international organisations

A similar extension to the rules of nationality and origin concerns International Organisations as set out in paragraph 8 of article 21: *"Whenever Community funding covers an operation implemented through an international organisation, participation in the appropriate contractual procedures shall be open to all natural or legal persons who are eligible pursuant to paragraphs 1, 2 and 3 as well as to all natural or legal persons who are eligible pursuant to the rules of that organisation, care being taken to ensure that equal treatment is afforded to all donors. The same rules shall apply in respect of supplies, materials and experts."*

The extensions of eligibility described in Section 2 of this note do not represent derogations. In duly justified cases, the JMA may grant derogations to the rule of nationality and origin to grant beneficiaries in accordance with Section 2.3.2 of the PRAG.

My services remain available for any further information that you may need.

Yours sincerely,

A rectangular stamp with a grid pattern is partially visible, containing some illegible text. A handwritten signature in black ink is written over the stamp.

Marcus CORNARO