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MEETING DOCUMENT

From:	European Commission
To:	Working Party of Foreign Relations Counsellors (RELEX) – Horizontal Questions
Subject:	Procurement under Global Gateway: Legal Framework and Eligibility Rules

PROCUREMENT under GLOBAL GATEWAY:

LEGAL FRAMEWORK and ELIGIBILITY RULES

The purpose of this note is to provide an overview of the rules governing access to procurement in the context of the EU's external action, including under Global Gateway, through the prism of the different management modes used for implementing the EU Budget and concrete examples. This note is limited to a description of the instruments implemented by DG INTPA, notably, NDICI-GE⁽ⁱ⁾.

I. INTRODUCTION: MANAGEMENT MODES UNDER GLOBAL GATEWAY

The 'management mode' (or method of implementation) describes the legal/contractual arrangements through which an EU-funded action is implemented, and the way funds are channeled to recipients. Under Global Gateway, procurement is carried out in different ways, depending on the entity managing the action.

On the one hand, for actions implemented in direct management, procurement is managed directly by the Commission's services.

On the other hand, for actions in indirect management, the Commission entrusts the implementation of Union funds, including through procurement, to a partner country or a pillar assessed entity ⁽ⁱⁱ⁾.

This note differentiates procurement under (1) direct management and indirect management with partner countries and (2) indirect management with pillar-assessed entities.

In this regard, the following considerations must be taken into account:

- direct management and indirect management with partner countries are treated together as the partner country is required, through the signature of a "financing agreement", to apply the Commission's rules.

- in case of indirect management with a pillar assessed entity, procurement can be carried out at two levels:

- i. by the pillar assessed entity itself ("procurement by the pillar assessed entity"), provided that the pillar assessment of the entity covers its rules and procedures for the award and management of procurement contracts;
- ii. by the grant beneficiary/borrower of the pillar assessed entity ("downstream procurement"), provided that the entity's pillar assessment covers its rules and procedures concerning the award and management of grants and/or financial instruments/budgetary guarantees.

II. ELIGIBILITY RULES (iii)

1. Direct management and indirect management with partner countries

a) What are eligibility rules?

Eligibility rules (also referred to as “access to market rules”) lay down which entities can participate in procurement award procedures, i.e. whether entities established in a particular country/territory are eligible for procurement procedures financed by the EU in third countries.

These rules are laid down in the financing instruments (NDICI-GE). NDICI-GE in Appendix 1, Table 1, summarises the restrictions in terms of eligibility of entities (based on their effective place of establishment/nationality). NDICI-GE bases the eligibility on nationality and, for legal persons, on the place of their establishment.

It is reminded that the Agreement on Government Procurement (GPA) under the World Trade Organisation (WTO) does not apply due to the “international assistance” exception in its Article II.3 (iv).

The OECD Development Assistance Committee (DAC) recommendation of untying aid calls for full untying, which requires that procurement is open to “substantially all” aid recipient countries in the List of ODA (official development aid) Recipients and to OECD members. To note that the OECD has launched in 2023 a review of the OECD DAC recommendation on untying. Notably, one of the objectives of such review is to assess whether “*the principles of open, fair and transparent procurement markets that underpin the DAC Recommendation [are] currently undermined by the practices of other development co-operation models*”(v).

b) Can these eligibility rules be further restricted for concrete procurement award procedures under NDICI-GE?

No, under the legal framework currently in force, it is not possible. Those limitations are only possible for grant award procedures, not procurement(vi).

c) Can the current eligibility rules under NDICI-GE extend to controlling entities?

No, it is not possible.

Compliance with the eligibility rules is limited to the place of establishment of an economic operator and does not look into the nationality or place of establishment of its controlling entities.

NDICI-GE does not contain provisions similar to the ones applicable to some programmes like the Digital Europe Programme(vii), the European Defence Fund(viii) or Horizon Europe(ix).

d) Do the current eligibility rules apply to the origin of supplies/materials procured under a procurement contract financed under NDICI-GE?

No, they do not apply.

The nationality restrictions apply to the entities participating in award procedures, but not to the origin of supplies/materials, which are fully untied under NDICI-GE ^(x) (“rule of origin”).

e) Could the upcoming “recast” of the EU Financial Regulation provide a legal basis to apply restrictions for NDICI-GE actions?

Yes. Article 136 of the recast of the EU Financial Regulation, which will enter into force before the end of 2024, includes an explicit horizontal legal basis for any necessary restrictions for the participation in the award procedure and to the full life cycle of the resulting procurement contract in cases where an action affects security or public order, in particular concerning strategic assets and interests of the Union and/or its Member States, including the protection of the integrity of digital infrastructure, communication and information systems, and related supply chains.

These restrictions, may affect:

- (a) the entity, in particular the criteria for access to the procedure or eligibility based on the country of establishment of the participants, including the contractor or beneficiary and the affiliated entities and any subcontractors, as well as with respect to direct or indirect control of any of those participants by public or private entities of a third country;
- (b) the activity, in particular with respect to the country of origin of the equipment, goods, supplies or services, as well as with respect to the place of performance, which may be limited to Member States;
- (c) additional security requirements for the entities and activities, in particular conditions based on a security risk assessment of the equipment, goods, supplies or services, manufacturer, contractor, beneficiary, the affiliated entities or any subcontractors.

Article 136 would not just allow to set restrictions regarding ownership/control but also to impose “rules of origin” restrictions, or more precisely rules on supply chains, place of manufacturing, place of assembly etc., necessary to ensure security/public order.

Those restrictions shall be limited to what is strictly necessary to achieve the required protection of security and public order. In order to apply those, the financing decision/measure will have to indicate that specific award procedures affect security or public order, as referred above.

f) What can we do to further restrict eligibility rules for concrete procurement award procedures under NDICI-GE?

Any further restrictions, beyond the ones that could be made possible through Article 136 of the recast of the EU Financial Regulation (see above), would require amending NDICI-GE. Such further restrictions could, in any case, be contemplated in the context of the Instrument that will be established for the next Multi-Annual Financial Framework.

On this subject, it is worth noting, albeit in a different context, that Article 11 of the Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility provides not only for stricter eligibility rules, affecting both the nationality of tenderers and the origin of supply and materials, but also for the possibility to restrict even more

access to procurement, in direct or indirect management, where such restrictions are required on account of the specific nature or objectives of the activity or specific award procedure or where those restrictions are necessary for the effective implementation of the activity.

2. Indirect management with pillar assessed entities

a) Which eligibility rules do pillar assessed entities apply?

It is to be reminded that eligibility rules of the partner entity are not assessed in the pillar assessment procedure.

Under the NDICI-GE, in case of procurement directly done by the pillar assessed entity, pillar assessed entities can apply their own eligibility rules, provided that entities that are eligible under NDICI-GE can participate. That is to say, in any event, entities eligible under NDICI-GE shall be eligible, potentially supplemented by the entities eligible under the pillar assessed entity's own rules as well.

In case of downstream procurement (procurement done by grant beneficiaries/borrowers), the rules laid down by the pillar assessed entity for downstream procurement apply.

Two situations can be identified in pillar assessed entities: some pillar assessed entities do not impose any eligibility restrictions, while others do impose eligibility restrictions (for example limiting it to their own member countries). This implies that:

- a) entities that have broader rules than those of NDICI-GE can apply their own rules. This includes pillar-assessed entities that have world-wide eligibility for procurement, either because they have untied their aid following the OECD DAC recommendations (see below, in particular, EU Member States) or because they are international organisations with a world-wide membership. This is also, for example, the case of the EIB.
- b) entities, in particular regional organisations (such as regional multilateral development banks) having narrower eligibility rules than those laid down in the NDICI-GE must obtain a waiver from their governing boards to extend eligibility to make it consistent with NDICI-GE.

In order to understand these different trends, it is important to take into consideration the following:

- membership of international organisations: members of international organisations are always eligible for procurement award procedures such organisations launch;
- implementation of OECD-DAC recommendation of untying aid (see above): some Member States organisations have implemented it, or have gone even beyond it;
- eligibility for non-EU/EEA economic operators may be the consequence of domestic legislation^(xi): For instance, EU Member States have developed differing systems in domestic law, which can have an impact on the eligibility rules of Member States organisations;

- NDICI-GE does not govern downstream procurement, so pillar assessed entity do not have to transpose the eligibility rules to any further entity carrying out procurement using EU funds. This takes into account the fact that pillar assessed entities' legal frameworks regarding procurement by borrowers vary depending on the nature of the operations or the borrower:

- a) In the case of public sector operations, the pillar assessed entity lays down the rules that the borrower/grant beneficiary shall apply (including eligibility rules or rules of origin);
- b) In case of private sector operations, given the very different nature of incentives and risks, the pillar assessed entities request that the works and services to be financed are appropriate for the project and are or will be procured at fair market prices, and under contracting conditions that are reasonable in relation to prevailing market practice. Thus, private sector clients often follow established private sector procurement methods rather than formal competitive tendering for their procurement ^(xii). Thus, no eligibility requirements are demanded;
- c) Lastly, the treatment of concessions (Public Private Partnerships) varies between pillar assessed organisations.

b) Can the Commission currently require pillar assessed partners to restrict access to procurement only to entities established in countries eligible under NDICI-GE?

No. According to Article 28(5) NDICI-GE, in case of actions in indirect management “*the eligibility rules of those entities shall also apply*”. Therefore, a limitation of eligibility rules can only come as a decision of the partners themselves.

In addition, even if some partners aligned, exceptions would have to be made in order for them to participate in large projects. These projects are usually co-financed by several co-financiers. In such a setup, co-financiers rely on the rules of one of the other co-financiers provided certain conditions are met. In those structures, if some pillar assessed entities followed only the EU eligibility rules, they would have to grant waivers every time they wished to jointly co-finance with non-aligned IFIs (with broader rules).

c) Could the Commission explore the application of restrictions under the EU Financial Regulation?

Yes, under new Article 136 of the EU Financial Regulation (recast), but only when security or public order can be affected.

This provision (see above) can apply to indirect management as well. The application of those provisions to budgetary guarantees under EFSD+ needs to be further explored due their different nature.

The considerations described above regarding the possibility of partners aligning with NDICI-GE also apply here.

Appendix 1

Figure 1: Pillar assessment structure for an entity requesting to be entrusted with implementation of the EU budget under indirect management

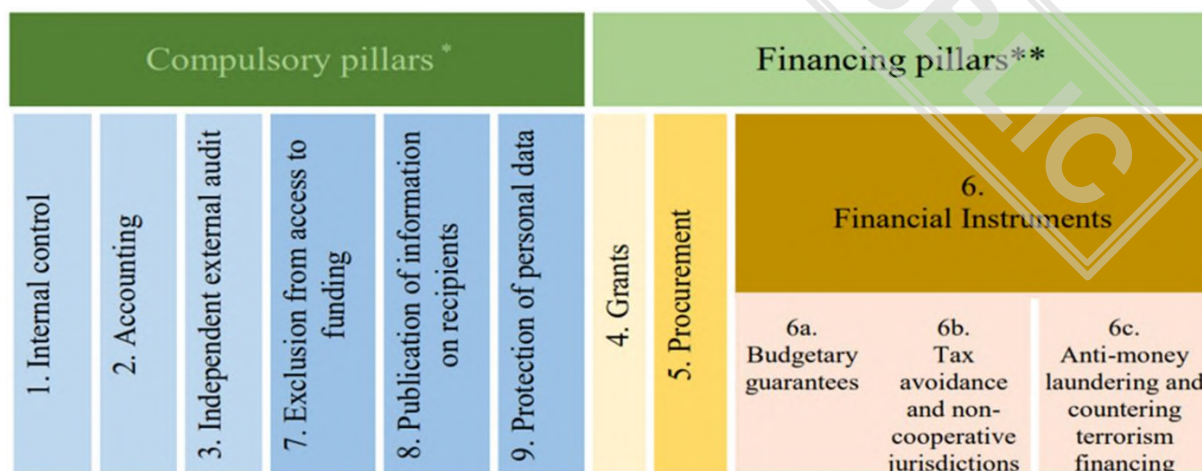


Table 1: Eligibility rules under NDICI-GE (Article 28)^(xiii):

Entities established in the countries/territories listed below are eligible by default:

- a) Member States, IPA III beneficiaries and contracting parties to the Agreement on the European Economic Area (Iceland, Lichtenstein, Norway);
- b) Neighbourhood partner countries;
- c) overseas countries and territories;
- d) developing countries and territories, other than G-20 group (Argentina, Brazil, China, India, Indonesia, Mexico, South Africa, Türkiye ^(xiv)).

In addition, entities established in other countries/territories may be eligible under conditions:

- a) Russian Federation: for cross border or multi-country programmes under the Neighbourhood geographic programme;
- b) developing countries which are members of G-20 group and other countries and territories: when the relevant procedure takes place in the context of an action financed by the Union under the Instrument in which they participate ^(xv) or the country is covered by a multi-country action;
- c) OECD members where actions are implemented in a LDC or a highly indebted poor country;
- d) countries for which reciprocal access to external funding is established by the Commission;
- e) Other: in the case of urgency or the unavailability of services in the markets of the countries or territories concerned, or in other duly substantiated cases where application of the eligibility rules would make the realisation of an action impossible or exceedingly difficult.

(i) Regulation (EU) 2021/947 of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009 (OJ L 209, 14.6.2021, p. 1).

(ii) The ‘pillar assessment’ is an assessment of an entity’s rules and procedures for the purpose of being entrusted with the implementation of EU funds under indirect management. The pillar assessment aims at verifying that the concerned entity can provide a protection of the EU financial interests that is equivalent to the one provided by the Commission when it implements EU funds directly (see Figure 1 in the Appendix 1 for more details on the structure of the pillar assessment). Under Global Gateway, pillar assessed entities implementing EU-funded actions are mainly international organisations, the European Investment Bank or the European Investment Fund, public law bodies or private law bodies with a public service mission. In addition, for the purpose of the External Action Guarantee under EFSD+, private law bodies without a public service mission may also be eligible, subject to certain conditions, including the finalisation of a pillar assessment, for concluding guarantee agreements with the Commission.

(iii) This note does not deal with the application of EU Restrictive Measures.

(iv) *“Except where otherwise provided in a Party’s annexes to Appendix I, this Agreement does not apply to: (e) procurement conducted: (i) for the specific purpose of providing international assistance, including development aid; (iii) under the particular procedure or condition of an international organisation or funded by international grants, loans or other assistance where the applicable procedure or condition would be consistent with this Agreement.”*

(v) see: [Untied aid - OECD](#)

(vi) According to Article 28(9) NDICI-GE, it is possible to restrict eligibility in terms of “nationality, geographical location or nature of applicants where such restrictions are required on account of the specific nature and the objectives of the action and where they are necessary for its effective implementation”. Reference to applicants in Article 28(9) NDICI-GE implies that restrictions are only possible for grants, but not for procurement (see definition of applicant in Article 2 of the EU Financial Regulation)

(vii) Article 12 allows the work programme (i.e. financing decision) to provide that legal entities established in associated countries and legal entities that are established in the Union but are controlled from third countries are not eligible to participate for duly justified security reasons. In such cases, calls for proposals and calls for tenders shall be restricted to legal entities established or deemed to be established in Member States and controlled by Member States or by nationals of Member States.

(viii) It specifically requests that “the recipients and subcontractors involved in an action shall not be subject to control by a non-associated third country or by a non-associated third-country entity”, in order to ensure the protection of essential security and defence interests of the Union and its Member States.

(ix) For actions related to EU strategic assets, interest, autonomy or security “for duly justified and exceptional reasons, in order to guarantee the protection of the strategic interests of the Union and its Member States, the work programme may also exclude the participation of legal entities established in the Union or in associated countries directly or indirectly controlled by non-associated third countries or by legal entities of non-associated third countries from individual calls for proposals, or make their participation subject to conditions set out in the work programme”.

(x) Article 28(3) NDICI-GE.

(xi) For procurement award procedures subject to the European Public Procurement directive, please note that the question of the competence to open up eligibility beyond the eligibility laid down in the public procurement directives is being discussed before the European Court of Justice (Case C-652/22).

(xii) “Procurement Principles applicable to Private Sector Transactions Guidance for MDBs 1 October 2012” available at: https://www.bstadb.org/MDB_ProcurementPrinciplesApplicableToPrivateSectorTransactions.pdf

(xiii) This table identifies the applicable rules in NDICI-GE to geographic programmes and Civil Society Organisations and Global Challenges thematic programmes. Other thematic programmes are fully untied (Human Rights and Democracy and the Peace, Stability and Conflict Prevention) meaning there are no legal or regulatory requirements to open competition for aid funded procurement ([Untied aid - OECD](#)).

(xiv) However, being an IPA III beneficiary, Turkey is eligible.

(xv) The notion ‘participation’ under Article 28(1)(d) NDICI-GE covers various forms of participation, such as where the third country participates in the action as a donor co-financing the action or where the third country participates in the action as a beneficiary.