

European Space Programme

ANNEX I.H – Part 3

Additional information regarding the Assessment of participating conditions

Version 0.1

HISTORY OF CHANGES		
Version	Publication date	Changes
0.1		



IMPORTANT NOTICE

The purpose of this document is to provide additional guidelines on the criteria which will be applied and the circumstance which will be taken into account by the contracting authority and the competent tender evaluation boards, to assess the situation of dominant influence.

These guidelines are not supposed to provide additional award criteria with respect to those included in the relevant tender documentation. They are brought to the attention of the candidates to ensure transparency and foster fair and equal treatment for the assessment of control (Article 7.1) of the Tender Specifications.

The criteria and circumstances included in the present guidelines are indicative and not exhaustive

This document does not include the evaluation of the request for waiver, which can take into account specificities of the tenders, in particular the sensitivity of the activities to be performed by the awarded entity.

The notion of control/decisive influence is assessed with regard to the overall situation and corporate governance of the entity and shall not be limited to the concrete situation and corporate governance concerning the subject matter of the tender or more in general EU funded programmes.

With regard to Annex I.H to the Tender Specifications and to the assessment of decisive influence, the macro excel may be also used to help tenderers, members of the core team and subcontractors to run a self-assessment and to anticipate their potential control by a third country or by a third-country entity and the necessary supporting documents that may be requested.

How is 'control' by a 'third country' or 'third-country entity' assessed?

'Legal entities' need to assess the 'control' by a third-country element by checking the following issues:

- a) Ownership structure and specific rights (*i.e.* shareholders rights)
- b) Corporate governance

- c) Commercial links conferring control
- d) Financial links conferring control
- e) Other sources of control

a) Ownership structure and specific rights (i.e. shareholders rights)

‘Control’ must be assessed following these indications:

- (i) When the ‘legal entity’ shares are **directly owned**” by individual shareholders (natural persons that own and control the company, and act under their own name) these are the ultimate owners. Attention needs to be paid to specific individual shareholders which operate under a mandate granted by the “real owner”. In such situation, information may be requested to clarify if the beneficial owner is an EU national.

In these cases, the nationality of the individual shareholders has to be considered as a first element of assessment:

- If all the shareholders are EU nationals, it is concluded that the ‘legal entity’ is not subject to ‘control’ by a third-country individual;
- If there are third-country individuals among the shareholders, their ability to exercise ‘control’ has to be assessed as explained below.

- (ii) When the ‘legal entity’ shares are **indirectly “owned”** by the ultimate owners, several ownership layers can exist between the ‘legal entity’ shareholders and the ultimate owners (the natural persons that own and control the company):

- The identification of the ultimate owners has to be conducted at each layer, and at each layer has to be assessed the existence of third-country individual or ‘third-country entity’ controlling that intermediate layer, up to the ultimate owners of all the layers involved;
- ‘legal entities’ must therefore assess, all along the chain of control of their entity until the ultimate owners, that there is no ‘control’ of the ‘legal entity’ by ‘third countries’ or ‘third-country entities’;
- In cases where shareholding is widely spread, and one or several ‘third-countries’ shareholders are the largest shareholders, even if the shareholding is below 25%, detailed control assessment of all the above-mentioned elements has to be conducted. Indeed, in such a case, even if shareholding may look as not significant, it could be *de facto* that the shareholder becomes the one being able to influence the strategic decisions;
- Only ultimate owners having more than 5% of the shares or 5% of the voting rights of the ‘legal entity’ must be identified.

- (iii) If the ‘legal entity’ is a company listed in the **stock exchange**, a subsidiary of a listed company or is controlled by a listed company, ‘control’ has to be assessed in the same way as described above. However, in some cases, as regards the shares that are floating, the ‘legal entity’ is only in a position of identifying the shareholders that register their attendance for the general meeting and not those that do not register. In these cases, in order to assess ‘control’, more emphasis should be made on identifying:

- the bodies embodied with the adoption of strategic decisions;
- the decisions that are taken at the shareholders' general meeting and the quorum (participation and majority) required to adopt such decisions;
- the decisions that are taken at other management bodies (such as Executive Board, Supervisory Board, Board of Directors, Advisory Boards, CEO) and the quorum (participation and majority) required to adopt such decisions;
- the appointment of management bodies and the possibilities of the largest shareholders to appoint them;
- any veto right (or possibility to exercise) or multiple voting shares (*e.g.* golden share), if existing;

Where not all the ultimate owners can be identified (due to the presence in the control chain of listed companies with important float (share of capital on a regulated stock market)), the legal representative of the 'legal entity' must ensure that under the national legislative provisions no unknown shareholder can, alone or in concert, be in a position to exercise a decisive influence on the 'legal entity'.

'Control' can be granted to third-country shareholders through extensive rights attached to their shares established in the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, or in shareholders agreements, such as right to veto a transfer of shares, pre-emption rights (right given to an existing shareholder to be the first option in case other shareholders want to sell their shares), right of the third-country shareholder to sell its shares (depending on the applicable conditions), right to purchase additional shares or conditions for the investment in the company imposed by the third-country shareholder. These rights could grant them the ability to obtain concessions on matters, which, on their face, and having regard to the corporate governance agreed upon, appear to be controlled by the EU shareholder(s).

Control can be established through agreements addressing decision making (vote or veto) and investment undertakings in the company with the relevant information contained in the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, or in shareholders agreements,

Evidence to be provided regarding ownership structure and specific rights.

The entity subject to participating conditions needs to provide:

- information on the nationality of the individual ultimate owners¹ that detain at least 5% of the capital or voting rights in the 'legal entity';

¹ Ultimate owners are always natural persons (except in cases of public entities) who ultimately control the legal entity. Such control can be direct or indirect :

- When 'legal entity' shares are directly "owned" by individual shareholders (natural persons that own and control the company, and act under its own name), those shall be considered a ultimate owners.
- When a 'legal entity' shares are indirectly owned by ultimate owners, several ownership layers can exist between the 'legal entity' shareholders and the ultimate owners (the natural persons that "own" and control the company).

- Information on the rights attached to the shares detained;
- the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, shareholders' agreements, or other relevant documents regarding the taking of decisions within the company
- a graph that includes :
 - the different ownership layers up to their ultimate owners.
 - For each layer, the existence of third-country individual or third-country entity controlling that intermediate layer, up to the ultimate owners of all the layers involved.

Additional evidence that may be requested during the evaluation process regarding ownership structure and specific rights.

- Evidence on the absence of third-country 'control' of each intermediate layer, up to the ultimate owner, according to the graph describing the chain of control of the 'legal entity',
- Copy of ID card or passport of the ultimate owner(s).

b) Corporate governance

When a 'third country' or 'third-country entity' has the possibility to veto decisions proposed by the EU 'shareholders or members, it exercises decisive influence. The assessment the 'legal entity' has to conduct is whether their strategic decisions may be influenced, actively (through an action) or passively (by not exercising its rights – *e.g.* abstention), by a 'third country' or by a 'third-country entity'.

For this purpose, the 'legal entity' has to identify at what level (which are the bodies) are the strategic business decisions taken within the 'legal entity'; which are the majorities of votes (and/or share capital) requested for the adoption of the decisions; what is the nature of the decisions they take, their decision-making procedures, including quorum requirements and voting rules and any prerogative accorded to other bodies. If the majorities requested for the adoption are such that they allow a minority shareholder or member to block strategic decisions, it is considered to have a veto right and therefore, influence the adoption of the strategic decisions and thus 'control'.

Evidence to be provided regarding corporate governance:

- Description of the decision-making bodies and their composition;
- The relevant rules regarding election, appointment, nomination or tenure of members of the decision-making bodies;
- The decision-making procedures.

In case of a nominee, fund, trust or any other institutional investment instrument (or arrangement) holding the shares, the requirement of not being subject to 'control' by a 'third country' or by a 'third-country entity' may be satisfied at the level of the nominee, trustee, or other registered owner, provided that the latter is an EU national and that it exercises decisive influence over that instrument or arrangement (*i.e.* takes the investment decisions).

c) Commercial links conferring control

Commercial dependence may consist in a cooperation between two 'legal entities', or may take the form of a joint venture, or purchase and sale of goods between the third-country shareholder and the 'legal entity'. To the extent that the 'legal entity' is dependent on such cooperation with the third-country shareholders, the latter could gain strategic influence over the former. A third-country customer or supplier might exercise the same dependence, even if it is not a shareholder, in cases of long-term supply or by agreements that allow it to decide on the commercial strategy.

Evidence to be provided regarding commercial dependence :

- Information on companies or individuals of 'third countries' that have a contractual relationship with the 'legal entity' which can give them 'control' over it. If this commercial relationship is with a company or individual of the 'third country' that is a shareholder, the relevant information about the shareholder(s) needs to be included

Additional evidence that may be requested regarding commercial dependence.

Cooperation agreements with third-country customers or suppliers (including shareholders if relevant), when they could confer 'control' over the company.

d) Financial links conferring control

'Control' could be exercised when the 'legal entity' is financially dependent on the contribution from the third-country shareholder. Due to this financial dependence, the third-country shareholder is in a position to obtain concessions in strategic areas, even though legally the EU shareholder would have the means to refuse such concession. To assess the degree of financial dependence, it needs to be assessed whether the third-country shareholder contributed to the financing of the 'legal entity' in a proportion higher to its shareholding. All modes of financing should be taken into account, such as capital increase, loans, guarantees, debt waivers bails and grants.

Evidence to be provided regarding financial dependence :

- Information on shareholders providing financing to the company, indicating the type of financing and nature and degree of 'control'.

Additional evidence that may be requested regarding financial dependence:

In case of third-country or third-country entity shareholder that provides financial contribution, any supporting document (loans, instruments of constitution, agreements) that justify the financial contribution.

e) Other sources of control

There might be other sources of 'control' specific to each case.

Evidence needs to be provided regarding other sources of control

All the information about any other means, process or link ultimately conferring ‘control’ to a ‘third country’ or ‘third-country entity’.