

PUBLIC PROCUREMENT

RELATED PROVISION: ARTICLE 5k OF COUNCIL REGULATION 833/2014
FREQUENTLY ASKED QUESTIONS – AS OF 26 AUGUST 2022

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

Last update: 12 May 2022

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?

Last update: 12 May 2022

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/EU¹; 2014/24/EU²; 2014/25/EU³; 2009/81/EC⁴) and to a big part of the contracts excluded from their scope.

3. From when are the sanctions applicable?

Last update: 12 May 2022

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).

¹ [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.](#)

² [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.](#)

³ [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.](#)

⁴ [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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 2 June 2022

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
- concessions related to 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?

Last update: 12 May 2022

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:

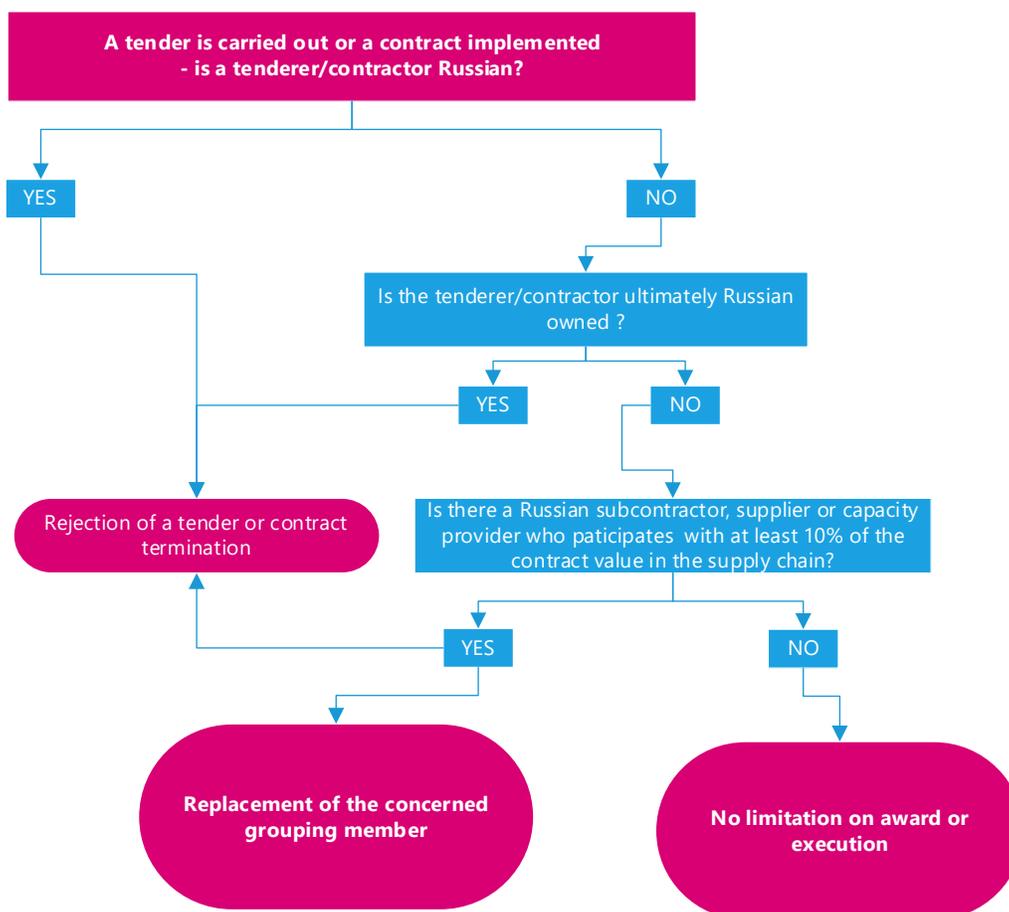
- the continuation of nuclear energy projects, radioisotopes precursors for medical application, radiation monitoring and civil nuclear cooperation
- intergovernmental cooperation in space programmes
- strictly necessary goods and services which cannot be purchased in sufficient quantity elsewhere
- 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?

Last update: 12 May 2022

Overall, the logic of the public procurement sanctions is:



9. Do the public procurement sanctions cover particular sectors?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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

11. What should they do concerning ongoing contracts?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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 situation⁵ and the asylum crisis situation⁶ can be consulted.

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

Last update: 12 May 2022

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.

⁵ 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.

⁶ 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.

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

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

Information on ownership is necessary to implement the Sanctions Regulations. Therefore, public buyers are authorised to request it by Article 6 of the GDPR.⁷ Nevertheless, all the rules on the protection of personal data (GDPR)⁸ 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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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

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

Last update: 12 May 2022

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.

⁷ [Regulation \(EU\) 2016/679.](#)

⁸ [Regulation \(EU\) 2016/679.](#)

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

Last update: 12 May 2022

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?

Last update: 12 May 2022

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

“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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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?

Last update: 12 May 2022

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.

36. Is a company established in Germany with a managing director of Russian nationality and German residence excluded from the award or the fulfilment of public contracts if the threshold value is reached?

Last update: 23 May 2022

No, it is not excluded on the basis of the Sanctions Regulation since the contract is signed with the company which is established in Germany and not with its managing director.

37. How do provisions under Article 5k apply to a person with a dual nationality – Russian and another?

Last update: 26 August 2022

Article 5k applies to Russian citizens and does not provide for exceptions for dual citizenship. Thus, having Russian nationality is decisive and any other citizenship irrelevant.

38. When shall a declaration of no Russian involvement be considered sufficient and when shall additional information be requested?

Last update: 26 August 2022

This is an issue of individual assessment of the contracting authority of each particular contract and tenderer, taking into account the size and importance of the contract, the nature of the contract and its particular market, the geographical location of the contract implementation, particular observations connected with the tenderer and its offer, and general information known to the buyer.

In any case, the information on Russian involvement should be requested on the whole ownership chain (up to the final beneficial owner) only where necessary. This would not be the case where it can be excluded that there is any individual indirect Russian participation above 10% of the contract value down the supply chain (all subcontractors and suppliers and their subcontractors and suppliers).

39. Can a competent national authority give a general authorisation for certain types of contracts?

Last update: 26 August 2022

The Sanctions Regulation empowers the competent national authorities to provide authorisations in certain cases provided for in Article 5k(2), and does not regulate the procedure or mechanism for granting those authorisations. Competent national authorities are therefore entitled to decide that the award of certain groups or types of contracts is authorised. Such a block authorisation may have the effect of releasing buyers from the need of analysing or checking situations within specific contracts, provided that they respect the conditions of those authorisations.

40. Can a competent national authority authorise the execution of already awarded contracts?

Last update: 26 August 2022

The authorisation of authorities by Article 5k(2) referred to under the preceding question covers both award of contracts and the continued execution thereof.

41. When shall a public buyer apply for authorisation?

Last update: 26 August 2022

Formally, there is no deadline for application. However, the authorisation should be requested as soon as possible to ensure that it is obtained on time before the award of a new contract or to have enough time for a new award procedure in case the authorisation is refused by the competent national authority.

42. Can contracts be terminated before 10 October 2022?

Last update: 26 August 2022

The Sanctions Regulation prohibits to execute contracts only from 10 October 2022. Thus, the Sanctions Regulation is not a legal basis to terminate them before.

In practice, the majority of contracts cannot be terminated from one day to the next. Therefore, the termination procedure should start sufficiently early to ensure that contracts are not executed beyond 10 October 2022.

While the Sanctions Regulation is a legal basis for termination of contracts, the procedure is subject to national law.

43. Do the sanctions apply to Russian nationals who have obtained refugee status (considering *inter alia* the Refugee Convention of 1951)?

Last update: 26 August 2022

Article 8 of the Refugee Convention of 1951⁹ states that exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, shall not be applicable to a refugee who is formally a national of the said State, solely on account of such nationality.

Article 18 of the Charter of Fundamental Rights of the EU provides that ‘the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees...’.

Therefore, in line with those provisions, Russian nationals having obtained refugee status in any of the EU Member States are not covered by the provisions of Article 5k of the Sanctions Regulation.

⁹ <https://www.unhcr.org/1951-refugee-convention.html>

44. Do sanctions apply to supplies purchased earlier, be it stocked, multiple times resold or used?

Last update: 26 August 2022

Sanctions apply to the conclusion of public contracts after 9 April 2022 and to the execution of prior contracts as from 10 October 2022.

The sanctions do not apply to the subject-matter of the offer or contract (supplies), but to the Russian or Russian owned entities (contractor, subcontractor, supplier or capacity providers) involved in the implementation of the contract (for participation above 10% of the contract value) after 9 April 2022 for newly concluded contracts or as from 10 October 2022 for prior contracts.

Therefore, sanctions are not applicable in the case where the contractor, subcontractor, supplier or capacity providers involved in the implementation of the contract has before the submission of the offer or contract award and before 9 April 2022 purchased supplies (over 10 percent of the contract value) from a Russian or Russian-owned entity.

45. Shall subcontracting be checked all the way down the supply chain to ensure that there is no Russian involvement?

Last update: 26 August 2022

Russian involvement should be checked as long as there is a possibility of a subcontractor or supplier whose involvement exceeds 10% of the contract value, even far down the supply chain, e.g. energy or raw materials.

46. Do the sanctions cover lots worth less than 80.000€ (or 1 million € in case of works) and constituting less than 20% of the value of the procurement they are part of?

Last update: 26 August 2022

Yes, they do. Article 5(10) of Directive 2014/24/EU¹⁰ allows to award such contracts without following the competitive procedure but that does not exclude them from the scope of the Directive. Therefore, being covered by the Directive, they are also covered by the Sanctions Regulation.

47. If an EU company has a permanent branch in Russia, is that EU company's branch covered by the Sanctions Regulation?

Last update: 26 August 2022

¹⁰ Article 16(10) of Directive 2014/25/EU

This depends on whether the branch fulfils the conditions or Art. 5 k (1). This has to be assessed case-by-case.

48. What is the relationship between Article 5k and Article 5aa?

Last update: 26 August 2022

Article 5aa refers mainly to entities owned by the Russian State but forbids transactions with them in general, not only within public procurement. Article 5k covers transactions by EU public entities with all Russian entities, including natural persons, in the context of public procurement. The two provisions thus have a different scope, which may overlap in individual cases.