

SUBJECT : Request for derogation to Rule of Origin and/or Nationality – Instructions (annex of Ch. 4.2 Procurement of Services, Supplies and Works)

Introduction

The relevant **legal framework** covering possible derogation to the above mentioned rules as set in Annex IV of the grant contract is outlined below:

Source	Text
Art 168 of the Financial Regulation	<ol style="list-style-type: none"> 1. Participation in tendering procedures shall be open on equal terms to all persons coming within the scope of the Treaties and, in accordance with the specific provisions in the basic instruments governing the cooperation sector concerned, to all such natural and legal persons who are nationals of the beneficiary third countries or of any other third country as are expressly mentioned in those instruments. 2. In duly substantiated exceptional cases, it may be decided, on the basis of the specific conditions laid down in the basic acts governing cooperation, to allow third-country nationals other than those referred to in paragraph 1 to tender for contracts. 3. Where an agreement on widening the market for procurement of goods or services to which the Community is party applies, the contracts for procurement financed by the budget shall also be open to third-country nationals other than those referred to in paragraphs 1 and 2, under the conditions laid down in this agreement.
PraG section 2.3.2	<p>Exceptions to the rule on nationality and origin may be made in some cases. The award of such derogation is decided on a case-by-case basis by the Commission before the procedure is launched.</p> <p>If the award of contract is preceded by a tender procedure, the derogation must be mentioned in the procurement notice; in such cases, except where justified, such derogation would concern not only one country but would be open to any nationality/origin.</p> <p>Without prejudice to the specificity of each basic act which foresees, as the case may be, exceptions to the rule on nationality and origin, the European Commission may, in duly substantiated cases:</p>

	<ul style="list-style-type: none"> - extend eligibility to natural and legal persons from a country not eligible. - allow the purchase of goods and materials originating from a non-eligible country. <p>Derogations may be justified on the basis of the unavailability of products and services in the markets of the countries concerned, for reasons of extreme urgency, or if the eligibility rules would make the realization of a project, a programme or an action impossible or exceedingly difficult. Note, however, that the argument that a product of ineligible origin is cheaper than the EU or local product would not alone constitute grounds for awarding derogation.</p> <p>Where EU is party in an applied agreement on widening the market for procurement of supply, works or services the contracts are also open to third-country nationals other than those referred to in the previous two paragraphs, under the conditions laid down in this agreement.</p>
Art. 7.3.3 of the Special Conditions of the Grant Contract	<p>Article 2.3 shall be replaced as follows: <i>omissis</i></p> <p>" Derogations as provided for in paragraph 2 may be justified on the basis of the unavailability of products and services in the markets of the countries concerned, for reasons of extreme urgency, or if the eligibility rules would make the realisation of a project, a programme or an action impossible or exceedingly difficult."</p>
Note of the E.C Ref. (2011)51745 4 - 12/05/2011	<p>.....<i>Omissis. "Derogations justified on the basis of the <i>unavailability of products and services in the markets of the countries concerned, for reasons of extreme urgency, or if the eligibility rules would make the realisation of a project, a programme or an action impossible or exceedingly</i> difficult can be awarded on a case-by-case basis before the procurement procedure is launched.</i></p> <p>In these cases, and in application of the principle of shared management, these derogations would be granted by the Joint Managing authorities to the grant beneficiary. Note, however, that the argument that a product of ineligible origin is cheaper than the EU or local product would not alone constitute grounds for awarding derogation.</p> <p>It is the responsibility of the grant beneficiary to submit the request for such derogation and to submit the necessary justification. Derogations cannot be granted retroactively"</p>

Key message1: the request of derogations (on nationality and/or origin) will be authorized by the JMA, **ALWAYS** on a case by case basis and must be submitted prior to the launching of the procedure.

DEROGATION ON ORIGIN

Case 1: Unavailability of Products/Goods.

- **How can be proved that a product and goods with proper rule of origin is not available in the concerned “eligible” countries?**

The first case is the most common, where the ordinary market/suppliers of the project beneficiary/partner can supply only a good that is produced in non-eligible countries, and there is no possibility that other producers exist in eligible countries.

Following the principle of “proportionality”, the market analysis depends on the value of the unit cost to be purchased.

Implementing of course an analysis of potential suppliers is necessary, as well as direct contact with ordinary suppliers in order to obtain/have a written confirmation of non-availability of product with adequate rule of origin.

Another case is when the specific characteristics of the good create a “**natural monopoly**” in the production (e.g. patented good, produced only by one factory). In this case a specific proof of this must be provided and will be checked by the JMA.

- **What kind of market research is sufficient?**

Project beneficiaries should be able to implement a wider analysis of potential suppliers.

Direct contact by the Beneficiary/partner with potential suppliers (see the Section “**How to obtain a Derogation**”) and an internet research as well (both on generalist and dedicated website) is needed to have a written confirmation of non-availability of products with adequate rule of origin.

For the case of supposed “one-producer” good, the proof that product of acceptable origin is not available could be provided by a public institution that can demonstrate its competence on the field (e.g. University) or by a professional associations (e.g. chambers of engineers, associations of suppliers of certain type of products, institutions having overview of country’s import/export activities, etc.).

Please note that probably such institution could ask a fee for issuing such a proof. **In any case, the unavailability of origin does not automatically imply the unavailability of suppliers. You will need additional proof to request also a derogation of the rule of nationality, as the product may be obtained by eligible importers.**

Case 2. Reasons of Extreme Urgency

- **What can be considered an extreme urgency in relation to derogation from Rule of Origin?**

‘Extreme urgency’ sometime dealing also with ‘unforeseen events’ refer generally to external factors. These external factors need to be justified that couldn’t be foreseen in the project drafting.

For instance, archaeological discoveries during infrastructure works cannot be considered unforeseen in old cities where excavation frequently leads to archaeological discoveries.

Similarly, the implementation of a chemical analysis of a specific element (e.g.: a lake) must foresee from the beginning the needed equipment and consumables (they can or cannot be charged to the project); but if, during the implementation of the analysis, an equipment breaks down, or some features of the lake impose to widen the analysis for reaching the project goal, maybe there is no time for making a market analysis in order to find out the eligible product, and therefore the needed good must be immediately purchased by the ordinary supplier.

Please note that “Internal factors” (e.g.: at partnership level and/or at each organization level) **generally will NOT constitute unforeseen extreme urgency**. This includes cases in which a Beneficiary or Partner started a procurement procedure too late compared with the implementing period of the contract.

Case 3. Realization of a Project Impossible or Exceedingly Difficult.

➤ When does a project, could become impossible, applying the rule of origin?

This case is linked to some requirements coming from project activities: the project needs a good computer which operating system is usually Microsoft Windows or Apple OS. In this case, as a matter of fact, the unavailability of different “eligible” operating system is clearly evident. Of course in other cases, such a condition is most difficult to assess, but anyway it follows the general rules, where “impossible” maybe is never, but it creates at least unforeseen problems.

➤ What are the criteria for assessing that respecting the rule of origin make a project implementation exceedingly difficult

They refer to the general principles of **efficiency, effectiveness, proportionality and market price**.

Exceedingly difficult realization of the project occurs e.g. when the service or equipment is available in the concerned countries, but its excessive price directly endangers the possibility to achieve the project objectives.

It can be argued that this should have been properly planned by the beneficiary/partners during project negotiation or at the time of the application but still unforeseeable circumstances (e.g.: unforeseeable and significant increase of the price and/or exchange rates, from the time of project drafting to the moment of activity implementation) at the time of the application can occur.

Efficiency, effectiveness, proportionality and market price principles must be linked with project overall activities, timeframe, etc. meaning that, if the “adaptation” of the eligible good can seriously affect one or more project activities, and/or reduce the time for activity/ies implementation, and/or could modify “the nature” of the project, this must be proved by the project Beneficiary (in cooperation with the concerned Partners as the case may be) and will be assessed (at least) at JMA level.

How to obtain a Derogation on the Rule of Origin ?

Key message 2: A specific derogation package shall be submitted to the JMA by the Project Beneficiary (an anticipation of scanned version of the documents is allowed).

Which are the requested documents?

Common documents to be provided for all cases:

- The Request of derogation¹, printed on head paper, stamped and hand written signed by the legal representative of the concerned project Beneficiary/partner, (for partners, the request will be collected and posted to the JMA **ALWAYS** through the Beneficiary), **with explanation of how far the conditions of unavailability of good/product and/or extreme urgency and/or realization of a project impossible or exceedingly difficult are fulfilled.**
- The List of product/goods with references to the concerned project activities and budget according to the Grant Contract (an excel file is strongly recommended).
- The Supporting Documents (copies) proving main technical characteristics of each item.

Additional documents for Case 1 only

- The explanation on how market analysis was conducted, meaning that at least 3 negative (i.e. “this good is not available as produced in eligible countries”) declarations made by relevant providers (at national/international level) shall be submitted.
- In case of “natural monopoly”, an annexed declaration realized by the competent public body or a professional association (even if it’s the project Beneficiary/partner itself) demonstrating it.

¹ See the attached form. In general terms, unless in case of additional requests of clarification, the official written reply by the JMA will be addressed to the Beneficiary within 14 calendar days starting from the day following the receipt of paper version documents.

DEROGATION ON NATIONALITY

According to the above mentioned set of rule, also by considering Art. 7.3.1 of your Grant Contract Special Conditions, (see the table below), main features as far as “Derogation on Nationality” is concerned, could be mentioned as follow:

- **The permission to derogate from the rule of nationality in order to authorize the participation of providers established in countries other than those “eligible” is dealing with “natural person” , (e.g. if a Beneficiary or a partner wants to have a certain artist for an event, or the maximum expert in the specific field of project intervention, naturally the “service” can only be delivered by that artist/expert (the so called “natural monopoly”), and/or with legal persons (e.g. when no “eligible” importer can sell a specific good with a derogation due to the limited “dimension” of the market for that good) or both of them.**
- **Key principles to be respected, procedures and template² to be used are the same as per the Derogation on Origin already described.**

7.3.1 Article 2.1 shall be replaced as follows:

“This contract is financed by the European Neighbourhood and Partnership Instrument. Pursuant to Article 21.1 of the 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, participation in the award of procurement or grant contracts 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), a Member State of the EEA or international organisations.

Tenderers must state, in the tender, the country of which they are nationals by presenting the usual proof of nationality under their national legislation.

This rule does not apply to the experts proposed by service providers taking part in tender procedures or service contracts financed by the grant”

² **See the attached form.** In general terms, unless in case of additional requests of clarification, the official written reply by the JMA will be addressed to the Beneficiary within 14 calendar days starting from the day following the receipt of paper version documents.